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Canada's Highest Court Rules on Employee Privacy Rights over Work Computer

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Introduction

In *R. v. Cole*, 2012 SCC 53, the Supreme Court of Canada held that a warrantless search and seizure by police of a teacher's employer-issued computer containing sexually explicit images of a female student were in violation of the teacher's rights under the *Canadian Charter of Rights and Freedoms*. In a time when employers are increasingly allowing (either explicitly or implicitly) employees to use employer-issued laptop computers, smart phones, and other digital devices for their own personal use, this decision, as summarized below, offers a number of important lessons.

Background

The accused, Richard Cole, was a high school computer science teacher in north eastern Ontario who also had "supervisory duties" with regards to the school's computer network. This meant that Mr. Cole had certain domain administrative rights which gave him access to the network server and all of the computers within the school that used the server, including student laptops.

On Friday, June 23, 2006, an information technologist monitoring the computer network noticed unusual activity on Mr. Cole's school-issued computer. Concerned about the stability of the network, he investigated further and discovered a "hidden" file in the "My Documents" folder of Mr. Cole's computer. When the technician, in the company of a co-worker, opened the file, they discovered several pornographic pictures. Mr. Cole, it was later

determined, apparently downloaded the pictures from another student's laptop. The following Monday, the technician contacted the school principal who subsequently determined that the pictures depicted a female student from grade 10.

The principal directed the technician to copy the pictures to a compact disk. Following instructions from the school's superintendent and the school board, the principal met Mr. Cole on his way to the school the next morning and seized his laptop. Mr. Cole did not resist, although he refused to tell the principal his password. Later that day, the school managed to access Mr. Cole's laptop and copied the temporary internet files from it onto a second compact disc. The school then deleted the images from Mr. Cole's computer so that no one else could view them.

The school turned over the two discs and the laptop to the police. Without obtaining a search warrant, the police viewed the contents of the discs and sent the computer for a forensic analysis. The officer in charge later explained that although he had considered obtaining a search warrant, he decided it was not necessary because the laptop was the property of the school.

Mr. Cole was later arrested and charged with possession of child pornography and unauthorized use of a computer contrary to the *Criminal Code*.

The School's Policy on Computer Use

On an annual basis, students at the school were required to sign an Acceptable Use ("AU") Agreement, which regulated their access to the school's computer network. Among other things, the AU Agreement provided that the school "may monitor all student work and e-mail including material saved on laptop hard drives. Users should NOT assume that files stored on network servers or hard drives of individual computers will be private". In addition, each year the principal of the school addressed the teachers at a staff meeting and explained that the AU Agreement also applied to them. In addition, a school board

policy, which teachers were responsible for knowing and following, governed the acceptable use of school information technology. Among other things, the policy provided that "all data and messages generated on or handled by board equipment are considered to the property of the [school]". The policy also allowed limited "incidental personal use" of information technology, prohibited the posting or accessing of certain inappropriate content (such as sexually explicit material), and provided that while email was considered private, the school board could open email in certain circumstances, such as if inappropriate use was suspected.

The Lower Courts' Decisions

On a pre-trial application before the Ontario Court of Justice, the trial judge excluded all of the computer evidence pursuant to section 24(2) of the *Charter*, after concluding that the police had infringed Mr. Cole's right to be secure against unreasonable search or seizure under section 8 of the *Charter*. More particularly, the trial judge determined that Mr. Cole had a reasonable expectation of privacy in the laptop's contents and that the actions of the police, in seizing the contents of this material without a warrant, represented "an egregious...breach of Mr. Cole's section 8 *Charter* rights."

On a summary conviction appeal to the Superior Court of Justice, the appeal judge reversed the trial judge's decision, after concluding that Mr. Cole did not have a reasonable expectation of privacy in the laptop's contents. The Court emphasized that the laptop was the property of the school and that the school's policies made clear that information stored on such property was not private. Further, Mr. Cole was aware of this policy or should have been aware of it, particularly given his administrative duties at the school. Finally, Mr. Cole's lack of a reasonable expectation of privacy did not change when the school turned over the material to the police.

The Court of Appeal of Ontario disagreed and excluded all of the material except the compact

disk containing the pictures of the student. The Court emphasized that the school permitted Mr. Cole to use his laptop for personal use, thus giving him a reasonable expectation of privacy in the personal information on the computer. Further, Mr. Cole did not abandon that privacy interest just because the computer was in the hands of his employer. Accordingly, the police's search of the laptop and the temporary internet files was *prima facie* unreasonable. However, because Mr. Cole had originally copied the pictures from the school's network, he had no privacy interest in them (rather, the student did). Thus, the transfer of the pictures to the police was not a seizure.

Supreme Court of Canada

The Supreme Court of Canada agreed with the Court of Appeal of Ontario that Mr. Cole had a privacy interest in his personal information on the computer. In a judgment written by The Honourable Mr. Justice Fish, the Court reasoned that just as Canadians have a reasonable expectation of privacy in their own personal computers, they also have a privacy interest in their work computers "at least where personal use is permitted or reasonably expected". When used for personal use, such computers, regardless of where they are located, "contain information that is meaningful, intimate, and touching on the user's biographical core." Given the school's workplace policies and that the computer was school property, however, Mr. Cole had a "diminished expectation of privacy" in comparison to the privacy interest he would have had in his own personal computer. Nonetheless, such a diminished expectation of privacy was still a reasonable state intrusion "under the authority of a reasonable law". Here, the police could point to no such law. Further, although the school's seizure of Mr. Cole's laptop was lawful, it did not furnish the police with the same authority. Thus, in searching and seizing the computer and the discs, the police violated Mr. Cole's section 8 rights.

The Court decided, however, that the evidence should not be excluded. The Court found that the

conduct of the police did not constitute an "egregious breach of the *Charter*" given that the law at the time governing privacy interests in workplace computers was "still unfolding". Further, the police did recognize and respect Mr. Cole's privacy interest in certain, private material on the laptop (i.e. pictures of his wife). The Court also emphasized Mr. Cole's diminished privacy interest in the computer, the fact that the material would have necessarily been discovered if the police had obtained a warrant, and the Crown's submission that the evidence was critical to its case.

In dissent, The Honourable Madam Justice Abella agreed with the Court that Mr. Cole's section 8 rights had been infringed. In her opinion, however, the disc containing the temporary internet files and the laptop computer should have been excluded.

Implications for Employers

In its decision, the Court expressly stated that because Mr. Cole was not challenging the actions of the school,¹ it would leave "for another day the finer points of an employer's rights to monitor computers issued to employees". Nevertheless, the Court's decision does have some important implications for employers. If you would like further details or assistance with these issues, please feel free to contact your FMC LLP Employment and Labour lawyer.

¹ Before the Court of Appeal of Ontario, the Crown conceded that the school board was subject to the *Charter*. However, that Court determined that the school's technician did not violate the *Charter* when he discovered the pictures during routine maintenance activities. The Court also concluded that the school board did not act unreasonably within the meaning of section 8 of the *Charter* when it searched and seized the laptop, particularly given the school's overriding obligation to ensure the health and safety of its students. Mr. Cole did not challenge these issues before the Supreme Court of Canada.

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