Guess Who's Creeping on Your Facebook

With the end of the school year and beginning of summer, Canadian teenagers are facing an unexpected obstacle to their party-making plans: Facebook. Police have reported using the popular website to monitor the location and size of teenage parties as well as the age of the participants. On June 11, the Ontario Provincial Police (O.P.P.) used Facebook to pre-empt an illegal bush party in Southern Ontario. Notified about plans for the 700 person bash by a member of the public, a police officer wrote on the Facebook group page that police "knew about the illegal event and would patrol the area and lay charges for trespassing" [1]. The teenagers got the message: no one showed up at the party.

A week later, police in Prince Edward Island reported using the website to track the location of prom parties in order to prevent underage drinking and impaired driving [2]. Over the past year, police on college campuses in the United States have used Facebook in their investigations [3]. Indeed, Facebook has proven to be a useful resource for police forces, helping them to identify suspects, find witnesses, and even locate missing persons.

Although the O.P.P. has stated that the "force does not patrol the website for potential illegal activity, instead using it only in conjunction with tips from the public," [4] the use of Facebook as an investigative and surveillance tool, and sometimes as a preventative policing measure, raises the legal issue of privacy rights [5]. Section 8 of the Charter of Rights and Freedoms guarantees that "everyone has the right to be free from unreasonable search and seizure" and thus protects individual privacy from state intrusion. In law, a warrantless search is considered to be unreasonable unless the Crown can show otherwise [6].

A review of the cases surrounding s. 8 provides insight into how Canadian courts might approach the privacy rights of Facebook users. Regina v. Plant [7], a 1993 decision of the Supreme Court of Canada, considered "whether state inspection of computer records implicates s. 8 of the Charter." Plant is the leading case on informational privacy. Informational privacy concerns core biographical details such as "a person's health, age, sexual orientation, a diary, medical files, [or] employment records" [8].

The legal test to determine if there has been a violation of s. 8 asks:

1. whether an individual has a reasonable expectation of privacy in the searched object;
2. If so, whether the state's intrusion was unreasonable.

"Reasonable expectation of privacy," the lynch-pin to issues under s. 8, is an objective test; that is, the court asks what society would consider as reasonable. Plant identified several other factors to consider when balancing an individual's right to privacy against effective law enforcement. These are:

1. the nature of the information;
2. the nature of the relationship between the party releasing the information and the party claiming its confidentiality;
3. the place where the information was obtained;
4. the manner in which it was obtained; and
5. the seriousness of the crime being investigated. [8]

In light of the Plant decision, a court might consider the nature of the information on Facebook. Facebook profiles generally contain core biographical details such as: music, book, and movie preferences; religious and political beliefs and sexual orientation; hometown, address, email, and daily schedule; educational and employment history; and interests, hobbies, club memberships, photos, and relation to friends.

Despite the intimacy of the details on a profile page, the relationship between Facebook Inc. and Facebook users diminishes reasonable expectations of privacy. According to Plant, the legal issue is whether the relationship between Facebook Inc. and Facebook users can be reasonably characterized as confidential [9]. Thus, a court would likely consider that a Facebook profile page is generally easy to access and public in nature. Despite the need for an account accessible via password, any Facebook user can view the profile page of another user if they are on the same network.

Moreover, some have raised privacy concerns regarding the site's current privacy agreement, which states: "We may use information about you that we collect from other sources, including but not limited to newspapers and Internet sources such as blogs, instant messaging services and other users of Facebook to supplement your profile" [10]. Such information can be sold to companies keen to capitalize on emerging trends. Another contractual clause reserves the right to sell user's data to private companies: "We may share your information with third parties, including responsible companies with which we have a relationship" [11]. With increased government powers legislated in the USA Patriot Act, which allows the US government to request information pertaining to Canadian citizens if held by a US company, such a clause may relinquish the privacy rights of Canadians.

The third factor of Plant would depend on the privacy settings of the particular user since it asks whether the police intrusion was into a place "ordinarily considered private." In Plant, Justice McLachlin (as she then was) stated that "computers may and should be private places, where the information they contain is subject to the legal protection arising from a reasonable expectation of privacy…the information may be as private as a house" [10]. The fourth factor asks whether the search was conducted in an intrusive or high-handed manner. It may be relevant whether the police were masquerading as a private citizen or acting in their official capacity while surveying Facebook.

A petitioner's argument for an infringement of s. 8 privacy rights would require the court to attempt to strike a balance between the petitioner's right to control access to his private life and the state's interest in efficient law enforcement. Effective use of public resources in

police investigations – such as a low-cost, cursory search on Facebook for a suspect – is an important factor that would be considered by the courts.

With over 28 million Facebook users, a large proportion of which are under the age of 25, perhaps the issue is not whether Facebook users have a privacy interest in their online profiles, but rather that users are releasing intimate lifestyle details without being aware of their legal rights or the importance of privacy [13]. The right to privacy is a fundamental value in a free and democratic society, central to developing new ideas and encouraging diversity [14]. It has been internationally recognized in both the Universal Declaration on Human Rights (article 12) and the International Covenant on Civil and Political Rights (article 17). Some scholars argue that privacy is crucial to mental health, "because it affords to everyone an environment where they can simply be, rather than be respectable," and crucial to relationships, being "inherent to notions of respect, love, friendship and trust" [15].

In light of the recent police surveillance, Facebook users may want to be wary of who is creeping on their Facebook page.

Cases

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- R. v. Plant, [1993] 3 S.C.R. 281.
- R. v. Tessling, [2004] 3 S.C.R. 432.

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- “Police looking into ‘babykiller’ Facebook group”, CTV News (13 June 2007).
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[2] “Facebook helping police patrol parties,” CBC News (19 June 2007), http://www.cbc.ca/canada/prince-edward-island/story/2007/06/19/prom-facebook.html?ref=rss
[3] Jodi Cohen. “Cop snares college pals in own Web,” Chicago Tribune (10 August 2006), online:http://www.nyu.edu/classes/siva/archives/003401.html. See also: Drew Chalfant, “Facebook postings, photos incriminate dorm party-goers”, The (Kentucky) Northerner (2 November 2005),http://www.thenortherner.com/media/paper527/news/2005/11/02/News/Facebook.Postings.Photos.Incriminate.Dorm.PartyGoers-1042037.shtml.
[4] Douse, supra, note 1.
[5] “Police looking into ‘babykiller’ Facebook group”, CTV News (13 June 2007).
[6] See Terry Romaniuk, “Right To Privacy Index”, Search Warrants Considered Judicially, online: http://members.shaw.ca/tjromaniuk/wp03index.htm.
[7] R. v. Plant, [1993] 3 S.C.R. 281 at 24 [Plant].
[8] John D. R. Craig, “Invasion of Privacy and Charter Values: The Common-Law Tort Awakens” (1997) 42 McGill L.J. 355 at 384 [Invasion].
[9] For an interesting perspective on the contractual relationship between Facebook and Facebook users see: Lauren Gelman, “Facebook Copyright Policy: We own it all – in perpetuity,” The Center for Internet and Society Weblog (23 January 2006), http://cyberlaw.stanford.edu/blogs/gelman/archives003726.shtml.
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[11] Ibid.
[12] Plant, supra, note 7 at 52.
[13] “Facebook” (27 June 2007) Wikipedia, online: <http://en.wikipedia.org/wiki/Facebook>.

[14] Invasion, supra note 8 at 7.
[15] Ibid 7.