

The Discoverability of Social Media Evidence in the Context of Family Law & Estates Litigation

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The prevalence of social media is undeniable. From Presidents who tweet to Prime Ministers who Instagram, social media has proven to be a popular tool that is widely accessible. However, social media use is not exclusive to politics. The practice of law has slowly embraced the value of social media as evidence in litigation. Social media can be defined as “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).”¹ It encompasses a variety of platforms including but not limited to Facebook, Twitter, Instagram, and Snapchat. The discoverability of social media posts in the context of family law and estates litigation is a developing trend. However, the lack of consistency in the treatment of these cases leaves many unanswered questions for lawyers seeking production of social media posts as evidence relevant to legal proceedings.

The *Rules of Civil Procedure* (the “Rules”) are broad in their documentary discovery obligations of parties to litigation, stating that “every document relevant to any matter in an action that is or has been in the possession, control or power of a party to the action shall be disclosed.”² Further, the *Rules* state that “every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested.”³ The content of posts on sites like Facebook and Twitter are considered to be information in electronic form that may be producible as documents under the *Rules*. Ontario courts have stated that if a party posts content on Facebook that relates to any matter at issue in an action, that party must identify such content in his or her affidavit of documents.⁴

In the case of *Leduc v. Roman*, the discoverability of the Facebook posts of the plaintiff was at issue in an action commenced after a motor vehicle accident claiming damages for loss of enjoyment.⁵ The defendant moved for an order for the production of all information on the plaintiff’s Facebook profile, arguing that that information on Facebook contained evidence of the plaintiff’s physical and social activities. The Court held that the Facebook profile page was a document that “lay within the control of the plaintiff” and concluded that “the Facebook

¹ Merriam-Webster Dictionary, *sub verbo* “social media”, online: <<https://www.merriam-webster.com/dictionary/social%20media>>.

² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.02(1), O. Reg. 438/08, s. 26.

³ *Ibid.* at r. 30.02(2).

⁴ *Leduc v. Roman*, [2009] O.J. No. 681 at para. 27, 308 D.L.R. (4th) 353 (S.C.J.).

⁵ *Ibid.* at para. 1.

profile could contain information that might have some relevance to demonstrating the Plaintiff's physical and social activities, enjoyment of life and psychological well being."⁶

Now that courts have accepted social media posts as producible documentary evidence, questions are arising to the scope of its use. There does not appear to be a consistent approach to the discoverability of social media posts, especially within the context of family law and estate litigation. Courts have reached different conclusions as to when social media posts are relevant, the scope of production of such posts, and the treatment of public posts in contrast to private posts. In most cases, courts have required the party seeking in the litigation production to demonstrate the relevance of the requested social media evidence to the matters at issue before ordering its production. Once the relevance of the content is established, courts may be prepared to order production of social media posts relating to the relevant time period and subject matter.

Often, courts will place limits on the scope of production of social media evidence, in an attempt to avoid a "high tech fishing expedition."⁷ Even where relevance is established, courts may be reluctant to order production of such posts until the parties have narrowed down precisely what they are looking for. The Court has rejected the argument that the nature of Facebook, as a social networking platform renders such posts irrelevant.⁸

Courts have also distinguished between posts made on a private Facebook account and those made on a public Facebook profile. It appears that courts may be more likely to order production of photographs made available on publicly accessible portions of social media platforms, while there is a higher threshold for photographs contained on the private portion of a social media account.⁹ A lawyer attempting to obtain evidence of a party's private account may wish to consider first reviewing the contents of that party's public profile.

While not yet explored within reported Ontario case law, the evidence contained in social media posts may become important in cases involving dependant's support claims. Photographs or information that depict a party's physical and social activities, enjoyment of life and psychological wellbeing may be helpful in determining the nature of an alleged dependant's relationship with the deceased, as well as the level of financial support previously provided and currently required. Further, social media evidence may shed light on a party's spending habits, travel expenses, relationships, and other behaviours that can be valuable in evaluating the merits of a dependant's support claim.

On the relevance of social media in family law disputes, the Court has stated as follows:

In the past couple of years evidence of social media, whether Facebook or Twitter, has surfaced in evidence in family law proceedings with increasing

⁶ *Ibid.* at paras. 8 and 9.

⁷ *Garacci (Litigation guardian of) v. Ross*, 2013 ONSC 5627 at para. 9 (Master).

⁸ *Schuster v. Royal & Sun Alliance Insurance Company of Canada*, [2009] O.J. No. 4518 at para. 39 (S.C.J.).

⁹ *Ibid.* at para. 37.

frequency. The thoughtless behaviour and comments which are posted on Facebook, and responded to by individuals of lesser or like minds, opens the door to a new form of evidence and window into the lives of future litigants.¹⁰

Ontario courts are acknowledging the increasing presence of social media as an evidentiary tool in family law matters and it follows that it will more frequently appear in other areas of law over time. Social media may become a useful tool in cases of dependant's support claims, as posts and photographs from social media accounts can assist in determining a party's social and financial behaviour. As more cases confront the question of when ordering the production of social media posts is appropriate and the scope of such discovery, it is likely that a more consistent approach will follow. For now, lawyers seeking the production of social media posts should be prepared to demonstrate the relevance of such posts and avoid setting off on what may otherwise be perceived to be a high-tech fishing expedition.

¹⁰ *Legien v. Legien*, 2012 SKQB 326 at para. 35.