

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kawall, 2026 ONCA 154

DATE: 20260227

DOCKET: M56734 (COA-23-CR-0779)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

His Majesty the King

Respondent

and

Keenan Kawall

Appellant

Chris Rudnicki and Theresa Donkor, for the appellant

Heather Fregeau, for the respondent

Travis Walker and Humna Shaikh, for the proposed intervener Canadian Civil Liberties Association

Heard: February 27, 2026

REASONS FOR DECISION

[1] The Canadian Civil Liberties Association (“CCLA”) brings this motion for leave to intervene in a criminal appeal set to be heard on March 17, 2026. The motion is brought in accordance with r. 30 of the *Criminal Appeal Rules*. The respondent does not oppose the CCLA being granted intervener status, but asks that the court limit the intervention to matters properly before the court on appeal.

[2] For the reasons that follow, I grant leave to intervene to the CCLA in accordance with the terms set out at the end of these reasons.

[3] This appeal will explore whether Mr. Kawall had a reasonable expectation of privacy in a photograph taken by a police officer in a public place. That photograph was later used in conjunction with facial recognition technology (“FRT”) in an effort to identify the appellant in an aggravated assault investigation. Once the FRT results were obtained, yielding 193 potential candidates, a manual comparison was done between various photographs and the appellant was selected as a match. His identity was then ascertained and sent to the officer investigating the aggravated assault.

[4] The investigation continued and ultimately led to a search warrant for the appellant’s address. That search warrant was directed at clothing that matched items worn by the suspect of the assault.

[5] The appellant brought a mid-trial application alleging that the taking of the photograph constituted a breach of his rights under s. 8 of the *Canadian Charter of Rights and Freedoms*. Based upon this argument, the appellant sought excision of related information from the information to obtain the search warrant, including the impugned photograph and the FRT analysis results. The defence took the position that the officer who took the photograph breached the appellant’s s. 8 rights by contravening *Collection of Identifying Information in Certain*

Circumstances - Prohibition and Duties, O. Reg. 58/16 (the “Regulation”).¹ The Regulation prohibits police from collecting identifying information from persons without their informed consent, subject to certain exceptions: Regulation, ss. 1, 5-6.

[6] The trial judge found, though, that while the Regulation was contravened, this did not result in a s. 8 *Charter* violation. The absence of a s. 8 breach was largely found to rest on the fact that the photograph was taken in a public space. The trial judge specifically noted that the officer did not take the appellant’s photograph with a view to the use of FRT and that “[w]here [the appellant] was located was the subject of multiple other video cameras which were also recording him.” Ultimately, the trial judge concluded that in the circumstances of this case, the appellant had no reasonable expectation of privacy in the photograph.

[7] It is against that factual and legal backdrop that this appeal arises.

[8] Specifically, I note that the constitutionality of FRT is not raised by the parties. I further note that the record in this case does not support conclusive findings about FRT. Likely owing to the fact that the focus at trial was on the taking of the photograph in the public space, a focus maintained by the parties on appeal, the factual record is far from complete when it comes to a broad constitutional

¹ The Regulation, which was in force at all relevant times, was revoked in 2024. It was succeeded by O. Reg. 400/23, which bears the same name.

assessment of FRT itself. As useful as academic articles may be, they do not constitute evidence that has been tested in court.

[9] Bearing that in mind, I turn to the CCLA's proposed submissions.

[10] There is no question that the CCLA can provide a useful perspective on s. 8 of the *Charter* and the lawful or unlawful taking of photographs in public spaces. As well, it can provide a useful perspective on how the availability of FRT may inform that s. 8 analysis.

[11] What the CCLA cannot do is transform this appeal into something it is not.

[12] I disagree with the Crown that the CCLA should not be permitted to provide submissions on whether the use of FRT in the context of an unlawfully obtained photograph constitutes a s. 8 breach. While I appreciate that the argument at trial was focussed primarily upon the actual taking of the photograph, the s. 8 analysis was informed by the alleged failure to comply with the Regulation and subsequent use of the photograph. Accordingly, and especially having regard to the appellant's submissions on appeal, I do not see the CCLA as improperly expanding the parameters of the appeal. All the CCLA proposes to do is give an additional perspective on the constitutional issue.

[13] With that said, the CCLA cannot use academic literature as if it were part of the factual record on appeal. It is not. It has not been tested and, while relevant, it cannot be advanced as something akin to evidence.

[14] I agree with the Crown that the CCLA's argument as it relates to FRT exacerbating bias and discrimination in policing is a step too far. There is simply no evidence of that in this case. Indeed, the appellant specifically declined to pursue the issue of racial bias when it was raised by the trial judge. I have reviewed the academic articles and reports relied upon by the CCLA to advance this argument and, in my view, it would inject a new issue into the appeal less than three weeks from argument. It should not be done.

[15] The CCLA's motion to intervene is granted on the following terms:

- (1) The CCLA will amend its draft factum in accordance with these reasons.
- (2) The CCLA shall file its factum of no more than 15 pages no later than Tuesday, March 3, 2026.
- (3) If the appellant sees a need to respond beyond a mere adoption of the CCLA's submissions, he may file a factum of no more than 5 pages, no later than Tuesday, March 10, 2026.
- (4) The Crown may file a responding factum of no more than 10 pages no later than Thursday, March 12, 2026.
- (5) The CCLA will have 15 minutes to make oral submissions at the hearing of the appeal.

“Fairburn A.C.J.O.”