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FOCUS ON LITIGATION LAW

Facebook and litigation: Anything you post on the Web can and will be used against you



Sudevi Mukherjee-Gothi

A recent Ontario Court of Appeal decision underlines a message that many in our

society don't seem to grasp: postings on the Internet – even on a restricted viewing access site – are not private and can be used against you in litigation.

As of June, 2008, Facebook had more than 70 million active users. People use it as a network to share photographs and stay connected with others. It was only a matter of time before the courts were called upon to deal with the impact of Facebook in

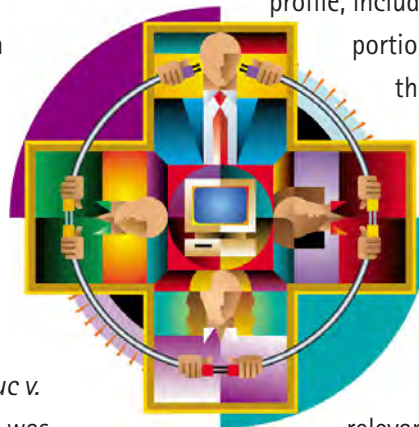
civil litigation, specifically in the realm of personal-injury lawsuits.

In Ontario, lawsuits are governed by the *Rules of Civil Procedure*, which impose an obligation on all parties in litigation to produce to the other parties every document relating to any matter at issue (with certain restrictions, such as solicitor and client privilege). These documents are listed in an Affidavit of Documents, which is sworn by the party and delivered prior to Examinations for Discovery.

In the 2009 Ontario Appeal decision in *Leduc v. Roman*, a plaintiff who was involved in a motor-vehicle accident claimed the accident caused limitations to his personal life.

At a medical examination arranged by the defendant's insurance company, the plaintiff advised a doctor that he had a number of friends on Facebook. Armed with that information, counsel for the defence requested an up-to-date Affidavit of

Documents, including all Facebook postings and conducted a search on Facebook that found the plaintiff had a Facebook profile but limited access to his site to designated "friends." The defence brought a motion for the preservation of all information in the plaintiff's Facebook profile and production of all information on the profile, including the restricted



portions available only to the plaintiff's Facebook friends. A lower court held that the defendants had the *onus* of demonstrating that the plaintiff had relevant materials on his Facebook profile, an *onus*, the court said, that had not been met.

The decision of the lower court was overturned on appeal. The Court of Appeal followed an earlier case, *Murphy v. Perger*, which had dealt with the production of "access-limited content" on a Facebook profile. In *Murphy*, the defendant moved for

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Focus Facts

Compensation for personal injuries arising out of a motor-vehicle accident in Ontario are subject to a deductible in respect of damages for pain and suffering, pursuant to the *Insurance Act*.

Currently, \$30,000 is deductible for general damages less than \$100,000 and \$15,000 in respect of family members' claims for loss of care, guidance and companionship. Recommendations have been made to the Financial Services Commission of Ontario for the government to reduce the deductibles to \$20,000 and \$10,000 respectively.

Facebook... (cont'd.)

production of the plaintiff's Facebook Web site. In that case, too, the plaintiff was making claims for personal injuries as a result of a motor-vehicle accident. Counsel for the plaintiff had already presented photographs of the plaintiff participating in various activities before the accident.

In *Murphy*, it was clear the plaintiff considered the photographs relevant to her claim. It was concluded that any invasion of privacy was minimal and outweighed by the defendant's need to have the photographs in order to assess the case. Furthermore, 366 people had already been granted access to the private site. Accordingly, production of the Web site and the photographs was ordered.

In *Leduc*, the Court of Appeal decided that a party who maintains a private or limited access profile is in no different position than one who sets up a publicly available profile.

Both are obliged to identify and produce any postings that relate to any matter at issue in the action.

In the *Leduc* appeal, because discoveries had already taken place, the Court allowed counsel to cross-examine the plaintiff on the affidavit regarding the kind of content posted on his Facebook profile.

Facebook is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. In the hands of a skilled civil litigator, this can be very useful information that can be used against you.

Sudevi Mukherjee-Gothi is a member of our Insurance Defence Group. Her litigation practice includes property and bodily injury claims in addition to providing opinions on insurance coverage issues.

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FOCUS ON BUSINESS LAW

What do real estate developers, real estate purchasers, criminals and terrorists have in common?



Jeffrey Alpert

Since February 20, 2009, they are all affected by Canada's *Proceeds of Crime (Money Laundering) and Terrorist Financing*

Act ("the Act").

The purpose of this legislation is the detection and deterrence of

money laundering and financing of terrorist activities. "Money laundering" is the disguising of the source of money or assets arising from criminal activities.

A number of financial institutions and businesses are already subject to the Act, which requires them to keep certain records, identify their clients, and file certain reports with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).

Real estate developers now have three main types of obligation:

1. Reporting
2. Record-keeping
3. Compliance regime

A "real estate developer" includes an individual or entity (other than a real estate broker or sales representative) who has sold the following properties to the public in any year after 2007:

- At least five new houses or condominium units.
- At least one new commercial or industrial building.
- At least one new multi-residential building, each of which contains five or more residential units.
- At least two new multi-unit residential buildings that together contain five or more residential units.

The reporting obligations of a real estate developer to FINTRAC under the Act include the following:

- To report where there are reasonable grounds to suspect that a transaction is related to the commission of money laundering or terrorist activity financing.
- To report where the developer knows that there is property in the developer's possession or control that is owned or controlled by a terrorist or a terrorist group.
- To report large cash transactions involving amounts of \$10,000 or more received in cash.

The record-keeping obligations of a real estate developer under the Act include:

- A receipt of funds record for every amount received in the course of a single transaction.
- A large-cash-transaction record.



- Client-information records, including copies of valid government-issued identification, such as a birth certificate, driver's licence, or passport.

Additional information is required in sale situations in which the real estate developer does not meet with the buyer.

The compliance regime obligations of a real estate developer under the Act include:

- The appointment of a compliance officer.
- The development and application of written compliance policies and procedures.
- The assessment and documentation of risks of money laundering and terrorist financing and measures to mitigate higher risks.
- Implementation and documentation of an ongoing compliance training program.
- A documented review of the effectiveness of policies and procedures, training program, and risk management.

If a real estate developer fails to comply with the requirements of the Act, it can lead to administrative monetary penalties and/or criminal charges. Penalties include up to five years' imprisonment and fines of up to \$2 million.

Focus Facts

Canada's newest stock exchange, the Canadian National Stock Exchange (CNSX, formerly CNQ) is now a Designated Stock Exchange under the *Income Tax Act*. This means that securities listed on the CNSX are eligible for contribution to registered retirement savings plans and tax free savings accounts, making equity securities of CNSX listed companies even more attractive for investors.

Please contact any one of our Corporate Finance Group for information on listing your company's securities on CNSX.

Torkin Manes LLP

Effective March 15, 2009, our firm name has changed from Torkin Manes Cohen Arbus LLP to Torkin Manes LLP. Please amend your records to reflect this change.

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What do... (cont'd.)

Purchasers who buy properties from real estate developers should be prepared to provide the necessary information required under the Act. These regulations coincide with new regulations recently put into place by the Law Society of Upper Canada that require lawyers to collect new information with respect to clients in addition to information collected in the past.

This legislation highlights a broader trend in Canada. It appears that governments now expect that professionals and the general public will co-operate with the authorities in fighting money laundering and terrorism. Whether this type of measure will assist in combating these threats remains to be seen.

Jeffrey Alpert acts for banks and other lenders in commercial loan transactions secured by real estate and personal property. He has expertise in asset-based lending, including receivables purchase financing. His practice also includes corporate and business law.

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FOCUS ON CORPORATE/COMMERCIAL LAW

Maxed out: How new measures to prevent credit card fraud could affect your business



Sonal Thomas

In 2007, more than 45 million credit card numbers were stolen from two retail stores in Miami because of

poorly protected wireless networks. The parent company of the retailer, TJX Companies Inc. set aside \$250 million to fix the flaws in its security system, pay various fines and fund the several lawsuits spawned by the breach. This was possibly the largest and costliest breach of credit card security in history. As a result of this and other headline-grabbing thefts of personal data, the credit card industry has put forward

new rules to protect against the unauthorized access to and theft of credit card information. The new rules apply to all companies that collect, store, process or transmit payment-card information, ranging from large financial institutions to small firms that sell products online.

The Payment Card Industry Data Security Standard (PCI DSS) consists of a set of rules devised to enhance security and protect consumer data. It was developed by payment brands like Visa, Mastercard and Discover Card to ensure global uniform security standards.



The PCI DSS imposes 12 requirements on companies. They are required to:

1. Install and maintain a firewall to protect cardholder data.

2. Prohibit use of vendor-supplied default passwords and other security parameters.
3. Protect stored cardholder data.
4. Encrypt transmission of cardholder data across networks.
5. Use and regularly update anti-virus software.
6. Develop and maintain secure systems and applications.
7. Restrict access to cardholder data to a need-to-know basis.
8. Assign a unique ID to each person with computer access.
9. Restrict physical access to cardholder data.
10. Track and monitor all access to network resources and cardholder data.
11. Regularly test security systems and processes.
12. Maintain a policy that addresses information security.

The PCI DSS is applicable to a number of situations. Many companies that use third parties to process their customers' credit card information — in an effort to limit their liability in the event of a leak — are now contractually requiring these third parties to be PCI DSS compliant. Payment brands like Visa and Mastercard are requiring that companies that accept payment by credit card also become compliant.

Although the PCI DSS is not law, as of last October credit card companies have begun policing it. Non-compliance could lead to a fine imposed by the credit card companies of \$50,000 for *every instance* of a breach. If several credit card numbers are leaked in one incident, this could result in a heavy financial penalty. Note that if a security breach occurs in an organization that has been assessed as PCI DSS compliant, the organization may still be responsible

for the losses associated with the breach, but will avoid the fine.

In any event, good business practice dictates that an organization's focus should not be on compliance, but rather on the security and protection of personal information. All businesses face the unfortunate reality of increasing incidence of fraud. Experience shows that when businesses take uniform precautionary measures to avoid security breaches, fraudsters find life more difficult. The PCI DSS is an example of the type of measure businesses can expect to be required to implement to prevent fraud.

Sonal Thomas is an associate in our Business Law Group and her practice focuses on all aspects of corporate law.

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Focus | Facts

A new type of privilege is emerging in a purely commercial context in an effort to foster commercial transactions: common interest privilege. This type of privilege allows parties with a common interest to disclose information to each other that would otherwise be protected by another type of privilege, without waiving the existing privilege. For example, a vendor would be able to share legal advice among the other parties to a single transaction without being deemed to have waived solicitor-client privilege for all purposes.

FOCUS ON REAL ESTATE LAW

Real estate legislation continues greening of Ontario



Nili Birshtein

The Ontario government is getting ready to introduce sweeping legislation that will implement changes

to real estate laws in an attempt to foster a green economic future. Bill 150, the *Green Energy Act, 2009* (the "Act") will advance energy

conservation through energy audits and mandatory disclosures to potential purchasers. The Act will affect the real estate sector by amending various statutes such as the *Building Code Act* and the *Planning Act*. The Act will also affect homeowners by requiring mandatory home-energy audits prior to selling or leasing a property. When implemented, the Act will oblige everyone who offers to sell or lease

an interest in real property for a term exceeding a prescribed period (yet to be determined) to provide information, reports or ratings related to the property's energy consumption and efficiency. The Act will impose an additional duty on anyone acting as an agent for the seller or lessor to inform the seller or lessor of any request for such information, reports or ratings.

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Focus Facts

The *Apology Act* became law on April 23, 2009, making apologies, including an expression of sympathy or regret, inadmissible as evidence of fault or liability. Insurance companies also cannot deny coverage simply for saying sorry. The new law does not apply to testimony in civil or administrative proceeding, including out of court examinations.

For more details about this legislation, read "Can doctors apologize?" in our Fall 2008 issue at www.torkinmanes.com/publications/pdf/focusfall2008.pdf.

Greening of Ontario... (cont'd.)

Bill 101, the *Home Energy Rating Act, 2008*, a private member's bill that passed its second reading and is now before the Standing Committee on Finance and Economic Affairs, set the stage for the portion of the Act dealing with home energy audits. Bill 101 requires the preparation of a home-energy rating report for detached and semi-detached homes and low-rise multi-unit residential buildings. The preparation of a home audit would be obligatory in the following circumstance:

- When selling or leasing a new home or building for which an application for a building permit is made after January 1, 2010.
- When entering into an agreement of purchase and sale for an existing

home or building on or after January 1, 2011.

- When entering into a tenancy agreement for the lease of a home or building on or after January 1, 2012.

As the *Home Energy Rating Act* is a private members' bill, it may never become law. That does not end the story, however, as it is widely expected that the government will incorporate most of the important provisions of Bill 101 into the *Green Energy Act* anyway.

Nili Birshtein is an associate in our Real Estate Group. She is involved in a wide range of matters, including the acquisition, sale and financing of commercial and residential real estate.

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FOCUS ON TRUSTS AND ESTATES LAW

Who will manage your financial affairs if you become incapacitated?



Risa Awerbuck

Who would manage your financial affairs if you were in an accident or had a stroke and were incapable of giving

instructions? Would these decisions be made by your spouse, your children, professional advisers or by the government?

In Ontario, we have the right to decide who is to make decisions

concerning the management of our financial affairs if we are incapable of doing so for ourselves. Under the *Substitute Decisions Act*, a person who is eighteen or older and has the required mental capacity, can appoint one or more persons to manage his or her financial affairs both while he or she has capacity to do so and while he or she is incapacitated. The appointment is made in a written document known as a Continuing Power of Attorney for Property. If you become incapacitated and you have not appointed someone to look after

your affairs, the Public Guardian and Trustee, a government official, will manage your property until the appointment of an attorney has been completed. The process of appointing an attorney for property is lengthy, time consuming, expensive and easily avoidable.

If you have property outside of Ontario, whether it is a bank account, investment account or real estate, your Continuing Power of Attorney for Property prepared in Ontario may not be in a form that is acceptable outside of the province. This also

applies to property held in other provinces. Accordingly, it is prudent to have a separate power of attorney document prepared in each jurisdiction where you hold property to ensure that it meets that jurisdiction's legal requirements. At a minimum, your Ontario power of attorney document should be reviewed by a lawyer in the other jurisdiction where you hold property.



sign on the account, or if you have been appointed as your child's attorney for property.

Your Continuing Power of Attorney for Property is an integral part of

your estate plan as your attorneys may be acting for years, and unlike your Will, there are no instructions to follow. It is imperative that you appoint attorneys whom

you trust, who have the ability to manage your financial affairs in a prudent manner and who will act in co-operation with your family.

Risa Awerbuck is a member of our Trusts and Estates Group. Risa provides advice to clients on estate planning matters in connection with the preparation of wills, trusts and power of attorney documents.

She can be reached at 416 777 5425, or rawerbuck@torkinmanes.com.

Given that many of us are members of the "sandwich generation," we should ensure that our elderly parents and young adult children (over age 18), also have a Continuing Power of Attorney for Property in place. For instance, if your child is away at university and has a bank account you transfer money into regularly for payment of expenses or if you have a family trust from which your child receives funds, once your child is 18-years-old, you no longer have authority to deal with his or her account. You will be permitted access to your child's account only if it is held jointly, if you are authorized to

Focus Facts

The process of insolvency reform in Canada continues to move ahead at a glacial pace. The latest in the confusing line of Acts, Bills, Amendments and Motions that the government has used to implement a sweeping array of changes to Canadian insolvency law is the Tories' budget bill, introduced in January 2009, to implement the federal budget. Buried among the various budget measures was an amendment to the Wage Earner Protection Programme Act ("WEPPA") that adds severance and termination pay to the definition of "Wages" under that Act.

WEPPA is a government fund that provides up to \$3,000 in unpaid wages to workers who are terminated as a result of the bankruptcy or receivership of their employer. Formerly, "wages" meant regular pay and vacation pay earned but not paid in the six months prior to bankruptcy or receivership. Now, severance and termination pay is also included. This change will substantially increase the amounts payable to former employees by the government. It may also have the side effect of creating major headaches for trustees and receivers.

Is there a topic you would like us to cover in a future issue of *Focus*? Visit torkinmanes.com and let us know.

Torkin|Manes Update

NEW PARTNERS

We are pleased to announce that **Jeffrey Alpert** and **Lisa Corrente** were admitted to the partnership, effective January 1, 2009.

NEW LAWYERS

We are pleased to announce that the following lawyers have joined the firm.

Daniela T. Di Rezze - Family
Risa Awerbuck - Trusts and Estates
Rachel Nusinoff - Family

ANNOUNCEMENTS AND NEWS

Howard Burshtein spoke on succession planning at the Annual Ontario Association of Architects Conference on May 8.

On May 7, **Linda Godel** co-chaired the National Charity Law Symposium, hosted by the CBA and OBA Charity and Not-for-Profit Law Sections and the Continuing Legal Education Committee.

For the for the 6th year in a row, **Sidney Troister** chaired the Law Society's Annual Real Estate Law Summit on April 22 & 23.

On April 3, **Gregory Hersen** presented "Managing Risk on Construction Projects - A Legal Perspective" to the Building Industry and Land Development Association. He also presented "Bidding and Tendering - Strategies for Minimizing and Eliminating Risk," at the Osgoode Professional Development Program, on January 29.

On March 25 and April 1, our **Labour Relations and Employment Law Group**

presented "Managing in Difficult Times - Issues and Options for Employers."

On March 26, members of our **Business Law Group** visited the offices of SF Partnership, LLP and presented a seminar entitled, "The Big Ds: Divorce, Death, Downsizing and Debt."

In March, the Law Society of Upper Canada appointed **Lorne Wolfson** to the Family Law Rules Committee. As well, Lorne was quoted in the February 5 issue of the *Globe & Mail* article entitled "Divorce Awards Can Adjust to Tough Times."

Jodi Kovitz wrote "Separating couples face uncertain times," for *The Lawyers Weekly* February 20 issue.

David Golden chaired the Osgoode Professional Development Program, "Legal Risk Management for Long-Term Care Facilities," on February 20.

Jeffrey Simpson presented "A Summary of the Latest Amendments to the *Bankruptcy and Insolvency Act* regarding the treatment of Personal Bankruptcy Discharges, at the Ontario Bar Association's 2009 Institute of Continuing Legal Education Program on February 2.

Co-Ordinator for the OBA Insurance Executive, **Sudevi Mukherjee-Gothi** hosted a dinner seminar on "Jury Openings and Closings" to the OBA Insurance Section on November 19.

Sabina Mexis updated the issues of the Income Tax and Family Law Newsletter published by well-known legal publisher, LexisNexis.

Torkin Manes Charity Golf Tournament

Our Torkin Manes Charity Golf Tournament to benefit the SickKids Foundation will be held at Silver Lakes Golf and Country Club on **Thursday, June 11.**

For more information, please call Michelle Thompson at 416 643 8816.

Baycrest ProAm Hockey

On April 24-25, **Irv Kleiner, Danny Melamed, Michael Hanley, Alan Bronstein, and Len Rodness** participated in the 4th Annual Baycrest International Pro-Am Hockey Tournament at the York Gardens Arenas, in support of Alzheimer's disease research and treatment. Each team drafted and played with an NHL Alumnus. The Torkin Manes players and their team members raised more than \$180,000 in support of this worthy cause. Thank you to everyone who supported our players as they survived two days of hockey while "sticking it to Alzheimers."

Sporting Life 10K

Torkin Manes and its friends and clients raised over \$7,500 in the Sporting Life 10K Challenge to benefit Camp Oochigeas for Children with Cancer. Thank you to so many of you who made a donation to Camp Oochigeas in support of our team.

Focus is published regularly by Torkin Manes LLP, Barristers & Solicitors. The contents are of a general nature, do not constitute legal advice, and are not intended to be a full and complete analysis of the topics. Before applying the concepts discussed in *Focus*, it is imperative that you consult your legal advisor.

If you would like to receive *Focus* by e-mail, please visit www.torkinmanes.com, or call Michelle Thompson at 416 643 8816, or e-mail mthompson@torkinmanes.com.

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