Court File No.: 31496

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

M.(A.)
(A Young Person)

Respondent

- and –

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Interveners

Court File No.: 31598

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

B E T W E E N:

GURMAKH KANG BROWN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I – OVERVIEW AND THE FACTS

Overview

1. These appeals will determine the scope of the common law police power to conduct random warrantless searches in the absence of reasonable grounds. These appeals will also determine the scope and contours of the intersection between s. 9 of the *Charter of Rights and Freedoms*, the right to be free from arbitrary detention, and s. 8 of the *Charter*, the right to be free from unreasonable search and seizure.

2. In *M.(A.)*, the police, assisted by specially trained drug sniffing dogs, attended, unannounced, at a high school for the sole purpose of conducting a "random search" of every student's belongings. The entire student body was confined to their classrooms for the duration of the search. The police had no warrant because they knew it would have been a "fruitless exercise" to apply for one. It would have been a fruitless exercise because they had no reasonable grounds to believe that there were drugs in the school. This search was not requested by the school, nor was the school aware that the police were coming that day. This search was not an isolated incident. The officer in charge had previously executed some 140 canine assisted searches, including one earlier that day.

3. To quote the Court of Appeal, the police were not acting as "school authorities in police uniforms"[1]. This was a police operation from start to finish. It targeted all students and their belongings. It was accomplished by arbitrarily detaining the entire student population for up to two hours.

4. The Crown suggests that the police were entitled to confine the students and search their possessions because they had some kind of prior "open invitation" from the school principal. Even if, contrary to the evidentiary record, this Court were to accept that this operation was somehow conducted on behalf of school authorities, it was still unlawful.

5. The "prior open invitation" rationale for a random mass confinement and search rests on the false premise that the principal would have been legally entitled to do the

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[1] *R. v. A. M*, Reasons for Judgment of Armstrong J.A., Ont. Ct. App. at para. 43 (*R. v. A..M.* Appellant Crown's Record, at p. 28) ("*M.(A.)*").

same thing. The law governing this issue was settled in *R. v. M.(M.R.)*,[2] where this Court balanced students' and society's right to a safe school environment with the right to be free from unreasonable search and seizure. Students do not waive their *Charter* rights when they cross their school's threshold. Although some school officials have some power to search students and their possessions without a warrant, there must be *reasonable grounds* for any such search. Random and arbitrary detention and/or searches are not permissible.

6. The principal admitted that, in this case, he would not have had the authority to search students' bags. It follows that he could not, by "invitation" or otherwise, confer any such authority on the police.

7. The Crown seeks to avoid this common sense conclusion by artificially framing the issue to be whether the dog was engaged in a "search" at the precise moment it sniffed the backpack and detected the odour of narcotics "in the air". With respect, dogs do not "search". Dogs assist the police in the exercise of their police powers and in particular the power to search and seize. At all material times it is *the police* who search, as an incident of their police power, through the instrumentality of the dog they have trained for that sole purpose.

8. The common sense reality is that the specially trained police dog is, for the purposes of this appeal, the direct extension of its handler. It is a necessary, direct, and indivisible part of a larger police search. The real focus of the *Charter* analysis is not the metaphysics of the dog sniff, the very last link in the chain, but the question of what the police were doing in the school in the first place and how they came to apply their dog's snout to the backpacks of the students who had been confined to their classrooms.

9. In R. v. *Evans*,[3] this Court held that when police, in the course of investigating, went to the front door of a house for the purpose of sniffing odours in the air, they were conducting an "olfactory search". The same reasoning applies in this case. The police were not in the school on a stroll. The police dog did not happen upon an odour in the air

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[2] [1998] 3 S.C.R. 393 (*R. v. A.M.* and *R. v. Kang Brown*, Joint Authorities of Her Majesty the Queen at Tab 23) ("*M.(M.R.)*").

[3] *R. v. Evans*, [1996] 1 S.C.R. 8, (*R. v. A.M.* and *R. v. Kang Brown*, Joint Authorities of Her Majesty the Queen at Tab 12) ("*Evans*").

while playing fetch. The police were, *as both they and the Crown conceded at trial*, in the school for the sole purpose of "randomly searching" for drugs. The search was arbitrary. Their conduct became unlawful as soon as they embarked on this illegal purpose and long before the policeman applied his dog's nose to A.M.'s backpack.

10. Even if this Court were only to ask the artificially narrow question of whether the sniff of the bag by the dog amounted to a search, the question must be answered in the affirmative. It was an "olfactory search", just like the act by the police of smelling the air was an "olfactory search" in *Evans*.

11. In addition, if the detection of the odour did not amount to a "search", and if this Court finds that no reasonable expectation of privacy was engaged, the evidence was still obtained in a manner that violated the *Charter*, specifically s. 9. The evidence is clear that the police operation could not have taken place but for the unlawful detention of the entire student body.

12. The *Charter* violations were serious. The police conduct violated the important principles set out in *M.(M.R.)*, as well as the school board's own policies enacted pursuant to the *Education Act*, which call for police to be used as a last resort and only to assist a teacher-directed search in the context of reasonable grounds. The activity in issue was bad from the point of view of both law and educational policy. It sent to students all the wrong messages about the importance (or lack thereof) of their rights under the *Charter*. It was entirely appropriate for the trial judge to have exercised his discretion in favour of excluding this evidence.

13. *Kang Brown* also raises the issue of a warrantless, unauthorized police search. The police set up an Operation Jetway checkpoint in an Alberta Greyhound bus station. Their conduct at the checkpoint mirrored the conduct those *very same officers* had been told was illegal by the Alberta Court of Appeal in *R. v. Lam*[4].

14. The police arbitrarily decided that Kang Brown looked suspicious simply because he made eye contact with them and carried a plain bag in an unusual way. The police, acting purely on a hunch, perhaps borne of intuition, stopped him and asked questions,

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[4] *R. v. Lam* (2003), 178 C.C.C. (3d) 59, at para. 9 (Alta. Ct. App.) (*R. v. A.M.* and *R. v. Kang Brown*, Joint Authorities of Her Majesty the Queen at Tab 19) ("*Lam*").

which he answered. The police then used a dog to do what they could not lawfully do themselves – search Mr. Kang Brown's bag.

The Facts

15. The CCLA accepts and relies upon the facts as found by the courts below. In addition, the CCLA submits that the following facts, which are clearly established by the evidence, are of critical importance to these appeals.

A. *R. v. M.(A.)*

Key Fact #1: This was a "search", in the minds of all involved

16. At trial, the police and the Crown acknowledged that the police were engaged in a search. Constable McCutcheon believed he was "searching"[5] as he had done earlier that day in another school and 140 times before that.[6] The Crown precluded further cross-examination on this point when it *formally conceded* that the use of the dog to sniff bags, lockers etc., was a search; the Crown stated, "[t]here is no dispute on that particular point".[7]

Key Fact #2: The search was random and conducted without reasonable grounds

17. Constable Callander testified that he went to St. Patrick's to conduct a "random search".[8] He acknowledged that any attempt to obtain a search warrant would have been "a *fruitless* exercise".[9] He also admitted that there were no exigent circumstances,[10] he did not have any "direct awareness" of drugs in the school,[11] and there was no concern for anyone's safety.[12]

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5 Trial Transcript, pp. 35, 38 (*R. v. A.M.* Appellant's Record, p. 74, 77).

6 Trial Transcript, p. 35 (*R. v. A.M.* Appellant's Record, p. 74).

7 Trial Transcript, p. 38 (*R. v. A.M.* Appellant's Record, p. 77).

8 See, for instance, the Trial Transcript, pp. 40, 41 (*R. v. A.M.* Appellant's Record, pp. 79, 80).

9 Trial Transcript, p. 49 (emphasis added) (*R. v. A.M.* Appellant's Record, p. 88).

10 Trial Transcript, p. 45 (*R. v. A.M.* Appellant's Record, p. 84).

11 *Ibid.*

12 *Ibid.*

18. Mr. Bristo, the principal, was not aware that the police were planning to search that day.[13] Principal Bristo "had no knowledge" that drugs were on school premises. He testified only that it was "pretty safe to assume" that drugs "could be there".[14] He admitted that he knew that neither he nor his staff could randomly search lockers and bags[15] and that he had "no reason or no information" to search any bag in the gym.[16]

Key Fact #3: This was a search by police, not by school officials

19. This was not a search carried out by school officials in the discharge of their statutory mandate. It was initiated and conducted by the police, with a drug sniffing dog, trained to communicate to its handler, by biting and scratching, its detection of drugs.[17] The Principal did not call the police and he had no notice of the search until the police arrived at the school.[18] Neither the Principal nor any school staff played an active role in the search.

Key Fact #4: The search violated the School Board's policies

20. The search contravened the policies of the school board developed under the *Education Act*. Policy 310 of the St. Clair Catholic District School Board sets a procedure for seizure of drugs. The procedure states that any student suspected of being in possession of drugs should be taken or reported to the principal. The policies state that: "[t]he principal should ask for the student's cooperation in emptying pockets, purses and knapsacks, etc. Police involvement should be used only when necessary, or if the well-being of the student is at risk."[19] The Provincial Code of Conduct states that "[s]tudents are to be treated with respect and dignity."[20]

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13 Trial Transcript, p. 8 (*R. v. A.M.* Appellant's Record, p. 47).

14 Trial Transcript, p. 10 (*R. v. A.M.* Appellant's Record, p. 49).

15 Trial Transcript, pp. 19-20 (*R. v. A.M.* Appellant's Record, p. 58-59).

16 Trial Transcript, pp. 20 (*R. v. A.M.* Appellant's Record, p. 59).

17 Trial Transcript, pp. 36-37 (*R. v. A.M.* Appellant's Record, p. 75-76).

18 Trial Transcript, p. 8 (*R. v. A.M.* Appellant's Record, p. 47).

19 St. Clair Catholic District School Board Policies and Procedures: Section 3: Students; Policy 3.10, Page 3 of 7 (*R. v. A.M.* and *R. v. Kang Brown*, Joint Authorities of Her Majesty the Queen at Tab 38) ("St. Clair Policies").

20 *Code of Conduct*, Ontario Ministry of Education, at p. 6 (*R. v. A.M.* and *R. v. Kang Brown*, Joint Authorities of Her Majesty the Queen at Tab 37) ("Code of Conduct").

21. This policy is consistent with the balance struck in *R. v. M. (M.R.)* between a safe orderly environment, the teaching of *Charter* values in our schools, and respect for student's rights, albeit appropriately tempered, to be free from unreasonable search and seizure. The police conduct in this case is inconsistent with the balance struck and incorporated into Policy 310.

Key Fact #5: All students were arbitrarily detained

22. All students were detained while the search was conducted. They were kept in their classrooms for approximately two hours.[21] Three classrooms, the hallway, and the small gym were searched.[22] The Principal testified that, had any students attempted to leave their classroom during the search, he would have expected that *the police* "would assist the teacher in holding them there".[23] The principal testified that he understood that this step was necessary to facilitate the search.[24] But for the detention, the police could not have searched the school.

B. R. v. *Kang Brown*

Key Fact #1: The police had no reason to search

23. On 25 January, 2002, three RCMP officers were patrolling the Calgary Greyhound Station as part of Operation Jetway. These were the same officers, in the same location, that led to the Alberta Court of Appeal decision in *R. v. Lam* – the current and controlling case in that province. In *Lam*, the Court found that the action at issue was a search within the meaning of s. 8 and was unlawful.[25]

24. Sergeant MacPhee initially found Kang Brown "suspicious" *only* because he made and held "eye contact" with the officer. The officer also became suspicious because of the absence of ID tags on Kang Brown's bag and the fact that Kang Brown carried his bag on his shoulder even though it had handles and not a shoulder strap.[26]

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21 Trial Transcript, p. 7 (*R. v. A.M.* Appellant's Record, p. 46).

22 Trial Transcript, p. 36 (*R. v. A.M.* Appellant's Record, p. 75).

23 Trial Transcript, p. 17 (*R. v. A.M.* Appellant's Record, p. 56).

24 Trial Transcript, p. 16 (*R. v. A.M.* Appellant's Record, p. 55).

25 *Lam, supra* note 4.

26 *R. v. Kang Brown,* Appellant's Factum, at para. 9.

25. Kang Brown did not evade the police. When the police approached and identified themselves, he stopped, answered their questions and, when requested, produced identification.[27]

26. MacPhee had no grounds to search Kang Brown when he approached him.[28] At its highest, the officer had a hunch or intuition about Kang Brown.

Key Fact #2: Kang Brown did not consent to be searched

27. Kang Brown kept control of his bag at all times. He made it clear he did not want the police to search his bag. The police had no reasonable grounds to search and Kang Brown clearly did not consent to the search. In fact, he expressly attempted to stop the officer from going through his bag.[29]

28. Police have no right to search a bag without consent or reasonable and probable grounds. Kang Brown exercised his right to be free from unreasonable search and seizure. To allow the police to search a bag with a tool (in this case a dog) when they clearly could not search the bag themselves would be to undermine s. 8 of the *Charter*.

PART II - ISSUES

29. The CCLA respectfully submits that the following issues arise:

(a) Did the police conduct violate s. 8 of the *Charter*?;

(b) Did the police conduct violate s. 9 of the *Charter*?

(c) Ought the evidence to have been excluded pursuant to s.24(2) of the *Charter*?

PART III - ARGUMENT

ISSUE #1 THE POLICE CONDUCT VIOLATED S. 8 OF THE *CHARTER*

A. The *M.(A.)* Appeal

1. The search was unlawful in light of *M.(M.R.)*

30. This Court has already established when students can be searched. In *M.(M.R.)*, this Court addressed the application of the *Charter* to searches of students by school

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27 *Ibid.* at paras. 10-11.

28 *Ibid.* at para. 15.

29 *Ibid.* at paras. 11-12, 17.

officials. It concluded that school officials may not conduct random searches. Reasonable grounds are required.[30]

31. In addition, Cory J. emphasized the important role of schools, and warned about the dangers of over-policing students. He stated that:

> [Schools] 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.[31]

32. The police, acting alone, could not lawfully have searched the school in the absence of reasonable and probable grounds. Yet, the Crown suggests that the police were entitled to enter the school for the purpose of searching for drugs because they were "invited" to do so by the principal.

33. The Principal testified that he did not have grounds to search lockers and bags in the circumstances of this case.[32] Yet, he somehow believed that the presence of the police made the search appropriate:

> Q. … And I take it, based on your training, that, again, correct me if I'm wrong, if I mischaracterize what your testimony is, that you did not feel that you could personally, or your staff, go around and start randomly searching the lockers and bags, that you needed the police to conduct that portion of the search.
>
> A. Uh, yes.
>
> . . .
>
> Q. Okay, so dealing with this case in particular, you had no reason or no information, or you certainly didn't believe you could properly go into the gym … and grab a bag and search it.
>
> A. No. Yeah, you're right.
>
> Q. And it was your position, in consultation with the officers you spoke to, that their presence and their conducting the search made it appropriate.
>
> A. Yes.[33]

34. The principal's concession was entirely appropriate in light of *M.(M.R.)*. He did not have authority to search. Therefore, he could not confer any such authority on the police.

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30 *M(M.R.), supra* note 2, at para. 48.

31 *Ibid*, at para. 3.

32 Trial Transcript, p. 20 (*R. v. A.M.* Appellant's Record, p. 59).

33 Trial Transcript, pp. 19-21 (*R. v. A.M.* Appellant's Record, pp. 58-60).

35. It is respectfully submitted that the police practice of invoking an open-ended prior invitation to show up at schools on a random basis with drug sniffing dogs and searching the schools, its students, and their belongings should be seen for what it was: an attempt to circumvent the constraints of *M.(M.R.)* and the policies of the school board which reflect the principles of *M.(M.R)*.

36. In this respect, the following observation made by the Court below is particularly apt and entirely correct:

> [W]hat occurred at St. Patrick's High School on November 7, 2002 was a search by the police. No school authority requested the presence of the police on that day. The principal received no notice of the intention of the police to conduct a search. Neither the principal nor the teacher, Mr. Morrison, played any active role in the search. The fact that some two years earlier the school principal had issued a standing invitation to the police to search the school with the assistance of a sniffer dog does not, in my opinion, turn the search of November 7, 2002 into a search by school authorities in police uniforms.[34]

2. A police-directed dog-assisted search is a s. 8 "search"

a. This was an "olfactory search" as discussed in Evans

37. The Crown resists the conclusion that the search was illegal by asserting that the police were not engaged in a "search" at all. Unlike the police officers involved, who believed they were searching, and the trial Crown who conceded there "was no issue on that point", the Crown now asserts that the events that November morning at St. Patrick's High School were nothing more than a dog "sniffing the air" around a pile of abandoned backpacks in which students have no expectation of privacy.

38. With respect, the characterization of the transaction that led to this appeal as a dog "sniffing the air" defies common sense and strains credulity.

39. As the police officers explained at trial, the only reason they went to St. Patrick's was to conduct a "random search" for drugs. They brought with them a dog which they had specially trained to make their search more effective. This conduct was unlawful quite apart from whether, at the very end of the piece, the dog's biological act of sniffing the bag amounted to a "search".

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[34] *M.(A.), supra* note 1, at para. 43.

40. However, even if this Court were to accept the Crown's invitation to scrutinize only the act by the dog of "sniffing", in isolation from the broader police conduct, it would still follow that the police were conducting an "olfactory search" of the bag. The dog's seminal sniff and subsequent signal was the end product of specialized police training and specialized police handling in an environment controlled and secured by way of a large scale arbitrary detention. The dog did not escape its handler, who was engaged in some other task, and happen upon contraband in the course of being recovered. The signal given by the dog to the handler which led to the Respondent's arrest was a pre-arranged code for the culmination of a successful police-directed criminal investigation. The dog, as it was used that day, was in every respect an extension of the police officer.

41. This situation is directly analogous to the situation this court confronted in *Evans*. In *Evans*, the police knocked on the front door of a house. When the door was opened, they detected an odour of marijuana. This Court held that, even though there is a deemed invitation to the public to knock at a front door, this invitation does not contemplate the officers' "olfactory search" for marijuana.[35] In arriving at this conclusion, Justice Sopinka noted that "there are sound policy reasons for holding that the intention of the police in approaching an individual's dwelling is relevant in determining whether or not the activity is a 'search' within the meaning of s. 8".[36] The Court concluded that, because the police had approached the door w*ith the intention of sniffing for marijuana*, the activity was a search, notwithstanding the fact that the odour of marijuana was in the air.[37]

42. The Crown seeks to distinguish *Evans* on the basis that the police in that instance were trespassing on private property. With respect, the *ratio* of *Evans* is that the police were on the property for the purpose of searching and that, in this context, the detection of the odour amounted to a "search". It is precisely because the police were on the property for the purpose of conducting an arbitrary search, just as they were in the school in this instance for the same purpose, that this Court held that their presence on the property, and the ensuing "olfactory search", was unlawful.

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35 *Evans, supra* note 3, at para. 24.

36 *Ibid*. at para. 20.

37 *Ibid.* at para. 21.

43. The reasoning in *Evans* is directly applicable to this case. The police did not happen upon drugs while in the school for other reasons. On the contrary, just like the police in *Evans*, they went to St. Patrick's school for the sole purpose of using a dog to search for drugs.

44. This is why it was plain and obvious to all the witnesses, and indeed to the Crown, at the trial, that this was a "search" on any meaning of the word.

b. The Crown's reliance on Tessling is misplaced

45. Notwithstanding this Court's decision in *Evans*, the Crown asserts, based on *R. v. Tessling*,[38] that St. Patrick's and its students and their belongings were not searched on November 7, 2002. However, it is respectfully submitted that, for the purposes of ss. 8 and 9 of the *Charter*, the police action in *Tessling* was fundamentally different from the police action in this case - and less intrusive.

46. It is submitted that the Court below was correct when it observed:

> 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.[39]

47. If a purposive approach to s. 8 requires, in every instance, the characterization of the privacy interest as personal, territorial, or informational, it is respectfully submitted that the police action in this instance engages all three.

48. Students' backpacks are, as the Court below noted, akin to a study, bedroom, and office rolled into one. They are designed to be carried on students' bodies. They are not see-through. They will contain intimate belongings and information. The personal nature of backpacks and their contents are recognized by the school board's general policy applicable to searches.

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[38] [2004] 3 S.C.R. 432 (*R. v. A.M.* and *R. v. Kang Brown*, Joint Authorities of Her Majesty the Queen at Tab 34) ("*Tessling*").

[39] *M.(A.), supra* note 1, at para. 47.

49. The practice of principals, at the direction of police, confining students to their classrooms to facilitate a search of their personal belongings, as well as classrooms, with the aid of police dogs amounts to an interaction between citizen and state that is fundamentally different from the significantly less intrusive capture of a heat signature by a high-flying aircraft, in the public domain, targeting a specific location in respect of which the police have specific information.

50. This Court in *Tessling* articulated principles to address a novel factual situation brought about by a specific technological advance. In *M.(A.)*, it is submitted that it would be more appropriate to have regard to first principles: namely those articulated in *M.(M.R.)* than to draw what is at best a strained analogy to fly-overs in the public domain.

51. The question of whether a reasonable expectation of privacy exists must be framed in broad and neutral terms:[40] do high school students have a reasonable expectation of privacy in their personal effects, and in particular their backpacks? This question must be answered in light of all the circumstances[41] and cannot be made to depend on an *ex post facto* assessment of whether or not those persons were engaged in illegal activities.[42]

52. The Court must consider the subject of the search, the relationship of the individual asserting the interest to that subject, and the location of the search. Special consideration must be given to whether the individual had a subjective expectation of privacy in the subject of the search and whether that expectation was reasonable.[43]

53. From backpacks to briefcases to personal bags, courts have found a reasonable expectation of privacy in a variety of situations. For example, in *M.(A.)*, the Ontario Court of Appeal quoted with approval from *R. v. Mohamad*:

> In the contemporary context, briefcases often house highly confidential personal and business information. They can serve, in a practical sense, as portable offices for

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40 *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 50 (Intervener's Brief of Authorities at Tab 9) ("*Wong*").

41 *R. v. Mohamad* (2004), 69 O.R. (3d) 481 at para. 23 (Ct. App.) (Intervener's Brief of Authorities at Tab 7) ("*Mohamad*"); *Tessling, supra* note 38 at para. 31; *R. v. Edwards* [1996] 1 S.C.R. 128 at para. 31 (Intervener's Brief of Authorities at Tab 5) ("*Edwards*").

42 *Wong, supra* note 40 at pp. 49-50.

43 *Tessling, supra* note 38 at para. 32; *Edwards, supra* note 41 at para. 45.

> their owners … [O]wners of briefcases generally have a reasonable expectation of privacy in the contents of their briefcases.[44]

54. The Court of Appeal continued:

> A student's backpack is in effect a portable bedroom and study rolled into one. It will contain personal items such as journals, photos, letters, personal hygiene items, medication, clothing and school records. Backpacks are often in reality the only way for students to carry and use items that are personal and important to them. These items are shielded from view and access.
>
> There are no contextual factors that diminish students' legitimate expectation of privacy, dignity, and autonomy in their backpacks. Students' expectation of privacy in their backpacks is objectively reasonable. Backpacks are not searched in the normal course of a school day, nor do students come to school expecting that their backpacks will be searched. The students did not consent to their backpacks being searched on November 7, 2002 and the Principal certainly could not consent on their behalf.[45]

55. The Crown relies on a Newfoundland and Labrador Court of Appeal case, *R. v. Taylor*, in support of its position; however, the Court in *Taylor* specifically agreed with the decision in *M.(A.)*. The Court canvassed case law and, in relation to the Ontario Court of Appeal in *M.(A.)* stated: "I agree with the result; opening the backpack was a warrantless search."[46]

56. In addition, the facts of the *Taylor* are distinguishable. That case arose out of a dog sniff of a package located in a FedEx warehouse. A reliable informer reported that there was a package in Taylor's name containing marijuana at a FedEx warehouse. FedEx then consented to the search and the police attended at the warehouse with a drug dog, which indicated at the package. A warrant was then obtained (a step that was not taken in *M.(A.)*) and the package opened. Marijuana was discovered inside.[47]

57. The Court in *Taylor* specifically held that it was "not necessary in deciding this case to determine whether a dog sniff in all circumstances is or is not a search within the meaning of s. 8… Rather, what is necessary is to decide whether *on the facts of this case* the dog sniff was a search within the meaning of s. 8."[48] On the facts of the case before it,

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44 *M.(A.), supra* note 1, at para. 49, citing *Mohamad, supra* note 41, at para. 25.

45 *M.(A.), supra* note 1, at para. 50.

46 *R. v. Taylor*, (2006), 40 C.R. (6th) 21 (N.L.Ct.App.), at para. 29 (*R. v. A.M.* and *R. v. Kang Brown*, Joint Authorities of Her Majesty the Queen at Tab 33) ("*Taylor*").

47 *Ibid.* at paras. 2-5.

48 *Ibid.* at para 13 (emphasis in original).

the Court found that the use of the dog sniff in the investigation did not violate the accused's reasonable expectation of privacy and therefore did not constitute a search.

58. As was stated above, courts are to look at the totality of the circumstances. A search conducted in a private place, with consent, based on individualized and reliable information cannot be compared to a drag-net search of an entire student population under detention.

59. In *Taylor,* the Court distinguished its case as well as *Tessling* from cases such as *M.(A.)*, *Brown*, and *R. v. Gosse*[49] (also relied upon by the Crown) in which it astutely dubbed the police activity at issue a "speculative sweep".[50]

60. With respect, the Crown's in terrorem arguments regarding the impact of this Court recognizing what the police officers, the prosecutor, and the courts below recognized, are unwarranted. The Crown suggests that a decision in this case could prohibit the use of sniffing dogs to detect explosives and to track personal scents.[51]

61. Many of the contexts proposed by the Crown would involve exigent circumstances such that a warrantless search would be permissible or circumstances in which the individual's privacy interest is not engaged. Other instances invoke the special power to avert imminent peril to life or health, rather than the general power to investigate crime. It simply does not follow that the rejection of the Crown's argument here would undermine the *legitimate* use of sniffer dogs.

3. The search was carried out in an unreasonable manner

62. The search was carried out unreasonably. As set out in the discussion of Issue #2, below, an arbitrary and unlawful detention of the entire student body was a necessary component of this police operation. This detention violated s. 9 of the *Charter*. It is respectfully submitted that it cannot be reasonable to carry out a search in a manner that violates other *Charter* rights.

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[49] *R. v. Gosse* (2005), 200 C.C.C. (3d) 147 (N.B.Q.B.) (*R. v. A.M.* and *R. v. Kang Brown*, Joint Authorities of Her Majesty the Queen at Tab 16).

[50] *Taylor, supra* note 46 at para. 28.

[51] *R. v. A.M.* Appellant's Factum at paras. 57-58.

B. The *Kang Brown* Appeal

63. Based on this Court's decision in *Evans*, it is submitted that the police were conducting an "olfactory search" of Kang Brown. For the purposes of the *Kang Brown* appeal, the CCLA relies upon the submissions made above in respect of "olfactory searches" in the context of the *M.(A.)* appeal.

64. In addition, it is respectfully submitted that the Alberta Court of Appeal made a fundamental error in its ruling in *Kang Brown.* The Court held that the sniff was not a search because, if the Appellant had not had any illegal drugs in his possession, "the dog sniff would have had no effect."[52]

65. Even if no illegal material had been found, Kang Brown would still have been subject to a search, and his right to privacy violated. Searches must be seen objectively, without regard to the *ex post facto* determination of guilt or innocence and without regard to whether, in fact, contraband was found.[53]

66. Kang Brown had a reasonable expectation of privacy in his bag. In *Buhay*, this Court found that travelers using buses have a reasonable expectation of privacy in their belongings. Arbour J. held that "the protections of s. 8 extend to the objects that a person stores and locks in a bus depot locker."[54]

67. *Buhay* involved luggage in a rented locker in a bus depot. This Court found that the police activity at issue violated the defendant's *Charter* rights. If luggage that has been left in a locker attracts *Charter* protection, then Kang Brown must be entitled to at least as much protection when he is standing next to, and asserting control over, his personal luggage. Indeed, the facts demonstrate that Kang Brown did not want to relinquish control of his bag – he never placed it in the luggage area of the bus, but rather kept it with him at all times.[55]

68. It is respectfully submitted that Mr. Kang Brown had a reasonable expectation of privacy in his personal belongings. These personal items were searched by the police

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52 *R. v. Brown*, 2006 ABCA 199, at para. 48 (Intervener's Brief of Authorities at Tab 1) ("*Kang Brown*").

53 *Wong*, *supra* note 40, at p. 49-50.

54 *Buhay*, [2003] 1 S.C.R. 631, at para. 20 (Intervener's Brief of Authorities at Tab 2).

55 *Kang Brown*, *supra* note 52, at paras. 88-90 (dissent).

using drug sniffing dogs. For the reasons articulated in the CCLA's submissions relating to the *M.(A.)* appeal, above, it is submitted that, based on *Evans*, the police, using the dog as a tool, were engaged in an olfactory search of the bag. Because this search was arbitrary and warrantless, it violated s. 8.

ISSUE #2 THE POLICE CONDUCT IN *M.(A.)* VIOLATED S. 9 OF THE *CHARTER*

69. If this Court is persuaded that the police were not in fact engaged in a search and/or that A.M. did not have any reasonable expectation of privacy, the analysis is not at an end. It is submitted that this Court should go on to consider whether the evidence was obtained in a manner that violates s. 9 of the *Charter*.

70. As set out in paragraph 22, above, the evidence clearly supports the Court of Appeal's observation that, to facilitate the police operation, "the entire student population was detained in their classrooms for a period of one and a half to two hours."[56] The Principal testified that the students were told to remain in their classrooms and that, had a student attempted to leave the classroom during the search, he would have expected that *the police* "would assist the teacher in holding them there".[57] The Principal also testified that he understood that this step was necessary to facilitate the search.[58]

71. In short, the students were the subject of an investigative detention secondary to a planned police operation. But for the detention, the police could not have searched the school.

72. As this Court emphasized in *R. v. Mann*, for an investigative detention to be justified, there must be "a clear nexus between the individual to be detained and a recent or on-going criminal offence."[59] There must be reasonable grounds to detain.[60] An officer's hunch is not enough.[61]

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56 *R. v. M.(A.), supra* note 1, at para. 57.

57 Trial Transcript, p. 17 (*R. v. A.M.* Appellant's Record, p. 56).

58 Trial Transcript, p. 16 (*R. v. A.M.* Appellant's Record, p. 55).

59 *R. v. Mann*, [2004] 3 S.C.R. 59, at para. 34 (Intervener's Brief of Authorities at Tab 6) ("*Mann*").

60 *Ibid*.

61 *R. v. Calderon* (2004), 188 C.C.C. (3d) 481 at para. 69 (Ont. Ct. App.) (Intervener's Brief of Authorities at Tab 3).

73. The police admitted at trial that there were no reasonable grounds to search the school. It is for this reason that the police described their operation as a "random search".[62] Indeed, the police were not even acting on a "hunch".

74. Since there were no reasonable grounds for the police operation as a whole, there cannot have been reasonable grounds for the detention that accompanied it. The detention was arbitrary and violated each student's s. 9 rights.

75. In *R. v. Wong*, a case in which the accused was detained while a police dog sniffed his luggage, the Court aptly observed that, "[w]hat makes the police conduct extremely serious is the arbitrary detention that facilitated the dog sniff. Without the arbitrary detention, the police could not have secured a dog sniff and would never have discovered the drugs".[63]

76. The unlawful detention was an integral part of the police conduct that led to the seizure of the evidence. Accordingly, the evidence was obtained in a manner that violated s. 9 of the *Charter*, quite apart from any corresponding violation of s. 8.

ISSUE #3: THE EVIDENCE OUGHT TO BE EXCLUDED UNDER S. 24(2)

77. In deciding whether to exclude the evidence under section 24(2) of the *Charter*, both trial judges looked to the three-part test articulated by this Court: trial fairness, the seriousness of the violation, and the effect of the exclusion on the reputation of the administration of justice.[64]

78. In *M.(A.)*, the Ontario Court of Appeal found no issue with the trial judge's analysis and interpretation of the test. It is respectfully submitted that the Ontario Court of Appeal is correct and that the evidence must be excluded.

79. In *M.(A.)*, both ss. 8 and 9 were violated. As in the *Calderon* case, the violation of the Respondent's rights "was 'double-barreled' and serious".[65]

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62 Trial Transcript, p. 40-41 (*R. v. A.M.* Appellant's Record, p. 79-80).

63 *R. v. Wong*, 2005 BCPC 24, at para. 81 (B.C. Prov. Ct.) (Intervener's Brief of Authorities at Tab 10); see also *Calderon*, *supra* note 61, at para. 93.

64 *R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 284-286 (Intervener's Brief of Authorities at Tab 4); *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 69 (Intervener's Brief of Authorities at Tab 8).

65 *Calderon*, *supra* note 61, at para. 94.

80. In *M.(A.)*, the Crown attempts to argue that the *Safe Schools Act*, the Code of Conduct passed by the Minister of Education and in effect at the time of the search, as well as the School Board's policies, provide some authority for the activity.

81. However, the school policies upon which the Crown relies undermine its argument. In conducting a random warrantless search, the school and the police were *in violation* of both the Provincial Code of Conduct and the St. Clair Catholic District School Board Policy.

82. The St. Clair Policies define a "search of the person" as "a *voluntary* search of all clothing, purses, *knapsacks*, etc. of the student. School personnel, with a witness present, are to request the student to empty all personal effects from clothing and purses/knapsacks."[66] In addition, the policies state that "[p]olice involvement should be used *only when necessary*, or if the well-being of the student is at risk."[67] Finally, the Provincial Code of Conduct states that "[s]tudents are to be treated with respect and dignity."[68]

83. These policies clearly do not contemplate, and indeed are at odds with, the police operation that took place. The Principal, according to his own belief and testimony, would not have been able to conduct the search himself. Accordingly, the School Board policies upon which the Crown relies, far from authorizing the search, render the *Charter* violations all the more serious.

84. The admission of the evidence in this case would bring the administration of justice into disrepute. There would be no sanction arising for the unlawful police activity. This activity resulted not from the misconduct of any particular officer but from a general practice of the police department. In the words of Constable Callandar, this was "common practice".[69] Unless the evidence is excluded, it would be impossible to vindicate the values protected by s. 8 of the *Charter*.

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66 St. Clair Policies, *supra* note 19, at page 2 of 7 (emphasis added).

67 *Ibid.* at page 3 of 7 (emphasis added).

68 Code of Conduct, *supra* note 20, at p. 6.

69 Trial Transcript, p. 40 (*R. v. A.M.* Appellant's Record, p. 79).

85. It is particularly important that children learn that *Charter* values will be vindicated and the *Charter* is not "something to be swept away in the interests of expediency."[70] This lesson is all the more important in the educational context.

86. In her recent speech on the occasion of the 25th anniversary of the *Charter*, the Chief Justice emphasized the important pedagogical function that the *Charter* performs with respect to young people in society. In particular, she asked:

> What can we do about the *Charter*-information deficit? Perhaps articles written to mark the *Charter*'s 25th anniversary and speeches like this will help. But the most important thing, it seems to me, is to educate our children and young people. The basics of the Canadian constitution, including the *Charter*, should be mandatory learning in our schools and high schools. They should be taught to every new Canadian. They should become part of our nation and its sense of itself.[71]

87. This case is an opportunity to engage in this same pedagogical project. By excluding the evidence in this case, the trial judge and the Court of Appeal sent the important message that the *Charter* is important in all facets of Canadian life, including the life of students in schools.

88. In her dissenting opinion at the Alberta Court of Appeal, Paperny J., correctly articulated the seriousness of the breach in *Kang Brown*. She stated that Mr. Kang Brown did have an expectation of privacy in his personal luggage. In addition, "the breach at issue occurred in the context of a deliberately designed and orchestrated program aimed at targeting suspicious individuals to persuade them to answer police questions and consent to searches." [72] Accordingly, it is submitted that this evidence also should be excluded in light of the seriousness of the *Charter* breach.

PART IV – COSTS

89. The CCLA seeks no costs and asks that none be awarded against it.

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[70] *R. v. A.M.*, Reasons for Judgment of Hornblower, J., Ont. Ct. J., *R. v. A.M.* Appellant's Record, at p. 11.

[71] Rt. Hon. B. McLachlin, "The *Charter* 25 years later: The good, the bad, and the challenges" (25th Anniversary of the *Charter* Symposium: A Tribute to Chief Justice R. Roy McMurtry, Toronto, Ontario, 12 April 2007), at p. 11 (Intervener's Brief of Authorities at Tab 11).

[72] *Kang Brown*, *supra* note 52, at paras. 146-47.

PART V – ORDER SOUGHT

90. The CCLA respectfully requests that, in the matter of *Kang Brown*, the appeal be allowed and an acquittal entered and, in the matter of *M.(A.)*, the appeal be dismissed.

91. The CCLA respectfully requests permission to present oral argument at the hearing of the appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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PART VI – TABLE OF AUTHORITIES

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B E T W E E N :

HER MAJESTY THE QUEEN	- and -	**A.M. (A Young Person)**	**Court File No.: 31496**
GURMAKH KANG BROWN	- and -	**HER MAJESTY THE QUEEN**	**Court File No.: 31598**

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

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