SCC Court Files No.: **34524**

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

BETWEEN:

MANDEEP SINGH CHEHIL

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

- and -

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

INTERVENERS

FACTUM OF THE INTERVENER SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

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

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SCC Court Files No.: **34397**

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

BETWEEN:

BENJAMIN CAIN MACKENZIE

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

- and -

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

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> These facts are unusual, and, taken together, they seem odd and perhaps suspicious. However, all of these facts are consistent with legal activity, and very few have any reasonable connection to criminal activity. We do not permit searches merely because people do not have proper identification or documentation, are nervous, or tell inconsistent versions of events. *State v. Neth*, (2008), 196 P.3d 658, (Wash. Sp. Ct.)

PART I – OVERVIEW

1. The reasonable suspicion standard, while by no means a newly minted legal concept, is rapidly becoming critical to the preservation of a range of civil liberties. It demarcates the line at which the state may interfere with a number of our most fundamental rights including, as in this case, the point at which the state may invade reasonable expectations of privacy by deploying a drug detection dog. Given the important role to be played by this standard, it is incumbent on the judiciary to carry out the independent and rigorous after the fact analysis of the constituent elements of this standard, so as to ensure individual privacy rights are not invaded at the subjective whims of law enforcement.

PART II – POSITION ON APPELLANTS' QUESTIONS

2. The multiple issues raised by this appeal are phrased in different ways by different parties. However, in essence, they each address the same core issue: what constitutes reasonable suspicion at law? The intervener's position on this issue is that this standard must be assessed independently, in a normative manner that takes into account individualized investigative outcomes.

PART III – MAIN ARGUMENT

3. Assertions of suspicion require rigorous scrutiny by our judiciary, lest it become a means of retroactive verification – a rubber stamp for law enforcement intuition. Reasonable suspicion is predicated on the totality of circumstances in a given case. However, as in other contexts that employ the totality of the circumstances test, lower courts would benefit greatly from a set of helpful 'markers' to guide their analysis. The adoption of these 'markers' will similarly provide law enforcement with guidance on when it is and is not legitimate to invade the privacy of individuals.

R. v. Tessling, 2004 SCC 67, para. 43

A. GENERALIZED SUSPICION AND SYSTEMATIC APPLICATION

4. This Court was clear in its rejection of a generalized suspicion standard in *Kang-Brown*:

> None of this, in my view, provides any legal basis for a 'generalized suspicion' test...If, in the future, Parliament should conclude that the problem of illegal drugs in this country is such as to require in the larger public interest searches based on 'generalized suspicion' by police dogs, it will be open to the government to attempt to justify under s. 1 of the *Charter*...That, of course, would be a different case and the validity of such a law, if challenged, would have to be examined. Such a change is not something that should be contemplated by the Court. It would not be incremental. It would be massive.

Elements of the decisions in the Courts below raise the spectre of a generalized suspicion standard. In *Chehil*, the Nova Scotia Court of Appeal held that a confluence of factors can amount to reasonable suspicion as long as the underlying factors are "consistent with the flow of illegal drugs." Similarly, the proposed *MacKenzie* standard disregards the trial judge's implication of a pre-textual drug monitoring program.

R. v. Chehil, 2011 NSCA 82, para. 36; ***R .v. Kang-Brown***, 2008 SCC 18, per LeBel, J., para. 14; per Binnie, J., paras. 73-74; per Deschamps, J., dissenting, paras. 157, 159; ***R. v. MacKenzie***, 2009 SKQB 415, para. 47

5. In *Kang-Brown*, this Court described Jetway as a program that employs drug profiles in order to identify individuals and then "target these individuals as they pass through a terminal and attempt to engage them in 'voluntary conversation.'" As described in *Kang-Brown*, the profile does not form the basis for privacy intrusion, but merely identifies individuals who are then investigated more closely. However, in *Chehil*, the 'further investigation' step is no longer applied. Instead, the privacy invasion occurs solely on the basis of rule-based factor matching. This amounts, essentially, to an automated decision-making process. Anyone who meets the list of factors is automatically 'suspicious'. The Supreme Court of the United States has rejected the systematic application of such profiles. These profiles tend to evolve into 'checklists' that adapt to a particular set of circumstances as needed and generally lack reliable predictive value.

R. v. Chehil, 2011 NSCA 82, para. 7; ***R. v. Kang-Brown***, 2008 SCC 8, para. 47; ***U.S. v. Sokolow***, 490 U.S. 1, (U.S. Sp. Ct. 1989), pp. 13-15

6. The low predictive value of these profiles has been recognized by Canadian courts. In *Cox*, the New Bunswick Court of Appeal held that the use of a 'smuggler's profile' amounted to little more than a collection of hunches and speculation. In *Calderon*, the Ontario Court of Appeal rejected a drug dealer profile that had led to no drugs in over one hundred stops. Academics have suggested that profiles evolve into a list of factors broad and general enough to justify any application *ex post*.

R. v. Calderon, [2004] 23 C.R. (6th) 1 (ONCA), paras. 71-72; ***R. v. Cox***, [1999] 132 C.C.C. (3d) 256, 170 D.L.R. (4th) 101 (NBCA), para. 12; **A. Pratt**, "Between a Hunch and a Hard Place: Making Suspicion Reasonable at the Canadian Border" (2010), 19(4) Social & Legal Studies 461, pp. 473-475

7. The *MacKenzie* standard is equally problematic for its disregard of the trial judge's suggestion that the stop in question was pre-textual. This Court has recognized specific powers to randomly stop individuals in narrow investigative contexts, including to investigate traffic violations or to ensure the integrity of international borders. This Court has squarely rejected any general undertaking that aims to use highway infractions as a pre-text for general crime investigation. In *MacKenzie*, while the underlying detention was not directly challenged, the trial judge held there was no serious traffic violation and, moreover, that the officers appeared to be engaged in a pre-textual stop:

> In my view, the opinions expressed by Cst. Sperle did not meet the "reasonable suspicion" standard required for a valid sniffer dog search at best he was acting on a hunch. Furthermore, it must be pointed out that both Cst. Warner and Cst. Sperle 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. Sperle, is a common occurrence. It is therefore quite conceivable that the observations of the accused claimed to have been noticed by Cst. Sperle were enhanced after the drugs were located.

In scenarios where the legality of the underlying investigative program is at issue, the reasonable suspicion standard should be applied with greater rigour. As noted by the Saskachewan Court of Appeal *en banke*, a "general or open-ended power to detain for the purpose of ferreting out possible criminal activity or involvement in such activity would clearly not be reasonable or justifiable."

R. v. Ladouceur, 2002 SKCA 73; ***R. v. MacKenzie***, 2009 SKQB 415, para. 47; ***R. v. Nolet***, 2010 SCC 24, para. 25; ***R. v. Yeh***, 2009 SKCA 112, para. 90

B. SUSPICION MUST BE OBJECTIVELY REASONABLE AND INDEPENDENTLY ESTABLISHED

8. The reasonable suspicion standard must be established by rigorous and independent assessment. Justice Binnie explained the nature of the standard in *Kang-Brown*:

As observed by P. Sankoff and S. Perrault, "Suspicious Searches: What's so Reasonable About Them?" (1999), 24 C.R. (5th) 123:

> [T]he fundamental distinction between mere suspicion and reasonable suspicion lies in the fact that in the latter case, a sincerely held subjective belief is insufficient. Instead, to justify such a search, the suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment.
>
> ...
>
> What distinguishes "reasonable suspicion" from the higher standard of "reasonable and probable grounds" is merely the degree of probability demonstrating that a person is involved in criminal activity, not the existence of objectively ascertainable facts which, in both cases, must exist to support the search. [pp. 125-26]

In carrying out the rigorous and independent *ex post* assessment envisioned by *Kang-Brown*, courts must avoid deferring to the assessments of officers. As noted in *Grant* with respect to investigative detentions, “[i]t is for the trial judge...to determine whether the line has been crossed.” Additionally, the onus must be on law enforcement to establish the probative value of factors relied upon. Finally, guidance is required on how to incorporate police expertise and knowledge into the reasonable suspicion analysis.

R. v. Grant, 2009 SCC 32, para. 32; ***R. v. Kang-Brown***, 2008 SCC 8, per Binnie, J., at paras. 75-78

Reasonable suspicion is an objectively driven analysis

9. The standard includes subjective and objective elements. However, the assessment process cannot amount to a mere judicial review of the reasonableness of the officer’s analysis. Put another way, it is a judge who decides whether suspicion was ‘reasonable’ and no deference is owed to law enforcement assessments. The trial judge is the finder of fact, and it is for him or her to objectively determine discernable considerations.

R. v. MacKenzie, 2011 SKCA 64, paras. 35-36; ***R. v. Yeh***, 2009 SKCA 112 (SKCA, *en banke*), para. 62; ***R. v. Payette***, 2010 BCCA 392, para. 25

10. Where an officer invades an individual’s privacy in the absence of subjectively held belief that a requisite legal standard has been met, there can be no reasonable suspicion. It would be inconsistent with the *Charter* to permit law enforcement to invade privacy in the absence of subjectively held suspicion.

11. In most scenarios, law enforcement are unlikely to undertake a search in the absence of subjective belief that the relevant legal standard, once clearly articulated, has been met. In light of this reality, an overly subjective analysis will not accord to section 8 the protection it warrants. As a constitutional standard, the reasonable suspicion analysis should be primarily driven by objective considerations. Lack of subjective suspicion will be rare. It may result from shifting legal standards (*Nguyen*), or where credibility issues arise (*Noel*). It may also arise where the privacy invasion is undertaken under pretext, or for an illegitimate purpose (*Ladoceur*; *Nolet*).

R. v. Ladouceur, 2002 SKCA 73, paras. 40-43; ***R. v. Nguyen***, 2012 ABQB 199, para. 85; ***R. v. Noel***, 2010 NBCA 28, para. 31; ***R. v. Nolet***, 2010 SCC 24, paras. 25, 36; ***R. v. Tessling***, 2004 SCC 67, para. 42

12. Questions of good faith and other more detailed consideration of the nature of police action are best left to the section 24(2) analysis. For example, a good faith, but not objectively reasonable, subjective fear for personal safety may be viewed as less likely to bring the administration of justice into disrepute. On the other hand, a good faith, but objectively unreasonable, subjective suspicion of the presence of drugs might be more likely to do so.

R. v. Grant, 2009 SCC 32, para. 32

Onus to establish innocuous factors are probative

13. The reasonable suspicion test is assessed on the totality of the circumstances in each particular case. However, where law enforcement train officers to rely on quantifiable indicators or factors of general application, the onus is on the Crown not only to set out relevant factors, but to establish the probative value of these factors. For example, a commonly referenced constellation of factors presented as 'suspicious' under the Jetway program includes: checking 'one piece of luggage', travelling overnight and flying mid-week are commonly listed as indicative of a drug carrier. If a high percentage of flyers check one piece of luggage and travel overnight in the middle of the week, this constellation of factors should not be capable of grounding a reasonable suspicion. It is incumbent on the Crown to establish such factors are, at the least, statistically indicative of anything.

Chehil **Respondent's Factum**, paras. 12-14; ***R. v. Chehil***, 2011 NSCA 82, para. 36; ***R. v. Kang-Brown***, 2008 SCC 8, per Binnie J., paras. 47, 59

14. Additionally, law enforcement can, and should, be called upon to establish a 'track record' for searches undertaken further to a specific profile. Where, as in *Calderon*, specific factors

had led to scores of stops with no results, the reliability of such indicia is at issue. Absent such evidentiary grounding, innocuous factors of this type "are no more than hunches, speculation and guesses that do not qualify as 'objectively discernible facts.'"

R. v. Calderon, [2004] 23 C.R. (6th) 1 (ONCA), paras. 71-72; ***R. v. Cox***, [1999] 132 C.C.C. (3d) 256, 170 D.L.R. (4th) 101 (NBCA), para. 12

Assessing officer knowledge and experience

15. While the trial judge remains the ultimate arbiter of whether a reasonable suspicion existed or not, officer knowledge and experience can be relevant to the analysis. In particular, properly trained officers may help the trial judge draw inferences from certain types of indicia. However, the line between 'police experience' and 'indiscriminate exercises of the police power' is thin and vague enough as to be virtually indistinguishable in many instances. In addition, there is concern that officer 'training' may lead to a 'checklist' approach, where officers become accustomed to a list of known 'acceptable factors'. If this list grows sufficiently long, a constellation of factors can then be selected to suit a wide range of scenarios.

A. Pratt, "Between a Hunch and a Hard Place: Making Suspicion Reasonable at the Canadian Border" (2010), 19(4) Social & Legal Studies 461, pp. 473-475; ***R. v. Kang-Brown***, 2008 SCC 8, per Binnie, J., para. 76

16. Officer experience or expertise should never serve as proxy for assessing the totality of the circumstances. Officers are not neutral experts, and there is a tangible risk that factors will be enhanced *ex post*. An officer's established experience might prove useful in suggesting what inferences might be properly drawn from a particular factor. For example, an officer's assessment of symptoms of drug use might assist the court in its independent analysis of these symptoms. However, robust and specific technical expertise on the part of the officer must first be established on the record of the proceeding.

R. v. MacKenzie, 2009 SKQB 415, para. 47; ***R. v. Payette***, 2010 BCCA 392, para. 25; ***R. v. Yeh***, 2009 SKCA 112, para. 56

17. Regardless, it should be emphasized that the trial judge is not a 'lay person'. It is not clear that an officer is more capable of drawing inferences from the presence of indicia such as the presence of 'air freshener' than a trial judge. A truly rigorous and independent after the fact assessment of reasonable suspicion requires that the trial judge remain the ultimate finder of fact and law. A standard that accepts all of an officer's inferences by assessing each contextual factor through the lens of the officer's experience will be neither 'after the fact'

nor independent.

R. v. MacKenzie, 2011 SKCA 64, para. 36; ***R. v. Yeh***, 2009 SKCA 112, para. 53

C. REASONABLE SUSPICION IS A FACTUAL AND NORMATIVE ANALYSIS

18. While a reasonable suspicion is determined on the totality of the circumstances, factors capable of contributing to this totality must be assessed on both a normative and a factual basis. A purely empirical assessment of whether a certain set of factors amount to a 'reasonable' suspicion or not will not fulfill the objectives of the *Charter*. Some factors may be *factually* indicative of suspicion, but should still not form the basis of an invasion of privacy.

R. v. Tessling, 2004 SCC 67, para. 42

19. Factors that implicate *Charter* principles should not form the basis of a reasonable suspicion. For example, even if the cost-benefit analysis can be established as favouring racial profiling techniques, racial profiling conflicts with *Charter* values. It implicates equality values protected by Section 15 of the *Charter*. In addition, the disproportionate stigma that results from a privacy violation premised on race-based factors is offensive to any directly implicated *Charter* right.

O.H. Gandy Jr. & L. Baruh, "Racial Profiling: They Said It Was Against the Law!" (2006), 3(1) *UOLTJ* 298, pp. 302-304; ***R. v. Campbell***, [2005] Q.J. No. 394, para. 32

20. Similarly, an exercise of constitutional rights should not form the basis of suspicion. An individual's right to remain silent or walk away from questioning is meaningless if exercising it forms the basis of reasonable suspicion:

> PC Adams testified that if persons wish to refuse to answer questions...and simply walk away; "well that's alright - they can do that". Yet this is precisely the reason that he became "suspicious" of Mr. Ferdinand...Young people have a right to "just hang out", especially in their neighbourhood, and to move freely without fear of being detained and searched on a mere whim, and without being advised of their rights and without their consent.

Similarly, the right to oppose a search an illegal search (*Kang-Brown*), unlawful arrest (*Campbell*) would be meaningless if exercising it would provide the reasonable grounds that were absent at the outset. The presumption of innocence is similarly implicated where past investigations become the basis of current suspicion (*Nguyen*). Individuals should not be forced to sacrifice their privacy in order to exercise these other rights, even if such activity

might be deemed 'suspicious'. The U.S. Supreme Court has also held that establishing suspicion on the basis of some activities, such as 'fashion', is inimical to free expression (*Sokolow; K.W.*).

R. v. Campbell, [2005] Q.J. No. 394, para. 37; ***R. v. Ferdinand***, [2004] 21 C.R. (6th) 65 (ONSC) paras. 16, 54; ***R. v. Kang-Brown***, 2008 SCC 8, per Binnie, J., para. 92; ***R. v. K.W.***, 2004 ONCJ 351, para. 11; ***R. v. Nguyen***, 2012 ABQB 199, para. 112

21. There are additional activities that individuals should be able to undertake without becoming 'suspicious' and, hence, sacrificing their privacy. Simply travelling along pathways identified as coinciding with the 'flow of drugs' should not expose individuals to a heightened level of suspicion. Similarly, citizens of 'high crime' neighbourhoods should not automatically be suspicious merely for walking outside their homes. Such location-based metrics can inform police decisions on where to expend resources – 'where to look' – but automatically subjecting all individuals found in these locations to a higher level of suspicion is problematic. These should be excised from the reasonable suspicion analysis altogether.

R. v. Chehil, 2011 NSCA 82, para. 36; ***R. v. N.O.***, 2009 ABCA 75, para. 39-40

22. Other innocuous and innocent factors that commonly contribute to a 'reasonable' suspicion, but are problematic from a normative perspective include: driving an expensive car, owning a cellular phone or driving at the speed limit are problematic as a basis of suspicion even if some factual correlation can be established between some of these factors and drugs, it is not reasonable in a free and democratic society to label individuals 'suspicious' on the basis of such innocuous factors. While some of these indicia might contribute to the formation of a 'reasonable' suspicion, they should not be relied upon heavily in contributing to such an assessment. Further, such innocuous factors should trigger a duty to investigate and seek out exculpatory explanations, to the extent possible. Where the entire totality of circumstances amount to no more than a compilation of innocent or innocuous factors, this should not justify a privacy invasion, under any standard.

R. v. Calderon, [2004] 23 C.R. (6th) 1 (ONCA), paras. para. 73; ***R. v. Cormier***, [1995] 166 N.B.R. (2d) 5 (NBCA), para. 2; ***R. v. Payette***, 2010 BCCA 392, para. 23; ***State v. Neth***, (2008), 196 P.3d 658, (Wash. Sp. Ct.), para. 14

D. MEASURING QUALITY OF THE SNIFF

23. If a positive indication from a drug detection dog is to be treated as reasonable and probable grounds justifying a search, the accuracy of the dog in question must be demonstrated on the

record of the proceeding. This accuracy must be premised on field deployments. Field deployments provide a more accurate assessment of the extent to which a search following an indication from that specific dog achieves its objective and leads to evidence of an offence. Cross-contamination, for example, is a real-world factor that affects the strength of the sniff to evidence correlation. Whereas a 'plain view' drug sniff might strongly correlate to possession of drugs, drug detection dogs can detect the scent of drugs even when no drugs are present. Low deployment accuracy might not therefore provide sufficient reason to believe the individual in question is in possession of drugs.

R. v. Janvier, 2007 SKCA 147, para. 35; ***R. v. Morelli***, 2010 SCC 8, para. 31

E. A RIGOROUS EXCLUSIONARY RULE IS NECESSARY

24. A strong exclusionary rule remains necessary in instances where prior judicial authorization is foregone. This is to ensure law enforcement err on the side of caution not only when applying standards 'in the field', but also when deciding to employ new investigative tools that operate on the borderline of existing legal standards. As noted by Justice Binnie in *Kang-Brown*:

> The administration of justice would be brought into disrepute if the police, possessing an exceptional power to conduct a search on the condition of the existence of reasonable suspicion, and having acted in this case without having met the condition precedent, were in any event to succeed in adducing the evidence. Drug trafficking is a serious matter, but so are the constitutional rights of the travelling public. In the sniffer-dog cases, the police are given considerable latitude to act *in the absence of any requirement of prior judicial authorization*. The only effective check on that authority is the after-the-fact independent assessment.

This will encourage law enforcement to exercise caution, even in the absence of prior judicial authorization. Where there is doubt as to the adoption of a new investigative technique, law enforcement can seek confirmation by way of judicial reference. Where suspicion is borderline, a rigorous exclusionary rule will encourage law enforcement to investigate further prior to violating the privacy of individuals.

R. v. Kang-Brown, 2008 SCC 8, para. 104; ***R. v. Yeh***, 2009 SKCA 112, para. 64

PART IV – COSTS

25. CIPPIC will not seek costs and asks that no costs be awarded against it.

PART V – ORDERS SOUGHT

26. CIPPIC does not seek oral argument, but respectfully requests that the take its submissions into account in resolving the principles raised by this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of January, 2013

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PART VI – TABLE OF AUTHORITIES

Authority		Reference in Factum
	Cases	
1.	***R. v. Calderon***, [2004] 23 C.R. (6th) 1 (ONCA)	6, 14, 22
2.	***R. v. Campbell***, [2005] Q.J. No. 394	19-20
3.	***R. v. Chehil***, 2011 NSCA 82	4-5, 13, 21
4.	***R. v. Cormier***, [1995] 166 N.B.R. (2d) 5 (NBCA)	22
5.	***R. v. Cox***, [1999] 132 C.C.C. (3d) 256, 170 D.L.R. (4th) 101 (NBCA)	6, 14
6.	***R. v. Ferdinand***, [2004] 21 C.R. (6th) 65 (ONSC)	20
7.	***R. v. Grant***, 2009 SCC 32	8, 12
8.	***R. v. Janvier***, 2007 SKCA 147	23
9.	***R .v. Kang-Brown***, 2008 SCC 18	4-5, 8, 13, 15, 20, 24
10.	***R. v. K.W.***, 2004 ONCJ 351	20
11.	***R. v. Ladouceur***, 2002 SKCA 73	7, 11
12.	***R. v. MacKenzie***, 2009 SKQB 415	4, 7, 16
13.	***R. v. MacKenzie***, 2011 SKCA 64	9, 17
14.	***R. v. Morelli***, 2010 SCC 8	23
15.	***R. v. N.O.***, 2009 ABCA 75	21
16.	***R. v. Nguyen***, 2012 ABQB 199	11, 20
17.	***R. v. Noel***, 2010 NBCA 28	11
18.	***R. v. Nolet***, 2010 SCC 24	7, 11
19.	***R. v. Payette***, 2010 BCCA 392	9, 16, 22
20.	***R. v. Tessling***, 2004 SCC 67	3, 11, 18
21.	***R. v. Yeh***, 2009 SKCA 112 (SKCA *en banke*)	7, 9, 16, 17, 24
22.	***State v. Neth***, (2008), 196 P.3d 658, (Wash. Sp. Ct.)	22

23.	***U.S. v. Sokolow***, 490 U.S. 1, (U.S. Sp. Ct. 1989)	5
	Academic	
24.	**O.H. Gandy Jr. & L. Baruh**, "Racial Profiling: They Said It Was Against the Law!" (2006), 3(1) *UOLTJ* 298	19
25.	**A. Pratt**, "Between a Hunch and a Hard Place: Making Suspicion Reasonable at the Canadian Border" (2010), 19(4) *Social & Legal Studies* 461	6, 15