

Ontario's top court rules employees have privacy interests in content on work computers

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On March 22, 2011 the Ontario Court of Appeal released its decision in *R. v. Cole*. It held that the police breached a high-school teacher's *Charter* rights when they searched his work laptop computer without a warrant. The appellate court ruled that the employee had a reasonable expectation of privacy in the contents of the work computer and that employers cannot give police access to workplace computers without a warrant.

Richard Cole was charged with possession of child pornography, and unauthorized use of a computer, under the *Criminal Code*. The charges arose after a school computer technician remotely accessed the hard drive of Cole's school-issued laptop and found sexually explicit images of an underage student. The Crown later alleged that while monitoring students' e-mail in the course of his duties, Cole found the images and copied them to his laptop.

When the technician discovered the images on Cole's hard drive, the school's principal directed the technician to copy the images onto a disc for use as evidence. The principal then required Cole to give back the laptop. School board officials searched its contents and copied the temporary Internet files onto another disc. The laptop and the two discs were then turned over to police, who searched them without a warrant.

On a pre-trial application, the trial judge excluded the evidence on the basis that the warrantless police search of the computer was an infringement of Cole's *Charter* right to be secure against unreasonable search and seizure. On appeal, the trial judge's decision was overturned. The Court ruled that the accused had no reasonable expectation of privacy in the school-issued laptop. Cole appealed this decision to the Ontario Court of Appeal.

REASONABLE EXPECTATION OF PRIVACY

The Court of Appeal began its analysis by noting that in order to establish that a person's privacy rights have been violated, the person must first establish he or she had a reasonable expectation of privacy. This determination is based on all the circumstances. It includes the following factors set out by the Supreme Court of Canada in the decision of *R. v. Edwards* (1996):

- whether the accused was present at the time of the search;
- whether the accused had possession or control of the property or place searched;
- whether the accused owned the property or place searched;

- the historical use of the property or item;
- the ability to regulate access, including the right to admit or exclude others from the place;
- the existence of a subjective expectation of privacy; and
- the objective reasonableness of the expectation.

The *Edwards* factors were supplemented by the decision of the Supreme Court in *R. v. Patrick* (2009) which held that an “expectation of privacy in things located on someone else's property must be one that an independent and informed observer is prepared to recognize as reasonable.” The Court stated that this determination requires consideration of:

- whether the informational content of the subject matter was in public view, had been abandoned, or was already in the hands of third parties;
- whether the police technique was intrusive in relation to the privacy interest;
- whether the evidence-gathering technique was objectively unreasonable; and
- whether the informational content exposed intimate details of the appellant's lifestyle or information of a biographical nature.

In applying the factors above, the Court of Appeal found that the computer, the computer network, and the computer server were all owned by the school board. Although the school issued the laptop for employment purposes, the accused was granted exclusive possession of the laptop, including during weekends and vacations, and was permitted to use it for personal purposes. In addition, Mr. Cole was able to protect access to the computer by a password. All of these factors established that he had a subjective expectation of privacy in the contents of the laptop.

In terms of whether it was objectively reasonable for Mr. Cole to expect privacy in the contents of the laptop, the Court noted that there was no clear policy relating to teachers' use of school laptops, particularly with respect to the monitoring or policing of such usage. The Court found that other teachers were also issued laptops and, like Mr. Cole, these teachers used their computers for personal purposes. These factors were found to be consistent with a reasonable expectation of privacy.

In applying the *Patrick* factors, the Court of Appeal noted that the information on the computer was not in public view, abandoned, or in the hands of third parties. The Court found that access by a state actor for the purpose of determining the nature of the information on the computer would be intrusive, since such information could expose intimate and personal details.

The Court then considered whether the fact that a computer technician could access the laptop diminished the accused's expectation of privacy. The Court likened this situation to that of a rented apartment or bus locker, stating that the existence of a master key does not destroy the expectation of privacy. Nevertheless, since the accused knew that a school technician had a limited right of access to the hard drive in order to maintain the security of the network system, the reasonable expectation of privacy was modified to this limited extent. The Court concluded this

stage of its analysis by holding that Mr. Cole had a reasonable expectation of privacy in the information stored on the laptop, subject to the limited right of access by his employer's technicians for work-related functions.

WAS THERE A VIOLATION OF PRIVACY?

Having concluded that there was a reasonable expectation of privacy in the information stored on the computer, the Court considered whether the accused's privacy rights were violated by the school computer technician, the principal and school board, or the police.

Based on the evidence, the Court was satisfied that the technician accessed Mr. Cole's computer for the limited purpose of maintaining the network. The sexually explicit images were found in the course of this legitimate access to the computer and the accused had no reasonable expectation of privacy with respect to this limited access. Similarly both the principal and the school board officials were found to be acting within the scope of their broad authority under the *Education Act* when they searched the content of the laptop and seized evidence. The obligation of school officials to ensure a safe and secure learning environment permitted these actions and the Court found that the *Charter* was not engaged.

The situation was different with respect to the police search. The Court noted that once the police had the laptop and the discs, there was no urgency or exigent circumstances that prevented them from seeking a warrant. Furthermore the limited modification to Mr. Cole's expectation of privacy because of the school technician's access to the laptop did not justify the police searching without a warrant. Although the laptop and its contents were in the hands of third parties, the accused did not abandon his privacy interest in the personal information stored on the computer. This meant that the school board did not have the authority to consent to a police search of a work laptop which they had permitted the teacher to use for personal purposes.

The privacy interest of the accused continued through the transfer of the laptop from the school board officials to the police, notwithstanding that the computer was lawfully seized by the school board. The police search captured every piece of personal information stored on the laptop without a warrant. The Court found that the warrantless police search of the laptop and the disc containing the temporary Internet files was unreasonable on its face.

The Court applied different considerations, however, to the disc containing the explicit images delivered by the principal to the police. The Court found that this evidence, like photographs in an envelope, did not require further search by police. As a result the Court held that, for *Charter* purposes, there was no police search or seizure of the disc containing the photographs.

The Court concluded that the warrantless police search of the laptop and the temporary Internet files was unreasonable. The Court allowed the appeal and sent the matter back to trial, with the laptop and temporary Internet files excluded as evidence.

In Our View

The *Cole* decision recognizes that employees often use work-issued electronic devices for personal purposes. Employees have a privacy interest in the content stored on such devices that cannot be waived by the employer. Nevertheless the school technician and school board officials were found not to have violated Cole's privacy rights, since they acted within the scope of their duties and authorities when accessing Cole's computer. The decision indicates that employers who wish to monitor usage of work computers should ensure that they have clear written policies providing for the appropriate usage, as well as access and monitoring by the employer of the electronic devices.

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