SCC File No.: 37971

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TOM LE

Appellant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

and

DIRECTOR OF PUBLIC PROSECUTIONS, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, CANADIAN MUSLIM LAWYERS ASSOCIATION, FEDERATION OF ASIAN CANADIAN LAWYERS AND THE CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC, CANADIAN CIVIL LIBERTIES ASSOCIATION, SCADDING COURT COMMUNITY CENTRE, JUSTICE FOR CHILDREN AND YOUTH, URBAN ALLIANCE ON RACE RELATIONS, CANADA WITHOUT POVERTY, THE CANADIAN MENTAL HEALTH ASSOCIATION MANITOBA AND WINNIPEG, THE ABORIGINAL COUNCIL OF WINNIPEG, INC., AND END HOMELESSNESS WINNIPEG INC.

Interveners

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada

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I. OVERVIEW AND STATEMENT OF FACTS

1. The constitutional questions in this appeal concern the ability of low-income, racialized persons to receive substantively equal access to the protections afforded under ss. 8 and 9 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

2. As foundational rights governing state-civilian interactions, ss. 8 and 9 must be interpreted with regard to other fundamental *Charter* values, including equality. This case requires the Court to address the way *Charter* principles apply to privacy and detention claims for individuals from racialized, low-income, or otherwise marginalized communities. A purposive interpretation of ss. 8 and 9 requires consideration of the effects of inequality and systemic racism on *Charter*-protected interests, including liberty, autonomy, and dignity. The Canadian Civil Liberties Association (the "CCLA") respectfully submits that the application of the frameworks set out in *R. v. Edwards*,[1] and *R. v. Grant*, [2] and their progeny, have allowed for uneven invasions of privacy and disproportionately heavy policing along the lines of socioeconomic status, race, and other *Charter*-protected grounds. Interpreted purposively and in accordance with *Charter* values, individuals should be entitled under ss. 8 and 9 to a substantively equal zone of privacy and freedom in which all people in Canada are able to move freely and with relative anonymity without unnecessary supervision or intrusion from the state.

3. The CCLA makes no submissions on the facts of these appeals.

II. POSITION ON QUESTIONS IN ISSUE

4. The CCLA submits the following:

i. The recognition of the reasonableness of shared, non-exclusive expectations of privacy amongst individuals vis-à-vis the state—regardless of the affluence of the individual or her home—is fundamental to the aspirational values underlying s. 8's purpose.

ii. In determining when a s. 9 detention has taken place, further guidance is needed under the *Grant* analysis, particularly with respect to state-civilian

[1] *R. v. Edwards*, [1996] 1 S.C.R. 128 ("*Edwards*").
[2] *R. v. Grant*, [2009] 2 S.C.R. 353 ("*Grant*").

interactions involving racialized and marginalized persons. It should be recognized that when officers use accusatory language with an individual, question racialized or marginalized individuals, or violate fundamental rights, the state has an intimidating effect that interferes with liberty within the meaning of s. 9.

III. STATEMENT OF ARGUMENT

A. The uneven gaze of state surveillance

5. It is well established that *Charter* rights must be interpreted in a manner sensitive to the context of a particular rights holder, and in a way that coheres with other fundamental *Charter* values, including substantive equality. This Honourable Court held that the *Charter* "should be interpreted in a way that maintains its underlying values and its internal coherence."[3] This approach is intended to ensure that all individuals are treated equally under the law, and have substantive access to *Charter* protections, regardless of their background, race, or socioeconomic status.

6. To delineate s. 8 protection in accordance with *Charter* values, it is important to recognize the intersectionality between economic inequality and the historical disadvantage that is experienced by groups protected by s. 15 of the *Charter*, including racialized communities.[4] If s. 8 is applied such that socioeconomically disadvantaged communities are disproportionately subjected to uninvited drop ins, casual surveillance, and further searches through questioning inside a private home or yard,[5] it perpetuates the disadvantage experienced by racialized communities and other *Charter*-protected groups by eroding equal access to the fundamental freedoms that privacy enables.[6] Lauwers J.A. in his dissent exposes the practical effect of such an erosion: "I doubt that the police would have brazenly entered a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community."[7]

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[3] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at paras. 80-86; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451: The "*Charter* should be construed as a coherent system" (at p. 561).

[4] Government of Canada, "Towards a Poverty Reduction Strategy: A backgrounder on poverty in Canada" October 2016; Government of Canada, National Council of Welfare Reports: "Poverty Profile: Special Edition" (2012) ("In two of Canada's largest cities, more than half of all persons living in poverty were from racialized groups: 58% in Vancouver; and 62% in Toronto").

[5] *R. v. Mellenthin*, [1992] 3 S.C.R. 615 ("*Mellenthin*").

[6] *R. v Dyment*, [1988] 2 S.C.R. 417, at p. 427: "privacy is at the heart of liberty in a modern state." It is "integral to individual flourishing and diversity": *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 26

[7] *R. v. Le*, 2018 ONCA 56, at para. 76 ("*Le* Appeal Decision") at para. 162.

7. Writing extra-judicially, the Hon. Justice Rosenberg described the unfinished evolution of *Charter* jurisprudence for racialized and socioeconomically disadvantaged communities:

> Most state-citizen searches occur outside the scrutiny of the *Charter* through so-called consent searches and searches incident to detention and arrest. We have … found it difficult to find a principled approach to the impact of systemic racism on the exercise of all police powers, including the search power, or to the effect of poverty and homelessness on security from unreasonable search and seizure. The protection against unreasonable search and seizure operates most robustly in the context of a police raid on a suburban dwelling.
>
> That constitutional guarantee is least effective in protecting the poor in public housing from unwarranted police intrusion. It appears to be, unfortunately, more of a challenge to apply the elaborate protections surrounding a dwelling-house adage to the corridors of a rundown apartment building and the cardboard boxes and sleeping bags of the homeless living on subway grates.[8]

8. The CCLA respectfully submits that the application of the *Edwards* test is one of the root causes of the prevalence of systematically uneven invasions of privacy. Applying a property and control-centric analysis, judges apply the *Edwards* test in ways that tend to discriminate based on socioeconomic status.[9]

9. The repeated references to the backyard's broken gate at trial and on appeal in this case is symptomatic of how *Edwards* is applied in a manner that is discordant with s. 8's purpose.[10] *Charter* protection should not only be afforded to those who can erect high fences and pay for expensive security. Neither the trial judge nor the majority of the Court of Appeal recognize that the fencing and security available in low-income community housing will not likely be the same as in a private condominium tower or a home in a suburban neighbourhood.

10. The scope of s. 8 protection is defined normatively and contextually.[11] It protects all individuals against unreasonable interference *by the state*. An ownership stake or possessory

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[8] Hon. Marc Rosenberg, "Twenty-Five Years Later: The Impact of the *Canadian Charter of Rights and Freedoms* on the Criminal Law" (2009) 45 Sup. Ct. L. Rev. (2d).

[9] The CCLA adopts the position of the Criminal Lawyers' Association with regards to the need to interpret the *Edwards* test in light of recent jurisprudence and to reject risk-based analysis.

[10] *R. v. Le*, 2014 ONSC 2033 ("*Le* Trial Judgment"), at paras. 14-15, 70, 76; *Le* Appeal Decision, *supra* note 7, majority reasons, at paras. 14 and 86.

[11] *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841: "…privacy is not a right tied to

interest in property was not intended to be determinative by the *Edwards* court.[12] In fact, the *presence* of the claimant "at the time of the search" was the first factor set out in the analysis.[13]

11. Indeed, the normative basis for recognizing s. 8 protection against state intrusion has been recognized even for claimants who share private space with others and lack the ability to regulate access. However, courts have only recognized this form of s. 8 protection in buildings that feature the hallmarks of affluence. S. 8 protection is recognized in shared areas of affluent buildings,[14] but not, for example, in an apartment that was too "small"[15] or in the case at bar. The CCLA submits that there is no principled reason why an invited guest in a private space who is present at the time of an unlawful police entry should be denied s. 8 protection, while a condominium owner who shares the space with neighbours and their guests retains s. 8 protection in that common area.[16]

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property, but rather a crucial element of individual freedom which requires the state to respect the dignity, autonomy and integrity of the individual" (at para. 19).

[12] S. 8 protects "people and not places": *Edwards*, *supra* note 1 at paras. 29, 45.

[13] *Ibid* at para. 45. One may query who else was contemplated under this factor besides guests, given the presence of a rightful occupant has not been a prerequisite to s. 8 protection.

[14] *R. v. Wong*, [1990] 3 S.C.R. 36 (recognizing that *all* persons behind the door of a room in a "major downtown hotel" had a reasonable expectation of privacy, regardless of who paid for the room); *R. v. White*, 2015 ONCA 508 (recognizing a reasonable expectation of privacy even in the common areas of a private condominium tower, despite police entry through a broken door); *R. v. Lindsay*, 2015 ONSC 1369, at paras. 104-109 (recognizing a privacy interest in a shared backyard because it was not in a large apartment complex shared by many residents); *R. v. Douale*, 2016 ONSC 3912, at para. 49 (recognizing s. 8 protection for the common area of a condominium due to the presence of security system "to protect the privacy interests of the residents").

[15] *R. v. Reid*, 2016 ONCA 944, at para. 12. See also, *R. v. Harris*, 2018 ONSC 4298 at paras. 32-40 (where s. 8 protection was denied in the common area of a condominium because the claimant was only a renter and not the owner of his unit).

[16] CCLA adopts the position of the Criminal Lawyer's Association in paragraphs 8-9 with respect to the basis on which invited guests might reasonably have a reasonable expectation of privacy in a location legally controlled by their host.

12. The impact of intrusive state conduct is relevant to shaping s. 8 protection.[17] This Court held in *Weatherall v. Canada (Attorney General)*, that as a result of "historical, biological, and sociological differences," one individual may find the same search by the state to be "different and more threatening" than another.[18] It is this nexus between inequality and the attendant effects of an invasion of privacy for individual dignity, freedom and liberty that informs the CCLA's submission. Extending the recognition of shared, non-exclusive expectations of privacy to less affluent communities is vital to the aspirational purpose of s. 8 and the *Charter* value of equality. Everyone should be entitled to an equal zone of privacy in which they are able to move freely and with relative anonymity without unnecessary supervision or intrusion from the state.

B. Double trouble: Police questioning in the course of an unlawful entry

13. As s. 8 protection is a precursor to the meaningful exercise of other fundamental *Charter* rights and freedoms,[19] a discriminate application also results in unequal access to fundamental freedom. The interwoven effects of state conduct vis-à-vis ss. 8 and 9 are instructive.[20] In *R. v. Mellenthin*, this Honourable Court held that questioning an individual during an unlawful search contributed to a violation under s. 8.[21] The state cannot be enabled to conduct a non-consensual entry into a zone of privacy to question the guests inside and elicit their personal information and associations. However, in focusing on property-based and control-centric factors, the framework in *Edwards* could be seen as enabling the state to do just that. As *Edwards* has been applied, an officer who unlawfully intrudes into a private home or yard and finds out "who lives here?", may conclude that a *Charter* remedy for a s. 8 breach would not be available to any guests who are investigated inside.

14. Under s. 9, it is difficult to conceive of this scenario as a voluntary police encounter: where could a person "walk away" to if the uninvited interaction takes place inside a private home or

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[17] *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 at para. 19: "The degree of privacy which the law protects is closely linked to the effect that a breach of that privacy would have on the freedom and dignity of the individual."
[18] *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 at 877.
[19] *Supra* notes 6 and 11; *A.M. v. Ryan*, [1997] 1 S.C.R. 157 at 79-81.
[20] Hon. Justice Casey Hill, "Investigative Detention: A Search/Seizure by Any Other Name?" (2008), 40 Sup. Ct. L. Rev. (2d) 179.
[21] *Mellenthin supra* note 5.

yard? To an individual present, it matters not whether the police breached their own *Charter* right or the right of a friend. It is the apprehension of the breach that is significant. Reasonable individuals would understandably be intimidated by the fact that an officer had just demonstrated an absence of compunction about violating the *Charter*.

C. The unequal right to freedom

> I felt very embarrassed, angry, shocked and hurt. I had never been put through this kind of confrontation in front of others. … I am still shaken about it. As I type, my hands are shaking. (T.S.)[22]

15. Most people in Canada can relate to the fear and intimidation of a confrontation with a police officer or state agent in an uninvited interaction. Being pulled over when driving, questioned in an accusatory manner by customs agents, or challenged by an armed officer whose conduct is unprofessional, are examples of experiences that most would prefer to avoid, even among individuals with access to resources and/or legal knowledge. In the face of uncertain risk, it is commonplace to feel rationally compelled to engage the officer rather than assert one's rights, seek clarification, or walk away. More than mere nuisance, police encounters can lead to fear, frustration, humiliation, and denigration, or in some cases escalation and more serious consequences.

16. The majority and dissenting reasons of the Court of Appeal engage the need for clarification as to what constitutes detention for the purposes of s. 9. Some courts, including this Honourable Court in *Grant*, have adverted to a general category of state-civilian interactions known as "community policing" or here, "street-level encounters."[23] Given that there are no *Charter*-free zones in Canada, the creation of this general category does not remove these interactions from *Charter* scrutiny. If the goal of our *Charter*'s s. 9 is to protect all individuals from arbitrary interference with freedom, a contextual analysis must be applied to ensure that systemic discrimination does not inequitably erode this freedom.

17. In *Grant*, this Court held that an individual's status as a visible minority is relevant to whether a reasonable person in the individual's circumstances was psychologically detained.[24] The

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[22] Ontario Human Rights Commission, "Paying the Price: The Human Cost of Racial Profiling," 2003, at pp. 13 and 43 ["Paying the Price"].
[23] *Le,* Appeal Decision, *supra* note 7**,** at para. 63 *per* Doherty J.A.; *Grant*, *supra* note 2 at para. 39.
[24] *Grant*, *supra* note 2 at para. 44.

inclusion of this factor was not an empty gesture. It was intended to have meaning. It recognizes that it is an unequally held privilege to be free to go about one's business without such interference, to feel physically safe from police use of force, and to feel secure that one's legal rights will be respected on the occasion when one is faced with a police encounter.

18. In the context of policing, it is well recognized that individuals from racialized, low-income, and other marginalized communities[25] are subject to far greater police scrutiny through interactions such as uninvited drops ins, unprompted questioning, spot checks, and carding, as compared to other communities who are rarely if ever subjected to systemic suspicion based on their personal characteristics. The "low-visibility"[26] nature of police stops creates a critical need for guiding oversight, as many encounters occur with "innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear."[27]

19. The existence of systemic racism in the criminal justice system has long been recognized.[28] In *R. v. Spence*, this Honourable Court held that

> racial prejudice against visible minorities is so notorious and indisputable that its existence will be admitted without any need of evidence. Judges have simply taken 'judicial notice' of racial prejudice as a social fact not capable of reasonable dispute.[29]

20. The Respondent Crown asserts that "[i]f the line for detention can be too easily crossed, the ability of police to engage in community policing would be impaired."[30] The Respondent has provided no evidence or legal support for this proposition. The Respondent also fails to consider the relevance of systemic racism on the s. 9 analysis in any respect. The disproportionate policing

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[25] This includes individuals who are Indigenous, are members of the LGBTQ community, are homeless, appear to have mental health or substance use issues; and/or any intersections thereof.

[26] *R v Mann*, [2004] 3 S.C.R. 59 at para 18.

[27] *Brinegar v. United States* (338 U.S. 160 (1949) at 181 (diss.)), *per* Jackson J.

[28] Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) ["Systemic Racism Report"].

[29] *R. v. Spence*, [2005] 3 S.C.R. 458 at para. 5. See also: *R. v. Brown*, 64 O.R. (3d) 161 (C.A.), at para. 9; *R. v. Golden*, [2001] 3 S.C.R. 679, at para. 83; *R. v. R.D.S.*, [1997] 3 S.C.R. 484, at para. 47; *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont. C.A.), at para. 54.

[30] Respondent's Factum, at para. 77.

of Black, Asian, and Indigenous individuals has led to police mistrust and a "sense of crisis,"[31] which is only worsened by recognized occurrences of racial profiling and unlawful use of force against racialized individuals.[32] Even after the release of *Grant*, the systematic elicitation by police of personal information in Toronto occurred disproportionately among Black individuals.[33]

21. The recognition of the contextual relevance of systemic racism is thus vital to ensuring that all individuals receive equal protection against arbitrary interference with liberty under s. 9. An individual encounter with police cannot be divorced from its broader context. Systematic and disproportionate interferences with liberty, particularly within racialized communities, have well recognized consequences for the liberty, self-worth, and personal dignity of individuals who are stopped in that community.[34] For members of heavily policed communities, each encounter carries with it uncertainty and at least a theoretical risk of lack of professionalism, abuse of power, escalation, charges, or use of force. In such circumstances, confronting police, asserting one's lack of consent, or even asking questions reasonably may not be regarded as a choice. Refraining from taking those steps is not a demonstration of consent.

22. Now almost ten years after *Grant* was decided, this appeal serves as an important opportunity to clarify the framework for psychological detention. The articulation of certain clear categories and principles around the meaning of detention under s. 9 would assist in providing officers with guidance so that all individuals have equally meaningful access to this right. This guidance would also assist police officers who cannot know what is in the mind of an individual

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[31] Race Relations and Policing Task Force, *The Report of the Race Relations and Policing Task Force* (Toronto, 1989) at 15-16; Hon. Michael H. Tulloch, "Report of the Independent Police Oversight Review" (Toronto: Queen's Printer for Ontario, 2017) at para. 12; LogicalOutcomes, "'This Issue Has Been with Us for Ages': A Community-Based Assessment of Police Contact Carding in 31 Division: A Final Report" (2014) at 1.

[32] *Elmardy v. Toronto Police Services Board*, 2017 ONSC 2074 (Div. Ct.); *Phipps v. Toronto Police Services Board*, 2009 HRTO 877; *R. v. Neyazi*, 2014 ONSC 6838; *McKay v. Toronto Police Services Board*, 2011 HRTO 499; *R. v. Byrnes*, 2018 ONCJ 278.

[33] Ontario Human Rights Commission, "Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario" (2017) at 32.

[34] Paying the Price, *supra* note 22; Scot Wortley & Akwasi Owusu-Bempah, "The Usual Suspects: Police Stop and Search Practices in Canada" (2011) 21 Policing and Society 395; Carol Tator, Frances Henry, Charles Smith & Maureen Brown, *Racial Profiling in Canada: Challenging the Myth of 'A Few Bad Apples'* (Toronto: University of Toronto Press, 2006) at 76.

prior to questioning,[35] and who may wish to meaningfully engage communities without further eroding trust through unwanted, uninvited encounters. The CCLA thus submits the following:

i. ***Police initiated stops to elicit personal information or interrogate*:** When an officer initiates an encounter and employs inquisitorial or accusatory language, such accusatory language and questioning amounts to detention under s. 9. This includes accusatory questions to elicit incriminating information. As recognized by Lauwers J.A., this also includes casually intimidating questions that become coercive in the context of an imbalance of power, such as: Who are you? What are you doing? Where you are going?;

ii. ***Police initiated stops of racialized and/or marginalized individuals***: A presumptive category of detention should be recognized within the context of systemic racism and public distrust, as described above. Where officers initiate an encounter with a racialized, marginalized, or vulnerable individual (including for example youth), it must be recognized that the state has a presumptively coercive and intimidating effect that interferes with liberty within the meaning of s. 9.

iii. ***Charter* violation:** Where the police encounter originates from a violation of the *Charter* (such as an unlawful entry into a zone of privacy), the reasonably apprehended breach itself interferes with liberty. The encounter is fundamentally coloured by the reasonable uncertainty as to whether there are lawful circumstances that justify such state conduct, or whether the state has disregarded the *Charter* with no apparent concern for the individual's rights, causing them to fear further consequences if they attempt to end the encounter.

iv. ***Uncertainty:*** An individual's liberty may be restricted not only by *certainty* that one is detained by the state, but also by *uncertainty* as to whether one must stay for *fear* of the consequences of walking away.[36] Such unnerving anxiety renders the interaction contextually oppressive.

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[35] Stephen Penney & James Stribopolous, '"Detention' under the *Charter* after *R. v. Grant* and *R. v. Suberu*," (2010), 51 Sup. Ct. L. Rev. (2d) 439.
[36] *Supra* para. 21.

v. ***Duration:*** The brevity of a detention, given its accompanying sting of discrimination, stigma and humiliation, does not detract from the weight of the injury caused to an individual from a heavily policed race or community. Like a storefront sign that reads, "No Blacks/Jews/Gays," the damaging effect of the message occurs within only a moment, but strikes at the core of individual dignity. The interference with freedom is painful and immediate.

23. Recognizing the presumptive interference with liberty that occurs when vulnerable individuals are stopped is consistent with the purpose of s. 9 and *Charter* values. Ensuring that s. 9 freedom is equally meaningful for all flows inexorably from the system of rights governing state-civilian interactions set out in the *Charter*. This is because the unequal denial of that freedom leaves individuals with "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[37]

IV. SUBMISSIONS ON COSTS

24. The CCLA makes no submissions regarding costs.

V. ORDER REQUESTED

25. The CCLA respectfully requests that this Court consider its submissions in deciding this appeal but makes no submission on the ultimate order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 21st day of August 2018.

For **Danielle Glatt**
Counsel to the Intervener,
Canadian Civil Liberties Association

For **Kate Robertson**
Counsel to the Intervener,
Canadian Civil Liberties Association

[37] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) at 494 *per* Warren C.J.

TABLE OF AUTHORITIES

Additional Sources

Legislation