

# Book Review: 'Employment Law and the New Workplace in the Social Media Age'

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## BOOK

**The Law Society of Upper Canada, *Special Lectures 2012: Employment Law and the New Workplace in the Social Media Age*. Toronto: Irwin Law, 2013. Hardback, 397pp: ISBN 978-1-55221-315-5**

## SOCIAL MEDIA: A WORKPLACE CHALLENGE

Social media in employment law is an unassumingly dense topic. Part of the difficulty is that there are different and in some instances conflicting interests subsumed by the term social media. The commercial interests of employing entities are juxtaposed with workers' expression rights where individuals are now placed in a position to publicize personal opinions in a way not previously available. Further complicating the area is the inherent tension of the medium: the corporate and economic interests served by social media to promote brand names and products compared against the less desirable aspect of putting the company in a potentially actionable position (vicarious liability as one example).

This collection of lectures on the topic in Canadian law (hereafter *The New Workplace*) is better called proceedings than special lectures. The distinction between proceedings and a series of lectures is not of consequence generally but assists in explaining the content of this volume. The collection reads like a "cases and materials" publication. Since social media is a multi-layered area for legal thought, *The New Workplace* could benefit from unifying commentary. It is comprised of a wide range of pieces, from fully-cited papers to blog/website entries. There is no apparent reason for the sequence of papers, nor the types of entries. The program provided to speakers and attendees (but which is absent from the collection) offers some idea as to the ordering of the entries.<sup>1</sup> A reader also finds there are a few introductions to papers which repeat similar points (for example, the large number of users on Facebook is a common entry point) and many authors refer to the same cases.<sup>2</sup> The critique offered here of the collection as a whole is that as a resource, *The New Workplace* is not user-friendly, save for the index of terms. Nevertheless, the collection offers an entry-point for more incisive inquiry into the intersection between employment law and uses of social media.

Many of the entries explore employers' concerns. The collection may have been enhanced by further employee-focused offerings, but there has been a noticeable attempt on the whole by

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<sup>1</sup> It can be found at <http://ecom.lsuc.on.ca/cpd/product.jsp?id=CLE12-0040899> (last accessed 5.10.14).

<sup>2</sup> For example: *Alberta v Alberta Union of Provincial Employees (R Grievance)* (2008), 174 L.A.C. (4<sup>th</sup>) 371 (Ponak); *Chatham-Kent (Municipality) v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127* (2007), 159 L.A.C. (4<sup>th</sup>) 321; *Re Lougheed Imports Ltd (cob West Coast Mazda)* (2010), 186 C.L.R.B.R. (2d) 82 (BCLRB); as well as the decision of the Ontario Court of Appeal in *Jones v Tsige* which Bernice Karn discusses in this collection, "Intrusion upon Seclusion" – The Tort Whose Time Has Come?"

authors to provide objective commentaries. The focus also seems hard to avoid because employers are more often in a position to face the challenged posed. One may also suggest that this book is missing more academic treatment. This reviewer does not view the absence as a deficiency for a book on a rapidly-developing area. Authorship by those who are at the forefront of advising on and litigating these issues provides its own merits. The following pages provide a critical overview of the articles in the volume. Due to space constraints, comments are selective, and focus on two main themes.

## CONTRIBUTIONS OF APPLICATION TO CANADIAN EMPLOYMENT LAW

The collection contains some papers where the discussion is outside of employment law but which touch on employment-related scenarios. For example, "If you Tweet It, They (the Police) Will Come!" discusses the criminal law aspects of social media. The facts of *R v. Cole*<sup>3</sup> illustrate the interaction between employment and criminal law. Another related area of consideration is professionalism. A transcript of a panel discussion amongst lawyers working with issues surrounding social media forms the content of "Professionalism Issues for Lawyers as Employees and Employers Using Social Media".<sup>4</sup> Given the preponderance of cases outlining less than artful comments by employees, the panel's discussion cautions that lawyers may also wander into similarly unsavoury territory through media such as blog postings centred around business development.

A couple of contributions are collections of previous website postings by authors (Adrian Ott and Nicole Black) who write in the social media area. Perhaps because of the topic, the inclusion of authors using this medium is appropriate. The items are short and may be categorized as offering perspectives on social media: from the changes brought about by the various platforms [OMIT] to the use of social media for the business development of law firms (the latter linking with the aforementioned panel discussion lead by Janice Rubin). These items are not as engaging as some of the more pointed pieces highlighted below.

Useful resources in *The New Workplace* are those chapters offering fact scenarios, commentary on developing a social media policy and other practical advice. "A Day in the Life of Today's Employment Lawyer: Fact Scenarios and Commentaries"<sup>5</sup> is a self-explanatory chapter providing helpful observations, though those looking for caselaw may be disappointed by the dearth of such references. Still these fact patterns offer a good example of how social media can prompt further issues in common employment situations such as insubordination and harassment. For those coming to social media and employment law issues for the first time, the fact scenario and annotated letter of employment provided by Lorna Cuthbert and Jennifer Fantini are a beneficial starting point.

Mark Crestohl (at the time Senior Counsel, Human Resources at the Toronto Dominion Bank (TD)) and John O'Reilly (Legal Counsel at the grocery store chain Loblaws Companies Ltd. (Loblaws)) relay their experiences in developing social media policies for their large respective employers. The former's chapter is a bit more detailed and likely of more use (though both contributors may have stated more in their presentations). In TD's policy, there were three

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<sup>3</sup> 2011 ONCA 218 [*Cole*]. The laptop of a teacher provided by his employer school board contained sexually explicit pictures of an underage student (found by a board technician during maintenance). The trial judge found that teachers used these laptop computers to store personal information. While the board owned the computers, it had given *de facto* control to the teachers.

<sup>4</sup> Moderated by Janice Rubin with panelists Ari Blacker, Stuart Rudner and Lisa Stam.

<sup>5</sup> Moderated by Rhonda Jansen and with panelists Catherine Peters, Melanie Reist, Rusty McLay.

categories of social media considerations for online comments by an employee: use of an electronic communication device provided by TD; use of the TD network (including for personal reasons); finally TD subject matter which is the category with the most breadth as it captures remarks made about work-related materials where an employee uses his/her own electronic device. Of note to multinational employers, in creating the policy, the US *National Labor Relations Act*<sup>6</sup> was a factor as it protects speech about working conditions. Crestohl expressed hesitation in adopting an off-duty and on-duty applicable policy: “In light of our policy direction being that employees should not be using social media tools to communicate for business purposes, it felt wrong to provide guidance on how one should optimize their use for business purposes.”<sup>7</sup> His indication that TD will be looking at a policy for business purposes soon segues into O’Reilly’s comments. Loblaws quickly saw the business applications for social media: “we want people (including employees) visiting the PC Facebook page and expressing positive sentiments about working for us and about our products.”<sup>8</sup> This last comment crystallizes the commercial dilemma of social media in the workplace alluded to at the start: the platforms can be of significant commercial benefit but also expose companies to other legal problems.

Picking up on the influence of the US *National Labor Relations Act*, Renee Mattei Myers’ chapter<sup>9</sup> takes the reader through relevant American law. The piece is more than of passing interest as she outlines a number of useful points. For example, she notes the National Labour Relations Board’s assessment of when a Facebook posting loses “protected concerted activity status”: “a four point test applies: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”<sup>10</sup> The comments arose from the case of *American Medical Response of Connecticut, Inc v. International Brotherhood of Teamsters, Local 443*<sup>11</sup> where a client of the plaintiff (AMR) complained about an employee (Souza). The employer asked Souza for a response but her supervisor refused her the opportunity to have assistance from the union in its preparation. To voice her displeasure Souza made several vulgar remarks on her Facebook page to ridicule the supervisor. The posting elicited supportive comments for Souza and further negative commentary about the supervisor. AMR terminated Souza for violating its policy prohibiting any depiction of the company on social media. The National Labor Relations Board supported Souza’s case as it took the view that criticisms on social networking sites about an employer may constitute protected activity. The case was later settled out of court.<sup>12</sup> *Souza* is a remarkable case itself and the social media aspect only enhances its pertinence.<sup>13</sup> While not as celebrated a case (and not mentioned in this collection), the UK case of *Smith v Trafford Housing Trust*<sup>14</sup> contributes to the jurisprudence in this area as the court expressed “real disquiet” at the disciplinary action taken against the plaintiff for expressing his opposition to same sex civil marriage on his Facebook account. The court found that the employer had technically breached the employment contract by demoting Smith at the time it had (but not because it had) as a result

<sup>6</sup> 29 USC § 151 (1935) [*NLRA*].

<sup>7</sup> Mark Crestohl, “Developing a Social Media Policy: TD Bank Group’s Experience” in *The New Workplace*, *supra* note 1, pp. 195-202 [Crestohl], 198.

<sup>8</sup> John O’Reilly, “Reflections on the Development of a Social Media Policy: Loblaws” in *The New Workplace*, *supra* note 1, pp. 203-205, 204.

<sup>9</sup> “Social Media and the Workplace: A View from the United States” in *The New Workplace*, *supra* note 1, pp.181-193.

<sup>10</sup> This was posted on the NLRB’s facebook page: [www.facebook.com/NLRBpage/posts/141052949280338](http://www.facebook.com/NLRBpage/posts/141052949280338)

<sup>11</sup> Case No 34-CA-12576 (27 October 2010) [*Souza*].

<sup>12</sup> “Facebook firing test case settled out of court”

[http://money.cnn.com/2011/02/08/technology/facebook\\_firing\\_settlement/index.htm](http://money.cnn.com/2011/02/08/technology/facebook_firing_settlement/index.htm) (last accessed September 25, 2013).

<sup>13</sup> Further useful information has come since this paper was delivered. For example, Memorandum OM 12-59 (May 30, 2012) from the Office of the General Counsel of the NLRB provides some insight into what are lawful and unlawful social media policies. It was developed at the request of employers.

<sup>14</sup> [2012] EWHC 3221 (Ch.).

of his posting. A small amount in damages was awarded (a difference in pay of a small period) because the demotion was permissible under the contract.

Three further entries discuss litigation. With “Injunctive Relief and the Departing Employee” Paul Le Vay, Owen M. Rees and Justin Safayeni summarize the relevant procedural points and tests. Of importance to social media issues, the authors note the decision in *Community Living v TBayTel*<sup>15</sup> where a *Norwich* order was pursued by the employer seeking release of cell phone and text records of an employee for the purpose of determining whether there had been a breach of policy. Andrew Bernstein and Rebecca Wise round out discussion of the intersection of litigation and social media with their overview of relevant procedural aspects in “Conducting Litigation in the Social Media Age”.

## CONTRIBUTIONS WHICH FOCUS ON CANADIAN EMPLOYMENT LAW

The remainder of the contributions centre on Canadian employment law and social media.

The first substantive contribution to the collection is “Privacy Protection in the Digital Workplace”.<sup>16</sup> The submission summarizes much of the applicable law in the area, providing a description of the relevant statutes and common law decisions in Canada. As a result of its descriptive character, it is a good introduction for those who are not well-versed in the nuances of this developing area. Guidance is taken from the Office of the Privacy Commissioner of Canada<sup>17</sup> who is charged with investigating complaints made under the federal statute, *Personal Information Protection and Electronic Documents Act*.<sup>18</sup> The authors introduce what is a common theme throughout the text: “many employers take the position that monitoring their employees’ computer usage and online activities is necessary to detect activity that may negatively affect business.”<sup>19</sup> The quotation refers to the business imperative for employers as *the* explanation for looking into employees’ online conduct. As a result, the privacy policy has been developed as an enabling document; a principle developed from an interpretation of the Ontario Court of Appeal’s decision in the criminal case of *Cole*.<sup>20</sup> As the authors point out, the finding in *Cole* means that employers cannot rely solely on ownership of technology used by employees.<sup>21</sup>

“Social Media In and Out of the Workplace: Old Laws Learn New Tricks”<sup>22</sup> is a fairly extensive contribution by Andrea York and Karinne Coombes. This is also a controversial topic beyond Canada.<sup>23</sup> The idea that a worker could be terminated for conduct outside of the employer’s walls (beyond conviction of a serious criminal offence) tests the traditional notions of employment law where off-duty conduct has largely been off limits for employers’ reproach. The authors largely summarize some of the leading social media decisions in labour arbitration and employment law. They conclude with three guiding considerations. First, social media challenges the ‘privacy’ of an employee’s conduct. Second, “where online conduct has the potential to reach a number of co-

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<sup>15</sup> 2011 ONSC 2734

<sup>16</sup> In *The New Workplace*, *supra* note 1, pp. 9-23

<sup>17</sup> www.priv.gc.ca

<sup>18</sup> S. C. 2000, c.5 [PIPEDA].

<sup>19</sup> Patrick Flaherty & Sarah Whitmore, “Privacy Protection in the Digital Age” in *The New Workplace*, *supra* note 1, pp. 9-23 [Flaherty & Whitmore], 10.

<sup>20</sup> *Cole*, *supra* note 4., See, for example, Flaherty & Whitmore, *supra* note 20, 17

<sup>21</sup> Flaherty & Whitmore, *supra* note 20, p. 20.

<sup>22</sup> Andrea York & Sarah Coombes in *The New Workplace*, *supra* note 1, pp. 45-73 [York & Coombes].

<sup>23</sup> See for example the decision of the European Court of Human Rights in *Pay v. UK* [2009] IRLR 139.

workers, it may even be deemed to have occurred ‘on the shop floor’”.<sup>24</sup> Finally, employers must have thoughtful social media policies in place.

Mary Beth Currie and Daniel Tobok discuss (in successive chapters) the use of social media for recruitment. In “Social Network Recruiting: What Are the Implications of this New Hiring Model?”<sup>25</sup> Currie reviews the relevant statutes and guidance from government agencies (both Ontario based). From there she offers some helpful remarks regarding the topic such as cautioning employers about concluding that information found on the internet relating to candidates is all accurate.<sup>26</sup> To this she suggests that hiring committees seek to verify information. Tobok’s chapter is a bullet point offering entitled “Social Network Recruiting: Implications of this New Hiring Model”.<sup>27</sup> His first sentence anticipates his ensuing comments: “Many people don’t understand that they hurt their chances of getting hired when they do unwise things on social media.”<sup>28</sup> He equates Facebook profiles with “dossiers”, a word which conjures up ideas of spycraft. However, Facebook is not simply a collection of information about an individual. It is a collection of information that the individual elects to provide to a select group. The individual has more control over his/her Facebook content than a dossier. More precisely, Tobok appears to be highlighting the monitoring of traffic conducted by Facebook which itself can be valuable information for companies with commercial products to sell.

Melany V. Franklin returns the reader to the post-hiring employment setting in “Cybersabotage: Employee Malfeasance in the Social Media Age”.<sup>29</sup> The term ‘cybersabotage’ is defined as the use of technology, including social media, to deliberately inflict harm on an organization.<sup>30</sup> Franklin employs different words using cyber as its root: cybertheft, cybordination. She emphasizes the process of investigation and considerations therein. She lists cases but does not engage with them as extensively as York and Coombes or Jonathan Maier (noted below).

“Employers and Defamation in the Age of Social Media: A Look at an Employer’s Potential Liability as a ‘Publisher’”<sup>31</sup> (by Michael C. Smith and Court Peterson) is an informative and wide-ranging offering. For example, the authors highlight the perils for employers who monitor and store information sent and received using its network for these companies put themselves in a situation of being found to have control over the information and therefore be identified as a publisher.<sup>32</sup> The authors only allude to another pressing issue:<sup>33</sup> how does vicarious liability intersect with this area of employment law?

It is surprising that the topic of Andrew Pinto and Robert Tarantino’s paper, “When Dinosaurs Roamed the Social Media Age: Harassment and Human Rights Cases in the New Workplace”,<sup>34</sup> is not engaged elsewhere in the collection. Ellickson and Atkinson casually allude to it when they write of employers’ duties to employees in regards to social media. With the passage of Ontario’s *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*,<sup>35</sup> workplace harassment has been added to the list of issues which may arise with social media.

<sup>24</sup> York & Coombes, *supra* note 23, 73. Reference omitted.

<sup>25</sup> In *The New Workplace*, *supra* note 1, pp. 75-94.

<sup>26</sup> This follows from the parameters set in *PIPEDA*, Schedule 1, ss.4.6, 4.6.1, Principle 6.

<sup>27</sup> In *The New Workplace*, *supra* note 1, pp. 95-99.

<sup>28</sup> *Ibid*, 95.

<sup>29</sup> In *The New Workplace*, *supra* note 1, pp.101-124.

<sup>30</sup> *Ibid*, 101.

<sup>31</sup> In *The New Workplace*, *supra* note 1, pp.227-257 [Smith and Peterson].

<sup>32</sup> The authors cite English case law on this distinction: Smith and Peterson, 235, 240.

<sup>33</sup> *Ibid*, 239.

<sup>34</sup> In *The New Workplace*, *supra* note 1, pp.349-365 [Pinto and Tarantino].

<sup>35</sup> S.O. 2009, c.23. The Act amended the *Occupational Health and Safety Act*, RSO 1990, c.O.1.



While no new cause of action was created, there is a regime for workplace inspections.<sup>36</sup> In the UK, the *Protection from Harassment Act, 1997*<sup>37</sup> has provided a new cause of action in tort on the topic<sup>38</sup> and this may prove useful for Ontario lawyers in developing advice for clients.

Perhaps the most relevant topic for anyone consulting this collection is termination for dismissal based upon social media usage. Here there are two offerings. Denis Ellickson and Meg Atkinson's "When Can Your Employer 'Unlike' You?: Just Cause for Dismissal and Social Media"<sup>39</sup> explores the topic (as suggested) from an employee's perspective. They contend that employers have duties to employees when social media usage is relied upon for disciplinary actions. Jonathan Maier takes the employer's perspective in "Cause for Termination in the Age of Social Media".<sup>40</sup> It is worth highlighting, as Maier does, that an employer need not prove actual harm has been suffered by employees' social media transgressions. All it need do is establish the risk of harm which would be detrimental to its business interests. These are two useful and thoughtful pieces on a demanding topic.

## CONCLUSION

The preceding comments illustrate the evolving understanding of social media's legal implications. The collection invites consideration of distinctions. Social media is not a vehicle for protecting speech which society would not otherwise condone, such as discriminatory remarks. Adjudication in this area, though, carries with it the potential to police behavior in a way which has not been undertaken previously. This is a challenge for employment law because it combines individual rights with societal interests. It is a harder form of balancing with which employment law is now burdened.

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<sup>36</sup> Pinto and Tarantino, *supra* note 35, 359.

<sup>37</sup> 1997, c.40.

<sup>38</sup> See *Majrowski (appellant) v. Guy's and St. Thomas's NHS Trust (respondents)* [2005] IRLR 340, aff'd [2006] IRLR 695 (CA).

<sup>39</sup> In *The New Workplace*, *supra* note 1, pp. 259-280.

<sup>40</sup> In *The New Workplace*, *supra* note 1, pp. 281-304.