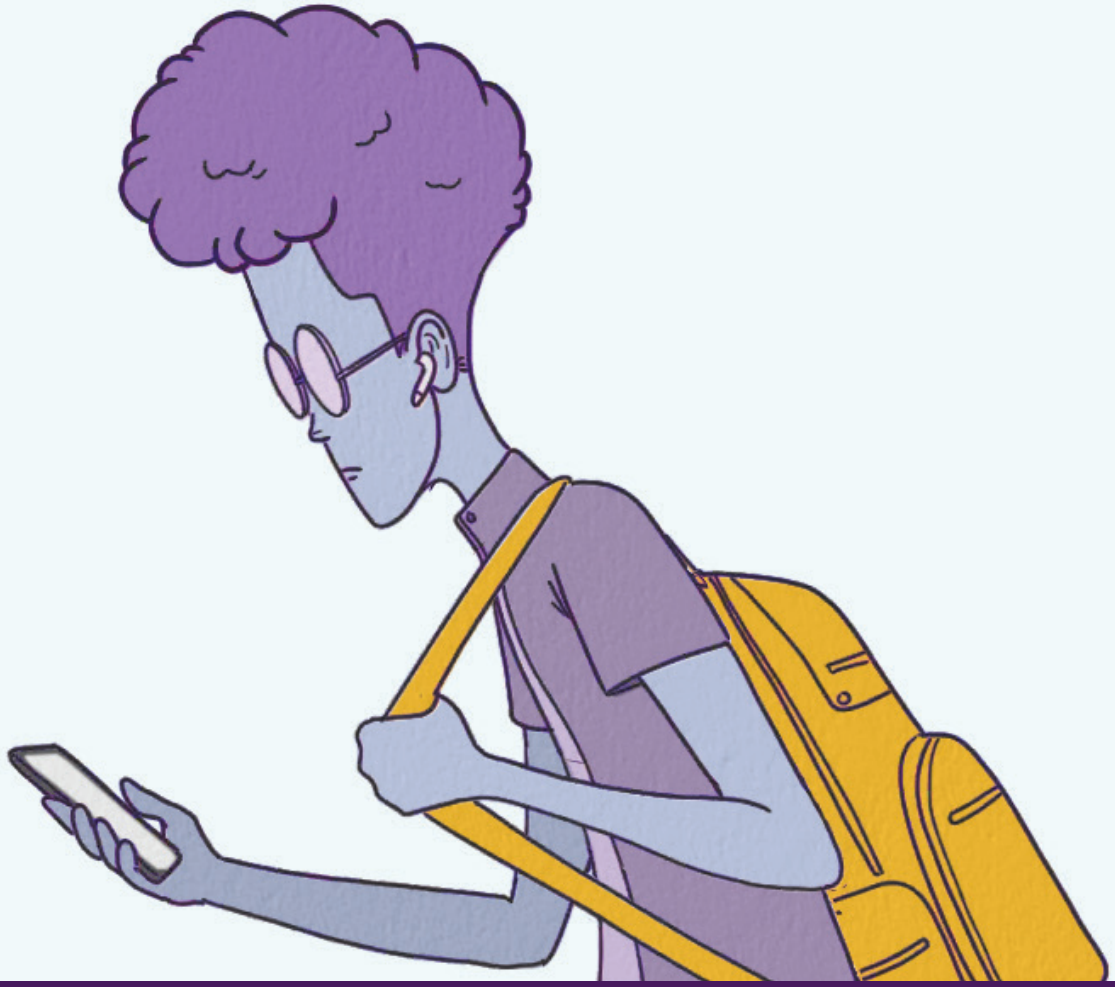
Digital Privacy Rights

FOR YOUTH



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The Law Foundation of Ontario

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Personal Electronic Device *Searches in Classrooms*

Introduction

As concerns regarding student safety at school continue to grow, so too do the responsibilities of educators to oversee and prevent threats to the wellbeing of the student body. What implications does this have for student privacy?

Students already have a diminished right to privacy while in school. School administrators are legally authorized to search students because of their duty to protect them and to provide an orderly learning environment. Given that students are now walking around with a wealth of personal information in their pockets, in what circumstances might school administrators be authorized to access that information in the name of student safety?

In British Columbia, some school boards and schools have set out explicit authorization to search personal electronic devices (PEDs), including phones, in their Code of Conduct. Whether those searches can lawfully include PEDs, however, remains unclear. The Supreme Court of Canada has considered the authority of school administrators to search students generally and established the necessary factors to be met for a reasonable search, but the specific context of searches involving PEDs has yet to be considered.

The legal authority to search students (and potentially their electronic devices) in school is a framework composed of multiple legal parts. We are going to break down that framework and define each part to help you understand how your rights in this particular area are constructed.

Part 1: The Charter

- The *Charter of Rights and Freedoms* establishes the privacy rights of Canadians in the context of searches.

- The *Charter* is part of Canada's constitution and sets out the rights and freedoms that are believed to be necessary in a free and democratic society. The *Charter* is the most important law in Canada, and all other laws must comply with it.

- The *Charter* doesn't guarantee absolute freedoms or exercise of rights, however. It also establishes that our rights and freedoms can be limited in order to protect other rights or national values. In fact, it states this right at the outset, in section 1: **The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**

- Section 1 means that the state is able to act in a way that limits your rights if they can justify their reason for doing so.

- Section 8 of the *Charter* states that **Everyone has the right to be secure against unreasonable search or seizure**. The basis of this section is the concept of a reasonable expectation of privacy. A reasonable expectation of privacy is the level of privacy you can expect to have in different contexts. There is a lower expectation of privacy, for example, at the border, in prison, or in schools. When a court considers section 8, they will consider whether state conduct infringed upon someone's reasonable expectation of privacy and whether a particular search and/or seizure was ultimately reasonable.

- The reasonable expectation standard is highly context-specific, and thus allows the court to be flexible in considering a number of factors.

- To prove that your section 8 rights have been violated, you must prove that a search or seizure occurred and that the search or seizure was unreasonable. A search or seizure is considered reasonable where it is authorized by law, the law is itself reasonable, and the manner in which the search is carried out is reasonable.

Part 2: What Our Courts Have Said

➤ The requirements for a reasonable search of a student are set out in two cases: ***R v M(MR)***, **1998 SCR 393** and ***R v AM***, **2008 SCC 19.**

- ***R v M(MR)***, **1998 SCR 393**
  - *R v MR* established that students do have an expectation of privacy at school, but that expectation is lower given the school setting and the responsibility of school administrators to ensure the safety and well-being of the student body. As such, a student cannot expect the same privacy right that they would have in their own home while they are at school. This is because the responsibility of the school administrators to provide a safe and orderly environment is a reasonable limit (recall section 1 of the *Charter*) on a student's right to privacy:

    > *"Teachers and principals must be able to react quickly and effectively to problems that arise in school, to protect their students and to provide the orderly atmosphere required for learning. Their role is such that they must have the power to search."*

  - The SCC also established the factors to consider when determining whether a search of a student at school is reasonable:

1. School administrators must be authorized to conduct searches by the Code of Conduct and the relevant statute that gives school boards and administrators their legal authority (in BC the School Act, in Ontario the Education Act)

2. The search must be carried out in a reasonable manner, meaning performed sensitively and in a way that is minimally intrusive to the student

3. The extent of the search must be justified by the gravity of the infraction/threat/concern

- Based on the *R v MR* criteria, while student searches are legally permitted, school administrators are not allowed to search a student as extensively as they want without reason. For example, if an administrator suspects a student is carrying or storing dangerous weapons at school, they would likely have the authority to expand the boundaries of their search to include a locker, backpack, (potentially) cell phone, etc., because the immediate threat to student safety justifies a swift, thorough, and extensive search. Not every possible infraction is as serious as bringing weapons to school, however, so the school official may not be justified in searching all of a student's property in every circumstance.

- ***R v AM*, 2008 SCC 19**

  - In *R v AM*, the SCC considered what types of searches may be reasonable, putting the factors established in *R v MR* to work.

  - The search considered in *R v AM* was a blanket invitation from a principal to police authorizing the use of sniffer dogs at random to search student backpacks for drugs.

- The SCC found this search to be unreasonable, holding that searches need to be based on evidence of a possible violation and not conducted at random.

- In addition to the three elements established in *R v MR*, *R v AM* added a fourth:

  4. Was the search based on evidence of a possible violation? This evidence includes a school administrator's reasonable suspicion of a violation. For example, did the school administrator have a good reason to suspect a rule was violated?

- A school administrator's "reasonable suspicion" could include a teacher seeing someone passing a student something suspicious, or a report from reliable students that a student was carrying a knife or other weapon, for example.

➢ There are two other cases that provide some additional insight:

- ***R v M(J)*, 2012 BCPC 126** sets out some of the things that have been considered by the BC Provincial Court as grounds for a reasonable search: the smell of cannabis, a student's known history with drugs, and suspicious activity near the student's locker. The court also considered the *School Act* and the school code of conduct and found that they provided sufficient grounds for a locker search.

- ***Ratt v Tournier*, 2014 SKQB 353** is a Saskatchewan decision that considered whether a vice-principal's search of a student's phone constituted a breach of privacy. It is important to note that this is a civil, not criminal, decision. Nevertheless, the court considered the *R v MR* factors in arriving at its decision. In *Ratt*, a student was texting during class and ignored his teacher's requests to stop. The teacher eventually took his phone away and gave it to the vice-

principal, who checked the phone in the presence of the student and saw a text referring to the theft of a vehicle. The vice-principal testified that he checked the phone because of the student's "unusual behaviour" and the fact that he had two previous suspensions for fighting. The vice-principal accepted the student's explanation that he wasn't personally involved in the theft but reported the theft to the police and did not inform the student's guardians. The court determined that while students can expect a certain degree of privacy over the contents of their phones, that right is outweighed where their behaviour is outside of the norm and the person searching establishes a reasonable basis for concern of violence or threats to the personal safety of a student or the general student body, as the duties and responsibilities of the teaching staff are greater (para. 33). While this case appears to follow the logic established in previous cases, it does not consider whether the search of a phone should be treated differently than the search of a backpack, for example, or if the gravity of the original infraction justified a phone search. Also, note that this case is not binding in BC.

Part 3: Our Laws

In BC and Ontario, the *School Act* and the *Education Act*, respectively, are the laws that set out the legal powers and responsibilities of teachers, school administrators, and school boards. Both acts require that students comply with school rules and codes of conduct.

- The *School Act* requires that students must comply with school rules, the code of conduct, and other rules and policies of the board or the school.
- The *Education Act*, establishes that principals have a duty to maintain proper order and discipline in school and that disciplinary action (suspension and/or expulsion) is possible for any conduct that may have an impact on school climate.

Part 4: Codes of Conduct

- Codes of conduct are guidelines published by school districts and individual schools that help administrators make decisions about various aspects of school life.
- Some BC Codes of Conduct authorize personal electronic device searches. In Ontario, there is less clarity in the specific context of device searches, but the Ministry of Education has published a Provincial Model for Local Police/School Board Protocol that provides general guidance around search and seizure, and protocols have been adopted by several school districts.

Conclusion

We encourage concerned parents and students to reach out to your school or school district and inquire about a technology use policy or whether their code of conduct specifically addresses search and seizure in the context of electronic devices. If not, feel free to share what you've learned and encourage them to establish a policy so that all students and administrators are clear on their respective rights and responsibilities!

Student Freedom *of Expression Online*

Introduction

Changes in technology mean that students are connected to their classmates like never before. Does this mean that the powers and responsibilities of school administrators extend to student conduct on social media? What rights do students have when it comes to their freedom of expression online and outside of school hours?

The Supreme Court of Canada has not considered a Charter challenge where a student's expression was met with disciplinary action, online or otherwise, so this area remains an open question. However, schools in BC and Ontario have established rules around student conduct online.

Part 1: Guidelines

- In BC, there are two sets of guidelines that help schools and school districts develop content for their codes of conduct, and those guidelines reference situations where student conduct online may be disciplined.[1] Any bullying, cyberbullying, harassment, intimidation, threats, or violence that takes place in any circumstances where the conduct would have an impact on the school environment can be subject to discipline.

- The Companion Guide to Provincial Standards also provides examples of unacceptable behaviours, including posts online that encourage contempt for staff or students based on sexual orientation, religion, or race.

- In Ontario, administrative decisions to expel students are reviewable by the Child and Family Services Review Board (CFSRB). School principals also have the authority to suspend students for activities that "have an impact on the school climate" while at school, at a school-related activity, or in other circumstances, per the *Education Act*.

- Both BC and Ontario require that mitigating circumstances be considered in disciplinary decisions (student age, maturity, and special needs). However, BC does not have an equivalent tribunal to Ontario's CFSRB.

1 The Provincial Standards for Codes of Conduct Order, and the Companion Guide to Provincial Standards

Part 2: Legal Challenges Past and Present

School administrators have a lot of flexibility and factors to consider when it comes to assessing and disciplining student behaviour, including when it takes place online. These examples not only demonstrate the kind of conduct that might attract discipline, but also raise questions as to the disciplinary decisions made by administrators.

- *BC Community Alliance v. School District No. 39 (Vancouver)*
  - An anti-Black racist and threatening video posted online by a 15-year-old white student at Lord Byng Secondary School in Vancouver in 2018 has led to a class complaint brought before the BC Human Rights Tribunal. The class of complainants, represented by the BC Community Alliance, alleges that in their handling of the incident, the Vancouver School Board and Ministry of Education discriminated against Black students based on race, colour, ancestry, and place of origin by failing to provide them with a safe learning environment in violation of section 8 of the BC Human Rights Code.
- *Ontario Child and Family Services Review Board Decisions*
  - The CFSRB in Ontario has reviewed two cases of expulsion (see next page) in relation to student conduct online, and those decisions provide some insight into how the "impact on the school climate" has been interpreted, as well as how the influence of mitigating factors may change the severity of discipline.

R.T. v Durham Catholic District School Board,

2008 CFSRB 94

A student was expelled for impersonating another student on Facebook and telling another student that she was going to "kill you right in ur sleep or at school". The CFSRB panel found that the threatening messages were so serious that it would be "very detrimental to the climate of the school" to permit the offending student to return and upheld the decision to expel the student.

DD v Renfrew County District School Board,,

2019 CFSRB 21

A student was expelled for posting a rap video on their personal YouTube channel that included vulgar, homophobic language and threats of violence against a specific teacher and students. The decision to expel was ultimately overturned and a suspension instituted. The adjudicator found that while the threats inevitably impacted the school climate, there were mitigating factors to be considered, such as the student being diagnosed with autism spectrum disorder. The adjudicator reasoned that because of this, the student could not control their behaviour, understand the consequences of making the video, and posed a low-safety risk.

Police Searches *of Cellular Phones*

Part 1: In Schools

While teachers and principals may have certain rights and responsibilities that override student privacy interests, police do not share those. The threshold for searching youth (and anyone) is much higher for the police, both in school and out, due to the liberty interests that are at stake for individuals when law enforcement is involved.

Generally, police can search only in very specific circumstances and in specific ways—they must have reasonable grounds to believe you are possibly engaged in criminal activity, have lawfully arrested you, or have a warrant. The reasonable grounds required of police are much more stringent than those authorizing a principal to search a student.

Things get a bit more complicated when teachers and police may be working together. Not all teacher/police searches are OK. The police may not use teachers to get around their own strict search parameters—they cannot ask a teacher or other school administrator to search a student on their behalf. The common law has considered this situation and refers to it as a school administrator acting as an "agent of the police". The school cannot act as an agent of the police. The legal test to determine whether a teacher was acting as an agent of the police is whether the search would have happened even if the police were not involved.

Part 2: General Police Powers

Police conduct is governed by various statutes, as well as the common law. For example, police powers of search without a warrant are authorized by both the *Criminal Code* and common law, and police use of force is authorized by section 25 of the *Criminal Code*, which allows police to use necessary force when arresting someone.

Our courts have determined that the nature of policing warrants a very broad and flexible range of powers that authorize the police to act in order to fulfill their duties of preserving the peace, preventing crime, and protecting life and property. This power is limited, however, by individual liberty interests protected by the *Charter*. The police must be able, to some extent, to link the individual whose rights are affected by their conduct to an actual or anticipated crime. The common law has established the Ancillary Powers Doctrine to govern the balance between police power and individual liberty: police actions that interfere with individual liberty are permitted as long as they

are ancillary to the fulfillment of recognized police duties. Intrusions on liberty will be accepted if they are found reasonably necessary for the police to fulfill these duties. The Doctrine allows the Court to consider the novel ways in which the police may intrude upon individual liberty and determine whether they are justified. For example, in *Fleming v. Ontario*, 2019 SCC 45 the Supreme Court of Canada considered whether the doctrine would include the police arresting someone acting lawfully in order to prevent a possible breach of the peace initiated by someone else.

The court's analysis ultimately involves a balancing of competing interests: the state's interest in lawful policing, including preventing crime and keeping the peace, and the liberty interests of citizens who are affected by police powers. Historically, however (as we know), the courts tend to be lenient on police and afford them a significant degree of latitude and discretion.

Part 3: Police Authority to Search Cell Phones

Police can search a cell phone in three instances: (1) via warrant, (2) with permission from the person, and (3) without warrant OR permission as part of a search incident to a lawful arrest. Ultimately, the police may search a phone as part of an arrest, but not in every circumstance. This common law power was established by the Supreme Court of Canada (SCC) in *R v. Fearon*, 2014 SCC 77.

However, in this case, the 7 justices of the SCC disagreed on the issue and were split 4-3. Justice Karakatsanis, writing for the disagreeing portion (aka the dissent), found that the police should not be able to search a phone except in extreme or "exigent" circumstances and that doing otherwise greatly infringes the privacy and liberty rights of individuals. Justice Karakatsanis suggested that such a power was akin to searching someone incident to arrest and finding their house key, and then using the house key to lawfully search the person's house without a warrant. Because of the volume

of private and otherwise irrelevant information available in someone's phone, having the automatic power to search it would be equally as invasive as searching someone's house without a warrant. It is possible that in the future, the dissenting judgement could be successfully applied in a case as courts reconsider searches of personal electronic devices. At present, while some parties have attempted to use the dissent in their argument, no court has decided to shift the tide on this conversation.

The majority of the justices felt that under certain circumstances, as long as the following four criteria were met, the police would be justified in searching a phone as part of a lawful arrest. Police officers will not be justified in searching a cell phone or similar device in every arrest, but a search will comply with section 8 of the *Charter* if police believe the search is necessary to protect themselves from harm or find evidence that might disappear before trial. This search can include a cell phone if there is a reasonable suspicion that it might contain important evidence, or may be necessary to protect the police, the accused, or the public. The four factors necessary for a lawful search as a result of *R v. Fearon* are:

1. **The arrest is lawful**. [This can be a fairly complex analysis, depending on the circumstances of the arrest.]

2. **The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable [aka someone else in the officer's position would also find it reasonable]. The valid law enforcement purposes in this context are**:

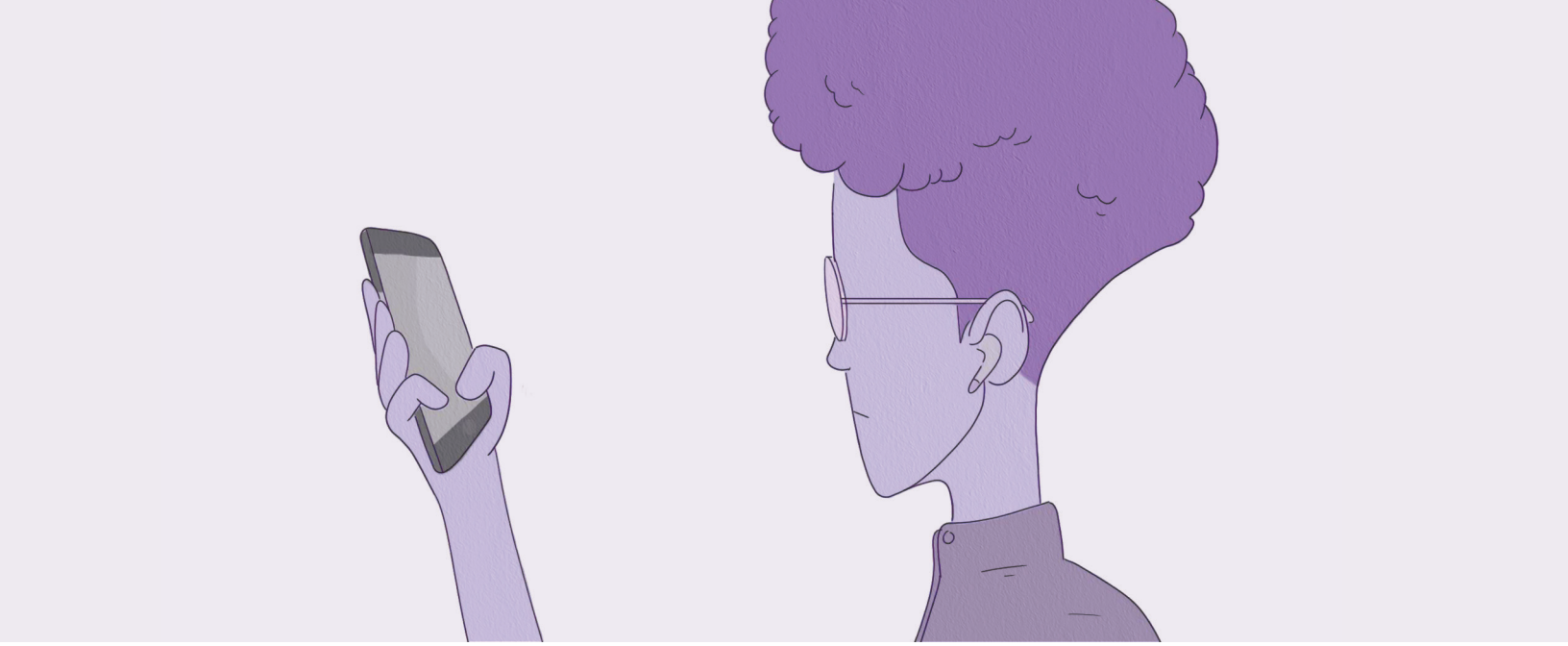
    i. Protecting the police, the accused, or the public;

    ii. Preserving evidence; or

    iii. Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest;

3. **The nature and the extent of the search are tailored to the purpose of the search.** [That is, the "nature and extent" of the search must be *truly incidental* to the particular arrest for the particular offence. In practice, this will mean that, generally, only recently sent or drafted emails, texts, and photos, and the call log may be searched. However, this is not a hard and fast rule – the test is whether the nature and extent of the search are tailored to the search's purpose]; and

4. **The police take detailed notes of what they have examined on the device and how it was searched**.



Conclusion

You might be wondering what happens if your phone is password-protected? The majority in *Fearon* at the SCC found that whether a phone is password-protected or not, or locked/unlocked, is not ultimately relevant, as someone's decision not to password-protect their phone does not indicate an abandonment of the privacy interests they have in the contents of the phone. In other words, phones attract the same significant level of privacy interests whether unlocked or not. Essentially, the Court found that it should not be a password standing between the police and the right to search a phone incident to arrest, it should be the 4 *Fearon* factors that must be fulfilled in order for the phone to be lawfully searched.

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