Court File No. 34524

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

MANDEEP SINGH CHEHIL

APPELLANT

– and –

HER MAJESTY THE QUEEN

RESPONDENT

– and –

ATTORNEY GENERAL OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION AND SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

INTERVENERS*

FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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Court File No. 34397

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

AND BETWEEN:

BENJAMIN CAIN MACKENZIE

APPELLANT

– and –

HER MAJESTY THE QUEEN

RESPONDENT

– and –

ATTORNEY GENERAL OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION AND SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

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PART I – OVERVIEW

1. In the context of investigative searches by police, s. 8 of the *Charter* has long been understood to require "reasonable and probable grounds"—*i.e.*, reasonable grounds to believe that evidence of an offence will be discovered through the search. The primary position of the British Columbia Civil Liberties Association (the "BCCLA") is that if there is to be a different standard for sniffer dog searches, it should be legislated by Parliament and justified under s. 1. While the plurality in *R v. Kang-Brown*[2] and *R v. A.M.*[3] adopted a "reasonable suspicion" standard, the extremely fractured result in those cases invites their reconsideration.

2. The BCCLA's position is consistent with (1) the respective roles of legislators and courts in our constitutional democracy, (2) their respective law-making competencies and (3) the concept of a democratic dialogue. Adoption of this position may also have the benefit of spurring Parliament to enact a comprehensive legislative scheme to address the constellation of relatively technical issues raised by sniffer dog searches. If there is a concern that adoption of the BCCLA's position might lead to confusion or an adverse impact on law enforcement interests, that concern could be addressed by suspending the effects of this Court's decision for 18 months.

3. Alternatively, if this Court decides that "reasonable suspicion" is the appropriate standard for sniffer dog searches, this Court must provide better guidance as to the factors relevant to that standard. In the absence of such guidance, courts will continue to blur the line between "reasonable suspicion" and the even lower standard of "generalized suspicion" that was rejected by 8 out of 9 judges in *Kang-Brown* and *A.M.*

4. In particular, given that a positive alert from a sniffer dog search leads to a second, more invasive search, this Court should emphasize that the Crown must prove that the sniffer dog was sufficiently reliable to provide the "reasonable and probable grounds" needed for the second search. This Court should also attempt to articulate clear and objective benchmarks as regards this reliability onus. Those benchmarks should be designed to require the use of sniffer dogs that are as accurate as reasonably possible so as to minimize the number of very invasive searches and even arrests produced by false-positive alerts.

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[2] 2008 SCC 18, [2008] 1 S.C.R. 456 [*Kang-Brown*] [Tab 7].
[3] 2008 SCC 19, [2008] 1 S.C.R. 569 [*A.M.*] [Tab 3].

PART II – ARGUMENT

A. Section 8 of the *Charter* should be interpreted to impose a "reasonable and probable grounds" standard for sniffer dog searches.

I. The fractured result in *Kang-Brown* and *A.M.* helps justify reconsideration of the "reasonable suspicion" standard for sniffer dog searches.

5. This Court fractured severely in *Kang-Brown* and *A.M.* While five judges, through three sets of reasons, agreed that a sniffer dog search would be s. 8-compliant if based on a "reasonable suspicion", the plurality could not agree on that standard's application. Given this fracturing, and the many concerns expressed below about judicial adoption of such a standard, this Court should reconsider the "reasonable suspicion" standard for sniffer dog searches in these appeals.

6. Consistent with the BCCLA's primary position, four of nine judges (LeBel, Fish, Abella and Charron JJ.) in *Kang-Brown* and *A.M.* held that *Charter* s. 8 requires, among other things, "reasonable and probable grounds" for a police investigative search. Before a lower standard could be applied respecting sniffer dog searches, it would be *necessary* for Parliament to create and justify a statutory framework:

> [G]iven the critical nature of the privacy interests at stake and the weakness of the factual foundation in this appeal and in the companion appeal of *A.M.*, the constitutional role of the Court suggests that the creation of a new and more intrusive power of search and seizure … should be left to Parliament to set up and justify under a proper statutory framework.[4]

7. A further three judges (McLachlin C.J. and Bastarache and Binnie JJ.) agreed that a statutory framework would be "*desirable*"[5] or "*preferable*".[6]

8. In the absence of a statutory framework, however, four judges (McLachlin C.J. and Binnie, Deschamps and Rothstein JJ.) held that sniffer dog searches would be s. 8-compliant if conducted on a "reasonable suspicion" standard. One judge (Bastarache J.) went further, stating that sniffer dog searches could also be conducted, in some circumstances, on an even lower standard of "generalized suspicion".

9. The plurality of five judges who accepted the "reasonable suspicion" standard agreed on that *label*, but on little more. They could not agree on the standard's application:

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[4] *Kang-Brown*, at para. 13, *per* LeBel J. [Tab 7].
[5] *Kang-Brown*, at para. 61, *per* Binnie J. See also para. 22 [Tab 7].
[6] *Kang-Brown*, at para. 213, *per* Bastarache J. (emphasis added). See also paras. 221 and 245 [Tab 7].

	Did the police have a "reasonable suspicion"?	
	Kang-Brown	***A.M.***
McLachlin C.J.	No.	No.
Bastarache J.	Yes, but the "generalized suspicion" standard was likely applicable anyway.	No, but the "generalized suspicion" standard was applicable anyway.
Binnie J.	No.	No.
Deschamps J.	Yes.	None was required because there was no "search".
Rothstein J.	Yes.	None was required because there was no "search".

10. The highly fractured result in *Kang-Brown* and *A.M.* helps to justify reconsideration of the "reasonable suspicion" standard for sniffer dog searches that those cases produced.

II. "Reasonable and probable grounds" is the well established standard for investigative searches by police.

11. The weight of this Court's jurisprudence since *Hunter v. Southam*[7] holds that investigative searches by police will comply with s. 8 of the *Charter* only if the "reasonable and probable grounds" standard is met.

12. On the rare occasions when this Court has countenanced a search based on a different standard, the search has generally been either non-investigative or conducted by state actors besides the police. For example, *R. v. Mann* speaks of a *protective* search by police based on "reasonable grounds to believe that … safety … is at risk".[8] *R. v. M. (M.R.)* addresses a "search *by school officials* of a student under their authority … if there are reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found".[9]

13. While Parliament has enacted legislation authorizing a few police investigative searches on a lower standard,[10] the constitutionality of that legislation has not been considered by this Court. If and when its constitutionality is considered, the government will doubtless give this Court the benefit of a robust evidentiary record against which to consider the reasonableness of

[7] [1984] 2 S.C.R. 145 [*Hunter*] [Tab 1].
[8] 2004 SCC 52, [2004] 3 S.C.R. 59 at para. 45 [*Mann*], *per* Iacobucci J. [Tab 10].
[9] [1998] 3 S.C.R. 393 at para. 48, *per* Cory J. (emphasis added) [Tab 8].
[10] See *A.M.*, at paras. 77-78 [Tab 3].

the lower, legislated standard and the extent to which it is demonstrably justifiable under *Charter* s. 1. No such record exists here, nor existed in *Kang-Brown* and *A.M.*

III. Any departure from the "reasonable and probable grounds" standard for sniffer dog searches should be legislated and justified by Parliament.

14. As it was in *Kang-Brown* and *A.M.*, the threshold question here is whether this Court should allow police to depart from the well established and understood "reasonable and probable grounds" standard absent legislation authorizing the departure, and absent an evidentiary record to justify it. The "yes" argument is that a new and lower standard is practically necessary, since sniffer dogs are superfluous where the police already have the "reasonable and probable grounds" needed for a more conventional search. It is said that there is, in effect, a legislative gap regarding sniffer dog searches that this Court must fill to allow police to do their job.

15. This Court has previously refused to fill perceived legislative gaps respecting search and seizure. Its refusal has come from proper concern for the respective roles of legislators and courts in our constitutional democracy, particularly as regards the protection of *Charter* rights.

16. For example, in *R. v. Wong*, Parliament had not yet legislated for the use of video surveillance. The Crown argued that the police could obtain a warrant for video surveillance under *Criminal Code* provisions permitting the interception of oral communications. La Forest J., writing for the majority, emphatically rejected this argument:

> *[I]t does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice.*
>
> ... On my view of the matter, the courts would be forgetting their role as guardians of our fundamental liberties if they were to usurp the role of Parliament ... . It is for Parliament, and Parliament alone, to set out the conditions under which law enforcement agencies may employ video surveillance technology in their fight against crime. Moreover, the same holds true for any other technology which the progress of science places at the disposal of the state in the years to come. *Until such time as Parliament, in its wisdom, specifically provides for a code of conduct for a particular invasive technology, the courts should forebear from crafting procedures authorizing the deployment of the technology in question. The role of the courts should be limited to assessing the constitutionality of any legislation passed by Parliament which bears on the matter.*[11]

[11] *R v. Wong*, [1990] 3 S.C.R. 36 at p. 57 [*Wong*] (emphasis added) [Tab 14].

17. Similarly, in *R. v. Shoker*, a *Criminal Code* provision permitted a sentencing judge to order that an offender abstain from the use of alcohol or drugs. The Court was asked to decide whether the sentencing judge could also order the offender to provide bodily samples. In effect, the Court was asked to grant ancillary search powers to the state absent authorization by Parliament. Charron J., writing for the majority, held that doing so would usurp the role of Parliament:

> It is Parliament's role to determine appropriate standards and safeguards governing the collection of bodily samples for enforcement purposes.
>
> ...
>
> Parliament has specifically addressed the issue of alcohol and intoxicating substances ... but it has not provided for a scheme for the collection of bodily samples as it has done in respect of parolees. Such a scheme cannot be judicially enacted on the ground that the court may find it desirable in an individual case.[12]

18. The logic of *Wong* and *Shoker* applies equally here. Courts are to be the check on state power, not the power itself. When this Court, in particular, becomes a lawmaker, who is to provide the careful scrutiny of state infringements of civil liberties that the *Charter* promises?

19. The concern about the respective roles of Parliament and the courts is not only principled, but also practical. Legislators, unlike courts, have a variety of tools by which to decide whether and how to make law. They can debate. They can commission studies. They can hold public hearings to which they invite witnesses and submissions from across the country. By contrast, courts are limited to the evidentiary record developed and adduced by the parties to a particular case. In the context of widely used search techniques, a one-off attempt by the Crown to justify the search conducted in a particular case provides an abysmal record on which to make general rules applicable in all cases.

20. This practical problem is particularly severe in the context of sniffer dog searches, as such searches give rise to an array of technical issues regarding training, reliability and deployment. For example, should sniffer dogs be deployed with a single handler or with handler teams? Should a sniffer dog only work with handlers with which it has trained? What measures should be taken to safeguard against handler cueing? Should sniffer dogs be trained to detect pharmaceutical-grade or "street" contraband? Should they receive differentiation training, to help differentiate contraband from other, similar-smelling items? Should they receive extinction

[12] *R v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399 at paras. 3 and 25 [*Shoker*] [Tab 12].

training, to help reduce false-positive alerts to residual odours? Should maintenance training be conducted? If so, how often? Of what relevance is reliability demonstrated in controlled environments, or with a different handler? Over what period should in-field reliability be measured? What weight, if any, should sniffer dog certifications be given? If they are to be given weight, which organizations' certifications should the courts recognize?

21. Courts, including this Court, decide cases as they are presented to them. They cannot make the broad inquiries and provide the detailed legal standards that legislators can. Bastarache J. put it well in *Kang-Brown*:

> Many decisions must be made about when and how dogs ought to be used in law enforcement, and both the public and the police are entitled to know how these animals can and will be used in Canada. This direction is best provided by Parliament, which is able to create a wholistic and harmonious scheme for the use of sniffer dogs in this country. Courts, on the other hand, are ill equipped to deal with the multitude of issues arising from the use of sniffer dogs. Not only are judges restricted to considering the issues and factual scenarios placed directly before them by specific parties (and therefore unable to create a wholistic scheme regulating the use of dogs generally); they also do not have access to the expertise necessary to determine what type of training sniffer dogs should receive or what degree of accuracy they should have in order to be deemed "reliable". Courts are also poorly positioned to determine when dogs should be used on bags as opposed to persons, when a warrant ought to be obtained prior to use of the dogs, and what form notice must take when sniffer dogs are used in a generalized way. All of these important decisions are best left to Parliament, which can study the various aspects of sniffer-dog use and craft policies suited for the Canadian context, in which *Charter* rights must be carefully balanced against the need for effective law enforcement.[13]

22. Courts also lack legislators' tools to monitor and limit the impact of newly made law. These tools are vital where, as here, a proposed law intrudes on fundamental rights. For example, legislators can include a sunset clause or require the executive or an independent body to study and report on a law's effect. The courts cannot.

23. Another reason for judicial restraint regarding sniffer dog searches is the risk of upending the courts' traditional dialogue with Parliament.[14] This dialogue has marked *Charter* jurisprudence for three decades, and has been expressly endorsed by the Court.[15] Under this model, the court acts to protect individual rights while Parliament legislates for the general

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[13] *Kang-Brown*, at para. 221, *per* Bastarache J. [Tab 7].
[14] Peter Hogg and Allison Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75 [Tab 18].
[15] See, *e.g.*, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 at para. 268 [Tab 2].

welfare. When legislation infringes *Charter* rights, the courts, by striking it down, signal to Parliament how to draft legislation that will be *Charter*-compliant.

24. Indeed, this Court's unwillingness to fill legislative gaps in *Wong* and *Shoker* demonstrably spurred Parliament to respond by filling those gaps.[16] Conversely, by filling the gaps itself, this Court mutes the dialogue, and discourages Parliament from enacting the sort of comprehensive and studied framework that is the exclusive purview of legislation. *Kang-Brown* and *A.M.* demonstrate this well: although 7 of 9 members of this Court lamented the lack of legislation to govern sniffer dog searches, no such legislation emerged. This Court's decisions had pre-empted it, or at least erased much of the impetus for Parliament to act.

IV. A "leave it to Parliament" posture regarding sniffer dog searches does not amount to this Court "[re-crossing] the Rubicon".

25. In *Kang-Brown*, Binnie J. wrote that he "would welcome parliamentary intervention in this contentious area".[17] However, he wondered how a "leave it to Parliament" approach could be reconciled with the recent precedents of *Mann* and *R. v. Clayton*,[18] in which this Court had endorsed investigative detentions based on reasonable suspicion and protective searches incidental to detention based on reasonable safety concerns. Ultimately, Binnie J. concluded that the Court should take a "can do" approach whenever it perceived a legislative gap regarding criminal procedure because it had already "crossed the Rubicon".[19]

26. With great respect, Binnie J. established a false dichotomy. In *Mann*, the Court described a common law power to search founded on a "carefully circumscribed" search power developed "through several decades of jurisprudence in the United States" and on existing Canadian jurisprudence that recognized "[t]he importance of ensuring officer safety".[20] In this way, the Court was recognizing a search power that had incrementally developed in the case law. The search power was also confined to protecting safety.[21] *Clayton* only developed these principles.

27. By contrast, in *Kang-Brown*, there was no suggestion that sniffer dogs had historically been deployed based on "reasonable suspicion" or that "reasonable suspicion" was a standard for

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[16] See *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 15 (following *Wong*) [Tab 15] and *Response to the Supreme Court of Canada Decision in R. v. Shoker Act*, S.C. 2011, c. 7 (following *Shoker*) [Tab 16].
[17] *Kang-Brown*, at para. 22 [Tab 7].
[18] 2007 SCC 32, [2007] 2 S.C.R. 725 [*Clayton*] [Tab 5].
[19] *Kang-Brown*, at para. 22 [Tab 7].
[20] *Mann*, at paras. 41-43, *per* Iacobucci J. [Tab 10].
[21] *Mann*, at para. 49, *per* Iacobucci J. [Tab 10].

similar searches that could now be incrementally extended to sniffer dogs. The Court was promulgating a new standard, rather than adopting one that had developed organically. It was also doing so in the context of investigative searches by police, for which "reasonable and probable grounds" had long been the accepted standard. If there was a Rubicon to cross, therefore, it was crossed not in *Mann* or *Clayton*, but rather in *Kang-Brown* and *A.M.*

28. Binnie J.'s argument in *Kang-Brown* about litigants' expectations can thus be turned on its head. Whereas Binnie J. postulated that litigants would expect a "can do" Court, the opposite was true. Based on cases like *Wong* and *Shoker*, a litigant would expect the Court generally to *refrain* from filling legislative gaps in derogation of *Charter* s. 8's guarantees. A litigant having read *Mann* and *Clayton* would expect the Court to do so only where it was recognizing the evolution of a legal norm and, even then, to do so only for the narrow purpose of protecting safety. No litigant would expect the Court unilaterally to promulgate a new, reduced standard for police investigative searches, especially in the absence of historical antecedents.

29. Accordingly, it would not amount to "[re-crossing] the Rubicon" for this Court to insist on "reasonable and probable grounds" for the use of sniffer dogs unless and until Parliament legislates otherwise. If there is a concern about confusion or the impact of such a decision on law enforcement interests, this Court can suspend the effects of its decision for 18 months. This would give Parliament ample opportunity to act, if it wished to do so.

B. Alternatively, if "reasonable suspicion" is to be the standard for sniffer dog searches, this Court must provide better guidance as to its requirements.

30. The "reasonable suspicion" standard has proven vague and unpredictable in its application by lower courts, perhaps owing to the plurality's inability to agree on its application even as they created it. If the standard is to be retained, this Court should provide better and clear guidance regarding its requirements. Moreover, given that false-positive alerts will often subject innocent parties to even more intrusive searches or even arrests, the requirements of "reasonable suspicion" for an initial sniffer dog search should be made robust. The BCCLA asks this Court to make three pronouncements in this regard.

31. *First, demeanour evidence, whether alone or in combination with other evidence, cannot support a "reasonable suspicion".* The plurality in *Kang-Brown* held that only *objectively* verifiable evidence can contribute to a "reasonable suspicion". Yet demeanour evidence is

nothing more than subjective, lay opinion concerning the meaning of a person's expressions or conduct.[22] It therefore cannot support a "reasonable suspicion".

32. *Second, the presence of a given fact (e.g., a criminal history), whether alone or in combination with other facts, cannot support a "reasonable suspicion" if the absence of that same fact could also support a "reasonable suspicion".* For example, in the *MacKenzie* appeal, the appeal court found that the accused's *absence* of a criminal record contributed to a "reasonable suspicion".[23] But the same court has also held that the *presence* of a criminal record can contribute to a "reasonable suspicion".[24] If both having a criminal record and not having a criminal record are suspicious, then *everyone* is suspicious and the standard effectively falls to "generalized suspicion"—a standard that this Court has already rejected.

33. *Third, the direction of travel, whether alone or in combination with other facts, cannot support a "reasonable suspicion".* Reliance on travel direction invites a standard of "generalized suspicion", because a great many travellers will ordinarily be travelling in the very same direction, as the Court of Appeal for Saskatchewan recently noted.[25]

C. The Crown should be required to prove a sniffer dog's reasonably high reliability to justify a further search for which "reasonable and probable grounds" are needed.

34. Where a sniffer dog search is conducted on the basis of "reasonable suspicion", a positive alert can give rise to the "reasonable and probable grounds" needed for a further, even more intrusive search only if it can be reasonably regarded as an additional indicator of the presence of contraband—*i.e.*, the sniffer dog must be reliable. The onus of proving reliability must rest with the Crown given the Crown's burden of proving the reasonableness of *any* warrantless search.[26]

35. The BCCLA maintains that Parliament, not this Court, is best placed to establish the particulars of the Crown's reliability onus. If, however, sniffer dog searches are to be permitted on grounds of "reasonable suspicion" absent input from Parliament, this Court should, for predictability's sake, attempt to articulate clear and objective benchmarks of sniffer dog reliability that must be met before a positive alert will give rise to the "reasonable and probable grounds" needed for a further search. These benchmarks should include an accuracy rate that

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[22] *R v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433 at paras. 75-76, *per* Rothstein J. See also paras. 141-144, *per* Binnie J. (in dissent) [Tab 13].
[23] *R v. MacKenzie*, 2011 SKCA 64 at paras. 31 and 34 [Tab 9].
[24] See, *e.g.*, *R v. Savage*, 2011 SKCA 65 at para. 26 [*Savage*] [Tab 11] and *R. v. Bramley*, 2009 SKCA 49 at para 53 [Tab 4].
[25] *Savage*, at para. 25 [Tab 11].
[26] *R. v. Collins*, [1987] 1 S.C.R. 265 at p. 278 [Tab 6].

each sniffer dog must have demonstrated *in the field*, because "dogs … do different things in the field than they do in the controlled environment of a training facility".[27]

36. These reliability onus benchmarks should be designed to require the use of sniffer dogs that are as accurate as reasonably possible. False-positive alerts may result in very invasive searches and even arrests. However, false-positive alerts do *not* produce contraband and so do not come before the courts. Through the cases that do come before them, courts therefore must do what they can to encourage the use of sniffer dogs that are highly reliable, thereby minimizing the intrusions of privacy occasioned by false-positive alerts.

37. The problem of false-positive alerts is enormous. Some of the most comprehensive data available on the rate of false-positive alerts in real-world settings comes from an Australian study. Over a two-year period, sniffer dogs generated more than 10,000 alerts. These alerts almost always resulted in a further search. Police searches located illegal drugs in only 26% of cases in which the dogs alerted. In other words, any given alert was almost three times more likely to be a false-positive alert than an accurate one.[28]

38. The reliability onus benchmarks should also focus on reliable detection of contraband, not the odour of it. In *Chehil*, the Crown makes an extensive argument about Boris the sniffer dog's reliability at detecting the *scent* of drugs.[29] But the "reasonable and probable grounds" standard requires reasonable grounds to believe that evidence *of an offence* will be discovered through the search. Possessing or trafficking drugs is an offence. Smelling like drugs, or possessing money or luggage that smells like drugs, is not. A showing that a sniffer dog excels at detecting the lingering smell of drugs, and that his alerts therefore are not a good predictor of the actual presence of drugs, weighs *against* a finding of "reasonable and probable grounds", rather than in favour of it.

PART III – ORDER REQUESTED

39. The BCCLA seeks permission to make oral submissions for 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 3rd day of January 2013.

MICHAEL A. FEDER

for **H. MICHAEL ROSENBERG**

[27] Richard E. Myers II, "In the Wake of *Caballes*, Should We Let Sniffing Dogs Lie?" (2006), 20 *Crim. Just.* 4, at p. 7 [Tab 19].
[28] Australia, New South Wales Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, (Sydney: NSW Ombudsman, 2006), online: NSW Ombudsman <www.ombo.nsw.gov.au/__data/assets/pdf_file/0020/4457/Review-of-the-Police-Powers-Drug-Detection-Dogs-Part-1_October-2006.pdf> [Tab 17].
[29] Respondent's factum (*Chehil*), at paras. 78-87.

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