

IN THE SUPREME COURT OF FLAVELLE
(ON APPEAL FROM THE FALCONER COURT OF APPEAL)

BETWEEN:

FLAVELLE (ATTORNEY GENERAL)

Appellant

- and -

MATTHEW ZHASKI

Respondent

APPELLANT'S FACTUM

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PART I – OVERVIEW AND FACTS

A. Overview

1. Flavellians are entitled to live safely, securely, and with certainty that crimes will be investigated with all of the resources at the state’s disposal.
2. This appeal asks the Court to consider whether the *Flavellian Charter of Rights and Freedoms* (“the *Charter*”) allows the police to monitor condominium security cameras with the condominium Board’s express consent. The answer to this question must be yes.
3. In investigating an attempted murder planned and carried out by the Respondent, the police took a reasonable and lawful course of action which was fully compliant with s 8 of the *Charter*. Condominium common areas, particularly those with visible security cameras on the walls, are not private places. Accordingly, individuals generally do not enjoy an expectation of privacy in those areas. If a limited expectation of privacy did exist in this case, the consent of the Board to allow the police access to the security cameras rendered the search constitutionally compliant.
4. Even if s 8 was infringed, the security camera evidence should not be excluded under s 24(2) because doing so would bring the administration of justice into disrepute. The state conduct was not serious, the Respondent’s *Charter* rights were only moderately impacted, and society has a heightened interest in seeing this case adjudicated on the merits. Exclusion of the evidence would erode public trust in the justice system.
5. There are reasonable constitutional limits on the investigatory resources available to the state. Those limits were not exceeded here. The security camera evidence should be admitted and the Respondent’s convictions restored.

B. Statement of Facts

i. The Shooting and Initial Investigation

6. Dr. Kusic is a radiologist who lives in Falconer. On October 30, 2016, two bullets were fired through the window of Dr. Kusic's ground-floor apartment on First Street. Dr. Kusic narrowly avoided being shot. She immediately called 911. When officers from the Royal Falconer Police Service ("RFPS") arrived minutes later, they conducted a sweep of the building's perimeter but could not locate the shooter. Dr. Kusic advised the officers that, in early 2016, she had received three harassing letters from an unknown sender.

7. During the course of their investigation, the RFPS determined the model of gun that was likely used. The RFPS also received three tips alleging that the Respondent, Matthew Zhaski, was involved in the shooting.

8. Mr. Zhaski had worked at Somerville General Hospital at the same time as Dr. Kusic in 2012. One of the tips alleging Mr. Zhaski's involvement in the shooting was anonymous, but the other two came from credible informants who had assisted the RFPS in the past. The latter two also told the RFPS that Mr. Zhaski regularly "hang[s] around" three people: Louis Abdo, Marie Sedis, and Anne Solie. Based on these reliable tips, the investigation focused on these four individuals, all of whom lived in Goldfarb Condos.

ii. Goldfarb Condos and the Continued Investigation

9. Goldfarb Condos is a 50-unit condominium building located in Somerville, Falconer. In 2014, numerous security cameras were installed inside and outside of the building in response to issues with crime. The cameras are acknowledged in Goldfarb Condos' rental and purchase agreements. The cameras are visible to the average, discerning person.

10. Mr. Zhaski lived in Goldfarb Condos through a Rarebnb agreement. Rarebnb is an online marketplace which allows owners or renters of property to provide short-term housing for guests. Mr. Zhaski had been using Rarebnb to live in various units of Goldfarb Condos since September 2016. His Rarebnb agreements did not mention the security cameras.

11. In April 2018, Detectives Ma and Xu of the RFPS approached Goldfarb Condos' property manager, Ms. Gagne, and named the four residents under police investigation. The detectives asked for remote access to the condominium's security cameras. Ms. Gagne told the detectives that the Board had authority over such matters, but that Ms. Solie, one of the investigation's targets, was a member of the Board. At the detectives' request, Ms. Gagne privately spoke with the Chair of the Board, Ms. Paparousis, who later provided her consent.

12. The RFPS remotely accessed three security cameras. One camera was in the gym, which was across the hall from Mr. Zhaski's first-floor apartment; another was on the wall near Mr. Abdo's and Ms. Solie's apartments; and the last was in the lobby.

13. As they were leaving the building that day, Detectives Ma and Xu overheard an argument between Mr. Zhaski and Ms. Solie in the condominium's doorway. The detectives heard Mr. Zhaski say, "She got the message. Nothing more needs to be done." They also heard Ms. Solie ask, "And the gun?" Everything else was inaudible. After the conversation ended, Detectives Ma and Xu walked away and attempted to observe Mr. Zhaski's first-floor apartment through the window, but nothing of interest was in plain view. The detectives then left.

iii. The Security Camera Evidence and Subsequent Arrests

14. Two pieces of evidence were obtained through the security cameras:

- a. April 30, 2018: In the lobby, Mr. Abdo asked if there was any news about the “First Street” investigation. Mr. Zhaski shook his head. Ms. Sedis told them not to discuss that subject in the lobby.
- b. May 6, 2018: In the gym, Ms. Solie asked Mr. Zhaski what he was going to do with the gun, to which Mr. Zhaski replied, “I don’t know.”

15. Largely based on the three initial tips and the evidence gathered through the security cameras, the police obtained a search warrant for Goldfarb Condos’ common areas and Mr. Zhaski’s unit. Upon executing the search warrant in Mr. Zhaski’s unit, the RFPS found a firearm of the model which was likely used in the shooting.

16. Mr. Zhaski, Mr. Abdo, Ms. Solie, and Ms. Sedis were charged under the *Criminal Code* with attempted murder, conspiracy, and using a firearm in the commission of an offence. Mr. Zhaski individually faced charges pertaining to his possession of the firearm.

17. Mr. Zhaski sought to exclude the security camera evidence under s 24(2) of the *Charter* on the basis that the surveillance violated his s 8 rights.

C. Judicial History

i. The Falconer Superior Court of Justice Decision

18. Roberts J of the Falconer Superior Court of Justice held that Mr. Zhaski’s s 8 rights had not been infringed because he did not have a reasonable expectation of privacy in the common areas of the condominium.

19. In the alternative, Roberts J held that Ms. Gagne’s and Ms. Papparousis’ consent to access the cameras was sufficient. She highlighted the fact that condominium management has been recognized by courts as having the power both to allow police entry to the common areas of their condominiums and to turn surveillance over to the police. Roberts J likened the detectives’ act of

accessing pre-existing, visible cameras to simply asking the condominium board for surveillance tapes as part of their investigation.

20. Even if there had been an infringement of Mr. Zhaski's s 8 rights, Roberts J would not have excluded the security camera evidence, which was "highly reliable and highly incriminating." In her s 24(2) analysis, Roberts J concluded that the administration of justice would be brought into disrepute if the impugned evidence was excluded.

ii. The Falconer Court of Appeal Decision

21. Cook JA, writing for the majority of the Court of Appeal, with Teixeira JA concurring, overturned the trial judge's decision. Cook JA held that Mr. Zhaski's reasonable expectation of privacy had been invaded by the police's use of the cameras in the building's common areas. He reasoned that installing hidden cameras and tapping into existing cameras both amounted to the state secretly watching and listening to residents. Cook JA opted to exclude the camera evidence under s 24(2) because, by his analysis, the state misconduct was severe and Mr. Zhaski's rights had been seriously impacted.

22. Cheng JA, dissenting, held that Mr. Zhaski's s 8 rights had not been infringed. Cheng JA held that there was a meaningful distinction between hidden cameras used by police and using existing cameras. In accessing pre-existing cameras, the police were surveilling Mr. Zhaski only where he had previously been surveilled. If there was a violation of s 8, Cheng JA would have included the evidence. The police acted in good faith by securing consent from the appropriate stakeholders, and their conduct was relatively unobtrusive and practical.

PART II – STATEMENT OF ISSUES

23. There are two issues on appeal:

Issue 1: Did the police violate Mr. Zhaski’s s 8 *Charter* rights when they accessed the pre-existing condominium security cameras with the Board’s consent?

Issue 2: If Mr. Zhaski’s s 8 rights were infringed, should the security camera evidence be excluded pursuant to s 24(2) of the *Charter*?

PART III – ARGUMENT

Issue #1: Accessing the condominium cameras did not violate Mr. Zhaski’s section 8 rights

24. Mr. Zhaski’s s 8 rights were not violated. Section 8 of the *Charter* provides that “[e]veryone has the right to be secure against unreasonable search or seizure.”¹ To determine whether this right has been violated, the court must answer two questions:

1. Did the claimant have a reasonable expectation of privacy in the subject matter of the search or seizure?
2. If so, was the search or seizure conducted reasonably?²

Answering these questions requires the court to balance the individual’s interest in maintaining their privacy and the state’s interest in effective law enforcement.³ The s 8 analysis is a contextual exercise, sensitive to the facts of each case.⁴

¹ *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.

² *R v Edwards*, [1996] 1 SCR 128 at para 45 [*Edwards*], Joint Book of Authorities, Tab 1 [Joint BOA].

³ *Hunter v Southam*, [1984] 2 SCR 145 at 159–160, Joint BOA, Tab 2; *Edwards*, *supra* note 2 at para 30, Joint BOA, Tab 1.

⁴ *R v Plant*, [1993] 3 SCR 281 at 293, Joint BOA, Tab 3; *Edwards*, *supra* note 2 at para 45, Joint BOA, Tab 1.

25. Mr. Zhaski's s 8 rights were not violated for two reasons. Firstly, Mr. Zhaski did not have a reasonable expectation of privacy in the common areas of Goldfarb Condos. Secondly, even if he did have a reasonable expectation of privacy, the search was conducted in a reasonable manner, having been authorized by Ms. Paparousis' consent.

A. The surveillance cannot be characterized as a search because Mr. Zhaski did not have a reasonable expectation of privacy

26. Mr. Zhaski had no reasonable expectation of privacy in the common areas of Goldfarb Condos. Without a reasonable expectation of privacy, a search cannot have occurred and Mr. Zhaski's s 8 rights cannot have been violated.

27. Whether one has a reasonable expectation of privacy depends on the totality of the circumstances, assessed with reference to a number of factors that have conventionally been grouped under four headings:

1. The subject matter of the alleged search;
2. The claimant's direct interest in the subject matter;
3. The claimant's subjective expectation of privacy in the subject matter; and
4. Whether that expectation of privacy was objectively reasonable.⁵

28. The Appellant concedes that Mr. Zhaski had a direct interest in the subject matter of the search: his interactions in the condominium common areas with other members of the conspiracy to murder Dr. Kusic. However, Mr. Zhaski did not have a subjective expectation of privacy with respect to those interactions because he knew the common areas were quasi-public, by virtue of

⁵ *R v Tessling*, 2004 SCC 67 at para 32 [*Tessling*], Joint BOA, Tab 4; *R v Spencer*, 2014 SCC 43 at para 18, Joint BOA, Tab 5.

being accessible to all residents and visitors. If he did have a subjective expectation of privacy, it was not objectively reasonable.

i. Mr. Zhaski did not have a subjective expectation of privacy

29. Although proving a subjective expectation of privacy is not a high bar, primarily because no reasonableness requirement attaches to it, the Respondent fails to meet this standard.⁶

30. When a person knowingly exposes information to the public, or to a section of the public, they can no longer be presumed to have a reasonable expectation of privacy with respect to that information.⁷ The information pertaining to Mr. Zhaski that was caught on camera was divulged in a quasi-public area, through which any Goldfarb Condos occupants, visitors, landlords, or staff could have passed. Mr. Zhaski cannot be entitled both to discuss the shootings publicly and then, when the discussions are overheard, claim that they are a private matter worthy of s 8 protection.

31. Mr. Zhaski *knew* the risks of talking about the First Street shootings publicly. Ms. Sedis warned Mr. Zhaski and Mr. Abdo not to discuss the matter in the lobby.⁸ This warning put Mr. Zhaski on notice that the condominium's common areas were not private and should not be treated as such.

32. Finally, comparable examples from the jurisprudence suggest that Mr. Zhaski's claim should fail. Claimants who have previously failed to establish a subjective expectation of privacy include a passenger in a friend's car⁹ and a man in his girlfriend's apartment.¹⁰ These claims are stronger than Mr. Zhaski's claim: common areas in a 50-unit condominium are inherently more

⁶ *R v Patrick*, 2009 SCC 17 at para 37 [*Patrick*], Joint BOA, Tab 6; *R v Jones*, 2017 SCC 60 at para 20, Joint BOA, Tab 7.

⁷ *Tessling*, *supra* note 5 at para 40, Joint BOA, Tab 4.

⁸ Grand Moot Official Problem at 8.

⁹ *R v Belnavis*, [1997] 3 SCR 341 at para 22 [*Belnavis*], Joint BOA, Tab 8.

¹⁰ *Edwards*, *supra* note 2 at para 46, Joint BOA, Tab 1.

public than a private citizen's car or apartment unit. The common areas are correspondingly less likely to be entitled to s 8's protection.

ii. If Mr. Zhaski had a subjective expectation of privacy, it was not objectively reasonable

33. In the alternative, if a subjective expectation of privacy existed, it was not objectively reasonable. Three key contextual factors in this case militate against the reasonableness of Mr. Zhaski's expectation: the location of the conversations, Mr. Zhaski's transient living arrangement, and the presence of visible security cameras.

(1) The conversations took place in common areas

34. A reasonable person would not expect their privacy to be maintained in the common areas of Goldfarb Condos. The Supreme Court of Canada has made clear that "[a]n important aspect of privacy is the ability to exclude others from the premises."¹¹ Mr. Zhaski did not own or control the common areas, nor did he regulate access to them. This, in turn, diminishes his reasonable expectation of privacy inside of them.¹²

35. Having private conversations in the condominium's public spaces and still expecting privacy is not objectively reasonable. The common areas are there to accommodate all who are lawfully inside of the building. Anybody coming to or leaving the building will pass through the lobby, and the gym is accessible to both residents and visitors.¹³ Any number of people could have overheard or walked into the room during one of Mr. Zhaski's conversations. The existence of that possibility further erodes Mr. Zhaski's expectation of privacy.¹⁴

¹¹ *Ibid* at para 49.

¹² *Ibid* at para 45; *Belnavis*, *supra* note 9 at para 20, Joint BOA, Tab 8; *R v Buhay*, [2003] 1 SCR 631 at para 18, Joint BOA, Tab 9.

¹³ Grand Moot Official Problem at 7.

¹⁴ *Tessling*, *supra* note 5 at paras 32, 46–47, Joint BOA, Tab 4.

36. The fact that Mr. Zhaski was recorded only when he was in public view serves to distinguish his claim from cases where surveillance was found to have violated s 8. In *R v Duarte*, the defendant was recorded discussing a drug transaction inside of an apartment with a police informant.¹⁵ In *R v Wong*, police conducted surveillance inside of a hotel room to investigate a suspected illegal gaming-house.¹⁶ Both cases turned on whether the defendant “spoke in circumstances in which it was reasonable for [him] to expect that his...words would be heard only by the persons he...was addressing.”¹⁷ In both cases, that expectation was found to be reasonable.

37. The same analysis does not apply to a condominium’s common area. In *Duarte* and *Wong*, the police intercepted private communications in settings with heightened expectations of privacy. The surveillance in this case was restricted to communications in the common areas of a 50-unit condominium, which attracts a far lower expectation of privacy than a private apartment and private hotel room. Deeming conversations that are had in quasi-public areas to be “private communications” would distort the definition of that phrase.

(2) *Mr. Zhaski’s transient living arrangement lowers his expectation of privacy*

38. The transient nature of Mr. Zhaski’s living arrangement lowers his reasonable expectation of privacy in the common areas of Goldfarb Condos. Ownership of property has long been considered a relevant factor in determining the reasonableness of one’s subjective privacy interest.¹⁸ In the condominium context, the Court of Appeal for Ontario recognized in *R v White* that ownership of property in a multi-unit dwelling impacts one’s expectation of privacy not only

¹⁵ *R v Duarte*, [1990] 1 SCR 30 [*Duarte*], Joint BOA, Tab 10.

¹⁶ *R v Wong*, [1990] 3 SCR 36 at 40-41, Joint BOA, Tab 11.

¹⁷ *Duarte*, *supra* note 15 at 47, Joint BOA, Tab 10.

¹⁸ *Edwards*, *supra* note 2 at para 45, Joint BOA, Tab 1.

in their own unit, but in the common areas as well.¹⁹ To be sure, a lack of ownership should not be dispositive. Renters in multi-unit dwellings may have, in many cases, a reasonable expectation of privacy in the common areas.

39. Mr. Zhaski, however, is not a typical renter. His relationship to Goldfarb Condos is marked by impermanence. Between September 2016 and June 2018, Mr. Zhaski rented a series of units in Goldfarb Condos through Rarebnb, moving every few months. On occasion, he moved out of Goldfarb Condos altogether for as much as a month at a time. Because of his transience, Mr. Zhaski's historical use of Goldfarb Condos is low.²⁰ Accordingly, his connection to the condominium and its common areas is attenuated.

(3) Mr. Zhaski was already being recorded by the condominium corporation

40. An expectation of privacy in the common areas is unreasonable given the condominium's extensive network of security cameras. A subjective expectation of privacy is less likely to be reasonable if the information over which the claimant asserts a privacy interest already lies in the hands of a third party.²¹ The subject matter of the search—Mr. Zhaski's interactions with the other three suspects in the common areas—was always going to be preserved by the condominium's security cameras, irrespective of the police's involvement. Although the decision in *R v Marakah* noted that a person does not “lose control of information” merely because another person possesses it, the existence of visible security cameras surely lessens Mr. Zhaski's expectation of privacy over

¹⁹ *R v White*, 2015 ONCA 508 at paras 40, 45 [*White*], Joint BOA, Tab 12. See also *R v Yu*, 2019 ONCA 942 at para 68 [*Yu*], Joint BOA, Tab 13.

²⁰ *Edwards*, *supra* note 2 at para 45, Joint BOA, Tab 1.

²¹ *Tessling*, *supra* note 5 at para 32, Joint BOA, Tab 4; *R v M(A)*, 2008 SCC 19 at para 128, Joint BOA, Tab 14; *Patrick*, *supra* note 6 at paras 65–68, Joint BOA, Tab 6.

that information.²² Once this factor is considered in conjunction with the other factors, Mr. Zhaski's expectation of privacy diminishes to the point of negation.

41. The common areas have been surveilled by the condominium corporation since 2014. In his time living in Goldfarb Condos, Mr. Zhaski had never gone to the gym, passed through the lobby, or walked in the hallways without being seen and heard by an extensive network of security cameras. None of this was changed by the police's investigation.

42. The fact that the condominium security cameras were in place prior to the investigation makes a material difference. In *R v Yu*, the Court of Appeal for Ontario held that a warrant is required to install hidden cameras in a condominium. Tulloch JA, writing for the Court, saw a clear distinction between the facts of *Yu* and the facts of this case:

“Both the fact that the camera was hidden and that it was installed and operated by police distinguish it from regular security cameras. [There are] different expectations of privacy in these different situations.

...

[W]hile residents expect to be under surveillance by the visible cameras installed by management, they do not expect to be under surveillance by ‘hidden cameras,’ much less hidden cameras installed by the police.”²³

43. There were no hidden or police-installed cameras in Goldfarb Condos. The residents were only under surveillance by the same cameras which had existed since 2014. By Tulloch JA's reasoned analysis, the Respondent's expectation of privacy must be different than the residents in *Yu*.

44. All residents who live in Goldfarb Condos should reasonably expect to be recorded in common areas. The cameras are “visible to the average, discerning person.”²⁴ As such, it is immaterial that the cameras are not mentioned on Mr. Zhaski's Rarebnb agreements because it is

²² *R v Marakah*, 2017 SCC 59 at para 41, Joint BOA, Tab 15.

²³ *Yu*, *supra* note 19 at paras 124, 128, Joint BOA, Tab 13.

²⁴ Grand Moot Official Problem at 4.

exceedingly likely that he was nevertheless aware of the cameras' presence. Even if Mr. Zhaski had remained unaware of the cameras, their visibility to the average person would render his lack of perception objectively unreasonable.

45. It is not necessary to assess whether a reasonable person would have expected the security system to have audio functioning. It is only necessary to determine whether they would have reasonably expected their conversation to be confidential. The reasoning in *Duarte* is instructive:

“[T]he assessment of whether the surreptitious recording trenches on a reasonable expectation of privacy must turn on whether the person whose words were recorded spoke in circumstances in which it was reasonable for that person to expect that his or her words would be heard only by the persons he or she was addressing.”²⁵

46. In a public or quasi-public space, this is not a reasonable expectation. Ms. Sedis' warning to refrain from discussing the shootings in the lobby is again illustrative. Ms. Sedis was conscious of the fact that conversations in common areas may not remain private. This belief, which was imparted to Mr. Abdo and Mr. Zhaski, was objectively reasonable.

B. If the surveillance was a search, it was consensual and conducted reasonably

47. The condominium's Board of Directors has the rightful authority to consent to a search. The Board's consent in this case was both voluntary and informed, and the subsequent search was performed in a reasonable manner.

48. When searches are conducted by the state, they must be done in a reasonable manner to maintain constitutional compliance. A warrant is presumptively required to satisfy this standard.²⁶

However, this presumption can be displaced by the consent of a person or entity with the authority

²⁵ *Duarte*, *supra* note 15 at 47, Joint BOA, Tab 10.

²⁶ *R v Nolet*, 2010 SCC 4 at para 21 [*Nolet*], Joint BOA, Tab 16; *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 99, Joint BOA, Tab 17.

to consent.²⁷ Here, the presumption was rightfully displaced by the consent of the Chair of the Board, Ms. Paparousis.

i. The Board has, and should maintain, the authority to consent

49. The Board has the rightful authority to consent to searches of the common areas. The *Condominium Act* requires that the Board, on behalf of the condominium corporation, “control, manage, and administer the [building’s] common elements.”²⁸ Goldfarb Condos’ bylaws further provide that the Board may restrict the use that visitors make of common areas, and that members of the Board may deny access to the building altogether to non-residents that they deem to be unsafe.²⁹ All of this suggests that the Board retains the ability to control and regulate access to the common areas. In light of the powers it has been delegated, the Board is best situated to consent to state searches of the condominium’s common areas.

50. Additionally, the *Occupier’s Liability Act* considers the Board, not the residents or owners, to be the sole occupier of the common areas.³⁰ This imposes a legal duty on the Board to take reasonable care to ensure that those who enter the premises are kept safe.³¹ If the Board faces exposure to liability, it must be capable of using its statutory authority to fully discharge its legal duty. That entails taking reasonable action to protect the condominium’s residents from threats to their safety, including the threat of being exposed to or victimized by crime.³²

²⁷ *R v Reeves*, 2018 SCC 56 at para 13 [Reeves], Joint BOA, Tab 18.

²⁸ *Condominium Act*, SO 1998, c 19, ss 17(2), 27(1).

²⁹ Grand Moot Official Problem at 5.

³⁰ *Condominium Act*, SO 1998, c 19, s 26.

³¹ *Occupier’s Liability Act*, RSO 1990, c O2, s 3(1).

³² An occupier can be liable under the *Occupier’s Liability Act* where their negligence results in another person being victimized by crime: *Q v Minto Management Ltd* (1985), 15 DLR (4th) 581, 49 OR (2d) 531 at 16, Joint BOA, Tab 19.

51. The Board’s exclusive authority over the common areas aids in distinguishing this case from those in which the courts ruled that third parties cannot provide consent. In *R v Reeves*, the defendant’s spouse consented to a seizure of a shared computer on which child pornography was found.³³ The seizure was held to have violated s 8 because “[w]aiver by one rights holder does not constitute waiver for all rights holders.”³⁴

52. The proposition from *Reeves* that others “cannot unilaterally authorize police to take things that we share [with them]” does not apply to these facts.³⁵ To analogize this case to *Reeves* would necessarily imply that all residents of Goldfarb Condos are co-owners and sharers of the common spaces, equally capable of providing consent. That characterizes the situation inaccurately. The power to consent is not given to multiple entities, but to one: the Board, acting on behalf of the condominium community as a whole. Nobody else was deprived of the ability to consent because nobody else had the ability to consent to begin with.

53. If condominium Boards are found by this Court to categorically lack the authority to consent to the police monitoring surveillance footage, it will significantly undermine their ability to promote the safety, security, and welfare of their respective residents, as they are statutorily required to do.³⁶ The Board must not be impeded from fulfilling its statutory duties.

ii. Ms. Paparousis’ consent was voluntary and informed

54. Detectives Ma and Xu took all of the necessary steps to validly obtain consent to monitor the security cameras in Goldfarb Condos’ common areas. The detectives ensured that any consent provided came from the proper channels by seeking the approval of Ms. Paparousis, the Chair of

³³ *Reeves*, *supra* note 27, Joint BOA, Tab 18.

³⁴ *Ibid* at para 52.

³⁵ *Ibid* at para 44.

³⁶ *Condominium Act*, SO 1998, c 19, ss 58(1)(a), 97(2)(b).

the Board. Since full Board approval was impracticable given Ms. Solie's membership, Ms. Paparousis' consent as Chair was authoritative.

55. The consent that Ms. Paparousis provided was voluntary. The detectives did not attempt to impose pressure on either Ms. Gagne or Ms. Paparousis to consent. Detectives Ma and Xu remained deferential to the condominium's authority throughout the process of requesting and receiving consent and, in turn, the consent they received was purely discretionary.

56. Ms. Paparousis' consent was also informed. The detectives provided the names of the residents under investigation and the precise method of investigation for which they were seeking consent. This was all the information that was necessary to provide. Ms. Paparousis made the informed decision that, in the circumstances, allowing the officers to monitor three select security cameras was warranted. That decision was not so unjustifiable as to merit judicial interference.

iii. Once consent was obtained, the search was conducted reasonably

57. The surveillance was conducted in the exact form that was consented to. The officers never attempted to obtain consent to access more cameras and never attempted to use the surveillance to ensure legal compliance by any residents other than the four for which consent was given. Though the RFPS was given the ability to change the camera's angles, there is no evidence that this ability was ever exercised. If the officers had, at any point, tried to overstep the bounds of the investigation to which Ms. Paparousis had consented, they would cross the line into unconstitutional conduct.³⁷ Instead, they conducted themselves appropriately throughout the investigation, strictly abiding by the consent which governed them. Mr. Zhaski's s 8 *Charter* rights were left wholly intact.

³⁷ Consent given for one purpose does not translate into consent for another purpose: *R v Mills*, [1999] 3 SCR 668 at para 108, Joint BOA, Tab 20; *R v Dymont*, [1988] 2 SCR 417 at 429-430, Joint BOA, Tab 21.

ISSUE #2: The camera evidence should be admitted under s 24(2)

58. If this Court finds that Mr. Zhaski's s 8 *Charter* rights were breached, the camera evidence obtained as a result of that breach should not be excluded under s 24(2).

59. Excluding evidence under s 24(2) requires the Respondent to first establish that the impugned evidence was obtained in a manner that violated their *Charter* rights.³⁸ If a s 8 violation is found, the Appellant concedes that the camera evidence was obtained in a manner that violated the Respondent's *Charter* rights.

60. After establishing that the evidence was obtained in a manner that infringed the claimant's *Charter* rights, the s 24(2) analysis turns to whether the admission of that evidence could bring the administration of justice into disrepute. There are three factors, outlined in *R v Grant*, that a court must consider when assessing the effect that inclusion of the evidence would have on the public's trust in the justice system:

1. The seriousness of the *Charter*-infringing state conduct;
2. The impact of the breach on the *Charter*-protected interests of the accused; and
3. Society's interest in the adjudication of the case on its merits.³⁹

The inquiry into the three factors is meant to be undertaken with a long-term, forward-looking, and societal perspective.⁴⁰

61. The *Grant* factors require the inclusion of the camera evidence. In this case, the potential *Charter*-infringing state conduct is not serious; any impact on the Respondent's *Charter*-protected rights is only moderate; and society's interest in the adjudication of the case on its merits weighs strongly in favour of inclusion. A reasonable person, informed of all relevant circumstances and

³⁸ *R v Strachan*, [1988] 2 SCR 980 at 1000 [*Strachan*], Joint BOA, Tab 22.

³⁹ *R v Grant*, 2009 SCC 32 at para 71 [*Grant*], Joint BOA, Tab 23.

⁴⁰ *Ibid.*

the values underlying the *Charter*, would *not* conclude that admitting the camera evidence could bring the administration of justice into disrepute.

62. The starting point of the s 24(2) inquiry is that “[e]vidence, even when obtained in a manner that infringes the *Charter*, is *prima facie* admissible.”⁴¹ Therefore, the ultimate onus of proving whether the admission of evidence could bring the administration of justice into disrepute rests squarely with the Respondent, the party opposing admission of the evidence.⁴² The Respondent is unable to discharge that onus.

A. The *Charter*-infringing state conduct was not serious

63. The police’s conduct in accessing the pre-existing cameras was not serious. The spectrum of *Charter*-infringing state conduct ranges from inadvertent or minor infringements to willful or reckless disregard for *Charter* rights.⁴³ Detectives Ma and Xu, in investigating a serious attempted murder involving a firearm, pursued a reasonable course of conduct in good faith. Their conduct rightfully falls along the lower end of the spectrum.

64. In accessing the cameras, Detectives Ma and Xu not only sought consent from the property manager, but also sought and received consent from the Chair of the Board, Ms. Paparousis. As stated by Cheng JA of the Falconer Court of Appeal, “[t]his is not nefarious state conduct.”⁴⁴ In *Yu*, the Court of Appeal for Ontario concluded that the state’s installation of hidden cameras was not overly serious, partially because the police had sought the condominium management’s

⁴¹ *Yu*, *supra* note 19 at para 136, Joint BOA, Tab 13; see also *R v Khelawon*, 2006 SCC 57 at para 34, Joint BOA, Tab 24.

⁴² *R v Collins*, [1987] 1 SCR 265 at 280, Joint BOA, Tab 25; *Yu*, *supra* note 19 at para 136, Joint BOA, Tab 13.

⁴³ *Grant*, *supra* note 39 at para 74, Joint BOA, Tab 23.

⁴⁴ Grand Moot Official Problem at 13.

consent before installing the cameras. Tulloch JA held that this prong of the *Grant* test weighed in favour of inclusion of the evidence.⁴⁵

65. In this case, the state conduct is even less serious than in *Yu*. Instead of installing new, hidden cameras, Detectives Ma and Xu accessed pre-existing cameras with Ms. Paparousis' consent. These cameras were visible to residents of the building and had been openly recording residents' comings and goings for years. In accordance with the reasoning in *Yu*, the conduct of Detectives Ma and Xu is not the kind of egregious state conduct from which the Court ought to disassociate itself.

i. Detectives Ma and Xu did not act in bad faith

66. Detectives Ma and Xu did not conduct themselves in bad faith. Respectfully, Cook JA mischaracterized the detectives' actions in accessing the pre-existing cameras as a "conscious scheme."⁴⁶ There is a distinction between knowing a warrant was likely required to install new hidden cameras and making a practical decision to access the pre-existing cameras instead, and intentionally circumventing the law by installing hidden cameras without a warrant.⁴⁷ This distinction is important, as it underscores the fact that the police were not deliberately breaching the Respondent's rights. By seeking consent from the Board, Detectives Ma and Xu were making a good faith attempt to respect Mr. Zhaski's rights.

67. Additionally, a finding that the officers were not acting in good faith would not automatically lead to a finding of bad faith.⁴⁸ A finding of bad faith, which would make the state conduct more serious, requires evidence that the state actions were knowingly or intentionally

⁴⁵ *Yu*, *supra* note 19 at para 136, Joint BOA, Tab 13.

⁴⁶ Grand Moot Official Problem at 12.

⁴⁷ *Yu*, *supra* note 19 at paras 124, 128, Joint BOA, Tab 13.

⁴⁸ *R v Fan*, 2017 BCCA 99 at para 71, Joint BOA, Tab 26; *R v Smith*, 2005 BCCA 334 at para 61 [*Smith*], Joint BOA, Tab 27.

wrong.⁴⁹ There is no evidence that Detectives Ma or Xu’s actions were knowingly or intentionally wrong.

68. At the time that the police accessed the cameras, there was no guidance from the Courts as to the scope of the Board’s ability to consent to police access to pre-existing cameras. This attenuates the seriousness of their conduct.⁵⁰ Given the legal uncertainty, requesting access to the condominium cameras was a reasonable alternative to installing hidden cameras in the circumstances.

ii. The police conduct was not part of a pattern of disregard for *Charter* rights

69. Even if this Court does not accept that Detectives Ma and Xu were trying to respect Mr. Zhaski’s rights, their conduct should be viewed as an isolated incident. Whether or not *Charter*-infringing state conduct is part of a larger pattern is not determinative, but the Supreme Court of Canada has deemed it to be one consideration in assessing the conduct’s seriousness. In *R v Strachan*, Dickson CJC did not exclude the evidence under s 24(2). Considering the seriousness of the *Charter* breach, he stated,

“The error seems to have been an isolated error of judgment, however, rather than a conscious determination to take advantage of the accused before allowing him to speak to counsel...[T]he motive seems to have been convenience rather than a desire to trap the accused into talking.”⁵¹ [emphasis added]

70. There is no evidence that Detectives Ma and Xu had any improper motive in seeking access to the pre-existing condominium cameras, nor that their conduct was part of a larger pattern of disregard for *Charter* rights.

⁴⁹ *Smith*, *supra* note 48 at para 61, Joint BOA, Tab 27.

⁵⁰ *R v Cole*, 2012 SCC 53 at paras 86-87 [*Cole*], Joint BOA, Tab 28; *R v Vu*, 2013 SCC 60 at paras 69, 71, Joint BOA, Tab 29.

⁵¹ *Strachan*, *supra* note 38 at 1007–1008, Joint BOA, Tab 22.

71. The police's other conduct in investigating the attempted murder of Dr. Kusic should not impact this inquiry. After overhearing a conversation between the accused and his co-conspirators, the detectives walked around the perimeter of the building and very briefly observed what was visible in plain view in Mr. Zhaski's apartment from the outside of the building. No evidence was gathered from that action. After obtaining the camera evidence, the police sought and were granted a warrant to enter the common areas of Goldfarb Condos and Mr. Zhaski's unit. In seeking the warrant, the police did not specifically mention the source of the camera evidence. The content of the warrant application may have been missing additional details, but it was not erroneous or misleading.

72. These actions should not be deemed to have increased the severity of the state's conduct. There was no evidence gathered from the observation of Mr. Zhaski's apartment and the Respondents have not challenged the validity of the warrant at any of the lower courts. In any event, there is no indication that disclosing the source of the camera evidence would have changed Domus J's decision to grant a warrant nor is there any evidence to suggest that the omission was made in bad faith.⁵²

73. Further, this case can be distinguished from cases where lack of disclosure in a warrant application has increased the seriousness of the state conduct. In *White*, the police entered the building's common areas multiple times before applying for a warrant to carry out the same conduct—entering the building's common areas.⁵³ The Court of Appeal for Ontario found that this suggested that the police knew their initial entries were *Charter*-infringing.⁵⁴ In this case, the police sought a warrant for an entirely different kind of action. There can be no inference that by

⁵² *Yu*, *supra* note 19 at paras 115, 119, Joint BOA, Tab 13.

⁵³ *White*, *supra* note 19 at para 64, Joint BOA, Tab 12.

⁵⁴ *Ibid.*

applying for a warrant to enter the common areas and Mr. Zhaski's unit, the police should have known their access to the pre-existing cameras was *Charter*-infringing.

74. There is no need for this Court to disassociate itself from the state conduct in this case. Detectives Ma and Xu sought a practical and reasonable course in requesting consent from building management. This course of action was not serious and in fact was an attempt to respect Mr. Zhaski's rights.

B. The impact of the breach on Mr. Zhaski's *Charter*-protected interests was not severe

75. The impact on Mr. Zhaski's s 8 rights was moderate, militating in favour of inclusion of the camera evidence.

76. The impact of a *Charter* breach lies on a spectrum, ranging from "fleeting" or "technical" to "profoundly intrusive."⁵⁵ The impact of the breach on Mr. Zhaski's s 8 interests lies on the lower end of the spectrum. Any expectation of privacy that Mr. Zhaski had in the common areas of Goldfarb Condos was low. Further, the information that was gathered was not of a particularly personal nature, and the evidence obtained through the cameras likely could have been discovered absent a *Charter* breach.

i. Mr. Zhaski had a low expectation of privacy in the common areas of Goldfarb Condos

77. Mr. Zhaski's low expectation of privacy attenuates the impact on his rights, supporting the conclusion that the second *Grant* factor weighs in favour of admitting the camera evidence.

78. The s 24(2) inquiry looks to the degree of privacy that a claimant can expect in order to analyze the impact on their rights.⁵⁶ A lower expectation of privacy lessens the impact on the

⁵⁵ *Grant*, *supra* note 39 at paras 76–77, Joint BOA, Tab 23.

⁵⁶ *Ibid* at para 78.

claimant's interests. In addition to the factors already enumerated in the Appellant's s 8 analysis, two further considerations lessen the impact on Mr. Zhaski's s 8 rights: the unique characteristics of Goldfarb Condos and the placement of the cameras within the common areas.⁵⁷

79. The characteristics of Goldfarb Condos lower Mr. Zhaski's expectation of privacy in the common areas. While Goldfarb Condos had instituted fob access to the building and installed several security cameras, these features are not unusual in multi-unit buildings. The purpose of these security measures was not only to keep strangers out of the building, but also to deal with criminal activity by residents of the building. The necessary trade-off for heightened building security in the form of security cameras was a diminished expectation of privacy inside of it.

80. Additionally, the size of the building attenuates the expectation of privacy held by Mr. Zhaski. In *White*, the respondent was the owner of a unit within a building that only had 10 units. The building was so small that police could hear into the unit of the accused through the stairwell.⁵⁸ In this case, Mr. Zhaski was the non-owner of a unit within a building that was five times the size of the building in *White*, and which had visible cameras. While the characteristics of Goldfarb Condos may not entirely negate the expectation of privacy Mr. Zhaski held, they do not weigh in favour of exclusion of the evidence.

81. The location of the pre-existing cameras that the police accessed also mitigates the impact on Mr. Zhaski's rights. It was recognized in *Yu* that expectations of privacy will vary within a building, with the highest expectation inside a unit.⁵⁹ As Tulloch JA states,

“As soon as [residents of a building] open their door, or exit their unit, it is reasonable to expect that they may be observed, **with that level of expectation increasing the**

⁵⁷ For a list of factors from Canadian jurisprudence, see *R v Pipping*, 2020 BCCA 104 at para 30, Joint BOA, Tab 30.

⁵⁸ *White*, *supra* note 19 at para 46, Joint BOA, Tab 12.

⁵⁹ *Yu*, *supra* note 19 at para 83, Joint BOA, Tab 13.

closer they get to the main areas of the building or to any security cameras.”⁶⁰
[emphasis added]

82. While the cameras were all placed relatively close to the units of the accused, the two cameras from which the impugned evidence was obtained were also placed in main areas of the building. One camera was placed on the wall of the gym, which was used not only by residents, but also by visitors to the building. The other was placed in the lobby of the building. Both of these areas were for all residents and visitors to enjoy, with visible security cameras that had been in place the entire time Mr. Zhaski lived in Goldfarb Condos. The placement of the cameras lessens the impact on Mr. Zhaski’s rights.

ii. The evidence was not of a personal nature, nor did it impact Mr. Zhaski’s human dignity

83. The evidence obtained through the pre-existing cameras relating to Mr. Zhaski is not personal in nature, nor does it infringe his human dignity. This lowers the impact on his rights.⁶¹

84. The information gathered through the cameras was not particularly personal. The information included the fact that there was a relationship between Mr. Abdo, Ms. Solie, Ms. Sedis, and Mr. Zhaski, and that Mr. Zhaski was involved in the attempted murder of Dr. Kusic. This information was available for public observation, as it was all gathered from the common areas of the building. The nature of this information is significantly less personal than, for example, information gathered from a personal computer or bodily evidence. The impersonal nature of the information and the low expectation of privacy diminishes the impact on Mr. Zhaski’s rights.⁶²

85. Unlike strip searches and body cavity searches, this is not a case where the human dignity of an individual has been seriously impacted.⁶³ Evidence was gathered from pre-existing cameras

⁶⁰ *Ibid* at para 86.

⁶¹ *Grant*, *supra* note 39 at para 78, Joint BOA, Tab 23.

⁶² *Ibid*.

⁶³ *Ibid* at para 114.

with the consent of the Board, solely in the building's common areas. As a result, Mr. Zhaski's *Charter*-protected interests were impacted only moderately.

iii. The security camera evidence was likely discoverable absent a *Charter* breach

86. Any impact on Mr. Zhaski's *Charter*-protected interests is further mitigated by the fact that the evidence was likely discoverable even absent a *Charter* breach. If evidence could have been discovered without *Charter*-infringing conduct, the impact will be lessened and the evidence may be more likely to be admitted.⁶⁴ The police had reliable evidence, through the three tips they received and the naked-ear surveillance from April 17, 2018, that the Respondent was of interest in the investigation and that there was evidence to be found in Goldfarb Condos. The police likely could have pursued a warrant to install hidden cameras and discovered the evidence through those means.

87. In *R v Nolet*, the Supreme Court of Canada found that the impugned evidence was admissible, partly because the evidence could have been discovered in ways other than through the s 8 breach.⁶⁵ Similarly, in *R v Cole*, the evidence in question was held to be admissible, partially because of the fact that the officer could likely have obtained a warrant. In both cases, this attenuated the impact of the breach on the interests of the accused.⁶⁶ In this case, the fact that the police could likely have sought a warrant for hidden cameras, instead of accessing the pre-existing cameras, lessens the impact on Mr. Zhaski's rights. There is no need for the Court to distance itself from the impact of any *Charter* violation which may have occurred here.

⁶⁴ *R v Côté*, 2011 SCC 46 at paras 65–66, 69, Joint BOA, Tab 31; *Grant*, *supra* note 39 at para 122, Joint BOA, Tab 23.

⁶⁵ *Nolet*, *supra* note 26 at para 54, Joint BOA, Tab 16.

⁶⁶ *Ibid*; *Cole*, *supra* note 50 at para 93, Joint BOA, Tab 28.

C. Society has a heightened interest in the adjudication of the case on its merits

88. Society's interest in the adjudication of this case on its merits weighs strongly in favour of including the evidence obtained from the cameras. The evidence is highly reliable and important to the Crown's case. Excluding reliable, important evidence from the prosecution of an accused charged with attempted murder and possession of an illegal firearm would bring the administration of justice into disrepute.

i. The camera evidence is reliable

89. There is no reason to question the reliability of the camera evidence. Both of the interactions that were recorded by the cameras happened naturally and in no way was the accused compelled to take part in the incriminating conversations by state conduct.⁶⁷ As stated in *Grant*, "exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective..."⁶⁸ The exclusion of this highly reliable evidence would seriously undermine the truth-seeking function of this Court.

ii. The camera evidence is important to the Crown's case

90. The camera evidence is of central importance to the Crown's prosecution of Mr. Zhaski. The truth-seeking function of this Court is best achieved by the inclusion of the evidence.⁶⁹

91. Without the security camera footage, the Crown has no direct evidence linking Mr. Zhaski to the most serious crime in question: the attempted murder of Dr. Kusic.⁷⁰ The tips, while useful in initially linking Mr. Zhaski to the shooting at First Street, are nowhere near as reliable or

⁶⁷ *Grant*, *supra* note 39 at para 81, Joint BOA, Tab 23.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* at para 23.

⁷⁰ *Yu*, *supra* note 19 at para 154, Joint BOA, Tab 13.

incriminating as Mr. Zhaski and his co-conspirators' own statements linking themselves to the shooting at First Street.

92. The naked-ear evidence did not clearly link Mr. Zhaski to the specific shooting in question, and his response regarding a gun was inaudible. Mr. Zhaski's statement, overheard by Detectives Ma and Xu, "She got the message. Nothing more needs to be done," is scant evidence for the prosecution of an attempted murder. While it is not the sole evidence, the security camera footage is a central component of the Crown's case.⁷¹

iii. The offences with which Mr. Zhaski is charged are serious

93. Mr. Zhaski has been charged with extremely serious offences, including attempted murder and unauthorized possession of a firearm. While there is no firearms exception to s 24(2), the seriousness of firearm-related crimes should be taken into account at the third stage of the *Grant* test.⁷² The unique danger of firearm offences has been considered in the s 24(2) analysis by appellate courts across Canada, in recognition of the serious threat that gun violence poses to the safety of all communities.⁷³ As Brown JA of the Court of Appeal for Ontario wrote in dissent in *R v Omar*:

“...the balance necessary to offer Canadians a peaceful community in which to live is not achieved by neutering the third *Grant* factor and treating illegal handguns as fungible with any other kind of evidence for the purposes of a s. 24(2) analysis.”⁷⁴

The Supreme Court of Canada overturned the majority in *R v Omar*, “substantially for the reasons of Brown J.A.”⁷⁵ While the evidence in question is not a physical firearm in this case,

⁷¹ *Cole*, supra note 50 at para 96, Joint BOA, Tab 28.

⁷² *R v Omar*, 2018 ONCA 975 at para 122–123 [*Omar*], Joint BOA, Tab 32.

⁷³ *R v Reid*, 2019 ONCA 32 at paras 66–69, Joint BOA, Tab 33; *R v Chan*, 2013 ABCA 385 at para 49, Joint BOA, Tab 34; *Omar*, supra note 72 at paras 122–138 (Brown JA, dissenting), Joint BOA, Tab 32, overturned on appeal in *R v Omar*, 2019 SCC 32 “substantially for the reasons of Brown J.A.,” Joint BOA, Tab 35.

⁷⁴ *Omar*, supra note 72 at para 138, Joint BOA, Tab 32.

⁷⁵ *R v Omar*, 2019 SCC 32 at para 1, Joint BOA, Tab 35.

the serious nature of the crimes in question, including the use of an illegal handgun in an attempted murder, must not be overlooked.

94. Though it is well established that the seriousness of an offence should not be permitted to overwhelm an analysis where the other factors point towards exclusion, that is not the situation in this case.⁷⁶ The seriousness simply adds to the other two factors, which already weigh in favour of including the camera evidence.

95. In this case, the reliability and importance of the evidence, and the seriousness of the charges, means that “the vindication of the specific *Charter* violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial.”⁷⁷ This factor weighs strongly in favour of inclusion of the camera evidence.

96. The s 24(2) analysis requires a balancing of the *Grant* factors, with a long-term view of the repute of the justice system. Excluding the evidence obtained through the cameras under s 24(2) would bring the administration of justice into disrepute. A careful balancing in this case requires the evidence obtained from the cameras in Goldfarb Condos to be admitted into evidence.

PART IV – ORDER SOUGHT

97. We respectfully request that the appeal be allowed, the security camera evidence admitted, and Mr. Zhaski’s convictions restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of August, 2021.



Madeleine Andrew-Gee and Mackenzie Faulkner
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⁷⁶ *R v Harrison*, 2009 SCC 34 at para 40, Joint BOA, Tab 36.

⁷⁷ *R v Kitaitchik*, [2002] OJ No 2476, 166 CCC (3d) 14 (CA) at para 47, Joint BOA, Tab 37; *Grant*, *supra* note 39 at para 82, Joint BOA, Tab 23.

PART V – TABLE OF AUTHORITIES

JURISPRUDENCE

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18	<i>R v Kitaitchik</i> , [2002] OJ No 2476, 166 CCC (3d) 14 (CA)	95
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22	<i>R v Nolet</i> , 2010 SCC 4	48, 87
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30	<i>R v Smith</i> , 2005 BCCA 334	67
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35	<i>R v White</i> , 2015 ONCA 508	38, 73, 80
36	<i>R v Wong</i> , [1990] 3 SCR 36	36
37	<i>R v Yu</i> , 2019 ONCA 942	38, 42, 47, 62, 64, 66, 72, 81, 91

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.

Condominium Act, SO 1998, c 19

S. 17 (2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.

S. 26 For the purposes of determining liability resulting from breach of the duties of an occupier of land, the corporation shall be deemed to be the occupier of the common elements and the owners shall be deemed not to be occupiers of the common elements.

S. 27 (1) A board of directors shall manage the affairs of the corporation.

S. 28 (1) Subject to subsection 42 (1), the owners shall elect the board of directors in accordance with this Act and the by-laws.

S. 58 (1) The board may make, amend or repeal rules under this section respecting the use of the units, the common elements or the assets, if any, of the corporation to,

(a) promote the safety, security or welfare of the owners and of the property and the assets, if any, of the corporation; or

[...]

S. 97(2) A corporation may, by resolution of the board and without notice to the owners, make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,

[...]

(b) in the opinion of the board, it is necessary to make the addition, alteration, improvement or change to ensure the safety or security of persons using the property or assets of the corporation or to prevent imminent damage to the property or assets; or

[...]

Occupier's Liability Act, RSO 1990, c O2

S. 3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.