

**File No: 170464-1  
Registry: Vancouver**

**In the Provincial Court of British Columbia**

**REGINA**

**v.**

**BUU LUAN TRUONG**

**RULING ON VOIR DIRE  
OF  
THE HONOURABLE JUDGE WEITZEL**

**COPY**

<b>Crown Counsel:</b>	<b>M. Loda</b>
<b>Defence Counsel:</b>	<b>M. Mines</b>
<b>Place of Hearing:</b>	<b>Vancouver, B.C.</b>
<b>Date of Judgment:</b>	<b>July 11, 2007</b>

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[1] THE COURT: Let me begin by thanking counsel for their patience. This is an oral ruling on an application made by the defendant, Buu Truong, to have a search warrant, which is pivotal to this case, quashed, and the evidence which was seized pursuant to it excluded. It is, in essence, a **Charter** application.

[2] Mr. Truong is charged with unlawful production of cannabis marihuana, and unlawful possession of cannabis marihuana in an amount exceeding three kilograms for the purpose of trafficking, both occurring on December the 8th of 2005, the day that a search warrant was executed on a premise at 5361 (sic) Gilpin Street in Burnaby.

[3] He has elected to be tried in the Provincial Court, enter pleas of not guilty, and at the outset the court was advised that he was -- that is the defendant, was going to seek a ruling that the warrant was unlawfully issued, that, as a result, s. 8 of the **Charter** was breached as it related to him, and that the evidence excluded as a result of the execution of the warrant be excluded.

[4] Accordingly, a *voir dire* was declared, and initially the application was made by Mr. Truong to seek leave to be able to cross-examine the affiant of the Information to Obtain document in this case, and another police officer. After

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extensive argument, I held that that was not necessary in the present case, and the argument concerning the sufficiency of the information supporting the search warrant could properly be argued on the basis of the search warrant itself as amplified by further documents which were filed in this case.

[5] The search warrant itself was marked as Exhibit A. A group of four Continuation Reports, Exhibit B, and these are police reports from various times over the course of this investigation, basically setting out that the -- who had now control of the file, and opinions at various times as to whether or not that particular police officer held the opinion that a search warrant would be available. And, in summary, it says that, on several occasions, four of them, that it was the opinion of another officer, Constable Thibodeau [phonetic], that he did not have sufficient evidence to obtain a search warrant.

[6] That, in my view, is of marginal relevance, given the fact that the warrant in this case was obtained on the 8th of December, 2005, and executed on that date, and these Continuation Reports relate to April the 28th of 2004, August the 18th of 2004, December the 21st of 2004, and March the 30th of 2005. So, a number of months, if indeed not years, before the search warrant itself was actually obtained.

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[7] The next what I will call amplification document has been marked as Exhibit C in these proceedings, and is a letter from the Crown to the defence counsel setting out information obtained as a result of having an interview with the affiant in this case, Constable Uzelac [phonetic], I take it in preparation for the trial, and that, in my view, does have relevance in at least one of the issues that I have to address on this application.

[8] The Information to Obtain a Search Warrant is a sworn document, and underlies the ultimate -- or forms the foundation of the decision that a Justice must consider in deciding whether or not a search warrant is appropriate. It is a sworn document setting out the grounds which the affiant has for concluding that there are reasonable and probable grounds to believe that a crime is being located at a certain location, and that the search of that location would be relevant to that investigation, and would disclose evidence relevant to the investigation. In this case, it is a summary of the police activities from January of 2003 until late December 2005 as it relates to a premise at 5361 Gilpin Street.

[9] Now, as I say, in summary, the Information to Obtain shows the following; that Constable Uzelac, on January the

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10th of 2003, November the 7th of 2004, November the 9th of 2004, December the 6th of 2005 and December the 7th of 2005, walked around a residential premise at 5361 Gilpin Street in Burnaby. He examined it from all sides, and he says that, on those occasions he smelled the odour of growing marihuana.

[10] The Information to Obtain also shows that, on several occasions, Constable Uzelac obtained Hydro consumption records for this residence, and he opines that an above normal amount of electricity was being consumed therein. The Information to Obtain also shows that, on March the 17th of 2005, other RCMP members attended at 5361 Gilpin Street on an unrelated matter and did not see or smell anything that indicated the presence of a marihuana cultivation operation at that residence.

[11] The affiant, Constable Uzelac, reviewed Hydro consumption rates for that period for that residence, and opines that this is the only period where the consumption rate was -- the only time during this period when the consumption rates were low. In my view, it is obvious that the purpose for that paragraph is to, in some way, explain why, in the past, on occasion, marihuana had been smelled, and thereafter on occasion marihuana had been smelled, but on that specific period, March of '05, the officers attended did not smell or see anything.

[12] As I say, it is agreed that, on December the 8th of '05,

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the Information to Obtain was sworn, was presented to a judicial Justice of the Peace, and a search warrant was issued.

[13] I have already described Exhibit B, which are these Continuation Reports, which, in my view, have marginal relevance to this issue, but it is important that I describe in greater detail Exhibit C. Exhibit C, which is an advisement of disclosure to the defence, states that the informant, Constable Uzelac, lived in the immediate area of the house in question, 5416 Gilpin Street, during the course of the investigation; that he walked past 5416 Gilpin Street in a easterly direction close to every day, as it was part of his regular route to work, and that he cannot say whether he smelled marihuana on days other than those described in the affidavit, but he did not make notes of any others, and I take that to mean did not make notes of having smelled marihuana on any of those other days.

[14] In consideration of all of the evidence on this *voir dire*, the defence argues that the court should find most of the Information to Obtain the Search Warrant is misleading and/or erroneous to a significant extent, and, in the result, the search warrant should be quashed. As I said at the outset, if that was done, then the search and the resultant

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seizure would be a breach of s. 8 of the **Charter**, and an argument then would raise as to whether or not the results of the search should be excluded from evidence or not.

[15] Now, the test for the court on an application such as this, in my view, is well summarized by Madam Justice Smith of the Supreme Court of British Columbia in a case called **R. v. Hole** [2006] B.C.J. No. 3033. It comes out of the Kamloops Registry.

[16] Now, here she was dealing with a case not dissimilar to the case at bar. There was a search and so on, seizures, search pursuant to search warrant, and the consideration then of the sufficiency of the information to support the search warrant. Commencing at paragraphs 15, in particular, through 23, she summarizes what, in my view, are the essential authorities and are the continually valid authorities that the court must be guided by in applications of this nature. I am not going to read it all in total, but I will refer to what, in my view, are some of the most important parts.

[17] Paragraph 15 concludes that:

The standard of review for the reviewing court is different than the standard of proof required for the authorizing justice.

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[18] So it is not simply substituting one's view for the other, but rather it is a different test that the court here applies in its reviewing capacity.

[19] Paragraph 16 states:

In granting a search warrant the authorizing justice must be satisfied there is sufficient reliable information to support the authorization.

[20] Paragraph 17:

This standard has also been variously described as requiring reasonable grounds, probable cause, or credibly based probability.

[21] Paragraph 18:

... the existence of sufficient reliable information must be based on the totality of the circumstances and not individual items of evidence.

[22] At paragraph 19 she turns to the test which I must apply in a situation such as this where it is a review. At paragraph 19 she states:

The test on review is more circumscribed than the standard of sufficient reliability for the authorizing judge. The reviewing judge must determine whether the authorizing justice could have granted the search warrant based on the record before him or her as amplified on review.

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[23] She goes on to state:

The reviewing judge is not to substitute his or her view for that of the authorizing judge but must be satisfied based on the record as amplified on review that the pre-conditions for the granting of the authorization existed.

[24] Paragraph 20 is important:

Information in the I[nformation] T[o] O[btain] fraudulently obtained, non-disclosure of material information, intentional misleading or non-deliberate errors that are material to establishing reasonable grounds, will affect the reliability of the ITO and the basis upon which the search warrant was granted.

[25] In paragraph 20 (sic) she states:

... the reviewing judge must excise from the I[nformation] T[o] O[btain] erroneous or non-material information that has not been corrected or clarified on amplification before deciding if there remains sufficient reliable information upon which the authorizing judge ...

And I read "or Justice":

... could have granted the search warrant.

[26] Paragraph 23 is of interest. She states:

The purpose of excising erroneous information is to avoid the corruption of a process that provides the police with an extraordinary investigative tool by which to secure evidence against a suspect.

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[27] I pause here to note that that tone is taken up in another decision of the Supreme Court, that being the decision of **R. v. Douglas Roy Newton**, N-E-W-T-O-N, a decision of the Honourable Mr. Justice Brooke on March 13th 2003, and cited at [2003] B.C.S.C. 1197, and at paragraph 37 of his judgment he notes that:

A search warrant authorizes the entry of the state into private property. No private property is accorded more protection under the law than a dwelling house. The information must be sufficient to support the warrant.

At paragraph 46 he states:

It must be remembered that a search warrant is obtained on a "without notice application", and that full and frank disclosure of all material facts is required. The affidavit must be one that the deponent, before swearing, should be able to say does not give a false impression, such that the reader is tricked into concluding it says something that it does not.

[28] So I take it from Madam Justice Smith in **R. v. Hole** in the sections that I have referred to, and then sort of as amplified by Mr. Justice Brooke in the case of **R. v. Newton** that I just referred to, stand for the proposition that while it is not a case of the reviewing court substituting its view of what the earlier justice or judge should have done, nonetheless, the reviewing court must be vigilant to avoid the

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corruption of a process which provides the police with an extraordinary investigative tool to secure evidence against a subject and to enter on to a person's property, which, in our system, is a highly protected right.

[29] The next thing I note, which is my own observation, is that most Informations to Obtain are not drawn by lawyers. Some are. In big cases where lawyers, Crown counsel or privately retained lawyers may be assisting the police in an investigation, but generally that is not the case, and Informations to Obtain, in cases such as the one at bar, are usually prepared by police officers, and I am prepared to take notice that most of them are not legally trained or not likely legally trained.

[30] But the test that the officers must meet in the preparation of the Informations to Obtain is not, in my view, a particularly difficult or highly technical or legal test. The test is, in my view, quite a common sense test, and is expressed in a fairly common sense way by Madam Justice Southin, as she then was, in the decision of **R. v. Robert Nicky Dellapenna**, Court of Appeal No. 018679, out of the Vancouver Registry from 1995.

[31] And in that case, and I, at this point, will not go into the facts in that case, but she addresses what is it that

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police officers are expected to do, and she expresses it at paragraph 37. She is commenting on a finding by the trial court that the informant, while having given incorrect information in the ITO, did not intentionally mislead. At paragraph 37, Madam Justice Southin says this:

By that, I take it the learned judge meant that the informant did not swear this information saying to himself, "I am going to tell the justice of the peace a pack of lies." But the informant plainly did not say to himself, "Have I got this right? Have I correctly set out what I've done, what I've seen, what I've been told, in a manner that does not give a false impression?"

[32] And that, in my view, really states, in a very non-technical way, really the test that the Information to Obtain is held up against, and ultimately the court, in having to make findings as to whether or not errors were intentionally misleading, whether they were intentionally not disclosed and so on are done for a proper purpose, for the purpose of giving a false impression or was it simply inadvertance, which did not really affect the impression of the whole Information to Obtain? And it is interesting that further in that decision she talks about the importance of not simply getting into a quibbling contest, that there may be errors in Informations to Obtain which may have little or no weight or influence on the ultimate presentation, and whether or not the presentation is

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true and accurate or false.

[33] With that in mind, I then turn to the arguments that are put forward by the defendant. The first argument I will address is the defendant's assertion that the informant, Constable Uzelac, while putting in the Information to Obtain that he had been near this premise one to -- five times over the course of two years, and smelled marihuana, that he had not disclosed that he had walked past the same premise close to every day as he walked to work, and that he made no note of smelling marihuana on any of those other days.

[34] The defence argues that, by omitting that information, which has been set out -- which is included in Exhibit C, that that is a material non-disclosure which would be relevant to the issue of whether a warrant issues, and which would show that, while on five days out of two years marihuana was smelled, on what the other 600 days apparently no note was made of the smell of marihuana.

[35] The defence argues that that is a material non-disclosure, and, in the result, it is material which should be excised from the Information to Obtain.

[36] The Crown argues that the court should not conclude or put the attendances on the five days -- specific days set out

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in the Information to Obtain in the same category as the other days when the officer was simply walking by. The Crown says that there is a difference between a police officer actually attending for the purpose of performing a criminal or quasi-criminal investigation versus the innocent act of simply walking by on one's way to work.

[37] There may be some weight in that, but I note that, when Constable Uzelac made his first observation on January the 10th, 2003, there is nothing set out in paragraph 6, which relates to that, suggesting that he was there for an investigative purpose, such as would arise if there was a compliant or some other information provided to the police which would thereby have initiated such an investigation.

[38] As I read it, it would be him simply walking by and he smells, and on that occasion he then took some further steps to, what I think has been referred to as "squaring" the building, to not simply stand on the front of the house, but then to -- he went around the alley and so on. So, if it was -- the smell was noticeable to him on that occasion when he was there in a non-investigative capacity, apparently, there is nothing to suggest he was there in an investigative capacity, then it undermines, in my view, in part, the argument, "Well, maybe he wasn't paying attention on those

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other days" or otherwise.

[39] Now, the Crown also argues that, in deciding whether or not this is a material non-disclosure, the court should look at another part of the Information to Obtain to show that the officer was forthright in a different way in saying that, on other occasions, the police did not smell marihuana there, and that is in particular with respect to what is set out in paragraph 22. That is the paragraph that states that, on March the 17th of 2005, some other police officers went to the house on unrelated matters and did not see or smell evidence of the marihuana grow operation.

[40] It is important that that is included in there because that, indeed, is highly relevant evidence. The difficulty, in my view, is that, while that paragraph is there, the officer goes on at paragraph 26 to provide an explanation. He does not simply leave it out there, but he seems to strain to provide an explanation as to why those police officers did not smell anything on March the 17th of 2005, and he does that by producing a list of Hydro bills, I take it, for that time period, the time period from September of 2004 to November of 2005, and the March 2005 period is in there.

[41] He looks at the various billing dates, the electrical power consumption based on kilowatts per hour, and the cost of

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the electricity, and he concludes that, as follows [as read in]:

It seems as though the only pay period where the hydroelectric consumption was below 8,400 kilowatts per hour was between March '05 and May '05, incidentally the same time Constable Shum [phonetic] attended the residence located at 5416 Gilpin Street.

[42] So the inference, as I take it there, is that he is saying, well, no wonder they didn't smell anything because the hydroelectric consumption was down, but when one looks at that chart, it is, in fact, clear that he is in error, that that -- the period from March to May of '05 was not the -- well, from March 23rd of -- to May 23rd, indeed it is lower, but the period from January 26th to March the 23rd is, in fact, the highest consumption period, and that would appear to be the -- encompass the attendance by those officers on May (sic) the 17th.

[43] Now, there may be some other explanation, I do not know. The explanation is not offered. It may be an explanation of billing dates and so on, but that is not obvious. What is obvious is that for the billing period that would have apparently covered the March 17th, 2005 period, the electrical power consumption was, in fact, higher. When one looks at the chart, indeed, it appears to have been the highest. So that,

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in my view, colours what the court can take from the disclosure that on March the 17th of 2005 other officers attended, did not see any evidence of a marihuana grow, but then trying to somehow or other justify it in an erroneous way on -- in paragraph 26, and, indeed, unless the judicial Justice of the Peace who was looking at all of this was going to sit down and analyze in great detail a almost arithmetic calculation is required to come to the conclusion of whether or not consumption was up or down, one would have expected, and indeed, in my view, it is appropriate to expect that with police officers going to give opinions as to explanations that they must be scrupulously careful in setting out how they came to their opinion and ensuring that the basis for that is indeed accurate.

[44] Now, other courts have considered situations where the failure to include in an Information to Obtain a Search Warrant other times when officers attended and did not make observations of smell of marihuana and so on. Other courts have considered that, and some of those decisions have been referred to.

[45] In the case of **R. v. Witter**, a decision of Madam Justice Loo, [2003] B.C.S.C. 1977, it was also a case where the accused was charged with what I will call "marihuana grow

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operation" in West Vancouver, and involves the search -- or the execution of a search warrant. At paragraph 23, she notes that:

While the informant disclosed that he smelled fresh bulk marihuana on his May 2[nd], 2000 visit, he did not disclose that he failed to detect any odour [of fresh bulk marihuana] on his other three attendances [to the house in question]. Decisions of this court suggest that an informant ought to disclose the occasions when he failed or she failed to detect the odour of marihuana ...

[46] And, thereafter, Madam Justice Loo cites **R. v. Dame, R. v. Nguyen, R. v. Oakley** and **R. v. Newton**. So, although she does not make a specific finding, it is clear when one reads the rest of her case that she concludes that the failure to disclose, in that case, the fact that the officer had been at that same premise on three occasions, had not smelt marihuana, was a material non-disclosure which resulted in that evidence being expunged.

[47] One of the cases that she refers to, **R. v. Newton**, also a decision of the Supreme Court of this province, I referred to it earlier, [2003] B.C.S.C. 1197, also dealt with a situation where the officers had not disclosed all of the times that they had been at this location, and in that case the court concluded that the failure to do so and the evidence relating to it should result in that evidence being expunged.

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[48] In **R. v. Dame**, a decision of Mr. Justice Holmes of the British Columbia Supreme Court, what is it, it is -- it looks like they register -- the number is CC970298, once again, this was a case that concerned the execution of a search warrant and so on. And at paragraph 22 of that decision, he notes that the Information to Obtain a Search Warrant, while it disclosed officers smelled marihuana on a date, November 25th of 1995, the Information to Obtain contained no reference to the fact that the detective visited the property just three days later, during which no odour of marihuana was detected from any vantage point.

[49] He states, and I quote:

I conclude it is fair to the person who must make the decision to issue a search warrant or not, whether the marihuana odour has been detected on several occasions or just one of many.

[50] He found that then to be a material non-disclosure.

[51] And, finally, **Monroe**, which is a case that has been referred to a lot in this argument, a decision of the Court of Appeal of this province from April of 1997, bearing registry number CA020523, a split decision of the court, but Mr. Justice Esson writing for the majority at paragraph 14 in reviewing the information -- or actually in reviewing the

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decision of the trial judge or the facts found by the trial judge, which were the same facts that then were before the Court of Appeal, found that the affiant in that case for the Information to Obtain, Sergeant Linde, had failed to disclose the fact that he had attended on the premise on at least two occasions -- two other occasions, and had been unable to detect the odour of marihuana. Although the -- so that was a factor before that -- the court in **R. v. Monroe**, and that evidence was expunged because of material non-disclosure.

[52] Taking into account, as I say, the nature of the non-disclosure, which is that, "On probably close to 800 days -- I did not -- I do not remember or I did not make any notes of smelling anything, but on five I did," that that is a significant, in my view, non-disclosure. In my view, the fact that that was not disclosed has the ultimate effect of creating a false impression. The impression given by this Information to Obtain is that, when the officer attended, he smelled marihuana, but it is clear that that is, in fact, not what happened.

[53] In my view, the reference to other police officers having attended and not smelling anything, as set out in paragraph 22, does not save my finding that a false impression is left because, as I said earlier, the officer then tries to justify

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why nothing was seen or smelled, and the nature of his justification is completely erroneous. So, in my view, whatever might be said about paragraph 22, it is completely undermined by paragraph 26.

[54] In the result, taking into account what other superior courts or how other superior courts have dealt with non-disclosure of this nature in the cases that I have averted to, I, indeed, conclude that this is evidence of a material nature, amounting to non-disclosure, and, in the result, it should be expunged from the Information to Obtain the Search Warrant.

[55] The next issue concerns what I will refer to as the "hydro consumption evidence." Certainly the cases recognize, and, indeed, the Honourable Judge Young of the Provincial Court in the decision of *R. v. Wesley* [2005] B.C.J. No. 1309, confirms that, that high consumption -- or high hydro consumption rates can be powerful evidence in cases such as this, if, indeed, the evidence is reliable.

[56] The case at bar contains a number of paragraphs -- of the Information at bar contains a number of paragraphs dealing with the hydro consumption rates at this premise, but they are all, in my view, based upon the paragraph 9, which states that consumption rates, and then opinions as to whether the

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consumption rates are above normal or not is based upon what appears to be, in essence, a formula, and paragraph 9 sets that formula out, sort of. It states that:

According to B.C. Hydro Guidelines, based on a 60-day pay period, the average dwelling home, for every 1,000 square feet in the residence will have approximately 750 kilowatt hours in the winter months, and 500 kilowatt hours in the summer months. The hydro consumption for the residence located at 5416 Gilpin Street clearly shows there to ...

And I think it should be, "be":

... an above normal amount of electrical power being consumed.

[57] But there is no evidence in that paragraph or any of the other three or four paragraphs dealing with electrical power consumption rates which shows what the square footage of this house is, so it is very unclear on what basis the affiant could conclude the consumption rate was above normal. And that, in my view, then goes to the issue of misleading evidence because, in each of the paragraphs which deal with consumption of electrical power, the officers says that the consumption clearly shows an above normal rate of consumption. Clearly shows. That, in my view, is simply a conclusion without any, any basis for coming to it.

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[58] Now, again, certain cases have dealt with that type of issue. **R. v. Witter**, which I referred to earlier, Madam Justice Loo's decision from 2003, dealt with consumption rates. At paragraph 24, she notes that there are ways that courts have accepted electrical -- or hydro consumption rates with the appropriate evidence in support, and, in particular, relying on the people who have special training and so on in the interpretation of B.C. Hydro electrical consumption records. But in the case before her, it was a police officer who says that he garnered his own knowledge, and she notes that he apparently has no expertise on the rate of electrical consumption, and at paragraph 27 she concluded that:

... it was not open for the informant to state that the readings were unusually high for normal readings.

[59] So, again, she looked at the conclusory statement, but held that he had no basis or special training or explanation as to how he came to his opinion, and, in the result, she says it was not open to him to do that. Now, again, she does not say, "As a result thereof, I am expunging it." Well, that is not so. Forgive me. Paragraph 29, she finds them to be misleading, but I take it that, as a result of that, she expunges them.

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[60] Another case which was -- which I had also referred to that was **R. v. Dame** with Mr. Justice Holmes from 1997, he also refers to electrical consumption rates at paragraph 25, and he says that the informant -- or the applicant -- or the -- yes, the informant of the Information to Obtain the Search Warrant had given an opinion about high consumption rates, but he had simply made observations without recording any essential data. He went on to hold that he did not think the officer was a dishonest person, but he concluded that he -- the officer had intentionally sought to create an impression that there was a high electrical consumption on a sustained basis, knowing that he had no evidence to support that conclusion. If he did not intend to create a misleading impression, he was extremely careless when he had a duty to be cautious and accurate. In any event, the information was misleading.

[61] So there is a case, again, where, in not dissimilar circumstances, a court found the failure to provide some proper grounding or foundation for a conclusion that there is above normal consumption use is misleading, and, in the result, should be expunged.

[62] Now, if one takes out the material that I have said should be expunged, essentially what that leaves in this Information to Obtain is the evidence of the observations of

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odour coming from the premise made by Constable Uzelac on December 6 and 7 of 2005. Now, that evidence is set out in paragraphs 23 and 25, and he talks about how he went past, noticed a smell, and then he goes around to the back and so on, and, in essence, what counsel refers to as "squaring" the premise and he says he did so by never entering physically on to the property, but he says that he made inquiries and, as a result of those inquiries, concluded that, in his view, the smell of growing marihuana was coming from that premise on those two dates.

[63] Now, the Crown argues that that evidence alone is sufficient to justify the issuance of a search warrant, and, indeed, I accept that there are cases where evidence of that nature *simpliciter* has been accepted, and it seems to me the leading case or the most powerful expression of that is **R. v. Hennessey**, a decision of Mr. Justice Barrow, on a *voir dire* dealing with the issue like we are here, and is cited at [2005] B.C.S.C. 408.

[64] That was a case where the officer says he smelled marihuana in the vegetative state, and it appeared to be coming out of a particular premise. He says he got out of his car, walked around, but he says that he was not able to get too close to it because there was a high cedar hedge, and

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there were other outbuildings and so on. He obtained a search warrant, and a search was affected.

[65] The court, in that case, found that the smell was sufficient. The court held that sometimes there are other factors, such as the unexplained presence of condensation on the windows, windows that are boarded or otherwise obscured, evidence of sort of heat patterns, unusual consumptions of power, frequent comings and goings, and so on. He notes that none of those were present in the existent case. He noted that there was, though, an explanation, for example, why some of these things may be present but simply not observed, and that is because of the nature of the premise itself, given its location, giving the -- given the hedge around it, and so on, that foreclosed the officer gathering some of the other evidence which one would normally expect. And, in the result, he held that the failure to do so in that case was not determinative of the issue.

[66] Mr. Justice Barrow then went on and considered a number of cases, and really concludes that each case is going to depend on the circumstances. He concludes that there is no authority for a proposition that the smell of marijuana *simpliciter* can never be the basis of a valid search warrant. He holds, in that case, it was sufficient.

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[67] Other cases, the case of **R. v. Schulz**, a decision of our Court of Appeal, [2001] B.C.J. No. 2164. On that occasion a police officer -- this dealt with possession for the purpose of trafficking of cannabis. A police officer had gone to a home to deliver a message to a person, and when he knocked on the door apparently a voice invited him in. The officer steps in and quickly he notes the smell and odour of marihuana, and the occupant quickly stands up and ushers the police officer out, and the court held that, with -- that was sufficient to form the reasonable and probable grounds. Smell and the other -- you know, the actions of the accused then perhaps being considered additional evidence of knowledge of guilt.

[68] And then the most recent decision, or seems to be, at least, **R. v. Wesley**, which I referred to earlier, Provincial Court decision of the Honourable Judge Young in Chilliwack, [2005] B.C.J. No. 1309. In that case, the officer swearing the Information was an officer who had experience in smelling growing marihuana, and that he had smelled growing marihuana coming from the Wesley residence. She also apparently had evidence of higher than average hydro consumption.

[69] On that basis, she supports the search warrant, but she does make a finding which was probably not necessary for that case, and that is that smell alone was sufficient to permit

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the issuance of a search warrant. So there is authority for that proposition, and I am mindful of it.

[70] The defence argues, though, that in this case, the case of **Hennessey** is, in fact, distinguishable, and the defence turns to paragraph 25 and 26 of Mr. Justice Barrow's decision where the court averts to the reliability of evidence as to the presence of smell, and how that can be enhanced if it is confirmed by more than one person. It is not, however, the court's opinion necessary for there to be more than one person, but that is a factor that the court could consider.

[71] And the court also confirmed at paragraph 25 that the issue here is one of reliable evidence, not simply any evidence, but reliable evidence, and the defence argues that, in the case at bar, there is nothing confirmatory of the observations of Constable Uzelac, inasmuch as he is the same person who makes the observations both on December 6th and 7th.

[72] There is no explanation offered as had been suggested in **Hennessey** as to why other usual type factors were not seen at this premise in question at bar. The defence really relies on the case of **Monroe**, and, to a lesser extent, the case of **Dame** because **Dame** really relies on **Monroe**. In **R. v. Monroe**, a decision of our Court of Appeal, and, in particular, of Mr.

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Justice Esson from 2000 -- or from 1997, in that case the Information to Obtain made reference to high electrical consumption, window covers, smell of marihuana, and the court, in analyzing then the evidence, concluded that the window cover evidence was not accurately presented in the Information to Obtain, but was presented in a manner intended to mislead, as was the evidence of high electrical consumption.

[73] That left only then, in that case, the evidence relating to smell of marihuana, and the court noted a number of things. First of all, that there was no independent verification of that. It was Sergeant Linde who had gone and made those observations, and, secondly, Sergeant Linde had misled the court by failing to disclose that there had been other occasions when he had attended and not smelled that marihuana. And, in the result, the Court of Appeal then, Mr. Justice Esson had to look, "Well, what could the court do then in dealing with, well, what do we do? What is left with the smell of marihuana?"

[74] I think the court accepts that smell of marihuana would be, in some circumstances, sufficient, but, in that case, the court, in deciding whether or not the smell of marihuana on whatever occasion it was, whether the court could conclude it to be reliable evidence that the court was entitled to look at

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the other evidence, and indeed the findings the court had made in excluding that other evidence.

[75] Paragraph 25, in my view, is the seminal decision or part of **Monroe** then in what the court did with the remaining marihuana odour evidence, and it states as follows:

The question, then, is whether the court can be satisfied that the remaining information is reliable, independently verifiable, and not affected by the finding that two major factual assertions were misleading. The assertion of having detected an odour "coming from the house" is affected by the finding that other aspects of the information were misleading. The trial judge gave some weight to the consideration that the officer had "wrapped his long experience as a police officer" around the three facts to which he testified. In some circumstances, that could be a proper consideration. But where it turns out that two of the three facts were stated deceptively, the fact of the informant having wrapped his experience around the facts must tell against the reliability of the third fact which is, by its nature, not independently verifiable. In my view, nothing remains which could validly support the issuance of the warrant. It follows that the search was unreasonable within the meaning of s. 8 of the **Charter**.

[76] When one looks at the factors that were before Mr. Justice Esson and applies then to the case at bar, indeed the three areas that are similar. Two of the areas, that is the failing to mention all of the other times he was at least going by the house and never saw anything, the misleading evidence relating to the hydro consumption are all factors to look at then when considering the final piece, which is his

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observations of odour of marihuana on the two occasions. They are not verified by other officers having attended and saying they smelt the same thing, and it is simply his assertion.

[77] The result in the case at bar, in my view, is the same result that occurred in **Monroe**, and that is the remaining two odour observations are adversely affected, in my view, and because of the earlier finding of two major factual assertions as being misleading or in some way not being properly disclosed, and that, then, affects the reliability of the third unverifiable observations.

[78] Now, it is unclear what Mr. Justice Esson does, but I think what he does is he expunges the evidence because he says there is nothing remaining, so, if it is expunged, there is nothing remaining.

[79] In the result, I expunge those final two observations, and that leads me to the conclusion, as it did Mr. Justice Esson, that nothing remains which could validly support the issuance of the warrant. That follows then that the search was unreasonable within the meaning of s. 8 of the **Charter**.

(RULING CONCLUDED)

**File No: 170464-1  
Registry: Vancouver**

**In the Provincial Court of British Columbia**

**REGINA**

**v.**

**BUU LUAN TRUONG**

**REASONS FOR JUDGMENT  
OF  
THE HONOURABLE JUDGE WEITZEL**

**COPY**

<b>Crown Counsel:</b>	<b>M. Loda</b>
<b>Defence Counsel:</b>	<b>M. Mines</b>
<b>Place of Hearing:</b>	<b>Vancouver, B.C.</b>
<b>Date of Judgment:</b>	<b>July 12, 2007</b>

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[1] THE COURT: These are oral reasons on now the issue of whether or not evidence should be excluded pursuant to s. 24(2) of the **Charter** following the court's finding yesterday that there had been a breach of s. 8, that is concerning the right to be secure against unreasonable search or seizure.

[2] In order to give context to the 24(2) ruling, I would state in summary that this is an allegation of a person operating a marijuana grow operation, that the police obtained a search warrant, searched a residential premise pursuant to that warrant, and found a marijuana grow operation consisting of 129 plants and some other cut marijuana, 3.3 kilograms in a drying room.

[3] The issue in the first part of the ruling was related to the sufficiency of the search warrant, and after having heard almost two full days of argument on that, this court in the end result, quashed the warrant finding that the majority of the contents should be expunged for, firstly, reasons of material non-disclosure, when over the course of two years, the officer swore to having attended on five occasions and smelling marijuana. But that evidence was amplified by other evidence showing that the officer lived nearby and walked by this subject premise almost daily on his way to work, and in

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my view, the failure to disclose that, in particular, to disclose that on literally hundreds of other days when the officer had gone by, that he did not attest to smelling the marijuana nor had he made any notes of that effect.

[4] Another significant part of the Information to Obtain was excised as it related to rates of hydro consumption and there were numerous paragraphs that set out rates and the officer's opinion that an unusually high rate of hydro was being consumed. And yet it appears his opinion was based on some sort of a formula which requires the calculation of the square footage of a house and there was no evidence contained anywhere as to the nature of the house or certainly, specifically, the square footage of it, which would then give any meaning to a formula and perhaps an opinion resulting from that formula, so that was excised.

[5] Finally, with respect to the remaining portions of it, having the court it took the -- what I consider to be the approach in *Monroe*, and ultimately excised those remaining portions as well as not being satisfied that they were reliable or consisted of reliable evidence which would have justified a justice of the peace to issue the warrant.

[6] So now we get to the next phase and we have had some discussion concerning on whom the burden rests and I do accept

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the Crown's submission now that when one combines the wording of **R. v. Collins**, Supreme Court of Canada, 33 C.C.C. (3d) 1, and a later decision of the Supreme Court of Canada, **R. v. Bartle** (1992), C.C.C. (3d) 289, although it dealt with impaired driving type evidence, nonetheless it confirms that the burden of persuasion now under s. 24(2) rests on the party seeking exclusion of the evidence. And even though I have quashed the search warrant and in theory it would look as if we now revert to a search conducted with out warrant, nonetheless it is the defence who seeks to have the evidence excluded, and **Bartle** seems to clearly state that even where a **Charter** right or infringement has shown to have occurred, the burden then still rests on the party seeking the exclusion of the evidence. The test is one of balance of probabilities and by -- there seems to be common agreement on that.

[7] A number of cases have been provided to the court. Certainly, the case of **Collins** is well familiar because that was perhaps one of the first cases concerning how a **Charter** application should be dealt with by the court. **Collins** was in 1987, it dealt with what is commonly called is a throat chokehold which the officers put on Ms. Collins when they thought that she had drugs in her mouth, and they held her throat to prevent her from swallowing that.

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[8] And the **Collins** case sets out the three-stage analysis that a court is required to consider, and that is still the law. In summary, the test really deals firstly with the issue of trial fairness and requires the court to inquire into the nature of the evidence that is the subject of the inquiry, and the court distinguishes between non-conscriptive or what is sometimes called real evidence, which existed independent of the **Charter** breach versus conscriptive evidence, such as incriminatory statements emanating from the accused which arise as a result of the **Charter** breach.

[9] The next factor is the seriousness of the breach and that requires the court to consider what -- whether the breach is egregious, and what rights are expected to be protected by the relevant section of the **Charter** were breached.

[10] Finally, there is the overreaching factor and that is whether the court -- to look at the specific and seminal finding as to whether or not the admission of evidence would bring the administration of justice into disrepute, and the law is clear that does not impart a notion of policing the police or punishing the police, but taking into account the public's perception of the administration of justice.

[11] A number of cases in not dissimilar circumstances have come to different results. There are two decisions, both of a

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judge of the Provincial Court, that is the Honour Judge Catherine Warren, when she was sitting in Burnaby during the period of 2001. The case of **R. v. Joe**, [2001] B.C.J. No. 881, which was rendered on February the 14th of 2001, was not a dissimilar situation to the case at bar. She ultimately found that there were problems with the Information to Obtain the Search Warrant and one of the problems was that it failed to disclose that there was more than one attendance to the subject property. Another problem related to a general statement that there were bars in windows where, in fact, it was only a very small number of bars in windows. There were problems with the evidence of hydro consumption where Judge Warren found that there was insufficient evidence to show how the opinion evidence of the officer concerning an unusual rate of hydro consumption was arrived at, and having excised that, she went on to find that the warrant should be quashed.

[12] At paragraph 29 though, after referring to **Dellapenna**, a decision of the Court of Appeal of this province from 1995, she quotes Madam Justice Southin and holds that in her own case, that is the case of **Joe**, there was not the dishonesty or gross carelessness which Madam Justice Southin had found in **Dellapenna** and in the result, she held that whatever problems in the Information to Obtain there were, they must have

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occurred as a result of his inexperience. Using the three-stage process, she went on to hold that the evidence sought to be excluded was real evidence existing independent of the violation, that it was accepted that it was a serious charge and that the breach was serious, but she concluded not so serious as to meet the test that Madam Justice Southin states in **Dellapenna** with that, and that is that the law abiding citizenry would consider the administration of justice to be brought into disrepute if it was admitted or included. In the result, she admitted the evidence.

[13] And in a similar way, in **R. v. Ma**, this again, Judge Warren sitting in Burnaby, [2001] B.C.J. No. 2154. This rendered in September. Again, having excluded a warrant for various reasons, came to the conclusion during the s. 24(2) analysis that the errors and discrepancies was caused through inadvertence and carelessness, but she found that the inadvertence and carelessness was not sufficiently gross, nor was it made with an apparent attempt to mislead as to come within the wording again of Madam Justice's statement in **Dellapenna**. Again, she went through the evidence and ultimately held it should be admitted, so I am mindful of those cases.

[14] There are other cases in not dissimilar circumstances

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where the evidence has been excluded. I must say with perhaps some pride that my sense of the analysis of Judge Warren of the Provincial Court in going through and arriving at her decision seems to be more consistent with what a case such as **Collins** suggests should be done.

[15] But having said that, there is the case of **R. v. Michael Dame**, a decision of Mr. Justice Holmes of the British Columbia Supreme Court, December of 1997, where following -- finding that the warrant should be quashed and finding that the information was misleading, and I note in particular paragraph 25, misleading but without holding the detective who was the affiant to be a dishonest person. He did go on to say that he -- the court concluded that there was -- that the detective:

. . . intentionally sought to create an impression that there was high electrical consumption on a sustained basis, knowing that he had no evidence to support that conclusion. If he did not intend to create a misleading impression, he was extremely careless when he had a duty to be cautious and accurate.

[16] And had anyone read the Information to Obtain the Search Warrant in the present case, it would have been immediately clear, with great respect, that there was no basis then for the opinion expressed at, at least, three points during that information that an unusual or an abnormally high amount of

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hydro was being consumed.

[17] So with great respect, I come to the same conclusion that Mr. Justice Holmes reached. I don't find the officer in the case at bar, that is Constable Uzelac, to be a dishonest person, but where the -- in particular with respect to the hydro readings, where it was put forward in such a casual manner and yet apparently relied on so much, even to explain why at a point in the investigation, other officers had not smelled anything, seems to me that he was, at the very least, extremely careless when he had a duty to be cautious and accurate and, again, in any event, the information was misleading.

[18] Mr. Justice Holmes, then with respect to the issue of whether or not the evidence should be excluded or not, deals with it in a very cursory manner at paragraphs 27 and 28. He cites **R. v. Jacoy** and then concludes:

I do not find that it would bring the administration of justice into disrepute to bar the fruits of the search from evidence in these circumstances.

And, accordingly, he found that it was not admissible.

[19] Madam Justice Loo, again, in dealing with findings not dissimilar from the ones at bar in a case called **R. v. Witter** also excluded the evidence. This is a decision of the Supreme

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Court, [2003] B.C.S.C. 1977, rendered October 2003. Her analysis with respect to 24(2) is set out in, essentially, one paragraph, the last paragraph, paragraph 32, and she holds that the violation of s. 10(b) and what would be a violation of s. 8 were such that the administration -- the admission of the evidence could bring the administration of justice into disrepute under 24(2) and she excluded the evidence. I am mindful that she did not enter into that more detailed analysis of 24(2), but that was her judgment.

[20] Finally, with respect to another case coming out of the B.C. Supreme Court in March of 2003, **R. v. Newton**, 2003 B.C.S.C. 1197, a decision of Mr. Justice Brooke. Once again, in circumstances not dissimilar to the case at bar, and that is which dealt with failing to include in the Information to Obtain occasions when officers had attended and not smelled marijuana and so on, and ultimately concluding that while there was no bad faith by the police, that nonetheless he ended up quashing the warrant and then went on to consider the issue of s. 24(2). That is at paragraphs 50 and so on.

[21] In paragraph 50, he sets out the three stage test in **Collins** which is agreed at bar. He holds that the -- although he doesn't make a specific finding, I do not think, I am sure he would have found the -- with respect to the first issue,

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that it is real unknown conscriptive evidence. He held that the evidence related to a relatively modest grow operation which is not dissimilar, with great respect from the case at bar. He held that the breaches of the accused's **Charter** rights are serious and I take it from that he is saying that because of allowed the entry into a person's home, that that made it serious, and he then goes on to say that there was a failure to provide full, frank disclosure and concludes that the administration of justice would be brought into disrepute if the evidence was admitted. So there is another case where in not dissimilar circumstances, evidence was excluded.

[22] Now, I am going to return to **Dellapenna** and **Monroe**, because **Dellapenna** is referred to in a number of cases and principally for the wording used by Madam Justice Southin, but I think it is instructive to look at what she was dealing with when she came to her conclusion that the evidence should be excluded. And what the factors that she took into account were, with great respect, are set out at paragraph 35, because that sets out why she quashed the warrant because one has to remember that the trial judge had found certain problems with the warrant, but had not quashed it.

[23] At paragraph 35, after reviewing the trial judge's reasons and the evidence, she held that:

When the informant said, in the third paragraph, that he had been to the property on two days, he said that which was false. When he said that he had conducted "static surveillance" he also said that which to any reasonably literate person was false. When he spoke of the lights being on and the property being vacant, he was giving a false impression in part by not stating anywhere in the information the time of day that he attended at the property. When he gave his opinion on the meaning of the electricity consumption, he was founding on tenuous comparisons . . .

[24] So those are the factors that, with great respect, she ultimately has to look at when she makes the statement which is so often cited in these cases, which is at paragraph 54. It is clear she found that the -- on the first branch of the test in **Collins** that it was real evidence irrespective of -- existing irrespective of the violation, which is what we have at bar, that the -- she says that the factors in **Jacoy** are not apt to the case at bar, but I accept that. With respect, it is a -- the sanctity of a person's home is a central right enshrined in the **Charter** and where that right has been infringed or denied, it is a serious matter.

[25] I am also mindful of the nature of the cases itself. It is -- I do not deny for a minute that marijuana grow operations are serious crimes. There are though more egregious and less egregious grow operations and, with respect in my view, given the number of plants here being relatively modest, I would classify it as a small operation and fall into

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the lesser end of the spectrum. On the findings that I just referred to that Madam Justice Southin takes, she held that the evidence should be excluded, that a law abiding citizenry would find that the admission of the evidence would bring the administration of justice into disrepute amongst those who know the facts.

[26] Now, that is expanded on and when one looks at **Monroe**, a decision of the British Columbia Court of Appeal in 1997 and the decision of Mr. Justice Esson, he goes back on several occasions to the words of Madam Justice Southin in **Dellapenna** and, indeed, he adopts her words in finding that the evidence should be excluded because the admission of it in the proceedings would bring the administration of justice in disrepute.

[27] And what was it that the Honourable Mr. Justice Esson looked at in coming to that conclusion? And that goes to, in my view, you go to paragraph 20 of the judgment to find out what was it that he found so egregious as to result in coming to that conclusion. With respect to the Information to Obtain the Search Warrant, he made the findings that:

. . . the informant did not correctly set out the facts with respect to the window covering and he stated the observations with respect to power consumption in a way calculated to give a false impression.

[28] And if I am not mistaken, there was even a suggestion that the officer had failed to report all of the times which he had attended. And faced with those facts, harkening to Madam Justice Southin in *Dellapenna*, he concluded using the *Dellapenna* test, that the evidence should be excluded.

[29] In the present case and certainly being respectful of Judge Warren in *Joe and Ma*, I am satisfied that the recent cases or more recent cases coming out of the Supreme Court, for example, *Newton* and *Witter*, seem to be in line with the approach taken by Madam Justice Southin in *Dellapenna* and expanded upon by Mr. Justice Esson in *Monroe*.

[30] And, in my view, with respect to the third branch of the test, taking into account the number of aspects of misleading or material non-disclosure, combined with the seriousness of the right that is infringed or denied, all satisfy me that the law abiding citizenry, who knew the facts of the case at bar, would conclude that the bringing of the administration of justice into disrepute would result if the evidence was admitted, a convoluted way of saying that to admit this evidence would bring the administration of justice into disrepute amongst those who know the facts and, accordingly, I exclude the evidence.

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(REASONS FOR JUDGMENT CONCLUDED)