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### WHAT IS IT AND HOW CAN YOU USE IT?

Facebook is a popular, free-access social networking website that is operated and privately owned by Facebook, Inc.<sup>1</sup> Users can join networks organized by city, workplace, school, and region to connect and interact with other people.<sup>2</sup> Facebook permits users to create profiles including photos and lists of personal interests, exchange private or public messages, and join groups of friends.<sup>3</sup> The website is free to users, but generates revenue from advertising.<sup>4</sup>

Launched in 2004, today Facebook has more than 120 million active users worldwide.<sup>5</sup> It is the leading social networking site based on monthly unique visitors, having overtaken its main competitor MySpace in April 2008.<sup>6</sup> One study found that 90% of University students report using Facebook daily.<sup>7</sup>

#### How does Facebook work?

Facebook is extremely user-friendly. To create a profile, users need only an e-mail address recognized by Facebook. Once a user has established a profile, they can update it as often as they like. Users can add or change their information including pictures, “favourites” and blog-type entries. Users can build networks of “friends”. “Friends” are other Facebook users who have agreed to be added as friends to a user’s profiles. Users can also join networks organized by city, workplace, school, or region to connect and interact with other people in those networks.

#### Posting photos on Facebook

One of the most popular applications on Facebook is the photo application which allows users to upload albums and photos. One of the most attractive features of the photo application is

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<sup>1</sup> “Facebook”, online: Wikipedia <<http://en.wikipedia.org/wiki/Facebook>> (as of Jan 27, 2009, 17:47 GMT).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> “Popularity Fuels Disclosure on Facebook, Study Finds” (16 December 2008), online: University of Guelph Campus News <[http://www.unoguelph.ca/news/2008/12/post\\_162.html](http://www.unoguelph.ca/news/2008/12/post_162.html)>.

<sup>6</sup> *Supra* note 1.

<sup>7</sup> *Supra* note 5.

that Facebook users can upload an unlimited number of photos, while other image hosting services limit the number of photos that a user is allowed to upload.

Another appealing feature of the photo applications is the ability to "tag", or label other Facebook users in a photo. For instance, if a photo contains a user's Facebook friend, then the user can tag the friend in the photo. "Tagging" another user sends a notification to the friend that they have been tagged, and provides them a link to see the photo. Tagging a friend in a photo also posts a notice on both the user's and the friend's "wall" alerting others that the photo(s) has been posted and/or tagged. The user does not need to obtain the "tagged" friend's permission in order to tag them in a photo. However, the "tagged" friend has the ability to "untag" themselves if they so desire.

### **Facebook Privacy**

A recent study by University of Guelph researchers found that the need for popularity is driving young adults to disclose more personal information on Facebook than they normally would reveal.<sup>8</sup> The study found that the majority of people (76%) are concerned about privacy and information control, yet they still disclose a great deal of personal information on Facebook.<sup>9</sup> This includes details such as birthdays, email addresses, hometowns, school and/or place of employment, "status" (the options are: single, in a relationship, engaged, married, "it's complicated" and "in an open relationship") and even intimate photographs.<sup>10</sup>

Researchers at the University of Guelph asked students to rank on a scale of one to seven how likely they were to post various types of pictures. "Profile" pictures of themselves, and pictures with friends or dressed up formally were most common, earning a mean ranking of more than six out of seven. Photos that depicted them "doing something illegal" - doing drugs, deliberately provocative shots and naked or partially naked photos - were deemed least acceptable, earning ratings of 2.45 and 1.49 out of seven, respectively.<sup>11</sup>

In light of obvious privacy issues, Facebook does allow users to control the privacy associated with their profile, news feed, photo albums and "wall". It also allows users to control who can search for them, how they can be contacted, and what information is available to applications linked with their profile.

To protect their privacy, users can limit their profile so that only those other users that they have accepted as friends can see their profile. On the other hand, profile privacy can be set to allow any other user on Facebook to access a user's profile. For photos, privacy settings can be set for individual albums, limiting the groups of users that can see an album. For example, the privacy of an album can be set so that only the user's friends can see the album, while the privacy of another album can be set so that all Facebook users can see it or so that only friends of friends can see it.

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<sup>8</sup> *Supra* note 5.

<sup>9</sup> *Supra* note 5.

<sup>10</sup> *Supra* note 5.

<sup>11</sup> Shannon Proudfoot, "Reconnect and reveal? Facebook study highlights contrast between privacy and popularity" *Canwest News Service* (14 December 2008), online: Canwest News Service <<http://www.canada.com/topics/news/national/story.html?id=1075192>>.

That said, Justice Brown recently held that 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.<sup>12</sup> Justice Brown held that parties are obliged to identify and produce any Facebook postings that relate to any matter at issue in an action, irrespective of whether they are posted on a user's public or private profile.<sup>13</sup>

### **Gathering and Using Facebook Information**

Facebook can be an incredibly valuable tool for collecting information on other users. A user can browse Facebook profiles based on criteria such as age, relationship status, or search the entire Facebook database for people using their name or e-mail address. As a user, you can contact other users through private messages or public notes on their profiles.

If a user's privacy setting is set to allow any other user of Facebook to access their profile, the information accessible to the public is limited only by what information the user has chosen to post. This can include information such as their name, birthdate and "status", their religious and political views, a list of their hobbies and interests, and their current or past place of employment. Almost certainly, there will be a range of personal photos. In these circumstances, Facebook can prove to be a priceless tool when investigating the background of a claimant.

In other instances, a user's profile will not be available to all other Facebook users but will be open only to his/her friends. In these circumstances, the information available to a non-friend will be limited but, with some creativity and time, it is still possible to find valuable information on a user by searching his or her friends who may have open or public profiles. Moreover, even users with "limited" profiles will sometimes create a "public" profile – a page with only selective information accessible to all Facebook users and, in some cases, accessible through an internet search engine like Google.

The evidence provided by information and photos found on Facebook, or even the mere fact that someone has a Facebook profile, can prove to be an invaluable tool for assessing the value of a plaintiff's claim for damages both at trial or in settlement discussions.<sup>14</sup> This tool seems to be specifically useful when dealing with a plaintiff who claims that their everyday social activities have been compromised. For example, in *Goodridge (Litigation Guardian of) v. King*,<sup>15</sup> Justice Platana concluded that the scarring on the plaintiff's face did not substantially interfere with her everyday life. Justice Platana based this finding, in part, on the fact that the plaintiff continued to socialize and date (as evidenced, in part, by Facebook information) and even went to the extent of providing her picture on Facebook.<sup>16</sup>

A very similar conclusion was reached in *Kourtesis v. Joris*.<sup>17</sup> In that case, the plaintiff's testimony had left the court with the impression that the plaintiff did not have a social life and

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<sup>12</sup> *Leduc v. Roman*, 2009 CanLII 6838 (ON S.C.).

<sup>13</sup> *Ibid.* at para. 32.

<sup>14</sup> *Murphy v. Perger*, [2007] O.J. No. 5511 at para. 10, (S.C.J.) [*Murphy*].

<sup>15</sup> 2007 CarswellOnt 7637 (S.C.J.) [*Goodridge*].

<sup>16</sup> *Ibid.* at para. 128.

<sup>17</sup> [2007] O.J. No. 2677 (S.C.J.) [*Kourtesis*].

that her enjoyment of life was significantly diminished. However, Justice Browne ultimately concluded, based on the strength of the Facebook photos produced at trial, that the plaintiff did in fact enjoy life and, contrary to testimony given by her and her family, she continued to enjoy an “active social life”.<sup>18</sup>

In other cases, photographs (and other Facebook information) can also be used by a defendant in order to impeach a plaintiff’s credibility regarding the impact of an accident on his/her life, depending on the evidence at trial and what the photographs depict.

In *Murphy v. Perger*,<sup>19</sup> on a motion for production of copies of the plaintiff’s Facebook site, Justice Rady, after considering the “competing interests” of privacy and relevancy, ordered the plaintiff to provide the defendant with copies of the web pages posted on the plaintiff’s Facebook site. Justice Rady concluded that any invasion of the plaintiff’s privacy was minimal and outweighed by the defendants’ need to have the photographs in order to assess the case. Justice Rady commented that the plaintiff could not have had a serious expectation of privacy given that 366 people had been granted access to her Facebook profile.<sup>20</sup>

### **Relevance**

The courts have now accepted that information contained on Facebook can be relevant to issues in civil proceedings. For example, Justice Boswell recently held that a court may “infer for the nature of the Facebook service, that other relevant documents are likely included in the Plaintiff’s profile”.<sup>21</sup>

### **Preserving and Accessing a Facebook Site**

At the stage of preliminary investigations, Facebook may offer some helpful insight into the claimant’s life and simply taking a “web shot” or printout of that information might be sufficient for some purposes. However, in cases where Facebook evidence may ultimately be used at trial it is important that the information be preserved.

Rule 45.01 of the *Rules of Civil Procedure* grants courts jurisdiction to make an interim Order for the custody or preservation of any property in question in a proceeding or relevant to an issue in the proceeding. On the strength of the case law discussed above, it is arguable that a claimant’s Facebook photos will be relevant to an issue in a personal injury action, are admissible at trial and, as such, should be preserved. An Order for the preservation of a Facebook site is crucial given that a claimant, once aware that a defendant has knowledge of his or her site, will almost certainly alter or change their profile to remove any photographs, text and/or other information that may be harmful to the claim they seek to advance.

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<sup>18</sup> *Ibid.* at paras 70-75.

<sup>19</sup> *Murphy*, *supra* note 12.

<sup>20</sup> *Ibid.* at para. 20-21.

<sup>21</sup> *Wise v. Dominion of Canada General Insurance*, [2009] O.J. No. 2946 (S.C.J.)