

# Constitutional Imperatives in Search and Seizure in Canadian Schools

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## Introduction

With the increasing presence of guns and drugs in public schools in Canada, the issue of school searches and seizures has raised important questions. For example, do school authorities have the power to search a pupil? If so, what are the circumstances in which a school official is allowed to carry out the search? What are the safeguards so that the search is not unreasonable? What happens to the evidence obtained by an unreasonable search? Because of the Canadian Charter's provision that 'Everyone has the right to be secure against unreasonable search or seizure,<sup>1</sup> these issues have to be decided in this constitutional perspective.<sup>2</sup>

## Property vs. Privacy

Under English common law, which influenced Australia and Canada alike, protection of one's property was jealously guarded. Most of the old laws dealing with search and seizure stemmed from that principle. However, with the arrival of the Canadian Constitution in 1982, and the entrenchment of fundamental rights and freedoms in the Canadian Charter of Rights in the Constitution, the Canadian courts reexamined the concept. It is now recognised that search<sup>3</sup> and seizure<sup>4</sup> provisions of the Charter are not amenable to proper interpretation under the old concepts of property, but should be substituted by 'reasonable expectation of privacy'. Because the right of privacy is not tied to property, the expectation of privacy must vary with the context. As was noted in *Schreiber v. Canada (A.G.)* [1998]:

The degree of privacy which the law protects is closely linked to the effect that a breach of that privacy would have on the freedom and dignity of the individual. Hence, a person is entitled to an extremely high expectation of privacy in relation to his or her bodily integrity ... or residence ... and entitled to a much lesser expectation in relation to a vehicle in which he or she was merely a passenger ... or an apartment to which he or she was a visitor ...<sup>5</sup>

Thus, if there is no reasonable expectation of privacy held by an accused with respect to the relevant place, there can be no violation of the section 8 security.<sup>6</sup> While the need for privacy can vary with the nature of the matter sought to be protected, the circumstances under which the search takes place and the purposes of the intrusion, the basic principle of privacy remains paramount.<sup>7</sup>

Grounded in man's [or woman's] physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state. Claims of privacy must, of course, be balanced against other societal needs, and in particular law enforcement, and that is what section 8 is intended to achieve<sup>8</sup>.

### **Liberal Rather Than Literal Interpretation**

As a result of the new and postmodern concepts of the Canadian Charter, the Supreme Court of Canada has been saying from the beginning that the Canadian Charter is a purposive document and should be interpreted accordingly. For example, it was said in a 1985 case that the rights the Charter guarantees have to be construed generously and not in a narrow or legalistic fashion.<sup>9</sup> In the first case on search and seizure that reached the Supreme Court of Canada in 1984, it was stated that the purpose of the Charter is to provide 'for the unremitting protection of individual rights and liberties'.<sup>10</sup> Nevertheless, even before the advent of the Charter, one of the basic interpretation principles of constitutional law was - and its existence and influence even today is not in doubt - that the constitution is organic and therefore 'a living tree capable of growth and expansion within its natural limits'.<sup>11</sup>

The 'living tree' analogy can best be seen under the Charter imperative in the following quotation of the Supreme Court of Canada:<sup>12</sup>

[The section 8 right] must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy. Its spirit should not be constrained by narrow legalistic classifications based on notions of property and the like ...

The concept of purposive interpretation required a framework for determining a person's reasonable expectation of privacy. The Supreme Court of Canada provided that framework in a 1993 case<sup>13</sup> in which it was decided that the framework has to be based on a number of contextual factors:

Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated allow for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement.

### **No More Mere Technicalities**

The process of criminal investigation and trial in every advanced and democratic country must be fair and fearless. In the same spirit, the fundamental freedoms in the Charter have to be examined and applied in an undistorted or undogmatic way. 'Charter challenges to the search process are

judicially no longer looked upon as mere technicalities. Such challenges now are seen in the grand scope of the protection of both the individual and the legal health of the process itself.<sup>14</sup> The consequence is that any evidence obtained in contravention of the section 8 protection can be excluded in a criminal trial. Thus, the whole purpose of criminal investigation becomes counterproductive. Furthermore, an unreasonable search or seizure can bring the administration of justice into disrepute.<sup>15</sup> This sends a clear message to all persons in authority who are empowered to search a citizen and/or seize their property to strictly follow the exacting criteria in over-riding a citizen's right to, and expectation of, privacy.

### **The Search and Seizure Powers in a School Setting**

Before 1998, the law on school searches was somewhat ambiguous and confusing and was based on a 1986 Ontario Court of Appeal's decision.<sup>16</sup> The Supreme Court of Canada was provided with an opportunity - in the context of an educational establishment - in 1998 (*R. v. M.(M.R.)*)<sup>17</sup>, to stipulate guidelines in the application of the Canadian Charter's freedom that everyone has a right 'to be secure against unreasonable search and seizure'.<sup>18</sup>

### **Facts of the Case**

A school vice-principal was informed by some reliable and well-informed students<sup>19</sup> that the accused (a 13 year-old junior high school student) intended to sell drugs at a school function on school property. The vice-principal asked the accused and his companion to come to his office where he asked each of the students if they were in possession of drugs, and, getting no satisfactory answer, advised them that he was going to search them. Prior to this, the vice-principal had called a police officer dressed in plain clothes to the premises in accordance with the school policy. The police officer remained present during the search, but did not say anything. A quantity of marijuana was found on the body of the accused which was seized by the vice-principal, who gave it to the police officer. The officer, after arresting the accused for possession of a narcotic, read the accused the police caution and his right to counsel and the right to contact a parent or an adult.

At the trial, the judge excluded the evidence found during the search,<sup>20</sup> and the Prosecution did not offer any other evidence - thus the charge against the accused was dismissed. The reason for the judge's conclusion was that the search violated the accused's rights under section 8 of the Charter - as the vice-principal was acting as an agent of the police, and proper procedural safeguards were missing. In the judge's opinion, the search of the pupil was intrusive, going to the personal integrity and privacy, as the accused did not give up his rights to privacy and other legal rights by virtue of his school enrolment.

The Court of Appeal allowed the Prosecution's appeal and ordered a new trial. In a unanimous decision the Court, disagreeing with the trial judge, decided, relying on the American leading case in the educational context,<sup>21</sup> that a pupil cannot have the same subjective expectation of privacy as the population generally. A lower expectation of privacy can be justified in a regulatory or administrative setting as opposed to the criminal or quasi-criminal context. The Court's reasoning was based on the primary duty of school officials and teachers. Their duty:

is the education and training of young people. A state has compelling interest in ensuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment from other children, and also to protect teachers themselves from violence by few students whose conduct in recent years has prompted national concern ... it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the school house as it does in the enforcement of criminal law. When the accused's application for leave to appeal was accepted, the Supreme Court of Canada finally had the opportunity to decide the issue of when, and in what circumstances, a search by a school official should be considered unreasonable and therefore in violation of the pupil's rights, under the constitutionally-entrenched Charter.

### **The Supreme Court Says Schools Come Under Different Standards**

The full Court of nine Justices heard and decided the final appeal. Eight held that the vice-principal was not acting as an agent of the police and the police officer did not carry out the search. The mere presence of the police officer was not sufficient to conclude that the officer was in fact the authority carrying out the search, as the officer at all times was completely passive. There was no evidence of an agreement or police instructions to the vice-principal that could create an agency relationship. Had there been no police officer present, the search would have been taken in the same shape and form. Were a school official to act as a police agent, the usual standard, generally requiring prior authorisation in the form of a warrant which is based upon information which provides reasonable and probable grounds, is applicable. But in the case of an ordinary search of, or seizure from, students on school property conducted by teachers or school officials within the scope of their responsibility and authority to maintain order, discipline and safety within the school, a modified and flexible standard has to be applied.

The majority decided that although a student attending school has a reasonable expectation of privacy with respect to his/her person and the items he/she carries on his/her person, a student's reasonable expectation of privacy in the school environment is significantly diminished. The existing law is that while a search requires prior authorisation, usually in the form of a warrant, from a neutral arbiter, 'it may not be reasonable in every instance to insist on prior authorisation'. The majority added:

the search of a student by a school authority is just such a situation where it would not be feasible to require that a warrant or any other prior authorisation be obtained for the search. To require a warrant would clearly be impractical and unworkable in the school environment. Teachers and administrators must be able to respond quickly and effectively to problems that arise in their school. When a school official conducts a search of seizure from a student, a warrant is not required.

They came to this conclusion because the problem of illicit drugs and dangerous weapons in schools is such that it challenges the ability of school teachers and administrators to fulfil their responsibility to maintain a safe and orderly environment. To require a warrant or other prior authorisation in a school setting is undesirable. The absence of a warrant in such circumstances does not lead to a presumption that the search was unreasonable. The Court's opinion was that school officials should be accorded a reasonable degree of discretion and flexibility so that they can ensure the safety of students and be able to enforce school regulations. Therefore, a more flexible approach should be taken to searches conducted by teachers and principals than would apply to searches conducted by the police. The Court added:

Ordinarily, school authorities will be in the best position to evaluate the information they receive. As a result of their training, background and experience, they will be in the best possible position to assess both the propensity and credibility of their students and to relate the information they receive to the situation existing in their particular school. For these reasons, courts should recognise the preferred position of school authorities to determine whether reasonable grounds existed for the search.

The ninth judge (Justice Major), while agreeing with many conclusions of the majority - especially that a student's expectation of privacy while on school property is lower than a member of the general public - dissented on the point of whether the vice-principal was an agent of the police. He agreed with the trial judge's finding that the vice-principal was an agent of the police, and therefore the criterion used should be that of the police-searches, where more strict safeguards prevail.

### **Conflicting Values**

Canada is not the first country to face the thorny question of school searches and seizures. It has been recognised in the United States as well that this question represents potentially conflicting values and principles. For example, the issue has been decided by the United States Supreme Court in *New Jersey v. T.L.O.*,<sup>22</sup> a case dealing with school search and seizure and the application of the Fourth Amendment's prohibition of unreasonable searches and seizures. In coming to its conclusion, the Court said that against the interests of the student's privacy 'must be set substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds'. The Court decided that the school setting requires (1) 'some easing of the restrictions to which searches by public authorities are ordinarily subject', (2) 'some modification of the level of suspicion of illicit activity needed to justify a search', and (3) a modification to the principle of a warrant requirement.

The Supreme Court of Canada also is fully aware that the issue of school searches and seizures presents a difficult choice. For example, the Court said that:

it is essential that school authorities be able to react swiftly and effectively when faced with a situation that could unreasonably disrupt the school environment or jeopardise the safety of the students. Schools today are faced with extremely difficult problems which were unimaginable a generation ago. Dangerous

weapons are appearing in schools with increasing frequency. There is as well the all too frequent presence at schools of illicit drugs. These weapons and drugs create problems that are grave and urgent. Yet schools also have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students.

### **The Standard of ‘Reasonableness’ in a School Setting**

It may be interesting to examine here what the Supreme Court of Canada had decided before the school case on the standard of reasonableness.

The Court in a 1990 case decided that, in determining whether or not legal search or seizure has occurred, the cornerstone<sup>23</sup> test of ‘reasonable expectation of privacy’ must be considered.<sup>24</sup> According to the Court, expectation of privacy must be reasonable, i.e., an expectation which society would be prepared to recognise as reasonable. For example, merely taking extra precautions to escape detection is not sufficient.<sup>25</sup> The Supreme Court of Canada was following the American case of *Katz v. United States*<sup>26</sup> to say that the constitutional protection extends to people, not places, and if something is knowingly exposed to the public, even in a person’s own home or office, it is not subject to the protection.

The concept of ‘reasonable expectation of privacy’ recognises that in certain circumstances, a diminished expectation of privacy is justified, for example, open areas visible from a public road, one’s work place, a restaurant, a hotel kitchen,<sup>27</sup> prison inmates, hijacking-callers, or when a person is under arrest.<sup>28</sup> In summary, whether or not a reasonable expectation of privacy exists should be determined on the basis of the totality of the circumstances.<sup>29</sup>

In the school case under consideration, the Supreme Court of Canada decided that if it is to be reasonable, a school search by school authorities must be conducted reasonably and must be authorised by a direct or indirect statutory provision which itself is reasonable. Furthermore, a school search may be undertaken if there are reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched. In determining whether the search is reasonable, all the circumstances surrounding a search, including the age and gender of the student, have to be taken into consideration.<sup>30</sup> To illustrate, searches undertaken in circumstances where the safety or health of students is involved, for example, it is reported that a student is carrying a gun, could require different, or even drastic, considerations. The reason for this lenient and flexible standard of reasonableness is that:

teachers and principals must be able to act quickly to protect their students and to provide the orderly atmosphere required for learning ... The role of teachers is such that they must have the power to search. Indeed students should be aware that they must comply with school regulations and as a result that they will be subject to reasonable searches. It follows that their expectation of privacy will be lessened while they attend school or a school function ... The reasonableness of a search by teachers or principals in response to information received must be

reviewed and considered in the context of all the circumstances presented including their responsibility for students' safety.

The Court summarised the legal position so far as it relates to the question whether a school search is reasonable:

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 authorised to conduct searches of their students in appropriate circumstances. In the school environment such a statutory authorisation 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.

## **Conclusions**

Section 8 of the Canadian Charter creates a new substantive right. It is not declaratory of a pre-Charter right. If anything, it gives the pre-existing right a new and polished quality.<sup>31</sup> The framers of the Charter deliberately chose the operative word 'unreasonable', instead of many other words available to them, for example, 'illegal', 'unlawful', 'illicit', or 'dishonest'. There was an intentional preference for the simple phrase used in section 8, which might be considered to be vague and open-ended. But it is intentional because the drafters did not wish to import complete American jurisprudence on the Fourth Amendment, which has two parts: the first part is identical to the Canadian provision, but then it goes on to add the warrant requirements. The second part of the Fourth Amendment has resulted in problems.<sup>32</sup> However, unlike the US provision, the Canadian section has no specificity except the basic right that everyone is free from 'unreasonable search and seizure'. Again unlike the United States, there is no particular 'historical, political or philosophical context capable of providing an obvious gloss on the meaning of the guarantee'.<sup>33</sup>

The Supreme Court of Canada has established a new precedent in the educational sphere, and, by giving wide interpretation to the power of search and seizure by school officers, has removed many doubts in school authorities' minds about the limits of their discretion in searching of pupils.<sup>34</sup> Previously, some people had advocated that the distinction between searches to enforce in-house rules and those involving potential criminal prosecutions should be recognised, and, accordingly, in the second category the school officials should be treated as agents of the police, resulting in strict and onerous standards of reasonableness.<sup>35</sup> This distinction has not been accepted or recognised by the Supreme Court of Canada. It is now clear that statutes giving powers of search or seizure are not interpreted in similar fashion. Regulatory or administrative statutes (for example an Education Act) are treated differently, and therefore interpreted less strictly, compared to criminal (or quasi-criminal) enactments. Education Acts are regulatory in nature, and therefore they are not treated or interpreted as criminal statutes are. Thus, evidence discovered in a school search cannot be excluded lightheartedly.<sup>36</sup> It is submitted that this distinction, when applied to the school environment, is germane and meaningful. It is further submitted that to impliedly treat school authorities as police agents, even though the evidence

obtained by them may be used in criminal prosecutions, is impractical and unrealistic. However, especially in a school setting, people in authority do not possess unlimited, draconian or unreasonable powers of search and seizure. What was said by a court in 1987 is appropriate even in a school search: ‘A search will be reasonable if it is authorised by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable’.<sup>37</sup>

There would be a sigh of relief in many school and education board coffee-rooms, because the Supreme Court’s decision has removed the artificiality, uncertainty and confusion that existed prior to its decision, in that school officials sometimes were considered as school authorities and at other times were treated as police agents. As a consequence, they had to tread very carefully when confronting pupils, with a view to search them (or their lockers), suspected of breaking school rules, even when suspected of possessing drugs or firearms. The removal of those doubts must be welcome to school and education board authorities.

### **Keywords**

Constitutional Rights; Search and Seizure; Schools; Canada.

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## Endnotes

- 1 Section 8 of the Canadian Charter of Rights and Freedoms. For a background of the Charter's impact on education, see A.N. Khan "The Legal Context of Canadian Education" (1997) *ANZJLE*, 2(1): 25-58. The importance of this section can be seen by examining section 52(1) of the Constitution Act 1982 which states: 'The Constitution of Canada, which includes the Canadian Charter of Rights and Freedoms, is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution, is to the extent of the inconsistency, of no force or effect'.
- 2 The influence of the United States Constitutional Fourth Amendment in section 8 is noticeable, but there are big differences. The Canadian provision does not include the warrant specification of the Fourth Amendment. Therefore, the American jurisprudence on the constitutional requirement and validity of a warrant is inapplicable in Canada.
- 3 'Search' is a common English word ... But in this section of the Charter ... the word is about looking for 'things' (and in this context I use the word 'things' to include words spoken). *R. v. Evens* (1994) 93 CCC (3d) 244 (British Columbia Court of Appeal).
- 4 These words are used disjunctively so that either search or seizure can offend the section: *R v Dymnt* (1988) 45 CCC (3d) 244 (SCC).
- 5 *Schreiber v. Canada (A.G.)* [1998] 1 SCR 841. This case confirmed that the Charter does not apply extraterritorially. It is unrealistic to expect foreign authorities to know and comply with the laws of Canada. See also *R. v. Terry* [1996] 2 SCR 207.
- 6 *R. v. Edwards* [1996] 1 SCR 128.
- 7 Justice La Forrest in *R. v. Dymnt* [1988] 2 SCR 417 (SCC).

- 8 In another case, the Supreme Court of Canada said that in recent years there has been a shift of focus in privacy rights from the protection of property interests in the place searched to a focus on the impact of the search and seizure on the individual regardless of the place searched. Therefore, the provision dealing with security from search and seizure protects people, not places or things: *R. v. Colarosso* [1994] 1 SCR 20.
- 9 *R. v. Big M Drug Mart* (1985) 1 SCR 295.
- 10 *Hunter v. Southam* (1984) 14 CCC (3d) 97 (SCC).
- 11 *Edwards v. Attorney General of Canada* [1930] AC 124 (Privy Council)- reconfirmed in *L.S.U.C v. Skapinker* (1984) 11 CCC (3d) 481.
- 12 *R. v. Dymont*, *supra*, note 3.
- 13 *R. v. Plant* [1993] 3 SCR 281.
- 14 J. A. Fontana, *The Law of S S* 1998
- 15 *R. v. Genet* (1989) 45 CCC (3d) 385 (SCC).
- 16 *R. v. G. (J.M.)* (1986) 56 O.R. (2d) 705 (Ontario .CA) (leave to appeal to the Supreme Court denied: (1987) 59 O.R. (2d) 286 (note).
- 17 *supra*.
- 18 The appeal was from the Nova Scotia Court of Appeal: (1997) 159 NSR (2d) 321.
- 19 The information provided by one of them previously had turned out to be correct.
- 20 The confusing state of the law at that point of time is evident from the Youth Court Judge's remarks:  
the search of the accused person was intrusive, going to personal integrity and privacy. I am not convinced on the evidence that the accused by virtue of his student enrolment knowingly or by implication, gave up all rights to privacy and gave up all of his rights, for rule infractions and internal discipline purposes, and also for incidental criminal prosecutions.  
Both the Court of Appeal and the Supreme Court of Canada rejected this exposition of the law.
- 21 *New Jersey v. TLO* 469 US 325 (1985).
- 22 *ibid*.
- 23 In another case the Court said this test was the pivotal test of the whole process: *R v Solomon* (1993) 85 CCC (3d) 496 (SCC). The Court added the right under section 8 must be interpreted 'in a broad and liberal manner'.
- 24 *R v. McKinlay Transport Ltd* (1990) 55 CCC (3d) SCC).
- 25 *R v. Lebeau* (1988) 41 CCC (3d) 163 (Ontario CA).
- 26 *Katz v. United States* 389 US 347 (1967).
- 27 But there is a considerable expectation of privacy in a hotel room: *R. v. Wong* (1990) 60 CCC (3d) 460 (SCC).
- 28 For example, see *R. v. Silveira* (1995) 97 CCC (3d) 450.
- 29 *R. v. Edwards* (1996) 104 CCC (3d) 136 (SCC).
- 30 It is interesting to note one observation by a judge: 'The Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialise and

diminish respect for the Charter which is a part of the supreme law of this country': *R. v. Altseimer* (1982) 1 CCC (3d) 7 (Ontario CA).

- 31 See *R. v. Silber* (1982) 69 CCC (2d) 147 (British Columbia CA).
- 32 From developments of the Fourth Amendment in educational context, see Fischer, T.C. 'From *Tinker* to *TLO*: Are Civil Rights for Students "Flunking" in School?' (1993) *Journal of Law & Education* 22: 409; Sanchez, J.M. "Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After *TLO*" (1992) *Journal of Law & Education*, 21.
- 33 *Southam v. Hunter*, *supra*.
- 34 The previous precedent on this point was an Ontario Court of Appeal's decision: *R. v. G.(J.M.)*, *supra*): when a principal hands over the pupil to the police, she becomes a police agent. See Dickinson, G. M. 'Principals and Criminal Investigation: Recent Developments' (1989) *Canadian Journal of Education*, 14:203.
- 35 For example, see MacKay, A.W. 'Don't Mind Me, I am from the R.C.M.P [Royal Canadian Mounted Police] *R. v. M. (M.R.)*-Another Brick in the Wall Between Students and Their Rights' (1997) 7 CR (5<sup>th</sup>) 24 (commenting on the Ontario Court of Appeal's decision. For a different point of view, see Dickinson, D.M. 'Searching for Reason: *R. v. M. (M.R.)*' (1998) *Education & Law Journal* 8: 442); MacKay, A.W. 'Students as Second class citizens Under the Charter' (1986) *CR* (3d) 54: 390.
- 36 Even in criminal searches, 'excluding evidence necessary for a conviction because of a minor Charter breach could bring the administration of justice into disrepute': *R. v. Genet* (1989) 45 45 CCC (3d) 385.
- 37 *R. v. Collins* (1987) 33 CCC (3d) 1 (SCC).