Personal Injury Claims And Privacy - Can ICBC Access Your Facebook Account?

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If you pursue a personal injury claim in the BC Supreme Court you will be bound by the Rules of Court with respect to production of relevant documents.

With our ever-expanding use of technology, more and more documents may become relevant in Injury Litigation. So, can computer records ever be relevant in personal injury claims?

Reasons for judgement were released today by the BC Supreme Court (Bishop v. Minichiello) dealing with this issue. In today's case the Plaintiff allegedly suffered a brain injury as a result of the negligence of the defendants. The Defendants wished to analyze the Plaintiff's computer hard drive to '*determine the period of time the plaintiff spends on Facebook between eleven at night and five in the morning*'. The Plaintiff refused to produce his computer hard-drive and this resulted in a Court motion seeking an order compelling the Plaintiff to do so.

Mr. Justice Melnick granted the motion and ordered that '*the parties agree on an independent expert to review the hard drive ...to isolate and produce to counsel...the information sought or a report saying that the information sought is not retrievable.*'.

In reaching this conclusion Mr. Justice Melnick engaged in the following analysis and application of the law:

IV. ANALYSIS

[46] Electronic data stored on a computer's hard drive or other magnetic storage device falls within the definition of "document" under R. 1(8) of the ***Rules of Court****:* ***Ireland*** *at para. 6.*

[47] Rule 26(1) requires disclosure of documents relating to any matter in question in the action. The decision of whether to grant an order requiring production under R. 26(10) is a discretionary one: ***Park*** *at para. 15. The court has used its discretion to deny an application for the production of documents in the following two circumstances: firstly, where thousands of documents of only possible relevance are in question; and secondly, where the documents sought do not have significant probative value and the value of production is outweighed by competing interests such as confidentiality and time and expense required for the party to produce the documents:* ***Park*** *at para. 15. Additionally, privacy concerns should be considered in a determination under R. 26(10), where the order sought is so broad it has the potential to unnecessarily delve into private aspects of the opposing party's life:* ***Park*** *at para. 21.*

[48] Disclosure in the civil litigation context is largely informed by an inquiry into relevance and probative value. Relevance should be granted a broad scope: ***Peruvian Guano*** *at 62. Relevancy is to be determined upon a description of the nature of the documents sought and a reasonable interpretation of the pleadings:* ***Boxer*** *at 359.*

[49] Relevant to this particular application are the values enshrined in s. 8 of the ***Charter*** *– the right to be secure against unreasonable search and seizure. Rule 26(10) confers no power to make an order that is really authorization for a search:* ***Privest Properties Ltd.*** *at para. 38.*

[50] Metadata is information recorded or stored by means of a device and is thus a document under R. 1(8): ***Desgagne*** *at para. 29. Metadata is a report of recorded data that is generated by computer software. It is not something created by the user; rather, it is based on what the user does with their computer. In*

*both **Park** and **Desgagne**, it was held the threshold of relevance had not been met to order production of records of the frequency and duration of computer use. However, Mr. Justice Myers in **Park** stated at para. 42 that he did not mean to say that hard drives and other electronic documents need never be produced under R. 26. Thus, in the appropriate case if the threshold of relevance is met, a hard drive may require production.*

*[51] This threshold was found to be met in **Chadwick**. Despite agreeing with the plaintiffs that this was a case in which the hard drive was to be regarded as a file repository and not a document itself, Mr. Justice Myers held that such a distinction was not to be determinative of the application.*

[52] Mr. Justice Bauman, for the Court of Appeal, held that leave to appeal the order should not be granted and the application was dismissed. The Court of Appeal stated that while an appropriate case may give rise to important issues such as privacy, solicitor-client privilege, expense, and time, this was not that case as Mr. Justice Myers' order was of narrow scope.

[53] Similarly, the application at hand is of narrow scope. The defence wishes to have the plaintiff's hard drive of his family computer produced and analyzed to determine the periods of time the plaintiff spent on Facebook between eleven at night and five in the morning, each day.

[54] Examination for discovery evidence of the plaintiff's mother confirms that the plaintiff is the only person in the family using the family computer between those hours. The plaintiff suggests that, at times, friends may use the computer once he logs onto Facebook. But that is an evidentiary issue for trial. The issues of privacy and solicitor-client privilege are basically resolved as only the plaintiff has the password to his Facebook account and he has not used this account to converse with his counsel.

*[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. This sentiment was approved in **Chadwick**. 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).*

*[56] The defence argues that this case is distinguishable from **Baldwin** and that the information sought is relevant. The plaintiff advised Dr. Zoffman that his sleep varies with the time one of his friends goes to bed. This is because he spends a substantial amount of time on Facebook chatting with this friend. The plaintiff alleges that ongoing fatigue is preventing him from maintaining employment and thus his late-night computer usage is relevant to matters at issue in this lawsuit.*

V. CONCLUSION

[57] The information sought by the defence in this case may have significant probative value in relation to the plaintiff's past and future wage loss, and the value of production is not outweighed by competing interests such as confidentiality and the time and expense required for the party to produce the documents. Additionally, privacy concerns are not at issue because the order sought is so narrow that it does not have the potential to unnecessarily delve into private aspects of the plaintiff's life. In saying that, I recognize the concern of the plaintiff that to isolate the information the defence does seek, its expert may well have consequent access to irrelevant information or that over which other family members may claim privilege. For that reason, I direct that the parties agree on an independent expert to review the hard drive of the plaintiff's family computer and isolate and produce to counsel for the defendant and counsel for the plaintiff the information sought or a report saying that the information sought is not retrievable, in whole or in part, if that is the case. I grant liberty to apply if counsel cannot agree on such an independent expert or if other terms of this order cannot be agreed.

[58] At the conclusion of the hearing on March 5, having been made aware that the passage of time was critical because of the potential for the memory of the plaintiff's family computer to be "overwritten" with

ongoing use, I directed that within two weeks of that date, an expert engaged by the plaintiff's counsel, at the expense of the defence, produce two copies of the hard drive to be deposited with the court pending this ruling. One of those copies should be used for the analysis I have now ordered. The other copy should remain with the court as a backup to be accessed only with further order of the court.

This case should serve as a reminder that technology is rapidly changing the potential scope of document production in Injury Litigation. Lawyers and Plaintiff's advancing BC Injury Claims need to be aware of the scope of documents that may be relevant and when doing so should not be so quick to overlook the potential relevance of electronically stored documents not only on a computer hard drive but also those that can be found on social networking sites such as Twitter, MySpace and Facebook.