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Workplace Law E-ssentials

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Key Development in Employee Privacy Expectations on Work Computers



This decision has critical implications for law enforcement investigations where possible evidence of criminal activity by an employee is derived from an employer owned technological device. Further, it remains to be seen whether *Cole* will lead to the imposition of limits on what use an employer can make of personal employee data stored on its computer.

Mr. Cole was a high school computer science teacher who administered his school's lap top program. Mr. Cole was responsible for supervising and monitoring student lap top use (including emails sent and received by the students). In performing his duties, Mr. Cole found nude images of an underage female student. He kept copies of these images and stored them in a secret file on his school issued laptop. In Mr. Cole's school, it was common practice for teachers to make personal use of their school issued tops and they would take them home after school, on weekends, and during summer holidays.

Mr. Cole's employer (through an IT employee) discovered his secret file and the pornographic images of the underage female student. The Board's IT employee reported what he had found on Mr. Cole's computer to the school's principal. The principal requested that Mr. Cole return his lap top and supply his password. Mr. Cole returned the lap top but refused to provide his password. Moreover, Mr. Cole specifically asked that the secret file not be accessed by the Board's IT professionals allegedly because it contained photographs of his wife.

Once the lap top was back in the employer's possession, a copy of the lap top's hard drive was made and Mr. Cole's internet browsing history (which yielded further pornographic images) was preserved. The employer then delivered copies of the disc and the lap top to the Police. The Police knew that the lap top was owned by the employer and the investigating officer was aware that Mr. Cole and other teachers at the school made personal use of the lap tops issues by the school Board. Nonetheless, the Police failed to obtain a search warrant before examining the lap top and the disc. As a result of the Police investigation, Mr. Cole was charged with possession of child pornography and unauthorized use of a computer in violation of ss. 163.1(4) and 432.1(1) of the *Criminal Code*.

At the Supreme Court of Canada, a six to one majority concluded that where an individual reasonably uses a computer for personal purposes, whether at work or at home, and irrespective of ownership, personal information that is "meaningful, intimate, and touching on the user's biographical core" will be contained on the computer. A reasonable expectation of privacy over that personal information is reduced but cannot be totally eliminated by an employer policy or by the employer's ownership of the computer.



We are proud to announce that Norm Grosman has been appointed Editor-in-Chief of Canadian Cases on Employment Law (CCEL).

Norm has been an Assistant Editor of CCEL for many years. Norm is also the author of *A Practical Guide to the Law of Hiring* (Canada Law Book) and a regular contributor to *The Employment Bulletin* (Canada Law Book).

Lexpert's Peer Review process has selected Norm Grosman and Bill Gale as two of the "Top 500 Lawyers in Canada" for 2012 – on a proportionate basis, we are certain no other law firm in Canada can proudly say that 20% of its lawyers are ranked amongst Canada's top 500!

Crucially for employers, the Supreme Court determined that the employer school board in this case acted properly in the circumstances. The employer had a legal responsibility to "maintain a safe school environment" and a related "reasonable power to seize and search the lap top". However, this "did not furnish the police with the same power." The Supreme Court disagreed with the Court of Appeal over the remedy provided to Mr. Cole for the Police's violation of his *Charter* rights. However, both the Court of Appeal and the Supreme Court concluded that the employer's policy that governed lap top use, which provided notice to school employee's that their use of the lap tops was subject to employer surveillance, reinforced the employer's right to conduct the type of monitoring and seizure that resulted in the discovery of Mr. Cole's criminal behaviour.

Critically, an employee's expectation of privacy is primarily determined on the basis of whether employer policies governing the use of computer technology are in place and followed. Employers must use such policies to reserve for themselves a right to set and enforce policies related to workplace technology. In this context, surveillance and monitoring of employer owned technology and the right of the employers to conduct investigations will not be arrested by employee privacy interests. Employers who fail to impose such policies and who have them but fail to enforce them may ultimately find themselves on tenuous ground when investigating or attempting to discipline or dismiss an employee who has misconducted themselves using employer owned technology. While arguably *Cole* does not take us there, future employment law cases will take notice of how the Supreme Court treated employee privacy interests in personal data and more robust employee rights may find fertile ground in the *Cole* decision. Employers should take notice and ensure that they have the policies and enforcement mechanisms in place to counter employee privacy arguments.

Termination & Outplacement Checklist

Pre-termination:

- Consult with lawyer – with or without just cause
- Preparation of termination letter – attention to detail
- Communication to retained staff – when / how

Severance Consideration:

- Employment Contract – does one exist
- Employment Standards Act (minimum legal obligation)
- Additional weeks/months (company policy / common law)
- Collection of company property
 - Telephone – company/personal use
 - Computer – company/personal use
- Benefits
 - Will they be continued? For how long?
- Use of Office (Working notice)
 - How long?
- Vacation Pay

Termination Meeting:

- Who will attend?



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- What to say? – how to control the unexpected
- Collection of personal items
- Collection of all company property
- Is security a concern

Post Termination:

- Access to personal items
- Return of company property
- Security/Access
- Any restrictive covenant obligations

Outplacement Services:

- Employment Support
 - Group or One-on-One
- Resume Services
 - Workshop vs. Customized

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