

# **Grand Moot 2021**

## **Police Surveillance and the Charter**

*R v Zhaski*

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## R v Zhaski

This appeal addresses the constitutionality of certain police surveillance methods. It explores the extent to which condominium residents possess a reasonable expectation of privacy in common areas and examines the tension between individual liberties and public safety.

Falconer is a common law province in the country of Flavelle. The capital and largest city of Falconer, Somerville, is a city of approximately 2.95 million people. The Constitution, judicial system, statutory law, common law, and social and political history of Flavelle and Falconer are identical to those of Canada and Ontario, respectively.

Flavelle's highest court is the Supreme Court of Flavelle. All Canadian legislation is binding on the Supreme Court of Flavelle, but the Court is not bound by Canadian jurisprudence. However, decisions of Canadian courts, particularly the Supreme Court of Canada, are considered highly persuasive.

The Superior Court of Falconer and the Falconer Court of Appeal have jurisdiction over all issues raised in their respective jurisdictions below.

## **Facts**

The following information was ascertained through police and witness testimony at trial and represents the totality of the evidence deemed relevant to the s. 8 application.

### ***The First Street Apartments Shooting***

On October 30, 2016, two bullets shattered the window of Dr. Kusic's first floor apartment in Somerville. The shots narrowly missed Dr. Kusic. At the time, Dr. Kusic was a 39-year-old radiologist at the Somerville General Hospital. She lived alone in a one-bedroom within First Street Apartments at 248 First Street, Somerville.

After the bullets were fired, Dr. Kusic immediately ran into the apartment's windowless bathroom, closed the door, and called 911 on her cell phone. The Royal Falconer Police Service arrived at Dr. Kusic's apartment door five minutes later. Three officers swept the perimeter of the apartment building but found no sign of the shooter or shooters. Two other officers took a statement from Dr. Kusic. She told the officers that she had not seen the person or people who fired the shots. Dr. Kusic further stated that between February and May 2016, she had received three anonymous, harassing letters. She had considered reporting the letters, but ultimately decided not to when the letters stopped arriving in May 2016. Dr. Kusic had destroyed all the letters.

### ***The Initial Investigation***

The police began an investigation into the shooting. The investigation team determined the model of gun likely used to fire the bullets but found no fingerprints or other evidence. Between January and March 2017, Staff Sergeant Chang, the lead officer on the investigation team, received three separate bald tips alleging that an individual named Matthew Zhaski was “involved” or “wrapped up in” the shooting at Dr. Kusic’s apartment. Zhaski had worked at Somerville General Hospital at the same time as Dr. Kusic in 2012. He had been charged with an assault in 2015, but the proceeding had been stayed due to a lack of evidence.

Two of the tips were from credible informants who had previously provided the RFPS with reliable information, although the third was an anonymous bald tip which the police could not verify. This third tip noted that Goldfarb Condos, the Somerville condominium where Zhaski was living, was “a hotbed of crime.” The third tip also indicated that other, unnamed residents of Goldfarb Condos were involved in the shooting.

The police attempted to follow up with the informants who provided the first two tips. The first suggested that Zhaski tended to “hang around” with individuals named Louis Abdo and Marie Sedis. The second informant mentioned those two names, as well as one Anne Solie. The police discovered on Zhaski’s public Facebook page that Solie was his ex-girlfriend. The investigation quickly homed in on these four individuals and Goldfarb Condos.

## ***Goldfarb Condos***

Goldfarb Condos consists of a small building with extensive security. The building has 50 units. There are several cameras inside and outside the building. A fob is required to enter the lobby, stairwells, elevators, and other common areas. Only residents may possess a fob. Most of the other buildings in the neighbourhood are less regulated and do not require fob access.

The fobs were implemented and the cameras installed in June 2014 after a series of drug deals and drug-debt-related assaults had occurred outside the condominium building, as a notorious dial-a-dope dealer had been operating from a unit inside. However, the dealer has been evicted, convicted, and has not been spotted near the building for years. Most residents currently living in the building moved in after the 2014 issues had long since resolved. Unfortunately, while this 2014 issue is resolved, other issues with petty crime persist.

Inside the apartment building, there were a number of security cameras. These cameras were visible to the average, discerning person. They were generally installed on the wall. The cameras were circular, approximately 7 cm in diameter, roughly the same colour as the surrounding wall, and installed 1-2 m above the ground. There was no signage to indicate that the cameras were present. However, the agreements for all residents who rent or buy a condo in the building after 2014 note that there are several cameras present within the building. The cameras recorded video and had built-in microphones which could pick up conversations from a 40 ft radius. The cameras were also equipped with night vision.

Under the Condo Board bylaws, the Condo Board may restrict the use visitors make of common areas. The by-laws also provide that a member of the Condo Board may deny access to the building to a non-resident if the member is satisfied that the non-resident's entry would directly result in unreasonable interference with the use and enjoyment of the units, the common elements, or the assets of the condo corporation, or if it would endanger the safety, security or welfare of the owners, property, and assets of the condo corporation. Of the Defendants, only Solie was a member of the Condo Board.

Zhaski had lived in various units of Goldfarb Condos since September of 2016 through a series of Rarebnb agreements. Rarebnb is a Somerville-based company that operates an online marketplace where hosts can provide guests with short-term lodging. Rarebnb does not own any of the listed properties, but rather receives a commission from each booking. Zhaski's Rarebnb contracts looked similar to a conventional lease, with three main exceptions. First, Zhaski's Rarebnb terms ranged from 1 to 8 months long. There were isolated periods of time in between each of his Rarebnb rentals when he lived elsewhere, but never for longer than a month. Second, Zhaski's Rarebnb agreements gave the owner of the unit discretionary access to the unit in cases of emergency. Third, Zhaski's Rarebnb agreements made no mention of the Condo Board's authority or the Condo's security cameras, or of police surveillance. Zhaski is one of an increasing number of individuals who use Rarebnb and similar services for long-term residence because of the contractual flexibility they offer.

### *Warrantless Camera Access and Control*

On April 17, 2018, Detectives Ma and Xu first entered Goldfarb Condos. They were dressed in suits, not in uniforms, as is customary for detectives of the RFPS. They proceeded without deviation to the Property Manager's office. There, they met with Ms. Gagné, the Property Manager, and explained that Zhaski, Solie, Sedis, and Abdo were subjects in an ongoing investigation. They provided no other details.

As the detectives would later testify during the hearing before the Falconer Superior Court of Justice (see page 10), the detectives understood that they would likely need a warrant to install hidden cameras, so they instead requested remote access to Goldfarb Condos' local network of security cameras. Ms. Gagné explained that this type of request should probably go to the Condo Board for approval but noted that Solie was a member of the Board. The detectives suggested that Ms. Gagné speak with Ms. Paparousis, the Chair of the Condo Board, alone to apprise her of the situation and ask for her permission. Ms. Gagné agreed.

The following day, Detectives Ma and Xu returned to see Ms. Gagné. She informed them that Ms. Paparousis had given her permission for them to access the cameras, and then she led the detectives down the hall to the security office. There, Ms. Gagné coordinated with Mr. Jones, the Condos' head of maintenance and security, to loop the Somerville Police into their local network of security cameras. Mr. Xu demonstrated on his own computer how the detectives would be able to control each camera's angle from their computers at the Somerville Police Station.

Though the detectives requested access to the entire system of security cameras, Ms. Gagné provided access only to the following three cameras:

- The first camera (“Camera 1”) was on the wall of the gym directly across the hall from Zhaski’s apartment on floor one. With the permission of the Condo Board, the gym was occasionally used by visitors. It was frequently used by Zhaski and Solie.
- The second camera (“Camera 2”) was on the wall at the end of the third floor hallway, where Abdo and Solie lived next door to each other. The wall was across from Abdo and Solie’s doors.
- The third camera (“Camera 3”) was in the lobby, on the wall and about five feet away from the entrance to the hallway leading to Sedis’s first floor apartment.

### *Naked Ear and Eye Surveillance*

As the Detectives Ma and Xu were leaving the building on April 17, 2018, they saw Zhaski and Solie arguing in the doorway of the condo while Sedis attempted to mediate things. The detectives walked about 6 meters from the doorway and each lit a cigarette while they listened to the three arguing. Most of the conversation was inaudible, but the detectives heard Zhaski say to Solie, “She got the message. Nothing more needs to be done.” The detectives also heard Solie ask Zhaski “And the gun?”, but Zhaski’s response was inaudible. Sedis then pulled Zhaski away toward the street. Solie glanced down the street and then went back inside the building.



Once Sedis and Zhaski were gone, the detectives walked around the corner to the East side of Goldfarb Condos. Detective Ma peered into the window of what he thought was Zhaski's apartment; however, he quickly realized that it was the wrong unit when he saw three young children playing on a couch. He and detective Xu walked to the next window over, which was indeed the window of Zhaski's apartment. Detective Ma observed ordinary clutter but nothing incriminating. After a few minutes, the two detectives left.

### *Camera Evidence*

Through the condo cameras, the police gathered two pieces of evidence against the four Defendants:

- On April 30, 2018 at 3:57 PM, Camera 3 recorded Abdo bumping into Zhaski and Sedis in the lobby. Abdo asked the two whether there was any news about the police investigation regarding "First Street." Zhaski shook his head and Sedis told them both not to discuss the matter in the lobby.
- On May 6, 2018 at 9:12 AM, Camera 1 recorded a conversation between Zhaski and Solie while the two were alone in the gym. After telling Zhaski about Solie's new job at a local restaurant, Solie asked Zhaski "what [Zhaski was] going to do with the gun." After a short pause, Zhaski replied, "I don't know." The conversation then turned to a broken piece of gym equipment. Solie and Zhaski used the gym's treadmills in relative silence for about an hour and then left.

### *The Search Warrant, Arrests, and Charges*

On June 10, 2018, the police obtained a search warrant from Domus J that allowed the police to enter the common areas of Goldfarb Condos as well as Zhaski's condo. The warrant was authorized on the basis of the three tips, combined with the information about Zhaski's work and criminal history, and the evidence from the remotely accessed cameras. The police simply stated the information that they had without attributing any of it to the cameras or mentioning that the police had remotely accessed the cameras.

On June 13, 2018, the police executed this search warrant. Through this warrant, the police recovered a firearm of the model that had likely been used to fire the shots into Dr. Kusic's apartment. The police arrested Zhaski, Abdo, Solie, and Sedis, who were charged with the following offences:

- Attempted murder, pursuant to s. 463 (a) of the *Flavelle Criminal Code*;
- Conspiracy, pursuant to s. 465 (1) (a) of the *Flavelle Criminal Code*; and
- Using a firearm in the commission of offence, pursuant to s. 85 (1) (a) of the *Flavelle Criminal Code*.

Zhaski was further charged with:

- Possession of a weapon for a dangerous purpose, pursuant to s. 88 of the *Flavelle Criminal Code* and
- Unauthorized possession of a firearm, pursuant to s. 91 of the *Flavelle Criminal Code*.

Zhaski sought to exclude evidence obtained through the warrantless use of the cameras on the grounds that it had been obtained in a manner that violated their rights under s. 8 of the *Flavelle Charter of Rights and Freedoms* (“the *Charter*”). Zhaski’s counsel argue that the police’s warrantless remote use of the video cameras infringed their rights under s. 8 and the evidence obtained as a result should be excluded under s. 24 (2) of the *Charter*.

### **Procedural History**

#### ***The Falconer Superior Court of Justice Decision***

The s. 8 motion commenced on January 20, 2019. Zhaski’s application was assessed apart from any applications brought by his co-defendants.

Roberts J dismissed the application, holding that Zhaski’s s. 8 rights had not been infringed.

Roberts J wrote:

It is not clear to me that Mr. Zhaski had a reasonable expectation of privacy in the common area of his Rarebnb rental. Mr. Zhaski chose Rarebnb instead of an ordinary lease because the service favours transience, and Mr. Zhaski did not want to put down roots. The actual owner of his unit retained discretionary access to the unit. These facts lead me to conclude that, although Mr. Zhaski had a reasonable expectation of privacy inside his unit, his relationship with the common area of the condo was more akin to a hotel guest’s relationship to the hotel’s common area.

Roberts J concluded in the alternative that the detectives had sufficient consent to attain remote access and control of the pre-existing cameras. He wrote:

Condo management is entitled to make certain decisions on behalf of condo residents. For instance, courts have concluded that condo management and Condo Boards have the power to consent to police entry into common areas. They also have the power to give their surveillance over to the police. The detectives in this case did not install hidden cameras. They obtained access to and control over pre-existing cameras. This is effectively indistinguishable from simply asking for surveillance tapes after the fact. I conclude that Ms. Gagné and Ms. Paparousis's consent was sufficient to authorize this action.

On the issue of s. 24(2), Roberts J wrote as follows:

Even if Mr. Zhaski's s. 8 rights were violated, the evidence collected from the condo cameras is admissible. The evidence is highly reliable and highly incriminating. The offences with which Mr. Zhaski is charged are grave. Somerville would be a more dangerous place, and the administration of justice would be brought into disrepute, if this evidence were excluded.

Finally, with respect to the naked ear surveillance, Roberts J wrote:

The detectives were not conducting a search when they overheard the defendants' public conversation. Moreover, the defendants' had no reasonable expectation of privacy in the threshold of their condo building. Police, just like everyone else, are allowed to benefit from serendipity.

Ultimately, Zhaski was convicted at trial on all counts.

### ***The Falconer Court of Appeal Decision***

Cook JA, writing for the majority, allowed the appeal, finding that Zhaski's s. 8 rights had been infringed and the evidence should be excluded under s. 24(2). Specifically, the police's use of the cameras in the condo building constituted a violation of Zhaski's reasonable expectation of privacy. Cook JA wrote:

There is no meaningful distinction between installing hidden cameras and surreptitiously tapping into existing cameras. In both cases, the state is secretly watching and listening to residents in their home. Covert state surveillance is covert state surveillance. If a warrant is required for the installation of hidden cameras, then a warrant is required for the

surreptitious use of existing cameras, particularly when the police are given control over the cameras' angles. Any reasonable detective would have arrived at that conclusion.

With respect to whether the evidence should be excluded under s. 24(2), Cook JA wrote:

When determining whether the evidence is to be excluded under section 24(4) of the Charter, three lines of reasoning must be considered, *R v Grant*, 2009 SCC 32:

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.

The test articulated in *Grant* favoured exclusion because the police misconduct was severe and the impact on Zhaski's Charter rights was serious. On the first branch of the *Grant* Test, Cook JA wrote:

What is especially troubling is that the detectives *knew* that they needed a warrant and attempted to find a loophole. This was not a good faith mistake. This was a conscious scheme.

On the second branch of the *Grant* Test, Cook JA wrote:

The cameras in question were not ordinary security cameras. They had powerful microphones and night vision. In fact, these microphones could have picked up conversations from within Mr. Zhaski's unit if those conversations were detectable from the hallway. Additionally, Goldfarb Condos was not an ordinary building. It was highly regulated, with fobs required for entry into each common area. Individuals who choose to live in Goldfarb Condos may very well choose it for its superior privacy. Given the invasiveness of the cameras and the strength of the privacy interest, there is no question that the impact on Mr. Zhaski's Charter rights was severe.

On the third branch of the *Grant* Test, Cook JA wrote:

Though the offences with which Mr. Zhaski is charged are fairly serious, that must not be permitted to overwhelm the analysis. Moreover, and without commenting on the merits of the case, I note that the police garnered alternative, legitimate evidence through tips

and permissible naked ear surveillance. Therefore, I am of the view that the administration of justice would not be brought into disrepute by the exclusion of the camera evidence.

Teixeira JA, concurring, wrote that the evidence should be excluded under s. 24(2).

Although the impact on Zhaski's rights was not serious, the police misconduct was severe and the inclusion of the camera evidence would bring the administration of justice into disrepute. The opinion of Teixeira JA reads, in part:

The public interest in protecting Charter rights and the maintenance of integrity in the justice system weigh in favour of excluding the evidence. While the charges against Mr. Zhaski are serious, the seriousness of the offence can cut both ways, in terms of the analysis set out in *Grant*. Flavellians have a heightened interest in seeing a determination on the merits where the offence is serious. Furthermore, as Justice Iacobucci observed, "we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the Charter. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system" *R v Burlingham* [1995] 2 SCR 206 at para 50.

Cheng JA, on dissent, held that Zhaski's s. 8 rights had not been infringed. She wrote:

Cook JA has asserted that there is no meaningful distinction between installing hidden cameras and surreptitiously tapping into existing cameras. Respectfully, I disagree. By tapping into the existing cameras, the police opted to surveil Mr. Zhaski only in places that were already known to be surveilled. Put differently, the detectives watched Mr. Zhaski only where he had no existing reasonable expectation of privacy. For that reason, I conclude that the detectives did not require anything more than the Property Manager's consent.

Cheng JA went on to say that, even if there were a s. 8 violation, the evidence should not be excluded under s. 24(2). She wrote:

This was not nefarious state conduct. The detectives pursued a strategy that was practical and relatively unintrusive. They not only sought the Property Manager's permission, but they instructed her to obtain permission from the Chair of the Board as well. That was a good faith effort to respect the Defendant's rights as much as possible in the circumstances.

The remedy given by the Court of Appeal was quashing the conviction and ordering a new trial excluding the camera evidence. On January 7, 2021, the Crown was granted leave to appeal the Falconer Court of Appeal decision to the Supreme Court of Flavelle.