

**Facebook in Litigation:
Taking a Poke at Discovery
Updated (January 15, 2010)**

by Louise Vrebosch



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In this era of exponential technological growth, and society's ability and willingness to adopt new technology even before it comes to market, our Courts have tended to lag in response. Although many people may find it difficult to remember the pre-Facebook world, Canada's courts are still trying to figure out when evidence taken from Facebook profiles should be admitted as evidence in litigation, and if so, how. This article will review how Facebook has been used in Canadian litigation and reviews the recent case law on Facebook and discoverability in an attempt to glean the rules that seem to be making themselves out. It provides practical tips for gaining access to information available on Facebook, but it also discusses certain issues that should be taken into consideration as Ontario courts seem open to allowing discovery.

Introduction

Recently, Internet applications such as Facebook, MySpace, YouTube and Twitter have changed social interaction. These applications allow everyday people to promote themselves. Thanks to the viral video phenomenon, YouTube¹ has made celebrities of the likes of Gary Brotsma whose Numa Numa Dance video has been viewed at least 700 million times². MySpace has allowed thousands of independent bands exposure to a world-wide fan base. Twitter seems to think we want to know what you're thinking... at all times.

Facebook, another such application, allows for "social networking" on the Internet. According to Facebook's "Info page":

Facebook's mission is to give people the power to share and make the world more open and connected.

Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet.³

¹ See *R. v. A.P.P.*, [2008] O.J. No. 1584 (Ct. J.), where two youths were charged with assault for setting a third youth on fire for the purpose of creating a YouTube video in order to become 'Stars.'

² You may not recognize the name Gary Brotsma, but you may recognize the image of a man sitting at a computer web cam with headphones on, lip-syncing the song "Dragostea din tei" as performed by the Moldovan pop group O-Zone now popularized by pop star Rihanna in the song "Live your life."

³ Facebook's Information page (May 13, 2009), online:
<<http://www.facebook.com/facebook?ref=pf#/facebook?v=info&viewas=0>>.

Mark Zuckerberg⁴ and co-founders Dustin Moskovitz, Chris Hughes and Eduardo Saverin launched Facebook in February 2004 from their Harvard dorm room. Initially, only Harvard University students had access. Eventually, that access was extended to other university students, high school students, etc... Today, according to its own statistics, Facebook boasts:

- More than 350 million active users
- 50% of active users log on to Facebook at least once each day
- More than two-thirds of Facebook users are outside of college
- The fastest growing demographic is those 35 years old and older
- Average user has 120 friends on the site
- More than 850 million photos uploaded to the site each month
- More than 8 million videos uploaded each month
- More than 3.5 billion pieces of content (web links, news stories, blog posts, notes, photos, etc.) shared each week.⁵

What content is available on Facebook?

Profile: Facebook users create a profile, in which they can list their name, birth date, religion, occupation, education and work information, etc... For the purposes of this paper, 'profile' will refer to the entirety of a user's Facebook pages. A 'profile' will include the user's personal information, photographs, videos, wall, etc...

Network: Users can choose to belong to a network. A network is a subset of the Facebook community. Networks can be associated to cities, universities, employers, etc... A user's network is important for the purposes of this article since some users will choose to allow access to their profile to other users within their network.

Email: Users have three methods of communicating within Facebook. The first is similar to regular email. The user can send email to one or several users. The correspondence back and forth can only be seen by the user and recipients.

Chat: Facebook has recently introduced an instant messaging feature. Users can communicate with other online users. Messages sent back and forth are only seen by the user and the recipient.

Wall: A user's Facebook wall is akin to having a whiteboard outside your dorm room door. Other users can post public messages, links, etc... on a user's wall. Access to a user's wall will depend on the user's privacy settings.

Photographs and Videos: Users can choose to have a profile photograph. Photographs of the user can be seen by either clicking on the user's profile photograph, or by clicking

⁴ Currently the CEO of Facebook, Zuckerberg was born May 14, 1984.

⁵ Facebook's Press Room page (January 15, 2010), online: <<http://www.facebook.com/press/info.php?statistics>>.

the link below the profile photo. Users can upload photo albums and videos to their profile. A user and a user's 'friends' can tag the user in photographs. 'Tagging' a photograph means identifying the subjects in a photograph. Once a photograph is tagged, if done properly, the subjects' names will appear beneath the photograph as links to the subject.

Other: There are of course, a myriad of other applications available to Facebook users. In conducting a search, you might consider searching a user's posted "Notes."

How can the information contained on Facebook be used in legal proceedings?

At the time I initially wrote this paper, May 13, 2009, there were 50 Canadian decisions reported on Quicklaw mentioning the word "Facebook," dating back to June 12, 2007.⁶ As of January 15, 2010, a Quicklaw search for "Facebook" reported 100 decisions. Nearly half of those cases are in the family law context, one fifth of the cases are in criminal law⁷, and one quarter in civil claims. Of the remainder, there are some constitutional cases, an administrative law case, a landlord tenant case and an estates case which referred to Facebook in determining mental competency⁸.

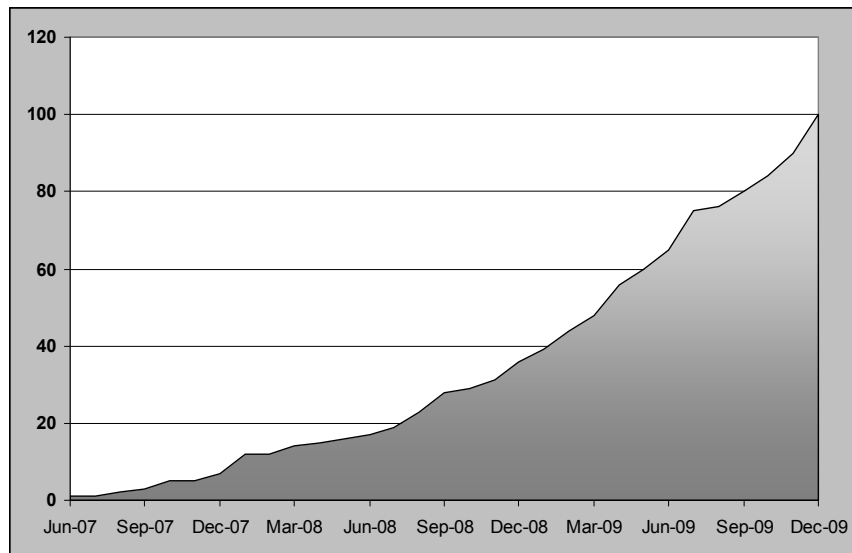


Figure 1: Number of reported decisions in Canada mentioning "Facebook" since June 2007 (For source data, see Schedule 'A')

⁶ *Kourtesis v. Joris, Infra* is the earliest decision, decided on June 12, 2007.

⁷ Bans on Facebook usage have also been included as part of criminal sentences. See for example, *R v. S.G.Z.*, [2009] B.C.J. No. 601 (Prov. Ct.), *R. v. B.S.B.*, [2008] B.C.J. No. 2227 (Sup. Ct.) at para. 2.

⁸ *Isber v. Zebrowski*, [2009] O.J. No. 4514 (Sup Ct.).

Although discoverability has not been an issue in many of these cases, whether that was because the profiles were public, or whether the parties had access in some other fashion, it is certainly becoming an issue in more recent decisions. A discussion on the discoverability cases will follow, but first the following is a review of the variety of ways in which Facebook content has been used in litigation.

To attack credibility

In an action for unlawful arrest, the plaintiff claimed “that he had never been intoxicated and that he is a very responsible person”⁹. In cross examination, counsel for the defendant police services board introduced entries from the plaintiff’s Facebook profile wherein the plaintiff described “publicly how he became extremely intoxicated on prior occasions”¹⁰.

To denigrate a party’s character

Facebook content is used repeatedly in family law disputes where one party will present content in an attempt to denigrate the other party’s character. In some cases, the Court has accepted the content as evidence of character flaws. For example, in denying a father’s application for access to his child, R. J. Williams J. referred simply to a crude joke posted as the caption to one of the father’s Facebook photographs to demonstrate that the father had “poor judgment.”¹¹ In another family law application where a father sought a guardianship and parenting order for his 12 year old daughter, the Court referred extensively to postings the father made on his Facebook page about his ex-wife. The Court found that the postings showed a lack of respect for his wife, and further, that posting the child’s photograph on his profile exposed the child to risk.¹²

⁹ *Hollingsworth v. Ottawa Police Services Board*, [2007] O.J. No. 5134 (S.C.J. (Sm. Cl. Ct.)) at para. 31.

¹⁰ *Hollingsworth, Ibid.*

¹¹ *Westhaver v. Howard*, [2007] N.S.J. No. 499 (Sup. Ct. (Fam. Div.)) at para. 26.

¹² See also *M.A.C. v. M.K.*, [2009] O.J. No. 368 (Ct. J.) at para. 17, where a mother complained that a father’s posting of his child’s photograph on Facebook and a dating site showed a “failure to respect boundaries.”

The content of a child's Facebook profile has also been at issue in custody disputes. In some cases, non-custodial parents have used photographs posted on their child's Facebook profile to discredit the custodial parent's parenting skills.¹³

To dispute damages claimed

Facebook photographs have been used to demonstrate that facial scarring resulting from a motor vehicle accident did not constitute a "serious impairment of an important physical, mental or psychological function within the meaning of s. 267.5(5) of the *Insurance Act*, since the Court found that, the plaintiff herself, gave evidence that "she socializes, dates, and has even gone to the extent of providing her picture on the computer program Facebook"¹⁴.

In another case, photographs posted on Facebook, depicting the plaintiff "participating in golf, snowboarding, rock-climbing, travel and other social activities all of which have a cost", assisted the Court in finding that denying a plaintiff's request for an advance of damages pending trial would not work a hardship.¹⁵

In *Bagasbas v. Atwal*¹⁶ where the plaintiff claimed \$40,000 for pain, suffering and loss of enjoyment resulting from a motor vehicle collision, the defendant used her Facebook profile photographs to show the plaintiff engaging in the very activities she claimed she could no longer do. These photographs went a long way in persuading the judge that the plaintiff took "an inflated view"¹⁷ of her injuries. The plaintiff was awarded a nominal amount of \$3,500 in non-pecuniary damages.

In a decision from Newfoundland, J. P. Adams J. was asked to assess damages for injuries sustained by the 28-year old male plaintiff in two separate motor vehicle accidents. The plaintiff claimed that, as a result of the accidents, "his social life had been severely curtailed" and

¹³ *W.R.V. v. S.L.V.*, [2007] N.S.J. No. 354 (Sup. Ct.) at para. 31, *T. K. B. v. P.M.S.*, [2008] B.C.J. No. 1923 (Sup. Ct.) at para. 16.

¹⁴ *Goodridge (Litigation guardian of) v. King*, [2007] O.J. NO. 4611 (S.C.J.) at para. 128.

¹⁵ *Cikojevic v. Timm*, [2008] B.C.J. No. 72 (Sup. Ct.) at para. 47.

¹⁶ [2009] B.C.J. No. 758 (Sup. Ct.).

¹⁷ *Bagabas v. Atwal*, *Ibid* at para. 8.

that “he was no longer able to play pool with his friends and he essentially had little or no social life, except the occasional weekend outing.”¹⁸

The plaintiff was cross examined on photographs from his Facebook profile which showed his “rather full and active social life.”¹⁹ The photographs showed the plaintiff attending and hosting parties, attending weekend outings at summer cabins, frequently drinking alcohol, smoking marijuana daily and he appeared “to have a number of friends with whom he communicated and socialized on a regular basis.”²⁰ J. P. Adams J. stated:

[w]ithout this 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.²¹

In the B.C. case, *Skusek v. Horning*²², the Court refers to defence counsel’s attempt to dispute the claimed damages by entering into evidence photographs from the Plaintiff’s Facebook account, without discussion of their admissibility.

In *K.T. v. A.S.*²³, another B.C. case, where the plaintiff was injured in a motor vehicle accident while a passenger in a vehicle driven by the defendant. The plaintiff claimed injuries to her neck and upper back as well as shoulder pain, headaches, an exacerbation of her sacroiliac

¹⁸ *Terry v. Mulowney*, [2009] N.J. No. 86 (S.C. (T.D.)) at para. 102.

¹⁹ *Terry v. Mulowney*, *Ibid* at para. 104.

²⁰ *Terry v. Mulowney*, *Ibid* at para. 104.

²¹ *Terry v. Mulowney*, *Ibid* at para. 105.

²² *Skusek v. Horning*, [2009] B.C.J. No. 1328 (Sup. Ct.).

²³ [2009] B.C.J. No. 2396 (Sup. Ct.).

joint dysfunction and chronic back pain that was partially disabling. In attempting to dispute damages, defence counsel submitted vast amounts of photographic evidence from the plaintiff's Facebook account showing her juggling a soccer ball, holding a bowling ball and sitting on a swing or teeter totter. The Court disregarded this evidence since the plaintiff did not claim that she was unable to do the things pictured, and since the Court did not find that the photographs had very much probative value. The Court stated "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."²⁴

In another B.C. case, *Mayenburg v. Lu*²⁵, "the defendants sought to introduce 273 photographs which they obtained from Facebook "walls" of [the plaintiff's] friends. The bulk of the photos showed no more than [the plaintiff] enjoying herself with her friend, for example having a drink in a bar or a pub." The Court ruled inadmissible any photos which did not show her doing a specific activity which she said she had difficulty performing, since they had no probative value.²⁶ Interestingly, the Court noted at the end of the decision that the plaintiff had initially objected to all photographs on the basis of privacy, however, in the interests of concluding trial in a timely manner, they withdrew their objection but wished to raise the matter of privacy in relation to costs.²⁷

²⁴ *Ibid* at para 246.

²⁵ [2009] B.C.J. NO. 1915 (Sup. Ct.).

²⁶ *Ibid* at para 39.

²⁷ In *Kinloch (Guardian ad litem of) v. Edmonds*, [2008] B.C.J. No. 2385 (Sup. Ct.), the plaintiff sought special costs as against the police defendants. In support of her claim, the Court referred to the "less than straightforward" manner in which Facebook photographs of the plaintiff were obtained during pre-trial investigations, the fact that the

To show a party's state of mind

In *R. v. Butler*²⁸, a voir dire was held to determine the admissibility of statements the deceased made to her friends and family via Facebook in relation to the man accused of her murder. The Court accepted Facebook and MSN conversations between the deceased and her family and friends in the days leading up to her death as evidence of her state of mind in relation to the accused and admitted the conversations as exceptions to the hearsay rule.

How can I get access to the information contained on Facebook?

Facebook users can apply varying degrees of privacy controls over the content contained on their profiles. A truly 'public' profile is one where the user allows everyone to access all content on their page. A 'private' profile is one where the user only allows 'friends' to access all content. Between these two extremes, lie the majority of most users' Facebook profile settings. Users can opt to allow access to "friends of friends" and "my networks and friends." There are a myriad of other privacy options available to users, too many to discuss in this paper. Suffice it to say that access to the profile will depend on which privacy settings the user has enabled.

Accessing 'Public' Profiles

Accessing a public profile is easily done in one of two ways. Without using your own Facebook profile, you can access the user's public search listing by using an Internet search engine, such as Google. This listing will normally display the user's profile photo, a random listing of Facebook friends, and a listing of groups of which the user is a "fan." Using the public listing, you can view the user's "friends" list. If the user's profile is set to public, you can also access the user's profile by clicking on their name.

If logged into Facebook, you can use the Facebook search at the top right corner of every Facebook page. Facebook will search all profiles containing the key terms either in the profile name, or in the contents of the profile's Info section. For example, if you search "Michael

defence then claimed privilege over the photographs, only disclosing them at 3:00 p.m. on the eve of trial. Although the Court was critical of the defence's approach, they refused to award special costs.

²⁸ [2009] A.J. No. 1242 (Q.B.).

Jackson,” Facebook will return results showing individuals named “Michael Jackson,” fan sites dedicated to “Michael Jackson” and individuals who list “Michael Jackson” in their interests.

Accessing ‘Private’ Profiles

It is generally accepted that asking to be the user’s friend, “poking” the user or writing on the user’s wall raises ethical concerns and would be akin to contacting the party.

Accessing a ‘private’ profile will depend on the privacy settings set by the user. As noted above, Facebook users have a myriad of ways to control who has access to the content on their profiles. At one extreme, users can choose not to appear in searches, or in their friends’ list of ‘friends.’ In this case, their profile would seem non-existent to anyone other than their ‘friends.’ More commonly, users’ names will appear in Facebook searches; however their profiles will be inaccessible to anyone outside of their privacy settings. Before requesting disclosure, consider the possibility that the user may have left access to their profile open to users in their network. A user’s network will often be posted on their public listing.

If a user’s profile is inaccessible, parties may consider requesting disclosure. As we will see in the cases below, Facebook profiles have been found to be “documents” that should be disclosed to the extent that they are relevant, pursuant to the *Rules of Civil Procedure*.

Kourtesis v. Joris

In *Kourtesis v. Joris*,²⁹ in the middle of a trial for damages resulting from a motor vehicle accident, E.R. Browne J. ruled that Facebook photographs of the plaintiff were admissible, and granted leave to recall the plaintiff. The plaintiff claimed that her soft tissue injuries affected her enjoyment of life, such that she did not participate in activities such as Greek dancing, and further, that she did not have many friends. A staff member of the defendant’s counsel came upon photographs of the plaintiff on her cousin’s Facebook after the second week of trial. The photographs depicted the plaintiff dancing and enjoying life.

Between the time defendants’ counsel found the Facebook profile and hearing the motion, the plaintiff’s Facebook profile was essentially deleted. E. R. Browne J. immediately

²⁹ [2007] O.J. No. 5539 (S.C.J.).

ordered “that the website be maintained without change until after trial.”³⁰ Judge Browne found eventually that “I do find, however, that the issue of her enjoyment of life is, as stated, a material element in assessing damages. In fairness, balance is in favour of the photos being introduced, subject to technicalities dealing with admissibility.”³¹

Murphy v. Perger

In *Murphy v. Perger*³², a 2007 action wherein the plaintiff sought damages allegedly arising from a motor vehicle accident, H. A. Rady J. was asked to determine whether access to the plaintiff’s private Facebook profile should be given to the plaintiff. The defendant was not seeking access to the email communication contained on the site.³³

The defendant had access to a publicly available site called “The Jill Murphy Fan Club” (Jill Murphy being the plaintiff) which contained photographs of the plaintiff engaged in social activities, but requested access to her private Facebook profile, wherein the plaintiff had 366 friends. The site also contained messages from her family and friends, describing the plaintiff as “the life of the party.”

The defendant successfully brought an ex parte motion for preservation of the Facebook profile. Defendant’s counsel brought the motion ex parte to avoid spoliation of evidence.

The defendant also brought a motion before Rady J. for production of the documents contained on the profile. The defendant relied on the decision in *Kourtesis v. Joris*, referred to above. The plaintiff claimed that the defendant was on a “fishing expedition” and that a higher degree of privacy³⁴ was to be expected since the plaintiff could not control who tagged her in photographs.³⁵

³⁰ *Kourtesis, Ibid* at para. 13.

³¹ *Kourtesis, Ibid* at para. 23.

³² [2007] O.J. No. 5511 (S.C.J.).

³³ *Murphy v. Perger, Ibid* at para. 1.

³⁴ The issue of privacy was first considered in *Murphy v. Perger, supra*, at paragraph 19, where the Court was pointed to “B.C. authority for the proposition that a court retains jurisdiction to refuse disclosure where the information is of minimal importance to the litigation but may constitute a serious invasion of privacy: *United Services Funds v. Carter* (1986), 5 B.C.L.R. (2d) 222 (B.C.S.C.); leave to appeal dismissed (1996), 5 B.C.L.R. (2d)

The Court found that the photographs contained on the Facebook site were documents pursuant to Rule 30.01(1)(a) that must be disclosed to the extent that they relate to any matter in issue, pursuant to Rule 30.02(1), and must be disclosed for inspection if requested.³⁶ The Court also found that the photos could be relevant to impeach the plaintiff's credibility as well as a means to assess the value of her claim for damages.

With respect to the plaintiff's claim that this was but a mere "fishing expedition," the Court found that given the nature of Facebook, as "a social networking site where [...] a very large number of photographs are deposited by its audience" and "given that the public site [to which the defendant had access,] includes photographs, it seems reasonable to conclude the private site would as well."³⁷ Finally, the Court found that "any invasion of privacy is minimal and is outweighed by the defendant's need to have the photographs in order to assess the case. The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site"³⁸.

Knight v. Barrett

In a case from the New Brunswick Court of Queen's Bench, H.H. McLellan J. was very critical of the use that the defendant intended for the plaintiff's own Facebook photographs. During the course of ongoing discovery, the defendant obtained printouts of the plaintiff's Facebook profile. Counsel for the defendant objected to the plaintiff's questions on discovery regarding the origin of the photographs. The Court found no fault on the part of the plaintiff for not disclosing the Facebook profile since "the concept of Facebook pages is relatively new in our society."³⁹ Interestingly, H. H. McLellan J. was wary of the defendants attempting to "ambush

379 (B.C.C.A.) and *M.(A.) v. Ryan* (1994), 98 B.C.L.R. (2d) 1 B.C.C.A.; aff'd [1997] 1 S.C.R. 157." Privacy was also raised as a concern by Master Dash in *Roman v. Leduc, infra*, and in the BC case, *Bishop v. Minichello, infra*, where defence was asking for login/logout records.

³⁵ *Murphy v. Perger, Ibid* at para. 7.

³⁶ *Murphy v. Perger, Ibid* at para. 9.

³⁷ *Murphy v. Perger, Ibid* at para. 17.

³⁸ *Murphy v. Perger, Ibid* at para. 20.

³⁹ *Knight v. Barrett*, [2008] N.B.J. No. 102 (Q.B.(T.D.)) at para. 7.

the Plaintiff by his own Facebook.” Defendant’s counsel was ordered to disclose the origin of the Facebook material.

Leduc v. Roman

In *Leduc v. Roman*,⁴⁰ the most recent court decision dealing with the production of Facebook information, D. M. Brown J. ordered that the plaintiff’s entire Facebook profile should be disclosed. The parties were involved in a motor vehicle accident. As a result, the plaintiff claimed loss of enjoyment of life and limitations to his personal life.⁴¹ The defendants became aware of the plaintiff’s Facebook profile when the plaintiff claimed to Dr. Bruun-Meyer during his defence medical that “he did not have friends in his current area, although he had ‘a lot on Facebook.’”⁴²

The defendants’ counsel conducted a Facebook search of the plaintiff’s profile, however found that he had limited his profile to his Facebook ‘friends.’ Counsel thus moved for:

- (i) the interim preservation of all information contained on Mr. Leduc’s Facebook profile
- (ii) production of all information on the Facebook profile, and
- (iii) the production of a sworn Supplementary Affidavit of Documents.⁴³

At first instance, Master Dash found that the Facebook profile pages were “documents” that “might have some relevance to demonstrating the Plaintiff’s physical and social activities, enjoyment of life and psychological well being.” However, he found that the defendant had to do more than merely prove that the plaintiff had a profile. He found that “speculation of what may be on the Plaintiff’s site or what is on a ‘typical’ site is insufficient.” Master Dash concluded that the Defendants were “clearly” on a “fishing expedition” and dismissed the motion.

⁴⁰ [2009] O.J. No. 681 (S.C.J.).

⁴¹ *Leduc v. Roman, Ibid* at para. 2.

⁴² *Leduc v. Roman, Ibid* at para. 3.

⁴³ *Leduc v. Roman, Ibid* at para. 6.

D. M. Brown J. reversed Master Dash's decision. He referred extensively to Rady J's reasons in *Murphy v. Perger*, above and came to some very important enunciations. First, he found that where a user has both a public and a private profile, in ordering production of the content on the private profile, it is reasonable to infer from the content on the public profile that similar content exists on the private profile.⁴⁴ Secondly, he found that where the user only has a private profile, a court can infer from the social networking purpose of Facebook, and its applications "that users intend to take advantage of Facebook's 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."⁴⁵

D. M. Brown J. went so far as eliminating the distinction between a private site and a public site in the following way: "[a] party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action."⁴⁶

Judge Brown found that it was reasonable in this case to infer that the plaintiff's "social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident."⁴⁷ He determined that the defendant's request was not merely a fishing expedition, but noted that some evidence of relevant content was required to compel disclosure. He thus ordered the plaintiff to re-attend for a cross examination to allow the defendant the opportunity to ascertain the relevance of the content posted on the plaintiff's Facebook profile.

Kent v. Laverdiere

Leduc v. Roman was referred to by Master Haberman in *Kent v. Laverdiere*,⁴⁸ where, four weeks before trial, the defendant moved for production of a Supplementary Affidavit of Documents listing the plaintiffs' Facebook documents. The plaintiffs claimed that there were

⁴⁴ *Leduc v. Roman, Ibid* at para. 30.

⁴⁵ *Leduc v. Roman, Ibid* at para. 31.

⁴⁶ *Leduc v. Roman, Ibid* at para. 32.

⁴⁷ *Leduc v. Roman, Ibid* at para. 32.

⁴⁸ [2009] O.J. No. 1522 (S.C.J.).

more than 1,500 pages of content on the three plaintiffs' Facebook profiles, which would take approximately 75 hours to review. Master Haberman refused the defendants' request based on her lack of jurisdiction to make an order that would interfere with a fixed trial date.

Master Haberman also stated that, even if she had the required jurisdiction, she would have dismissed the motion. She found that the rendering of the *Leduc v. Roman* decision did not represent a "substantial or unexpected change in circumstances" that would justify delaying the trial. In referring to *Leduc v. Roman*, Master Haberman made the following comments: "[w]hile at first sight, the appeal decision seems to have reversed a decision of the master, the approach adopted by Brown J. is, in fact, more of a modification of the master's approach than a reversal of it."⁴⁹

Further, Master Haberman stated "Before *Leduc* can be invoked, there must be something to suggest at least some possible connection between the matters in issue and the documents sought." She continued in *obiter* that even if she had the jurisdiction to make the order, she found nothing in the pleadings of the *Family Law Act* for the claimants "to suggest that there could possibly be anything in the Facebook or MySpace pages [...] that could possibly be relevant."⁵⁰ She did, however, find that there may exist content relevant to the main plaintiff's claims with respect to her lessened enjoyment of life, and the negative effect on her ability to earn income or find romantic companionship.

Lodge v. Fitzgibbon

In a very interesting, yet brief decision from New Brunswick⁵¹, H.H. McLellan J. ordered that defence counsel attend at the offices of plaintiff's counsel to view the plaintiff's Facebook account. The Court limited access to the plaintiff's own page, recognizing that allowing access to friends' pages "becomes geometric very quickly."

⁴⁹ *Kent v. Laverdiere*, *Ibid* at para. 26.

⁵⁰ *Kent v. Laverdiere*, *Ibid* at para. 33.

⁵¹ *Lodge v. Fitzgibbon*, [2009] N.B.J. No. 418 (Q.B. T.D.).

Wice v. Dominion of Canada General Insurance

In *Wice v. Dominion of Canada General Insurance*⁵², Wice suffered a traumatic brain injury in a motor vehicle accident and Dominion was his Accident Benefits Insurer. After brief Examinations for Discovery, Dominion brought a motion for a further and better Affidavit of Documents, containing Facebook content.

Dominion filed evidence that Wice had a Facebook account that was “closed” to the public and had 110 friends. Dominion sought an order preserving “any and all information and documentation in his Facebook account for the duration” of litigation. Dominion also requested that Wice “identify any information or documentation contained in his Facebook profile that is relevant to this litigation.”⁵³

In *Wice*, Justice Boswell incorrectly states that Brown J. ordered production in *Leduc*, whereas Brown J. really only ordered that the plaintiff re-attend at Examinations for Discovery to determine the relevance of any Facebook content. Justice Boswell refers to the “inferences” that Brown J. discusses with respect to the nature of Facebook and the “likely existence” of relevant documents.

Justice Boswell states that the Defendant produced evidence demonstrating that there are relevant photographs of the Plaintiff participating in social activities posted on his Facebook profile, and thus given the inferences discussed in *Leduc*, Boswell J. ordered production of the further and better Affidavit of Documents including any relevant documents contained in his Facebook account, or any other similar account. Boswell J. also ordered preservation of the Facebook account or any other similar account.

⁵² [2009] O.J. No. 2946 (Sup. Ct.).

⁵³ *Ibid* at para 14.

The Defendant, apparently shooting for the moon, also sought an order for production of email account information. Without proof that Wice had an email account, they argued that he must have had an email account to establish a Facebook account. This request was denied.

Schuster v. Royal & Sun Alliance Insurance Co. of Canada

In *Schuster v. Royal & Sun Alliance Insurance Co. of Canada*⁵⁴ the plaintiff was also involved in a motor vehicle accident and sued her insurer, Royal, for compensation for injuries. As a result of the accident, the plaintiff alleged that she suffered injuries to her head, neck, shoulder, back and left leg, which have impaired her ability to work and to participate in social and recreational activities.

Through surveillance of the plaintiff, Royal learned that she had a Facebook account. The account was restricted to 67 friends. The investigator was able to obtain Facebook content of the plaintiff through the Facebook account of her mother-in-law.

Royal thus brought an *ex parte* motion for an interim order preserving the Facebook content and production of the documents contained therein. In Royal's Affidavit in support of their Motion, they attached pre- and post-accident photographs of the plaintiff sitting on a chair and sitting on the floor. The Affidavit asserts that the Facebook content in the plaintiff's account contains relevant information to her claims for loss of enjoyment of life and income loss. The Court found that the Affidavit did not set out the basis for this assertion.

The Court was unclear as to whether or not Royal requested access to the Facebook site itself or whether it was requesting "information from her profile" such as printouts etc. The Court assumed it was the latter, stating that it would not grant the former since such an order had

⁵⁴ [2009] O.J. No. 4518 (Sup. Ct.).

not been made in either *Wice* or *Leduc*. Again, it should be noted, that the Court in *Schuster*, incorrectly relies on *Leduc* as having ordered production.

The Court looked at whether or not Royal met the test for bringing an *ex parte* motion, as set out in Rule 40 and section 101(1) of the *Courts of Justice Act*. They also referred to the test from *R.J.R. MacDonald* for the granting of interlocutory injunctions, namely:

1. Serious question to be tried;
2. Irreparable harm if the motion is not granted;
3. Balance of convenience between the parties;

The Court easily found that there was a serious issue to be tried; the extent to which the collision impaired the plaintiff's ability to earn income and participate in recreational activities.

With respect to the second question, Royal argued that it would be deprived of the opportunity to respond to the plaintiff's claim without access to the Facebook content. The Court found instead that they could not infer proof of irreparable harm, that evidence had to be clear and not speculative.⁵⁵ The Court thus found that there was no evidence that the Facebook account contained relevant evidence. Further, the Court presumed that the Plaintiff chose not to include the Facebook content in her Affidavit of Documents because it was irrelevant.⁵⁶

⁵⁵ *Ibid* at para 27.

⁵⁶ *Ibid* at para 30.

The Court refers to Boswell J.'s discussion on inference as *obiter dicta*, and that such an inference was inappropriate in the case at hand. Justice Price basically shuts down the inference referred to in *Leduc* and relied on in *Wice* at paragraph 29:

I do not regard the mere nature of Facebook as a social networking platform or the fact that the Plaintiff possess 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.

Price J. then went to the third part of the test, the balance of convenience, and found in favour of the Plaintiff's privacy interests over the Defendant's disclosure interests since the Defendant had the opportunity to cross-examine the plaintiff on her Affidavit of Documents as well as ask her about her Facebook account on Examination for Discovery and failed to do either.⁵⁷ Since the Defendant did not discover the Plaintiff's Facebook account until after Examinations for Discovery, the Court thus granted the Defendant leave, pursuant to Rule 30.06, to cross examine the Plaintiff on her Affidavit of Documents.

Price J. also denied the Defendant's request for a preservation order, since the Court found that there was no evidence that the Plaintiff would attempt to delete content from her Facebook profile pending trial.⁵⁸ The Court found that it would be inappropriate to issue an *ex-parte* order that would interfere with her right to delete content. Price J. cited from the Federal Privacy Commissioner's recent Report wherein they referred to Facebook's privacy settings and that its users choose what information they make available and to whom. The Court found that

⁵⁷ *Ibid* at para 40.

⁵⁸ An argument could be made that Price J. failed to recognize the dynamic nature of electronic documents. A different result may have been had with reference to the Sedona Canada e-Discovery Principles, available online at: http://www.thesedonaconference.org/dltForm?did=2_07WG7pubcomment.pdf.

the plaintiff, in setting her privacy settings to “private” had a privacy interest in the content that should be respected unless the defendant could show legal entitlement to such information.⁵⁹

What if the Facebook profile is deleted before production?

Where there is evidence of spoliation of evidence, a request can be made to Facebook for third party production. Facebook’s privacy policy contains the following clause:

We may be required to disclose user information pursuant to lawful requests, such as subpoenas or court orders, or in compliance with applicable laws. We do not reveal information until we have a good faith belief that an information request by law enforcement or private litigants meets applicable legal standards. Additionally, we may share account or other information when we believe it is necessary to comply with law, to protect our interests or property, to prevent fraud or other illegal activity perpetrated through the Facebook service or using the Facebook name, or to prevent imminent bodily harm. This may include sharing information with other companies, lawyers, agents or government agencies.⁶⁰

As of May 1, 2009, Facebook’s Data Retention policy is as follows:

Facebook users may modify or delete any of their profile information at any time by logging into their account. Information will be updated immediately. Individuals who wish to deactivate their Facebook account may do so on the My Account page. Removed information may persist in backup copies for a reasonable period of time but will not be generally available to members of Facebook.

Where you make use of the communication features of the service to share information with other individuals on Facebook, however, (e.g., sending a personal message to another Facebook user) you generally cannot remove such communications.⁶¹

Practical Suggestions based on the Case Law

The following procedure for getting disclosure can be gleaned from the case law:

⁵⁹ *Ibid* at para 53.

⁶⁰ Facebook Principles (May 13, 2009), online: <<http://www.facebook.com/facebook?ref=pf#/policy.php?ref=pf>>.

⁶¹ Facebook’s Statement of Rights and Principles (May 13, 2009), online: <<http://www.facebook.com/terms/english.php>>.

1. Include “production of any information or documentation contained in a Facebook profile, or any similar Internet application” as part of your Discovery Plan, as required under the *Rules of Civil Procedure*.
2. Conduct an Internet search of the user. An Internet search will pull up the user’s friends’ profiles, as well as the user. Note any networks that the user is associated with.
3. Conduct a Facebook search for the user and any associated family members or friends.
4. If the user profile is public, consider the ruling in *Knight v. Barrett, Supra*, where defendant’s counsel was ordered to disclose the origin of the material to the plaintiff.
5. If the user profile is private, or has limited access, try a Facebook search within the user’s network.
6. If a profile is detected, bring an *ex parte* Motion for preservation of the Facebook account or any other similar account. Consider, however, that the precedent set by *Schuster v. Royal & Sun Alliance Insurance Co. of Canada*⁶² will present a barrier.
7. On discovery, examine the user to determine whether the content of their profile is relevant to the action.
8. If a profile was not found, consider the possibility that the profile is ‘hidden.’ In this case, ask the user on discovery whether or not they have a Facebook profile.
9. Content on the site should be listed in a Supplementary Affidavit of Documents, if not in the original Affidavit of Documents. Plaintiff’s counsel has a duty “to explain to the client, in appropriate cases, that documents posted on the party’s Facebook profile may be relevant to allegations made in the pleadings.”⁶³
10. If the content is not listed in the Affidavit of Documents, request a Supplementary Affidavit of Documents listing the Facebook profile contents.

⁶² [2009] O.J. No. 4518 (Sup. Ct.).

⁶³ *Leduc v. Roman, Supra* at para. 28

11. If a request for Supplementary Affidavit of Documents is refused, apply to the Court under Rule 30.06 of the *Rules of Civil Procedure* for cross-examination, service of a further and better Affidavit of Documents, disclosure or production for inspection of the document, etc...
12. Should you bring a Motion for production of the Facebook evidence, be clear about what you're asking for. Consider *Schuster v. Royal & Sun Alliance Insurance Co. of Canada*⁶⁴ where the Court asked whether or not the defendant was asking for access to the site, or production of the information contained therein (such as printouts, etc.). In *Schuster*, the Court stated that it would not order access.
13. Like any other evidence, the intended productions should be relevant to a material issue in the case. See the Court's reaction in *K.T. v. A.S.*⁶⁵, discussed above, to the attempted admission of evidence that the plaintiff was capable of doing things she never claimed she could not do.
14. Keep in mind that an unsuccessful attempt at admission, or where the admission of the evidence is prejudicial or infringes privacy rights, plaintiffs may wish to raise this issue when dealing with costs. For an example of this, see *Mayenburg v. Lu*⁶⁶, above, or *Kinloch (Guardian ad litem of) v. Edmonds*.⁶⁷

How much faith do we put in the depiction of the Internet self?

It is clear from the cases discussed above, that evidence from Facebook profiles can often prove rather compelling in litigation. It is thus important to really question the weight that should be given to the information obtained from these profiles, given that it is increasingly accepted that our Facebook selves are, at least somewhat, skewed versions of the real thing. As Justice Blouin of the Ontario Court of Justice⁶⁸ accepted last year, Facebook allows people to create “an

⁶⁴ [2009] O.J. No. 4518 (Sup. Ct.).

⁶⁵ [2009] B.C.J. No. 2396 (Sup. Ct.).

⁶⁶ [2009] B.C.J. NO. 1915 (Sup. Ct.).

⁶⁷ [2008] B.C.J. No. 2385 (Sup. Ct.).

⁶⁸ *R. v. Sather* [2008] O.J. No. 918 (Ont. Ct. J.).

alternate persona.” People use Facebook to promote the person they want to be, not necessarily the person they are. Again, Justice Blouin accepted expert evidence that “people who profile themselves [on Facebook] embellish their character” and may “say provocative things to elicit a response from their Facebook friends.” Therefore, caution must be exercised in relying on information extracted from Facebook as evidence of the ‘true’ depiction of the party.

How many friends does it take before you lose your expectation of privacy?

As discussed above, in considering whether or not to grant access to a party’s Facebook profile, Ontario courts have considered the party’s privacy interests. Courts have used the number of “friends” that a party has as a guideline in determining whether or not the party’s expectation of privacy has been triggered. For example, given that the plaintiff had given access to the content of her site to 366 Facebook “friends,” the Court in *Murphy v. Perger*⁶⁹ found that “the plaintiff could not have a serious expectation of privacy.” Further, in *Leduc v. Roman*⁷⁰, the Court found that a court can infer from the social networking purpose of Facebook, and its applications “that users intend to take advantage of Facebook’s 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.”⁷¹

These cases raise two questions for me. First, how many friends does it take to affect your expectation of privacy? What if the party had 5 friends? 20 friends? 100 friends? Where will the Courts draw the line? Further, what if the party had 366 friends, but the user had limited the content available to 365 of those “friends”?

⁶⁹ *Murphy v. Perger, supra.*

⁷⁰ *Leduc v. Roman, supra.*

⁷¹ *Leduc v. Roman, supra* at para. 31.

Professional obligations involved in conducting searches

Since Facebook users can choose from a variety of privacy settings; profiles can thus scan a spectrum between absolutely public, to absolutely private. A user might limit access to their profile to their “friends” or to individuals in their “network.” A “network” is basically a subset of the Facebook “universe.” You may choose your hometown, your place of employment, your university or high school as your “network.” The thing with networks is that, many networks require some form of authentication. For example, to join the University of Toronto network, you must provide a U of T email address. Before allowing you access to the U of T network, Facebook requires you to grab a “confirmation link” from an email sent to the address you provided. Basically, without a valid U of T email address, you can’t join their network.

If, for whatever reason, you successfully change your network to match the plaintiff’s network, the following should be considered. Given Rule 6.03(7) of the Rules of Professional Conduct about contacting a represented party, it has been widely assumed that requesting the plaintiff’s Facebook “friendship” is wrong. However, what if the plaintiff belonged to the U of T network. You’re a Waterloo alumnus, but someone in your office went to U of T. If you use their profile to get access to the plaintiff’s profile, is that wrong? What if you borrow your friends U of T email address to change your network temporarily? Is that wrong? Basically, how far can you go to manipulate your own Facebook profile to fit within the plaintiff’s security parameters?

Consider further, some lawyers have begun “friending” witnesses to an action, arguing that since there is no property in witnesses, they are not contravening the *Rules*. And finally, it has been suggested, although not confirmed by the author, that once a friend request has been made, if the requestee contacts the requestor with a message, for example “Who are you?” the requestor will have access to the requestee’s profile for a period of 30 days.

How far are we going to go?

Finally, as with all technology, we have to ask ourselves, how far are we going to go? As you may have heard, in December 2008, counsel in Canberra, Australia convinced a judge of the Australian Capital Territory's Supreme Court to allow them to serve documents over the Internet after repeatedly failing to serve the papers in person. The defendants had failed to pay back a mortgage taken out with the plaintiff company. Before resorting to Facebook, the plaintiff's lawyer had tried serving the defendants at their home address and their last known business address, but they had essentially vanished... without a trace... However, their Facebook profiles still existed. Plaintiff's counsel was able to identify the defendants using the dates of birth, email addresses and the fact that the co-defendants each appeared on the other's "friends" list.

Of course, Australian Courts had previously been accepting service via email and text message, and therefore service via Facebook is not a huge leap. However, in an unreported decision⁷² from Alberta, Master Breitkreuz allowed service of a Notice of Action on a defendant via their Facebook profile.

Other Interesting Cases Involving Facebook

Are comments posted on Facebook "threats" at law?

In *R. v. Sather*,⁷³ a father was accused of uttering threats to cause death or bodily harm. Mr. Sather created a petition against the Children's Aid Society when they removed his child from the custody of his wife. Mr. Sather admitted to posting the following comments on Facebook:

"when I find out what nurse called CAS may god have murcey on my soul cuz I'm going straight to hell with a 25 yr pit stop in prison"

⁷² *Knott v. Sutherland* (5 February 2009), Edmonton 0803 02267 (Alta. Q.B.M.).

⁷³ [2008] O.J. No. 918 (Ct. J.).

“Dan is gonna go suicidal bomb CAS”

“Dan is sick of all the bull shit and in the midst of planning a tacticle strike to get kyle back and disappearing off the face of the earth.”

“Dan is plan B is in full operation as of Nov. 23 first the man power was set up then the fire power is obtained now 2 weeks to find out where there keeping him.”

“Dan is scared its almost time.”⁷⁴

R. Blouin J. found that these postings were not meant to intimidate and acquitted Mr. Sather. In coming to this decision, R. Blouin J. considered expert evidence “called to explain how people use Facebook. [The expert witness,] 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.”⁷⁵

Facebook’s effect on publication bans

In the matter of *R. v. J. S. R.*,⁷⁶ the criminal prosecution of one of the accused in the Jane Creba shooting, the Court was asked to order a publication ban of the evidence to be heard at trial. In considering the effectiveness of publication bans, I.V.B. Nordheimer J. considered a statement made by then Chief Justice Lamer in *Dagenais v. Canadian Broadcasting Corp.*,⁷⁷ wherein he noted that “[i]n the global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult.”⁷⁸ Nordheimer J continued:

That concern has only exacerbated in the almost fifteen years since *Dagenais* was decided. We can now add to the list of holes through which information can slip the realities of blogs, podcasts, satellite radio, specialty television channels, websites such as “YouTube” and “facebook”, and the ever increasing number of personal

⁷⁴ *R. v. Sather, Ibid* at para. 6.

⁷⁵ *R. v. Sather, Ibid* at para. 9.

⁷⁶ [2008] O.J. No. 4160 (S.C.J.).

⁷⁷ [1994] 3 S.C.R. 835.

⁷⁸ *Dagenais, Ibid* at para. 89.

websites. Most, if not all, of these outlets lie outside any effective control by this court.⁷⁹

As of the update of this article, a Court in Oshawa, Ontario was grappling with how to balance a court-ordered publication ban with the thousands of mourners who posted their condolences to the family on Facebook.

Facebook Login/Logout records associated with plaintiff's claim of ongoing fatigue

In *Bishop (Litigation guardian of) v. Minichello*,⁸⁰ T.J. Melnick J. ordered production of the plaintiff's Facebook login/logout records. The plaintiff alleged a brain injury resulting in ongoing fatigue which prevented him from maintaining employment. The plaintiff claimed to a doctor that "his sleep varies with the time one of his friends goes to bed. This is because he spends a substantial amount of time on Facebook chatting with his friend."⁸¹ The defendant thus brought the motion to have his computer "hard drive analyzed to determine the period of time the plaintiff spends on Facebook between eleven at night and five in the morning each day."⁸²

T. J. Melnick J. granted the order, finding that the information sought was sufficiently probative, and limited such that the privacy concerns were not at issue. The defendant attempted, on appeal, to broaden the order to all computer activity but was denied.⁸³

In *Carter v. Connors*,⁸⁴ a motion was brought by the defendant for an order that the plaintiff, who was in the middle of being examined for discovery, provide an undertaking to have her Internet Service Provider provide her at-home computer use records, including records of how much time was spent on Facebook, from the date of the motor vehicle accident at issue in

⁷⁹ *R. v. J. S. R.*, *Supra* at para. 60.

⁸⁰ [2009] B.C.J. No. 692 (Sup. Ct.).

⁸¹ *Bishop v. Minichello*, *Ibid* at para. 56.

⁸² *Bishop v. Minichello*, *Ibid* at para. 1.

⁸³ [2009] B.C.J. No. 2446 (C.A.).

⁸⁴ [2009] N.B.J. No. 403 (Q.B. T.D.).

the action. The undertaking was refused during discoveries on the grounds that the plaintiff had an expectation of privacy in the data.

F. Ferguson J. framed the issue as follows:

Does the law of civil discovery in New Brunswick allow a party to compel production of Internet and Facebook usage records from the service provider of a Plaintiff who held an administrative clerk position prior to a motor vehicle accident when the basis of the claim filed by her is a soft tissue injury that is claimed to have resulted from the accident that prevents her from resuming full time work?⁸⁵

According to F. Ferguson J., the answer was ‘yes.’ In this case, “the probative value of the information requested is of such a level that its disclosure will not infringe upon a reasonable expectation of privacy.”⁸⁶ Further, that:

it cannot be reasonably concluded that the specific information sought in this motion does not qualify as meeting a “semblance of relevance” test which is what is required at this stage for an order to issue. It does so, by possibly providing a window into what physical capacity the Plaintiff has to keyboard, access the Internet and communicate with family friends and associates on Facebook and thus what capacity she may have to work. In that sense: “It may lead to the discovery of admissible evidence”, the threshold required for the evidence to be produced.⁸⁷

In an Ontario criminal law decision dealing with homicide, the victim’s Facebook activity was used to set out a chronology of events leading up to her murder.⁸⁸

Facebook and Election Spending

For an interesting case discussing the use of Facebook in election campaigns, see *British Columbia Teachers’ Federation v. British Columbia (Attorney General)*,⁸⁹ where F.W. Cole J.

⁸⁵ *Ibid* at para 10.

⁸⁶ *Ibid* at para 38.

⁸⁷ *Ibid* at para 40.

⁸⁸ *R. v. Brickman*, [2009] O.J. No. 4612 (Sup. Ct.).

⁸⁹ [2009] B.C.J. No. 619 (Sup. Ct.).

discusses at length the effect that Facebook and other Web 2.0 applications such as YouTube, have had on the way politicians campaign.⁹⁰

Facebook used as evidence of intent

You are all surely aware of the recent criminal case involving the murder of Stefanie Rengel, orchestrated by Melissa Todorovic and carried out by her boyfriend, D.B. It was found that Ms. Todorovic, believing Ms. Rengel to be a threat to her relationship with D.B., planned, orchestrated and directed D.B. to kill Ms. Rengel. In the decision by Justice Nordheimer with respect to having Ms. Todorovic sentenced as an adult, the Court referred to the digital evidence of Ms. Todorovic's intent. This evidence included instant messages and Facebook content wherein Ms. Todorovic told D.B. on numerous occasions that she wanted him to kill Ms. Rengel, at one point threatening to block him until he did so⁹¹.

Facebook used to determine income in support claim

In attempting to determine the husband's income in a Family Law case⁹² dealing with support, the Court was referred to the husband's girlfriend's Facebook status which said "Cat Food \$50, Lawyer's Bills \$500,000, Bother ex- Priceless."⁹³ The Court disregarded this evidence since it could not be attributed to the husband.

Conclusion

In conclusion, content from Facebook profiles will continue to be introduced in legal proceedings. It is likely that this content will be found relevant, particularly in assessing damages. However, the content will be harder to access as plaintiffs' counsel will no doubt begin advising their clients to eliminate profiles before bringing an action. Thus, determining whether a profile exists, and consequently gaining access to that profile will become increasingly difficult.

As Facebook makes it easier to hide profiles, it will become too cumbersome a chore to determine whether or not a plaintiff has a Facebook profile, let alone try to get access to it.

Finally, lawyers and judges must begin to consider the weight to be given evidence obtained from Facebook profiles, how the information is obtained and further, the courts must establish a

⁹⁰ See in particular, paras. 217-232.

⁹¹ *R. v. Todorovic*, [2009] O.J. No. 3246 (Sup. Ct.).

⁹² *Mills v. Elgin*, [2009] B.C.J. No. 2310 (Sup. Ct.).

⁹³ *Ibid.* at para 44.

better system of determining when a party's expectation of privacy is triggered; relying simply on the number of friends a user has is insufficient.

**Schedule 'A': List of all Canadian decisions, as reported by Quicklaw,
mentioning the word "Facebook"**

| Case Name | Cite | Date | Subject | Jurisdiction |
|---|------------------------|-------------|----------------------|---------------------|
| Kourtesis v. Joris | [2007] O.J. No. 5539 | 12-Jun-07 | Discovery | Ontario |
| W.R.V. v. S.L.V. | [2007] N.S.J. No. 354 | 28-Aug-07 | Family | Nova Scotia |
| Kourtesis v. Joris | [2007] O.J. No. 3606 | 24-Sep-07 | Costs | Ontario |
| Murphy v. Perger | [2007] O.J. No. 5511 | 03-Oct-07 | Discovery | Ontario |
| Goodridge (Litigation guardian of) v. King | [2007] O.J. No. 4611 | 30-Oct-07 | Damages | Ontario |
| Westhaver v. Howard | [2007] N.S.J. No. 499 | 05-Dec-07 | Family | Nova Scotia |
| Hollingsworth v. Ottawa Police Services Board | [2007] O.J. No. 5134 | 27-Dec-07 | Credibility | Ontario |
| Knight v. Barrett | [2008] N.B.J. No. 102 | 08-Jan-08 | Discovery | New Brunswick |
| Knight c. Barrett | [2008] A.N.-B. no 102 | 08-Jan-08 | Discovery | New Brunswick |
| R. c. Cormier | [2008] J.Q. no 61 | 10-Jan-08 | Criminal | Quebec |
| Cikojevic v. Timm | [2008] B.C.J. No. 72 | 16-Jan-08 | Civil | British Columbia |
| R. v. Sather | [2008] O.J. No. 918 | 03-Mar-08 | Criminal | Ontario |
| R. v. Bedford | [2008] O.J. No. 5760 | 14-Mar-08 | Criminal | Ontario |
| R. v. A.P.P. | [2008] O.J. No. 1584 | 25-Apr-08 | Criminal | Ontario |
| Brouse v. Lillini | [2008] O.J. No. 2322 | 23-May-08 | Family | Ontario |
| Hassan v. Mufti | [2008] O.J. No. 2422 | 18-Jun-08 | Family | Ontario |
| R. v. Momprevil | [2008] O.J. No. 5635 | 18-Jul-08 | Criminal | Ontario |
| R.B. v. M.D.M. Nstein Technologies Inc. c. Chauvet | [2008] B.C.J. No. 1520 | 31-Jul-08 | Family | British Columbia |
| [2008] J.Q. no 7437 | | 08-Aug-08 | Employment | Quebec |
| C.M.R. v. O.D.R. | [2008] N.B.J. No. 367 | 15-Aug-08 | Family | New Brunswick |
| R. v. Blake | [2008] O.J. No. 3291 | 20-Aug-08 | Criminal | Ontario |
| Assn. of Part-Time Undergraduate Students of the | | | Administrative Law | |
| [2008] O.J. No. 3344 | | 27-Aug-08 | | Ontario |
| R. v. J.S.R. | [2008] O.J. No. 4160 | 02-Sep-08 | Criminal | Ontario |
| R. v. Woods | [2008] O.J. No. 3466 | 03-Sep-08 | Criminal | Ontario |
| Hawboldt v. Melanson | [2008] N.S.J. No. 364 | 08-Sep-08 | Family | Nova Scotia |
| R. v. Sayers | [2008] O.J. No. 3516 | 09-Sep-08 | Criminal | Ontario |
| K.S. v. D.B. | [2008] N.S.J. No. 623 | 17-Sep-08 | Family | Nova Scotia |
| R. v. Goulette | [2008] N.B.J. No. 373 | 25-Sep-08 | Criminal | New Brunswick |
| T.K.B. v. P.M.S. | [2008] B.C.J. No. 1923 | 09-Oct-08 | Family | British Columbia |
| Keddy v. Keddy | [2008] N.S.J. No. 486 | 03-Nov-08 | Family | Nova Scotia |
| T.L.G. v. D.M.B. | [2008] B.C.J. No. 2602 | 06-Nov-08 | Family | British Columbia |
| R. v. B.S.B. | [2008] B.C.J. No. 2227 | 07-Nov-08 | Criminal | British Columbia |
| Chohan v. Lawrence | [2008] B.C.J. No. 2346 | 01-Dec-08 | Credibility Landlord | British Columbia |
| Pawlus c. Hum Kinloch (Guardian ad litem of) v. Edmonds | [2008] J.Q. no 12563 | 02-Dec-08 | Tenant | Quebec |
| [2008] B.C.J. No. 2385 | | 05-Dec-08 | Costs | British Columbia |
| M.J.M. v. A.D. | [2008] A.J. No. 1484 | 19-Dec-08 | Family | Alberta |
| Reid v. Reid | [2009] N.S.J. No. 95 | 12-Jan-09 | Family | Nova Scotia |
| M.A.C. v. M.K. | [2009] O.J. No. 368 | 27-Jan-09 | Family | Ontario |
| M.A.C. v. M.K. | 94 O.R. (3d) 756 | 27-Jan-09 | Family | Ontario |
| Dearden v. Dearden | [2009] O.J. No. 993 | 12-Feb-09 | Family | Ontario |
| R. v. Butler | [2009] A.J. No. 1242 | 13-Feb-09 | Criminal | Alberta |

| Case Name | Cite | Date | Subject | Jurisdiction |
|--|---|------------------------|--------------------|----------------------------|
| R. v. Anderson | [2009] P.E.I.J. No. 7 | 18-Feb-09 | Criminal | P.E.I. |
| R. v. S.G.Z. | [2009] B.C.J. No. 601 | 19-Feb-09 | Criminal | British Columbia |
| Leduc v. Roman | [2009] O.J. No. 681 | 20-Feb-09 | Discovery | Ontario |
| R. v. MacMillan | [2009] O.J. No. 2117 | 02-Mar-09 | Credibility | Ontario |
| R. v. Spackman | [2009] O.J. No. 1528 | 02-Mar-09 | Criminal | Ontario |
| British Columbia Teachers' Federation v. British | [2009] B.C.J. No. 619 | 30-Mar-09 | Constitutional | British Columbia |
| A c. Corporation Sun Media | [2009] J.Q. no 8226 | 31-Mar-09 | Constitutional | Quebec |
| Bishop (Litigation guardian of) v. Minichiello | [2009] B.C.J. No. 692 | 07-Apr-09 | Discovery | British Columbia |
| R. v. Brown | [2009] O.J. No. 1514 | 14-Apr-09 | Criminal | Ontario |
| Kent v. Laverdiere | [2009] O.J. No. 1522 | 14-Apr-09 | Discovery | Ontario |
| Bagasbas v. Atwal | [2009] B.C.J. No. 758 | 16-Apr-09 | Damages | British Columbia |
| Terry v. Mullaney | [2009] N.J. No. 86 | 17-Apr-09 | Damages | Newfoundland |
| Nabigon v. Lavallee Droit de la famille -- 09938 | [2009] J.Q. no 3901 | 22-Apr-09 | Family | Quebec |
| R. v. Walpole | [2009] O.J. No. 3657 | 28-Apr-09 | Criminal | Ontario |
| Fiegehen v. Kendrick | [2009] S.J. No. 275 | 08-May-09 | Family | Saskatchewan |
| M.N.S. v. J.T.S. | [2009] B.C.J. No. 1001 | 20-May-09 | Family | British Columbia |
| Schick v. Woodrow | [2009] S.J. No. 366 | 20-May-09 | Family | Saskatchewan |
| Ferguson v. Gilmour | [2009] O.J. No. 2141 | 26-May-09 | Family | Ontario |
| Daley v. Daley | [2009] O.J. No. 2449 | 12-Jun-09 | Family | Ontario |
| Himes v. Himes | [2009] O.J. No. 2787 | 17-Jun-09 | Family | Ontario |
| Lodge v. Fitzgibbon | [2009] N.B.J. No. 418 | 22-Jun-09 | Discovery | New Brunswick |
| Young v. Young Children's Aid Society of Inverness/Richmond v. C.S.L | [2009] N.S.J. No. 311 | 30-Jun-09 | Family | Nova Scotia |
| Skusek v. Horning Droit de la famille - 091638 | [2009] B.C.J. No. 1328 [2009] J.Q. no 6891 | 02-Jul-09 03-Jul-09 | Damages Family | British Columbia Quebec |
| Wice v. Dominion of Canada General Insurance Co. | [2009] O.J. No. 2946 | 06-Jul-09 | Discovery | Ontario |
| T.S.S. (Re) Mansfield v. Rasmussen | [2009] A.J. No. 791 [2009] O.J. No. 3942 | 08-Jul-09 16-Jul-09 | Family Family | Alberta Ontario |
| R. v. Doyle | [2009] N.S.J. No. 609 | 17-Jul-09 | Criminal | Nova Scotia |
| Mingo v. Solomon | [2009] O.J. No. 3031 | 17-Jul-09 | Family | Ontario |
| Brissette c. Audet | [2009] J.Q. no 8339 | 24-Jul-09 | Civil | Quebec |
| R. v. Todorovic | [2009] O.J. No. 3246 | 28-Jul-09 | Criminal | Ontario |
| Wice v. Dominion of Canada General Insurance Co. | [2009] O.J. No. 4774 | 28-Jul-09 | Discovery | Ontario |
| Bocage Cadet c. R. Children's Aid Society of Inverness/Richmond v. S.S. | [2009] J.Q. no 9392 [2009] N.S.J. No. 455 | 12-Aug-09 29-Sep-09 | Criminal Family | Quebec Nova Scotia |
| Peacher v. Peacher | [2009] A.J. No. 1012 | 16-Sep-09 | Family | Alberta |

| Case Name | Cite | Date | Subject | Jurisdiction |
|--|------------------------|-------------|--------------------------------|---------------------|
| Mayenburg v. Lu | [2009] B.C.J. No. 1915 | 25-Sep-09 | Discovery | British Columbia |
| R.M.S. v. F.P.C.S. | [2009] B.C.J. No. 1925 | 28-Sep-09 | Family | British Columbia |
| Vipond v. Hoffman | [2009] S.J. No. 589 | 01-Oct-09 | Family | Saskatchewan |
| C.C. v. K.C. | [2009] O.J. No. 4318 | 07-Oct-09 | Family Wills and Estates | Ontario |
| Isber v. Zebrowski | [2009] O.J. No. 4514 | 29-Oct-09 | | Ontario |
| Schuster v. Royal & Sun Alliance Insurance Co. of Canada | [2009] O.J. No. 4518 | 29-Oct-09 | Discovery | Ontario |
| R. v. Brickman | [2009] O.J. No. 4612 | 02-Nov-09 | Criminal | Ontario |
| E.L.C. v. E.S.B. | [2009] B.C.J. No. 2247 | 12-Nov-09 | Family | British Columbia |
| Foulds v. Schmaltz | [2009] S.J. No. 751 | 13-Nov-09 | Family | Saskatchewan |
| Mills v. Eglin | [2009] B.C.J. No. 2310 | 20-Nov-09 | Family | British Columbia |
| Snider v. Laszlo | [2009] O.J. No. 5032 | 20-Nov-09 | Family | Ontario |
| L.C. v. S.L. | [2009] A.J. No. 1344 | 26-Nov-09 | Family | Alberta |
| K.T. v. A.S. | [2009] B.C.J. No. 2396 | 01-Dec-09 | Damages | British Columbia |
| Carter v. Connors | [2009] N.B.J. No. 403 | 02-Dec-09 | Discovery | New Brunswick |
| Bains v. Bains | [2009] B.C.J. No. 2426 | 03-Dec-09 | Family | British Columbia |
| Droit de la famille -- 093011 | [2009] J.Q. no 15307 | 04-Dec-09 | Family | Quebec |
| C.C. v. A.S. | [2009] A.J. No. 1364 | 08-Dec-09 | Family | Alberta |
| Bishop (Litigation guardian of) v. Minichiello | [2009] B.C.J. No. 2446 | 08-Dec-09 | Discovery | British Columbia |
| Aguer v. Thot | [2009] S.J. No. 711 | 08-Dec-09 | Family | Saskatchewan |
| Greenhalgh v. Douro- Dummer (Township) Alberta (Child, Youth and Family Enhancement Act, Director) v. Children and Family Services for York Region v. E.T. | [2009] O.J. No. 5438 | 17-Dec-09 | Damages | Ontario |
| | [2009] A.J. No. 1439 | 21-Dec-09 | Family | Alberta |
| | [2009] O.J. No. 5587 | 31-Dec-09 | Family | Ontario |