Using Police Dogs to Search People

The Supreme Court of Canada began hearing arguments regarding the Crown's appeal of R. v. Brown [1] on May 22, 2007. Brown, a 2006 case from the Alberta Court of Appeal, concerns the constitutionality of sniffer dogs. In Brown, a police officer approached a traveller at a bus depot, and after engaging the suspect in conversation, used a sniffer dog to smell the suspect's luggage.

Because the law in Canada is unclear regarding the use of sniffer dogs, the majority of the Court of Appeal applied R. v. Tessling [2], a 2004 decision of the Supreme Court involving the use of an infrared camera to capture heat images. The majority held that since the police were in a public place and the sniffer dog yielded crude information (the dog could only detect nine types of drugs), the accused did not have a reasonable expectation of privacy in the odours emanating from his luggage.

Justice Paperny dissented, arguing that the use of a sniffer dog in these circumstances constituted a search. First, she interpreted Tessling to mean that, in some instances, there will be a privacy interest in odours emanating from someone's person or luggage in a public place [3]. Second, she warned that the majority decision severely limits the scope of section 8, which is "fundamental to the relationship between state and citizen" [4]. Third, in contrast to the majority, Justice Paperny argued that sniffer dogs are invasive: they reveal personal information with near certainty and are physically intrusive. As a result, Justice Paperny would have excluded the evidence and withdrew the charges. She argued that this Charter remedy was appropriate since the violation was serious and the police did not act in good faith. Indeed, the RCMP's Jetway program, at issue in Brown, has faced numerous constitutional challenges.

R. v. A. M [5] is a companion case to Brown and was also heard by the Supreme Court on May 22, 2007. The Ontario Court of Appeal ruled that the warrantless and random search by a police officer of a high school student's backpack violated the student's section 8 Charter right to be free from unreasonable search and seizure. Because of the violation, the Court of Appeal excluded the evidence pursuant to section 24(2) of the Charter and withdrew the charges.

The circumstances of the case have garnered media attention. On November 7, 2002, three police officers requested permission from the principal to conduct a random search of the school with a sniffer dog. Sniffer dogs are trained to detect drugs such as marijuana, heroin, hashish, and cocaine and are regarded as "an integral part of the police officer's search" [6]. In this case, the sniffer dog alerted the police to a backpack in the gymnasium in which the police found marijuana and psilocybin ("magic mushrooms"). A.M., a young offender, was charged with possession for the purpose of trafficking in respect of both drugs.

The Court of Appeal held that without reasonable and probable grounds of suspicion that a crime had been committed, neither the school authorities nor the police had the right to conduct the search. In law, a warrantless search is prima facie (on its face) unreasonable unless the Crown can prove otherwise. Hunter v. Southam Inc. [7] established the limits of warrantless and unjustified searches in 1984. In the school context, the Supreme Court of Canada held in R. v. M. (M.R.) [8] that a search of a student by a school official does not require a warrant and the absence of a warrant does not render the search unreasonable. However, this power is limited insofar as "the school authorities must have reasonable grounds to believe that there has been a breach of school regulations or discipline and that a search of a student would reveal evidence of that breach" [9]. In A.M., on the day of the search, the police "had no information with respect to a specific target area in the school and no information with respect to particular persons to be searched" [10]. Thus, the search was conducted without reasonable grounds and violated the student's Charter right to be free from unreasonable search and seizure. The trial judge held that to rule otherwise would be to deprive A. M. and students in similar situations of their Charter rights.

1. and A.M. are the latest development on the issue of sniffer dogs and the extent to which their use infringes section 8 of the Charter. The policy issue concerns the limits of police power: should the police be able to use sniffer dogs to conduct random searches of schools and other public places such as parks, malls or bus depots? The legal issue is whether the use of a sniffer dog constitutes an unreasonable search within the meaning of section 8. To be unreasonable, the accused must have a reasonable expectation of privacy in the smells emanating from his person or belongings, and the search using the sniffer dog must be an unreasonable intrusion of this expectation.

The Supreme Court's ruling on both Brown and A.M. may clarify the law regarding sniffer dogs and section 8 Charter rights in Canada.

Cases

- R. v. Brown, 2006 ABCA 199 (CanLII).
- R. v. Tessling, [2004] 3 S.C.R. 432.
- R. v. A.M., 2006 CanLII 13550 (ON C.A.).
- R. v. M.(A)., 2004 ONCJ 98 (CanLII).
- R. v. M. (M.R.), [1998] 3 S.C.R. 393.
- Hunter v. Southam Inc., [1984] 2 S.C.R. 145.

Sources

- Tracey Tyler, "Random police searches tested in court" Toronto Star (22

May 2007) A1.
- "Top court hears Charter challenge on use of sniffer dogs" CBC News, http://www.cbc.ca/canada/ottawa/story/2007/05/22/sniffer-dogs-scc.html

Further Reading

- Don Stuart, "Police Use of Sniffer Dogs Ought to be Subject to Standards: Dangers of Tessling Come to Roost" (2005) 31 C.R. (6th) 255.
- "Featured Court Ruling: Hunter v. Southam Inc." Centre for Constitutional Studies.
- Terry Romaniuk, "Search Warrants Considered Judicially" (22 May 2007).
- "RCMP Best Practices – Pipeline/Convoy/Jetway [Programs]" (15 September 1999).

[1] R. v. Brown, 2006 ABCA 199 (CanLII) [Brown]
[2] R. v. Tessling, [2004] 3 S.C.R. 432 [Tessling].
[3] Brown, supra, note 1 at 100.
[4] Brown, supra, note 1 at 106.
[5] R. v. A.M., 2006 CanLII 13550 (ON C.A.) [A.M.].
[6] A.M., supra, note 5 at 46.
[7] Hunter v. Southam Inc., [1984] 2 S.C.R. 145.
[8] R. v. M. (M.R.), [1998] 3 S.C.R. 393.
[9] R. v. M.(A)., 2004 ONCJ 98 (CanLII).
[10] A.M., supra, note 5 at 16.