



EMPLOYMENT LAW SERIES
Peter Israel, General Editor



THE LAW AND PRACTICE OF Workplace Investigations

2
Gillian Shearer



The Law and Practice of Workplace Investigations

By Gillian Shearer

The Law and Practice of Workplace Investigations analyzes the various aspects of an investigation, including employer duties, consequences of errors, rules of conduct, and investigative techniques. In addition to this analysis, the text explores common issues such as privilege, negligent investigation, and recovery of costs, making it a comprehensive guide to the policies and precedents surrounding workplace investigations.

Author Gillian Shearer provides all of the information necessary to conduct prompt and effective workplace investigations that meet the requirements of human rights and Occupational Health and Safety legislation. With these expert insights, readers will be prepared to help employers avoid significant financial and reputational damages.

“By focussing individually on the distinct rights and interests of the complainant, the accused, the witness(es), the employer, and the investigator, Gillian brings clarity and practical advice to all aspects of the process.”

— Peter Israel, BA, LLB

2 Employment Law Series: Volume Two

PETER ISRAEL *General Editor*

Emond's Employment Law Series offers clear, concise guidance on the practical and procedural aspects of employment law. Ideally suited for practising lawyers and human resources professionals, this collection covers the most challenging and important topics within employment law, anchored by the expertise of General Editor Peter Israel. Titles are authored by various experts in the employment law field, lending balance and comprehensiveness to the series.



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
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VII. Access to Employee's Computer

It is debatable whether the employer may gain access to an employee's personal information that is stored, rightly or wrongly, on the employer's hardware. The leading case on the question is *R v Cole*,³ a Supreme Court of Canada decision that arose in a criminal context.

Richard Cole was a high school teacher who was allowed to use the school board's laptop computer for personal purposes. He stored personal information on the computer, including nude and semi-nude photographs of a female student.

In the course of routine maintenance, the school's IT department discovered the offending images. The computer was surrendered to the police, who accessed the

³ *R v Cole*, 2012 SCC 53, [2012] 3 SCR 34.

computer without a warrant, thereby raising the issue of a Charter breach.⁴ This, in turn, led to an assessment of the accused's reasonable expectation of privacy in the contents of the computer. The Charter is intended to protect such interests, and allows for state intervention only by legal authority.

It is the question of "reasonable expectation of privacy" in an employment context that is of interest here.

In *Cole*, the employer did allow for personal use of employer-issued computers, but also maintained a policy providing that personal email remained private, and stating that "all data and messages generated on or handled by board equipment are considered to be the property of [the school board]." Further, the school's "Acceptable Use Policy," which applied to students and teachers, warned users not to expect privacy in their files.

The Supreme Court stated that in circumstances where personal use of workplace computers is permitted or reasonably expected, the individual has a reasonable expectation of privacy in the personal information that is stored on the machine. Such policies may diminish, but do not eradicate, a user's expectation of privacy:

The Court left no doubt in *R. v. Morelli* ... that Canadians may reasonably expect privacy in the information contained on their own *personal* computers. In my view, the same applies to information on *work* computers, at least where personal use is permitted or reasonably expected.

Computers that are reasonably used for personal purposes—whether found in the workplace or the home—contain information that is meaningful, intimate, and touching on the user's biographical core. *Vis-à-vis* the state, everyone in Canada is constitutionally entitled to expect privacy in personal information of this kind.

While workplace policies and practices may diminish an individual's expectation of privacy in a work computer, these sorts of operational realities do not in themselves remove the expectation entirely: The nature of the information at stake exposes the likes, interests, thoughts, activities, ideas, and searches for information of the individual user.⁵

The court continued with the theme that the school board's policies and practices diminished the expectation of privacy, but did not eradicate it:

The nature of the information in issue heavily favours recognition of a constitutionally protected privacy interest. Mr. Cole's personal use of his work-issued laptop generated information that is meaningful, intimate, and organically connected to his biographical core. Pulling in the other direction, of course, are the ownership of the laptop by the

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5 *Supra* note 3 at paras 1-3 (emphasis in original), citing *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253.

school board, the workplace policies and practices, and the technology in place at the school. These considerations diminished Mr. Cole's privacy interest in his laptop, at least in comparison to the personal computer at issue in *Morelli*, but they did not eliminate it entirely.⁶

The case did involve the actions of the police, which clearly is a government actor and subject to Charter protections, unlike a private employer. The court stated that it would defer to a future case the consideration of the rights of the employer to conduct a search of the computer.

However, the direction of the court to offer protection to the personal information of employees is clear:

The closer the subject matter of the alleged search lies to the biographical core of personal information, the more this factor will favour a reasonable expectation of privacy. Put another way, the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest.

Computers that are used for personal purposes, regardless of where they are found or to whom they belong, "contain the details of our financial, medical, and personal situations" (*Morelli*, at para. 105). This is particularly the case where, as here, the computer is used to browse the Web. Internet-connected devices "reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet" (*ibid.*).

This sort of private information falls at the very heart of the "biographical core" protected by s. 8 of the *Charter*.⁷

It is likely that whatever a written employment agreement or an employer's clearly intended policy document may state, such words will not allow for an infringement of personal rights. Equally, ownership is not conclusive of an employee's right to expected privacy:

While the ownership of property is a relevant consideration, it is not determinative Nor should it carry undue weight within the contextual analysis. As Dickson J. (later C.J.) noted in *Hunter*, at p. 158, there is "nothing in the language of [s. 8] to restrict it to the protection of property or to associate it with the law of trespass."

The context in which personal information is placed on an employer-owned computer is nonetheless significant. The policies, practices, and customs of the workplace are relevant to the extent that they concern the use of computers by employees. These "operational realities" may diminish the expectation of privacy that reasonable employees might otherwise have in their personal information

6 *Ibid* at para 58.

7 *Ibid* at paras 46-48.

Even as modified by practice, however, written policies are not determinative of a person's reasonable expectation of privacy. Whatever the policies state, one must consider the *totality* of the circumstances in order to determine whether privacy is a reasonable expectation in the particular situation⁸

A clear and well-defined policy that sets out what personal uses are allowed or not, and that states that the employer retains the right to examine and access personal data stored on the employer's computer equipment, is a first step in defining the respective rights of both parties. It may well not rule the day, but it remains essential to define expected positions.

On the basis of the Ontario Court of Appeal decision in *Jones v Tsige*,⁹ a private employer could be sued for breach of an employee's expected privacy for reading the employee's private files and email, absent an agreement that purports to allow such access, but likely, given the words of the the Supreme Court in *Cole*, even where such an agreement is in place.

The Court of Appeal defined the tort as follows:

The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

...

These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practises and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.¹⁰

It would be prudent to tread carefully regarding personal information stored on the employee's computer or backed up on the company's server. A conservative investigative approach, which is most likely to insulate the employer against allegations of

⁸ *Ibid* at paras 51-53 (emphasis in original), quoting *Hunter v Southam Inc*, [1984] 2 SCR 145.

⁹ *Jones v Tsige*, 2012 ONCA 32.

¹⁰ *Ibid* at paras 71, 72.

“fishing,” would be to begin the computer systems investigation with a narrow scope, and then, only on the basis of evidence of misconduct, to broaden the intrusion into the employee’s privacy. Typically, where an employee is engaging in misconduct using the employer’s property, a narrow search will reveal information that can then be used to justify a more expansive review of the employee’s conduct.

It is clear, however, that business communications, as distinct from personal communications on employer computer systems, would very likely be fair game in a workplace investigation.

IV. What Use Can Be Made of Statements to the Investigator?

The question of privilege may pre-empt the discussion of the use that can be made of statements to the investigator. Privilege is discussed in detail in Chapter 7. It must be kept in mind that it is the employer's decision whether to waive privilege. An employee being questioned should take no comfort in a statement from the investigator that the investigation and ensuing report will be covered by legal advice privilege or, for that matter, any other privilege.

To ensure that statements provided to the investigator are protected, the employee's best course of action is to enter into an agreement by which (1) the employer agrees that the information is to be provided in the course of a solicitor-client relationship and (2) the employer covenants with the employee that it will not waive this privilege without the written consent of the employee. However, it is unlikely that most employers would agree to such a position, for good reason.

Equally, statements from the investigator that the interview is "confidential" will be of no consequence when the investigator is met with a police summons, absent a finding that the report is prepared as legal advice or in anticipation of litigation, and that the privilege thereby engaged has not been waived.

Similarly, evidence given by an employee "without prejudice" is meaningless and of no assistance in defending an issue of admissibility in subsequent proceedings.

The essential question confronting a person being investigated, and indeed the investigator as well, is whether statements made in the course of an inquiry can be used later against the employee in a criminal or quasi-criminal proceeding.

There is no doubt that such statements are admissible in a civil proceeding—again, absent a privilege that has not been waived.

As noted previously, there are many examples of alleged workplace conduct that may give rise to criminal charges, including sexual harassment, employee theft, workplace abuse, possession of pornography, and threats of physical assault. Such misconduct certainly can give rise to criminal and other proceedings. Under the common law

confessions rule, a statement made by a person to a “person in authority” is inadmissible in proceedings when the statement is made “involuntarily.” The accused bears the burden of proving that a statement was made to a “person in authority”; the Crown bears the burden of proving that the statement was made voluntarily. Both steps must be passed to meet the test of admissibility.

The case law discussed below has defined these terms in some detail. The end goal is to determine whether a statement is admissible against its maker in a criminal proceeding.

The first question in the analysis is how to determine whether the person receiving the information may be considered to be a “person in authority.” As noted, the onus of proving that a statement was made to a “person in authority” is on the accused.⁴⁴

The Supreme Court of Canada considered the “person in authority” issue in *R v Hodgson*.⁴⁵

The facts of the case showed that following an allegation of sexual assault, the victim, her parents, and her stepfather confronted the accused at his place of employment. The accused admitted to them his culpability. The question was whether the statements of the parents recounting the confession were admissible.

Cory J, for the majority, stated the fundamentals of the common law confessions rule:

It “can now be taken to be clearly established in Canada that no statement made out of court by an accused to a person in authority can be admitted into evidence against him unless the prosecution shows, to the satisfaction of the trial judge, that the statement was made freely and voluntarily.”⁴⁶

As to the question of “a person in authority,” the court noted that the classification of those that may meet this definition is not closed. The critical question is whether the accused person reasonably believes that the receiver of the information is in a position to influence “the prosecution or investigation” of the crime. Cory J stated:

[T]he person in authority requirement generally refers to anyone formally engaged in “the arrest, detention, examination or prosecution of the accused” This definition may be enlarged to encompass persons who are deemed to be persons in authority as a result of the circumstances surrounding the making of the statement. ...

44 The issue of the “evidential” onus is not as straightforward as that suggested above; it is similar to the swaying evidential burden in a human rights prosecution. A full discussion of the topic is beyond the scope of this text. For those interested a more in-depth analysis of this issue, see *Peel Law Association v Pieters*, 2013 ONCA 396. See also *R v Grandinetti*, 2005 SCC 5 at paras 37-40, [2005] 1 SCR 27.

45 *R v Hodgson*, [1998] 2 SCR 449.

46 *Ibid* at para 12, quoting *Erven v R*, [1979] 1 SCR 926 at 931.

A parent, doctor, teacher or employer all may be found to be a person in authority if the circumstances warrant, but their status, or the mere fact that they may wield some personal authority over the accused, is not sufficient to establish them as persons in authority for the purposes of the confessions rule. ... Instead, it requires a case-by-case consideration of the accused's belief as to the ability of the receiver of the statement to influence the prosecution or investigation of the crime. That is to say, the trial judge must determine whether the accused reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities. This view of the person in authority requirement remains unchanged.⁴⁷

Thus, if the accused reasonably believes that the workplace investigator may influence the prosecution or investigation of the crime, then the investigator may meet the test for "a person in authority."

It is well accepted that the test to determine whether an examiner is a "person in authority" is largely subjective.⁴⁸ The trier of fact must determine whether the accused person in his or her context rationally believes that the person questioning the accused may be able to influence the prosecution of a case against him or her.

In *R v Benson*,⁴⁹ the Manitoba Court of Queen's Bench considered the application of the test of a "person in authority" and concluded that this issue was proved as the first step of the common law confessions rule.

The court considered the factors below to be relevant to this aspect of the analysis. It found that the accused Marvin Benson rationally believed that the investigators were "acting on behalf of the state":

1. Benson referred to the Auditor General's Office (AGO) as the "legislative police" and believed that the AGO could investigate as the police for government.
2. Benson asked the team from the AGO what their respective backgrounds were. One person, Tario, replied that he was a 25-year veteran of the RCMP, that he had worked as a fraud investigator in the Commercial Crime Division, and that he worked closely with the RCMP from time to time.
3. Benson asked for and received an assurance of confidentiality.
4. Benson testified that he believed that his interviewers had control over him and that he had no choice but to answer their questions. He was not cautioned nor was he advised to seek legal counsel.

The court concluded that the accused had met the burden of proving that he had spoken to "persons in authority":

47 *Ibid* at paras 16 and 36, quoting *R v AB* (1986), 26 CCC (3d) 17 at 26 (Ont CA).

48 *R v Grandinetti*, *supra* note 44.

49 *R v Benson*, 2009 MBQB 310.

In my view, the evidence also establishes an objectively reasonable basis for Mr. Benson's belief that he was speaking to persons in authority, in the context of the circumstances surrounding the making of his statement. While Mr. Benson was not specifically told of the relationship or close collaboration between the AGO and the police or prosecution, there is no doubt that he knew or inferred that.⁵⁰

The second component of the test, which the Crown must prove, is that the statement was made voluntarily.

False promises of confidentiality have been found to affect the voluntary nature of a statement.⁵¹ The court noted that other factors affecting voluntariness included, in *Benson*, the fact that none of the accused had been told that the issue had been referred to the RCMP, that fraud and forgery were suspected, that the RCMP could access the statements, and that they were not required to attend or provide information.

This reasoning is similar in theme to the "full disclosure" requirement in the context of an administrative suspension, as stated by the Supreme Court of Canada in *Potter v New Brunswick Legal Aid Services Commission*.⁵²

Interestingly, on the same issue of whether the statement was voluntary, the court in *Benson* determined that the threat to induce the statement need not be directly related to the criminal charge before the court.⁵³ It will suffice that there was an implied threat to jeopardize the employment of the accused, failing cooperation with the investigators. This is so, even in the context where the Crown must prove the voluntariness of the statement.⁵⁴

In *R v Nomoselski*,⁵⁵ the Saskatchewan Provincial Court held that the statement given by the accused was involuntary. She was apparently confused and unsophisticated, she was told that the HR person was present to look out for her interests, she was given no warning, and she was interviewed in a potentially misleading way. The court considered other evidence as well—namely, the investigator could not be sure whether his handcuffs were visible during the interview, he did not take notes properly, and his later evidence on other issues cast doubt on the overall reliability of his evidence.

Perhaps more importantly, after the interview had begun but before the accused was arrested, when Charter rights were not engaged, the investigator failed to provide

50 *Ibid* at para 33.

51 *Ibid* at para 77.

52 *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 SCR 500, as discussed in Chapter 3, citing the *Bhasin* duty. This is also a good example of another context in which the *Bhasin* duty of honest performance could be expected to be influential.

53 *R v Reid (DL)*, 2000 CanLII 28745, 192 Nfld & PEIR 77 (NLSCTD).

54 Alternative reasoning was put forward on the issue of voluntariness in *Benson*—namely, that an inducement was given that the accused would be favourably treated by the authorities.

55 *R v Nomoselski*, 2000 CanLII 19620, 197 Sask R 200 (Sask Prov Ct).

a warning. This failure, in itself, did not define the issue of admissibility, but it remained a significant factor in the court's assessment of the voluntariness of the statement. The court stated:

I find that the failure to provide a warning at the outset of the interview was a significant factor. To be clear, it is my understanding that the warning that would be required of a person in authority in these circumstances may be limited to a statement to the effect that the accused be told that she has nothing to hope for from any promise or favour and nothing to fear from any threats.⁵⁶

The court also noted that in a context to which the Charter did not apply, a further warning that the accused has the right to remain silent may not be required by the common law.⁵⁷

⁵⁶ *Ibid* at para 28.

⁵⁷ *Ibid*. This latter point remains controversial and is not, in any event, the focus of the present topic. The accused does have the right to remain silent without engaging Charter rights. The loftier application of *Bhasin* principles remains to be determined.