# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Vu,***
2004 BCCA 230

Date: 20040428
Docket: CA030455

Between:

**Regina**

Respondent

And

**Hung Manh Vu**

Appellant

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Braidwood

J.I. Solomon — Counsel for the Appellant

P.W. Hogg — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
27 February 2004

Place and Date of Judgment: Vancouver, British Columbia
28 April 2004

**Written Reasons by**:
The Honourable Mr. Justice Donald

**Concurred in by:**
The Honourable Madam Justice Rowles

**Dissenting Reasons by:**
The Honourable Mr. Justice Braidwood (Page 25, para. 44)

**Reasons for Judgment of the Honourable Mr. Justice Donald:**

[1] This case raises two main issues: whether the refusal of a defence request for a *voir dire* into the validity of a search warrant was proper and whether the actual search went beyond the scope of the warrant. If the search did go beyond the scope of the warrant, then it is necessary to determine if the evidence seized in the search should have been excluded under s. 24(2) of the ***Charter of Rights and Freedoms*** as a remedy for a breach of s. 8. I would exclude the evidence and order a new trial on the second ground. It is unnecessary to decide the first ground.

[2] Hung Manh Vu appeals against convictions for production of cannabis (marihuana) and for unlawful possession of the same for the purpose of trafficking, contrary to ss. 7(1) and 5(2) of the ***Controlled Drugs and Substances Act***, R.S.C. 1996, c. 19. Those convictions were pronounced on 27 November 2002 after a trial in the Provincial Court: 2002 BCPC 676.

[3] Vancouver City Police received a tip that a possible marihuana grow operation was taking place at 3131 East 6th Avenue in Vancouver. Constable Dino Falcone and another officer went to the residence on 14 March 2000 and observed that the basement windows were covered with dark material and

that the odour of bulk or growing marihuana was detectable from the neighbour's property. Also, they observed the hydro meter's ring spinning much more rapidly than other similar residences nearby and there appeared to be only one light on in the living room area. They noticed condensation on the glass cover of the hydro meter indicating high humidity. On the basis of these observations, Constable Falcone swore an Information to Obtain a Search Warrant (the "Information to Obtain") on 7 April 2000 and on the same day a justice of the peace issued a warrant to search which reads as follows:

> WHEREAS it appears on the sworn information of Dino Falcone, Constable 1832
> That there are reasonable grounds to believe that there is a controlled substance(s) or precursor(s), a thing(s) in which such a controlled substance(s) or precursor(s) is contained or concealed, offence-related property(ies), or a thing(s) that will afford evidence in respect of an offence under the Controlled Drugs and Substances Act ("the Act"), to wit:
> Cannabis marihuana, in bulk or growing form, and grow equipment used in the production of Cannabis marihuana to wit; electrical panels, switches, lights, pumps, ballasts, venting equipment, wiring, documents to establish residency.
> in respect of which one or more offences have been committed contrary to the following section(s) of the Act, namely:
> On April 07, 2000 at or near the City of Vancouver, Province of British Columbia, did unlawfully possess a controlled substance, to wit, Cannabis marihuana in an amount greater than 30grams, contrary to Section 4(1) of the C.D.S.A. is or are in a place, namely: The dwelling house of person or persons unknown located at 3131 East 6th Avenue, Vancouver, British Columbia.

> **THIS IS THEREFORE**, to authorize you to enter the said place between the hours
> Of 5:30 pm, on April 7, 2000 and 9:00 pm, on April 7, 2000
> And to search for and to seize the said controlled substance(s), precursor(s), property(ies), or thing(s), as the case may be, and to deal with it according to law.
>
> [Emphasis added]

[4] On 7 April 2000, police officers executed a search warrant at that address. They found a marihuana grow operation. 127 plants in the bud stage were distributed between three of the four rooms in the basement. The fourth room had likely been used to grow marihuana in the past. There was an elaborate ventilation system in place in the basement. High-pressured solar light bulbs were in use. The hydro meter for the house had been tampered with.

[5] Access to the basement growing area was only possible from the interior of the house through a locked and deadbolted door located at the bottom of a stairwell. No keys to the locks on that door were found in the house. Access to the basement growing area was not possible from outside the house because the exterior door not only was locked with a doorknob lock and deadbolt lock, but it also had a slide lock that could not be opened from outside.

[6] In the living room, police located a number of bills in the name of Hung Manh Vu or Manh Hung Vu bearing the address of the house. They were dated January, February or March 2000.

[7] In an attic access opening located in a small closet in the kitchen of the house, an officer located a garbage bag containing 16 one-pound vacuum-sealed bags of marihuana (7.7 kilograms). The odour of cultivated marihuana could be smelled from the living room.

[8] Various pieces of equipment often found in relation to the cultivation of marihuana were found in plain view in several areas in the upstairs of the home. For example, in the kitchen police seized a pedestal oscillating fan, a vacuum bag sealer and a box of sealable plastic bags.

[9] The police also found two sets of keys. A key on the first set fit a Pontiac parked in the backyard of the property. A key on the second set fit a Honda also parked in the backyard. Other keys on the second set fit the locks of several exterior entrances to the house including one of two locks securing the basement door entry to the marihuana grow area.

[10] An officer opened the Honda and found photocopies of both a passport and a Government of Canada citizenship card in the name of Hung Manh Vu, as well as two passport photographs bearing a likeness to the appellant. The police also found inside the vehicle two Canada Trust transfer forms for cash dated 29 February 2000 and 29 March 2000 in the name of H. Vu and ICBC registered owner papers for the vehicle in the name of Manh Hung Vu of 3131 East 6th Avenue.

[11] Both vehicles parked in the backyard area of the property had been observed there for at least a few hours.

**APPLICATION FOR *VOIR DIRE***

[12] At the beginning of the trial, defence counsel applied for a *voir dire* concerning deficiencies in the search warrant application. The Crown had no notice of an intention to challenge the warrant. Had the application been granted, an adjournment would have been required to produce Constable Falcone, the informant who obtained the warrant, who by that time had transferred to Nelson, B.C. At first, Crown counsel objected on the basis that no notice had been provided. It was decided that the trial would commence and the Crown would call its witnesses and the question of the ***Charter*** challenge would be taken up the next day. When the matter was addressed

at the beginning of the following day, Crown counsel abandoned the objection on the lack of notice and opposed the application on the basis that the *voir dire* would prove futile for the defence. In support of that objection, Crown counsel submitted that defence counsel had not brought forward any evidentiary basis for challenging the warrant. This Court held in ***R. v. Vukelich*** (1996), 108 C.C.C. (3d) 193 that the accused must establish grounds upon which the warrant may be set aside.

[13] The position of the defence was that since hydro meter observations had been held in earlier cases to be unreliable in proving excessive electricity consumption: see e.g. ***R. v. Monroe***, [1997] B.C.J. No. 1002 (B.C.C.A.), it was misleading of the informant to put this evidence forward in support of a warrant. That being so, the defence should have an opportunity to cross-examine the informant in order to demonstrate that he may have presented other evidence of a misleading nature. The Crown replied with the argument that even if the hydro meter observations were excluded from the Information to Obtain, there remain two other pieces of evidence - the odour of marihuana and the dark covering on the basement windows - which have been held in other cases to be sufficient for the issuance of a warrant.

[14] In ruling on the application, the trial judge exercised her discretion to refuse the *voir dire* because of lack of notice. She held that if she were to grant the *voir dire*, the effective use of court resources and the expeditious determination of criminal matters would be seriously undermined. In the alternative, she accepted the Crown's submission that there would be no point to a *voir dire* because even if the challenged evidence were expunged, there was sufficient evidence remaining for the warrant: ***R. v. Sievert***, 2000 BCCA 575.

[15] The other important ruling in the trial was on the admissibility of evidence obtained from the Honda motor vehicle. The trial judge held that since the car was in the yard it was covered by the warrant, but if she was wrong in that finding and a breach of s. 8 of the ***Charter*** had occurred, she would nevertheless have admitted the evidence found in the search because the officers acted in good faith having a reasonable belief that the vehicle was related to the occupants of the house. She said the evidence was real evidence and there is a lower expectation of privacy relating to vehicles. That expectation is lowered further when the vehicle is parked for some time on the property where a grow operation is discovered.

[16] On the issue of the scope of the warrant, the trial judge decided to follow an Ontario Court of Appeal decision, ***R. v. Haley*** (1986), 27 C.C.C. (3d) 454 rather than a decision of the Supreme Court of British Columbia in ***R. v. Brown***, [1995] B.C.J. No. 2642. She felt bound to follow ***Haley*** because, in her view, the facts in ***Brown*** were somewhat different from the facts in the case before her. In the result, she admitted the evidence.



[17] It is apparent from her reasons for conviction that the documents found on the search of the Honda were important in identifying the appellant as a person connected with the grow operation. She said in her reasons:

> [12] In the rear area of the residence were parked two vehicles. Constable Kindratsky located two sets of keys in the house and determined one set of keys operated a Pontiac 6000, and the keys for the second set of keys operated the Honda which was situated behind the Pontiac. The keys which operated the Honda also operated a lock on the upper rear door of the house, as well as the locks on the front door. Furthermore, one of the keys operated the doorknob lock on the basement rear door. No keys were found on the premises which operated the inside door at the basement level, which would permit access into the cultivation area.
>
> [13] Inside the Honda vehicle, licence plate KSV 049, Constable Kindratsky seized two passport photos, as well as photocopies of a passport and a Government of Canada Citizenship card, both in the name of Hung Manh Vu, with a date of birth of September 14th, 1964. These passport photographs appear to bear a likeness to the accused before this court. Also inside the vehicle were located two

> Canada Trust transfer forms for cash, dated February 29th, 2000, and March 29th, 2000, in the name of Vu and the initial H. Also found was the ICBC registered owner papers for the vehicle, in the name of Manh Hung Vu, at 3131 East 6th Avenue, and with an expiry date of October 20th, 2000.
>
> [14] In my view, it is clear on the evidence that a person by the name of Hung Manh Vu had access and control to the main floor of the residence and also, therefore, was in a position to allow or disallow access to the basement area.



**ISSUES**

[18] The appellant frames the issues on appeal in this way:

> **(A)** That the learned trial judge erred in refusing the Defence application for a voir dire to raise s. 8 and 24(2) Charter issues, and erred in not granting an adjournment of the trial so that the essential witness on the voir dire, the Informant Cst. Falcone, could be called to give evidence.
>
> **(B)** That the learned trial judge erred in holding that the search of the Appellant's vehicle was not in violation of s. 8 of the Canadian Charter of Rights and Freedoms and that the evidence seized therefrom was admissible in the trial.

**DISCUSSION**

[19] The appropriate remedy for either ground is a new trial. Since I would allow the appeal on the second ground, it is not necessary to express an opinion on the first. For practical

reasons, I do not think it is necessary to say anymore about the first ground than this. At a new trial, defence counsel will have an opportunity to provide written notice in accordance with the practice that prevails in the trial courts in this province and will have an opportunity to present a better articulation of the grounds for a ***Charter*** challenge. Defence counsel below (not Mr. Solomon) did not give the trial judge much assistance in the way he put his position for a *voir dire*. At a new trial the outcome may be different if notice is given and a better organized argument is presented.



**Search of the Vehicle**

[20] On the face of the warrant I do not, with respect, see how it is possible to find that it authorized the search of a motor vehicle. The warrant recites that there are reasonable grounds to believe that evidence of an offence under the ***Controlled Drugs and Substances Act*** are "in a place, namely the dwelling house...". The authority is "to enter the said place...". The antecedent of place is clearly the dwelling house. That language cannot be stretched to include a vehicle.

[21] Neither can it be said that the Information to Obtain provides a context for giving an expansive reading to the warrants such that it can include the Honda. There is reference in the Information to Obtain to the Pontiac but to no other vehicle.

[22] Thus the search was not authorized by law: either by the warrant or by reason of exigent circumstances or a search incidental to an arrest. The appellant was not arrested at the time of the searches. It must follow in my judgment that the search of the vehicle violated s. 8.

[23] The trial judge stated at para. 17 in her reasons for judgment:

> I agree the issue before the court is a complex and unsettled area of the law. As a matter of *stare decisis* I am bound to follow the authority of the Ontario Court of Appeal in ***R. v. Haley*** since, in my view, the facts of that case more proximates the facts of the case at bar than does the Supreme Court of British Columbia case of ***R. v. Brown***.

[24] The trial judge felt bound by the ***Haley*** case. I think she was wrong in her application of *stare decisis* in two respects. First, a judge of the Provincial Court of British Columbia is not bound to follow a decision of the Court of Appeal of another province, although a judge may find the

reasoning persuasive and give effect to it. Second, when faced with conflicting decisions, one from the Court of Appeal of a different province and another from a higher court within the jurisdiction, the Provincial Court is bound to follow the latter.

[25] The error in the present case is compounded by the fact that the pronouncement in ***Haley*** which the trial judge felt bound to follow was *aliter* while the determination as to the scope of the warrant in ***Brown*** was part of the *ratio* of the case. Moreover, the trial judge distinguished ***Brown*** on a difference in the facts which I think is immaterial.

[26] A most useful treatise on the subject of *stare decisis* is that published by William F. Ehrcke (now Mr. Justice Ehrcke of the British Columbia Supreme Court) entitled "Stare Decisis" (1995) 53 The Advocate 847. At 850 he wrote:

> There can be no doubt that trial judges are bound to accept as binding the law as pronounced by appellate courts above them in their judicial hierarchy. Thus, Chief Justice Rinfret was led to say in *Woods Manufacturing Co. Ltd. v. The King*, [1951] S.C.R. 504 at p. 515:
>
> > It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in

> it is undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of the relationship between the courts.



The learned author had reference to the ***Wolf*** decision in addressing the topic of *stare decisis* in relation to courts in other provinces:

> No court at any level in one province is bound to follow a decision of a court in another province. The principle as it applies to the Court of Appeal of any province was articulated by the Supreme Court of Canada in *Wolf v. The Queen*, [1975] 2 S.C.R. 107, at p. 109:
>
> > A provincial appellate court is not obliged, as a matter of either law or practice, to follow a decision of the appellate court of another province unless it is persuaded that it should do so on its merits or for other independent reasons.
>
> The same rule applies to lower courts. The principle of *stare decisis* cannot bind a court in one province to follow a court in another province since, apart from the Supreme Court of Canada, no court outside a given province has the power to overturn a decision within the province. The point was elegantly expressed by Matheson, Co. Ct. J. in *Regina v. Beaney*, [1970] 1 C.C.C. 48 (Ont. Co. Ct.) at pp. 53-54:
>
> > The Court of Appeal of Manitoba stands outside the hierarchy of Courts of this Province and, while there are many compelling reasons why a

> Judge of first instance in this Province ought to try to conform with the decisions of other provincial appellate Courts, in my respectful submission he is not bound by them. The point at issue here is underscored by the undoubted consequence that if, in the opinion of the Court of Appeal of Ontario, I should be correct in the substantive point of law in question, that Court surely would not reverse my judgment simply because I failed to follow an extra-provincial appellate decision with which it, too (*ex hypothesi*) disagreed.
>
> The British Columbia Court of Appeal came to a similar conclusion in *Regina v. Active Trading Ltd. et al.* (1975), 26 C.C.C. (2d) 412 (B.C.C.A.) at p. 414.

[27] In a nutshell, the rule of *stare decisis* is based on hierarchy. Lower courts are bound to follow decisions rendered by the courts that have the power to reverse them. Since an appellate court out of province has no such power, their decisions have no binding force within this province.

[28] It has been suggested that since ***R. v. Sellars***, [1980] 1 S.C.R. 527, lower courts are obliged to follow *obiter dicta* from the Supreme Court of Canada. That is a controversial proposition which I do not need to address. But no one has suggested that *obiter dicta* from the appellate court in one province is to be followed by a trial court in another province. Logically this must be so because if the ratio is not binding, *obiter dicta* could never be.

[29] The case of ***Haley*** was considered by the Ontario Superior Court of Justice in ***R. v. Brennen***, [2000] O.J. No. 3257 *per* Kozak J. This was a case like ***Haley*** which involved the search of a motor vehicle in the course of the search of a residence authorized by warrant. Kozak J. found that the remarks of the Ontario Court of Appeal in ***Haley*** suggesting that the vehicle search was not beyond the scope of the warrant were *obiter dicta* and not binding on him:

> [68] As has been stated, it remains a live issue as to whether the notion of curtilage associated with the dwelling is sufficient to extend the scope of a warrant to include vehicles on or associated with a dwelling identified in the warrant. For some time the view in Canada was that if the police wanted to search a motor vehicle located at the address to be searched, the vehicle had to be specifically included in the warrant. However, in R. v. Haley (supra) the Ontario Court of Appeal in what would appear to be an obiter comment, stated that if the car had been in the garage of the premises being searched or even on the driveway, there would be little doubt but that the search warrant would cover the search of the car. Crown Counsel relies upon Haley as its second ground for justifying the search of the accused's vehicle.
>
> [69] What this court must first of all determine is whether the decision of our court of appeal in Haley is a case where the doctrine of stare decisis applies, and is therefore a binding precedent. Both Laskin J.A. and Shroeder J.A. in Delta Acceptance, express the view that for a decision for a court of co-ordinate or superior authority to be binding as a legal precedent, that it must enunciate a principle or a substantive rule of law. The only thing binding upon a subsequent judge, is the principle upon which the case was decided. I have some difficulty concluding that the Court of Appeal in

Haley, dealt with the issue of the search of the car as an extension of the curtilage of the dwelling on a principled basis. Instead the comments of MacKinnon J.A. would appear to be more akin to what Laskin J.A. had to say in Delta Acceptance in that they represented a first impression of the court without any mention of common law principles or reference to decisions from other provincial appellate courts. The decision was also based on the fact that the owner of the vehicle was also the owner of the dwelling that was being searched. At page 465 of Haley, MacKinnon J.A. had this to say: "Apparently at trial, Crown counsel "conceded" that the motor vehicle was "improperly searched", although the trial judge found that the police acted without malice and with an honest but mistaken belief as to their right to search the car. The concession having been made, the Crown felt bound by that concession on the appeal. Although the concession cannot be directly disturbed now I would not want to be taken as accepting it as necessarily, legally correct. There was a valid warrant to search the premises at 8 East 35th St. The car belonging to the respondent containing the lease was out in front of the house (within 100 ft.). The keys to the car were in the respondent's residence, which was being legally searched. Certainly, if the car had been in the garage of the premises or even on the driveway, there would be little doubt but that the search warrant would cover a search of the car. We do not have a description of the premises, so we do not know whether there was either a garage or driveway attached to the premises. One might conclude that there was neither, as neither car was on a driveway or in a garage, the unlicensed car being in an adjacent parking lot. It would appear that the reasoning process in Haley was more concerned with a particular question of fact than it was in developing a permanent binding legal precedent to be followed by courts of co-ordinate or inferior jurisdiction. Accordingly, I am of the view that the decision in Haley does not bind an inferior court to adopt as a principle of law that any vehicle in the garage or driveway of a dwelling that is being subjected to a search, pursuant to a valid search warrant, would be included in the said warrant as a place to be searched. At best the

> facts in Haley should be confined to vehicles owned by the occupants or owner of the premises being searched, and even then the issue was not dealt with on a principle basis but rather was considered in the disposition of other issues. The vehicle is therefore not included in the curtilage of the Enns residence.
>
> [Emphasis added]

[30] Moving to the ***Brown*** case, the question of the lawfulness of the vehicle search was directly on point. There the police searched a residence pursuant to a valid search warrant and after finding keys dropped by someone in the residence, they proceeded to search two vehicles parked in the driveway of the residence. Romilly J. found that the search warrant did not permit the search of vehicles which may have been on the premises. He noted that one of the officers who attended the search of the premises recognized the appellant's car parked 25 feet from the carport of the residence and parked partly on the grass and partly on the driveway.

[31] One of the occupants of the house dropped some keys when the police entered the place. The Crown argued that the search of the accused's vehicle was reasonable, pointing to the fact that in similar circumstances it was standard procedure on the part of the R.C.M.P. at that detachment (Powell River) to search buildings and vehicles close to the dwelling house.

[32] While the text of the warrant was not set out in the decision, it is apparent from the reasons of Romilly J. that the warrant authorized the search of the dwelling but did not specify vehicles on the property. In those circumstances he found that the search of the vehicle was a warrantless search contrary to s. 8 and the evidence ought to be excluded under s. 24(2). In discussing the nature of the breach, Romilly J. said:

> [30] Notwithstanding the concession of Defence Counsel, however, I find the practice of routinely searching vehicles on premises for which a warrant is obtained regardless of whether the vehicles are included in the warrant to search in order to obtain incriminating evidence amounts to a wilful flagrant or deliberate breach of an accused charter of rights. This sort of practice would usually tend to favour exclusion of the evidence.

[33] As mentioned, I am unable to find any meaningful distinction between the circumstances in ***Brown*** and those in the case at bar. In my view, the trial judge in the present case was obliged to follow the ruling in ***Brown*** that the authority to search a dwelling house does not include the authority to search vehicles on the property. And accordingly the search of the Honda was unlawful and contrary to s. 8.

[34] There remains the exclusion issue under s. 24(2).

[35] The trial judge's analysis of s. 24(2) of the ***Charter*** against the possibility that she was incorrect in finding no breach of s. 8 is at paras. 21 and 22 of her ruling:

> For these reasons I find there was no breach of s. 8 of the ***Charter of Rights and Freedoms***. If I am wrong in my finding, I would nevertheless have admitted into evidence at the trial the evidence found as a result of the search of the Honda vehicle for the reasons that the officers, in my view, acted in good faith in carrying out their search and in believing the vehicle was related to the occupants of the residence.
>
> Furthermore, the evidence found was real evidence and not conscripted evidence, and there is a lower expectation of privacy relating to vehicles. The officers had reasonable grounds to believe the vehicles should be searched wherever a marihuana grow operation is found since evidence about the grow operation might be found therein. Further, regarding vehicles and the lower expectation of privacy, in my view, where a vehicle is parked for some time on the same property as where a marihuana grow operation is found, the expectation of privacy must surely become even lower and proportionally superseded by the public interest in detection of the identity of the criminals involved.

[36] It would appear from the foregoing that the trial judge's opinion of the good faith of the officers is based on their having reasonable grounds to believe the vehicle may provide evidence related to the offence under investigation. While appellate courts must defer to the trial judge's determination of good faith, here I think the trial judge proceeded on an erroneous principle. Surely the likelihood that the vehicle

might contain relevant evidence is, in the absence of exigent circumstances or a search incidental to an arrest, only a basis for obtaining another warrant, one that clearly authorizes a search of the vehicle.

[37] Romilly J. was concerned in ***Brown*** that the officers searched the vehicle in accordance with a practice of searching vehicles without warrants. I agree with him that that bears directly on the good faith of the police as one of the factors enunciated in ***R. v. Collins*** (1987), 33 C.C.C. (3d) 1.

[38] The practice of the police was explored in the cross-examination of Detective Robert Tyldsley who coordinated the investigation:

> Q Okay. Do you have a practice, sir, in respect of the five hundred odd search warrant attendances that you've been on, do you have a practice with respect to the searching of vehicles found on or about the property?
>
> A A practice.
>
> Q I'm just thinking, if they're not specified in the warrant as something to be searched, do you search them in any event?
>
> A I have done, yes.
>
> Q And as a matter of practice or a case by case basis, or --

> A If -- I -- I have searched them without a search warrant, yes.
>
> Q Okay.
>
> A If they're not named on the search warrant and -- and I haven't re-attended for a search warrant, I -- I have just searched them.

[39] Constable Murray Kindratsky said that although he usually examines the search warrant in situations like this, he did not look at the warrant in this case. He went ahead and searched the vehicle not knowing whether the vehicles were a part of the authority or not. As for the practice of searching a car on the property of a suspected grow operation, he said:

> Q Okay. And again, as per my earlier question, it's normal procedure for you to search a car, or cars like this at the rear of a premise that's being searched for a suspected grow operation?
>
> A I will search, Your Honour, if I find that there may be offence related material in the vehicle. In this case, the keys were in the house, and in an attempt to establish if there was offence related material, I used the keys to open the vehicle and check them.

[40] I have said that reasonable grounds to search do not provide a basis for a finding of good faith. A warrant is required and every police officer should know that. The

thinking that reasonable grounds constitutes good faith must be discouraged, otherwise police will shortcut the warrant process in the expectation that the evidence obtained in a warrantless search will be admitted notwithstanding a s. 8 breach.

[41] Not only is the trial judge's finding of good faith based on an erroneous ground, but the behaviour of the police manifested the opposite of good faith. The officer who searched the vehicle did not read the warrant to see whether it authorized the search. This shows a casual indifference to the privacy interests protected by s. 8. Both that officer and the detective in charge indicated a practice of searching vehicles on property covered by a warrant despite the absence of any specific authority relating to vehicles. An occasional lapse is one thing, a practice is quite another and engages the good faith criterion in the ***Collins'*** analysis.

[42] In my view, the reputation of justice will suffer much more from tolerating a practice of unauthorized searches than setting aside the convictions. The exclusion of the evidence taken in the vehicle search would not end the matter. On a new trial the Crown may have other means of proving the appellant's identity as a person with knowledge and control of the grow operation.

[43] In the result, I would allow the appeal, set aside the convictions and order a new trial.

“The Honourable Mr. Justice Donald”

I Agree:

“The Honourable Madam Justice Rowles”

**Reasons for Judgment of the Honourable Mr. Justice Braidwood:**

[44] I have had the advantage of reading in draft form the reasons for judgment of Mr. Justice Donald. I find myself unable to agree in the disposition of the appeal as he proposes.

[45] In my view, on the first issue, the learned trial judge neither erred in refusing to order a *voir dire* nor in finding that there was sufficient reliable information upon which the authorizing judge's decision to issue the search warrant could reasonably be based. On the second issue, notwithstanding that the search of the Honda was unlawful and contrary to s. 8 of the ***Charter***, the admission of the evidence found in the Honda would not bring the administration of justice into disrepute within the meaning of s. 24(2); thus, the evidence was properly admitted by the trial judge. Accordingly, I would dismiss the appeal.

## I. FACTS

[46] As Donald J.A. has summarized the essential facts of this case, the issues on appeal, and the trial judge's reasons, it is unnecessary for me to do so. However, since I find it necessary to address the first ground of appeal, I set out the material part of the Information to Obtain a warrant:

As a result of information from a Crime Stoppers tip, dated February 2000 regarding the presence of a possible marihuana cultivation at **3131 E. 6th** Ave., I attended that residence initially on Mar 14, 2000 at approximately 2000hrs in company of Det Harvey Brown Drug Squad 2. With the Kokesh decision in mind, I made the following observations from outside the target premise property lines:

. . . All the visible basement windows appear to be covered with dark material (not curtains) with no appearance of visible light. . . .

The hydro meter was located on the west side of the premise, easily visible from the neighbour's property. The meter was spinning rapidly using the black mark on the ring as a gauge. There appeared to be one light on in the living room. I then observed a hydro meter on a larger 2 level residence located in the same block as the target residence, and observed the meter moving very slowly with the residence appearing to have lights on, throughout the residence. . . .

. . . [O]n Mar 14, 2000, the informant in the company of Constable Flewelling re-attended the target residence . . . .

. . .

My first approach to the premises was from the east at approximately 2130hrs. There was a slight breeze from the north. As I was approximately due south of the residence, on the front sidewalk, I detected the odour of bulk or growing marihuana. The odour of the bulk or growing marihuana was very strong and remained for the duration of the time I stood there, approximately 30 seconds. As I walked west, the odour dissipated. No odour was detected as I walked eastbound in the lane north of the target residence.

The hydro meter was still located on the west side of the target premise and easily visible from the neighbour's property. I timed the meter's revolutions using the black mark on the ring as a

> gauge and observed the ring spinning rapidly at 40 revolutions per minute. There was heavy condensation on the glass covering of the hydro meter.
>
> Prior to my second approach at approximately 2145 hrs, from the front of the residence, I observed a slight breeze from the north by northwest. Walking westbound as I was about south by south east of the residence on the sidewalk, I detected the odour of bulk or growing marihuana. The odour of the bulk or growing marihuana was very strong and remained the duration of the time I stood there, approximately 30 seconds. As I walked further west, the odour dissipated.
>
> . . . I then re-attended a larger two level residence, with lights on throughout the residence, located in the same block as the target residence, and timed an easily visible hydro meter. The meter was timed at 2 revolutions per minute.

## II. DISCUSSION

### A. ISSUE A

[47] The governing authority on this issue is ***R. v. Garofoli***, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161 [cited to S.C.R.]. Mr. Justice Sopinka, for the majority, discussed the threshold for a *voir dire* and the onus on the defence at 1465:

> With respect to prolixity, I am in favour of placing reasonable limitations on the cross-examination. Leave must be obtained to cross-examine. The granting of leave must be left to the exercise of the discretion of the trial judge. Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the

> cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization, as for example the existence of reasonable and probable grounds. [Emphasis added.]



And further, at 1452 and 1454, he discussed both the standard of review applicable to an authorizing judge's decision to issue a search warrant and the impact of any evidence in the Information to Obtain a warrant said to be fraudulent or misleading:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. 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. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.
>
> . . .
>
> . . . The reviewing judge should not set aside this decision unless he or she is satisfied on the whole of the material presented that there was no basis for the authorization. . . .
>
> [Emphasis added.]

The principles in ***Garofoli*** have been re-affirmed by the Supreme Court of Canada: see ***R. v. Grant***, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173 [cited to S.C.R.]; ***R. v. Bisson***, [1994] 3

S.C.R. 1097, 94 C.C.C. (3d) 94 [cited to S.C.R.], aff'g (1994) 87 C.C.C. (3d) 440 (Que. C.A.); and ***R. v. Araujo***, [2000] 2 S.C.R. 992, 2000 SCC 65.

[48] On several occasions this Court has applied the principles from ***Garofoli***. I will limit my discussion to two of the leading cases: ***R. v. Vukelich*** (1996), 108 C.C.C. (3d) 193, 78 B.C.A.C. 113; and ***R. v. Pires***, 2004 BCCA 33.

[49] In ***Vukelich***, the Court rejected the appellant's argument that the trial judge erred by refusing to direct a *voir dire* on the constitutionality of the search warrant for the appellant's residence. Chief Justice McEachern, for the Court, discussed the threshold which must be met before it is necessary to hold a *voir dire*. He noted that the statements of counsel should provide the basis for having (or not having) a *voir dire*, and that defence counsel should summarize the facts upon which it relies in support of its submission that there has been a ***Charter*** breach: "If that does not persuade the trial judge to embark upon a *voir dire*, . . . then the defence must go further or fail on this issue" (para. 20). Further, he suggested that "judges must be more decisive in this connection than they have been in the past because far too much judicial time is consumed by the conduct of these kinds of enquiries" (para. 17).

[50] Counsel for the appellant in ***Vukelich*** submitted that whenever the constitutionality of a search warrant is challenged the trial judge must conduct a *voir dire*. After considering the relevant authorities, including ***Garofoli*** and ***Grant***, McEachern C.J.B.C. rejected the submission that an accused is entitled as of right to a *voir dire* in such circumstances and held that the trial judge need not embark upon an enquiry that will not assist the proper trial of the real issues (para. 26).

[51] McEachern C.J.B.C. then considered whether the result would be different when, as in the instant case, the accused alleges that the affidavit in support of the warrant contains deliberately fraudulent or misleading information. He held that in most cases, such circumstances, “if related to the essence of the case”, would ordinarily persuade the trial judge to direct a *voir dire*; however, on the facts of the case, McEachern C.J.B.C. found the allegations of falsity were argumentative, conclusory, and did not relate to the central issue (para. 30). Accordingly, he found that the trial judge did not err in refusing to direct a *voir dire*.

[52] In ***Pires***, the Court addressed the burden the defence must discharge before being entitled to cross-examine on an affidavit filed in support of an authorization. The appellants

in ***Pires*** were denied the right to cross-examine an informant at trial and asked the Court to clarify at exactly what point the defence will have shown "a basis" such that it will have satisfied the onus set out in ***Garofoli***, *supra* at 1465.

[53] Madam Justice Newbury declined to provide a more precise standard on this issue than that set out in ***Garofoli***. She held that little would be accomplished – and the matter could be further complicated – if the Court were to re-phrase the test set out by Sopinka J.; an attempt to quantify or qualify the "basis" that must be shown before cross-examination is permitted would "unduly restrict" the discretion of the trial judge and could threaten the balance set out in ***Garofoli*** between the right of cross-examination and the avoidance of prolixity (***Pires***, *supra* at paras. 30-31, and 40).

[54] Counsel for one of the appellants in ***Pires*** urged the Court to adopt the line of reasoning in ***National Post v. Canada*** (2002), 101 C.R.R. (2d) 158 (Ont. Sup. Ct. J.), and submitted that it was enough for him to satisfy the reviewing court that the cross-examination of an informant "might" elicit testimony tending to discredit the existence of one of the preconditions to the authorization. Newbury J.A. declined to follow ***National Post*** to the extent that the decision to allow cross-examination in that case on the basis that it

"may" turn something up could be taken to have modified the "test" set out in ***Garofoli***:

> [37] . . . [A]ny cross-examination "may" turn something up; but according to ***Garofoli***, cross-examination does not arise as a matter of right. Counsel here did not provide any evidence, submissions or "will-say" statements to the trial judge tending to discredit the existence of one of the preconditions for the order . . . . If their speculation were a sufficient "basis", cross-examination would be a matter of course in every case and the balance struck by the Supreme Court in ***Garofoli*** between the rights of an accused and the efficient use of judicial resources would be abrogated. . . .

[55] Chief Justice Finch, concurring in the result in ***Pires***, held that the phrase "will elicit testimony" in ***Garofoli***, *supra* at 1465, "must be taken to require something less than certainty, and something more than "an air of reality"" (para. 73). In other words,

> [77] . . . the ***Garofoli*** test is not met by showing a mere possibility that discrediting testimony may be obtained. Such a test would permit endless fishing expeditions, since virtually anything is possible. Such a test would effectively eliminate the more expeditious practice of editing out those parts of an affidavit shown to be unreliable.
>
> [78] I conclude therefore that in order to meet the test established in ***Garofoli***, on the request for cross-examination, there must be a basis for believing that there is a reasonable likelihood of eliciting evidence which strikes at the foundation of the authorization.

[56] In light of the above, well-settled principles, I am unable to agree with counsel for the appellant that there is no authority to support the trial judge's dismissal of the appellant's application for a *voir dire*.

[57] In the case at bar, during the application for a *voir dire*, defence counsel argued that evidence in the Information to Obtain a warrant regarding the hydro meter was, according to several authorities, including ***R. v. Monroe*** (1997), 8 C.R. (5th) 324, 90 B.C.A.C. 256, misleading, "akin to fraud", and "a calculated deception". On this basis alone defence counsel submitted that the warrant could be quashed and that he therefore ought to be given an opportunity to cross-examine Constable Falcone.

[58] In ***Monroe***, based on unchallenged evidence adduced by the defence, Esson J.A. (Donald J.A. concurring) allowed the appeal against conviction because he found two of the three facts relied in the officer's affidavit were misleading; thus, he concluded on review that there was insufficient reliable information remaining to support the issuance of the warrant.

[59] In the instant case the sole basis for defence counsel's application for a *voir dire* was his allegations of fraud and deception. These allegations were made with reference to a single fact in the Information to Obtain a warrant, namely,

Constable Falcone's observations relating to how fast the ring on the hydro meter was spinning. Defence counsel did not indicate an intention to lead any evidence concerning the meter reading.

[60] In making these allegations, defence counsel challenged neither the statement of fact that the ring on the meter was spinning approximately 20 times faster than that of a larger neighbouring house nor the statement that there was heavy condensation on the glass covering of the hydro meter; rather, citing Esson J.A.'s reasons in ***Monroe***, counsel appeared to be arguing that such statements of fact could not be used as a basis to infer that electricity was being consumed in order to assist in the cultivation of marihuana.

[61] In my view, it was up to the Justice of the Peace what inferences to draw from the facts contained in the Information to Obtain a warrant. Further, it hardly seems fair or accurate to characterize such statements of fact or the inferences sought to be based thereon as fraudulent or "calculate to deceive". Defence counsel's objections to the inferences capable of being drawn from unchallenged statements of fact in the affidavit to obtain a warrant did not provide a basis for believing that there was a reasonable likelihood that evidence striking at the foundation of the authorization would have

been elicited during cross-examination of Constable Falcone: ***Pires***, *supra* at para. 78. Consequently, the threshold necessary to hold a *voir dire* not having been met by counsel, the trial judge did not improperly exercise her discretion in refusing the application for a *voir dire*.

[62] Even assuming, for the sake of argument, that statements concerning the hydro meter could be taken as misleading and thus need to be excised from the information, it is clear, as Newbury J.A. noted in ***Pires***, *supra* at para. 38, that "the possible existence even of fraud . . . does not automatically "open the door" to cross-examination". Two of the three grounds in the affidavit to obtain a warrant were independent of the evidence relating to the meter reading and remained reliable and unchallenged; namely, that the basement windows were covered in dark material (not curtains), and that an odour of bulk or growing marihuana was detected on the appellant's premises. Both of these facts are common indicators of a marihuana grow operation, and this Court has held that the odour of bulk or growing marihuana on its own is capable of providing a basis for a search warrant: see ***Monroe***, *supra* at para. 6; and ***R. v. Schulz*** (2001), 159 B.C.A.C. 146, 2001 BCCA 601 at para. 14.

[63] The facts set out in the Information to Obtain a warrant were all known to the trial judge at the time of the application for a *voir dire*. In my opinion, the learned trial judge correctly ruled that there was no basis to hold a *voir dire* because there is no issue relating to fraud and, even if the meter readings were expunged from the Information to Obtain, there remained sufficient reliable evidence upon which the Justice of the Peace could reasonably have issued the warrant: ***Bisson***, *supra* at 1098. Accordingly, I would reject this ground of appeal.

**ISSUE B**

[64] I agree with Donald J.A.'s comments in his reasons for judgement at paragraphs 20-23; the search of the Honda was unlawful and contrary to s. 8 of the ***Charter***; however, for the reasons that follow, I do not agree that the evidence found therein should be excluded under s. 24(2).

[65] Before discussing the three-step inquiry under s. 24(2) in the context of this case, it is appropriate to re-iterate the principles applicable to appellate review of a trial judge's decision to admit or exclude evidence obtained in breach of s. 8. Madam Justice Arbour recently canvassed these principles in ***R. v. Buhay***, [2003] 1 S.C.R. 631, 2003 SCC 30 at paras. 42-48. While a trial judge's decision to admit or

exclude evidence under s. 24(2) is a question of law from which an appeal will generally lie, there are discretionary elements in a s. 24(2) analysis (para. 43).

[66] A significant discretionary component of the s. 24(2) analysis is, of course, the judicial adjudication of disrepute. This, as Arbour J. noted, involves “an appreciation of evidence in the exercise of discretion”, and is to be distinguished from the duty imposed on the trial judge to exclude evidence which she or he has found would bring the administration of justice into disrepute (para. 44). Evaluating whether the admission of evidence would bring the administration of justice into disrepute is a question of mixed fact and law and is thus subject “to a standard of palpable and overriding error” (para. 45).

[67] The deference shown by appellate courts to the decisions of trial judges regarding disrepute is particularly important when questions as to the credibility of witnesses and findings of fact (such as good faith) are in issue. As Arbour J. put it ***Buhay***, *supra* at paras. 46-47:

> On the s. 24(2) issue as on all others, the trial judge hears evidence and is thus better placed to weigh the credibility of witnesses and gauge the effect of their testimony. Iacobucci J., dissenting in part in *Belnavis*, *supra*, at para. 76, explained

cogently the rationale for deference to the findings of trial judges:

> The reasons for this principle of deference are apparent and compelling. Trial judges hear witnesses directly. They observe their demeanour on the witness stand and hear the tone of their responses. They therefore acquire a great deal of information which is not necessarily evident from a written transcript, no matter how complete. Even if it were logistically possible for appellate courts to re-hear witnesses on a regular basis in order to get at this information, they would not do so; the sifting and weighing of this kind of evidence is the particular expertise of the trial court. The further up the appellate chain one goes, the more of this institutional expertise is lost and the greater the risk of a decision which does not reflect the realities of the situation.
>
> The findings of the trial judge which are based on an appreciation of the testimony of witnesses will therefore be shown considerable deference. In s. 24(2) findings, this will be especially true with respect to the assessment of the seriousness of the breach, which depends on factors generally established through testimony, such as good faith and the existence of a situation of necessity or urgency (*Law*, *supra*, at paras. 38-41).
>
> [Emphasis added.]

[68] Chief Justice McEachern, for the Court, made a similar observation in ***R. v. Fahbod*** (1996), 74 B.C.A.C. 9 at para. 9, where, regarding the assessment of the seriousness of the breach under s. 24(2), he said:

> [T]he authorities so strongly hold these kinds of arguments depend upon an analysis of the evidence and that we ought not lightly to interfere with the

> conclusions reached by trial judges in their assessment of the evidence as a whole. In my view, these kinds of arguments must usually be won, if at all, in the trial court.



[69] Turning to the three factors in the s. 24(2) analysis, the evidence found inside the Honda is clearly classified as non-conscriptive; thus, its admission would not render the trial unfair. See ***Buhay***, *supra* at para. 50; ***R. v. Stillman***, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321 at para. 75; and ***R. v. Evans***, [1996] 1 S.C.R. 8, 104 C.C.C. (3d) 23 at para. 29.

[70] I would not characterize the ***Charter*** violation in this case as being of a serious nature. It must be remembered that the appellant's expectation of privacy regarding the Honda was lower than that which exists in relation to the dwelling house: ***Grant***, *supra* at 242; ***R. v. Wise***, [1992] 1 S.C.R. 527 at 533 and 547, 70 C.C.C. (3d) 193.

[71] Pursuant to a valid search warrant, the police searched the dwelling house. In the house they found what I think can fairly be said to be a sophisticated marihuana grow operation. The police also found two sets of keys in the house; the keys on the second set fit the Honda and several exterior doors on the house. Constable Kindratsky, the officer who searched the Honda and found the documents described above by Donald J.A.

in paragraph 10, testified that in circumstances like this he usually examines the search warrant to see whether the warrant authorized a search of the vehicle on the premises; however, in this case he was not part of the entry team and he neglected to examine the warrant before searching the Honda. During cross-examination by trial counsel for the appellant, both Constable Kindratsky and Detective Tyldsley admitted that they have, in the past, searched vehicles not mentioned in a search warrant but found on property in circumstances similar to those in this case. Based on these admissions, Donald J.A. concludes that the police behaviour “manifested the opposite of good faith” and would exclude the evidence found in the Honda. With respect, I cannot agree with his conclusion on this point.

[72] The trial judge, after hearing all of the testimony of the police witnesses, had an opportunity to assess the credibility of the police witnesses. She found as a fact that the officers acted in good faith in searching the Honda. Such a finding is entitled to considerable deference and should only be disturbed on appeal if it can be said that the trial judge made a palpable and overriding error. In my view, the trial judge in this case did not make such an error. Constable Kindratsky testified that he usually does examine the search

warrant, but failed to do so in this case; while this perhaps indicates carelessness on his behalf, it does not evince bad faith.



[73] In my opinion, the exclusion of the evidence in this case would bring the administration of justice into disrepute. I find Sopinka J.'s reasons on this point in ***Evans***, *supra* at para. 31, to be apposite:

> Finally, I would note that the exclusion of the evidence in this case would tarnish the image of the administration of justice to a much greater extent than would its admission. The cultivation of a narcotic is a serious offence, often leading to other social evils. The evidence obtained in violation of s. 8 is necessary to substantiate the charges against the appellants: simply put, if the evidence is excluded, the perpetrators of a very serious crime will go unpunished. As a result, I would hold that the evidence obtained by the *Charter* violation in this case must not be excluded pursuant to s. 24(2). To hold otherwise would certainly lessen the esteem in which the public holds the administration of justice.

[74] This is not a case of the police running roughshod over an accused's rights. The police found a large scale marihuana grow operation in the house. While the cultivation of a narcotic is a very serious offence, the breach of the appellant's rights was not serious. Admitting the evidence would not lessen the esteem in which the public holds the administration of justice. There is no need in this case to

acquit the guilty in order to ensure that in the future the public's right to privacy is protected; to do so in this case would bring the administration of justice into disrepute.

[75] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Braidwood"