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# EMPLOYEE'S RIGHT TO PRIVACY EXTENDS TO INFORMATION STORED ON EMPLOYER'S COMPUTER

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The Supreme Court of Canada has concluded that employees may reasonably expect privacy in the information contained on workplace computers, where personal use is permitted by the employer or reasonably expected. The decision in *R. v. Cole*, 2012 SCC 53, may surprise some employers who felt they had unlimited access to information stored on employer-owned computers, laptops, smartphones and other devices provided to employees.

**The Facts in *R. v. Cole***

A high school teacher was charged with possession of child pornography following the discovery of nude and partially nude photographs of an underage female student on the accused's laptop, by a technician performing routine maintenance. The school board who employed Cole provided him with a laptop computer for his work, but permitted him to also use it for personal use. Written school board policy stated that all data and messages generated on, or handled by, the school board's computer equipment would be considered property of the school board and could be subject to access by school administrators in certain situations. It was unclear from the policy, however, whether the laptops would be subject to general searches or random monitoring by the employer.

The school board technician who discovered the photographs informed the school principal. The photographs were copied and provided to the police. With the consent of the laptop's owner (the school board), the police then conducted a search of the laptop without a search warrant. At trial, the accused applied, successfully, to exclude the evidence obtained from the search of the laptop on the ground that it was obtained in violation of section 8 of the Canadian Charter of Rights which protects against unreasonable search or seizure. The Crown appealed and the case eventually found its way to the Supreme Court of Canada.

**The Supreme Court's Decision**



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The fact that the school board owned the laptop, and that its written policy stipulated that all data and messages generated on, or handled by, the school board's computer equipment were considered to be the property of the school board, was not enough to eliminate entirely the employee's reasonable expectation of privacy. Where an employee's personal use of workplace computers is permitted or reasonably expected by the employer, the Court found the employee has a reasonable expectation of privacy in the personal information contained in those computers. A written policy may diminish the employee's expectation of privacy in work computers, laptops, tablets or smartphones, but it can't remove the expectation entirely.

Where a person has a reasonable expectation of privacy, it is protected by s. 8 of the Charter. The police in this case were found to have infringed the accused's right to be protected against unreasonable search and seizure. Although the school board employer had the lawful rights to seize and search the laptop, that right of the employer did not give the police the same power. After the school board informed the police of the information discovered, the police should have obtained a warrant to search the computer. Even though the evidence was obtained in an unconstitutional manner, however, the Supreme Court refused to exclude its use in the criminal proceedings.

**The Trend Toward Greater Protection of Privacy Rights Extends to the Workplace**

Although *R. v. Cole* was a criminal law case, it has great significance to employment law. British Columbia is one of only four provinces in Canada with privacy legislation. The tort of violating the privacy of another person is recognized and protected by the BC *Privacy Act.* The B.C. legislation does not, however, provide a precise definition of what constitutes an invasion of privacy. The decision in *R. v. Cole* suggests there are limits over just how far employers can go in monitoring the information stored on the digital devices they supply to their employees. The case suggests that employees can expect some privacy in the personal information they generate or store on the employer's devices.

In provinces like Ontario, which don't have similar privacy legislation, the courts have recently recognized a new tort for "intrusion upon seclusion". In 2012, the Ontario Court of Appeal became the first Appellate Court in Canada to recognize the common law tort of invasion of privacy. In *Jones v. Tsige*, 2012 ONCA 32, Ms. Jones and Ms. Tsige worked at different branches of the Bank of Montreal. When Ms. Tsige became involved in a relationship with Ms. Jones' former husband, Ms. Tsige accessed Ms. Jones' personal bank account information at least 174 times. There was no legitimate reason for viewing the information and it was contrary to the bank's written policy and code of conduct for employees. The bank disciplined its employee, Ms. Tsige, for the unauthorized access to Ms. Jones' account, Ms. Jones then successfully sued Ms. Tsige for "intrusion upon seclusion" which the court described as follows:



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*"One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person."*

The decision in *R. V. Cole* confirmed that employees do have a reasonable expectation of privacy with respect to information stored on workplace computers. The case has changed the old blanket presumption that employees had no right or expectation of privacy on workplace computers. Now, the expectation of privacy depends on written policies, employer practices and customs governing the use of workplace computers.

These recent court decisions suggest that employers could face litigation if they go too far in monitoring the digital devices they supply to their employees. Employer access to personal information on workplace computers is now more likely than ever, to be scrutinized and employers too could be held accountable if they intrude on an employee's reasonable expectation of privacy.

In a day and age when more and more employers are issuing laptops, tablets, smartphones and other devices to employees to ensure they are connected to the office "24/7", it is becoming more difficult for employees to separate their work life from their personal life. The eight-hour work day is becoming a thing of the past. As the lines get blurred between work and personal time, it is not surprising that the use of computer and other devices for work and personal use also becomes blurred.



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