



## Education Law eBulletin

A newsletter for educators

NOVEMBER 2006

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### Court Rules: No EI for Part-Time Teachers During the Summer Between Contracts

In May 2006, the Federal Court of Appeal ruled that three teachers whose contracts ended but who were verbally notified that they would be renewed for the next school year were ineligible for Employment Insurance (EI) benefits during the summer.

In *Bazinet v. Canada (Attorney-General)*, three teachers in Quebec had applied for EI during the 2003 summer after their one-year contracts for the 2002-2003 school year ended. The teachers had received payment for the full year during the ten month school year. At the end of June, two of the three teachers were informed that their positions would be renewed, with the third teacher receiving such notice in early July. Accordingly, the teachers were not under contract during the summer as their contracts had ended and they had not yet signed contracts regarding the next school year. All three teachers applied for EI for the period of July and August during which they had no employment contracts.

Section 54 of the *Employment Insurance Act* allows the Employment Insurance Commission to make regulations prohibiting the payment of benefits, in whole or in part, and restricting the amount of benefits payable to persons in an occupation (e.g., teaching) which regularly experiences a period during which no work is performed (i.e., the summer months) by a significant number of the persons in that occupation. Pursuant to s.54, the EI Commission enacted Regulation 33(2), which provides that “[a] claimant who was employed in teaching for any part of the claimant’s qualifying period is not entitled to receive benefits...for any week of unemployment that falls in any non-teaching period of the claimant unless (a) the claimant’s contract of employment for teaching has terminated....”

The three teachers successfully appealed the denial of EI benefits based on the exception in Regulation 33(2) as they were not under contract during the summer. In turn, the EI Commission appealed these decisions.

The Umpire allowed the Commission’s appeal finding that the three teachers were ineligible for EI benefits during the summer months as there was no real break in the employment relationship with their school board. Specifically, the Umpire recognized that the teachers had received the full year’s salary during the 10 month school year and, accordingly, were not entitled to benefits for amounts that had not been lost.

The teachers then applied to the Federal Court of Appeal for judicial review. In a unanimous decision, the Court dismissed the appeal, finding that intention of Parliament is to pay employment insurance benefits to those individuals who, through no fault of their own, are truly unemployed and who are seriously engaged in an earnest effort to find work. The Court held that the three teachers had not suffered a “genuine severance” from the employer. Accordingly, the Court stated that the word “unemployed” is not synonymous with “not working.”

Thus, the federal government has tightened the EI purse strings and now recognizes that contract teachers who are informed, in writing or verbally, that their positions will be renewed for the next school year are not entitled to receive EI benefits during the summer months. School board administrators may wish to keep this in mind and notify contract teachers of their ineligibility for EI benefits when making offers to renew teachers’ contracts.

The Nova Scotia Court of Appeal stayed a decision of a school board directing the release of an audit report to the public pending the outcome of the appeal because the principal who was the subject of the report would suffer irreparable harm that could not be rectified by way of damages in the event that the report was released. The principal was subsequently successful on appeal. *Reid v. Halifax Regional School Board*, [2006] N.S.J. No. 101.

The Ontario Court of Appeal held that the amount of child support a parent is ordered to pay should be determined with the expectation that a child with means will contribute something from those means toward his or her post-secondary education expenses. *Lewi v. Lewi*, [2006] O.J. No. 1847.

In a complaint alleging discrimination against a student by a substitute teacher, the British Columbia Human Rights Tribunal dismissed the complaint on the basis that hearing the matter would be contrary to the purposes of the *Code*, as the matter had already been investigated and disposed of by three other statutory bodies. *Cunningham v. Comox Valley School District No. 71*, [2006] B.C.H.R.T.D. No. 142.

## Ontario Court of Appeal upholds ruling on drug dog search

In 2004 we reported on the *R. v. A.M.* case, in which police officers from the Sarnia Police force and the Ontario Provincial Police attended a local high school and, with the assistance of a drug detection dog, conducted a “warrantless and random search of the school.” Although the attendance of the police on that particular day was not at the request of school authorities, the police were acting on an open invitation from the principal to search the school when the dog was available.

As a result of an indication from the drug detection dog, the police were directed to the backpack of a student, “A.M.” When a police constable searched the backpack, he found a quantity of cannabis marijuana and psilocybin (magic mushrooms). A.M. was subsequently charged with possession for the purpose of trafficking in respect of both drugs.

At trial, counsel for A.M. moved to exclude the evidence of the drugs found in the backpack on the basis that the search by the police was unreasonable and therefore offended s. 8 of the *Canadian Charter of Rights and Freedoms*. As was reported in our September 2004 eBulletin, the trial judge, Justice G. M. Hornblower of the Ontario Youth Justice Court, excluded the evidence related to the drugs under s. 24(2) of the *Charter*, finding that there did not exist reasonable grounds to conduct the search. In the result, A.M. was acquitted of the charges.

The Crown appealed the decision to exclude the evidence, but in April 2006 the Ontario Court of Appeal dismissed the appeal.

The Court of Appeal recognized that a zero tolerance policy existed at the school, and that the policy had been communicated to both students and parents. The Court held that, although a standing invitation had been issued by the principal, the police were not expected or asked by school authorities to search the school on the day in question. Further, the Court held that a standing invitation issued two years earlier did not result in turning this search into a search by school authorities. Moreover, the Court held that “neither the *Education Act* nor the subsidiary policies provide for warrantless, random searches.” Further, the principal testified that school authorities could not have legally conducted the search that was carried out by the police in this case. Accordingly, the Court held that the search in question was a police search and should be held to the higher standard. The Court held that both the initial search by the dog and the latter search of the backpack were searches that engage s. 8 of the *Charter*.

The Crown then argued that, although the search was warrantless, it was still reasonable due to a lower expectation of privacy afforded to students. In this respect, the Court made particularly significant comments regarding students’ personal items, including backpacks and gymbags. After hearing statements from counsel for A.M. and the Canadian Civil Liberties Association, the Court held that in the context of the search in this case, the owner of the backpack should be afforded a reasonable expectation of privacy because backpacks are extensions of students’ bedrooms and studies and are not routinely subject to search in the normal course of a school day. In this respect, the Court held that there were insufficient grounds to conduct the search and relied on the Supreme Court of Canada decision in *R. v. M.R.M.*, which stated “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.”

The grounds, or lack thereof, on which the searches were premised were not based on credible information. Specifically, the Court held that the detention of students in classrooms for up to two hours was not reasonably necessary given that there were insufficient grounds to conduct a random, warrantless search.

In *R. v. M.R.M.*, where a student was searched by a vice-principal after receiving a tip from a credible student informant, the Supreme Court of Canada upheld the search, finding not only that students have a diminished expectation of privacy in school but also that teachers and principals must be able to act quickly in response to serious breaches of school policies. At first blush, the Court of Appeal’s decision in *A.M.* seems difficult to reconcile with *M.R.M.* insofar as the Court of Appeal’s statements seem to afford students’ backpacks more protection than students themselves. It must be remembered, however, that the search in *A.M.* was held not to be a search performed by school authorities as was the search in *M.R.M.* The Court of Appeal ruled that the search in *A.M.* was a police search and therefore subject to the standard of reasonableness. On that theory, the Supreme Court’s statements in *M.R.M.* that courts should be more lenient when examining the reasonableness of searches conducted by teachers and principals (as compared to the higher standards expected of the police) would seem not to apply to the search in *A.M.*

The decision of the Court of Appeal in *A.M.* has called into question the ability of school authorities to use drug detection dogs in their ongoing efforts to maintain a drug-free, safe learning environment. The Court of Appeal’s decision is difficult to reconcile with that of the Supreme Court of Canada in *R. v. M.R.M.* in certain aspects. Leave to appeal the Court of Appeal’s decision in *A.M.* to the Supreme Court of Canada was granted on November 16, 2006, and the case is to be argued before the Supreme Court sometime in 2007.

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