Landmark Case

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SCHOOL SEARCHES AND PRIVACY: *R.* v. *M. (M.R.)*

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R. v. *M. (M.R.)* (1998)

Facts

A vice-principal at a high school in Nova Scotia was told by several students that a 13-year-old student was selling drugs on school property and would be bringing drugs to a dance. The other students knew the 13-year-old well and one of them had given correct information to the vice-principal on an earlier occasion.

At the dance, the vice-principal asked the accused and a friend to come to his office, where he asked them if they were in possession of drugs and told them he was going to search them. In the office was an RCMP officer, who identified himself and watched the search.
The vice-principal seized a bag concealed in the student's sock and gave it to the officer, who identified the contents as marijuana. The officer arrested the student for possession of a narcotic, and then explained to him his rights, including the right to talk to a lawyer and the right to speak to a parent. The student tried to call his mother but was unable to reach her. He told the vice-principal and the officer that he didn't want to call anyone else. The student then went to his locker with the RCMP officer. The officer searched it, but found nothing. The other student was also searched in the principal's office, though nothing was found.

The Right to Privacy

The *Canadian Charter of Rights and Freedoms, 1982* is part of the Constitution of Canada and protects everyone against actions of the government that violate our fundamental freedoms. Since the school was a public school and since the vice-principal was guided by the province's *Education Act*, everyone agreed in court that the school must respect the *Charter.* As well, all police officers, including RCMP officers, must follow the *Charter* whenever they are fulfilling their duties.

One of the fundamental freedoms protected by the *Charter* is described in s. 8*:*

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

One of the values the courts have decided that s. 8 protects is the **right to privacy:** it means that police or other authorities cannot simply invade your personal space whenever they please – your home, your body, your knapsack, or your private telephone conversations.

However, the right to privacy *varies* depending on where you are. When a person is in her own home, she is entitled to a great degree of privacy. When a person is boarding an airplane and might represent a security risk, she is entitled to a lesser degree of privacy. Whenever the court looks at s. 8 when the authorities have conducted a search or seizure, it must ask if a person had a **reasonable expectation of privacy** in all the circumstances. To do so, the court will ask some of the following questions:

- Where did the search take place? Was it a public or private place?
- Was the accused present at the time of the search?
- Did the accused believe he had privacy at the time?
- Was the accused's expectation of privacy reasonable by community standards?

Another question the court must ask when measuring whether a search was **reasonable** is *who* was doing the searching. Since the police have considerable powers, which include the power to arrest as well as limited powers of lawful violence, it is very important for them to exercise those powers with restraint. The courts are much more likely to hold that a search or seizure was unreasonable if the police act outside the rules.

However, the courts may give more leeway to other kinds of authorities depending on the circumstances. Since this case involved a vice-principal, the courts had to consider *why* a vice-principal might need to search a student under certain circumstances and *what kind of search* would be reasonable within a school environment.

Excluding the Evidence of an Unreasonable Search

If a court decides that the government has participated in an **unreasonable search or seizure,** it may decide to ignore any proof or **evidence** that comes out of the search or seizure. In this case, the court would have ignored or **excluded** any evidence relating to the finding of the bag of marijuana in the student's sock. Without this evidence, it would be almost impossible to find the student guilty of dealing drugs on the night of the dance.

The test that the court must apply when it decides whether it should exclude evidence is laid out in s. 24(2) of the *Charter:*

> **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.

This is a very complicated test, but it becomes simpler if it is broken into two parts. First, the court must decide if the authorities – the vice-principal or the RCMP officer – breached any of the student's rights in obtaining the evidence. Second, the court will ask questions about the circumstances surrounding the violation of the right:

- Was the student forced to **incriminate** himself because of the breach of his right?
- How serious was the breach of his right?
- Would the reputation of the courts suffer if the evidence were included?
- Would the reputation of the courts suffer if the evidence were excluded?

In general, courts will almost always exclude evidence if the breach of his right means that the student is forced to incriminate himself via a **statement,** via the **use of his body,** including an illegal physical search, or via the taking of bodily samples, such as DNA samples. This is because the authorities were able to obtain proof of a crime by violating the student's rights, and allowing them to use that proof at trial would make the trial unfair.

The Trial Decision

The 13-year-old student's case came to trial in Nova Scotia's Family Court, under the initials "M.R.M" in order to protect his identity under the terms of the *Young Offenders' Act.* His lawyer argued that the search and seizure in the vice-principal's office was unreasonable for several reasons:

1. Since an RCMP officer was present and watched the search, the vice-principal was effectively an **agent of the police**. Aiding this argument was the fact that the school had a strict policy of contacting the RCMP if a student was found in possession of drugs or alcohol. If the trial judge accepted the argument, the search would have to meet the strict police standard described above.

2. There was **no warrant** for the search or seizure. Normally, when authorities believe that proof of a crime exists in a location or on a person, they must take the grounds for their belief before a judicial officer, who examines the evidence and signs a warrant if there are **reasonable and probable grounds** for the belief. The police may then search the location or person. However, if an authority conducts a search or seizure *without* a warrant, courts will call it unreasonable unless the **Crown** proves that:
    a. a law authorized the search;
    b. this law was reasonable;
    c. the way in which the search was carried out was reasonable.

3. At the time the search was carried out, the vice-principal was not merely trying to protect the school, but was participating in a full-fledged criminal investigation. This enhanced the student's rights.

4. The presence of the RCMP officer intimidated the student and forced him to agree to the interrogation and search in the vice-principal's office.

5. The information given in advance to the vice-principal was too vague and unreliable to justify a search without further investigation.

The student's lawyer went on to argue that since the search was a **body search** that disclosed proof (the bag of marijuana) that otherwise might never have been found, the student was effectively forced to incriminate himself. If such evidence were allowed at trial, it would affect the **fairness of**

the trial and lower the reputation of the court as a fair and impartial place. In sum, the lawyer suggested to the court that the unreasonable search violated the right to privacy protected by s. 8 of the *Charter* and that it should be **excluded** under the test of s. 24(2) of the *Charter*.

After hearing the arguments of the **Crown** (representing the government) and the **defence** (representing the **accused**), Judge Dyer agreed with the accused and excluded the evidence. He found that the vice-principal was an agent of the police because there was an "agreed strategy" that the vice-principal would search the student in order to allow the RCMP officer to arrest the student if any drugs were found. Since the Crown's case depended on the **admission** of the evidence of the search, it terminated its case and the judge **dismissed** the charge against the accused.

Appeal to the Nova Scotia Court of Appeal

The government of Nova Scotia disagreed with this ruling and **appealed** it to the Nova Scotia Court of Appeal. It argued that the vice-principal was not an agent of the police and that the search was reasonable. Its main points were:

1. It is essential that school authorities be able to deal with a situation that could unreasonably disrupt the school environment or jeopardize the safety of the students. These problems include the presence of drugs and dangerous weapons, both of which are immediate dangers to students.

2. For this reason, school officials must be able to react swiftly and effectively when they have reasonable grounds for suspecting that a search will turn up evidence of a violation of school rules. The immediacy of the danger justifies the lack of a warrant.

3. The way in which the search was carried out did not cross the line. The vice-principal and the student were both male and the search was not overly intrusive.

4. Since there was no pre-planned teamwork between the vice-principal and the RCMP officer, the vice-principal was acting on his own and was not an agent of the police.

5. Students know that they are in an environment with rules and regulations and appreciate the need for safety and protection. For this reason, there is little or no **reasonable expectation of privacy** within the school setting.

Three judges of the Court of Appeal agreed with these points. They said that without a pre-arranged plan with the police, the vice-principal was acting on his own. They felt that the search would have taken place whether or not the RCMP officer was in the office. They found that the seizure of the discovered drugs was legal and that the student's rights were not violated. Without a violation of rights, the Court of Appeal did not need to examine whether the evidence should be excluded.

Since the trial had effectively ended once the evidence was excluded, the Court of Appeal ordered a new trial with the evidence of the drug seizure included. This would allow the trial judge to

decide on the student's guilt based on all of the evidence. However, with such incriminating evidence before the court, it would be very difficult for the student to argue his innocence.

Appeal to the Supreme Court of Canada

The student applied for permission to have his case heard by the Supreme Court of Canada, the highest appellate court in this country. The Supreme Court hears only the most important appeals from all the provinces and territories. Its decisions are final: they cannot be appealed to any other court. A panel of seven judges heard his case on June 25, 1998, and released their written decision on November 26, 1998.

The Majority Opinion of the Supreme Court of Canada

Six out of the seven judges agreed with the decision of the Nova Scotia Court of Appeal. Justice Peter Cory, who wrote the **majority decision,** looked at the needs of the school environment. He noted, "Schools today are faced with extremely difficult problems which were unimaginable a generation ago." Drugs and weapons especially interfere with the care and education of children. Then, in order to maintain a safe and orderly environment, teachers and other school officials must be able to act swiftly and effectively to combat dangers within the school system.

Justice Cory also felt that the vice-principal was not an **agent of the police.** He suggested that the best test for determining whether he was acting in this manner was to ask if the search would have taken place in the same manner had the RCMP officer had not been present. He concluded that there was nothing in the evidence to suggest that the vice-principal would have acted differently had he been alone. He also resisted the suggestion that the mere presence of the officer transformed the search, noting that many students in a high school setting are bigger and stronger than teachers or administrators, and that it would be impractical to have them conduct searches without the presence of security or police in appropriate circumstances.

In examining the right to privacy protected by s. 8, Justice Cory asked whether the appellant had a **reasonable expectation of privacy** in the circumstances. While school is a controlled area in which teachers and administrators have powers to provide a safe environment and maintain order and discipline, the Supreme Court accepted that the appellant would have a reasonable expectation of privacy over his body. One does not give this up the moment one enters into a school.

However, at the same time, students know that teachers and administrators sometimes need to search students and their belongings to seize prohibited items. Justice Cory argued that in recent years, guns and drugs had entered the school environments in increasing numbers, creating a need to act quickly to combat the dangers they present. For a teacher or administrator, seeking a warrant to search and seize would not be feasible or desirable.

While the *Charter* requires that most authorities have **reasonable and probable grounds** of suspicion that an offence has been committed and that evidence exists at the site of the search, Justice Cory felt that this standard would not be practical for teachers and administrators in the special environment of a school. Rather, he concluded, "School authorities must be accorded a reasonable degree of discretion and flexibility to enable them to ensure the safety of their students and to enforce school regulations." Accordingly, he put forward a lower standard requiring that

teachers or administrators have "reasonable grounds to believe that a school rule has been violated and that evidence of the violation will be found in the location or on the person of the student searched." These grounds could consist of information from just one student that the school authority considers credible.

Second, the search must be reasonable and appropriate in light of the danger of the breach of the school rule. The existence of an immediate threat to student safety would justify a "swift, thorough and extensive" search; the possession of a pack of gum against school rules would not justify such a strict search.

Applying these tests to the facts of the case, Justice Cory suggested that the presence of the RCMP officer in the vice-principal's office was "merely passive" until the drugs were found. He also suggested that the vice-principal's "primary" motivation was to maintain order and discipline in the school.

The search itself was based on reasonable grounds, as the vice-principal had reason to believe that the students pointing out the drug dealer had reliable information. Second, it took place in a reasonable fashion in the relative privacy of the office and in a minimally intrusive fashion.

The Dissenting Opinion of the Supreme Court of Canada

One judge on the Supreme Court disagreed with the views of the majority. In a **dissenting opinion,** Justice Jack Major argued that the trial judge had reason to conclude that the vice-principal was acting as an agent of the police. Since the trial judge is closer to the facts than courts of appeal, and can watch the witnesses in person, and is closer to the community affected by the trial, appellate courts normally **defer** to a trial judge's **findings of facts** (as opposed to findings of law) unless they are clearly absurd.

In this light, Justice Major suggested that several factual circumstances mentioned by the trial judge supported his conclusion that the vice-principal made himself into an agent of the police.

These circumstances were:

1. The clearly criminal consequences of a successful search;
2. The likelihood that the presence of a police officer would support and affect the search;
3. The meeting of the vice-principal and the officer directly before the search;
4. The school policy requiring the school officials to call the RCMP.

Justice Major also noted the inconsistency of a RCMP officer allowing a school official to conduct a search that he could not conduct himself because of the stricter standards required of police searches. This was a shortcut that should not be taken.

Based on his conclusion that the search was a police search, Justice Major went on to find the search **unreasonable**. The vice-principal did not confirm or **corroborate** the information he had received from the students, but acted solely on their word. While the tips were compelling in certain respects, they were vague about where the drugs might be found. Last, the vice-principal

had dealt with only one of the tipsters before the day of the dance, and therefore had less reason to believe their word without more information. This he never sought.

Finally, Justice Major applied s. 24(2) of the *Charter* and concluded that the evidence should be excluded. He decided that the appellant had been required to incriminate himself: even though the drugs might have been found at another point of the dance if the search had never taken place, to say they *would* have been found was too strong. As self-incriminating evidence, it would not be fair to admit it at trial.

The Result

Despite Justice Major's dissent, the case was sent back for a new trial because the majority had found that the evidence was gathered fairly and should be admissible.

Classroom Discussion Questions

1. Where did the trial begin? To which courts was the case appealed?

2. What section of the *Charter of Rights and Freedoms* protected the accused's privacy rights? Is the *Charter* an ordinary piece of legislation, or does it have special status?

3. In your opinion, why is it that only the government can breach the *Charter?*

4. If this incident had taken place in a private school, do you think the accused would have been protected?

5. Does the word "privacy" appear in the relevant section of the *Charter?* If not, why is this right protected?

6. Arrange the following locations in order of where you believe you have the greatest "reasonable expectation of privacy" to where you have the least. Why might you expect to have more privacy in one place than in another?
    - A sidewalk.
    - A public washroom.
    - Your bedroom.
    - An airport.
    - Your locker.
    - Your pockets.
    - Your friend's house.
    - Your driveway.
    - Your car (when you are in it).
    - Your car (when you are away from it and it is parked in the street).

7. What function does the word "reasonable" perform in the legal tests you have considered? Does the word reasonable mean a different thing to a seventy-year-old male judge than to a thirteen-year-old female student? If so, is it fair to make it the basis for a test that might send a person to jail?

8. Was it fair for the Court of Appeal and the Supreme Court to conclude that the vice-principal was not an "agent of the police"? Should the vice-principal's knowledge that charges were likely to follow if he found drugs affect the analysis?

9. Which kinds of search would be reasonable for a gun and which would be reasonable for a pack of cigarettes?

10. How much should a judge be able to draw on societal trends, such as the prevalence of drugs and guns in schools? Does this mean that the law changes over time?

11. What do you think of s. 24(2) of the *Charter?* What kinds of admission of evidence would "bring the administration of justice into disrepute" in your eyes?

12. The Supreme Court in this case does not define what schools should do in every situation, but instead suggests principles they should follow in balancing the right to privacy against the school's duty to protect its students. Is this guideline easily followed? Can a student use it to assert her privacy rights?

Privacy Rights: Worksheet

For each of these hypothetical cases, try to apply the structures of reasoning set out by the Supreme Court, bearing in mind the cautions of Justice Major's dissent, and provide reasons for whether you would:

1. Find a reasonable expectation of privacy (and, if so, explain whether this would be a limited or strong expectation of privacy);
2. Conclude that the search was reasonable;
3. Exclude the evidence if the search was not reasonable.

Scenario One: School is in session during the daytime. A vice-principal has heard rumours that some students in Grade Eight are selling drugs, but he has not identified the culprit or culprits. When the students in Grade Eight are in gym class and have left their bags behind at the entrance of the gymnasium, he "locks them down" and invites the police onto the school grounds to bring sniffer dogs to test the bags and the row of Grade Eight lockers for drugs. The dogs find drugs in one of the bags and in two of the lockers. (For a real-life evaluation of a similar case, see the Ontario Court of Appeal's decision in *R. v. A.M.,* [2006] O.J. No. 1663, decided April 26, 2006 and available on the court's web site at www.ontariocourts.on.ca/decisions/2006/april/C42056.htm)

Scenario Two: TTC subway officials in Toronto have received intelligence from Canada's spy agency, CSIS, that terrorists are planning to explode bombs during rush hour at five points in the downtown core the same afternoon. The spy agency describes the information as "reliable" but declines to provide more information to protect its sources. It does provide a specific time for the suspected explosions. TTC officials and police officers pick subjects at random at every station in the GTA and expose them to bag and body searches. A disproportionate number of young Muslim men and women are targeted. Some are taken by force into specialized search rooms, while others are patted down alongside the tracks. In the sock of one of the search targets is a cellophane bag containing crack cocaine.

Scenario Three: A man is arrested after a police helicopter passes randomly over his home with a special instrument that registers unusual amounts of heat emanating from buildings. This information is presented to a justice of the peace, who grants the police a search warrant. A marijuana grow-op is located in the basement of the house. The instrument does not give up any information as to the nature of the heat or the contents of the house. (For a real-life evaluation of a similar case, see the Supreme Court of Canada's decision in *R. v. Tessling,* which was decided October 29, 2004 and is available at http://scc.lexum.umontreal.ca/en/2004/2004scc67/2004scc67.html)

Scenario Four: A man is arrested under similar conditions as were present in Scenario Three, but with the difference that the grow-op was not discovered via helicopter, but after a government-run hydro company passes along all customer account information to the authorities to allow them to detect spikes in energy use.

Conclusion: After thinking about these different scenarios involving privacy rights and the needs of public authorities, describe ways in which the courts can set standards to honour privacy rights without utterly preventing authorities from carrying out their duties. Is there a way to give these standards "teeth" to prevent the authorities from abusing privacy rights? Last, what do you think should happen when these searches turn up evidence of an unanticipated crime, as in Scenario Two? Is it fair for the Crown to be able to use this evidence in a courtroom?