C.A.C. No. 104578

NOVA SCOTIA COURT OF APPEAL

Chipman, Roscoe and Pugsley, JJ.A.

Cite as: R. v. Patriquen, 1994 NSCA 243

BETWEEN:		
HER MAJESTY THE QUEEN	Appellant	James C. Martin and Christopher Bundy for the Appellant
- and -		
MICHAEL RONALD PATRIQUEN and BARRY ALEXANDER NAGY	Respondents	Warren K. Zimmer for the Respondent, Patriquen and Kevin Burke, Q.C. for the Respondent, Nagy
		Appeal Heard: October 5, 1994
		Judgment Delivered: December 20, 1994

THE COURT: The appeal is allowed and a new trial is ordered as per reasons for judgment of Roscoe, J.A.; Chipman, J.A. concurring and Pugsley, J.A. dissenting.

ROSCOE, J.A.:

The respondents were charged with possession for the purposes of trafficking and cultivation of marijuana contrary to Sections 4(2) and 6(2) of the **Narcotic Control Act**. At the commencement of their trial in Supreme Court,

after the jury selection, a **voir dire** was held to determine the admissibility of evidence obtained by the police as a result of a seizure of marijuana plants. The respondents alleged that their **Charter** rights under s. 8, to be secure from unreasonable search and seizure, had been violated.

Constable Furey, of the R.C.M.P. Bridgewater detachment, was the only witness to testify on the **voir dire**. On July 12, 1992, he received a telephone call from a casual acquaintance who informed him that marijuana plants were growing on a piece of property at Lapland, Lunenburg County. Constable Furey and the informant drove to the property, which was accessed by leaving the paved highway, travelling a few miles on a woods road, then parking the vehicle and walking a short distance on a secondary woods road to a clearing. At the clearing Constable Furey observed approximately 100 marijuana plants in various stages of growth, most of which were staked and surrounded by chicken wire. On July 31,1992, Constable Furey returned to the site with two other policemen and took photographs of the plants. It was on this visit that they first observed a beaten path through the woods which led to a residence approximately 500 yards from the crop. On August 20, 1992, the informant advised Constable Furey that two unknown people were in the area of the residence. The next day Constable Furey and another policeman attended at the site, hid in the woods and conducted

surveillance. After an hour or so, the respondents arrived in a truck carrying several five gallon jugs of water and commenced watering the marijuana plants. They were arrested and the plants were seized. Later in the day the police obtained search warrants to search the house. No evidence relevant to this case was seized from the house. Constable Furey indicated that prior to August 21 he did not know who owned the property where the plants were growing nor who

occupied the house. Crown counsel at the trial agreed that the land and residence were owned by Louis Charette, and that the property was "occupied and possessed" by the respondents.

The trial judge found that the police did not have reasonable grounds for their belief that the property searched contained narcotics, that they only had a mere suspicion. He stated:

> "Therefore, there was no lawful entry and the warrant obtained after the three entries but before the search of the residence was invalid. The warrantless search was unreasonable. Clearly, s. 8 of the **Charter** was infringed."

On the question of whether the evidence should be excluded pursuant to s. 24(2) of the **Charter** the trial judge considered the three part test established in **R. v. Collins**, [1987] 1 S.C.R. 265 and found: (1) that the admission of the evidence would not render the trial unfair; (2) that the police were not acting in good faith because they ought to have known that warrantless searches are presumed to be unreasonable, therefore the breach was serious, and; (3) that the administration of justice could be brought into disrepute if the evidence were admitted. In concluding that the evidence was not admissible, he said:

> ". . . The courts cannot condone a practice of deliberate, unlawful conduct which may intrude on individual privacy."

The respondents were acquitted when the Crown offered no other evidence.

The issues raised by the Crown's appeal of the acquittal are:

(1) Whether the learned trial judge erred by finding that the respondents' rights under s. 8 of the **Charter** had been violated.

(2) Whether the learned trial judge erred in excluding the evidence obtained as a result of the search under s. 24 of the **Charter**.

1. Was there a breach of s. 8 of the Charter?

Section 8 provides:

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

What is protected by s. 8 is a person's reasonable expectation of privacy (**Hunter v. Southam**, [1984] 2 S.C.R. 145). The question in this case is whether there is a reasonable expectation of privacy in a secluded plot of land surrounded by woods in a rural area. It is not necessary for a person to have a proprietary interest in the place searched in order to establish rights pursuant to s. 8. The respondents do need to establish however that they had a reasonable expectation of privacy in the place searched before s. 8 protection can be found to have been violated.

In **Hunter v. Southam**, Dickson, J. as he then was, adopted the reasoning of the United States Supreme Court in **Katz v. United States** (1967), 389 U.S. 347 when it interpreted the Fourth Amendment of the United States Constitution as providing protection "of people, not places". The issue in **Katz** was whether police use of an electronic listening device placed on the outside of a phone booth contravened the Fourth Amendment. Stewart, J. for the majority said:

> "Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area", viewed in the abstract is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. ...[citations omitted]... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

Harlan J. in a concurring opinion stated:

> "As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place". My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable". Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."

In **Hunter v. Southam**, after considering **Katz**, Dickson, J. accepted the reasonable expectation of privacy test as appropriate "for construing the protections in s. 8" and said that the assessment in a particular case must be whether:

> ". . . the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement." (p. 159)

Katz has also been approved in several other Supreme Court of Canada decisions, including most recently **R. v. Plant**, [1993] 3 S.C.R. 281 where Sopinka for the majority said at page 291:

> "The purpose of s. 8 is to protect against intrusion of the state on an individual's privacy. The limits on such state action are determined by balancing the right of citizens to have respected a reasonable expectation of privacy as against the state interest in law enforcement. See **Hunter v. Southam Inc**., [1984] 2 S.C.R. 145, at pp. 159-60. Section 8 protects people and not property. It is, therefore, unnecessary to establish a proprietary interest in the thing seized.

> See **Hunter**, **supra**, at p. 158; **R. v. Dyment**, [1988] 2 S.C.R. 417, per La Forest J., at pp. 426-27; **Katz v. United States**, 389 U.S. 347 (1967). In this respect, I must disagree with the Court of Appeal which relied on the absence of a proprietary interest on the part of the appellant in the computer information.
>
> In balancing the reasonable expectation of privacy of the individual with the interests of the state in law enforcement, this Court has determined that electronic taping of private communication by state authorities violates the personal sphere protected by s. 8: **R. v. Duarte**, [1990] 1 S.C.R. 30. Similarly, such investigative practices as videotaping of events in a private hotel room (**R. v. Wong**, [1990] 3 S.C.R. 36) and seizure by state agents of a blood sample taken by medical personnel for medical purposes (**Dyment**, **supra**) have been found to run afoul of the s. 8 right against unreasonable search and seizure in that the dignity, integrity and autonomy of the individual are directly compromised. While this Court has considered the possibility of violations of s. 8 in relation to informational privacy (**Dyment**, **supra**, at p. 429), we have not previously considered whether state inspection of computer records implicates s. 8 of the **Charter**."

In **Plant**, the Court adopted an American approach to the privacy expectations in information kept by third parties and found that there is no reasonable expectation of privacy in computer records of electricity consumption, since the records did not contain personal and confidential information. One of the factors taken into account in coming to that conclusion was that the records of energy consumption were "subject to inspection by the public at large."

In this case, Crown counsel admitted at the trial that the respondents "occupied and possessed" the land in question. On the appeal, counsel for the respondents contend that this admission restricts the Crown's right to argue that the respondents had standing to rely on s. 8. However, as indicated in **Plant**, the propriety right alone, is not determinative of the privacy interest. The right of people to privacy on open privately-owned land has not yet been considered by the Supreme Court of Canada, but a similar question regarding cultivation of marijuana on Crown land was determined in **R. v.**

Boersma, unreported, June 17, 1994 (Q.L., S.C.J. No. 63). In a brief decision, Iacobucci, J. for the Court said:

> "This appeal comes to us as of right. The appellants were charged with the possession and cultivation of marihuana on what was Crown land. The plants were being cultivated in plain sight and were observed by police officers walking by on a dirt road. In these circumstances, we agree with Lambert J.A. of the British Columbia Court of Appeal that the appellants had no reasonable expectation of privacy with respect to the area on which marihuana was being cultivated and were thus not entitled to the protection of s. 8 of the **Canadian Charter of Rights and Freedoms**. Accordingly the appeal is dismissed."

The trial judge in **Boersma** held that the accused had a reasonable expectation of privacy in the remote land and that the warrantless search violated his s. 8 **Charter** rights. Lambert, J.A. for the British Columbia Court of Appeal, (unreported, November 10, 1993, Q.L., B.C.J. No. 2748) said at paragraph 9:

> "The key question in this appeal, as it was the key question before the trial judge, relates to whether the two accused had established a "reasonable expectation of privacy" protected by s.8 of the **Canadian Charter of Rights and Freedoms** with respect to the area in which marijuana was being cultivated. That corresponds to the second issue raised by the Crown.
>
> In my opinion, this case is quite different on its facts than **Kokesch**. There a private house was involved. In this case the activity was being carried out on Crown land that is accessible to everyone. In my opinion, there is a quite different expectation of privacy in a private house and for activities being carried on in a private house than there is for activities being carried out in the open air and particularly in the open air on Crown land.
>
> An argument advanced with some force on behalf of the two accused in this Court was that the police themselves were trespassers on the interest in the land on the road side of the fence as they passed through and around the chain and as they walked along the road. In my opinion, the conduct of the police in this respect has no relevance to the question of the reasonable expectation of privacy of the two

> accused on Crown land. They have, in my opinion, no reasonable expectation of privacy with respect to this kind of activity, and by that I mean a gardening activity on Crown land, when the privacy relates to whether they were susceptible to being seen by other people. If they do not have a right of privacy or expectation of privacy with respect to being seen people who are also on the Crown land they do not acquire an expectation of privacy when they are on the Crown land in relation to people viewing them from land subject to a private interest adjacent to the Crown land.
>
> For those reasons I consider that the two accused in this case had no reasonable expectation of privacy in relation to the gardening type of activity and in relation to being seen engaging in that gardening type activity at the time when they were doing so. In the words used in the Supreme Court of Canada in **Plant v. The Queen**, in which judgment was rendered on 30 September 1993, it is my opinion that in this case there was no expectation that the dignity, integrity, and autonomy of the two accused would be free from being compromised in the circumstances I have described."

In my view, the expectation of privacy on privately held woodland is not substantially different from that of Crown land. As with the computer records in **Plant**, woodlands in rural areas are in some respects "subject to inspection by members of the public at large". See for example the provisions of the **Angling Act**, R.S.N.S. 1989, c.14 which allow any resident to cross on foot any uncultivated land in order to access a lake, stream or river for the purpose of fishing. "Uncultivated" is defined as land in its natural wild state and includes land that has been cleared.

In **Oliver v. United States**, 104 S.Ct.1735 (1984), the United States Supreme Court confirmed that the Fourth Amendment protection does not extend to "open fields". Justice Powell, speaking for the majority, relied on **Katz**, **supra**, for the proposition that:

> ". . . The Amendment does not protect the merely subjective expectation of privacy, but only those

> "expectation[s] that society is prepared to recognize as 'reasonable'.". . ." (p. 1741)

After referring to the fact that certain enclaves, most significantly the home, are free from interference Justice Powell remarked:

> "In contrast, open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And [the accused] concede that the public and police lawfully may survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

After explaining the distinction between open fields and the "curtilage", or the land immediately surrounding and associated with the home, Justice Powell asserts that the term "open fields" includes any unoccupied or undeveloped area outside the curtilage and has been extended to include thickly wooded areas. In the conclusion of his opinion he states:

> "Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment."

Oliver v. United States was relied on by VanCamp, J. in **R. v. Marchese**, unreported, May 25, 1989, Q.L.; O.J. No. 796 (Ont.H.C.), a case also involving a search for marijuana in an open field.

I adopt the reasoning of Justice Powell expressed in **Oliver** in concluding that the respondents did not have a reasonable expectation of privacy in the clearing in the woods where the marijuana plants were growing

and therefore there was no breach of their s. 8 **Charter** rights. It is not necessary to determine if the searches were unreasonable and if so, whether the evidence should be excluded or not pursuant to s. 24(2) of the **Charter**. The appeal should therefore be allowed and a new trial ordered.

There is however another point that requires comment. In this case the respondents submit that the admission of Crown counsel at the commencement of the **voir dire** went beyond that referred to above and that there was also an admission that there was a **prima facie** breach of s. 8 because there were warrantless searches. It is submitted that "in conceding a **prima facie** breach of Section 8, the Crown was also conceding that the respondents had a reasonable expectation of privacy with respect to their occupation and possession of the property." I do not agree that the Crown conceded there was a reasonable expectation of privacy; those words were not used in the passage where the discussion of admissions took place. It is difficult to discern exactly what concessions were made because of Crown counsel's apparent confusion about what he was being asked to admit and the frequent interruption of his submissions regarding the procedure he intended to follow, both by defence counsel and the trial judge. In the event however that defence counsel had the understanding that the expectation of privacy was conceded and that to decide the appeal on that point would be unfair to the respondents, I propose to address the other issues argued on the appeal.

2. Was the search reasonable?

A warrantless search is **prima facie** unreasonable. In order to prove that it was reasonable the Crown must establish, among other things, that it was authorized by law. (See **R. v. Collins**, **supra**.) The Supreme Court has decided in **R. v. Grant**, [1993] 3 S.C.R. 223 that :

> ". . . warrantless searches pursuant to s. 10 NCA must be limited to situations in which exigent circumstances render obtaining a warrant impracticable. Warrantless searches conducted under any other circumstances will be considered unreasonable and will necessarily violate s. 8 of the Charter. To the extent that s. 10 NCA authorizes a search in the absence of the limiting circumstances, it is invalid." (p. 241)

Since there were no exigent circumstances in this case it must be concluded that the search was not reasonable, assuming at this point that there was a reasonable expectation of privacy.

3. Should the evidence be excluded pursuant to s.24(2) of the Charter?

When a Court of Appeal reviews a decision of a trial judge made pursuant to s. 24(2) of the **Charter**, it should not substitute its view absent any unreasonable finding of fact, or error in law or principle. (See **R. v. Grant**, **supra**, p. 256.) In this case, the trial judge commenced the s. 24(2) analysis by saying:

> "Evidence obtained as a result of a warrantless search is tainted. It usually is not admissible. But it may be admissible if its admission would not bring the administration of justice into disrepute."

With respect, the statement that "the evidence ... is usually not admissible" is an oversimplification and is inaccurate. An analysis of the twenty-one cases decided by the Supreme Court of Canada since 1982, dealing with warrantless searches that were found to have breached s. 8 of the **Charter** reveals that in eight of those cases, the evidence was excluded pursuant to s. 24(2). In the other thirteen cases, the evidence was admitted. The cases where the evidence was excluded are:

R. v. Collins, [1987] 1 S.C.R. 265; **R. v. Pohoretsky**, [1987] **R. v. Dyment**, [1988] 2 S.C.R. 417; **R. v. Greffe**, [1990] 1 S.C.R. 755; **R. v. Kokesch**, [1990] 3 S.C.R. 3 ; **R. v. Mellenthin**, [1992] 3 S.C.R. 615; **R. v. Dersch**, [1993]

3 S.C.R. 768; and **R. v. Borden**, unreported, September 30, 1994, Q.L. S.C.J. No. 82.

The cases where the Supreme Court determined that the evidence was admissible despite the s. 8 breach are:

R. v. Seiben, [1987] 1 S.C.R. 295; **R. v. Hamill**, [1987] 1 S.C.R. 301; **R. v. Jacoy**, [1988] 2 S.C.R. 548; **R. v. Duarte**, [1990] 1 S.C.R. 30; **R. v. Thompson**, [1990] 2 S.C.R. 1111; **R. v. Wong**, [1990] 3 S.C.R. 36; **R. v. Tessier**, [1991] 3 S.C.R. 687; **R. v. Wise**, [1992] 1 S.C.R. 527; **R. v. Erickson**, [1993] 2 S.C.R. 649; **R. v. Plant**, **supra**; **R. v. Grant**, **supra**; **R. v. Wiley**, [1993] 3 S.C.R. 263; and **R. v. Colarusso**, [1994] 1 S.C.R. 20.

In addition to the inaccurate statement, the trial judge appears to have placed the onus on the Crown to prove that the evidence should be admitted, which is an error in law. Combined with the statement that the evidence is "usually not admissible", it amounts to saying that **prima facie**, the evidence should be excluded. However, the evidence is **prima facie** admissible. (See **R. v. Brown** (1987), 76 N.S.R. (2d) 64 (N.S.S.C.A.D.)) It is the party applying to exclude the evidence who must establish on the balance of probabilities that the admission of the evidence would bring the administration of justice into disrepute. (**Collins v. R**., **supra**, at p. 280.) Because of these two errors, it is necessary for this Court to reconsider the s. 24(2) application to exclude the evidence.

The three part test developed in **Collins** requires a consideration of the following matters:

(1) Does the admission of the evidence effect the fairness of the trial?

(2) Is the **Charter** violation of a trivial or serious nature?

(3) Whether the justice system reputation will be better served by the inclusion or exclusion of the evidence?

The admission of the evidence in this case would not effect the fairness of the trial. As indicated in **Collins** at page 284:

> ". . . Real evidence that was obtained in a manner that violated the **Charter** will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the **Charter** and its use does not render the trial unfair."

The second part of the test requires a consideration of whether the police officers acted in good faith, whether it was a technical or inadvertent breach, whether the breach was motivated by urgency to prevent the loss of the evidence and whether the evidence could have been obtained without a **Charter** violation. In this case, the trial judge found that the officers acted in bad faith " because they knew or ought to have known the law that warrantless searches are presumed to be unreasonable". When questioned about the reason for not obtaining a warrant, Constable Furey testified that he felt there was no reason to obtain a warrant "given the circumstances the information provided by the source and attending the property to confirm the information provided". In answering questions by the trial judge as to why he did not apply for a warrant, he stated that in the past "searches have been conducted in similar circumstances of property excluding structures whether it be barns or homes and we've accessed land before to search land without a warrant." The officer was not questioned about what statutory authority or which case he was relying on as authority for conducting a warrantless search of open land as were the officers in **Grant**, **Wiley** and **Plant**, **supra**.

Section 10 of the **Narcotic Control Act** states:

> "A peace officer may, at any time, without a warrant enter and search any place other than a dwelling-

> house, and under the authority of a warrant issued under section 12, enter and search any dwelling-house in which the peace officer believes on reasonable grounds there is a narcotic by means of in respect of which an offence under this Act has been committed."

The officers in **Grant**, **Wiley** and **Plant**, **supra**, were held by the Supreme Court of Canada to have been acting in good faith because they relied on the apparent statutory authority in s. 10 of the **Narcotic Control Act** and they had reasonable and probable grounds to believe that there were narcotics at the place searched. It was not until the decisions in **Grant**, **Wiley** and **Plant** that warrantless searches under s. 10 of the **Narcotic Control Act** were declared unconstitutional absent exigent circumstances. Before those cases in 1993, the Supreme Court of Canada had not addressed that question specifically in a case where there were reasonable and probable grounds. In **Kokesch**, for example the warrantless perimeter search was unreasonable because the officers did not have reasonable and probable grounds required for a warrantless search pursuant to s.10 of the **Act**.

In **Wiley**, **supra**, the trial judge had concluded that the police had acted in bad faith because they did not undertake "cautious and careful interpretation of previous court decisions" . In the Supreme Court however, Sopinka, J. found: (p.278)

> "In this case, the Court of Appeal overruled the trial judge who excluded the evidence. It did so principally on the basis that the trial judge erred in respect of his determination that the police did not act in good faith. The Court of Appeal was of the view that the trial judge considered that the judgment of this Court "turned back the clock" in respect of investigations which pre-dated that judgment. I agree that this was an error on the part of the trial judge and that, for this reason, it was appropriate for the Court of Appeal to interfere with the trial judgment. Moreover, I agree with McEachern C.J.B.C. that the police acted in good faith relying on the judgment of the Court of Appeal in **Kokesch**, **supra**, and s. 10 NCA. "

In this case, one of the factors that led the trial judge to find bad faith was that he found that the police had only a mere suspicion, not reasonable and probable grounds to believe that the crop existed. That is an assessment based on the reliability or credibility of the informant and the information he provided. In that respect, the officer said he had no reason to disbelieve the informant, a person whom he had known for three years, although he had never acted as an informer in the past. In **Plant**, Sopinka, J. assessed the reliability of the "tip" as follows: (p.297)

> ". . . The information given by the anonymous informant was compelling in that it identified the location of the cultivation operation and located the appellant's house in a fairly specific geographic region, albeit without specifying an exact street address. It is impossible to determine whether the source was credible except by reference to the fact that the information was subsequently corroborated by a police reconnaissance which resulted in identification of the exact address of the residence described by the informant. The tip itself, therefore, was compelling enough in its specification of the place in which the offence was occurring for the police to readily locate the exact address of the appellant's residence and corroborate the report of the informant. I conclude that the anonymous tip, although made by an unknown informant, was sufficiently reliable to have formed part of the reasonable grounds asserted in the information to obtain the warrant."

In this case, the information received was "compelling" as it identified a specific location in a remote area and the informant was prepared to take the officer there to point out the exact site. At that point there was no other method of determining whether it was reliable other than by police reconnaissance. It was not feasible for example to check electricity usage as in **Plant**, since this crop was growing out-of-doors. In this case, it appears from the evidence that the crop could not be seen from the woods road, so it was necessary to enter upon the lands to corroborate the information. Having done that, and observed the crop firsthand, in a minimally intrusive fashion, the police

then had reasonable and probable grounds and could have obtained a warrant. They did not because they did not understand that it was required. In my view, there was no evidence of bad faith in this case, and therefore, if there had been a breach of s. 8, it should not have been classified as serious or flagrant.

With respect to the third part of the test under s. 24(2), the conclusion of Sopinka, J. in **Plant** seems to be particularly applicable to the facts of this case: (p. 301)

> "With respect to the third factor to be considered, I have concluded that the administration of justice would not be brought into disrepute should the evidence be admitted. The guilt of the appellant with respect to cultivation of marihuana contrary to s. 6(1) NCA is clearly established on the real evidence. Further, as previously indicated, the offence is a serious one punishable by imprisonment for a maximum of seven years. Exclusion of the evidence would result in the absence of evidence by which the appellant could be convicted. In these circumstances, the seriousness of the offence militates in favour of the admission of the evidence: see **Collins**, **supra**, **per** Lamer J. (as he then was), at p. 286. I agree with the Court of Appeal that, on balance, exclusion of the evidence would have a greater negative effect on the repute of justice than would its admission."

In this case, it is my opinion that, having regard to all the circumstances, the respondents did not satisfy the onus of establishing that the admission of the evidence would bring the administration of justice into disrepute.

Summary:

To summarize, in conclusion, in my view, there was no breach of s. 8 of the **Charter** because the respondents did not have a reasonable expectation of privacy in the field where the marijuana crop was growing. In the event however that the respondents were under the misunderstanding that the issue of privacy interests had been conceded at the trial, the issue of whether the

evidence should have been excluded pursuant to s. 24(2) has been addressed as if there had been a breach of s. 8 and unreasonable searches. The respondents did not meet the burden of proving that the administration of justice would be brought into disrepute by the admission of the evidence, so it should have been admitted. Accordingly, the appeal should be allowed and a new trial ordered.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

PUGSLEY, J.A. (Dissenting)

I have had the benefit of reading the reasons for judgment prepared by Justice Roscoe.

I respectfully disagree that the respondents did not have a reasonable expectation of privacy in the clearing where the marijuana plants grew. In my opinion, there was a breach of the respondents' rights under s. 8 of the **Charter**.

I, as well, respectfully disagree with Justice Roscoe's conclusion that the evidence contained in violation of the s. 8 right, should not be excluded under s. 24(2) of the **Charter.**

The issues in this case, arise as a consequence of members of the R.C.M.P., without warrant, entering upon land, known to be privately held, in a rural forest setting, in search of evidence of a crime.

In a location that could not be seen from any vantage point accessible to the public, the police discovered in excess of 100 marijuana plants.

The discovery is apparently the only evidence to incriminate the respondents.

The agreement reached by counsel for the Crown at trial, (on appeal the Crown was represented by counsel from the Department of Justice, Halifax) and for the respondents, are of importance when considering the issues:

(1) The property, although owned by one Louis Carrette, was occupied and possessed at all relevant times by the respondents. Unfortunately the boundaries of the "property" were never specified and this failure leads to some difficulty in attempting to define the area over which the respondents had a "reasonable expectation of privacy". It is clear from the transcript, that the property includes a

residence, a clearing in which the marijuana was growing, and a well travelled path of 500 yards in between (hereinafter referred to as the "Property". Constable Furey, testified that on July 31 he took photographs of the residence, the clearing, two or three outbuildings adjacent to the residence, as well as a lake behind the residence. It is reasonable to infer all were included within the confines of the Property;

(2) There were three warrantless searches of the Property by the R.C.M.P. on July 12, 31, and August 21, 1992.

The trial evidence given by Constable Furey, the only witness on the ***voir dire*** discloses:

- Initial search on the morning of July 12, 1992 was prompted by a telephone call to Constable Furey's home. He had known the caller in a "casual social manner" for approximately three years. They had met occasionally over coffee. The caller had never acted as a paid, or unpaid informant for the R.C.M.P. The caller stated that there was a growth of what he "felt to be marijuana plants" on a particular piece of land. Constable Furey was not advised by the caller of his source of knowledge, nor did Constable Furey inquire respecting the source.
- The caller took Constable Furey by car on a paved road approximately 20 minutes distant from the Town of Bridgewater. Upon leaving the pavement, the vehicle was operated on a gravelled or "forest or woods" road for one and one-half to two miles. They then left the vehicle and walked, for approximately five minutes, on a secondary woods road, not accessible by vehicle

because of fallen trees and growth, to a clearing. The clearing contained in excess of 100 healthy marijuana plants, appropriately staked, wired and attended.

- The Property is located in Lapland, a wooded rural community, and the only industry is that of forestry.

- On July 31, Constable Furey returned to the Property with two members of the R.C.M.P., Bridgewater Drug Section, so they could have direct knowledge of the growth and take photos. While in a concealed position at the end of the treeline, Constable Furey noted that there was a vehicle at the residence "as well as children playing going back and forth from the lake very close by to the residence itself".

  A beaten path extended from the clearing approximately 500 yards to a residence and two to three outbuildings. The path appeared to be frequently walked. Another crop site was close to, and visible from, the residence.

- On August 21, 1992, Constable Furey attended with a member of the provincial emergency response team. They were armed, dressed in camouflaged gear, and used two-way walkie-talkies. They waited, concealed in separate locations, at the edge of the treeline. After the respondents watered and spoke with the plants, Constable Furey and his associate, on the count of three and with weapons drawn, emerged from their observation posts, and arrested the respondents for violations of the **Narcotic Control Act**.

  A search warrant was obtained in the afternoon authorizing a search by the R.C.M.P. of the residence and outbuildings.

- There was no evidence to establish the existence of exigent circumstances, rendering it impractical to obtain a warrant. Constable Furey testified he did not consider a warrant was needed because "in the past, searches have been conducted in similar circumstances of property excluding structures whether it be barns, or homes, and we've accessed land before to search land without a warrant."
- The visits of July 21 and August 21 were motivated primarily on the evidence discovered by Constable Furey on the warrantless search of July 12. While some additional information from the caller was received between July 12 and July 31, and again between July 31 and August 21, no attempt was made to verify the information given.

In my opinion, it is a reasonable inference from the evidence to conclude that all observations made by Constable Furey and his associates, of the clearing, the residence, the outbuildings, the lake and the pathways connecting them, were made while the R.C.M.P. were located on the Property and that the secondary woods road, only accessible by foot, was located on the Property as well.

The evidence further discloses, in my opinion, that Constable Furey knew on the first warrantless search made on July 12, that the Property was, in fact, private property.

Section 8 of the **Charter** provides:

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

Some of the writers, interested in this section, have found it useful to refer to the case law developed in the United States relating to the Fourth Amendment to the Constitution.

It provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Our Supreme Court has determined that the standards under s. 8 only apply where a person has a reasonable expectation of privacy, following the American analysis that privacy, rather than property, is the interest that should be protected by the laws governing search and seizure.

The conclusion I have reached, respecting the respondents' reasonable expectation of privacy in the clearing, is inconsistent with that expressed by the majority of the Supreme Court of United States in **Oliver v. United States** (104 S.C.T 1735 (1984)). It is apparent from Justice Powell's reasons that he was, in part, influenced by the "historical underpinnings" of the open fields doctrine, as well as "the historical and contemporary understanding" of the purposes of the Fourth Amendment (at 1742) (an editor's note makes it clear that the use of the term "open fields" may "include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" or a "field" as those terms are used in common speech.)

The American approach is to be contrasted with the purposive approach adopted by the Supreme Court of Canada.

Justice LaForest in **Hunter v. Southam Inc.,** [1984] 2 S.C.R. 145 stated at p. 154:

> The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in

> the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic contest capable of providing an obvious gloss on the meaning of the guarantee.

In some areas of privacy analysis, the Supreme Court of Canada has rejected well developed American standards (**R. v. Duarte** (1990), 53 C.C.C. (3d) 1 (S.C.C.)).

The editors of **Search and Seizure Law in Canada** (Hutchinson, Morton and Bury, Carswell 1994, 1-12) state:

> The development of the law in the cases noted above, made it clear that the guarantee in s. 8 of the **Charter** will follow a different course than that followed by the American cases.

The cases referred to include **Duarte**.

The question in this appeal, to paraphrase the comments of LaForest, J. in **R. v. Wong** (1991), 1 C.R. (4th) 1 (S.C.C.) is not whether the respondents, who may have engaged in illegal activity of cultivating and trafficking marijuana, have a reasonable expectation of privacy because they carried out their activity in a clearing of the forest in Lapland, but the "neutral" question of whether, in our society, persons who are in possession of a large property in a forested area, have a reasonable expectation of privacy with respect to activities that take place on their property within 500 yards of their dwelling.

The respondents have argued strenuously that a statement at trial by Crown counsel that there "was a foray, that ***prima facie*** there's a breach of s. 8" constituted an acknowledgment that the respondents had a reasonable expectation of privacy with respect to their occupation and possession of the Property.

Constable Furey was the only witness during the ***voir dire***. The transcript of the trial evidence placed before us also includes a copy of counsel's submissions. It is noted that Crown counsel submitted during the course of its argument, that it was "an unnatural interpretation to say that people in the woods have a reasonable expectation of privacy."

While both counsel for the respondents addressed this issue in their subsequent submissions, neither advanced an argument to the trial judge that the concession made by the Crown of a ***prima facie*** breach of s. 8, deprived the Crown from arguing that the respondents had a reasonable expectation of privacy. This omission lends support to the Crown's submission on appeal that Crown counsel at trial had not conceded that the respondents had a reasonable expectation of privacy in the clearing.

I conclude, therefore, the Crown is not barred from raising this issue on appeal.

The critical question, therefore, is whether the respondents had a reasonable expectation of privacy in activities carried on by them on the Property.

I conclude in the circumstances of this case, that they did.

If the respondents had located their garden in the curtilage, directly outside the front door of the residence, there would, in my opinion, be no doubt that they would have a reasonable expectation of privacy to that area.

In the circumstances of this case, where the respondents are admittedly in possession and occupation of a large property, their expectation should be no less because the garden is located in a clearing some 500 yards from the residence, and connected to it by a well travelled path.

There is no evidence establishing active occupation of any other properties in the vicinity.

There is no evidence to suggest that the Property was used by hikers, hunters or fishermen.

There is some evidence that the Property, including the residence and the lake, was used by the respondents and their children in an ordinary domestic manner.

A number of urban conveniences are not available to those who decide to live in a rural setting. Those who make that choice, obviously are prepared to give up the urban advantages to enjoy a life free from interference.

The comments of Justice Marshall, on behalf of the minority dissenters in **Oliver v. United States, *supra***, are apposite:

> Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agriculture businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in the sustained and creative endeavour. Private land is sometimes used as a refuge for wild life, where flora and fauna are protected from human intervention of any kind.

Justice LaForest echoed this theme in **R. v. Dyment**, [1988] 2 S.C.R. 417 at 427 when he stated:

> Grounded in man's physical and moral autonomy, privacy is essential for the well being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order.

The respondents, being in lawful possession of the Property, would have available civil remedies exercisable against trespassers.

In addition, s. 41 of the **Code** recognizes that a certain amount of defensive force is justifiable in dealing with trespassers. (See also s. 42.)

Unlike the fact situation in **Oliver v. United States**, ***supra***, there is no evidence in this case that "no trespassing signs" were posted on the Property. I do not consider that omission, in view of the location and lack of accessibility to the Property, affects the respondents' reasonable expectation to privacy. The location of the Property, mitigates against visits from those out for a casual stroll in the woods.

Justice Roscoe has referred to the decision of both the Supreme Court of Canada and the British Columbia Court of Appeal in **R. v. Boersma**, (unreported) June 17, 1994, Q.L. S.C.J. 63, November 10, 1993 Q.L. B.C.J. 2748.

The key element in these two decisions would appear to be the location of the marijuana plants on Crown land.

Lambert, J.A., on behalf of the British Columbia Court of Appeal, stated at p. 5:

> In this case the activity was being carried out on Crown land that is accessible to everyone."

In the present case, it was agreed that the cultivation occurred on Property in possession of the respondent. The evidence discloses that the clearing was located adjacent to a woodland path some five minutes by foot from a woods road.

The facts, in my respectful opinion, are not comparable.

I conclude the respondents did have a reasonable expectation of privacy for activities conducted in the clearing, and as there were no exigent circumstances, that the search was not reasonable.

It remains to be considered whether the respondents have established on the balance of probabilities that the admission of the evidence would bring the administration of justice into disrepute.

The evidence sought to be excluded is real evidence.

The exclusion of real evidence, in these circumstances, will rarely be considered to affect the fairness of the trial (**R. v. Collins**, [1987] 1 S.C.R. 265 at 284).

It is relevant to consider the seriousness of the **Charter** violation to assist in assessing the disrepute that the administration of justice would suffer if the impugned evidence were admitted.

The Crown justifies the three warrantless searches conducted in this case in its reliance on s. 10 of the **Narcotic Control Act**:

> A peace officer may, at any time, without a warrant enter and search any place other than a dwelling-house, and under the authority of a warrant issued under section 12, enter and search any dwelling-house in which the peace officer believes on reasonable grounds there is a narcotic by means of or in respect of which an offence under this Act has been committed.

To succeed in this argument, in this case, in my opinion the Crown must establish that:

(1) The police had reasonable grounds to believe there was marijuana on the Property;

(2) There was no authoritative case law reasonably available to the police in the summer of 1992, establishing that s. 10 was available only in exigent circumstances.

In my opinion, the Crown has not satisfied either burden.

In support of the police's position, on the first point, is the identification of a specific location in a remote area and Constables Furey's evidence that:

> I had no reason to disbelieve any of the information he was providing. I based my credibility on this particular individual on the proceeding three years

> where I had come to know this individual in a casual, social manner.

The caller, however, was not a known previously reliable informant, and the information was not corroborated by police investigation prior to making the decision to conduct the search.

This is not the case of one warrantless search, but rather three separate warrantless searches, the first separated in time by almost six weeks from the third, with no attempt by the police to verify the information by independent investigation, or to determine the source of the caller's information.

Constable Furey considered his attendance on the Property, on July 12, as a confirmation of the information provided and hence the basis for the further warrantless searches.

The comments of Sopinka, J. in **Kokesch**, [1990] 3 S.C.R. 3 (at p. 29) are particularly apposite:

> It should not be forgotten that ***ex post facto*** justification searches by their results is precisely what the Hunter standards were designed to prevent.

The "totality of circumstances" in my opinion, do not meet the standard of reasonableness required by the section (Wilson, J.A., in **R. v. Debot** (1990), 52 C.C.C. (3d) 193 at 215 (S.C.C.)).

With respect to the second issue, the burden of which rests on the Crown, the three warrantless searches took place in the month of July and August, 1992.

While it is accurate that the Supreme Court of Canada did not specifically consider the "exigent circumstances" principle until the trilogy of cases (**Grant**, **Wiley**, **Plant**), there was sufficient reference in **Kokesch** to alert the police to the Court's predisposition.

Dickson, C.J.C., was in the minority in his conclusions concerning s. 24(2), but his opinion that the warrantless perimeter search conducted was unlawful, was adopted by the majority (Sopinka at p. 26).

In the course of making this determination, Dickson, C.J.C. fully endorsed the "comments of Martin, J.A., on the interpretation of s. 10(1) of the **Narcotic Control Act**" as expressed on behalf of the Ontario Court of Appeal in **R. v. Rao** (1984), 12 C.C.C. (3d) 97.

In **Rao**, Martin, J.A., stated at p. 123:

> In my views, the warrantless search of a person's office requires justification in order to meet the constitutional standard of reasonableness secured by s. 8 of the **Charter**, and statutory provisions authorizing such warrantless searches are subject to challenge under the **Charter**. The justification for a warrantless search may be found in the existence of circumstances which make it impracticable to obtain a warrant: see, for example, s. 101(2) of the **Code**, s. 11(2) of the **Official Secrets Act.** The individual's reasonable expectation of privacy must, of course, be balanced against the public interests in effective law enforcement. However, where no circumstances exist which make the obtaining of a warrant impracticable and when the obtaining of a warrant would not impede effective law enforcement, a warrantless search of an office of fixed location (except as an incident of a lawful arrest cannot be justified and does not meet the constitutional standard of reasonableness prescribed by s. 8 of the **Charter**. [emphasis added]

The **Kokesch** decision was handed down on September 30, 1990, almost two years before the searches in this case occurred.

To expect the R.C.M.P. of Bridgewater, Nova Scotia, in July of 1992, to be familiar with a decision of the Supreme Court of Canada delivered in September 1990, on the important issue of limiting the rights of entry and search under s. 10 of the **Narcotic Control Act**, is not, in my opinion, to impose a "burden of instant interpretation of court decisions" on the police (see Sopinka, J. in **Kokesch** at p. 33).

This circumscription of police power in the field of search and seizure should have been known to Constable Furey. In this sense, the police cannot be said to have proceeded in good faith, as that term is "understood in s. 24(2) jurisprudence" (Sopinka, J. in **Kokesch** at p. 32).

I conclude that the Crown has not met the two burdens that I suggest it is obliged to meet in this case, when it attempts to justify its position under s. 10.

I conclude the **Charter** violation to be a serious one.

The administration of justice could suffer some degree of disrepute from the exclusion of the impugned evidence since we are led to believe that the outcome of the trial will depend on this ruling.

If, however, the government "becomes a law breaker, it breeds contempt for law" (Brandeis, J. in **Olmstead v. U.S**. (1928), 277 U.S. 438 at 485).

The police, in dealing with a casual social acquaintance not a previously reliable informant, conducted three warrantless searches without making any attempt to carry out any independent investigation to check the reliability of, or source of the caller's information, or to determine the current limits on their authority.

In my opinion, the adminstration of justice would suffer far greater disrepute if the evidence were admitted than if excluded.

I would uphold the decision of the trial judge that the evidence from the search is inadmissible and accordingly dismiss the appeal.

Pugsley, J.A.