

SCC Decision Offers Potential Insight Into Privacy Rights For Private-Sector Employees



In a significant decision focused on public employers, the Supreme Court of Canada (SCC) recently held that Ontario public school boards are “government” and, as such, they are subject to the provisions of the *Canadian Charter of Rights and Freedoms* (*Charter*), and their teachers are protected from unreasonable search and seizure in their places of employment. In [*York Region District School Board v. Elementary Teachers’ Federation of Ontario*](#), the SCC provided recommendations for how an alleged breach of an employee’s Charter-based right to privacy should be analyzed. Although the SCC did not explicitly reference the reasonable expectation of privacy in private-sector workplaces, the analysis undertaken in *York Regions District School Board* may be worthy of consideration in the private-sector context.

Background

Two teachers at a public school that was part of the York Region District School Board stored information about their concerns regarding interpersonal issues in the workplace on a personal, password protected log. The log was stored in the cloud as a private Google Docs document through a private internet account. The Board heard about the communications and searched unsuccessfully for the log on its Information Technology (IT) platforms. Upon entering the classroom of one of the teachers when she was absent, the school’s principal touched the mousepad of her school laptop, saw the log on the screen, read what was visible, and took screenshots. The classroom laptops of both teachers were then seized and the principal forwarded the screenshots to the Board for investigation. The teachers were reprimanded in writing by the Board for failing to conduct themselves in accordance with the Ontario College of Teachers Standards of Practice.

The teachers’ union grieved the written reprimands, sought to have them rescinded and asked that each teacher be awarded \$15,000 in damages for the Board’s violation of their right to privacy without reasonable cause and its use of the communications to discipline the teachers.

Decision of the Supreme Court of Canada

Although the matter was not argued as a *Charter* claim at arbitration, the SCC ultimately dismissed the appeal from the lower courts on the basis that the

arbitrator should have appreciated that Ontario public school teachers are protected from unreasonable search and seizure in their place of employment under s. 8 of the *Charter*, and did not apply the *Charter*.

Upon finding that Ontario public school boards are government, the SCC noted that the Education Act confirmed this as public schools “exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves”. The SCC concluded that since Ontario public school boards are government, their employees, including teachers, enjoy rights under s. 8 of the *Charter* against unreasonable search and seizure in the workplace.

The SCC made a point of noting that its analysis related specifically to Ontario public school boards and that “the question of the applicability of the *Charter* to public schools in other provinces, or to the operation of private schools” is left for another day. Because

the SCC received extensive submissions regarding s. 8 and the privacy of school employees, the SCC provided the following guidance in light of “the practical utility of providing general guidance on such matters:”

- the analysis under s. 8 is contextual;
- courts should be cautious in adapting the s. 8 framework from the criminal law context to the employment context; and
- in the employment context, consideration of the employer’s “operational realities, policies and procedures,” the level of regulation in the workplace, and the terms of the relevant collective agreement (specifically, management rights provisions), can assist in determining the existence and scope of a reasonable expectation of privacy.

Finally, the SCC emphasized that it did not wish “to displace existing arbitral jurisprudence, but to supplement it” to protect constitutional rights in the workplace. Accordingly, existing arbitral jurisprudence pertaining to workplace privacy continues to be relevant; however, the analytical framework under s. 8 of the *Charter* must also be appreciated and applied.

Bottom Line for Employers

In *York Region District School Board*, the court stressed that a s. 8 analysis is contextual and, in the employment context, factors that can assist in determining the existence and scope of a reasonable expectation of privacy are the employer’s policies and procedures, workplace regulation, and any applicable collective agreements. Although the SCC decision does not refer explicitly to private-sector workplaces, the decision may be worthy of consideration in the private sector, with private-sector employers undertaking a contextual analysis similar to the SCC analysis to determine an employee’s reasonable expectation of privacy.

Notably, on April 11, 2022, Bill 88, [Working for Workers Act, 2022](#) received Royal Assent and became law. It amended Ontario’s *Employment Standards Act, 2000*, to require private-sector employers that, on January 1 of any year employ 25 or more employees, to ensure that before March 1 of that year they have a written policy in place for all employees with respect to electronic monitoring. This policy must address whether the employer electronically monitors employees and, if so, provide, among other things, a description of how and in what circumstances the employer may electronically monitor employees, and the purposes for which information obtained through electronic monitoring may be used by the employer. It would be helpful if all employers, including private-sector employers, would ensure that their privacy policies, proper use of technology policies, and employment agreements outline the

existence and scope of their employees' reasonable expectation of privacy in the context of workplace investigations, not only with respect to electronic monitoring, but with respect to monitoring of all kinds. Such clarity may help to reduce grievances like the one that was filed by the union in *York Region District School Board*.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Authors: [Rhonda B. Levy](#), [Barry Kuretzky](#), [Rabeena Obaidullah](#)

Littler