COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Arkinstall v. City of Surrey*, 2010 BCCA 250

Date: 20100520
Docket: CA036620

Between:

Jason Cyrus Arkinstall and Jennifer Aline Green

Appellants
(Petitioners)

And

City of Surrey, British Columbia Hydro and Power Authority and Attorney General of British Columbia

Respondents
(Respondents)

And

British Columbia Civil Liberties Association

Intervenor

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Low
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, October 24, 2008
(*Arkinstall v. City of Surrey*, S073785)

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Place and Date of Hearing:	Vancouver, British Columbia March 3 & 4, 2010
Place and Date of Judgment:	Vancouver, British Columbia May 20, 2010

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice Low
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Chief Justice Finch:

I. INTRODUCTION

[1] The main issue on this appeal is whether the provisions of the *Safety Standards Act,* S.B.C. 2003, c. 39 [*SSA*], that authorize the warrantless entry and inspection of residential premises for the regulatory purpose of inspecting electrical systems for safety risks that may be related to marihuana grow-operations infringe the appellants' rights under s. 8 of the *Charter of Rights and Freedoms.*

[2] The appellants refused to let a team of fire safety inspectors enter their home so long as they insisted on being accompanied by police officers who did not have a warrant. As a result, power to their home was disconnected. The appellants petitioned the British Columbia Supreme Court for a variety of remedies including a declaration that the impugned provisions of the *SSA* be declared of no force and effect as offending s. 8 of the *Charter*. They were supported by the Intervenor, the BC Civil Liberties Association. The petition was opposed, in whole or in part, by the City of Surrey, the Attorney General of British Columbia, and BC Hydro and Power Authority.

[3] While the learned chambers judge granted the petition in part, the appellant appeals two paragraphs of the order:

> 3. Sections 18(1), 19(1), 19(2), 19.1, 19.2, 19.3, 19.4, and 38 of the *Safety Standards Act*, SBC 2003, c. 39 do not violate s. 8 of the *Canadian Charter of Rights and Freedoms*.
>
> 4. There were reasonable and lawful grounds for the safety officer of the City of Surrey's Electrical and Fire Safety Inspection Team ('EFSI Team") to seek to enter the Petitioner's residence pursuant to the *Safety Standards Act*;

[4] In *R. v. Bichel* (1986), 4 B.C.L.R. (2d) 132 (C.A.) [*Bichel*], this Court held that a warrantless search of residential premises by a building inspector for the purpose of investigating compliance with a municipal zoning by-law did not constitute a breach of the homeowner's s. 8 *Charter* rights. Because the application and correctness of this decision was called into question by the appellants, the Court heard this appeal as a division of five judges.

[5] I would allow the appeal for the reason that ss. 18(1) and 19.3(1) of the *SSA* violate s. 8 of the *Charter* to the extent that they authorize the warrantless entry and inspection of residential premises for the regulatory purpose of inspecting electrical systems for safety risks that may be related to grow-operations.

II. FACTS

[6] Arkinstall, the Attorney General of British Columbia and the City of Surrey accept the facts as set out in the reasons for judgment of Mr. Justice Smart: *Arkinstall v. City of Surrey,* 2008 BCSC 1419.

[7] The appellants, Jason Arkinstall and Jennifer Green, reside with their young son in a house in the City of Surrey ["Surrey"]. The house has a floor space of 6,800 square feet, and, in addition to the electrical appliances common to most homes, has an indoor pool, sauna/steam room, hot tub, greenhouse, and central air conditioning.

[8] In November 2005, Surrey's Electrical and Fire Safety Inspection Team ["EFSI Team"] attended at the appellants' residence for the purposes of an inspection because of the appellants' unusually high electricity consumption. They did so pursuant to the *SSA*. Mr. Arkinstall was not present but advised EFSI Team members over the telephone that he did not object to the entry of electrical and fire inspectors into his premises but that the police would not be admitted without a warrant. Mr. Arkinstall had had prior dealings with the RCMP, and it was therefore his position that under no circumstances would RCMP officers be permitted to enter his home without a warrant.

[9] The EFSI Team departed without conducting an inspection. Surrey did not take any further steps at the time as it had only limited consumption records that showed one high reading and not a history of high consumption. The EFSI Team did not return to the appellants' residence in 2005.

[10] In November 2006, Capt. McKibbon of the Surrey fire department examined data that BC Hydro had provided with respect to the appellants' residence. Two

readings in 2004 indicated daily electrical consumption of 64 and 73 kilowatt-hours ("kwH"). In 2005, average daily use doubled to 142 kwH and remained within the range of 131 to 151 kwH. Capt. McKibbon reviewed documents in Surrey files relating to the residence but did not find any electrical or building permits that explained the high electricity consumption or the change in consumption pattern. He also reviewed properties of similar size in the vicinity to determine normal consumption for the area. One such property with an outdoor pool, for instance, had electrical consumption of between 95 and 117 kwH per day. He ultimately flagged the appellants' residence for an EFSI Team inspection.

[11] Capt. McKibbon sent the appellants' address to the RCMP for "deconfliction" and was advised not to attend the residence for an inspection. A further download of electrical consumption information in April 2007 again identified the appellants' residence as among the residences exceeding the threshold fixed by regulation at 93 kwH per day. This time the RCMP did not raise any objection to an inspection.

[12] Capt. McKibbon was the individual who identified the appellants' residence as one requiring inspection. He was not a designated safety officer or safety manager within the meaning of the *SSA*. Prior to the inspection, the EFSI Team reviewed the file. None of the members had concerns about inspecting the address.

[13] On 28 May 2007, the EFSI Team attended the appellants' residence. The Team was refused entry and left an information package in the mail slot. Correspondence was also couriered to the appellants on that date, requesting that they contact the EFSI office to arrange an inspection. Mr. Arkinstall contacted the office and advised that he would permit the electrical inspector and fire officials to enter his residence but not the RCMP. The clerk in the EFSI office explained that the electrical inspector and fire officials could not enter without the police members first doing a check. No appointment was made for an inspection.

[14] On 30 May 2007, the EFSI Team re-attended at the appellants' residence. The Team consisted of Mr. Gibson, a fire officer, two RCMP officers and Capt. McKibbon. Mr. Arkinstall again advised that he would permit access to the non-

police members of the Team but not to the accompanying police officers. Capt. McKibbon informed him that if he did not permit an inspection with police officers, the electrical power would be disconnected. This was the EFSI Team's standard procedure if they were not permitted to inspect a property.

[15] The EFSI Team's operational procedure also mandated that safety inspectors would not enter a residence unless it was first cleared by the RCMP members. As the police were not permitted entry into the appellants' residence, no electrical safety inspection was carried out. Accordingly, the decision was made to disconnect power to the appellants' property. Mr. Gibson telephoned BC Hydro while at the gate to the property to request a "hard disconnect", which is a disconnection of power from its source at the street. He also requested that the EFSI office forward the hard disconnection order, or compliance order, to BC Hydro.

[16] BC Hydro followed up on the hard disconnection order on 31 May 2007. A BC Hydro employee attended at the appellants' residence and was invited by Mr. Arkinstall to inspect the premises. After walking around the residence, the employee telephoned Capt. McKibbon and indicated to him that he had been in the residence and did not observe any electrical problems. Capt. McKibbon inquired whether the employee had looked in the crawl spaces and at all of the electrical panels and installations, and was told that he had not. He then instructed the BC Hydro employee to continue with the disconnection of electrical power.

[17] As a result of the disconnection, the appellants and their son moved to a hotel. Electrical power was restored to the residence on 5 June 2007, pursuant to an interlocutory injunction, following which they moved back into their home. Further to an order of the court of 19 June 2007, an electrical contractor approved by Surrey inspected the appellants' residence and successfully completed the EFSI Team safety checklist.

[18] It was the evidence of Ms. Green that the appellants' residence has never been used to house a grow-operation.

[19] As of November 2007, residential consumption records provided by BC Hydro for properties in Surrey exceeding the threshold have not included the appellants' residence.

III. STATUTORY PROVISIONS

[20] The *SSA* came into force on 1 April 2004. The relevant provisions for the purposes of this appeal are as follows:

> Powers of safety officers
>
> 18 (1) For the purposes of this Act and in the course of performing their duties, safety officers may exercise any or all of the following powers and any other powers assigned to them under the regulations:
>
> ...
>
> (c) if satisfied that there are reasonable grounds to do so, enter any premises at any reasonable time for the purpose of
>
> (i) inspecting regulated work, regulated products and records respecting regulated work or regulated products, or
>
> (ii) investigating any incident;
>
> (d) inspect all regulated products and regulated work found on any premises by a safety officer;
>
> ...
>
> Compliance orders
>
> 38 (1) A safety officer may, in writing, issue to a person a compliance order under this section if
>
> (a) in the opinion of the safety officer there is a risk of personal injury or damage to property because
>
> (i) regulated work is being carried out in a manner that does not comply with this Act and the regulations, or
>
> (ii) a regulated product is being used or disposed of in a manner that does not comply with this Act and the regulations,
>
> (b) a person
>
> (i) fails to comply with a requirement of a safety officer or safety manager who is carrying out duties assigned under this Act, or
>
> (ii) obstructs, hinders, delays or fails to cooperate with or provide necessary assistance

to a safety officer or safety manager who is carrying out duties assigned under this Act, or

(c) a person fails to comply with this Act and regulations.

(2) A compliance order under subsection (1) must

(a) name the person to whom the order is addressed,

(b) specify the action to be taken, stopped or modified,

(c) state the reasons for the order,

(d) state that the person may, in writing, request a review by a safety manager under section 49 or may appeal to the appeal board,

(e) be dated the day the order is made, and

(f) be served on the person to whom it is addressed.

(3) Without limiting subsection (2) (b), a compliance order may specify any of the following requirements:

(a) that regulated work be stopped, or that practices involving the regulated work be modified;

(b) that a regulated product be stopped, closed down or disconnected from energy sources, or that practices involving the regulated product be modified;

(c) that advertising, display or disposal of a regulated product be stopped;

(d) that any other action by a person be taken, modified or stopped if necessary to prevent, avoid or reduce risk of personal injury or damage to property.

(4) A safety officer may amend a compliance order and subsection (2) applies.

(5) If satisfied that the circumstances that gave rise to a compliance order are no longer present, a safety officer may terminate the compliance order by providing the person to whom the order is addressed with written permission to resume the work or activity detailed in the order.

(6) Regulated work or a regulated product that has been closed down, stopped, disconnected or turned off must not be started, reconnected or turned on again except

(a) as provided for in the order, or

(b) with written permission of a safety officer.

[21] Section 18(1)(c) permits safety officers to enter premises at any reasonable time for the purposes listed above so long as the safety officer is satisfied that there are "reasonable grounds" for doing so. As the trial judge noted at para. 135 of his reasons, these provisions contain a sufficiently coercive element that it is

appropriate to assess the authorizing provisions as if they authorize entry *per se.* Further, the chambers judge concluded that the definition of "premises" is sufficiently broad to include residential premises. In any event, as set out below, where high electricity consumption is the basis for an inspection, s. 19.3(1) removes any uncertainty in this regard as it specifically authorizes a safety officer to exercise the s. 18(1)(c) power with respect to a residence.

[22] On 23 June 2006, the *Safety Standards Amendment Act*, 2006, S.B.C. 2006, c. 31, came into force. This legislation amended the *SSA* by adding ss. 19.1 to 19.4. Those provisions state:

> Definitions
>
> 19.1 In this Division:
>
> "account information" means
>
> (a) the name of the account holder with respect to,
>
> (b) the service address of and billing address for, and
>
> (c) the electricity consumption data with respect to,
>
> a residence to which an electricity distributor distributes electricity;
>
> "electricity consumption data" means available electricity consumption data
>
> (a) for the most recently completed billing period at the time a request is made under section 19.2 (1), and
>
> (b) for the previous 24-month billing period;
>
> "electricity distributor" means
>
> (a) the British Columbia Hydro and Power Authority continued under the *Hydro and Power Authority Act*,
>
> (b) a public utility, within the meaning of the *Utilities Commission Act*, that owns or operates electricity equipment or facilities, and
>
> (c) a municipality that owns or operates electricity equipment or facilities and that would be a public utility within the meaning of the *Utilities Commission Act*, but for paragraph (c) of the definition of "public utility" in that Act;
>
> "residence" means premises designed for use as a private dwelling, and any other building or structure adjacent to those premises that is intended for the private use of the owner or occupier of those premises;
>
> "residential electricity information" means the available account information for all of the residences that

(a) are within the jurisdictional boundaries of a local government that makes a request under section 19.2 (1), and

(b) according to the current records of the electricity distributor distributing electricity to the residences, are consuming electricity at a level within a range prescribed by regulation.

Residential electricity information

19.2 (1) A local government may request, in writing, from an electricity distributor the residential electricity information with respect to the residences within its jurisdictional boundaries.

(2) If an electricity distributor receives a request under subsection (1), the electricity distributor must provide that residential electricity information to the local government within a reasonable time.

(3) A local government that receives residential electricity information from an electricity distributor under this section may disclose account information derived from that residential electricity information, or a portion of that account information, to

(a) an authority to which the administration of the Act has been delegated under Part 2 or Part 12, and

(b) a provincial police force or a municipal police department, as those terms are defined in the *Police Act*.

Notice of inspection

19.3 (1) If, after receiving account information under section 19.2 (3), a safety officer intends on the basis of that information to exercise the power granted under section 18 (1) (c) and (d) with respect to a residence identified in the account information, the safety officer must give a notice to the owner or occupier of that residence.

(2) The notice under subsection (1) must

(a) be in writing,

(b) state the safety officer's intention to enter the residence and conduct an inspection, and the reasons for the intended entry and inspection,

(c) set out the date by which the owner or occupier must reply to the notice to arrange a date and time for the safety officer to enter the residence and conduct an inspection,

(d) set out how to reply to the notice, and

(e) state that the safety officer may issue a compliance order if the owner or occupier does not

(i) reply to the notice within 2 days of the date on which it was received,

(ii) within a reasonable time complete arrangements to the satisfaction of the safety officer for the safety officer to enter the residence and conduct an inspection, or

> (iii) allow the safety officer to enter the residence at the arranged date and time.
>
> Compliance with notice
>
> 19.4 An owner or occupier who receives a notice under section 19.3 (1) must
>
> (a) reply to the notice within 2 days of the date on which it was received,
>
> (b) within a reasonable time complete arrangements to the satisfaction of the safety officer for the safety officer to enter the residence and conduct an inspection, and
>
> (c) allow the safety officer to enter the residence at the arranged date and time.

[23] Section 19.1 is a definitions section. Section 19.2 provides that, upon a request from a local government, an electricity distributor is required to provide residential electrical consumption records for all residences that exceed a prescribed consumption level set by regulation. The *Electrical Safety Regulation*, B.C. Reg. 100/2004, sets that level at 93 kwH per day or more, averaged over one billing cycle. Section 19.2 of the *SSA* also permits disclosure of the electrical consumption information to authorities with delegated authority to administer the *SSA* and to the police. Sections 19.3(1) and 19.4 establish notice requirements for safety officers and compliance obligations for notice recipients.

[24] Since enactment of the amendments in the fall of 2006, BC Hydro has forwarded the residential consumption records of approximately 6,000 properties to Surrey for review. Of those, approximately 1,000 have been identified for inspection.

IV. PARTIES' POSITIONS

A. Appellants

[25] The appellants submit that the chambers judge's first error was in his interpretation of s. 19.3(1) of the *SSA*. The chambers judge held that s. 19.3(1) required "reasonable grounds" before an inspection of a home could take place. The appellants contend that this was an error because, properly read, s. 19.3(1) permits entry into a person's home solely on the basis of "account information". The

appellants contend that if s. 19.3(1) allows entry and inspection simply on the basis of hydro consumption, then it is contrary to s. 8 of the *Charter.*

[26] The appellants next submit that even if the chambers judge was correct in his interpretation of s. 19.3(1), he nevertheless erred in holding that s. 19.3(1) and s. 18(1) of the *SSA* comply with s. 8 of the *Charter.* It is the appellants' position that the warrantless inspections authorized by the *SSA* violate s. 8 even when they are conducted by safety officers without the presence of the police. The appellants say an administrative warrant should be required. The appellants submit the chambers judge erred in applying a less rigorous standard in determining whether searches under the *SSA* are reasonable.

[27] The appellants contend that the chambers judge erred in fact and law when he failed to adequately distinguish this Court's decision in *Bichel* and relied upon it for the proposition that the criteria established in *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145 [*Hunter*], need not be applied in this case. In any event, the appellants contend that *Bichel* was wrongly decided. As a result, the appellants say that despite the regulatory nature of the *SSA*, the context of the inspections under this regime demand that the *Hunter* criteria be met. Specifically, the appellants contend that the *Hunter* criteria must be met because individuals have a very high expectation of privacy in their home that is not diminished by virtue of their contractual relations with BC Hydro under the Electrical Tariff; because the *SSA* is akin to criminal law legislation; and because the searches under the *SSA* involve a high level of intrusion into the appellants' privacy.

[28] Lastly, the appellants submit that the chambers judge erred in holding that on the particular facts of this case there were reasonable grounds to allow the state officials to demand entry and inspection of the appellants' home.

B. British Columbia Civil Liberties Association

[29] The BC Civil Liberties Association appeared as an intervenor. It supports the appellants generally in the relief they seek. The BCCLA contends that where the privacy interest at stake is that of the home, only circumstances of exigency will justify a departure from a prior authorization scheme. The BCCLA therefore contends that the legislation at issue fails the reasonableness test.

C. Attorney General of British Columbia

[30] The Attorney first contends that the *Charter* issue need not be decided. Rather, he says the case should be decided narrowly on the basis that the decision to inspect the appellants' home was flawed on administrative grounds. The Attorney contends that if the chambers judge was correct in determining that the decision to disconnect the power was not authorized by the *SSA*, then there is no need to address the question of the constitutionality of the *SSA*.

[31] In any event, the Attorney contends that there is no constitutional requirement for a warrant in all cases. The Attorney contends that the courts do not draw a bright line in search and seizure cases, but instead seek to strike a balance between the interest of the appellants in being left alone and the government's interest in intruding on individuals' privacy in order to advance its goals.

[32] The Attorney contends that in the context of this regime the appellants' reasonable expectation of privacy is diminished for five reasons. First, the regime is regulatory in nature. The Attorney contends that *Bichel* held that administrative inspections, even of a residence, are subject to a more flexible standard of reasonableness than is applicable to criminal searches subject to the *Hunter* criteria. Second, the inspection is carried out by safety officers and not the police. Third, the *SSA* only authorizes inspections on the basis of "reasonable grounds." The Attorney contends that the appellants' interpretation of s. 19.3(1) is incorrect and that the chambers judge did not err in this regard. Fourth, the inspection can only be conducted at a "reasonable time" and with reasonable notice. Fifth, a reasonable

SSA inspection is minimally intrusive. As a result, the Attorney contends that the inspection regime under the *SSA* is reasonable and does not violate s. 8 of the *Charter.*

D. City of Surrey

[33] The City contends that the *Charter* challenge ought to fail because the legislation strikes the appropriate balance between preserving the public interest while safeguarding a reasonable expectation of privacy associated with private dwellings by requiring that inspections be conducted in a reasonable manner with notice, at a reasonable time, and upon reasonable grounds. In oral argument, the City conceded that the nature of these inspections is intrusive because it requires an inspector to search every space in a home.

[34] The City also contends that the chambers judge was correct in finding that there were reasonable grounds for the safety officer to seek entry into the appellant's residence to conduct an inspection.

E. British Columbia Hydro and Power Authority

[35] BC Hydro submits the chambers judge was correct in concluding that s. 19.3(1) requires "reasonable grounds" for an inspection to occur.

[36] BC Hydro contends that the chambers judge did not err in holding that the impugned provisions of the *SSA* do not violate s. 8 of the *Charter.* It contends that the chambers judge correctly considered both the public interest in eliminating safety hazards associated with grow-operations and the expectation of privacy attached to private residences.

[37] BC Hydro contends that the *SSA* does not authorize an unreasonable search because of the regulatory nature of the safety inspection, the diminished expectation of privacy of the appellants that results from the Electrical Tariff, and because safety inspections carried out under the *SSA* are minimally intrusive. For these reasons,

BC Hydro contends that the chambers judge correctly applied a more flexible and less rigorous standard for assessing the reasonableness of *SSA* inspections.

V. ISSUES

[38] A preliminary issue is raised by the Attorney General of British Columbia. The Attorney contends that the constitutional issues raised by the appellants need not be decided on this appeal, and that the appeal can be decided on narrow administrative law grounds.

[39] The appellants raise three issues, submitting that:

(a) The chambers judge erred in his interpretation of s. 19.3(1) of the *SSA*.

(b) The chambers judge erred in his conclusion that the impugned provisions of the *SSA* do not violate s. 8 of the *Charter*; and

(c) The chambers judge erred in his finding that there were reasonable grounds for the safety officer to seek to enter the home.

VII. ANALYSIS

A. Preliminary Issue

[40] The Attorney submits that notwithstanding the appellants' s. 8 *Charter* challenge, the decision to inspect the appellants' home was nevertheless flawed on administrative law grounds. As a result, the Attorney submits that the s. 8 *Charter* question need not be answered on this appeal.

[41] In deciding this preliminary issue below, Smart J. said:

> 55 A preliminary issue is the propriety of addressing the constitutional issues raised on this petition. It is the position of the Attorney General that this case ought to be disposed of on administrative law grounds, and it counsels a course of judicial restraint with respect to the constitutional questions which it contends are better left to a case with a more fulsome set of facts. It says that at its root, the present case concerns two decisions of an

> administrative decision-maker: the decision to inspect the petitioners' residence, and the subsequent decision to order a disconnection of power when the petitioners refused to permit RCMP officers to accompany the EFSI Team. The Attorney General submits that if either decision was made without authority, the petitioners should succeed in having it quashed and the petition should be resolved on that basis.
>
> 56 In my view, it is not premature to address the constitutional issues raised by the petitioners. While I recognize that authorities such as *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, caution judicial restraint in making constitutional decisions where a matter is capable of a decision on non-constitutional grounds, resolving the present case on the narrow basis proposed by the Attorney General will not dispose of the dispute between the petitioners and Surrey. Even if I were to find that either or both administrative decisions were made without authority, the petitioners would remain subject to a regulatory regime that they contend is unconstitutional. The ongoing relationship between Surrey, BC Hydro and the petitioners will continue to engage the impugned provisions of the SSA, and so to defer consideration of the constitutionality of the legislation would be to leave important live issues unresolved.
>
> 57 I am also satisfied that a sufficient factual basis exists for me to decide the constitutional issues that the petitioners raise.

[42] I agree and would not accede to the Attorney's submission on this issue.

B. Interpretation of Section 19.3(1) of the *SSA*

[43] The appellants submit that Smart J. erred in his interpretation of s. 19.3(1) of the *SSA* when he held that the section requires "reasonable grounds" to exist before an inspection can occur. The appellants submit that by enacting s. 19.3(1) the legislature intended to authorize safety officers to enter into and inspect a person's home solely on the basis of "account information". The appellants submit that the requirement for "reasonable grounds" in 18(1)(c) is *not* imported into 19.3(1). As a result, there is no requirement that there be "reasonable grounds" for an inspection under 19.3(1). The appellants submit that if s. 19.3(1) does not require reasonable grounds and allows entry and inspection simply on the basis of hydro consumption, then it is clear that s. 19.3(1) is contrary to s. 8 of the *Charter.*

[44] In deciding this issue below, the chambers judge said:

> 82 I do not agree that s. 19.3 ought to be construed in the manner the petitioners contend. Section 18(1)(c), which is specifically referred to in s. 19.3, requires that the safety officer be satisfied that there are reasonable

> grounds to enter particular premises for the purposes of an inspection. In my view, that requirement qualifies s. 19.3 such that a safety officer's decision to exercise s. 18 powers "on the basis of [account] information" must be reasonable.
>
> 83 In some instances, data indicating extraordinarily high energy consumption, without more, may be sufficient to constitute reasonable grounds. In others, however, that may not be the case. For example, the account information for a particular residence may indicate energy consumption only slightly above the threshold. If that residence has a large square footage and also contains authorized electrical installations that would justify high consumption numbers, then the account information alone would not necessarily provide reasonable grounds for an inspection.
>
> 84 Thus, while s. 19.3(1) contemplates that account information exceeding the consumption threshold will be an indication for concern, an inspection by a safety officer pursuant to s. 18(1)(c) must at all times be based on reasonable grounds.
>
> 85 As I interpret s. 19.3(1), its purpose is to establish notice requirements for a safety officer intending to conduct an inspection of a residence on the basis of electrical consumption information. In contrast, an inspection of premises under s. 18(1)(c) may simply be conducted at any reasonable time.

[45] I agree with the judge's analysis on this issue. I would not give effect to this ground of appeal.

C. Section 8 of the *Charter*

[46] The chambers judge concluded his s. 8 analysis, stating:

> 160 Residential inspections conducted pursuant to the *SSA* are of a regulated service that can present a danger to both occupants and the community. They are driven by safety, as opposed to criminal law, objectives, and require both notice and reasonable grounds. In my view, the *SSA* strikes a reasonable balance between administrative efficiency and individual privacy, such that its provisions authorizing electrical safety inspections are reasonable for the purposes of s. 8 of the *Charter*.

[47] For the reasons that follow, I respectfully disagree with the chambers judge's conclusion in relation to the warrantless inspection of homes for the purpose of inspecting electrical systems for safety risks that may be associated with marihuana grow-operations.

[48] I would emphasize that this analysis and conclusion concern only *SSA* inspections of private residences for the purpose of inspecting electrical systems for

safety risks that may be associated with grow-operations. These reasons do not stand for the proposition that it is necessary to obtain administrative warrants for *all* regulatory inspections of private residences. Further, nothing in these reasons should be taken as commenting on the need for administrative warrants in relation to *SSA* inspections of homes for purposes other than inspecting electrical systems for safety risks that may be associated with grow-operations.

1. Legal Framework

[49] Section 8 of the *Charter* provides:

> Everyone has the right to be secure against unreasonable search or seizure.

[50] In *Hunter,* Dickson J. described the purpose of s. 8 at 159-160:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

[51] An inquiry under s. 8 proceeds in two steps: *R. v. Edwards*, [1996] 1 S.C.R. 128. First, it is necessary to determine whether a person possesses a reasonable expectation of privacy on the basis of all the circumstances. This is a threshold step necessary to determine whether s. 8 is engaged. There is no question that individuals possess a considerable expectation of privacy in relation to their homes. Section 8 is clearly engaged. Second, the court must determine whether the search was reasonable.

[52] In *Hunter*, the Supreme Court of Canada stated that a warrantless search is *prima facie* unreasonable. To rebut this presumption of unreasonableness, it is necessary to meet the three requirements established in *R. v. Collins*, [1987] 1 S.C.R. 265: that the search was authorized by law; that the law authorizing the search was reasonable; and that the manner in which the search was carried out

was reasonable. The main area of dispute on this appeal is under the second *Collins* criterion.

[53] In *Hunter,* Dickson J. identified a set of criteria that, in the absence of exigent circumstances, must be met for a search in a *criminal* investigation to be "reasonable": that there is prior authorization; that this authorization came from a neutral and impartial arbiter acting judicially; and that there are reasonable and probable grounds established upon oath to believe that an offence has been committed and that there is evidence to be found at the place of the search.

[54] The *Hunter* criteria provide the default standard against which "reasonableness" is assessed. However, the strict criteria of *Hunter* need not be applied mechanically in every case. As Dickson J. stated in *Hunter* at 161:

> I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.

[55] One general exception to the *Hunter* criteria has arisen in the regulatory context. This exception is engaged on this appeal because, as the chambers judge concluded, the *SSA* is not criminal law, but has as its pith and substance public safety: see para. 92 of the chambers judgment. That conclusion was not challenged on appeal and, in any event, I am of the opinion that it is correct.

[56] The regulatory exception to the *Hunter* criteria was discussed by the Supreme Court of Canada in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* [1990] 1 S.C.R. 425 [*Thomson*]. In *Thomson*, the Supreme Court of Canada held, in part, that a document production order under s. 17 of the *Combines Investigation Act,* R.S.C. 1970, c. C-23, constituted a seizure but was not unreasonable under s. 8 of the *Charter.* The Court held that there was a relatively low expectation of privacy in respect of these business documents since they are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. This limited privacy interest coupled with the fact that the Court was dealing

simply with a production order meant that the seizure was reasonable. La Forest J. said at 506-507:

> ... Since the adoption of the *Charter*, Canadian courts have on numerous occasions taken the view that the standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context.
>
> ... As Dickson J. made clear in *Hunter v. Southam* ... the purpose of s. 8 is the protection of the citizen's reasonable expectation of privacy (p. 159). But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. ... In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restauranteur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises.
>
> [Emphasis added.]

[57] Wilson J. also echoed this view of the *Hunter* requirements at 495-496:

> ... It is because of this need for delicate balancing that Dickson J. in *Hunter* identified several criteria which must be met if a search in a criminal investigation is to meet the test of reasonableness. I think that these criteria were accurately summarized by J. Holland J. at trial as set out earlier in these reasons. I would agree, however, that these criteria are not hard and fast rules which must be adhered to in all cases under all forms of legislation. What may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context. What is important is not so much that the strict criteria be mechanically applied in every case but that the legislation respond in a meaningful way to the concerns identified by Dickson J. in *Hunter*. This having been said, however, it would be my view that the more akin to traditional criminal law the legislation is, the less likely it is that departures from the *Hunter* criteria will be countenanced. This seems to have been what Dickson C.J. had in mind when he said in *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 527, that departures from the Hunter criteria will be exceedingly rare. [Emphasis added.]

[58] According to La Forest J., the standard of reasonableness in the criminal context will *not usually* be appropriate to a determination of reasonableness in the administrative or regulatory context. However, it is clear from the case law that the "reasonableness" analysis exists on a sliding scale. For example, in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 [*McKinlay*], the Supreme Court of Canada

examined whether a production order under the *Income Tax Act* constituted an unreasonable seizure. For reasons similar to those in *Thomson,* the Court held that it did not. Wilson J. stated at 645:

> Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful. [Emphasis added.]

[59] Further, at 649:

> ... The greater the intrusion into the privacy interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. [Emphasis added.]

[60] Thus, the greater the reasonable expectation of privacy and the more intrusive a search is into that expectation of privacy, the more likely the *Hunter* criteria will be required; the less intrusive a search and the lower the expectation of privacy, the less likely the *Hunter* criteria will be required. As Wilson J. stated, in the regulatory context a lesser standard of reasonableness *may* apply *depending* upon the legislative scheme under review. This means that in some regulatory circumstances the *Hunter* criteria may be required. Thus, there is a sliding scale of reasonableness within the regulatory context. The determination of where on the sliding scale a particular regulatory regime fits requires assessing a number of factors and circumstances specific to that regime.

[61] The regulatory exception to the *Hunter* criteria was applied in *Bichel.* This Court examined whether a zoning by-law that authorized a building inspector to enter at all reasonable times upon any property or premises to ascertain whether the regulations and provisions of the by-law were being, or had been, complied with violated s. 8 of the *Charter.* In *Bichel,* the inspector sought to inspect a residence to determine whether it contained an extra suite that was not in compliance with the zoning by-law. This Court held that a criminal search warrant procedure was not appropriate for inspections of an administrative nature. Since the inspection involved only a *minimal intrusion* into the privacy of an individual, involved no seizure of property and was something reasonably expected of community members, it would

not be reasonable to require an expensive and *ineffective procedure* of prior authorization of *such routine* administrative inspections. This Court stated at 144:

> ... Once it is recognized that such inspections must proceed on a routine basis, area by area, without proof in advance of an infraction by any particular householder, then it would be an empty and futile gesture, in my opinion, to have an independent official hear the reasons a search is to be made and give a prior authorization ...
>
> ...
>
> ... In my opinion, it would not be reasonable to insist upon prior authorization of administrative inspections, which could only be an expensive, routine measure incapable of providing any real protection to the householder.
>
> [Emphasis added.]

[62] The decision in *Bichel* was based on this Court's conclusion that the inspections were "minimally intrusive", routine, and were not based on "proof in advance of an infraction". Because there was no "reasonable grounds" requirement to be tested and assessed, an independent arbiter would serve no real function. As will be seen below, the nature of the regime and inspections involved in *Bichel* were very different from the inspections at issue on this appeal.

2. Application to this Case

[63] To assess the reasonableness of *SSA* inspections conducted for the purpose of inspecting electrical systems for safety risks that may be related to marihuana grow-operations, it is necessary to examine the context of these inspections, the extent of the expectation of privacy, the intrusiveness of the inspections, and other factors that militate for or against applying the *Hunter* criteria.

[64] In reaching his conclusion that the *SSA* did not violate s. 8, the chambers judge stated:

> 138 It is apparent from the authorities that the justification for the more flexible approach to regulatory searches is the need for increased expediency and efficiency, as well as the diminished expectation of privacy and lower level of state intrusion such searches generally entail. Nevertheless, the mere fact that a warrantless search is conducted pursuant to a regulatory statute is not conclusive as to whether it is reasonable. Assessing the reasonableness of a search power for *Charter* purposes always involves balancing an individual's privacy interests on the one hand with the state's

> interest in intruding upon that privacy in order to advance its goals, on the other, in the context of particular circumstances at hand. [Emphasis added.]

[65] For the reasons that follow, I am of the opinion that the usual "justification[s] for the more flexible approach to regulatory searches" are absent in the context of the inspections at issue. In contrast, many of the "concerns identified by Dickson J. in *Hunter*", to borrow language from Wilson J., exist in this regime and justify requiring an administrative warrant.

i. Expectation of Privacy and Intrusiveness

[66] Smart J. stated, in the passage above, that one of the justifications for the "more flexible approach to regulatory searches" is the "diminished expectation of privacy and lower level of state intrusion such searches generally entail". In this case, however, the expectation of privacy is high and the inspections are very intrusive. As a result, this justification is not available.

[67] As noted above, the greater an individual's expectation of privacy and the more intrusive a search is, the more likely it is the *Hunter* criteria will be required.

[68] Individuals have a considerable expectation of privacy in their homes. In *R. v. Tessling,* 2004 SCC 67, Binnie J. stated:

> 22 The original notion of territorial privacy ("the house of everyone is to him as his castle and fortress": *Semayne's Case*, [1558-1774] All E.R. Rep. 62 (1604), at p. 63) developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are most likely to take place (*Evans, supra*, at para. 42; *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 140, *per* Cory J.: "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'"; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 43), in diluted measure, in the perimeter space around the home (*R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 237 and 241; *R. v. Wiley*, [1993] 3 S.C.R. 263, at p. 273), in commercial space (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 517-19; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pp. 641 *et seq.*), in private cars (*Wise, supra*, at p. 533; *R. v. Mellenthin*, [1992] 3 S.C.R. 615), in a school (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 32), and even, at the bottom of the spectrum, a prison (*Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, at p. 877). Such a hierarchy of places does not contradict the underlying principle

> that s. 8 protects "people, not places", but uses the notion of place as an analytical tool to evaluate the reasonableness of a person's expectation of privacy.

[69] There is a "hierarchy of places", atop of which is the home. Importantly for our purposes, the hierarchy decreases in the level of expected privacy as one moves from the home to the perimeter space around the home, to commercial space, to private cars, to schools, and then, at the bottom, to prisons. The expectation of privacy in the context of the inspections at issue on this appeal is higher than that in the contexts of *R. v. Grant,* [1993] 3 S.C.R. 223 (perimeter of house), *Thomson* (commercial space) and *McKinlay* (commercial space). *Bichel* involved a private residence; however, as the appellants note, it was only after *Bichel* that the Supreme Court of Canada developed a nuanced hierarchy of privacy in which privacy in the home is second only to personal privacy.

[70] The expectation of privacy in relation to the home exists despite the fact that an individual can be said to have a lower expectation of privacy in relation to a regulated thing in the home, such as an electrical panel or electrical wiring. For example, as Wilson J. stated in *McKinlay* at 649:

> ... Thus, when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home. [Emphasis added.]

[71] In *McKinlay,* Wilson J. noted that a document production order was much less intrusive than tax officials going onto private property to collect those same documents. She reasoned that while there is a diminished expectation of privacy in those documents, there is a considerable expectation of privacy in relation to business premises and residences. As a result, when the regulated thing is obtained or found only after going into or through things or places that possess a high expectation of privacy, the search will be intrusive.

[72] Similarly, in *Thomson,* La Forest J. cited the above passage from *McKinlay* before stating at 521:

> ... I would say that while a business, be it incorporated or unincorporated, may have little expectation of privacy in relation to its business records relevant to an investigation under the Act, it has a significant privacy interest in the inviolability of its business premises. It must be added that its owners and managers also have a significant privacy interest in the inviolability of their private homes, since there was nothing in s. 10 to restrict the Director's powers of search to business premises. [Emphasis added.]

[73] While a safety inspector may be looking for an electrical panel or electrical wiring in which the individual has a diminished expectation of privacy, if doing so means intruding into the individual's home where there is a high expectation of privacy, such an inspection will be intrusive. This conclusion is not affected by the Electrical Tariff entered into between BC Hydro and its customers. BC Hydro customers receive electrical power from BC Hydro in accordance with the Electrical Tariff. While it is accepted that there is a diminished expectation of privacy with respect to entry of BC Hydro employees onto a customer's property, and with respect to the customer's hydro consumption records (see *R. v. Bourque,* 2001 BCSC 621, and *R. v. Benham,* 2003 BCCA 341), I am of the opinion that the Electrical Tariff does not significantly lower an individual's expectation of privacy in relation to the interior of their homes.

[74] Not only is there a high expectation of privacy in this case, but the inspections constitute a considerable intrusion. The impugned inspections require a full inspection of the home. There is no way to target an inspection, and the violations being searched for are not easily found. The appellants correctly state that:

> 96 Searches under the *SSA* are intrusive. They involve walking through the entire residence, searching electrical panels, and very involved searches of attic spaces, and crawl spaces. Indeed, the Chambers Judge commented on the level of "thoroughness" of the search when discussing police involvement in same.

[75] Counsel for the City of Surrey conceded in oral argument that the inspections are very intrusive, and that it is necessary for the inspector to go through the entire house looking through every room, attic, basement, crawl space, and closet.

[76] These inspections expose every room of an individual's home, to borrow La Forest J.'s language in *Thomson,* to the "chilling glare of inspection". The intrusiveness of these inspections far exceeds that of the production order for documents in *McKinlay* and *Thomson.* Similarly, the impugned inspections are far more intrusive than those in *Bichel,* which this Court described as minimally intrusive. In *Bichel,* while the inspections occurred in the home, the inspections involved, for example, looking to see if a non-compliant extra suite existed. The scope of the inspection required to fulfill such a purpose is narrow. In effect, the inspector could target the search and determine readily whether or not there was a violation. That form of inspection is, however, very different from inspecting each and every space of a home to determine whether or not there are electrical safety risks associated with a grow-operation.

ii. Stigma

[77] The presence or absence of stigma is another factor that militates for or against applying the *Hunter* criteria. The issue of stigma was discussed in *Thomson* by La Forest J. at 507-508:

> The situation is, of course, quite different when the state seeks information, not in the course of regulating a lawful social or business activity, but in the course of investigating a criminal offence. For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such investigations. The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirement of a warrant, based on a showing of reasonable and probable grounds to believe that an offence has been committed and evidence relevant to its investigation will be obtained, is designed to provide this protection. [Emphasis added.]

[78] Further, at 516-517:

> To recapitulate, the relevance of the regulatory character of the offences defined in the Act is that conviction for their violation does not really entail, and is not intended to entail, the kind of moral reprimand and stigma that undoubtedly accompanies conviction for the traditional "real" or "true" crimes. It follows that investigation for purposes of the Act does not cast the kind of suspicion that can affect one's standing in the community and that, as was explained above, entitles the citizen to a relatively high degree of respect for his or her privacy on the part of investigating authorities. This does not, of course, mean that those subject to investigation under the Act have no, or no significant, expectation of privacy in respect of such investigations. The decision of this Court in *Hunter v. Southam Inc.*, *supra*, makes clear that they do. But it does suggest that the degree of privacy that can reasonably be expected within the investigative scope of the Act is akin to that which can be expected by those subject to other administrative and regulatory legislation, rather than to that which can legitimately be expected by those subject to police investigation for what I have called "real" or "true" crimes. [Emphasis added.]

[79] The cases suggest that stigma is usually lower in the regulatory context than it is in the criminal context and that, as a result, this is another factor justifying the less rigorous regulatory standard.

[80] Here, however, the appellants argue that the chambers judge erred when he held that absent police presence, there was no "aura of criminality" in a typical electrical safety inspection. They argue that the fact that these searches target residences where grow-operations are suspected means that being subjected to such a search raises the spectre of criminality. They argue that not all members of the community would reasonably expect to be subjected to the type of search authorized by the *SSA* because the searches under the *SSA* are not random or routine and, in fact, target high energy consumers who are suspected of committing an offence. Further, in their factum the appellants submit:

> 84. Indeed, Garis [Surrey Fire Chief] admitted that most people accused by state officials of having a house that either has been used or is being used by them as a grow operation would "certainly" feel stigmatized.
>
> 85. The local government shares account information with the police adding further to the aura of criminality surrounding these searches. The Chambers Judge stated:
>
> > I admit that it is not entirely apparent to me why it is necessary to provide electricity consumption data to the police in order to ensure inspector safety and to avoid interference in ongoing

> police investigations. Simply advising the police of the address to be inspected would seem to be sufficient.
>
> 86. Finally, although the effect of the Chambers Judge's decision is that police will not be able to routinely enter into private homes, there remains reason to believe that police will accompany the EFSI Teams on searches and be on the street or even on the doorstep of residences being inspected. This type of behaviour (at least the former) was not prohibited by the Court and is seriously stigmatizing for the affected residents. [References omitted.]

[81] I respectfully agree. While these inspections are regulatory and while they do not attract the same level of stigma that arises in relation to criminal law searches, it is likely that they give rise to more stigma than would generally be expected from other regulatory inspections. This concern weighs in favour of the *Hunter* standard.

iii. Feasibility of Obtaining a Warrant

[82] In *Hunter,* Dickson J. stated at 161:

> I recognize that it may not be reasonable in every instance to insist on prior authorization order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure. [Emphasis added.]

[83] Here, obtaining a warrant is feasible. There is a 48 hour notice provision built into the *SSA.* It cannot, therefore, be said that these searches are exigent. Further, counsel for the City of Surrey conceded in oral argument that Surrey does not object to a warrant being required and will do whatever is mandated by the court or legislation.

[84] Further still, the appellants point out that all that is being sought is a requirement that the EFSI Team obtain an administrative warrant under s. 275 of the *Community Charter,* S.B.C. 2003, c. 26. Such an administrative warrant is easier to obtain than a criminal warrant, and it is obtained on the basis of a lower standard. In *Hunter,* the third criterion required that there be reasonable and probable grounds established upon oath to believe that an offence has been committed and that there is evidence to be found at the place of the search. In the context of this regime, however, s. 18(1) requires only that "reasonable grounds" exist to believe that permit

conditions, or codes or standards established by regulation, are not being complied with.

[85] Finally, the record indicates that since late 2007, the EFSI Team's practice has been for one of the fire officials on the Team to obtain an administrative warrant for the Team to enter a residence in cases where it has not received a response from the owner or occupant by the end of the 48 hour notice period. Safety Officer Ronald Gibson deposed on cross-examination that the rate at which the EFSI Teams can do their work has not been slowed down by this new procedure of obtaining an administrative warrant. In this case, therefore, Dickson J.'s statement that where a warrant is feasible it should be required is apposite. I note that a warrant will not be required in exigent circumstances.

[86] Smart J. stated that one of the justifications for the more flexible approach to regulatory searches is the need for increased expediency and efficiency. Here, however, the regulatory regime is not undermined or made inefficient or inexpedient by a warrant requirement. Thus, the appellants' privacy interest can be protected without undermining the public interest in public safety.

iv. Usefulness of a Warrant

[87] In *Hunter,* Dickson J. described the purpose of requiring a warrant at pg. 160:

> ...That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of *prior authorization*, not one of subsequent validation. [Italic emphasis in original; underline emphasis added.]

[88] In some regulatory cases, the courts have concluded that warrant provisions would serve no useful purpose. For example, in *McKinlay,* Wilson J. wrote at 648-649:

> Accordingly, the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns. The

> Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained. If this is the case, and I believe that it is, then it is evident that the *Hunter* criteria are ill-suited to determine whether a seizure under s. 231(3) of the *Income Tax Act* is reasonable. The regulatory nature of the legislation and the scheme enacted require otherwise. The need for random monitoring is incompatible with the requirement in *Hunter* that the person seeking authorization for a search or seizure have reasonable and probable grounds, established under oath, to believe that an offence has been committed. If this *Hunter* criterion is inapplicable, then so too must the remaining *Hunter* criteria since they all depend for their vitality upon the need to establish reasonable and probable grounds. For example, there is no need for an impartial arbiter capable of acting judicially since his central role under *Hunter* is to ensure that the person seeking the authorization has reasonable and probable grounds to believe that a *particular* offence has been committed, that there are reasonable and probable grounds to believe that the authorization will turn up something relating to that *particular* offence, and that the authorization only goes so far as to allow the seizure of documents relevant to that *particular* offence. [Italic emphasis in original; underline emphasis added.]

[89] In *McKinlay*, Wilson J. concluded that the need for random monitoring in that specific regulatory context was not amenable to the *Hunter* standard. Spot-checks that are not based on "reasonable grounds" are not amenable to the search warrant criterion because there is no assessment for the arbiter to undertake.

[90] Similarly, in *Bichel* the inspections were conducted as spot-checks. This Court stated at 144:

> Once it is recognized that such inspections must proceed on a routine basis, area by area, without proof in advance of an infraction by any particular householder, then it would be an empty and futile gesture, in my opinion, to have an independent official hear the reasons why a search is to be made and give a prior authorization.

[91] Further, at 144:

> *Hunter v. Southam* holds that prior authorization is a precondition for a valid search and seizure if it is feasible and reasonable to insist upon prior authorization. In my opinion, it would not be reasonable to insist upon prior authorization of administrative inspections, which could only be an expensive, routine measure incapable of providing any real protection to the householder. [Emphasis added.]

[92] The inspections in *Bichel* were not amenable to a warrant requirement. Here, however, the inspections are different. The appellants correctly submit that unlike the inspections carried out pursuant to the by-laws at issue in *Bichel,* searches carried out under the *SSA* are not random or routine and, in fact, target high energy consumers who are therefore suspected of committing an offence. The inspections have to be based on "reasonable grounds". Pre-authorization is, therefore, not futile or meaningless. A neutral arbiter can test whether there are reasonable grounds to believe that permit conditions, or codes or standards established by regulation, are not being complied with, thereby fulfilling the important role described by Dickson J. in *Hunter.*

D. Summary of Section 8 Analysis

[93] While the impugned inspections in this case are regulatory in nature, they constitute a considerable intrusion into an individual's reasonable expectation of privacy. While there is a requirement under s. 19.3(1) of the *SSA* that there be "reasonable grounds" for an inspection, this requirement is not sufficient to render the searches reasonable under s. 8. An administrative warrant is feasible, serves a beneficial function, and should be required. Requiring an administrative warrant in these circumstances protects the individual's expectation of privacy, and it does so without undermining the public interest in public safety. To obtain an administrative warrant it will be necessary to show that "reasonable grounds" exist to believe that permit conditions, or codes or standards established by regulation, are not being complied with. This Court's decision in *Bichel* stands for the narrow proposition that in the regulatory context of a minimally intrusive spot-check search in which a warrant would serve no function, a warrant is not required. Accordingly, *Bichel* is of limited application on this appeal.

VIII. CONCLUSION

[94] To the extent that ss. 18(1) and 19.3(1) of the *SSA* authorize the warrantless entry and inspection of residential premises for the regulatory purpose of inspecting

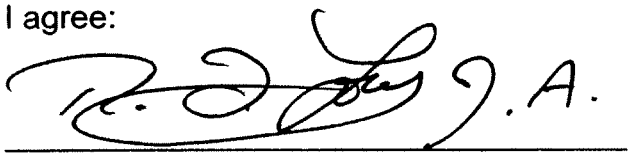
electrical systems for safety risks that may be related to marihuana grow-operations, they infringe the appellants' rights under s. 8 of the *Charter of Rights and Freedoms.*

[95] It is unnecessary to consider the appellants' third ground of appeal, namely, whether the chambers judge erred in holding that there were reasonable grounds to conduct an inspection.

[96] I would allow the appeal.

The Honourable Chief Justice Finch

I agree:

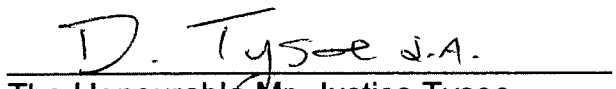


The Honourable Mr. Justice Low

I agree:

The Honourable Mr. Justice Frankel

I agree:



The Honourable Mr. Justice Tysoe

I agree:

The Honourable Mr. Justice Groberman