



July 9, 2010

Nelson City Council
Suite 101, 310 Ward St.
Nelson, B.C.
V1L 5S4

VIA FAX: (250) 352-2131

Dear: Nelson City Council

RE: Proposed Grow Operations Bylaw

I am writing you in my role as President of the B.C. Civil Liberties Association (“BCCLA”) concerning the Nelson Police Department’s (“NPD”) decision to pursue a proposed grow operations search bylaw despite a recent B.C. Court of Appeal decision declaring such legislation unconstitutional.

We write to you because of the BCCLA’s strong concern about the potential for severe violations of privacy. We are also deeply concerned that media reports suggest this law is actually being drafted by the NPD.

Media reports appear to suggest that the proposed bylaw has the effect of sidestepping the established criminal framework that requires police to first obtain a warrant before they can enter and investigate a private home. When interviewed NPD Chief of Police Dan Maluta lauded the bylaw saying it had been mostly accepted by NPD officers, “We asked them if it would break their hearts not to go the Criminal Code route, and we were able to rid the neighbourhoods of these places through other means, like through use of the grow op bylaw, and they said, ‘No, absolutely not. The ultimate goal is to get rid of the grow’”.¹

In *Arkinstall v. City of Surrey* warrantless searches of private homes by a safety inspector and fire official were found to violate the Canadian Charter of Rights and Freedoms. The Court of Appeal held that government officials entering and searching a person’s home, where they have a right to privacy, is highly invasive and unjustifiable without a warrant. It is a constitutionally protected right that people are not subjected to unreasonable searches, and the Court has ruled that searching without a warrant is indeed unreasonable.

Moreover, because these searches target residences where grow operations are suspected, individuals are treated like criminals without being afforded the

¹ Nelson Daily News, “NPD Police propose new marijuana grow operation bylaw”. May 6, 2010.


protections that go along with the criminal system. It is important that before subjecting people to this, the investigating officials first apply to an officer of the court and ensure they have a legitimate reason to suspect that someone has broken the law. Indeed, the family in the *Arkininstall* case was not running a grow operation, and when they refused to let the police enter their home they had their power cut off.

We would also like to highlight the fact that, as the Court ruled, requiring safety officials to obtain a warrant before searching does not undermine public safety. Granted the NPD and safety inspectors will continue to face a slight delay before they may legally search a person's home, however this time is spent demonstrating to a court official that their reasons for search are reasonable. As a result, this ensures an individual's constitutionally protected rights are not infringed, while also letting police pursue the public interest in safety.

We are also deeply concerned that media reports seem to suggest that the Nelson Police Department is actually writing this bylaw for the City of Nelson. Typically, the division of labour between the police as law enforcers and elected legislators as law drafters is well established, and with good reason. Police officers have incredible powers of investigation and use of force, and also considerable currency in community when speaking on matters of public safety, that combine to present an implicit political danger to any elected official that would refuse a request to pass a police-drafted law. The disproportionate and unique powers of police officers, even if never used or hinted at in order to encourage the passage of a particular police-drafted law, would present at the very least the perception of a problem, if not an actual problem, of a blurring between the line of police as enforcers and council as legislators.

Thank you for your prompt attention to this matter. We hope that our discussion on this matter will be mutually constructive.

Yours truly,

A handwritten signature in black ink, appearing to read "R. Holmes", written in a cursive style.

Robert Holmes
President

cc. Chief of Police, NPD VIA FAX: (250) 354-4179; Stan Lowe, Office of the Police Complaint Commissioner, VIA FAX: (604) 660-1223