

Court File No. 31496

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

A.M.

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO

Intervener

Court File No. 31598

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

BETWEEN:

GURMAKH KANG BROWN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL OF QUEBEC and ATTORNEY GENERAL OF ONTARIO

Interveners

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ONTARIO
(pursuant to Rules 55 and 59 of the *Rules of the Supreme Court of Canada*)

ATTORNEY GENERAL OF ONTARIO

Crown Law Office – Criminal
720 Bay Street, 10th Floor, Toronto, ON M5G 2K1

Robert W. Hubbard / Alison Wheeler

Tel: (416) 326-2307 / (416) 326-2460

Fax: (416) 326-4656

E-mail: robert.hubbard@ontario.ca

alison.wheeler@ontario.ca

**Of Counsel to the Attorney General of Ontario,
Intervener in A.M. and in Kang Brown**

BURKE-ROBERTSON LLP

Barristers and Solicitors
70 Gloucester Street, Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.

Tel: (613) 236-9665

Fax: (613) 235-4430

E-mail: rhouston@burkerobertson.com

**Agent for the Attorney General of
Ontario**

TO: THIS HONOURABLE COURT

AND TO:

ATTORNEY GENERAL OF CANADA
900 - 840 Howe Street
Vancouver, British Columbia V6Z 2S9

Kenneth Yule

Tel: (604) 666-0213
Fax: (604) 666-2760
E-mail kenneth.yule@justice.gc.ca

**Counsel for the Appellant in A.M.
Counsel for the Respondent in Kang Brown**

WALTER FOX
Barrister and Solicitor
312 - 100 Richmond Street West
Toronto, Ontario M5H 3K6

Walter Fox

Tel: (416) 363-9238
Fax: (416) 363-9230
E-mail: fox@sympatico.ca

Counsel for the Respondent, A.M.

ALIAS A. SANDERS
Barrister and Solicitor
The Grain Exchange Building
#608, 815 First Street S.W.
Calgary, Alberta T2P 1N3

Alias A. Sanders

Tel: (403) 294-9495
Fax: (403) 294-9599
E-mail: amelia@nucleus.com

**Counsel for the Appellant,
Gurmakh Kang Brown**

ATTORNEY GENERAL OF CANADA
284 Wellington Street, Bureau 2299
Ottawa, Ontario K1A 0H8

Francois Lacasse

Tel: (613) 957-4770
Fax: (613) 941-7865
E-mail: francois.lacasse@dpp.gc.ca

**Agent for the Appellant in A.M.
Agent for the Respondent in Kang Brown**

MCCARTHY TÉTRAULT LLP
40 Elgin Street
Suite 1400
Ottawa, Ontario K1P 5K6

Colin S. Baxter

Tel: (613) 238-2000
Fax: (613) 563-9386
E-mail: cbaxter@mccarthy.ca

Agent for the Respondent, A.M.

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin Street
Suite 2600
P.O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Henry S. Brown, Q.C.

Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: henry.brown@gowlings.com

**Agent for the Appellant,
Gurmakh Kang Brown**

ATTORNEY GENERAL OF QUEBEC
1200 Rte de l'Église, 2e Étage
Ste-Foy, Quebec G1V 4M1

Gilles Laporte

Tel: (418) 643-1477
Fax: (418) 646-1696

**Counsel for the Attorney General of
Quebec, Intervener in Kang Brown**

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, Quebec J8X 3R1

Sylvie Roussel

Tel: (819) 771-7393
Fax: (819) 771-5397
E-mail: s.roussel@noelassociés.com

**Agent for the Attorney General of Quebec,
Intervener in Kang Brown**

TABLE OF CONTENTS

	<u>Page</u>
PART I - THE INTERVENER'S POSITION AS TO THE FACTS	1
PART II –THE INTERVENER'S POSITION ON THE POINTS IN ISSUE	1
PART III – ARGUMENT.....	1
A. Overview of the Position of the Attorney General of Ontario.....	1
B. The Prelude Period: The Police Were Lawfully in Place at the Time of the Sniffs.....	3
C. The Dog Sniffs Do Not Constitute a 'Search'	8
D. The Physical Searches of the Contents of the Bags.....	12
E. Errors in the Analysis of the Courts Below in A.M.....	15
PART IV – POSITION ON COSTS.....	20
PART V – ORDER SOUGHT.....	20
PART VI – TABLE OF AUTHORITIES.....	21
PART VII – STATUTES AND REGULATIONS IN ISSUE.....	22
APPENDIX – CHART OF OTHER RELEVANT PROVINCIAL LEGISLATION	31

PART I - THE INTERVENER'S POSITION AS TO THE FACTS

1. The Attorney General of Ontario accepts as substantially correct the statement of facts contained in the factum of the Appellant in *A.M.* and the parties in *Brown*.

PART II - THE INTERVENER'S POSITION ON THE POINTS IN ISSUE

2. The Attorney General of Ontario advances two propositions, namely that:
 - (a) Police use of a drug-sniffing dog to detect odours emanating from a backpack, suitcase or other container located in a public place does not constitute a breach of s.8 of the *Charter*; and,
 - (b) In *A.M.* because, pursuant to the school's zero tolerance drug policy, the principal requested and consented to the entry of the police for the purposes of searching the public areas of the school, no reasonable expectation of privacy was infringed.

PART III - ARGUMENT

A. Overview of the Position of the Attorney General of Ontario

3. Does a person in a *public* place have a *reasonable* expectation of privacy over odours in *public* air space? The answer to this question is self-evident, for how can there be any *reasonable* expectation of privacy over smells in the *public* ether? In any event, no violation of a reasonable expectation of privacy occurs when the police, while already *lawfully* in a place, use a dog to sniff the air for illegal drugs emanating from bags. When the police are *lawfully* in a place with a dog, a dog sniff does not change the character of an otherwise lawful investigation; a dog sniff does not in and of itself infringe a person's constitutionally protected interest in privacy.
4. When a person takes a bag into a public place, he or she may have a reasonable expectation of privacy *in the contents* of the bag, but the reasonable expectation does not extend

to odours *emitted from* the bag. The police need not “avert their senses or their equipment from detecting emissions in the public domain”.¹ When police are lawfully present in a place, whether they use their own human senses, a dog, or other technology to detect an emission of an odour in a space, no reasonable expectation of privacy is infringed.

5. The ‘searches’ here should be analyzed in three stages: (a) the prelude to the dog sniff, (b) the dog sniff, and (c) the physical bag search, as delineated below:

(a) Stage 1 - the prelude to the dog sniff: The police officers were lawfully in the school and in the bus station, making observations of a ‘public’ rather than ‘private’ nature. Neither the bus traveller nor the school student had any reasonable expectation of privacy in the public areas of their respective locations. Even assuming an expectation of privacy, however, the expectation was shared with others; it can properly be waived, as here, with the consent of the authorities in charge of the ‘public’ location. In *Brown*, the Greyhound authorities consented to the police presence and activity in the bus station. In *A.M.*, it was at the principal’s invitation and with his express consent that the police conducted a ‘search’ of the public areas of the school. School authorities have the authority to permit these types of searches; such searches are lawful.

(b) Stage 2 - the dog sniff: While the police dog detected specific odours emanating from the traveller’s luggage and the student’s knapsack, the dog did not give police access to the private contents of the bags. The dog only detected what was already in the public space. The dog’s actions did not constitute a search; the dog merely supplied a piece of information that the

¹ See *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 51.

police could use, along with other information, to determine whether further action was warranted.

(c) Stage 3 – the physical bag searches: Pursuant to lawful search powers, police entered into the private spaces circumscribed by the bags and searched the contents. At this stage, the police legitimately intruded on the reasonable expectations of privacy of the owners in their bags. In *Brown*, the search was lawful as incident to arrest. In *A.M.*, the search of the backpack was lawful in accordance with *R. v. M.R.M.*²

B. The Prelude Period: The Police Were Lawfully in Place at the Time of the Sniffs

6. The lawfulness of police actions leading up to a dog sniff will be an important consideration in determining whether their subsequent actions were reasonable. In *Brown* and *A.M.*, the police were *lawfully* present in both locations at the time of the dog sniffs. The drug detections were unlike the one in *R. v. Evans*³ where police were trespassing on private property when they smelled marijuana through the front door. Here, at the time of the sniff, the police were lawfully on the private property in question. The RCMP Jetway program in Calgary operated at the Greyhound terminal with the support of the bus company.⁴ The OPP dog unit in Sarnia had a standing invitation from the principal of the high school.⁵ Consequently, the police acted with the express consent of those in charge of the property.

² *R. v. M.R.M.*, [1998] 3 S.C.R. 393.

³ *R. v. Evans*, [1996] 1 S.C.R. 8.

⁴ Respondent's Record (*Kang Brown*), Evidence of I. G. MacPhee, p. 8.

⁵ Appellant's Record (*A.M.*), Evidence of J. G. Bristo, p. 49 ln. 10 (in-chief); p. 52 ln. 25 (cross-ex).

7. In *R. v. Edwards*,⁶ this Court emphasized that the privacy right infringed under s.8 of the *Charter* must be that of the accused person who makes the challenge. Here, neither accused had a reasonable expectation of privacy in the public location in which they were located at the time of the police investigation.

8. In *A.M.*, in the prelude to the dog sniff, the police performed a sweep through the high school, but that sweep was at the express invitation and with the consent of the principal of the school. Even if the students and staff of the school had a limited or other expectation of privacy in the public areas of the school subject to the sweep, the principal had the authority to consent to an invasion of this privacy. The principal's consent clothed the police with lawful authority to conduct the 'search' during the prelude period. Moreover, the police conducted the search as an agent of the school authorities. As the trial judge concluded, "the officers attended the school with their dog and asked for permission to search the school for drugs. Mr. Bristo (the principal) gave them that permission".⁷

9. The school's "zero tolerance" drug policy was known and the police dog team had been in the school before. The principal testified that:

(a) Students were warned about the possibility that there could be drug dogs, in keeping with the policy of zero tolerance of drugs.⁸

(b) Parents were informed "that in order to deal with the issue of drugs in the school, we will access and use the services of the police and the dogs if they're available."⁹

⁶ *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 34.

⁷ Appellant's Record (*A.M.*), Reasons for Judgment of Hornblower J., p. 3, ll. 17-25.

⁸ Appellant's Record (*A.M.*), Evidence of J. G. Bristo, p. 45 ll. 14-26 (in-chief).

⁹ Appellant's Record (*A.M.*), Evidence of J. G. Bristo, p. 45 ll. 14-26 (in-chief).

(c) “[K]ids who are engaged in this type of activity don't want to be caught. They go out of their way to hide things around the building or hide it on their person.” Use of the dogs allows the search to be conducted efficiently and quickly.¹⁰

10. Students have no reasonable expectation they will be free from observation by school authorities while at school. Students are subject by legislation to extensive disciplinary and safety-oriented regulation. Ontario legislation provides that teachers and principals have a duty to maintain safety and discipline in the schools and classrooms under their supervision.¹¹ Pupils have a corollary duty to exercise self-discipline and to be responsible to the principal for their conduct while at school.¹² Other provinces have comparable legislative regimes of safety and discipline within schools.¹³

11. In *R. v. M.R.M.*, this Court recognized the important role of school authorities in ensuring the safety of pupils.¹⁴

Teachers and principals are placed in a position of trust that carries with it onerous responsibilities. ... It is they who must carry out the fundamentally important task of teaching children so that they can function in our society and fulfill their potential. In order to teach, school officials must provide an atmosphere that encourages learning. During the school day they must protect and teach our children. ...

... 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

¹⁰ Appellant's Record (*A.M.*), Evidence of J. G. Bristo, p. 46 ll. 10-26 (in-chief).

¹¹ *Education Act*, R.S.O. 1990, c. E-2 at ss. 264(1)(e) and 265(1)(a);

Operation of Schools – General, R.R.O. 1990, Reg. 298, ss. 11(1)(a) and 20(h).

¹² *Operation of Schools – General*, *supra* at s. 23(1) and 23(4)

¹³ See Appendix for a table listing comparable statutory provisions for all provinces and territories.

¹⁴ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at paras. 35-36. While dissenting in the result, Major J. agreed with the rest of the Court as to the existence of dangers from drugs and guns in schools and the importance of school officials being able to create and maintain a safe learning environment (paras. 72 and 74).

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.

12. In *M.R.M.*, this Court interpreted the Nova Scotia legislation to mean that students have a reduced expectation of privacy while at school,¹⁵ such that a search without warrant of a student's person may be justified when it is needed to enforce discipline or ensure safety. *M.R.M.* provides that, if reasonable grounds exist to believe a disciplinary or safety rule has been violated, a school official may search the private spaces of a student, including pockets and clothing,¹⁶ school lockers¹⁷ and personal bags found inside lockers.¹⁸ If students have a dramatically reduced expectation of privacy **inside** these private spaces while at school, any expectation of privacy in the air **outside** those spaces, if it exists at all, must be very limited indeed.

13. In *A.M.*, the principal of the school had authority to invite the police into the school and its vicinity. A principal or vice-principal has statutory power to exclude from school premises anyone whose presence, in his or her judgement, is detrimental to the safety of anyone else in the school and to direct anyone to leave once admitted.¹⁹ Police have no general authority to enter

¹⁵ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 47.

¹⁶ *R. v. M.R.M.*, [1998] 3 S.C.R. 393; *R. v. J.M.G.* (1986), 29 C.C.C. (3d) 455 (Ont. C.A.) at 460.

¹⁷ *R. v. Z. (S.M.)* (1998), 131 C.C.C. (3d) 436 (Man. C.A.) at para. 21.

¹⁸ *R. v. M.W.S.*, 2005 BCPC 213 (B.C. Prov. Ct.).

¹⁹ *Education Act*, *supra*, ss. 265(1)(m) and 305; *Access to School Premises*, O. Reg. 474/00, ss. 2 and 3. The regulation grants access to certain classes of people in s. 2(1), but then limits that access by the principal's discretion to exclude under s. 3(1); see *Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board* (2003), 64 O.R. (3d) 454 (Ont. C.A.) at para. 35, ruling that even a school pupil may be excluded by the principal.

In addition the *Trespass to Property Act*, R.S.O. 1990, c. T-21, also makes it an offence for a person to enter any premises without authorization of the occupier, or to fail to leave the premises when directed (s. 2). School sites are specifically included in the ambit of this *Act* and the school board is deemed to be the

school premises and – assuming no judicial authorization or exigent circumstances – may lawfully enter only with the permission of the school board, or its delegates such as the principal or vice-principal, and only for the particular purpose for which permission is granted. Students have no control over who may be present in a school and thus no reasonable expectation that police will or will not be present on any given day. When police moved through the school grounds with the consent and blessing of the principal, they did not breach the privacy rights of the students.

14. In *R. v. Edwards*,²⁰ a determinative factor in deciding whether a reasonable expectation of privacy existed was the ability to regulate access to the place in question. In neither case here did the accused have control over the premises where the dog ‘searched’. The accused may have had control over the *contents* of their bags, but the dog sniff was of the public air outside the bags. In *A.M.*, the student could not exclude from the school any person the principal chose to admit, and could not admit anyone the principal excluded. In *Brown*, it was the bus company’s decision who could be in the terminal, not the traveller’s. During the period of the prelude to the dog sniff, the police did not infringe any reasonable expectation of privacy of either accused.

occupier (s. 1(2)). A peace officer or an agent of the school board may arrest without warrant anyone reasonably believed to be committing the offence (s. 9(1)).

²⁰ *R. v. Edwards*, [1996] 1 S.C.R. 128 at paras. 47-50.

C. The Dog Sniffs Do Not Constitute a 'Search'

15. Only when the constitutionality of police actions leading up to the dog sniff has been evaluated, can the constitutionality of the sniff itself be properly assessed.

16. *Plant, Edwards and Tessling*²¹ defined the parameters of a reasonable expectation of privacy. Applying these measures of a reasonable expectation of privacy, a sniff of air surrounding a bag by a dog lawfully present with the police does not engage s.8 of the *Charter*.

(1) According to *R. v. Plant*,²² information must be of a "personal and confidential" nature to deserve constitutional protection. In *Plant's* words, s.8 of the *Charter* protects "a biographical core of personal information" including "information which tends to reveal intimate details of the lifestyle and personal choices of the individual." The odours emanating from drugs that can be ascertained by a dog sniff do not meet this threshold.

(2) In *R. v. Edwards*,²³ this Court stressed that, in applying a 'totality of circumstances' standard, the factors to be considered in measuring whether a reasonable expectation of privacy is extant may include the following:

- (i) presence at the time of the search;
- (ii) possession or control of the property or place searched;
- (iii) ownership of the property or place;
- (iv) historical use of the property or item;
- (v) the ability to regulate access, including the right to admit or exclude others from the place;
- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objective reasonableness of the expectation.

A police dog sniffing the air in a public location engages none of these factors.

When, as here, there is no question that the police are otherwise lawfully in

²¹ *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Tessling*, [2004] 3 S.C.R. 432.

²² *R. v. Plant*, [1993] 3 S.C.R. 281 at 293

²³ *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45.

position with a dog, it can scarcely be said that there is 'ownership or control' of the public air surrounding a package or, there is 'ability to regulate access' of others to the public space surrounding the package.

(3) In *R. v. Tessling*, this Court defined three categories of privacy protected by s.8 of the *Charter*: personal privacy, territorial privacy and informational privacy. A dog sniff does not involve personal privacy, for it involves no touching or invasion of the body.²⁴ A dog sniff in a public place does not invade territorial privacy.²⁵ At most, a dog sniff can engage only issues of informational privacy, namely "how much *information* about ourselves and activities we are entitled to shield from the curious eyes of the state."²⁶ In *Tessling*, this Court applied the totality of circumstances and the *Edwards* criteria in concluding that police use of FLIR technology did not violate a reasonable expectation of privacy.²⁷ If patterns of heat distribution on external surfaces of a house are not a type of information in which an accused has an expectation of privacy because the information provides no insight into one's private life and its disclosure does not affect "dignity, integrity and autonomy" of the person, how could an accused have a reasonable expectation of privacy in smells in public spaces detectable from drugs located in bags in public spaces?

17. The dog sniffs here were not 'searches' within the meaning of s.8 of the *Charter*. By any of the tests of privacy recognized by this Court, a dog sniff without more does not violate a reasonable expectation of privacy.

²⁴ *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 21.

²⁵ *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 22.

²⁶ *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 23.

²⁷ *R. v. Tessling*, [2004] 3 S.C.R. 432 at paras. 31-64.

18. Extracts of judicial reasoning supporting the conclusion that dogs sniffing for drugs do not constitute a 'search' with the meaning of s.8 of the *Charter* can be summarized under the following four broad principles:

1. A drug detection dog sniff discloses only limited information of a non-personal nature:

(a) It reveals nothing about the individual's 'biographical core of personal information.' "All it reveals is the existence or prior existence of a controlled substance. An intention or desire to secrete a controlled substance or contraband in a suitcase does not equate with a "reasonable expectation of privacy" to the contents of the suitcase, or more precisely, to what is emanating from the suitcase."²⁸

(b) A drug dog sniffing a package cannot disclose personal information. Because, unlike opening a package (which would allow police to see whatever is in it), a dog sniffing for drugs can only tell one thing: there are drugs in the package. There can be no reasonable expectation of privacy in that fact alone.²⁹

(c) "This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."³⁰

2. The passive act of sniffing odours is inconsistent with the usual meaning of 'search'; a 'search' implies an active intrusion.

(a) "[S]earch implies some physical intrusion into what is searched, for the purpose of examining what is in it. That word is not apt to describe the mere act of detection of an odour generated by the content of the item searched, which is released into the atmosphere surrounding it without any positive acts of a third person to effect that release. If it were otherwise ridiculous questions would arise as to how close one would need to get to an item generating an odour before one could be said to be searching it."³¹

(b) "[A] sensory perception of any type simply cannot constitute an act of searching, because it is a passive act which cannot possibly constitute a

²⁸ *R. v. Gosse*, 2005 NBQB 293, 200 C.C.C. (3d) 147 (N.B.Q.B.) at paras. 37-38.

²⁹ *R. v. Taylor*, 2006 NLCA 41, 40 C.R. (6th) 21 (N.L.C.A.) at para. 22.

³⁰ *United States v. Place*, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983) at para. 12.

³¹ *Question of Law Reserved (No 3 of 1998)* (1998), 71 S.A.S.R. 223 at 226.

trespass.”³² “A mere act of enabling a dog to sniff the air in the vicinity of a suitcase involves no trespass to it, just as, ... neither the eye nor the ear can be guilty of trespass.”³³

(c) “[A] dog who is sniffing the area around a bag or parcel ... could perhaps be described as an act of identification, but certainly not a search.”³⁴ All a drug dog does is alert the police. The dog’s actions merely provide information that may create a basis for subsequent police action.³⁵

(d) A dog’s sniff is “passive, non-threatening, non-intrusive and non-invasive.”³⁶ A dog’s sniff is “not a mysterious or unknown ability to the general public. It can be distinguished from the complexities of the FLIR device and from other technological devices. ... A dog’s nose has long been a device often in public use for hunting and for search and rescue operations. ... People know and understand exactly how a dog’s nose works. It works exactly like theirs, only it is much more sensitive.”³⁷

(e) A dog sniff does not infringe the personal integrity of the person. As long as there is no trespass, a dog sniff is no different than a human sniffing something in a public place. “It matters not that the dog acts differently from the police officer in the way he detects and indicates, short of bunting and ferreting and putting his nose on a pocket, the presence of a substance, or that the dog acts under the encouragement of the police officer. There is still not a trespass to the person, and there is not a search.”³⁸

3. There is no *reasonable* expectation of privacy in odours escaping from contraband items when they are in public air spaces.

(a) A sniff by a *drug* detection dog does “not expose noncontraband items that otherwise would remain hidden from public view.”³⁹

(b) A canine sniff by a well-trained *narcotics-detection* dog is “*sui generis*” because it “discloses only the presence or absence of narcotics, a contraband item.”⁴⁰

³² *Question of Law Reserved (No 3 of 1998)* (1998), 71 S.A.S.R. 223 at 226.

³³ *Question of Law Reserved (No 3 of 1998)* (1998), 71 S.A.S.R. 223 at 227.

³⁴ *Question of Law Reserved (No 3 of 1998)* (1998), 71 S.A.S.R. 223 at 224.

³⁵ *R. v. Davis*, 2005 BCPC 11 (B.C. Prov. Ct.) at paras. 21-22 and 28.

³⁶ *R. v. Mercer*, 2004 ABPC 94 (Alta. Prov. Ct.) at para. 46.

³⁷ *R. v. Mercer*, 2004 ABPC 94 (Alta. Prov. Ct.) at para. 45.

³⁸ *Darby v. D.P.P.*, 2004 NSWCA 431 (S.Ct.N.S.W. (C.A.)) at para. 62.

³⁹ *United States v. Place*, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983) at para. 12.

4. Section 8 is a personal right, protecting people not places.
- (a) "Section 8 is a personal right, protecting people not places. It does not protect the air in a public place over which an accused has no ownership or control."⁴¹
- (b) When a bag is in a public place, there can be no reasonable expectation of privacy in the area surrounding the bag.⁴²

D. The Physical Searches of the Contents of the Bags

19. The last stage of analysis focuses on the actual searches of the contents of the bags. There is no question that the searches of the bags here amounted to a search within s.8 of the *Charter*. However, the searches were lawful for the reasons set out below.
20. While a dog sniff of public air is not a 'search' within the meaning of s.8 of the *Charter*, this is not to say that a dog sniff could never breach s.8 of the *Charter*. The lawfulness of the dog sniff depends on the lawfulness of the actions of the police during the prelude to the sniff. Moreover, the lawfulness of the police intrusion into the contents of any bags also depends on whether they had lawful authority to search the contents of the bag. Concluding that a dog sniff of public air outside a bag is not a s.8 *Charter* violation does not give the police a license to search, for the police must still have a statutory or common law authority to open the bag and physically search its contents.

⁴⁰ *United States v. Place*, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983). See also *R. v. Gosse*, 2005 NBQB 293, 200 C.C.C. (3d) 147 (N.B.Q.B.) at paras. 36-38, applying *Place*.

⁴¹ *R. v. Mercer*, 2004 ABPC 94 (Alta. Prov. Ct.) at para. 53.

⁴² *R. v. Davis*, 2005 BCPC 11 (B.C. Prov. Ct.) at para. 23.

21. A dog sniff alone is not a search; it *only* supplies information that may lead to one. The alert or identification of the drug dog that drugs are in a container still requires a further determination by the police officer whether a lawful basis exists to enter the container to effect an invasion of personal privacy. If either the prelude circumstances or the ultimate search of the container is unreasonable, there may be a violation of s.8 of the *Charter*. When an officer views something that leads him to seize an item; if at the time of the viewing, the officer is unlawfully in the location, the seizure of the item may be constitutionally impermissible. It is not the viewing itself that violates s.8 of the *Charter*. It is the steps before and after the viewing that have constitutional consequences. It is no different with the act of smelling. It is not the smelling but the circumstances surrounding it that govern the issue of the lawfulness of the act.

22. In *R. v. Evans*,⁴³ the manner of smelling marijuana at the door of the accused was held to be reasonable. However, the trespass of the police on property without a warrant for the purposes of conducting a criminal investigation was not. This Court said:⁴⁴

I conclude that individuals in the position of the Evans have a reasonable expectation of privacy in the approach to their home, an expectation that is waived for the purpose of facilitating communication with the public.

Where members of the public (including police) exceed the terms of this waiver, and approach the door for some unauthorized purpose, they exceed the implied invitation and approach the door as intruders. As a result, where the police, as here, approach a residential dwelling for the purpose of securing evidence against the occupant, the police are engaged in a "search" of the occupant's home. The constitutional permissibility of such a "search" will accordingly depend on whether or not the search is "reasonable" within the meaning of s.8.

In the instant case, the manner in which the police conducted their search was clearly reasonable. The police attended the Evans' home

⁴³ *R. v. Evans*, [1996] 1 S.C.R. 8.

⁴⁴ *R. v. Evans*, [1996] 1 S.C.R. 8 at paras. 21 and 24.

based on reasonable suspicions and did nothing more than "sniff" for marijuana. Despite the reasonableness of the officers' actions, however, I must nonetheless hold that the presumption of unreasonableness has not been rebutted. Clearly, the actions of the police in approaching the Evans' home and searching for marijuana were not "authorized by law" within the meaning of this Court's decision in *Collins*. By virtue of ss. 10 and 12 of the *Narcotic Control Act*, R.S.C., 1985, c. N-1, a search warrant is required in order to search a dwelling in connection with an investigation of an alleged offence under that Act. These provisions would take precedence over any common law right to search based on the "knock on" principles. But even if the statutory provisions in ss. 10 and 12 of the *Narcotic Control Act* were subject to the "knock on" principles, the implied invitation at common law would not extend to authorize an olfactory search. (Emphasis added)

23. In *Brown*, the appellant's argument that there was a violation of s.8 of the *Charter* rests solely on his contention that the dog-sniff itself was a breach of the appellant's reasonable expectation of privacy. Since this contention is without merit, there is no question that the search of the contents of Brown's luggage was reasonable.

24. In *A.M.*, the lawfulness of the search of the backpack rests on the prelude circumstances and the existence of reasonable grounds to search the contents of the backpack, not on the nature of the dog sniff. In *A.M.*, the police were lawfully in place at the time of the dog sniff. Because this Court has authorized warrantless searches in schools when reasonable grounds to believe a school rule has been violated and evidence of the violation will be found,⁴⁵ the search of the contents of the backpack was also lawful, for such grounds existed.

⁴⁵ *R. v. M.R.M.*, [1998] 3 S.C.R. 393.

25. In *Edwards*, this Court cautioned that an inquiry under s.8 of the *Charter* should take place in two distinct phases. This Court stated:⁴⁶

It is important to emphasize that generally, the decision as to whether an accused had a reasonable expectation of privacy must be made without reference to the conduct of the police during the impugned search. There are two distinct questions which must be answered in any s. 8 challenge. The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy. ... Usually, the conduct of the police will only be relevant when consideration is given to this second stage.

In any determination of a s. 8 challenge, it is of fundamental importance to remember that the privacy right allegedly infringed must, as a general rule, be that of the accused person who makes the challenge. ...

The intrusion on the privacy rights of a third party may however be relevant in the second stage of the s. 8 analysis, namely whether the search was conducted in a reasonable manner. (Emphasis added)

E. Errors in the Analysis of the Courts Below in A.M.

26. In *A.M.*, the courts below reached the wrong result by failing to analyze the lawfulness of the three distinct phases of the 'search', namely the prelude to the sniff, the sniff and the search of the contents of the backpack separately. Instead, the Court lumped the phases together. The Court of Appeal said:

[45] ... [I] do not find it necessary in this case to decide whether the police activity prior to the search of the backpack constituted a search for s. 8 purposes. 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 *R. v. Edwards*, [1996] 1 S.C.R. 128 at paras. 33, 34, 36.

*R. v. Taylor*⁴⁷ identified this failure to distinguish between the three phases of the search. If the Court had proceeded properly, it would have reached a different conclusion about the lawfulness of the ‘searches’.

27. The Court should have reached the conclusion that there was no breach of any reasonable expectation of privacy in the prelude to the dog sniff, or, alternatively, that the prelude to the dog sniff was consented to by the person with the authority to consent. Once the dog sniff provided the grounds to search the student’s backpack, this search was also reasonable on the authority of *M.R.M.*

28. In *A.M.*, the Court of Appeal found that there was an “unauthorized warrantless random search”⁴⁸ with “no credible information to suggest that a search was justified.”⁴⁹ This conclusion of the Court of Appeal was contrary to the findings of the trial judge and the evidence, namely that:

(a) The search was “initiated when the principal contacted the police .. to request their assistance”.⁵⁰

(b) The “search would not have taken place without the invitation being extended by the school authorities, an invitation that was extended to allow the school authorities to more easily enforce school discipline.”⁵¹

(c) The school authorities were not acting as agents of the police.⁵²

(d) The search of the gymnasium was at the express request of the principal.⁵³

⁴⁷ *R. v. Taylor*, 2006 NLCA 41, 40 C.R. (6th) 21 (N.L.C.A.) at para. 25-29.

⁴⁸ Appellant’s Record (*A.M.*), Reasons for Judgment of Armstrong J.A., p. 33 at para. 59.

⁴⁹ Appellant’s Record (*A.M.*), Reasons for Judgment of Armstrong J.A., p. 33 at para. 57.

⁵⁰ Appellant’s Record (*A.M.*), Reasons for Judgment of Hornblower J., p. 5, ll. 20-21.

⁵¹ Appellant’s Record (*A.M.*), Reasons for Judgment of Hornblower J., p. 5, ll. 22-27.

⁵² Appellant’s Record (*A.M.*), Reasons for Judgment of Hornblower J., p. 5, ll. 6-11.

(e) The school “has a zero tolerance policy for drugs. Students are aware of the policy and are also aware that to enforce the policy, the school authorities may resort to the use of police officers with drug detector dogs.” The principal who is “charged with maintaining a safe and orderly school” used the zero tolerance policy and the police dog as the means “to ensure the existence of a safe and orderly school”⁵⁴

(f) The principal was concerned about the presence of drugs in the school. He had received reports from parents and school neighbours about drug use.⁵⁵ The principal testified that it was “pretty safe to assume” drugs would be in the school at the time of the search.⁵⁶

(g) The police were only there “at the request of the school principal”.⁵⁷ The police did “not go in without the request of the school.”⁵⁸

29. In addition, in contravention of *Edwards*, the Court of Appeal failed to keep separate the analysis relating to the question of the accused’s expectation of privacy from the question of police conduct. In the same vein, the Court also improperly considered the conduct of the school authorities in keeping the students in the classroom in determining that the conduct of the search was unreasonable.⁵⁹

30. In *M.R.M.*, this Court asked the following questions:⁶⁰

“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?”

The answers provided in *M.R.M.* are equally apposite here. This Court said:

⁵³ Appellant’s Record (*A.M.*), Reasons for Judgment of Hornblower J., p. 9, ll. 2-22; Reasons for Judgment of Armstrong J.A., p. 17 at paras. 10-12.

⁵⁴ Appellant’s Record (*A.M.*), Reasons for Judgment of Hornblower J., p. 3, ll. 2-15.

⁵⁵ Appellant’s Record (*A.M.*), Reasons for Judgment of Armstrong J.A., p. 16 at para. 7.

⁵⁶ Appellant’s Record (*A.M.*), Reasons for Judgment of Armstrong J.A., p. 17 at para. 11.

⁵⁷ Appellant’s Record (*A.M.*), Evidence of R. K. McCutchen, p. 75 ll. 5-10 (in-chief), p. 77 ll. 25-27 (cross-ex); Evidence of M. Callander p. 84, ll. 20-25 (cross-ex).

⁵⁸ Appellant’s Record (*A.M.*), Evidence of R. K. McCutchen, p. 78 ll. 10 (cross-ex).

⁵⁹ Appellant’s Record (*A.M.*), Reasons for Judgment of Armstrong J.A., p. 33 at para. 57; p. 34 at para. 62.

⁶⁰ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 1.

- (a) “[I]t 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.”⁶¹
- (b) “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.”⁶² “[W]eapons and drugs create problems that are grave and urgent.”⁶³
- (c) “[T]he reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances. Students ... 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.”⁶⁴
- (d) “Teachers and principals are placed in a position of trust that carries with it onerous responsibilities. When children attend school or school functions, it is they who must care for the children's safety and well-being. ... In order to teach, school officials must provide an atmosphere that encourages learning. During the school day they must protect and teach our children.”⁶⁵
- (e) “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.”⁶⁶
- (f) “To require a warrant would clearly be impractical and unworkable in the school environment. Teachers and administrators must be able to respond quickly and effectively to problems that arise in their school. When a school official conducts a search of or seizure from a student, a warrant is not required.”⁶⁷
- (g) “Indeed students should be aware that they must comply with school regulations and as a result that they will be subject to reasonable searches. It

⁶¹ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 3.

⁶² *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 3.

⁶³ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 3.

⁶⁴ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 33.

⁶⁵ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 35.

⁶⁶ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 36.

⁶⁷ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 45.

follows that their expectation of privacy will be lessened while they attend school or a school function.”⁶⁸

(h) “School authorities must be accorded a reasonable degree of discretion and flexibility ... to enforce school regulations. Ordinarily, school authorities will be in the best position to evaluate the information they receive. As a result of their training, background and experience, they will be in the best possible position to assess both the propensity and credibility of their students and to relate the information they receive to the situation existing in their particular school. For these reasons, courts should recognize the preferred position of school authorities to determine whether reasonable grounds existed for the search.”⁶⁹

(i) “A provision to search students in appropriate circumstances is reasonable in the school environment. As a student M.R.M. would have a reduced expectation of privacy. Mr. Cadue had reasonable grounds to believe M.R.M. was in breach of school regulations and that a search would reveal evidence of that breach. ... I am satisfied that the search was not unreasonable and in the circumstances there was no violation of M.R.M.’s s. 8 rights.”⁷⁰

31. The trial judge in *A.M.* aptly observed that the problems in schools identified by *M.R.M.* were equally so today.⁷¹ Schools must be able to deal with drug trafficking and other issues flexibly.⁷² In *A.M.*, the policies initiated and enforced by the School Board and the principal were commensurate with their duty to keep schools safe and to look after the students’ wellbeing. The principal’s invitation to the police to enter the school with a drug detection dog was an accepted and reasonable practice consonant with school policies. Schools must remain places of education; they cannot be locations where student or other drug traffickers store their drugs and ply their trade without any ability of the school authorities to deal with the situation.

⁶⁸ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 47.

⁶⁹ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 49.

⁷⁰ *R. v. M.R.M.*, [1998] 3 S.C.R. 393 at para. 64.

⁷¹ Appellant’s Record (*A.M.*), Reasons for Judgment of Hornblower J., p. 8, ll. 17-20.

⁷² See *R. v. M.R.M.*, [1998] 3 S.C.R. 393 and the extracts in paragraph 30 above.

PART IV – POSITION ON COSTS

32. The Attorney General of Ontario does not seek any costs.

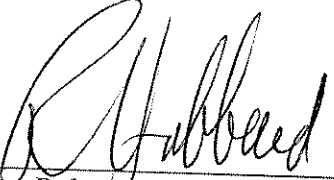
PART V – ORDER SOUGHT

33. The appeal in *A.M.* should be allowed and the appeal in *Brown* should be dismissed in accordance with the reasoning above.


34. The Attorney General of Ontario requests permission to present oral argument at the hearing of the appeal.

All of which is respectfully submitted.

This 30th day of March 2007.



Robert W. Hubbard, Counsel
for the Attorney General of Ontario



Alison Wheeler, Counsel
for the Attorney General of Ontario

PART VI – TABLE OF AUTHORITIES

	cited at para.
<i>Access to School Premises</i> , O. Reg. 474/00	13
<i>Darby v. D.P.P.</i> , 2004 NSWCA 431 (S.Ct.N.S.W. (C.A.))	18
<i>Davis; R. v.</i> , 2005 BCPC 11 (B.C. Prov. Ct.)	18
<i>Education Act</i> , R.S.O. 1990, c. E-2	10, 13
<i>Edwards; R. v.</i> , [1996] 1 S.C.R. 128	7, 14, 16, 25, 29
<i>Evans; R. v.</i> , [1996] 1 S.C.R. 8	6, 22
<i>Gosse; R. v.</i> , 2005 NBQB 293, 200 C.C.C. (3d) 147 (N.B.Q.B.)	18
<i>J.M.G.; R. v.</i> (1986), 29 C.C.C. (3d) 455 (Ont. C.A.)	12
<i>M.R.M.; R. v.</i> , [1998] 3 S.C.R. 393	5, 11, 12, 24, 27, 30, 31
<i>M.W.S.; R. v.</i> , 2005 BCPC 213 (B.C. Prov. Ct.)	12
<i>Mercer; R. v.</i> , 2004 ABPC 94 (Alta. Prov. Ct.)	18
<i>Operation of Schools – General</i> , R.R.O. 1990, Reg. 298	10
<i>Plant; R. v.</i> , [1993] 3 S.C.R. 281	16
<i>Question of Law Reserved (No 3 of 1998)</i> (1998), 71 S.A.S.R. 223	18
<i>Taylor; R. v.</i> , 2006 NLCA 41, 40 C.R. (6 th) 21 (N.L.C.A.)	18, 26
<i>Tessling; R. v.</i> , [2004] 3 S.C.R. 432	4, 16
<i>Trespass to Property Act</i> , R.S.O. 1990, c. T-21	13
<i>United States v. Place</i> , 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983)	18
<i>Z. (S.M.); R. v.</i> , (1998), 131 C.C.C. (3d) 436 (Man. C.A.)	12

PART VII – STATUTES AND REGULATIONS IN ISSUE

1. *Education Act*, R.S.O. 1990, c. E-2
2. *Operation of Schools – General*, R.R.O. 1990, Reg. 298
3. *Access to School Premises*, O. Reg. 474/00
4. *Trespass to Property Act*, R.S.O. 1990, c. T-21

Education Act
R.S.O. 1990, c. E-2

Duties of teacher

264. (1) It is the duty of a teacher and a temporary teacher,

...

discipline

(e) to maintain, under the direction of the principal, proper order and discipline in the teacher's classroom and while on duty in the school and on the school ground;

...

Duties of principal

265. (1) It is the duty of a principal of a school, in addition to the principal's duties as a teacher,

discipline

(a) to maintain proper order and discipline in the school;

...

access to school or class

(m) subject to an appeal to the board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils;

...

Access to school premises

305. (1) The Minister may make regulations governing access to school premises, specifying classes of persons who are permitted to be on school premises and specifying the days and times at which different classes of persons are prohibited from being on school premises.

Prohibition

(2) No person shall enter or remain on school premises unless he or she is authorized by regulation to be there on that day or at that time.

Loi sur l'Éducation
L.R.O. 1990, c. E.2

Fonctions de l'enseignant

264. (1) L'enseignant, même temporaire, exerce les fonctions suivantes:

...

discipline

(e) faire respecter, sous la direction du directeur de l'école, le bon ordre et la discipline dans sa classe et, s'il est de service, à l'école et sur le terrain de l'école;

...

Fonctions du directeur

265. (1) En plus de ses fonctions d'enseignant, le directeur d'école exerce les fonctions suivantes :

discipline

(a) maintenir le bon ordre et la discipline dans l'école;

...

accès à l'école ou à la classe

(m) sous réserve d'un appel au conseil, refuser d'admettre dans une classe ou à l'école la personne dont la présence dans cette classe ou à l'école pourrait, à son avis, nuire au bien-être physique ou mental des élèves;

...

Accès aux lieux scolaires

305. (1) Le ministre peut, par règlement, régir l'accès aux lieux scolaires, préciser les catégories de personnes auxquelles il est permis de s'y trouver et préciser les jours et les heures où cela est interdit à des catégories différentes de personnes.

Interdiction

(2) Nul ne doit entrer ni rester dans des lieux scolaires à moins d'être autorisé par règlement à s'y trouver ce jour-là ou à cette heure-là.

Same, board policy

(3) A person shall not enter or remain on school premises if he or she is prohibited under a board policy from being there on that day or at that time.

Direction to leave

(4) The principal of a school may direct a person to leave the school premises if the principal believes that the person is prohibited by regulation or under a board policy from being there.

Offence

(5) Every person who contravenes subsection (2) is guilty of an offence.

Idem: politique du conseil

(3) Nul ne doit entrer ni rester dans des lieux scolaires si une politique du conseil lui interdit de s'y trouver ce jour-là ou à cette heure-là.

Ordre de quitter les lieux

(4) Tout directeur d'école peut ordonner à qui que ce soit de quitter des lieux scolaires s'il croit que les règlements ou une politique du conseil lui interdit de s'y trouver.

Infraction

(5) Quiconque contrevient au paragraphe (2) est coupable d'une infraction.

Operation of Schools – General
R.R.O. 1990, Reg. 298

Duties of Principals

11. (1) The principal of a school, subject to the authority of the appropriate supervisory officer, is in charge of,

(a) the instruction and the discipline of pupils in the school;

...

Duties of Teachers

20. In addition to the duties assigned to the teacher under the Act and by the board, a teacher shall,

...

(h) co-operate with the principal and other teachers to establish and maintain consistent disciplinary practices in the school;

...

Requirements for Pupils

23. (1) A pupil shall,

(a) be diligent in attempting to master such studies as are part of the program in which the pupil is enrolled;

(b) exercise self-discipline;

(c) accept such discipline as would be exercised by a kind, firm and judicious parent;

(d) attend classes punctually and regularly;

(e) be courteous to fellow pupils and obedient and courteous to teachers;

(f) be clean in person and habits;

***Fonctionnement des écoles -
dispositions générales***

R.R.O. 1990, Règl. 298

Fonctions du directeur d'école

11. (1) Le directeur d'une école, sous réserve de l'autorité de l'agent de supervision compétent, est responsable de ce qui suit :

(a) l'enseignement dispensé aux élèves de l'école et les règles de discipline les concernant;

...

Fonctions de l'enseignant

20. Outre les fonctions que lui confère la Loi et le conseil, l'enseignant exerce les fonctions suivantes :

...

(h) il collabore avec le directeur d'école et les autres enseignants en vue d'établir et de maintenir une discipline cohérente dans l'école;

...

Exigences en ce qui concerne l'élève

23. (1) L'élève :

(a) s'applique à maîtriser les matières du programme auquel il est inscrit;

(b) fait preuve d'autodiscipline;

(c) se soumet à la discipline qui correspond à celle que pourrait exercer un père ou une mère bienveillant, ferme et sensé;

(d) fréquente l'école avec assiduité et ponctualité;

(e) est courtois envers ses camarades et fait preuve d'obéissance et de courtoisie envers les enseignants;

(f) observe les règles de propreté et d'hygiène;

- (g) take such tests and examinations as are required by or under the Act or as may be directed by the Minister; and
- (h) show respect for school property.
- (2) When a pupil returns to school after an absence, a parent of the pupil, or the pupil where the pupil is an adult, shall give the reason for the absence orally or in writing as the principal requires.
- (3) A pupil may be excused by the principal from attendance at school temporarily at any time at the written request of a parent of the pupil or the pupil where the pupil is an adult.
- (4) Every pupil is responsible for his or her conduct to the principal of the school that the pupil attends,
- (a) on the school premises;
- (b) on out-of-school activities that are part of the school program; and
- (c) while travelling on a school bus that is owned by a board or on a bus or school bus that is under contract to a board.
- (g) subit les tests et examens exigés par la Loi ou que peut imposer le ministre;
- (h) respecte les biens scolaires.
- (2) Lorsque l'élève revient à l'école après une absence, le père ou la mère de l'élève, ou l'élève lui-même s'il est adulte, justifie son absence, verbalement ou par écrit, selon ce qu'exige le directeur d'école.
- (3) Le directeur d'école peut, à n'importe quel moment, autoriser un élève à ne pas fréquenter, temporairement, l'école si le père ou la mère de l'élève, ou l'élève lui-même s'il est adulte, en fait la demande par écrit.
- (4) L'élève est responsable, devant le directeur de l'école qu'il fréquente, de sa conduite :
- (a) dans les locaux ou l'enceinte de l'école;
- (b) dans le cadre des activités périscolaires qui font partie du programme d'études;
- (c) lorsqu'il voyage dans un autobus scolaire dont le conseil est propriétaire ou que le conseil a loué.

Access to School Premises

O. Reg. 474/00

1. This Regulation governs access to school premises under section 305 of the Act.

2. (1) The following persons are permitted to be on school premises on any day and at any time:

1. A person enrolled as a pupil in the school.
2. A parent or guardian of such a pupil.
3. A person employed or retained by the board.
4. A person who is otherwise on the premises for a lawful purpose.

(2) A person who is invited to attend an event, a class or a meeting on school premises is permitted to be on the premises for that purpose.

(3) A person who is invited onto school premises for a particular purpose by the principal, a vice-principal or another person authorized by board policy to do so is permitted to be on the premises for that purpose.

(4) Subsection (1), (2) or (3) does not entitle a person to have access to all areas of the school premises.

(5) Subsection (1) does not restrict the right of the board to lock the school premises when the premises are not being used for a purpose authorized by the board.

Accès aux lieux scolaires

Règl. de l'Ont. 474/00

1. Le présent règlement régit l'accès aux lieux scolaires pour l'application de l'article 305 de la Loi.

2. (1) Il est permis aux personnes suivantes de se trouver dans des lieux scolaires n'importe quel jour et à n'importe quelle heure :

1. Les personnes inscrites comme élèves à l'école.
2. Le père, la mère ou le tuteur de tels élèves.
3. Les personnes que le conseil emploie ou dont il retient les services.
4. Les personnes qui se trouvent dans les lieux à une autre fin licite.

(2) La personne qui est invitée à assister à une activité, à une classe ou à une réunion qui se tient dans des lieux scolaires peut s'y trouver à cette fin.

(3) La personne que le directeur d'école, un directeur adjoint ou une autre personne que la politique du conseil autorise à le faire invite dans des lieux scolaires à une fin particulière peut s'y trouver à cette fin.

(4) Le paragraphe (1), (2) ou (3) ne confère pas un droit d'accès à l'ensemble des lieux scolaires.

(5) Le paragraphe (1) ne porte pas atteinte au droit qu'a le conseil de fermer à clé les lieux scolaires lorsqu'ils ne sont pas utilisés à une fin autorisée par lui.

3. (1) A person is not permitted to remain on school premises if his or her presence is detrimental to the safety or well-being of a person on the premises, in the judgment of the principal, a vice-principal or another person authorized by the board to make such a determination.

(2) A person is not permitted to remain on school premises if a policy of the board requires the person to report his or her presence on the premises in a specified manner and the person fails to do so.

3. (1) La personne dont la présence nuit à la sécurité ou au bien-être de quiconque se trouve dans des lieux scolaires, de l'avis du directeur d'école, d'un directeur adjoint ou d'une autre personne que le conseil autorise à juger d'une telle situation, ne peut y rester.

(2) La personne qu'une politique du conseil oblige à signaler d'une manière précisée sa présence dans des lieux scolaires et qui ne le fait pas ne peut y rester.

Trespass to Property Act
R.S.O. 1990, c. T-21

School boards

1. ...

(2) A school board has all the rights and duties of an occupier in respect of its school sites as defined in the *Education Act*.

Trespass an offence

2. (1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier, is guilty of an offence and on conviction is liable to a fine of not more than \$2,000.

Colour of right as a defence

(2) It is a defence to a charge under subsection (1) in respect of premises that is land that the person charged reasonably believed that he or she had title to or an interest in the land that entitled him or her to do the act complained of.

Loi sur l'Entrée sans autorisation
L.R.O. 1990, c. T.21

Conseils scolaires

1. ...

(2) Un conseil scolaire a tous les droits et toutes les obligations d'un occupant à l'égard de ses emplacements scolaires au sens de la Loi sur l'éducation.

L'entrée sans autorisation est une infraction

2. (1) Est coupable d'une infraction et passible, sur déclaration de culpabilité, d'une amende d'au plus 2 000 \$ quiconque n'agit pas en vertu d'un droit ou d'un pouvoir conféré par la loi et :

(a) sans la permission expresse de l'occupant, permission dont la preuve incombe au défendeur :

(i) ou bien entre dans des lieux lorsque l'entrée en est interdite aux termes de la présente loi,

(ii) ou bien s'adonne à une activité dans des lieux lorsque cette activité est interdite aux termes de la présente loi;

(b) ne quitte pas immédiatement les lieux après que l'occupant des lieux ou la personne que celui-ci a autorisée à cette fin le lui a ordonné.

L'apparence de droit constitue une défense

(2) Constitue une défense à une accusation portée aux termes du paragraphe (1) à l'égard des lieux qui sont des terres, le fait que l'accusé croyait raisonnablement avoir sur les terres un droit ou un intérêt l'autorisant à accomplir l'acte sur lequel repose la plainte.

Arrest without warrant on premises

9. (1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2.

Delivery to police officer

(2) Where the person who makes an arrest under subsection (1) is not a police officer, he or she shall promptly call for the assistance of a police officer and give the person arrested into the custody of the police officer.

Arrestation sans mandat sur les lieux

9. (1) Un agent de police, l'occupant des lieux ou une personne que ce dernier a autorisée à cet effet, peut arrêter sans mandat une personne qu'il croit, pour des motifs raisonnables et probables, être sur les lieux en contravention de l'article 2.

Garde de la personne arrêtée confiée à un agent de police

(2) Lorsque la personne qui procède à une arrestation aux termes du paragraphe (1) n'est pas un agent de police, elle doit rapidement requérir l'aide d'un agent de police et lui confier la garde de la personne arrêtée.

Appendix

Other provinces have legislation substantially similar to Ontario's, authorizing school officials to control safety and discipline and to regulate access to school premises. The provisions cited here are reproduced in the Attorney General of Ontario's book of authorities.

	safety and discipline	control of premises
Alberta		
<i>School Act</i> , R.S.A. 2000, c. S-3	s. 12 s. 18(1)(f) s. 20(f)	s. 27(1)(c)
British Columbia		
<i>School Act</i> , R.S.B.C.1996, c. 412	s. 6(1)	
<i>School Regulation</i> , B.C. Reg. 265/89	s. 4(1)(c) s. 5(7)(g)	
<i>Trespass Act</i> , R.S.B.C. 1996, c. 462		ss. 4, 4.1
Manitoba		
<i>Public Schools Act</i> , C.C.S.M. c. P250	s. 47.1 s. 58.10(b) s. 96(c), (e), (f)	s. 47.1(3)(b) s. 261(2)
<i>Petty Trespasses Act</i> , C.C.S.M. c. P50		s. 1(1)(b)
New Brunswick		
<i>Education Act</i> , S.N.B. 1997, c. E-1.12	s. 14(1) s. 21(2) s. 27(1)(e) s. 28(2)(c)	s. 20 s. 21(1) s. 22 s. 45(1)-(2)
<i>School Administration Regulation - Education Act</i> , N.B. Reg. 97-150	s. 14	
<i>Trespass Act</i> , S.N.B. 1983, c. T-11.2		s. 1 ("occupier") s. 2
Newfoundland and Labrador		
<i>Schools Act</i> , 1997, S.N.L. 1997, c. S-12.2	s. 11 s. 24(3)(f) s. 33(e) s. 76(1)(e)	s. 41
<i>Petty Trespass Act</i> , R.S.N.L. 1990, c. P-11		s. 2(1)(c) s. 4
Northwest Territories		
<i>Education Act</i> , S.N.W.T. 1995, c. 28	s. 34 s. 45(1)(h)-(i) s. 69(1) s. 69(2)(g)-(h), (j)-(k)	s. 46

Nova Scotia		
<i>Education Act</i> , S.N.S. 1995-96, c. 1	s. 26(1)(k)-(o) s. 38(1) s. 38(2)(e) s. 121	s. 27
<i>Protection of Property Act</i> , R.S.N.S. 1989, c. 363		s. 2(b) s. 4
Nunavut		
Same statute as the Northwest Territories (via s. 29 of the <i>Nunavut Act</i> , S.C. 1993, c. 28).		
Ontario		
<i>Education Act</i> , R.S.O. 1990, c. E-2	s. 264(1)(e) s. 265(1)(a)	s. 265(1)(m) s. 305
<i>Operation of Schools – General</i> , R.R.O. 1990, Reg. 298	s. 11(1)(a) s. 20(h) s. 23	
<i>Access to School Premises</i> , O. Reg. 474/00		ss. 1-3
<i>Trespass to Property Act</i> , R.S.O. 1990, c. T-21		s. 1(2) s. 2 s. 9
Prince Edward Island		
<i>School Act</i> , R.S.P.E.I. 1988, c. S-2.1	ss. 72-73 s. 98(e)-(g) s. 99(g), (m)	s. 54 s. 115
<i>Trespass to Property Act</i> , R.S.P.E.I. 1988, c. T-6		s. 3
Québec		
<i>Education Act</i> , R.S.Q. c. I-13.3	s. 76	s. 93
Saskatchewan		
<i>Education Act</i> , 1995, S.S. 1995, c. E-0.2	s. 150(3)(c),(e),(f) ss. 151-152 s. 175(2)(e), (j) s. 193 s. 231(2)(d), (i), (l), (m)	s. 367
Yukon Territory		
<i>Education Act</i> , R.S.Y. 2002, c. 61	s. 38(e) s. 39 s. 168(d), (i) s. 169(d), (k), (n)	
<i>School Trespass Act</i> , R.S.Y. 2002, c. 199		s. 2