Supreme Court of Canada rules on privacy rights in schools

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In York Region District School Board v. Elementary Teachers' Federation of Ontario, 2024 SCC 22, the Supreme Court of Canada held that the *Charter* right against unreasonable search and seizure applies to employees of publicly-funded school boards.

Key takeaways

- The Supreme Court confirmed that all activities of school boards are subject to the *Charter of Rights and Freedoms*, as they are governmental in nature. This includes the actions of its principals, when they are acting in their official capacity as agents of the board.
- When determining the validity of school board rules involving privacy interests or the freedom of expression, in addition to applying the traditional "KVP Test" from *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.*, 1965 CanLII 1009 (ON LA), we expect that arbitrators will often employ a *Charter* rights analysis.
- Subject to board policies, school board employees may have a reasonable expectation of privacy with respect to content on their board-issued electronic devices, including laptops.

On the advice of their union, two teachers maintained a password-protected log on Google Docs, via a personal Gmail account, where they recorded their concerns regarding another teacher. The principal entered one of their classrooms to return some teaching materials after classes had ended. The teacher was not present. The principal saw that her board-issued laptop was open and touched its mousepad. A document called "Log Google Docs" opened on the screen. The principal read what was visible on the screen and then scrolled through the document. He used his cellphone to take screenshots of the document. When the principal had finished taking photos, he shut down the laptop.

The principal informed his superintendent. The Board seized the teachers' board-issued laptops, and gave the teachers written reprimands.

A labour arbitrator dismissed the resulting grievance. Applying the arbitral "balancing of interests" framework, the arbitrator held there was no breach of the teachers' reasonable expectation of privacy when balanced against the school board's interest in managing the workplace, set out in section 265 of the *Education Act*.

Supreme Court of Canada decision

After the matter made its way through the courts, the Supreme Court of Canada set aside the arbitrator's decision. According to the Supreme Court, the arbitrator had failed to address the teachers' constitutional rights under section 8 of the *Charter*, which states: "Everyone has the right to be secure against unreasonable search or seizure."

The Supreme Court of Canada held that teachers are protected by section 8 of the *Charter* in the workplace, because publicly-funded school boards are inherently governmental, and section 8 does not solely apply in the criminal law context. The arbitrator's failure to address the section 8 concern was an error of law that required her decision to be quashed.

The Supreme Court of Canada also held in a concurring opinion that the arbitrator's decision was unreasonable because, based on the Board's policies and practices, the teachers had a reasonable expectation of privacy. As with any Internet-connected device, the information contained on the teachers' board-issued laptops had the potential to reveal their "specific interests, likes, and propensities," which is personal, biographical information protected by section 8 of the *Charter*.

Next steps for school boards

School boards should consider reviewing their acceptable use of technology policies and their practices concerning the use of board-issued laptops. In light of the Supreme Court of Canada's conclusion that the *Charter* applies to school boards, boards may also wish to consider their Code of Conduct policies and investigation procedures for students, including board-issued devices, lockers, and board property.

A more detailed review of the Supreme Court's decision – including the *Charter* analysis and the administrative and privacy law issues raised by this decision – is forthcoming in a companion bulletin that will be accessible here when published.

If you have any questions about this important decision, please contact John-Paul Alexandrowicz and Melissa Eldridge, the Co-Chairs of BLG's National School Boards Practice.

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