Canadians may reasonably expect privacy in the information contained on their own personal computers. In my view, the same applies to information on work computers, at least where personal use is permitted or reasonably expected.”

Supreme Court of Canada Comments On Work Computers and Privacy Expectations

In *R. v. Cole*, a recent criminal law decision, the Supreme Court of Canada offered a number of comments regarding privacy expectations of employees in relation to personal information on their work computers. The Court’s comments were broad in nature and it is likely they ultimately will have an impact extending beyond the realm of criminal law and into the sphere of labour and employment law.

The case involved a high-school teacher who had been provided with a laptop for his use in teaching. The School Board issued a *Policy and Procedures Manual* (the “Manual”) which spoke to the use of computers by teachers. The Manual stated personal use of school computers was permitted but also included the following important qualifications:

- all data and information generated or transmitted on Board computers or related equipment was considered to be Board property and not the property of the users of the computers and related equipment; and,

- the Board’s administration reserved the right to open private e-mails if it considered it necessary to do so in order to maintain the system or where there was a suspicion of inappropriate use.

The Board also had an *Acceptable Use Policy* which the school principal reviewed annually with all teachers in the school. This policy included the statement that “[users] should NOT assume that files stored on network servers or hard drives of individual computers will be private”.

In a majority decision, the Court set out in general terms the privacy concerns that may arise in relation to personal use of computers. It stated computers that “are reasonably used for personal purposes” may contain information that is “meaningful, intimate, and touching on the user’s biographical core”. The Court further stated the information in a computer arising from personal use may reveal private information about a person’s likes, dislikes, interests, the subject matters pursued through internet searches, and so on. It further stated that “while workplace policies and practices may diminish an individual’s expectation of privacy in a work computer” in regard
to such private information, “operational realities” might result in a limited privacy right being preserved.

The Court ruled that “privacy is a matter of reasonable expectations”. In order to determine whether an employee has a “reasonable expectation of privacy” in regard to any personal data in his or her work computer, one must consider the “totality of the circumstances” in which the following factors are relevant:

- the nature of the information in question;
- whether the employee had a direct interest that information;
- the employee’s subjective expectations in regard to privacy; and
- the objective reasonableness of those expectations.

The Court stated that while the ownership of the computer and related equipment was relevant, it was not determinative and therefore should not be accorded undue weight. The Court also stated the “context” in which the computer was used for personal purposes is significant and it is necessary to have regard to the policies, practices and customs of the workplace in relation to the personal use of computers. Accordingly, the Court stated the wording of a policy, while relevant, will not be determinative since the “totality of the circumstances” must be considered.

The Court concluded that in the circumstances of the case before it, the teacher’s subjective expectation of privacy was objectively reasonable. However, the Court also stated that in the particular context, including the legislative context (the Board was subject to the Education Act, which imposed duties on the employer that do not apply to other employers) as well the relevant workplace policies and practices, the teacher’s privacy rights were not absolute – the Court characterized those rights as “diminished” but not eliminated entirely.

Much about this decision relates to the criminal law as well as the special context in which school board operate. Nonetheless, the following broad principles set out in the decision are likely to be viewed as relevant whenever an issue arises regarding an employer’s privacy rights in relation to personal information contained in a work computer:

- where personal use of a work computer is permitted and/or reasonably expected, an employee will have a basis for a reasonable expectation of privacy in relation to personal information stored in the computer;
- such reasonable expectation of privacy may be diminished by a number of factors, including the ownership of the computer and certain practices in the workplace, though ownership is not determinative and the “totality of circumstances” must be considered;
- a computer policy that restricts the personal use of computers will be relevant but not will not be determinative in the face of evidence of a practice of permitting some personal use;
• if an employee establishes a privacy right, even a limited privacy right, the breach of that right by the employer may result in the latter being prevented from relying on the information in question in subsequent legal proceedings;

The law regarding privacy rights in relation to computers continues to evolve. This case confirms that the issue of privacy rights in the workplace involves some complexity and requires a degree of sophistication when being addressed by employers. However, the case does not detract from the importance of employers having well written computer use policies. Such policies should be clear, updated, and well-documented, particularly where employers permit their employees to use work-issued computers for personal purposes. All employees should be informed and educated about the scope and impact of such policies and the employer should ensure its practices and procedures are consistent with said policies.

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