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Social media: a management tool, or another risk to manage?

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In the late 19th century, the invention of the telephone ushered in a new age of communications. In 2004, little more than a century later, the advent of Web 2.0 revolutionized the way individuals interact, both privately and in the workplace. The word “productivity” has taken on a new meaning. Popular social networks, such as Facebook, MySpace, Google+, Twitter and LinkedIn, enable us to exchange information immediately, to our benefit as well as detriment. On the Internet, we can now express our views in complete freedom, often under the cover of anonymity. A new vocabulary has sprung up, and emoticons are used to convey feelings.

This new social reality has meant new challenges for business administrators and legal professionals alike. The Web – and social networks in particular – has turned out to be a mother lode of information for some, but hazards also exist. Among the questions we discuss in this article, we will investigate the ability to use information gathered from social networking sites for legal purposes, as well as the consequences of misuse.

1- Using social networks for legal purposes

The *Act to establish a legal framework for information technology*, passed by Quebec’s National Assembly in 2001, was aimed at allowing, supporting and defining evidence provided through electronic means, as well as recognizing the fact that, in the age of Internet communications, electronic documents are increasingly replacing paper.

With this law, the government established the notion of legal neutrality for documents submitted as evidence, stating that their value “is neither increased nor diminished solely because of the medium or technology chosen.”¹ This law has important ramifications as ever more organizations move toward the paperless office. However, the integrity of electronic documents is just as important, meaning that we must ensure that the information has not been altered. This integrity must be maintained throughout the life of

¹ *Ibid.*, Article 5.

the document². Moreover, it's the responsibility of the person who disagrees with the evidence submitted to challenge its reliability, since the law presumes the integrity of this type of document³.

As a result, we now legally equate information found on the Internet, including social networks, with a document in writing (i.e. a message created by a person to communicate information) or in audio-visual format (e.g. photograph, audio recording or video), to which the same evidence-related rules apply.

In addition, any evidence obtained in violation of privacy laws, such as emails acquired through unauthorized access to the account of a witness⁴, is considered inadmissible. This issue raises the question of the public or private nature of the information found on social networks. Is an employer allowed to access an employee's private information? Can an insurer challenge a disability claim using photos from Facebook as evidence? Does the law allow for a guilty ruling based on the defendant's online activities?

The courts have yet to rule decisively on privacy issues, but appear to favour the wishes expressed by the account owner. As such, the law protects individuals who have chosen to limit their information to a certain number of friends⁵. In contrast, other judges have ruled that the content found on Facebook does not belong to the private domain, considering the size of a person's list of friends, along with a list equally as large, that of friends of friends.⁶

Otherwise, electronic documents are considered to be equal in value to other forms of evidence. These documents must be submitted in due course⁷, and the defendant may object to the hearsay⁸ they contain.

² *Ibid.*, Article 6.

³ *Ibid.*, Article 7 and Article 89 of the *Code de procédure civile*, L.R.Q., c C-25.

⁴ 9116-8609 *Québec inc. vs. Sénécal*, 2010 QCCS 3308.

⁵ *Schuster vs. Royal & Sun Alliance Insurance Company of Canada*, 2009 CanLII 58971 (ON SC).

⁶ *Landry et Provigo Québec inc. (Maxi & Cie)*, 2011 QCCLP 1802 [*Landry*].

⁷ *Droit de la famille – 102652*, 2010 QCCS 4860.

⁸ *Landry, supra*, note 7.

As an example, the courts have allowed the CSST to challenge the disability claim of an individual whose Facebook page indicated that he had taken part in high-level sporting events while on leave from work.⁹ This person had written that he expected “another big day tomorrow”¹⁰, and had taken part in activities incompatible with his injuries while he was on disability leave¹¹. Evidence gathered from social networks has also been admitted in criminal trials¹².

To sum it up, keep in mind that subject to privacy laws, courts may admit as evidence the content found on a person’s social networking page, if it’s required to assess the credibility of a witness. Consequently, users who believe they can say anything online should take note and exercise caution.

2- Misuse of information and personality rights

The use of social media, whether for personal or work purposes, requires us to follow a code of ethics. Certain rules must be observed in order to protect ourselves against legal action for defamation or invasion of privacy. Personality rights fall within the framework of the right to privacy as enshrined in Quebec’s *Charter of human rights and freedoms*¹³. As such, the unauthorized publication or forwarding of photographs can form the basis of a damages lawsuit¹⁴.

Spreading false information, as well as identity theft, can also justify legal action to obtain compensation. In the case of *Laliberté vs. Transit Éditeur inc*¹⁵, the court ruled that there was no legitimacy in assuming the identity of another person with the intent of giving the impression that this person is the sender of emails and the author of replies.

⁹ *Brisindi et STM (Réseau des autobus)*, 2010 QCCLP 4158.

¹⁰ *Renaud et Ali Excavation inc.*, 2009 QCCLP 4133.

¹¹ *Garderie Les « Chat » ouilleux inc. et Marchese*, 2009 QLLP 7139.

¹² *R. vs. Vaillancourt*, 2011 QCCQ 2434; *Lévis (Ville de) vs. Lachance*, 2011 CanLII 2650 (QC CM).

¹³ L.R.Q., chapter C-12.

¹⁴ *Aubry vs. Editions Vice-versa inc.*, [1998] 1 R.C.S. 591, *J.G. c. M.B.*, 2009 QCCS 2765.

¹⁵ 2009 QCCS 6177.

Defamatory statements made on a blog¹⁶ or on Facebook have also been used against their authors in legal proceedings¹⁷.

These few examples demonstrate the importance of watching what you say and thinking twice before clicking “send”. Employers who could face legal action resulting from the online activities of employees can benefit from establishing clear policies regarding the personal use of the Internet, as well as properly enforcing these policies.

In conclusion, we advise you to keep the following rules in mind:

- An email is equal in value to a letter. Read it over before sending! If you are not willing to sign a letter containing the same message as your email, do not send it.
- Contrary to a written letter, an email can almost always be traced. Be mindful of what you write and ask yourself what your reaction would be if your employer saw the message.
- If your message is of a delicate or confidential nature, the telephone might be the better option. A simple call is often far more effective, personal and private.
- Be careful of the online friends you choose and of the information you share freely.
- Always be sure to have permission before posting personal information about others, or photos of them.
- Remember to respect the intellectual property rights of others.
- Keep in mind that third parties can follow your online activities, and not all people do so with good intentions.

¹⁶ *Corriveau vs. Canoe inc.*, 2010 QCCS 3396 (judged on appeal); *Wade vs. Diop*, 2009 QCCS 350 (appeal rejected), *Blanc vs. Éditions Bang Bang inc.*, 2011 QCCS 2624; *Prud'homme vs. Rawdon (Municipalité de)*, 2010 QCCA 584; *National Bank of Canada vs. Weir*, 2010 QCCS 402.

¹⁷ *Thomas vs. Brand-u Media inc.*, 2011 QCCQ 395.

- Do not get involved in tense debates that risk becoming unpleasant. In the case of an error or misunderstanding, don't hesitate to apologize first.
- Act as though your comments are adding value to the mass of information available online.
- As an employer, remind your employees of the importance of identifying themselves and their position whenever they're representing the company.
- Adopt a clear policy on employees' use of social networking sites, not only in the workplace but also in their private lives.
- Employees must at all times respect the privacy of customers and of the organization.
- Employees who express opinions of their company's products or services must clearly indicate that these views are personal and do not necessarily reflect those of the organization.
- Unless authorized, employees may not use the company logo for personal ends.

When it comes to social media, good judgement remains the ultimate tool to protect yourself.

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