

Court of Appeal File No. C66542  
Superior Court File No. 749/13

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

Appellant

and

JEFFREY BOGAERTS

Respondent

**NOTICE OF MOTION OF THE RAILWAY ASSOCIATION OF CANADA  
(Motion for Leave to Intervene)**

The moving party, the Railway Association of Canada, will make a motion in writing to the Honourable Associate Chief Justice, on a date to be set, at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5.

**PROPOSED METHOD OF HEARING:** The motion is to be heard in writing as an unopposed motion under subrule 37.12.1(1).

**THE MOTION IS FOR:**

1. An order granting the Railway Association of Canada (“**RAC**”) leave to intervene as a friend of the court in this appeal.
2. An order that RAC shall be entitled to serve a factum in the appeal not to exceed 15 pages in length by August 16, 2019 or within any schedule that is ordered by the court for the delivery of materials for the appeal.

3. An order that by September 13, 2019, or within any schedule that is ordered by the court for the delivery of materials for the appeal, the appellant and the respondent shall be entitled to serve a factum in reply to the interveners' facta.
4. An order that RAC may present oral argument at the hearing of the appeal for a time equal to that which has been granted to the other interveners or on such other terms as ordered by the court.
5. An order that RAC shall not raise new issues or adduce further evidence or otherwise supplement the record of the parties.
6. An order that RAC shall consult with the other interveners to avoid repetition in the interveners' facta and oral arguments.
7. An order that the parties may serve the appeal books and compendium and exhibit book and their facta and books of authorities on RAC by delivering an electronic copy by email or file-sharing application.
8. An order that RAC will serve its factum and book of authorities by delivering an electronic copy by email or file-sharing application.
9. An order that RAC will not seek, nor will they be subject to, any award of costs including the costs of the motions for leave to intervene.

**THE GROUNDS FOR THE MOTION ARE:**

1. Established in 1917, RAC is one of Canada's leading trade associations representing nearly 60 freight and passenger railway companies in Canada, including Canadian National Railway Company ("CN") and Canadian Pacific Railway Company ("**Canadian Pacific**").
2. RAC conducts research, develops policy, and advocates on behalf of its membership and for the benefit of Canadian railways generally. Railway safety has been and continues to be central to RAC's advocacy efforts. Safety is an important public good in and of itself and is also a critical part of the sustainability and growth of the rail sector.
3. To protect their people, property, and resources, and to ensure the safety and security of the communities that they serve, two of RAC's members, CN and Canadian Pacific each operate, at arm's length, a law enforcement agency; the CN Police Service and the Canadian Pacific Police Service, respectively.
4. Railway policing has existed since before Confederation and constables have been appointed under federal legislation for this purpose since at least 1919. Contemporary railway policing is governed by Part IV.1 of the *Railway Safety Act*, R.S.C. 1985, c. 32, legislation which is administered by Transport Canada.
5. Railway police constables exercise their authority pursuant to the *Railway Safety Act* and are "peace officers" within the meaning of section 2 of the *Criminal Code*. They enforce Part III of the *Canada Transportation Act* and federal and provincial laws "in so far as their enforcement relates to the protection of property owned, possessed or administered by a railway company and the protection of persons and property on that property."

Under section 44(3) of the *Railway Safety Act*, railway police constables have jurisdiction “on property under the administration of the railway company and in any place within 500m of property that the railway company owns, possesses or administers.”

6. Under section 44(1) of the *Railway Safety Act*, only a judge of a superior court is allowed to appoint or discharge railway police constables in their capacity as peace officers.
7. Under section 44.1(1) of the *Railway Safety Act*, CN and Canadian Pacific are obligated to establish and implement procedures for receiving and dealing with complaints concerning their police constables. The railway companies must each file a copy of their procedures for addressing complaints with Transport Canada and must implement the ministry’s recommendations, including any regarding publication of the procedures.
8. Over their long history, railway police services have developed various internal policies and procedures related to investigations, search and seizures, and access to information.
9. RAC has a real, substantial, and identifiable interest in the subject matter of this appeal. If upheld as is, the decision of the court below will have knock-on effects which extend beyond the Ontario Society for the Prevention of Cruelty to Animals (the “OSPCA”). The disposition of this appeal will have serious and significant impacts on long-established railway law enforcement agencies and their ability to exercise lawful policing powers.
10. RAC would make an important contribution to this appeal, distinct from the parties and other (proposed) interveners. RAC’s submissions would offer a comparative context to aid in the Court’s assessment of the purpose and structure of statutory policing models.

RAC could describe the specific and different transparency and accountability mechanisms which are embedded in railway policing, including statutory protections and oversight by the federal government and the courts.

11. If RAC is granted leave, it intends to make submissions on the following issues:

- ***Whether section 7 of the Charter is intended to be triggered when someone is simply exposed to the possibility of having lawful police powers exercised against them.***

Lowering the bar to section 7 may invite improper speculation as to whether Part IV.1 of the *Railway Safety Act* could eventually lead to a deprivation of anyone's liberty, simply because the legislature has authorized railway constables to exercise police powers. This could undermine any legitimate law enforcement action taken by officers who play a key role in a regulatory regime designed to promote public safety. The laws that railway police services enforce under the *Canada Transportation Act* and the *Criminal Code* are always open to Charter scrutiny, as are the actions of individual police constables when engaging in search and seizure, arrest or detention activities.

- ***Whether the new principle of fundamental justice provides a manageable standard or asks the courts to engage in a policy-making exercise.*** The transparency and accountability mechanisms identified by the lower court may not be applicable to every public body and law enforcement agency. Railway policing services have different checks and balances in place. The new principle of fundamental justice may require courts to weigh and rank markers of transparency and accountability and to decide how much transparency and accountability is sufficient to allow the exercise of otherwise-lawful police powers.

- ***Whether the decision under appeal, if upheld, should be strictly limited to the particular circumstances of the OSPCA.*** The statutory protections in place and the oversight provided by both the federal government and the courts ensure substantial transparency and accountability within railway policing.
12. RAC intends its submissions to be brief and focused on the specific issues described above that transcend the parties' immediate interests. It will seek to avoid duplication of submissions made by the parties or the other interveners.
  13. RAC does not seek to file any further evidence.
  14. RAC would seek no costs in the proposed intervention and would ask that no costs be awarded against it, including the costs of the motion for leave to intervene.
  15. No prejudice will arise from the intervention of RAC in the appeal, and its participation is the interest of the parties and the court.
  16. Neither the appellant nor the respondent opposes RAC's motion for intervener status provided specific terms are ordered. These terms have been incorporated into the order sought on this motion.
  17. Rules 13, 37, 39 and 61 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

1. Affidavit of Tanis Peterson, sworn July 12, 2019.

July 12, 2019

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