

Supreme Court of Canada Rules on Use of Sniffer Dogs (*Her Majesty the Queen v. A.M. et al*, 2008 S.C.C. 19)
*By Debra A. Tumbach, Senior Lawyer, Alberta School Boards Association, Legal Services***Introduction**

On April 25, 2008, the Supreme Court of Canada, in a split decision, confirmed that random searches undertaken by police officers, in schools, with the assistance of drug sniffer dogs constituted a violation of a student's right to be free from unreasonable search and seizure.

Justice LeBel, speaking for the majority (with whom Fish, Abella and Charron, JJ. agreed), stated "Students are entitled to privacy even in a school environment Entering a schoolyard does not amount to crossing the border of a foreign state. Students ought to be able to attend school without undue interference from the state, but subject, always, to normal school discipline."

Justice LeBel concluded that there was no authority, either in statute or at common law, justifying the search. The police officers did not have a search warrant, nor was the dog sniffer search conducted by the school authorities on proper grounds as set out in *M. (M.R.)*. "For the reasons stated in *R. v. Kang-Brown*, our Court should not attempt to craft a legal framework of general application for the use of sniffer dogs in schools. As a result, the evidence was properly excluded"

Facts

As we [*the ASBA Legal Briefs*] reported earlier, this Ontario case involved a random, warrantless search of a high school by police officers, with the assistance of a sniffer dog. Based upon the police officer's own testimony, the police went to the school to conduct a random search, and the principal had admitted that the school authorities themselves could not legally have conducted the search that was carried out by the police in this case.

The principal used the school's public address system to tell everyone that the police were on the premises and that students should stay in their classrooms until the search was conducted. The students were prevented from leaving their classroom for the duration of the police investigation. The police, not the school principal, took charge of the investigation. The principal had no involvement beyond giving permission and telling students to remain in the classroom.

The police search included the gymnasium. The sniffer dog alerted to a backpack in the gymnasium. The backpack was searched by a constable, and it contained five bags of marijuana, a tin box containing a further five bags of marijuana, a bag containing approximately 10 magic mushrooms, and a bag of drug-related paraphernalia. The student's identification was in the backpack. The student was charged with possession for the purpose of trafficking marijuana and possession of psilocybin (magic mushrooms).

Judgment

At trial, the student argued that the searches were unreasonable under section 8 of the *Charter of Rights and Freedoms*. The trial judge allowed the application, finding two unreasonable searches, including the search by the drug dog and the police search of the backpack, and excluded the evidence from the trial. The Court of Appeal upheld the acquittal.

In this decision, the Supreme Court of Canada ruled: that a drug dog sniff is a search, attracting the protections under section 8 of the *Charter*, which provides: "Everyone has the right to be secure against unreasonable search and seizure." (per McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron, JJ.);

Deschamps and Rothstein, JJ., dissented, ruling that the dog sniff of the backpack at the school did not amount to a search within section 8 of the *Charter*. As such, they ruled that there was no need to determine whether section 8 of the *Charter* was violated because the dog sniff of the backpack at the school did not amount to a search; that the police possess a common law power to search using drug sniffer dogs on the basis of a *Charter*-compliant standard of: reasonable and probable grounds (per LeBel, Fish, Abella and Charron, JJ.). These justices concluded that there is no authority at common law for the sniffer dog search and therefore upheld the exclusion of evidence; reasonable suspicion (per McLachlin C.J., Binnie, Deschamps and Rothstein, JJ.); and generalized suspicion (per Bastarache J.).

There was no authority at common law for the sniffer dog search in this case (per LeBel, Fish, Abella and Charron, JJ.).

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"Thank you Debra"

Patricia Parulekar
National Director, CSBA

Comments

The court rendered four different sets of reasons, including: majority reasons by Justice LeBel, concurred in by Justices Fish, Abella and Charron; partially concurring judgment by Binnie J., concurred in by Chief Justice McLachlin; dissenting reasons by Justice Deschamps, concurred in by Justice Rothstein; and dissenting judgment by Bastarache J., dissenting as to the result.

In reviewing the court's comments, it is important to remember that the court considered a "police search", undertaken on school premises. This was not a case involving a search of a student by authorized school personnel for disciplinary reasons, but rather a police search as part of a criminal investigation. Justice Binnie, in his concurring judgment, considers the leading case on student searches in schools, *R. v. M. (M.R.)*, where it was held that the "reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances", but notes the importance of attaching significance to the distinction between searches by school authorities and those by the police: "The difference between a police search and an investigation by school authorities was of critical importance to the Court's decision in *M. (M.R.)* and, I believe, is of importance here as well" (paragraph 46). "In *M. (M.R.)*, the issue was the constitutionality of the body search of a student for drugs at a school dance by the vice-principal. The Court specifically held that if a *body search* had been conducted by the police, or the school authorities acting as agents of the police, reasonable and probable grounds of belief would have been required. However, **reasonable suspicion** was sufficient for school authorities. The teaching of *M. (M.R.)* is that in matters of **school discipline**, a broad measure of discretion and flexibility ... will be afforded the school authorities, but when police are conducting a body search, even on school premises, the ordinary standard of justification applicable to police will be required" (Binnie J. at paragraph 45).

The majority judgment by LeBel J., the concurring judgment by Binnie J., and the differences in reasons by Bastarache J., centered on the threshold or standard by which the constitutionality of a police search should be measured. Justice LeBel was of the view that it was not the place for the courts to "craft a legal framework of general application for the use of sniffer dogs in schools". As such, he found that the currently recognized common law standard needed to be met before a search could occur, that being of reasonable and probable grounds, unless the search was otherwise authorized by statute.

Justice Binnie was of the view that, in the context of routine criminal investigations, the police should be entitled to use sniffer dogs based only on a reasonable suspicion, rather than needing to establish both reasonable and probable grounds. In Justice Binnie's view, where there are grounds of reasonable suspicion, the police should not have to take their suspicions to a judicial officer for prior authorization (obtain a warrant) to use the dogs in an area where the police are already lawfully present. If there were no grounds of reasonable suspicion, the use of sniffer dogs would violate the *Charter* section 8 reasonableness standard (paragraphs 12 to 14).

In other words, police officers should not be required to obtain a search warrant before undertaking this type of search. Searches undertaken without prior authorization are warrantless searches. At law, they are presumptively unreasonable and need to satisfy the exceptional requirements previously set out by the Supreme Court of Canada in the *Collins* decision. The protection for the individual who was the subject of such a search, on the basis of reasonable grounds, would – in Justice Binnie's view – reside in the ability to have such warrantless search judicially reviewed in the courts.

Having stated his view as to the appropriate standard to be applied to such searches, which differed from the majority opinion, Justices McLachlin and Binnie were still of the view that the search by the police of the student (A.M.) in the school was a "random, speculative search", which violated the student's right to be free from unreasonable search and seizure.

Justice Bastarache, in his dissenting opinion, while agreeing that the dog sniff constituted a search within the meaning of section 8 of the *Charter*, differed on the threshold necessary for police to commence such a search. Justice Bastarache was of the view that a random sniffer dog search in a school would be deemed reasonable where it is based on a "**generalized**" suspicion, providing a reasonably informed student would have been aware of the possibility of random searches involving the use of dogs.

While the dissenting views of Justice Bastarache may be viewed as the most "school friendly", Justice Bastarache was clear that there are limits on when such searches can occur, noting: the police cannot enter a school and conduct a search whenever they please on the basis that drugs may be found there on any given day; reasonable suspicion requires more than a mere hunch; ongoing suspicion does not exist in relation to schools; it is necessary for each random dog sniff search to be justified on the basis of a suspicion that drugs will be located at that specific location, at the specific time the search is being performed.

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Where does this leave schools?

It is clear that random, speculative searches by drug dogs in the school, when undertaken by police officers, are unconstitutional. What is less clear is the standard to be adopted by police officers in undertaking such searches. The majority (LeBel, Fish, Abella and Charron, JJ.) were of the view that the standard remained unchanged and that reasonable and probable grounds were required, unless authorized by statute, leaving the door for Parliament to make appropriate changes to the *Criminal Code* or for the provinces to provide a legislative answer, provided that the legislation is, in itself, constitutionally valid. However, McLachlin C.J., Binnie, Deschamps and Rothstein, JJ., supported a decreased threshold for undertaking searches, that being of reasonable suspicion, while Justice Bastarache supported the undertaking of searches on a generalized suspicion. Whether the standard of reasonable suspicion will be the new standard by which police officers may undertake searches with the use of drug dogs remains to be seen.

Justice Binnie also leaves the door open as to whether police dog searches may occur in schools where the threat to safety is more imminent, noting at paragraph 37: “If the police in this case had been called to investigate the potential presence of guns or explosives at the school using dogs trained for that purpose, the public interest in dealing quickly and efficiently with such a threat to public safety, even if speculative, would have been greater and more urgent than routine crime prevention. Generally speaking, the legal balance would have come down on the side of the use of sniffer dogs to get to the bottom of a possible threat to the lives or immediate safety and well-being of the students and staff.”

The implication would appear to be that searches for drugs in schools using sniffer dogs are considered “routine crime prevention” and do not attract the same form of urgent response and, as such, the same ability to invade the privacy rights of students. This ruling does not change the standard under which searches of students or their lockers are to be undertaken in the school setting by school personnel who are authorized pursuant to legislation to undertake the same. The standard remains one of reasonable suspicion as set out in the leading student search case, *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393. As above noted, this case supported a broad measure of discretion and flexibility necessary for school authorities to undertake searches based on “reasonable grounds”. What is reasonable will depend on the “totality of the circumstances” but could include, for example, credible evidence that a school rule had been broken, such as personal observations, evidence from staff, parents, or credible students.

Implications

The Supreme Court of Canada has clarified that searches by police officers in schools, with the use of sniffer dogs, which are completed on a random basis, are unconstitutional and must therefore cease.

The case does, however, raise a number of considerations for schools as they endeavour to maintain order and discipline in accordance with their statutory obligations. This decision does **not** change the standard under which those authorized by statute (principals) can undertake searches of students, their possessions or lockers following the principles enunciated in *R. v. M. (M.R.)*. The standard is one of reasonable suspicion, and is not affected by this decision.

Both police and school administrators can no longer rely upon generalized views that at any given time, there will be drugs in the school and that each of them are therefore respectively authorized to undertake random searches. As indicated by the courts, what is reasonable will depend on the totality of the circumstances and must be premised on reasonable suspicions.

This commentary provides a general overview and cannot be regarded as legal advice.

In the next few weeks, we will be canvassing the implications that this decision raises and will provide follow-up information as to the decision’s potential impact on board policy, procedures, safety considerations and related matters.

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