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Monitoring Employees' E-Messages - Impact of Recent U.S. Ruling for Canada?

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On June 17, 2010, the United States Supreme Court issued its much anticipated decision in [City of Ontario v. Quon](#) (PDF). This was its first decision regarding the monitoring of electronic communications in the workplace by employers.

What impact, if any, will the *Quon* decision have on Canadian law regarding employer monitoring of electronic communications in the workplace?

What the Quon Case Was About

The *Quon* case involved the employer's review of text messages sent by a police officer using his employer-provided alphanumeric pager while on duty. Some of his messages were sexually explicit. Since the employer was a government entity, the officer's Fourth Amendment right "to be secure ... against unreasonable searches and seizure" was engaged. The court therefore had to decide whether the officer had a legitimate expectation of privacy and, if so, whether the search engaged in by the employer was unreasonable.

The U.S. Supreme Court declined to decide the issue of whether the officer had a reasonable expectation of privacy with respect to the text messages. This did not need to be decided because it found that the employer's search and review of the messages had been reasonable in any event.

Relevance for Canadian Employers

Section 8 of the *Canadian Charter of Rights and Freedoms* is Canada's equivalent to the Fourth Amendment. It protects against unreasonable government intrusions on an individual's personal privacy.^[1] Canadian courts engage in a two-part test similar to that engaged in by American courts and have frequently looked to American decisions in this area.

While the *Charter* does not apply to the actions of private sector employers, "*Charter* values" can influence decisions applicable to such employers.

For example, Section 8 *Charter* cases have been referenced by some private sector labour arbitrators when ruling on the admissibility of evidence obtained through covert surveillance of employees. In such instances, arbitrators have assessed the reasonableness of the employer's decision to instigate surveillance and the manner in which it was conducted.

It will be interesting to see whether the following two conclusions of the U.S. Supreme Court regarding the reasonableness of the employer's search have any impact upon Canadian arbitrators:

1. *The availability of less intrusive options does not necessarily make a search unreasonable.*

The lower level appeal court had determined that the search was unreasonable since there were other, less intrusive, options available. In overturning that decision, the Supreme Court stated that it "has repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable." Even assuming there were ways that employer could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable. The legal requirement is merely that the search not be "excessively intrusive."

Some Canadian arbitrators have used the "least intrusive" analysis engaged in by the lower appeal court. It has sometimes been used as a basis for concluding that a decision to conduct surveillance is unreasonable in the circumstances. However, as the Supreme Court cautioned, this approach does not properly address the issue of reasonableness.

2. *The extent of a legitimate expectation of privacy is relevant to assessing whether the search was too intrusive.*

Although the Supreme Court expressly declined to decide whether the officer had a legitimate expectation of privacy with respect to the text messages, it said that if there was a legitimate expectation of privacy, it would be limited. This lessened the risk that the review of text messages would be unduly intrusive. The Court held that "the fact that the search did reveal intimate details of his life did not make it

unreasonable." Under the circumstances a reasonable employer would not expect that such a search would intrude on such intimate matters.

In a number of cases, Canadian arbitrators applying the "reasonableness" approach have not engaged in a full analysis regarding the extent of an employee's legitimate expectation of privacy. As the Supreme Court has noted, the employee's legitimate expectations are relevant throughout the analysis.

The potential impact of the *Quon* decision is not limited to unionized employers. Several Canadian jurisdictions have enacted legislation governing the collection, use and disclosure of employees' personal information by employers in the last decade. The concept of "reasonableness" plays a prominent role throughout such legislation, and it is expected that the *Quon* decision will contribute to the continued development of an appropriate and reasonable balance between employer and employee interests.

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[1] Section 8 states: "Everyone has the right to be secure against unreasonable search or seizure."

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