No. S073785
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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 B.C. CIVIL LIBERTIES ASSOCIATION

INTERVENOR

WRITTEN SUBMISSIONS IN REPLY OF THE B.C. CIVIL LIBERTIES ASSOCIATION

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1. The intervenor, the B.C. Civil Liberties Association ("BCCLA"), offers the following brief submissions in reply. The submissions deal with:

a. the Attorney General's argument that the constitutional questions need not be addressed;

b. the Attorney General's argument concerning constitutional *vires*, and invocation of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FOIPPA*");

c. BC Hydro's argument that "there can be no reasonable expectation of privacy on the part of customers and section 8 is not engaged";

d. the City of Surrey's argument that entry to the private dwelling is constitutional because the impugned sections contemplate the Safety Officer's having formed "reasonable grounds"; and

e. the Attorney General's argument concerning s. 8 of the *Charter*, and invocation of the *Community Charter*, S.B.C. 2003, c. 26.

I. Constitutional Questions Must Be Addressed

2. The Attorney General argues at several points that the "constitutional question[s] [are] not reached" if the administrative question is decided in the Petitioners' favour (A.G.'s argument, paras. 44-47, 146). The BCCLA respectfully disagrees.

3. The administrative question itself rests upon the necessary task of statutory construction. To the extent that the Court finds that there is any ambiguity in the Act, it will be necessary to consider the presumption of constitutionality, which will engage the constitutional questions in any event.

4. And even if the Court determines that the decision to disconnect the Petitioners' power was made without legal authority, it remains for the Court to consider the remaining aspects of the legislative scheme: unless it can now be said that the City's concern for the safety of the Petitioners' residence is or will be coterminous with these proceedings, it must be presumed that the ongoing relationship between those parties will continue to engage the impugned provisions of the Act.

5. Accepting the Attorney General's submission would, with respect, prolong the dispute between the parties, promote a multiplicity of proceedings, and be an inefficient use of resources, both for the court and for the litigants. This is not a case where it can be said that the non-constitutional aspect of

the case disposes of the entire dispute between the parties and, accordingly, the principle from L'Heureux-Dubé J.'s concurring reasons in *Advance Cutting* respectfully does not arise.

II. The *Freedom of Information and Protection of Privacy Act* and the Federalism Issue

6. The BCCLA argued, *inter alia*, that it is not constitutionally permissible under the *Constitution Act, 1982* for a provincial Legislature to enact a statute to assist in a police criminal investigation. It cited *R.* v. *Colarusso*, [1994] 1 S.C.R. 20 for the principle that a province cannot "assist [a] police investigation into a potential crime by gathering the evidence and placing it into police custody".

7. With respect to this last point, the Attorney General first mentions that Justice La Forest's discussion was *obiter*. While that may technically be the case, with respect, we must not "presuppose a strict and tidy demarcation between the narrow *ratio decidendi* of a case, which is binding, and *obiter*" (*R.* v. *Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76 at para. 52). Justice La Forest's comments represented the views of the majority of the Court on a point of law that requires—indeed, cries out for—certainty, and are thus highly persuasive (*ibid.* at para. 57).

8. More substantively, the Attorney General professes that "permitting the municipalities to share electricity consumption information with police cannot be seen as colourably 'criminal' lawmaking" (A.G. Argument, para. 94). He argues that the sharing of personal information was already permitted by the *Freedom of Information and Protection of Privacy Act* ("*FOIPPA*"), and suggests that the BCCLA's arguments would be better directed towards that latter statute (*ibid.*, paras. 104-05).

9. With respect, this misses the mark. It is not an answer to say that another provision may be "more unconstitutional". The impugned provisions of the Act do not rest on, incorporate or even refer to *FOIPPA*. *FOIPPA* is not relevant to the present inquiry and the BCCLA would not have deigned as intervenor to expand the issues by bringing its constitutionality into question here.

10. In any event, though, even if *FOIPPA* were engaged in these proceedings—which it is not—that statute does not (on a proper interpretation) suffer from the same infirmities as s. 19.2(3). The provision the Attorney General is presumably referring to is s. 33.2(*i*), which states:

> *Disclosure inside Canada only*
> **33.2.** A public body may disclose personal information referred to in section 33 inside Canada as follows: [...]
> (*i*) to a public body or a law enforcement agency in Canada to assist in a specific investigation
> (i) undertaken with a view to a law enforcement proceeding, or
> (ii) from which a law enforcement proceeding is likely to result[.]

FOIPPA, *supra*

11. In the BCCLA's submission, s. 33.2 of *FOIPPA*, properly understood, is not the broad authorising provision that the Attorney General alleges. Rather, it provides confirmation that, where a public body makes disclosure to a law enforcement agent—either voluntarily, under compulsion of subpoena, *etc.*, or under some otherwise valid statutory authority—there will be no violation of *FOIPPA*.

12. There is in this connection, in the BCCLA's respectful view, a clear distinction between:(i) legislation that purports to provide independent authorisation to share information (as, the BCCLA has argued, is the case with certain definitions in s. 19.1 and with s. 19.2(3)); and (ii) legislation that references otherwise valid instances of sharing, and prescribes that they will be treated in a certain manner. *FOIPPA* is properly understood as an instance of the latter, and that this interpretation flows from the principles stated in paragraph 48 of the BCCLA's main Argument.

13. Further to this point, the BCCLA points out that the Supreme Court of Canada very recently touched on analogous issues, in *Juman* v. *Doucette*. That case merits some discussion, as it goes some distance to refuting the Attorney General's proposition.

Juman v. *Doucette*, 2008 SCC 8

14. *Juman* concerned the scope of the "implied undertaking" in civil litigation. The Attorney General of B.C. and the Vancouver Police Department (the "Applicants") sought access to discovery transcripts in civil proceedings. The Attorney General argued that there was no implied undertaking in the Province but that, if there were, it did not extent to *bona fide* disclosures of criminal activity.

15. The Court, in a unanimous judgment by Binnie J., rejected both these bold submissions. Justice Binnie variously pointed out that:

a. the Applicants "have available to them the usual remedies of subpoena *duces tecum* or a search warrant under the *Criminal Code*" (para. 5);

b. that the "collection of evidence" requires "in the ordinary way laid down by Parliament in s. 487 of the *Criminal Code*, the application for a search warrant or subpoena *duces tecum* at trial" (para. 39);

c. that "[t]he rules of discovery were not intended to constitute litigants as private attorneys general" (para. 43); and, perhaps most tellingly,

d. the Applicants' "objective was to obtain evidence that would help explain the events under investigation, and possibly to incriminate the appellant. I think it would be quite wrong for the police to take advantage of statutorily compelled testimony in civil litigation to undermine the appellant's right to silence and protection against self-incrimination afforded him by the criminal law." (Para. 53).

Juman, *supra* [emphases added]

16. Likewise, it would be "quite wrong"—*viz.* unconstitutional—for a provincial Legislature to enact legislation that permits the compulsion of information, and then purports to create independent statutory authority for the "compelling" party to share the same with the police. Such legislation can have only one purpose: to assist the police in the investigation of suspected criminal activity. With respect, the Attorney General's position here, as in *Juman*, reaches too far.

17. The province may not legislate to create statutory authorisation for parties to disclose information to the police concerning ongoing or prospective criminal investigations. In the context of

the *Safety Standards Act*, that is precisely what the Legislature has attempted to accomplish in s. 19.2(3). The Constitution properly frustrates that attempt.

III. The *Community Charter* and the Section 8 Issue

A. BC Hydro's Argument

18. In respect of the impugned provisions authorising entry into private residences, the Respondent British Columbia Hydro and Power Authority ("BC Hydro") argues for the stark proposition that "there can be no reasonable expectation of privacy on the part of customers and section 8 is not engaged" (BC Hydro argument, para. 49).

19. With respect, this submission wrongly subsumes the resident's reasonable expectation of privacy with the Safety Officer's purpose for entry. If an individual is interrupted in the privacy of his own home by a Hydro inspector, it does not lie in that inspector's mouth to say, "It's just me, so you have no privacy anyway." It may be that the interference is *reasonable*, but that is a wholly separate matter from whether there is an expectation of privacy to begin with.

20. Section 8 case law, the BCCLA submits, is consistent on this point: the privacy of the individual is what is at stake. It bears repeating that, if state action—whether authorised by statute or not—interferes with a reasonable expectation of privacy in situations where there is no prior authorisation scheme, then the action is presumptively unreasonable. The onus lies on the Crown to rebut that presumption.

21. Whether or not the safety purpose of the entry is reasonable, notwithstanding the absence of a prior authorisation scheme, is something to be determined in connection with the Crown's attempt to rebut the presumption of reasonableness. It is not, with great respect, something that negates the reasonable expectation of privacy at the outset.

B. City of Surrey's Argument

22. Likewise, the City of Surrey's suggestion—that any search must be reasonable for *Charter* purposes in light of the requirement in s. 18(1)(*c*) that the Safety Officer be "satisfied that there are reasonable grounds" before entry—provides no answer to the s. 8 issue.

23. In *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 Dickson J. (as he then was) established that a purposive reading of s. 8 revealed a prophylactic purpose: the provision seeks to protect privacy and must therefore *prevent* unjustified searches before they occur, rather than merely providing an *ex post facto* remedy (*ibid.* at 160). Discussing the prior authorisation requirement, Dickson J. held (at 162):

> For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.

24. In assigning the assessment of reasonable grounds to the Safety Officer—the very person authorised to enter the dwelling—the Legislature did not create the sort of independent prior authorisation envisioned by the Court in *Hunter*. While that of course does not deal a fatal blow to the legislation—as the Crown may still rebut the presumption of unreasonableness under the three-step approach in *R.* v. *Collins*, [1987] 1 S.C.R. 165—it would be anomalous (and, in the BCCLA's submission, contrary to the prophylactic purpose of s. 8) if the Crown were permitted to rely on the "reasonable grounds" standard in s. 18(1)(*c*) in meeting its onus under *Collins*.

25. The Act permits entry into a private dwelling, where the individual is presumed to have a high level of privacy, without prior independent authorisation. It is thus presumptively unreasonable. Any assertion that the standard provided in place of the independent authorisation is reasonable is but an attempt to "pull oneself up by one's own bootstraps". In that connection, to accept the City's argument would largely render the requirement for prior independent authorisation otiose.

26. The Crown's attempt to rebut the presumption of unreasonableness must rest uniquely on the whether the purpose of the search is of sufficient importance to render it, in the totality of the circumstances, reasonable. The presumptively unreasonable "reasonable grounds" standard cannot assist.

C. Attorney General's Argument

27. The Attorney General invokes s. 16 of the *Community Charter*, S.B.C. 2003, c. 26, which operates as an ostensible "gloss" on statutory powers of entry such as in the Act (A.G. Argument, paras. 142-43). While that provision might provide that any searches must be carried out in a reasonable manner, that merely confirms the third prong of the *Collins* test. Prior to reaching that point, it is necessary to find that the search is permitted by a reasonable law. The *Community Charter* does not add anything in that respect.

28. All that the *Community Charter* requires is twenty-four (24) hours' notice prior to entry (s. 16(5)(*b*)). That condition provides no additional "protections" to those included in the impugned sections, which, it will be recalled, provide prior service of a notice indicating the date and time of preferred entry and allowing two (2) days (*i.e.* 48 hours) to reply. It is difficult, in this context, to understand how the *Community Charter* might be said to render the entry provisions "reasonable".

29. The BCCLA emphasises that the onus on the Attorney General is a stringent one: it must establish on a balance of probabilities that the provisions are reasonably necessary to the operation of the administrative scheme. The provisions are, though, not aimed at emergent situations. Accordingly, the Crown has failed to rebut the presumption of unreasonableness. Sections 18(1)(*c*), as it applies to residences, and ss. 19.3 and 19.4 are unconstitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

16/04/2008
Dated

Brent B. Olthuis

Counsel for the Intervenor, BCCLA

LIST OF AUTHORITIES