IN THE SUPREME COURT OF FLAVELLE

(ON APPEAL FROM THE FALCONER COURT OF APPEAL)

BETWEEN:

FLAVELLE (ATTORNEY GENERAL)

Appellant

- and –

MATTHEW ZHASKI

Respondent

FACTUM OF THE RESPONDENT

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PART I - OVERVIEW AND FACTS

A. OVERVIEW

1. The right to privacy is critical to the functioning of a free and democratic society. In *R v Wong*, the Supreme Court of Canada remarked that it is a "hallmark of a society such as ours that its members hold to the belief that they are free to go about their daily business without running the risk that their words will be recorded at the sole discretion of agents of the state."[1] Over 30 years later, state surveillance continues to pose a risk to Flavellians' privacy, but with decades of technological advances that have made surveillance more covert and intrusive than ever before.

2. For the Respondent, Mr. Matthew Zhaski, the state surveillance at issue occurred right on his doorstep. As a suspect in a criminal investigation, the police were secretly watching Mr. Zhaski—and even listening to him—for 24 hours a day in his condo lobby, hallway, and gym.

3. To avoid obtaining a warrant for surveillance, Detectives Ma and Xu circumvented Mr. Zhaski's s 8 *Charter* rights by attempting to find what a majority of the Falconer Court of Appeal aptly described as a "loophole": they asked Mr. Zhaski's Condo Board and property management for access to and control of pre-existing cameras installed throughout the building.

4. The police violated s 8 by accessing and controlling security cameras where Mr. Zhaski enjoyed a high expectation of privacy. The Condo Board Chair could not validly authorize such an intrusive search. The severe police misconduct and significant impact on Mr. Zhaski's rights warrant exclusion of the evidence under s 24(2) of the *Charter*.

5. Mr. Zhaski deserves the chance to be tried without the inclusion of unconstitutionally obtained evidence. By excluding the camera evidence, this Court will send a message that the disregard for *Charter* rights by persons who have the duty to uphold them will not be tolerated.

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[1] *R v Wong*, [1990] 3 SCR 36 at 46 [*Wong*], Joint Book of Authorities, Tab 11 [Joint BOA].

B. FACTS

1. The Initial Investigation

6. On October 30, 2016, two bullets went through the window of Dr. Kusic's unit in First Street Apartments, a condo building in Somerville. The Royal Falconer Police Services arrived at her apartment and performed a perimeter search, but they found no initial suspects.

7. Between January and March of 2017, Staff Sergeant Chang led an investigation into the shooting. There was no evidence other than the model of the gun used to fire the shots and three tips alleging that Mr. Zhaski was involved. While two tips were from credible informants, the third was anonymous and could not be verified. It stated that "other unnamed residents" of Goldfarb Condos were involved in the shooting and that the building was "a hotbed of crime."[2]

8. The first informant additionally speculated that Mr. Zhaski was involved in the shooting because he tended to "hang around" Mr. Louis Abdo and Ms. Marie Sedis. The second informant mentioned those names as well as one Ms. Anne Solie, who detectives confirmed through social media was Mr. Zhaski's ex-girlfriend. The police also discovered that both Mr. Zhaski and Dr. Kusic worked at Somerville General Hospital in 2012.[3]

2. Mr. Zhaski's Rarebnb Residence in Goldfarb Condos

9. Rarebnb is a short-term lodging platform in Somerville. Mr. Zhaski has lived in several Goldfarb Condo units through numerous one- to eight-month long Rarebnb agreements.[4]

10. Goldfarb Condos is a small building of only 50 units and has extensive security. Only residents possess fobs for common areas and elevators. The Condo Board has the authority to limit access to non-residents. In 2014, cameras were installed on both the inside and outside of the

[2] Grand Moot Official Problem at 3.
[3] Grand Moot Official Problem at 2–3.
[4] Grand Moot Official Problem at 5.

building. They are only 7 centimetres in diameter, and roughly the same colour as the walls.[5]

11. The standard rental and purchase agreements for Goldfarb Condos noted that these cameras existed. Beyond this, however, there was no signage that indicated their presence.

12. Mr. Zhaski, as a Rarebnb user, was not subject to the rental agreement, nor did his Rarebnb contract make any mention of security camera recording on the premises. Given the absence of signage, Mr. Zhaski was never notified of the surveillance measures in place. Further, it is not clear that any residents knew that the cameras were equipped with night vision and built-in microphones that had the ability to pick up conversations within a 40-foot radius.[6]

3. <u>Warrantless Camera Access and Control by Royal Falconer Police Services</u>

13. On April 17, 2018, Detectives Ma and Xu entered Goldfarb Condos. They explained to Ms. Gagne, the Property Manager, that Mr. Zhaski, Ms. Sedis, Mr. Abdo and Ms. Solie were subjects of an ongoing investigation. Detectives Ma and Xu requested access to the pre-existing cameras in the building. The detectives specifically requested remote access because they knew that hidden camera installation would require a warrant.[7]

14. Ms. Gagne noted that these requests typically required consent from the Condo Board, but that was likely unattainable in this case because Ms. Solie was a member.[8] Instead of obtaining a warrant, the police decided to seek consent from the Chair of the Board, Ms. Paparousis, alone.

15. The police could alter the camera angles remotely, but the cameras were affixed as follows:

    1. Camera 1 was on the wall of the gym across from Mr. Zhaski's first-floor apartment, well within 40-feet of his door. The gym was frequently used by Mr. Zhaski and Ms. Solie.

[5] Grand Moot Official Problem at 4.
[6] Grand Moot Official Problem at 4.
[7] Grand Moot Official Problem at 6.
[8] Grand Moot Official Problem at 5.

2. Camera 2 was on the wall at the end of the third-floor hallway, across from Mr. Abdo and Ms. Solie's neighbouring units.
3. Camera 3 was in the lobby, five feet from the entrance to the first-floor hallway leading to Mr. Sedis's condo.[9]

4. Naked Ear and Eye Surveillance

16. As Detectives Ma and Xu were leaving the building on April 17, 2018, they saw Mr. Zhaski, Ms. Solie and Mr. Sedis having a conversation in the doorway of the building. The detectives covertly listened in on the conversation from six metres away. While much of the conversation was inaudible, the detectives overheard Mr. Zhaski say to Ms. Solie, "She got the message. Nothing more needs to be done", and Ms. Solie's reply, "And the gun?", to which the answer was inaudible.[10] After this, the detectives walked around the side of the building with the intention of looking into Mr. Zhaski's apartment. Instead, the detectives looked into someone else's window and observed children playing. When looking into Mr. Zhaski's unit, they found nothing incriminating.[11]

5. Warrant, Arrests, and Charges

17. On June 10, 2018, Domus J granted the police a search warrant for the common areas of Goldfarb Condos and Mr. Zhaski's condo. The warrant was based in part on the evidence gathered from the cameras, although the police did not disclose the source or mention the cameras at all.[12]

18. During their search of Mr. Zhaski's unit, the police found a firearm that matched the model used to fire shots into Dr. Kusic's unit. Mr. Zhaski was subsequently arrested.[13]

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[9] Grand Moot Official Problem at 6–7.
[10] Grand Moot Official Problem at 7.
[11] Grand Moot Official Problem at 8.
[12] Grand Moot Official Problem at 9.
[13] Grand Moot Official Problem at 9.

19. Mr. Zhaski was ultimately charged with and convicted of attempted murder, pursuant to s. 463 (a) of the *Flavelle Criminal Code*; conspiracy, pursuant to s 465(1) of the *Code*; using a firearm in the commission of offence, pursuant to s 85(1)(a) of the *Code*; possession of a weapon for a dangerous purpose, pursuant to s 88 of the *Code*; and unauthorized possession of a firearm, pursuant to s 91 of the *Code*.[14]

20. In addition to the other evidence, two pieces of camera evidence were used to convict Mr. Zhaski:

1. On April 30, 2018, Camera 3 recorded Mr. Abdo running into Mr. Zhaski and Ms. Sedis in the lobby. He asked if they had heard anything about the investigation of "First Street." Mr. Zhaski shook his head, then Ms. Sedis said not to discuss it in the lobby.
2. On May 6, 2018, Camera 1 recorded a conversation between Mr. Zhaski and Ms. Solie in the gym regarding Ms. Solie's new job. She asked what Mr. Zhaski was "going to do with the gun." He said he did not know, then returned to using the treadmill.[15]

C. JUDICIAL HISTORY

21. Mr. Zhaski brought a motion under s 8 of the *Charter*, asserting that the police's warrantless remote use of the video cameras violated his privacy rights and that the evidence should therefore be excluded under s 24(2) of the *Charter*. His application, and all subsequent proceedings, were assessed apart from his co-defendants.

1. The Falconer Superior Court of Justice Decision

22. The motion judge, Roberts J, held that Mr. Zhaski did not have a reasonable expectation of privacy. She ruled that because the Respondent was leasing the apartment through Rarebnb, his

[14] Grand Moot Official Problem at 9.
[15] Grand Moot Official Problem at 8.

expectation of privacy in common areas was "more akin to a hotel guest's relationship to the hotel's common area."[16] In the alternative, she ruled that the police had sufficient consent from the Condo Board to access the cameras.

23. Justice Roberts noted that consent would be sufficient to obtain ordinary surveillance tapes from a condo building retrospectively. She concluded that this was "indistinguishable" from the state accessing and controlling condo cameras with night vision and audio recording capabilities to watch and listen to residents in real-time.[17] Because she found the two indistinguishable, she held that adequate consent had been provided by Ms. Gagne and Ms. Paparousis alone.

24. On the issue of s 24(2), Roberts J ruled that she would have admitted the evidence even if Mr. Zhaski's s 8 privacy rights were violated. She noted that the video evidence was reliable and incriminating, and her analysis focused on the seriousness of the charges.

2. The Falconer Court of Appeal Decision

25. Mr. Zhaski appealed Roberts J's ruling to the Falconer Court of Appeal. Writing for a majority of the court, Cook JA allowed the appeal, finding that Mr. Zhaski's s 8 rights were violated and that the camera evidence should be excluded under s 24(2). As a result, Mr. Zhaski's convictions were quashed and a new trial was ordered.[18]

26. Justice Cook disagreed with Roberts J's comparison between accessing and controlling pre-existing on-site cameras and requesting surveillance tapes after the fact. The majority found that there was no meaningful distinction between secretly tapping into existing cameras and installing hidden cameras: a warrant was needed for both, particularly where police have control

[16] Grand Moot Official Problem at 10.
[17] Grand Moot Official Problem at 10–11.
[18] Grand Moot Official Problem at 11–12, 14.

over camera angles. Without a warrant for this control and access, the police violated Mr. Zhaski's reasonable expectation of privacy.[19]

27. In determining that the evidence should be excluded under s 24(2), the majority highlighted the severity of the police misconduct: the police "*knew* that they needed a warrant and attempted to find a loophole. This was not a good faith mistake. This was a conscious scheme."[20] Justice Cook also held that the technologically advanced cameras, which could pick up audio from within the Respondent's unit, were a significant intrusion into Mr. Zhaski's s 8 rights. Given the invasiveness of the cameras in a building with "superior privacy", he concluded that there was "no question" that the impact on s 8 was severe.[21] The seriousness of the charges could not outweigh the severe police misconduct and the impact on Mr. Zhaski's s 8 rights.[22]

28. In concurrence, Teixeira JA agreed that the evidence should be excluded under s 24(2) given the police's severe misconduct and its potential to bring the administration of justice into disrepute. She emphasized that the public's interest in maintaining the integrity of the justice system and protecting *Charter* rights favoured exclusion in this case.[23]

29. In dissent, Cheng JA found that, despite the police being given full control of the cameras, there was no s 8 violation because Mr. Zhaski was only recorded "in places that were already known to be surveilled" by the Condo Board. Even if s 8 were violated, she would have admitted the evidence because, in her view, the police exhibited a good faith effort to respect Mr. Zhaski's rights by implementing a "practical and relatively unintrusive" strategy.[24]

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[19] Grand Moot Official Problem at 11–12.
[20] Grand Moot Official Problem at 12 [emphasis in original].
[21] Grand Moot Official Problem at 12.
[22] Grand Moot Official Problem at 13–14.
[23] Grand Moot Official Problem at 13.
[24] Grand Moot Official Problem at 14.

PART II - ISSUES

30. The questions to be decided on this appeal are as follows:

a. Did the police violate s 8 of the *Charter* when they accessed the condo cameras?

b. If so, did the consent of the Condo Board Chair and property manager nonetheless authorize the search?

c. Should the camera evidence be excluded under s 24(2) of the *Charter*?

PART III - ARGUMENT

ISSUE #1: THE POLICE CONDUCT VIOLATES S 8 OF THE *CHARTER*

31. The police violated Mr. Zhaski's objectively reasonable expectation of privacy. Section 8 of the *Charter* ensures that everyone "has the right to be secure against unreasonable search or seizure."[25] Flavelle has consistently recognized the utmost importance of limiting the police's ability to intrude on people's residences without prior judicial authorization.[26]

32. Section 8 does not confer on law enforcement any additional powers of "reasonable" search and seizure beyond those already in existence; rather, it acts as a limiting agent. Where prior authorization in the form of a warrant is not practicable, s 8 ensures that law enforcement agents do not intrude into people's lives in a manner that would be deemed "unreasonable."[27]

33. In this case, police had no reason to commence a search prior to obtaining a warrant. They were not operating in an urgent situation. If prior authorization is possible, it is a precondition for a search. This guards against retrospective validation of unconstitutional searches.[28]

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[25] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 8.
[26] *R v Tessling*, 2004 SCC 67 at para 13 [*Tessling*], Joint BOA, Tab 4.
[27] *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 156, 161 [*Hunter*], Joint BOA, Tab 2.
[28] *Tessling*, *supra* note 26 at para 33, Joint BOA, Tab 4; *Hunter*, *supra* note 27 at 146, Joint BOA, Tab 2.

34. Whether a search is deemed unreasonable depends on a balancing of the state's interest in law enforcement against an individual's right to privacy and right to be left alone by the government.[29] These competing interests are assessed by considering the totality of the circumstances. The four general categories to be considered are:

1. The nature or subject matter of the alleged evidence gathered by police,
2. Whether the Respondent had a direct interest in the contents of the search,
3. Whether Mr. Zhaski had a subjective expectation of privacy in the subject matter, and
4. If so, whether that expectation was objectively reasonable.[30]

A. THE EVIDENCE REVEALED INFORMATION ABOUT MR. ZHASKI'S BIOGRAPHICAL CORE

35. The personal nature of the information captured by the camera evidence gives rise to a significant expectation of privacy. The information sought to be protected by s 8 is that which touches on an individual's biographical core.[31] The closer the subject matter comes to this biographical core, the more reasonable it is to find an expectation of privacy.[32] The cameras in the Goldfarb Condos that Falconer Police had access to captured Mr. Zhaski's every movement and conversation, offering up a wealth of intimate information to the Falconer Police.

36. The camera evidence offered an intimate and detailed view into Mr. Zhaski's life—a view that he never intended to share. The Supreme Court in *R v Spencer* held that characterizing the subject matter of a search must extend beyond surface level "mundane" observations or data, and must instead include the potentially private information that could be revealed, such as the

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[29] *Hunter*, *supra* note 27 at 159, Joint BOA, Tab 2.
[30] *Tessling*, *supra* note 26 at para 32, Joint BOA, Tab 4; *R v Spencer*, 2014 SCC 43 at paras 17–18 [*Spencer*], Joint BOA, Tab 5; *R v Patrick*, 2009 SCC 17 at para 27 [*Patrick*], Joint BOA, Tab 6.
[31] *R v Plant*, [1993] 3 SCR 281 at 293 [*Plant*], Joint BOA, Tab 3.
[32] *R v Cole*, 2012 SCC 53 at para 46 [*Cole*], Joint BOA, Tab 28.

"intimate details of the lifestyle of the individual and personal choices of the individual."[33] In *R v Marakah*, the Supreme Court held that the question to be answered when determining the subject matter of the search is "what the police were really after."[34] The information that the police were really after in this case went far beyond mundane descriptive information.

37. The permanent cameras placed in view of Mr. Zhaski's personal doorway and in the lobby offered an in-depth look into his home and his way of life. Every time he left his unit, came home for the day, made a remark to himself or to a close friend, or so much as ran on the treadmill, Flavelle police were observing and listening. As Cook JA noted, given the proximity of one camera to Mr. Zhaski's unit and the camera's advanced audio recording capabilities, Mr. Zhaski could have even been recorded within his unit.

38. Mr. Zhaski's conversations and engagement with Ms. Sedis, Ms. Solie, and Mr. Abdo were personal and went to his biographical core. In *R v Kang-Brown*, the Supreme Court characterized information such as an individual's contact with controlled substances or drug users as information of a "very personal nature."[35] Mr. Zhaski was observed interacting with individuals suspected in a shooting and recorded speaking about firearms. The conversations and contact that Mr. Zhaski had with the other parties undoubtedly revealed information that Mr. Zhaski considered confidential and would not have willingly disclosed.

39. It is essential to distinguish the nature of naked eye and ear surveillance from permanent recording, which is far more intrusive. As the Supreme Court observed in *R v Duarte*, it is not the threat of private conversations being overheard and divulged that requires regulation but rather the "much more insidious danger inherent in allowing the state, in its unfettered discretion, to record

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[33] *Spencer*, *supra* note 30 at para 25, Joint BOA, Tab 5.
[34] *R v Marakah*, 2017 SCC 59 at para 15 [*Marakah*], Joint BOA, Tab 15, citing *R v Ward*, 2012 ONCA 660 at para 67 [*Ward*], Joint BOA, Tab 38.
[35] *R v Kang-Brown*, 2008 SCC 18 at para 175 [*Kang-Brown*], Joint BOA, Tab 39.

and transmit our words."[36] In that case, La Forest J noted that society should not accept "as the price of choosing to speak to another human being, the risk of having a permanent electronic recording made of our words."[37] In *R v Wong,* the Supreme Court held affirmed that the same is true of video surveillance.[38] 24/7 state surveillance has a much more profound ability to capture core biographical information simply due to its continuity.

40. The danger in affording the state unfettered discretion to record and transmit information is increased by the 24/7 nature of condo surveillance. As noted by the Ontario Court of Appeal for Ontario in *R v Yu*, "the camera never blinks"—permanent and continued surveillance results in greater personal information being captured than "purpose-oriented individual entries."[39]

41. The police did not enter Mr. Zhaski's building with the intention of catching him in a specific act, nor did they request video footage of a specific timeframe based on information they sought to corroborate. Rather, the police engaged in a fishing expedition, constantly monitoring Mr. Zhaski's movements and conversations in the hope that he would say or do something incriminating. This broad and unrestricted access undoubtedly captured intimate, biographical elements of Mr. Zhaski's life.

B. MR. ZHASKI HAD A DIRECT INTEREST IN THE CAMERA EVIDENCE

42. The camera evidence recorded Mr. Zhaski and revealed information about his activities and choices. This gives him a direct interest and personal expectation of privacy in the evidence.[40]

43. Mr. Zhaski's charges and conviction rest in part on the camera evidence. The overarching question before the Court is whether Mr. Zhaski was involved in firing the shots into Dr. Kusic's

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[36] *R v Duarte*, [1990] 1 SCR 30 at 32 [*Duarte*], Joint BOA, Tab 10.
[37] *Ibid* at 48.
[38] *Wong*, *supra* note 1 at paras 51–53, Joint BOA, Tab 11.
[39] *R v Yu*, 2019 ONCA 942 at para 129 [*Yu*], Joint BOA, Tab 13.
[40] *Marakah*, *supra* note 34 at para 93, Joint BOA, Tab 15.

unit. As the camera evidence reveals conversations about both his firearm use and his knowledge of the First Street apartments, Mr. Zhaski is clearly invested in the admissibility of the footage.

C. MR. ZHASKI HAD A SUBJECTIVE EXPECTATION OF PRIVACY IN HIS DOORWAY AND COMMON AREAS

44. Mr. Zhaski had a subjective expectation of privacy in his travels to and from the building, his unit, the gym, and in all conversations that occurred within these areas. The threshold for finding a subjective expectation of privacy is low and is easily met in this case.[41]

45. The quasi-public nature of a condo common area does not obliterate all privacy interests. Although one may have less of a privacy interest in common areas than within one's private residence, condo common areas have been held to be "more private than public."[42] Furthermore, a subjective expectation of privacy has been found in condo common areas and entryways in similar cases. In *R v Kim*, the Court found that the applicants had a subjective expectation of privacy in their 12th-floor hallway.[43] Similarly, in *Sandhu*, the court found that it was "easy to infer" that the applicants did not expect to be observed in the area outside of their apartment door and that, had they been aware of the surveillance, their behaviour likely would have been altered.[44]

46. The Appellant, citing *R v Tessling*, contends that Mr. Zhaski could not have had a subjective expectation of privacy because he "knowingly" exposed the information to the public. However, this is not a case where Mr. Zhaski abandoned information knowing that any casual observer might hear it. Mr. Zhaski, likely seeing no other residents around, had no reason to believe that his conversation was being overheard. Accepting that Mr. Zhaski could not have had a

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[41] *R v Sandhu*, [2018] ABQB 112 at para 37 [*Sandhu*], Joint BOA, Tab 40.
[42] *Ibid* at paras 39–40.
[43] *R v Kim*, 2020 BCSC 1064 at paras 49–52 [*Kim*], Joint BOA, Tab 41.
[44] *Sandhu*, *supra* note 41 at para 37, Joint BOA, Tab 40.

subjective expectation of privacy because other residents had access to the common areas is tantamount to suggesting that the second we step outside of our homes, all privacy interests vanish.

47. Central to the concept of privacy is the notion that a person should be able to seclude themselves.[45] Mr. Zhaski behaved in a manner consistent with someone who believes that they are exercising control over their disclosure of personal information. Meanwhile, the cameras rolled.

48. Mr. Zhaski did not suspect that his every move would be subject to a detailed technological probing and analysis. Continuous and permanent recording offers the possibility of a meticulous review not possible in live entry. As was observed in *R v Sandhu*, continuous recording captures greater spans of time and can be "paused, replayed, and studied" unlike eyewitness surveillance. In *Sandhu*, police were able to identify the branding on a bag dropped into a garbage chute in order to retrieve it and link the contents to the accused.[46] These sorts of minute details are the kind of information that is unlikely to be identified positively by an eyewitness but is made possible by recording and replay. In Mr. Zhaski's case, the police were able to review video footage as much as was necessary to transcribe his conversations or reposition cameras for a better view.

49. Mr. Zhaski and other unit dwellers would expect to be able to have private conversations so long as they occurred beyond the range of the average human's ears and eyes—not a camera with a 40-foot audio recording range. In their original visit, the detectives could barely make out the words of a conversation happening six meters away, the equivalent of approximately twenty feet. The cameras, on the other hand, could pick up clear conversations at double this distance.

50. Mr. Zhaski was unaware that he was being surveilled by police at all times of the day. The building made no effort to inform him. He neither received nor signed any rental agreement that

[45] *R v Hassan*, 2017 ONSC 233 at para 111 [*Hassan*], Joint BOA, Tab 42.
[46] *Sandhu*, *supra* note 41 at para 45, Joint BOA, Tab 40.

mentioned the existence of on-site cameras. There is no evidence that the condo management made any additional effort to indicate that residents' movements and conversations were being recorded.

51. If Mr. Zhaski *had* spotted a camera in the building, he would have reasonably assumed the camera was operated by condo management. This is in no way equivalent to an expectation of state surveillance,[47] and would still not alert him to the audio-recording capabilities.

D. MR. ZHASKI'S SUBJECTIVE EXPECTATION OF PRIVACY WAS OBJECTIVELY REASONABLE

52. The firearm discovered in Mr. Zhaski's unit, and his conversations with Ms. Solie, Ms. Sedis, and Mr. Abdo, should not colour the objective reasonableness of Mr. Zhaski's expectation of privacy. Reasonable expectation of privacy is a normative standard assessed from the perspective of a "reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy."[48]

53. Whether or not Mr. Zhaski was involved in illegal activity or harbouring illegal items behind the closed doors of his home does not factor into the s 8 analysis. It turns solely on the privacy that can be expected in the area in question: the common areas of the building, including one's personal doorway. As the Supreme Court emphasized in *R v Wong*, allowing *ex post facto* justification of unlawful state conduct has no place in a justice system that values individual rights and freedoms.[49]

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[47] *Yu*, *supra* note 39 at para 123–126, Joint BOA, Tab 13.
[48] *Spencer*, *supra* note 30 at para 18, Joint BOA, Tab 5, citing *Patrick*, *supra* note 30 at para 14, Joint BOA, Tab 6; *Cole*, *supra* note 32 at para 35, Joint BOA, Tab 28.
[49] *Wong*, *supra* note 1 at para 19, Joint BOA, Tab 11.

54. Many courts have considered the level of privacy that can reasonably be expected in condo common areas.[50] However, the analysis is highly contextual. It looks to the totality of the circumstances. Thus, there can be no uniform answer about privacy in all shared spaces.

55. Relevant factors to be considered under the totality of circumstances include (1) Mr. Zhaski's control and use of the property, (2) his ability to regulate access with his fob, (3) the size and security of the building, (4) the visibility of the cameras and the notice provided thereof, (5) the condo management's possession of the recording, and (6) the nature of the information.[51]

56. No one factor will be determinative of the expectation of privacy. No factor is meant to be interpreted in black and white terms. Privacy interests exist on a sliding scale and cannot be assessed with an 'all or nothing' approach.[52]

(i) Control, Ownership and Use of the Unit

57. Mr. Zhaski's lack of ownership in the unit did not diminish his reasonable expectation of privacy in the common areas and in his doorway. Ownership itself does not convey a greater degree of privacy; rather, ownership is a proxy for control and possession of one's unit. The Supreme Court in *R v Spencer* observed that privacy is closely related to control and access; people can decide "when, how, and to what extent information about them is communicated to others."[53] In *R v Pipping*, the British Columbia Court of Appeal similarly held that analyzing the level of control over and ability to regulate access to a space is essential when determining the reasonable expectation of privacy enjoyed in that space.[54] Mr. Zhaski had the ability to regulate who entered

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[50] See e.g., *Yu*, *supra* note 39, Joint BOA, Tab 13; *R v White*, 2015 ONCA 508 [*White*], Joint BOA, Tab 12; *Hassan*, *supra* note 45, Joint BOA, Tab 42; *R v Batac*, 2018 ONSC 546 [*Batac*], Joint BOA, Tab 43.
[51] *R v Edwards*, [1996] 1 SCR 128 at para 45 [*Edwards*], Joint BOA, Tab 1; *White*, *supra* note 50 at para 45, Joint BOA, Tab 12; *R. v. Pipping*, 2020 BCCA 104 at para 30 [*Pipping*], Joint BOA, Tab 30.
[52] *R v Jarvis*, 2019 SCC 10 at para 41 [*Jarvis*], Joint BOA, Tab 44.
[53] *Spencer*, *supra* note 30 at para 40, Joint BOA, Tab 5, citing A. F. Westin, *Privacy and Freedom* (New York: Atheneum, 1970), at 7 [*Westin*].
[54] *Pipping*, *supra* note 51 at para 30, Joint BOA, Tab 30.

his unit and who he allowed into the building and common areas in the same way as an owner or standard renter.

58. The transience of Mr. Zhaski's residency is also irrelevant to the analysis. Condo renters, apartment dwellers, and individuals living in insecure or transient housing settings do not deserve any less privacy from the state than those in detached homes.[55] An assignee or a subletter of a three-month stretch of a one-year lease would enjoy the same right to exclusive occupancy in the unit as the original tenant.[56] Mr. Zhaski's lease through Rarebnb is no different.

(ii) Size and Security of the Goldfarb Condo

59. The security features implemented by the building increased the expectation of privacy that Mr. Zhaski and all building residents could reasonably maintain. In *Batac*, the Ontario Superior Court of Justice held that a building's use of fobs to control access to and within the building, similar to Goldfarb Condos' security measures, constituted "exceptional security measures" that resulted in a high level of privacy.[57]

60. Given the smaller size of the building, it was reasonable for Mr. Zhaski to have a greater expectation of privacy in the common areas. Condo residents have a heightened expected level of privacy in common areas in buildings of smaller size, given that fewer people are likely to have access to shared spaces. For example, in *R v White*, the building contained only 10 units. The intimate nature of the building created a higher expectation of privacy, especially considering that any presence would have been "noteworthy."[58] The size of Mr. Zhaski's residence, at 50 units, is

[55] *White*, *supra* note 50 at para 51, Joint BOA, Tab 12.
[56] *Residential Tenancies Act*, 2006, S.O. 2006, c. 17, s 2(2), 95(8) [*RTA*].
[57] *Batac*, *supra* note 50 at para 42, Joint BOA, Tab 43.
[58] *White*, *supra* note 50 at para 46, Joint BOA, Tab 12.

much more akin to the intimate atmosphere that the court considered in *White* than, for example, the 200-unit building in *R v Hassan*, or the 27-storey building with over 300 units in *Batac*.[59]

(iii) Condo Management Surveillance, Communication and Placement of Cameras

61. Mr. Zhaski's lack of awareness about the existence of cameras further increased the reasonableness of his expectation of privacy in the building's common areas.

62. Mr. Zhaski reasonably had a greater expectation of privacy against surreptitious state recordings in his condo hallway compared to live police entry in the same location. Surreptitious recording by the state is "highly, if not uniquely, invasive of individual privacy."[60] The Supreme Court in *Wong* described surreptitious permanent recordings as "fundamentally irreconcilable" with acceptable state conduct.[61]

63. Even if Mr. Zhaski had spotted a camera, he would have reasonably assumed that only condo management staff monitored the surveillance. Unlike in *Batac* and *Sandhu*, where condo signage indicated that management was surveilling residents in certain areas, there was no communication about surveillance provided by Goldfarb Condos beyond the rental agreement that Mr. Zhaski never received.[62] Still, even in *Batac*, where additional communication was present, the court found that residents were neither aware that their doorways were being recorded, nor were they cognizant that police could access the recordings. Similarly, in *Yu*, the Court found that the installation of hidden cameras by the state could not reasonably fall within the powers and duties that a condo board would be assumed to have.[63] In the same vein, had Mr. Zhaski spotted a

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[59] *Hassan*, *supra* note 45 at para 13, Joint BOA, Tab 42; *White*, *supra* note 50 at para 46, Joint BOA, Tab 12; *Batac*, *supra* note 50 at paras 2, 4, Joint BOA, Tab 43.
[60] *Yu*, *supra* note 39 at para 123, Joint BOA, Tab 13.
[61] *Wong*, *supra* note 1 at para 15, Joint BOA, Tab 11.
[62] *Batac*, *supra* note 50 at para 42, Joint BOA, Tab 43; *Sandhu*, *supra* note 41 at para 18, Joint BOA, Tab 40.
[63] *Yu*, *supra* note 39 at para 126, Joint BOA, Tab 13.

camera, it would be reasonable to assume that handing over real-time camera access to the state without notice was beyond the powers of the Board or management.

64. In this case, the police's ability to control the condo cameras made their conduct functionally equivalent to installing new cameras. Even residents informed and aware of the Board's surveillance would not have assumed that the police could control the position of cameras in real-time to better observe residents' movements and conversations.

(iv) Nature of the Information

65. Mr. Zhaski's privacy interest was heightened where the camera had the ability to record his daily interactions and movement near his doorway. In *Yu*, the court specifically noted that "the level of expectation of privacy increases the closer the area comes to a person's residence, such as the end of a particular hallway of a particular floor of the building."[64] Courts have also consistently distinguished doorways as a location where residents can expect privacy above and beyond that expected in the rest of their building. In *R v Heckert v 5470 Investments Ltd*., the court held that video surveillance of a woman's 12th-floor condo unit doorway was "disturbingly intrusive" because she had the right to be left alone with regard to her coming and going at her home.[65] Mr. Zhaski should be afforded the same right.

66. The camera surveillance in this case captured information that was personal, and Mr. Zhaski could reasonably have expected it to be private. The search was unreasonable and violated s 8 of the *Charter*.

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[64] *Yu*, *supra* note 39 at paras 81–84, Joint BOA, Tab 13.
[65] *Heckert v 5470 Investments Ltd.*, 2008 BCSC 1298 at para 86 [*Heckert*], Joint BOA, Tab 45.

ISSUE #2: CONDO BOARD OR PROPERTY MANAGEMENT CONSENT COULD NOT AUTHORIZE THE STATE SURVEILLANCE

67. Third party consent from the building's property manager and the Chair of the Board could not validly authorize the 24/7 audio-video surveillance in the common areas of the Goldfarb Condos. Only judicial authorization is acceptable for this. A Chair of a Condo Board or a property manager is unqualified to consent to such intrusive state surveillance. Allowing them to authorize surveillance through the pre-existing cameras negates the privacy protections of s 8 of the *Charter*.

A. CONDO BOARDS AND MANAGEMENT ARE ILL-EQUIPPED TO AUTHORIZE SURVEILLANCE

68. Condo boards are not qualified to give consent for this level of surveillance on behalf of residents. Condo boards normally regulate access to common areas as a matter of practicality, but they do not possess legal training and experience necessary to make decisions about residents' *Charter* rights. Simply put, condo boards provide poor, unprincipled safeguards for privacy rights.

69. Allowing condo board representatives to consent to an otherwise unreasonable and unconstitutional search wrongly puts the decision in the hands of a small few untrained people. In Ontario, a condo board can contain as few as three people.[66] In the present case, one Board member single-handedly made the decision to allow police access to 24/7 audio and video surveillance.

70. In *Yu*, the Court of Appeal for Ontario held that it was unreasonable for the condo board or its delegates to consent to the police installing cameras in the building on behalf of residents, as it was "beyond the bounds of its authority."[67] In doing so, Tulloch JA held that there was a significant difference between a board occasionally allowing non-residents to enter common areas as needed and allowing surreptitious video surveillance by police.[68] The facts in this case are

[66] *Condominium Act*, SO 1998, c 19, s. 27(2) [*Condominium Act*].
[67] *Yu*, *supra* note 39 at para 132, Joint BOA, Tab 13.
[68] *Ibid*.

analogous to *Yu*; in both cases, the police controlled the cameras, could watch in real-time, and residents were unaware of the police surveillance.

B. ALLOWING CONDO BOARDS TO AUTHORIZE HIGHLY INTRUSIVE SURVEILLANCE NEGATES *CHARTER* PROTECTIONS

71. Putting the decision to authorize contemporaneous surveillance in common areas in the hands of an untrained board or property management obliterates the degree of protection offered by the reasonable and probable grounds standard that is needed to obtain a warrant. In fact, it provides no protection at all. Police might be able to obtain consent to surveil a condo complex with barely any evidence for targeting the building. Condo board members and staff may also feel pressured to simply say 'yes' in the face of authority despite a lack of evidence.

72. The present case provides a perfect example of this lack of protection. While the Appellant states that Ms. Paparousis' consent was "informed",[69] the police provided her with no details beyond the fact that the four defendants were part of a criminal investigation. She knew nothing about the evidence or the merits of the police investigation. She made no further inquiries. The Respondent agrees that the consent received was "purely discretionary"[70]—that is precisely the problem with this approach. No principled determination was made.

73. Allowing condo board members or property management to authorize real time state surveillance using pre-existing cameras would create inappropriate distinctions between the level of privacy protection afforded to those people who live in buildings without cameras and those who live in buildings with cameras already installed. If there are no cameras, the police require a warrant for surveillance. If there are already cameras, police would merely require simple consent.

[69] Factum of the Appellant at para 56.
[70] Factum of the Appellant at para 55.

74. A similar distinction in privacy protections has been rejected in the telecommunications context. In *R v Telus Communications Co*, the Supreme Court of Canada considered whether police required authorization before asking Telus to secure the prospective and continuous production of text messages. Unlike other telecommunications providers, Telus maintained its own computer database of text messages. The Court noted that if Telus did not maintain this database, police would certainly be required to obtain authorization to secure prospective text messages. The Court ruled that it would create a "manifest unfairness" not to require judicial authorization simply because the telecommunications provider already maintained its own database.[71]

75. Given these issues, authorizing police control of pre-existing cameras in condo common areas is a task best left in the hands of judges, who are highly skilled at evaluating the strength of evidence against civil liberties. This approach would provide robust protections for privacy rights.

ISSUE #3: THE CAMERA EVIDENCE SHOULD BE EXCLUDED UNDER S 24(2) OF THE *CHARTER*

76. This Court should exclude the camera evidence under s 24(2) of the *Charter* because its admission would bring the administration of justice into disrepute.[72] If the admission of the evidence would bring the administration of justice into disrepute in the mind of a reasonable person informed of all circumstances and *Charter* values, this Court must exclude it.[73]

77. To determine whether the admission of the evidence would bring the administration of justice into disrepute, this Court must consider the three *Grant* factors: (1) the seriousness of the state misconduct; (2) the severity of the impact on the accused's *Charter* interests; and (3) society's interest in an adjudication of the case on its merits.[74]

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[71] *R v TELUS Communications*, 2013 SCC 16 at para 13 [*Telus*], Joint BOA, Tab 46.
[72] *R v Grant*, 2009 SCC 32 at para 68 [*Grant*], Joint BOA, Tab 23.
[73] *Ibid* at para 68.
[74] *Ibid* at paras 71, 73, 85; *R v Harrison*, 2009 SCC 34 at para 2 [*Harrison*], Joint BOA, Tab 36.

78. The *Grant* analysis is not centred on the short-term effects of admission in the immediate case. Rather, its focus is on the long-term impacts of admission on the administration of justice.[75]

79. An analysis of the *Grant* factors strongly weighs in favour of excluding the camera evidence. The seriousness of the *Charter*-infringing state conduct was severe. The impact on Mr. Zhaski's s 8 privacy rights was significant. These two factors, along with the long-term importance of ensuring the judicial system is beyond reproach, outweigh the importance of upholding the truth-seeking function of the criminal justice process in the immediate case.

80. While courts generally give deference to a trial judge's s 24(2) analysis, this deference falls away where an appellate court reaches a different conclusion about whether a *Charter* right has been breached.[76] Since Roberts J determined that the police did not breach s 8, no deference should be given to her s 24(2) analysis.

A. THE POLICE MISCONDUCT WAS SEVERE

81. The police misconduct in this case was severe, pointing toward the exclusion of the evidence. The police acted in bad faith by deliberately attempting to circumvent the need for a warrant. They also proceeded to carry out a highly intrusive search despite receiving only partial consent and demonstrated a casual attitude towards upholding *Charter* rights.

82. Where police misconduct is wilful and flagrant, evidence is more likely to be excluded.[77] As the Supreme Court of Canada held in *Grant*, "[w]ilful or flagrant disregard of the Charter by those very persons who are charged with upholding the right in question may require that the court

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[75] *Grant*, *supra* note 72 at para 68, Joint BOA, Tab 23.
[76] *Ibid* at para 129; *Pipping*, *supra* note 51 at para 66, Joint BOA, Tab 30; *R v Reddy*, 2010 BCCA 11 at para 89 [*Reddy*], Joint BOA, Tab 47.
[77] *R v Burlingham*, [1995] 2 SCR 206 at para 45–56 [*Burlingham*], Joint BOA, Tab 48; *Grant*, *supra* note 72 at para 75, Joint BOA, Tab 23.

dissociate itself from such conduct."[78] As a result, the admission of evidence cases involving wilful violations is more likely to bring the administration of justice into disrepute.

83. Conversely, good faith police conduct attenuates the seriousness of the breach. Where the misconduct is an "isolated error of judgment,"[79] the result of an understandable mistake,[80] a mistake of a "merely technical nature,"[81] or where the police have attempted to respect the accused's *Charter* rights,[82] the evidence is less likely to be excluded. The misconduct is also less likely to be considered severe in extenuating circumstances, such as the need to prevent the disappearance of evidence or where there is a measure of urgency to obtain evidence.[83]

1. The Police Did Not Act in Good Faith by Circumventing the Need for a Warrant

84. The police misconduct here was not in good faith: it was deliberate, wilful, and flagrant. As a result, the camera evidence should be excluded. The decision to access and control the cameras without a warrant was neither an 'isolated error of judgment' nor an understandable mistake. The police did not attempt to respect Mr. Zhaski's *Charter* rights. There were no extenuating circumstances. The detectives made a conscious determination in their attempt to circumvent the need for a warrant by accessing pre-existing cameras, just as they made the conscious and inappropriate decision to peer into the windows of residents' units.[84]

85. Though the Appellant asserts that discoverability pushes toward inclusion of the evidence in the second *Grant* inquiry,[85] the Supreme Court in *R v Côté* made clear that discoverability also

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[78] *Grant*, *supra* note 72 at para 75, Joint BOA, Tab 23.
[79] *R v Strachan*, [1988] 2 SCR 980 at para 50 [*Strachan*], Joint BOA, Tab 22.
[80] *Harrison*, *supra* note 74 at para 22, Joint BOA, Tab 36.
[81] *R v Therens*, [1985] 1 SCR 613 at para 76 [*Therens*], Joint BOA, Tab 41; *R v Buhay*, 2003 SCC 30 at para 52 [*Buhay*], Joint BOA, Tab 9.
[82] *R v Aucoin*, 2012 SCC 66 at para 49 [*Aucoin*], Joint BOA, Tab 50.
[83] *Grant*, *supra* note 72 at para 75, Joint BOA, Tab 23; *Wong*, *supra* note 1 at paras 36, 41, Joint BOA, Tab 11; *Therens*, *supra* note 81 at para 76, Joint BOA, Tab 49.
[84] Grand Moot Official Problem at 8.
[85] Factum of the Appellant at paras 86-87.

pushes toward exclusion at the first stage.[86] The Appellant's own case law supports this point: though the Court in *R v Cole* did consider discoverability as part of the second *Grant* factor, the Court also noted that "[w]here a police officer could have acted constitutionally but did not, this might indicate that the police officer adopted a casual attitude toward – or, still worse, deliberately flouted – the individual's *Charter* rights".[87]

86. The detectives' willingness to go ahead with only partial consent further demonstrates the wilfulness of the misconduct. Although Ms. Gagne told the detectives that their request to access the cameras "should probably go to the Condo Board for approval," the officers proceeded anyway with only the consent of the Chair of the Board.[88] While one of the defendants was admittedly on the Board, the prudent course of action in response to this issue was to obtain a warrant—which the detectives should have done in the first place.

87. The detectives' failure to mention where they acquired the evidence used to obtain a warrant exacerbates their misconduct. The failure to mention the source of the evidence used to obtain the search warrant is at best a glaring error on the part of detectives. As Huscroft JA remarked in *White*, "[i]f the police were confident that they had acted in accordance with the law, one would have expected to see details of their investigation in the ITO."[89]

88. All of these acts—attempting to find a loophole to avoid a warrant, circumventing the consent required from the Board, peering into residents' windows, and leaving the source of the information off of the application for a warrant—are indicative of a larger pattern of disregard for Mr. Zhaski's *Charter* rights. This exacerbates the seriousness of the police misconduct.[90]

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[86] *R v Côte*, 2011 SCC 46 at para 71 [*Côte*], Joint BOA, Tab 31.
[87] *Cole*, *supra* note 32 at para 89 [*Cole*], Joint BOA, Tab 28.
[88] Grand Moot Official Problem at 6.
[89] *White*, *supra* note 50 at para 64, Joint BOA, Tab 12.
[90] *Grant*, *supra* note 72 at para 75, Joint BOA, Tab 23.

2. The Detectives' Ignorance of *Charter* Standards Alone Warrants Exclusion of the Evidence

89. Even if the police honestly believed that controlling and accessing the pre-existing cameras did not require a warrant, their misconduct is still serious. Ignorance or negligence of *Charter* standards should not be encouraged, and "wilful blindness cannot be equated with good faith".[91]

90. Accessing and controlling the pre-existing cameras is functionally equivalent to installing new cameras. Police could fully control the angle of the cameras and could watch and listen to residents in real time, offering a 24/7 survey into residents' lives. In both cases, residents would be unaware of the ongoing state surveillance.

91. Given the functional equivalence between accessing existing cameras and installing new ones, it should have been clear to the police that a warrant was likely necessary. The detectives' behaviour clearly demonstrates wilful blindness and deliberate ignorance about *Charter* standards. At the very least, the detectives should have inquired further. They chose not to.

92. When conducting a highly intrusive search, society would expect the police to be prudent about obtaining judicial authorization for their actions. People "rightly expect and assume [that the police] will discharge their professional responsibilities with punctilious respect for the law."[92] Instead, the police attempted to find a "loophole" that would allow them to skip this step.[93] This casual attitude towards *Charter* rights aggravates the seriousness of the state misconduct.[94]

B. THE IMPACT ON MR. ZHASKI'S S 8 RIGHTS WAS SEVERE

93. The impact on Mr. Zhaski's privacy rights was severe in this case. This pushes further toward excluding the camera evidence. Breaches can range from "fleeting and technical to

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[91] *Grant*, *supra* note 72 para 75, Joint BOA, Tab 23; *R v Genest*, [1989] 1 SCR 59 at para 87 [*Genest*], Joint BOA, Tab 51.
[92] *R v Kelly*, 2010 NBCA 89 at para 1 [*Kelly*], Joint BOA, Tab 52.
[93] Grand Moot Official Problem at 12.
[94] *Côte*, *supra* note 86 at para 71, Joint BOA, Tab 31.

profoundly intrusive."[95] The impact is heightened where, like in Mr. Zhaski's case, the accused's expectation of privacy was high.[96]

94. The constant and permanent nature of the audio-video surveillance is profoundly intrusive, exacerbating the impact of the surveillance. The police monitored Mr. Zhaski's comings and goings continuously for weeks. They recorded his personal, private conversations and could observe him bringing over any guests. A search does not have to violate a person to the degree of "strip searches and body cavity searches"[97] for the impact on the accused to be serious.

95. The present case can be distinguished from cases where condo surveillance evidence was admitted under s 24(2) because the impact on privacy rights here was greater. In *R v Hassan*, the Ontario Superior Court of Justice admitted camera evidence from a condo hallway. However, the cameras only operated for limited hours for a limited number of days and had no audio recording capabilities.[98] The accused also did not use the unit as a home.[99] In a similar case, *R v Pipping*, the accused was not the one renting the unit, and therefore had a diminished privacy interest.[100] These cases are factually distinct from Mr. Zhaski's case in material ways.

96. The present case is more analogous to *R v White*, where the Court of Appeal for Ontario ultimately excluded evidence obtained from police surveillance in a condo building.[101] After obtaining information from a confidential informant about the accused selling drugs, an officer sat in the building's stairwell multiple times to listen into the accused's unit. The court affirmed the trial judge's conclusion that the impact on the accused's rights was "serious."[102]

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[95] *Grant*, *supra* note 72 at para 76, Joint BOA, Tab 23.
[96] *Ibid* at para 78
[97] Factum of the Appellant at para 85.
[98] *Hassan*, *supra* note 45 at para 148, Joint BOA, Tab 42.
[99] *Ibid* at para 155.
[100] *Pipping*, *supra* note 51 at para 23, Joint BOA, Tab 30.
[101] *White*, *supra* note 50 at paras 67–69, Joint BOA, Tab 12.
[102] *Ibid* at paras 65–68, aff'g *R v White*, 2013 ONSC 1823 at para 105 [*White* Trial Decision], Joint BOA, Tab 53.

97. The camera surveillance in the present case had an even greater impact on privacy rights than the surveillance in *White*. The officer in *White* only occasionally listened in to the accused's unit. By contrast, as Cook JA correctly noted, the cameras in this case could watch and listen to conversations in the common areas and beyond Mr. Zhaski's door 24/7.

C. SOCIETY'S TRUTH-FINDING INTERESTS DO NOT OUTWEIGH THE STRONG PULL TOWARDS EXCLUSION

98. The severe misconduct and impact on Mr. Zhaski's *Charter* rights outweigh any benefits from society's interest in adjudicating this case on its merits. Where the first two *Grant* factors make a strong case for exclusion, the third will "seldom if ever tip the balance in favour of admissibility".[103]

99. Nonetheless, a few factors lessen the pull towards inclusion at this third inquiry. While the charges in this case are serious, seriousness should not play a significant role in the analysis. Additionally, although the evidence is reliable, its exclusion will not obliterate the prosecution's case. Granting a new trial with the camera evidence excluded would best meet the long-term interests of upholding *Charter* rights for those facing serious charges.

1. The Seriousness of Mr. Zhaski's Charges Should Not Overwhelm the Analysis

100. While there is no dispute that the charges in this appeal are serious, the seriousness of the charges faced by Mr. Zhaski is insignificant to the s 24(2) analysis. As the Supreme Court of Canada held in *Grant*, the relevance of seriousness under the third *Grant* factor is significantly reduced by the fact that seriousness cuts both ways in the s 24(2) analysis.[104]

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[103] *R v Le*, 2019 SCC 34 at para 142 [*Le*], Joint BOA, Tab 54, referring to, *R v Paterson*, 2017 SCC 15 at para 56 [*Paterson*], Joint BOA, Tab 55; see also *R v McGuffie*, 2016 ONCA 365 at para 63 [*McGuffie*], Joint BOA, Tab 56; *Côte*, *supra* note 86 at paras 81-89, Joint BOA, Tab 31; *R v Morelli*, 2010 SCC 8 at paras 98-112 [*Morelli*], Joint BOA, Tab 57.

[104] *Grant*, *supra* note 72 at para 84, Joint BOA, Tab 23.

101. Although society has an interest in adjudicating the case on its merits, the public also has an interest in "ensuring that the justice system remains above reproach in its treatment of those charged with … serious offences."[105] The public's concerns about protecting individual rights and distancing the courts from police misconduct "come to the forefront" where the consequences of a conviction are particularly serious.[106] Allowing seriousness to overpower the analysis would "declare that in the administration of the criminal law 'the ends justify the means'".[107] For this reason, seriousness cannot be allowed to overwhelm the analysis.[108]

102. In this case, the long-term effects of admitting the *Charter*-infringing evidence are more harmful to the administration of justice than any immediate benefits of its inclusion. The Court in *Grant* was clear that the s 24(2) analysis is focused on the long-term effects—and not the short-term effects—on the integrity of the judicial system,[109] and that "[t]he short-term public clamour for a conviction in a particular case must not deafen the s 24(2) judge to the longer-term repute of the administration of justice."[110] This long-term focus points toward the exclusion of the evidence.

2. The Exclusion of the Camera Evidence Would Not Gut the Prosecution's Case

103. The benefits of truth discovery and the adjudication of a case on its merits are attenuated in this case. This is because other evidence is available to the prosecution.

104. The importance of the evidence to the prosecution's case is a factor to be considered under the third *Grant* inquiry.[111] In cases where the exclusion of evidence would effectively "gut" the

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[105] *Spencer*, *supra* note 30 at para 80, Joint BOA, Tab 5; *R v Taylor*, 2014 SCC 50 at para 38 [*Taylor*], Joint BOA, Tab 58.
[106] *McGuffie*, *supra* note 103 at para 73, Joint BOA, Tab 56; *Grant*, *supra* note 72 at para 84, Joint BOA, Tab 23; *R v Dhillon*, 2010 ONCA 582 at para 60 [*Dhillon*], Joint BOA, Tab 59.
[107] *Harrison*, *supra* note 74 at para 40, Joint BOA, Tab 36.
[108] *Yu*, *supra* note 39 at para 153, Joint BOA, Tab 13; *Harrison*, *supra* note 74 at para 40, Joint BOA, Tab 36.
[109] *Grant*, *supra* note 39 at para 68, Joint BOA, Tab 23.
[110] *Ibid* at para 84.
[111] *Ibid* at para 83.

prosecution's case, the truth-seeking function of the criminal law process is negatively impacted, pulling toward admission of the evidence.[112] That is not the case here.

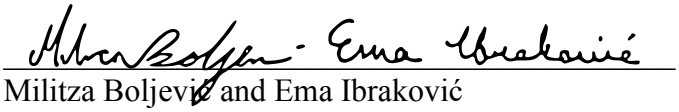
105. The camera evidence used at trial consisted of two interactions. First, there was a recorded conversation between Mr. Zhaski, Ms. Sedis, and Mr. Abdo about whether there was any news regarding the investigation of "First Street". Second, there was a conversation between Ms. Solie and Mr. Zhaski about "what [he was] going to do with the gun."[113]

106. While this camera evidence is clearly useful to the prosecution, it is not the only evidence, nor the strongest evidence, available. Unlike in *Yu,* where the evidence gathered from the camera surveillance was "necessary" and "essential" to two convictions,[114] the prosecution in this case could still rely on other evidence: the evidence from the conversation outside the building between Mr. Zhaski and Ms. Solie and the evidence obtained from the search warrant, a firearm of the same model that may have been used to fire shots into Dr. Kusic's apartment. Given that the evidence at issue would not gut the prosecution's case, the pull toward admission at this stage is mitigated.

PART IV - ORDER SOUGHT

107. The Respondent respectfully requests that this Court dismiss the appeal and uphold the decision of the Falconer Court of Appeal quashing the Respondent's convictions and ordering a new trial excluding the camera evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of August, 2021.



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[112] *Côte*, *supra* note 86 at para 47, Joint BOA, Tab 31.
[113] Grand Moot Official Problem at 8.
[114] *Yu*, *supra* note 39 at para 154, Joint BOA, Tab 13.

PART V - TABLE OF AUTHORITIES

JURISPRUDENCE

	Case Authority	Paragraph
1	*Heckert v 5470 Investments Ltd*, 2008 BCSC 1298	65
2	*Hunter et al v Southam Inc*, [1984] 2 SCR 145	32, 33, 34,
3	*R v Aucoin*, 2012 SCC 66	83
4	*R v Batac*, 2018 ONSC 546	54, 59, 60, 63
5	*R v Buhay*, 2003 SCC 30	83
6	*R v Burlingham*, [1995] 2 SCR 206	82
7	*R v Cole*, 2012 SCC 53	35, 52, 85
8	*R v Côte*, 2011 SCC 46	85, 92, 98, 104
9	*R v Dhillon*, 2010 ONCA 582	101
10	*R v Duarte*, [1990] 1 SCR 30	39
11	*R v Edwards*, [1996] 1 SCR 128	55
12	*R v Genest*, [1989] 1 SCR 59	89
13	*R v Grant*, 2009 SCC 32	76, 77, 78, 80, 82, 83, 88, 89, 93, 100, 101, 102, 104
14	*R v Harrison*, 2009 SCC 34	77, 83, 101
15	*R v Hassan*, 2017 ONSC 233	47, 54, 60, 95
16	*R v Jarvis*, 2019 SCC 10	56
17	*R v Kang-Brown*, 2008 SCC 18	38
18	*R v Kelly*, 2010 NBCA 89	92
19	*R v Kim*, 2020 BCSC 1064	45
20	*R v Le*, 2019 SCC 34	98
21	*R v Marakah*, 2017 SCC 59	36, 42
22	*R v McGuffie*, 2016 ONCA 365	98, 101
23	*R v Morelli*, 2010 SCC 8	98

24	*R v Paterson*, 2017 SCC 15	98
25	*R v Patrick*, 2009 SCC 17	34, 52
26	*R v Plant*, [1993] 3 SCR 281	35
27	*R v Pipping*, 2020 BCCA 104	55, 57, 80, 95
28	*R v Reddy*, 2010 BCCA 11	80
29	*R v Sandhu*, 2018 ABQB 112	44, 45, 48, 63
30	*R v Spencer*, 2014 SCC 43	34, 36, 52, 57, 101
31	*R v Strachan*, [1988] 2 SCR 980	83
32	*R v Taylor*, 2014 SCC 50	101
33	*R v Telus Communications Co*, 2013 SCC 16	74
34	*R v Tessling*, 2004 SCC 67	31, 33, 34
35	*R v Therens*, [1985] 1 SCR 613	83
36	*R v Ward*, 2012 ONCA 660	36
37	*R v White*, 2013 ONSC 1823	96
38	*R v White*, 2015 ONCA 508	54, 55, 58, 60, 87, 96
39	*R v Wong*, [1990] 3 SCR 36	1, 39, 53, 62, 83
40	*R v Yu*, 2019 ONCA 942	40, 51, 54, 62, 63, 65, 70, 101, 106

LEGISLATION

***Flavellian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Flavelle Act 1982* (UK), 1982, c 11**

S. 8 Everyone has the right to be secure against unreasonable search or seizure.

S. 24 (2) Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

***Residential Tenancies Act*, SO 2006, c 17**

S. 2 (2) For the purposes of this Act, a reference to subletting a rental unit refers to the situation in which,

> **(a)** the tenant vacates the rental unit;
>
> **(b)** the tenant gives one or more other persons the right to occupy the rental unit for a term ending on a specified date before the end of the tenant's term or period; and
>
> **(c)** the tenant has the right to resume occupancy of the rental unit after that specified date.

S. 95 (8) If a tenant has assigned a rental unit to another person, the tenancy agreement continues to apply on the same terms and conditions and,

> **(a)** the assignee is liable to the landlord for any breach of the tenant's obligations and may enforce against the landlord any of the landlord's obligations under the tenancy agreement or this Act, if the breach or obligation relates to the period after the assignment, whether or not the breach or obligation also related to a period before the assignment;
>
> **(b)** the former tenant is liable to the landlord for any breach of the tenant's obligations and may enforce against the landlord any of the landlord's obligations under the tenancy agreement or this Act, if the breach or obligation relates to the period before the assignment;

(c) if the former tenant has started a proceeding under this Act before the assignment and the benefits or obligations of the new tenant may be affected, the new tenant may join in or continue the proceeding. 2006, c. 17, s. 95 (8).

***Condominium Act*, SO 1998, c 19**

S. 27 (2) Subject to subsection 42 (4), the board shall consist of at least three persons or such greater number as the by-laws may provide.