

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.

AB v BRAGG COMMUNICATIONS INC., 2012 SCC 46, [2012] 2 SCR 567.

Date Released: September 27, 2012

<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10007/index.do>

Facts

A.B. was a 15-year-old girl from Nova Scotia. In March 2010, she discovered that someone had posted a fake Facebook profile of her under a slightly different name. The fake profile included her picture, identifying information, negative commentary about her appearance and sexually explicit references.

Facebook disclosed the IP address associated with the fake profile account to A.B. The IP address belonged to an individual who subscribed to internet services through a company owned by Bragg Communications.

Through her father as guardian, A.B. applied to the court to have Bragg reveal the identity of the persons associated with the IP address. A.B. wanted to minimize her chance of suffering further harm from bullying, so she asked to bring her application anonymously. A.B. also asked that the Court impose a publication ban on the contents of the fake Facebook profile, meaning that the media would not be permitted to publish the details contained in the account.

Procedural History

The trial court that heard the application ordered Bragg to disclose the names of the people associated with the IP address. Bragg did not challenge this request. However, the court denied A.B.'s request for anonymity or a publication ban. The court reasoned that there was no evidence that A.B. would be harmed if this information were released.

The Nova Scotia Court of Appeal upheld this decision, deciding that a publication ban was not justified because A.B. did not bring evidence that substantial harm would arise from media reporting, and that public embarrassment is not a sufficient reason to limit the principle of open courts and trials.

Issues

1. Should Bragg Communications be required to release the identity of the person(s) who created the fake Facebook account?
2. Should A.B. be permitted to proceed with her claim anonymously?
3. Should the press be allowed to publish information found in the fake Facebook account?



Decision

The Supreme Court of Canada (SCC) unanimously allowed the appeal, in part. Bragg was ordered to disclose the identity of the person(s) who created the fake Facebook account, and A.B. was allowed to proceed with her claim anonymously. However, the Court did not preclude the press from publishing the non-identifying information found in the fake Facebook profile.

Ratio

The SCC found that while an open court and freedom of the press are central to our court system, protection from cyberbullying can justify restricting them. In future cases, courts must weigh the harm that could result from revealing the identity of a person who seeks to bring their case anonymously against the importance of maintaining an open court.

The Court recognized the inherent vulnerability of children and relied on “logic and reason” to determine that “objectively discernible harm” would arise to A.B. if her identity was revealed. Consequently, in an application involving sexualized cyberbullying, there is no need for a particular child to demonstrate that she or he is personally at-risk for specific and immediate harm.

With regard to the non-identifiable information in the fake Facebook account, the Court held that there was no reason to restrict the publication and media disclosure

of these facts. No harm could arise to A.B. from disclosing this information because the information could not lead to A.B.’s identity being revealed.

Reasons

The open court principle is a fundamental democratic principle that requires courts to remain accessible and open to the press and public, and is inextricably tied to freedom of expression. A.B. requested two restrictions on the open court principle: the right to proceed anonymously, and a publication ban on the content of the fake Facebook profile. The other side argued that the open court principle should trump A.B.’s privacy interests, since A.B.’s age alone did not mean that she would face specific harm from disclosing her identity and the contents of the Facebook account.

The SCC reasoned that even without evidence of specific harm, there was reason to believe that objective harm could occur to A.B. First, the court recognized the inherent vulnerability of children. This vulnerability comes from age, not emotional maturity. Second, the court recognized the increased psychological risks that cyberbullying poses for children. Further, the court noted that children rely on anonymity for protection from future bullying, and that without this anonymity children might not bring cases against their bullies. Children may reasonably fear that if their identity is disclosed when they bring cases against their cyberbullies,



they will suffer from further bullying. Thus, anonymity protects a child's access to justice.

Importantly, the Court observed that a claimant's name (identity) is of minimal value to press freedom. After all, even if A.B. pursued her claim anonymously, the press could still report the case without including her name or personal details. Therefore, given A.B.'s age, the nature of cyberbullying, and the risks of disclosing her identity, A.B.'s privacy interest and protection outweighed the open court principle.

However, with regard to the non-identifying content in the Facebook profile, the Court held that this information could not be connected to A.B. and therefore could not harm A.B. Accordingly, the open court principle prevailed, and the publication and disclosure of these facts was not restricted.

DISCUSSION

1. How unusual was A.B.'s situation? Do you know of anyone who has been harassed through social media in this way?
2. Is cyberbullying more or less damaging than in-person bullying? How so? Should different laws be created to regulate these different forms of bullying? Why or why not?
3. Why is it important that the justice system remain highly transparent? Was the "open court principle" correctly balanced with the potential harm to A.B.?
4. Does age matter? Should the courts afford the same protection of anonymity to an applicant that is 30 years old? Explain.
5. If the courts do not protect the identity of those seeking to reveal their cyber bullies, will people stop relying on the courts? Do you think that A.B. would get further bullied if her identity were revealed? If so, what type of risks would she face at school?

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R v BOUDREAU, 2012 SCC 56, [2012] 3 SCR 157.

Date Released: October 26, 2012

<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12636/index.do>

Facts

On a cold night in February 2009, Donald Boudreau drove to a bar and drank alcohol until he was very intoxicated. His sober friend drove him in his car to her house, where he continued to drink alcohol. When Boudreau decided to go home the next morning, he was still unfit to drive. His friend called a taxi company that would send two drivers to drive both him and his car home.

When no taxi arrived after about 20 minutes, the taxi service was called again and Boudreau's friend asked him to wait outside so she could go to sleep. It was minus 15 degrees Celsius outside. While waiting for the taxi, he got into his own truck and started the engine so that he could turn on the heat. The automatic transmission was set to "park".

Boudreau fell asleep in the truck, and when the taxi arrived, the driver called the police. The police found him sleeping in the driver's seat of his vehicle with the engine on. The police arrested Boudreau for having care and control of a vehicle while impaired by alcohol. The quantity of alcohol in his blood was over three times the legal limit.

Criminal Code, RSC 1985, c C-46

253. (1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

- (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
- (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

Procedural History

At trial, the judge held that in order for someone to have care and control of a vehicle, she or he must pose a risk of putting the vehicle in motion. Since Mr. Boudreau did not attempt to drive the vehicle, had a safe plan to get home, and understood the gravity of driving while impaired, the judge concluded that his actions did not pose a risk of putting the vehicle in motion. Thus, the judge acquitted him of the charges.



On appeal, the Quebec Court of Appeal reversed the trial judge's decision and convicted Boudreault. The Court held that intention to drive was not part of the test under s. 253 of the *Criminal Code*. The Court held that, in fact, he posed a risk to drive the vehicle because he was so intoxicated that his judgment would have been impaired when he woke up.

Issues

1. Is risk of danger – risk of putting the vehicle in motion – an essential element of the offence of “care and control” under s. 253 of the *Criminal Code*?
2. If so, was the trial judge mistaken in this case for finding that there was no risk in these circumstances?

Decision

The Supreme Court of Canada (SCC) allowed the appeal and restored the acquittals.

Ratio

Writing for the majority of the Court, Justice Fish held that the actual risk of danger is an element of the offence of “care and control” of a vehicle under s. 253 of the *Criminal Code*.

Further, the SCC set out guidelines for similar cases heard in the future. The essential elements of the offence are:

1. An intentional course of conduct associated with a motor vehicle;

2. By a person whose ability to drive is impaired, or whose blood alcohol exceeds the legal limit; and
3. In circumstances that create a realistic risk of danger to persons or property.

A realistic risk does not have to be substantial or likely. As it is used here, the term “realistic” is intended to mean even a low chance of such danger. A danger of realistic risk might arise in at least three ways:

- a. An inebriated person who does not intend to drive changes his or her mind and proceeds to do so;
- b. An inebriated person may unintentionally set a vehicle in motion; or
- c. A stationary vehicle may endanger persons or property through the negligence or bad judgment of an intoxicated person.

The Crown can demonstrate realistic risk of danger by establishing impairment and a present ability to set the vehicle in motion. To avoid conviction, an accused will be required to present reliable evidence to show that no realistic risk of danger existed in the circumstances. In future cases, it will be for the trial judge to determine whether a risk of danger exists after examining all of the evidence. An alternative plan to get home without driving shall be considered, and it will be up to the trial judge to determine whether this plan minimizes the risk of danger posed by the intoxicated driver.



Majority

Justice Fish, writing on behalf of six of the seven Supreme Court justices hearing the case, held that when someone intends to set a vehicle in motion while intoxicated, it will usually mean that a danger of risk exists. However, intention to put the car in motion is not an essential element of the offence. Even without this intention, a danger of risk could be created if an individual's level of intoxication impaired his or her judgment. Thus, intention only helps establish whether a risk exists.

The Court held, however, that the purpose of s. 253 of the *Criminal Code* is to protect public safety. Therefore, if someone poses no realistic risk of harm, then they are outside the intended scope of the offence. In this case, the trial judge applied the correct test for this offence while weighing the evidence presented by the parties. Since the trial judge determined that Boudreau posed no risk of setting the vehicle in motion, he posed no realistic risk of danger to the public. Therefore, the SCC restored his acquittals.

Dissenting Minority

Justice Cromwell disagreed with the majority of the Court. He held that an accused can be convicted of the offence of "care and control" of a vehicle while intoxicated as expressed in s. 253 of the *Criminal Code*, even if **no** risk of harm exists.

Unlike Justice Fish, Justice Cromwell held that the purpose of this provision is preventive: the law intends to prevent harm that may arise from the inherent danger caused by an intoxicated driver. He wrote at para. 86: "[T]he net of criminality has been cast widely in order to avoid the inherent risk of the interaction of alcohol and automobiles." In his view, danger is present when an intoxicated person takes care and control of a vehicle. He interpreted the meaning of "care and control" to mean that a person has assumed the ability to operate a vehicle. Thus, risk of danger is not to be assessed as part of the offence. Rather, the court must look to the facts of the case and only assess the degree to which the intoxicated individual has control of the car.

In this case, the accused sat behind the wheel while drunk and engaged the engine. Section 253 of the *Criminal Code* was enacted precisely to prevent this kind of behaviour. Justice Crowell stated that by adding in an additional element of the "realistic risk" that this conduct poses, the majority had distorted the preventative nature and wide ranging scope of the provision.

DISCUSSION

1. What is your immediate reaction to this judgment: was the right decision made? Explain your answer.
2. The SCC accepted that Boudreault did not intend to drive the vehicle. Could his intentions have changed while waiting for the taxis?
3. Do you think that the fact that Boudreault was waiting for a taxi mattered in the majority's decision? Why? If he had not done this, do you think the Court would have reached the same conclusion?
4. In your opinion, what would have happened had Boudreault not started the engine? Does this change the degree to which he was in "care and control" of the vehicle?
5. What is more important: preventing harm that could arise from drunk driving or ensuring that individuals who pose no risk to society are not unjustly convicted? Which of these were most important to the majority reasons? Which of these were more important to the dissenting reasons?

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R v MABIOR, 2012 SCC 47, [2012] 2 SCR 584

Date Released: October 5, 2012

<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10008/index.do>

Facts

The accused, Clato Mabior, is HIV-positive. His house was the site of many parties where alcohol and drugs were freely exchanged. On occasion, Mabior had sex with women who came to his parties, but he did not disclose his HIV status to the women he was having sex with. Sometimes he wore a condom; other times he did not.

Nine women came forward alleging that they had sex with Mabior and that he did not disclose that he was HIV-positive. Eight of the nine women testified that they would not have had sex with him had they known of his HIV status. None of the women contracted HIV.

Mabior was charged with nine counts of aggravated sexual assault. In his defence, he put forward evidence that he was under treatment that greatly reduced his viral load (the concentration of HIV in his blood) and that there was therefore a low risk of transmission of the disease.

Criminal Code RSC 1985, c C-46

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

...

(2) This section applies to all forms of assault, including sexual assault, ... and aggravated sexual assault.

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

...

(c) fraud;

273. (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

(2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable

(b) in any other case, to imprisonment for life.



Procedural History

At trial, Mabior was convicted on six of the nine counts. The trial judge acquitted him on three of the counts because, during these three sexual encounters, he was wearing a condom and his viral load was undetectable. With a condom and undetectable viral load, he did not put the three women at “significant risk of serious bodily harm”, namely, contracting HIV.

Mabior appealed the six convictions. The Manitoba Court of Appeal varied the trial judge’s decision, acquitting him of an additional four charges. The Court found that the trial judge had erred in determining that **both** an undetectable viral load **and** the use of a condom were required to adequately reduce the risk of serious harm. Rather, the Court held that **either** a low viral count **or** condom use would negate the serious risk he posed of transmitting the disease. The Crown appealed these four acquittals to the Supreme Court of Canada (SCC).

Issues

1. Under what circumstances does failure to disclose HIV status before sex negate consent and thus become “fraud” as set out in s. 265 of the *Criminal Code*?

Decision

The SCC allowed the appeal in part. Mabior’s convictions in respect to three of the four women were restored.

Ratio

The ratio can be found in para. 4 of the decision: “[A] person may be found guilty of aggravated sexual assault under s. 273 of the *Criminal Code* if he fails to disclose HIV-positive status before intercourse and there is a realistic possibility that HIV will be transmitted.” Without a realistic possibility of transmission, the HIV-positive person will not have defrauded his or her partner. Without fraud, the sex will be deemed consensual and no crime will have occurred.

A realistic possibility of transmission will not exist if the HIV-positive person: (a) has a low viral count as a result of treatment; and (b) uses a condom. However, the Court concluded that the law could adapt in the future with advancements in treatment that reduce the likelihood of transmission or the danger posed by HIV.

As well, the Court restricted its decision to the disclosure of HIV status, and not to the disclosure of other sexually transmitted diseases.

REASONS

Chief Justice McLachlin clarified the test for when fraud would negate sexual consent. The existing test was established in *R v Cuerrier*, [1998] 2 SCR 371, which was then the leading case on HIV and sexual consent. In *Cuerrier*, the SCC held that not disclosing HIV-positive status would amount to

aggravated sexual assault if the accused was shown to have committed 1) a dishonest act, either falsehoods or failure to disclose HIV status; and 2) a deprivation, as in denying the sexual partner knowledge which would have caused her to refuse sexual relations that exposed him or her to a significant risk of serious bodily harm.

The Court kept the *Cuerrier* framework, but noted that the second part of this test was uncertain. It did not specify how significant a “significant risk” must be to qualify as a deprivation, define what would constitute “serious” bodily harm or explain the interaction of these two factors. The Court needed to clarify this test because in order for a law to be effective, it must be clear enough to allow citizens to conduct their behaviour accordingly.

To resolve these issues, the SCC considered the purposes of criminal law, the history of cases involving non-disclosure, the law in other jurisdictions, and how the *Charter of Rights and Freedoms* should apply. Writing for a unanimous Court, Chief Justice McLachlin noted that the criminal law must be careful not to punish conduct that is solely dishonest, but not harmful. At the same time, the criminal law must protect and balance the *Charter* value of human dignity and the freedom of individuals to make informed choices about their behaviour and sexual health. Thus, the Chief Justice formulated the test below to balance these competing concerns.

A person may be found guilty of aggravated sexual assault under s. 273 of the *Criminal Code* if he or she fails to disclose HIV-positive status before intercourse and there is a realistic possibility that HIV will be transmitted. There will be no realistic possibility of bodily harm if: (a) condom protection was used; **and** (b) the accused’s viral load at the time of sexual relations was low.

As reported in the decision, with no condom usage and a normal viral load, there is a 0.05 to 0.26% chance that an HIV-positive individual will transmit their disease to a sexual partner. Use of a condom reduces the risk of HIV transmission by 80%, on average, and a low viral load further decreases the chances of transmission by 89 to 96%. Thus, these two precautions together reduce the risk of transmission so greatly that they negate a realistic chance of transmission. With no realistic chance of transmission, no significant risk of bodily harm exists, and therefore, a sexual partner is not deprived of knowledge that might lead them to withhold consent.

Applied to this case, Chief Justice McLachlin noted that it had been established at trial that Mabior had a low viral load but did not use a condom when having sex with three of the four women. Thus, he was convicted of aggravated sexual assault on those three counts. However, he was acquitted on one count because he had used a condom and had a low viral load in that sexual encounter.

Mabior was deported to South Sudan in February 2012, after serving his criminal sentence, but before this ruling was issued.

DISCUSSION

1. Consider the perspectives of both Mr. Mabior and the victims. Why might someone want to keep their HIV status private, if there was no significant risk of transmission? Why might a potential partner want to know about it prior to sex, even if there was no significant risk of transmission?
2. Consider the percentages that describe the chances of HIV being transmitted. How likely is transmission? Is it necessary to require **both** a low viral load **and** the use of a condom, given this likelihood? Explain.
3. Does the condom-use requirement put women with HIV in a different situation with respect to the law than it does for men with HIV? Why or why not?
4. In your opinion, why did the SCC specify that these guidelines apply only to HIV and not to other sexually transmitted diseases?
5. What kinds of medical developments might cause this ruling to be modified in the future?

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MOORE v BRITISH COLUMBIA (EDUCATION), 2012 SCC 61, [2012] 3 S.C.R. 360.

Date Released: November 9, 2012

<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12680/index.do>

Facts

Jeffery Moore received special education as a public school student because he has significant dyslexia, a learning disability with problems in reading, writing and spelling. Unfortunately, this special education program did not do enough to address his learning needs, so the psychologist from his school district recommended that Moore attend the local Diagnostic Centre to receive the necessary help. A more successful program was implemented, but because of Provincial budget cuts, the Diagnostic Centre was closed. His parents were forced to pay for him to go to a private school to get him the remedial help he needed. There he thrived and earned an award for "Most Improved Student".

In 1996, Moore's father filed a complaint with the British Columbia Human Rights Tribunal against the school district and the Province on the grounds that he had been denied a service customarily available to the public. He argued that because the Diagnostic Centre had been closed, Moore had not been provided the same educational service that other students in the province received.

British Columbia's Human Rights Code, RSBC 1996, c 210

8. (1) A person must not, without a bona fide and reasonable justification,

- (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
- (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

Procedural History

The Tribunal ruled that the District and the Province had discriminated against Moore when it closed the local Diagnostic Centre and failed to provide alternative accommodation. As a remedy, the Tribunal ruled that Jeffrey's parents be reimbursed for the cost of his private school tuition and,



additionally, receive \$10,000 for pain and suffering. The Tribunal also found that the closure of the Diagnostic Centre amounted to systemic discrimination against students with severe learning disabilities, and ordered a wide range of remedies against both the District and the Province.

In 2008, a judicial review in the B.C. Supreme Court overturned the Tribunal's ruling. The reviewing judge found that because the closure affected students with special needs equally as a group, Jeffrey had not been discriminated against individually. The Tribunal's decision was set aside. Moore appealed, and in 2010 a majority of the Court of Appeal dismissed the appeal. The appellate court ruled that since Jeffrey did not receive worse treatment than other students with dyslexia, he could not claim discrimination.

Moore appealed this judgment to the Supreme Court of Canada (SCC) and his appeal was heard in March 2012.

Issues

Should "service... customarily available to the public" mean education generally, or special education?

Decision

In November 2012, the SCC unanimously allowed the appeal, in part.

Ratio

Special education is an inherent part of basic education as guaranteed by British Columbia's *Human Rights Code*. It is not an extra service, but rather one part of the basic service that ensures children with special learning needs can access the same level of basic education that the Government of British Columbia is legally required to provide to all public school students in the province.

REASONS

The SCC considered whether Jeffrey had been discriminated against by being denied a "service... customarily available to the public". While basic education was clearly a service that is available to the public, the supports offered at the Diagnostic Centre were not. The judges had to decide between opposing views on Jeffrey's special education: was it an extra service that went over and above what was given to most students? Or was it the support that Jeffrey needed to in order to make use of the general educational services that other students received?

The SCC found that special education is not a luxury, but rather "...the ramp that provides access" to the basic education to which all children in British Columbia are legally entitled. The Court ruled that the lower courts had erred in comparing Jeffrey's case only to that of other students with special needs. Making individuals with disabilities



prove that the discrimination they suffer is worse than that suffered by other people with disabilities could mean that service providers could drastically cut programs, as long as the reductions affected all people with disabilities equally. This could mean perpetuating the discrimination that the *Human Rights Code* aimed to abolish.

Writing for the Court, Justice Abella noted that learning supports programs were essential to the provision of general education. Without the ongoing support of the Diagnostic Centre, Jeffrey could not receive the full benefit of his general education in the same way as other students. The Court held that Jeffrey had suffered discrimination on the basis of his disability.

Once discrimination was found, the District had the chance to justify the discrimination. The SCC found that the District was not able to do so. The District attempted to justify closing the Diagnostic Centre by arguing that it had been in the middle of a budget crisis and that it had no other choice. But, because the District had not performed any assessment, financial or otherwise, of what alternatives were available to special needs students, it could not reasonably say that it had no other choice. The Court noted further that the District had failed to adequately consider the full impact the closure of the Centre would have on students with special needs.

After finding that the discrimination against Jeffrey could not be justified, the SCC considered the appropriate remedy. The Tribunal had ordered the District to reimburse Jeffrey's parents for the cost of the private school tuition. The Court upheld this remedy because it was logically connected to the discrimination. Further, the Court upheld the Tribunal's order for the \$10,000 compensation for "injury to Jeffrey's dignity, feelings, and self-respect." However, the SCC did not restore the more systemic remedies that the Tribunal had imposed.

After completing his education, Jeffrey Moore became a successful journeyman plumber.

DISCUSSION

1. What are some ways in which teachers and schools can work to accommodate differences in the ways different students learn?
2. Did the Moore family have the option of keeping Jeffrey in public school after the Diagnostic Centre was closed? What kind of education would he have received if they had done so? Explain.
3. The District was not able to justify the discrimination because it failed to consider any alternatives to closing the Diagnostic Centre. Do you think the discrimination would have been justifiable if the District had considered alternatives? Explain.
4. The SCC noted that some programs with a similar cost, such as an environmental and outdoor education facility, were retained after the budget cuts. Try to think of one or two arguments both for and against closing that facility in place of the Diagnostic Centre.
5. Do you agree with the Court's ruling, or do you think that special needs services go above and beyond the basic educational services most students receive? Explain.

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R v NS, 2012 SCC 72, [2012] 3 S.C.R. 726.

Date Released: December 20, 2012

<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12779/index.do>

Facts

N.S.'s cousin and uncle were being tried for repeatedly sexually assaulting N.S. when she was a child. The men tried to get an order requiring N.S. to remove her niqab – a veil that covers her face but not her eyes – when testifying. They argued that N.S. wearing her niqab while testifying would compromise their right to a fair trial because it would conceal her facial expressions and demeanor and make it difficult to assess or challenge her credibility on the witness stand. On the other hand, N.S. asserted that her religious beliefs required her to wear a niqab in public where men (other than certain close family members) might see her. These two arguments meant that there was a clash of rights guaranteed under the *Canadian Charter of Rights and Freedoms*. N.S.'s right to freedom of religion was in conflict with the co-accused's rights to a fair trial, including the right to assess and challenge the reliability of witness testimony.

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion

...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

11. Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

...

Procedural History

The preliminary inquiry judge found that N.S.'s religious beliefs were "not that strong" and ordered her to remove her niqab. N.S. sought a judicial review of this order.



The Superior Court of Justice quashed the order and returned the matter to the first court with the instruction that N.S. could testify with a niqab if she established a “sincere religious reason” for doing so. However, this Court also ruled that the preliminary inquiry judge could exclude her evidence if the niqab was found to have impeded the accused’s ability to challenge her testimony.

N.S. appealed again. The Ontario Court of Appeal laid out specific factors for judges to consider when deciding whether to permit a witness to testify wearing a niqab, and again returned the matter to the preliminary inquiry judge. N.S. appealed this decision to the Supreme Court of Canada (SCC). Her appeal was heard in December 2011.

Issues

When, if ever, should a witness who wears a niqab for religious reasons be required to remove it when testifying?

Decision

In December 2012, the majority of the SCC dismissed N.S.’s appeal. The Court created an approach to balance a witness’s freedom of religion and the accused’s right to a fair trial. The matter was again sent back to the preliminary inquiry judge to apply the test and to decide whether N.S. would have to remove her niqab.

Ratio

A witness who wears a niqab for sincere religious reasons may be required to remove it when testifying in a criminal trial if: a) No

other reasonable measures can prevent the risk to the fairness of the trial; and b) The benefits outweigh the negative effects of requiring removal of the niqab.

REASONS

Majority

Section 2(a) of the *Charter* protects freedom of conscience and religion. For a religious practice to be protected it must be based on a “sincere” religious belief. The majority found that N.S. did have a sincere religious belief that she had to wear a niqab while testifying.

Sections 7 and 11(d) of the *Charter* give the accused a right to a fair trial, including a right to make a full defence. The majority had to decide whether allowing N.S. to testify with a niqab would cause a serious risk to the fairness of the trial. They concluded there would be a serious risk because it is “deeply rooted” in the criminal justice system that seeing a witness’s face is important for assessing credibility and proper cross-examination. But, they recognized that in some instances wearing the niqab would not pose a serious risk to trial fairness, such as when evidence is uncontested.

The majority then outlined factors that would help judges determine whether the benefits of a witness removing her niqab would outweigh the negative effects. The following factors should be considered when thinking about the negative effects of a witness removing a niqab:

- What is the impact of failing to protect this particular witness’s sincere belief?
- How important is the religious practice to the witness?



- What is the degree of state interference with the religious practice?
- How does the actual situation in the courtroom affect the harm to the witness?
- Are there broader social harms that would result? (e.g. discouraging people who wear niqabs from participating in the justice system)

The following questions should be considered when thinking about the benefits of requiring a witness to remove her niqab:

- What is the nature of the evidence being given by the witness?
- How important is the witness's evidence to the case?
- What type of proceeding is it?
- Is public confidence in the justice system being protected?

The majority's framework is to be used by judges when making a decision about niqabs in the courtroom. They felt that this approach was fairer than an absolute rule that always allowed niqabs or never allowed them.

Concurring Minority

Justice LeBel and Justice Rothstein agreed with the majority's decision to dismiss N.S.'s appeal. However, they did not agree that witnesses should be allowed to wear niqabs in certain circumstances. They rejected the majority's case-by-case approach because the factors added too much uncertainty and complexity. Thus, they determined that there had to be a clear rule – always or never. While

both rights are extremely important, the justices held that making sure that justice is done openly is a "fundamental part of a democratic society". Therefore, we should never allow witnesses to wear niqabs when testifying.

Dissenting Minority

Justice Abella disagreed with the majority. She would have created a rule that always allowed witnesses to wear niqabs, except in very limited circumstances when the witness's face is directly relevant to the case (e.g. where her identity is in issue). She did not agree that seeing less of a witness's face significantly undermined the ability to assess credibility. In fact, she pointed to several examples in which the Court will accept testimony in less than ideal circumstances, such as when an interpreter is required or when the witness has a speech impairment. She found that the fairness of the trial should be understood from the perspective of not just the accused, but also of the community and the complainant. Under these circumstances, she reasoned that considering the fairness of a trial only from the perspective of the accused could discourage women from Muslim communities from coming forward in sexual assault cases because it could force them to choose between their religious beliefs and their ability to participate in the justice system.

DISCUSSION

1. In this case, the judges of the SCC produced three different conclusions. Sum each of these up in one or two sentences.
2. Do you agree that the ability to see a witness's face is a fundamental part of assessing credibility? Why or why not?
3. Do you think requiring witnesses to remove their niqabs will cause some people to avoid testifying or bringing charges, in effect forcing these people out of the justice system? Explain.
4. In the preliminary hearing, the judge found that N.S.' religious beliefs were "not that strong" because of evidence that she would remove her niqab under some circumstances, such as posing for a driver's license photo or to go across a border. Are these examples comparable to testifying in court? Why or why not?
5. This case stemmed from sexual attacks that happened when N.S. was a young child. How, if at all, is this fact reflected in the decision? Might the Court have ruled differently if the charges in question involved theft or something less violent in nature? Explain.

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.

Date Released: October 19, 2012

<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

8. (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



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



R v COLE

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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.