R. *v*. M. (M.R.), [1998] 3 S.C.R. 393

M.R.M. *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v*. M. (M.R.)

File No.: 26042.

1998: June 25; 1998: November 26.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for nova scotia

Constitutional law -- Charter of Rights -- Application -- Search and seizure in schools -- Student at junior high school suspected of drug dealing and searched at school by vice-principal in presence of RCMP -- Whether guarantee against unreasonable search and seizure applicable to searches of students in schools -- Canadian Charter of Rights and Freedoms, s. 32.

Constitutional law -- Charter of Rights -- Search and seizure -- Schools -- Student at junior high school suspected of drug dealing and searched at school by

vice-principal in presence of RCMP -- Illegal drugs found -- Circumstances in which search by school officials unreasonable -- Whether normal standards for search and seizure applicable in school situations -- Whether evidence seized admissible -- Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Constitutional law -- Charter of Rights -- Detention -- Schools -- Student suspected of drug dealing compelled to attend at school official's office and to submit to search by vice-principal in presence of RCMP -- Whether student detained within meaning of s. 10(b) of the Canadian Charter of Rights and Freedoms.

A junior high school vice-principal was given reasonably reliable information from students that the accused, a student, was intending to sell drugs at a school function on school property. He asked the accused and his companion to come to his office where he asked each if they were in possession of drugs and advised them that he was going to search them. A plain-clothed RCMP constable, called by the vice-principal pursuant to school policy, was present but said nothing while the vice-principal spoke to the students and searched them. The vice-principal seized a hidden cellophane bag of marijuana and gave it to the constable who advised the accused that he was under arrest for possession of a narcotic. The constable read to him the police caution and his right to counsel, and advised him that he had the right to contact a parent or adult. The accused attempted unsuccessfully to reach his mother by phone and stated that he did not wish to contact anyone else. The constable and the accused then went to the accused's locker and searched it but nothing was found there.

The trial judge found that the vice-principal was acting as an agent of the police and held that the search violated the accused's rights under the *Canadian Charter of Rights and Freedoms*. He excluded the evidence found in the search. The Crown did

not offer any further evidence, and the charge against the accused was dismissed. The Court of Appeal allowed the Crown's appeal and ordered a new trial. At issue here is when and in what circumstances a search by an elementary or secondary school official should be considered unreasonable and therefore in violation of the student's rights under the *Charter*.

Held (Major J. dissenting): The appeal should be dismissed.

Per Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.: The *Charter* guarantee against unreasonable search and seizure (s. 8) is engaged because schools constitute part of government.

The mere fact that there was cooperation between the vice-principal and the police and that a police officer was present during the search was not sufficient to suggest that the vice-principal was acting as an agent of the police. The search would have taken place without the presence of the police officer and was not materially different than it would have been had there been no police involvement.

To establish a violation of s. 8 of the *Charter*, the accused must first establish a reasonable expectation of privacy with respect to the relevant place. Given that the search was of the accused's person, the existence of a subjective expectation of privacy and the objective reasonableness of that expectation are important. A subjective expectation of privacy with respect to one's person has been historically recognized and is reasonable and is not rendered unreasonable merely by the student's presence at school. A reasonable expectation of privacy, however, may be diminished in some circumstances. It is lower for a student attending school than it would be in other circumstances because students know that teachers and school authorities are responsible

for providing a safe school environment and maintaining order and discipline in the school. Students know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items.

A different standard should be applied to searches by school authorities. Teachers and principals are placed in a position of trust that carries the onerous responsibilities of teaching and of caring for the children's safety and well-being. In order to teach, school officials must provide an atmosphere that encourages learning. The possession of illicit drugs and dangerous weapons at school challenges the ability of school officials to fulfill their responsibility. Current conditions require that teachers and school administrators be provided with the flexibility needed to deal with discipline problems in schools and to be able to act quickly and effectively. One of the ways in which school authorities may be required to react reasonably is by conducting searches of students and seizing prohibited items. Where the criminal law is involved, evidence found by a teacher or principal should not be excluded because the search would have been unreasonable if conducted by the police.

Under the general rule established by this Court, a search to be reasonable requires prior authorization (usually a warrant) and reasonable and probable grounds for the search. A search conducted without prior authorization is *prima facie* unreasonable. To require that a warrant or any other prior authorization be obtained for the search would clearly be impractical and unworkable in the school environment. Teachers and principals must be able to react quickly and effectively to problems that arise in school, to protect their students and to provide the orderly atmosphere required for learning. Their role is such that they must have the power to search. Further, students' expectation of privacy will be lessened while they attend school or a school function. This reduced expectation of privacy coupled with the need to protect students and provide a positive

atmosphere for learning clearly indicate that a more lenient and flexible approach should be taken to searches conducted by teachers and principals than would apply to searches conducted by the police.

A search by school officials of a student under their authority need not be based upon reasonable and probable grounds. Rather, in these circumstances, a search may be undertaken if there are reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched. Searches undertaken in situations where the health and safety of students is involved may well require different considerations. All the circumstances surrounding a search must be taken into account in determining if the search is reasonable.

A teacher or principal should not be required to obtain a warrant to search a student and thus the absence of a warrant in these circumstances will not create a presumption that the search was unreasonable. A search of a student will be properly instituted in those circumstances where the teacher or principal conducting the search has reasonable grounds to believe that a school rule has been violated and the evidence of the breach will be found on the student. These grounds may well be provided by information received from just one student that the school authority considers credible. Alternatively the reasonable grounds may be based upon information from more than one student or from observations of teachers or principals, or from a combination of these pieces of information which considered together the relevant authority believes to be credible. The approach to be taken in considering searches by teachers may be summarized in this manner:

> (1) A warrant is not essential in order to conduct a search of a student by a school authority.

> (2) The school authority must have reasonable grounds to believe that there has been a breach of school regulations or discipline and that a search of a student would reveal evidence of that breach.
>
> (3) School authorities will be in the best position to assess information given to them and relate it to the situation existing in their school. Courts should recognize the preferred position of school authorities to determine if reasonable grounds existed for the search.
>
> (4) The following may constitute reasonable grounds in this context: information received from one student considered to be credible, information received from more than one student, a teacher's or principal's own observations, or any combination of these pieces of information which the relevant authority considers to be credible. The compelling nature of the information and the credibility of these or other sources must be assessed by the school authority in the context of the circumstances existing at the particular school.

The search conducted by school authorities must be reasonable, authorized by statute, and appropriate in light of the circumstances presented and the nature of the suspected breach of school regulations. The permissible extent of the search will vary with the gravity of the infraction that is suspected. The reasonableness of a search by teachers or principals in response to information received must be reviewed and considered in the context of all the circumstances presented including their responsibility for students' safety. The circumstances to be considered should also include the age and gender of the student.

The factors to be considered in determining whether a search conducted by a teacher or principal in the school environment was reasonable can be summarized in this manner:

1. The first step is to determine whether it can be inferred from the provisions of the relevant *Education Act* that teachers and principals are authorized to conduct searches of their students in appropriate circumstances. In the school environment such a statutory authorization would be reasonable.

2. The search itself must be carried out in a reasonable manner. It should be conducted in a sensitive manner and be minimally intrusive.

3. In order to determine whether a search was reasonable, all the surrounding circumstances will have to be considered.

This modified standard for reasonable searches should apply to searches of students on school property conducted by teachers or school officials within the scope of their responsibility and authority to maintain order, discipline and safety within the school. This standard will not apply to any actions taken which are beyond the scope of the authority of teachers or principals. Further, a different situation arises if the school authorities are acting as agents of the police where the normal standards will apply.

In the case at bar, the vice-principal was not acting as an agent of the police and the police officer himself did not carry out the search. The mere presence of the police officer was not sufficient to conclude that the officer was in fact the authority carrying out the search. The officer was at all times completely passive. The test applicable to searches conducted by teachers therefore applied. The search was by inference authorized by the provisions of the Nova Scotia *Education Act*. As a student the accused would have a reduced expectation of privacy. The vice-principal had reasonable grounds to believe that the accused was in breach of school regulations and that a search would reveal evidence of that breach. The search was conducted in a reasonable and sensitive manner. Taking into account all the circumstances, the search was not unreasonable and did not violate the accused's s. 8 rights.

This case dealt only with a search of students in an elementary or secondary school. No consideration has been given to searches made in a college or university setting.

The compelled attendance of a student at a principal's office or some other form of restraint by a school authority, even if it could be understood as falling within the strict terms of the definition of "detention", should not be considered as "detention" for the purposes of s. 10(*b*). This section was meant to apply to relations between individuals and the state, usually focused upon the investigation of a criminal offence, and not to relations between students and teachers. Its application in the school context is inappropriate and would lead to absurd results.

Per Major J. (dissenting): The actions of school officials as an extension of government are subject to the *Charter*. A student on school property has an expectation of privacy sufficient to engage s. 8 but that expectation is and should be lower than a member of the general public.

A warrantless search is *prima facie* unreasonable. To prove reasonableness, the Crown must demonstrate that the search was authorized by a reasonable law and carried out in a reasonable manner. A warrantless search can be justified if: (1) the information predicting the crime was compelling; (2) the source was credible; and (3) the information was corroborated. These factors should not be applied as strictly to searches conducted by school officials acting *qua* school officials.

Here, the vice-principal, because of the school policy requiring the school authorities to contact the police when a student was found in possession of drugs, was acting as a *de facto* agent of the police. The search as conducted therefore required that the accused be given his *Charter* protections. Further, the circumstances of the search breached s. 8 as they failed to meet the standards necessary for a valid search. The vice-principal, as a police agent, did not investigate to corroborate the information that he received; he acted solely on the word of the informants. Had the vice-principal been

acting as vice-principal, he could have lawfully conducted the search because of the modified standard of reasonableness governing searches by school officials.

In determining whether evidence obtained in breach of the *Charter* should be admitted under s. 24(2) of the *Charter*, trial fairness, the seriousness of the breach and the effect that excluding the evidence would have on the repute of the administration of justice must be considered. Given that the accused was detained by the vice-principal and felt that he had to comply with the requests of the vice-principal and police officer, the evidence was conscriptive. Its admission would adversely affect trial fairness and accordingly it should be excluded under s. 24(2) of the *Charter*.

Cases Cited

By Cory J.

Applied: *R. v. Broyles*, [1991] 3 S.C.R. 595; **considered:** *R. v. J.M.G.* (1986), 56 O.R. (2d) 705; *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), aff'g 94 N.J. 331 (1983); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; **referred to:** *R. v. Debot*, [1989] 2 S.C.R. 1140; *R. v. Simmons*, [1988] 2 S.C.R. 495; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *R. v. Edwards*, [1996] 1 S.C.R. 128; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Wong*, [1990] 3 S.C.R. 36; *Zamora v. Pomeroy*, 639 F.2d 662 (1981); *People v. Overton*, 301 N.Y.S.2d 479 (1969); *State in Interest of T.L.O. v. Engerud*, 94 N.J. 331 (1983), aff'd 469 U.S. 325 (1985); *Cloutier v. Langlois*,

[1990] 1 S.C.R. 158; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Bartle*, [1994] 3 S.C.R. 173.

By Major J. (dissenting)

R. v. Broyles, [1991] 3 S.C.R. 595; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Debot*, [1989] 2 S.C.R. 1140; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Belnavis*, [1997] 3 S.C.R. 341; *R. v. Evans*, [1996] 1 S.C.R. 8.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 10(*b*), 24(2), 32(1).

Education Act, R.S.N.S. 1989, c. 136, s. 54(b), (g).

Education Act, General Regulations, N.S. Reg. 226/84, s. 3(7), (9).

Narcotic Control Act, R.S.C., 1985, c. N-1, s. 11 [rep. 1996, c. 19, s. 94].

Authors Cited

Fischer, Thomas C. "From *Tinker* to *TLO*; Are Civil Rights for Students 'Flunking' in School?" (1993), 22 *J. L. & Education* 409.

Sanchez, J. M. "Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After *T.L.O.*" (1992), 21 *J. L. & Education* 381.

APPEAL from a judgment of the Nova Scotia Court of Appeal (1997), 159 N.S.R. (2d) 321, 7 C.R. (5th) 1, [1997] N.S.J. No. 144 (QL), allowing a Crown appeal from a judgment of Dyer J.F.C. Appeal dismissed, Major J. dissenting.

Mona Lynch and *Cathy Benton*, for the appellant.

Ivan G. Whitehall, Q.C., and *Paula Taylor*, for the respondent.

The judgment of Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ. was delivered by

//*Cory J.*//

1 CORY J. -- Teachers and those in charge of our schools are entrusted with the care and education of our children. It is difficult to imagine a more important trust or duty. To ensure the safety of the students and to provide them with the orderly environment so necessary to encourage learning, reasonable rules of conduct must be in place and enforced at schools. Does the nature of the obligations and duties entrusted to schools justify searches of students? To what extent are students entitled to an expectation of privacy while they are on school premises? These questions must be considered in this appeal.

2 This case involves a search by a junior high school vice-principal of a 13-year-old student. A small quantity of marijuana was found in the search and the student was charged with possession of a narcotic.

3 In order to decide whether the evidence found in the search should have been excluded at the appellant's trial, it must be determined when and in what circumstances a search by a school official should be considered unreasonable and therefore in violation of the student's rights under the *Canadian Charter of Rights and Freedoms*. The question presents potentially conflicting values and principles. On one hand, it is

essential that school authorities be able to react swiftly and effectively when faced with a situation that could unreasonably disrupt the school environment or jeopardize the safety of the students. Schools today are faced with extremely difficult problems which were unimaginable a generation ago. Dangerous weapons are appearing in schools with increasing frequency. There is as well the all too frequent presence at schools of illicit drugs. These weapons and drugs create problems that are grave and urgent. Yet schools also have a duty to foster the respect of their students for the constitutional rights of all members of society. 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. How should the appropriate balance of these values be achieved?

I. Factual Background

4 The search at issue in this case was conducted by Mr. Cadue, the vice-principal of a junior high school. Mr. Cadue was responsible for enforcing school policies, which included a policy that any student found in possession of drugs or alcohol on school property would be suspended. If the vice-principal concluded that a criminal matter was involved, he was to call the RCMP.

5 Mr. Cadue testified that he had been told by several students that the appellant was selling drugs on school property. He said he had reason to believe this information because the students knew the appellant well and one of them had, on an earlier occasion, given him information which had proven to be correct. On this day, a school dance was to be held and Mr. Cadue was responsible for its supervision. Earlier in the day he had been told by one of the informants that he believed the appellant would be carrying drugs that evening.

6 When Mr. Cadue saw the appellant arrive at the dance, he called the RCMP to request that an officer attend at the school. He then approached the appellant and his friend and asked them to come to his office. He asked each of the students if they were in possession of drugs and advised them that he was going to search them. The RCMP officer, Constable Siepierski, then arrived, dressed in plain clothes. He spoke briefly with Mr. Cadue outside the room, then entered, identified himself to the two boys and sat down. He did not say anything while Mr. Cadue spoke to the students and searched them. The appellant turned out his pockets and at the request of Mr. Cadue, pulled up his pant legs. The vice-principal noticed a bulge in the appellant's sock and removed a cellophane bag. He gave the bag to Constable Siepierski who identified the contents as marijuana. The Constable then advised the appellant that he was under arrest for possession of a narcotic and read to him the police caution and his right to counsel. The Constable also advised him that he had the right to contact a parent or adult. The appellant attempted unsuccessfully to reach his mother by phone and stated that he did not wish to contact anyone else. Constable Siepierski and the appellant then went to the appellant's locker and searched it but nothing was found there.

7 At trial, the judge concluded that the search had violated the appellant's rights under the *Charter* and excluded the evidence found in the search. The Crown did not offer any further evidence, and the charge against the appellant was dismissed. The Court of Appeal allowed the Crown's appeal and ordered a new trial. Thereafter, leave to appeal to this Court was granted.

II. Relevant Statutory Provisions

Canadian Charter of Rights and Freedoms

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

10. Everyone has the right on arrest or detention

. . .

(*b*) to retain and instruct counsel without delay and to be informed of that right; . . .

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.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Education Act, R.S.N.S. 1989, c. 136

54 It is the duty of a teacher in a public school to

. . .

(b) maintain proper order and discipline in the school or room in his charge and report to the principal or other person in charge of the school the conduct of any pupil who is persistently defiant or disobedient;

. . .

(g) give constant attention to the health and comfort of the pupils, to the cleanliness, temperature, and ventilation of the school rooms, and to the aesthetic condition of the rooms, grounds and buildings;

Education Act, General Regulations, N.S. Reg. 226/84

3 . . .

(7) A principal is responsible to the school board through the superintendent of schools and is responsible for:

(a) supervising and administering the educational program in the school as directed by the school board through the superintendent;

(b) implementing and co-ordinating a curriculum;

(c) supervising and evaluating staff and programs;

(d) developing effective communication with parents.

. . .

(9) A vice-principal is responsible for:

(a) assisting the principal in carrying out his duties as directed by the school board or the principal;

(b) assuming the duties of the principal in his absence.

III. Judicial History

A. *Halifax Family Court*

9 Dyer J.F.C. held that the appellant's rights under ss. 8 and 10(*b*) of the *Charter* had been violated and that the evidence should be excluded pursuant to s. 24(2).

10 He found that the actions of the vice-principal were aimed at potential arrest and criminal charges, not merely administrative sanctions. He found that there was an agreed strategy between Mr. Cadue and Constable Siepierski that Cadue would conduct the search with a view to the officer's laying a possession charge if the search was productive. At the time of the search, a criminal investigation "was in full flight". Dyer J.F.C. found that Mr. Cadue became an agent of the police. Although he may have been initially acting within his administrative powers, "a different state of affairs exists when a conscious decision is taken, not just to invoke in-house remedies, but to apply the full force of the criminal law including actual police attendance and to lay formal charges if a search is fruitful".

11 As a result, Dyer J.F.C. distinguished this case from *R. v. J.M.G.* (1986), 56 O.R. (2d) 705, in which a school principal had acted without police assistance or intervention. There the search had been found to be justified, but Dyer J.F.C. here found that a different standard of conduct was imposed by the fact of actual police intervention before the search.

12 He found that the appellant was detained in law, if not at the time of the initial intervention by Mr. Cadue, at least upon police intervention before the search commenced. He disagreed with the court in *J.M.G.* that students are already under a detention of a kind throughout their school attendance and this overrides traditional concepts of detention for *Charter* purposes. In any case, he would not hold that police officers, when they intervene, should only be held to the lower standard of school officials. The appellant would have had the right to be informed of the right to retain and instruct counsel in any other situation. This requirement should not be ignored merely because of the school setting.

13 He noted that it was conceded that the search was warrantless and therefore was *prima facie* unreasonable. He found that the search of the appellant's person was intrusive, going to personal integrity and privacy. In his view, the appellant did not give up his rights to privacy and other legal rights by virtue of his school enrolment.

14 Dyer J.F.C. held that the evidence should be excluded under s. 24(2) of the *Charter*. He noted that the jurisprudence suggested that real evidence will generally be admissible. He thought that this case could be distinguished from the "major drug cases" and did not accept the argument that the drug cases support a presumption of admissibility. He concluded that there were several *Charter* violations, despite ample opportunity for compliance, and that the violations were more than trifling. It was his opinion that the exclusion of the evidence would not bring the administration of justice into disrepute. Therefore, he was satisfied that exclusion was the appropriate remedy.

B. *Nova Scotia Court of Appeal* (1997), 159 N.S.R. (2d) 321

15 Pugsley J.A., with whom Chipman and Roscoe JJ.A. concurred, stated at para. 25 that "[c]ogent arguments could be made" that Cadue was exercising a government function as an educational state agent, and that the *Charter* restricted the scope of Cadue's actions taken pursuant to the *Education Act*. However, since no evidence or submissions had been directed to the issue of the application of the *Charter*, Pugsley J.A. considered it to be inappropriate to come to a conclusion on this issue, and assumed, for the purposes of the appeal, that the *Charter* did apply.

16 Pugsley J.A. noted that the rights in s. 8 applied to cases where persons had a reasonable expectation of privacy, and this expectation depends on the context. He stated that the rights of young students must be interpreted in light of the important

function of education in society and society's interest in ensuring that children attend a safe educational environment. This safe environment can only be maintained if school officials and staff have the authority to ensure proper order and discipline, including protection from those trafficking in drugs. The principal and staff do not have express authority under the *Education Act* for search and seizure, but do have the statutory responsibility for maintaining proper order and discipline, attending to the health and comfort of students, and supervising and administering the educational program of the school.

17 Similar provisions in the Ontario *Education Act* were noted in *J.M.G., supra*, in determining the reasonableness of a search by a school principal. There, the Ontario Court of Appeal approved the lower standard applicable in a school setting set out by the U.S. Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). This standard requires two criteria to be met: first, that the action was "justified at its inception" and second, that the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

18 Pugsley J.A. agreed with the Ontario Court of Appeal's reliance on the U.S. Supreme Court decision in this context. He found that the evidence in this case meets both criteria of the *T.L.O.* test. Cadue had received reliable information which required appropriate action, and the search was "reasonably related in scope" because it was conducted in private and was not overly intrusive. Pugsley J.A. thought that the trial judge had erred in failing to consider the factors that prompted Cadue to question and search the appellant. According to *R. v. Debot*, [1989] 2 S.C.R. 1140, a Court should consider whether the information predicting the criminal offence was compelling, whether the source was credible, and whether the information was corroborated by police investigation prior to the search.

19 Pugsley J.A. found that the first two factors were satisfied here and the third factor was not an essential prerequisite in a school setting. The consideration of the totality of circumstances should involve a consideration of the reasonable expectation of privacy "enjoyed by junior high students in the face of the societal interest of maintaining a safe environment in schools" (p. 331). Pugsley J.A. noted that this Court has recognized that persons should expect a lesser degree of privacy when they pass through border controls (*R. v. Simmons*, [1988] 2 S.C.R. 495) and in the context of regulatory matters (*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3).

20 Pugsley J.A. noted that the search here was only of the exterior of the appellant's person, not a highly invasive search such as a strip and body cavity search. He thought the age and sex of the student might also be relevant, and here the search was not conducted by a male teacher on a young female student. Taking into account all the factors, he found that the search was reasonable and the appellant's reasonable expectation of privacy in a school setting was not infringed.

21 The trial judge's finding that the vice-principal was acting as an agent for the police was examined and rejected. Mere police presence, without a pre-arranged plan or instruction by the police, was insufficient to make Mr. Cadue an agent of the police. In his opinion, it was clear from the evidence that the request to attend Cadue's office, the questioning and search, would have occurred in any event if Constable Siepierski had not been present. Therefore the only remaining issue under s. 8 was whether the subsequent seizure of the evidence by Constable Siepierski caused the initial search and seizure to become unreasonable. He found that even if there was a seizure

by the police officer, it had been lawful and therefore concluded that the appellant's rights under s. 8 had not been infringed.

22 With respect to s. 10 of the *Charter*, Pugsley J.A. first considered whether the appellant was detained by Cadue within the meaning of s. 10. He again noted that the extent of the appellant's right to counsel was defined by the context in which that right was asserted, namely as a student in a junior high school. He followed, at p. 338, the analysis of the Ontario Court of Appeal in *J.M.G.* (at pp. 711-12) that a student is already "under detention of a kind throughout his school attendance" and the actions taken were merely part of maintaining order and discipline in the school, and concluded that there was no detention by the vice-principal.

23 The second question was whether the appellant was detained by Constable Siepierski. Pugsley J.A. found, at p. 339, that it "was not until Cst. Siepierski determined the nature of the contents of the plastic bag that a detention occurred", and this detention was immediately followed by giving the appellant his s. 10(*b*) rights. Alternatively, he found that even if the trial judge was correct that there was a detention and violation of the right to counsel, this violation did not affect the reasonableness of the search. This was not a case where the advice of counsel would have had any effect on the discovery of the evidence.

IV. Analysis

A. *Application of the Charter*

(1) Application of the *Charter* to Public School Authorities

24 At the outset it must be determined whether the *Charter* applies to the actions of the vice-principal. The courts below assumed that it does, as have other courts in similar circumstances (e.g., *J.M.G.*, *supra*). The respondent in this appeal did not dispute that the *Charter* should apply, arguing only that the *Charter* analysis should take into account the school context. The appellant submitted that the *Charter* applies because the school board, schools and their employees are part of the apparatus of government, according to the test set out by this Court in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229. It was suggested that schools and schools boards are analogous to the community college which was found to be part of government in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. The alternative submission was that because the actions of the vice-principal were taken under the authority of the *Education Act*, R.S.N.S. 1989, c. 136, the *Charter* applies, following *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

25 In light of the concession made by the respondent it would be inappropriate to discuss and determine finally which of the alternative submissions should be applied. Rather it would be best to assume simply, for the purposes of this case, that schools constitute part of government and as a result the *Charter* applies to the actions of the vice-principal.

(2) Was the Vice-Principal Acting as an Agent of the Police?

26 The trial judge in this case also found that the vice-principal was acting as an agent of the police. This finding, if accepted, would not only provide an alternative basis for the application of the *Charter* but would also affect the analysis of the alleged violations. The appellant submits that the finding of the trial judge on this issue should not be disturbed. Generally, a finding such as this would not be interfered with by an appellate court. However, in this case, the evidence adduced cannot support that finding and it should not be accepted.

27 It is clear that Mr. Cadue cooperated with the police. He was aware that if drugs were found it would be a criminal matter as well as a matter of school discipline, and that it was the policy of the school to contact the police in such a case. He called the police before beginning the search and permitted an officer to observe as he conducted the search. When the marijuana was found, it was handed over to Constable Siepierski, who arrested the appellant and conducted a further search of the appellant's locker.

28 The mere fact that there was cooperation between the vice-principal and the police and that an officer was present during the search is not sufficient to indicate that the vice-principal was acting as an agent of the police. The trial judge stated that there was an "agreed strategy" between Mr. Cadue and Constable Siepierski that resulted in Mr. Cadue's acting as a police agent. With respect, there is no evidence to support this conclusion. There is no evidence of an agreement or of police instructions to Mr. Cadue that could create an agency relationship.

29 The issue as to whether an individual is acting as an agent of the police was considered by this Court in *R. v. Broyles*, [1991] 3 S.C.R. 595. While that case involved

a police informer, the essential elements of the test applied in that case are equally applicable to the case at bar. There it was said at p. 608:

> Only if the relationship between the informer and the state is such that the exchange between the informer and the accused is materially different from what it would have been had there been no such relationship should the informer be considered a state agent for the purposes of the exchange. . . . [W]ould the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?

Applying the test to this case, it must be determined whether the search of the appellant would have taken place, in the form and in the manner in which it did, but for the involvement of the police. The evidence, in my opinion, demonstrates that it would have taken place and was not materially different than it would have been if there had been no police involvement. Although Mr. Cadue knew that criminal charges might result, the primary motive for the search was the enforcement of school discipline, for which he was responsible. There is nothing in the evidence to suggest that the vice-principal initiated the search or conducted it differently because of police intervention. It is thus apparent that the vice-principal was not acting as an agent of the police.

30 This conclusion is not determinative with respect to the application of s. 8 since the *Charter* applies, in any event, to the actions taken by Mr. Cadue. However, the finding that he was not an agent of the police will affect the analysis of the alleged violation of the appellant's *Charter* rights.

B. *Were the Rights of the Appellant Under Section 8 of the Charter Violated?*

(1) Reasonable Expectation of Privacy

31 Did the appellant have, in the circumstances presented, a reasonable expectation of privacy, and if he did, what was the extent of that expectation? The appellant must first establish that in the circumstances he did have a reasonable expectation of privacy. This is apparent because if there is no reasonable expectation of privacy held by an accused with respect to the relevant place, there can be no violation of s. 8 (see, e.g. *R. v. Edwards*, [1996] 1 S.C.R. 128; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841). 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). A reasonable expectation of privacy is to be determined in light of the totality of circumstances (*Colarusso*; *Edwards*, at para. 31; *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 62). The factors to be considered in assessing the circumstances may include the accused's presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of a subjective expectation of privacy, and the objective reasonableness of the expectation (*Edwards*, at para. 45).

32 Here the search was of the appellant's person. In the circumstances it is obvious that some of the factors referred to in *Edwards* are not applicable. However, the existence of a subjective expectation of privacy and the objective reasonableness of that expectation remain important. It is also necessary to consider the context in which the search took place. Here the appellant was a student at the school, attending a school function held on school property. The search was carried out by the school authority

responsible for supervision of that function. Considering all these factors, did the appellant have a reasonable expectation of privacy with respect to his person and the items he carried on his person? In my view he did. A student attending school would have a subjective expectation that his privacy, at least with respect to his body, would be respected. In light of the heightened privacy interest that has historically been recognized in one's person, a subjective expectation of privacy in that respect is reasonable. I do not think that this expectation is rendered unreasonable merely by virtue of a student's presence in a school. It follows that the appellant did have a reasonable expectation of privacy in that regard, with the result that s. 8 is engaged.

33 However, the reasonable expectation of privacy, although it exists, may be diminished in some circumstances, and this will influence the analysis of s. 8 and a consideration of what constitutes an unreasonable search or seizure. For example, it has been found that individuals have a lesser expectation of privacy at border crossings, because they know they may be subject to questioning and searches to enforce customs laws (see *Simmons, supra*). It was because of this lesser expectation of privacy, that a customs search did not have to meet the standards in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, in order to be reasonable. Similarly, 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.

34 In some cases a court may be required to determine with greater precision whether and to what extent a student has a reasonable expectation of privacy in the location of the search. In the case of locker searches, for example, courts have engaged in more detailed factual analyses to determine the degree of control that school authorities maintain over the lockers and the effect that this may have on the reasonable expectation of privacy and the reasonableness of the search (see, e.g., *Zamora v. Pomeroy*, 639 F.2d 662 (1981); *People v. Overton*, 301 N.Y.S.2d 479 (1969); *State in Interest of T.L.O. v. Engerud*, 94 N.J. 331 (1983), aff'd 469 U.S. 325 (1985)). Here there was a search of the appellant's locker. However, since no evidence was found there, the lawfulness of that search is not in issue. For the purposes of these reasons the findings that the appellant did have a reasonable expectation of privacy with respect to his person, but that he would have reasonably expected a lesser degree of privacy in a school environment, will suffice. They may be taken into account in defining the standard to be applied to the search of the appellant.

(2) Standard to Be Applied to Searches by School Authorities

(a) *Is a Different Standard Required?*

35 Teachers and principals are placed in a position of trust that carries with it onerous responsibilities. When children attend school or school functions, it is they who must care for the children's safety and well-being. It is they who must carry out the fundamentally important task of teaching children so that they can function in our society and fulfil their potential. In order to teach, school officials must provide an atmosphere that encourages learning. During the school day they must protect and teach our children. In no small way, teachers and principals are responsible for the future of the country.

36 It is essential that our children be taught and that they learn. Yet, without an orderly environment learning will be difficult if not impossible. 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. Current conditions make it necessary to provide teachers and school administrators with the flexibility required to deal with discipline problems in schools. They must be able to act quickly and effectively to ensure the safety of students and to prevent serious violations of school rules.

37 One of the ways in which school authorities may be required to react reasonably to discipline problems is by conducting searches of students and to seize prohibited items. Possession of items which are prohibited by school policy may, in

some cases, also constitute or provide evidence of a criminal offence. As a result items found in a search by a school authority may be sought to be used as evidence in a criminal trial. The question then arises whether evidence found by a teacher or principal should potentially be excluded because the search would have been unreasonable if it had been conducted by police.

38 The United States Supreme Court considered this question in *T.L.O.*, *supra*. In that case, the assistant vice-principal of a high school searched the purse of a student suspected of smoking in the school lavatory, contrary to school rules. The student had denied that she even smoked, and the assistant vice-principal searched her purse, apparently to ascertain the truth of this claim. He found a package of cigarettes, and upon removing them, saw a package of cigarette rolling papers in the purse. This made him suspect drug use, and so he proceeded to make a thorough search of the purse. He found some marijuana, a pipe, plastic bags, a fairly substantial amount of money, a list of students who owed the student money, and letters implicating her in marijuana trafficking. Delinquency charges were brought against the student and a motion was brought to suppress the evidence found in her purse.

39 It was held that the Fourth Amendment's prohibition of unreasonable searches and seizures does apply to searches carried out by public school officials. It was also found, at pp. 338-39, that students in schools may claim a legitimate expectation of privacy. However, in the opinion of the majority, "[a]gainst the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds" (p. 339). Therefore, the Court held, at p. 340, that the school setting "requires some easing of the restrictions to which searches by public authorities are ordinarily subject". In particular, the warrant requirement is "unsuited to the school environment", and thus school officials need not

obtain a warrant before searching a student who is under their authority (*idem*). In addition, it found that the school setting "also requires some modification of the level of suspicion of illicit activity needed to justify a search" (*idem*).

40 The Court noted that "'probable cause' is not an irreducible requirement of a valid search" and that it had not hesitated in the past to adopt a lesser standard when it would best serve the public interest. Consequently, the court articulated the following test to be used in determining whether a search by a school official was reasonable (at pp. 341-43):

> We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," *Terry v. Ohio*, 392 U.S., at 20, 88 S.Ct., at 1879; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.
>
> . . . By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense.

Applying this test, the majority of the Court found that the search conducted by the assistant vice-principal was not unreasonable.

41 The Ontario Court of Appeal in *J.M.G.*, *supra*, adopted the test articulated by the U.S. Supreme Court in *T.L.O.* In that case, a school principal, acting on information received from a teacher, brought a student to his office, searched him and found a small packet of marijuana hidden in his sock or pant leg. He then called a police officer, with whom he had spoken earlier. The officer came and arrested the student for possession of a narcotic. The Ontario Court of Appeal applied the test from *T.L.O.* and found that the search was justified at its inception (at p. 709). Once he had received information that a student was concealing drugs on a particular part of his person, it was not unreasonable for the principal to require the student to remove his socks to prove or disprove the allegation. The search was "reasonably related to the desirable objective of maintaining proper order and discipline" (*idem*). The Court also found that the search was not excessively intrusive (*idem*). It was noted that in Canada the law generally requires a warrant or other prior authorization. However, the Court thought that the relationship between the principal and student was different from that between a police officer and a citizen, and that "society as a whole has an interest in the maintenance of a proper educational environment, which clearly involves being able to enforce school discipline efficiently and effectively" (at p. 710). It was therefore held to be "neither feasible nor desirable" that prior authorization be required in the case of a principal searching a student (at p. 711).

42 The Court of Appeal in this case followed *J.M.G.* and applied the *T.L.O.* test. The test established in *T.L.O.* dispenses not only with the warrant requirement but also with the need for probable cause, imposing instead a generalized standard of reasonableness in all the circumstances. However it must be observed that this test has been subject to criticism in the United States (see, e.g., J. M. Sanchez, "Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After *T.L.O.*" (1992), 21 *J. L. & Education* 381; Thomas C. Fischer, "From *Tinker* to *TLO*; Are Civil

Rights for Students 'Flunking' in School?" (1993), 22 *J. L. & Education* 409). Nonetheless in my view the test set out in *T.L.O.* can be applied in the elementary and secondary school setting in Canada. Significantly the same result reached in *T.L.O.* can be obtained by applying principles to be derived from decisions of this Court which have considered the *Charter*.

43 In Canada, the need to establish the existence of reasonable and probable grounds for the search provide the required minimum constitutional guarantee of reasonableness in all but a few very limited exceptions. Nonetheless, the question remains, should this standard be required in the school setting?

(b) *What Standard Should Be Applied?*

44 The general rule, established by this Court in *Hunter*, *supra*, is that in order to be reasonable, a search requires prior authorization, usually in the form of a warrant, from a neutral arbiter (at pp. 160-62). According to this rule, a search conducted without prior authorization is *prima facie* unreasonable. However, the Court recognized in *Hunter*, at p. 161, that "it may not be reasonable in every instance to insist on prior authorization". Prior authorization is a precondition for a reasonable search where it is feasible to obtain it (*idem*). Further it was acknowledged that it might be appropriate to dispense with the warrant requirement in situations where it is not feasible to obtain prior authorization.

45 In my opinion the search of a student by a school authority is just such a situation where it would not be feasible to require that a warrant or any other prior authorization be obtained for the search. To require a warrant would clearly be impractical and unworkable in the school environment. Teachers and administrators

must be able to respond quickly and effectively to problems that arise in their school. When a school official conducts a search of or seizure from a student, a warrant is not required. The absence of a warrant in these circumstances will not lead to a presumption that the search was unreasonable.

46 The other basic principle enunciated in the *Hunter* decision was that a reasonable search must be based on reasonable and probable grounds. It was held, at p. 167, that "[t]he state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion". Therefore, "reasonable and probable grounds . . . to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the *Charter*, for authorizing search and seizure" (p. 168). The requirement of reasonable and probable grounds has been maintained subject only to very limited exceptions (e.g., search incident to arrest; see *Cloutier v. Langlois*, [1990] 1 S.C.R. 158).

47 Yet teachers and principals must be able to act quickly to protect their students and to provide the orderly atmosphere required for learning. If a teacher were told that a student was carrying a dangerous weapon or sharing a dangerous prohibited drug the parents of all the other students at the school would expect the teacher to search that student. The role of teachers is such that they must have the power to search. Indeed students should be aware that they must comply with school regulations and as a result that they will be subject to reasonable searches. It follows that their expectation of privacy will be lessened while they attend school or a school function. This reduced expectation of privacy coupled with the need to protect students and provide a positive atmosphere for learning clearly indicate that a more lenient and flexible approach should

be taken to searches conducted by teachers and principals than would apply to searches conducted by the police.

48 A search by school officials of a student under their authority may be undertaken if there are reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched. Searches undertaken in situations where the health and safety of students is involved may well require different considerations. All the circumstances surrounding a search must be taken into account in determining if the search is reasonable.

49 School authorities must be accorded a reasonable degree of discretion and flexibility to enable them to ensure the safety of their students and to enforce school regulations. Ordinarily, school authorities will be in the best position to evaluate the information they receive. As a result of their training, background and experience, they will be in the best possible position to assess both the propensity and credibility of their students and to relate the information they receive to the situation existing in their particular school. For these reasons, courts should recognize the preferred position of school authorities to determine whether reasonable grounds existed for the search.

50 A teacher or principal should not be required to obtain a warrant to search a student and thus the absence of a warrant in these circumstances will not create a presumption that the search was unreasonable. A search of a student will be properly instituted in those circumstances where the teacher or principal conducting the search has reasonable grounds to believe that a school rule has been violated and the evidence of the breach will be found on the student. These grounds may well be provided by information received from just one student that the school authority considers credible.

Alternatively the reasonable grounds may be based upon information from more than one student or from observations of teachers or principals, or from a combination of these pieces of information which considered together the relevant authority believes to be credible. This approach to reasonable grounds in the school environment will permit school authorities to deal speedily and effectively with breaches of school regulations and disciplinary problems, which is so essential to providing a safe and positive environment for learning. Yet it will provide for the reasonable protection of students' rights. The approach to be taken in considering searches by teachers may be summarized in this manner:

> (1) A warrant is not essential in order to conduct a search of a student by a school authority.
>
> (2) The school authority must have reasonable grounds to believe that there has been a breach of school regulations or discipline and that a search of a student would reveal evidence of that breach.
>
> (3) School authorities will be in the best position to assess information given to them and relate it to the situation existing in their school. Courts should recognize the preferred position of school authorities to determine if reasonable grounds existed for the search.
>
> (4) The following may constitute reasonable grounds in this context: information received from one student considered to be credible, information received from more than one student, a teacher's or principal's own observations, or any combination of these pieces of information which the relevant authority considers to be credible. The compelling nature of the

> information and the credibility of these or other sources must be assessed by the school authority in the context of the circumstances existing at the particular school.

If this approach is followed it will permit school authorities to fashion remedies that are efficacious and flexible.

(c) *The Search Must Be Reasonable*

51 If it is to be reasonable the search must be conducted reasonably and must be authorized by a statutory provision which is itself reasonable. There is no specific authorization to search provided in the *Education Act*, R.S.N.S. 1989, or its regulations. Nonetheless, the responsibility placed upon teachers, and principals to maintain proper order and discipline in the school and to attend to the health and comfort of students by necessary implication authorizes searches of students. See s. 54(b) and Regulation 3(7) and (9). Teachers must be able to search students if they are to fulfil the statutory duties imposed upon them. It is reasonable, if not essential to provide teachers and principals with this authorization to search. It is now necessary to consider the circumstances in which the search itself may be considered to be reasonable.

52 The search conducted by school authorities must itself be reasonable and appropriate in light of the circumstances presented and the nature of the suspected breach of school regulations. The permissible extent of the search will vary with the gravity of the infraction that is suspected. For example, it may be reasonable for a teacher to take immediate action and undertake whatever search is required where there are reasonable grounds to believe that a student is carrying a gun or some other dangerous weapon. The existence of an immediate threat to the students' safety will justify swift, thorough and

extensive searches. That same type of search might not be justified where, for example, a student is reasonably believed to have gum which is prohibited by school regulations in his or her pocket. The reasonableness of a search by teachers or principals in response to information received must be reviewed and considered in the context of all the circumstances presented including their responsibility for students' safety.

53 The circumstances to be considered should also include the age and gender of the student. For example, a search of the person of a female student by a male teacher may well be inappropriate and unreasonable. Every search should be conducted in as sensitive a manner as possible and take into account the age and sex of the student. It should not be forgotten that the manner in which students are treated in these situations will determine their respect for the rights of others in the future.

54 The factors to be considered in determining whether a search conducted by a teacher or principal in the school environment was reasonable can be summarized in this manner:

1. The first step is to determine whether it can be inferred from the provisions of the relevant *Education Act* that teachers and principals are authorized to conduct searches of their students in appropriate circumstances. In the school environment such a statutory authorization would be reasonable.

2. The search itself must be carried out in a reasonable manner. It should be conducted in a sensitive manner and be minimally intrusive.

3. In order to determine whether a search was reasonable, all the surrounding circumstances will have to be considered.

(d) *When and to Whom Does This Standard Apply?*

55 This modified standard for reasonable searches should apply to searches of students on school property conducted by teachers or school officials within the scope of their responsibility and authority to maintain order, discipline and safety within the school. This standard will not apply to any actions taken which are beyond the scope of the authority of teachers or principals.

56 Further a different situation arises if the school authorities are acting as agents of the police. The application of the test set out in *Broyles*, *supra*, will determine whether the person conducting the search was a police agent. It will have to be determined whether the search would have taken place, in the form and in the manner in which it did, but for the involvement of the police. The usual standard, requiring prior authorization in the form of a warrant which is based upon information which provides reasonable and probable grounds, will continue to apply to police and their agents in their activities within a school. 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. Since the usual standard continues to apply to police actions, it must also apply to any agent of the police. There would obviously be a potential for abuse, were that not the case.

(3) Application to This Case

57 Was the search conducted in this case unreasonable? In my view it was not. As a result, there was no infringement of the appellant's rights under s. 8 of the *Charter*.

58 First, for the reasons set out earlier I am satisfied that Mr. Cadue was not acting as an agent of the police. The mere fact that there was some cooperation between the vice-principal and the police, since both knew that criminal charges might result, is not sufficient to establish an agency relationship. Quite simply, there is no evidence of any agreement between Mr. Cadue and Constable Siepierski, nor is there anything to indicate that Mr. Cadue was acting under the instructions of the police. He brought the appellant to his office and initiated the search with the primary purpose of fulfilling his duty to maintain order and discipline in the school. The search was conducted within the scope of his authority as vice-principal to enforce discipline. That he knew that criminal proceedings might also result if drugs were found does not alter the situation. The search would have taken place in the same form and manner regardless of any police involvement. Therefore the vice-principal was not acting as a police agent and as a result the modified standard applicable to school authorities should govern the consideration of his search.

59 Nor can it be said that the police officer himself carried out the search and that the usual higher standard should therefore apply. The police officer was present when the search took place, but took no active part whatsoever in the search. His presence was merely passive, up until the point when the drugs were found and given to him, and the arrest was made. If the police officer had in some manner, taken an active role in the search, the application of different considerations would be required. However that is not the situation presented in this case.

60 It was further argued that the mere presence of the police officer was sufficient to conclude that the officer was in fact the authority carrying out the search. That contention flies in the face of the evidence and cannot be accepted. The officer was at all times completely passive. It cannot be forgotten that on occasion a secondary school student may be larger and more powerful than the teacher who must in the interests of the safety of other students conduct the search. No doubt in these circumstances, if financial resources permitted it, a security officer might be employed by the school and would, unless violence was threatened, be present and sit passively in the office. His presence would not affect the validity of the search. There should be no difference if it is a police constable who is present as long as that constable remains passive during the search. In this case the student in his testimony expressed the opinion that Mr. Cadue was the "boss", that it was his school. This serves to confirm that in the eyes of the accused the Constable took no part in the search.

61 As a result, the test applicable to searches conducted by teachers applies to the search carried out by Mr. Cadue of the appellant's person. The absence of a warrant, therefore, does not mean that the search was *prima facie* unreasonable. Two additional matters need to be considered. First, it must be determined whether the vice-principal had reasonable grounds to believe that a school rule had been or was being violated, and that evidence of this violation would be found on the appellant's person. Second, it must be decided whether the search was conducted in a reasonable manner.

62 Mr. Cadue had received information from several students indicating that the appellant possessed marijuana and was trafficking in it on the school grounds. He thought that this information was reliable because these students knew the appellant well. One of the students had given him accurate information on a previous occasion.

None of this information had been corroborated by his own observations, but this corroboration will not always be necessary. In this case the information came from a number of sources which the vice-principal had reason to believe were credible. On the day of the search, he had received specific information that the appellant would be carrying drugs that evening. This would have provided him with reasonable grounds to believe that he would find marijuana, a prohibited substance, if he searched the appellant's person at that time. Taking into account all of these factors, the requirement of the existence of reasonable grounds was satisfied in this case.

63 The search undertaken by Mr. Cadue was conducted reasonably. It took place in the relative privacy of the principal's office. The search conducted was appropriate to the offence of possession of a prohibited substance Mr. Cadue reasonably believed was in the possession of M.R.M. The search was minimally intrusive and was carried out in an appropriately sensitive manner.

64 In summary, the search was by inference authorized by the provisions of the Nova Scotia *Education Act*. A provision to search students in appropriate circumstances is reasonable in the school environment. As a student M.R.M. would have a reduced expectation of privacy. Mr. Cadue had reasonable grounds to believe M.R.M. was in breach of school regulations and that a search would reveal evidence of that breach. The search was conducted in a reasonable and sensitive manner. Taking into account all the circumstances I am satisfied that the search was not unreasonable and in the circumstances there was no violation of M.R.M.'s s. 8 rights. In meeting these requirements the search as well meets all the conditions of the test set out in *T.L.O.* It should be noted that this case deals only with a search of students in an elementary or secondary school. No consideration has been given to searches made in a college or university setting.

C. *Were the Rights of the Appellant Under Section 10(b) of the Charter Violated?*

65 The appellant further submits that he was detained when Mr. Cadue took him to his office, and since he was not informed of his right to counsel at that time, his rights under s. 10(*b*) of the *Charter* were also violated. I cannot accept this submission.

66 The appellant testified that he felt he had no choice but to follow the vice-principal to his office and remain there. There is no doubt that he felt that he was under some measure of compulsion. Within the school students must often feel compelled to obey school rules and the instructions of their teachers and principals. Students may often be told by teachers to go to a certain location and to wait there for further instructions. Yet the school environment requires that this be done. It does not mean that the students were detained within the meaning of s. 10(*b*).

67 Detention has been defined to include a "deprivation of liberty by physical constraint" or "when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel" (*R. v. Therens*, [1985] 1 S.C.R. 613, at p. 642). Even if the compelled attendance of a student at a principal's office or some other form of restraint by a school authority could be understood as falling within the strict terms of the definition of "detention" set out in *Therens*, it should not be considered as "detention" for the purposes of s. 10(*b*). In my view that section was not meant to apply to relations between students and teachers, but rather to relations between individuals and the state, usually focused upon the investigation of a criminal offence. The right to counsel provided in s. 10(*b*) was designed to address the vulnerable position of an individual who has been detained by the coercive power of the state in the

course of a criminal investigation, and is thus deprived of his or her liberty and placed at risk of making self-incriminating statements (*R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 191). Its application in the school context is inappropriate and would lead to absurd results. As a result, there was no detention for *Charter* purposes in this case, and thus no violation of s. 10(*b*) can be found.

68 Once again, it must be stated that if the vice-principal had been acting as an agent of the police, or if the police officer himself had taken any active role in detaining the appellant, it might well be that the appellant was detained within the meaning of s. 10(*b*). However, on the facts presented in this case, the appellant was not detained prior to his arrest by Constable Siepierski. He was properly cautioned and instructed as to his right to counsel at the time of the arrest. Therefore, I find that there was no violation of the appellant's s. 10(*b*) rights.

V. Disposition

69 In the result the appeal is dismissed.

The following are the reasons delivered by

//*Major J.*//

70 MAJOR J. (dissenting) -- I agree with many of the conclusions reached by Cory J.

71 In particular, I agree that the actions of school officials as an extension of government are subject to the *Canadian Charter of Rights and Freedoms.* I agree that

a student on school property has an expectation of privacy sufficient to engage s. 8 but that expectation is and should be lower than a member of the general public.

72 It is self-evident that school authorities must have the ability to provide a safe haven for students that creates a proper learning environment. In order for that environment to exist a students' expectation of privacy is lessened by the *Education Act*, R.S.N.S. 1989, c. 136, to provide teachers and other school personnel with the ability to search lockers, desks and students. Students and parents know and accept these conditions upon enrolment.

73 I do not agree with Cory J. in his conclusion that the Nova Scotia Court of Appeal was correct in reversing the trial judge and concluding that the vice-principal in this appeal was not acting as an agent of the police at the time he conducted the search of the appellant. The trial judge had found that the vice-principal at the critical time was acting as an agent of the police. There was evidence upon which the trial judge could reach that conclusion and neither the Court of Appeal of Nova Scotia or this Court should interfere with that finding. In the result, it is my opinion that the vice-principal, if acting as vice-principal, could have lawfully conducted the search he did. However, as he was acting as an agent of the police, the search as conducted required the appellant to be given his *Charter* protections.

74 These reasons will not interfere with the safe and orderly operation of schools. The risk of physical harm and the prevalence of alcohol and illegal drugs at some schools is a sad but well-known fact. The school staff have the ability to deal with these problems. If they elect to involve the police, which in many cases would be prudent, and if in doing so they elect to become agents of the police then the procedures prescribed for police investigations have to be followed.

Facts

75 The chronology and facts of this appeal are fully described in the reasons of Cory J.

Analysis

Issue 1

76 At trial Dyer J.F.C. held that Mr. Cadue, the vice-principal, was acting as an agent of Constable Siepierski when he searched the appellant and his companion for narcotics. He held:

> The present case involved a young person and a school official, initially. The police officer attended at Cadue's request, but allowed Cadue to conduct a personal search. I find there was an agreed strategy that Cadue conduct the search with a view to the officer laying a possession charge if the search was productive. By this stage a criminal investigation was in full flight. By virtue of this, I find that Cadue thereby became an agent of the police, notwithstanding outward appearances and the absence of a formal declaration of roles upon reentry of the office.

The Nova Scotia Court of Appeal overturned this finding of fact on the grounds that the available evidence could not support a finding of agency and that mere police presence was not sufficient to create an agency relationship: see *R. v. Broyles*, [1991] 3 S.C.R. 595. *Broyles* dealt with the use of a police informant and developed a test for determining when such an informant is an agent of the police. In determining when an informer is a state agent the question is (at p. 608): "would the exchange between the

accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?"

77 The *Broyles* test should be interpreted in light of the circumstances to which it is applied. The situation in the present appeal is clearly different from the police directing an informant to befriend an individual in order to gather information desired by the police. School officials who conduct searches will generally be conducting them on their own initiative and with a view to investigating the breach of school rules, not at the behest of the police to further a criminal investigation. School officials are generally not experienced in conducting searches and it is likely that the intervention or presence of a police officer will affect the nature of this type of search. It is disingenuous for the respondent to suggest that the presence of the police officer had no effect on the appellant's perception of the interrogation and subsequent search.

78 It is my opinion that the finding of the trial judge and inferences drawn from them should not be disturbed. The vice-principal and the police officer conferred outside of the principal's office prior to the vice-principal's conducting the search of the appellant. The trial judge could and reasonably did conclude that the vice-principal received instructions from the police officer on how to conduct the search. There was no evidence on the content of the conversation between the police officer and the vice-principal outside the office where the students were detained, but I agree with the trial judge that it stretches credulity to suggest that their meeting related to anything other than the reason for calling the police and how the search should be conducted.

79 Of particular significance is the testimony of the vice-principal that the school policy required him to contact the Royal Canadian Mounted Police ("RCMP") when a student was found in possession of drugs or alcohol if he believed the possession

was of a criminal nature. This policy, as worthwhile as it is, has the effect of making a school official a *de facto* agent of the police when and if the police engage the services of that person to conduct the subsequent investigation.

80 Our society calls upon its peace officers to ensure our safety; theirs is a dangerous occupation. The use of shortcuts by law enforcement officials will frequently be efficient but just as frequently may offend *Charter* rights as occurred here.

Issue 2

81 The search of the appellant was warrantless and therefore *prima facie* unreasonable: see *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145. In order to prove reasonableness, the Crown must demonstrate that: (1) the search was authorized by law; (2) the law authorizing the search was reasonable, and (3) that the manner in which the search was carried out was reasonable. The respondent submitted that the *Education Act* was the statute that authorized the vice-principal to search the appellant. However, if he was acting as an agent of the police he would have derived his power of search from the *Narcotic Control Act*, R.S.C., 1985, c. N-1 (now repealed). Section 11 of the *Narcotic Control Act* states:

> **11.** A peace officer may search any person found in a place entered pursuant to section 10 and may seize and, from a place so entered, take away any narcotic found therein, anything therein in which the peace officer reasonably suspects a narcotic is contained or concealed, or any other thing by means of or in respect of which that officer believes on reasonable grounds an offence under this Act has been committed or that may be evidence of the commission of such an offence.

82 This Court's decision in *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1168, provides guidance as to the criteria that should be considered in determining whether a warrantless search can be justified:

> (i) Was the information predicting the commission of a criminal offence compelling?
>
> (ii) If the information is based on a "tip" originating from a source outside the police, was that source credible?
>
> (iii) Was the information corroborated by police investigation prior to making the decision to conduct the search?

83 I agree with Cory J. that these factors should not be applied as strictly to searches conducted by school officials, but here the vice-principal was acting *qua* agent of the police, not in his capacity as school administrator. A modified standard of reasonableness does not govern the conduct of police or their agents merely because they conduct a search on school premises and that search was conducted in a manner that would be proper if conducted by the school personnel alone.

84 The circumstances of the search breached s. 8 as they failed to meet the standard set out in *Debot*. The vice-principal, as a police agent, did not investigate to corroborate the information that he received; he acted solely on the word of the informants. While it is not necessary that all three conditions of the *Debot* test be entirely satisfied, as a weakness in one component can be overborne by strengths in others, this search lacked a strong foundation in reasonableness. The "tips" were somewhat compelling, yet lacked precision as to where the appellant would be carrying

the drugs. Additionally, the vice-principal had limited dealings with one of the informants and none with the others. Consequently his ability to assess their credibility was limited.

Application of Section 24(2)

85 In determining whether evidence obtained in breach of the *Charter* should be admitted three categories are considered: trial fairness, seriousness of the breach and the effect that excluding the evidence would have on the repute of the administration of justice: see *R. v. Collins*, [1987] 1 S.C.R. 265. In both *R. v. Stillman*, [1997] 1 S.C.R. 607, and *R. v. Belnavis*, [1997] 3 S.C.R. 341, the Court outlined the analysis to be undertaken in determining whether evidence should be excluded pursuant to s. 24(2) of the *Charter*.

86 *Stillman* identified trial fairness as a consideration of fundamental importance and directed that evidence should be classified as conscriptive or non-conscriptive. At p. 655 Cory J. held:

> Evidence will be conscriptive when 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.

If the admission of the impugned evidence would render the trial unfair, the evidence must be excluded without consideration of the remaining s. 24(2) factors. Generally, conscriptive evidence derogates from the fairness of the trial.

87 The respondent took the position that the evidence in the present appeal should not be classified as conscriptive because the appellant merely did something that assisted the vice-principal in finding the narcotics. The respondent further argued that the evidence was real and most likely discoverable in any event as the vice- principal could have followed the appellant and waited for him to remove the drugs from his sock on his own accord: see *R. v. Evans*, [1996] 1 S.C.R. 8.

88 The appellant was detained by the vice-principal and felt that he had to comply with the requests of the vice-principal and police officer and therefore it is unreasonable to characterize the taking off of his shoes and lifting of his pant leg as merely assisting the vice-principal. These actions were essential to the discovery of the narcotics. Similarly, I am also not persuaded by the respondent's submission that the evidence would have inevitably been discovered had the vice-principal followed the appellant and waited for him to remove the narcotics from his sock. This is highly speculative given that the appellant might have left the dance without removing the narcotics from his sock.

89 In summary, I would classify the evidence in this case as conscriptive and conclude that its admission would adversely affect trial fairness. Given my above finding it is not necessary to consider the remaining s. 24(2) factors and accordingly I would exclude the evidence.

Disposition

90 In the result I would allow the appeal and restore the acquittal of the appellant.

Appeal dismissed, MAJOR J. *dissenting*.

Solicitor for the appellant: Nova Scotia Legal Aid, Halifax.

Solicitor for the respondent: The Attorney General of Canada, Ottawa.