IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA
Citation: R. v. R. M. D., 2008 NSPC 52

Date: 20080724
Docket: 1868648/1868649
Registry: Amherst

Between:

Her Majesty the Queen

v.

R. M. D.
(A young person within the meaning of the
Youth Criminal Justice Act)

Restriction on publication: **Pursuant to s. 110(1) and 111(1) of the *Youth Criminal Justice Act***

Editorial Notice

Identifying information has been removed from this unofficial version of the judgment to comply with the publication ban.

Judge: The Honourable Judge Carole A. Beaton

Heard: 2 July 2008 in Amherst, Nova Scotia

Oral decision rendered: 24 July 2008

Written decision released: 16 September 2008

Counsel:	Mr. Paul Carver, for the federal crown Ms. Sharon French, for the federal crown Mr. Bruce Baxter, for the provincial crown Ms. Stephanie Hillson, for the defence

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 110(1) and s. 111(1) OF THE *YOUTH CRIMINAL JUSTICE ACT* APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

111(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

By the Court:

[1] The Applicant, R. M. D., is charged in the Youth Justice Court that:

> On or about the 17th day of January 2008 at, or near S., Nova Scotia, did being at large on his undertaking given to an officer in charge and being bound to comply with a condition of that undertaking directed by the said officer in charge fail without lawful excuse to comply with that condition to wit: keep the peace and be of good behaviour contrary to section 145(5.1) of the Criminal Code.

As set out in information number 551012. Information number 551013 alleges that:

> On or about the 17th day of January 2008 at, or near S., Nova Scotia, did unlawfully have in his possession, not in excess of 30 grams, Cannabis (Marihuana), a substance listed in schedule II of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and did thereby commit an offence contrary to section 4(1) of the said Act.

[2] These matters came before the court for trial on July 2nd, 2008. By consent of the parties, the trial commenced with a *voir dire* on the **Charter** motion raised by the Defendant, on the understanding that any evidence provided in the *voir dire* could then be adopted as evidence in the trial proper, subject to and pending the outcome of the *voir dire* and this decision on the application. The Defendant filed a notice of **Charter** application dated June 10th, 2008, seeking an order granting exclusion of certain evidence which the Applicant asserts was obtained in violation of his rights pursuant to section 8 of the **Charter**. Specifically, the Applicant maintains that the search of him by K. M. and John Choisnet on January 17th, 2008 constituted an unreasonable search and violated his rights pursuant to section 8 of the **Charter**, as a result of which, any statements made by the accused to the police and any items secured as a result of the search should be excluded pursuant to section 24(2) of the **Charter**.

[3] The burden in this matter rests with the Applicant to establish, on a balance of probabilities, based upon the evidence provided to the court in the *voir dire*, that his rights pursuant to section 8 were violated, as that burden was identified and articulated in *R. v. Collins* [1987] 1 S.C.R. 265. This Court must ask: is it more

probable than not, based upon the evidence before me, that a violation of the Applicant's right to be free from unreasonable search or seizure occurred?

Summary of Issues

[4] Both the Applicant and the Respondent have referred the court to the decision in *R. v. M. R. M.* [1998] S.C.J. 83, the circumstances of which are remarkably similar in many respects to the case at hand, and the principles of which counsel agree have not been compromised or diminished by the Supreme Court of Canada's recent decision in *R. v. A. M.* [2008] S.C.J. 19 to which both Crown and Defence have also referred. The essence of the issue before the court in this matter lies with the Applicant's assertion that the search conducted, despite the statutory authority of school officials to conduct it, and despite the absence of the standard of reasonableness of the search that would apply to peace officers under the same circumstances, was unreasonable as the Principal and Vice Principal conducted it on January 17, 2008 at S. J. H.S., and was unreasonable under the circumstances as they existed at the time the search was conducted. The standards identified and the assessment or test of reasonableness as both adopted by Cory, J. in *M. R. M.* (supra), also involving a case of a search of a student at a school, clearly apply in the instant case. In a lengthy passage at paragraph 50 of that decision, Cory, J. stated:

> A teacher or principal should not be required to obtain a search warrant to search a student and thus the absence of a warrant in these circumstances will not create a presumption that the search was unreasonable. A search of a student will be properly instituted in those circumstances where the teacher or principal conducting the search has reasonable grounds to believe that a school rule has been violated and the evidence of the breach will be found on the student. These grounds may well be provided by information received from just one student that the school authority considers credible. Alternatively the reasonable grounds may be based upon information from more than one student or from observations of teachers or principals, or from a combination of these pieces of information which considered together the relevant authority believes to be credible. This approach to reasonable grounds in the school environment will permit school authorities to deal speedily and effectively with breaches of school regulations and disciplinary problems, which is so

> essential to providing a safe and positive environment for learning. Yet it will provide for the reasonable protection of students' rights. The approach to be taken in considering searches by teachers may be summarized in this manner:
>
> > (1) A warrant is not essential in order to conduct a search of a student by a school authority.
> >
> > (2) The school authority 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 such breach.
> >
> > (3) School authorities will be in the best position to assess information given to them and relate it to the situation existing in their school. Courts should recognize the preferred position of school authorities to determine if reasonable grounds existed for the search.
> >
> > (4) The following may constitute reasonable grounds in this context: information received from one student considered to be credible, information received from more than one student, a teacher's or principal's own observations, or any combination of these pieces of information which the relevant authority considers to be credible. The compelling nature of the information and the credibility of these or other sources must be assessed by the school authority in the context of the circumstances existing at the particular school.
>
> If this approach is followed it will permit school authorities to fashion remedies that are efficacious and flexible.

[5] The factors which Cory, J. identified as those to be considered when determining whether a search conducted by a school official in the school environment was reasonable, were summarized (at paragraph 54 of his decision) as the "modified standard for reasonable searches" test. Cory, J. said:

> (1) The first step is to determine whether it can be inferred from the provisions of the relevant education act that teachers and principals are authorized to conduct searches of their students in appropriate circumstances. In the school environment such a statutory authorization would be reasonable.
>
> (2) The search itself must be carried out in a reasonable manner. It should be conducted in a sensitive manner and be minimally intrusive.
>
> (3) In order to determine whether a search was reasonable, all the surrounding circumstances will have to be considered.

[6] It is undisputed that a search of the pants pockets and belongings of the Applicant was conducted by the Principal and the Vice Principal of S.J.H.S. on January 17th, 2008. That search was instigated at the request of the Principal that the Applicant accompany her to the office, as a result of a complaint received by her regarding stolen property missing from an area in which the Applicant and another person were noted to have been seen minutes prior to the report of the missing items. It is not disputed by the Applicant that as per the authority vested in the Principal pursuant to the *Education Act*, S.N.S. 1995-96, c.1, and the responsibilities of both teachers and students in the school, outlined in the "Department of Education Code of Conduct" (which was exhibit 3 in the *voir dire*), the Principal was entitled to conduct a search. It is also not disputed by the Respondent that the provisions of the **Charter** are triggered in this case as public schools constitute an aspect of government, as that same assumption was made by the Supreme Court of Canada in *R. v. M. R. M.* (supra): see paragraph 25.

[7] Further, it is not disputed by the Applicant that while he had a reasonable expectation of privacy in both his person and his belongings, that expectation was diminished, given that he was in the confines of a school environment, as the principle was also adopted by the court in *M. R. M.* (supra). Having said that, it is also important to note that the Supreme Court of Canada has recently recognized that a reduced expectation of privacy in a school setting does not eliminate the concurrent expectation of privacy extending to students' belongings, per *R. v. A. M.* (supra).

[8] In this case, the Applicant asserts that while the school officials had the authority to conduct a warrantless search, nonetheless, the Principal and Vice

Principal did not possess reasonable grounds in this case to believe that a search of the Applicant would reveal evidence of a breach of the school rules and/or an offence, and given the surrounding circumstances that existed at the time the decision was made to search the Applicant and his belongings, there were alternatives open to the school officials to effect their purpose, absent violating the Applicant's privacy expectations, by conducting an unreasonable search.

[9] Therefore, the issue for this court to determine falls under the second and third branches of Cory, J.'s "modified standard" test:

> (a) Was the search conducted in a reasonable manner; and
>
> (b) Considering all of the surrounding circumstances, was the decision to search a reasonable one?

Evidence/Facts in Dispute

[10] Before embarking on an analysis of the legal issues, it is necessary to address the divergent evidence provided to the court as between and among the Applicant, witnesses called on behalf of the Applicant, and the witness on behalf of the Respondent crown.

[11] Ms. K. M., the Principal of S.J.H.S., testified for the Crown. She indicated that on January 17th, 2008, she presided over an assembly in the school gym that started between 2:35 p.m. and 2:45 p.m. and lasted approximately six minutes, ending by 2:50 p.m. All the students in the school attended. She recalled that within two minutes following the end of the assembly, she was approached by more than two, but fewer than five senior high students - basketball players - whom she knew, trusted and knew to be truthful to her, students demonstrating leadership qualities. Those students reported that a variety of items, including hats and sneakers, were missing from their book bags, which had been deposited outside the gym in the hallway during the assembly. The same students reported they had seen the Applicant and another male student over and around the book bags, following which a teacher confirmed that he had seen the Applicant and the other student in the hallway during the assembly, although neither had been in attendance at school that day. Ms. M. located the Applicant and the other individual down the hall from the gym and asked them to accompany her and the Vice Principal, who was with her, to the office to speak in private. At the office,

she spoke to each youth separately and told them why they were there: that items were missing and they had been seen in the area where those items went missing. The Principal told the boys what types of items she would be looking for in conducting a search of them. She inquired as to whether the boys had anything sharp before she would examine their belongings, and she asked them to turn out their pants pockets, and she looked through their book bags and coats. She located a drug pipe in the Applicant's book bag and four bags of marijuana in his coat pocket. She asked the Applicant to wait while the police and his mother were contacted.

[12] Ms. M. testified that she has conducted approximately 30 such searches of students during her four years as Principal, and it is her practice that searches are always done by her and the male Vice Principal or another male in his place. No physical contact would ever be made with any student, and the only portion of the student's body that would be engaged in a search would be if the student was requested to turn out their pants pockets. Depending on what items school officials were looking for, the person searched would be asked to turn out his/her pockets, or the brim of a hat, or expose other items of clothing. In this case, the Applicant was not asked to turn out the brim of a hat, as the Principal did not expect the missing items such as footwear could be stored in that location. The Principal testified that in conducting the search in the office, her aim was to protect the privacy of and be respectful toward the Applicant, to conduct a discreet exercise and to not embarrass the Applicant.

[13] The Principal testified that in her capacity as Principal, acting *in loco parentis* to the students of the school, she could not sit idly by if one student had stolen from another, and she needed to act on credible and reliable information received from students in order to maintain respect and trust and to not have discipline in the school negatively impacted by her failure to intervene when a criminal act may have occurred. In deciding whether to search the Applicant and his friend, Ms. M. assessed the factors before her including: whether what was being reported was a wild accusation, whether she had trust in the individual reporting the information, whether the individual reporting the information had proven themselves trustworthy to her over time, and whether the person being accused would have had an opportunity to commit the act being complained of. In this particular case, time was also a factor because she believed, given the timing of the complaints, that no one would have had time to enter or exit the school between the end of the assembly and the time the complaint was received by her.

It was the end of the day and students were leaving and were emotional because of the subject matter of the assembly. As a result, it was important to Ms. M. to look for the property before the school emptied and/or students took matters into their own hands. Ms. M. stated that as a school Principal, it is her expectation that students report these kinds of events, and she is entrusted to encourage and respond to such reporting.

[14] On cross examination the witness agreed that at the time she encountered the Applicant, she had not conducted any search of the area in an effort to locate the missing property, nor had she received any reports that any property had been recovered. She was not sure whether the Applicant's book bag was searched first, but his book bag and his coat pockets were searched to look for a missing hat or shoes. She could not recall whether it was she or the Vice Principal who had searched the book bag. She believed the drug pipe was located in the book bag. No stolen property was located as a result of the search.

[15] On cross examination, the Principal reported that she could recall that at least two of the complaining students who approached her advised there were items missing. In court, she could not recall any more than the identification of white sneakers and a red hat as being some of the missing items. She did not arrange for a search of the gym area prior to deciding to speak to the Applicant, and she could have asked the Applicant to wait while a search was conducted, but she did not do that. She did not recall any hats being found before the Applicant was searched. Independent of her notes that she had reviewed during direct, she could remember that the marijuana was found in the book bag and the pipe was found in the jacket. She did not recall telling investigator Constable Jackson that the marijuana was in the jacket and agreed she would have spoken to the police before her notes were made, and her notes were made within the same hour of the events.

[16] Upon having had an opportunity to refresh her memory from notes made by her an hour after the events, Ms. M. then testified that four bags of marijuana were found in the Applicant's book bag first, and then the drug pipe was found in his coat. The witness indicated she was relying heavily on her notes to assist her in her recollection, although she could not recall whether the other student had a book bag, or whether the other student's jacket was searched first, or the names of the students who complained to her. Ms. M. agreed with defence counsel that she couldn't recall initially if the Applicant's book bag or coat had been searched first, but she now believed it was the book bag. She indicated that it would be fair to say

that a few of the details were hard to recall because of the passage of time. She agreed that she would tailor the search to the nature of the items being looked for, and in this case she was not looking for drugs, although she could expect that she could find a missing hat in a coat pocket. She also agreed she would have assessed the reliability of the information of those providing it in first considering whether or not to conduct a search. She did not conduct a cursory search of the area before the more serious search of the Applicant because it made sense to her, based upon what she knew, that the Applicant and the other student may have taken those items.

[17] Ms. M. struck me as an articulate and credible witness, able to provide considerable detail as to the events unfolding, the decisions she made, the factors that led to those decisions and the results of the search of the Applicant's belongings. While there was undoubtedly a contradiction between her initial indication that she found a drug pipe in the Applicant's book bag and marijuana in his coat, and her later clarification that the opposite was the case - that is that the pipe was found in the coat and the marijuana in the book bag - nonetheless, I am not persuaded that technical contradiction should be fatal to any reliance on her evidence. In the end, it is a distinction without a difference, as both types of contraband were found in the belongings of the Applicant, as a result of the search conducted. The minor confusion on that point does not persuade me that Ms. M.'s powers of recall are compromised to the extent that the court cannot or should not rely on her evidence of her recollections. Further, any significance associated with this minor contradiction will ultimately be tempered by my findings with respect to the evidence of the Applicant, about which I will comment on shortly.

Defence Evidence on the Voir Dire

The Evidence of C.A.B.

[18] C.A.B. testified he was in the school assembly on the morning of January 17th for approximately one hour, and before entering the gym he lined up in the hallway and removed his hat. After the assembly he could not locate it, and he asked around but not one knew its location. The hat was later found when the Applicant approached him and said it was on top of a trophy case. When he located that hat, C.A.B. told the Principal. He had no idea where the Applicant was at that time. He was unable to recall how much time had passed from the time the hat was found to the time he told the Principal, but it was "not that long". On

cross examination by the Federal Crown, C.A.B. agreed that he never made any notes of what happened and he never talked to anyone about it since that time, because he had his hat back. He agreed he could have been mixed up about where Ms. M. was when he told her that his hat was missing, because the event happened a long time ago, and he agreed that it was possible that he had gone to her office to speak to her when his hat was found. He agreed it was possible that someone other than the Applicant had told him where his missing hat could be found, and he agreed that he really did not know how much time went by between losing his hat and reporting the loss to the Principal.

[19] On cross examination by the Provincial Crown, C.A.B. agreed that somebody had told him his hat was located on the trophy case and he had to jump up in order to see that. He also agreed his memory of the events was better at the time they occurred than at the date that he testified.

[20] On re-direct, C.A.B. said he knew for a fact the Applicant had told him his hat was on the trophy case, and on that issue as put to him by the Federal Crown on cross, he had merely misinterpreted the question.

[21] On the whole, while C.A.B. certainly impressed me as an individual who was doing his best to be truthful, nonetheless, the whole of his evidence left me with the distinct impression that his powers of recall had been compromised by the passage of time. Further, because he was open to the possibility of alternate suggestions put to him on cross examination, he was not able to eliminate the potential for events of significance to have unfolded at a different time, place or in a different way than he was able to remember when in the witness box. As C.A.B. himself identified it, he was able to recall those aspects of the event that were of significance or importance to him, as opposed to other aspects of the event which did not matter to him once he had recovered his missing hat. In that respect, his evidence is of very limited assistance to the court.

<u>The Evidence of Constable Jackson</u>

[22] Constable Jackson testified on direct that he was dispatched to the school with his partner and apprised by the Principal that she had located a pipe and marijuana during the course of the search of the Applicant in relation to missing hats. He arrested the Applicant and the Principal reported that the marijuana had been found in the Applicant’s jacket.

[23] On cross examination by the Federal Crown, the witness agreed that he made his notes independent of any review of them by the Principal and the information he recorded was done in a summary form.

[24] Constable Jackson agreed the marijuana and the pipe could have been found "wherever", but he understood they had been found in the Applicant's jacket. He didn't recall any mention of a book bag. He maintained several times that he understood that the contraband was found in the Applicant's jacket, and also agreed that what was important to him was to understand that the Applicant had possessed the contraband in order to arrest him for that alleged offence.

[25] I am satisfied that the Constable Jackson was responding to the complaint of possession of contraband and his focus would have been on the fact that it had been found with the Applicant, as opposed to whether it was that the pipe was located by the Principal in the book bag and the drugs in a jacket, or vice versa. In that respect, I rely on the detailed evidence of Ms. M. , who is the person who actually conducted the search and was in a much better position to testify on that specific point than the officer who was not present for the search.

The Evidence of Deputy Chief Ruddick

[26] Deputy Chief Ruddick testified that he accompanied Constable Jackson to the S.J.H.S. where they met with the Principal and she provided them with the drugs she advised had been found during the course of the search of the Applicant, who was then turned over to Constable Jackson and then placed under arrest. The officer understood that the marijuana had been located, to his recollection, in a backpack. That evidence corroborates the Principal's evidence that in the course of her search of the Applicant she examined his backpack. Deputy Chief Ruddick was not subject to any cross examination.

The Evidence of R.M.D.

[27] The evidence of the Applicant, R.M.D. on direct was that he had gone to the school on January 17th at the end of the day to meet a friend, and instead met up with another individual, T.B.B. Because no one appeared to be around and they heard there was an assembly, the two boys went to the gym and looked in the window and noted two teachers watching them. After that, C.A.B. reported his hat

was missing, and five minutes later the Applicant saw the hat on top of a trophy case on the second floor of the school and told C.A.B. where it was. A minute or two later the Principal took him to the office and asked him to empty his pockets and searched his jacket and found a pipe. R.M.D. maintained he was not in possession of any backpack or book bag that day. Once he was in the Principal's office, the Applicant did not know what was happening until he was told they were looking for a stolen hat, and he advised that if it was C.A.B.'s hat they were looking for, then he had already found it for C.A.B. He was told to turn out his pants pockets, a request with which he complied, and then he was asked to pass his jacket, and he did not feel he had any choice but to comply with the Principal's request. He took off the jacket and it was searched.

[28] On cross examination by the Federal Crown, the Applicant was unable to recall seeing any book bags in the hallway outside the gym that day. When first placed in the office, he did not know why he was there or that there were items missing; he assumed there must be a reason he had been asked to the office, but he did not know what it was. When the Principal came into the office with the Vice Principal, that was the first indication to him of missing items, but he did not know if a hat had been mentioned as missing. I note this evidence was in direct contradiction to R.M.D.'s evidence in chief where he said that he was told the Principal and Vice Principal were looking for a stolen hat and he told them he had already found C.A.B.'s hat. The Principal mentioned other items missing and while he couldn't recall, R.M.D. knew she did not mention sneakers and he did not believe she had mentioned a hat. He qualified that he had only offered up finding C.A.B.'s hat once "she" meaning the Principal "said about stolen items", again a contradiction with his evidence on that point in direct.

[29] On cross examination by the Provincial Crown, the Applicant agreed that he was told there were items missing before he was asked to first turn out his pockets and then take off and turn over his jacket. He agreed it was possible for a folded baseball cap to fit inside his coat pocket, although the brim of it would, in his view, likely stick out of the top of the pocket. He felt it was "personal" to be asked to take off his coat, although he did not feel threatened or fearful of violence, and no one touched him. He agreed the contraband items located by the Principal came out of his coat pocket. In the end, therefore, the contradiction between the evidence of what Ms. M. remembered as the location of the contraband, versus her notes, versus Constable Jackson's evidence on that point, makes the entire issue

somewhat of a “tempest in a teapot” as it is the evidence of the Applicant that all of the contraband - a pipe and drugs - were nonetheless located on his belongings.

[30] I do not believe for one moment that R.M.D. was attempting to mislead the Court. Rather, he has no recollection of having had a backpack with him that day. The evidence persuades me the Principal was methodical and thoughtful about the conduct or execution of the search and I am satisfied, upon her evidence, that both the Applicant’s backpack and coat were searched. The Principal was specifically positioned to pay attention to the mechanics and the specifics of the search and she followed up the steps she took by reviewing her detailed notes of the events. On her evidence, I am persuaded the Applicant was possessed of a backpack that day, which was searched as part of the Principal’s search of the Applicant’s belongings. Having said that, the ultimate issue for the court, regardless of whether the search included a coat, as the Applicant testified, or a coat and a backpack, as Ms. M. testified, and which I accept, is whether that search can survive section 8 scrutiny.

[31] I am satisfied, on the whole of the evidence before me on the *voir dire*, that the Principal of the school based her decision to search the Applicant upon the following factors:

(a) Within two minutes of the end of an assembly in the school gym, the Principal received complaints from between three and five senior students (students whom she trusted and whom had exhibited leadership qualities in the past). Those students reported that some of their property was missing.

(b) The same students reported that the accused had been seen in the area of their backpacks, located immediately outside the gym in which the assembly was being conducted, shortly prior to their discoveries of missing items.

(c) As the Principal exited the gym, a teacher confirmed that the Applicant had been in the area of the backpacks while the assembly was being conducted. The same teacher mentioned that the Applicant had not been in attendance at school that day.

(d) School was ending for the day and whatever action the Principal might decide to take concerning the possible theft of students’ property was time sensitive and needed to be taken before the student population would disperse.

[32] I am also satisfied that the search, when conducted, resulted in the Principal locating a drug pipe in the coat of and marijuana in the backpack of the Applicant.

Issues Before the Court

[33] With deference to the order in which Justice Cory posited the questions raised in the second and third branches of the modified standard test, I will first address the third question as to whether the search was reasonable, followed by the second question as to whether the search was conducted in a reasonable manner.

Was it reasonable to conduct a search?

[34] It is entirely clear from the evidence before this court that the Principal was not acting on mere suspicion; rather, she had information from multiple sources she considered credible and trustworthy, including eyewitness evidence of the accused being in the vicinity from which the items had gone missing during the very narrow time frame in which the assembly was in session, and on that basis, she formulated reasonable grounds that the accused could be in possession of stolen property. I am satisfied on the evidence before me that the Principal acted swiftly and decisively, but not carelessly or recklessly, and made a decision which was time sensitive, to avoid having any potential culprits disperse from the school. It is to be emphasized that the Principal did not ultimately have to be correct or accurate about her reasonable grounds; it is the formation of her grounds that is subject to the scrutiny of this court, and not the outcome or results emanating from their formation.

[35] It strikes this Court as impractical for the Applicant to suggest that a reasonable alternative to the decision to search the accused would, under the existing circumstances, have been for the Principal to "lock down" the entire building and prevent the egress of any student until the entire school could be searched with a view to locating the missing property of the complainants. Given Principal M. 's evidence that the school serves approximately 400 students, it would, in my view, be most impractical for the Principal to have reached such a decision to try to prevent the exit of 400 students from the building, particularly given that the assembly had been an emotionally charged event related to its purpose in marking the tragic death of seven high school basketball players from New Brunswick. Surely the cumulative effect of all of the information the Principal had before her, which needed to be acted on swiftly, could easily

eliminate the practicality of a decision to detain the entire student body. Were the situation such that there was nothing more or less to connect the Applicant to the area where the items went missing any more than any other student, then such a decision to detain everyone, while still highly impractical, might have been the only one able to be logically reached. However, the Principal was possessed of very specific information from more than one source, which she considered reliable, all of which reasonably pointed to the real potential that the Applicant and his companion were involved.

[36] There is no doubt, as asserted by the Applicant, that the decision to search him was ultimately based upon a series of "circumstantial observations" of other students and teachers, as opposed to any direct observation of him by the Principal or, in the alternative, any direct observation by anyone that the Applicant had been going through students' belongings. However, it is to be remembered that the circumstances of that day were not that there were many students in the hallway area in the vicinity of the book bags from which the items were discovered missing within a short time following the end of the assembly; rather, the evidence was that all of the school population was inside the gym in an assembly and certain students and a teacher had noted only the Applicant and another male student outside the gym in the area of students' book bags during that time. In my view, there was nothing random about the Principal's identification of R.M.D. as possibly being involved in the fact that there were items missing.

[37] The Applicant asserts that the Principal's evidence that searches are an extreme resort calls into question why a search would have been the first resort in this case. The Applicant suggests that in the alternative, the Principal could have chosen to confine him while a search was conducted in the general area in which the items went missing, as opposed to conducting a specific search of the Applicant himself. Again, for the same reasons set out earlier, this court does not accept that under the circumstances as they existed that the Principal was acting with haste or recklessly or capriciously or was on some sort of "wild goose chase" and unfairly targeted R.M.D. for the purpose of or with the result of subjecting him to an extreme measure.

[38] The Applicant urges that once there were no missing items located on the other male who accompanied him to the Principal's office, being the individual who was first searched, that should have properly compelled the Principal not to act in relation to a search of the Applicant. With respect, that suggestion is without

merit; if such a notion was carried to its logical extension, then it would be the case that any searcher, using the reasonable grounds to formulate a decision to conduct a search of any nature or kind in relation to multiple individuals, would then be put in the immediate position of having to make a potentially very arbitrary decision about who would be first subject to that search, in essence forcing the searcher to guess about which, if any of the searches, might prove fruitful. This attends to the notion that the individual formulating a reasonable decision to search another or the belongings of another does not ultimately have to be correct about the outcome of the search and whether it will bear results. The same circumstances that propelled the Principal to the reasonable decision that a search was necessary were not eliminated or negated in any way by the fact that another party identically situated to the Applicant was searched first without result.

Was the search conducted in a reasonable manner?

[39] The evidence clearly establishes that Ms. M. approached the Applicant in the hall and asked him to accompany her to her office. The evidence further establishes that once at the office, the Applicant was separated from the other party and placed in an office by himself. Both the Applicant and the Principal are at one in their evidence that the reason for the Applicant's presence in the office, the concern of the Principal, and the indication that the Applicant would be searched were all clearly explained to him. The evidence of the Applicant makes it clear that he believed he had no choice but to submit to such a search, although the whole of the evidence of both the Applicant and the Principal supports that the search was conducted in a dignified fashion, in private, and no physical contact was ever made by the Principal or the Vice Principal with the Applicant. There is nothing about the evidence that suggests the search was conducted in anything but a professional, calm and measured manner by the school authorities, and likewise that the Applicant responded in a calm fashion.

[40] I am satisfied on the whole of the evidence that the search was conducted in a sensitive manner and was minimally intrusive. I accept the Principal's evidence that there had been other items identified to her as missing by the complaining students such that her ultimate decision to search the Applicant, while it did not extend to any physical contact with him, did include a request that he turn out his pants pockets, with which the Applicant complied. It may be asked what the emptying of pockets would have to do with the production of missing items such as sneakers and ball hats, however, I accept that the Principal's inability to recall

the specific nature of all items identified to her by the complaining students is a function of the passage of time between the actual events and the date of the *voir dire*, which rendered the Principal unable to recall the other items that had been specifically enumerated to her at that time. On the whole of the evidence and the atmosphere as I am satisfied it existed at that time, and the respect that I am satisfied the Principal was demonstrating for the Applicant, I am not persuaded that she was acting in a capricious fashion or was acting with the knowledge that requiring a student to turn out his pants pockets could never produce an item such as footwear, as that would be a physical impossibility. While I cannot disagree that any reasonable individual would recognize the unlikelihood of locating missing footwear in the Applicant's jacket, owing to the sheer physical impracticality of secreting an item of footwear in a location relatively smaller than the footwear, nonetheless, that did not eliminate the potential for finding a missing hat in the Applicant's jacket.

[41] In *M. R. M.* (supra) at paragraphs 48 and 49 the court noted:

> A search by school officials of a student under their authority may be undertaken if there are reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched. Searches undertaken in situations where the health and safety of students is involved may well require different considerations. <u>All the circumstances surrounding a search must be taken into account in determining if the search is reasonable</u>.
>
> School authorities must be accorded a reasonable degree of discretion and flexibility to enable them to ensure the safety of their students and to enforce school regulations. 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. (emphasis added)

[42] Based upon all of the evidence before me, including that of Ms. M. , I am satisfied that based upon all of the circumstances present on the January 17th, 2008

and made known to the Principal and/or possessed by her, the decision to search the belongings of the Applicant was a reasonable one, properly reached. I am further satisfied the search was conducted in a reasonable manner with due consideration for the privacy of the Applicant.

The Applicability of Section 24

[43] I am not persuaded that the section 8 rights of the Applicant were violated for the reasons set out above. Accordingly, it is not necessary to consider any remedy that might apply in the absence of any such breach. However, if this court is not correct in its assessment of the reasonableness of the search and the absence of any violation of the Applicant's section 8 rights, then I would nonetheless have refused to exclude the evidence under section 24(2). This court would have applied the three prong test set out in *R. v. Collins* [1987] 1 S.C.R. 265: What is the effect of the admission of the evidence on the fairness of the trial, how serious is the breach and what effect would the exclusion of the evidence have on the administration of justice?

[44] In this case, clearly any exclusion of the evidence would have had a significant effect on the fairness of the trial as it would, practically speaking, mean that the Crown would have had no evidence of possession of drugs, upon which to permit the court to adjudicate in relation to the *Controlled Drugs and Substances Act* charge. In addition, this would have directly affected the section 145 charge, as the Provincial Crown acknowledges the strength of that charge rises and falls on the strength of the Federal Crown's case on the drug charge.

[45] Absent the search, there would be no evidence about the defendant having possessed a pipe and four small bags of marijuana. This is non-conscriptive evidence. The items seized as evidence were "real evidence and existed independently": *R. v. MacEachern* 2007 N.S.C.A. 69. The evidence seized is clearly key to prosecution of the alleged offences.

[46] Obviously, there is a sharp distinction between the fact pattern in the instant case and that in *R. v. A. M.* (supra). In that case, the accused was subject to a random search of school bags by a sniffer dog, which is to be sharply contrasted from the situation in which the Applicant found himself on January 17th, 2008. R.M.D. was not the subject of a random and speculative act on the part of school authorities, but rather, the specific subject of a careful and thoughtful analysis

conducted by school authorities prior to searching his belongings. The search itself was minimally intrusive. I am not persuaded that the admission of the evidence would have had the effect of denying the Applicant or any other student in that situation their right to be protected from unreasonable search and seizure as there was nothing random or speculative about the search conducted.

[47] Society has an interest in the prosecution of drug offences, and this is amplified in the instant case by the interest that society has in the prosecution of those offences which speak to the need to maintain law and order in public educational settings. To exclude the evidence would, in my view, more likely tend to bring the administration of justice into disrepute, than would the admission of the evidence under all the circumstances.

[48] Accordingly, in the absence of my determination that the search was lawful and not in violation of the Applicant's section 8 rights, the Applicant would not in any event, in my view, have been entitled to a remedy pursuant to section 24(2) of the **Charter** based upon the case before me.

YJCJ