

Case Name:

R. v. Nguyen

**Between
Regina, and
Tuan Khong Nguyen**

[2009] B.C.J. No. 2348

2009 BCPC 343

File No. 192271-1

Registry: Vancouver

British Columbia Provincial Court
Vancouver, British Columbia

M.F. Giardini Prov. Ct. J.

Heard: February 5 and 6, September 4, October 1 and
23, 2009.

Judgment: November 9, 2009.

Reasons: November 17, 2009.

(60 paras.)

Criminal law -- Controlled drugs and substances -- Possession for purpose of trafficking -- Marijuana -- Cultivation or production -- Trial of accused charged with unlawful production of marijuana and possession of marijuana for purpose of trafficking -- Accused acquitted -- Police found marijuana grow operation in basement of house rented by accused while investigating complaint of break and enter -- No fingerprint evidence linking accused to grow operation -- While there was evidence of someone living in house at time grow operation discovered, no evidence accused lived in house or of relationship between accused and persons living in house -- Circumstantial evidence insufficient to conclude that only reasonable inference was accused had knowledge of grow operation or was involved in producing marijuana.

Criminal law -- Evidence -- Methods of proof -- Circumstantial evidence -- Trial of accused charged with unlawful production of marijuana and possession of marijuana for purpose of trafficking -- Accused acquitted -- Police found marijuana grow operation in basement of house rented by accused while investigating complaint of break and enter -- No fingerprint evidence linking accused to grow operation -- While there was evidence of someone living in house at time grow operation discovered, no evidence accused lived in house or of relationship between accused and persons living in house -- Circumstantial evidence insufficient to conclude that only reasonable inference was accused had knowledge of grow operation or was involved in producing marijuana.

Trial of accused charged with unlawful production of marijuana and possession of marijuana for the purpose of trafficking. While investigating a break and enter complaint, police discovered a marijuana grow operation in the basement of the house that had been rented by the accused and his family. When police attended the residence to investigate the complaint, the door to the residence was closed. The officer saw a footprint near the door and that a window panel above the door was broken. An officer entered the residence through the broken window panel and found that no one was home. At the time the officer entered the residence, he did not detect any odours or hear any sounds, but did detect an odour of marijuana when he approached the stairway leading to the basement. In the basement, the officer found a marijuana grow operation in three rooms consisting of approximately 246 marijuana plants. The officer later obtained a search warrant and a search was carried out pursuant to the warrant. When police searched the residence, they found evidence in the living room, kitchen and the three upstairs bedrooms that the home was occupied by the accused and his family. In addition, police found a baggie of marijuana in a kitchen cupboard and a baggie of marijuana in a refrigerator in the laundry room. Police detected a faint odour of marijuana in the upper levels of the house, which became stronger in the basement. The day after the search, police returned to the home and found the back door open and that the house had been emptied. Police later attended at another address they had located for the accused. Police observed a vehicle that was registered to the accused, which had also been observed at the address where the grow operation was found, at the residence. The next day police spoke with the accused and asked him to attend the police station to provide a statement, which he did. Hydro documentation for the residence for the period of time in question listed two persons as account holders, one of whom might have been the accused, and showed a significantly higher rate of usage during the period of time when the accused lived at the residence than when other tenants were living there.

HELD: Accused acquitted. There was no fingerprint evidence linking the accused to the grow operation in the basement of the house. In addition, while there was evidence of someone living in the house at the time the grow operation was discovered, there was no evidence that the accused lived in the house or of the relationship between the accused and persons living in the house. The circumstantial evidence as a whole was insufficient to conclude that the only reasonable inference was that the accused had knowledge of the marijuana grow operation or was involved in producing marijuana.

Statutes, Regulations and Rules Cited:

Controlled Drugs and Substances Act, s. 2, s. 5(2), s. 7(1)

Criminal Code, s. 4(3)

Counsel:

Counsel for the Crown: E. Hobday; J. Whyte.

Counsel for the Defendant: J. Solomon.

REASONS FOR JUDGMENT

M.F. GIARDINI PROV. CT. J.:--

INTRODUCTION

1 Mr. Nguyen is charged with unlawfully producing marihuana contrary to s. 7 (1) of the *Controlled Drugs and Substances Act*, and with possession of a controlled substance for the purpose of trafficking; namely, cannabis marihuana, in an amount exceeding 3 kg contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. These

offences are alleged to have occurred on December 12, 2006, at or near Burnaby, British Columbia.

2 The charges against the accused arose out of a police investigation into a break and enter complaint which led to the discovery of a marihuana grow operation ("the grow op") in the basement of a house on Smith Avenue in Burnaby. According to the landlord, the house had been rented to the accused and his family. When the police went to investigate the break and enter they did not find anyone in the house.

3 The accused did not call evidence and did not testify in his own defence. However, he is not required to do so. The accused is presumed to be innocent of the offences charged against him. It is up to the Crown to prove beyond a reasonable doubt that he did in fact commit those offences.

4 The issue in this case is whether the accused had knowledge of the marihuana grow op and some control over it and whether he was involved in unlawfully producing marihuana.

BACKGROUND

The rental of the house

5 Mr. Cary Chien, an owner of a house at 4475 Smith Avenue, in Burnaby, British Columbia, ("the Smith Avenue house") testified he had owned the house for a number of years. However, he was not living in the house in December 2006 when the events giving rise to these charges occurred. Mr. Chien said he rented the property to the accused and his family. He thought this was in 2002. Initially, the accused's family consisted of the accused, his wife and two children. Later there was a third child and, at one point, the accused's brother was also living in the basement of the Smith Avenue house. The rent was paid by post-dated cheques provided to Mr. Chien three months in advance. Sometimes he went to pickup the cheques, other times the cheques would be dropped off at the house where he lived.

6 Mr. Chien recalled seeing the accused and his wife in the house sometime in 2006 but could not say precisely when that was. In direct examination he said the last time he had seen the accused at the Smith Avenue house was probably in November 2006 when he went to pick up the rent cheques. However, in cross-examination Mr. Chien said he could not say for sure how he got the three post-dated cheques in November 2006. He could not remember whether they were handed to him or whether they were put in his mailbox.

7 In direct examination Mr. Chien said the accused had signed the rent cheques. In cross-examination he said the cheques were in the accused's name and that of his wife. He was asked whether it was possible that the cheques were in the brother's name. He said when the accused first rented the house there was no brother, the brother came later. When Mr. Chien was pressed on that point in cross-examination he said he didn't believe there was any change of name; he just assumed that it was the same person. Mr. Chien was asked if he recalled the name on the cheque. He said he could not recall. He did not compare the cheque to any other documents. He did not recall seeing the accused sign the cheque.

8 Mr. Chien was specifically asked whether he could recall whose names were on the last three rent cheques (that is November 2006 to February 2007). Mr. Chien said he believed he checked the last cheque because he thought it might bounce. The accused's name was on it; however he did not compare that cheque to the others.

The police investigation

9 On December 12, 2006, Constable Cummins, along with other RCMP officers, went to 4775 Smith Avenue in Burnaby to investigate a break and enter complaint. The front door of the house was closed. There was a footprint on the left side of the door and a window panel above the door was broken. Constable Cummins said he tried to go through the front door but the door would not open. Accordingly, an officer climbed in through the broken window panel above the door. When the police entered the house they found no one in the residence. Constable Cummins did not smell anything when he first entered the house neither did he hear any sounds. However, as he approached the stairwell leading down to the basement he smelled the odour of marihuana.

10 In the basement Constable Cummins saw a marihuana grow op in three rooms. In the first room there were about 100 foot-high plants and four lights with shrouds. In the second room there were about 200 plants and six lights with shrouds. In the third room there were 80 empty pots and eight lights with shrouds. The marihuana plants appeared to be alive and in the growing stage. Constable Cummins later obtained a search warrant and a search was carried out pursuant to that warrant.

11 In cross-examination Constable Cummins said he was only at the Smith Avenue house that day. He made no effort to contact the owners of the house. Constable Cummins said he saw blood around the front door and around the lock. He acknowledged that the window above the door was broken and an RCMP entered through that window. Constable Cummins said the number of plants he referred to was an estimate. He did not count the marihuana plants. He said an officer from the identification team went through the basement but found no fingerprints.

12 An admission was subsequently made that there was a total of 246 marihuana plants in the Smith Avenue house. One hundred and nineteen (119) of the plants were in the vegetative stage and one hundred and twenty-seven (127) of the plants were in the propagation/vegetative stage.

13 Constable Shum, the main Crown witness in these proceedings, said he had gone to the Smith Avenue house on November 16, 2006, at about 4:30 p.m. On that occasion he did not enter the house but simply made observations. He drove to the rear alley and saw a vehicle on the rear driveway of the Smith Avenue house. The vehicle was parked on the driveway which led up to the garage. The garage door was closed. The vehicle was a newer model Dodge Caravan license number 371 HCD.

14 Constable Shum said he ran a check on that license plate number on Prime/CPIC. The defence raised an objection about the admissibility of the evidence regarding the vehicle license check performed on that occasion. Accordingly, the evidence regarding the vehicle license check was given in a *voir dire*. After hearing the evidence and argument from counsel, I upheld defence counsel's objection that the evidence the Crown sought to elicit was hearsay and could not be admitted for its truth.

15 Later in the trial an admission was made that Tuan Khong Nguyen, with the address of 4775 Smith Avenue in Burnaby, British Columbia, was the registered owner of a 2002 Dodge station wagon, with license plate number 371 HCD, from February 24, 2006, to December 23, 2006.

16 On December 12, 2006, Constable Shum went to the Smith Avenue house with another officer at approximately 12:30 p.m. and executed the search warrant. Constable Shum entered through the front door. He smelled a faint odour of marihuana as soon as he entered the house. However, he did not hear the sound of fans or smell marihuana from outside the house. Constable Shum took photographs of various areas of the house. To the best of his knowledge nothing had been disturbed before he took photographs

What the photographs depict

17 One of the things Constable Shum saw and photographed was a tiny camera mounted on the outside of the house in an area adjacent to the front door. The camera appeared to be operational. In the dining area, just outside the kitchen, there was a small TV on top of a wooden structure. The screen on the TV showed the front of the residence.

18 Photographs were taken of three bedrooms which were in the upper level of the Smith Avenue house. One bedroom was identified as the master bedroom. In that bedroom there was a double bed. On the walls were two framed photographs that appeared to be wedding pictures. Constable Shum said he could identify the man in those photographs as the accused. In the closet of that room there was both men's and women's clothing.

19 The photographs of another bedroom show a fully furnished room with a bed, a chest of drawers and other furniture. There were clothes in the closet, photographs/posters on the wall, toys throughout the room as well as other items. The photographs of a third bedroom show a room which contained a bed and what appears to be a small chest of

drawers. A photograph of a child is on one wall. There were other items in the room and in the closet as well.

20 Photographs taken of the kitchen show a refrigerator in which Constable Shum found food that appeared to be reasonably fresh. There were decorative plants in the kitchen that appeared to be healthy. To the left of one of the windows there was a photograph of a man in a blue sweater. Constable Shum said the man in the photograph is a person he now recognized as the accused.

21 Constable Shum did not find any marihuana in the kitchen. However, another police officer, Constable Coogan, found a Ziploc baggie of marihuana, which he referred to as "shake", in a cupboard above the microwave. He also found a bag of dried marihuana (larger than a sandwich baggie) in a refrigerator located in the laundry room in the basement.

22 Photographs taken of the living room show a room which was furnished with couches, a television and some coffee tables. There were pictures on the walls and in an area off the living room there was what appears to be a piano. In an alcove-like area adjacent to the living room there was a desk on top of which was a computer. Envelopes and a cartoon were also found on that desk. Constable Shum photographed some of the envelopes but he said he did not open them. Some of the photographs show envelopes with the names Tuan Nguyen and Tuan Khong Nguyen. It is not clear whether some of the photographs are simply close-ups of envelopes already photographed or of additional envelopes.

23 Another police officer, Constable Coogan, said that some of the documents found on the desk were in envelopes and some were already opened. He could not remember which items were already opened and which items were sealed. Constable Coogan said three documents (a letter from CIBC, a Citibank MasterCard statement, and a Medical Services Plan billing notice) were in a folder on the desk. All the other documents were on top of the desk.

24 Constable Shum seized the computer. The police did not obtain any information that was relevant to this case from that computer. It was Constable Shum's understanding that the computer was returned to the accused on February 14, 2007, when the accused voluntarily attended at the police station to give a statement. However, Constable Shum did not personally observe the computer being returned to the accused or the accused accepting the computer.

25 Constable Shum said when he was in the upper level of the house he smelled the faint odour of marihuana. He noted this faint odour when he first entered and could smell it all over the upper level of the house. Constable Shum went downstairs to the basement. As he did so the odour of marihuana became stronger, in particular, the odour of marihuana intensified at the bottom of the stairway going to the basement. When Constable Shum went to the basement he noted there were no locked doors. He also noted that there were no locked doors in the upper level. Constable Shum said he and Constable Coogan took about two hours to search the residence. One of the things he found in the basement was a refrigerator in the laundry room. Inside the refrigerator was a bag of marihuana.

26 Constable Shum returned to the Smith Avenue house the next day. He went there to see if anyone could be found in the house. Constable Shum returned to the Smith Avenue house again on February 13, 2007. On that day the door at the back of the house was open and he went into the house. There was no furniture at all in the house and everything had been cleared out of the basement.

27 On February 14, 2007, Constable Shum, along with other officers, went to a house at 9260 Capstan Way in Richmond. He said he obtained this address for the accused from computer checks. Another officer had gone to the Capstan Way house the night before and had seen a 2002 Dodge Caravan similar to the one which Constable Shum had seen at the Smith Avenue house, however, the vehicle had a different license plate number.

28 Constable Shum spoke to Mr. Nguyen and told him the police were investigating a grow op. He asked Mr. Nguyen if he would go to the police station to make a statement. He also asked for identification. The accused produced a British Columbia driver's license with a date of birth of September 29, 1973. The accused agreed to go to the police station to provide a statement.

29 In cross-examination Constable Shum said that he did not arrest the accused in February 2007 because he did not

feel he had grounds for an arrest. Constable Shum said the accused was not a suspect at that time; he was just a person of interest. The accused went to the police station and gave a statement. He was released without charges at that time.

The Hydro account

30 Mr. Calvin Sanderson, a security investigator who has the responsibility of providing revenue protection services to BC Hydro, testified about certain power consumption records for the Smith Avenue house. Through him the Crown entered the following BC Hydro documents as exhibits:

1. Historical data for 4775 Smith Avenue: This document showed the move-in and move-out dates for various account holders at that address from 1977 to 2007. In particular this document showed someone named Thu Thanh Hua was the account holder for the period of January 3, 2003, to December 16, 2006.
2. Electric billing history: This document showed the electrical consumption from January 3, 2003 to June 22, 2007. In particular this document showed that Thu Thanh Hua was the name of the customer for the Smith Avenue house for the period of January 3, 2003 to December 16, 2006. The ID number for the account was shown as 1349172. In commenting on this document Mr. Sanderson noted that the move-in and move-out dates are generated by the customer either through a telephone call or over the internet. He said there are no "physical offices".
3. Consumption screen: This document showed the meter readings from September 21, 2007, to December 12, 2008. On this document there was reference to "contract account" which refers either to the mailing address or the actual address of the house in question. Below the entry for each contract account there was the ID number assigned to each individual customer. This document showed that for the period of 23-12-2003 to 16-12-2006 the named customers of record for the Smith Avenue house were Thu Thanh Hua and Tuan Nguye. Immediately after the name Nguye is the entry "29 Sep 73".

31 In cross-examination Mr. Sanderson was asked why a second customer of record was not listed in other documents (other than the consumption screen). He said the consumption screen was the most significant page and it has the most significant numbers. The other documents entered as exhibits do not contain all the data. He could not explain why this was the case.

32 Mr. Sanderson was asked about the nature of the intake process when a customer asks for electrical services. He explained intake is done through a call centre by telephone or by e-mail. He was asked how biographical information such as names, dates of birth and addresses given by the customer to the call centre is confirmed. He said there is no confirmation process. A person could call in and say he was Donald Duck and service would be provided. A person who applies for electrical services can provide a second name. He acknowledged that the BC Hydro documents entered as exhibits do not indicate who called BC Hydro to provide the information contained in them. Mr. Sanderson said he does not know what questions the call centre staff asks prospective customers.

The position of the parties

33 The Crown submits it has proved the charges against the accused beyond a reasonable doubt and refers to a number of points, which will be discussed below, to support its submission. The defence on the other hand argues that the evidence before me is clearly circumstantial and the Crown cannot establish guilt based on the circumstantial evidence in this case. The defence argues there are other reasonable inferences that can be drawn from the circumstantial evidence other than the inference that the accused had knowledge and control of the marihuana grow operation.

34 Below I have set out the major points relied on by the Crown and the defence's response to the Crown's

submissions on each of them:

(a) *Rental of house*

The Crown argues there is evidence before the Court that the accused was the person who rented the house and the person who paid the rent. The defence argues that the evidence as to who rented the house and who paid the rent is unclear and uncertain. However, the defence says, even if it were proven that the accused initially rented the house and lived there at some point, there is no evidence before the Court about when the accused was last in the Smith Avenue house.

(b) *The BC Hydro Account*

The Crown argues BC Hydro records show that the accused as well as another person were subscribers to BC Hydro for electrical services at the Smith Avenue house between January 2003 and December 16, 2006. The Crown argues that "Nguye" clearly refers to the accused. The Crown argues that although the second name shown on the consumption screen ("Nguye") is missing the letter N, this is merely a spelling error. The Crown says the date beside the name "Nguye" is the accused's birth date. Additionally, the Crown argues that electrical usage at the Smith Avenue house, as shown on the BC Hydro documents, was significantly higher during the period the accused was living there than it was when other tenants were living there.

The defence argues that the information on the BC Hydro documents is not sufficient to establish that the accused was responsible for the BC Hydro services at the Smith Avenue house. The defence points out that the name on the records is Thu Thahn Hua. The defence also notes that the BC Hydro security investigator gave evidence that when someone applies for BC Hydro services the information provided to the call centre is not checked. Accordingly, the defence asserts if the name on the account is the accused's name, someone else could have given the accused's name to BC Hydro. The defence also submits the Court ought not to reach any conclusions about electrical usage. The Crown has not laid a proper foundation to allow the drawing of inferences about differences in electrical usage between tenants. The defence argues there is no expert evidence about BC Hydro usage, what is normal, what is excessive, etc.

(c) *Documents found in house*

The Crown notes that a number of documents were found on the computer desk in the upstairs living room area of the Smith Avenue house. According to the Crown, most of the documents are in the name of the accused and of Thu Thanh Hua, the same name that is on the BC Hydro account. The Crown argues the Court can draw two different inferences from these documents. The first inference is that the accused had a connection to the Smith Avenue house; the second inference is that the house was occupied and someone had been in the house around December 12, 2006, given that some of the documents were postmarked December 2006.

The defence argues that the documents submitted in evidence are inconclusive. While there were several documents with the accused's name on them, those documents are not as significant as the

type of documents considered sufficient in the case law cited. The defence argues that a number of the documents in this case had the names of other people, including the names of the owners of the house.

(d) *House fully occupied*

The Crown argues that the condition of the Smith Avenue house when it was searched by police showed unmistakable signs of recent occupation. The Crown says the accused was one of the occupants of the house. The Crown asked me to consider what the police saw inside the house and in particular the photographs of the house interior which were entered as exhibits. There was clothing in the closets, food in the fridge, and a surveillance camera directed at the front door and connected to a monitor in the dining room. Additionally, in a room that appeared to be the master bedroom there were two wedding photographs. The man in the wedding photographs was identified by Constable Shum as being the accused.

The Crown also urges me to consider the fact that a 2002 Dodge Caravan was seen on November 16, 2006, at the Smith Avenue house parked on the back driveway. The same Dodge Caravan was seen by the police, albeit with a different license plate number, at the Capstan Way house where the police went to speak to the accused. The Crown also argues that the smell of marijuana would have been evident to anyone who entered the house. Additionally, some marijuana was found in a kitchen cupboard and in a refrigerator in the laundry room. This evidence points to knowledge on the part of the occupants.

The defence argues the accused was not present at the Smith Avenue house at the time the police attended to investigate in December 2006 or any other time that the police attended. There is no evidence before the Court about the last time the accused was in the Smith Avenue house. The defence points out there is no fingerprint evidence connecting the accused to the marijuana plants found in the house. Further, there is no evidence about how long the plants were in the house. The defence argues there is no evidence from which the Court can conclude that a person would know there was a marijuana grow op in the basement if the person were upstairs or outside. One officer smelled marijuana in the stairwell going to the basement and another officer smelled the faint odor of marijuana upstairs later in the day. The defence argues the smell of marijuana upstairs later in the day could have been present because the door from upstairs to the basement may have been left open during the police investigation. In sum, the defence says that the Crown has not established the elements of possession or of production.

LEGAL PRINCIPLES

Possession for the purpose of trafficking

35 Section 5 (2) of the *Controlled Drugs and Substances Act* provides that no person shall, for the purpose of trafficking, possess certain substances set out in schedules to the *Act*, one of those substances is cannabis marijuana.

36 In order to prove possession, the Crown must prove the accused had both knowledge and control of the drugs in question. The definition of possession which is found in s. 4(3) of the *Criminal Code* is adopted in s. 2 of the *Controlled Drugs and Substances Act*. Section 4(3) of the *Criminal Code of Canada* provides as follows:

4 (3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

- (i) has it in the actual possession or custody of another person, or
- (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

37 Section 4(3) thus provides that possession can be proved by establishing that an accused had personal possession, constructive possession or joint possession of a prohibited drug. However, in each instance, the Crown must establish that an accused had both knowledge and control of the prohibited drugs or substances.

38 In this case, there was no evidence of personal possession, thus the issue is whether the Crown has established either constructive or joint possession. In either case, the Crown must prove beyond a reasonable doubt that Mr. Nguyen had knowledge of the marihuana found in the Smith Avenue house as well as some measure of control over it.

Production of marihuana

39 Section 7 (1) of the *Controlled Drugs and Substances Act* provides that, except as authorized under the regulations, no person shall produce certain substances included in certain schedules under the *Act*. Cannabis marihuana is one of those substances. Section 2 of the *Controlled Drugs and Substances Act* defines the term "produce". That definition includes cultivating, propagating or harvesting the substance or any living thing from which the substance may be extracted or otherwise obtained.

40 The gravamen of the offence of production requires proof of active participation in the growing of the plants; see *R. v. Tran*, [2006] B.C.J. No. 2684. This typically includes some active tending to the crop or enabling its growth, such as planting, assembling the apparatus, applying fertilizer, or harvesting the crop.

41 A person may be found guilty of the offence of production by directly participating in acts which constitute production as defined in the *Controlled Drugs and Substances Act*. However, a person may also be found guilty as a party to the offence of production if she aids or abets another person to produce a prohibited substance.

42 The issue before me on the charge of producing marihuana is whether the Crown has proven beyond a reasonable doubt that Mr. Nguyen was actively participating in the growing of the marihuana plants found in the Smith Avenue house.

Circumstantial evidence

43 In circumstances where the Crown's case is largely based on circumstantial evidence, I must be satisfied, beyond a reasonable doubt, that the guilt of the accused is the only reasonable inference to be drawn from the proven facts: see *R. v. Cooper* 1977, 34 C.C.C. (2d) 18. The test was described in slightly different terms in *R. v. Charemski*, [1998] 1 S.C.R. 679, namely, that "there was no other rational explanation for the circumstantial evidence but that the defendant committed the crime".

44 Where evidence is circumstantial, it is necessary to distinguish between drawing inferences and impermissible

speculation. This distinction has been discussed in a number of cases and was reviewed by Madam Justice MacKenzie in *R. v. Giles*, [2008] B.C.J. No. 522. The inference must be one that can be reasonably and logically drawn. It cannot depend on speculation or conjecture. An inference in a criminal case ought not to be based on a mere guess or suspicion.

45 In cases involving circumstantial evidence a judge must be careful not to simply weigh each individual circumstance in isolation to see whether or not it supports a finding of guilt. Instead, all of the circumstances, taken together, must be considered to determine whether or not the evidence as a whole amounts to proof beyond a reasonable doubt: see *R. v. G.L.J.*, [1997] B.C.J. No. 2994 (B.C.C.A.)

ANALYSIS

46 The determination I must make in this case is whether the Crown has proven beyond a reasonable doubt that the accused had possession of the marihuana plants found in the Smith Avenue house and/or whether he was involved in the production of the marihuana plants found growing in the basement of the house. I understand that I must review the evidence in its totality and not simply consider individual circumstances in isolation. However, in order to assess the evidence in its totality I must consider the individual components that make up the whole of the evidence.

47 The central factual issue in this case is whether the evidence establishes that the accused had knowledge of the marihuana grow operation and some control over it and whether he was actively involved in the grow operation in some capacity. The Crown argues I should infer the accused did have knowledge and control and that he was actively involved in the grow operation from the following evidence: rental of the house, the presence of the accused's car in the driveway, documents found in the house, responsibility for the BC Hydro count, and other evidence pointing to a lived-in house, including pictures of the accused in the house, food in the refrigerator and other similar *indicia* of residency. I will consider the evidence adduced in this case under the general categories used by the Crown.

Rental of the house

48 I will first address the rental of the house. It is clear from one of the now former owners of the house, Mr. Chien, that he rented the property to the accused and his family sometime in 2002. His evidence was that post-dated cheques were either dropped off at his house or in his mailbox or that he would go to the Smith Avenue house to pick up the cheques himself. The last post-dated cheques Mr. Chien had for the Smith Avenue house were for the period of December 2006 to the end of February 2007. In his direct examination Mr. Chien said he went to the Smith Avenue house to pick up the cheques but he could not remember if the accused was there. He said maybe it was his wife who was there. However, in cross-examination, he acknowledged that he could not say for sure how he got the cheques in November 2006 and whether the cheques were handed to him personally or were put in his mailbox. Mr. Chien said the accused's name and that of his wife was on the cheques he received. However, when pressed on this point, he said he did not recall the name on the cheque but he assumed it was that of the same person, that is, the accused. No copies of the cheques were filed in evidence neither was any evidence led as to the name of the wife or children of the accused. Mr. Chien could not comment on who had signed the cheques. He did not recall seeing the accused sign the cheques.

49 Given this equivocal evidence, it is not clear who was paying the rent on the Smith Avenue house at the time the alleged offense was discovered.

Vehicle at the house

50 Next I will turn to Constable Shum's observation of a car in the driveway. On November 16, 2006, he went to the Smith Avenue house at about 4:30 p.m. He saw a vehicle parked on the rear driveway leading up to the garage. The vehicle was a newer model Dodge Caravan license number 371 HCD. An admission was made that a Dodge station wagon with the same license plate number was registered to Tuan Khong Nguyen; the registration documents listed the same address as the Smith Avenue house. This evidence, by itself, is insufficient to establish residency or to tie the accused himself to the Smith Avenue house. The observation was made on one occasion only and the accused himself was not seen either in the vehicle or in the house.

Documents on the desk

51 I now turn to the documents and the computer found on the desk. First, in relation to the computer, there is evidence from Constable Shum that nothing was found in the computer that was relevant to this case. Constable Shum testified that he thought the computer was returned to the accused when he was interviewed in February 2007. However, Constable Shum did not personally observe the computer being given to the accused or the accused accepting the computer. Given this testimony, there is no evidence before me to link the accused to the computer and thus to the Smith Avenue house.

52 As noted, a number of documents were found on the same desk as a computer. Of the 12 documents entered into evidence only three were addressed to Tuan Khong Nguyen. One of these three documents was a letter dated October 16, 2006, from CIBC requesting additional information relating to a Visa application. Another document was an undated and unsigned letter titled "Family Sponsorship and Immigration". The last document was a Conservative Party sustaining donor renewal form for 2007 which was also undated.

53 Four of the 12 documents were addressed to a Mr. or Ms. Hua. Those documents were a MasterCard statement dated 11/07/2006, a Medical Services Plan premium billing notice dated September 7, 2006, (one of the persons covered by that premium billing notice was listed as Tuan K. Nguyen), a letter from Moscrop High School dated November 30, 2006, regarding a student named Richard Pham and lastly a Canada Revenue Agency GST credit notice dated July 5, 2006. There was no evidence to establish the relationship, if any, between the accused and Mr. or Ms. Hua. Mr. Chien gave evidence that the accused and his family (a wife and three children) rented the house but he did not provide evidence about the names of the wife or the children.

54 The remaining four documents were addressed to the Chien's (Jane, Jerry, Jaus) who I understood were members of the Smith Avenue house owner's family. Two of these documents had a post office date stamp showing the date of December 2006.

The documents addressed to the Chien's cannot assist in establishing that the accused was a resident at the Smith Avenue house. However, they do show, as argued by the Crown, that someone was living at the house during the relevant period because those documents were found on a desk in the living room.

55 The documents addressed to Mr. or Ms. Hua do not assist in establishing that the accused was a resident of the Smith Avenue house at the relevant time because there is insufficient evidence of his relationship to Mr. or Ms. Hua. The fact that someone with a similar name is listed on the Medical Services Plan suggests there may be a relationship but that is not a sufficient evidentiary basis from which to draw any further inference.

The BC Hydro account

56 I now turn to the BC Hydro account. The documents regarding the BC Hydro account show that in the electric billing history document a person by the name of Thu Thanh Hua was listed as the customer for the account relating to the Smith Avenue house. The customer ID number for that electric billing history is 1349172. The move-in date for that account is shown as January 3, 2003. The move-out date is shown as December 16, 2006. The consumption screen document for the Smith Avenue house lists the names of three different individuals and their customer account ID numbers. Next to customer account ID number 1349172, (which is the same customer ID number as the one in the electric billing history) are the names Thu Thanh Hua and Tuan Nguye. The Crown argues this evidence shows that the accused was a subscriber for the BC Hydro account at the Smith Avenue house.

57 The evidence relating to the BC Hydro account is not sufficient evidence to establish that the accused was responsible for the BC Hydro services at the Smith Avenue house. First, the name listed is not the same as the accused's name. The Crown asked me to assume there was a spelling error in the surname. I decline to do so because there is no evidence before me that allows me to draw that conclusion. The Crown argues that a date entry on the consumption screen document ("29 Sep 73") was the accused's date of birth. If the date entry on that document was a date of birth,

that might possibly have assisted in determining whether the name Nguye referred to the accused. However, there is no evidence before the Court that the entry "29 Sep 73" is a date of birth. The security investigator gave evidence that when a person applies for BC Hydro services they do so either through the call centre, over the telephone, or through the internet. Apparently there is no other way to contact the staff who deals with accounts because there are no "physical offices". Information provided by the subscriber to the call centre is not confirmed. The evidence before me does not establish who subscribed for the service or how the name Tuan Nguye came to be recorded in the BC Hydro records or whether Tuan Nguye and the accused are the same person.

Evidence suggesting residency

58 I now turn to the various items found in the house. The photographs of the house and other evidence led by the Crown clearly establishes that someone was living in the Smith Avenue house at the time the police discovered the grow op. However, the home furnishings, toys, clothing, and other items found in the house do not in themselves point to the accused as being the person living there. The Crown places particular emphasis on the fact there were pictures of the accused in the house. In particular the Crown points to wedding pictures in the master bedroom. Constable Shum identified the man in those wedding pictures as the accused. In addition, in the kitchen, there was a photograph of a man in a blue sweater. The man in that photograph was identified by Constable Shum as the accused. In my view, the photographs are not sufficient evidence to establish that the accused was living at the Smith Avenue house at or about the time that the alleged offences were discovered.

59 There is no evidence before me about the relationship between the accused and the persons living in the house at the time the marihuana grow operation was discovered. There are a number of photographs of children and adults hanging on the walls of various rooms in the Smith Avenue house. However, there is no evidence before me about who those persons are and whether there is a relationship between those persons and the accused. There are documents regarding a Mr. or Ms. Hua but there is no evidence of the relationship, if any, between that person and the accused. There was no identification evidence relating to the accused (for example passports, medical documents, tax documents etc.) found in the Smith Avenue house. There was no fingerprint evidence linking the accused to the grow operation in the basement.

60 I understand that I must not simply analyze the individual pieces of circumstantial evidence relied on by the Crown. Instead I must look at the evidence in its totality to determine whether the Crown has proven its case against the accused beyond reasonable doubt. In this case, I find that the circumstantial evidence, considered as a whole, is not enough to lead me to conclude that the only reasonable inference to be drawn in this case is that the accused had knowledge and control of the marihuana grow operation or was involved in producing marihuana. The evidence adduced by the Crown does raise suspicions about the accused's connection to the house and to the people who were living there. However, in a criminal case an inference drawn from circumstantial evidence must not be based on conjecture or on a mere guess or suspicion. Accordingly, I find that the charges against the accused have not been proven beyond a reasonable doubt.

M.F. GIARDINI PROV. CT. J.

cp/e/qlrds/qlpwb/qlaxw