THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2009 SKCA 112 Date: 20090929

Between: Docket: 1571

Her Majesty the Queen

Appellant

- and -

Kang-Po Tom Yeh

Respondent

Coram:
Klebuc C.J.S., Lane, Jackson, Richards, Smith, Hunter and Wilkinson JJ.A.

Counsel:
Douglas G. Curliss for the Appellant
Aaron A. Fox, Q.C. for the Respondent

Appeal:

From:	2008 SKQB 289
Heard:	April 28, 2009
Disposition:	Dismissed
Written Reasons:	September 29, 2009
By:	The Honourable Mr. Justice Richards
In Concurrence:	The Honourable Mr. Chief Justice Klebuc
	The Honourable Mr. Justice Lane
	The Honourable Madam Justice Smith
	The Honourable Madam Justice Wilkinson
Concurring in the Result:	The Honourable Madam Justice Jackson

In Concurrence:	The Honourable Madam Justice Hunter

Richards J.A.

I. Introduction

[1] The respondent, Kang-Po Tom Yeh, was travelling on the Trans Canada Highway near Moose Jaw, Saskatchewan. The police stopped his car after they observed it drifting from side to side in the driving lane. Mr. Yeh was questioned and asked to perform tests aimed at determining whether he was impaired by drugs. The detention led to a sniffer dog search and the discovery of a quantity of marijuana in his vehicle. Mr. Yeh was arrested. After a more thorough search, he was ultimately charged with possession of marijuana and ecstasy for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act* and with being in possession of the proceeds of crime contrary to s. 354 and s. 355 of the *Criminal Code.*

[2] The trial was conducted in the Court of Queen's Bench. The learned trial judge concluded Mr. Yeh had been denied both his right to be promptly informed of the reasons for detention as guaranteed by s. 10(a) of the *Charter* and his right to retain and instruct counsel without delay as guaranteed by s. 10(b). The trial judge also found that the dog search had breached Mr. Yeh's right to be secure against unreasonable search and seizure as provided by s. 8 of the *Charter*. She excluded the evidence obtained as a result of the *Charter* breaches and, as a consequence, found Mr. Yeh not guilty.

[3] The Crown appeals from the Queen's Bench decision. It says the trial judge erred in her analysis of the *Charter* issues and urges this Court to set

aside the acquittal and order a new trial. More specifically, the Crown says Mr. Yeh was informed of the reasons for his detention and that, because he was involved in a traffic safety stop, the police had no obligation to advise him of his s. 10(b) rights. With respect to s. 8 of the *Charter*, the Crown argues the police had reasonable grounds to suspect Mr. Yeh was in possession of illegal drugs and, as a result, had a proper basis for engaging the sniffer dog.

[4] This appeal raises an additional issue which flows from this Court's decision in *R. v. Nguyen*, 2008 SKCA 160. In that case, the majority indicated an investigative detention could not be lawfully conducted in connection with what might be called suspected, as opposed to known, criminal activity. The Crown suggests that view was misplaced. An extended panel of the Court was designated to hear the present appeal in order that this question could be considered afresh.

[5] I conclude, for the reasons set out below, that this case is best resolved on the ground that the police officers who detained Mr. Yeh did not have adequate grounds for using a sniffer dog. This resulted in a breach of his right to be free of unreasonable search and seizure, as guaranteed by s. 8 of the *Charter*.

[6] In addition, as also explained below, I conclude an investigative detention may be lawfully conducted in relation to a "suspected" offence. To the extent *R. v. Nguyen* suggests otherwise, it should not be followed.

[7] In the end, the trial judge made no error in excluding the evidence gained as a result of the *Charter* breach. The Crown's appeal must be dismissed.

II. The Facts

[8] This case ultimately turns on the facts. As a consequence, it is necessary to set them out in some detail.

[9] On the afternoon of April 18, 2007, R.C.M.P. Constables Danny Donison and Ian Warner were on traffic duty on the Trans Canada Highway just west of Moose Jaw. Constable Warner was accompanied by Nugget, his trained drug dog.

[10] The two constables were in a marked police vehicle. They were parked facing west but were monitoring traffic moving in both directions on the divided highway. The weather was clear. The wind was gusting between 37 and 50 km/h.

[11] Constable Donison observed a vehicle travelling eastward. As it came over a hill to the west, it was straddling the centre line between the two eastbound driving lanes. It then continued properly in the right hand lane of the highway. Constables Donison and Warner pulled out to pursue the vehicle and then followed it. They saw the car drift four or five times from side to side within the right hand driving lane. There were no sudden or erratic movements and speed was not an issue.

[12] Constable Donison said he was concerned about possible driver fatigue or impairment. He engaged the police cruiser's emergency lights. The vehicle being pursued immediately pulled over to the right hand shoulder of the highway and parked appropriately. Constable Donison stopped behind it and approached the driver's side door. Constable Warner approached the passenger side door.

[13] The driver of the vehicle was Mr. Yeh. Constable Donison told him that he had been weaving in his lane. Mr. Yeh denied this. Mr. Yeh was asked for his driver's licence and registration. He produced both without difficulty. Constable Donison asked him how long he had been driving and Mr. Yeh replied that he had just finished school and was moving from Calgary to Winnipeg. Mr. Yeh, according to Constable Donison, appeared to understand his questions and to give appropriate answers.

[14] Constable Donison detected no odour of alcohol and no odour of drugs or any other substance. However, he said he noticed a distinct grey tone to Mr. Yeh's skin and observed Mr. Yeh's hands were shaking. On cross-examination, he conceded that he had no knowledge of Mr. Yeh's normal skin tone and that he did not ask Mr. Yeh if he was ill.

[15] Constable Donison took Mr. Yeh's documents and returned to the police cruiser to check them on his computer. The results were negative. Constable

Donison said he became “a little bit suspicious” that Mr. Yeh might be under the influence of a narcotic.

[16] At this point, R.C.M.P. Constable Darcy Wilson arrived on the scene. He parked behind the Donison-Warner police cruiser. Constable Donison told him that the car they had pulled over had been weaving and that the driver was “acting strangely.” Constable Donison also said the driver’s skin was grey or pale and that he was concerned the driver might be using narcotics. Constable Wilson did not get any particulars as to what was meant by Mr. Yeh “acting strangely” and he was not told Mr. Yeh’s vehicle had been weaving within the proper driving lane or that it had stopped promptly and properly when signalled to do so. Neither was Constable Wilson told Mr. Yeh had produced his licence and registration without difficulty and had understood questions and responded appropriately to them.

[17] Constable Wilson advised Constable Donison that he was SFST (“Standardized Field Sobriety Testing”) trained and indicated he could evaluate Mr. Yeh for impairment. He knew Constable Donison’s concerns related to impairment by drugs but he did not tell Constable Donison there were no standardized tests to detect impairment of that kind.

[18] Constables Wilson and Donison then approached Mr. Yeh’s vehicle. Constable Donison asked Mr. Yeh if he had consumed any alcohol and Mr. Yeh replied in the negative. Constable Donison then asked if he was on any prescription medication or drugs and Mr. Yeh said he was not. Constable

Wilson said that, while Mr. Yeh spoke to Constable Donison, Mr. Yeh's fists were clenched and he was staring ahead and not making eye contact. He indicated Mr. Yeh's responses were slow, his skin pale, his attitude somewhat distant and his breathing rapid.

[19] At this point, Constable Wilson took over. He asked Mr. Yeh to look at him and to open his hands. When Mr. Yeh did this, his hands and upper arms trembled. Constable Wilson observed Mr. Yeh's eyes to be pink. He understood this to be a sign of cannabis marijuana use within the previous four to six days. He asked Mr. Yeh when he last used alcohol and Mr. Yeh said it was a long time ago. He then asked Mr. Yeh when he had last used a narcotic. Mr. Yeh repeated the question and then said, "[a] long time ago." Constable Wilson acknowledged in his evidence that, at the time, it did not occur to him that he was asking Mr. Yeh when he had last committed a criminal offence and that this could have been a reason that Mr. Yeh repeated the question.

[20] Constable Wilson asked Mr. Yeh to step out of his car. He did not tell Mr. Yeh that he wanted to conduct sobriety tests and did not tell him that his participation in those tests was voluntary. Mr. Yeh was not advised of a right to counsel or given a standard police warning.

[21] Mr. Yeh swung his legs out of the vehicle and used the frame of the car to pull himself up. Constable Wilson acknowledged this could have been a sign of impairment or merely the actions of someone who was stiff after a period of driving. Mr. Yeh walked in a normal fashion toward Constable

Wilson at a location between the rear of his own vehicle and the front of the Donison-Warner police cruiser.

[22] Constable Wilson proceeded to administer the "Romberg test" to Mr. Yeh. It involves leaning the head back with eyes closed and estimating the passage of 30 seconds. The object of the test, according to Constable Wilson, is to assess impairment by having the subject of the test divide his or her attention between more than one thing. Difficulty in completing a divided attention task is an indication of impairment by alcohol or drugs.

[23] There are two parts to the Romberg test. The first involves the police officer providing instructions and the second is the test proper. Constable Wilson began to give the instructions and noted that Mr. Yeh started the test before they were complete. Constable Wilson asked him to wait until the instructions were finished. When he performed the test, Mr. Yeh stopped at 22 seconds. Constable Wilson said this was not a gross misestimate and not a definite sign of impairment.

[24] Constable Wilson said Mr. Yeh was swaying, albeit not grossly, during the test. He acknowledged this could have been explained by the gusting wind but noted the swaying was both from side to side and back and forth. Mr. Yeh still had tremors in his arms and, according to Constable Wilson, had tell-tale signs of recent narcotic use because his eyelids fluttered when he tilted his head back. The tremors caused his eyes to partially open, revealing rapid eye movement. Constable Wilson indicated in cross-examination that he had not

closed his own eyes when he demonstrated the test to Mr. Yeh and acknowledged that this was possibly the reason Mr. Yeh did not close his eyes for the whole test.

[25] Constable Wilson testified that he then decided to confirm his observations by doing a test for pupil dilation and constriction. He believed Mr. Yeh's pupils were somewhat larger than normal. Constable Wilson asked Mr. Yeh to cover one eye for approximately 30 seconds and then to open the eye, exposing it to sunlight while looking at him. The Constable said that, once a pupil is exposed to light, it constricts and then should go to normal. He observed what he described as "rebound dilation" in Mr. Yeh's eye and described it as the body's attempt to compensate for the amount of light contesting the effect of drugs to keep the pupil dilated. However, in cross-examination, Constable Wilson conceded that he had no expertise in relation to the assessment of normal dilation or constriction of pupils and did not know anything of Mr. Yeh's usual pupil dilation.

[26] In light of his observations, Constable Wilson concluded Mr. Yeh had used cannabis marijuana at some point in the previous two to four hours. However, he decided it was necessary to continue with further tests to determine if there was enough evidence to warrant arresting Mr. Yeh for impaired driving. He concluded Mr. Yeh was more than likely in possession of a narcotic and was transporting it in his car.

[27] Constable Wilson said he listed off the various things he had observed about Mr. Yeh's behaviour and again asked him when he had last used marijuana. Mr. Yeh replied that he had used it two days earlier. Constable Wilson then told Mr. Yeh he was being detained for purposes of investigating possible transportation of narcotics and for purposes of further investigating the offence of impaired driving. He advised Mr. Yeh of his right to counsel and gave him the standard police warning. Mr. Yeh indicated he did not wish to contact counsel.

[28] At this point, Constable Wilson directed Constable Warner to deploy Nugget. The dog did not detect any drugs on Mr. Yeh's person. He was walked around Mr. Yeh's vehicle and ultimately did a positive "sit" indicating that he had detected the odour of drugs emanating from the vehicle. In this regard, the evidence reveals that Nugget was trained to detect marijuana, hash, psilocybin, cocaine, methamphetamine and heroin. Both Constable Wilson and Nugget had been "validated" in April of 2007. Mr. Yeh has not made any issue of Nugget's accuracy or reliability.

[29] While Nugget was being deployed, Constable Wilson continued with the impairment tests. He asked Mr. Yeh to stand on one leg while raising his other leg off the ground and counting out loud. Mr. Yeh put his leg down after the count of 21, saying it was tired. However, when asked to continue, he did so and successfully completed the test. His execution of the test on the other leg was perfect.

[30] Constable Wilson concluded that, while he was confident Mr. Yeh had used marijuana, he did not have sufficient evidence to arrest him for impaired driving. He believed there were signs of narcotic use but not to a degree which allowed him to conclude Mr. Yeh was impaired.

[31] When the testing was complete, and in view of Nugget's positive "sit," Constable Wilson placed Mr. Yeh under arrest for transporting a narcotic and again advised him of his right to counsel and gave him the standard warning. Mr. Yeh indicated he understood but did not wish to contact counsel.

[32] Shortly afterward, Constable Warner advised Constable Wilson that a significant amount of marijuana had been found in Mr. Yeh's vehicle. As a result, Constable Wilson told Mr. Yeh that he was being placed under arrest for possession of marijuana for the purpose of trafficking and, once again, instructed him as to his right to counsel and gave him a warning. Mr. Yeh was placed in a police car and transported to Moose Jaw. A more thorough search of Mr. Yeh's vehicle later revealed a quantity of ecstasy and $9,000 in cash, in addition to the marijuana. As noted at the outset, Mr. Yeh ultimately was charged with two counts of possession for the purpose of trafficking and one count of possession of the proceeds of crime.

III. The Trial Judgment

[33] The trial judge was faced, at the outset of the proceedings, with a *Charter* application to exclude evidence based on alleged denials of Mr. Yeh's

right to counsel and of his right to be secure against unreasonable searches. A *voir dire* was held.

[34] The trial judge began her decision on the *voir dire* by carefully reviewing the evidence. In turning to the legal issues presented by the case, she looked first at the question of whether the initial stop made by Constables Donison and Warner had offended s. 9 of the *Charter* – the right to be free from arbitrary detention. She concluded the stop had been motivated by concern Mr. Yeh might be impaired or fatigued and thus a threat to highway safety. As a result, she found no *Charter* violation. Mr. Yeh took no issue with this view at trial and he takes no issue with it on this appeal.

[35] The trial judge then turned to s. 10 of the *Charter*. It reads as follows:

> Everyone has the right on arrest or detention
>
> a) to be informed promptly of the reasons therefor;
>
> b) to retain and instruct counsel without delay and to be informed of that right; and
>
> c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

[36] The judge concluded Mr. Yeh's rights under both s. 10(a) and (b) had been violated. She found he had been detained as of the time of the initial stop by Constable Donison but had not been told the reason for the detention until the point when Constable Wilson had advised him he was being held for purposes of investigating possible impaired driving and drug offences. Similarly, the trial judge found Mr. Yeh had not been informed of his right to

counsel until he had been placed under investigative detention by Constable Wilson.

[37] Next, the trial judge turned to s. 8 of the *Charter* – the right to be "secure against unreasonable search or seizure." She concluded Constable Wilson had no reasonable grounds to believe Mr. Yeh was in possession of narcotics. As a result, she found the dog search and the search subsequently conducted by Constables Warner and Donison to have been a violation of s. 8. In arriving at this decision, the trial judge said Constable Wilson's opinions as to Mr. Yeh's impairment and drug use were without merit because of Constable Wilson's lack of expertise. She wrote as follows:

> [93] Leaving aside for the moment the issues arising out of the use of evidence obtained from the accused after he was detained and prior to him being provided with his rights to counsel and warning it is instructive to examine Cst. Wilson's evidence. Cst. Wilson formed a number of opinions arising out of observations he made. However the conclusions he reached as a result of his observations and the opinions he formed based on those observations and conclusions are not supported by any form of expertise. Cst. Wilson candidly acknowledged he was not an expert in any way. He also acknowledged that the information received in the SFST course did not make him any form of expert in that area either.
>
> [94] Cst. Wilson was aware the accused had been weaving back and forth as he drove. Cst. Wilson made certain observations which included the following: rapid pulse, pale skin, pink eyes, his muscles were clenched, he avoided eye contact and his hands and arms were trembling. Cst. Wilson directed Mr. Yeh to complete certain tests and at the conclusion of those test he concluded he did not have enough evidence to arrest Mr. Yeh for impaired driving. This was his conclusion, even though the opinions he formed about drug use by Mr. Yeh based on some of these observations are without merit because of his lack of expertise.

[38] Finally, the trial judge considered s. 24 of the *Charter*. She concluded that the evidence obtained as a result of the *Charter* breaches should be

excluded and, in consequence, found Mr. Yeh not guilty on all three counts he was facing.

IV. Analysis

[39] The trial judge found there had been breaches of Mr. Yeh's rights under ss. 10(a) and (b) of the *Charter* prior to the initiation of the dog search. However, it is not necessary to deal with her findings in that regard. In order to narrow the focus of this case, I am prepared to assume, without in any way deciding, that the Crown is correct in arguing there was no violation of those rights.

[40] In the end, I find it necessary to examine only two issues in order to resolve this appeal. The first is the question of whether Constable Wilson had sufficient grounds for initiating a sniffer dog search of Mr. Yeh's vehicle. The second is the issue raised by *Nguyen*, it being the reason this appeal was heard by an extended panel.

A. The Legality of the Dog Search

[41] The leading authorities with respect to the use of drug sniffer dogs are the Supreme Court of Canada's recent decisions in *R. v. Kang-Brown*, 2008 SCC 18 and *R. v. A.M.*, [2008] 1 S.C.R. 568.

[42] *Kang-Brown* arose from an R.C.M.P. program designed to detect drug couriers at bus stations. A police officer observed Mr. Kang-Brown disembark from a bus and, based on behaviour the officer considered to be

suspicious, he approached Mr. Kang-Brown and introduced himself as a police officer. He told Mr. Kang-Brown he was free to go at any time. The officer then asked Mr. Kang-Brown if he was carrying narcotics and requested permission to look in his bag. Mr. Kang-Brown put his bag down but, when the officer went to touch it, Mr. Kang-Brown pulled it away, looking nervous. At that point, the officer signalled for a sniffer dog. The dog approached and sat down, thereby indicating the presence of drugs in the bag. Mr. Kang-Brown was arrested and ultimately convicted of possession of cocaine for purposes of trafficking and possession of heroin.

[43] The majority of the Supreme Court confirmed the lawfulness of the use of the drug dog. While the Court characterized a dog "sniff" in this context as a search which engaged s. 8 of the *Charter*, it held that the police are nonetheless entitled to employ drug sniffer dogs where they have reasonable grounds to suspect the presence of contraband. See: Binnie J. at para. 25; Deschamps J. at para. 192; Bastarache J. at para. 213.

[44] Significantly, the Supreme Court stressed that a hunch based on intuition gained by experience does not constitute a reasonable suspicion. There must be *objective* grounds which support the opinion of the police officer. As the Court of Appeal for Ontario stated in *R. v. Simpson* (1993), 12 O.R. (3d) 182 at p. 202:

> 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.

[45] Binnie J., McLachlin J. concurring, underlined that a “reasonable suspicion” is something more than a “mere suspicion” and something less than “reasonable and probable grounds.” He quoted P. Sankoff and S. Perrault, "Suspicious Searches: What's so Reasonable About Them?" (1999), 24 C.R. (5th) 123:

> [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. [p. 125]
>
> …
>
> 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. [p. 126]

See also: Deschamps J. at paras. 164-166.

[46] It follows that, in this case, the trial judge erred when she indicated a police officer may not use a dog to search a person for drugs “in the absence of reasonable and probable grounds to lawfully arrest the [person] for a specific indictable offence.” In fact, as decided by *Kang-Brown*, the police were entitled to conduct a sniffer dog search of Mr. Yeh’s vehicle so long as the “reasonable suspicion” standard was satisfied.

[47] I appreciate, of course, that the facts in this appeal are somewhat different than those in *Kang-Brown*. Most significantly, Mr. Yeh was detained by the police on a traffic stop prior to the dog search and the facts

which are said to have justified the search came to the attention of the police by virtue of his detention. However, in my view, this distinction is ultimately of no legal significance. There is no reason in principle why facts which come to light as a result of a lawful traffic stop should be excluded from consideration when the police determine if they have a reasonable suspicion of a possible drug crime so as to warrant a sniff search.

[48] It is true, of course, that in *Kang-Brown* the Supreme Court said an investigative detention does not involve any right to search the detainee beyond what is reasonably necessary for safety purposes. As a result, the police have no right to conduct a sniff search as an incident of an investigative detention. Any such search needs to be independently justifiable in the sense that, before it is undertaken, the police must have a reasonable suspicion that the person who is the subject of the search is illegally in possession of drugs.

[49] Given that the same standard – reasonable suspicion – triggers both the right to conduct an investigative detention and the right to conduct a sniff search, there will sometimes be an overlap between detention and search in the limited sense that the same facts which justify the investigative detention will also justify the sniff search. This Court's recent decision in *R. v. Bramley*, 2009 SKCA 49, is an illustration of that sort of situation. However, the circumstances warranting a detention obviously will not always or necessarily empower the police to conduct a dog search. For example, if an individual is detained for investigative purposes based on a reasonable suspicion that he or she is committing a weapons offence, the police will have no right to conduct

a sniff search unless, in addition, the circumstances give rise to a reasonable suspicion that the detainee is *also* unlawfully in possession of drugs. The right to conduct an investigative detention and the right to conduct a sniff search are not coextensive and the right to undertake a sniff search is not an incident of the right to detain for investigative purposes.

[50] Nonetheless, as a bottom line, it is true that, by making sniffer dogs available to officers who conduct traffic patrols or do community policing, the police could presumably more frequently put themselves in a position where they would have the information necessary to justify dog searches than might otherwise be the case. However, in the absence of further clarification from the Supreme Court, this seems to be the inevitable consequence of the combined effect of the Court's decisions in *R. v. Mann*, [2004] 3 S.C.R. 59 authorizing investigative detentions and *Kang-Brown, supra*, authorizing sniff searches.

[51] I turn, therefore, to Constable Wilson's reasoning with respect to the rationale or justification for the dog search. It can be summarized in brief terms. First, based on his observations of Mr. Yeh and the tests he had performed, Constable Wilson concluded Mr. Yeh had used marijuana within the previous four hours. Second, because Mr. Yeh had indicated he was driving from Calgary, Constable Wilson assumed the marijuana had been consumed during the course of the trip and that it was thus likely Mr. Yeh had marijuana in his vehicle. It is useful to examine this line of thinking in further detail.

[52] I begin with Constable Wilson's conclusion that Mr. Yeh had used marijuana in the previous four hours. In this regard, it is important to distinguish what the Constable saw as evidence of possible impairment or drug use generally and what he saw as evidence of the fact Mr. Yeh had recently used marijuana. As summarized above, Constable Wilson referred to a number of matters as being relevant to impairment. These included his observations of tenseness, clenched fists, grey skin, rapid breathing and pulse, slowness in responding to questions and a somewhat distant attitude. However, with respect to the critical issue of recent consumption of marijuana, Constable Wilson referred only to "eyelid tremors, rebound dilation and muscle tremors" as the factors which, in his mind, indicated Mr. Yeh had used marijuana within the previous four hours.

[53] Constable Wilson's assessment of the situation involving Mr. Yeh must be considered against the background of the now established notion that the experience and training of a police officer should be taken into account when the reasonableness of a suspicion is assessed. This is because a fact or consideration which might have no significance to a lay person can sometimes be quite consequential in the hands of the police. See: *R. v. Mouland*, 2007 SKCA 105 at para. 26. This said, it is also clear that, when necessary, the courts must be prepared to look carefully at what is held out to be "experience" or "training" in order to ensure that the integrity of the reasonable suspicion concept is maintained.

[54] Constable Wilson, in examination-in-chief, candidly acknowledged he was not an expert of any kind. However, he referred to being trained on "the course" as to the significance of eyelid tremors, muscle tremors, pupil dilation and rebound dilation. In cross-examination, he moved away from that account of his background. First, he acknowledged his relevant formal training consisted of a four hour course as part of basic instruction which dealt with alcohol, drugs and their effect and, in addition, a four day SFST course which primarily focussed on administering standardized field tests to determine impairment by alcohol. Second, Constable Wilson readily accepted that he was not trained as a drug recognition expert, *i.e.* someone able to recognize the kind of drugs people might have consumed and to assess levels of impairment. Third, and most significantly, he confirmed there was nothing in his course materials concerning how long the effects of drugs might last. In response to a question from Mr. Yeh's counsel, he said this:

> Q I take it though part of the formal training on that SFST course was not sort of how long the drugs last and that sort of thing. That wasn't a formal part of that training.
>
> A Oh, no.

[55] As a result, the best reading of the transcript suggests Constable Wilson's knowledge about such matters as pupil dilation and eyelid tremors came from "another publication" which was not part of his formal course work. This is significant.

[56] Recognizing symptoms of drug use and then employing them to determine what kind of drugs have been consumed and when they were

consumed is, on its face, a technical or scientific sort of endeavour. It is not the kind of skill one would readily expect a police officer to pick up outside of a formal training or educational session. To the extent an officer might acquire information of this kind by way of self-directed reading or research, a judge should obviously be very slow to put much credit in the officer's knowledge in the absence of a careful examination of its specific source and the reliability of that source. In this case, where Constable Wilson's information came from an unknown and unnamed "publication," I see no basis for giving any meaningful weight to his views about when Mr. Yeh consumed marijuana.

[57] For her part, the trial judge concluded Constable Wilson's opinions were without merit because of his "lack of expertise." This, I think, is essentially the same point I have just made. By way of clarification, however, it should be underlined that, in order to take into account a police officer's training or experience in these sorts of matters, it is not necessary that the officer have the qualifications of an "expert" in the technical sense of being someone entitled to give opinion evidence.

[58] That point made, I move to the second piece of Constable Wilson's reasoning – the idea that Mr. Yeh had consumed marijuana while driving from Calgary and was therefore likely to be in possession of marijuana. This is a proposition of dubious merit. The record is clear that Mr. Yeh's vehicle did not smell of marijuana, either raw or burnt, nor did it smell of anything else, *i.e.* Mr. Yeh was not using a masking agent to camouflage the odour of

marijuana. Further, none of the police officers who testified had seen any drug paraphernalia or evidence of drug consumption in Mr. Yeh's car.

[59] The only consideration which suggested Mr. Yeh might have used marijuana on his trip from Calgary was Constable Wilson's conclusion that Mr. Yeh had consumed the drug within four hours of being stopped. The problem with this idea is that Constable Wilson did not know if Mr. Yeh had driven straight through to Moose Jaw from Calgary or whether he had stopped along the way in circumstances where he might have bought marijuana and consumed all of it or, by way of further example, been supplied marijuana by third parties such as friends and consumed all he had been offered. The relevant part of the transcript reads as follows:

> Q And I take it you made no inquiry of Mr. Yeh before having that search proceeded with to determine if he had driven continuously from Calgary or stopped along the way or whatever?
>
> A No.
>
> Q In other words, for example, Medicine Hat, Swift Current, those are all small cities or cities in between Calgary. You hadn't asked him how long – whether he stayed at any of them over the night or that sort of thing.
>
> A No, I hadn't.
>
> Q For all you knew, notwithstanding that he was on his route, on a trip from Calgary, he could have been driving for five minutes before he got stopped. You just didn't know.
>
> A That's correct.
>
> Q And you made no inquiries to determine that.
>
> A No.

[60] All of this suggests Constable Wilson's suspicions, examined objectively, were effectively in the nature of a mere hunch.

[61] The Crown contests this view and stresses that "reasonable suspicion" is a relatively low hurdle. It quite properly emphasizes the difference between a "reasonable suspicion" Mr. Yeh had drugs in his vehicle and a belief to that effect based on "reasonable and probable grounds." However, while accepting this, I am unable to conclude the facts of this case can sustain a reasonable suspicion Mr. Yeh was transporting or in possession of marijuana.

[62] The key flaw in the Crown's position revolves around Constable Wilson's conclusion that Mr. Yeh had consumed marijuana in the four hours before he was stopped. There is nothing to suggest Constable Wilson was anything other than well-intended in this regard but he simply did not have the training or background to make such a determination. When this difficulty is combined with the patchy logic involved in the other steps of the Constable's thinking, I am unable to accept the Crown's submission that the "reasonable suspicion" standard has been satisfied on the facts of this appeal. The *objectively* discernable considerations do not sustain its position. It follows, in my respectful view, that the dog search violated Mr. Yeh's right to be free from unreasonable search and seizure as guaranteed by s. 8 of the *Charter*.

[63] This leads, of course, to the question of the proper remedy for the *Charter* breach. As noted above, the trial judge concluded the evidence obtained as a result of the violation should be excluded pursuant to s. 24(2) of the *Charter*. Although her analysis was framed along somewhat different lines than what I have set out above, her basic assessment of the circumstances

surrounding the breach of s. 8 of the *Charter* was parallel to, and fully in keeping with, my own conclusions. This is consequential because the authorities indicate a trial judge's decision under s. 24(2) should not be interfered with by this Court unless it was based on a wrong principle or was unreasonable. See: *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 68; *R. v. Buhay*, [2003] 1 S.C.R. 631 at para. 48.

[64] I accept that the evidence obtained from Mr. Yeh by virtue of the illegal search was non-conscriptive and there is no suggestion that the R.C.M.P. officers in question acted in bad faith. However, in my view, the logic of Binnie J. in *Kang-Brown* recommends itself on the facts of this appeal. He wrote as follows:

> [104] … 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.

The Supreme Court's recent ruling in *R. v. Grant*, 2009 SCC 32 about the application of s. 24(2) of the *Charter* does not undercut the validity of these comments.

[65] I conclude, therefore, that the trial judge's decision to exclude evidence in this case should be sustained.

B. The *Nguyen* Issue

[66] As explained above, the second issue which requires attention in this appeal is the one arising from *R. v. Nguyen*. In order to deal with it, some background is required.

[67] As an initial point, I note that, since this appeal was argued, the Supreme Court has released its decisions in *R. v. Suberu,* 2009 SCC 33 and *R. v. Grant, supra.* Those cases consider police authority with respect to stops and questioning. Among other things, they attempt to clarify the point at which a "detention" can be said to begin. In my view, *Grant* and *Suberu* do not directly affect the issue which is at stake in the present proceedings. This is so because, in revisiting *Nguyen,* we are not dealing in any immediate way with the question of where the demarcation lies between "preliminary questioning" and "investigative detention." We are examining what lies on the investigative detention side of the line once that line has been established. In other words, the issue which requires resolution in this appeal only concerns the authority of the police in relation to "investigative detentions" in the sense of that term contemplated by *R. v. Mann, supra., i.e.* situations where liberty interests are suspended by physical or significant psychological restraint.

[68] The present contours of the law concerning investigative detentions trace back to the decision of the English Court of Appeal in *R. v. Waterfield*, [1963] 3 All E.R. 659. It suggested a two-stage analysis for determining the

scope of common law police powers. In circumstances where police conduct interferes with an individual's liberty or property, it is necessary to first consider whether the conduct comes within the scope of a duty imposed on the officer by law. If it does, the analysis must move on to the issue of whether the conduct involved a justifiable use of powers associated with the duty or, to use the words of the Supreme Court in *Dedman v. The Queen*, [1985] 2 S.C.R. 2 at p. 35, whether the power in question is "reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference." Obviously, all police powers must also be *Charter* compliant.

[69] The investigative detention concept was developed in some depth in the Court of Appeal for Ontario's decision in *R. v. Simpson, supra.* It concerned a situation where a police officer understood a particular residence to be a crack house. The officer saw a vehicle pull into the driveway. The driver exited the vehicle and entered the house. She left a short time later accompanied by Mr. Simpson in the passenger seat. The police officer pulled the vehicle over, questioned Mr. Simpson and ultimately removed a bag of cocaine from his pocket. In its decision, the Court of Appeal employed *Waterfield* and U.S. "stop and frisk" jurisprudence to confirm a police power to conduct investigative detentions. However, it said such detentions could be justified only if the detaining officer had "articulable cause" and the stop was reasonable in the circumstances. As noted above, it defined articulable cause as follows, at p. 202:

> …a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.

[70] In *R. v. Mann*, *supra*, now the leading case in this area, the Supreme Court endorsed the approach taken in *Simpson* and confirmed the existence of a common law police power to detain for investigative purposes. Indicating his preference for the term "reasonable grounds to detain" as opposed to "articulable cause," Iacobucci J. summarized his analysis as follows:

> [34] The case law raises several guiding principles governing the use of the police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.

[71] All of this leads to *R. v. Nguyen* and the question of whether investigative detentions can be conducted in relation to what might be referred to as "suspected" offences or whether they must be conducted exclusively in respect of offences which have been reported to the police or which the police have otherwise confirmed prior to the detention.

[72] *Nguyen* concerned a vehicle stop which led to drug possession charges being laid against three individuals. In the course of its reasons, the majority

of the Court, obviously drawing on paragraph 34 of the *Mann* decision, said this:

> [13] The court in *Mann* carefully placed strict limits on the use of investigative detention. There must be: (i) "a recent or on-going criminal offence"; and (ii) a "clear nexus" between the detainee and that offence. Having satisfied these two criterion, the decision to detain must be "further assessed" against all of the circumstances to ensure that the detention was reasonably necessary. Investigative detention will not avoid *Charter* challenge if its purpose is to determine whether a crime has been or is being committed as opposed to determining whether the detainee is linked to a recent or on-going crime. Nothing in *R v. Kang-Brown* changes this analysis.
>
> [14] Before a police officer can detain a person for investigative purposes, there must be some aspect of the circumstances, relied upon by the officer, to permit a future judicial assessment as to whether a crime has been or is being committed or is about to be committed, as a first step in the *Mann* analysis. (See the judgment of Binnie J. in *Kang-Brown.*) An ongoing police investigation, a reported crime, or an odour of contraband of sufficient strength, as examples, might lead a judge to conclude in assessing police conduct after the fact that, at the point of detention, a crime has been or is being committed or is about to be committed. None of these indicia of a recent or on-going criminal offence are present in this case.
>
> …
>
> [20] When the Nguyen vehicle was stopped in this case, the only activity under investigation was that of travelling too fast for road conditions. When Duy Nguyen was subsequently placed under investigative detention for some other crime in relation to drugs, the only indicia of criminal activity beyond the speeding infraction was excessive nervousness, a strong odour of cologne and a rented car. Such nebulous and ambiguous factors-even when taken together-cannot meet the criteria of *Mann* and *Simpson* so as to establish the existence of a recent or on-going criminal offence.
>
> [Footnotes Omitted; Emphasis Added]

[73] It is the highlighted aspect of this passage, the notion that an investigative detention may not be conducted "to determine whether a crime has been or is being committed," which has been questioned by the Crown. As noted at the outset, the present appeal was heard by an extended panel of

the Court in order that this aspect of *Nguyen* could be considered afresh. I shall now proceed with that task.

[74] It is perhaps useful to begin by clarifying a point which, in my respectful view, led to some difficulties in *Nguyen*. The point is this. There is a conceptual and practical distinction between (a) the question of how particular or specific a police suspicion must be in order to justify an investigative detention, and (b) the question of whether an investigative detention may be conducted only in respect of an offence which has been reported to the police or which the police otherwise understand has been committed. Any analysis which fails to appreciate the difference between these two notions will, of necessity, be flawed.

[75] It is, of course, well established that the police do not enjoy a general power to detain individuals for the purpose of ferreting out possible criminal activity. More particularly, they may not conduct an investigative detention to determine whether an individual is, in some broad way, "up to no good." In order to justify an investigative detention, the police suspicion must be particularized, *i.e.* it must relate to specific criminal wrongdoing. Just *how* specific it must be is not an issue in this appeal.

[76] This idea of the particularity of a suspicion is easily illustrated. For example, the police could not detain an individual for investigative purposes simply because he was walking in a downtown alley at 2:00 a.m. and they had a hunch he might be doing *something* illegal. On the other hand, if the police

were in possession of information warranting a reasonable suspicion that the individual in the alley had just committed a robbery, he could be detained.

[77] The question of whether the police may detain an individual in connection with a *suspected* offence is a different matter than the idea that suspicion must be particularized. Once again, an example might serve to illustrate the point. Suppose a police officer is patrolling a residential neighborhood in the early morning hours in circumstances where there has been no report of any theft or other criminal activity and where he or she has not seen any evidence of such activity. If the officer comes upon a man loading a television set into the trunk of a car parked in a dark alley, he or she might suspect the man is involved in a theft. (I assume, for purposes of this discussion, that these facts would not afford reasonable grounds to make an arrest pursuant to s. 495(1) of the *Criminal Code* but would justify a detention.) In this situation, the officer's suspicions would be very specific and he or she might well be able, on the spot, to relate them to the governing section of the *Criminal Code*. Nonetheless, by affecting an investigative detention of the man with the television set, the officer would be acting only on a reasonable suspicion that a crime had been committed. The officer would not be proceeding in relation to an offence which had been reported or which he or she otherwise knew had taken place.

[78] For ease of exposition in examining the *Nguyen* matter, I propose to use the term "known" to describe criminal activity which has been reported to the police or which the police understand, by virtue of some other means, to have

occurred. I will use the term "suspected" in connection with criminal activity that the police have reason to believe has taken place or is taking place but in relation to which their thinking remains only at the level of suspicion and where, accordingly, there is no basis for an arrest.

[79] It is important to stress that the issue raised by *Nguyen* for resolution in the present proceedings does not concern the specificity of the suspicion required to justify an investigative detention. The issue is whether such a detention may be undertaken in circumstances where the police reasonably *suspect,* but do not *know,* that criminal activity has taken place or is taking place. In other words, as noted, the issue concerns the statement in *Nguyen* that an investigative detention cannot be conducted "to determine whether a crime has been or is being committed."

[80] The relevant inquiry with respect to the "known offence-suspected offence" issue necessarily begins with the United States case law on which *Simpson,* and ultimately *Mann,* were grounded. Significantly, the American authorities do not limit the "stop and frisk" power to situations where the police are investigating or pursuing a known offence. *Terry v. Ohio,* 392 U.S. 1 (1968) is the foundational decision in this area. It involved a situation where a police officer simply suspected Mr. Terry and his associates of contemplating the robbery of a store. The detention and the subsequent weapons search, both of which the United States Supreme Court found to be lawful, were grounded on an experienced police officer's observations of such things as how Mr. Terry and his colleagues walked back and forth in front of

the store, peered in its windows and conferred with each other. The officer was not investigating a known offence at the time Mr. Terry was detained.

[81] Not surprisingly, the American cases since *Terry* have not restricted the application of the stop and frisk doctrine to circumstances involving criminal behaviour which is somehow known or established prior to the detention. Rather, the approach of the United States Supreme Court has been to find that investigative detentions can be reconciled with the demands of the Fourth Amendment so long as there is a reasonably grounded suspicion of criminal activity. This is illustrated by numerous decisions including *United States v. Arvizu*, 534 U.S. 266 (2002) (suspected transportation of drugs); *Illinois v. Wardlow*, 528 U.S. 119 (2000) (suspected drug trafficking); *United States v. Sokolow*, 490 U.S. 1 (1989) (suspected drug possession); *Florida v. Rodriguez*, 469 U.S. 1 (1984) (suspected possession of drugs); *Reid v. Georgia*, 448 U.S. 438 (1980) (suspected possession of drugs).

[82] By way of further background, it is also useful to refer to *Simpson, supra,* which, as explained, is the seminal Canadian decision. In that case, the Court of Appeal for Ontario found no articulable cause justifying the detention in question. However, its reasoning on the point had nothing to do with the fact the detention had been conducted in relation to a *suspected* drug offence. To the contrary, the reasons of the Court suggest it was entirely prepared to find articulable cause if the facts had established a sufficiently strong basis for believing Mr. Simpson might be involved in criminal activity. There is no indication of any sort that the lawfulness of the detention was

somehow conditional on the police officer knowing an offence had in fact been committed or was being committed.

[83] All of this background helps to properly understand *Mann* itself where, at paragraph 34, quoted above, Iacobucci J. specifically referred to the United States stop and frisk case law and to *Simpson* as providing the "guiding principles" for the use of police power to detain for investigative purposes. By virtue of that comment, his reference in paragraph 34 to "... the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence" should be read and understood against the backdrop of the relevant American authorities and *Simpson*. In other words, it would seem that Iacobucci J.'s reference to "recent" and "on-going" offences should not be taken as describing only crimes which the police know have been committed or which they know are being committed. Rather, read in context, the terms used in paragraph 34 are best understood as including situations where a police officer has a reasonable suspicion that the prospective detainee is, or has been, involved in an offence, *i.e.* as including situations where the crime itself is only *suspected*.

[84] Iacobucci J.'s summary of his view of the law at paragraph 45 of *Mann* is also worthy of note in this regard. He wrote as follows:

> [45] To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary.

The reference in this passage to a "particular crime," read in context, reflects the idea that the police may not detain an individual out of a general sense he or she might be doing something unlawful. As discussed above, police suspicions must relate to specific criminal wrongdoing. In short, the language used by Iacobucci J. to encapsulate his position contains no suggestion that investigative detentions may be conducted only in situations where the police are acting in relation to known offences.

[85] Thus, in my view, there is every reason to read *Mann* as authorizing investigative detentions in relation to offences which are only reasonably suspected at the time of the detention.

[86] All of this said, I acknowledge it is possible to construct an argument to the effect *Mann* did not purport to speak to the lawfulness of detentions conducted in relation to suspected offences. It involved a situation where the police were investigating a reported break and enter—a "known" offence—and detained Mr. Mann because he fit the description of the suspect. Against this background, I note Iacobucci J.'s statement, at paragraph 17 of his reasons, that he was concerned with laying down the common law governing detentions "in the particular context of this case." All of this, it might be suggested, raises questions about whether Iacobucci J. intended to speak to the legality of detentions conducted in relation to suspected offences.

[87] Therefore, in the interest of clarity and completeness, it may be useful to metaphorically place *Mann* to the side and to use what might be called "first

principles" to examine the status of investigative detentions as they relate to suspected criminal activity.

[88] The analysis in this regard starts, as it must, with *Waterfield* and its initial requirement of a police duty. This hurdle is easily cleared as it is readily apparent that the police have a duty to solve and prevent crimes. See: *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 18; *The Police Act, 1990*, S.S. 1990-91, c. P-15.01, s. 36.

[89] The second aspect of the *Waterfield* test is that the police power in issue must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public interest served by the interference. See: *Dedman v. The Queen, supra,* at p. 35 and *R. v. Mann, supra,* at para. 39. In the present context, this consideration involves balancing the importance and utility of empowering police to detain individuals for the purpose of investigating their possible involvement in suspected crimes against the deprivation of liberty which is inherent in such detentions.

[90] A general or open-ended power to detain for the purpose of ferreting out possible criminal activity or involvement in such activity would clearly not be reasonable or justifiable. See: *Mann*, at para. 17. The question, therefore, is whether, in relation to suspected crimes, the restrictions which the jurisprudence places on the nature and scope of investigative detentions are sufficient to render such detentions justifiable in the sense contemplated by

cases such as *R. v. Waterfield, supra, R. v. Mann, supra, R. v. Clayton*, [2007] 2 S.C.R. 725 and *R. v. Kang-Brown, supra*.

[91] One critical factor to note in relation to the reasonableness or justification issue is that an investigative detention is lawful only when a police officer has a reasonable suspicion of specific criminal activity based on *objectively* verifiable grounds and only when, in all of the relevant circumstances, the detention is reasonable. As noted, a generalized feeling on the part of the police that an individual is doing something wrong can not serve as the basis for a lawful detention. Thus, in this way, the prerequisites for investigative detentions help to ensure they will not be based on the sorts of hunches and intuitions which can serve as a cover for arbitrary conduct and either deliberate or unconscious profiling based on factors such as race, ethnic origin or socioeconomic status.

[92] A second factor which works to make investigative detentions reasonable and bring them within the reach of the *Waterfield* test is their limited scope. Specifically, such detentions must be brief. They attract an obligation for the police to explain the reason for the detention and, in light of *R. v. Suberu*, *supra,* an obligation to advise the detainee of his or her s. 10(b) *Charter* right to retain and instruct counsel. They involve no search authority beyond a reasonable safety pat-down. And, finally, they impose no obligation on detainees to respond to police questioning. Thus, while such detentions represent an intrusion on personal liberty, that intrusion is limited.

[93] On the other side of the coin, the ability of the police to briefly detain individuals in relation to their possible involvement in suspected offences is self-evidently important for the advancement of law enforcement objectives and the protection of the community. The effectiveness of the police would necessarily be compromised if they could act only in relation to crimes which have already been reported or which they otherwise know have been committed or are in progress. Imagine my earlier example of the police officer who sees a man hurriedly loading a television set into the trunk of a car at 2:00 a.m. in a dark alley in a residential neighborhood. It would clearly frustrate the achievement of policing objectives and undermine community safety concerns if, because he only had grounds to reasonably *suspect* criminal wrongdoing, the officer could not detain the man to investigate the situation.

[94] Overall, it is reasonable to countenance the deprivation of liberty involved in investigative detentions connected to suspected offences in light of the importance of the community interest served by allowing the police to pursue such practices. Such detentions must not only be based on reasonable suspicion of criminal activity. They must, as well, be reasonable in the circumstances as a whole. As a result, I conclude that, at common law, the police may detain an individual for purposes of an investigation when they have reasonable grounds to suspect he or she is involved in criminal activity. It is not necessary that the detention be in relation to a known, as opposed to a suspected, offence.

[95] Having established the common law status of this species of investigative detention, the next question is whether it can be reconciled with the *Charter* and, more specifically, reconciled with the terms of s. 9 of the *Charter*. Section 9 states, of course, that everyone has the right not to be arbitrarily detained or imprisoned. It thereby raises a very real question about the constitutional validity of detentions in relation to suspected offences. Here, as in many situations in the criminal sphere, the demands of law enforcement are in tension with the *Charter's* guarantees of liberty. The challenge is to find an appropriate balancing point between these two sets of interests. In attempting to do so, our legal tradition has always accepted that police powers do not necessarily correspond with police duties. We have quite properly taken this state of affairs as being appropriate in light of the importance ascribed to the protection of individual liberty.

[96] I conclude, however, in light of the underlying logic of *Mann* and *Kang-Brown,* that a police power to detain for investigative purposes in relation to suspected offences can be reconciled with the substance of s. 9 of the *Charter* on effectively the same basis as has been recounted above in the context of the second wing of the *Waterfield* test. I will not repeat that discussion. Suffice to say that, overall, the reasonable suspicion standard, qualified by the requirement that a detention must be reasonable when seen in its full context, and combined with the limited scope of police powers available once an individual is detained, serves to create an acceptable balance between the need to safeguard individual liberty and privacy interests, on the one hand, and the need to protect the public on the other.

[97] My thinking on this issue is supported by the fact that, since the Supreme Court's ruling in *Mann*, there have been a number of appellate level decisions which have found an investigative detention to be lawful in circumstances where the police officers involved only suspected a crime had been committed or was being committed.

[98] *R. v. Nesbeth*, 2008 ONCA 579 (leave to appeal recently denied by the Supreme Court, [2009] S.C.C.A. No. 10 (QL)), is an example. At 11:00 p.m. the police encountered Mr. Nesbeth carrying a knapsack in a stairwell in an apartment complex plagued by drugs, guns and gang violence. The stairwell smelled of marijuana. On seeing the officers, Mr. Nesbeth clenched the knapsack and, when asked what he was doing, replied "Oh shit" and began to run. He tried to impede the officers' progress by pushing a shopping cart in their way and he threw away the knapsack before he was caught and detained. The Ontario Court of Appeal upheld the validity of the detention even though, on the facts, it was not conducted in relation to a known offence. See also: *R. v. Calderon* (2004), 188 C.C.C. (3d) 481 (Ont. C.A.) at para. 69.

[99] *R. v. Duong*, 2006 BCCA 325 is to a similar effect. In that case, a police officer came upon Mr. Duong seated in a parked car in an area with a high incidence of property crime, specifically thefts of and from cars. The officer saw a car stereo with cut wires in the back seat and asked Mr. Duong to exit the vehicle so that he could investigate whether the stereo was stolen. The officer had valid safety concerns and, while patting down Mr. Duong, felt

what he thought might be a knife in his pocket. It turned out to be packages of cocaine and heroin. The British Columbia Court of Appeal rejected an argument to the effect that, without any evidence of criminal activity or reports of criminal activity taking place, or an active ongoing police investigation, there was no proper basis for the detention.

[100] The Supreme Court's own comments in *R. v. Wilson,* [1990] 1 S.C.R. 1291, are also instructive. Although it was decided prior to *Mann* and does not involve any extended examination of the issues, *Wilson* does suggest that the doctrine of articulable cause or reasonable suspicion can be used to reconcile police stops in relation to suspected offences with s. 9 of the *Charter*. The case involved a situation where the police saw a vehicle pull away from a bar at closing time. They stopped the car, looking for an impaired driver. Cory J., for the majority of the Court, wrote as follows at p. 1297:

> [13] …In a case such as this, where the police offer grounds for stopping a motorist that are reasonable and can be clearly expressed (the articulable cause referred to in the American authorities), the stop should not be regarded as random. As a result, although the appellant was detained, the detention was not arbitrary in this case and the stop did not violate s. 9 of the *Charter*.

[101] I note too that in *Kang-Brown,* at paragraph 94, Binnie J. referred with apparent approval to *R. v. Schrenk*, 2007 MBQB 93, a case where an investigative detention was found to have been lawfully conducted in a situation where the police only suspected a drug offence in light of Mr. Schrenk's nervous behaviour and the unusual details of his use of a rental car.

[102] There are, not surprisingly, a number of decisions where investigative detentions have been found to be unlawful. My colleague Jackson J.A. refers to some of them at paragraph 135 of her reasons. Most of these decisions involve situations where a *Charter* violation was found because the police were acting on the basis of what amounted to a mere hunch that the detainee was engaged in criminal activity or because the police had only a general suspicion that the detainee might be doing something unlawful. With perhaps one or two arguable exceptions, all of them seem to proceed on the unarticulated assumption that, if the facts had been sufficient to warrant a reasonable suspicion of involvement in criminal wrongdoing, it would not have mattered if the detention was in relation to an offence which itself was suspected as opposed to known. I am aware of no case where a court has expressly analyzed the issue raised in this appeal and concluded that an investigative detention may not be conducted if, to quote *Nguyen*, its purpose is "to determine whether a crime has been or is being committed."

[103] In summary, I conclude that *Mann* should not be read as meaning an investigative detention may be lawfully conducted only in relation to a "known" offence. To the extent *R. v. Nguyen* holds otherwise, it should not be followed. In this case, Constable Donison might potentially have been shown, at most, to have had a reasonable *suspicion* that a marijuana offence was being committed. This did not, in itself, render Mr. Yeh's detention unlawful.

V. Conclusion

[104] I conclude, for the reasons set out above, that the Crown's appeal must be dismissed. Mr. Yeh's rights, as guaranteed by s. 8 of the *Charter*, were violated by the sniffer dog search and the trial judge made no error in excluding the evidence obtained as a result of that breach.

DATED at the City of Regina, in the Province of Saskatchewan, this 29th day of September, A.D. 2009.

"RICHARDS J.A."

RICHARDS J.A.

I concur "KLEBUC C.J.S."

KLEBUC C.J.S.

I concur "LANE J.A."

LANE J.A.

I concur "SMITH J.A."

SMITH J.A.

I concur "RICHARDS J.A."

for WILKINSON J.A. (as per authorization)

Jackson J.A.

I. Introduction

[105] The Court has been asked to reduce the rights of citizens to be free from unwarranted police interference in favour of an expansion of the police power to detain and to search individuals using a sniffer dog. We are asked to do so in the context of a case where we all agree the appeal must be dismissed for the reason that, whatever the standard for determining when the police may detain an individual, the police did not meet it in this case. In doing so, we are also asked to depart from a prior decision of the Court, *R. v. Nguyen*, 2008 SKCA 160, [2009] 2 W.W.R. 591. The Crown has, since the hearing of the within appeal, abandoned its appeal as of right from *Nguyen* to the Supreme Court of Canada.

[106] I will address the issues grouped broadly under the categories of: (i) the chronology of events that brought the Court to re-consider *Nguyen*; (ii) the law establishing when the police may place someone under investigative detention; (iii) the law pertaining to the use of sniffer dogs to search a person—or the place in which the person is located—when a person is detained for investigative purposes; and (iv) the application of the law to the particular facts of this appeal.

II. The Chronology

[107] For a proper understanding of this appeal, it is necessary to provide some context and a chronology of events. On December 12, 2008, this Court

released its decision in *Nguyen*. The majority gave two grounds for denying the Crown its right of an appeal from an acquittal. First, relying on *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, the Court held that investigative detention could not be justified as there were no reliable indicia of a particular recent or on-going criminal offence (see: paras. 11-14 and 20). Second, while the Crown's position at trial was unclear, if the decision not to include an accused's statement as part of the grounds of arrest was the product of Crown counsel's considered choice, the majority held that the Crown should not be permitted to raise a new argument on appeal (see: paras. 38-42). The dissenting judge took a different view of the issues and, in relation to the first, held that recent case law had applied the *Mann* "doctrine to cases where on-going criminal activity is, itself, only suspected" (see: para. 86).

[108] The dissent on a question of law in *Nguyen* gave the Crown an appeal, as of right, to the Supreme Court of Canada. On January 9, 2009, the Crown exercised this right and filed its Notice of Appeal with the Supreme Court of Canada (see: 2009 S.C.C. Bulletin 87, January 23, 2009). On February 9, 2009, the Supreme Court of Canada fixed October 23, 2009, as the tentative date to hear the appeal from *Nguyen*.

[109] On February 10, 2009, this Court heard argument in *R. v. Bramley and Schiller* and released its decision on April 23, 2009 (see: 2009 SKCA 49, 324 Sask.R. 286). In *Bramley*, the Court stated that paras. 13 and 14 of *Nguyen* appeared to be *obiter dicta* and that the effective reason for dismissing the appeal was that the Crown had advanced a different theory of the case on

appeal from that upon which it had relied at trial (see: *Bramley*, para. 31). The Court went on to express reservations about the approach taken by the majority of the Court in *Nguyen*, with respect to investigative detention, and suggested that "it may be appropriate for this Court, in a proper case, to revisit the question of whether investigative detentions can be lawfully conducted in respect of suspected, as opposed to known, offences" (see: *Bramley*, para. 33).

[110] Meanwhile, the appeal in the within matter was proceeding through the process of appeals in this Court. The appeal was originally scheduled to be heard on April 14, 2009, but on April 9, 2009, counsel were advised that the matter would be adjourned *sine die*, at the direction of the Court, as it planned to sit a panel of five or seven judges as early as the last week in April. On April 16, 2009, a panel of seven was set for the purposes of hearing the within appeal on April 28, 2009. Counsel were advised on April 21, 2009 that the Court "will want to hear submissions on the question of whether an investigative detention can be conducted in respect of a *suspected* offence" (see: memo dated April 21, 2009 on Court File CA 1571, emphasis in the original). Defence counsel provided supplementary written materials. The Crown filed additional case law.

[111] On April 28, 2009, the within appeal was heard and reserved. A few days later, on May 6, 2009, the Crown filed a notice with the Supreme Court of Canada discontinuing its appeal from this Court's decision in *Nguyen*.

[112] Stability of the law, which is the cornerstone of *stare decisis*, requires that an appellate court's discretion to overturn one of its prior decisions, particularly in criminal law matters, is not to be lightly exercised. See: *R. v. Bernard*, [1988] 2 S.C.R. 833 at pp. 849-60, and *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1353. However, given that another panel of the Court has stated that what was said regarding investigative detention in *Nguyen* constitutes *obiter dicta*, I will consider it to be so. The matter will be considered afresh, albeit in the context of an appeal where we all agree that regardless of the standard for determining whether an investigative detention is permitted, Mr. Yeh was arbitrarily detained, and the sniffer dog should not have been deployed.

III. The Section 9 Right: Freedom from Arbitrary Detention

[113] The task facing the Court is not the construction of a statute. It is rather the interpretation of a judicial decision, i.e., *Mann*, for the purpose of determining *when* a detention is arbitrary, and therefore contrary to s. 9 of the *Charter*, and when it is not. A question of law has been extracted from *Mann*: whether the police have the power to detain someone on reasonable suspicion of the person's involvement in a suspected offence or a reasonably suspected particular offence, as opposed to a power of detention based on reasonable suspicion of the person's involvement in a particular crime only.

[114] In brief compass, the language of *Mann* is clear. It establishes the standard. A modification to the *Mann* language that shifts the emphasis, from reasonable suspicion as to an individual's involvement in a crime, to reasonable suspicion as to whether there is a crime at all expands police

powers. Such an expansion of police powers is not justified by the record before us.

[115] While the Court is not construing a statute, the *Charter*, and the principles of interpretation that govern the *Charter*, provide the framework for the analysis that follows. The Supreme Court of Canada has recently restated those principles. See: *R. v. Grant*, 2009 SCC 32.

[116] In *Grant*, the Court confirmed that a constitutional guarantee such as s. 9 should be interpreted in a generous rather than a legalistic way, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection (see *Grant*, para. 17). The Court declared that "[t]he purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference" (*Grant*, para. 20). It is against this backdrop that the issues on this appeal must be considered.

[117] For my part, it is not possible to answer the question posed, without considering the larger picture and context. The context is a traffic stop when the police move from a first detention, pertaining to a traffic stop, to a second detention, which is effected ostensibly for the purpose of investigating a narcotics offence. It is in this particular context that we are asked to effect, what I perceive to be, an incremental increase in police powers. This incremental increase will have repercussions beyond the parameters of this appeal—particularly in relation to pedestrian stops—which are largely unknown. Witness this case where the police believed it was an appropriate

exercise of their authority to deploy a sniffer dog in circumstances falling well short of a detention permitted under *Mann*.

[118] In addition to considering the principles of interpretation that govern the *Charter*, it is also important to ground the analysis of the issues in an understanding of the police power of arrest. It is necessary to do so for two reasons: (i) to understand the reason why *Mann* as it stands now represents a reasonable expansion of police power; and (ii) to establish at least a general marker for when the lawful arrest power ends, before considering when the power to place someone under detention begins.

[119] When the police come upon or encounter crime, they can arrest someone without warrant only if they find the person committing or apparently committing a criminal offence (s. 495(1)(b) of the *Criminal Code*). Reasonable and probable grounds to support the police officer's belief are not sufficient. From the perspective of the party being arrested, a peace officer has no right to arrest, without warrant, a person he or she finds committing an offence, unless an offence is being committed or apparently being committed. (See, e.g., *R. v. Biron*, [1976] 2 S.C.R. 56 at pp. 72-75; *R. v. Roberge*, [1983] 1 S.C.R. 312 at pp. 318 and 324-25; *R. v. Wright*, 2007 ONCJ 493 at para. 65; and *R. v. Janvier*, 2007 SKCA 147, [2008] 3 W.W.R. 1 at paras. 21-22.) In making the determination as to whether to exercise the power of arrest under s. 495(1)(b), it must be pointed out that the police are also entitled to rely on any item that is found in plain view (see: *R. v. Spindloe*, 2001 SKCA 58,

[2002] 5 W.W.R. 239), and they can also rely on the plain smell doctrine (see: *R. v. Sewell*, 2003 SKCA 52, [2004] 6 W.W.R. 694)).

[120] During crime investigation or with a reported crime, however, as occurred in *Mann*, the power to arrest under s. 495(1)(b) is of no assistance, because the police do not see or smell the indicia of a particular crime. The crime under investigation will have already taken place—thus *Mann* can be seen as addressing a gap in police powers. The difficult question, both from the perspective of determining the reach of *Mann* and from the policy perspective, is whether the police have a power of detention in circumstances, other than in the circumstances described in *Mann*, most notably, when the police themselves encounter an individual in what they conclude to be "suspicious circumstances." It must be clearly understood, however, that this is the usual field of application for the arrest power under s. 495(1)(b).

[121] In answering the question posed in the previous paragraph, language is important. Neither *Mann* nor *Nguyen* use the words "known offence." In my respectful view, "known offence" implies a degree of certitude that sets the bar too high. Even with a reported crime, one cannot say that the crime is "known." The most one can say is that the circumstances have risen to a level that will probably permit a judge, in the exercise of review of the police officer's actions, to conclude that a crime had been recently committed or was apparently being committed at the time of the detention so as to avoid a determination that the detention was arbitrary. In the context of the exercise of the police power of arrest under s. 495(1)(b) of the *Criminal Code*, the

words “known offence” are not used. (See: *Biron, supra* and *Roberge, supra*.) Just as the words “known offence” demand too much of the police, “suspected offence” or “reasonably suspected offence” accords too much discretion to the police in determining when they may place someone under investigative detention.

[122] Further, *Nguyen* does not suggest that the police themselves cannot be the origin of the opinion that a particular recent crime has been committed or is being committed, in the sense of the police being the witness to a crime, but not to the perpetration of the crime by a particular individual, which would permit the use of the arrest power under s. 495(1)(b) of the *Criminal Code*. *Nguyen,* simply, was not that type of case. The police witness cases are similar to some of the cases, which under the law prior to *Mann* permitted a police power of detention under the rubric of “articulable cause.” It is also the type of case that Rosenberg J.A. was prepared to call “close” in *R. v. Byfield* (2005), 193 C.C.C. (3d) 139 (Ont. C.A.) at para. 20.

[123] *Mann* is a “reported crime” case, but it is unlikely anyone would disagree with an application of *Mann* that permits a power of detention, if the circumstances confronting a police officer rise to the point of belief that the officer, as witness, decides a particular crime has been recently committed or is being committed. For example, if an officer sees a woman lying on the ground crying and, seconds later, sees a man fleeing with a woman’s handbag, it is probable that a trial judge would conclude that investigative detention was necessary to determine whether the detained person is linked to the recent,

specific crime of theft. The arrest power under s. 495(1)(b) of the *Criminal Code* would not be available because the individual is not found committing or apparently committing an offence. An investigative detention power may be necessary, in such circumstances, to permit the police to determine whether the individual is linked to the recent crime of theft in the same way as with a reported crime. In such a case, the police need not wait for a crime to be reported if they observe, smell or hear something that causes them to believe that a particular crime has recently been committed or is being committed—assuming, of course, that the balance of the *Mann* criteria are satisfied. This, however, is not the type of case that concerns the Crown on this appeal.

[124] The Crown is concerned with the case where the police observations of the individual, and of the potential crime, occur simultaneously, which is the scenario normally addressed by the police power of arrest, but the circumstances fall short of permitting an arrest pursuant to s. 495(1)(b) of the *Criminal Code*. To pinpoint the analysis, the specific fact pattern that concerns the Crown arises with respect to drugs in the traffic stop or random stop case; hence the appeals from the acquittals in *Nguyen*, *Bramley* and the within appeal. Once the police determine there is no basis for a traffic stop, but they have suspicions about drug activity, can the police continue to detain the person, while they use various investigative techniques, including a sniffer dog, to gather enough evidence for an arrest under s. 495 of the *Criminal Code*, or to search the person, using the exigent circumstances power under ss. 11(5) and (7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19?

[125] That is the real issue confronting the Court on this appeal, and it is one of the issues that the majority of the Court decided against the Crown in *Nguyen*, absent the presence of a sniffer dog. To address it again in this appeal, these are the background questions: (i) what did the Supreme Court of Canada hold in *Mann*; (ii) has the Supreme Court of Canada resiled from *Mann*; (iii) how does the *Nguyen* analysis fit with *Mann*; (iv) what is the academic interpretation of *Mann*; (v) how have the courts interpreted and applied *Mann*; and (vi) should the law be expanded to permit investigative detention based on a "suspected offence." A related question of law, raised for the first time on this appeal, is whether the police can use a sniffer dog to investigate a person who has been placed under investigative detention with respect to the crime of possession of a drug or, in other words, whether there is a stand-alone search power in such circumstances.

[126] With respect to what *Mann* decided, these are the critical passages:

> [34] The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.

> [35] Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain....
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> …
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> [45] To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary.... [Emphasis added.]

Thus, the Court in *Mann* demands in para. 34 "a recent or on-going criminal offence," and in para. 45 "a particular crime," which is language that connotes not only the identification of a category of crime, but a "particular" crime. There must also be a "nexus" between a particular individual and the crime under investigation, which expresses a further limit on when the police may detain an individual. The Court uses the language of restraint and confines the application of the expanded police power to the type of case before it.

[127] Supreme Court authority has not stepped back from the language of *Mann*. In *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, Abella J. for the majority wrote:

> [28] *Mann* dealt with the detention of an individual walking on the sidewalk during the investigation of a break and enter. The Court concluded that the detention was lawful since the accused not only closely matched the description given by the radio dispatcher, which had included the age, race, height, weight, and clothing of the suspect, but also because the accused was only two or three blocks from the scene of the reported crime. While the circumstances in this case are different from those in *Mann* since the police in this case were obviously unable to identify any particulars about the occupants before their initial detention, some of the analysis in *Mann* is nonetheless helpful in assessing whether the police were acting within the scope of their common law powers:

> The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officers' reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officers' duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test. [Emphasis added by Abella J.; para. 34.]

…

[44] This analysis is logically compelling given the purpose of the detention and the reasonableness of the police view, at the time, that Clayton and Farmer were implicated in the criminal activity under investigation. The police knew that some of the people leaving the parking lot would have guns. They also knew that the suspects were black males in the parking lot of the Million Dollar Saloon. After stopping the Jaguar, the police discovered that both occupants matched the race of the suspects mentioned in the 911 call, that Clayton was wearing leather gloves despite being a passenger and despite the weather not being glove weather, and that Clayton was giving strange and evasive answers to P.C. Robson's questioning. The trial judge found that Clayton was behaving in a way that gave rise to a reasonable suspicion that he might be in possession of a firearm. That gave the officer reasonable grounds for suspecting that he was one of the four men who had a gun in the parking lot.

…

[47] . . . had the police stopped the vehicle and discovered that the occupants did not correspond to the description given by the 911 caller, they would have had no reasonable grounds for the continued detention of the occupants. For example, had the caller described individuals who were white, the police would not have had reasonable grounds for the continued detention of non-white occupants. On the particular facts of this case, however, based on their subsequent observations, there were reasonable grounds, as required by *Mann*, for the police to conclude that the two occupants of the car they had stopped were implicated in the crime being investigated. [Emphasis added.]

Thus, the majority in *Clayton* required that there be a nexus between the individuals being detained and the particular crime that was being investigated—an application of the underlying principles of *Mann*.

[128] In *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, eight of the nine judges rejected a "generalized suspicion" test. Binnie J., for example, wrote:

> [73] None of this, in my view, provides any legal basis for a "generalized suspicion" test. This is not to say that sniffer dogs can never be deployed where for example the police have evidence that a crime has actually been committed and the police have reasonable suspicion in relation to one or more members of a group of people closely linked in proximity to the crime (as in *Clayton* and *Mann*) but cannot identify the guilty member of the group. *But here the police had no evidence that any crime had been committed at all*.... [Emphasis added by Binnie J.]

In *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569, the companion case to *Kang-Brown*, Binnie J. used the same language, in finding the search to be unreasonable. He wrote: "[t]he police had no evidence even that a crime had been committed..." (para. 53).

[129] While the ratios in *Kang-Brown* and *A.M.* use the language of "reasonable suspicion" to set the test for the use of sniffer dogs, they do so, not because the language of *Mann* is no longer applicable, but because those cases concern the search power under s. 8 of the *Charter* alone, not the power of detention and a search incident thereto under s. 9. The reference to "searching on reasonable suspicion" is used in contradistinction to words indicating the authority of the police to obtain a warrant to search on "reasonable grounds to believe" in the presence of drugs. Since no individuals were detained in either *Kang-Brown* or *A.M*, nothing more needed to be said.

[130] To complete the list, I note the Supreme Court of Canada's most recent decision in *Grant*, *supra*. In *Grant*, the accused, a young black man, was walking down a sidewalk in close proximity to a number of schools, when he came to the attention of the police. As the police drove past, the accused stared at them, while at the same time fidgeting with his coat and pants in a way that aroused the suspicions of the police officers, who subsequently detained him. The parties were agreed that, in such circumstances, the police lacked legal grounds to detain the accused (see: para. 12). The majority of the Court offered no further comment on the issue.

[131] The majority of the Court in *Nguyen* interpreted *Mann* and *Kang-Brown* in this way:

> [12] *Mann* follows upon the analysis in *R. v. Simpson* [(1993), 79 C.C.C. (3d) 482]. In *Simpson*, Doherty J.A. described the circumstances that must exist to justify an investigative detention as: "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." [Emphasis added in *Nguyen*.]
>
> [13] The Court in *Mann* carefully placed strict limits on the use of investigative detention. There must be: (i) "a recent or on-going criminal offence"; and (ii) a "clear nexus" between the detainee and that offence. Having satisfied these two criterion, the decision to detain must be "further assessed" against all of the circumstances to ensure that the detention was reasonably necessary. Investigative detention will not avoid *Charter* challenge if its purpose is to determine whether a crime has been or is being committed as opposed to determining whether the detainee is linked to a recent or on-going crime. Nothing in *R. v. Kang-Brown* [2008 SCC 18; [2008] 1 S.C.R. 456] changes this analysis.
>
> [14] Before a police officer can detain a person for investigative purposes, there must be some aspect of the circumstances, relied upon by the officer, to permit a future judicial assessment as to whether a crime has been or is being committed or is about to be committed, as a first step in the *Mann* analysis. (See the judgment of Binnie J. in *Kang-Brown* [at paras. 26 and 104].) An ongoing police investigation,

> a reported crime, or an odour of contraband of sufficient strength, as examples, might lead a judge to conclude in assessing police conduct after the fact that, at the point of detention, a crime has been or is being committed or is about to be committed. None of these indicia of a recent or on-going criminal offence are present in this case.
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> …
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> [20] When the Nguyen vehicle was stopped in this case, the only activity under investigation was that of travelling too fast for road conditions. When Duy Nguyen was subsequently placed under investigative detention for some other crime in relation to drugs, the only indicia of criminal activity beyond the speeding infraction was excessive nervousness, a strong odour of cologne and a rented car. Such nebulous and ambiguous factors–even when taken together–cannot meet the criteria of *Mann* and *Simpson* so as to establish the existence of a recent or on-going criminal offence. [Emphasis added.]

I remain of this view.

[132] The academic community has interpreted *Mann* and the ensuing Supreme Court jurisprudence as applying to particular crimes. Indeed, the academic commentary does not even extend a police power to detain an individual, in relation to what I call an "observed crime." In *The Law of Investigative Detention* (Markham, Ont.: LexisNexis Canada, 2008), Professor Fiszauf notes that *Mann* requires "[t]he subject of the detention must be connected to a specific, recent, past, or on-going offence" (p. 75). He adds that a nexus is needed between the subject of the detention and an underlying offence.

[133] In *Understanding Section 8*: *Search, Seizure, and the Canadian Constitution*, (Toronto, Ont.: Irwin Law, 2005), Professors Boucher and Landa note "[i]n light of the Supreme Court's decision in *Mann*, it is clear that

the police may not use investigative detention as a proactive or preventive measure" (p. 246).

[134] Professor Gottardi in "*R. v. Mann:* Regulating State Intrusions in the Context of Investigative Detentions" (2004) 21 C.R. (6th) 27, states that the nexus requirement means that "police stops based on general suspicion of criminal activity are not constitutional" (p. 29). See also: Skibinsky, "Regulating *Mann* in Canada" (2006) 69 Sask. L. Rev. 197 at 207.

[135] Since we are engaged in the exercise of interpreting *Mann*, it is important to review the decisions from across the country that have interpreted and applied this decision. First of all, it must be pointed out that none of the Courts have been asked to address the specific issues raised on this appeal. Thus, the most that can be accomplished by this exercise is to review the various fact patterns and extrapolate from the case law based on the language used and the result. The cases fall into three broadly based categories. The first category includes those cases where the Courts found that the detention was arbitrary and used the precise language of *Mann* to do so: *R. v. Ferdinand* (2004), 21 C.R. (6th) 65 (Ont. Sup. Ct.) at para. 37; *R. v. Calderon* (2004), 188 C.C.C. (3d) 481 (Ont. C.A.) at para. 69; *R. v. Bell*, 2004 ABPC 136, 123 C.R.R. (2d) 1 at para. 16; *R. v. Graham* (2004), 124 C.R.R. (2d) 121 (Ont. Ct. J.) at paras. 25-26; *R. v. Abraham*, 2004 MBQB 234, 7 M.V.R. (5th) 128 at para. 9; *R. v. A.B.*, [2004] O.J. No. 5660 (QL) (Ont. Ct. J.) at para. 22; *R. v. K.W.*, 2004 ONCJ 351 at para. 38; *R. v. S.V.*, 2005 ONCJ 410, 32 C.R. (6th) 389 at paras. 23-25; *R. v. Peters*, 2006 BCSC 1560, 147

C.R.R. (2d) 334 at para. 33; *R. v. Filli*, [2007] O.J. No. 3192 (QL), 2007 CarswellOnt 5281 (Ont. Sup. Ct.) at para. 74, affirmed by 2008 ONCA 649; *R. v. Barrett*, [2007] O.J. No. 3680 (QL), 2007 CarswellOnt 6899 (Ont. Sup. Ct.) at para. 55; *R. v. Ambrose*, 2008 NBPC 32 at paras. 30 and 36; and *R. v. Yaran*, 2009 ABPC 31 at paras. 94-95. (Ms. Skibinsky analyzes and categorizes many of these decisions in her article (see *Skibinsky, supra*).)

[136] The second category of cases includes those decisions where the Courts found there was no arbitrary detention and the fact patterns resemble most closely those of *Mann* either because the police had received a tip or the police were investigating a particular crime: *R. v. Gomez*, 2006 BCPC 82; *R. v. Dykhuizen*, 2007 ABQB 489; and *R. v. Hanano*, 2007 MBQB 9, 210 Man.R. (2d) 250.

[137] The third category of cases encompasses those cases where the Courts have not found the detention to be arbitrary and there was no reported crime and the police were not engaged in investigating a particular crime: *R. v. Cooper*, 2005 NSCA 47, 195 C.C.C. (3d) 162; *R. v. Reid*, [2005] O.J. No. 5618 (QL), 2005 CarswellOnt 7545 (Ont. Sup. Ct.); *R. v. Duong*, 2006 BCCA 325, 142 C.R.R. (2d) 261; *R. v. Schrenk*, 2007 MBQB 93, [2007] 9 W.W.R. 697; *R. v. Lynds*, 2007 NSPC 47, 264 N.S.R. (2d) 24; *R. v. Nesbeth*, 2008 ONCA 579, 238 C.C.C. (3d) 567, leave to appeal denied [2009] S.C.C.A. No. 10 (QL); and *R. v. Pearson*, 2009 ABQB 382. Admittedly, *Schrenk* is referred to with approval in the reasons of Binnie J. in *Kang-Brown* at para. 94. Nonetheless, in my respectful view, insofar as these decisions permit

investigative detention without the police, and subsequently, the trial judge, being able to say that the detention was in relation to a particular recent or ongoing crime, these decisions are not in keeping with *Mann*.

[138] If we return to the scenario mentioned in para. 120 of these reasons, which is whether the police have a power of detention when the police encounter an individual in "suspicious circumstances," I note that all of the cases in para. 137 are cases of this type. Some of the decisions in para. 135, however, also fall into the same category, but the courts, nonetheless, concluded that the police could not detain for investigative purposes in such circumstances.

[139] As I have previously mentioned, the case before us imports two additional, significant variants from the general scenario pertaining to whether the police have a power of detention in circumstances falling short of finding a person committing a particular crime. These two variants must be considered when determining where to fix the standard for determining whether the police have a power of investigative detention. First, the detention occurs in the context of a traffic stop, which occurs with respect to the regulated activity of driving, but one in which the stop is saved only by the application of s. 1 of the *Charter* (see: *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 and *R. v. Mellenthin*, [1992] 3 S.C.R. 615). Second, the crime at issue is governed by the *Controlled Drugs and Substances Act*, which confers upon the police additional search powers in exigent circumstances (see: s. 11). What concerns the Crown is whether the police have sufficient authority to

deal with drugs in the traffic stop case, i.e., when the police stop an individual for one reason and then begin to "suspect" the person possesses or is trafficking in drugs, can the police place the person under investigative detention while they investigate further, and, for example, can they deploy a sniffer dog? Notwithstanding the concern of the Crown, the question is whether the Supreme Court had this type of scenario in mind when it authorized a police power of detention for the purposes of determining whether there is a nexus between a particular individual and a recent or ongoing crime. In my respectful opinion, it is not.

[140] If one adheres to the language of *Mann* and *Clayton*, *supra*, it would be a rare case where the police in the context of a traffic stop would have the authority to detain either the driver, or a passenger, of a vehicle, for investigative purposes on suspicion that the person possesses, or is trafficking in, drugs. There would normally be no 9-1-1 call, tip or reported crime. Because the individual and the suspicious circumstances are present at the same moment in time, the only legal element that is absent, for the purposes of the exercise of the arrest powers under s. 495(1)(b) of the *Criminal Code*, is whether the person is committing or apparently committing a particular crime. In my respectful opinion, this is not the type of case to which *Mann* is addressed. Based on *Mann*, if the circumstances do not permit an arrest under s. 495(1)(b), the police cannot shore up the arrest power with a power of detention looking for evidence as to whether the person possesses drugs. Further, it would be a rare case, given knowledge of the individual, and knowledge of the circumstances, that detention would be necessary in all of

the circumstances, such that the detention would fail in any event on the second branch of *Mann* as well. The police must let the individual proceed, leaving the issue of suspected criminality to other police investigative techniques.

[141] A reasonably bright line for the police in the field, and for a judge in the courtroom in the ultimate supervision of police activity, is what is required. *Mann* provides this line. The words of *Mann* establish the necessary criteria to avoid the slide into using investigative detention to search for evidence of drugs based on generalized suspicion. This previously cited passage from *Mann* is particularly important:

> [35] Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest. [Emphasis added.]

In other words, the Supreme Court of Canada has already set the standard for investigative detention and further qualification or explanation is not necessary.

[142] *Mann* is a narrowly targeted expansion of police powers intended to fill a perceived gap in police powers to give the police the authority to address (i) reported crimes; (ii) crimes that are being actively investigated; or (iii) in any other situation, where detention is necessary, in all of the circumstances, to determine whether a particular individual is linked to a recent or ongoing crime that is brought to the attention of the police in the field. To use the

language of Professors Boucher and Landa, however, the police may not use investigative detention as a proactive or preventive measure beyond what is stated here (Boucher and Landa, *supra*).

[143] The full *Mann* criteria are these. A police officer cannot detain someone unless the following requirements of *Mann* have been met:

1. the officer decides, based on all of the information available, including a reported crime and what he or she hears, smells and sees, that a crime has been recently committed, or is being committed;
2. the officer has a reasonable suspicion that there is a clear nexus between the particular individual to be detained and the crime identified by the officer; and
3. the detention is reasonably necessary given the totality of the circumstances.

If, in the exercise of the courts' supervisory power, a judge cannot conclude that these criteria were met before the person was placed under investigative detention, the detention will be found to be arbitrary.

[144] Given this view of the law, the words "suspected offence" or reasonable suspicion of an offence simply do not enter the picture. The words "reasonably suspected" and "particular offence" cannot stand together. When a police officer's belief rises to the point of a "specific or particular" crime, the threshold of suspicion will have easily been crossed. Only one other

decision uses the words “suspected offence” and that is *Cooper, supra* (para. 41).

[145] The problem with a power of investigation, linked to reasonable suspicion only of an offence, is that the purpose of the detention changes fundamentally. Such a power moves the legal goal posts, in what I will call the police stop cases, from detaining an individual to determine whether he or she is linked to a crime to detaining the individual for the purposes of discovering whether there is a crime so as to permit an exercise of the arrest powers. In my view, an expansion of the law in this manner will lead to an inconsistent application of the law, depending on how aggressively the police engage in preventive policing in any given community—and a significant expansion of innocent members of the travelling public being detained by the police. Moreover, the line between detention based on a “suspected offence,” and detention based on suspicious generalized criminal activity, is too narrow for the courts to supervise without obtaining inconsistent results. We will continue to see an incremental expansion of police activity as represented by *Nguyen, Bramley* and this case. The fact patterns in these cases are playing out in other jurisdictions as well. See, for example, *Pearson, supra.*

[146] A power to detain based on a “suspected offence” or a “reasonably suspected offence” is also more open to the abuse of police powers on the basis of stereotype or race. This was a factor in *Calderon* (see: para. 73), and is a concern expressed by the academic community (see: Benjamin Berger, “Race and Erasure in *R. v. Mann*” (2004) 21 C.R. (6th) 58 at 59; Tim Quigley, “*Mann*, It’s a Disappointing Decision” (2004) 21 C.R. (6th) 41 at 44-45; and

David Tanovich, “The Further Erasure of Race in *Charter* Cases” (2006) 38 C.R. (6th) 84 at 84-86).

[147] This expansion of police powers will have occurred without any debate in Parliament, and without any of the possible safeguards, including general monitoring and reporting of police behaviour, being put in place (see: Fiszauf, *supra*). It also goes, almost without saying, that an expansion of police powers, by judicial decision alone, precludes any future *Charter* scrutiny of the increased power, and is inconsistent with the usual tenor of the evolution of the common law, which traditionally defends civil liberties and does not infringe them, without cogent evidence of the need to do so.

[148] In considering whether there *should* be an expansion of police powers, I must say that this issue was not argued in the Queen’s Bench. Indeed, the case before us was argued entirely on the basis that *Mann*, and the subsequent Supreme Court authority, permits the detention of individuals for “suspected offences” in the context of a traffic stop case where the suspected offence is one dealing with drugs. If the standard is placed at a different point, a further analysis of the *Waterfield* criteria, having regard for traffic stops and pedestrian stops and drug investigation, is required. There is no evidentiary base to permit us to conclude that the law of investigative detention should be expanded generally, or specifically, with respect to drug offences under the *Charter*, or to address or exclude traffic stops, using the analysis in *R. v. Waterfield*, [1963] 3 All E.R. 659.

IV. Section 8 Issues: Use of Sniffer Dogs to Search when a Person is Detained

[149] The remaining issue concerns the use of a sniffer dog in the circumstances of this case, i.e., in the course of a routine traffic stop when the police decide to detain an individual on the basis of reasonable suspicion of a narcotic offence. If the police detain an individual with respect to a narcotic offence, do they have the authority to search the person, or the place occupied by the person, by using a sniffer dog? The question of whether a dog search for narcotics can exist with a s. 9 detention, which has been effected in relation to a narcotics offence, was not put before the Court in *Bramley*.

[150] Since the standard for when the police may place someone under investigative detention and the standard for when the police may deploy a sniffer dog both use the same language of reasonable suspicion, the definition of the standard has implications for both types of police power. If the law regarding when the police can detain someone for investigative purposes is as I have stated it to be, this issue is not as significant for the travelling public, because it is less likely that the circumstances in a traffic stop case will rise to the point that the police have the authority to place someone under investigative detention. If the law permits investigative detention based on a suspected offence, the issue is more acute. In my respectful view, however, regardless of where the standard is placed, if the police detain an individual with respect to a narcotics offence, the limits imposed by *Mann* apply, and a dog search is not permitted.

[151] The Supreme Court of Canada held in *Kang-Brown* and *A.M.* that a dog sniff is a search within the meaning of s. 8 of the *Charter*. The Supreme Court has not addressed the issue of whether the police may deploy a dog to search an individual, or the place in which he or she is found, if the individual is detained for investigative purposes with respect to a narcotics offence. Neither in *A.M.*, nor in *Kang-Brown*, was an individual detained before the dog was deployed. (See: paras. 123 and 180 of *Kang-Brown*, and the judgments of the trial and appeal courts in *Kang-Brown*: 2005 ABQB 608, 203 C.C.C. (3d) 132 and 2006 ABCA 199, [2006] 9 W.W.R. 633.)

[152] The significance of the finding in *Kang-Brown* and *A.M* that a dog search is governed by s. 8 of the *Charter* cannot be overstated. Unlike in the United States, dog searches in Canada will be scrutinized by the courts under the authority of the Constitution. As a consequence, the common law restrictions on the search power apply. One of those restrictions is imposed by *Mann*.

[153] *Mann* permits a police officer to search an individual who is detained for investigative purposes, only if the search is necessary for safety. In *Mann*, Iacobucci J. contrasted the search power incident to an arrest with the search power pertaining to an investigative detention:

> [37] ... I note at the outset the importance of maintaining a distinction between search incidental to arrest and search incidental to an investigative detention. The latter does not give license to officers to reap the seeds of a warrantless search without the need to effect a lawful arrest based on reasonable and probable grounds, nor does it erode the obligation to obtain search warrants where possible. [Emphasis added.]

The officer must believe on reasonable grounds that his or her safety, or the safety of others, is at stake in order to conduct a pat-down search (para. 40 of *Mann*). Further, as Laskin J.A. wrote for the majority in *Calderon*, *supra*, even if there is a broader search power incidental to an investigative detention, it would not extend to a search for the purpose of discovering evidence of a crime, as such a search would not be "reasonably necessary" (para. 79).

[154] As Professor Gottardi demonstrates, it is implicit in *Mann* that a search to preserve or discover evidence or other contraband is not authorized by law (see Gottardi, *supra*, p. 36). Since the police would not be permitted to search for drugs in the within appeal, the police cannot use a dog to conduct a search that they, as individuals, are prohibited from performing. The facts in *Mann* illustrate this point. If the police can use a sniffer dog to search a detained person, this would mean that if the crime in *Mann* had been identified as an infraction under the *Controlled Drugs and Substances Act*, a dog could have been used to search Mr. Mann for drugs—a search that the police could not themselves perform.

[155] There is good reason to limit dog searches when a person is detained. Consider the fact pattern in *Bramley*, and in the within appeal. In both instances, the police stopped a vehicle using the power contained in s. 209.1 of *The Traffic Safety Act*, S.S. 2004, c. T-18.1, as amended S.S. 2006, c. 9. Within minutes, a second police car, carrying a sniffer dog, arrived on the scene. An officer from this second car deployed the dog shortly thereafter. All of this took place in the context of a routine traffic stop. While the police

officer's hunch as to criminal activity turned out to be correct in both *Bramley* and this case, this Court will never see the cases where the police do not find contraband. Police conduct must be considered objectively from the perspective of the ordinary travelling public, as well as from the perspective of crime prevention. If the police can use a sniffer dog when a person is detained in the circumstances such as the case at bar, the traffic stop runs the risk of becoming a pretext for a search for drugs, contrary to *Ladouceur, supra* and *Mellenthin, supra*.

[156] I recognize that a ruling to this effect may mean that dog searches, as an investigative technique, will be used more rarely in Canada than in the United States, but that is a by-product of declaring dog searches to be searches governed by s. 8 of the *Charter*. It also dovetails with the caution expressed by the majority of the Court in *Kang-Brown* as to the use of a sniffer dog as an investigative tool.

[157] If a sniffer dog can be used to search individuals detained on reasonable suspicion that they are implicated in the particular crime of drug possession, or the places in which such persons are found, there is even more support for the conclusion that investigative detention requires (i) a particular crime and not a suspected offence or reasonable suspicion of an offence; (ii) a sufficient nexus linking the individual to the particular crime; and (iii) the need, in all of the circumstances, for the person to be placed under investigative detention.

V. Application of the Law to the Situation of Mr. Yeh

[158] The learned trial judge did not make a finding that Mr. Yeh was arbitrarily detained at the point that the investigation moved from concerns about traffic safety to possession of drugs. Indeed, she does not make a finding in relation to the legal state in which Mr. Yeh found himself at that moment, but, to say that is not the same as saying she believed Mr. Yeh was properly detained, when the police began to question and touch him. Because the trial judge was firmly of the view that there could be no search even if Mr. Yeh were properly detained, she simply did not have to make the finding that he was arbitrarily detained with respect to the offence of possession of marihuana. See: *R. v. Yeh*, 2008 SKQB 289, 322 Sask.R. 35 at para. 91.

[159] In relation to the breaches of ss. 10(a) and (b) of the *Charter*, the trial judge wrote:

> [79] Here Mr. Yeh was detained from the time of the initial stop by Csts. Donison and Warner. From that time forward he was not free to leave. He was not initially told why he was being detained. Cst. Donison informed the accused that he had been weaving in his lane, and the accused denied it. Cst. Donison said he was concerned about the possibility of impairment or driver fatigue – but he never communicated these concerns to the accused and did not at any time advise the accused that he was being detained for investigation into those issues.
>
> [80] In response to questions posed by the police, Mr. Yeh provided the following information to them. He denied he was weaving in his lane. He said he was moving from Calgary to Winnipeg and that he had just finished school. He said he hadn't consumed any alcohol and that he wasn't on any prescription medication. He said the last time he consumed alcohol was a long time ago. He said the last time he had consumed a narcotic was a long time ago. He said his arms and hands were shaking because he was tired. Later the accused said he had used marihuana two days previously.
>
> [81] In addition the police took the accused's pulse without his consent. The accused performed a number of roadside tests, including tests not prescribed by the *Act*.

[82] All of these answers were given and much of the other evidence was provided to the police after he had been detained, firstly pursuant to an investigation for impaired operation of a motor vehicle and ultimately pursuant to an investigation under the *CDSA*. The only additional evidence provided by the accused after he was finally given his rights to counsel was the one leg stand test which he performed very well.

[83] I am satisfied that the accused has met the onus on him to show that he was not informed promptly of the reasons for his detention. He was not permitted to retain and instruct counsel without delay and he was not informed of his right to do so. His s. 10(a) and (b) rights were violated.

[160] In relation to the breach of s. 8, the trial judge wrote:

[91] Even though an officer may have "articulable cause" to lawfully detain an accused, the officer may not search the accused for drugs in the absence of reasonable and probable grounds to lawfully arrest the accused for a specific indictable offence. The search must be an incident of lawful arrest, not a mere incident of lawful detention for articulable cause. (*R. v. Le* (2001), 160 C.C.C. (3d) 146 (B.C.C.A.) at paras. 12-13, leave to appeal to S.C.C. refused April 11, 2002 [[2002] 2 S.C.R. vii].)

The Analysis

[92] There is no question there was a search. It was a warrantless search. Mr. Yeh was the driver and sole occupant of the vehicle. It was privately owned. On the face of it Mr. Yeh had a reasonable expectation of privacy in the vehicle he was driving.

[93] Leaving aside for the moment the issues arising out of the use of evidence obtained from the accused after he was detained and prior to him being provided with his rights to counsel and warning it is instructive to examine Cst. Wilson's evidence. Cst. Wilson formed a number of opinions arising out of observations he made. However the conclusions he reached as a result of his observations and the opinions he formed based on those observations and conclusions are not supported by any form of expertise. Cst. Wilson candidly acknowledged he was not an expert in any way. He also acknowledged that the information received in the SFST course did not make him any form of expert in that area either.

[94] Cst. Wilson was aware the accused had been weaving back and forth as he drove. Cst. Wilson made certain observations which included the following: rapid pulse, pale skin, pink eyes, his muscles were clenched, he avoided eye contact and his hands and arms were trembling. Cst. Wilson directed Mr. Yeh to complete certain tests and at the conclusion of those tests he concluded he did not have enough evidence to arrest Mr. Yeh for impaired driving. This was his conclusion,

> even though the opinions he formed about drug use by Mr. Yeh based on some of these observations are without merit because of his lack of expertise.
>
> [95] Cst. Donison observed the same physical signs as Cst. Wilson. Cst. Donison testified that until Cst. Wilson gave the instructions for the dog to conduct the free air search, there was no expectation of any search being conducted as there were no grounds to conduct a search.
>
> [96] However Cst. Wilson concluded that at some point in the previous 6 hours the accused was in the consumption phase of a narcotic and he believed that the accused had consumed marihuana within 2-4 hours and that would have meant that somewhere in his travels he was in the consumption phase of a narcotic. Cst. Wilson further believed that the accused was more than likely in possession of a narcotic and to be transporting a narcotic in his car or to at one time to have been transporting a narcotic in his car that day. It was at this point that Cst. Wilson directed that the search be done by the dog.
>
> [97] Cst. Wilson had no reasonable grounds to believe on either a subjective or objective basis that the accused was in possession of narcotics, nor on the evidence did he say that he did. The Crown has failed to meet the onus on it. Accordingly the search conducted by the dog and by the police was unreasonable and contrary to s. 8 of the *Charter*.

These comments are particularly important given that counsel cited *Kang-Brown* to the trial judge. The trial judge knew the crucial issue.

[161] While using the terminology of "articulable cause," the trial judge concluded that the search using the dog was an unlawful search, unless the police had reasonable grounds to arrest. She clearly concluded that all of the testing and touching of Mr. Yeh by Cst. Wilson, after Mr. Yeh had been initially detained by Cst. Donison, was contrary to s. 8 because there was no search power short of a search power tied to the power of arrest—and even with respect to that power she commented on its limits. For a similar approach, see: *Ambrose, supra*, paras. 42-45.

[162] The Supreme Court of Canada has recently issued *R. v. Suberu,* 2009 SCC 33, which discusses extensively the law pertaining to s. 10 of the *Charter*, and *R. v. Harrison*, 2009 SCC 34, which concerns, primarily, the exclusion of evidence under s. 24(2) of the *Charter*. These issues were not significant ones on this appeal, and further discussion of these cases is best left for another day.

VI. Conclusion

[163] In the result, the learned trial judge addressed the issues she had to address to make the rulings she did, and she made no errors of law in doing so. I would dismiss the appeal.

DATED at the City of Regina, in the Province of Saskatchewan, this 29th day of September, 2009.

"JACKSON J.A."
Jackson J.A.

I concur:

"JACKSON J.A."
for Hunter J.A.