Court File Number: 31598

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Alberta)

BETWEEN:

GURMAKH KANG BROWN

Appellant
(Appellant in Court of Appeal)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent in Court of Appeal)

APPELLANT'S FACTUM

Alias A. Sanders & James M. Lutz
Barristers & Solicitors
The Grain Exchange Building
#608, 815 First Street S.W.
Calgary, Alberta, T2P 1N3
Tel. (403) 294-9495
Fax: (403) 294-9599

Counsel for the Appellant

Gowling Lafleur Henderson LLP
Henry S. Brown, Q.C.
2600 - 160 Elgin Street
P.O. Box 466, Station "D"
Ottawa, Ontario, Kip 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: henry.brown@gowlings.com
Agent for the Appellant

Jolaine Antonio
Attorney General of Canada
#510, 606 - 4th Street S.W.
Calgary, Alberta, T2P 1T1
Tel. (403) 299-3978
Fax: (403) 299-3966

Counsel for the Respondent

Robert Frater
Attorney General of Canada
284 Wellington Street, Suite 2311
Ottawa, Ontario, K1A 0H8
Tel. (613) 957-4763
Fax: (613) 941-7865
E-mail: robert.frater@justice.gc.ca
Agent for the Respondent

INDEX

Page

Part I	-	Statement of Facts	1
Part II	-	Points in Issue	13
Part III	-	Argument	14
Part IV	-	Submissions on Costs	21
Part V	-	Order Sought	21
Part VI	-	List of Authorities	22
Part VI	-	Constitution Act, 1982	23

Part I - Statement of Facts

Judicial History

1. After trial by judge alone in the Court of Queen's Bench of Alberta, the Appellant, Gurmakh Kang-Brown (hereinafter "Kang-Brown"), was convicted of possession of cocaine for the purpose of trafficking, and possession of heroin, contrary to ss. 5(2) and 4(1) of the *Controlled Drugs and Substances Act.*

2. The defence had argued that police arbitrarily detained and unlawfully searched the accused, contrary to ss. 9 and 8 of the *Charter of Rights and Freedoms*; and that the drugs seized from his carrying bag ought to be excluded from evidence pursuant to s. 24(2) of the *Charter.* At the conclusion of the *voir dire* on these issues the trial judge found no breaches of Kang-Brown's Constitutional rights. She ruled that even if his ss. 8 or 9 rights had been violated, the evidence was admissible nonetheless.

3. The defence at trial relied heavily on the Alberta Court of Appeal decision in *R. v. Lam & Dinh.* That case incorporated in part the reasoning in *R. v. Tessling* by the Ontario Court of Appeal. The trial judge ruled that the subsequent reversal of *R. v. Tessling* by this Court had overturned *R. v. Lam & Dinh* as well, and therefore the Defence argument was rejected.

4. Kang-Brown appealed his conviction to the Alberta Court of Appeal. Prior to the hearing, the Crown Respondent made an application for a reconsideration of a decided case, *v. Dinh & Lam.* The Alberta Court of Appeal declined the application, though the Crown respondent was free to argue at the appeal hearing that *R. v. Lam & Dinh* had been overruled.

5. The majority of the Alberta Court of Appeal agreed with the Crown Respondent that the lower court was correct in deciding that the Appellant's *Charter* rights had not been violated and by inferring that *R. v. Tessling* had overruled or distinguished *R. v. Lam & Dinh.* The dissent at the Alberta Court of Appeal distinguished *R. v. Tessling* from *R. v. Lam & Dinh*, found that Kang-Brown's s.8 rights were violated, and held that the trial judge erred by not excluding the evidence from trial. Although the dissenting justice did not agree with the trial judge's ruling on s.9, she declined to find an error given the standard of appellate review.

6. Kang-Brown appeals as of right with respect to *Charter* sections 8 and 24(2) only.

The Facts

7. Jetway is an RCMP project in which teams of officers are posted at airports and bus and train stations in Canada to monitor the traveling public and identify and arrest drug couriers or people carrying weapons, proceeds of crime or other contraband. Often police service dogs are part of the Jetway team. Such dogs are trained to detect the odour of various controlled drugs and substances, such as marihuana and cocaine, in luggage and other containers.

Appellant's Record, pages 3-4, para. 2

8. On January 25, 2002, a Jetway team consisting of plainclothed R.C.M.P. officers Sergeant MacPhee, Constable Ritchie, dog handler Sergeant Bouey and Police Service Dog Chevy were patrolling the Calgary Greyhound bus terminal. They watched passengers disembark from the overnight bus from Vancouver.

Appellant's Record, pages 3-4, paras. 2, 3, 4

9. Kang-Brown disembarked from the Vancouver bus amidst a throng of other passengers. Although he was not previously known to the Jetway team and his appearance was normal, Sgt MacPhee concentrated his attention on Kang-Brown from that moment onwards. Kang-Brown locked eye contact with the plainclothes officer for a few seconds while disembarking. Sgt MacPhee had been trained to watch for an elongated stare. He watched as Kang-Brown took an unusual course: he walked to the underbelly of the bus without looking at the bags being unloaded, went around the bus in a direction different from the other passengers, and positioned himself ten to fifteen feet behind Sgt MacPhee. Kang-Brown's bag was also deemed to be unusual because it bore no Greyhound or other identifying tags. Kang-Brown carried it high over his shoulder even though it had handles rather than a shoulder strap. He looked at MacPhee periodically over his shoulder. To the officer, this was "rubbernecking", a suspicious sign for which he was trained to watch. They locked eye contact before and after Kang-Brown went to the washroom. All of these factors attracted and held the officer's attention. MacPhee decided to monitor Mr. Kang-Brown out to the curb.

Appellant's Record, pages 4-5, paras. 5, 6, 8-13

10. MacPhee closed the gap between himself and Kang-Brown in the foyer between the inner and outer exit doors. He identified himself as a police officer and produced his identification card and badge. He told Kang-Brown that he was not in any sort of trouble and is free to go at any time. MacPhee said he just talks to people as they are traveling. MacPhee asked Kang-Brown where he had come from and asked to see his bus ticket. Kang-Brown said he had left it on the bus, but voluntarily produced his identification instead. MacPhee made a quick note of Kang-Brown's name and date of birth, and passed it to another plainclothes officer, Cst Ritchie.

Appellant's Record, pages 5-6, paras. 14-18

11. MacPhee and Kang-Brown discussed why and how long the latter would be in Calgary. Kang-Brown was getting "increasingly antsy." Still, they kept talking. MacPhee learned that Kang-Brown purchased his bus ticket shortly before his trip. Last minute purchases are significant for the Jetway team. MacPhee told Kang-Brown that they find many drug couriers at the bus station and charge them accordingly. He asked if Kang-Brown was transporting drugs. Kang-Brown said no, then picked up his bag and put it over his shoulder again. MacPhee asked Kang-Brown if he had any concerns about showing him his bag. Kang-Brown paused for about two seconds, and then put his bag down on the floor and started to open it. MacPhee said, "Thanks, sir. You're certainly not obliged to show me but thanks." He started to kneel down to where Kang-Brown was crouching unzipping the bag, indicating that for officer safety reasons he wanted to be the one to search the bag.

Appellant's Record, pages 5-6, 8 paras. 14-18, 28

12. Before MacPhee's hands touched the bag, Kang-Brown exclaimed: "What are you doing?" and retracted the bag, pulling it back toward himself and away from the police officer. Kang-Brown seemed panicked and very agitated at that point.

Appellant's Record, page 7, para. 21

13. MacPhee quickly nodded to Sgt Bouey, who was about forty feet away in the terminal lobby with Police Service Dog Chevy, which was the signal to approach. He called on Bouey so they could use Chevy as an investigative tool. Within a few seconds, Bouey was at MacPhee's location with Chevy. Kang-Brown, visually upset and shaking, was just starting to stand up with the bag, which was partially unzipped when Chevy made an immediate passive indication of the presence of drugs in the bag by sitting down. MacPhee checked with Bouey, who nodded an affirmative signal to him. MacPhee then told Mr. Kang-Brown that he was under arrest for possession of and/or trafficking in a controlled substance.

Appellant's Record, pages 7, 9, paras. 22, 23, 24, 30

14. Immediately upon arrest, the officers searched Kang-Brown's bag incident to the arrest. They found a box taped shut at the very bottom of the bag, under some clothing. Inside the box officers found a brown paper bag that held two zip lock baggies containing approximately 17 ounces of cocaine. Kang-Brown also retrieved a small Starbucks breath mint container from his jeans pocket which contained a small amount of heroin.

Appellant's Record, pages 7, paras. 25, 26

15. When MacPhee approached the Appellant he did so to for the purpose of gathering further information. He had only suspicion and lacked reasonable or probable grounds for arrest or a warrant. MacPhee did not know of any crime in progress. No tip had been received relating to Kang-Brown or the bus from Vancouver. No legislation triggered his inquiries. The critical point at which the investigation changed was with the arrival of Police Service Dog Chevy. The dog's indication of the presence of drugs was the critical factor which provided the reasonable and probable grounds for arrest and search incident to arrest.

Appellant's Record, pages 79-80, 81-83, 93-96, 97

16. MacPhee adopts a friendly and non-authoritarian approach to passengers he investigates in the Jetway program. He has talked to an average of eight people per week over the course of seven years; only ten or eleven have walked away from him in total. Aside from one or two people per year, everyone else has remained to answer his questions.

Appellant's Record, pages 98-101

17. Although the Appellant had placed his bag on the ground and opened it in response to the officer's queries, he would not permit touching the bag. He withdrew his consent to the search of his bag ***before*** Sgt. Bouey attended with the Chevy for the purpose of sniffing it.

Appellant's Record, pages 84, 90-91

18. The Vice President of Business Development and Analysis of Greyhound, Canada testified that, in the wake of the terrorist attacks on September 11, 2001, signs were distributed to Greyhound bus terminals throughout Canada, probably by the end of October, 2001. These signs indicated, *inter alia*, "Passengers may be asked to reveal the contents of their luggage prior to boarding the coach." The signs said nothing of revealing the contents of passengers' luggage after disembarking from the coaches. The witness had not checked to see that the signs were posted at each terminal. He could not recall any particular policy regarding where in the terminals the signs were to be posted. Certainly, he did not know if any sign was posted in the New Westminster bus station from which Kang-Brown departed on January 25, 2002.

Appellant' Record, pages 104-107, 109

19. Greyhound does not search all passengers entering its buses. The witness did not have any idea of how many passenger's bags have been searched. There is no screening device for luggage in the Greyhound terminals such as those in airports. The Greyhound personnel would not actively search passengers boarding or disembarking from its buses.

Appellant's Record, pages 105, 107

20. Sgt. MacPhee did not know whether Greyhound had posted its signs in British Columbia terminals at the relevant time. He could not say that the Appellant would have seen such signage in the Calgary terminal.

Appellant's Record, pages 76-77

21. Mr. Kang-Brown did not testify on the *voir dire*. If the drugs were admitted into evidence, possession of cocaine for the purpose of trafficking was conceded by the Defence.

Reasons for Judgment at trial

22. The trial judge found no breaches of Kang-Brown's right to be free from arbitrary detention, holding that the officer's interest in him was was neither arbitrary nor random, nor was there any physical or psychological detention. MacPhee's interest in Kang-Brown was triggered by factors identified as suspicious by an experienced officer and the Jetway training program. Police may ask questions of a suspect without triggering section 9 of the *Charter* in the absence of significant physical or psychological restraint. Kang-Brown was told that he was free to leave at any time. He chose not to. He spoke to the officer voluntarily. MacPhee did not block Kang-Brown's path. He asked to see what Kang-Brown was carrying, while advising that there was no obligation to show him. In short, there was no control over Kang-Brown's movements and no compulsion to comply. Kang-Brown's nervousness was as consistent with consciousness of guilt as with psychological detention, and, absent his testimony there was no evidence of psychological detention.

Appellant's Record, pages 11, 12-13, paras. 39, 40, 43 - 46, 48

23. The trial judge did not find a detention based on the officer's goal to elicit incriminating information to justify a search of Kang-Brown's bag. In her view, to hold that a search begins with a request for cooperation is an unreasonable restriction of police investigative powers.

Appellant's Record, page 13, paras. 49, 50

24. Even if there was a detention, the judge held there were reasonable grounds to detain Kang-Brown for investigative purposes. The factors which led MacPhee to question Kang-Brown were related to the Jetway training and were particular to Kang-Brown's conduct. Although each factor, such as the elongated stares, were of little weight on their own, the combination of factors rendered the officer's suspicion reasonable and an investigatory detention justifiable. Despite the absence of a known recent or ongoing offence, the ongoing investigation of drug transport and trafficking was deemed a sufficient basis for the police acts.

Appellant's Record, pages 14, paras. 55, 57

25. If the dog sniff of Kang-Brown's bag prior to his arrest was a search, the judge held it was not reasonably necessary to ensure officer safety incident to investigative detention.

Appellant's Record, page 15, paras. 60, 61

26. The question regarding *Charter* s. 8 was whether Kang-Brown had a reasonable expectation of privacy in the smell emanating from his bag in the bus terminal and whether the dog sniff of his bag was a search. The trial judge held that the answer to both questions was negative, so there was no breach of Kang-Brown's section 8 rights.

Appellant's Record, page 15, para. 62

27. The trial judge's analysis followed a line of reasoning established by this Court in the residential marihuana grow operation cases of *R. v. Evans*, [1996] 1 S.C.R. 8, *R. v. Plant*, [1993] 3 S.C.R. 281, and *R. v. Tessling*, [2004] 3 S.C.R. 432. Those cases concerned territorial privacy, greatest in the context of a dwelling house. They .endorsed a reasonable expectation of privacy in the biological core of personal information which individuals in a free and democratic society wish to maintain private from the state. In balancing privacy interests against state interests of policing and security, the jurisprudence acknowledges that section 8 of the *Charter* does not protect all information an individual prefers to keep confidential. Protected information includes only the intimate details of the individual's lifestyle and personal choices.

Appellant's Record, pages 15, 16, paras. 63, 65, 66

28. To determine whether Kang-Brown's expectation of privacy was objectively reasonable, the trial judge relied on an analogy between odour emanating from a bag and heat emanating from a home. That comparison was first raised by the Alberta Court of Appeal in *R. v. Lam & Dinh* (2003),[2003] A.J. No. 811, wherein the evidence of drugs detected by a police dog was excluded on the basis that the detection devices such as dogs, like heat detection technologies, impermissibly enable police to "see" into a private space. This Court's subsequent decision in *R. v. Tessling*, [2004] 3 S.C.R. 432 determined that the use of heat-seeking FLIR (Forward Looking Intra Red) technology as an investigative tool respecting a marihuana grow operation does not "see" through the walls of the building, but merely detects the patterns of heat on the exterior of the structure. The trial judge therefore concluded that the dog's detection of odours emanating from Kang-Brown's bag did not "see" into the bag, and therefore he had no reasonable expectation of privacy in odours which escape into the public realm. The trial judge inferred that the Alberta Court of Appeal's decision in *Dinh & Lam* had been overruled by this Court's decision in *Tessling*.

Appellant's Record, pages 16-21, paras. 67, 70, 73, 75-78

29. The trial judge stated that neither FLIR heat detection nor a sniffer dogs expose any intimate details of the suspect's lifestyle or biographical core of personal information, both investigative tools are physically non-intrusive; they provide no insight into one's private life or biographical core of personal information; and neither affects the "dignity, integrity and autonomy" of the suspect. The FLIR technology reveals only the possibility that a marihuana grow operation is present. Its data is otherwise meaningless. A trained sniffer dog can indicate a reasonable likelihood that selected controlled drugs are to be found. The judge decided this was a distinction without a difference: neither technological aid discloses anything of the suspect's personal habits, choices, philosophies, beliefs, values, associations or preferences.

Appellant's Record, pages 16-20, paras. 67, 68, 73

30. The trial judge distinguished Dinh *& Lam* from *Tessling* because "the place or object in issue was not a private dwelling place, but a bag carried on public transport." In other words, the high degree of privacy which attaches to a private dwelling was lacking here. As such, the judge held there was no strong presumption of privacy in the odours Kang-Brown knowingly exposed to the public, notwithstanding a smell was not detectable without the sensitive olfactory nerves of a trained police dog, and that the police were not concerned merely with the odour, but what the odour revealed about the contents of the bag.

Appellant's Record, pages 18-20, paras. 73

31. Operating from the perspective that there is no reasonable expectation of privacy in relation to concealing drug possession, any distinction between police use of FLIR technology or a sniffer dog was held to be meaningless. On the other hand, in light of the serious crime of drug trafficking, the trial judge found that their use is not objectively unreasonable.

Appellant's Record, pages 18-20, paras. 73

32. Although there was no evidence that Greyhound bus passengers would have anticipated a search of their luggage on the offence date, the judge held that it is not reasonable for travellers using public transport in the post 9/11 era to expect that their luggage is exempt from being searched. For that reason, too, the trial judge was of the view that Kang-Brown had no reasonable expectation of privacy in the circumstances of this case.

Appellant's Record, pages 18-20, 23, paras. 73, 87

Court of Appeal

33. An appeal to the Court of Appeal was dismissed with a strong dissent by Paperny J. Given the standard of review on questions of mixed fact and law, the Panel unanimously dismissed arguments respecting the trial judge's ruling on arbitrary detention pursuant section 9 of the *Charter*. Paperny J. would have excluded the evidence at trial based on a section 8 breach.

Appellant's Record, pages 33-35, 37, 44, 54, paras. 7, 13, 26, 46, 96

34. The majority of the Court ruled that *Dinh & Lam* had been overruled by *Tessling*, or was distinguishable, given that its central tenets were contradicted by this Court, most notably the propositions that: (1) the purpose of the investigative tool was to detect what was inside the container or structure, rather than to inspect the exterior or emanations into the air around the object of the search; (2) doing so is akin to seeing inside the private place; (3) using a device beyond human senses constitutes an impermissible search; (4) the purpose of the police action is relevant to whether or not there was a search; (5) a dog sniff is necessarily a search.

Appellant's Record, pages 38-44, paras. 32,33, 34, 36, 38, 39, 45

35. The majority noted that *Tessling* distinguishes between searches of homes, persons, and information. The *Charter* protects only information that concerns lifestyle and personal choices. The bag searched in the case at bar was classified as an informational search.

Appellant's Record, page 43, para. 43

36. The test of whether there is a breach of a reasonable expectation of privacy was identified as one in relation to the ordinary citizen rather than the fruits or the search:

> ¶ 47 The privacy interests to be assessed and protected under s. 8 of the *Charter* are not, of course, confined to the particular activity or type of activity detected in the prosecution at hand. Finding drugs does not retroactively make any "search" disappear. The relevant question is not whether counterfeiters or fences or drug smugglers have a reasonable expectation of privacy for the tools, merchandise or fruits of their trade. The first question is whether the ordinary citizen who has committed no offence has a reasonable expectation of privacy which would be significantly invaded by the police action in question here. The danger of the police rifling through homes or suitcases is not so much their finding illegal items like guns, but their seeing legal intimate or personal items.

Appellant's Record, page 44. para. 47

37. Notwithstanding that the question was premised on the reasonable expectation of privacy of the traveling public, and not the drug smuggler, the majority then found the dog search innocuous, because it reveals the presence of drugs only. The majority was so inclined because the other contents of the bag would not be revealed through the use of the dog sniff.

Appellant's Record, page 44, para. 48

38. The majority reasoned that police could properly investigate an obvious strong smell coming from luggage or from a locker in a bus depot. In their view, "All that is different here is the use of a dog with a nose keener than human noses" but that, in their opinion, did not make this a search for section 8 purposes. No reference was made to this Court's decision in ***R. v. Buhay***,[2003] 1 S.C.R. 631 in relation to this point.

Appellant's Record, page 45, para. 53

39. The majority also found that there was no reasonable expectation of privacy here, given that "the search was in a public place (bus depot foyer), and was not in a private place (not even inside the luggage)."

Appellant's Record, page 45, para 54

40. The dissenting judgment was by Paperny J., one of the Justices who decided *Dinh & Lam*. She characterized the Jetway program and its use of police service dogs as follows:

> ¶ 87 This appeal involves "Operation Jetway", a Royal Canadian Mounted Police ("R.C.M.P.") program designed to curtail drug trafficking by monitoring the traveling public in airports and bus depots. The R.C.M.P. uses a specialized team of officers to profile certain behaviors, demeanor, dress and other visible personal characteristics which they consider indicative of criminal activity. The R.C.M.P. target these individuals and attempt to engage them in "voluntary conversation". The aim is to have the "targets" consent to a search to determine whether they are carrying drugs on their person or in their luggage. In circumstances where consent is withheld or equivocal, it is common for the R.C.M.P. to use a sniffer dog to detect the odour of narcotics emanating from the target's person or belongings.

Appellant's Record, page 52, para 87

41. Paperny J. rejected the view that there is no privacy interest in an "emission" from private bag to public space or that a dog sniff is not a search, noting same conclusions were reached by the Ontario Court of Appeal in *R. v. A.M.*, [2006] O.J. No. 1663 .

Appellant's Record, page 55, para. 102

42. Paperny J. noted that *Tessling* limits itself to the current value of FLIR technology. When the technology improves and the nature and quality of the information changes, its use will be reevaluated. In her view, the majority's reliance on the principle that the state need not turn a blind eye to emissions is very different from seeking them out without authorization. She relied on the principle expressed by this Court in *Tessling* that heat escaping from a home is not abandoned as a measure preserving the reasonable expectation of privacy against excessive state interference.

Appellant's Record, pages 55-56, paras. 103-105

43. Paperny J. found that the majority view of *Tessling* which suggests there is no privacy interest in emissions detected by the police using sensory-enhancing devices eviscerates section 8 of the *Charter*. She rejected it as much too broad. Where, as in *Dinh & Lam*, the device detects with near certainty the contents of the private space, it is akin to "seeing" into the bag, unlike the mundane data produced by the FLIR technology in *Tessling*.

Appellant's Record, pages 57, 60, 61, paras. 108-111, 129, 133

44. Adopting an interpretation of privacy which preserves a personal interest in information that we choose to keep confidential, Paperny J. cited precedents where privacy rights were preserved in a public locker at a bus station, as in *R. v. Buhay*, [2003] 1 S.C.R. 631, and in a private safe broken open as exposed to the public, as in *R. v. Law*, [2002] 1 S.C.R. 227. In her view, the principle that s. 8 "protects people, not places" preserves privacy in a public place. The question, then, turns to the reasonableness of a person's expectation of privacy in particular public spaces.

Appellant's Record, pages 57-58, paras. 112-116

45. Paperny J. noted the subject of police attention was Kang-Brown's' personal luggage which he carried through the bus station. There is a social norm within our society to preserve the privacy of odours emanating from our personal belongings. The smell was undetectable by human senses and was not knowingly exposed. Kang-Brown had a subjective expectation of privacy respecting the contents of his bag over which he maintained possession, control and exclusive access and which was concealed from public view.

Appellant's Record, pages 59, 60, 61, paras. 121-124, 127 131

46. The setting, in a bus station, would not have reduced Kang-Brown's reasonable expectation of privacy in the bag. The setting was distinguishable from the circumstances at airports because of the security measures incorporated there.

Appellant's Record, pages 59-60, paras. 126, 130

47. The nature of the investigation was pertinent. Unlike the use of FLIR technology, the dog search is immediate and personal. Paperny J. described this aspect as follows:

> ¶ 135 The dog sniff was also intrusive in a physical sense. Many people are afraid of dogs. The use of dogs has an historical connotation that cannot be ignored. Dogs can and often are intended to be intimidating and their proximity to an individual can be highly invasive. So too can their enhanced olfactory sense, as any person who has been sniffed by a dog, friendly or otherwise, can attest.

Appellant's Record, page 61, para. 135

48. In her view, the search was not "relatively unintrusive" given that "a trained police dog [was] rapidly summoned to sniff personal luggage in one's immediate possession."

Appellant's Record, page 63, para. 149

49. Finally, Paperny J. found error in the trial judge's assessment of the seriousness of the breach for the purposes of a s. 24(2) analysis. The trial judge erred by allowing her analysis that there was no s. 8 breach to taint her assessment of the police actions to determine that the breach was not sufficiently serious to warrant an exclusion of the drug evidence from trial.

Appellant's Record, pages 62-63, paras. 145-150

Part II - Points in Issue

50. The trial judge erred by failing to find that the Appellant was subject to an unreasonable search and seizure and the evidence ought to have been excluded from trial pursuant to section 24(2) of the *Charter of Rights and Freedoms*.

51. Madam Justice Paperny's dissenting judgment was correct: (a) the use of a police dog trained to detect contraband in Kang-Brown's bag was a search; (b) Kang-Brown had a reasonable expectation of privacy in the contents of and odours emanating from his bag; (c) *R. v. Tessling* is distinguishable from *R.. v. Lam & Dinh* but has not overruled it; (d) trial judges may not rely on the reasons used to determine there was no *Charter* breach at all when assessing the seriousness of a section 8 *Charter* breach.

Part III - Argument

(a) The use of a police dog trained to detect contraband in Kang-Brown's bag was a search.

52. It is common ground that Sgt. MacPhee lacked reasonable and probable grounds required for arrest or to obtain a warrant until Police Service Dog Chevy sniffed the air around Mr. Kang-Brown's bag and indicated the presence of drugs therein. There was no basis for arrest until the result of the sniff was communicated from Chevy to the police handler and then to MacPhee. The dog sniff was not relevant to ensure officer safety, so, if it was a search, it was not incident to lawful detention: *R. v. Mann*, [2004] 3 S.C.R. 59 at paras. 37, 45. Nor was it a search incident to arrest, given that the sniff gave rise to the arrest and not the reverse: *R. v. Feeney*, [1997] 2 S.C.R. 13 at paras. 34-37.

53. Historically, purposive attempts to detect the odour of marijuana have constituted a search contrary to section 8 of the Charter, though cases where police inadvertently stumble upon such a scent are distinguishable. Courts have considered whether the police conduct is an accepted component of the investigation in question. For example, in *R. v. Evans*, [1996] 1 S.C.R. 8 at paras. 9, 16, 18, 20, the implied invitation to knock at the door of a residence did not extend to police officers who attend for the purpose of detecting the smell of marijuana: such action breached Evans' section 8 rights.

54. The analogy extends to the traveling public queried by police for the purpose of detecting drug couriers. Although the police may approach bus passengers with questions, much as as the homeowner extends an invitation to knock upon the door, neither contemplates scenario that police may use the opportunity to sniff for drugs. The implied invitation does not extend that far and neither does the acquiescence and cooperation of the traveling public: *R. v. Lam & Dinh*, [2003] A.J. No. 811 at paras. 40-49.

55. In *R. v. Buhay*, [2003] 1 S.C.R. 631 at paras. 24, 37 the "plain view" doctrine was inapplicable where the officers did not detect the odour of marijuana during the course of a routine patrol or by the ordinary use of their senses. In the case at bar, Sgt. MacPhee did not detect the smell of controlled drugs by his own senses. He was dependent on the superior detection tool of the drug sniffing dog to discern its presence. As such, use of the sniffer dog was a search because the smell was not voluntarily exposed to the public.

56. The rest of the Jetway investigation is relevant for the purpose of discerning a section 8 breach. It cannot be that, as long as the officers avoid the threshold of arbitrary detention, police service dogs may sniff the luggage of every passenger in a bus terminal, the bag and locker of every student in a school, the purse of every shopper in a mall, the briefcase of every lawyer in a Courthouse, or anything carried by anyone in a public place. Even the reasonable man on the Clapham omnibus could be besieged by police dogs ensuring his lawful compliance. Indeed, if the prelude to the dog sniff is disregarded in a section 8 analysis, then the purpose of the police investigation up to that point would merely spare the dog and not the public from such speculative investigative sweeps.

(b) Kang-Brown had a reasonable expectation of privacy.

57. Even in a bus station, a marijuana smell does not negate a reasonable expectation of privacy. Where police attention is drawn to the smell of marijuana in a rented locker in a bus terminal, a search of the locker absent a warrant is *prima facie* unreasonable, and a breach of s.8 of the *Charter*. There is a privacy interest in that rented space: *R. v. Buhay*, [2003] 1 S.C.R. 631 at paras. 20-22, *R. v. Lam & Dinh*, [2003] A.J. No. 811 at paras. 6, 16, 22, 27, 28. Likewise, there is a substantial privacy interest in a bag. *R. v. A.M.*, [2006] O.J. No. 1663 at paras. 49-50.

58. The *Charter* protects people and not places (*R. v. Tessling*, para. 62), so there is no reasoned basis for assuming a lesser privacy interest in luggage carried on one's person in the bus terminal than one would expect were it stored in a locker. It might even have been greater. A search in relation to place - a dwelling house - is distinguishable from a search of personal belongings in a public place. The law of trespass and the sanctity of the home attracts lesser constitutional protection than privacy of the person (*R. v. Tessling*, at paras 14-16, 21-22). There is overlap between the categories (*R. v. Tessling*, at para. 24). More than "informational privacy" is at stake in this case, because the luggage is firmly in Kang-Brown's grasp. Connected to his body, the bag is conceptually akin to a search of his pockets, which is a search of the person.

59. In light of the test in *R. v. Buhay*, [2003] 1 S.C.R. 631 at paras. 18, 24 of whether there is a reasonable expectation of privacy in the totality of the circumstances, the case at bar is more compelling than the locker cases. Kang-Brown was present at the time of the search. The bag was used to transport his personal belongings. It hid the contents from public view. No odour detectable by human senses escaped from it. Kang-Brown carried his luggage close to his body,

using the short-handled straps as if it were a shoulder bag. He had exclusive access to the bag and its contents, maintained his grasp on it, would not relinquish possession and control over it, and withdrew it from the officer's reach the moment MacPhee indicated he wanted to physically search the luggage. Nor was there any evidence that the traveling public at that time would expect their bags to be searched by police, electronic sensors, drug-sniffing dogs or Greyhound staff on the coaches or in the bus terminal.

60. In the absence of signs advising the lockers were subject to searches or unless a dangerous substance was contained therein, neither bus station staff nor police had a right to search without a warrant: *R. v. Buhay*, [2003] 1 S.C.R. 631 at paras. 20, 21. The trial judge erred by stating "it cannot be said that travellers choosing to use public transport in these days of random terrorist attacks have a reasonable expectation that their luggage is exempt from search." The evidence was otherwise. There was no policy of searching luggage by staff or police. Greyhound terminals lacked the inspection equipment seen at airports. Unlike later cases, such as R. *v. Mercer*, [2004] A.J. No. 634 at paras. 4, 21, 25, 33, the only security policy Greyhound adopted to deal with terrorism was posting signs, but no evidence confirmed their presence. This atmosphere was vastly different from an airport, where anyone boarding a place can reasonably assume their luggage will be searched for security purposes first: *R. v. Daley*, [2001] A.J. No. 815 at paras. 4-9, 23, 47, 49, *R. v. Lam & Dinh*, [2003] A.J. No. 811 at para. 60.

61. Once a privacy interest is presumed, the accused need not testify to that effect: *R. v. Tessling*, para. 38. Thus, the lower courts erred by discounting Kang-Brown's subjective expectation of privacy on the basis that he did not give evidence on the *voir dire*.

62. There is judicial discomfort with using sniffer dogs to conduct "speculative sweeps" for drug traffickers: *R. v. Taylor*, [2006] N.J. No. 218 at paras. 30-36. The tension lies between our historic expectation of privacy as normative and reasonable and the arsenal of current police investigatory technologies. See S. Coughlan, "Privacy Goes to the Dogs" 40 C.R. (6th) 31. The process is not sanitized where agencies such as Greyhound, a school or the electric company invite or consent to police searches: citizen's personal privacy is compromized regardless whether police providing security for them or whether such institutions are acting as agents of the state. *R. v. A.M.*, [2006] O.J. No. 1663, *R. v. Le*, [2005] A.J. No. 338 at para. 62.

63. A breach of *Charter* section 8 privacy interests is presumed when a sniffer dog is deployed in the course of an arbitrary detention. *R. v. A.M.*, [2006] O.J. No. 1663 at paras. 57-59, *R. v. Lam & Dinh*, [2003] A.J. No. 811 at paras. 16, 58, 59, 75, *R. v. Peardon*, [2005] B.C.J. No. 807 at para. 16, 28, *R. v. Wong*, [2005] B.C.J. 204 at paras. 79, 102. A judicial determination that one's section 8 rights have been breached can be independent of any finding in relation to section 9 of the *Charter*. Notably, the same foreplay is present in the jetway cases whether or not the suspect's section 9 rights are breached: *R. v. Arabi*, [2002] A.J. No. 549 at paras. 1-8. An arbitrary detention will make a section 8 breach more egregious for the purpose of assessing the seriousness of the breach, but it is not determinative of the lawfulness of the search at issue. Thus, if the dog sniff is a search and one for which the arresting officer lacked consent or reasonable and probable grounds, the police conduct is unlawful notwithstanding the absence of an arbitrary detention. The case at bar presents such a scenario.

64. Some Courts have concluded that there is no breach of the right to privacy if the luggage put to the canine olfactory test is in transit, the owner is absent, and/or the possibility of a search of baggage is visibly posted or presumed: they rely on the absence of a reasonable expectation of privacy or the fact that no biographical information would be disclosed by the dog sniff. *R. v. Taylor*, [2006] N.J. No. 218 at paras. 2-6, *R. v. Gosse*, [2005] N.B..J. No. 330 at paras. 8-17, 24-28, 39, *R. v. Mercer*, [2004] A.J. No. 634 at paras. 23, 30, 31, 37, 38, 39. None of these decisions reconcile the distinction between the legendary accuracy of the dogs' sniff, reported at *R. v. Donovan*, [1991] N.W.T.J. No. 37 at page 3, *R. v. Gosse*, [2005] N.B..J. No. 330 at paras. 7, 36, *R. v. Mercer*, [2004] A.J. No. 634 at paras. 9, 11, 43, *R. v. Wong*, [2005] B.C.J. 204 at para. 15 with the mundane or "meaningless" data generated by FLIR technology. In that regard, they are fundamentally flawed. Madam Justice Paperny was correct in noting such disctinction was of great importance at para. 36 of *R. v. Tessling* and in the circumstances of this case.

(c) R. v. Tessling **is distinguishable from** *R.. v. Lam & Dinh*

65. References in *R. v. Lam & Dinh*, [2003] A.J. No. 811 at paras. 30-35 to the subsequently overturned decision of Ontario Court of Appeal in *R. v. Tessling* led some judges to conclude that *Dinh & Lam* is no longer good law. That is not so. The references in *Dinh & Lam* to FLIR technology, though inconsistent with *Tessling*, are *obiter dicta*. The balance of principles espoused therein are sound.

66. This Court in *Tessling*, at paragraphs 28-29 makes clear that the reasonableness of one's expectation of privacy is inextricably linked with the quality and specificity of the information the technological aid can produce. That would be true whether police rely on FLIR imaging or a dog sniff. The critical difference is that the former produces data which, on its own, is mundane or meaningless (*R. v. Tessling*, paras. 36, 55, 58). The latter is nearly conclusive. Unlike the FLIR images which merely buttress other factors justifying a warrant to search a house, the dog sniff is considered sufficiently reliable on its own as a basis for arrest. Thus, the other factors gleaned in a Jetway investigation - the "elongated stare," rubbernecking or a recently purchased ticket - are hardly relevant to justify the arrest. The positive indication for the presence of controlled drugs by a trained police service dog sniff is akin to "though the wall" technology which it can "see" into the private space and identify its contents: *Kyllo v. United States*, (2001) 533 U.S. 27. The police were interested in the dog sniff specifically because it revealed the contents of Kang-Brown's bag and confirmed MacPhee's suspicion that Kang-Brown was a drug courier. It was not a mundane factor that would be irrelevant absent other corroboration.

67. The FLIR technology considered in *Tessling* has been surpassed by digital recording ammeters (load profile devices) which monitor the cycle of electric consumption and can produce graphs which readily reveal the distinctive patterns of usage consistent only with a marihuana grow operation. Like the responses of sniffer dogs, the DRA readouts standing alone can provide a basis for a warrant. For that reason courts have ruled that DRA technology may be the subject of a warrant application, but not the basis for one. Given the precision of results obtained from a DRA printout and the positive indication of a sniffer dog, they are equally distinguishable from *Tessling*. *R. v. Le*, [2005] A.J. No. 338 at paras. 22, 25, 29-30, 37-38, 43, 46-47, *R. v. Cheung*, [2005] S.J. No. 474 at paras. 2, 12, 43-46, 51-61, 63-65.

68. Although the right to privacy protects a biographical core of personal information from involuntary dissemination to the state, particularly information which tends to reveal intimate details of the lifestyle and personal choices of the individual, the test does not end there. The nature of the information relating to lifestyle and personal choices is merely an illustration, not an exhaustive list *R. v. Tessling*, at paras. 25-26. Nonetheless, it is still applicable to the dog sniff cases.

69. The lower courts failed to consider that odours emanating from Kang-Brown's bag would reveal details of his lifestyle and personal choice. By artificially limiting the involvement of the dog by the nature of information it communicates to its handler, they reason that personal details are not revealed to the state. In fact, the dog can smell enough to discern what food might be in the bag, whether the laundry is clean or dirty, whether the owner has any pets, the environment in which the bag has been stored, whether the scent of the bag matches the person carrying it, and perhaps even intimate details of a person's recent sexual history. The discomfort inherent in sharing these odours with an unfamiliar dog is not mitigated by its status as a police service animal which is still an agent of the state. Even if the dog has not been trained to communicate anything other than the presence of controlled drugs, that does not change the fact that the dog, under the direction and control of its police handler, intruds upon and detects intimate details of the lifestyle and personal choices of the individual.

70. By concentrating only on the information the dog communicates to its handler, and by limiting the dog's training to sniffing for controlled drugs, the trial judge and the majority of the Alberta Court of Appeal concluded that the use of the sniffer dog was non-intrusive, much like the distant and passive infrared photography of heat radiating from a building: *R. v. Tessling*, paragraph 34, 55. Notwithstanding the analogy between the use of FLIR technology and a dog sniff, wherein each detects information from within by inspecting the surface, the manners of search differ greatly. The dog sniffed the personal baggage in Kang-Brown's hands. He refused to let MacPhee search his bag and tried to secure his belongings. These dog searches are literally a very different animal, and sometimes a rather aggressive one. *R. v. Donovan,* [1991] N.W.T.J. No. 37 (S.C.) at pages 2-3, *R. v. Mercer*, [2004] A.J. No. 634 at para. 45, *R. v. Wong*, [2005] B.C.J. 204 at para. 15.

71. The majority of the Alberta Court of Appeal dismissed the spectre of the state surveilling citizens not under investigation for particular offences, but offered no safeguards to prevent it from occurring. With respect, the image of police patrolling public places with sniffer dogs in order to investigate rather than protect the populace is objectionable. It is qualitatively different from a remote and passive heat-sensing device of which the subject might remain blissfully ignorant. R. *v. Wong*, [1990] 3 S.C.R. 36 at pages 47-52, *R. v. A.M.*, [2006] O.J. No. 1663 at para. 47. The intrusiveness distinguishes the dog sniff cases from the FLIR line of reasoning: *R.*

v. Lam & Dinh, [2003] A.J. No. 811 at paras. 40-49. The presumption that police accompanied by sniffer dogs may engage in regular patrols of public places such as bus stations, as advocated in *R. v. Gosse*, [2005] N.B..J. No. 330 at paras. 29, 60, leads inexorably to the police state to which Madam Justice Paperny in her dissent alludes.

(d) Trial judges may not rely on the reasons used to determine there was no *Charter* breach at all when assessing the seriousness of a section 8 *Charter* breach.

72. The trial judge erred law in applying in the tests pursuant to s. 24(2) of the *Charter*. The obtrusiveness of the warrantless search was given short shrift, as was the individual's reasonable expectation of privacy: *R. v. Buhay*, [2003] 1 S.C.R. 631 at page 655 at para. 52. Notwithstanding *dicta* about the efficiency of dogs, many might reasonably find it intrusive on their personal space.

73. Paperny J. set out, at page 52, para. 87 of the Appellant's Record, the *modus operandi* of the Jetway program which capitalizes on the cooperative nature of the Canadian public in order to conduct an increasingly pointed investigation. Although the conversation was brief, the detention was progressive and included surveillance and stalking. It triggered nervousness leading to near panic in Kang-Brown. Other courts have noted the same progression: see *R. v. Arabi*, [2002] A.J. No. 549 at paras. 1-8, 47, 48 (Prov. Ct.), para. 87. The pattern culminates by invoking the nose of a trained drug-detecting police service dog to find the odour of drugs not discernible to the human nose.

74. This nature of the test for admissibility or exclusion of evidence pursuant to section 24(2) of the *Charter* is predicated on a breach of a Constitutional right. When a judge rules there is no breach of a Constitutional right, then considers the section 24(2) test, s/he must do so based on an assessment of the evidence which gives effect to the seriousness of the breach. That is not to say all breaches are serious, but the trial judge in this case erred by relying on her reasons for denying that there was a breach to minimize its importance in the section 24(2) assessment. As such, she erred in principle.

Part IV - Submissions on Costs

75. Costs are not at issue in this appeal.

Part V - Order Sought

76. It is respectfully requested that this Court allow this appeal and find that the Appellant's *Charter* rights were breached.

77. The Appellant asks this Honourable Court to exclude the evidence tendered on the *voir dire.*

78. In the alternative, a *trial de novo* is sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

____

Alias Amelia Sanders,

Part VI - List of Authorities **Paragraphs**

Authority	Paragraphs
Kyllo v. United States, (2001) 533 U.S. 27	56
R. v. A.M., [2006] O.J. No. 1663	57, 62, 63, 64, 71
R. v. Arabi, [2002] A.J. No. 549	63, 73
R. v. Buhay, [2003] 1 S.C.R. 631	55, 57, 59, 60, 72
R. v. Cheung, [2005] S.J. No. 474	64, 67
R. v. Daley, [2001] A.J. No. 815	60
R. v. Donovan, [1991] N.W.T.J. No. 37	64, 70
R. v. Evans, [1996] 1 S.C.R. 8	53
R. v. Feeney, [1997] 2 S.C.R. 13	52
R. v. Gosse, [2005] N.B..J. No. 330	60, 64, 71
R. v. Lam & Dinh, [2003] A.J. No. 811	54, 57, 60, 63, 64, 65, 71
R. v. Le, [2005] A.J. No. 338	62, 64, 67
R. v. Mann, [2004] 3 S.C.R. 59	52
R. v. Mercer, [2004] A.J. No. 634	60, 64, 70
R. v. Peardon, [2005] B.C.J. No. 807	63
R. v. Taylor, [2006] N.J. No. 218	62, 64
R. v. Tessling, [2004] 3 S.C.R. 432	58, 61, 64, 65, 66, 67, 68, 70
R. v. Wong [1990] 3 S.C.R. 36	71
R. v. Wong, [2005] B.C.J. 204	63, 64, 70
S. Coughlan, "Privacy Goes to the Dogs" 40 C.R. (6th) 31.	62

Part VI - Constitution Act, 1982

Section 8: Unreasonable Search or Seizure

8, Everyone has the right to be secure against unreasonable search or seizure.

8. Chacun a droit a la protection contre les fouilles, les perquisitions ou les saisies abusives.

Section 9: Arbitrary Detention or Imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

9. Chacun a droit a la protection contre la detention ou l'emprisonnement arbitraires.

Section 24(2): Exclusion of Evidence

24(2). Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings wouldb ring the administration of justice into disrepute.

24(2). Lorsque, dans une instance visee au paragraphe (1), le tribunal a conclu que des elements de preuve ont ete obtenus dans de conditions qui portent atteinte aux droits ou libertes garantis par la presente charte, ces elements de preuve sont ecartes s'il est etabli, eu egard aux circonstances que leur utilisation est susceptible de deconsiderer l'administration de la justice.

Court File Number: 31598

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Alberta)

BETWEEN:

GURMAKH KANG BROWN

Appellant
(Appellant in Court of Appeal)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent in Court of Appeal)

APPELLANT'S BOOK OF AUTHORITIES

Alias A. Sanders & James M. Lutz
Barristers & Solicitors
The Grain Exchange Building
#608, 815 First Street S.W.
Calgary, Alberta, T2P 1N3
Tel. (403) 294-9495
Fax: (403) 294-9599

Counsel for the Appellant

Gowling Lafleur Henderson LLP
Henry S. Brown, Q.C.
2600 - 160 Elgin Street
P.O. Box 466, Station "D"
Ottawa, Ontario, K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: henry.brown@gowlings.com
Agent for the Appellant

Jolaine Antonio
Attorney General of Canada
#510, 606 - 4th Street S.W.
Calgary, Alberta, T2P 1T1
Tel. (403) 299-3978
Fax: (403) 299-3966

Counsel for the Respondent

Robert Frater
Attorney General of Canada
284 Wellington Street, Suite 2311
Ottawa, Ontario, K1A 0H8
Tel. (613) 957-4763
Fax: (613) 941-7865
E-mail: robert.frater@justice.gc.ca
Agent for the Respondent

List of Authorities	Tab

List of Authorities	Tab
Kyllo v. United States, (2001) 533 U.S. 27	1
R. v. A.M., [2006] O.J. No. 1663	2
R. v. Arabi, [2002] A.J. No. 549	3
R. v. Buhay, [2003] 1 S.C.R. 631	4
R. v. Cheung, [2005] S.J. No. 474	5
R. v. Daley, [2001] A.J. No. 815	6
R. v. Donovan, [1991] N.W.T.J. No. 37	7
R. v. Evans, [1996] 1 S.C.R. 8	8
R. v. Feeney, [1997] 2 S.C.R. 13	9
R. v. Gosse, [2005] N.B..J. No. 330	10
R. v. Lam & Dinh, [2003] A.J. No. 811	11
R. v. Le, [2005] A.J. No. 338	12
R. v. Mann, [2004] 3 S.C.R. 59	13
R. v. Mercer, [2004] A.J. No. 634	14
R. v. Peardon, [2005] B.C.J. No. 807	15
R. v. Taylor, [2006] N.J. No. 218	16
R. v. Tessling, [2004] 3 S.C.R. 432	17
R. v. Wong [1990] 3 S.C.R. 36	18
R. v. Wong, [2005] B.C.J. 204	19
S. Coughlan, "Privacy Goes to the Dogs" 40 C.R. (6th) 31.	20