
CANADA / JUDGMENT

R. v. Wiley

[1993] 3 SCR 263

COURT

Supreme Court of Canada

DECIDED

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R. v. Wiley

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Report

[1993] 3 SCR 263

Case number

22804

Judges

Lamer, Antonio; La Forest, Gérard V.; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank

On appeal from

British Columbia

Subjects

Constitutional law

Notes

SCC Case Information: 22804

Decision Content

R. v. Wiley, [1993] 3 S.C.R. 263

Robert Wallace Wiley Appellant

v.

Her Majesty The Queen Respondent

and

David Angelo Grant Intervener

Indexed as: R. v. Wiley

File No.: 22804.

1992: November 5; 1993: September 30.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Unreasonable search and seizure -- Cultivation of marihuana -- Police conducting perimeter search of accused's property without a warrant -- Whether warrantless perimeter search violated s. 8 of Canadian Charter of Rights and Freedoms -- Narcotic Control Act, R.S.C., 1985, c. N-1, s. 10.

Constitutional law -- Charter of Rights -- Admissibility of evidence -- Bringing administration of justice into disrepute -- Police conducting perimeter search of accused's property without a warrant -- Search warrant later obtained partly on basis of information gathered during perimeter search -- Warrantless perimeter search violating accused's right to be secure against unreasonable search and seizure -- Whether search pursuant to warrant reasonable -- Whether evidence should be excluded -- Canadian Charter of Rights and Freedoms, s. 24(2) .

The police received a tip from an informant indicating that marihuana was being cultivated in a hydroponic grow lab at a certain residence. Two officers went to determine the exact location of the reported residence. They entered onto the property and noted vents on the outside of the house with condensation on them and the smell of fresh marihuana emanating from them. On returning to their detachment they ascertained that the residence whose perimeter had been searched belonged to the accused. An information was sworn which included the observations of the informant as well as those made during the perimeter search. A search warrant was issued pursuant to s. 12 of the Narcotic Control Act ("NCA"). On execution of the warrant, a grow lab containing marihuana plants and related cultivation equipment were located. The trial judge acquitted the accused on charges of unlawful cultivation of marihuana and possession of marihuana for the purposes of trafficking. He concluded that the evidence seized by means of the warrant should be excluded pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms since the warrant had been issued on the basis of information obtained through a warrantless perimeter search which was contrary to s. 8 of the Charter . The Court of Appeal allowed the Crown's appeal and ordered a new trial.

Held: The appeal should be dismissed.

The warrantless perimeter search of the accused's residence was unreasonable and therefore in violation of s. 8 of the Charter . A warrantless search to be reasonable must be authorized by law. The only plausible legal authorization in the present case is s. 10 NCA and that section is constitutionally applicable to warrantless searches only in situations where exigent circumstances render it impracticable to obtain prior judicial authorization, and no evidence was led to establish such circumstances here.

The warrant and the search and seizure conducted pursuant to it are nonetheless legally valid. The warrant was issued on the basis of five pieces of evidence, namely two tips by an informant, observations made during a police reconnaissance, police inquiries at the station house as to the ownership of the accused's residence and observations made during the warrantless perimeter search. The tips were relevant and reliable and properly taken into account by the issuing justice. Even without the observations made during the warrantless perimeter search, the other facts in the information, taken together, were sufficiently compelling that the warrant would still have been issued. While there is a sufficient temporal connection between the evidence obtained as a result of the search pursuant to the warrant and the warrantless perimeter search to trigger the operation of s. 24(2) of the Charter , the trial judge erred in excluding the evidence. The police acted in good faith relying on s. 10 NCA and the Court of Appeal's decision in *R. v. Kokesch*, even though that decision was later overturned by this Court. Furthermore, the evidence was real in nature and was essential to establishing the occurrence of these relatively serious offences.

Cases Cited

Applied: *R. v. Grant*, [1993] 3 S.C.R. 000; distinguished: *R. v. Kokesch*, [1990] 3 S.C.R. 3, rev'g (1988), 46 C.C.C. (3d) 194; referred to: *R. v. Plant*, [1993] 3 S.C.R. 000, aff'g (1991), 116 A.R. 1; *R. v. Fiedler*, B.C. Prov. Ct., December 14, 1990; *R. v. Collins* (1989), 48 C.C.C. (3d) 343; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *R. v. Debot*, [1989] 2 S.C.R. 1140; *R. v. Duguay*, [1989] 1 S.C.R. 93; *R. v. Greffe*, [1990] 1 S.C.R. 755.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8 , 24(2) .

Narcotic Control Act, R.S.C., 1985, c. N-1, ss. 4(2), 6(1), 10 [rep. & sub. c. 27 (1st Supp.), s. 199], 12.

APPEAL from a judgment of the British Columbia Court of Appeal (1991), 9 B.C.A.C. 271, 19 W.A.C. 271, overturning the appellant's acquittal by Collver J. on charges of unlawful cultivation of marihuana and possession of marihuana for the purposes of trafficking. Appeal dismissed.

Greg Cranston and Claire Ducluzeau, for the appellant.

S. David Frankel, Q.C., for the respondent.

David M. Rosenberg, for the intervener.

The judgment of the Court was delivered by

Sopinka J. -- This appeal was heard together with the appeal in *R. v. Plant*, [1993] 3 S.C.R. 000. After hearing these appeals and while judgment was reserved, we heard the appeal in *R. v. Grant*, [1993] 3 S.C.R. 000. By reason of the similarity of the issues, Wiley sought and was granted leave to intervene in *Grant* and presented argument. Reasons for judgment in these three appeals are being released concurrently. As explained in *Grant*, the Attorney General of Canada conceded that s. 10 was inoperable in so far as it purported to authorize a warrantless search absent circumstances in which it was impracticable to obtain a warrant. The Attorney General acknowledged that this concession would apply to this appeal. The present appeal focuses on whether a warrantless search constitutes an unreasonable search and seizure, thereby violating s. 8 of the Canadian Charter of Rights and Freedoms, and whether evidence obtained in a search subsequent to the violation should be excluded on the ground that its admission would bring the administration of justice into disrepute pursuant to s. 24(2) of the Charter.

I. The Facts

The appellant was acquitted on two charges of unlawful cultivation of marihuana and possession of marihuana for the purposes of trafficking under ss. 6(1) and 4(2), respectively, of the Narcotic Control Act, R.S.C., 1985, c. N-1 ("NCA"). The acquittals resulted from the exclusion of evidence gained by the police through warrantless perimeter searches which were contained in an information that resulted in issuance of a search warrant. On January 2, 1990, Constable Lamb, an RCMP officer, received a tip from a paid and previously reliable informant which indicated that marihuana was being cultivated in a hydroponic grow lab at a certain residence. The informant gave a detailed description of the residence and its location and said that some seven months earlier he or she had seen about 60 plants growing in a lab in a vented concrete bunker buried below a hot tub attached to the residence. The informant further described the size of the room and the manner in which it was lit. The informant was not questioned as to the way in which this information was obtained. On January 19, 1990, the informant told Constable Lamb that he or she had been in a bush near the residence on January 18, 1990 and had detected the smell of marihuana emanating from the premises.

On January 23, 1990, Constable Lamb and another RCMP officer, Constable Lea, set out to determine the exact location of the reported residence. A vented concrete bunker at the rear of the house was observable from the road. Constable Lea entered onto the property and noted approximately twelve vents on the outside of the house, felt condensation on them and noted the smell of fresh marihuana emanating from them.

On return to their detachment, the two officers ascertained that the residence around which the perimeter had been searched belonged to the appellant, Robert Wiley. Constable Lamb swore an information which included the observations of the informant as well as those made during the perimeter search. Further, he indicated that the vent holes were consistent with a hydroponic marihuana grow lab. A search warrant was issued pursuant to s. 12 NCA. On execution of the warrant, a grow lab containing 31 marihuana plants and related cultivation equipment were

located under the hot tub.

The police felt that they had reasonable and probable grounds to believe a narcotic was present on the premises prior to the warrantless perimeter search. Further, Constable Lea knew of the British Columbia Court of Appeal decision in *R. v. Kokesch* (1988), 46 C.C.C. (3d) 194. He understood that decision to have indicated that where police had grounds to believe a narcotic was contained inside, trespass on the perimeter was legitimate, although he admitted having known that decision was on appeal to this Court. The trial judge concluded that the evidence obtained through the warrant should be excluded pursuant to s. 24(2) of the Charter since the warrant had been obtained through use of information gleaned through a warrantless perimeter search which was contrary to s. 8 of the Charter. As a result, the appellant was acquitted on both charges. However, the British Columbia Court of Appeal allowed the appeal of the Crown, concluded that the evidence ought to have been admitted and ordered a new trial.

II. Judgments Below

A. Supreme Court of British Columbia

Following a voir dire with respect to the admissibility of the evidence obtained during the search pursuant to the warrant issued, Collver J. determined that the evidence should be excluded pursuant to s. 24(2) of the Charter since the warrant had been issued at least partially on the basis of observations made during the warrantless perimeter search which violated s. 8 of the Charter. After noting the propriety of Constable Lamb's decision not to act on the information received from the informant on January 2, 1990 since the crop to which the informant referred would have matured by the time the information was received, Collver J. considered what he referred to as the other three phases of the investigation involved. Following on the tip of January 19, 1990, the trial judge found that the purpose of the constables' visit to the reported site was to confirm the address and description of the premises.

However, he noted that Constable Lamb in cross-examination admitted that he knew that Constable Lea's entry onto the property constituted trespass, while Constable Lea indicated that he believed the British Columbia Court of Appeal decision in *Kokesch*, supra, to have determined that the entry onto the property was legal. Furthermore, the trial judge found, on the basis of Constable Lamb's testimony in cross-examination, that he believed that he had reasonable and probable grounds to obtain a search warrant prior to entry onto the premises and viewed Constable Lea's having smelled the odour of fresh marihuana to have been "icing on the cake". However, Collver J. found on the basis of Constable Lamb's testimony that this observation, gained as a result of Constable Lea's warrantless perimeter search, did constitute part of the information which led to the subsequent issuance of the search warrant.

Although he noted his sympathy for police officers who find the parameters of their legitimate actions in a state of flux due to the Charter, Collver J. adopted the approach of Tweedale J. of the Provincial Court of British Columbia in *R. v. Fiedler*, unreported, December 14, 1990, a decision which relied heavily on the reasoning of this Court in *R. v. Kokesch*, [1990] 3 S.C.R. 3, in

concluding that police should give a "cautious and careful interpretation of previous court decisions" in the area of warrantless searches. In applying this approach to the case at bar, Collver J. concluded at p. 11 that although the actions of Constables Lamb and Lea were not flagrant or wilful, they were "deliberate ... [and] considered, and ... that a risk was run." He further relied on this Court's decision in *Kokesch*, supra, for the premise that the good faith of the officers involved was a relevant consideration in determining whether the evidence ought to be admitted or excluded. He determined that the officers had not acted in good faith given that one of them was aware that the British Columbia Court of Appeal decision in *Kokesch*, supra, had been appealed to this Court.

Having considered the applicable law, Collver J. determined that the information gained through the warrantless perimeter search was critical to the issuance of the search warrant in that the other data contained in the sworn information constituted uncorroborated evidence of an undisclosed informant's observations. Collver J. thus concluded as follows, at p. 13:

Because the evidence gathered in that unlawful way was so critical to the decision to obtain a search warrant and to the issuance of that warrant, I am satisfied that the admission of the evidence obtained as a result would bring the administration of justice into disrepute.

As a result, the charges were dismissed and the appellant acquitted.

B. Court of Appeal for British Columbia (1991), 9 B.C.A.C. 271

The Court of Appeal for British Columbia overturned the decision of the Supreme Court of British Columbia and determined that the impugned evidence ought to have been admitted. Assuming, without deciding whether the warrantless search had violated s. 8 of the Charter, McEachern C.J.B.C., writing for a unanimous court, found at p. 274 that the trial judge had erred in concluding that the decision of this Court in *Kokesch*, supra, had "turned back the clock insofar as investigations which took place prior to [that] decision". He concluded that the law at the time of the warrantless search was as stated by the British Columbia Court of Appeal in *Kokesch*, supra, so that the trial judge ought not to have considered Constables Lamb and Lea to have been acting in other than good faith merely because they relied on a decision which was later overturned by this Court.

In assessing whether the evidence ought to have been excluded pursuant to s. 24(2) of the Charter, McEachern C.J.B.C. agreed that good faith demonstrated by the officers was one relevant consideration. However, he relied on the decision of the Alberta Court of Appeal in *R. v. Plant* (1991), 116 A.R. 1, in support of his finding that it was not demonstrated in the case at bar that the officers had acted in a manner other than in good faith merely by relying upon case law which was subsequently overturned. Further, he adopted the factors offered by the Crown in support of the good faith of the actions of the officers. These factors included; i) the fact that Constable Lea honestly believed that the appellate authority in the area determined that warrantless perimeter searches did not contravene s. 8 of the Charter, ii) the fact that reasonable grounds to believe that marihuana cultivation was occurring on the premises existed prior to the

perimeter search, iii) the fact that the warrant was supportable without the evidence of what Constable Lea saw and smelled during the search and iv) the fact that the dwelling-house was entered only after judicial authorization was obtained.

McEachern C.J.B.C. further concluded in his s. 24(2) analysis that admission of the evidence would not operate unfairly against the appellant because it was pre-existing physical evidence and relied on the decision of the Ontario Court of Appeal in *R. v. Collins* (1989), 48 C.C.C. (3d) 343, in support of that position. Finally, McEachern C.J.B.C. noted that this Court's decision in *Kokesch*, supra, was binding authority, but found that the case at bar was distinguishable from that case. While the officers in *Kokesch*, supra, were inspired to conduct a night-time perimeter search based on mere suspicion, the officers in the case at bar already had reasonable grounds to obtain a warrant prior to entry onto the property and the search was conducted in broad daylight. Based upon this analysis, McEachern C.J.B.C., for a unanimous court, concluded that sufficient grounds existed for admission of the impugned evidence pursuant to the *Collins* test and ruled that the decision of the trial judge to exclude such evidence was in error. As such, the Crown appeal was allowed, the acquittals set aside and a new trial ordered.

III. The Issues

1. Did the searches violate s. 8 of the Charter ?

2. Should the evidence obtained be excluded under s. 24(2) of the Charter ?

IV. Pertinent Legislation

Narcotic Control Act, R.S.C., 1985, c. N-1

10. 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.
12. A justice who is satisfied by information on oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant, under the hand of the justice, authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics.

Canadian Charter of Rights and Freedoms

8. Everyone has the right to be secure against unreasonable search or seizure.
24. . . .

- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

V. Analysis

A. Did the searches violate s. 8 of the Charter ?

There were two searches involved: a warrantless perimeter search and a search pursuant to a warrant issued under s. 12 NCA. Different principles apply in determining the reasonableness of each search.

In *R. v. Collins*, [1987] 1 S.C.R. 265 ("*Collins (S.C.C.)*"), at p. 278, this Court stated the following with respect to assessment of the reasonableness of a search:

... once the appellant has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable.

A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.

In the case at bar, there was no judicial pre-authorization of the perimeter search conducted. It was, therefore, incumbent upon the Crown to establish on a balance of probabilities that the search was nonetheless reasonable in accordance with the above criteria. For the reasons which follow, I have concluded that the Crown has failed to meet this burden.

Searches founded upon either common law principles or statutory provisions may be "authorized by law" within the meaning of s. 8 : *Collins (S.C.C.)*, supra. In the present case, the only plausible legal authorization was a statutory provision: s. 10 NCA. That provision authorizes a warrantless search of a place other than a dwelling house where a peace officer believes on reasonable grounds there is a narcotic by means of or in respect of which an offence under the NCA has been committed. I have concluded that there was no statutory authorization for the warrantless perimeter search. In *Grant*, I concluded that s. 10 NCA is only constitutionally applicable to warrantless searches in situations where exigent circumstances render it impracticable to obtain prior judicial authorization. No evidence was led to indicate the exigent circumstances which would have been necessary to bring this search within the constitutional parameters of s. 10. This being the case, I have concluded that the warrantless perimeter search was not authorized by law. Therefore, the Crown has failed to meet the burden set out for it in *Collins (S.C.C.)*, supra, and I must conclude that the warrantless perimeter search, not being authorized by law, constituted an unreasonable search and violated s. 8 of the Charter .

Having concluded that the warrantless perimeter search violated s. 8 of the Charter , it is necessary to determine the effect which inclusion of facts obtained during the unconstitutional search in the information in support of the warrant has on its validity. In *R. v. Garofoli*, [1990] 2

S.C.R. 1421, this Court concluded that a search warrant issued in reliance, in part, on facts which are found to be inadmissible on review will continue to be valid if it can be shown that the warrant would have issued even if the inadmissible facts had been excised from the information sworn to obtain the warrant.

With regard to the standard of review, the decision in *Garofoli* indicated, at p. 1452, that if, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere.

Accordingly, if in the case at bar it can be concluded that the search warrant would have issued absent inclusion of the evidence obtained during the warrantless perimeter search, then the warrant and the search and seizures conducted pursuant to it remain legally valid.

The search warrant was issued on the basis of five pieces of evidence relied on to support the reasonable grounds of the belief of the police that an illicit narcotic was contained in the residence of the appellant. They included two tips by a known and previously reliable informant, observations made during a police reconnaissance, police inquiries at the station house as to the ownership of the appellant's residence and observations made during the warrantless perimeter search. This Court has determined that police may not rely upon facts within an information which were obtained in a manner contrary to the Charter. See *Grant and Kokesch*, *supra*. In order to assess whether the warrant would have issued absent the facts obtained during the constitutionally violative perimeter search, it is necessary to consider whether the other four pieces of information were sufficient to constitute the reasonable grounds necessary for warrant issuance pursuant to s. 12 NCA.

In the case at bar, the two tips of an informant which were received by police formed important components of the information sworn to obtain the search warrant. To decide whether these tips properly contributed to the reasonable grounds asserted by police, it is necessary to assess their reliability. In *R. v. Debot*, [1989] 2 S.C.R. 1140, this Court determined that the reliability of the tip of an informant depends on an assessment of the totality of the circumstances and specified three areas of concern, at p. 1168:

First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search?

The first tip received by police indicated that the appellant was engaged in a hydroponic marihuana growing operation in his residence. The tip was rendered more compelling by the informant's detailed description of the residence and its location and a statement which indicated that the informant had seen 60 marihuana plants growing in a lab in a concrete bunker below a hot tub attached to the house. The second tip, obtained just a few days prior to issuance of the search warrant, from the same informant, indicated that the informant had detected the

smell of marihuana emanating from the appellant's premises. Both of these tips contained information with sufficient detail and accuracy to categorize them as compelling.

The source of the two tips was credible. The police knew the identity of the informant and indicated that he or she had been a reliable source of information in the past. Thus, the credibility of the informant was established without the need to infer it from the fact that the tip given proved accurate on subsequent inspection by police.

The tips were corroborated in subsequent police reconnaissance. The police were able to confirm from the road outside of the appellant's residence that a low, vented concrete structure was located at the back of the house. Not only was this consistent with the description offered by the informant in the first tip, the police were able to confirm from past experience that the existence of the vents was in keeping with a hydroponic marihuana growing operation, thereby supporting the second tip with respect to the odour of marihuana emanating from the premises.

On this basis, I would conclude that the tips were relevant and reliable and properly taken into account by the issuing justice in determining whether the officers had reasonable grounds to believe that an illicit narcotic was contained in the appellant's residence in contravention of the NCA. The appellant argued that the tips of the informant ought not to be accepted as part of the reasonable grounds for issuance of the warrant on the basis that it appeared that the informant had trespassed in order to obtain the information in the second tip. Even if this Court accepts that the informant trespassed on the property of the appellant in order to obtain the information revealed to police, there is no evidence to indicate that the police in any way encouraged the informant to use illegal means to obtain information, nor that the informant was an agent of the police. In fact, the police instructed the informant not to commit any illegal acts, in accordance with the standard caution given to informants. As such, this is not a case where the police created grounds for their reasonable belief on the basis of their own illegal acts or those of their agents. This case is thus distinguishable from *Kokesch*, supra, where it was the illegal acts of the police themselves which created the basis for their reasonable belief. Given that the tips meet the test set out by this Court in *Debot*, supra, and ought not to be excised from the information on the basis of wrongdoing by the police, the issuing justice properly relied on the facts derived from the tips in the information sworn to obtain the search warrant.

In addition, other information was also available. As previously indicated, the police had conducted a reconnaissance of the premises which confirmed the existence of the vented concrete bunker attached to the appellant's residence which was consistent with the existence of a hydroponic marihuana growing operation. Finally, the police could also rely on inquiries made at the station-house which revealed that the house was the residence of the appellant, which was important for the purposes of identifying the suspect in the information sworn to obtain the search warrant.

Employing the standard set out by this Court in *Garofoli*, supra, I would conclude that even without the observations made during the warrantless perimeter search, the police in the case at bar had reasonable grounds to believe that a narcotic was contained in the appellant's residence

in contravention of the NCA. For that reason, I must respectfully disagree with the finding of the trial judge that the evidence relating to the warrantless perimeter search was crucial to issuance of the search warrant. The other facts contained in the information, when taken together, were sufficiently compelling to convince me that the warrant would still have issued. The same conclusion was reached by McEachern C.J.B.C. in the Court of Appeal. Therefore, the search and seizures were judicially pre-authorized and reasonable and did not constitute a violation of s. 8 of the Charter .

2. Exclusion of Evidence Under s. 24(2) of the Charter

Although the evidence sought to be excluded was obtained as a result of a search pursuant to a valid search warrant, this does not end the matter. As I explained in *Grant*, it is necessary to determine whether the evidence was "obtained in a manner" that infringed the Charter by reason of the perimeter search which I have held violated s. 8 of the Charter . The connection between the evidence ultimately unearthed and the warrantless perimeter search, in my view, constitutes a sufficient temporal connection to trigger operation of s. 24(2) of the Charter . As I indicated in *Grant*, although the warrantless perimeter search was not essential to the search and seizure validly conducted pursuant to a warrant, all of these actions formed component parts of an ongoing investigation and thus are not sufficiently remote from one another to diminish their temporal connection.

As stated in *Grant*, at p. 000, this Court will not ordinarily interfere with the s. 24(2) determination of a court of appeal absent "some apparent error as to the applicable principles or rules of law, or ... a finding that is unreasonable". See *R. v. Duguay*, [1989] 1 S.C.R. 93, at p. 98, and *R. v. Greffe*, [1990] 1 S.C.R. 755, at p. 783.

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 respect of the latter, while the constitutionality of that section was not in issue in the Court of Appeal, the subsequent decision of this Court in *Grant* does not affect that finding. The police were entitled to rely on s. 10 as apparently applied by the Court of Appeal in *Kokesch*. As stated by this Court in *Kokesch* (at pp. 33-34), the police must act on the basis that the powers given to them by Parliament are constitutionally valid unless otherwise declared by the courts. They do not have to predict the outcome of an appeal.

In other respects, McEachern C.J.B.C. applied the *Collins* (S.C.C.), *supra*, factors and declined to exclude the evidence, and I find no error of law in his reasons nor is his conclusion unreasonable. Indeed I agree with it. I agree with him that the decision of this Court in *Kokesch*,

supra, is distinguishable on the ground that in that case the police acted only on suspicion, whereas here they had reasonable grounds. The significance of this distinction is that, assuming the constitutional validity of s. 10 (subject to the reservation I expressed in Grant with respect to its application), the police in this case could have honestly believed that, having reasonable grounds, they were acting pursuant to statutory authority. On the other hand, in Kokesch, supra, they would have known that mere suspicion did not entitle them to resort to s. 10. In view of the determination in Grant, in future investigations this distinction will only have significance if the criteria for the application of s. 10 are otherwise met.

In the result, the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Cranston & Co., Vancouver.

Solicitor for the respondent: John C. Tait, Ottawa.

Solicitors for the intervener: Rosenberg & Rosenberg, Vancouver.

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