

Principals and Criminal Investigations of Students: Recent Developments

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Educators' legal authority over their pupils has traditionally relied upon the common law doctrine of *in loco parentis*. Modern jurisprudence, however, has recognized, and in some cases preferred, an alternative theory of legal authority based upon a statutory duty to maintain proper order and discipline. Thus has arisen a duality in the legal characterization of educators' legal personality. They are at once surrogate parents and state agents. In law, the distinction between the two roles is often significant, especially in the exercise of discipline over pupils. The *Canadian Charter of Rights and Freedoms* and the *Young Offenders Act* have served to bring the distinction to the fore as courts probe the extent of educators' legal obligations as state agents in executing their duty. This paper examines critically three recent cases involving the powers and obligations of principals investigating criminal conduct in their schools.

L'autorité légale des éducateurs sur leurs élèves est généralement associée à la doctrine du *in loco parentis* du common law. Toutefois, la jurisprudence moderne reconnaît, et dans certains cas, privilégie une autre théorie de l'autorité légale, fondée celle-là sur le devoir statutaire de maintenir l'ordre et la discipline. Il en résulte une dualité dans la description de la personnalité légale des éducateurs. Ils sont à la fois des substituts parentaux et des agents de l'État. En droit, la distinction entre les deux rôles est souvent importante, surtout lorsqu'il s'agit de maintenir la discipline à l'école. La *Charte canadienne des droits et libertés* et la *Loi sur les jeunes contrevenants* ont servi à mettre cette distinction de l'avant, les cours cherchant à déterminer les obligations légales des éducateurs en tant qu'agents de l'État dans l'exercice de leurs fonctions. Dans cet article, l'auteur fait la critique de trois cas récents impliquant les pouvoirs et les obligations des directeurs d'école dans les enquêtes qu'ils mènent au sujet de comportements criminels dans leurs établissements.

In 1765, Blackstone (Vol. 1) wrote about the legal authority of teachers:

The power of a parent by our English laws is much more moderate (than that of the paterfamilias in Roman law): but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. . . .

He may also delegate part of his parental authority during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis* (in the place of the parent), and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed. (Par. 617, pp. 452-453)

Teachers' common law authority over their students has thus been based traditionally upon an implied delegation of parental authority under the doctrine of *in loco parentis*. Modern jurisprudence, however, prefers to justify educators' authority on the social-utilitarian premise that the maintenance of order and discipline is a prerequisite of an appropriate learning environment (Murdock v. Richards, 1954; R. v. Dimmell, 1980). This notion is reinforced by education statutes that impose upon teachers and principals the responsibility to maintain proper order and discipline.¹

The doctrine of *in loco parentis* has not disappeared entirely, however. In fact, its civil guise—the “careful parent” test—persists as the most commonly invoked standard of analysis in negligence claims against teachers. Despite recent indications that courts will entertain a professional standard of care, there is still a general reluctance to reject the careful parent test altogether (Myers and Myers v. Peel County Board of Education and Jowett, 1981; Thornton, Tanner et al. v. Board of School Trustees, 1975). Moreover, section 43 of the *Criminal Code* codifies the common law doctrine of *in loco parentis* by permitting parents, teachers and others standing *in loco parentis* to use reasonable force to correct children.²

This duality in the legitimation of teachers' and principals' powers has given them a Jeekyll-and-Hyde legal personality. As Jeekyll, they embody the kind, firm and judicious parent with all attendant authority and responsibility. As Hyde, they are executors of state imperatives in education legislation and thus potentially invested with other legal responsibilities. Prominent among these potential responsibilities is the protection of suspected student offenders' rights under the *Canadian Charter of Rights and Freedoms* and the *Young Offenders Act*. This article will examine recent developments in the law with respect to principals' authority to search students suspected of breaches of school rules or the criminal law, and their responsibilities to respect the students' rights under the *Charter* and the *Young Offenders Act*.

Three recent cases shed light on these matters. While two Ontario court decisions reinforce principals' legal authority to investigate deviant student behaviour through detentions and personal searches, an Alberta decision demonstrates that extending police-like authority to educators also invests them with responsibilities normally associated with state law enforcement officials.

REGINA V. L. L.³

The Facts

A theft of money had occurred at the school where L. L. was a fourteen-year-old student. L. L. was suspected. The principal of the school and three

teachers met with L. L. in the school's infirmary to question the boy about his involvement in the theft. During the questioning, which lasted about 1.5 hours, L. L. was never informed that he had a right to remain silent or to retain counsel. Nor was he told that he was free to leave the room.

Near the beginning of the questioning the principal told L. L. to empty his pockets and place their contents on the table. The boy complied and placed a package of cigarettes on the table. Cigarettes were contraband in the school, so the principal confiscated them. Originally, L. L. had been reluctant to answer questions, but as the "interview" progressed, he confessed to having stolen the money and to having purchased drugs with it. He also admitted that the cigarettes confiscated by the principal contained a foil wrapper of marijuana. Upon searching the cigarette package and locating the marijuana, the principal called the police.

To the layman, the procedures adopted by the principal perhaps seemed eminently reasonable; the evidence against the student appeared to be compelling and his conviction seemed assured. Riding the back of the *Charter*, however, L. L.'s counsel raised a series of important issues by arguing that several of L. L.'s *Charter* rights had been violated, namely, his rights not to be subject to unreasonable search and seizure (section 8), not to be arbitrarily detained (section 9), his right to retain and instruct counsel without delay, and his right to be so informed (section 10(b)). The defence also relied on provisions of the *Young Offenders Act* which support the principle that young persons ought to be afforded procedural and substantive rights and be informed as to what those rights are when they are accused of criminal conduct (sections 3(1)(e),(f),(g), and 3(2)). Finally, L. L.'s counsel contended that, since the evidence obtained by the principal had been obtained in a process that violated the accused boy's rights, it ought to be excluded by the court. Section 24(2) of the *Charter* permits a court to exclude evidence "obtained in a manner that infringed or denied any rights or freedoms guaranteed by [the] *Charter*" if its admission in court "would bring the administration of justice into disrepute."

The Youth Court's Decision

Characterizing the application of the *Charter* to school situations as "uncharted territory" and a "potential minefield," the judge recognized the delicate balance that exists between the affirmation of children's rights and the frustration of discipline in schools. Despite the latter concern, the judge ruled "with some trepidation" that the evidence secured by the principal was inadmissible as he was not convinced that "a fourteen year old boy who was summoned to be questioned about a *Criminal Code* offence by a principal and three teachers would not consider himself detained" (R. v. L. L., 1985, p. 5).

Nor was he convinced that the boy was “aware that he need not answer the questions asked of him especially when he was being told that it was for his own good” (R. v. L. L., 1985, p. 5). The inadmissibility of the evidence necessarily meant L. L.’s acquittal. The court did, however, draw a distinction between investigations for mere breaches of school rules and those involving alleged criminal conduct. The judge implied that the former would perhaps not invoke *Charter* obligations. The Crown appealed the decision of the Youth Court to the District Court.

The District Court’s Decision

The appeal was heard by the Honourable Pierre Mercier of the District Court. Judge Mercier focussed on the issue whether L. L. was “detained” within the meaning of the *Charter*. He ruled that the school authorities had not intended their interrogation of L. L. to obtain evidence for the purposes of securing a criminal conviction. Their original intent had been to find out whether L. L. had committed a theft and, if so, to advise his parents with the hope of correcting his behaviour. Even though L. L. had been ultimately charged with a criminal offence, the detention “in respect to that charge” was “slight” (R. v. L. L., 1986, p. 5). The finding of the marijuana and the consequent charge were products of the seizure of the cigarettes which represented a mere breach of school rules. Moreover, the criminal element introduced by the discovery of the marijuana came at a late point in the interrogation. The court also noted that the boy had been allowed to leave the room briefly during the interrogation, presumably demonstrating that he was not being “detained.”

In summary, Judge Mercier held that the school authorities “had good reason to question L. with respect to the theft” (R. v. L. L., 1986, p. 4). When they embarked upon the interrogation, they had no intention of invoking the criminal justice system—at that point their intention was to help L. L. to straighten himself out. The fact that during the questioning a statement by L. L. led to further investigation of the contents of the cigarette package did not, in Judge Mercier’s view, “render the detention nor [sic] the seizure of the cigarette package unlawful or unreasonable” (R. v. L. L., 1986, p. 5).

Judge Mercier allowed the appeal, set aside L. L.’s acquittal, entered a finding of guilty, and granted him an absolute discharge.

REGINA V. J. M. G.

The Facts

J. M. G. was a fourteen-year-old grade 7 student in a Thunder Bays school. One of the teachers in the school told the school’s principal that a student had

seen J. M. G. placing drugs in his socks. The principal telephoned a policeman and a secondary school principal for advice. Acting on this advice, the principal removed J. M. G. from class and requested that he come to the office.

The events in the principal's office were witnessed by the vice-principal. The principal told J. M. G. that he was suspected of having drugs and asked him to remove his shoes and socks. At this point the student removed a rolled cigarette from his pant leg and swallowed it. The principal reached into J. M. G.'s pant leg or sock and retrieved a tin-foil package containing three butts which were later analyzed and determined to be marijuana.

The principal left the room and telephoned his police acquaintance who came to the school, arrested J. M. G., gave him the standard caution that he was not required to say anything, and informed him of his right to speak to a lawyer. J. M. G. was charged with possession of a narcotic and proceeded to trial in the Youth Court in Thunder Bay.

The thrust of the defence's argument at trial concerned alleged breaches of sections 8 and 10(b) of the *Charter* which provide, respectively, a right against unreasonable search and seizure and a right on arrest or detention to retain counsel and be informed of that right.

The Youth Court and District Court Decisions

On 1984 August 29, J. M. G. was convicted by Provincial Court Judge G. R. Kunnas of possession of a narcotic. In rejecting the defence's submissions based on the *Charter*, the judge stated:

... search and seizure is indeed ... in the usual point in case, occasioned by a peace officer. In this instance, it was occasioned by a person in authority in a school setting and looking at the sections of the *Charter* as brought forward, I do not believe it was an unreasonable search and as a result of the search and ensuing findings therefrom, I do not believe the admission of same will bring the administration of justice into disrepute. (R. v. J. M. G., 1984, p. 80)

J. M. G. appealed to the District Court where Judge F. G. McDonald quashed his conviction. Although he provided no formal reasons for his decision, Judge McDonald was quoted as commenting during the course of the lawyers' arguments that "when it comes to the administration of the law it has to be done by people in authority" and that "the law of the land does not give a principal the right to search and seizure in a criminal context" ("Principal ruled at fault in drug seizure case," 1985).

The judge's comments and ruling were potentially devastating to the authority of the principal to investigate students' misconduct independently of the police. The case was quickly appealed to the Ontario Court of Appeal.

The Court of Appeal's Decision

The appeal was heard on 1986 May 20 and 21, by Justices Brooke, Grange, and Zuber. In addition to the lawyers for the federal Crown and the accused, the court heard argument from counsel for the Attorney General of Ontario, who intervened on the side of the prosecution, and from the Canadian Civil Liberties Association, who intervened on the side of the accused. The interests of the intervenants were clear. The Attorney General of Ontario was there to maintain the authoritative integrity of the Ontario *Education Act* and the province's principals. In particular, Ontario's Attorney General sought leave to make submissions concerning several issues:

- (a) the application of the *Canadian Charter of Rights and Freedoms* . . . to the conduct of educators in the school environment;
- (b) the disciplinary authority and powers which may be lawfully and constitutionally exercised by educators in furtherance of common law and statutory obligations to provide education in an environment which is conducive to learning, healthy and safe; and,
- (c) the extent to which modern pedagogical science involves exercise of discipline by educators, and, the nature of behavioural deviance requiring control in the schools. (R. v. J. M. G., 1986, Factum of the Attorney General of Ontario, p. 2)

After pointing out the particularly serious danger inherent in drug use and possession in the school environment, the Attorney General went on to argue in favour of investing school principals with sufficient legal authority to conduct investigations in schools independently of the police:

It would seem evident that educators must correct a continuum of student behaviour from gum chewing, smoking cigarettes in washrooms, swearing, truancy, lateness, failure to perform assigned tasks, talking out-of-turn, to more serious misbehaviour which may constitute, in addition to breach of school or classroom rules, a breach of the criminal law such as vandalism (mischief), theft, assault, narcotic possession, possession of obscene material or weapons, or falsely setting off fire alarms. It is unreasonable to submit that an educator must summon the police or provide a right to counsel whenever criminal conduct is uncovered. The school official surely has a discretion to not involve the civil authorities (just as in the case of the parent) by exercising discipline in the school environment and through the parents. The exercise of such parent-like responsibility will frequently, and reasonably turn on the subject's explanation, apology and prior school record for misconduct. (p. 16)

If the Attorney General's interest was in advancing principals' investigatory powers, the Canadian Civil Liberties Association's interest was in advancing the *Charter* rights of pupils caught up in such investigations in schools.

In a judgment released on 1986 September 23, the court allowed the appeal and restored the conviction and sentence imposed upon J. M. G. by

the Youth Court. The Court of Appeal side-stepped the potentially thorny "threshold" issue of whether the *Charter* applies to the actions of school principals by ruling that there had not been any violations of the accused's *Charter* rights in any event. It was thus unnecessary to decide the difficult issue of the *Charter's* application (R. v. J. M. G., 1986, p. 708).

Writing for the court, Justice Grange first dealt with the question of unreasonable search under section 8 of the *Charter*. As there was no Canadian case dealing directly with the sort of situation before the court, reference was made to a relevant American case—the decision of the Supreme Court of the United States in *New Jersey v. T. L. O.* (1985). In that case, a student's purse had been searched by the principal on suspicion that it contained cigarettes. In the course of the search traces of marijuana were found. While the American Supreme Court held that the Fourth Amendment⁴ protected the student's privacy under these circumstances, it recognized the need to balance the student's expectation of privacy against "the school's equally legitimate need to maintain an environment in which learning can take place" (*New Jersey v. T. L. O.*, 1985, p. 743). Justice Grange quoted a passage from the judgment of Justice White in *T. L. O.* which might usefully be repeated.

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of school children 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 the nature of the infraction. (R. v. J. M. G., 1986, p. 709)

The Ontario Court of Appeal applied the two tests suggested by the United States Supreme Court. Not only was the search of J. M. G. "justified at its inception," wrote Justice Grange, but it was "dictated by the circumstances." The principal's statutory duty under section 236(a) of Ontario's *Education Act* "to maintain proper order and discipline in the school" was the root of the principal's obligation to conduct a search of J. M. G. The search was thus "reasonably related to the desirable objective of maintaining proper order

and discipline.” Nor was the scope of the search “excessively intrusive” (R. v. J. M. G., 1986, p. 709).

It was suggested to the court that the principal should have called in the police as early as the time of his receipt of the initial report of J. M. G.’s wrongful conduct. The court rejected this suggestion and provided some guidelines for principals faced with the question of when to involve the police in cases of suspected criminal behaviour by students. The court recognized that in some cases it would be advisable to involve the police early. These were cases where the crime was “so obvious and so heinous that police participation was inevitable” (R. v. J. M. G., 1986, p. 710). However, in cases where there was uncertainty whether an offence had occurred or about the extent of the offence or where the offence was known but seen as minor by the principal, discretion must be afforded the principal to decide whether to handle the situation himself, consult the student’s parents or call the police. This discretion cannot be properly exercised, however, until the principal verifies the nature and extent of the crime, which is exactly what the principal in J. M. G. was attempting to do (R. v. J. M. G., 1986, p. 710).

The court quickly disposed of the argument that a principal ought to be required to obtain prior authorization from an impartial person before conducting a search in the same way that police must seek search warrants from a judicial officer. Society’s interest in maintaining a proper educational environment meant that the principal must be able to enforce discipline “efficiently and effectively” and “it is often neither feasible nor desirable that the principal should require authorization before searching his or her student and seizing contraband” (R. v. J. M. G., 1986, p. 710–711).

Justice Grange then turned his attention to whether the actions of the principal had transgressed section 10(b) of the *Charter*. There was certainly no denying that the principal had not informed J. M. G. of his right to retain and instruct counsel prior to forcing him to remove his shoes and socks. The question was, had the student been “detained” within the meaning of section 10(b)? Noting that J. M. G., like all other students (presumably of compulsory school age), was already under a kind of detention throughout his school attendance, Justice Grange rejected the notion that he had been detained in the sense contemplated by the *Charter*. He went on to state that J. M. G.

was subject to the discipline of the school and required by the nature of his attendance to undergo any reasonable disciplinary or investigative procedure. The search here was but an extension of normal discipline such as, for example, the requirement to stay after school or to do extra assignments or the denial of privileges. (R. v. J. M. G., 1986, p. 712)

The disciplinary action in this case (the search) carried “possible significant legal consequences.” In cases where the consequences become “inevitable,”

the principal becomes an agent of the police. The judgment implies that *Charter* obligations such as those in section 10(b) would fall on the principal under such circumstances. Such had not been the case in the J. M. G. matter, however, since the principal, up to the point where J. M. G. swallowed the cigarette and attempted to hide the foil package, had merely been discharging his statutory duty to maintain order and discipline. Once the offence was confirmed, he decided to notify the police. J. M. G. was therefore not “detained” until after the search which provided the evidence convincing the principal to call the police. Justice Grange also noted that the denial of legal advice under these circumstances was hardly significant given that such advice could not have precluded what was a lawful search.

Having found that no *Charter* rights had been violated, Justice Grange correctly deemed it unnecessary to consider the application of the “reasonable limits” proviso in section 1 of the *Charter*. Nevertheless, he stated that had he been required to deal with the issue, he would have found that section 236(a)⁵ of the Ontario *Education Act* necessarily implied the right to search and seize in the instant circumstances and as such represented a “reasonable limit” “prescribed by law” that was “demonstrably justified in a free and democratic society” (*R. v. J. M. G.*, 1986, p. 713).

REGINA V. H.

The Facts

H. was a thirteen-year-old student charged with theft of \$65 from his teacher’s purse. Upon discovering that the money was missing, the teacher discussed the matter with her class and told them that if the money were returned, that would be the end of the matter. H. and some other boys acted on this offer, admitted the theft, and returned the money. When the principal learned about this incident from another teacher, he ordered the boys to the office where, in his own words, he “interrogated” them. He obtained admissions from the boys about their involvement in the theft and turned the boys and the evidence over to the police. There was no doubt that the teacher and the principal both failed to provide the boys with access to counsel and to inform them of their right to consult a lawyer, parent or other adult of their choice.

The Youth Court’s Decision (R. v. H., 1985)

H. was tried before Her Honour Judge Russell of the Provincial Court (Youth Division). In a coherent and carefully considered judgment released on 1985 October 24, Judge Russell set out the issues in the case as follows:

- (1) Whether the *Charter of Rights and Freedoms* applies to teachers and principals who are employees of a public school board in the execution of their duties?
- (2) (a) Whether a student who is required to attend the principal's office for interrogation by the principal concerning a criminal offence is under detention within the meaning of s. 10 of the *Charter* and entitled to the rights guaranteed by that section?
- (b) If so, whether the admission of evidence obtained as a result of that interrogation, including that of the principal and the accomplices, would bring the administration of justice into disrepute and should be excluded?
- (c) Whether an admission of a student to a teacher should be excluded when it was obtained as a result of the teacher telling the student there would be no further consequences? (R. v. H., 1985, p. 252)

After examining scholarly opinions concerning the scope of the *Charter's* application, the court concluded that the actions of teachers and principals as employees of school boards were governed by the *Charter*. The basis for this conclusion was that general authority to make rules regarding suspension and expulsion of students had been delegated to school boards by the legislature. As delegates of legislative authority, the educators were deemed subject to the *Charter's* prescriptions (R. v. H., 1985, p. 256).

Having ruled that the *Charter* applied, Judge Russell turned to whether its provisions had been violated, and if so, the effect of such violations. First, had H. been under a "detention" in the principal's office within the meaning of section 10(b) of the *Charter*? Noting that she thought it unlikely that Parliament intended the *Charter* to apply to a "detention imposed as a normal disciplinary measure upon a school student," the judge characterized H.'s detention as something out of the ordinary (R. v. H., 1985, p. 256). She relied on Justice Le Dain's interpretation of "detention" in R. v. Therens (1985) where he concluded that the word's meaning was not restricted to restraint by the police:

In his view, that section necessarily refers to a variety of forms of detention, which may be of short duration, in which a peace officer or other agent of the state assumes control over the movement of a person by a demand or a direction which may have significant legal consequences, and which prevents or impedes access to counsel. The issue, he said, is whether the person reasonably regards himself or herself as free to refuse to comply. (R. v. H., 1985, p. 256)

The facts of the H. case disclosed that H.'s presence in the principal's office was the result of the principal's command. In the court's view, "it [was] reasonable to believe that a 13-year-old would believe that he had no other choice but to attend; it [was] also reasonable to believe that the accused felt

compelled to attend because of the probable consequences if he failed to attend" (R. v. H., 1985, p. 257). Moreover, this was no ordinary detention aimed at disciplining an unruly pupil over a breach of school rules; this was an interrogation for the purpose of deciding whether to report a criminal offence to the police. The accused's awareness of the nature and purpose of the detention added to his "psychological compulsion" (R. v. H., 1985, p. 257). Judge Russell accordingly ruled that H. had been detained within the meaning of section 10 of the *Charter* and that his rights to counsel and to be told of that right had been violated.

Having thus ruled, the court was then required to consider the effect of the violation of the accused's rights—whether the admission of evidence obtained in violation of his rights would "tend to bring the administration of justice into disrepute" (*Charter*, section 24(2)). Judge Russell found a direct causal connection between the obtaining of the evidence and the *Charter* violation. (This finding may be contrasted with the reasoning of the Ontario Court of Appeal in *J. M. G.* where a denial of section 10(b) rights was held not to be related to the conducting of a lawful search.) The violation preceded and led to the obtaining of the evidence. Moreover, the court found an element of unfairness in the way this matter was handled since the principal broke "a teacher's promise which the boys had reason to believe would be honoured" (R. v. H., 1985, p. 259). Judge Russell ruled that the nature of the *Charter* violation in this case was such as to bring the administration of justice into disrepute and hence she ruled inadmissible the boys' statements to the principal.

Some passing comments by the court about the role played by the principal in this case are worth noting. Despite the best of intentions, the principal

in handing the evidence over to the police . . . became inextricably involved in the administration of justice by doing the work of the police themselves. The evidence he provided the police became the evidence in the case; there was no need for the police to attempt to obtain a statement from the accused; the principal had done their work for them. (R. v. H., 1985, p. 259)

Thus, in the court's view, the principal in this case had acted as the agent of the police in gathering evidence of a criminal offence. H.'s principal had, indeed, become Mr. Hyde.

Having excluded the evidence obtained by the principal, the court lastly considered whether the inculpatory statements made to the teacher were admissible. There was no question of detention and thus no *Charter* issue. But there was the question of whether, in receiving the statements, the teacher was "a person in authority" within the meaning of section 56 of the *Young Offenders Act* and governed by the prescriptions contained therein. Section 56 states that a statement given by a young person to a "person in authority" is

not admissible in evidence unless it is given voluntarily (that is without duress, threats, inducements, or promises of favour) and after the young person has been advised that he is not required to give a statement, that any statement given may be used against him, and that he has a right to consult with counsel, a parent, or other adult chosen by him.

In deciding that the teacher was a "person in authority," Judge Russell relied on the test established by the Ontario Court of Appeal and adopted by the Supreme Court of Canada in *R. v. Rothman* (1981) in which the meaning of that phrase was determined according to the subjective test of "whether the accused believed that the person he dealt with had some degree of power over him and whether he thought that person could either make good his promise or carry out his threats" (*R. v. H.*, 1985, p. 261). Judge Russell found it entirely "reasonable to presume that a 13-year-old boy would believe that his teacher would exercise power over him and could make good on her promises" (*R. v. H.*, 1985, p. 261). The inducement offered by the teacher's promise of no further consequences also violated the basic common law rule that, to be admissible, statements must be voluntarily given. But for the teacher's promise, the boys would not have confessed. The court thus ruled the statements made to the teacher inadmissible.

The court also held that the statements made to the principal were inadmissible under the *Young Offenders Act* since the principal had not complied with the procedural preconditions set out in section 56. The principal had thus violated both the *Charter* and the *Young Offenders Act*. Since the only evidence against the students was comprised of their statements, which were ruled inadmissible, the charge against H. was dismissed. The Crown appealed Judge Russell's decision to the Alberta Court of Queen's Bench.

The Decision of the Court of Queen's Bench (R. v. M. H., 1986)

The appeal was heard on 1986 June 26, by Justice Duchêne. The judgment, which runs to only four pages, is disappointing given the importance and complexity of the issues involved in the case. In fairness to the court, however, it appears that there was an understanding among counsel and the judge that, in order to expedite the release of the judgment, an oral rather than written judgment would be given (*R. v. M. H.*, 1986, p. 1).

After reviewing the facts of the case, Justice Duchêne concluded that it was unnecessary for him to decide whether the *Charter* applied to educational institutions. He did state, however, by way of *obiter dicta*,⁶ that he would have decided, if necessary, that it did not (*R. v. M. H.*, 1986, p. 3). It became unnecessary to consider the *Charter's* application because of the court's ruling that the evidence in this case was obtained in contravention of the *Young Offenders Act* and could be excluded on that ground alone.

Judge Duchêne held that the principal and teacher had been “persons in authority” under the law and, as such, were subject to both common law and statutory (*Young Offenders Act*) prescriptions concerning the admissibility of confessions. He found that there was “a clear breach” of section 56(2) (b) of the *Young Offenders Act* since “there was no warning to the young person, there was no statement of his right to consult counsel or another person or a guardian . . .” (R. v. M. H., 1986, p. 4).

The court concluded with the following statement which seems rather puzzling: “I would therefore find that if there was a detention by the principal, that he and the teacher were persons in authority and that the statements made were not shown to have been made voluntarily” (R. v. M. H., 1986, p. 4). This statement is perplexing for a couple of reasons. First, surely the question of whether there was a “detention” or not is relevant only to the *Charter of Rights* which the court had already decided to ignore. It does not seem directly relevant to the *Young Offenders Act* issue: the test established in R. v. Rothman (1981) for whether someone is a “person in authority” is not whether he is detaining the maker of the statement but rather whether the maker subjectively believes that the person has authority over him and the authority to make good any threats or promises. Moreover, section 56(2) (b) provides a set of preconditions which must all be met before a statement will be admissible. So even if a statement were “voluntary” under section 56(2) (a), a failure to follow the procedural prescriptions of section 56(2) (b), (c), and (d) would still preclude the statement’s admission into evidence.

Regardless of the confusion at the end of the judgment, the result was clear. The statements of the boys were held to be inadmissible and since they formed the only evidence of H.’s involvement in the theft, he was acquitted.

CONCLUSION

The decisions of the Ontario courts in J. M. G. and L. L. are distinctly conservative and authoritarian. They provide strong judicial reinforcement of the exercise of traditional authority in schools. Principals’ worst fears about the *Charter’s* undermining of their disciplinary authority have thus not been realized in Ontario. Similarly, the Alberta decision casts doubt on whether the *Charter* will even be held to apply at all in school settings. The Alberta case, however, clearly conveys the message that educators may be seen in law to be “persons in authority” for the purposes of receiving confessions from students and hence that they will be held to the strictures of the *Young Offenders Act*.

The legal dimensions of the role of the principal have been explicated to some degree by the recent decisions. Principals’ statutory and common law obligations to enforce discipline for the recognized social-utilitarian purpose of maintaining an appropriate learning environment, necessarily cast them

in the role of a state agent of sorts. Their disciplinary authority thus appears more firmly rooted in notions of state agency than in the doctrine of *in loco parentis*. While in J. M. G. the Court of Appeal left open the issue of the *Charter's* application to the actions of principals, their finding that principals' authority to search students is implied in section 236(a) of the Ontario *Education Act* would seem necessarily to determine the issue. That is, it is commonly accepted that the *Charter* applies to those who act according to statutory power (Hogg, 1985, p. 671). Had the Court characterized principals as surrogate parents—"in effect the alter ego and delegate" of parents—as the Crown urged them to do, the answer to the *Charter's* application might well be different as few suppose that the *Charter* applies to parental discipline of children.⁷ As noted, however, there would seem to be a significant point of disagreement between the Ontario Court of Appeal and the Alberta Court of Queen's Bench concerning the threshold issue of the *Charter's* application to schools.

Several more specific conclusions may be drawn in the wake of the L. L., J. M. G. and H. decisions.

1. J. M. G. establishes a common law rule that lawful authority for principals to search and seize is implicit in a general statutory provision to maintain order and discipline.
2. Reasonableness of such searches for the purposes of individuals' rights under section 8 of the *Charter* must be considered both in terms of the reason for the search at its inception and in terms of its degree of intrusiveness. Normally, school officials will merely require reasonable suspicion that a search will disclose evidence of a breach of school rules or the criminal law. Secondly, the scope of the search will not be excessive where 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 the nature of the infraction."
3. Students are lawfully detained in school through their mere attendance. They are required to submit to any reasonable disciplinary or investigatory procedure including searches. Detentions which are merely extensions of this normal sort of disciplinary practice do not invoke *Charter* rights on behalf of students. Whenever students are detained, however, under circumstances where significant legal consequences are inevitable, they may then be viewed as being detained within the meaning of section 10(b) of the *Charter*. As such, they would be entitled to the right to retain and instruct counsel without delay and be informed of that right. Under these circumstances, the school authorities are acting as agents of the police. When do principals become agents of the police? The linch-pin of that determination is the decision to call the police; without that decision legal consequences can hardly be said to be "inevitable." Thus principals have

substantial control over the legal features of their role and over the extent of rights due students.

4. The J. M. G. (1986) decision provides some limited guidance concerning when principals ought to call in the police. When the student's crime is so obvious and heinous that police participation is inevitable, the police should be called. Otherwise, the decision affords principals discretion as to how they will handle the case. But what is a heinous crime? J. M. G. (1986) provides little guidance except that, in that case, the simple possession of marijuana while "a very serious breach of discipline . . . was not a crime of great magnitude" (p. 710). And, of course, as noted above, the "inevitability" of police participation rests substantially upon the principal's decision whether to notify them. To this extent, the Court's reasoning becomes circular.
5. Courts will consider teachers and principals to be "persons in authority" in law when they receive confessions from students concerning criminal behaviour. As such, they must conform to the strictures of the *Young Offenders Act* before the confession will be admitted in court against the student. Some educators will think themselves compromised by this legal characterization of their role. They may, indeed, view the legalistic litany imposed by the *Young Offenders Act* as at least an implied invitation to remain silent to save one's skin, and thus inimical to their role as moral guide and exemplar. To this extent, it may seem that they are taking a hand in reinforcing the perception that it is socially acceptable to attempt to avoid accountability for one's misdeeds.⁸

The J. M. G. (1986) decision will undoubtedly be met by a collective sigh of relief by principals across the country. It implies legal authority to search from the barest of statutory sources thus demonstrating judicial willingness to reinforce principals' authority in schools. Moreover, it establishes a relatively low threshold for deciding when such searches will be legally permissible—a test of "reasonable suspicion." As the court in *New Jersey v. T. L. O.* (1985) observed, this relaxed standard means school administrators will be spared the agony of determining before a search whether the niceties of probable cause have been established (p. 744). Meeting a test of reasonable suspicion is clearly far less onerous than a test based on probability.

MacKay (1984) states that the degree of cause needed to justify a search rises as a search becomes more intrusive—the "greater the invasion of the student's privacy, the greater must be the evidence that the search is necessary" (p. 220). MacKay's comments about the direct relationship between the degree of cause required and the intrusiveness of the search, are reflected in the J. M. G. (1986) judgment insofar as it incorporates the ruling of Justice White in *T. L. O.* (1985) that "a search will be permissible in its scope when the measures adopted are . . . not excessively intrusive in light of the age

and sex of the student and the nature of the infraction" (p. 743). It is clear from this statement that the more serious the misconduct, the more intrusive the search may be. Presumably, such cases would involve weapons or other substances that posed immediate and serious threats of harm to the student and others in the school. One is left wondering, however, whether greater justification will be required in the search of a female rather than a male student or a younger as opposed to an older student, and what rationales exist for such discriminations. In fact, an argument might be mounted that such differential treatment transgresses the equality provisions of section 15 of the *Charter*. These relationships are left tantalizingly undeveloped by the Ontario Court of Appeal.

Although recent Ontario decisions reinforce principals' authority in schools, they ought not to be viewed as providing a carte blanche for overzealous administrators. Legal precedents are no substitute for circumspection and common sense. The legal acceptability of principals' disciplinary actions will still be determined in the light of the unique facts in individual cases.

NOTES

¹ See, for example, the *Education Act* (Ontario) R. S. O. 1980, c. 129, sections 235(1)(e) and 236(a).

² Renewed emphasis on parental delegation of authority appears in recent Law Reform Commission of Canada recommendations tabled in the House of Commons on December 3, 1986. Among them was the suggestion that teachers be allowed to strap a misbehaving student only with the permission of the child's parents ("Tougher penalties," 1986).

³ Pursuant to the *Young Offenders Act*, the names of young offenders may not be published.

⁴ The Fourth Amendment provides a right to be secure against unreasonable search and seizure (*Constitution of the United States*, Amendment IV).

⁵ The Judgment reads section "8(a)" which can only be construed as a clerical error since there is no such section.

⁶ *Obiter dicta*, literally "things said in passing," while not forming part of the decision of the court for purposes of binding precedence, nevertheless can influence decisions of subsequent courts.

⁷ In *R. v. A. B.* (1986) the Ontario Court of Appeal overturned a Youth Court's ruling that the accused's confession to his mother was made to "a person in authority" for the purposes of s. 56 of the *Young Offenders Act*.

⁸ Recent research conducted by Jaffe, Leschied, and Farthing (in press) suggests, however, that young offenders take a rather tough attitude toward criminal justice, and, in some instances, endorse punishment which is harsher than what would be imposed by a judge. The relationship of the degree of students' knowledge about the law and their attitudes toward criminal responsibility—especially their own—is an area that begs further research.

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