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Arbitral Awards Command Judicial Deference: SCC

The Supreme Court of Canada overruled the Manitoba Court of Appeal in [*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*](#), 2011 SCC 59, reinstating a "creative" and reasonable arbitral award applying the equitable remedy of estoppel to prevent a union from holding an employer to the strict terms of a collective agreement when the union had acquiesced in a long-standing contrary practice of calculating vacation entitlements. The court found reasonableness, not correctness, to be the appropriate standard for review of arbitral awards and reinforced the broad mandate of labour arbitrators to adapt relevant legal principles like estoppel to the context of labour relations. These articles discuss the decision:

- [Supreme Court favours arbitrator's decision](#), Legal Feeds blog;
- [Labour Arbitrators Have More Scope Than Courts, Supreme Court Says](#), Fasken Martineau.

Leave to Appeal Granted in R. v. Cole

The Supreme Court of Canada has granted leave to appeal the Ontario Court of Appeal decision in [R. v. Cole](#), 2011 ONCA 218, which found that evidence obtained from a warrantless police search of a teacher's laptop breached his privacy rights under s. 8 of the *Charter* and should be excluded from his criminal trial. The case has employment law implications because of the court's finding that in some circumstances employees may have a reasonable expectation of privacy regarding the contents of employer-provided electronic devices.

Noteworthy Cases From Other Jurisdictions

The B.C. Court of Appeal discusses the [Evans](#) test for assessing whether an employee acted reasonably in refusing continued employment with the purchaser of the business in [Silva v. Leippi](#), 2011 BCCA 495. They summarise the test at para. 29 as "...a reasonable person should be expected to take available employment where the salary offered is the same, where working conditions are not substantially different, and where there are no acrimonious relations."

A termination under the lay off provisions of Ontario's *Employment Standards Act* is also a termination at common law according to the Court of Appeal in [Elsegood v. Cambridge Spring Service \(2001\) Ltd.](#), 2011 ONCA 831, allowing an employee laid off for the statutory maximum of 35 weeks to claim wrongful dismissal damages. The court rejected the employer's argument that the *ESA* and the common law are independent regimes, concluding that an employee's employment status simply does not survive termination by a valid enactment of the legislature.

The Ontario Divisional Court clarifies the test for frustration of contract when it becomes illegal for an employee to continue working in [Cowie v. Great Blue Heron Charity Casino](#), 2011 ONSC 6357. The court found that, unlike in disability or illness cases, frustration of contract due to illegality in the employment relationship must be assessed at the time of termination, without considering whether future events might change the employee's status.

The court questions the emphasis on "character of employment" in fixing notice periods in wrongful dismissal claims in [Systad v. Ray-Mont Logistics Canada Inc.](#), 2011 BCSC 1202. The judge notes at para. 19 "...that there are very few situations where the "character of employment" will be of paramount relevancy in the consideration of the appropriate notice period to be ordered. I adopt the statements that giving undue attention to the character of employment represents "antiquated social values" and is "antithetical to the law's ultimate goal, namely egalitarian justice". "

In [Kingston \(City\) v. Canadian Union of Public Employees, Local 109](#), 2011 CanLII 50313 (ON LA), one of the first cases decided under the new workplace violence provisions of Ontario's *Occupational Health and Safety Act*, the arbitrator dismissed the grievance of an employee terminated for uttering a death threat to a co-worker, finding that the utterance of threatening words alone is enough to constitute workplace violence and there need be no evidence of an immediate ability to do physical harm. The arbitrator noted four significant ways in which the Bill 168 amendments have impacted the analysis in such cases, providing guidance to employers, employees and unions on how workplace violence should be handled.

Government Abolishes Mandatory Retirement for Federal Employees

[Bill C-13](#) received royal assent on December 15, 2011, signalling the end of mandatory retirement for federally regulated employees when the legislation comes into force December 15, 2012, except where it is a *bona fide* occupational requirement. The bill repeals sections of the *Canadian Human Rights Act* and *Canada Labour Code* that permit employers to force employees to retire once they reach a certain age, regardless of their ability to do the job. Employers will have one year to ensure that their workplace policies and collective agreements comply.

Child Pornography Reporting Legislation and Regulations in Force

[Bill C-22](#), *An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service*, came [into force](#)

December 8, 2011, requiring internet service providers to notify police when they believe their service is being used to commit a child pornography offence.

Details about the new legislation can be found in the [legislative summary](#), in the [press releases and background documents](#), in the [parliamentary speeches](#), and

in the Slaw article [Mandatory Reporting of Internet Child Pornography by Persons Who Provide an Internet Service Now Law](#).

[The Internet Child Pornography Reporting Regulations](#) came into force

December 6, 2011. They provide the framework for the reports to be made

under the act and designate the Canadian Centre for Child Protection as the

report receiving organization. For further information on the content of the

regulations see the Slaw article [Internet Child Pornography Reporting Regulations](#), posted January 12, 2012.

Recommended Reading

These publications may be of interest to labour and employment lawyers:

- The cover story of the January 2012 *Canadian Lawyer*, [The death of collective bargaining?](#), speculates on the future of collective bargaining given the federal government's increasing involvement in labour disputes. The issue also contains the article [Labour & employment boutiques holding their own](#), which lists *Canadian Lawyer's* top 10 Canadian labour and employment firms.
- The December 2011 [employment and labour law newsletter](#), published by McMillan, contains 13 articles on labour and employment topics, including two charts of notice periods from recent cases in western and eastern Canada.
- These two articles are from the December/January *Canadian Lawyer In House* magazine:
 - [Employers as insurers](#) - discusses age-based distinctions in pension benefit plans and whether older workers who continue to work past the age of 65 may lawfully receive diminished benefits;
 - [Implementing workplace drug and alcohol testing](#) - reviews the case law on workplace drug and alcohol policies, including random testing and what can be done about refusal or test failure.
- These two articles from Workplace Wire, a Heenan Blaikie LLP publication, look back at 2011 from a serious and a humorous perspective:
 - [Criminal Prosecutions For Workplace Accidents: The Year in Review](#) - considers developments in criminal negligence prosecutions for workplace accidents in Canada and elsewhere;

- [Best \(Worst?\) Excuses for Employee Absenteeism 2011](#).

2012 MBA Mid-Winter Meeting

The Manitoba Bar Association's [Mid-Winter Meeting](#) will be held January 19-20, 2012 at the Fort Garry Hotel. The Labour and Employment Law section is sponsoring the program **Employment Law Update: The latest on *Wallace* damages, restrictive covenants and other recent developments in employment law**. Other programs that may interest employment and labour lawyers include:

- Administrative Law Boot Camp: Back to Basics - sponsored by the Administrative Law section;
- Innovative Strategies for Effective Communication - sponsored by the Women Lawyers' Forum;
- Ethical Practices in the Electronic Age - The Use of Social Media; and
- Contractual Interpretation: Substance and Practice - with Toronto lawyer Geoff Hall, author of *Canadian Contractual Interpretation Law*.

For further details see the [registration form](#) or [brochure](#).

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