ARKINSTALL: WHY YOU MAY NEED AN ENTRY WARRANT AND HOW TO GET ONE

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This paper will begin with some discussion of the recent decision of *Arkinstall v. Surrey (City)*, 2010 BCCA 150. In *Arkinstall*, the British Columbia Court of Appeal found that a particular search by a local government under the *Safety Standards Act*, R.S.B.C. 1996, c. 1 required an entry warrant if conducted without consent. Although dealing with a particular inspection, the Court's discussion of why an entry warrant was required likely has broad application determining what authority is required by a local government to conduct other more routine inspections. This paper will also give a summary of the four general authorities under which a local government employee may enter a property for inspection purposes, including under an entry warrant, and will end with a short primer on how an entry warrant is obtained.

I. THE COURT OF APPEAL DECISION IN *ARKINSTALL V. SURREY (CITY)*

In *Arkinstall* the Court considered the Constitutional issue of whether a warrantless search of a residence in response to above average electricity consumption under section 19.3 of the *Safety Standards Act* offended a person's right to be free from unreasonable search and seizure guaranteed under section 8 of the *Charter of Rights and Freedoms* [*Charter*]. The Court found that even though the *Safety Standards Act* allowed the Surrey's electrical safety inspection teams to enter a private residence without an entry warrant, the occupants' *Charter* rights were violated by the intrusive and stigmatizing search done without a warrant. It is important to keep in mind that even though a bylaw or a statute may say that an inspector may enter, entry will not be lawful if it violates a person's *Charter* rights.

The Background Facts

The background facts to the Appeal are that in 2007 the City of Surrey, through BC Hydro records obtained under the *Safety Standards Act*, had identified the Arkinstall family home as likely housing a grow-op due to the Arkinstalls' abnormally high electricity consumption. Surrey had assembled electrical inspection safety teams that consisted of electrical inspectors, bylaw enforcement officers and RCMP officers who would enter residences to determine whether the property contravened a bylaw targeting properties used to grow or manufacture controlled substances, most commonly marihuana grow-ops. After a dispute between the Arkinstalls and Surrey over whether the RCMP could be part of Surrey's electrical inspection team, Surrey decided not to inspect the Arkinstall residence without police accompaniment. Surrey did ask that B.C. Hydro disconnect the Arkinstalls' electricity. The Artkinstalls moved out of their house after the power was cut off and Surrey subsequently engaged an electrical contractor to inspect the Arkinstalls' home and the contractor determined that the residence had never been used as a grow-up and that there were no electrical safety concerns.

This attempted exercise of Surrey's authority to conduct warrantless searches with police accompaniment under the *Safety Standards Act* was challenged in the Supreme Court of British Columbia. The lower court held in 2008 that such searches could only be conducted without a warrant if the police did not attend. The Supreme Court of British Columbia also held that the collection of above-average residential electricity consumption by municipalities and responsive searches under the *Safety Standards Act*'s was not an attempt to unconstitutionally stiffen Federal criminal law prohibitions of marihuana grow-ops. The Court's view on two important Constitutional issues went unchanged on appeal in *Arkinstall;* municipalities could still target and inspect controlled-substance properties for health and safety reasons and police could not enter properties for this purpose without a warrant. The Court's most significant opinion was on the Constitutional issue of when section 8 of the *Charter* requires a local government inspector to obtain a warrant.

Section 8 of the *Charter*

Section 8 of the *Charter* provides that:

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

Not every act of investigating compliance with a bylaw constitutes a "search" under the *Charter*, however the mere entry onto private property by an investigating bylaw officer or inspector would likely be such a search. The legal questions are whether there is a reasonable expectation of privacy in the area searched and whether the search is "unreasonable".

For over two decades, local government lawyers in British Columbia have relied on *R. v. Bichel* (1986), 33 D.L.R. (4^{th}) 254 in support of the position that entry by a local government inspector for the purposes of investigating compliance with a bylaw is not an unreasonable search if it is done with notice and at a reasonable time. The view of the Court in *Bichel*¸ a Court of Appeal decision, was that inspections for the purposes of enforcing zoning and construction bylaws are not for the purpose of furthering criminal investigations, do not carry the stigma of a police search and are minimally intrusive on a person's privacy.

Bichel has consequently been cited in support of the general proposition that local government "administrative" searches never require a warrant to be reasonable, unlike police "criminal" searches. *Bichel* was also decided before local governments were given the authority to obtain entry warrants under s. 275 of the *Community Charter*. The Court of Appeal has now clarified *Bichel* in its decision in *Arkinstall* to indicate that certain local government inspections, including, but not limited to, inspections under s. 19.3 of the *Safety Standards Act*, will be unreasonable searches if they are conducted without a warrant or consent.

What Makes a Warrantless Search Unreasonable?

In deciding that an administrative warrant is required for searches under s. 19.3 of the *Safety Standards Act* the Court of Appeal considered the following factors assessing whether such searches offended section 8 of the *Charter*:

(a) the reasonable expectation of privacy in the place subject to search and the degree of intrusion into that place;

(b) the stigma associated with the search; and

(c) the feasibility and usefulness of obtaining a warrant for the search

All of these factors can be assessed for any local government inspection, and this paper will discuss them below. It is important to note that these factors do not result in a checklist of yes or no answers that can be used to determine whether a warrant is required. Rather this conclusion is to be made once the factors are considered in combination and with regard to the particular circumstances. To put it another way: Do all the factors mean that a warrantless search is an unreasonable search under the circumstances? For example, there is considerable uncertainty over the comparative weight of each of these factors should be given and in many cases coming to the correct conclusion may be very difficult do to do, even for the Court.

A. The Expectation of Privacy and the Degree of Intrusion

The first factor combines two separate elements. The expectation of privacy depends on the type of place searched and what privacy a person might reasonably expect in that place. If there is no reasonable expectation of privacy, then section 8 of the *Charter* is not engaged. This assessment of privacy will always depend on the particular circumstances. For example, the average person will expect more privacy at a municipal pool if they keep their personal contents stored in a locker rather than spread out on a bench. The fact that a municipal pool is a public place would not mean that there could never be a reasonable expectation of privacy.

The expectation of privacy is generally higher on private property compared to public and at its highest inside a residence. There is still variance of privacy expectations within types of property. A common area in a strata-property has a lower expectation of privacy than a strata unit. Commercial or institutional property where personal records or effects are expected to be stored, such as medical offices or commercially rented storage lockers have a higher expectation of privacy than restaurants or factories. The inspections at issue in *Arkinstall* were conducted inside private residences so the occupiers expectation of privacy was found to be quite high. Inspectors should therefore be mindful of how "private" the place is that they intend to inspect.

The inspections discussed in *Arkinstall* were also found to be very intrusive, since inspectors went "through the entire house looking through every room, attic, basement, crawl space and closet," looking for evidence of a grow-op or unsafe electrical wiring. In *Arkinstall* the Court

seemed to find the inspection for an extra, non-compliant suite at issue in *Bichel* was not very intrusive, although for an inspector to conclusively determine the number of dwellings in a building, that inspector should enter every room. Other inspections, such as an inspection to measure liveable floor space for the purposes of assessing compliance with floor area ratio requirements can also involve a high degree of intrusion. Inspectors should therefore also be mindful of how intrusive the inspection is.

Although the Court does not provide a precise weighting of these to elements, this first factor likely only favours an entry warrant where there is both a relatively high expectation privacy and a more than minimally intrusive search. It is likely that most inspections conducted by local governments do not meet both of these conditions, but this always depends on the particular circumstances.

It is also notable that the Court did not consider whether taking photographs during an inspection heightens the intrusion. Although photographs only document what can be seen by the inspector, they also create a permanent record that is much more detailed than any testimony that an inspector could give in Court. While taking photographs is generally assumed to be part of the inspection process, there is some uncertainty in this area, and the Court may in future clarify what authority is required to take pictures.

B. Stigma

The factor of stigma relates preventing a person from being unreasonably subject to searches that would reflect poorly on their character. In *Bichel* the court found that, unlike a search conducted by police, the a municipal inspection for bylaw compliance did not carry much stigma. However, in *Arkinstall* the Court found that Surrey's electrical safety inspections did carry a high degree of stigma because the inspections were conducted on properties suspected of hosting criminal activities. The Court felt that before such a stigmatizing search was conducted, a warrant should be obtained as a check against groundless searches. A Justice issuing a warrant is expected to ensure that there are reasonable grounds for every search.

The Court in *Arkinstall* noted that most municipal inspections are regulatory and do not attract the same level of stigma as those associated with criminal investigations. Stigmatization is unlikely to be a factor for most inspections, but may arise if there is a public perception of suspected criminal activity associated with local government inspection. Inspection of certain businesses such as pawn shops and body-rub parlours for the purposes of investigating compliance with bylaws that have a crime-prevention purpose may carry a stigma. Although less prominent a factor than privacy, inspectors should be mindful of the effect of a search on a person's reputation.

C. Feasibility and Usefulness of Obtaining a Warrant

The factors in the *Arkinstall* decision, and the one that will likely most affect how local governments enforce their bylaws, is whether a warrant is both feasible and useful. The Court of Appeal clarified the meaning of its decision in *Bichel* by saying that:

> This Court's decision in *Bichel* stands for the narrow proposition that in the regulatory context of a minimally intrusive spot-check search in which a warrant would serve no function, a warrant is not required (at para. 93).

The potential difficulty for local governments is that most inspections are not spot-checks, but targeted property investigations in response to complaints. The Court indicates that targeted investigations should receive the prior authorization of a warrant, although it is unclear whether this is the necessary where there is no stigma and no significant privacy concern associated with the search.

Regarding the feasibility of obtaining a warrant, the Court noted that the searches in *Arkinstall* were conducted with 48 hours notice and after Surrey had some grounds, specifically records of high electricity consumption, to want to enter the residence. The Court also noted that entry warrants under section 275 of the *Community Charter* are easier to obtain than criminal search warrants, so the speed and efficiency with which Surrey can conduct searches under the *Safety Standards Act* was not compromised if they were required to obtain a warrant.

While it is not feasible to obtain a warrant for some searches by government, such as airport security checks, most inspections by a local government relate to a specific property that can be identified in the warrant and are not so urgent that that there is not time to obtain one.

Regarding the usefulness of a warrant, the Court in *Arkinstall* emphasized that the warrant requirement provides a check against groundless searches. Since many of the inspections that the local government would like to do are to confirm the validity of complaint, the local government has already established a ground, specifically that it receive a complaint, before it investigates a property. It would appear that where a warrant is required, the local government's inspectors would have to put their grounds for the search before a Justice. Again it is not clear whether this is required when there is otherwise no stigma or significant privacy concern. In any case this additional step are likely required in many more inspections than previously thought.

II. THE FOUR AUTHORITIES TO ENTER

The first part of this paper discusses the factors, outlined in *Arkinstall*, that relate to the determination of whether a warrant is required to inspect a property. A warrant could either be an entry warrant under section 275 of the *Community Charter* or a search warrant under section 21

of the *Offence Act*. This part of the paper will discuss the differences between these two types of warrants as well as discuss the two general authorities for warrantless entry for inspection purposes: consent and statutory authority.

Consent to Enter

Most people are permitted to enter private property by invitation. Asking and being allowed to enter is also the easiest and best way for an inspector to enter a property. In all cases where consent is sought, the inspector should be clear about why they want to enter the property and what they would like to inspect. There is always a risk that after a search that person will complain that the inspector went beyond the consent that was granted to them, or that there was a misunderstanding about why the inspector was entering the property. When that entry is subject to a legal challenge, the court will usually excuse a misunderstanding over the scope of the consent if the inspector otherwise had statutory authority to enter.

Statutory Authority to Enter

Section 16 of the *Community Charter* and section 268 of the *Local Government Act* enable municipalities and regional districts to adopt bylaws that authorize employees such as licence inspectors and bylaw enforcement officers to enter property. The sections impose conditions on such entry and those conditions may be further limited by the authorizing bylaw. It is likely that most entries to property performed by inspectors can be legally done under this statutory authority. Whether this is a practical, is another issue.

If there is resistance to entry, non-consensual entry for an inspection may be achieved as a result of charging the owner or occupier with obstructing a peace officer or contravening section 153 of the *Community Charter* . The local government may also seek to enforce its statutory authority to enter under the *Community Charter* or the *Local Government Act* in the Supreme Court of British Columbia. In such cases the local government must either lay an information or commence a civil proceeding to get the Court's help in entering under the local government's statutory authority. Seeking such orders from the Court is more involved than obtaining a warrant that authorizes the use of a locksmith or police accompaniment to get past locked doors or an obstructive person.

Entry under an Entry Warrant

As discussed above a warrant authorizing entry can be either an entry warrant or a search warrant. At law, the need for warrant will only arise either when section 8 of the *Charter* would otherwise be violated, however it may also be the most practical way to enter. Entry warrants are statutorily authorized by s. 275 of the *Community Charter*, which says:

> 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.

Who may enter and what actions that person may take are not limited by section 275 of the *Community Charter*. It is therefore preferable for the inspector to seek a warrant that allows for the taking of photographs, the attendance of police, and where necessary, the attendance of a locksmith.

It would also appear from this section that "other action" could include seizure of items, however since the warrant is described as an "entry" warrant, and the *Offence Act* has specific sections that deal with seizure under a search warrant, it may be that the Court would interpret seizure as being beyond the scope of the entry warrant. This is another issue regarding entry warrants about which the law is not clear.

Entry under a Search Warrant

A search warrant is by far the least likely authority that an inspector will use to enter a property but it is also the most powerful. A search warrant under the *Offence Act* may be issued under section 21 whenever a Justice is convinced that there is:

> reasonable ground to believe that there is in a building, receptacle or place
>
> (a) anything on or in respect of which an offence has been or is suspected to have been committed, or
>
> (b) anything that there is reasonable ground to believe will afford evidence as to the commission of such an offence

An offence in this case includes an offence against a bylaw. The Court in *Arkinstall* clearly stated that it is harder to obtain a search warrant than an entry warrant. A search warrant is usually obtained for catching people "red-handed" or to dig up evidence in support of the commission of an offence, which the Court considers to require higher grounds for suspicion than an inspection for the purposes of determining whether "permit conditions, or codes or standards established by regulation, are not being complied with." (*Arkinstall* at para. 84)

A search warrant also provides the clearest authority for an inspector to seize an item from private property. The *Offence Act* allows for the seizure of things expressly mentioned in the search warrant and additional things that the person executing a warrant reasonably believes has been obtained by, or has been used in, the commission of an offence. As mentioned above, it may be that a Justice may also authorize seizure under an entry warrant, but the surest course would be to proceed by entry warrant in such rare cases.

III. HOW TO GET AN ENTRY WARRANT

A. Introduction

As stated above, entry may be made with the consent of the owner or occupier, and that is the preferred way to conduct an inspection. If that fails, then, in the case of a dwelling, a 24 hour notice is given. Although clearly the intention of paragraph 16(5)(b) of the *Community Charter* is to give the local government the right to enter a dwelling once that notice is given, our advice would always have been to seek an alterative to forcible entry. *Arkinstall* hasn't changed that advice. It has merely reinforced it.

The entry earrant referred to in Section 275 of the *Community Charter* is what the Court of Appeal in *Arkinstall* refers to as an "administrative warrant". That is to say it is used to enforce administrative or regulatory, as opposed to criminal, matters. The grounds for conducting an administrative search need only be 'reasonable" not "reasonable and probable". The same should be said of the grounds necessary to obtain an entry warrant, although all Judicial Justices of the Peace (JJPs) may not agree. In other words, and as stated in *Arkinstall*, it should be much easier to obtain an entry warrant than a search warrant.

Applications can be made at any provincial court registry, but lower mainland applications should be made at the Justice Centre in Burnaby. If the application is to be made at a local registry, call ahead to advise of your intention and to ensure that a Provincial Court Judge (PCJ) or JJP will be available.

You may have to be clear with the registry on what you are seeking and where the authority for an entry warrant lies. While entry warrants are becoming more common, you cannot expect, and indeed are unlikely to find, that registry staff will be certain about what you want and how you can get it.

You need to know that jurisdiction is found in Section 275 of the *Community Charter* which provides that a justice may issue an entry 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. You need to know that the justice must be satisfied by evidence on oath or affirmation (in the form of an Information) that access to property is necessary for the purposes of:

(i) the Act;

(ii) the *Local Government Act*; or

(iii) for the purposes of a municipal power, duty or function under another *Act*.

You also need to know that the term "*justice*" means a justice as defined in the *Offence Act* and that in the *Offence Act* that term includes a JJP and a Provincial Court Judge (PCJ).

B. Preparing the Information

When drafting the information you need to include reference to which bylaw or *Charter* provision is being investigated in the introductory paragraphs. Depending on the facts and what you are seeking, you usually need to then set out, in clear language, the following information:

(a) Who you are and that you have personal knowledge of the facts set out in the Information except where that knowledge is stated to be based on information and belief and where stated on information and belief that you believe those facts to be true;

(b) Who owns and/or occupies the property you wish to enter;

(c) What is located there;

(d) Some history of the non-compliance;

(e) Efforts made and notices given to enter to inspect the property and/or building on the property.

In the concluding paragraph you have to ask for a date and time of entry, the latter expressed in terms of a number of hours, specifics on who is to enter (do you need a police officer, do you need a locksmith?), what you seek to obtain (do you intend to take photographs?) and what you are seeking to find.

The evidence in the Information cannot be based on speculation, but it need not "prove" a breach. The test is not the civil standard of balance of probabilities, nor even reasonable and probable grounds. The Information must only establish reasonable grounds to believe that, for example, a secondary suite exists in a residential dwelling contrary to the zoning bylaw.

Note that if you evidence is based on information and belief then the complainants' identity will have to be divulged. That may be a problem.

Good evidence would include such things as hydro records for secondary suites or controlled substance properties or admissions against interest made by owners or occupiers.

C. Swearing the Information and obtaining the Warrant

At the Justice Centre, located at the end of a short corridor on the third floor of non-descript building at 301-4306 Kingsway in Burnaby, you will use an intercom to request entry, then be "buzzed" into a small non-descript waiting area. A man or woman will meet you. They will be a Justice of the Peace to "take", or commission, your Information. A file will then be opened and you may also wait in the small office, come back later to find the result. Eventually, your warrant will be granted or rejected. If rejected, the JJP may make a note on the face of the

warrant for the reasons it is refused or appear to explain the reasons for refusal. If the warrant is granted you may not even see the JJP.

If the warrant is refused you may redraft it to address the specific concerns raised by the JJP, but you have to advise, in the concluding paragraph of the revised Information, that the application was previously considered, when and where it was considered, by whom it was considered and that the warrant was refused and why it was refused.

The process is much the same in a local registry. The information is sworn at the registry counter before a JP. The JP or registry staff will then take it to a judge or JJP. We have never make such an application in open court, although there appears to be no reason why a warrant could not be issued in an open court.

Expect to wait a considerable period of time for the answer to your application. You will often be advised to come back in a few hours, or that they will call you to tell you that the warrant is ready to be picked up.