

# Employee Privacy Update:

Supreme Court of Canada Releases Decision in *R v Cole*

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The Supreme Court of Canada released its much-awaited decision in *R. v. Cole*, 2012 SCC 53, on October 19. This criminal law case is notable for employers because it provides commentary on an employee's right to privacy when using an employer-supplied laptop.

#### THE FACTS

Cole, a high school teacher, was accused of possession of child pornography. The images were found on a laptop issued by his employer, which he was permitted to use for personal purposes under the employer's Acceptable Use Policy. The images were discovered when one of the school's information technologists was performing network maintenance activities. The school copied the files onto a disc and provided them to police, along with the computer. The police determined that a search warrant was unnecessary because the school authorities had represented that they owned the computer and its associated data.

#### PRIOR DECISIONS

At trial, the judge refused to admit the files from the laptop into evidence on the basis that they were obtained without a search warrant, contrary to Section 8 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The Ontario Court of Appeal partially overturned the decision and determined that the disc containing photographs of the student was legally obtained and therefore admissible. While Cole had a reasonable expectation of privacy in the laptop, this expectation was modified to the extent that he knew his employer's technician could access the laptop while performing maintenance. As a result, Cole had no expectation of privacy with respect to the limited type action performed by the employer in this case. The Court of Appeal went on to find that the police violated Cole's right to privacy when they searched his laptop without a search warrant.

#### THE SUPREME COURT OF CANADA DECISION

The Supreme Court of Canada held that the Court of Appeal correctly concluded that Cole had a reasonable expectation of privacy in his employer-issued computer. Fish J., writing for the majority, began the decision by stating that Canadians may reasonably expect privacy in the information contained on their work computers where personal use is permitted or reasonably expected. He emphasized that these devices contain "information that is meaningful, intimate and touching on the user's biographical core." (para. 2) As such, while workplace policies and practices may diminish an individual's expectation of privacy in a work computer, they do not necessarily remove the employee's right to privacy altogether.

Fish J. stated that one must examine totality of the circumstances in order to determine whether an employee has a reasonable expectation of privacy in an employer-issued computer. Four lines of inquiry guide this analysis: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject

## Contact

*Please direct questions or suggestions to:*

### **New Brunswick**

Trisha Gallant-LeBlanc  
506.462.4764  
tgallant-leblanc@coxandpalmer.com

### **Newfoundland & Labrador**

Chris Peddigrew  
709.570.5338  
cpeddigrew@coxandpalmer.com

### **Nova Scotia**

Alison Bird  
902.491.4138  
abird@coxandpalmer.com

### **Prince Edward Island**

Alanna Taylor  
902.629.3921  
ataylor@coxandpalmer.com

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matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable.

Fish J. found that the employer's policy, which alerted users to the fact that laptops may be searched and stated that the laptop and its entire contents were the property of the employer, diminished but did not eliminate Cole's reasonable expectation of privacy. Fish J. emphasized that "the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest." (para. 46) Further, the fact that the employer's policy permitted personal use strengthened the reasonableness of Cole's expectation of privacy.

Ultimately, Fish J. found that the illegally obtained photographs and files from Cole's computer were admissible into evidence because their exclusion would "have a marked negative impact on the truth-seeking function of the criminal trial process." (para. 97)

Abella J., the sole Justice in dissent, stated that employees have a reasonable expectation of privacy in the personal use of work computers regardless of ownership of the property. She asserted that as employees are increasingly given computers for their exclusive use, the ownership of the device or the data is becoming an increasingly unhelpful consideration. However, Abella J. would have excluded the evidence because it was obtained in clear breach of Cole's *Charter* rights.

### **LESSONS FOR EMPLOYERS**

The Supreme Court of Canada's decision in *R. V. Cole* suggests a trend to protect an employee's expectation of privacy in the personal use of employer property. It emphasizes the importance of a contextual approach which considers the circumstances of the use, the type of information at issue and the content of the employer's policies.

While this decision was made in the context of state interference with privacy rights, the Court's analysis will likely be persuasive in future employment law cases. Employers should bear in mind the Court's conclusion that an employee can have a reasonable expectation of privacy in an employer-supplied laptop where personal use is permitted. This principle will likely be extended to other electronic devices, such as smart phones.

Given the Court's comments, it is important for employers to implement a carefully drafted, reasonable policy that is tailored to the circumstances of the workplace. The policy should clearly state that employer-supplied devices will be monitored. Employers should also consider whether to authorize personal use of the devices. While these policies and practices may not be determinative of an employee's rights, they can diminish an otherwise reasonable expectation of privacy.