

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

Appellant (Respondent on Cross-Appeal)

and

JEFFREY BOGAERTS

Respondent (Appellant on Cross-Appeal)

**FACTUM OF THE PROPOSED INTERVENOR,
CANADIAN CIVIL LIBERTIES ASSOCIATION**
(Motion for Leave to Intervene)

June 28, 2019

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, Ontario M5H 4E3

Ewa Krajewska (LSO# 57704D)

Tel: 416-367-6244
Fax: 416-367-6749
Email: ekrajewska@blg.com

Alannah Fotheringham (LSO# 70882F)

Tel: 416-367-6394
Fax: 416-367-6749
Email: afotheringham@blg.com

Lawyers for the Proposed Intervenor,
Canadian Civil Liberties Association

TO: Ministry of the Attorney General
Civil Law Division
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, Ontario M7A 2S9

Daniel Huffaker (LSO# 56804F)
Tel: 416-326-4470
Fax: 416-326-4015
Email: daniel.huffaker@ontario.ca

Lawyer for the Appellant in Appeal
(Respondent in Cross-Appeal)

AND TO: Kurtis R. Andrews
P.O Box 12032 Main P.O.
Ottawa, Ontario K1S 3M1

Kurtis R. Andrews (LSO# 57974K)
Tel: (613) 565-3276
Fax: (613) 565-7192
Email: kurtis@kurtisandrews.ca

Lawyer for the Respondent in Appeal
(Appellant in Cross-Appeal)

AND TO: Arvay Finlay LLP
1710-401 West Georgia Street
Vancouver, BC V6B 5A1

Arden Beddoes (LSUC# 62108W)
Tel: 604-696-9828
Fax: 888-575-3281
Email: abeddoes@arvayfinlay.ca

Gall Legge Grant Zwack LLP
1000-1199 West Hastings Street
Vancouver, BC V6E 3T5

Benjamin Oliphant (LSUC# 66956K)
Tel.: 604-891-1181
Fax: 604-669-5101
Email: boliphant@glgzlaw.com

Lawyers for the Intervenor, Animal Justice
Canada

**AND TO: INFORMATION AND PRIVACY
COMMISSIONER OF ONTARIO**

Suite 1400, 2 Bloor Street East
Toronto, ON M4W 1A8

Stephen McCammon (LSO# 37502R)

Tel.: (416) 326-1920

Fax: (416) 325-9186

Email: stephen.mccammon@ipc.on.ca

Lawyer for the Intervenor,
Information and Privacy Commissioner of Ontario

TABLE OF CONTENTS

I. OVERVIEW	1
II. FACTS.....	2
A. The CCLA’s Background and Expertise	2
B. The CCLA’s Interest in this Appeal	3
C. The CCLA’s Proposed Submissions.....	7
III. ISSUES & ARGUMENT	8
A. The Test for Leave to Intervene.....	8
B. The CCLA Ought to be Granted Leave to Intervene.....	9
i. The Nature of the Appeal and the Issues it Raises.....	9
ii. The CCLA Will Make a Useful Contribution to this Appeal	10
IV. ORDER REQUESTED.....	11
SCHEDULE “A” – AUTHORITIES CITED.....	12
SCHEDULE “B” – STATUTES CITED.....	13

I. OVERVIEW

1. The Canadian Civil Liberties Association (“CCLA”) seeks leave to intervene in this appeal. The CCLA also seeks leave to file a factum and present oral argument at the hearing of the appeal.
2. This appeal concerns the constitutionality of certain provisions of the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O. 36 (the “*OSPCA Act*”), which granted inspectors with the Ontario Society for the Prevent of Cruelty to Animals (the “OSPCA”), a private charity, certain law enforcement and police powers. The lower court found that the impugned provisions violated section 7 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). In doing so, the lower court recognized a new principle of fundamental justice, namely that “law enforcement bodies must be subject to reasonable standards of transparency and accountability”.
3. The lower court also found that the provisions of the *OSPCA Act* granting the OSPCA certain search and seizure powers did not violate section 8 of the *Charter*.
4. This appeal raises significant questions regarding sections 7 and 8 of the *Charter*, the circumstances in which it is appropriate to recognize a new principle of fundamental justice. It also raises significant questions regarding why certain protections are necessary to defend the liberty and security of the person interests under section 7 of the *Charter*, and privacy interests under section 8 of the *Charter*, where law enforcement powers are delegated to a private body.
5. If granted leave to intervene, the CCLA will make submissions on: (i) the legal principles that inform when and why it is appropriate for the courts to recognize a new principle of fundamental justice; (ii) why, when law enforcement powers are delegated to a non-governmental body, especially in circumstances where the exercise of those powers may lead to criminal sanctions, heightened scrutiny, limits and accountability measures are necessary in order to prevent

abuse of those powers, and ensure privacy interests are protected ;and (iii) the types of scrutiny and limits that are necessary for ensuring that bodies with law enforcement powers exercise them in a constitutionally compliant manner, in particular to protect liberty and security of the person rights under section 7 of the *Charter*, and privacy rights under section 8 of the *Charter*.

II. FACTS

A. The CCLA's Background and Expertise

6. The CCLA was established in 1964. It is a leading organization dedicated to the furtherance of civil liberties across Canada. The CCLA has several thousand supporters from all parts of the country. The CCLA's membership represents a wide variety of persons, occupations, and interests.

Affidavit of Noa Mendelsohn Aviv affirmed July 2, 2019 ("Affidavit") at para. 3, Motion Record of the Canadian Civil Liberties Association ("MR"), Tab 2, p. 8.

7. The CCLA was formed with the objective of promoting respect for and observance of fundamental human rights and civil liberties. The CCLA continually seeks to defend, extend and foster the recognition of those rights and liberties through advocacy inside and outside of courts.

Affidavit at para. 4, MR, Tab 2, p. 9.

8. The CCLA's major objectives include the promotion and legal protection of individual freedom and dignity against unreasonable invasion by public authority. In recognition of its important advocacy role, the CCLA has been granted leave to intervene in many important civil liberties cases.

Affidavit at para. 5, MR, Tab 2, p. 9.

9. The CCLA is well placed to offer a broad, national, civil liberties perspective that differs from the perspectives of the parties and other intervenors. The CCLA's contribution to the

development of the law in relation to fundamental rights and freedoms and the *Charter* has been recognized on numerous occasions by the courts.

Affidavit at para. 6, MR, Tab 2, p. 9.

10. The CCLA has a distinct awareness and understanding of many aspects of civil liberties, having argued for and defended the rights of individuals on many occasions. The CCLA has been involved in the litigation of many important civil liberties issues arising both prior to and under the *Charter*. It is frequently granted intervenor status before courts and tribunals across Canada, including this Court, to present oral and written argument on civil liberties issues.

Affidavit at paras. 13-14, MR, Tab 2, p. 11.

B. The CCLA's Interest in this Appeal

11. The CCLA has an interest in safeguarding the right to life, liberty, and security of the person under section 7, and in ensuring that no one is deprived of this right in a manner that is not in accordance with the principles of fundamental justice. Likewise, the CCLA has an interest in safeguarding the right to be free from unreasonable search and seizure under section 8.

Affidavit at para. 19, MR, Tab 2, p. 12.

12. The CCLA is uniquely positioned as an intervener in this appeal due to its expertise in criminal and constitutional law, and the civil liberties dimensions within those areas. The CCLA has particular expertise on the issues raised in this appeal, namely:

- (a) the scope of the life, liberty and security of the person interests under section 7 of the Charter;
- (b) the principles of fundamental justice under section 7 of the Charter; and

- (c) the privacy interests protected under section 8 of the Charter.

Affidavit at para. 20, MR, Tab 2, p. 13.

13. The CCLA has been granted intervener or party status in many cases involving the *Charter* and civil liberties and specifically the right to life, liberty and security of the person, and the principles of fundamental justice. For example, the CCLA has intervened or participated in the following cases:

- (a) *R. v. Le*, 2019 SCC 34, concerning the application of sections 8 and 9 of the Charter to a police investigation of individuals in a private backyard;
- (b) *R. v. Mills*, 2019 SCC 22, regarding whether the state can conduct online undercover investigations by communicating with individuals under a falsified social media profile;
- (c) *R. v. Jarvis*, 2019 SCC 10, regarding whether students in a school have a reasonable expectation of privacy from being surreptitiously photographed by their teacher, within the meaning of the voyeurism offence under the *Criminal Code*;
- (d) *R v. Marakah*, 2017 SCC 59, regarding whether the sender of a text message has a reasonable expectation of privacy in the message once it is accessible on a recipient's cell phone;
- (e) *R. v. Jones*, 2017 SCC 60, concerning whether an individual has a reasonable expectation of privacy in text messages stored by a service provider;
- (f) *R. v. Saikaley*, 2017 ONCA 374, concerning the proper interpretation of the *Customs Act* in relation to the warrantless search of cell phones (or other electronic devices) of anyone entering Canada;

- (g) *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, concerning the impact of provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and associated regulations, on solicitor-client privilege and whether these provisions unjustifiably violate s. 7 of the *Charter*;
- (h) *R v. Fearon*, 2014 SCC 77, concerning the scope of the police power to search incident to arrest and whether it extends to a warrantless search of personal electronic devices;
- (i) *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, concerning the challenge of the *Immigration and Refugee Protection Act* and the named person's ability to know and meet the case against him, in accordance with the s. 7 guarantee of a right to a fair process;
- (j) *R v. Nur*, 2015 SCC 15, *R v Nur*, 2013 ONCA 677 and *R v Nur*, 2011 ONSC 4874, concerning the challenge of mandatory minimum sentencing provisions on the basis of ss. 7, 12, and 15 of the *Charter*;
- (k) *R. v. Fearon*, 2014 SCC 77, concerning the scope of the police power to search incident to arrest and whether it extends to a warrantless search of personal electronic devices;
- (l) *R. v. Vu*, 2013 SCC 60, concerning the scope of the police authority to search computer and other personal electronic devices found within a place for which a warrant to search has been issued;
- (m) *Telus v. Her Majesty the Queen*, 2013 SCC 16, concerning the interpretation of the *Criminal Code's* interception provisions and whether the authorizations in a General Warrant and Assistance Order are sufficient to require a cell phone company to forward copies of all incoming and outgoing text messages to police;

- (n) *R v. Smickle*, 2013 ONCA 678, concerning the constitutionality of s. 95(2)(a)(i) of the *Criminal Code*;
- (o) *R. v. Ipeelee*, 2012 SCC 13, concerning the application of sentencing principles to aboriginal offenders;
- (p) *R. v. NS*, 2012 SCC 72, concerning a Muslim woman's right to wear a niqab while testifying due to her sincere religious beliefs and in light of the guarantee of a fair trial the right to make full answer and defence under ss. 7 and 11(d) of the *Charter* (written submissions only);
- (q) *R v. Khawaja*, 2012 SCC 69, concerning the constitutionality of several of the *Criminal Code* provisions concerning terrorist activities;
- (r) *R. v. Cole*, 2012 SCC 53, examining an employee's reasonable expectation of privacy in employer-issued computers and the application of s. 8 to police investigations at an individual's workplace;
- (s) *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, concerning the constitutionality of the *Criminal Code* provisions prohibiting various activities associated with prostitution on the basis of ss. 2(b) and 7 of the *Charter*;
- (t) *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, concerning the Minister of Health's decision to refuse Insite, a supervised safe injection site, an exemption from the prohibitions on the possession and trafficking of controlled substances under s. 56 of the *Controlled Drugs and Substances Act*;

- (u) *Toussaint v. Attorney General of Canada*, 2011 FCA 213, concerning whether a person living in Canada with precarious immigration status has the right to life-saving healthcare under s. 7 of the *Charter*;
- (v) *R. v. Gomboc*, 2010 SCC 55, concerning the constitutionality of police conducting warrantless searches of private dwelling house using real-time electricity meters;
- (w) *Prime Minister of Canada, et al. v. Omar Ahmed Khadr*, 2010 SCC 3, concerning *Charter* obligations to Canadian citizens detained abroad and the appropriateness of *Charter* remedies in respect to matters affecting the conduct of foreign relations;
- (x) *R v. Nasogaluak*, 2010 SCC 6, concerning mandatory minimum sentences in the context of s. 255(1) of the *Criminal Code*.

Affidavit at para. 21, MR, Tab 2, pp. 13-17.

14. Accordingly, the CCLA is well placed to offer a broad, national, civil liberties perspective that differs from the perspectives of the parties and other interveners.

Affidavit at para. 22 MR, Tab 2, p. 17.

C. The CCLA's Proposed Submissions

15. If granted leave to intervene, the CCLA proposes to focus its submissions on:
- (a) The legal principles that inform when and why it is appropriate for the Courts to recognize a new principle of fundamental justice;
 - (b) Why, when law enforcement powers are delegated to a non-governmental body, especially in circumstances where the exercise of those powers may lead to criminal

sanctions, heightened scrutiny, limits and accountability measures are necessary in order to prevent abuse of those powers, and ensure privacy interests are protected;

- (c) Types of scrutiny and limits that are necessary for ensuring that bodies with law enforcement powers exercise them in a constitutionally compliant manner, in particular to protect liberty and security of the person rights under section 7 of the *Charter*, and privacy rights under section 8 of the *Charter*. Such limits include for example, in appropriate circumstances, *ex ante* oversight of the exercise of these powers.

Affidavit at para. 17, MR, Tab 2, pp. 11-12.

III. ISSUES & ARGUMENT

16. The only issue on this motion is whether to grant the CCLA leave to intervene in this appeal.

A. The Test for Leave to Intervene

17. The CCLA seeks leave to intervene as a friend of the court pursuant to Rule 13.03.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 13.03, Schedule “B” to this Factum.

18. The factors to be considered in determining whether an application for leave to intervene should be granted are:

- (a) The nature of the case;
- (b) The issues that arise; and
- (c) The likelihood that the proposed intervenor will be able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 1990 CarswellOnt 393 at para. 10, Brief of Authorities of the Canadian Civil Liberties Association (“BOA”), Tab 1.

Jones v. Tsige (2011), 2011 CarswellOnt 13217 (C.A.) at para. 22, BOA, Tab 2.

19. In public interest cases – particularly those involving the *Charter* – this Court has relaxed the traditional rules to allow for participation by intervenors who meet at least one of the following three criteria:

- (a) The proposed intervenor has a substantial and identifiable interest in the subject matter of the proceedings;
- (b) The proposed intervenor has an important perspective distinct from the immediate parties; or
- (c) The proposed intervenor is a well-recognized group with a special expertise and a broadly identifiable membership base.

Bedford v. Canada (Attorney General), 2009 ONCA 669 at para. 2, BOA, Tab 3.

B. The CCLA Ought to be Granted Leave to Intervene

20. The CCLA submits that the nature of the case, the issues it has raised, and the useful contribution the CCLA will make to the resolution of the issues on this appeal militate in favour of granting the CCLA leave to intervene. The CCLA further submits that it meets all three of the criteria set out by this Court in *Bedford v. Canada*, as the CCLA has an identifiable interest in the subject matter of this appeal, an important perspective distinct from the parties, and a broad membership consisting of a wide variety of persons, occupations, and interests.

i. The Nature of the Appeal and the Issues it Raises

21. This appeal raises significant questions of importance to the public regarding the application of the *Charter* to the actions of a private regulatory body exercising law enforcement and police

powers. How such bodies must protect individual privacy interests, and whether or not such bodies are subject to a principle of fundamental justice requiring transparency and accountability will have a significant impact on the public and their interaction with such organizations. The fact that Mr. Bogaerts was granted public interest standing in this case also demonstrates that the issues in this appeal transcend the immediate interests of the parties.

ii. The CCLA Will Make a Useful Contribution to this Appeal

a. The CCLA's Substantial and Identifiable Interest

22. As explained above, the CCLA has a long history of involvement in cases concerning sections 7 and 8 of the *Charter* and the principles of fundamental justice. The issues in this appeal – particularly the extent of privacy protections, and the implications of the novel principle of fundamental justice recognized by the lower court – are of vital interest to the CCLA and its efforts to defend and promote the recognition of fundamental human rights and freedoms. Accordingly, the CCLA has a real and substantial interest in these proceedings.

b. The CCLA's Distinct Perspective

23. The CCLA's submissions will differ from that of the immediate parties to the application. The CCLA will offer a broad, civil liberties perspective to the issues in dispute, and will offer this Court valuable submissions relating to the wider rationale for and appropriate scope of the new principle of fundamental justice recognized by the lower court; a well-founded perspective on the need for enhanced scrutiny of non-governmental bodies; as well as proposals for types of scrutiny and limits necessary to ensure that a body with law enforcement powers exercises these in a constitutionally compliant manner.

c. The CCLA has Special Expertise on Sections 7 and 8 of the *Charter* and has a Broad Membership Base

24. As outlined above, the CCLA has extensive experience as an intervenor and party advocating with respect to issues arising under sections 7 and 8 of the *Charter*. It also has a broad membership in the form of thousands of supporters drawn from communities across the country.

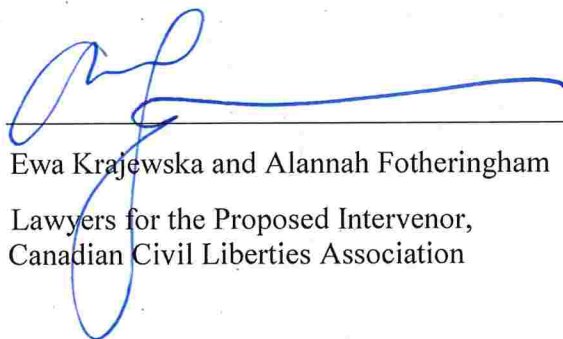
25. If granted leave to intervene, the CCLA will not cause prejudice to the parties. The CCLA will not add to the record, or widen the issues before this Court. Rather, it will offer a unique perspective and analysis of the legal issues before the Court.

IV. ORDER REQUESTED

26. The CCLA respectfully requests that it be granted leave to intervene as a friend of the court, be permitted to file a factum not exceed 15 pages in length, and be permitted to present oral argument at the hearing of this appeal.

27. The CCLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of June, 2019.



Ewa Krajewska and Alannah Fotheringham
Lawyers for the Proposed Intervenor,
Canadian Civil Liberties Association

SCHEDULE “A” – AUTHORITIES CITED

1. *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 1990 CarswellOnt 393
2. *Jones v. Tsige* (2011), 2011 CarswellOnt 13217 (C.A.)
3. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, 2009 CarswellOnt 5572

SCHEDULE “B” – STATUTES CITED

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 13.03

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (1); O. Reg. 292/99, s. 4; O. Reg. 186/10, s. 2; O. Reg. 82/17, s. 16.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1; O. Reg. 82/17, s. 16.

Court File No.: C66542

THE ATTORNEY GENERAL OF ONTARIO

Appellant in Appeal
(Respondent in Cross-Appeal)

-and-

JEFFREY BOGAERTS

Respondent in Appeal
(Appellant in Cross-Appeal)

COURT OF APPEAL FOR ONTARIO

**FACTUM OF THE PROPOSED
INTERVENOR, CANADIAN CIVIL
LIBERTIES ASSOCIATION**

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, Ontario M5H 4E3

Ewa Krajewska (LSO# 57704D)

Tel: 416-367-6244
Fax: 416-367-6749
Email: ekrajewska@blg.com

Alannah Fotheringham (LSO# 70882F)

Tel: 416-367-6394
Fax: 416-367-6749
Email: afotheringham@blg.com

Lawyers for the Proposed Intervenor,
Canadian Civil Liberties Association