WARRANTLESS PERIMETER SEARCHES
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Due to the proliferation of marijuana grow operations in B.C., law enforcement and governments are constantly trying to develop new investigative techniques and strategies. One of the primary obstacles which face the police in their investigation and enforcement is the requirement of prior judicial authorization to enter onto an individual's property. The requirements to obtain a search warrant under the ***Criminal Code*** or ***Controlled Drugs and Substances Act*** are well known. The constitutional protection of an individual's right to be free from state intrusion and the sacrosanct nature of the residence are steadfastly protected within our jurisprudence. Without a search warrant, entry onto the property can only be made where circumstances justify a warrantless entry. This paper seeks to review the law regarding warrantless perimeter searches focusing on the doctrine of exigent circumstances and provincial/municipal authority.

The starting point: *R v. Kokesch*

The seminal case dealing with warrantless perimeter searches of a premise is ***R v. Kokesch*** [1990] 3 S.C.R. 3 In ***Kokesch***, the police received information that a marijuana grow operation was in Kokesch's residence. The officers then walked up the driveway and being within feet of the residence, gathered sufficient grounds to obtain a search warrant. It was commonplace that the initial trespass onto the property constituted a warrantless search. The issue then whether the warrantless search was justifiable and whether the evidence obtained from the warrantless search admissible in the proceedings.

The majority, written by Mr. Justice Sopinka, held that the evidence must be excluded from the proceedings. The Court noted that the police intentionally trespassed on the property with only minimal information that had not been corroborated. Further, the police did not canvass any other avenues of investigation prior to trespassing on the property, knowing that they lacked

sufficient grounds to obtain a warrant to authorize their entry onto the property. The Court found that the violation was "very serious and in no sense mitigated by the good faith on the part of the police officers." (pp. 55).

The Court was cognizant of the fact that the impugned evidence was real evidence, was reliable and was essential to the prosecution of the case. However, the Court recognized the need to distance itself from such Charter-infringing conduct and noted that the administration of justice would suffer greater disrepute to admit this evidence (pp. 57).

Although the s. 24(2) analysis in ***Kokesch*** relies upon the ***Collins/Stillman*** criteria, the principles enunciated by the Court are equally applicable in the current ***Grant***[1] analysis. The Supreme Court in ***Grant*** noted that once a breach was found, the starting point was that the administration of justice was already in disrepute and the purpose of s. 24(2) was to prevent any further disrepute and to maintain the public confidence in the justice system. The Court recognized the need to distance itself from wilful behaviour which showed a reckless disregard for a person's charter rights (pp. 74 to 75). Similarly, the Court confirmed the importance of the privacy interests of a person's residence and noted that impact of a breach of that right will be regarded as serious (pp. 78).

Exigent Circumstances

The evolution of the warrantless residence searches then shifted to the doctrine of exigent circumstances and whether or not it could justify such an entry. The issue became particularly relevant in the context of 911 calls and the common law duty of the police to ensure the safety of individuals.

In ***R v. Godoy*** [1999] 1 S.C.R. 311, the police responded to a 911 call from an apartment where the call was disconnected halfway through. Upon attendance at

[1] 2009 SCC 32

the apartment, the police knocked on the door, which was answered by the Accused. The Accused claimed that everything was okay inside, refused to open the door completely and refused to allow the police to enter the suite. The police forced entry into the suite and found the Accused's spouse who appeared to have been assaulted.

In determining the authority for the police entry into the suite, Chief Justice Lamer (as he then was) noted at paragraph 11,

> In my view, public policy clearly requires that the police *ab initio* have the authority to investigate 911 calls, but whether they may enter dwelling houses in the course of such an investigation depends on the circumstances of each case.

The Court then stated that the actions of the police officer must be in accordance with the criteria set out in ***Waterfield*** and ***Dedman***. At paragraph 18, the Court cited Mr. Justice Doherty in ***Simpson***, where he stated,

> The 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 that interference.

The Court affirmed the significant privacy rights of an individual's residence, but noted that they were not without restriction. After reviewing the conduct of the police, the Court held that the warrantless entry was justified and the Accused was convicted of the assault.

911 Calls and Marijuana Grow Operations

The Supreme Court's decision in ***Godoy*** makes it clear that a 911 call alone is not carte blanche to permit warrantless entries onto an individual's property. A

contextual analysis must be undertaken to determine whether or not the investigation of that call requires the warrantless entry and to what extent.

The issue of warrantless perimeter searches resultant from a 911 call frequently arises with suspected marijuana grow operations. Often, an anonymous 911 call is made alleging a break and enter or a fire hazard at a residence. The police attend and demand entry into the residence to investigate the call. The issue then becomes whether the police officer can rely upon the exigent circumstances doctrine and his duty to protect life to enter the residence. As with all of these cases, the answer is “It depends.”

In ***R v. Mann*** 2003 SCC 1725, the police responded to a 911 call of a break-in in progress. The police arrived on scene and arrested two of the suspected burglars. The police spoke with Mann, who stated that only he and his father were in the residence and did not require any further police assistance. One of the burglars advised the police that the reason they were attempting to rob the house was because it contained a marijuana grow operation. Mann was arrested for production and the police then entered the residence without a warrant and found such an operation in the basement. At trial, some police officers testified that the purpose of entering the residence was not to investigate the possibility of a grow operation, but rather to ensure that no further persons remained in the residence, including suspects.

In his decision, Justice Groberman (as he then was) stated that the police ignored the evidence before them which suggested that there were no further burglary suspects present and that Mann was the 911 caller (pp. 25 – 27). Further, there was no reason to doubt what Mann stated about the residence. Groberman J. noted that the primary purpose of the warrantless search was to investigate the suspected grow operation (pp. 29). In assessing the reasonableness of the search, Groberman J. noted at paragraph 41,

> From the earliest days of the ***Charter***, it has been established that a warrantless search in the course of a criminal investigation is prima facie unreasonable. [...] In order to be lawful, the Crown must demonstrate that this search comes within the limited category of entries into a dwelling house that are reasonable and lawful, notwithstanding the absence of a warrant. Dwelling houses have been seen as particularly sacrosanct in law and very limited powers to warrantless entry exist in respect of them.

After assessing the facts before him, the Court found that there was no genuine public safety when the police decided to enter the residence without a warrant and therefore, the entry could not be justified under exigent circumstances. Further, he noted the observations made by the police during the impermissible search ought to be excised from the subsequently obtained search warrant. In considering the admissibility of the evidence, the Court concluded that the totality of the circumstances necessitated the exclusion of the evidence.

The British Columbia Court of Appeal recently dealt with the doctrine of exigent circumstances and warrantless searches in ***R v. Larson*** 2011 BCCA 454. In ***Larson***, the police located Larson who appeared to be suffering from a delusional episode. Larson claimed that unknown individuals broke into his residence and attempted to harm him. Larson was taken to the hospital by the police due to his psychiatric state. En route, the police called other officers to investigate Larson's allegations; of note, the police were aware that Larson's residence was a suspected grow operation. The police arrived at Larson's residence and did not observe any signs that there was a home invasion, but went into the residence in any event. Significantly, the allegations of Larson occurred two hours prior to the police attendance. The Court noted that at the time of the warrantless entry, there existed no genuine safety concerns. As the observations from the warrantless search formed the ITO, the subsequent search was also held to be invalid. The Court excluded the evidence found in the search under the ***Grant*** analysis.

Another factor to be considered in reviewing a warrantless entry is the scope of the search performed. In ***R v. Batanov*** 2011 BCSC 1749, the police received a call about three suspicious males observed on a property. When the police attended, they observed boards missing from the fence and the rear sliding door to the residence was open. Prior to entering the residence, the police were advised that the residence contained a licensed grow operation. While searching the residence for intruders, the police located the grow operation and counted the numbers of plants to ensure it complied with the allowable amount on the license posted at the house, which it did not. The police used the observations gleaned from the warrantless search to form the basis of the ITO.

Mr. Justice Joyce held that the initial entry into the residence was valid, as there were objective facts which gave rise to a concern about individuals inside, their safety, and the possibility of a grow rip (pp. 43). However, the Court concluded that the scope of the search undertaken by the police exceeded the permissible limits for a warrantless safety search (pp. 48 to 54). He noted that the purpose of the search shifted from a legitimate safety search into an improper criminal investigation for evidence. Further, the Court held that the police could not rely on plain sight to justify their actions, as it was inconsistent with the initial purpose why they entered the residence, noting such an approach would "fly in the face of the law set down in ***Godoy***." (pp. 56). The search warrant was deemed to be invalid and the Court had little difficulty in excluding the evidence from the case. Joyce J. noted that the police were well aware of the scope of their authority when entering the residence and intentionally acted beyond that (pp. 61). In assessing the impact of the ***Charter***-infringing conduct, the Court noted at paragraph 62,

> [T]he prosecutor suggests that, because the police were lawfully inside the residence and merely took a quick count of what they saw, the impact of the breaches of Mr. Batanov's ***Charter*** protected interests in minimal. I disagree. It must be kept in mind that even though the police had the authority, under exigent circumstances, to enter the Accused's home without a warrant, this case is still concerned with the privacy interests in

> relation to his home. Those privacy interests are entitled to the utmost protection. In my view, the Court must guard against the notion that once the police are lawfully inside a person's home, unlawful searches conducted by them will be viewed as a minimal intrusion into protected privacy interests. ***Godoy*** **and similar cases stress the importance of maintaining clear limits on the extent of the police powers flowing from the duty to preserve public safety.** [Emphasis Added]

Provincial/Municipal Authority

In recent years, another area of litigation has centred on the interplay between warrantless perimeter searches and provincial/municipal authority to permit entry for public safety and inspection purposes. Again, these issues arise primarily in the context of "controlled substance houses."

Safety Standards Act

The ***Safety Standards Act*** was enacted in 2003 and came into force on April 1, 2004. As a consequence of the ***Act***, municipalities created Safety Inspection Teams, who were responsible for investigating premises with excessive hydro consumption. Such teams were created in Abbotsford, Surrey, Chilliwack, Coquitlam, Langley, Pitt Meadows, Port Coquitlam, Richmond, and Mission.

With the enactment of the ***Safety Standards Amendment Act*** in 2006, an information sharing relationship was established between BC Hydro and the individual municipalities. As set out in sections 19.1 to 19.4, a municipal government simply requests all of the account information and electricity consumption data (for the past two years) from BC Hydro or electricity distributor and it **must** be provided. By operation of regulations and municipal by-laws, BC Hydro routinely provides this information for any residence where the usage is over 93 kWh, a level deemed to be three times the average consumption. Upon receipt of this information, the municipal government has the "**discretion**" to

disclose the information to a designated safety officer listed under the ***Act*** or the provincial or municipal police force.

Upon receipt of this information, the safety officer can then give written notice to the owner or occupier of the residence of the intention to enter the residence and conduct a safety inspection. The occupant then is required to respond to the notice within two days of it being posted. Failing a response from the occupant, the safety officer would be permitted to enter the residence. The practice, however, seems to be that where no response has been received, an administrative warrant under the provisions of the ***Community Charter*** is obtained to allow entry.

The constitutionality of the ***Safety Standards Act*** was challenged in ***Arkinstall v. Surrey (City)*** [2008 BCSC 1419, overturned on appeal at 2010 BCCA 250]. In ***Arkinstall***, the Petitioners received a notice advising of a safety inspection pursuant to s. 18(1). The Petitioners agreed to the inspection, but refused to allow the police (who accompany the electrical safety inspection team for security purposes) into the residence. On the third attempt to inspect the property, which was again met with the refusal to allow the police into the residence, the decision was made to cut off the power to the property until such time an inspection could be completed. The day following that decision, a BC Hydro employee attended the property to cut off the power. The Petitioners allowed the employee access to their residence and a cursory inspection was undertaken where no safety issues were discovered. Despite being advised of the lack of issues with the house, the decision was maintained to cut off the power.

The Chambers Judge held that the provisions of the ***Safety Standards Act*** did not violate s. 8 of the Charter, as the purpose of the law was public safety and not criminal investigation. The Court did find that the accompaniment of the police officers did violate the s. 8 rights of the Petitioner and therefore, the police could not enter the property without a warrant.

On appeal, the Court agreed that the pith and substance of the ***Act*** was public safety and not criminal investigation (pp. 55). The Court did not, however, accept simply accept that since the search was regulatory, it fell into the exemption noted in ***Hunter*** and should not be governed by the warrantless search criteria from ***Hunter***[2]. Rather, the Court noted that a flexible approach must be undertaken in determining the reasonableness of the law and the search (pp. 58). Where the search was found to be more akin to a criminal investigation, the less permissible departures from the ***Hunter*** criteria would be allowed. The Court distinguished the facts in ***Arkinstall*** from other regulatory cases, where production orders were made for documents or other less intrusive searches were conducted. They noted that in ***Arkinstall*** the level of expectation of privacy in a private residence and of the intrusiveness of the search were significant and therefore required greater adherence to the principles enunciated in ***Hunter*** (pp. 60).

With respect to the hierarchy of locations with the greatest expectation of privacy, the Court noted that a person's residence would be at the top of the list (pp. 69). The Court agreed that the Petitioner did have a lesser degree of privacy over the electrical readings; however, they stated (pp. 73)

> While a safety inspector may be looking for an electrical panel or electrical wiring in which the individual has a diminished expectation of privacy, if doing so means intruding into the individual's home where there is a high expectation of privacy, such an inspection will be intrusive. [3]

Further, the Court noted that the scope of the search was highly intrusive, as it

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[2] The regulatory exemption to warrantless searches was expanded on in ***Thomson Newspaper Ltd v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*** [1990] 1 S.C.R. 425.

[3] The reasoning is consistent with the Supreme Court of Canada in ***R v. Gomboc*** 2010 SCC 55, where the majority held that the tapping of the Accused's electric line did not require a direct search of the individual's residence and therefore did not engage their territorial privacy interest of the home.

authorized the entirety of the residence to be subject to the “chilling glare of inspection” (pp. 74).

The Court also emphasized the stigma associated with these forms of inspections. While not typically a factor for consideration in a regulatory offence, the Court held it was of significance as the starting point for the inspections is that the person was believed to have committed an offence, primarily the production of marijuana (pp. 77 to 81).

The Court rejected the doctrine of exigent circumstances (pp. 83). The notice provisions of the ***Act*** required that a minimum of 48 hours notice be provided prior to entering any residence. Further, the Court commented on the readily available administrative warrants under the ***Community Charter***. It was established that where no response was received by the owner served with a notice, the standard practice was to obtain such a warrant. The Court noted that the obtaining of a warrant did not impact the efficiency with which the enforcement team did their job or impede them in any substantial way (pp. 85).

The Court further rejected the Respondent’s argument that the warrant served no valid purpose in the process, as it was a regulatory offence. Again, the Court noted the factual distinction between typical regulatory offences and the case at bar. It was noted that in ***Arkinstall*** the inspection was not done randomly or as a matter of routine, rather the specific residence was being targeted due to its electrical consumption. The Court noted that in such cases, the review by a neutral arbiter served an important function to ensure the grounds were sufficient to authorize the entry (pp. 92).

Fire Services Act

Similar provincial authority for warrantless searches has also been argued under the ***Fire Services Act***. In ***R v. Collings*** 2010 BCSC 1658, the fire department

responded to a 911 call about a shed fire. It was suspected that a generator in the shed caused the fire, which was quickly extinguished. The fire department noted that there was a wire connecting the generator in the shed to the primary residence (which did not show any signs of a fire). The fire department knocked on the door and received no response from the residence. The police attended for the purpose of traffic control. The fire department spoke with the police and relayed their concerns, which included the fact that the residence may contain a marijuana grow operation.

The police officer circled the house and knocked on the windows until Collings was awoken from the bedroom. In doing so, the officer made other observations consistent with a marijuana grow operation. The Accused exited the residence, closed the door behind him, and spoke with the police and fire department. He advised that there were no electrical issues with the house and no other occupants. The Accused re-entered and exited the residence (closing the door at all times) and confirmed there was no fire issues inside. The Accused refused to allow anyone to enter his residence.

The fire department called the Electrical Fire Safety Team to assess the property. The Team arrived within minutes and were not granted access to the residence. After being advised by the municipality's counsel that there was no authority to enter the property, the Deputy Fire Chief concluded he could enter the residence under the auspices of the ***Fire Services Act***. He demanded entry to the property to check for ongoing fire concerns, notably some one hour and twenty minutes after arriving on scene. When the Accused again refused entry, he was detained by the police. To no one's surprise, no fire was located in the residence, but a marijuana grow operation was present. Further, during the course of their "safety inspection," the fire department counted the number of lights, fans, and plants and relayed that information to the police, which formed the basis of the ITO sworn the following day. Prior to the obtaining of the search warrant, two additional warrantless entries were made into the residence, in order to complete

the official safety report and to show two members of the Safety Team what a marijuana grow operation looked like before it was dismantled.

The Court found that the fire department lacked the necessary authority to enter the residence in the manner they did, finding that the purpose of the intrusion was for criminal investigation and that no exigent circumstances existed (pp. 75). The Court noted that since the Accused was allowed to freely go into his residence and the warrantless entry not being made until 80 minutes after the initial arrival vitiated the claim that there was an emergency fire risk. Further, the Court held that the general fire concerns associated with a marijuana grow operation are insufficient to find exigent circumstances (pp. 100). The evidence obtained in the search was excluded and the Accused was acquitted.

In ***R v. Do*** 2012 BCSC 22 (ss. 8 and 9 decision) and 2012 BCSC 411 (s. 24(2) Analysis), Mr. Justice Fitch dealt with a similar fact pattern, with one notable difference: the Accused did not have standing to challenge the search itself. In ***Do***, a 911 call was made about a possible house fire. Upon attending the property, a large amount of steam was observed from the vent on the roof. The Accused exited the residence and spoke with the fire department and police and advised that the other occupant of the house was taking a steam shower. The Accused then returned to his residence and closed the door. The police and fire department knocked on the door and demanded entry. The Accused refused and was arrested for obstruction. Further, upon the door being opened, there was an overwhelming smell of marijuana and he was detained for production of marijuana. The police searched the residence and located a large marijuana grow operation.

At trial, the Crown relied upon the doctrines of exigent circumstances, statutory authority under the ***Fire Services Act***, and common law duty to protect life to justify the entry. All of these bases were rejected by the Court. In assessing

exigent circumstances, Fitch J. cited the case of ***R v. Jamieson***[4] where Madam Justice Saunders stated

> The exigent circumstances doctrine must be applied rigorously so as not to permit the police to accomplish by the back door what they cannot through the front door [...] (pp. 112).

The Court noted that the facts did not support a justification of exigent circumstances as the police and fire department were on scene for over an hour before entering the residence (pp. 119). Further, it was evident to all that there was no smoke coming from the house. The Court also noted that the length of the search (35 minutes) was inconsistent with a search for life and safety and in reality was an investigative search for criminal activity (pp. 122). The Court concluded that the warrantless search was impermissible and found breaches of the Accused's ss. 8 and 9 rights as it pertained to his arrest.

On s. 24(2), the Accused sought to have the fruits of the search excluded. The Court noted that while the unlawful arrest of the Accused fell more towards the serious end of the ***Charter*** spectrum, that the initial investigative detention was lawful. The key distinguishing factor for the Court was the fact that the Accused had no reasonable expectation of privacy with respect to the house. Given that finding coupled with the reliability and importance of the evidence to the Crown's case, the evidence was admitted into the case and the Accused was convicted of production and PPT.

Hydro Officers as Police Agents

Another important inquiry centers on how the provincial safety investigation into the property commenced. Consideration should be given to whether or not an argument can be made that the electric company was acting at the behest and direction of the police, thereby making them a police agent. Such an argument

[4] (2002) 166 C.C.C. (3d) 501 (B.C.C.A.)

was successful in ***R v. Liang et al*** 2007 Y.J. No. 3. In ***Liang***, the police requested hydro consumption information for a number of properties. After being told by Yukon Electric that there was nothing significant in the records, the police advised the electric company that they believed there may be a bypass on the property. In the case of a second residence, the police specifically requested that Yukon Electric attend and check for a hydro bypass. In both cases, a bypass was discovered; of note, Yukon Electric attended within two hours of their conversation with the police. This information was relied upon significantly in the ITOs for the properties. The Court found that Yukon Electric was acting as a agent for the police and that the search would not have occurred but for the direction from the police. The search was held to be a warrantless perimeter search and the paragraphs referencing the bypasses were expunged from the ITOs.

What can be argued?

When dealing with cases where there has been a warrantless entry onto a property, defence counsel should review the disclosure material with a view to answering the following questions:

- Who made the decision to enter the property?
- What authority (statutory or common law) was the decision maker relying upon?
- What facts were known to the decision maker at the time? Be wary of ex post facto justifications, such as reliance upon by-laws (***Collings***) or common law exigent circumstances (***Do***).
- What was the status of the investigation prior to entry? What grounds did the decision maker have?
- What did the decision maker do to follow-up on the initial reason to attend the property/corroborate any tip information?

- Did the decision maker have any discussions with other persons (the police) prior to going into the residence?

- What did the police know about the residence prior to that date and time?

- What is the time period between the initial attendance on the property and the decision to enter the residence? Can any delays be justified? (such as requiring specialized officers and equipment in the case of suspected clandestine labs)

- What did the decision maker do after the warrantless entry into the house? What information did they relay to the police?

- Does the scope of the search confirm with the initial reason for entry?

Counsel should always remember that by its very definition a warrantless search runs afoul of s. 8 and is the responsibility of the Crown to justify the search. Like most things in criminal practice, an examination of the facts is necessary to determine the validity of the warrantless perimeter searches. Counsel should not simply accept a justification of exigent circumstances or purported provincial/municipal authority. Even after the entry has been justified, counsel may still be able to challenge the scope of the search to ensure it complies with the limited permitted purpose of the warrantless search.