

EMPLOYMENT MATTERS

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EMPLOYEE PRIVACY AND WORK COMPUTERS

Do employees have a right to privacy over the content of their work computers?

The Supreme Court of Canada recently rendered a decision in which it discussed the issue of an employee's expectation of privacy over the content of his work computer. In *R. v. Cole**, the accused was charged with (among other things) possession of child pornography. The child pornography was found on his work computer.

While the *Cole* decision was issued in the context of a criminal case, and the Court declined to address the "finer point" of an employer's right to monitor computers issued to its employees, the decision nonetheless provides a glimpse into how the Court might view an employee's right to privacy over the content of his work computer. On the issue of expectation of privacy, the Court had this to say:

"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."

In other words, if employers allow their employees to use work computers for personal reasons, they may reasonably expect privacy over the information stored therein.

The issue at stake is *informational* privacy, as the nature of the information exposes a person's likes, interests, thoughts, activities, ideas, and searches for information.

What else did the Court have to say?

- While the ownership of property is a relevant consideration, it is not determinative.
- The context in which personal information is placed on an employer-owned computer is significant.
- While workplace policies and practices may diminish an employee's expectation of privacy, they do not in themselves remove the expectation entirely.
- Whether an employee has a reasonable expectation of privacy depends on "*the totality of the circumstances.*"

What is the moral of the story?

Employers should have clear and concise workplace policies addressing their rights, responsibilities and expectations vis-à-vis computer and Internet usage. Employers who require absolute unrestricted access to their work computers may want to consider banning personal use altogether. While the Court left the "finer point" of an employer's right to monitor computers for another day, employers should be mindful of the Court's comments in the *Cole* case. If you require assistance in reviewing, drafting or implementing your policy, I invite you to contact me.

* *R. v. Cole*, 2012 SCC 53



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