
Sniffer dogs at schools –a systemic failure to respect the rights of students

In *R. v. A.M.* (April 25, 2008) the Supreme Court of Canada ruled on the constitutionality of the use of sniffer dogs to search and locate drugs at high schools. The case was considered along with *R. v. Kang-Brown* (April 25, 2008), another sniffer dog case, although in the latter instance the search was conducted at a bus terminal. In his testimony at trial, a police officer involved in the sniffer dog search at the high school indicated that he had participated in 140 such searches on previous occasions. In light of that testimony, one of the members of the Supreme Court of Canada stated, “The failure to respect the right of students may therefore be described as systemic.” In the majority decision of the Court, the exclusion of the evidence obtained from the search was upheld, and the *Charter* right of the accused student to be secure against an unreasonable search was ruled to be violated.

THE UNWARRANTED SEARCH

The high school where the search took place had a zero-tolerance policy towards the possession and consumption of drugs and alcohol. The principal of the high school offered the local police an open invitation to bring sniffer dogs into the school to search for drugs. In November 2002, three police officers and a sniffer dog went to the high school and asked the principal for permission to search the school. Although the principal had no specific information suggesting drugs were present in the school at that time, and although the police later acknowledged that they had no grounds to obtain a search warrant, the principal gave permission to the police to conduct the search.

The students were detained in their classrooms while the police investigated the premises. Part of the police search included a sweep of the gymnasium where some students’ backpacks were lying unattended. The sniffer dog reacted to one of the backpacks and signaled to its handler the presence of drugs. The police officer physically searched the contents of the backpack and found marijuana and psilocybin (magic mushrooms). The accused was then charged with possession and possession for the purpose of trafficking.

At trial, the drugs were excluded from evidence on the basis that the discovery of the drugs had been a *search* within the meaning of section 8 of the *Charter* which guarantees everyone “the right to be secure against unreasonable search or seizure.”

The search was found to be warrantless, random and without authority under the *Education Act* or the criminal law. The trial judge stated that the admission of the drugs into evidence would bring the administration of justice into disrepute. The accused was acquitted and this decision was upheld at the Court of Appeal.

THE SUPREME COURT OF CANADA

The Supreme Court considered this case with *R. v. Kang-Brown*, an Alberta case in which a sniffer dog identified drugs on an adult at a bus terminal. The two cases involved similar issues such as whether a dog “sniff” is a search within section 8 of the *Charter*, and if so, whether such a search violates the *Charter*. In light of the historic use of sniffer dogs by the police, the Court was also required to address what standard of justification the *Charter* demands from police before they can use sniffer dogs.

The Supreme Court first addressed whether there was a search within section 8 of the *Charter*. In order to decide this point it had to be established that students at a high school have a reasonable

expectation of privacy, in particular with respect to the contents of their backpacks. The court found that students do indeed have a reasonable expectation that the contents of their backpacks will not be opened to the random and speculative scrutiny of the police.

The majority of the Court found that the police are acting within their common law powers when they use sniffer dogs to investigate crimes. However the requirements of the *Charter* must still be met. The majority of the Court ruled that what had occurred at the high school was a warrantless search, which was therefore presumed to be unreasonable.

The Court therefore applied the *Collins* rule that:

A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.

Since there was no statutory authority for sniffer dog searches, the Court focused on whether the search was authorized by the common law, and whether such a search violated section 8 of the *Charter*. The majority of the Court divided on this issue and offered two competing views about the standard for *Charter* compliance when sniffer dogs are used.

‘REASONABLE AND PROBABLE GROUNDS’ OR ‘REASONABLE SUSPICION’?

Four members of the majority held that the *Charter*-compliant standard for dog sniff searches was “reasonable and probable grounds” as established in one of the seminal Supreme Court cases relating to search and seizure, *Hunter v. Southam Inc.*, [1984]. The standard in *Hunter v. Southam* requires public officers to have a factual foundation for their beliefs that a crime has been committed and that there is relevant evidence to be found at the place of the search.

The remaining two members of the majority suggested a standard less onerous than reasonable and probable grounds called “reasonable suspicion”. This lower standard for *Charter* compliance requires that a police officer have a subjective belief, backed by objectively verifiable indications, that evidence of a criminal act exists in the place. This standard is somewhat less demanding than reasonable and probable grounds. It has been used to authorize police action in areas where people have a lower expectation of privacy, such as at border crossings.

Notwithstanding their divergent views about the standard for *Charter* compliance in sniffer dog searches, the majority of the Supreme Court agreed with the lower courts and held that the search at the high school was warrantless, random and unreasonable from the outset, given that there was no factual foundation to meet either the reasonable grounds or reasonable suspicion standard.

In light of that determination, the Supreme Court was then required to determine whether the evidence obtained from the search should be excluded under subsection 24(2) of the *Charter*:

S. 24(2) Where...a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The majority of the Court concluded that the trial judge properly excluded the evidence under s. 24(2) of the *Charter*. In his concurring reasons, Justice Ian Binnie quoted the lower court judge:

“The *Charter* must not be seen as something to be swept away in the interests of expediency...the rights of every student in the school were violated that day as they were all subject to an unreasonable search.”

In Justice Binnie’s view, the lower court judge had a greater awareness of the effect that the admission or exclusion of the evidence would have on the reputation of the administration of justice in the community. In this respect, there should be no interference with the lower court decision to exclude the evidence and the six-member majority of the Supreme Court upheld the acquittal.

In Our View

Although there were differing views relating to the proper level of *Charter* compliance for police searches in schools, the majority of the Court nevertheless recognized that students have a reasonable expectation of privacy within the school setting. Although the Constitution does not prohibit the use of sniffer dogs by the police, it does require that any such use accord with the standards established by section 8 of the *Charter*. Unless and until a statutory scheme to the contrary is enacted, the present common law of Canada requires that public officers wishing to use sniffer dogs to conduct searches, at a minimum, must have underlying reasonable suspicion that there is evidence of criminal activity to be found at the place of the search.

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