

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK  
TRIAL DIVISION  
JUDICIAL DISTRICT OF MIRAMICHI

Citation: 2009 NBQB 317  
Date: December 2, 2009

Docket: N/C/66/07

Between:

Rosemary Carter, Plaintiff,  
Respondent

- and -

Herbert Connors, Defendant,  
Applicant

-and-

Rosemary Carter, Plaintiff

-and-

The Dominion of Canada General  
Insurance Company, Defendant

Before: Justice Fred Ferguson

Date of hearing: November 25, 2009

Date of decision: December 2, 2009

Appearances:

Barry R. Morrison Q.C. - for the Applicant

Louis M. Boudreault - for the Respondent

Stephen Barnett for the Defendant Company

**FERGUSON J.**

**INTRODUCTION**

[1] The Applicant-Defendant has brought a motion for an order that the Plaintiff, who is currently undergoing discovery examination by the Applicant's counsel, provide an undertaking to have her Internet Service Provider, Bell-Aliant, disclose the history of her Internet use at her home from the date of a motor vehicle accident in 2004 until today. Included in that request is a specific ancillary request that, in the event the motion succeeds, the technician that assembles the Internet use record segregate as a discrete record, if possible, the time spent on the Internet social network site Facebook that may be disclosed in the Plaintiff's Internet use account record. The Plaintiff has conceded in her examination that she also has an account on the social networking site Facebook. The motion is brought pursuant to Rule 33.12 of *The Rules of Court* but, practically speaking, under the auspices of Rule 32.06 and 33.08(3) of *The Rules of Court*.

[2] The Plaintiff is currently engaged in proceedings in this court instituted in 2006 for damages she claims she

suffered by reason of a traffic accident involving the Defendant, Mr. Connors, which occurred on November 27, 2004.

[3] She has refused to provide the undertaking requested on the advice of counsel on the grounds that the account history information sought is either not relevant or an infringement of her right to privacy or both. No issue has been made about the nature of the information sought, that is, that the information is likely stored in electronic format only.

[4] The outcome of this motion depends upon whether the information sought is relevant within the meaning that has been attributed to it at common law as well as the special definition that has been given to it by *The Rules of Court* and relevant jurisprudence that govern the discovery process. The outcome of the motion also depends upon the extent to which a litigant can refuse to disclose this sort of information on the grounds that the request infringes her reasonable expectation of privacy in the information sought.

**THE RECORD**

[5] On July 2, 2009 during what appears to have been and continues to be a protracted and ongoing examination for discovery Mr. Morrison, counsel for the Applicant, while examining the opposing party Plaintiff Ms. Carter, received a response to a question he had posed to her that established that she had an Internet account for her computer and used the Internet at her home under an agreement with the service provider Bell-Aliant. She also conceded to having an account on the social networking site Facebook.

[6] At that point in the questioning of her Mr. Morrison asked for an undertaking from her and her counsel Mr. Boudreault:

"I'd like an undertaking to get all the Aliant records for computer use at the plaintiff's residence from the date of loss forward."

[7] Counsel for Ms. Carter immediately refused the request on the grounds that it constituted an invasion of her privacy. Mr. Morrison then stated he would bring a motion to have the release of the information compelled by court

order. Mr. Boudreault on behalf of Ms. Carter stood by his claim of an expectation of privacy in the data sought and challenged Mr. Morrison to file a motion.

[8] Mr. Morrison then expanded his request:

“And the request would not only include the time spent on the computer but also any time, specifically if it’s available, with the technician’s assistance, on Facebook. Okay.”

[9] It is also relevant to the outcome of the motion that the Plaintiff was an administrative clerk at the local hospital prior to the accident and has not resumed work full time for that employer since the date of the accident. According to Mr. Morrison, and not disputed by Mr. Boudreault, she has tried to return to work but has been able to do so only for short periods of time. According to her, this in part is due to the soft tissue injuries she claims resulted from the accident.

#### **THE ISSUE**

[10] Does the law of civil discovery in New Brunswick allow a party to compel production of Internet and Facebook usage records from the service provider of a Plaintiff who held an

administrative clerk position prior to a motor vehicle accident when the basis of the claim filed by her is a soft tissue injury that is claimed to have resulted from the accident that prevents her from resuming full time work?

## **ANALYSIS**

### **Relevancy - Generally**

[11] Before outlining the common law principles that govern the law of admissibility based upon relevancy it must be borne in mind that this initial summary of relevancy principles is general in nature. These general principles do not fully circumscribe the special rules applicable to the examination for discovery process which, through statutory enactment and interpretive jurisprudence, have further refined and expanded the general principles relating to relevancy. Those special rules will be dealt with under a separate heading.

[12] All evidence is admissible in a proceeding that is logically relevant to a fact in issue and is not otherwise inadmissible because of a particular rule of law or evidence or because it's probative value is exceeded by the

prejudicial effect that will result from its admission. Relevance is very much a product of the other evidence and issues in a case. These statements were made with respect to expert evidence in *R. v. Morin* (1988) 44 C.C.C. (3d) 193 (S.C.C.) at 218 (paragraph 64) per Sopinka J.

[13] Generally, relevance has been described by the Supreme Court as having its origins in logic, common sense, and human experience. The leading case on relevancy in Canada is *Morris v. R.* (1983), 7 C.C.C. (3d) 97 (S.C.C.). As Justice La Forest said in *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.) in dissent at page 421 (concurring in by several justices of the Court on the relevancy issue; see, also, the comments of Dickson C.J.C. at page 404):

"As I observed earlier, at the stage of the threshold inquiry into relevancy, basic principles of the law of evidence embody an exclusionary policy, namely, that any item of evidence which, as a matter of common sense, logic and human experience, has any tendency to prove a fact in issue ought, prima facie, to be admitted to assist in the discovery of truth because the cumulative effect of such evidence may be sufficient to prove a fact in issue."

[14] In addition, in *R. v. Underwood* (2002), 9 C.R. (6<sup>th</sup>) 354 (A.C.A.) the court held that evidence is not irrelevant just

because it can be interpreted in more than one way, or can support more than one inference. To establish relevance, the proponent need only show that one possible interpretation of the evidence is relevant to an issue at trial. The strength or weight of the evidence is for the trier of fact to decide.

[15] In *Underwood* the trial judge had excluded certain statements attributed to a third party, deceased at the time of trial, that while being rather oblique in nature had some tendency to support the position of the accused that the third party committed the murder. A new trial was ordered.

[16] The recent review of the historic homicide alleged against Steven Truscott reported as *R. v. Truscott* [2006] O.J. No. 4171 (O.C.A.) also dealt with the issue of relevancy but in a different context. There, McMurtry C.J. said this about the relevancy analysis at paragraph 23:

"Relevance is contextual in that it depends on the facts in issue, the position taken by the parties in respect of those facts, and the other evidence adduced in relation to those facts: see *R. v. Arp* (1998), 129 C.C.C. (3d) 321 at 338 (S.C.C.). Because relevance is contextual, a court will often be unable to determine relevance at the time the evidence is proffered, but will receive

the evidence conditionally and determine the relevance of the evidence after the evidentiary picture has been fully developed. It does not follow, however, that because relevance often cannot be determined when the evidence is tendered, that relevance should not be addressed when the evidence is tendered. If a court is satisfied when the evidence is tendered that the evidence is irrelevant, it should so hold and refuse to admit the evidence. A court should not hear evidence on the chance that it might somehow, at some time, in some way become relevant in the proceedings."

[17] To these principles can be added the following general statements about relevance that emerged in *R. v. Blackman* 2008 SCC 37 (S.C.C.), the latest Supreme Court pronouncement on the common law principle of relevance. At paragraphs 29-30 Charron J. said this:

"The most basic principle of our law of evidence is that, as a general rule, any information that is relevant to an issue in the case may be admitted in evidence. Put differently, evidence may only be admitted if it relates logically to an issue in the case. Without this relationship, the proposed evidence, regardless of whether it is in hearsay form or not, has no probative value and is therefore inadmissible. Given this cardinal principle, the trial judge rightly inquired into the relevance of the out-of-court statements during the *voir dire*. Indeed, if the evidence is not relevant, there is no need to embark upon a *voir dire* at all. One of the

arguments advanced by the defence at the conclusion of the *voir dire* was that there was no evidence linking the person allegedly stabbed by Mr. Ellison to the accused. Counsel argued that without such a link, Mr. Ellison's out-of-court statements were irrelevant. Although this argument was not repeated before this Court, it is an important point that merits further comment. Therefore, before addressing the issue of whether the trial judge was correct to admit Mr. Ellison's statements under the principled approach to hearsay, I will deal with the question of threshold relevance.

### 5.1 Threshold Relevance

Relevance can only be *fully* assessed in the context of the other evidence at trial. However, as a threshold for admissibility, the assessment of relevance is an ongoing and dynamic process that cannot wait for the conclusion of the trial for resolution. Depending on the stage of the trial, the "context" within which an item of evidence is assessed for relevance may well be embryonic. Often, for pragmatic reasons, relevance must be determined on the basis of the submissions of counsel. The reality that establishing threshold relevance cannot be an exacting standard is explained by Professors David M. Paciocco and Lee Stuesser in *The Law of Evidence* (4th ed. 2005), at p. 29, and, as the authors point out, is well captured in the following statement of Cory J. in *R. v. Arp*, [1998] 3 S.C.R. 339, at paragraph 38:

To be logically relevant, an item of evidence does not have to firmly

establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue".

[18] As can be seen from this short summary of the common law on the principle of relevancy, the threshold of admissibility on the grounds of relevance is low.

### **Relevancy in the Discovery Context**

[19] The statutory breadth of the scope of the questioning of a witness on the grounds that the answers to the questions put or information sought are relevant at an Examination for Discovery is codified in Rule 32.06(1) of *The New Brunswick Rules of Court*. It states in part:

"Unless ordered otherwise, a person being examined for discovery shall answer to the best of his knowledge, information and belief, *any proper question relating to an issue in the action...*" [Emphasis added]

[20] The same principle is repeated in Rule 33.08(3) respecting the production of other material. It reads in part:

"Where a person admits upon his examination that he has in his

possession, custody or control anything not previously disclosed *which relates to the matters in question* in the proceeding and which is not privileged, he shall produce it for inspection by the examining party..." [Emphasis added]

[21] These two Rules have substantially the same effect although directed toward different types and forms of evidence. As a preliminary observation, I believe that the scope of the Rule is wide enough to implicitly encompass a "right of control" such that any Bell-Aliant Internet or other electronic data records of use specific to the Plaintiff's account constitute "anything" within the meaning of the Rule.

[22] The operative phrase: "which relates to the matters in question" were the subject of extensive analysis and consequent direction by the Chief Justice in *Seely v. Corrier* [2009] N.B.J. No. 6 (N.B.C.A.), in that case with respect to Rule 32.06(1).

[23] In that judgment Drapeau C.J. made several preliminary observations that help frame the issue. At paragraphs 23, 25 and 7 he said:

"Under Rule 32.06(1), a person being examined for discovery is required to

answer any "proper" question "relating to an issue in the action". That person must do so to the best of his or her knowledge, information and belief.

In *Juman v. Doucette*, [2008] 1 S.C.R. 157, [2008] S.C.J. No. 8(QL), 008 SCC 8, para. 24, Justice Binnie points out that discovery, in one form or another, plays an essential role in preventing surprise or "litigation by ambush", in encouraging settlement and in narrowing the issues where a trial turns out to be necessary. Needless to say, differences in the wording of the applicable procedural rules may operate to expand or narrow the scope of discovery in the various jurisdictions. However, Justice Binnie's assessment of the purposes of discovery essentially replicates the views of Justice Dickson in *Seven Seas Restaurant Ltd. v. Central and Eastern Trust Co.*(1978) 26 N.B.R. (2d) 533, [1978] N.B.J. No. 341(QL), a case decided under our former Rules, and those of Ryan, J.A., for the Court, in *Violette et al. v. Wandlyn Inns Ltd. et al.* (1995), 69 N.B.R. (2d) 374 (C.A.), [1995] N.B.J. No. 574 (QL), in respect of the current Rules of Court. In his customary perspicuous manner, Ryan, J.A. summarizes as follows the primary objectives and the manifold elements of the general purpose of our current discovery rules:

One of the objectives of oral examination for discovery is to enable the opposite party to know what case he or she is called upon to meet and, in addition, to simplify the trial by procuring admissions: *Graydon v. Graydon* (1921), 51 O.L.R. 301 (H.C.). The tendency of the courts is not to circumscribe the avenues of discovery but to widen them: *Henderson v.*

*Mercantile Trust Co.* (1922), 52 O.L.R. 198.

The objectives just mentioned are examples of the general purpose of discovery which includes particulars, disclosure of documents, inspection of documents, admitting of documents, physical examination, production of reports, inspection of property and interrogatories. The general purpose of discovery can be summarily described as follows:

1. to enable the examining party to know the case he or she has to meet;
2. to enable a party to obtain admissions which will dispense with other formal proof of your own case;
3. to obtain admissions which will permit you to destroy your opponent's case; and
4. to facilitate settlement.

[paras. 2-3]

See, as well, *Doucett v. Crowther et al.* (1992), 129 N.B.R. (2d) 1 (Q.B.), [992] N.B.J. no. 507 (QL), per McLellan, J., paras. 8-9.

Oral discovery dwarfs all other available discovery devices in terms of importance and effectiveness. In *Guimond et al. v. Fiberglas Canada Inc. et al* (1996), 173 N.B.R. (2d) 25, (Q.B.), [1996] N.B.J. No. 53 (QL), Justice McLellan rightly observed, after referring to *Hauck v. Cavendish Farms*

*Ltd. - Les Fermes Cavendish Ltee* (1984), 56 N.B.R. (2d) 238 (Q.B.), [1984] N.B.J. No. 247(QL), p. 245, per Meldrum J., that the requirement of "full disclosure at discovery before trial thoroughly permeates the present *Rules of Court* of this province". The obligation of the party being examined to answer to the best of his or her knowledge, information and belief is probably the most telling indicator of a legislative bias in favor of the fullest disclosure possible and I have no doubt the drafters of the discovery rules were alive to the following verity: full pre-trial disclosure helps ensure that settlement efforts will not be stymied by misinformed speculation regarding the strength of the adverse party's case."

[24] However, it was at paragraphs 28 and 29(in part) that he provided the clear perimeter for relevancy in the discovery context:

"The "full disclosure" approach to the interpretation of the discovery rules has been endorsed by this Court (see *Kay v. Kay* (1999), 215 N.B.R. (2d) 291 (C.A.), [1999] N.B.J. No. 289 (QL), para. 26, and *Reilly v. Paul* (2006), 305 N.B.R. (2d) 146 (C.A.), [2006] N.B.J. No. 380 (QL), para. 20). It helps shape the meaning of the phrase "proper question that relates to an issue in the action" found in Rule 32.06(1) by favoring an interpretation that promotes broad informational disclosure (see *Euclide Cormier Plumbing and Heating Inc. et al. v. Canada Post Corporation et al.*, para. 49). As Justice Russell observed in *Rocca Enterprises Ltd. et al. v. University Press of New Brunswick Ltd.* (1989), 103 N.B.R. (2d) 224 (Q.B.), [1989] N.B.J. No. 621 (QL), our

*Rules of Court* authorize discoveries "conducted on a broad base" [para. 9]. Relevance, in the discovery context, stands to be assessed broadly (see *Stamper and Di Domenicantonio v. Canadian National Railway Company* (1985), 63 N.B.R. (2d) 342 (C.A.), [1985] N.B.J. No. 218 (QL), para. 17, per Hoyt, J.A. (as he then was). Thus, a question meets the relational requirement if it touches upon a subject having a "semblance of relevance". That test, which has long been the benchmark in Ontario, is echoed, in varied formulations, throughout the jurisprudence in this jurisdiction (see, for example, *Rocca Enterprises Ltd. and Fougère v. Acadia Drug Ltd. et al.* (1993), 206 N.B.R. (2d) 1 (Q.B.), [1993] N.B.J. No. 405 (QL), per Riordon J. Any evidence that "may" be material to the issues raised by the pleadings must be answered (see *Williams et al.*, at para. 19 and *Ross v. New Brunswick Teachers Association and Beutel* (1996), 174 N.B.R. (2d) 236, [1996] N.B.J. No. 160 (QL), para. 10). While all agree discovery may not delve into material bearing no relation to the issues raised in the pleadings, it has been universally accepted that relational pertinence stands to be determined on a generous reading of the allegations in the pleadings (see *Seven Seas Restaurant*, para. 6). In *Slattery (Bankrupt) v. Slattery et al.* (1989), 95 N.B.R. (2d) 422 (Q.B.), [1989] N.B.J. No. 310 (QL), para. 10, Justice Jones acknowledged that "[c]ourts have generally given a wide interpretation to relevancy" before citing, with approval, Justice Dickson's views on point in *Seven Seas Restaurant*.

Our jurisprudence pertaining to the scope of oral discovery mirrors Ontario case law on the subject. In Choate on Discovery, looseleaf, 2nd ed. (Scarborough, Ont.: Carswell, 1993), the

authors explain, at pages 2-94.2 et seq., that "[s]ubstantial latitude is given to the examiner so that a full examination may be carried out pertaining to the issues". They go on to state that relevance in this context must be assessed "with some latitude" by reference to the pleadings. In my view, the phrase "any proper question relating to an issue in the action" found in Rule 32.06(1), like the corresponding and substantively equivalent phrase in Rule 31.06(1) of Ontario's Rules of Civil Procedure ("any proper question relating to any matter in issue") permits more exploratory latitude than authorized by the rules of evidence applicable at trial. More importantly for our present purposes, *I accept the proposition that a question meets the "semblance of relevance" test if, given the wide berth allowed to examining counsel, the answer may lead to the discovery of admissible evidence (see Holmsted and Watson, Ontario Civil Procedure, at 31-66).*" [Emphasis added]

[25] Thus, the touchstones for relevancy determination at the examination for discovery stage are: "a semblance of relevancy" or that: "the answer may lead to the discovery of admissible evidence." It is thus clear that the common law admissibility requirements of relevancy in the trial context have been further reduced at this early point in the proceedings.

#### **Privacy - Generally**

[26] As shall be seen, determining the scope of individual privacy can be somewhat assisted by analyzing some of the judgments on privacy in criminal cases. The Supreme Court has cautioned judges against the direct use of such Charter jurisprudence as a shield in private litigation. In *Hill v. Church of Scientology* [1995] 2 S.C.R. 130 (S.C.C.) Cory J. described it at paragraphs 93-6:

"When determining how the Charter applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.

In *Dolphin Delivery*, supra, it was noted that the Charter sets out those specific constitutional duties which the state owes to its citizens. When government action is challenged, whether it is based on legislation or the common law, the cause of action is founded upon a Charter right. The claimant alleges that the state has breached its constitutional duty. The state, in turn, must justify that breach. While criminal cases present the prime example of government action, challenges to government action can also arise in civil cases. The state's obligation to uphold its constitutional duties is no less pressing in the civil sphere than in the criminal. The two cases of *B.C.G.E.U.*, supra, and *Dagenais*, supra, present a very specific type of

"government action" in the civil context. In both cases, the Court was called upon to consider the operations of the Court and to determine the extent of its own jurisdiction to consider matters which were essentially public in nature. The cases did not involve strictly private litigation. Therefore, they must be approached with caution when considering what analysis should be applied in purely private civil litigation.

Private parties owe each other no constitutional duties and cannot found their cause of action upon a Charter right. The party challenging the common law cannot allege that the common law violates a Charter right because, quite simply, Charter rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with Charter values. It is very important to draw this distinction between Charter rights and Charter values. Care must be taken not to expand the application of the Charter beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to Charter scrutiny. Therefore, in the context of civil litigation involving only private parties, the Charter will "apply" to the common law only to the extent that the common law is found to be inconsistent with Charter values.

Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking Charter values into account. Far-reaching changes to the common law must be left to the legislature."

[27] Subsequently in *A.M. v. Ryan* [1997] 1 S.C.R. 157 (S.C.C.) McLachlin J. (as she then was) added to our understanding of the interrelation between the two types of proceedings at paragraphs 22 and 30 (in part ) and 38:

"I should pause here to note that in looking to the Charter, it is important to bear in mind the distinction drawn by this Court between actually applying the Charter to the common law, on the one hand, and ensuring that the common law reflects Charter values, on the other..

As noted, the common law must develop in a way that reflects emerging Charter values. It follows that the factors balanced under the fourth part of the test for privilege should be updated to reflect relevant Charter values. One such value is the interest affirmed by s. 8 of the Charter of each person in privacy. Another is the right of every person embodied in s. 15 of the Charter to equal treatment and benefit of the law.

It remains to consider the argument that by commencing the proceedings against the respondent Dr. Ryan, the appellant has forfeited her right to confidentiality. I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a licence to delve into private aspects of her life which need not be probed for the proper disposition of the litigation."

[28] Those directions provide helpful guidance concerning the limited use of *Charter* jurisprudence in assessing privacy interests in private litigation.

[29] Societal concern for individual privacy has grown significantly in Canada's recent past principally due to: 1) a plethora of statutory enactments that have broadened the protection of individual privacy rights, 2) the evolution of the *Canadian Charter of Rights and Freedoms* (*the Charter*) and 3) the common law developments during the same period. In the past several years, principally driven by rapid advances in technology, the Supreme Court has turned its focus to this area of the law and provided considerable guidance in helping Canadians understand what privacy rights one can reasonably expect to be protected in such a technologically advanced country as Canada where the evolution of technological science and its proliferation has made it difficult to defend against the loss of individual privacy.

[30] The subject area has been logically divided by the Supreme Court into three important aspects of privacy. At the apex of this paradigm lies privacy of the person, principally as it relates to bodily integrity. Beneath it

lie those rights that relate to territorial privacy and informational privacy. It is with that last subcategory that this application is concerned.

[31] Determining where the line between a reasonable and unreasonable expectation of privacy lies has been made more comprehensible as a result of the seminal decision on this issue in the criminal case of *R. v. Tessling* [2004] 3 S.C.R. 43 (S.C.C.) where Binnie J. made these important general observations concerning informational privacy at paragraph 25:

"Privacy is a protean concept, and the difficult issue is where the "reasonableness" line should be drawn. Sopinka J. offered a response to this question in the context of informational privacy in *Plant, supra*, at p. 293, as follows:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. [Emphasis added.]"

[32] He had earlier set out the general perimeters for a reasonable expectation of privacy at paragraph 23 when he said:

"Beyond our bodies and the places where we live and work, however, lies the thorny question of how much *information* about ourselves and activities we are entitled to shield from the curious eyes of the state (*R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60). This includes commercial information locked in a safe kept in a restaurant owned by the accused (*R. v. Law*, [02] 1 S.C.R. 227, 2002 SCC10, at para. 16). Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy [page445] and Freedom* (1970), at p. 7. Its protection is predicated on the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain ... as he sees fit.

(Report of a Task Force established jointly by Department of Communications/Department of Justice, *Privacy and Computers* (1972), at p. 13)"

[33] As noted, in framing the informational privacy right sought to be protected in this instance it is important to bear in mind that the principles outlined above are derived from criminal cases in which state activity into individual privacy was the subject of review. As has been stated,

somewhat different rules derived from the same general foundational principles guide the analysis in private litigation proceedings such as these.

### **The Individual Expectation of Privacy at the Discovery Stage**

[34] The Respondent has claimed an individual privacy right with respect to her general Internet use records as well as her social network use records on the Internet social network site Facebook maintained by her service provider Bell-Aliant. It is not clear at this point whether Bell-Aliant has the capacity to generate discrete Facebook use data and the requested order is conditional on those records being in existence or able to be specifically identified and generated.

[35] Several cases have dealt with similar issues as are raised here. They assist in determining the scope of privacy rights to computer records and data in civil proceedings:

- 1) *Park v .Mullen* [2005] B.C.J. No. 285 (B.C.S.C.) The claim being pursued was for damages for cognitive dysfunction. The request was for an itemized list of all files stored on the Plaintiff's computer for a

period of three and one half years. She was, both before and after the accident, a human resources counsellor who used her computer for work and personal use at home. Several other individuals were users of the computer. Client's files were acknowledged to be part of the electronically stored inventory. The application was dismissed as being overly broad and an unwarranted intrusion into the Plaintiff's privacy as well as that of others not a party to the proceedings. In addition, it had not been established that production of the file list was relevant to the trial issue.

- 2) *Ireland v. Low* [2005] B.C.J. No. 159 (B.C.S.C.) The Plaintiff brought an action for injuries sustained in a car accident alleging loss of capacity to earn income. In his spare time he operated a home based business building and selling trailers. It was the Defendant's claim that computer activity could be indicative of the level of business activity he was able to maintain after the accident. The request was specifically that the computer hard drive or memory be delivered to an expert for copying and a file list of all files, emails and instant messenger communications and deleted files

be turned over to the Defendant. There were other computer users, namely, the Plaintiff's wife and stepson. Creating a file list would necessarily oblige the expert to look at some of the files and would also involve an analysis of the data. The motion was denied on the basis that it constituted an unwarranted intrusion into the privacy of third parties and the costs to generate the information would be excessive. A partial order issued against the Plaintiff directing him to certify that his list of documents included any electronic files and emails he had been able to retrieve from his recycle bin that were relevant.

3) *Bishop v. Minichiello* 2009] B.C.J. No. 692 (B.C.S.C.)

The Defendant, in a claim for damages for brain injury, brought an application for production of the hard drive of the family computer specifically requesting an accounting of the amount of time the Plaintiff spent on the social network site Facebook between 11:00 p.m. and 5:00 a.m. The request was aimed at addressing the issue of his habitual sleep time and his ability to work. The Plaintiff had claimed that fatigue was preventing him from maintaining employment. The order was granted on the basis that it was relevant to past and future wage

loss and was so narrow in its scope that it would not delve unnecessarily into the Plaintiff's privacy.

- 4) *Pritchard v. Crosfield* [2005] B.C.J. No. 3032 (B.C.S.C.) Master Patterson (In Chambers) The claim arose as a result of a car accident in which the Plaintiff claimed head injuries and possible neurological damage. Subsequent to the accident the Plaintiff began working in a family business from his home using a computer. The application requested a virtual stripping of the computer hard drive. The Plaintiff agreed to produce all relevant documents, files and emails generated on the computer. The application was dismissed as it related to emails and Internet searches as it amounted to an unwarranted invasion of the privacy of the individual. The Plaintiff was ordered to prepare and produce a list of documents that were available on the computer related to the business.

- 5) *Leduc v. Roman* [2009] O.J. No. 681 (O.S.C.J.) The Plaintiff was involved in a car accident that he alleged prevented him from engaging in sporting activities. Other evidence established that he was a

person who had an account with Facebook. The Defendant sought production of his profile page from Facebook. The order was granted on a limited basis. It was apparent that the Plaintiff's profile page could potentially provide content relevant to the Plaintiff's post-accident lifestyle and did not constitute a fishing expedition. However, the Master being appealed from could possibly have avoided the appeal ruling had he allowed cross-examination of the Plaintiff on his supplemental affidavit of documents to ascertain the relevance of the content posted by the Plaintiff.

[36] It is clear from these judgments that the success of an application to retrieve an individual's electronic computer data principally depends upon the degree of intrusion into the private lifestyle choices and electronic activity of the Internet user as well as the probative values of the information sought.

[37] A separate issue concerns the likelihood that third party privacy rights may be affected by any disclosure. Third party privacy rights are to be given special attention when those third parties are not parties to the legal proceedings. See, for example, the concern expressed by

Robertson J.A for third party tax payer privacy rights in the case of *R. v. Chapelstone Developments Ltd.* [2004] N.B.J. No. 450 (N.B.C.A.) beginning at paragraph 30.

## CONCLUSION

[38] In this instance I believe that the probative value of the information requested is of such a level that its disclosure will not infringe upon a reasonable expectation of privacy. That is so because the information sought is not, at least at this stage of proceedings, information that could qualify as revealing very personal information over which most right thinking Canadians would expect a reasonable expectation of privacy. Put another way, it does not reveal: "intimate details of the lifestyle and personal choices of the individual."

[39] Having said that, it appears clear that this may be only the first of more questioning by The Defendant's counsel, Mr. Morrison, of the Plaintiff with respect to her general Internet and specific Facebook usage at the examination for discovery. If the questioning attempts to delve deeper into the Plaintiffs lifestyle as it pertains to these subjects, relevancy and privacy, it will require a re-

examination of the reasonable limits of such questioning. For example, included in that assessment will be the extent to which an individual may claim a reasonable expectation of privacy in the use of social networking site electronic data.

[40] That said, it cannot be reasonably concluded that the specific information sought in this motion does not qualify as meeting a "semblance of relevance" test which is what is required at this stage for an order to issue. It does so, by possibly providing a window into what physical capacity the Plaintiff has to keyboard, access the Internet and communicate with family friends and associates on Facebook and thus what capacity she may have to work. In that sense: "It may lead to the discovery of admissible evidence", the threshold required for the evidence to be produced.

[41] Incidentally, it must not be forgotten that this legal action was commenced by the Plaintiff and in launching it she has implicitly accepted certain intrusions into what otherwise might be private information the disclosure of which would ordinarily be left to her own personal judgment. Of course those intrusions are subject to the implied

undertaking of confidentiality except with respect to the ongoing proceeding.

[42] The Respondent has argued that if an order is made to disclose the information sought it will mine data, in the form of use records, of others including family members who have had access to the Plaintiff's computer while visiting her. On that issue, it is important to note that the information requested does not trench upon third party privacy rights that ought to be protected by the court in these circumstances where those individuals, because they are not a party to the proceedings, have no legal voice to be heard. At this point the only specific account and individual data request relates to the Plaintiff's use of her personal Facebook account. Even in those circumstances the request is directed at account use time only. Issuing the order requested will apply the common law in a way that is consistent with *Charter* the values on privacy.

[43] The Respondent has also posited that the relevancy, from a probative value standpoint, of the use data records that could be generated has been unacceptably compromised by other users who have shared the Internet account while visiting the Plaintiff. That argument is one more properly made at trial in the event the evidence of account use is

admitted as part of the Defendant's case. See, to the same effect, *Bishop v. Michichiello* (*supra*) at paragraph 54.

[44] There is also the matter of the confidentiality of use of the information that any search might reveal. That, of course, is covered by the implicit undertaking that all parties and their counsel are deemed to accept and apply, that they will not use or impart the information received except in the proceeding in which it is ordered disclosed. *Clements v. Fougere* [2008] N.B.J. No. 18 (N.B.C.A.) per Drapeau C.J. at paragraph 5.

[45] Finally, a number of the decisions referred to that have seen requests for such information rejected have noted the significant costs associated with collating and converting such electronic data into usable form. It has been identified as one of the reasons for the rejection of such a request. The cost issue is not unique to civil proceedings. It has become a serious issue when production orders are made utilizing the provisions of s. 487.013 of the *Criminal Code* to compel the production of voluminous bank records in proceedings. Cost is invariably an issue. In the present case the defendant has agreed to pay any costs associated with the data search and production thus eliminating any concerns over costs.

[46] An order will thus issue in favour of the Applicant:

1) That the Plaintiff, Rosemary Carter obtain from Bell-Aliant, her Internet Service Provider, a history of her computer account use at her residence from November 27, 2004 until the date of this judgment;

2) That the Plaintiff, Rosemary Carter request that Bell-Aliant, her Internet Service Provider, attempt to generate an account use history from November 27, 2004 until the date of this judgment of her use of the social network site Facebook, if such a record is able to be generated;

3) The account use histories referred to in 1) and 2) once obtained shall be distributed by her to the Defendants in this proceeding upon being prepared;

4) The Defendants in these proceedings shall keep confidential the information contained in these documents and make use of them only in these proceedings and for any legitimate purpose connected to the underlying proceeding and in no

circumstances shall any part of it be disclosed to anyone not entitled to access under this order or any expert not specifically engaged by a party to this proceeding for the specific purpose of preparing an opinion on an issue directly related to this or the underlying proceeding;

5) The costs associated with retrieval and collating the information on the account use history referred to in this order shall be borne by the defendant, Herbert Connors.

Ms. Carter is ordered to pay costs only to the Respondent Herbert Connors in the amount of \$500.00 as the Defendant Company did not actively participate in the motion.

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Fred Ferguson J.Q.B.