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Case Note

***83** The Supreme Court of Canada Rules on the Use of Drug-Sniffing Dogs in Schools

Katie Rowen [FNa1]

R. v. M. (A.) [FN1]

Constitutional law--Criminal law--Search and seizure--Right to be free from unreasonable search and seizure--Reasonable suspicion--Whether reasonable grounds required beyond generalized suspicion of drug use in school--Whether evidence obtained in breach of *Charter* should be excluded--*Canadian Charter of Rights and Freedoms*, ss.8, 24(2).

In a recent landmark decision, the Supreme Court of Canada has held evidence obtained through the use of drug-sniffing dogs in a public high school inadmissible under section 8 of the *Canadian Charter of Rights and Freedoms*. [FN2]

In 2000, the principal of St. Patrick's High School in Sarnia, Ontario issued an open invitation to the Sarnia Police Service to bring its drug-sniffing dogs into the school to search for drugs. The school had a “zero tolerance” policy for the possession and consumption of alcohol and drugs and had communicated this policy to students and parents. On November 7, 2002, the police arrived at the school with a sniffer dog and asked for permission to sweep through the school. At trial the police acknowledged that they had no information that there were drugs in the school on that day and no grounds to obtain a search warrant. The principal also acknowledged that, although there had been anecdotal reports from parents and neighbours regarding drug activity involving students, he had no specific information that there were drugs in the school on the day in ***84** question. Nonetheless, the principal agreed to allow the police to search the school using a sniffer dog. He made an announcement on the school's public address system that the police were on the premises and that students should stay in their classrooms until the search was completed. The evidence was that the police took charge of the investigation and that school authorities had no subsequent involvement in the conduct of the search

The police searched extended to the gymnasium, where the accused student, A.M., had left his backpack unattended while participating in gym class. The sniffer dog “alerted” to the backpack by biting at it. When the backpack was opened by the police it was found to contained ten bags of marijuana, ten “magic mushrooms” (psilocybin), a pipe, a lighter, rolling papers, and a roach clip, as well as A.M.'s wallet containing his identification. A.M. was charged with possession for the purposes of trafficking marijuana and possession of psilocybin.

The accused student argued that the sniffer dog search violated his right under section 8 of the *Charter* “to be secure against unreasonable search and seizure.” The accused further argued that, in light of the section 8 violation, the evidence obtained through the search should be excluded under section 24 of the *Charter* on the

grounds that its admission would “bring the administration of justice into disrepute.”

At first instance, the Ontario Youth Court Judge held that the search constituted a violation of s. 8 of the *Charter*, indeed, that all students in the school had been subjected to an unreasonable search, and that the evidence should be excluded under s. 24. The Court of Appeal agreed that the use of the sniffer dog constituted a “search” under the *Charte*r and rejected the Crown's argument that the student's expectation of privacy in his backpack “was so significantly diminished as to be negligible.” The Court of Appeal held that the use of sniffer dogs in the school constituted a warantless, random search which was not authorized by either the criminal law or the *Education Act* and that the evidence should be excluded.

At the Supreme Court of Canada, nine justices issued four separate sets of reasons. The most extensive reasons were provided by Justice Binnie, who wrote for himself and Chief Justice McLachlin. They concluded that although the use of sniffer dogs constitutes a “search” under the *Charter*, it is a minimally invasive type of search and a requirement of prior judicial authorization (a warrant) ought not to be imposed. However, McLachlin C.J.C. and Binnie J. did reject the use of sniffer dog searches where, as in this case, there was *no* basis on which to suspect the presence of drugs. In an attempt to reach a compromise position ***85** between requiring a warrant and permitting wholly groundless searches, they held that in order to justify the use of sniffer dogs, the police must have a “reasonable suspicion.” Their reasons for judgment also stressed that students do have a constitutionally protected privacy interest while at school, including in their backpacks, and once again clarified that there is no “school exception” to the exercise of police powers. However, a student's reasonable expectation of privacy while at school is reduced, and “significantly greater latitude must be given to school authorities in the discharge of their responsibilities than to the police.” [FN3] Binnie J. and McLachlin C.J.C. ultimately concluded that the search in question was undertaken without “reasonable suspicion” and would have excluded the evidence on the basis that the facts demonstrated a systemic failure to respect the rights of all of the students at the school.

Bastarache J., in partial dissent, adopted the “reasonable suspicion” standard set by McLachlin C.J.C. and Binnie J. for the use of drug-sniffing dog searches, and concluded that there was a violation of s. 8 in this case. Nonetheless, he would have admitted under s. 24 the evidence obtained through the use of the sniffer dog.

In a concurring opinion, four members of the court (LeBel, Fish, Abella, and Charron JJ.) agreed with Binnie J. and McLachlin C.J.C. that students are entitled to privacy in a school environment, noting that “entering a schoolyard does not amount to crossing the border of a foreign state.” [FN4] This group of justices found that the dog search constituted a violation of s. 8 and that the evidence obtained through the search was properly excluded. However, they declined to adopt the “reasonable suspicion” standard articulated by Binnie J. and McLachlin C.J.C. The group refused to elaborate on the circumstances in which a dog search might be constitutional, stating that “our Court should not attempt to craft a legal framework of general application for the use of sniffer dogs in schools.” [FN5]

Dissenting reasons given by Deschamps J. for herself and Rothstein J. concluded that the accused did not have a reasonable expectation of privacy in light of the fact that parents and students were aware of the “zero tolerance” policy and the prospect that sniffer dogs might be used. Deschamps J. also placed great weight on the fact that the accused's backpack was unattended at the time and that the dogs were searching the premises rather than the accused's person. Because Deschamps and Rothstein***86** JJ. concluded that the accused had no expectation of privacy in the circumstances, no *Charter* violation was found.

A clearly divided Court, in issuing the various reasons summarized above, has produced a very confused view of the current state of the law regarding the constitutionality of drug- sniffing dog searches in schools. Although the majority of the Court recognized that individuals in schools have a reasonable expectation of privacy, they noted that this privacy right is restricted in the school setting. While police will not be required to obtain a warrant to conduct a school search using drug-sniffing dogs, the majority of the Court found that the police had insufficient grounds to conduct the dog search on the facts of this particular case, where there was no information about the presence of drugs on the school in the day in question. The Principal's statement that “it's pretty safe to assume” that there could have been drugs on school property on the day in question, was found to be insufficient to justify the search. The Supreme Court of Canada's decision in *R. v. M. (A.)* certainly stands for the proposition that school administrators should not issue open invitations to law enforcement to conduct such searches in the absence of specific information.

Five of the nine Justices adopted “reasonable suspicion” as the standard required to justify searches by sniffer dogs. While this standard is clearly intended to be a ‘middle ground’ between the requirement of a warrant and the no-prior-information requirement, the exact scope of the “reasonable suspicion” standard in the school context is yet to be determined. Would mere *suspicion* that there were drugs at the school on the day of the search have been sufficient to render the search constitutional? What information would have rendered such a suspicion reasonable? Is the requirement that the principal have information that the accused *himself* was in possession of drugs--or simply that *a* (possibly unknown) student had drugs at the school? It is also unclear how the result might be different if the individual implicated by the sniffer dog were a teacher or other staff member, rather than a student.

Despite the fact that the Court's divided reasons leave many questions regarding the “reasonable suspicion” standard, what is now clear is that police may no longer undertake groundless, ‘proactive’ school searches using drug-sniffing dogs, and that school administrators may not authorize such activity.

[FNa1]. Of Green & Chercover, Toronto.

[FN1]. (2008), [2008] S.C.J. No. 19, 2008 CarswellOnt 2257, 2008 CarswellOnt 2258 (S.C.C.).

[FN2]. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 (hereinafter “*Charter*”).

[FN3]. *Ibid*. at para. 47.

[FN4]. *Ibid*. at para 1.

[FN5]. *Ibid*. at para 2.
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