

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Nguyen, 2007 NSPC 53

Date: 24Sept2007

Docket: 1469377

1469379

1469381

Registry: Halifax

Her Majesty the Queen

v.

Tuan Anh Nguyen

Judge: The Honourable Judge Castor H. Williams

Decision: September 24, 2007

Charge: 7(1) CDSA; 5(2) CDSA; 326(1)(a) CC

Counsel: Marc Covan for the Crown
Eugene Tan for the Defendant

INTRODUCTION

[1] “Operation Hunger” was the name of a combined police task force in the Halifax Regional Municipality that resulted in the take down of a marihuana cultivation venture and other related activities in certain metro residential houses. As part of this operation, the police undertook the surveillance of persons of interest, vehicles and residences. On its conclusion, the police, under the authority of search warrants, entered several homes, seized plants and articles connected with marihuana cultivation, and arrested several individuals, including the accused, Tuan Anh Nguyen.

[2] In mid November 2003, Robert Woods, a real estate agent, met with a party of five adult Vietnamese persons one of whom the police alleged was the accused who was then accompanied by his pregnant wife. The group informed Woods that they had an interest in local homes as they intended to relocate to the Halifax Regional Municipality from Ontario. In any event, the police further alleged that after several home inspections, the accused executed or caused to be executed documents for the purchase and sale of houses situated at 23 Hudson Drive and 27 Kenneth Drive, both in the Halifax

Regional Municipality.

[3] When the police monitored the group's activities, they saw the accused motor vehicle, on occasions, go to and from these homes. Likewise, the police lifted the accused fingerprint from a propane cylinder container that they removed from the kitchen area of 23 Hudson Drive. Additionally, the police discovered that these two houses were unoccupied but, even so, they had extensive electrical and interior structural modifications that accommodated and facilitated the unobtrusive cultivation of marihuana plants and the unlawful diversion of electricity.

[4] Furthermore, during the search of the accused apartment, the police seized documents that they suggested showed not only a detailed accounting of monies and materials used in the marihuana cultivation enterprise, but also listed the names of persons, including that of the accused, who received or was owed monies for the unlawful venture. Similarly, they seized, from a closet of the bedroom occupied by the accused and his immediate family, documents that outlined instructions on how to grow and manage hydroponically grown marihuana plants.

[5] Also, the police found in the accused possession either, constructive or actual, electrical equipment and devices similar to those that someone had installed to unlawfully divert and use electricity supplied to the houses. Additionally, the police removed, from the accused apartment, plant fertilizers that could be used to stimulate plants grown in a hydroponic environment. As well, they took, either from the constructive or actual possession of the accused, large sums of cash, power and telephone bills, several cell phones and an electronic scale that suggested a drug trafficking organization.

[6] As a result, the police have charged the accused with the production of marihuana; possession of marihuana for the purpose of trafficking; and, the unlawful diversion of electricity. However, the accused has denied that he was involved in any wrongdoing and that the authorities were mistaken as to his involvement and were also confused as to his identity. The accused did not testify but evidence presented on his behalf suggested that he was an innocent bystander to any criminal organization or enterprise. Therefore, this case is a consideration of whether, in all the circumstances, the Crown has established beyond a reasonable doubt that, on the total evidence, the guilt of the accused was consistent with the facts that he was an active participant

in the grow operation and inconsistent with any other rational conclusion than that he was involved in the marihuana cultivation and other related criminal activities.

The Position of the Parties

(a) The Crown

[7] Put succinctly, the Crown's theory was that the accused, as did other principals in the unlawful enterprise, used an alias when he met with Woods. However, the total evidence established both circumstantially and directly that he was involved in the marihuana grown operations, either as a joint principal or as a party to the offences with knowledge of the illegal venture.

[8] In support, the Crown points to his latent fingerprint on a propane cylinder removed from 23 Hudson Drive; the location of the seized items, particularly the financial papers and receipts from his bedroom closet; the identification evidence of Woods that the accused was indeed the person with whom he met in November 2003; the surveillance evidence placing the

accused vehicle at the cultivation sites; his bank account showing significant money deposits with no known source of employment income with a large deposit balance of \$26,752.05; the unsatisfactory explanation, if at all, for electrical components and various growth fertilizers discovered at his apartment; the analysis of the various documents and items, such as cellular phones' call histories, seized from his apartment; the large quantity of cash found in his constructive possession, more than \$24,000.00 Canadian dollars, when considered as a whole, was consistent with the conclusion and inconsistent with any other rational conclusion but that, beyond a reasonable doubt, the accused is guilty as charged.

[9] Additionally, there was the testimony of Huu Hai Nguyen who presented unsupported but significant defence evidence. However, the accused failure to call the named important supportive witnesses to address this vital piece of evidence that could have supported an innocent explanation for his observed activities and his possession of suspiciously incriminating items, entitled the court to draw an adverse inference against him.

[10] Put another way, the Crown has submitted that anyone involved in the production and possession of marihuana for the purpose of trafficking would have knowledge of the diversion of the electricity supplied to the houses. Furthermore, as the electrical and ventilation modifications to the houses were essential for the grow operations, anyone involved in the cultivation of the marihuana would need to go to the houses to manipulate and adjust the timing of the lighting and ventilation systems. Therefore, from his observed activities, associations and possessions, a reasonable person fully informed of all the facts could reasonably and rationally conclude that the accused had actual knowledge of the grow operations and was, in fact, an active participant in the illegal venture.

(b) the Accused

[11] Essentially, the accused presented that the Crown's case against him was entirely circumstantial and there was no direct evidence, or any, that he had knowledge of or was a party involved in the marihuana cultivation.

[12] First, although he did visit 23 Hudson Drive it was merely for social reasons. Huu Hai Nguyen, who is his father-in-law, was “throwing a party” and was showing him the premises. Furthermore, as the propane cylinder, on which was his fingerprint, was found in the kitchen and not in the basement where the marihuana plants were located, that alone could not mean that he had knowledge of the plants. Further, as there were no physical traces of him in the basement there is no evidence to connect him with the marihuana cultivation. Additionally, there was no evidence concerning the use or purpose of this propane cylinder nor the period of time that it had been in its found location. Moreover, there was no evidence that he was ever physically at 27 Kenneth Drive.

[13] Second, the accounting records, if indeed they were as alleged, were not in his writing but that of his wife, Ha Nguyen. It was Huu Hai Nguyen, as he admitted, who instructed her to keep the records concerning the cultivation endeavour, which she kept in their bedroom. Accordingly, his mere presence in the bedroom, without more, was not enough to ground knowledge or any liability. Consequently, as no connection has been established between him and his wife’s presumed knowledge and recordings it cannot be said, without

a doubt, that he knew or was aware of what his wife was doing or the meaning of her records.

[14] Third, as he was not the only person occupying the apartment, others would have had, and did have access to the seized cellular phones and who had control of the electrical components and the growing fertilizers. In particular, it must be noted that Huu Hai Nguyen has claimed ownership of the electrical equipment and has testified that it was he who had arranged to have the homes modified. Notably, he has taken full responsibility by pleading guilty to that and other related offences. Thus, the accused has been exonerated by this testimony and therefore was not involved.

[15] Fourth, the forensic photographic lineup identification process was flawed as the police failed to carry out proper and established procedures. Thus, Woods' in court identification of the accused as the person whom he met in November 2003 and self-identified as "Hung" should not be given any weight. Similarly, anyone could have used the accused debit card to purchase items that were not seized by the police and there was no evidence that those purchased items were used in the cultivation process. Put

succinctly, there was no evidence to link the accused to the financing or cultivation of the marihuana cultivation venture and the Crown has failed to establish a circumstantial case against him.

Agreed Statement of Facts

[16] Here, I have received, pursuant to the **Criminal Code**, s. 655, *Agreed Statement of Facts*, tendered and admitted as Exhibits, 81, 81A and 87. Basically, the parties have agreed that, between June 15, 2004 and October 4, 2004, an indoor marihuana growing operation was ongoing at 23 Hudson Drive and 27 Kenneth Drive and that both houses are located in the Halifax Regional Municipality. I so find.

[17] Additionally, they have agreed that harvested and growing plants removed from the subject houses were tested scientifically and proved to be marihuana. I so find.

[18] Likewise, they have agreed that during the time in question electrical power, at the subject houses, was fraudulently and without colour of right

diverted from the owner, Nova Scotia Power, for the purposes of providing energy for the grow operations located in the premises. Again, I so find.

Findings of Fact and Analysis

[19] First, I accept and find that the police removed from the master bedroom at 27 Carrington Place, Apartment 205, the following Exhibit items.

1. Top shelf of closet to the left: envelope containing itemized list of income and expenses for the grow operations at 23 Hudson Drive, identification of the Defendant, a personal letter from the Defendant to his sister (see translation by Dr. Hall (Exhibit 55)), the Defendant's Record of Landing, dated August 6, 1991, the Defendant's Supplementary Identification Form, and the Defendant's application for permanent residence card, dated October 10, 2004;
2. Top shelf of a closet to the left: Telus cellphone;
3. Top shelf of a closet to the right: vehicle registration in the name of Thuan B. Duong, 1995 Chevrolet Lumina van and keys (2);
4. Top shelf of a closet to the right: ziploc bag containing power/phone bills for the telephone 448-8785 and 830-2177, rent receipt;
5. Top shelf of a closet to the right in a brown purse: Canada Trust blank cheque/baggage tags/Canada Trust bank book in the name of the Defendant;
6. In a black leather jacket hanging in closet to the right front pocket: Canadian currency (amount \$700.00);
7. In a black leather jacket hanging in closet to the right in the left front pocket: Canadian currency (amount Euro 500);

8. Top shelf of closet to the right in a box: Canadian Trust bank card and Sears Travel business card;
9. In white bag on floor in closet to the right: Canadian currency (amount \$3,340.00);
10. In white bag on floor in closet to the right: receipts and financial papers concerning expenses for grow operations at 23 Hudson Drive, 27 Kenneth Drive; receipts for purchase of personal items by the Defendant; bank account information for the Defendant son, Anthony Nguyen;
11. In pair of pants on floor in closet to the right: Canadian currency (amount: 4 x \$100.00 bills);
12. On night stand by bed: cellphone (Nokia - 448-8785) and vehicle financial record;
13. Second drawer of night stand: vehicle information re 1992 Honda Accord, license number DXN 117, miscellaneous papers.

[20] Second, as the accused has submitted that he was neither involved in the grow operation nor had any knowledge of it and, as the Crown has countered that, the evidence taken as a whole, disclosed his active participation, it is therefore necessary to outline, as follows, certain parts of the evidence to determine the accused's participation, if at all, in the grow operation:

(a) Issue of Evidence of Identify: Who is Hung?

[21] Fundamentally, the accused has denied that he had ever met with Woods, the realtor, for the purpose of negotiating the purchase of the subject houses, or at all. Thus, by inference, he has also denied that he is the person known to Woods as Hung. All the same, on the total evidence, I find that in November 2003, Woods, did meet with five adult Vietnamese persons and one, who took a leadership role, identified himself as Hung. Also, I find that Hung's pregnant wife was a member of that group. As well, I find that the group told Woods that they were interested in purchasing homes in the Halifax Regional Municipality as they intended to relocate from Ontario.

[22] Also, I find that Woods gave Hung his business card and cellular phone number as 499-9447 and that Hung reciprocated with his contact phone number as 448-8785. As well, I do not doubt and find that Woods had considerable personal contact with Hung, at least fifteen times, and also contact by telephone, at least eight times, as did Hung with Woods. I find that they came to know each other as more than casual acquaintances and that they also had established a professional working relationship. Hung had

viewed and inspected several homes and had even introduced, to Woods, other prospective purchasers. Woods describes Hung as, “short, full head of hair, Vietnamese, age early forties, protruding nostrils, large openings in the nostril area.” I accept and find this description to be that of the person whom he met in November 2003 and with whom he had subsequent communications and physical contacts.

[23] Moreover, I accept and find that, on October 4, 2004, the police, under the authority of a search warrant, entered the accused residence at 27 Carrington Place, Apartment 205. Then, they removed from a night stand in his bedroom, beside the bed that he occupied, a Nokia cellular phone, Exhibit 12, with telephone number 448-8785. I so find. Likewise, I accept and find that they seized, in Exhibit 10, which was a white bag located in his bedroom closet, a handwritten invoice from Evergreen Garden Supplies a business located in Vancouver, British Columbia, made out to “Tuan - Halifax.” Written on the invoice was the telephone number “902-448-8785.” Also found, in Exhibit 10, was a consignee copy of a bill of lading, Exhibit 85, from Consolidated Fastfrate Inc., addressed to “Mr. Tuan” with, “Phone No. (902) 448-8785.”

[24] Additionally, I do not doubt and I find that on a corner stand behind the kitchen table, the police seized Exhibit 17, an address book with telephone numbers. In this book is noted, "Tuan 902-448-8785, 604-724-8037." I take notice that 604 is a telephone area code in British Columbia and I accept and find that the accused resided in British Columbia before he relocated to Nova Scotia. Found in another bedroom, occupied by the Defence witness, Huu Hai Nguyen, was Exhibit 22, a Nokia cellular phone with telephone number 905-616-5293. Upon analysis, this phone had stored in its call history, "Tuan Tay 1 902 448 8785," and "Tuan 1 604 727 8037." I find that these are the same phone numbers that are also listed in Exhibit 17.

[25] Further, I find that when the police analyzed the call history of Exhibit 12, the cellular phone located in the accused bedroom, they discovered an entry, "Bo 902 830 9175." Huu Hai Nguyen, on behalf of the accused, testified that this was his cellular phone number. His testimony is consistent with the assigned number to a Samsung cellular phone, Exhibit 14, that the police seized, on a couch, from the apartment's living room. I find that this piece of evidence is also supported when it is considered with the discovery, also in the apartment, of Telus Mobility cellular bills for, "Client No. 04127067"

dated 05-Aug-04 with an account detail for, "902-830-9175, Ha Nguyen," and on 05-Sep-04, detailing the address as, "Ha Nguyen, 27 Carrington PI Apt 205 Halifax NS B3S 1K1."

[26] Therefore, I accept and find that Huu Hai Nguyen owned the cellular phone with assigned number 902 830 9175. Likewise, I do not doubt and I accept and find that he is the father of Ha Nguyen and thus is the accused father-in-law. On the linguistic and etymological evidence of Dr. Penelope Hall, I accept and find that the word "Bo," in Vietnamese is a term of endearment and when translated to English means "father." Thus, it is my opinion that a person fully informed of all the circumstances could reach a rational conclusion that the reasonable inference is, on the proven facts, that only the accused or his wife would refer to Huu Hai Nguyen as "Bo." I therefore conclude and find that Bo is the accused father-in-law, Huu Hai Nguyen. Indeed, Huu Hai Nguyen has confirmed this fact in his testimony.

[27] Additionally, I accept and find that the police removed from Exhibit 4, a "ziploc" bag that was placed in a closet in the accused bedroom, a Roger's Wireless phone bill dated May 31, 2004 for account number 451852099 for

the wireless useage for 902-448-8785 addressed to, "Mr. Binh Tran." Also, there was a letter dated 06/12/2004 for the same account addressed to "Mr. Binh Tran 604- 64 Farifax Dr Halifax NS B3S 1N5." Exhibit 63 shows that the address on the driver's license of both Huu Hai Nguyen and the accused, when issued in February and May 2004 respectively, was 64 Fairfax Drive, Apt. 604, Halifax, NS, B3S 1N5, ostensibly the same address as the telephone bill. I so find.

[28] Also, in Exhibit 4, the ziploc bag that they found on the top shelf in the accused bedroom closet, the police removed a Rogers Wireless bill, for "Mr. Binh Tran," dated June 30, 2004, in the amount of \$99.05. From financial documents that the police removed from Exhibit 10, a white bag found on the floor of the accused bedroom closet, I find that this amount of \$99.05 was paid, on July 26, 2004, from a Canada Trust, Clayton Park Shopping Centre Branch, account number 0517872 in the name of one, "T. Nguyen," a name corresponding to that of the accused. I so find.

[29] Furthermore, I find that the police took from Exhibit 5, a brown purse that they found in the accused bedroom closet, a blank cheque drawn on a TD

Canada Trust, Vancouver, B.C., branch, showing account number 517872 in the name of, "Tuan Nguyen, 1119 57th Ave E., (604) 619-8209, Vancouver, B.C., V5X 1T7. From an *Application For a Permanent Resident Card*, a document that the police removed from Exhibit 1, an envelope containing documents found in the accused bedroom closet, I conclude and find that the accused stated that his address, between February 1996 and October 2003, was 1119 East 57th Avenue, Vancouver, British Columbia, the same address that was on the blank cheque. I so find.

[30] Moreover, I accept and find that Woods had telephone conversations with Hung to congratulate him on the birth of Hung's son and I do not doubt and I find that the accused son, Anthony Nguyen, as shown by his birth certificate, Exhibit 65, was born on May 12, 2004. This was within the time frame when Woods recalled the telephone conversation between himself and Hung with him, Woods, congratulating Hung on the birth of Hung's son. I so find. Also, I find that when the police entered the accused bedroom, on October 4, 2004, they also saw, as show in Exhibit 63, photograph MVC-002S, a child's crib which I find is consistent with the fact that the accused has an infant child.

[31] To this mix, I add the fact that also from Exhibit 10 was a receipt from the Sony Store showing a purchase of a DVD camcorder for \$1348.92 on 04/05/13. I note that the named purchaser "Nguyen Tuan, 902-448-8785" and that he paid with a debit card ending with the numbers 2687. The accused, bank record, as I have found, shows a payment to the Sony Store of the same amount on the same date. As I have found the accused's son, Anthony, was born on May 12, 2004. In his testimony, Huu Hai Nguyen stated that the accused bought a video camera shortly after his son's birth. I accept this piece of evidence as credible and I so find.

[32] Furthermore, I accept and find and do not doubt that in the accused bedroom, the police also removed, along with other items, Woods business card that he gave to the person who had identified himself as Hung. Moreover, I find that the telephone bill for 448-8785, the accused cellular phone as I have found, showed calls out to 499-9447, Woods cellular number on May 12 and 13, 2004.

[33] Accordingly, in my opinion, when considered with the total admissible evidence, this body of evidence, which was not rebutted by the accused, was

consistent with the rational inference that the cellular phone with designated number 448-8785 was often used or was controlled by the accused and it was inconsistent with any other rational conclusion but that, without a reasonable doubt, that he exercised control over the cellular phone with the designated number 448-8785 or that it belonged to him. I so find.

[34] I have found that Woods, through many contacts was familiar with the person known to him as Hung. Furthermore, he was able to describe that person and gave a distinguishing feature as “protruding nostrils, large openings in the nostril area.” When the police showed him a photo lineup, Exhibit 72, he, without any doubt, quickly identified “Hung” because of his nostril and hair line, as photo number 11, which was that of the accused. Also, he identified the accused, in court, as the person known to him as Hung. As well, he had seen this person, on an earlier point in time, at the Dartmouth Court and then they had recognized each other.

[35] Another items that the police removed from Exhibit 10 was a sales slip, dated “21/08/04” from Home Depot for the purchase of several plumbing related items that was paid with a debit card ending with the number 2687.

A TD Canada Trust debit card ending with the number 2687, depicted in Exhibit 65, and bearing the name “Tuan Nguyen” was found in the accused possession upon his arrest. I accept and find this piece of evidence to be credible and trustworthy.

[36] However, how reliable is Woods’ identification evidence? I instruct myself on the issue of identification from such authorities as **R. v. Nikolovski** (1996), 111 C.C.C. (3d) 403 (S.C.C.), **R. v. Sophonow (No. 2)** (1986), 25 C.C.C. (2d) 415 (Man. C.A.) (Leave to appeal to the S.C.C. refused, April 22, 1986) at p. 438, **R. v. Shermetta**, [1995] N.S.J. No. 195 (C.A.), and **R. v. Brown and Angus** (1951), 99 C.C.C. 141 (B.C.C.A.). In my opinion, even though I find that the police’s approach to arranging and showing the photographic lineup was faulty and problematic, I find that Woods had a good memory and intelligence and was able to relate a detailed description of the person whom he knew as Hung, in particular, the wide nostrils, which are an observed facial characteristic of the accused. Consequently, I have no difficulty in finding that Woods’ knowledge of and his familiarity and contacts with Hung put him in the unique position sufficient for him to identify the person whom he knew as Hung. Thus, in the circumstances, I find that his

evidence on identification was credible, reliable and trustworthy.

[37] Therefore, on the total evidence, weighing the above accepted facts as presented, which the accused has not overcome, and on my above analysis, I conclude and find, that the uncontradicted proven facts consistently and overwhelmingly point to the rational conclusion that the accused was indeed the person self-identified to Woods, in November 2003, as Hung, and it is inconsistent with any other rational conclusion but that the accused was indeed the person known to Woods as Hung.

[38] Accordingly, I do not doubt and I conclude and find that the accused was indeed the person whom Woods knew as Hung. Put another way, I am satisfied that the Crown has proven, beyond a reasonable doubt, that Hung and the accused are one and the same person.

(b) Issue of Possession and Party to the Offences: Is the accused culpable?

[39] To address this sub-issue, I think that it is first necessary to set out the

applicable legal context and governing legal principles upon which I will review the evidence.

(I) The Law

[40] The following are the relevant **Criminal Code** sections:

4(3) Possession

For the purpose 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) whether one or 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.

21(1) Parties to offence

Every one is a party to an offence who

1. (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

21(2) Common intention

Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[41] I note, however, that the Crown's position is that the accused and Huu Hai Nguyen acted in "common participation" as principal offenders in the offences as charged and pursuant to the Criminal Code s. 21 (1)(a).

[42] First, under the **Criminal Code**, s.21 (1), criminal responsibility is attached to a person as a party to an offence, (a) as a principal if that person, with the requisite state of mind, personally commits the offence. Liability is also imposed under subsection (b) if a person does or omits to do anything that would assist or support a principal to commit an offence.

Likewise, under subsection (c) liability is imposed if a person “abets” the principal.

[43] Simply put, “abets” means to actively encourage, assist or to support the principal to accomplish a particular objective. Whether as a principal, an aider or as an abettor, each person bears the same legal responsibility for the offence and it does not matter what particular role the person played in the commission of the offence. See: **R.v. Thatcher**, [1987] 1 S.C.R. 652, [1987] S.C.J. No. 22, paras. 68-73, **R.v. Sparks**, [2006] N.S.J. No. 392 (Prov. Ct.).

[44] However, there can be more than one principal offender. For example, in situations where more than one person, with the same state of mind, is present during the commission of an offence and does some act to accomplish a common criminal objective and any of them either jointly or severally achieved that common objective, all the parties present at the commission of the crime commit it as joint principals. See: **R.v. H.(L.I)** (2003), 176 C.C.C. (3d) 526 (Man. C.A.), at para.19.

[45] Furthermore, if one or more persons pursue a joint criminal enterprise where there is a division of labour, so to speak, as to who does what to accomplish the common goal, each participant in the joint venture is a joint principal as each act done by each one to further the crime is, in law, the act of all who are involved. See: **R.v. Mena** (1987), 34 C.C.C. (3d) 304 (Ont.C.A.), at pp.314-315. As well, a distinction can be made between evidence of “common participation” and evidence of a “common purpose” as “evidence of a joint enterprise means no more than evidence of a common criminality.” **R.v. Unger and Houlahan** (1993), 83 C.C.C. (3d) 228 (Man. C.A.) (Leave to appeal to the S.C.C. refused 84 C.C.C. (3d) vi.).

[46] Second, liability for the possession of controlled drugs under the **Controlled Drugs and Substances Act**, s.5(2) is not restricted to the application of the **Criminal Code**, s.4 (3). The **Criminal Code**, s.21 may also be applied where one or more persons formed a common intention to sell controlled substances thereby extending the liability for the possession of controlled substances by one party to all parties to the offence. Thus, a person is in joint possession, if he or she is found to be a party to the offence of possession for the purpose of trafficking. **R.v. Chambers** (1985),

20 C.C.C. (3d) 440 (Ont.C.A.).

[47] Likewise, a conviction for joint possession for the purpose of trafficking is possible if a person is found to have assisted in bringing a marijuana crop to maturity even if he or she does not own nor have any interest in the disposition of the crop. *R.v. Arason* (1992), 78 C.C.C. (3d) 1 (B.C.C.A.).

[48] Also, although in drug offences, control is an essential element to be analyzed in determining whether a person is in possession, like knowledge and consent, it is assessed on the facts of each case. *R.v. Caldwell* (1972), 7 C.C.C. (2d) 285 (Alta. C.A.), *R v. Harrison* (1982), 67 C.C.C. (2d) 401 (Alta. C.A.), *R.v. Kushman* (1948), 93 C.C.C. 231 (B.C.C.A.).

[49] Third, if a party presents evidence that shows that there is another witness(s), such as a friend, who is available, competent and compellable and who is in a position to provide favourable or supportive evidence for that party, and who was present during the commission of an offence, or who has direct evidence on a particular issue raised by that party, it may be appropriate, in the circumstances, for the court to draw an adverse inference

against that party if he or she does not call that witness. **R.v. Charette** (1982), 67 C.C.C. (2d) 357 (Ont. C.A.).

[50] Additionally, if the Crown makes out a prima facie case that cries out for an explanation and none is presented by the accused the trier of fact can draw, not based on speculation or conjecture, an adverse inference against him. **R.v. Coyle**, [2003] N.S.J. No. 257 (Prov. Ct.), para. 18, **R.v. Jack** (1972), 70 C.C.C. (3d) 67 (Man. C.A.).

(ii) Relevant Expert Evidence

[51] The Crown called Dr. Penelope Hall, a linguist and an expert in the Vietnamese language. She interpreted the several documents that were written in Vietnamese and explained the meaning of terms used. Her testimony was most helpful in assisting the Court to understand the nuances and usages of the Vietnamese language and the significance of those documents in the context of the total evidence. I accept and find her expert evidence to be credible and trustworthy. I so find.

[52] David Boyle, accepted by agreement, as an expert in electrical construction, gave a detailed account of the method used to divert electricity at 23 Hudson Drive. He explained that there were two operating electrical systems one of which was illegal. Referring to Exhibit 61, photographs 24-28 and 32-35, he explained that the illegal system tapped into the legal system but bypassed the legal electrical meter and operated by the use of a series and combination of circuit breakers, switches, power panels, electrical connectors, time clocks and lighting ballasts. In his opinion, Exhibits 25-32, the electrical components, were similar to those he found installed at 23 Hudson Drive. Exhibit 33, the crimping tool, would have been used by someone with electrical knowledge to splice and to connect wires as he found was done at 23 Hudson Drive. I accept and find his evidence to be credible and trustworthy.

[53] Constables Paul Robinson and Richard Hill were qualified, by agreement, as expert witnesses to provide expert evidence in relation to “the production, use, availability, distribution, packaging, sale price and value of cannabis (marihuana.)” Robinson testified that Canada has now become a source country for marihuana that is produced both indoors and outdoors.

Indoors cultivation would emulate the soil, light and wind conditions that was native to the plants.

[54] He opined a small grow operation would produce ten to fifteen plants while a larger one would grow anywhere from five hundred to one thousand plants producing between fifty and one hundred pounds of marihuana. A distribution chain would be established and, in a large operation, the producer sells to his distributor by the pound. The current price, per pound was between \$2500.00 and \$3500.00. At street level, in the chain of distribution, a gram would be sold for \$15.00.

[55] His further opinion was that persons involved in grow operations did so on a strict cash basis. As it was a cash transaction business, their usual and necessary paraphernalia were lights, ballast, timers, fans, duct work, soil, baggies, cell phones, scales and large amount of cash. Additionally, the grow soil could only be used once in a growing cycle of sixteen weeks and then it had to be discarded, generally at a landfill or the roadside.

[56] At 23 Hudson Drive, which is depicted in the series of photographs as shown in Exhibit 61, he found in all three of the basement rooms a total of five hundred and forty-eight marihuana plants of which four hundred and one were in the vegetative stage and one hundred and forty-seven were into the flowering stage. Also, he found bags of growing soil; the electricity supply to the house had been tampered; there was an adjustable lighting system that could be adjusted as the plants matured, linked to adjustable timers; a watering system, constructed of hoses and copper tubing, containing nutrients; oscillating fans and a ventilation systems designed to minimize the odour that the plants would emit. Additionally, the carpet from one room had been removed to accommodate the ventilation modifications. Further, he opined that these were recent modifications to the building and that their maintenance would require someone to adjust them and to check periodically to ensure that all was in working order.

[57] The Constable also opined that 23 Hudson Drive was a very sophisticated marihuana grow operation. In one year it could have produced three crops and the discovered plants had a marihuana production value of approximately \$212,000.00 and at street level \$578,000.00 and the lighting

equipment and wiring and other set up costs exceeded \$25,000.00. Further, as the power was still on, he opined that it was an ongoing operation. He would rate this operation as a top dealer and, in his opinion, because the producer is supplied from the bottom, he, the producer, would have in his possession large sums of cash, usually \$20.00 in bundles of \$1000.00.

[58] With respect to the items removed from the accused's apartment, he opined that Exhibit 18, the fertilizers found in the kitchen, were growth supplements that typically are used to induce plant flowering. Exhibit 36, the bottles of fertilizers removed from a hallway closet, included rooting hormone to help the plant clones develop roots, more blossom busters and supplements to induce plant budding. Exhibit 24, a working 500 grams digital scales that was found in a hallway closet, typically would be used to weigh the marijuana buds for packaging and sale. Exhibits 27 and 29, found in a small hallway closet, were intake valves used in the grow operations, similar to those, used at 23 Hudson Drive, as shown in Exhibit 61, photograph 38. Exhibit 37, a stainless steel shallow well jet pump, removed from a large closet in the hallway was designed to spray and water plants.

[59] He further opined that the Evergreen Garden Supplies list removed from Exhibit 10 was a shopping list for items that characteristically are used in or to set up a grow operation. I have no reasons to doubt the expert opinion as noted above. As a result, I accept and find his observations and conclusions to be credible, reliable and trustworthy.

(iii) Other Direct and Circumstantial Evidence of Alleged Participation.

[60] I do not doubt and I find that 25 Carrington Place, Apartment 205 was a three bedroom apartment. Moreover, I accept and find that when the police entered the apartment, Ha Nguyen, the accused's wife, went to the master bedroom, where he was asleep, and woke him up. In the master bedroom was a child's crib, Exhibit 63, photograph MVC-002S, which was consistent with the proposition that the accused, his wife and their infant son, occupied this room. I so find. I also accept and find that the police found present a total of six adults, four males and two females who were either sleeping or resting in the rooms. In addition to the accused and his wife, Ha Nguyen, in the master bedroom, I accept and find that also present, in a second bedroom was, Huu Hai Nguyen, the accused's father-in-law.

[61] I note that removed from Exhibit 1 was a single page, written in Vietnamese, but translated by Dr. Hall, of what the Crown contended, was an itemized list of income and expenses from the grow operation at 23 Hudson Drive. According to this view, Crown Brief, page 12:

The two groupings of figures at the top of the page is a listing of amounts owed to four individuals, namely; Bo (Huu Hai Nguyen) - \$26,000.00, Thuan (Thuan Duong) - \$10,000.00, Binh (Binh Tran) - \$10,000.00, Bo + Thuan + Minh (myself) - \$11,000.00. The Crown says that the references to "myself" is a reference to the Defendant, Tuan. The figures below this grouping represent expenses in relation to the setting up of growing operations at 23 Hudson Drive. In particular, the references to "do set up \$12,950.00" was clearly a reference to the purchase of grow equipment from Evergreen Garden Supplies in Vancouver, British Columbia, The receipt for the expense is found in Exhibit 10 (Page 130), and equals exactly \$12,950.00. Other expenses listed below that are numbered one through five, corresponding with other receipts noted in Exhibit 10. Significantly, "Bill 3" is in the amount of \$1,164.00. Again, referring to Exhibit 10 (Pages 52 & 56) there are four receipts numbered "3", three from Home Depot and one from Kent Building Supplies. Totaling these receipts ($\$30.54 + \$61.30 + \$456.53 + \$315.39 = \$1163.76$). The Crown says that the total of these figures represents the entry "Bill 3" found in Exhibit 1. The Court will note that all of the calculations in Exhibit 1 are whole numbers, with no reference to change. It is reasonable to infer that the individual that prepared Exhibit 1 was rounding off the figures, and in the case of "Bill 3" they rounded up.

[62] I have no difficulty in accepting this line of reasoning as it is compatible with a rational interpretation of the evidence that I accept and find. In addition, I accept and find that the accused's debit card as I have found was used to purchase what appears to be plumbing materials on August 21, 2004. Additionally, I accept and find that in Exhibit 10 was another receipt for the

cash purchase of solder and electrical circuits and clamps, made also on August 21, 2004. Moreover, I accept and find that, upon analysis, several receipts from Exhibit 10 dated between May and August 2004, from the Home Depot, Canadian Tire, Walmart and Kent, revealed the purchase of electrical related items, work tools and plumbing materials. I accept and find that these receipts are numbered and are cross-referenced with the document listing the grow expenses removed from Exhibit 1. Therefore, it is reasonable to infer and I do infer and find that these specified purchases were for the grow operations.

[63] In my opinion, this body of evidence created a prima facie case that points to the rational conclusion that the accused had in his control and custody receipts for the purchase of supplies that, on the expert evidence, were characteristic of items used in or to set up a grow operation. Also, I find that, it created a threshold liability that he had in his possession and control, an accounting for the setting up of the grow operation at 23 Hudson Drive and 27 Kenneth Drive. After all, it was his bedroom in which the police found all these documents and, every personal identifying evidence removed from this bedroom either belonged to him or pertain to his infant son and to no other person.

[64] Therefore, as this body of evidence has established a prima facie case against him, it is reasonable to conclude, in the absence of any credible explanation, that he not only had knowledge of but also had consent, control and custody over these documents. I do not find Huu Hai Nguyen testimony on the point that he used the accused bedroom closet to store his own grow operation documents, to be credible or trustworthy. Even if it were so, supported by the evidence that I accept, a case could still be made out that the accused had, in law, possession.

[65] In my opinion, other documents removed from Exhibit 10, when considered with the total evidence, also created circumstantially, a threshold degree of liability that could adversely affect the accused. I specifically refer to the Nova Scotia Power bill, for meter 885100 for service from June 23 to August 24, 2004, from which someone had cut off the billing address. The amount on the face of this bill, \$275.82, was accounted for in a list of expenses on another document that was translated from Vietnamese by Dr. Hall, Exhibit 55. In all the circumstances, I think that from the entry “power 276,” on this document, I can reasonably infer and, in all the circumstances, I do infer that

it was an expense accounting of the grow operation at 27 Kenneth Drive.

[66] Furthermore, I accept and find that, Arthur Cormier, a Meter Services Electrical Inspector, from Nova Scotia Power went to 27 Kenneth Drive on October 4, 2004. I accept that he discovered an un-metered and unauthorized power connection at this residence. I do not doubt and find that he copied the meter number from the house meter, confirmed this number, 885100, with Nova Scotia Power, and wrote it in his Inspection Report, Exhibit 93.

[67] Moreover, I accept, and find as credible and reliable, his evidence that numbered meters owned by Nova Scotia Power, are individually assigned by the power company to a residence and is unique only to the designated residence and no other. This meter number, 885100 was the one specific to 27 Kenneth Drive. Consequently, I accept and find that the meter numbered 885100, owned by the Nova Scotia Power, was specifically assigned, by it, to 27 Kenneth Drive.

[68] Here, I have concluded that the accused had contacts with Woods concerning the purchase of the subject homes and an inference could be drawn

that he was aware of the purposes for the purchases. The fact that this power bill, with the address removed, was found in the accused's constructive possession, in my opinion, could, *prima facie*, without a reasonable credible explanation, lead to an inference unfavorable to the accused. I so find.

[69] Another document, in my opinion, that could implicate the accused, is the invoice from Evergreen Garden Supplies in British Columbia. This document, as I have found, had written on it the name "Tuan - Halifax" with the accused's telephone number 902 -448-8785. It is also written partly in Vietnamese. There is the uncontradicted evidence that the accused lived in British Columbia and, here, he was the only one who did.

[70] It may well be coincidental that this shipment of supplies originated in British Columbia a place from whence he relocated to the Halifax Regional Municipality and that it is written partly in Vietnamese. But, Huu Hai Nguyen's testimony, on this point, did not disperse my lingering doubts of a continuing connection by the accused. I say so because even though, he, Huu Hai Nguyen, stated that it was he who had ordered these items as, in my opinion, if that were the case, he did not explain either satisfactorily or credibly, why

neither of his name nor telephone number appeared on the invoice.

[71] I accepted Dr. Hall's testimony as credible and trustworthy that in Vietnamese, the accused would also go by the name "Tuan." As well, I observed that, in testimony, Huu Hai Nguyen referred to the accused as "Tuan." Furthermore, there is no evidence that any other person involved in these offences before me goes by the name "Tuan." Therefore, I do not accept Huu Hai Nguyen's evidence, on the point, as credible and trustworthy, that this document referred to someone other than the accused.

[72] Moreover, I find that the scroll book, removed from Exhibit 10, on translation from Vietnamese, contained a list of income and expenses for the grow operations. Huu Hai Nguyen, in testimony, confirmed that this was a list of income and expenses for 27 Kenneth Drive. I have no reasons to doubt him. In any event, this document disclosed that "Bo" who I concluded to be Huu Hai Nguyen, Tuan, who I concluded is the accused, Thuan, Dung, Chat and Ky were involved in a sharing financial arrangement that involved the marijuana grow operations. Consequently, despite his denials and the attempts by his father-in-law to exonerate him, in my opinion, this body of evidence has also

established a threshold liability adversely affecting the accused.

[73] The accepted expert opinion was that grow operations were intensive and required the replenishment of soil when the plants were harvested. This required the producers to dispose of the spent soil and to purchase fresh soil. The receipt, which I conclude and find was in the accused constructive possession, Exhibit 10, for the shipment of thirty bales of Promix plant soil from Halifax Seed Company, with partial pick up in August 2004, is consistent with the theory that a new operation commenced at 23 Hudson Drive in August and that the soil at 27 Kenneth Drive needed replenishing. I so find.

[74] Moreover, in my opinion, the rentals of the vans from Discount Car and Truck Rentals by Thuan Duong on August 13 and September 15, 2004 become significant when I consider that on August 13, 2004 grow-operation supplies shipped from Vancouver, consigned to "Mr. Tuan" was picked up by the consignee from Fast Freight, here in Burnside. Again, the slips and receipts for these transactions were removed from Exhibit 10. Also, when I factor in the receipts for the disposal of bagged soil at Halifax C & D Recycling Ltd, on August 13, 2004 and subsequent; underpad carpet (23 Hudson Drive), on

September 8, 2004; all transported by Discount, I could reasonably infer that the rentals of the vans were for the purpose to transport grow operations equipment and to transport spent soil for disposal.

[75] On the expert evidence and in all the circumstances, I could draw a reasonable inference and also could conclude that, as Exhibits 24-33, 36 and 37, are items characteristic to the grow operation and the drug distribution trade, without any credible explanation, they were in fact used for those purposes. As a matter of fact, Huu Hai Nguyen testified that it was he who arranged for the electrical diversions and that it was he who kept the unused equipment and components at the apartment. That may well be the case, but on the legal principles and the authorities set out above and on the total evidence and that which I have accepted and found, prima facie, it does not exonerate the accused from criminal jeopardy. Also, even if the accused wife kept the grow records, as asserted to by Huu Hai Nguyen, I find and conclude, and it is my opinion, that the total evidence and that which I have accepted and found, does not support her participation in the grow operations to the exclusion of the accused.

[76] More expert evidence shows that the police found, in the basement at 23 Hudson Drive, an elaborate water system constructed with copper tubing and hoses. I have found that such materials, including soldering paste, were purchased either with the accused debit card or cash between August 16, and 21, 2004. There are four receipts each identified with the number 3, totaling \$1163.76. Significantly, the list for expenses, as I have found, removed from Exhibit 10, shows "bill (3), 1164." As all the figures on the expense sheet displayed no decimal amounts it is reasonable to infer, and I do infer, that all amounts are rounded up to the nearest dollar and that the amount shown represented these purchases.

[77] Another point here is that to reroute and move the copper pipes in a building, I think that I can take judicial notice, as this fact is notoriously and commonly known, that plumbing accessories, such as soldering paste, as purchased, would be required. Also, on the same principle and as every handyman would know, I can take judicial notice that propane gas, in cylinders as found in the kitchen at 23 Hudson Drive, is also used in soldering copper tubing. As a result, in my opinion, the finding of the accused right hand thumb fingerprint on the propane cylinder and the listing of the costs of these items on

the grow expense sheet, in all the circumstances, created a reasonable inference that the accused, in August 2004, was instrumental in the rerouting of the copper pipes to create the water system, with the attached hose, as found at 23 Hudson Drive.

[78] On the surveillance evidence I accept and find that the accused vehicle was at the grow sites during July, August and September 2004. I accept the notion, as presented by the Crown, as it is supported by the expert evidence, that in a marihuana grow operation secrecy is important and that it is reasonable to infer that one would only visit a commercial grow operation, as here, either to set up its operations or to maintain the plants. Furthermore, it is highly unlikely that producers, as here, would risk exposure of their operations to nonparticipants by inviting them to the grow site for a party and to show them the building. Thus, when placed in the context of the grow operation, the timing of the accused visits and their duration, as observed, could, in my opinion, lead a reasonable person, fully informed of all the facts, to reach a rational and reasonable conclusion that the accused visited the sites, but that these visits were not for any innocent purposes, as suggested by Huu Hai Nguyen. I so find.

[79] I considered the expert evidence about the cash transaction characteristics of the drug trade. When I weighed and evaluated this aspect of the evidence with the evidence of the significant amount of cash located, particularly in the accused's bedroom, and other areas, and the fact that he was unemployed with no known source of employment income; his bank deposits of large sums of money; his bank deposit balance of \$26,752.05, in all the circumstances, it is reasonable to infer and I do infer and find that this body of evidence created the threshold liability that his only source of income was from the grow operations.

[80] In my opinion, Huu Hai Nguyen's testimony disclosed not only his own involvement in the grow operations, the production of marihuana and the diversion of electrical power, but it also created a web of circumstances that when carefully dissected implicated the accused. By way of example only, his testimony placed the accused not only as his son-in-law but also as a close associate. Further, he claimed that he had "invited" the accused to 23 Hudson Drive for a party. However, in my opinion, on the surveillance and the expert evidence concerning the requirement for secrecy that I find to be reliable, credible and trustworthy, and on the facts as I have found, this assertion finds

no support. Moreover, he has admitted to the actuality of a commercial grow operations with shared income and expenses and, even though he may have refused to discuss, despite the written evidence, the involvement of the accused, in my opinion, his testimony, at the minimum, admitted the existence of a group of persons who participated in this grow operations of which he was a part. I so find.

[81] Further, Huu Hai Nguyen asserted that he had instructed his daughter to keep a record of the grow operations income and expenses which would explain the documents being found in the accused bedroom. He also suggested that it was Thuan Duong, on his directions, who ordered the supplies from Evergreen Supplies and that the company got the name and telephone numbers wrong. However, the Defence did not call these two witnesses, who were competent and compellable, to support this vital defence theory. Therefore, in my opinion, as the Crown had established a threshold liability that cries out for an explanation or to be displaced, the failure of the accused to call these witness, who could support his theory of innocence, created no foundation or basis on which I could draw an inference that was favorable to him.

Conclusion

[82] On the facts, as I have found and accepted, and in considering the expert testimony of Dr. Hall and, on my observations of the witnesses as they testified and my impressions of their testimonies, and on my assessment and evaluation of the total evidence, I have no reservation in saying that I think that the accused and his associates were employing their etymological diversity, comprehension and knowledge as a stratagem to create doubt and to confuse. However, on the above analysis, I am satisfied that the Crown has prove beyond a reasonable doubt, the accused identity. In short, I have no doubts and I conclude and find that the accused and the person known to Woods as Hung is one and the same person.

[83] I have evaluated and weighed the evidence of the accused association with the purchase of the grow operations houses; the items the police removed from his bedroom, particularly the documentary evidence found in Exhibit 10 and their analyses: the surveillance evidence of his vehicle going to and from the grow sites throughout July, August and September 2004; his unexplained large bank account, bank deposits and the large sums of cash found in his

possession when arrested; his latent fingerprint on a propane cylinder at a grow site; and, his failure to call Thuan Duong and Ha Nguyen as witness, who ostensibly could have presented favorable supporting evidence on his behalf.

[84] As a consequence, I conclude and find that there is uncontradicted evidence of a common criminality. Also, I conclude and find that there is uncontradicted evidence, consistent with the fact and inconsistent with any other rational conclusion, that the accused did acts that were consistent and compatible with accomplishing the common criminal objective of producing, possessing and selling marijuana. Likewise, I conclude and find that there is incontrovertible evidence that the diversion of electricity to power the grow operation was a necessary activity and that anyone who was involved in the grow operation, reasonably, would also have knowledge of the electricity diversion. Finally, I conclude and find that there is uncontradicted evidence that is consistent with the fact and inconsistent with any other rational conclusion but that the accused was an active participant in the grow operation, as alleged.

[85] Therefore, in my opinion, on the total evidence, the Crown has presented sufficient evidence on the essential elements of all the offences and has established a threshold liability adversely affecting the accused. It is also my opinion that at the end of the trial, this threshold liability was not displaced by the evidence presented for the accused. Furthermore, on the total evidence, when I apply the legal principles, that I earlier posited, to the facts as I have found and, on the analysis that I have made, I am satisfied that there is sufficient credible and reliable evidence that is consistent with the guilt of the accused and is inconsistent with any other rational conclusion but that the accused is guilty as charged. Put another way, there was no foundation for me to draw any inferences favourable to the accused and the threshold liability became the ultimate liability of proof beyond a reasonable doubt.

[86] In the result, I find the accused guilty of all the counts on the Information tried before me and, accordingly, I will enter convictions on the record. Guilty as charged.

J.