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Internet and E-Commerce Law in Canada

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• SPOLIATION AND SOCIAL MEDIA •

Timothy M. Banks, Fraser Milner Casgrain LLP

Court orders requiring production of material from Facebook and social media are newsworthy in Canada and the United States. From the Canadian litigator's perspective, the fuss is a bit peculiar. Records that are relevant to a dispute are required to be produced in litigation. The fact that they are personal, private or potentially embarrassing is not an accepted ground to refuse disclosure.

What is concerning from a litigator's perspective is the potential for the intentional destruction of social media records in order to avoid production in litigation.

Requirement to Produce Relevant Documents

In Ontario, the *Rules of Civil Procedure*[1] require that litigants must disclose to all of the parties to the litigation the existence of every relevant document in their possession, power or control, and must produce to the other parties all of those relevant documents that are not privileged.

A document is defined by the Ontario *Rules of Civil Procedure* to include data and information in electronic form.[2] Electronic information will be in the power of a party if that party could obtain a copy of it.[3] So, pictures and posts accessible through a litigant's social media account are documents and within the power of that litigant to produce. The only question is whether those posts are relevant.

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Photographs and posts to social media accounts may be relevant to litigation in a number of ways. In a personal injury or long-term disability case, they may suggest that claims of being unable to enjoy life or to work are exaggerated or false. They may suggest that a litigant was in a location or with people as alleged and contrary to protestations otherwise. They may contain evidence of defamation or substantiate the truth of what might otherwise be defamatory statements.

Preservation Obligation

Once litigation has been commenced or is contemplated, litigants and potential litigants should be careful, however, that they do not take steps to "cleanse" their social media accounts.

It often comes as a surprise to litigants that they are required to preserve physical and electronic documents—even if that material might be unhelpful to their case. It may be even more surprising to these litigants that the preservation obligation may begin well before litigation has been commenced. Once a demand letter is drafted or received, or legal advice is sought with respect to potential litigation, a potential litigant may be required to preserve evidence.

It is one thing to fail to preserve documentation that may be destroyed in the ordinary course. It is another matter altogether to destroy records intentionally in order to avoid those records coming to light in ongoing or subsequent litigation. Intentionally destroying potential evidence is spoliation. Spoliation occurs where a party (the spoliator) has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation.[4] In Canada, spoliation usually produces an adverse inference

that the evidence would have been unhelpful to the spoliator and may result in sanctions.[5]

Closing a Facebook Account to Hide from Production

A recent U.S. case illustrates some of the pitfalls and, in the U.S., sanctions for spoliation and social media.[6] The basic facts of the case were

- The plaintiff was the husband of a woman who was killed in an automobile accident. He sued the truck driver and the driver's employer and initially won a substantial damage award.
- During the discovery process for his trial, he was asked about his Facebook account. The defendants had produced a photo justifying the request that was apparently taken after his wife's death and showed him holding a beer can and wearing an "I [heart] hot moms" t-shirt.
- The plaintiff, with the lawyer's advice, deleted the Facebook account and responded that he did not have a Facebook account at the time of responding to the discovery requests.

The Virginia court was not impressed. It cut the damages award to the plaintiff in half and awarded cost sanctions against both the plaintiff and his lawyer.

In Canada, courts are reluctant to make similar awards preferring to remedy the wrong in other ways. The principal remedy is an adverse inference or rebuttable presumption that the lost or destroyed evidence would not assist the litigant who destroyed the evidence.[7] The presumption may be rebutted by demonstrating that there was no intention to subvert the litigation. However, even in those circumstances, the court has the authority to use cost sanctions or other procedural remedies. If there was an intention to destroy the evidence to subvert the litigation, the court could, in an extreme case, dismiss the claim or strike the defence.

To date, however, courts in Canada (unlike the U.S.) have not awarded damages against the spoliator. Nevertheless, once litigation is contemplated—resist the urge (and, if you are lawyer, instruct your client to resist the urge) to press delete!

The Underused Schedule "C"

The Virginia case would have an interesting twist if it were to occur in Ontario. Although honoured in the breach, the Ontario *Rules of Civil Procedure* require parties to disclose to other parties in the litigation all documents that have been lost or destroyed. More specifically, the obligation is to list all records that "were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location."[8]

This list is commonly referred to as Schedule "C" to the affidavit of documents that is required to be produced by every party to the litigation. The affiant must swear that the list is complete. Properly instructed, an honest litigant who has deleted relevant social media records would have to list them (and admit to the destruction) in the Schedule "C." Failing to do so would certainly compound the error of judgment and assist as evidence of an intention to subvert the discovery process.

However, the list that is typically produced today in Ontario is just boilerplate. Not uncommonly, Schedule "C" simply states "Nil" or refers generically to originals of records that

were sent to their intended recipients. In an era in which it is all too easy too tempting to hit the delete button, insisting on a detailed Schedule "C" or an examination on a boilerplate Schedule "C" might be prudent.

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1 R.R.O. 1990, Reg. 194, Rule 30.02(1).
2 *Ibid*. Rule 30.03(1)(a).
3 *Ibid*. Rule 30.03(1)(b).
4 *McDougall v. Black & Decker Canada Inc.*, [2008] A.J. No. 1182, 2008 ABCA 353 at para. 29 [*McDougall*].
5 *Ibid*.
6 *Lester v. Allied Concrete Co.*, Case No. CL09-223 (Va. Cir. Ct. Sep. 1, 2011); and Lester v. Allied Concrete Co., Case Nos. CL08-150, CL09-223 (Va. Cir. Ct. Oct. 21, 2011).
7 *McDougall*, *supra* note 4, at para. 29.
8 *Supra* note 1, Rule 30.03(2)(c).

• EMPLOYERS' USE OF FACEBOOK IN THE HIRING PROCESS— IT'S NOT A "LIKE" •

Eileen Vanderburgh, Alexander Holburn Beaudin + Lang LLP

Can employers require prospective employees to provide access to their Facebook profiles and accounts? A recent article in *The Globe and Mail* highlighted a growing trend among U.S. employers to require job applicants to provide their Facebook login and password as part of the application process. Facebook has warned U.S. employers that requiring applicants to provide their Facebook passwords is a violation of the terms of service and illegal under federal law. In light of the recent focus on this issue, it is worthwhile to review the privacy obligations of B.C. employers in the hiring process and, in particular, in the collection of personal information from social media sites.

In British Columbia, the *Personal Information Protection Act*, SBC 2003, CHAPTER 63 [*PIPA*], limits the ability of private sector organizations to collect, use and disclose an individual's personal information even with the consent of the individual. Under *PIPA*, an organization may only collect, use and disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances. *PIPA* allows organizations to collect "employee personal information" without consent, if the collection is reasonable for the purposes of establishing, maintaining or terminating an employment relationship with the individual. "Employee personal information" is defined in *PIPA* to include personal information that is reasonably required for an employment relationship and to specifically exclude personal information that is not about an individual's employment. There is a strong presumption in *PIPA* that the collection of personal information that does not fall within the definition of "employee personal information" is not appropriate for the purposes of establishing, maintaining or terminating an employment relationship and, therefore, the collection of such personal information from Facebook, with or without the consent of the individual, is a breach of *PIPA*.

The B.C. Commissioner has published guidelines on *PIPA and the Hiring Process*[1] and on *Social Media Background Checks*[2] that address the privacy concerns around the use of social media in the hiring process. For most individuals their Facebook page contains predominantly non-employment personal information that a prospective employer is not permitted to collect