

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* MacKenzie, 2013 SCC 50, [2013] 3 S.C.R. 250 | **Date:** 20130927  **Docket:** 34397 |

**Between:**

**Benjamin Cain MacKenzie**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Attorney General of Ontario,**

**British Columbia Civil Liberties Association, Canadian Civil Liberties Association and**

**Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic**

Interveners

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 92)  **Dissenting Reasons:**  (paras. 93 to 136) | Moldaver J. (Abella, Rothstein, Karakatsanis and Wagner JJ. concurring)  LeBel J. (McLachlin C.J. and Fish and Cromwell JJ. concurring) |

R. *v.* MacKenzie, 2013 SCC 50, [2013] 3 S.C.R. 250

Benjamin Cain MacKenzie Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Ontario,

British Columbia Civil Liberties Association,

Canadian Civil Liberties Association and

Samuelson‑Glushko Canadian Internet Policy and

Public Interest Clinic Interveners

**Indexed as: R. *v.* MacKenzie**

2013 SCC 50

File No.: 34397.

2013:  January 22; 2013:  September 27.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for saskatchewan

*Constitutional law — Charter of Rights — Search and seizure — Sniffer dogs — Accused seeking to exclude evidence of marihuana seized during highway traffic stop — Whether police had reasonable grounds to suspect accused was involved in drug‑related offence — Whether search was unreasonable — Whether evidence should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).*

*Constitutional law — Charter of Rights — Arbitrary detention — Accused seeking to exclude evidence of marihuana seized during highway traffic stop — Whether accused was arbitrarily detained — Canadian Charter of Rights and Freedoms, s. 9.*

The accused was charged with possession of a controlled drug for the purpose of trafficking. He takes issue with a police sniffer‑dog search of his vehicle that occurred during the course of a highway traffic stop.  He says the police lacked reasonable suspicion that he was involved in a drug‑related offence when they had their dog sniff his vehicle. The police relied on the accused’s erratic manner of driving, high level of nervousness, the pinkish hue of his eyes, his course of travel and contradictory answers on his travel dates in determining that the reasonable suspicion standard required for a valid sniffer‑dog search was met. Asserting that the sniff was an unconstitutional search, the accused seeks to have the marihuana found in the rear hatch of his car excluded. The trial judge agreed with the accused and excluded the evidence directing that a verdict of not guilty be entered against the accused. The Court of Appeal reversed the decision finding that the constellation of objective factors was sufficient to meet the reasonable suspicion standard. The court set aside the acquittal and remitted the matter to trial.

*Held* (McLachlin C.J. and LeBel, Fish and Cromwell JJ. dissenting): The appeal should be dismissed.

*Per* Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.: Police may use sniffer dogs for routine crime prevention in contexts where individuals have a reasonable, but lesser expectation of privacy and the police have reasonable grounds to suspect that a search will reveal evidence of a criminal offence. The use of sniffer dogs as a police investigative technique should be approached one case at a time, in each instance having regard to the context of the situation, balancing the extent of any privacy interest and the state’s countervailing interest in law enforcement.

Reasonable suspicion must be grounded in objectively discernible facts, which can then be subjected to independent judicial scrutiny. While it is critical that the line between a hunch and reasonable suspicion be maintained to prevent the police from engaging in indiscriminate or discriminatory practices, it is equally vital that the police be allowed to carry out their duties without undue scepticism or the requirement that their every move be placed under a scanning electron‑microscope.

Officer training and experience can play an important role in assessing whether the reasonable suspicion standard has been met. Police officers are trained to detect criminal activity. Thus, in assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person standing in the shoes of the police officer. Expert qualifications are not required as a precondition for police testimony on matters properly within the realm of officer training and experience. However, police training and experience should not be accepted uncritically by the courts. Hunches or intuition grounded in an officer’s experience will not suffice, nor is deference necessarily owed to a police officer’s view of the circumstances because of his or her training or experience in the field. Essentially, a trial judge must appreciate the significance of police training and experience when evaluating the worth of the factors considered in forming a belief that an accused might be involved in a drug‑related offence.

Reasonable suspicion must be assessed against the totality of the circumstances. Exculpatory, common, neutral, or equivocal information should not be discarded when assessing a constellation of factors. However, the test for reasonable suspicion will not be stymied when the factors which give rise to it are supportive of an innocent explanation. The police need not have evidence indicative of a reasonable *probability* of finding drugs under a reasonable suspicion standard. To require more would render the distinction between reasonable and probable grounds and reasonable suspicion all but illusory. We are looking here at possibilities, not probabilities. Are the facts objectively indicative of the *possibility* of criminal behaviour in light of the totality of the circumstances? If so, the objective component of the test will have been met. If not, the inquiry is at an end. While more innocent persons will be caught under a reasonable suspicion standard than under the reasonable and probable grounds standard, that is the logical consequence of the way these standards have been defined. This cost to individual privacy is accepted as a reasonable one in part because properly conducted sniff searches are minimally intrusive, narrowly targeted and highly accurate.

Here, the trial judge did not reject the officers’ evidence as to the nature of their detail on the day in question and he declined to make an adverse finding of credibility. Therefore, it is accepted that the officer’s testimony was credible. The factors identified by the officer provide the objective basis needed to support his belief that the accused might be involved in a drug‑related offence. Looking at the totality of the evidence through the lens of an officer with training and field experience in the transportation and detection of drugs, the officer’s subjective belief that the accused might be involved in a drug‑related offence was objectively substantiated. Accordingly, the officer had reasonable suspicion that the accused was engaged in a drug‑related offence such that the police could enlist the sniffer dog to perform a sniff search of the accused’s vehicle. The accused’s s. 8 privacy rights were not breached and the marihuana seized from the rear hatch of his car was thus admissible at trial.

It is important that the detention and search issues be kept distinct because they stem from different police powers and must respect different *Charter* rights. The detention and the sniff must be independently justified, even if both are based on the same underlying facts that led police to reasonably suspect that the accused was involved in a drug‑related offence. The conclusion that the police had reasonable suspicion sufficient to justify the sniffer‑dog search thus leads to the conclusion that the police had reasonable grounds to detain the accused. There is no suggestion here that the manner in which the accused was detained was not reasonably necessary in the circumstances. Accordingly, there was no breach of the accused’s right against arbitrary detention.

*Per* McLachlin C.J. and LeBel, Fish and Cromwell JJ. (dissenting): Rigorous judicial scrutiny of dog‑sniff searches remains a vital part of the balance struck under s. 8 of the *Charter* between the need for effective law enforcement and the protection of the public’s privacy rights. Without question, the police must be allowed to carry out their duties, and the reasonable suspicion standard acknowledges that innocent people may sometimes be reasonably suspected of a crime. Nevertheless, courts must remain vigilant and not shirk their role in evaluating police action for *Charter* compliance, particularly where the only effective check on that action is after‑the‑fact independent judicial assessment.

The police cannot simply draw on their experience in the field to create broad categories of “suspicious” behaviour into which almost anyone could fall. Such an approach risks transforming the already flexible standard of reasonable suspicion into the “generalized” suspicion standard that has been rejected in the past. In order to uphold and reinforce privacy rights, courts must not fail to hold police accountable when they stray from the proper exercise of their power and draw broad inferences of criminality without specific, individualized suspicion that can be objectively assessed. The constellation of facts grounding reasonable suspicion must be based in the evidence, tied to the individual, and capable of supporting a logical inference of criminal behaviour. Further, exculpatory, neutral and equivocal factors form part of the constellation of relevant factors under the reasonable suspicion standard and cannot be disregarded by either the police or the court. The reasonable suspicion determination must be made from the perspective of a reasonable person standing in the shoes of the investigating officer. However, even while undertaking its objective assessment from an officer’s perspective, a court should not show that officer’s testimony any particular deference. The danger of placing undue emphasis on an officer’s testimony is that a court may inadvertently subvert the objective component of the reasonable suspicion standard. The objective analysis of reasonable suspicion is often largely dependent on a police officer’s personal observations. Credibility is therefore pertinent not only to the officer’s subjective belief; it also affects the reasonableness of the officer’s suspicion. As a result, an appellate court should keep a trial judge’s credibility concerns in mind when undertaking its assessment of whether an officer had objective grounds on which to base his suspicion.

The police lacked the requisite reasonable suspicion to conduct the dog‑sniff search in this case. Specifically, the police lacked objective grounds on which to justify deploying a sniffer dog to search the accused’s vehicle. The trial judge committed neither an error of law nor a palpable and overriding error of fact. The trial judge understood the reasonable suspicion standard. Nothing in the trial judge’s reasons indicates that he did not know that the experience and training of police officers is an important consideration. The police in this case relied on markers that apply broadly to innocent people, or markers only of generalized suspicion which were at best highly equivocal.  Taking into account the officer’s training and experience, the totality of the circumstances, including neutral and equivocal factors, and showing due deference to the trial judge’s credibility concerns with regard to the officer’s observations, the collective significance of these factors is not capable of supporting a logical inference of criminal behaviour. Therefore, the Court of Appeal had no basis on which to interfere with the trial judge’s conclusion. Ultimately, the constellation of factors available to the police was insufficient to ground reasonable suspicion and the accused’s *Charter* rights were breached as a result. Furthermore, the admission of the evidence would bring the administration of justice into disrepute and should be excluded.

**Cases Cited**

By Moldaver J.

**Referred to:** *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. Kang‑Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *R. v. Belnavis*, [1997] 3 S.C.R. 341; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Evans*, [1996] 1 S.C.R. 8; *Florida v. Jardines*, 133 S.Ct. 1409 (2013); *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Yeh*, 2009 SKCA 112, 337 Sask. R. 1; *R. v. Schrenk*, 2010 MBCA 38, 255 Man. R. (2d) 12; *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Turpin*, 2010 SKQB 444, 365 Sask. R. 67, aff’d 2012 SKCA 50, 393 Sask. R. 184; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. Tran*, 2007 BCCA 491, 247 B.C.A.C. 109; *R. v. Whyte*, 2011 ONCA 24, 272 O.A.C. 317.

By LeBel J. (dissenting)

*R. v. Kang‑Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Chehil*, 2013 SCC 49. [2013] 3 S.C.R. 220; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. Yeh*, 2009 SKCA 112, 337 Sask. R. 1; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. Morrissey* (1995), 22 O.R. (3d) 514; *R. v. Bramley*, 2009 SKCA 49, 324 Sask. R. 286; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 8, 9, 10(*b*), 24(2).

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 5(2).

*Traffic Safety Act*, S.S. 2004, c. T‑18.1.

**Authors Cited**

Sankoff, Peter, and Stéphane Perrault. “Suspicious Searches: What’s so Reasonable About Them?” (1999), 24 C.R. (5th) 123.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Klebuc C.J. and Richards and Caldwell JJ.A.), 2011 SKCA 64, 371 Sask. R. 291, 86 C.R. (6th) 78, 239 C.R.R. (2d) 218, [2011] 12 W.W.R. 102, 518 W.A.C. 291, [2011] S.J. No. 328 (QL), 2011 CarswellSask 351, setting aside a decision of McLellan J., 2009 SKQB 415, 342 Sask. R. 281, 202 C.R.R. (2d) 11, [2009] S.J. No. 625 (QL), 2009 CarswellSask 695, and remitting the matter to trial.  Appeal dismissed, McLachlin C.J. and LeBel, Fish and Cromwell JJ. dissenting.

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Written submissions only by *Tamir Israel*, for the intervener the Samuelson‑Glushko Canadian Internet Policy and Public Interest Clinic.

The judgment of Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

Moldaver J. —

I. Introduction

1. In this case, Benjamin MacKenzie takes issue with a police sniffer-dog search of his vehicle that occurred during the course of a highway traffic stop. He says the police lacked reasonable suspicion that he was involved in a drug-related offence when they had their dog sniff his vehicle. Asserting that the sniff was thus an unconstitutional search, he seeks to have the 31.5 lbs of marihuana found in the rear hatch of his car excluded, leaving the Crown with no case against him. The trial judge agreed with Mr. MacKenzie and excluded the evidence, but the Court of Appeal for Saskatchewan reversed the decision. Because the police did have reasonable grounds to suspect that Mr. MacKenzie was involved in a drug-related offence, I am satisfied the sniff was lawful. I would accordingly dismiss the appeal.
2. In this appeal, and in the companion case of *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, we seek to clarify certain principles concerning sniffer-dog searches first articulated in *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, and *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569. Those cases established that the police may use sniffer dogs for routine crime prevention in contexts where individuals have a reasonable, but lesser, expectation of privacy, such as bus terminals and schools, and the police have reasonable grounds to suspect that a search will reveal evidence of a criminal offence. In the present cases, which concern analogous contexts of an airport and a motor vehicle on a public highway, we consider the meaning of the term “reasonable suspicion” and the types of evidence a court can look to in deciding whether the standard of “reasonable suspicion” has been met. We also consider how the police should proceed when a dog provides a positive indication, or “alerts”, to the presence of a targeted substance.
3. I have had the benefit of reading the reasons of Karakatsanis J. in *Chehil*. My colleague’s efforts have spared me the heavy lifting in this case, as the broader questions that I have just mentioned are fully canvassed in her reasons. I therefore concentrate here on the application of the reasonable suspicion standardto the facts of this case. I also address certain additional issues that arise in the context of a sniffer-dog search that occurs subsequent to a roadside stop, as occurred here. The Court did not address those issues in *Kang-Brown* and *A.M.* and the facts of this case present an occasion for clarification of the applicable principles.

II. Facts

1. Mr. MacKenzie’s case did not proceed to trial. In a pre-trial motion, he moved to have the marihuana excluded from evidence on the basis of arguments grounded in his s. 8 right against unreasonable search and seizure and his s. 9 right against arbitrary detention under the *Canadian Charter of Rights and Freedoms*. The evidence at the *voir dire* consisted of the testimony of Constables Sperlie and Warnerof the Royal Canadian Mounted Police (“RCMP”). The appellant, Mr. MacKenzie, did not testify, nor did he call evidence.

A. *The Initial Stop*

1. On September 12, 2006, Constables Sperlie and Warner were in a marked police cruiser monitoring traffic on the Trans-Canada Highway just west of Caronport, Saskatchewan. At about 7:00 p.m., the constables observed the appellant’s maroon Nissan travelling in an easterly direction towards them. As the appellant’s car came over the crest of a hill, the police radar indicated that it was travelling at a speed of 112 kilometres per hour — a mere two kilometres per hour over the posted limit. At this point, however, the officers saw the front end of the appellant’s car “pitching forward like it was slowing down very fast” (A.R., vol. II, at p. 4). They attributed this to the sudden and rapid deceleration of the car from 112 kilometres per hour to 89 kilometres per hour — the speed at which the car was travelling when it passed their police cruiser.
2. The officers pursued the appellant. Two kilometres down the road, they spotted his car parked on the side of the highway. The officers had not signalled him to stop. They wanted to give him a warning about speeding, even though they were unsure of precisely how fast he had been driving.
3. During cross-examination, Cst. Warner explained that it was not his practice to write tickets for drivers going only two kilometres per hour above the speed limit. However, in cases like the present one where he was unable to get a reading on precisely how fast the vehicle was travelling, he would pull the driver over in order to “provide a warning of some type, either written or verbal” (A.R., vol. II, at p. 65).
4. The appellant was the only occupant of the car. As Cst. Sperlie approached the driver’s window, the appellant — unprompted — said “he was sorry, he knew he was speeding, he would slow down” (A.R., vol. II, at p. 5). Cst. Sperlie confirmed that “the reason for the stop was [the police] believed he was speeding” (*ibid*.). Upon request by Cst. Sperlie, the appellant produced his licence and registration.

B. *Constable Sperlie’s Observations of the Appellant*

1. When the appellant was handing over his licence and registration documents, Cst. Sperlie noticed that the appellant’s hands “were shaky, they were trembling” (A.R., vol. II, at p. 6). He further noted that the appellant “appeared to be sweating” with “beads of sweat forming on his forehead”, that “his breathing was very rapid”, and that “his carotid artery was pulsing very rapidly” (*ibid.*).
2. The appellant’s strained breathing led Cst. Sperlie to ask the appellant if he was “all right”, at which point the appellant sought and received permission to take his asthma medication (A.R., vol. II, at p. 6). According to Cst. Sperlie, the medication did not result in any “noticeable decrease” in the appellant’s rapid breathing (*ibid.*). Cst. Sperlie further noticed that the appellant’s eyes “had a pinkish colour to them” (*ibid.*).
3. According to Cst. Sperlie, the appellant’s nervous reaction continued even after he was told that he was being investigated for a minor speeding infraction. Although he had been involved in thousands of traffic stops, Cst. Sperlie stated that “Mr. MacKenzie’s level of nervousness was extremely high, it was probably some of the highest nervousness that I’ve seen in a traffic stop” (A.R., vol. II, at p. 11).
4. When questioned about the details of his trip, the appellant replied that he was returning to Regina from Calgary. After claiming initially that he had left Regina to go to Calgary the preceding day, he corrected himself, stating instead that he had left Regina two days ago. According to Cst. Sperlie, “[h]e seemed to be somewhat confused on when he had traveled to Calgary” (A.R., vol. II, at p. 7).
5. While Cst. Sperlie was talking to the appellant about his trip, Cst. Warner advised Cst. Sperlie that he had performed a record check on the appellant and that the result was “all negative” (A.R., vol. II, at p. 7). By now, Cst. Sperlie suspected that the appellant was involved in an offence under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“*CDSA*”).
6. As a consequence, Cst. Sperlie asked the appellant to step out of the vehicle, after which he advised the appellant of the basis for his suspicions. Cst. Sperlie recalls telling the appellant that he was “going to temporarily detain him, for further investigation” (A.R., vol. II, at p. 8) and then advised him of his *Charter* rights, including his right to counsel under s. 10(*b*). The appellant said he understood his rights and declined to call a lawyer.[[1]](#footnote-1)
7. Cst. Sperlie testified that the inferences he drew from his observations of the appellant stemmed from his training and experience. He had completed the usual standardized field sobriety testing course, including a half-day lecture on different types of drugs and their observable effects on humans. He further stated that he had attended an RCMP drug “pipeline course” where he learned about different indicators and behaviours that are commonly exhibited by highway travellers who are involved in criminal conduct, and a second week-long “advanced pipeline course”, where he gained further insight into traffic stop scenarios, including training about hidden compartments in vehicles.
8. Added to this was Cst. Sperlie’s experience in the field. He testified that he had been involved with “probably in excess of 5,000” traffic stops and discovered drugs and other controlled substances on “about 150” occasions, “[t]he vast majority of those [being] highway traffic stops” (A.R., vol. II, at pp. 9-10). He was not questioned by the Crown or the defence about the number of times he had searched vehicles for drugs and come away empty-handed. Nor was he seriously challenged in cross-examination about his training and experience as a police officer or the factors used by the police to detect the behavioural characteristics and practices of drug users and traffickers.
9. In line with his training and experience, Cst. Sperlie testified that there were a number of factors in the appellant’s case that led him to believe that the appellant might be involved in an offence under the *CDSA*. The factors upon which he relied are found in the following excerpts from his testimony:

(1) Erratic Driving

A: . . . I’ve seen driving behaviours with regards to erratic driving. Commonly when a vehicle approaches the police vehicle, if they’re exceeding the speed limit, that vehicle will generally slow down to the speed limit and continue past the police. In this case I observed a very erratic reaction, over reaction to police presence, where the vehicle actually slowed down to 20 kilometres per hour under the speed limit and then continued at that, and in fact the vehicle pulled over to the side of the road before we even got behind it and put the lights on.

. . .

A: . . . The erratic driving to me was -- was certainly an overreaction, something that I have experienced in the past during the course of my -- my traffic duties, as -- as an overreaction with people that are trying to hide something from the police. [A.R., vol. II, at pp. 10-11]

(2) Extreme Nervousness

A: Yeah, in -- in all the traffic stops that I’ve been involved with I’ve seen different behaviours and stuff like that, nervousness being one of them. In every traffic stop there’s a certain level of nervousness, and that -- that nervousness quickly diminishes early on in the stop. I’ve seen in the investigations where we’ve detected a traveling criminal, or somebody that’s involved in criminality, that nervousness does not diminish, it stays very elevated, and in some cases increases in elevation up until the point when we discover what it is the person is -- is trying to hide from us. . . .

. . .

A: . . . Mr. MacKenzie’s level of nervousness was extremely high, it was probably some of the highest nervousness that I’ve seen in a traffic stop. And what is significant about this nervousness is when I told him the reason -- the relatively minor reason for the stop, this nervousness did not diminish, it -- it stayed very, very elevated. . . .

. . .

A: . . . there was no other reason for him -- that we located, for him to be nervous. He wasn’t a suspended driver, you know, he didn’t forget to renew his driver’s licence, or anything like that, typical things where I will see people that are nervousness . . . . [A.R., vol. II, at pp. 10-12 and 14]

(3) Physical Signs Consistent With the Use of Marihuana

A: . . . Mr. MacKenzie had a pinkish colour to his eyes, and on the SFST course, the standardized field sobriety testing course, during that half day lecture on drugs one of the -- one of the symptoms that they taught us about cannabis marihuana was it will -- it can cause a reddish or a pink coloration to the -- to the eyes, and I did see a pink coloration in Mr. MacKenzie’s eyes. The other thing they taught us too is that marihuana use can cause muscle tremors that you can see in the hands or the leg, eye tremors, that type of thing. And those two sym -- the tremors I saw in his hand I’ve also seen as a -- as an indication of a very elevated level of nervousness. During my investigations involving drugs on the side of the highway, those primarily involved cannabis marihuana, and I’ve talked to those people that use cannabis marihuana about the effects that it has on them, things like that, and I’ve seen the pink eyes that they have, and they tell me that they’ll frequently use products like Visine to get rid of that pink colour so that nobody knows that they’ve -- they’ve used marihuana. I’ve also seen people that were high on marihuana and they did have the muscle tremors, eyelid tremors, leg tremors, finger tremors. [A.R., vol. II, at p. 12]

(4) Travel on a Known Drug Pipeline

A: . . . Mr. MacKenzie told me that he was coming from Calgary and that he was traveling to Regina. I do know Calgary, through my experience as a peace officer, as being a well known source of controlled drugs and substances, and that the -- the typical movement of drugs in Western Canada goes from west to east, and certainly some of those drugs come from Calgary to -- to Regina. Mr. MacKenzie also appeared somewhat confused with regards to when he went to Calgary. He -- I’ve experienced in the past where people that are involved in criminality on the highway, they try to make up a story very quickly at the side of the road, to try to prevent being detected, to have their -- the activity that they’re involved in detected by police, and a lot of times their story will start to get messed up and they don’t -- they don’t -- they’re trying not to say that they just drove out to a place real quick, to pick up drugs and come back to Regina, they don’t want to say that to the police. So they’ll start to try to make the story up, and I’ve seen that in the past, where they get confused on the story. [A.R., vol. II, at p. 13]

C. *The Dog Sniff of the Appellant’s Car*

1. After the appellant confirmed that he understood the basis for his detention and his *Charter* rights, Cst. Sperlie asked him if he would consent to a search of his car. When the appellant declined to consent, Cst. Sperlie turned to his canine companion, Levi, a “single-profile” narcotic detector dog who had been assigned to him in his capacity as a traffic officer.
2. Levi conducted a perimeter search of the car and by his actions, indicated the scent of drugs in the rear hatch area. Cst. Sperlie testified that Levi “became very focused on that back part of the vehicle, he became very excited, his tail was wagging” (A.R., vol. II, at p. 21). Cst. Sperlie then indicated to Cst. Warner that “it’s positive and to arrest for *CDSA*” (A.R., vol. II, at p. 22).

D. *The Arrest and Search Incident to Arrest*

1. Once the appellant was arrested, Cst. Sperlie began a manual search of the car. He found several gift-wrapped boxes in the rear hatch. Cst. Sperlie engaged the appellant in a conversation about what was in them, which ultimately led to the revelation that they contained marihuana. Cst. Sperlie then directed Cst. Warner to re-arrest the appellant for possession for the purpose of trafficking.
2. Once back at the RCMP detachment, the police determined the appellant was in possession of 31.5 lbs of marihuana with a street value of between $57,000 and $95,000. The appellant was duly charged with possession of a controlled drug for the purpose of trafficking under s. 5(2) of the *CDSA*.

III. Relevant Constitutional Provisions

1. The relevant *Charter* provisions read as follows:

*Canadian Charter of Rights and Freedoms*

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

**9.** Everyone has the right not to be arbitrarily detained or imprisoned.

IV. Judicial History

A. *Court of Queen’s Bench for Saskatchewan (2009 SKQB 415, 342 Sask. R. 281)*

1. On a pre-trial motion brought by the appellant to have the marihuana excluded from evidence under s. 24(2) of the *Charter*, the trial judge identified three factors that Cst. Sperlie relied on “to detain [the appellant] temporarily for further investigation under the [*CDSA*]”: (1) the appellant’s very high level of nervousness; (2) the pinkish hue of the appellant’s eyes (consistent in the officer’s opinion with the use of marihuana); and (3) the appellant’s course of travel from Calgary, a known source of narcotics, to Regina, a known destination of sale (an opinion for which “[n]o evidence was offered” in support) (para. 32).
2. Turning to the sniff search performed by Levi, and bearing in mind the “reasonable suspicion” standard set by this Court in *Kang-Brown* and *A.M.*, the trial judge concluded: “In my view, the opinions expressed by Cst. Sperl[i]e did not meet the ‘reasonable suspicion’ standard required for a valid sniffer dog search[,] at best he was acting on a hunch” (para. 47 (emphasis added)).
3. The trial judge further observed that although the two officers were from northern Saskatchewan, they “claim to have been on routine traffic patrol with a ‘sniff dog’ in the southern part of the province” (para. 47). Noting that the appellant was only travelling two kilometres per hour over the posted speed limit when the officers observed him, the trial judge stated:

I have a concern that the two officers may have been in the area with the purpose of conducting random traffic stops for the sole purpose of checking for drugs being transported from west to east which, according to Cst. Sperl[i]e, is a common occurrence. It is therefore quite conceivable that the observations of the accused claimed to have been noticed by Cst. Sperl[i]e were enhanced after the drugs were located. [Emphasis added; para. 47.]

1. Having determined that the marihuana was obtained in a manner that violated the appellant’s privacy rights under s. 8 of the *Charter*, the trial judge excluded it from evidence for the reasons given by Binnie J. in *Kang-Brown*, at para. 104. In the end, the trial judge reasoned that the police had abused the power afforded to them and initiated a warrantless search on inadequate grounds.
2. With the marihuana excluded from evidence, the Crown could not prove its case. Hence, the trial judge directed that a verdict of not guilty be entered against the appellant.

B. *Court of Appeal for Saskatchewan (2011 SKCA 64, 371 Sask. R. 291)*

1. The Court of Appeal considered the trial judge’s comment about the sincerity of Cst. Sperlie’s subjective belief when he deployed Levi and the fact that he may have “enhanced” his observations of the appellant “after the drugs were located” (para. 20). In the court’s view, if the trial judge “had intended to reject the constable’s testimony, then he would have done so in clear terms” (para. 21). But as he had not done so, the court proceeded on the basis that the trial judge was satisfied that Cst. Sperlie had the subjective belief he needed to deploy Levi.
2. As for the trial judge’s conclusion that Cst. Sperlie did not have reasonable suspicion that the appellant was involved in a drug-related offence, the court determined that the trial judge erred in discounting the inferences drawn by Cst. Sperlie as mere “opinion”. The inferences drawn by Cst. Sperlie were based on his “issue-specific knowledge, training and experience” and their probative value was to be assessed “not in terms of unsubstantiated opinion” but as “*informed* opinion” in line with Cst. Sperlie’s training and experience (para. 33 (emphasis in original)).
3. In the end, while acknowledging that the case was “very close to the line”, the court was satisfied that the “constellation of objective factors” was sufficient to meet the “reasonable suspicion standard” (para. 37). It followed that the sniffer-dog search was reasonable and conformed to the requirements of s. 8 of the *Charter*. Hence, the marihuana was lawfully obtained and there was no need to consider s. 24(2). In light of this conclusion, the court set aside the appellant’s acquittal and remitted the matter to trial.

V. Analysis

A. *Introduction*

1. This case concerns a sniff search by a drug-detection dog of a motor vehicle parked on the side of a public highway, having been pulled over for a regulatory infraction. That is the context against which the search in question is to be assessed. This Court has held that motor vehicles, though emphatically not *Charter*-free zones, are places in which individuals have a reasonable but “reduced” expectation of privacy (*R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 38; see also *R. v. Wise*, [1992] 1 S.C.R. 527, at p. 534). The privacy context here is thus analogous to the bus terminal in *Kang-Brown* and the school in *A.M.*, where the use of police sniffer dogs on the basis of reasonable suspicion was found to pass *Charter* muster. As a result, I am satisfied that the police here were entitled to enlist the aid of a sniffer dog for crime prevention on the same basis.
2. Neither *Chehil* nor this case “require a category-based decision on the constitutionality of the use of sniffer dogs by the police that will apply in all circumstances” (*Kang-Brown*, at para. 137, *per* Deschamps J.). We continue to approach the use of this police investigative technique one case at a time, in each instance having regard to the context of the situation, balancing the extent of any privacy interest and the state’s countervailing interest in law enforcement. This case, for example, “does not involve explosives, guns or other public safety concerns” (*Kang-Brown*, at para. 18, *per* Binnie J.; see also *A.M.*, at para. 3, *per* Binnie J.). Nor does it involve the use of sniffer dogs in contexts such as the home, where courts have long recognized a heightened privacy interest (see, e.g., *R. v. Evans*, [1996] 1 S.C.R. 8; *Florida v. Jardines*, 133 S.Ct. 1409 (2013)).
3. Because the sniff, arrest, and search incident to arrest occurred *after* the appellant was pulled over for speeding, it is important to identify the relevant legal authority for each of these actions, having regard to what the police knew and when they knew it (*R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 4). Accordingly, I propose to begin my analysis with the initial stop for speeding and will then consider both the appellant’s detention and the searches. Though the courts below did not approach the case in the same manner, I do so for purposes of clarifying the framework that guides such inquiries. Nevertheless, and as I stated at the outset, the principal question in this appeal remains whether the police had reasonable grounds to suspect that the appellant was involved in a drug-related offence.

B. *The Detention*

1. Counsel for the appellant acknowledged during the *voir dire* that the police had the authority to detain the appellant to investigate for speeding pursuant to *The Traffic Safety Act*, S.S. 2004, c. T-18.1. Counsel argued, however, that the further detention of the appellant after Cst. Sperlie had delivered his warning fell afoul of this Court’s decision in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59.
2. *Mann* held that the police are entitled to detain a person for investigative purposes where they have reasonable grounds to suspect that the individual is connected to particular criminal activity and that such a detention is reasonably necessary in the circumstances (para. 45). In essence, the appellant’s argument here is that there was no basis to detain him.
3. It is important that the detention and search issues in this case be kept analytically distinct because they stem from different police powers and must respect different *Charter* rights (*R. v. Yeh*, 2009 SKCA 112, 337 Sask. R. 1, at paras. 48-49; *R. v. Schrenk*, 2010 MBCA 38, 255 Man. R. (2d) 12, at para. 105). We have never suggested that a sniffer-dog search is authorized as a search incidental to a detention. On the contrary, the detention and the sniff must be independently justified, even if both are based on the sameunderlying facts that led police to reasonably suspect that the appellant was involved in a drug-related offence.
4. In this case, the basis for the detention and the basis for the search are one and the same — reasonable grounds to suspect that the appellant was involved in an offence under the *CDSA*. Accordingly, the grounds for both the detention and the sniff must sink or swim together. My conclusion that the police had reasonable suspicion sufficient to justify the sniffer-dog search (which I set out in full below) thus leads equally to the conclusion that the police had “reasonable grounds to detain” the appellant under the authority recognized in *Mann* (para. 33).
5. Parenthetically, I note that the reference in *Mann* to “reasonable grounds to detain” has led to some confusion for the bench and bar alike. In the context of detention, “reasonable grounds” means reasonable grounds *to suspect* that an individual is involved in particular criminal activity, which is synonymous with reasonable suspicion. However, in other contexts, such as an arrest, “reasonable grounds” means reasonable grounds *to believe* that an individual is or has been involved in a particular offence, which is synonymous with reasonable and probable grounds. The former concept is a matter of possibilities, while the latter is one of probabilities. See *Chehil*, at para. 27; *Kang-Brown*, at para. 164, *per* Deschamps J.
6. To return to the facts here, it is unnecessary to consider whether the manner of the appellant’s detention was reasonably necessary in the circumstances. Unlike *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408, there is no suggestion here that the manner in which he was detained (being asked to sit by the side of the road while the sniff was conducted) was not reasonably necessary in the circumstances.
7. Accordingly, there was no breach of the appellant’s right against arbitrary detention under s. 9 of the *Charter*.

C. *Did the Police Have Reasonable Grounds to Suspect That the Appellant Was Involved in a Drug-Related Offence?*

1. I turn then to the crux of this case. The hallmark of reasonable suspicion, as distinguished from mere suspicion, is that “a sincerely held subjective belief is insufficient” to support the former (*Kang-Brown*, at para. 75, *per* Binnie J., citing P. Sankoff and S. Perrault, “Suspicious Searches: What’s so Reasonable About Them?” (1999), 24 C.R. (5th) 123, at p. 125). Rather, as Karakatsanis J. observes in *Chehil*, reasonable suspicion must be grounded in “objectively discernible facts, which can then be subjected to independent judicial scrutiny” (para. 26).
2. In this case, for reasons that will become clear, an objective assessment of the facts that the Crown says support Cst. Sperlie’s reasonable suspicion hinges on the credibility of his and Cst. Warner’s evidence at the *voir dire*. Accordingly, whether there was reasonable suspicion that the appellant was engaged in a drug-related offence on the facts here depends on three questions:

(1) Did the trial judge reject Cst. Sperlie’s evidence as incredible?

(2) Did the Court of Appeal overstep its bounds by substituting its finding as to reasonable suspicion for the finding made by the trial judge and, in particular, by concluding that the trial judge failed to account for Cst. Sperlie’s training and experience?

(3) Was Cst. Sperlie’s subjective belief that the appellant might be involved in a drug-related offence objectively reasonable?

I tackle each of these three questions in turn.

(1) Did the Trial Judge Reject Cst. Sperlie’s Evidence as Incredible?

1. A preliminary question in this case is whether the trial judge rejected Cst. Sperlie’s evidence as incredible. The trial judge theorized that Constables Sperlie and Warner may have been “in the area” — hundreds of kilometres from their respective home bases — for the purpose of conducting random traffic stops to check “for drugs being transported from west to east” (para. 47). Assuming that to be the case, the trial judge theorized further that Cst. Sperlie may have “enhanced” his observations of the appellant after locating the marihuana in the rear hatch of the appellant’s car (*ibid.*). The issue, thus, is not the sufficiency of reasons on findings of credibility. See, e.g., *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3. Rather, the issue is *whether a finding was made at all*.
2. Manifestly, if the officers were in fact engaged in random traffic stops to check for drugs, their actions would be unconstitutional and amount to a serious abuse of the powers society has entrusted to them. Had the trial judge so found, this would also have tainted the entirety of their evidence and put an end to the matter. There would have been no need for the trial judge to write a decision devoted in the main to the principles of law governing sniff searches and the meaning of the term “reasonable suspicion”. A simple rejection of the officer’s evidence would have sufficed.
3. The allegations underlying such a finding and the ramifications for both the appellant and the officers are serious matters, not to be taken lightly. I accept that there will be cases in which a trial judge refuses to act on an officer’s testimony where the trial judge has real concerns about the officer’s veracity. See, e.g., *R. v. Turpin*, 2010 SKQB 444, 365 Sask. R. 67, aff’d 2012 SKCA 50, 393 Sask. R. 184. In such cases, where the officer’s testimony is crucial, the Crown will have failed to prove on a balance of probabilities that its warrantless search was reasonable (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 161; *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278).
4. In this case, if the trial judge had such concerns about the sincerity of Cst. Sperlie’s belief, and more importantly the integrity of his and Cst. Warner’s evidence, I do not believe he would have addressed such concerns in the offhand fashion he did — and then almost as an afterthought, in a single paragraph. Rather, I expect he would have signalled his concerns and indicated that they prevented him from acting on the evidence of the officers. It would then follow that the Crown had failed to meet its burden of proving the search was reasonable.
5. I conclude as much because Cst. Sperlie offered a complete explanation as to why he and Cst. Warner were on traffic duty several hundred kilometres from their respective home bases and why they had Levi with them at the time. In his cross-examination of Cst. Sperlie during the *voir dire*, counsel for the appellant sought to impugn the officer’s credibility in an exchange:

Q: What were you doing in Moose Jaw?

A: We were asked to come down here and -- and conduct traffic work.

Q: So you came down here to do traffic work, with your dog?

A: Correct. [A.R., vol. II, at p. 44]

1. As Cst. Sperlie would go on to explain during cross-examination, he and other RCMP officers had often been asked to assist with traffic work in other parts of the province. By way of example, Cst. Sperlie testified that he had gone to Buffalo Narrows, Saskatoon, and “all over the province” to assist with conducting traffic work (A.R., vol. II, at pp. 44-45).
2. Cst. Sperlie further testified that the RCMP at the relevant time had a shortage of officers with “probably half the number of traffic members in this division that . . . we had in previous years, and we’re seeing a decrease in officer visibility” on highways (A.R., vol. II, at p. 45). He explained that the RCMP was attempting to muster a “greater visibility of police”, which could be facilitated by bringing in officers from various different areas to focus on “traffic projects” in one area at a time (*ibid.*).
3. When asked why he had his dog with him while on traffic duty, Cst. Sperlie explained that Levi lives with him and “went with me everywhere I went, days on and days off” and “on one occasion” even accompanied him on a holiday (A.R., vol. II, at p. 44). Cst. Sperlie also testified that he had been asked to do traffic work in other areas of the province both before and after he got Levi and that he previously had done work “in all different places, in -- in the same areas, in fact, that I’ve been with the dog” (A.R., vol. II, at p. 45).
4. On its face, Cst. Sperlie’s testimony during cross-examination thus provides a satisfactory explanation for why he and Cst. Warner were located where they were, doing what they were doing. The trial judge did not reject this evidence. Instead, he raised two speculative concerns, which he then proceeded to leave unresolved. Put differently, in the end, his concerns notwithstanding, the trial judge declined to make an adverse credibility finding. Surely, it is not our role to do so now. On the record before us, and absent an adverse credibility finding, we must proceed on the basis that the trial judge accepted Cst. Sperlie’s testimony as credible.
5. To do otherwise, when the trial judge himself did not do so, would leave us in an unworkable legal limbo — the officers’ testimony is not out, but it is not quite in either, and we are left to guess what the trial judge thought about it. Instead of relying on what *the trial judge* actually did, *we* would be required to arbitrarily assign weight to the various pieces of evidence based on our own assumptions. With respect, that is not the role of an appellate court. We must take the findings of the trial judge, or the lack thereof, as they actually are — not how they couldhave been.

(2) Did the Court of Appeal Impermissibly Substitute Its Finding as to Reasonable Suspicion for the Finding of the Trial Judge?

1. The appellant submits that the Court of Appeal failed to show deference to the trial judge’s findings of fact and merely substituted its own findings for those of the trial judge. I disagree.
2. Whether the facts as found by the trial judge amount to reasonable suspicion is a question of law (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20; *Nolet*, at para. 47). As McLachlin C.J. and Charron J. explained in *Shepherd*, the logic of which is equally applicable to reasonable suspicion:

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

Accordingly, in a case such as this one, an appellate court must *always* engage in a *de novo* analysis and thereby substitute its own view of the correct answer for a trial judge’s legal conclusion. Deference would apply only if one of the parties sought to attack a finding of fact on appeal. That is not the case here.

1. During cross-examination, defence counsel did not challenge the probative value of the factors on which Cst. Sperlie relied. It is true, however, that defence counsel did cross-examine Cst. Sperlie at some length on his *ability to detect* certain of those factors, such as nervousness (see A.R., vol. II, at pp. 27-32). For example, Cst. Sperlie was asked if he had taken any classes in anatomy, physiology, or endocrinology. He answered that he had not taken such classes and he conceded that he was not a “drug recognition expert” (A.R., vol. II, at p. 30).
2. This Court, however, has not required expert qualifications as a precondition for police testimony on matters properly within the realm of officer training and experience. Just three years ago, in *Nolet*, there was a question as to an officer’s ability to identify an unexplained $115,000 in bills of small denominations wrapped in bundles as being typical of drug transactions. The issue was whether the discovery of the cash objectively supported the officer’s subjective belief that he had reasonable and probable grounds to arrest. The officer had testified:

Based on my experience as well as research I have done and the sessions I have had with experts and people who have been involved in this type of activity, the type of bundling that was observed there with the elastic bands and the small denominations is indicative of it being involved in proceeds of crime and in particular of the drug trade in my mind. [Emphasis added; para. 48.]

After pointing to the officer’s testimony, Binnie J. held for a unanimous Court: “While the Crown did not attempt to qualify the officer as an expert on drug monies, the officer’s experience and training supported the probative value of his evidence on this point” (*Nolet*, at para. 48(emphasis added)). In this case, Cst. Sperlie testified:

In 2001 I had what’s called a pipeline course, it’s a course that’s offered by the R.C.M.P. that just teaches front line members different indicators, behaviours and things of traveling criminals along the highway. It essentially enhances the awareness of -- of front line police officers. I’ve also, in 2001, had a standardized field sobriety testing course, and on that course there is a half day lecture on different types of drugs and the observable effects that those drugs have on the body, essentially what officers -- what types of effects the officer can see in a person that’s consumed different types of drugs. [Emphasis added; A.R., vol. II, at pp. 8-9.]

1. There is no material distinction between *Nolet* and this case. Police officers need not be trained pharmacologists or toxicologists or medical doctors before they can give evidence on the factors that their training and experience has taught them provide reasonable grounds to suspect that someone is engaged in the use of drugs. As Richards J.A. (as he then was) observed in *Yeh* with respect to the recognition of drug use symptoms:

. . . 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. [Emphasis added; para. 57.]

Granted, the ability to detect the symptoms of drug use “is not the kind of skill one would readily expect a police officer to pick up outside of a formal training or educational session” (*Yeh*, at para. 56). But there *was* such training in this case. Accordingly, it would be a mistake to place emphasis on the fact that Cst. Sperlie was not qualified as a “drug recognition expert”.

1. In any event, focusing on Cst. Sperlie’s expert status misses a more important point. What is at issue in this appeal is not Cst. Sperlie’s *ability to detect* nervousness — his unsurprising lack of training in endocrinology would presumably pose no hurdle in that regard — *but the probity of nervousness as a factor tending to indicate involvement with a drug-related offence*. In other words, the appellant challenges *the use of* nervousness, pink eyes, and such as relevant factors in the constellation that the police are trained to look for in supporting a reasonable suspicion. See, e.g., A.F., at para. 39 (“nervousness coupled with factors . . . [is] not objectively sufficient”). And *that* is something on which Cst. Sperlie was never challenged — and on which we have no evidence other than his uncontradicted testimony. To ignore this crucial distinction is to ignore that this is essentially a bait-and-switch argument.
2. Against that backdrop, the trial judge accepted Cst. Sperlie’s evidence and made no finding of fact as to the probative value of the factors on which Cst. Sperlie was taught to rely (or, for that matter, on the value of the police training sessions that Cst. Sperlie attended). For example, the trial judge did not find that extreme nervousness was of little or no value as a factor going to whether the appellant might be involved in a drug-related offence. If he had, this would have been a different case. See *Chehil*, at para. 65 (citing various cases).
3. Absent its rejection by the trial judge or an adverse finding of fact, Cst. Sperlie’s evidence as to the factors he learned about from his training and experience is thus on the table. And it must be considered. The Court of Appeal found that the trial judge failed *as a matter of law* to appreciate the significance of that training and experience when evaluating the worth of the factors he considered in forming his belief that the appellant might be involved in an offence under the *CDSA*. I agree.
4. Here, the trial judge concluded — with no explanation as to why and, in particular, with no analysis of officer training or experience — that Cst. Sperlie’s “opinion” that the appellant might be involved in a drug-related offence was “at best . . . a hunch” (para. 47). The trial judge’s statement that Cst. Sperlie acted on nothing more than a hunch is another way of stating his *legal* conclusion that Cst. Sperlie lacked reasonable suspicion. And that conclusion, in my view, was incorrect because it would appear to give little, if any, weight to Cst. Sperlie’s training and experience.[[2]](#footnote-2)
5. Officer training and experience can play an important role in assessing whether the reasonable suspicion standard has been met. Police officers are trained to detect criminal activity. That is their job. They do it every day. And because of that, “a fact or consideration which might have no significance to a lay person can sometimes be quite consequential in the hands of the police” (*Yeh*, at para. 53). Sights, sounds, movement, body language, patterns of behaviour, and the like are part of an officer’s stock in trade and courts should consider this when assessing whether their evidence, in any given case, passes the reasonable suspicion threshold.
6. Thus, in assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person “standing in the shoes of the police officer” (*R. v. Tran*, 2007 BCCA 491, 247 B.C.A.C. 109, at para. 12; see also *R. v. Whyte*, 2011 ONCA 24, 272 O.A.C. 317, at para. 31).
7. That is not to say, however, that police training and experience must be accepted uncritically by the courts. As my colleague Karakatsanis J. notes in *Chehil*, “hunches or intuition grounded in an officer’s experience will [not] suffice”, nor is deference necessarily owed to a police officer’s view of the circumstances because of his or her training or experience in the field (para. 47). Reasonable suspicion, after all, is an objective standard that must stand up to independent scrutiny.
8. In sum, while it is critical that the line between a hunch and reasonable suspicion be maintained to prevent the police from engaging in indiscriminate or discriminatory practices, it is equally vital that the police be allowed to carry out their duties without undue scepticism or the requirement that their every move be placed under a scanning electron microscope.
9. With those principles in mind, I turn then to a *de novo* assessment of the objective reasonableness of Cst. Sperlie’s subjective belief, which is the heart of the matter.

(3) Was Cst. Sperlie’s Subjective Belief Objectively Reasonable?

1. The appellant submits that Cst. Sperlie’s subjective belief lacked objective support. That really is the nub of the appellant’s case. In essence, he maintains that even taking Cst. Sperlie’s training and experience into account, the factors that he relied upon to ground his suspicion were either characteristics of a general nature that apply broadly to innocent people, or patterns of experience that are not objectively supported or supportable. In either case, the argument is that the factors were valueless.
2. For example, the appellant says it is common for speeders to slow down quickly when they spot a police radar unit, and it is equally common for innocent people to show signs of nervousness when they are stopped by the police. Likewise, hand tremors are as consistent with nervousness as they are with marihuana use, and there are many reasons, apart from marihuana use, why people may have pinkish-coloured eyes.
3. Equally fruitless, the appellant says, is the evidence about his travelling from Calgary to Regina. All manner of innocent people drive the Trans-Canada Highway from Calgary to Regina every day. Identifying that stretch of highway as a known drug route, with drugs moving from Calgary to Regina, says nothing about the appellant. It is a meaningless piece of information that cannot be used to ground reasonable suspicion.
4. The concerns raised by the appellant are not idle. They bear careful consideration. Each case must be assessed having in mind the legal principles that my colleague Karakatsanis J. has identified in *Chehil*. What follows is a summary of the principles from *Chehil* that are pertinent to this case.
5. Reasonable suspicion must be assessed against the totality of the circumstances. Characteristics that apply broadly to innocent people and “no-win” behaviour — he looked at me, he did not look at me — cannot on their own, support a finding of reasonable suspicion, although they may take on some value when they form part of a constellation of factors.
6. Exculpatory, common, neutral, or equivocal information should not be discarded when assessing a constellation of factors. However, the test for reasonable suspicion will not be stymied when the factors which give rise to it are supportive of an innocent explanation. We are looking here at possibilities, not probabilities. Are the facts objectively indicative of the *possibility* of criminal behaviour in light of the totality of the circumstances? If so, the objective component of the test will have been met. If not, the inquiry is at an end.
7. Assessing whether a particular constellation of facts gives rise to a reasonable suspicion should not — indeed must not — devolve into a scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are the bywords, and they are to be applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.
8. Parenthetically, I note that there are several ways of describing what amounts to the same thing. Reasonable suspicion means “reasonable grounds to suspect” as distinguished from “reasonable grounds to believe” (*Kang-Brown*, at paras. 21 and 25, *per* Binnie J., and at para. 164, *per* Deschamps J.). To the extent one speaks of a “reasonable belief” in the context of reasonable suspicion, it is a reasonable belief that an individual *might* be connected to a particular offence, as opposed to a reasonable belief that an individual *is* connected to the offence. As Karakatsanis J. observes in *Chehil*, the bottom line is that while both concepts must be grounded in objective facts that stand up to independent scrutiny, “reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime” (para. 27).
9. Applying the principles articulated in *Chehil* to the case at hand, I am satisfied that the factors identified by Cst. Sperlie provide the objective basis needed to support his belief that the appellant might be involved in a drug-related offence.
10. When the appellant saw Cst. Sperlie’s radar unit, it would seem that he had little cause to be concerned. At worst, he was travelling a few kilometres per hour above the posted limit. His reaction however was noticeable and pronounced, to the point that his sudden decrease in speed caused the front end of his vehicle to pitch forward. Cst. Sperlie described his driving at that point as erratic. Equally odd, the appellant pulled over to the side of the road on his own without being directed by the police to do so.
11. In making his observations of the appellant, Cst. Sperlie was clear that what he was seeing was not the normal nervous reaction one might expect to see in a driver pulled over for speeding. Having in mind the thousands of traffic stops he had made over the years, the appellant’s level of anxiety was “some of the highest nervousness” he had ever seen. Indeed, it was so pronounced that it caused him to ask the appellant if he was “all right”.
12. As it turned out, Cst. Sperlie was not imagining things. His concerns were borne out by the appellant who asked for, and received permission to use his asthma medication. The medication did not assist, however. After taking it, the appellant’s extreme degree of nervousness continued unabated — even though he knew he was being investigated for a relatively minor speeding infraction. That too seemed unusual to Cst. Sperlie, and even more so when he learned from a record search that the appellant had no outstanding tickets or violations that might account for his abnormal state of anxiety.
13. Accepting Cst. Sperlie’s evidence at face value, the appellant’s attempt to portray his manner of driving and his degree of nervousness as commonplace reactions that one would expect to see in the population at large is not an accurate depiction of the evidence.
14. Apart from the appellant’s extreme state of anxiety, Cst. Sperlie noticed that his eyes were pinkish in colour and his hands were trembling. From his training and experience as a police officer, these symptoms were consistent with a marihuana user — hence the link to drugs and the possibility that the appellant was concealing drugs in his car.
15. Finally, the appellant was travelling on the Trans-Canada Highway from Calgary to Regina. From his training and experience, Cst. Sperlie knew that this stretch of highway was a drug route. Standing alone, that factor would have been inconsequential. But it did not stand alone. It was something to be considered along with the other factors, including the appellant’s slip-up as to the day he left Regina to go to Calgary.
16. From his experience, Cst. Sperlie knew that drug traffickers tend to do fast turnarounds — which is precisely what the appellant admitted to, before attempting to change his initial response to indicate he had spent more time in Calgary. Viewed in that light, the appellant’s attempt to have the route and destination evidence treated as worthless falls short. It takes on weight when considered with the whole of the evidence presented.
17. Looking at the totality of the evidence through the lens of an officer with training and field experience in the transportation and detection of drugs, I am satisfied that Cst. Sperlie’s subjective belief that the appellant might be involved in a drug-related offence was objectively substantiated. Accordingly, Cst. Sperlie had reasonable suspicion that the appellant was engaged in a drug-related offence.
18. Having concluded as much, I pause here to reiterate that courts, under the banner of rigorous judicial oversight, must guard against upping the ante for reasonable suspicion to the point that it virtually mirrors the test for reasonable and probable grounds. To do so would be especially problematic given the clear warning in *Chehil* that “reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard” (para. 27).
19. The reasonable and probable grounds standard is a more demanding standard than the reasonable suspicion standard. It follows inexorably from this that more innocent persons will be caught under a reasonable suspicion standard than under the reasonable and probable grounds standard. That is the logical consequence of the way these standards have been defined.
20. However unappealing that result may be, we should candidly acknowledge that it is the foundation on which *Kang-Brown*, *A.M.*, and the other reasonable suspicion cases have been built. Indeed, Karakatsanis J. does just that in *Chehil*, explaining that the “factors that give rise to a reasonable suspicion may also support completely innocent explanations” because the “reasonable suspicion standard addresses the *possibility* of uncovering criminality, and not a *probability* of doing so” (para. 32 (emphasis in original)). We accept this cost to individual privacy as a reasonable one in part because properly conducted sniff searches are “minimally intrusive, narrowly targeted, and highly accurate” (*Chehil*, at para. 28). In short, we have judged the trade-off between privacy and security to be acceptable.
21. The strength of the factors relied on by the police will, of course, vary from case to case. For example, in *Chehil* the police presented uncontradicted evidence that “most people meeting this constellation had been proven to be drug couriers” (para. 64 (emphasis added)). Here, by contrast, we do not have evidence that *most* people who match the factors identified by the police with respect to the appellant have proven to be drug couriers. Rather, what we have is uncontradicted evidence that the factors relied on were “commonly” exhibited, “seen in [previous] investigations”, and “experienced in the past” by individuals found to be involved in a drug-related offence (A.R., vol. II, at pp. 10-11).
22. That, however, does not amount to a material evidentiary distinction between these two cases. As *Chehil* makes clear, the police need not have evidence indicative of a reasonable *probability* of finding drugsunder a reasonable suspicion standard. In my respectful view, to require more would render the distinction between reasonable and probable grounds and reasonable suspicion all but illusory.
23. The appellant has not challenged Levi’s accuracy or reliability (*voir dire* reasons, at para. 37). And absent any other argument that the search was carried out in an unreasonable manner, the sniff search was thus lawful.

D. *The Arrest and Search Incident to Arrest*

1. The appellant appears to concede that, after the dog’s positive alert and considering the totality of the circumstances, the officers had reasonable and probable grounds to proceed with a warrantless arrest and search incident to it (*Kang-Brown*, at para. 200, *per* Deschamps J.; *Chehil*, at para. 55). Accordingly, I need not say more about this.

VI. Conclusion

1. For these reasons, I agree with the Court of Appeal that the police had reasonable suspicion that the appellant was involved in a drug-related offence such that they could enlist Levi to perform a sniff search of the appellant’s vehicle. The appellant’s s. 8 privacy rights were not breached and the marihuana seized from the rear hatch of his car was thus admissible at trial.
2. I would therefore dismiss the appeal.

The reasons of McLachlin C.J. and LeBel, Fish and Cromwell JJ. were delivered by

LeBel J. (dissenting) —

1. Introduction
2. I have read the reasons of my colleague, Moldaver J. With great respect, I cannot agree with his conclusion.
3. I agree with Justice Moldaver that the principal question in this appeal is whether the police had reasonable suspicion that the appellant was involved in a drug-related offence. Unlike my colleague, however, I am of the opinion that the police lacked the requisite reasonable suspicion to conduct the dog-sniff search in this case. Specifically, the police lacked objective grounds on which to justify deploying a sniffer dog to search the appellant’s vehicle. The trial judge committed neither an error of law nor a palpable and overriding error of fact. Therefore, the Court of Appeal had no basis on which to interfere with his conclusion. Ultimately, the constellation of factors available to the police was insufficient to ground reasonable suspicion, and the appellant’s *Charter* rights were breached as a result. I would allow the appeal and reinstate the trial judge’s decision to exclude the evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.
4. Analysis
5. The relatively low standard of reasonable suspicion, which allows police officers considerable latitude, increases the need for careful review of police action:

. . . where the citizen’s only protection against unlawful searches by police dogs is after-the-fact scrutiny of the stated grounds of “reasonable suspicion”, it is important that the after-the-fact judicial scrutiny be conducted with serious diligence and rigour.

(*R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 97, *per* Binnie J.)

1. Rigorous judicial scrutiny of dog-sniff searches remains a vital part of the balance struck under s. 8 of the *Charter* between the need for effective law enforcement and the protection of the public’s privacy rights. Some, like my colleague, worry that the police will be unduly burdened by having their activities minutely scrutinized by the courts. Without question, the police must be allowed to carry out their duties, and the reasonable suspicion standard acknowledges that innocent people may sometimes be reasonably suspected of a crime. Nevertheless, courts must remain vigilant and not shirk their role in evaluating police action for *Charter* compliance, particularly where the only effective check on that action is after-the-fact independent judicial assessment. Possession of illegal drugs is a serious matter, but so is the public’s constitutional right to be secure against unreasonable search or seizure.
2. The police cannot simply draw on their experience in the field to create broad categories of “suspicious” behaviour into which almost anyone could fall. Such an approach risks transforming the already flexible standard of reasonable suspicion into the “generalized” suspicion standard that a majority of this Court rejected in *Kang-Brown*. In order to uphold and reinforce privacy rights, courts must not fail to hold police accountable when they stray from the proper exercise of their power and draw broad inferences of criminality without specific, individualized suspicion that can be objectively assessed. The constellation of facts grounding reasonable suspicion must be “based in the evidence, tied to the individual, and capable of supporting a logical inference of criminal behaviour” (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 46).
3. *The Trial Judge Did Not Err in Applying the Reasonable Suspicion Standard With Regard to Cst. Sperlie’s Training and Experience*
4. Justice Moldaver agrees with the Court of Appeal’s finding that the trial judge “failed *as a matter of law* to appreciate the significance of [Cst. Sperlie’s] training and experience when evaluating the worth of the factors he considered in forming his belief that the appellant might be involved in an offence under the *CDSA*” (para. 60). As a result, my colleague concludes that the trial judge incorrectly applied the law to the facts, thereby committing an error of law.
5. I disagree with this conclusion. The trial judge understood the reasonable suspicion standard. As the Court of Appeal rightly found, the trial judge “committed no error of law with respect to the legal meaning of the concept of reasonable suspicion itself” (2011 SKCA 64, 371 Sask. R. 291, at para. 24). Nothing in the trial judge’s reasons indicates that he did not know that the experience and training of police officers is an important consideration. A judge is assumed to know the law. No one disputes that the reasonable suspicion determination must be made from the perspective of a reasonable person standing in the shoes of the investigating officer. It is clear from the trial judge’s reasons that he appreciated the legal significance of an officer’s training and experience in the context of the reasonable suspicion standard.
6. The trial judge explicitly discussed the evidence regarding Cst. Sperlie’s training, mentioning that the officer had taken RCMP courses, including “a course to enable him to spot persons transporting illegal drugs” (2009 SKQB 415, 342 Sask. R. 281, at para. 6). The trial judge also noted that, in Cst. Sperlie’s experienced opinion, nervousness increases during traffic stops with people who are transporting drugs, and Calgary is a well-known source of drugs (para. 7). In addition, the transcript of the *voir dire* reveals that the trial judge was sensitive to the legal relevance of an officer’s training and experience when assessing the objective grounds for reasonable suspicion (A.R., vol. II, at p. 88):

[DEFENCE COUNSEL]: And I think that’s what this case is, especially when you read *Mann* in conjunction with *Nguyen* and *Harris* out of our Court of Appeal, this is mere hunches and intuition. This isn’t something that, you know, that we can really get our teeth on and say well this is objective findings of reasonable grounds.

I’m going to go -- for instance, sweat, excessive pulsating carotid, I don’t even know what that is. I mean -- I mean I don’t think that’s a grounds -- or provides --

THE COURT: Yeah, but you are not a trained police officer.

[DEFENCE COUNSEL]: Pardon me?

THE COURT: You are not a trained police officer. [Emphasis added.]

1. The Court of Appeal asserted that the trial judge “does not question the constable’s training” (para. 30), yet the trial judge did in fact do just that, writing: “When Cst. Sperl[i]e was cross-examined, he admitted that he had never been qualified as an expert. He also stated he had never taken any classes in physiology but, as noted above, had been trained by other R.C.M.P. officers” (para. 9 (emphasis added)).
2. My colleague writes that Cst. Sperlie was not “seriously challenged in cross-examination about his training and experience as a police officer or the factors used by the police to detect the behavioural characteristics and practices of drug users and traffickers” (para. 16). However, I note that Cst. Sperlie was cross-examined for nearly five pages of the *voir dire* transcript on his RCMP training, his academic background in science, anatomy, physiology and endocrinology, his years of experience in the drug section of the RCMP as well as in traffic services, and his knowledge of drug trafficking. In particular, Cst. Sperlie conceded on cross-examination that he was not qualified as a drug recognition expert, drug recognition being the ability to evaluate whether a person’s physical symptoms are indicative of drug use. The trial judge had sufficient evidence on which to base his assessment of the legal significance of Cst. Sperlie’s training and experience, or lack thereof.
3. Even while undertaking its objective assessment from an officer’s perspective, a court should not show that officer’s testimony any particular deference:

An officer’s training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion. However, this is not to say that hunches or intuition grounded in an officer’s experience will suffice, or that deference is owed to a police officer’s view of the circumstances based on her training or experience in the field: see *Payette*,[2010 BCCA 392, 291 B.C.A.C. 289,] at para. 25*.* A police officer’s educated guess must not supplant the rigorous and independent scrutiny demanded by the reasonable suspicion standard. [Emphasis added.]

(*Chehil*, at para. 47)

1. The risks of attaching excessive weight to police testimony have long been recognized in the jurisprudence. In *Graat v. The Queen*, [1982] 2 S.C.R. 819, at p. 840, for example, Dickson J. (as he then was) advised that “there may be a tendency for judges and juries to let the opinion of police witnesses overwhelm the opinion evidence of other witnesses”.
2. The danger of placing undue emphasis on an officer’s testimony is that a court may inadvertently subvert the objective component of the reasonable suspicion standard. Although an officer’s testimony must be weighed with an appreciation of that officer’s specific training and experience, courts must also “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” (*R. v. Yeh*, 2009 SKCA 112, 337 Sask. R. 1, at para. 53). Officer training and experience should never serve as a proxy for an objective assessment of the constellation of factors giving rise to reasonable suspicion.
3. There is no indication in the trial judge’s reasons that he disregarded the training and experience that informed Cst. Sperlie’s professional opinion. The Court of Appeal erred by substituting its decision for that of the trial judge when the trial judge had committed neither an error of law in failing to appreciate the legal significance of the officer’s training and experience nor an overriding error of fact in evaluating that training and experience.
4. *Cst. Sperlie’s Credibility*
5. In his reasons, the trial judge signalled his concerns regarding Cst. Sperlie’s credibility as follows:

. . . it must be pointed out that both Cst. Warner and Cst. Sperl[i]e were from northern Saskatchewan and they claim to have been on routine traffic patrol with a “sniff dog” in the southern part of the province. The posted speed limit where the car was travelling was 110 km per hour. The radar clocked the accused as travelling at 112 km per hour which is only two km over the speed limit. I have a concern that the two officers may have been in the area with the purpose of conducting random traffic stops for the sole purpose of checking for drugs being transported from west to east which, according to Cst. Sperl[i]e, is a common occurrence. It is therefore quite conceivable that the observations of the accused claimed to have been noticed by Cst. Sperl[i]e were enhanced after the drugs were located.

When I consider all of the facts in this case, I can only conclude that the search performed by the officers was unreasonable. [paras. 47-48]

1. I agree with Moldaver J. that the trial judge’s credibility concerns did not lead him to find that Cst. Sperlie lacked a subjective belief that the appellant might be involved in a drug-related offence. The trial judge did not reject the entirety of Cst. Sperlie’s testimony as not credible, although he did find that the officer’s subjective belief was a relatively weak one: “. . . at best he was acting on a hunch” (para. 47 (emphasis added)).
2. The trial judge could undoubtedly have articulated his credibility findings more explicitly and extensively. Yet, as this Court noted in *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 26: “Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings.” It is true, as my colleague points out, that the trial judge did not discuss Cst. Sperlie’s explanation as to why he was on traffic duty in that location. However, reasons “should not be read, as a verbalization of the entire process engaged in by the trial judge” (*R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 525). A trial judge is not required to list or discuss “all of the evidence bearing on the issues before the court”(*R. v. Bramley*, 2009 SKCA 49, 324 Sask. R. 286, at para. 39).
3. As the trial judge in this case made no palpable and overriding error in assessing Cst. Sperlie’s credibility, considerable deference is owed to his assessment (*R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 10). Even though he found that Cst. Sperlie had a sincerely held *subjective* belief, the trial judge’s credibility concerns should not be discounted as irrelevant to the determination of whether Cst. Sperlie had *objective* grounds on which to base his suspicion. Such concerns, even if they do not result in the wholesale rejection of a witness’s testimony, may properly inform the assessment of the probative value of the evidence. Thus, while the trial judge in this case did not make an adverse finding of credibility in the sense of discarding the entirety of Cst. Sperlie’s evidence as unbelievable, he appropriately drew his conclusion regarding the *overall* reasonableness of Cst. Sperlie’s suspicion in light of his concern that the officer may have been “enhanc[ing]” his observations of the accused’s appearance and demeanour (see paras. 47-48 of the trial judge’s reasons).
4. In sum, the objective analysis of reasonable suspicion is often largely dependent on a police officer’s personal observations. Credibility is therefore pertinent not only to the officer’s subjective belief; it also affects the “reasonableness” of the officer’s suspicion. As a result, an appellate court should keep a trial judge’s credibility concerns in mind when undertaking its assessment of whether an officer had objective grounds on which to base his suspicion.
5. *Cst. Sperlie’s Subjective Belief Was Not Objectively Reasonable*
6. An objective basis for reasonable suspicion has not been made out in this case. In the words of Karakatsanis J. in *Chehil*, the constellation of objective facts is not “capable of supporting a logical inference of criminal behaviour” (para. 46). I conclude that Cst. Sperlie’s speculation, or hunch, was not equivalent to reasonable suspicion.
7. Cst. Sperlie’s testimony in this case focused in large part on the appellant’s appearance and demeanour. More specifically, he testified that the appellant was extremely nervous when pulled over by police, with shaky hands, sweat on his forehead, rapid breathing, and a pulsing carotid artery. He described the appellant as having pinkish-coloured eyes, and he testified that the appellant’s high level of nervousness continued unabated throughout the traffic stop.
8. The constellation of factors also included the fact that the appellant, who was speeding slightly, slowed his vehicle suddenly when the police radar unit came into view and pulled over to the side of the road without having been instructed to do so by the police. He was travelling on the Trans-Canada Highway from Calgary to Regina, on a quick turnaround trip, and he initially said he had gone to Calgary on Monday instead of Sunday. When the officers checked their database, they found that the appellant had no criminal record.
9. As discussed above, Cst. Sperlie lacked training in relevant fields such as physiology and anatomy, training that provides scientific tools to accurately assess which physical symptoms indicate drug use. While Cst. Sperlie had attended a half-day lecture on types of drugs and their effects on the human body, in which he had learned that marihuana use may cause pink eye colouration and muscle tremors, he admitted in cross-examination that he was not qualified as a drug recognition expert. He also did not appear to know whether the pulsing he had observed was in the appellant’s exterior or interior carotid artery.
10. Although it is not necessary for officers to be qualified experts in order for their training and experience to be taken into account, courts must be careful not to put too much stock in an officer’s knowledge of scientific and technical matters such as recognizing symptoms of drug use if an officer has received little relevant training (*Yeh*, at paras. 56-57).
11. In addition, Cst. Sperlie knew that the appellant was asthmatic, since the appellant asked to use his inhaler. This fact could well account for the appellant’s shortness of breath. Exculpatory, neutral and equivocal factors form part of the constellation of relevant factors under the reasonable suspicion standard and cannot be disregarded by either the police or the court (*Chehil*, at para. 33).
12. Cst. Sperlie testified that after using the inhaler, the appellant remained suspiciously short of breath, but he conceded under cross-examination that he did not know precisely what type of medication the appellant had used. Moreover, Cst. Sperlie had no medical training on which to base a diagnosis of how the inhaler would normally affect the appellant’s breathing.
13. With regard to the sweat on the appellant’s forehead, defence counsel presented evidence that an Environment Canada weather report put the temperature two hours before the time of the traffic stop at 27 degrees Celsius. The Crown did not submit evidence to the contrary, apart from Cst. Sperlie’s testimony that he did not think that was the actual temperature at the time.
14. As part of his training, Cst. Sperlie had attended a week-long “pipeline” course that dealt with indicators of criminal behaviour on the highway, traffic stop scenarios and hidden compartments in vehicles. He testified that, in his experience, drug traffickers frequently make quick turnaround trips between “source” cities and “destination” cities, often remain nervous throughout traffic stops, and may lie about their travel itineraries.
15. A particular driving route, on its own, is not indicative of suspicious behaviour, particularly when it is the primary route between two major cities. The trial judge noted in his reasons that “[n]o evidence was offered” to support Cst. Sperlie’s opinion that Calgary was a “known source of narcotics” and Regina a “known destination of sale” (para. 32). Although this factor should not be completely discarded, it will typically carry little weight.
16. The fact that the appellant had no criminal record yet remained nervous throughout the stop, something Cst. Sperlie relied upon in deciding to conduct the sniff search, is a factor that may “go both ways” (*Chehil*, at para. 31). On its own, lack of a criminal record cannot support reasonable suspicion; indeed, it may well undermine a reasonable suspicion of criminal activity. While it forms part of the constellation of factors, it is therefore a highly equivocal factor.
17. Cst. Sperlie testified that he had been involved in over 5,000 traffic stops, close to 150 of which involved controlled drugs and substances. This is certainly evidence of his considerable experience in making traffic stops. However, given that no evidence was presented on Cst. Sperlie’s rate of error, this statistic does not necessarily support the argument that it was reasonable for Cst. Sperlie to draw an inference of illegal drug possession in this instance. Absent an error rate, it is impossible to determine whether this statistic supports or undermines the reasonableness of Cst. Sperlie’s inference.
18. The police in this case relied on markers that apply broadly to innocent people, or markers only of generalized suspicion (*Chehil*, at para. 31), which were at best highly equivocal: slowing down upon sight of the police and pulling over after speeding; acting highly nervous when confronted by the police; sweating on a warm day; breathing rapidly as an asthmatic; having pinkish eyes; using the primary highway route to make a quick turnaround trip between two major cities; correcting an initial response when asked about travel dates; and lacking a criminal record.
19. As Karakatsanis J. states in *Chehil*, “[t]he more general the constellation relied on by the police, the more there will be a need for specific evidence regarding police experience and training” (para. 47).
20. Therefore, taking into account the officer’s training and experience, the totality of the circumstances, including neutral and equivocal factors, and showing due deference to the trial judge’s credibility concerns with regard to the officer’s observations, I conclude that the collective significance of these factors is not capable of supporting a logical inference of criminal behaviour.
21. I use the word “collective” here because an assessment of the objective grounds for reasonable suspicion requires a global review of the constellation of factors in light of “the totality of the circumstances” (*Chehil*, at paras. 29 and 33). A court must step back and analyze the factors as a whole. In the instant case, weaknesses in respect of a number of key factors included in the relevant constellation diminish the *overall* reasonableness of the officer’s suspicion.
22. When viewed collectively, the factors do not support a finding that the police had objective grounds for reasonable suspicion when they conducted the warrantless dog-sniff search of the appellant’s vehicle. The search violated the appellant’s rights under s. 8 of the *Charter*. As Moldaver J. rightly points out, the search and the post-traffic-stop detention of the appellant “sink or swim” together (para. 37). As a result, the appellant’s s. 9 *Charter* rights were also violated.
23. Remedy
24. Based on the breach of the appellant’s rights, the trial judge excluded the evidence under s. 24(2) of the *Charter*. I would uphold the trial judge’s ruling.
25. This Court has repeatedly emphasized the high degree of deference that is owed to a trial judge’s decision to exclude or admit evidence under s. 24(2): see, e.g., *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 59; *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 68; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 48. It is not open to an appellate court to reweigh the facts or reassess the evidence in order to substitute its own view on the decision under s. 24(2):

In all cases, it is the task of the trial judge to weigh the various indications [under s. 24(2)]. No overarching rule governs how the balance is to be struck. . . . Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.[Emphasis added.]

(*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 86)

1. In the case at bar, however, it is not entirely clear whether the trial judge considered the proper factors, as his reasons with regard to s. 24(2) are cursory. He lists the *Grant* factors but analyzes only one of them. It is therefore appropriate to conduct a full *Grant* analysis here, assessing and balancing the three factors in order to determine whether the admission of evidence resulting from the *Charter* breaches would bring the administration of justice into disrepute.
2. *Seriousness of the Charter-Infringing State Conduct*
3. Cst. Sperlie testified that at the time of the traffic stop, in 2006, he did not believe that a dog sniff was considered a search. It is true that at that time the law on whether dog sniffs were searches and on the level of suspicion required to justify a sniff search was in a state of flux. As a result, the infringement of s. 8 of the *Charter* in this case was neither wilful nor flagrant. Nonetheless, when the law is in flux, the police should err on the side of caution. Moreover, Cst. Sperlie must have been aware that his decision to detain the appellant engaged the *Charter*, since Cst. Sperlie read Mr. MacKenzie his rights from a “*Charter* card” before detaining him on a suspicion of drug possession and then deploying the sniffer dog. The *Charter*-infringing conduct was deliberate, not inadvertent. In my opinion, the conduct was serious.
4. *Impact of the Breach on the Charter-Protected Interests of the Accused*
5. The appellant’s privacy interest in the contents of his vehicle is lower than the privacy interest attached to the contents of his home. Nonetheless, the public enjoys a reasonable expectation of privacy when travelling down a highway. Although the dog-sniff search impacted the appellant’s *Charter*-protected privacy rights, the impact was moderate, due to the brief and non-intrusive nature of the search. Likewise, the breach of the appellant’s s. 9 rights was of fairly short duration. But an arbitrary detention of any length, including a pat-down by police, has a substantial impact on a person’s *Charter*-protected interests. The cumulative impact of these breaches, while not severe, was more than minimal.
6. *Society’s Interest in the Adjudication of the Case on Its Merits*
7. Society’s interest in the adjudication of a case on its merits will almost always weigh in favour of admitting the evidence. The evidence in this case is reliable and relevant to the prosecution. Yet, when assessing society’s interests, one must bear in mind that the focus of s. 24(2) is on the broad impact the admission of the evidence would have on the long-term repute of the justice system (*Grant*, at para. 70). The considerable latitude afforded to police by the laxer threshold of reasonable suspicion means that evidence obtained by virtue of a *Charter* breach should not be lightly admitted, for fear of undermining the integrity of the justice system. As Binnie J. wrote in *Kang-Brown*, at para. 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.

1. In this case, the seriousness of the state conduct supports exclusion. The impact of the breach also favours exclusion, albeit to a lesser degree. The reliability of the evidence and its importance to the Crown’s case weigh in favor of admission. In balancing these factors, I agree with the trial judge that the admission of evidence would bring the administration of justice into disrepute.

IV. Conclusion

1. For the above reasons, I would allow the appeal and exclude the evidence under s. 24(2) of the *Charter*.

*Appeal dismissed,* McLachlin C.J. *and* LeBel*,* Fish *and* Cromwell JJ. *dissenting.*

Solicitors for the appellant:  Richmond Nychuk, Regina.

Solicitor for the respondent:  Public Prosecution Service of Canada, Saskatoon.

Solicitor for the intervener the Attorney General of Ontario:  Attorney General of Ontario, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association:  McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association:  Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Samuelson‑Glushko Canadian Internet Policy and Public Interest Clinic:  University of Ottawa, Ottawa.

1. Consequently, this appeal does not raise the question of — and we do not answer — whether the police could have proceeded with the sniff had the appellant asked to call his lawyer. [↑](#footnote-ref-1)
2. I accept that the trial judge refers to officer training and experience in his recitation of the facts and during the *voir dire*. In my respectful view, however, two fleeting mentions cannot — and do not — amount to any meaningful analysis. [↑](#footnote-ref-2)