

TOP FIVE 2013

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v COLE, 2012 SCC 53, [2012] 3 S.C.R. 34.

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<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12615/index.do>

Facts

Richard Cole was a high school teacher charged with possession of child pornography and unauthorized use of a computer. Cole's employer (the school board) gave him a laptop to be used for work. He was also permitted to use the laptop for incidental personal purposes. The school board's policy about this use, however, was that files stored on its computers would not be considered private.

While performing computer maintenance via a remote network, a technician found a hidden folder on Cole's laptop. This folder contained nude and partially nude photographs of an underage female student. The technician notified the principal and copied the photos to a compact disc. The principal seized the computer and its temporary internet files were copied onto a second disc.

The laptop and discs were given to the police. Although they did not have a warrant, the police reviewed the contents of the laptop and created a mirror image of the hard drive. Cole attempted to have the police's computer files excluded from evidence in his trial pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms*. He argued that the

warrantless review of the laptop by police infringed his rights under s. 8 of the *Charter* because it was a violation of his right to a reasonable expectation of privacy.

Canadian Charter of Rights and Freedoms

2. (Everyone has the right to be secure against unreasonable search or seizure.

24. (2) Where, 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.

Procedural History

The trial judge found that although the school board had the right to access these files because the computer was board property, the police did not have the right to do so without a warrant. The judge determined there had been a breach of s. 8 of the *Charter* and excluded all of the computer material



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from evidence. As there was no further evidence, the charges were dismissed.

The Crown appealed, and the summary conviction appeal court judge found that there was no s. 8 *Charter* breach and allowed all of the evidence.

The Ontario Court of Appeal set aside that decision, and excluded the laptop, the mirror image of the hard drive and the disc containing the temporary internet files. But, it found that the search and seizure of the laptop by the principal and the school board was authorized by law and reasonable. The disc containing the images of the underage student was therefore created lawfully, and could be included in the evidence against Mr. Cole. The Court ordered a new trial on the basis that the first judge was mistaken to exclude this evidence. Although it could now proceed against Cole with the images on the disc, the Crown appealed the order excluding the other evidence to the Supreme Court of Canada (SCC). The appeal was heard in May 2012.

Issues

1. Did Cole have a reasonable expectation of privacy on his work laptop?
2. Did the school board's authority to search the laptop mean it could grant police the right to conduct a search without a warrant?
3. Was the search and seizure by the police of the laptop and the disc containing the internet files unreasonable, making it contrary

to s. 8 of the *Charter*? If so, should it be excluded pursuant to s. 24(2) of the *Charter*?

Decision

The appeal was allowed and the order excluding the laptop, hard drive mirror and copy of the temporary internet files was set aside.

Ratio

Employees have a right to privacy over personal use of workplace computers and should not be subject to warrantless police searches.

Personal use of a work laptop can generate information that is meaningful, intimate, and connected to a person's "biographical core." This means that a person can have a constitutionally protected privacy interest, even when using a work computer. The expectation of privacy is less than would be true in the case of a personal computer, but it still exists. However, infringements upon this interest may still be justified.

REASONS

Majority

Section 8 of the *Charter* protects Canadians' privacy interests by prohibiting unreasonable search and seizure. Privacy interests are based on reasonable expectations. A person will have a reasonable expectation of privacy when the information in question goes to his



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or her biographical core (i.e. the information reveals intimate details of the lifestyle and personal choices of the individual). A court will then consider whether the search or seizure was justifiable in light of the reasonable expectation of privacy.

In this case, the SCC had to decide to what extent Cole had a reasonable expectation of privacy regarding his work laptop. To do this, the Court had to consider the facts of the situation and whether the work laptop contained personal and confidential information. On one hand, Cole did not own the laptop and the school board had clearly told him not to assume that information stored on the computer was private. On the other hand, computers can contain intimate details about a person and Cole had been given the discretion to use this one for personal purposes.

The Court found that information stored in the course of browsing the internet goes to the very heart of the biographical core protected by s. 8 of the *Charter*. This is because internet-connected devices can reveal much about our personal situations, likes, dislikes, financial information, medical history and more. Therefore, Cole had a constitutionally protected reasonable expectation of privacy regarding his work laptop.

The Court ruled that the police breached Cole's *Charter* right privacy by searching and seizing the laptop without a warrant. When

such a breach is found, the courts must determine whether including evidence that is gathered by violating a *Charter* right would bring the justice system into disrepute and cause the public to lose faith in the police and the courts.

The SCC found that the evidence should not be excluded because it was not an outrageous breach of the *Charter*, and that the police officer did consider the accused's rights, even though he came to the wrong conclusion. The Court also noted that a warrant could successfully have been obtained if applied for by the police, and that the evidence was strong and reliable proof.

Dissenting Minority

Justice Abella agreed with the much of the reasoning of her colleagues, but disagreed as to including the evidence in the new trial. In her view, it was of little importance to the Crown's case, because the images would be included regardless. Further, Justice Abella noted that there was no urgent reason preventing the police for waiting for a warrant. Because no warrant was issued there was effectively no limitation placed on what amount of Mr. Cole's personal information the police could access. She reasoned that the investigating police officer was experienced in cyber crime investigation and should have taken more care to proceed without infringing the *Charter* rights of the accused.



DISCUSSION

1. What type of information would you say speaks to your biographical core? Your Facebook posts or Tweets? Private e-mails? Search histories? Why?

2. If you were told that your personal internet use was not necessarily private, would it change the way you use the Internet? How so?

3. In your opinion, should evidence of illegal activity found on a personal computer be treated differently than the same evidence on a work computer? Explain.

4. Mr. Cole was a teacher found with nude images of an underage student. Do you think the case would have been decided differently if he had a different job? Or if the evidence in question was of illegal drug use or something else that was not connected to his position in the school? Why or why not?

5. Since the trial would proceed with the images as evidence, whose reasoning makes the most sense to you: that of the majority or that of Justice Abella? Explain.