

The Top Five 2010

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. Morelli, 2010 SCC 8

<http://scc.lexum.org/en/2010/2010scc8/2010scc8.html>

In this case, the Supreme Court of Canada (SCC) dealt with what it means to “possess” pornography under the Criminal Code of Canada (CCC).

Date Released: March 19, 2010

The Facts

On September 5, 2002, a computer technician arrived unannounced at Mr. Morelli's house to install a high-speed internet connection he had previously ordered. The accused lived with his wife and two children, aged 3 and 7, but was alone that day with his younger daughter. When the technician opened up Mr. Morelli's web browser, he found several links to both adult and child pornography on Mr. Morelli's "favourites" list. The technician also noticed that Mr. Morelli had home videos and a webcam connected to a videotape recorder that was pointed at the toys and child. When the technician returned the next day to complete the installation, everything suspicious had been "cleaned up"; the child's toys had been placed in a box, the videotapes could no longer be seen, the webcam was pointed at the computer user's chair and the computer hard drive had been "formatted".

In November, concerned for the child's safety, the technician reported what he had seen to a social worker, who contacted the RCMP. Upon receiving this information, the police used it to obtain a search warrant to search Mr. Morelli's computer. Pornographic pictures involving children were found on the computer and the accused was charged with possession of child pornography contrary to s. 163.1(4) of the CCC.

Criminal Code of Canada

163.1 (4) Every person who possesses any child pornography is guilty of
(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
(b) an offence punishable on summary conviction.

At trial, Morelli unsuccessfully argued that the search warrant was not valid under s. 8 of the *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms

8. Everyone has the right to be secure against unreasonable search and seizure.

The trial judge convicted Mr. Morelli. On appeal, the majority of the Court of Appeal for Saskatchewan upheld the conviction.

The Decision

In a split 4-3 decision, the SCC quashed Mr. Morelli's conviction and entered his acquittal, holding that the unreasonable search and seizure violated his s. 8 rights and that admitting the illegally obtained evidence would damage the credibility of the justice system.

In deciding this case, the SCC tried to determine what it means to "possess" pornography. The issue of possession was of particular importance because s. 163.1(2) to (4.1) of the CCC establishes four distinct offences related to child pornography: (1) the making of child pornography; (2) the distribution of child pornography; (3) the possession of child pornography; and (4) the accessing child of pornography.

In this case, for the police to obtain a search warrant, a justice of the peace had to have reasonable and probable grounds to believe the offence of possession had been committed. To have "possession" of something under the CCC, it is important that the person accused had knowledge of the possession in question and control of the object possessed. However, this is complicated in the case of Internet use because computers routinely store on the hard drive temporary copies of images accessed online by a user. This is known as "caching." The caching function varies and can be modified by the user, but sometimes this happens automatically and without the user's knowledge and cached files are generally automatically discarded after a certain number of days.

Justice Fish, writing for the majority, focused on possession as arising out of control of the underlying data file in some way. The majority decision stated that "merely viewing in a Web browser an image stored in a remote location on the Internet does not establish the level of control necessary to find possession." Creating an "icon or "favourite" on one's computer also does not constitute possession. In order to commit the offence of possession, a person must knowingly acquire the underlying data files and store them in a place under his or her control. This is because the underlying file is the stable object, capable of being possessed. Accordingly, automatic caching of a file on a computer's hard drive will not constitute possession unless it is shown that the file was knowingly stored and retained through the cache.

In their decision, the majority also discussed the presence of the webcam, which was used as part of the grounds in obtaining a search warrant. The majority stated that the webcam had a weak connection to the crime alleged, adding that it was speculative to conclude that the accused was the "type" to hoard illegal images on the basis of the fact that he had a webcam. The majority also stated that the fact that Mr. Morelli cleaned up after the technician's first visit does not support a conclusion that he was seeking out and storing child pornography. In essence, the Court held that although Mr. Morelli's conduct was suspicious, as a matter of law, mere suspicion is no substitute for reasonable grounds. Accordingly, the majority indicated that the evidence obtained as a result of the illegal search should be excluded under s. 24(2) of the *Charter*, because admitting the illegally obtained evidence in this case would damage the reputation of the justice system. The majority held that the required degree of control was not present and Mr. Morelli was found not to have "possession" of the images under the CCC.

Canadian Charter of Rights and Freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(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.

The Dissent

Writing for the dissent, Justice Deschamps also analyzed the issue of possession. Her dissent focused on control over the material sufficient for a person's use or benefit. She stated: "Control [is] the defining feature of possession, not the possibility of finding data files on a hard drive." Possession exists if the accused willingly took or maintained control of the object with full knowledge of its character for his or her benefit or for the benefit of someone else. She also found that there were reasonable grounds to believe that Mr. Morelli was in the habit of reproducing and saving images of child pornography and that the search warrant was therefore validly issued.

Justice Deschamps concluded that, in the internet age, the definition of control needs to evolve and become more flexible in order to adapt to our changing world. As such, she concluded that the necessary amount of control was present in this case to establish possession.

Discussion Issues

1. Do you agree with the majority that the presence of the webcam, when taken in connection with the images the technician found on the computer, only establish a weak connection between Mr. Morelli and the possession of child pornography? Do you feel that the evidence did support a finding that he was in possession of child pornography?
2. The majority held that the evidence obtained from the illegal search should be excluded under the *Charter* because admitting evidence that was obtained illegally would bring the administration of justice into disrepute. Do you agree? How do you balance the reputability of the administration of justice with the risk posed by excluding evidence that could lead to a conviction?
3. What do you think it means to "possess" images that you access on your computer? Do you think it is enough to simply view the pages? What about marking something as a "favourite" or a home page? Is physically saving the images too high of a threshold? Is it not high enough?
4. Whose idea of "possession" do you agree with more, that of the majority (articulated by Justice Fish) or that of the dissent (articulated by Justice Deschamps)?