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Whatever Happened to ... The Law of Sniffer Dog Searches

Posted By [Peter Bowal](#) On January 6, 2014 @ 2:39 pm In [Famous Cases](#) | [No Comments](#)



[1]When does a sniff amount to an illegal search? The Supreme Court of Canada recently weighed in on this question and the decision changes the law in Canada from what it had previously been. What was the law prior to the recent decision?

Assume you are walking along the street or are on public transit. Perhaps you are at the Greyhound bus depot where the police believe illegal drugs are being brought in and moved. Normally not much privacy would be expected in such public places.

If a police dog walks alongside someone and indicates (usually by sitting down) that this person has illegal drugs in his pocket or bag, that is an illegal search in Canada. Any drugs found will not be admissible in evidence if drug possession charges are laid.

This ruling emerges from a 2008 case from the Supreme Court of Canada called *R. v. Kang-Brown*, [2008] 1 SCR 456 [2]. As we will see, it was out of step with our American, British and Australian cousins.

The Kang-Brown Facts

On the morning of January 25th, 2002, Mr. Gurmakh Kang-Brown disembarked from an all-night Greyhound bus trip from Vancouver at the Calgary bus terminal, a route that the Calgary police suspected of being frequented by drug couriers. Several plainclothes officers were present as part of the Calgary Police Service's *Operation Jetway*, to observe passengers for suspicious behaviour that might indicate illegal courier activity.

Alighting the bus with his bag slung over his shoulder, Kang-Brown made sustained eye contact with plain clothes officer Sergeant Macphee, who returned his stare. Walking through the terminal, Kang-Brown turned and looked again at officer Macphee several times. Just before Kang-Brown exited the building, Macphee walked up and introduced himself as a police officer, showing his badge. He told Kang-Brown that he was not in any trouble and that he was free to go at any time, but that he would like to ask him some questions. Kang-Brown responded that that was fine with him.

After more small talk, Macphee noticed that Kang-Brown was becoming increasingly nervous. Macphee asked if Kang-Brown was carrying any illegal drugs. Kang-Brown answered that he was not. Macphee requested to peek into Kang-Brown's bag.

Kang-Brown put the bag on the ground and began to open it. Macphee knelt down, with his hands about to touch the bag. He said, "just an officer safety thing here, do you mind?" Before Macphee could touch the bag, Kang-Brown jerked it away and exclaimed "what are you doing?"

At this point, Macphee signaled another officer to approach with Chevy, a dog trained to sit when it detected narcotics. Chevy sat next to Kang-Brown's bag. Macphee arrested Kang-Brown for the possession of narcotics. A search of the bag turned up a box containing approximately \$90 000 worth of cocaine and a small amount of heroin.

An Unconstitutional Search?

It is challenging to unpack the four separate opinions from the nine judges, but all agreed that the dog's sniff at the bus depot was a search subject to "reasonable search and seizure" principles under section 8 of the Charter.

At trial, despite handler evidence that sniffer dog Chevy had historically enjoyed an accuracy rate of about 90% on detections (and was obviously accurate in this case), Kang-Brown's lawyer argued that the use of a sniffer dog was an unlawful search. Under the *Charter*, all the evidence obtained as a result would be inadmissible at trial. Without any admissible evidence, there could be no conviction for the drug possession charge.

The case went to the Supreme Court of Canada in 2008. It is challenging to unpack the four separate opinions from the nine judges, but all agreed that the dog's sniff at the bus depot was a search subject to "reasonable search and seizure" principles under section 8 of the *Charter*. A minority of four judges said Canadian police can, even in the absence of legislative authority (i.e. under the common law) search using drug sniffing dogs on a *reasonable suspicion*. Another judge said the standard was *generalized suspicion*, which would have covered the facts of this case. The other four judges said the standard was the same as it has always been: the higher standard of *reasonable and probable grounds*. One will recall that the only reason the police officer approached Kang-Brown in the bus depot was because of his suspicious eye contact and the dog was summoned later after he was reluctant to open his bag.

Six judges said this sniff search violated section 8 of the *Charter* and the evidence of all the illegal drugs found were inadmissible against Kang-Brown. The other three judges disagreed.

Impact

As a result of the Supreme Court decision in *Kang-Brown*, sniffer dog searches were permitted only after police had reasonable and probable grounds to believe someone was bearing illegal drugs. This rendered sweeps and general monitoring by canines essentially unconstitutional in Canada in public spaces such as bus depots and streets.

There was flexibility in the application of *Kang-Brown* based on the nature of the public venue in which the search was conducted. For example, there was a lower expectation of privacy in airports, where security is more pervasive and people are subject to repeated searches (*R v. Chehil*, 2009 NSCA 111 (CanLII) [3]), or even on a public highway (*R v. MacKenzie*, 2013 SCC 50 (CanLII) [4]). Posting signs indicating that people and their bags may be randomly searched (which was the case at the Calgary bus depot, but some of the evidence on that was equivocal) may also reduce general privacy expectations.

Different Jurisdictions – Different Breeds of Sniffer Dog Law

Sniffer dogs have had to pass constitutional muster in other jurisdictions as well. The United States Supreme Court has decided four cases related to sniffer dogs. Basically, they say that the use of dogs in a public place does *not* amount to a search, so the equivalent Fourth Amendment right of the *Constitution* is not offended (*United States v. Place* (1983), 462 U.S. 696 [5]). The U.S. Supreme Court has also concluded that dog sniffs during routine traffic stops are permissible and are not searches, provided the traffic stop itself is legal. However, the Court classifies a dog sniff as a search – requiring probable cause and a warrant – on private property (*Florida v. Jardines* (2013), 133 S.Ct. 1409 [6]).

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British law also refuses to define a dog sniff in a public place as a search. Peace officers often rely on sniffer dog indications as their basis for reasonable suspicion required for a further

physical search. No legislation specifically governs the use of sniffer dogs by law enforcement and the practice has never been challenged in the courts. ("*Sniffer Dogs*", Release Legal Emergency & Drugs Service (London) 2013 [7])

A study by the Ombudsman of New South Wales in Australia reported that drugs were found in only 27% of searches conducted after a dog had given a positive indication of their presence. The study, coupled with sustained public outcry led to the 2005 repeal of the *Drug Dogs Act*, the legislation that enabled warrantless dog sniffs. Besides legal legitimacy, any police investigation tactic should have functional legitimacy.

Conclusion

The law of sniffer dogs, as in most areas of the criminal law, strives to balance the duty of law enforcement to detect and investigate crimes with our *Charter* right to be "secure against unreasonable search or seizure." There was a long-standing threshold that police must possess *reasonable and probable grounds* in order to conduct any search and this largely consigned technology-free sniffer dogs to the kennel.

However, the legal landscape with regard to sniffer dogs changed significantly with the release of the September 27, 2013 Supreme Court of Canada decision in the case of *R. v. Chehil* [8]. In that decision, which was unanimous, the judges examined in great detail the concept of "reasonable suspicion", which differs from "reasonable and probable grounds". We will examine that decision and its impact on the Canadian law on sniffer dogs in our next column.

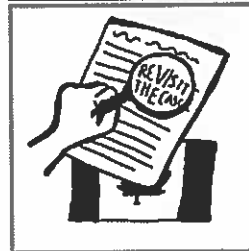
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[2] *R. v. Kang-Brown*, [2008] 1 SCR 456: <http://canlii.ca/t/1wnbc>

[3] *R v. Chehil*, 2009 NSCA 111 (CanLII): <http://canlii.ca/t/26ggh>

[4] *R v. MacKenzie*, 2013 SCC 50 (CanLII): <http://canlii.ca/t/g0qbv>

[5] *United States v. Place* (1983), 462 U.S. 696: http://scholar.google.ca/scholar_case?case=5031844227599510007&hl=en&as_sdt=6&as_vis=1

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[6] *Florida v. Jardines* (2013), 133 S.Ct. 1409: http://scholar.google.ca/scholar_case?case=3945591952650905206&q=Florida+v.+Jardines+2013+U.S.+11+-+564&hl=en&as_sdt=2006

[7] "Sniffer Dogs", Release Legal Emergency & Drugs Service (London) 2013: <http://www.release.org.uk/law/sniffer-dogs>

[8] *R. v. Chehil*: <http://canlii.ca/t/g0qbs>

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