Education and Law Journal
1999-2000

Case Comment

***125** Still Searching for Reason

Greg M. Dickinson [FNa1]

R. v. M. (M.R.) [FN1]

Constitutional law-Search of student-Right to counsel-*Canadian Charter of Rights and Freedoms*, ss. 8, 10(b)

In a previous issue I wrote about the controversial *M. (M.R.)* case where the Nova Scotia Court of Appeal had overruled a trial judge's acquittal of a young offender who had been charged with drug possession after a body search conducted by a school vice-principal in the presence of an R.C.M.P. officer. [FN2] In that Case Comment I called for clarification of the rather confused law in this area and recognition of the danger of permitting educators to conduct searches under relaxed due process requirements in situations leading to criminal prosecution. The Supreme Court of Canada's subsequent ruling in the case, in my ***126** view, is somewhat disappointing in the degree to which it did either of these things.

I set out the facts fully in my earlier Comment and will only precis them here. The vice-principal (Cadue) had been advised by students he considered reliable that another student (M.) intended to sell drugs at a school dance. Pursuant to school policy, Cadue notified the police. When M. arrived at the school Cadue asked him to come to the office where the vice-principal searched the student, seizing a bag containing marijuana. The search was conducted in the presence of an R.C.M.P. officer who had identified himself to M. but took no active part in the search. The drugs were turned over to the officer who then arrested M. and explained his *Charter* s. 10(b) right to retain counsel. The trial judge ruled that Cadue had acted as an agent of the police and had violated M.'s *Charter* rights, thus resulting in the exclusion of the evidence seized in the search. There being no other evidence offered by the Crown to incriminate him, M. was acquitted. The two broad issues before both the Court of Appeal and Supreme Court of Canada were whether the search involved s. 8 *Charter* rights (and whether they were violated) and whether the circumstances triggered a s. 10(b) right to counsel. Ancillary to both was the question of the capacity in which Cadue had acted. The Court of Appeal allowed the appeal and ordered a new trial. M. appealed to the Supreme Court of Canada.

The Supreme Court continued the judicial practice to date of dodging determination of the threshold issue of the *Charter*'s application to public school authorities. The respondent (the Crown) did not dispute the *Charter*'s overall application in the case, and it was therefore unnecessary for the Court to decide the issue. A closer examination of the majority's comments on the matter, however, suggests at least that the Court had no doubt that the *Charter* applied and that the only question was which of several possible rationales for its application was the

proper one:

> In light of the concession made by the respondent it would be inappropriate to discuss and determine finally which of the alternative submissions should be applied. Rather it would be best to assume simply, for the purposes of this case, that schools constitute part of government and as a result the *Charter* applies to the actions of the vice-principal. [FN3]

***127** In his lone dissent, Major J. was somewhat more definite, stating that "the actions of school officials as an extension of government *are* subject to the *Canadian Charter of Rights and Freedoms*." [FN4] In any event, the overall effect of the Court's comments on the issue should be sufficient to put the basic question of *Charter* application to rest, if anyone still doubted it, and simply leave the academic niceties of determining the proper rationale open for discussion by those who care to.

The first substantive issue the Court chose to address was whether the vice-principal was acting as an agent of the police when he detained and searched M. This finding was central to the ultimate determination of the case in at least two ways. First, a principal acting as a police agent would be disqualified from availing himself of relaxed search standards, should the Court agree that such lower standards indeed exist in schools; and, second, detentions by the police and their agents would trigger a s. 10(b) *Charter* right to counsel.

The majority agreed with the Court of Appeal that the trial judge had erred in concluding that Cadue had searched M. as an agent of the R.C.M.P. In the majority's view, the evidence did not support this finding. There was no evidence of a joint strategy or of any instructions having been given to the vice-principal by the police regarding how to conduct the search. Mere police presence during the search and evidence of cooperation between the school and the police were insufficient to establish an agency relationship according to the test established in *R. v. Broyles*. [FN5] In *Broyles*, the Supreme Court had ruled that police agency occurred only when an affirmative answer could be given to the following question: "[W]ould the exchange between the accused and the [alleged police agent] have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?" [FN6] The majority ruled that, in the present case, the evidence showed that the search would have proceeded in materially the same fashion with or without police involvement. Without using the terminology *per se*, the Court differentiated between principals' "educational state agent" and "police state agent" roles when it commented:

> Although Mr. Cadue knew that criminal charges might result, the primary motive for the search was the enforcement of school discipline, for which he was responsible.***128** There is nothing in the evidence to suggest that the vice-principal initiated the search or conducted it differently because of police intervention. [FN7]

Having disposed of this critical issue, the Court turned next to the questions of whether section 8 *Charter* rights existed in this case and, if so, whether they had been violated. These questions, in turn, involved a bundle of sub-issues, including whether students enjoy a reasonable expectation of privacy at school, if so whether it was different in quality and magnitude from that of ordinary citizens elsewhere; what standards of reasonableness applied; finally, whether the facts of the present case disclosed a violation of such standards.

The question of when a reasonable expectation of privacy exists has been considered a number of times by the Supreme Court. It is a matter of some variability depending on a host of factors, three of which were particularly relevant in this case: the accused's subjective (own personal) expectation of privacy, the objective reasonableness (in the view of the reasonable person) of the expectation of privacy, and the particular context of the search (search of a student attending a school function on school property). The majority had little difficulty

concluding that M. had a personal expectation that the privacy of his person and the items he carried on his person, would be respected by school authorities. The historical importance of a “heightened privacy interest” in one's person suggested that this subjective expectation was also reasonable, even at school. Hence, s. 8 rights were engaged.

The Court held, however, that the magnitude of such an expectation of privacy may vary according to the context of the search in question, thus affecting the requirements of a reasonable search under s. 8. Just as customs searches do not have to meet the full strictures laid down in *Hunter v. Southam* [FN8] (e.g. prior authorization by warrant) because people crossing borders have a lesser expectation of privacy, one should also associate a lower expectation of privacy with searches conducted by school authorities:

> Similarly, the reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances. Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know ***129** that this may sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A student's reasonable expectation of privacy in the school environment is therefore significantly diminished. [FN9]

The Court's next task was to decide the effect that this reduced expectation of privacy had on the standards to be applied to school searches. The majority's rationale for ultimately striking a standard for school searches lower than that applying in the wider society, was not unexpected. First, the Court made the general observation that learning occurs best, if not exclusively, in an orderly environment. [FN10] Moreover, the Court continued, problems threatening safety in schools and educators' ability to teach-namely, “illicit drugs and dangerous weapons”-have

> increased to the extent that they challenge the ability of school officials to fulfill their responsibility to maintain a safe and orderly environment. Current conditions make it necessary to provide teachers and school administrators with the flexibility required to deal with discipline problems in schools. [FN11]

Hence, the Court's assumption-apparently unsubstantiated by any evidence- about the escalation of what has become popularly and generically known as “school violence” provided the essential public policy rationale for crafting a lower level of constitutional rights for school students. It is doubtful that the Court had valid and reliable data - indeed it likely had no data at all- before it to justify this conclusion. Did the justices then take “judicial notice” of an increase in drug and weapon possession in schools sufficient to warrant eroding the constitutional rights of students right across the country? If so, this is a highly questionable exercise of this judicial prerogative, given the work of Dolmage and others who warn about the danger of inaccurate public ***130** perceptions of youth crime crafting false “realities” which, in turn, drive bad public policy. [FN12]

Nonetheless, the Supreme Court determined that a different and lower standard should apply to searches conducted at a school by school authorities compared to those conducted by police. The majority relied on the decision of the United States Supreme Court in *New Jersey v. T.L.O.* [FN13] and its adoption by the Ontario Court of Appeal in *R. v. G. (J.M.)* [FN14], in striking a standard for school-based, educator-conducted searches. The *T.L.O./G.(J.M.)* test “dispenses not only with the warrant requirement but also with the need for probable cause, imposing instead a generalized standard of reasonableness in all the circumstances.” [FN15] The essence of the test is captured in the following passage from the U.S. Supreme Court's opinion in *T.L.O.*:

> ... the accommodation of the privacy interests of schoolchildren with the substantial need of teachers

> and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception," ...; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," .... Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.
>
> ... By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in ***131** the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. [FN16]

The Supreme Court of Canada adapted the *T.L.O.* dicta to produce its own version of the reduced standard:

> (1) A warrant is not essential in order to conduct a search of a student by a school authority.
>
> (2) The school authority must have reasonable grounds to *believe* that there has been a breach of school regulations or discipline and that a search of a student would reveal evidence of that breach.
>
> (3) School authorities will be in the best position to assess information given to them and relate it to the situation existing in their school. Courts should recognize the preferred position of school authorities to determine if reasonable grounds existed for the search.
>
> (4) The following may constitute reasonable grounds in this context: information received from one student considered to be credible, information received from more than one student, a teacher's or principal's own observations, or any combination of these pieces of information which the relevant authority considers to be credible. The compelling nature of the information and the credibility of these or other sources must be assessed by the school authority in the context of the circumstances existing at the particular school. [FN17]

There are two particularly noteworthy points in the Court's summary. The first is the deference that the majority says courts should accord educators in determining whether reasonable grounds existed to justify a search. The message here is clear: it will be very difficult for a court to "second guess" the reasons an educator had for conducting a school-based search. Any information considered credible by the educator would seem to suffice. The second noteworthy point concerns a degree of confusion about the requisite state of mind of the would-be searcher. Although the majority purported to adopt the reasoning of the United States Supreme Court in *T.L.O.*, their own dicta depart significantly from the *T.L.O.* test. In *T.L.O* the U.S. Supreme Court determined that a search is justified at its inception where "there are reasonable grounds for *suspecting* that the search will turn up evidence" [FN18] that the student violated the law or a school rule. The majority of the ***132** Supreme Court of Canada, however, introduced quite a different knowledge threshold: "reasonable grounds to *believe*." Viewed as a continuum, the responses a person can have to information she or he is given about something fall between certainty of belief and certainty of disbelief. Suspicions, one would have thought, would fall somewhere in the middle. One normally associates a lower degree of reliability with "suspicion", as opposed to "belief." I may suspect something to be the case, but find that I lack the evidence (and consequent moral certainty) to believe it to be true and hence to justify a particular course of action. This suggests, of course, that the test proposed by the Supreme Court could conceivably be viewed as more stringent than the *T.L.O.* standard. It is doubtful that is

what the Court intended, especially given its obvious desire to grant considerable flexibility and leeway to educators who search students at school. However, the uncertainty the Court introduced, whether it ultimately makes any practical difference or not, is nevertheless unfortunate.

In addition to being reasonable at its inception-that is, based on reasonable grounds, whether belief or suspicion-school searches must also be reasonably carried out. In other words, the scope and the manner of conducting them must not be unreasonably excessive or intrusive given the circumstances prompting the search. Reasonable scope had already been established as a constitutional requirement of school-based searches in both *T.L.O.* and *G. (J.M.)* and the Supreme Court added very little in its judgment in *M. (M.R.)*. The majority summarized this branch of its reasoning as follows:

> 1. The first step is to determine whether it can be inferred from the provisions of the relevant *Education Act* that teachers and principals are authorized to conduct searches of their students in appropriate circumstances. In the school environment such a statutory authorization would be reasonable.
>
> 2. The search itself must be carried out in a reasonable manner. It should be conducted in a sensitive manner and be minimally intrusive.
>
> 3. In order to determine whether a search was reasonable, all the surrounding circumstances will have to be considered. [FN19]

The majority followed the reasoning of the Ontario Court of Appeal in *G. (J.M.)* in concluding that principals received authority to search by implication under the *Education Act*. The responsibility the legislation ***133** places on school officials to safeguard students and ensure proper order and discipline "by necessary implication authorizes searches of students." It is worth noting that while, strictly speaking, the *ratio decidendi* in *G. (J.M)* applied only to principals, the Supreme Court made it clear that the implicit statutory authority to search extended also to teachers.

The Supreme Court also borrowed heavily from *T.L.O.* and *G. (J.M.)* in its analysis of what would constitute reasonable scope in school-based searches. First, they adopted the sliding scale approach of the other courts: the justifiability of the intrusiveness of a search varies with the seriousness of the reasons giving rise to the search and the immediacy of any danger posed by the objects of the search. And, as in the previous cases, the Supreme Court noted that reasonableness of the scope of a search included consideration of the age and sex of the student. While the relevance of the relative sexes of searcher and searchee is obvious, it is not, however, clear how age should affect the issue. One assumes that the intention is that the older the student the greater the concern about intrusiveness but, as in the other cases, the point is left completely unexplained.

The effect of this central part of the majority's ruling, then, is that as long as educators are searching students at school or during school functions *qua* educators, they will be subject to a lower constitutional standard of reasonableness. If, however, they are acting as agents of the police, they will be held to the higher standard normally applying to police searches-probable cause. As discussed above, the majority held that the vice-principal, Cadue, had not been acting as an R.C.M.P. agent during the search of M.. The Court found that Cadue's search satisfied both arms of the reasonableness test: the basis for the search was information received from several sources Cadue considered credible and the search itself was conducted in a minimally intrusive manner in the privacy of the principal's office. Thus, the search did not violate M.'s s. 8 *Charter* rights.

The remaining issue for the majority was M.'s contention that he had been denied his s. 10(b) *Charter* right. His "detention" by Cadue, he argued, had triggered a right to obtain and instruct counsel without delay and to be informed of his right to do so. This argument got no further in the Supreme Court than it had in the Court of Ap-

peal in *G. (J.M.)*, and for the identical reason. Section 10, both courts ruled, was not meant to apply to school-based detentions and relations between students and teachers but rather to "relations between individuals and ***134** the state, usually focused upon the investigation of a criminal offence." [FN20]

> The right to counsel provided in s. 10(b) was designed to address the vulnerable position of an individual who has been detained by the coercive power of the state in the course of a criminal investigation, and is thus deprived of his or her liberty and placed at the risk of making self-incriminating statements (*R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 191). Its application in the school context is inappropriate and would lead to absurd results. [FN21]

With respect, the Court's reasoning regarding the distinction it draws is not particularly well developed. Surely, the majority cannot be saying that teachers are not agents of the state. It already concluded that they are in accepting the *Charter*'s overall application to the case. Moreover, the search power itself was inferred from the undeniably state-conferred and coercive provisions of the *Education Act*. Nor was it a surprise to any of the participants in the instant case that the fruits of the search would turn out to be evidence of the commission of potentially serious criminal offences, drug possession and/or trafficking. This brings us back to the rather fine-one might argue artificial -distinction between searching for educational as opposed to criminal justice system purposes. [FN22] Moreover, it is hard to fathom why the application of s. 10(b) of the *Charter* in the context of crime-implicated school investigations (in cases as extreme as the instant one at least) would be any more "absurd" than the application of s. 56 of the *Young Offenders Act*, which protects almost identical interests and which has been held to constrain principals' interrogations of young persons reasonably suspected of having committed criminal offences. [FN23]

In any event, as I suggested in my comment on the lower court decision in the present case, there is reason to treat the s. 10(b) issue as moot. Case law suggests that denial of s. 10(b) rights to counsel will not be fatal to a subsequent search since no practical advantage is to be gained from prior advice from counsel, who would be powerless to prevent***135** the search. [FN24] The Supreme Court, however, did not address this point.

In sum, the Supreme Court has brought a degree of closure to the question of school searches. However, the *ante status quo* established by *T.L.O.* and *G. (J.M.)* has changed little. Moreover, conceptual confusion has been introduced surrounding the necessary state of mind of a would-be searcher-must he or she *believe* or merely *suspect* a search will turn up evidence? - in order to make the search reasonable at its inception. Given the Court's deferential posture toward the decisions school administrators make in deciding whether to search, however, it is doubtful that the conceptual distinction between belief and suspicion will have any practical significance.

Writing about the Ontario Court of Appeal's decision in *G. (J.M.)*, A. Wayne MacKay described students as "second-class citizens" when it comes to the constitutional rights they are afforded at school. [FN25] The Supreme Court of Canada has now clearly ruled that students do, indeed, have a reasonable expectation of a lower degree of privacy in the school setting, leading to a relaxed standard for educator-conducted personal searches for violation of school rules and the criminal law. Whether conditions in today's schools are so serious and widespread to justify public policy abridging students' privacy rights in this way is seriously in doubt. It is not reassuring that the highest court in the land would dilute civil liberties to address a putative social problem in the absence of reliable proof thereof.

[FNa1]. Professor, Faculty of Education, The University of Western Ontario, London, Ontario.

[FN1]. [1998] 3 S.C.R. 393, 166 D.L.R. (4th) 261, 233 N.R. 1, 171 N.S.R. (2d) 125 (S.C.C.).

[FN2]. Greg M. Dickinson, “Searching for Reason” (1998) 8 E.L.J. 441.

[FN3]. Above, note 1, at 410 [S.C.R.].

[FN4]. 430 [S.C.R.]. Emphasis added.

[FN5]. [1991] 3 S.C.R. 595, 120 A.R. 189 (S.C.C.).

[FN6]. Ibid. at 608.

[FN7]. Ibid. at 412.

[FN8]. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

[FN9]. Above, note 1 at 414 [S.C.R.].

[FN10]. Not a novel judicial position. This is merely the social utilitarian purpose courts have identified, in lieu of *in loco parentis*, for granting educators common law authority to use physical force to discipline students even over parental objection. See, e.g. *Murdock v. Richards*, [1954] 1 D.L.R. 766 (N.S. S.C.).

[FN11]. Above, note 1 at 416 [S.C.R.].

[FN12]. See W. R. Dolmage, “One Less Brick in the Wall: The Myths of Youth Violence and Unsafe Schools” (1995-96) 7 E.L.J. 185 and W.R. Dolmage, “Lies, Damned Lies and Statistics: The Media's Treatment of Youth Violence”, in this issue of the *Education & Law Journal*.

[FN13]. 469 U.S. 325 (U.S. N.J., 1985).

[FN14]. (1986), 56 O.R. (2d) 705 (Ont. C.A.), leave to appeal refused (1987); S9 O.R. (2d) 2S6n (S.C.C.).

[FN15]. Above, note 1 at 419 [S.C.R.].

[FN16]. Above note 13 at 341-343 quoted in above, note 1 at 417, 418 [S.C.R.].

[FN17]. Ibid. at 422, 423 [S.C.R.]. Emphasis added.

[FN18]. Above, note 16. Emphasis added.

[FN19]. Ibid. at 424 [S.C.R.].

[FN20]. Ibid. at 429 [S.C.R.].

[FN21]. Ibid.

[FN22]. See the discussion in above, note 2 at 448-450.

[FN23]. See, for example, *R. v. H.(M.)* (26 June 1986), (Alta. Q.B.) [unreported - No. 8503-04478-S2] reproduced in G. M. Dickinson and A. W. MacKay, *Rights, Freedoms and the Education System in Canada* (Toronto:

Emond Montgomery, 1989) at 395.

[FN24]. Above, note 2 at 447, referring to *R. v. Debot*, [1989] 2 S.C.R. 1140 (S.C.C.) and *R. v. Guberman* (1985), 23 C.C.C. (3d) 406 (Man. C.A.).

[FN25]. A. W. MacKay, "R. v. J.M.G. Case Comment: Students as Second Class Citizens under the Charter" (1986) 54 C.R. (3d) 390.
10 Educ. & L.J. 125

END OF DOCUMENT