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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 implications of the decision for employers:

- [Supreme Court of Canada says reasonable expectation of privacy for workers continues on employer-supplied laptops](#), Stikeman Elliott;
- [Workplace Policies Can Diminish An Employee's Expectation Of Privacy](#)

[In Personal Information On Work Computers](#), Borden, Ladner, Gervais;

- [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.

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;
- [Mandatory Retirement of Partners in Law Firms](#), Slaw;

The *Canadian Lawyer* cover story [New tricks](#) discusses what some lawyers are doing to resist retirement.

Supreme Court to Hear Conflict of Interest Case in New Year

A tentative date has been set for the Supreme Court of Canada to hear the appeal of [Wallace v Canadian Pacific Railway](#), 2011 SKCA 108, in which the court will consider, among other things, whether it is a conflict of interest for a law firm to accept a retainer to sue a current client on an unrelated matter without first obtaining the informed consent of the client. Also at issue is the proper test for determining the exceptional cases where the informed consent of a current client to act adverse can be inferred and when the remedy of disqualification of legal counsel is available or appropriate for breaches of the duty of loyalty. The tentative hearing date is January 24, 2013.

Protecting Client Confidentiality

Targeted data breaches at several Canadian law firms have highlighted the need for both increased high-tech security and mandatory breach reporting according to Privacy Commissioner Jennifer Stoddart in this [Lawyers Weekly article](#). Each technological advance increases the risk of a data security breach, a nightmare scenario for lawyers who must keep client information confidential. [Securing Personal Information: A Self-Assessment Tool for Organizations](#), developed by the privacy commissioners of Canada, BC, and Alberta, will help you gauge how well your firm is protecting personal information. Not all breaches originate from external sources, however, and not all internal breaches are intentional. Developing a policy to guide employees on the acceptable use of firm technology is an important preventative measure. The Lawyers Mutual publication [Data Security Policy](#), authored by Pegeen Turner, identifies the elements of a data security policy and provides a sample law firm policy. It also includes a sample service provider confidentiality agreement to be signed by outside service providers who have access to firm information when completing their work.

The Slaw article [Securely Deleting Data From Mobile Devices](#) discusses the importance of wiping data from mobile devices, another source of unintended confidentiality breaches.

Don't Be A CASL Casualty

Canada's anti-spam legislation (passed in 2010 and expected to come into force in the new year) will require all businesses, including law firms, to reassess and likely change their electronic marketing strategies. For a summary of the steps law firms should take now to ensure compliance see [What's it all about? How anti-spam legislation can affect your firm](#), a recent post on the CBA's Practice Link website.

Resources for Solo or Small Firm Practitioners

There are many excellent online resources for lawyers practising on their own or in a small firm setting, or considering whether to do so. These examples are only the tip of the iceberg:

- [10 tips for starting your own firm](#) - this *4Students* article, aimed at recently called lawyers but applicable to any lawyer considering solo practice, outlines how to do it right. It also provides links to more comprehensive resources such as the Law Society of Upper Canada's 100-page [Guide to Opening Your Practice](#) and [Practice Management Guidelines](#), and the Canadian Bar Association's [Practice Link](#) library.
- The Law Society of British Columbia provides free online access to its Professional Legal Training Course materials, including the August 2012 edition of [Practice Management](#) which has sections on Opening a Law Practice, Law Office Systems and Procedures, File Management, Client Relations, and precedents for retainer and non-engagement letters.
- The Canadian Bar Association's [Small, Solo and General Practice Forum](#) represents the common needs of general practitioners. Among its

publications is the [General Knowledge](#) newsletter, the latest edition of which contains articles on [What you need to know before hiring a lawyer as an independent contractor](#), [Developing and marketing your own practice](#), and [The ethics of cloud computing for lawyers](#).

- The American Bar Association's [Solo, Small Firm, and General Practice Division](#) publishes two online resources: [GP Solo magazine](#) (six times a year) and [GP eReport](#) (monthly). The theme of the [September October 2012](#) magazine is The Changing Face of Law Practice, and one of its [articles](#) is about lawyers who have had to forge their own path.
- And, if you are at the other end of the lawyer demographic and are contemplating retiring from a solo or small firm practice you'll want to read [3 Introductory Steps for Small Firm Succession](#), a recent Slaw post which summarizes the basic steps you need to take now to begin the succession process.

Getting Paid Just Got Easier

[Square](#), an electronic payment service that lets users accept credit card payments through their smart phones or iPads, is now available in Canada. This low cost, no contract, straightforward payment service will be a winner for smaller Canadian law firms according to David Bilinsky, the author of the Slaw post [Square Comes to Canada](#).

Websites 101

If your firm website is due for an overhaul the Slaw article [How Usable Is Your Website?](#) provides several useful tips for using images and graphics, improving layout and design, and adapting your writing to suit the web. [Anatomy of a Law Firm Website \(Re\)Design](#), by Practice Link author Susan Van Dyke, is also instructive, particularly on the question of whether to revamp an existing website or create a new one.

Upcoming 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.

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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