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Employee Privacy Expectations on Work Computers: SCC

The Supreme Court of Canada decision in [R. v. Cole](#), 2012 SCC 53 has implications for employers who monitor the way their employees use workplace computers. The case involved an Ontario teacher who was charged with possessing child pornography after his employer turned over his work-issued laptop and copies of a hidden folder containing explicit photos of a student to the police. The court found that the warrantless police search of the computer violated s.8 of the *Charter*, but set aside the exclusionary order made by the Court of Appeal and ordered a new trial. Although the court left "for another day the finer points of an employer's right to monitor computers issued to employees" (para.60), it did find that "(t)he context in which personal information is placed on an employer-owned computer is nonetheless significant. The policies, practices, and customs of the workplace are relevant to the extent that they concern the use of computers by employees. These "operational realities" may diminish the expectation of privacy that reasonable employees might otherwise have in their personal information." (para.52)

These articles discuss the employment law implications of the decision:

- [Workplace Policies Can Diminish An Employee's Expectation Of Privacy In Personal Information On Work Computers](#), Borden, Ladner, Gervais;
- [Employee Privacy Update](#), Cox & Palmer;
- [It's Official: The Supreme Court of Canada concludes that employees](#)

[may have a reasonable expectation of privacy in relation to their work-issued computers](#), Workplace Wire;

- [Employee Privacy Rights on Company Computers - the new legal standard in Canada](#), Gowlings.

Law Firm Partner Not an Employee: BCCA

The British Columbia Court of Appeal overturned earlier rulings that law firm partners could be treated as employees under human rights legislation in [Fasken Martineau DuMoulin LLP v. British Columbia \(Human Rights Tribunal\)](#), 2012 BCCA 313, ending a Vancouver lawyer's challenge to the mandatory retirement provisions of his firm's partnership agreement. The court found it "legally unsupportable" to treat the firm as an entity separate from the partner, and stated that there could be "no doubt that in Canadian law, a partnership is not a separate entity from its partners, and a partner cannot be an employee of, or employed by, a partnership of which he is a member." (para.45) For comments on the case see:

- [Mandatory Retirement and the Partnership Track in Fasken Martineau DuMoulin LLP v BC \(Human Rights Tribunal\)](#), The Court;
- [B.C. Court of Appeal says partners not employees of law firm](#), Legal Feeds blog;
- [B.C. court quashes age-discrimination case](#), Globe & Mail;
- [Mandatory Retirement of Partners in Law Firms](#), Slaw.

Duty to Mitigate Must Be Clear: ONCA

The Court of Appeal decision in [Bowes v. Goss Power Products Ltd.](#), 2012 ONCA 425 will change the way employment contracts are negotiated say those commenting on the decision. The court found that "if parties who enter into an employment agreement specifying a fixed amount of damages intend for mitigation to apply upon termination without cause, they must express such an intention in clear and specific language in the contract." (para.62) In this case, where the agreement was silent with respect to a duty to mitigate, the court issued a declaration that the employee was entitled to the amount of salary *in lieu* of notice specified in the agreement notwithstanding any salary earned from his new employer. These articles discuss the decision:

- [The live wire of duty to mitigate](#), Canadian Lawyer;
- [Ontario Court of Appeal Ruling Means Employers Should Be Reviewing Termination Clauses in Employment Agreements](#), Slaw;
- [No duty to mitigate losses Severance pay cannot be deducted in notice period](#), Lawyers Weekly.

Ending Mandatory Retirement for Federally Regulated Employees

Part 12 of [Bill C-13](#), the *Budget Implementation Act*, will come into effect December 15, 2012, repealing s.15 (1)(c) of the *Canadian Human Rights Act* and ending mandatory retirement for federally regulated employees. Part 12 also amends the *Canada Labour Code* to repeal a provision that denies employees the right to severance pay for involuntary termination if they are entitled to a pension. Finally, it amends the *Conflict of Interest Act*.

The *Lawyers Weekly* article, [Changing the rules, and perceptions The end of mandatory retirement, and the thorny issue of age discrimination](#), discusses how the demise of mandatory retirement affects the workplace.

Proposed Accessibility Legislation in Manitoba

The Accessibility Advisory Council, established with the passage of *The Accessibility Advisory Council Act* in June 2011, has published a final [report](#) outlining its recommendations for accessibility legislation in Manitoba. The Council is calling for legislation similar to that already in place in Ontario, and these articles discuss both the Manitoba proposals and developments in Ontario:

- [Accessibility Legislation In Canada - Additional Requirements Under The AODA And Proposed Accessibility Legislation In Manitoba](#) - Osler;
- [Recommendations for New Manitoba Legislation to Remove Barriers Faced by People With Disabilities](#) - Slaw.

Labour and Employment Law News

These publications discuss current labour and employment law issues:

- [Is Home Where the Work Is? Depends On Where Home Is: Ernst v Destiny Software Productions](#) - this article from The Court discusses the decision in [Ernst v. Destiny Software Productions Inc.](#), 2012 BCSC 542, in which the court dismissed the wrongful dismissal claim of a work-from-home employee who had unilaterally decided to move his home to Mexico.
- [Are Employers in British Columbia and Alberta Stepping Outside Privacy Boundaries in Requesting Access to a Job Applicant's Social Media Profile?](#) - this McCarthy Tetrault article considers the legality of employer requests for disclosure of employee social media usernames and passwords.
- [Employee Constructively Dismissed, but No Damages Awarded Because of Failure to Mitigate](#) - this Slaw post concerns [Chevalier v. Active Tire & Auto Centre Inc.](#), 2012 ONSC 4309, a constructive dismissal case where the court declined to award damages to the employee because he had refused to return to his job after the employer acknowledged it was a mistake to terminate him and apologised.
- [Is it time to review your company's workplace violence policy?](#) - the adequacy of workplace violence training may impact an employer's right to terminate an employee who assaults a co-worker according to the

author of this *InHouse* article. The article discusses [*Shakur v. Mitchell Plastics*](#), 2012 ONSC 1008, in which the court found an employee who swore at and pushed his manager was wrongfully dismissed given the employee's otherwise good work record.

- [*Overtime lawsuits hit a snag*](#) - overtime lawsuits are becoming more common in Canada but may face greater scrutiny in our courts than in the US according to the author of this *Globe and Mail* article. The article discusses [*Brown v. Canadian Imperial Bank of Commerce*](#), 2012 ONSC 2377, in which the judge declined to certify a proposed overtime class action lawsuit against CIBC.
- [*Calling senior lawyer dishonest, negligent can get you fired*](#) - This *Law Times* article discusses the finding in [*Bennett v. Cunningham*](#), 2012 ONCA 540 that a sole practitioner had just cause to fire a junior lawyer who accused her, among other things, of being "dishonest and negligent."

Fall CPD: LSM

The Law Society is bringing back Martin Latz, one of North America's leading experts and instructors on negotiating techniques, for two day-long workshops on negotiation strategy. [*Gain the Edge!® Negotiation Strategies for Lawyers*](#) takes place November 7, 2012 and [*Advanced Negotiation Strategies*](#) is on December 6, 2012. Further information can be found in the program agendas ([Nov 7](#) and [Dec 6](#)) and on the [presenter's website](#),

[*Electronic Legal Research Booster \(An Intermediate Level Legal Research Program\)*](#) - Enhance your online legal research skills at this hand-on program where you will learn how to find the best free legal commentary on recent case law and legislative developments in your practice area. The program takes place on November 14, 2012, from 1:00 to 4:00 p.m. at the Law Society classroom.

[*Practical Ethics: Real Problems, Real Solutions*](#) - [register](#) soon to attend either the morning or afternoon session of this live repeat of last winter's popular program on practising ethically. The sessions take place on December 10, 2012 and feature leading legal ethics instructor Paul Paton and local panellists Vivian Rachlis, Bill Gange and Anita Southall.

Labour Law Section Meeting: MBA

Dave Dyson, Assistant Deputy Minister of Labour Programs, will talk about recent developments in employment standards, workplace safety and health, and labour relations at a lunch hour program on November 8, 2012. The program, a [meeting of the Labour Law section](#) of the Manitoba Bar Association, will be held in the Law Society classroom. RSVP to the MBA.

National Conference: CBA

The 13th annual Administrative Law, Labour and Employment Law Conference, [At the Crossroads](#), will be held November 23-24, 2012 in Ottawa, Ontario. In addition to the usual year in review sessions, presenters will discuss employee privacy, expert evidence before administrative tribunals, tribunal member expertise, and lobbying basics. For more detail see the [website](#) and [agenda](#).

Honouring Chief Justice Richard Scott on His Retirement

Manitoba's legal community is invited to participate in two events honouring Chief Justice Richard Scott on his retirement. An educational forum [Courting Change: The Changing Role of Courts](#) will be held February 8, 2013 and a [gala dinner](#) is planned for February 9, 2013. See www.scottretirement.org for more information.

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