Employees Have a Reasonable Expectation of Privacy in Work Computers: Supreme Court of Canada

Author(s): Christopher Naudie, Mary Paterson

In R. v. Cole, 2012 SCC 53 (October 19, 2012), the Supreme Court of Canada held that employees may reasonably expect privacy in the information stored on their work-issued computers — at least where personal use is permitted or reasonably expected.

Background

Cole was a criminal case. The accused, a high-school teacher, was accused of having illegal content on his work laptop. His employer — the school board — owned the computer, but it had a policy that permitted staff to make personal use of their work-issued devices. The policy also warned — and teachers were reminded annually — that users should not expect to retain privacy in their files (other than email).

While performing systems maintenance, a school board technician discovered contraband on the accused’s computer. The employer seized the laptop and gave it to the police. Without a warrant, the police searched the contents of the laptop and laid charges against the accused.

The trial judge excluded all of the computer evidence under s. 24(2) of the Canadian Charter of Rights and Freedoms (Charter). In his view, the police had breached the teacher’s Charter right to be secure against unreasonable search and seizure. The Court of Appeal for Ontario similarly concluded that the teacher had a reasonable expectation of privacy and that the police had unlawfully interfered with this expectation. The Court excluded the laptop.

Though the Supreme Court of Canada allowed the appeal, holding that admission of the evidence would not bring the administration of justice into disrepute, the Court agreed that the teacher’s right to be secure against unreasonable search and seizure had been violated. Justice Fish, for the majority, and Justice Abella, for the dissent, both agreed that the police breached s. 8 of the Charter when they searched the contents of the work computer.

Application to Employers

Although the majority expressly declined to address the “finer points” of an employer’s right to monitor
its employees’ computer use, the *Cole* decision will impact how employers approach privacy on electronic devices and may foreshadow future developments in the law of personal privacy.

The centerpiece of *Cole* is the decision — the first of its kind from the Supreme Court — that an employee could have a reasonable expectation of privacy in the informational content on a work-issued laptop. This privacy interest exists independently of, and may survive, the employer’s ownership of the computer.

According to the majority decision, workplace policies do not determine whether an employee has a constitutionally protected privacy interest. Though the employer’s policy *Cole* diminished the strength of the teacher’s reasonable expectation of privacy, the policy did not eliminate it. The nature of the information on the teacher’s work laptop weighed too heavily in favour of recognizing that the employee had a privacy interest. By using the laptop for personal purposes, the teacher generated personal content that lay “at the very heart of [his] ‘biographical core’”.

Furthermore, *Cole* tells us that an employer cannot unilaterally set policies that expunge its employees’ privacy interests in work-issued devices. While the Supreme Court seems willing to take these sorts of policies into account, they are not considered conclusive. As Justice Fish wrote, “[w]hatever the policies state, one must consider the totality of the circumstances in order to determine whether privacy is a reasonable expectation in the particular situation...” (para. 53).

The conclusion that the teacher had a reasonable expectation of privacy meant that his right to be secure from unreasonable search and seizure was engaged. As a result, even though the employer was permitted to seize the laptop, the police still needed a warrant to search it. Justice Fish explicitly held that the employer had no power to consent to the search on behalf of its employee. The employer may own the computer and all of the surrounding IT infrastructure, but it still has no power to consent — on an employee’s behalf — to a government search. Though *Cole* dealt with the police, this rule would likely apply equally to any other state investigatory agency, such as the Competition Bureau, that might wish to search work computers.

If government authorities seek to search or seize an employee’s computer, the employer should consult counsel. Its employees may have a privacy interest in personal information stored on employer-owned devices.

**The Tort of Invasion of Privacy**

In addition to its impact on employers, *Cole* may also chart the course for the development of the tort of invasion of privacy that was recently recognized by the Court of Appeal for Ontario. For that tort to be established, the plaintiff must show that (a) the defendant acted intentionally; (b) the defendant invaded the plaintiff’s private affairs or concerns without lawful justification; and (c) a reasonable person would regard the invasion as highly offensive.

The Supreme Court’s willingness to recognize a privacy interest in personal information stored on work computers may give the new tort of invasion of privacy greater scope, potentially impacting the employee/employer relationship. It will be for future courts to develop “the finer points of an employer’s right to monitor computers issued to employees” (para. 60) and the application of the tort of invasion of privacy to personal information stored on work computers.

For more information on the new tort of invasion of privacy, see the Osler Update dated January 23, 2012 by Jennifer Dolman, Evan Thomas, and Lia Bruschetta.
For more information on the new tort of invasion of privacy, see the Supreme Court of Canada's decision in Cole, 2012 SCC 53 (October 19, 2012), the Supreme Court of Canada held that employees may have a reasonable expectation of privacy to personal information stored on work computers.

In his view, the police had breached the teacher’s right to be secure from unreasonable search and seizure. The teacher had a reasonable expectation of privacy and that the police had unlawfully interfered with this expectation. The Court excluded the laptop.

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The conclusion that the teacher had a reasonable expectation meant that his right to be secure from unreasonable search and seizure was engaged. As a result, even though the employer was the owner of the computer and all of the surrounding IT infrastructure, but it still had no power to consent — on behalf of its employee. The employer may have a policy that permitted staff to make personal use of their work-issued devices. The policy also warned — and teachers were reminded annually — that users should not expect to retain privacy in their files (other than personal files stored on the work laptop).

If government authorities seek to search or seize an employee’s computer, the employer should consult counsel. It’s employees may have a privacy interest in personal information stored on employer-owned devices. While the Supreme Court seems willing to take these sorts of policies into account when considering a reasonable expectation of privacy, the policy did not eliminate it. The nature of the content that lay “at the very heart of [his] ‘biographical core’.”

Furthermore, the teacher had a privacy interest. By using the laptop for personal purposes, the teacher generated personal information on the teacher’s work laptop weighed too heavily in favour of recognizing that the employee had a reasonable expectation of privacy, the policy did not eliminate it. The nature of the content that lay “at the very heart of [his] ‘biographical core’.”

The center of the case was the teacher’s reasonable expectation of privacy. The Court excluded the laptop.

As a result, the Court held that the teacher’s right to be secure from unreasonable search and seizure had been violated. Jusce Fish, for the majority, and Jusce Abella, for the dissent, both agreed that the police breached s. 8 of the Canadian Charter of Rights and Freedom when they searched the contents of the work computer.

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The trial judge excluded all of the computer evidence under s. 24(2) of the Canadian Charter of Rights and Freedom. The police searched the contents of the laptop and laid charges against the accused.

Although the majority expressly declined to address the “finer points” of an employer’s right to monitor computers issued to employees “(para. 60) and the applicability of the tort of invasion of privacy to personal information stored on work computers. It will be for future courts to develop ‘the finer points of an employer’s right to monitor computers issued to employees.’”

While the tort of invasion of privacy was recently recognized by the Court of Appeal for Ontario. For that tort to be established, the plainff must show that (a) the defendant acted intentionally; (b) the defendant invaded the plaintiff’s privacy to personal information stored on work computers.

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In Cole, the majority did not bring the administration of justice into disrepute, the Court agreed that the teacher’s right to be secure from unreasonable search and seizure was engaged. As a result, even though the employer was the owner of the computer, the police still needed a warrant to search it.
The Tort of Invasion of Privacy

The centerpiece of the decision was the Court's application of the test for invasion of privacy to the facts of the case. The Court found that the teacher, R. v. Cole, had a reasonable expectation of privacy in his work laptop. The policy of the school board, which permitted staff to make personal use of their work-issued devices, did not eliminate the employee's privacy interest. The nature of the employee/employer relationship was such that the employee could have a reasonable expectation of privacy in the information stored on a work-issued computer.

The Court noted that the employee's reasonable expectation of privacy was not diminished by the fact that the employer, the school board, owned the computer. The employer's right to monitor computers issued to employees was balanced against the employee's right to privacy. The Court held that the employees had a privacy interest in personal information stored on employer-owned computers.

The Court also considered the impact of the invasion on the employee. The teacher, R. v. Cole, had a privacy interest in personal information stored on his work laptop. The police had breached his reasonable expectation of privacy by searching his laptop. The Court excluded the laptop from the evidence.

The decision was significant because it established the tort of invasion of privacy as a cause of action in Canadian law. The decision also highlighted the importance of protecting personal privacy in the workplace.

For more information, please visit osler.com or contact the following individual(s):

**TORONTO**
Christopher Naudie, Partner, Litigation
416.862.6811
cnaudie@osler.com

**TORONTO**
Mary Paterson, Partner, Litigation
416.862.4924
mpaterson@osler.com

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