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The Law of Sniffer-Dog Searches in Canada

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In *Who's a Good Boy? U.S. Supreme Court Considers Again Whether Dog Sniffs Are Searches* (*Justic*, January 16, 2019), Professor Sherry F. Colb notes that the United States Supreme Court "is currently considering whether to grant review in *Edstrom v. Minnesota.*" She indicates that this "presents the issue whether police must obtain a search warrant before bringing a trained narcotics dog to sniff at a person's door for illicit drugs." Professor Colb's article goes on to consider prior occasions in which the Supreme Court of the United States has considered the constitutionality of searches though dog sniffing.[1]

Ultimately, the United States Supreme Court denied the application for *certiorari* in *Edstrom v. Minnesota* (2019 WL 888181). As a result, it will not be considering the dog-sniff issue raised in that case.

Professor Colb's article made me think about the law of dog-sniffing-related searches in my country. As a result, in this column, I intend to look at how the use of sniffer-dogs searches has been addressed by the Supreme Court of Canada.

INTRODUCTION

The Supreme Court of Canada's initial consideration of this issue came in the companion cases of ***R. v. Kang-Brown***, 2008 SCC 18, and ***R. v. A.M.***, 2008 SCC 19. The issue was framed in the context of whether the use of the sniffer dogs in these cases constituted a search and if so, whether the search was reasonable in the context of section 8 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982. That section of the Charter states:

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

SECTION 8 OF THE CHARTER

In Canada, section 8 of the Charter has been interpreted such that "the 'search or seizure' question reduces to whether the act intruded on the claimant's 'reasonable expectation of privacy'. If not, there was no 'search or seizure' and no violation of section 8" (see Steven Penney, *The Digitization of Section 8 of the Charter: Reform or Revolution?* (2014), 67 S.C.L.R. (2d) 505, at paragraphs 6 to 8). In ***R. v. Spencer***, 2 S.C.R. 212, the Supreme Court of Canada held that a "sniffer dog provides information about the contents of the bag and therefore engages the privacy interests relating to its contents" (at paragraph 47).

In the Canadian context, a violation of section 8 of the *Charter* can lead to exclusion of evidence pursuant to section 24(2) of the *Charter*, which states:

> 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 of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

R. V. KANG-BROWN

In ***Kang-Brown***, a police officer involved in an operation designed to detect drug couriers at bus stations approached the accused, identified himself, and asked the accused if he was carrying narcotics. The accused said no. The officer then asked to look in the accused's bag. Another officer with a sniffer dog approached. The dog sat down, indicating the presence of drugs in the bag. The accused was searched and drugs were found on his person and in his bag.

The trial judge found that the accused was neither arbitrarily detained nor unlawfully searched and entered a conviction. The Alberta Court of Appeal upheld the conviction. An appeal was taken to the Supreme Court of Canada.

R. V. A.M.

In ***A.M.***, the police used a sniffer dog to search a school for the presence of drugs. In a gymnasium, the sniffer dog reacted to an unattended backpack. The police, without obtaining a search warrant, opened the backpack and found illicit drugs. The trial judge excluded the evidence and acquitted the accused. The Ontario Court of Appeal upheld the acquittal. An appeal was taken to the Supreme Court of Canada.

WHAT APPROACH DID THE SUPREME COURT OF CANADA TAKE?

In each of these decisions, the Supreme Court of Canada was divided and three judgments were filed in each instance. As a result, determining the *ratio discendi* can be difficult. Interestingly, many years later, the Supreme Court suggested in ***Spencer*** that while it was "divided on other points, it was unanimous in holding that the dog sniff of Mr. Kang-Brown's bag constituted a search" (at paragraph 29). In ***R. v. Aucoin***, 3 S.C.R. 408 (2012), the Supreme Court indicated that in ***Kang-Brown*** it "recognized a common law power to conduct sniffer

Footnotes

1. I became aware of this article because of it being posted by Judge Kevin Burke in his blog (see blog.amjudges.org/).

dog searches" (at paragraph 76). Finally, in ***R. v. MacDonald***, 1 S.C.R. 37 (2014), the Court indicated that in ***Kang-Brown*** "a majority of the Court recognized a common law power to conduct sniffer-dog searches" (at paragraph 32).

It appears that a majority of the Court in ***A.M.*** and ***Kang-Brown*** concluded as follows:

1. A dog's sniffing constitutes a search for the purposes of section 8 of the Charter; and
2. The use of sniffer dogs is lawful based upon the common-law powers of the police to investigate crime.

Five years after these two decisions were rendered, the Supreme Court of Canada returned to the issue of the use of sniffer dogs. Once again, it rendered two judgments (***R. v. Chehil***, 2013 SCC 49, and ***R. v. MacKenzie***, 2013 SCC 50). However, this time the majority decisions are readily ascertainable.

R. V. CHEHIL

In ***Chehil***, the police checked the accused's airplane luggage by utilizing a drug detection dog. The dog gave a positive indication for the scent of drugs. The accused was arrested and his luggage was searched. Three kilograms of cocaine was found.

At the commencement of her decision in ***Chehil***, Justice Karakatsanis, writing for the entire Court, succinctly explained what it had decided in ***A.M.*** and ***Chang-Brown*** (at paragraph 1):

> The Court concluded that the use of a properly deployed drug detection dog was a search that was authorized by law and reasonable on a lower threshold of "reasonable suspicion". Because they are minimally intrusive, narrowly targeted, and can be highly accurate, sniff searches may be conducted without prior judicial authorization.

The Supreme Court also indicated that the appeal required it "to elaborate on the principles underlying the reasonable suspicion standard and its application." This elaboration resulted in the Supreme Court holding that the police can use a drug detection dog without obtaining prior judicial authorization if they have a "reasonable suspicion" based on objective, ascertainable facts, that evidence of an offence will be discovered through the utilization of the dog. The Court indicated that the "reasonable suspicion standard requires that the entirety of the circumstances, inculpatory and exculpatory, be assessed to determine whether there are objective ascertainable grounds to suspect that an individual is involved in criminal behaviour" (at paragraph 6).

The Supreme Court also indicated in ***Chehil*** that reasonable suspicion "derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. While reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime.… As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard" (at paragraphs 26 and 27).

[S]niff searches may be conducted without prior judicial authorization.

However, the Court also indicated that a constellation of factors "will not be sufficient to ground reasonable suspicion where it amounts merely to a 'generalized' suspicion because it 'would include such a number of presumably innocent persons as to approach a subjectively administered, random basis' for a search'… Indeed, the reasonable suspicion standard is designed to avoid indiscriminate and discriminatory searches" (at paragraph 30). The Court also held that a "nexus must exist between the criminal conduct that is suspected and the investigative technique employed. . . . In the context of drug detection dogs, this nexus arises by way of a constellation of facts that reasonably supports the suspicion of drug-related activity that the dog deployed is trained to detect" (at paragraph 36).

Finally, the Court held in ***Chehil*** that the onus is on the Crown "to show that the objective facts rise to the level of reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion of criminal activity." The Court pointed out that "the reliability of a particular dog is also relevant to determining whether a particular sniff search was conducted reasonably in the circumstances" (at paragraph 45).

THE CONCLUSION IN *CHEHIL*

The Supreme Court indicated that when a sniffer dog delivers a positive indication, the police may arrest the suspect if they have reasonable and probable grounds to do so. If the arrest is valid, the police may conduct a search to secure evidence without prior judicial approval. The Court stated that this "is what occurred in this case" (at paragraph 55).

The Court concluded in ***Chehil*** that "considering the strength of the constellation of factors that led to the decision to deploy the dog, the reliability of the dog, and the absence of exculpatory explanations, the positive indication raised the reasonable suspicion generated by the constellation to the level of reasonable and probable grounds to arrest the accused" (at paragraph 76).

R. V. MACKENZIE

In ***MacKenzie***, the accused was charged with possession of a controlled substance for the purpose of trafficking. The police had stopped the accused's vehicle for speeding. After the vehicle was stopped, the investigating officer suspected that the accused was involved in illegal drug activity. He detained the accused and then utilized a drug detection dog to conduct a perimeter search of the vehicle, resulting in a "positive" reaction by the dog. The police arrested the accused and searched his vehicle incident to the arrest. Thirty-one pounds of marihuana was found.

At the commencement of his reasons in ***McKenzie***, Justice Moldaver, writing for the majority of the Court, referred to Justice Karakatsanis's reasons in ***Chehil***, and indicated that her

[T]he use of a sniffer dog constitutes a search that is protected by section 8 of the Charter.

"efforts have spared me the heavy lifting in this case, as the broader questions that I have just mentioned are fully canvassed in her reasons." He then indicated: "I therefore concentrate here on the application of the reasonable suspicion standard to the facts of this case. I also address certain additional issues that arise in the context of a sniffer-dog search that occurs subsequent to a roadside stop, as occurred here. The Court did not address those issues in *Kang-Brown* and *A.M.* and the facts of this case present an occasion for clarification of the applicable principles" (at paragraph 3).

SNIFFER DOGS AND MOTOR VEHICLES

Justice Moldaver noted in ***McKenzie*** that the Court "has held that motor vehicles, though emphatically not Charter-free zones, are places in which individuals have a reasonable but 'reduced' expectation of privacy. . . . The privacy context here is thus analogous to the bus terminal in ***Kang-Brown*** and the school in ***A.M.***, where the use of police sniffer dogs on the basis of reasonable suspicion was found to pass *Charter* muster. As a result, I am satisfied that the police here were entitled to enlist the aid of a sniffer dog for crime prevention on the same basis" (at paragraph 31).

WHAT IS REASONABLE SUSPICION?

The Court pointed out in ***McKenzie*** that reasonable suspicion "must be assessed against the totality of the circumstances. Characteristics that apply broadly to innocent people and 'no-win' behaviour—he looked at me, he did not look at me—cannot on their own, support a finding of reasonable suspicion, although they may take on some value when they form part of a constellation of factors" (at paragraph 71). However, the Court also pointed out that "while it is critical that the line between a hunch and reasonable suspicion be maintained to prevent the police from engaging in indiscriminate or discriminatory practices, it is equally vital that the police be allowed to carry out their duties without undue scepticism or the requirement that their every move be placed under a scanning electron microscope" (at paragraph 65).

Justice Moldaver explained the concept of "reasonable suspicion" in the following manner (at paragraphs 73 and 74):

> Assessing whether a particular constellation of facts gives rise to a reasonable suspicion should not—indeed must not—devolve into a scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are the bywords, and they are to be applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.
>
> Parenthetically, I note that there are several ways of describing what amounts to the same thing. Reasonable suspicion means "reasonable grounds to suspect" as distinguished from "reasonable grounds to believe" (*Kang-Brown*, at paras. 21 and 25, per Binnie J., and at para. 164, per Deschamps J.). To the extent one speaks of a "reasonable belief" in the context of reasonable suspicion, it is a reasonable belief that an individual might be connected to a particular offence, as opposed to a reasonable belief that an individual is connected to the offence. As Karakatsanis J. observes in *Chehil*, the bottom line is that while both concepts must be grounded in objective facts that stand up to independent scrutiny, "reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime" (para. 27).

THE CONCLUSION IN *MCKENZIE*

The Supreme Court concluded in ***McKenzie*** that "the police had reasonable suspicion that the appellant was involved in a drug-related offence such that they could enlist Levi to perform a sniff search of the appellant's vehicle. The appellant's s. 8 privacy rights were not breached and the marihuana seized from the rear hatch of his car was thus admissible at trial" (at paragraph 91).

A SUMMARY OF THE SUPREME COURT OF CANADA'S DECISIONS

As we have seen, it is well settled in Canada that the use of a sniffer dog constitutes a search that is protected by section 8 of the Charter. However, it is also well settled that Canadian police can use sniffer dogs to search without prior judicial authorization if they have the requisite reasonable suspicion. In addition, if a Canadian police officer has reasonable and probable grounds to arrest as a result of the use of a sniffer dog, that officer can conduct a search incidental to the arrest. This search does not require prior judicial authorization and extends beyond a search of the person arrested (see ***R. v. Saeed***, 1 S.C.R. 518). However, none of the cases decided by the Supreme Court of Canada involved residences.

The Supreme Court has clearly indicated that the constitutionality of sniffer-dog searches are based on two primary factors: (1) the reliability of such searches and (2) their non-invasive nature. In addition, the Court's granting of constitutional validity to such searches was based upon the police having reasonable suspicion. In ***Goodwin v. British Columbia*** (*Superintendent of Motor Vehicles)*, 3 S.C.R. (2015) 250, the Court noted that "a high degree of accuracy has been crucial to endorsing sniffer-dog searches on a lower standard of reasonable suspicion" (at paragraph 67).

It has been suggested by one author that the Supreme Court has set the "standard for a sniff search in these kinds of locations" as a "possibility—not probability." A standard "justified by the minimally intrusive nature of sniff searches" (see Sonia Lawrence, *2013: Constitutional Cases in Review* (2014), 67 S.C.L.R. (2d) 3, at paragraph 51).

In ***R. v. Zolmer***, 2019 ABCA 93, the Alberta Court of Appeal described these types of searches as examples of "air searches," which are not considered to be "intrusive" (at paragraph 32). In ***R. v. Jackman***, 2016 ONCA 121, it was noted that a "dog sniff is minimally invasive on an individual's privacy interests" (at paragraph 26). In addition, the Supreme Court of Canada has not limited dog-sniffer searches to border searches. The power is broad enough to search at schools and in motor vehicles.

Where else it will be expanded to, if anywhere, waits to be seen.

Despite their non-intrusive nature, the use of sniffer dogs must comply with section 8 of the Charter. Thus, for a search based upon the use of a sniffer dog to be reasonable, the police must have reasonable grounds to suspect that a search will reveal evidence of a criminal offence. This will depend, in part, on the reliability of the dog utilized. In ***Goodwin***, the Supreme Court stated that the "reliability of a search or seizure mechanism is directly relevant to the reasonableness of the search or seizure itself." The Court also indicated that the "high degree of accuracy" involved in sniffer-dog searches was "crucial to endorsing sniffer-dog searches on a lower standard of reasonable suspicion" (at paragraph 67). Thus, the dog effectively becomes the Crown's most important witness. The dog's "qualifications" are an important element.

CONCLUSION

Though the Supreme Court of Canada's rulings in the dog-sniff cases has provided Canadian police with a broad constitutional search power, it is not an unlimited one. Consider ***R. v. Molnar***, 2018 MBCA 61, and ***R. v. Urban***, 2017 ABCA 436. These decisions illustrate that though reasonable suspicion is a low standard, it must be objectively established and that it only applies to the dog sniff, not any subsequent searches.

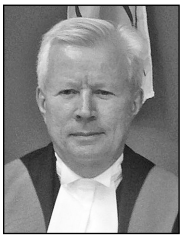
In ***Molnar***, the accused was charged with the offence of possession of marijuana for the purpose of trafficking. The police had utilized a sniffer dog to test a suitcase in the baggage car of a train. A positive reaction was obtained. The suitcase had no identification. The accused was arrested, and the suitcase was searched. Drugs were found and connected to her. The trial judge ruled that the police had reasonable grounds to arrest the accused and that the searches were incidental to her arrest. The accused was convicted.

On appeal, the Manitoba Court of Appeal overturned the conviction. The Court of Appeal noted that the "hit on the grey suitcase by Bernie was compelling information that elevated Constable Kristalovich's reasonable suspicion that the grey suitcase contained marijuana to reasonable grounds to believe (subjectively and objectively) that it did." However, the police did not connect the bag to the accused before arresting her. This led the Court of Appeal to hold that there "was no evidence that the grey suitcase in question was the only grey suitcase in the baggage car bound for Washago. While the evidence was strong to establish a reasonable suspicion, particularly after Bernie's positive hit on the grey suitcase, in contrast to the cases cited above, the required strong connection between the grey suitcase and the accused for the RCMP to have objective reasonable grounds to arrest her did not exist" (at paragraph 35).

In ***Urban***, the accused was convicted of the offence of possessing marijuana for the purpose of trafficking. The conviction was based upon evidence found by the police after deploying a sniffer dog to search the exterior of his vehicle.

In setting aside the conviction, the Alberta Court of Appeal indicated that though the "reasonable suspicion standard has become a low bar particularly since ***Chehil*** and ***MacKenzie***," the totality of the evidence did not support the officer's "subjective belief that Mr. Urban might be involved in a drug-related offence. . . . Consequently, he lacked authority at common law to detain Mr. Urban for the purpose of a controlled substance investigation and to conduct a sniffer dog search of the exterior of Mr. Urban's vehicle, thereby breaching Mr. Urban's rights under s 9 (arbitrary detention) and s 8 (unreasonable search and seizure) of the *Charter*" (at paragraph 44).

In conclusion, the Supreme Court of Canada has considered sniffer-dog searches and given them their constitutional blessing, but only at the initial investigative stage. Their use to search residences has not been considered. As the Supreme Court noted in ***MacKenzie***, relying in part on a decision of the Supreme Court of the United States, this case does not "involve the use of sniffer dogs in contexts such as the home, where courts have long recognized a heightened privacy interest (see, e.g., ***R. v. Evans***, 1 S.C.R. 8; ***Florida v. Jardines***, 133 S. Ct. 1409 (2013)."[2]



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2. In R. v. Leipert (1997) 1 S.C.R. 281, the Court dealt with an appeal in which, after receiving a tip from a Crime Stoppers program, a police officer went to the accused's residence with a sniffer dog and on "four different occasions the policeman and Bruno walked the street in front of Leipert's residence. Each time Bruno indicated the presence of drugs in Leipert's house." The police then obtained a search warrant. The "main allegations raised in support of the warrant were the observations of the police officer at the site." When the search warrant was executed, evidence was seized and the appellant was charged with cultivation of marijuana and possession of marijuana for the purpose of trafficking. In the Supreme Court of Canada, the appeal concerned disclosure of the Crime Stoppers tip rather than the use of the dog's reaction to obtain a search warrant.