

GRAND MOOT 2011

R. v. Appleseed

A) Summary of the Case

1. Brandenburg is a city in the province of Falconer, which is a common law province in Flavelle. Flavelle and Falconer have a system of government, Constitution, judicial system and common law history identical to that of Canada and Ontario, respectively.
2. On March 27, 2006, John Appleseed placed a call to 911 requesting emergency medical assistance to his residence at 425 Bismark Lane. The Brandenburg City Fire Department (the “**BCFD**”) was the first to respond to the call.
3. Upon arriving at the scene, the BCFD found Appleseed on the front steps outside of a detached home with severe burns on the left side of his body. First Class Firefighter Mark Johnston, who was also trained as a paramedic, treated Appleseed’s wounds.
4. Appleseed told Johnston that he had suffered the burns after knocking over a pot of boiling pasta. Johnston was of the opinion that the burns were more consistent with a severe acid burn.
5. Johnston was aware that acids were used in the production of methamphetamine (“**meth**”). There had been a number of recent, high-profile chemical fires in the city. Johnston was therefore immediately suspicious that Appleseed’s home housed a clandestine lab used for producing meth (a “**meth lab**”). Once the ambulance arrived, Johnston surrendered the care of Appleseed to the paramedics and immediately informed the Fire Chief, Mark Greenberg, of his suspicion.
6. Meth labs contain materials that are highly flammable, if not explosive, largely because of the corrosive and highly flammable nature of the chemicals used in the production of meth. The risk of fire is heightened due to the fact that meth manufacturers are often not qualified chemists and do not operate in a carefully controlled environment.
7. Moreover, short term exposure to high concentrations of chemical vapours that exist in meth labs can cause severe health problems or even result in death. Exposure from these substances can result from volatile air emissions, spills, fires and explosions. The risk of fire in meth labs therefore poses a serious public health risk to those in the immediate vicinity.
8. Within the past six months, the BCFD responded to eight fires in meth labs that resulted in five deaths and over \$3 million in property damage. In response to the high-profile media coverage of the fires, the Brandenburg City Fire Chief struck an internal committee (the “**Committee**”), chaired by Greenberg, to investigate how to respond to the growing problem of fires caused by illegal meth labs. The Committee was still conducting its investigation at the time Appleseed phoned 911.

9. One of the provisions being considered by the Committee was section 14(1)(b) of the *Falconer Fires Protection and Prevention Act* (the “**Act**”), which provides:

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.¹

10. During its investigation, the Committee had heard that this warrantless entry power may run afoul of the *Falconer Charter of Rights and Freedoms* (the “**Charter**”). The Committee therefore included a caution with its recommendations, which noted that more legal advice would have to be obtained to determine whether section 14(1)(b) infringed individuals’ civil liberties before the Committee could recommend invocation of the provision to deal with meth labs.

11. As Chair of the Committee, Greenberg was aware of the right of entry powers conferred by section 14(1)(b) of the Act and he immediately began to consider exercising that statutory power. Although he shared Johnston’s suspicion, Greenberg was unsure whether the apparent acid burns were sufficient reason to believe that there was a device likely to cause a fire in the building.

12. Greenberg therefore approached Appleseed and explained that he was concerned about the ongoing risk of fire, without mentioning his suspicion about the meth lab, and asked for Appleseed’s consent to check the premises. Appleseed replied that he had turned off the stove and that he would not consent to the BCFD entering the house. As Greenberg started to protest, the paramedics interrupted to insist that Appleseed be taken to the hospital immediately to receive treatment.

13. While Greenberg was speaking to Appleseed, an off-duty Detective in the Narcotics Division of the Brandenburg City Police Department (the “**BCPD**”) pulled over to see if he could offer any assistance. Detective Andrew Toews spoke to Johnston and learned of his suspicion about the meth lab. When Greenberg returned from speaking with Appleseed, Detective Toews explained to Greenberg that the house regularly received deliveries of large quantities of chemicals associated with meth production, and that its occupants had been under investigation by the Narcotics Division for nearly a year. However, Detective Toews explained that they had never been able to gather enough evidence to obtain a warrant.

14. Greenberg immediately decided that the apparent chemical burns on Appleseed’s leg, combined with the information imparted by Detective Toews, constituted sufficient justification to exercise

¹ *Fire Protection and Prevention Act*, RSO 1997, C-4 s 14(1)(b).

the right of entry under section 14(1)(b) of the Act. Greenberg ordered the firefighters at the scene to don their protective gear and to prepare to enter the house.

15. Approximately 30 minutes after arriving, the BCFD attempted to enter the front door of the house, only to find that it was locked. The BCFD quickly determined that the back door was also locked. However, the BCFD was able to open a small, unlocked window at the side of the house. Only Jennifer Gravenhurst, the smallest member of the BCFD team at the scene, was able to fit through the window – and only without wearing her protective gear. Greenberg looked through the open window and determined that there was no imminent threat to Gravenhurst’s safety and ordered her to go through the window without her protective equipment in order to unlock the front door.
16. Once Gravenhurst unlocked the front door, a team of five firefighters, including Greenberg, entered the building. The BCFD team began to search every room of the house. Greenberg attempted to enter the basement, but found that the door was locked. He therefore kicked the door open, damaging the frame of the door. Upon entering the basement, Greenberg found a meth lab. The heat sources required for the production of the meth were not operating at that time. Greenberg made a mental note of the equipment and chemicals at the scene before leaving the building.
17. Detective Toews remained outside the house while the BCFD team entered the building. Once Greenberg exited the building he immediately told Detective Toews about what was inside. Greenberg subsequently swore an affidavit attesting to the existence of the meth lab, including the amount and types of chemicals at the scene. This affidavit formed part of the Information to Obtain a Warrant (“ITO”).
18. Later the same day, a Justice of the Peace issued a warrant to search the premises for evidence of a meth lab. Detective Toews returned to the house with several other officers to search the premises. The evidence found in this search was used to charge Applesseed with production of meth and possession for the purpose of trafficking meth, contrary to sections 7(1) and 7.1 of the *Controlled Drugs and Substances Act*, respectively.

B) Judicial History

a. Falconer Superior Court of Justice

19. In the *voir dire* at trial, Applesseed argued that the warrant authorizing the BCPD’s search was invalid and the subsequent search therefore breached section 8 of the *Charter*. The BCFD’s warrantless search was not authorized by law and was contrary to section 8 of the *Charter*. As the BCPD’s search warrant was obtained on the basis of information obtained from the BCFD’s warrantless search, the BCPD’s search warrant was therefore invalid and the search itself contravened Applesseed’s section 8 rights. Applesseed further argued that in light of this *Charter*

breach, the evidence obtained in the search should be excluded under section 24(2) of the *Charter*.

20. The Crown argued that the initial warrantless search by the BCFD was reasonable and complied with section 8 of the *Charter*. The information obtained from the BCFD's warrantless entry properly formed the basis for the warrant executed by the BCPD. The BCPD search was therefore both authorized by law and compliant with section 8 of the *Charter*. In the alternative, the Crown argued that even if the search breached Appleseed's section 8 rights, the evidence collected by the BCPD should not be excluded under section 24(2) of the *Charter*.
21. It was common ground between the parties that if the initial search by the BCFD did not contravene section 8 of the *Charter*, then the warrant and subsequent search by the BCPD was unassailable. Similarly, the parties agreed that if the initial search by the BCFD breached section 8 of the *Charter*, the warrant was invalid and the BCPD search contravened section 8 of the *Charter*. The primary issue was therefore whether the search by the BCFD contravened section 8 of the *Charter*.
22. Justice Oster of the Falconer Superior Court of Justice concluded that the BCFD entry was a search and turned to consider the factors laid out in *R v Collins*.²
23. On the first branch of the *Collins* test, Justice Oster held that the search was authorized by law, pursuant to section 14(1)(b) of the Act. However, Justice Oster held that the search was not authorized by the exigent circumstances doctrine. There was no risk of imminent threat, as determined by Greenberg when he ordered Gravenhurst to enter the premises without protective equipment.
24. Considering the second branch of the *Collins* test, Justice Oster held that section 14(1)(b) of the Act is reasonable. Justice Oster 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. Here the provision is carefully tailored to allow entry to protect public safety. The threat to public safety is real. Fires can erupt unpredictably. Where there is reason to believe that a substance or device is likely to cause a fire, firefighters must be empowered to eliminate the threat, whether it is imminent or not.
25. Justice Oster then went on to consider the third branch of the *Collins* test, and found that the search was carried out in a reasonable manner. The record indicated that Greenberg was reluctant to exercise his right of entry under section 14(1)(b) of the Act based on mere speculation. He first sought Appleseed's permission to enter the premises, but was unable to obtain permission before Appleseed was taken away for a medical emergency. Only after speaking with Detective Toews and learning about the ongoing narcotics investigation did Greenberg exercise the right of

² *R v Collins*, [1987] 1 SCR 265 [*Collins*].

entry. Finally, the BCFD did not force their way into the home, but rather searched for a less intrusive alternative to enter the house.

26. 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).
27. Applesseed was ultimately found guilty at trial.

b. Falconer Provincial Court of Appeal

28. Applesseed appealed his conviction to the Falconer Provincial Court of Appeal, arguing that the evidence obtained from the BCPD search should not have been admitted.
29. A majority of the Court of Appeal held that the evidence obtained from the BCPD search should not have been admitted at trial. Writing for both himself and Justice Luong, Justice Ablaza found that the BCFD search violated section 8 and that to admit the evidence would bring the administration of justice into disrepute.
30. Applying the first branch of the *Collins* test, Justice Ablaza accepted the trial judge's finding that the search was authorized by section 14(1)(b) of the Act, but not by the doctrine of exigent circumstances.
31. However, on the second branch of the *Collins* test, Justice Ablaza overturned the trial judge's finding that the law itself was reasonable. Similar legislation in all but one of Falconer's other nine provinces contain an explicit requirement that a fire be either imminent or occurring before firefighters may exercise their right of warrantless entry. The lack of an imminence requirement in the Flavellian legislation is overly broad, as it inappropriately sacrifices individual privacy for administrative efficiency. Having accepted the trial judge's finding that there was no imminent danger in this case, Justice Ablaza did not consider whether the provision should be read to include an imminence requirement.
32. Justice Ablaza then turned to the third branch of the *Collins* test. He held that the manner in which the BCFD search was carried out was unreasonable. The search was conducted after Applesseed had explicitly refused to allow Greenberg to enter the premises and after he had been taken away. Moreover, the doors to the house were locked and the BCFD was only able to gain entry by climbing through a small window. The meth lab itself was housed behind a locked door, which Greenberg forced open, causing damage to the property. Justice Ablaza therefore held that the BCFD search violated section 8 of the *Charter*.

33. On the question of section 24(2), Justice Ablaza held that the evidence should be excluded from trial. In making this determination, he relied on the three-part test laid out in *R v Grant*.³ Justice Ablaza found that the evidence obtained from the search was both highly reliable and central to the Crown's case against Appleseed. However, society's interest in adjudicating this case on the merits could not outweigh both the impact of the search on Appleseed's section 8 rights and the seriousness of the state's conduct.
34. Appleseed was entitled to a very high degree of privacy in his locked home. The illegal search therefore had a very serious impact on Appleseed's reasonable expectation of privacy, as protected by section 8 of the *Charter*.
35. Justice Ablaza also found that the infringing state conduct was very serious. While the BCFD and the BCPD did not necessarily act in bad faith, their conduct was a serious and reckless circumvention of the requirement to obtain prior judicial authorization. Detective Toews admitted that the police did not have enough evidence to obtain a warrant to search Appleseed's residence. It was only upon learning this information that Greenberg decided to search the premises by other means.
36. Writing in dissent, Justice Sanderson agreed with the trial judge's decision to admit the evidence at trial. However, he disagreed with the trial judge as to whether the BCFD search contravened section 8 of the *Charter*.
37. Justice Sanderson agreed with the majority's finding that, based on the three-part *Collins* test, the BCFD search breached Appleseed's section 8 rights.
38. However, Justice Sanderson held that the evidence obtained from the BCPD search should not be excluded under section 24(2) of the *Charter*. He found that society has a strong interest in adjudicating the case on its merits. The production of meth poses a danger to human health and can result in significant property damage, in addition to the increased levels of addiction and criminal activity that result from the illicit drug trade. Society has a strong interest in ensuring that those individuals involved in illicit drug production are prosecuted for their actions. Justice Sanderson held that this consideration, when taken together with the fact that the evidence was highly reliable and central to the Crown's case, far outweighed the impact of the search on Appleseed's section 8 rights. Justice Sanderson would have therefore admitted the evidence obtained from the BCPD search.

³ *R v Grant*, [2009] 2 SCR 353 [*Grant*].

C) Issues on Appeal

The Crown has been granted leave to appeal the Court of Appeal's decision to the Supreme Court of Flavelle. The Supreme Court of Flavelle is asked to decide the following questions:

- a) Did the search of Appleseed's residence by the BCFD contravene section 8 of the *Charter*?
- b) If so, should the evidence obtained during the search be excluded pursuant to section 24(2) of the *Charter*?