SECTION 8 OF THE *CHARTER*

SEARCH AND SEIZURE ROLE PLAYS

Scenario 1

Scott is sitting in his apartment eating dinner. He hears a knock and opens the front door. Two police officers stand at the door.

OFFICER 1: Good evening, sir. We're currently investigating the robbery, which occurred at a 7-11 on 162 King St. on the evening of October 12. We have reason to believe you may have been involved in this incident. We'd like to take a look around your apartment.

SCOTT: Sure. Go right ahead, I have nothing to hide.

OFFICER 1 enters the apartment and begins opening closets and drawers, looking through Scott's things.

OFFICER 1: Bob, look at this.

OFFICER 1 pulls a gun out of a drawer, opens the bullet cartridge, and then holds it up.

OFFICER 1: It's a Glock 19. Same bullets as the bullet found in the wall of the 7-11. And one's missing.

Scenario 2

Scott is sitting in his apartment eating dinner. He hears a knock and opens the front door. Two police officers stand at the door.

OFFICER 1: Good evening, sir. We're currently investigating the robbery, which occurred at a 7-11 on 162 King St. on the evening of October 12. We have reason to believe you may have been involved in this incident. We'd like to take a look around your apartment.

SCOTT: What robbery? I don't know anything about that.

OFFICER 2 hands Scott the warrant.

OFFICER 2: Sir, we have a warrant. If you'd please step aside and wait in the hallway, we'll try to get this search done as quickly as possible.

OFFICER 1: Bob, look at this.

OFFICER 1 pulls a gun out of a drawer, opens the bullet cartridge, and then holds it up.

OFFICER 1: It's a Glock 19. Same bullets as the bullet found in the wall of the 7-11. And one's missing.

Scenario 3

Scott is sitting in his apartment eating dinner. He hears a knock and opens the front door. Two police officers stand at the door.

OFFICER 1: Good evening, sir. We're currently investigating the robbery, which occurred at a 7-11 on 162 King St. on the evening of October 12. We have reason to believe you may have been involved in this incident. We'd like to take a look around your apartment.

SCOTT: What? What are you talking about? You can't come in here.

OFFICER 2: Sir, it will be easier for all of us if you just cooperate.

SCOTT: What? No! Do you have a warrant?

OFFICER 2: Sir, let's not make this more difficult than it needs to be.

While OFFICER 2 is talking to SCOTT, OFFICER 1 enters the apartment and begins opening closets and drawers, looking through Scott's things.

SCOTT: Get out! What are you doing?

OFFICER 1: Bob, look at this.

OFFICER 1 pulls a gun out of a drawer, opens the bullet cartridge, and then holds it up.

OFFICER 1: It's a Glock 19. Same bullets as the bullet found in the wall of the 7-11. And one's missing.

OFFICER 2: Good work, Mel. Let's take it down to the station.

SECTION 8 OF THE *CHARTER*

THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCH OR SEIZURE

In Canada, a person's privacy interests are protected by Section 8 of the *Canadian Charter of Rights and Freedoms*. Section 8 of the *Charter* guarantees that:

> Everyone has the right to be secure against unreasonable search and seizure.

Section 8 acts as a limitation on the search and seizure powers of the government, including police and other government investigators. As the Supreme Court of Canada (SCC) noted in *R v Genest*, this limitation is aimed at balancing the privacy interests of individuals with the interests of the state in investigating and prosecuting crime:

> The privacy of a man's home and the security and integrity of his person and property have long been recognized as basic human rights … But as much as these rights are valued, they cannot be absolute. All legal systems must and do allow official power in various circumstances and on satisfaction of certain conditions to encroach upon rights of privacy and security in the interests of law enforcement, either to investigate an alleged offence or to apprehend a lawbreaker or to search for and seize evidence of crime.

The purpose of s. 8 is the protection of a person's privacy interests, not the protection of property. There are three zones in which an individual has a privacy interest:

- Personal (i.e. the body)
- Informational
- Territorial (i.e. places or things)

WHAT CONSTITUTES A SEARCH?

Police actions will only constitute a "search" where they intrude on an individual's **reasonable expectation of privacy**. A person's expectation of privacy varies depending on the environment, and there are some situations where the expectation of privacy is stronger. It is accepted that people have high expectations of privacy in relation to searches of the body or person. While all searches of the body breach bodily integrity, the more invasive the search (e.g. DNA samples, strip searches, etc.), the higher the expectation of privacy.

With respect to information, the greatest protection is given to information about biological attributes or that which reveals intimate details of a person's lifestyle and personal choices.

Finally, among places (i.e. territorial privacy), the more a place shares the quality of being a home, the higher the expectation of privacy. Thus, the

greatest expectation of privacy is generally in a person's home, followed by the perimeter around the home. The lowest expectation of privacy is generally for public places like parks or public buildings, or places where people otherwise have a diminished expectation of privacy, such as prisons. However, the character of the particular place being searched can affect the level of privacy expected. For example, although there is generally a lower expectation of privacy in schools, courts have held that students have a reasonable expectation of privacy in their lockers and backpacks because these are more private areas within the public area of the school.

Since an individual's reasonable expectation of privacy depends on the situation, not every search or seizure by state agents will engage the protection of s. 8 of the *Charter*. A person will only receive the protection of s. 8 where it is established that they had a reasonable expectation of privacy and that the police breached that privacy. Whether or not a person has a reasonable expectation of privacy is determined by looking at all of the circumstances of each case, including whether that person:

- Was present at the time of the search;
- Had possession or control of the property or place that was searched;
- Owned the property or place searched;
- Had historically used the property or item;
- Had the ability to control or regulate access to that property or place, including the right to admit or exclude others from it;
- Had a subjective expectation of privacy; and
- Had an expectation of privacy that was objectively reasonable.

In each case, the court will weigh all of these factors in determining whether a person had a reasonable expectation of privacy "in the totality of the circumstances". For example, in the case of *R v Edwards* (1996), in which these factors were first established, the SCC found that the accused did not have a reasonable expectation of privacy in his girlfriend's home because he did not contribute to rent, he was never there for more than a few days, and although he had a key, there was no evidence that he ever exercised control over the home by trying to exclude other people.

WHEN IS A SEARCH REASONABLE?

Once it has been determined that a person had a reasonable expectation of privacy, the search will only be permitted under s. 8 of the *Charter* if it was reasonable.

The basic requirement for a search to be reasonable is a warrant. The SCC established in *Hunter v Southam* (1984) that a search by police without a warrant will be presumed to be unreasonable unless the Crown can prove otherwise. In order to prove that a warrantless search is reasonable, the Crown must show either that there was consent or that police had legal authorization other than a warrant. The factors to prove legal authorization were set out in *R v Collins* (1987), as follows:

1. The search is authorized by law (either statute or case law);
2. The law that authorizes the search is itself reasonable; and
3. The search is carried out in a reasonable manner.

Even if police have obtained a warrant or legal authorization, a search can still be found to be a violation of s. 8 if it is established, on the basis of the above factors, that the search is carried out unreasonably. The police must have the warrant with them when they carry out the search, and they must knock and announce their presence before forcing entry. They generally cannot search people found inside the place being searched, but they can detain them until the search is completed. They can only use reasonable force in executing the warrant, unless they have prior knowledge of any safety concerns. If police fail to follow these rules when carrying out a search, the search will be unreasonable and in violation of s. 8.

If the Crown cannot prove either consent or all three of the above factors, the search will be unreasonable and contrary to s. 8 of the *Charter*. The court must then determine what should happen to any evidence the police gathered during the search.

TYPES OF SEARCHES

Searches occur in a number of different circumstances, including upon arrest or detention. The most common types of searches are as follows:

Consent Searches

The most common way that searches are conducted in Canada is by consent. This means that a person agrees to let the police search a particular place. In order to give consent, a person can either explicitly say that they consent to the search, or police can imply consent from what the person says or does. For example, if police ask to enter a person's house and the person says yes or opens the door to let the officer in, that can be inferred as consent to search the house. However, people always have the right to refuse to consent to a search, in which case, police cannot search until they obtain a warrant.

Courts have put some restrictions on what will qualify as consent in order to protect people's rights and ensure that consent is validly given. These restrictions were set out in the case of *R v Wills* as follows:

1. There must be consent, either express or implied (through words or actions).
2. The person giving consent must have the authority to give it. This means that the person must be exercising control over the property the police are attempting to search, but they do not have to own the property.
3. The consent must be voluntary. It cannot be the result of police oppression, coercion, or threats.
4. The person giving consent must be aware of the nature of the police conduct that they are consenting to.
5. The person giving consent must be aware of their right to refuse to give

consent. However, police are not required to advise people that they have a right to refuse to consent (unlike in the United States).

6. The person giving consent must be aware of the potential consequences.

A consent search will only be valid if a court is satisfied on a balance of probabilities that all of these requirements were met. If the consent search was valid, any evidence the police obtained in the search will be admissible in court.

If the police conduct a search, the person will have to prove that these above criteria were not met. A challenge to the admissibility of the evidence obtained from the search would happen in court. If the search does not result in charges, it is very difficult to challenge the constitutionality of the search or the appropriateness of the conduct.

Searches with a Warrant

If there is no consent to a search, the police must obtain a warrant in order to conduct the search. A warrant is a document that police obtain from a justice of the peace or judge that gives them legal authority to search a particular place for a particular item or items. The general requirements for obtaining a warrant are set out in s. 487 of the *Criminal Code of Canada*. Other sections of the *Criminal Code* address special types of warrants, such as warrants for wiretaps (s. 186) and DNA (s. 487.05).

In order to obtain a warrant, a police officer must appear before a justice of the peace (or judge) and swear *an information* – that is, provide evidence to show why police need to conduct the search. This can also be done over the phone in special circumstances (s. 487.1). The evidence must specify where police intend to search, what they intend to search for, and why the search is necessary for their investigation.

In order to issue a warrant, the justice of the peace must be satisfied that there are reasonable and probable grounds to believe that the items sought exist and will be found in the place police want to search. The justice of the peace must also be satisfied that there are grounds for believing a criminal offence has been committed, and that evidence of that offence will be found in the place to be searched. If the justice of the peace is satisfied by the police officer's evidence, the warrant will be issued.

The police must have the warrant with them when they conduct the search and they must knock and announce their presence before trying to force entry. The person who is being searched must be shown the warrant.

"Hot Pursuit"

In an emergency situation, police do not need to get a warrant before conducting a search. Emergency situations typically arise when there is a danger that evidence will be destroyed before police can obtain a warrant. This is often referred to as "hot pursuit". When the police are in hot pursuit of a suspect or of particular evidence that may be destroyed, the officer does not need to get a warrant.

DISCUSSION QUESTIONS

1. When does police action constitute a search?

2. In what circumstance will a person receive the protection of s. 8 of the *Charter*?

3. In determining whether a person has a reasonable expectation of privacy in a given situation, what considerations would a court take into account?

4. Give an example of a location where an individual would have a high expectation of privacy and one where they would have a low expectation of privacy.

5. What is the basic requirement for a search to be reasonable?

6. In order to prove that a warrantless search was reasonable, what does the Crown need to show?

EXPECTATION OF PRIVACY

Rank the expectation of privacy cards in order of 'reasonable expectation of privacy', where 1 is where you have the greatest expectation of privacy and 10 is where you have the least.

SIDEWALK	PUBLIC PARK
AIRPORT	YOUR BEDROOM
YOUR DRIVEWAY	SCHOOL LOCKER
YOUR CAR (WHEN YOU'RE IN IT)	YOUR CAR (PARKED IN THE PARKING LOT)
YOUR POCKET	YOUR FRIEND'S HOUSE

IS THIS A SEARCH?

Review the scenario and complete the chart.

Scenario 1 - A police officer approached a woman sitting in a pub. He identified himself as a police officer while at the same time applying a "throat hold" – a tight grip around the throat, which prevents a person from swallowing in case they have drugs hidden in their mouth. They found a small balloon full of heroin in her hand.

	Scenario 1
Was there a search by police?	
If yes, what type of search?	
Did the person have a reasonable expectation of privacy?	
Was the search reasonable?	
Considering all of the above questions, were the s. 8 *Charter* rights of the accused violated?	

IS THIS A SEARCH?

Review the scenario and complete the chart.

Scenario 2 - The principal of a high school gave an open invitation to police to bring drug-sniffing dogs into the school to search for drugs. One day, police arrived at the school with sniffer dogs to conduct a random search, even though they weren't aware of any drugs in the school. Students were told that police were in the school and to stay in their classrooms. During the search, one of the dogs reacted to a backpack lying next to a wall in the gym, which police were told belonged to student A. The bag was subsequently seized by one of the police officers who searched the contents without having a warrant. The officer found drugs in the bag and student A was arrested.

	Scenario 2
Was there a search by police?	
If yes, what type of search?	
Did the person have a reasonable expectation of privacy?	
Was the search reasonable?	
Considering all of the above questions, were the s. 8 *Charter* rights of the accused violated?	

IS THIS A SEARCH?

Review the scenario and complete the chart.

Scenario 3 - The vice principal of a junior high school was told by some students that student M was planning to sell drugs at a dance being held on school property. The school's policy was that students found in possession of drugs or alcohol on school property would be suspended and police would be called if officials believed a criminal matter was involved. On the night of the dance, the vice principal saw M arrive and called the police. He asked M and M's friend to come to his office, where a police officer was waiting. The vice principal questioned the two boys and told them he was going to search them. The police officer didn't say or do anything. M emptied his pockets and pulled up his pant legs at the vice principal's request, revealing a bag of marijuana tucked into his sock. The vice principal gave the drugs to the police officer, who arrested M.

	Scenario 3
Was there a search by police?	
If yes, what type of search?	
Did the person have a reasonable expectation of privacy?	
Was the search reasonable?	
Considering all of the above questions, were the s. 8 *Charter* rights of the accused violated?	

CASE STUDY: WARRANTLESS SEARCH
R v Patrick, 2009 SCC 17

http://scc.lexum.org/en/2009/2009scc17/2009scc17.html

In this case, the Supreme Court of Canada (SCC) addressed whether a warrantless search of garbage cans located on a residential property constituted a violation of s. 8 of the *Charter*.

Date released: April 9, 2009

Facts

Police suspected that Mr. Patrick was operating an ecstasy lab in his home, and on several occasions, seized bags of garbage that had been placed at the rear of his property left for city garbage pick up. The police did not have to set foot on Mr. Patrick's property to pick up the bags, but did have to reach through the airspace over his property line. The police used items in the bags, some of which were found to be contaminated with ecstasy, to acquire a search warrant of Mr. Patrick's property and to charge him.

Mr. Patrick claimed that the police violated his right under s. 8 of the *Canadian Charter of Rights and Freedoms* by searching his garbage.

> ***Canadian Charter of Rights and Freedoms***
>
> 8. Everyone has the right to be secure against unreasonable search and seizure.

The trial judge held that Mr. Patrick did not have a reasonable expectation of privacy for the items taken from his garbage, and that the seizure of the garbage bags, the search warrant and the search of Mr. Patrick's dwelling were therefore lawful. The trial judge admitted the evidence and convicted Mr. Patrick of unlawfully producing, possessing and trafficking in a controlled substance.

A majority of the Alberta Court of Appeal upheld the convictions.

Decision

The SCC unanimously agreed that the police did not breach Mr. Patrick's *Charter* rights by removing his garbage and using it to obtain a search warrant. Therefore, the evidence found was admissible and the conviction upheld. Two judges wrote separate concurring reasons for the decision.

Justice Binnie (McLachlin C.J., LeBel, Fish, Charron and Rothstein JJ. concurring) wrote that the Court had to evaluate whether Mr. Patrick had a reasonable expectation of privacy in the contents of his garbage. He found that Mr. Patrick had abandoned his privacy interest when he left his garbage bags out for collection at the edge of his property. It might have been different if he had simply placed them on his porch or by his house, but because the bags were left just inside his property line, they were unprotected and within easy reach of anyone walking by.

Justice Abella wrote a separate concurring judgment. She said that when Mr. Patrick left his garbage bags, he had only "abandoned" them for one specific purpose: to be picked up by the municipal waste disposal system. Mr. Patrick did not abandon any privacy interest in the personal information contained in his garbage bags. Waste left out for disposal does hold some expectation of privacy, even if it is a diminished one. Police should at least have reasonable suspicion that a criminal offence has been, or is likely to be, committed before conducting a search of garbage bags. In this case, the police did have reasonable suspicion that Mr. Patrick was operating an ecstasy lab, so the search was not in violation of Mr. Patrick's s. 8 *Charter* right.

DISCUSSION QUESTIONS

1. Do you think Mr. Patrick had a reasonable expectation of privacy that his garbage bags would not be searched by the police?

2. Did the location of the garbage bags matter? Would it have been different if the bags were placed on Mr. Patrick's porch or inside an open garage?

3. Do you agree with Justice Binnie or Justice Abella's reasoning? What privacy interest should garbage bags hold? In what way, if any, does the privacy interest change if the police suspect that a criminal offence has been committed?

4. If police may search garbage bags placed at the end of a property, what else might they be allowed to search?

CASE STUDY: SNIFFER DOG SEARCHES
R v AM, 2008 SCC 19 & *R v Kang Brown*, 2008 SCC 18

http://scc.lexum.org/en/2008/2008scc19/2008scc19.html
http://scc.lexum.org/en/2008/2008scc18/2008scc18.html

Section 8 of the *Charter* guarantees everyone freedom from unreasonable search or seizure. A police officer, acting without a warrant, must have reasonable and probable grounds for the search. Evidence obtained by an unreasonable search in violation of s. 8 may be excluded under s. 24(2) of the *Charter*. The Supreme Court excluded evidence of drugs found in a high school student's backpack by a police sniffer dog. In a companion case the Supreme Court excluded drugs found in passenger's bag at a bus depot.

Date released: April 25, 2008

Facts of *R v AM*

St. Patrick's High School in Sarnia had a zero tolerance policy for possession and consumption of drugs and alcohol. The principal of the school advised the Youth Bureau of Sarnia Police Services that if the police ever had sniffer dogs available to bring into the school to search for drugs, they were welcome to do so. On November 7, 2002, three police officers accepted his invitation and took their police dog, Chief, to the school. Chief was trained to detect drugs. Neither the principal nor the police had any suspicion that any particular student had drugs, though the principal said that it was pretty safe to assume that drugs were in the school. The principal used the school's public address system to tell students that the police were on the premises and that they had to stay in their classes until the search had been conducted. The police then walked Chief around the school.

Chief reacted to one of several backpacks that had been left unattended in the gymnasium by biting at it. Without obtaining a warrant, the police opened the backpack. Inside they found 10 bags of marijuana, a bag containing approximately ten magic mushrooms (psilocybin), a bag containing a pipe, a lighter, rolling papers and a roach clip. The back pack also had the student's wallet that enabled the police to identify A.M. as the owner. He was charged with possession of narcotics for the purposed of trafficking.

At trial, A.M. brought an application for exclusion of the evidence, arguing that his rights under s. 8 of the *Charter* had been violated. The trial judge allowed the application, finding two unreasonable searches: the search conducted with the sniffer dog and the search of the backpack. He excluded the evidence and acquitted the accused. The Court of Appeal and the Supreme Court of Canada upheld the acquittal.

The Supreme Court's analysis of this case is mainly set out in a companion case, *R v Kang-Brown*, released the same day.

Facts of *R v Kang Brown*

The facts in *Kang- Brown* are similar. The RCMP found drugs after they had a sniffer dog sniff the bag of a passenger in the Calgary Greyhound bus terminal. The police first made eye contact and had a short conversation with Kang-Brown before having the sniffer dog search his bag.

Decisions

The Court, split 6-3, found that the police use of a sniffer dog in both cases violated s. 8 and should be excluded. The Court was deeply divided and there were four sets of reasons in each decision making the application of these judgments in future *Charter* cases, difficult.

Four judges – LeBel J., (Fish, Abella and Charron JJ concurring)- held that there is no common law power to use sniffer dogs in bus depots and in schools unless the police meet the existing and well-established standard of having reasonable and probable grounds or have obtained a search warrant. The courts should not create a new more intrusive power of search and seizure. That should be left to Parliament to set up and justify under a proper statutory framework.

Four judges – McLachlin C.J., Binnie, Deschamps and Rothstein JJ. - held that the police have a common law power to conduct a warrantless search using sniffer dogs on the basis of individualized reasonable suspicion. This standard complies with section 8 although it is less than "reasonable and probable grounds". However these four judges split on the application of that principle to the facts.

Binnie J. (McLachlin C.J. concurring) found the police in each of the two cases did not have individualized reasonable suspicion and the evidence should be excluded under s. 24(2).

Deschamps J. (Rothstein JJ. Concurring) found the individualized suspicion standard was met in *Kang-Brown*, and that there was no unconstitutional search in A.M. because there the privacy interest in the unattended backpack was slight and the search not intrusive. There no violation of s. 8 in either case.

Bastarache J. agreed (with McLachlin C.J., Binnie, Deschamps and Rothstein JJ.) that individualized suspicion is enough to support the use of a sniffer dog, but went further. He expressed the view that a generalized reasonable suspicion standard will sometimes be sufficient. In Kang-Brown it would have been equally permissible for the police to use sniffer dogs to search the luggage of all of the passengers at the bus depot that day, if they had had a reasonable suspicion that drug activity might be occurring at the terminal. A random sniffer-dog search in a school is reasonable where it is based on a generalized reasonable suspicion of drug activity at the school, providing a reasonably informed student is aware of the possibility of random searches involving the use of dogs. Schools are unique environments and a lower standard is appropriate given the importance of preventing and deterring the presence of drugs in schools to protect children; the highly regulated nature of the school environment; the reduced expectation of privacy students have while at school; and the minimal intrusion caused by a sniffer dog.

It seems that five judges approved of a reasonable suspicion standard for the use of dog sniffers on buses and in schools but there is no clear agreement as to what that standard means.

DISCUSSION ISSUES

1. McLachlin C.J., Binnie, LeBel, Fish, Abella and Charron agreed that students should expect a reasonable degree of privacy in their personal belongings. Bastarache J. thought that this expectation should be diminished in a school environment while Deschamps and Rothstein JJ. thought that students should not have any such expectation while at school. What degree of expectation of privacy do you think students are entitled to have at school in their lockers, their backpacks and their pockets?

2. Does the presence of drugs in school change your answer to the first question? Does it make a difference if there is a reasonable suspicion of presence of drugs or there are reasonable grounds for believing that they are present? How would you define the difference between these two standards?

3. How would suspected weapons at school affect your assessment of the privacy entitlements of students and the standard of knowledge required to justify a search?

4. In the 2004 case of *R v Tessling*, the RCMP used an airplane equipped with a Forward Looking Infra-Red ("FLIR") camera to record images of thermal energy or heat radiating from buildings. Based on the results of the FLIR image coupled with information supplied by two informants, the RCMP were able to obtain a search warrant for Tessling's home. (Buildings used as marijuana grow operations are "hot" because of the grow lamps used.) Inside Tessling's residence, the RCMP found a large quantity of marijuana and several guns. The SCC held that the RCMP's use of FLIR technology did not violate Tessling's constitutional right to be free from unreasonable search and seizure. FLIR technology measures crude heat emission from houses and cannot determine the nature of the source of heat within the building or "see" through the external walls.

   What explains the different result from the use of FLIR and sniffer dogs? Do you agree that a police dog's sniff is more intrusive to an individual's privacy? What if FLIR technology becomes more sophisticated and is able to reveal core biographical details, lifestyles or private choices?