

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***R. v. Tran,***  
2006 BCSC 1504

Date: 20061011  
Docket: X068435  
Registry: New Westminster

Between:

**Regina**

And

**Xeo Tran aka Heo Tran**

Before: The Honourable Madam Justice MacKenzie

## **Reasons for Judgment**

Counsel for Crown:

E. Laurie

Counsel for Accused:

J. I. Solomon

Date and Place of Trial/Hearing:

September 25 and 26, 2006  
New Westminster, B.C.

[1] Xeo Tran is charged with unlawfully producing marihuana, contrary to s. 7(1) of the **Controlled Drugs and Substances Act**, [1996, c. 19] and with possession of marihuana for the purpose of trafficking, contrary to s. 5(2) of the **Controlled Drugs and Substances Act**. The charges arise from a search of a house in Surrey, British Columbia on October 28, 2004. Mr. Tran, who appeared to be a transient visitor, was the only occupant at the time. He answered the door to the police.

[2] The Crown's case is based on circumstantial evidence.

[3] The defence concedes that the evidence proves that someone committed both the alleged offences. The issue is whether the guilt of Mr. Tran is the only reasonable inference to be drawn from the proven facts: **R. v. Cooper**, [1978] 1 S.C.R. 860. Specifically, has the Crown proven that Mr. Tran was producing the marihuana in the sense of actively participating in the growing of the plants: **R. v. Powell** (1983), 9 C.C.C. (3d) 442 (B.C.C.A), **R. v. Vu** 2002 B.C.C.A.659, and possession by Mr. Tran within the meaning of s. 4(3) of the **Criminal Code**, R.S.C. 1985, c. C-46 and incorporated in the **Controlled Drugs and Substances Act** by virtue of s. 2(1) of that statute. Possession must include both knowledge and some act or measure of control.

[4] Mr. Tran did not testify or call any other evidence.

[5] The following evidence was elicited in the Crown's case.

[6] On the morning of October 28, 2004 a man called 911 and reported that his sister was being assaulted in the basement of the house at 10061 – 144 Street in

Surrey, British Columbia. Constables Riddle and Rolls were dispatched to that address and told the caller would be waiting outside. They arrived at 7:44 a.m. and observed a red car bearing B.C. licence plate number 001 FCN parked in the driveway. The plate number came back as registered to a female. No one was waiting outside the house. The officers decided to ensure that a woman was not being assaulted inside, so they knocked on the front door, yelling: "Police. Open the door". Mr. Tran, later identified by his Alberta driver's licence, answered the door. There was no other entrance.

[7] Constable Riddle explained the police attendance and asked whether anyone else was in the house. Mr. Tran said "No", but the officers entered to be sure. From the entrance, Cst. Riddle could smell growing marihuana. Constable Rolls stayed with the accused while Cst. Riddle walked through the two upstairs bedrooms. He found marihuana clones growing in one of them ("the first bedroom"). He did not find anyone in the house, but there was a rice cooker on the kitchen floor and a mattress on the floor of a second bedroom ("the second bedroom") and a suitcase containing clothing admitted to be Mr. Tran's. Lying on top of it was also an address book belonging to Mr. Tran. Constable Riddle explained to Mr. Tran that he was being investigated for possession of marihuana.

[8] Constable Riddle went to the basement and opened an unlocked door; there he discovered an overwhelming smell of marihuana and high humidity. Inside, he saw approximately 400 marihuana plants. There were large shrouds, high intensity lights, steel bars on the outside of the windows and milar film on the windows. This

metal tape sheeting keeps light and heat inside, but shades the outside so no one can look in.

[9] Constable Riddle arrested Mr. Tran and explained his rights. Mr. Tran was taken to the police station while Cst. Riddle obtained a search warrant to seize the equipment and plants.

[10] Twenty-two photographs depict the interior of the house, the location and nature of the marihuana grow operation, and the plants and equipment.

[11] There was food in the kitchen and some dried marihuana in the fridge. There were a dozen beer bottles on the kitchen floor. Constable Riddle said it definitely appeared to him that someone occupied the house.

[12] Defence counsel concedes Mr. Tran had slept the previous night in the second bedroom.

[13] There was also men's clothing in the hallway closet upstairs. Defence counsel submits that it could have belonged to someone other than Mr. Tran.

[14] The doors to all the rooms were unlocked, and the police did not locate any house or car keys in their search. The land title documents revealed the owner of the house was one Tham Van Nguyen. The forensic identification team examined the grow equipment for fingerprints but found none.

[15] Mr. Tran's Alberta drivers license showed his date of birth as March 30, 1937.

[16] The upper level of the home was minimally furnished. There was a couch, coffee table, television and entertainment stand in the living room.

[17] There were three unlocked marihuana grow rooms in the basement. The police seized 92 plants from one room that were all potted in soil and averaged two feet tall. They were in the vegetative state. There was a wall mounted exhaust fan on the east wall and an oscillating fan on the west wall. There were five 1000 watt hps high sodium lights and hoods.

[18] The second grow room contained 70 marihuana plants averaging approximately two feet tall, potted in soil and in a vegetative state. There were four lights and hoods and one oscillating fan, one boxed fan and two set industrial timers.

[19] There were also nine ballasts and capacitors in the electrical room associated with the grow room, and two unused bulbs on the floor. There was a portable spray nutrient wand and a container with a pump to spray nutrients. There were hand written grow instructions on the wall with three types of nutrients for grow operations written across the top of the document.

[20] The third room contained 212 clones and 200 plants in the flowering stage. They were potted in soil, ranging in size from 3 to 3.5 inches tall. They were supported by sticks. The room also contained 12 bulbs, two exhaust and two oscillating fans, two industrial timers set at reverse times, and 12 ballast and capacitors attached as individual units.

[21] There were 575 marihuana clones on metal shelves in the closet of the first bedroom (not the one with the mattress and Mr. Tran's suitcase) under fluorescent lights.

[22] Five receipts that appeared to be for nutrients or supplies from garden stores were found in a cupboard in the living room television stand, and a box of jiffy cubes was in the upstairs bathroom.

[23] Notably, in the glove box of the red car, the police found two documents in Mr. Tran's name. One was a gas bill and the second was an overdue final notice for the same account. Each bore a different Surrey address for Mr. Tran and neither was that of this house.

[24] A B.C. Hydro bill in the name of one Heo Tran and the registration for the car were also in the glove box. The registration was in the name of Ho Thi Nhan with an address of 14820 – 86 Avenue in Surrey.

[25] Another address book on the living room coffee table belonged to Mr. Tran.

[26] The police also seized unopened mail. The first was on a banister going upstairs and addressed to "Sandy Chow" at this location, 10061 – 144 Street, Surrey. Another piece of unopened mail was addressed to Tham Ngyen at the same address. Another was addressed to Marissa K. Chow at this location. The final piece of unopened mail, found on the living room table, was for a Sanford N. Chow, at this address.

[27] Sergeant Furac provided expert opinion evidence based on this grow operation that consisted of 1,149 marihuana plants and the equipment described earlier. He estimated the potential yield per plant to be 2 ounces (bud only). Assuming all the plants were brought to harvest, the yield would be 2,298 ounces or 143 pounds. Growers typically sell marihuana by the pound, and the price per pound in October 2004 was \$1,800 to \$2,200 Cdn, which means the potential value of all the marihuana from the plants was between \$257,400 and \$314,400 Cdn., assuming they all reached maturity.

[28] Sergeant Furac said these plants required maintenance or tending by watering or feeding at least once a day as there was no automatic system. There were no pumps, tanks or timers to automate the system. This soil based medium requires intensive tending; someone must connect a hose and use a spray nozzle or pump to water or feed the plants from a bathtub or tank.

[29] The plants at the flowering stage had been manicured, and were supported by bamboo sticks. Other indicia of active tending included the nutrients and the jiffy pucks (a compressed soil medium) that expand when water is added to provide a root system for growing clones. The 12 trays of clones upstairs and those with the 200 flowering plants were consistent with a replenishing operation that took clones to flowering and then onto the mature stage. This commercial operation was not highly sophisticated.

[30] A propane tank was found in the kitchen. Such tanks are used as a heat or cooking source by marihuana grow operators who access electricity from the stove or dryer to run the ballast system.

### **The law**

[31] There is no dispute on the law regarding both production and possession of marihuana.

[32] On “production”, the B.C. Court of Appeal in **Vu** held that it is possible to possess marihuana for the purpose of trafficking without producing or cultivating it. This is because a conviction for possession for the purpose of trafficking requires proof of knowledge and an element of control but does not require any evidence of active participation in the growth of the plants. Contribution to the growth of plants is irrelevant to a finding of possession. The court’s comments in **Vu** about its decision in **Powell** are enlightening.

[33] In **Powell**, the court said the gravamen of the offence of cultivating is active participation in the growing of the prohibited plants. In **Vu**, the same court applied that reasoning to the offence of production of marihuana. Thus, the gravamen of the offence of production is active participation in the growing of the prohibited plants. What is required for proof of production is evidence of active participation in the growth of the plants. Therefore, the issue before me on the count of producing marihuana is whether the Crown has proven beyond a reasonable doubt that Mr. Tran was actively participating in the growing of marihuana plants.



[34] The definition of “possession” in s. 4(3) of the **Criminal Code** is incorporated in the **Controlled Drugs and Substances Act** by virtue of s. 2(1) of that statute.

Subsection 4(3) of the *Code* provides:

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 of 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.

[35] Counsel both rely on various cases which applied the same principles to different fact patterns. The cases are fact dependent, and I will not review them all.

The Crown’s cases are: **Vu**, **R. v. Tran** (2005), 194 O.A.C. 278 (C.A.); **R. v. Fisher** (2005), 200 C.C.C. (3d) 338 (B.C.C.A.); **R. v. Pronick**, 2004 BCPC 535; **R. v. Lucin**, 2005 BCSC 1440; **R. v. Cates** (6 September, 2002) Vancouver 117185 (B.C. Prov. Ct); and **R. v. To** (1992), 16 B.C.A.C. 223.

[36] The defence cases are **R. v. Black**, [1996] B.C.J. No. 3148 (Q.L.); **R. v. Cameron** (2002), N.S.R. (2d) 349 (C.A.); **R. v. Le** (Vancouver Prov. Reg. No. 132667, May 23, 2006); **R. v. Polukoshko**, [1999] B.C.J. No. 646 (Q.L.); **R. v. Ryan** 2004 BCSC 1134; **R. v. Coull** (1986), 33 C.C.C. (3d) 186 (B.C.C.A.); **R. v. Neill**, 2003 BCSC 109; and **R. v. Chen**, [2006] O.J. No. 1379 (Ont. Sup. Ct. Jus.) (Q.L.).

[37] The Crown argues that the additional defence cases of **Coull**, **Neill**, and **Chen** concern only the issue of whether the evidence in each case established the accused was a resident of the premises in which he was found.

[38] In **Coull**, for example, the court focused on whether the accused was a resident. McLaughlin J.A. (then) for the court addressed the question whether there was sufficient evidence to find knowledge and control on the part of **Coull**. She said (at ¶19 and ¶21):

¶19 In my view, there was not. The fact that he had been seen at the residence once before is equivocal. It certainly does not demonstrate that he lived at the premises or that he exercised any measure of control over them. The same may be said of the fact that he was found standing upstairs. There was nothing in that to connect him with the marijuana growing operation downstairs, the processing operation in the kitchen or the marijuana found on the dining table.

¶21 Finally, it is suggested that the fact that a video recorder rented in Coull's name was found on the premises indicates knowledge and control over them. I cannot agree. Assuming (without deciding) that the evidence of the rental slip in Coull's name can be taken as evidence that he had rented the machine, that rental does not permit the inference that he lived in the premises or had control over what was done there. The equivocal nature of this evidence is indicated by the Crown's failure to tender the rental slip in evidence. It may be that the slip would have shown an address of residence quite different from the premises where the marijuana was found, thereby negating any inference that he resided there and possessed both knowledge and control over what was done there. This possibility is sufficient to point out the danger of convicting on such evidence.

[39] The Crown points out that in **Neill**, the Crown's theory was that the accused and his girlfriend were living together in the house. The issue was whether there was some doubt that **Coull** had already moved out when the offence was discovered, so there was discussion about whether he had a key to the house,

whether there was documents in his name or other indicia of residency. **Chen** involved the same focus and issue.

[40] The Crown says residency of an accused can be relevant, but is not a prerequisite to a finding of knowledge and control that can be established in other ways.

[41] The Crown argues that an owner of a marihuana grow operation may hire others to take care of the plants. That caretaker may have knowledge or control though he may not be permanently residing at the premises. In such a case, documents in his name would not be found, he may not be paying the hydro or other bills, or even have a key. But there might be other indicia that he was the caretaker, so evidence of residency would have little relevance, according to the Crown.

[42] Here, the Crown's theory is that Tran was the caretaker, based on the evidence of his presence at the property when the police attended, the fact the house was only being used for a marihuana grow operation, and Tran's access to the unlocked grow rooms.

[43] I find the cases of **Fisher**, **Vu**, and **Coull**, to be most helpful. In **Fisher**, Smith J.A., giving the judgment of the court, reviewed the law on "possession" set out in **Rex. v. Hess (No.1)** (1948), 94 C.C.C. 48 (B.C.C.A.); **Beaver v. The Queen**, [1957] S.C.R. 531; **Rex v. Colvin and Gladue** (1942), 78 C.C.C. 282 (B.C.C.A.); **R. v. Terrence**, [1983] 1 S.C.R. 357; **R. v. Smith** (1973), 10 C.C.C. (2d) 384 (B.C.C.A.); and **R. v. Camerson** at ¶24 :

As is evident from my summary of the law, neither constructive possession nor joint possession requires proof of manual handling. To establish constructive possession, it was incumbent upon the crown to prove beyond a reasonable doubt that the appellant knew of the presence of the cocaine and that he had some measure of control over its location. To establish joint possession, the Crown was required to show that someone other than the appellant had possession of the cocaine with his knowledge and consent and that he had some measure of control over it.

[44] While ownership or residence of the premises may be relevant to prove possession, the question is whether the accused was in possession of and had control over the marihuana regardless of who owned it.

[45] I agree with the Crown that on the evidence, particularly the smell, that knowledge of the presence of the marihuana in the basement of the house was inescapable. The only reasonable inference is that the accused knew of its presence. Constable Riddle said the smell of growing marihuana was evident from the entrance way when the accused opened the door. I find the accused knew the marihuana was present.

[46] The Crown also says the only reasonable inference on the evidence is that the accused had the requisite measure of control over the marihuana to found a conviction for possession for the purpose of trafficking, and that the only reasonable inference is that he was actively participating in the growth of the plants by tending them so as to be guilty of producing the marihuana. The Crown relies on the expert evidence that this grow operation required daily tending by way of watering and feeding because it used soil rather than the automatic system of a hydroponic operation.

[47] In her able argument, the Crown submitted the evidence that other people were associated to the house (the several pieces of unopened mail addressed to others at that address, the land title documents showing the residence was owned by someone other than the accused, the male clothing in the hall closet apart from the accused's clothing in his suitcase, and the car registered to a different person) does not negate control by the accused at the relevant time, or a reasonable inference that he was then actively participating in the growing of the marihuana plants. She submits that it does not matter that the accused's primary residence was not this house and that he was only a visitor. Others may also have had control over the plants and been involved in tending them. She says that several people can exercise control and be actively involved in growing them.

[48] The Crown submits there was no indicia of normal residency because there was little furniture, no personal items other than the accused's clothing in his suitcase, the male clothing in the hall closet, and the unopened mail addressed to several others at the residence.

[49] The Crown submits that if the unopened mail indicates that others were staying there, their presence was also temporary as it is clear that the house was being used solely as a grow operation; there was nothing downstairs except grow rooms and nothing in the first bedroom except 500 marihuana clones in the closet. In the second bedroom was the mattress on the floor with the suitcase of the accused. The Crown says there is no evidence that other people stayed, or slept there.

[50] In summary, the Crown says it would be mere speculation to draw any conclusion other than possession by Mr. Tran and cultivation of the marihuana.

### **Discussion**

[51] While a temporary stay as caretaker of the plants could be sufficient for a finding of possession and production, Mr. Tran was not found in the basement with the grow rooms. There was nothing on his person, no equipment or scent about him to connect him sufficiently to the grow rooms to show he had the requisite measure of control over them to infer possession at law. The police did not locate any fingerprints. The two documents in his name found in the glove box of the red car (not registered to him) bore different addresses for him from that of this grow operation. He had an Alberta driver's licence. There were several pieces of unopened mail that were addressed to other people at this particular address, and other male clothing in the hall closet.

[52] The evidence reveals circumstances that are obviously suspicious. But I disagree with the Crown that there was no other activity going on inside the residence except the growing of marihuana. The Crown's evidence itself included the opinions of the police that someone was living in the house because there was food on the coffee table and in the kitchen, a rice cooker, dirty dishes on the counter and beer bottles on the floor. There was a television and normal furniture in the living room. It is true that the first upstairs bedroom was empty except for the clones in the closet; Mr. Tran had slept on the mattress in the second bedroom, at least the night prior to his arrest. His presence was obviously temporary on the evidence of his

suitcase and Alberta driver's licence. The evidence is consistent with his having stayed the night, having been granted access by the usual resident, residents or owners.

[53] I recognize that the two bedrooms were not furnished in the usual way, and it looks as if Mr. Tran was a caretaker of the plants and present to tend the grow operation. The grow room doors were unlocked, so he had access to them. But I do not think that determines a sufficient degree of control, or measure of control, for possession on his part. Nor do I think there is sufficient evidence to prove he was producing the marihuana. I find the reasoning in **Coull** is indeed applicable to the facts in this case.

[54] The unopened mail is capable of founding an inference that other people had control over the marihuana and were producing it. Mr. Tran may have been involved also, but in my view there is insufficient evidence connecting him to the grow operation in the basement to find beyond a reasonable doubt that he was actively participating in the growth of the plants and had the requisite measure of control over them to find him in possession. The accused may have been there to tend the marihuana plants and was probably in possession of them, but that standard falls short of proof beyond a reasonable doubt.

[55] I must therefore acquit the accused on both counts on the indictment.

"A.W. MacKenzie, J."  
The Honourable Madam Justice A.W. MacKenzie