A Right To Privacy

Student Guide

IMPORTANT NOTICE

This document has legal information up to date as of June 1, 2017. None of the information in this guide should be taken as legal advice.

Background Information

You will be asked to read summaries of real court decisions. To understand what is going on in these cases, it is important to understand a bit about the law and how courts work.

How Supreme Court Judges Make Decisions

Two of the cases included in this guide took place before the Supreme Court of Canada, the highest court in the country. The Supreme Court reviews decisions made by certain other courts across Canada, usually in cases involving legal issues of national importance. Decisions at the Supreme Court are final, which means that no other court can change them.

The Supreme Court hears "appeal" cases. An appeal occurs when one person involved in a case thinks that a decision made by a lower court was wrong, and requests that the decision be changed. During an appeal, the higher court does not hear witnesses or examine new evidence. Instead, the judges examine the evidence that was presented in the lower court, and the applicable law, and then decide whether the original decision was correct.

There are nine judges on the Supreme Court. While not all of them hear every case, there must always be an odd number of judges. This is because the Supreme Court isn't like a jury in a criminal case. Juries must be unanimous in their decisions. Instead, Supreme Court decisions are made by majority vote. However, all the judges who hear a case have a chance to explain their individual reasoning, even when they don't agree with the majority. This reasoning appears in the written version of the court's decision. The decisions of the Supreme Court influence what courts across Canada decide on similar issues.

Introduction to the Law on Searches

What is a search?

A search is an inspection of a place (for example, a house, car or backpack) or person to look for evidence relating to a possible violation of the law. The person carrying out the search must either have authorization from a court, called a "warrant", or another kind of legal authorization to search.

What is a search warrant?

A search warrant is a judge's authorization for the police to conduct a search. Police officers asking for a warrant must convince a judge that they have "reasonable and probable" reasons to believe that they will find evidence relating to a violation of the law in the place they want to search.

What kinds of searches are allowed?

Under Section 8 of the Canadian Charter of Rights and Freedoms every Canadian is protected against "unreasonable" searches and seizures. This protection applies to searches by police officers or other people acting on behalf of the State in places where a person has a reasonable expectation of privacy: the person's home, car, hotel room, backpack, clothes, etc.

The purpose of the Charter protection is to protect citizens against unjustified State intrusions into their private lives.

When is a search reasonable?

For a search to be "reasonable" it must meet these tests:

- It must be authorized by law.
- The people searching must have "reasonable and probable grounds" for thinking the law has been broken or is about to be broken, and that evidence of this will be found in the place searched.
- It must be carried out in reasonable way.

A search is authorized by law when the person searching has authorization under a court order called a warrant, or another kind of legal authorization

However, the police can search without a warrant when they think that evidence could be lost if they wait to get a warrant. Also, the police do not need a warrant to do frisk searches for security reasons of people they arrest and their belongings (backpack, car). They can only do this after they have put someone under arrest.
A search is carried out in a reasonable way. For example, a search done with unnecessary force is not reasonable

What happens when a search is found to be unreasonable?

If a person accused of a crime can show that a search was unreasonable, he or she can ask the judge to throw out any evidence found during the search. Judges can prevent evidence obtained illegally from being used in court.

Searches in Schools: Are They Allowed?

Yes, school authorities have rights and responsibilities that give them a right to search students.

School authorities must maintain order and discipline on school grounds. On top of this, schools have to supervise and educate students under their care. Parents expect schools to take action if the safety and well-being of students is at risk. This means that schools can, under certain conditions, search a student to ensure respect for school rules. These rules usually prohibit, among other things, drugs and weapons at school.

To be legal, searches by school authorities must respect these rules: school authorities must have reasonable grounds to believe that a school rule has been broken and that a search of the student or his personal belongings will prove that the rule has indeed been broken. Also, the search itself must be carried out respectfully, and in the least intrusive way possible given the circumstances.

School authorities have more latitude than the police when it comes to searches. This latitude cannot be transferred to the police. For example, if school authorities find drugs on a student, the police still need a search warrant to use the drugs for a police investigation.

R. v. Patrick, 2009, Supreme Court of Canada

R. v Patrick, 2009, SCC

FACTS

Patrick was operating an ecstasy lab in his home. The police suspected this, but did not ask for a search warrant. Instead, they went to the lane behind his house and reached into his backyard to grab his garbage bags. In the bags, they found items used for making drugs, along with traces of ecstasy. The police then used this evidence to get a warrant to search his house.

Patrick was later charged with producing, possessing and trafficking ecstasy. He was found guilty based on the evidence the police found in the garbage bags and in his house.

Patrick appealed this decision. He claimed that taking evidence from the garbage bags was an unreasonable search in violation of his rights under Section 8 of the Canadian Charter of Rights and Freedoms. Section 8 gives protection against "unreasonable" searches and seizures.

The case eventually went to the Supreme Court of Canada, the highest court in the country. The Supreme Court had to first decide whether taking evidence from Patrick's garbage was actually a "search". If so, the court then had to decide whether it was unreasonable. Remember that a judge can throw out evidence found during an unreasonable search.

What is an "unreasonable" search?

Refer back to the information sheet **Introduction to the Law on Searches** (page 3).

The Decision

R. v Patrick, 2009, SCC

All the Supreme Court judges agreed that the police were justified in using the evidence they found in the garbage bags. However, not all the judges had the same reasons for coming to this decision.

The Majority Reasoning

Six out of seven Supreme Court judges said that Patrick could not have expected the contents of the garbage bags to stay confidential. He put his garbage at the back of his property to be picked up by garbage collectors. By doing this, Patrick abandoned his garbage. Also, the bags were accessible to anyone walking in the lane. Patrick therefore gave up his privacy rights in the contents of the garbage bags. The actions of the police were not an unreasonable search or seizure.

People throw a lot into the garbage and recycling. Often, what they throw away has personal information about their finances, what they eat, their states of health, etc. Usually they want these things to be private. However, the Supreme Court decided that we can't expect to have the same privacy rights over things we throw in the garbage or recycling. The court decided to draw a line: things "abandoned" in garbage cans that are easily accessible are no longer protected.

Minority Reasoning

The seventh judge agreed that the police were allowed to take the garbage bags. However, her reasoning was different. She emphasized that almost all garbage is very private. In her opinion, when people throw something in the garbage, they have not necessarily abandoned it. Therefore, the police shouldn't automatically be allowed to take garbage. This judge said that the courts should look at where the police have a reasonable belief that a crime has been committed. In Patrick's case, the judge decided that the police were allowed to take the garbage because they had a reasonable suspicion that Patrick was committing a crime.

Discussion Questions for R. v. Patrick

R. v Patrick, 2009, SCC

1. Why are privacy rights important?
2. Why is it important to protect individuals from police intrusion?
3. Should the police need warrants to search houses, people, objects, etc.?
4. Should there be special rules to protect certain personal information?
    a. Do you think a bill in the recycling with a credit card number on it is worth less to the owner than something like an old T-shirt still inside the house?
    b. Do people have privacy rights in information stored on cookies on their computers?
    c. Do people "abandon" personal information when they use a public computer?
5. Do people have a right to privacy everywhere on their properties?
6. Do you think the Supreme Court would have reached a different decision if the garbage bags were on Patrick's back porch instead?
7. Do you agree with the seventh judge that the police need a reasonable suspicion you have committed a crime to take your garbage?

R. v. A.M., 2008, SCC

R. v. A.M., 2008, Supreme Court of Canada

FACTS

A high school principal gave police an open invitation to come to his school with sniffer dogs as part of the school's zero-tolerance policy for drugs. Parents had been complaining about a drug problem at the school, but on the day the police came to the school, there was no particular evidence that there were any illegal drugs on the premises.

Students were kept in their classrooms while dogs sniffed the school. A student had left a backpack in the gymnasium and one of the sniffer dogs reacted to it. The police opened the backpack, found illegal drugs and charged the student who owned the bag with possession of drugs for the purpose of trafficking.

THE DECISION

Seven out of nine judges at the Supreme Court agreed that using a sniffer dog to try to find drugs in the student's backpack was a search and that the search was "unreasonable" under Section 8 of the Canadian Charter of Rights and Freedoms. Six out of nine judges agreed that the evidence found in the backpack should be excluded at the trial. Since this evidence was the basis of the case, this meant that the student would be found not guilty.

Privacy at School

All the judges agreed that students are entitled to a certain level of privacy at school. They also agreed that the right to search for public safety reasons or in the context of a crime investigation must be balanced with a student's right to privacy. However, the judges differed on how much privacy could be expected at school.

- Some judges said a student's backpack was like a "portable bedroom and study" and that students should be able to expect privacy at school.
- Other judges said that, since ensuring student safety was important, students must expect less privacy in school than in other circumstances.
- Finally, some judges said that since the student in this case wasn't present and had left his backpack in plain view, he shouldn't have any reasonable expectation that his bag was protected by privacy rights.

What is an "unreasonable" search?

Refer back to the information sheet Introduction to the Law on Searches (page 3).

R. v. A.M., 2008, SCC

Authority to Use Sniffer Dogs

Most of the judges said that there was no authority for the search, so the search was unreasonable. However, the other judges brought up interesting arguments in favour of the use of sniffer dogs:

- Since dogs sniff air, and air is public space, there had been no invasion of privacy at the school.
- It would be ineffective to require police to have a reasonable suspicion about a particular backpack before dog sniffing. If they had a reasonable suspicion, they would just get a warrant to search that backpack and wouldn't need dogs.
- A dog sniff isn't that intrusive because the dog is only trained to look for illegal drugs. In other words, it is unlikely that a dog sniff would bother innocent students who hadn't brought drugs to school.
- Sniffer dogs only help police detect illegal substances, and not other things in a person's bag.
- If the police searched schools based merely on suspicion and without using dogs, they might end up targeting students who had done nothing wrong. This meant that dog-sniffing could actually be less intrusive.

Discussion Questions for R. v. A.M.

1. Do you agree with the judges who said that students should have less of a privacy right at school than in other places?
    a. Would your answer change if the police were ensuring school safety (for example, looking for guns) instead of preventing crime (for example, looking for drugs)?
    b. In the U.S. there is no protection against drug-sniffing dogs since this isn't considered a search. Do you think this is appropriate?
2. Do you agree with the judges who said dog sniffing is different from a physical search?
3. In a different case called Tessling, the Supreme Court decided that police could use infrared sensing of heat coming off buildings to detect a marijuana-grow operation. The court said that the person living in the building had no privacy interest in this information. What do you think?
4. The Tessling case is similar to R. v. A.M. and R. v. Patrick. In all of these cases the police wanted to know whether there were illegal drugs. In the Patrick case, it was acceptable to take the bags because the owner didn't want them anymore. In the Tessling case, it was acceptable because the owner never owned the information about how much heat came off the house. But in R. v. A.M., the court decided the student owned the information in his backpack and had a right to protect it.
    a. Do you agree with the court's decisions about what kinds of information we want to keep private?
    b. Do you think that the kind of information we want to keep private might change as technology evolves?

Roman v. Leduc, 2009, Ontario Superior Court

Roman v. Leduc, 2009, Ont SC

FACTS

John Leduc was involved in a car accident. He claimed that the other driver was responsible for the accident. He said that, as a result of the accident, his personal life had suffered and he could not take part in certain activities. One of Leduc's claims was that he could no longer play sports.

The other driver's insurance company found out that Leduc had a Facebook profile, but the public part of the profile showed only his name and picture. The company wanted access to the private section of his Facebook profile, hoping it would have pictures of Leduc playing sports, at parties or doing other things that would show that he was not suffering as a result of the accident.

Prior to a court hearing, both parties can ask the other side to produce documents and information relevant to the case. The defendant (the insurance company) asked the judge to force Leduc to print all his Facebook pages, including the entire private section of his profile. Leduc refused, saying there was nothing relevant to the case in those pages.

THE FIRST DECISION (2008)

The insurance company argued that the average Facebook profile contains evidence about someone's lifestyle, including that person's ability to play sports or engage in social activities. The company said that this information was relevant to the case.

The court disagreed, finding that this wasn't always the case. Just because the average person's profile has information about lifestyle does not mean that the private part of John Leduc's profile had this information. The court refused to order Leduc to produce his whole Facebook profile.

APPEAL DECISION (2009)

The appeal court based its decision on a similar case in which the victim of an accident had posted numerous photos on her public Facebook profile showing her taking part in social activities. In that case, the court agreed with a request to see even photos only her friends had access to. The judge in that case found that there was no real privacy issue since 366 Facebook friends had access to the private site.

In Leduc's case, the appeal court found that the purpose of Facebook is social networking: users post information, photos, etc., that they intend to show others. The court ordered Leduc to hand over anything that would be relevant to the insurance company. This could include pages in the private part of his Facebook profile relevant to the case.

What is an appeal?
See the information sheet How Supreme Court Judges Make Decisions (page 2) to learn about appealing a case and the structure of the court system in Canada.

Roman v. Leduc, 2009, Ont SC

Discussion Questions for Roman v. Leduc

1. Do you think that the number of Facebook friends you have should affect whether the information posted on your Facebook profile is considered private?
2. Do you think any information on Facebook is intended to be private or public?
3. Do you think that new technologies require changes to privacy laws?
4. What kinds of materials should be allowed as evidence in court?
5. In a case from Australia, an employee called in sick to work. However, in his Facebook status he admitted he was just calling in sick because he was still drunk from the night before. His employer found out about his status and used it as evidence to fire him. Is this different from the Leduc case?

Activity

Town Hall Meeting

Should schools be able to track the use of the Internet on school computers?

Anna and Lucy used to be friends. However, a month ago, Anna posted pictures on her Facebook profile of Lucy passed out at a party. Lucy's sister, a Facebook friend of Anna's, saw the photos and showed them to Lucy's mom. Lucy got grounded for two months and isn't allowed to use the computer at home.

Lucy started sending threatening messages to Anna privately on Facebook using school computers. In one of the threats, she said Anna should "watch her back" at school the next day because she has a knife hidden somewhere at school.

Mr. Phillips, the school principal, has been told that the girls are having a fight, but does not know how serious it is. Both girls are telling different stories. He would like to know what is really going on. He thinks that the school has the right to search information sent using school computers in order to ensure the safety of students.

Anna is scared by the threats, but wants the school to stay out of it. She doesn't want the principal to see her whole Facebook profile!

Anna's mother Lynn has also heard about Lucy's threats. She is angry and wants to know why the school is letting students promote violence using school resources.

Sgt. Duprès is a local police officer. If someone is threatening to use violence at school, he must make sure no students are harmed. He would like to do a search at school to see if there are any weapons.

With your new knowledge of privacy law in Canada, you have to help find a solution to this issue. In groups of five, you need to come up with a new section for the school's Code of Ethics about monitoring Internet use at school.

Town Hall Meeting

Preparing for the Town Hall Meeting

- As part of this activity, you will play the role of a principal, police officer, student, parent or mediator. To find out what role you play, the teacher will ask you to number off from one to five.
- In the first part of the activity, all students playing the same role will be in the same group.
- Each group (except the mediators – see below) will have 10 minutes to discuss the following questions:

What are your concerns?

- Why is it important to have a rule about monitoring Internet use on school computers?
- As a student, parent, principal or police officer, what are you worried about?

What is the best rule to solve the problem?

- Should the rule say that the school can monitor all Internet use on its computers?
- Should the rule say that the school cannot monitor Internet use?
- Can you group come up with a compromise that would solve the problem?

How will you convince other groups that you have the best answer?

- Think about the other people involved. What are they concerned about?
- Does your rule respond to their concerns?
- What arguments support your position?

- During the discussions, the mediators circulate among the groups. They ask the groups the questions on the card handed out by the teacher.
- You then go back to your original group, where there is one principal, police officer, student, parent and mediator. You each have two minutes to explain your concerns and to try to convince the other people to adopt your rule. The mediator is in charge of giving everyone equal speaking time and taking notes of things on which the members agree or disagree.
- As a group, you have to decide which rule to choose. If your group cannot agree, you can make this your conclusion. In either case, be prepared to talk about your discussion and how you came to your decision!