**SUPREME COURT OF NOVA SCOTIA**
**Citation:** R. v. Fougere, 2010 NSSC 169

**Date:** 20100422
**Docket:** PtH No. 322062
**Registry:** Port Hawkesbury

**Between:**

Her Majesty the Queen

v.

William Rodney Fougere

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| **Judge:** | The Honourable Justice Frank Edwards |
| **Heard:** | April 20 & 22, 2010, in Port Hawkesbury, Nova Scotia |
| **Written Decision:** | April 27, 2010 |
| **Counsel:** | Wayne J. MacMillan, for the Crown<br>Kevin Burke, Q.C. for the Defence |

**By the Court**:

[1] This is a *voir dire* to determine whether the information provided to the Justice on July 30, 2009 provided a sufficient basis upon which to issue a warrant.

[2] The informant is Constable Curtis Kuchta of the Sydney Drug Section of the RCMP. On July 29, 2009 Corporal Kalvin George, together with Constable Kuchta, met with a source who was known to Corporal George. At that time, the source provided the following information to Corporal George in Constable Kuchta's presence:

- Rodney Fougere is growing marihuana in his back yard;
- there are approximately 70 plants in Rodney Fougere's back yard;
- Rodney Fougere has a nursery for his marihuana plants in one of his sheds, or his garage;
- the marihuana plants will still be there;
- Rodney Fougere is selling marihuana from his residence;
- Rodney Fougere lives in the fourth house on the right on Highway 206 past Green's house;
- the house is hard to see from the road;
- Rodney Fougere drives a white truck that has a black bar that comes across the box of the truck.

[3] The source also told Corporal George that he knew Rodney Fougere and had seen the plants in the back yard.

[4] The following day Constable Kuchta, with Corporal George, drove by Mr. Fougere's house and saw a white truck with a black bar in the driveway and that there was a garage and outbuildings on the property.

[5] As noted on page 7 of the Information to Obtain, Constable Kuchta confirmed on July 30, 2009 that Mr. Fougere lived at the address where he had driven by previously that day and that he resided there with a female, Sylvia Fougere. He further determined that a "William Fougere" had a previous record for possession for purposes of trafficking.

[6] The information provided to the Justice of the Peace can be categorized as follows:

1. A statement by the informant that he was told by a reliable source that Rodney Fougere is growing marihuana in his back yard and is selling marihuana from his residence;

2. that 70 marihuana plants were growing in his back yard;

3. the police investigation consisted of

> (a) driving by the residence and confirming the civic address;
> (b) determining that a Rodney and Sylvia Fougere lived at that address;
> (c) determining that a William Rodney Fougere had a criminal record.

[7] Counsel submits that a mere assertion by an informer that a certain person is engaged in criminal activity or that drugs would be found at a certain place does not form a sufficient basis for the granting of a warrant (see ***R. v. Debot*** (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), at p. 218).

[8] Justice Martin, in the Debot decision, reasoned at p. 218:

> "... The underlying circumstances disclosed by the informer for his or her conclusion must be set out, thus enabling the justice to satisfy himself or herself that there are reasonable grounds for believing what is alleged. I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds ..."

[9] On a review of the validity of a search warrant, the reviewing judge merely determines whether there was credible evidence on which the decision would be based (see ***R. v. Garofoli***, [1990] 2 S.C.R. 1421).

[10] The reviewing judge is to consider the evidence presented in the ITO, as amplified at the review hearing, and determine whether this evidence meets the

standard required, that is, whether the evidence gives rise to a "credibly based probability" that there is evidence of an offence in the place to be searched.

[11] Justice Warner of this Court considered the applicable law in ***R. v. Woodworth*** [2006] NSJ No. 26 at paragraph 37:

> 37 The circumstances in *Debot* involved a warrantless search, but, at paragraphs 80-86 in *Garofoli*, the Supreme Court summarized the law from *Debot* and *Greffe*, as it applies to ITOs based on confidential informants, as follows:
>
> > 80 ... I conclude that the following propositions can be regarded as having been accepted by this court in DeBot and Greffe:
> >
> > 81(I) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
> >
> > 82(ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances." There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors, including:
> >
> > 83(a) the degree of detail of the "tip"
> >
> > 84(b) the informer's source of knowledge; and
> >
> > 85(c) indicia of the informer's reliability, such as past performance or confirmation from other investigative sources.

> 86(iii) The results of the search cannot, ex post facto, provide evidence of reliability of the information.

[12] At paragraph 73, Justice Warner correctly observed that "... each case is decided on the totality of the circumstances of that case." And, at paragraph 75, he noted:

> In summary, the information to obtain the warrant, excising the materials blacked out, and excising and amplifying further based on the evidence from the review hearing, provides sufficient basis upon which the issuing justice could have found that the necessary reasonable and probable grounds existed.

[13] Here I am satisfied that the Crown has established that the warrant was appropriately issued. This was a tip from an informer with proven and longstanding reliability. Paragraph 6(a) to (k) of the Information to Obtain ("ITO") states the following:

> 6. On July 30, 2009, I spoke with Corporal Kalvin George (Cpl. George, a member of the RCMP, in the Province of Nova Scotia, and learned the following information:
>
> a. He has a proven reliable confidential source who associates freely with persons involved in criminal activity and who Cpl. George verily believes.
>
> b. He has known the source, hereinafter referred to as Source "A" since September of 2003.

c. Source “A” has been a confidential and proven reliable source for the Royal Canadian Mounted Police since September of 1998.

d. He has been a co-handler of Source “A” since September 2003, and the primary handler since June of 2008.

e. Source “A” has provided information on subjects involved in the trafficking, importation and production of Cannabis products and Cocaine.

f. Source “A” has a criminal record however has no convictions for perjury or public mischief.

g. The primary motivation for Source “A” is believed to be monetary compensation.

h. Between September, 2003 and October, 2007 the Sydney Drug Section, has maintained contact with Source “A” on a monthly basis with a total of no less than seventy-three(75) telephone and or personal meetings. Since October, 2007 he has maintained contact with Source “A” on a sporadic basis with a total of no less than 15 telephone and or personal meetings.

I. Source “A” has been paid financial awards on no less then 20 occasions.

j. Since September of 1998 Source “A” has provided significant information on separate instances either resulting in the seizure of property, Controlled Substances, and the laying of criminal charges or provided information that assisted investigations.

...

k. The information provided by Source “A” has been corroborated with information obtained from other

> sources and/or information obtained through other investigative means. Source "A" has personal knowledge of the information contained herein, based upon conversations and observations with the persons involved, unless otherwise stated.

[14] At paragraph 62 of ***Woodworth***, Justice Warner referred to a reliability spectrum for informants:

> ... If one assesses the credibility of the informant by placing him or her on a spectrum, which, at the low end includes an anonymous informant providing an anonymous tip on a single occasion, and on the other end an informant with a history of proven reliability providing more than one tip, then this Court places Source A at some point below the mid-point of the spectrum but not at or near the low end. ...

[15] In the present case, I would place Source "A" near the high end of the spectrum.

[16] Counsel argued that there is no indication in the ITO of ***when*** Source "A" had made his observations. Clearly, the issuing justice did have some information regarding ***when*** but that information was blacked out by the time I saw the ITO. (The paragraph following paragraph 9(h) of the ITO contains the word "ago" in mid sentence with the preceding several words blacked out.) Obviously, the blacking out was done to protect the Source's identity.

[17] During the review hearing, the Crown elicited evidence that the Source's observations had been made "within a month" of the tip to police. Counsel for the Accused argued that I could not consider such "amplification evidence". He quoted the recent decision of the Supreme Court of Canada in ***R. v. Morrelli*** [2010] SCJ No. 8, where the Court stressed the limited scope of amplification evidence. The Court stressed that the main use of amplification evidence was to correct minor good faith errors. But the Court also said: "In all cases, the focus is on 'the information available to the police at the time of the application' rather than information that the police acquired after the original application was made." (See Paragraphs 39 - 43 especially the last sentence in paragraph 43.) The point is that amplification evidence cannot be used to fill in gaps in the information which existed at the time of the application.

[18] Here, I am satisfied that I am entitled to consider the evidence "within a month." Such evidence is entirely consistent with the principles set out in ***Morrelli***. It gives nothing new which was not available to the police or the issuing justice at the time of the application. But, for my purposes, the evidence rebuts the notion that the police could have been acting on stale information.

[19] If I did not use the “within a month” evidence, the ITO has some temporal indication. The police spoke to the Source on July 29, 2009. The information the Source imparted was then placed in paragraph 9 of the ITO. That information is in the present tense: “Rodney Fougere ***is*** growing ....”. There ***is*** (sic) approximately 70 marijuana plants ...” and “The marijuana plants will still be there ...” Accordingly, even if I ignore the “within a month” evidence, I can still infer that the police were acting upon observations of the current situation on the Fougere property.

[20] Counsel also argued that the ITO lacked the specificity present in that in ***Woodworth***. Again, I note that each case has to be decided on its individual circumstances. Given the totality of the circumstances here, I am satisfied that the issuing justice had sufficient information from which he could infer the requisite reasonable and probable grounds. I am satisfied that the warrant was properly issued.

J.