Court of Appeal File No.: CA036620

COURT OF APPEAL

ON APPEAL FROM the Judgments of the Honourable Mr. Justice Smart of the Supreme Court of British Columbia in Vancouver, pronounced 24 October 2008 and 26 February 2009

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
(Intervenor)

INTERVENOR'S FACTUM

JASON CYRUS ARKINSTALL AND JENNIFER ALINE GREEN

Joseph J. Arvay, Q.C.
Counsel for the Appellants

ARVAY FINLAY, BARRISTERS
1350 - 355 Burrard Street
Vancouver, BC V6C 2G8
Tel./Tél.: 604.689.4421
Fax/Téléc.: 604.687.1941

CITY OF SURREY

J.J. McIntyre
Counsel for this Respondent

MW LAW OFFICES
1501 – 543 Granville Street
Vancouver, BC V6C 1X8
Tel./Tél.: 604.605.4300
Fax/Téléc.: 604.605.4301

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Ron A. Skolrood
Counsel for this Respondent

LAWSON LUNDELL LLP
1600 – 925 West Georgia Street
Vancouver, BC V6C 3L2
Tel./Tél.: 604.685.3456
Fax/Téléc.: 604.669.1620

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Brent B. Olthuis
Counsel for the Intervenor

HUNTER LITIGATION CHAMBERS
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1
Tel./Tél.: 604.647.3540
Fax/Téléc.: 604.647.4554

ATTORNEY GENERAL OF BRITISH COLUMBIA

Craig E. Jones
Counsel for this Respondent

LEGAL SERVICES BRANCH
6th Floor, 1001 Douglas Street
Victoria, BC V8W 9J7
Tel./Tél.: 250.387.3129
Fax/Téléc.: 250.356.9154

INDEX

CHRONOLOGY

19 October 2007	Goepel J. Orders that the BCCLA be added as an intervenor in the proceedings below
21 to 24 April 2008	Petition is heard before Smart J.
24 October 2008	Smart J. delivers reasons
26 February 2009	Smart J. delivers supplemental reasons
16 April 2009	Frankel J.A. Orders that the BCCLA be added as an intervenor in this Honourable Court

OPENING STATEMENT

This case requires the Court to assess whether provisions of the ***Safety Standards Act***, which authorize agents of the state to enter private premises, in circumstances of suspected criminality and in the absence of any prior authorization scheme, constitute reasonable interferences with the high degree of privacy that one expects in one's home.

Where legislation is challenged under s. 8 of the *Charter*, analysis focuses on the reasonableness of the privacy infringement. It is appropriate, the British Columbia Civil Liberties Association submits, to consider the legislation's controls (or lack of controls) over the manner of the search at this stage as well.

The BCCLA submits that the proper approach to assess reasonableness in cases like this is to commence with the criteria set out in ***Hunter v. Southam Inc.*** Although there may be departures from ***Hunter***, the strictures from that case should presumptively apply. The state bears the onus of establishing that a departure from the ***Hunter*** standards is reasonable and warranted in the particular circumstances.

Generally, where the privacy interest at stake is that of the home, only circumstances of exigency will warrant a departure from a prior authorization scheme. As such circumstances are exceptional, prior authorization will be the constitutionally-required norm.

The legislation before the Court on this appeal fails the reasonableness test.

PART 1: STATEMENT OF FACTS

1. The Appellants appeal from the Order of Smart J. finding that certain provisions of the *Safety Standards Act*, S.B.C. 2003, c. 39, as am. by S.B.C. 2006, c. 31 (the "Act") do not violate s. 8 of the *Canadian Charter of Rights and Freedoms*.[1]

2. The learned Chambers Judge found that the impugned provisions are "directed at facilitating the identification and inspection of [marijuana] grow operations". On the record, that conclusion is unimpeachable.

> ***Arkinstall v. Surrey (City of)*, 2008 BCSC 1419, 300 D.L.R. (4th) 232, 89 B.C.L.R. (4th) 148 ("Chambers Judge's Reasons") at para. 92**

3. One of the impugned provisions, section 19.2, empowers local governments to compel production of residential electricity information from utility providers. As noted by the learned Chambers Judge:

> 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 kilowatt-hours ("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.
>
> **Chambers Judge's Reasons at para. 35**
>
> **See also: Act, ss. 19.1, 19.2**

4. Sections 18(1), 19.3, and 19.4 are also impugned. In combination, and as interpreted by the learned Chambers Judge, these provisions authorize persons

---

[1] The Appellants also challenge the Chambers Judge's findings concerning the search that occurred in the instance. The BCCLA supports the Appellants in this regard, but makes no submissions on the point.

appointed as "safety officers"[2] to enter residential premises. Where the entry is to conduct an inspection after having received residential account information, the Act imposes certain notice requirements.

Chambers Judge's Reasons at paras. 132-35;

Act, ss. 18(1)(*c*), 19.3, 19.4

5. The Act does not limit the exercise of the entry power to exigent circumstances. In fact, it contemplates some passage of time between the issuance of an in-residence inspection notice and the occasion of that inspection.

Act, ss. 19.3, 19.4

Chambers Judge's Reasons at para. 134

6. Yet the Act does not provide any scheme for independent prior authorization. On the contrary, it purports to endow the safety officer with the power to enter a residence based only on his or her subjective belief that "there are reasonable grounds" to enter for the purpose of "inspecting regulated work, regulated products and records respecting regulated work or regulated products".

Act, s. 18(1)(*c*)

7. The British Columbia Civil Liberties Association ("BCCLA") intervenes in this appeal pursuant to the 16 April 2009 Order of the Honourable Mr. Justice Frankel.

---

[2] Section 11 of the Act requires the Minister of Housing and Social Development or a delegated local government to appoint safety officers in accordance with the Act and regulations.

PART II: ERRORS IN JUDGMENT

8. The BCCLA supports the Appellants generally in the relief they seek. The BCCLA seeks to assist this Honourable Court regarding the analytical approach appropriate to this manner of constitutional challenge, and will focus its submissions on the legislation rather than the actual facts of this case.

PART III: ARGUMENT

I. Background

9. Section 8 of the *Charter* reads:

Search or seizure **8.** Everyone has the right to be secure against unreasonable search or seizure.	*Fouilles, perquisitions ou saisies* **8.** Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

***Canadian Charter of Rights and Freedoms*, s. 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**

10. Recently, Binnie J. accurately noted that s. 8 "has proven to be one of the most elusive *Charter* provisions despite the apparent simplicity of its language".

***R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569 at para. 5**

11. Although s. 8 can be invoked to challenge legislation as well as state action, the jurisprudence has predominantly developed in the latter circumstance. Moreover, on those occasions where courts have considered challenges to statutory provisions, it has typically been federal legislation at issue.

See, e.g.: *R. v. Rao* (1984), 46 O.R. (2d) 80 (C.A.); *R. v. Grant*, [1993] 3 S.C.R. 223 [s. 10 of the *Narcotic Control Act*]

***Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 154 [s. 10(1) of the *Combines Investigation Act*]**

***Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Practices Commission)*, [1990] 1 S.C.R. 425 [s. 17 of the *Combines Investigation Act*]**

***R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 [s. 231(3) of the *Income Tax Act*]**

***R. v. Baron*, [1993] 1 S.C.R. 416 [s. 231.3 of the *Income Tax Act*]**

12. The instant appeal involves a challenge to legislation. The court below found that legislation to be *intra vires* the provincial Legislature as regulating property and civil rights. No appeal has been taken from that finding. This appeal therefore represents a confluence of two of s. 8's more elusive aspects: (i) its application to legislation and (ii) its application to the "regulatory search".

II. Entry to Private Dwelling

13. The invocation of s. 8 leads to two distinct inquiries:

i. does the claimant have a reasonable expectation of privacy?

ii. has there been an unreasonable intrusion on that right to privacy?

***R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 33, *per* Cory J.**

a. *Reasonable Expectation of Privacy*

14. The Chambers Judge held that the definition of "premises" in s. 1 of the Act "is sufficiently broad to include residential premises".

Chambers Judge's Reasons at para. 133

15. If that is correct, then prior to the 2006 amendments introducing ss. 19.1 to 19.4, the Act authorized entry into a residential home.[3] With respect, this is not at all clear from the context, including the definitional language in s. 1 of the Act and the legislative history.

---

[3] The Chambers Judge noted, at para. 78 of his reasons, that the amendments confirmed "to the extent that there may have been uncertainty as to whether 'premises' included residential premises for the purposes of s. 18 [...] that a safety officer could exercise the powers under s. 18(1)(*c*) and (*d*) with respect to a residence, at least insofar as electricity consumption information was the basis for the inspection."

16. The BCCLA is content, however, to indicate: (i) that the Act in its present form clearly purports to authorize entry into a residential home, as the Chambers Judge found (at para. 135); (ii) that electrical consumption, without more, provides only a crude inference of what may occur in the house; and (iii) that, if the Act does not deem high electrical consumption to constitute reasonable grounds,[4] then it at least seeks to have safety officers give significant consideration to high electrical consumption in their assessment of whether or not to conduct an inspection of a household. These observations are sufficient to embark upon the constitutional issues.

17. There can be little doubt that all persons have a presumptively reasonable expectation in their dwelling.

18. In ***Eccles v. Bourque***, and with increasing frequency since the adoption of the *Charter*, the Supreme Court of Canada has referenced and drawn from the principle in ***Semayne's Case*** (1604), 5 Co. Rep. 91a: "the house of everyone is to him as his castle and fortress", which not even the forces of the Crown can enter except in very limited circumstances.

Eccles v. Bourque (1974), [1975] 2 S.C.R. 739 at 742-43

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

19. That one has a reasonable expectation of privacy in the interior of one's house is elementary. But the importance of this privacy right plays a significant role in the balancing process inherent in the second s. 8 inquiry: namely, whether there has been an unreasonable intrusion on a protected privacy interest. In that vein, the BCCLA

---

[4] As the Appellants submit and as the BCCLA supports.

sets out some pertinent extracts from s. 8 cases dealing with the home:

> "The legitimate expectation of privacy in one's home or office is one of the most valued rights of the individual afforded protection by a democratic society." (***Rao, supra* at ____**)
>
> "[T]he home [is] the principal bulwark against the invasion of an individual's privacy". (***R. v. Wise*, [1992] 1 S.C.R. 527 at 555, *per* La Forest J. (dissenting but not on this point).** See also in this regard ***R. v. Silveira*, [1995] 2 S.C.R. 297 at para. 41, *per* La Forest J. (dissenting but not on this point); *R. v. Evans*, [1996] 1 S.C.R. 8 at para. 3, *per* La Forest J.)**
>
> "[A] private dwelling [is] the most private of places". (***R. v. Plant*, [1993] 3 S.C.R. 281 at 302, *per* McLachlin J. (as she then was)**)
>
> "There is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'." (***Silveira, supra* at para. 140, *per* Cory J.)**
>
> "The *Narcotic Control Act* itself recognizes the age-old principle of the inviolability of the dwelling-house. It must be the final refuge and safe haven for all Canadians. It is there that the expectation of privacy is at its highest and where there should be freedom from external forces, particularly the actions of agents of the state, unless those actions are duly authorized." (***Ibid.* at para. 141)**
>
> "The home is the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish. The unauthorized presence of agents of the state in a home is the ultimate invasion of privacy. It is the denial of one of the fundamental rights of individuals living in a free and democratic society." (***Ibid.* at para. 147)**
>
> "[T]he home [is] being the place where our most intimate and private activities are most likely to take place". (***Tessling, supra* at para. 22)**

20. The privacy interest in the home is so integral to Canadian society that it justifies an exception to the police power to effect a warrantless arrest. The Court held in ***Feeney*** that the *Charter* mandated a general prohibition against warrantless arrests in a dwelling house. Sopinka J. wrote in that case:

> Requiring a warrant prior to arrest avoids the *ex post facto* analysis of the reasonableness of an intrusion that *Hunter* held should be avoided under the *Charter*.

***R. v. Feeney*, [1997] 2 S.C.R. 13 at para. 49**

See also *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.)

21. Warrantless arrests are permitted generally in other locations: see s. 495 of the *Criminal Code*. The lesson from *Feeney*, therefore, is that one's reasonable expectation of privacy in one's dwelling place is so great that extra care must be taken in that context to uphold the prophylactic purpose of s. 8. When it comes to the home, we should not be vigilant to prevent state interference in the first place; we must not be content to remedy it after the fact.

***Criminal Code*, R.S.C. 1985, c. C-46, s. 495**

22. It would be incongruous to hold that the individual's interest in excluding the state from his or her home is any less in a "regulatory" context. The issue is what intrusions are reasonable in the particular context.

b. *Unreasonable Intrusion*

23. ***Hunter v. Southam Inc.*** established that warrantless searches are *prima facie* unreasonable. The government bears the onus in rebutting this presumption.

***Hunter v. Southam Inc., supra* at 161**

24. ***Collins*** states: "A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable."

***R. v. Collins*, [1987] 1 S.C.R. 265 at 278**

25. The years that have passed since ***Hunter*** and ***Collins*** were decided have not attenuated the above principles.

See *e.g. R. v. A.M.*, *supra* at 13, *per* Binnie J.

***R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 at para. 48, *per* Binnie J.**

26. The instant appeal concerns whether the impugned sections of the Act—which purport to authorize the entry into private residences—are themselves reasonable interferences with the high degree of privacy that one presumptively expects in that location. The Court in this appeal is tasked with placing some parameters around the assessment of reasonableness.

27. In ***Hunter v. Southam Inc.***, Dickson J. (as he then was) set out a number of criteria that would render a search reasonable. Wilson J. provided a helpful summary in ***Thomson Newspapers***:

> The criteria, once again, are as follows:
>
> (a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
>
> (b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;
>
> (c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and
>
> (d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation."

***Thomson Newspapers*, *supra* at 498-99, *per* Wilson J.**

28. As is apparent, the ***Hunter v. Southam Inc.*** criteria were formulated in the context of a criminal-style investigation. Nevertheless, it is unhelpful to describe the instant Act as "regulatory" and to insist that the ***Hunter*** criteria are inapplicable.

29. The *Charter* must receive a contextual application, which "is not a mere exercise in taxonomy":

> As La Forest J. stated in [*R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154] at p. 209, "what is ultimately important are not labels (though these are undoubtedly useful), but the values at stake in the particular context".

***R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 at paras. 60-61**

30. In assessing reasonableness, the court must consider and balance the values underlying the state's and citizen's respective interests, in order to determine:

> 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[.]

***Hunter v. Southam Inc.*, *supra* at 159-60**

31. It is instructive to note that, in cases where the Supreme Court of Canada has departed from the strictness of the ***Hunter v. Southam Inc.*** criteria, it has taken pains to indicate that failing to do so would undercut the statutory scheme at issue.

32. For instance, in ***Thomson Newspapers***, which concerned the power to compel testimony or documents in the anti-combines context, La Forest J. noted that "combines legislation cannot rely on the type of periodic on-site inspection which is characteristic of many other types of regulatory legislation". Combines legislation relied on voluntary compliance, buttressed by a random inspection regime. If it were necessary to establish reasonable and probable grounds before obtaining compelled

testimony or documents, this "might make our anti-combines legislation practically unenforceable."

***Thomson Newspapers, supra* at 513, 522-23, *per* La Forest J.**

33. A similar approach was followed in ***McKinlay Transport***, considering requirement letters in the federal income tax context. Wilson J. noted that the scheme "was based on the principle of self-reporting and self-assessment." Instead of requiring that every taxpayer submit all his or her records to the Minister, the Minister was "given broad powers in supervising this regulatory scheme", which he "must be capable of exercising [...] whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act."

***McKinlay Transport, supra* at 648-49**

34. These pragmatic concerns for the efficacy of the legislative regime are typically considered in the balancing process. The point is, in neither of these cases was it a matter of declaring the legislation "criminal" and "regulatory", with the level of *Charter* protection to follow accordingly. Indeed, as pointed out in ***Jarvis***, the divergent ***Hunter*** and ***Thomson Newspapers*** cases arose under the same statute. (One might make the same observation with respect to ***McKinlay Transport***, on one hand, and ***Baron*** and ***Jarvis*** on the other.)

***Jarvis, supra* at para. 61**

35. ***Hunter*** has recently been recognized as constant "the point of departure" even when assessing the *Charter* compliance of less-intrusive investigative techniques (i.e. even where "[a]n overly rigid reading of *Hunter v. Southam* produces a dilemma").

***R. v. Kang-Brown, supra* at para. 59**

***R. v. A.M., supra* at para. 51**

36. In the BCCLA's submission, ***Hunter*** similarly remains the touchstone for assessing reasonableness *outside* of the criminal context, when it is a question of violating the sanctity of the home.

37. This is appropriate in light of the privacy interest at stake. It accords ill with the traditional common law—and, now, constitutional—protection that surrounds the dwelling place if one is to equip state actors with the power to determine for themselves whether they should have entry. Whether their purpose for entry be trifling or pressing, it should only be in exigent circumstances—emergencies—that entry is permitted absent the checks and balances of prior authorization.

38. It can hardly be overemphasized that the state bears the onus to establish that its interests outweigh those of the citizen in the context of a warrantless search. In the present case, as discussed below, the province has not established any such pragmatic enforcement concerns. There is nothing to attenuate the expectation of privacy that one has in one's home, and the province has not met the onus to rebut the presumption of unreasonableness.

i. Privacy Interests

39. Again, any state interference with the inviolability of the home constitutes a most serious violation of privacy. And the purpose of s. 8 is to prevent unjustified state intrusions upon privacy. Indeed, the prior authorization requirement from ***Hunter*** serves an instrumental role in the fulfilment of that broader goal.

***Hunter v. Southam Inc., supra* at 160**

40. The BCCLA's reference to "prior authorization" is not to a formalized or pre-ordained scheme such as for the issuance of a *Criminal Code* search warrant. Rather, what is necessary, again in the words of Dickson J. is "for the person authorizing the search to be able to assess the evidence [...] in an entirely neutral and impartial manner."

***Ibid.* at 162**

41. The requirement of prior authorization also has an impact upon the third ***Collins*** criterion: the reasonable execution of the search.

42. The Act (in s. 18(1)(*c*)) only requires that entry to the premises occur at a reasonable time. It contains no other controls over the manner in which entry is effected.

Act, *supra*, s 18(1)(*c*)

Chambers Judge's Reasons at para. 134

43. A system of prior authorization allows an opportunity for objective reflection on the protections that ought to be in place to ensure that the interference with privacy is as minimal as possible. This includes the privacy rights of third parties (i.e.

persons other than he or she who is responsible for the electrical utility). It is conceivable that, in any given instance, the safety officer's entry to a dwelling will impact the privacy rights of other residents than the person whose name was provided pursuant to s. 19.2. *Charter* jurisprudence teaches that the privacy rights of these persons are relevant to the reasonableness of how a search is carried out.

***R. v. Thompson*, [1990] 2 S.C.R. 1111 at 1143-44, *per* Sopinka J.**

44. In the criminal search warrant context, the issuing judge has the ability to impose conditions on the implementation of the warrant, to ensure protection of other interests.

***Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860**

***Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421**

***Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1991] 3 S.C.R. 459**

45. Likewise in the present context, a prior authorization scheme provides an ability to tailor and limit searches so as to minimize infringements of privacy such as those described here. If the state requires access to an individual's living space—the place of his or her most intimate activities—it must surely "get in" and "get out" with the least impairment to the privacy interest.

ii. State Interests

46. The province's interest in creating the inspection scheme is, on the Chambers Judge's findings, the ameliorization of public safety through elimination of marijuana grow operations.

Chambers Judge's Reasons at para. 92

47. It is not imperative in the promotion of that interest for safety officers to have powers of entry to private residences, without prior authorization. Indeed, and as discussed above, the scheme of the Act belies any claims of exigency. Sections 19.3 and 19.4 contemplate the passing of days between the notice and the inspection. There is no good reason in this context why the safety officers could not present the case for entry to an independent arbiter, who could take into account the competing interests and determine whether or not to permit entry, and on what conditions.

48. Finally, the BCCLA notes that prior authorization is not an unknown quantity to the Legislature. There are in fact numerous "regulatory" statutes in this province in which prior authorization is required for entry to a residence. The following statutory provisions are illustrative and are reproduced in the Appendix to this Factum:

(i) Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, ss. 150, 152

(ii) *Carbon Tax Act*, S.B.C. 2008, c. 40, s. 43(4)

(iii) *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 28(3.1) to (3.3)

(iv) *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75, s. 9(4)

(v) *Community Charter*, S.B.C. 2003, c. 26, s. 49(8)

(vi) *Drinking Water Protection Act*, S.B.C. 2001, c. 9, ss. 25(5), (6)

(vii) *Election Act*, R.S.B.C. 1996, c. 106, ss. 276(5), (6)

(viii) *Food Safety Act*, S.B.C. 2002, c. 28, ss. 9(4), (5)

(ix) *Forest Act*, R.S.B.C. 1996, c. 157, s. 142.2(2) to (4)

(x) *Gaming Control Act*, S.B.C. 2002, c. 14, s. 82

(xi) *Insurance Premium Tax Act*, R.S.B.C. 1996, c. 232, ss. 12.1(3) to (5)

(xii) *International Financial Activity Act*, S.B.C. 2004, c. 49, ss. 54(3) to (5)

(xiii) *Medicare Protection Act*, R.S.B.C. 1996, c. 286, ss. 36(6), (7)

(xiv) *Motor Fuel Tax Act*, R.S.B.C. 1996, c. 317, ss. 41(3), (4)

(xv) *Prevention to Cruelty to Animals Act*, R.S.B.C. 1996, c. 372, ss. 14(2), 15

(xvi) *Public Health Act*, S.B.C. 2008, c. 28, s. 25

(xvii) *Security Services Act*, S.B.C. 2007, c. 30, ss. 32(4), 33

(xviii) *Social Service Tax Act*, R.S.B.C. 1996, c. 431, ss. 113(4), (5)

(xix) *Tobacco Tax Act*, R.S.B.C. 1996, c. 452, ss. 21(4), (5)

(xx) *Transportation Act*, S.B.C. 2004, c. 44, s. 23

(xxi) *Vancouver Charter*, S.B.C. 1953, c. 55, s. 324.1

(xxii) *Water Act*, R.S.B.C. 1996, c. 483, s. 83(3)

(xxiii) *Wildlife Act*, R.S.B.C. 1996, c. 488, s. 88.1

49. These instances go to show that, in the normal course, the Legislature is sensitive to the heightened expectations of privacy in a dwelling house, and that it appropriately provides for prior independent authorization where entry to the same is sought. While the *vires* of the Act is not currently on appeal, one is left to puzzle over the Legislature's failure to provide for such a scheme in the ***Safety Standards Act***, dealing as it does with suspected marijuana grow operations.

50. With respect, the Chambers Judge erred when he distinguishing the above examples from the Act at bar on account that "they do not require reasonable grounds for entry".

Chambers Judge's Reasons at para. 159

51. On the contrary, these provisions require that an independent arbiter be satisfied of the appropriateness of entry to the residence. Indeed, several provisions expressly refer to the "reasonable grounds" standard.

> **See *e.g. Carbon Tax Act*, s. 43(5); *Food Safety Act*, s. 9(5)(*c*); *Gaming Control Act*, s. 82(2)**

52. The Chambers Judge further erred when he concluded at para. 160 that the impugned provisions struck "a reasonable balance between administrative efficiency and individual privacy". Any "balance" that impairs privacy more than is necessary is not reasonable, but unreasonable. And unconstitutional.

53. Considered in the balance, the state interests in public safety are far outweighed by the individual interest in the sanctity of the home. The impugned provisions of the Act are not in compliance with s. 8 of the *Charter*.

III. Compulsion of Account Information

54. The BCCLA makes one observation in closing. In his reasons, the learned Chambers Judge cited ***R. v. Plant***, *supra*, for the proposition that:

> [T]he Supreme Court of Canada has held that a consumer of electricity has no reasonable expectation of privacy with respect to electrical consumption records[.]
>
> **Chambers Judge's Reasons at para. 113 (also 129)**

55. With respect, and particularly in light of the judgments in ***R. v. A.M.*** and ***R. v. Kang-Brown*** (released the day after argument in the case at bar completed), this passage reveals an overly broad reading of ***Plant***. The Chambers Judge's interpretation of the case undoubtedly coloured his assessment of s. 19.2 of the Act,

which remains impugned in this appeal. On account of that fact, and the teachings of the subsequent cases, the BCCLA makes the following brief comments.

R. v. Kang-Brown, supra

R. v. A.M., supra

56. Throughout his reasons in ***Plant***, Sopinka J. expressly confined his comments to the facts then at bar. (It is not insignificant that in her concurring reasons, McLachlin J. (as she then was) drew contrary conclusions about the electrical records from the record.)

See *Plant, supra* at 293-96, *per* Sopinka J., 302-04, *per* McLachlin J.

57. Binnie J. reiterated the fact-specific nature of ***Plant*** (and other s. 8 cases) in ***R. v. A.M.*** when he stressed:

> [T]he courts have to deal with what is presented to them as reality. Some of the interveners portrayed the resolution of the dog-sniffing issue in this case as critical to the future of informational privacy. It is true that the information conveyed by a sniffer-dog alert reveals important information to the police about the crime under investigation (being one of the circumstances that distinguishes this case from *Tessling*). This appeal, however, does not purport to chart the future course of informational privacy any more than did *R. v. Plant*, [1993] 3 S.C.R. 281, or *Tessling*. It is in the nature of this rapidly developing field that courts will need to return again and again to fundamental principles to draw the reasonableness line.

***R. v. A.M., supra* at para. 39 [emphasis added]**

58. In respect of those persons in British Columbia who are subject to the Act at bar, the Chambers Judge ought not to have proceeded, peremptorily, from the proposition that there can be no reasonable expectation of privacy in electrical account information. To draw such a conclusion on the facts of a particular case, it is necessary

to engage in the contextual approach Sopinka J. described at p. 239 of his reasons in ***Plant***.

59. In any event, a focussed inspection of one person's electrical records in the course of a particular investigation—following the receipt of an anonymous tip and initial police work to identify the suspected house (***Plant***)—is a world away from a power to compel the records of all "the residences within [the local government's] jurisdictional boundaries" that have surpassed an arbitrary threshold consumption level.[5]

Act, s. 19.2(1)

60. The compulsion power in s. 19.2, exercisable in the absence of any reasonable suspicion, amounts to state surveillance of the entire population. In the BCCLA's submission, this factor is properly considered as part of the "totality of circumstances" that speak to a reasonable expectation of privacy in those records: residents of this province do not expect their municipal governments to comb through utility records with a view to isolating suspected marijuana grow-operations to inspect.

***Edwards, supra* at para. 45, *per* Cory J.**

***Tessling, supra* at paras. 31-33**

61. As intervenor, the BCCLA therefore submits that this Court's approach to s. 19.2 and the other impugned provisions should not presume that the residential account information is trifling or unworthy of constitutional protection.

---

[5] As noted by the Chambers Judge at para. 36: "Since ... the fall of 2006, BC Hydro has forwarded the residential consumption records of approximately 6,000 properties to Surrey for review. Of these, approximately 1,000 have been identified for inspection."

PART 4: ORDER SOUGHT

62. The Intervenor supports the Appellants in the relief they seek. It seeks no costs and asks that no order of costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated 15 MAY 2009

Brent B. Olthuis
Counsel for the Intervenor, the British Columbia Civil Liberties Association

Canadian Charter of Rights and Freedoms, s. 8. Part I of the _Constitution Act, 1982_, being Schedule B to the _Canada Act 1982_ (U.K.), 1982, c. 11

Search or seizure

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

Fouilles, perquisitions ou saisies

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Criminal Code, R.S.C. 1985, c. C-46, s. 495(1)

495. (1) A peace officer may arrest without warrant

(*a*) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

495. (1) Un agent de la paix peut arrêter sans mandat

a) une personne qui a commis un acte criminel ou qui, d'après ce qu'il croit pour des motifs raisonnables, a commis ou est sur le point de commettre un acte criminel;

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, ss. 150, 152

150 (1) For the purposes of an inspection, an inspector may do any of the following:

(*a*) enter the business premises of a person at any reasonable time;

(*b*) inquire into any business, affairs or conduct of a person;

(*c*) inspect, audit or examine any record, goods or other thing or the provision of services in the premises;

(*d*) inspect a vehicle or vessel that is being used for business purposes;

(*e*) require any person who has possession or control of any of the records, goods or other things in the premises, vehicle or vessel to produce the records, goods or things;

(*f*) make a record, including a record on film, audio tape, video tape or otherwise, of the premises, vehicle or vessel and any thing in or on the premises, vehicle or vessel;

(*g*) remove any record from the premises, vehicle or vessel for the purpose of making copies;

(*h*) remove and retain any record, good or other thing that may be required as evidence from the premises, vehicle or vessel.

(2) The authority under subsection (1) must not be used to enter a private dwelling except with the consent of the occupant or with the authority of a warrant under section 152 *[inspection under warrant]*.

152 (1) If satisfied by evidence given under oath that entry on or into a building, receptacle or place, including a private dwelling , is necessary for any purpose related to carrying out an inspection, a justice may issue a warrant authorizing an inspector to enter on or into that building, receptacle or place and conduct an inspection.

(2) In the warrant, a justice may authorize an inspector to do one or both of the following:

(*a*) enter at a specified time or within a specified period;

(*b*) enter by force, if necessary.

(3) An inspector may make an application for a warrant under subsection (1) without notice to any other person.

***Carbon Tax Act*, S.B.C. 2008, c. 40, s. 43(4)**

43 (4) The power to enter a place under subsection (1) or (2) must not be used to enter a dwelling occupied as a residence without the consent of the occupier except under the authority of a warrant under subsection (5).

(5) On being satisfied by evidence on oath that there are in a place records or other things for which there are reasonable grounds to believe that they are relevant to the matters referred to in subsection (1) or (2), a justice may issue a warrant authorizing a person named in the warrant to enter the place in accordance with the warrant in order to exercise the powers referred to in subsection (1) (a) and (b) or (2) (a) and (b).

***Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 28(3.1)ff**

28 (3.1) In a protective intervention order, the court may include an order authorizing a police officer to arrest, without a warrant, the person against whom the protective intervention order is made if the police officer has reasonable grounds to believe that the person has contravened or is contravening the protective intervention order.

(3.2) An order under subsection (3.1) does not authorize entry into a dwelling for the purpose of arresting a person.

(3.3) On application by a director, the court may issue a warrant authorizing a police officer, subject to subsection (3.4) and by force if necessary, to enter any dwelling specified in the warrant for the purpose of arresting a person against whom a protective intervention order has been made if there are reasonable grounds to believe that that person

(*a*) has contravened or is contravening the order, and

(*b*) is or will be present in the dwelling .

***Community Care and Assisted Living Act*, S.B.C. 2002, c. 75, s. 9(4)**

9 (4) The director of licensing or a medical health officer must not enter a private single family dwelling under subsection (2) (a) unless

(*a*) the occupier of the dwelling consents to the entry, or

(*b*) the entry is authorized by a warrant under subsection (5).

(5) A justice may issue a warrant authorizing the director of licensing or a medical health officer to enter a private single family dwelling under subsection (2) (a) if

(*a*) there is cause to believe that the dwelling is being used or is intended to be used as a community care facility and is not licensed under this Act,

(*b*) entry to the dwelling by the director of licensing or a medical health officer is necessary to ascertain whether the dwelling is being used or is intended to be used as a community care facility, and

(*c*) entry to the dwelling by the director of licensing or a medical health officer has been refused or there are reasonable grounds for believing that entry will be refused.

(6) The director of licensing or a medical health officer must not use force to execute a warrant issued under subsection (5) unless the use of force is specifically authorized in the warrant .

(7) In this section, **"private single family dwelling "** means a structure that is used primarily as a personal residence by the owner, occupier or an employee or agent of the owner or occupier.

***Community Charter*, S.B.C. 2003, c. 26, s. 49(8)**

49 (8) Subject to subsection (9), an animal control officer may, without a warrant , enter and search any place, except a place that is occupied as a private dwelling , and seize a dog, if the officer believes on reasonable grounds that

(*a*) the dog is a dangerous dog,

(*b*) the dog presents an imminent danger to the public, and

(*c*) the purpose of seizing the dog cannot reasonably be accomplished if the officer is required to obtain a warrant.

***Drinking Water Protection Act*, S.B.C. 2001, c. 9, s. 25(5), (6)**

25 (5) An order under this section may authorize persons designated by the drinking water officer to enter on or into property for the purpose of controlling, abating, stopping, remedying or preventing the drinking water health hazard.

(6) As restrictions on subsection (5),

(*a*) except in the case of an emergency, a person authorized under that subsection must take reasonable steps to notify the owner or occupier before entering the property, and

(*b*) the authority must not be used to enter a private dwelling except with the consent of the occupant or as authorized by a warrant under this or another Act.

***Election Act*, R.S.B.C. 1996, c. 106, s. 276(5), (6)**

276 (5) The authority under subsection (3) must not be used to enter a dwelling house except with the consent of the occupant or the authority of a warrant under subsection (6).

(6) On being satisfied on evidence on oath or affirmation that there are reasonable and probable grounds to believe that there are in a place records or other things relevant to matters referred to in this section, a justice may issue an order authorizing the chief electoral officer, a representative of the chief electoral officer or a peace officer to enter

the place and search for and seize any records or other things relevant to the matter in accordance with the warrant.

***Food Safety Act*, S.B.C. 2002, c. 28**

9 (4) The authority under subsection (1) must not be used to enter a private dwelling except with the consent of the occupant or the authority of a warrant under subsection (5).

(5) If satisfied by evidence given under oath or affirmation that

(*a*) the reason for entry described in subsection (1) (a) exists in relation to a private dwelling,

(*b*) entry to the private dwelling is necessary for any purpose related to carrying out an inspection under subsection (1), and

(*c*) entry to the private dwelling has been refused or there are reasonable grounds for believing that it will be refused,

a justice may issue a warrant authorizing an inspector or a peace officer to enter the private dwelling and conduct the inspection in relation to those parts of the private dwelling believed to be used as a food establishment.

***Forest Act*, R.S.B.C. 1996, c. 157, s.142.2(2)ff**

142.2 (2) A forest revenue official may not enter a dwelling under subsection (1) unless a person who occupies the dwelling consents or a warrant authorizes the entry.

(3) If satisfied by evidence given under oath that entry into a dwelling is necessary in order to exercise the powers under section 142.21 (a), a justice may issue a warrant , subject to any conditions the justice considers appropriate, authorizing a forest revenue official to enter the dwelling .

(4) The commissioner may apply for a warrant under subsection (3) without notice to any other person.

***Insurance Premium Tax Act*, R.S.B.C. 1996, c. 232, s. 12.1(3)-(5)**

12.1 (3) If any business premises referred to in subsection (2) (a) is a private dwelling , an authorized person may not enter the dwelling except with the consent of the occupant or under the authority of a warrant under subsection (4).

(4) If satisfied by evidence given under oath that entry into a private dwelling is necessary for any purpose related to the administration or enforcement of this Act, a justice may issue a warrant , subject to any conditions the justice considers appropriate, authorizing an authorized person to enter the dwelling .

(5) The commissioner may make an application for a warrant under subsection (4) without notice to any other person.

***Gaming Control Act*, S.B.C. 2002, c. 14, s. 82**

82 (1) In addition to any other powers under this Part, for the purposes referred to in section 78 (2) (b) or 81 (2), the general manager or a person authorized in writing by the

general manager may enter any place or premises, including a dwelling occupied as a residence without the consent of the occupier, under the authority of a warrant issued under subsection (2).
(2) A justice may issue a warrant authorizing the general manager or a person authorized by the general manager under subsection (1) and, if appropriate, any peace officer that the general manager or authorized person may call on for assistance to enter a place, premises or dwelling occupied as a residence in accordance with the warrant , for the purposes referred to in section 78 (2) (b) or 81 (2), if the justice is satisfied by evidence on oath that there are in the place records or things that there are reasonable grounds to believe are relevant to the exercise of those powers.

***International Financial Activity Act*, S.B.C. 2004, c. 49, s. 54(3)-(5)**
54 (3) If any business premises referred to in subsection (2) (a) is a private dwelling , an authorized person may not enter the dwelling except with the consent of the occupant or under the authority of a warrant under subsection (4).
(4) If satisfied by evidence given under oath that entry into a private dwelling is necessary for any purpose related to the administration or enforcement of this Act, a justice may issue a warrant , subject to any conditions the justice considers appropriate, authorizing an authorized person to enter the dwelling .
(5) The commissioner may make an application for a warrant under subsection (4) without notice to any other person.

***Medicare Protection Act*, R.S.B.C. 1996, c. 286, s. 36(6), (7)**
36 (6) The power to enter a place under subsection (5) or (12) must not be used to enter a dwelling house occupied as a residence without the consent of the occupier except under the authority of a warrant under subsection (7).
(7) On being satisfied on evidence on oath or affirmation that there are in a place records or other things for which there are reasonable grounds to believe that they are relevant to the matters referred to in subsection (5) or (12), a justice may issue a warrant authorizing an inspector named in the warrant to enter the place in accordance with the warrant in order to exercise the powers referred to in subsection (5) or (12).

***Motor Fuel Tax Act*, R.S.B.C. 1996, c. 317, s. 41(3), (4)**
41 (3) The power to enter a place under subsection (1) must not be used to enter a dwelling occupied as a residence without the consent of the occupier except under the authority of a warrant under subsection (4).
(4) On being satisfied by evidence on oath that there are in a place records or other things for which there are reasonable grounds to believe that they are relevant to the matters referred to in subsection (1), a justice may issue a warrant authorizing a person named in the warrant to enter the place in accordance with the warrant in order to exercise the powers referred to in subsection (1) (a) and (b).

***Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372, ss. 14(2), 15**

14 (2) An authorized agent who believes on reasonable grounds that there is an animal in critical distress in any premises, other than a dwelling house, or in any vehicle, aircraft or vessel, may enter the premises, vehicle, aircraft or vessel without a warrant for the purpose of taking any action authorized by this Act to relieve that critical distress.

15 An authorized agent may, without a warrant , during ordinary business hours enter any premises, other than a dwelling house, where animals are kept for sale, hire or exhibition for the purpose of determining whether any animal is in distress in the premises.

***Public Health Act*, S.B.C. 2008, c. 28, s. 25**

25 (1) A health officer may conduct an inspection at any reasonable hour.

(2) Before entering a vehicle or place, a health officer must

(*a*) take reasonable steps to notify the owner or occupier of the place of the date and time that the health officer will be entering, and

(*b*) if the place is a private dwelling , obtain either the consent of the owner or occupier or a warrant to enter.

(3) Despite subsection (2) (a), a health officer may conduct an inspection without providing notice if

(*a*) providing notice would not be reasonably possible or practical in the circumstances, or

(*b*) in the case of a regulated activity, providing notice would frustrate the purposes of the inspection.

***Security Services Act*, S.B.C. 2007, c. 30, ss. 32(4), 33**

32 (4) The authority under subsection (1) must not be used to enter a private dwelling except with the consent of the occupant or under the authority of a warrant under section 33.

33 (1) If satisfied by evidence given under oath that entry on or into a building, receptacle or place, including a private dwelling , is necessary for any purpose related to conducting an inspection under this Act, a justice may issue a warrant authorizing an inspector to enter on or into that building, receptacle or place and conduct an inspection.

(2) In the warrant, a justice may authorize an inspector to do one or both of the following:

(*a*) enter at a specified time or within a specified period of time;

(*b*) enter by force, if necessary.

(3) An inspector may make an application for a warrant under subsection (1) without notice to any other person.

***Social Service Tax Act*, R.S.B.C. 1996, c. 431, s. 113(4), (5)**
113 (4) The power to enter a place under subsection (2) must not be used to enter a dwelling occupied as a residence without the consent of the occupier except under the authority of a warrant under subsection (5).
(5) On being satisfied by evidence on oath that there are in a place records or other things for which there are reasonable grounds to believe that they are relevant to the matters referred to in subsection (2), a justice may issue a warrant authorizing a person named in the warrant to enter the place in accordance with the warrant in order to exercise the powers referred to in subsection (2) (a) to (c).

***Tobacco Tax Act*, R.S.B.C. 1996, c. 452, s. 21(4), (5)**
21 (4) The power to enter a place under subsection (2) must not be used to enter a dwelling occupied as a residence without the consent of the occupier except under the authority of a warrant issued under subsection (5).
(5) On being satisfied by evidence on oath that there are in a place records or other things for which there are reasonable grounds to believe that they are relevant to the matters referred to in subsection (2), a justice may issue a warrant authorizing a person named in the warrant to enter the place in accordance with the warrant in order to exercise the powers referred to in subsection (2) (a) to (c).

***Transportation Act*, S.B.C. 2004, c. 44, s. 23**
23 (1) Subject to this section, the power to enter premises under section 18 (a) or 22 (1) (a) must not be used to enter a dwelling occupied as a residence without the consent of the occupier.
(2) Without limiting any other rights, powers or advantages of the minister under this or any other enactment, the minister may, for the purposes referred to in section 18 (b) or 22 (1) (b), as the case may be, enter a dwelling occupied as a residence, without the consent of the occupier, under the authority of a warrant issued under subsection (3) of this section.
(3) A justice may issue a warrant authorizing a person named in the warrant and, if appropriate, any peace officer that the named person may call on for assistance to enter a dwelling occupied as a residence in accordance with the warrant , for the purposes referred to in section 18 (b) or 22 (1) (b), if the justice is satisfied by evidence on oath that the entry is required for those purposes.

***Vancouver Charter*, S.B.C. 1953, c. 55 ,s. 324.1**
324.1 (8) Subject to subsection (9), an animal control officer may, without a warrant , enter and search any place except a place that is occupied as a private dwelling , and seize a dog, if the officer believes on reasonable grounds that

(*a*) the dog is a dangerous dog,
(*b*) the dog presents an imminent danger to the public, and
(*c*) the purpose of seizing the dog cannot reasonably be accomplished if the officer is required to obtain a warrant.

***Water Act*, R.S.B.C. 1996, c. 483, s. 83(3)**

83 (3) The authority under subsection (1) must not be used to enter into a private dwelling except with the consent of the occupant or as authorized by a warrant issued under this or another Act.

***Wildlife Act*, R.S.B.C. 1996, c. 488, s. 88.1**

88.1 (1) In this section:

"attractant" means food, food waste, compost or other waste or garbage that could attract dangerous wildlife;

"private dwelling" means a structure used solely as a private residence or a residential accommodation within any other structure.

(2) If a conservation officer believes on reasonable grounds that dangerous wildlife is or may be attracted to any land or premises other than a private dwelling, the conservation officer may, without a warrant, enter and search the land or premises.

(3) If a conservation officer believes on reasonable grounds that the existence or location of an attractant in, on or about any land or premises, other than in a private dwelling, poses a risk to the safety of any person because the attractant is attracting or could attract dangerous wildlife to the land or premises, the conservation officer may issue a dangerous wildlife protection order directing an owner, occupier or person in charge of that land or premises to contain, move or remove the attractant within a reasonable period of time specified in the order.

LIST OF AUTHORITIES

Authorities	Paragraph(s)
Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421	41
Canadian Broadcasting Corp. v. New Brunswick (A.G.), [1991] 3 S.C.R. 459	41
Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860	41
Eccles v. Bourque (1974), [1975] 2 S.C.R. 739 at 742-43	18
Hunter v. Southam Inc., [1984] 2 S.C.R. 145	11, 20, 27, 36, 37
R. v. A.M., 2008 SCC 19, [2008] 1 S.C.R. 569 at para. 5	10, 22, 32, 49, 51
R. v. Baron, [1993] 1 S.C.R. 416 [s. 231.3 of the *Income Tax Act*]	11
R. v. Collins, [1987] 1 S.C.R. 265 at 278	21
R. v. Edwards, [1996] 1 S.C.R. 128 at para. 33, *per* Cory J.	13, 54
R. v. Feeney, [1997] 2 S.C.R. 13	20
R. v. Golub (1997), 117 C.C.C. (3d) 193 (Ont. C.A.)	20
R. v. Jarvis, 2002 SCC 73, [2002] 3 S.C.R. 757 at paras. 60-61	26, 31
R. v. Kang-Brown, 2008 SCC 18, [2008] 1 S.C.R. 456 at para. 48, *per* Binnie J.	22, 32, 49
R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627 [s. 231(3) of the *Income Tax Act*]	11, 24, 30
R. v. Plant, [1993] 3 S.C.R. 281	48, 50
R. v. Rao (1984), 46 O.R. (2d) 80 (C.A.); *R. v. Grant*, [1993] 3 S.C.R. 223 [s. 10 of the *Narcotic Control Act*]	11
R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432 at para. 22	18, 54
R. v. Thompson, [1990] 2 S.C.R. 1111 at 1143-44, *per* Sopinka J.	40
Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Practices Commission), [1990] 1 S.C.R. 425 [s. 17 of the *Combines Investigation Act*]	11, 29