

# R. v. Seguin – Don't expect to get your stuff back anytime soon



By [Jacob Stilman](#)

A recent decision by the Ontario Superior Court provides useful, albeit sobering, guidance to the issue of applications by individuals for the return of items seized by the police.

In [R. v. Seguin](#), 2015 ONSC 1908 (CanLII), the applicant, Justin Seguin, made application to the Superior Court for the return of a computer hard drive that had been seized in the course of a child pornography investigation. Ultimately, the application was unsuccessful, but the ruling does provide guidance in an

area where the rules and procedures governing such applications have been somewhat uncertain.

The facts of the case are as follows: Police received information from Microsoft that a number of suspected child porn files had been uploaded to their Cloud storage system. (Note: Microsoft has for some years been co-operating with law enforcement agencies to monitor and report on the transmission of child porn images; when an image is detected on their servers the police are alerted to the ISP address of the user. The police will typically then track down the subscriber associated with the ISP address, and ultimately execute a search warrant at the suspected location of the subscriber, seizing computers and other electronic storage devices to search for child porn materials.)

In the Seguin case the police had taken out a search warrant for the location of the ISP address, and had further determined that the user name on the account was one "Joel Seguin." It was further determined that the target household had seven occupants. On the day that the search warrant was to be executed, Justin Seguin, was observed leaving the residence with a computer. He was arrested, searched and the computer he was carrying was seized. The search warrant on the residence was then executed and other electronics were also seized. Ultimately no child porn was located on any of the devices seized from the residence. However, the computer that Justin Seguin was carrying was encrypted, and he refused to provide police with the password. As the password was highly secure, police have, to date, been unable to open the hard drive to view its contents.

The law with respect to the retention and return of property seized by police is governed by s. 490 of the Criminal Code. Generally, where charges have not been laid, police may not detain an item seized in the course of a search or arrest beyond one year. However, the items can be held for longer where there is a judicial determination that further detention is warranted due to the complexity of an investigation. The outcome of this case hinged on the application of this exception. However, before settling that issue, the judge had to deal with the issue of the legality of the arrest and the seizure of the computer itself.

The defence argued successfully that the actual seizure of the computer was not authorized by the search warrant, which only empowered the police to seize items from the actual residence. The defence was also successful in arguing that Seguin's arrest was unlawful, hence the Crown could also not rely on the doctrine of "search incident to arrest" to justify the seizure.

One might have thought that at this point Seguin would be getting his computer back. But the court invoked the "not so fast" doctrine, relying on s. 487.11 of the Criminal Code. Quoting from the decision:

"The Crown's principal argument in this matter was that the seizure of the laptop was necessary in order to preserve evidence or, put another way, the seizure was made in exigent circumstances."

[Section 487.11](#) of the [Code](#) codifies the concept of exigent circumstances in the context of a warrantless search. That section states:

"A peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, may, in the course of his or her duties, exercise any of the powers described in subsection 487(1) or 492.1(1) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant."

The court continued with its analysis to find that the computer had obviously been in the house for which there was a valid search warrant. Furthermore, if the computer was not seized prior to the execution of the warrant there was a real likelihood that Seguin could have been warned by his family members of the search, and therefore had the opportunity to get rid of the computer or expunge its contents. This very real risk of destruction of evidence satisfied the requirement of "exigent circumstances."

The end result was that, despite the unreasonableness of the arrest, and the further unlawful seizure of the computer in violation of s. 8 of the Charter, police were permitted to retain the computer, and to continue in their efforts to decrypt the hard drive. (Good luck to them — the password was a 26-character alpha-numeric beast.) Nevertheless, this case is a useful illustration of how courts may adopt a very contextual and deferential approach in applying this provision. Counsel contemplating an application for the return of seized property had best be aware of it.