

## Privacy in Schools: Dogs, Lockers, Bodies and Backpacks

By Linda McKay-Panos

### Cases Considered:

[R. v. Kang-Brown, 2008 SCC 18,](#)

[R. v. A.M., 2008 SCC 19.](#)

I would like to believe that teenagers are protected from all of the evils of the world when they are at school. At the same time, teenagers are growing into adults and do have rights, such as a reasonable expectation of privacy. The *Canadian Charter of Rights and Freedoms* ("Charter") s. 8 provides that:

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

This section applies to everyone, including young people. This actually makes sense, as society expects them to be contributing citizens once they turn 18. In order to be full citizens, with both rights and responsibilities, they have to have some experience with these. One rights issue that tests parents' protective instincts is the area of searches, including those using drug sniffing dogs in schools. The law on this issue is actually quite complex, and this post discusses some of the key cases that will affect decisions about what kinds of searches are reasonable in Alberta schools.

### Backpacks

Two recent decisions of the Supreme Court of Canada have provided some much needed guidance on searching backpacks using sniffer dogs. In *R. v. A.M.*, 2008 SCC 19 ("A.M."), the police had a long-standing invitation from the principal of a high school to bring sniffer dogs into the school to search for drugs. The police had no knowledge that there were drugs in the school and they would not have been able to obtain a warrant to search the school. During the police's visit to the school, the students were confined to their classrooms as a trained police dog sniffed their backpacks in an empty gymnasium. The dog led police to a backpack which contained marijuana and magic mushrooms. A youth (A.M.) was subsequently charged with possession of marijuana for the purpose of trafficking. In 2004, the Ontario Court of Appeal upheld a trial judge's decision to exclude the drugs as evidence and acquit the youth. The Court held that the accused's rights under *Charter* s. 8 had been violated. The Crown appealed to the Supreme Court of Canada.

In a 6-3 majority, the S.C.C. held that the dog sniff amounted to a “search” within s. 8 of the *Charter*. The S.C.C. held that the subject matter of the sniff is not public air space. It is the concealed contents of the backpack. As with briefcases, purses and suitcases, backpacks are the repository of much that is personal, particularly for people who lead itinerant lifestyles during the day as in the case of students and travellers. Teenagers may have little expectation of privacy from the searching eyes and fingers of their parents, but they expect the contents of their backpacks not to be subject to the random and speculative scrutiny of the police. This expectation is a reasonable one that society should support. The guilty secret of the contents of the accused’s backpack was specific and meaningful information, intended to be private, and concealed in an enclosed space in which the accused had a continuing expectation of privacy. By use of the dog, the policeman could “see” through the concealing fabric of the backpack. (*A.M.*, paras. 62 to 67).

The S.C.C. also noted that a warrantless search using sniffer dogs would be justified in the case where the police held a reasonable suspicion. However, in this case, there was no proper justification for the search (*A.M.*, para. 91).

The dissenting justices argued that the accused did not have a reasonable expectation of privacy in light of the circumstances of the case. Students and parents had been made aware of the drug problem and the zero-tolerance drug policy and of the fact that sniffer dogs might be used. Dogs had in fact been used on prior occasions to determine whether narcotics were present at the school. While school policy must be implemented in a manner consistent with a legitimate expectation of privacy, the well-advertised means devised and used by the school reduced the accused’s subjective expectation of privacy very significantly (*A.M.*, para. 129).

In a companion case released the same day, *R. v. Kang-Brown*, 2008 SCC 18, the accused was found with cocaine and heroin when his bags were flagged by a drug sniffing dog at a Calgary bus terminal in 2002. The S.C.C. held that the warrantless police search was a random search based on the notion that sometimes buses running from Vancouver to Calgary are used by drug couriers. Thus, there was no proper justification for the search.

The implication of these cases for Alberta schools is that drug-sniffing dogs cannot be brought into schools to search backpacks unless there is a reasonable suspicion that students possess drugs. However, other cases (discussed below) indicate that students do have a diminished expectation of privacy in the school setting and that in some circumstances, warrantless searches of their person, their backpacks or their lockers might be constitutional.

### **Body Searches**

In *R. v. M.R.M.*, [1998] 3 S.C.R. 393, a student attending a school dance was searched by the vice-principal and was found to be secreting a bag of marijuana in his sock. The vice-principal had acted on information he had received from “several students that the appellant was selling drugs on school property” and “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” (at para. 6).

The majority (per Justice Cory) accepted that a student attending school has a reasonable expectation of privacy so as to engage s. 8 of the *Charter*. However, Cory J. reasoned (at para. 33):

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.

Cory J. adopted (at para. 42) the test established in the majority decision of the United States Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), aff'g 94 N.J. 331 (1983) that "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." In rejecting the application of the "reasonable and probable grounds" requirement for a reasonable search enunciated in *Hunter et al. v. Southam Inc.*, 1984 CanLII 33 (S.C.C.), [1984] 2 S.C.R. 145, Cory J. reasoned (at paras. 47 and 48):

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.

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.

Cory J. summarized the approach to be taken in considering searches by teachers as follows (at para. 50):

(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.

### **Lockers**

Generally, school lockers are the property of the school board and are used by the students only with the permission of the school. Schools are advised to inform each student of the school's right to search lockers (including removal of locks) and should have appropriate policies in place that they communicate to students, so that the students have a reduced expectation of privacy (see: E. Roher and S. Wormwell, *An Educator's Guide to the Role of the Principal*, Canada Law Book, 2008 at 280).

In *R. v. Z (S.M.)* (1998), 131 C.C.C.(3d) 136 (Man. C.A.), the vice-principal of a junior high school conducted a locker search of a 15 year old student's locker, after reports of drug use in the school. Students had reported that the student ("Z") was present when drug use took place or was associated with other students thought to be involved in drugs. Also, there were reports of illness associated with drug use. On the morning of the search, Z was absent without permission and had returned to the school through an entrance that was not usually open during the day. These factors caused the vice-principal to suspect that Z may have picked up drugs that day. The vice-principal searched Z's locker and found some marijuana. The trial judge acquitted Z, holding that the search was unconstitutional. The summary conviction appeal judge overturned the acquittal. The Manitoba Court of Appeal agreed and the conviction was upheld.

It remains to be seen how *A.M.* and *Kang-Brown* will influence these earlier decisions concerning searches on school property. The reasonable expectation of privacy will likely continue to be assessed in a contextual fashion, based on the particular circumstances of the case.

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