# Fessing Up to Facebook: Recent Trends in the Use of Social Network Websites for Civil Litigation

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## INTRODUCTION

In December 2008, after several failed attempts to serve a couple with court documents by email by and text messaging their mobile phones, an Australian lawyer won the right to serve a default judgment by posting the terms of the judgment on the defendants' Facebook "Wall." In a ruling that appears to be the first of its kind anywhere in the world, Master Harper of the Supreme Court of the Australian Capital Territory held that the lawyer could use the social networking site to serve court notices.[1] The Facebook profiles showed the co-defendants' dates of birth, email addresses and "friend" lists and declared the co-defendants to be friends of one another. This information was enough to satisfy the Master that Facebook would "be effective in bringing knowledge or notice of the proceedings to the attention of the defendant."[2] Facebook, for its part, was quite happy with the result, stating: "We're pleased to see the Australian court validate Facebook as a reliable,

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1 This appears to be an unreported decision, although the details are provided in a number of online articles. The defendants, Carmel Rita Corbo and Gordon Kingsley Maxwell Poyser failed to keep up the repayments on $150,000 they borrowed from MKM in 2007 to refinance the mortgage on their Kambah townhouse. It seems that the news of the default judgment got out before the lawyer, Mr. McCormack, had the opportunity to serve the papers. The couple's Facebook profiles disappeared from the social networking site. See: "Facebook okay for serving court documents: Australian Court", *National Post* (17 December 2008); Rod McGuirk, "Aussie Court OKs Using Facebook for Serving Lien", *ABC News* (16 December 2008), online: ABC News <http://abcnews.go.com/International/wireStory?id=6470258>; Bonnie Malkin, "Australian couple served with legal documents via Facebook", *Telegraph* (16 December 2008), online: Telegraph <http://www.telegraph.co.uk/news/newstopics/howaboutthat/3793491/Australian-couple-served-with-legal-documents-via-Facebook.html>.

2 *Ibid.* but *cf. Citigroup Pty Ltd. v. Weerakoon*, [2008] QDC 174. In that case, the Queensland District Court refused a request to allow substituted service of court documents by email to a defendant's Facebook page. In so deciding, Judge Ryrie stated: "I am not so satisfied in light of looking at the uncertainty of Facebook pages, the facts that anyone can create an identity that could mimic the true person's identity and indeed some of the information that is provided there does not show me with any real force that the person who created the Facebook Page might indeed be the defendant, even though practically speaking it may well indeed be the person who is the defendant" (at 2 of 3).

secure and private medium for communication. The ruling is also an interesting indication of the increasing role that Facebook is playing in people's lives."[3]

There is no doubt that Facebook[4] is now playing an increasing role in people's lives. For the few who are unfamiliar with the application, Facebook is a non-commercial "social website" or, as put by its Terms of Use, "a social utility that connects you with the people around you."[5] The site's "Facebook Principles" state that a user may "set up a personal profile, form relationships, perform searches and queries, form groups, set up events, add applications and transmit information through various channels." According to Facebook, "as of June 2008, Facebook had more than 70 million active users . . . and users over the age of 25 made up the fastest growing demographic."[6] If you have a computer, the odds are good that you are one of the, now over 140 million, people who have posted personally sensitive information onto Facebook or a similar social network site such as MySpace,[7] Faceparty,[8] Friendster,[9] Bebo,[10] Badoo,[11] Habbo,[12] Nexopia,[13] Tagged[14] and many more.[15] If you are a typical user, you network with friends, upload photographs of yourself and your family members, enter your email address and cell phone number, and much more.[16]

Facebook asserts that this information is "secure and private" and it is possible for a user to adjust their privacy settings to restrict access to a Facebook site. Yet, it was just a few weeks prior to the writing of this article that Facebook backed down (for now) following a firestorm of protest regarding a change in its "Terms of Use" to claim ownership over user-generated content *in perpetuity* even after someone

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3 *Ibid.*

4 Facebook, online: <http://www.facebook.com>.

5 Facebook: "Terms of Use", online: <http://www.facebook.com/terms.php>.

6 *Leduc v. Roman* (2009), [2009] O.J. No. 681, ¶17 [Leduc], 2009 CarswellOnt 843 (Ont. S.C.J.).

7 MySpace, online: <http://www.myspace.com> (popular in the United States — 253,000,000 users).

8 Faceparty, online: <http://www.faceparty.com> (popular in the United Kingdom).

9 Friendster, online: <http://www.friendster.com> (popular in ASEAN countries — 90,000,000 users).

10 Bebo, online: <http://www.bebo.com> (40,000,000 users).

11 Badoo, online: <http://badoo.com> (popular in Europe — 13,000,000 users).

12 Habbo, online: <http://www.habbo.com> (popular with teens — 117,000,000 users).

13 Nexopia, online: <http://www.nexopia.com> (popular in Canada — 1,400,000 users).

14 Tagged, online: <http://www.tagged.com> (70,000,000 users).

15 For a comprehensive list of social network sites, refer to Wikipedia's List of Social Networking Websites, online: Wikipedia <http://en.wikipedia.org/wiki/List_of_social_networking_websites>; See also James Grimmelmann, "Saving Facebook", (2009) 94 Iowa L. Rev. 1137 [Grimmelmann].

16 Farhad Manjoo, "You Have No Friends: Everyone Else is on Facebook. Why Aren't You?" *Slate* (27 February 2009), online: Slate <http://www.slate.com/id/2008678>.

closed or cancelled their account.[17] For insurance professionals who handle claims that proceed to civil litigation, this begs the question: how does a user's expectation of privacy play out in the litigation context?

Consider that "[a] full filled-out Facebook profile contains about forty pieces of recognizably personal information, including name, birthday, political and religious views, online and offline contact information, gender, sexual preference, relationship status, favorite books, movies, etc., educational and employment history and, of course, picture."[18] Facebook is the largest photo-sharing application on the web with more than fourteen million photos uploaded daily. Facebook further offers multiple tools for users to search out and add potential contacts. In completing a typical Facebook profile, a person will have created a comprehensive database of information about both who they are and who they know.[19] This is, for the most part, information that our laws treat as highly private. Not surprisingly, courts are struggling to define how the plethora of private information contained in social network websites should be used in litigation. Should a person's choice to keep their Facebook profile private and share it only with selected "friends" override the right of other litigants to access information that may be relevant to a case?

For professional "fact-gatherers" such as lawyers, insurance adjusters, claims handlers and private investigators, the vast wealth of information that people volunteer on Facebook can be a goldmine or a smoking gun, depending on your perspective. The personal information contained in a Facebook profile may be highly relevant to matters at issue in litigation; when dealing with claims, particularly in the personal injury context, the information contained on a Facebook page can make or break a case. It is, therefore, crucial that legal and insurance professionals stay informed of new developments in this emerging area of law. This article, written with the practitioner in mind, summarizes the approach currently adopted by Canadian courts and contrasts this approach with that adopted in other jurisdictions.

## I. FACEBOOK AND THE LITIGATION PROCESS

It is important to understand that litigation is a fact-gathering process. In Canada, our procedural rules of litigation facilitate this process in two ways. First, courts place a positive obligation on each party to identify all of the documents in their possession or control that may be "relevant" to issues in the litigation, and to produce each such document unless privilege is claimed over it.[20] Second, lawyers are allowed to question a representative of each adverse party under oath — a pro-

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17 See e.g. Chris Walters, "Facebook's New Terms of Service: We Can Do Anything We Want with Your Content. Forever." *The Consumerist* (19 February 2009), online: <http://consumerist.com/5150175/facebooks-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever>.

18 Grimmelmann, *supra* note 15 at 1149.

19 Ibid.

20 A party is required to prepare a list of all the relevant documents, although the precise nature of the list will depend on the province. For example, in Ontario, the list of documents must be set out in an affidavit sworn by the party: Rule 30.03, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

cess referred to as "examination for discovery." The purpose of these processes is to uncover the facts of a case so that the law can be properly and fairly applied.

How does Facebook fit into these processes? Canadian courts have considered web-based networking sites such as Facebook and MySpace pages to be "documents." If a party posts content on Facebook that relates to any matter at issue in an action, then that party is required to identify the content for the other side.[21] In fact, a recent Ontario decision has held that it is now incumbent on lawyers to specifically raise the issue of Facebook profiles with their clients and explain that any relevant material that is posted on such sites will need to be produced in litigation.[22]

It sometimes happens though, that relevant documents are overlooked or omitted. Facebook profiles are often among these overlooked documents. As noted by one judge, "[t]he concept of Facebook is relatively new in our society. I see no fault on the part of counsel for the Plaintiff for not disclosing the existence of the Facebook page in the Affidavit of Documents. I suspect that when this action was filed in 2004 few people had heard of Facebook."[23] In such instances, where the privacy setting on a Facebook profile has been set to allow public access, few issues arise; anyone who learns of the site can search for, and download any relevant information. Problems arise, however, where access to a Facebook page has been restricted.

### (a) Public Facebook Profiles

A number of cases in Canada have already admitted photographs or other information posted on a public Facebook page as evidence relevant to issues raised in the litigation.[24] In one case, the discovery of photographs of a party posted on a MySpace page was the basis for a request to produce more photographs that were not posted on the site.[25]

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21 *Murphy v. Perger* (2007), [2007] O.J. No. 5511, 67 C.P.C. (6th) 245, 2007 CarswellOnt 9439 (Ont. S.C.J.) [*Murphy*].

22 *Leduc*, *supra* note 6 at para. 28.

23 *Knight v. Barrett*, [2008] N.B.J. No. 102, at ¶. 7 [*Knight*], 2008 NBQB 8, 2008 CarswellNB 136 (N.B. Q.B.).

24 For example, *Hollingsworth v. Ottawa Police Services Board* (December 27, 2007), Doc. 06-SC-096789, [2007] O.J. No. 5134 (Ont. S.C.J.) — a plaintiff's entry on his Facebook page wherein he described how he became intoxicated on public occasions was used to contradict his claim of unlawful arrest; *Pawlus c. Hum*, [2008] J.Q. No. 12565 (J.C.Q.) — a landlord terminated a lease because of loud noises. The apartment would, on occasion, become a "fraternity house." In reaching the conclusion that the tenant did not fulfill his obligation as a renter, the Board examined evidence, which included pictures published on the Fraternity's Facebook site; See also *Goodridge (Litigation Guardian of) v. King* (2007), [2007] O.J. No. 4611, 2007 CarswellOnt 7637 (Ont. S.C.J.); *R. (C.M.) v. R. (O.D.)*, [2008] N.B.J. No. 367, 2008 NBQB 253, 2008 CarswellNB 473 (N.B. Q.B.).

25 *Weber v. Dyck* (2007), [2007] O.J. No. 2384, 2007 CarswellOnt 3851 (Ont. S.C.J.).

In *Kourtesis v. Joris*,[26] the plaintiff claimed that, following a car accident, she was unable to engage in Greek dancing, an activity that she had previously enjoyed. During the course of trial, but after the plaintiff had testified, a member of the defence lawyer's staff happened across the plaintiff's private Facebook page showing post-accident pictures of her dancing at a party. The lawyer attempted to put these pictures into evidence. In deciding what to make of the photos, the Judge decided that the photographs, as "snapshots in time" and "taken out of context", had only minimal evidentiary weight, but they were still "highly relevant" to the assessment of damages regarding the plaintiff's claim for loss of enjoyment of life. Further, the photographs were *not* on the same footing as surveillance photos because, unlike surveillance photos, the plaintiff had control of the photographs on her Facebook site and so she could not be surprised by their existence and content. Finally, the mere fact that the photographs were contrary to the plaintiff's evidence at trial did not make them "prejudicial." The judge held, however, that the plaintiff should be permitted to be recalled at trial so that she could have the opportunity to explain them.

Courts in the United States have shown a similar willingness to allow into evidence materials that are posted on public social network sites. *Dexter v. Dexter*[27] was an appeal of a child custody case in which the father was granted sole custody of his daughter over the mother's objections. The mother had posted blogs on her public Myspace account stating that "she practiced sado-masochism, was a bisexual and a pagan. . . . Although appellant denied using illicit drugs, her on-line blogs contain several references to drug usage. In her Myspace writings, appellant stated that she was on hiatus from using illicit drugs during the pendency of the proceedings, but that she planned on using drugs in the future. She also said that she would use drugs in her home if Giovanna was sleeping."[28] The mother challenged the admissibility of her on-line postings, claiming that the information was private. The Court, however, stated that, because the writings were open to public view, the mother could not have an expectation of privacy regarding her postings. Having regard to her statements on these sites, the court found that the daughter's interests could be adversely affected by living with the mother. The court awarded custody to the father.[29]

### (b) Private Facebook Profiles

Canadian courts have mechanisms in place to monitor compliance with the disclosure duty. Where a party has reason to believe that another party has not complied with these disclosure obligations, he or she can ask the court to order disclosure of the documents. However, a court can refuse to order the disclosure of documents where the information is of minimal importance to the litigation, but

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[26] *Kourtesis v. Joris* (2007), [2007] O.J No. 5539, 2007 CarswellOnt 5962 (Ont. S.C.J.) [*Kourtesis*].

[27] *Dexter v. Dexter*, 2007 Ohio 2568.

[28] *Ibid.* at para. 33.

[29] *Ibid.*

may constitute a serious invasion of privacy.[30] A private document is, quite simply, any document that is not public, and that may include "private" Facebook profiles.[31] This creates a dilemma for a party seeking production of a restricted-access Facebook page: in order for a court to order production of a document, a court requires *evidence*, as opposed to mere speculation, that a potentially relevant undisclosed document exists. Yet, a party is unable to access the Facebook site in order to determine whether it contains relevant information.

To date, there are two cases in Canada which have dealt with the production of the access-limited contents of a Facebook profile. The first case, *Murphy v. Perger*, is a decision of Justice Rady issued in October of 2007.[32] In that case, the plaintiff, Ms. Murphy, was involved in a car accident that, she alleged, caused her to suffer from a chronic pain disorder. She sued the other driver, seeking damages for the detrimental impact on her enjoyment of life and her inability to participate in social activities. Shortly before the trial, the defendant's lawyer discovered a public website called "The Jill Murphy Fan Club", which contained post-accident pictures of Ms. Murphy at a party. This public webpage led the lawyer to Ms. Murphy's private Facebook page. The lawyer was able to view Ms. Murphy's name and a list of her 366 Facebook "friends", but she had set the privacy settings so that permission was required to view her other Facebook material. The defendant's lawyer sought production of the Facebook pages (but not the Facebook emails) on the basis that it likely contained relevant information. The plaintiff's lawyer objected, claiming that the defendant was on a "fishing expedition" because there was only a mere possibility of there being relevant material on the site, and that this was too speculative to justify an order for production given the plaintiff's expectation that the site would be kept private.

Rady J. disagreed with the plaintiff's argument and ordered the Facebook pages to be produced. Her Honour concluded that it was reasonable to assume that there would be relevant photographs on the site because Facebook is a social networking site where a large number of photographs are posted by its users. Since the plaintiff had already put pre-accident pictures of herself into evidence, it was decided that post-accident pictures of the plaintiff would also be relevant. Finally, Rady J. decided that the plaintiff could not have any "serious expectation of privacy given that 366 people have been granted access to the private site."[33]

The second case to consider this issue is *Leduc v. Roman*, in which a decision of a Master was appealed to Justice Brown.[34] The plaintiff, Mr. Leduc, was involved in a car accident which, he claimed, caused him to suffer various ailments and loss of enjoyment of life. Mr. Leduc underwent a psychiatric medical evaluation and told the defendant's expert psychiatrist that he did not have a lot of friends

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30 *United Services Funds v. Carter* (1986), 5 B.C.L.R. (2d) 222 (B.C. S.C.); leave to appeal dismissed (1986), 5 B.C.L.R. (2d) 379 (B.C. C.A.); *M. (A.). v. Ryan* (1994), 98 B.C.L.R. (2d) 1 (B.C. C.A.); leave to appeal allowed (1995), 127 D.L.R. (4th) vii (note) (S.C.C.); affirmed [1997] 1 S.C.R. 157 (S.C.C.).

31 *Leduc*, *supra* note 6.

32 *Murphy*, *supra* note 21.

33 *Ibid.* at para 20.

34 *Leduc*, *supra* note 6.

in his current area, although he had "a lot of Facebook friends." This remark apparently went unnoticed by the defence lawyer, for it was not until *after* Mr. Leduc had been examined for discovery that the defence lawyer's office was conducting a search of Facebook and discovered that Mr. Leduc had a Facebook account. His publicly available profile showed only his name and picture. Because Mr. Leduc had restricted access to his site to only his Facebook friends and, thus, the defence lawyer's office was unable to view the site.

The defence lawyer requested an up-to-date affidavit of documents from the plaintiff's lawyer including the Facebook profile. When this was refused, the defence lawyer brought a motion before the court seeking, among other things, 1) an order requiring Mr. Leduc to preserve all the information on the Facebook profile, and 2) production of the Facebook profile itself. Mr. Leduc's lawyer argued that it would be too speculative to infer that relevant material was posted on his Facebook site merely by proving the site's existence. He sought to differentiate his case from that in *Murphy*: in that case, there was a public website that posted relevant pictures of the plaintiff, creating a reasonable inference that there was also relevant material on her private Facebook page, whereas in this case, there could be no such inference.

When the matter had first been argued, the Master had granted the preservation order, but had refused to order production of the Facebook profile, holding that the request was a fishing expedition. Brown J. disagreed. He was of the opinion that a court *can* infer from the social networking purpose of Facebook that users intend to take advantage of it to make their personal information public:

> 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 sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter at issue in an action. . . . To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.[35]

Brown J. noted, however, that mere proof of the existence of a Facebook site would not entitle a party to gain access to *all* of the material placed on that site. Some material on the site might be relevant to the action, some might not. In order to gain access to this material, the level of proof required to show that the information may be relevant "should take into account the fact that one party has access to

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[35] *Ibid.*, at paras. 31-32 & 35.

the documents and the other does not."[36] Brown J. also noted that a defendant would normally have the opportunity to ask about the existence and content of a Facebook profile during the examination for discovery, and where the answers reveal that the Facebook page may contain relevant content, a court can order that those portions be produced.

Brown J.'s obiter comments raise some interesting issues regarding the extent to which users of social networking sites actually do intend to make their information publicly available. To illustrate, in response to a blog summary of this case posted by Michael Geist,[37] the comments of readers are largely critical of Brown J.'s ruling. Some colloquial posts on this blog site are an indication of the scope of public confusion with respect to this decision:

> Robert said:
>
> *Nice precedent*!
>
> Does she use Facebook? Maybe if she did she might reconsider the equation that "privacy" settings are futile and transparent in the eyes of the law, as this sets some very undesirable precedent. . . .
>
> Steve H. said:
>
> If I want to use Facebook as my own private journal and lock it down for my own use — or even that of my close friends — it does not mean that I ever intend to make that information available to anyone else. Facebook security settings are designed for this. . . .
>
> Luke said:
>
> And what about blogger blogs. I thought about starting a private journal in a blogger but only keeping myself as a reader. Can logic like above be applied to a private blogs on a service like blogger? I guess I should read the whole ruling . . . it might not be as bad as it sounds.
>
> jamie said:
>
> *well that's fine. . . .*
>
> Prior to making it public, it's quite possible to delete every post, every photo and every friend.
>
> . . . .
>
> Winston said:
>
> *I'm confused.*
>
> If you write something down (or otherwise author something), it can be used as evidence in court, even if it was intended to be private and only for your own eyes. What is new here, or specific to facebook?
>
> . . . .
>
> Steve H. said:
>
> *It's the Reasoning That's the Problem*

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36 *RCP Inc. v. Wilding* (2002), [2002] O.J. No. 2752, ¶12, 2002 CarswellOnt 2275 (Ont. S.C.J.).

37 Michael Geist, *Ontario Judge Orders Disclosure of Facebook Profile*, online: Michael Geist: <http://www.michaelgeist.ca/content/view/3701/125/>.

> I know a few people have been commenting that anything, even personal diaries, can be used in a court of law. I understand that. But that is not what the judge says in the demand of the password-protected Facebook data. Rather, the demand is based on the (I feel mistaken) belief that everything on Facebook is expected to be openly shared, so the defendant must produce it. . . .
>
> My problem is not with the demand to release the information. It's with the fact that — at least based on my reading of the initial post — the judge either apparently does not fully understand that Facebook can have private areas, or that the judge puts a lesser value on the privacy of social media than that of other personal material.[38]

The Internet has generated a mythology that, somehow, it is an anarchistic space, not subject to rules or license, as illustrated by the causal and rampant downloading and file-sharing of copyright protected music and movies. This urban mythology is dichotomous to the cold hard reality that *all* space, whether *terra-firma* or hyperspace, is subject to the rule of law. The intangible nature of the internet gives rise to a misconception that the internet is not a "real" thing; that it is possible to download, copy, disseminate and publish text, photos and other personal information into ephemeral "e-space" without consequence.

### (c) Private Facebook Emails

No Canadian case to date has considered a request for the production of Facebook emails. It may be inferred from *Leduc*, however, that Courts will treat Facebook emails differently than the other information on a Facebook profile; even a "private" Facebook profile is viewable by all the user's "friends", whereas email is not; consequently, a Court may not be able to infer from the nature of the Facebook service either the intent to make public, or the likely existence of, relevant *email* communication. As a result, courts may hold that there is a greater expectation of privacy with respect to Facebook email communications.

This reasoning is in line with a decision of the Nevada District Court, *Mackelprang v. Fidelity National Title Agency of Nevada Inc.*[39] A married plaintiff alleged that she was sexually harassed by senior members of her company, and that this led to her constructive dismissal. She alleged, among other things, that a vice president of her company sent sexually explicit emails to her office computer on a weekly basis. During the course of litigation, the defendant's lawyer discovered that, a few months after leaving the defendant's employ, the plaintiff had opened two Myspace accounts; in one of the accounts, the plaintiff identified herself as a single 39 year old female who did not want children, and in another account, she identified herself as a married woman with six children whom she loved.

The defendant's lawyer obtained a subpoena directing Myspace to produce all records for those accounts, including private email exchanges between the plaintiff and others. According to the Court, "in response to the Subpoena, Myspace.com produced certain 'public' information regarding the two accounts, but refused to

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38 *Ibid.*

39 *Mackelprang v. Fidelity National Title Agency of Nevada Inc.*, 2007 U.S. Dist. Lexis 2379 (D. Nev. Jan. 9, 2007).

produce private email messages on either account in the absence of a search warrant or a letter of consent to production by the owner of the account."[40] The plaintiff refused to consent to the obtaining of the release of the private messages on the grounds that the information sought by the defendants were irrelevant to the lawsuit and improperly invaded her privacy. She contended that the defendants were on a "fishing expedition" and that they had "no relevant basis for discovering the private email messages on either account."[41]

The defendant's lawyer brought a motion seeking to compel the plaintiff to consent to production of the emails. The defendants pointed to the plaintiff's two Myspace accounts as creating an inference that the plaintiff was using Myspace email to "facilitate the same types of electronic and physical relationships that she has characterized as sexual harassment in her complaint."[42] If the plaintiff had, in fact, been voluntarily pursuing extra-marital relationships through Myspace, then this information could be used to impeach her credibility and rebut her sexual harassment claims. The emails could be telling as to whether the plaintiff had actually suffered emotional distress as a result of the harassment, and might contain admissions relevant to the case.

The Court disagreed with the defendant and refused to order production of the emails. The defendant had nothing more than a suspicion and speculation that the plaintiff may have engaged in sexually related email communications on Myspace. There was an insufficient connection between the accounts and the workplace to make her private emails relevant.[43] The Court noted:

> Ordering plaintiff to execute the consent and authorization form for release of all of the private email messages on Plaintiff's Myspace.com internet accounts would allow Defendants to cast too wide a net for any information that might be relevant and discoverable. It would, of course, permit Defendants to also obtain irrelevant information, including possibly sexually explicit or sexually promiscuous email communications between Plaintiff and third persons, which are not relevant, admissible or discoverable.[44]

The Nevada District Court opined that, although it was theoretically possible that emails on the Myspace account might contain relevant information, the defendant should have limited the request to the production of *relevant* email communications. As in *Leduc*, the Court in *Mackelprang* noted that the determination of whether certain email communications were relevant could be properly ascertained through the discovery process.

With this case in mind, it remains to been seen whether evidence contained in a Facebook profile itself could give rise to a sufficiently reasonable inference that that email communications are relevant. For example, if relevant postings on a Facebook wall made express reference to email communications, this might be sufficient to convince a Canadian court to order disclosure, notwithstanding the expectation of privacy surrounding such communications.

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[40] *Ibid.* at para. 2.

[41] *Ibid.* at para. 5.

[42] *Ibid.* at para. 24.

[43] *Ibid.* at para. 3 & 6.

[44] *Ibid.* at para. 7.

## CONCLUSION

It is important to note that lawyers' rules of professional conduct strictly prohibit them from making direct contact with parties who are represented by counsel, and this certainly includes contact by way of Facebook. It would be a breach of a lawyer's duties of honesty and candor to create a false profile in an attempt to elicit information from another party's private Facebook profile and may constitute a breach of Facebook's Terms of Use. Consider, for example, the case of *Knight v. Barrett*.[45] In that case, it was unclear how a party had obtained information from another's private Facebook profile, so the court ordered the party who had *obtained* this information to include it in their affidavit of documents, and allowed cross-examination on that affidavit so that it could be determined how they had obtained the information. The Judge stated that such disclosure would allow both parties to prepare for trial in the same light, and that it was not appropriate for the defendants to seek to ambush the plaintiff with his or her own Facebook page. With this cautionary tale in mind, a number of salient points should be taken from the cases referred to above:

- Where a party's personal information is relevant to an action, legal practitioners should be cognizant of the potential wealth of relevant information available on the Internet. Internet searches, including "Google" searches and searches of common social network websites should be commenced as soon as possible in the course of investigating a claim. Follow-up searches should be commenced at regular intervals thereafter.
- The current case law suggests that lawyers have been surprised to learn that his or her own client maintained a Facebook page, and this fact was not brought to their attention until very late in the litigation. Thus, Internet searches should be performed on a regular basis, not just on opposing parties, but also on one's own client.
- Following Justice Brown's comments in *Leduc*, it appears that practitioners have a duty to ensure that their clients understand that Facebook profiles are producible "documents", and that any relevant content that is posted on a Facebook profile will need to be disclosed, and preserved in order to avoid spoliation issues.
- Facebook pages are dynamic — where relevant material is discovered, this material needs to be preserved. Web pages should be downloaded, saved and dated. High-quality colour copies of these pages should be printed out for future use in litigation.
- Depending on the circumstances, it may be prudent to obtain a preservation order respecting the content of a Facebook page or other social network profile.

As observed by Mitchell Kapor, the pioneer of the personal computer revolution, "getting information off the Internet is like taking a drink from a fire hydrant." The Internet is transforming the way we share and disclose personal information. In order for practitioners to obtain optimal results in litigation, it is important to be aware of the vast amount of potentially relevant information available online, and

45 *Knight*, *supra* note 23.

to stay alert for new developments in web-based technologies. If you have not heard of blogs, Twitter, Flickr, Internet communities, Wikipedia, cyber mobs, and other current trends, you are already "out of date" and could be missing out on key sources of relevant information. Cyberspace awaits — boldly go.