

**Facebook in the Workplace:
Findings of a Content Analysis of Canadian Arbitration Cases**

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Abstract

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Since the introduction of instant messaging programs in the mid-1990s, the use of social media tools has grown exponentially. As popular social networking Web sites such as Facebook and MySpace become more prevalent, employers and employees alike, are faced with a new reality – dealing with an increasing online ‘cross-over’ between personal and work lives. Many users think their pages are personal and private to them, but are they? Because these sites are still relatively new and considered somewhat of an ‘uncharted territory’, employers and employees struggle to know their rights when employees use these sites, at home and on the job site, in ways that could harm employers or their organizations. The ever-growing question about an employer’s right to use social media to monitor and evaluate, and even discipline and dismiss employees was the driving force behind this research study. Facebook, the clear front-runner in today’s social media tools, has exceeded 845 million active users around the world, making it an ideal social media study subject. A content analysis of Canadian arbitration cases was selected as the most effective way to gather *documented evidence* of how Facebook-related human resources issues are being ruled upon for unionized employees. The study findings highlight that year-over-year, the number of these arbitration cases relating to social media use in the workplace is increasing. The findings also show that arbitrators, in large part, are deciding in favour of employers who discipline or dismiss, based on the content posted by their employees on Facebook.

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Table of Contents

Abstract	ii
Acknowledgements	iii
List of Tables	vi
List of Figures	vii
CHAPTER 1: INTRODUCTION	1
Background	1
Research Overview	2
Organization of this Project	3
CHAPTER 2: LITERATURE REVIEW	5
The Evolution of Social Media	5
Policy Guidance	7
Implications for the Workplace	9
Gaps and Future Research	16
CHAPTER 3: METHODOLOGY	18
Research Framework	18
Research Summary	20
CHAPTER 4: FINDINGS	21
Case Inclusions	21
Descriptive Statistics	22
Trends	28
Directions	34

CHAPTER 5: DISCUSSION AND CONCLUSION	42
Summary of Study Findings	42
Research Implications	42
Limitations and Future Research	45
Conclusion	46
References.....	49
Appendix A: Arbitration Case Decision Analysis Framework.....	53
Appendix B: Reference List of Case Study Inclusions.....	54

List of Tables

Table 1. Summary of Trends	28
Table 2. Summary of Directions	34

List of Figures

Figure 1.	Arbitration Cases by Year Since the Establishment of Facebook	23
Figure 2.	Arbitration Cases by Jurisdiction	23
Figure 3.	Gender of Employees	24
Figure 4.	Grounds for Grievances	24
Figure 5.	Overall Disposition (Decisions), by Number of Cases	25
Figure 6.	Cases by Industry Sector	26
Figure 7.	Cases by Size of Employer	26
Figure 8.	Employees' Length of Service	27
Figure 9.	Employees' Job Positions	27

CHAPTER 1: INTRODUCTION

Since the mid-1990s, the global popularity of social media tools has exploded. In March 2012, the social networking Web site, Facebook, cited more than 845 million active users, and it is currently available in over 70 languages worldwide (Facebook.com, 2012). The average Facebook user has 130 “friends” in their network, with whom they can share messages, status updates, photos, videos and event invitations. A December 2011 ranking of worldwide Facebook adoption showed that 49 % of the Canadian population use Facebook, and 62% percent of all Canadians with Internet access are Facebook users (pingdom.com, 2011). Grossman (as cited in Siegle, 2011, p.14) notes that, “Facebook membership grows by almost three-quarters of a million people each day,” and that, “If Facebook were a country, only China and India would surpass it in population.”

With the growth of social media (and particularly Facebook) use in our homes and workplaces, the line between our personal and professional lives has become increasingly ‘blurred’. Employers and employees are struggling with how to deal with Facebook in the workplace. Because social media use, in general, is relatively new, many employers find themselves trying to keep up with the technology, make use of its advantages and avoid its pitfalls. Additionally, a lack of clear policy leaves employees trying to determine what is appropriate (and inappropriate) use and whether content posted on a ‘personal’ page (or even *logging in* to their page while on the job) will have negative repercussions on them and their careers. Many employers are either forging ahead and using social media to monitor employees without the proper training to do so, or conversely, don’t know whether they have the right to view these pages, and what, if any, recourse they have when inappropriate material is posted about them, their employees or their organization.

The blurring lines of Facebook in the workplace have led to a number of disciplinary actions and dismissals in Canada, due to either its very use by employees while on the job, or because employees posted inappropriate or revealing content relating to their professional lives. In some cases, employees felt the comments made on their personal pages were ‘private’; in others, employers delayed taking action when inappropriate Facebook entries were brought to their attention, because they did not know whether it was within their legal rights.

While some employers have developed policies or guidelines on e-mail and Internet use, social media use presents its own challenges with respect to privacy issues – and clear guidance is needed for both employers and employees. Along with a glaring lack of social media policy, research studies exploring the rights of employers and employees in the new ‘Facebook world’ are sparse. There is much research to be done, as the social media phenomenon will only continue to grow, and we will need to have a clear understanding of its widening impacts on not only employers and employees, but also on individuals and society as a whole.

Research Overview

My research is designed to address the question, “Do employers have the right to use information obtained through Facebook as a tool to monitor and evaluate employees, and as grounds for discipline and dismissal?” The purpose of this study is to review arbitration case decisions for trends and directions that shape the ways in which we change over time with respect to privacy, Facebook use and the workplace.

A content analysis of Canadian arbitration cases was selected as the most effective way to gather *documented evidence* on how Facebook-related human resources issues are being ruled upon by arbitrators. Focus groups, questionnaires and interviews were not chosen as they collect

anecdotal information and opinions, which are not necessarily based on facts and law.

Arbitration rulings were also selected because they can help to influence future workplace and government policies in a tangible way.

Examining arbitration decisions helps to illustrate the growing number of Canadian workplace issues arising since Facebook was introduced, show the current social media and privacy policy gaps that exist, demonstrate the impacts on employers and employees in dealing with these issues, and provide future insight into how Facebook-related workplace issues will be treated by employers, and the courts, as time goes on.

As Facebook (and the use of all social media) continues to grow, employers and lawmakers will be left with no choice but to deal head-on, and more frequently, with these workplace issues. Government and employer policies will need to be developed and communicated clearly. Employees will find that, increasingly, they will be accountable for the details they share on Facebook, and in some cases, their online missteps may cost them their livelihoods.

Organization of this Project

The remainder of this research study project is laid out in chapters and will provide background information on the study and its findings. Chapter 2 includes a literature review that provides background on the evolution of social media, policy guidance, implications for the workplace, and future considerations. Chapter 3 looks at the study approach and the methods used to arrive at and collect the appropriate arbitration cases for the analysis. Chapter 4 examines the findings from the content analysis, provides descriptive statistics from the cases and looks at

trends and directions uncovered by the case review. Finally, Chapter 5 provides a summary of the findings, points out some study limitations, and highlights areas for future research.

CHAPTER 2: LITERATURE REVIEW

Living in a society where technology is constantly evolving and changing has its good and bad points. In our personal lives, better technology allows us to download our favourite music quicker, video chat with friends around the world when we want to, and instantly upload special family photos to a Web site where they can be shared with others. But what happens when technology leads to an employee being fired because they wrote something on their Facebook page about their employer, thinking it was a private place to vent their frustrations? This chapter will examine how social media is evolving in our society, the exponential growth of Facebook, and privacy policy guidance in Canada. It will also look at employer practices and employee perspectives with regard to Facebook use and the workplace, and will highlight knowledge gaps and future research that can be done in this growing area.

The Evolution of Social Media

One of the most significant advances in technology in the past several decades has been the introduction of the personal computer. Its widespread use in the home and office has dramatically changed how we live and do business. Following closely behind this technology have been social networking tools that allow us to connect and share information with anyone in the world, at any time. The earliest examples of these social media include ICQ (I Seek You) and America Online (AOL) Instant Messenger, introduced in the mid-1990s, that allowed users to send messages to others who were simultaneously signed in to the service.

Since that time, the use of social media has exploded. Today, we can communicate instantly with people around the world with tools such as Internet forums, web logs (commonly known as 'blogs'), mini-blogs (e.g. Twitter), content management (e.g. photograph, picture, video, and music-sharing) Web sites, wikis, podcasts, and social networking sites such as

Facebook and MySpace (Wikipedia.com, 2011). Wilson (2009, p.55) reports that currently “there are nearly 900 Internet applications and websites classed as ‘social networking’, with more appearing each week.”

Of the current social media available, Facebook is the clear powerhouse. Founded in February 2004 by then-students Mark Zuckerberg, Dustin Moskovitz, Chris Hughes and Eduardo Saverin, “the Facebook” was developed as a way to share information with other students within Harvard University. Facebook’s ‘social network’ was soon expanded to include Stanford, Columbia and Yale University, and by October 2005, it supported over 800 college networks, as well as high school and international universities.

In September 2006, Facebook opened its registration so that anyone in the world could join. In just eight years since its launch, Facebook now boasts “more than 845 million active users” worldwide (Facebook.com, March 2012). Today, the company employs over 3,000 people in its Menlo Park, California headquarters, 12 U.S. offices, and 18 international offices. Facebook has become such an iconic success story, in fact, that *Time Magazine* named Chairman and CEO Mark Zuckerberg its Person of the Year in 2010 (Grossman, 2010).

As Smith and Kidder (2010) explain, registered Facebook users are provided with a standard page they can use to upload the information they want. This can include contact information, photos, picture ‘albums’, and status updates to let others know what they are doing. They can perform searches to see if other individuals are registered Facebook users, and invite them to be their ‘friend’ (commonly known as ‘friending’). Those who accept the invitation will now have access to the information on the individual’s page. Facebook hosts a large variety of applications and games that can be used by any registered user. Friends can post messages on an individual’s ‘wall’. Friends’ status updates are streamed on the individual’s Facebook page, and

individuals can be ‘tagged’ in photos, which means their name is associated with the image shown. Friends are also able to communicate more discretely via instant messaging or e-mail between their Facebook pages.

Known globally as a “social utility that helps people communicate more efficiently with their friends, family and coworkers” (Facebook.com, 2012), Facebook’s widespread accessibility and popularity made it an ideal subject for this research project. Because Facebook is now so pervasive in our culture, examining its use in relation to the workplace will no doubt provide future insights into how social media technologies, in general, will impact companies and the people who work for them.

Policy Guidance

In Canada, we are governed by two federal privacy laws. Both pieces of legislation are overseen by the Privacy Commissioner of Canada, who has the right to receive and investigate privacy complaints (Office of the Privacy Commissioner Web site, 2012).

The *Privacy Act*, which took effect in July 1983, obligates Canada’s federal government departments and agencies to respect privacy rights by limiting the collection, use and disclosure of personal information. The *Act* also gives individuals the right to access and request correction of any personal information held by these federal government organizations.

Canada’s newer privacy law is the *Personal Information Protection and Electronic Documents Act* (PIPEDA). This law sets out ground rules for how private sector organizations (i.e. non-federal government employers) can collect, use, or disclose personal information in the course of commercial activities. PIPEDA has been fully in force since 2004 (Office of the Privacy Commissioner Web site, 2012).

This research project will focus primarily on PIPEDA as the main source of federal legal privacy guidance for Canadian employers with respect to collecting and sharing employee information.

PIPEDA's purpose, as stated in the *Act* is:

to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances (Department of Justice Canada Web site, 2012).

While Canadian privacy legislation has been in force for some time, PIPEDA does not contain clear-cut direction for employees and employers trying to deal with the new world of social networking. This leaves employers and employees unsure of their rights when it comes to using social media. Canada's Assistant Privacy Commissioner, Elizabeth Denham, publically acknowledges that her office receives calls from Canadians who are concerned about current or potential employers using Facebook or the Google search engine to do 'background checks' on individuals (Denham, May 2010). She notes, "While we haven't yet investigated a complaint involving surreptitious social networking background checks, my *feeling* is that PIPEDA would prevent this kind of collection of personal information." Her shaky assertion speaks to the need for more specific policy direction when it comes to how social media should (and should not) be used by employers and employees.

Privacy Commissioner Jennifer Stoddart makes a telling statement about Canada's privacy laws and the challenges that lawmakers currently face in keeping up with technology.

She states:

Protecting privacy in this rapidly transforming online landscape demands agile, creative and effective responses. The reality is, however, that we have a situation where legislative amendments wind their way through the Parliamentary process at a glacial pace in comparison to the rate at which the world is changing. A dispute over a point of law can take several years to resolve through the courts. It is not realistic to anticipate dramatic change in how the wheels of the legal and Parliamentary systems move in the foreseeable future (Stoddart, 2010).

While the main focus of this research project is on federal privacy legislation, it should be noted that each of Canada's provinces and territories also has privacy legislation on the collection, use and disclosure of personal information. Either an independent commissioner or ombudsman is authorized to receive and investigate complaints in these jurisdictions.

Although these are still early days in the social networking era, significant legal developments, including clear social media use policies, and education about social media use will be necessary to protect employers and employees from becoming the victims of lightning-speed changes in technology, and federal laws unable to keep the pace with these changes.

Implications for the Workplace

Privacy

As social media is rooted in sharing information with others, and as more people than ever are using these tools, in and out of the workplace, this invariably raises concerns about privacy. Many question whether employers have the right to use the information viewed through social media to monitor and evaluate current employees, or as grounds for their discipline and dismissal. There are also concerns about whether content posted by employees on social networking sites like Facebook, possibly accessible to hundreds, thousands or even millions of people (depending on the user's privacy settings) can really be considered 'private'.

Today's social media users may be communicating with a false sense of security, believing that their personal information is protected because online interactions take place where a person feels secure (at home or at work). However, as LaFerla (as cited in Clark and Roberts, 2010) indicates, the consequences of an employer accessing personal information via social media can be serious, and may include a missed promotion opportunity or even loss of employment, as in the case of a U.S. flight attendant who lost her job for posting a picture of herself in uniform online.

The Merriam-Webster dictionary (Merriam-Webster.com, 2012) defines *privacy* as "freedom from unauthorized intrusion." Does this definition suggest that employees can post whatever they wish on Facebook about their employer or colleagues, with an expectation that their page will be free from 'unauthorized intrusion' by their employer? Where is the line drawn between an employer's right to access information and an employee's right to keep certain information private? Can we really have an expectation of privacy in today's online world? The answer to these questions depends on who you ask.

Manning (as cited in Clark and Roberts, 2010, p.517) argues that an employee has "a right to liberty, and flowing from liberty is a right to lead one's life separate from work." Conversely, Myatt and Sugarman (as cited in Clark and Roberts, 2010, p.517) counter that "...work is not a right but a privilege, and...an employer has a right to know whatever it can about a person to protect its property right in the business." Myatt also contends that an employee is a direct representative of the company at all times, on and off work, and therefore, must never act in a manner that will harm the reputation of their employer.

A recent research study conducted by Ryerson University's Privacy and Cyber Crime Unit noted a major disconnect between younger and older Canadians' views on online privacy

expectations. The research found that young Canadians have a unique perception of ‘network privacy’. They believe the information they post online is private because it is put there solely for the use of their own social network. The older group of Canadians in the study (business executives who participated in the study on behalf of leading public and private sector organizations), on the other hand, reject and do not recognize the notion of ‘network privacy’. Instead, they are of the view that information posted online is public and deserves no protection (Levin et al, 2008).

In January 2010, Facebook’s Mark Zuckerberg made a revealing (and controversial) statement that privacy was no longer a ‘social norm’. “People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people,” he said. “That social norm is just something that has evolved over time” (Johnson, 2010).

And certainly, Facebook has played a significant role in pushing the social norms around privacy. In 2008, Canada’s Office of the Privacy Commissioner launched an investigation following a complaint by the Canadian Internet Policy and Public Interest Clinic, a public advocacy group, regarding a number of Facebook’s practices. The Privacy Commissioner responded with a set of recommendations for Facebook to better protect the privacy of its users. By September 2010, Ms. Stoddart announced that her office had reviewed the changes implemented by Facebook, and concluded that the issues raised in the complaint were resolved to her satisfaction. However, she added that her office had received new complaints in early 2010, that they were currently under investigation, and that the Office would remain committed to monitoring Facebook’s activities to ensure that Canadians’ privacy rights are respected (Office of the Privacy Commissioner, 2010).

Regardless of privacy considerations, however, some businesses are moving toward the use of social media to look at potential employees. Clark and Roberts (2010) report that a U.S. human resources-based survey found 43% of the human resource professionals polled use social networking sites to gain information on job applicants; however, only 21% received training to do so, and only 5% had a policy in place governing the practice.

Despite the debate over the right for privacy versus the right for employers to have access to information, one thing is very clear – employees need to be extremely careful about what they post online. As Elizabeth Denham, Canada’s Assistant Privacy Commissioner, notes,

Despite all of the horror stories we’ve heard about people being fired or disciplined for what they post online, there appears to be a continued lack of individual awareness about the nature social networks. There is nothing private about going online... Even if you use privacy settings (which many people don’t) what you post can be shared. It will be archived. It’s out there. It will be there for a long, long time (Denham, 2010).

Employer Practices

The very nature of social networking sites, including Facebook, requires us to provide and share personal information. This has created an opportunity for employers to have access to information an employee may not, otherwise, want shared in the workplace. Some employers have their own Facebook accounts and may be able to access their employees’ personal information, depending on what privacy settings the employees have used, and without their consent or knowledge.

As Brandenburg (2008, p.602) outlines, the fact that social networking sites merely *feature* privacy settings is not enough. “...many Facebook users simply do not activate their privacy settings. Other social networkers enable their privacy settings, but fail to realize that

employers nonetheless may be able to gain access to profiles seemingly protected by privacy settings.”

Smith and Kidder (2010, p.493) underscore the challenges around using social networking sites for evaluating employees. “Very few organizations...have addressed the questions of how or under what circumstances managers should use social networking sites as a means of evaluating job candidates or current employees. Still, it is clear that employers are using Facebook.”

Conversely, other employers may not be comfortable (or even largely familiar) with Facebook, do not know how it works, or what to do if they learn employees are making derogatory comments about the company or colleagues on their ‘private’ Facebook pages. Because social media is relatively new, most companies do not yet have policies to address its use. Inevitably, this is causing confusion and frustration for managers who are unsure of how to address employees using social media in inappropriate or potentially damaging ways.

As time goes on and this phenomenon continues to grow, we will see more and more examples of managers grappling with social media. As in the case of *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re) (2010)*, one of the most notable Facebook-related dismissal cases in Canada, one middle manager, unsure of how to properly address the Facebook ranting of two employees, informed the owner about the content, “and legal counsel was consulted to see what the appropriate action was...The Employer had never encountered a situation involving Facebook postings before” (para 45).

This sentiment is echoed in *Wasaya Airways LP v. Air Line Pilots Assn., International (2010)*. In this case, the arbitrator’s report underscores the uncertainty of the Chief Pilot and Director of Human Resources in handling Facebook-related human resource issues, and

highlights the Union's argument that some exception should be made for the grievor, given the newness of social media. The arbitrator notes, "Consequently, some leeway and benefit of the doubt ought to be extended to the grievor in the instant case, given that these types of social forums are something new and unfamiliar. Indeed, Mr. Macklin and Ms. Murdoch-Woods both testified as to their uncertainty of how to deal with Facebook or Facebook issues" (para 53).

While Facebook's accessibility potentially makes it easy for employers to go online and see what their employees are up to in their spare time, Canada's Assistant Privacy Commissioner issues a warning to employers thinking about using social media to spy on potential or current employees. Ms. Denham notes that employers and recruiters should not be using personal information collected from social media sources in a discriminatory manner against job candidates. She further advises that they "...should be aware that social networking pages may well contain inaccurate, distorted or out of date information...They need to be cautious about relying on such information" (Denham, 2010).

Employee Reactions and Perspectives

There are mixed views on employees' understanding of the link between social media use and the consequences of sharing personal information. Cohen (as cited in Smith and Kidder, 2010, p. 493) provides a harmless, yet telling example of how some users are not 'tuned in' to the fact that what they post in places like Facebook can be broadly viewed by others, and this can have an impact in the workplace.

He cites this exchange:

A co-worker apologized to me recently for being slow in a task. "It's probably just your insomnia from last night," I said. She was confused about how I knew, but I reminded her we were Facebook friends, and that she posted a 'status update' about her sleeplessness.

Other employees, on the other hand, are very well aware of the repercussions of their postings. In the case of *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re) (2010)*, the arbitrator noted the following exchange between the grievor, A.P., and his girlfriend:

The Facebook conversation continued with a post from A.P.'s girlfriend. She posted: Somethings (sic) just shouldn't be broadcasted on facebook (sic), especially when you still work there. A.P. appears to have posted back: That's the whole point honey (para 40).

As social media continues to turn our society into a giant fishbowl, for all of the world to look in, it appears that users *are* becoming more aware of the need to watch what they say and do online, and to protect their privacy. A study conducted to measure online 'reputation management' by the American Pew Research Centre found that an increasing number of social media users recognize the need to take measures to protect their privacy, limit who can see their pages, and 'revise' the information that others post about them. The study found that 65% of social media users have changed their privacy settings to limit what they share with others online, 56% have 'unfriended' certain contacts in their network, 36% have deleted comments made by others on their profile and 30% have removed their names from photos (Madden, 2010).

Experts warn, however, that even the most seasoned users, who have educated themselves on how to protect their privacy through the use of privacy settings, need to be extremely careful before posting to sites like Facebook. Rosenblum (as cited by Kobsa and Wang, 2009, p.2) argues that, "Internet users lack any realistic sense of how public their record of posts online is." Kobsa and Wang note that once content is posted to a social networking site, even if it is later deleted by the individual, the site owners can save or archive copies of the page, or other parties may possess printed copies, both of which could be harmful to the user in the future.

Because this is such uncharted territory, Canadians will no doubt be looking to precedent-setting legal cases to see how they are dealing with the privacy issues around Facebook use, as well as for clues as to how future legislation may be shaped to address these issues.

The Privacy Commissioner of Canada, Jennifer Stoddart, provides insight into how Canadian courts have been interpreting privacy issues in the context of social media sites, to date. She notes:

Several cases have dealt with the new issue of privacy and the production of contents of a Facebook profile. They offer us some insight on how the courts will weigh the competing requirements for fairness and transparency during the discovery process against privacy interests of litigants. 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 (Stoddart, 2010).

Ms. Stoddart's assertion should serve as a clear warning to Canadian employees who believe they can post what they wish about their employer or colleagues on Web sites like Facebook (and be fully protected under the PIPEDA legislation) that this may not be the case.

Gaps and Future Research

While research has begun in recent years to measure the opinions and behaviours of employers and employees with regard to Facebook use and the workplace, there remains much work to be done.

There are many knowledge gaps around the issue of Facebook use and its implications on the workplace. It remains unknown how many Canadian employers have already developed, or are planning to develop, social media policies to help guide them and their employees through the growing pains of the social media explosion. We also do not know how many use Facebook

as part of their business, or how many allow employees to use Facebook during their work day. Findings on how many employers believe they are within their legal rights to use (or how many have used) Facebook to monitor, discipline and dismiss employees based on posted content would help to reveal their perceived rights and their knowledge of privacy law. For those who do monitor their employees' Facebook use, it would be helpful to know how many of them have informed their employees of this, and how many, if any, have asked them to sign agreements, providing employers with consent to collect this information .

More research is also needed around employees and their knowledge about privacy settings and the appropriate use of social networking Web sites. Statistics on how many employees have used Facebook to comment on their work day, specific work tasks, their colleagues and employers would help researchers understand how the average social media user may be impacting their workplaces – and their careers. We also do not know how many employees believe the onus is on them to use social media sites responsibly and to consider the content that they are about to post (versus solely relying on their privacy settings to keep their information – appropriate or inappropriate – from getting back to employers), or whether they feel that employers are out of line in their use of social media as a monitoring tool.

As social media use continues to broaden, there will be a growing need for researchers to examine its potential far-reaching impacts on individuals, businesses, communities and society.

CHAPTER 3: METHODOLOGY

Arbitration cases play an integral role in settling disputes between employers and employees. In this study, employers' rights are examined through a content analysis of Canadian arbitration case decisions that focus on Facebook-related employee disciplinary actions and dismissals.

Research Framework

Research Approach and Design

The study uses a content analysis of secondary data (in the case of this study, Canadian arbitration case decisions). Berg (as cited in Harris, 2001) explains content analysis as a process during which written documents are examined and an objective analysis of messages is done using a clear set of established rules. There is great value in content analysis as an unobtrusive means of getting information “with great potential for studying beliefs, organizations, attitudes and human relations” (Neuman, as cited in Harris, 2001, p.193).

The decision to undertake a content analysis using arbitration case rulings was chosen for a couple of reasons. First, it can be argued that responses to questionnaires and interviews can be influenced by what participants think researchers want to hear, by a hesitation to discuss sensitive subjects, and by imperfect recall (Harris, 2001). Additionally, unlike focus groups, interviews or questionnaires that collect *anecdotal information* and *opinions* of how workplace and social media issues should be handled, arbitration case rulings provide *documented guidance and direction* for lawmakers and organizations. As a result, they were the information source of choice for the purpose of this research study.

Arbitration cases play a key part in settling disputes between employers and employees, who are represented by a union. Arbitrators have a responsibility, by hearing cases, analyzing

employer and employee perspectives, and considering past court, tribunal and arbitration case rulings, to determine whether employers are lawful in the treatment of their employees.

Arbitration case decisions provide evidence about how Facebook-related workplace issues are being perceived and handled by arbitrators, employers and unions. Arbitrators' rulings demonstrate their understanding of these issues, and can establish precedents to be used in the future by fellow arbitrators to rule on similar cases.

By analyzing arbitration case decisions, this research project will provide insights about the growing number of Canadian workplace issues that have arisen since Facebook's 'mainstream' introduction in September 2006, underscore current social media and privacy policy gaps, demonstrate how employers and employees dealing with these issues are affected, and provide a look into the future with regard to how Facebook-related workplace issues will be treated on a go-forward basis by employers, and the courts.

Case Selection Criteria

Finding the appropriate cases to analyze for this project involved a two-step process. First, Canadian tribunal cases involving Facebook and discipline or dismissal in the workplace were selected using the Quicklaw legal database. The second step in the case selection process was to further examine the search results to determine the fit for appropriate cases using the following criteria:

1. The arbitration cases must have a final decision rendered by an arbitrator.
2. The cases must be related to employee discipline or dismissal and Facebook use.

Research Summary

The intended goal of this research is to create awareness about the growing trend of Facebook-related workplace issues. It is also to provide insight to lawmakers, unions, companies and their employees about how arbitrators are ruling on these cases and the general direction in which this issue is moving, when an employer's right to access information is considered alongside an employee's right to privacy. The project's findings should provide insight to them to think differently about how the use of Facebook (and in fact, all social media) in the workplace may significantly impact employees, employers, organizations and society, as a whole. This study underscores the gaps that exist in workplace policy and legislation, and contributes to a research area that will continue to grow as social media use spreads in Canada, and around the world.

CHAPTER 4: FINDINGS

As noted in Chapter 3, this research study was done using a content analysis of Canadian arbitration case decisions. Case searches were conducted using the legal database Quicklaw, with a focus on cases referencing Facebook use and employee discipline or dismissal.

Case Inclusions

The cases were selected using a two-step process. Each case had to have a final decision rendered by an arbitrator and be related to an employee dismissal or discipline and Facebook use. Once the cases were selected, each was analyzed based on frameworks that identified elements such as the nature of the grievance, jurisdiction, arbitrator, employee and union information, industry sector, arbitrators' decisions, rationale, redress and jurisprudence to assess the presence of patterns and trends in the case information.

Findings

Case Selection Results

The process for selecting appropriate cases for study included two steps. First, case searches of "all Board and Tribunal cases" were done using the Quicklaw database. As Facebook was only launched in 2004 (and public membership became possible in September 2006), the search timeframe was narrowed to cases within the past 10 years. A search using the key words "Facebook", "discipline" and "dismissal" turned up 35 arbitration cases.

A second step, which included a closer review of the cases to ensure they met the criteria, revealed that 16 cases were not appropriate for this study. These cases could not be included in the study for the following reasons: 1) they were duplicates of another case in the list, 2) they

dealt with Facebook use, but did not involve a work-related dismissal or discipline (e.g. one case involved a grievor alleging he received hate messages through Facebook, but it was not related to a job or workplace situation), and 3) Facebook use was referenced within the case proceedings, but was not directly linked to the discipline or dismissal (e.g. a grievor who cited other colleagues' use of Facebook in the workplace as inappropriate, but whose own dismissal had nothing to do with Facebook use). Ultimately, 19 cases were used for this research study.

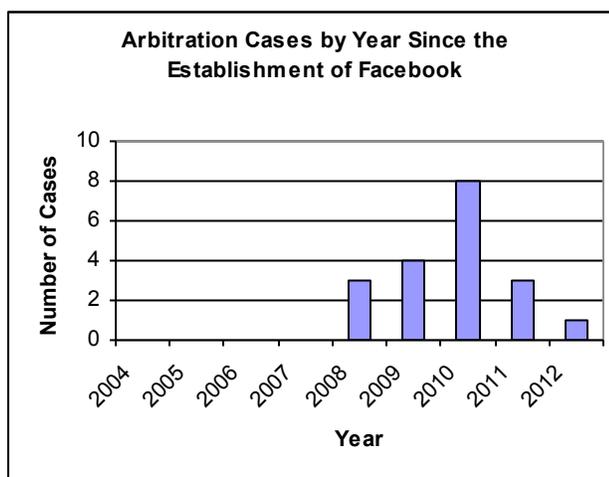
The resulting cases were then examined against two frameworks (attached as Appendix A) to look at case information, factors and outcomes including the year, jurisdiction, reason for the grievance, employer name, size, age and type, the grievor's name, gender, age, job position and employment record, arbitrator's name and gender, the arbitrator's decision and rationale, remedy and jurisprudence noted in the decision. Each case was carefully reviewed and information was collected to complete each field in the frameworks. These framework elements help to determine whether there are patterns (e.g. whether there are similarities among grievors, such as age, gender, or job position) or emerging trends (e.g. whether cases are increasing or decreasing year-over-year or if arbitrators are providing similar decision rationales), and can provide clues as to how similar future cases may be handled.

Descriptive Statistics

Following a process to establish a set of appropriate arbitration cases for this study, 35 cases were initially selected. A more thorough review of this group revealed that a total of 19 cases met the inclusion criteria for the study. The arbitration case decisions analyzed represent the period from June 20, 2008 to January 9, 2012. Even though Facebook was launched in 2004, there were no cases between 2004 and 2007. As illustrated in Figure 1, the review of the study case group shows there were three cases in 2008, four in 2009, eight in 2010, three in 2011, and

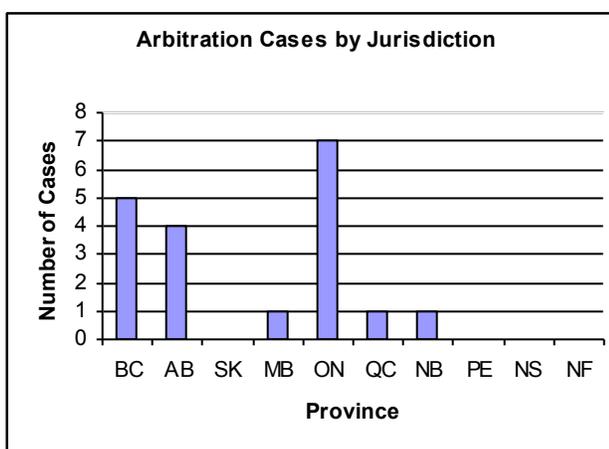
one case so far, in 2012. It can be noted that, although there was reduction in cases in 2008, the volume of cases is increasing over time.

Figure 1: Arbitration Cases by Year Since the Establishment of Facebook



Regionally, the majority of the cases (84%) occurred in Ontario, British Columbia and Alberta (with seven, five and four cases, respectively), with one case each in Manitoba, Quebec and New Brunswick. Figure 2 shows the breakdown by geographical location (jurisdiction).

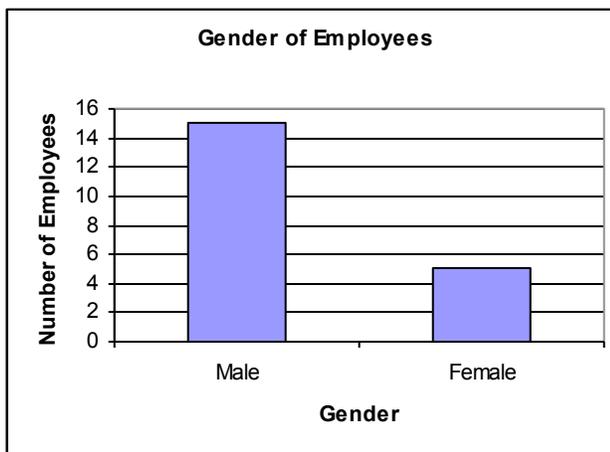
Figure 2: Arbitration Cases by Jurisdiction



There were a total of 20 employees involved in the 19 arbitration cases. Of this group, 15 (or 75%) were male and the remaining five (25%) were female, demonstrated in Figure 3, below.

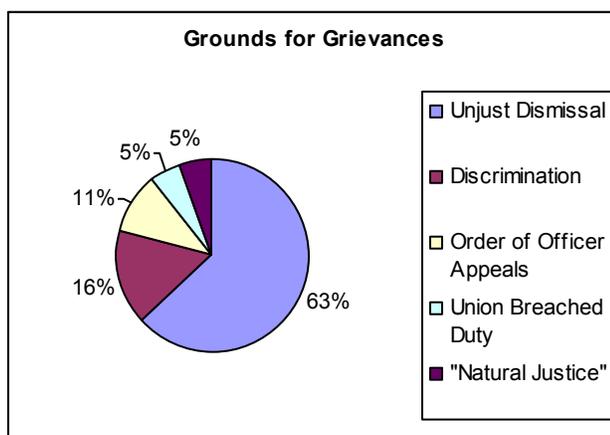
A total of 18 arbitrators heard the cases (one male arbitrator heard two of the selected cases). The make-up of the arbitrator group was 14 males (78%) and four females (22%).

Figure 3: Gender of Employees



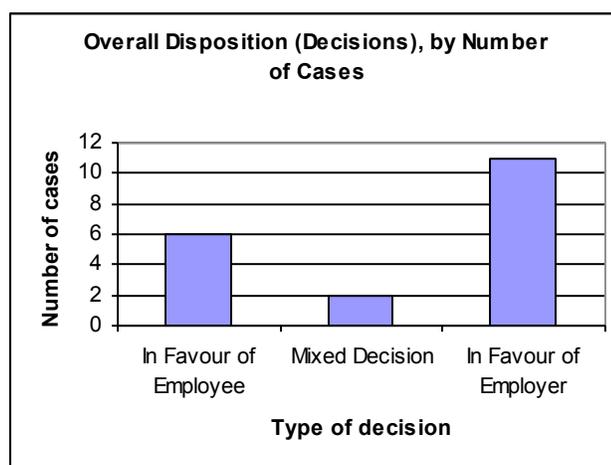
The grounds for grievances fell into several different categories, including unjust dismissal (12 cases or 63%), discrimination (three cases or 16% – one based on mental disability, one based on race and one human rights complaint), Order of Officer appeals (two cases or 11%), the Union breached its duty of fair representation (one case or 5%), and failure to observe the grounds of ‘natural justice’ (one case or 5%), (see Figure 4).

Figure 4: (Grievor’s) Grounds for Grievances



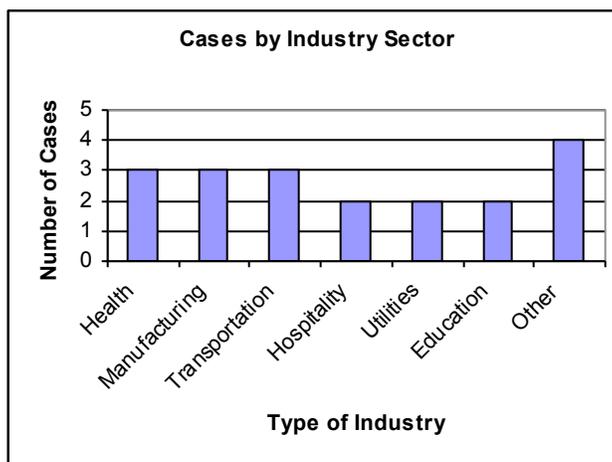
The arbitration case decisions were also examined by disposition (i.e. whether the grievance succeeded or the grievance was dismissed). In only six cases (or 32%) of the total group of 19 did the arbitrator rule fully in favour of the employee (see Figure 5). In two cases (11%), the grievances partly succeeded and were partly dismissed. Notably, 11 cases (or 58%) had decisions that were favourable for the employer.

Figure 5. Overall Disposition (Decisions), by Number of Cases



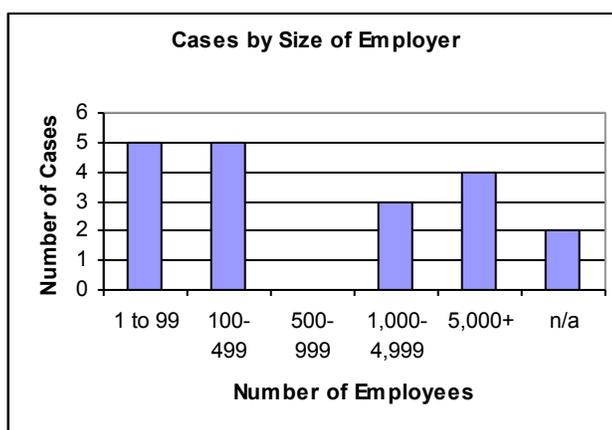
The employers and employees represented in these cases come from a variety of industries. As shown in Figure 6, the highest number comes from the health care, manufacturing, and transportation industries with three cases each, followed by hospitality, education and utilities with two cases each.

Figure 6. Cases by Industry Sector



The fact that the cases were spread out almost evenly across a number of industries suggests that no one sector is more susceptible to experiencing Facebook-related issues than another. However, when looking at the size of the employers involved in this study, it is of note that 12 of the 17 organizations for which this information is available (or 71%) in the cases have 100 or more employees, so larger employers do appear to be more prone to Facebook-related issues (and grievances initiated against them).

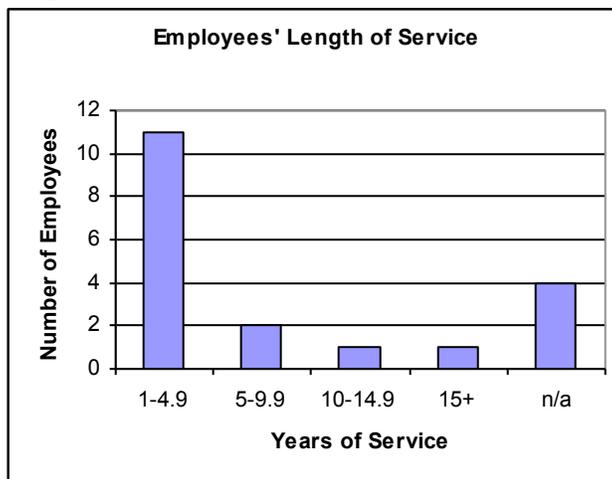
Figure 7. Cases by Size of Employer



The employees' length of employment with organizations was wide-ranging, extending anywhere from two months to 18 years of service. Length of service data was only available for

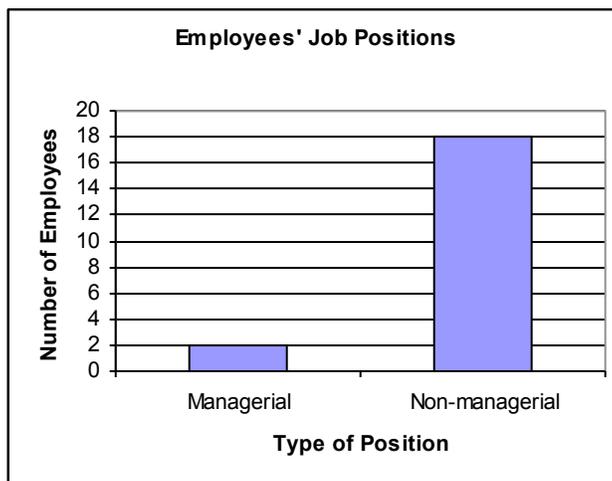
15 of the 20 employees; of those, 13 (or 87%) had less than 10 years of service. Two employees (or 13%) had been with their company for more than 10 years (see Figure 8).

Figure 8. Employees' Length of Service



Of the total group, only two employees (or 10%) held middle or senior management positions; the remaining 18 employees (90%) were in non-management positions.

Figure 9. Employees' Job Positions



Case Trends and Directions

The study cases were analyzed based on case factors and outcomes in the arbitrators' decisions (see Appendix A). As a result, several trends and directions are discussed in the sections below.

Table 1: Summary of Trends

Trends	Description
Increase in cases	Year-over-year rise in the number of arbitration cases relating to Facebook use and the workplace
More decisions in favour of the employer	Majority of arbitrators' decisions either favoured or partly favoured the employers
'Type' of employee involved in the cases	Mostly male, individuals in non-managerial jobs, individuals in larger companies, and individuals working with their employer less than 10 years

Trends

The issue of appropriate (vs. inappropriate) Facebook use and the workplace raises many questions from the perspective of employers, employees, the courts and lawmakers. While some remain largely unanswered, the review of the 19 cases in this study revealed two important trends in this area. The first is an increase in the number of arbitration cases relating to Facebook use and the workplace. The second is a growing number of cases in which the arbitrator is deciding in favour of the employer – this latter trend may come as a surprise to employees who think their accounts are private and protected from employers, by either their privacy settings or by PIPEDA legislation. The case review also highlighted a sub-trend – certain 'types' of employees who were involved in the cases. These trends provide a revealing glimpse into how Facebook-related issues are being dealt with now, and how we will look at them in the future.

Increase in Cases

Social media, and more specifically, Facebook, are fairly new phenomena. Because Facebook is only eight years old (and has only been available to the general public since

September 2006), we are just beginning to feel its effects in our homes, workplaces, and society. In the first three years following Facebook's launch, there were no workplace-related arbitration cases in Canada. However, in the past five years, the number of cases has steadily begun to climb. This is not surprising when we consider the fact that in December 2006, Facebook only had 12 million total users worldwide, and that number has now grown to over 845 million users (Facebook.com). In other words, Facebook membership has grown over 70 times its size since December 2006.

It is difficult to say how, or even if, the nature of the cases will change as time goes on. However, within this first trend, a sub-trend emerges when looking at the people involved in the cases – to date, the majority of employees have been male (75%), individuals working in a non-managerial position (90%), individuals working for a company that has 100+ employees (71%), and individuals who have been with their employer for less than 10 years. This will be important information for employers, policy analysts, researchers and social marketing experts to have as they begin to work on developing government and workplace social media policies, and put in place targeted public awareness and education campaigns around this issue.

With 19 cases in the past five years, and an increasing number of cases year-over-year (with the exception of 2011), arbitrators may be seeing more and more of these work-related Facebook cases in the years to come.

More Decisions in Favour of the Employer

There were three outcomes for these dismissal cases. The arbitrator either: 1) ruled in favour of the employee, and the employees retained their job or were otherwise compensated, 2) ruled in favour of the employer, and employees did not get their job back and did not have to be

compensated, or 3) held the grievance in part, in which case the dismissal remained, but the employee received some form of compensation.

Of the total group of 19 cases used in this study, the arbitrator ruled fully in favour of the employee in six cases (or 32% of the time). A good example to illustrate this is the case of *Alberta Distillers Ltd. v. United Food and Commercial Workers, Local 1118 (2009)*, where the arbitrator found no admissible evidence to prove the grievor had harassed another employee via Facebook (negative comments had, however, been posted on the grievor's Facebook page by one of his co-workers). Arbitrator Jones ruled that because there was no evidence to justify the company imposing discipline, let alone a dismissal, the grievor was to be reinstated immediately, with no loss of income, benefits, seniority or service.

In *Manitoba Lotteries Corp. v. General Teamsters Local Union No. 979, (2010)*, Arbitrator Simpson found that the employer had cause to discipline the employee (who claimed that he had a gun in his workplace locker – and later indicated he was kidding – but was known by colleagues to have posted pictures of his guns on his Facebook page), but determined that dismissal was excessive. Relying on the Supreme Court of Canada in *R. v. Khelawon (2006) 2 S.C.R. 787*, which deals with matters of hearsay (when a statement is recanted), and *Re Tuxedo Villa (2001)*, which establishes whether there is cause for discipline and grounds for dismissal, the arbitrator found that some of the 'evidence' was actually hearsay, and he was concerned by how the decision to terminate the employee was reached. He noted that, even though the grievor lacked truthfulness in his interview, he had been employed in excess of two years, during that time he had taken advantage of training to broaden his skills and he had a satisfactory work record. Based on all of the evidence, the 'employment relationship' had not been irreparably damaged. He found that dismissal was excessive, and reinstated the employee (however, the

period between the termination and reinstatement would serve as a suspension without salary, benefits or accumulation of seniority).

In two cases (11%), the grievances partly succeeded and were partly dismissed. This is demonstrated in the case of *Wasaya Airways LP v. Air Line Pilots Assn., International* (2010), in which an airline pilot for the company was dismissed for posting offensive comments about his employer in a “Top 10”-style list on Facebook. Arbitrator Marcotte noted that the Facebook comments insulted the company’s clients and staff, and were damaging to the company. He found that the grievor’s misconduct could negatively impact the employer’s reputation and ability to do business. That aside, the arbitrator also found that the punishment of dismissal was discriminatory, because it was inconsistent with the one-day suspension given to a co-worker who had responded to the Facebook comments. As a result, termination of employment was set aside and a four-month suspension was substituted. The grievor was to be paid full compensation and benefits for those four months. However, because Arbitrator Marcotte found that the Facebook entries had irreparably damaged the grievor’s future working relationships with colleagues and clients, the grievor was required to resign effective the end of the four-month suspension period.

In *Groves v. Cargojet Holdings Ltd.*, (2011), Arbitrator Somers found that the termination of the employee (who posted threats of violence against her colleagues on her Facebook page) was excessive. The arbitrator relied on *William Scott & Co. v. C.F.A.W., Local P-162*, (1977) to suggest that the Facebook postings were not a serious offense when compared to a direct threat made in the workplace. She made the distinction between the grievor in *Alberta and A.U.P.E. ("R")* (2008), who made repeated, lengthy and frequent entries in her blog that had unlimited access and could be viewed by anyone, and Ms. Groves, who posted comments to her

Facebook page, which had more limited access. Arbitrator Somers used the same jurisprudence, however, to note the grievor's complete lack of apology. In paragraph 117, she notes:

In *Alberta and A.U.P.E., supra*, arbitrator Ponak strongly condemned the employee's failure to tender a sincere apology to those she had hurt. I note that in the present case, the complainant has shown the same disregard for the effect of her statements on her co-workers. She has not shouldered responsibility for her offensive posts. She has been unwilling to recognize the serious impact of her behaviour. Unfortunately, like the employee in the *Alberta v. A.U.P.E.* case, Groves has shown a signal lack of remorse for what she has done. She has not tendered an apology, not taken responsibility for the disrespect and abusiveness of her comments.

In this case, the grievor did not ask to be reinstated, and Arbitrator Somers found that it would be not suitable, in any event. Nonetheless, the arbitrator took into account the grievor's lack of remorse and poor overall performance history while employed at Cargojet to make her decision. She awarded the grievor a month's salary, ordered her termination letter to be expunged from her record of employment, and requested that the grievor remove the Facebook postings which precipitated the discipline, if she had not already done so.

A total of 11 cases (or 58%) had decisions that were fully favourable for the employer. In *Credit Valley Hospital v. Canadian Union of Public Employees, Local 3252 (2012)*, for example, the arbitrator fully dismissed the grievance of a hospital employee fired for posting two photos on Facebook showing the scene where a teenage hospital patient had committed suicide a few hours earlier. Again, in this case, it was noted that the grievor was not truly remorseful, and that he did not accept responsibility for his misconduct. Arbitrator Levinson relied on the jurisprudence in *Re Municipality of Chatham-Kent and Canadian Auto Workers, Local 127 (Clarke) (2007)*, where the arbitrator upheld an employee's discharge, in part, because the grievor breached a confidentiality agreement by disclosing residents' personal information on a publicly accessible blog. He also cited *Re Vancouver Hospital and Health Sciences Centre and*

H.E.U. (Khan) (1995), where the arbitrator upheld the discharge of an employee who had a telephone conversation with someone with whom she shared confidential medical information about a resident. Arbitrator Levinson found that the grievor in the Credit Valley Hospital case had violated the Hospital's code of conduct and breached the confidentiality of patient, employee and corporate information, and the grievance was allowed (and the dismissal held).

In *Teck Coal (Cardinal River Operations) v. United Mine Workers of America, Local 1656, (2010)*, we see, once again, the arbitrator ruling on the side of the employer. The grievor, who claimed he suffered from a mental disorder (addiction to alcohol) and was not accommodated by his employer, was dismissed when he posted on his Facebook page that he was "in the city and ready to party" on the day following a meeting with his employer to discuss his poor job performance and frequent absenteeism. After this posting, the grievor missed the next four days of work, leading to his ultimate dismissal. In paragraph 35, Arbitrator Taylor notes:

The Grievor was repeatedly put on notice that his attendance would have to improve. He was told of the negative impact his absences caused the plant. He was repeatedly offered assistance. All to no avail. The Grievor has shown no remorse for his failings. He retreated to the last refuge -- alcoholism -- which he demands be accepted as the reason for his conduct.

Arbitrator Taylor concluded that there was no evidence that the grievor was an alcoholic. He noted that the grievor had demonstrated a clear preference to drink, party and be with friends over his work. He ruled that the grievor had broken the trust in the employer relationship, and that there was just cause for his dismissal.

Overall, these case findings are extremely significant, because they indicate that the arbitrators ruled in favour of the *employer*, either in part or fully, in 13 of the 19 (68%) cases, as was illustrated in Figure 5. This is a telling indication of how Facebook-related workplace issues

are likely to be treated in Canada in the coming years. The findings also signal to other arbitrators, law makers, employers and employees the need for a better understanding of social media's impacts, as well as clear policies, direction, legislation and education for business owners and employees.

Directions

The case review revealed three general case directions, as noted in Table 2, and discussed in the section below.

Table 2: Summary of Directions

Directions	Description
Jurisprudence	Jurisprudence cited was mostly unrelated to social media, but arbitrators are beginning to use some research study case decisions (which find in favour of employers) as jurisprudence in subsequent cases.
Main reasons for decisions (cases upheld)	Most commonly cited elements in arbitrators' decision rationales: <ul style="list-style-type: none"> ○ Grievor not credible or story not believable ○ Insubordinate employee behaviour ○ Past work disciplinary record ○ Lack of remorse, ownership or apology ○ Irreparable employment relationship
Lack of social media and privacy policies	None of the employers had a social media policy. Only two employers referred to general confidentiality policies, but they were not specific to employee privacy. This highlights the need for clear policies for employees.

Jurisprudence

The jurisprudence among all of the cases was examined. Because social media is still quite new, not surprisingly, the majority of cases cited by arbitrators in their decisions were unrelated to social media use (as an additional note, none of the arbitrators referred to federal or provincial privacy legislation in their findings). The arbitrators' jurisprudence did, however, refer to a number of other relevant issues.

Some cases were cited as jurisprudence in several of the research study case decisions. The case of *Re Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162, (1976)*, for example, as cited in *Wasaya Airways LP v. Air Line Pilots Assn., International (2010)* and in *Groves v. Cargojet Holdings Ltd. (2011)*, dealt with the appropriate approaches for severe discipline, including dismissal.

Also cited in those same two cases was *Ottawa-Carleton District School Board v. Ontario Secondary School Teachers' Federation, District 25 (Plant Support Staff) (2010)* which examines what was referred to as 'harmful off-duty actions'. The case states that,

...where an employer disciplines an employee for actions or behaviours that occur when the employee was off duty, the onus is on the employer to establish, generally, that the employee's actions are such that the off-duty conduct harms its public reputation, or product, or, adversely affects its ability to conduct its affairs and direct its workforce in an efficient manner, or, adversely affects other employees' ability to work with the employee (p.18).

Faryna v. Chorny, (1951) B.C.J. No. 152; (1952) 2 D.L.R. 354 (B.C.C.A.) and *Bell v. Dr. Sherk and others, (2003)* were also widely cited by arbitrators, employers and unions within this research study, and spoke to the issue of witness credibility, and being able to rule only on the information made available at the time of the hearing.

Both the *Chatham-Kent Re Chatham-Kent (Municipality) and CAW.-Canada, Loc. 127 (Clarke)(2007)* and *Re Alberta and A.U.P.E. ("R") (2008)* cases were also cited in a number of the research study cases. This jurisprudence found that where the Internet is used to display commentary or opinion, the individual doing so must know there is potential for virtually world-wide access to those statements.

Two of the research study cases, *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re) (2010)* and *Wasaya Airways LP v. Air Line Pilots Assn., International (2010)* were used as

jurisprudence for another of the research study cases, as they are considered landmark decisions with respect to the inappropriate use of Facebook by an employee. In the West Coast Mazda case, two employees were terminated after making repeated and offensive online remarks about their colleagues, bosses and the company's products. Arbitrator Matacheskie found the comments posted "offensive and egregious", and found that the individuals expressed hate toward and ridiculed their managers and colleagues to the extent that there was proper cause for dismissal. In the Wasaya Airways case, an airline pilot was dismissed for posting a derogatory "Top 10"-style list that the employer viewed as insulting to its clients and staff, and damaging to the Company's reputation. In this case, Arbitrator Marcotte found that the grievor's misconduct had the potential to negatively impact the Company's reputation and ability to do business, and the pilot's action had 'poisoned' the work environment.

The fact that arbitrators are beginning to cite these landmark cases, along with others like *Chatham-Kent Re Chatham-Kent (Municipality) and CAW.-Canada, Loc. 127 (Clarke)*(2007) and *Re Alberta and A.U.P.E. ("R")* (2008), and are using them to make their decisions, should serve as a warning to employees to think carefully before posting work-related comments on Facebook, or any other social media.

Main Reasons for the Arbitrators' Decisions

An examination of the study case dispositions revealed recurring arbitral findings. In cases where the arbitrators decided in favour of the employee, the common reasons provided were insufficient grounds for dismissal and no evidence to support any wrongdoing, as in the case of *Alberta Distillers Ltd. v. United Food and Commercial Workers, Local 1118 (Whiteside Grievance)*, (2009).

For the two cases in which the grievances were held in part, the arbitrators noted that there was just cause for discipline, but they also signaled that termination was excessive. It should be noted that for both of these cases, the arbitrator did not recommend a return to work. In *Wasaya Airways LP v. Air Line Pilots Assn., International (Wyndels Grievance)*, (2010) and in *Groves v. Cargojet Holdings Ltd.*, (2011), the arbitrators found that the relationship between the employer and employee was damaged beyond repair, and therefore, a return to work was not an option for either employee.

For the remainder of the cases there were several consistent findings noted by the arbitrators who upheld the dismissals (and determined that the employers had dismissed with just cause). Some arbitrators determined that the grievor's version of the story was not believable and lacked credibility. This was especially clear in the case of *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re)*, (2010), as Arbitrator Matacheskie concluded:

However, even if I accept A.P.'s version that he apologized for comments "made" on his Facebook page rather than for comments "he made" on his Facebook page, it does not make sense for him to not clearly express that he did not make the postings and someone had hacked into his account... This does not fit into the preponderance of probabilities (para 114).

Insubordinate behaviour was another common theme among the cases where arbitrators upheld the dismissals. In *RBI Canada 2000 Inc. (Re)*, (2008), Arbitrator McDonald has no doubt that the employer's decision to terminate was with cause. In paragraph five he notes, "This threat together with the acts of insubordination regarding continual lateness and improper internet use entitled RBI to dismiss Mr. Smith with just cause."

Several cases note that the employees' inappropriate behaviour continued through, and often despite, the discipline efforts of employers, rendering the employment situation untenable. (As a note, a number of employers referred to having a progressive discipline policy.) *Kootenay*

Society for Community Living (Re), (2011) provides a good example of this – where Arbitrator Mahil outlines seven separate occasions where the grievor was disciplined during the nearly two-and-a-quarter years she was with the company.

The three most commonly noted elements among *all* of the cases include: 1) the presence of a disciplinary record for past issues, 2) no remorse, sense of ownership, or apology (or perhaps worse, an insincere apology) from the grievor and, 3) the state of the employment relationship (whether it could be rebuilt, or was damaged beyond repair).

Eight out of the 19 (or 42% of the) arbitration cases in this study involved an employee who had been formally disciplined for past workplace issues. It is of note that, of this group of eight who had previously been disciplined by their employer, all eight (100%) either fully lost or partly lost their arbitration cases. In these cases, it appears that arbitrators are considering the sum of the employees' discipline issues when making their final decisions.

The absence of remorse, any ownership of the problem, or an acceptable apology was widely cited among arbitrators, as well. In 11 of the 19 (or 58% of the) cases, arbitrators noted and often chastised those who failed to take responsibility for their behaviour, show remorse or regret, or make a sincere apology (and some apologized only after being guided by their union or counsel to do so). In *Hydro One Networks Inc. v. Society of Energy Professionals*, (2010), Arbitrator Herman questions the value of the grievor's apology (even though the employee was eventually successful in his case) using these words:

He sent no apology to her through the Union or counsel until about a week before the hearing when advised to do so by counsel, hardly real remorse in the Employer's view. It submits that the grievor is not genuinely remorseful and really doesn't 'get it' even now (para 21).

In *Brisson v. Star Choice Communications Inc.*, (2009), Arbitrator Delude also notes a total lack of regret in the grievor, as well as a refusal to shoulder any blame for his own actions:

Furthermore, his angry comments to Mr. Munroe on the Monday following the drive downtown, as the latter has reported in a testimony that I have no valid reason to question, reveal very clearly that Mr. Brisson showed no regret and continued to escape any blame for his actions (para 39).

The relationship between employers and employees was also broadly noted. The ‘employer relationship’ was referred to by arbitrators in seven out of the 19 (or 37% of the) cases. Arbitrators spoke of the need to have trust and commitment between the two parties. They referred to employment relationships that could be repaired, and those that are irreparably broken, as in paragraph 56 of *Payukotayno: James and Hudson Bay Family Services v. Canadian Union of Public Employees and its Local Union No. 4313*, (2009), where Arbitrator Stout remarked, “The Grievor testified that he had done nothing wrong... In these circumstances, I have no faith that the Grievor could be rehabilitated and the employment relationship made viable.” Conversely, in paragraph 29 of *Hydro One Networks Inc. v. Society of Energy Professionals*, (2010), Arbitrator Herman leans heavily on the potential for the employment relation to be repaired in his decision to reinstate the employee. He notes:

There is little reason to conclude that other similar improper behaviour would occur should the grievor return to work, nor that the trust relationship between employee and employer cannot be repaired, even given the sensitivity of certain aspects of the grievor’s duties and responsibilities (para 29).

Employee Privacy and Social Media Policies

The cases were examined for the presence of privacy and social media policies among the 19 employers. These policies could help provide direction and guidance for employees, and establish a set of expectations and potential consequences, if breached. The case review revealed

that many company policies were noted as part of the 19 hearings (by both employers and unions). These included policies on confidentiality, harassment, non-discrimination, ethical conduct, workplace violence prevention, personal appearance, safety, equal opportunity, discipline, employees as clients of the agency, conflict of interest, telephone and computer access, computer use, and sexual harassment.

However, none made reference to any of the employers having a social media policy in place. As a note, only one case, *Alberta Distillers Ltd. v. United Food and Commercial Workers, Local 1118 (2009)* addressed the absence of the employer's social media policy when it cited, "The Company does not have a policy about governing what employees may say about the Company or other employees or how they may use social networking programs (such as Facebook) outside of the work place" (para 17).

Additionally, none of the 19 employers appeared to have a policy specific to employee privacy in place – although two cases, *Credit Valley Hospital v. Canadian Union of Public Employees, Local 3252 (2012)* and *Payukotayno: James and Hudson Bay Family Services v. Canadian Union of Public Employees and its Local Union No. 4313 (2009)* referred to confidentiality policies within the context of employees. In the first case, the Hospital's policy is clear in its effort to protect employee information when it states, "The Hospital views the disclosure of confidential patient/staff & corporate information by any employee/ volunteer, without proper authorization, as a violation of the individuals [sic] employment/volunteer obligation and will result in disciplinary action up to and including dismissal" (para 3). In the second case, the family services agency's confidentiality and release of information policy also refers to the need to keep client and employee information confidential, stating that, "...any

breach of confidentiality is grounds for disciplinary action, up to and including discharge” (para 10).

Barring these two examples which address the protection of employee information as part of an overall confidentiality policy, the case analysis uncovered a significant gap in the presence of social media and privacy policies for employees. Without clear policies in place, employees and employers will find themselves increasingly vulnerable to the potential career-related hazards that we are starting to associate with Facebook and social media.

CHAPTER 5: DISCUSSION AND CONCLUSION

There was a time not so long ago, that if an employee was upset about a work issue, colleague or boss, he would vent these frustrations on the shop floor, in the lunchroom, or perhaps at the local coffee shop. However, today's world is one in which, increasingly, people are taking to their Facebook pages to air their frustrations. Whether they consider it at the time or not, this creates a permanent record of that moment – one that can be viewed by hundreds, and even thousands, of people at once. The result is that there is now much more potential for employees to publicly damage the reputations of their companies, managers and colleagues. And because there is a written record of this damage, employees are also making themselves more susceptible to facing discipline and dismissal at the hands of their employers.

Summary of Study Findings

This study included a literature review and a content analysis of 19 Canadian arbitration case decisions regarding work-related Facebook issues. The cases, which covered the period from June 2008 to January 2012, revealed that the majority of the arbitrators' decisions (68%) either fully or partly favoured the employer, and less than one-third of the decisions (32%) were fully in favour of the employee. Additionally, year-over-year, an increasing number of Facebook-related employee arbitration cases are emerging.

A look at the employees involved in these cases revealed that there were three male employees for every one female. Ninety percent of the employees had worked in a non-managerial position. Additionally, the majority had worked with the employer for 10 years or less.

Most of the employers involved in these cases had 100+ employees. Additionally, a number of cases revealed that employers are unsure of how to deal with Facebook and social media. Moreover, they do not know what to do when they learn that inappropriate remarks about them or their company have been posted online.

As social media and Facebook are quite new, much of the jurisprudence offered in the study cases was not directly related to social media use, but referred to areas such as off-duty activities, use of the Internet, appropriate approaches for discipline, witness credibility, feeling remorse and the value of an apology. However, we are now beginning to see the use of these Facebook study case findings as jurisprudence in other similar arbitration cases. This means that these arbitrators' decisions are making, and will continue to make, significant impacts on future Facebook-related rulings.

Arbitrators cited several main reasons for upholding employee dismissals. They included the grievors' lack of credibility, insubordinate behaviour, a history of workplace discipline issues, a lack of remorse, sincerity, or apology, and an irreparable employment relationship. Where grievances were held in part, arbitrators determined that there was just cause for discipline, but felt that a termination of employment was excessive. In cases where the grievances were allowed, arbitrators most often noted insufficient evidence or insufficient grounds for dismissal.

The case analysis also showed that employers do not currently have privacy or social media policies in place for their employees. As a result, both are struggling to know how to deal with Facebook in the workplace, and pinpoint exactly what is considered appropriate (and inappropriate) Facebook use.

Research Implications

This study examined a human resources issue that will only continue to grow over time – whether employers have the right to use Facebook to monitor and evaluate, and even discipline and dismiss employees. The research suggests that, in the absence of social media and privacy policies for employers and employees, arbitrators could be seeing more of these cases as time goes on. This means that employers and employees in Canada may become increasingly embroiled in Facebook-related workplace issues, unless clear direction and legislation is provided by lawmakers.

As noted by Arbitrator Somers in *Groves v. Cargojet Holdings Ltd.*, (2011), “There is a small but growing body of jurisprudence attempting to define social networking activity and its relation to traditional employment law principles, such as insubordination and harm to business reputation” (para 73). The cases contained in this study and the arbitrators’ findings are both important and groundbreaking in this area. They will provide important guidance for lawmakers, and have the potential to significantly influence future directions and the policies that will be developed on workplace-related Facebook use.

Employers also have an important role to play in this issue. They must get educated, if they haven’t already, about social media and Facebook. They need to familiarize themselves with privacy legislation, and what their limits are, as employers, when it comes to using Facebook to see what employees are saying online. They also need to know how to handle a situation where an employee is posting damaging comments about managers, the company or its products. As necessary, they must engage human resources, information technology, legal, privacy and social media experts to assist them in developing policies for their companies. It is their responsibility to provide employees with guidance on this issue, and a basic understanding

of what is expected of them (and the repercussions if they do not follow the policy). It is not enough to merely have a social media or privacy policy in place. There needs to be clear communication to employees about what is acceptable, and education about what these policies really mean for them.

Employees also have to engage their managers in this discussion. They need to make sure they know what their employers expect of them when it comes to Facebook use. They must use common sense and err on the side of caution when posting comments to Facebook, or any social media. They must educate themselves about their online privacy settings and make sure their information is protected from anyone they do not want to see it. Finally, if they are frustrated at work, they should discuss their issues with their employer, instead of airing it publicly in a permanent, and potentially career-limiting, written record.

This issue is not going to go away any time soon. The immediacy of Internet and cell phone technology means that now, within seconds, thousands of people can have a window into our thoughts and activities. As illustrated succinctly by the union representative in *Sheridan College Institute of Technology and Advanced Learning v. Ontario Public Service Employees Union, O.L.A.A. No. 632 (2010)*:

...in a very short time he realized his actions were a stupid thing to do and he took down the post voluntarily. Rowe was not the first and likely will not be the last person to produce a document on the internet and live to regret it. It is an unfortunate aspect of super speed technology, once you press 'send', it is too late (para 119).

Limitations and Future Research

There are strengths and limitations of this research that must be taken into consideration. Because Facebook was launched in 2004, and only made available to the public in September

2006, there were a limited number of Canadian arbitration cases available for this study.

However, this study can provide a baseline for future content analysis work in this area, and give researchers the ability to measure the number of arbitration cases in Canada, year-over-year, into the future. It will also allow them to compare how arbitrators' decisions and rationales for these cases compare and contrast with those in future years.

The decision to focus solely on Facebook use was based on the fact that it is the most widely used social medium currently available, and it garnered, by far, the most results when searching for social media-related employee arbitration cases. As a result, this allowed the study to focus on cases dealing with a very specific issue. Conversely, there are countless types of social media that could be examined for similar workplace issues. As other social media gain more popularity (and users), this study has the potential to be expanded to include other types of social media use.

It should be noted that all of the cases reviewed for this study involve former unionized employees who have taken their cases to arbitration. Facebook-related discipline issues in non-unionized workplaces are not captured here. This study, therefore, is not representative of *all* workplace cases relating to this matter. Nonetheless, it does provide us with important insights into how arbitrators are deciding on these cases now, and how we will look at them in the future.

There are many potential areas for future research around Facebook, social media and workplace issues. It is unknown how many Canadian employers have social media policies in place to provide direction for their employees. We also do not know how many employers use Facebook as part of their business, or what percentage of employees use Facebook at work. Findings on whether employers believe they are within their legal rights to use Facebook to monitor, discipline and dismiss employees would demonstrate their awareness of the issue, and

flag where further education is necessary. Measuring employee levels of awareness about whether their Facebook use is currently being monitored by their employer would help demonstrate the level of communication between both parties about this issue, and provide the opportunity to ask employees whether they think it is appropriate for employers to monitor their Facebook pages.

Further research is also needed around employees' knowledge about privacy settings and the appropriate use of social networking Web sites. Statistics on how many employees have commented on Facebook about their workplace would help researchers better understand how the average social media user may be impacting their employer and their job. We do not know how, or whether, Facebook use on the job impacts productivity. We also do not know how many employees believe it is their responsibility to use social media sites sensibly or whether they merely rely on their privacy settings to keep their information away from employers.

Conclusion

This study provides evidence that, without properly developed (and communicated) privacy and social media policies and direction, employers and employees will see an increasing number of workplace issues related to the use of Facebook. As a result, arbitrators will see more of these cases before them in the years to come.

And while the Office of Privacy Commissioner of Canada warns employers about using social media to check out potential or current employees, this study shows that nearly 70% of the time, arbitrators are issuing decisions in Facebook-related cases that either partly or fully favour the employer. This should send a strong signal to employees that they must take measures to protect their personal information, or better yet, refrain from posting anything on Facebook that future or current employers could potentially view and use as grounds for discipline or dismissal.

What is clear is that employers and employees need to educate themselves about the ‘appropriate use’ of Facebook as it relates to the workplace. To help mitigate uncertainty and the requirement for disciplinary action, employers must develop social media-related workplace policies and communicate their expectations clearly to employees. Employees need to be educated on the policies, and engage employers with their concerns or questions to ensure they fully understand how the policies will impact them. Legislators and policy makers must consider the growing social media trend and the individual’s right to privacy in their future policy development work.

By continuing to study the issue of Facebook and the workplace, researchers will be well-positioned to fill in some of the existing information gaps, and help reduce the future impacts of workplace-related Facebook issues on companies and those who work for them.

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Appendix A: Arbitration Case Decision Analysis Frameworks

Part 1: Descriptive Information

Background Information	Analysis Factors
Case number	Employee gender
Decision date	Arbitrator gender
Employer name	Disposition (decision upheld/dismissed)
Employer age	Jurisprudence
Grievor name	Region
Grievor age	Year of case
Union name	Grievor gender
Union type	Grievor occupation
Union age	Jurisdiction
	Employer size
	Industry sector

Part 2: Case Factors and Outcomes

Case Factors
Employment record (positive history / discipline issues)
Reference to 'employment relationship'
Reference to remorse, accountability, or apologies
Case Outcomes
Decision
Rationale
Jurisprudence
Remedy

Appendix B: Reference List of Case Study Inclusions

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