

## R v Hodgkinson

### A) Summary of the Case

1. Mayoville is the largest city in the province of Falconer, which is a common law province in the country of Flavelle. Flavelle and Falconer have a system of government, Constitution, judicial system, *Criminal Code*, and common law history identical to that of Canada and Ontario, respectively.
2. Richard Fox is an aspiring actor and television producer living in Mayoville. On August 15, 2011, Fox observed a flyer on Mayoville's Main St. advertising a community education seminar on "protecting your children from online predators" offered by the Mayoville Police Department (MPD). On a whim, Fox decided to attend.
3. The MPD had developed the seminar in response to a growing number of complaints from concerned Mayovillian parents who had discovered their pre-teen and teenage children having sexually explicit online conversations with strangers. Detective Olivia Stabler, head of the MPD sex crimes division, organized the seminar with the goal of educating concerned parents about Flavellian law surrounding sex and minors.
4. At the seminar, Detective Stabler explained that, under section 172.1 of the Flavellian *Criminal Code*,<sup>1</sup> it is a crime for an adult to communicate online with a minor in order to facilitate the commission of a sexual offence against that minor. She emphasized that whether the facilitated contact would amount to a sexual offence would depend on whether the minor could legally consent to sexual activity with the stranger, which would turn on their relative ages and the existence of any relationship of trust or authority. Detective Stabler advised the attendees to bring any such conversations that they observed to the attention of police. She also advised that any video recordings of sexual activity involving the attendees' minor children would constitute child pornography.
5. The seminar was very well attended, which Fox took to mean that there was considerable public interest in the subject matter. There was particularly strong interest in Detective Stabler's discussion of child pornography laws. By the time Detective Stabler had concluded her presentation, Fox had developed an idea for a television pilot that he hoped would be his ticket to stardom.

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<sup>1</sup> RSC 1985 c C-46.

6. Fox stayed after the seminar to chat about his concept with Detective Stabler. He described his plan of posing as a minor in an online chat room, initiating sexually-explicit conversations with adults and, if the adults seemed interested, suggesting that the predators meet with him in person. Fox planned to videotape his confrontations with unsuspecting predators, which he hoped would create great television drama. Fox asked Detective Stabler for her advice on how best to collect evidence to ensure a conviction.
7. Detective Stabler told Fox that she really admired his initiative, and that it was refreshing to see a citizen with such zeal for law enforcement. She instructed him that, in order to ensure that the facilitated contact would constitute a sexual offence, he should pose as a 12- or 13-year-old and seek out online predators who were over the age of majority. Detective Stabler then gave Fox her e-mail address and offered to answer any further legal questions he might have.
8. Encouraged by this discussion, Fox went home and immediately set up a chat-room account with the screen name lonelygirl13. He hired Chelsea Stoddard, a youthful-looking 19-year-old actress, to pose as the eponymous minor. On lonelygirl13's chat profile, Stoddard listed that she was a 13-year-old girl interested in making new friends and meeting someone special.
9. Detective Stabler and Fox stayed in contact after the community meeting. Stabler advised Fox that, in order to generate the most persuasive evidence, he should confront the predators with the chat logs during the interview and have them confess on camera that they intended to have sex with a minor. She also suggested that the predators might also bring items with them which would be even more solid evidence of their intention to have sex. Fox promised to hand over any evidence that he obtained to the MPD, and Stabler said that she looked forward to seeing his show on television.
10. On September 3, 2011, Stoddard sent a private message to 51-year-old David Hodgkinson, who went by the screen name older\_man\_31. Stoddard told him that she was attracted to older men, but was embarrassed by her lack of experience. He replied that he was 31, and said that he would be happy to be her boyfriend.
11. After chatting by instant message for several weeks and exchanging photographs, Stoddard invited Hodgkinson to meet with her privately, telling him that she wanted him to be her first time. Hodgkinson was reluctant, asking her whether she was sure about it, but agreed after Stoddard told him that she would find another boyfriend if he declined, arguing that he would not refuse to have sex if he truly loved her.

12. She told him that her parents were currently out of town, and gave Hodgkinson the address of a house that Fox had rented for the purpose of filming the show. Hodgkinson indicated that he was very excited and described in graphic detail all of the sexual acts that he intended to perform on Stoddard. He promised to come over the next afternoon and mentioned that he would be bringing a video camera.
13. At approximately 2 pm on September 29, 2011, Hodgkinson arrived at the rented house and was invited inside by Stoddard. She offered him a drink, brought him to the den, then left the room in order, she told him, "to slip into something more comfortable." She continued talking as she left, indicating that she had a "surprise" for him.
14. At that point, Fox, dressed in a dark suit, emerged from the next room, announcing, "I'm probably not the surprise you were expecting." Fox had spent over a decade working as a lifeguard to supplement his acting income, which had given him both a broad build and a strong air of authority.
15. Hodgkinson immediately asked, "Am I going to jail?" Fox closed the door to the den, locked it, and replied, "Let's have a little talk first." Fox confronted Hodgkinson with the chat logs and asked him whether he had come to the house intending to have sex with a 13-year-old girl. When Hodgkinson refused to acknowledge any such intention, Fox read back to him the many instances when he had expressed to Stoddard his intention to perform sexual acts on her. He then asked whether Hodgkinson had brought condoms and a video camera with him that day. Hodgkinson refused to answer, saying, "I don't have to talk to you."
16. Fox then asked Hodgkinson whether he was aware that it was a crime for an adult to have sex with a 13-year-old, or to talk with one on the internet for that purpose. Instead of answering the question, Hodgkinson asked, "Are you going to book me now?" Fox replied, "Let's have a look inside your bag first," and held out his hand. Hodgkinson, believing that Fox was a police officer, handed over his backpack. Inside, Fox found condoms, lubricant, and a DVD.
17. Fox went through all of the items, describing them for the cameras and laying them out on a table. He then asked Hodgkinson one more time whether he had come to the house intending to have sex with a 13-year-old. Hodgkinson begged to be let off with a warning and Fox replied that he was free to go. Hodgkinson ran out of the house, leaving his backpack and its contents behind.

18. Thrilled with the success of his plan, Fox edited together all of the footage from the hidden cameras and created a pilot episode for his show. Unfortunately, all of the major Flavellian networks rejected it, citing the disturbing nature of the content and the poor videography.
19. Fox was crushed by the failure of his television show, but nevertheless paid a visit to Detective Stabler at MPD headquarters on October 25, 2011, bringing along the chat logs, a copy of the pilot, and Hodgkinson's abandoned backpack (complete with all of its contents). He explained that the show had not worked out, but expressed his hope that some good could still come of the project and left all of the evidence with the MPD.
20. On the basis of Fox's account, including his description of the backpack's contents, Detective Stabler sought and obtained a warrant to search Hodgkinson's backpack. She first watched the pilot for Fox's show, and became concerned that Fox's method of interrogating Hodgkinson would be subject to scrutiny under the *Flavellian Charter of Rights and Freedoms*.<sup>2</sup> She decided that she could not submit the video as evidence.
21. Detective Stabler then read the chat logs between Hodgkinson and Stoddard. It became obvious that Stoddard had not only initiated the sexual discussion, but that she had pressured Hodgkinson into agreeing to it. Detective Stabler realized that the Crown would never succeed in obtaining a conviction for luring, as Stoddard's aggressive seduction tactics clearly constituted entrapment.
22. Detective Stabler then examined the backpack and watched the DVD, which she discovered contained several videos of young children engaged in sexual acts with adults. On the basis of the DVD, the MPD obtained a warrant to search Hodgkinson's home, where they found DVDs containing thousands of hours of footage of child pornography, a studio in which Hodgkinson had evidently produced some of the material himself, and accounting records indicating that Hodgkinson had been actively involved in selling and purchasing child pornography for over five years.
23. The MPD presented this evidence to one of Falconer's Crown Attorneys, who charged Hodgkinson with making child pornography, distribution of child pornography, possession of child pornography and accessing child pornography, contrary to sections 163.1(2), (3), (4), and (5) of the *Criminal Code*.

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<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

## B) Judicial History

### a. Falconer Superior Court of Justice

24. In the *voir dire* at trial, Hodgkinson argued that the warrant authorizing the police search was invalid because the police had obtained the DVD in violation of his section 8, 9, and 10(b) *Charter* rights. Hodgkinson argued that Mr. Fox's search of his backpack was unreasonable and was contrary to section 8. In addition, Mr. Fox's interrogation, which gave him the opportunity to seize the DVD, constituted an arbitrary detention contrary to section 9. Hodgkinson also argued that Fox had violated his section 10(b) *Charter* right by not informing him of his right to counsel. As the police search warrant was obtained on the basis of the seized DVD, the warrant was therefore invalid. Hodgkinson further argued that in light of this breach, the evidence obtained in the police search should be excluded under section 24(2) of the *Charter*.
25. The Crown argued that the *Charter* should not apply to Mr. Fox's actions because Mr. Fox was not performing a government function or acting as a state agent. Mr. Fox produced the episode entirely on his own and did not coordinate any of his activities with police. His primary goal was to create a pilot episode for a television show, not to obtain evidence that would lead to a conviction. His decision to turn over the DVD to police was made entirely of his own volition, after the major television networks had rejected his show.
26. The Crown further argued that, even if Mr. Fox were found to be a state agent, he did not breach any of Mr. Hodgkinson's *Charter* rights. His search was authorized by the citizen's arrest provisions in the *Criminal Code* and was based on reasonable grounds.
27. In the alternative, the Crown submitted that even if Mr. Fox is found to have violated Mr. Hodgkinson's *Charter* rights, the evidence collected by the police in its search should not be excluded under section 24(2) of the *Charter*.
28. It was common ground between the parties that if the Court found Fox to be a state agent for the purposes of section 8, he would similarly be a state agent for the purposes of section 9. The Crown conceded that if Fox's actions constituted an arrest authorized by s 494(1) of the *Criminal Code*, they would constitute a detention under section 9. If the Crown could not establish that Fox had reasonable grounds to arrest Hodgkinson under section 494(1) of the *Criminal Code*, it would have failed to prove that Hodgkinson's detention was not arbitrary.

29. Justice Ho of the Falconer Superior Court of Justice concluded that Richard Fox had acted as a state agent in his detention and search of Mr. Hodgkinson. In coming to this conclusion, she applied the “but for” test from *R v Buhay*<sup>3</sup>, which asks: would the search have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?
30. Justice Ho found that Mr. Fox would not have created the pilot had he not attended Detective Stabler’s presentation. Furthermore, she found that Mr. Fox would not have carried out his operation in the form and manner in which he had, had he not consulted with Detective Stabler in advance; Justice Ho made a finding of fact that Mr. Fox incorporated Detective Stabler’s advice into his production.
31. Justice Ho then considered whether Mr. Hodgkinson had been arbitrarily detained, contrary to his section 9 *Charter* rights. She found that while Mr. Fox’s interrogation did meet the test for detention as set out in *R v Grant*,<sup>4</sup> it was not arbitrary and therefore did not violate Mr. Hodgkinson’s section 9 *Charter* rights. Mr. Fox only detained him after he had acquired reasonable grounds to believe that Mr. Hodgkinson was in possession of child pornography.
32. Having found that there was a detention, Justice Ho found that there had also been a violation of Mr. Hodgkinson’s section 10(b) right “to retain and instruct counsel without delay and to be informed of that right.” However, because the seizure of the DVD was reasonable, the violation of Mr. Hodgkinson’s 10(b) right to counsel had no impact on the evidence against him.
33. Justice Ho held that Mr. Hodgkinson had a reasonable expectation of privacy in his backpack and that as a result, Mr. Fox’s seizure of the DVD constituted a search under section 8 of the *Charter*. Justice Ho then turned to the criteria authorizing a warrantless search laid out in *R v Collins*.<sup>5</sup>
34. Justice Ho found that the search met all three criteria laid out in *Collins* and thus did not violate Mr. Hodgkinson’s section 8 *Charter* rights. First, the search was justified by law, pursuant to section 494(1) of the *Criminal Code* (Arrest without warrant by any person). Mr. Hodgkinson’s suggestion that he videotape his encounter with Ms. Stoddard gave made it apparent that he would be in possession of child pornography.
35. Second, the law itself was found to be reasonable. Justice Ho found that citizen’s arrest powers are important safeguards for situations in which a crime is clearly in progress and no police are present.

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<sup>3</sup> 2003 SCC 30, [2003] 1 SCR 631.

<sup>4</sup> [2009] 2 SCR 353 [*Grant*].

<sup>5</sup> [1987] 1 S.C.R. 265 [*Collins*].

36. Third, the search was carried out in a reasonable manner. Mr. Fox did not use excessive force or coercion in order to seize the backpack. At all times Mr. Fox treated Mr. Hodgkinson with dignity and respect.
37. Because there had been no meaningful breach of Mr. Hodgkinson's *Charter* rights, Justice Ho did not consider whether the evidence should be excluded under section 24(2). She ruled that the DVD evidence was admissible. The search warrant for Mr. Hodgkinson's house was therefore valid and the evidence obtained in the police search was admissible at trial. Mr. Hodgkinson was ultimately convicted on all four counts, and sentenced to ten years' imprisonment.

#### **b. Falconer Court of Appeal**

38. Hodgkinson appealed his conviction to the Falconer Court of Appeal, arguing that Justice Ho had erred in finding against a breach of his section 8 and 9 *Charter* rights. Hodgkinson then argued that the evidence obtained from the police search should not have been admitted at trial.
39. A majority of the Court of Appeal found for Mr. Hodgkinson and held that the evidence obtained from the police search should not have been admitted at trial. Writing for both himself and Justice Axelrod, Justice Sanderson found that Fox's detention and search of Mr. Hodgkinson violated sections 8 and 9 of the *Charter*. He then went on to find that to admit the evidence that became discoverable as a result of those violations would bring the administration of justice into disrepute.
40. Justice Sanderson agreed with the trial judge's findings that Mr. Fox should be considered a state agent and that his actions constituted a search and a detention, as those terms are used in sections 8 and 9 of the *Charter*, respectively.
41. Justice Sanderson ruled that the detention had been arbitrary because Mr. Fox did not have reasonable grounds to believe that Mr. Hodgkinson would be in possession of child pornography. The detention therefore violated section 9 of the *Charter*.
42. In finding that there had been a detention, Justice Sanderson agreed with the trial judge that finding a section 10(b) violation automatically followed, but also agreed that this violation was irrelevant to the admissibility of the evidence in question.
43. Justice Sanderson then turned to section 8. Applying the first branch of the *Collins* test, he disagreed with the trial judge's finding that the search was authorized by section 494(1) of the *Criminal Code*.

Fox did not possess enough evidence to make it apparent that Hodgkinson would be in possession of child pornography, and thus was not authorized to search him. Because the Crown had to satisfy all three parts of the *Collins* test to justify the reasonableness of Fox's search, Justice Sanderson held that Mr. Fox's search violated section 8 of the *Charter*.

44. In the event that he was wrong on the first branch, Justice Sanderson went on to consider the second part of the *Collins* test. On this branch, Justice Sanderson overturned the trial judge's finding that section 494(1) of the *Criminal Code* was reasonable. The section provides that "[a]ny one may arrest without a warrant... (a) a person whom he finds committing an indictable offense..." Justice Sanderson found that this wording is both overly broad and ignorant of the fact that ordinary civilians usually lack the proper equipment and training needed to detain and subdue potentially-dangerous criminals, while at the same time respecting their *Charter* rights. For the same reasons, he found that the law could not be upheld under section 1 of the *Charter* because it failed the minimal impairment branch of the *Oakes* test.<sup>6</sup>
45. On the third branch of the *Collins* test – whether the search was conducted in a reasonable manner – the parties agreed with Justice Ho's finding that the search was conducted reasonably. However, having found that Fox's search failed the first two parts of the *Collins* test, Justice Sanderson found that the search was unreasonable and breached Hodgkinson's section 8 rights.
46. Justice Sanderson then went on to consider section 24(2) of the *Charter*, holding that the evidence obtained from the police search should be excluded from trial. In making this determination, he relied on the three-part test laid out in *Grant*.<sup>7</sup> Justice Sanderson found that the evidence obtained from the search was both highly reliable and central to the Crown's case against Hodgkinson. However, society's interest in adjudicating this case on the merits could not outweigh both the impact of the search on Hodgkinson's section 8 and section 9 rights and the seriousness of the *Charter*-infringing state conduct.
47. The *Charter*-infringing state conduct was very serious: Detective Stabler's wilful support of Mr. Fox's pilot was done in bad faith. Detective Stabler knew that Mr. Fox's television show would involve violations of Mr. Hodgkinson's *Charter* rights and yet did nothing to pre-emptively modify her friend's behaviour. Mr. Fox's ignorance of *Charter* standards did not constitute good faith, especially given that he took on the role of law enforcement in his detention and search of Mr. Hodgkinson.

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<sup>6</sup> *R. v Oakes*, [1986] 1 SCR 103.

<sup>7</sup> *Grant*, *supra* note 4.

48. Furthermore, the violations of Mr. Hodgkinson's section 8 and section 9 rights had a high impact on his *Charter*-protected interests. Mr. Hodgkinson had a very high expectation of privacy in his backpack, which he kept on his person. Mr. Fox's unreasonable search therefore had a very serious impact on his reasonable expectation of privacy, as protected by section 8 of the *Charter*. Moreover, Mr. Fox's interrogation was what enabled him to seize the DVD. This violation therefore had a tremendous impact on his legal rights.
49. Writing in dissent, Justice Guest agreed with the trial judge's decision to admit the evidence at trial. However, she also agreed with the majority's finding that the police search violated Mr. Hodgkinson's section 8 and section 9 *Charter* rights.
50. Nonetheless, Justice Guest would have still admitted the evidence obtained from the police search on the basis that it did not satisfy the test for exclusion under section 24(2). She found that society has a strong interest in adjudicating this case on its merits. The production of child pornography involves actual children who are often physically harmed and sexually abused. This sort of abuse can carry lifelong consequences for the children involved. Justice Guest 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 Hodgkinson's *Charter* rights. She would have therefore admitted the evidence obtained from the police search.

### 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 Crown has conceded that if section 494(1) of the *Criminal Code* is found to be arbitrary or unreasonable under sections 8 or 9 of the *Charter*, it cannot be upheld under section 1.

The Court is asked to decide the following questions:

1. Should the *Charter* apply to Mr. Fox's detention and search of Mr. Hodgkinson?
2. If so, did Fox's detention of Mr. Hodgkinson contravene section 9 of the *Charter*; and/or
3. did his search of Mr. Hodgkinson's backpack contravene section 8 of the *Charter*?
4. If one or more *Charter* breaches are established, should the evidence obtained during the police search be excluded pursuant to section 24(2) of the *Charter*?