

Citation:

Date:

File No: 126950-1
Registry: Surrey

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

DAVID AUGUST LANGE



**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE H. H. FIELD**

Counsel for the Crown:

J. Lees

Counsel for the Defendant:

R. Harris

Place of Hearing:

Surrey, B.C.

Date of Hearing:

July 3 and August 30, 2002

Date of Judgment:

November 13, 2002

Mr. Lange is charged with producing marijuana, in Delta, on 15 March, 2002.

Circumstances of the Offence

[1] The police, investigating a hit and run accident near the residence of Mr. Lange, inadvertently came across a marijuana grow operation. In searching for the suspect in the backyard, the police detected an odor of marijuana coming from the residence. After a follow-up investigation, a search warrant was applied for. Later 230 marijuana plants were seized from three separate rooms. 193 plants were described as clones. A bag of dried marijuana weighing 130.4 grams was found in a drawer. There were documents and pamphlets found pertaining to Compassion Clubs. Because of the small size of the plants, and the early stage of growth, the Crown cannot assess the value of the grow. The property was leased to Mr. Lange.

[2] It is submitted by counsel for Mr. Lange that 25% of the grow was destined for the Edmonton Compassion Club. The remaining marijuana was being used for research and further product was grown in order to produce another strain to accommodate specific medical needs. Some of the crop was to be destroyed.

[3] By way of background, the Edmonton Compassion Club, who received marijuana from Mr. Lange, provided the product to authorized users. Later, the transactions were organized so the yield would not surpass the demand for medical use.

[4] Mr. Lange received monies for the transactions. Although there is no accounting that relates to capital expenditures, expenses and sales, the Crown submits he realized a profit of \$500-\$800 per month from December 2000 to the date of the search. Mr.

Harris submits the monies were used by Mr. Lange to cover his living expenses. Evidence discloses a sustained period where the defendant grew marijuana for medicinal purposes.

[5] The Crown concedes the marijuana he was growing was essentially for medicinal purposes, however, submits that he engaged in the "commercial production" of marijuana by reason of receiving some financial benefits from the sales. Mr. Harris, counsel for defendant, submits the grow was not for profit but the motive was for reasons of compassion. Mr. Lange was providing the drug to persons who suffered from specific medical problems.

[6] The Crown submits that a custodial sentence is appropriate and further submits the sentence could be served in the community pursuant to Section 742 of the Criminal Code. The Defense submits the court consider the discharge provisions of the Criminal Code.

[7] The Crown submits the following aggravating factors:

- 1) A real sanction ought to be imposed because of the amount of plants including their potential "commercial value".
- 2) The operation was located in a populated residential area near a park and elementary school. Such grow operations directly affect the social fabric of the community. There is an increase potential for fire, home invasions and damage to property, see *R.v. Nguyen, Zare J.*, Ontario Court of Justice
- 3) The size of the grow increased the possibility of detection by either the "criminal element or organized crime."
- 4) The drug related record of the defendant ending in conviction in 1989 for cultivation, where he was sentenced to a period of custody for 4 months:

1985-01-16 Port Hardy BC	(1) Poss of a narcotic Sec 3(1) NC Act (2 charges) (2) Poss of a restricted drug Sec 41(1) F & D Act (2 charges)	(1-2) Susp sent & probation 2 mos on each chg
1985-07-23 Port Hardy BC	Poss of narcotic Sec 3(1) N C Act (2 charges)	\$500 I-D 30 days
1988-04-26 Campbell River, BC	Trafficking in a narcotic Sec 4(1) NC Act	30 days
1989-01-05 Campbell River, BC	Cultivation Sec 6(1) CC (RCMP Campbell River 87-13748)	4 mos

In summary, 9 prior drug related convictions. The last conviction related to the growing of ten plants, the offence dates back to 1987.

- 5) That Mr. Lange does not have an exemption permitting him to grow or possess marihuana. These offences were in wilful violation of the law and not committed with the tacit knowledge and approval of the police. There is a regulatory scheme that provides a framework for lawfully growing Marijuana.
- 6) There was no record kept of the inventory or the finances of the grow operation.

[8] Notwithstanding these factors, the Crown agrees this is not a case solely motivated by greed. In this regard, the Crown's submissions are set out in paragraph 10 of the admissions of fact:

"The accused's grow operation was not for personal use. It was "commercial" in the sense that it was being grown and distributed to others in exchange for money. It was not, however, a typical "commercial operation" in that profit was not the sole or even primary purpose behind the grow. The marihuana produced by the accused was intended to be distributed solely to "Compassion Networks" operating in B.C. and Alberta. The Networks would then sell the marihuana to individuals who had authorizations to possess marihuana."

Submission of the Defense: Mitigating Circumstances

[9] Mr. Harris asks the court to order a conditional discharge. He submits the main purpose of the grow was motivated by compassion, that Mr. Lange was growing marijuana in order to ensure that those properly authorized had a source of medicinal marijuana. In support of his submission the following documents were filed verifying:

- That Mr. Dave Lange has been a supplier of medicinal cannabis to the Vancouver Compassion Club. A letter signed by Hillary Black, Founder and Co-Director of B.C. Compassion Club Society has been filed as an exhibit in these proceedings:

"The Compassion Club is a registered non-profit organization which provides a variety of services to its approximate 700 registered members, including the sale of marijuana for medicinal purposes to those who qualify. Of these, 80 percent have a letter from their doctor recommending its use and the balance must meet certain criteria established by the Club. The majority of members to whom marijuana is sold suffer from AIDS, cancer or multiple sclerosis."

Further

"...The strain of Marijuana are suited to medical use. It is perhaps noting that there is a provision under section 56 of the Controlled Drugs and Substances Act to legally possess marijuana under certain conditions if it is necessary for medical purposes and exemption from the Minister of Health is first obtained."

R. v. Small, at paragraph 2, decision of BCCA.

- **Mr. Munir Ahmed**, founder of the Edmonton Compassion Network, a non profit organization that helps people with chronic illnesses access medical cannabis, confirms that Mr. Lange provided product to his organization on a consignment basis (letter dated July 24, 2002). They distribute Mr. Lange's product to fifteen individuals who have lawful exemptions to possess marijuana for medicinal purposes.

- ♦ Those authorized to possess marijuana benefited from the strains grown. The following letters were filed:

Mr. Ron Mcleod: He is a person associated with the Alberta Compassion Organization. He suffers chronic pain due to scar tissue on the frontal lobe of his brain, fibromyolgia and other problems. He reports that the strain produced by Mr. Lange helps with chronic pain, making life bearable.

David Sinanamon who has a Section 56 Exemption cannot grow the drug due to constraining factors in his residence. In obtaining the product from Edmonton, he confirms that Mr. Lange's high quality medical grade marijuana is most effective for his illness. He regrets that Mr. Lange is unable to produce marijuana to people who have need. In his letter he reports that Mr. Lange is both knowledgeable and experienced in his field.

Both David Sinanamon and Rob McLeod were contacted by Deborah Jack, Probation Officer, who wrote the pre-sentence report confirming the veracity of what was claimed by the defendant. A further letter filed, bears testimony to the therapeutic use of marijuana.

In further support of his application for a discharge, Mr. Harris submits:

- Prairie Plant Systems, a government supplier who grew the crop in an abandoned mine at Flin Flon Manitoba, had problems with the quality of their grow resulting in product not being able to reach people in need, persons suffering from glaucoma, nausea relating to chemotherapy, epileptic seizures, chronic pain and other medical conditions. Their exemptions could not be accommodated.

Mr. Lange is producing high quality strains without contaminants. The growing environment is controlled in order to avoid contamination. No particles or artificial fertilizers were used by him to increase the yield. The Federal Government has been unable to meet the demand for the therapeutic use of medical marijuana.

- There is a risk of harm associated in buying marijuana from those who traffic in the drug from an environment associated either in the black market or from the street. The Compassion Network in both British Columbia and Alberta supplied by Mr. Lange is not a criminal organization with the attendant risks associated with growing for profit or greed.
- In response to the Crown's submission as to where Mr. Lange produced the marijuana, there is no evidence that this grow operation increased the risk of fire, home invasion or drive by shootings. The purpose of the grow eliminated any risk of interaction with the criminal element.
- The location reduced the risk of detection. The police discovery of the grow was accidental and not intricately bound to any earlier police investigation.

The Offender

[10] Mr. Lange is 36 years of age. He has been in car sales most of his life. For the past four months he worked in sales for Jim Pattison Chev and Olds. His present manager has no concerns about his employee. He emphasizes the subject's personal integrity. The period 1994-1997, he was a volunteer with the Burnaby Mental Health Society, acting as Chairman of the Board between 1995 and 1997. Since 1989 he became involved in self development, earlier having a substance abuse problem.

[11] Regarding the offense, Mr. Lange advised the writer of the pre-sentence report,

"I have a large amount of remorse for not doing the necessary paperwork and causing unnecessary grief to my girlfriend, clients and court."

[12] In addition to being in a semi-permanent relationship with a young woman, his parents are highly supportive of him.

[13] In conclusion the report emphasizes that his hybridizing and plant productions methodology indicate research, planning and execution skill encompassing attention to detail. The writer concluded that Mr. Lange is an appropriate candidate for community supervision.

The Law and Medicinal Use of Marijuana

[14] The Parker decision, OCA, concluded that the discretion given to the Minister of Health to grant Sec.56 exemption for persons in need of marijuana for therapeutic purposes did not meet constitutional requirements.

[15] The response to the decision at the legislative level was to introduce a regulatory scheme for the use of marijuana for medicinal purposes, July 2001: See *R. v. Small*, paragraph 5.

"The Minister stated that a five-year contract has been issued to a Saskatoon company to establish "a Canadian source of quality, standardized, affordable, research-grade marijuana". Mr. Rock anticipated that the first quantity of marijuana would be available for distribution within one year of the contract award."

[16] The federal government recognizes society's interest in both the production and use of medicinal marijuana, however, the remedial legislation for granting exemptions has not provided the necessary medical relief to those in need, see *R. v. Lucas*, at paragraph 47:

"This case must be viewed in a broad context, in which to date, the combination of federal regulations and College of Physicians trepidation has made it extremely difficult for applicants to obtain

approval to use marijuana. Further, the federal government has so far been unable to ensure any legal supply of marijuana to those whom Health Canada thinks need it as a therapy. This is a particular hardship for those who cannot grow it."

Further at paragraph 34:

"It is clear that marijuana has both a recreational and medicinal use. This case has to do with medicinal use only, and ought not to be viewed as relevant to the debate over the legal proscription against the recreational use of marijuana. That issue will presumably be decided in *Malmo-Levine*. In the medicinal sense, the drug clearly has value, and this value probably outweighs the risks to the individual and the community. The government of Canada has recognized this by its unfulfilled attempts to make it available to patients with certain medical conditions."

[17] The legislative and judicial response to the medicinal use of marijuana underscores the principle that immediate access to the therapeutic use of marijuana cannot be under-estimated.

Decision

[18] Mr. Harris submits that Mr. Lange intends to make application for a licence to produce marijuana for designated persons. In order to be a successful candidate, the applicant, need be without conviction for a period of 10 years. His last conviction, cultivating marijuana, occurred in 1989. At the time of the seizure he was beginning the process to apply for an Exemption.

[19] Mr. Harris emphasizes that the growing operation was done for compassion and not greed, that the community has an interest in seeing that gravely ill persons are provided with relief. The court agrees with that submission. Further concludes from all of the evidence that this was not a typical commercial grow operation motivated by a desire for profit.

[20] In considering the principles set out in *R. v. Fallowfield*, I am satisfied that it is in the best interest of the Defendant that he should be discharged. I must now consider whether to grant a discharge would not be contrary to the public interest.

[21] His failure to comply with the federal regulations governing the growing of medicinal Marijuana for sale, although neglectful was an honest mistake in the reading of the text of the application. He was not aware of the fine print in the application that allowed him to apply for a license to be made ten years after conviction of a designated drug offense.

[22] Mr. Lange has demonstrated a sense of responsibility evidenced by his guilty plea. His reason for the production of Marijuana was solely motivated by compassion and a desire to ameliorate the pain suffered by others. This was not truly a "commercial enterprise" driven by greed, and profit. He operated to fill a void created by the legal framework as did Mr. Lucas (see *R. v. Lucas*). There is minimal or little risk to the public.

[23] There is nothing in the language of the *Criminal Code* or in the *Fallowfield* decision that operates to make a previous conviction an absolute bar to a discharge. Dispositions are dependent on the circumstances. Since 1987 he has lived an exemplary lifestyle. See *R. v. Bigg*, *R. v. Lucas*.

[24] The underlying principle in *R. v. Small*, BCCA is not dissimilar from the case at Bar. The Court was aware that although the Minister granted Certificates of Exemption permitting the use of marijuana, there was no legal source of supply: *R. v. Small*, see paragraph 6. The present legislative framework has failed to deliver on its intended

mandate. Persons with exemptions are encountering difficulty in obtaining impurity-free cannabis from growers, who may legally sell the drug.

[25] The British Columbia Court of Appeal in *R. v. Small* was aware of the potential for abuse of the exemption and Mr. Small's conviction for production of marijuana. The amount of product seized was in excess of what was found at Mr. Lange's residence. The Court ordered a conditional discharge.

[26] Although he did not have a system that provided accountability, he acted out of the same principles that motivated Mr. Lucas, to provide medicinal marijuana upon which the government has failed to deliver upon.

[27] This case has to do with the therapeutic use of marijuana for medicinal purposes, not the production of marijuana for commercial purposes, nor relevant to the debate surrounding the legalization or decriminalization of the drug. The cases set out in Reasons for Judgment by Mr. Justice Lysyk, *R. v. Dean*, are not applicable to the case at bar.

[28] I am satisfied that Mr. Lange is a man of good character, who acted out of principle. He is skilful in the production of medicinal marijuana. The public interest that encompasses the due administration of criminal justice would not be held in disrepute if a discharge was ordered. Mr. Lange, as well as others who use Marijuana for therapeutic purposes would benefit if no record was registered against him, for this offence. The submissions made in support of Mr. Lange's application for a discharge outweigh the aggravating factors.

[29] The Court orders a conditional discharge. A probation order to follow for 1 year. The fundamental principles of sentencing can be accommodated having Mr. Lange bound by the mandatory, statutory conditions in Sec. 732.1(2). There is no necessity to order any further restrictions.

[30] The Court orders Mr. Lange to keep the peace and be of good behaviour, to appear before the court when required, notify the court or his probation officer in advance of any change of name or address, and of any change of occupation or employment.

[31] He will be subject to a firearm prohibition for ten years pursuant to Section 109 of the *Criminal Code*.

[32] The following cases have been considered in this judgment:

- R. v. Small*, 152 CCC 3rd 412, BCCA
- R. v. Small*, March 10, 2000, BCPC 103360-01-T, Vancouver
- R. v. Small*, Supreme Court of British Columbia, CC991259
- R. v. Parker*, 2000 O.J. No. 2787
- R. v. Lucas*, 2002 BCPC 0268
- R. v. Fallowfield*, 1973, 13 C.C.C. 2nd 450
- R. v. Dean*, 2002 BCJ No. 1110
- R. v. Nyugen*, Ontario Court of Justice, June 3, 2002, Zare J.
- R. v. Bigg* [1994], B.C.J. No. 174, BCPC.



The Honourable Judge H. H. Field
Provincial Court of British Columbia