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 RESPONDENT
(John Appleseed)

Counsel for the Respondent:

Joe Ensom
Kate Southwell

Oral Argument:

October 6, 2011
SUPREME COURT OF FLAVELLE

TABLE OF CONTENTS

PART I: OVERVIEW

1. On March 27, 2006, the Brandenburg City Fire Department ("BCFD") crawled through a window to conduct a warrantless search of the Respondent, John Appleseed's, home, over his express objections. This search was carried out for an improper law enforcement purpose and represented an extremely serious violation of Mr. Appleseed's section 8 right to be free from unreasonable search and seizure, as enshrined in the *Charter of Rights and Freedoms* (the "*Charter*"). In order to maintain public confidence in the administration of justice, Mr. Appleseed submits that the evidence found as a result of this search should be excluded under section 24(2) of the *Charter*.

2. All citizens have the highest expectation of privacy in their homes. This privacy interest was deliberately and egregiously violated when the BCFD chose to intrude on Mr. Appleseed's home, kick down a door, and conduct a search without a warrant.

3. Warrantless searches, such as the one perpetrated against Mr. Appleseed, are presumptively unreasonable for the purposes of section 8. To rebut this presumption, the Crown has the burden of proving that the search was reasonable by meeting all three branches of the Collins test. In this case, the Crown has failed to meet any of those three branches. The search was not authorized by law; the law relied upon as authority is unreasonable; and the search was carried out in an unreasonable manner.

4. Allowing the admission of evidence obtained in a manner so recklessly in violation of the *Charter* would amount to judicial endorsement of such behaviour. Appearing to condone such egregious *Charter* breaches would significantly diminish public confidence in the justice system

and erode the fundamental rights and freedoms enshrined in the *Charter*.

5. As a result of this violation of Mr. Appleseed's fundamental right to be free of warrantless state intrusion into his home, Mr. Appleseed submits that the evidence obtained as a result of this search be excluded under section 24(2) of the *Charter*, as its admission would bring the administration of justice into disrepute.

PART II: FACTS AND JUDICIAL HISTORY

(A) Background Facts

6. On March 27, 2006, John Appleseed placed a call to 911 requesting emergency medical assistance to his home at 425 Bismark Lane. The call only requested medical assistance, not fire personnel. Mr. Appleseed made no mention of an ongoing fire or potential fire hazard.

Trial Judgment at para 2.

7. Upon arriving at the scene, the BCFD found Mr. Appleseed on the front steps of his home with severe burns on his left side. Mr. Appleseed told the attending paramedic, First Class Firefighter Mark Johnston, that he was injured by boiling water. However, Johnston suspected that the injuries were more consistent with acid burns.

Trial Judgment, *supra* para 6 at paras 3-4.

8. Johnston was aware that acids were used in the production of methamphetamine ("meth") and immediately suspected that Mr. Appleseed's home housed a clandestine lab used for producing meth (a "meth lab"). Johnston informed the Fire Chief, Mark Greenberg, of his suspicion.

Trial Judgment, *supra* para 6 at para 5.

9. Section 14(1)(b) Falconer *Fires Protection and Prevention Act* (the "Act") provides a Fire Chief with the power to enter a "land or premises" if "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) [*FPPA*].

10. Greenberg was unsure whether Mr. Appleseed's burns were sufficient to justify using the section 14(1)(b) warrantless entry power to search for the suspected meth lab. He approached Mr. Appleseed, who denied the BCFD permission to enter his home. Mr. Appleseed was subsequently taken to the hospital for medical treatment.

Trial Judgment, *supra* para 6 at paras 11-12.

11. While Greenberg was speaking to Mr. Appleseed, an off-duty detective of the Brandenburg City Police Department ("BCPD") Narcotics Division, Detective Andrew Toews, arrived. Toews informed Greenberg that the house had received deliveries of chemicals associated with meth production, that there was an ongoing BCPD investigation of the home, and that the BCPD had never been able to gather enough evidence to obtain a warrant.

Trial Judgment, *supra* para 6 at para 13.

12. Immediately after learning of the stalled police investigation, Greenberg decided that he had sufficient justification to exercise the right of entry under section 14(1)(b). The BCFD then attempted to enter the house but found that both doors were locked. Greenberg ordered the smallest member of the BCFD team, Jennifer Gravenhurst, to remove her protective gear in order to enter the home through a small unlocked window.

Trial Judgment, *supra* para 6 at paras 14-15.

13. Once Gravenhurst unlocked the door, the entire home was searched room-by-room by a team of five firefighters, including Greenberg. To enter the basement, Greenberg kicked in the locked door, damaging the frame. There Greenberg found a meth lab but no operating heat sources. He then made a mental note of the equipment and chemicals at the scene.

Trial Judgment, *supra* para 6 at para 16.

14. Upon exiting, Greenberg immediately detailed his findings for Detective Toews and swore an affidavit attesting to the existence of the meth lab, including the amount and types of chemicals at the scene. The affidavit formed part of the Information to Obtain a Warrant.

Trial Judgment, *supra* para 6 at para 17.

15. Later that day, Detective Toews returned to the house with a warrant to search the premises, and the evidence found in this search was used to charge Mr. Appleseed with production of meth and possession for the purposes of trafficking meth contrary to sections 7(1) and 7.1 of the *Controlled Drugs and Substances Act*.

Trial Judgment, *supra* para 6 at para 18.

(B) Judicial History

(i) *Falconer Superior Court of Justice*

16. In a *voir dire*, Oster J concluded that there had been no violation of Mr. Appleseed's section 8 *Charter* right against unreasonable search and seizure. The evidence found in the search was thus admitted, and Mr. Appleseed was subsequently convicted at trial.

Trial Judgment, *supra* para 6 at para 26.

17. It was common ground between the parties that if the initial BCFD search did not violate section 8 of the *Charter*, then the subsequent warrant was not unconstitutional. The parties also agreed that if the initial search was a violation of Mr. Appleseed's section 8 *Charter* rights, then the subsequent warrant would be invalid and the BCPD search would also be a violation of Mr. Appleseed's rights. The primary issue was therefore whether the search by the BCFD contravened section 8 of the Charter.

Trial Judgment, *supra* para 6 at para 26.

18. Applying the first branch of the test set out in *R v Collins* ("*Collins*"), Oster J found that the search was authorized by law, pursuant to section 14(1)(b) of the Act. However, he found that it was not authorized by the exigent circumstances doctrine because there was no risk of imminent threat to the property or persons. On the second branch of the test, Oster J found that section 14(1)(b) of the Act is reasonable and intended to address a real threat to public safety. Proceeding to the third branch, Oster J found that the search was carried out in a reasonable manner given that the BCFD were unable to obtain permission from Mr. Appleseed before he was removed for medical treatment and that they searched for a less intrusive manner of entering the home.

Trial Judgment, *supra* para 6 at paras 23-25.
R v Collins [1987] 1 SCR 265.

19. In conclusion, Oster J found that the search did not violate section 8 of the *Charter*, and he thus did not proceed to consider section 24(2).

Trial Judgment, *supra* para 6 at para 26.

(ii) *Falconer Provincial Court of Appeal*

20. On appeal, Ablaza J, writing for the majority, reversed the findings of Oster J. He ruled that the search did violate Mr. Appleseed's section 8 *Charter* rights and that the evidence should be excluded under section 24(2).

Court of Appeal Judgment *supra* para 16 at para 29.

21. Sanderson J, writing in lone dissent, held that while the search did violate Mr. Appleseed's section 8 rights, the evidence should not be excluded under section 24(2).

Court of Appeal Judgment *supra* para 16 at paras 36-38.

22. On the first branch of the *Collins* test, Ablaza J accepted that the search was authorized by section 14(1)(b) of the Act. However, on the second branch Ablaza J set out a strongly worded judgment detailing why the Act itself was not reasonable, given the lack of an imminent danger requirement. On the third branch of the *Collins* test, Ablaza J held that the manner of the search was unreasonable.

Court of Appeal Judgment *supra* para 16 at paras 30-32

23. Having found a violation of Mr. Appleseed's section 8 *Charter* rights, Ablaza J turned to whether the evidence found in the subsequent BCPD search should be excluded under section 24(2) of the *Charter*.

24. Applying the three factors of the test in *R v Grant* ("*Grant*"), Ablaza J found that the infringing conduct was "very serious", that the search had "a very serious impact" on Mr.

Appleseed's privacy interest, and that these outweighed society's interest in adjudication on the merits. Thus, Ablaza J held that the evidence found in the searches of Mr. Appleseed's home should be excluded under section 24(2) of the *Charter,* as its admission would bring the administration of justice into disrepute

> Court of Appeal Judgment *supra* para 16 at paras 34-35.
> *R v Grant*, 2009 SCC 32 [*Grant*].

PART III: ISSUES

25. There are two issues in this appeal:

1. Was the search of the Appleseed residence conducted in an unreasonable manner in violation of section 8 of the *Flavellian Charter of Rights and Freedoms*?

2. If Mr. Appleseed's section 8 rights were breached, should the evidence obtained during the subsequent search be excluded under section 24(2)?

PART IV: ARGUMENTS

ISSUE #1: WAS THE SEARCH OF THE APPLESEED RESIDENCE CONDUCTED IN AN UNREASONABLE MANNER IN VIOLATION OF SECTION 8 OF THE *FLAVELLIAN CHARTER OF RIGHTS AND FREEDOMS*?

(A) The BCFD Engaged in a "Search" for the Purposes of Section 8

(i) Mr. Appleseed Had a Strong Expectation of Privacy in His Home

26. Section 8 of the *Charter* protects the right to be secure against unreasonable search and seizure by the State. To establish an infringement of section 8, the person raising the claim must first establish that he or she had a reasonable expectation of privacy in the thing searched or seized.

> *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc*, [1984] 2 SCR 145, at para 25 [*Hunter v Southam*].

27. The search of Mr. Appleseed's home by the BCFD was a very substantial intrusion on his privacy. Mr. Appleseed had a high expectation of privacy in his home. It has been well established by the Supreme Court of Canada that there is no place on earth where persons can have a greater expectation of privacy than within their dwelling-house. Mr. Appleseed expressly denied the BCFD and the police permission to enter his home, yet the BCFD thoroughly searched his entire home room-by-room and broke down the locked basement door.

R v Collings, 2010 BCSC 1658, [2010] BCJ No 2300 at para 74 [*Collings*].
R v Tessling, 2004 SCC 67, [2004] 3 SCR 432 at para 22.
R v Silveira [1995] 2 SCR 297, 97 CCC (3d) 450 at para 140 [*Silviera*].
Trial Judgment, *supra* para 6 at para 16.

(B) The BCFD's Search Was Unreasonable

28. A search by a state agent without prior authorization by warrant is presumptively unreasonable and therefore in violation of section 8. The Crown has the burden of showing that the search was nonetheless reasonable, on a balance of probabilities. In *Hunter v Southam*, the Supreme Court of Canada held that where it is feasible to obtain authorization prior to a search, such authorization is a pre-condition to a valid search. In this case, no prior authorization was made for the BCFD's initial search of Mr. Appleseed's house. Not only was there no warrant in this case, there was insufficient evidence for the police to obtain a warrant.

Hunter v Southam, *supra* para 26 at para 28.
Collings, *supra* para 27 at para 67.
Trial Judgment, *supra* para 6 at para 13.

29. Accordingly, the Crown bears the burden of disproving the presumption that the search of Mr. Appleseed's house was unreasonable. A warrantless search may be found to be reasonable if it meets the three conditions provided in *Collins*:

1. the search is authorized by law;

2. the law authorizing the search is reasonable; and
3. the manner in which the search is carried out is reasonable.

Collins, supra para 18.

30. In this case, the BCFD's search fails on all three branches of the *Collins* test. The BCFD's search was not authorized by law, the law which allegedly authorized the search is unreasonable, and the manner in which the search was carried out is unreasonable.

(i) The Search Was Not Authorized By Law

31. The search was not authorized by section 14(1)(b) of the Act because the BCFD performed the search for an improper law enforcement purpose, bringing their actions outside of conduct authorized by the legislation. In the alternative, having been denied entry into the house, the BCFD were required to obtain a warrant pursuant to section 14(6) before entering the home and using force to break down a door. In either alternative, prior judicial authorization of the search was required.

(a) *The Search Was Made For an Improper Law Enforcement Purpose*

32. The search of Mr. Appleseed's residence took place for an improper purpose, which was to provide information to assist the police in connection with the ongoing criminal investigation of a suspected meth lab. The Crown claims that the BCFD's search was authorized by a broad warrantless entry power granted by section 14(1)(b) of the Act, which states 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.

FPPA, supra para 9.

33. 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).

34. Section 14(1)(b) does not authorize searches undertaken for criminal investigation purposes. Read in context, the purpose of section 14(1)(b) is to enable firefighters to take immediate action to protect the public when faced with a clear and imminent fire safety risk. It is reasonable to conclude that the legislature intended this right of entry to be used for public safety and fire prevention purposes, which may justify a broad entry power in some circumstances to avoid harm to persons or property. However, there is no suggestion that the Act is intended to provide firefighters with a similarly broad entry power for the purposes of law enforcement.

35. In the recent case of *Collings,* the British Columbia Superior Court held that the Surrey Fire Department (SFD) breached a resident's section 8 rights by exercising a statutory warrantless search power for an improper purpose. In *Collings*, the SFD responded to a fire in Mr. Collings' shed and extinguished it. After being informed by the police that the home was a suspected marijuana grow operation, the SFD searched Mr. Collings' residence pursuant to legislation similar to section 14(1)(b) of the Act.

Collings, supra para 18.

36. It was held in *Collings* that a search conducted for an improper law enforcement purpose was not authorized by a statutory warrantless search power. The SFD argued that the search was for a legitimate public safely purpose, but the Court held that although the firefighters may have had a sincere subjective concern about a potential safety hazard, that concern did not form the primary motivation for the entry and search, as no objective basis for the safety concerns was proven. In finding this, the Court relied heavily on the fact that the Deputy Chief knew both that the police did not have reasonable grounds to obtain a search warrant, and that the search would likely lead to criminal charges, as the police were standing by expectantly.

Collings, *supra* para 18 at paras 114, 121.

37. In *Collings*, the Court found that the purpose of the intrusion was criminal investigation, not inspecting for safety risks. Crucially, the Court found an improper purpose despite no evidence of express collusion between the fire department and the police. The improper purpose was implied by the actions of the fire department personnel and their knowledge that their search would most likely lead to criminal sanctions against the resident of the home.

Collings, *supra* para 18 at para 128.

38. The Court relied on five key facts in holding that the search was made for an improper purpose and thus not authorized by law. First, the police were a but-for cause of the search, as they provided the SFD with the information which prompted the search. Second, the SFD knew that the police needed further information to obtain a warrant. Third, it was clear to the SFD that the results of their search would be used for criminal investigation purposes, to the "grave legal detriment" of Mr. Collings. Fourth, the purported public safety motivation had no objective basis proven at trial. Fifth, and finally, the purported public safety motivation did not explain why the

SFD catalogued the contents of the marijuana grow operation and then immediately provided that information to the police. Based on these facts, the Court held that the search was coloured by an improper law enforcement purpose.

Collings, *supra* para 18 at paras 73, 75, 123, 127-128.

39. As was the case in *Collings*, the search of Mr. Appleseed's home was not authorized by law due to the improper law enforcement purpose of the BCFD. The key facts that the Court relied on in *Collings* are all present in the case at bar. First, it is undisputed that police information was a but-for cause of the search. Greenberg was aware that the police required more information in order to obtain a warrant, and he knew that his search would likely lead to grave penal consequences for the operator of the meth lab he suspected was in the home.

Trial Judgment, *supra* para 6 at para 13.

40. Second, the search of Mr. Appleseed's home may have been partially motivated by a subjective concern for public safety, but without an objective basis for that concern. There was no evidence of an express need to enter the home to prevent immediate danger; to the contrary, the trial judge found that by entering the window without protective gear, the BCFD clearly perceived that there was no immediate danger. There was no indication of a fire, and Greenberg knew that the home had been under investigation for almost a year without any incident. Finally, Greenberg's detailed mental notes regarding the contents of the meth lab indicate a purpose which goes beyond checking for public safety concerns. He was collecting sufficient information to assist the waiting police officer in obtaining a warrant for criminal investigation purposes. Greenberg knew that unless he searched Mr. Appleseed's home, the police were unlikely to obtain reasonable grounds to obtain a warrant.

Trial Judgment, *supra* para 6 at paras 13, 16, 23.

41. Although there is no evidence of express collusion, the facts of this case clearly correspond to *Collings* and demonstrate that there was an improper motivation for the BCFD search: assisting a criminal investigation. This improper purpose was not authorized by the Act, which provides for warrantless searches strictly for the purpose of fire prevention.

(b) *The BCFD Was Required to Get a Warrant Pursuant to Section 14(6)*

42. In the alternative, because Mr. Appleseed expressly denied the BCFD entry to his home, the BCFD was required to obtain a warrant by the procedure created by section 14(6) of the Act:

> (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… 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…

FPPA, *supra* para 9.

43. Sections 14(6) and 14(1) both apply when there is the risk of a 'substance or device that is likely to cause a fire', with the key difference that section 14(6) applies in cases where the fire chief has been denied entry to the home. In circumstances where the owner of a home refuses to consent to a search, it is reasonable to interpret this section as requiring the BCFD to obtain a warrant in compliance with the *Hunter v Southam* requirements. This was the interpretation adopted by the British Columbia Court of Appeal in *Arkinstall v City of Currey* ("*Arkinstall"*), when considering similar safety inspection legislation in relation to suspected marijuana growing

operations.

Arkinstall v City of Surrey, 2010 BCCA 250 at para 65 [*Arkinstall*].

44. The dual provisions of 14(1) and 14(6) are understandable in the context of attempting to preserve the privacy rights of citizens who do not wish to have firefighters enter their homes without permission. There is no warrant requirement for firefighters to enter a home in the event of a fire or emergency, as this type of entry would serve a public safety purpose, not a criminal investigation purpose. Barring exigent circumstances, a search which has not received prior judicial authorization, and may have severe criminal law consequences, is an unreasonable breach of a person's expectation of privacy in their home.

Arkinstall, supra para 43 at para 93.

45. In either alternative, the search was not authorized by law and is therefore unreasonable. When Mr. Appleseed expressly denied the BCFD permission to enter his home, he triggered section 14(6), and the BCFD were required to obtain a warrant. Failing to do so means that the search of Mr. Appleseed's home was not authorized by either section 14(1) or section 14(6) of the Act.

(ii) Section 14(1)(b) is Not a Reasonable Law

46. Section 14(1)(b) of the Act is not a reasonable law. The lack of an imminence requirement in the Flavellian legislation renders section 14(1)(b) overly broad, as it inappropriately sacrifices individual privacy for administrative efficiency.

47. Assessing the reasonableness of a search power for Charter purposes always involves balancing an individual's privacy interests with the state's interest in intruding upon that privacy

in order to advance its goals, in the context of particular circumstances at hand. In this case, the extremely broad search power inappropriately sacrifices Mr. Appleseed's privacy interests by failing to constrain the exercise of that power to cases where there is an imminent danger to persons or property.

Grant, *supra* para 24 at para 28.

48. Ablaza J of the Falconer Provincial Court of Appeal held that held that section 14(1)(b) of the Act is far too broad and intrusive to be justified by the State's interest in preventing potential fires. In so holding, he relied on that fact that similar legislation in all but one of Flavelle'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.

Court of Appeal Judgment, *supra* para 26 at para 31.

49. An imminence requirement is necessary to prevent this law from giving firefighters an unreasonably broad search power. On its face, section 14(1)(b) authorizes firefighters to enter virtually any home at virtually any time. Most residences have electrical systems, a furnace, a stove, and possibly a fireplace. All of these devices have caused fires in the past, and would be sufficient to give a fire chief 'reason to believe' that there is a device likely to cause a fire in any home that contains them. It is highly unlikely that the legislature intended to grant fire departments untrammelled discretion to search any home they wished without a warrant.

(iii) The Search Was Not Carried Out in a Reasonable Manner

50. The search of Mr. Appleseed's home was not carried out in a reasonable manner. The ostensible motivation of the search was to ensure public safety. A reasonable search is one where the search was no more intrusive than necessary for the purpose. The actions of the BCFD

before, during and after the search were unreasonable because they were more intrusive than necessary for a public safety purpose.

Collings, *supra* para 27 at para 136.

51. First, the search was unreasonable because there was no need for an immediate inspection. There was no imminent danger such that an inspection could not have been conducted at a later time with either a warrant or Mr. Appleseed's permission. At no time was an attempt to obtain an administrative warrant was undertaken. Greenberg knew that the police had been investigating the home for nearly a year and no fire had occurred in that time. A reasonable search would require the BCFD to attempt to get permission to enter, or a warrant, given the lack of immediate danger.

Trial Judgment, *supra* para 6 at paras 13, 23.

52. Second, the search was excessively intrusive because the BCFD used force and caused property damage in the course of the search. Section 14(5) of the Act prohibits the use of force to enter a home when exercising entry authority under 14(1). Mr. Appleseed had denied the BCFD entry, and locked the doors to his home. The BCFD entered the home through a small window, and chose to deliberately damage Mr. Appleseed's property while inside his home. Greenberg subsequently kicked down the door to the basement, causing damage to the very property he was supposedly safeguarding with the search. There is no evidence that Greenberg sought alternate means of entry to the basement to avoid damage to the house. This damage to Mr. Appleseed's home was unreasonable and unjustified as there was no imminent danger.

Trial Judgment, *supra* para 6 at paras 9, 15-16.

FPPA, *supra* para 9.

53. Finally, Greenberg's mental catalogue of the contents of the basement was unreasonable and unnecessary to ensure there was no public safety concern. Once discovering the meth lab, Greenberg took the further step of making a mental catalogue of all equipment and chemicals in the lab. The information he noted was immediately communicated to police when he exited Mr. Appleseed's home, in sufficient detail to form the basis for a police warrant. This was an unnecessarily intrusive step, given the purported public safety purpose of the search.

> Trial Judgment, *supra* para 6 at paras 16-17.

54. In this case, the BCFD's actions were more intrusive than necessary given the ostensible public safety purpose of the search. There were no exigent circumstances and no reason a safety inspection could not have taken place at a later time, with a warrant or the permission of Mr. Appleseed. There was no evidence of any immediate hazard or fire. The BCFD nevertheless invaded Mr. Appleseed's home through a window, and kicked down a door in the course of their search, damaging his private property. As in *Collings,* the detailed information provided by the firefighters to the police reveals that the efforts of the fire department went beyond merely confirming the non-existence of any immediate hazard. The BCFD's actions were excessive, destructive, and amounted to undue cooperation with the police. Therefore, the search was not reasonable in the manner it was carried out.

ISSUE #2: IF MR. APPLESEED'S SECTION 8 RIGHTS WERE BREACHED, SHOULD THE EVIDENCE OBTAINED DURING THE SUBSEQUENT SEARCH BE EXCLUDED UNDER SECTION 24(2)?

55. If the Court finds that the BCFD's warrantless entry into Mr. Appleseed's home was an

infringement of his section 8 rights, Mr. Appleseed submits that the evidence found in the subsequent BCPD search should be excluded under section 24(2), as its admission would bring the administration of justice into disrepute.

(A) The Test for Exclusion Under Section 24(2)

56. The Supreme Court of Canada set out the test for exclusion of evidence under section 24(2) in *Grant*. *Grant* set out three factors that should be considered in the context of the facts to determine whether, on a balance of probabilities, the admission of evidence would bring the administration of justice into disrepute. These factors are:

(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.

Grant, *supra* para 24 at para 85.

57. These factors must be balanced objectively to determine "whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence."

Grant, *supra* para 24 at para 68.

(B) Standard of Review Suggests Deference to Ablaza J

58. The Supreme Court of Canada has repeatedly held that the findings of lower courts with regards to section 24(2) issues should not be overturned unless there has been an apparent error or law or unreasonable finding. While the trial level Court did not consider the section 24(2) issue, it was examined at length by Ablaza J at the Court of Appeal. Ablaza J concluded that the

evidence found in the search should be excluded, as its admission would bring the administration of justice into disrepute. Given the absence any such error of law or unreasonable finding, Ablaza J's section 24(2) ruling is entitled to a high degree of deference and should not be overturned.

> *Silviera*, *supra* para 27 at paras 57, 128.
> Court of Appeal Judgment, *supra* para 26 at para 33.

(C) The *Charter* Infringing Conduct Was Serious

59. The intentional warrantless entry of Mr. Appleseed's home, over his explicit objections, was not a minor or technical breach. This was a reckless and deliberate breach of Mr. Appleseed's fundamental *Charter* right to be free of unreasonable state intrusion into his home. As McLachlin CJ held in *Grant*,

> the more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the Courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

Admitting the evidence obtained as a result of this objectionable conduct would significantly damage public confidence in the *Charter*.

> *Grant*, *supra* para 24 at para 72.

60. Two elements of the BCFD's behaviour made this breach an especially serious one. First, a warrantless intrusion into a private home is a particularly serious infringement. Next, the BCFD conducted this search with a lack of good faith.

i) A Warrantless Intrusion into a Private Home is a Particularly Serious Infringement

61. This warrantless intrusion was particularly serious because it violated Mr. Appleseed's private home, which courts have long identified as entitled to special protection. It has been recognized for centuries that an individual has a particularly significant privacy interests in his or her home.

> *R v Vaughan*, 2011 BCPC 20 at para 96.
> *Semayne's Case* (1604), 5 Co Rep 91, 77 ER 194.
> *Silviera, supra* para 27 at para 153.

62. Despite this longstanding recognition of the importance of a person's heightened privacy interest in his home, the BCFD entered Mr. Appleseed's house, over his express objections, without a warrant. This deliberate violation of such a significant principle represented a serious breach of Mr. Appleseed's *Charter* protected rights and freedoms.

ii) The BCFD Acted with a Lack of Good Faith

63. Another element contributing to the serious nature of the breach is that the BCFD acted with a lack of good faith when conducting the search of Mr. Appleseed's home. The Supreme Court of Canada has held that a breach conducted in such a deliberate, wilful, or flagrant manner is more serious than a technical or inadvertent breach. McLachlin CJ noted in *Grant* that "admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute."

> *R v Therens* (1985), 18 CCC (3d) 481 (SCC) at 512.
> *Grant, supra* para 24 at para 74.

64. While the behaviour of the BCFD may not have reached the level of bad faith, the search was conducted with reckless disregard and in deliberate circumvention of Mr. Appleseed's *Charter* protected rights. This search demonstrated a lack of good faith in two ways: first, the search was conducted for an improper purpose, and second, it displayed a reckless disregard for the *Charter*.

a) Improper Law Enforcement Purpose

65. The main indicator of the BCFD's lack of good faith is the fact that the search appears to have been carried out in part for an improper law enforcement purpose. Greenberg purportedly entered Mr. Appleseed's home for public safety motivations, which would have been a legitimate purpose under section 14(1)(b) of the Act. However, on the facts, he was also motivated by a criminal law enforcement purpose, which is not supported by the Act. This ulterior and improper motive demonstrates a lack of good faith and makes the breach a more serious one.

66. Improper motives demonstrate a lack of good faith by undermining warrant requirements, subverting the true purpose of legislation, and showing a lack of respect for *Charter* protected privacy interests. In *Collings*, which had very similar facts, the Court held that a warrantless search conducted for an improper criminal investigation purpose constituted a very serious *Charter* violation. The law enforcement purpose underlying the warrantless invasion of Mr. Appleseed's home can similarly be characterized as extremely serious *Charter* infringing state conduct.

Collings, *supra* para 27 at para 155.

67. Several facts point towards the existence of a law enforcement motive for the search. First, Greenberg made a mental note of all of the equipment and chemicals present in the

basement, which he immediately relayed to the police to enable them to obtain a warrant. If the search had genuinely been motivated solely by a public safety concern, it seems likely that Greenberg's initial reaction upon discovering a meth lab would have been more focused on securing the safety of the scene. He could have called for specialists in hazardous chemicals and taken steps to ensure that the chemicals were not currently volatile. Instead, before taking any public safety steps, Greenberg's first reaction was to assist the police in getting a warrant.

68. The next indicator of a law enforcement motive is that Greenberg did not perceive any imminent danger, which suggests that his entry was not motivated by a pressing public safety concern. That Greenberg did not perceive a risk of imminent threat when deciding to enter was a finding of fact by Osler J. This finding is also demonstrated by the fact that Greenberg allowed Gravenhurst to enter the home without her protective gear. Given the lack of pressing danger, Greenberg's decision to barge into Mr. Appleseed's home with limited evidence takes on the colour of a law enforcement search.

Trial Judgment, *supra* para 6 at para 23.

69. Finally, Greenberg only made the decision to enter the home after learning that the police had conducted surveillance, seen some chemicals delivered, and yet lacked sufficient evidence to obtain a search warrant. Greenberg did not know how long ago the chemicals had been delivered or whether they were still present in the house. However, he claimed that this scant information was enough to justify his warrantless entry powers under the Act. This raises the inference that Greenberg entered, at least in part, to assist the police with their investigation.

Court of Appeal Judgment, *supra* para 26 at para 35.

70. Although the BCFD may have had sincere concerns about a potential safety hazard, the

search also appears to have been motivated by a desire to gather information for the police, as they were unable to obtain a warrant. This inference is supported by the findings of Ablaza J at the Court of Appeal, who found that the conduct of the BCFD "was a serious and reckless circumvention of the requirement to obtain prior judicial authorization."

Court of Appeal Judgment, *supra* para 26 at para 35.

71. By entering with a tainted motive, the BCFD demonstrated a lack of good faith. Greenberg knew that the police were unable to obtain a warrant. He also knew that he could gather the necessary evidence for them to obtain this warrant by claiming the warrantless search powers under the Act. This deliberate subversion of the requirement that the police obtain judicial authorization for searches shows a lack of good faith and disregard for the *Charter,* which makes the breach particularly serious.

b) Reckless Disregard for the Charter

72. By conducting the search without a firm certainty that they were legally authorized to do so, the BCFD acted with a reckless disregard for the *Charter* rights of Mr. Appleseed. Greenberg initially suspected that he had insufficient grounds to enter the home under section 14(1)(b). This uncertainty led him to ask for Mr. Appleseed's permission to conduct a search, which was explicitly denied. However, Greenberg changed his mind and decided that he did indeed have authorization after only one brief conversation with BCPD Detective Toews.

Trial Judgment, *supra* para 6 at para 11.

73. With no firm evidence and a wavering belief that he was authorized to enter Mr. Appleseed's home, Greenberg should have erred on the side of caution and not barged ahead

with the warrantless search. As the Supreme Court of Canada noted in *R v Kokesch*, where there exists only suspicion and no firm evidence, the suspect should be left alone. To charge ahead and obtain evidence illegally and unconstitutionally makes the violation more serious. Instead of erring on the side of caution, Greenberg showed a reckless disregard for Mr. Appleseed's *Charter* right to be free of state intrusion into his home, making the violation an even more serious one.

R v Kokesch [1990] 3 SCR 3 at para 45.

(D) The Breach had an Extremely Serious Impact on Mr. Appleseed

74. The unconstitutional state intrusion into Mr. Appleseed's private home was a particularly significant violation of his privacy interests. The second factor of the *Grant* analysis calls for an "evaluation of the extent to which the breach actually undermined the interests protected by the right infringed." This factor weighs strongly in favour of the exclusion of the evidence found during this warrantless search.

Grant, supra para 24 at para 76.

75. As noted above, at paragraph 27, people have the highest privacy interest in their homes, and unconstitutional state intrusion into a home is thus "the ultimate invasion of privacy." Mr. Appleseed had a fundamental privacy interest in his home, which was violated by the BCFD's search.

Silviera, supra para 27 at paras 153, 144, 145.

76. The Supreme Court of Canada held in *Grant* that "[a]n unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not." Thus, as Ablaza J found,

"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." The seriousness of this impact weighs strongly in favour of the exclusion of the evidence found during the search.

Grant, *supra* para 24 at para 77.
Court of Appeal Judgment, *supra* para 26 at para 34.

(E) Society's Interest in Adjudication on the Merits Weighs Against Admission

77. The third factor of the *Grant* analysis balances all of the facts to evaluate whether the truth-seeking function of the Court would be better served by admission or exclusion of the evidence.

Grant, *supra* para 24 at para 79.

78. Although society may have an interest in admitting the evidence found in the search, three factors weigh strongly against the admission of this evidence. First, public confidence in the *Charter* would be significantly eroded if this evidence were admitted. Next, the seriousness of the penalty requires particularly high *Charter* standards. Finally, the reliability and necessity of the evidence is not determinative.

i) Admission Would Erode Public Confidence in the *Charter*

79. Admitting evidence obtained in such a serious violation of Mr. Appleseed's fundamental rights would erode the *Charter* and significantly damage the long term reputation of the administration of justice.

80. By admitting the evidence found as a result of this violation, this Court would appear to

condone the egregious behaviour of the BCFD. Courts have repeatedly held that the strength of the *Charter* will be eroded by admission of evidence obtained in such serious violations. As the Supreme Court of Canada declared in *Collins*, the purpose of section 24(2) "is to prevent having the administration of justice brought into further disrepute by the admission of evidence in the proceedings. This further disrepute will result from […] judicial endorsement of unacceptable conduct by the investigatory and prosecutorial agencies."

Collins, supra para 18 at para 281.

81. Allowing state agents to deliberately and recklessly breach the *Charter* without consequence would remove the force and weight from *Charter* protected rights and freedoms. Judicial approval of the behaviour of the BCFD in this case would deal a significant blow to public confidence in the justice system's ability and willingness to protect the rights of all Flavellians.

82. While society may have an interest in adjudicating this case on its merits, it has an even more pressing interest in ensuring that the state does not run roughshod over this country's constitutionally enshrined rights and freedoms. Chief Justice McLachlin at the Supreme Court expressed these concerns in *R v Harrison*, when she held that "[t]o appear to condone wilful and flagrant *Charter* breaches that constituted a significant incursion on the appellant's rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it."

R v Harrison, 2009 SCC 34 at para 39 [*Harrison*].

ii) The Seriousness of the Penalty Requires Particularly High *Charter* Standards

83. It is true that the charges against Mr. Appleseed are very serious ones; however this factor weights in favour of exclusion of the evidence. The seriousness of an offence can weigh both for and against society's interest in the admission of evidence. As McLachlin CJ held in *Grant*, "while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways".

Grant, supra para 24 at para 84.

84. While the seriousness of this offence gives society a higher interest in adjudicating the case on its merits, its severe penal consequences raise society's interest in ensuring that any conviction was gained in full adherence with the *Charter*. In *Grant*, McLachlin CJ held that "while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high".

Grant, supra para 24 at para 84.

85. Meth is a very dangerous drug, and its production and sale are correspondingly significant criminal offences. If found guilty of these charges, the *Controlled Drugs and Substances Act* sets out a penalty of life imprisonment. Given that this offence is subject to the harshest penalty available, society has a particular interest in ensuring that no person is convicted of these charges on the basis of evidence obtained in violation of his *Charter* protected rights. For this reason, the seriousness of the charges weigh in favour of excluding the evidence found in the BCFD's unconstitutional search.

Falconer *Controlled Drugs and Substances Act*, ss 7(2), 7.1(2).

iii) Reliability and Necessity of the Evidence are Not Determinative

86. Courts have repeatedly held that society's interest in the admission of reliable evidence will be outweighed by the necessity of preserving public respect for the rule of law when the breach is serious and the impact on the accused is severe. It is true that the evidence found in the search of Mr. Appleseed's home is both reliable and necessary to the Crown's case. However, given the seriousness of the breach and its correspondingly serious impact on Mr. Appleseed, the reliability and necessity of the evidence do not outweigh the factors pointing to exclusion.

R v Harrison, *supra* para 82 at para 39.

(F) Balancing the *Grant* Factors

87. On balance, the *Grant* factors require that the evidence should be excluded, as its admission would bring the administration of justice into disrepute. Even if the Court does not find that each factor on its own supports the position of Mr. Appleseed, on the whole they weigh in favour of exclusion.

88. The corrosive impact of admission on the *Charter* and the seriousness of the penalty both weigh in favour of exclusion of the evidence. This was a particularly serious breach that had an extremely significant impact on Mr. Appleseed's *Charter* protected rights. Admitting this evidence, which was obtained in a deliberate violation of Mr. Appleseed's significant privacy interest in his home, would bring the administration of justice into disrepute.

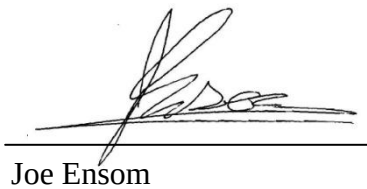
(G) Conclusion

89. Given the seriousness of the infringing conduct, its impact on the rights of the Mr. Appleseed, and society's interest maintaining confidence in the justice system, Mr. Appleseed submits that the evidence found during the search of the home should be excluded under section 24(2), as its admission would being the administration of justice into disrepute.

PART V: ORDER SOUGHT

90. The Respondent respectfully requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Joe Ensom

Kate Southwell

SCHEDULE A: TABLE OF AUTHORITIES

Jurisprudence

Arkinstall v City of Surrey, 2010 BCCA 250.

R v Buhay, 2003 SCC 30, 2003 CarswellMan 230.

Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc, [1984] 2 SCR 145.

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

R v Collins [1987] 1 SCR 265.

Court of Appeal Judgment.

Eldridge v British Columbia (Attorney General),[1997] 3 SCR 624.

R v Grant, 2009 SCC 32.

R v Harrison, 2009 SCC 34.

R v Kokesch [1990] 3 SCR 3.

Semayne's Case (1604), 5 Co Rep 91, 77 ER 194.

R v Silviera, [1995] 2 SCR 297.

R v Tessling, 2004 SCC 67, [2004] 3 SCR 432 at para 22.

R v Therens (1985), 18 CCC (3d) 481.

Trial Judgment.

R v Vaughan, 2011 BCPC 20.

Legislation

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

Falconer *Fires Protection and Prevention Act*, s 14.

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

Texts

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

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.