

Legislation compelling psychiatric tests of teachers upheld by B.C. Court of Appeal

In a decision released on February 19, 2003, a majority of the British Columbia Court of Appeal has upheld the constitutionality of provisions in the B.C. *School Act* under which a teacher can be compelled to undergo psychiatric testing or face dismissal. The B.C. Teachers' Federation had challenged the provisions under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, which provide:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
8. Everyone has the right to be secure against unreasonable search or seizure.

The case, *B.C. Teachers' Federation v. Board of School Trustees of School District No. 39 (Vancouver)*, involved a teacher of adult students and students aged 16-19 years who was dismissed after some six and a half years of service. Without the Board's knowledge, the teacher had fallen deeply into debt in 1998. This had caused her to develop behavioural problems such as poor attendance, failure to provide an effective phone number and mailing address, untimely preparation of time sheets, and "unusual" correspondence with the Board in which she expressed the belief that the Board had provided personal information to persons who were stalking her.

After hearing from the school medical officer that the teacher might be suffering from a physical, mental or emotional disorder, the Board invoked its power under the *School Act* to require the teacher to undergo a psychiatric examination, and provide the Board with a certificate from the psychiatrist within 14 days or face possible dismissal. Ultimately, the teacher refused to be examined and was dismissed by the Board.

The union grieved the dismissal and raised the issue of the constitutionality of the relevant provisions of the *School Act* by way of a preliminary motion in the arbitration. The arbitrator ruled that the legislation did not violate the *Charter* and the union appealed to the Court of Appeal.

NO CHARTER VIOLATION, APPEAL COURT RULES

Noting that those in charge of educational institutions "have a duty to sustain a positive environment because teaching is such an important function in our society", a majority of the B.C. Court of Appeal dismissed the union's appeal. Turning first to section 8 of the *Charter*, the Court questioned whether a psychiatric examination could be considered a search or seizure:

"... I am not of the view that what was requested of the employee by the School Board could be said to fall within the parameters of s. 8 of the *Charter*. The teacher was simply required to have a consultation with a psychiatrist who would then issue a report to the Board setting forth his conclusions about the mental or emotional condition of the instructor. ... It is not evident to me how it could be said that a consultation with a psychiatrist is "a search" nor can I apprehend how it could be said that any "seizure"

would occur in such circumstances. [Previous cases in which violations of section 8 were found] involving searches or surveillances of premises, seizures of documents or the taking of blood samples are at a considerable remove from the factual circumstances of this case. In my view, cases dealing with such issues are so factually differentiated from the case at bar that they are not applicable to the circumstances of the present case." Further, the Court held, this case differed from other section 8 cases in that no criminal or administrative penalties could be imposed, only the loss of the teacher's employment, which the Court characterized as a remedial, not a penal, consequence.

The fact that the dispute arose in an employment context was also cited by the Court in rejecting the challenge based on section 7 of the *Charter*:

"What is at issue in this case does not, in my opinion, rise to the level of any interest concerning the life, liberty or security of the person that would invoke the application of s. 7 of the *Charter*. ... Since, in my opinion, the issue in this case concerns a particular employment relationship and a health issue related thereto, I do not consider s. 7 of the *Charter* can properly be engaged. I am unable in this case to discern any state interference with a liberty or security interest that should be found to be subject to s. 7 *Charter* protection."

DISSENT: PSYCHOLOGICAL EXAM AN "UNREASONABLE SEARCH"

The dissenting judge observed that *Charter* law with respect to section 8 has evolved, and noted that the law has recognized that invasions of a person's bodily integrity, such as the collection of blood samples, can constitute a search. There was no reason to resist extending the application of section 8 to forced psychological examinations:

"Is there any difference, in principle, between the degree of privacy individuals can reasonably expect in relation to invasions of their bodily integrity through, for example, strip searches, body cavity searches, and obtaining blood samples or samples of other bodily fluids for analytical purposes, than for invasions of their psychological integrity in order to search for information derived from their most private thoughts and feelings? ... In my view, individuals have at least as great an interest in maintaining their psychological integrity against state intrusion as their bodily integrity. In fact, submitting to blood tests, or providing hair samples for DNA analysis, may well be viewed as significantly less invasive than submitting to the psychological probing of a psychiatrist appointed by the state."

Having found that the examination was a "search", the dissenting judge went on to hold that the provisions of the *School Act* authorizing the examination were flawed, in that they provided no clear and specific criteria upon which to base the decision to compel a teacher to undergo the examination. If the legislation had specified that the examination should be carried out only if the teacher's state of mind or conduct had been determined to represent a real risk of danger to students, the judge noted that she would have found the search mandated by the legislation to be reasonable.

The dissent also held that the legislation breached section 7 of the *Charter*, in that it forced the teacher to choose between sacrificing her privacy interest and losing her employment. In the dissent's view, infringement of one's privacy rights was tantamount to an infringement on one's liberty:

"I am satisfied that the teacher has established that her right to liberty was engaged in these circumstances within the meaning of section 7 of the *Charter*. I am also satisfied

that ... the teacher's liberty interest was infringed by the state mandating that she forego her right to personal and psychological integrity or forfeit her means of livelihood."

In Our View

Ontario's *Education Act* does not have explicit provisions authorizing a school board to require an employee to submit to a medical examination or risk dismissal. However, it does authorize a principal to "refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils".

While a *Charter* challenge might be raised in Ontario against an order of a school board requiring a teacher to submit to a medical examination or face dismissal, the Court in the *B.C. Teachers' Federation* case acknowledged the "reasonableness" of medical requests in the context of certain working environments - including teaching - when the facts warrant further inquiry. As a result, the case will be of assistance to school boards that request medical documentation from their employees - whether the request is made under a collective agreement, an education statute, or other employment-related legislation.

The union is considering whether to appeal the decision to the Supreme Court of Canada. We will advise readers of any further developments in this case.

For further information, please contact [Lynn Harnden](#) at (613) 940-2731 or [Jennifer Birrell](#) at (613) 940-2740.

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