



Think Like Judges – Excerpts from *R v AM*¹

The following quotes are taken directly from the Judgments of the Supreme Court of Canada website:
<http://scc.lexum.org/en/2008/2008scc19/2008scc19.pdf> *R. v. A.M.*, [2008] 1 S.C.R. 569, 208 SCC 19.

1. *Per McLachlin C.J. and Binnie, Deschamps and Rothstein JJ.*: The police possess a common law power to search using drug sniffer dogs on the basis of a *Charter* compliant standard of reasonable suspicion.

***Per Bastarache J.*:** The police possess a common law power to search using drug sniffer dogs on the basis of a *Charter* compliant standard of generalized suspicion.

***Per LeBel, Fish, Abella and Charron JJ.*:** There was no authority at common law for the sniffer-dog search in this case.

2. *Per McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.*: The dog sniff of the backpack at the school amounted to a search within s. 8 of the *Charter*.

***Per Deschamps and Rothstein JJ.*:** The dog sniff of the backpack at the school did not amount to a search within s. 8 of the *Charter*.

3. *Per McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.*: The sniffer-dog search of the backpack at the school violated s. 8 of the *Charter*.

***Per Deschamps and Rothstein JJ.*:** There is no need to determine whether s. 8 of the *Charter* was violated because the dog sniff of the backpack at the school did not amount to a search.

4. *Per McLachlin C.J. and Binnie J.*: The police possess common law authority to use sniffer dogs in appropriate circumstances. 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 would have been greater and more urgent than routine crime prevention. [7] [37]

The dog sniff amounts to a search within s. 8 of the *Charter*. The information provided when the dog is trained to alert to the presence of controlled drugs permits inferences about the precise contents of the source that are of interest to the police. 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 open 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

¹ Activity and selection of quotations provided by Charter in the Classroom: Students, Teachers and Rights (CC: STAR)



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 police officer could “see” through the concealing fabric of the backpack. [8] [62-63] [66-67]

Although a warrantless sniffer-dog search is available where reasonable suspicion is demonstrated, the sniffer-dog search of the students’ belongings in this case violated their *Charter* rights under s. 8. The dog-sniff search was unreasonably undertaken because there was no proper justification. The youth court judge found that the police lacked any grounds for reasonable suspicion and the Crown has shown no error in the youth court judge’s finding of fact. [91]

While the sniffer-dog search may have been seen by the police as an efficient use of their resources, and by the principal of the school as an efficient way to advance a zero-tolerance policy, these objectives were achieved at the expense of the privacy interest (and constitutional rights) of every student in the school. The *Charter* weighs other values, including privacy, against an appetite for police efficiency. Because of their role in the lives of students, backpacks objectively command a measure of privacy, and since the accused did not testify, the question of whether he had a subjective expectation of privacy in his backpack must be inferred from the circumstances. [15] [62-63]

Per Deschamps and Rothstein JJ. (dissenting): In light of the totality of the circumstances, the accused did not have in this case a reasonable expectation of privacy that engaged s. 8 of the *Charter*, and a new trial should be ordered. [140] [149]

While the use of the dog amounted to a search from an empirical perspective, what the accused had to establish was whether that use amounted to a “search” from a constitutional perspective. The pivotal question in this appeal was thus whether the accused had a reasonable expectation of privacy in respect of odours imperceptible to humans that emanated from his unattended backpack in a school gymnasium. This requires consideration of whether the accused had a subjective expectation of privacy and whether his privacy interest was objectively reasonable. [119] [128]

The accused did not have a subjective expectation of privacy. Students and parents were 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. [129]

Per Bastarache J. (dissenting): The dog sniff constituted a search within the meaning of s. 8 of the *Charter*. The accused had a reasonable, but limited, expectation of privacy in his backpack when the dog sniff occurred, even though he was not carrying the backpack at the time. A high school student who, like his classmates, leaves his bag unattended continues to have a reasonable expectation of privacy in its contents. It is relevant from an objective perspective that the odour identified by the dog sniff was not accessible to humans and that its detection provided immediate information about the contents of the backpack. The accused’s reasonable expectation of privacy is, however, reduced by the fact that this dog sniff occurred at the school. Students are aware of the importance both society at large and school administrators place on the school environment, and have a diminished expectation of privacy as a result. [150] [157-159]