THE NAKED TRUTH: DIVORCE AND THE MEDIA

or

Oops! Your privates are showing!

Paper prepared by

TRACEY L. JACKSON, (B.A. LL. B., LL. M.)

and

NATALIE A.M. HILLARY (B.A., J.D.)

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I. OVERVIEW

If there is one truth in divorce law, it is that there is no such thing as privacy. While clients often complain about having to produce agendas, diaries, personal banking statements, credit card bills, personal photographs, emails, Facebook profiles, computer hard-drives, text messages and other personal information, they are sure eager to get their hands on the same documents from their ex-spouses.

Not only do divorce litigants disclose very personal documents and information in the course of their matrimonial litigation, they have no general right to privacy regarding the information disclosed therein.[1] Once the divorce litigant's personal information is in a court proceeding, it might as well be on the front page of the local newspaper or appearing on You-Tube around the world, because the court does very little to protect a litigant's privacy. Information revealed in a divorce case may be of great interest to the media, who has a function to serve in providing information to the general public. In today's society it is the press reports of trials that make the courts truly open to the public. The principle that courts must function openly is fundamental to our system of justice. The public's need to know is undeniable and the court protects that need to know.[2]

The role of the media in the court system was summarized by the Ontario Superior Court of Justice in T.v.T.:

> *The press and other media are the means by which the public obtain information about the justice system. Only a minute fraction of the public has the time to personally access a case before the Court and sit, in what is called the public gallery (no longer a gallery), to witness the proceedings first-hand. The press and media, on the other hand, have representatives who can do just that and report their findings to the public in general.*[3]

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[1] In Michie v. Michie, 2010 BCCA 232, the BCCA upheld the lower court's dismissal of the husband's application for an order restraining his ex-wife from disseminating information about his financial affairs to an estranged business associate, on the grounds that there is no general right of privacy regarding information disclosed in matrimonial litigation.

[2] Nova Scotia (Attorney General) v. MacIntyre (1982),132 D.L.R. (3d) 385 (S.C.C.) at para.1346.

[3] T.v.T. [2003] O.J. no.132 (Ont.Sup.Ct.Jus.) at para. 14.

The intersection of divorce law and the media has always been about striking a balance between the privacy of the litigants and the necessarily public nature of the court system. In no other area of law is this intersection more pronounced than in divorce cases due to the inherently "private" details of the parties' lives that creep into the courtroom. It is in the very process of divorce litigation that one's previously "private" conduct becomes very "public" thereby exposing one's innermost thoughts, actions, habits and secrets. Most of us do not go about our daily activities with the thought that someday, a judge, a courtroom full of observers and perhaps the media, will be judging, commenting and scrutinizing our behaviour. While we may expect to be naked in our bedrooms, we don't necessarily expect to show our privates to the public at large.

With the evolution of new media and social media there is simply more information available that is potentially interesting. While the traditional media has always been interested in a good divorce story, historically, given the limits of media space due to budget constraints, only the most salacious divorce stories captured media attention and therefore were distributed to the masses. The result was that most divorces proceeded in relative obscurity; nobody was particularly interested that Mr. Smith had an affair with Mrs. Jones. However, with the advent of new media, the internet, web-news and social media, the "space" for news is now infinite; everything and anything is potentially newsworthy. We are no longer limited by the size of a newspaper, the cost of producing a newspaper, or the cost of the production of a television broadcast. Now, the creation, publishing, distribution, and consumption of media content has become more democratized, instantaneous and, most importantly, practically free of charge. Without the constraints of budgets and space, any divorce with the slightest juicy detail will capture media attention, induce public consumption and generate commentary both favourable and unfavourable.

Moreover, now that the production and distribution of media content can be done in real time, there is no actual time for reflection, second thoughts, editing, damage control or negotiation on the part of the actors involved. Adulterers used to only fear the private detective hired to snap photographs of hotel room exploits, but now adulterers must be cautious of photographs on Facebook, real-time accounts of one's activities tracked on Twitter, intercepted emails, texts and other messages, and of course, a You-Tube song written by a thinly-disguised scorned lover. These types of evidence, now readily available in the various media are the new life-blood of the divorce lawyer.

It is the divorce lawyer's job to maximize or minimize the potential impact of the grave errors in judgment of their clients. Grave errors in judgment have always been made; the difference today is that somewhere, somehow, somebody has a record of those

errors, just waiting for the right moment for the one to be exalted to the Stature of "Exhibit A".

II. WHAT IS PRIVATE

In divorce proceedings, there are a number of ways in which private information is revealed in court, and is therefore potentially very public. The court is in essence the conduit between the private and public sphere. Increased use of social media sites and advances in technology grant access to deeper secrets, more explicit content, and therefore more exciting news. Therefore, the first steps in protecting one's client from having their dirty laundry aired on the front page of a newspaper or all over the internet, is to protect their privacy as best as possible. Unfortunately, divorce lawyers have few tool at their disposal.

A. What is Privacy?

1) General Privacy Legislation

While several provincial and federal statutes **(See Appendix I)** exist to protect the privacy of individuals, they offer little protection to divorce litigants.

The Privacy Act[4] makes it a tort for a person to "willfully and without a claim of right" violate the privacy of another. This tort does not require proof of damage. The B.C. Court of Appeal confirmed the term "without a claim of right" in Hollinsworth v. BCTV to mean "an honest belief in a state of facts which, if it existed, would be a legal justification or excuse".[5] Notably the Privacy Act does not define "privacy"; the drafters preferred to leave the task of defining it to the courts.[6] Consequently, courts have interpreted privacy to mean "a right to be let alone", and to be "free from unwarranted publicity" and "a right to withhold oneself from public scrutiny if one chooses".[7] Privacy is not an absolute right, but one exercisable to the extents that it is consistent with "law and public policy".[8]

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[4] The Privacy Act, R.S.B.C. 1996, c.373.

[5] Hollinsworth v. B.C.T.V. (1998), 59 B.C.L.R. (3d) 121 (B.C.C.A.) at para. 127.

[6] "Report on The Privacy Act of British Columbia", (2008)*The British Columbia Law Institute*, BCLI Report No. 49 at pg.5.

[7] Davis v. McArthur, (1969), 10 D.L.R. (3d) 250 (BCSC; rev'd 17 D.L.R. (3d) 760 (B.C.C.A.), note 16 at 763 BCCA.

[8] *Ibid.*

The degree of privacy one can expect depends upon, *inter alia*, the nature of the relationships of the parties.[9] Courts appear to accept that persons in a domestic relationship have a lesser degree of privacy protection than do persons in an arm's length relationship.[10]

2) Expectation of Privacy

Under the Privacy Act, there can be no reasonable expectation of privacy in a place normally open to public view, regardless of the nature of the place. In Silber v. British Columbia Broadcasting System Ltd, the plaintiff's struggle with a BCTV reporter on the plaintiff's property was filmed and broadcast. [11] The plaintiff's breach of privacy claim was unsuccessful because the court found that a passerby could view the scene and therefore the plaintiff could not have a reasonable expectation of privacy. While the expectation of privacy is greater in private spaces, if the private space can be viewed from the outside, the expectation of privacy under the Privacy Act cannot be high. For example, if a person appears in a lighted window of their home at night, they cannot complain if they are seen from the street.[12]

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[9] Section 1(2)-(4)of the Privacy Act sets out the degree of privacy to which a person is entitled and reads as follows:

> *(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.*
>
> *(3)In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.*
>
> *(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accompanied by trespass.*
>
> [emphasis added]

Section 2(2) outlines the exceptions of when an act or conduct is not a violation of privacy and includes consent to by some person entitled to consent; authorization by law pertaining to police officers and police investigations; and "the act or conduct was incidental to the exercise of a lawful right of defence of person or property".

[10] In Oliver v. Oliver Docket No. E083900,(trial February 2011; decision currently unreleased), Recently, Madam Justice Fenlon commented that she would be surprised if married couples living in the same house did not have access to each other's emails.

[11] Silber v. British Columbia Broadcasting System Ltd.,(1986) 69 B.C.L.R. 34 (B.C.S.C.).

[12] Milner v. Manufactures Life Insurance Co. 2005 BCSC 1661.

3) Waiver of Expectation

An expectation of privacy can be lost through carelessness or an inadvertent lapse in vigilance. In Milton v. Savinkoff, the court rejected a plaintiff's claim for breach of privacy when she had left topless photos of herself in the defendant's jacket pocket, which the defendant showed to a third party.[13] The court found that the plaintiff had implicitly waived her right to privacy and was indifferent to expectations of privacy by having the film developed. Following Milton, it could be argued that a divorce litigant who shares photographs with friends on an on-line social media website, has no reasonable expectation of privacy.

III. FINDING PRIVATE EVIDENCE

A. The Traditional Approach: Hidden Tapes & Private Investigations

Before the introduction of Facebook walls, public tweeting, and email accounts, good old private investigators and hidden recording devices were hard at work in divorce litigation. For better or worse, these traditional investigative approaches are still prevalent in divorce cases today.

In Canada it is not illegal to record conversations as long as one person participating in the conversation is aware that it is being recorded.

Section 184(1) of the Criminal Code of Canada sets out the general rule regarding illegal interception:

> *Everyone who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.*
> *[emphasis added]*

[13] Milton v. Savinkoff (1993), 18 C.C.L.T. (2d) 288 (B.C.S.C.). The claim predated B.C.'s Privacy Act; the plaintiff sued under The Federal Privacy Act, R.S.C., 1979, c.336, which mirror section 1(2)-(4) of B.C.'s Privacy Act in place today.

Section 184(1) consists of several key words defined as follows:

1. "intercept": includes listen to, record or acquire a communication or acquire the substance, meaning or purpose thereof";[14]

2. "communication": consists of passing ideas, words or information from one person to another and there may be multiple "communications" during one conversation. [15] Communication involves at least two people, in which the communication is directed form one person to another. [16]

3. "private (communication)": may be any oral or telecommunication that is made under circumstances in which it is reasonable for the originator of the communication to expect that it will not be intercepted by any person other than the person intended by the originator to receive it.[17]

Illegal interception may therefore apply not only to recording personal or telephone conversations with a recording device, but also to using a telephone or computer to acquire text and email communications, when the person sending the communications has a reasonable expectation that they will remain private.

Whether a communication is "private" depends on whether the originator had a reasonable expectation of privacy. Some examples in which the court found that the originator had no real expectation of privacy include:

- When a kidnapper made a call to a father for ransom, the kidnapper could have no reasonable expectation that police would not be listening or the call would not be recorded[18]; and

- When the originator sent a message over a pager system which operates so that persons other than the intended recipient may have heard the messages and the

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[14] As defined by Section 183 of the Criminal Code of Canada.

[15] R. v. Goldman, [1980] 1 S.C.R. 976 at 995.

[16] In R. v. Davie, (1980), 54 C.C.C. 92d 216 (B.C.C.A.), it was found that prayer from one person to God is not a communication.

[17] As defined by Section 183 of the Criminal Code of Canada.

[18] R v. Tam (1993), 80 C.C.C. (3d) 476 (B.C.S.C.) at 479.

> originator had not control over who may hear his messages beyond the intended recipient. [19]

Section 182(2) of the Criminal Code provides a number of exceptions to the law against illegal inception. The most important exception in the context of family law cases is section 184(2)(a) states that prohibiting interception of private communications does not apply to:

> *(a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;*

Therefore any intended recipient or originator of a communication is entitled to record it as is any person who is not partaking in the conversation as long as one person in the conversation knows that it is being recorded. A private investigator could therefore legally record a conversation between spouses as long as one spouse gave his or her consent to tape the conversation.

B. ***The Techy Approach: Computer Data & Spyware***

It is joked that it used to be that if you wanted to get to know someone you would go on a date or two, talk, and eventually meet their family and friends, but in today's world, if you really want to know your prospective partner, check his or her computer. In divorce proceedings this sentiment could not be more true. In the era of the internet, divorce cases are becoming rife with email interceptions, online accounts, and computer documents. The new technological, and legally ambiguous, approach to investigating your spouse includes hacking email accounts and using Spyware programs, such as keystroke logging.

1) Keystroke Logging Software

Keystroke logging, also called keylogging, is a type of spyware software installed on a computer that records every key stroke of its user. In this manner, personal emails, passwords, or online conversations are reproduced for the software's installer. Keystroke logging may be used for legitimate reasons on home or personal computers to monitor a child's computer usage on websites and in chatrooms. However, a suspicious spouse may find it a useful tool to investigate a partner.

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[19] R. v. Lubovac (1989), 101 A.R. 119 (Alta. C.A.) at para. 20.

According to the University of Ottawa's Canadian Internet Policy & Public Interest Clinic (CIPPIC), Canada does not have legislation that specifically targets spyware.[20] The federal and provincial privacy laws in place are those prohibiting fraud, misleading misrepresentation, unfair trade practices, and privacy concerns between individuals and companies.[21]

Although courts may criticize the use of subterfuge in family law cases, the actual practice of accessing your spouse's online communications and data or inserting spyware, remains a legal grey area. While it may be unlikely that parties will attempt to introduce the data received from keylogging software, the information obtained from it may be invaluable as basis for future investigation.[22]

Absent an admission from one spouse that he or she installed keylogging software on a computer to spy on the other spouse, a court may be hard pressed to find blame for any spyware programs found on a that computer. Keylogging software may be installed by a third party through internet downloading and viruses. It is not easily detected and generally needs another software program to even discover it exists and remove it.[23] A litigant may explain any keylogging program found on a spouse's computer as a virus or a download from the internet.[24] Prudent divorce counsel should specifically ask at an examination for discovery whether keylogging software has been installed by the other party or on his or her behalf.

2) Accessing E-mail Accounts

There is rarely a divorce trial today wherein emails are not introduced as exhibits. The vexing question is whether a spouse can legally access the email account of another. During happier times, spouses often share passwords and computers, or at the very least, do not conceal personal passwords to email, social media networks, banking, and other personal websites and data. If a spouse has pre-authorized a website or a net server to automatically provide the password on log-in, accessing partners' email

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[20] University of Ottawa, "Spyware" Canadian Internet Policy & Public Interest Clinic, online: (last updated 2 June, 2007) < http://www.cippic.ca/spyware/>.

[21] *Ibid.*

[22] However, a BC Supreme Court Family Law Rule 9-1(1)(a) requires a party to list all documents that may prove or disprove a material fact and all other documents to which the party intends to refer at trial.

[23] *Ibid.*

[24] In Proulx v. Viau 2008 ONCJ 748 (Ont. Ct. of Justice), the mother found keystroke logging software on the home computer, was convinced the father installed it. The the court accepted the father's explanation and commented that spyware and keystroke logging was a common risk for anyone owning a computer. See paras: 14 and 32.

accounts may be as easy as typing in their user name. There are no reported decisions of a spouse being charged criminally for what may be a breach of privacy to their partner.

South of the border, the legality of this very issue is being argued in a landmark case involving a Michigan man charged criminally under an internet computer misuse law originally intended to protect the stealing of trade secrets and I.D.s..[25] In 2009, Leon Walker, the third husband of Clara Walker, hacked into his wife's e-mail account and discovered that she was having an affair with her second husband. The second husband had previously been arrested for beating Clara in front of the daughter she had with her first husband. Leon claims he was motivated by a desire to protect the child, but nonetheless he is charged with accessing his wife's computer fraudulently.[26] [27]

Leon's case has incited debate in Canada as to which section of the Criminal Code would potentially apply to a spouse who hacked into another's e-mail account. Osgoode Hall Law School, Professor Simon Fodden, suggested that the Criminal Code's section on illegal interception[28] may apply to such a case.[29] Professor Fodden was doubtful that the saving clause under s.184(2)(a) of express or implied consent would rescue spouses who hack into their partner's email as Leon did.[30]

The closest Canadian equivalent of the Michigan law that Leon Walker is charged under is section 342.1(1) of the Criminal Code, regarding unauthorized use of a computer and reads:

> **342.1 (1)** Every one who, fraudulently and without colour of right,
>
> (*a*) obtains, directly or indirectly, any computer service,

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[25] Caroline Black, "Leon Walker, Mich. Dad, Faces Trial for reading Estranged Wife's E-mails", *CBS News* (2 February, 2011), online: < http://www.cbsnews.com/8301-504083_162-20030408-504083.html>.

[26] *Ibid.*

[27] The Fraudulent Access to Computers, Computer Systems and Computer Networks Act 53 of 1979, Section 752.792, Sec.5. reads as follows:

> A person shall not intentionally and without authorization or by exceeding valid authorization do any of the following:
>
> (a) Access or cause access to be made to a computer program, computer, computer system, or computer network to acquire, alter, damage, delete, or destroy property or otherwise use the service of a computer program, computer, computer system, or computer network.

[28] Criminal Code of Canada, Section 184(1).

[29] Simon Fodden, "Is it a Crime to Read Your Spouse's Email?", *Slaw Canada's Online Legal Magazine* (29 December 2010), online: Slawlaw.ca,<http://www.slaw.ca/2010/12/29/is-it-a-crime-to-read-your-spouses-emails/>.

[30] *Ibid.*

> (*b*) by means of an electro-magnetic, acoustic, mechanical or other device, intercepts or causes to be intercepted, directly or indirectly, any function of a computer system,
>
> (*c*) uses or causes to be used, directly or indirectly, a computer system with intent to commit an offence under paragraph (*a*) or (*b*) or an offence under section 430 [mischief] in relation to data or a computer system, or
>
> (*d*) uses, possesses, traffics in or permits another person to have access to a computer password that would enable a person to commit an offence under paragraph (*a*), (*b*) or (*c*)
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or is guilty of an offence punishable on summary conviction.

Professor Fodden suggests that section 342.1(1) is not drafted clearly enough to incorporate email theft between spouses and family and that a more concise law should be drafted if Parliament's intent is to criminalize such behavior between spouses.[31] The defence for a spouse who intercepted computer data under section 342.1(1) would be that he or she had the "colour of right" to do so. However, there are no reported cases on this point.

While the Criminal Code may not punish unauthorized email access, B.C.'s Privacy Act may do so. In Nesbitt v. Neufeld, the BCSC found that one spouse could successfully sue the other under the Privacy Act for breach of privacy when accessing private email communication.[32]

The parties in Nesbitt had lived together and had a child, about whom access and guardianship was at issue. Also at issue was Dr. Nesbitt's unauthorized use of Ms. Neufeld's private emails and communications. While living together, Ms. Neufeld gave Dr. Nesbitt a computer that contained her personal correspondence. During the protracted divorce litigation, Dr. Nesbitt reproduced Ms. Nesbitt's emails and sent letters and communications to individuals in order to embarrass and scandalize her. Dr. Nesbitt also set up Facebook pages and websites that reproduced these communications and expressed further disparaging opinions and remarks about Ms. Nesbitt, her acquaintances, and even her parents. Dr. Nesbitt argued that he was merely defending his reputation and himself in relation to allegations in the divorce proceeding.

After concluding that Dr. Nesbitt's actions were malicious and willful, the court noted that it was no excuse that the correspondence was in the computer that Ms. Neufeld

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[31] *Ibid.*

[32] Nesbitt v. Neufeld, 2010 BCSC 1605.

gave to Dr. Nesbit, stating that "a brief scan of Ms. Neufeld's correspondence would soon show their personal nature, and ordinarily, one would return them to the author and/or owner".[33]

The court stated at par 94:

> *I find Ms. Neufeld had a reasonable expectation that her personal information and private correspondence would not be emailed or faxed to third parties or publicly posted on the Internet without her knowledge and consent. Put alternatively, Ms. Neufeld did not consent to Dr. Nesbitt's use of data from her home computer for unlawful purposes.*

The violations by Dr. Nesbitt were numerous and Ms. Neufeld was awarded $40,000 in damages. Dr. Nesbitt is appealing the decision to the BCCA, but no decision is reported to date.

Obtaining emails of the other spouse is usually fairly straight-forward as many spouses neglect to change email providers, accounts, or passwords after separation. It would be difficult trying to argue that a spouse who had revealed his or her password or who had allowed prior email access had a reasonable expectation of privacy.

C. ***The "Friendly" Approach: Facebook & Social Media Websites***

> *"[...] it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it 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"*[34]

Obtaining information from a litigant's Facebook page is becoming increasingly prevalent and useful in divorce litigation. Whether a person has any expectation of privacy on a social networking site such as Facebook—even with more restrictive privacy settings—is doubtful. In Murphy v. Perger, the court found that, "the plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.[35]

Cases have liberally ordered document disclosure of information on social networking sites. The court has ordered production of Facebook material in personal injury cases in which photographs of a plaintiff involved in sports or activities may relate directly to

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[33] *Ibid* at 92.

[34] Leduc v. Roman (2009), D.L.R. (4th) 353 (Ont.Sup.Ct.Jus.) at par 31.

[35] Murphy v. Perger, (2007) 67 C.P.C. (6th) 245 (Ont.Sup.Ct.Jus.) at par. 20.

claims of injury and loss of enjoyment. Personal Injury cases are currently the most common type of case in which these issues are brought forward, but the reasoning is applicable to divorce proceedings as well.

The following principles on Facebook disclosure emerge:

- It is beyond controversy that a person's Facebook profile may contain documents relevant to the issues in an action.[36]
- A request for Facebook content production is not necessarily a fishing expedition, even if the defendant cannot see the content on the Facebook page due to privacy settings.[37]
- A party must identify relevant Facebook content in his affidavit of documents.[38]
- A litigant cannot hide behind a "private profile" requiring permission to avoid disclosure obligations.[39]
- Given the social networking purpose of Facebook, the court may infer that the user intends to make information available to share with others, even if the party has a private profile.[40]
- Given the nature of Facebook, its purpose, and the nature of the site, it may be reasonable to conclude that there are likely relevant photographs on the site.[41]
- A court may refuse disclosure where the information is of minimal importance to the litigation but may constitute a serious invasion of privacy.[42]

Ultimately, a litigant in a family law proceeding may not be able to make claims relating to their parenting abilities or lifestyle, then hide behind self-set privacy controls on a website, such as Facebook, which purpose is to enable people to share information about how they lead their lives.

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[36] *Supra* at note 34 at par. 23.

[37] *Ibid.*

[38] *Ibid.* at par. 27.

[39] *Supra* at note 35.

[40] *Supra* at note 34 at par. 31.

[41] *Ibid.* at par. 17.

[42] United Services Funds v. Carter, (1986) 5 BCLR (2d) 222, the principle was considered in Murphy v. Perger, (2007) 67 C.P.C. (6th) 245, but ultimately the court found that it did not apply to the case at bar.

Counsel should be aware that their client could be ordered to provide the contents of their facebook profile if it can be determined that a profile exists and could be relevant to the issues at bar.

A court may even order an *ex-parte* and unexpected download of a party's profile to preserve the evidence.[43]

Prudent divorce counsel should ask about the other souse's use of Facebook, Twitter, Linked-In and other social media sites at examination for discovery in divorce cases in order to establish the site's existence, use, and relevance for comprehensive document disclosure applications. Facebook profile and content could be relevant to issues such as adultery, parental conduct, availability for children, lifestyle for income purposes, paternity, spending habits, alcohol and drug consumption and the like.

IV. THE USE OF "PRIVATE" EVIDENCE IN COURT

While no-fault divorce is the norm in Canada, adultery, pornography, binge-drinking, prostitution, and drug consumption remain issues that arise frequently in contentious and hotly contested divorce cases, and particularly those involving children. When the future residence and care of children is at issue, it is difficult to argue that those issues are irrelevant to one's ability to parent. However, it is one thing to legally obtain useful "information", but it's quite another to make use of it in divorce proceedings. Just because you have the information, it does not mean the court will accept it as evidence.

Whether a court will allow unauthorized videos, emails and recordings to be introduced as evidence at trial will depend on the judge. Some judges may hardly blink an eye at private emails between a wife and her friends that are somehow reproduced at trial by the husband. Other judges may chastise parties for their use of subterfuge in a divorce proceeding and refuse to admit any evidence acquired using underhanded methods.

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[43] In Sparks v. Dube, 2011 NBQB 40 the plaintiff had claimed injury but a PI had found photos of the plaintiff zip-lining—take at an undetermined date but posted after the accident—on her public Facebook profile. The court ordered, during an *ex parte* application, that the plaintiff retain a second lawyer, at the defendant's expense, who would in essence, show up and surprise the defendant and provide her with the order to download her Facebook profile (so it could not be altered or deleted). The plaintiff's lawyer would then retain the "sealed" profile and could at that point make an application to contest disclosure. The plaintiff's lawyer was informed of the order. Ultimately the case settled before the material could be seized or the order appealed.

1) Intercepted Conversations

As Justice Barrow noted in Matthew v. Matthew, the authorities on the admissibility of illegally obtained evidence are not entirely consistent.[44] In Luckov v. Taylor, a case involving a custody application, the father sought to rely upon a transcript of a secret tape recording that he made of the mother's private telephone conversation with various parties.[45] Noting that the secret tapings could very well be a criminal act under the Criminal Code, the court said:

> *Plainly put, the opportunity for abuse is obvious (as here, where the transcript of the interception is disputed) and the court should strongly discourage such divisive steps in family law cases where the parties are rather to be encouraged to move toward a stage where the are able to co-operatively raise their children.*[46]

In Fattali v. Fattali, another custody case, the father sought to introduce evidence of a conversation the father had secretly taped between himself and the child's pediatrician.[47] Unlike Luckov v. Taylor, the father was part of the conversation secretly taped so illegality would not be a consideration. Regardless, the court found the tape was inadmissible and stated:

> *In my view, such forays into the gathering of potential evidence are to be discouraged in the strongest terms. Proceedings involving the best interests of children should not be decided on evidence the product of calculated subterfuge. It does not help the father's position to be plotting tricks or deceit to advance his cause.*[48]

In J.F. v. V.C. the evidence of secretly recorded interviews between the children and members of their medical team was not admitted because to permit such tactics could

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[44] Matthew v. Matthew, 2007 BCSC 1825 at para. 33. This is a custody and access case in which the husband sought to admit evidence from his wife's private diary. The husband acquired the diary after breaking into a locked box in the wife's bedroom, where he knew he was not allowed to go. Ultimately the court decided the evidence had "significant probative value which outweighs prejudice caused by its admission" (at para 58).

[45] Luckov v. Taylor, 2008 ONCJ 795.

[46] *Ibid* a para. 10.

[47] Fattali v. Fattali (1996), 22 R.F.L. (4th) 159, (Ont.Ct Jus. (Gen. Div).

[48] *Ibid* at para. 5.

cause mischief and may discourage those in helping professionals from becoming involved in family disputes.[49]

In Seddon v. Seddon, another custody dispute, the court refused to admit the father's 20 hours of secretly recorded conversations between the mother and the children. Calling the practice "odious", the court stated that the father's tapings of the mother and other parties without their consent was likely a criminal offence.[50]

However, in Reddick v. Reddick, a ruling made during a custody trial, the court admitted the father's four recorded conversations between the mother and the child because the "evidence goes to such important issues of parental alienation and inappropriate pressure on the children and leads to the conclusion that it should be admitted in the best interests of the children."[51]

Likewise in B. v. B., in an interim custody application in which the father alleged alienation, the court allowed the father's tape-recorded telephone conversations between the mother and the children, concluding:

> *...the law is clear that if the information is relevant, the identity of the parties known, and the recording trustworthy, the evidence by way of taped conversations should be received.*[52]

More recently in S.C. v. J.C., the Saskatchewan Court of the Queen's Bench reviewed the conflicting Ontario and British Columbia cases on intercepted communications in order to determine whether the father could introduce into evidence text messages between the child and the mother he had copied from the child's phone were admissible.[53] The father forwarded the texts to his own Blackberry before transferring them to his computer and printing them off. The court said:

> *We begin with the well-entrenched proposition that the manner of obtaining relevant evidence, whether by legal or illegal means, will not affect its admissibility because judges ought to have all relevant evidence before them. The law has developed, however, allowing that the presiding judge has the discretion to exclude intercepted communications for policy reasons.*[54]

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[49] J.F. v. V.C. (2000), R.F.L. (5th) 45 (Ont.Sup Ct.Jus.)

[50] Seddon v. Seddon, [1994] B.C.J. No. 1729 (B.C.S.C.)

[51] Reddick v. Reddick, [1997] O.J. No. 2497 (Ont.Ct.Jus. Gen.Div) at para. 24.

[52] B. v. B. (1997) 68 A.C.W.S. (3d) 888 (B.C.S.C.) at para. 12.

[53] S.C. v. J.C. 2009 SKQB 87.

[54] *Ibid* at para. 69.

The Court listed the following guidelines for admissibility of intercepted communications:

> (i) There is a limited discretion to exclude relevant evidence, regardless of how it was obtained;
>
> (ii) The judicial exercise of that discretion involves a balancing of competing interests; and
>
> (iii) The court should consider whether the probative value of the evidence outweighs the prejudicial effect on the party opposite and/or the reputation of the administration of justice.[55]

Applying the guidelines, the court found:

1) The text messages had some probative value in that they showed that the mother was touting the benefits to the child of moving to Ontario;

2) Admitting the text messages would be prejudicial to the mother as the father may have selected a sampling. The court had no way of knowing whether or not the reproduced messages were representative of the entirety of the communications between the mother and child;

3) There is prejudice to the administration of justice in family law proceedings if this nature of evidence is routinely admitted because there is already enough conflict and mistrust in family law cases without the parties worrying about secret tapings;

4) Given that the child and her mother frequently communicate by text messages, entering the messages into evidence would most likely restrict their ability to communicate candidly with each other on matters of concern; and

5) The court suspected that the child's trust in the father would be diminished if theses text messages were admitted into evidence because of the breach of the child's privacy. [56]

The court ultimately found that the balance weighed against admitting the texts into evidence but that the court's decision might very well be different if the intercepted communications showed that the child was at risk in some fashion. [57] Overall the probative value was small but the prejudice was great.

While, the area of law involving intercepted communications may remain a grey area for parties to a divorce proceeding, a lawyer would not advise their clients to secretly

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[55] *Ibid* at para. 70.

[56] *Ibid* at paras. 71-74.

[57] *Ibid* at paras. 75.

acquire their spouse's communications. Chapter 8, Rule 1(b) of the British Columbia Law Society's Professional Conduct Handbook states that a lawyer must not:

> *Knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonorable.*

This is a broadly worded Rule, using the words "dishonest or dishonorable" instead of "illegal". A lawyer may walk a fine line between ensuring that their client collects all relevant information for their divorce proceeding and assisting their client in participating in dishonest conduct.

2) Facebook Profiles and Emails

Unlike secretly taped conversations or text messages, the court will readily admit into evidence facebook profiles, messages and emails.

In E.L.C. v. E.S.B., a custody case in which the mother wished to move to Australia with her children, the court noted that the husband "intercepted" his wife's emails after learning that she was having an emotional affair over the internet with a man in Australia.[58] Not only did the judge not question the legality of this "interception" but continued to give evidentiary weight to particular lines in the emails, before reproducing them in detail in the written judgment.

In M.N.S. v. J.T.S., an interim custody application, the mother logged into the father's Facebook account, where she found messages suggesting the father was engaged in drug dealing and usage.[59] The court reproduced the messages at length in its written decision and used them as the basis of its order to compel the father to disclose his medical information to the mother and to deny the father's application for unsupervised access. The legitimacy of the mother's access to the father's Facebook account was never mentioned.

The following are cases in which Facebook messages and photos were introduced as evidence in divorce and custody proceedings:

- A father's negative Facebook comments about the mother led the court to finding that the father had a hard time separating parenting issues from children's issues.[60]

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[58] E.L.C. v. E.S.B. 2009 BCSC 1543 at par 51

[59] M.N.S. v. J.T.S., 2009 BCSC 661

[60] Hassan v. Mufti (2008), 169 A.C.W.S. (3d) 356 (Ont.Sup. Ct.Jus.)

- Facebook photos of the husband participating in trips, hiking, four-wheeling, biking, etc. as well as Facebook posting in which he states that he is "self-employed" were introduced as exhibits at trial. They assisted the court in finding that the husband was intentionally unemployed and "undoubtedly" working under the table for cash to avoid child support.[61]

- Facebook communication between an alleged "step-parent" and a child in which the step-parent began his message with "Hey son", gave weight to the court's finding that the step-parent was in *loco parentis* to the child and was obligated to pay child support.[62]

- A father allowed his daughter to create and log into a Facebook account for him, which contained negative comments by him and others about her mother. The court found the Facebook messages were intended to involve the daughter in the parents' legal dispute and to promote an alliance with the father at the detriment of her relationship with the mother.[63] Ultimately, the court found that the father still posed a risk to the children's emotional health, and the mother was awarded sole custody and primary residence of the children. The court granted the father joint custody but supervised access.

- Facebook photos of the mother embracing an unknown man were introduced to demonstrate adultery.[64]

- Transcripts of a father's Facebook conversations were introduced as evidence of the father's participation in the drug trade, resulting in a dismissal of the father's application for unsupervised access to the child.[65]

Clearly, in family law proceedings, Facebook evidence may be used across a broad range of issues that include questions of parenting skills, lifestyle and income, adultery, and loco *parentis*.

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[61] C.M.R. v. O.D.R. 2008 NBQB 253 at paras 54 & 61.

[62] Nabigon v. Lavallee (2009), 176 A.C.W.S. (3d) 791 (Ont.Sup.Ct.Jus.) at para. 9.

[63] Bains v. Bains, 2009 BCSC 1666 at paras.103 and 151.

[64] *Supra* at note 58 at par 51.

[65] *Supra* at note 59.

3) Be Careful What You Say

Even if the court ultimately decides to give little or no weight to taped conversations from secret recordings, intercepted emails, text messages of Facebook information, in most cases the potentially embarrassing information will be discussed in the judge's reasons. In this manner, the court makes the details and secrets of litigant's private lives available to the media. Surely it must have been embarrassing for the mother in E.L.C. v. E.S.B. to have Facebook photos of her embracing her lover shown in court and later the description of her embracing her lover were immortalized in the court's judgment, even if the photos themselves did not strongly influence the judge's decision.[66]

A divorce litigant may also find any words they write about their spouse or child come back to haunt them in the reasons for judgment and potentially the press. In R.E.W. v. R.E.W. the court commented in its judgment how Mrs. W. sent copies of sexually explicit emails that she had exchanged with boyfriend to her husband with the comment "Eat your heart out asshole".[67] The court then reproduced sections of nasty email communication between Mrs. W and her husband including:

> *May 22: ... I am sure that the children will be forever indebted to you for your display of generosity in letting them have two whole days more time with their daddy than the wise old judge allotted. The sad thing is that you think this makes up for the 130 days a year you took from them. I predict they will never forgive you.*[68]

In M.N.S. v. J.T.S., the father's Facebook messages concerning drug use were reproduced in an interim custody application, one of which reads as follows:

> *Fuck I just woke up slobbering all over my pillow from a Gatorade nap. Top quality shit I can attest.*[69]

Once the potentially embarrassing information is reproduced by the court, it is fair game for news agencies, bloggers, websites, and the general public to view and comment upon. Therefore, knowing that your client may be followed, recorded, spied upon, electronically searched, and Facebook creeped, divorce lawyers may want to consider

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[66] *Ibid.*

[67] R.E.W. v. R.E.W. 2003 BCSC 18 at para. 32.

[68] *Ibid.*

[69] *Supra* at note 59 at para. 16.

the different ways in which they can protect their client's privacy from the media during court proceedings.

V. PROTECTING THE DIVORCE LITIGANT'S PRIVACY FROM THE MEDIA

It is a hallmark of our justice system in Canada that cases are tried in public and that the public has access to the judicial system:

> *"One cornerstone of the rule of law in Canada is the operation of an open and transparent court system. The open court principle has been described as "the very soul of justice": Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 SCR 522. Public policy favours the openness of the court system in order to maintain the public's confidence in its integrity and their understanding of the administration of justice: Towers, Perrin, Forster & Crosby Inc. V. Cantin (2000), 50 OR (3d) 476 (SCJ) at para. 6. Moreover, the right of members of the public to obtain information about the courts falls within the ambit of the guarantee of freedom of expression contained in section 2(b) of the Canadian Charter of Rights and Freedoms."*[70]

Public accessibility and freedom of expression in relation to court proceedings are necessary so that society can be assured justice is being done.[71]
With that kind of fundamental principle, it is little wonder that the public and therefore, the media is granted rather liberal access to information, court files and court rooms. The impact of the openness of the court system is a greater invasion of the privacy of divorce litigants because divorce cases necessarily concern evidence of an intimate and personal relationship. While the court recognizes that divorce files require more privacy than other court files, the protection from public and media access is minimal.

Historically there were accidental privacy safeguards for divorce litigants such as lack of time for court watchers to attend court, space and time constraints in the media, and slow, inefficient dissemination of information. In other words, divorce litigants could fly under the radar in the past but rarely experience the same luxury today. Is it becoming increasingly difficult, if not nearly impossible to protect a divorce litigant's privacy in the current era of instantaneous dissemination of information and diminishing privacy expectations.

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[70] D.B. Trust (Trustees of) v. JB (Litigation guardian of), 97 OR (3d) 544 (Ont.Sup.Ct.Jus) at para. 7.

[71] B.G. v. British Columbia 2002 BCSC 1417 at para. 61.

While the court recognizes that privacy is a value deserving of protection by the law, it also candidly recognizes that individuals engaged in family law proceedings may very well be embarrassed or humiliated by having their lives exposed to public scrutiny.[72] If the Rules of Court do not offer sufficient privacy for a divorce litigant, using an "initials" style of cause, sealing the court file and finally a publication ban may be obtained if the circumstances warrant. However, whether these remedies are truly effective, especially in the age of internet and social media websites, is contentious.

A. The Rules of Court

In British Columbia, the BC Supreme Court Family Law Rules contain a number of rules intended to provide some measure of privacy protection for litigants.

> **Rule 22-(8)(1)(a):** restricts the access of court records in respect to family law cases to:
>
> a) Any lawyer
>
> b) The parties
>
> c) A person authorized by the parties or parties' lawyers. [73]

One can easily see how simple it would be for the press to gain access to a court file; befriend a lawyer or a party.

Rule 22-8(1)(a) does not confer on a party a legal right to prevent anyone other than the persons name in the subrule from having access to a registry file and publishing its contents.[74] Access to other persons than those names in the subrule may be granted upon application to the court, unless a party demonstrates a significant or substantial risk of significant harm resulting from the access.[75]

Recently the BC Supreme Court made an interim order for spousal support in the case of Chad Kroeger of the band Nickelback who is being sued for unjust enrichment and

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[72] R.F. v. O.B. 2006 SKQB 496 at para. 38.

[73] Supreme Court of British Columbia, Court Record Access Policy, part II, section 3, p. 21 and Rule 22-8(1)(a).

[74] Leung v. Leung (1993), 77 B.C.L.R. (2d) 305.(B.C.S.C.).

[75] P.(K.V.) v. E.(T.) (1998), 56 B.C.L.R. (3d) 344 (B.C.S.C.).

spousal support by his former common law spouse, Marianna Goriuk. While we are not counsel for either party, a lawyer at our firm was able to photocopy every page in the court file, except for the JJC Case Conference Management Brief and the Transcripts from Chambers Hearings.[76] We were able to obtain copies of Mr. Kroeger's affidavits and his Form 8 Financial Statement, which attached his income tax returns and other sensitive personal financial information. While we have access to this information we are not permitted to disclose certain parts of the financial information obtained pursuant to Rule 5-1(29) of the BC Supreme Court Family Rules.

> **Rule 5-1(29):** restricts who has access to financial documents obtained Rule 5-1, which include information found in a party's Form 8 Financial Statement. The rule states whomever has access to the information must not disclose it unless for the purpose of:
>
> a) Valuation of an asset
>
> b) determination of the disclosing party's income, or
>
> c) in the course of permitting the documents to be introduced into evidence during the family law case.

Thus we cannot reveal information obtained from the file that the parties were obligated to disclose under Rule 5.

Mr. Kroeger did not even marry Ms. Goriuk, but still, his financial circumstances are now exposed to the public. Even details of his bank accounts, bank account numbers, balances, various business interests etc. are all detailed in the court file, for a limited audience to access, but without limitation on the dissemination. He did not have a sealing order, although presumably he could apply for one under R-1(3).

> **Rule 5-1(30):** allows the court to seal the whole or any part of a document provided under Rule 5-1 if the court considers that public disclosure would be a hardship.

This Rule only applies to financial information.

Litigants are also under an implied undertaking to maintain a certain amount of confidentiality in court proceedings. British Columbia courts recognize an implied undertaking on parties not to use discovered documents or evidence for any purpose

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[76] Goriuk v. Turton, 2011 Vancouver Registry Docket #E100071 (B.C.S.C.).

other than the proceedings in which the documents or evidence were obtained.[77] This implied undertaking applies in every case, even when there is potential that evidence might disclose criminal conduct.[78] It also extends to post-judgment discovery, that is, documents obtained after trial in aid of execution.[79] The implied undertaking provides some measure of confidentiality in family law proceedings where confidential, embarrassing, or private website communications and emails may be provided through discovery.

White the British Columbia Rules of Court provide some measure of privacy to divorce litigants, other jurisdictions offer greater protection. The Courts of Justice Act[80] provides Ontario courts with the jurisdiction to order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record. In addition, Ontario's Rules of Civil Procedure permit a court to dispense with requirements that title of a proceeding names the parties "in the interest of justice".

When the Rules of Court are not adequate to protect the privacy of divorce litigants, divorce litigants can try their hand at obtaining one of the remaining three protections: a publication ban, a sealing order, and an amended style of cause using initials.[81] A litigant's fear of mere humiliation is not sufficient reason to cause the court to order one of these special procedures that infringe upon the openness of the judicial system; there must be more at risk.

B. Publication Bans

1) Publication Bans In General

Publication bans offer the greatest protection of privacy and are therefore the most difficult protection to obtain. Publication bans infringe greatly on the openness principle and thus, they are seldom ordered, particularly in divorce cases.

Although legislation automatically implements publication bans on the names of a young persons accused of a crime[82] and the names of children in child protection cases in

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[77] Litton v. Braithwaite, 2006 BCSC 1481.

[78] Juman v. Doucette, 2008 SCC 8 at paras. 3 and 4.

[79] Procon Mining and Tunnelling Ltd. v. McNeil, 2010 BCSC 1184.

[80] The Courts of Justice Act RSO 1990, c.C. 43.

[81] Using initials in a style of cause is sometimes referred to as a "partial publication ban".

[82] Youth Criminal Justice Act S.C. 2002, c.1., Part 6.

some provinces[83], the court approaches applications for publication bans outside of those contexts with caution and great scrutiny. In some civil cases, courts grant publication bans where litigants claim damages for sexual assault.[84]

In R. V. Mentruck, the Supreme Court of Canada held that a publication ban should only be ordered when:

> 1) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> 2) The salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[85]

In practice, courts seldom grant publication bans without evidence of a serious risk to the administration of justice or the interests of the parties. Often, the court will opt instead for an alternative measure that the court decides will have less of an intrusion into the open court principle.

2) Publication Bans in Divorce Cases

If obtaining a publication ban for criminal cases is difficult, successfully applying for one in a divorce case is next to impossible. The court will take steps to protect the identities and privacy of children in certain cases, but it is very rare that a divorce case that warrants a such a sweeping measure as a publication ban.

In K.V. v. T.E., Madam Justice Loo set aside a publication ban she had previously ordered on an *ex parte* basis.[86] The case involved access, custody and support of a child arising out of a brief affair between a well-known basketball player and a woman who was not his wife. The parties had previously consented to an order amending the

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[83] In Ontario, The Child And Family Services Act, RSO 1990, C.11 s.45 protects the names of children in child protection cases and states that hearings are private unless a court orders otherwise.

[84] See B.G. v. British Columbia, 2004 BCCA 345 where the BCCA upheld a partial publication ban that allowed the parties to use pseudonyms, even when the plaintiffs were unsuccessful in their claim for damages for sexual assault.

[85] R. V. Mentruck, [2001] R SCR, 205 DLR (4th) 512 at para. 32.

[86] K.V. v. T.E. (1998),56 BCLR (3d) 344 (BCSC).

style of cause to reflect only the initials of the parties and to sealing the court file. Neither of those orders were the subject of judicial scrutiny or commentary. [87]

Her Ladyship went on to state the following:

> The Supreme Court of Canada has made it clear that freedom of expression, an open court, and judicial accountability are principles of a free and democratic society. A publication ban, or an order banning the publication of any name or feature of the case which might disclose the identity of the defendant or his family, curtails the public's right to know, and judicial accountability: Scott v. Scott, [1913] A.C.417 (H.L.); Nova Scotia (Attorney General) v. MacIntyre (1982), 132 D.L.R. (3d) 385 (S.C.C.); Dagenais v. CBC, [1994] 3 S.C.R. 835.
>
> The defendant has not satisfied me that there is a real and substantial risk that either he or his wife, the twins or E. will be irreparably or significantly harmed as a result of the publication. The onus of demonstrating harm is a high one. It is not enough that the defendant may be embarrassed or that he and his family may be subject to unwanted publicity. The Charter guarantees public access to and publicity of court proceedings and their records, subject to certain limited exceptions which do not exist here.
>
> In my view, parties to the litigation cannot by consent agree to what amounts to a publication ban.
>
> It therefore appears that notwithstanding Rule 60(22), parties do not have a right to insist that the proceedings remain private, or that information contained in the files not be disclosed to persons other than the parties, or any solicitor in all circumstances. If a third party seeks access to a matrimonial file, a general desire to keep matters private or to avoid publicity is not sufficient to deny access. It appears that a significant risk that significant harm will otherwise occur must be demonstrated in order to overcome the openness principle and the majority decision in Edmonton Journal. [88]

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[87] Madam Justice Loo stated :

> Although the sealing of the file in these proceedings was done by consent. I question whether the orders ought to have been made.
>
> *Ibid*, at para 26

[88] *Supra* at note 86, at paras 6-7.

A litigant must be careful that they do not go too far when applying for a publication ban. In K.V. v. T.E. the defendant sought an order restraining and enjoining the plaintiff's solicitor from disseminating or publishing information relating to the proceedings. [89] Not only was the order dismissed, the Defendant had to pay special costs.

Although publication bans are difficult to obtain in divorce litigation, in L.G.S. v. G.M.S. without further explanation, the court noted that a previous partial publication ban was granted with respect to the names of the parties to matrimonial proceedings due to the "privacy concerns arising from the nature of the parties' business", which was a drug and alcohol treatment centre.[90]

3) Even if a Publication Ban is Ordered, Will it Work?

Even if a client obtains an order for a publication ban, there is no guarantee that the ban will protect the client's privacy. Historically, it was relatively straight-forward to impose a publication ban and to monitor enforcement of that ban, as the only true publishers of information were the printed press, television, and radio within the jurisdiction. Now, however, with Twitter, Facebook, You-Tube and blogging, individuals may have large audiences to whom they can disseminate information in a nanosecond. Since a publication ban is only effective in the jurisdiction in which it is brought, enforcement outside of Canada's borders would prove virtually impossible given the borderless nature of internet information sharing.

In fact, there are instances where information banned in Canada has been disseminated either outside of Canada or within Canada on Facebook. In the 2005 Gomery Inquiry involving the Liberal Party's "sponsorship program' aimed at nationalist advertising in Quebec, an American blog, Captain's Quarter's, posted the details of Jean Brualt's testimony despite a publication ban on the evidence[91]. Although the publication ban was eventually lifted, the American blog summarized a blacked out portion of the witness's testimony, which was picked up by Canadian bloggers who—while often not repeating the banned information themselves—posted links to the American blogger's website.

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[89] K.V v. T.E. (1998), 80 A.C.W.S. (3d) 514 (BCSC).

[90] L.G.S. v. G.M.S.,2010 B.C.S.C. 297 at para.7.

[91] Rondi Adamson, "Borderless blogs vs. Canada press ban" *The Christian Science Monitor* (13 April 2005), online: <http://www.csmonitor.com/2005/0413/p09s01-coop.html> .

In 2008, when two youths in Toronto were charged with first degree murder of 14-year-old Stefanie Rengel, the Youth Criminal Justice Act, which protects the privacy of young persons under the Act, should have automatically prevented publication of the names of the accused.[92] However, on Facebook the youths charged were identified repeatedly by name and in photographs from numerous Facebook users and commentators.[93]

In 2010, the name of a murdered 2-year old boy made its way onto Facebook. The boy's name as well as the name of the accused offender (the mother's boyfriend) were subject to a publication ban.[94] After the boy was murdered, his father made a Facebook memorial page, which family, friends, mourners and even strangers could come across online. The site for the child attracted 2,400 members and included many people who did not personally know the victim.[95]

In 2011, Facebook users and friends of the murder victim, North Delta teenager Laura Szendrei, published the name of the youth accused of murdering her. As well, the details of the family history of the accused were discussed in online chat rooms.[96] Although such publication is in violation of the Youth Criminal Justice Act, the Delta police commented that policing online publications of such information is very difficult and "almost impossible" to remove once on the web[97]. This is especially true given that information on the internet spreads like wildfire so that countless sites around the world will re-post information once its online.[98]

The average divorce litigant would rarely have the facts to support a publication ban. But even if ordered, with the instantaneous multi-faceted sharing of information around

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[92] Part 6, Section **110** (1) of the Youth Criminal Justice Act S.C. 2002, c.1. reads as follows:

> Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

[93] Betsy Powell and Bob Mitchell, "Gag orders in a Facebook age" *The Toronto Star* (4 January 2008), online: TheStar.com < http://www.thestar.com/article/290941>.

[94] Jesse McLean, "Does Facebook page break the law?", *The Toronto Star* (11 January 2010), online: TheStar.com < http://www.thestar.com/news/ontario/oshawa/article/748973--does-facebook-page-break-the-law>.

[95] *Ibid.*

[96] Kim Bolan, "Chatrooms identify accused young offender in Delta teen's murder", *The Vancouver Sun* (24 February 2011), online: <http://www.vancouversun.com/news/Chatrooms+identify+accused+young+offender+Delta+teen+murder/4336105/story.html>.

[97] *Ibid.*

[98] *Ibid.*

the globe, a publication ban does not even offer absolute privacy protection for divorce litigants.

C. *Sealing Records*

As an alternative to a publication ban the court may protect the interests of either the parties or the children in the litigation by sealing all or some of the court file. The court considers sealing orders to be a less-intrusive alternative to publication bans while still providing some protection of privacy to the family litigants.

In order to obtain a sealing order or an order of confidentiality, the party establish that:

1) the order is necessary in order to prevent a serious risk to an important interest; and
2) that the risk of harm to any person outweighs the public interest in open and accessible court proceedings.[99]

Even if a court file is sealed, for obvious reasons (*stare decisis)*, the Reasons for Judgment are still open to the public. Reasons for judgment are not part of the court file, even though a copy may be kept there. Reasons for judgement, including reasons that are given orally, are in a different category and are available to the public and the media to copy from the court file upon payment of the applicable fee.[100]

D. *Use of Initials in the Style of Cause*

The least intrusive and thus most commonly granted remedy available to divorce litigants for privacy protection is an order to use initials in the style of cause. However, the use of initials in the style of cause is neither as prevalent nor as easy to obtain as one might think in the family law context.

1) The use of Initials

Courts generally acknowledge that the use of initials instead of the parties' names in civil litigation does not infringe upon the court's openness to the same extent that publication bans or sealing orders do. For example, in B.G. v. British Columbia the

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[99] Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 at par 47, 48, 53, and 54.

[100] Family Law Practice Direction: Access to Divorce and Family Relations Act Files, implemented October 18, 2002 by Chief Justice Donald I. Brenner, *Annotated Family Practice* 2010-2011.

British Columbia Court of Appeal found that courts have frequently recognized that replacing the names of certain parties with initials relates only to "a sliver of information" and minimally impairs the openness of judicial proceedings.[101]

In G. v. British Columbia College of Teachers, a case involving alleged misconduct by a teacher, Burnyeat J. allowed the case to be cited with initials until the case was determined on a final basis, to protect the interests of Mr. G's children and children at the school where Mr. G taught.[102]

Initials are ordered in cases which publication bans and sealing orders were denied; the court orders initials because of the minimal impact initials have on the openness of the court. For example, in The D.B. Trust v. J.B. and D.B., D Brown J. refused a sealing order in a trust matter involving two children, but considered the use of initials in the title of proceedings and in affidavit materials as a "reasonable alternative measure" to protect the children's privacy interests.[103] The court in D.B. Trust further stated that the right of members of the public to obtain information of the courts falls within the ambit of the guarantee of freedom of expression in section 2(b) of the Charter of Rights and Freedoms.

2) Initials in Divorce Litigation

In divorce cases there is often no record of the reasons why initials are used in the style of cause. Often, the use of initials is made by consent order, without judicial consideration. The cases in which the style of cause is restricted to the parties' initials demonstrate no clear application of any guidelines or test for determining when to use initials. In fact, in one case, the judge merely said, "[a]s this is a family law proceeding I have used the initials of the parties and the style of cause is so amended..." without stating anything further on the topic.[104]

Some of the factual circumstances that exist in the cases where initials are used have been used as follows:

- The mother is from an exceedingly wealthy family; the mother was not particularly "maternal"; the eldest child suffers from a severe learning disability,

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[101] *Supra* at note 84 at para.26.

[102] G. v. British Columbia College of Teachers, 2004 BCSC 626.

[103] The D.B. Trust v. J.B. and D.B., [2009] O.J. No. 2693 (Ont,Sup,Ct.Jus.).

[104] K.J.B. v. W.S.B. 2004, BCSC 837.

and "public disclosure of this family's personal circumstances and history would be harmful to the children."[105]

- The 17-year old child suffered from an obsessive-compulsive disorder as well as from bed-wetting. [106]
- The father was convicted of 55 counts of various criminal charges, and sentenced to over 2 years in jail.[107]
- The mother had made repeated and unfounded allegations against the father of sexual abuse and drug dealing.[108]
- A bitterly contested, lengthy matrimonial litigation.[109]
- A custody case involving a birth father's application for custody of his child whom the birth mother had placed in the care of third parties unbeknownst to the birth father.[110]
- A custody case involving a child with dyspraxia and in which allegations of violence raised in the cause could harm the children as well as the father's career in the investment field.[111]

There are instances where the court has considered an application to use initials in the style of cause in unremarkable divorce cases, and the results are inconsistent. In one case, the court allowed the use of initials where the husband was a tax lawyer and where information regarding his financial circumstances might impair his ability to earn an income. [112] In another case, the court declined to grant an order permitting the plaintiff to commence an action using only initials in a matrimonial file without evidence of some kind of risk or harm to the Children or the litigants.

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[105] D. v. D. 2008 BCSC 306 at para. 3.

[106] D.K. v. M.K. 2010 ONSC 4585.

[107] M.J.M. v. A.D. 2008 ABPC 379.

[108] B.A.J. v. V.L., 2010 BCSC 514. In this case, Masuhara J. was critical of the mother for opposing the father's application to use initials in the style of cause.

[109] R.E.W. v. R.E.W. 2003 BCSC 18.

[110] R.F. v. O.B. 2006 SKQB 496.

[111] C.D.G. v. D.J.P., 2010 BCSC 1216.

[112] C.A.C v. W.H.C. (October 19, 2010), B.C.S.C. Court File: E013126, an unreported decision of Master Taylor.

In another case, the court declined the use of initials where the plaintiff wife had made allegations that "strike at the very core of [the husband's] identity", that are "sexual", "significant and dreadful". The husband argued that irreparable harm would come to him, to his new wife and family to his business if his identity were known. In declining the husband's application, the court noted that the husband was no stranger to the court system or to the publicity that family law litigation can bring and further noting that humiliation of one party does not warrant the right to anonymity. [113]

In D.K. v. M.K, the husband was applying for an order compelling the child to undergo an assessment for alienation.[114] Counsel for the husband and the Office of the Children's Lawyer (OCL) sought an order protecting the 17 year old child's confidentiality through the use of initials, but did not move to seal the court file. The wife, out of a concern for her freedom of speech, opposed the order on her right to make public all aspects of the litigation. The Ontario Superior Court of Justice, considered D.B. Trust, Sierra Club, and the Child and Family Services Act, and found that initials were necessary to protect to protect the child's privacy. The court stated that such an order would not prevent public comment or debate but would protect the child from being singled out in a way that may be detrimental to his best interests and protect his right to privacy.[115]

Although the court will not readily grant an order to cite the case with initials, an application with strong evidence of potential harm to a child or to the earning capacity of a payor will likely be sufficient.

VI. THE ALTERNATIVE: GETTING INTO BED WITH THE MEDIA...SLOWLY

The reality of litigating in an open court system in the age of social media sites, online blogs and news media is that at the end of the day, there are very few dark corners of litigants lives left unexposed and un-scrutinized in some fashion by some type of media. When it comes to internet publications, everyone has an opinion about everything. This is why lawyers need to figure out how to use the potential media interest to your client's advantage.

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[113] T.v.T. 63 OR (3d)188 (O.S.C.) The court ordered the cased cited with full names from that point onward.

[114] *Supra* at note 106.

[115] *Ibid* at para. 20.

A. *Making Media Work For Your Client*

Knowing that as soon as a court case is started, privacy becomes a thing of the past for divorce litigants, is useful information for settling. Imagine that a divorce client has embarrassing information regarding his or her ex-spouse that would come to light in a court case. If the lawyer knows that the ex-spouse would like to guard that information and ensure it is kept confidential, settling out of court on the client's terms become a whole lot easier. This negotiating tool is not extortion because the client is not threatening to reveal information unless the other party settles. Rather, the threat is to go to court (which cannot be extortion)[116], which in turn will likely lead to the revelation of the damning information in the media. The bottom line is that the better evidence the client has, the more likely a settlement out of court will be, particularly where the other side wishes to avoid the media publicity.

B. *Talking to the Media*

If all attempts to keep the case out of court, by settling to keep confidential the potentially embarrassing information, have failed despite the damning and embarrassing information, then go to the media, but do so slowly and carefully.

In an interview with the Honourable Justice Patrick LeSage, when asked about his perspective on counsel speaking to the media, Justice LeSage took a clear stance that counsel should not plead their case in the media and that argument should be saved for the courtroom.[117] Justice LeSage indicated that if anything is said to the media, it should be very general:

> You may possibly say your client will be pleading not guilty to these charges and we see no merit in them and I'm sure at the end of the day

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[116] Section 346 of the Criminal Code defines extortion as:

> 346. (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.
>
> (2) A threat to institute civil proceedings is not a threat for the purposes of this section.

[117] William M. Trudell, "Interview with The Honourable Justice Patrick LeSage Former Chief Justice of the Superior Court of Justice" *Ontario Criminal Lawyers' Association Newsletter*, Vol 23, No.4 (22 July/August 2002) pg. 22.

> justice will be done and my client will be satisfied with the result or something like that.[118]

However, views of lawyers that speak to the media have been changing over the past few decades, to allow for more media coverage than what was once deemed appropriate. As David M. Brown notes in his article "What Can Lawyers Say in Public?":

> Whereas in 1983 Chief Justice Laskin suggested that a lawyer was "very close to contempt" for speaking to reporters about a case on the steps of the Supreme Court of Canada, that court now permits reporters to interview parties and their counsel in the foyer of the court building.[119]

According to Tracey Tyler, a legal affairs reporter for *The Toronto Star*, when reporters contact lawyers about their cases they do not expect lawyers to assess their client's chances of victory or to pronounce on the strength for the opponent's evidence.[120] She writes at par 8:

> Like lawyers, journalists face restraints, and we have to be very careful about treading into that territory. The *sub judice* rule still exists.

The term *sub judice* literally means "under judicial consideration", and refers to the rule that while a case in ongoing or under consideration, it is inappropriate to make or publish comments which may tend to prejudice a fair trial or influence the course of justice.[121] To comment in appropriately upon a case *sub judice* is to invite allegations of contempt against the court.

A review of case law demonstrates reporters such as Tracey Tyler have reason to perhaps be even more cautious than lawyers about the rule of *sub judice*. It appears the rule is most often applied to journalists and members of the media for publicity of a trial. In R v. Forese and British Columbia Television Broadcasting System Ltd. (No.3) (1979), 50 C.C.C. (2d) 119, Chief Justice McEachern of the BCSC (as he then was) summarize the basic rules as follows at p. 121:

> It is therefore a grave contempt for anyone, particularly the members of what is now called the media, to publish, before during a trial, any

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[118] *Ibid* at par 122.

[119] David M. Brown, "What Can Lawyers Say in Public?" (1999) 78 Can. Bar. Rev, reprinted with permission by The Law Society of British Columbia.

[120] Tracey Tyler, "The care and feeding of reporters: A lawyer's guide" *The Advocates' Society Journal* (Spring 2011), 29 Advocates' J. No.4, 9-12, par.8.

[121] David M. Brown, "What Can Lawyers Say in Public?" (1999) 78 Can. Bar. Rev, at pg. 34-35, reprinted with permission by The Law Society of British Columbia.

> statements, comments, or information which reflect adversely upon the conduct or character of an accused person, or to suggest directly or indirectly that he has been previously convicted of any offence, or to comment adversely or at all upon the strength or weakness of his defence.

In Ontario, the Ministry of Attorney General endorses the rule of *sub judice* and writes the following explanation on its website:

> The rule applies where court proceedings are ongoing, and through all stages of appeal until the matter is completed. It may also apply where court proceedings have not yet been started, but are imminent.
>
> The rule is not limited to parties in a case or their lawyers. It applies to the public, statements by public officials and statements made in the Legislature.
>
> The *sub judice* rule may be breached by public statements that risk prejudging matters or issues that are before the courts. It is the concept of prejudging that is central to the rule.
>
> A breach of the *sub judice* rule can include, for instance, statements urging the court to reach a particular result in a matter, comments on the strength or weakness of a party's case or particular issue, or comments on witnesses or evidence in a case.

The Ontario Ministry of Attorney General website then ensures that *sub judice* does not prohibit fair and accurate reporting of the factual content on ongoing judicial proceeding by the media, as long as the report does not "usurp the court's role by prejudicing the case or its legal issues".[122]

However, there are considerations other than contempt of court for a lawyer or his client who wishes to use the media as a tool for litigation. Doing so may close the doors to legal argument for some court applications, especially those in which a client needs to demonstrate prejudice. In Audziss v. Santa (2003), 121 A.C.W.S. (3d) 1147, the Ontario Superior Court of Justice dismissed an application by Santa to dismiss a conflict of interest application against him for wan to prosecution or delay. As part of the court's reasoning for dismissing Santa's application, it found that Santa had not suffered prejudice from the delay as he had used the time to litigate in the media and draw attention to the litigation in newsletters.

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[122] "Sub Judice Rule", Ontario Ministry of Attorney General, last modified 9 December 2010, online: < http://www.attorneygeneral.jus.gov.on.ca/english/legis/subjudicerule.asp>.

Speaking to the media may also expose a lawyer to professional scrutiny from Law Societies. In British Columbia, The Law Society's Professional Conduct Handbook, Chapter 8, Rule 23(a), reads as follows:

> A lawyer must not:
>
> (a) Comment publicly on the validity, worth or probable outcome of a legal proceeding in which the lawyer acts

At other times, especially when a lawyer is advocating in a public-interest case or a special-interest group, a lawyer may need to consider the client's interests in arousing public interest and debate about its case. The Law Society of Upper Canada's Rules of Professional Conduct anticipate that there are times when the lawyer's role will involve the media. Rule 6.06 (1) reads:

> Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

However, this rule is followed by a lengthy commentary warning that lawyers in public appearances should conduct themselves professionally, must make sure their comment is in the best interests of their client, within the scope of the retainer, and free of self-promotion. It advises that lawyers should be aware that they will ordinarily have no control over any editing that may follow or the context in which their statement appears or is used. The commentary acknowledges that it is proper and accepted for lawyers to comment in a non-legal setting that involves fundraising and charity. It also remarks that lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies, on the effect of particular legislation or decided cases, or to offer an opinion about casts that have been instate are about to be instituted, saying that "this, too, is an important role the lawyer can play to assist the public in understanding legal issues".[123]

Reporter Tracey Tyler confirms that reporters cannot let you read a story before it is reported as it would amount to giving newsmakers editorial control and threaten the independency of the paper.[124] However, often if it is in print and a lawyer is worried about a quote they said, it's usually not a problem for the reporter to delete the comment if it has not gone to press.[125]

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[123] The Law Society of Upper Canada "Rules of Professional Conduct" (Amendments current to April 28, 2011), Rule 6.06 Commentary.

[124] Tracey Tyler, "The care and feeding of reporters: A lawyer's guide" *The Advocates' Society Journal* (Spring 2011), 29 Advocates' J. No.4, 9-12, par.27.

[125] *Ibid* at par 22.

While Lawyers should refrain from making prejudicial out-of-court statements during a trial that could endanger the trial's fairness, they should also be careful of what they say even years after their case concludes. In Stewart v. Canadian Broadcasting Corporation, the court held that a lawyer who publically advocates for their client or attempts to enhance the public's perception of their client, may owe a fiduciary duty to that client and that client's public image, even after the retainer has ended.[126]

In 1978, Stewart ran over a woman with his vehicle and was convicted of criminal negligence causing death. Greenspan was retained as Stewart's lawyer mid-way through the trial when media coverage and public perception of Stewart was very negative. At trial, Greenspan "went to extraordinary lengths" to use the court and media to influence public perceptions about his client.[127] More than a decade later, in 1991, Greenspan participated as a host, narrator, and writer in a CBC episode of "The Scales of Justice", which re-enacted Stewart's crime and trial. Stewart sued Greenspan for breach of implied contractual terms of confidentiality and breach of fiduciary duty of loyalty owed to him.

The court found that Greenspan did not breach any duty of confidentiality or disclose secret information contrary to the Rules of Professional Conduct. Further, the court held that Greenspan did not have a contractual obligation to keep information in the public domain confidential or to act in the best interests of Steward after termination of the retainer. Despite these findings, the court stated:

> The fact that all of the broadcast content was public knowledge (except for the exaggeration of the distance Mr. Stewart dragged Mrs. Jordan screaming in agony) does not prevent a fiduciary duty of loyalty, or keep it from binding Mr. Greenspan. It is true that Mr. Greenspan, through his involvement in the broadcast, participated in republishing public information about Mr. Stewart, his crime, trial and sentencing. It is also true that in some circumstances, the re-publication of public information may not be subject to any fiduciary duty. However, the relationship in issue at the relevant time is that of counsel and former client, and the fiduciary duty in issue originates in, and takes its character from the nature of the counsel work in issue.[128]

Ultimately, Greenspan was found to have favoured his own financial interests and self-promotion over his client's interests and had undercut the benefits and protection Greenspan had initially provided.[129] Stewart was awarded damages of $5,750 against Greenspan.

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[126] Stewart v. Canadian Broadcasting Corporation (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.).

[127] *Ibid* at para. 38.

[128] *Ibid* at para.318.

[129] *Ibid* at paras. 268-273.

While Stewart is an unusual case, it certainly emphasizes the lawyer's duty to be loyal to a former client well after the retainer ended. A lawyer should be careful not to publicize or publish a former client's case. If a lawyer chooses to publicize or speak publically about a former case, it is advisable that he or she ensures that the content is faithful to and consistent with the advocacy approach taken by the lawyer on the client's behalf during the retainer.[130]

In the case of Kroeger, the results of Ms. Goriuk's application for spousal support were reported (in some instances incorrectly[131]) in the media and spawned commentary from readers (mostly unfavourable for Ms. Goriuk[132]). While the media reports do not suggest that counsel for either party spoke to the media, perhaps counsel for Ms. Goriuk ought to have done so in an effort to rehabilitate the public's view of her client. While it may not be particularly relevant to the decision of the judge, having the public opinion weighing in against a client can have profoundly negative psychological effect on the client. Similarly, if the press is favourable to a client's position, the positive press can bolster the confidence of the litigant. In the end, remember that the media is a powerful weapon, whether it is engaged purposely or accidentally.

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[130] David M. Brown, "What Can Lawyers Say in Public?" (1999) 78 Can. Bar. Rev, at pg. 39.

[131] Matthew Robinson, "Kroegar to part with more nickels", *The Vancouver Sun*, (21 May 2011), online: < http://www.vancouversun.com/entertainment/Kroeger+part+with+more+nickels/4821908/story.html>; Keith Fraser, "Nickelback's Chad Kroeger in court as ex seeks $95K a month in alimony", *The Vancouver Province*, (21 May 2011), online: <http://www.theprovince.com/entertainment/Nickelback+Chad+Kroeger +court+seeks+month+alimony/4819464/story.html>.

The Vancouver Sun article incorrectly reported spousal support amount award to be $25,000 per month when the judgment, as correctly reported in *The Vancouver Province*, was for $25,000 per month net of taxes. On an income of $12,000 per annum, for Ms. Goriuk to receive $25,000 per month, net of taxes, Mr. Kroeger's spousal support payment would have to be $41,576 per month.

[132] *Supra* at note 130. In *The Vancouver Province*, unfavourable comments by readers include:

> "This glutton is at the trough digging for gold & expects to be compensated for life. The free ride is still not over & she has received far more than she deserves."
>
> "The simple fact is, she's trying to claim that Chad's inspirations and song writing came from her presence (more or less) and now she's leaving and wants what she had before but now without having to do anything for it."
>
> "She never earned that money! Did I see her on stage singing along... do I see her name in the credits of the liner notes. Tell me; what did she do to earn herself 95K?"
>
> "I think she is asking for a lot of money please she was a hairdresser before this. Chad gave her a lifestyle that she would have never gotten if it were not for him. She should consider the years with him a gift and move on. Bitter hag comes to mind."
>
> "She should get squat! She got to live the life for a while but now it is over. She doesn't sing or write the songs she just spends the money. No marriage and no kids should mean it is back to cutting hair. The Law is screwed up when it gives these women (or men) ridiculous alimony amounts for no reason. If she wants to have the life style she should do what it takes to keep him."

VII. CONCLUSION

For better or worse, the media is practically an interested party in divorce litigation in Canada. Private details of a divorce litigant's life that have been secretly recorded, accessed online, or intercepted over email and text, end up in court. Quite purposefully, the court acts as a conduit bringing the private details of a litigant's personal life to the media. The media's role in bringing to the public's attention the secrets of divorce litigant's lives, is educational for the public, embarrassing for the litigants, informative for the judge, and both useful and challenging for divorce lawyers. The media is a double-edged sword that may be used to encourage negotiation between parties and drive settlement, but that will also expose the weaknesses and indiscretions of a divorce litigant's conduct. A divorce lawyer can use the lack of privacy for litigants, social media information and media interest in divorce cases to the client's advantage. As is usually the case with divorce cases, how the lawyer uses this knowledge will depend upon which side he is on!

If a divorce lawyer has a client who has behaved questionably, who may behave badly, or who has skeletons in his closet, and, who doesn't want the world to know, the lawyer should:

- Search the client on Facebook and Google to see what type of information is already available to the general public;
- Advise the client to change passwords to email accounts, social networking sites, online banking and other internet resources that require a password;
- Inform the client to refrain from using Facebook during the divorce litigation;
- Advise the client to change internet providers, email service providers, and email accounts;
- Arrange for the client's computers to be checked for key-logging software;
- Inform the client that emails, texts, Facebook postings and photos may be admissible in court and advise the client not to leave electronic devices accessible to the opposing party;
- Advise the client to change cell phone providers and to obtain a new phone or smartphone with a lock function and a new password;

- Remind the client to be careful of the language and content when writing emails, texts or Facebook messages to their spouse and children;
- Remind client not to make disparaging comments to the opposing party or about the opposing party to the children;
- During the litigation process, encourage the client to conduct himself or herself as though a judge is watching every move he makes, as that's not far from reality.
- Inquire as to whether the opposing party has installed Key-logging software;
    - Installed Email encrypting;
    - Hired a private investigators; and
    - Made any hidden tapes or recordings

- Make a robust effort to successfully negotiate a resolution of the matter before pleadings are even filed as once the action is started, the cat is at least half-way out of the bag!
- If the lawyer does not successfully negotiate a resolution, and the matter does end up in court, apply to have the case cited by initials only
- If the opposing party seeks to introduce damaging evidence, agree to exclude it or render it irrelevant to the issues in the case
- If the case attracts media attention, spin it to your client's advantage

If a divorce lawyer is representing a spouse who could benefit from the possession of damaging evidence against the other spouse, either to use a bargaining tool or to prevail in some aspect of the case, the lawyer should:

- Advise the client to download everything off home or shared computers;
- Obtain a forensic image of all computer hard drives in the home;
- Conduct an internet search of the opposing party to see whether he or she has an on-line presence, especially on Facebook, Twitter, Linked-In;

- Ask the opposing party about the existence and content of social media networks, such as Facebook; obtain profiles and passwords;
- Search the opposing party on Facebook and the internet;
- Advise the client to retain all email communications and texts between the parties;
- Advise the client to audio tape conversations with the opposing party with a view to obtaining relevant admissions;
- Hire a private investigator to assist with surveillance of the opposing party; obtain reports and recordings from the private investigator;
- Advise the client to make copies of any documents, communications or data discovered in devices left in the home or other shared location that may relate to the divorce proceeding;
- Remind the opposing party about the lack of privacy if the case is not settled and it proceeds to court;
- Remind the opposing party that the media will have access to the court case once it is commenced in an effort to encourage negotiations and settlement;
- If the case does not settle before pleadings are filed, then make positive but general comments to the media that cast the client in a sympathetic light but do so in a manner that does not prejudge the outcome of the case.

A prudent divorce lawyer will remain aware of the foregoing ways in which the abundance of private and damaging information coupled with the looming presence of the media will impact divorce proceedings. Armed with this knowledge, he will govern himself accordingly to ensure that the media either will or will not (depending on which side he's on) catch the divorce litigant with his privates showing.

APPENDIX I – PROVINCIAL AND FEDERAL PRIVACY LEGISLATION

Provincial and Canadian statutes addressing the privacy of individuals and are briefly summarized as follows:

Legislation	What It Does
The Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.	Concerns the right to privacy refers in terms of security against unreasonable search and seizure – cannot be used by one private citizen against another private citizen.
The Federal Privacy Act R.S.C., 1985, c.P-2	Concerns the right to privacy of personal information under the control of a federal government institution.
The Personal Information And Protection Act, S.B.C., 2003, c.63	Concerns privacy of information held by public sector organizations; does not limit information available by law to a party of a proceeding.
The Freedom of Information And Protection of Privacy Act. R.S.B.C. 1996, c.165	Concerns the privacy of information held by public corporations/ organizations
The Privacy Act, R.S.B.C. 1996, c.373	Defines the statutory tort for individual violations of the privacy of other individuals
The Criminal Code of Canada, R.S.C., 1985, c.C-46	Certain sections address privacy rights through the criminalization of certain actions such as illegally intercepting private communications.