S.C.C. File No. 34524

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

B E T W E E N:

MANDEEP SINGH CHEHIL

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

ATTORNEY GENERAL OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, AND SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Interveners

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

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S.C.C. File No. 34397

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

B E T W E E N:

BENJAMIN CAIN MacKENZIE

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

ATTORNEY GENERAL OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, AND SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

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PART I – OVERVIEW

1. Four years ago in *Kang-Brown* and *A.M.*, a "polarized" Supreme Court extended the common law powers of the police by recognizing their ability to use sniffer dogs in warrantless searches of ordinary Canadians where they have "reasonable suspicion" that the person searched is engaged in a drug crime.[1] A 5-4 majority of this Court granted the police this new power on the basis that the after-the-fact judicial scrutiny of the grounds of reasonable suspicion would require "objectively discernible facts" and would be conducted with "serious diligence and rigour."[2] These appeals test the fidelity to these protections.

2. The CCLA submits that warrantless searches of ordinary Canadians through sniffer dogs are an exception to the baseline constitutional principle that Canadians are entitled to be left alone and any police search is *prima facie* unreasonable without prior judicial authorization. It is therefore imperative for the "reasonable suspicion" standard not to be diluted. The possibility of innocent travellers being inconvenienced, erroneously detained, or falsely arrested through deployment of sniffer dogs and their inevitable false positives must not be forgotten.

3. The CCLA submits that the decisions under appeal dilute the reasonable suspicion standard and expose Canadians to arbitrary and discriminatory policing, for three reasons. First, the decisions under appeal fail to apply a sufficiently rigorous *ex post* judicial assessment by (1) deferring unduly to the training and experience of police officers in the use of sniffer dogs, and (2) relying on malleable and unverifiable profiles for drug traffickers to ground reasonable suspicion rather than for the more limited purpose of conducting further investigation. Second, the reliability of particular sniffer dogs must be measured based on actual deployments in the field rather than controlled tests. Drug dogs may perform very well in training, but what counts is their performance in the field and the degree to which they indicate "false positives" on law-abiding Canadians whose rights would otherwise be infringed. Third, a positive alert by a sniffer dog only justifies the less intrusive option of a verification search, not an arrest. Ordinary Canadians should not face arrest simply because a drug dog falsely indicates on their property.

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[1] *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, ¶19, Binnie J. (issues "polarized the Court") [Tab 10]; *R. v. A.M.*, [2008] 1 S.C.R. 569 [Tab 2].

[2] *Kang-Brown, id.*, ¶¶76, 97, Binnie J. [Tab 10].

PART II – ARGUMENT

A. After-the-Fact Judicial Review Of Sniffer Dog Searches Must Be "Rigorous"

4. A sniffer-dog search is authorized based on "reasonable suspicion," a lower standard than reasonable grounds to believe.[3] Reasonable suspicion "means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds."[4]

(a) Reasonable suspicion is a robust standard to be applied with "serious diligence and rigour"

5. *Not a "low threshold".* Contrary to the Crown's assertion, reasonable suspicion is not a "low threshold."[5] It is a robust standard to be judged with "serious diligence and rigour."[6] This is because reasonable suspicion is an ***exception*** to s. 8's usual requirement of prior judicial authorization for a search warrant based on reasonable and probable grounds.[7] As Binnie J. wrote in *Kang-Brown*, a rigorous judicial review is essential because "the citizen's only protection against unlawful searches by police dogs is after-the-fact scrutiny of the stated grounds of 'reasonable suspicion.'"[8] Anything less would allow the exception to eclipse the rule.

6. *Need for objective facts.* Establishing reasonable suspicion requires proof of objective facts. It is not a smell test. There must be "a ***constellation of objectively discernable facts***" – or objectively verifiable indicators – giving the officer reasonable cause to suspect the ***particular*** individual is implicated in a ***particular*** criminal offence.[9] The officer must reasonably suspect

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3 *Id.*, ¶25, Binnie J. (McLachlin C.J. concurring); ¶107, Deschamps J. (Rothstein J. concurring); and ¶¶213-214, Bastarache J. [Tab 10].

4 *Id.*, ¶75, Binnie J. [Tab 10].

5 Respondent's Factum (*MacKenzie*), ¶60.

6 *Kang-Brown*, above, note 1, ¶97, Binnie J. [Tab 10]; David M. Tanovich, "Rethinking the *Bona Fides* of Entrapment" (2011) 43 U.B.C. L. Rev. 417, 428 ("robust approach") [Tab 23].

7 *Kang-Brown*, *id.*, ¶¶48, 97, 104, Binnie J. [Tab 10]; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J. (as he then was) [Tab 1].

8 *Kang-Brown*, *id.*, ¶97, Binnie J.; see also ¶26 ("the after-the-fact judicial scrutiny of the grounds for the alleged 'reasonable suspicion' must be rigorous"); ¶78 ("[t]he after-the-fact review can only truly be an 'independent assessment' if there are objective grounds put forward to support the personal opinion of the police officer"); and ¶104 ("[i]n the sniffer-dog cases, the police are given considerable latitude to act ***in the absence of any requirement of prior judicial authorization.*** The only effective check on that authority is the after-the-fact independent assessment" (Binnie J.'s emphasis)) [Tab 10]; and Tanovich, above, note 6, p. 428 (reasonable suspicion standard "serve[s] to protect individuals from overreaching policing") [Tab 23].

9 *Kang-Brown*, *id.* ¶25, Binnie J. ("reasonable grounds to suspect the presence of contraband"); ¶60 ("[t]he police failed because they exercised their common law power based on speculation rather than objectively verifiable

the accused possesses drugs.[10] This focussed, particularized standard ensures that this common law police power is exercised only where the intrusion into privacy is "***reasonably necessary*** on an objective view of the totality of the circumstances."[11] Any lesser standard would "open the floodgates to sniffer dogs everywhere,"[12] as also feared by the four dissenters in *Kang-Brown.*[13]

7. Thus, the factors relied on by the police to base their reasonable suspicion must be "generally associated with narcotic traffickers," because otherwise the Court will be "sweeping up 'a very large category of presumably innocent travelers, who would be subject to virtually random seizures."[14] To illustrate, without evidence, the police cannot support a reasonable suspicion to use sniffer dogs in bus terminals with the bald assertion that "bus depots in general or Calgary in particular are rampant with drug dealers."[15] Otherwise there could be random searches on large swaths of the Canadian public based on "generalized" rather than "particularized" suspicion.[16] "Drug trafficking is a serious matter, but so are the constitutional rights of the travelling public."[17]

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evidence supporting reasonable suspicion"); ¶73 ("***here the police had no evidence that any crime had been committed at all***" (Binnie J.'s emphasis)); ¶75 ("'Suspicion' is an expectation that the targeted individual is possible engaged in some criminal activity"); ¶76 ("a constellation of objectively discernible facts" suggesting that the accused "is criminally implicated in the activity under investigation" (emphasis removed)); ¶78 ("[t]he after-the-fact review can only truly be an 'independent assessment' if there are objective grounds put forward to support the personal opinion of the police officer"); ¶¶87, 96 (need for "marker[s]" of reasonable suspicion); and ¶88 ("no evidence that cash payments are unusual" when buying bus tickets) [Tab 10]. See also Alec Fiszauf, *The Law of Investigative Detention* (Markham, Ont.: LexisNexis, 2008), 63 (reasonable suspicion must be "supported by factual elements beyond subjective belief which permit an independent judicial assessment") [Tab 24]; and Tanovich, above, note 6, p. 427 [Tab 23].

[10] See above, footnote 9; see also Jared Biden, "A 'Whiff' of Criminality: Reasonable Suspicion in the Context of Dog-Sniff Searches" (2012) 75 Sask. L. Rev. 189, 192-93 [Tab 17].

[11] *R. v. Aucoin*, 2012 SCC 66, ¶83, LeBel J. (dissenting) (emphasis added). See also ¶¶30, 36, Moldaver J. [Tab 3].

[12] *Kang-Brown*, above, note 1, ¶21, Binnie J. [Tab 10]; *cf.* the lower more malleable standard applied by the Nova Scotia Court of Appeal, which merely found the factors relied upon by the police to be "consistent with the flow of illegal drugs": *R. v. Chehil*, 2011 NSCA 82, ¶36, MacDonald C.J.N.S.

[13] See, *e.g.*, *Kang-Brown*, *id.*, ¶16, LeBel J., Fish, Abella and Charron JJ. concurring (expressing concern about a downgrading of the legal standard on the basis of the record before the Court "might lead to an even looser test of 'generalized suspicion' [...] The result would verge on honouring reasonable and probable cause in principle, while gutting it in practice through an even wider use of a standard of reasonable suspicion") [Tab 10].

[14] *Id.*, ¶79, Binnie J. [Tab 10].

[15] *Id.*, ¶73, Binnie J. [Tab 10].

[16] *Id.*, ¶¶19, 21, 83, Binnie J. [Tab 10].

[17] *Id.*, ¶104, Binnie J. [Tab 10].

8. To take only two of the more outlandish factors considered by the police in these appeals, a person's ***absence*** of criminal record cannot provide any basis for reasonably suspecting that the accused has engaged in a drug crime.[18] Nor does that fact that an accused is travelling by car from one major Canadian city (Calgary) to another (Regina),[19] or by plane from one province (B.C.) to another (Nova Scotia).[20] If the police believe otherwise, they should be prepared to justify their belief to a court of law with the appropriate evidence, such as objectively verifiable evidence that a particular travel route is a common drug corridor.

9. The robustness of the "reasonable suspicion" standard is obviously intended to "avoid indiscriminate and discriminatory exercises of police power" before they happen.[21] But here lies the rub. The decisions under appeal highlight a disconnect between the robustness of the "reasonable suspicion" standard and how some courts apply it in practice, thereby eroding the rigour of the *ex post facto* assessment. In *MacKenzie*, the Saskatchewan Court of Appeal deferred unduly to the knowledge, training, and experience of the police officer who deployed the sniffer dog.[22] In *Chehil*, the Nova Scotia Court of Appeal effectively endorsed the officers' use of a "drug courier profile" to target the accused's bags for a sniffer-dog search.[23] As will be shown, both approaches fail to respect constitutional requirements.

(b) Avoid undue deference to the police

10. To maintain a robust after-the-fact judicial review, the reviewing court must not defer unduly to the judgment of the police officers who conducted the sniffer-dog search. This is not to say that courts should ignore the officers' valuable training and experience. Quite the contrary. Courts should measure an officer's stated grounds of reasonable suspicion against the standard of a reasonable person with the officer's level of knowledge, training, and experience.[24] But courts

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18 *R. v. MacKenzie*, 2011 SKCA 64, ¶9, Caldwell J.A. ("Constable Warner brought me back the – the driver's licence, registration, and he told me that he – the queries that he had done were all negative. ***At that point I suspected that Mr. MacKenzie was involved in an offence under the*** **Controlled Drugs and Substances Act** [...]" (emphasis added)).

19 *Id.*, ¶10.

20 *R. v. Chehil*, 2010 NSSC 255, 268 C.C.C. (3d) 249 (N.S.S.C.), ¶170, Cacchione J.

21 *R. v. Simpson* (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 (C.A.), p. 501, Doherty J.A. [Tab 13].

22 *MacKenzie*, above, note 18, ¶¶30-33, Caldwell J.A.

23 *Chehil*, above, note 12, ¶37, MacDonald C.J.N.S.

24 *E.g., R. v. Juan*, 2007 BCCA 351, 222 C.C.C. (3d) 289, ¶¶19, 27, Thackray J.A. [Tab 9].

must not defer unduly to the officer's opinions. As the B.C. Court of Appeal stated in *Payette*: "While I appreciate the objective reasonableness requirement must be viewed in the light of the investigating officer's background and experience, ***deference to an officer's intuition must not render the objective element of the inquiry meaningless***."[25]

11. Excessive reliance on police training and experience poses two dangers. First, the officer's subjective intuition risks degrading the objective elements of the test and rendering the standard largely unreviewable. "Training and experience" can thus become a Trojan horse for unverifiable hunches and gut instincts. Second, police officers routinely rely on many intangible, unverifiable factors other than their training and experience, making it very difficult if not impossible to separate objective from subjective factors. As Steven Penney notes, "much empirical scholarship suggests [that], in exercising broad, discretionary powers, police rely as much on occupational culture and other informal norms as on formal legal rules."[26]

12. In particular, this Court should reject the Saskatchewan Court of Appeal's approach in *MacKenzie*. There, Caldwell J.A. held that the trial judge erred in finding that the officer lacked reasonable suspicion because the trial judge did not identify a specific flaw with the officer's opinion. In other words, the officer's informed opinion must be accepted, unless the reviewing court can pin-point a definite error.[27] The Crown takes this approach even further by defining the issue as one of deference, asserting that "[a]n officer's belief in the existence of a reasonable suspicion ought not to be second guessed, unless it is unreasonable or not rationally capable of supporting an inference of suspicion."[28]

13. This sweeping "the police know best" approach ignores the reviewing court's constitutional obligation to scrutinize the reasonableness of the officer's subjective suspicion independently by examining the "objectively verifiable indications."[29] The reviewing court should start with the evidence (including objective evidence of training and experience) – not the

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[25] *R. v. Payette*, 2010 BCCA 392, 259 C.C.C. (3d) 178, ¶25, Neilson J.A. (emphasis added) [Tab 12]; *R. v. Yeh*, 2009 SKCA 112, 248 C.C.C. (3d) 125, ¶¶56-57, Richards J.A. [Tab 14]. See also Biden, above, note 10, pp. 203-04 [Tab 17].

[26] Steven Penney, "Conceptions of Privacy: A Comment on *R. v. Kang-Brown* and *R. v. A.M.*" (2008) 46 Alta. L. Rev. 203, 220 [Tab 20].

[27] *MacKenzie*, above, note 18, ¶¶30-33, Caldwell J.A.

[28] Respondent's Factum (*MacKenzie*), ¶43.

[29] *A.M.*, above, note 1, ¶80, Binnie J. [Tab 2].

officer's opinion – and then determine, independently, whether, in law, the objectively verifiable facts rise to the level of reasonable suspicion. ***This is a question of law for the reviewing court to assess independently, dispassionately, and correctly.*** The deferential – rather than independent – approach urged by the Court of Appeal in *MacKenzie* and the Crown dilutes the "reasonable suspicion" standard.[30]

(c) Indicator profiles cannot ground reasonable suspicion

14. This Court should also not endorse the use of "indicator profiles," like the 'drug courier profile' in *Chehil*,[31] as a basis for reasonable suspicion. Officers should use these profiles only as administrative tools to justify further investigation, not as grounds to interfere with privacy. Such profiles cannot withstand a rigorous judicial review, as they are inherently unreliable, malleable, and overinclusive.

15. *Generalizations without empirical support.* Drug courier profiles are often used without empirical support for their validity.[32] As Fish J. warned in *Morelli*, generalizations that are "devoid of meaningful factual support" do not pass constitutional muster. "To permit reliance on broad generalizations about loosely defined classes of people is to invite dependence on stereotypes and prejudices in lieu of evidence."[33] Check-lists do not discharge the Crown's duty to prove that the factors relied on objectively provide reasonable grounds for suspicion.

16. *Too fluid and malleable.* In addition, because drug courier profiles are malleable and applied inconsistently by law enforcement,[34] allowing such profiles to constitute reasonable suspicion lacks objectivity. Pratt J. put it nicely in dissent in *U.S. v. Hooper*: "The 'drug courier profile' [...] is so fluid that it can be used to justify designating anyone a potential drug courier if the [drug enforcement] agents so choose. [...] [A] canvass of numerous cases reveals the drug

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30 See *e.g.*, *R. v. Calderon* (2004), 188 C.C.C. (3d) 481, 23 C.R. (6th) 1 (Ont. C.A.), ¶¶71-72, Laskin J.A. (neutral indicators cannot ground reasonable suspicion) [Tab 5]; *R. v. Cox* (1999), 170 D.L.R. (4th) 101, 132 C.C.C. (3d) 256 (N.B.C.A.), ¶12, Ryan J.A. (elements of a smuggler's profile that were "no more than hunches, speculation and guesses" do not qualify as "objectively discernible facts") [Tab 6].

31 *Chehil*, above, note 20, ¶¶21, 25, 29, 46, Cacchione J.

32 Mark J. Kadish, "The Drug Courier Profile: In Planes, Trains, and Automobiles; And Now in the Jury Box" (1997) 46 Am. U. L. Rev. 747, 772 [Tab 19].

33 *R. v. Morelli*, [2010] 1 S.C.R. 253, ¶¶73, 79, Fish J. [Tab 11].

34 Charles L. Becton, "The Drug Courier Profile: 'All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye'" (1987) 65 N.C. L. Rev. 417, 433, 438-444, 474-480 [Tab 16]; *United States v. Hooper*, 935 F.2d 484 (2d Cir. 1991), 499-500, Pratt J. (dissenting) [Tab 15].

courier profile's 'chameleon-like way of adapting to any particular set of observations.'"[35] This is a dangerous basis to interfere with individual liberties.

17. *Perverse incentives.* Because profiles are "chameleon-like," they can be used to justify police conduct *ex post*, thereby creating perverse incentives for law enforcement.[36] "[A]gents may selectively modify the profile during the initial stop and thereafter customize it to fit any hapless traveler who had the misfortune to catch the agent's 'trained eye.'"[37]

18. *Increased governmental intrusion.* "Drug courier profiles" inevitably sweep up many innocent bystanders. As one commentator notes, "'indicator profiling' [...] casts too wide a net with often meagre returns [...]."[38] "Profiles" fail to protect the innocent and unsuspecting public against arbitrary and discriminatory state power.

19. *Racial profiling.* Racial profiling is an unfortunate reality in this country.[39] Racialized communities are disproportionally impacted by warrantless police powers,[40] which tend to lead to stereotyping and discriminatory profiling, whether consciously or not.[41] This is borne out by experience. "'[I]ndicator' profiling [...] in practice seems to be associated with disturbing and disproportionately high numbers of suspects stopped who are members of racial or ethnic or

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35 *Hooper, id.*, p. 499, Pratt J. [Tab 15].

36 See Penney, above, note 26, p. 220 ("A police officer observes suspicious behaviour by a member of a racial minority perceived to be disproportionately involved in drug trafficking. Assume that there are legitimate *indicia* of suspicion, but that at least some judges would retrospectively find that it did not quite reach the level of reasonable suspicion. What is to dissuade the officer from conducting the search – the possibility that a judge *may* find that reasonable suspicion was lacking *and* that the officer's misconduct was sufficiently serious to warrant exclusion under s. 24(2) of the Charter? As not searching would allow a suspected drug trafficker to go free, most police would likely conduct the search." (footnotes omitted)) [Tab 20].

37 Becton, above, note 34, p. 438 [Tab 16].

38 Fiszauf, above, note 9, p. 72 [Tab 24]. See also *Calderon*, above, note 30, ¶72, Laskin J.A [Tab 5]; Kadish, above, note 32, p. 761 [Tab 19]; Jodi Sax, "Drug Courier Profiles, Airport Stops and the Inherent Unreasonableness of the Reasonable Suspicion Standard after *United States v. Sokolow*" (1991) 25 Loy. L.A. L. Rev. 321, 342-43. (footnotes omitted) [Tab 22].

39 Tanovich, above, note 6, pp. 431-32 [Tab 23]; *R. v. Brown* (2003), 173 C.C.C. (3d) 23, ¶9, Morden J.A. (Ont. C.A.) [Tab 4]; Fiszauf, above, note 9, pp. 68-69 (ethnic, nationality-based, and cultural profiling also exists in Canada) [Tab 24].

40 See David A. Harris, "Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked" (1994) 69 Ind. L.J. 659, 660 [Tab 18].

41 Penney, above, note 26, p. 219 [Tab 20]. See also Steven Penney, "Reasonable Expectations of Privacy and Novel Search Technologies: An Economic Approach" (2007) 97 J. Crim. L. & Criminology 477, 526-27 [Tab 21].

cultural minorities." Indicator profiles appear to "act as a mask for ***bias-based*** profiling."[42] As one commentator has noted, before long being "black and poor" means being "stopped and frisked" – or, in this case, sniffed.[43]

20. In the result, Canadian society as a whole is diminished by: (1) the malleability of police profiling; (2) the perverse incentives it creates; and (3) the resulting increase in governmental intrusions into private lives. These serious harms are only magnified for racialized communities.[44] This Court should recognize this reality and disapprove of broad-brush indicator profiles in favour of a more Canadian, culturally-sensitive assessment of each case on its merits.

21. *Limited use of indicator profiles.* Given the inherent dangers of profiles, they should not be used, as a matter of law, to ground reasonable suspicion. Police should only be permitted to use these check-lists to focus their resources on further, constitutionally permissible, investigation. As a U.S. commentator notes, "[t]he proper role of the drug courier profile is ***not*** to establish in court that agents had a reasonable suspicion before the stop. Rather, it should serve as a tool for [drug enforcement] agents to use in identifying suspects, following or investigating further, and stopping suspects once reasonable suspicion actually exists."[45] This can involve something as simple as asking the suspect some questions. Like a "hunch," a drug courier profile "is a valuable investigative tool" – but also like a "hunch," "is no substitute for proper *Charter* standards when interfering with a suspect's liberty."[46] Without objective evidence, the Court risks giving free rein and unlimited deference to officers' "speculation," thereby rendering unreviewable their hunches, educated-guesses, and gut-instincts.[47]

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[42] Fiszauf, above, note 9, pp. 69, 71 (footnotes omitted) (emphasis in original) [Tab 24].

[43] Harris, above, note 40 [Tab 18].

[44] See Sax, above, note 38, p. 348 [Tab 22].

[45] Becton, above, note 34, p. 471 (emphasis added) [Tab 16].

[46] *R. v. Harrison*, [2009] 2 S.C.R. 494, ¶20, McLachlin C.J. (discussing "hunches") [Tab 7].

[47] *Kang-Brown*, above, note 1, ¶60, Binnie J. ("speculation" not enough to justify reasonable suspicion); ¶76 ("a hunch based on intuition gained by experience cannot suffice as 'articulable cause'") [Tab 10]; see also *Chehil*, above, note 20, ¶¶172, 174, Cacchione J.

B. The Accuracy Of Sniffer Dogs Should Be Measured Objectively Based On Actual Deployments, Not Controlled Tests

22. This Court justified using sniffer dogs under the lower reasonable suspicion standard based partly on the Crown adducing objective and concrete evidence to support the "high accuracy" and "proven track record" of the "specifically trained" sniffer dog relied upon.[48] This requires much more than the police's opinion that the particular dog should be trusted. In *Kang-Brown* this Court warned (and the RCMP accepted) that "'sniffer dogs' are not interchangeable" and it is therefore "statistically incorrect to extrapolate the reliability of all sniffer dogs from the track record of one single dog."[49] "The importance of proper tests and records of particular dogs will be an important element in establishing the reasonableness of a particular sniffer-dog search."[50] "If the lawfulness of a search is challenged, the outcome may depend on evidence before the court in each case about the individual dog and its established reliability."[51]

23. The reliability of sniffer-dogs should be measured not based on tests in controlled environments, but rather based on ***actual deployments***. Because sniffer dogs are used to intrude into individuals' privacy interests in uncontrolled environments, it is the reliability of the particular dog in identifying the presence of contraband in such environments that counts.

24. On the *Chehil* appeal, the Crown submits that the reliability of a sniffer-dog should not be impugned when it alerts in the field to contaminated currency or a lingering smell.[52] The Nova Scotia Court of Appeal adopted a similar approach.[53] Respectfully, however, this is fundamentally wrong. If a dog indicates on contaminated currency, the dog is doing what it is trained to do – *viz.*, to detect the smell of drugs.[54] But consistency with training is not the issue when the reliability of an investigatory tool is assessed. Rather, the issue is how reliable the tool is at ***indicating the commission of a drug crime***. Because sniffer-dogs detect smells, not drugs, there will inevitably be false positives. Each and every time this happens, the *Charter*-protected

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48 *Kang-Brown*, *id.*, ¶¶25, 60, 63, 65, 99, Binnie J. [Tab 10]; see also *A.M.*, above, note 1, ¶42, Binnie J. [Tab 2].

49 *Kang-Brown*, *id.*, ¶¶65, 99, Binnie J. [Tab 10].

50 *A.M.*, above, note 1, ¶84, Binnie J. [Tab 2].

51 *Id*, ¶88, Binnie J. [Tab 2].

52 Respondent's Factum (*Chehil*), ¶¶78-85.

53 *Chehil*, above, note 12, ¶¶52-54, MacDonald C.J.N.S.

54 *A.M.*, above, note 1, ¶87, Binnie J. [Tab 2].

interests of ordinary Canadians are infringed. All such false positives should count against a dog's reliability. It is of course also critical for the police to keep appropriate records of all sniffer-dog searches in the field and to establish to the court that they have done so.

C. Positive Indication By A Sniffer Dog Justifies A Verification Search, Not An Arrest

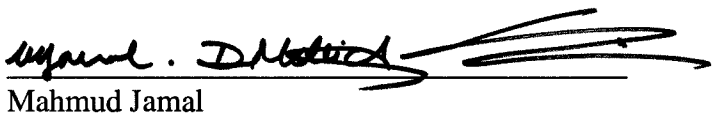
25. Both appeal courts below held that the dog's positive indication provided reasonable and probable grounds to arrest the accused, even before finding any drugs, and that their arrests justified subsequent searches for evidence.[55] But this Court in *Kang-Brown* was divided on whether a positive alert by a dog justified an arrest (*per* Deschamps J.), or rather simply a verification search to confirm the presence of drugs (*per* Binnie J.).[56]

26. With respect, Binnie J.'s approach better respects constitutional norms, for two reasons. First, the aim of the *Charter* is "to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference."[57] Second, "[a]rresting someone is the penultimate interference with liberty, short of being in custody."[58] A verification search is less destructive of *Charter* protected interests, but just as effective as an arrest in determining whether the sniffer dog has given a false positive. The point is made by drug-dog Boris' false indication on the cooler in *MacKenzie* – this surely cannot justify a person's arrest in Canada.

PART III – ORDER SOUGHT

27. The CCLA takes no position on the disposition of these appeals, and does not seek costs and asks that none be awarded against it. It seeks leave to present 10 minutes of oral argument.

Toronto, January 7th, 2012



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55 *MacKenzie*, above, note 18, ¶17, Caldwell J.A.; *Chehil*, above, note 12, ¶58, MacDonald C.J.N.S.

56 *Kang-Brown*, above, note 1, ¶101, Binnie J., ¶200, Deschamps J. [Tab 10].

57 *Hunter*, above, note 7, p. 160, Dickson J. [Tab 1].

58 *R. v. Janvier*, 2007 SKCA 147, 227 C.C.C. (3d) 294, ¶48, Jackson J.A. [Tab 8].

PART IV – TABLE OF AUTHORITIES

Mark J. Kadish, "The Drug Courier Profile: In Planes, Trains, and Automobiles; And Now in the Jury Box" (1997) 46 Am. U. L. Rev. 747 — 15, 18

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