IN THE SUPREME COURT OF FLAVELLE

(ON APPEAL FROM THE FALCONER PROVINCIAL COURT OF APPEAL)

BETWEEN:

Her Majesty The Queen

Appellant

– and –

John Appleseed

Respondent

FACTUM OF THE APPELLANT
(Her Majesty The Queen)

Counsel for the Appellant:

Michael Portner Gartke
Emily Shepard

Oral Argument:

October 6, 2011
SUPREME COURT OF FLAVELLE

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PART I: OVERVIEW

1. On March 27, 2006, the Brandenburg City Fire Department (the "BCFD") went into the Respondent's house to protect the public from a dangerous methamphetamine lab. This lab, which was located in the Respondent's basement, contained volatile, toxic chemicals that are prone to explode.

2. Following the BCFD's search of the Respondent's house, Fire Chief Mark Greenberg relayed information about the contents of the lab to the police department. The police department used this information to obtain a search warrant and seize evidence from the Respondent's house. This evidence was used to charge the Respondent under the *Controlled Drugs and Substances Act*.

3. The BCFD's search of the Respondent's house did not violate the Respondent's section 8 *Charter* right against unreasonable search and seizure. The evidence obtained by the subsequent police search should therefore be admissible against him in court.

4. The BCFD search was reasonable and thus did not violate the Respondent's section 8 rights. The BCFD search satisfies all of the criteria for warrantless searches outlined in *R v Collins*: the search was authorized by law; section 14(1)(b) of the *Act* is reasonable; and the manner in which the search was carried out was reasonable.

R v Collins, [1987] 1 SCR 265, 13 BCLR (2d) 1 [*Collins*].

5. Even if this Court finds that the BCFD breached the Respondent's section 8 *Charter* right, evidence obtained through this search should still be admissible under section 24(2) of the *Charter*. The evidence is both reliable and central to the Crown's case against the Respondent.

6. The BCFD chose to enter the Respondent's house under the good faith belief that they were respecting the Respondent's *Charter* rights. Chief Greenberg was acting to prevent the outbreak of fire in the Respondent's house based on a reasonably held belief that the Respondent housed a methamphetamine lab. Excluding this evidence would bring the administration of justice into disrepute by failing to deter a serious crime that has caused significant harm to the Brandenburg community.

PART II: FACTS AND JUDICIAL HISTORY

(A) Background Facts

7. On March 27, 2006, the BCFD responded to a 911 call at the residence of John Appleseed, the Respondent, who was suffering from severe burns on the left side of his body. The Respondent explained that he had burnt himself with boiling water from his stove, but First Class Firefighter Mark Johnston immediately thought that his injuries were more consistent with acid burns. Mark Johnston was trained as a paramedic.

Problem at paras 2-4.

8. There had been a number of recent high-profile methamphetamine lab fires in Brandenburg. The BCFD was thus immediately suspicious that the Respondent might be operating a methamphetamine lab. Methamphetamine labs contain highly flammable and explosive chemicals, which create a major public safety risk of fire.

Problem at paras 5-6.

9. Fire Chief Mark Greenberg of the BCFD immediately considered exercising his statutory power under section 14(1)(b) of the Falconer *Fires Protection and Prevention Act* (the "*Act"*), which provides that:

> 14. (1) The Fire Marshal or a fire chief may, without a warrant, enter on land or premises if,
> ...
> (b) he or she has reason to believe that a substance or device that is likely to cause a fire may be situated on the land or premises.

Falconer *Fires Protection and Prevention Act,* s 14(1)(b).
Problem at paras 8-9.

10. Chief Greenberg was unsure whether the apparent acid burns were sufficient reason to believe that there was a device likely to cause fire in the building. Chief Greenberg thus requested entry into the Respondent's house to verify for ongoing fire risks but was denied entry by the Respondent. Before Chief Greenberg could converse more with the Respondent, paramedics took the Respondent to the hospital to treat his burns.

Problem at paras 11-12.

11. An off-duty detective arrived on the scene while Chief Greenberg was speaking to the Respondent. Detective Toews revealed to Chief Greenberg that the police had observed shipments of large quantities of chemicals associated with methamphetamine production

arriving at Mr. Appleseed's house. The police had been monitoring the Respondent's house, but did not have enough information to obtain a warrant for a search of the premises.

Problem at para 13.

12. Immediately after hearing this information, Chief Greenberg ordered his team of firefighters to enter the Respondent's house under section 14(1)(b) of the *Act*. Both doors to the house were locked, so a member of the BCFD entered through an unlocked window and opened the door for the rest of her team.

Problem at paras 14-15.

13. The BCFD searched the house. Upon arriving at a locked door to the basement, Chief Greenberg forced it open, finding a methamphetamine lab on the other side. Chief Greenberg swore an affidavit describing what he observed, and Detective Toews used this to obtain a warrant to search the Respondent's house. Following the police search, the Respondent was charged with production of methamphetamine and possession for the purpose of trafficking methamphetamine, contrary to sections 7(1) and 7.1 of the *Controlled Drugs and Substances Act*, respectively.

Problem at paras 16-18.

(B) Judicial History

i. Trial Judgment

14. Justice Oster held that the search by the BCFD was reasonable and therefore compliant with section 8 of the *Charter*. Consequently, he did not consider whether the evidence could have been properly admitted under section 24(2). The Respondent was then found guilty at trial.

Problem at paras 26-27.

15. Oster J concluded that the BCFD entry was a search under section 8 but concluded that it satisfied all three requirements of the Collins test for determining the reasonableness of warrantless searches.

Problem at paras 21-23.
R v Collins, [1987] 1 SCR 265, 13 BCLR (2d) 1 [*Collins*].

16. Oster J held that the search was authorized by law, pursuant to section 14(1)(b) of the *Act*. Oster J also concluded that section 14(1)(b) of the *Act* is reasonable, noting that the reasonableness of a search is subject to a less strenuous standard when the search is not carried out for law enforcement purposes. Oster J found that 14(1)(b) of the *Act* is carefully-tailored to protect against a real public safety risk of fire erupting unpredictably.

Problem at para 24.

17. Oster J held that the search was conducted reasonably. Chief Greenberg initially sought the Respondent's permission to enter and only authorized the BCFD's entry after obtaining reasonable grounds for doing so. In addition, the BCFD appropriately searched for the least-intrusive form of entry into the house.

Problem at para 25.

ii. Falconer Provincial Court of Appeal

18. The Respondent appealed his conviction to the Falconer Provincial Court of Appeal, where the majority found that evidence obtained from the police search should not have been admitted at trial. Writing for the majority, Justice Ablaza found that the search violated section 8 and that admitting the evidence would bring the administration of justice into disrepute.

    Problem at paras 28-29.

19. Ablaza J agreed with Oster J that the search was authorized by section 14(1)(b) of the *Act* but found that the law itself is unreasonable. Ablaza J found that the lack of an imminence requirement makes section 14(1)(b) overly broad.

    Problem at paras 30-31.

20. Ablaza J also found that the BCFD carried out its search in an unreasonable manner: the Respondent had explicitly denied Chief Greenberg entry; the house's doors were locked; and Chief Greenberg forced open and damaged the Respondent's basement door.

    Problem at para 32.

21. Using the test from *R v Grant*, Ablaza J held that the evidence from the police search should be excluded from trial under section 24(2). Ablaza J found that the evidence obtained from the search was both highly reliable and central to the Appellant's case against the Respondent. However, Ablaza J found that society's interest in adjudicating this case on the merits could not outweigh both the impact of the search on the Respondent's section 8 rights and the seriousness of the state conduct.

Problem at paras 33-35.
R v Grant, [2009] 2 SCR 353 [*Grant*].

22. Writing in dissent, Justice Sanderson agreed that the BCFD's search breached the Respondent's section 8 rights. However, Sanderson J held that the evidence obtained from the police search should not be excluded under section 24(2). Society has a strong interest in preventing the production of methamphetamine, which causes significant property damage. Methamphetamine also endangers human life through addiction and through the drug trade. Sanderson J held that society's interest in prosecuting the Respondent, combined with the reliability and importance of the evidence to the Crown's case, far outweighed the impact of the search on the Respondent's section 8 rights. Sanderson J would have therefore admitted the evidence obtained from the subsequent police search.

Problem at paras 36-38.

PART III: ISSUES

23. There are two issues in this appeal:

1. **Did the search of the Respondent's residence by the BCFD contravene section 8 of the *Charter*?**

2. **If so, should the evidence obtained during the search be excluded pursuant to section 24(2) of the *Charter*?**

PART IV: ARGUMENT

ISSUE #1: THE SEARCH OF THE RESPONDENT'S RESIDENCE BY THE BCFD DOES NOT CONTRAVENE SECTION 8 OF THE CHARTER

24. The BCFD's search meets all of the requirements of the *Collins* test for warrantless searches: the search was authorized by law; section 14(1)(b) of the *Act* is reasonable; and the manner in which the search was carried out was reasonable.

Collins, *supra*.

25. A party seeking to justify a warrantless search must rebut a presumption of unreasonableness.

Canada v Southam, *supra* at para 30.

26. In order to rebut the presumption of unreasonableness, a party exercising a warrantless search must satisfy the three criteria set out by the Supreme Court of Canada in *R v Collins*.

1. The search must be authorized by law.
2. The law authorizing the search must be reasonable.
3. The manner in which the search is carried out must be reasonable.

Collins, *supra* at para 34.

(A) The BCFD's search was authorized by law.

27. The BCFD's search was authorized by section 14(1)(b) of the *Falconer Fires Protection and Prevention Act* (the "*Act*"), which provides that:

> **14.** (1) The Fire Marshal or a fire chief may, without a warrant, enter on land or premises if,
> ...

> (b) he or she has reason to believe that a substance or device that is likely to cause a fire may be situated on the land or premises.
>
> *Falconer Fires Protection and Prevention Act,* s. 14(1)(b).

28. This provision must be interpreted according to the unifying principle of statutory interpretation, described in Driedger's *The Construction of Statutes* and adopted by the Supreme Court of Canada:

> … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament.
>
> *Rizzo & Rizzo Shoes Ltd*. (Re), [1998] 1 SCR 27.
> *Bell Express Vu v. Rex*, 2002 SCC 42, [2002] 2 SCR 559.
> E.A. Driedger, The Construction of Statutes, 2nd ed (Toronto: Butterworths, 1983).

29. An ordinary interpretation of section 14(1)(b) of the *Act* authorizes the BCFD's search. In this case, the Respondent's burns, combined with information about the chemicals shipped to his house, gave Chief Greenberg a reason to believe that a methamphetamine lab containing dangerous chemicals might be operating on the premises.

30. Chief Greenberg knew that the presence of a methamphetamine lab in the Respondent's house would constitute "a substance or device that is likely to cause a fire." The BCFD had ample experience dealing with the risk posed by methamphetamine labs, and had responded to eight fires in methamphetamine labs over the previous six months.

(B) Section 14(1)(b) of the Falconer Fires Protection and Prevention Act is reasonable.

31. Section 14(1)(b) and Part V of the *Act* exist to enable fire chiefs to be proactive in investigating potential causes of fires and in dealing with fires. Section 14(1)(b) must be read in the context of the entire *Act*, specifically with regard to the other sections of Part V*: Rights of Entry in Emergencies and Fire Investigations*. Section 15 of the *Act* authorizes fire chiefs to use a wide range of tactics in dealing with immediate threats to life, including the right to use force. Section 14 of the *Act* contemplates less imminent threats, and accordingly grants fire chiefs fewer rights to deal with them. Under section 14 of the *Act*, Fire Marshals and fire chiefs are not allowed to use force and must have "reason to believe" that there is a risk of fire on the premises.

Falconer Fires Protection and Prevention Act, ss 14, 15.

32. In addition to these explicit safeguards is the security that comes with granting this statutory power only to senior members of fire departments. Fire chiefs and fire marshals have a high level of training and experience. They can thus justifiably be given discretion in determining whether a risk of fire calls for a warrantless entry under section 14.

33. The Supreme Court of Canada has noted that the reasonableness of a search is subject to a less strenuous standard when the search is not carried out for law enforcement purposes. Justices Sopinka and Iacobucci stated that:

> *The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness*. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8.

British Columbia (Securities Commission) v Branch, [1995] 2 SCR 3 at para 52 [Emphasis in original].

34. Writing for the Ontario Court of Appeal in *R v Campanella*, Justice Rosenberg applied this reasoning to uphold the rights of court security guards to perform searches on people entering a courthouse. Rosenberg J found that individuals entering a court have a high expectation of privacy regarding their person. However, that privacy right is appropriately subject to the right to safety of all those in attendance at the court.

R v Campanella, supra.

35. The Respondent has a lower right to privacy against a search driven by considerations of public safety than he does against a search motivated by law enforcement. Section 8 of the *Charter* protects only a reasonable expectation of privacy. It is well-established that there is nowhere in which a person can have a greater expectation of privacy than in his or her dwelling-house. However, a less strenuous standard of reasonableness has been held to apply to searches where the state seeks to advance interests other than law enforcement, such as safety, administrative or regulatory objectives.

Canada v Southam, [1984] 2 SCR 145.
R. v Silveira, [1995] 2 SCR 297, 97 CCC (3d) 450, at para 140 of SCR [*Silveira*].
R v Campanella (2005), 195 CCC (3d) 353, 2005 CarswellOnt 1355 [*Campanella*].

36. Writing for the Supreme Court of Canada, Dickson J, (as he then was) in *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc.*("*Hunter v Southam*"), stated that:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable"; search and seizure, or positively as an entitlement to a "reasonable" expectation of

> privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals... [Underlining in original]
>
> *Canada v Southam*, *supra* at para 25.

37. The Respondent's privacy interests had to give way to public safety interests in this case. *Hunter v Southam* dictates that a court perform a balancing exercise weighing an individual's expectation of privacy against state interests. The fire department has a positive obligation to protect the public from dangerous fire risks such as methamphetamine labs. The legislature has recognized this obligation by its creation of section 14(1)(b) of the *Act*, which gives fire departments the ability to deal proactively with potential fire risks.

> *Canada v Southam*, *supra* at para 42.

38. Chief Greenberg authorized the BCFD entry because of his concern that the Respondent's house might contain dangerous chemicals that could cause a fire. Methamphetamine labs contain highly flammable and explosive materials. These labs are at particular risk of causing fires because methamphetamine manufacturers are often not qualified chemists and do not operate in a carefully controlled environment.

> *R v Jamieson*, [2002] BCJ No 1476, 2002 BCCA 411.

39. The BCFD's search was driven by safety considerations. In addition to the known dangers posed by methamphetamine labs, Chief Greenberg was aware that Brandenburg had experienced a number of recent, high-profile chemical fires. The chemicals posed a risk of fire. It was thus important that Chief Greenberg take note of these chemicals in order to be able to instruct the appropriate personnel to dismantle the lab.

40. Section 14(1)(b) contemplates searches carried out for the protection of public safety, not for the purposes of law enforcement. Section 14(1)(b) is a necessary power to protect public safety. It gives fire chiefs and fire marshals the ability to be proactive in averting fires by giving them the ability to respond quickly and decisively to fire risks. The broad search power accorded to a fire chief under section 14(1)(b) is therefore reasonable.

Falconer Fires Protection and Prevention Act, s 14(1)(b).

(C) The search was conducted in a reasonable manner.

41. At the Court of Appeal, Justice Ablaza erred in his analysis of the law relating to the reasonableness of the BCFD search. The BCFD's immediate exercise of its statutory power, its entry through a window, Chief Greenberg's decision to force open the basement door, and the BCFD's interactions with police were all reasonable.

(i) The BCFD's immediate exercise of its statutory power was reasonable.

42. Chief Greenberg acted appropriately in responding immediately to the clear public safety threat posed by a potential methamphetamine lab in the Respondent's residence. Methamphetamine labs contain highly flammable and explosive chemicals, which create a major public safety risk of fire. These labs are at particular risk of causing fires because methamphetamine manufacturers are often not qualified chemists and do not operate in a carefully-controlled environment.

43. In addition to suggesting the presence of a methamphetamine lab, the Respondent's burns gave Chief Greenberg a reason to believe that the Respondent was not operating said lab safely. The Respondent's methamphetamine lab posed a clear public safety risk that Chief Greenberg was obligated to deal with in the most prompt manner possible.

(ii) The BCFD's entry through a small window was reasonable.

44. The existence of an alternative procedure to obtain a warrant does not mean that the BCFD has to get a warrant when the situation falls clearly within the provisions of their warrantless entry power, as it does here. Section 14(6) of the *Act* reads as follows:

> 14. (6) A justice of the peace may issue a warrant authorizing the Fire Marshal or a fire chief named in the warrant to enter on land or premises and exercise any of the powers referred to in subsection (2) or (3) if the justice of the peace is satisfied on evidence under oath that there are reasonable grounds to believe that entry on the lands or premises is necessary for the purposes of conducting an investigation into the cause of a fire or of determining whether a substance or device that is likely to cause fire is situated on the land or premises and,
>
> (a) the Fire Marshal or fire chief has been denied entry to the land or premises or has been obstructed in exercising any other of those powers with respect to the land or premises; or
>
> (b) there are reasonable grounds to believe that the Fire Marshal or fire chief will be denied entry to the land or premises or obstructed in exercising any other of those powers with respect to the land or premises.
>
> *Falconer Fires Protection and Prevention Act,* s 14(6).

45. Subsections 14(1)(b) and 14(6) should be read in conjunction with the rest of section 14 of the *Act*. Subsection 14(5) states that "a person who enters land or premises under subsection (1) or (3) shall not use force to enter the land or premises." Reading these sections together demonstrates that the *Act* creates a warrant-issuing power for circumstances in which the fire department's entry to a premises is blocked by an occupant. If an occupant of a premises

locks its doors and windows and prevents a fire chief from entering, the fire chief can then seek a warrant under subsection 14(6). A fire chief is prohibited from using force and so must obtain a warrant to compel an occupant to let him or her inside.

Falconer Fires Protection and Prevention Act, s 14.

46. In the instant case, had the Respondent remained on the premises, Chief Greenberg would not have been able to gain entry without resorting to the use of force, which is prohibited under subsection 14(5) of the *Act*. The BCFD did not have to use force in order to gain entry into his house. The BCFD were able to gain entry by entering through an unlocked window. The BCFD's entry was thus properly authorized by the *Act*.

Falconer Fires Protection and Prevention Act, s 14.

47. The decision to send Jennifer Gravenhurst through the window without her protective gear is consistent with the existence of a safety concern. The present case is similar to *R v Baxter*, in which a firefighter also entered an unlocked window without protective gear in order to unlock a door. In *Baxter*, the Calgary Fire Department (CFD) was called to investigate a home that was emitting smoke. The CFD entered the home because of a potential fire, but because there was no smoke danger in the room where the unlocked window was located, the firefighter who entered was not at immediate risk.

R v Baxter, [2007] AJ No 967 at para 29, 2007 ABPC 242 [*Baxter*].

(iii) Chief Greenberg's decision to force open the basement door was reasonable.

48. Chief Greenberg's decision to force open the basement door is authorized by the *Act*. Subsection 14(2)(c) prescribes a broad range of powers that a fire chief may exercise upon

gaining entry into a premises under subsection 14(1)(b). Subsections 14(2)(b) and (c) both authorize forcing open an inner door that is impeding the progress of a search.

49. Subsection 14(2) of the *Act* prescribes a fire chief's powers upon entry under subsection (1). Subsection (c) permits a fire chief who has entered a premises under subsection (1) to "make such excavations on the land or premises as he or she considers necessary." Subsection (d) permits a fire chief to "require that any machinery, equipment or device be operated, used or set in motion under specified conditions."

Falconer Fires Protection and Prevention Act, s 14.

50. Subsection 14(5) of the *Act* prohibits the use of force to "enter the land or premises" under the authority subsection 14(1). There is no part in section 14 or within Part V of the *Act* that prohibits the use of force within a premises to conduct fire investigations.

Falconer Fires Protection and Prevention Act, s 14.

51. Courts have dealt with the destruction of personal property as part of police searches on several occasions. In all of these cases, courts have found that the destruction of an individual's personal property is unreasonable when the property damage itself is unnecessary to the proper conduct of the search.

R v Rosales, 2010 ONSC 1992.
R v Gogol (1994), 27 CR (4th) 357 at para 44 (OCJ – Prov. Div.).
R v Genest, [1989] 1 SCR 59 at para 57.

52. In the instant case, the damage to the basement door was necessary in the context of the BCFD's search. In order to be sure that a methamphetamine lab did not exist in the

Respondent's house, the BCFD had to search the entirety of the premises. A basement is a logical place to locate a clandestine lab, and the BCFD would thus have been remiss if it had neglected to search that part of the house. In order to search the basement, the BCFD had to force open the basement door.

(iv) Chief Greenberg's interaction with Detective Toews was reasonable.

53. Chief Greenberg's interaction with Detective Toews does not indicate that the BCFD search was carried out for law-enforcement purposes. Chief Greenberg's investigation of the methamphetamine lab was performed in the interest of public safety.

54. In this case, Chief Greenberg ordered the BCFD search of his own initiative according to his obligations as a fire chief. Chief Greenberg considered exercising his statutory power under the *Act* before Detective Toews arrived on the scene. The detective's only role in the search was his provision of information regarding the ongoing police investigation of the property.

55. The facts of the present case are distinguishable from *R v Collings*, another case in which a fire department searched an individual's house, against his consent, for an illegal drug operation (a marijuana grow operation).

R v Collings, [2010] BCJ No 2300, 2010 BCSC 1658 [*Collings*].

56. In *Collings*, the Deputy Fire Chief cooperated extensively with the RCMP, delayed entering the house while they discussed warrant requirements, and unnecessarily (for a fire investigation) catalogued the contents of the marijuana grow operation inside. An RCMP

officer participated directly in the fire department's investigation of the potential grow operation by performing a perimeter search and asking for permission to search the Collings residence. These factors indicated to the Court that the Deputy Fire Chief's authorization of the search was motivated primarily by his desire to assist the police with their criminal investigation.

Collings, *supra* at paras 14, 21, 44.

57. In the instant case, Detective Toews had no interaction with the Respondent. Detective Toews's only involvement in the BCFD's investigation was through his provision of information regarding the police investigation of Mr. Appleseed's property.

Collings, *supra* at paras 14 and 21.

58. The court in *Collings* found that the fire department's extensive cataloguing of details regarding the grow operation served a primarily law-enforcement rather than safety function. In the instant case, Chief Greenberg merely made a mental note of his observations of the methamphetamine lab and did not write down details that would serve no purpose in a fire investigation. Given their potential fire risk, Greenberg had a responsibility to catalogue the chemicals that he observed in order to assist in the BCFD's efforts to eliminate a public safety risk.

59. As a fire chief with the BCFD, Chief Greenberg had experience working alongside the police. Out of professional courtesy for the police force, Chief Greenberg invited the police to search the premises before the fire department dismantled the methamphetamine lab. Chief

Greenberg's respect for the police's law enforcement mandate was appropriate under the circumstances of this case.

60. The BCFD's search was authorized by section 14(1)(b) of the *Act*, which appropriately balances individuals' privacy rights with public safety considerations. The BCFD conducted its search in a reasonable manner and thus did not violate the Respondent's section 8 rights.

ISSUE #2: ADMITTING EVIDENCE OBTAINED FROM THE SEARCH WOULD NOT BRING THE ADMINISTRATION OF JUSTICE INTO DISREPUTE

61. Even if this Court finds that the BCFD's search violated the Respondent's *Charter* rights, evidence obtained from this search should still be admissible under section 24(2) of the *Charter*. The circumstances of the search satisfy the test for admitting evidence under section 24(2) as set out in *R v Grant.*

Grant, supra.

62. Section 24(2) of the *Charter* states:

> Where, in proceedings under subsection (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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Charter, supra at s 24(2).

63. In *Grant*, McLachlin CJ and Charron J set out three factors for the court to consider when determining whether evidence should be admitted under section 24(2):

> (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message that the justice system condones serious state misconduct),
>
> (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and
>
> (3) society's interest in the adjudication of the case on its merits.

Grant, supra at para 71.

64. After considering these three factors, the Court must determine whether, on balance, the admission of the evidence in question would bring the administration of justice into disrepute.

This inquiry is concerned with the long-term, prospective, and societal impact of admitting the evidence on the justice system in the eyes of the reasonable member of the community.

Grant, supra at paras 68-71.

65. In this case, two *Grant* factors weigh heavily in favour of admitting the evidence obtained through the BCFD's search of the Respondent's home. First, the BCFD's conduct was not serious, as Chief Greenberg made the decision to enter the Respondent's house in good faith. Second, society has a pressing interest in seeing this case adjudicated on its merits given the significance of the evidence to the Crown's case and the severe social harm caused by the production and trafficking of methamphetamine.

(A) The appellate judge's application of section 24(2) is not subject to traditional deference.

66. No special deference is owed to the Falconer Court of Appeal's admissibility analysis under section 24(2) of the *Charter*. The rationale for according deference to a trial judge's section 24(2) analysis is not present at the appellate level.

67. An appellate court will traditionally defer to the trial judge's section 24(2) analysis because of a trial judge's unique ability to hear first-hand evidence and determine community standards. The trial judge did not consider the application of section 24(2) to the present case.

Problem at para 26.

68. The decision of the Falconer Court of Appeal does not attract deference given the court's removal from the community and inability to hear the original evidence. The trial judge's

exposure to testimony assists in her evaluation of certain factors under the *Grant* test, such as the seriousness of the *Charter* breach. As Lamer J highlighted in *Collins*, a trial judge is also better-positioned to understand the "community values" at stake.

R v Mann, 2004 SCC 52 at para 59.
Collins, supra at p 283.

(B) The *Charter* breach was not serious, as the BCFD acted in good faith.

69. The BCFD's search of the Respondent's house was not a serious or flagrant breach of the Respondent's *Charter* rights.

70. The Court must evaluate the seriousness of the *Charter* breach based on whether state conduct was so "severe or deliberate" that the Court must dissociate itself from this conduct. State conduct lies along a spectrum, ranging from inadvertent violations to those that show a wilful or reckless disregard for *Charter* rights.

Grant, supra at paras 72-74.

(i) The BCFD did not act recklessly or with disregard for the Charter.

71. At no time did the BCFD demonstrate a disregard for the Respondent's *Charter* rights. All members of the BCFD conducted their search professionally, acting within their statutory authority to ensure that a risk of fire was not present. The BCFD did not use excessive force, choosing to enter the house through a window rather than breaking down the door. Once the BCFD understood the risk present inside the house, they left and allowed the appropriate authorities to handle this risk.

72. There is no evidence that Chief Greenberg's decision was part of a systemic practice of searching houses for drug facilities. This was an informed decision based the facts known to Chief Greenberg and his experience as a fire chief.

Problem at paras 15-16.

(ii) The BCFD acted in good faith, pursuant to a constitutionally valid law.

73. If the state acted in good faith, a *Charter* breach is considered less serious. Good faith is established where the decision-maker honestly and reasonably believed that he was acting lawfully.

Grant, supra at para 75.
R v Caron, 2011 BCCA 56, BCJ No 200, 269 CCC (3d) 15 para 41 [*Caron*].

74. Chief Greenberg was acting pursuant to a law that he understood to authorize him to enter the Respondent's house because of the risk of fire. The courts have long held that an individual is acting in good faith for the purposes of section 24(2) if he or she is relying on a law that the court has not considered unconstitutional. As Dickson CJ wrote in *R v Kokesch*:

> The police cannot be expected to predict the outcome of Charter challenges to their statutory search powers, and the success of a challenge to such a power does not vitiate the good faith of police officers who conducted a search pursuant to the power.

R v Kokesch, [1990] 3 SCR 3 at para 54.
R v Morelli, 2010 SCC 8 at para 42.
R v Simmons, [1988] 2 SCR 495 at para 99.
R v Duarte, [1990] 1 SCR 30.
R v Evans, [1996] 1 SCR 8 at para 30.

75. Chief Greenberg reasonably believed that he was acting within his legal authority to enter the Respondent's house. Section 14(1)(b) of the *Act* authorizes entry where there is reason to believe that a substance likely to a cause a fire is present. Chief Greenberg had ample reason to believe that a risk of fire in the form of a methamphetamine lab existed in the Respondent's house. The chemical burns on the Respondent's left side, the severity of these burns, and the Respondent's dishonest answer about the source of these burns first raised suspicion. Chief Greenberg's suspicion was buttressed by further information that the house regularly received large deliveries of chemicals and that the Narcotics Division was investigating the occupants of the house.

Problem at paras 3-5; 12-14.

76. Chief Greenberg subjectively believed that he was acting within his legal authority. He initially rejected the idea of entering the Respondent's house because he did not have enough information to support his suspicion. Once he received additional information, he considered this sufficient to believe that a risk of fire existed, and immediately entered the Respondent's house.

Problem at paras 11 and 14.

(iii) The suspected risk was sufficient to justify entry.

77. A methamphetamine lab poses a serious safety risk to the public and a significant risk of fire. Such labs contain explosive chemicals that may ignite if they are improperly handled or stored. Exposure to the vapours from these chemicals may be fatal or cause long-term health

problems. The unfortunate and striking number of fires and resultant deaths caused by methamphetamine labs in the past six months speaks to the extreme risk that these facilities pose to the general public.

Problem at paras 6-8.

78. Additional risk factors may have existed at the time Chief Greenberg decided to enter the residence, including the presence of other individuals in the house who may have been exposed to or using the materials in the lab. The Respondent's burns also illustrated that he did not know how to properly manage harmful chemicals, suggesting that these chemicals were not safely stored or controlled. Chief Greenberg had no way of knowing the magnitude of the risk unless he entered the Respondent's home.

(iv)The decision to search the Respondent's house was motivated by the BCFD's public safety mandate.

79. The protection of public safety was the primary motive for Chief Greenberg's decision to enter the Respondent's house. There is nothing in Chief Greenberg's conduct to suggest that he conducted the search to aid in the criminal prosecution of the Respondent. Chief Greenberg never solicited information from Detective Toews. Prior to speaking with Detective Toews, Chief Greenberg had already considered the potential safety risk present in the Respondent's house. The information voluntarily provided by Detective Toews assisted Chief Greenberg in evaluating whether a risk of fire existed within the house.

Problem at paras 13-14.

80. Chief Greenberg's actions while he was in the Respondent's house are also consistent with the protection of public safety. Once Chief Greenberg determined that the chemicals contained in the lab posed no immediate safety risk, he made a mental note of the chemicals present in order to report this information to the appropriate authority to dispose of these toxic substances.

81. In many situations, the statutory duty of a firefighter will overlap with police interests without raising suspicion as to the good faith of the non-police actor. In *R v Colarusso*, a coroner, pursuant to his authority to investigate under the *Coroners Act*, requested a blood sample from an unconscious man who was suspected of driving while intoxicated. The coroner then provided this sample to the police. La Forest J ruled that both the police and the coroner had acted in good faith, as both believed they were following their legitimate statutory mandates.

R v Colarusso, [1994] 1 SCR 20 at para 117.

82. The duties of a firefighter inevitably intersect with police interests, as many fires or potential fires have criminal roots. This overlap does not automatically colour a fire department's legitimate actions to prevent fires. In *R v Persad*, the Ontario Court of Appeal considered the legality of a Fire Marshal's investigative search in light of the marshal's decision to hand over samples collected at the scene of the fire to police. The Court found that because the Fire Marshal had acted within her statutory authority, admitting the evidence would not bring the administration of justice into disrepute.

R v Persad, [2001] OJ No 1589 (CA).

(C) Society has a strong interest in the adjudication of the case on its merits.

83. The court must also determine whether the truth-seeking role of the justice system would be better-served by the inclusion of the contested evidence. Under this inquiry, the Court must examine the reliability of the evidence, its importance to the Crown's case, and the seriousness of the offence with which the accused has been charged.

Grant, supra, at paras 79-84.

(i) The evidence obtained is both reliable and crucial to the Crown's case against the Respondent.

84. The physical evidence demonstrating the presence of a methamphetamine lab obtained through the BCFD's search of the Respondent's house is highly reliable.

85. Evidence obtained through the BCFD's search of the Respondent's house is also essential to the Crown's case against the Respondent. The material seized is critical to establish the offences of the production of methamphetamine (s 7(1)) and the possession of methamphetamine for the purpose of trafficking (s 7.1(1)) under the *Controlled Drugs and Substances Act.* Without this evidence the Crown would be unable to convict the Respondent.

(ii) The seriousness of the offence militates toward inclusion of the evidence.

86. The more serious the offence, the greater the interest society has in deterring such conduct through a trial on the merits of the case. Producing and trafficking methamphetamine are serious offences that carry serious penalties. McLachlin CJ and Charron J recognized in

Grant that this factor has the potential to militate toward both inclusion and exclusion of the evidence. However, in *R v Harrison*, McLachlin CJ found that the offence of possession for the purpose of trafficking was serious enough to weigh in favour of admitting evidence obtained through an illegal search.

Grant, *supra* at para 84.
R v Harrison, 2009 SCC 34 at para 34.

87. The seriousness of the offence justified admitting evidence of a methamphetamine lab in *R v Wong*. The British Columbia Court of Appeal unanimously upheld the trial judge's decision to admit the evidence of a lab that posed "an extreme hazard" to the residential community. The trial judge noted the need to preserve the integrity of the justice system and to refrain from condoning *Charter*-infringing state conduct, but found that society's interest in deterring serious crime in a residential neighbourhood outweighed this concern.

R v Wong, 2010 BCCA 160 at paras 42-44.

(iii) The severe harm caused by the offence increases society's interest in deterring this crime.

88. Society's interest in the adjudication of the case on its merits will also depend on the impact the offence has on society at large.

89. Courts have long recognized the negative impact that the production and trafficking of narcotics has on society. In *R v Grant*, Sopinka J referred to the production and sale of illicit drugs as a "pernicious scourge in our society" that "permits sophisticated criminals to profit by inflicting suffering on others."

R v Grant, [1993] 3 SCR 223 at para 29.

90. In *Silveira*, Cory J referred to the sale of a hard drugs as:

> ...a crime that has devastating individual and social consequences. It is, as well, often and tragically coupled with the use of firearms. This crime is a blight on society and every effort must be undertaken to eradicate it.

Silveira, *supra* at para 142.

91. Methamphetamine is a substance that can cause extreme destruction, both through its production and consumption. As Hamilton Prov Ct J stated in *R v Sattar*:

> ...methamphetamine is a particularly vile drug, known to reap devastating havoc in the lives and health of virtually all who use it and upon the well being of the community. Thus society has a significant interest in ensuring that those making this terrible substance available to others are lawfully apprehended and punished. Accordingly, I am confident that the community would wish that the police pursue such criminals to the full extent of the law, using all legal investigative tools available to them.

R v Sattar, 2008 ABPC 115, AJ No 452, 172 CRR (2d) 121 at para 124.

92. In *Evans*, the evidence obtained through a violation of the accused's section 8 rights was admitted under section 24(2), in part because of the seriousness of the offence of possession for the purposes of trafficking. Sopinka J stated:

> ...the exclusion of the evidence in this case would tarnish the image of the administration of justice to a much greater extent than would its admission. The cultivation of a narcotic is a serious offence, often leading to other social evils. The evidence obtained in violation of s. 8 is necessary to substantiate the charges against the appellants: simply put, if the evidence is excluded, the perpetrators of a very serious crime will go unpunished.

Evans, *supra* at para 32.

93. Methamphetamine has had an increasingly harmful effect on the Brandenburg community. Eight fires have erupted in clandestine methamphetamine labs over the past six months. These fires resulted in the deaths of five innocent civilians, as well as three million dollars in property damage.

Problem at para 8.

94. In *R v Caron,* Frankel J pointed to evidence of an increasing incidence of gun crime to support society's interest in admitting an improperly seized pistol under section 24(2). Likewise, the increasing damage to society caused by the production of methamphetamine weighs in favour of admitting the evidence in this case.

Caron, supra at para 66.

(D) Excluding evidence obtained from the search would bring the administration of justice into disrepute.

95. After considering the three *Grant* factors, the court must weigh these considerations together to determine, on the whole, whether the admission or exclusion of the evidence would bring the administration of justice into disrepute.

Grant, supra at para 85.

96. Together, these factors indicate that the administration of justice would be brought into disrepute by the *exclusion* of the evidence seized as a result of the BCFD's search. The BCFD conducted a good-faith search that was not part of a systemic abuse of *Charter* rights.

Society has a strong interest in deterring and punishing those who clandestinely produce methamphetamine at the expense of the surrounding community.

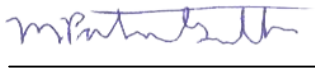
97. This conclusion is similar to McLachlin CJ and Charron J's weighing of the factors in *Grant.* In that case, both the violation of the accused's privacy interests and society's interests in the adjudication of the case on its merits were strong and pulled in opposite directions. To break this impasse, the Court pointed to the non-egregious nature of police conduct. Police officers had acted based on their understanding of the law "in circumstances of considerable legal uncertainty," and this tilted the balance in favour of admitting the evidence.

Grant, *supra* at para 140.

PART V: REMEDY SOUGHT

98. The Appellant respectfully requests that the appeal from the Falconer Provincial Court of Appeal be allowed and that the convictions entered against the accused be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Michael Portner Gartke

Emily Shepard

SCHEDULE A: TABLE OF AUTHORITIES

Cases

R v Collins, [1987] 1 SCR 265, 13 BCLR (2d) 1.

R v Grant, [2009] 2 SCR 353.

R v Collings, 2010 BCSC 1658, [2010] BCJ No 2300.

Canada v Southam, [1984] 2 SCR 145.

R v Silveira, [1995] 2 SCR 297, 97 CCC (3d) 450.

R v Campanella (2005), 195 CCC (3d) 353, 2005 CarswellOnt 1355.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27.

Bell Express Vu v Rex, 2002 SCC 42.

R v Baxter, 2007 ABPC 242, [2007] AJ No 967.

R v Rosales, 2010 ONSC 1992.

R v Gogol (1994), 27 CR (4th) 357 (OCJ – Prov Div).

R v Genest, [1989] 1 SCR 59.

R v Mann, 2004 SCC 52.

R v Caron, 2011 BCCA 56, BCJ No 200, 269 CCC (3d) 15.

R v Kokesch, [1990] 3 SCR 3.

R v Morelli, 2010 SCC 8.

R v Simmons, [1988] 2 SCR 495.

R v Duarte, [1990] 1 SCR 30.

R v Evans, [1996] 1 SCR 8.

R v Colarusso, [1994] 1 SCR 20.

R v Persad, [2001] OJ No 1589 (CA).

R v Harrison, 2009 SCC 34.

R v Wong, 2010 BCCA 160.

R v Grant, [1993] 3 SCR 223.

R v Sattar, 2008 ABPC 115, AJ No 452, 172 CRR (2d) 121.

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Statutes

Falconer *Controlled Drugs and Substances Act.*, ss 7, 7.1.

Falconer *Fires Protection and Prevention Act*, ss 14, 15.

Flavellian Charter of Rights and Freedoms, ss 8, 24(2).

Secondary Authorities

E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983).

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SCHEDULE B: STATUTORY PROVISIONS

Falconer *Controlled Drugs and Substances Act*

7. (2) Every person who contravenes subsection (1)

(a) where the subject-matter of the offence is a substance included in Schedule I or II, other than cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for life;

(b) where the subject-matter of the offence is cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years;

(c) where the subject-matter of the offence is a substance included in Schedule III,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; and

(d) where the subject-matter of the offence is a substance included in Schedule IV,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

…

7.1 (2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than ten years less a day.

Falconer *Fires Protection and Prevention Act*

Entry where fire has occurred or is likely to occur

14. (1) The Fire Marshal or a fire chief may, without a warrant, enter on land or premises if,

(a) a fire has occurred on the land or premises; or

(b) he or she has reason to believe that a substance or device that is likely to cause a fire may be situated on the land or premises.

Powers upon entry

14. (2) Upon entering on land or premises under subsection (1), the Fire Marshal or a fire chief may,

(a) close, and prevent entry to, the land or premises for the length of time necessary to complete the examination of the land or premises;

(b) in the case of an entry under clause (1) (a), remove from the land or premises, retain and examine any article or material, and take such samples or photographs, make videotapes and other images electronic or otherwise that in his or her opinion may be of assistance in determining the cause of the fire under investigation;

(c) make such excavations on the land or premises as he or she considers necessary;

(d) require that any machinery, equipment or device be operated, used or set in motion under specified conditions; and

(e) make any reasonable inquiry of any person, orally or in writing.

Entry to adjacent lands
14. (3) A person who enters on land or premises under subsection (1), may, without a warrant, enter on adjacent land or premises if the entry is necessary for the purposes of conducting an investigation into the cause of a fire or of determining whether a substance or device that is likely to cause fire is situated on the land or premises.

Same
14. (4) A person who enters on adjacent land or premises under subsection (3) may exercise any of the powers mentioned in subsection (2) on or with respect to the adjacent land or premises.

Use of force
14. (5) A person who enters land or premises under subsection (1) or (3) shall not use force to enter the land or premises.

Warrant authorizing entry
14. (6) A justice of the peace may issue a warrant authorizing the Fire Marshal or a fire chief named in the warrant to enter on land or premises and exercise any of the powers referred to in subsection (2) or (3) if the justice of the peace is satisfied on evidence under oath that there are reasonable grounds to believe that entry on the lands or premises is necessary for the purposes of conducting an investigation into the cause of a fire or of determining whether a substance or device that is likely to cause fire is situated on the land or premises and,

> **(a)** the Fire Marshal or fire chief has been denied entry to the land or premises or has been obstructed in exercising any other of those powers with respect to the land or premises; or
> **(b)** there are reasonable grounds to believe that the Fire Marshal or fire chief will be denied entry to the land or premises or obstructed in exercising any other of those powers with respect to the land or premises.

...
Use of force
14. (9) A person authorized by a warrant issued under subsection (6) to enter land or premises for the purpose of doing a thing may call on police officers as necessary and may use force as necessary to make the entry and do the thing.

Flavellian Charter of Rights and Freedoms
8. Everyone has the right to be secure against unreasonable search or seizure.

24 (2). Where, in proceedings under subsection (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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.