



Education Law eBulletin

A newsletter for educators

APRIL 2008

SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
250 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group:

John P. Bell
john.bell@shibleyrighton.com

Brian P. Nolan
brian.nolan@shibleyrighton.com

Diane M. Abbey
diane.abbey@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul R. Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Jennifer E. Trépanier
jennifer.trepanier@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

Bryce Chandler
bryce.chandler@shibleyrighton.com

Supreme Court of Canada: Random School Searches Unreasonable

On April 25, 2008, the Supreme Court of Canada released two decisions regarding random searches and the use of drug sniffer dogs to conduct those searches. These decisions were particularly relevant as one, *R. v. A.M.*, involved the search of a Sarnia area high school using said sniffer dogs. In that case, the search was initiated based on a longstanding invitation by the school administration to the local police department. This is significant as neither the principal nor the police had any reasonable grounds or even reasonable suspicions to suspect that drugs would be found on school premises on the day in question. During the ensuing search, a drug dog did indicate upon a backpack which had been left unattended by a student in the school's gymnasium. When the sniffer dog indicated upon the backpack, the dog handler then proceeded to search the backpack and found a quantity of marijuana and psilocybin. The owner of the backpack, A.M., was subsequently charged pursuant to the *Criminal Code*.

Prior to the Supreme Court of Canada decision, both the trial judge and Court of Appeal found that, given there were no specific reasons to conduct the search on the day in question, the search by police and the sniffer dog was inherently unreasonable. Accordingly, the evidence, being the drugs and drug paraphernalia, was deemed inadmissible with respect to the criminal possession charges against A.M.

The majority of the Supreme Court of Canada upheld this finding. More specifically, the majority held that the search was authorized neither under warrant nor under the reasons in *R. v. M.R.M.*, another Supreme Court of Canada decision where the principal had been told by a reliable student informant that another student had drugs on his person. Although the majority in *A.M.* did not prohibit the use of drug sniffer dogs in schools, it stressed that schools and police could not use such methods to conduct random and warrantless searches. In short, the majority of the Supreme Court of Canada found that students have a legitimate expectation of privacy and any reduction in that expectation of privacy should be addressed by Parliament through legislative reform.

At first blush, it would appear that, like performing a search of a student, in order to "unleash the hounds", police and/or school administrators need a reason for doing so. However, it must be remembered that *R. v. A.M.* was a criminal case; the core issue was whether evidence attained through a dog sniff search was admissible in criminal proceedings. The court did not comment regarding the use of dogs for other purposes. In addition, it is significant to note that although the majority held that the search was unwarranted, five of the nine presiding justices held that a search of school premises by police authorities, including drug sniffer dogs, should be held to the lower search standard of "reasonable suspicion" as opposed to "reasonable and probable grounds".

In any event, until this issue is explored further by the courts or the legislature, the current standard of reasonable and probable grounds must be attained prior to conducting a search using either police or police assets, which would include sniffer dogs. However, with respect to principals' powers to search for the purpose of enforcing school rules and regulations, the Supreme Court of Canada's decision in *R. v. M.R.M.* remains the leading authority.

In this respect, in *M.R.M.*, the Supreme Court made the following observations regarding searches performed by school authorities:

- A warrant is not essential in order to conduct a search of a student by a school authority
- 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.
- 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.
- 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.

As always, 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.

Employee or Independent Contractor?

Recently, in *Kelowna Christian Center Society v. Canada (Minister of National Revenue - M.N.R.)*, [2008] T.C.J. No. 44, the Tax Court of Canada found that an educator who provided distance services online was an independent contractor and, therefore, not engaged in insurable or pensionable employment during the time in question. In coming to this conclusion, the court reviewed whether an employer-employee relationship actually existed between the payor and the payee. There are a number of considerations when evaluating whether an individual is an employee or an independent contractor for income tax purposes, and the courts over the years have developed key tests to assist in determining this. Four of the most significant tests are:

Control Test: Courts will review the ability of the company to control the actions of the individual. Generally an individual will be found to be an employee where an institution has the right to control the amount, the nature, and the management of the work to be performed. Conversely, an independent contractor is one who is given a defined objective and is left to his or her own devices to attain the desired result.

Economic Reality Test: These considerations review whether the individual has the ultimate responsibility for the profit or loss of the contract. Where there is financial risk, and the individual bears the risk of profit or loss, it is generally inferred that the individual is an independent contractor. The extent to which the individual uses the company's assets or tools to complete the work is also considered.

Specific Results Test: Examining the nature of the services provided; if an individual is contracted to achieve a specific result as opposed to having an open-ended set of duties and tasks, he or she is more likely to be considered to be an independent contractor.

Integration Test: Courts will also examine the individual's degree of involvement in the organization. If the individual's participation is integral to the company, the individual may be considered to be an independent contractor. This test alone is becoming less useful however, as courts recognize that separate entities may be mutually dependent without creating an employer-employee relationship (ie. Information Technicians who contract out their services, but are regularly present at a specific location).

Although there was no specific understanding between the teacher and the online school that she be engaged as an independent contractor, the Court found that the teacher's belief that she was an employee was belied by a number of other factors. These factors included that: no source deductions were made by the Society; a course on how to carry on your own business was offered to individuals including the teacher at orientation; and the teachers' remuneration was different from a traditional teaching position. Other factors which pointed to an independent contractor relationship were that the teacher was paid an annual amount per student, that she was free to perform the services on her own time and at a location chose by her, and benefits were optional and paid for by the teacher. Finally, regarding control, the Court held that there was nothing in the contract that dictated how the online instruction was to be performed; in the core areas of teaching and assessment, the teacher contractually had considerable freedom in how to perform this work.

This case is significant as it serves as a reminder that the intentions of the parties are not always relevant to the classification of an individual as employee or independent contractor. Notwithstanding the wording of a contract or the belief of one party that he or she in an employee, Courts will look at the circumstances of employment to determine the nature of the relationship.

At Shibley Righton LLP, we are always prepared to answer any questions which may arise regarding this or any other employment issue.

Caselaw

The Ontario Divisional Court dismissed an application for judicial review of a the decision of a Principal's decision, made on behalf of the Toronto District School Board, to transfer the applicants from one educational institution to another. *K.B. (Litigation Guardian of) v. Toronto District School Board*, [2008] O.J. No. 475.

The British Columbia Supreme Court held that although a trustee who had purchased a home in another province and sold her home in British Columbia had a "strong connection" to the British Columbia community, the trustee could not have two residences. As the trustee's primary residence was not in British Columbia, she was no longer eligible to act as trustee for a school board in British Columbia. *Maple Ridge School District No. 42 v. Joostema*, [2008] B.C.J. No. 265.

The British Columbia Supreme Court held that a professor, whose services had been engaged by over 40 letters of engagement over a period of nine years was continuously employed and therefore, based on his personal characteristics, entitled to 15 months' notice after his employment was terminated. *Monjushko v. Century College Ltd.*, [2008] B.C.J. No. 102.

We welcome your comments and questions. Send them, and any updated contact information, to bryce.chandler@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com

Legal Disclaimer: The information contained in this publication is not intended to be legal advice. It is general information only. You should take appropriate professional advice on your particular circumstances. Shibley Righton LLP disclaims all responsibility for all consequences of any person acting on, or refraining from acting in reliance on, information contained herein.