**File no. 31598**

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

B E T W E E N:

**GURMAKH KANG BROWN**

Appellant

- and -

**HER MAJESTY THE QUEEN**

Respondent

- and -

**THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)**

Intervener

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# FACTUM OF THE INTERVENER, CRIMINAL LAWYERS' ASSOCIATION
**(pursuant to Rules 55 and 59 of the *Rules of the Supreme Court of Canada*)**

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## PART I - STATEMENT OF FACTS

1. On April 05, 2007, Deschamps J. granted the Criminal Lawyers' Association (Ontario), hereinafter the CLA, intervener status in the *R. v. Kang Brown* and *R. v. A.M.* appeals. Leave was granted to file a 20 page Factum. The Court reserved on the request to make 20 minutes oral argument.

*Order of Deschamps J.*, dated April 5, 2007

2. The CLA adopts the facts as set out in the Appellant's Factum in *R. v. Kang Brown*, and the Respondent's Factum in *R. v. A.M.*

## PART II - POINTS IN ISSUE

3. The appeals in *R. v. Kang Brown* and *R. v. A.M.* raise two important issues concerning the scope of s. 8 of the *Charter* and the police power to intercept "emissions", namely:

(i) The warrantless use of specially trained, highly sensitive dogs by police to detect narcotics in individuals' personal effects; and

(ii) The contextual, fact-specific approach to be taken to a s. 8 analysis, which focuses on the nature and quality of the information produced by the impugned surveillance instrument, and its intrusiveness in relation to the individual's reasonable privacy interests.

4. The CLA submits that the reasons of the Ontario Court of Appeal and of the minority in the Alberta Court of Appeal are correct. Specifically, it is the position of the CLA that:

- The basic lesson of *Tessling* is that a person's expectation of privacy is inextricably linked with the quality and specificity of the information the technological aid can produce.
- Section 8 analyses are highly contextual; the result in *Tessling* was restricted to the specific factual attributes of FLIR technology as it then existed. It should not be applied as if it authorized the use of any equipment to detect any emission in any public place.
- The use of dogs as an instrument of investigation is extremely intrusive because of their potentially aggressive behaviour, historical association with the

persecution of minorities, and the subjective fear experienced by many individuals.

- The fact that a dog's sniff is precise and may be relied upon on its own as a basis for arrest—as compared to FLIR data which, on its own, is meaningless and can only justify a warrant to search a house in combination with other information—is a significant factor distinguishing the intrusive state action at issue in the cases currently under appeal, from the heat imaging in *Tessling.*

- Dog sniff searches are so intrusive that police should be required to have full *Hunter v. Southam,* [1984] 2 S.C.R. 145, grounds for conducting them. Alternatively, and at the very minimum, police should have the grounds required by *R. v. Mann,* [2004] 3 S.C.R. 59, before conducting the sniff search, e.g. reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the sniff search is reasonably necessary on an objective view of the circumstances.

- Drug-sniffing dogs should not be used to conduct "speculative sweeps". However, where specific, identifiable security concerns present an immediate threat to the protection of life, bomb-sniffing dogs may be warranted.

## PART III - ARGUMENT

5. At the centre of both the *Kang Brown* and *A.M.* appeals are conflicting interpretations of this Court's decision in *R. v. Tessling* and its application to the use of drug-sniffing dogs to detect narcotics in individuals' personal effects. While both of the lower courts relied heavily on *Tessling,* they came to opposite conclusions as to its application. In *Kang Brown*, the majority of the Alberta Court of Appeal held that *Tessling* stands for the broad proposition that emissions emanating from private to public do not attract any privacy interest and, as a consequence, that police can use whatever technological aids are currently available to detect them. In *A.M.*, by contrast, the Ontario Court of Appeal held that there is a significant difference between the targeted use of FLIR technology at issue in *Tessling* and the use of a dog to randomly sniff at the belongings of an entire student body. The Court found that this kind of "speculative sweep" was an unreasonable search.

> *R. v. Tessling*, [2004] 3 S.C.R. 432
> *Reasons for Judgment of Côté J.A.* (Alberta Court of Appeal) at para. 32(j); A.R. Vol. I at p. 39.

*Reasons for Judgment of Armstrong J.A.* (Ontario Court of Appeal) at para. 47; A.R. Vol. I at p. 29.

6. The CLA submits that the majority of the Alberta Court of Appeal vastly oversimplifies the reasoning in *Tessling* in a way which substantially diminishes section 8 protection—not only in relation to dog sniff searches, but, by implication, also with regard to the interception of a wide range of information about daily human activity by agents of the state.

### (i) The Decision Of This Court In *Tessling*

7. In *Tessling*, this Court addressed the use of a Forward Looking Infra-Red ("FLIR") camera to overfly properties owned by an individual suspected of housing a marijuana grow-operation. At issue was whether the state action constituted a "search" and therefore attracted *Charter* protection. In determining that the use of FLIR technology did *not* constitute a search, the Court emphasized that where police use "external surveillance" to obtain information, reasonableness must be determined by focusing on the "nature and quality" of the information produced by the surveillance instrument, and then evaluating its impact on an accused's privacy interest.

*Tessling, supra,* at paras. 35-36, 45.

8. A determining factor for the Court was that FLIR technology could not, at that stage of its development, permit any inferences about the precise activity giving rise to the heat. FLIR did not indicate what activities generated the heat "on view" outside of the house, but rather only that some activities in the house generated heat. Thus, considering the "totality of the circumstances"—a highly contextual, fact-specific analysis—the Court concluded that the use of FLIR technology did not intrude on the reasonable sphere of privacy of the accused. The Court expressly limited its decision, therefore, to the specific characteristics of FLIR technology at the time.

*Tessling, supra,* at paras. 35-36, 53, 55, 62.

### (ii) There is a Privacy Interest in an "Emission" Emanating From Private to Public

**THE INFORMATION CONVEYED BY POLICE DOGS IS PRECISE AND SPECIFIC**

9. The majority of the Alberta Court of Appeal ignores the intrusiveness of police dog sniffing and over-simplifies *Tessling* by failing to recognize the fact-specific, contextual nature of a s.8 analysis. Most significantly, the Alberta Court of Appeal ignores the weight that *Tessling* gives to the nature of the sensory enhancing device involved, the type of information obtained from its use, and the "quality" of the information the surveillance can deliver.

10. In the majority's view, *Tessling* holds that emissions emanating from private to public do not attract any privacy interest and, as a consequence, that police can use whatever technological aids are currently available to detect them. For example, Justice Côté states the following as a key principle flowing from *Tessling*:

> If something, including odors, is emitted into the public domain from a private place, the police need not refrain from using their own senses, or equipment (limiting that to present technology), to detect it. Whether the equipment is now in general public use is not the issue. (citations omitted)
>
> *Reasons for Judgment of Côté J.A.* (Alberta Court of Appeal) at para. 32(j); A.R. Vol. I at p. 39.

11. The majority of the Alberta Court of Appeal suggests that *Tessling* holds that devices which detect something emanating from a private place are not the equivalent of a search "inside" that place. This interpretation ignores the Court's emphasis in *Tessling* on the non-intrusive aspect of FLIR technology. At paras. 46-53, Binnie J. specifically addresses the intrusiveness of the surveillance technology as a key factor in determining whether a search has occurred. FLIR technology, according to Binnie J., cannot "see" inside a house because it only reads patterns of heat outside of the building, without being able to determine the *source* of that heat or the activity that produced it. As Binnie J. states:

> ...the debate is forced back to the same question posed at the outset: what exactly does the FLIR image tell the police about the existence of a marijuana grow-op inside the house? The answer, as discussed, is that FLIR imaging cannot identify the source of the heat or the nature of the activity that created it. It merely tells the police that there are heat-generating activities within the home. (It would be strange if it were otherwise.) The existence and distribution of heat on the external walls is consistent with a number of hypothesises including as one possibility the existence of a marijuana grow-op. FLIR's usefulness depends on what other information the police have.
>
> *Tessling, supra,*at para. 53

12. Because the data that FLIR produces is meaningless on its own and can only be used to corroborate other information, it is less intrusive than other types of searches. By contrast, the dog sniff indicates with significant precision (according to the finding of the Trial Judge in *Kang Brown*, the dog was accurate over 92 percent of the time) whether drugs are present, or even whether they *were* present.[1] It thus reveals not only the presence of contraband, but the target's conduct with or exposure to drugs in the recent past. It is precisely the nature of the instrument and the quality of the information that it produces which was at the heart of the decision in *Tessling*. Whether an instrument is more or less intrusive and whether the information it produces is more or less precise and specific in relation to the offence being investigated will help to determine whether the state action attracts the protection of s. 8.

> *Reasons for Judgment of Romaine J.* (Alberta Court of Queen's Bench) at para. 73(g), A.R. Vol. I at pp. 19-20
> *Tessling, supra,* at paras. 50-54.

13. This is the interpretation of *Tessling* adopted by the Ontario Court of Appeal in *A.M.*, as well as a number of other trial courts, in which Armstrong J.A. stated:

> I am not persuaded that the judgment of the Supreme Court of Canada in Tessling is supportive of the Crown's position that a dog sniff is not a search. In Tessling, the house

[1] Despite the Trial Judge's finding, the accuracy and reliability of sniffer dogs is in significant dispute, a fact which played a central role in Justice Souter's dissent in the recent US Supreme Court Case *Illinois v. Caballes*: "The infallible dog, however, is a creature of legal fiction....their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to error by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine....Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are 'generally reliable' shows that dogs in artificial testing situations return false positives anywhere from 12.5 to 60 percent of the time...." 543 U.S. 405, 125 S.Ct. 834 (2005) at 839-40 (citations omitted). It is regrettable that better legislative facts are not before this Court on this issue.

> of the accused was specifically targeted as a result of information that the accused was involved in a marijuana grow operation. I see a significant difference between a plane flying over the exterior of a building (on the basis of information received) and the taking of pictures of heat patterns emanating from the building, and a trained police dog sniffing at the personal effects of an entire student body in a random police search.
>
> *Reasons for Judgment of Armstrong J.A.* (Ontario Court of Appeal) at para. 47, A.R. Vol. I at p. 29.
> *R. v. Le* (2005), 30 C.R. (6th) 124 (Alta. Q.B.)
> *R. v. Cheung* (2005), 272 Sask.R. 49 (Sask. Q.B.)

14. By contrast, the majority of the Alberta Court of Appeal contended that the police should not have to avert their senses to the odour of drugs, whether or not their senses are aided by an external instrument. In taking this approach, however, the CLA submits that the majority asked itself the wrong question. There is a significant difference between requiring the police to "avert" their senses, e.g. to turn a blind eye, to indicators of illegal activity, and allowing them to deliberately search out odours through the use of an instrument of extreme sensitivity. (Specially trained drug-sniffing dogs have a sense of smell many times superior to that of humans.) As Justice Paperny pointed out, referring to the decision of the U.S. Supreme Court in *Kyllo v. United States*, as cited by *Tessling*: "[t]he statement [in *Kyllo*] is that public officials need not turn a blind eye, a concept distinct from searching out emissions without authorization". [emphasis added]

> *Reasons for dissent of Paperny J.A.* (Alberta Court of Appeal) at para. 105, A.R. Vol. I at p. 56.
> *Tessling, supra,* at para. 51.
> *Kyllo v. United States,* 533 U.S. 27 (2001).

15. This point has also been made by academic commentators. As one observer stated in relation to the majority's decision in *Kang Brown*:

> It is perfectly reasonable, for example, for police to rely on the smell of alcohol on a driver's breath or in a stopped vehicle as part of a justification for making a breathalyser or ALERT demand. But one cannot reason from that fact to the conclusion that other methods of investigating the driver or car, such as the use of an alcohol detection wand to find quantities of alcohol in the air that are not discoverable by the human nose, would not constitute a search. Not averting one's senses is quite distinct from deliberately training one's investigative technology (including a sniffer dog's nose) on a particular suspect to detect the otherwise undetectable.

Steve Coughlan, *Privacy Goes to the Dogs*, (2006), 40 C.R. (6th) 31 at pp. 33-34.

The use of a wand to detect miniscule quantities of alcohol undetectable to a police officer's senses is analogous to the police use of sniffer dogs to detect the presence of prohibited substances: in both cases a police officer would not be required to avert his or her senses from any odour detectable to the ordinary human senses, but the reliance on a sensory enhancing device to *reveal* specific and meaningful information about the individual's activities transforms the interaction between the police officer and the individual from a neutral interaction into a search.

16. Clearly, not every use of a technological aid turns an observation into a search. If that were so, police officers would be conducting a search whenever they wore glasses. While eye glasses allow a person with weak eyesight to see *as well as an ordinary person* with good eyesight, however, binoculars and x-ray devices allow an individual to see something *nobody* could see with a naked eye. There is thus a qualitative difference between glasses and binoculars as a technological aid. It is this difference in the specificity and precision of the information which the technology conveys which, according to *Tessling*, is significant for the purposes of a s. 8 analysis. A rigorous section 8 test must be capable of discerning between, for example, the emissions of a person who walks down a street and blows smoke from a marijuana cigarette into a police officer's face, and those of an individual who has a triple-wrapped bag of marijuana in the locked trunk of a car. The framework proposed by the majority of the Alberta Court of Appeal would be incapable of making such distinctions.

*Tessling, supra,* at paras. 35-36.

**IF S. 8 DOES NOT PROTECT EMISSIONS ITS PRIVACY PROTECTION IS SUBSTANTIALLY REDUCED**

17. The majority of the Alberta Court of Appeal pays particular attention to *Tessling's* case-by-case approach, and repeatedly emphasizes that it will not create "[f]actual categories of police action". Ironically, however, the court succeeds in doing exactly that: by determining that the interception of emissions from private to public are not a "search", the decision of the Court

below creates a categorical, sweeping exclusion of a wide range of informational data from the scope of s. 8 and the protection of the *Charter*.

> *Reasons for Judgment of Côté J.A.* (Alberta Court of Appeal) at para. 3; A.R., Vol. I, p. 33.

18. The conclusion that a police directed dog sniff is not a search is of serious concern for two reasons. First, a decision which excludes "emissions" from the protection of the *Charter* could result in serious intrusions into a wide range of human activity. The danger of such an approach becomes obvious when one considers the variety of "emissions" resulting from common human activities, particularly as the result of the proliferation of wireless technology, communications devices, electro-magnetic radiation, and GPS systems. Virtually every kind of communicative activity has "emanations." Under the Alberta Court of Appeal's approach, for example, it would not be a search for police officers to sound waves emanating from inside a house with a parabolic microphone.

19. Moreover, as some commentators observe, humans unconsciously and involuntarily "emit" DNA on a relatively constant basis.[2] If the state had unfettered access to all such "emissions", a wide variety of information about our day-to-day movements, relationships, and financial and business decisions would be subject to warrantless monitoring by the state. Such a sweeping outcome, the CLA submits, cannot have been the import of *Tessling*.

> Renée M. Pomerance, *Shedding Light on the Nature of Heat: Defining Privacy in the Wake of R. v. Tessling*, (2005), 23 C.R. (6th) 229 at 236.
> Ian Kerr and Jena McGill, *Emanations, Snoop Dogs and Reasonable Expectations of Privacy*, forthcoming in Criminal Law Quarterly 52 (23).

20. The difficulties with this approach become even more apparent when considering the majority's statement that "the police need not refrain from using their own senses, or equipment (limiting that to present technology) to detect [emissions]". If police are able to use *whatever*

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[2] Indeed, recent studies have even demonstrated that dogs can detect certain types of cancer with 86 to 97 percent accuracy: M. McCulloch, et. al., "Diagnostic Accuracy of Canine Scent Detection in Early- and Late-Stage Lung and Breast Cancers", 5 *Integrative Cancer Therapy* 2006.

*technology is in current use*, there is no limit to the state's ability to detect and examine the private activities of everyday life.

> *Reasons for Judgment of Côté J.A.* (Alberta Court of Appeal) at para. 32(j); A.R. Vol. I at p. 39.

21. In her dissent in *Kang Brown*, Justice Paperny correctly pointed out the implications of the majority's reasoning:

> Such an interpretation renders a vast range of common human activities subject to police surveillance without prior judicial authorization. "Emissions" are broadly understood to include everything that can be seen, heard, or smelled and may "emanate" from computers, cell phones, homes, televisions, radios, persons, luggage, handbags, etc. in other words from anywhere or anything. The majority accepts this. Further they accept it without regard to the particular technology the police choose to use in the detection. I do not accept that the Supreme Court of Canada in Tessling sought to eradicate all privacy interests in "emissions" that occur from private to public. In my view Tessling was not intending to eviscerate s. 8 by granting police a license to intercept information in this manner. [emphasis added]
>
> *Reasons for Dissent of Paperny J.A.* (Alberta Court of Appeal) at para. 106; A.R., Vol. I, p. 56.

22. Second, if, as the majority of the Alberta Court of Appeal suggested, there are no privacy implications to a dog sniff, it would follow that there are no public places which the police cannot attend with investigative dogs. This would include the workplace, places of worship, schools, shopping centres, athletic facilities, concert halls, and so forth. Such a finding would implicitly authorize police officers to randomly patrol public spaces with highly trained dogs in the absence of articulable cause, permitting the state to intercept a wide range of personal information. In the CLA's view, the dictates of the ordered liberty of Canadian society do not require or permit such intrusive policing.

### (iii) The Use of Dogs as Instruments of Surveillance

#### THE USE OF DOGS AS A SEARCH INSTRUMENT: A REASON FOR CAUTION

23. Counsel for the Minister of Justice comments that "with respect to detecting odours or smells dogs do what people do, they just do it better", while the majority of the Alberta Court of Appeal states that a canine nose is "something similar to (but more sensitive than) an ordinary

human nose". With respect, these characterizations of the use of sniffer dogs is disingenuous. At its core, these statements assume that because dogs are "natural", rather than "hi-tech" instruments, they are not intrusive and should be considered as simply being an extension of the police officer's own natural senses. For this reason, the Attorney General argues, "[w]hen a police officer in a public place detects an odour in the air there is no violation of s. 8 of the *Charter*. That the same odour is detected by a trained police dog does not change the result." According to this premise, because a police officer need not "avert" his senses, he is also permitted to deliberately bring a highly sensitive dog whose senses are may orders of magnitude keener than his own to a place without even a reasonable suspicion that there are drugs. This proposition is problematic for three reasons.

> *Appellant's Factum,* A.M., para. 3.
> *Reasons for Judgment of Côté J.A.* (Alberta Court of Appeal) at paras. 52-53; A.R., Vol. I, p. 45.

24. First, part of the significance of *Tessling* lies in its recognition that courts should avoid a knee-jerk reaction which supposes that all technological surveillance is so intrusive that it engages s. 8. What is important is not the nature of the technology, the Court determined, but rather what kind of information the police are able to obtain from it, what meaning it conveys, and how they use it. For the same reason, it is not significant to a s. 8 analysis whether the sensory enhancing device used by the state in its investigations is "natural", such as a dog's innate ability to detect odours, or "high-tech", such as the use of x-ray machines. As noted, a dog's sense of smell is many orders of magnitude times more sensitive than that of a human being, increasing a police officer's ability to detect substances invisible to the naked eye by a magnitude at least as great as other kinds of technological innovations. What is significant, then, is not the "organic" nature of a dog as an instrument of surveillance, but the quality of the information that dogs as sensory-enhancing devices produce.

> *Appellant's Factum,* A.M., para. 3.
> *Tessling, supra,* at paras. 35-36, 53-55.

25. Second, this approach fails to analyse the *purpose* for which the officers approached Kang Brown and A.M.. In *R. v. Evans*, this Court found that when a police officer approaches a

dwelling for the specific purpose of sniffing the air, this constitutes "an olfactory search". Although there is a deemed invitation to the public to knock at a front door, this invitation does not contemplate officers knocking on the door for the specific purpose of sniffing for marijuana. As La Forest J. stated, "there are sound policy reasons for holding that the intention of the police in approaching an individual's dwelling is relevant in determining whether or not the activity is a 'search' within the meaning of s. 8".

> *R. v. Evans*, [1996] 1 S.C.R. 8 at paras. 15-16, 20, 30.

26. As noted by Armstrong J.A. in *A.M.*, the decision in *Evans* is directly applicable to the case at hand. Just as the police did not 'happen upon' the smell of drugs in *Evans*, here the police did not just "happen" to bring a highly-trained drug-sensitive dog to a bus depot or a school. The police attended the bus depot and the school with a drug-sniffing dog with a very specific purpose: to find drugs and arrest drug traffickers. This was not the "smell" version of the plain view doctrine.

> *Reasons for Judgment of Armstrong J.A.* (Ontario Court of Appeal) at para. 48; A.R., Vol. I at p. 29.

27. Third, as Justice Armstrong pointed out at the Ontario Court of Appeal, by comparison to FLIR images which are taken at a distance and unbeknownst to the subject of the investigation, a dog sniff is in fact a particularly intrusive experience. This observation is supported by *R. v. Donovan*, in which the "aggressive profile" of police dogs played a key role in the trial judge's finding that an inspection conducted by an investigative dog constituted a search under the *Charter*. *Donovan* involved the use of a police dog, Argus, to detect the presence of narcotics in luggage in the public area of an airport. Browne J. noted that the police had no reason to suspect Donovan, and that Argus "cruised" around the airport sniffing anyone "who might be at the airport for any reason that afternoon." The dog indicated to his handler that there were narcotics in Donovan's carry-on luggage and, when the dog handler asked the dog for confirmation of narcotics, responded by jumping on his hind legs and barking. The trial judge found that the dog may have made physical contact with Donovan, and did make contact with his hand luggage. Observing that "[i]f the dog's attention is not drawn away when a scent is located, he will paw,

bite and tear at the location in an attempt to reach the source of the scent," Browne J. took note of that fact that:

> Argus as with any other police dog will react and 'attack' a person if the dog is threatened, to protect his master, or if ordered to attack. Also, the dog will bite if he is resisted, if someone is aggressive towards him or if he feels that someone is afraid of him....Cpl Cuvelé was cautious to point out that the handler must work closely with the dog to prevent some harm from occurring. Cpl. Cuvelé in his evidence described two incidents where Argus reacted to people in a disturbing manner to fear in reacting aggressively towards a young boy at a Boy Scout meeting, to aggression where he bit a person in one of the taverns in Iqaluit [sic].

Browne J. concluded that "[t]he invasion of personal space, [and] the potential or possibility of physical contact or physical harm" were key factors in determining that the police dog had conducted a search.

> *Reasons for Judgment of Armstrong J.A.* (Ontario Court of Appeal) at para. 47; A.R., Vol. I, p. 29.
> *R. v. Donovan*, [1991] N.W.T.J. No. 37 at pp. 1-3 (QL)

28. The use of dogs by law enforcement also has particularly negative historical associations. As Paperny J.A. noted:

> 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. [emphasis added]

Dogs have historically been used by law enforcement and para-military organizations as an instrument of intimidation and aggression against the most vulnerable members of society. For example, in Nazi Germany dogs were routinely used both in and outside of concentration camps in the persecution of Jews, homosexuals, and other "anti-social groups". Similarly, during the civil rights movement in the American South, dogs were used by law enforcement to break up peaceful protests and attack demonstrators, including schoolchildren. More recently, the use of dogs by some military jailers to terrorize the inmates of Abu Ghraib has become notorious, and images of this form of torture are ingrained in the public imagination.

*Reasons for Dissent of Paperny J.A.*, (Alberta Court of Appeal) at para. 135; A.R., Vol. I, p. 61.
*Appellant's Factum*, Kang Brown, para. 47.

29. Because of the association between state agents, the use of dogs, and cruel or inhumane treatment, it would be wrong to give state actors a blank cheque to employ dogs as an instrument of investigation without restriction. A failure to impose restrictions on the police use of dogs would ignore the cultural associations, subjective experiences, and enormously intimidating effect that dogs in the hands of law enforcement may have for many members of society. As Justice Le Dain observed in *R. v. Therens*, a *Charter* analysis should not ignore the reality of police-citizen interactions on the ground. The police use of sniffer dogs must therefore be subject to judicial scrutiny.

*R. v. Therens*, [1985] 1 S.C.R. 613 at pp. 633, 644.

**(iv) The Accused Had a Reasonable Expectation of Privacy**

30. It is firmly established in Canadian law that persons have an expectation of privacy in their belongings. While this expectation of privacy is lesser than the expectation of privacy in the home, it still attracts the protection of the *Charter*.

*R. v. Buhay*, [2003] 1 S.C.R. 631 at paras. 20, 21.
*R. v. Mohamad* (2004), 69 O.R. (3d) 481 at para. 25, (Ont. C.A.)
*R. v. Indoe* (2005), 26 C.R. (6th) 356 at paras. 40-41, 48 (Ont. S.C.J.)
*R. v. Sauvé* (1998), 59 C.R.R. (2d) 59 at 65 (Ont. Prov. Ct.)

31. Following on this jurisprudence, the Ontario Court of Appeal in *A.M.* held that students have a legitimate expectation of privacy in their schoolbags and cited with approval the following passage from the Canadian Civil Liberties Association:

> There are no contextual factors that diminish students' legitimate expectation of privacy, dignity, and autonomy in their backpacks. Students' expectation of privacy in their backpacks is objectively reasonable. Backpacks are not searched in the normal course of a school day, nor do students come to school expecting that their backpacks will be searched. The students did not consent to their backpacks being searched on November 7, 2002 and the Principal certainly could not consent on their behalf.

> *Reasons for Judgment of Armstrong J.A.* (Ontario Court of Appeal) at para. 50; A.R., Vol. I, p. 30.

32. Paperny J.A. came to a similar conclusion regarding an individual's luggage:

> ...the contents and odour of one's personal luggage can reveal intimate details of one's lifestyle and individual personal choices and thus constitute protected biographical core personal information. Further it cannot be disputed that the reason the police wanted the information from the dog sniff was to ascertain details about Kang Brown's personal lifestyle – that is, his involvement in illegal drug activity.
>
> *Reasons for Dissent of Paperny J.A.* (Alberta Court of Appeal) at para. 137; A.R., Vol. I, p. 62.

33. While individuals may *consent* to having their luggage checked where security concerns warrant—and entrance into a building such as an airport or courthouse may reasonably be contingent on an individual consenting to be searched—this does not mean that they *expect* that their luggage will be searched in the normal course of things.

34. In *R. v. Wong,* this Court established that a "broad and neutral" approach should be taken to determining whether a reasonable expectation of privacy exists. Such a determination does not depend on an *ex post facto* assessment of whether or not the persons subjected to the search were engaged in illegal activities.

> *R. v. Wong,* [1990] 3 S.C.R. 36 at para. 20.

35. The question at issue in these appeals, therefore, is not whether drug traffickers have a reasonable expectation of privacy, or whether drugs can be considered to be "inherently private", but whether people traveling on buses or students attending school have a reasonable expectation of privacy from the inspection of their personal effects by state agents. The "broad and neutral" approach to determining s. 8 rights dictated by *Wong* was adopted by the trial judge in *A.M.* and affirmed by the Ontario Court of Appeal. Of particular concern to the trial judge was the impact of the use of the investigative dog on the rights of the *other* students, whose possessions had equally been examined through the police use of an instrument of surveillance. As Hornblower J. stated:

> While this case centres around the rights of A.M., the rights of every student in the school were violated that day as they were all subject to an unreasonable search. This search was unreasonable from the outset. It is completely contrary to the requirements of the law with respect to a search in a school setting. To admit the evidence is effectively to strip A.M. and any other student in a similar situation of the right to be free from unreasonable search and seizure. It is effectively saying that persons in the same situation as A.M. have no rights. Such a finding would, to my mind, bring the administration of justice into disrepute notwithstanding the other factors I have alluded to. [emphasis added]
>
> *Reasons for Judgment of Hornblower J.* (Ontario Youth Justice Court); A.R., Vol. I, p. 11.
> *Reasons for Judgment of Armstrong J.A.* (Ontario Court of Appeal) at para. 62; A.R., Vol. I, p. 21.

36. The indiscriminate use of sniffer dogs to conduct "speculative sweeps" was also noted by the Newfoundland Court of Appeal in *R. v. Taylor*, in which the Court observed that "there is a considerable tension between the type of speculative sweep used in *Gosse*, *McCarthy* and *Brown*, and Justice Dickson's assertion of 'the public's interest in being left alone by government' in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc."*. [emphasis added]

> *R. v. Taylor* (2006), 40 C.R. (6th) 21 (N.L.C.A.).

### (v) The Police Can Use Sniffer Dogs Where Reasonable Grounds Exist

37. Counsel for the Minister of Justice warns that if a dog sniff constitutes a search under s. 8 of the *Charter*, state authorities will no longer be able to use dogs for an array of important security functions, including detecting explosives along a car route where a foreign dignitary will be driving, or tracking down fugitives. But this issue is no issue at all. The question is not whether the police may *ever* employ trained dogs in their investigations, but rather under what circumstances they may be used, and whether the police use of dogs to investigate individuals who have been neither arrested nor detained will be subject to judicial scrutiny.

> *Appellant's Factum*, Kang Brown, paras. 57-58.
> *Respondent's Factum*, A.M., paras. 61-62.

38. As with other searches under the *Charter*, and given the particularly intrusive nature of dog sniff searches, it is the position of the CLA that state agents utilizing drug-sniffing dogs as instruments of surveillance must meet the constitutional requirements for a search established by this Court in *Hunter v. Southam*. Namely,

> (i) Where feasible, a search must be approved by prior authorization; there is a presumption that a warrantless search is unreasonable.
>
> (ii) The person authorizing the search must act in a judicial manner. He or she must assess in a neutral and impartial fashion whether a search is appropriate on the evidence available.
>
> (iii) The standard for issuance of the warrant are reasonable and probable grounds to believe that an offence has been committed, and that evidence of that offense is to be found at the place to be searched.
>
> *Hunter v. Southam,* [1984] 2 S.C.R. 145.

39. Alternatively, and at the very minimum, police should have the grounds required by *R. v. Mann* before conducting the sniff search, e.g. reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the sniff search is reasonably necessary on an objective view of the circumstances. Dogs should not be used to conduct "speculative sweeps", except where specific, identifiable security concerns warrant such random searches. Where dogs are being utilized in the context of security measures to prevent threats to human life, the considerations relating to the use of sniffer dogs may be considerably different. At issue in these appeals, however, is the specific use of investigative dogs for the purposes of law enforcement where there is no immediate threat to the protection of life.

> *R. v. Mann*, [2004] 3 S.C.R. 59.

40. Unlike in *R. v. Ladouceur*, in which the Court determined that the arbitrary exercise of state power through random traffic stops was justified on the basis of extensive evidence of highway safety concerns, in the instant case the Minister of Justice has not shown that there is a significant threat to public safety. Indeed, no s. 1 evidence has been introduced that would justify the extraordinarily arbitrary and random authority sought by the government in this case.

> *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 at pp. 1279-1281.

**(vi) Conclusions**

41. The CLA submits that the principles established by the Ontario Court of Appeal and by the minority in the Alberta Court of Appeal are generally correct and should be affirmed. Specifically, the CLA submits that:

- a dog sniff constitutes a search under s. 8 of the *Charter*;
- the contextual, fact-specific approach articulated in *Tessling* requires close scrutiny of the intrusive nature of the instrument used by the police in relation to the accused's privacy interest, with specific regard to the quality of the information the instrument produces;
- *Tessling* does not stand for the principle that individuals have no privacy interest in emissions from private to public;
- by comparison to the FLIR technology assessed in *Tessling*, the dog sniff is far more intrusive because of the precision and accuracy of the sniff and the proximity of the dog to the person being investigated;
- individuals have a reasonable expectation of privacy in their emissions because of the highly intimate, unique information this data conveys about personal and lifestyle choices;
- the use of dogs as an instrument of investigation is extremely intrusive because of their historical use in the persecution of minorities and the subjective fear many individuals associate with dogs. For this reason, the Court should put reasonable limits on the use of dogs; and
- as a result of the intrusive nature of the dog sniff, at the very minimum police should have reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the sniff search is reasonably necessary on an objective view of the circumstances, as required by *R. v. Mann*.

## PART IV - NATURE OF THE ORDER REQUESTED

42. The CLA seeks leave to make oral submissions of not longer than 20 minutes. The CLA takes no position on the disposition of these appeals, which turns on an assessment of the particular facts of the cases.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF APRIL, 2007.

_____
FRANK ADDARIO

_____
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## PART V - TABLE OF AUTHORITIES

M. McCulloch, et. al., “Diagnostic Accuracy of Canine Scent Detection in Early- and Late-Stage Lung and Breast Cancers”, 5 *Integrative Cancer Therapy* 2006 footnote 2