

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

RICHARD COLE

Respondent

- and -

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PART I – OVERVIEW AND CONCISE STATEMENT OF FACTS

1. This appeal is not about the employer-employee relationship. It is about the relationship between individuals and the police. The Court must decide whether an IT policy for employment purposes can forfeit an employee's *Charter* rights to privacy in intensely personal information on work-issued communication devices.

2. The answer is no. Canadian use of work devices for non-work purposes is ubiquitous. Personal computers and cell phones, used at home, work, or elsewhere, contain in exquisite detail their users' thoughts, communications, beliefs, needs, actions, interests and desires.¹ They expose similar information from third parties who have either used the computer or communicated with its primary users via the Internet. The questions of where title resides to the computers, cell phone, wires, transmission towers or other communication device misses the constitutional issue. The nature of information at stake is such that state access to it without a warrant constitutes an intrusive, extensive, and invasive interference with the privacy interests enshrined in s. 8 of the *Charter*. The concurrent *property* rights of an employer do not negate this constitutional protection. Nor do they permit the state to use an employer's IT policy as a back door to circumvent an employee's constitutionally enshrined *privacy* rights.

3. The Canadian Civil Liberties Association ("CCLA") relies on the facts set out by the Court of Appeal.²

PART II – ISSUES

4. The CCLA submits that (i) s. 8 protects employee personal information in employer-issued devices; (ii) the warrantless search cannot be rendered lawful by statute or common law; and (iii) s. 24(2) must focus on the privacy expectation enjoyed by the subject of the search *vis-à-vis* the police.

¹ *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 3.

² Reasons for Judgment, Court of Appeal, Appellant's Record, Vol. I. p. 48 ("Court of Appeal Reasons")

PART III - ARGUMENT

ISSUE 1: Section 8 Protects Personal Information in Employer-Issued Devices

5. Section 8's broad, personal right to privacy is "at the heart of liberty in a modern state"; it is a precondition to healthy democratic discourse and social interaction; it protects individual dignity, integrity and autonomy; its suppression encourages self-censorship and chills expression.³

6. Section 8 is engaged by state conduct which interferes with a reasonable expectation of privacy and thereby constitutes a "search". The expectation of privacy is a normative, stable standard – "the privacy we are entitled to expect, not what we actually get as a practical matter".⁴ The constitutional protection it promises must keep pace with developments in both technology and surveillance.⁵ Its presence is to be determined "on the basis of the totality of the circumstances" and from the perspective of a reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy.⁶ The focus is on the existence of a subjective expectation of privacy and the objective reasonableness of that expectation.⁷

7. The Crown's vision of privacy, in which the scope of s. 8 is defined by the vagaries of IT employment policies, will license "random and speculative" police scrutiny using *any* surveillance technique available; this will include remote covert inspection, tantamount to a wiretap, of the kind

³ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60; *R. v. Dyment*, [1988] 2 S.C.R. 417, at paras. 17, 22; Paul M. Schwartz, "Privacy and Democracy in Cyberspace" (1999) 52 *Vanderbilt L. Rev.* 1609, at pp. 1652-53, 1656-57, 1664; Valerie Steeves, "Reclaiming the Social Value of Privacy" in Ian Kerr, Valerie Steeves & Carole Lucock, eds. *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (New York: Oxford University Press, 2009), p. 191, at pp. 193, 196; *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, at para. 3 (*per* La Forest J., concurring), 65-66 (*per* McLachlin J., dissenting).

⁴ *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 42; Steve Coughlan, Annotation on *R. v. Cole* (2001), 83 C.R. (6th) 1.

⁵ *Tessling*, at para. 55; *R. v. Wong*, [1990] 3 S.C.R. 36, at paras. 9, 15, 28; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 14.

⁶ *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45; *Tessling*, at para. 19; *Patrick*, at para. 14.

⁷ *Tessling*, at para. 19.

used by the technician to access the Respondent's computer.⁸ Placing an entire category of conduct or information entirely outside the reach of constitutional protection must be avoided, since it bars later courts from weighing competing societal and individual interests on a case-by-case basis.⁹ A justice, weighing those interests, can ensure that a warrant permits state intrusion only where there is good reason to believe that a search – appropriately limited in scope – will disclose evidence of a specific crime.¹⁰ This flexible approach, adopted by the Court of Appeal, avoids the “broad absolutes” that the Crown says should be avoided, while preserving fundamental civil liberties.¹¹

8. The CCLA adopts the Respondent's submission that he subjectively expected privacy in the computer and the information derived from it.¹² Whether that expectation of privacy is objectively reasonable depends on a proper characterization of the search subject matter and the claimant's interest therein, the reasonableness of the use of the surveillance technology, the intrusiveness of the police action and, crucially in this case, the nature and quality of the information disclosed.¹³

(a) Nature and Quality of Information Makes Privacy Expectation Reasonable

9. Communication devices like computers and cell phones, wherever used, are repositories of intensely personal information relating to their primary user's and third parties' activities, personal preferences, and the individuals and organizations with whom they interact. In *Dyment*, La Forest J. held that the concept of informational privacy under s. 8 of the *Charter*:

is based on the notion of the dignity and integrity of the individual...
‘This notion of privacy derives from the assumption that all

⁸ *Edwards*, at para. 34; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 31; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569, at paras. 62-63; *R. v. Duarte*, [1990] 1 S.C.R. 30, at paras. 21-23; *Wong*, at para. 14; Stephen Coughlan, *Criminal Procedure* (Toronto: Irwin Law, 2008), at p. 83; Court of Appeal Reasons, at paras. 11-12; Michael A. Geist, “Computer and E-Mail Workplace Surveillance in Canada: The Shift from Reasonable Expectation of Privacy to Reasonable Surveillance” (2003) 82 Can. Bar. Rev. 151, at pp. 159-162.

⁹ Coughlan, *Criminal Procedure*, at p. 83.

¹⁰ *Hunter v. Southam*, at pp. 160-61, 167-68; *R. v. Jones*, 2011 ONCA 632, at paras. 48-50.

¹¹ Factum of the Appellant, at paras. 42-46 (“FAP”).

¹² Factum of the Respondent, at paras. 19-20 (“FRE”).

¹³ *Patrick*, at para. 27; *Tessling*, at paras. 32, 34-37.

information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.’ In modern society, especially, retention of information about oneself is extremely important.¹⁴ [Emphasis added.]

10. In determining whether an objectively reasonable expectation of privacy attaches to information, the Court has consistently drawn the reasonableness line by assessing the nature and quality of the information generated by the impugned investigatory technique.¹⁵ As the Court held in *Plant*, to foster “the underlying values of dignity, integrity and autonomy”, s. 8:

should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.¹⁶ [Emphasis added.]

11. Not all information about a person is protected. But, as a general rule, an objectively reasonable expectation of privacy should be found where state conduct intrudes upon this “core”.¹⁷

12. In Canadian society, our lives are deeply integrated with employers, corporations and government. We have to work. We use computers and cell phones to do so. Personal, non-work use of work computers and cell phones for all manner of Internet activity (browsing, banking, communications through email and instant messaging and social media like Facebook and Twitter, etc.) is recognized as ubiquitous – whether or not it is condoned by employers.¹⁸

¹⁴ *Dyment*, at para. 22.

¹⁵ See *Tessling*, at paras. 29-30; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at paras. 1 (*per* LeBel J.), 58 (*per* Binnie J.) 175 (*per* Deschamps and Rothstein JJ.), 227 (*per* Bastarache J.); *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at paras. 34-36 (*per* Deschamps J.), 119, 123-25, 130, 139-142 (*per* McLachlin C.J.C. and Fish J.).

¹⁶ *R. v. Plant*, [1993] 3 S.C.R. 281, at para. 20 (emphasis added).

¹⁷ *Plant*, at para. 20; *aff’d Tessling*, at paras. 25-26.

¹⁸ See e.g. Stuart E. Rudner & Nafisah Chowdhury, “Facebook, Myspace... Dealing with Employee Internet and Email (Ab)use” (Ontario Bar Association, 7th Annual Current Issues in Employment Law, 6 March 2008) (Toronto: Ontario Bar Association, 2008), at pp. 3-5; Geist, “Computer and E-Mail Surveillance”, at pp. 155-56; *United States v. Nosal*, 2012 WL 1176119 C.A.9 (Cal.) (9th Cir. 2012), at pp. 2, 5; *R. v. Little*, 2009 CanLII 41212 (ON SC), at paras. 16-27, 147-151.

13. Work computers, for all intents and purposes, are indistinguishable from the “personal computer” described in *Morelli*. Both:

often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations. They even reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet.¹⁹

14. The nature and quality of the information at issue overwhelmingly points to there being an objectively reasonable expectation of privacy in such devices. The Crown ignores that this Court has firmly recognized that constitutional protection must be afforded where information this cogent and this personal is at stake.

15. The *Morelli* Court held that “[i]t is difficult to imagine a search more intrusive, extensive, or invasive of one’s privacy than the search and seizure of a personal computer.”²⁰ An inspection of an employer-issued communication device is equally intrusive and invasive. It exposes highly revelatory information. It can disclose personal communications, and can be performed remotely and covertly.²¹ Thus, it can be functionally equivalent to a wiretap – a serious intrusion into the privacy of multiple parties that at a minimum requires prior judicial authorization.²² Access, without consent, to the Respondent’s computer and the Internet files derived from it is a “search” that should be subject to s. 8 and the constitutional requirements of *Hunter v. Southam*. None of the factors raised by the Crown diminish or negate that conclusion.

(b) Employer IT Policies Cannot Set Constitutional Standards

16. The Crown’s vision of privacy allows unsupervised remote access to intensely personal information through the portal of employer-drafted IT policies. The Crown’s reliance on *Gomboc*

¹⁹ *Morelli*, at para. 105; see also *R. v. Jones*, at para. 51.

²⁰ *Morelli*, at para. 2.

²¹ Court of Appeal Reasons, at paras. 11-12; Geist, “Computer and E-Mail Surveillance”, at pp. 159-162.

²² *R. v. Tse*, 2012 SCC 16, at para. 17; *Duarte*, at paras. 21-23; *Wong*, at paras. 13-14.

for this investigative windfall is misplaced. Factors that regulate the relationship between an individual and the employer have no constitutional significance to the relationship between citizen and state where the investigation of crime is concerned.²³ This Court has acknowledged the impact of regulatory regimes on expectations of privacy when considering laws that authorize a specific actor to engage in the specific conduct complained of.²⁴ But it has never suggested that a law regulating one type of relationship, let alone a workplace policy that is un-bargained for and imposed on an employee, should determine the constitutional protections which govern the relationship between individual and state in the investigation and prosecution of crime.

17. IT policies should have little relevance to an individual's reasonable expectation of privacy from police scrutiny. Such policies vary to a great extent, usually are not freely negotiated, may not even be known to employees, and provide only exceptions for access to what is otherwise understood to be private.²⁵ To say that policies acknowledging only occasional and exceptional access for a specific purpose regulate all expectations of privacy is to turn a limited exception into a blanket rule.²⁶

(c) Property Interests Not Constitutionally Determinative

18. The employer's asserted ownership of the computer and the data it contained did not vitiate the Respondent's otherwise reasonable expectation of privacy (see FAP paras. 51, 56, 61). Personal information sent through and stored on the Internet invariably passes through the 'property' of third parties, like Internet Service Providers, whose policies may assert ownership of the property and the

²³ *Dyment*, at paras. 28, 30; *R. v. Colarusso*, [1994] 1 S.C.R. 20, at para. 74; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at paras. 33-34, 37; *R. v. Law*, [2002] 1 S.C.R. 227, at paras. 18-28.

²⁴ *Gomboc*, at para. 31; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at paras. 14, 28, 31; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at paras. 58, 63-64.

²⁵ Court of Appeal Reasons, at paras. 17, 19, 40, 41; Rudner *et al.*, "Facebook, Myspace...", at pp. 17-18.

²⁶ Steve Coughlan, Annotation on *R. v. Cole* (2001), 83 C.R. (6th) 1.

data it contains.²⁷ However, the personal interests protected by s. 8 of the *Charter* are of wider ambit than those based on a titled right to enjoy property.²⁸ While conventional property law concepts are a tool useful in evaluating the reasonableness of some expectations of *territorial* privacy, traditional notions of title, custody and control will have little relevance where, as here, the privacy interest is based not on ownership of an object, but on what the information generated during its use reveals about a person.²⁹ We must recognize that the police are not interested in the cables and plastic that make up computers and cell phones that connect us to the Internet. They are interested in the cloud of *thoughts, ideas, and information* that pass through and attach to that property.³⁰ The nature and quality of the information at issue must drive the analysis.

(d) School Context Irrelevant

19. *M. (M.R.)* is not authority for reducing or rendering unreasonable the Respondent teacher's expectation of privacy *vis-à-vis* the police. In *M. (M.R.)*, the Court held only that students enjoy a modified expectation of privacy *vis-à-vis* teachers.³¹ The decision expressly does not apply to police.³² There remains a critically important distinction between an investigation *by school authorities*, and a criminal investigation *by police* in a school: this Court has held that the latter requires "a warrant ... based upon information which provides reasonable and probable grounds".³³

20. A modified expectation of privacy was found in *M. (M.R.)* to allow school officials "to act quickly and effectively to ensure the safety of students and to prevent serious violations of school rules".³⁴ That rationale does not apply in respect of a work computer already seized from the

²⁷ Rudner *et al.*, "Facebook, Myspace...", at p. 17; Geist, "Computer and E-Mail Surveillance", at pp. 159-162.

²⁸ *Hunter v. Southam*, at pp. 157-159; *Dyment, supra*, at paras. 15-16.

²⁹ *Tessling*, at paras. 16, 22.

³⁰ *A.M.*, at para. 37.

³¹ *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at paras. 1, 55.

³² *M. (M.R.)*, at para. 56.

³³ *A.M.*, at paras. 2 (*per* LeBel J.), and 46-47(*per* Binnie J.); *M. (M.R.)*, at para. 56.

³⁴ *M. (M.R.)*, at paras. 36-37.

employee, searched by the employer, and under their control or that of the police: there is no danger that the evidence will be lost, requiring the police to act more quickly than would be permitted by a warrant; and, as the employee no longer has control, the ongoing risk of rule violations and to student safety must be understood to be minimal.³⁵

ISSUE 2: Search Unconstitutional Because Not Authorized by Law³⁶

(a) No Lawful “Piggyback”

21. A “regulatory agency” collecting information for one purpose may not lawfully disclose that information to police simply because the police investigation is for the “same purpose”.³⁷ The Crown’s position in this regard runs against this Court’s jurisprudence, which explains that the police performing their criminal law function cannot avoid their constitutional obligations by relying on the lower standards enjoyed by another.³⁸ In any event, the doctrine relied on by the Crown has no application here. The purposes for the School Board’s information collection – “to maintain proper order and discipline in the school” and “to give assiduous attention to the health and comfort of the pupils” – is not the same as the police purpose: investigation to assist criminal prosecution.³⁹

(b) No Common Law Doctrine of Third-Party Consent

22. The Crown submits that “[i]n appropriate circumstances a third party may validly waive a person’s privacy interest”.⁴⁰ Canadian law does not currently, and, for two reasons should not, recognize a common law doctrine of third-party consent as lawful authority for police access.⁴¹

³⁵ Court of Appeal Reasons, at paras. 64, 67, 79; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 28, 87-92: the dangers arising from possession of child pornography, while great, are nullified where the accused is no longer in possession of the harmful images.

³⁶ *R. v. Collins*, [1987] 1 S.C.R. 265, at para. 23.

³⁷ See FAP paras. 88-93.

³⁸ *Dyment*, at paras. 28, 30; *Colarusso*, at para. 74; *Buhay*, at paras. 33-34, 37; *Law*, at paras. 18-28.

³⁹ *Education Act*, R.S.O. 1990, c. E.2, ss. 265(1)(a), (j); *A.M.*, at paras. 2, 46-47; *M. (M.R.)*, at para. 56.

⁴⁰ FAP, at para. 77 (emphasis added).

⁴¹ FRE, at paras. 70-73.

23. First, it is well settled that waiver of a *Charter* right is effective only if it is shown to be both clear and unequivocal, and to have been given voluntarily by the individual rights holder who has been informed of the effect waiver will have on his or her right.⁴² It would be a significant departure from this rule to infer “clear and unequivocal” waiver of a *Charter* right against police scrutiny (or delegation of an individual’s waiver rights) from an employee’s acquiescence to IT policies dealing only with their employer’s limited right of access. Even if such an inference can be drawn, acquiescence to the terms of a contract of adhesion, like the terms and policies governing employment, cannot properly be understood to constitute informed consent or freely given waiver.⁴³

24. Second, a police power of warrantless access based on third-party consent would constitute common law authority for a search – *ie.* authority for conduct interfering with a reasonable expectation of privacy. Common law police powers can be recognized only in accordance with the *Waterfield* test, as adopted by this Court in *Dedman*, which requires the Crown to show that (1) the search “fell within the general scope of the duties of a police officer under statute or common law”, and (2) the “interference with liberty [was] necessary for the carrying out of the particular police duty and [was] reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference”.⁴⁴

25. The doctrine proposed by the Crown cannot pass the second stage of this test.⁴⁵ As Karakatsanis J.A. observed in the court below, and as conceded by the Crown in this Court, “a

⁴² *R. v. Richard*, [1996] 3 S.C.R. 525, at para. 22; *R. v. Askov*, [1990] 2 S.C.R. 1199, at para. 65; *R. v. Borden*, [1994] 3 S.C.R. 145, at para. 34.

⁴³ *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 72; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 97-99.

⁴⁴ *Gomboc*, at para. 144; *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at paras. 58, 67-69; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at para. 22.

⁴⁵ The CCLA assumes for argument that the first stage of the test would have been met: see *Clayton*, at para. 23.

warrant could easily have been obtained”; since there was no danger that the evidence sought would be lost, a warrantless search was entirely unnecessary.⁴⁶

ISSUE 3: Evidence Properly Excluded

26. The second *Grant* inquiry, into the impact of the *Charter* violation on the *Charter*-protected interests of the accused, focusses on the individual’s *actual* reasonable expectation of privacy and the *actual* conduct that violated it.⁴⁷ IT policies should be relevant to this only to the extent that they have informed the Court’s reasonable expectation of privacy analysis. The IT policies at issue modified only the Respondent’s relationship with his employer. Since he reasonably expected his core biographical information would not be subject to warrantless *police* scrutiny, the warrantless search of the computer and the data derived from it disclosing his Internet browsing history was highly invasive.⁴⁸ Balanced with the other *Grant* factors, the evidence must be excluded.

PART IV& V - COSTS AND REQUEST TO MAKE ORAL ARGUMENT

27. The CCLA does not seek costs, and requests that no costs be awarded against it. The CCLA requests that it be granted permission to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this first day of May, 2012.

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⁴⁶ Court of Appeal, at paras. 67, 79; FAP, at para. 98(g).

⁴⁷ *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 76-78.

⁴⁸ *Morelli*, at para. 2; see also *Jones*, at paras. 96-98.

PART VI – TABLE OF AUTHORITIES

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5	<i>Dedman v. The Queen</i> , [1985] 2 S.C.R. 2	24
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6	<i>Godbout v. Longueuil (City)</i> , [1997] 3 S.C.R. 844	23
7	<i>Hunter v. Southam Inc.</i> , [1984] 2 S.C.R. 145	5, 7, 18
8	<i>R. v. A.M.</i> , 2008 SCC 19, [2008] 1 S.C.R. 569	7, 18, 19, 21
9	<i>R. v. Askov</i> , [1990] 2 S.C.R. 1199	23
10	<i>R. v. Borden</i> , [1994] 3 S.C.R. 145	23
11	<i>R. v. Buhay</i> , 2003 SCC 30, [2003] 1 S.C.R. 631	16, 21
12	<i>R. v. Clayton</i> , 2007 SCC 32, [2007] 2 S.C.R. 725	24, 25
13	<i>R. v. Colarusso</i> , [1994] 1 S.C.R. 20	16, 21
14	<i>R. v. Collins</i> , [1987] 1 S.C.R. 265	21
15	<i>R. v. Duarte</i> , [1990] 1 S.C.R. 30	7, 15
16	<i>R. v. Dyment</i> , [1988] 2 S.C.R. 417	5, 9, 16, 18, 21
17	<i>R. v. Edwards</i> , [1996] 1 S.C.R. 128	6, 7
18	<i>R. v. Gomboc</i> , 2010 SCC 55, [201] 3 S.C.R. 211	10, 16, 24
19	<i>R. v. Grant</i> , 2009 SCC 32, [2009] 2 S.C.R. 353	26

20	<i>R. v. Jones</i> , 2011 ONCA 632	7, 13, 26
21	<i>R. v. Kang-Brown</i> , 2008 SCC 18, [2008] 1 S.C.R. 456	15
22	<i>R. v. Law</i> , [2002] 1 S.C.R. 227	16, 21
23	<i>R. v. Little</i> , 2009 CanLII 41212 (ON SC)	12
24	<i>R. v. M. (M.R.)</i> , [1998] 3 S.C.R. 393	7, 19, 20, 21
Appellant Tab 49	<i>R. v. Morelli</i> , 2010 SCC 8, [2010] 1 S.C.R. 253	2, 13, 15, 26
25	<i>R. v. Nolet</i> , 2010 SCC 24, [2010] 1 S.C.R. 851	16
26	<i>R. v. Patrick</i> , 2009 SCC 17, [2009] 1 S.C.R. 579	6, 8
Appellant Tab 52	<i>R. v. Plant</i> , [1993] 3 S.C.R. 281	10, 11
27	<i>R. v. Richard</i> , [1996] 3 S.C.R. 525	23
28	<i>R. v. Sharpe</i> , 2001 SCC 2, [2001] 1 S.C.R. 45	20
29	<i>R. v. Tessling</i> , 2004 SCC 67, [2004] 3 S.C.R. 432	6, 8, 10, 11, 18
30	<i>R. v. Tse</i> , 2012 SCC 16	15
31	<i>R. v. Wong</i> , [1990] 3 S.C.R. 36	6, 7, 15
32	Stuart E. Rudner & Nafisah Chowdhury, “Facebook, Myspace... Dealing with Employee Internet and Email (Ab)use” (Ontario Bar Association, 7 th Annual Current Issues in Employment Law, 6 March 2008) (Toronto: Ontario Bar Association, 2008), at pp. 3-5	12, 17, 18
33	Paul M. Schwartz, “Privacy and Democracy in Cyberspace” (1999) 52 Vanderbilt L. Rev. 1609, at pp.1652, 1653	5
34	Valerie Steeves, “Reclaiming the Social Value of Privacy” in Ian Kerr, Valerie Steeves & Carole Lucock, eds. <i>Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society</i> (New York: Oxford University Press, 2009), p. 191	5
35	<i>Syndicat Northcrest v. Amselem</i> , 2004 SCC 47, [2004] 2 S.C.R. 551	23
36	<i>United States v. Nosal</i> , 2012 WL 1176119 C.A.9 (Cal.)	12

PART VII - STATUTES

Education Act, R.S.O. 1990, c. E.2, ss. 265(1)

Duties of principal 265. (1) It is the duty of a principal of a school, in addition to the principal's duties as a teacher, discipline (a) to maintain proper order and discipline in the school; co-operation (b) to develop co-operation and co-ordination of effort among the members of the staff of the school; register pupils and record attendance (c) to register the pupils and to ensure that the attendance of pupils for every school day is recorded either in the register supplied by the Minister in accordance with the instructions contained therein or in such other manner as is approved by the Minister; pupil records (d) in accordance with this Act, the regulations and the guidelines issued by the Minister, to collect information for inclusion in a record in respect of each pupil enrolled in the school and to establish, maintain, retain, transfer and dispose of the record; timetable (e) to prepare a timetable, to conduct the school according to the timetable and relevant school year calendar, to make the timetable and calendar	Fonctions du directeur 265. (1) En plus de ses fonctions d'enseignant, le directeur d'école exerce les fonctions suivantes : discipline a) maintenir le bon ordre et la discipline dans l'école; collaboration b) accroître la collaboration et la coordination des efforts entre les membres du personnel de l'école; inscription des élèves et cahier de présence quotidienne c) inscrire les élèves et veiller à ce que leur assiduité pour chaque jour de classe soit inscrite soit dans le cahier de présence fourni par le ministre conformément aux instructions qui y figurent, soit d'une autre façon approuvée par le ministre; dossiers d'élèves d) conformément à la présente loi, aux règlements et aux lignes directrices du ministre, recueillir des renseignements en vue de les verser dans un dossier pour chaque élève inscrit à l'école, et constituer, tenir, conserver et transférer le dossier, ainsi que s'en défaire; emploi du temps e) préparer un emploi du temps, diriger l'école en fonction de cet emploi du temps et du calendrier de l'année scolaire pertinent, permettre aux élèves, aux
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accessible to pupils, teachers, designated early childhood educators and supervisory officers, to assign classes and subjects to teachers and to assign junior kindergarten or kindergarten classes or extended day program units to designated early childhood educators; examinations and reports (f) to hold, subject to the approval of the appropriate supervisory officer, such examinations as the principal considers necessary for the promotion of pupils or for any other purpose and report as required by the board the progress of the pupil to his or her parent or guardian where the pupil is a minor and otherwise to the pupil; promote pupils (g) subject to revision by the appropriate supervisory officer, to promote such pupils as the principal considers proper and to issue to each such pupil a statement thereof; textbooks (h) to ensure that all textbooks used by pupils are those approved by the board and, in the case of subject areas for which the Minister approves textbooks, those approved by the Minister; reports (i) to furnish to the Ministry and to	enseignants, aux éducateurs de la petite enfance désignés et aux agents de supervision d'avoir accès à l'emploi du temps et au calendrier, assigner des classes et des matières aux enseignants et assigner des classes de maternelle ou de jardin d'enfants ou des groupes de programme de jour prolongé aux éducateurs de la petite enfance désignés; examens et bulletins scolaires f) faire subir, sous réserve de l'approbation de l'agent de supervision compétent, les examens qu'il juge nécessaires pour le passage des élèves ou dans un autre but, et communiquer les progrès de l'élève, comme le conseil l'exige, à son père, sa mère ou son tuteur, ou à l'élève lui-même s'il est majeur; passage des élèves g) sous réserve de révision par l'agent de supervision compétent, voir au passage des élèves comme il le juge opportun et remettre à chacun d'eux une attestation à cet effet; manuels h) s'assurer que les manuels scolaires utilisés par les élèves sont ceux que le conseil a approuvés et, dans le cas de matières pour lesquelles le ministre approuve les manuels scolaires, ceux qui sont approuvés par le ministre; rapports i) fournir au ministère et à l'agent de
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the appropriate supervisory officer any information that it may be in the principal's power to give respecting the condition of the school premises, the discipline of the school, the progress of the pupils and any other matter affecting the interests of the school, and to prepare such reports for the board as are required by the board;	supervision compétent les renseignements qu'il est en mesure de donner concernant l'état des locaux scolaires, la discipline à l'école, les progrès des élèves et d'autres questions touchant les intérêts de l'école, et préparer des rapports à ce sujet pour le conseil comme ce dernier l'exige;
care of pupils and property (j) to give assiduous attention to the health and comfort of the pupils, to the cleanliness, temperature and ventilation of the school, to the care of all teaching materials and other school property, and to the condition and appearance of the school buildings and grounds;	mesures d'hygiène vis-à-vis des élèves et entretien des biens scolaires j) accorder une attention soutenue à la santé et au confort des élèves, à la propreté, à la température et à l'aération de l'école, au maintien en état du matériel d'enseignement et des autres biens scolaires, à l'état et à l'apparence des bâtiments et terrains scolaires;
report to M.O.H. (k) to report promptly to the board and to the medical officer of health when the principal has reason to suspect the existence of any communicable disease in the school, and of the unsanitary condition of any part of the school building or the school grounds;	rapport au médecin-hygiéniste k) prévenir immédiatement le conseil et le médecin-hygiéniste lorsqu'il a des raisons de soupçonner la présence d'une maladie transmissible dans l'école, et leur signaler l'état insalubre d'une partie des bâtiments ou des terrains scolaires;
persons with communicable diseases (l) to refuse admission to the school of any person who the principal believes is infected with or exposed to communicable diseases requiring an order under section 22 of the <i>Health Protection and Promotion Act</i> until furnished with a certificate	personne porteuse de maladie transmissible l) refuser l'admission à l'école de la personne qui, selon lui, est atteinte d'une maladie transmissible requérant un ordre aux termes de l'article 22 de la <i>Loi sur la protection et la promotion de la santé</i> ou de la

of a medical officer of health or of a legally qualified medical practitioner approved by the medical officer of health that all danger from exposure to contact with such person has passed; access to school or class (m) subject to an appeal to the board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils; and visitor's book (n) to maintain a visitor's book in the school when so determined by the board.	personne qui a été en contact avec une telle maladie, jusqu'à la présentation d'un certificat délivré par un médecin-hygiéniste ou un médecin dûment qualifié qu'il a approuvé, indiquant que le danger de contagion résultant du contact avec cette personne est écarté; accès à l'école ou à la classe m) sous réserve d'un appel au conseil, refuser d'admettre dans une classe ou à l'école la personne dont la présence dans cette classe ou à l'école pourrait, à son avis, nuire au bien-être physique ou mental des élèves; registre des visiteurs n) tenir un registre des visiteurs dans l'école si le conseil le prescrit.
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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-AND-

RICHARD COLE

Respondent

-AND-

DIRECTOR OF PUBLIC PROSECUTIONS,
ATTORNEY GENERAL OF QUEBEC, CRIMINAL
LAWYERS' ASSOCIATION (ONTARIO), THE
CANADIAN CIVIL LIBERTIES ASSOCIATION and
CANADIAN ASSOCIATION OF COUNSEL TO
EMPLOYERS

Interveners

**FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION
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