

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Arkinstall v. City of Surrey***,
2008 BCSC 1419

Date: 20081024
Docket: S073785
Registry: Vancouver

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996, c. 241

Between:

Jason Cyrus Arkinstall and Jennifer Aline Green

Petitioners

And

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

Respondents

And

The British Columbia Civil Liberties Association

Intervener

Before: The Honourable Mr. Justice Smart

Reasons for Judgment

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Date and Place of Trial/Hearing:

April 21 – 24, 2008
Vancouver, B.C.

I. NATURE OF THE APPLICATION

[1] The petitioners, Jason Arkininstall and Jennifer Green, reside in a house in the City of Surrey (“Surrey”). In May 2007, Surrey’s Electrical and Fire Safety Inspection Team (the “EFSI Team”) attended at their residence to conduct an electrical inspection pursuant to the **Safety Standards Act**, S.B.C. 2003, c. 39 [**SSA**]. The petitioners’ residence had been identified for inspection due to high electricity consumption.

[2] The EFSI Team was composed of a safety officer, a fire official, two RCMP officers, and the Team coordinator.

[3] Mr. Arkininstall advised the members of the Team that the safety officer and fire officials would be permitted to enter his residence but he refused entry to the RCMP officers. As it was the policy of the EFSI Team not to enter a residence without the police members first undertaking a safety check of the premises, the Team left the property without conducting an inspection. As a result, Surrey requested the British Columbia Hydro and Power Authority (“BC Hydro”) to disconnect the electrical power to the petitioners’ residence.

[4] Electrical power to the petitioners’ residence was reconnected a number of days later pursuant to an interlocutory injunction ordered by this Court.

[5] The petitioners launch a two-pronged attack on the constitutionality of the **SSA**. They submit that certain recent amendments are *ultra vires* the legislative authority of the province as a colourable exercise of the criminal law power contrary

to s. 91(27) of the **Constitution Act, 1867**. They additionally challenge the **SSA** pursuant to the **Canadian Charter of Rights and Freedoms** (the "**Charter**"), submitting that, in authorizing warrantless inspections of private dwellings, the legislation is contrary to both s. 7 and s. 8.

[6] The petitioners seek the following relief:

- a. a declaration that the disconnection of electrical power to the petitioners' residence was *ultra vires* and/or unlawful;
- b. a declaration that the disconnection of electrical power to the petitioners' residence was in breach of the rules of natural justice and procedural fairness;
- c. various orders relating to the reconnection of electrical power to the petitioners' residence;
- d. a declaration that ss. 18(1), 19(1), 19(2), 19.1, 19.2, 19.3, 19.4 and 38 of the **SSA** are of no force and effect;
- e. a declaration that there were no reasonable or lawful grounds for the safety officer to seek to enter the petitioners' residence;
- f. a declaration that there were no reasonable and lawful grounds for RCMP officers to seek to enter the petitioners' residence;
- g. damages or such other just and appropriate remedy pursuant to s. 24 of the **Charter**, and
- h. an order for costs, including special costs.

[7] Surrey responds that the **SSA** is valid provincial legislation that does not infringe the **Charter** as asserted by the petitioners. Further, it says that its operational safety requirement that the EFSI Team include police officers to ensure the safety of Team members is reasonable and consistent with the **Charter**.

[8] The Attorney General of British Columbia (the “Attorney General”) counsels a course of judicial restraint with respect to the constitutional questions, submitting that this petition ought to be disposed of on more narrow grounds relating to the administrative decisions that led to the disconnection of electrical power to the petitioners’ residence. The Attorney General nevertheless defends the constitutionality of the **SSA** on both division of powers and **Charter** bases.

[9] BC Hydro is named as a respondent in these proceedings, though no specific relief is sought against it, apart from the claim for damages that appears to be directed at all respondents. BC Hydro endorses the positions taken by Surrey and the Attorney General regarding the constitutional validity of the **SSA**.

[10] Finally, the intervener British Columbia Civil Liberties Association (the “BCCLA”) submits that the amendments to the **SSA** render it constitutionally infirm from a division of powers standpoint, though on a different basis than put forth by the petitioners. The amendments, it contends, provide for an additional investigative tool for the police such that they amount to legislation in respect of criminal investigative procedure. The BCCLA also challenges both the **SSA** and Surrey’s operational requirement of a police presence on the EFSI Team as contrary to s. 8 of the **Charter**.

[11] The evidence on this petition comprised affidavits and transcripts of cross-examination of the affiants on their affidavits.

[12] In these Reasons, I will first provide a factual overview in order to place the legal issues into context. I will then address the challenges to the legislation relating to the division of powers, followed by those based on s. 8 of the *Charter*.

II. FACTUAL OVERVIEW

[13] Indoor marijuana cultivation (which I will refer to as “grow operations”) is a matter of enormous public concern throughout this province.

[14] Myriad problems are associated with grow operations, including crime, structural and electrical hazards due to alterations to existing structures and electrical installations, high concentrations of dangerous chemicals, and the presence of weapons.

[15] From an electrical safety perspective, electrical bypasses (connections to the electrical power supply that obtain power before the meter measures it for billing purposes), the overloading of electrical circuits, and poor wiring contribute to an increased potential for fires in residences that house grow operations.

[16] Len Garis is Fire Chief for Surrey. By the early 2000s, he had become increasingly concerned with the proliferation of grow operations in his municipality, with the corresponding rise in the incidence of fire and other dangers that such operations present for emergency responders, occupiers of the residences involved, and their neighbours. Convinced that the criminal justice system was overwhelmed and unable to effectively cope with the increase in grow operations, he began to look

for alternatives to the criminal law process to address their proliferation and the associated public safety hazards.

[17] On behalf of the Fire Chiefs Association of British Columbia (the “FCABC”), Chief Garis initiated discussions with various experts regarding the problems related to grow operations, and the potential for an administrative or non-criminal law approach to reducing their number. These experts included Inspector Paul Nadeau of the RCMP; Dr. Darryl Plecas of the School of Criminology and Criminal Justice at the University College of the Fraser Valley; forensic electrical engineer Richard van Leeuwen; and lawyer Lorena Staples, QC.

[18] Marijuana cultivation is one of Dr. Plecas’s areas of study. He participated in a comprehensive study of marijuana cultivation in the province which entailed a review of all cases of alleged marijuana cultivation that had come to the attention of the police, initially between 1997 and 2000, and later extended to 2003. As part of the study, the research group had been given access to the Surrey Fire Department’s records.

[19] A report covering the 1997 – 2000 time period was published in May 2000, and indicated that the number of grow operations in the province was on the rise, that the operations were becoming larger and more sophisticated, and that this presented an increasingly significant risk to community safety. The final report for the entire seven-year period was issued in March 2005.

[20] A sub-report entitled “The Connection between Marijuana Growing Operations and House Fires in British Columbia” that used Surrey as a case study

was published between the two reports. It indicated that over the seven-year period, the risk of fire in a residence with a grow operation was 24 times greater than for a home without a grow operation; this ratio derived from the statistic that Surrey averaged one fire per year per 525 residences while the likelihood of fire associated with grow operations was one in 22. As well, the study concluded that the average property damage involved in a grow operation fire was nearly double the damage assessed for house fires generally. The report attributed the source of the fires associated with grow operations to overloading of electrical circuits and poor wiring, as well as to electrical bypasses. Regardless of the specifics, the general cause of the fires could be traced to lack of compliance with electrical standards.

[21] Richard van Leeuwen prepared a report that drew upon his decade of experience investigating electrical failures on behalf of insurance companies and lawyers. He noted that the illegal nature of grow operations means that the necessary electrical installations are seldom performed by qualified electricians and are never inspected by provincial electrical inspectors. Moreover, since grow operations require a significant amount of electrical power, many use bypasses which pose additional hazards. Mr. van Leeuwen identified as follows some of the dangers associated with grow operations and bypasses:

- Inadequate electrical protection, such as fuses or circuit breakers, to limit electrical faults, thus increasing the likelihood that a fault will result in fire;
- Heightened electrocution risks for those up to 10 meters from a ground rod, normally at the side of a house;
- Tripping, shock and fire hazards arising from unprofessional and substandard installation of electrical systems;

- Overloading of electrical conductors that can lead to electrocution hazards for unsuspecting emergency personnel; and
- Lack of monitoring of grow operations with a consequent increase in the likelihood that fires will be well established before they are noticed, creating additional risks for firefighters and neighbouring properties.

[22] Lorena Staples, QC, issued an opinion on the viability of an administrative approach to mitigating the risks of grow operations to the community by disconnecting the supply of electrical power to such operations. Her opinion proposed a four step process:

- a. Establish a threshold of electricity consumption that would indicate, in the absence of a known installation, the existence of a grow operation or other dangerous use of electricity.
- b. Obtain consumption records to determine the location of residences with threshold levels of electrical consumption indicating a strong probability of fire, shock or tripping hazards. She observed that the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165 [***FOIPPA***] was likely to pose an obstacle by requiring that a case for disclosure be demonstrated in each instance. She indicated that if electrical consumption records were legislatively mandated to be available on request, this would enable electrical inspectors and fire officials to identify residences with higher than average electrical consumption.
- c. Confirm the existence of an electrical, fire, shock or tripping hazard by inspection or other means pursuant to s. 18 of the ***SSA*** or s. 24 of the ***Fire Services Act***, R.S.B.C 1996, c. 144. She also observed that it might be advisable for the safety officers and fire inspectors to be accompanied by the police when making these inspections for safety purposes.
- d. Take appropriate proactive and preventative action to alleviate the risk of fire and other hazards from electrical bypasses and unsafe equipment. She noted that a safety officer has authority under s. 38 of the ***SSA*** to order disconnection of power if the

owner or occupant of the premises fails to comply with an order to discontinue the unsafe practices.

[23] In September 2004, the FCABC submitted a report to the provincial government entitled “On an Urgent Matter of Public Safety” urging it to act immediately to address the public safety risks of grow operations. The report reviewed some of the associated risks, and attached the expert opinions commissioned by Chief Garis and referred to above. It expressed the FCABC’s view that existing approaches to grow operations were not “effective or acceptable in terms of reducing fire related occurrences nor is it respectful of the risk to the health and safety of the public and firefighters due to electrocution.” The FCABC submitted a follow-up supplementary report in November 2004 which provided updated information from Dr. Plecas.

[24] The provincial government was receptive to the overtures made by the FCABC and struck a task force which considered, among other things, ways in which existing electrical safety legislation could be used to address the hazards associated with grow operations. The task force included representatives from the Ministry of Community, Aboriginal and Women’s Services; the Ministry of the Solicitor General; the Office of the Fire Commissioner; the Ministry of the Attorney General; BC Hydro; and the British Columbia Safety Authority, which performs electrical safety inspections throughout the province, except for eight municipalities which have that authority delegated to them, including Surrey. An information bulletin issued by the British Columbia Safety Authority in early March 2005

confirmed how the **SSA** could be used to carry out an effective electrical safety inspection program:

Safety Concern

The British Columbia Safety Authority has determined that electrical installations associated with indoor residential marijuana grow operations typically present a significant risk to public safety, especially in residential neighbourhoods. The British Columbia Fire Chief's Association has experienced an alarming increase in these operations in British Columbia.

Safety Standards Act – Authority to Eliminate Hazards

This Bulletin provides confirmation and clarification of the provisions of the Safety Standards Act for authorities having jurisdiction to require an inspection of an electrical installation where a potential hazard has been identified. Serious non compliances with the British Columbia Electrical Code are common when electrical products are installed for marijuana grow operations. These non compliances can result in fires and shock hazards. Marijuana grow operations in British Columbia are sometimes discovered by fire departments when responding to a fire call. These residential hazards commonly jeopardize the safety of persons and property and extend to adjacent properties. Immediate action may be taken to disconnect the electrical supply to the premises to prevent injury and property damage.

Notice to Owner or Occupant

Authorities having jurisdiction routinely investigate potentially hazardous installations to ensure safety when such an installation has been made known to them. When abnormal excessive power usage has been identified, an investigation will take place in order to evaluate this usage and confirm the safety of the installation. If the owner or occupant of such an identified premises is not available to allow entry for an inspection, a notice can be posted on the premises requesting the owner or occupant arrange for access. This notice should set out the reasons for requiring the inspection and provide the time required for the owner to make the premises accessible for an inspection. Failure to provide access in the required time could result in disconnection of power to the premises.

Warning to Authorities

As a matter of public safety, due to the potentially dangerous nature of an inspection of a marijuana grow operation, before approaching a

residential property where you suspect the presence of a marijuana grow operation, authorities are advised to request assistance from a police officer who will provide security and keep the peace.

[25] On March 3, 2005, the Solicitor General announced a pilot project in Surrey. The accompanying news release was entitled “B.C. Moves to Reduce Risks From Grow Ops”, and described the intent of the project as the reduction of house fires and other public safety hazards caused by residential grow operations through a strict enforcement of the **SSA**. It also quoted the Solicitor General, Rich Coleman, as saying “Grow ops are increasing in size and sophistication right across B.C. ... We need to tackle this problem from every angle to ensure that police and other authorities have the tools they need to protect the public. This will send a message to criminals that grow ops will not be tolerated and we’ll find all kinds of ways to shut them down.” The release continued on to explain that a team of firefighters, police officers and electrical inspectors would be conducting inspections of suspicious homes with unusually high electrical power consumption. If the team found that a residence was a hazard or if a resident did not permit an inspection within a reasonable time, power to the residence would be disconnected.

[26] To implement this pilot project, Surrey established the EFSI Team. The Team consisted of an electrical inspector, a fire official, and two RCMP officers; it was supervised by a Team coordinator. The pilot involved the RCMP submitting tips regarding suspected grow operations to the EFSI Team for investigation. The police members of the EFSI Team then submitted requests to BC Hydro for the electricity consumption records of the residences suspected of containing grow operations. Under the provisions of **FOIPPA**, BC Hydro was authorized to disclose such

information to the police. Once that information was received, the EFSI Team conducted inspections under the authority of the **SSA**.

[27] It was the evidence of Chief Garis that in discussions leading to the announcement of the EFSI pilot, it was agreed that the RCMP members of the Team would be involved only to provide security and to keep the peace, not to gather evidence. He understood that the RCMP had developed an operational protocol for its members participating in the EFSI Team, though he had never seen it.

[28] Surrey also developed operational guidelines for the EFSI Team. They provided, in part, as follows:

The Electrical and Fire Safety Inspection Team may conduct inspections on properties, residential, commercial and agricultural; [*sic*] where advice has been received concerning the existence of marijuana grow operations. The purpose of the inspection is to determine, by way of a physical inspection, if electrical systems are in compliance with BC Electrical Code and City Bylaw provisions and that no fire hazards are present as a result of the non-compliant use of electricity.

If electrical systems are not found to be in compliance with BC Electrical or City Bylaw requirements, or if in the opinion of the Electrical or Fire Team Member Inspector, a fire hazard from the non-compliant [*sic*] of electrical power exists, the Electrical Inspector has the authority to order a disconnect of the electrical service through the power authority or take immediate action to disconnect power. (see B.C. Safety Authority Information Bulletin, see B.C. Hydro).

Team member safety will take precedence over all other objectives.

Other Team objectives shall include:

- resident life safety
- neighbour life safety
- preservation of property
- preservation of neighbouring property

Evidence collection or the existence of alleged criminal activity shall not be of concern to the Team. However, if Police Team members believe that an activity immediately threatens the safety of the Team members or the residence, they may take action. Otherwise, Police Team members may refer matters of interest to the appropriate police division. Police Team members shall be peacekeepers for team activities and should not be encumbered otherwise.

[29] Capt. McKibbon is a Fire Captain in Surrey, and is presently the coordinator of the EFSI Team. His evidence was that the EFSI Team always includes two RCMP officers for the safety of the other members of the team. When the Team attends a residence, the RCMP officers first walk through the house and outbuildings to determine whether it is safe for the balance of the Team to enter. Once the premises are declared safe, the RCMP officers remain at the property but do not accompany the electrical and fire inspectors unless the occupants of the property are trailing them. Capt. McKibbon deposed that the RCMP officers do not attend to gather evidence for a police investigation; their role is limited to ensuring the safety of the EFSI Team during inspections.

[30] The pilot project was carried out from March 15 to June 3, 2005. Chief Garis prepared a report on the EFSI initiative (entitled "Eliminating Residential Marijuana Grow Operations – An Alternate Approach"), which indicated that during those 90 days, the EFSI Team processed 420 police tips and, from those, inspected 126 residences. The Team found cause to terminate electrical power at 78 residences and issue seven-day repair notices at 11 others. Overall, 119 of the 126 residences were required to be rendered safe in some manner.

[31] Based on the EFSI pilot results and projections, the report identified the following direct and indirect benefits of the initiative:

- Reducing the significant electrical and fire safety hazards associated with grow operations in residential areas;
- Reducing the backlog of grow operation tips to police;
- Addressing a large number of low-level grow operations or weaker cases, allowing the criminal justice system (police and the courts) to focus on the crime networks behind the marijuana trade;
- Serving as a deterrent for residential marijuana production by interrupting operations and causing an operational hurdle for growers; and
- Raising public awareness about the dangers associated with grow operations.

[32] While lauding the success of the pilot project, the report also cited the lack of proactive disclosure of information regarding residences with high electricity consumption as one of the challenges facing the EFSI program.

[33] Chief Garis's report was not submitted to the province. Nevertheless, this concern was brought to its attention in a February 2006 FCABC briefing to the Minister of Public Safety and Solicitor General in support of contemplated legislative changes to streamline the process by requiring B.C. Hydro to report unusual energy consumption to local authorities. The briefing memorandum referred to statistics respecting grow operations and the EFSI initiative, and also explained the philosophy behind the administrative approach:

The driver behind the administrative approach, and the companion legislation, is that public safety is paramount and outweighs personal convenience and the pursuit of criminal prosecution. The

administrative approach is positioned as a complement to (not a replacement of) the criminal justice system in the fight against grow operations. It allows local governments to efficiently and legally address the prevalent fire, electrocution and health risks associated with grow operations without drawn-out criminal investigations. At the same time, it attends to the backlog of police tips and multitudes of low-level grow operations, helping free up police resources to attack the high-level organized crime networks behind the marijuana trade.

[34] The ***Safety Standards Amendment Act, 2006***, S.B.C. 2006, c. 31, came into force on June 23, 2006. The legislation added ss. 19.1 to 19.4 to the ***SSA***, which are the primary provisions at issue on this petition.

[35] 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 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. Sections 19.3 and 19.4 establish notice requirements for safety officers and compliance obligations for notice recipients.

[36] 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.

[37] The evidence on the petition was that criminal charges did not arise out of the discovery of active grow operations during EFSI Team inspections.

Capt. McKibbon, for instance, deposed that where such an operation was discovered, the marijuana plants and growing equipment were seized by the RCMP but no charges were laid against the owner or occupant. The evidence of Ron Gibson, an electrical inspector designated as a safety officer for the purposes of the **SSA**, was to similar effect.

[38] Counsel for Surrey advised the Court in writing after the hearing had concluded that it had come to his attention that this evidence was not entirely accurate:

Following on the hearing ... it has come to my attention from counsel within the Public Prosecution Service of Canada that there may have been instances in which they have received Reports to Crown Counsel submitted to them by the RCMP and arising out of an EFSI inspection. There may have been prosecutions and convictions obtained in a number of instances. Captain McKibbon (EFSI coordinator) and Mr. Gibson (safety officer) both testified there were no charges arising out of an EFSI inspection.

It would appear that my forceful submissions on behalf of the City of Surrey regarding no charges possible in relation to the grow-op arising from RCMP involvement in the first instance as part of a warrantless EFSI inspection team is not a view shared by the RCMP.

[39] I am grateful to counsel for Surrey for responsibly and promptly advising me of this information.

Inspection of the Petitioners' Residence

[40] Mr. Arkinstall and Ms. Green live with their young son in Surrey. Their 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.

[41] In November 2005, the EFSI Team attended at the petitioners' residence for the purposes of an inspection on the basis of unusually high electricity consumption. Mr. Arkininstall was not present but advised 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. Arkininstall 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.

[42] The EFSI Team departed without conducting an inspection. Surrey did not proceed further at the time as it had only limited consumption records that showed one high reading, not a history of high consumption. The EFSI Team did not return to the petitioners' residence in 2005 or 2006.

[43] In November 2006, Capt. McKibbon examined data that BC Hydro had provided with respect to the petitioners' residence. Two readings in 2004 indicated daily electrical consumption of 64 and 73 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 petitioners' residence for an EFSI Team inspection.

[44] Capt. McKibbon sent the petitioners' 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 petitioners' residence as among the residences exceeding the threshold. This time the RCMP did not raise any objection to an inspection.

[45] Capt. McKibbon was the individual who identified the petitioners' 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.

[46] On May 28, 2007, the EFSI Team attended the petitioners' residence. The Team was refused entry and left an information package in the mail slot. Correspondence was also couriered to the petitioners 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.

[47] On May 29, 2007, counsel for Mr. Arkininstall wrote a letter to the EFSI Team, although it appears not to have been received until the afternoon of May 30, after the attempted inspection but prior to the disconnection of electrical power.

[48] On May 30, 2007, the EFSI Team re-attended at the petitioners' residence. The Team consisted of Mr. Gibson, a fire officer, two RCMP officers and Capt. McKibbon. Mr. Arkininstall again advised that he was permitting 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, the electrical power would be disconnected. This was the EFSI Team's standard procedure if they were not permitted to inspect a property.

[49] 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 petitioners' residence, no electrical safety inspection was carried out. Accordingly, the decision was made to disconnect power to the petitioners' 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.

[50] BC Hydro followed up on the hard disconnection order on May 31, 2007. A BC Hydro employee attended at the petitioners' residence and was invited by Mr. Arkininstall 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.

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

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

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

III. STATUTORY PROVISIONS

[54] The principal sections of the **SSA** that are in play on this petition are the following:

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 ground 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;

...

Division 3 – Residential Electricity Information

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.

Division 5 – Enforcement

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.

IV. ANALYSIS

1. Preliminary Issue

[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.

2. Division of Powers

a. Positions of the Parties

[58] Both the petitioners and the BCCLA accept that the **SSA** as originally enacted was within provincial competence as legislation relating to property and civil rights (s. 92(13) of the **Constitution Act, 1867**). Each argues, albeit on different grounds, that the 2006 amendments render the **SSA** *ultra vires*.

[59] The petitioners submit that the amendments, especially as they operate in conjunction with s. 18(1)(c) and s. 38(1)(b), constitute a colourable attempt to enact criminal law and procedure contrary to s. 91(27) of the **Constitution Act, 1867**. They say that the impugned provisions have as their pith and substance the stiffening of the criminal law with respect to grow operations by supplementing the criminal prohibition with a penalty of disconnection of electrical power and the seizure of any marijuana plants and growing equipment found in a residence. The petitioners contend that electrical safety is cited to camouflage the true purpose of the provisions or is, at most, so ancillary a purpose as to not constitute their pith and substance. The true purpose of the impugned provisions is to shut down and punish grow operations independent of safety concerns. In this regard, they submit that it is significant that in the discussions surrounding the EFSI program and in the application of the **SSA**, the focus has been on shutting down grow operations, not on rendering them safe. The petitioners additionally contend that the strict insistence on police entry into residences and the authority of local governments to share

electrical information with the police contradict the assertion that the **SSA** places safety concerns above criminal law interests.

[60] The BCCLA does not share the petitioners' position that the amendments are constitutionally infirm from a division of powers standpoint, with the exception of ss. 19.1 and 19.2(3). It submits that these provisions are, in pith and substance, geared towards the investigation of possible offences under the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19 [**CDSA**], a statute enacted pursuant to Parliament's authority over criminal law. The BCCLA's particular concern is with respect to s. 19.2(3), which permits a local government to disclose account information to the police. This, submits the BCCLA, cannot be rationally defended as being concerned primarily with property and civil rights. Rather, it provides for an additional investigative tool for the police in their enforcement of the **CDSA** and their broader law enforcement duties, such that its dominant characteristic is related to Parliament's criminal law power.

[61] Similarly, the BCCLA submits that the definitions of "account information" and "electricity consumption data" in s. 19.1 are so expansive as to be in pith and substance related to criminal investigative procedure. If combating existing or imminent safety hazards associated with grow operations was the purpose of the impugned provisions, then there would be little justification for permitting a local government to demand the names and billing addresses of properties with electricity consumption exceeding the prescribed threshold, and for that data to cover the previous 24-month billing period.

[62] The Attorney General characterizes the 2006 amendments as aimed at facilitating the identification and inspection of dangerous grow operations, and their remediation through the use of the pre-existing mechanisms within the **SSA**. It is apparent from the extrinsic evidence, it says, that the dominant concern underlying the amendments was the electrical and fire safety problems associated with grow operations. While secondary social harms were also identified, the amelioration of those harms is a legitimate provincial concern, in any event. The Attorney General challenges many of the bases upon which the petitioners attack the constitutional validity of the impugned provisions.

[63] With respect to the BCCLA's submission that the information sharing provision of the **SSA** constitutes legislation with respect to criminal investigative procedure, the Attorney General responds that even prior to the impugned amendments, **FOIPPA** permitted such information to be shared with the police for the purposes of criminal investigations and other police purposes. The **SSA** does not compel disclosure of the information to the police, but simply adds authority for a municipality to share it with the police in circumstances where a criminal investigation is not underway or likely to result. Accordingly, s. 19.2(3) does not constitute colourable criminal lawmaking.

[64] Surrey advances similar arguments in support of its position that the **SSA** does not entrench upon federal jurisdiction over criminal law.

b. Analysis

i. Legal Framework

[65] Determining whether legislation falls within the legislative competence of Parliament or the province entails two steps. The first is to determine the essential character, or pith and substance, of the statute. Where a law has more than one feature, its dominant feature determines its pith and substance; other features are merely incidental and not part of the constitutional analysis. The second step is to classify that essential character by reference to the heads of power under ss. 91 and 92 of the **Constitution Act, 1867** to determine whether the law comes within the jurisdiction of the enacting government: **Reference re: Firearms Act (Can.)**, 2000 SCC 31, [2000] 1 S.C.R. 783 [**Reference re: Firearms Act**]; **R. v. Morgentaler**, [1993] 3 S.C.R. 463, 125 N.S.R. (2d) 81. The authorities recognize that there may be areas of overlapping jurisdiction: **R. v. Banks**, 2007 ONCA 19, 84 O.R. (3d) 1; **Federated Anti-Poverty Groups of B.C. v. Vancouver (City)**, 2002 BCSC 105, 40 Admin. L.R. (3d) 159.

[66] Ascertaining the essential character of a statute, in turn, requires an examination of both the purpose and the legal effect of the law: **Reference re: Firearms Act** at para. 16. A law's purpose may be stated in the preamble or elsewhere in the legislation. It may also be determined by reference to appropriate extrinsic materials or by considering the mischief the law was intended to remedy.

[67] Determining the legal effect of a law involves a consideration of how the law sets out to achieve its purpose. In looking at the effect of legislation, the Court may

consider both its legal and practical effects. The legal effect refers to how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is ascertained from the terms of the legislation itself. The practical effect of legislation refers to its practical operation, and includes “side effects” that flow from the application of the statute which are not direct effects of the legislative provisions themselves: *Kikarla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146. In appropriate cases, the Court may consider evidence of this second form of effect.

[68] A presumption of constitutionality operates such that the onus rests with the party seeking to challenge the constitutionality of a law.

ii. **Do the impugned provisions of the SSA relate to criminal law?**

[69] Both the petitioners and the BCCLA accept that prior to the 2006 amendments, the **SSA** was an enactment within provincial competence as being related to s. 92(13) of the *Constitution Act, 1867*, property and civil rights.

[70] The **SSA** creates a comprehensive regulatory scheme with respect to inherently dangerous products and systems, including those relating to electricity, refrigeration, gas, elevating devices and pressure vessels. The **Act** mandates the appointment of safety officers to perform regulatory functions, and s. 18 endows them with a range of powers to further the discharge of their duties. Among these are the authority to issue and revoke permits, to enter premises to conduct inspections of regulated works and products, to compel information, and to seize a regulated product. Section 19 imposes a duty on those subject to the **SSA** to

cooperate with safety officers in the performance of their duties, while s. 38 authorizes a safety officer to issue a compliance order for failure to comply with the requirements of a safety officer or the **Act**. Section 72 renders failure to comply with a compliance order an offence, and s. 78 sets out potential penalties upon conviction. Those penalties include a fine not exceeding \$100,000.00, a term of imprisonment for not more than 18 months, or both.

[71] The 2005 EFSI pilot project in Surrey was conducted pursuant to the **SSA** before it was amended. A convenient summary of the mechanics of EFSI Team inspections conducted during the pilot is found at pp. 21-22 of Chief Garis's report:

1. The RCMP submit suitable tips to the EFSI team for investigation. (These were primarily older tips that appeared to be either low-level operations or lacked sufficient evidence to make a good case.)
2. Team members do a drive-by of the addresses to note the size and age of the home and other potential power uses, such as a pool. Security issues are noted and license plates on the vehicles are run to determine if the owner has a history of violence or drugs, as a safety precaution for the team.
3. The police members on the EFSI team submit Freedom of Information (FOI) requests to BC Hydro for the electricity consumption of houses believed to be grow operations. Hydro's Freedom of Information Coordinating Office processes these requests on a case-by-case basis and discloses or withholds requested information in accordance with the FOIPP act.
4. Hydro's security department – Accenture Business Services for Utilities – reviews locations approved for suspected theft. Sites with suspected bypasses – denoting electricity theft – are forwarded to police.
5. Once information has been obtained from BC Hydro's FOI office, the sites are researched by the EFSI clerk for city information including building permits, floor plans, aerial photos, inspection documents, bylaw complaints and dog licences.

6. The EFSI team then approaches the properties. If the occupants respond to the knock on the door, they are asked for permission to enter and conduct an electrical inspection, or are given the option of setting up an appointment within 48 hours. If there is no response to the knock – the most common result – three notices are posted on the property requiring the occupant to call for an electrical inspection within 48 hours or the power will be disconnected. Notices are also couriered to the property owner and resident.
7. If no appointment is made, the team returns in 48 hours, knocks on the door, and turns off the power if there is no response. In most cases, however, an appointment is made within the required timeframe and the inspection takes place. After the team arrives on the site, the police officers secure the premises first. While the occupants wait outside, the electrical official inspects the house, almost always finding cause for a disconnection due to electrical code violations. If children are present, the Ministry of Children and Family Development is contacted.
8. The file is then turned over to the city's electrical department, which follows up with the permitting/reconnection process.

[72] I note that in his cross-examination, Chief Garis testified that sub-paragraph 6 does not reflect what actually happened; even if the occupant was at home when the Team first arrived, the policy was to schedule the inspection for a later date.

[73] From a division of powers perspective, it is important when analyzing the impugned provisions of the **SSA** to bear in mind that the entirety of the process outlined above was possible under the pre-existing regime. While it may be that the amendments facilitated the EFSI inspection process, care must be taken not to attribute purposes or effects to the amended **SSA** that could also have been attributed to the **SSA** prior to the amendments. That **Act**, it must be recalled, is conceded to have been within provincial competence.

[74] Thus, for instance, the petitioners' submission that the **SSA** is criminal law because it essentially couples a prohibition on grow operations with a penalty blurs this distinction. The purported penalties they point to are the disconnection of electricity, the seizure of marijuana plants and growing equipment discovered during inspections, and the provisions in the legislation that render failure to comply with a compliance order an offence and provide for penalties. Leaving aside the merits of this submission, nothing in the amendments altered the **SSA** as it relates to these matters, and a challenge to the constitutionality of the present **Act** on this particular basis is therefore misplaced.

[75] I add that I would not have acceded to this submission in any event. The disconnection of electrical power as provided for in s. 38 of the **SSA** is a measure intended to enforce the safety objectives of the **Act**. Similarly, the provisions which attach penalties to failure to comply with a compliance order exist to ensure compliance with the **Act's** regulatory scheme. The evidence is that any seizures of marijuana plants and growing equipment were made by the police members of the EFSI Team, not safety officers performing functions under the **SSA**. They were, accordingly, made independently of the **SSA**. While that may have implications for the **Charter** questions raised on this petition, it does not make the regulatory legislation criminal law.

[76] The **Safety Standards Amendment Act, 2006** was introduced for First Reading on April 6, 2006, passed Second Reading on May 3, 2006, and Third Reading on May 8, 2006. It received Royal Assent on May 18, 2006, and was

brought into force on June 23, 2006. That **Act** added ss. 19.1 – 19.4 to the **SSA**. Those provisions have been referred to earlier.

[77] Section 3.1 of the **Electrical Safety Regulation** sets the threshold level of electricity consumption for the purposes of the definition of “residential electricity information” at 93 kWh per day or more, averaged over one billing cycle. With respect to the reason for the threshold being set at this level, Section Notes drafted with respect to the **SSA** amendments indicate that a technical committee with representation from the British Columbia Safety Authority, B.C. Hydro, Fortis, B.C. and Surrey determined that consumption at this level during the summer months was a reasonable indicator of the possibility of a grow operation in a residence. It was the evidence of Capt. McKibbon that average normal electricity consumption for a typical house is 33 kWh, which put the threshold at three times the average. He conceded in cross-examination, however, that he did not know how the 33 kWh figure was arrived at.

[78] What, then, were the primary legal effects of the amendments? Firstly, they provided local governments with the authority to request and receive from electricity distributors residential electricity consumption records for residences exceeding the prescribed consumption level. Secondly, they permitted local governments to disclose this information to the police. Thirdly, to the extent that there may have been uncertainty as to whether “premises” included residential premises for the purposes of s. 18 of the **SSA**, the amendments confirmed 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.

[79] The petitioners submit that s. 19.3 introduced a further change by deeming the receipt of account information “reasonable grounds” for the purposes of s. 18. Surrey appears to similarly interpret the provision, as it states at para. 68 of its written submissions that “electrical consumption in excess of the Threshold constitutes reasonable ground to inspect.”

[80] Section 19.3(1) reads:

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.

[81] Sections 18(1)(c) and (d), in turn, provide:

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;

...

[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.

[86] If these were the legal effects of the amendments to the **SSA**, what was their purpose? As the **Safety Standards Amendment Act, 2006** itself provides no specific indication of legislative purpose, it is necessary to look further afield.

[87] The evidence reviewed in detail earlier indicates that the EFSI approach to addressing grow operations was at its core a safety initiative. It is not without relevance that one of its chief advocates was the Fire Chief for Surrey. The information he gathered and presented to the provincial government on behalf of the FCABC focused on the dangers to emergency responders and to the public posed by the electrical and fire hazards associated with grow operations. Various government ministries were represented in the task force that was subsequently organized to consider, among other things, how existing electrical safety legislation could be used to address the hazards inherent in grow operations. The province was a partner in the EFSI pilot, which sought to do that through strict enforcement of the **SSA**.

[88] From the outset, the lack of proactive disclosure of electrical consumption information had been considered a barrier to optimizing the EFSI approach. In February 2006, some months after the initial three month pilot, Chief Garis submitted to the Minister of Public Safety and Solicitor General that legislative changes in that regard were required to improve the efficacy of the administrative approach in disabling grow operations. The amendments to the **SSA** quite obviously resolved this concern.

[89] When introducing the **Safety Standards Amendment Act, 2006** for First Reading, John Les, Minister of Public Safety and Solicitor General, had this to say:

Bill 25 proposes an amendment to the Safety Standards Act. This amendment will help local authorities target and shut down marijuana grow operations more quickly and more efficiently. Grow ops are a rising concern in British Columbia. They are more likely to catch fire,

they are more likely to have guns inside, they are more likely to be robbed, they pose a danger to our neighbourhoods, and we're determined to shut them down.

Members may recall that just two days ago there was an explosion in a residential area in Vancouver. It turned out that it was a grow operation, and the explosion actually damaged neighbouring properties significantly.

With these amendments, municipalities will now be able to obtain information from electricity companies about residences with unusual power consumption. The names and addresses of the account-holders will be given to local authorities so that they can target grow-op houses.

We believe that British Columbians have a right to feel safe in their homes and in their neighbourhoods. This proposed amendment will help give people that peace of mind.

[90] On Second Reading, Rich Coleman, Minister of Forests and Range, the ministry with responsibility for the **SSA**, said, in part, the following:

Bill 25 proposes an amendment to the Safety Standards Act of British Columbia that will help shut down marijuana grow operations in residential areas. We know that in Canada marijuana and cannabis cultivation, otherwise known as marijuana grow ops, has more than doubled over the past decade. We know that these grow operations, particularly if they are located in residential areas, pose a real problem for police and other safety personnel and local governments.

The amendment to this act is developed in partnership with the Minister of Public Safety and Solicitor General, who will help address these problems. Crime and violence are associated with grow ops. Organized crime is a big player in grow ops. Marijuana that comes out of grow ops is often laced with other chemicals like crystal meth and put into the system to destroy the lives of our citizens and injure our children.

There are other safety issues, as well, other than just the drug. There is the theft of over \$50 million worth of power from B.C. Hydro. There is the abject lack of any concern about the health issues with regard to children living in grow ops by some people who have them. The bypassing of power and the electrical things that are done can put some significant stress on our systems. Unsafe electrical installations done without permission under the Safety Standards Act can and do

cause major fires in residential grow operations. Fires caused by grow ops have a greater risk of growing out of control and threatening neighbouring properties. Many grow ops are discovered as a result of fires. By making it easier to target and shut down grow ops, we reduce the risk to our communities.

It is estimated that there are 20,000 marijuana grow ops in British Columbia this year. Three-quarters of those operations are in houses or apartments. Grow ops are breeding grounds for mould, fungus and explosive chemicals. They require the use of high-wattage hydroponic growing equipment. It is dangerous for adults and children who live in them, and dangerous for emergency responders who enter. Grow-op houses are more likely to house guns and more likely to be robbed than other residential properties.

[91] Minister Coleman went on to specifically refer to the EFSI pilot in Surrey:

The city of Surrey conducted a pilot project last year that identified the needs for these amendments. That pilot project was funded in conjunction with our Ministry of Public Safety and Solicitor General. This initiative launched electrical safety inspections to address the misuse of electricity found occurring in residential growing operations. In three months 119 grow ops were dismantled, and 94 percent of the locations had significant electrical safety violations. But most disturbingly, there were 49 children living in these homes. This pilot project gives us an idea of why the proposed legislation is needed.

With this legislation, local governments will be able to obtain suspicious-account information from hydro companies. This will allow for inspection teams to visit these homes to look for any unsafe electrical installations. If a grow operation is discovered, the power can be shut off. More importantly, we will rid our neighbourhoods of these dangerous operations. With power prices continuously rising, the unregulated use of power affects us all.

It is estimated that grow op-related electrical thefts are in excess of \$12 million a year. In response, B.C. Hydro is allocating more staff to identify and deal with any accounts that may steal power and is planning to allocate more staff in order to handle the increased information requests as a result of this proposed legislation.

To protect the privacy of our citizens, we're taking steps to ensure that the information collected is only shown to the authorities that need to see it. Every measure has been taken to ensure that those abiding by

the law will not be affected. We will protect privacy, and we'll shut down these grow ops.

British Columbia has had the highest rate of drug crimes among the provinces for the past two decades. British Columbians have the right to feel safe. They have the right to feel safe in their homes and their neighbourhoods, and they have a right to think that their governments will stand up when a solution can be found to a problem. These changes will help with that problem.

In this province, grow ops are a scourge. They lead to other multiple levels of crime and issues for law enforcement communities. In a number of our communities we have issues of homicides that are directly related to the drug trade in British Columbia. We have gang violence. We find more guns in grow ops than anywhere else in our crime scenes.

We are dealing with something that is only doing one thing: fuelling the pockets of organized crime at the expense of our children. It is time that we did some things that we can do provincially to send a message not just in British Columbia but to the rest of the country. The leadership needs to be taken on these issues to protect our communities.

Madam Speaker, I am proud of this piece of legislation with the amendments to the Safety Standards Act. I believe it's an important little piece of the puzzle, another tool in the toolkit for law enforcement and for communities to protect our children and our families.

[92] On the basis of the impetus driving the amendments to the **SSA**, their legislative effect and the totality of the Ministers' comments, I find that the essential character of the impugned provisions is directed at facilitating the identification and inspection of grow operations in the interests of public safety. While ameliorating the fire and related risks arising from unsafe electrical installations was certainly a core objective driving the province's interest in this regard, I am not persuaded that it was the only one. It is apparent from the Ministers' comments that reducing the associated health and physical hazards, and mitigating the social harms related to marijuana cultivation, such as crime and violence, were also objectives the

government sought to pursue by facilitating the EFSI approach to grow operations. Although I do not find that the dominant purpose of the amendments was exclusively electrical safety, I am, nevertheless, satisfied that public safety was. I consider any criminal enforcement aspects, such as the freeing up of police resources, to be ancillary and incidental to the public safety objective of the legislation.

[93] The petitioners submit that increased reliance on electrical bypasses is a foreseeable consequence of the amendments, and that this detracts from their purported electrical safety rationale. They emphasize that grow operations with bypasses pose a greater fire risk, a point that was admitted by Dr. Plecas. In my view, whether or not the amendments have this effect, electricity distributors have the means to detect bypasses, as well as statutory and contractual rights to inspect premises and disconnect power as appropriate. More importantly, however, the wisdom or efficaciousness of legislation is not a factor relevant to the division of powers analysis. In ***Reference re: Firearms Act***, the Court explained as follows at para. 18:

The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: *Morgentaler, supra*, at pp. 487-88, and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

[94] This principle that the efficaciousness of legislation is not relevant to the Court's division of power analysis is also the answer to the petitioners' submission that if the province's objective was truly electrical safety, its focus would have been on rendering grow operations safe rather than shutting them down. To do the former would, of course, be to condone a criminal offence. Shutting down a grow operation is certainly one way of rendering it safe, and, in any event, it is not for me to question the wisdom of this approach in considering the constitutionality of the **SSA**.

[95] The petitioners also argue that the statistics upon which the province relied, namely, those in the reports of Dr. Plecas, do not support the legislation. They say that Dr. Plecas's claim that houses with grow operations are 24 times more likely to catch fire than those without is based on a statistical analysis that was biased and manipulated in order to exaggerate the actual fire risk associated with grow operations. Dr. Plecas admitted on cross-examination that if a number of assumptions were injected into his analysis, that figure could be considerably lower.

[96] Again, the reliability of the data upon which the province may have relied is not a matter for this Court. As L'Heureux-Dube J., for the Court, wrote in **R. v.**

Levogiannis, [1993] 4 S.C.R. 475 at pp. 487-488, 67 O.A.C. 321:

Parliament, on the other hand, is free to enact or amend legislation in order to reflect its policies and priorities, taking into account societal values which it considers important at a given time. It is clear that, in enacting s. 486(2.1) of the *Criminal Code*, Parliament was well aware of the plight of young victims of sexual abuse, as well as the need to curtail such abuse. This is perfectly legitimate. The only limit placed on Parliament is the obligation to respect the *Charter* rights of those affected by such legislation.

[97] The same reasoning applies to the right of the legislature to enact the legislation at issue in the present case.

[98] Finding, as I do, that the impugned provisions relate in pith and substance to public safety, it then becomes necessary to determine whether that purpose falls within the legislative competence of the province. I am satisfied that it does, and that s. 92(13) of the **Constitution Act, 1867** confers the relevant legislative authority.

[99] I would add that even to the extent that deterring and shutting down grow operations to reduce the criminal activity associated with marijuana cultivation was a provincial objective, that, too, is a valid provincial purpose. The jurisprudence recognizes a concurrent authority between the federal government and the province with respect to the suppression of conditions giving rise to crime and the prevention of crime, so long as the provincial legislation can be classified as in relation to a matter within provincial competence: **Bédard v. Dawson**, [1923] S.C.R. 681, (*sub nom. Bédard v. Dawson and Attorney General for Quebec*) [1923] 4 D.L.R. 293 [**Bédard**]; **Di Iorio v. Warden of the Montreal Jail**, [1978] 1 S.C.R. 152, (*sub nom. Di Iorio v. Warden, Jail of Montreal and Brunet*) 73 D.L.R. (3d) 491 [**Di Iorio**]; **Attorney General (Can.) v. City of Montreal et al.**, [1978] 2 S.C.R. 770, (*sub nom. Attorney-General of Canada et al. v. Dupond et al.*) 84 D.L.R. (3d) 420 [**Canada (A.G.)**].

[100] In **Bédard**, for example, provincial legislation authorizing the closing of disorderly houses, which were defined in part by reference to the **Criminal Code**,

was upheld as valid provincial legislation in relation to property. Idington J. referred at 684 of the S.C.R. to “the duty of the legislature to do the utmost it can within its power to anticipate and remove, so far as practicable, whatever is likely to tend to produce crime.” Similarly, Duff J. wrote at 684 of the S.C.R., “the legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate.”

[101] In **Canada (A.G.)**, Beetz J., for a majority of the Court, upheld a municipal bylaw imposing a temporary prohibition on assemblies, gathering and parades. He cited **Bédard** and **Di Iorio** for the proposition that the suppression of conditions likely to favour the commission of crimes falls within provincial competence, and held that the bylaw was a valid regulation of the municipal public domain. He characterized the bylaw as a preventative measure, the purpose and effect of which was the prevention of conditions conducive to breaches of the peace and detrimental to the administration of justice.

[102] Thus, provincial legislation addressed at reducing activities that are also subject to penalties under criminal law may be constitutionally valid so long as enacted pursuant to a head of power enumerated in s. 92 of the **Constitution Act, 1867**. In the present case, s. 92(13) is the relevant head of power.

[103] For the foregoing reasons, I conclude that the impugned provisions are *intra vires* the legislative competence of the province, and are not a colourable exercise of the federal criminal law power.

iii. Do the impugned provisions relate to criminal investigative procedure?

[104] As noted, the BCCLA's division of powers concern lies with the information sharing provision of the **SSA**, s. 19.2(3), which permits a local government to disclose account information derived from residential electricity information to the police. Citing **R. v. Colarusso**, [1994] 1 S.C.R. 20, 110 D.L.R. (4th) 297

[**Colarusso**], the BCCLA submits that it is not constitutionally permissible for the province to enact legislation to assist in a criminal investigation. The BCCLA also contends that the definitions of "account information" and "electricity consumption data" in s. 19.1 are so expansive as to be in pith and substance related to criminal investigative procedure. The submission, as I understand it, is that the extent of the information that BC Hydro provides to a municipality under the **SSA** exceeds what is necessary for the purposes of the inspection regime; the fact that that information may then be disclosed to the police indicates that the purpose of the impugned provisions is to assist criminal investigations.

[105] I will address the second of these submissions first as it can be disposed of most easily.

[106] "Account information" is defined in s. 19.1 as the name and address of the account holder, and the electricity consumption data for the associated residence. "Electricity consumption data", in turn, refers to the electricity consumption data for the most recent billing period and the previous 24-month billing period. As the Attorney General points out, correctly, in my view, it is reasonable that an inspection regime that requires notice of an inspection to be provided to the owner or occupant

also authorize the provision of the name of the account holder and the service/billing address. As well, I consider the definition of “electricity consumption data” to be reasonable in the context of the inspection scheme, given the evidence of Capt. McKibbon that it is the pattern of electricity usage that is important. Indeed, I note his evidence that after the initial unsuccessful attempt to inspect the petitioners’ house in 2005, Surrey did not proceed further since it had limited consumption records that showed one high reading as opposed to a history of high consumption.

[107] The Union of B.C. Municipalities distributes on its website a document entitled “Residential Electrical Safety Tools User Guidelines” which provides some guidance to municipalities in employing the **SSA** to carry out an effective safety inspection program. The Steering Committee which produced the documents comprised a number of municipalities, BC Hydro, the British Columbia Safety Authority, the Ministry of Public Safety and Solicitor General, the Office of Housing and Construction Standards, and the RCMP. At p. 6, it stressed the importance of a pattern of electricity consumption:

There are a number of legitimate uses of electricity which could contribute to residential consumption at or above 93 kWh per day. In the winter months, BC Hydro estimates that 60,000 – 100,000 customers with electric space heat (or supplemental electric space heat) would use in excess of 93 kWh per day. In the summer months, however, these customers should return to normal consumption levels. For this reason, it is important that municipalities and safety officials consider the full 24 months of account data with a focus on identifying high consumption which persists throughout the year to screen out locations that may in fact have electric heat.

[Emphasis in original]

[108] Accordingly, I find the two impugned definitions to be entirely consistent with the public safety objectives of the **SSA** amendments.

[109] I similarly consider s. 19.2(3) to be consistent with those same objectives.

The Section Notes regarding the amendments to the **SSA** provide the following explanation with respect to that particular provision:

- The local government may share the account information with the police. This is necessary so that the police can ensure that such inspections will not hinder ongoing criminal investigations, and to ensure that it will be safe for the safety inspection team to conduct an inspection. If there is an ongoing criminal investigation, no inspection would be initiated. As electricity consumption exceeding a prescribed level in residential properties could be due to the presence of grow-ops, inspections may pose personal safety risks for the safety officers. To safeguard against these risks, the police will check for any connection of name or address to criminal activity.
- There is no intent to provide the police with the account information for the purpose of assisting criminal investigations. However, once the police obtain the account information they may use it for legitimate police purposes, as such purposes are set out in the governing legislation of the police force.

[110] I accept that the purpose of s. 19.2(3) is to ensure that **SSA** inspections do not interfere with ongoing criminal investigations and to protect the safety of inspection personnel. As such, it is part of the scheme embodied in the **SSA** amendments, which I have already concluded is within provincial competence as legislation aimed at improving public safety.

[111] 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. As a matter of practice, it appears this is what occurs. When s. 19.2(3)(b) was put to Capt. McKibbon in cross-examination, he indicated that the EFSI Team had never exercised that particular power. He explained that when the Team contacts the police for “deconfliction” purposes prior to an inspection, it simply provides the police with the address of the residence, not the electricity consumption data.

[112] I observe that Chief Garis’s evidence on this point was different. He agreed when it was suggested to him that Hydro information was “routinely” provided to the police. Nevertheless, Capt. McKibbon has been the coordinator of Surrey’s EFSI Team for the past one and one half years, and is likely to have greater knowledge of the specific procedures of the Team. For this reason, I prefer Capt. McKibbon’s evidence on this point.

[113] Matters of practice aside, the Supreme Court of Canada has held that a consumer of electricity has no reasonable expectation of privacy with respect to electrical consumption records: **R. v. Plant**, [1993] 3 S.C.R. 281, 145 A.R. 104 [**Plant**]. The disclosure of such information to the police in the present context, therefore, does not raise the same concerns that disclosure of other types of information might.

[114] The BCCLA cites **Colarusso** in support of its position. One of the questions before the Court in that case was whether certain sections of Ontario’s **Coroners Act** encroached upon the federal criminal law power. Although the case was disposed of on **Charter** grounds, the majority saw fit to outline some of its concerns

about the investigative powers given to coroners under the **Act** with a view to providing some guidance. Section 16(5) of the **Act** required a coroner who seized evidence in furtherance of his or her investigation to place that evidence in the custody of a police officer for safekeeping. In finding this to be problematic, La Forest J., for the majority, wrote as follows at 70 – 71 of the S.C.R.:

The most troublesome element of the investigative powers in s. 16 of the *Coroners Act* is that, beyond providing the potential for complicity between a coroner and the police in a situation where criminal charges may be laid, s. 16(5) actually requires complicity. Under s. 16(5), a coroner who seizes any evidence in furtherance of his or her investigation is compelled, in the absence of legislation to the contrary, to place the evidence in the custody of a police officer for safekeeping. In many situations, this evidence may ultimately incriminate a defendant. As such, the coroner is assisting the police investigation into a potential crime by gathering the evidence and placing it into police custody. Often, the police will be in a better situation where the coroner seizes evidence because the coroner's power of search and seizure is restricted only by the pre-requisite that the coroner believes on reasonable and probable grounds that such action is necessary for the purpose of his or her investigation, whereas a police officer must generally comply with the prior authorization requirements of *Hunter, supra*, which can only be met if an independent arbiter is satisfied on reasonable and probable grounds that an offence has been committed and that a search may afford evidence of that offence. In effect, the coroner can easily find himself or herself in the position of assisting the criminal investigation merely by complying with the mandatory elements of s. 16(5) of the *Coroners Act*.

This cannot be allowed. We permit the coroner to seize without complying with the *Hunter* standards because he or she does so for a purpose that is unrelated to a criminal investigation.

[115] La Forest J. considered that the dependency of the coroner on the police during the investigative stage brought this provision, in addition to others, dangerously close to the boundary of criminal law.

[116] In contrast to the provisions in question in **Colarusso**, s. 19.2(3) of the **SSA** does not compel the disclosure of residential electricity information to the police; it simply authorizes such disclosure. Moreover, the information that is authorized to be disclosed is not information regarding which a reasonable expectation of privacy attaches, again, in contrast to **Colarusso**.

[117] For these reasons, I do not accede to the BCCLA's submission that certain provisions in the impugned amendments to the **SSA** are impermissibly geared toward criminal investigative procedure.

[118] I turn now to address the **Charter** issues raised on this petition.

3. **The Charter**

a. **Positions of the Parties**

[119] The petitioners submit that the **SSA** authorizes both the search of private residences (inspections pursuant to s. 18) and seizures (the disconnection of electrical power) without a warrant in circumstances that are not exigent, and the legislation is therefore contrary to s. 8 of the **Charter**. Although they acknowledge that the judicial authorities mandate a different standard of reasonableness for regulatory, as opposed to criminal, searches, they say that inspections under the **SSA** are not regulatory searches. They point to the focus of the inspections on investigating criminal drug operations, the stated need for a police presence due to the apprehension of criminal danger, and the possibility of criminal consequences

arising from the inspections, which they say imbue the inspections with criminal law considerations that remove them from a purely regulatory context.

[120] It is the position of the petitioners that the full rigours of *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [*Hunter v. Southam*], should apply to an inspection under the **SSA**, such that prior authorization by a neutral arbiter based on reasonable and probable grounds that a safety hazard exists ought to be required. It is not necessary that the authorization process rise to criminal law standards; an administrative warrant obtained under s. 275 of the *Community Charter*, S.B.C. 2003, c. 26, would be sufficient in this regard. However, by failing to require any prior authorization at all, the petitioners say that the **SSA** is contrary to s. 8 of the *Charter*.

[121] In the alternative on this point, the petitioners say that even if a warrant is not necessary, the **SSA** allows for an unreasonable search because of its failure to specify in detail when an inspection can be demanded on safety grounds. The petitioners interpret ss. 19.3 and 18 in combination as permitting a safety officer to treat high electrical consumption as a basis for having “reasonable grounds ... to investigate an incident”. As there is nothing in the evidence to suggest that the electricity consumption threshold established by regulation is dangerous, consumption exceeding that level cannot provide reasonable grounds for a safety officer to believe that a fire risk exists. The petitioners submit that, at a minimum, the **SSA** should set out detailed conditions of the sort that would be required to obtain a criminal or administrative warrant before an inspection can be demanded.

[122] The petitioners also challenge Surrey’s policy of requiring the presence of police officers at EFSI inspections. As nothing in the **SSA** explicitly or impliedly authorizes police entry into a residence targeted for inspection, the **Act** does not authorize the disconnection of electrical power on the basis that occupants refuse the police entry. The petitioners contend that if the **SSA** is to be construed to permit for police entry, then it is contrary to s. 7 and s. 8 of the **Charter** and is not justified under s. 1.

[123] With respect to Surrey’s submission that police are entitled to enter a residence pursuant to their common law duty to keep the peace, the petitioners respond that the exercise of common law police powers is subject to constitutional constraints, and that any such power to keep the peace cannot be the basis for the disconnection of electrical power when police are denied entry into a residence in circumstances where the peace is not “broken”.

[124] Finally, the petitioners submit that by failing to clearly specify the reasonable grounds upon which an inspection can occur or the way in which the decision to inspect can be made, the **SSA** deprives the occupant of security of the person in a vague or arbitrary manner, contrary to s. 7 of the **Charter**.

[125] The BCCLA similarly contends that s. 18(1)(c), insofar as it might be interpreted to permit entry into a residence, is presumptively unreasonable under the **Charter**. It submits that s. 19.3, s. 19.4 and the definition of “residence” in s. 19.1 are likewise presumptively unreasonable. The basis for entry – the safety officer’s belief in “reasonable grounds” – falls short of the “reasonable and probable grounds”

standard that is widely applied in like circumstances. Even though the provisions may contemplate the consent of the occupier, because of the coercive power of a compliance order and the associated penal sanctions for failure to comply, the impugned provisions must be assessed as if they authorize entry.

[126] The BCCLA submits that there is no statutory authority in the **SSA** for a police officer to accompany a safety officer conducting an inspection pursuant to the legislation. Moreover, there is no basis in common law for an officer to “tag along” on an administrative search, particularly one that does not contemplate prior authorization. The BCCLA says that it would be bootstrapping in the extreme to permit the police to avoid the constitutional requirement for a warrant by acknowledging the existence of such a power at common law.

[127] The thrust of the Attorney General’s position is that administrative inspections under the **SSA** are subject to a different standard of reasonableness than are police searches in criminal contexts. Moreover, “reasonableness”, it says, is built into the legislative regime pursuant to which such inspections are conducted. The powers of a municipally-appointed safety officer under the **SSA** are circumscribed by s. 16 of the **Community Charter**, which impose certain procedural constraints, such as a minimum of 24 hours notice, reasons for entry, and entry at a reasonable time and in a reasonable manner. Reasonableness is also built into the **SSA** itself, as s. 19.3 requires the safety officer to permit a reasonable time for an inspection to be arranged before further action is taken. The Attorney General submits that while the Court may find that the administrative policies adopted by Surrey fail to meet the

constitutional requirements of the **Charter**, the **SSA** itself is not unconstitutional as nothing in it authorizes an unreasonable search.

[128] Surrey takes a similar position, submitting that the present case does not turn on the constitutionality of the **SSA** but, rather, on the reasonableness of the City's operational safety requirement that the EFSI Team include RCMP officers. It says that the police role is limited to preserving the peace, and that such a measure is reasonable, and, accordingly, consistent with s. 8 of the **Charter**. If the petitioners succeed in establishing a breach of s. 8, then the operational requirement is a reasonable limit in accordance with s. 1 of the **Charter**.

[129] In a slightly different vein, BC Hydro contends that s. 8 of the **Charter** is not engaged. On the basis of **Plant**, it says that a consumer of electricity has no reasonable expectation of privacy in electrical consumption records. Further, the terms of the BC Hydro Electric Tariff (the "Electrical Tariff") make it clear that BC Hydro customers receive electrical service on the basis that the manner in which they use that service will be inspected from time to time under the Electrical Tariff. Accordingly, they have no expectation of privacy in connection with the manner in which they use BC Hydro's electrical service, and s. 8 of the **Charter** is not engaged.

[130] BC Hydro also submits that, in any event, the fact that the **SSA** permits warrantless entry into residences in order to fulfil its objectives does not render the resulting inspection unconstitutional. The searches are of an administrative or regulatory nature, and such searches have been held not to violate s. 8. Whether or not inspectors are expecting to discover a grow operation, the inspection authorized

under the **SSA** is concerned with potential safety issues involving regulated products and works. As well, the search is minimally invasive, in that it must be conducted in compliance with the requirements of the **SSA** in terms of reasonableness.

b. Analysis

i. Is the SSA contrary to s. 8 of the Charter?

[131] Section 8 of the **Charter** guarantees the right to be secure against unreasonable search or seizure. A warrantless search is *prima facie* unreasonable, thus shifting the burden to the Crown to demonstrate that the search was reasonable: **Hunter v. Southam**. A search will be reasonable if: (1) it is authorized by law; (2) the law itself is reasonable; and (3) the manner in which the search was carried out is reasonable: **R. v. Collins**, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508 [**Collins**].

[132] Authority for an electrical safety officer to conduct an inspection is provided by s. 18(1) of the **SSA**. Subsection (c) states that, if satisfied that there are reasonable grounds to do so, a safety officer may “enter any premises at any reasonable time” for the purpose of an inspection. “Premises” are defined in the **Act** as “land, a building or a structure in, on or under which a regulated product is located or where regulated work is done”. For the purposes of the **Act**, electrical equipment is a “regulated product”, and related services, such as installation, operation and maintenance, constitute “regulated work”.

[133] In my view, this definition of “premises” is sufficiently broad to include residential premises. Where high electricity consumption is the basis for an inspection, s. 19.3 puts to rest 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.

[134] Section 18(1)(c) does not require notice of an inspection; it requires only that it be conducted at a reasonable time. Where the inspection is of a residence and is based on account information, s. 19.3 imposes certain notice requirements. The notice must: (1) be in writing; (2) state the safety officer’s intention to enter the residence to conduct an inspection and the reasons for the inspection; (3) set out the date by which the occupant must reply to the notice to arrange the inspection; (4) set out how to reply to the notice; and (5) indicate that the safety officer may issue a compliance order if the owner or occupant fails to reply to the notice within two days of the date it was received, complete the arrangements within a reasonable time or allow the safety officer to enter the residence at the arranged time.

[135] Although these provisions contemplate the consent of the owner or occupier prior to entry into a residence, as previously noted, failure to comply with a compliance order is an offence to which penal sanctions may attach. In my view, this adds a sufficient coercive element that it is appropriate to assess the authorizing provisions as if they authorize entry *per se*.

[136] The **SSA** does not provide for prior authorization for an inspection by an independent arbiter. The basis for an inspection is a safety officer’s belief that

reasonable grounds exist. The question is whether this inspection regime is reasonable.

[137] The *Hunter v. Southam* criteria for a reasonable search are prior authorization by a judicial officer on reasonable and probable grounds. While this standard continues to prevail with respect to searches conducted in furtherance of law enforcement objectives, a less strenuous standard of reasonableness has been held to apply where the state seeks to advance interests other than law enforcement in conducting a search, such as those of a regulatory or administrative nature:

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161 [*Thomson Newspapers*]; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568; *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406, (*sub nom. R. v. Potash*) 115 D.L.R. (4th) 702 [*Comité paritaire*]. As La Forest J. explained in *Thomson Newspapers*, a decision involving a *Charter* challenge to provisions of the *Combines Investigation Act* authorizing the forced production of documents, participation in a regulated activity diminishes expectations of privacy (at 507 of the S.C.R.):

It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity.

[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.

[139] The **SSA** creates a comprehensive regulatory regime with respect to inherently dangerous products and systems, including electrical power. The **Act** seeks to achieve compliance with that regime in part by inspection of regulated work and products where reasonable grounds for such inspection exists.

[140] The petitioners argue that an inspection under the **SSA** differs from a purely regulatory search in that it is conducted with a view to discovering a breach of the **Criminal Code**. I would point out, however, that regardless of whether that may be the case, the grounds, scope and potential consequences of an electrical safety inspection are governed by the provisions of the **SSA**, not the **Criminal Code**.

[141] The province's interest in monitoring compliance with the **SSA** must be balanced against the singular fact that the **Act** authorizes inspection of private residences. The authorities speak, without exception, of the very high expectation of privacy that attaches to a private dwelling: see **R. v. Tessling**, 2004 SCC 67, [2004]

3 S.C.R. 432 at para. 22 and the cases cited therein. As Cory J. wrote in *R. v. Silveira*, [1995] 2 S.C.R. 297, 23 O.R. (3d) 256 at para. 140, “there is no place on earth where persons can have a greater expectation of privacy than within their ‘dwelling-house’”.

[142] While acknowledging the heightened expectation of privacy that attaches to a residence, BC Hydro submits that an important contextual factor diminishing that expectation in the present circumstances is the fact that BC Hydro customers receive electrical power from BC Hydro in accordance with the Electrical Tariff. The Electrical Tariff is approved by the British Columbia Utilities Commission and is enacted under the regulatory power of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473. The relationship between BC Hydro and its customers is contractual, and its terms are dictated by the Electrical Tariff. Among its terms are the following:

Use of Electricity

A Customer shall use electricity only for the purposes permitted under the availability clause of the rate schedule for which application is or was made.

Electrical Load

Unless otherwise specified in a service agreement, a Customer shall not increase the electrical load installed in the Customer’s Premises by more than 15 kW or 20 percent, whichever is greater, without advising BC Hydro in advance and receiving BC Hydro’s approval.

Refusal to Provide Service and Discontinuance of Service

The Authority may refuse to provide service or may discontinue without notice service to any customer who:

1. failed to pay for service at any or all premises, or
2. breached the terms and conditions upon which service is provided by the Authority, or

3. refused to provide reference information and identification acceptable to the Authority, when applying for service or at any subsequent time on request by the Authority, or
4. occupies the premises with another occupant who has an outstanding account incurred for service while occupying any premises at the same time as the customer.

...

The Authority shall not be liable for any loss, injury or damage suffered by any customer by reason of the discontinuation of or refusal to provide service as aforesaid.

Termination of Service

...

BC Hydro reserves the right to suspend or terminate service at any time to prevent fraudulent use of electricity, to protect its property, or to protect its service to other Customers, or if the Customer fails to comply with the terms of its service agreement, or if BC Hydro is ordered by a competent government authority to suspend or terminate such service.

Access to Premises

The Authority's agents and employees shall have, at all reasonable times, free access to the equipment supplied with electricity and to the Authority's meters and apparatus and the wires leading therefrom on the customer's premises to ascertain the quantity or method of use of service.

[143] BC Hydro submits that customers are supplied with electrical service on the basis that the manner in which they use that service will be inspected from time to time under the Electrical Tariff. By applying for electrical service, customers expressly consent to those terms. Accordingly, BC Hydro says, there can be no reasonable expectation of privacy on the part of customers, and s. 8 is not engaged.

[144] It is not accurate, in my view, to say that the **Charter** is not engaged in these circumstances. While it may be that the Electrical Tariff circumscribes customers'

expectations of privacy such that inspections conducted pursuant to its terms may not contravene s. 8, the Electrical Tariff does provide authority for crown corporation employees to enter onto customers' premises, and it is therefore subject to **Charter** scrutiny.

[145] A number of authorities in this province have considered the right of electrical utility employees to enter onto property pursuant to the access provision in the Electrical Tariff reproduced above, including **HMTQ v. Bourque**, 2001 BCSC 621 [**Bourque**], and **R. v. Benham**, 2003 BCCA 341, 184 B.C.A.C. 29 [**Benham**]. In **Bourque**, for example, a BC Hydro electrical contractor attended at the accused's property to change the meter and noticed an irregularity which suggested an electrical bypass. As a result, another BC Hydro employee attended to measure the current flow, which involved taking measurements from two conductors and a meter. The equipment was owed by BC Hydro and was located on the outside wall of the accused's house. The measurements indicated that a theft of electricity was occurring at the premises, and this information was reported to the police who obtained a search warrant. The resulting search revealed evidence of both an electrical theft and a grow operation. The accused argued that the search violated s. 8 of the **Charter** on a number of bases, one of which was that the access provision in the Electrical Tariff was unconstitutional insofar as it permitted entry onto a customer's private property to investigate the criminal offence of electrical theft without the safeguards of **Hunter v. Southam**.

[146] Neilson J. (as she then was) upheld the Electrical Tariff and held that the search warrant was validly obtained. She found that there was a diminished

expectation of privacy with respect to the entry of BC Hydro employees onto customer property, and that the failure of the access provision to meet the standards of *Hunter v. Southam* did not render it unconstitutional. Her reasoning, in part, was as follows at paras. 88-89:

... However, *Hunter v. Southam* is clear that the key question in deciding whether legislation violates s. 8 of the *Charter* will be whether there was a reasonable expectation of privacy in the given situation. The Court of Appeal in *Hutchings*, and the decisions of this court which have followed that judgment, have found that B.C. Hydro customers have a lower expectation of privacy by virtue of the regulatory scheme to which they have agreed, which includes the provisions of the Tariff.

In my view, there is an ample basis to support a similar conclusion on the constitutional issue before me. I find that B.C. Hydro employees entering the private property of B.C. Hydro customers to investigate electrical theft are not operating in a pure law enforcement context. Their role and activities stem primarily from the regulatory scheme and objectives of B.C. Hydro, in particular, its mandate to provide electricity to its customers in an “adequate, safe, efficient, just and reasonable” manner. I find that there are significant and appropriate limitations to their right of access which are in accord with those objectives. Their entry is limited to investigating equipment which belongs to B.C. Hydro, and matters relevant to the commodity which it sells. Their activities on the property, and the information they obtain, are minimally intrusive in terms of privacy concerns of the residents. The customers have imputed knowledge of this right of entry, and of B.C. Hydro’s right to investigate whether its customers are paying for electricity and using its equipment properly. Finally, B.C. Hydro acknowledges it does not have general powers of law enforcement. While the theft of electricity is a criminal offence, it is intimately bound to the activities of B.C. Hydro. I find that the limited ability to carry out preliminary investigations into that offence is insufficient to raise the expectation of privacy in what is otherwise clearly a regulatory context.

[147] These paragraphs were subsequently quoted in *Benham*, where Low J.A., for the Court, found the reasoning of Neilson J. to be compelling. As in *Bourque*, the police used information obtained during BC Hydro inspections of electrical wires and meters on the outside of the accused’s house to obtain a search warrant for

electricity theft. A grow operation was discovered during the execution of the warrant. The accused was convicted, and argued on appeal that the convictions were based on evidence obtained in contravention of his rights under s. 8 of the **Charter**. He contended that the access provision in the Electrical Tariff was overly broad because it did not preclude access to the interiors of buildings, including private dwellings. He also argued that the provision was unconstitutional because it did not contain the safeguards of **Hunter v. Southam**. In essence, his submission was that **Bourque** was wrongly decided because it did not discuss the first point and was in error on the second.

[148] With respect to the first issue, Low J.A. held that determination of that question should await a case with the necessary factual basis, as the equipment in the case before him was on the outside of the accused's dwelling. On the second issue, he found that Neilson J.'s reasoning was compelling and that her conclusion should prevail.

[149] I accept that the extent to which the Electrical Tariff circumscribes the reasonable expectation of privacy of BC Hydro customers also affects their expectation of privacy in the context of safety inspections under the **SSA**. The safety objectives of such inspections are intimately bound with the terms upon which BC Hydro supplies electrical services. However, the inspections at issue in the decisions to which I have referred were limited to the exteriors of the customers' residences; inspections requiring entry into a residence raise different considerations. I note, for instance, that Neilson J. wrote with respect to inspections by BC Hydro employees that "their activities on the property, and the information

they obtain, are minimally intrusive in terms of privacy concerns of the residents". It is questionable whether this could be said of an inspection that required entry into a customer's residence.

[150] The authorities regarding regulatory searches that were cited to me largely involved searches of non-residential premises: for example, **Comité paritaire** (inspections regarding working conditions at non-union shops); **Re Belgoma Transportation Ltd. and Director of Employment Standards** (1985), 51 O.R. (2d) 509, 20 D.L.R. (4th) 156 (C.A.) (inspection of business premises by employment standards officer); **Regina v. Quesnel** (1985), 53 O.R. (2d) 338, 24 C.C.C. (3d) 78 (C.A.) (inspection of premises to investigate compliance with production quotas for regulated farm products).

[151] One exception was **R. v. Bichel** (1986), 4 B.C.L.R. (2d) 132, 33 D.L.R. (4th) 254 (C.A.) [**Bichel**].

[152] This case involved a warrantless search of a residence for the purpose of investigating compliance with a municipal zoning bylaw. The bylaw in question, quoted at 135 in the B.C.L.R., authorized a building inspector to "enter at all reasonable times upon any property or premises to ascertain whether the regulations and provisions herein contained are being or have been complied with." It was unlawful under the bylaw for any person to prevent or obstruct the entry of the building inspector. A person convicted of an offence against the bylaw was liable to a maximum penalty of \$500.00 or imprisonment for a period not exceeding 60 days. The Court of Appeal rejected the appellant's submission that the bylaw was

inconsistent with s. 8 of the **Charter** because it permitted a warrantless search of residential premises.

[153] Macfarlane J.A., for the Court, held that there was a distinction between a search in the course of a criminal investigation and an inspection in the course of ensuring compliance with regulatory bylaws. While a warrant procedure was appropriate for the former, it was not for the latter. In contrasting the two types of searches, he wrote as follows at 143-144 of the B.C.L.R.:

The standard proposed in *Hunter v. Southam Inc.* involves prior authorization by a judicial officer based upon proof of reasonable and probable grounds justifying intrusion. It is reasonable that such a standard be applied in a criminal investigation, or when a search is being made of the type contemplated by the Combines Investigation Act. That type of search involves intrusion without notice, whether it be convenient or inconvenient. It may involve a serious invasion of privacy, for instance a search through personal property. It may involve a deprivation of personal property. A police raid inevitably involves personal stigma. The search warrant procedure is needed and applies well in that type of situation.

Different considerations apply to administrative inspections. Under the North Vancouver Zoning By-law, the inspection is limited to "reasonable times". The householder may refuse entry if the inspector comes at an inconvenient time. ... An inspection involves a minimal intrusion into the privacy of a person, if conducted at a reasonable time. It does not involve a search or a seizure of personal property. It involves looking at construction, wiring, plumbing and heating, and at things which may affect health or safety. There is no stigma attached to the inspection. It is something that may be reasonably expected by all members of the community, in whose interest it is to maintain health and safety standards. 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. The fact that an infraction may be discovered, and a penalty imposed, does not persuade me that a cumbersome and ineffective procedure should be put in place. It would not protect the

individual violator from being discovered. Nor is it in the public interest that he should be so protected.

[154] The reference to administrative inspections being routine and conducted area by area without proof in advance of an infraction suggests a type of random inspection different from that contemplated under the **SSA**, which requires that reasonable grounds for an inspection exist before an owner or occupant's privacy interests are intruded upon. To that extent, **SSA** inspections can be said to be even less intrusive.

[155] While the petitioners sought to distinguish *Bichel* as a dated decision, it has been cited by the Supreme Court of Canada, including in *Comité paritaire* and *Colarusso*, and also by other courts in more recent years, for example, *Jackson v. Penticton (City)*, 2004 BCSC 711.

[156] The petitioners and the BCCLA both refer to a number of provincial and federal statutes that require prior authorization for entry into residential premises for even non-criminal purposes. These include the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 28(3.3); the *Health Act*, R.S.B.C. 1996, c. 179, s. 59(4) and s. 61(2); and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 231.1(2).

[157] Section 28(3.3) of the *Child, Family and Community Service Act* authorizes a police officer to enter a dwelling for the purposes of an arrest, and is therefore not an apt comparison. The *Health Act*, however, provides an interesting counterpoint to the **SSA** in its treatment of residential inspections. Section 61(1)

provides that certain designated officials may enter into any property to conduct an inspection for the purpose of determining compliance with the **Act** and regulations or the existence of a health hazard. Subsection (2) states that “the authority under subsection (1) 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”. Section 61.1 provides for the issuance of an entry warrant by a justice where satisfied by evidence on oath or affirmation that access to the property is necessary for the purposes of the **Act**.

[158] Section 231.1 of the **Income Tax Act** authorizes entry into any premises where a business is carried on for any purpose related to the administration or enforcement of that Act. Like the provincial **Health Act**, it provides that where those premises are a dwelling, the authorized person may not enter except with the consent of the occupant or under the authority of a warrant issued by a judge.

[159] In my view, what distinguishes these statutes from the **SSA** is that they do not require reasonable grounds for entry, in contrast to a safety officer exercising inspection powers under s. 18(1) of the **SSA**. Further, an inspection under the **SSA** occurs at a date and time arranged with the occupant, not upon an unannounced knock at the door.

[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**.

[161] Before I move on to consider the police action, I wish to very briefly address the petitioners' argument that the **SSA** authorizes a seizure in the form of the disconnection of electrical power.

[162] The essence of a seizure for the purpose of s. 8 is the "taking of a thing from a person by a public authority without that person's consent": **R. v. Dyment**, [1988] 2 S.C.R. 417 at 431, 55 D.L.R. (4th) 503. At the point of disconnection, electrical power does not belong to the customer, and, accordingly, there is no seizure. As I view it, disconnection is simply a refusal of service.

ii. The Police Conduct

[163] In introducing his analysis regarding the balance between individual liberties and police action in **R. v. Mann**, 2004 SCC 52, [2004] 3 S.C.R. 59, Iacobucci J. wrote as follows at para. 15:

Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law. The vibrancy of a democracy is apparent by how wisely it navigates through those critical junctures where state action intersects with, and threatens to impinge upon, individual liberties.

[164] The present case raises important questions regarding this "critical juncture" in the context of police participation in electrical safety inspections.

[165] As a matter of operational policy, the EFSI Team always includes two RCMP officers among its members. The electrical safety officers will not conduct their inspections without the RCMP officers first “clearing” the target residence. As Capt. McKibbon explained:

Our policy is strict that way that we will not enter the house until the house has been cleared by the two RCMP members, and there’s just no – we have no leeway there. ... We will not enter the house until it’s been cleared and deemed safe by the RCMP.

[166] As to what is meant by the police clearing a residence, Mr. Gibson gave this evidence:

- Q. Now, when the police go in, I think you used the word they go in – actually I’m not sure what term you used – they “clear” the house I think is the word you used. The police go in to clear the house?
- A. That’s a term we use, meaning they enter first and just make sure that things are safe for us. And that’s explained to the people at the door. They’re generally very polite with them, and they explain to them that there’s no charges against them. They’re not looking for anything in particular; they just have to make sure that the house is safe for the entry of us in respect to dogs or whatever else they may have seen in there.
- Q. So the police in that respect, they will walk through the whole house to see whether or not it’s safe for you; correct?
- A. That’s correct.
- Q. All right. And will the police also examine crawl spaces and attics and places that you would otherwise be subsequently inspecting, before you inspect?
- A. They will – yeah, they will find out where the attics are. They come back, they will tell us, okay, the panel is in that corner, the attic hatch is there, et cetera. Now, some of them physically go down, sometimes we have to bring a ladder in to get down into the attic – or into the crawl spaces. So the method of checking it will vary a little bit. We have to obviously bring a ladder in to

check the attics. You know, quite often they're 9-foot ceilings, so, you know, they can't check the attic until we physically bring a ladder in.

[167] Once the premises are declared safe, the police officers remain with the occupants at the property. They do not accompany the electrical and fire inspectors unless the occupants follow them.

[168] Police participation in EFSI Team inspections is driven by the straddling of electrical safety issues with other safety issues that may arise from grow operations. Such operations may be connected to organized crime and may be operated by individuals with weapons, aggressive dogs, or other means of protecting themselves and their crops from other criminals. Although electrical safety inspections are scheduled in advance and residents are unlikely, for a number of reasons, to want to cause harm to inspection personnel, I appreciate why inspectors wish the security that is provided by the police participation. The issue for me to decide is whether that police participation is consistent with the *Charter*.

[169] Regardless of any operational guidelines or policies of the EFSI Team to the contrary, it is apparent that the police may use information or evidence they uncover while searching premises for police purposes. As Surrey advised the Court, there may have been instances in which the RCMP has submitted Reports to Crown Counsel arising out of EFSI Team inspections. This is not surprising. Police officers do not cease to be such simply because they are described as being part of an electrical safety inspection team.

[170] The police are not authorized by warrant to enter the residences. (I should add that the evidence of Mr. Gibson was 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 [which includes the police members] 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.)

[171] In my view, the actions of the police, although carried out as members of the EFSI Team, constitute a search for the purpose of the **Charter** analysis. The fact that the police walk through the entire residence and look into attics and crawl spaces provides some sense of the thoroughness of the search they conduct.

[172] A warrantless search is presumptively unreasonable and is, therefore, contrary to s. 8 of the **Charter** unless it can be justified upon application of the test in **Collins**. The first stage of that test asks whether the search is authorized by law.

[173] Authorization for police action may be derived from statute or the common law. The parties agree that the **SSA** does not expressly authorize police entry into a residence. In my view, the **SSA**, on a fair reading, does not impliedly provide that authority either.

[174] I turn, then, to the common law. The common law powers of the police were described by the English Court of Criminal Appeal in **R. v. Waterfield**, [1963] 3 All E.R. 659 [**Waterfield**], and adopted by Supreme Court of Canada in subsequent decisions, including **Dedman v. The Queen**, [1985] 2 S.C.R. 2 [**Dedman**]. The **Waterfield** test has been the subject of a number of decisions from the Supreme

Court of Canada in recent years. Its application and relationship to the **Charter** have been subjects of disagreement amongst some members of the Court.

[175] Police duties traditionally recognized at common law are preservation of the peace, prevention of crime, and protection of life and property: **Dedman** at p. 32. In the present case, Surrey submits that police participation on the EFSI Team is necessary for the safety of inspectors and to keep the peace or to prevent a breach of it.

[176] In **R. v. Clayton**, 2007 SCC 32, [2007] 2 S.C.R. 725 [**Clayton**], the Court considered **Waterfield** and the authority of the police to detain and search individuals for investigative purposes. Abella J., on behalf of the majority, found that the police conduct at issue was justified at common law. In explaining how common law powers should be consistent with the **Charter**, she wrote as follows at para. 21:

... The courts can and should develop the common law in a manner consistent with the *Charter*: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 875-78. The common law regarding police powers of detention, developed building on *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.), and *Dedman v. The Queen*, [1985] 2 S.C.R. 2, is consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk. The standard of justification must be commensurate with the fundamental rights at stake.

[177] While disagreeing with Doherty J.A.'s decision in the Court of Appeal below, she endorsed his description of the **Waterfield** test and quoted it with approval at para. 22 of **Clayton**:

The powers of police constables at common law, often described as the ancillary police power, as set out in *Waterfield* have been accepted by the Supreme Court of Canada as part of the Canadian common law in several decisions rendered both before and after the proclamation of the *Charter*: see e.g. *Knowlton v. The Queen* (1973), 10 C.C.C. (2d) 377 (S.C.C.) at 379-80; *Dedman v. The Queen* (1985), 20 C.C.C. (3d) 97 (S.C.C.); *R. v. Godoy* (1999), 131 C.C.C. (3d) 129 (S.C.C.) at 135-36; *R. v. Mann* [(2004) 185 C.C.C. (3d) 308 (S.C.C.)], at 320-1. The power of the police to detain for investigative purposes in some circumstances and the power to search as an incident of arrest are two of the better known examples of the exercise of the common law ancillary police power: *R. v. Mann, supra*; *R. v. Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.) at 107-108.

Where the prosecution relies on the ancillary power doctrine to justify police conduct that interferes with individual liberties, a two-pronged case-specific inquiry must be made. First, the prosecution must demonstrate that the police were acting in the exercise of a lawful duty when they engaged in the conduct in issue. Second, and in addition to showing that the police were acting in the course of their duty, the prosecution must demonstrate that the impugned conduct amounted to a justifiable use of police powers associated with that duty: *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.) at 23-24.

[178] The police conduct at issue in the present case was the proposed police participation, as part of the EFSI Team, in aid of an electrical safety inspection. In analysing this conduct in accordance with *Waterfield*, I will assume at the first stage that the police were acting in the exercise of a lawful duty, specifically, protection of life and property and preservation of the peace. My analysis will focus on whether the police conduct satisfies the second prong of the *Waterfield* test.

[179] In *Clayton*, Abella J. explained what the analysis at this second prong entailed by reference to earlier authorities that had applied *Waterfield* (paras. 25-26):

In *R. v. Godoy* [citation omitted], at para. 18, this Court accepted the following test developed by Doherty J.A. in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) at p. 499, for assessing whether police interference with individual liberties was justified:

[T]he justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.

In determining the boundaries of police powers, caution is required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy, and enabling the police to do what is reasonably necessary to perform their duties in protecting the public. It was expressed by LeDain J. in *Dedman*, as follows:

The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

[180] In the present case, the EFSI Team sought entry of its RCMP members to search the petitioners' residence to ensure there was nothing that could compromise the safety of the electrical and fire safety officers. There is no evidence to suggest that the proposed police conduct was grounded in any specific safety concerns regarding the petitioners or their residence. Rather, adherence to the EFSI Team's blanket policy that the police members search every residence targeted for an inspection was its basis.

[181] That policy is driven by generalized concerns that residents of properties with high electricity consumption may be engaging in criminal activities and that those properties may contain weapons or pose other safety hazards to inspectors. Its strict application means that it matters not whether a resident is a 27-year-old known

drug dealer or an 87-year-old widow who has never been the subject of a police investigation. In either case, the resident is required to permit the police to enter and conduct a thorough search of his or her residence or else risk disconnection of electrical power.

[182] A police search of a private residence, even when conducted in aid of an electrical safety inspection, is intrusive. The search and police presence during the safety inspection add a significant stigma to the inspection, imbuing it with an aura of criminality absent from a typical electrical safety inspection. These factors must be considered together with the very high expectation of privacy that attaches to a private residence. Police intrusion into that privacy on the basis only of an operational policy that mandates a search without any assessment as to whether it is necessary in the specific circumstances at hand is not, in my view, a justifiable use of police powers. Accordingly, I conclude that police conduct pursuant to the EFSI Team's operational policy does not satisfy the second prong of the ***Waterfield*** test, and that it is therefore not justifiable at common law.

[183] I wish to emphasize that I am not concluding that at common law the police may never enter a residence without a warrant for the purpose of assisting inspection personnel. What circumstances would justify that intrusion into a resident's privacy is not an issue that is before me.

[184] I am sympathetic to the safety concerns of safety officers and their desire to have the police assist them. Nevertheless, as the EFSI Team's operational policy

mandates police searches that are not authorized by law, I find that policy and police conduct in carrying out such searches to be contrary to s. 8 of the **Charter**.

[185] For the foregoing reasons, I conclude that the police did not have authority to seek to enter and search the petitioners' residence without a warrant in aid of the EFSI Team inspection. As a result, the disconnection of electrical power to the petitioners' residence consequent upon their refusal to permit the police entry was unlawful.

[186] In *R. v. Wong*, [1990] 3 S.C.R. 36, 45 O.A.C. 250, the Supreme Court of Canada considered whether the installation of a video camera in a hotel room to record an illegal gambling operation was contrary to s. 8 of the **Charter**. Prior judicial authorization had not been obtained since the **Criminal Code** did not then provide for this investigative aid.

[187] A majority of the Court found that the video recording was a search for the purposes of s. 8. Writing for the majority, La Forest J. concluded that there was no power to conduct such a search at common law and that the recording violated s. 8. He also commented on the absence of any provision in the **Criminal Code** to obtain judicial authorization for electronic visual surveillance, and cautioned that it was for Parliament, not the Courts, to devise a code of procedure for judicial pre-authorization of such surveillance.

[188] I consider that reasoning to apply here.

[189] The legislature enacted and amended the **SSA** without including authority for police participation in electrical safety inspections. If the legislature shares the safety concerns of safety officers and considers police participation in such inspections to be necessary, then it falls to legislators, as opposed to the Courts, to determine procedures that will permit this to occur in a way that is lawful and in accordance with the **Charter**.

[190] I would observe that authority may exist under s. 275 of the **Community Charter**, which provides for the issuance of administrative warrants:

Entry warrants

275. If satisfied by evidence on oath or affirmation that access to property is necessary
- (a) for the purposes of this Act or the *Local Government Act*,
or
 - (b) for the purposes of a municipal power, duty or function under another Act,
- a justice may issue a warrant authorizing a person named in the warrant to enter on or into property and conduct an inspection or take other action as authorized by the warrant.

[191] I understand that this provision is presently being used by the EFSI Team in certain circumstances. Whether it provides a basis for prior judicial authorization, based on reasonable grounds, for the police to assist in safety inspections conducted pursuant to the **SSA** is not for me to resolve.

V. CONCLUSION

[192] In light of my conclusion regarding s. 8 of the **Charter**, it is not necessary that I address the petitioners' submissions based on s. 7 of the **Charter** or the administrative law arguments that were raised on the petition.

[193] In summary, I conclude that the **SSA** is not legislation that relates in pith and substance to criminal law or criminal investigative procedure. Its dominant purpose is facilitating the identification and inspection of grow operations in the interests of public safety. As such, the **SSA** is *intra vires* the legislative competence of the province.

[194] With respect to the challenges to the EFSI Team inspections grounded in the **Charter**, I find that the provisions of the **SSA** authorizing electrical safety inspections of residences do not violate s. 8. Such inspections are of a regulated service that can present a danger to both occupants of a residence and their neighbours. They are driven by safety, as opposed to criminal law, objectives, and require both reasonable grounds and notice to the occupant. 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**.

[195] However, in the circumstances of the present case, I find that the police did not have authority, either pursuant to statute or at common law, to enter and search the petitioners' residence in aid of the EFSI Team inspection without a warrant.

Accordingly, the disconnection of electrical power to the petitioners' residence consequent upon their refusal to permit the police entry was unlawful.

[196] In addition to the declaratory orders, the petitioners seek damages and costs. I invite the parties to make further submissions to me either in person or in writing on these issues. If there are any additional orders sought in light of my reasons, they may be applied for at that time.

"SMART J."