Social Media in Labour and Employment: Privacy, Human Rights, and the Formation, Management and Termination of the Employment Relationship

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Abstract

From a legal perspective, social media is a relatively new phenomenon, but its implications for employers, employees, trade unions, and their advocates are proving to be marked in all aspects of employment and labour relationships—formation, management, termination and post-termination. Social media is a double-edged sword, having potential for both positive and negative influence on business generally, and employment and labour relationships specifically. Part II of this paper describes various types of social media that are most often involved in employment and labour issues and disputes. Part III of this paper explores the implications of social media pre-employment, Part IV explores the implications of social media during the employment relationship, and Part V explores the implications of social media post-employment. Part VI of this paper discusses social media implications peripheral to the employment and labour relationships. Part VII concludes this paper with the observation that social media is not going away, and it will continue to be a factor in employment and labour relationships, before, during and after those relationships. Social media has great potential for both positive and negative effects on business, human resources, and labour relations. To minimize the negative risks for employers, trade unions, and employees, clear social media policies should be in place, well-advertised, and consistently enforced.

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I. Introduction

From a legal perspective, social media is a relatively new phenomenon, but its implications for employers, employees, trade unions, and their advocates are proving to be marked in all aspects of employment and labour relationships—formation, management, termination and post-termination. Social media is a double-edged sword, having potential for both positive and negative influence on business generally, and employment and labour relationships specifically. Part II of this paper describes various types of social media that are most often involved in employment and labour issues and disputes. Part III of this paper explores the implications of social media pre-employment, Part IV explores the implications of social media during the employment relationship, and Part V explores the implications of social media post-employment. Part VI of this paper discusses social media implications peripheral to the employment and labour relationships. Part VII concludes this paper with the observation that social media is not going away, and it will continue to be a factor in employment and labour relationships, before, during and after those relationships. Social media has great potential for both positive and negative effects on business, human resources, and labour relations. To minimize the negative risks for employers, trade unions, and employees, clear social media policies should be in place, well-advertised, and consistently enforced.

II. Social Media Generally

Social media may be defined as "the use of web-based and mobile technologies to turn communication into an interactive dialogue."[1] "Social media encompasses any Internet applications that allow users to create and exchange content, blending technology with social interaction."[2] There are hundreds, possibly thousands, of social media clients,[3] but a few of the best-known and most-used are Facebook,[4] MySpace,[5] Twitter,[6] LinkedIn,[7]

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[1] "Social media", online: Wikipedia <http://en.wikipedia.org/wiki/Social_media>.
[2] Jeff Lowe & Sze-Mei Yeung, "Integrating Social Media into the Workplace", *The Lawyers Weekly* (28 January 2011), online: The Lawyers Weekly <http://www.lawyersweekly-digital.com/lawyersweekly/3035?folio=11#pg12>.
[3] "A client is an application or system that accesses a service made available by a server": "Client (computing)", online: Wikipedia <http://en.wikipedia.org/wiki/Client_(computing)>.
[4] Facebook, online: <http://www.facebook.com>.
[5] MySpace, online: < http://www.myspace.com>.
[6] Twitter, online: <http://twitter.com>.
[7] LinkedIn, online: <http://www.linkedin.com>.

and Google+.[8] Wikipedia,[9] contains a partial list of well-known, and less-well-known, social media sites.[10]

Social media is a double-edged sword in relation to businesses, particularly in the labour and employment context, having the potential for both positive and negative influence on business generally, and employment and labour relationships specifically. Businesses can benefit from exploiting social media[11] to advertise their products and services,[12] to seek qualified candidates to fill job vacancies,[13] to increase office productivity,[14] and to retain talent.[15] Law firms, like other organizations/employers, have begun to utilize social media.[16] Numerous authors have published works dedicated to guiding companies' utilization of social media to grow their businesses,[17] succeed in their

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[8] "A quick look at Google+", online: Google <http://www.google.com/+/learnmore>.

[9] "Wikipedia is a free, web-based, collaborative, multilingual encyclopedia project supported by the non-profit Wikimedia Foundation. Its 20 million articles have been written collaboratively by volunteers around the world. Almost all of its articles can be edited by anyone with access to the site, and it has about 100,000 regularly active contributors. As of July 2011, there are editions of Wikipedia in 282 languages. It has become the largest and most popular general reference work on the Internet, ranking sixth globally among all websites on Alexa and having an estimated 365 million readers worldwide": "Wikipedia" online, Wikipedia <http://en.wikipedia.org/wiki/Wikipedia>.

[10] "List of social networking websites", online: Wikipedia <http://en.wikipedia.org/wiki/List_of_social_networking_websites>.

[11] Mario Toneguzzi, "Firms See Value in Using Social Media", *Calgary Herald* (29 October 2011) D3.

[12] See e.g. Hessie Jones, "Small Business: Tips and Resources for Building Your Online Presence", *Calgary Herald* (3 November 2011), online: <http://www.calgaryherald.com/entertainment/Small+Business+Tips+resources+building+your+online+presence/5653888/story.html>.

[13] See e.g. Laura Holson, "Wanted: Professional Twit", *The Globe and Mail* (25 May 2009) L.5. See also Shawn Hoult, "Using Social Media Sites for Advancement: Don't Get Sucked into Inappropriate Postings, Say Experts" *Calgary Herald* (15 June 2011), online: <http://www.calgaryherald.com/business/Using+social+media+sites+advancement/4952351/story.html>; Covert, Kim, "Employers Using Social Media to Recruit Workers" *The Province* (03 Oct 2010) A.33.

[14] See e.g. Jason Magder, "Social Networking Can Improve Office Productivity" *Calgary Herald* (20 July 2011), online: <http://www.calgaryherald.com/business/Social+networking+improve+office+productivity/5132220/story.html>.

[15] Sheila Sobell, "Social Networking @ Work", *The Costco Connection* (Nov/Dec 2011) 21.

[16] See e.g. Sara Arnstein & Richard Lee, "Tweet Your Way to Success at the Office: How Law Firms Can Use Social Media Marketing", *The Lawyers Weekly* (7 May 2010), online: The Lawyers Weekly <http://www.lawyersweekly.ca/index.php?section=article&articleid=1161>. See also Gary Mitchell, "Using social media to raise your profile: The Coach", *The Lawyers Weekly* (21 January 2011), online: The Lawyers Weekly <http://www.lawyersweekly.ca/index.php?section=article&volume=30&number=34&article=4>.

[17] See e.g. Susan Sweeney, *Social Media for Business: 101 Ways to Grow Your Business Without Wasting Your Time* (Gulf Breeze, FL: Maximum Press, 2011).

businesses,[18] and propel organizational performance,[19] to name but a few related topics. Many electronic media-savvy organizations today maintain a presence on the most popular social media sites. For example, the Canadian Bar Association, in addition to its own web site,[20] enjoys a presence on Facebook,[21] LinkedIn,[22] and Twitter.[23] Social media is here to stay—employers, trade unions, employees and their advocates must accept that fact, adjust to it, and take advantage of its immense positive potential while limiting its equally immense negative potential to incur liability of various sorts. One 2011 study of 2,800 college students and young professionals found that 56% reported "that if they encountered a company that banned access to social media, they would either not accept a job offer or would join and find a way to circumvent corporate policy."[24]

Social media is a very powerful tool in the hands of businesses' customers and employees that can be used by the former to affect public perceptions toward the business positively or negatively, or can be misused by the latter to the detriment of the employer-employee relationship in addition to the reputation of the business generally.[25] Social media can cause "damage to a company's confidentiality or reputation if employees post rumors, leak trade secrets or bully colleagues,"[26] topics addressed in Part IV below.

One famous example of a disgruntled customer utilizing social media against a large business to great effect occurred when in the summer of 2009 the Halifax band Sons of Maxwell uploaded a music video about their frustration with United Airlines

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[18] See e.g. Lon Safko, *The Social Media Bible: Tactics, Tools, and Strategies for Business Success* (Hoboken, NJ: Wiley, 2010). See also Shel Israel, *Twitterville: How Businesses Can Thrive in the New Global Neighborhoods* (New York, NY: Portfolio, 2009).

[19] See e.g. Arthur L. Jue, *Social Media at Work: How Networking Tools Propel Organizational Performance* (San Francisco, CA: Jossey-Bass, 2010).

[20] Canadian Bar Association, online <http://www.cba.org/cba>.

[21] "Canadian Bar Association" online: Facebook <http://www.facebook.com/pages/Canadian-Bar-Association/108588069166013>.

[22] "Canadian Bar Association" online: LinkedIn <http://www.linkedin.com/company/canadian-bar-association>.

[23] "Follow [the CBA National Administrative Law Section] on Twitter @CBAAdmLaw to stay informed of National and Branch Section events and happenings as well as notice of court decisions of interest to administrative law practitioners": *Intra Vires*, online: Canadian Bar Association <http://www.cba.org/cba/newsletters-sections/2011/2011-11_admin.aspx>.

[24] MCT, "Great Tech Expectations for Future Workforce" *Calgary Herald* (29 November 2011), online: <http://www.calgaryherald.com/life/Great+tech+expectations+future+workforce/5783760/story.html>.

[25] See Elaine Wiltshire, "Using Social Media Safely", *The Lawyers Weekly* (18 June 2010), online: The Lawyers Weekly <http://www.lawyersweekly.ca/index.php?section=article&articleid=1193>.

[26] Sobell, *supra* note 15.

customer service to YouTube.[27] The song, United Breaks Guitars,[28] exposed United Airlines to devastating publicity after the music video went viral,[29] causing the airline to make amends to the band for $1,000 damage to a guitar caused by baggage handlers that the band witnessed throw into the baggage-hold of the aircraft, after more than a year of the airline refusing to pay for the repairs.[30] Corporate recognition of the significant negative power of social media in the hands of disgruntled customers has prompted some companies to hire so-called social media "firefighters" to snuff out online complaints and polish corporate branding.[31]

Disgruntled former employees may also cause social media nightmares for their former employers, as discussed in Part V below. However, potential social media pitfalls and liabilities in the employment context are not confined to ongoing or terminated employment relationships; rather, they also exists at the pre-employment stage, as discussed next in Part III.

III. Pre-Employment Social Media Implications

There is a real temptation on the part of human resources professionals to access the personal profiles of job applicants' social networking sites to learn "facts" about them for use in the selection process. Two areas of law that employers may fall afoul of in using

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[27] YouTube, online <http://www.youtube.com>.
[28] United Breaks Guitars, online: YouTube <http://www.youtube.com/watch?v=5YGc4zOqozo>.
[29] "A viral video is one that becomes popular through the process of Internet sharing, typically through video sharing websites, social media and email": "Viral Video", online: Wikipedia <http://en.wikipedia.org/wiki/Viral_video#>.
[30] Sarah Schmidt, "Airline Capitulates after Viral Video Deluge: Canadian Band Started Singing to the Web After Baggage Handlers Broke Their Guitar", *Edmonton Journal* (10 July 2009) A.3. See also Richard Warnica, "Baby's Diaper Blowout Costs St. Albert Couple Their Plane Seats; Newlyweds Raise a Stink Online in Search of Refund" *Edmonton Journal* (08 Nov 2010) A.3.
[31] Misty Harris, "Customer Service in 140 Characters or Less: Companies Hire Social Media 'Firefighters' to Snuff out Online Complaints, Polish their Brand" *Edmonton Journal* (11 July 2009) A.1. See also Hollie Shaw, "Web Watch: Companies are Increasingly Forced to Monitor—and respond—to events on social media sites" *National Post* (03 Sep 2010) FP.7; Antonia Zerbisias, "The Customer is Always Writing: Companies are Monitoring the Social Media Buzz for Intelligence about their Business and Brands" *Toronto Star* (30 Jan 2011) A.13; Misty Harris, "Customer Service Made Short and Tweet: Savvy Companies Monitor what People are Saying" *The Vancouver Sun* (11 July 2009) D.1; Hollie Shaw, "When Loyalty Goes Bad: An Angry Customer can Become Costly, Study Says" *National Post* (29 July 2011) FP.12; Gillian Shaw, "The New Caveat Emptor: In this Age of User-Generated Reviews—Where One Click can Deliver Dozens of Critiques—We Need Not Only be Wary of What We're Buying, But of What's Being Said About it and by Whom" *The Vancouver Sun* (04 Nov 2011) A.11; Jason Markusoff, "Four-Letter Rail Rage Surfaces on Twitter" *Calgary Herald* (15 Sep 2011) A.5.

social media to perform background checks on prospective employee candidates are privacy law and human rights law.

i. Privacy Law

There is (as yet) no common law[32] or constitutional[33] right to be free from invasion of privacy in Canada. Individuals' rights to be free from invasion of privacy by private organizations or public bodies are legislated—federally[34] and provincially.[35] "The issues related to privacy are twofold—compliance with the law and stakeholder trust."[36] Most users of social media sites mistakenly believe that the personal information they post for their "friends" to view is private, and they have an expectation of privacy in fact, if not in law. If an applicant learns that a prospective employer has accessed their personal social media site(s), there may be an irreparable loss of trust in the organization based on the perceived moral breach of privacy, even in the absence of a legal breach of privacy. However, such conduct could also amount to a legal breach of privacy if it breaches the relevant privacy legislation.

The Alberta *Personal Information Protection Act*[37] ("*PIPA*") governs the collection, use and disclosure of "personal information"[38] by "organizations"[39] under provincial jurisdiction. As a general rule *PIPA* mandates that organizations shall not collect, use or disclose a person's personal information without their consent.[40] It then sets out enumerated exceptions to the general rule.[41] However, an overriding general rule

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[32] *Bank of Montreal v. Cochrane*, 2010 ABQB 541, [2010] A.J. No. 1210 at paras 6-7 (QL)
[33] *Euteneier v. Lee*, [2005] O.J. No. 3896 at para 63 (QL) (CA), leave to appeal to SCC refused, [2005] S.C.C.A. No. 516 (QL): "there is no free-standing right to dignity or privacy under the *Charter* or at common law."
[34] *Privacy Act*, RSC 1985, c P-21 (public); *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 ["*PIPEDA*"] (private).
[35] *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (public); *Personal Information Protection Act*, SA 2003, c P-6.5 ["*PIPA*"] (private).
[36] Rob Pickel, "Checking Social Media Sites When Hiring?: Proceed with Caution" *Canadian HR Reporter* (28 March 2011) 17.
[37] *PIPA, supra* note 35.
[38] *Ibid*, s 1(k): "'personal information' means information about an identifiable individual."
[39] *Ibid*, s 1(i): "'organization' includes a corporation, an unincorporated association, a trade union as defined in the *Labour Relations Code*, a partnership as defined in the Partnership Act, and an individual acting in a commercial capacity, but does not include an individual acting in a personal or domestic capacity."
[40] *Ibid*. s 7.
[41] *Ibid*. ss 14, 17, 20.

is that an organization may collect,[42] use[43] or disclose[44] personal information only for purposes that are reasonable, and only to the extent that is reasonable for meeting the purposes for which the information is collected, used or disclosed. *PIPA* creates a statutory cause of action for damages for breach of *PIPA*,[45] as does the federal *PIPEDA.*[46] Although the statutory cause of action for damages for breach of *PIPA* has yet to be litigated, damages have been awarded for breach of *PIPEDA.*[47]

An organization perusing the social media pages of prospective employees without their knowledge is *prima facie* collecting their "personal information" without their consent. Relying on that collected "personal information" to make hiring decisions is *prima facie* using their "personal information" without their consent. Unless the prospective employer can justify the collection and use absent consent by fitting the conduct within one of the enumerated exceptions and can show that the collection and use was for purposes that are reasonable, and were only done to the extent that is reasonable for meeting the purposes for which the information was collected and used (selection/hiring decisions), it risks a finding of breach and potential damages.

As social media is a relatively new phenomenon, it is no surprise that there is a paucity of jurisprudence in the area of privacy law concerning prospective employers mining applicants' personal information from social media sites. However, privacy commissioners are alive to the issues. The Office of the Privacy Commissioner of Canada has written: "Using [social networking sites] in the workplace raise complex issues that affect employee privacy, corporate security or branding and have an impact on the employment relationship."[48] The federal Commission also provides information

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[42] *Ibid*. s 11.
[43] *Ibid*. s 16.
[44] *Ibid*. s 19.
[45] *Ibid*. s 60.
[46] *PIPEDA, supra* note 34, s 16(c).
[47] See e.g. *Girao v. Grossman*, 2011 FC 1070, [2011] F.C.J. No. 1310 (QL); *Landry v. Royal Bank of Canada*, 2011 FC 687, [2011] F.C.J. No. 880 (QL); *Nammo v. TransUnion of Canada Inc*., 2010 FC 1284, [2010] F.C.J. No. 1510 (QL).
[48] "Social Networks Sites in the Workplace: An Introduction", online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca/fs-fi/02_05_d_40_sn_e.cfm#contenttop>.

related to "Privacy and Social Networking in the Workplace"[49] and "Social Networking and Privacy."[50]

The Office of the Information and Privacy Commissioner for British Columbia recently published "Guidelines for Social Media background Checks,"[51] "developed…to help organizations and public bodies navigate social media background checks and privacy laws." The BC Commission's guidelines must be read cautiously in light of the different privacy legislation in Alberta and federally, but they are a helpful tool nonetheless. The BC Commission identifies risks of relying on social media background checks, including collecting and using inaccurate or irrelevant personal information, collecting too much personal information (beyond the extent that is reasonable for meeting the purposes for which the information was collected and used), and overreliance on consent.[52] The BC Commission also provides useful considerations in deciding whether to utilize social media background checks.

In December 2011, the Office of the Information and Privacy Commissioner of Alberta released it own "Guidelines for Social Media Background Checks,"[53] because it "is concerned that organizations may be implementing social media background checks without fully understanding the legal implications of doing so."[54] The guidelines point out that "[w]hile social media background checks may appear enticing, the reality is that many risks associated with conducting social media background checks exist."[55] The Commission suggests that when assessing if a social media background check is "reasonable" for the purposes of *PIPA*, Organizations should query whether: they are collecting irrelevant and too much personal information; they are collecting third-party personal information; they are over-relying on consent; they are collecting (in)accurate

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[49] "Privacy and Social Networking in the Workplace", online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca/fs-fi/02_05_d_41_sn_e.cfm#contenttop>.
[50] "Social Networking and Privacy", online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca/fs-fi/02_05_d_35_sn_e.cfm#contenttop>.
[51] "Guidelines for Social Media background Checks", online: Office of the Information and Privacy Commissioner for British Columbia <http://www.oipc.bc.ca/pdfs/private/Guidelines-SocialMediaBackgroundChecks.pdf>.
[52] *Ibid* at 2-4.
[53] "Guidelines for Social Media Background Checks", online: Office of the Information and Privacy Commissioner of Alberta <http://oipc.ab.ca/Content_Files/Files/Publications/Social_Media_Guidelines_Dec_2011Final.pdf>.
[54] *Ibid* at 1.
[55] *Ibid* at 2.

personal information.[56] The Guidelines set out other helpful considerations and things to avoid as well.[57]

ii. Human Rights Law

The second area of law that employers may fall afoul of in using social media to perform background checks on prospective employee candidates is human rights law. Human rights legislation is quasi-constitutional,[58] and human rights principles of equality are constitutional.[59] Alberta[60] and Canada[61] each have enacted human rights legislation.

The *Alberta Human Rights Act* contains the following prohibitions:

> 7 (1) **No employer shall**
>
> (a) **refuse to employ** or refuse to continue to employ **any person**, or
>
> (b) discriminate against any person with regard to employment or any term or condition of employment,
>
> **because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person**.[62]
>
> 8 (1) **No person shall** use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or **make any written or oral inquiry of an applicant**
>
> (a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person, or
>
> (b) **that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation**.[63]

Personal information collected from social media sites, even if lawful from a privacy law perspective, will almost assuredly contain information that would make known to the prospective employer some or all of the person's "race, religious beliefs,

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[56] *Ibid* at 2-5.
[57] *Ibid* at 5-6.
[58] *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 81 ["*Vaid*"].
[59] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c 11, s 15 ["*Charter*"].
[60] *Alberta Human Rights Act*, RSA 2000, c A-25.5.
[61] *Canadian Human Rights Act*, RSC 1985, c H-6.
[62] *Alberta Human Rights Act, supra* note 60, s 7; emphasis added.
[63] *Ibid*, s 8; emphasis added.

colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation," the prohibited grounds of discrimination under the legislation. If the applicant is not hired, even if the reason for not hiring is unconnected to prohibited grounds, the employer has opened itself up to *allegations* of discrimination; *viz*. that the employer refused to employ the person because of one or more prohibited grounds that it learned of through its social media search.

The *Alberta Human Rights Act*, s 8 clearly prohibits prospective employers from making any written or oral inquiry of an applicant that requires an applicant to furnish any information concerning prohibited grounds. Arguably, seeking an applicant's consent to access his or her social media pages (which may address potential privacy law liability if the applicant consents) would breach *Alberta Human Rights Act*, s 8 if by doing so it "requires an applicant to furnish any information concerning" prohibited grounds. One can imagine that a person's Facebook pages could easily include such personal information as: pictures of the person on a trip to his or her homeland (race, ancestry, place of origin, colour, gender, age), pictures of the person at his or her church, mosque or synagogue (religious beliefs), the fact that person belongs to a group dedicated to depression, epilepsy, alcohol or drug addiction (mental disability), pictures of the person in a wheelchair, using crutches, or without a limb (physical disability), pictures of the person's celebration of same-sex marriage (marital status, family status, sexual orientation).

Mining social media personal information of prospective employee applicants, with or without their consent, carries liability risks that prospective employers should seriously weigh before deciding whether to succumb to the temptation of easily obtained background information. Employers should also be aware that many social media sites allow users the ability to view a log of all those who have viewed their site pages without the viewers knowing they have been logged.

Potential social media pitfalls and liabilities in the pre-employment context have not been litigated so as to provide stakeholders with much jurisprudential guidance; however, a body of related labour and employment case law has been building over the past few years, as discussed next in Part IV.

IV. Social Media Implications during Employment

There are numerous contexts in which social media has become a factor in labour and employment law during the employment relationship, including: *Charter*[64] s 2(b) freedom of expression; confidentiality; criminal; discipline/dismissal; defamation (tort of); duty of fair representation (trade unions'); evidence; human rights; insurance benefits; labour relations boards; professional licensure; and workers' compensation.

i. *Charter* s 2(b) Freedom of Expression

Postings to social media are forms of "expression" in Canadian constitutional parlance, or "speech" in American.[65] Recall that the *Charter* only applies to "government" action[66]—public employers in our context. In *National Post*,[67] the majority of the Supreme Court of Canada wrote:

> As recently pointed out in *Grant*[68] ..., the protection attaching to freedom of expression is not limited to the "traditional media", but is enjoyed by "everyone" (in the words of s. 2(b) of the *Charter*) who chooses to exercise his or her freedom of expression on matters of public interest whether by blogging, tweeting, standing on a street corner and shouting the "news" at passing pedestrians or publishing in a national newspaper.[69]

However, as with all other forms of constitutionally protected expression, expression communicated via social media is subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[70]

In *Pridgen*,[71] the University's General Faculties Council Review Committee held that the Pridgen twins (graduate students) posted negative comments on Facebook about Professor Mitra and placed them on probation for non-academic misconduct. Justice Strekaf quashed the Committee's decision, holding that its effect was to sanction the

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[64] *Charter, supra* note 59.
[65] See e.g. Mara Lee, "Deal Reached After Worker Fired over Facebook Post", *Calgary Herald* (12 February 2011) H2, where the NLRB was arguing that a worker's Facebook post that "Frank", her supervisor, was a jerk was protected speech made outside the workplace even though posted on the Internet.
[66] See e.g. *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, [1990] S.C.J. No. 124 (QL).
[67] *R. v. National Post*, 2010 SCC 16, [2010] S.C.J. No. 16 (QL).
[68] *Grant v. Torstar Corp*., 2009 SCC 61, [2009] S.C.J. No. 61 (QL) ["*Grant*"].
[69] *R. v. National Post*, *supra* note 67 at para 40; emphasis added.
[70] *Charter, supra* note 59, s 1.
[71] *Pridgen v. University of Calgary*, 2010 ABQB 644, [2010] A.J. No. 1181 (QL) ["*Pridgen*"].

Pridgen twins and prohibit them from publicly espousing their critical views regarding Professor Mitra while studying at the University of Calgary—its purpose was to restrict their freedom of expression. The order had a direct effect on their freedom of expression, violated *Charter* s 2(b),[72] and was not justified under s. 1.[73]

In *UFCW*,[74] the union was on lawful strike against Palace Casino, and its members were picketing. The union posted signs in the area of the picketing stating that video images of persons crossing the picket line could be placed on its web-site, "www.CasinoScabs.ca," which posting was in fact done. The Information and Privacy Commissioner of Alberta, following complaints, held that the union's collection, use and disclosure of the complainants' personal information were in breach of *PIPA*.[75] On judicial review, Justice Goss held:

> The exception in s. 4(3)(c) of *PIPA* that applies only to an organization that has a journalistic purpose and no other purpose infringes s. 2(b) of the *Charter* and is not justified under s. 1 of the *Charter*; and The provisions in PIPA that prohibit an organization from collecting, using and disclosing personal information collected at a public, political demonstration, like a picket line, infringe s. 2(b) of the *Charter* and are not justified under s. 1 of the *Charter*.[76] ..

And further

> that section 7 of the Regulation is in violation of the freedom of expression protected under section 2(b) of the Charter, and this violation is not demonstrably justified under section 1 of the Charter, to the extent that it prohibits a trade union from: photographing or video-recording a picket line site and surroundings in the course of a lawful strike, including persons at that site or surroundings, and/or publishing or internet-posting such photographs or video-recordings in publications or websites of that trade union at the time of the strike or subsequently…[77]

Public employers that intend to attempt to stifle the social media expressions of their employees should be cognizant of the *Charter* s 2(b) implications of their actions. "To determine whether [an employee] engaged in misconduct, it is important to consider freedom of speech and the grievor's duty of loyalty to the employer. Although the employer is entitled to a loyal employee, that entitlement is not absolute. Free speech is

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[72] *Ibid* at para 75.
[73] *Ibid* at para 83.
[74] *United Food and Commercial Workers, Local 401 v. Alberta (Information and Privacy Commissioner),* 2011 ABQB 415, [2011] A.J. No. 940 (QL) ["*UFCW*"].
[75] *PIPA, supra* note 35.
[76] *UFCW, supra* note 74 at para 181.
[77] *Ibid* at para 188.

also not an absolute right… the facts must be analyzed case by case to determine whether the duty of loyalty has been breached, since free speech is also at issue"[78]

While social media criminal law implications are examined fully in Part IV.iii below, *Neveu*,[79] belongs here as it is a *Charter* s 8[80] decision. In *Neveu*, Gabriel Luc Claude Neveu was charged with the offence of possessing child pornography obtained via the Internet. The question was whether the Information to Obtain disclosed a credibly based probability that evidence of the offence of possessing child pornography would still exist in the locations sought to be searched by police; including, Mr. Neveu's residence, garage and outer buildings at Lake Charlotte, his motor vehicle and spaces controlled or used by Mr. Neveu at his place of employment.[81] Mr. Neveu argued insufficient grounds were set out in the Information to Obtain to form a basis for the issuance of the search warrant, and that the resultant search breached *Charter* s 8.[82] The argument was dismissed.

ii. Confidentiality

Confidentiality is important both during the employment relationship,[83] as well as following its termination,[84] and in the context of negotiated settlement agreement provisions. In *CUPE 561*,[85] J.J. attempted to file a human rights complaint against the union, which the Tribunal refused to accept for filing based in part on the complaint being untimely. The Union had adduced evidence showing that J.J. had posted extensive information on her blog about her previous human rights complaint, including some of the evidence that was in front of the Tribunal (some of the school district's exhibited

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[78] *MacLean v. Treasury Board (Department of Public Works and Government Services)*, 2011 PSLRB 40, [2011] C.P.S.L.R.B. No. 40 at paras 112-113 (QL).
[79] *R. v. Neveu*, 2005 NSPC 51, [2005] N.S.J. No. 487 (QL).
[80] "Everyone has the right to be secure against unreasonable search or seizure": *Charter, supra* note 59, s 8.
[81] *R. v. Neveu, supra* note 79 at para 11.
[82] *Ibid* at para 3.
[83] There is a "common law duty to not disclose confidential information of the employer": *Perewernycky v. National - Oilwell Canada Ltd*., 2007 ABQB 170, [2007] A.J. No. 298 para 31 (QL). "[E]mployee's [owe] common law obligations in relation to confidential property": *Flag Works Inc. v. Sign Craft Digital (1978) Inc*., 2007 ABQB 434, [2007] A.J. No. 876 at para 91 (QL).
[84] "[T]he current law…restricts post-employment duties to the duty not to misuse confidential information, as well as duties arising out of a fiduciary duty or restrictive covenant": *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc*., 2008 SCC 54, [2008] S.C.J. No. 56 at para 18 (QL) ["*RBC Dominion*"]; emphasis added.
[85] *J.J. v. Canadian Union of Public Employees, Local 561*, 2011 BCHRT 196, [2011] B.C.H.R.T.D. No. 196 (QL) ["*CUPE 561*"].

documents, some of J.J.'s exhibited documents, some of the union's exhibited documents, a respondent's letters to J.J.), and some testimony that J.J. heard at the Tribunal hearings.[86] The complaint was not accepted for filing.

In *Chevalier*,[87] Justice Strekaf pointed out that "Rule 5.33 codifies the common law implied undertaking which prohibits the use of discovery evidence except for the purposes of the action in which it was produced. However, once documents are filed on the Court record, they are, absent any restricted court access order, available to the public."[88] This was a wrongful dismissal action against Sunshine wherein

> [t]he lawsuit and the underlying dispute has generated considerable interest on a number of internet sites. Copies of the pleadings were posted on one site, and other sites—including a Facebook wall—contain numerous comments with respect to the circumstances that gave rise to the litigation. Sunshine expressed concerns that the documents in question, which include notes used in the investigation of the incident, could be taken out of context and reproduced on the internet sites which might affect the reputation of [Sunshine].[89]

Sunshine's application for a "confidentiality order" was dismissed.[90]

In *CLAC*,[91] the union claimed that the comment "glad day is over, it was all in my favour" posted to the Facebook wall of an employee breached the covenant to "keep these terms confidential" in a settlement agreement. The Ontario Labour Relations Board disagreed: "CLAC is therefore obliged to do what it agreed to do under the settlement [and is] directed to pay to the applicant the amount of $800.00."

iii. Criminal Law

Criminal law is relevant to our topic in at least two ways: employees who commit social media related crimes with the employer's computer equipment on or off the employer's premises; and employees who commit off work social media related crimes and the resulting charges bring the employer into disrepute.

In *CEP 2289*,[92] the union initially grieved the suspension, and ultimately the termination, of the grievor who had initially been charged, and ultimately convicted, of

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[86] *Ibid* at para 25.
[87] *Chevalier v. Sunshine Village Corp*., 2011 ABQB 557, [2011] A.J. No. 1005 (QL) ["*Chevalier*"].
[88] *Ibid* at para 6.
[89] *Ibid* at para 4.
[90] *Ibid* at para 9.
[91] *Christian Labour Assn. of Canada*, [2009] O.E.S.A.D. No. 404 (QL) ["*CLAC*"].
[92] *CEP Atlantic Communications Council, Local 2289 v. Bell Aliant Regional Communication L.P. (R.S. Grievance)*, 203 L.A.C. (4th) 407, [2010] C.L.A.D. No. 419 (QL) ["*CEP 2289*"].

using a computer chat room to communicate with a person believed to be under 14 years of age for the purpose of facilitating the commission of an offence; namely invitation to sexual touching. The grievor had used the employer's computer while at his home to facilitate commission of the offence. The grievance was dismissed and the termination justified based on the following conduct: "the internet luring conviction and sentence, the misuse of the Employer's computer for this purpose and the abuse of the [Employer's] customer's wi-fi system to commit the offence."[93]

In *Carswell*,[94] the reasons for judgment clearly identify both the accused and his employer: "[David] Carswell was … 51 when this matter began. He has been employed for 24 years by the Simcoe Board of Education as a primary school teacher and a school teacher for junior high and high school for an additional five years prior to that."[95] "The police…obtained his address and particulars of what he did for a living. They confirmed that the site he allegedly made the purchase from did contain images the *Criminal Code* would define as child pornography."[96] The accused was convicted.

In *Gowen*,[97] the reasons disclose the following regarding Kyle Gowen: "Prior to his arrest, he was steadily employed at the Irving Mainway at Eastern Passage and taking business administration at the Nova Scotia Community College at Dartmouth."[98] Not surprisingly, Mr. Gowen lost his employment. *Gowen* was a detention hearing related to first degree murder charges. A friend of co-accused Amanda Greene, learned of Dillon Jewitt's death through Facebook.[99] Mr. Gowen pleaded guilty and was sentenced to life imprisonment with a 15-year period of parole ineligibility.[100]

Hepburn,[101] was a Crown application for leave to appeal a sentence of two years less a day followed by two years of probation. While the offences were taking place Mr. Hepburn was employed but by the time of sentencing he had been unemployed for about a year due to publicity from the charges.[102] He had initiated internet relationships with

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[93] *Ibid* at para 61.
[94] *R. v. Carswell*, 2009 ONCJ 297, [2009] O.J. No. 2624 (QL).
[95] *Ibid* at para 117.
[96] *Ibid* at para 16.
[97] *R. v. Gowen*, 2010 NSSC 471, [2010] N.S.J. No. 720 (QL).
[98] *Ibid* at para 34.
[99] *Ibid* at para 75.
[100] *R. v. Gowen*, 2011 NSSC 249, [2011] N.S.J. No. 379 (QL).
[101] *R. v. Hepburn*, 2010 ABCA 157, [2010] A.J. No. 565 (QL).
[102] *Ibid* at para 12.

females, aged 14 to 15 through social networking sites. He used internet luring to enable the making of child pornography.[103] Leave to appeal was refused.

In *Johannson*,[104] Scott B. Johannson pleaded guilty to three possession of child pornography charges, and was found guilty of two charges of making available child pornography.[105] Mr. Johannson's personal home computer contained a software program known as "LimeWire",[106] within which was a shared folder containing child pornography videos and child pornography still images.[107] The reasons disclose that at the time of sentencing: "He is … employed on a part-time basis by the Department of Statistics at the University of Saskatchewan."[108] He was sentenced to "a term of imprisonment for one year on [the two charges of making child pornography available] which sentences are to be served concurrently. On the three possession of child pornography [he was sentenced] to a term of 45 days of imprisonment in respect to each charge."[109]

In *Lorette*,[110] Jordan Lorette was charged with sexual assault of a stranger who was leaning against a bank teller's wicket. The complainant testified "she felt someone press against her from behind. She described the pressure as hard and banana-shaped, 'like an erection', against her lower back."[111] Mr. Lorette testified that he had mistaken the complainant for an ex-girlfriend named Larissa:

> He insisted that his physical contact with the complainant was consistent with the friendly relationship he maintained with Larissa and was in no way sexual. In cross-examination he explained that his iPhone, keys and wallet were in his cargo shorts pockets and he agreed that the front of these pockets may have touched the complainant's back. He said nothing as he approached the woman as he was "certain" she was Larissa. From behind, he says she had the same hair, build, stature and style of dress as Larissa. He produced three photos of Larissa that he had printed from her Facebook account, including one that portrayed Larissa and the defendant affectionately posing for the camera while in the back of a taxi. The defendant says he said nothing to the woman at the counter when he realized his mistake because of his shock and embarrassment and because he could not think of anything to say.[112]

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[103] *Ibid* at para 23.
[104] *R. v. Johannson*, 2009 SKQB 12, [2009] S.J. No. 154 (QL).
[105] *Ibid* at para 1.
[106] "LimeWire is a free peer-to-peer file sharing (P2P) client program that runs on Windows, Mac OS X, Linux, and other operating systems supported by the Java software platform": "LimeWire" (6 December 2011), online: Wikipedia <http://en.wikipedia.org/wiki/LimeWire>.
[107] *R. v. Johannson*, 2008 SKQB 451, [2008] S.J. No. 827 at para 3 (QL).
[108] *R. v. Johannson, supra* note 104 at para 3.
[109] *Ibid* at para 20.
[110] *R. v. Lorette*, 2010 ONCJ 259, [2010] O.J. No. 2991 (QL).
[111] *Ibid* at para 6.
[112] *Ibid* at para 11; emphasis added.

Justice Green found: "the defendant's account simply makes sense. Larissa, the former girlfriend for whom he mistook the woman at the counter, appears to me to bear something more than a generic resemblance to the complainant."[113] "The physical elements of the defendant's conduct amount to common rather than sexual assault. He honestly mistook the complainant for a former girlfriend who, he believed, would implicitly consent to the impugned contact. Accordingly, I find the defendant not guilty."[114] Larissa did not testify at the trial, and the Facebook evidence seems to have carried significant weight.[115] The reasons also disclose: "The defendant was 28 and single at the time of trial. He had been employed for three years as an account executive with a major sports entertainment enterprise."[116] It is likely that one who knew Jordan Lorette could easily deduce the identity of his employer from the reasons.

In *McCall*,[117] the reasons disclose: "At the time of the alleged offence, [Raymond Kelly McCall] was 40 years of age and was employed as a security manager with Intercon Security at Park Place located at 666 Burrard Street in the City of Vancouver. At that time Mr. McCall was married and was the father of a young child."[118] Judge Rideout began the reasons for judgment as follows:

> Facebook is a computer online Social Networking Site (SNS) that connects people with friends and others who work, study and live around them. People from all walks of life around our world use Facebook to keep in touch with friends, post photographs, share links and exchange other information. Facebook is readily available for the access by users to view profiles of confirmed friends and people within their networks. Facebook also has a darker side as online predators may access this site for the purpose of exploiting vulnerable people, including children and teens, usually for sexual or other abusive purposes. It is alleged by the Crown that the accused, Raymond Kelly McCall, utilized Facebook, and other online contact sites, for the purpose of communicating with a girl who was under the age of 16 years for the purpose of facilitating the commission of an offence under s. 152 of the *Criminal Code* with respect to that person, contrary to s. 172.1(1)(b) of the *Criminal Code*.[119]

Mr. McCall was convicted,[120] and sentenced to 12 months in prison followed by probation for three years.[121]

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[113] *Ibid* at para 29.
[114] *Ibid* at para 48.
[115] Social media evidence is discussed further in Part VI.vii below.
[116] *Lorette, supra* note 110 at para 9.
[117] *R. v. McCall*, 2011 BCPC 7, [2011] B.C.J. No. 115 (QL)
[118] *Ibid* at para 4.
[119] *Ibid* at para 1.
[120] *Ibid* at paras 118-119.
[121] *R. v. McCall*, 2011 BCPC 143, [2011] B.C.J. No. 1197 at paras 33-34 (QL).

In *Proulx*,[122] Dwayne Proulx used his employment computer to download and store 2,466 images of child pornography.[123] At sentencing the reasons disclose Mr. Proulx had maintained gainful employment indicative of successful social integration since his initial job loss following the offence.[124] Mr. Proulx was sentenced to 8 months incarceration followed by 3 years probation.[125]

In *W.A.E.*,[126] R.C.M.P. executed a search warrant at Mr. E's residence and his place of employment. The computer seized from Mr. E's place of employment contained 158 "child sexual abuse and other child images."[127] Mr. E. was sentenced to 20 months' imprisonment and three years' probation.[128]

In *MacIntyre*,[129] James David MacIntyre was sentenced to an 18-month conditional sentence and 30 months probation following his guilty plea to a charge of internet luring related to communications with a police officer posing as a 13-year-old girl. Mr. MacIntyre had "enjoyed a reasonably successful career with a local retail store where he rose to a supervisory level, responsible for upwards of 12 employees at various times. He voluntarily reported his charges to his employer and as a consequence, was dismissed."[130]

In December 2011, Brad Sloan, a Timmins Ontario lawyer, pleaded guilty to a criminal charge of possession and distribution of child pornography after a forensic computer examiner retained for an investigation retrieved 4,377 images depicting individuals or pairs of young girls in various sexual poses on his law office computer. The fact that the investigation involved a law office complicated the computer search because of concerns over solicitor-client privilege.[131] Mr. Sloan had shared the images

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[122] *R. v. Proulx*, 2009 MBPC 13, [2009] M.J. No. 101 (QL).
[123] *Ibid* at para 2.
[124] *Ibid* at para 5.
[125] *R. v. Proulx*, 2010 MBQB 58, [2010] M.J. No. 87 at para 32 (QL).
[126] *R. v. W.A.E.*, 289 Nfld. & P.E.I.R. 214, [2009] N.J. No. 218 (QL).
[127] *Ibid* at para 5.
[128] *R. v. W.E.*, 2010 NLCA 4, [2010] N.J. No. 15 (QL).
[129] *R. v. MacIntyre*, 2009 ABPC 177, [2009] A.J. No. 717 (QL).
[130] *Ibid* at para 19.
[131] Law Times, "Lawyer Pleads Guilty in Porn Case", *Law Times* (12 December 2011), online: Law Times <http://www.lawtimesnews.com/201112128840/Inside-Story/Monday-December-12-2011>. See also, Michael McKiernan, "Lawyer's Child-Porn Trial Hits Roadblocks", *Law Times* (16 May 200), online: Law Times <http://www.lawtimesnews.com/201005176893/Headline-News/Lawyers-child-porn-trial-hits-roadblocks>.

with others and, in e-mail exchanges, noted his computer's security, including the fact that no one else accessed it.[132]

iv. Discipline/Dismissal

When Howard Levitt, employer-side employment lawyer, used to have employer clients that "wished to fire an employee for cause", he would advise them to "[c]heck [the employee's] expense accounts and their job applications", because, in his view, "[m]any employees gild the lily on their expenses and most lie on their resumes."[133] But now, according to Mr. Levitt, "there is an even easier method—check their Facebook postings and Google their names."[134] Labour and employment law jurisprudence touches on social media related discipline and dismissal in at least the contexts of blogs, chat rooms, email, Facebook, and discussion forums.

In *AUPE*,[135] the Union grieved the termination of "R" after she had created a number of internet blogs, being internet websites that contained an online personal diary, on a recommendation of her therapist to write things down as a way to address certain feelings of anger and helplessness. Although there were a number of personal, non-work-related postings, the blogs also contained postings about R's workplace, which included unflattering comments about some of her supervisors and co-workers. R used pseudonyms to refer to individuals with whom she worked, rather than using their actual names. The grievance was denied by the majority of the arbitral board, which decision was quashed on judicial review, the latter decision upheld by the Court of Appeal, which remitted the matter back to the arbitral board.

In *EV Logistics*,[136] the employee was terminated after posting a blog containing a narrative admiring of Adolf Hitler, the NAZI SS, and other controversial topics, as well as a number of photos (a skull and crossbones, a person in an SS uniform, SS emblem

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[132] "Lawyer Pleads Guilty in Porn Case", *Ibid.*
[133] Howard Levitt, "How Facebook Can Lead to Cause for Firing", *Ottawa Citizen* (10 February 2011), online: <http://www.working.com/ottawa/Facebook+lead+cause+firing/4258681/story.html>.
[134] *Ibid.*
[135] *Alberta v. Alberta Union of Provincial Employees (R. Grievance)*, 174 L.A.C. (4th) 371, [2008] A.G.A.A. No. 20 (QL), judicial review allowed, 2009 ABQB 208, [2009] A.J. No. 368 (QL), appeal dismissed, 2010 ABCA 216, [2010] A.J. No. 747 (QL) ["*AUPE*"].
[136] *EV Logistics v. Retail Wholesale Union, Local 580 (Discharge Grievance)*, [2008] B.C.C.A.A.A. No. 22 (QL) ["*EV Logistics*"].

and an SS flag). EV Logistics was identified in the blog as its author's employer.[137] EV Logistics' Director Business Operations was "horrified when he read the blog."[138] The RCMP became involved, the employee removed the blog and apologized, and his employment was terminated. His union grieved the termination. The Arbitrator wrote: "while the employer is not the custodian of the grievor's character or personal conduct, his conduct may be a disciplinary concern to the employer if it adversely impacts on the legitimate business interests of the employer."[139] The Arbitrator held there were sufficient mitigating factors to justify a reduction in the disciplinary penalty of discharge, and substituted an unpaid suspension from the date of discharge to the date of reinstatement.[140]

In *Chatham-Kent*,[141] the employee, a Personal Care Giver at the Home for the Aged, had created a website (blog) that was accessible to anyone with internet access, where she had published resident information and pictures without resident consent and had made inappropriate comments on this site about residents entrusted to her care. Her termination was upheld by the Arbitrator.

In the *Graham Grievance*,[142] a 23 year employee, who was senior operator in the City's waterworks unit, spent over 3 hours on an internet "chat room", used for messages that were wholly unrelated to his work, not responding to alarms indicating a low chlorine level. The arbitral board upheld the termination. In the *Davies Grievance,*[143] the grievor, a teacher at an elementary school, had engaged in inappropriate touching of several female students, was suspended for five days without pay, transferred to a different elementary school, and was required to attend a workshop/course on maintaining professional boundaries with students. The union unsuccessfully grieved the disciplinary suspension on the theory that the grievor had been the victim of an

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[137] *Ibid* at para 8.
[138] *Ibid* at para 10.
[139] *Ibid* at para 58.
[140] *Ibid* at para 67.
[141] *Chatham-Kent (Municipality) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127 (Clarke Grievance)*, 159 L.A.C. (4th) 321, [2007] O.L.A.A. No. 135 (QL) ["*Chatham-Kent*"].
[142] *Canadian Union of Public Employees, Local 37 v. Calgary (City) (Graham Grievance)*, [2003] A.G.A.A. No. 30 (QL) ["*Graham Grievance*"].
[143] *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Davies Grievance)*, [2010] B.C.C.A.A.A. No. 143 (QL) ["*Davies Grievance*"].

orchestrated attack by a group of girls who trumped up the charges against him. To support its theory, the Union adduced evidence that the girls frequented a chat room called "Nexopia"[144] to communicate with each other.

In the *Labatt Grievance*,[145] Corey Labatt was terminated for engaging in instances of personal harassment, misrepresentation and intimations of unauthorized and improper interference with Hydro One's IT system with respect to a summer student working for Hydro One. Mr. Labatt was a Communications Coordinator at Hydro One's Corporate Communications Department. Mr. Labatt and the summer student had conversed on the phone and via Facebook, and after an agreed-upon in-person meeting failed to occur, Mr. Labatt sent the following email to her from his home computer to hers:

> What do I care about someone like that? Obviously your MO is to lead on as many Hydro One guys as possible to try to secure yourself a job. Good luck with that. . . gee maybe you should have thought about how much power and influence I have over the HR dept and all of their computer systems before you treated me like shit and jeopardized all of your career aspirations. Try to figure THAT out yourself. You'll have plenty of time to reflect on it when you're working at Tim Horton's for the rest of your life. TTYN [Talk To You Never].[146]

The Arbitrator wrote:

> This was a single isolated incident arising out of a friendship the grievor had with another employee. As noted, interaction with the public was not involved nor was there evidence that the public was even aware of the incident. The incident took place outside working hours away from work and did not compromise Hydro One's reputation or operation in any manner. The grievor has accepted full responsibility and is remorseful. …
>
> In the circumstances, I substitute for the discharge a suspension without pay from the date of the termination until the date of this Award.[147]

In the *Whiteside Grievance*,[148] employee 1 was terminated for allegedly harassing comments posted to his Facebook wall by employee 2 about employee 3. The Union's non-suit motion was granted by the Arbitrator who wrote: "With respect to the comment on the Grievor's Facebook wall, the uncontradicted evidence is that this comment was made by [employee 2], not the Grievor."[149]

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[144] Nexopia, online: <http://www.nexopia.com>.
[145] *Hydro One Networks Inc. v. Society of Energy Professionals (Labatt Grievance)*, [2010] O.L.A.A. No. 76 (QL) ["*Labatt Grievance*"].
[146] *Ibid* at para 11.
[147] *Ibid* at paras 29-30.
[148] *Alberta Distillers Ltd. v. United Food and Commercial Workers, Local 1118 (Whiteside Grievance)*, [2009] A.G.A.A. No. 46 (QL) ["*Whiteside Grievance*"].
[149] *Ibid* at para 37.

In *Brisson*,[150] one of many reasons the employer relied on to terminate the employment of the non-unionized employee was that "Mr. Brisson accessed Facebook on the internet during his shift. He was looking up employee profiles to show a team leader. The Complainant's use of Facebook was inappropriate and as it is not a work tool, it is deemed as an unauthorized web site."[151] The dismissal was upheld by the federal adjudicator on a different culminating incident.[152]

In the *Cameron Grievance*,[153] Gordon (Kesh) Cameron was allegedly overheard by co-worker 1 discussing with co-worker 2 a situation involving a gun in regards to a weekend poker party. Co-worker 1 told co-worker 3 that when she told Mr. Cameron that his involvement with guns is not a good idea, he responded to the effect, "What if I have a gun in my locker right now?" Co-worker 1 told co-worker 3 that Mr. Cameron then turned to co-worker 2 and said something to the effect, "You know I'm just kidding, right?" Co-worker 1 and co-worker 3 discussed the fact that Mr. Cameron possessed guns as evidenced from his page on Facebook, and they informed management. Mr. Cameron was terminated, but the Arbitrator substituted an unpaid suspension for the dismissal given all the circumstances.

In the *Rowe Grievance*,[154] the termination of Steve Rowe, an Infrastructure Analyst in the employer's Information Technology Department, was upheld by the Arbitrator. The uncontested facts were:

> The grievor used a computer owned by the College (nicknamed "Numb" by him), which was surplus to its requirements, for private purposes while it was connected to the College's network, without the College's authorization. …he used the network and Numb to download and store thousands of copyrighted works, including movies, TV shows, music tracks and games, totaling over half a terabyte of data. He gave access to Numb and its stored media to at least 11 people, including colleagues at the College, his sister, his mother and friends outside the College. The downloading and dissemination of this material violated copyright. He had been using the network in this way since the early part of the decade. Among the material he downloaded on Numb (but later deleted) were pornographic videos. On the basis of the titles of the pornographic material listed in one of Numb's directories, the employer suspected that some of it was child pornography, but (despite its investigation of the matter, in cooperation with the local police force) it was not able to confirm those suspicions. The grievor used the College's network for these purposes so as to take advantage of the network's downloading speed. The

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[150] *Brisson v. Star Choice Communications Inc*., [2009] C.L.A.D. No. 62 (QL) ["*Brisson*"].
[151] *Ibid* at para 19.
[152] *Ibid* at para 40.
[153] *Manitoba Lotteries Corp. v. General Teamsters Local Union No. 979 (Cameron Grievance),* [2010] M.G.A.D. No. 16 (QL) ["*Cameron Grievance*"].
[154] *Sheridan College Institute of Technology and Advanced Learning v. Ontario Public Service Employees Union (Rowe Grievance)*, [2010] O.L.A.A. No. 632 (QL) ["*Rowe Grievance*"].

> grievor used Numb to engage in chats over the College's network with his girl-friend, also an employee of the College, some of which strongly suggest that, on numerous occasions, the two planned sexual encounters on the employer's premises (although the grievor denies that they actually did engage in sex on the employer's premises). On one occasion, they joked about having sex on a supervisor's desk. He met his girlfriend on several occasions in secure rooms, specifically "wiring closets", where data switches, etc. were located, rooms she was not authorized to enter. When questioned about the activities described above, the grievor lied to the employer. On the day his employment was terminated, the grievor posted a photo on his Facebook profile, showing the rear of a person engaged in rock climbing, to which he added an arrow pointing to the buttocks of the climber and the caption: "Sumon [his manager] can kiss this." (The grievor voluntarily removed this from Facebook the next day.)[155]

In the *Norman Grievance*,[156] the arbitrator upheld Kyle Norman's termination. One of the findings of fact relating to Mr. Norman's emotional state was supported by his Facebook postings in which he indicated he was "ready to party."[157]

In the *Wyndels Grievance*,[158] Captain John Wyndels was terminated after posting comments on his Facebook page about the employer, which created potential harm to the employer's reputation and its ability to efficiently manage its business. The arbitrator held that termination was excessive in all the circumstances, but that the employment relationship had been damaged beyond repair so reinstatement was not appropriate. The arbitrator substituted a 4 month unpaid suspension for the termination, ordered 3 months damages in lieu of reinstatement to be paid, and ordered Mr. Wyndels to resign.[159]

In *Groves*,[160] non-union employee Elyse Groves complained to a federal adjudicator that she had been unjustly dismissed. Ms. Groves had been terminated after she posted the following comments on her Facebook page concerning the lead hand to whom she reported:

> "Elyse Groves hates losers. This guy at work is a fag. I hate him. I have ever felt lower at work. Whatever, I dont need friends.
> [AB] replies: punch him in the twig and berries and say "you know what you did" Imfao but seriously
> Elyse Groves I have steel toes...Kicking would work better.
> [AB] replies: well there you go just don't forget to say the line lol
> Elyse Groves I will yell it so loud that I will spit in his face when I say it.
> [CD] replies: WHO?!?!?!?!?; OP
> Elyse Groves My lead hand. Not Graham. Even though I would have liked to haha.

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[155] *Ibid* at para 4.
[156] *Teck Coal (Cardinal River Operations) v. United Mine Workers of America, Local 1656 (Norman Grievance)*, Alta. G.A.A. No. 2010-043, [2010] A.G.A.A. No. 37 (QL) ["*Norman Grievance*"].
[157] *Ibid* at para 5(n).
[158] *Wasaya Airways LP v. Air Line Pilots Assn., International (Wyndels Grievance)*, [2010] C.L.A.D. No. 297 (QL) ["*Wyndels Grievance*"].
[159] *Ibid* at para 122.
[160] *Groves v. Cargojet Holdings Ltd*., [2011] C.L.A.D. No. 257 (QL) ["*Groves*"].

> [CD] replies: LOL Awwww Graham's cool shit
> Elyse Groves Ya he is cool if you like ... ill just say he is cranky lol"
> "Elyse Groves my work is already enough like a high school. All people do is talk and everyone is so shady. I wish I could do that Haha but then there would be a lot more people missing work from black eyes and broken bones lol"[161]

The adjudicator held that termination was excessive in all the circumstances, but that the employment relationship had been damaged beyond repair so reinstatement (although not sought) was not appropriate.[162] The employer was ordered to pay one month damages in lieu of reinstatement, and Ms. Groves was ordered to take down the Facebook postings which gave rise to the discipline.

In *Champeau Grievance*,[163] Philip Champeau, a flight planner for Ontario Air Ambulance, was terminated for using the employer's computer to post a personal message on the public message board GTAMotorcycle.com that reflected negatively on the employer, and for downloading images portraying women in various states of undress on or around motorcycles onto the employer's computer, which the employer claimed to be pornographic (but the arbitrator held otherwise).[164] Mr. Champeau had posted: "Police said 53-year-old Brien Bowen died in hospital while his passenger 51-year-old Wendy Bown *[sic]* also of Peterborough, suffered non-life threatening injuries. Apparently he was so severely injured it took 5 hours to clean the helicopter afterwards."[165] The employer's policy regarding inappropriate use of computers had not, at the time of the misconduct, been consistently enforced.[166] Mr. Champeau "realized almost immediately after his dismissal that what he had done was wrong and he removed the posted BLOG from the motorcycle website. He expressed sincere remorse and apologized for his conduct."[167] The arbitrator substituted an unpaid suspension for the termination and ordered Mr. Champeau reinstated.[168]

Employers should refrain from acting too quickly on perceived social media misuse by employees. Social media, like other electronic media, are susceptible to

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[161] *Ibid* at para 22.
[162] *Ibid* at para 122-127.
[163] *Ornge v. Ontario Public Service Employees Union, Local 505 (Champeau Grievance)*, [2011] O.L.A.A. No. 232 (QL) ["*Champeau Grievance*"].
[164] *Ibid* at para 6.
[165] *Ibid* at para 2.
[166] *Ibid*.
[167] *Ibid* at para 7.
[168] *Ibid* at para 8.

hacking. For example, in August 2011 a tweet appeared on Calgary Stampeders quarterback Henry Burris's Twitter account that referenced a sex act and contained a crude remark about women. Stampeders staff saw the tweet, notified Mr. Burris and the message was promptly removed. Mr. Burris denied posting the tweet, and following an investigation, the Stampeders accepted that he did not know how the tweet appeared in his account.[169]

v. Defamation (Tort of)

The tort of defamation has long been a peripheral area of law to labour and employment. Posting defamatory statements to social media very likely meets the "publication" element of the defamation cause of action.[170] While the civil courts have inherent jurisdiction over claims of defamation, labour arbitrators have exclusive jurisdiction over claims of defamation provided that the "essential character" of the "defamation" dispute arises out of the collective agreement.[171] As with defamation published through conventional means, social media published defamatory statements can occur between employees with an organization, toward members of an organization from a person outside the organization, or between organizations (such as trade unions or corporations). With the advent of social media, grumbling that once occurred in private or around the "water-cooler" is now often found online.[172]

In *Barrick*,[173] Jorge Lopehandia, in his personal capacity and in his capacity as an officer (employee), director and representative of Chile Mineral Fields Canada Ltd., embarked upon an Internet campaign to effect "extremely serious [results] to the stance and Public Image" of Barrick Gold Corporation by posting a blizzard of messages on

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[169] Kristen Odland, "Burris Denies Responsibility for Offensive Twitter Tweet: Bauer Accepts Quarterback's Statement" *Calgary Herald* (25 August 2011) B.2.

[170] "A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff": *Grant, supra* note 68 at para 28 (QL); emphasis added.

[171] See e.g. *Ancheta v. Joe*, 2003 BCSC 93, [2003] B.C.J. No. 112 at para 88 (QL); *Minalu v. Sims*, [2006] O.T.C. 64, [2006] O.J. No. 291 at para 24(10) (QL) (SCJ); *Fording Coal Ltd. v. United Steelworkers of America, Local 7884*, 1999 BCCA 38, [1999] B.C.J. No. 111 (QL).

[172] Robert Todd, "Facebook is the New Water Cooler: B.C. Ruling Shows Venting on Online Social Media Sites Can Lead to Getting Fired", *Canadian Lawyer Magazine* (February 2011) 39, 41.

[173] *Barrick Gold Corp. v. Lopehandia*, 187 O.A.C. 238, [2004] O.J. No. 2329 (QL) ["*Barrick*"].

"bulletin boards" or "message boards" on various Internet websites. Barrick Gold Corporation was awarded $75,000 general and $50,000 punitive damages against Mr. Lopehandia and Chile Mineral Fields Canada Ltd, as well as permanent injunctive relief.[174]

In *RWU 517/580*,[175] the defendant unions applied to have the plaintiff union's liable (defamation) action summarily dismissed on the ground that the words complained of that had been published on the defendants' website were published on an occasion of qualified privilege.[176] Justice Rice noted that "[i]f the publication was excessive, qualified privilege will be lost. If it was not excessive, then the defence will be open at trial."[177] The published words read:

> Friday, January 12th, 2000, was a historical date for Retail Wholesale Union Local 517. On that day a majority of the 102 workers at DSL Distribution Canada Ltd. voted to join Local 517 rather than remain with Christian Labour Association of Canada (CLAC). Until that day Local 517 consisted solely of Rogers Sugar workers. Finally some new blood after 54 years. CLAC is what is known in the labour movement as a "rat union." They are usually invited in to represent workers at the request of the employer. They then sign a substandard agreement. This is done in order to make it more difficult for legitimate unions to acquire representation rights. Once we started to tell people what our WU could do for them, the workers at DSL realized that joining our union was the right way to go. From then on it was just a matter of approaching enough people outside of work, because the CLAC was working hard on the worksite to keep the unit. In fact, many workers told us if CLAC had worked that hard in representing their interest, then they probably would not have looked at changing their representation.[178]

Justice Rice also wrote: "Regrettably there is no authority that either counsel or I could find on this issue where the [publication] medium was a website."[179] Note this was a 2003 decision. Justice Rice continued: "And I have to find that probably a significant number of those who accessed and presumably read the message were not within the group of interested persons entitled to receive the information, a group which the defendant concedes is the limit and which he pleads is the specific group, the members of the union."[180] Justice Rice found "that the likelihood of a significant exposure to persons not interested is there, and that it is excessive because it is not incidental and reasonably

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[174] *Ibid* at para 83.
[175] *Christian Labour Assn. of Canada v. Retail Wholesale Union*, 2003 BCSC 2000, [2003] B.C.J. No. 3100 (QL) ["*RWU 517/580*"].
[176] *Ibid* at para 1.
[177] *Ibid* at para 8.
[178] *Ibid* at para 3.
[179] *Ibid* at para 21.
[180] *Ibid* at para 24.

necessary to publish the messages on the defendants' website without restriction."[181] The application was dismissed, and the defendants' claim of qualified privilege was struck."[182]

In *Cragg*,[183] Sylvia Stephens, a self-described advocate for the First Nations' poor and for social justice, had defamed three individuals who worked for or occupied positions in the Nisga'a Lisims Government thorough the social medium of email. Each of the three plaintiffs was awarded $25,000 in general damages and $10,000 in aggravated damage following default judgment. Injunctive relief was also ordered.

In *Hay*,[184] Steven Hay sued Justin Partridge and Crystal Partridge in defamation. Mr. Hay was an acting deputy warden at the Baffin Correctional Centre in Iqaluit, Nunavut. The defendants were employees below Mr. Hay in rank, one of whom reported directly to him. The defendants circulated a defamatory newsletter at the Centre, and used the Internet for the dissemination of the libelous content. Justice Johnson found "the use of the internet [to be] an aggravating factor because it is anonymous and instantaneous."[185] Mr. Hay was awarded general damages of $35,000, including aggravated damages and $6,500 costs.[186]

In *Newman*,[187] Susan Pearl Halstead was a parent of children who attended schools, she was involved with parent advisory councils for schools, and she was the president of an anti bullying group. Ms. Halstead posted negative information about various teachers, a retired school trustee, and parent (plaintiffs) on chat rooms, bulletin boards and a website ("GAFER"), all of which she created. The plaintiffs sued Ms. Halstead in defamation. Ms. Halstead was ordered to pay general damages of $150,000, $75,000, $125,000, $75,000, $100,000, $15,000, $25,000, $25,000, $15,000, $20,000, and $1,000 to the individual plaintiffs depending on the severity of the defamation, as well as $50,000 punitive damages, and costs. Injunctive relief was also ordered.

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[181] *Ibid* at para 30.
[182] *Ibid* at para 32.
[183] *Cragg v. Stephens*, 2010 BCSC 1177, [2010] B.C.J. No. 1641 (QL) ["*Cragg*"].
[184] *Hay v. Partridge*, 2004 NUCJ 3, [2004] Nu.J. No. 9 (QL) ["*Hay*"].
[185] *Ibid* at para 17.
[186] *Ibid* at paras 32-33.
[187] *Newman v. Halstead*, 2006 BCSC 65, [2006] B.C.J. No. 59 (QL) ["*Newman*"].

In *Smith*,[188] John G. Smith was a city councillor and a former member of the board of school trustees. Gregory Paul Cross published defamatory statements about Mr. Smith in various emails alleging Mr. Smith had failed to take action with respect to a teacher who had complaints against him for his conduct with female students and who had been disciplined by the College of Teachers for having sexual relations with a person under the age of majority; Mr. Cross also alleged in the emails that Mr. Smith had lied. Mr. Smith was awarded $25,000 in general damages, $10,000 in punitive damages, and costs. Justice Hinkson's judgment was affirmed by the Court of Appeal.

vi. Duty of Fair Representation (Trade Unions')

Social media has played a part in some complaints to labour relations boards alleging that unions had breached their duty to fairly represent their members. In *Kootenay,*[189] Leiska Varnals, a Residential Care Worker, complained that her union had breached its duty to fairly represent her when it refused to advance her termination grievance to arbitration. One part of Ms. Varnals's disciplinary history had been a verbal reprimand for posting clients pictures on Facebook.[190] Her complaint was dismissed.

In *Thomas*,[191] Michael Thomas complained that his union had breached its duty to fairly represent him when it decided not to progress his termination grievance to arbitration. Prior to his termination, Mr. Thomas had showed the Union an extract from his personal blog containing complaints about the camp provided by Suncor Energy Services Inc. at its Firebag job site. The Union advised Mr. Thomas he should not continue to post more blogs of a similar nature as it may adversely affect his employment. Notwithstanding this advice Mr. Thomas posted a further blog containing complaints about the camp which apparently included photographs or video of camp conditions. Suncor informed the employer that Mr. Thomas was banned from its site, and the employer terminated Mr. Thomas's employment because it did not have any work

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[188] *Smith v. Cross*, 2007 BCSC 1757, [2007] B.C.J. No. 2602 (QL); affirmed, 2009 BCCA 529, [2009] B.C.J. No. 2327 (QL) ["*Smith*"].
[189] *Re Kootenay Society for Community Living*, BCLRB No. B45/2011, [2011] B.C.L.R.B.D. No. 45 (QL) ["*Kootenay*"].
[190] *Ibid* at para 14.
[191] *Re Thomas*, [2011] A.L.R.B.D. No. 12 (QL).

within the scope of his job and classification within the union's jurisdiction that was not on a Suncor owned site. His complaint was dismissed.

vii. Evidence

There are various evidentiary issues related to the disclosure, admissibility, and use of social media evidence proffered in court and administrative proceedings.[192] Stoddart writes:

> **31** … Courts are now familiar with Facebook and other social networking sites and have recognized that they contain private or personal information. …
>
> **32** Generally, where the courts have determined that the personal information on a litigant's social networking site is relevant to the matter before the court, they have ordered disclosure of that information or at least inclusion of that information. Courts have also affirmed in these cases that determining the relevance of information includes a consideration of privacy interests. This may include any prejudice to the litigants or any third parties that may result from the production of information from a social networking site.[193]

Relevant jurisprudence follows. *Beaudoin*,[194] was an action against former independent contractors for alleged breach of confidentiality restrictive covenants. The defendants obtained an *ex parte* Anton Piller order[195] to seize evidence including:

> Any information, records created or generated by Beaudoin, Oldco, Worldhire, and all equipment, tools, personal computers, laptop computers, diskettes, facsimile machines, books, central processor units, backup disk drives, records, reports, files, notes, data, tapes, and 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, a desktop computer and two laptop computers (brands IBM X-40 and Hewlett Packard) and any other accessories related to these devices (the "Hardware and Records"), relating to the matters in issue in the within proceeding.[196]

In *Anderson*,[197] Dana Anderson, was a teacher employed by the Greater Essex County District School Board, who was insured under the Teachers Life Insurance Society's group policy of disability insurance. Ms. Anderson was kicked in the head by a

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[192] See Darcy Marker, "Disclosure of Facebook Information: The 'Relevance' of a Personal Injury Plaintiff's Facebook Page" *The Lawyers Weekly* (4 November 2011) 14.
[193] Jennifer Stoddart, "Privacy in the Era of Social Networking: Legal Obligations of Social Media Sites" (2011), 74 Sask. L. Rev. 263 at paras 31-32.
[194] *1483860 Ontario Inc.* (c.o.b. *Plan IT Search*) v. *Beaudoin*, 2010 ONSC 6294, [2010] O.J. No. 5315 (QL), varied, 2011 ONSC 5311, [2011] O.J. No. 5054 (QL) ["*Beaudoin*"].
[195] "An Anton Piller order is… a thoroughly 'draconian' measure equivalent to a private search warrant reserved for 'exceptional circumstances' … where 'unscrupulous defendants' may if forewarned make 'relevant evidence disappear'": *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] S.C.J. No. 18 at para 29 (QL).
[196] *Beaudoin, supra* note 194 at para 54.2.
[197] *Anderson v. 45859 Ontario Ltd*. (c.o.b. *Teachers Life Insurance Society (Fraternal)*), 2010 ONSC 6585, [2010] O.J. No. 6041 (QL) ["*Anderson*"].

horse and sustained head and facial injuries; she applied for long term disability benefits, which application was denied. Ms. Anderson sued for wrongful denial of benefits, and in the context of the action she was ordered to "preserve all documents contained on her Facebook site and produce a supplementary affidavit of documents that identifies relevant documents contained on the site."[198]

In *Bishop*,[199] Brendon Bishop claimed, through his litigation guardian, damages for brain injury arising out of a motor vehicle accident. The defence applied for an order to compel production of the hard drive of the Bishop family computer to have the hard drive analyzed to determine the period of time Brendon Bishop spent on Facebook between eleven at night and five in the morning each day.[200] Justice Melnick considered whether the Facebook login/logout records are producible as a document,[201] and noted: "Electronic data stored on a computer's hard drive or other magnetic storage device falls within the definition of 'document' under" the applicable Rules of Court;[202] and that "documents stored in electronic form are discoverable in much the same way as paper documents."[203] Justice Melnick wrote:

> The information sought by the defence in this case may have significant probative value in relation to the plaintiff's past and future wage loss, and the value of production is not outweighed by competing interests such as confidentiality and the time and expense required for the party to produce the documents. Additionally, privacy concerns are not at issue because the order sought is so narrow that it does not have the potential to unnecessarily delve into private aspects of the plaintiff's life. In saying that, I recognize the concern of the plaintiff that to isolate the information the defence does seek, its expert may well have consequent access to irrelevant information or that over which other family members may claim privilege. For that reason, I direct that the parties agree on an independent expert to review the hard drive of the plaintiff's family computer and isolate and produce to counsel for the defendant and counsel for the plaintiff the information sought or a report saying that the information sought is not retrievable, in whole or in part, if that is the case….[204]

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[198] *Ibid* at para 17.
[199] *Bishop (Litigation guardian of) v. Minichiello*, 2009 BCSC 358, [2009] B.C.J. No. 692 (QL), leave to appeal to BCCA refused, 2009 BCCA 555, [2009] B.C.J. No. 2446 (QL) ["*Bishop*"].
[200] *Ibid* at para 1.
[201] *Ibid* at para 5.
[202] *Ibid* at para 46.
[203] *Ibid* at para 6.
[204] *Ibid* at para 57. See also *Carter v. Connors*, 2009 NBQB 317, [2009] N.B.J. No. 403 at para 36 (QL): "the success of an application to retrieve an individual's electronic computer data principally depends upon the degree of intrusion into the private lifestyle choices and electronic activity of the Internet user as well as the probative values of the information sought."

In *DeWaard*,[205] another personal injury case, Justice Strekaf wrote: "While Mr. DeWaard's Facebook profile is not completely consistent with his evidence at trial, I am prepared to accept that Facebook profiles may contain an overly positive perspective regarding one's abilities and interests or a certain amount of puffery."[206] In *Frangione*,[207] also a personal injury case, Master Pope wrote:

> It is now beyond controversy that a person's Facebook profile may contain documents relevant to the issues in an action. Brown J. in *Leduc*,[208] ... cited numerous cases in which photographs of parties posted to their Facebook profiles were admitted as evidence relevant to demonstrating a party's ability to engage in sports and other recreational activities where the plaintiff put enjoyment of life or ability to work in issue.
>
> It is also good law that a court can infer from the nature of the Facebook service the likely existence of relevant documents on a limited-access Facebook profile….[209]

However, in *Schuster*[210] Justice Price wrote:

> An order that the Plaintiff produce for inspection the information from her Facebook profile (print-outs of her profile, etc.) is consistent with her documentary discovery obligations under Rules [of Court]. In contrast, an order granting the Defendant access to the Plaintiff's Facebook profile, by requiring her to provide her username and password, is clearly beyond the scope of [the Rules].[211]

But in *Sparks*,[212] in relation to the Rule that "[w]here the inspection of real or personal property is necessary for the determination of an issue in a proceeding, the court may order the inspection of such property by any party or his authorized representative", Justice Ferguson held "all of what is contained in Ms. Sparks [Facebook] Profile qualifies as property for the purposes" of the Rule.[213]

Carleton,[214] was a Labour Board application for trade union certification. The Labour Board refused to order the Union to turn over the passwords required to access web pages and social media sites, or to provide a copy of the contents of web pages and social media sites on an ongoing basis.

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[205] *DeWaard v. Capture the Flag Indoor Ltd*., 2010 ABQB 571, [2010] A.J. No. 1491 (QL) ["*DeWaard*"].
[206] *Ibid* at para 41; emphasis added.
[207] *Frangione v. Vandongen*, 2010 ONSC 2823, [2010] O.J. No. 2337 (QL) ["*Frangione*"].
[208] *Leduc v. Roman*, 308 D.L.R. (4th) 353, [2009] O.J. No. 681 at para 23 (QL):
[209] *Frangione, supra* note 207 at paras 34-35.
[210] *Schuster v. Royal & Sun Alliance Insurance Co. of Canada*, 83 C.P.C. (6th) 365, [2009] O.J. No. 4518 (QL) ["*Schuster*"].
[211] *Ibid* at para 18.
[212] *Sparks v. Dubé*, 2011 NBQB 40, [2011] N.B.J. No. 38 (QL) ["*Sparks*"].
[213] *Ibid* at para 43.
[214] *Canadian Union of Public Employees v Carleton University*, [2010] O.L.R.D. No. 4057 (QL) ["*Carleton*"].

Old Town Tavern,[215] was an appeal of an Employment Standards Branch decision ordering the employer to pay the non-union employee, Kim Voutt, owed monies for wages earned and pay in lieu of notice of termination. The employer adduced evidence of "a 'Facebook' printout showing a status update made by Voutt … in which printout Voutt describes herself as 'very happy' to be no longer working at Old Town."[216] The employer argued that the "happy Facebook" printout was supportive of the proposition that Ms. Voutt had quit her employment (and not been unjustly terminated).[217] The Labour and Employment Board was not convinced, and the Branch's decision was affirmed.

In *CLAC*,[218] the union and Robyn McLellan entered into a settlement agreement with a confidentiality clause. The union took the position that Ms. McLellan breached the confidentiality provisions of the agreement and as a result it did not have to live up to its end of the bargain. The union adduced evidence in the form of entries made by Ms. McLellan on her Facebook page. The union was directed to file written submissions setting out why the comment "glad day is over, it was all in my favour" should be considered to violate a commitment to "keep these terms confidential." Following receipt of the submissions, the Board was not convinced and declared the union was obliged to do what it agreed to do under the settlement.[219]

Roseblade,[220] was a human rights complaint by Kristine Roseblade against her former employer and manager. Ms. Roseblade alleged discrimination and harassment on the ground of disability. The Tribunal wrote:

> The applicant sought to introduce an email (from a hotmail account) dated March 15, 2006 from Tony Patrick, a former employee and the applicant's friend, and blog entries from May 13, 2005 to October 31, 2005, obtained from the internet, written by a person who eventually replaced the applicant as manager. The corporate respondent objected on the basis there was no proof these particular documents had been disclosed to the respondents.
>
> After much discussion with the parties, I was not satisfied that these particular documents had been disclosed to the respondents. Additionally, the applicant stated she had no intention of calling either Tony Patrick or the author of the blogs as a witness. After determining the documents were simply intended to corroborate the applicant's testimony, and in light of real concerns with the authenticity of the internet documents and the absence of their authors for

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[215] *Re Dickieson* (c.o.b. *The Old Town Tavern*), [2011] N.B.L.E.B.D. No. 18 (QL) ["*Old Town Tavern*"].
[216] *Ibid* at para 26.
[217] *Ibid* at para 35.
[218] *McLellan v Christian Labour Association of Canada*, [2009] O.E.S.A.D. No. 369 (QL) ["*CLAC*"].
[219] *CLAC, supra* note 91.
[220] *Roseblade v. Randy River Inc*., 2011 HRTO 363, [2011] O.H.R.T.D. No. 383 (QL) ["*Roseblade*"].

> cross-examination, I decided not to admit the documents into evidence. In my view, the prejudice of the late production and highly questionable reliability outweighed their limited probative value.[221]

Social media is hearsay evidence unless the author gives evidence to authenticate it; however, most administrative tribunals will admit hearsay evidence and give it appropriate weight.

In *Ornelas*,[222] Emanuela Ornelas had a complaint before the human rights tribunal. Ms. Ornelas made negative remarks about a respondent to her complaint in Facebook messages to the respondent's brother-in-law (in which she referred to the personal respondent as "an asshole" and "perverted", among other things) and to another person.[223] The respondent's legal counsel wrote to Ms. Ornelas warning her about the defamatory nature of her published statements and threatened legal action.[224] Ms. Ornelas amended her complaint to include the allegation that the threat of civil litigation constituted a reprisal and/or threat of reprisal against her contrary to the human rights legislation.[225] The Tribunal held that the communications from the respondent's lawyer to Ms. Ornelas were subject to absolute privilege and could not be relied on to found a reprisal complaint,[226] which finding was upheld on reconsideration.[227]

In the *Internet Audit Grievance*,[228] an employee had been terminated for excessive personal internet usage while at work. The union objected to the admission of an "internet investigation report" adduced by the employer to support its decision to terminate the employee. The union argued that the report was based on information collected in breach of BC's *Freedom of Information and Protection of Privacy Act*, s 26.[229] "The Employer's proxy server creates computer files known as 'log files' that are stored on the hard drive of the proxy server. The log files record, in electronic form, all the web sites visited (URL requested), web category, date and time, IP address of source

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[221] *Ibid* at paras 7-8; emphasis added.
[222] *Ornelas v. Casamici Restaurant*, 2011 HRTO 1531, [2011] O.H.R.T.D. No. 1525 (QL) ["*Ornelas*"].
[223] *Ibid* at para 69.
[224] *Ibid* at para 5.
[225] *Ibid* at para 6.
[226] *Ibid* at para 1.
[227] *Ibid* at para 74.
[228] *Health Employer's Assn. of British Columbia v Health Sciences Assn. of British Columbia (Internet Audit Grievance)*, 208 L.A.C. (4th) 107, [2011] B.C.C.A.A.A. No. 60 (QL) ["*Internet Audit Grievance*"].
[229] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 26.

computer, and user account when the internet is accessed by means of the proxy server."[230] The arbitrator ruled:

> that the investigation report and supporting documents are within the exception in s.26(c) and so the information in them was not collected in contravention of FIPPA. As it was not collected in contravention of FIPPA I do not have to decide if it should or should not be admissible in light of that. I am satisfied in any event that the report and supporting documents are admissible applying the usual arbitral tests for admissibility. They may be entered into evidence at the hearing of this matter.[231]

In *CPR*,[232] the employer wrote to the union to advise of its intention to request that employees produce their personal communication device records as a routine part of investigations into alleged incidents and/or accidents. The union grieved the policy on the following grounds: the "request is premature, improper and violates employees' privacy rights as well as their rights under the collective agreement, including the mandatory right to a fair and impartial investigation, the *Canadian Human Rights Act*, the *Canada Labour Code* and the Company's Discrimination and Harassment Policy and the *Canadian Charter of Rights and Freedoms*." The union's policy grievance was dismissed.

Similarly, Kim Farrell, had been employed as a bus driver with Metrolinx Go Transit until she was terminated from her employment for allegedly using her cell phone for texting while driving her bus from Toronto to Hamilton.[233] On the employer's request, the board subpoenaed Ms. Farrell's cell phone records. The union objected that the production was an invasion of Ms. Farrell's privacy interests and contrary to provisions of Ontario's privacy legislation. The union's preliminary objection was denied.

viii. Human Rights (Discrimination)

Allegations of discrimination are common in the labour and employment law context,[234] and social media is appearing more often in the context of such complaints.

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[230] *Internet Audit Grievance, supra* note 228 at para 2.9.
[231] *Ibid* at para 51.
[232] *Canadian Pacific Railway Company v Teamsters Canada Rail Conference*, Case No. 3900, online: Canadian Railway Office of Arbitration & Dispute Resolution <http://www.croa.com/CASES/CR3900.doc> ["*CPR*"].
[233] *Amalgamated Transit Union - Local 1587 v Ontario (Metrolinx - GO Transit) (Farrell Grievance)*, 199 L.A.C. (4th) 118, [2010] O.G.S.B.A. No. 214 (QL) ["*Farrell Grievance*"].
[234] See generally E. Wayne Benedict, "The Duty to Accommodate in the Labour/Employment Context: Western Canada 2009" (10 September 2010), online: JDSupra <http://www.jdsupra.com/post/documentViewer.aspx?fid=b1f2a154-2f49-4036-94fd-31684019c8c1>.

Adams,[235] pertained to a complaint of discrimination in employment on the basis of religion and race filed by Nada Adams alleging that an employee of Paquette Personnel discriminated against her during a job interview; specifically, by allegedly deciding not to forward her name to a prospective employer for reasons of her race (unspecified) and religion (Muslim).[236] Ms. Adams wore a veil during the job interview. The respondents adduced evidence of how Ms. Adams presents herself on various "social media" websites. In her pictures on those websites Ms. Adams is not wearing a veil.[237] In relation to her pictures on internet social media websites, Ms. Adams said she has "... no issue whatsoever with showing pictures of me unveiled because islamically they are only a shadow of me and not the real live person."[238] The complaint was dismissed.

In *Berezan*,[239] the Respondent applied to dismiss the complaint of discrimination based on sexual orientation of Tammy Berezan and Debbie Wray, two employees that had been terminated, by attempting to assert that he did not know that the complainants were in a same sex relationship until after he had terminated the employment. He asserted that "his daughter, who was Facebook friends with Ms. Berezan, saw that Ms. Berezan had updated her status to indicate that she and Ms. Wray were in a relationship. His daughter conveyed this information to Mr. Comeau, who was very surprised."[240] The application to dismiss the complaint on that ground was dismissed.[241]

In *Campbell*,[242] Andrea Campbell filed a complaint against Katz alleging discrimination in employment based on sex (pregnancy). Ms. Campbell was frustrated by the post-maternity-leave return to work arrangements and posted derogatory comments on Facebook about the situation. Amongst other things, she wrote: "Fucking work is totally screwing me cuz i can only go back part time. So instead of trying to be helpful they gave me a whopping 8 whole hours next week. Because I can sure as

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[235] *Adams v. K.M. Paquette & Associates Ltd*. (c.o.b. *Paquette Personnel*), 2011 BCHRT 25, [2011] B.C.H.R.T.D. No. 25 (QL) ["*Adams*"].
[236] *Ibid* at paras 2-3.
[237] *Ibid* at para 22.
[238] *Ibid* at para 44.
[239] *Berezan v. M.R. Photo & Cameras Ltd*. (c.o.b. *Photo Express Foto Source*), 2010 BCHRT 42, [2010] B.C.H.R.T.D. No. 42 (QL) ["*Berezan*"].
[240] *Ibid* at para 35.
[241] *Ibid* at para 61.
[242] *Campbell v. Katz Group Canada*, 2010 BCHRT 227, [2010] B.C.H.R.T.D. No. 227 (QL) ["*Campbell*"].

hellliveon that! Fuckers."[243] The comments were brought to Katz's attention by one of Ms. Campbell's co-workers, and Katz terminated Ms. Campbell's employment upon her return to work.[244] There had been previous discipline. The complaint was dismissed.

In *Chiang*,[245] Po Yu Emmy Chiang, a teacher-librarian, filed a complaint alleging that she had been discriminated against in relation to her employment on the basis of religion (Christian) by the Vancouver Board of Education. Megan Fergusson sponsored the School's Pride Club, also known as a Gay/Straight Alliance. Part of Ms. Chiang's complaint alleged:

> Megan Fergusson emailed to all staff ... a video clip of a BBC program ("the Most Hated Family in America" YouTube) on a small radical Baptist Church in the U.S. which was very vocal and militant in condemning homosexuals. Megan attached a comment with the video, "Here is a reminder of how some young people are still being taught to hate." Megan used this video to target Christians. Her commentary, particularly the use of the word "hate" further singled Christians out to be intolerant bigots. This created a hostile work environment for me and others who are professing Christians. The video and commentary exposed me to discrimination and unfair treatment among the staff, as evidenced by the actions of my principal in the months following.[246]

The complaint was dismissed.

In *D.D.*,[247] the employer gave the employee an election (resign or be terminated) after its information technology security manager noticed the employee was frequenting numerous web sites for purposes unrelated to his job duties for extensive periods. The audit logs showed that the employee was accessing pornographic sites, in addition to membership based sites such as Facebook, and other internet sites ranging in genre from shopping, running and cooking. The logs also showed that the employee would sometimes access pornography sites for up to three hours at a time.[248] The employee elected to resign. Later, the employee alleged discrimination against him in employment because of mental disability (depression), and that his resignation was procured under duress and diminished mental capacity. The tribunal dismissed the complaint, stating: "the complainant has not put forward any psychological evidence that would give

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[243] *Ibid* at para. 16.
[244] *Ibid* at para. 17.
[245] *Chiang v. Vancouver Board of Education*, 2009 BCHRT 319, [2009] B.C.H.R.T.D. No. 319 (QL) ["*Chiang*"].
[246] *Ibid* at para 10.
[247] *D.D. v. H.A.*, 2008 BCHRT 361, [2008] B.C.H.R.T.D. No. 361 (QL) ["*D.D.*"].
[248] *Ibid* at para 15.

credence to his assertion that there is a connection between his conduct and clinical depression."[249]

In *Estrada*,[250] Walter Estrada complained that he had been discriminated against in employment because of a criminal conviction.[251] The respondents' application for summary dismissal of the complaint was dismissed. Mr. Estrada was a baker who regularly worked with one of two young women early in the morning. Mr. Estrada sent the two young women with whom he worked invitations to become his "friends" on Facebook. When the two young women accessed Mr. Estrada Facebook profile, it showed

> …that he had a criminal record for serious criminal offences, including sexual assault, that he was currently working for the corporate respondent, and that he had left several previous positions because of his criminal record. The profile also contained graphic details of the sexual assault, as well as a photograph highlighting the clothed midsection of the complainant's body.
>
> The two employees informed the store manager of contents of the Facebook profile, after which the manager also viewed it. Soon thereafter, the manager fired the complainant.[252]

In *Khan*,[253] Cheryl Khan complained of discrimination against her in employment on the basis of race, colour, ethnic origin and family status. She alleged the owner of Lynx Trucking, repeatedly made offensive and demeaning racial comments to her during the five months she was employed at Lynx Trucking. The fact that Ms. Khan had accessed Facebook at work despite being told that she should not be viewing Facebook on company time was raised by the respondents. The complaint was allowed for harassment on the basis of race, colour and ethnic origin, and the respondents were jointly and severally liable to pay general damages of $25,000 to Ms. Khan.

In *Pardy*,[254] Guy Earle, a comedian, was alleged to have directed homophobic and sexist insults at Lorna Pardy (a customer) while Mr. Earle was the master-of-ceremonies at an "open mic" comedy show at Zesty Restaurant. The Tribunal held that Mr. Earle was an "employee" of the Zesty Restaurant for the purposes of the human rights

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[249] *Ibid* at para 89.
[250] *Estrada v. Clace Holdings Ltd*., 2008 BCHRT 232, [2008] B.C.H.R.T.D. No. 232 (QL) ["*Estrada*"].
[251] In British Columbia a prohibited ground of discrimination in employment is if the "person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person": *Human Rights Code*, RSBC 1996, c 210, s 13(1).
[252] *Estrada, supra* note 250 at paras 7-8.
[253] *Khan v. 820302 Ontario Inc*. (c.o.b. *Lynx Trucking, Transportation and Leasing*), 2010 HRTO 265, [2010] O.H.R.T.D. No. 253 (QL) ["*Khan*"].
[254] *Pardy v. Earle*, 2011 BCHRT 101, [2011] B.C.H.R.T.D. No. 101 (QL) ["*Pardy*"].

legislation.[255] After the complaint had been filed, but before it was heard, Mr. Earle appeared on a YouTube video interview about the events that prompted the complaint.[256] The Tribunal held: "that Mr. Earle's actions aggravated her pre-existing condition of generalized anxiety disorder with panic attacks, and caused her PTSD [and] that Mr. Earle's false public statements about Ms. Pardy in the YouTube interview exacerbated and prolonged these effects on her."[257] The complaint was justified and Mr. Earle was ordered to pay Ms. Pardy $15,000 general damages, and Zesty Restaurant was ordered to pay her $7,500.[258]

ix. Insurance Benefits

As discussed in Part IV.xii below, workers compensation boards are considering evidence of injured workers' use of social media sites in adjudicating disabilities. Social media use is also a factor recently considered in relation to private disability insurance benefits entitlements.[259] For example, in *State Farm*,[260] the issue before the Ontario Financial Services Commission was whether Daniel Prete was required to disclose all photographs and videos in which his image appear and were created between relevant dates that were posted to, and remained on, his Facebook account.[261] The Commission held he was not, and wrote:

> **11** Social media sites are becoming ubiquitous. They provide a very popular means to communicate with friends and acquaintances on line. This motion raises the question of an applicant's obligation to disclose photographs or video images uploaded to the restricted portion of a Facebook account to his or her insurer in the context of an arbitration. …
>
> **16** The issues for arbitration stem from Mr. Prete's claim for an income replacement benefit and housekeeping and home maintenance benefits. There are no photos on either Mr. Prete's profile page or "Wall" that relate to his claims for these benefits. Therefore, I find that State Farm has failed to establish a reasonable relationship between the images on Mr. Prete's restricted portion of his Facebook account and the issues to be arbitrated.
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> **17** As well, the nature of social networking forums make the requirement to disclose images on such forums procedurally burdensome in the context of an administrative law tribunal.

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[255] *Ibid* at para 351.
[256] "Guy Earle's Vancouver Lesbian Controversy", online: YouTube <http://www.youtube.com/watch?v=L9FjRQnO3ks>.
[257] *Pardy, supra* note 254 at para 265.
[258] *Ibid* at para 521.
[259] See *Anderson, supra* note 197 and accompanying text.
[260] *Prete v. State Farm Mutual Automobile, Insurance Co*., [2011] O.F.S.C.D. No. 7 (QL) ["*State Farm*"].
[261] *Ibid* at para 2.

> Active participants in these sites post and remove images frequently. The images do not necessarily have the date upon which they were created. It is not uncommon for adults to post their baby pictures. This practice exemplifies the reality that an image may be posted on a date relevant to the claim but was not created at a relevant time. It would be a procedural quagmire to set guidelines for the preservation and production of these images in a manner that would render them reliable evidence in a process that is required to provide a speedy, accessible and fair process for dealing with disputes relating to the Schedule.
>
> **18** Finally, the images posted on social networking forums include those of many people unrelated to an applicant's claims. Those unrelated parties were befriended by an applicant without the expectation of their personal images potentially becoming evidence in an arbitration proceeding. Some of the images may be personally sensitive and only intended to be shared with those in their circle of "friends".
>
> **19** I find the potential relevance of images posted on a social networking forum to be too remote when weighed against factors such as sensitivity and practicality. Therefore, I find that Mr. Prete is not required to disclose the photographs and video images in which his image appears and were created between December 10, 2007 and December 10, 2009 and were posted and remain on his Facebook account.

x. Labour Relations Boards

Social media sites *are* becoming ubiquitous, and labour relations boards have also been faced with evidence relating to social media supporting factors relevant to disputes before them. For example, *BCAA*[262] was an application by certain employees to vary the union's certification—an application to decertify a single branch of the BCAA where the certification covered multiple branches. The employer and certain employees argued that locations in the unit operate independently and are distant from one another so decertification of the unit as a whole would be impracticable due to difficulties faced by employees communicating with employees in other branches. The Board raised the question of how access to social media and the internet should influence the Board's assessment of whether it is practically possible to decertify the unit as a whole.[263] The Board wrote:

> **46** The Union submits that Certain Employees are computer literate and capable of starting a blog, a facebook page, texting or using ordinary e-mail. The Union adds that Certain Employees can find ways to contact one another using the seniority lists, the telephone, by making contact at training sessions or when working temporarily at other locations. The Union submits these opportunities give employees a practical way to organize support for decertifying the unit as a whole.
>
> **47** The Employer argues that social media are inappropriate organizing tools because they disclose an individual's orientation toward a union. The Employer submits that information

[262] *Re British Columbia Automobile Assn.*, 197 C.L.R.B.R. (2d) 227, [2011] B.C.L.R.B.D. No. 106 (QL), reconsideration dismissed, [2011] B.C.L.R.B.D. No. 184 (QL) ["*BCAA*"].
[263] *Ibid* at para 44.

> should be kept confidential from an employer and a union. The Employer submits that online methods of communication are incompatible with back-and-forth discussions. It adds that the potential use of pseudonyms and online anonymity does not foster open discussion. Moreover, the Employer argues that it cannot be assumed that Certain Employees possess the practical skills to blog or use the internet to promote decertification. The Employer submits that employees should not be doing this at work. The Employer adds that using the internet will not assist Park Royal employees unless they can get an initial message to other unionized employees by way of more traditional means (i.e., telephone or letter writing).
>
> **48** In my view, this factor must be assessed from the standpoint of a reasonable Park Royal employee exercising due diligence. From that standpoint it is fair to infer that the advent of the internet, social media and "smart-phones" erode barriers to employee participation in workplace democracy. However, there are significant practical barriers remaining in place for Certain Employees. The Employer has raised a fair point that these methods of communication do not replace the effectiveness of one-to-one discussions.

The Board ordered that the ballots cast in the partial decertification vote be counted.

In *ThyssenKrupp*,[264] the employer terminated an elevator mechanic after it learned of a video uploaded to YouTube in which the employee was shown stapling his scrotum to a 4"X4" piece of wood to win a $100 bet with his co-workers.[265] In upholding the termination, the Ontario Labour Relations Board wrote: "If the [employer]'s employees want to emulate the principals of Jackass[266] by self abuse, they may be free to do so when they are not on [employer]'s premises and cannot be identified as being associated with the [employer]."[267] ThyssenKrupp was identifiable as the employer in the YouTube video.

In *Lougheed Imports*,[268] the employer terminated two employees (union supporters) during the union's organization of a group of employees. The union brought an unfair labour practices complaint to the British Columbia Labour Relations Board. The complaint was dismissed and the Board held that the employer had just cause to terminate the two. The grounds for termination were Facebook postings, which included:

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[264] *International Union of Elevator Constructors, Local 50 v ThyssenKrupp Elevator (Canada) Ltd*., 2011 CanLII 46582 (ON LRB) ["*ThyssenKrupp*"].
[265] See "Construction Worker Sacked for YouTube Stunt", *Canadian HR Reporter* (24 October 2011) 5, 17.
[266] "Jackass is an American [show] featuring people performing various dangerous, crude, ridiculous, self-injuring stunts and prank": "Jackass (TV Series)", online: Wikipedia <http://en.wikipedia.org/wiki/Jackass_(TV_series)>. The elevator mechanic was emulating one of the characters in jackass, Steve O, who staples his scrotum in one of his stunts: "Steve O Staples Scrotum", online: YouTube <http://www.youtube.com/watch?v=2XorxALRYkI>.
[267] *ThyssenKrupp, supra* note 264 at para 43.
[268] *Lougheed Imports Ltd*. (c.o.b. *West Coast Mazda*), BCLRB No. B190/2010, [2010] B.C.L.R.B.D. No. 190 (QL) ["*Lougheed Imports*"].

Sometimes ya have good smooth days, when nobodys fucking with your ability to earn a living. ... and sometimes accidents DO happen, its unfortunate, but thats why there called accidents right?[269]

When a labour relations lawyer calls ya at 7PM and ya fax him 25 task sheets, ya gotta wonder??? Unfair labour practices, coupled with workplace harassment. ... C'mon Guys??? At least read up on the laws before ya throw the first punch ... because that second punch can by a DOOZY. ...[270]

If somebody mentally attacks you, and you stab him in the face 14 or 16 times. ... that constitutes self defence doesn't it????[271]

.... Works been a shit-storm lately, our shop is a certified union now, so been stressed rt out (Management needs somebody to blame & Im that guy). ... so yeah if you see summa my ANGRY statuses lately, that's why. ...[272]

Completely Exploded & SNAPPED on the Fixed Ops/Head Prick at work today .... He sent me Home (With Pay) and wrote me up (Strike 1) .... although the FUKN gloves are off now ,,,I gotta control my temper. One strike in 4 years aint bad, I guess.[273]

Hhhmmmm??? According to this reprimand at work, Im confrontational & disruptive to the WHOLE shop ... AND .... My outburst yesterday was threatening and didn't allow The WestCoastAutoGroup to conduct regular business .... well????All I Gotta say is they pissed off the WRONG GUY ....big time.[274]

[Employee] Is wondering if his 2 supervisors at work, go to the bathroom together?? And who holds who's penis while pissing??[275]

Was asked for my opinions at a morning safety meeting...I replied "No comment"... Seems my Boss, whos owned the business 25 yrs & is fixed operations director of 2 dealerships as well ... couldnt comprehend my reply?? So its confirmed...HE'S A COMPLETE JACK-ASS... not just Half-a Tard.[276]

A sure sign summers done .... Detailing the owners boat for storage.[277]

west coast detail and accessory is a fuckin joke....dont spend your money there as they are fuckin crooks and are out to hose you... there a bunch of greedy cocksucin low life scumbags... wanna know how I really feel??????[278]

I heard that Marco and [F.Y.] were seen fondling each others nut sack in the shop bathroom?? Any truth to that? That shop ripped off a bunch ppl I know.[279]

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[269] *Ibid* at para 13.
[270] *Ibid* at para 15.
[271] *Ibid* at para 17.
[272] *Ibid* at para 18.
[273] *Ibid* at para 27.
[274] *Ibid* at para 28.
[275] *Ibid* at para 31.
[276] *Ibid* at para 35.
[277] *Ibid* at para 36.
[278] *Ibid* at para 37.
[279] *Ibid* at para 38.

> All in humour, however, none of the stereo shit I bought there works, at all...Deck only plays store bought discs and subs are blown and amp is fried, again. The alpine stuff I bought from A&B works awesome tho. [280]

One of the employees posted his status as "stress relief anyone" and then posted the top five kills from "Dexter," which is a television show concerning a vigilante serial killer.[281] In relation to the most egregious poster, the Board wrote:

> I find that the nature of the comments made towards the supervisors were offensive and egregious. J.T. expressed contempt for and ridiculed the manager and supervisors in such a manner that there was proper cause. The fact that the Employer allowed this insubordinate conduct to continue for a matter of weeks does not mitigate against a finding of proper cause. I therefore find the penalty is not out of proportion with the misconduct and there is proper cause for the decision to terminate the employment of J.T.[282]

In relation to the other employee, the Board wrote: "the Employer found that the dishonesty in the investigation meeting compounded the misconduct and determined that it justified termination. I agree and find that there is proper cause for the termination of A.P."[283]

xi. Professional Licensure

In some cases, maintaining professional licensure is a condition of continued employment. Social media has been a factor in professional discipline and licensing proceedings. In other cases, maintaining regulatory licensure is a condition of continuing in business. For example, *CESI*[284] was an appeal of a decision of the Ministry of the Environment to revoke a provisional Certificate of Approval Waste Management System. In its application to operate a waste management system, Canadian Environmental Services Inc. identified Shawn Paul Haniff as its sole director. The Ministry of the Environment decided that Vincent Lootawon and Teishu Lootawon were also involved in the day to day operation of Canadian Environmental Services Inc., and that they each had several previous convictions relating to contravention of the laws relating to waste management and the conduct of a waste management business, the discharge of a contaminant into the natural environment causing an adverse effect, as

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[280] *Ibid*.
[281] *Ibid* at para 19.
[282] *Ibid* at para 112.
[283] *Ibid* at para 115.
[284] *Canadian Environmental Services Inc. v. Ontario (Ministry of the Environment)*, [2010] O.E.R.T.D. No. 22 (QL) ["*CESI*"].

well as fraud and forgery contrary to the *Criminal Code* respecting documentation used in a waste management business.[285] There was evidence of information from the Facebook account of Ms. Lootawon, which listed Shawn Haniff as one of her "friends," and that for this to occur, it would have been necessary for Mr. Haniff to agree to the listing.[286] Counsel raised concerns about the authenticity and accuracy of the Facebook evidence, and submitted that it should be given no weight.[287] The appeal was dismissed.

In *Hoidas*,[288] the Ontario College of Teachers Discipline Committee reprimanded Ronald Frank Hoidas for professional misconduct; *viz*. failure to maintain classroom discipline and control of students. Three of Mr. Hoidas's male students placed duct tape on parts of another male student's body, including eventually his mouth, and/or used duct tape to secure him to a chair. While the other students were doing the duct taping, another student used the camera accessory of his cell phone to make a video of the incident. The resulting video was uploaded to YouTube, which was posted with tag lines that included the first and last names of the duct-taped student and the nickname of the School. The video was viewed over 1000 times.

In *Schalm*,[289] the Ontario College of Teachers Discipline Committee revoked the Certificate of Qualification and Registration of Paul Schalm for professional misconduct; *viz*. he accessed an Internet chat room where he attempted to communicate, for a sexual purpose, with an individual whom he believed to be a thirteen year old female. Mr. Schalm had previously pleaded guilty and been convicted of an offence that he did, by means of a computer system, communicate with a person whom he believed was under the age of fourteen years for the purpose of facilitating the commission of an offence.[290]

In *Laarakker*,[291] a Law Society of British Columbia Discipline Hearing Panel found Gerardus Martin Maria Laarakker, a sole-practitioner in Vernon, British Columbia,

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[285] *Ibid*. at para 3.
[286] *Ibid* at para 38.
[287] *Ibid.*
[288] *Ontario College of Teachers v. Hoidas*, 2009 LNONCTD 34 (QL) ["*Hoidas*"]
[289] *Ontario College of Teachers v. Schalm*, 2008 LNONCTD 54 (QL) ["*Schalm*"]. See also, *Ontario College of Teachers v. Fisher*, 2004 LNONCTD 11 (QL); *Ontario College of Teachers v. Burdett*, 2011 LNONCTD 13 (QL); *Ontario College of Teachers v. Crespin*, 2004 LNONCTD 37 (QL).
[290] *Schalm, Ibid* at para 11.
[291] *Law Society of British Columbia v. Laarakker*, 2011 LSBC 29, [2011] L.S.D.D. No. 175 (QL) ["*Laarakker*"].

guilty of professional misconduct for, in part, posting the following to the "Canadian Money Advisor" internet blog about an Ontario lawyer:

> I am a lawyer.
>
> This guy is the kind of lawyer that gives lawyers a bad name. He is relying on intimidation and blackmail to get the lousy $500. Don't pay him. I hate these sleazy operators.
>
> Speaking as a lawyer, he would have little chance of collecting in court. He would have rto [sic] prove that a chiold [sic] was a habitual criminal. As far as an adult is concerned, he has to prove the loss.
>
> Also remember this, he has to bring the action in a court near to where the incident took place (at least in BC) Gueuss [sic] what - that ain't going to happen.

In *Simpson*,[292] the Discipline Committee of the Institute of Chartered Accountants of Ontario found Fraser Edward Simpson guilty of professional misconduct and reprimanded, fined and expelled him. Evidence before the Committee included:

> In her examination-in-chief, Ms. Saber was referred to the e-mail …from Mr. Simpson to LinkedIn Customer Service which was copied to her. The subject of the e-mail was "RE: Marshall Sone". The e-mail said that Mr. Sone had a "long sorted history" which included a conviction for fraud and expulsion from the Institute. After the reference to Mr. Sone, the e-mail included a paragraph which read: "Please keep an eye out for this fraudster. His wife is a real beauty too, her name is Jacqueline Saber and operates Saber and Sone Financial and Insurance Consultants Inc. Her specialty is credit card fraud". Ms. Saber testified that she had not been convicted of credit card fraud or fraud of any type.[293]

In the *Laurendeau Grievance*,[294] York University terminated the employment of tenured Professor Paul Laurendeau for gross professional misconduct; *viz*. offering to improve a female student's course grade in exchange for "sexual favours."[295] In addition to an audio recording surreptitiously made by the student, social media evidence was before the arbitrator:

> There was evidence led regarding certain activity on [the student]'s Facebook site. I allowed this evidence to be heard over the objection of the Association because of my concern that some person or persons were attempting to interfere with a witness in this case. I indicated that I would not draw any conclusion regarding the origin of these communications unless it could be shown on balance who was behind them. It cannot be so shown. I therefore re-affirm that I will neither attribute those communications to anyone nor rely on those communications for any purpose in this case. I remain concerned, though, as everyone must, that someone would try to influence this process by such means, and that there appears to be no way to ascertain who was making those efforts.[296]

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[292] *Re Simpson*, 2009 LNICAO 21 (QL).
[293] *Ibid* at para 22.
[294] *York University Board of Governors v. York University Faculty Assn. (Laurendeau Grievance)*, 183 L.A.C. (4th) 404, [2009] O.L.A.A. No. 270 (QL) ["*Laurendeau Grievance*"].
[295] *Ibid* at para 22.
[296] *Ibid* at para 3.

The grievance was dismissed and the termination upheld.

xii. Workers' Compensation

Social media evidence has been adduced in workers compensation benefits adjudications, usually in an attempt to show that the claimant is more able than he or she claims. In ONWSIAT Decision No. 1706/10,[297] the worker appealed the denial of benefits for claimed right shoulder and neck disabilities as well as a psychotraumatic disability. Her appeal was allowed, in part. "The worker acknowledged that she has an account on the Facebook website. She stated, however, that her daughter uses her Facebook account to play games. The worker acknowledged that she uses her right hand to manipulate the computer mouse, but emphasized she does not use the computer very often."[298]

In BCWCAT Decision No. WCAT-2008-03747,[299] the worker was employed as a trainman when he was involved in a near-collision between his train and a crane on the same tracks. The worker developed post-traumatic stress disorder and depression because of this incident. The WCB provided the worker wage loss and health care benefits for an extended period of time, and ultimately determined the worker had a permanent partial disability resulting from his PTSD and major depressive disorder. The employer's request for review and appeal were both denied. The employer's submissions on the appeal included:

> The employer had provided the worker's "Facebook" page to the Review Division; however the review officer had not placed significant weight on this evidence. The employer's representative argued this was incorrect. The worker had listed himself as an investment banker on Facebook, and therefore he was either capable of earning significant income, or he was misrepresenting himself.
>
> The worker's comments on the Facebook page that he was seeking social interaction and relationships was not consistent with his reported degree of discomfort with unfamiliar people and social situations.[300]

The Appeal Tribunal wrote:

> The employer's representative argued the review officer gave insufficient weight to the worker's Facebook account and the comments he made on it. I do not take the same view. Facebook is a social networking site where individuals post profiles and information about

[297] Ontario Workplace Safety and Insurance Appeals Tribunal Decision No. 1706/10, 2011 ONWSIAT 1331, [2011] O.W.S.I.A.T.D. No. 1294 (QL) ["ONWSIAT Decision No. 1706/10"].
[298] *Ibid* at para 24.
[299] British Columbia Workers Compensation Appeals Tribunal Decision No. WCAT-2008-03747, 2008 CanLII 73983 (BC WCAT) ["BCWCAT Decision No. WCAT-2008-03747"].
[300] *Ibid* at para 13.

> themselves. The worker indicated on his Facebook page that he was self-employed, his position was CEO, and his occupation was "investment banker." Given the worker's prior work history and education, I believe it would be extremely unlikely he had obtained work, even on a self-employed basis, as an investment banker. I consider it more likely that the worker was utilizing humour and irony in describing his unemployed status, and I place no weight on this evidence as it pertains to his employability.
>
> The Facebook page provided by the employer indicates only that the worker had established a Facebook account, and that he had completed his profile. He had no list of friends, or current activity in over ten days between the time the listings were made, and the employer's representative printed off the page. This does not suggest to me the worker was actively socializing on the Internet. The entries indicate he was attempting to be humorous, and was simply exploring the site's features.[301]

In BCWCAT Decision No. WCAT-2008-03915,[302] "Hard copies of the worker's webpage on the Facebook.com website were provided as evidence demonstrating that, despite the worker's claim to the contrary, she was not a depressed, disabled person in the summer of 2007."[303] The employer's appeal was dismissed.

In ACAWC Decision No. 2009-315,[304] the Tribunal wrote: "With respect to the question of whether there was an employment hazard or circumstance which presented a risk of injury, the evidence shows that heavy lifting was involved in the worker's job duties." [305] The Tribunal wrote:

> We acknowledge a May 4 [no year provided] facebook message between the worker and another co-worker, which reads as follows:
>
> "[From worker] Just needed you to help me with my wcb file for [employer name]. Just gotta get you to sign this form that says that at least one time you or any coworker lifted something that we should have used a crane for. Aka anything over fifty pounds.
>
> [Other coworker] for sure man i lifted shit that 2 people should have lifted [together] i [know] how it was there"
>
> We understand this to confirm that workers did heavy lifting in the performance of their job duties.[306]

BCWCAT Decision No. WCAT-2010-02959,[307] was a worker appeal resulting in the variance of the review officer's decision. The reasons state:

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[301] *Ibid* at paras 42-43.
[302] British Columbia Workers Compensation Appeals Tribunal Decision No. WCAT-2008-03915, 2008 CanLII 74120 (BC WCAT) ["BCWCAT Decision No. WCAT-2008-03915"].
[303] *Ibid* at para 29.
[304] Appeals Commission for Alberta Workers' Compensation Decision No. 2009-315, 2009 CanLII 65729 (AB WCAC) ["ACAWC Decision No. 2009-315"].
[305] *Ibid* at para 10.
[306] *Ibid* at para 10.5.
[307] British Columbia Workers Compensation Appeals Tribunal Decision No. WCAT-2010-02959, 2010 CanLII 76735 (BC WCAT)) ["BCWCAT Decision No. WCAT-2010-02959"].

> [**22**] The client services manager also advised the worker at that time that the Board was aware of statements made by the worker on her Internet Facebook website, where she announced that she had constructed a gazebo on her own in the same timeframe, except for the roof, which a friend helped with. The worker told the client services manager that she had made up the story of building her own gazebo and, in fact, her friends built it for her. She would have those friends provide written statements. The client services manager said that the worker also stated that her back had recovered and that she was "fine now". …
>
> [**53**] With respect to constructing a gazebo, the worker said that her remarks had been misinterpreted. When she had written in her FaceBook page that she was now back to putting up the gazebo alone, she was being facetious and somewhat sarcastic. She had written the entry after two friends who had started to build the structure had failed to return to finish it. She asserted in the hearing that she had not assembled any part of the gazebo. She did not recall the exact dates that her friends had been there to construct the gazebo, but she thought it had been completed before she had taken her pre-arranged vacation. …
>
> [**59**] The worker announced on Facebook that she had built a gazebo by herself. However, two witnesses have attested to the contrary, and have stated that the worker did no more than supervise the operation, which occurred over the course of three days in June 2009. Work was done on the first day and on the third day, with no work done on the second day. I am satisfied that the evidence given by Witness A and by Witness B is internally and externally consistent. I appreciate the review officer's concerns with the manner in which Witness A phrased her first statement; however, I am satisfied that the clarification contained in exhibit #2, along with the viva voce evidence from Witness B is sufficient to address and allay those concerns. While the worker's behaviour in trying to shame her friends by deliberately stating a falsehood as an exercise of sarcasm on her Facebook page is arguably bizarre, I find the testimony of the two witnesses is sufficient to establish that the worker likely did not build the gazebo.

ACAWC Decision No.: 2011-171,[308] was a worker appeal of WCB's decision to deny a claim of permanent aggravation of the worker's pre-existing low back degenerative disc disease. Evidence included that the worker "can turn a computer on, play cards and navigate Facebook."[309] The worker's appeal was denied.

In WHSCC Decision No 20115983,[310] the worker successfully appealed a retroactive WCB decision that resulted in her owing repayment of a $19,770.90 overpayment. The worker's claim had been accepted for wrist tendonitis. A gym's Internet website contained photos of the worker exercising, and the worker had made the following entries on the gym's blog:

> − June 16, 2009, "…Pull-ups(with band) then switched half way through the first 21 to the rings. Thrusters 15 lbs bar"
> − June 18, 2009, "…12 PUSHUPS"
> − June 19, 2009, "DEATH BY THRUSTERS, 10+4 TOTAL 49 THRUSTERS WOULD HAVE

[308] Appeals Commission for Alberta Workers' Compensation Decision No.: 2011-171, 2011 CanLII 11761 (AB WCAC) ["ACAWC Decision No.: 2011-171"].
[309] *Ibid* at para 75.3.
[310] In the matter of an appeal under Section 21 of the Workplace Health, Safety and Compensation Commission Act, S.N.B. 1994 c. W-14, Decision No 20115983, 2011 CanLII 28756 (NB WHSCC) ["WHSCC Decision No 20115983"].

> DONE MORE IF MY WRIST WASNT SO SORE…"
> − June 25, 2009, "…45lbs bar, then added weight got up to 85lbs… Pull up 24"
> − June 26, 2009, "SUPPOSE TO BE MY REST DAY SO TOOK IT "EASY" AND ROWED FOR 3000M"
> − June 29, 2009, "…30 Clean and Jerk for time. … THEN…[name given] added a little extra fun As many pullups as possible in one minute Did 20 pullups with elastic [sic][311]

In ACAWC Decision No.: 2011-430,[312] the following evidence was before the Tribunal: "Colour copies of the photographs previously provided by the employer and obtained from the worker's social media internet site concerning a motorcycle trip and a horseback riding event."[313]

BCWCAT Decision Nos. WCAT-2011-00884 / WCAT-2011-00885,[314] was an application to the tribunal for a determination (and certification to the court) concerning a civil action based on a disability caused by occupational disease, a personal injury or death—the Tribunal was being asked if the workers compensation legislation litigation bar applied. The following evidence was before the Tribunal: "the plaintiff's *curriculum vitae* as set out on the 'LinkedIn' Internet website."[315]

In ACAWC Decision No.: 2011-443,[316] a worker appeal, the following evidence was before the Tribunal: "She uses a laptop computer at home. She is able to use Facebook and search the internet for such things as job searches."[317]

In BCWCAT Decision No. WCAT-2011-02503,[318] an employer appeal, the reasons disclose the following:

> [28] The employer provided the Board with the worker's Facebook wall with entries boasting about shooting down a bull moose during a hunting trip. A Board Field Investigator scheduled an interview with the worker to discuss his Facebook entries.
>
> [29] The Field Investigation Report dated October 29, 2010, confirms that on October 24, 2010 the worker went hunting with his friends. At first, the worker denied any hunting activities but then conceded that he and some friends drove around looking for animals.

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[311] *Ibid* at 8.
[312] Appeals Commission for Alberta Workers' Compensation Decision No.: 2011-430, 2011 CanLII 30957 (AB WCAC) ["ACAWC Decision No.: 2011-430"].
[313] *Ibid* at para 5.3.
[314] British Columbia Workers Compensation Appeals Tribunal Decision Nos. WCAT-2011-00884 / WCAT-2011-00885, 2011 CanLII 31728 (BC WCAT) ["BCWCAT Decision Nos. WCAT-2011-00884 / WCAT-2011-00885"].
[315] *Ibid* at para 12.
[316] Appeals Commission for Alberta Workers' Compensation Decision No.: 2011-443, 2011 CanLII 31957 (AB WCAC) ["ACAWC Decision No.: 2011-443"].
[317] *Ibid* at para 81.2.
[318] British Columbia Workers Compensation Appeals Tribunal Decision No. WCAT-2011-02503, 2011 CanLII 74513 (BC WCAT) ["BCWCAT Decision No. WCAT-2011-02503"].

> [30] When shown his Facebook entries, the worker stated that he shot a bull moose with his 300 Wind Mag, a high powered rifle. He used the rifle on his left shoulder. He exaggerated on Facebook because he did not want to look bad. In reality, he shot at the bull moose but missed. His friend shot it down. He also confirmed that he did not assist his friends in packing the approximate 500-pound moose. A Facebook entry confirmed that he had help packing it because his one arm was "not good."
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> [31] One hour after the interview, the worker called the Field Investigator back to apologize about not telling the complete truth. He confirmed that he used his left shoulder/arm to shoot the moose. His shot did hit and wound the moose. His friend then had to finish it off. He did not want the Board to think that he was a bad hunter.
>
> [32] I find that the fact that the worker went hunting does not negate the fact that a specific workplace incident occurred on September 22, 2010. The hunting activity took place on October 24, 2010, nearly one month after the workplace incident. The hunting activities may be relevant to the issue of the extent of the worker's disability, but do not speak to the issue of whether the worker suffered a right shoulder injury. I note that there is medical opinion which supports that the worker had a right shoulder injury, and no medical opinion to the contrary. The extent of the worker's disability is not before me.
>
> [33] I find that although the worker denied the hunting activities at first, he did come clean and apologized about not being truthful. He even called the Field Investigator back to clarify important details.
>
> [34] Overall, I find that the hunting activities do not provide sufficient basis to disentitle the worker from having his claim accepted.

In ONWSIAT Decision No. 394/11,[319] an unsuccessful worker appeal, the reasons disclose the following:

> [**17**] On October 26, 2007, the Adjudicator considered the worker's objection. The Adjudicator reviewed the findings from the RSD. The GVGO was incorporated in April 2005 and was run out of the worker's residential address. There was no indication that the worker was earning an income from the organization. An October 2006 newsletter from the organization quoted the worker indicating that he had "seriously started" growing giant pumpkins in 1999 and that he had become "obsessed with growing them." The Adjudicator also reviewed the organizations online message board. The worker's account had been registered on June 22, 2005. The worker had made 364 posts on September 24, 2007. The posts promoted the club and weighoff events, and offered technical growing advice. On March 9, 2006, the worker had posted a message that he had packaged 3000 individual seed packages. The Adjudicator noted a March 12, 2006 post from the worker which states "It's supposed to hit a high of 10 degrees here today. There is still snow in the garden, but not that much. It will be a while before I'm playing in it though." On February 4, 2006, the worker wrote "I agree with Joe about making sure your vines are buried and the tips are pinned down. I built a permanent 5-foot high fence on the north and west sides of the garden. On the other two sides I used the orange plastic snow fencing." Contest results for the organization indicated the worker grew giant pumpkins in 2004, 2005, and 2006. …
>
> [**36**] In these circumstances, the Panel accepts that the worker had developed considerable computer, communication and leadership skills from 1999 to 2005. This evidence does not indicate that his low back disability was a significant impairment. The worker testified that his wife did all his typing and most of the work in relation to the organization. The Panel is not so persuaded. The worker testified that he types with two fingers. The newsletters and other

[319] Ontario Workplace Safety and Insurance Appeals Tribunal, Decision No. 394/11, 2011 ONWSIAT 619 (CanLII) ["ONWSIAT Decision No. 394/11"].

> documentation concerning the organization indentify the worker and his wife separately as contributors. It does not stand to reason that the worker's wife would have typed his over 300 posts to the organization's message board. The worker's evidence is that he became the resident of the organization from 2005 to 2009 by doing virtually nothing because of his low back condition. This is not credible on its face. The worker's wife attended the hearing as an observer and was not called to testify.

In ONWSIAT Decision No. 1706/10,[320] an "in part" successful worker appeal, the following evidence was before the Tribunal: "The worker acknowledged that she has an account on the Facebook website. She stated, however, that her daughter uses her Facebook account to play games. The worker acknowledged that she uses her right hand to manipulate the computer mouse, but emphasized she does not use the computer very often."[321]

Social media misuse has also been held to be the *cause* of compensable worker injuries. For example, in WHSCC Decision No. 20084949,[322] the worker, a teacher, successfully appealed the denial of benefits for a workplace injury (adjustment disorder with depressed mood and Post Traumatic Stress Disorder) caused by students' misuse of social media, as described by the teacher: "Several former students created a false, extremely defamatory website on www.facebook.com. They who write anonymous letter/email to my Principal/Vice Principal Department Heads and staff falsely alleging inappropriate relations to underage girls."[323]

While social media has emerged as a factor in many contexts of ongoing employment relationships, it is also an emergent factor in both the manner of employment termination, and post-termination employment contexts, as discussed next in Part V.

V. Post-Employment Social Media Implications

Contexts in which social media have emerged as a post-employment factor, include highly public employee resignations, defamation actions, and post-employment privacy violations.

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[320] Ontario Workplace Safety and Insurance Appeals Tribunal, Decision No. 1706/10, 2011 ONWSIAT 1331 (CanLII) ["ONWSIAT Decision No. 1706/10"].
[321] *Ibid* at para 24.
[322] In the matter of an appeal under Section 21 of the *Workplace Health, Safety and Compensation Commission Act*, S.N.B. 1994 c. W-14, Decision No. 20084949, 2008 CanLII 26992 (NB WHSCC) ["WHSCC Decision No. 20084949"].
[323] *Ibid* at 2.

i. Employee Initiated Termination (Extreme Exits)

As Goodman notes, in the age of social media, "[e]mployers find themselves caught in the middle, wanting to use social media to promote their products and services, but also trying to determine where to draw the line on workers' rights to post job gripes on these sites."[324] Social media enables ease of self-promotion through self-publication, and some employees have sought to kill two birds with a single stone, as the saying goes, by getting their "15 minutes of fame", while simultaneously attempting to right perceived injustices through attacking the reputation of their soon-to-be-former employers. However, these employees likely have given little or no thought to how their decisions to "go out with a bang" could adversely affect their ability to procure alternative employment from prospective employers, given the human resources "infamy" incurred by workers that make such choices.[325] Employers on the receiving end of such public resignations may experience devastating negative media attention when the antics of "extreme exits" go viral on the Internet. Some (in)famous examples follow.

In August 2011 Joey DeFrancesco sneaked members of a brass band into the Providence, Rhode Island, hotel where he worked and had them strike up a lively Serbian folk song just as he turned in his resignation letter.[326] Mr. DeFrancesco posted a video of the dramatic resignation on You-Tube.[327]

Joe Sale quit his job with LivingSocial in October 2011 by sending his business cards, marketing material and promotional items back to LivingSocial in a white trash bag with a note that said "Treat your sales force like trash and see how bad your company starts to 'stink.'." Sale let his 1,500-plus Facebook friends (including about 50 current and former LivingSocial employees) know about his unconventional exit, posting a photo of the trash bag and note.[328]

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[324] Cindy Krischer Goodman, "Do Workers Have the Right to Complain Online?: Firms Grapple with Damaging Internet Posts" *Calgary Herald* (8 October 2011) G.2.
[325] "An extreme exit can show bad judgment, and word can quickly spread to a potential employer, especially via social media": Laura Petrecca, "Be Careful about Dramatic Exits: Frustrated Employees Opt for Dramatic Resignations to Protest Ever-Increasing Workloads" *The Ottawa Citizen* (30 November 2011) F1.
[326] *Ibid.*
[327] "Worker Uses Marching Band to Quit Job", online: YouTube <http://www.youtube.com/watch?v=O5eLauza6CQ>.
[328] Laura Petrecca, *supra* note 325.

In 2010, "Sun Microsystems CEO Jonathan Schwartz quit via Twitter. Days after Oracle acquired Sun, he tweeted: 'Today's my last day at Sun. I'll miss it. Seems only fitting to end on a #haiku. Financial crisis/Stalled too many customers/CEO no more'."[329]

Also in 2010, JetBlue flight attendant Steven Slater quit his job after getting into an argument with a passenger by cursing out the passengers over the airplane intercom, grabbing a beer from the galley, opening the side door and siding down the emergency chute. His extreme exit made international headlines, and was uploaded to YouTube.[330]

While still an employee of Starbucks, barista Christopher Cristwell posted a song he had written and performed to YouTube, expressing his frustrations with the job, which has garnered about 1 million views.[331] When Starbucks became aware of the video it terminated Mr. Cristwell's employment, which prompted him to write, perform and post a sarcastic encore.[332]

In August 2011, a Toronto Whole Foods Market employee quit his 5-6 year employment by e-mailing a 2,000-word diatribe against the company to its entire Midwestern division.[333] Gawker[334] posted the entire contents of the email,[335] which subsequently went viral. The essence of the employee's rant was that, in his opinion, the espoused "core values" of Whole Foods Market (which he personally ascribed to) were "complete and utter bullshit" in corporate practice. A couple of weeks earlier, 24 year old Kai Nagate, CTV's former Quebec City bureau chief, posted "Why I Quit My Job" to his blog.[336] Mr. Nagate's very public, unsolicited, and negative "exit interview" was widely reported both nationally and internationally.

The public expression of employees' negative "opinions" about their former employers is likely detrimental to both parties' reputations: the former's in the go-forward employment context (prospective employers); and the latter's in the business

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[329] *Ibid*.
[330] "JetBlue Flight Attendant Steven Slater Flips Out, Grabs Beer, Quits Job & Gets Arrested", online: YouTube <http://www.youtube.com/watch?v=FynRYzioJHE>.
[331] "The Starbucks Rant Song", online: YouTube <http://www.youtube.com/watch?v=MUTrJW-0xtc>.
[332] "The Starbucks Rant Song 2", online: YouTube <http://www.youtube.com/watch?v=w_e2Ediazks>.
[333] Sarah Boesveld, "Take This Job and Blog It: A New Generation of Social-Media Savvy Workers Aren't Shy About Talking Back to the Boss" *The Ottawa Citizen* (8 August 2011) D.1.
[334] Gawker, online: <http://gawker.com>.
[335] "Read a Disgruntled Whole Foods Employee's Epic Resignation Letter", online: Gawker <http://gawker.com/5824287/read-a-disgruntled-whole-foods-employees-epic-resignation-letter>.
[336] Kai Nagate, "Why I Quit My Job", online: www.kainagata.com <http://kainagata.com/2011/07/08/why-i-quit-my-job>.

(customers) and employment (retention and recruitment) contexts. However, if the employees' expressions cross over into defamatory statements of "fact," the law of defamation may be invoked.

ii. Defamation (Tort of)

Hard feelings usually accompany the breakdown of an employment relationship, and hard intemperate words spoken or written may follow. One party may make statements of fact to a third-party about the other party to the failed relationship that tend to lower that other party's reputation in the eyes of a reasonable person.[337] If that happens, defamation litigation may ensue.

In *McQuaig*,[338] David B. McQuaig was President and CEO of International Health Partners Inc. Brian Barbour was President and CEO of Harbour Financial Inc. the former corporation entered a six-month term contract with the latter corporation for the provision of investor relations services. The contract was not renewed upon its expiry. Mr. Barbour sent email memos defaming Mr. McQuaig to Health Partners Inc.'s Board of Directors, and enabled his brother, Dwight Barbour, to post derogatory statements about Mr. McQuaig to Stockhouse Media Corporation's internet chat rooms called "bullboards" where subscribers can post messages about particular stocks. Mr. McQuaig's employment was terminated by International Health Partners Inc. after the defamatory statements were published. Mr. Barbour's pleas of the defences of qualified privilege, justification or fair comment were rejected. Mr. McQuaig's action was allowed and he was awarded general damages of $75,000, and $25,000 punitive damages against Mr. Barbour and Financial Inc. jointly and severally.

In *Hubbard*,[339] Dennis Hubbard's complaint of discrimination in employment based on sexual orientation was dismissed. He was found to have engaged in improper conduct during the course of the complaint, and ordered to pay costs of $1,500. Following the filing of his complaint, "Mr. Hubbard had delivered e-mails to several media outlets, to individuals, and to the company's local and international offices [and

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[337] See *Grant, supra* note 68.
[338] *McQuaig v. Harbour Financial Inc*., 2009 ABQB 678, [2009] A.J. No. 1347 (QL) ["*McQuaig*"].
[339] *Hubbard v. Magicuts*, 2008 BCHRT 236, [2008] B.C.H.R.T.D. No. 236 (QL) ["*Hubbard*"]. See also *Ornelas, supra* note 222 and accompanying text where Emanuela Ornelas was warned by respondent's counsel about the defamatory nature of her Facebook-published statements and threatening legal action.

he] was maintaining a 'blog' in which he was publicly discussing his complaint. Respondents' counsel noted that they considered these communications to be unlawful and defamatory."[340]

While damages awarded in Canadian defamation cases are not as high as in the United States,[341] they may still be significant, particularly if awarded against individuals.[342] It should be noted that simply posting a hyperlink to a social media site that directs those who click on the link to a defamatory website is not "publication" for the purposes of defamation law.[343]

iii. Embarrassing Pleadings—Public Record

Pleadings, including pleadings in wrongful dismissal actions, are part of the public record once filed, as are all materials filed in such proceedings. Pleadings of "fact" made in the course of litigation are subject to "absolute privilege" for the purposes of defamation law, unless made with malice, which provides a full defence to a related claim of defamation.[344] Therefore, with litigation comes the risk of non-actionable embarrassment. For example, the *Toronto Star* ran a story in relation to Tracy Francis's wrongful dismissal action against the law firm Rusonik, O'Connor, Ross, Gorham & Angelini. The pleadings contained allegations that it was "perfectly acceptable within the firm culture" to make "disparaging remarks" in email, such as referring to lawyers inside and outside the firm as "closet felchers," "fags," "stupid, fat and lazy," and "delusional, lazy and cheap." One firm lawyer allegedly referred to an Ontario court judge as a "useless tit," while another commented "the zoo is aware he has escaped."[345] One can surmise that the law firm in question would, in hindsight, have preferred to keep this "dirty laundry" confidential through a settlement agreement and release with Ms. Francis

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[340] *Ibid* at para 9.
[341] See e.g. Kashmir Hill, "Why An Investment Firm Was Awarded $2.5 Million After Being Defamed By Blogger", Forbes (7 December 2011), online: Forbes <http://www.forbes.com/sites/kashmirhill/2011/12/07/investment-firm-awarded-2-5-million-after-being-defamed-by-blogger>.
[342] See Part IV.v above.
[343] *Crookes v. Newton*, 2011 SCC 47, [2011] S.C.J. No. 47 (QL).
[344] *Liboiron v. Majola*, 2007 ABCA 18, [2007] A.J. No. 75 at para 10 (QL).
[345] Betsy Powell, "Law Firm Emails Aired in Wrongful Dismissal Suit: Name-Calling and Insults Peppered Communications" *Toronto Star* (10 September 2011) GT.1.

containing a confidentiality clause. The damage to the firm's reputation has likely exceeded the costs of a settlement.

iv. Privacy

As mentioned above, social media being a relatively new phenomenon, there is a paucity of jurisprudence in this area of privacy law. However, ex-employers' use and/or disclosure of ex-employees' personal information may incur allegations of privacy breach. In *Double L*,[346] the employer hired a contractor to make a promotional video, which included images of various employees performing services offered by the employer, such as changing tires, hooking vehicles up to be towed, and driving. Two employees left their employment and subsequently complained that the employer breached *PIPA*[347] when it used and disclosed their images without their consent. The adjudicator held: "that the images of the Complainants in the promotional video are not the Complainants' personal information under the Act, but rather their work product. The collection, use and disclosure provisions in Part 2 of the Act therefore do not apply to the Complainants' images in the video."[348]

v. Wrongful Dismissal (Common Law) or Unjust Termination (Statute)

Social media evidence may be relevant post-termination in both wrongful dismissal actions as well as adjudications under employment standards legislation.

In *Wilson*,[349] evidence from Nathan Wilson's Facebook pages was considered by the employment standards adjudicator in arriving at the decision to order the former employer to pay Mr. Wilson statutory termination pay in the amount of $2,094.21.

In *RBI Canada*,[350] the Employment Standards Branch had ordered the employer to pay $3,360.00 for pay in place of notice of termination to Jeffery Robert Smith, a non-union employee. The employer appealed the decision, which appeal was allowed on the basis of just cause. Evidence of "Facebook correspondence [set] out Mr. Smith's

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[346] *Re Double L Towing*, [2011] A.I.P.C.D. No. 53 (QL) ["*Double L*"].
[347] *PIPA, supra* note 35.
[348] *Double L, supra* note 346 at para 22.
[349] *7214936 Canada Inc. operating as Javaroma Gourmet Coffee & Tea v Nathan Wilson*, 2010 CanLII 56280 (NWT LSB) ["*Wilson*"].
[350] *Re RBI Canada 2000 Inc*., [2008] A.E.S.U.D. No. 22 (QL) ["*RBI Canada*"].

inability to accept the reasons for his being placed on probation and his intention to quit due to his lousy pay."[351]

vi. Post-Termination Restrictive Covenants

Some restrictive covenants may survive the termination of employment, such as non-competition or non-solicitation covenants. Similarly, some classes of employees—fiduciaries—have obligations that survive the termination of employment, such as not to take advantage of opportunities personally that became known to the former fiduciary through her fiduciary position. Even former employees who were not fiduciaries have common law obligations that survive the termination of employment, such as the "post-employment … duty not to misuse confidential information."[352] Social media may become a factor in post employment duties, and allegations of their breach. For example, in October 2010 Oakland CA writer Noah Kravitz quit his 4-year employment writing a blog for Phonedog.com. During his employment, Mr. Kravitz began writing on Twitter under the name Phonedog_Noah; by the time he quit he had amassed 17,000 followers. After he quit, Mr. Kravitz began writing as NoahKravitz, keeping all his followers under that new handle. Eight months after Mr. Kravitz quit, PhoneDog sued him alleging that the Twitter list was a customer list, and seeking damages of $2.50 a month per follower for eight months, for a total of $340,000.[353]

VI. Social Media Implications Peripheral to the Employment Relationship

As discussed above, there are many contexts in which social media are a factor before, during and after labour and employment relationships. This Part discusses social media in several contexts peripheral to labour and employment, and which do not fit neatly within the categories set out above.

In *Manson*,[354] Tycho Manson, a lawyer and a director of legal affairs at Quebecor Media Inc. in Toronto, brought a defamation action against anonymous blog posters that

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[351] *Ibid* at para 4.
[352] *RBC Dominion, supra* note 84.
[353] John Biggs, "A Dispute Over Who Owns a Twitter Account Goes to Court", online: *The New York Times* <http://www.nytimes.com/2011/12/26/technology/lawsuit-may-determine-who-owns-a-twitter-account.html?_r=2&ref=technology>.
[354] *Manson v. John Doe No. 1*, 2011 ONSC 4663, [2011] O.J. No. 3572 (QL) ["*Manson*"].

had made *prima facie* defamatory comments about him. Justice Pepall validated service via email upon John Doe 1, and wrote:

> In this case, JD1 has used his e-mail address to write to the plaintiff's employer and to Google on the subject matter of the plaintiff's motion against Google. It is also clear from the materials in the supplementary motion record that JD1 had notice of this motion but opted not to attend. The plaintiff's counsel sent the notice of motion, the supporting affidavit and the factum to JD1 by e-mail and JD1 responded. He or she stated that they were unable to receive any file attachments and all incoming text was limited to 200 characters thereby suggesting that the entire document could not be received. In a subsequent e-mail, he or she suggested that they were located in the United States. No apparent effort was made by JD1 to obtain the full motion record which included the statement of claim nor did anyone appear in court on behalf of JD1 at the hearing of this motion. I conclude that to the extent he or she has not received the full motion record and the statement of claim, it is due to a deliberate attempt to evade service. I am satisfied that the notice of motion came to the attention of JD1 but he or she has opted not to respond. In these circumstances, the request that service on JD1 be validated is granted.[355]

In *OPSEU 234*,[356] the Ontario Labour Relations Board ordered the communication of its order to affected employees (union members), in part, by ordering the union to "provide a link on the Union Local 234 blog to the order of the Board."[357]

In *Ménard*,[358] an American journalist referred in a blog to an intimate extramarital relationship between Brigadier-General J.B.D. Ménard and Master Corporal Bianka Langlois while the two were serving in the operational theatre of Afghanistan contrary to the military Code of Service Discipline. Brigadier-General Ménard was subsequently court marshalled and sentenced to demotion to the rank of colonel and a fine of $7,000.

In *Steelworkers Local I-500*,[359] Rick Morgan was found in contempt of court and banned from the picket line for a period of 60 days. Mr. Morgan admitted that in late August 2010 he posted messages to a Facebook web page that stated as follows:

> This is not a threat just an observation. If you want Anti Scab legislation put into place in this province better yet country wide this is how you do it. Blow up the Scab bus when it is full in place where a few innocent bystanders get taken out along with the scabs. People will take notice then, and the demand from the people of this country to never let this kind of situation take place again will be overwhelming. Then the government would have no choice but to put

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[355] *Ibid* at para 8; emphasis added.
[356] *Ontario (Ministry of Community Safety and Correctional Services) v Ontario Public Service Employees Union, Ontario Public Service Employees Union, Local 234, and Emidio Casullo*, [2009] O.L.R.D. No. 2184 (QL) ["*OPSEU 234*"].
[357] *Ibid* at para 2.ix.
[358] *R v Ménard*, 2011 CM 3007, 2011 CM 3007 (CanLII).
[359] *ECP, Engineered Coated Products, a Division of Intertape Polymer Group Inc. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local I-500*, 2010 ONSC 7197, [2011] O.J. No. 320 (QL) ["*Steelworkers Local I-500*"].

> the legislation in place only to let the people think they really have a say. Again this is not a threat just an observation of the world we live in.[360]

In *Shonn's*,[361] Justice Boyle of the Tax Court of Canada wrote:

> The only question before the Court in these Employment Insurance ("EI") and Canada Pension Plan ("CPP") appeals is whether Mr. William Hall was an employee or was a self-employed independent contractor at Shonn's Makeovers & Spa in 2008 where he worked as a colouring artist. Both surprisingly, and perhaps as a true sign of our times, this ends up turning on his Facebook status.[362]

Mr. Hall was found to be an independent contractor.[363]

In *Lee*,[364] the Ontario Public Service Grievance Board was to hear allegations that the employer failed to provide a workplace free from harassment and discrimination by failing to take sufficient action in regards to a blog that contained offensive and defamatory material directed at managers.[365] The employer's preliminary motion to dismiss the complaint was rejected.

In Order PO-2745,[366] the Ontario Information and Privacy Commissioner "reject[ed] the suggestion that the affected party's Internet blog postings on the subject matter of the record [containing his personal information] effectively render some or all of the information in the record itself non-confidential through a surrender of confidentiality."[367] In other words, the complainant having discussed the disclosure of his personal information on a public blog did not amount to a waiver of his statutory right to privacy.

In *Lounsbury*,[368] the Plaintiff Bonnie Lounsbury was awarded damages for wrongful dismissal of $143,965.95 and "costs on a solicitor-client basis and punitive damages of $10,000.00"[369] Justice Saull determined it to be "a case where the entire defence was premised on lies—lies that were perpetuated in the statement of defence and

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[360] *Ibid* at para 22.
[361] *Shonn's Makeovers & Spa v. Canada (Minister of National Revenue - M.N.R.)*, 2010 TCC 542, [2010] T.C.J. No. 415 (QL) ["*Shonn's*"].
[362] *Ibid* at para 1.
[363] See also *Fredderick Patrick Brown v Style In Time Hair Studio Limited*, 2011 NSLST 7, 2011 NSLST 7 at para 26 (CanLII) where social media evidence was considered in determining the relationship between the parties—employee vs. independent contractor.
[364] *Lee v. Ontario (Ministry of Community Safety and Correctional Services)*, [2011] O.P.S.G.B.A. No. 11 (QL) ["*Lee*"].
[365] *Ibid* at para 1.
[366] *Re Ministry of Municipal Affairs and Housing*, [2008] O.I.P.C. No. 231 (QL) ["Order PO-2745"].
[367] *Ibid* at para 15.
[368] *Lounsbury v. Dakota Tipi First Nation*, 2011 MBQB 96, [2011] M.J. No. 138 (QL) ["*Lounsbury*"].
[369] *Ibid* at para 57.

counterclaim through to the amended statement of defence and counterclaim through to discoveries and through to the trial whereupon the proceedings regarding liability came to an end but only when the lies were unveiled during the cross-examination of Chief Pashe."[370] Evidence that supported the fact that "the defendant's behaviour before, during and after the trial of this matter was high-handed, malicious and reprehensible"[371] included: "posting disturbing comments on Facebook at 3:26 p.m., on June 8, 2010, immediately after the defendant's case collapsed due to Chief Pashe's admitted lying on the stand; [and] refusing to remove the Facebook posting."[372]

In *CEP 72*,[373] the union was claiming jurisdiction over certain work, being "the recording of phone interviews conducted, and recorded, … using CallParrot software, which recordings were subsequently posted on the employer's TVOParents website as podcasts."[374] The grievance was allowed, and the arbitrator held "that the work of recording for broadcast purposes, which includes posting as a podcast, is the exclusive work of members of the CEP bargaining unit."[375]

In *BCAA*, the British Columbia Labour Relations Board wrote "it is fair to infer that the advent of the internet, social media and 'smart-phones' erode barriers to employee participation in workplace democracy."[376]

VII. Conclusion

Social media is ubiquitous in Canadian society; it is not going away, and it will continue to be a factor in employment and labour relationships, before, during and after those relationships. Social media has great potential for both positive and negative effects on business, human resources, and labour relations. To minimize the negative risks for employers, trade unions, and employees, clear and well-drafted social media policies should be implemented, well-advertised within the organization, and consistently enforced.

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[370] *Ibid* at para 52.
[371] *Ibid* at para 55.
[372] *Ibid* at para 55.9, 55.10.
[373] *Ontario Educational Communications Authority v Canadian Labour Congress (Communications, Energy and Paperworkers Union of Canada) Local 72*, [2011] O.L.A.A. No. 437 (QL) ["*CEP 72*"].
[374] *Ibid* at para 4.
[375] *Ibid* at para 103.
[376] *BCAA,* note 262 at para 48.

> When creating a social media policy, there is no one-size-fits-all plan. Some companies use social media to brand themselves and expand market research, whereas others are simply trying to protect themselves from potential legal and security risks and control employee productivity. Regardless of the type of policy implemented, it must be well understood by employers and employees alike. With social networking sites becoming more prevalent, the need for a social media policy cannot be understated. It is a delicate balance between restricting the employee's right to freedom of expression and protecting the employer.[377]

Moulton notes: "On the one hand, there is the proliferation and reach of social media. On the other hand, there are employees who post comments and info, often without thinking through the implications."[378] She quotes Kate Macartney: "The [social media] policy should certainly address employer-specific concerns such as ensuring personal social media use does not interfere with work responsibilities, prohibiting employees from speaking on behalf of the company unless specifically authorized to do so, and reminding employees that company policies, such as confidentiality policies and agreements, apply to their use of social media."[379] A social media policy should also inform employees that, contrary to popular belief, the law generally does not recognize a "reasonable expectation of privacy" related to statements posted by individuals to social media sites. Employees should be educated not to post information to social media that they would be loath to see on a print out in an investigatory meeting with their employer.

Wilson adds: "Whether you're a law firm or any other kind of business, you should formulate policies on social media use that your employees and contractors must adhere to as a condition of their employment."[380] Wilson also provides helpful considerations when drafting a social media policy.[381]

Recently, Canada's Conservative government encouraged federal civil servants to utilize social media, but set out the rules for such use in a 25-page social media use policy.[382] Even Apple Inc. recently released social media guidelines after negative

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[377] George Waggott, "Creating Social Media Policies for the Workplace" *The Lawyers Weekly* (8 July 2011), online: The Lawyers Weekly <http://www.lawyersweekly-digital.com/lawyersweekly/3110?pg=11#pg11>.
[378] Donalee Moulton, "Social Media Policies Can Reduce Risk" *The Lawyers Weekly* (22 October 2010), online: The Lawyers Weekly <http://www.lawyersweekly-digital.com/lawyersweekly/3023?pg=21#pg21>.
[379] *Ibid.*
[380] Tony Wilson, "Social Media Policies and Your Law Firm" *The Lawyers Weekly* (16 July 2010), online: The Lawyers Weekly <http://www.boughton.ca/files/Social_Media_TW1.pdf>.
[381] *Ibid.*
[382] Kathryn May, "When Facebook Meets Rule Book: Public Servants Told to use Social Media, But Have 25 Pages of Guidelines to Tell Them How" *The Ottawa Citizen* (25 November 2011) A.1. See "Guideline

employee posts to social media.[383] According to Grapevine, "The leaked guidelines were circulated to staff following the sacking of Samuel Crisp, an employee that posted negative comments about his employer on Facebook. Crisp subsequently took his case to an employment tribunal, which upheld Apple's decision."[384]

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for External Use of Web 2.0", online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=24835>.

[383] "Apple Releases Social Media Guidelines after Negative Employee Posts", online: The Grapevine: <http://www.thegrapevinemagazine.com/?newsid=4985>.

[384] *Ibid.*