

The Top Five 2008

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



R. v. A.M., 2008 SCC 19 & R. v. Kang-Brown, 2008 SCC 18

<http://scc.lexum.org/en/2008/2008scc19/2008scc19.html>

<http://scc.lexum.org/en/2008/2008scc18/2008scc18.html>

Section 8 of the Charter guarantees everyone freedom from unreasonable search or seizure. A police officer, acting without a warrant, must have reasonable and probable grounds for the search. Evidence obtained by an unreasonable search in violation of s. 8 may be excluded under s. 24(2) of the Charter. The Supreme Court excluded evidence of drugs found in a high school student's backpack by a police sniffer dog. In a companion case the Supreme Court excluded drugs found in passenger's bag at a bus depot.

Date released: April 25, 2008

The Facts of *R. v. A.M.*

St. Patrick's High School in Sarnia had a zero tolerance policy for possession and consumption of drugs and alcohol. The principal of the school advised the Youth Bureau of Sarnia Police Services that if the police ever had sniffer dogs available to bring into the school to search for drugs, they were welcome to do so. On November 7, 2002, three police officers accepted his invitation and took their police dog, Chief, to the school. Chief was trained to detect drugs. Neither the principal nor the police had any suspicion that any particular student had drugs, though the principal said that it was pretty safe to assume that drugs were in the school. The principal used the school's public address system to tell students that the police were on the premises and that they had to stay in their classes until the search had been conducted. The police then walked Chief around the school.

Chief reacted to one of several backpacks that had been left unattended in the gymnasium by biting at it. Without obtaining a warrant, the police opened the backpack. Inside they found 10 bags of marijuana, a bag containing approximately ten magic mushrooms (psilocybin), a bag containing a pipe, a lighter, rolling papers and a roach clip. The back pack also had the student's wallet that enabled the police to identify A.M. as the owner. He was charged with possession of narcotics for the purposed of trafficking.

At trial, A.M. brought an application for exclusion of the evidence, arguing that his rights under s. 8 of the *Charter* had been violated. The trial judge allowed the application, finding two unreasonable searches: the search conducted with the sniffer dog and the search of the backpack. He excluded the evidence and acquitted the accused. The Court of Appeal and the Supreme Court of Canada upheld the acquittal.

The Supreme Court's analysis of this case is mainly set out in a companion case, *R. v. Kang-Brown*, released the same day.

The Facts of *R. v. Kang-Brown*

The facts in *Kang-Brown* are similar. The RCMP found drugs after they had a sniffer dog sniff the bag of a passenger in the Calgary Greyhound bus terminal. The police first made eye contact and had a short conversation with Kang-Brown before having the sniffer dog search his bag.

The Decisions

The Court, split 6-3, found that the police use of a sniffer dog in both cases violated s. 8 and should be excluded. The Court was deeply divided and there were four sets of reasons in each decision making the application of these judgments in future *Charter* cases, difficult.

Four judges – LeBel J., (Fish, Abella and Charron JJ concurring)- held that there is no common law power to use sniffer dogs in bus depots and in schools unless the police meet the existing and well-established standard of having reasonable and probable grounds or have obtained a search warrant. The courts should not create a new more intrusive power of search and seizure. That should be left to Parliament to set up and justify under a proper statutory framework.

Four judges - McLachlin C.J., Binnie, Deschamps and Rothstein JJ. - held that the police have a common law power to conduct a warrantless search using sniffer dogs on the basis of individualized reasonable suspicion. This standard complies with section 8 although it is less than "reasonable and probable grounds". However these four judges split on the application of that principle to the facts.

Binnie J. (McLachlin C.J. concurring) found the police in each of the two cases did not have individualized reasonable suspicion and the evidence should be excluded under s. 24(2).

Deschamps J. (Rothstein JJ. Concurring) found the individualized suspicion standard was met in *Kang-Brown*, and that there was no unconstitutional search in *A.M.* because there the privacy interest in the unattended backpack was slight and the search not intrusive. There no violation of s. 8 in either case.

Bastarache J. agreed (with McLachlin C.J., Binnie, Deschamps and Rothstein JJ.) that individualized suspicion is enough to support the use of a sniffer dog, but went further. He expressed the view that a generalized reasonable suspicion standard will sometimes be sufficient. In *Kang-Brown* it would have been equally permissible for the police to use sniffer dogs to search the luggage of all of the passengers at the bus depot that day, if they had had a reasonable suspicion that drug activity might be occurring at the terminal. A random sniffer-dog search in a school is reasonable where it is based on a generalized reasonable suspicion of drug activity at the school, providing a reasonably informed student is aware of the possibility of random searches involving the use of dogs. Schools are unique environments and a lower standard is appropriate given the importance of preventing and deterring the presence of drugs in schools to protect children; the highly regulated nature of the school environment; the reduced expectation of privacy students have while at school; and the minimal intrusion caused by a sniffer dog.

It seems that five judges approved of a reasonable suspicion standard for the use of dog sniffers on buses and in schools but there is no clear agreement as to what that standard means. One of those five, Justice Bastarache, has since retired.

Discussion Issues

1. McLachlin C.J., Binnie, LeBel, Fish, Abella and Charron agreed that students should expect a reasonable degree of privacy in their personal belongings. Bastarache J. thought that this expectation should be diminished in a school environment while Deschamps and Rothstein JJ. thought that students should not have any such expectation while at school. What degree of expectation of privacy do you think students are entitled to have at school in their lockers, their backpacks and their pockets?
2. Does the presence of drugs in school change your answer to the first question? Does it make a difference if there is a reasonable suspicion of presence of drugs or there are reasonable grounds for believing that they are present? How would you define the difference between these two standards?
3. How would suspected weapons at school affect your assessment of the privacy entitlements of students and the standard of knowledge required to justify a search?
4. In the 2004 case of *R. v. Tessling* the RCMP used an airplane equipped with a Forward Looking Infra-Red ("FLIR") camera to record images of thermal energy or heat radiating from buildings. Based on the results of the FLIR image coupled with information supplied by two informants, the RCMP were able to obtain a search warrant for Tessling's home. (Buildings used as marijuana grow operations are "hot" because of the grow lamps used.) Inside Tessling's residence, the RCMP found a large quantity of marijuana and several guns. The Supreme Court held that the RCMP's use of FLIR technology did not violate Tessling's constitutional right to be free from unreasonable search and seizure. FLIR technology measures crude heat emission from houses and cannot determine the nature of the source of heat within the building or "see" through the external walls.
5. What explains the different result from the use of FLIR and sniffer dogs? Do you agree that a police dog's sniff is more intrusive to an individual's privacy? What if FLIR technology becomes more sophisticated and is able to reveal core biographical details, lifestyles or private choices?