

SUPREME COURT OF NOVA SCOTIA

Citation: *Jamieson v. Duchesneau*, 2024 NSSC 110

Date: 20240418

Docket: *Halifax*, No. 531439

Registry: Halifax

Between:

Kerri-Anne Jamieson

Applicant

v.

Tiffany Duchesneau

Respondent

Judge: The Honourable Justice Gail L. Gatchalian

Heard: March 26, 2024, in Halifax, Nova Scotia

Counsel: Kerri-Anne Jamieson, Self-Represented
Tiffany Duchesneau, Self-Represented

By the Court:

Introduction

[1] Kerri-Anne Jamieson has applied for an order under the *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c.7, against Tiffany Duchesneau.

[2] Under s.5(1) of the *Act*, “[a]n individual ... who is or was the victim of cyber-bullying may apply to the court for an order under Section 6.”

[3] The *Act* defines cyber-bullying as follows in s.3(c):

an ***electronic communication***, direct or indirect, that causes or is likely to cause harm to another individual’s health or well-being ***where the person responsible for the communication*** maliciously intended to cause harm to another individual’s health or well-being or was reckless with regard to the risk of harm to another individual’s health or well-being...

[emphasis added]

[4] Section 3(c) goes on to list examples of what may constitute cyber-bullying.

[5] Ms. Jamieson claims that, on or about February 10, 2024, Ms. Duchesneau posted on Ms. Duchesneau’s Instagram page a photo of Ms. Jamieson’s Instagram page, which included Ms. Jamieson’s Instagram handle and picture, with the following words superimposed on the photo of Ms. Jamieson’s Instagram page:

“...If you follow them or their crew, I will simply assume you support p*dos and

their actions ...” (“the alleged post”). Ms. Jamieson says that Ms. Duchesneau placed the alleged post on Ms. Duchesneau’s Instagram story, and later “highlighted” it.

[6] Ms. Jamieson adamantly denies any suggestion that she would engage in any predatory behaviour towards children. Ms. Jamieson states that, although the alleged post was later removed, she was harmed by it.

[7] Ms. Duchesneau denies making the alleged post, alleging that Ms. Jamieson, in her affidavit evidence, has fabricated the alleged post using a third party app.

[8] Ms. Jamieson relied on her Affidavit and her Rebuttal Affidavit. Ms. Duchesneau relied on their Reply Affidavit. The parties represented themselves at the hearing. There was no cross-examination on the affidavits.

[9] In order to determine this Application, I will consider the following:

1. The evidence relied on by Ms. Jamieson in her original Affidavit to prove the alleged post.
2. The evidence relied on by Ms. Duchesneau in their Reply Affidavit to support their claim that Ms. Jamieson fabricated the alleged post.
3. The evidence relied on by Ms. Jamieson in her Rebuttal Affidavit to prove the alleged post.
4. Whether the electronic evidence relied on by Ms. Jamieson is admissible.

5. Whether the electronic evidence relied on by Ms. Duchesneau is admissible.
6. Whether Ms. Jamieson has established, on a balance of probabilities, that Ms. Duchesneau is responsible for the alleged post.

The Evidence Relied on by Ms. Jamieson in her Original Affidavit

[10] In her original Affidavit, Ms. Jamieson stated as follows:

The defendant publicly stated through an Instagram story (later highlighted), an accusation wherein I, the plaintiff, was alleged to engage in predatory acts/ behaviors towards minors.

[Original Affidavit of Ms. Jamieson, page 1, para.4]

[11] Ms. Jamieson included in her original Affidavit a page entitled “Brief of Law, Contents”, and on that page, she wrote in part:

Section 1A through 2A discuss the upload of photos including my face and instagram handle to their instagram story claiming I am a “pedo” as they put it.

[Original Affidavit of Ms. Jamieson, Exhibit A, pages 1 and 2]

[12] On page 3 of Exhibit A to her original Affidavit, Ms. Jamieson wrote as follows:

This page is about them posting my face and my Instagram page falsely declaring that I am a “pedo” and my ‘crew’ support my actions.

[Original Affidavit of Ms. Jamieson, fifth page]

[13] Next, on page 3 of Exhibit A to Ms. Jamieson's Affidavit, are what appear to be two pictures, side by side ("Picture J1" and "Picture J2").

[14] There is no dispute between the parties that, on the top third of Picture J1, we see Ms. Duchesneau's Instagram picture and Instagram handle. The top third of Picture J1 also includes the words "15 posts, 631 followers and 83 following," and four icons that might be highlight icons. In the bottom third of Picture J1, on the left, there is an image that might be a screenshot of another Instagram page, with the words at issue in this Application. There is no dispute that the ostensible screenshot includes Ms. Jamieson's Instagram handle. Below the ostensible screenshot of Ms. Jamieson's Instagram page, there is a "download" button. To the right of the ostensible screenshot on Picture J1 is a large, blank, black space.

[15] Picture J2 appears to be a larger version of the ostensible screenshot seen on Picture J1.

[16] Ms. Jamieson did not, in the Affidavit, say what Pictures J1 and J2 are, who took the pictures, or how they were taken, other than what I have already excerpted from the Affidavit. Ms. Jamieson did not say whether the pictures are of a webpage; if so, what webpage and what device was used to display the website; the date the pictures were taken; who took the pictures; or whether the pictures

involved any editing. If Picture J1 is of a webpage, the webpage does not appear on the picture.

[17] I conclude, based on the passages that I have excerpted from Ms. Jamieson's original Affidavit, that Ms. Jamieson's purpose in including Pictures J1 and J2 in her original Affidavit was to convince the Court that Picture J1 is a screenshot of Ms. Duchesneau's Instagram page with the alleged post in a highlight, and that Picture J2 is a blown up picture of the alleged post in a highlight.

The Evidence Relied on by Ms. Duchesneau in Their Reply Affidavit

[18] In their Reply Affidavit, Ms. Duchesneau wrote as follows, asserting that Pictures J1 and J2 in Ms. Jamieson's original Affidavit were generated using a third party app:

1A – Discussing my online account and the alleged uploaded [sic] I (Tiffany Duchesneau) am being accused of. The plaintiff states this is a screenshot of my personal highlight/Instagram containing her 'face' as well as a message directed about her has been generated in a third party app. You can see the **DOWNLOAD** button on the bottom of the pictures, and nowhere on the picture does it show my Instagram name, the date it was posted, the ability to interact etc. I have included a screenshot of my own Instagram to show what looking at one of my Highlights would look like, for clarification.

[Reply Affidavit of Ms. Duchesneau, Exhibit A, page 1, emphasis in original]

[19] On the next page of their Reply Affidavit, Ms. Duchesneau wrote as follows:

As shown, when clicking on my highlight, if not used by a third party or editing app, it will show the title of the Highlight. As well as the date it was posted.

[Reply Affidavit of Ms. Duchesneau, Exhibit A, page 2]

[20] Ms. Duchesneau then included three pictures below the above-noted passage. I conclude, based on the passages that I have excerpted from Ms.

Duchesneau's reply Affidavit, that:

1. Ms. Duchesneau is saying that the first picture is of their Instagram page ("Picture D1").
2. Ms. Duchesneau is saying that the second picture is what is seen when one clicks on one of their Highlights on their Instagram page ("Picture D2").
3. The third picture is a copy of Picture J1.

[Reply Affidavit of Ms. Duchesneau, Exhibit A, page 2]

[21] Picture D1 includes: Ms. Duchesneau's Instagram picture and Instagram handle, as well as the number of posts, followers and those being followed. There are differences between the ostensible screenshot of Ms. Duchesneau's Instagram page in Picture J1 and Picture D1. For example, there is no large, blank, black space on Picture D1.

[22] There are differences between the ostensible highlight in Picture J2 and the highlight in Picture D2. Picture D2 has the name and date of the highlight, and

features allowing the viewer to interact with the highlight, for example, by liking it. Picture J2 does not have these features.

Evidence in Ms. Jamieson's Rebuttal Affidavit

[23] On page 2 of Exhibit A to her Rebuttal Affidavit, Ms. Jamieson includes three pictures with handwritten editing on them:

1. The first picture ("Picture J3"), on the top left of the page, appears to be the same or similar to Picture J1, but Ms. Jamieson has circled one of the highlight icons, which has a strawberry emoji below it. This highlight, with the strawberry emoji, appears in Picture J1.
2. The second and third pictures ("Pictures J4 and J5"), on the top right of the page and on the bottom right of the page, appear to be pictures of the alleged post – the screenshot of Ms. Jamieson's Instagram page with the offending words, first seen in Pictures J1 and J2. Now, however, the highlight icon and the strawberry emoji appear at the top of the alleged post. These are not seen in Pictures J1 or J2.

[24] Ms. Jamieson then wrote as follows in her Rebuttal Affidavit:

I do have an alternate screenshot with the "same picture, time stamp and the name of the highlight" (which is a strawberry emoji)

This was seen through a third-party app known as: instanavigation.

This is the format of the site.

There is no law which states I cannot view a person's **public** social media accounts through a third-party website.

(I only began doing this when someone brought this screenshot to my attention and then I continued to watch and see if they would continue (they did).

...

[Rebuttal Affidavit of Ms. Jamieson, Exhibit A, page 2]

[25] It is not clear what screenshot Ms. Jamieson is referring to when she writes “when someone brought this screenshot to my attention.”

[26] Ms. Jamieson does not respond to or challenge Ms. Duchesneau’s allegation that Picture J1 was generated using a third party app.

[27] Rather, she includes, on the next page of her Rebuttal Affidavit (Exhibit A, page 3), a further four pictures, which she acknowledges were taken using a third party app called instanavigation:

1. In the large picture at the top, left corner of the sixth page of Ms. Jamieson’s Rebuttal Affidavit (“Picture J6”), one can see the website address “instanavigation.com”. Picture J6 contains a picture of Ms. Duchesneau’s Instagram picture and Ms. Duchesneau’s Instagram handle, but in locations that are different from what we see in Picture J1. Under Ms. Duchesneau’s Instagram picture in Picture J6, we see “Statistics based on last 12 posts,” and a list of six statistics. There is a link to “Highlights” on Picture J6. One of the highlight icons looks similar to one of the highlight icons in Picture J1, except that the name of the highlight in Picture J1 is a strawberry emoji, and the name of the highlight in Picture J6 is a star emoji, strawberry emoji, star emoji.

In her Rebuttal Affidavit, to the right of Picture J6, Ms. Jamieson wrote:

This highlight has been changed to [star emoji, strawberry emoji, star emoji] but as you can see the image is still the same.

The highlight stating I am a ‘pedo’ (their words) has since been removed from the highlight and replaced with the images below.

...

2. There are three pictures at the bottom of the sixth page of Ms. Jamieson’s Rebuttal Affidavit, above which Ms. Jamieson wrote “The replacement highlights” (Pictures J7, J8 and J9”).

[Rebuttal Affidavit of Ms. Jamieson, Exhibit A, page 3]

[28] None of the above-noted pictures in Ms. Jamieson’s Rebuttal Affidavit contain the alleged post.

[29] Presumably, Ms. Jamieson is asserting, in her Rebuttal Affidavit, that the alleged post seen in Picture J1 used to be in the same highlight icon that we see in Picture J6. However, there is nothing in Picture J1 to indicate which highlight icon corresponds to the alleged post.

[30] On page 2 of Exhibit A to her Rebuttal Affidavit, Ms. Jamieson also wrote the following:

Note: I have attached a screen recording of me clicking their profile photo and it opening the post as further evidence. Can be seen on the thumb drive under ‘story screen recording’.

[31] Ms. Jamieson did not say, in the body of her Rebuttal Affidavit, whether the attached video showed her accessing Ms. Duchesneau’s actual Instagram page, or using a third party app or other website.

[32] In the video, someone is viewing a webpage on a smart phone. The webpage is not Ms. Duchesneau's Instagram page. The website address appears to be tanavigation.com. I find that the address is, for some reason, cut off on the webpage, and that the website is the instanavigation.com website. The page being viewed in the video has Ms. Duchesneau's Instagram picture and handle, but includes the words "anonymous view." The video ostensibly shows someone clicking on the highlight with the strawberry emoji, upon which the alleged post appears.

Whether the Electronic Evidence Relied on by Ms. Jamieson is Admissible

[33] Under s.23C of the *Evidence Act*, R.S.N.S. 1989, c.154, the person seeking to introduce an electric document has the burden of proving its authenticity by evidence capable of supporting a finding that the document is what the person claims it to be. The threshold set out in this section is low. It is met when there is *some* evidence to support the conclusion that the thing is what the party presenting it claims it to be. The threshold can be satisfied by direct or circumstantial evidence. See D. Paciocco, "Proof and Progress: Coping with the Law of Evidence in a Technological Age" (2013) 11 C.J.L.T.181 at p.196 and *R. v. Ball*, 2019 BCCA 32 at para.70

[34] Ms. Jamieson did not make a claim, in her affidavits, about what Pictures J1, J2, J3, J4 or J5 are. I do not know, based on her evidence, whether her claim is that Pictures J1 to J5 are screenshots of Ms. Duchesneau's Instagram page, screenshots of what is seen when looking at Ms. Duchesneau's Instagram page through a third party app, pictures sent to her by someone else, something she edited, or some other document. I do not know. Pictures J1, J2, J3, J4 and J5 have not been authenticated.

[35] Ms. Jamieson does not make a claim, in her Rebuttal Affidavit, about what the video depicts, other than saying that it is a screen recording of her clicking Ms. Duchesneau's profile photo. The video appears to show someone on the instanavigation.com website. There is evidence capable of supporting the conclusion that the video is of Ms. Jamieson accessing the instanavigation.com website. There is no evidence capable of supporting any claim that the video is of her accessing Ms. Duchesneau's Instagram page.

[36] Under s.23D(1) of the *Evidence Act*, the best evidence rule is satisfied on proof of the integrity of the electronic records system in or by which the document was recorded or stored.

[37] Proof of integrity can be satisfied by direct evidence or by the presumptions found in s.23E of the *Evidence Act*, which states that, in the absence of evidence to the contrary, the integrity of the electronic documents system is presumed:

(a) by evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record, and there are no other reasonable grounds to doubt the integrity of the electronic records system;

(b) if it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

[38] Ms. Jamieson has failed to satisfy the statutory best evidence rule in relation to Pictures J1, J2, J3, J4 and J5. Ms. Jamieson did not, in her evidence, explain how she obtained the pictures, for example, whether she obtained them by accessing Ms. Duchesneau's Instagram account using a computer or a smart phone. There is insufficient evidence to establish the integrity of the electronic records system in or by which J1, J2, J3, J4 and J5 were recorded or stored.

[39] Ms. Jamieson has satisfied the statutory best evidence rule in relation to the video of her on the instanavigation.com website attached to her Rebuttal Affidavit.

In the video, someone is using a smart phone to access the instanavigation.com website. The smart phone appears to be operating properly. The video therefore falls within one of the statutory presumptions of integrity.

Authentication of Ms. Duchesneau's Electronic Evidence

[40] There is some evidence capable of supporting the conclusion that Pictures D1 and D2 in Ms. Duchesneau's Reply Affidavit are screenshots of their actual Instagram page and one of their highlights. Ms. Duchesneau's evidence is that these are screenshots of their own Instagram showing what one of their highlights looks like.

[41] Ms. Duchesneau has satisfied the statutory best evidence rule in relation to Pictures D1 and D2. I infer from Ms. Duchesneau's affidavit evidence that Ms. Duchesneau used a computer device, whether a computer or smart phone, to access their own Instagram account and to take a screenshot of their account and highlight. The computer device appears to have been operating properly. Pictures D1 and D2 therefore fall within one of the statutory presumptions of integrity.

Whether Ms. Jamieson Has Established that Ms. Duchesneau Made the Alleged Post

[42] I find that Ms. Jamieson has not established, on a balance of probabilities, that Ms. Duchesneau made the alleged post on Ms. Duchesneau's Instagram account. I rely on the following reasons.

[43] First, I accept the evidence of Ms. Duchesneau that Pictures D1 and D2 in their Reply Affidavit accurately show what their Instagram page and highlights look like: there is no large, empty space on the main page, and when one clicks on a highlight, one sees the date and title of the highlight and one has the ability to interact with it. Ms. Jamieson did not challenge this evidence.

[44] Second, Pictures J1 and J2 in Ms. Jamieson's original Affidavit, and the images depicted in the video attached to Ms. Jamieson's Rebuttal Affidavit, differ significantly from the screenshots of Ms. Duchesneau's actual Instagram page in Pictures D1 and D2.

[45] Third, Ms. Jamieson conceded in oral argument that she did not access Ms. Duchesneau's Instagram account directly to view the alleged post. Rather, she used a third party app. Therefore, Ms. Jamieson has not provided the court with an image showing the alleged post on Ms. Duchesneau's Instagram page.

[46] Fourth, there is no evidence before me about the nature of the third party app, or the instanavigation app or website. In the absence of any such evidence, I

am unable to find that the images or video relied on by Ms. Jamieson accurately depict what was on Ms. Duchesneau's Instagram account.

[47] Fifth, I do not find Ms. Jamieson's evidence about the existence of the alleged post on Ms. Duchesneau's Instagram page to be credible, for the following reasons:

- Ms. Jamieson included Pictures J1 and J2 in her original Affidavit for the purpose of convincing the Court that J1 is a screenshot of Ms. Duchesneau's Instagram page with the alleged post in a highlight, and that Picture J2 is a blown up picture of the alleged post in a highlight. However, Ms. Jamieson did not disclose to the Court in her original Affidavit that she had not directly viewed Ms. Duchesneau's Instagram page.
- Ms. Jamieson did not address Ms. Duchesneau's allegation that Pictures J1 and J2 were generated using a third party app.
- Ms. Jamieson did not explain, in her affidavits, why she used a third party app to provide the court with purported images of the alleged post rather than providing a screenshot of Ms. Duchesneau's Instagram page.

- Ms. Jamieson did not provide any information to the Court about the third party app.
- Ms. Jamieson did not explain why the images in her Affidavits looked different than the screenshots of Ms. Duchesneau's actual Instagram page and highlights.
- Ms. Jamieson did not explain why the images of the alleged post in Pictures J1 and J2 (the purported highlight) do not have a strawberry emoji but the images of the alleged post in Pictures J4 and J5 (the purported highlight) do.
- Ms. Jamieson did not disclose in her Rebuttal Affidavit that the video showed her accessing the instanavigation.com website, but rather intimated that she was accessing Ms. Duchesneau's Instagram page.

Conclusion

[48] Ms. Jamieson has failed to establish that Ms. Duchesneau referred to Ms. Jamieson as a "p*do" on Ms. Duchesneau's Instagram page. The application is dismissed, with costs payable to Ms. Duchesneau.

[49] If the parties cannot agree on the amount of costs, I will receive written submissions from them within two weeks of this decision.

