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Ontario Public School Boards are Bound by the Charter
Teachers are protected from unreasonable search and seizure in the workplace

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In *York Region District School Board v Elementary Teachers' Federation of Ontario*,[1] the Supreme Court of Canada held the *Canadian Charter of Rights and Freedoms* ("*Charter*")[2] applies to all public school boards in Ontario. This means an Ontario public school board must consider the *Charter* even when acting in its capacity as an employer. In this decision, the *Charter* right to be free from unreasonable search and seizure was engaged when a principal accessed a teacher's personal Gmail account left open on the teacher's work laptop.

What happened?

Two teachers employed by the York Region District School Board ("Board") recorded their private communications regarding workplace concerns on a shared personal, password-protected log, stored in the cloud through a personal Gmail account. The school principal, who had been made aware of the log, entered the classroom of one of the teachers and, in her absence, touched the mousepad of her Board laptop, saw the log opened on the screen, read what was visible, then scrolled through the document and took screenshots with his cellphone. Later, the principal and Board superintendent agreed they should seize the laptop as it was Board property.

The Board issued written reprimands to the teachers for failing to conduct themselves in accordance with the Ontario College of Teachers' Standards of Practice. The teachers' union grieved the discipline, claiming the search violated the teachers' right to privacy at work. The union did not allege a *Charter* breach. A labour arbitrator, appointed under the collective agreement, dismissed the grievance on the basis there was no breach of the teachers' reasonable expectation of privacy when balanced against the Board's interest in managing the workplace. In other words, the arbitrator applied a pure 'arbitrable approach' (balancing of interests) rather than a *Charter* approach.

The union applied to the Divisional Court for judicial review of the arbitrator's decision. The majority of the Divisional Court found the arbitrator's decision was reasonable. The dissenting Divisional Court judge raised the *Charter*, for the first time, and would have held the arbitrator was bound to consider the *Charter*. The union appealed the Divisional Court decision, and the Court of Appeal for Ontario unanimously allowed the union's appeal and quashed the arbitrator's decision, holding the *Charter* applied and ought to have been considered. The Board appealed to the Supreme Court of Canada.

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[1] 2024 SCC 22 [*York Region*].
[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24).

The Supreme Court's decision

The Supreme Court held Ontario public school boards are subject to the *Charter* because they are "inherently governmental" and are "in effect, an arm of the government." The Court explained: "All actions carried on by Ontario public school boards are subject to *Charter* scrutiny, including the principal's actions, in this case, as he acted in his official capacity as an agent of the Board."

The teachers were therefore covered by the *Charter*'s section 8 protection against unreasonable search and seizure, and the *Charter* was a "legal constraint" the arbitrator had to consider, even if the parties did not raise it. Failure to consider the *Charter* was therefore a fatal error.

That having been said, it is important to recognize the following about the decision:

- The Supreme Court did not determine whether the teachers' *Charter* rights were, in fact, violated in this case. It only determined that those rights should have been considered.

- The Supreme Court noted the right against unreasonable search and seizure is contextual and must be adapted to the circumstances. For example, an employer's operational realities, policies and procedures may affect the reasonableness of an employee's expectation of privacy. In this way, a search in an employment context may be considered very differently from in a criminal context.

- The SCC explained a section 8 search and seizure analysis must proceed in two steps: first, is there a reasonable expectation of privacy and second, was the search and seizure reasonable? The analysis is both subjective (what the individual expects) and objective (what the average person, in the same circumstances, might expect). A decision maker should consider (1) the subject matter of the search, (2) whether the individual being searched has a direct interest in the subject matter, (3) whether the individual being searched has a subjective expectation of privacy in the subject matter, and (4) whether this subjective expectation of privacy is objectively reasonable.

Next steps

The decision is fresh, and it is unclear how and the extent to which it will be applied to public school boards, as well as other public and quasi-public sector organizations. We will monitor these developments closely to assist our public and quasi-public sector clients navigate these uncharted waters.

To learn more and for assistance, contact your Sherrard Kuzz lawyer or info@sherrardkuzz.com.

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