NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Chehil***, 2011 NSCA 82

Date: 20110916
Docket: CAC 339413
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Mandeep Singh Chehil

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Farrar, JJ.A.
Appeal Heard:	May 10, 2011, in Halifax, Nova Scotia
Held:	Appeal is allowed and a new trial is ordered, per MacDonald, C.J.N.S.; Saunders and Farrar, J.A. concurring.
Counsel:	Mark J. Covan, for the appellant Stanley W. MacDonald, Q.C., for the respondent

Reasons for judgment:

[1] In the secured area of the Halifax Airport, RCMP officers directed their dog, Boris, to sniff the respondent's checked baggage for illegal drugs. It had just arrived on a flight from Vancouver. There were positive indications which prompted the officers to arrest Mr. Chehil once he retrieved his suitcase from the public carousel. Once searched, a significant stash of cocaine was discovered. Mr. Chehil was charged with possession for the purpose of trafficking.

[2] Cacchione, J. of the Supreme Court of Nova Scotia ruled that this search infringed Mr. Chehil's *Charter* rights. As a result, the evidence seized was declared inadmissible, resulting in an acquittal. The Crown now appeals to this court.

[3] For the reasons that I will develop, I would allow the appeal and order a new trial. Simply put, I respectfully disagree with the trial judge's legal conclusion on this issue. In my view, there was no *Charter* breach. Instead, the officers had the requisite reasonable suspicion to direct the luggage sniff and then, armed with that additional information, they were justified in arresting Mr. Chehil and searching his bag.

BACKGROUND

[4] Mr. Chehil boarded an overnight *Westjet* flight from Vancouver to Halifax. He had no reservation. He simply walked up to the ticket sales counter alone and paid cash. He checked one locked suitcase.

[5] Meanwhile, back in Nova Scotia, a special RCMP team was tasked to detect the flow of illegal drugs into the Halifax International Airport. Its *modus operandi* included consulting with local airline agents in an effort to identify travellers displaying suspicious patterns.

[6] When the officers checked the manifest for Mr. Chehil's flight, they noticed that he matched several of their established indicia. Cpl. Gregory Alexander Fraser, one of the investigating officers, explained it this way:

> **A.** . . . we had examined the different flights that arrive from different parts of Canada and we had determined that the Province of British Columbia is a

well-known source province for both marijuana and cocaine to Nova Scotia, that couriers are often contracted with cash money to make the delivery so that the currency they would use in purchasing a ticket would most likely be cash. Also, with the purchase of cash there is no -- what is commonly referred to as a paper trail, it cannot be followed up by police investigating traffic -- or travel rather by an individual, recorded travel by an individual.

In this instance the time of the flight was overnight and we would -- and we knew that there would be reduced law enforcement present in Vancouver and it was arriving in Halifax early morning, before dinner, and there would likely be a reduced amount of security present for that flight.

It is a direct flight, I believe, possibly one stop in either Edmonton or Calgary. I can't recall today whether it was non-stop or there was one stop.

The relevance to this is that once the product has been purchased and placed on board the fewer number of stops that the aircraft makes from its point of origin to its destination reduces the number of times that the product can be stolen or detected by law enforcement.

Q. You had mentioned that you noted that this individual was travelling alone. What significance, if any, did that have?

A. The significance of the fact that Mr. Chehil was travelling alone is relevant in that the fewer number of persons that know an individual is transporting an illegal commodity the less chance there is of it being detected by police. In other words, there is less chance of someone supplying information to the police for their benefit.

Plus, there is the cost of sending additional persons that distance that would have to come out of the supplier's -- or the purchaser's expenses.

...

A. And in this instance the flight was what's known as a redeye flight, which is a late night flight, and usually is a cheaper flight. It's not as desirous by the travelling public as a daylight flight or a daytime flight.

Q. What type of a ticket purchase was it?

A. I believe it was a discounted price.

Q. But in terms of -- the cash had been paid for travel from where to where?

A. The ticket was travel from Vancouver to Halifax one way.

Q. Did that have any significance for you?

A. The significance of that is that the individual that was travelling may not have known when he would have been able to return to Vancouver.

His departure from Halifax may have been incumbent upon his ability to complete the transaction and drop the product off and possibly pick up payment prior to returning to Vancouver and at the time of departure he may not have been able to have had that knowledge presented to him.

Q. In terms of the discount aspect of the flight, what significance, if any, did that have for you?

A. If he had been given a certain amount of currency or money to travel from Vancouver to Halifax and return, any monies that were not spent would be his, for his own use.

. . .

Q. So, when you were examining these particular pieces of information and you then came to a conclusion, what did you base it on? You mentioned you had received training in this.

A. These indicators are indicators that are known to be common with persons involved in criminal activity, moving contraband. From personal experience doing investigations on individuals travelling from Halifax to other parts of Canada with currency, which is a common occurrence that narcotics flow from west to east and money flows from east to west, we were able to determine through our investigations that this same practice is used by persons using airline travel moving currency.

Every attempt is made to be in the presence of a police environment or security at an airport for the least amount of time when these individuals are involved in criminal activity. On reviewing the information provided on that manifest and my training in actual investigations that we conducted, I was reasonably suspicious that this possibly could be a person of interest to us.

[7] That, in the team's collective view, was enough to justify the dog sniff:

> **A.** After we received that information we left the WestJet office and returned to our office at the airport, discussed it with the other investigators that were present and working that day, and that was Cst. Andy -- or Andrew Pattison and Cst. Guy Daigle, who was an investigator and a trained specialty dog handler.
>
> It was agreed that we would follow up on our investigation on Mr. Chehil and that Cst. Daigle, Ruby and myself would go the secure air side baggage offloading area and Cst. Pattison would go upstairs and meet the flight on its arrival and attempt to identify Mr. Chehil as he exited the aircraft.

[8] Boris was a Labrador retriever specially trained to detect the scent of drugs and to react accordingly. Up to that time, he had completed over 30 months of active service involving over 1000 investigations. As the above passage reveals, he was handled by Cpl. Guy Joseph Daigle.

[9] When the flight arrived in Halifax, a total of ten bags were set aside for sniffing with Mr. Chehil's being noted as number 7. The other nine were randomly selected to give Boris choices. Here is how Cpl. Daigle described the ensuing search:

> **A.** Then I went and got Boris from my truck and I did a quick run by the bags. When we got by bag number 7 Boris -- I noticed that Boris turned and looked at that particular bag but I didn't slow down. And I kept on going.
>
> I thought that he more than likely had gotten a small whiff of some narcotics or something that brought his attention to that particular bag. I went back to bag number 1 and came back for a second pass at a slower pace, probably spending about two seconds or so per bag.
>
> And immediately when I got to bag number 7 Boris sniffed hard and sat immediately, his tail -- wagging his tail vigorously. And he was staring at me waiting for his reward. I could tell he was excited and for me this meant that he had located the scent of a narcotic which was coming from the area of that bag or coming from that bag, being emitted from that bag.
>
> I told Boris to continue and pulled on his chain for him to continue. He only went well about a foot or so and as he was sniffing the next bag which was right next to it which was a cooler he slowly put his bum down.

> I felt that it might have been contamination or he might have still been getting the smell from that first bag. However I did inform the other members that he had indicated hard on the first bag, Mr. Chehil's bag. And it was a much more subtle indication on the second bag but if we had time we should speak to the person who owned that second bag, which was actually a cooler.

[10] The cooler referred to in this passage was claimed by another passenger. It too was searched (with the owner's permission) but it contained no drugs. Despite this apparent false indication, the team felt that they were nonetheless justified in arresting Mr. Chehil and searching his suitcase. This they did promptly upon his retrieving it. He was taken to a private room, the bag was opened and drugs discovered. Mr. Chehil was then charged.

[11] At trial, Mr. Chehil brought a *Charter* application asserting that both the dog sniff and subsequent suitcase search (incident to arrest) were unlawful. As a remedy, he sought to have the cocaine excluded from the evidence. This relief would be tantamount to an acquittal.

[12] The trial judge heard Mr. Chehil's application by way of a *voir dire*. Mr. Chehil called no evidence but instead relied on the testimony of the investigating officers who were called by the Crown and cross-examined by the defence.

[13] The judge had problems with both the sniff search and the search of the suitcase incident to arrest. Regarding the sniff search, he felt that the team was merely acting on an "educated guess", not enough to meet the requisite reasonable grounds to suspect:

> ¶172 Corporal Fraser testified that it was the cumulative nature of the factors set out above which lead him to form a suspicion that the applicant was transporting drugs from Vancouver to Halifax and that his suspicion ripened into reasonable and probable grounds once he received information from Corporal Daigle that the PSD had indicated on the applicant's bag.
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> ...
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> ¶174 I am not satisfied that the factors listed above when considered in their totality and cumulatively together with Corporal Fraser's experience could lead to Corporal Fraser having an objectively reasonable suspicion that the applicant's luggage contained narcotics. Corporal Fraser was at best relying on an educated guess.

[14] Regarding the arrest, obviously, if the sniff search were unlawful, the grounds for arrest would evaporate. However, the judge also had independent concerns involving Boris' false indication with the cooler:

> ¶173 I am not satisfied, contrary to their evidence, that Corporal Fraser or Constable Ruby had reasonable and probable grounds to believe that the applicant's bag contained narcotics once they received information from Corporal Daigle of PSD Boris' indication on the applicant's bag, since the dog had indicated not only on the applicant's bag but also on the cooler which was situated next to it in the line up of the bags sniffed by the dog.

[15] These factors, in the judge's view, rendered the search of the suitcase unlawful:

> ¶178 There are three conditions which must be satisfied for a valid search incident to arrest. These are as follows: (1) the search must be lawful; (2) the search must have been conducted as an incident to the lawful arrest; and (3) the manner of the search must be reasonable.
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> ¶179 A search incident to arrest is an exception to the rule in **Hunter and Southam** that warrantless searches are *prima facie* unreasonable.
>
> ¶180 In the present case the search was not based on the reduced standard of reasonable suspicion but rather on speculation. Accordingly the search was not lawful and the arrest which followed was unlawful. I am not satisfied that forcing open the applicant's suitcase was a search incident to a lawful arrest. The search was therefore unreasonable.
>
> ¶181 The police had no lawful authority to arrest and search the applicant. His rights under ss. 7 and 9 of the **Charter** were therefore infringed.
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> ¶182 The search not being authorized by law was accordingly unreasonable and a violation of the applicant's right to be free from unreasonable search and seizure under s. 8 of the **Charter**.

[16] As to a remedy, the judge found these *Charter* violations to be serious enough to exclude this essential evidence.

> ¶213 In the present case the violation was serious. The officers did not even meet the reduced standard of reasonable suspicion. Their actions were speculative

> and indiscriminate. The evidence also establishes that in the period from 2003 to 2008 hundreds of random searches of passengers and their luggage were conducted by the CIT with apparent complete disregard for the constitutional rights of the persons involved.
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> ¶214 This evidence gathering technique was objectively unreasonable since the police did not have reasonable suspicion to suspect that the applicant was transporting drugs before searching his luggage.
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> . . .
>
> ¶221 The evidence obtained in this case as a result of the illegal search was nonconscriptive evidence. While society has an interest in an adjudication of the case on its merits and trafficking in cocaine is a serious offence, the evidence must in my opinion be excluded. The words of Justice Binnie in **R. v. Kang-Brown** at para. 104 are appropriate in this case. At para. 104 he stated:
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> > ... The administration of justice would be brought into disrepute if the police, possessing an exceptional power to conduct a search on the condition of the existence of reasonable suspicion, and having acted in this case without having met the condition precedent, were in any event to succeed in adducing the evidence. Drug trafficking is a serious matter, but so are the constitutional rights of the travelling public. In the sniffer-dog cases, the police are given considerable latitude to act *in the absence of any requirement of prior judicial authorization*. The only effective check on that authority is the after-the-fact independent assessment. I conclude that the police initiated a warrantless search on inadequate grounds. In my view, on the facts here, the evidence should be excluded.
>
> [Emphasis by Binnie, J.]

[17] On appeal before us, the Crown also brought a preliminary motion to introduce fresh evidence. Specifically, it maintained that the judge erred by preventing Cpl. Fraser from testifying about (a) his communication with the *Westjet* agent regarding exactly when the ticket was purchased; and (b) why he felt that Boris was reliable. The proposed fresh evidence represented what Cpl. Fraser would have said about these two topics, had he been given the opportunity. Specifically, he would have testified that according to the *Westjet* agent, the ticket was purchased "shortly before" the flight departed. Regarding Boris' reliability,

he would have testified about his familiarity with Boris' yearly validation reports, and, based on his conversations with staff, that these testing procedures were both reliable and valid and that Boris was "a reliable sniffer dog".

[18] We reserved judgment on this motion, pending the outcome of the appeal proper.

ISSUES AND STANDARD OF REVIEW

[19] As noted, the two issues involve the legality of both the sniff search and the search of the suitcase (incident to Mr. Chehil's arrest). These issues are obviously intertwined because the officers relied on the information garnered from the sniff search to justify the arrest and search of the suitcase. That said, they cannot be completely merged because, as noted, even had the sniff search been lawful, the judge still had problems with Boris' reliability.

[20] Turning to the appropriate standard of review, the Crown advances this appeal on a question of law pursuant to the *Criminal Code*:

> **676.** (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

We review questions of law on a correctness standard. In other words, if we disagree with the judge on a question of law, our view would prevail.

[21] At the same time, we should defer to the judge's factual findings. See: **Housen v. Nikolaisen**, 2002 SCC 33 at ¶25 and **R. v. R.E.W.**, 2011 NSCA 18 at ¶ 29 to 31. However, ignoring or seriously misapprehending important evidence can amount to a reversible error of law. See: **R.E.W.** at ¶ 32.

[22] In this appeal, the police had to meet certain standards to justify their actions. For example, to justify the sniff search they required only a "reasonable suspicion" that the suitcase contained illegal drugs. This is because such a search would be less intrusive. However, to justify Mr. Chehil's arrest and incidental

search of the suitcase, which is obviously more intrusive, the police required the higher standard of "reasonable and probable grounds" to believe that the suitcase contained illegal drugs. The appropriate standard upon which we are to review these two issues rests at the heart of this appeal.

[23] Specifically, whether the police met these requisite standards are questions of law which we would review on a correctness standard. In other words, should we conclude that the police had reasonable grounds to justify either the dog sniff or the arrest, then our view would prevail. For example, in meeting the requisite "reasonable and probable grounds" standard, the Supreme Court of Canada in **R. v. Shepherd**, [2009] 2 S.C.R. 527, 2009 SCC 35, noted:

> ¶20 While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount *at law* to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of reasonable and probable grounds is a question of fact. *However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law*: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23. In our view, the summary conviction appeal judge erred in failing to distinguish between the trial judge's findings of fact and his ultimate ruling that those facts were insufficient, *at law*, to constitute reasonable and probable grounds. Although the trial judge's factual findings are entitled to deference, the trial judge's ultimate ruling is subject to review for correctness.
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> [Emphasis added.]

[24] In my view, the same logic would apply to the "reasonable suspicion" standard required for a sniff search. In other words, whether the facts (as found by a trial judge) amount to a reasonable suspicion is a question of law. After all, this too involves "the application of a legal standard to the facts of the case". Indeed, the legal standard for reasonable suspicion is well established in Canadian jurisprudence. See **R. v. Kang-Brown**, 2008 SCC 18 at ¶ 75. I will discuss the elements of this standard in more detail later.

[25] Recently, the British Columbia Court of Appeal in **R. v. Payette**, 2010 BCCA 392, took the same approach when considering a dog sniff search at a roadside check point:

> ¶21 The question of whether a particular set of facts is capable of constituting objectively reasonable grounds is a question of law, reviewable on a standard of correctness: *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527 at para. 20. The Crown argues that deference must nevertheless be shown to the underlying findings of facts. That may be the case, but here there is no dispute as to the factual findings. The question is simply whether the trial judge was correct in finding that they met the legal standard of reasonable suspicion.

See also **Kang-Brown**'s twin decision: **R. v. A.M.**, 2008 SCC 19 at ¶ 79.

[26] Therefore in my analysis that follows, I will review whether, on the facts of this case, the officers had the requisite grounds to justify:

(a) the sniff search; and

(b) the arrest and search incidental thereto.

ANALYSIS

The Sniff Search

[27] In **Kang-Brown**, *supra*, a majority of the Supreme Court of Canada confirmed that the police are justified in engaging "trained and well-handled" police dogs to sniff a traveller's luggage provided they act on a "reasonable suspicion" that a crime is being committed. For example, Binnie, J. explains:

> ¶58 My colleague LeBel J. writes, at para. 1:
>
> > ... I acknowledge that the *Charter* does not prohibit the use of sniffer dogs or other investigative techniques by police; it does require, however, that they be used in accordance with the standards established by s. 8.
>
> We agree that the use of a sniffer dog amounts to a "search" because of the significance and quality of the information obtained about concealed contents, whether such contents are in a suspect's belongings or carried on his or her person. (In the present case, the positive "sniff" was itself considered sufficient by

> the RCMP to arrest the appellant before even physically checking his bag to confirm the presence of illegal drugs.) However, because of the minimal intrusion, contraband-specific nature and pinpoint accuracy of a sniff executed by a trained and well-handled dog (as in the case of Chevy here), it is my view for reasons set out in *A.M.*, released concurrently, that a proper balance between an individual's s. 8 rights and the reasonable demands of law enforcement would be struck by permitting such "sniff" searches on a "reasonable suspicion" standard without requiring prior judicial authorization.

[28] What then constitutes a “reasonable suspicion”? Binnie, J., goes on to explain:

> ¶75 The “reasonable suspicion” standard is not a new juridical standard called into existence for the purposes of this case. “Suspicion” is an expectation that the targeted individual is possibly engaged in some criminal activity. A “reasonable” suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. As observed by P. Sankoff and S. Perrault, “Suspicious Searches: What’s so Reasonable About Them?” (1999), 24 C.R. (5th) 123:
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> > [T]he fundamental distinction between mere suspicion and reasonable suspicion lies in the fact that in the latter case, a sincerely held subjective belief is insufficient. Instead, to justify such a search, the suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment.
> >
> > ...
> >
> > What distinguishes “reasonable suspicion” from the higher standard of “reasonable and probable grounds” is merely the degree of probability demonstrating that a person is involved in criminal activity, not the existence of objectively ascertainable facts which, in both cases, must exist to support the search. [pp. 125-26]
>
> Writing about “reasonable suspicion” in the context of the entrapment defence, Lamer J. in *R. v. Mack*, [1988] 2 S.C.R. 903, thought it unwise to elaborate “in the abstract” (p. 965). See also *R. v. Cahill* (1992), 13 C.R. (4th) 327 (B.C.C.A.), at p. 339. However, in *Alabama v. White*, 496 U.S. 325 (1990), the U.S. Supreme Court contrasted “reasonable suspicion” with reasonable grounds of belief (or, what the U.S. lawyers call “probable cause”):

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. [p. 330]

[29] In elaborating, Binnie, J., adopts the reasoning of the Ontario Court of Appeal in **R. v. Simpson** (1993), 12 O.R. (3d) 182. While requiring less than the reasonable and probable grounds standard, it involves more than a hunch:

> ¶76 The U.S. Fourth Amendment cases were reviewed by the Ontario Court of Appeal in connection with investigative stops based on reasonable suspicion in *R. v. Simpson* (1993), 12 O.R. (3d) 182, where Doherty J.A. concluded, at p. 202:
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> > These cases require a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. The requirement that the facts must meet an objectively discernible standard . . . serves to avoid indiscriminate and discriminatory exercises of the police power. [Emphasis added.]
>
> The Court of Appeal stated that a hunch based on intuition gained by experience cannot suffice as "articulable cause". The *Simpson* description of "articulable cause" was treated as equivalent to "reasonable suspicion" in the context of s. 99(1)(f) of the *Customs Act* in *R. v. Jacques*, [1996] 3 S.C.R. 312, *per* Gonthier J., at para. 24, and Major J., at para. 52, and I conclude that it applies to "reasonable suspicion" in the present context as well. See also *R. v. Ferris* (1998), 126 C.C.C. (3d) 298 (B.C.C.A.), at para. 37.

[30] Furthermore, it requires an element of objectivity:

> ¶77 It is important to emphasize the requirement for *objective* "articulable" grounds, as did the B.C. Court of Appeal in *R. v. Lal* (1998), 113 B.C.A.C. 47, at para. 23:
>
> > The fundamental point is that the trial judge must be in a position to make an independent assessment of the facts upon which the suspicion is based.

> ¶78 The importance of objective grounds in the present context, of course, is that where police initiate warrantless "sniff" searches there is no before-the-fact judicial authorization. The after-the-fact review can only truly be an "independent assessment" if there are objective grounds put forward to support the personal opinion of the police officer. As Doherty J.A. commented in *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.):
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> > The protection against police excess rests not only in the standard itself, but in its retrospective application. [para. 65]
>
> ¶79 The objective of the Jetway program and similar police operations in the U.S. is therefore to identify characteristics "generally associated with narcotics traffickers" (W. R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004), vol. 4, at p. 503) without sweeping up "a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure" (*Reid v. Georgia*, 448 U.S. 438 (1980), at p. 441). In these cases, the *Charter* protection is of immediate concern not only to accused drug dealers but to the general travelling public who have every right to go about their law-abiding business without being the subject of random police searches, by dog or otherwise.

[31] Thus, this test reflects the court's effort to balance an individual's privacy interests with society's interest in combatting crime. Abella, J. in **R. v. Clayton**, 2007 SCC 32 (in the context of a search incident to investigative detention) put it nicely:

> ¶31 The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.

[32] Binnie, J. in **A.M.**, *supra*, transposes this same logic to our situation; the sniff search:

> ¶5 ...

> Stripped of the relevant context, musing on the differences between a dog's nose and an infrared camera, or generalizing about "emanations", does not greatly advance the resolution of the issues before us. What is required is to strike an appropriate balance between the state's need to search (whether the need be public safety, routine crime investigation or other public interest) against the invasion of privacy which the search entails, including the disruption and prejudice that may be caused to law-abiding members of the public, whether travelling (as in *Kang-Brown*) or in the schools (as here) or in the peace and quiet of their own homes.

[33] Turning then to the decision under appeal, it is clear from his comprehensive and careful reasons that the judge well understood the appropriate test for a reasonable suspicion:

> ¶150 A review of the separate judgments in **R. v. Kang-Brown** and **R. v. A.M.** indicates that at least five of the justices favoured a reasonable suspicion standard for dog sniff searches. Shortly after these decisions were released Professor Don Stuart in his article, Revitalizing Section B: Individualized Reasonable Suspicion is a Sound Compromise for Routine Dog Sniff Use (2008), 55 C.R. (6th) 376 referred to the likelihood that "with the retirement of Justice Bastarache, all eight justices currently favour a test of at least individualized reasonable suspicion".
>
> ¶151 What is clear from these separate judgments is that police cannot simply rely on speculation, intuition, hunches or educated guesses. A well educated guess that drugs will be found does not amount to reasonable suspicion.
>
> ¶152 The decisions in **Kang-Brown** and **A.M.** make it clear that reasonable suspicion is a lower standard than that of reasonable and probable grounds. It is not the standard of absolute certainty or even reasonable probability. Reasonable suspicion means "something more than a mere suspicion and less than a belief based upon reasonable and probable grounds". It requires "objectively discernable" facts, capable of articulation, which allow the Court to make an independent assessment of the basis for the suspicion. It must be supported by factual elements that can be identified and presented in evidence. The person claiming to have reasonable suspicion must be able to identify and articulate the factors justifying the reasonable suspicion allegedly held.
>
> ¶153 There must be a constellation of objectively discernable facts which give the officer reasonable cause to suspect illegal activity. In **R. v. Simpson** (1993), 12 O.R. (3d) 182 Doherty J.A. stated at p. 202:

> ... The requirement that the facts must meet an objectively discernable standard...serves to avoid indiscriminate and discriminatory exercises of the police power.

> ¶154 The reduction of the standard from reasonable and probable grounds to a reasonable suspicion requires, according to Binnie J. in **Kang-Brown** that courts engage in rigorous after the fact judicial scrutiny of the grounds alleged to constitute reasonable suspicion: **R. v. Kang-Brown** (*supra* at para. 26).

[34] Furthermore, the judge properly asserted that, simply because Mr. Chehil was in an airport where security measures are heightened, he nonetheless retained a privacy interest in his suitcase:

> ¶135 Although a person's expectation of privacy in the airport context is greatly reduced because of the layers of security measures previously outlined, it is not in my opinion completely eliminated. A distinction must be drawn between a traveller's expectation of privacy in the airport context in relation to flight safety and to general police investigations. In the former I conclude that a traveller has a reduced expectation of privacy vis-a-vis the security of the aircraft. However, with respect to the latter I consider that a traveller does have an expectation of privacy as it relates to the conduct of general police investigations.

> ¶136 I do not agree with the respondent's submission that because this was a search at an airport the applicant could not have a reasonable expectation of privacy. In **R. v. A.M.** Binnie stated at para. 48:

> > If an accused has a privacy interest in the content of a letter, it is not lost when she takes it out of her purse and posts it. If an accused has documents concealed in the locked trunk of his car, the privacy interest in the contents of the trunk of the car does not depend on whether he is in the car or has left it parked somewhere, including a public lot. My home is no less private when I am out than when I am there. When students left their backpacks in the gymnasium, they did not thereby lose their privacy interest in the concealed contents, in my view.

> To this I would add that travellers do not lose their privacy interest in their belongings simply because they are in an airport and submit themselves and their baggage to security screening.

> ¶137 The respondent Crown argues that there should be no credibility for the suggestion that a member of the travelling public, utilizing an airport and

> commercial airline, would acknowledge and accept the lack of privacy in themselves and their belongings for certain purposes (e.g. explosive substances, weapons, etc.), but not for others (e.g. drug couriers and contraband.) For the reasons previously mentioned I do not accept this contention.
>
> ¶138 It is important to note that the search involved the applicant's suitcase. The applicant had a direct interest in that suitcase and its contents. He identified the suitcase as being his when he checked in for his flight and an identification tag bearing his name was placed on the suitcase. The suitcase was locked.

[35] The judge also properly made the distinction between two types of law enforcement in airports; those that target terrorism and those that target crime generally. Heightened efforts to combat the former cannot be used to circumvent protections guaranteed with the latter:

> ¶144 From the fact that the applicant purchased a ticket, checked his suitcase as checked baggage and boarded the aircraft a reasonable inference can be drawn that the applicant knew and intended that his luggage be subjected to the security measures in place in an airport. It cannot, however, be inferred that by doing this he consented to his bag being searched by the police.
>
> ¶145 Security measures at an airport are meant to ensure passenger and aircraft safety, not as a method of general police investigation.

[36] That said, I respectfully disagree with the judge's conclusion that the police lacked the requisite reasonable suspicion in these circumstances. Instead when I view the "constellation of objectively discernable facts", I see reasonable grounds for suspicion. In other words, I see ample uncontested evidence to justify a reasonable expectation that Mr. Chehil was engaged in criminal activity. To be specific, consider the following evidence all of which, based on police intelligence, is consistent with the flow of illegal drugs:

- a Vancouver-Halifax flight
- a walk up passenger travelling alone and paying cash
- the last ticket purchased for that flight
- just one relatively new suitcase that was locked

– an overnight flight

– a one-way ticket

[37] These factors, in my respectful view, converge to establish the requisite reasonable grounds to suspect. In reaching this conclusion, I am not overlooking the fact that each of these factors considered in isolation offers an innocent explanation. For example, many innocent people travel alone. Many may use overnight flights to save money. A certain percentage may walk up without a reservation. No doubt some still pay cash. Not everyone has an old suitcase.

[38] However, we must step back and look at the "constellation" of factors. In other words, our task is not to consider each factor in isolation to determine if there may be innocent explanations. As noted, the judge properly articulated this in his reasons. However my concern is not with how the judge articulated the law. Instead, I am concerned with how he applied the law. Specifically, instead of looking for a constellation of factors, he appeared to look at each in isolation and in doing so, dwelled on the corresponding innocent explanations:

> ¶170 The following information was known to Corporal Fraser and Constable Ruby and was the basis for making the decision to call in the dog for a sniff search:
>
> 1. The applicant was travelling on a flight from British Columbia, which the police knew as a source province for drugs.
>
>   The evidence shows that the vast majority of travellers from British Columbia are not drug traffickers. Simply because a person is travelling from a source province does not automatically mean that this person is involved in illicit drug business. The officers acknowledged this.
>
> 2. The ticket was purchased with cash. The officers knew from their experience and training that drug couriers are paid by suppliers in cash and use cash to purchase their tickets so as to avoid a paper trail.
>
>   While a cash purchase is objectively suspicious it does not by itself constitute a reasonable suspicion. No attempt was made to determine the reason for this cash purchase. The police did not speak to the applicant.

Corporal Fraser acknowledged that some persons who are not involved in criminal activity purchase their tickets using cash.

There are numerous reasons why some people make purchases, even of airline tickets, in cash and not by credit card. While a cash purchase may be an indicator of criminal intent, it may also be because the person does not own or use a credit card. Bankrupts, students and persons who do not believe in paying exorbitant credit card interest rates are but some examples of those who may not own or use a credit card.

3. The applicant was flying on an overnight flight. The use of overnight or red-eye flights are typically preferred by drug couriers because of the reduced police presence as well as the lower cost of such flights.

Many travellers use overnight flights for a variety of reasons. The reduced cost of air fare on such flights; scheduling reasons or a desire to be home as quickly as possible being but some examples of why an innocent traveller would use an overnight flight. Corporal Fraser agreed that many legitimate travellers use overnight flights.

4. That this was a one-way flight with only one stop over, without a change of aircraft which meant that the luggage loaded at the place of origin would remain in the plane until it reached its destination.

I accept the evidence that some drug couriers travel on a one-way ticket because they are often not sure of the time when they can drop-off the drugs or receive payment for them. The police evidence was also that drug couriers use quick turn around flights. In the present case no attempt was made to determine the reason for one-way travel by the applicant.

Most travellers try to get to their destination in the shortest possible time. Direct flights or flights with no change of aircraft are preferred over longer connecting flights. Not changing aircraft is preferred since it reduces the chances of missing a connecting flight should there be a delay in the original flight and of losing luggage.

5. The applicant was travelling alone. I accept the evidence of Corporal Fraser, Constable Pattison and Corporal Vail that in the context of drug investigations travelling alone means that fewer people know about the travel arrangements which reduces the risk of discovery either by the police or by other criminals who might want to take the product which is being transported and that travel alone is less expensive than travel with another person. However, the fact that a person is travelling alone does not

> automatically make that person a drug courier. Many single persons, students or persons travelling on business travel alone. No attempt was made to determine why the applicant was travelling alone.
>
> Only the cash purchase of a ticket at perhaps the last minute, although the evidence on this last point is not clear, could be viewed as suspicious circumstances. The rest are equivocal.

[39] In fact, the judge felt that the police improperly ignored the potential for this litany of innocent explanations:

> ¶171 Corporal Fraser determined as soon as he saw the location of the applicant's name on the flight manifest and that the ticket was purchased in cash, that he would have the dog sniff the applicant's bag. No further investigation was done. Corporal Fraser, the CIT leader, decided to search the applicant's bag based on his intuition and not on a reasonable suspicion. *It cannot be said in the present case that a global assessment of the significance of the facts was considered nor was there any consideration given to facts which pointed away from a suspicion that the applicant was involved in the criminal activity alleged. Exculpatory, neutral or equivocal information would appear to not have been considered.* The cumulative effect of the various factors did not, in my opinion, establish a reasonable suspicion to believe that the applicant was involved in criminal activity.
>
> [Emphasis added.]

[40] Respectfully, this approach misses the mark. Again, there were clearly innocent explanations for each factor. But that is not the issue. Instead, we must ask whether these factors coalesced into reasonable suspicion, despite a potential innocent explanation for each.

[41] Furthermore, as is evident from the above passages, the judge felt that the police could have taken additional steps to buttress their grounds for suspicion. For example, he noted:

- "No attempt was made to determine the reason for this cash purchase."
- "The police did not speak to the applicant."

– "...no attempt was made to determine the reason for one-way travel..."

– " No attempt was made to determine why the applicant was travelling alone."

[42] Could the police have done more? By all means. However, again, that is not the question. Instead, the question is whether in this case the police did enough to establish a reasonable suspicion. In my view they did and, respectfully, the judge erred in concluding otherwise.

The Arrest and Incident Suitcase Search

[43] I begin with the basic premise. The police searched Mr. Chehil's suitcase without a warrant. This is presumptively unreasonable and for the search to be reasonable in this case the police, as noted, would have to have had reasonable and probable grounds to believe that the suitcase contained illegal drugs. See: **R. v. Collins**, [1987] 1 S.C.R. 265 at ¶ 22 to 24 and **R. v. Kang-Brown**, *supra*, at ¶99 *per* Binnie, J. and at ¶ 200 (*per* Deschamps, J.) .

[44] Of course, my conclusion on the first issue goes a long way to establishing the requisite reasonable and probable grounds. In other words, Boris' positive indication in addition to Mr. Chehil's other suspicious travel patterns represents a strong indication that Mr. Chehil was transporting illegal drugs.

[45] However, as noted, the judge had problems with Boris' reliability, even had the sniff search been justified. His concerns involved the fact that Boris had indicated on the cooler when, in fact, it contained no drugs (repeated for ease of reference):

> ¶173 I am not satisfied, contrary to their evidence, that Corporal Fraser or Constable Ruby had reasonable and probable grounds to believe that the applicant's bag contained narcotics once they received information from Corporal Daigle of PSD Boris' indication on the applicant's bag, since the dog had indicated not only on the applicant's bag but also on the cooler which was situated next to it in the line up of the bags sniffed by the dog.

[46] I agree that a positive indication does not automatically justify an arrest should the dog not be sufficiently reliable. Again, I refer to Justice Binnie in **Kang-Brown**:

> ¶99 Had I concluded that the dog-sniff search was based on reasonable suspicion, I would have agreed that Chevy's positive alert would have given the police the grounds to proceed on the spot with a warrantless search of the appellant's bag, as discussed in *A.M.*, because of Chevy's demonstrated accuracy 90 to 92 percent of the time. Sergeant MacPhee says he based his actions on
>
> > . . . a lot of factors pertaining to the history and the training and the background of the animal.
> >
> > Q Of the animal?
> >
> > A Yes. [A.R., at p. 83]
>
> The RCMP accept that different dogs possess different abilities and track records and that "sniffer dogs" are not interchangeable. *Proof must be made of the accuracy of a particular animal before police reliance is justified. This is another matter that should be established in the evidence (as it was here).*
>
> [Emphasis added.]

[47] However, the judge's concern here is, in my respectful view, misplaced. It ignores the fact that Boris is trained not to detect drugs but the smell of drugs. This sounds like semantics, but it is not.

[48] Note again, for example, Cpl. Daigle's expert opinion that the false indication with the cooler likely resulted from scent actually emanating from Mr. Chehil's bag which was right next to the cooler:

> **A.** Then I went and got Boris from my truck and I did a quick run by the bags. When we got by bag number 7 Boris -- I noticed that Boris turned and looked at that particular bag but I didn't slow down. And I kept on going.
>
> I thought that he more than likely had gotten a small whiff of some narcotics or something that brought his attention to that particular bag. I went back to bag number 1 and came back for a second pass at a slower pace, probably spending about two seconds or so per bag.

> And immediately when I got to bag number 7 Boris sniffed hard and sat immediately, his tail -- wagging his tail vigorously. And he was staring at me waiting for his reward. I could tell he was excited and for me this meant that he had located the scent of a narcotic which was coming from the area of that bag or coming from that bag, being emitted from that bag.
>
> I told Boris to continue and pulled on his chain for him to continue. He only went well about a foot or so and as he was sniffing the next bag which was right next to it which was a cooler he slowly put his bum down.
>
> *I felt that it might have been contamination or he might have still been getting the smell from that first bag.* However I did inform the other members that he had indicated hard on the first bag, Mr. Chehil's bag. And it was a much more subtle indication on the second bag but if we had time we should speak to the person who owned that second bag, which was actually a cooler.
>
> [Emphasis added.]

[49] This was evidence from a duly qualified expert witness and the defence called no evidence to rebut this opinion. There was therefore no basis for the judge to reject Cpl. Daigle's explanation and, by doing so he, in my respectful view, seriously misapprehended the evidence.

[50] That was the judge's only noted concern about Boris in this aspect of his decision dealing with the grounds for arrest. However, later in his decision, as part of his s. 24(2) analysis, the judge highlighted another concern (which out of an abundance of caution I feel compelled to address at this stage).

[51] The added concern involved Cpl. Daigle's records that suggested Boris was 87.6% accurate in the field with actual deployments. The judge questioned this statistic because it included indications where no drugs were found (although the officer remained satisfied of the dog's accuracy because he assumed that the drugs had been recently removed from the place searched). The judge cautioned:

> ¶191 In Exhibit VD11 there are 15 instances of actual deployment where the dog indicated the presence of a narcotic and a search was done but no drugs were found. Despite this, those deployments were shown as being confirmed searches because the person who was searched either said that drugs were used by him or her or used in the vicinity of the luggage. Corporal Daigle could not say whether

> the person who admitted using or being in the presence of drug use was or was not lying about that, nor could he say that drugs had been present but missed by the dog because they were hidden in a secret compartment in the luggage. This undermines the officer's description of these searches as confirmed searches.
>
> ¶192 Eleven instances are shown as confirmed searches on Exhibit VD11 where no drugs only cash was found. The money in those cases was never tested for drug contamination. Money which is discovered in this fashion is now tested for drug contamination. Had the money been tested and found to have been contaminated by drugs, then a notation as a "confirmed search" would have been more plausible. The fact that such money was never tested for possible drug contamination yet the search was categorized as a confirmed search also calls into question the methodology used by Corporal Daigle to rate his PSD's reliability and accuracy.
>
> ¶193 Random deployments such as walking through the airport where the dog did not indicate positively on any person or bag would not be shown on Exhibit VD11 as deployments.
>
> ¶194 PSD Boris' accuracy and reliability is reduced when one considers only his actual deployments. His accuracy rating then falls below 90% and is actually 87.6%. That rating falls even lower into the 70% range when one removes from the assessment those cases where the dog has indicated but no drugs were found and the subject has allegedly admitted prior use.

[52] Yet, Cpl. Daigle on cross examination explained why a 87.6% accuracy rating was nonetheless justified. First, he addressed the 15 occasions when there were positive indications but no drugs were found, emphasizing that with each such occasion, the person under investigation admitted to recently having had possession of illegal drugs:

> **Q.** Now would you agree with me that if we take those 15 that you have indicated as positive indications, okay, add them to 22 that becomes 37.
>
> **A.** Fifteen plus 22 equals 37 but I wouldn’t add them to the 22.
>
> **Q.** Why not?
>
> **A.** Because it’s admitted use. You have admitted to using and I believe that’s why the dog indicated.

Q. Yeah but the dog hasn't found any drugs. You can't say with certainly that that dog was accurate on that occasion, can you?

A. But the dog on validation is hitting at 99 percent to 100 percent. For him to be indicating 15 times on something that's not there at all when a person admits, I wouldn't buy that argument.

Q. You may not buy that argument but you can't sit here and tell us that for certain that there were drugs in that bag when the dog indicated on it.

A. Which is why we should be going with the validations.

Q. Okay. But you answered my question, the answer to that is yes, right?

A. I can't tell you for certain.

[53] Cpl. Daigle also addressed the 11 occasions when no drugs were found, but "contaminated" money was nonetheless discovered. For example, note this exchange on cross examination:

A. Well that parcel was singled out because of indicators, characteristics to parcels being shipped -- see in Halifax the drug comes in usually from the western provinces. Money is usually shipped out towards the western provinces. This parcel would have indicators that made it suspicious in the first place.

Then when the dog indicated on this money, the dog's not trained to indicate on money but he indicated on the money, for me it was because it was contaminated with drug -- the way the drug -- the money is also wrapped, it's quite common in the drug world that twenty dollar bills are used quite a bit and they're wrapped in thousand dollar bundles with elastics.

And those circumstances added together with the fact that the parcel was picked out from whatever parcels made me mark it as positive. I believe it was contaminated.

Q. You believe it was contaminated?

A. Yes.

Q. Your belief is what contributes to Boris' reliability right?

A. Yes.

[54] In my respectful view, again there is no basis to question Cpl. Daigle's unrebutted expert evidence and such challenges must therefore be viewed as no more than speculation.

[55] Finally, the judge was also sceptical about what Cpl. Daigle touted as Boris' 99% accuracy in controlled testing:

> ¶199 While it may be that in yearly validations PSD Boris' accuracy is 99%, this cannot be accepted as a true indicator of his accuracy in actual use.
>
> ¶200 Validations are done in a controlled environment. They are conducted by the RCMP and not an independent agency. During the validation exercises the hides (subject matter of the search) are always scented. Corporal Daigle was unaware of any testing with respect to how much wrapping would be required to mask the scent of a drug so that the dog would not indicate on that packet. However, it was his evidence that where drugs were found but the dog had not indicated the presence of drugs, this was because of how the drugs were wrapped. This statement is difficult to accept as fact because Corporal Daigle agreed that a determination of how much wrapping would be required to mask the scent of the drugs has never been done. He admitted that such a determination could be made by testing done in a controlled environment, such as the RCMP dog training facility, however it would appear that to date this has not been done.
>
> ¶201 The evidence also demonstrates that there is no national standard for rating a PSD's accuracy nor is there a consistent methodology used to rate a PSD's accuracy. It is interesting to note that in the training course which Corporal Daigle and other dog masters took with their PSD's no instruction was given to the dog handlers on to how to capture a dog's reliability. A dog master's rating of his PSD's accuracy is very subjective.

[56] Respectfully, this criticism of Boris' reliability as well appears to be misguided. Again, it highlights what the police could be doing to enhance accuracy, such as independent testing facilities and national testing standards. While these are laudable goals, they do not reflect the real issue in this case. Instead, the question is simply this. Considering that the only evidence on this *voir dire* was that offered by the Crown, can it be disputed that, in Cpl. Daigle's expert

opinion, Boris was 99% accurate in annual controlled validations? In my respectful view, it cannot.

[57] In short, the challenge to Cpl. Daigle's expert evidence appears to be based on conjecture that, for example, admitted drug users may be lying, that contaminated drug money may be clean, that the annual validation process may be flawed or that national standards are required. Respectfully, all this represents a misapprehension of the evidence serious enough to warrant our interference.

[58] For all these reasons, I conclude that the police, armed with the suspicious indicators justifying the sniff search, together with the added results from this search, had reasonable and probable grounds to believe that Mr. Chehil was in possession of illegal drugs. His arrest was therefore justified, thus making it reasonable for the police to search his suitcase. There was therefore no *Charter* breach.

[59] With no *Charter* breach, there is no need for us to conduct a s. 24(2) analysis. Nor is it necessary for us to consider the Crown's motion to introduce fresh evidence. I say this because my conclusion would have been the same, with or without the proposed fresh evidence. In other words, we know that Mr. Chehil's was the last ticket purchased and that he paid in cash. This, combined with the other suspicious indicia, is enough to establish a reasonable suspicion even if we don't know when exactly the purchase occurred. Furthermore, Cpl. Daigle testified as to Boris' reliability. As well, Cpl. Fraser believed Boris to be reliable. Therefore, further evidence on this point is unnecessary.

DISPOSITION

[60] I would allow the appeal and order a new trial.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Farrar, J.A.