R v Cole (2012): Can Police Search Your Workplace Computer Without a Warrant?

This article was written by a law student for the general public.

Introduction

On October 19, 2012, the Supreme Court of Canada ruled that employees have a reasonable expectation of privacy in information on their workplace computers.[1] As a result of the *R v Cole* decision, information on employees' workplace computers, such as downloaded files, saved pictures, and web browsing history, cannot be unreasonably searched or seized by the police.[2] The following Featured Court Ruling provides a summary and analysis of the *R v Cole* decision.

Facts

Cole, an Ontario high school teacher, was assigned a laptop by his school. The school board owned the laptop, but Cole was allowed to use the laptop for personal purposes. A technician, performing maintenance activities, found a hidden folder on the laptop. The folder contained nude and partially nude photographs of an underage female student. The technician notified the principal and at the principal's request, the technician copied the photographs to a compact disc (CD). The principal seized the laptop, and school board technicians copied the temporary Internet files onto a second CD. The police received the laptop and both CDs from school officials. Without a warrant, the police viewed the contents of both CDs and made a mirror image of the hard drive. Cole was charged with possession of child pornography under section 163.1(4) of the *Criminal Code* and with the unauthorized use of a computer under section 342.1(1) of the *Criminal Code*.[3]

Procedural History

In 2008, an Ontario Court of Justice judge excluded all of the computer material[4] as evidence in the trial because it was obtained in violation of the section 8 *Charter* right to be secure against unreasonable search or seizure.[5] The Crown, wanting the computer material to be admissible as evidence, appealed the decision to the Summary Conviction Appeal Court. In 2009, the Summary Conviction Appeal Court reversed the trial judge's findings, allowed the computer material to be used as evidence,[6] and found no section 8 breach.[7] Cole, asserting his right against unreasonable search and seizure, appealed the decision to the Ontario Court of Appeal. In 2011, the Ontario Court of Appeal affirmed the trial judge's findings but excluded the CD containing the temporary Internet files, the laptop, and the mirror image of the hard drive. The CD containing the nude and partially nude photographs was not excluded because the Court of Appeal ruled that Cole did not

have a privacy interest in the photographs once they were lawfully seized by the school principal.[8] The Crown, still wanting all of the computer material to be admissible as evidence, appealed the decision to the Supreme Court of Canada.[9]

Issues

The Supreme Court of Canada considered the following issues:

1. Did Cole have a reasonable expectation of privacy in his employer-issued work computer?

2. Was the police's warrantless search and seizure of the laptop and the CD containing the temporary Internet files unreasonable under section 8 of the *Charter*?[10]

3. Can an employer validly consent to a warrantless search and seizure of a laptop issued to one of its employees?

4. If there was a section 8 breach, should the evidence be excluded under section 24(2) of the *Charter*?[11]

Decision

The Supreme Court of Canada ruled:

1. Cole had a reasonable, though diminished, expectation of privacy in information on his workplace computer.[12]

2. The police's warrantless search and seizure was unreasonable.[13]

3. An employer cannot consent to a warrantless search and seizure of a laptop issued to one of its employees.[14]

4. The police breached section 8, but the evidence should not be excluded under section 24(2) of the*Charter*.[15]

Court's Analysis

Issue 1: Did Cole Have a Reasonable Expectation of Privacy?

The *Charter* protects an individual's expectation of privacy only if that expectation is reasonable.[16] An expectation is reasonable if an informed person in the accused's position would expect privacy.[17]Canadians are more likely to expect privacy interests if the information in question is personal and private.[18] Workplace computers may contain details of financial, medical, and personal situations, and reveal specific interests, likes, and dislikes. As a result, information on workplace computers is subject to a constitutionally protected privacy interest.[19]

Issue 2: Was the Police's Warrantless Search and Seizure Unreasonable?

The school board officials, acting at the request of the principal, searched and seized the

laptop without a warrant. The Court ruled that this search and seizure was not unreasonable because the principal had a duty to maintain a safe school environment.[20]

However, the Court ruled that the police's search of the laptop was unreasonable because they did not have a warrant or Cole's consent. The police were authorized to take physical control of the laptop and protect any potential evidence, but the Court determined that they were not authorized by law to search the laptop or make a mirror image of the hard drive. The police's unreasonable search and seizure of the laptop breached section 8 of the *Charter*.[21]

Issue 3: Can an Employer Consent to a Warrantless Search and Seizure?

The Court ruled that the school board cannot waive Cole's privacy interest. In some situations, consent can be given to waive a *Charter* right, but the consent given must be both voluntary and informed. Because Cole has a privacy interest in information on the laptop, he must be the one who knowingly consents to waive his*Charter* rights.[22] At no point during the investigation did Cole consent to the warrantless search and seizure of the laptop.

Issue 4: Should the Evidence be Excluded?

The Supreme Court ruled that the police's warrantless search of Cole's workplace computer breached section 8 of the *Charter*.[23] Once a *Charter* breach has been established, the Court must determine if the evidence gathered as a result of the breach should be excluded under section 24(2) of the *Charter*.[24] If admitting the evidence would lead the public to assume the justice system was not operating fairly, the evidence will be excluded.[25] Three questions are considered when deciding whether to exclude evidence:

1. How serious was the police misconduct?

2. How are the accused's interests impacted?

3. Would the truth-seeking function of the trial process be better served if evidence was admitted or excluded?[26]

First, the Court decided that the investigating officer did not act negligently or in bad faith by searching and seizing the laptop and CDs. While Cole's section 8 rights were breached, the investigating officer's actions did not amount to serious misconduct.[27]

Second, the Court determined that Cole had a diminished expectation of privacy because the laptop was owned by the school board. Cole's right to privacy would have been greater if he owned the laptop. Additionally, the information on the laptop and CDs was "discoverable," meaning that the police would have found all the information on the laptop and CDs if they had a warrant. If evidence can easily be found without the *Charter* breach, the Court will find that the accused's personal interests were not greatly impacted.[28]

Third, the Court must consider the effects of excluding or including the evidence. Since the

laptop, the mirror image of the hard drive, and the CD containing temporary Internet files is reliable evidence that could be used to prove the alleged offences, the Court ruled that the computer material could be admitted as evidence.[29]

Justice Abella's Dissent

Justice Abella stated that the evidence should be excluded under section 24(2) of the *Charter*.[30] Relying on the same three factors listed above, Justice Abella dissented on the basis that the investigating officer's decision not to get a warrant was serious police misconduct. Justice Abella also stated that Cole's interests were greatly impacted because the search was invasive. Additionally, she said that the Crown could proceed with charges against Cole even if the evidence in question was excluded.[31]

Significance of the Ruling

In a previous 2010 decision, the Supreme Court ruled that people have a reasonable expectation of privacy in information on personal computers.[32] The *R v Cole* decision extends the scope of this privacy interest to include employer-owned computers which contain employees' personal information.[33] Because the frequent use of technology has blurred the divide between home and work, the *Cole* decision signals the Court's willingness to react to the changing reality of workplace technology. The *R v Cole* decision, however, is not all-encompassing. Specifically, it only applies when it is reasonably expected or explicitly stated that employees are permitted to use work computers for personal uses.[34] Undoubtedly, as technology becomes more pervasive, courts will be asked to re-evaluate the scope of the privacy interest. For the time being, however, by enlarging the scope of the privacy interest to include workplace computers, the Court has given employees some protection against unreasonable search and seizure of personal information.

[1] *R v Cole*, 2012 SCC 53, [2012] 3 SCR 4 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/12615/1/document.do> .

[2] *Ibid*.

[3] *Criminal Code*, RSC 1985, c C-46 s 163.1(4) (every person who possesses any child pornography is guilty of a criminal offence); *Ibid*, s 342.1(1) (every person who uses, directly or indirectly, a computer system with intent to commit an offence is guilty of a criminal offence).

[4] *R v Cole*, 2008 ONCJ 278, 175 CRR (2d) 263 <http://www.canlii.org/en/on/oncj/doc/2008/2008oncj278/2008oncj278.html>.

[5] *Canadian Charter of Rights and Freedoms,* s 8, Part I of the *Constitution Act, 1982*, being

Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("[e]veryone has the right to be secure against unreasonable search or seizure," s 8).

[6] *R v Cole* (2009), 190 CRR (2d) 130 <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii20699/2009canlii20699.html>.

[7] *Charter*, *supra* note 5.

[8] *R v Cole*, 2011 ONCA 218 at para 80, 231 CRR (2d) 76 <http://www.canlii.org/en/on/onca/doc/2011/2011onca218/2011onca218.html>.

[9] *Cole*, *supra* note 1 at paras 6-7.

[10] *Charter*, *supra* note 5.

[11] *Ibid*, ss 8, 24(2) ("[w]here, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute," s 24(2)).

[12] *Supra* note 1 at para 8.

[13] *Ibid* at para 10.

[14] *Ibid*.

[15] *Charter*, *supra* note 5, ss 8, 24(2); *Cole*, *supra* note 1 at para 11.

[16] *Ibid* at para 34.

[17] *Ibid* at para 35.

[18] *Ibid* at para 46.

[19] *Ibid* at para 58.

[20] *Ibid* at para 62.

[21] *Ibid* at para 65; *Charter*, *supra* note 5.

[22] *Cole*, *supra* note 1 at paras 77-79.

[23] *Charter*, *supra* note 5.

[24] *Ibid*, s 24(2).

[25] *Ibid*.

[26] *Cole*, *supra* note 1 at para 81.

[27] *Ibid* at para 87; *Charter*, *supra* note 5.

[28] *Cole*, *supra* note 1 at paras 92-93.

[29] *Ibid* at para 96.

[30] *Charter*, *supra* note 5, s 24(2).

[31] *Cole*, *supra* note 1 at para 135.

[32] *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253 <http://www.canlii.org/en/ca/scc/doc/2010/2010scc8/2010scc8.html>.

[33] *Cole*, *supra* note 1 at para 1.

[34] *Ibid*.