No. 31598

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

GURMAKH KANG BROWN

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

RESPONDENT'S FACTUM
HER MAJESTY THE QUEEN
(Pursuant to Rule 36(2))

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PART I
STATEMENT OF FACTS

Overview

1. The Appellant Kang Brown used public transportation to bring a large amount of cocaine to Calgary from Vancouver. When he arrived at the Greyhound Bus Terminal in Calgary he attracted the attention of a police officer with expertise in detecting persons carrying drugs, and other prohibited items. Based on his observations of, and interaction with, Kang Brown, the officer reasonably suspected him to be in possession of drugs. This suspicion ripened into reasonable grounds to arrest when a police dog detected the odour of drugs in the air in the vicinity of the bag Kang Brown was carrying. Seventeen ounces of cocaine were found when the bag was searched incidental to arrest. A small amount of heroin was found on Kang Brown's person.

2. Kang Brown was convicted of possession of cocaine for the purpose of trafficking, and possession of heroin. In a ***voir dire*** ruling the trial Judge rejected his arguments that (a) the use of a dog violated his rights under s. 8 of the ***Canadian Charter of Rights and Freedoms***, and (b) the drugs should be excluded under s. 24(2). In dismissing a conviction appeal a majority of the Court of Appeal for Alberta agreed. Kang Brown reiterates these arguments before this Court.

3. The Courts below correctly held that the dog's sniff of the bag did not violate any constitutionally protected privacy interest. With respect to detecting odours or smells dogs do what people do, they just do it better. When 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. In neither case does the state interfere with a constitutionally protected expectation of privacy.

The Investigation

4. Operation Jetway is a national program started by the Royal Canadian Mounted Police in 1997. "It involves investigators monitoring the travelling public in airports and bus and train stations in order to attempt to identify and arrest drug couriers or people carrying weapons, proceeds of crime or other contraband."

Ruling (Romaine J.), App.R. p. 4, para. 3; Resp.R. pp. 2, 3

(Note: A more detailed description of this program is found in ***R. v. Gill***, [2006] A.J. No. 1026 (QL) (Prov.Ct.) @ paras. 8 – 15 (per Millar P.C.J.).)

5. On Friday, January 25, 2002, three members of the Jetway Unit were at the Calgary Greyhound Bus Terminal. All were in plain clothes. Sergeant Iain Grant MacPhee, who at this time had over 26 years experience as a police officer, was in charge. Also present were Constable Gary Michael Ritchie, and Sergeant (then Corporal) Valerie L. Bouey. Accompanying Bouey was Police Service Dog Chevy, a female Black Labrador. Chevy is trained to give a passive indication (by sitting down) upon detecting the odour of the following drugs: marihuana, Cannabis resin (in solid and liquid form), methamphetamine, opium, heroin, psilocybin (i.e., magic mushrooms), cocaine, and crack cocaine. She does not have the ability to differentiate one scent from another. Prior to this investigation Chevy had been in active service for 22 months. Her success rate in detecting drugs was 90% to 92%.

Resp.R. pp. 12, 115 - 119

(Note: Chevy's abilities are also discussed in ***R. v. Mercer*** (2004), 362 A.R. 136 (Prov.Ct.), involving the seizure of a large quantity of marihuana at the Calgary Greyhound Bus Terminal on May 28, 2003. As noted by Daniel P.C.J., prior to the Mercer investigation, Chevy had detected a variety of illicit drugs having a total street value of nearly $6,000,000.00: para. 10).

6. At approximately 11:02 a.m. the overnight bus from Vancouver arrived. It was of interest to the officers as they knew, from past successful investigations, that it is used to transport drugs and money from British Columbia to other parts of the country.

Resp.R. pp. 6, 10 – 12, 50, 51

(Note: This is not to say that the police will always encounter someone on this bus suspected of being involved in criminal activity. For example, in the week before the trial in this case Sergeant MacPhee did not talk to any passengers arriving from Vancouver: Resp.R. pp. 56, 100.)

7. MacPhee had been taught to watch for people who gave him an "elongated stare". As Kang Brown looked at him in this way when he disembarked from the bus the officer became interested in him.

Ruling (Romaine J.), App.R. p. 4, para. 5; Resp.R. pp. 13, 14, 41

8. Kang Brown went to where luggage was being removed from the underbelly of the bus, but did not look at any bags. He did not follow the route taken by the other passengers. Walking in a different direction he took up a position some ten to fifteen feet behind MacPhee. Although the bag Kang Brown had with him had two handles, he carried it high over his shoulder. It had no tags.

Ruling (Romaine J.), App.R. p. 4, paras. 5, 6; Resp.R. pp. 14-17, 41, 42

9. Kang Brown walked into the lobby of the terminal. Before entering a washroom he suddenly turned and looked at MacPhee. On the basis of his training the officer considered this suspicious behaviour, i.e., "rubber-necking".

Ruling (Romaine J.), App.R. p. 5, para. 10; Resp.R. pp. 18, 19

10. After coming out of the washroom (at 11:07 a.m.) Kang Brown adjusted his clothing. He put his bag down to put on his coat, and again stared at MacPhee.

Ruling (Romaine J.), App.R. p. 5, paras. 11, 12; Resp.R. pp. 19, 55

11. After the officer broke off eye contact, Kang Brown walked toward the doors leading from the lobby. MacPhee followed. Just before reaching the doors Kang Brown turned to face the officer, who continued walking past him into a foyer area.

Ruling (Romaine J.), App.R. p. 5, paras. 14, 15; Resp.R. p. 20

12. When Kang Brown entered the foyer MacPhee identified himself as a police officer, produced his identification, and stated:

> Good morning, sir. I'm a police officer out here at the bus terminal. You're not in any sort of trouble and you're free to go at any time. We just talk to people as they are travelling.

Ruling (Romaine J.), App.R. p. 5, para. 16; Resp.R. pp. 21, 22, 48, 74, 75

13. As Kang Brown put down his bag, MacPhee engaged him in conversation. When the officer asked to see his ticket Kang Brown initially agreed, but then said that he had left it on the bus. He offered to go back to the bus to get it, but MacPhee said this was not necessary. Kang Brown voluntarily produced his identification, and the officer made a note of his name and date of birth. Kang Brown stated that he would probably stay in Calgary over the weekend, as his cousin had just become engaged. As they spoke Kang Brown became "increasingly antsy", uncomfortable, and avoided eye contact with MacPhee.

Ruling (Romaine J.), App.R. pp. 5, 6, para. 17; Resp.R. pp. 22 – 24, 79

14. In response to a question from MacPhee, Kang Brown said he had purchased his ticket shortly before leaving. He also said he was not carrying any drugs, or large amounts of money.

Ruling (Romaine J.), App.R. p. 6, para. 18; Resp.R. pp. 24, 53, 54, 88

15. Kang Brown picked up his bag, and again put it on his shoulder. In answer to a question from MacPhee he said it contained only clothing.

Ruling (Romaine J.), App.R. p. 6, para. 19; Resp.R. pp. 24, 89, 90

16. When the officer asked to see the contents of the bag, Kang Brown put it down again. As Kang Brown began to unzip the bag, MacPhee knelt down. Gesturing that he wanted to check the bag himself, MacPhee stated, "Just an officer safety thing here, do you mind?"

Ruling (Romaine J.), App.R. pp. 6, 7, para. 19; Resp.R. pp. 24, 25, 90

17. Before MacPhee touched the bag Kang Brown pulled it away, exclaiming, "What are you doing?" He became panicked, very agitated, and almost hostile.

Ruling (Romaine J.), App.R. p. 7, para. 20; Resp.R. pp. 25, 27, 91, 92

18. Assessing Kang Brown's actions and demeanour, MacPhee suspected him to be involved in criminal activity. As the officer stated in cross-examination:

> Based on my training and experiences, those observations have -- in a cluster, in a group like that, formulated in my mind that this person is of great interest to me. In -- in the context of being a drug courier or somebody involved in some sort of criminal activity.

Ruling (Romaine J.), App.R. p. 8, para. 29; Resp.R. pp. 77, 78

19. Bouey was standing some 40 feet away with Chevy (who was on a six-foot leash). MacPhee signalled them to approach. Bouey did not direct the dog. When Chevy entered the foyer she moved immediately to the bag, sniffed it, and sat down. Bouey signalled MacPhee that Chevy had "alerted" on the bag (i.e., detected the odour of drugs).

Ruling (Romaine J.), App.R. p. 23; Resp.R. pp. 25, 30, 124, 141 - 145

20. Based on Kang Brown's actions and Chevy's "positive indication", MacPhee had reasonable grounds to arrest Kang Brown, and did so at 11:09 a.m. Kang Brown was told he was being arrested for possession and / or possession of a controlled substance for the purpose of trafficking. He was also advised of his rights in accordance with s. 10(b) of the ***Charter***. Kang Brown denied there were any drugs in the bag. He produced a mint container from his pocket, which was later found to contain a small amount of heroin.

Ruling (Romaine J.), App.R. p. 7, paras. 24, 25; Resp.R. pp. 26, 31, 32, 93 – 96, 111

21. Ritchie searched the bag. Under some clothing he found a box containing a Kang Brown paper bag. Inside were two plastic zip lock baggies containing the cocaine.

Ruling (Romaine J.), App.R. p. 7, para. 26; Resp.R. pp. 31, 98

State of the Law at the Time of the Investigation

22. In January 2002 there were two conflicting trial decisions in Alberta on the lawfulness of using a police dog to detect drugs. Sergeants MacPhee and Bouey were involved in both cases.

23. In ***R. v. Dinh*** (2001), 42 C.R. (5th) 318 (Alta.Prov.Ct.) (February 28, 2001), Maloney P.C.J. held that using a dog to sniff at a locker at the Calgary Greyhound Bus Terminal constituted an unreasonable search: paras. 26 – 28.

(Note: This decision was affirmed on appeal 18 months after Kang Brown's arrest: ***R. v. Lam; Dinh*** (2003), 138 C.C.C. (3d) 59 (Alta.C.A.) (June 24, 2003).)

24. In ***R. v. Hoffart***, [2001] A.J. No. 1605 (QL) (Q.B.), a case on facts similar to those in the case at bar, Kenny J. summarily rejected an argument that the use of a dog to detect the odour of drugs emanating from a bag violates s. 8 of the ***Charter***: paras. 21 – 23. This decision was rendered on November 13, 2001, a little more than two months before Kang Brown's arrest.

25. MacPhee was cross-examined regarding his understanding of the law:

> Q: So, I'm going to ask you, on January 25, 2002, you were aware that the law was in flux over the dog sniff search, correct?
>
> A: Yes, I mean it was -- there was -- there was [sic] cases with and – and cases against, if you want to put it that way.
>
> Q: Okay. And rather than take the dog out of the Jetway system until these issues had been resolved, you decided just to forge ahead until there was a higher authority?
>
> A: Well, it wasn't a matter of forging ahead. We were very careful in developing this program and liaising basically with the Department of Justice or our contacts with Justice Canada. We basically established that we could still continue or we believed that we could still continue to use the dog in the Jetway program. And then it was basically – it was ultimately with the ***Dinh and Lam*** decision [Alta.C.A.] that came out that basically we shut down completely the use of the dog for a period of time.
>
> Q: Okay. Is the dog back in now?
>
> A: Yes, it is.
>
> Q: Okay.
>
> A: Let's – if I can put it this way, if I could clarify to the court, the dog is back in. We're just getting the dog back now [i.e., in February 2005]; however, in a very limited context and a very unique different context to basically amend [sic] with the courts.
>
> . . .
>
> Q: Is the dog back due to changes in the case law from ***Dinh and Lam*** at the Court of Appeal or for some other reason?
>
> A: I would say it's as a result of a decision from the Supreme Court of Canada as part of the reason and also modification of the overall program and the context of which we utilize the dog.

Resp.R. pp. 39 - 41; Also p. 85

(Note: The decision referred to in the last answer is ***R. v. Tessling***, [2004] 3 S.C.R. 432 (October 29, 2004). It overruled a judgment of the Court of Appeal for Ontario that had been relied on by the Court of Appeal for Alberta in ***Lam; Dinh***.)

26. Bouey was also cross-examined regarding her understanding of the law:

> Q: Okay. On January 25th, 2002, you were aware that there were conflicting decisions regarding the dog sniffs, correct?
>
> A: Yes, I was aware that there was [sic] conflicting decisions in both levels of court.
>
> Q: Okay. But you didn't stop the usage of your dog, did you?
>
> A: No, I did not. Yes, there were conflicting decisions. We modified our practices in the Jetway program as we dealt with each court case. The -- there were several decisions that -- sorry, one decision that was under appeal [i.e., ***Lam; Dinh***]. It was a rather significant decision. So prior to that being decided on, we did make some modifications to our program to keep in line with what we believed was going to happen in the courts.
>
> . . .
>
> Q: Okay. So notwithstanding your awareness that there was [sic] conflicting decisions at two levels of court, you changed some elements in the Jetway program, but you continued to use the dog, correct?
>
> A: Well, as I've explained, we worked in a proactive policing program and we attempted to modify our practices to do the best practice. But as in all areas of policing, one just can't stop what they're doing. They have to grow and progress, and so the answer to that would be yes, we continued using the police service dog in a modified approach.

Resp.R. pp. 140 - 141

Relevant Constitutional Provisions

27. ***Canadian Charter of Rights and Freedoms*, *Canada Act 1982*** (U.K.), Schedule B

8. Everyone has the right to be secure against unreasonable search or seizure.	8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.
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 would bring the administration of justice into disrepute.	24.(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Trial Judge's Ruling
((2005), 203 C.C.C. (3d) 132, 31 C.R. (6th) 231, 386 A.R. 48)

28. A ***voir dire*** was conducted with respect to various ***Charter*** breaches alleged by Kang Brown. The Crown called the three investigating officers, and a Greyhound employee. No defence evidence was called.

App.R. pp. 103 – 108; Resp.R. p. 151

29. The trial Judge held that prior to being arrested Kang Brown was neither physically, nor psychologically, detained. There was, therefore, no breach of s. 9 of the ***Charter*** (arbitrary detention). In the alternative, if Kang Brown was detained, then such action was lawfully an "investigative detention", as per ***R. v. Mann***, [2004] 3 S.C.R. 59. She also found that there had been no breach of s. 10(b) of the ***Charter*** (right to counsel) post-arrest.

Ruling (Romaine J.), App.R. pp. 13, 14, 21, paras. 52, 55, 56, 81

30. With respect to Chevy's sniff of the air surrounding the bag, the trial Judge, after an extensive review of the facts and the law, stated:

> [74] In conclusion, I find that the odour emanating from Mr. Kang- Brown's bag, which he voluntarily brought into a public transportation facility, was not information in which he had a reasonable expectation of privacy. It did not offer any insight into his private life or biographical core of personal information, other than the fact that he was carrying prohibited drugs. That is not a disclosure that affects his "dignity, integrity and autonomy", nor in respect of which he is entitled to a reasonable privacy interest. In the totality of the circumstances of this case, the dog sniff was not a search within the meaning of s. 8 of the ***Charter***.

Ruling (Romaine J.), App.R. p. 20

31. Notwithstanding her decision that the investigation had been carried on without any breaches of Kang Brown's rights, the trial Judge went on to consider the application of s. 24(2) of the ***Charter***. In holding that the evidence should not be excluded in any event, she applied the law as set out in ***R. v. Stillman***, [1997] 1 S.C.R. 607, and ***R. v. Buhay***, [2003] 1 S.C.R. 631.

Ruling (Romaine J.), App.R. pp. 22, 23, paras. 82 – 88

32. With respect to the contention that the police had acted in bad faith the trial Judge stated:

> [87] In this case, contrary to Mr. Kang- Brown's submissions, there was no bad faith. Sergeant MacPhee is an experienced officer, knowledgeable of the issues of search and seizure, and it is apparent from his testimony that he attempted to perform

> his duties in such a manner that he did not breach Mr. Kang- Brown's ***Charter*** rights.
> . . .

Ruling (Romaine J.), App.R. p. 23

33. Following this ruling the evidence called on the ***voir dire*** was, with consent, admitted on the trial proper. The Crown then closed its case. Kang Brown elected not to call evidence, and convictions were entered.

Court of Appeal Decision
([2006] 9 W.W.R. 633, 210 C.C.C. (3d) 317, 39 C.R. (6th) 282, 60 Alta.L.R. (4th) 223, 391 A.R. 218, 144 C.R.R. (2d) 338)

34. A majority of the Court of Appeal dismissed Kang Brown's conviction appeal.

35. Côté J.A. (O'Leary J.A. concurring) held that the trial Judge had not erred in either fact or law in holding that Kang Brown had not been detained prior to being arrested.

Reasons (Alta.C.A.), App.R. pp. 33 – 36, paras. 6 – 22

36. Agreeing with the trial Judge that Chevy's sniff of the bag did not infringe s. 8 of the ***Charter***, Côté J.A. stated, ***inter alia***:

> [52] What if I am wrong, and the Supreme Court of Canada's ***Tessling*** decision has since changed the legal rules enough to require a fresh assessment of the facts? To guard against that, I have followed the steps enumerated by the Supreme Court of Canada in paragraph 32 of ***Tessling*** and applied by it, in the paragraphs following. The result in the present case seems to me plain, if one applies those steps to the present facts. No home was involved, the police were in a purely public place (not the yard of a home), the dog only yielded a crude piece of information (yes or no to the presence of an unknown quantity of an unknown illegal drug), no intimate details of private lives could possibly be revealed, the odors came out passively, and they were detected by something similar to (but more sensitive than) an ordinary human nose. There was no reasonable expectation of privacy for that limited information in that public place.
>
> [53] An obvious loud noise or obvious strong smell coming from luggage or from a locker in a bus depot can be noted and used by police, as defence counsel here properly conceded. All that is different here is the use of a dog with a nose keener than human noses. But the Supreme Court of Canada in ***Tessling*** says that that is not enough to turn this into a "search" under s. 8 . . .
>
> [54] So I would conclude here that there was no search, and no unreasonable search.

Reasons (Alta.C.A.), App.R. p. 45

37. Turning to s. 24(2) of the ***Charter*** on the assumption that there had been breaches of ss 8 and 9, Côté J.A concluded that the exclusion, rather than the admission, of the evidence would bring the administration of justice into disrepute. In this connection he stated, ***inter alia:***

> [62] Before us, counsel for the appellant argued that the officer was guilty of bad faith, because he used the dog and other methods which had been already condemned by the ***Lam*** decision, ***supra***. Indeed, it was the same officer involved in the ***Lam*** case and the present case, says counsel. However, the condemnation assertion is not correct. The decision of the Alberta Court of Appeal in ***R. v. Lam***, ***supra***, was given long after the dog sniff and arrest in the present case. The only court decision in the ***Lam*** case before the arrest in the present case was the decision in Provincial Court: (2001), 284 A.R. 304, 2001 ABPC 48. At the time of the appellant's arrest, the officer knew that ***Lam*** was then under appeal (A.B. p. 60). But up to the date of the arrest in the present case, there had been no appellate pronouncement on this topic in Alberta, and the decisions of trial courts on the subject in Alberta had been contradictory (as Crown counsel points out to us). (Details are given in the A.B. pp. 50, 51, 53, 96-98, and citations in ***R. v. Mercer*** (2004) 45 Alta. L.R. (4th) 144, 2004 ABPC 94.) Not guessing which conflicting trial judge to follow is scarcely police bad faith, as the term is understood in case law on s. 24(2). See ***R. v. Mercer***, ***supra***, at 154 (para. 25).
>
> [63] Police usually act deliberately and not accidentally. But failure to predict future changes in case law is not bad faith, even in its narrow or technical sense. Canada must have about 2000 trial judges. Rarely will all their precedents be unanimous.
>
> . . .
>
> [77] The impugned sniff here involved a natural emanation (odor) in a very public place, without any artificial entry or extraction. It was from luggage, not a person nor the clothing being worn. The information thus obtained was very crude: there seemed to be some evidence of the presence, in an unknown quantity, of some one or more of 9 possible drugs. It produced but a tiny fraction of the information which opening the luggage and rifling through it would have produced (and did after arrest). The earlier sniff was in no sense the equivalent of such a step. It also gave far less information than x- raying the luggage would have produced. The dog could not reveal irrelevant, embarrassing, or personal information. The dog would not respond to body odors, intimate objects, alcohol, prescription drugs, written materials, cash, jewellery, knives, or pornography. The data were incapable of giving any information about private lifestyles or intimate activities.

Reasons (Alta.C.A.), App.R. pp. 46, 47, 50

38. Paperny J.A. dissented on two questions of law; ***viz.***, ss 8 and 24(2) of the ***Charter***. She would have allowed the appeal, and entered an acquittal on the basis that the use of the dog constituted an unreasonable search warranting the exclusion of the drugs.

Reasons (Alta.C.A.), App.R. pp. 55 – 64, paras. 99 - 154

PART II

ISSUES

39. Kang Brown appeals to this Court, as of right, pursuant to s. 691(1)(a) of the ***Criminal Code***. On the basis of the dissent below he sets out the issues as follows:

> 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 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.

Appellant's Factum, p. 13

40. The Crown's position is that the issues before this Court are properly stated as follows:

(a) Did the majority of the Court of Appeal err in holding that using a drug-sniffing police dog to detect the odour of a controlled substance emanating from a bag being carried in a public place does not constitute a breach of s. 8 of the ***Charter***?

(b) If s. 8 was violated, then did the majority of the Court of Appeal err in holding that the cocaine and heroin which are the subject matter of the charges should not be excluded pursuant to s. 24(2) of the ***Charter***?

PART III

ARGUMENT

Sniffer Dogs and the *Charter*

What Sniffer Dogs Do

41. Although this case involves the detection of the odour of a prohibited substance, this is not the only use made by law enforcement and other government agencies of the canine's keen sense of smell. As indicated in the material filed by the Crown in support of its leave application in the companion case of ***The Queen v. A.M.***, S.C.C. No. 31496 (on appeal from (2006), 208 C.C.C. (3d) 438 (Ont.C.A.)), dogs are also used to detect explosives (including firearms and ammunition), track human scents (e.g., fugitives or missing persons), and locate human remains.

Affidavit of Chief Superintendent Michael J.A. Woods (R.C.M.P.), paras. 7 – 9; Affidavit of Superintendent Brian Deevy (O.P.P.), paras. 5, 6

42. In addition, dogs trained to detect accelerants are used in arson investigations.

See:
www.calgary.ca/portal/server.pt/gateway/PTARGS_0_2_767_203_0_43/http%3B/content.calgary.ca/CCA/City+Hall/Business+Units/Calgary+Fire+Department/About+CFD/Divisions/Fire+Inspection+and+Investigations/Accelerant+Detection+Dogs.htm;

www.surrey.ca/Living+in+Surrey/Emergency+and+Protective+Services/Fire/General+Information/default.htm

Dog Sniff For Drugs in a Public Place is Not a Search

43. Not every criminal investigative action undertaken by the state is a "search or seizure" for the purposes of s. 8 of the ***Charter***. As Sopinka J. stated in ***R. v. Evans***, [1996] 1 S.C.R. 8:

> 11 What then is the purpose of s. 8 of the ***Charter***? Previous decisions of this Court make it clear that the fundamental objective of s. 8 is to preserve the privacy interests of individuals. As this Court stated in ***Hunter v. Southam Inc.***, [1984] 2 S.C.R. 145, at p. 160, the objective of s. 8 of the ***Charter*** is "to protect individuals from unjustified state intrusions upon their privacy". Clearly, it is only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that s. 8 of the ***Charter*** comes into play. As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. <u>On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a "search" within the meaning of s. 8.</u> [emphasis added]

See also: ***R. v. Law***, [2002] 1 S.C.R. 227 @ para. 15 (per Bastarache J.); ***R. v. Tessling***, [2004] 3 S.C.R. 442 @ para. 18 (per Binnie J.)

44. The determination of whether an investigative technique interferes with a constitutionally protected privacy interest is contextual, and requires a juridical evaluation of the "totality of the circumstances": ***Tessling*** @ para. 19. In the case at bar, to paraphrase La Forest J. in ***R. v. Wong***, [1990] 3 S.C.R. 36 (at p. 46), the question is whether Kang Brown can legitimately claim that it was not open to the police, in the absence of prior judicial approval, to use a dog to determine whether the odour of a prohibited substance was emanating from his bag. In other words, does using a dog "see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society".

45. While a subjective expectation of privacy is a factor, it is not determinative. To adopt the language of Harlan J. in his concurring opinion in ***Katz v. United States***, 389 U.S. 576 (1967) (at 361), what must be determined is whether such an expectation is "one that society is prepared to recognize as 'reasonable'".

46. Like ***Tessling***, what is in issue here is informational privacy. Prior to arresting Kang Brown the police did not inspect the interior of the bag. This only occurred after Chevy's keen sense of smell detected the odour of cocaine escaping from it. As with the F.L.I.R. technology in ***Tessling*** (see para. 47), Chevy's nose did not permit the police to "see" into the bag.

47. The significant difference between this case and ***Tessling***, is that in the latter the information obtained by the F.L.I.R. device was found to be "meaningless", in the sense that, standing alone, it could not support reasonable grounds for further investigative action, e.g., obtaining a warrant, or making an arrest: paras. 35, 36. However, as Binnie J. stated in ***Tessling***, odours emitted in public are not constitutionally protected, even though they may not be detectable by unaided human senses (at para. 51):

> I agree with Stevens J., at p. 45, speaking for the minority in ***Kyllo***, that
>
> > public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. [emphasis added]

As the Courts below and others have correctly held this is particularly so when the odour is that of a prohibited drug.

(Note: As set out in its Appellant's Factum in the ***A.M.*** appeal, it is the Crown's position that the Court of Appeal for Ontario erred in that case in reaching the opposite conclusion.)

48. ***R. v. Gosse*** (2005), 200 C.C.C. (3d) 147 (N.B.Q.B.), is apposite. A police dog detected the odour of drugs emanating from a suitcase in the luggage compartment of a bus. After determining that the suitcase belonged to Gosse, an officer went to speak with him. At this time Gosse started to "shake tremendously". Based on Gosse's demeanour, and the dog's reaction to the suitcase, the police had reasonable grounds to arrest him. The suitcase was then opened and found to contain cocaine, methamphetamines, and marihuana.

49. In dismissing an objection to the admissibility of these drugs, McNally J. stated:

> [38] The use of the police dog as an investigative tool provides the police or the state with no further insight into Mr. Gosse's private life. Further, it reveals nothing of his "biographical core of personal information", nor does it affect his "dignity, integrity and autonomy". <u>All it reveals is the existence or prior existence of a controlled substance.</u> An intention or desire to secrete a controlled substance or contraband in a suitcase does not equate with a "reasonable expectation of privacy" to the contents of the suitcase, or more precisely, to what is emanating from the suitcase. [emphasis added]

50. Also pertinent is ***R. v. Taylor*** (2006), 40 C.R. (6th) 21 (N.L.C.A.). On the basis of information from a reliable informer that there was a package at a FedEx warehouse containing marihuana, the police went to investigate. The package was located and, with the consent of FedEx, placed at the rear of the warehouse along with others. A drug dog was brought in, and twice indicated detecting the odour of drugs emanating from the package. A search warrant was then obtained. The package contained three pounds of marihuana.

51. Dismissing an objection to the use of the dog, Rowe J.A., preferring the reasoning of the majority in the case at bar to that in ***A.M.*** (Ont.C.A.), stated:

> [21] The contents of a package may reveal some insight into the individual's "biographical core of personal information", whose disclosure could affect their "dignity, integrity and autonomy" (***Tessling***, para. 63; also, ***R. v. Plant***, [1993] 3 S.C.R. 281 (S.C.C.) at 293). Such information could be disclosed by opening the package to view its contents.

> [22] Could such personal information be disclosed by the dog sniffing the package? No, because unlike opening the package (which would allow police to see whatever is in it), a dog sniffing for drugs can tell us only one thing: are there drugs in the package. There can be no reasonable expectation of privacy in that fact *alone*. [emphasis in original]

52. That the use of a dog trained to detect only the odour of marihuana, or some other prohibited drug, does not interfere with a person's "dignity, integrity and autonomy" as protected by s. 8 of the ***Charter***, is consistent with the view expressed by Gonthier and Binnie JJ. in ***R. v. Clay***, [2003] 3 S.C.R. 735, in the context of s. 7, that there is nothing "'inherently personal' or 'inherently private' about smoking marihuana": para. 32.

53. In advancing his appeal, Kang Brown, in paragraph 53 of his factum, relies on this Court's decision in ***Evans*** in asserting, "Historically, purposive attempts to detect the odour of marihuana have constituted a search contrary to section 8 of the ***Charter***". This, however, ignores the fact that the result in that case turned on the police having trespassed on residential property in their efforts to detect whether marihuana was being grown inside. In going to the front door solely for the purpose of determining whether marihuana was present the police infringed on the Evans' territorial privacy: paras. 11, 12, 16.

54. ***Evans*** does not stand for the proposition that section 8 of the ***Charter*** is infringed any time the police, without a warrant, attempt to detect the smell of a prohibited substance. This is reflected in Morden A.C.J.O.'s judgment in ***R. v. Laurin*** (1997), 113 C.C.C. (3d) 519 (Ont.C.A.), holding that there was no search when the police, in the course of a grow operation investigation, detected the smell of marihuana while standing in the hallway outside the door of an apartment: 533 – 535. Similarly, in ***R. v. Paquette*** (27 June 2000), New Westminster Registry No. X056154 (B.C.S.C.), Vickers J. held that ***Evans*** did not apply when a police officer investigating a grow operation detected the smell of marihuana when he went to the front door for the purpose of making a legitimate enquiry regarding another matter: para. 22.

55. Indeed, to accept Kang Brown's submission is to accept that an unreasonable search occurred in ***Buhay*** as soon as the officers who attended at the bus depot detected the odour of

marihuana escaping from the locker in which the security guards had previously found a quantity of this drug: paras. 4, 5.

See also: ***R. v. Rajaratnam***, [2006] A.J. No. 1373 (QL), 2006 ABCA 333 @ paras. 28ff (per The Court): no s. 8 violation when Sergeant MacPhee and Constable Ritchie sniffed at a bag, and detected the odour of Bounce fabric softener sheets, known to be used to mask the smell of drugs, smell not providing any biographical information

56. To hold that a drug sniffing dog cannot be used to detect odours in the public domain would not only have a serious and detrimental effect on law enforcement, but would produce perverse results.

57. Although this issue was not raised in ***R. v. Leipert***, [1997] 1 S.C.R. 281, affirming (1996), 106 C.C.C. (3d) 375 (B.C.C.A.), its facts provide a good example. As set out in the reasons of Southin J.A. (at para. 4), after receiving a CrimeStopper's tip with respect to a grow operation in a residence a police officer attended with his drug dog in the area four times. They did not go onto the property. The first two times the dog detected the odour of drugs coming from the premises. On the third occasion both the dog and the officer detected the odour. On the fourth and last visit, only the dog detected the odour. These facts, together with the officer's observation of matters consistent with a grow operation (i.e., covered windows, condensation), were used to obtain a search warrant.

(Note: Although not mentioned in the decisions, the Information to Obtain the warrant indicated that the dog, Bruno, had previously detected three grow operations. In addition, he had recently won the Narcotic Detection Competition at the Provincial Police Dog Championships: Case on Appeal, p. 61.)

58. Another example is found in ***R. v. Davis***, [2005] B.C.J. No. 90 (QL), 2005 BCPC 11. In an effort to stem the movement of drugs to Vancouver Island the police patrolled the publicly accessible car deck of a ferry with a sniffer dog. It detected the odour of drugs coming from the rear window of a van. When the police approached the partially open driver's window they could smell the strong odour of fresh marihuana coming from inside. The driver (and sole occupant), who was sleeping in the vehicle, was arrested. Auxier P.C.J. held that as the driver had no reasonable expectation of privacy in the area outside his vehicle the actions of the dog did not constitute a search: para. 23.

59. ***R. v. Gallant*** (2006), 140 C.R.R. (2d) 189 (N.B.Q.B.), another Operation Jetway case, also underscores this point. An officer at a bus depot in Moncton overheard Gallant, who was one of a group of four individuals, say "good spot to smoke a joint". This caused the officer to walk his dog in their direction. The dog detected the odour of drugs coming from the bag Gallant was carrying. It was later found to contain 18 grams of marihuana, and 890 ecstasy pills. Rideout J. held that the dog's actions did not violate the ***Charter***: paras. 36 – 39.

60. If, as Kang Brown contends, it is unreasonable for the police to use a dog to detect odours in the public domain too faint to be detected by the human nose, then the officers in all of these cases engaged in constitutionally impermissible behaviour. With respect, such a finding would trivialize the ***Charter***.

61. As well, if the ***Charter*** precludes the use of a dog to detect the odour of drugs, then it logically follows that, in the absence of a warrant, dogs could not be used to detect other odours that are not detectable by humans. In some circumstances this would rule out using them to detect explosives, e.g., random security patrols of public transportation facilities such as subway, train, and bus stations, or checking vehicles parked along a route to be taken by a foreign dignitary. It would also preclude using dogs to check persons lawfully detained, but not arrested, following an explosion, or suspected arson.

(Note: In ***R. v. Eng*** (1995), 56 B.C.A.C. 18, an arson case, the police detected a faint to moderate smell of gasoline on Eng's clothing when he was arrested. This fact was used to support reasonable grounds for a search warrant: paras. 43, 45 (per Wood J.A.). It is the Crown's position that the legality of such a "sniff" would be no different had the odour been detected by a dog trained for accelerants, and that this would also be so in the case of an investigative detention under ***Mann***.)

62. Lastly, if, as Kang Brown contends, individuals have a reasonable expectation of privacy in very faint odours emanating from their personal effects or property, then it is arguable that such an expectation would also have to be recognized with respect to one's personal "scent". This, too, would lead to perverse results, as it would limit the use of tracking dogs, which have been an accepted and valuable investigative tool for the longest time.

See: ***R. v. Alain*** (1992), 21 B.C.A.C. 156 @ para. 5 (per Seaton J.A.): dog tracking evidence used to connect a person (found hiding in some bushes) to a bag of cocaine discarded while fleeing from police; ***R. v. D.(J.F.)*** (2005), 196 C.C.C. (3d) 316 (B.C.C.A.) @ 5 (per Oppal J.A.):

tracking dog used to locate offenders (hiding in the bushes) who had caused a boat to catch on fire

Foreign Courts Have Held That a Dog Sniff is Not a Search

63. Although the legal analyses differs from that which applies under the ***Charter***, it is noteworthy that the use of drug dogs has been upheld in other jurisdictions. The reasoning in these decisions is instructive.

64. This question was considered in the context of the Fourth Amendment in ***United States v. Place***, 462 U.S. 696 (1983). After a dog detected the odour of narcotics emanating from the luggage of a person lawfully detained at an airport, the police obtained a warrant. Over a kilogram of cocaine was found. In holding there had been no violation of Place's rights, O'Connor J. stated (at 706):

> The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." ***United States v. Chadwick***, 433 U.S., at 7. We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. Id., at 13. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is ***sui generis***. <u>We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here - exposure of respondent's luggage, which was located in a public place, to a trained canine - did not constitute a "search" within the meaning of the Fourth Amendment</u>. [emphasis added]

See also: ***Illinois v. Caballes***, 543 U.S. 405 (2005) @ 5 (slip opinion) (per Stevens J.): "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has a right to possess does not violate the Fourth Amendment."

65. The Supreme Court of Southern Australia (Full Court) considered this question, albeit in a non-constitutional context, in ***Questions of Law Reserved (No. 3 of 1998)*** (1998), 71 S.A.S.R. 223 (***sub. nom Hoare***), special leave refused (1999), 13 Leg. Rep. c7a (H.Ct.). Holding that it is not unlawful for the police to use dogs to check bus luggage for drugs, Prior J. stated (at 224):

> I agree in particular with the submission put by the Director of Public Prosecutions that mere sensory perception, whether by eye, ear or nose, cannot of itself constitute a search. It follows that odours which emit from a person's bag are exposed to the plain perception of the public at large. Thus a dog sniffing the area around a bag or parcel does not effect a search of that bag or parcel. It could perhaps be described as an act of identification, but certainly not a search. [emphasis added]

66. This reasoning was adopted in ***Darby v. Director of Public Prosecutions*** (2004), 150 A.Crim.R. 314 (N.S.W.C.A.), wherein Giles J.A. (in concurring reasons) said:

> 62 A police officer would have been entitled to walk in the vicinity of the appellant and, if he were able to smell cannabis leaf in the appellant's possession, form a reasonable suspicion sufficient to entitle him to search the appellant. He would not thereby commit trespass to the person. Treating a drug detection dog as an extension of the police officer, an aid to his olfactory senses, the position is unchanged. It matters not that the dog acts differently from the police officer in the way he detects and indicates, short of bunting and ferreting and putting his nose on a pocket, the presence of a substance, or that the dog acts under the encouragement of the police officer. There is still not a trespass to the person, and there is not a search. In my opinion, Rocky's sniffing in the vicinity of the appellant, indicating that there was a scent without putting his nose on it, was not a search. [emphasis added]

See also: Ipp J.A. @ paras. 121-123

Conclusion

67. Having regard to where and how Chevy's olfactory abilities were used to detect the odour of cocaine in the air outside Kang Brown's bag, nothing done by the police interfered with his reasonable expectation of privacy. Both the trial Judge and the majority of the Court of Appeal were correct in finding no breach of s. 8 of the ***Charter***.

Charter, Section 24(2) - Admissibility of Evidence

68. Should this Court find that Chevy infringed Kang Brown's s. 8 rights then, as held by the trial Judge and the majority of the Court of Appeal, the cocaine should not be excluded. Under a proper application of the test articulated in ***R. v. Collins***, [1987] 1 S.C.R. 265, as clarified in ***Stillman***, the only reasonable conclusion is that exclusion of the evidence, rather than its admission, would bring the administration of justice into disrepute. Indeed, as discussed below, on this issue there are a number of parallels between this case and ***Evans***, wherein this Court admitted marihuana seized from a residence following an improper "sniff" at a front door.

69. The factors to be considered in a s. 24(2) analysis are well known.
See: ***Buhay*** @ para. 41 (per Arbour J.)

70. The cocaine found in Kang Brown's bag is clearly non-conscriptive and, therefore, its admission would not impair trial fairness.
See: ***Buhay*** @ para. 50; ***Evans*** @ para. 29

71. The factors relating to the seriousness of the breach are conveniently summarized in ***Buhay***:

> 52 The second set of factors relates to the seriousness of the ***Charter*** violation. The seriousness of the police's conduct depends on "whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant": ***Therens***, ***supra***, at p. 652. It is also relevant to consider whether the violation was motivated by a situation of urgency or necessity: ***Therens***, at p. 652; ***R. v. Silveira***, [1995] 2 S.C.R. 297, at p. 367; ***Law***, ***supra***, at para. 37. Also pertinent is whether the police officer could have obtained the evidence by other means, thus rendering her or his disregard for the ***Charter*** gratuitous and blatant: ***Collins***, ***supra***, at p. 285; ***Law***, ***supra***, at para. 37. The court may also look at some or all of the following factors: the obtrusiveness of the search, the individual's expectation of privacy in the area searched and the existence of reasonable and probable grounds (***R. v. Caslake***, [1998] 1 S.C.R. 51, at para. 34). As we have seen, the trial judge is entitled to considerable deference on this point: ***Law***, ***supra***, at para. 38.

72. What militates strongly in favour of admission in this case is that the officers involved did not knowingly or deliberately infringe constitutional rights. In January of 2002 the law concerning the use of dogs to detect drugs in public places was, as it remains today pending

resolution by this Court, unsettled. The issue had then yet to reach any appellate court in the country. Further, and most relevant, in Alberta there were two conflicting trial decisions: ***Dinh*** (Alta.Prov.Ct.) and ***Hoffart*** (Alta.Q.B.). Of these, ***Hoffart*** was the latest (November 23, 2001). On facts which are, for all intents and purposes, identical to those in the case at bar, Kenny J. held that s. 8 was not violated when Chevy detected the odour of cocaine emanating from Hoffart's bag: paras. 21 – 24.

73. Given the dearth of jurisprudence on sniffer dogs in early 2002, the judgments in ***R. v. Simmons*** (1989), 11 C.C.C. (3d) 193 (Ont.C.A.), affirmed, [1988] 2 S.C.R. 495, are apposite. At issue was whether Simmons was "detained" for the purposes of s. 10(b) of the ***Charter*** when she was required to submit to a customs strip search. Drugs were found on her person. In allowing a Crown appeal from acquittal the majority of the Court of Appeal held that s. 10(b) was not triggered, but would have admitted the evidence in any event.

74. Although Tarnopolsky J.A. dissented with respect to s. 10(b), he agreed that the evidence should not have been excluded under s. 24(2). Finding "neither a lack of good faith on the part of the customs inspectors nor a knowing disregard of ***Charter*** rights" he noted, ***inter alia***, that although prior to Simmons arrival the only ruling on this issue in Ontario had been a Provincial Court decision holding that s. 10(b) did apply in the circumstances, there had yet to be "an authoritative judicial determination" on the point: 228, 229. Dickson C.J. agreed. Having concluded that Simmon's was "detained", he held the evidence admissible, noting that in light of the state of the law at the time, "there was nothing deliberate or blatant in the denial of [her] rights": 534, 535.

75. ***Evans*** is again pertinent. In holding that the marihuana which the officers initially smelled while standing at the front door was admissible notwithstanding a breach of s. 8, Sopinka J. stated:

> 23 Turning next to the seriousness of the ***Charter*** violation, I would not characterize the violation of s. 8 in the instant case as particularly grave. The good faith of the police in the present case cannot be questioned: the trial judge expressly found that the police were aware of this Court's decision in ***Kokesch*** and felt that their actions in approaching the Evans' door were consistent with that decision. As a result, although the initial "olfactory" search of the Evans' home has now been found to have been constitutionally impermissible, the police were unaware that the

> search was beyond their investigatory powers. The subsequent search of the Evans' home was undertaken in reliance on a warrant. Although I have found that the warrant was invalid, the police (who at all times believed that they were acting in an appropriate manner), had no reason to doubt the validity of the warrant at the time that the search of the Evans' home was conducted. This warrant was produced to the appellants before the search had progressed very far. [emphasis added]

In light of the Queen's Bench decision in ***Hoffart***, it was not unreasonable for Sergeants MacPhee and Bouey to believe it was open to them to continue to utilize Chevy to develop grounds to arrest.

See also: ***R. v. Wiley***, [1993] 3 S.C.R. 263 @ 278, 279 (per Sopinka J.): marihuana admitted under s. 24(2), police acting in good faith, relying on the law as set out in ***R. v. Kokesch*** (1988), 46 C.C.C. (3d) 194 (B.C.C.A.), prior to that decision being overruled by this Court: [1990] 3 S.C.R. 3.

76. Also mitigating the gravity of any breach is that (a) there is a lower expectation of privacy in luggage being carried in public than exists with respect to one's physical person, home, or office, and (b) a "sniff" of the air outside a bag is far less intrusive that an unauthorized examination of its entire contents.

77. Lastly, possession of cocaine for the purpose of trafficking is a serious offence.

78. Having regard to all the circumstances, it is the exclusion rather than the admission of the 17 ounces of cocaine Kang Brown was carrying that would bring the administration of justice into disrepute. Not to admit this evidence would "extract too great a toll on the truth seeking goal of [this] criminal trial": ***Buhay*** @ para. 73.

PART IV
COSTS

79. The Respondent makes no submissions as to costs.

PART V
NATURE OF ORDER SOUGHT

80. That this appeal be dismissed without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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February 1, 2007

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