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# Professional Regulation and Privacy Rights: A Case Comment on *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22

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In a recent decision in *York Region District School Board v. Elementary Teachers' Federation of Ontario, 2024*, the Supreme Court of Canada considered the applicability of the *Canadian Charter of Rights and Freedoms* to school boards and, in so doing, concluded that teachers, in their employment relationship with school boards, are protected by the right to be secure against unreasonable search or seizure under section 8 of the *Charter*. At the heart of the analysis, the Court held that public school boards in Ontario are inherently "governmental" for the purposes of section 32 of the *Charter* and, consequently, the actions of a school board in carrying out its governmental functions are required to be *Charter* compliant.

While much has been written about the decision and its impact on privacy rights in the workplace generally, the decision requires a closer read in terms of examining privacy rights in the context of professional regulation and the takeaways for regulators in understanding the ever-evolving reach of the *Charter* and its role in regulatory decision-making. As always, our analysis of the case starts with the facts.

**Facts**

The case centered on two teachers who had been disciplined by their school board employer for maintaining a private "log" that the employer (and other employees at the school) contended was creating a toxic work environment and constituted a breach of the school board's "Respectful Workplace Policy". According to the evidence, the log was stored remotely on a cloud-based server in a private account, and it was not accessible or saved to the school board's server. The school principal had been made aware of the log's existence and conducted an unsuccessful IT search of the schools' internal databases. However, later in the school year, the principal visited one of the teachers' classrooms, to return some teaching materials after class, and found the school board's laptop was opened and was left unattended in the room. When he touched the laptop mousepad, the log appeared on the screen. The principal then took photos of the log on his cell phone, and the teachers' laptops were subsequently seized and searched. As a result of the contents of the log, the school board reprimanded the teachers, in writing, for failing to conduct themselves in accordance with the Ontario College of Teachers' Standards of Practice.

The Elementary Teachers' Federation of Ontario (the "**Union**") grieved the written reprimands, sought to have them rescinded, and requested that each teacher be awarded $15,000 for the breach of their privacy rights. Although the Union argued that the school board had violated the teachers' right to privacy, it did not explicitly allege a *Charter* breach as part of the grievance. In terms of the search, the Union alleged three breaches of the teacher's privacy: (1) the Board's search of its IT platforms; (2) the principal's search of the board's classroom laptop; and (3) the searches conducted after the board seized both laptops. Ultimately, the arbitrator dismissed

the Union's grievance and concluded, among other things, that there was no breach of the teachers' "diminished" reasonable expectation of privacy in the log when balanced against the board's "legitimate interest" in addressing the issue of the toxic work environment allegedly caused by the teachers. The arbitrator's decision was upheld on appeal to the Divisional Court, with the majority holding that the framework for analysis was not section 8 of the *Charter*, but rather the rights of employers and employees under the collective agreement.

The Union appealed the Divisional Court's decision to the Court of Appeal for Ontario. In its decision, the Court of Appeal quashed the arbitrator's decision and concluded that (1) section 8 of the *Charter* applied to the actions of the principal and the school board; (2) the teachers had a reasonable expectation of privacy; (3) the arbitrator erred in interpreting and applying the law concerning the teachers' *Charter* right; and (4) the arbitrator reached an unreasonable decision.

**Supreme Court of Canada Decision**

On appeal to the Supreme Court, the school board argued that the *Charter* did not apply, and school board employees do not have an expectation of privacy guaranteed by section 8. It also argued that even if section 8 jurisprudence was applied, the search was reasonable in the circumstances.

The Supreme Court dismissed the appeal, holding that:

1. The *Charter* applies to public school boards in Ontario operating under the *Education Act* given the inherently governmental nature of public education, as set out in section 93 of the *Constitution Act, 1867* and section 23 of the *Charter*.[1] Accordingly, school employees, including teachers, have a right against unreasonable search and seizure in the workplace that is protected by section 8 of the *Charter*; and

2. The arbitrator failed to engage in an adequate section 8 analysis. The majority rejected the argument that the arbitrator had functionally engaged in a section 8 analysis by referencing relevant principles and jurisprudence and held that there must be clear acknowledgment and a fulsome analysis of a *Charter* right when it arises[2].

Of note, the majority found that the less deferential correctness standard of review applied to the question of whether school boards were subject to the *Charter*. It also held that the correctness standard applied to the arbitrator's reasons in determining the scope and application of a *Charter* right, noting: "the issue of constitutionality on judicial review — of whether a *Charter* right arises, the scope of its protection, and the appropriate framework of analysis — is a 'constitutional question' that requires 'a final and determinate answer from the courts'."[3]

Having concluded that the arbitrator erred in law, the Court then noted that the proper remedy, in the usual circumstance, would be to set aside the arbitrator's decision and to send the matter back for further consideration by the arbitrator – applying the proper analysis to determine the *Charter* issue. However, during the intervening period while the appeals were ongoing, the reprimands had been removed from the teachers' employment files by operation of the "sunset clause" in the collective agreement. Consequently, the matter was now moot and would not be dealt with further.

As a result, by way of *obiter*, the Court went on to consider the arguments raised by the parties and dealt with by the courts below to provide some general guidance on the section 8 analysis for (1) determining the reasonable expectation of privacy and (2) the reasonableness of a search. Of significance, the Court noted that criminal law jurisprudence on section 8 should not be indiscriminately imported into non-criminal matters. The analysis under section 8 is contextual, needs to be adapted to the occupational context, and whether or not state action has interfered with the individual's reasonable expectation of privacy is to be determined based on the "totality of the circumstances".

**Key Takeaways for Regulators**

***(i) Courts will be less deferential where the Charter applies***

As noted in the minority reasons, the Court in *York Region* seems to have given little deference to the arbitrator's analysis despite her familiarity with the *Education Act* and the operational realities of working in the education system.[4] Consequently, regulators should be aware and cautious moving forward that administrative decisions involving the scope of the *Charter* rights may be subject to less deference. Courts will apply a correctness standard of review to decisions as to whether *Charter* rights are engaged, however, the question remains as to whether this less deferential standard will be applied in evaluating whether *Charter* right in question has been infringed.

***(ii) Administrative Decision-Makers should be proactive where Charter issues arise***

Even where a party does not explicitly raise the *Charter*, reviewing courts will expect administrative decision-makers to explicitly consider whether a *Charter* right is implicated, and expect such decisions makers to engage in a full and robust *Charter* analysis.

Notably, this issue was explored by Kelsey Ivory in *Bilingualism in the Tribunal Settings* in her discussion of the Court's decision in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*[5]. Similar to the circumstances in *York Region*, the Court held that decision-makers must address *Charter* values even if they are not raised by parties.

The Court's reasons also seem to place great emphasis on the form and framework (as opposed to functionality) of the arbitrator's reasoning and the lack of explicit reference to a constitutional / section 8 analysis. The decision is a valuable reminder on the importance of reasons and that administrative decision-makers should make explicit reference to any constitutional or *Charter* analysis they are conducting.

***(iii) Expectations of Privacy in the "Workplace"***

As employees in the Ontario public schools, teachers were found to have section 8 right to be free of unreasonable search and seizure within their workplace. While the Court was only addressing the issues of school boards, school boards are not the only workplaces in Ontario that could be considered "governmental" for purposes of section 32 of the *Charter* or where regulated professionals, like teachers, work. As noted by the Court in *York Region*, it may be determined that an entity is "government" for the purposes of section 32 where, by (1) its very nature or (2) the degree of governmental control exercised over it, the entity is akin to a government. Under this branch, where the entity is found to be "government", the *Charter* applies to all its actions.

While it is a given that the actions of regulators are subject of *Charter* scrutiny, regulators should also be mindful of the *Charter* obligations that may now be imposed on other entities who have reporting obligations to the regulator or where their registrants are engaging in their practice. The *York Region* decision, particularly the Court's comments in *obiter,* do not specifically address how an expectation of privacy in the workplace may impact the school's supervisory role over its employees, and in turn, may impair or impact a regulator's ability to regulate its registrants. In large measure, the Court's analysis and comments focused on the labour relationship and workplace context without discussing the implications within the regulatory context. In our view, it is an important aspect of the contextual section 8 analysis for decision-makers to consider the lens of the professional regulatory body.

While this decision is notable because it extends the scope of the *Charter* to Ontario school boards, the question as to whether the *Charter* applies to searches conducted under regulatory regimes has, in large measure, been answered. For example, it is firmly established that the *Charter* applies to regulatory searches conducted under the *Regulated Health Professions Act*. That said, a

person's reasonable expectation of privacy varies depending on context – and context for regulated professionals is key. The Supreme Court of Canada has made clear that professional regulatory bodies' statutory powers should be interpreted broadly, emphasizing the "onerous obligation" on them to protect the public.[6] In relation to their professional activities and in particular matters that are relevant to an investigation, regulated professionals cannot therefore expect a high degree of privacy. [7] In *Sazant*, the Ontario Court of Appeal emphasized that a regulated professional's expectation of privacy in relation to an authorized investigation is "limited".[8]

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

[1] *York Region*, at para 79.

[2] *York Region* at para 94.

[3] *York Region*, at para 63.

[4] *Yok Region*, at para 122

[5] *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31.

[6] *Pharmascience Inc. v. Binet*, 2006 SCC 48 at paras 36-38.

[7] *Fagbemigun v College of Physicians and Surgeons of Ontario*, 2023 ONSC 2642 at para 40.

[8] *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at para 167.

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