



IN A FLASH

Quick Read Memos for Human Resource Professionals



March 30, 2011

Decision Regarding Privacy Concerns in the Context of Workplace Computers

In the recent decision of *R v Cole*, the Ontario Court of Appeal issued an important statement on individuals' privacy rights in personal information stored on work computers.

In *Cole*, a teacher was accused of possessing child pornography. While conducting a virus scan on the teacher's work computer, a school technician noticed that the teacher's computer contained explicit nude images of a grade 10 student on the hard drive. The technician promptly informed the school principal, who directed the technician to copy the nude images onto a separate disc and to seize the laptop. The principal also informed the school board, which sent another official to search the laptop.

The discs and the laptop were then turned over to the police, who searched the contents of the laptop's hard drive without first obtaining a warrant.

The teacher's laptop was owned by the school board and provided to the teacher by the school board. However, the school board allowed teachers to take their laptops home with them and it allowed teachers to use their laptops for personal use.

In a unanimous decision, the Court of Appeal found that the teacher's Charter right against unreasonable search and seizure had been breached by the police, as he had a reasonable expectation of privacy in the contents of his laptop, despite the fact that it was owned by the school board. As such, the contents of the laptop's hard drive, which had been obtained by the police without a warrant in the course of a criminal investigation, could not be utilized as evidence in prosecuting the teacher.

However, the Court of Appeal also found that the technician, principal and school board had not violated the teacher's privacy rights, given that the offending images were inadvertently located during a routine virus check, and given that the technician, principal and school board had acted reasonably in protecting the integrity of school equipment, ensuring compliance with school board regulations and protecting the safety and security of its students.

The Court of Appeal also found that the police did not breach the teacher's Charter

rights by searching the separate disc containing the nude pictures which had been copied by the technician. The teacher had no reasonable expectation of privacy in those photographs. As such, the disc was not excluded from the evidence that could be used in prosecuting the teacher.

This case illustrates that employees generally have a privacy interest in the personal information stored on electronic devices provided by their employer such as cell phones, blackberries or laptops. Nevertheless, if the employer inadvertently discovers that such devices are being used for inappropriate purposes, the employer may take appropriate action (including engaging in disciplinary measures up to and including termination).

However, employers (even private employers) should institute clear and explicit written policies if they wish to take a more active role in protecting against inappropriate usage of such devices. Such usage policies should clearly indicate the employer's intention to monitor employee computer usage, and should clearly set out exactly which activities are considered inappropriate usage of employer-provided electronic devices.

If you have any questions about employee privacy issues, or any other questions relating to workplace law, please do not hesitate to contact a Mathews Dinsdale lawyer.

For more information on new developments in Workplace Law, please refer to our website at: <http://www.mathewsdinsdale.com/news-events/in-a-flash/>

