

# **Social Networking in Litigation**

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*Social Media in the Courts*

Presented by:  
**Brian A. Vail QC**  
**Field LLP**  
**Edmonton, Alberta**

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## I. INTRODUCTION

In the modern world, a number of social networking sites have been created, whereby people from all over the world are beginning to communicate with each other in new ways on the Internet. Social networking sites are a cultural phenomenon which have revolutionized interpersonal communication and will continue to do so. Their increasing influence was emphasized in a 2009 report from the Office of the Privacy Commissioner (Canada)<sup>1</sup>:

6. Social networking sites are a cultural phenomenon. In the last five years, the popularity of these sites has exploded, with millions of people around the world joining them to keep in touch with their friends and family and to meet new people. They represent a dramatic shift in the way people communicate, and their use raises interesting questions about long-held views on what it means to have a private life or a sense of “privacy”.

7. In an age where it appears almost everyone is leaving their digital footprints everywhere, including their views, pictures, beliefs and sometimes romantic foibles, our notions of controlling one’s personal information – the foundation on which the *Personal Information Protection and Electronic Documents Act* (the Act) is built – are being significantly challenged.

A number of social networking sites have grown up, including Facebook, Twitter, MySpace, Nexopia and Bebo. Facebook appears to be the most popular. Users create profiles on Facebook, as well as other social networking sites, in order to share personal information about themselves and communicate with others. The Assistant Privacy Commissioner had the following to say about Facebook<sup>2</sup>:

8. Facebook is the most popular social networking site in the world – with over 200 million users worldwide and nearly 12 million users in Canada alone. It describes itself as a “social utility that helps people communicate more efficiently with their friends, family and coworkers.” Its tag line is “Facebook is a social utility that connects you with the people around you.”

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10. . . . On Facebook, users decide what information they provide in order to meet their own needs for social networking. In order for individuals to join Facebook, Facebook requires that users provide only four pieces of personal information: their name, email address, date of birth, and gender. All other information is uploaded voluntarily by the user for the express purpose of sharing it with others.

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<sup>1</sup> (E. Denham, Assistant Privacy Commissioner of Canada, *Report Of Findings Into The Complaint Filed By The Canadian Internet Policy And Public Interest Clinic (CPPIC) Against Facebook Inc.*, PIPEDA Case Summer #2009-008 (the “Privacy Report”)), at ¶¶6-7

<sup>2</sup> Privacy Report at ¶¶8-10

My experience has been that social networking site users are virtually tripping over themselves to share a plethora of extremely personal details about themselves on their social networking sites, including posts, photographs, residential details, hobbies, likes, dislikes, etc. As noted in the Privacy Report<sup>3</sup>:

88. . . . Most notably, unlike individuals in earlier cases, Facebook users proactively and voluntarily upload their personal information to the Facebook site for the express purpose of sharing it with others.

As of October 2008, there were 10 billion photographs posted on Facebook<sup>4</sup>. Even the most sophisticated people seem to be willing, indeed eager, to post very personal details about themselves on social networking sites. One media report<sup>5</sup> indicates that the wife of the newly-appointed Chief of Britain's MI-6 spy agency posted the fact of his appointment, together with "family pictures and details of where they live and take their holidays, and who their friends and relatives are" on Facebook. One security expert indicated that, as a result, the "family would almost certainly need to be re-housed and the children may require extra protection".

Many social networking site users often seem to have little or no clue as to how little privacy they leave themselves, although this is rapidly changing. It seems that when some people are working on a computer while physically alone in a room or cubicle there is a disconnect with the fact that they are communicating with the world on the Internet. They post things that can later be used against them. While people have been doing stupid things since time immemorial, the Internet provides them with more tools to increase the negative consequences of their stupidity exponentially.

This "disconnect" has been discussed in psychological literature as the "online disinhibition effect". See especially J. Suler, Ph. D., "The Online Disinhibition Effect".<sup>6</sup> Dr. Suler defines this term as the pervasive phenomenon whereby "people say and do things in cyberspace that they wouldn't ordinarily say and do in the face-to-face world" because they "loosen up, feel less restrained, and express themselves more openly". He recognizes two categories of this. First, there is "benign disinhibition" where people "share very personal things about themselves" and "reveal secret emotions, fears" [and] "wishes" or "show unusual acts of kindness and generosity". This is to be contrasted with "toxic disinhibition" where people employ "rude language, harsh criticisms, anger, hatred, even threats" or "visit the dark underworld of the Internet - places of pornography, crime,

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<sup>3</sup> at ¶88

<sup>4</sup> Privacy Report, ¶237

<sup>5</sup> "British Spy Chief's Cover Blown On Facebook", *Reuters*, 7 July 2009 (<http://www.reuters.com/article/idUSTRE56403820090705>)

<sup>6</sup> *CyberPsychology & Behavior*, (2004) Volume 7, No. 3, pp. 321 - 326, updated August 2004: <http://users.rider.edu/~suler/psycyber/disinhibit.html> .

and violence – territory they would never explore in the real world”. He posits that there are a minimum of six factors that contribute to or explain the online disinhibition effect:

1. **Dissociative Anonymity.** Dr. Suler notes that internet users can hide or alter their identities online. He points out that “[w]hen people have the opportunity to separate their actions online from their real world and identity they feel less vulnerable about opening up” and “they don’t have to own their behavior by acknowledging it within the full context of who they ‘really’ are”.
2. **Invisibility.** He notes that in the text-driven online environment people are not visible to each other and this gives them “the courage to go places and do things they otherwise wouldn’t”. This is not the same thing as anonymity, although there is some overlap. Even where people know a bit about each other, “the opportunity to be physically invisible amplifies the disinhibition effect” in that they “don’t have to worry about how [they] look or sound when [they] say (type) something”.
3. **Asynchronicity.** online many communications are asynchronous in that “[p]eople don’t interact with each other in real time”. He notes that “[n]ot having to deal with someone’s immediate reaction can be disinhibiting” whereas “[i]mmediate, real-time feedback from others tends to have a very powerful effect on the ongoing flow of how much people reveal about themselves”.
4. **Solipsistic Introjection.** Dr. Suler posits that in the absence of face-to-face cues people “may feel that their mind has merged with the mind of the online companion”. He indicates that “[r]eading another person’s message might be experienced as a voice within one’s head, as if that person’s psychological presence and influence have been assimilated or introjected into one’s psyche”. People tend to imagine what the other person’s voice sounds like or conjure up an imagined visual image for the other person.
5. **Dissociative Imagination.** Dr. Suler writes that “the combination of solipsistic introjection with the escapability of cyberspace . . . magnifies disinhibition” because “[p]eople may feel that the imaginary characters they ‘created’ exist in a different space, that one’s online persona along with the online others live in an make-believe dimension, a dream world, separate and apart from the demands and responsibilities of the real world”. They “split or ‘dissociate’ online fiction from offline fact”.
6. **Minimization of Status and Authority.** Dr. Suler posits that a person’s online status may be unknown to readers and therefore may not have as much impact as authority figures might

have in real life. While “[p]eople are reluctant to say what they really think as they stand before an authority figure” offline, “online, in what feels more like a peer relationship – with the appearances of ‘authority’ minimized – people are much more willing to speak out and misbehave”.

Many people have learned how to access a person’s information by accessing their social networking sites including:

1. employers screening prospective employees<sup>7</sup>;
2. insurers monitoring the lives of people making disability claims or being paid disability benefits<sup>8</sup>;
3. lawyers, police, investigators or others locating and communicating with witnesses, suspects and people they are trying to find; and
4. lawyers, police, investigators or others seeking information and evidence about suspects, opposing clients, witnesses and potential jurors.

The practice of law must adapt to account for this phenomenon, in a number of ways:

1. **Social networking sites facilitate the accessing of information about people, places and things.** Social networking sites can provide a gold mine of information, and even evidence, to litigation counsel. To the extent that one can surreptitiously access information about a subject because of the lack of privacy settings on the subject’s social networking site, one can sometimes ambush an opponent at trial using information from that individual’s (or another person’s) social networking site, as occurred in *Kourtesis v. Joris*<sup>9</sup> and *Terry v. Mallowney*<sup>10</sup>. Even if the information on a social networking site is restricted due to privacy settings or the social networking site’s information retention policies, a litigant may be able to go to court to preserve the contents of that site and obtain disclosure.
2. **Clients must be advised differently.** They must be advised to take steps to protect their privacy, but not to destroy evidence.

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<sup>7</sup> J. Davison, “How an online posting can cost you your job”, **CBC News**, 18 October 2012  
<<http://www.cbc.ca/news/canada/edmonton/story/2012/10/17/f-online-postings-job-dismissal.html> >>

<sup>8</sup> Depressed woman loses benefits over Facebook photos” **C.B.C. News**, 19 November 2009,  
<http://www.cbc.ca/canada/montreal/story/2009/11/19/quebec-facebook-sick-leave-benefits.html>; M.White, “Benefits cut off over Facebook photos”, **Edmonton Journal**, 20 November 2009; O. Ha-Redeye, “The Benefits of Facebook or Lack Thereof, When Depressed”, **slaw.ca**, 22Nov09 (<http://www.slaw.ca/2009/11/22/facebook-benefits-when-depressed/>)

<sup>9</sup> 2007 CarswellOnt 4343 (Ont.S.C.)

<sup>10</sup> 2009 CarswellNfld 85 (N.L.S.C.)

3. **Ethical principles apply in a new dimension.** What is illegal or unethical to do in person, or in hard copy, is just as illegal or unethical in e-space.

In this paper, I will analyze the legal principles that have developed with respect to accessing and employing information from social networking sites.

## II. CHANGING POLICIES OF SOCIAL NETWORKING SITES

### A. Introduction

There has been controversy in several countries around the globe with respect to social networking sites (particularly Facebook) and privacy, such that social networking site users are becoming more sophisticated with respect to privacy settings and are taking more steps to restrict access to the contents of their sites.

In particular, there has been international controversy about the privacy aspects of Facebook's operation. This includes a very public discussion in Canada under the *Personal Information and Protection of Electronic Documents Act* ("PIPEDA")<sup>11</sup> as reviewed by the federal Assistant Privacy Commissioner <sup>12</sup>.

The Canadian controversy involving Facebook arose as a result of a number of issues. Those of concern to this paper are Facebook policies with respect to:

1. privacy settings;
2. account deactivation and deletion;
3. accounts of deceased users;
4. personal information of non-users; and
5. retention of material for deceased members regarding whether or not there should be an ability to delete a Facebook account as opposed to deactivate it.

With the advent of the Privacy Report, Facebook worked (and perhaps prepared for litigation) with the Privacy Commissioner to change to the way the public at large can access someone's Facebook account.

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<sup>11</sup> S.C. 2000, c. 5

<sup>12</sup> Privacy Report