DISCOVERABILITY OF SOCIAL MEDIA EVIDENCE

Bianca C. Jaegge and Julie K. Lamb

Guild Yule LLP

WHAT IS SOCIAL MEDIA?

- **It encompasses a broad range of websites such as social networking sites, professional networking sites, blogs, and photo and video sharing sites.**
- **Facebook, Twitter, Instagram, MySpace, LinkedIn, etc.**

WHY TALK ABOUT SOCIAL MEDIA?

- **There is a growing presence in the number and popularity of social media sites.**
- **In July 2014, Facebook had over 1.1 billion users.** *(Ronald Podolny and Arieh Bloom, "'Like' It or Not – Current Trends in Discoverability of Social Media Evidence", The Advocates Quarterly, Volume 42, 2014, 263-280 at 264)*
- **A recent Quicklaw search revealed "Facebook" is mentioned in over 2,300 cases across Canada (1,473 in the last 3 years and 470 in the last year).**

WHY TALK ABOUT SOCIAL MEDIA?

- **We are starting to see Facebook posts on lists of documents.**
- **It can be an efficient, inexpensive and definitive source of information.**
- **However, social media sites often have privacy settings with restricted access, making it difficult to view what may be relevant information. For example, on Facebook, to gain access to more photos and commentary you must be a "friend" of that user.**

WHY TALK ABOUT SOCIAL MEDIA?

- **So, in litigation, can we use social media to our advantage?**
- **How do we gain access?**
- **Are there any ethical issues in using social media?**
- **Today, we'll discuss the BC Civil Rules, caselaw that touches on disclosure of social media and some ethical considerations.**

THE RULES ON DISCLOSURE

- **Rule 1-1(1): a "document" includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device**
- **Rule 7-1: Two tiers of discovery**
- **<u>First tier</u>: production of documents in the party's possession or control that could be used at trial to "prove or disprove a material fact"**
- **<u>Second tier</u>: production of documents "relating to any or all matters in question in the action."**

THE RULES ON DISCLOSURE

- **Rule 1-3(2) Proportionality. The two tiered process is premised upon the overriding objective of proportionality. (*Przybysz v Crowe*, 2011 BCSC 731 at para 27)**
- **The first stage is a tighter scope, whereas the second stage allows for further exploring an issue after the initial round of document disclosure.**

CASE LAW

We are going to discuss the following 6 cases respecting discoverability of social media evidence:

1. ***Desgagne v Yuen*, 2006 BCSC 955**
2. ***Bishop v Minichiello*, 2009 BCSC 358**
3. ***Dosanjh v Leblanc and St. Paul's Hospital*, 2011 BCSC 1660**
4. ***Fric v Gershman*, 2012 BCSC 614**
5. ***Greg Court Developments Ltd. v Sievert*, 2014 BCSC 551**
6. ***Cui v Metcalfe*, 2015 BCSC 1195**

CASE LAW: *DESGAGNE V YUEN*, 2006 BCSC 955

- **The defendants applied for an order requiring the plaintiff to produce his computer hard drive, metadata relating to the plaintiff's computer usage, Internet browser history, Palm Pilot and video game unit. The defendants argued this was relevant to the plaintiff's alleged injuries and post-accident functionality.**
- **The Court dismissed the application, finding that the orders sought are too broad and no evidence was proffered showing relevance:**

> *[14]…The defendants are seeking disclosure of all available information to show virtually every element of the plaintiff's activities for all her waking hours. In a sense the disclosure would be even more intrusive than that obtained from an electronic monitoring bracelet, which only records physical location* [Emphasis added]

CASE LAW: *DESGAGNE V YUEN*, 2006 BCSC 955

- **The Court recognizes the "new challenges" electronic documents pose. However, they were considered to be no different than paper documents:**

> *[20] … For the purposes of this part of the motion (as opposed to the request for the metadata, which I discuss below) the documents stand in no different light than paper documents, and the hard drive is the digital equivalent to a filing cabinet or document repository. A request to be able to search a party's filing cabinets in the hopes that there might be found a document in which an admission against interest is made would clearly not be allowed. Its digital equivalent should also not be allowed.* [Emphasis added]

CASE LAW: *DESGAGNE V YUEN*, 2006 BCSC 955

- **The Court draws a distinction between personal photographs that might assist the defence in refuting the plaintiff's claim to *physical* as opposed to *cognitive* impairment:**

> *[49] This is not a case where the plaintiff seeks damages arising out of an inability to undergo physical activity… Rather, the plaintiff's predominant injury is cognitive…I do not see, nor have the defendants shown, how photographs of the plaintiff on vacation, or with her friends and family, may shed any light on these cognitive abilities.*

CASE LAW: *BISHOP V MINICHIELLO*, 2009 BCSC 358

- **This was an application by the defendant to analyze the plaintiff's family computer hard drive to determine the plaintiff's Facebook usage between 11pm and 5am. The plaintiff claimed debilitating fatigue.**
- **The Court allowed production of the hard drive to an independent expert to isolate the information sought respecting Facebook usage.**

CASE LAW: *BISHOP V MINICHIELLO*, 2009 BCSC 358

- **Despite the fact that the computer is used by other family members, the Court recognized the importance of production of relevant documents:**

> *[55] It is true the Bishop family computer is more akin to a filing cabinet than a document; however, it is a filing cabinet from which the plaintiff is obligated to produce relevant documents…Simply because the hard drive contains irrelevant information to the lawsuit does not alter a plaintiff's duty to disclose that which is relevant. If there are relevant documents in existence they should be listed and produced (or simply listed if they are privileged). [Emphasis added]*

CASE LAW: *BISHOP V MINICHIELLO*, 2009 BCSC 358

- **Leave to was appeal dismissed (2009 BCCA 555). There was no evidentiary foundation for the request for the electronic records of the plaintiff's computer usage beyond Facebook. Any other websites used late at night was speculative.**

CASE LAW: *DOSANJH v LEBLANC AND ST. PAUL'S HOSPITAL*, 2011 BCSC 1660 (MASTER TAYLOR)

- **The defendant sought the plaintiff's hard drive, social media, iPhone and digital camera data pursuant to Rule 7-1(11).The basis of the application was that this material might relate to the plaintiff's health, mental state and employability.**
- **The old Rules considered relevancy, whereas the test now is materiality. Demands pursuant to Rule 7-1(11) require an explanation "with reasonable specificity" the reason why such additional documents should be produced.**

CASE LAW: *DOSANJH v LEBLANC AND ST. PAUL'S HOSPITAL*, 2011 BCSC 1660 (MASTER TAYLOR)

- **The defendant was largely unsuccessful.**
- **The defendant failed to indicate the material fact or facts which it believes can be proved by searching the plaintiff's personal computer and her social media sites. Rather, the defendant merely argued that health, enjoyment of life and employability are in issue.**

CASE LAW: *DOSANJH v LEBLANC AND ST. PAUL'S HOSPITAL*, 2011 BCSC 1660 (MASTER TAYLOR)

- **The Court found the defendant's application too broad, classifying it as a "classic fishing expedition", and emphasized the importance of privacy rights:**

> *[29] To be able to obtain a litigant's private thoughts and feelings as expressed to friends or family members after the fact is, in my view, similar to a party intercepting private communications of another party. [Emphasis added]*

CASE LAW: *DOSANJH v LEBLANC AND ST. PAUL'S HOSPITAL*, 2011 BCSC 1660 (MASTER TAYLOR)

[30] I am unable to envisage any rational justification for breaching the privacy rights of an individual in civil proceedings simply because it is alleged that the individual's general health, enjoyment of life and employability are directly at issue. Merely because a record may be made of the communication shouldn't make it any different than a private telephone conversation. If not, surely applications in civil proceedings for recordings of private communications can't be far behind. [Emphasis added]

[33]… In fact, I am more inclined to call this application a classic fishing expedition, but without the appropriate bait… [Emphasis added.]

CASE LAW: FRIC V GERSHMAN, 2012 BCSC 614 (MASTER BOUCK)

- **The defendant sought plaintiff's entire Facebook profile, including photos, comments and metadata.**
- **The Court considered several cases respecting production of personal photos and videos, including D*esgagne v Yuen*, 2006 BCSC 955.**

CASE LAW: FRIC V GERSHMAN, 2012 BCSC 614 (MASTER BOUCK)

- **The defendant was partially successful. The Court ordered production pursuant to the second tier of discovery.**
- **The Court ordered production of photos relevant to the plaintiff's claim of physical impairment. The Court considered the pleadings and the plaintiff's discovery evidence.**

CASE LAW: FRIC V GERSHMAN, 2012 BCSC 614 (MASTER BOUCK)

- **The Court recognized the interplay between privacy rights and disclosure obligations:**

  > *[75] The plaintiff is not obliged to include commentary from the Facebook web-site. If such commentary exists, the probative value of this information is outweighed by the competing interest of protecting the private thoughts of the plaintiff and third parties: Dosanjh v. Leblanc.*

- **Rather than ordering production of metadata, she ordered the plaintiff to identify the photographs by location, date and time assuming that was possible to do.**

CASE LAW: GREG COURT DEVELOPMENTS LTD. V SIEVERT, 2014 BCSC 551 (MASTER BOUCK)

- **This was an application by the plaintiff for production of the defendants' documents, including all documentation created or recorded in paper or electronic form pertaining to the facts and matters in issue, including the defendants' personal and laptop computers and the contents of all hosted personal email accounts used by the defendants, as well as email passwords.**
- **This was a residential construction dispute concerning the construction of the defendant's home. The plaintiff general contractor asserted a lien claim and sought damages for breach of contract and negligent misrepresentation.**

CASE LAW: GREG COURT DEVELOPMENTS LTD. V SIEVERT, 2014 BCSC 551 (MASTER BOUCK)

- **The defendants were examined for discovery, but these were adjourned given the amount of requests for additional information. The plaintiff followed up with its demands for those requests.**
- **Some of the information requested had been provided.**

CASE LAW: GREG COURT DEVELOPMENTS LTD. V SIEVERT, 2014 BCSC 551 (MASTER BOUCK)

- **The plaintiff was partially successful.**
- **The defendants used e-mail to communication with each other and third parties during the construction period.**
- **The defendants were ordered to deliver their personal computers to a jointly retained expert who would then copy the drives onto a CD which may be related to the subject construction. The search parameters were restricted to a certain timeline, as plead in the plaintiff's NOCC.**

CASE LAW: GREG COURT DEVELOPMENTS LTD. V SIEVERT, 2014 BCSC 551 (MASTER BOUCK)

- **The court recognizes the importance of privacy rights and the need for a factual or legal foundation for production of such an order. The court said that the terms are akin to an "authorization to search" prohibited by *Desgagne v Yuen*:**

> *[34] This aspect of the plaintiff's application requires the court to balance the objective of proper disclosure with an individual's privacy rights: Desgagne v. Yuen, 2006 BCSC 955... [Emphasis added]*

CASE LAW: GREG COURT DEVELOPMENTS LTD. V SIEVERT, 2014 BCSC 551 (MASTER BOUCK)

- *[35]…The proposed order fails to address (let alone protect) the privacy rights of the defendants, not to mention those individuals who may have access to these devices, such as the defendants' minor children and third parties who have communicated with the defendants on matters completely unrelated to this lawsuit. [Emphasis added]*

CASE LAW: CUI V METCALFE, 2015 BCSC 1195 (MASTER MACNAUGHTON)

- **The defendant sought production of documents including all photos and videos of the plaintiff participating in various activities since the MVA. The defendant brought his application under both tiers of the discovery Rules.**
- **The Court held that *Ahadi v Valdez*, 2013 BCSC 714 does not stand for the general proposition that a plaintiff who claims damages for physical injuries has an obligation to produce electronic documents at the first stage of the discovery.**

CASE LAW: CUI V METCALFE, 2015 BCSC 1195 (MASTER MACNAUGHTON)

- **The documents sought depict the plaintiff's activities at a moment, or moments, in time and do not necessarily prove or disprove a material fact. In order to be disclosed at the first instance there needs to be evidence that the photos or videos contradict the plaintiff's other evidence. (para 14)**
- **The Court followed *Fric v Gershman*. The Court considered the pleadings, the plaintiff's XFD evidence and statements made to her expert.**

CASE LAW: CUI V METCALFE, 2015 BCSC 1195 (MASTER MACNAUGHTON)

- **The Court also considered proportionality.**
- **The defendant was partially successful. Of the 4,600 photos, only those relating to certain activities after the MVA were ordered to be produced. Further, only one picture from each event was required. No disclosure was required of photos prior to the MVA; her pre-accident activities are well documented in her evidence.**
- **The Court considered the plaintiff's privacy rights. No disclosure was required of comments and status updates from her Facebook account (including the comments on the producible photos).**

CASE LAW: A SUMMARY

- **Materiality, proportionality and privacy rights are considered by the Court.**
- **The Court looks beyond the pleadings and considers discovery evidence.**
- **Broad orders will be dismissed and considered an invasion of privacy.**
- **It is more difficult to convince the Court that social media evidence is material to issues surrounding cognitive impairments as opposed to physical impairments.**

ETHICAL CONSIDERATIONS

- **There are no explicit Rules in the Code of Professional Conduct respecting social media use or in litigation.**
- **Browsing publicly available Facebook profiles is one thing. How far can a lawyer probe to get intelligence on another party?**
  - **Rule 3.1-1: A "*competent lawyer*" will go as far as the retainer demands *"investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action."***

ETHICAL CONSIDERATIONS

Is it acceptable for a counsel to "friend" opposing parties on Facebook to gain access?

Rule 5.5: ***"subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way."*** *[Emphasis added]*

Rule 5.1-2: when ***"acting as an advocate, a lawyer must not [...] make suggestions to a witness recklessly or knowing them to be false."***

ETHICAL CONSIDERATIONS

- **Counsel should not engage in "tactics" to obtain evidence on any sort of false pretense. Ethical concerns arise where a lawyer hides his or her real identity or misrepresents him or herself.**
- **"Friending" people with social media accounts to gain access to information under privacy settings requires a false pretense that the lawyer is a "friend", unless the user is aware of the purpose of his or her communication and the identity of the lawyer.**

ETHICAL CONSIDERATIONS

- **What about represented litigants?**

Rule 7.2-6: ***Subject to rules 7.2-6.1 and 7.2-7, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer: a) approach, communicate or deal with the person on the matter; or b) attempt to negotiate or compromise the matter directly with the person.***

ETHICAL CONSIDERATIONS

Rule 7.2-9: ***When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must: a) urge the unrepresented person to obtain independent legal representation; b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.***

ETHICAL CONSIDERATIONS

Twitter is less clear since you do not need to be "invited" to follow someone. However, a notification that someone has started following you may be considered communication. Yet, tweets may be viewed without "following" a user.

ETHICAL CONSIDERATIONS

- **What about an assistant or investigator?**

  Rule 3.2-7: *A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.*

- **A few American bar associations have already contemplated this issue. For example, the Association of the Bar of the City of New York September 2010 Formal Opinion states:**

  …a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website…

ETHICAL CONSIDERATIONS

…a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

http://www.nycbar.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf

ETHICAL CONSIDERATIONS

- **What about affidavits in support of document production applications?**
- **It may be advantageous to have a paralegal, assistant or an investigator review social media websites (publicly available information), in the event that an affidavit is required.**

ETHICAL CONSIDERATIONS

- **When may counsel use social media to contact a non-party?**

Rule 5.3: ***Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.***

Rule 7.2-1: ***A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.***

TAKEAWAYS

- **The creation of a social media account is not a general waiver of the right to privacy.**
- **The court will weigh privacy interests against probative value.**
- **Social media accounts (photos, videos, other postings) are considered documents and are subject to disclosure rules.**
- **An order against someone for disclosure is likely to require more than simply pleadings, i.e. discovery evidence. It may be better to wait until after examinations for discovery have been conducted and the party's online habits explored.**

TAKEAWAYS

- **Prepare discovery questions about online and social media use and data.**
- **Monitor social media throughout litigation.**
- **Take a cautious approach respecting social media use. Ethical rules surrounding counsel's use of social media remain somewhat unclear, a conservative approach is most advisable.**

QUESTIONS?

THANK YOU!