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R v Navales and Reasonable Suspicion

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Cases Commented On: *R v Navales*, 2014 ABCA 70; *R v Canlas,* 2014 ABCA 160; *R v Ng*, 2014 ABPC 62; *R v Tosczak,* 2014 ABQB 86

The engagement of section 8 and section 9 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) in the drug sniffer dog cases has captured the interest of civil libertarians and law enforcement for what is required for a "reasonable suspicion." The 2013 Supreme Court decisions of *R v Chehil*, 2013 SCC 49, and *R v MacKenzie*, 2013 SCC 50 effectively lowered what would be required of police officers to form the reasonable suspicion necessary to conduct a "sniff" search. This resulted from the Supreme Court allowing an officer's training and experience, in the totality of the circumstances, to form the objective requirement necessary to the forming of reasonable suspicion. The Alberta Court of Appeal in *R* v *Navales,* 2014 ABCA 70, was tasked with applying this law in Alberta. At issue was how officers would use their training and experience, and a constellation of neutral "no win" behaviours on the part of the accused to form the objective grounds needed to find reasonable suspicion. The result has been what dissenting judges have referred to as a lowering of the standard to that of a generalized suspicion. Significantly, this line of decisions has been applied outside of the drug sniffing dog context, and even outside of the reasonable suspicion context, to other areas of criminal law in *R v Canlas*, 2014 ABCA 160, *R v Ng*, 2014 ABPC 62, and *R* v *Tosczak,* 2014 ABQB 86.

Drug sniffing dog cases have proven to be an interesting area for developing criminal law jurisprudence regarding sections 8 and 9 of the *Charter.* Drug sniffing dog investigations by their very nature generally involve both a detention and a search. The Supreme Court found in *R* v *Kang-Brown*, 2008 SCC 18, that an officer would require a reasonable suspicion to perform the dog sniff search. Flash forward four years later, and both the Supreme Court, and the Alberta Court of Appeal are still trying to determine what will amount to a reasonable suspicion to perform the sniff search. Reasonable suspicion requires a subjective belief that is objectively reasonable and subject to judicial scrutiny (*Kang-Brown* at paras 26, 75). The Supreme Court of Canada in *Chehil* found that an officer's training and experience can provide the objective component necessary to form a reasonable suspicion (*Chehil* at paras 46, 47). *Mackenzie* dealt with "no win" behaviour, which is "characteristics that apply broadly to innocent people – he looked at me, he did not look at me" (*Mackenzie*, at para 71). Justice Moldaver found that this behaviour does have "some value" in forming reasonable suspicion when looked at as part of a constellation of factors assessed against the totality of the circumstances (at para 71).

There was also a strong dissent in *Mackenzie* written by Justice Lebel for himself, Chief Justice McLachlin, Fish J., and Cromwell J. The dissent highlighted a point from the Court's previous

decision of *Kang-Brown,* that after the fact judicial scrutiny must be rigorous as exclusion of evidence is the only check on police powers regarding breaches under sections 8, 9 or 10 of the *Charter* (*Mackenzie,* para 96). The dissent's main concern was that the approach taken by the majority transformed the reasonable suspicion requirement into a requirement of only a generalized suspicion (at para 97). The dissent was concerned with courts and police drawing broad inferences of criminality without an objective element (at para 97). The dissent also disagreed with the majority's approach of using police officer training and experience as a proxy for an objective assessment (at para 105).

Mackenzie and *Chehil* also saw the Canadian Civil Liberties Association (CCLA) intervene on behalf of the defence and urge against the use of drug courier profiles (CCLA Factum in *Chehil* and *Mackenzie,* available here). Their concern was that drug courier profiles used to form the suspicion are "malleable and unverifiable" (*CCLA Factum* at para 3). Echoing the concerns raised by the dissent in *Mackenzie,* the CCLA argued that deference to police officer training and experience makes it impossible to separate the objective from the subjective (at para 11). The fear of the CCLA is that the effect of this deference will be to dilute the meaning of reasonable suspicion (at para 21).

The Alberta Court of Appeal was then tasked with applying these two Supreme Court decisions in the *Navales* case. The facts in *Navales* briefly are as follows. As part of "Operation Jetway" plainclothes police officers were monitoring buses coming from Vancouver, "a known drug route." Once in the bus station, Navales turned to go to the washroom, saw the police dogs training, then changed directions a couple more times and exited the bus depot. Outside the bus depot the undercover officer engaged him in conversation and observed that he purchased his bus ticket soon before departure, bought it under a different name, had a large quantity of $100 bills, gave different responses to how long he planned on staying in Calgary, and seemed nervous. This formed the suspicion for the dog search (*Navales,* at paras 4-6).

The reasonableness of the officer's suspicion was assessed in the context of the law as set out in *Chehil* and *MacKenzie* (*Navales,* at para 15). As in *Chehil,* the majority decision of the Court of Appeal (written by Paperny J.A. for herself and Martin J.A.) dismissed the argument that neutral factors which alone do not point to a reasonable suspicion should be viewed individually (at para 17). The Court assessed the totality of the circumstances, and the standard of possibility rather than probability of crime. The Court then found a reasonable suspicion did exist in this case (at paras 22, 23).

Berger J.A. however agreed with the dissent from *Mackenzie* in his reasons in *Navales*. Berger J.A. did concur with the majority of the Court of Appeal that *Chehil* and *Mackenzie* made the outcome of *Navales* inevitable (at para 24). However, he argued the change in the law ignored the distinction between suspicion and reasonable suspicion (at para 29). He argued that in effect, the standard of reasonable suspicion has been reduced to generalized suspicion based on the decisions of *Chehil* and *Mackenzie.* Hence, he was left with no choice but to concur in the result of the majority and dismiss the appeal.

The *Navales* decision has proved to be an important development for criminal law, proof of which is how the Court's reasoning has been imported into other areas of criminal law. For instance, the Alberta Court of Appeal in the decision of *R* v *Canlas,* 2014 ABCA 160, imported the reasoning from *Navales* into a case outside the drug sniffing dog context. Bielby J.A., writing for the majority, used *Navales* to allow the Court to look at the totality of factors including training and experience to form an officer's reasonable and probable grounds for arrest under section 495(1)(a) of the *Criminal Code*. *Navales* gave Bielby J.A. the authority to show that one

piece of neutral evidence is not neutral when taken as a constellation of factors (*Canlas* at paras 12, 13). The Court found that that constellation of factors combined with an officer's training and experience can form the objective criteria required for arrest.

The decisions of *Chehil, Mackenzie*, *and Navales* have also been used in the Alberta Provincial Court for dealing with an alleged section 9 *Charter* breach in the context of stopping a motor vehicle under the suspicion it was stolen. In the decision of *R* v *Ng,* 2014 ABPC 62, the Honourable S.E. Richardson looked to *Chehil, Mackenzie*, *and Navales* to show that a constellation of factors could be considered and would not require officers to rule out innocent explanations (*Ng* at para 34). *Chehil, Mackenzie,* and *Navales* have also been used in the Alberta Court of Queen's Bench in the impaired driving context concerning the reasonable suspicion and reasonable and probable grounds required for a breath demand (*R* v *Tosczak,* 2014 ABQB 86).

As has been expressed by dissenting judges, the CCLA, and academics, this clarification of the reasonable suspicion rule has effectively lowered the standard to one of generalized suspicion (see e.g. Jared Biden, *A "Wiff" of Criminality: Reasonable Suspicion in the Context of Dog-Sniff Searches"* (2012) 75 Sask LR 189). This is because defence counsel in most cases will lack the resources to persuade a court that the officer's training and experience do not reasonably ground the suspicion. *Navales* and the cases in Alberta that have followed have placed weight on a constellation of "no win" factors to a growing area of criminal law and threaten to lower what the Crown needs to prove both for both reasonable suspicion and reasonable and probable grounds. The risk to the justice system, and the integrity of the *Charter* is that too much deference provided to police officers will effectively subvert the role of the trier of fact. Also at risk is that *Charter* infringing conduct on the part of the police will be free from the rigorous judicial scrutiny required by the *Charter*.

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