

# When “Friends” Become Adversaries: Litigation in the Age of Facebook

R O N A L D P O D O L N Y \*

## INTRODUCTION

**T**he defining feature of technological development in the first decade of the twenty first century has been the proliferation of social-networking sites. These sites allow users to connect to their online “friends” and to express themselves through pictures, videos, and verbal notes or comments. Social networking sites have reached unprecedented popularity. At the end of 2009, there were 350 million active users registered on Facebook alone.<sup>1</sup>

The widespread popularity of social networking websites has led to a body of law<sup>2</sup> that remains relatively unexamined. What is the admissibility of photographs or comments found on Facebook or other social networking sites? What weight should such “Facebook evidence”<sup>3</sup> be given in family law, cases of personal injury, or criminal proceedings? Can the service of legal documents be effected via Facebook?

This paper surveys case law in this area to provide guidance to litigators who wish to utilize social networking technology in their work. It proceeds in three parts. The first part addresses the admissibility of Facebook evidence, discussing the distinction between evidence found on the “public” and “private” elements of the user profile in question, as well as the approach to Facebook postings in the discovery process. The second part surveys Canadian jurisprudence in which Facebook evidence has been prominently featured. It

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<sup>1</sup> “Facebook: Statistics” Facebook (2010), online: Facebook <<http://www.facebook.com/press/info.php?statistics>>.

<sup>2</sup> At the end of 2009, a Westlaw search using the names of popular social networking sites produced some 100 Canadian decisions on the topic.

<sup>3</sup> In this paper, the term “Facebook evidence” connotes photographic, textual and video evidence collected from social networking websites, including Facebook, MySpace.com and other similar services.

discusses cases in various areas of law, including: torts, family, criminal, and other contexts for trends in courts' approach to Facebook evidence. It also addresses the emerging body of law dealing with service on social networking websites and contains a proposal for the adoption of service on Facebook as a mainstream alternative to personal service. Finally, the third part of the paper contains practical suggestions for counsel dealing with Facebook evidence.

## I. WHAT IS ADMISSIBLE?

Numerous cases in torts, family, criminal, and other areas of law have established beyond dispute that Facebook evidence is admissible in Canadian courts. Several outstanding issues remain, however. Disagreement persists among courts with regards to admissibility of postings found in the "private"<sup>4</sup> portion of a user's profile. While some courts have held such evidence admissible, others have refused to order production of such documents. Arguably, the better view is the one which accords with the decision of the Ontario Superior Court of Justice in *Schuster v. Royal & Sun Alliance Insurance Co. of Canada*,<sup>5</sup> In that case, the court deemed evidence found in the "private" portion of a user's profile to be admissible and subject to the applicable disclosure obligations only where information contained in the "public" portion of a user's profile indicated that the "private" portion may contain evidence relevant to the *lis*. Such an approach balances litigants' transparency interest with the reasonable privacy expectations held by users of social networking sites.

Perhaps the most restrictive approach to admissibility of Facebook evidence was taken by Ontario Master Haberman in *Kent v. Laverdiere*.<sup>6</sup> The case involved a personal injury action arising out of an attack by a dog. The defendant wished to introduce a supplemental affidavit of documents containing Facebook postings which involved the three plaintiffs. The Master ruled that she lacked the authority to make orders that would interfere with the trial date, which, in her estimation, the grant of such a request was likely to do. In denying the order, Master Haberman observed as follows:

It is also important to bear in mind that, while Facebook and MySpace may be relatively recent additions to some of our lives, photographs of plaintiffs, both before and after accidents, have long been around, and it is photographs that defendants are generally after in personal injury actions when they ask for Facebook pages. The fact that these

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<sup>4</sup> The "private" portion of a user's profile is the portion that is only accessible to his or her "friends" on the social network. In contrast, the "public" portion is accessible to all members of the network.

<sup>5</sup> [2009], 78 C.C.L.I. (4th) 216 at paras. 37-39, 83 C.P.C. (6th) 365, (Ont. Sup. Ct. J.) [Schuster cited to C.C.L.I.].

<sup>6</sup> [2009], 78 C.P.C. (6th) 182, (Ont. Sup. Ct. J.), Master Haberman.

photos are now mounted on a site that can be viewed by certain pre-determined individuals where a plaintiff maintains a private Facebook account does not make these photos any more relevant than they were before the existence of Facebook or, arguably, more public. Again, there is no suggestion that questions were asked about photos of any of the plaintiffs at discoveries.<sup>7</sup>

Taken to its logical extreme, the statement appears to suggest that where a party fails to inquire as to the existence of Facebook postings during the examination for discovery, or where the counterparty fails to answer in a truthful or timely fashion, they cannot be introduced into evidence, even though such documents are posted on a Facebook or MySpace profile. This conclusion is contentious. Even if one accepts Haberman's assertions with regards to the "private" portion of a Facebook profile, it is unclear whether photographs posted in the "public" portion of a Facebook profile are admissible absent direct inquiries in discovery. From a factual perspective, "public" Facebook postings are not akin to traditional photo albums, as they are often open for the world to see. Even the "private" portion of a Facebook profile exists on a continuum between a family photo album kept in a bedroom drawer and one left open in the town square. It is accessible to hundreds of individuals around the clock, but only upon obtaining the user's initial permission. The comparison to a traditional family photo album is thus inapposite. In any case, other Canadian jurisprudence generally demonstrates a more liberal approach to the admissibility of Facebook evidence.

In *Leduc v. Roman*,<sup>8</sup> the plaintiff commenced an action for loss of enjoyment of life following a motor vehicle accident. The defendant moved for the production of the plaintiff's Facebook profile. The motion was dismissed by a Master,<sup>9</sup> whose decision the defendant appealed. The appeal was allowed in part, as the Court found that the Master erred in characterizing the defence motion for the disclosure of the plaintiff's "private" profile as a "fishing expedition." The court observed that the defendant learned about the profile after the plaintiff's examination for discovery, and trial fairness dictated that the defendant be allowed to test whether the profile contained relevant content. The Court stated:

Where, in addition to a publicly-accessible profile, a party maintains a private Facebook profile viewable only by the party's 'friends,' I agree ... that it is reasonable to infer from the presence of content on the party's public profile that similar content likely exists on the private profile. A court then can order the production of relevant postings on the private profile.

Where, as in the present case, a party maintains only a private Facebook profile and his public page posts nothing other than information about the user's identity, I also agree ... that a court can infer from the social networking purpose of Facebook, and the

<sup>7</sup> *Ibid.* at para. 12.

<sup>8</sup> (2009) 308 D.L.R. (4<sup>th</sup>) 353, 73 C.P.C. (6<sup>th</sup>) 323 (Ont. Sup. Ct. J.)[*Leduc* cited to D.L.R.].

<sup>9</sup> *Leduc v. Roman*, 2008 CarswellOnt 8652 (Ont. Sup. Ct. J.), Master Dash (WLeC).

applications it offers to users such as the posting of photographs, that users intend to take advantage of Facebook's applications to make personal information available to others. *From the general evidence about Facebook filed on this motion it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of 'friends' with whom they can share information about themselves, and on which 'friends' can post information about the user. A party who maintains a private, or limited access, Facebook profile stands in no different position than one who set up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action.*<sup>10</sup>

In *Wice v. Dominion of Canada General Insurance Co.*,<sup>11</sup> the court went even further. In reliance on *Leduc*, the court held that the very nature of Facebook means that relevant photographs may be posted on the plaintiff's entirely "private" profile, which only his "friends" could access. Accordingly, an order mandating the preservation and disclosure of relevant Facebook evidence from the defendant's "private" profile was issued:

The case at bar, while not a tort case, does raise the issue of Mr. Wice's ability to function - at least in certain defined circumstances. As I have already pointed out, his ability to function in a wide range of social situations may be circumstantial evidence from which a trier of fact could draw an inference about his ability to function in the defined circumstances in issue. The Defendant has produced evidence demonstrating that there are relevant photographs of the Plaintiff participating in social activities posted on his Facebook profile. *The court may also infer from the nature of the Facebook service, that other relevant documents are likely included in the Plaintiff's profile.*<sup>12</sup>

Some courts have adopted a more nuanced and restrictive approach to the admissibility of Facebook evidence. In *Mayenburg v. Lu*,<sup>13</sup> the court ruled admissible only those photos that showed the plaintiff in a personal injury action engaged in a specific activity which she claimed to have had difficulty performing.<sup>14</sup> In *Schuster*,<sup>15</sup> the defendant insurer brought a motion for an interim order for the preservation of documents contained in the insured's Facebook page. The defendant alleged that the "private" portion of the insured's Facebook profile contained information relevant to the claim. The court refused the order, stating:

When drawing inference as to whether there is relevant information in private pages of litigant's Facebook account, whether there is relevant information in public profile is determinative.

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<sup>10</sup> *Ibid.* at paras. 30-32 [emphasis added].

<sup>11</sup> (2009), 75 C.C.L.I. (4<sup>th</sup>) 265 (Ont. Sup. Ct. J.) [*Wice*].

<sup>12</sup> *Ibid.* at para. 18 [emphasis added].

<sup>13</sup> 2009 BCSC 1308, [2009] B.C.W.L.D. 7802.

<sup>14</sup> *Ibid.* at para. 39.

<sup>15</sup> *Supra* note 5.

In the present case, I find that the evidence relied on does not support the inference ... In its absence, I am not prepared to draw an inference from the nature of Facebook itself or the content of [the plaintiff's] Facebook profile that her account is likely to contain relevant evidence.

...

*I do not regard the mere nature of Facebook as a social networking platform or the fact that the Plaintiff possesses a Facebook account as evidence that it contains information relevant to her claim or that she has omitted relevant documents from her Affidavit of Documents. The photographs that the Defendant has obtained from the ["public" portion of] Plaintiff's account in the present case do not appear, on their face, to be relevant.*<sup>16</sup>

The court in *Schuster* explicitly distinguished the finding in *Wice* that "[t]he court may ... infer from the nature of the Facebook service" that relevant documents may be found in a "private" profile.<sup>17</sup> The *Schuster* court found that the statement was in *obiter*, and that evidence from the "public" portion of a Facebook profile must be adduced before production of the "private" portion may be ordered.<sup>18</sup>

In *Weber v. Dyck*,<sup>19</sup> after the action was set for trial, the defendants learned that the plaintiff had a MySpace webpage, on which she posted photographs of herself and announced certain information about her employment. In particular, the plaintiff shared images of her trips to Paris and the Swiss Alps, of playing piano and even of passing the Associate of Royal Conservatory Teachers examination. The court, therefore, granted leave for defendants to bring a motion to compel production of the Facebook profile, holding:

[I]t is my view that not only has the plaintiff had a substantial change in circumstances since this matter was placed on the trial list relating to her educational status, there has been a substantial change relating to her career, employment status and her place of residence. ... I find that because there has been a substantial change in circumstances of the plaintiff since placing this matter on the trial list, it would be manifestly unjust in these circumstances not to grant leave for the defendants to bring this motion.<sup>20</sup>

In *Knight v. Barrett*,<sup>21</sup> the defendant in a motor-vehicle accident obtained the plaintiff's Facebook postings. The plaintiff argued that the defendant had to disclose on discovery precisely what materials were in his possession and how he obtained them. The Court agreed but added that no fault lay with the plaintiff for not disclosing the existence of the Facebook page in the Affidavit of Documents as, "When this action was filed in 2004 few people had heard of Facebook."<sup>22</sup>

<sup>16</sup> *Ibid.* at paras. 33, 37, 39 [emphasis added].

<sup>17</sup> *Supra* note 11 at para. 18.

<sup>18</sup> *Supra* note 5 at para. 32.

<sup>19</sup> 2007 CarswellOnt 3851 (Sup. Ct. J.), Master L.A.M. Pope (WLeC).

<sup>20</sup> *Ibid.* at para. 10.

<sup>21</sup> 2008 NBQB 8,(2008) 331 N.B.R. (2d) 199 .

<sup>22</sup> *Ibid.* at para. 7.

On the other hand, shutting down one's Facebook page during legal proceedings may lead to an adverse inference as to one's credibility. In *Terry v. Mullooney*,<sup>23</sup> the plaintiff in a personal injury action shut down his Facebook profile after being confronted with the contents of his public profile in open court. The court stated:

Without [Facebook] evidence, I would have been left with a very different impression of Mr. Terry's social life. He admitted as much in cross-examination. After he was confronted with this information which is publicly accessible, he shut down his Facebook account saying he did it because he didn't want "any incriminating information" in Court. I draw an adverse inference against Mr. Terry on account of this statement and conclude that the Facebook account which he shut down and some particular messages which he deleted prior to shutting down the account entirely contained information which would have damaged his claim.<sup>24</sup>

It is at least possible that the shutting down of a Facebook profile *in anticipation* of litigation would likewise draw an adverse credibility finding or court sanction, similarly to deliberate destruction of relevant materials in anticipation of a discovery request.

Admissibility of Facebook conversations, rather than postings of pictures or comments, became the subject of legal debate in *R. v. Butler*.<sup>25</sup> In that case, statements of a murder victim regarding her fears of the accused were made to third parties on Facebook and MSN Messenger. Such statements were held admissible under the "state of mind" exception to hearsay.<sup>26</sup> In contrast, statements concerning the accused's intentions, as related to the victim by someone else, were inadmissible as double hearsay.<sup>27</sup>

Similarly, in *R. v. Todorovic*,<sup>28</sup> a murder case which received much media attention across the country, the accused's web chats, including those conducted on Facebook, were admissible to prove *mens rea*. The court stated:

The more common occurrence in criminal cases where a person's intentions or motive is sought to be proven is for the prosecution to proffer documents such as notes or letters where the intentions are made clear, or to call witnesses to whom the accused person may have communicated their intentions or to introduce the contents of telephone communications made after the fact and intercepted by the police pursuant to judicial authorization. In this case, however, the bulk of the evidence regarding Melissa's intentions was found on the hard drives of computers used by Melissa and D.B.. The evidence consisted primarily of records of instant messages between Melissa

<sup>23</sup> 2009 NLTD 56, 285 Nfld. & P.E.I.R. 19.

<sup>24</sup> *Ibid.* at para. 105.

<sup>25</sup> 2009 ABQB 97, [2010] 4 W.W.R. 469, 472 A.R. 174 [*Butler*].

<sup>26</sup> *Ibid.* at paras. 61-62. The "state of mind" exception to the hearsay rule permits the admission of statements made by the declarant which relate to his or her state of mind, where the declarant's state of mind is relevant and the statement is made in a natural manner. See e.g. *R. v. Griffin*, 2009 SCC 28, 307 D.L.R. (4<sup>th</sup>) 577, 244 C.C.C. (3d) 289.

<sup>27</sup> *Butler*, *ibid.* at para. 64.

<sup>28</sup> 2009 CarswellOnt 4353 (Sup Ct. J.) (WLeC).

and D.B., as well as other persons, and messages sent through the social website known as "facebook". Additional evidence was found in text messages recovered from cellular phone company records. *What would, in another age, have shown up in personal notes exchanged between intimates, nowadays finds itself digitally recorded in cyberspace. The words, and their impact, are no less real, however.*<sup>29</sup>

The argument that Facebook postings should not be given any evidentiary weight, because such postings do not accurately reflect a person's life experiences, was rejected by the court in *R. (C.M.) v. R. (O.D.)*.<sup>30</sup> Despite the father's assertion that pictures of him engaged in activities which require a source of income did not reflect his day-to-day existence, but rather a "fantasy life" he had constructed to impress others, the court held that he was intentionally unemployed for the purposes of avoiding his child support obligations.<sup>31</sup>

Not only postings themselves, but "metadata" describing the time during which a user was logged on to a social networking site, may be discoverable. In *Bishop (Litigation Guardian of) v. Minichiello*,<sup>32</sup> a personal injury action, at issue was the ability of the plaintiff to maintain employment after suffering what the plaintiff described as "debilitating fatigue" caused by the accident. The plaintiff had previously advised an expert that his sleep patterns varied due to the substantial amount of time he spent on Facebook at night.<sup>33</sup> The defendant sought access to the "metadata" which would enable the parties to ascertain whether the plaintiff spent long hours late at night on Facebook, a behavioural pattern which may explain his fatigue. In ordering the production of such metadata, the British Columbia Supreme Court observed:

It is true the Bishop family computer is more akin to a filing cabinet than a document; however, it is a filing cabinet from which the plaintiff is obligated to produce relevant documents. This sentiment was approved in *Chadwick. Simply because the hard drive contains irrelevant information to the lawsuit does not alter a plaintiff's duty to disclose that which is relevant. If there are relevant documents in existence they should be listed and produced (or simply listed if they are privileged).*<sup>34</sup>

The court held that the probative value of the metadata in relation to the plaintiff's past and present wage loss outweighed any competing interests, such as confidentiality or the time and expense required to obtain it. In particular, the court held that issues of privacy and solicitor-client privilege were "resolved" due to the fact that only the plaintiff had the password to his Facebook account, and he did not use the account to converse with his

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<sup>29</sup> *Ibid.* at para. 25 [emphasis added].

<sup>30</sup> 2009 NBQB 253, (2008) 337 N.B.R. (2d) 90, 864 A.P.R. 90.

<sup>31</sup> *Ibid.* at paras. 54, 61.

<sup>32</sup> 2009 BCSC 358, (2009) 94 B.C.L.R. (4th) 170, aff'd 2009 BCCA 555, 77 C.P.C. (6th) 19.

<sup>33</sup> *Ibid.* at para. 56.

<sup>34</sup> *Ibid.* at para. 55 [emphasis added].

counsel.<sup>35</sup> A recent New Brunswick decision reached a similar result, holding that the probative value of material on the plaintiff's Facebook account outweighed her privacy interests as there were no intimate personal details contained on the account.<sup>36</sup> One question which remains judicially unanswered is whether, if a plaintiff uses Facebook to communicate with counsel, his metadata would be discoverable. In principle, there is no reason for metadata not to be discoverable even in that case, as metadata itself does not reveal the content of such privileged communications, but only the fact of their (potential) existence.

It appears, then, that it is "beyond controversy" that a person's Facebook profile may contain materials relevant to a legal action and which may need to be disclosed to satisfy discovery obligations.<sup>37</sup> Undisputedly, however, courts may not provide relief by ordering the provision of a Facebook password from one party to another<sup>38</sup>; rather, courts may only order disclosure of Facebook content and metadata associated with a Facebook profile. The disagreements between courts centre on the access to the "private" portion of a Facebook profile. The better view is that a plaintiff seeking disclosure of documents posted on the "private" portion of a user's profile must adduce some evidence (based on the "public" portion or examination for discovery) which would lead a court to believe that the "private" portion contains documents which are relevant to the action. Fishing expeditions will not be allowed, but a defendant may not hide from disclosure by restricting access to information he or she posts on the web to a select group of "friends."<sup>39</sup>

## II. FACEBOOK IN CIVIL AND CRIMINAL LITIGATION

### Overview

Over the past several years, a number of decisions that have referred to, or relied upon, evidence collected on social networking sites have been produced by Canadian courts.<sup>40</sup> The decisions fall into the following categories:

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<sup>35</sup> *Ibid.* at para. 57.

<sup>36</sup> *Carter v. Connors*, 2009 NBQB 317,355 N.B.R. (2d) 235.

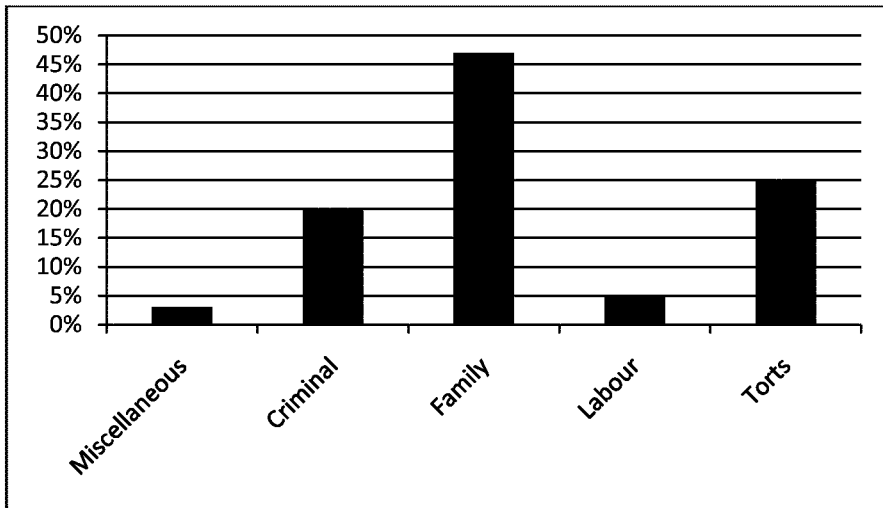
<sup>37</sup> *Supra* note 8 at para. 23.

<sup>38</sup> *Supra* note 5 at para. 19.

<sup>39</sup> "For an alternate discussion of recent Canadian case law in this area, see Louise Vrebosch, "Facebook in Litigation: Taking a Poke at Discovery" (15 January 2010), online: Paterson, MacDougall LLP <[http://www.pmlaw.com/pmlaw\\_pdfs/Facebook6.pdf](http://www.pmlaw.com/pmlaw_pdfs/Facebook6.pdf)>.

<sup>40</sup> *Supra* note 2.





Miscellaneous	3%
Criminal	20%
Family	47%
Labour	5%
Torts	25%

The most common contexts in which Facebook evidence is considered by the courts are in the areas of family, criminal, and tort law.

### Family Law

The full diversity of situations in which Facebook may play a role in family law litigation is demonstrated by the British Columbia Supreme Court decision in *Bains v. Bains*.<sup>41</sup> In that case, a divorced father permitted his daughter to create a Facebook account for him, and then to add him as a “friend” to her own account, thus giving her access to postings and comments critical of her mother, made by him- and others. The court directed harsh criticism at such conduct, accusing the father of “perpetuating the ‘blame mom’ attitude,”<sup>42</sup> and subsequently ordered the father to remove the daughter from his list of

<sup>41</sup> 2009 BCSC 1666, [2010] W.D.F.L. 985.

<sup>42</sup> *Ibid.* at para. 103.

“friends” and to switch his Facebook password.<sup>43</sup> Similarly, a father’s negative comments on Facebook regarding the mother led the court to conclude that “he has a hard time separating [parents’] issues from children’s issues,” and were partially responsible for the award of custody to the mother in *Hassan v. Mufti*.<sup>44</sup>

In *M. (M. J.) v. D. (A.)*,<sup>45</sup> the father posted pictures of his child on his Facebook account and thus linked the child to his negative comments about the child’s mother. Furthermore, he “exposed [the child] to adult-appropriate matters which the father thinks are fun.”<sup>46</sup> The court held that “the father’s actions around his Facebook link [were] indicative of his lack of respect for the mother,” a situation in which “a shared decision-making arrangement would be destructive and chaotic for the child.”<sup>47</sup> The mother thus received sole custody.

In *Ferguson v. Gilmour*,<sup>48</sup> a father permitted his 10-year-old son to register on Facebook, despite the mother’s prohibition. Such conduct was held to demonstrate that the father was “more susceptible to being manipulated by the children in relation to rules and discipline issues” and contributed, along with other factors, to the court’s ruling that the children were to reside with the mother.<sup>49</sup>

In several decisions, Facebook evidence has been accepted by courts in support of allegations of adultery or bad judgment. In *C. (E.L.) v. B. (E.S.)*,<sup>50</sup> the plaintiff in a divorce action posted two pictures of herself on Facebook “with an unidentified male holding the plaintiff around the waist in a form of an embrace.”<sup>51</sup> Such evidence was accepted by the court in support of the defendant’s assertion that the plaintiff committed adultery. Similarly, in *C. (L.) v. L. (S.)*,<sup>52</sup> the Alberta Provincial Court accepted Facebook pictures of the mother with a male companion together on a Vegas trip as, among other factual findings, evidence of failing to act in the child’s best interests.<sup>53</sup> In *S. (M.N.) v. S. (J.T.)*,<sup>54</sup> the mother obtained the father’s Facebook password and

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<sup>43</sup> *Ibid.* at para. 156.

<sup>44</sup> [2008] W.D.F.L. 3731 at para. 56, 169 A.C.W.S. (3d) 356 (Ont. Sup. Ct. J.) [cited to W.D.F.L.].

<sup>45</sup> 2008 ABPC 379, [2009] A.W.L.D. 769, [2009] W.D.F.L. 885.

<sup>46</sup> *Ibid.* at para. 52.

<sup>47</sup> *Ibid.* at para. 54.

<sup>48</sup> [2009] W.D.F.L. 3210 (Sup.Ct.J.).

<sup>49</sup> *Ibid.* at para. 52.

<sup>50</sup> 2009 BCSC 1543, [2010] B.C.W.L.D. 2769,

*Ibid.* at para. 51.

<sup>52</sup> 2008 ABPC 359, [2010] A.W.L.D. 1040, [2009] W.D.F.L. 920.

<sup>53</sup> *Ibid.* at paras. 67-69.

<sup>54</sup> 2009 BCSC 661, [2009] B.C.W.L.D. 4525, [2009] W.D.F.L. 3037.

adduced transcripts of his Facebook conversations as evidence of his participation in the drug trade. The court accepted such evidence and refused to grant the father unsupervised access on the basis of the court's concern for the child's safety.<sup>55</sup>

Much weight was assigned to the opening "Hey son," used by the respondent in a Facebook conversation with the applicant's child in *Nabigon v. Lavallee*.<sup>56</sup> The phrase was cited by the court in support of its finding that the man was *in loco parentis* of the child and subject to child support payment obligations. A father's Facebook pictures depicting him engaged in various costly activities were cited by the court in *R. (C.M.) v. R. (O.D.)*<sup>57</sup> in support of its findings both that he had been "intentionally unemployed" in order to avoid child support obligations, and that he had another source of income.<sup>58</sup>

On the other hand, the posting of a Facebook picture often does not signify a failure in judgment and is not assigned much weight. In *Dearden v. Dearden*,<sup>59</sup> the court held that the mother's "salacious photos on Facebook" had no bearing on her ability to care for the children, and was thus irrelevant for the determination of temporary custody and access.<sup>60</sup> Similarly, in *C. (M.A.) v. K. (M.)*,<sup>61</sup> a lesbian couple accused a sperm donor of not abiding by the terms of the agreement which the couple had executed with him at the time the child was conceived. The accusation was made in response to, *inter alia*, the posting of a picture of himself with the child on a dating website linked to his Facebook account. The court refused to draw any significant negative inference against the sperm donor from such evidence.<sup>62</sup> In *S. (R.M.) v. S. (F.P.C.)*,<sup>63</sup> the wife cited, as evidence of bad judgement, the fact that the husband posted a picture on Facebook which depicted his daughter potty training. The court found the picture not to be provocative and questioned the wife's reasons for, having failed to approach the husband with a request to remove the picture, waiting until the divorce proceeding to raise the issue.<sup>64</sup> In *Droit de la famille – 091638*,<sup>65</sup> while the court accepted that the daughter's Facebook "chats," on their face, demonstrated a lack of commitment to school,

<sup>55</sup> *Ibid.* at paras. 12, 18.

<sup>56</sup> [2009] W.D.F.L. 3478 (Ont. Sup.Ct. J.) at para. 9.

<sup>57</sup> 2008 NBQB 253, 337 N.B.R. (2d) 90, 864 A.P.R. 90.

<sup>58</sup> *Ibid.* at para. 61.

<sup>59</sup> 2009 ONCJ 90, [2009] W.D.F.L. 1365.

<sup>60</sup> *Ibid.* at para. 11.

<sup>61</sup> 2009 ONCJ 18, 94 O.R. (3d) 756, 63 R.F.L. (6th) 438.

<sup>62</sup> *Ibid.* at para. 21.

<sup>63</sup> 2009 BCSC 1323, [2010] W.D.F.L. 725, [2010] B.C.W.L.D. 1311.

<sup>64</sup> *Ibid.* at para. 84.

<sup>65</sup> 2009 QCCS 3099, [2009] R.D.F. 623, at paras. 25, 37.

it held that since the daughter never expected the parents or the court to read such conversations, no inference could be drawn from them. Concerns about the daughter's conduct as demonstrated by her Facebook profile were similarly minimized by the court in *G. (T.L.) v. B. (D.M.)*.<sup>66</sup> In that case, the 13-year-old's Facebook page stated that she "smokes weed" and enjoys "drinking" and "being stoned." Nevertheless, the court accepted the mother's evidence that such comments did not reflect the daughter's current behaviour nor the atmosphere in the mother's home.<sup>67</sup> In *Mills v. Eglin*,<sup>68</sup> a derogatory comment posted by the husband's girlfriend on the wife's Facebook page ("Cat Food \$50, Lawyer's Bills \$500,000, Bothering ex – Priceless" could not be attributed to the husband and was therefore disregarded in a support payment proceeding.<sup>69</sup> Finally, in *Dimitrov v. Dimitrova*,<sup>70</sup> the fact that, as the father alleged, the mother permitted their daughter to engage in excessive Facebook use, was not sufficient to disturb a previous order granting sole custody to the mother.

## Torts

Numerous cases in the personal injury field have, likewise, considered the weight that must be assigned to photos and verbal comments posted on social networking sites. The decisions endorse the admissibility of Facebook evidence to assist the courts in evaluating the degree of a plaintiff's injuries. In *Bagasbas v. Atwal*,<sup>71</sup> the plaintiff claimed to have sustained lasting injuries as a result of the defendant's negligence. The plaintiff claimed to no longer be able to kayak, hike, or cycle; however, the defendant produced photographs posted on the plaintiff's Facebook profile which showed the plaintiff engaged in precisely these activities.<sup>72</sup> The court thus held that the plaintiff suffered no lasting injuries. Similarly, the plaintiff's enjoyment of an ATV, during the period he claimed to have been injured, was permitted to be introduced into evidence in *Chohan v. Lawrence*.<sup>73</sup>

In *Cikojevic v. Timm*,<sup>74</sup> a personal injury case, the defendant admitted liability and the plaintiff applied for an advance of damages. The judge, in light of the plaintiff's Facebook photographs, which portrayed her engaged in

<sup>66</sup> 2008 BCPC 396, [2009] W.D.F.L. 1110, [2009] B.C.W.L.D. 1677.

<sup>67</sup> *Ibid.* at para. 65.

<sup>68</sup> 2009 BCSC 1595, [2010] W.D.F.L. 1473, [2010] B.C.W.L.D. 2575.

<sup>69</sup> *Ibid.* at para. 45.

<sup>70</sup> 2007 ABQB 35, [2007] A.W.L.D.

<sup>71</sup> 2009 BCSC 512.

<sup>72</sup> *Ibid.* at para. 5.

<sup>73</sup> 2008 BCSC 1655, [2009] B.C.W.L.D. 3441.

<sup>74</sup> 2008 BCSC 74, [2008] B.C.W.L.D. 4788, 164 A.C.W.S. (3d) 70.

activities that require funds to sustain, such as golfing and snowboarding, held that she was in no need of an advance of damages.<sup>75</sup> Facebook pictures of the plaintiff dancing following a motor vehicle accident were admitted into evidence in *Kourtesis v. Joris*,<sup>76</sup> along with a grant of leave for the plaintiff to be recalled for examination by her counsel in regards to the photographs.

In *Goodridge (Litigation Guardian of) v. King*,<sup>77</sup> the question before the court was whether the scarring experienced by the plaintiff, who was a victim of an automobile accident, was “serious” within the meaning of the *Insurance Act*<sup>78</sup> and the associated case law. The fact that the plaintiff posted her pictures on Facebook was, *inter alia*, seen as evidence that her scarring was not “serious” in the requisite sense.<sup>79</sup> In *Skusek v. Horning*,<sup>80</sup> Facebook pictures showing the plaintiff engaged in strenuous physical activity were among the factors which led the court to lower the amount of her damages.

In contrast, in *T.(K.) v. S.(A.)*,<sup>81</sup> Facebook postings showing the plaintiff enjoying various activities were held not be probative. The court stated that at issue in a personal injury action is the plaintiff’s ability to enjoy various activities, rather than the ability to engage in them at all. Accordingly, the mere fact that the plaintiff engaged in sports did not mean that she was not entitled to damages:

The defence also produced vast amounts of photographic evidence showing the plaintiff juggling a soccer ball, holding a bowling ball, sitting on a swing or teeter-totter at various points in time. ... In any event, I did not find the photographic evidence or the evidence of certain entries in her Facebook page of much probative value one way or the other. The focus in quantifying non-pecuniary damages is not so much to assess what enjoyment and activities are left in a plaintiff’s life after certain amenities are taken away, as it is to assess which activities of enjoyment and amenities of life have been lost or compromised as a result of the accident. The key issue is whether the injuries from the accident cause the plaintiff discomfort or pain while participating in such conduct or afterward, or otherwise compromises her ability to do so. The plaintiff’s very nature is to challenge her limitations at the extremes of her reduced post-accident abilities. I accept that although she was physically able to engage in a wide variety of physical activities, even demanding ones, after the accident, she was largely motivated to do so as a feature of her eating disorder and frequently paid the price by aggravating her symptoms and enduring pain.<sup>82</sup>

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<sup>75</sup> *Ibid.* at para. 47.

<sup>76</sup> 2007 CarswellOnt 5962 at paras 71-75, [2007] (Sup Ct. J.) (WLeC).

<sup>77</sup> (2007) 161 A.C.W.S. (3d) 984 (Sup .Ct. J.).

<sup>78</sup> R.S.O. 1990, c. I.8, s. 267.5(5).

<sup>79</sup> *Supra* note 77 at para. 128.

<sup>80</sup> 2009 BCSC 893, [2009] B.C.W.L.D. 7610 at para 30.

<sup>81</sup> 2009 BCSC 1653, [2010] B.C.W.L.D. 3433.

<sup>82</sup> *Ibid.* at para. 246.

As a general proposition, it is quite unorthodox to hold that Facebook material, or other evidence showing the plaintiff engaged in activities which would likely be affected by the injuries sustained in the accident, is not probative of the severity of her injuries. Accordingly, the holding in this case is likely limited to its facts and, in particular, the plaintiff's tendency to participate in activities "at the extremes of her reduced post-accident abilities."<sup>83</sup> Even then, the finding does not explain why the plaintiff's ability to engage in certain strenuous activities, albeit with pain, is not probative of her physical condition.

### Criminal Law

Criminal law, likewise, represents another sphere in which Facebook evidence finds increasing acceptance; however, similarly to courts considering Facebook evidence in other areas of the law, courts hearing criminal cases weigh the probative value of Facebook evidence against other considerations, including users' privacy interests and nature of the forum. In *Kinloch (Guardian ad litem of) v. Edmonds*,<sup>84</sup> a young offender sued police for mistreatment while in custody. Police sought to introduce photographs posted on Facebook as evidence of the plaintiff's drug use. The court questioned the manner in which the police came into possession of the Facebook evidence and refused to ascribe any significance to it.<sup>85</sup> Similarly, in *R. v. Anderson*,<sup>86</sup> a female soccer coach was accused of having a sexual relationship with the minor complainant. Despite the introduction of Facebook transcripts of such conversations, the court refused to ascribe any significance to them on the basis of similar conversations the complainant held on Facebook with another soccer coach. The court held that the messages to another coach contained "some of the same language as the messages exchanged between the complainant and the appellant, further lending credibility to ... the assessment that the messages were nothing more than adolescent chatter."<sup>87</sup> Likewise, in *R. v. Sather*,<sup>88</sup> although the accused's Facebook postings which threatened Children's Aid Society employees were undisputed, the court refused to find him guilty of uttering threats, due to its inability to discern in the postings the intent to cause harm or intent to threaten. It is at least possible that the court was influenced by the nature of the medium and would have reached a different result if the threats were communicated via telephone. Indeed, similarly to the

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<sup>83</sup> *Ibid.*

<sup>84</sup> 2008 BCSC 1684. [2009] B.C.W.L.D. 675.

<sup>85</sup> *Ibid.* at para. 38.

<sup>86</sup> 2009 PECA 4, 241 C.C.C. (3d) 432, 283 Nfld. & P.E.I.R. 179.

<sup>87</sup> *Ibid.* at para. 84.

<sup>88</sup> 2008 ONCJ 98 [*Sather*]

Court in *Droit de la famille – 091638*,<sup>89</sup> the Court appeared to have been influenced by the fact that postings on Facebook are, frequently, neither fully public in nature nor aimed at the particular reader who happens to come across them. Thus, in *Sather*, the Court stated:

Firstly, expert evidence was called to explain how people use Facebook. Jesse Hirsch testified that people who profile themselves embellish their character. They deliberately say provocative things to elicit a response from their Facebook “friends.” In a sense they construct an alternate persona.

Secondly, even without expert evidence to interpret them, it is clear that the postings were expressions of emotions directed towards people who might be sympathetic to Mr. Sather’s anger at losing his son. *Only a fortuitous search by a CAS employee brought this to the attention of the authorities.*<sup>90</sup>

In contrast, in *R. v. Weavers*,<sup>91</sup> the accused’s postings on both his own as well as the victim’s MySpace page were held to substantiate the allegation of uttering a death threat. The difference between the cases is explained by the fact that, in *Weavers*, the postings were directed at the recipient of the threat, whereas in *Sather* they were made without the intent that the subject of the messages ever become aware of them.

In *R. v. Spackman*,<sup>92</sup> in excluding evidence derived from the testimony of a suspect which the police, in the Court’s opinion, had failed to investigate as an alternative suspect, the Court also excluded all evidence of the alternative suspect’s communications obtained from Facebook.<sup>93</sup>

In *R. v. Brickman*,<sup>94</sup> a Facebook log-in assisted the court in retracing the victim’s location shortly before the murder, while in *R. v. Brown*,<sup>95</sup> the accused attempted to conceal his drinking prior to the drunk driving arrest by contacting the bartender who had served him on Facebook and urging her not to reveal his alcohol consumption to the police.<sup>96</sup>

In *R. v. P. (A.P.)*,<sup>97</sup> evidence concerning Facebook use among teenagers was admitted to elucidate the motive behind a young offender setting his friend on fire and filming the act:

I was told by several witnesses that, for teenagers, one of the attractions of interactive social networking networks such as Facebook or YouTube is that one can become a “Star” if many people visit a site on which videos or pictures are posted (the number of

<sup>89</sup> *Supra* note 65.

<sup>90</sup> *Supra* note 88 at para. 9[emphasis added].

<sup>91</sup> 2009 ONCJ 437.

<sup>92</sup> 2009 CarswellOnt 4214 (Sup. Ct. J.) (WLeC).

<sup>93</sup> *Ibid.* at para. 261.

<sup>94</sup> 2009 CarswellOnt 6693 (Sup. Ct. J.) (WLeC).

<sup>95</sup> 2009 ONCJ 154, 2009 CarswellOnt 1977.

<sup>96</sup> *Ibid.* at para. 14.

<sup>97</sup> 2008 ONCJ 196, , 57 C.R. (6th) 100.

visitors to a site can itself be collated and posted). With luck, a teenager can start the process of perhaps becoming a Star by posting outrageous video clips showing himself or herself engaged in humorous, risky or simply outlandish behaviours.<sup>98</sup>

Similarly, in *R. v. Telford*,<sup>99</sup> a Facebook message indicating the break-up which preceded the assault in question was admitted into evidence. Finally, in *R. v. Z. (S.G.)*,<sup>100</sup> a defendant, convicted of assault, was prohibited from communicating with the victim's family, including via Facebook.

### Facebook Service

Service of legal documents on Facebook is quickly emerging as a developing area of the law. In principle, there is nothing to prevent a Canadian court from recognizing service of process on Facebook as an alternative to personal service, in an appropriate case. So far, only courts in Australia<sup>101</sup> and New Zealand<sup>102</sup> have recognized service on Facebook as a valid alternative to personal service. In both cases where such service was permitted, the parties in question avoided personal service, but failed to remove their profiles from Facebook. Counsel were successful in convincing the courts that Facebook messages containing legal process did in fact come to the parties' attention. In an even more revolutionary development, in the UK, a political blogger was permitted to serve an injunction via Twitter on a person who had earlier impersonated him using that service. In the absence of a name or address of the impersonator, a court held that service via Twitter was an appropriate alternative.<sup>103</sup>

### III. RECOMMENDATIONS

Recent jurisprudence concerning evidence posted on social networks contains several lessons for counsel. It is beyond dispute that, particularly in family law or personal injury actions, it is prudent to survey the

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<sup>98</sup> *Ibid.* at para. 7.

<sup>99</sup> 2009 ONCJ 174 at para. 12, 2009 CarswellOnt 2217.

<sup>100</sup> 2009 BCPC 92 [2009] B.C.W.L.D. 4525.

<sup>101</sup> *MKM Capital Pty. v. Corbo & Poyser* (unreported, ACT Supreme Court, Master Harper, 12 December 2008); cf.: *Citigroup Pty. Ltd. v. Weerakoon*, [2008] QDC 174. See also, "Are You Being Served? Social Networking Sites Used to Serve Court Documents." (2009) 12(4) INTLB 61.

<sup>102</sup> *Axe Market Gardens Ltd. v. Axe & Anor*, HCWN CIV-2008-485-002676 (16 March 2009).

<sup>103</sup> Donal Blaney, "Donal Blaney v. Person(s) Unknown" *Blaney's Blarney* (October 1, 2009), online: Blaney's Blarney <<http://donalblaney.blogspot.com/2009/10/donal-blaney-v-persons-unknown.html>>. See also Frances Gibb, "High Court to serve injunction through Twitter" *The Times Online* (October 2, 2009), online: The Times Online <[http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article6857851.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article6857851.ece)>.



counterparties' Facebook, MySpace, and other social networking profiles for information which may relate to the claim. The information must be electronically stored (and dated) by the litigant, in order to prevent the counterparty from deleting it in anticipation of the litigation. Such Facebook evidence, if relevant, is likely to be admissible in an eventual hearing.

If a party does not have access to the counterparty's full Facebook profile, it may be necessary to investigate whether the "public" portion of the profile contains information which may lead a court to conclude that the private portion contains pictures or postings relevant to the claim. In that case, a motion may be brought to compel disclosure of the relevant information in the private profile.

Similarly, in the family law context, counsel may need to advise parents undergoing divorce or separation not to communicate with their children via Facebook, as such communication is admissible and may be seen as an inappropriate effort to assert influence over the child. The provision of social networking passwords to children in order to enable them to log into the parents' profiles has, likewise, been met with judicial disapproval.

Of course, all parties should be advised not to post on Facebook or other similar social networking websites, photos which may compromise their litigation position in any future dispute. Such advice, however, even if it can be delivered on time, will often clash with the fundamental human need to share the various intimate details of one's life with a community of "friends," however amorphous the term has become in the Internet age.

