IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: Fowler v. Adams 2006NLTD164
Date: 20061030
Docket: 2004 01T 3476

BETWEEN: WILLIAM JAMES FOWLER
APPLICANT

AND: MICHAEL ADAMS
FIRST RESPONDENT

AND: WILLIAM MORROW
SECOND RESPONDENT

JUDGE: The Honourable Justice David B. Orsborn

Appeal from Adjudicator under the *Royal Newfoundland Constabulary Act*

Place of hearing: St. John's, Newfoundland and Labrador

Summary: At the request of school authorities, Sgt. Michael Adams and his police dog Storm conducted a drug sniff search at a junior high school. The search included the dog walking up and down the aisles of the classroom in which S., a grade 8 student, was seated. Fowler, S's father, complained to the Police Public Complaints Commission, asserting that the search was unlawful. Following an investigation, the Public Complaints Commissioner laid disciplinary charges against Adams alleging conduct unbecoming a police officer on the grounds of an unlawful search. A disciplinary adjudicator dismissed the charges, finding that there was no search of S., that Sgt.

Adams had a bona fide belief in the lawfulness of the search, and that in any event the school authorities consented to the search. However, the adjudicator recommended that the police and regional school board develop policies and guidelines for school searches. Fowler appealed the dismissal of the charges.

The court found that there had been a search of S.'s person and that the necessary consent to a search of her person had not been given. But the court also held that, even if the search were considered unlawful and contrary to s. 8 of the *Charter*, in all of the circumstances – including a long-standing agreement between the police and the school board to conduct school searches and the knowledge and approval of Adams' superior of his role in such searches – no disciplinary action was warranted.

Because of Fowler's obvious concern, the court discussed in *obiter* issues concerning the lawfulness of the search.

The appeal was dismissed and the adjudicator's disposition and recommendations confirmed.

Appearances:

William Fowler	For himself
D. Bradford L. Wicks	For the First Respondent

Authorities Cited:

CASES CONSIDERED: R. v. A.M., 2006 O.J. No. 1663 (C.A.) (QL); **R. v. Taylor**, 2006 NLCA 41; **R. v. Brown**, 2006 ABCA 199; **R v. M. (M.R.)**, [1998] 3 S.C.R. 393; **R. v. Tessling**, 2004 SCC 67; **R. v. Edwards**, [1996] 1 S.C.R. 128.

ACTS CONSIDERED: *Royal Newfoundland Constabulary Act, 1992* SNL 1992 c. R-17; *Schools Act, 1997* SNL 1997 c. S-12.2.

REASONS FOR DECISION

Orsborn, J.:

INTRODUCTION

[1] This is an appeal from a decision of an adjudicator dismissing the disciplinary charges brought against police officer Sgt. Michael Adams under the *Royal Newfoundland Constabulary Act, 1992*[1].

[2] The charges were laid following a public complaint filed by William Fowler arising out of a sniff search conducted by a police dog at the junior high school attended by his daughter S.

[3] Following a hearing, the adjudicator dismissed both charges but made two recommendations addressing the formulation of policy and procedure guidelines for such searches. The adjudicator also ordered that Sgt. Adams be compensated for his reasonable costs incurred as a result of the hearing.

[4] William Fowler has appealed the adjudicator's decision, exercising the statutory right of appeal in s. 36 of the *Act*.

ISSUES

[5] The primary arguments raised by Fowler are:

1) that the adjudicator erred when he concluded that the sniff search conducted by the police dog Storm was not a search of the person of S. but rather a search of "the air in the classroom in which the students were seated";
2) that, since an unlawful search is contrary to the Royal Newfoundland Constabulary Policy and Procedures and Manual,

[1] SNL 1992 c. R-17 ("the Act").

the adjudicator erred in declining to consider the lawfulness of the search and in addressing only Sgt. Adams' good faith belief in the lawfulness of the search;

3) that the adjudicator erred in failing to consider the question of whether the school officials could consent to a search of S. and in addressing only Sgt. Adams' reasonable belief that the search was lawful because it was conducted with the consent of school officials.

[6] Fowler also raised issues of a reasonable apprehension of bias on the part of the adjudicator, and of the adjudicator failing to consider issues addressed by the Public Complaints Commissioner in his written report of February 4, 2003 to Mr. Fowler. At the hearing of the appeal, I indicated my view that these claims lacked merit and did not require a response from counsel for Adams. I do not propose to address them further.

REFERENCE TO THE ADJUDICATOR

[7] Upon receipt of Fowler's complaint, the Chief of Police investigated the allegations and dismissed the complaint. Fowler filed a Notice of Appeal with the Public Complaints Commissioner who investigated the complaint. The Commissioner concluded that there had been an unlawful search of S. but that any failure was "structural and systemic". He recommended against disciplining Sgt. Adams and proposed a 'system-oriented' settlement of the complaint. Notwithstanding the dismissal of the complaint against Sgt. Adams, the Commissioner (by this time a different Commissioner) referred the complaint to an adjudicator pursuant to subs. 28(2) of the *Act*. The reference sets out the specific charges with particulars:

> **AND WHEREAS** pursuant to the Act and the regulations made thereunder, Sgt. Michael Adams, Regimental No. 334, is alleged to have conducted himself in a manner unbecoming a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by:
>
> (i) carrying out his duties contrary to the Policy and Procedures Manual, and in particular part 1, Chapter B and/or Part 10, chapter J thereof, contrary to Section 3(1)(j) of the *Royal Newfoundland Public Complaints Regulations*, C.N.R. 970/96, thereby committing an offence contrary to Section 3(2) of the said Regulations; and,

> (ii) neglecting or omitting to promptly and diligently perform his duties as a police officer, contrary to Section 3(1)(d) of the *Royal Newfoundland Constabulary Public Complaints Regulations*, C.N.R. 970/96;
>
> thereby committing an offence contrary to Section 3(2) of the said Regulations.
>
> The particulars of the alleged offence are as follows:
>
> > That Sgt. Michael Adams, accompanied by PSD Storm, did unlawfully detain S. (a minor) at St. John Bosco School, St. John's, on February 27th, 2002, and did conduct an unlawful search of S. (a minor) at St. John Bosco School, St. John's, on February 27ths, 2002, and did conduct said unlawful search of S. (a minor) without any or any adequate investigation, and did fail to advise or ensure that S. (a minor) or her parents were advised of her constitutional rights prior to a search being conducted of S. (a minor) at St. John Bosco School, St. John's, on February 27th, 2002, and did conduct Police Dog Service Unit training in a facility occupied by young persons.

[8] There were two specific charges referred to the adjudicator – one based on carrying out duties contrary to the Policy and Procedures Manual and the other based on an alleged failure to properly and diligently perform duties ("discreditable conduct"). The adjudicator dismissed both charges.

[9] The appeal and Fowler's submissions focussed on the charge relating to Adams' conduct with respect to the standard required by the Policy and Procedures Manual. These reasons will deal with that charge. No serious issue was taken with the adjudicator's conclusion on the discreditable conduct charge and I will not deal with it further.

THE CIRCUMSTANCES

[10] The following reflects the adjudicator's findings of fact.

[11] For a number of years, high school administrators in St. John's had been concerned with illegal drug use by students. The administrators sought the co-operation and assistance of the police in addressing the problem. On December 7, 1998, the Avalon East School Board and the Royal Newfoundland Constabulary

held a press conference and issued the following release - set out in its entirety by the adjudicator:

> **"R.N.C. POLICE DOGS USED TO EDUCATE STUDENTS ABOUT DRUGS"**
>
> St. John's – December 7, 1998 – A unique approach is being used in drug sniffing police dogs to help educate students in high schools. The Royal Newfoundland Constabulary has joined with the Avalon East School Board to introduce a new approach that will focus on education and prevention.
>
> Members of the RNC police dog service have met with school officials and principals to address the concern in addition to visiting the schools to speak with the students about the dangers associated with drugs, RNC dog handlers and their partners. Storm and Jerry will be doing periodic searches of various high schools in the RNC Northeast Avalon policing jurisdiction. In recent weeks, RNC police dogs have visited six schools and in two incidents a small quantity of marihuana was found.
>
> Mr. Brian Shortall, CEO/Director of Education for the Avalon East School Board stated. "We are extremely pleased to be working together with the RNC on this joint initiative. Parents and students alike should be aware that any time schools may be searched by RNC dogs. This move has already been welcomed by those students who see the benefit of keeping this problem out of our schools and educating them about the harmful effects of drugs". Meanwhile, Deputy Chief Oliver of the RNC explains. "We often receive requests from schools for our police dogs to visit and meet with the students. This proactive approach is intended to educate students while at the same time send a message that illegal activity will be tolerated. This is another example of what community policing is all about and we welcome the **opportunity to work with schools to address problems as they are identified."** [Emphasis and underlining by adjudicator]

[12] From 1998 to February 2002, Sgt. Adams was involved in approximately 60 school searches, with about 20 of these searches involving classrooms. In each case the search was initiated by an invitation from the school in question. Sgt. Adams would make a report to his superior following each search. The evidence before the adjudicator was that the program was well received by schools, parents and students; indeed the only complaint ever received was the one from William Fowler.

[13] In February 2002, S. was a grade 8 student at the St. John's Bosco School. She was approaching her 14th birthday. The school is a k-12 school consisting of

primary (k-3); elementary (4-6); junior high (7-9); and high (10-12). The students in each section are separated from those in the other sections.

[14] On February 20th, Sgt. Adams received a call from Brenda Manning, principal of the school[2]. Manning had received complaints and concerns from parents and students about drugs being sold and passed around the younger children in the school. The school had not previously been involved in a drug search but Manning and her staff felt that "it might be a necessary measure considering the threat to students and the community as a whole". Manning and Adams set up an appointment for February 27th.

[15] By coincidence, on February 27th a teacher in the junior high section observed one or more students under the influence of drugs, and Manning herself smelled marijuana off a student using the office telephone. There was no suggestion whatever that S. was in any way suspected of using or otherwise being involved in drugs. She was not the student observed by the teacher nor the student observed by Brenda Manning.

[16] Adams arrived at the school on February 27th accompanied by Officer Robert Wellon of the Canada Border Security Agency. Manning and Leo Vaughan, the Vice-Principal, felt that the purpose of the search was to "send a message" and act as a deterrent to students. Adams asked Manning to make an announcement over the public address system that a police officer and a police dog were in the school to do a search. Manning also announced that all students were to remain in their classes. Manning told Adams that she wanted a search of the corridors, the classrooms and the area behind the school. (Officer Wellon and his chocolate Labrador Retriever conducted the search of the high school while Sgt. Adams and his German Shepherd Storm conducted the search of the junior high).

[17] Colleen Hogan, a teacher on staff, was asked to accompany Adams during the search. Adams put the drug collar on Storm and held the dog throughout on a six foot leash. The dog is trained to sit if it smells any of the drugs for which it has been trained to search. No student would be identified or removed from any class, but any indication of drugs during the search would be reported to the police Drug Section for follow-up.

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[2] Brenda Manning did not testify before the adjudicator. She provided a written statement which was accepted as her evidence.

[18] Adams first walked the dog up and down the corridors. He then proceeded to each classroom waiting outside until the classroom teacher introduced him.

[19] Michael Grant was S.'s homeroom teacher. Grant did not recall the public address announcement and said that he was advised by a colleague that a search was to be conducted. Adams, Hogan and Storm came into the classroom. Adams introduced himself and then walked Storm up and down the aisles, passing by each student twice. The dog passed within one or two feet of each student. Grant understood that the students were not to leave the room in the absence of a legitimate reason to do so. Adams believed that any student could leave if he or she wished.

[20] The search of S.'s classroom took two or three minutes. The dog was on the leash the whole time. No student was touched by any part of the dog. No drugs were indicated during the search. The evidence is consistent that the search was conduced efficiently and professionally. The adjudicator was satisfied that at no time was any child in danger from either of the dogs and that the handlers were throughout in complete control of their dogs.

THE CHARGE

[21] Subsection 3(1)(j) of the *Royal Newfoundland Constabulary Public Complaints Regulations*[3]:

> 3. (1) A police officer shall not conduct himself or herself in a manner unbecoming to a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary which shall include but not be limited to the following …
>
> (j) carry out his or her duties in a manner contrary to the Policy and Procedures Manual …

[22] The Policy and Procedures Manual contains a section on Search and Seizure. The relevant extracts:

> "1. General:
>
> a. Members conducting searches must comply with legal, constitutional and case law requirements.

[3] C.N.L.R. 970/96.

b. Section 8 of the Canadian Charter of Rights and Freedoms states, “Everyone has the right to be secure against unreasonable search and seizure”.

2. Effect of an Unlawful Search:

a. Depending on the circumstances of each case, an unlawful search may give rise to one or more of the following consequences:

(1) criminal action for assault;
(2) a civil action for trespass, false arrest and/or breach of Charter rights;
(3) policy disciplinary sanctions (internal or public complaint discipline process).

b. Depending on the circumstances of each case, an illegal search may also affect the future prosecution of the matter which is the subject of the investigation in one of the following ways:

(1) At the discretion of the Court, evidence obtained as a result of the illegal search may be excluded; or
(2) The court may order any other remedy which it considers appropriate pursuant to Section 24(1) of the Charter of Rights and Freedoms.

(c) In addition, citizens are entitled to use as much force as is reasonably necessary to prevent unlawful searches of their person, place or things. Such resistance will not constitute an assault, resistance, or obstruction unless the resisting force is unreasonable …

…..

9. Search conducted With Consent:

a. Lawful rights against search and seizure may be waived in some cases, for example, a suspect can give a member permission to search his/her person, home, car, effects, provide samples for DNA analysis, etc. but this waiver will not be valid unless it is given voluntarily by a person having the necessary legal authority to make such a disposition. Thus, without restricting the generality of the foregoing, the following points must exist for a search by consent to be lawful:

(1) there was consent, express or implied;

(2) the consent giver had the authority to do so (i.e. consent given by someone in apparent occupation or control of the vehicle or premises);
(3) the consent was voluntary (i.e. not the product of policy coercion or other conduct that negated);
(4) the consent giver was aware of the nature of the police conduct to which he/she was being asked to consent;
(5) the consent giver was aware of their right to refuse the police request; and
(6) the consent giver was aware of the potential consequence (i.e. any item seized could be used in evidence against them) of giving consent.

Note: it is advisable in such instances that the consent be obtained in writing if at all possible. In this way there is a clear record of what the consent giver was advised of at the time consent was given …

…..

12. General Search Procedures

a. Because of its extraordinary and sensitive nature, persons and/or their persons and/or their property shall not be searched unless:

(1) It is carried out strictly in accordance with the law;
(2) It is based upon reasonable and probable grounds;
(3) The extent of the search is not only authorized by law, but is also reasonable under the circumstances; …

THE ADJUDICATOR'S DECISION

[23] The adjudicator concluded that Sgt. Adams did not detain S. or any of the students. His decision at para. 103:

> According to the teachers' evidence, they were instrumental in ensuring the students remained seated in their classrooms. As noted, S.'s homeroom teacher, Grant, testified that no person had "total control of the situation". Therefore, the joint initiative was present at the classroom level as much as it was at the School Board/RNC command level. I can only conclude that it was, as much as anything, an exercise of the teacher's parentis powers in keeping the students at their desks during the classroom search (as it was in authorizing the search in the first place). According to Grant, he could not recall Sgt. Adams instructing students to stay in their seats. Also, Grant indicated it was only "common sense" for the students to remain seated during the time Sgt. Adams and PSD Storm were searching the classroom. However, Grant testified that he, not Sgt. Adams, would assess any

> student's request to leave during the search and, if necessary, consult with the administration not Sgt. Adams. Finally, there is Sgt. Adams' evidence that he had no intention of stopping any student from leaving the classroom and that he was not there to detain students.

[24] He further concluded that none of the students had been advised of their constitutional rights, but that in any event none of the students had been subjected to a search of their person. At para. 105:

> … It is equally clear that none of the students were subjected to a search of their person. Instead, the dog using its exceptional olfactory sense, searched the air in the classroom in which the students were seated. Obviously, if the dog detected drugs, the Drug Section would be advised. Furthermore, the privacy interests of students were respected, by both the school administrators and RNC. According to Sheppard, lockers would only be opened with the consent of a student. In addition, there were no evidence to suggest that the RNC ever searched the person of a student during any of the school searches conducted in the 1998-2002 period. Therefore, it would appear that neither the RNC members nor the school administrators believed that there was any necessity of advising students of their constitutional rights. …

[25] With respect to consideration of the lawfulness of the search – since if the search was unlawful it would be in contravention of the Policy and Procedures Manual – the adjudicator declined to decide the issue. He concluded that Sgt. Adams had a bona fide belief in the lawfulness of the search – based on the request and authorization of the school officials – and that such an honest belief served to preclude his conduct as being contrary to the Policy and Procedures Manual. The adjudicator also relied for his position on the difference between his role in a disciplinary process and that of a judge considering a *Charter* breach and potential subs. 24(2) remedy.

[26] The decision, at para. 99:

> As noted, I have been urged to address the legality or constitutionality of the search. Given my finding of a bona fides belief on Sgt. Adams' part, such an analysis is, at least to a large degree, unnecessary. However, I am compelled to address the following points:
>
> 1. An adjudicator under the Act is not in the same position as a judge hearing a case involving a charge under either the Criminal Code of Canada or Controlled Drugs and Substances Act.

2. An adjudicator is, as noted, "to inquire into the matter referred to him or her". In other words, to determine if the charge or charges alleged against the member has or have been substantiated on the balance of probabilities.

3. A judge conducting a trial on a criminal or drug charge is to determine if the Crown has proven beyond reasonable doubt the charge or charges laid against the accused.

4. Different considerations apply in each situation. However, as part of the trial process, a judge must, at least in some cases, address the legality or constitutionality of searches. Such a determination is necessary in order to ascertain if specific evidence is admissible against the accused.

5. It would be presumptuous (at the least) for an adjudicator to proffer an opinion, in the context of the public complaint process, as to the constitutionality of school searches in general and, in particular, classroom searches.

6. Any such finding would have little, if any, value as it is not binding on any court. Therefore, in large measure, the exercise is little more than speculation on the adjudicator's part. Consequentially, the matter before me is best decided on the basis I have outlined in this Decision.

[27] However, the adjudicator did go on to consider the issue of consent, but still in the context of the belief of Sgt. Adams. At para. 100:

> In this case, Sgt. Adams' conduct must be carefully considered in terms of the RNC Policy and Procedure Manual. Upon doing so, it is noteworthy that paragraph 9 ("Search Conducted With Consent") provides that a search conducted with consent is lawful. The paragraph outlines the criteria which must exist for the search to be lawfully conducted. Bearing in mind the circumstances which existed prior to February 27, 2002, it is my finding that Sgt. Adams held the reasonable belief that the school searches were conducted with the consent of the school administrators and, as a result, were lawful. This belief is in very large measure rooted in the understanding he had as to the authority of school administrators. It is clear from the evidence that his understanding was shared with other witnesses, most noteably, Sheppard. Therefore, it is my finding that Sgt. Adams' belief was in keeping with the weight of the evidence.

[28] His conclusion with respect to the charge of carrying out duties in a manner contrary to the Policy and Procedures Manual – at para. 106:

> In summary, I find on the basis of the evidence in its entirety, that Sgt. Adams' conduct did not constitute a violation of the RNC Policy and Procedures Manual. Resultingly, Charge # 1 is dismissed.

[29] His recommendations:

> 125. After considering this case, and the larger context, I would make the following recommendations:
>
> (1) The Department of Justice provide such legal advice as is necessary to the RNC and/or School Board to assess the constitutional issues associated with the searching of schools, including occupied classrooms, by RNC officers.
>
> (2) If, in the opinion of the Department of Justice, such searches do not offend the Charter, a policy be developed by the RNC and included in the RNC Policy and Procedures Manual setting out the steps to be taken in conducting such searches.
>
> 126. In conclusion, I therefore find that, pursuant to s. 33(1)(c) of the Act, Sgt. Michael Adams conducted himself in a proper manner and shall be compensated for reasonable costs incurred by him as a result of the investigation and Hearing.

THE STATUTORY APPEAL

[30] Fowler was given leave to appeal pursuant to subs. 36(2) and (3) of the *Act*. The *Act* does not limit the matters which may be appealed and gives the judge a broad remedial authority:

> 36(6) A judge of the Trial Division may confirm, reverse or vary the order of the adjudicator and may make an order that an adjudicator may make under section 33.

[31] The range of orders open to an adjudicator under s. 33 (and therefore to a judge under subs. 36(6):

> 33(1) Following a hearing not respecting the chief an adjudicator shall make a determination on the balance of probability and may order
>
> (a) that the decision appealed from be confirmed;

(b) that the police officer who is the subject of the complaint

(i) comply with standards of police service prescribed in the regulations,

(ii) enter a rehabilitative or further training program which the adjudicator considers necessary,

(iii) be reinstated with or without a reprimand,

(iv) where he or she is not a commissioned officer, not be considered for promotion for a time period of up to 3 years,

(v) where he or she is not a commissioned officer, be demoted permanently or for a specified period,

(vi) where he or she is not a commissioned officer, be suspended with or without a salary for a specified period of time, and

(vii) where he or she is not a commissioned officer, be dismissed from his or her position with the constabulary;

(c) that, where the police office who was the subject of the complaint conducted himself or herself in a proper manner, he or she be compensated for reasonable costs incurred by him or her as a result of the investigation and hearing;

(d) that the police officer who was the subject of the complaint pay the reasonable costs incurred by the constabulary in an investigation and discipline of that police officer by the chief; and

(e) that the police officer who was the subject of the complaint pay the reasonable costs incurred by the commission in conducting an investigation or hearing.

ANALYSIS

[32] I will not discuss in detail the standard of review and the pragmatic and functional analysis required to determine this standard. As will be seen, I agree with the adjudicator's disposition of the matter, although not with all aspects of his analysis. Suffice it to say that, given the statutory appeal and the broad scope of

appellate remedies, the standard of review is that of correctness, subject however to appellate deference on findings of fact.

[33] Another consideration in my approach to the analysis of the adjudicative decision is that Mr. Fowler made it quite clear in his submissions that he was not so much concerned with the discipline of Sgt. Adams as he was with getting confirmation from the court that the search of his daughter was unlawful. However, this appeal is from an adjudicator considering disciplinary action under the *Act* and my focus will be on that issue.

[34] In my view, the adjudicator made the following reviewable errors in the course of his analysis:

> 1) the adjudicator erred in concluding that there was no search of the person of S..

[35] As previously noted, the adjudicator concluded "that none of the students were subjected to a search of their person. Instead the dog using its exceptional olfactory sense searched the air in the classroom in which the students were seated" (para. 105). I was not provided with any authority which has concluded that a dog sniff around a person – for the purpose of determining whether any smell of illegal drugs in emanating from that person – is not a search. I hasten to point out that I am not considering at this stage whether or not any search was a search within the meaning of s. 8 of the *Charter*. In **R. v. A.M.**[4], Armstrong, J.A. of the Ontario Court of Appeal considered a dog sniff search of a backpack in a gymnasium. I take from his reasons that he considered the sniffing of the backpack to be a search. He said, at para. 45 ff:

> 45 … In my view, the dog sniff of A.M.'s backpack and the search of the backpack by Constable Callander constituted a search for the purposes of s. 8 of the *Charter*.
>
> 46 I agree with the submission of counsel for the Canadian Civil Liberties Association:
>
> The dog is a necessary, direct, and integral part of the police officers' search of the classrooms, gymnasium and backpacks. The dog is, in essence, a physical extension of its handler and is directly and immediately connected to the consequent physical search of the backpack.

[4] 2006 O.J. No. 1663 (C.A.) (QL).

> 47 I am not persuaded that the judgment of the Supreme Court of Canada in *Tessling* is supportive of the Crown's position that a dog sniff is not a search. In *Tessling*, the house of the accused was specifically targeted as a result of information that the accused was involved in a marijuana grow operation. I see a significant difference between a plane flying over the exterior of a building (on the basis of information received) and the taking of pictures of heat patterns emanating from the building, and a trained police dog sniffing at the personal effects of an entire student body in a random police search.
>
> 48 I note that the Supreme Court of Canada has held that police officers who attended at the door of a house for the purpose of sniffing for the odour of marijuana were involved in an "olfactory search" which engaged s. 8 of *Charter*: see *R. v. Evans*, [1996] 1 S.C.R. 8 at para. 30.

[36] In **R. v. Taylor**[5], Rowe, J.A. considered this reasoning to be unclear since it covered three separate activities – the dog sniff, the warrantless search of the backpack itself, and the "speculative sweep" of the "personal effects of an entire student body" (para. 29). Rowe, J.A. said that, should the reasoning in **R. v. A.M.** mean that a dog sniff in all circumstances was a search within the meaning of s. 8, he would disagree with it. However, my reading of **Taylor** indicates that it does not in any sense suggest the conclusion that a sniff search directed at a smell emanating from a person – a search involving personal privacy rather than territorial or informational privacy – is not, at the least, a 'search' of that person, as that term is commonly understood. I repeat that I am not at this point addressing a s. 8 Charter issue.

[37] In **R. v. Brown**[6], Côté, J.A. considered a dog sniff search of a bag in a bus depot. He concluded that there was no search, but he carefully circumscribed his decision. At para. 4:

> Therefore, it is possible that the legal result could differ in another case with somewhat different evidence. I do not say that all police conversations in bus depots or airports necessarily fall into the same legal category. Nor do I create a category in which I pen all police dogs or their sniffing. In particular, this case did not involve a sniff of a person, nor of clothing being worn, not into a pocket in clothing.

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[5] 2006 NLCA 41.
[6] 2006 ABCA 199.

[38] This was of course written in the context of a s. 8 *Charter* issue involving an exclusion of evidence.

[39] It seems to me to be almost self-evident that a dog sniff by a trained dog, purposely conducted in close proximity to a person, with the intent of seeing whether or not a smell of illegal drugs is detected by the dog – and assuming that there is no other likely source of the smell other than the person – is a search of that person. In such circumstances, to draw a distinction between the person and the air around the person is, in my view, to ignore reality.

[40] The adjudicator erred in concluding that there had been no search of the person of S. when the dog twice passed closely by her while she was at her desk in the classroom.

> 2) The adjudicator erred in concluding that, in the circumstances, any required consent to the search of S. was given by the school administration.

[41] No doubt the adjudicator's conclusion on this issue was influenced by his conclusion that there had been no search of the person of S.

[42] School authorities do have the ability in certain circumstances to seach the person of a student without the consent of that student[7]. In **R. v. M. (M.R.)**, the Supreme Court of Canada sets out the preconditions for such a search; I will not discuss them here since there was no suggestion that any of them were present in this case.

[43] Similarly, police officers may conduct a search of a person without that person's consent, but again, only in certain circumstances. In most cases a search warrant will be required, although a warrantless search may be conducted in some circumstances. Again, there is no suggestion that a search of S. was, according to accepted legal principles, an authorized search of her person. In my view, the adjudicator erred in considering only the consent of the school authorities and not the specific consent or absence of consent, of S.

> 3) The adjudicator erred in considering the lawfulness of the search only in the context of the reasonable and honest belief held by Sgt. Adams.

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[7] See **R v. M. (M.R.)**, [1998] 3 S.C.R. 393.

[44] The offence in question incorporated the provisions of the Policy and Procedures Manual. That manual directs that "Members conducting searches much comply with legal, constitutional and case law requirements".

[45] Thus, determining whether a search is contrary to the provisions of the manual requires consideration of whether or not the search was lawful.

[46] The lawfulness of the search does not depend on the honest belief of the searcher that the search was authorized. Determining lawfulness – that is, whether or not the search was reasonable for the purposes of s. 8 of the *Charter* – requires an assessment of the "totality of the circumstances"[8].

[47] Included in the assessment will be a determination of who conducted the search, consideration of any authority for the search, including the existence of reasonable and probable grounds (in the case of a police search), or other authorization (in (eg.) the case of a search by school authorities), the nature of the privacy interest invaded, the existence and extent of any reasonable expectation of privacy in that interest, and the nature of the search itself, including its intrusiveness.

[48] The adjudicator concluded that, sitting as a disciplinary tribunal as part of the public complaints process, it would be "presumptuous to proffer an opinion" on the constitutionality, or lawfulness, of the search. However, as noted, he did go on to discuss lawfulness in the context of Sgt. Adams' reasonable and honest belief of its lawfulness in the sense of the search having been invited and authorized by school administrators.

[49] The adjudicator's reluctance to consider the issue of lawfulness is understandable. Such a determination is usually made in the context of a criminal proceeding where evidence is sought to be excluded because of a s. 8 *Charter* breach. Outside the s. 24 'remedial arena' of the *Charter* the question of unreasonable search seldom arises, particularly when nothing is found as a result of the search.

[50] But it seems to me that, given the incorporation of the lawfulness of the search into the requirements of the Policy and Procedures Manual, and from there into the charge of acting contrary to the provisions of that manual, the adjudicator

[8] See **R. v. Tessling**, 2004 SCC 67; **R. v. Edwards**, [1996] 1 S.C.R.128.

was indeed required either to reach a conclusion as to the lawfulness of the search (assuming that the search was conducted by the police and not by the school authorities) or proceed to consider the disciplinary offence on the assumption that the search was unlawful and contrary to the Policy and Procedures Manual. In doing neither, the arbitrator erred.

[51] I said earlier in these reasons that, although I believe the adjudicator to have erred in his analysis, I agree with his disposition of the proceeding. As I will shortly explain, I agree with the disposition even if I were to conclude that the search of S. was unlawful. Accordingly, I do not propose to offer a firm opinion on whether the search was lawful or not – that is, on whether the search was contrary to s. 8 of the *Charter*.

[52] However, in view of the obvious concern of Mr. Fowler on this issue, and in view of the recommendations for further study made by the adjudicator, the following comments may be of assistance, recognizing however that they are not necessary for my disposition of this appeal and do not represent a final trial judicial determination of the matter.

[53] It is clear that schools and the parents of students at schools have a legitimate and serious concern about the problem of illegal drugs and the involvement of students in their use and sale. It is equally clear that the regional school board considered the problem to be serious and widespread, at least at the high school level. But addressing the problem requires consideration of the privacy rights of students. To what extent does the problem, if any, warrant the infringement of these rights? Are the rights of students diminished by virtue of their being in school? Cory posed the issue clearly in **R. v. M. (M.R.)**[9] at para. 1:

> Teachers and those in charge of our schools are entrusted with the care and education of our children. It is difficult to imagine a more important trust or duty. To ensure the safety of the students and to provide them with the orderly environment so necessary to encourage learning, reasonable rules of conduct must be in place and enforced at schools. Does the nature of the obligations and duties entrusted to schools justify searches of students? To what extent are students entitled to an expectation of privacy while they are on school premises?

[9] Supra, fn. 7.

[54] And para. 3:

> … The question presents potentially conflicting values and principles. On one hand, it is essential that school authorities be able to react swiftly and effectively when faced with a situation that could unreasonably disrupt the school environment or jeopardize the safety of the students. Schools today are faced with extremely difficult problems which were unimaginable a generation ago. Dangerous weapons are appearing in schools with increasing frequency. There is as well the all too frequent presence at schools of illicit drugs. These weapons and drugs create problems that are grave and urgent. Yet schools also have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example and may be undermined if the students' rights are ignored by those in authority. How should the appropriate balance of these values be achieved?

[55] And further at para. 36:

> It is essential that our children be taught and that they learn. Yet, without an orderly environment learning will be difficult if not impossible. In recent years, problems which threaten the safety of students and the fundamentally important task of teaching have increased in their numbers and gravity. The possession of illicit drugs and dangerous weapons in the schools has increased to the extent that they challenge the ability of school officials to fulfill their responsibility to maintain a safe and orderly environment. Current conditions make it necessary to provide teachers and school administrators with the flexibility required to deal with discipline problems in schools. They must be able to act quickly and effectively to ensure the safety of students and to prevent serious violations of school rules.

[56] **R. v. M. (M.R.)** involved a search by school authorities. There is no suggestion in the decision that a search by police would be assessed against any standard other than that which is applied to all police searches; that is, a police search would not be assessed against the standard applicable to a search by school authorities, even if the search took place in the school. The situation may of course be different if it were found that, in conducting the search, the police were acting as agents of the school authorities.

[57] I consider it unlikely on the facts of this case that Sgt. Adams and Officer Wellon would be found to be acting as agents of the school authorities. The search was intended by the school authorities to act as a deterrent and to send a message that it was not wise to bring drugs into the school. The police were invited by the

school to do the search, but the search was conducted entirely by the police, using a police dog. It was a visible exercise of police authority, and the reasonable inference is that much if not all of the deterrent effect would come from the fact of police involvement. I note further the evidence before the adjudicator to the effect that, had there been any evidence of illegal drugs, the finding would have been turned over to the Drug Section of the police force.

[58] I have earlier concluded that, in the circumstances, the sniff search was a search of the person of S.. Assuming that this conclusion is correct, the issue of the lawfulness of the search – that is whether or not it contravened s. 8 of the *Charter* – requires consideration of whether, in all of the circumstances, S. had a reasonable expectation of privacy in her person, or at least in any odours coming from her person that could only be detected by a trained sniffer dog.

[59] A search of the person engages the highest privacy interest. As Binnie, J. said in **R. v. Tessling**[10] at para. 21:

> Privacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity, and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal.

[60] A determination of a reasonable expectation of privacy involves an assessment of not only the particular privacy interest involved, but of all of the circumstances of the search – see **R. v. Tessling** at para. 32.

[61] The reasonable expectation of privacy of students in a school setting was discussed in **R. v. M. (M.R.)**. Cory, J. speaking for the majority, concluded that the student did have an expectation of privacy with respect to his or her person. He said, at para. 32:

> Here the search was of the appellant's person. In the circumstances it is obvious that some of the factors referred to in *Edwards* are not applicable. However, the existence of a subjective expectation of privacy and the objective reasonableness of that expectation remain important. It is also necessary to consider the context in which the search took place. Here the appellant was a student at the school, attending a school function held on school property. The search was carried out by the school authority responsible for supervision of that function. Considering all these factors, did the appellant have a reasonable expectation of privacy with respect to his person and the items he carried on his person? In my view he did. A

[10] Supra fn. 8.

> student attending school would have a subjective expectation that his privacy, at least with respect to his body, would be respected. In light of the heightened privacy interest that has historically been recognized in one's person, a subjective expectation of privacy in that respect is reasonable. I do not think that this expectation is rendered unreasonable merely by virtue of a student's presence in a school. It follows that the appellant did have a reasonable expectation of privacy in that regard, with the result that s. 8 is engaged.

[62] However, Cory, J. went on to point out that the extent of such an expectation of privacy may be lessened in the school setting. At para. 33:

> However, the reasonable expectation of privacy, although it exists, may be diminished in some circumstances, and this will influence the analysis of s. 8 and a consideration of what constitutes an unreasonable search or seizure. For example, it has been found that individuals have a lesser expectation of privacy at border crossings, because they know they may be subject to questioning and searches [page278] to enforce customs laws (see *Simmons*, supra). It was because of this lesser expectation of privacy, that a customs search did not have to meet the standards in *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, in order to be reasonable. Similarly, the reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances. Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A student's reasonable expectation of privacy in the school environment is therefore significantly diminished.

[63] Based on this reasoning, and again without expressing a firm opinion, I consider more likely than not that S. had, while at school, a reasonable expectation of privacy, at least to the extent that she would not be subject to a sniff search of her person by a police sniffer dog trained to search for drugs.

[64] This conclusion would bring the sniff search within the ambit of s. 8 of the *Charter*. Thus there rises for consideration the authorization for the search, and whether or not, even if authorized, the search was conducted reasonably.

[65] Assuming that the search was conducted by the police and not the school authorities, and there being no warrant, any authorization would have to be found in the grounds that support a warrantless search. No argument was advanced that

such grounds existed and it is unlikely that in the circumstances such an argument could be made with respect to the search of S..

[66] If indeed it were concluded that the search was conducted by school authorities, thus bringing into play the grounds set out in **R. v. M. (M.R.)** at para. 48, I consider it still unlikely that, in the circumstances, such grounds of search authorization existed with respect to S.

[67] Further, a search by school authorities "must be authorized by a statutory provision which is in itself reasonable". A potential source of authority is found in the *Schools Act, 1997*[11], and in particular subs. 24(3) and sec. 33:

> 24(3) A principal of a school shall, subject to the direction of the board …
>
> (f) maintain order and discipline in the school and on the school grounds and at those other activities that are determined by the principal, with the teachers of the school, to be school activities;
>
> …..
>
> 33 A teacher's responsibilities shall include …
>
> (e) under the direction of the principal, maintaining and supervising order and discipline among the students while they are in the school or on the school grounds and while they are attending or participating in activities that are determined by the principal, with the teachers of the school, to be school activities; …

[68] In this regard, I note that in **R. v. M. (M.R.)**, a statutory duty on a teacher to "maintain order and discipline …" and to "give constant attention to the health and comfort of the pupils …" was found "by necessary implication" to authorize searches of students by school authorities (para. 51). It is likely that the above-noted provisions of the *Schools Act, 1997* would support the same conclusion.

[69] With respect to the manner in which a search is conducted in a school setting, Cory, J. said, at paras. 52-53:

> The search conducted by school authorities must itself be reasonable and appropriate in light of the circumstances presented and the nature of the suspected breach of school regulations. The permissible extent of the search will vary with

[11] SNL 1997 c. S-12.2.

> the gravity of the infraction that is suspected. For example, it may be reasonable for a teacher to take immediate action and undertake whatever search is required where there are reasonable grounds to believe that a student is carrying a gun or some other dangerous weapon. The existence of an immediate threat to the students' safety will justify swift, thorough and extensive searches. That same type of search might not be justified where, for example, a student is reasonably believed to have gum which is prohibited by school regulations in his or her pocket. The reasonableness of a search by teachers or principals in response to information received must be reviewed and considered in the context of all the circumstances presented including their responsibility for students' safety. [page286]
>
> The circumstances to be considered should also include the age and gender of the student. For example, a search of the person of a female student by a male teacher may well be inappropriate and unreasonable. Every search should be conducted in as sensitive a manner as possible and take into account the age and sex of the student. It should not be forgotten that the manner in which students are treated in these situations will determine their respect for the rights of others in the future.

[70] Clearly, the determination of whether a dog sniff search was a reasonable manner of conducting an otherwise authorized search would require an examination of all of the circumstances.

[71] It will be apparent from the above discussion that, at least in my view, there is a serious question of the lawfulness of the sniff search of S.. As Cory, J. so clearly set out in the opening paras. of **R. v. M. (M.R.)**, while the presence of illegal drugs in schools is a "grave and urgent" problem, the response to the problem must respect the constitutional rights of all members of society, including students. I am also mindful of the comments of Rowe, J.A. in **R. v. Taylor**[12], when he referred to "speculative sweeps" of the nature undertaken here as "disquieting" (para. 34). Drawing a clear distinction between speculative sweeps for drugs and "screening techniques used to protect life and safety, eg. searches for weapons or explosive when travelling by air", Rowe, J.A. noted the "considerable tension" between speculative sweeps for drugs and "the public interest in being left alone".

[72] Mr. Fowler has serious and legitimate concerns with the lawfulness of the search. But, as he fairly acknowledged, these concerns involve more matters of policy for the school board and the police. Subjecting Sgt. Adams to disciplinary action because he carried out a task requested by the school and sanctioned by his superiors would be unfair and unjust.

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[12] Supra, fn. 5.

[73] The adjudicator was correct in his disposition of the case by recommending that the school board and the Royal Newfoundland Constabulary fully investigate the constitutional issues associated with the searching of schools and that, if appropriate, a school search policy be developed following the assessment of the legal issues involved. In the circumstances of this case, I would have made a similar disposition.

CONCLUSION

[74] The recommendations and conclusion of the adjudicator found at paras. 125-126 of his decision are hereby confirmed, including the order respecting Sgt. Adams' costs[13]. I repeat these for ease of reference:

> 125. After considering this case, and the larger context, I would make the following recommendations:
>
> (1) The Department of Justice provide such legal advice as is necessary to the RNC and/or School Board to assess the constitutional issues associated with the searching of schools, including occupied classrooms, by RNC officers.
>
> (2) If, in the opinion of the Department of Justice, such searches do not offend the Charter, a policy be developed by the RNC and included in the RNC Policy and Procedures Manual setting out the steps to be taken in conducting such searches.
>
> 126. In conclusion, I therefore find that, pursuant to s. 33(1)(c) of the Act, Sgt. Michael Adams conducted himself in a proper manner and shall be compensated for reasonable costs incurred by him as a result of the investigation and Hearing.

[75] The appeal is dismissed.

[76] In the particular circumstances of this case, each party will bear their own costs of the appeal.

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[13] It is not clear from the *Act* (subs. 33(1)(c)) or the adjudicator's decision by whom this compensation is to be paid. If necessary, the parties may request directions from the adjudicator.