M E M O

To: **You (counsel for the Appellant Paul Flynn)**
From: **Senior Partner**
Date: **September 16, 2019**
Re: ***R v Flynn***

We represent the appellant Paul Flynn in this criminal appeal. I filed the Notice of Appeal and will prepare the Appeal Book, but I need you to write the factum and argue the appeal for me.

Our factum is due on Friday, October 25, 2019 at 9:00 a.m. and must be filed electronically via Brightspace. We must also provide a copy to opposing counsel. You will receive the respondent's factum a week later, on Friday, November 1, 2019.

The appeal will be heard during the week of February 3 – 6, 2020. I am scheduled to be out of town at a sentencing hearing that week. You will need to check the Court's docket to determine the exact date and time of the appeal. Should the appeal be delayed for inclement weather, it will likely be rescheduled for the same time the following week. Please keep this time available.

The relevant facts of the case and grounds of appeal are set out below. Additionally, I have provided you with the relevant portion of the reasons of the Supreme Court of Canada, from which we are appealing.

Good luck!

This is an appeal in the case of *R v Flynn*. Paul Flynn was charged with one count of theft over $5000 under section 344(a) of the *Criminal Code* and one count of breaking and entering under section 348(1)(b) of the *Criminal Code*. Flynn was tried in the Supreme Court of Nova Scotia. The entire case against Flynn turned on DNA evidence tendered by the Crown. At trial, Flynn challenged the admissibility of that evidence on the basis that it had been collected in violation of his right to be free from unreasonable search and seizure under s 8 of the *Charter*. The trial judge found no *Charter* breach, admitted the evidence and entered a conviction. Flynn appealed to the Nova Scotia Court of Appeal. The Court of Appeal divided 2-1, with the majority overturning the conviction and entering an acquittal. The Crown appealed to the Supreme Court of Canada. The Supreme Court of Canada reversed the decision of the Court of Appeal, upholding the trial judge's

finding that there was no *Charter* breach and restoring the conviction. The relevant portions of the judgment are produced below. **The judgment of the Supreme Court contains some lines of argument you may consider, but you are not obligated to make the same arguments nor are you limited by them**.

Here are the facts as found by the trial judge (which are not disputed and not subject to appeal).

Constable Michaela Elias responded to a 911 call at a private residence in Herring Cove, Nova Scotia on August 12, 2016. The homeowner and caller, David Grassley, had recently returned from a month-long trip to Italy. One of the first things Grassley did once he got home was check the safe in his bedroom closet, which contained $200,000 in cash, jewellery, as well as a few sentimental belongings. David opened the safe to find that it had been emptied. He immediately called the police.

When Constable Elias arrived at Grassley's home, she interviewed him, surveyed both the interior and exterior of his home, and reviewed the property's security camera footage. David's home was perfectly tidy and there were no signs of a break and enter. There was, however, a small blood stain on the closet's trim, which had not been there before Grassley left for Italy.

The security camera footage from the time of Grassley's absence to his return showed a figure approaching David's home on two different nights, then retreating each time. The figure was dressed the same way on both nights: in black denim jeans, a black hoodie, and black sneakers. It also appeared, although Constable Elias could not be certain, that the figure was an adult male of average height and build. Nothing else about the figure could be identified.

Constable Elias took a sample of the blood stain for DNA testing purposes and gave it to her police department's forensics lab. The lab confirmed that the DNA profile extracted from the blood could not be matched to any other DNA profile in their system.

Constable Elias was also intrigued by the figure she saw in the footage. Though the figure's dress was very nondescript, she lived in a Halifax condominium, and frequently saw in the lobby one of her neighbours dressed in precisely the same attire. She knew this neighbour only vaguely: she knew his name was Paul Flynn and that he was a locksmith. She was fairly sure that Paul did not know she was a police officer.

Reasonably confident that she did not have reasonable grounds to obtain a warrant to search Paul's condominium unit with the evidence available to her, and yet still intensely suspicious, Constable Elias hoped to find a way to match the DNA sample from the crime scene to Paul Flynn. She approached her supervising sergeant, Katrina DiNardo, with the idea of searching for Paul Flynn on "Heritage", which is a website headquartered in Waterloo, Ontario that provides its subscribers with information about their ancestry on the basis of the DNA subscribers submit. When she visited the Heritage website, Constable Elias took note of the Terms of Use Agreement to which Heritage makes all of its subscribers agree. That agreement contains the following statement:

> "As a condition for use of the services that Heritage provides, you acknowledge that Heritage employees can view and analyze your DNA profile for the purposes of Heritage-related research, and you give your consent to Heritage for its employees to do this. You also acknowledge that Heritage employees

> will comply with police requests to solicit your DNA information, and you give your consent to Heritage disclosing to the police such information upon request."

When Constable Elias searched "Paul Flynn" on the Heritage website, multiple subscribers with that name appeared. One of those subscribers had "Halifax, Nova Scotia" listed as their location. Constable Elias called Heritage to inquire about getting the DNA profile associated with that one subscriber. The Heritage representative told Michaela that they would need proof of her credentials, but that as soon as they received that, they would forward to her a copy of that subscriber's DNA information. She faxed Heritage the necessary proof and just a few hours later received an email from Heritage with the DNA information attached in an electronic file.

Constable Elias forwarded the DNA information provided by Heritage to the forensics lab. The lab compared that information with the DNA acquired from the blood sample. The DNA was a match. On this basis, Constable Elias wanted to apply for a warrant to search Mr. Flynn's condominium unit. Sergeant DiNardo contacted the Nova Scotia Public Prosecution Service because she was uncertain about whether the evidentiary basis of the warrant was sound.

Angela Wilson, a Senior Crown Attorney at the Nova Scotia Public Prosecution Service told Constable Elias that she was not certain that the evidence obtained from Heritage would be admissible, and in order to avoid having the case thrown out it would be better if the police could find an additional way to match the DNA from the crime scene to Paul Flynn.

The police developed another plan. Constable Elias would strike up a conversation with Flynn at their condominium building, feign romantic interest in him, and ask him out for drinks at a nearby bar, in the hopes that at some point Flynn would leave behind a bottle or cup from which a DNA sample could be obtained. The plan worked flawlessly. Constable Elias set up a date with Flynn on Friday evening, September 9, 2016. She ordered bottles of beer from the bar and the two talked at a table for several hours. At one point after finishing a bottle of beer, Flynn excused himself to go to the bathroom. Constable Elias immediately picked up the empty bottle and handed it off to Sergeant DiNardo, who was also undercover and waiting in the bar.

Sergeant DiNardo immediately sent the empty bottle to the forensics lab. The DNA from the bottle was a match to both the DNA sample taken from the blood stain at the crime scene and the Heritage DNA sample.

A search warrant for Flynn's condominium unit was obtained on the basis of both the DNA match from both the Heritage DNA sample and the sample obtained from the beer bottle. That search resulted in the discovery of all of the items that were missing from Grassley's safe, and Flynn was charged with theft and breaking and entering.

At trial, counsel for Flynn argued that his section 8 *Charter* right to be free from unreasonable search and seizure has been violated twice: once when the police obtained his DNA from Heritage, and again when the police surreptitiously gathered his DNA from the beer bottle.

On cross-examination, Flynn admitted that he read Heritage's Terms of Use Agreement before clicking "I agree". He acknowledged that he was aware that numerous individuals at Heritage he

would never know might access his information. He also said despite that he expected he would still retain a "good deal" of privacy even after signing the Agreement.

The trial judge found no *Charter* violations. With respect to the first claim about Heritage, she found that the lack of a subjective expectation of privacy, because Flynn acknowledged that he had read the Terms of Use Agreement, meant that s 8 was not engaged. With respect to the claim about the beer bottle, she found that Flynn had abandoned the bottle when he left the table and therefore there was no expectation of privacy in it or the DNA left upon it either.

Flynn appealed. The Nova Scotia Court of Appeal reversed the trial judgment, in a 2-1 split decision. The majority found that s 8 of the *Charter* was breached during both searches. With respect to the claim involving Heritage, the majority found that the lack of a subjective expectation of privacy was not enough to vitiate the protection of the *Charter* and it was objectively reasonable to expect privacy from the police when using a web service like Heritage. With respect to the claim involving the beer bottle, the majority found that even if Flynn had abandoned the beer bottle, he had not abandoned his DNA on the bottle, and still maintained an expectation of privacy in it. The dissent would have upheld the trial judge's reasoning.

The Crown appealed to the Supreme Court of Canada, which split 5-4, finding in the Crown's favour on both issues.

With respect to the first issue, on whether obtaining Flynn's DNA from Heritage violated s 8, the majority held in part:

> [31] This court has held in *R v Marakah*, 2017 SCC 59, that the inquiry into whether a person has a reasonable expectation of privacy must be broken down into three components: 1) did the claimant had a direct interest in the subject matter; 2) did the claimant have a subjective expectation of privacy in the subject matter; and 3) if so, was the claimant's subjective expectation of privacy objectively reasonable? See also, *R v Patrick,* 2009 SCC 17.
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> [32] Given the trial judge's finding that the respondent knew that others, including the police, could access his DNA from Heritage, there can be no s 8 breach. The existence of a subjective expectation of privacy is a threshold issue under s 8 of the *Charter*. If a claimant does not have a subjective expectation of privacy, that ends the inquiry. See *R v Bearisto,* 2018 ABCA 118.
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> [33] In any event, any expectation of privacy the respondent had was not objectively reasonable. Several judges of this court previously held that the existence of a regulatory framework which allowed liberal disclosure of personal information to be determinative of a reasonable expectation of privacy: see *R v Gomboc,* 2010 SCC 55, per Abella, J. (concurring).

> [34] The Heritage Terms of Use Agreement renders any expectation of privacy the respondent does have unreasonable. It is not reasonable for the respondent to sign a contract and then expect that something other than what they contracted for to occur: see *R v Godbout*, 2014 BCCA 319. The Respondent is simply asking this Court to ignore the existence of the Agreement.

With respect to the second issue, on whether obtaining Flynn's DNA from the beer bottle violated s 8, the majority held in part:

> [52] This Court has held that there is no expectation of privacy where a person abandons an object, see *R v Patrick*, *supra*. Where a person is not in custody, police are free to follow a person and collect items discarded by that person without their consent and without violating a privacy interest, see *R v Stillman*, [1997] 1 SCR 607 at para 62.
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> [53] Where a person abandons an object in a public place they give up confidentiality in that object and in all the information embedded therein: see *D'Amico c R,* 2019 QCCA 77 at para 314 (per Thibault, JA). To hold otherwise would never allow the police to obtain DNA samples from any object, since the claimant will always abandon an object, rarely if ever consciously even considering the DNA on it.
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> [54] The respondent left an empty bottle he had used on the table in a public bar and left the dining area to go to the bathroom. At that stage, the bottle could have been taken by the bar staff or any member of the public in the bar, including the police. There is no objectively reasonable expectation of privacy in those circumstances: see *D'Amico, supra* at para 379.

The dissent disagreed on both points. With respect to the first issue, the dissent wrote in part:

> [76] I disagree with my colleague's characterization of a subjective expectation of privacy as a threshold issue for the purposes of s 8 of the *Charter*. In *R v Tessling*, 2004 SCC 67 this Court warned of the risks of requiring a subjective expectation of privacy to determine the issue of whether a search has occurred. Just because a person believes they are being watched or could be watched does not mean the *Charter* does not protect them.
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> [77] If all it takes to allow the police access to unlimited amounts of deeply personal information is a ubiquitous terms of service agreement in a contract, then we risk the protections in s 8 of the *Charter* being totally undermined, especially when it comes to the content of deeply personal information like one's DNA profile. Even without a subjective expectation of privacy, I find that the respondent could still establish a reasonable expectation of privacy.
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> [78] With respect to whether the respondent signing a ridiculously invasive policy is determinative of the reasonableness of the expectation of privacy, the expectation of privacy analysis is a normative one: see *R v Spencer,* 2014 SCC 43. Our society is not one, or at least should not be one, in which a person can simply sign away their *Charter* rights.

With respect to the second issue, the dissent wrote in part:

> [86] The caselaw on abandonment has evolved significantly since *Stillman*, *supra*. The distinction between what the police may do while a suspect is in custody as opposed to when they are not should no longer be maintained. As this Court made clear in *Marakah*, *supra*, the subject of a search is no longer the object the police seize, but "what they are really after". In the case of DNA samples taken from so-called abandoned objects, it is apparent the police are not after the object, but the DNA left on it. The distinction in *Stillman* between in and out of custody was based on a lowered expectation of privacy when a person is in custody, but while a person might have a lowered expectation of privacy in some things while in custody, there should never be a lowered expectation of privacy in one's DNA profile, especially when the shedding of DNA is so often beyond the control of the person altogether.
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> [87] The issue in this case is not whether the respondent abandoned the bottle in the bar, but whether he abandoned his DNA profile when he got up from the table to go to the bathroom: see *D'Amico*, *supra* (per Vauclair, JA). It is not reasonable to expect that people voluntarily abandon their DNA to the public or law enforcement every time they use a tissue or drink from a disposable receptacle. That is *especially* true where the "abandonment" is part of a specially crafted ruse designed by the authorities to create circumstances where it could occur.

Mr. Flynn has now appealed the decision of the Supreme Court of Canada to the Supreme Moot Court of Dalhousie, on the following grounds of appeal:

1) **That the Supreme Court of Canada erred in finding that the appellant had no reasonable expectation of privacy in the content of his DNA stored on the Heritage website because of the Terms of Use Agreement; and**

2) **That the Supreme Court of Canada erred in finding that the appellant had no reasonable expectation of privacy in the content of his DNA on a beer bottle because he had abandoned it.**

The parties agree that if the evidence is admissible, it establishes Mr. Flynn's guilt beyond a reasonable doubt with respect to both offences. The Crown concedes that if either of the police actions constitutes a search, the evidence should be excluded. You therefore need not and should not address any *Charter* s 24(2) issues.

Note: The Supreme Moot Court of Dalhousie prefers that counsel cite only the most relevant cases and authorities. You may cite up to seven cases on each issue, any relevant legislation you feel should be brought to the Court's attention, and up to two secondary sources. You may cite *R v Edwards,* [1996] 1 SCR 128 without it counting against your seven-case limit.

If you need to cite the underlying Supreme Court of Canada decision in this case, the citation is 2019 SCC 108, and it also does not count against your seven-case limit.