

Goldmine or Minefield: Social media and the internet

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The new normal

- Most Canadians are living at least a part of their life online
 - Facebook,
 - Twitter,
 - Google+,
 - Tumblr,
 - Instagram,
 - Flickr
- All of which provide fertile ground for evidence in all sorts of cases



1993



"On the Internet, nobody knows you're a dog."

2008

**“On Facebook, 273 people know I’m a dog.
The rest can only see my limited profile.”**



SOCIAL MEDIA EXPLAINED (DONUT EDITION)



« I'm eating a donut »



« I like donuts »



« This is where I eat donuts »



« Here's a video of me eating a donut »



« Here's a vintage photo of my donut »



« Here's a pretty donut recipe »



« Here's a viral picture of my donut »



« My skills include donut eating »



« Now listening to "Donuts" »



« I'm a Google employee who eats donuts »

What can you lawfully collect?

- Depends upon the circumstances
 - Hiring? May need consent depending on application of privacy laws
 - Due diligence? May need consent depending on application of privacy laws

Insurance and litigation cases

- Depends on the nature of the claim and where it happens
- First party claims – subject to privacy laws
- Third party claims – depends on where
 - BC, Alberta, Quebec – subject to provincial privacy laws
 - Rest of Canada – Not subject to privacy laws, other than tort of invasion of privacy
- Your right to collect info depends on your client's right

State Farm v. OPC, 2010 FC 736

- Most significant decision for insurers and their counsel since PIPEDA came into effect
- Third party claim made against State Farm's insured
- Plaintiff sought access to documents, including where privilege was claimed, under PIPEDA
- State Farm took the position that PIPEDA did not apply

State Farm v OPC, 2010 FC 736

- One of a series of complaints brought by one plaintiff's counsel in New Brunswick
- Plaintiff in a motor vehicle accident case demanded access to all of the personal information held by insurer, including documents said to be privileged
- Insurer provided all non-privileged documents and plaintiff complained
- Insurer told OPC that it did not have jurisdiction because it was not collected, used or disclosed in the course of commercial activities
- OPC never issued a finding but concluded that she had jurisdiction
- Insurer sought judicial review

State Farm v OPC, 2010 FC 736

- Insurer said that New Brunswick courts had jurisdiction over matters of NB litigation
- Went up to the NB CA, but the Court said it belonged in the Federal Court
- Hearing and decision in the Federal Court
- Insurer is an agent for the insured. The insured is not engaged in commercial activity and using the “services” of the insurer doesn’t make it commercial.

State Farm v OPC, 2010 FC 736

- Court said:
 - ... I conclude that, on a proper construction of PIPEDA, if the primary activity or conduct at hand, in this case the collection of evidence on a plaintiff by an individual defendant in order to mount a defence to a civil tort action, **is not a commercial activity contemplated by PIPEDA, then that activity or conduct remains exempt from PIPEDA even if third parties are retained by an individual to carry out that activity or conduct on his or her behalf.**

State Farm v. OPC, 2010 FC 736

- OPC has changed how it deals with access claims during litigation
- Leave it to the court where the matter is seized
- Not about surveillance, per se, but affects surveillance based on whether there is jurisdiction

PIPEDA and Surveillance

- PIPEDA or provincial equivalents apply to all first party claims
- BC, Alberta and Quebec statutes apply to all claims in their jurisdictions

PIPEDA Case #311

... when an individual initiates a lawsuit there is **an implied consent that the other party to the suit may collect information required to defend itself** against the damages being sought by the individual who filed the suit. When the woman initiated her lawsuit against the insurance company's client and when her testimony and medical reports revealed discrepancies and were inconsistent with the injuries claimed, the Assistant Privacy Commissioner concluded that she gave her implied consent to the collection of her personal information.

What can you find?

- Primarily: evidence that impeaches the witnesses' evidence about abilities, disabilities and day-to-day life.
- Sometimes: evidence about the circumstances leading up to the claim or discussion about the claim itself.
- Not always relevant in every case, but should be considered.

Nathalie Blanchard and Manulife

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Nathalie Blanchard loses benefits over Facebook beach photos

f t e



Nathalie Blanchard lost Manulife benefits when she posted this and other photos of herself on Facebook.

Nathalie Blanchard and Manulife

- Highly publicized case
- 29 year old woman
- Major depressive disorder
- Disability lasting 1 year and a half
- According to media reports, Manulife stopped LTD payments because of photos on Facebook
- Privacy settings limited access to her “friends”

Terry v. MULLowney, 2009 NLTD 56

- Plaintiff suffered injuries following two accidents
- Medical evidence was subjective
- Testimony at trial that he could no longer engage in social activities as a result of his injuries
- In cross-examination, he was confronted with evidence from his Facebook account
- It showed that he had engaged in social activities. There were references to daily consumption of alcohol and marijuana in the few months leading to trial

The Court stated at paragraph 105:

“Without this evidence, I would have been left with a very different impression of Mr. Terry’s social life.”

Leduc v. Roman 2009 (Ont. Sup. Ct.)

- Plaintiff injured in an auto accident
- Examination for discovery had already been held
- Defense counsel learned that plaintiff had a Facebook account
- His public profile only showed his name, photo, and city of residence - Settings limited access to his “friends” only
- He was quoted in one of the medical reports as saying he had several “Facebook friends”

Leduc v. Roman 2009 (Ont. Sup. Ct.)

- Even where a party has a Facebook account with privacy settings, there remains an obligation to disclose and produce all relevant documents
- The Court agreed that a preservation order was appropriate and an order to provide a further and better affidavit of documents

Leduc v. Roman 2009 (Ont. Sup. Ct.)

- The Court ordered the defendant have the right to cross-examine the plaintiff on his new affidavit of documents about the content of his Facebook account on the ground that:

“ ...a court can infer, from the nature of the Facebook service, the likely existence of relevant documents on a limited-access Facebook profile.”

A fishing expedition or not?

- Speculation
- Request too wide
- Privacy settings on account
- Existence of evidence
- Narrow or specific request
- Privacy settings on account

Fishing expedition or not?

Speculation

- Photos of the person standing or sitting -
Schuster v. Royal & Sunalliance
2009 Ontario

Existence of evidence

- Photos of the person engaging in sports and activities
- Text reporting participation in social activities

Fishing expedition or not?

Wide Request

- Hard drive history: time spent on the internet, sites visited, etc. + other users of same computer
- (*Frangione v. Vandogen*, 2010 Ont.), *Desgagne c. Yuen*, 2006 C.-B.)

Narrow/Specific Request

- Content of Facebook account (without emails) – only the relevant documents
- Time spent connected to Facebook account– *Carter v. Connors* 2009 NB

What is an “expectation of privacy”?

Account Settings

- 67 friends – refused
Schuster v. Royal & Sunalliance
2009 Ontario

Account Settings

- 200 friends – allowed
Frangione v. Vandongen 2010
Ontario
- 366 friends - allowed
Murphy v. Perger 2007 Ontario
- 110 friends – allowed
Wice v. Dominion, 2009 Ontario

Impact of large number of friends

“...he permits some 200 ‘friends’ to view what he now asserts is private.... ”

“ ...This is a preposterous assertion especially given his testimony that only five of the 200 are close friends. In my view, there would be little or no invasion of the plaintiff’s privacy if the plaintiff were ordered to produce all portions of his Facebook site. ”

- Frangione v. Vandongen 2010 (Ont. Master)

Impact of large number of friends

“The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.”

- *Murphy v. Perger* 2007 Ont. Sup. Ct.

How to obtain the evidence?

- In *Terry c. MULLowney*, the evidence was said to be “*publicly accessible*”
- The content of the profile can lead to access to the private content depending on the relevance of what is on the profile (exemple *Wice c. Dominion*)
- *Ex parte* motion ***if justified***
- Young female plaintiff alleging serious impairment following an accident
- Chronic pain, frequent headaches, leg pain

Sparks v. Dubé, 2011, NB

- Medical reports stated she could not travel in a car for more than one hour and she was limited in her ability to carry on activities, such as her university studies
- Difficulty carrying anything weighing more than 5-10 lbs
- She was asserting that her claim was not capped

Sparks v. Dubé, 2011, NB

- Defendant retained an investigator and obtained access to certain photos
- Woman had posted photos of herself in a trip somewhere warm (beach), engaging in social activities
- Most damning photos showed her doing an outdoor adventure course

Sparks v. Dubé, 2011, NB

- The Court found that the timing of the photos coincided with some of the medical reports
- The Court agreed that *ex parte* proceeding was justified given the nature of Facebook evidence
- The Court ordered the preservation of the Facebook account – ***required the plaintiff's counsel to obtain and preserve the information – very unusual case***

Order for production

- Second part of motion
- No longer *ex parte*
- Plaintiff can participate in the determination
- Not done in *Sparks v. Dubé* (amicable settlement of the action)

Preservation does not equal production

“I do agree with Master Dash that mere proof of the existence of a Facebook profile does not entitle a party to gain access to all material placed on that site. Some material may relate to matters in issue; some may not. Rule 30.06 requires the presentation of some evidence that a party possesses a relevant document before a court can order production...”

- Leduc v. Roman, 2009 Ontario

Questions to consider

- Existence of social media accounts: Facebook, LinkedIn, Twitter, YouTube, blog
 - Be very broad in your questions as new services are popping up all the time
- Account settings: how many “friends”, who can see photos (“friends only” or “friends of friends”)

Questions to consider

- Are they all real friends or are some merely acquaintances? *Frangione v. Vandongen* 2010 (Ont.)
- Anyone else know the password?
- Changes brought to account since the action (negative inference in *Terry v. Mallowney* 2009 T.-N.)

Practical considerations

- When collecting info, consider
 - how it will be presented to the Court?
 - who will be able to authenticate it and testify to it?
 - perhaps should not be an employee of the law firm and really should not be the lead lawyer
- Bare screen caps, particularly from mobile devices, are not ideal. But sometimes all you've got. Try to get full context, all comments, etc.
- When you see it, save it. It may be deleted later.

Questions?

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Social media policies

Why a social media policy?

- Any business needs to be mindful of their reputation and that can be made/ruined by employees (or can be enhanced by employees)
- The usual rule of “don’t be stupid” is not enough
- Employees often – incorrectly – assume that they can’t be disciplined for out of work conduct or are not aware they have obligations of loyalty.

What needs to be in a social media policy?

- General direction
- Who it applies to
- What activities it applies to
- Who speaks on behalf of the company
- What can be said
- What cannot be said
- Best practices and good behaviour
- Who is responsible for policing it

Who should it apply to?

- Everyone

What activities it applies to

- All use of social media* that either (a) uses the company's equipment or (b) relates to the company, its clients and its business *in any way*.
- Define social media very broadly so you don't have to amend it to take into account new social media services.
- You probably shouldn't care about a staff person's collection of kitty photos on Pinterest, but you might care about the drunken pub crawl photos on Instagram.

Who speaks on behalf of the company?

- Social media users need to be very clear about who they are speaking for.
- People who are associated with a company may be assumed to be a spokesperson for the company or their comments will simply be attributed to the company
 - “Opinions are personal and should not be attributed to **Acme Co.** or its clients.”
- If the company has official accounts, who can post to them needs to be clearly understood.
- Other users should not create accounts using the company’s name - @mcinnescooper on Twitter should be the official account. (You’d be surprised how often this happens.)

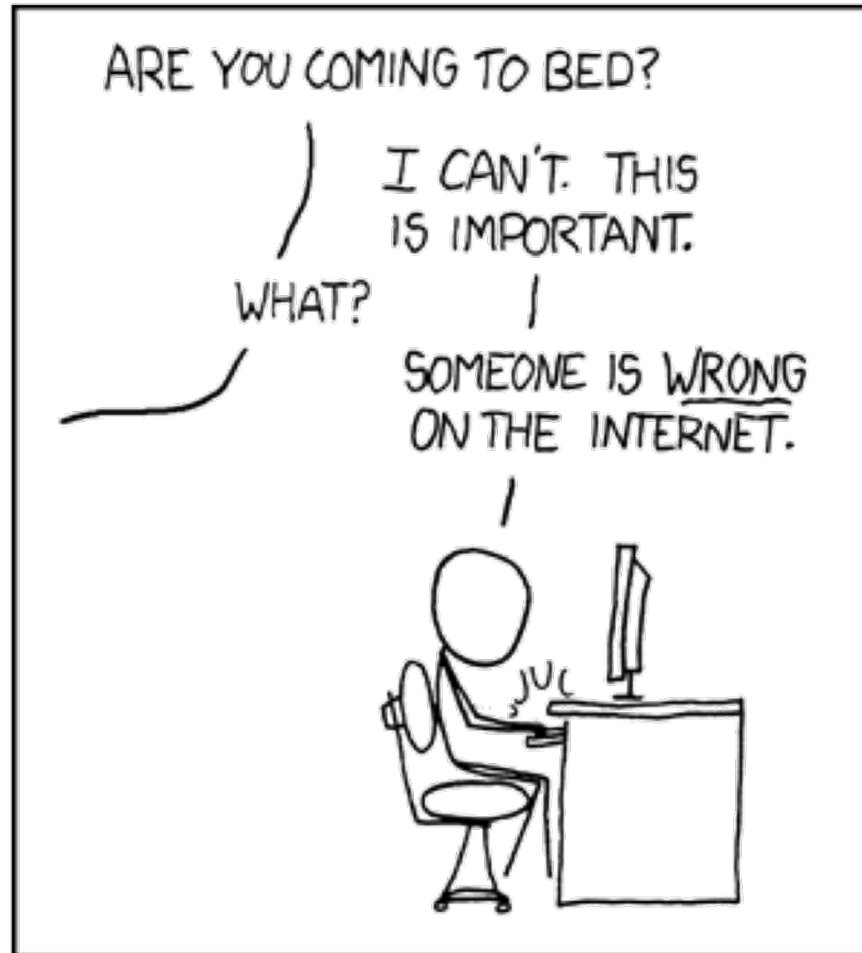
What can be said

- Be engaged in your communities
- In the offline world, you don't just sit silently in the corner.
- Engage with your communities and your clients.
- Engage with potential clients.
- Engage with colleagues in the area.
- Probably more important to think about what can't be said ...

What can't be said

- NOTHING about current or past clients/customers without their authorization
- NOTHING about any non-public information
- NOTHING that conflicts with employer's or customers' business interests
- If you can't say anything nice, don't say anything at all.
- Don't feed the trolls

Don't feed the trolls



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Best practices and good behaviour

- Separate the personal from the professional – difficult to do
- Recall that anything an employee of a company does reflects on the company
- Be professional and use good judgement. If you have to ask whether it's "over the line", it's probably not a good idea.
- Educate and share your expertise.

Best practices and good behaviour

- Consider training and education, not just about the words of the policy but best practices and how social media can be useful
- Are you speaking as the company, an employee or as an “individual”.

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