



Dealing with Social Media Evidence: at the IRB and with IRCC

*Presentation by:
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Agenda

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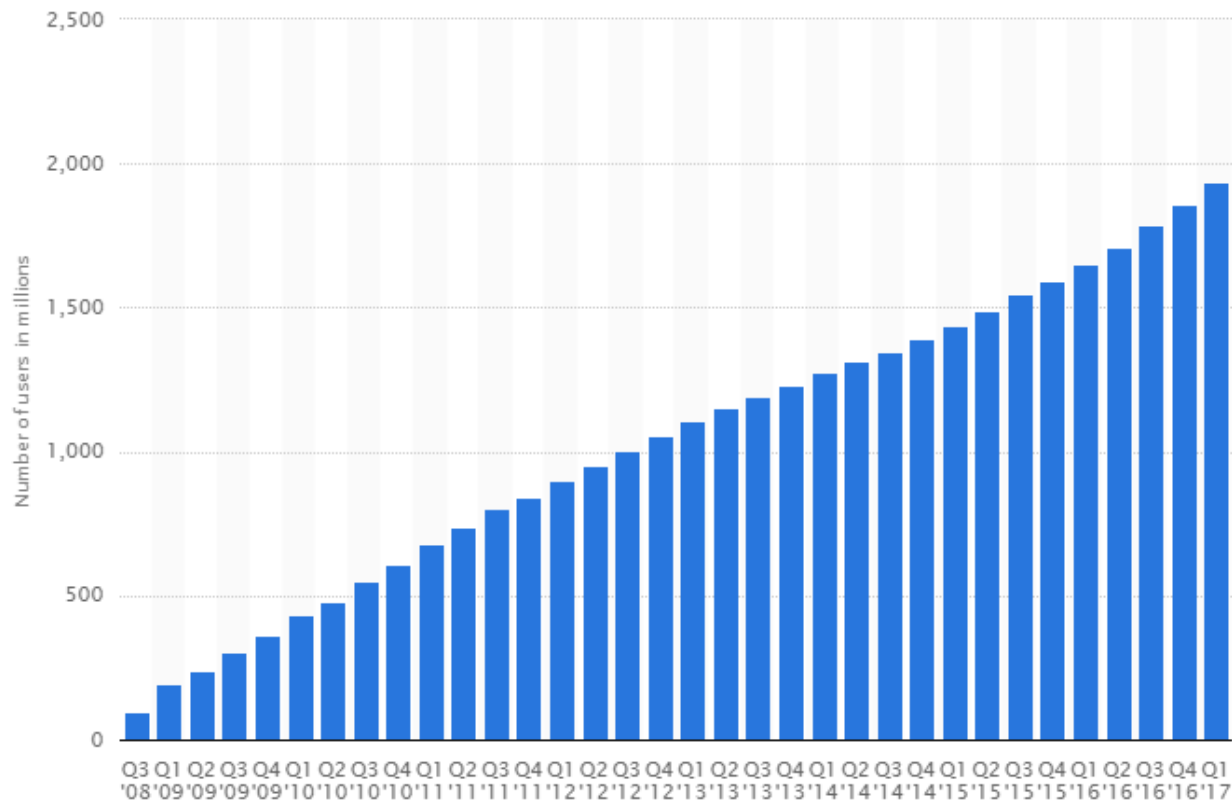
"OK, I'm now going to read out loud every single slide to you, word for word, until you all wish you'd just die."

Why is Social Media Evidence Relevant?

- Personal and user-created content: e.g. messages and photos reflecting allegations of persecution, photos, political content, record of intimate relationships, etc.
- Time and date tagging of posts
- “Geotagging” of posts to mark a location
- Content is public, but privacy settings are adjustable:
 - Facebook
 - Twitter
 - LinkedIn
 - Instagram
- Messaging Applications (what’s a phone?)
- Ask a Millennial!

Facebook's global reach

- **1.94 billion** monthly active users as of Q1-2017



Ways Social Media Evidence is Used to Impeach or Bolster Credibility

Use by Claimant/Applicant

- At the RPD/RAD to corroborate allegations:
 - › Threats from agent of persecution
 - › Evidence of same-sex relationship
 - › Political/religious profile and activity, including *sur place* claims
- In spousal or other family reunification applications / at the IAD in sponsorship appeals
 - › Evidence of communion
 - › Evidence of development of relationship (e.g. photos)
- Where else?

Ways Social Media Evidence is Used to Impeach or Bolster Credibility

by the Minister (Interventions) or RPD/RAD

- Social media profile/posts are not consistent with allegations:
 - › Presence in a place at a time that is inconsistent with allegations
 - › “Friends” with a person against allegations (e.g. agent of persecution)
 - › Number, frequency and/or nature of posts not reflective of someone in hiding
 - › Emotional content of posts not consistent with likely emotional state
 - › Sky’s the limit
- Question: do IRCC officers independently investigate social media when not disclosed by applicant?

Article: “Taking Facebook at Face Value: The Refugee Review Tribunal’s use of social media evidence”

by Emma Wagstaff and Kieran Turner (2014) 21 AJ Admin L 172

Review of academic evidence on social media use shows:

- Online profiles are often inaccurate – selectively curated or purely fraudulent
 - › Selective: only posting gourmet meals and not Kraft dinner
 - › Fraudulent: Dutch woman “on vacation” in Thailand
- Photos are particularly unreliable
 - › Are curated (e.g. constant vacation, happy times)
 - › “latergrams” – photo posted after it was taken
 - › Can be altered easily
- Poor security features lead to unreliability
 - › Sites can be hacked
 - › Are often left “logged in” – other users can operate account

A Cartoon Interlude



Conclusions from Review of Australian Refugee Review Case Law

- Social media evidence is not always reliable. It is highly context-specific. However, it should also not be treated as inherently unreliable. Therefore:
 - 1. Decision-makers must be prudent in appropriately considering social media evidence**
 - Training about factors that affect the reliability of information, the technical features of social media platforms, and the diversity of social media use.
 - Should ask useful questions about the privacy of the user's account and how the account is used by the person.
 - Develop an understanding of the person's level of engagement and sophistication of social media use.
 - 2. Prudent messages should be developed for users of social media to be careful in "avatar maintenance"**

RRT vs. IRB

- The Refugee Review Tribunal in Australia appears to have extremely broad inquisitorial powers, including asking to view claimants' social media sites in a hearing, with no notice
 - › Unclear whether claimants have a right to object
- Not common for IRB members to ask claimants to show their social media in a hearing – unclear whether they could compel a claimant to do this
 - › Claimants do offer to present their smartphone during a hearing
- IRB members have power to request the Research Directorate to review claimants' social media
 - <http://www.irb-cisr.gc.ca/Eng/ResRec/Pages/ResMethRec.aspx>
- In Canada, social media evidence generally gets on to the record via the claimant or the Minister in an intervention

Case Law: Social Media Evidence

Inconsistent with Allegations

RAD File: MB4-03162 - 2015 CanLII 47612 – Roxanne Cyr

- Claimant's Facebook was active when claimant said he was detained; he also posted while in transit in France and upon arrival in Canada, including posts that would reveal his whereabouts
- Claimant had explained that his wife was using his Facebook to try to show that he was fine and not detained
 - › letter from her was submitted in response to Minister's intervention.
- Explanation not accepted by RPD or RAD
 - › RAD found explanation not credible, partially because the BOC did not mention that wife used Facebook as a cover in this way

Case Law: Social Media Evidence

Inconsistent with Allegations

RAD File: MB4-04785 - 2015 CanLII 70118 – Louis Cousineau

- While in hiding, claimant had two Facebook accounts and frequent posts involving over 200 “friends”
- Explanation: he used aliases and the authorities did not have the technology to find the accounts
- RPD found that i) was unlikely there would be consistent internet service in the remote area of hiding, and ii) behaviour was not consistent with someone who feared being found – CBSA found the accounts
- RAD rejected new evidence to show internet widespread in DRC because was not specific to the area of hiding
- RAD upheld RPD finding

Case Law: Social Media Evidence

Inconsistent with Allegations

Diaz v. MCI, 2016 FC 1343 – Strickland J.

- Claimant had traveled to his mother's birthday party and posted photos while under threat – leaving wife and child
- Explanation: was not aware that photos were publically accessible
- RPD found his behaviour was not consistent with someone who feared being found – i) posting public photos OR ii) not investigating whether his privacy settings were public
- Claimant did not appear to file evidence in response to Minister's intervention
- Appeared to be poorly prepared: “more likes, more famous” (para 22)
- Federal Court upheld RPD's finding

Case Law: Social Media Evidence

Inconsistent with Allegations

RAD File: TB4-09845 - 2015 CanLII 21302 – Deborah Morrish

- Facebook evidence had photos of couple/family together after couple had allegedly split due to religious conversion
- Explanation: not clear break – photos taken previously
- RAD found that RPD had erred in putting significant weight on Facebook posts:
- **“Facebook posts do not provide reliable evidentiary basis, because any message or photo can be posted at any time and in any context”. “Can put up any ‘front’ that you want for followers for a variety of reasons, which may mask reality more than reveal it.”**
- **Granted appeal outright**

Case Law: Claimant's Social Media Evidence Supporting Claim Ignored

Chery v. MCI, 2015 FC 264 – Shore J.

- Used social media as corroboration of political opinion (postings of articles – probably Twitter)
- [47] “It appears from the evidence that the applicant’s political opinion is central to his alleged fear, considering his duties and involvement in SipoHaiti and FRONDEL, the articles that he published in the newspaper Cap-Express and in social media, and his involvement in the Arnaud Saint-Amour matter.”

Case Law: Claimant's Social Media Evidence Unreliable

RAD File: TB4-01390 - 2014 CanLII 94176 – Ed Bosveld

- Claimant submitted new photos from Facebook in support of sexual orientation in support of RAD
- RAD found Facebook photos unreliable as no way of knowing where photos were taken and when.
- Not explicitly mentioned by RAD, but photos were apparently not attached to an affidavit
- Additional concern because the photos were apparently posted at the same time as the RAD appeal, and not when the relationship started – appeared to have been posted in order to create evidence to support appeal

Case Law: Failure to Disclose Available Social Media Evidence

RAD File : TB3-08065 - 2014 CanLII 96475 – D. McSweeney

- Lack of social media evidence was held against the claimant.
- Had alleged that had used “Plenty of Fish” to communicate with potential partners, but did not advance this evidence.
- RAD found that the appellant had computer skills, so it was expected this evidence would be advanced.

Case Study: Photos of Guns! Oh my!

- Claimant targeted by criminal gang – disclosed FB threats
- Minister then found FB page, which had been under a pseudonym, and intervened on credibility and Article 1F(b) on basis of photo postings of guns and claimant “reflecting a gang lifestyle”; comments accusing him of having shot someone – “attempted murder”
- Client’s Explanation:
 - › Guns were not his – photos were on a phone that a friend lent him when he travelled to Canada and he created a slideshow of them
 - › He was trying to “look tough” so people would be scared of him
 - › Allegations of having shot someone were consistent with narrative
- What to do?

Case Study: Photos of Guns! Oh my!

- Photos appeared to be stock photos – a google search found all of them publically available on the internet
 - › Law clerk swore an affidavit indicating how easily he was able to find them and included copies as exhibits
- Affidavit from claimant explaining his attempt to cultivate a tough online persona
- Copy of the 2014 Australian study / other academic sources on unreliability of Facebook avatar
- Thorough submissions to explain how the online messages were consistent with client's narrative and he was falsely accused of having shot someone

Messaging Applications

- text messages, Facebook Messenger, WhatsApp, Kik, Line, WeChat, Google Hangouts, Viber Skype, ICQ, KakaoTalk, Telegram, Instagram DM:
 - › Corroborative evidence for refugee claims – threats, LGBT relationships
 - › Spousal/Common-Law relationships- IAD sponsorship appeals, spousal sponsorships
- Each application has its own “archive” settings or ability to export messages
- Message history may be linked to an account, or a single device
- Making clients aware of the value of this evidence at the earliest opportunity – switch to another platform?
- Beware possible negative impact

Case Law: Perils of Disclosing too much evidence of communication

IAD File : MB4-01417 - 2016 CanLII 95666 – H. Masmajian

- 236 pages of Facebook Messenger communications disclosed in support of spousal sponsorship appeal
- Evidence was that this was the couple's only form of communication in the first year of their relationship
- The applicant had been very focussed on the sponsor's marital status and loneliness in the early times, and quickly began speaking to her using pet names
- Member concluded the applicant had gotten into the relationship for the purpose of immigrating to a Western country

Practical Tips

- 1) Canvass what social media/messaging evidence might be available, what might be harmful
 - What to disclose: beware Pandora's box
 - Think carefully about how best present evidence
 - › cut and paste vs. screen capture – SnagIt tool
 - › use of export function for message histories
 - › colour vs. black and white
 - › loose vs. exhibit to affidavit (the more potentially unreliable the evidence, the more it should be attached as an exhibit to an affidavit)
 - › Include main profile page with identity information
 - Ethical issue: to what extent should counsel assist in obtaining social media evidence?

Practical Tips

2) Advise clients of possibility of Ministerial intervention and notion of altering privacy settings (see handout)

- Ethical issue: should counsel advise to change settings?
- Not good enough to change name to a pseudonym: can be searched by email address – can be discovered from the contacts of other known contacts
- For unsophisticated clients – have someone check to ensure it has been done properly
- Privacy settings for platforms may change – keep checking
- HOWEVER, if claim is based on political opinion, for example, may want to leave open in order to establish risk

› *Mohebbi v. MCI*, 2014 FC 182

Practical Tips



Practical Tips

Responding to Ministerial Intervention

3) Review Australian article for ideas and objective sources on unreliability of social medial evidence

4) Respond with objective evidence to the extent possible

- › Personal evidence (sworn)
- › Expert/technical evidence

5) Prepare the client!

Good luck!

