

Landmark Case

SNIFFER DOGS, SCHOOL SEARCHES, AND THE *CHARTER*. *R. v. A.M.*

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R. v. A.M. (2008)

Background

In 2002, A.M. was a student at St. Patrick's High School in Sarnia, Ontario. The school had a zero-tolerance policy towards drugs that was well known by students, faculty, and parents.

The principal of St. Patrick's, Mr. Bristo, had offered a standing invitation to the local police to search the school whenever they had the resources to do so. On November 7, 2002, the local police arrived at the school and requested permission to bring in their sniffer dog, Chief, to search the premises. The police had no specific reason to suspect that drugs were at the school that day and would not have been able to obtain a warrant to search the premises. Sniffer dogs are trained to alert to the presence of odours associated with drugs (i.e. the smell of marijuana). Mr. Bristo agreed, and the police proceeded to bring the dog through the school. During the search, students were told to remain in their classrooms while Chief inspected students' lockers. After completing a sweep of the halls, the officer asked the principal if there were any other locations to search. The principal took the officer to the gymnasium, where a number of backpacks were lined up against the walls.

In the gymnasium, Chief indicated the presence of drugs in one of the bags, the one which belonged to A.M. The police opened the backpack where they found ten bags of marijuana, a bag containing approximately ten "magic mushrooms", a bag containing a pipe, a lighter, rolling papers and a roach clip. The police also found A.M.'s wallet and identified A.M. as the owner of the backpack. A.M. was arrested and charged with possession of drugs with the intent of trafficking.

Ontario Court of Justice

At trial, A.M. argued that his **constitutional rights** had been infringed by the police search, and therefore the evidence gathered by the police during the search should be **inadmissible** under section 24(2) of the *Charter*. Section 24(2) allows a court to exclude evidence that is gathered by breaching someone's rights.

The Charter of Rights and Freedoms

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

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 Youth Court judge found that there were two searches conducted on November 7, 2002. The first search was conducted by the sniffer dog, which alerted police to the presence of drugs. The second search was the physical searching of A.M.'s backpack by the police officer. The judge found that both of these searches were 'unreasonable', and therefore unconstitutional and excluded the evidence.

Court of Appeal

The Crown appealed this ruling to the Court of Appeal for Ontario. The Court of Appeal agreed with the earlier ruling that the searches were 'unreasonable'. The Crown appealed the decision to the Supreme Court of Canada.

Supreme Court of Canada

The nine judges of the Supreme Court of Canada considered whether sniffer dog searches are constitutional, and then looked at how they should be used in the school environment.

The Supreme Court of Canada addressed the following four major issues:

1. Did the police possess the legal power to use drug sniffer dogs? If so, are there limitations to this power?
2. Did the use of the drug-sniffing dog in these circumstances amount to a "search" under section 8 of the *Charter*?
3. If it was considered a "search", was there a violation of A.M.'s section 8 right?
4. If there was a section 8 violation, should the evidence be excluded in the criminal case against A.M.?

1. Did the police possess the legal power to use drug sniffer dogs? If so, are there limitations to this power?

If the police did not have the authority to conduct this type of search, then the police search would have been illegal, and the case against A.M. could not proceed.

A majority of judges decided that the police did have the legal authority to use drug-sniffing dogs in order to investigate crimes. The Court found that this police investigatory power was a **common law power**, based on decisions in past cases.

The Court decided that sniffer dog searches are legitimate for a number of reasons. The searches are **minimally intrusive** (the dogs were sniffing air, rather than physically looking through the contents of people's belongings), targeted, and usually highly accurate. The Court found that this investigatory power must be used in a way that is consistent with the *Charter*.

Therefore, to comply with *Charter* protection, the Court agreed that police could only use drug-sniffing dogs (**without a warrant**), when there was a "**reasonable suspicion**" that drugs would be found.

The Standard of “reasonable suspicion”?

The Court stated that any drug-sniffing search without a warrant would be assumed to be unreasonable unless the police could demonstrate evidence of a “reasonable suspicion”. Any drug dog search done without a warrant would require evidence that the police had reason to believe (or a reasonable suspicion that) drugs were going to be at a certain location at that time.

The Test for Reasonable Suspicion:

Before the police can use a drug-sniffing dog to search a person or their belongings *they must have reasonable grounds to suspect that the person is carrying drugs on their person or inside their belongings.*

In order for the grounds to be reasonable, they would have to be based on some objectively verifiable evidence (such as testimony, video surveillance, etc.). The police could not merely use drug-sniffing dogs in situations where they had a “hunch” that drugs were nearby.

2. Did the use of the drug-sniffing dog in these circumstances amount to a “search” under section 8 of the *Charter*?

The **Majority** found that the drug dog search was a search under section 8 of the *Charter*. The Supreme Court of Canada paid particular attention to the fact that the case occurred at a school and discussed a student’s expectation of privacy at school. The Majority recognized that students have a lower expectation of privacy when at school, however it refused to extend this lowered expectation to police conduct. The Court acknowledged that staff members of a school are responsible for maintaining order in the school, while police are responsible for criminal investigations.

The Court compared the backpacks of students with the briefcases and purses of adults. The Majority stated that business people would consider it absurd to have the contents of these cases and bags searched at random by the police. Therefore, students could expect similar protection from arbitrary police searches.

The Majority dismissed the argument that the dog was merely sniffing “public air space”. Chief Justice McLachlin found that when the dog was sniffing the air, it was effectively “seeing through” the fabric of the bags. The personal contents of backpacks, particularly for young students who spend much of their time at school and are effectively living out of their book bags, are private. Therefore the drug dog search is a “search” within the meaning of section 8 of the *Charter*.

3. If it was considered a “search”, was there a violation of A.M.’s section 8 right?

Having established that a search did take place at the school, the Court considered whether the search was based on a ‘reasonable suspicion’.

Neither the school authorities nor police had any specific information that drugs were on the school grounds on November 7, 2002. The officers’ “reasonably well-educated guess” that there

would be drugs somewhere on school property on any given day was not sufficient. Thus, the search was unreasonable and a violation of A.M.'s rights.

4. If there was a section 8 violation, should the evidence be excluded in the criminal case against A.M.?

Section 24(2) of the *Charter* allows for the admission of evidence, despite a *Charter* violation, unless the inclusion of the evidence would "bring the administration of justice into disrepute". This section is intended to provide flexibility in *Charter* cases.

In cases of relatively minor violations of a person's rights, judges often admit the evidence.

The Court considered two major competing values: the *Charter* rights of students, and expediency of police investigations. **Expediency** refers to the ability of police to use their resources as efficiently as possible. Drug dog searches require very little resources, and they are highly effective. In this case, this efficiency had to be balanced against the *Charter* rights of the students.

The Court agreed with the findings of the lower courts that the evidence should not be admitted. By excluding the evidence in A.M.'s case the Court was encouraging police forces to respect the *Charter* rights of students, and to adhere to regular search standards even in schools.

Dissent

The dissenting judges felt that A.M. had no legitimate privacy interest. A **subjective expectation of privacy** would exist if A.M. personally believed that the contents of his bag would not be examined. An **objective expectation of privacy** considers the situation from a third person perspective and asks whether a reasonable person in similar circumstances would have believed the contents of their backpack were safe from a police search. The **Dissent** found that A.M. did not have an objective or subjective expectation of privacy.

Parents and students had been made aware of the school's drug policy, and A.M. had chosen to bring drugs to school despite this policy. Thus it was unnecessary to consider whether the dog search, and the physical search which preceded it, resulted from a 'reasonable suspicion'.

Conclusion

The Majority agreed with the lower courts that a section 8 *Charter* violation had occurred, and that the evidence should be excluded pursuant to section 24(2). The evidence against A.M. could not be included in the criminal case, and A.M.'s acquittal was upheld. The decision gives guidance to police and schools about how to protect students' privacy while also ensuring safety in schools.



Classroom Discussion Questions

1. What was the arrangement that the principal of St. Patrick's High School had with the local police?
2. What was the argument that A.M. made during his criminal trial about the evidence gathered by the police?
3. Why does the accused in this case only have the abbreviation "A.M." rather than a full name?
4. What is the standard of reasonable suspicion? How did it affect the outcome of A.M.'s case?
5. Do you agree with the majority or dissenting opinion about students' expectation of privacy at school? Do students have a privacy interest at school that deserves protection from police searches?
6. Where are some places where people have heightened or lowered expectations of privacy? What are the criteria that you consider when deciding these locations?
7. Do you feel that a dog sniff is a "search"? What do you think constitutes a search?
8. Supreme Court of Canada cases such as *A.M.* often include dissenting opinions. What is the purpose of publishing these dissenting opinions if they do not form Canadian law (as majority rulings do)?
9. Interveners are third parties who make arguments at a court case, with the permission of the Court. The Canadian Civil Liberties Association intervened on behalf of the respondent (A.M.). What do you think was the goal of their intervention?
10. The Supreme Court of Canada has limited resources and must be selective about which appeals it will hear. What criteria would you use to decide if a case should be debated in Canada's highest court?



R. v. A.M.: Worksheet 1

Using your textbook, the case summary and a dictionary, provide definitions/explanations for the following terms/phrases. All of these terms/phrases are bolded in the summary package:

Constitutional Rights

Inadmissible

Common Law Power

Minimally Intrusive

Warrantless Search

Reasonable Suspicion

Majority

Expediency

Subjective Expectation of Privacy

Objective Expectation of Privacy

Dissent



R. v. A.M.: Worksheet 2

Standard of Reasonable Suspicion

Consider the following scenarios where sniffer dogs, or similar technologies are involved.

For each scenario, answer the following questions as you think the Courts would:

1. Was there a “search” by police?
2. Did the person have a legitimate privacy interest?
 - a. Objective?
 - b. Subjective?
3. Was the search reasonable? Did the authorities meet the standard of reasonable suspicion?
4. Considering all of the above questions, were the section 8 rights of the accused violated?

Scenario One: A gas spray is developed which makes the hands of anyone who smokes marijuana turn green. The police make an impromptu visit to a school one day and decide to bring the gas spray. A student has his hands sprayed and they turn green. The police subsequently search his locker and find marijuana.

Scenario Two: The police have purchased new computer software that allows them to monitor online MSN conversations. They receive information from a teacher that four high school students are rumoured to be drug dealers. The police start to monitor the students’ online conversations. The conversations reveal that one student will have a large quantity of drugs in his locker on a specific date. The police don’t know which locker it will be, so they bring sniffer dogs into the school on that date. They eventually find drugs in one of the suspected students’ lockers.

Scenario Three: A new narcotic, in pill form, has gained popularity at many local high schools. The police have only recently trained sniffer dogs to identify it, but the drug remains difficult for the dogs to identify. Even the dogs with the highest accuracy rates cannot identify the drug more than 50% of the time. The police receive information that the drug will be in a specific section of lockers in a high school on a certain date. When they arrive at the school the sniffer dog begins barking at two different lockers. After looking inside the lockers, the police discover that one is completely clean, while another has the drug inside it.



R. v. A.M.: Worksheet 2 Discussion Points for Teachers

Scenario One: The Green Gas Spray

1. *Was there a search by police?*

- Does spraying this gas on students' hands constitute a search? Why or why not?
- The Supreme Court of Canada found that a drug-sniffing dog was not just sniffing public airspace, but actually "seeing through" the contents of a bag. In the same way, this spray could be considered to "see through" the locker of a particular student and could therefore be considered a "search".
- Alternatively, the spray was not a search at all, but rather a scientific test to screen for drug-related material.

2. *Did the person have a legitimate privacy interest? Was there an objective and subjective expectation of privacy?*

- The Supreme Court of Canada found that being in a school environment minimized privacy interests, but did not eliminate them altogether. What is an appropriate level of privacy interest in a school environment? How does it compare to the level of privacy interest in other environments?
- How does awareness of a drug policy affect the level of privacy interest in a school environment? Does it make a difference if the student was not personally aware of this policy?
- Discuss the school authorities' role in "maintaining order" at school. How do you balance that with a students' privacy interest?
- Is the bacteria/biological material on a person's hands deserving of privacy?
- Do students' hands, being a part of their physical person, deserve a high degree of privacy? Is this a more invasive search than the dog sniffing that occurred in *R. v. A.M.*?

3. *Was the search reasonable? Did the authorities meet the standard of reasonable suspicion?*

- Consider whether the police had prior knowledge of drugs in the school.

4. *Considering all of the above questions, were the section 8 rights of the accused violated?*

- The answer to this question depends on the students' reasoning with the above factors. If students argue and support the argument that (1) the spraying of the hands constitutes a search, (2) students have a reasonable expectation of privacy in the bacteria/biological material on their hands and (3) the search is unreasonable because the authorities did not meet the standard of reasonable suspicion, then (4) the section 8 rights of the accused were violated. However, if students argue and support the argument that any one or more of the three factors were not present in this scenario (it was not a search, there was no expectation of privacy, or the search was unreasonable),

then the section 8 rights of the accused were not violated. Answers on both sides are acceptable if students provide reasons from earlier questions to support their ideas.

Scenario Two: The MSN Monitoring

1. *Was there a search by police?*

- Is the monitoring of MSN conversations a “search”?
 - The Supreme Court of Canada was willing to interpret drug sniffing dogs as a search in order to protect the privacy of students in the school environment. How does this compare to monitoring an MSN conversation on a school computer? Does it make a difference if these MSN conversations took place on a home computer as opposed to a school computer? If on a school computer, does it make a difference if the MSN conversation happened during or outside school hours?

2. *Did the person have a legitimate privacy interest? Was there an objective and subjective expectation of privacy?*

- Do the accused in this scenario have a legitimate privacy interest in their conversations, both on a subjective and objective level?
- What are the implications of having internet messages monitored?

3. *Was the search reasonable? Did the authorities meet the standard of reasonable suspicion?*

- Students should note the possibility of two searches in this scenario: 1) MSN monitoring, and 2) sniffer dog search
- **The MSN monitoring:** the police received information from a teacher about four *rumoured* drug dealers. The uncertainty of information received (i.e. the fact that they were based on “rumours”) would likely complicate any police justification for a search. Students should note that reasonable suspicion is a flexible standard, and that depending on the reliability of the informant involved and the circumstances surrounding the rumours, the monitoring could be considered reasonable.
- **The sniffer dog search:** the sniffer dog search could possibly be found reasonable as well, considering that the MSN conversation gave fairly reliable indications that drugs would be present at a school. Students should note that since the police did not know which locker the drugs would be located in, many other lockers and bags were subject to search (merely by the dog passing by) even though no reasonable suspicion existed for such a large number of students to be searched.
- Had the sniffer dogs discovered drugs in a locker that was not one of the students whose MSN conversation had been monitored, would the search of that student’s locker be reasonable?

4. *Considering all of the above questions, were the section 8 rights of the accused violated?*

- The answer to this question depends on the students’ reasoning with the above factors.
- If students argue that the monitoring occurred within the reasonable suspicion standard, then there is the possibility that the accused’s rights were not violated.

However, given the importance and legitimacy of the accused's privacy interests, which were intruded upon, a section 8 violation could be found.

- Answers on both sides are acceptable if students provide reasons from earlier questions to support their ideas.

Scenario Three: Pill-based Drug

1. *Was there a search by police?*

- Based on the precedent established in *R. v. A.M.*, the Courts would find that the dog sniffing constituted a search.

2. *Did the person have a legitimate privacy interest? Was there an objective and subjective expectation of privacy?*

- The accused (the student whose locker had drugs inside) would have had a legitimate privacy interest, similar to the one A.M. enjoyed. The main point to remember here is that this is a locker, rather than a bag. It is possible that because a locker is attached to school property, that it might have a different level of privacy attached to it. Does having a lock on your locker change the level of privacy?
- Students should be encouraged to discuss whether they have more or less privacy in their lockers than they do with their backpacks.

3. *Was the search reasonable? Did the authorities meet the standard of reasonable suspicion?*

- Students should note the possibility of two searches in this scenario: 1) search of the section lockers, and 2) search of the individual lockers
- **Search of the section lockers:** the Supreme Court of Canada recognized the unique circumstances of using dogs for searches. Dogs can make mistakes, and their appropriate use depends on their accuracy rates. It is clear that they were fallible in this context because only one locker contained drugs, despite the dog identifying both lockers. The specific information that the police had about a section of lockers suggests that the initial search was conducted on the basis of the reasonable suspicion standard.
- Would police have had a reasonable suspicion to search another section of lockers?
- **Search of the individual lockers:** the second search of the two separate lockers would likely have been considered unreasonable because of the poor accuracy rates of sniffer dogs in relation to that particular drug.

4. *Considering all of the above questions, were the section 8 rights of the accused violated?*

- A violation of section 8 would likely be found in this case because of the accuracy issues surrounding the dogs and this specific drug.



R. v. A.M.: Worksheet 3

The Courts are constantly faced with situations where they must balance the goals of the state with the rights of the individual. In *R. v. A.M.*, expediency of the police and the elimination of a threat to school safety (i.e. drugs) had to be balanced with A.M.'s personal *Charter* right to be free from unreasonable search and seizure. In their effort to achieve balance between state and personal goals, courts consider various perspectives and must make decisions about what evidence to admit, and what effect their decisions will have on society and the reputation of the justice system.

Part A – A Look at Differing Perspectives

1. Divide students into groups of six and distribute scenario one to each group.
2. Within each group of six, have two students represent the police, two students represent the accused, and two students represent the other students in the school at the time of the search.
3. Have students discuss the following questions with their group. Students should discuss the questions from the perspective they have been assigned.
 - What was the purpose of the search from your point of view?
 - From your perspective, was the standard of reasonable suspicion met?
 - Was the search reasonable? Why or why not?
 - From your perspective, should the evidence be admitted? Why or why not?
 - In your view, what will be both the short term and long term effects of this incident? (Discuss the effects on the school, as well as the broader society)
4. Repeat the activity using scenarios two and three. Have students switch roles each time so that they consider a different perspective for each scenario.

Scenario One: The police hear that a school is experiencing problems with anti-Semitic violence. Several Jewish students have been the targets of both verbal and physical abuse. The police learn that an anti-Semitic newsletter is being circulated around the school that makes derogatory statements about specific students attending that school. The police arrive one afternoon and while students are confined to their classroom, they begin individually searching lockers. They find large stacks of the newsletters in three separate lockers.

Scenario Two: A school is experiencing problems with weapons on school grounds and two students have recently been expelled for having guns at school. There are rumours around the school that two groups of students have threatened to fight each other, firearms included. The police do not know when weapons will be on school grounds, but the principal has informed them that there is a "good chance" that there will be weapons on campus just about any day of the school week.

Scenario Three: A group of students have hacked into their school network and posted embarrassing photos and sensitive personal information about students and teachers on the Internet. The police suspect that the students uploaded these pictures from their cell phones. The police look through each student's cell phone and find the pictures in one student's phone.

Part B - Follow-Up Discussion Questions

1. What is an appropriate level of privacy should students expect in a school environment? How does it compare to the privacy expectations in other environments?
2. What expectation of privacy should students have with relation to their lockers? Their backpacks? Pockets? The contents of their wallets? Their cell phones?
3. Does that expectation of privacy change if there are drugs in the school? If there are weapons? What other factors affect this expectation of privacy?
4. How do school authorities (i.e. principals, teachers) balance their duty to maintain a safe school environment with respecting students' privacy interests?
5. What kind of precedent has *R. v. A.M.* set with respect to school searches?
6. If the Supreme Court of Canada had decided that the search in *A.M.* was reasonable, what effects, if any, would this decision have on the school environment?

Part C – What's Your View?

Have students choose one scenario and write a one to two page response to the questions from Part A from their own perspective.