

LEADERSHIP UPDATE

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It's the Principal of the Thing: Investigations, Interviews, Search & Seizures in the School

Part 1

The Question: When can a School Administrator investigate or otherwise become involved in an investigation of an alleged criminal incident involving students?

Section 20(f) of the *School Act*, R.S.A. 2000, c. S-3, [the *School Act*], provides that “[a] principal of a school must ... maintain order and discipline in the school and on the school grounds and during activities sponsored or approved by the board”.

It has been recognized that similar provisions give principals the power to interview and even ‘search’ a student if they have reasonable grounds to believe that a school rule has been or is being violated, because, in doing so, they can maintain order and discipline in the school. Indeed, in *R. v. M.R.M.*, [1998] S.C.J. No. 83, [*M.R.M.*], the Supreme Court of Canada, after noting that the Nova Scotia *Education Act* did not have such a provision, held that a search of students was authorized by inference because a provision to search students in appropriate circumstances was reasonable in the school environment.

One must recognize, however, that this power is limited. As the Ontario Court of Appeal noted in *Regina v. J.M.G.*, [1986] O.J. No. 923 (C.A.)(QL), [*J.M.G.*], an alleged crime may be so obvious and so heinous that police should be involved instead.

Furthermore, it appears from a recent decision of the Alberta Provincial Court that if the alleged crime did not occur on school property or during school hours, any inquiries by school authorities into the conduct may attract the student’s *Charter* and other rights. That is, all of the circumstances surrounding an investigation, interview or search and the seriousness of the conduct will be taken into account in determining if what the principal did was reasonable.

Additional limitations are imposed by both the *Canadian Charter of Rights and Freedoms* [the *Charter*] and the *Youth Criminal Justice Act (YCJA)*, S.C. 2002, c. 1, [the *YCJA*].

In a review of the jurisprudence in this area, it is usually assumed that the *Charter* applies to the activities of school authorities in this context. The relevant *Charter* provisions that become involved include

8. Everyone has the right to be secure against unreasonable search or seizure.
10. Everyone has the right on arrest or detention
 - (b) to retain and instruct counsel without delay and to be informed of that right.

The relevant guiding *YCJA* provisions are:

- 146 (2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the

I hope I shall
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maintain
what I
consider
the most
enviable of
all titles, the
character of
an honest
man.

George Washington



young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless

(a) the statement was voluntary;
(b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that

- (i) the young person is under no obligation to make a statement,
- (ii) any statement made by the young person may be used as evidence in proceedings against him or her,
- (iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and
- (iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult

- (i) with counsel, and
- (ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and

(d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

When is a Student Detained?

In *J.M.G.*, *supra*, a student who was requested by the principal to attend his office was informed that the principal had reason to suspect that the student was in possession of drugs. The Ontario Court of Appeal held that

the principal had ‘searched’ the student, in the sense that the principal took some tin foil from the accused’s right sock or pant leg. Nevertheless, the student was not ‘detained’ within the meaning of s. 10(b) of the *Charter*, because a student, in these circumstances, was already subject to the discipline of the school and required by the nature of his attendance to undergo any reasonable discipline or investigative procedure.

The Supreme Court also recently recognized, in *M.R.M.*, *supra*, that although the compelled attendance of a student at a principal’s office or some other form of restraint by a school authority could be understood as a “detention”, it did not necessarily bring it into the meaning of “detention” for the purposes of s. 10(b) of the *Charter*.

However, in *R. v. Johnson*, [1997] O. J. No. 4648, the Ontario Provincial Court held that the presence of two police officers during the search made it clear that the defendant was under their control as well as the principal’s, and thus, he was detained within the meaning of s. 10(b).

Recently, in *R. v. J.Y.*, [2007] A.J. No. 730, the Alberta Provincial Court held that although the principal interviewed two students about alleged criminal conduct without the presence of the police and before contacting the police, the principal in those circumstances was an agent of the police and a person in authority. As a result, the students’ statements were obtained in breach of their s. 10(b) *Charter* rights and their statements to the principal were not admissible against them as the principal had failed to give them the proper warning required by s. 146(2) of the *YJCA*.

In that case, however, the alleged criminal conduct happened off of school property outside of school hours. The only relevance to the school was that both the accused and the victim were students. In those kind of circumstances, therefore, it would likely be best for the school authorities to inform the police of their concerns and leave it in their hands, unless somehow a failure to act immediately could lead to an unreasonable disruption in the school environment or jeopardize the safety of students.

Interviewing Students about Alleged Criminal Conduct

As noted earlier, although the principal in *R. v. J.Y.*, *supra* interviewed the two students prior to contacting the police, the judge held that, nevertheless, the principal was both a person of authority and an agent of the state, and thus, the

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students' rights with respect to confessions were engaged under both the *YCJA* and the *Charter*.

A different result occurred in *R. v. C. S.*, [2006] N.B.J. No. 176 where the New Brunswick Provincial Court held that the actions of teachers in interviewing and searching a student with respect to drugs were done not as persons of authority or agents of the state, but was appropriate conduct within their statutory authority as teachers, and thus neither the *YCJA* or the *Charter* came into play.

Why the difference in the decisions? In *R. v. J.Y.*, it likely comes down to the fact that the alleged criminal conduct occurred off school property and after school hours, and thus, when the principal 'detained' the students for questioning about the incident, there was no connection to her statutory authority as a principal to 'maintain order and discipline in the school', and, as noted by the judge, there was no immediate safety risk.

In *R. v. C.S.*, however, the alleged criminal activity, the selling of drugs, was occurring at the time partly on school property, and thus it was a suspected breach of school regulations as well as the law that the court found required the immediate action by the teachers given the seriousness of the suspected offence.

Indeed, the Supreme Court in *M.R.M.* specifically noted that it was essential that school authorities be able to react swiftly and effectively when faced with a situation that could unreasonably disrupt the school environment or jeopardize the safety of the students. Thus, it will be those circumstances where a court will be more lenient when reviewing their actions in the context of an alleged *Charter* breach. However, if such swiftness is not required, a court will be less inclined to hold a school authority to the modified, lesser standard.

When is a School Administrator a Person of Authority or an Agent of the State?

The judges in both *R. v. J.Y.* and *R. v. C.S.* considered the decision of the Supreme Court in *R. v. Hodgson*, which outlined the relevant principles to follow in determining who is a person in authority:

- Who is a person in authority is determined on a case-by-case basis, but likely includes persons whom the accused reasonably believes are acting on behalf of the police or prosecuting authorities and could therefore influence or control the proceedings against him.
- The issue as to who is a person in authority must be resolved by considering it *subjectively from the viewpoint*

of the accused, (although there must be a reasonable basis for that viewpoint).

- If the accused succeeds in arguing that a person hearing a statement *may* be a person in authority, the Crown then has to demonstrate beyond a reasonable doubt that the person was not a person in authority, or even if he was, that the statement was made voluntarily.

In *M.R.M.*, the Supreme Court noted the test for determining whether a person is acting as an agent of the state; namely, whether the evidence reveals that the investigation, interview, or search and seizure would have taken place, in the form and in the manner in which it did, but for the involvement of the police.

Interestingly, although the principal in *R. v. J.Y.* did not contact police prior to interviewing the two students, and although the judge considered *M.R.M.*, he did not enunciate that test in finding that the principal was an agent of the police. Again, however, the incidents had occurred off school property, after school hours, and there was no immediate risk to any student. Therefore, because the actions were taken outside the scope of the principal's authority, the only conclusion left was that she was acting as an agent of the police.

The Lesson for School Administrators

What school administrators need to know, then, is that investigations or interviews of young people of this nature can potentially attract their rights under the *Charter* and *YCJA* to be free from improper coercion by the state, either because the administrator will be found to be acting as a person in authority or as an agent of the state.

Accordingly, if school administrators carry out investigations or interviews with respect to alleged criminal wrongdoings, they may have a duty to give a *Charter* warning to advise students of their right to retain and instruct counsel and to be informed of that right, as well as their section 146 *YCJA* caution that they do not have to talk or give a written statement, that any statement they give must be voluntary and may be used against them in legal proceedings and that they may have at least a parent, but likely also a lawyer, present during the interview and when making a statement.

As seen in *R. v. J.Y.*, this requirement will likely be applied more stringently in cases where the alleged criminal conduct occurs off school property and beyond the school administrator's normal authority, as opposed to those cases where the misconduct occurs at and during school.

Up coming sessions



Leadership Essentials FOR ADMINISTRATORS

Administrators within the first two years of their appointment or administrators new to the Province of Alberta are invited to attend the 2007 Leadership Essentials for Administrators Conference November 22 - 23 at the Sheraton Cavalier Hotel and Conference Center in Calgary. Space is limited; apply early.

There is NO REGISTRATION COST to attend this conference and a grant-in-aid will offset transportation and accommodation costs for participants.

For more information and a registration form visit the ATA website at www.teachers.ab.ca/ Resources for School-Based Administrators/ Leadership Essentials for Administrators or call Konni deGoeij in Member Services at 1- 800- 232-7208 or 447-9472 or Mark Yurick in Professional Development at 1- 800- 232-7208 or 447-9475.

Mediation in the Workplace: A Workshop with Dr Nancy Love

November 29 and 30

The workshop is targeted at senior leaders in education, in particular, Alberta Teachers' Association members who have central office responsibilities. The workshop will be presented by Dr Nancy Love, founder and president of The PULSE Institute (People Using Language Skills Effectively). Love is a mediator and an international trainer in workplace mediation and leadership. She has worked with many organizations to assist them with in-house mediation programs and policy development. This is a unique opportunity for leaders in the teaching profession to participate in that training.

Registration fee includes the costs of registration, refreshments, breakfast and lunch on each day of the workshop. Registration deadline is November 23.

To download the registration form, visit the ATA's website (www.teachers.ab.ca), click on Events Calendar in the masthead and locate the provincial ATA events for November 2007.