

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

B E T W E E N:

RUSSELL STEPHEN PATRICK

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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PART I: STATEMENT OF FACTS

1. The Appellant put out household garbage for collection in accordance with the City of Calgary's *Bylaw to Regulate and Manage Waste*.¹

On six occasions, armed not with a search warrant but with mere suspicion, police seized and searched the Appellant's garbage bags and used their contents to obtain a warrant to search his home.

2. This Court must determine whether individuals who consent or are compelled to provide private information about themselves to one party, for one purpose, abandon their privacy interest therein to others and for other purposes.

3. The Criminal Lawyers' Association (Ontario) (hereinafter "the CLA") respectfully submits that one does not give up his or her right to privacy "at large" when they permit access to information, for a limited and/or statutorily-compelled purpose.

4. The CLA accepts and relies on the facts as set out in the Appellant's factum, and in the factum of the Intervener Canadian Civil Liberties Association.

PART II: ISSUES

5. The CLA submits that household garbage contains personal information such as, intimate details about sexual practices, health, and personal hygiene . . . financial and professional status, political affiliations and inclinations, private thoughts . . . "intimate activity associated with the 'sanctity of a man's home and the privacies of life'"²

and as such, should be protected.³

6. The CLA further submits that, in placing his garbage out for collection as required and in the manner required by statute, the Appellant did not abandon it nor his privacy interest therein, but was merely complying with his obligation as a citizen.

1 City of Calgary, Bylaw No. 20M2001, *Waste Bylaw* (6 October 2003), (Appellant's Book of Authorities, Tab 31)

2 *State v. Greenwood*, 108 S. Ct. 1625 (1988) at para.51

3 *R. c. Andrews*, [2005] J.Q. No. 8595; *State v. Goss*, 834 A.2d 316 (N.H. 2003) (Respondent's Authorities, Tab 34); *State v. Granville*, 142 P.3d 933 (N.M. Ct. App. 2006) (Respondent's Authorities, Tab 37)

PART III: ARGUMENT

7. This Court has recognized that the right to privacy is not an all-or-nothing right and that the need for privacy, “can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion.”⁴

8. This Court has recognized that there are areas of personal privacy that are essential to the maintenance of human dignity, all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit. In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential **to the persons to whom, and restricted to the purposes for which it is divulged**, must be protected. ⁵ (Emphasis added)

9. Moreover, the right to privacy includes the reasonable expectation that private information will remain confidential to the persons to whom it was divulged, and for the purpose for which it was divulged. Disclosure to others or for other purposes does not extinguish the person’s reasonable expectation of privacy.⁶

10. It is respectfully submitted that a relinquishment of control over information for a limited purpose and to a single authorized party cannot be equated with an abandonment of the information and any privacy interest therein.

Disclosure without compulsion

With consent

11. One may consent to the disclosure to one person of information in which there is a reasonable expectation of privacy without abandoning, waiving or lessening one’s reasonable expectation of privacy *vis-à-vis* others.

12. Parliament and this Court affirmed the right of a complainant or witness to disclose confidential records in which their expectation of privacy may be high to Crown counsel, while providing that in so doing, their reasonable expectation of privacy *vis-à-vis* others is not abandoned, waived or in any way lessened.⁷

13. One may confide information in which one’s expectation of privacy may be high to one person, knowing that it may be repeated, without abandoning, waiving or lessening one’s reasonable expectation that the same information will not be surreptitiously recorded by the state.⁸

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R. v. Colarusso, [1994] 1 S.C.R. 20, at p.53; see also *R. v. Buhay*, [2003] 1 S.C.R. 631 at para.22, 23, 24

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R. v. Dymont, [1988] 2 S.C.R. 471 at para.22 and at para.17

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R. v. Mills, [1993] 3 S.C.R. 668 at para.108

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R. v. Mills, [1993] 3 S.C.R. 668 at para.108; Section 278.2 of the *Criminal Code of Canada*

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R. v. Duarte, [1990] 1 S.C.R. 30 at pps.14 and 15

14. One may consent to the disclosure of information in which there is a reasonable expectation of privacy for one purpose, without abandoning, waiving or lessening one's reasonable expectation of privacy in that information being used for other purposes.

15. Mr. Borden's consent to provide hair and blood samples for DNA testing for one sexual assault investigation did not extinguish or lessen his expectation of privacy in those samples when police used them to investigate another sexual assault.⁹

16. Mr. Colarusso's blood was volunteered at the hospital, to hospital personnel, for medical purposes and then lawfully seized under the *Coroner's Act*. Notwithstanding that there had been a consent seizure and a lawful state seizure to two different parties, and for two different purposes, Mr. Colarusso maintained a reasonable expectation of privacy in the same blood when police sought to use it in a criminal investigation,

I can see no basis for holding that, at least in relation to the use of evidence for criminal law purposes, the reasonable expectation of privacy in one's own bodily fluids guaranteed by s.8 of the *Charter* is diminished merely because a coroner chooses to exercise his or her power to seize under s.16(2) of the *Coroner's Act*. As such, the intervention by the coroner does not alter the fact that the police must comply with the *Hunter* requirement of prior judicial authorization before seizing a bodily fluid sample which was initially taken from an impaired driving suspect for medical purposes.¹⁰

17. Assuming, *arguendo*, that Mr. Dyment would have consented to the collection of his free-flowing blood for the purpose of providing medical treatment, this was held not to be a consent to "give it to a stranger for purposes other than medical purposes unless the law otherwise required."¹¹

Disclosure without compulsion

Without consent

18. One may have one's reasonable expectation of privacy breached by access to private information by one party, without abandoning, waiving or lessening one's reasonable expectation of privacy in that information *vis-à-vis* others.

19. Teenagers may have little expectation of privacy in the contents of their backpacks against the prying eyes of their parents, but they maintain a reasonable expectation of privacy in the contents of that same backpack when it concerns the scrutiny of the police.¹²

20. The security guards who opened Mr. Buhay's bus depot locker invaded his privacy, but this did not extinguish nor lessen his reasonable expectation of privacy at the time that the police subsequently searched it.¹³

21. When Mr. Law reported his locked safe as having been stolen, he maintained a residual privacy interest in the contents when it was found open and accessible by police

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R. v. Borden, [1994] 3 S.C.R. 145

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R. v. Colarusso, [1994] 1 S.C.R. 20 at p.31

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R. v. Dyment [1988] 2 S.C.R. 471 at para.27 and 28

12

R. v. A.M., 2008 SCC 19 at para.63

13

R. v. Buhay, [2003] 1 S.C.R. 631 at para.33, 34

investigating that theft, such that no other state agency could view its contents for another purpose without a warrant.¹⁴

Disclosure without consent and by state compulsion

22. If a reasonable expectation of privacy can be maintained despite the consensual or non-consensual disclosure for limited purposes, or to limited parties, it is submitted that this Court must protect the existence of a residual expectation of privacy where there is a statutory requirement or compulsion to disclose for limited purposes or to limited parties.

23. Courts have recognized that when garbage is placed for collection in accordance with bylaws and ordinances, this does not represent an abandonment of the privacy interest therein,

lorsque le citoyen met ses sacs à déchets au chemin, il remplit son obligation beaucoup plus qu'il abandonne ses sacs.¹⁵

24. One may be compelled to provide information in which there is a reasonable expectation of privacy to one person, without abandoning, waiving or lessening one's reasonable expectation of privacy *vis-à-vis* others. This Court has held in other situations that acquiescence or compliance with a statutory obligation to provide private information does not extinguish or lessen an expectation of privacy "at large."

25. Blood is an intimately personal substance, the collection of which can involve a serious violation of a person's bodily integrity and a significant intrusion on his or her privacy.

26. The DNA warrant provisions contained in the *Criminal Code of Canada* conform with section 8 of the *Charter of Rights and Freedoms* because (*inter alia*) the samples are collected for a clearly articulated, limited purpose, and the legislation expressly prohibits misuse of the information thereby obtained.¹⁶

27. A declarant who provides a statutorily-compelled incriminating statement under the *Motor Vehicle Act* is protected from its use in any other context.¹⁷

28. The Appellant, being statutorily-compelled to dispose of his garbage in the manner that he did, should not lose any expectation of privacy therein by virtue of his compliance with the bylaw, nor should the police be permitted to take advantage of his compliance in order to circumvent the need for prior judicial authorization to search.

PART IV: SUBMISSIONS ON COSTS

29. The CLA respectfully requests that no costs be ordered against it.

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R. v. Law, [2002] 1 S.C.R. 227 at para.16-20, 23

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R. c. Andrews, [2005] J.Q. No. 8595 at para.101; *People v. Krivda*, 486 P.2d 1262 (Cal.1971) at para.9 (Respondent's Authorities, Tab 54), *State v. Morris*, 680 A.2d 90, 165 Vt. 111 (Vt. 1996) at para.95(Respondent's Authorities, Tab 63)

16

R. v. S.A.B., [2003] 2 S.C.R. 678 at para.13, 14, 48-50

17

R. v. White, [1999] 2 S.C.R. 417

PART V: ORDER SOUGHT

30. The CLA respectfully requests that this Court allow the appeal and set aside the conviction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th day of July 2008.

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PART VI: AUTHORITIES

	Cited at paragraph
<i>R. v. A.M.</i> , 2008 SCC 19	19
<i>R. c. Andrews</i> , [2005] J.Q. No. 8595	23
<i>R. v. Borden</i> , [1994] 3 S.C.R. 145	15
<i>R. v. Buhay</i> , [2003] 1 S.C.R. 631	7, 20
<i>R. v. Colarusso</i> [1994] 1 S.C.R. 20	7, 16
<i>R. v. Duarte</i> , [1990] 1 S.C.R. 30	13
<i>R. v. Dymnt</i> [1988] 2 S.C.R. 471	8, 17
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<i>State v. Greenwood</i> , 108 S. Ct. 1625 (1988) Headnote and para.50 only	5
<i>People v. Krivda</i> , 486 P.2d 1262 (Cal.1971) at para.9 (Respondent's Authorities, Tab 54)	23
<i>R. v. Law</i> , [2002] 1 S.C.R. 227	21
<i>R. v. Mills</i> [1993] 3 S.C.R. 668	9, 12
<i>State v. Morris</i> , 680 A.2d 90, 165 Vt. 111 (Vt. 1996) (Respondent's Authorities, Tab 63)	23
<i>R. v. S.A.B.</i> , [2003] 2 S.C.R. 678	26
<i>R. v. White</i> , [1999] 2 S.C.R. 417	27

PART VII: LEGISLATION

	Cited at paragraph
City of Calgary, Bylaw No. 20M2001, <i>Waste Bylaw</i> (6 October 2003), (Appellant's Book of Authorities, Tab 31)	1
Section 278.2 of the <i>Criminal Code of Canada</i>	12