SUPREME COURT OF CANADA

CITATION: R. *v.* A.M., [2008] 1 S.C.R. 569, 2008 SCC 19

DATE: 20080425
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BETWEEN:

Her Majesty The Queen
Appellant
and
A.M.
Respondent
- and -
Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, St. Clair Catholic District School Board and Canadian Foundation for Children, Youth and the Law (Justice for Children and Youth)
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 2)	LeBel J. (Fish, Abella and Charron JJ. concurring)
PARTIALLY CONCURRING REASONS: (paras. 3 to 99)	Binnie J. (McLachlin C.J. concurring)
DISSENTING REASONS: (paras. 100 to 149)	Deschamps J. (Rothstein J. concurring)
DISSENTING REASONS: (paras. 150 to 191)	Bastarache J.

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R. *v.* A.M., [2008] 1 S.C.R. 569, 2008 SCC 19

Her Majesty The Queen *Appellant*

v.

A.M. *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, St. Clair Catholic District School Board and Canadian Foundation for Children, Youth and the Law (Justice for Children and Youth) *Interveners*

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Neutral citation: 2008 SCC 19.

File No.: 31496.

2007: May 22; 2008: April 25.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and

Rothstein JJ.

on appeal from the court of appeal for ontario

Constitutional law — Charter of Rights — Search and seizure — Sniffer dogs — Schools — Police using sniffer dog to search school for illicit drugs — Positive alert by dog to student's backpack left in school gymnasium leading to examination of content of backpack by police officer, who confirmed presence of illegal drugs — Whether dog sniff constituted search of content of student backpack — If so, whether search reasonable — If search unreasonable, whether evidence should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Police — Police powers — Investigative tools — Sniffer dogs — Whether common law powers of police to investigate crime include use of sniffer dogs.

The police accepted a long-standing invitation by the principal of a high school to bring sniffer dogs into the school to search for drugs. The police had no knowledge that drugs were present in the school and would not have been able to obtain a warrant to search the school. The search took place while all the students were confined to their classrooms. In the gymnasium, the sniffer dog reacted to one of the unattended backpacks lined up against a wall. Without obtaining a warrant, the police opened the backpack and found illicit drugs. They charged the student who owned the backpack with possession of cannabis marihuana and psilocybin for the purpose of trafficking. At trial, the accused brought an application for exclusion of the evidence, arguing that his rights under s. 8 of the *Canadian Charter of Rights and Freedoms* had been violated. The trial

judge allowed the application, finding two unreasonable searches: the search conducted with the sniffer dog and the search of the backpack. He excluded the evidence and acquitted the accused. The Court of Appeal upheld the acquittal.

Held (Bastarache, Deschamps and Rothstein JJ. dissenting): The appeal should be dismissed.

1. *Per* McLachlin C.J. and Binnie, Deschamps and Rothstein JJ.: The police possess a common law power to search using drug sniffer dogs on the basis of a *Charter* compliant standard of reasonable suspicion.

Per Bastarache J.: The police possess a common law power to search using drug sniffer dogs on the basis of a *Charter* compliant standard of generalized suspicion.

Per LeBel, Fish, Abella and Charron JJ.: There was no authority at common law for the sniffer-dog search in this case.

2. *Per* McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.: The dog sniff of the backpack at the school amounted to a search within s. 8 of the *Charter*.

Per Deschamps and Rothstein JJ.: The dog sniff of the backpack at the school did not amount to a search within s. 8 of the *Charter*.

3. *Per* McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.: The sniffer-dog search of the backpack at the school violated s. 8 of the *Charter*.

Per Deschamps and Rothstein JJ.: There is no need to determine whether s. 8 of the *Charter* was violated because the dog sniff of the backpack at the school did not amount to a search.

4. *Per* McLachlin C.J. and Binnie, LeBel, Fish, Abella and Charron JJ.: In the circumstances of this case, the evidence should be excluded pursuant to s. 24(2) of the *Charter*.

Per Deschamps and Rothstein JJ.: There is no need to determine whether the evidence should be excluded pursuant to s. 24(2) of the *Charter* because the dog sniff of the backpack at the school did not amount to a search.

Per Bastarache J.: The trial judge erred in excluding the evidence pursuant to s. 24(2) of the *Charter*.

Per LeBel, Fish, Abella and Charron JJ.: Students are entitled to privacy in a school environment. Since there was no authority in the statutes or at common law for the sniffer-dog search in this case, the search violated s. 8 of the *Charter*. For the reasons stated in *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, 2008 SCC 18, our Court should not attempt to craft a legal framework of general application for the use of sniffer dogs in schools. As a result, the evidence was

properly excluded under para. 24(2) of the *Charter*. [1-2]

Per McLachlin C.J. and Binnie J.: The police possess common law authority to use sniffer dogs in appropriate circumstances. If the police in this case had been called to investigate the potential presence of guns or explosives at the school using dogs trained for that purpose, the public interest in dealing quickly and efficiently with such a threat to public safety would have been greater and more urgent than routine crime prevention. [7] [37]

The dog sniff amounts to a search within s. 8 of the *Charter*. The information provided when the dog is trained to alert to the presence of controlled drugs permits inferences about the precise contents of the source that are of interest to the police. The subject matter of the sniff is not public air space. It is the concealed contents of the backpack. As with briefcases, purses and suitcases, backpacks are the repository of much that is personal, particularly for people who lead itinerant lifestyles during the day as in the case of students and travellers. Teenagers may have little expectation of privacy from the searching eyes and fingers of their parents, but they expect the contents of their backpacks not to be open to the random and speculative scrutiny of the police. This expectation is a reasonable one that society should support. The guilty secret of the contents of the accused's backpack was specific and meaningful information, intended to be private, and concealed in an enclosed space in which the accused had a continuing expectation of privacy. By use of the dog, the police officer could "see" through the concealing fabric of the backpack. [8] [62-63] [66-67]

Although a warrantless sniffer-dog search is available where reasonable suspicion is demonstrated, the sniffer-dog search of the students' belongings in this case violated their *Charter* rights under s. 8. The dog-sniff search was unreasonably undertaken because there was no proper justification. The youth court judge found that the police lacked any grounds for reasonable suspicion and the Crown has shown no error in the youth court judge's finding of fact. [91]

While the sniffer-dog search may have been seen by the police as an efficient use of their resources, and by the principal of the school as an efficient way to advance a zero-tolerance policy, these objectives were achieved at the expense of the privacy interest (and constitutional rights) of every student in the school. The *Charter* weighs other values, including privacy, against an appetite for police efficiency. Because of their role in the lives of students, backpacks objectively command a measure of privacy, and since the accused did not testify, the question of whether he had a subjective expectation of privacy in his backpack must be inferred from the circumstances. [15] [62-63]

In the context of a routine criminal investigation, the police are entitled to use sniffer dogs based on a "reasonable suspicion". If there are no grounds of reasonable suspicion, the use of the sniffer dogs will violate the s. 8 reasonableness standard. Where there are grounds of reasonable suspicion, the police should not have to take their suspicions to a judicial official for prior authorization to use the dogs in an area where the police are already lawfully present. All "searches" do not have the same invasive and disruptive quality and prior judicial authorization is not a universal condition precedent to any and all police actions characterized as "searches" given that the touchstone of s. 8 is reasonableness. Account must be taken in s. 8 matters of all the relevant

circumstances including the minimal intrusion, contraband-specific nature and high accuracy rate of a fly-by sniff. The warrantless search is, of course, presumptively unreasonable. If the sniff is conducted on the basis of reasonable suspicion and discloses the presence of illegal drugs on the person or in a backpack or other place of concealment, the police may confirm the accuracy of that information with a physical search, again without prior judicial authorization. But all such searches by the dogs or the police are subject to after-the-fact judicial review if it is alleged (as here) that no grounds of reasonable suspicion existed, or that the search was otherwise unreasonably undertaken. [12-14]

Permitting the police to act on a standard of reasonable suspicion within the framework of s. 8 will allow inappropriate conduct by the dog or the police to be dealt with on the basis that although the lawful authority to use the sniffer dog does exist, the search in the particular case was executed unreasonably, and thereby constituted a *Charter* breach, on the basis of which the evidence obtained may be excluded. The importance of proper tests and records of particular dogs will be an important element in establishing the reasonableness of a particular sniffer-dog search. From the police perspective, a dog that fails to detect half of the narcotics present is still better than no detection at all. However from the perspective of the general population, a dog that falsely alerts half of the time raises serious concerns about the invasion of the privacy of innocent people. An important concern for the court is therefore the number of any such false positives. It is important not to treat the capacity and accuracy of sniffer dogs as interchangeable. Dogs are not mechanical or chemical devices. Moreover, the sniff does not disclose the presence of drugs. It discloses the presence of an odour that indicates either the drugs are present or may have been present but are no longer present, or that the dog is simply wrong. In the sniffer-dog business, there are many

variables. [82] [84-85] [87-88]

In sniffer-dog situations, the police are generally required to take quick action guided by on-the-spot observations. In circumstances where this generally occurs, it is not feasible to subject the "sniffer dog's" sniff to prior judicial authorization. Both the subject and his suspicious belongings would be long gone before the paperwork could be done. In the particular context of sniffer dogs, there is sufficient protection for the public in the prior requirement of reasonable suspicion and after-the-fact judicial review to satisfy the "reasonableness" requirement of s. 8. [90]

The trade-off for permitting the police to deploy their dogs on a "reasonable suspicion" standard without a warrant is that if this procedure is abused and sniffer-dog searches proceed without reasonable suspicion based on objective facts, the consequence could well tip the balance against the admission of the evidence if it is established under s. 24(2) of the *Charter* that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. Youth court judges have a greater awareness than appellate judges do of the effect that admission or exclusion of the evidence would have on the reputation of the administration of justice in the community with which they deal on a daily basis. Here, the youth court judge excluded the evidence. His exclusion of the evidence should not be interfered with. [14] [90] [98]

Per Deschamps and Rothstein JJ. (dissenting): In light of the totality of the circumstances, the accused did not have in this case a reasonable expectation of privacy that engaged s. 8 of the *Charter*, and a new trial should be ordered. [140] [149]

While the use of the dog amounted to a search from an empirical perspective, what the accused had to establish was whether that use amounted to a "search" from a constitutional perspective. The pivotal question in this appeal was thus whether the accused had a reasonable expectation of privacy in respect of odours imperceptible to humans that emanated from his unattended backpack in a school gymnasium. This requires consideration of whether the accused had a subjective expectation of privacy and whether his privacy interest was objectively reasonable. [119] [128]

The accused did not have a subjective expectation of privacy. Students and parents were made aware of the drug problem and the zero-tolerance drug policy and of the fact that sniffer dogs might be used. Dogs had in fact been used on prior occasions to determine whether narcotics were present at the school. While school policy must be implemented in a manner consistent with a legitimate expectation of privacy, the well-advertised means devised and used by the school reduced the accused's subjective expectation of privacy very significantly. [129]

The accused's expectation of privacy was also not objectively reasonable. First, the place where the search occurred was a school with a known problem of drug use by students, both on and off school property. The police were there with the permission (and at the request) of the school's principal in furtherance of disciplinary goals being pursued by the school in order to confront a systematic drug problem. The dogs were used primarily to search the premises, not the students. In these circumstances, the objective expectation of privacy in respect of an unattended backpack on this school's property was not only significantly diminished, but extremely low. Second, the accused was not present at the time of the search. Since there were no students in the

school gymnasium at the time of the search, there was no risk that the dog, on sniffing a backpack worn by a student, might make a false positive indication leading to a — more intrusive — personal search of the student. Third, the accused's backpack was left not only unattended, but also in plain view. While there is no indication that the backpack was abandoned, the use of a sniffer dog to check an unattended bag left in plain view is less intrusive than the use of one to check a bag that is either worn or carried by an individual, or is placed in a locked compartment out of plain view. Fourth, the investigative technique was relatively non-intrusive. The dog detected the presence of drugs in the accused's backpack without the backpack being opened. Moreover, the dog was trained only to detect drugs and find humans. It could not therefore convey any information other than that there were drugs present. Thus, the use of a sniffer dog in these circumstances was a less intrusive investigative technique than simply opening the accused's backpack without a prior positive indication by the dog. [130-131] [137-139]

Per Bastarache J. (dissenting): The dog sniff constituted a search within the meaning of s. 8 of the *Charter*. The accused had a reasonable, but limited, expectation of privacy in his backpack when the dog sniff occurred, even though he was not carrying the backpack at the time. A high school student who, like his classmates, leaves his bag unattended continues to have a reasonable expectation of privacy in its contents. It is relevant from an objective perspective that the odour identified by the dog sniff was not accessible to humans and that its detection provided immediate information about the contents of the backpack. The accused's reasonable expectation of privacy is, however, reduced by the fact that this dog sniff occurred at the school. Students are aware of the importance both society at large and school administrators place on the school environment, and have a diminished expectation of privacy as a result. [150] [157-159]

A random sniffer-dog search in a school would be deemed reasonable where it is based on a generalized reasonable suspicion, providing a reasonably informed student would have been aware of the possibility of random searches involving the use of dogs. Schools are unique environments and the application of this lower standard is appropriate given the importance of preventing and deterring the presence of drugs in schools to protect children, the highly regulated nature of the school environment, the reduced expectation of privacy students have while at school, and the minimal intrusion caused by searches of this nature. However, the police cannot enter a school and conduct a search whenever they please on the basis that drugs may be found there on any given day. Reasonable suspicion requires more than a mere hunch. Further, since a generalized, ongoing suspicion does not exist in relation to schools, it is necessary for each random dog-sniff search to be justified on the basis of a suspicion that drugs will be located at that specific location at the specific time the search is being performed. Although it is necessary that a dog-sniffer search in a school be related to a reasonable suspicion that drugs will be located on the premises at the time the search occurs, it is unreasonable to expect that a sniffer-dog search will occur at the precise moment that a reasonable suspicion is first formed. How long the suspicion lasts will depend in large part on the nature of the information received and on whether it is supplemented by additional indicators that the presence of drugs continues. In every instance, the key inquiry is whether there is a sufficient basis on which to form a reasonable suspicion about the presence of drugs at the time the search occurs. [152] [163-164] [168] [174-175]

In this case, the search of the accused's backpack was unreasonable. The trial judge determined that the students were aware of the zero-tolerance policy for drugs and that it may be enforced using sniffer dogs, but there is no evidence that the sniffer-dog search which led police to

arrest the accused was founded on a current reasonable suspicion that drugs would be found. The trial judge concluded that school authorities had little more than a "reasonably well-educated guess" that drugs would be at the school on the day the search was conducted. The evidence likewise indicates that the police themselves had no direct awareness as to the possible existence of drugs at the school on the day the search occurred. [179-180]

Although the search violated s. 8 of the *Charter*, the trial judge erred in excluding the evidence found in the accused's backpack pursuant to s. 24(2) of the *Charter*. The search, which was conducted in good faith and was non-intrusive in nature, occurred in an environment where the expectation of privacy was diminished. The evidence obtained was non-conscriptive in nature and did not affect the fairness of the trial. [190]

Cases Cited

By LeBel J.

Applied: *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, 2008 SCC 18; **referred to:** *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393.

By Binnie J.

Applied: *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, 2008 SCC 18; **referred to:** *R. v. Tessling*, [2004] 3 S.C.R. 432, 2004 SCC 67; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Edwards*, [1996]

1 S.C.R. 128; *R. v. Wise*, [1992] 1 S.C.R. 527; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Katz v. United States*, 389 U.S. 347 (1967); *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *Kyllo v. United States*, 533 U.S. 27 (2001); *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *Terry v. Ohio*, 392 U.S. 1 (1968); *R. v. Colarusso*, [1994] 1 S.C.R. 20; *United States v. Place*, 462 U.S. 696 (1983); *United States v. Jacobsen*, 466 U.S. 109 (1984); *Illinois v. Caballes*, 543 U.S. 405 (2005); *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Wiggins*, [1990] 1 S.C.R. 62; *R. v. Thompson*, [1990] 2 S.C.R. 1111; *Doe v. Renfrow*, 631 F.2d 91 (1980); *R. v. Evans*, [1996] 1 S.C.R. 8; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *R. v. Clayton*, [2007] 2 S.C.R. 725, 2007 SCC 32; *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Lal* (1998), 113 B.C.A.C. 47; *R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10; *R. v. Stillman*, [1997] 1 S.C.R. 607.

By Deschamps J. (dissenting)

R. v. Kang-Brown, [2008] 1 S.C.R. 456, 2008 SCC 18; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Tessling*, [2004] 3 S.C.R. 432, 2004 SCC 67; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Edwards*, [1996] 1 S.C.R. 128; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Campanella* (2005), 75 O.R. (3d) 342; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

By Bastarache J. (dissenting)

R. v. Kang-Brown, [2008] 1 S.C.R. 456, 2008 SCC 18; *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30; *R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52; *R. v. Tessling*, [2004] 3 S.C.R. 432, 2004 SCC 67; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Therens*, [1985] 1 S.C.R. 613.

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Criminal Code, R.S.C. 1985, c. C-46, s. 254.

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), ss. 98, 99.2.

Education Act, R.S.O. 1990, c. E.2, ss. 301(1), 306(1)2, 309(1)5.

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APPEAL from a judgment of the Ontario Court of Appeal (Goudge, Armstrong and Blair JJ.A.) (2006), 79 O.R. (3d) 481, 209 O.A.C. 257, 208 C.C.C. (3d) 438, 37 C.R. (6th) 372, [2006] O.J. No. 1663 (QL), 2006 CarswellOnt 2579, upholding the accused's acquittal entered by Hornblower J. (2004), 120 C.R.R. (2d) 181, [2004] O.J. No. 2716 (QL), 2004 CarswellOnt 2603, 2004 ONCJ 98. Appeal dismissed, Bastarache, Deschamps and Rothstein JJ. dissenting.

Kenneth J. Yule, Q.C., *Jolaine Antonio* and *Lisa Matthews*, for the appellant.

Walter Fox, for the respondent.

Robert W. Hubbard and *Alison Wheeler*, for the intervener the Attorney General of Ontario.

Dominique A. Jobin and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

Kenneth D. Madsen, for the intervener the Attorney General of British Columbia.

Frank Addario and *Emma Phillips*, for the intervener the Criminal Lawyers' Association (Ontario).

Jonathan C. Lisus, Christopher A. Wayland and *Sarah Corman,* for the intervener the Canadian Civil Liberties Association.

Thomas McRae, for the intervener the St. Clair Catholic District School Board.

Martha Mackinnon, for the intervener the Canadian Foundation for Children, Youth and the Law (Justice for Children and Youth).

The reasons of LeBel, Fish, Abella and Charron JJ. were delivered by

[1] LEBEL J. — I have read the reasons of my colleague Binnie J. I agree that the appeal should be dismissed, but on the basis of my comments in the companion case, *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, 2008 SCC 18. Students are entitled to privacy even in a school environment (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 32). Entering a schoolyard does not amount to crossing the border of a foreign state. Students ought to be able to attend school without undue interference from the state, but subject, always, to normal school discipline.

[2] As found by the Court of Appeal and by Binnie J., a search was conducted. The authority for that search was nowhere to be found in the statute law or at common law. This is not a case, for example, where the police would have entered the school under the authority of a search warrant and used sniffer dogs to assist in effecting a more focussed search. Nor was the dog-sniffer search conducted by the school authorities on proper grounds as set out in *M. (M.R.)*. For the reasons stated in *Kang-Brown*, our Court should not attempt to craft a legal framework of general

application for the use of sniffer dogs in schools. As a result, the evidence was properly excluded under para. 24(2) of the *Canadian Charter of Rights and Freedoms*. I would dismiss the appeal.

The reasons of McLachlin C.J. and Binnie J. were delivered by

[3] BINNIE J. — The issues in the present appeal are whether a sniffer-dog "sniff" of a student's backpack is a search within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms*, and if so, in what circumstances police officers may use sniffer dogs to search a school for illicit drugs. This case involves routine crime investigation. It does not involve explosives, guns or other public safety issues in the schools.

[4] This appeal was argued together with *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, 2008 SCC 18 (released concurrently), which raises similar issues in the context of a bus terminal. In both appeals, arguments were framed by analogy with technology or devices considered in decided cases, especially *R. v. Tessling*, [2004] 3 S.C.R. 432, 2004 SCC 67. In *Kang-Brown*, a majority of the Alberta Court of Appeal equated a dog sniff of the odour of marijuana emanating from a piece of luggage to the infrared imaging of heat emanating from a building in *Tessling*. Emanations were treated generically as largely devoid of any constitutionally protected privacy interest, regardless (it seems) of the very different value to the police of the information thereby obtained about what an individual seeks to preserve as private.

[5] Section 8 has proven to be one of the most elusive *Charter* provisions despite the apparent simplicity of its language:

8. Everyone has the right to be secure against unreasonable search or seizure.

In the present appeal, the Ontario Court of Appeal saw a "significant difference" ((2006), 79 O.R. (3d) 481, at para. 47), between sniffer dogs and *Tessling*-type heat imaging technology, but framed the issue more broadly, as had the trial judge, in terms of the reasonableness of "a trained police dog sniffing at the personal effects of an entire student body in a random police search" (para. 47). I think the approach of the Ontario courts is more in keeping with the "totality of the circumstances" reasoning adopted in s. 8 cases by this Court in *R. v. Wong*, [1990] 3 S.C.R. 36, *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45, and *Tessling* itself where, at para. 19, the Court said:

> . . . the Court early on established a purposive approach to s. 8 in which privacy became the dominant organizing principle. . . . Given the bewildering array of different techniques available to the police (either existing or under development), the alternative approach of a judicial "catalogue" of what is or is not permitted by s. 8 is scarcely feasible.

Stripped of the relevant context, musing on the differences between a dog's nose and an infrared camera, or generalizing about "emanations", does not greatly advance the resolution of the issues before us. What is required is to strike an appropriate balance between the state's need to search (whether the need be public safety, routine crime investigation or other public interest) against the invasion of privacy which the search entails, including the disruption and prejudice that may be caused to law-abiding members of the public, whether travelling (as in *Kang-Brown*) or in the schools (as here) or in the peace and quiet of their own homes.

[6] In this case, the principal of St. Patrick's High School, in Sarnia, had issued a standing invitation to the Sarnia police to bring sniffer dogs to the school whenever convenient to the police. Both the Attorney General of Ontario and the intervener St. Clair Catholic District School Board argue that this invitation was all the justification the police required. The accused, on the other hand, argues that sniffer dogs may only be used where the police have reasonable grounds to believe a drug offence has been committed by the individual who is the subject of the search and that a search will lead to discovery of evidence or, perhaps, to the apprehension of the perpetrator. The Attorney General of Ontario denies that the use of sniffer dogs constitutes a s. 8 search at all, as the dogs simply sniff the air which is part of our shared public space. He thus contends that nothing done here even engaged the rights of the accused under s. 8 of the *Charter*. The youth court judge held that neither the police nor the school authorities had anything more than a "hunch" to suspect the presence of drugs in the school at the relevant time of the search ((2004), 120 C.R.R. (2d) 181, 2004 ONCJ 98). He held the "sniff" to be a search and excluded the evidence both of the dog sniff and the subsequent physical search by the police of the student's backpack.

[7] For the reasons expressed in *Kang-Brown*, I believe the common law powers of the police to investigate crime and bring perpetrators to justice includes the use of sniffer dogs. Such powers, however, are subject to compliance with the *Charter*.

[8] I also agree with the youth court judge that the deployment of sniffer dogs in the school constituted a s. 8 search, which may be defined as the state invasion of a reasonable expectation of privacy; *R. v. Wise*, [1992] 1 S.C.R. 527, at p. 533. The dog's positive alert led immediately and without judicial intervention to the physical examination of the contents of the accused's backpack

to confirm the dog's identification of illegal drugs.

[9] While the dog sniff constituted a search, it is a search of a minimally intrusive and tightly targeted type. For reasons to be explained, I would not go so far as the accused who insists that the full *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, requirement of *prior* judicial authorization must be imposed. In effect, the defence argument would mean that the dogs can only be used where there is no need for them. If the police have reasonable and probable grounds to believe that an individual has committed a drug offence and that a search would lead to apprehension of the perpetrator and/or discovery of evidence, the police would already have the grounds required for a search warrant. The defence argument produces too much rigidity and does not take into account the minimally intrusive nature of a sniffer-dog search, and the fact that a sniffer dog properly trained and handled "alerts" only to contraband with a high degree of accuracy.

[10] In the United States, from whose Fourth Amendment decisions *Hunter v. Southam* drew inspiration, a series of divided Supreme Court decisions has declined to grant *any* Fourth Amendment protection against "narcotic" sniffer dogs. This may be, at least in part, because the courts may fear that once it is found that a police activity amounts to an invasion of a cognizable privacy interest, the legal machinery of prior judicial authorization is presumptively imposed: *Katz v. United States*, 389 U.S. 347 (1967). This may have involved the U.S. courts in a form of cost-benefit analysis, as noted by K. L. Pollack:

> . . . in deciding these cases, the Court arguably made implicit findings that the costs of imposing a probable cause requirement outweighed the corresponding benefits to individual privacy. In these cases, the intrusion into individual interests was low, and the Court seemed unconcerned about the prospect of arbitrary government use of these

> searching methods. . . . [I]n pure investigatory searches, no middle standard exists between suspicionless searches and those searches based on probable cause.
>
> (K. L. Pollack, "Stretching the *Terry* Doctrine to the Search for Evidence of Crime: Canine Sniffs, State Constitutions, and the Reasonable Suspicion Standard" (1994), 47 *Vand. L. Rev.* 803, at pp. 820-21)

[11] The result of this U.S. jurisprudence is that use of police sniffer dogs for crime investigation sits entirely outside the Fourth Amendment. I do not agree that in Canada such use of police dogs is without constitutional regulation, although I agree that the degree and nature of that s. 8 regulation must be apt to the circumstances and reflect the minimally intrusive, contraband-specific nature and, where established, accurate olfactory capacity of a properly trained dog. This context gives rise to two consequences of importance.

[12] Firstly, I conclude that in the context of a routine criminal investigation, the police are entitled to use sniffer dogs based on a "reasonable *suspicion*". If there are no grounds of reasonable suspicion, the use of the sniffer dogs will violate the s. 8 reasonableness standard.

[13] Secondly, where there *are* grounds of reasonable suspicion, I believe the police should not have to take their suspicions to a judicial official for prior authorization to use the dogs in an area where the police are already lawfully present (in any event there is at present no mechanism in the *Criminal Code*, R.S.C. 1985, c. C-46, to issue such an authorization based only on reasonable suspicion). All "searches" do not have the same invasive and disruptive quality. In *Hunter v. Southam*, the combines officers were poised to rummage through private papers of varying degrees of relevance and irrelevance of the *Edmonton Journal* under a Director's order whose sweep was described by Dickson J. as "breathtaking" (p. 150). The *Hunter v. Southam* requirement of prior

judicial authorization is the gold standard because an important purpose of s. 8 is to *prevent* unreasonable searches and not in the usual case just to give an after-the-fact remedy. However, prior judicial authorization is not a universal condition precedent to any and all police actions characterized as "searches" given that the touchstone of s. 8 is reasonableness. Account must be taken in s. 8 matters of *all* the relevant circumstances including (as stated) the minimal intrusion, contraband-specific nature and high accuracy rate of a fly-by sniff. The warrantless search is, of course, *presumptively* unreasonable, and must satisfy the exceptional requirements set out in *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278.

[14] If the sniff is conducted on the basis of reasonable suspicion and discloses the presence of illegal drugs on the person or in a backpack or other place of concealment, the police may, in my view, confirm the accuracy of that information with a physical search, again without prior judicial authorization, as will be discussed. But, of course, all such searches by the dogs or the police are subject to after-the-fact judicial review if it is alleged (as here) that no grounds of reasonable suspicion existed, or that the search was otherwise carried out in an unreasonable manner. Here the after-the-fact judicial review was engaged when the prosecution attempted to rely on the evidence obtained in the search. The exceptional authority given to the police to use sniffer dogs on the basis of reasonable suspicion and without prior judicial authorization will, if abused, lead to important consequences under s. 24(2) of the *Charter* which provides that where a court concludes

> that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The exclusion remedy was granted in this case and, in my opinion, rightly so.

[15] I accept the youth court judge's finding of fact that this was a random speculative search. What was done here may have been seen by the police as an efficient use of their resources, and by the principal of the school as an efficient way to advance a zero-tolerance policy. But these objectives were achieved at the expense of the privacy interest (and constitutional rights) of every student in the school, as the youth court judge and the Court of Appeal pointed out. The *Charter* weighs other values, including privacy, against an appetite for police efficiency. A hunch is not enough to warrant a search of citizens or their belongings by police dogs.

[16] The youth court judge, having refused to admit the evidence produced by the search, acquitted the accused. The Ontario Court of Appeal affirmed the acquittal, and I would dismiss the further appeal to this Court.

I. Facts

[17] In 2000, the principal of St. Patrick's High School advised the Youth Bureau of Sarnia Police Services that if the police ever had sniffer dogs available to bring into the school to search for drugs, they were welcome to do so. On a couple of occasions prior to the facts giving rise to the present appeal, the police had taken advantage of the invitation to check the parking lot, the hallways and, time permitting, other areas suggested by the principal. We do not know the results of these prior visits.

[18] The school had a zero-tolerance policy for possession and consumption of drugs and alcohol, a policy which had been communicated to the students and their parents.

[19] On November 7, 2002, three police officers decided to go to the school with a sniffer dog. The police asked the principal for "permission" to go through the school. At trial they admitted that they had no information that drugs were then present in the school and freely acknowledged that they had no grounds to obtain a search warrant. The principal acknowledged that he had no information about drugs in the school at that time, although he said: "[I]t's pretty safe to assume that they could be there" (A.R., at p. 49 (emphasis added)). In cross-examination, the principal was asked:

> Q. Okay. But you never, armed with specific information, had called them and said this is what I know, therefore I think a search should be conducted.
>
> A. No.
>
> (A.R., at p. 53)

Police Officer Callander of the Sarnia Police gave similar evidence:

> Q. Okay. You did not have any direct awareness as to the existence of drugs and where that might be, and there was no indication that safety of people/students were at risk. You were not armed with any of that kind of information.
>
> A. No.
>
> (A.R., at p. 84)

The principal had heard occasional anecdotal reports from parents or neighbours about "kids in our

school who are doing drugs" (A.R., at p. 50), but nothing specific to the November 7, 2002 time period.

[20] Having issued a standing invitation, the principal readily gave permission to the police to search the school with sniffer dogs. The principal then used the school's public address system to tell everyone that the police were on the premises and that students should stay in "their classroom[s] until th[e] search was conducted" (A.R., at p. 47). The effect of this announcement was that no student could leave his or her classroom for the duration of the police investigation.

[21] The police, not the school authorities, took charge of the investigation. The principal testified that he had no involvement beyond giving permission and telling the students to remain in their classrooms. There was no discussion with him as to how the search was to be conducted.

[22] The police search included the gymnasium. Constable McCutchen of the Ontario Provincial Police was accompanied by his sniffer dog, Chief, who was trained to detect heroin, marijuana, hashish, crack cocaine and cocaine. There were no students in the school gymnasium but some backpacks were lying next to the wall. Chief "alerted" to one of the backpacks by biting at it. Constable McCutchen handed the backpack to Sarnia police Constable Callander who physically searched through its contents and confirmed Chief's identification of drugs including five bags of marijuana, a tin box containing a further five bags of marijuana, a bag containing approximately ten magic mushrooms (psilocybin), a bag containing a pipe, a lighter, rolling papers and a roach clip. A.M.'s wallet, containing his identification, was in the backpack. A.M. was charged with possession for the purpose of trafficking marijuana and possession of psilocybin.

II. Relevant Constitutional Provisions

[23] The relevant *Charter* provisions read as follows:

Canadian Charter of Rights and Freedoms

> **8.** Everyone has the right to be secure against unreasonable search or seizure.
>
> **9.** Everyone has the right not to be arbitrarily detained or imprisoned.
>
> **24.** . . .
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

III. Judicial History

A. *Ontario Youth Justice Court (Hornblower J.)* (2004), 120 C.R.R. (2d) 181, 2004 ONCJ 98

[24] The youth court judge held that there were two searches conducted on November 7, 2002. The first was the sniffer-dog search, which resulted in the dog "alerting" to the backpack of A.M. The second was the physical search of the backpack by the Sarnia police officer. In his view, neither search was reasonable. While there was some evidence that neighbours and parents had expressed concern about the possible presence of drugs at the school, the school authorities

possessed no information relevant to the day of the search. The school principal simply thought it possible that on any given day drugs might be found in the school. While some flexibility must be extended to school authorities, the youth court judge did not believe that "a reasonably well-educated guess" constituted reasonable grounds to conduct a search (para. 16).

[25] The youth court judge further found that the search in this case was not a search conducted by school authorities, but a search by the police. No school authority took any active role. The fact that the principal had on an earlier occasion invited a search by police did not convert the search on November 7, 2002 into one by school authorities.

[26] As to the admissibility of the evidence under s. 24(2) notwithstanding the *Charter* breach, the youth court judge acknowledged a reduced expectation of privacy in a school setting and noted that trafficking in marijuana is a serious offence. No bad faith could be imputed to either the police or the school authorities. On the other hand, the rights of every student in the school were violated that day as they were all subject to an unreasonable search. To admit the evidence would bring the administration of justice into disrepute. For these reasons, the youth court judge held that the evidence should be excluded, and A.M. acquitted.

B. *Court of Appeal for Ontario (Goudge, Armstrong and Blair JJ.A.)* (2006), 79 O.R. (3d) 481

[27] Armstrong J.A. wrote for the Court of Appeal that what had occurred at St. Patrick's High School on November 7, 2002 was a search by police. No school authority requested the presence of police on that day, and no school official played any active role in the search. The

"standing invitation" to the police to conduct a sniffer-dog search of the school did not render this search a "search by school authorities" (para. 22).

[28] The court rejected the Crown's argument that the police conduct did not amount to a "search" within the meaning of s. 8, noting the Sarnia constable's testimony that the police went to the school to conduct a "random search" (emphasis added), that the Ontario Provincial Police constable agreed in cross-examination that he and the dog were engaged in a *search*, and that the Crown conceded that point at trial (para. 45).

[29] Armstrong J.A. disagreed with the Crown's contention that A.M.'s expectation of privacy in his backpack "was so significantly diminished as to be negligible" (para. 49). He accepted the submission of both counsel for the accused and the Canadian Civil Liberties Association that, as the Association had put it, "[a] student's backpack is in effect a portable bedroom and study rolled into one" (para. 50).

[30] Neither the *Education Act*, R.S.O. 1990, c. E.2, nor its subsidiary policies, nor the provincial *Ontario Schools: Code of Conduct* (2001), provide for warrantless searches, and the principal had admitted that the school authorities themselves could not legally have conducted the search that was carried out by the police in this case.

[31] Armstrong J.A. observed that to facilitate the search, the entire student population was detained in their classrooms for a period of one and a half to two hours. Although the principal himself made the announcement to the student body, he did so to accommodate the police. There

was no credible information to suggest that a search was justified and no reasonable grounds to detain the students. The detention aggravated the unreasonableness of the search.

[32] The youth court judge was right to exclude the evidence. This was a warrantless, random search which was not authorized by either the criminal law or the *Education Act*. The breach was serious. Admission of the evidence would bring the administration of justice into disrepute. The Crown's appeal from the acquittal was therefore dismissed.

IV. Analysis

[33] Section 8, like the rest of the *Charter*, must be interpreted purposively, that is to say, to further the interests it was intended to protect. While these interests may go beyond privacy, they go "at least that far" (*Hunter v. Southam*, at p. 159). A privacy interest worthy of protection is one the citizen subjectively believes ought to be respected by the government and "that society is prepared to recognize as 'reasonable'" (*Katz*, at p. 361). In each case, "an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement" (*Hunter v. Southam*, at pp. 159-60).

[34] In carrying out this assessment, a number of considerations have emerged which should assist in the resolution of these appeals.

[35] First is the recognition of the type of society which Canadians, by their adoption of the

Charter, have elected to live in. "The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state" (*R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28). Students are no less deserving of constitutional protection than adults, although their age, vulnerability and presence in a school environment, all factor into the "totality of the circumstances".

[36] Secondly, the focus must be on the "impact on the subject of the search or the seizure [here all the students at the school], and not simply on its rationality in furthering some valid government objective" (*Hunter v. Southam*, at p. 157). The impact includes disruption, inconvenience and potential embarrassment for innocent individuals subjected to the dog sniff or other intrusive police attention.

[37] Thirdly, the assessment of the privacy interest necessarily takes place in the shadow of the reason why the police want the information. As noted in *Tessling*, "the police were clearly interested in the 'heat profile' not for its own sake but for what it might reveal about the [illegal] activities *inside* the home" (para. 41 (emphasis in original)). If the police in this case had been called to investigate the potential presence of guns or explosives at the school using dogs trained for that purpose, the public interest in dealing quickly and efficiently with such a threat to public safety, even if speculative, would have been greater and more urgent than routine crime prevention. Generally speaking, the legal balance would have come down on the side of the use of sniffer dogs to get to the bottom of a possible threat to the lives or immediate safety and well-being of the students and staff.

[38] Fourth, the Court must consider the significance of the information obtained as a result of the police intervention. Mr. Alan Gold, Q.C., amongst others, has criticized use of the meaningfulness of the information as an important factor in the determination of whether a reasonable expectation of privacy exists. He writes:

> I appreciate that Tessling can be understood as referencing a category of information — electrical and heat information — that is in general uninformative and "meaningless,". . . . But . . . [a] fine meal can be made from scraps, and the police certainly seem highly interested in this "meaningless" information.
>
> ("Privacy Suffers From the Heat: R. v. Tessling", paper delivered at Law Society of Upper Canada 5th Annual Six-Minute Criminal Defence Lawyer, June 4, 2005, at paras. 7-8)

Of course, much police work *does* consist of assembling different "scraps" of information, some of it apparently meaningless, into a significant picture. This fact does not necessarily generate constitutional protection for the "meaningless scraps" that form part of the mosaic unless there is something else in the context that drives that result. In the present case, *Tessling* is inapplicable. The information is highly meaningful. We are not dealing with "scraps". The dogs pointed the police to the sniffer dog's equivalent of a smoking gun.

[39] Fifth, the courts have to deal with what is presented to them as reality. Some of the interveners portrayed the resolution of the dog-sniffing issue in this case as critical to the future of informational privacy. It is true that the information conveyed by a sniffer-dog alert reveals important information to the police about the crime under investigation (being one of the circumstances that distinguishes this case from *Tessling*). This appeal, however, does not purport to chart the future course of informational privacy any more than did *R. v. Plant*, [1993] 3 S.C.R.

281, or *Tessling*. It is in the nature of this rapidly developing field that courts will need to return again and again to fundamental principles to draw the reasonableness line.

[40] Professor Kerr and Ms. McGill rightly warn of snooping technologies under development including reference to "Honeybees Join the Bomb Squad" and talk of "sensors that will scan crowds to determine whether anyone is planning to commit — or is even thinking of committing — an illegal act" (see I. Kerr and J. McGill, "Emanations, Snoop Dogs and Reasonable Expectations of Privacy" (2007), 52 *Crim. L.Q.* 392, at pp. 410-11, footnote 57). The s. 8 jurisprudence will continue to evolve as snooping technology advances. This flexibility is essentially what the "totality of the circumstances" approach is designed to achieve. On these occasions, critics usually refer to "Orwellian dimensions" and *1984*, but the fact is that 1984 came and went without George Orwell's fears being entirely realized, although he saw earlier than most the direction in which things might be heading. The Court can insist on proper evidence of what the police or government are up to and how, if at all, the information the police seek to collect can be used. As *Tessling* noted, "[w]hatever evolution occurs in future will have to be dealt with by the courts step by step. Concerns should be addressed with as they truly arise" (para. 55).

A. *The Use of Sniffer Dogs*

[41] For reasons expressed in *Kang-Brown*, I believe the police are acting within their common law powers, provided the requirements of the *Charter* are respected, when they call on the use of sniffer dogs in the course of crime investigation in places to which they otherwise have lawful access. In the present context, the s. 8 right to be secure against unreasonable search or seizure is

of paramount importance. What occurred at St. Patrick's High School on November 7, 2002 was a warrantless search, and therefore *presumptively* unreasonable. As Lamer J. stated in *Collins*, at p. 278:

> . . . once the appellant has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable.
>
> A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.

(See also *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at para. 36; *R. v. Caslake*, [1998] 1 S.C.R. 51, at paras. 10-12.)

[42] For the reasons to be explained below, as well as the analysis set out in *Kang-Brown*, my opinion is that in cases where reasonable suspicion exists, the first two conditions of the *Collins* test are satisfied (*Collins*, at pp. 278-79; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 15-16). Where reasonable suspicion exists, a sniffer-dog search is authorized by the common law, and the common law itself is reasonable because of the minimally intrusive, narrowly targeted and high accuracy of "sniff searches" by dogs with a proven track record like Chief. However, on the facts of this case, because of the absence of reasonable suspicion, the search fails the first and third branches of the *Collins* test. As there was no reasonable suspicion, the search was not authorized by law and fails the first requirement. Further, it fails on the third requirement, namely that the search be conducted reasonably. The police failed because they proceeded on the basis of speculation rather than objectively verifiable evidence supporting reasonable suspicion.

B. *A Student's Privacy Is Entitled to Constitutional Protection*

[43] In support of their argument that s. 8 of the *Charter* is not engaged because of free access to "emissions in the public domain", the Attorneys General alluded to the dissent in *Kyllo v. United States*, 533 U.S. 27 (2001), cited in *Tessling*, at para. 51:

> . . . public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. [p. 45]

This frequently quoted passage from *Kyllo* clearly refers to situations involving immediate public hazards, not routine crime investigation. The present appeal, however, is a case of routine crime investigation, not public hazards. Moreover, the police here were not asked to "avert their senses". The question before us relates to the circumstances in which the police can initiate an investigation using sniffer dogs.

[44] The leading Canadian case on searches in schools is *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, where it was held that "the reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances" (para. 33). After adverting to the fact that "weapons and drugs create problems that are grave and urgent", Cory J. nevertheless maintained that "schools also have a duty to foster the respect of their students for the constitutional rights of all members of society" (para. 3).

> Learning respect for those rights is essential to our democratic society and should be

> part of the education of all students. These values are best taught by example and may be undermined if the students' rights are ignored by those in authority. [para. 3]

Of course, the consequences for the student of a police search are potentially far more serious than would result from an exercise of school discipline.

[45] In *M. (M.R.)*, the issue was the constitutionality of the body search of a student for drugs at a school dance by the vice-principal. The Court specifically held that if the *body search* had been conducted by the police, or the school authorities acting as agents of the police, reasonable and probable grounds of belief would have been required. However, reasonable suspicion was sufficient for school authorities. The teaching of *M. (M.R.)* is that in matters of school discipline, a broad measure of discretion and flexibility (para. 49) will be afforded the school authorities, but when police are conducting a body search, even on school premises, the ordinary standard of justification applicable to police will be required. Cory J. stated:

> The modified standard for school authorities is required to allow them the necessary latitude to carry out their responsibilities to maintain a safe and orderly school environment. There is no reason, however, why police should not be required to comply with the usual standards, merely because the person they wish to search is in attendance at an elementary or secondary school. [para. 56]

In the present case, of course, we are not dealing with a body search, which is far more intrusive than a dog sniff and whose results are not limited to the disclosure of contraband.

[46] My colleague Deschamps J. (at para. 131) cites *M. (M.R.)* as authority for a diminished expectation of privacy in schools, but seemingly does not attach importance to the distinction

between school authorities (which is what Cory J. is speaking of in the passage she cites) and the police. The difference between a police search and an investigation by school authorities was of critical importance to the Court's decision in *M. (M.R.)* and, I believe, is of importance here as well.

[47] Some authors have criticized the distinction between a search by school authorities and a police search if the end result in both situations is a prosecution, e.g. D. Stuart, "Reducing Charter Rights of School Children" (1999), 20 C.R. (5th) 230; A. W. MacKay, "Don't Mind Me, I'm from the R.C.M.P.: *R. v. M. (M.R.)* — Another Brick in the Wall Between Students and Their Rights" (1997), 7 C.R. (5th) 24. However, I agree with Cory J. that significantly greater latitude must be given to school authorities in the discharge of their responsibilities than to the police. If evidence sufficient to ground a prosecution should come to light in the course of a school investigation, the evidence no doubt will be passed on to the regular prosecutorial authorities if the school authorities think it appropriate to do so. Otherwise, schools may become safe havens for juvenile drug dealers, which would be unacceptable. In any event, Cory J. factored this possible outcome into his consideration in pronouncing the usual *caveat* that "[a]ll the circumstances surrounding a search must be taken into account in determining if the search is reasonable" (*M. (M.R.)*, at para. 48). The important point is that the Court in *M. (M.R.)* refused to carve out a "school exception" to the exercise of police powers.

[48] My colleague Deschamps J. concludes that the accused lacked any personal privacy interest in his bag when left in the gym. She writes:

> No *personal* privacy interest as defined in *R. v. Tessling*, [2004] 3 S.C.R. 432, 2004 SCC 67, at para. 23, is in issue in this case, since A.M. was not wearing or carrying his

> backpack at the time of the alleged search. [Emphasis in original; para. 121.]

Reliance is also placed on the *unattended* backpack factor at paras. 100, 120, 128, 131, 138, 147 and 148 of my colleague's reasons. I do not agree with the importance attached to the circumstance that the backpack was unattended. If an accused has a privacy interest in the contents of a letter, it is not lost when she takes it out of her purse and posts it. If an accused has documents concealed in the locked trunk of his car, the privacy interest in the contents of the trunk of the car does not depend on whether he is in the car or has left it parked somewhere, including a public parking lot. My home is no less private when I am out than when I am there. When students left their backpacks in the gymnasium, they did not thereby lose their privacy interest in the concealed contents, in my view.

[49] My colleague Deschamps J. then writes:

> A third factor is the fact that A.M.'s backpack was left not only unattended, but also in plain view. [para. 138]

As I see it, the issue is not whether the outside of the backpack was in plain view. The privacy issue relates to the concealed contents.

C. *Reasonableness Incorporates a Measure of Flexibility*

[50] While the primary s. 8 focus is on the impact of the police action on the person searched, or from whom the effects are seized, it is evident that the impact of the search (potential criminal prosecution) cannot by itself render the warrantless search unreasonable. Warrantless searches

generally arise in the context of a criminal prosecution.

[51] An overly rigid reading of *Hunter v. Southam* produces a dilemma for both the defence and the Crown. Here, the Crown argues that little privacy is at stake because of the nature of the container (backpack), the place of the search (the school), and the narrowness of the sniffer dog's focus (contraband). If this argument fails to persuade, however, the Crown is faced with the full brunt of the *Hunter v. Southam* procedural requirements with the consequence, generally speaking, that the dogs can only be used where they are not needed. If the police already have reasonable and probable grounds to obtain a search warrant for a physical search, they have no need to deploy a sniffer dog.

[52] From the defence viewpoint, on the other hand, if the Court finds a "privacy" interest to exist, the backpack is thereby surrounded by a legal fortress impenetrable to a sniffer dog or any other person or device without the subject's consent or a judicially authorized search warrant. But if this defence argument fails, as it has in the United States, the citizen will be left without any s. 8 protection at all against the use of sniffer dogs.

[53] The opposing positions offer an all-or-nothing result — i.e. the activity is either wholly regulated by a rigid constitutional procedure or it is completely unregulated — that appears inconsistent with a "reasonableness" approach which should offer a more nuanced answer. This point was famously made by Professor Anthony G. Amsterdam writing over 30 years ago in the context of the U.S. Fourth Amendment:

> The fourth amendment, then, is ordinarily treated as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings. To label any police activity a "search" or "seizure" within the ambit of the amendment is to impose those restrictions upon it. On the other hand, if it is not labeled a "search" or "seizure," it is subject to no significant restrictions of any kind. It is only "searches" or "seizures" that the fourth amendment requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them.
>
> ("Perspectives on the Fourth Amendment" (1973-1974), 58 *Minn. L. Rev.* 349, at p. 388)

The "all-or-nothing" approach was eventually rejected by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), a case which gave rise to the warrantless investigative police "stops" based on reasonable suspicion (called *Terry* stops). This approach was accepted in Canada in *Mann*. The present case, of course, is different. The police had no evidence even that a crime had been committed at the school on November 7, 2002.

[54] Professor Katz has noted that the American approach "totally eliminates significant invasions of privacy from any fourth amendment protection because they are not akin to traditional searches. However, these unprotected invasions of privacy involve interests that a reasonable person in a free society would expect to have protected" (L. R. Katz, "In Search of a Fourth Amendment for the Twenty-first Century" (1989-1990), 65 *Ind. L.J.* 549, at p. 581). In Canada, although the police may be regulated by internal non-constitutional administrative procedures where available, "there is considerable pressure by the police community to leave that area unregulated" (M. Rosenberg, "Controlling Intrusive Police Investigative Techniques Under Section 8" (1991), 1 C.R. (4th) 32, at p. 43. Professors Coughlan and Gorbet have written:

> If there is no reasonable expectation of privacy, there is no search, no s. 8 protection, and no opportunity for judicial scrutiny. There is no forum for balancing competing interests: that has ended at the earliest possible stage.
>
> (S. Coughlan and M. S. Gorbet, "Nothing Plus Nothing Equals . . . Something? A Proposal for FLIR Warrants on Reasonable Suspicion" (2005), 23 C.R. (6th) 239, at p. 241; see also S. Coughlan, "Privacy Goes to the Dogs" (2006), 40 C.R. (6th) 31.)

[55] I do not believe the Crown's solution of placing sniffer dogs entirely outside constitutional regulation is consistent with our jurisprudence which recognizes that *within* the *Charter* the need for privacy "can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion" (*R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 53) as will now be analyzed in greater detail.

D. *The Crown's Argument*

[56] At this point, it is convenient to restate the Crown's argument, which says that what was done here was perfectly reasonable. The police inquiry began with a relatively unobtrusive examination by dogs of odours emanating from three classrooms and some lockers and eventually the small gym where a pile of backpacks were kept. Unlike *M. (M.R.)*, there is no evidence of any body searches. The Crown emphasizes that a school is a regulated environment and the students know it. Drug-free schools are important to assure safety and promote learning. Sniffer dogs smell only the surrounding air; neither their snouts nor their handlers physically enter the students' backpacks. The dog communicates nothing about the contents except the presence of an illegal drug, which the student has been told time and time again is prohibited under a zero-tolerance policy. The student has no reasonable expectation of privacy in contraband, argues the Crown. As

stated, these arguments have found favour in the United States: *United States v. Place*, 462 U.S. 696 (1983); *United States v. Jacobsen*, 466 U.S. 109 (1984), and *Illinois v. Caballes*, 543 U.S. 405 (2005).

[57] In *Place*, O'Connor J., writing for the majority, commented in *obiter* that a canine sniff is *sui generis* because it "discloses only the presence or absence of narcotics, a contraband item" (p. 707). In her view, the sniff did not constitute a "search" within the meaning of the Fourth Amendment. Blackmun J., concurring in the result, suggested that a canine sniff might be a "minimally intrusive" search justifiable upon reasonable suspicion (p. 723).

[58] In *Jacobsen*, federal agents seized a white powder leaking from a freight package in transit and identified it as cocaine. Stevens J., writing for the majority, found that the search and seizure of the cocaine was reasonable and did not violate the Fourth Amendment because "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest" (p. 123).

[59] In *Caballes*, an Illinois state trooper stopped a driver, Caballes, for speeding on a highway. When the trooper radioed the police dispatcher to report the stop, a second trooper headed for this scene with a sniffer dog. While the first trooper was writing a warning ticket, the second trooper walked the dog around the car, and the dog alerted at the trunk. On the basis of the alert, the troopers searched the trunk, found marijuana and arrested Caballes. The majority of the U.S. Supreme Court held that the dog sniff did not violate the Fourth Amendment. The traffic stop was based on probable cause and was lawful. Its duration was not excessive. The use of a sniffer dog,

which does not expose lawful items that otherwise would remain hidden from public view, did not implicate legitimate privacy interests, in the view of the majority.

[60] The Crown is understandably supportive of the U.S. approach. Its argument can be organized around the following issues:

(i) What degree of privacy could students reasonably expect in the contents of their backpacks having regard in particular to the school setting?

(ii) Did the dog sniff constitute a search of the contents of the backpacks?

(iii) Is an intermediate standard of reasonable suspicion applicable?

(iv) Was a prior judicial authorization required in this case?

(v) Were the students unlawfully detained?

(vi) If there is a violation of s. 8 or s. 9 of the *Charter*, ought the evidence to be excluded under s. 24(2)?

E. *What Degree of Privacy Can Students Reasonably Expect in Their Backpacks?*

[61] Canadian courts have accepted as correct the proposition that s. 8 protects “people, not

places". People do not shed their reasonable expectations of privacy in their person or in the concealed possessions they carry when they leave home, although those expectations may have to be modified depending on where they go, and what "place" they find themselves in.

[62] The backpacks from which the odour emanated here belonged to various members of the student body including the accused. As with briefcases, purses and suitcases, backpacks are the repository of much that is personal, particularly for people who lead itinerant lifestyles during the day as in the case of students and travellers. No doubt ordinary businessmen and businesswomen riding along on public transit or going up and down on elevators in office towers would be outraged at any suggestion that the contents of their briefcases could randomly be inspected by the police without "reasonable suspicion" of illegality. Because of their role in the lives of students, backpacks *objectively* command a measure of privacy.

[63] As the accused did not testify, the question of whether or not he had a *subjective* expectation of privacy in his backpack must be inferred from the circumstances. While teenagers may have little expectation of privacy from the searching eyes and fingers of their parents, I think it obvious that they expect the contents of their backpacks not to be open to the random and speculative scrutiny of the police. This expectation is a reasonable one that society should support.

[64] The Crown's contrary assertion that the backpacks of students enjoy a diminished expectation of privacy and are therefore essentially open to suspicionless searches by police rests on three arguments:

(1) The school setting is known by students to be closely supervised and regulated;

(2) there can be no privacy interest in the public airspace in the vicinity of the backpacks;

(3) the subject matter of the "sniff" is the presence of illegal drugs, and contraband is not a constitutionally protected privacy interest.

I will briefly examine each of these points in turn.

(1) The School Setting Is Known by Students to Be Closely Supervised and Regulated

[65] While, as *M. (M.R.)* noted, a student's expectation of privacy is lessened in the school setting in relation to school authorities, it does exist and was not abandoned (even in relation to school authorities) when the students left their backpacks in the gymnasium. In *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30, we held that Mr. Buhay had not abandoned his privacy interest in his duffel bag when he left it in a rented bus station locker. The Court emphasized that the locker had been paid for and was under lock and key. An analogy was drawn to a hotel room (para. 23). *Buhay* thus had stronger privacy features than does this case. However, here as in *Buhay*, the individuals in question sought to preserve as much privacy in their belongings as the circumstances of their lives and activities permitted. As held in *M. (M.R.)*, the fact that school authorities may on occasion disregard this expectation of privacy does not make it disappear. "Expectation of privacy is a normative rather than a descriptive standard" (*Tessling*, at para. 42).

(2) Can There Be a Privacy Interest in Public Airspace?

[66] I do not think *Tessling* is of much help to the Crown in this case. Here, as in *Tessling*, the carrying medium can be characterized as emanations, not detected by unaided human senses, from an object exposed to public view. However, unlike *Tessling*, the information provided by a drug-dog sniff, when the dog is trained to alert to the presence of controlled drugs, is entirely unlike a FLIR image in that it most definitely permits inferences about the precise contents of the source that are of interest to the police. Under the Operation Jetway program at issue in *Kang-Brown*, a positive alert by a sniffer dog was *itself* taken by the police as reasonable and probable grounds for an arrest. However, the subject matter of the sniff is not public air space. It is the concealed contents of the backpack. Dog sniffing is, in terms of the *Kyllo* jargon (at p. 46), a "through-the-wall" technology, as compared with *Tessling*, where we held that FLIR technology could only show "that some of the activities in the house generate heat. That is not enough to get the respondent over the constitutional threshold" (para. 62).

[67] The Crown argues that in this case, as in *Tessling* and *Plant*, the information obtained is not part of a "biographical core of personal information", i.e. does not reveal intimate details about the lifestyle of the accused that he is entitled to protect. However, *Tessling* and *Plant* were premised on the finding that the information had already escaped the possession and control of the suspect. In *Plant*, the electricity records were generated by a third party (the electrical company); in *Tessling*, information regarding the heat escaping from a house simply could not be controlled, as any home insulation salesman can tell from walking down a Canadian street after a snowfall. Here, the guilty secret of the contents of the accused's backpack was not known to third parties. It was specific and

meaningful information, intended to be private, and concealed in an enclosed space in which the accused had a continuing expectation of privacy. By use of the dog, the policeman could "see" through the concealing fabric of the backpack.

[68] In *Dyment*, *Plant* and *Tessling*, the various categories of "information" (including "biographical core of personal information") were used as a useful analytical tool, not a classification intended to be conclusive of the analysis of information privacy. Not all information that fails to meet the "biographical core of personal information" test is thereby open to the police. Wiretaps target electrical signals that emanate from a home; yet it has been held that such communications are private whether or not they disclose core "biographical" information: *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Wiggins*, [1990] 1 S.C.R. 62, and *R. v. Thompson*, [1990] 2 S.C.R. 1111. The privacy of such communications is accepted because they are reasonably intended by their maker to be private: R. M. Pomerance, "Shedding Light on the Nature of Heat: Defining Privacy in the Wake of *R. v. Tessling*" (2005), 23 C.R. (6th) 229, at pp. 234-35.

(3) Can There Be a Legitimate Privacy Interest in Contraband?

[69] The Crown says that while there may be an asserted privacy interest in belongings generally, there can be no *legitimate* privacy interest in contraband. This argument incorporates a semantic shift from "reasonable expectation" of privacy to "legitimate" expectation of privacy. The Attorneys General ask the Court to adopt the view of the U.S. Supreme Court in *Place* (p. 707) and *Caballes* (p. 411) that

> because the [dog's] sniff can only reveal the presence of items devoid of any legal use, the sniff "does not implicate legitimate privacy interests" and is not to be treated as a search.

A denial of any protected privacy interest in sniffer-dog situations has on occasion led in the United States to serious repercussions. In *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), a school was raided and 2,780 students subjected to a sniff search, without the police having any specific information as to particular drugs or contraband, transactions or events, or drug suppliers on the premises. As recounted by Swygert J. in his dissent in that case (at p. 93):

> Every student was instructed to place his belongings in view and his hands on his desk. Girls placed their purses on the floor between their feet. The teams of searchers moved from room to room, and from desk to desk. Every single student was sniffed, inspected, and examined at least once by a dog and a joint school-police team. The extraordinary atmosphere at the school was supplemented still further when representatives of the press and other news media, invited in by school authorities, entered the schoolhouses and classrooms during the raid and observed the searches while in progress.

As it turns out, the dog alerted to the plaintiff in that case because she had been playing with one of her own dogs on the morning of the search and her dog was in heat.

[70] I think this branch of the Crown's case is effectively addressed by what was said by La Forest J. in *Wong*, at p. 50:

> . . . it would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy. Rather, the question must be framed in broad and neutral terms so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable

expectation of privacy.

[71] In the United States, numerous judges continue to assert the wider privacy interests. Brennan J. (Marshall J. concurring) in *Jacobsen* warned in his dissent, at p. 138, that

> under the Court's analysis in these cases, law enforcement officers could release a trained cocaine-sensitive dog — to paraphrase the California Court of Appeal, a "canine cocaine connoisseur" — to roam the streets at random, alerting the officers to people carrying cocaine. Cf. *People* v. *Evans*, 65 Cal. App. 3d 924, 932, 134 Cal. Rptr. 436, 440 (1977). Or, if a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine, there would be no Fourth Amendment bar, under the Court's approach, to the police setting up such a device on a street corner and scanning all passersby. In fact, the Court's analysis is so unbounded that if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present. In short, under the interpretation of the Fourth Amendment first suggested in *Place* and first applied in this case, these surveillance techniques would not constitute searches and therefore could be freely pursued whenever and wherever law enforcement officers desire. Hence, at some point in the future, if the Court stands by the theory it has adopted today, search warrants, probable cause, and even "reasonable suspicion" may very well become notions of the past.

In *Caballes*, as already noted, the U.S. Supreme Court held that the use of a narcotics-sniffing dog during a routine traffic stop, in the absence of any suspicion of the motorist's involvement in drug activity, did not implicate legitimate privacy interests. Ginsburg J. (Souter J. concurring) stated in dissent, at p. 422:

> Under today's decision, every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population.
>
> . . .
>
> . . . Nor would motorists have constitutional grounds for complaint should police

> with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green.

See also K. Lammers, "Canine Sniffs: The Search That Isn't" (2005), 1 *N.Y.U. J.L. & Liberty* 845, at pp. 849-50.

[72] As held by our Court in *Wong*, the emphasis should not be on the object of the search but on where the search takes place and its potential impact on the person that is subject to the search. Similarly, in *Jacobsen*, Brennan J. (Marshall J. concurring) in dissent noted that

> [i]n determining whether a reasonable expectation of privacy has been violated, we have always looked to the context in which an item is concealed, not to the identity of the concealed item. Thus in cases involving searches for physical items, the Court has framed its analysis first in terms of the expectation of privacy that normally attends the location of the item and ultimately in terms of the legitimacy of that expectation. . . . The fact that a container contains contraband, which indeed it usually does in such cases, has never altered our analysis. [p. 139]

These observations, although in dissent, seem to me to put the focus where it belongs, namely on the person, place or thing searched and the purpose for which the search is undertaken. A suspicionless search should not be absolved by after-the-fact discovery of contraband. The end does not justify the means. Unregulated sniffing raises the very real problem of false positives, where a dog's alert has proven to be inaccurate, or inaccurately interpreted by its handler, and a law abiding citizen is put to embarrassment and inconvenience.

[73] I therefore do not agree with the Crown's argument that A.M.'s reasonable privacy interest in the contents of his backpack extended only to what was lawful and excluded what was

unlawful. On the contrary, I expect A.M. would not have cared if the police had found a polished apple for the teacher in his backpack. He would very much care about discovery of illicit drugs. In past cases, we have accepted a legitimate privacy interest in a home despite the presence therein of a drug (*R. v. Evans*, [1996] 1 S.C.R. 8, at para. 42), as well as the privacy of an office despite the existence of incriminating documents (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 517-19; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pp. 641 *et seq.*) and an automobile despite the discovery of incriminating evidence (*Wise*, at p. 533) or drugs (*R. v. Mellenthin*, [1992] 3 S.C.R. 615). In *Buhay*, at para. 21, we upheld the privacy interest of an accused in the contents of a duffel bag found in a locker in a bus depot notwithstanding the presence of marijuana. There is no reason why a student's privacy interest in his backpack should not be deemed similarly respected despite the presence of contraband.

[74] However, the fact that the "sniff" only communicates the presence of contraband and does not disclose the nature or existence of other personal belongings is not without significance. It weighs in the "unreasonableness" balance because, unlike the hand search, a dog sniff is a very narrowly targeted invasion of the suspect's privacy interest.

F. *The Dog Sniff Constituted a "Search" of the Contents of the Student Backpacks*

[75] The use of the dog to "sniff" the students' backpacks constituted a search. As the police officers explained at trial, the only reason they went to St. Patrick's High School was to conduct a "random search" for drugs. They had no reason to suspect at that point that any crime at all had

been or was about to be committed. They brought with them a dog which they had specially trained to make their "search" more effective.

[76] The Attorney General of Canada argues that "[w]ith respect to detecting odours or smells dogs do what people do, they just do it better" (factum, at para. 3). I do not think this attempt to anthropomorphize sniffer dogs is convincing. Dogs have a capacity not available to human beings. The better analogy is to a machine or device for detecting odours (such as a smoke alarm), although dogs, being living creatures, are more variable than machines in their performance. The dog "sniffing" cannot be treated as an isolated phenomenon and detached from the broader police conduct. I do not think it is plausible for the Crown to argue at one and the same time that the sniffer-dog utility lies in quick accurate identification of illicit drugs concealed inside a backpack, but that the result is not a search. The lack of plausibility is equally apparent in *Kang-Brown*, where the Crown argues simultaneously that the dog sniff was not a search of the contents of the suspect's bag, yet the information about the concealed contents revealed by the sniff was treated by the RCMP as sufficient to arrest the suspect without ever looking inside the self-same bag.

G. *The Courts and Parliament Have Already Adopted for Some Purposes an Intermediate Standard of "Reasonable Suspicion"*

[77] The suggestion that sniffer-dog searches be permitted on reasonable *suspicion*, based on objective grounds, rather than "reasonable *belief*" as laid down in the circumstances of *Hunter v. Southam* should, of course, be approached with caution. Reasonable "suspicion" has been used by this Court to authorize police action in the context of investigative detention (*Mann* and *R. v. Clayton*, [2007] 2 S.C.R. 725, 2007 SCC 32), entrapment (*R. v. Mack*, [1988] 2 S.C.R. 903, at pp.

964-65), and as justification for the search of a student by a school authority in *M. (M.R.)*, as already noted. The "reasonable suspicion" standard has been adopted by Parliament in regard to searches in areas where there exists a lesser expectation of privacy, such as at border-crossings (e.g., the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 98 (a personal search of an individual who is about to leave Canada, a person who has recently arrived, or a person who has been in a departure area and who leaves the area but not Canada), and s. 99.2 (where it is suspected that a person has secreted on or about their person any contraband)). A reasonable suspicion standard has also been adopted in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 49 (frisk search of an inmate suspected of carrying contraband). Section 254 of the *Criminal Code* (authorizing use of an "approved screening device" for testing "the presence of alcohol in the blood") also offers some legislative analogy outside the border and prison context as it too provides for a minimally intrusive search without a warrant triggered on reasonable suspicion.

[78] Parliament has also used "reasonable suspicion" where it is of the view that the public importance of the objective outweighs the individual's privacy interest, as in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, including s. 15(1) (search of the person), s. 16(1) (search of conveyance), s. 16(2) (search of baggage) and s. 17(1) (opening of mail).

[79] The validity of some of these legislative provisions is being challenged in the courts, and their particular circumstances will have to be considered at the relevant time. My point simply is that "reasonable suspicion" is a recognized legal standard that has been adopted where considered appropriate by *both* Parliament *and* the courts.

[80] Of course if "reasonable suspicion" is construed as nothing more than a subjective standard, it may lead, as critics fear, to abuse in terms of arbitrary police action and racial profiling. Realistically, the possibility of after-the-fact accountability will not help a lot of innocent people who have been put to embarrassment by false positives. However, "reasonable suspicion" requires the police officer's subjective belief to be backed by objectively verifiable indications, as is discussed more fully in *Kang-Brown* and by the B.C. Court of Appeal in *R. v. Lal* (1998), 113 B.C.A.C. 47. The problem does not arise in the present case, as the youth court judge concluded that there were no grounds even of reasonable suspicion.

[81] Why should the lower standard of reasonable suspicion be adopted? As in *Mann*, the need is to strike an appropriate balance, having regard to the opposing interests. Firstly, the search, properly conducted, does not require any physical contact with the person or object being sniffed. The dog in this case was trained to alert "actively", by making physical contact with the object searched (A.R., at pp. 75-76), but that is not essential. This is an important factor in differentiating a "sniff" search from the physical entry into an individual's private place.

[82] Permitting the police to act on an "intermediate" standard, that of reasonable suspicion, within the framework of s. 8 will allow inappropriate conduct by the dog or the police to be dealt with on the basis that although the lawful authority to use the sniffer dog does exist, the search in the particular case was executed unreasonably, for example, using an inappropriately trained or poorly disciplined dog, and thereby constituted a *Charter* breach under the third branch of *Collins*, on the basis of which the evidence obtained may be excluded.

[83] Secondly, as discussed, the dog's communication capacity is limited to a positive alert or a failure to react at all. Unlike a wiretap or a physical search, the police do not obtain a lot of information about a suspect that is not relevant to their specific drug inquiry. While the suspect has a privacy interest in the place where the drugs are concealed, the fact that the sniff will disclose nothing except the presence of illegal drugs in that private place is a factor weighing in favour of moving the balance point to the reasonable suspicion standard.

[84] Thirdly, the evidence in this case is that the sniffer dog Chief has an enviable record of accuracy. Of course dogs, being living creatures, exhibit individual capacities that vary from animal to animal. While a false positive may be rare for Chief, it is not thus with all dogs. The importance of proper tests and records of particular dogs will be an important element in establishing the reasonableness of a particular sniffer-dog search.

[85] The Crown attaches considerable importance to what it says are statistics relevant to the detection rate, that is to say the successful location of drugs in a search conducted pursuant to a dog sniff (true positives), but an important concern for the Court is the number of *false positives*. From the police perspective, a dog that fails to detect half of the narcotics present is still better than no detection at all. From the perspective of the general population, a dog that falsely alerts half of the time raises serious concerns about the invasion of the privacy of innocent people.

[86] Robert Bird, in his article "An Examination of the Training and Reliability of the Narcotics Detection Dog" (1996-97), 85 *Ky. L.J.* 405, claims that many dogs maintain "a near perfect record of narcotics detection" (p. 406). However, Justice Souter's dissent in *Caballes*

provides a useful compilation of some of the decided cases in the United States where, on the facts, the result was otherwise:

> The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. [pp. 411-12]

Broadly based studies demonstrate an enormous variation in sniffer-dog performances, with some dogs giving false positives more than 50 percent of the time. Canadian police data seem not to be available, but in 2006, the New South Wales Ombudsman issued a report containing extensive empirical data on the use of sniffer dogs by police since the introduction of the *Police Powers Act*. During the review period, 17 different drug detection dogs made 10,211 indications during general drug detection operations. The Ombudsman reported:

> Almost all persons indicated by a drug detection dog were subsequently searched by police. This is in accordance with police policy which states that an indication by a drug detection dog gives police reasonable suspicion to search a person.
>
> Prohibited drugs were only located in 26% of the searches following an indication. That is, almost three-quarters of all indications did not result in the location of prohibited drugs.
>
> The rate of finding drugs varied from dog to dog, ranging from 7% (of all indications) to 56%.
>
> (NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001* (2006), at p. ii (emphasis added).)

See also L. R. Katz and A. P. Golembiewski in "Curbing the Dog: Extending the Protection of the

Fourth Amendment to Police Drug Dogs" (2006-2007), 85 *Neb. L. Rev.* 735.

[87] Moreover, the sniff does not disclose the presence of drugs. It discloses the presence of an odour that indicates *either* the drugs are present *or* may have been present but are no longer present, or that the dog is simply wrong. Odour attaches to circulating currency and coins. In the sniffer-dog business, there are many variables.

[88] I mention these conflicting reports because it is important not to treat the capacity and accuracy of sniffer dogs as interchangeable from one dog to the next. Dogs are not mechanical or chemical devices. The police claim that they have available dogs like Chief who have a high accuracy rate and a low percentage of false positives. If the lawfulness of a search is challenged, the outcome may depend on evidence before the court in each case about the individual dog and its established reliability. Neither the police nor other government authorities are justified in relying on the "myth of the infallible dog". Proper police manuals require a handler to record a dog's (or the team's) performance. This is (or should be) accepted as an essential part of a handler's work (see S. Bryson, *Police Dog Tactics* (2nd ed. 2000); R. S. Eden, *K9 Officer's Manual* (1993)), to be adduced as part of the evidentiary basis laid before the trial court at which sniffer-dog evidence is sought to be introduced.

[89] The argument of critics based on the existence of inept or poorly trained animals should not obscure the point that a non-obtrusive search by a dog/handler team of established reliability represents, in my view, a lesser step in a criminal investigation than a physical search and one that may be triggered by reasonable suspicion.

H. *Is a Prior Judicial Warrant Required?*

[90] In sniffer-dog situations, the police are generally required to take quick action guided by on-the-spot observations. In circumstances where this generally occurs, as in the bus terminal situation in *Kang-Brown*, it is not feasible to subject the "sniffer dog's" sniff to prior judicial authorization. Absent a positive "alert" by the dog, the police would have no basis on which to push their investigation beyond a few *Mann*-type questions, much less to detain the suspect. Both the suspect and his suspicious belongings would be long gone before the paperwork could be done or a telewarrant processed (even if such procedures were made available on a "reasonable suspicion" standard). While a school setting provides a different set of difficulties, the fact remains that there is no mechanism in the *Criminal Code* to obtain a warrant on the basis of reasonable suspicion, and there is apparently no immediate prospect of Parliament addressing these issues. In my view, in the particular context of sniffer dogs, there is sufficient protection for the public in the prior requirement of objectively based reasonable suspicion and after-the-fact judicial review to satisfy the "reasonableness" requirement of s. 8. The trade-off for permitting the police to deploy their dogs on a "reasonable suspicion" standard without a warrant is that if this procedure is abused and sniffer-dog searches proceed without reasonable suspicion based on objective facts, the consequence could well tip the balance against the admission of the evidence.

[91] It is clear that the dog-sniff search here was unreasonably undertaken. The youth court judge found that the police lacked any grounds for reasonable suspicion. He wrote:

> The search conducted November 7, 2002, was conducted without any reasonable grounds. While Mr. Bristo gave evidence of concern expressed by neighbours of the school and parents of the children at the school of observations they had made giving rise to a reasonable belief drugs would be at the school. There were no such disclosures to school authorities on that day. Those disclosures to which Mr. Bristo referred, had all been made previous to the day in question. Until the moment the police arrived that day, none of the school officials were aware the police were coming. The invitation to the police was extended in a general fashion some time earlier.
>
> Mr. Bristo did testify as to his belief in the likelihood of drugs being present in the school on that day or any other day. Perhaps not surprisingly, he is of the view that on any given day drugs will be found in the school. While some flexibility must be extended to school authorities with respect to what information will give them reasonable grounds, I do not believe the intent of the Supreme Court in *M. (M.R.)* is to allow a reasonably well-educated guess to constitute reasonable grounds. [paras. 15-16]

Nor is a "reasonably well-educated guess" sufficient to constitute reasonable suspicion. The Crown has shown no error in the youth court judge's finding of fact. I therefore conclude that although a warrantless sniffer-dog search is available where grounds for reasonable suspicion are demonstrated, the sniffer-dog search of the students' belongings in this case violated their *Charter* rights under s. 8.

I. *Were the Students Unlawfully Detained?*

[92] The accused contends that when the students were told by the principal to remain in their classrooms, there was a s. 9 detention. I do not agree.

[93] The school principal announced over the school's public address system that the police were on site and on his own initiative informed the staff and students that they were to remain in their classrooms until the police were finished (A.R., at pp. 3, 47 and 64). He made this

announcement for the mutual benefit of the police and the school population, "so the dogs can work and the kids can feel — the kids are out of the halls" (A.R., at p. 55). The principal acknowledged that his announcement would make it easier for the police to do their jobs, but repeated that the benefit was "mutual" (A.R., at p. 55). His announcement should be seen as action by the school principal pursuant to the *Education Act* to maintain order and discipline in the school. It was not itself a *Charter* breach.

J. *Should the Evidence Nevertheless Be Admitted Pursuant to Section 24(2) of the Charter?*

[94] Constable Callander testified that he went to St. Patrick's to conduct a "random sear[ch]" (A.R., at p. 79). He acknowledged that any attempt to obtain a search warrant would have been "a fruitless exercise" (A.R., at p. 88). He did not have any "direct awareness" of drugs in the school (A.R., at p. 84) and there was no concern for anyone's safety (A.R., at p. 84). My colleague Deschamps J. writes that:

> There is evidence in the record that drugs were prevalent at the school. . . . Mr. Bristo . . . testified that "on any given day drugs will be found in the school" . . . . [para. 104]

However, in the paragraph cited by my colleague, the trial judge concluded that Mr. Bristo's comments represented no more than a "reasonably well-educated guess" (para. 16). The trial judge did not find that drugs were prevalent in the school. There is no evidence from which it could be concluded that St. Patrick's had any greater problem than other schools. This is not to diminish the importance of dealing with drugs in schools, but, with respect, the trial judge was in a better position

than we are to evaluate the effect of Mr. Bristo's evidence.

[95] After a careful review of the s. 24(2) factors set out in *Collins*, the youth court judge concluded:

> This search was unreasonable from the outset. It is completely contrary to the requirements of the law with respect to the search in a school setting. To admit the evidence is effectively to strip A.M. and any other student in a similar situation of the right to be free from unreasonable search and seizure. It is effectively saying that persons in the same situation as A.M. have no rights. Such a finding would, to my mind, bring the administration of justice into disrepute, notwithstanding the other factors I have alluded to. [para. 25]

[96] In *Collins*, Lamer J. held that the exercise of a trial judge's discretion in s. 24(2) is "grounded in community values" and that its exercise would not be interfered with on appeal unless it were based on a wrong principle or exercised in an unreasonable manner (p. 283). See also *R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10, at para. 32, *Wise*, at p. 539, *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 68, and *Buhay*, at para. 48.

[97] The youth court judge here noted that the evidence of the drugs existed independently of the *Charter* violation and that its admission, being non-conscriptive, would not affect trial fairness (A.R., at p. 10). The evidence was essential to the Crown's case. Further, having regard to the school setting, "the breach must be seen on the less serious end of the scale" (A.R., at p. 10). No bad faith could be attributed to the police or school authorities (A.R., at p. 11). All of these factors tended to favour admission of the evidence despite the *Charter* breaches. However, weighed against admission was the fact that the speculative sweep in this case appears to be the standard practice of

the Ontario Provincial Police and Ontario's municipal police forces. The searches did not respect the rules set out four years previously by this Court in *M. (M.R.)*; nor did they comply with the school board's own policies enacted pursuant to the *Education Act*, which call for police to be used only "when necessary, or if the well-being of the student is at risk" (see *St. Clair Catholic District School Board Policies and Procedures: Section 3: Students* (2000), Policy 3.10, at p. 3). Constable McCutchen acknowledged that he had participated in sniffer-dog searches of schools on approximately 140 prior occasions (A.R., at p. 74). The failure to respect the right of the students may therefore be described as systemic. In the end, weighing the good with the bad, the youth court judge concluded that "the *Charter* must not be seen as something to be swept away in the interests of expediency. While this case centres around the rights of A.M., the rights of every student in the school were violated that day as they were all subject to an unreasonable search" (para. 25).

[98] Like Armstrong J.A. in the Ontario Court of Appeal, I would not interfere with the balance of competing values struck by the youth court judge or his exclusion of the evidence. Youth court judges carry out special responsibilities for young people in trouble with the law. They have a greater awareness than appellate judges do of the effect that admission or exclusion of this evidence would have on the reputation of the administration of justice in the community with which they deal on a daily basis. The trial judge's analysis was brief but perceptive. I would not interfere.

V. Disposition

[99] I would dismiss the appeal.

The reasons of Deschamps and Rothstein JJ. were delivered by

[100] DESCHAMPS J. (dissenting) — The presence of drugs in our schools is a very serious social problem. Schools must be substantially free of illegal drugs to promote a safe and productive learning environment for the benefit of students and staff. In this case, a high school's zero-tolerance policy for drugs was enforced using a sniffer dog to check an unattended backpack in an empty school gymnasium. Even though students and parents had been informed of the zero-tolerance policy and sniffer dogs had been used in the past, the respondent A.M. claims that evidence of the marijuana and psilocybin ("magic mushrooms") found in his backpack by police using a sniffer dog should be excluded on the basis that it was obtained unconstitutionally.

[101] In my view, both the trial judge and the Ontario Court of Appeal erred in failing to consider the threshold issue of whether A.M. had a reasonable expectation of privacy that engaged s. 8 of the *Canadian Charter of Rights and Freedoms* in this case. In my view, he did not. Accordingly, I would allow the appeal and order a new trial.

[102] This case was heard together with *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, 2008 SCC 18, which concerns the use by police of a sniffer dog to check the luggage of a traveller in a bus terminal on the basis of a reasonable suspicion that evidence of an offence would be discovered. There are several common issues in these two cases. Unlike in the instant case, however, the facts of *Kang-Brown* also raise the issues of a reasonable expectation of privacy engaging s. 8 of the *Charter*, and reasonable suspicion. That case is thus better suited to legal analysis. In the interest of concision, therefore, the main legal propositions at issue in both cases are set out in my reasons

in *Kang-Brown*.

1. Facts

[103] A.M. was a student at St. Patrick's High School in Sarnia, Ontario. The school had a zero-tolerance policy for drugs. The trial judge noted that "[s]tudents are aware of the policy and are also aware that to enforce the policy, the school authorities may resort to the use of police officers with drug detector dogs" ((2004), 120 C.R.R. (2d) 181, 2004 ONCJ 98, at para. 5). Parents were also made aware of the zero-tolerance policy and of the use of sniffer dogs to enforce the policy.

[104] There is evidence in the record that drugs were prevalent at the school. Neighbours of the school and parents of students had spoken to the principal, Mr. Bristo, about the presence of drugs at the school. Specifically, Mr. Bristo testified that parents and neighbours had called him to report that they believed students were engaging in drug activities outside the school, and parents had also reported that they were aware of students using drugs and were "fearful about a safe and orderly environment" (A.R., at p. 50). Under cross-examination, Mr. Bristo agreed that the reports relating to drugs in the school were ongoing and consistent. He also testified that "on any given day drugs will be found in the school" (A.R., at p. 8) and that some students "go out of their way to hide things around the building or hide it on their person" (A.R., at p. 46).

[105] After becoming the principal of St. Patrick's High School in September 2000, Mr. Bristo had issued a "standing invitation" to the police to visit the school with sniffer dogs if dogs were

available (A.R., at p. 2). The trial judge stated that the invitation had been "extended to allow school authorities to more easily enforce school discipline" (A.R., at p. 5).

[106] Between September 2000 and November 2002, the police went to the school with their sniffer dog on a couple of occasions to determine whether there were illegal drugs there (A.R., at p. 16). They would go through the hallways and the parking lot and, "if time is available, sometimes even [go] into classrooms" (A.R., at pp. 45-46).

[107] On November 7, 2002, three police officers once again asked for permission to look for drugs at the school with their dog. Mr. Bristo immediately gave them permission to do so. To allow the police to do their work, he made an announcement over the school's public address system in which he instructed students to remain in their classrooms. The dog was trained to find humans and detect five types of narcotics: heroin, marijuana, hashish, crack cocaine and cocaine. There is no evidence that the dog went into any classrooms or came into direct contact with any students on this occasion.

[108] Once the police had gone through the areas of the school they had intended to visit, they asked Mr. Bristo if there were any other areas that might be of interest. He suggested a gymnasium.

[109] In the gymnasium, where there were no students, the dog indicated to his handler that he smelled drugs in a backpack lying with others next to the wall. The handler passed the backpack to another officer, who searched it and found five bags of marijuana, ten magic mushrooms

(psilocybin), drug paraphernalia (a pipe, a lighter, rolling papers and a roach clip) and a wallet containing A.M.'s identification.

[110] A.M. was suspended for a number of days pursuant to the school's zero-tolerance drug policy. He was also charged with possession of cannabis marijuana for the purpose of trafficking and with possession of psilocybin.

[111] A.M. brought an application to exclude the evidence of the marijuana and psilocybin under s. 24(2) of the *Charter* on the basis that his s. 8 right to be secure against unreasonable search or seizure had been infringed. Hornblower J. based his analysis on this Court's decision in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, and began by considering "whether the school authorities were acting as agents of the police" (para. 10). After finding that they were not, he immediately turned to the issue of the reasonableness of the search. He reasoned that since the search was conducted without prior judicial authorization, it was *prima facie* unreasonable and that any search of A.M.'s backpack would have to be based on reasonable grounds, specific to an individual, to believe that evidence of an offence would be discovered. He accordingly found that s. 8 of the *Charter* had been infringed. Hornblower J. concluded that the evidence should be excluded under s. 24(2) of the *Charter*. As a result, the charges against A.M. were dismissed.

[112] Armstrong J.A., writing for the Ontario Court of Appeal, considered that the use of the sniffer dog at the school constituted a warrantless and random search. He agreed that the use of the dog constituted a police search and stated that the dog sniff of A.M.'s backpack constituted a search for s. 8 purposes. In his view, "a student's backpack should be afforded at least the same degree of

respect as an adult's briefcase" ((2006), 79 O.R. (3d) 481, at para. 49). He held that because the search was warrantless it was *prima facie* unreasonable. Armstrong J.A. stated that neither the legislation nor the policies in effect at the time authorized warrantless, random searches. He could find no error in Hornblower J.'s decision to exclude the evidence. Accordingly, he dismissed the appeal and upheld the dismissal of the charges.

2. Issues

[113] The issues in this appeal are whether A.M.'s right to be secure against unreasonable search or seizure pursuant to s. 8 of the *Charter* was infringed in the circumstances of this case and, if so, whether the evidence obtained should be excluded pursuant to s. 24(2) of the *Charter*.

3. Analysis

[114] The *Charter* provision involved in this appeal reads as follows:

> **8.** Everyone has the right to be secure against unreasonable search or seizure.

[115] After summarizing the legal principles applicable to this s. 8 claim, I will apply them to this case.

3.1 *Applicable Legal Principles*

[116] As mentioned above, my view on the law applicable to this case is set out more fully in the companion case of *Kang-Brown*. With this in mind, the main legal principles to be applied in assessing this s. 8 claim can be summarized as follows:

(1) To determine whether s. 8 is engaged, an accused must establish that his or her expectation of privacy was reasonable in light of the totality of the circumstances. The alleged privacy interest must be framed in broad and neutral terms.

(2) If s. 8 is engaged, the reasonableness of the search or seizure must be evaluated. The Crown must show that the search was authorized by law, that the law was reasonable, and that the search was carried out in a reasonable manner.

(3) Where the Crown relies on common law police powers as authority for the search, it must demonstrate both (a) that the police were acting in pursuit of a lawful duty when they conducted the search, and (b) that the search amounted to a justifiable use of police powers associated with that duty.

(4) The grounds the police must have had for a court to find that a given investigative technique was properly employed will depend on what was reasonably necessary in the circumstances. The standards range from no grounds, to reasonable suspicion, to reasonable grounds to believe that evidence of an offence will be discovered.

[117] It is therefore necessary in the case at bar to determine whether A.M. had a reasonable

expectation of privacy that engaged s. 8.

3.2 *Application to This Appeal*

3.2.1 Identifying A.M.'s Alleged Privacy Interest

[118] The central issue in this appeal is whether the use of a sniffer dog amounts to a "search" for the purposes of s. 8 of the *Charter*.

[119] A.M.'s backpack was closed and was in a pile with others in the small gymnasium of St. Patrick's High School when the police officers entered the room with their sniffer dog. It is significant that the odours emanating from the backpack could not be detected by the police using their own senses and that the police necessarily relied on the use of the dog to identify, among the several backpacks in the gymnasium, which, if any, contained controlled substances. The dog's positive indication on sniffing A.M.'s backpack enabled the police to ascertain what was *inside* the backpack with a reasonably high degree of accuracy. Accordingly, I have no difficulty in finding that the use of the dog in this case amounted to a search from an *empirical* perspective. However, what A.M. had to establish was that the use of the dog amounted to a "search" from a *constitutional* perspective such that it implicated a reasonable expectation of privacy that engaged the protection of s. 8. This is the question I will now consider.

[120] Framed in broad and neutral terms, the alleged privacy interest was in odours imperceptible to humans that emanated from A.M.'s unattended backpack in a school gymnasium.

[121] No *personal* privacy interest as defined in *R. v. Tessling*, [2004] 3 S.C.R. 432, 2004 SCC 67, at para. 23, is in issue in this case, since A.M. was not wearing or carrying his backpack at the time of the alleged search. Indeed, he was not present when the backpack was searched. It would be a different case if A.M. had been wearing the backpack when the police checked it with the sniffer dog. Moreover, the backpack in question is clearly not the type of bag a student would wear on his or her person at all times such that a search of the bag would be tantamount to a search of the person wearing it.

[122] The alleged privacy interest in this case has both an *informational* and a *territorial* component. As in *Kang-Brown*, the odours from A.M.'s backpack might disclose intimate personal details about him, namely his having recently come into contact with a controlled substance either as a drug trafficker, an illegal drug user or a legal drug user (such as a user of medicinal marijuana), or by being in the company of drug users.

[123] The territorial component of the alleged privacy interest in this case is considerably less significant than in *Kang-Brown*. Whereas the search in that case took place in a bus terminal, the one in the case at bar took place in a school. I will discuss these factors in greater detail below in evaluating the reasonableness of A.M.'s expectation of privacy.

[124] Having identified the alleged privacy interest in this case, I will now consider whether A.M.'s expectation of privacy was reasonable.

3.2.2 Reasonableness of A.M.'s Expectation of Privacy

[125] The principal submission made by the Crown in its appeal in this case is that A.M. did not have a reasonable expectation of privacy that engaged s. 8 of the *Charter*.

[126] In my view, both the trial judge and the Court of Appeal erred in failing to consider the threshold issue of whether A.M. had a reasonable expectation of privacy that engaged s. 8 of the *Charter*. At trial, Hornblower J. did not consider whether a reasonable expectation of privacy was at stake. Rather, he simply assumed that it was. The Court of Appeal did not correct this error of law. Armstrong J.A. simply stated: "I do not find it necessary in this case to decide whether the police activity prior to the search of the backpack constituted a search for s. 8 purposes. In my view, the dog sniff of A.M.'s backpack and the search of the backpack by Constable Callander constituted a search for the purposes of s. 8 of the *Charter*" (para. 45).

[127] It must be determined whether, in light of the totality of the circumstances, including the relevant factors discussed in *R. v. Simmons*, [1988] 2 S.C.R. 495, *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45, and *Tessling*, at para. 32, the dog sniff of A.M.'s backpack involved a reasonable expectation of privacy that A.M. had. Neither the trial judge nor the Court of Appeal conducted this analysis. This Court must therefore do so.

[128] The pivotal question in this appeal is whether A.M. had a reasonable expectation of privacy in respect of odours imperceptible to humans that emanated from his unattended backpack in a school gymnasium. This requires consideration of whether A.M. had a subjective expectation

of privacy and whether his privacy interest was objectively reasonable. In *Kang-Brown*, at para. 140, I identify a non-exhaustive list of factors to aid in this assessment:

> (i) the presence of the accused at the time of the alleged search;
>
> (ii) the subject matter of the alleged search:
>
> (a) ownership and historical use of the subject matter;
>
> (b) whether the subject matter was in public view;
>
> (c) whether the subject matter had been abandoned;
>
> (d) where the subject matter is information, whether the information was already in the hands of third parties; if so, was there a duty of confidentiality in relation to it?
>
> (iii) the place where the alleged search occurred:
>
> (a) ownership, possession, control or use of the place where the alleged search took place;
>
> (b) the ability to regulate access, including the right to admit or exclude others from the place;
>
> (c) notification of the possibility of searches being conducted in the place;
>
> (iv) the investigative technique used in the alleged search:
>
> (a) whether the police technique was intrusive in relation to the alleged privacy interest;
>
> (b) whether the information obtained in the alleged search exposed any intimate details of the accused's lifestyle, or information of a biographical nature.

[129] In my view, A.M. did not have a subjective expectation of privacy in the case at bar. Students and parents were aware of the drug problem and the zero-tolerance drug policy and of the fact that sniffer dogs might be used. Dogs had in fact been used on prior occasions to determine

whether narcotics were present at the school. A.M. did not lead any evidence to rebut these facts. Defiance of school policy must not be confused with an expectation of privacy. Of course, school policy must be implemented in a manner consistent with a legitimate expectation of privacy. However, the well-advertised means devised and used by the school reduced A.M.'s subjective expectation of privacy very significantly, as was true of the R.I.D.E. program in issue in *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at pp. 28-29.

[130] Moreover, there are numerous factors that support a finding that A.M.'s expectation of privacy was not objectively reasonable.

[131] First, the place where the search occurred was a school with a known problem of drug use by students, both on and off school property. In *M. (M.R.)*, which concerned a personal search of a student by a school official, Cory J., writing for the majority, held that a student's reasonable expectation of privacy is significantly diminished while he or she is at school:

> . . . the reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances. Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A student's reasonable expectation of privacy in the school environment is therefore significantly diminished. [para. 33]

These words by Cory J. are all the more compelling where, as in the instant case involving an unattended backpack on school property, a non-personal search is in issue. A.M. did not have a right to control access to the school and, unlike in *M. (M.R.)*, the police were there with the permission

(and at the request) of the school's principal in furtherance of disciplinary goals being pursued by the school in order to confront a systematic drug problem. The dogs were used to search the premises, not the students. In these circumstances, the objective expectation of privacy in respect of an unattended backpack on this school's property was not only *significantly diminished*, but extremely low.

[132] It is notable that there is a clear connection between the school environment, which is tightly controlled, and the search that took place at the school. The provincial *Ontario Schools: Code of Conduct* (2001), established under the *Education Act*, R.S.O. 1990, c. E.2, recognizes that "illegal drugs are addictive and present a health hazard", and calls on Ontario schools to "work cooperatively with police" to address the issue (p. 3). A.M. was subject to school discipline as a result of the drugs that were found in his backpack. Constable Callander testified that the Sarnia police do not go into a school with their sniffer dog unless asked to do so by school authorities (A.R., at p. 78). It is also notable that neither the police nor the school authorities acted on an "educated guess" or a random "hunch" in this case. Rather, the school authorities invited the police in response to what they reasonably viewed as credible concerns expressed by students' parents and neighbours of the school. They relied on cooperation with the police to ensure a safe and secure learning environment for the benefit of all students and staff.

[133] Owing to the drug problem in this school, it was critical that the school authorities take enhanced control measures. The well-publicized zero-tolerance policy and the measures taken in the past to enforce that policy call to mind Le Dain J.'s comment in *Dedman* (at p. 36) that the psychological effects of random vehicle stops under the R.I.D.E. program, which were carried out

to detect impaired motorists, tended "to be minimized by the well-publicized nature of the program, which is a necessary feature of its deterrent purpose".

[134] A.M., and all the school's other students and its staff, benefited from an environment that was substantially free from illegal drugs and the ills that they bring. In this respect, the situation in a school, where the environment is controlled for the benefit of those who attend it, is analogous to — albeit distinct from — that of a courthouse, where one has a very low expectation of privacy in respect of one's belongings: see *R. v. Campanella* (2005), 75 O.R. (3d) 342 (C.A.), at paras. 17, 19, 20 and 24.

[135] The controlled environment of a school's property is also analogous to the customs context. In *Simmons*, Dickson C.J. held that the degree of personal privacy reasonably expected at customs is lower than in most other situations, both because the state has an important interest in enforcing customs laws in the interest of public safety and because individuals have a significantly reduced expectation of privacy. According to Chief Justice Dickson:

> People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. [Emphasis added; p. 528.]

[136] Likewise, schools are expected to ensure the safety of their students and staff. Students fully expect that school authorities will perform this crucially important function. In the instant case,

the reasonable expectation of privacy of the school's students was even lower in light of the school's well-publicized zero-tolerance policy and the means employed in the past to enforce it. As Dickson C.J. noted in *Simmons* (at p. 526), this contextual approach to determining reasonableness under s. 8 was established in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, where Dickson J. (as he then was) had held, at pp. 159-60:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. [Emphasis added; emphasis in original deleted.]

[137] A second factor that supports a finding that A.M.'s expectation of privacy was not objectively reasonable is the fact that he was not present at the time of the search. I would add that since there were no students in the school gymnasium at the time of the search, there was no risk that the dog, on sniffing a backpack worn by a student, might make a false positive indication leading to a — more intrusive — personal search of the student.

[138] A third factor is the fact that A.M.'s backpack was left not only unattended, but also in plain view. While there is no indication that the backpack was abandoned, the use of a sniffer dog to check an unattended bag left in plain view is less intrusive than the use of one to check a bag that is either worn or carried by an individual, or is placed in a locked compartment out of plain view.

[139] A fourth factor is the fact that the investigative technique was relatively non-intrusive.

While it is true that the dog was able to detect the presence of drugs in A.M.'s backpack, it was able to do so without the backpack being opened. Moreover, the dog was trained only to detect drugs and find humans. It could not therefore convey any information other than that there were drugs present. Thus, the use of a sniffer dog in these circumstances was a less intrusive investigative technique than simply opening A.M.'s backpack without a prior positive indication by the dog.

[140] The use of a sniffer dog as an investigative technique did not intrude unreasonably on A.M.'s privacy interest, since his informational privacy interest was extremely limited in the school environment. Therefore, in my view, in light of the totality of the circumstances, A.M. did not have a reasonable expectation of privacy that engaged s. 8.

3.2.3 Reasonableness of the Search

[141] Since I am of the view that A.M. did not have a reasonable expectation of privacy that engaged s. 8 of the *Charter*, it is not necessary to determine whether the search was reasonable.

[142] Furthermore, since A.M. did not have a reasonable expectation of privacy in respect of his backpack that was sufficient to engage s. 8 of the *Charter*, and since the police were lawfully present at the school with the principal's permission and were acting in pursuit of their duty to investigate and prevent crime, no individualized grounds were required for the police to employ their sniffer dog as they did in this case.

3.2.4 Additional Comments

[143] I have had the benefit of reading the reasons of Binnie J., which invite the following comments.

[144] At para. 86 of his reasons, Binnie J. notes that no evidence as to the accuracy of sniffer dogs was adduced in the instant case. He proceeds to impugn the accuracy of sniffer dogs generally, by drawing on data gathered by the New South Wales Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001* (2006), concluding at para. 87: "In the sniffer-dog business, there are many variables." With respect, this foray into the accuracy of the dog used in this case is unwarranted. The trial proceeded on the basis that sniffer dogs are generally accurate. This general accuracy was established both as an explanation for their widespread use and as a basis for the argument that they should be accepted as a proper investigative tool. This Court must confine its disposition of the instant case to the facts that were adduced and accepted at trial. It is not proper for the Court to consider the inaccuracy of sniffer dogs *ex proprio motu* and, in so doing, to make an assumption that the dog used might have been improperly trained.

3.2.5 Section 24(2)

[145] It is not necessary to consider excluding the evidence under s. 24(2) of the *Charter* since no infringement of a *Charter* right has been established.

4. Conclusion

[146] Schools are places of education, but will that education consist of enlightenment for the betterment both of students and of our free and democratic society, or will schools become places where students become ensnared by drugs, gangs, violence and anti-social behaviour? It is crucial to recognize that the presence of drugs in a school cannot reasonably be dissociated from the physical violence that attends the trafficking, purchase and use of drugs. Our criminal law, education legislation and school board policies recognize that students are particularly vulnerable to the dangers posed by illegal drugs, dangers which are so immediate and grave as to be indissociable from the social risks posed by, for example, weapons. The introduction of drugs into a school is tantamount to the introduction of a toxic substance into an otherwise safe environment. Not only are drugs literally, and directly, toxic, but they are indirectly toxic as well in light of the harm and violence that attend the production, trafficking and consumption of drugs. Since drugs are readily concealed and since their odours are often imperceptible to humans, school officials are essentially powerless to confront the possession and trafficking of drugs in these institutions of learning without the assistance of the police using well-trained sniffer dogs.

[147] Drugs had infiltrated St. Patrick's High School. A zero-tolerance policy for drugs was in effect, and parents and students alike had been informed that the policy existed and that it would be enforced by using sniffer dogs. On the day in question, as on other occasions, the police went to the school and, with the permission of the principal, used their dog to check A.M.'s unattended backpack in the school's gymnasium. Only after the dog gave a positive indication of the presence of a controlled substance did the police open the unidentified backpack and find drugs inside, together with A.M.'s identification. In light of these circumstances, A.M. did not establish a reasonable expectation of privacy that would preclude the use of the sniffer dog.

[148] This case demonstrates the importance of answering the threshold question whether an accused had a reasonable expectation of privacy that engaged s. 8 of the *Charter* before prematurely subjecting the investigative technique employed by the police to a full s. 8 analysis. In my view, the privacy interest affected by the use in this case of a sniffer dog to check A.M.'s unattended backpack in a school gymnasium where there were no students was so extremely low that it did not engage s. 8 of the *Charter*.

[149] Because I have found that A.M. did not have a reasonable expectation of privacy that engaged s. 8 of the *Charter*, I would allow the appeal and order a new trial.

The following are the reasons delivered by

[150] BASTARACHE J. (dissenting) — A.M. has been charged with possession of psilocybin (magic mushrooms) and possession of cannabis marijuana for the purpose of trafficking. Police discovered the drugs in A.M.'s backpack after the bag was sniffed by a police dog trained in drug identification. The search took place at St. Patrick's High School, where A.M. was a student. The central issue raised by this appeal is whether the dog sniff constituted a reasonable search under s. 8 of the *Canadian Charter of Rights and Freedoms* and, if not, whether the evidence ought to be excluded pursuant to s. 24(2).

[151] The reasons which follow form an application of the principles I have outlined in the accompanying case of *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, 2008 SCC 18. In *Kang-Brown*, I

emphasized the important role sniffer dogs can play in the prevention and deterrence of crime and found that the use of these dogs is appropriate, under certain conditions, where police have a reasonable suspicion about the presence of illicit substances. In some instances, this suspicion will attach to a particular individual, as was demonstrated in *Kang-Brown* itself. In other situations, however, police will have a reasonable suspicion that attaches to a particular activity or location rather than to a specific person. This generalized suspicion will form a sufficient basis to justify random searches of bags or luggage in some circumstances. Absent Parliamentary direction on when generalized reasonable suspicion will be sufficient to allow the use of sniffer dogs, the courts must make this determination on a case-by-case basis by balancing the importance of protecting the privacy interests of individuals with the public interest in preventing and investigating criminal activity.

[152] In my view, using sniffer dogs to perform a random search for drugs at a high school can be justified on the basis of a reasonable generalized suspicion. Schools are unique environments in which crime prevention has a heightened importance, and the need to protect children from the dissemination of drugs must be taken into account when the requisite balancing is performed. This does not mean, however, that police may enter a school and conduct a search whenever they please on the basis that drugs *may* be found there on any given day. Reasonable suspicion requires more than a mere hunch. Further, the suspicion must be temporally related to the search — police are unable to justify the random use of sniffer dogs by relying on a suspicion which existed many months in the past.

[153] In this case, the use of the dog sniff was not based on a current, reasonable suspicion.

As a result, the search was unreasonable for the purposes of s. 8 of the *Charter*. The evidence found in A.M.'s backpack, however, ought nonetheless have been admissible at trial. Section 24(2) of the *Charter* requires that evidence is only excluded when its admission would bring the administration of justice into disrepute, and admission in this case would not have that effect. As a result, I would have allowed the appeal on the limited basis that the evidence against A.M. ought to have been admitted at trial notwithstanding the breach of his s. 8 rights.

I. Facts

[154] The essential facts of this case can be briefly summarized. On November 7, 2002, the police arrived at St. Patrick's High School and asked for permission to search the school for drugs. The principal, Mr. Bristo, agreed to the search, and students were directed to remain in their classrooms while the police used a sniffer dog to search three classrooms and several lockers in the hallway. Mr. Bristo then indicated to the police that they should search the gymnasium, where a number of student school bags were lined up against a wall. The police dog, Chief, sniffed the bags and indicated the presence of drugs in one of them. That bag was then searched by a police officer who found it to contain several bags of marijuana, ten magic mushrooms, and other drug paraphernalia. Identification indicating that the backpack belonged to A.M. was also found and he was subsequently arrested and charged.

[155] St. Patrick's has a zero-tolerance policy with regards to possession of drugs and use of drugs in the school. Parents and students are made aware of this policy and are informed that the school may access the services of police dogs if they are available. Mr. Bristo became principal of

the school in September 2000 and at that time he contacted the police and gave them a "standing invitation" to conduct searches at the school whenever resources made it feasible to do so. Mr. Bristo testified that although he had in the past received reports from neighbours and parents about drug activity in and around the school, he had "no knowledge" that there might be drugs within the school on the date the search was performed. It was, however, "pretty safe to assume that they could be there".

II. Analysis

A) *Reasonable Expectation of Privacy*

[156] A police activity is only considered a search for the purposes of s. 8 of the *Charter* if it invades a reasonable expectation of privacy (*R. v. Evans*, [1996] 1 S.C.R. 8, at para. 11). This expectation can vary with the "nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion" (*R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 53), and must be evaluated in light of the "totality of the circumstances" (*R. v. Edwards*, [1996] 1 S.C.R. 128).

[157] In my view, A.M. had a reasonable, but limited, expectation of privacy in his backpack at the time the dog sniff occurred. Student backpacks frequently contain many personal items and I am prepared to find that A.M., like other high school students, had a subjective expectation that the contents of his bag were private. As I noted in *Kang-Brown*, it is relevant from an objective perspective that the odour identified by the dog sniff was not accessible to humans and that its

detection provided immediate information about the *contents* of the backpack. The sniff thus revealed a "biographical core of personal information" about A.M. and his personal choices that would otherwise have been kept secret from the state.

[158] In addition, I find that the fact that A.M. was not carrying his backpack at the time the search occurred did not remove his reasonable expectation of privacy in its contents. An individual is not required to be physically in possession of an object in order for a reasonable expectation of privacy to be found (*R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30, and *R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10), and there is no indication in this case that A.M.'s backpack was in any way abandoned. To the contrary, the evidence suggests that A.M. and his classmates were likely *required* by school officials to leave their bags unattended in the gym at the time the search began: "there was a class . . . being conducted in that area when all of [the search] was announced. But the students were not in the gym [at the time of the search] as I recall. Where they had been directed to, I can't testify to firmly" (A.R., at p. 65 (emphasis added)). Regardless of where A.M. and his classmates were directed to after the search was announced, it is in my view clear that these students had not abandoned their backpacks by leaving them in the gym that day. Further, I believe that a high school student who, like his classmates, leaves his bag unattended during gym class continues to have a reasonable expectation of privacy in its contents. As a result, both a subjective and objective expectation of privacy have been established.

[159] A.M.'s reasonable expectation of privacy is, however, diminished by the fact that this dog sniff occurred at the school. Schools are highly regulated environments where the threat of dangerous weapons and illicit drugs must be taken very seriously by school officials charged with

maintaining an effective and safe learning environment. Students are aware of the importance both society at large and school administrators place on the school environment, and have a diminished expectation of privacy as a result. This diminished expectation was emphasized by this Court in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393:

> . . . the reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances. Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A student's reasonable expectation of privacy in the school environment is therefore significantly diminished. [para. 33]

[160] My conclusion is thus that although A.M. had a reasonable expectation of privacy in his backpack, this expectation was significantly diminished as a result of the fact that this search occurred at a school. Privacy interests do not need to be of the highest form to attract s. 8 protection (*Buhay*, at para. 22), but the degree of the interest will be taken into account in the remainder of the analysis (*M. (M.R.)*, at para. 34).

B) *Reasonable Search Authorized by Common Law*

(1) Lawful Police Duty

[161] The police were issued an open invitation to attend St. Patrick's High School to search for drugs anytime they had resources available to do so. The search conducted on November 7, 2002 was an attempt to identify individuals carrying illegal drugs in order to ensure the continued

safety of the school environment, and this activity thus falls within the police powers to preserve the peace and prevent crime (*Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 32; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at para. 26).

(2) Nature of the Search

[162] In *Kang-Brown*, I identified numerous features which make searches of bags using sniffer dogs minimally intrusive on an individual's reasonable expectation of privacy. These include the fact that these searches are expedient and therefore create minimal inconvenience for the individual; the fact that the only information revealed by the dog sniff is the presence or absence of drugs; and the fact that the presence of drugs can be signalled in a completely non-threatening manner. In this case, it is also significant that A.M. was not even present when the search occurred and that there was therefore absolutely no interference with his bodily integrity and no creation of an embarrassing or humiliating encounter.

C) *Standard for Conducting the Search*

[163] I found in *Kang-Brown* that a search of luggage using sniffer dogs would be deemed reasonable where it was based on a reasonable suspicion. This lowered standard for instigating a search is, in my view, appropriate, given the important preventative potential of sniffer dogs and the minimal intrusion caused by searches of this nature. I further found that in some situations, it would be appropriate for police to base this search not on individualized suspicion related to a particular individual, but rather on a generalized suspicion attaching to a particular activity or location.

Although it was not necessary for the outcome of the appeal in *Kang-Brown*, it was my conclusion that a public bus terminal was one example of an environment where it was reasonable for police to use sniffer dogs to perform random searches where they had a generalized suspicion about the presence of drugs, providing that a reasonably informed member of the travelling public would have been aware of the possibility of random searches involving the use of dogs.

[164] In my view, schools are another environment in which it is appropriate to base random searches of bags on the lowered standard of a generalized reasonable suspicion. I reach this conclusion by weighing the public interest in preventing and deterring the presence of drugs in schools with the rights of students to be free from state interference. The balancing of privacy interests with the suppression of crime always underlies the s. 8 analysis and must be performed every time the court is asked to consider the reasonableness of a police procedure (*R. v. Tessling*, [2004] 3 S.C.R. 432, 2004 SCC 67, at paras. 17-18; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60; *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293).

[165] The increased presence of drugs at schools is a disturbing trend. Parliament's concern about this trend is reflected in numerous pieces of legislation including the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, which makes being in or near a school an aggravating factor on sentencing for drug-related offences (s. 10(2)(*a*)(iii)), and the *Education Act*, R.S.O. 1990, c. E.2, which *requires* school administration to suspend students found in possession of illicit drugs (s. 306(1), para. 2) and expel those found trafficking (s. 309(1), para. 5). This Court has also recognized the gravity of drugs in our school systems. In *M. (M.R.)*, Cory J., writing for the majority, found that the escalation of illicit substances in the school environment represents a threat

to the ability of teachers and administrators to care for and educate this country's children:

> In recent years, problems which threaten the safety of students and the fundamentally important task of teaching have increased in their numbers and gravity. The possession of illicit drugs and dangerous weapons in the schools has increased to the extent that they challenge the ability of school officials to fulfill their responsibility to maintain a safe and orderly environment. [para. 36]

[166] In *M. (M.R.)*, the majority of this Court determined that a vice-principal's search of a 13-year-old student was reasonable despite the fact that it was not authorized by a warrant. The search was conducted in the presence of a police officer after several students reported that the youth was likely to be carrying drugs. Marijuana was found. In concluding that the search was reasonable, the Court emphasized that the need to protect students and create an orderly atmosphere for learning necessitated according school authorities a reasonable degree of discretion and flexibility. The altered approach was also appropriate, given the students' reduced expectation of privacy while at school.

[167] Although the Court in *M. (M.R.)* went on to find that the special nature of the school environment did not authorize *police* (or agents of the police) to proceed without a warrant, that finding related specifically to traditional police searches (*M. (M.R.)*, at para. 56). As has been discussed, a sniffer-dog search is unique from other forms of police search because of its minimally intrusive nature. The standard applicable to other forms of police searches in schools is therefore not necessarily applicable to dog searches.

[168] In my view, the incredible importance of preventing drug activity in schools, the highly

regulated nature of the school environment, the reduced expectation of privacy students have while at school, and the minimally intrusive nature of dog-sniff searches all support a finding that police may use sniffer dogs to search in schools where there is a *reasonable suspicion* of drug activity. Further, I believe it is irrational to conclude that school administrators or police must have an individualized suspicion before they are able to conduct dog-sniff searches in schools. This would require that information about a particular student be obtained before a search could occur and would limit searches to specific individuals. Such an approach fails to recognize that in many cases, school authorities will be aware that there is a drug problem within the school without knowing specifically which students are likely to be carrying illicit substances on any particular day.

[169] A reasonable suspicion about the presence of drugs at school may result from tips by community members, parents, or other students, and it is unreasonable to assume that these individuals will always be able to identify the particular individuals believed to be involved. It is also possible that a reasonable suspicion develops as a result of drug paraphernalia being found on school property. Once again, while the discovery of these materials may be sufficient to raise a reasonable suspicion about the presence of drugs, it will frequently not be possible to determine who is actually in possession of them before a search occurs. Indeed, the very reason sniffer dogs are so effective in the school environment is their ability to determine, specifically, where drugs are located. The principal of St. Patrick's High School testified as follows:

> [A]lthough the staff is vigilant, kids who are engaged in this type [of] activity don't want to be caught. They go out of their way to hide things around the building or hide it on their person. The . . . ability of the police to come in with the dogs, who are specially trained, allows us to conduct a search very, very quickly in the building. Because when the dogs come in, it takes approximately two hours maybe at the most . . . so you can do something like that very quickly and very thoroughly because the

dogs are very, very well-trained.

(A.R., at p. 46)

Requiring that school authorities or police know exactly where drugs are located *before* the search occurs significantly hinders the benefits of this kind of search technique.

[170] As I noted in *Kang-Brown*, a random search based on generalized suspicion also has the benefit of being non-targeted in nature. This minimizes the risk of inappropriate profiling and reduces the stigma associated with being searched. Students in a school being randomly searched by dogs are aware that they are not being singled out and that they are not the subject of any particular suspicion, and no student is therefore required to be embarrassed by being targeted for investigation.

[171] Further, it is in my view extremely important to consider the incredible impact random sniffer-dog searches in schools may have on *preventing* drug activity from occurring at these locations. The highly efficient and extremely accurate nature of sniffer-dog searches creates a real threat to individuals seeking to bring drugs into our schools. In fact, the very possibility that this kind of search *may* occur is likely to deter some potential drug traffickers from taking the risk of being caught. In my view, it is the scope and effectiveness of the search which creates the threat and leads to the deterrence. Restricting dog-sniff searches to specific individuals therefore minimizes the preventative effect of this kind of search in an environment where prevention ought to be of paramount importance.

[172] This does not mean, however, that police ought to be able to conduct random dog searches in any school at any time. As I have indicated, students continue to possess a reasonable expectation of privacy while at school, and the public interest in preventing and detecting crime using sniffer dogs must be balanced against the privacy interests of students. It is for that reason that a reasonable suspicion that drug activity is occurring at the school must exist prior to any search. Further, it is insufficient that a search be based on a suspicion which existed at some time in the past; rather, the reasonable suspicion underlying the search must have a temporal connection to the search itself.

[173] In *Kang-Brown*, I found that police have an ongoing reasonable suspicion about drug activity occurring at this country's airports and bus and train depots. This ongoing suspicion has resulted in the creation of Operation Jetway, a special RCMP initiative aimed specifically at trying to minimize the use of our public transportation systems for the movement of illicit substances. In my view, it would be inappropriate to find that this same ongoing suspicion exists in all schools. Although it is true that the presence of drugs on school premises is becoming an escalating problem in Canada, I am unprepared to conclude that school officials and police have a constant reasonable suspicion that drugs will be found in any school at any time. To make such a finding without more evidence on the subject would be to erode the reasonable suspicion standard of any meaning and to significantly undermine the rights of youths in this country.

[174] Since a generalized, ongoing suspicion does not exist in relation to schools, it is necessary for each random dog-sniff search to be justified on the basis of a suspicion that drugs will be located *at that specific location at the specific time the search is being performed*.

[175] Although it is necessary that a dog-sniffer search in a school be related to a reasonable suspicion that drugs will be located on the premises at the time the search occurs, I do recognize that it is unreasonable to expect that a sniffer-dog search will occur at the precise moment that a reasonable suspicion is *first formed*. Such a standard fails to recognize that when information about drugs on the premises is received, school officials may need time to consult with each other before determining how to proceed. It is also unrealistic to assume that a tip about the presence of drugs will only raise a reasonable suspicion for an hour or a day or a week after it is received. How long the suspicion lasts will depend in large part on the nature of the information received and on whether it is supplemented by additional indicators that the presence of drugs continues. In every instance, the key inquiry is whether there is sufficient basis on which to form a reasonable suspicion about the presence of drugs at the time the search occurs. In my view, school authorities who receive information about the presence of drugs on school premises ought to proceed as follows:

1. The school authorities must satisfy themselves that the information giving rise to the reasonable suspicion is credible. The information itself may come from a variety of sources including one or more students, a teacher's or principal's own observations, tips from parents or community members, physical evidence of drugs found on school property, or any combination of these sources.

2. Once information about drugs at the school is deemed credible, school authorities may then determine the best strategy for responding to the concern. This may involve working cooperatively with police or drug and alcohol agencies, as is required by the

Ontario Schools: Code of Conduct (2001), (authorized by the s. 301(1) of the *Education Act*).

3. In some situations, the reasonable suspicion may be such that school officials wish to invite police to perform a random search at their school. Given the realities of police resources, it is unrealistic to assume that a search will be feasible the same day an invitation is issued. For that reason, it is permissible for school officials to issue police with an "open invitation" to search the school.

4. When police resources enable a search to occur, school officials must determine whether their reasonable suspicion about the presence of drugs on the premises still exists. It is not permissible for a search to occur on the basis of a reasonable suspicion which existed in the past, and school authorities must be satisfied that they have a current reasonable suspicion that drugs will be found on the premises *on the day* the search occurs.

[176] With respect, I think the distinction between a search initiated by school authorities who ask for police assistance and a search initiated by the police who ask school authorities for assistance is of no moment. Nor is it necessary to go into a deep analysis of the "open invitation". In every case, what is occurring is a cooperative effort to assure a safe environment for students by preventing the sale and use of drugs. What matters is that the search be undertaken only when a reasonable suspicion can be established and related in time to that particular search.

[177] The process I have suggested above ensures that an appropriate balance will be struck between the public interest in preventing drug activity at schools and the privacy interests of students. Allowing random searches on the basis of a current, reasonable suspicion ensures that students are not subjected to unfounded invasions of their privacy while simultaneously protecting the valuable role sniffer-dog searches may play at preventing and deterring drugs in the school system.

[178] Finally, I wish to reiterate my finding in *Kang-Brown* that random drug sniff searches must only occur where it is established that reasonably informed members of the public would have been aware that they may be used. Although the provision of such knowledge does not make it reasonable to base a search on generalized reasonable suspicion (this must be determined on a case-by-case basis by balancing the requisite factors), it is a necessary precondition to a finding that a random search is reasonable within the meaning of s. 8 of the *Charter*.

[179] In this case, I am satisfied that students at St. Patrick's High School were given sufficient notice that a random sniffer-dog search might occur. They clearly had the required knowledge. The school has a zero-tolerance policy for drugs and the trial judge determined that students were aware of the policy and were aware of the fact that it may be enforced using drug detector dogs ((2004), 120 C.R.R. (2d) 181, 2004 ONCJ 98, at para. 5).

[180] There is, however, no evidence that the sniffer-dog search which led police to arrest A.M. was founded on a current reasonable suspicion that drugs would be found. While I accept that the principal of St. Patrick's High School was concerned about the presence of drugs at his school,

concern is insufficient to justify a random search. The fact that the school had received calls in the past from parents and neighbours about the use of drugs is also an insufficient basis. Principal Bristo testified that he had no knowledge that the police were planning on searching the school on November 7, 2002 (A.R., at p. 47) and, importantly, when asked if he had any knowledge that there might be drugs within the school on that date he replied "I had no knowledge of it. It's . . . pretty safe to assume that they could be there" (A.R., at p. 49 (emphasis added)). The trial judge concluded on the basis of these answers that school authorities had little more than a "reasonably well-educated guess" (para. 16) that drugs would be at the school on the day the search was conducted, and I agree with that conclusion. The evidence likewise indicates that the police themselves had no direct awareness as to the possible existence of drugs at the school on the day the search occurred (A.R., at p. 84). In their view, the search was conducted solely because it was requested by the school principal (A.R., at p. 77). As a result, the requisite generalized suspicion was lacking and the search must therefore be found to be in contravention of s. 8 of the *Charter*.

D) *Admission of the Evidence*

[181] Section 24(2) of the *Charter* requires that the admissibility of evidence obtained in violation of an individual's *Charter* rights be considered. Evidence will only be excluded when, having regard to all the circumstances, its admission would bring the administration of justice into disrepute (*Law*; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Stillman*, [1997] 1 S.C.R. 607). The circumstances to be considered in making this determination can be grouped into three categories:

> (1) the effect of admitting the evidence on the fairness of the subsequent trial, (2) the seriousness of the police's conduct, and (3) the effects of excluding the evidence on the

> administration of justice. Trial judges are under an obligation to consider these three factors.
>
> (*Law*, at para. 33, relying on *Collins*.)

(1) Trial Fairness

[182] The concept of trial fairness is concerned with the continued effects of self-incrimination and, where an "accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples", admission of the resulting evidence would generally affect the fairness of the trial (*Stillman*, at para. 80). This kind of evidence is referred to as "conscriptive" (*Law*, at para. 34, citing *Stillman*, at para. 80).

[183] Where, as here, however, the evidence is non-conscriptive because it existed independently of the violation and did not emanate from the accused, its admission will not affect trial fairness (*Buhay*, at para. 50, citing *Stillman* and *Evans*).

(2) Seriousness of the Breach

[184] Assessing the seriousness of the breach requires a determination of "whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant": *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 652. It is also relevant to consider whether the violation was motivated by a situation of urgency or necessity, the obtrusiveness of the search, and the individual's expectation of privacy (*Buhay*, at para. 52).

[185] The trial judge determined that this breach "must be seen on the less serious end of the scale" (para. 22), and I agree with that conclusion. It is significant that the search occurred in an environment where there is a diminished expectation of privacy and that the search itself was of a non-intrusive nature. It is also significant that the police conducted the search in cooperation with the school principal and that they believed this gave them the authority to do so. Constable McCutchen testified that he understands that the police respond to requests from schools in order to "assist" where there is a problem with drugs. He estimated that in his 10 years with the Ontario Provincial Police Canine Unit, he has conducted dog-sniff searches in 140 schools (A.R., at p. 74). Constable Callander was another officer who participated in the search at St. Patrick's. He has been with the Clearwater Police Force for 27 years and testified that searches of this nature are "common practice" (A.R., at p. 79) and are conducted upon invitation from school principals (A.R., at p. 79). In my view, this evidence supports a finding that the officers involved in this search were unaware that using dog sniffs to search the school in the circumstances of this case breaches the *Charter* if there is no reasonable suspicion that drugs will be found.

[186] The evidence also indicates that school authorities were not aware that this kind of search constituted a breach of the *Charter*. The principal of St. Patrick's High School testified that he feels bound by the *Education Act* to provide a safe and orderly environment in the school (A.R., at p. 47) and that he needs the cooperation of the police to help discover drugs in the building (A.R., at p. 45). He further testified that although he is unable to arbitrarily select a locker or a bag and search it without "something more" (A.R., at p. 59), the police do not need to provide him with any specific information indicating a need for a search in order to proceed (A.R., at p. 53). In his view,

the arrangement he had with police at the time A.M.'s bag was searched allowed a random search to be conducted by sniffer dogs at any time, and was restricted only by the availability of police resources (A.R., at p. 53).

[187] This evidence is sufficient to establish that the *Charter* breach in this case was neither deliberate nor wilful. Both the school officials and police officers involved were acting in good faith when the sniffer-dog search was performed and, as I result, I find that the breach was inadvertent. This factor, combined with the diminished expectation of privacy and the non-intrusive nature of the search, leads me to conclude that the breach was not of a serious nature.

(3) Effect of Exclusion on the Reputation of the Administration of Justice

[188] The final stage of the s. 24(2) analysis considers whether excluding the evidence would have a detrimental effect on the administration of justice. This generally requires consideration of "whether the unconstitutionally obtained evidence forms a crucial part of the Crown's case and, where trial fairness is not affected, the seriousness of the underlying charge" (*Law*, at para. 39).

[189] It is clear that the evidence obtained by the search is necessary to substantiate the charges against A.M., and it therefore forms a crucial part of the Crown's case. In addition, the trafficking charges against A.M. are of a serious nature, and the fact that the offence occurred within a school is an aggravating element.

[190] In my view, all of the aforementioned factors favour allowing this evidence to be admitted. Although this search was not performed on the basis of a reasonable suspicion that drugs

would be found, it was conducted in good faith. The search was non-intrusive in nature and occurred in an environment where the expectation of privacy was diminished. The evidence obtained was non-conscriptive in nature and does not affect the fairness of the trial. As a result, it is my view that excluding this evidence would bring the administration of justice into disrepute and that the trial judge erred by failing to admit it at trial.

[191] For these reasons, I would allow the appeal on the limited basis that the evidence against A.M. ought to have been admitted.

Appeal dismissed, BASTARACHE, DESCHAMPS *and* ROTHSTEIN JJ. *dissenting.*

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