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• STATUS UPDATE: SOCIAL MEDIA IN THE CHANGING LANDSCAPE OF LITIGATION IN CANADA •

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Information disseminated through social media platforms such as Facebook and LinkedIn is of growing utility in litigation matters. Evidence obtained from social media accounts by way of discovery (preservation and production orders) has significantly strengthened the positions of litigating parties. This should come as no surprise as individuals routinely "post" messages, thoughts, pictures, and experiences on these platforms, leaving a wake of evidence in the process.

There has been marked development in this area of law in Canadian jurisprudence. To date, courts and tribunals have, among others things, ordered the preservation and production of entire social media accounts, have dismissed wrongful dismissal claims based in part on the disparaging nature of comments posted online, and have considered social media evidence against claims of the loss of enjoyment of life and the inability to work. However, the courts are cognizant of the private nature of this information and have been careful to balance the probative value of this evidence against the privacy interest of the social media user. Generally, the courts have resolved this tension by making a determination of how "private" the social media account is through the application of a number of factual indicia. As this area of law develops, Canadian courts and tribunals will no doubt find increasing utility in the evidentiary value such information provides.

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When Social Media Is Producible

Canadian jurisprudence is clear that social media accounts are considered documents that must be produced if they contain relevant and material information. This principle manifests itself most acutely in personal injury claims where the "social" aspect of social media speaks directly to the claimant's loss of enjoyment of life. For example, social media such as pictures of claimants engaged in recreational activities are often admitted as evidence relevant to demonstrating the claimant's enjoyment of life or ability to work.

However, the probative value of social media is not limited to personal injury claims. In one instance, disparaging comments made against an employer by an employee on a blog was sufficient to dismiss the employee's claim for wrongful dismissal. In another, a former employer was able to obtain an Anton Piller[1] order to seize, among other things, the LinkedIn account of an employee that they claimed had breached confidentially restrictive covenants in an employment contract.

Many courts have inferred from the nature of the social media service the likely existence of relevant documents on a limited-access account. Some courts have denied such an inference, requiring instead that private information on limited-access accounts is producible only when information available publicly infers the existence of relevant material held privately. Interestingly, some courts have cautioned that such accounts are likely to contain a degree of "puffery" that must be taken into consideration.

In determining the privacy interest of the social media user, many courts point to factual indicia of privacy surrounding the account itself. Many social media accounts are of limited access, con-

taining internal controls that limit the viewable content and the discoverability of the account set at the discretion of the account holder. Courts have also considered the number of individuals able to view the social media account. In one example, the claimant's Facebook account was viewable by 200 Facebook "friends," only 5 of which were described as "close friends." The court concluded that this wide audience mitigated against privacy, and the Facebook account had to be produced.

The following table contains a list, with noteworthy considerations, of select reported Canadian cases requiring the production of social media accounts.

Decision Court	Type of Case Social Media	Noteworthy Considerations
Alberta v. Alberta Union of Provincial Employees [2008] A.G.A.A. No. 20 (Alta. Griev. Arb.)	Wrongful Dismissal Blog	In this arbitration, an employee had posted negative comments about her colleagues on a personal blog. In hearing a claim for wrongful dismissal, the Alberta Arbitration Board took into consideration the disparaging nature of the comments and the employee's lack of remorse. The board also noted how the employee took no steps to block public access to her comments. The majority of the board upheld the termination, noting the destructive effect of the comments on the employee-employer relationship. This case was overturned in the Alberta Court of Queen's Bench based on a breach of a representation clause in the collective agreement.
Leduc v Roman [2009] O.J. No. 681 (Ont. Sup. Ct.)	Personal Injury Facebook	The court noted that postings on Facebook pages are considered documents within the meaning of the Ontario *Rules of Civil Procedure*.A party must produce any of his Facebook postings relevant to any matter in issue in an action. Where a party maintains a private Facebook profile, it is reasonable to infer from the presence of content on the party's public profile that similar content likely exists on the private profile.
Carter v. Connors [2009] N.B.J. No. 403 (N.B.Q.B.)	Personal Injury Facebook	In this case, the plaintiff had been unable to return to work as an administrative clerk for more than short periods after a motor vehicle accident. The defendants made an application to have the plaintiff's Internet Service Provider disclose the history of her internet use, including a discrete record for Facebook. The court noted that the information to be garnered had a semblance of relevance as it would provide a window into what physical capacity the plaintiff had as to keyboard, accessing the Internet, and ability to communicate with family, friends, and associates on Facebook. This was directly relevant to what capacity the plaintiff may have to work.

DeWaard v. Capture the Flag Indoor Ltd. [2010] A.J. No. 1491 (Alta. Q.B.)	Personal Injury Facebook	In this case, the defendants alleged that the Facebook account of the plaintiff, who had obtained an injury while playing laser tag at the defendant's facilities, evidenced a substantial recovery as it recorded, through pictures and text, a normal and active lifestyle. This was inconsistent with statements made by the plaintiff to experts. In dismissing this inconsistency, the court accepted that Facebook profiles may contain an overly positive perspective regarding one's abilities and interests or a certain amount of "puffery." The inconsistencies were not sufficient to impeach the plaintiff's credibility.
1483860 Ontario Inc. (c.o.b. Plan IT Search) v. Beaudoin [2010] O.J. No. 5315 (Ont. Sup. Ct.)	Breach of confidentiality/ restrictive covenants LinkedIn	In this case, the plaintiff, on the grounds that the defendant was breaching a confidentiality/restrictive covenant, obtained an Anton Piller order to seize "other materials in any way *relating* to the Confidential Information in any form whatsoever including electronic format such as Microsoft Word, Microsoft Outlook, hotmail, yahoo mail and LinkedIn."
Frangione v. Vandongen [2010] O.J. No. 2337 (Ont. Sup. Ct.)	Personal Injury Facebook	In this case, the plaintiff produced only relevant information from his Facebook page that was available to the public and contested the production of private information. The plaintiff had his Facebook privacy settings set to restrict its content to 200 "friends," admitting only 5 of which were "close friends." The court noted that it may infer from the nature of the Facebook service the likely existence of relevant documents on a limited-access Facebook profile. The existence of relevant information available publicly allowed the court to infer the probable existence of information held privately.
Ottenhof v. Kingston Police Services Board [2011] O.J. No. 976 (Ont. Sup. Ct.)	Personal Injury Facebook	In this case, the defendants sought to compel the production of all content on the private portion of the plaintiff's Facebook account. Access to the party's Facebook account through the party's pass-word is overly intrusive unless the party is claiming as part of his or her damages claim a level of disability that inhibits his or her computer time. In those circumstances, a forensic examination of the Facebook account may be necessary.

Dube v. Young [2012] A.J. No. 434 (Alta. Prov. Ct.)	Division of Marital Property Facebook	In this case, the plaintiff brought an action against the defendant for damages in respect of an automobile purchased and retained by the defendant. The defendant relied on a Facebook post by the plaintiff to contend that the vehicle had been provided as a gift. The court noted that Facebook postings may be used to establish intent although they should be applied with caution as they often provide an overly positive perspective. The court concluded that the Facebook posting was "boastful and self-congratulatory, if not downright tacky and nothing more than an effort on the part of the Plaintiff to make himself appear generous and kind-hearted." As a result, the Facebook post was insufficient to evidence a gift.

When Social Media Is not Producible

Canadian courts have clarified instances when social media accounts are not producible. It is clear that, where the social media accounts are not relevant and material to the pleadings, they need not be produced. Production is also not required in instances where the privacy interest of the account holder outweighs the probative value of the evidence. In one example, a claimant's Facebook account was viewable by only 67 Facebook "friends" with strict privacy settings. The court implied that this mitigated in favour of privacy, and the account was not producible. In a second example, the court noted that permitting access to 139 "friends" operated to exclude approximately 1 billion Facebook users, showing a privacy interest that prevented production.

The following table contains a list, with noteworthy considerations, of select reported Canadian cases not requiring the production of social media accounts.

Decision Court and Year	Type of Case Social Media	Noteworthy Considerations
Kent v. Laverdiere [2009] O.J. No. 1522 (Ont. Sup. Ct.)	Personal Injury Facebook Myspace	In this case, the court refused to require the production of a supplementary affidavit of documents, making two primary observations. First, the pleadings failed to show the social media pages could be relevant to the matters in issue. Second, while for one plaintiff there was the semblance of relevance, the court noted that the kind of information sought through production of Facebook pages would have been equally available through surveillance.
Schuster v Royal & Sun Alliance Insurance Co. of Canada [2009] O.J. No. 4518 (Ont. Sup. Ct.)	Personal Injury Facebook	In this case, the plaintiff had her Facebook privacy settings set to restrict its content to 67 "friends". The Court found that purpose of the page was not created for sharing with the public. What is determinative when drawing an inference that the private Facebook page likely contains relevant material is whether there

		is relevant information in their public profile. The court cautioned that the mere nature of Facebook as a social networking platform is not necessarily evidence that it contains information that is relevant. The court further noted that an order requiring a party to provide a username and password to provide access to their Facebook page is beyond the scope of the Ontario *Rules of Civil Procedure*.
Stewart v. Kempster [2012] O.J. No. 6145 (Ont. Sup. Ct.)	Personal Injury Facebook	In this case, the court noted that Facebook has about 1 billion users. Out of those, the plaintiff permitted only 139 people to view her private content, excluding approximately 1 billion users from viewing the private content. The court found that this supported a real privacy interest in the content of the Facebook account. As a result, the court concluded that there were no relevant documents on the plaintiff's Facebook account.

Conclusion

When hearing applications for the production and preservation of social media accounts, the court is being asked to engage in a delicate balance between the privacy of the individual and the probative value of the evidence. Two factors that clearly erode an account holder's privacy interest include relaxed privacy settings and the existence of relevant information available on public portions of the account that allows the inference of the probable existence of information held privately.

As shown above, a third factor, being a large number of "friends" able to view the social media page, has proven unclear. However, it is likely that courts are more concerned with the nature of the account holder's relationship with the audience as opposed to its size. When making an application for the production or preservation of social media accounts, it may be more appropriate to frame the argument as being about the nature of the "friendship" as opposed to the quantum. The more "public" the audience is, the less likely a legitimate privacy interest exists.

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[1] An Anton Piller order is a civil search warrant that provides the right to search premises and seize evidence without warning. These orders are provided to prevent the destruction of relevant evidence.

• MANAGERS FILE COMPLAINTS ABOUT EMPLOYEES' OFFENSIVE BLOG POSTS, BUT REMEDY DENIED •

Adrian Miedema, Dentons

In an interesting case, a group of managers who complained that their workplace had been poisoned by the employer's inaction in the face of offensive blog postings by their employees has been denied a remedy.[1]

The managers were Operational Managers at the Middlesex Detention Centre. They complained about a blog associated with a local of the Ontario Public Service Employees Union. Some of the blog posts alleged managerial corruption or negligence, such as having "screwed up" an attendance management program. The blog posts used words such as "useless," "pathetic," "vindictive," "morons," and "misfits." Cartoons and comments referred to "kangaroo courts" imposing discipline on the employees. The blogs characterized the managers' "pay for performance" as being bonuses for "screwing up."

The blog was initially not password protected, but password protection was added at some point.

The managers argued that the blog comments were "harassment," violated the employer's harassment policy, and that, by not acting on those violations, the employer breached the terms and conditions of the managers' employment contracts.

The Public Service Grievance Board held that senior management—who managed the complaining managers—had not violated the complaining managers' terms and conditions of employment in the way that the blog issue was handled. In particular, senior management did not violate the employers' policies in the way they handled the issue. Senior management made clear to all employees that the disrespectful portions of the blog were not to be tolerated and was instrumental in getting the blog removed from the public domain. That senior management did not pursue the matter further after password protection was added to the blog was an exercise in discretion that did not breach the managers' employment contracts. As such, the complaints of the managers were dismissed.

Although senior management's handling of the blog issue was considered reasonable, had the facts been different—and the offensive blog posts continued to be accessible to the public—the Public Service Grievance Board might have granted a remedy.

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[1] *Lee v. Ontario (Ministry of Community Safety and Correctional Services)*, [2013] O.P.S.G.B.A. No. 1.

• IS THERE LIFE AFTER DEATH FOR YOUR DIGITAL ASSETS? •

Lisa Statt Foy, Field Law

Digital assets. It is a phrase that is currently trending among Canadians in general and legal commentators in particular. Some argue that it is a critical topic for any estate plan. Others feel it has no place in an estate-planning meeting. So what is the answer?

It depends. Simply having an online presence does not necessarily mean that you should immediately call your estate lawyer. The key questions are: Do you have digital (electronic) assets? Do you have electronic property that has value?

"Value" is a subjective question. It may mean monetary value (such as a vast digital music library or a four-digit PayPal seller account). However, it can also mean sentimental value (such as those digital photos that are stored only on your laptop or in the cloud or a blog that

documents your child's first year). Electronic accounts that contain information of a personal or sensitive nature may also be "valuable" to the extent that it is vital to you to either prohibit or restrict access to such information on your death (such as private Facebook or other social-networking accounts, or e-mail accounts with sensitive correspondence).

If on a review of your online or electronic property, there is little that you would describe as "valuable," you likely do not need to undertake a rigorous planning exercise to assist your executor and beneficiaries. In most cases, providing access to such assets by documenting their existence and the corresponding login credentials will be sufficient to allow the executor to take control over such assets. More difficult questions arise when determining how to securely document such login information while keeping it close enough at hand to keep it current and complete.

Keep in mind that not all of your digital assets are transferable or can all be continued after your death. Many of your assets are not "owned" by you: use is governed by a licence or terms of use that terminate on your death. In such circumstances, providing access to such digital assets may be the only means by which the assets can be maintained after your death.

If the quality or quantity of your digital assets is significant, you may wish to seek guidance as to how to implement your wishes in the event of your death or incapacity. Such a plan might include a comprehensive inventory of such assets and the relevant login credentials. It would also document your wishes with respect to specific assets and explore the logistics by which your executor can secure such assets and fulfil your wishes. For example, you may wish to instruct your executor to delete your e-mail accounts without reading or publishing the contents. You may also direct your executor to access your Facebook account and obtain a download of all of the account contents for the interests and records of your family (currently Facebook accounts cannot be continued on death of the holder). If you are a business owner, it might be particularly important to understand which digital assets the corporation holds and which ones you own personally.

At minimum, if you retain important or valuable documents and files on a password-protected computer or other device, you should consider securely documenting the passwords or providing them to your executor. In many cases, where you own the digital assets, your executor will be able to eventually take control. However, the process can be time consuming and disordered because the service providers' rules vary widely, and protocols are often not consistently applied. Further, where you do not own the digital asset (*e.g.*, Facebook accounts) there is no guarantee that the service provider will honour your direction to your executor. Therefore, simply providing an inventory of such assets, and a means to access them, can go a long way to giving your executor timely control and benefiting your beneficiaries with use of such assets. However, where loss of the electronic materials would be devastating to your loved ones, reproducing the assets on non-password protected medium (such as memory cards and external hard drives) would always be advisable.

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