

## PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

### R. v. Cole - Supreme Court of Canada (2012)

#### FACTS

Richard Cole was a high school teacher in Ontario. He also supervised a laptop computer program for students at his school. As a supervisor, he could access student computers connected to the school network.

Mr. Cole's school board gave him a laptop to help him do his work. Only he could use it, and he protected it with a password.

Both his school and the school board had rules about these computers:

1. Employees could occasionally use board-issued computers for personal use.
2. The board was the owner of both the computers and messages and other data on the computers.
3. People with these computers should not expect privacy in their files.

A technician doing maintenance on the board's computers discovered a hidden folder on Mr. Cole's laptop. The folder had nude photos of a 16-year-old female student. In the court case, her name stayed confidential, but we will call her Sarah.

Mr. Cole had accessed a student's school email account. This student had saved nude photos of Sarah in this account. Mr. Cole had copied them to his laptop.

The technician reported the discovery to Mr. David, the school principal. Mr. David confiscated Mr. Cole's laptop and asked the technician to put copies of the photos on a compact disk (CD). Later, school board technicians made a second CD of temporary Internet files from Mr. Cole's computer. These files recorded his Internet surfing history and contained a lot of pornographic images.

The school board contacted the police and handed over the CDs and laptop. The board told the police that the board owned the computer and the data on it.

Without getting a search warrant, an experienced police officer, Officer Burt, immediately examined the laptop and two CDs. Two months later, he sent a copy of the computer's hard drive to forensic experts for examination.

Mr. Cole was charged with the crime of possessing child pornography. He asked the court to throw out the evidence collected from the computer. He said that the evidence had been gathered during an “unreasonable” search and seizure in violation of his rights under Section 8 of the Canadian Charter. Section 8 says that everyone has the right to be protected against unreasonable searches and seizures. Mr. Cole argued that the search was unreasonable because the police did not get a search warrant.

## QUESTIONS

### Unreasonable Search and Seizure — Section 8

1. Was it reasonable for Mr. Cole to expect that personal data in the work computer would remain private?
2. Were the search and seizure of the computer and its data “unreasonable” because the police did not get a search warrant?

### Accepting the Evidence — Section 24

3. If the search and seizure were unreasonable and violated Mr. Cole’s rights, should the computer evidence be thrown out under Section 24 of the Canadian Charter? Section 24 says that courts cannot accept evidence gathered in violation of someone’s rights when accepting the evidence would “bring the administration of justice into disrepute”.

## EXPLANATIONS

**Section 8** – The general rule is that the police need a search warrant to search and seize. A warrant is permission from a judge. A search without a warrant is presumed to be unreasonable, and the police must then show that another legal rule gave them permission to search and seize.

**Section 24** – Bringing the administration of justice into disrepute means, in general terms, damaging society’s confidence in the justice system.

When the violation of rights and negative impact on the person accused of a crime is serious, it is more likely that a court will refuse controversial evidence.

On the other hand, if the violation and negative impact are not so serious, and society has a strong interest in having the case heard with the controversial evidence, it is more likely that a court will accept the evidence.

## PREPARATION FOR PLEADINGS

### Lawyers for the accused — Mr. Cole (respondent)

The lawyers for Mr. Cole must show the following:

#### **Reasonable Expectation of Privacy – Section 8**

- It was reasonable for Mr. Cole to expect that personal data on the work computer would remain private.

Ask yourself these questions:

- ⇒ Is the line between work and personal information becoming blurred because employees are often allowed to use work computers away from the workplace?
- ⇒ Should employers have a right to see everything an employee is doing with a work-issued computer?
- ⇒ Does having a password make everything on a computer private?
- ⇒ Is there a difference between the two CDs, one with the photos of Sarah and the other with Mr. Cole's browsing history?

#### **Unreasonable Search and Seizure – Section 8**

- Mr. Cole had a reasonable expectation of privacy in the personal data. This means that the police should have gotten a warrant to search and seizure this data.
- Since the police did not get a warrant, the search and seizure were unreasonable and violated Mr. Cole's rights.

*For help with this argument, see the explanation box above about searches and seizures.*

#### **Accepting the Evidence – Section 24**

- The violation of Mr. Cole's rights under Section 8 was serious and had a significant impact on him because he was charged with a crime. If the computer evidence is accepted, this will reflect badly on the justice system: it sends a message that the police don't need to follow the rules about warrants.
- For these reasons, the computer evidence should be thrown out and the case against Mr. Cole rejected.

*For help with this argument, see the explanation box above about Section 24.*

Don't forget to anticipate the arguments of the other side!



## Lawyers for the government (appellant)

The lawyers for the government must show the following:

### Reasonable Expectation of Privacy – Section 8

- Based on the computer policies of his school and school board, Mr. Cole could not reasonably expect that he had a right to privacy regarding personal data on his laptop.

Ask yourself these questions:

- ⇒ Is ownership of a computer a good way to decide who owns the data on the computer?
- ⇒ Should the school board and school rules determine what privacy rights Mr. Cole had in his personal data?
- ⇒ Is there a difference between the two CDs, one with the photos of Sarah and the other with Mr. Cole's browsing history?

### Unreasonable Search and Seizure – Section 8

- The search was reasonable because the police were told that the computer and the data belonged to the school board and not to Mr. Cole.
- The police did not need a search warrant since the school board freely gave them the computer and CDs of data.

Ask yourself this question:

- ⇒ Should different rules apply to searches by schools and by the police?

*For help with this argument, see the explanation box above about searches and seizures.*

### Accepting the Evidence – Section 24

- Even if the search was unreasonable under Section 8 and Mr. Cole's rights were violated, the court should accept the computer evidence.
- The violation of rights was not very serious. Given the school board and school rules, Mr. Cole must have had a reduced expectation of privacy in the personal computer data.
- Even if the police had waited to get a warrant, the result would have been the same for Mr. Cole: the police would have found the same evidence and charged him with a crime.

- It is in society's interest to discover the truth and have Mr. Cole's case decided using all of the computer evidence.

*For help with this argument, see the explanation box above about searches and seizures.*

Don't forget to anticipate the arguments of the lawyers for Mr. Cole and their responses to your arguments. Remember that they have a right to respond to your arguments.

