

CANADA / JUDGMENT

R. v. Adam et al

2007 BCSC 764

COURT

Supreme Court of British Columbia

DECIDED

31 May 2007

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2007 BCSC 764 R. v. Adam et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Adam et al,

2007 BCSC 764

Date: 20070531

Docket: X067362

Registry: New Westminster

Regina

Against

Wade Alex Adam, Sean William Doak, Robert Vaughn Hamm, Bryon John Newberry, Shane Jason Schindler, Thomas William Westle and Trevor Lee Ernest Zacharuk

Before: The Honourable Mr. Justice S.R. Romilly

REASONS FOR SENTENCE

Counsel for the Crown

Mandana Namazi

Leslie LeClair

Counsel for the Accused, Wade Alex Adam

John Conroy, Q.C.

Counsel for the Accused Sean William Doak

John Conroy, Q.C.

Counsel for the Accused, Robert Vaughn Hamm

Darcy P. Lawrence

Counsel for the Accused Bryon John Newberry

Kenneth R. Beatch

Counsel for the Accused, Trevor Lee Ernest Zacharuk

Kenneth R. Beatch

Date and Place of Hearing:

April 19-20 and May 28-31, 2007

New Westminster, B.C.

TABLE OF CONTENTS

Section

Paragraph(s)

A.

CHARGES BEFORE THE COURT

1 - 4

B.

BACKGROUND

5 - 17

C.

ROLES PLAYED BY EACH OF THE ACCUSED WHO WERE FOUND GUILTY OF THE CONSPIRACY

18 - 24

(i) The Role of Doak

18

(ii) The Role of Newberry

19

(iii) The Role of Adam

20

(iv) The Role of Zacharuk

21

(v) The Role of Hamm

22 - 23

D.

POSITION OF THE CROWN

25 - 46

(i) First Aggravating Factor

26

(ii) Second Aggravating Factor

27

(iii) Third Aggravating Factor

28 - 30

(iv) Fourth Aggravating Factor

31 - 35

(v) Fifth Aggravating Factor

36

(vi) Sixth Aggravating Factor

37 - 46

E.

POSITION OF THE ACCUSED DOAK

47 - 53

F.

POSITION OF THE ACCUSED NEWBERRY

54 - 56

G.

POSITION OF THE ACCUSED ADAM

57 - 60

H.

POSITION OF THE ACCUSED ZACHARUK

61 - 63

I.

POSITION OF THE ACCUSED HAMM

64 - 67

J.

THE LAW

68 - 81

(i) The Legislation

68 - 69

(ii) The Criminal Code Sentencing Provisions

70 - 73

(iii) Acceptable Range of Sentences for These Types of Offences

74 - 78

(iv) Departing from the Acceptable Range of Sentence

79

(v) Conclusion on the Issue of Acceptable Range of Sentence for These Types of Offences

80 - 81

K.

RELEVANCE OF DVD'S AND ARTICLES WHICH MR. CONROY SEEKS TO INTRODUCE ON THIS HEARING

82 - 92

(i) Meaning of Relevance

88 - 90

(ii) Exclusion of Relevant Evidence When Offered by Defence

91

(iii) Ruling on the Relevance of These Materials which Mr. Conroy Seeks to Introduce on this Sentence Hearing

92

L.

SENTENCING PRECEDENTS

93 - 101

M.

AGGRAVATING FACTORS

102 - 109

(i) Criminal Record of Newberry

105 - 109

N.

MITIGATING FACTORS

110 - 111

O.

LETTERS IN SUPPORT OF THE ACCUSED

112 - 119

(i) Letters in Support of Doak

115

(ii) The Law Surrounding Evidence of Untried Offences at a Sentence Hearing

116

(iii) Analysis and Decision with Respect to the Letters of Support of Doak

117 - 119

P.

ADDRESSING THE SENTENCING OBJECTIVES IN SECTIONS 718, 718.1 AND 718.2 OF THE CRIMINAL CODE

120 - 128

Q.

CONCLUSION

129 - 133

R.

PRE-SENTENCE CUSTODY

134 - 136

S.

VICTIM FINE SURCHARGE

137

T.

WEAPON PROHIBITION

138 - 139

A. CHARGES BEFORE THE COURT

[1] The accused are charged with two counts of conspiracy:

Count 1

Shane Jason SCHINDLER, Thomas William WESTLE, Sean William DOAK, Trevor Lee Ernest ZACHARUK, Byron John NEWBERRY also known as Bryon John NEWBERRY, Robert Vaughn HAMM and Wade Alex ADAM, between the 1st day of September, 2000 and the 17th day of July, 2001, at or near the City of Chilliwack, at or near the City of Coquitlam and at or near the Town of Princeton, all in the Province of British Columbia, and at any other place or places in the Province of British Columbia, and at or near the City of Seattle, in the State of Washington, and at or near the City of Medford, in the State of Oregon, and at or near Klamath Falls, in the State of Oregon, all in the United States of America, and at any other place or places in the United States of America, did unlawfully conspire the one with the other or others of them and with Judson Edward BAKER, Evgeniy Stefanov YORDANOV, Michael James STRAUMIETIS, also known as Thomas Scott NEWMAN, Robert Charles HIGGINS, Norman Maxwell SINCLAIR, Andrew John IVANY, Christopher Patrick WASILEWICZ, Gerard Majella MORIN, John Fredrick LEGREE, Paul Ramo FABRIS, Thomas Perry RUDDER and Edward Terrance RICHARDS and with a person or persons unknown, to export from Canada a controlled substance, to wit: Cannabis (marihuana), contrary to Section 6(1) of the Controlled Drugs and Substances Act, and did thereby commit an offence contrary to Section 465(1)(c) of the Criminal Code.

Count 2

Shane Jason SCHINDLER, Thomas William WESTLE, Sean William DOAK, Trevor Lee Ernest ZACHARUK, Byron John NEWBERRY also known as Bryon John NEWBERRY, Robert Vaughn HAMM and Wade Alex ADAM, between the 1st day of September, 2000 and the 17th day of July, 2001, at or near the City of Chilliwack, and at or near the City of Coquitlam, and at or near the Town of Princeton, all in the Province of British Columbia, and at any other place or places in the

Province of British Columbia, and at or near the City of Seattle, in the State of Washington, and at or near the City of Medford, in the State of Oregon, and at or near Klamath Falls, in the State of Oregon, all in the United States of America, and at any other place or places in the United States of America, did unlawfully conspire the one with the other or others of them and with Judson Edward BAKER, Evgeniy Stefanov YORDANOV, Michael James STRAUMIETIS, also known as Thomas Scott NEWMAN, Robert Charles HIGGINS, Norman Maxwell SINCLAIR, Andrew John IVANY, Christopher Patrick WASILEWICZ, Gerard Majella MORIN, John Fredrick LEGREE, Paul Ramo FABRIS, Thomas Perry RUDDER and Edward Terrance RICHARDS and a person or persons unknown to traffic in a controlled substance, to wit: Cannabis (marihuana), contrary to Section 5(1) of the Controlled Drugs and Substances Act, and did thereby commit an offence contrary to Section 465(1)(c) of the Criminal Code.

- [2] After a trial that lasted almost one year, the following accused were found guilty as charged: Wade Alex Adam ("Adam"), Sean William Doak ("Doak"), Robert Vaughn Hamm ("Hamm"), Bryon John Newberry ("Newberry") and Trevor Lee Ernest Zacharuk ("Zacharuk"). The reasons for judgment were reported in R. v. Adam, 2007 BCSC 126.
- [3] Having decided to enter a conviction against these accused on Count 1 in the indictment, the exportation of marihuana charge, I now have the task of dealing with the sentences that should be imposed on these accused.
- [4] For the reasons stated below, I impose the following sentences:
- (1) Doak is sentenced to a period of seven years' imprisonment. In addition there will be a forfeiture order as outlined at the end of these reasons.
 - (2) Newberry is sentenced to a period of five years' imprisonment. In addition there will be a forfeiture order as outlined at the end of these reasons.
 - (3) Hamm is sentenced to a period of three and one-half years' imprisonment.
 - (4) Adam is sentenced to a period of three and one-half years' imprisonment.
 - (5) Zacharuk is sentenced to a period of three and one-half years' imprisonment. In addition there will be a forfeiture order as outlined at the end of these reasons.

B. BACKGROUND

- [5] During the period alleged in the indictment those parties who were found guilty were involved in a massive conspiracy to transport tons of marihuana from British Columbia into the United States of America. The proceeds of these sales of marihuana in the United States were then brought back into Canada.
- [6] According to the evidence adduced at trial, the operation headed by Doak was huge. Evidence at trial indicated that these accused used various means to smuggle marihuana into the United States and bring the proceeds of the sales back into Canada. The modes of transportation for the marihuana included fixed wing aircraft, helicopters, semi-trailers and

by foot. Frederick Legree ("Legree"), Paul Ramos Fabris ("Fabris") and Hamm received the marihuana from Canada. Legree and Fabris kept the marihuana in warehouses and lockers in the United States for distribution to various Doak customers in the United States.

- [7] Tens of millions of dollars were realized by the conspirators in this illegal enterprise. The semi-trailer part of the operation alone involved 13 trips to the United States with each truckload consisting of between 300 and 600 pounds of marihuana fetching a price, according to the evidence, of \$2,500.00 (U.S.) per pound. According to the evidence, there were other truckloads that were sent from Canada to the United States with a driver by the name of Paul, but his contract with the Doak organization was terminated when he demanded too much money for his services. The truck phase of the operation alone, realized approximately \$10,000,000.00 (U.S.). At that time the U.S. dollar was up to 40% higher than the Canadian dollar.
- [8] There were two successful fixed wing trips undertaken by Edward Terrance Richards ("Richards"). A third trip was disrupted by the R.C.M.P. in Princeton, British Columbia. Each of the two successful trips carried 150 pounds of marihuana into the United States. That operation accounted for approximately \$1,000,000.00 worth of revenue to the Doak organization.
- [9] According to the evidence at trial, the helicopter phase of the operation took place from September to January 2001, a period of approximately 16 weeks. According to the evidence, the helicopters made two or three trips a day, sometimes two or three times a week with each load containing approximately 100 pounds of marihuana. The Crown estimates that the revenues from that mode of transportation realized \$36,000,000.00 (U.S.).
- [10] According to the evidence, there were eight "walks across", with four persons each carrying a hockey bag with 50 pounds of marihuana each time. According to Crown counsel, from this operation the Doak organization realized approximately \$4,000,000.00.
- [11] On June 12, 2001, Legree was arrested in the United States on his way back to Canada. On his arrest he was found to be in possession of approximately \$240,365.00 (U.S.). Fabris was arrested on the same day as he was leaving a locker in which marihuana was stored for distribution in the United States. The police found a key to a storage locker located at the facility in Fabris' possession. Upon opening the locker, officers found:
1. Approximately 23 pounds (10 kilograms) of British Columbia marihuana;
 2. A fully loaded Smith & Wesson 9mm semi-automatic pistol;
 3. Four boxes of 9mm ammunition;
 4. Several maps of the Skagit and Whatcom County areas and other items.
- [12] Fabris and Legree were arrested for drug conspiracy in the United States. They entered into a plea agreement in the United States whereby they would receive lower sentences in return for their agreeing to provide information to the American authorities and to testify against

the co-accused. Because of their co-operation with the American authorities, they were sentenced to 45 months in jail for the conspiracy offences. As part of the agreement, they were allowed to serve part of that sentence in Canada. In addition to this sentence, both Legree and Fabris were sentenced to nine months' imprisonment for contempt when they refused to testify at this trial.

- [13] One of the co-conspirators, Richards, was the pilot of the fixed winged aircraft that was used to transport marihuana from Canada to the United States for Doak's organization. This phase of the operation began in February 2001. On February 15 and 16, 2001, Legree and Fabris met with the aircraft piloted by Richards in or near Sekiu, Washington. Legree and Fabris received four or five bags of marihuana, and provided money to Richards to be transported to Canada. Fabris also provided guns to Richards to be transported to Canada.
- [14] On February 23, 2001, Richards was arrested as he was about to take another load of marihuana across the border into the United States of America. He was charged with possession for the purpose of trafficking with respect to the five bags (149 pounds) of marihuana that was found on his plane. He was not charged with conspiracy to export marihuana, which is the charge before this court. Richards pled guilty to the charge of possession for the purpose of trafficking and was sentenced to two years in jail and placed on probation for one year. Crown counsel submits that the role of Richards was akin to that of a courier.
- [15] Shane Jason Schindler ("Schindler") provided advice and encouragement to Doak, acted as a reference and referred suppliers and customers to Doak. At the outset of the trial he pled guilty to one of the counts in the indictment, conspiracy to traffic, and was sentenced to three years in the penitentiary. In his submissions at the sentence hearing, Schindler's counsel stated exactly why his client was pleading guilty to conspiracy to traffic and not to conspiracy to export.
- [16] Crown counsel submitted that this is the largest conspiracy of its kind ever brought before the courts in British Columbia, and the largest group ever convicted for this type of activity in British Columbia.
- [17] Suffice it to say that in my final judgment I outlined the role played by each of the persons that were found guilty.

C. ROLES PLAYED BY EACH OF THE ACCUSED WHO WERE FOUND GUILTY OF THE CONSPIRACY

(i) The Role of Doak

- [18] It was established from the evidence adduced at trial that Doak was the leader of the organization. He was responsible for, and in control of, the day-to-day activities of the group. Doak directed subordinates in many respects, including in relation to which quantities and qualities of marihuana were to go to which customer in the United States, obtaining marihuana supply, securing funding for the enterprise, and organizing and paying for

modes of transport. From the evidence adduced at the trial it is evident that Doak made approximately 100 calls a day all dealing with this enterprise.

(ii) The Role of Newberry

- [19] From the evidence adduced at trial, I found that Newberry was a partner in Doak's organization. Newberry assisted in arranging personnel and marihuana shipments. Newberry was the person responsible for the recruitment and management of Legree and Thomas William Westle. Newberry was responsible for organizing and controlling the semi-trailer transport into the United States.

(iii) The Role of Adam

- [20] From the evidence adduced at trial, I found that Adam was the production manager for the Doak conspiracy. Apart from Doak, Adam was the one accused who knew all the other participants in the conspiracy. He was responsible for purchasing, packaging, and arranging for transport of the marihuana to the United States. When problems surfaced in the United States regarding the delivery of product to the American customers, it was Adam's responsibility to sort this out. Adam also participated in the marihuana exportation by walking marihuana across the border in large hockey bags into remote locations of Washington State.

(iv) The Role of Zacharuk

- [21] Zacharuk assisted in several ways with the transport of marihuana destined for the United States. He was responsible for the following tasks: the collection of the marihuana from suppliers; the packaging and marking of the marihuana in accordance with the customers to whom it would be delivered; and the delivery of the marihuana to the various modes of export. During the walk across phase, Zacharuk transported the marihuana inside hockey bags from Canada into remote locations of Washington State.

(v) The Role of Hamm

- [22] Hamm is a Canadian who operated a trafficking network in the United States where he received marihuana from Doak and delivered that marihuana to his and Doak's customers in the United States. Hamm was Doak's primary customer over the course of the entire conspiracy and he was aware of, and in contact with, various members of the conspiracy throughout.
- [23] Hamm's involvement was as more than a customer simply agreeing to the purchase of marihuana on one or two occasions. Hamm participated in ensuring that the common design to which he was a party was successful. At various times throughout the conspiracy, Hamm offered the services of his employees in the transport of Doak's money and marihuana, and permitted Legree to use one of his homes in the United States to assemble and distribute marihuana to other customers. It is apparent that Hamm and Doak had a mutually beneficial relationship.

[24] Having dealt with the roles played by each of the accused who were found guilty, I now turn to the position of the Crown and the accused with respect to sentence.

D. POSITION OF THE CROWN

[25] Crown counsel submits that this case is unique in many respects and that reference to case law is of limited assistance in determining what should be an adequate sentence for these offenders. Crown counsel submits that the following were aggravating factors in the case at bar.

(i) First Aggravating Factor

[26] The Crown maintains that the most significant aspect of this matter is that this group of accused stand apart from other groups convicted of similar offences in British Columbia. This organization was at the upper echelon of operations.

(ii) Second Aggravating Factor

[27] The second aggravating factor is the cross-border aspect of the conspiracy.

(iii) Third Aggravating Factor

[28] This conspiracy was of the highest level of sophistication. The conspirators and co-conspirators used coded language. They had code names; they used phone cards to try to avoid detection; they used mike clear net phones for which, at the time, the police did not have the technology to intercept calls; they had GPS systems to be able to use remote locations for helicopter landings.

[29] There were dozens and dozens of persons on either side of the border working with this organization. Because of the size of the organization they were able to change the modes of transportation with relative ease when they perceived a problem or had a concern. The organization had well-placed connections. There is evidence throughout of almost unending resources and they had an incredible ability to carry on with their illegal enterprises despite the challenges that they faced.

[30] Notwithstanding the letters of support that were filed, I am satisfied that this was not a circumstance that the accused simply fell into; there was too much deliberation and planning by these accused for that to be the case. Nor were their dealings in this conspiracy a "mistake". The calls that were intercepted show that the accused were very much aware of the risks and dangers which they faced. The accused simply used their vast resources and their sophistication to overcome the hurdles that they faced.

(iv) Fourth Aggravating Factor

[31] Many persons were involved in the operation in both Canada and in the United States. In the course of the conspiracy, several other offences or criminal acts were committed on both sides of the border.

- [32] As was pointed out by the expert witness, an organization involved in the exportation of marihuana would have to obtain its supply of marihuana from either one or several grow operations. Evidence at this trial showed the conspiracy's involvement in many of those grow operations. The evidence seized at Zacharuk's residence on July 16, 2001 shows a large number of grow operation supplies, various pay sheets for employees and lists consistent with the Doak organization being involved in the production of the marihuana that it was using for export.
- [33] A gun was carried by Fabris for protection during his duties for the Doak organization. On his arrest the police found a key to a storage locker located in Fabris' possession. Upon opening the locker, officers found a fully loaded Smith & Wesson 9 mm semi-automatic pistol and four boxes of 9mm ammunition. Then there is evidence that on February 14, 2001, Richards returned to Canada with an unknown amount of cash and a number of handguns which had been given to him by Fabris for transport to Canada.
- [34] There is also call 117 where Doak is speaking to someone called Kevin in the United States. In this call Doak is trying to find out where Stahl, one of his customers, was. Initially Doak speaks to Kevin and then he gets the "enforcer" to speak to him. In an obviously threatening tone the "enforcer" tells Kevin that "he better talk to his priest". This call demonstrates some of the organized crime aspects to this conspiracy.
- [35] Under this heading the Crown points out that the conspiracy involved the setting up and retrieving of marihuana product from various grow operations. Crown counsel submits that that is an aggravating factor with respect to all of the accused.
- (v) Fifth Aggravating Factor
- [36] According to Crown counsel, the fifth aggravating factor is the long-term aspect of these offences. Crown counsel submits that there are many calls that demonstrate this. In call 71, for example, Doak speaks of having one of these accounts for three years when discussing problems they were having with the account. There is also the contents of call 90 where Doak tells Newberry about taking "hit after hit after hit". Despite all of these "hits" he still has the motivation to continue with this illegal enterprise.
- (vi) Sixth Aggravating Factor
- [37] According to Crown counsel, the sixth aggravating factor is the greed motivation and the amount realized by the organization in terms of revenue. Crown counsel drew my attention to the heated conversation between Newberry and Doak in call 78 where Doak accused Newberry of doing business behind his (Doak's) back.

- [38] Under this heading, Crown counsel also drew my attention to call 114 between Doak and Hamm where Doak tells Hamm that he is desperate for money to buy more marihuana for export to the United States of America. Crown counsel also drew my attention to call 124 between Doak and Legree, where Doak is trying to figure out other persons that they could get involved in the organization. He wants to source out tasks to other persons to aid their criminal enterprise.
- [39] Crown counsel also drew my attention to call 140, which took place between Doak and Newberry on June 12, 2001, the date of the arrest of Legree and Fabris in the United States of America. In that call Doak indicates that he is still motivated to try to find new ways to continue the illegal enterprise.
- [40] Crown counsel submits that the two year sentence imposed on Richards is the bottom floor for the sentence that should be imposed. In making that submission they stress that Richards only pled guilty to one count of possession for the purpose of trafficking involving the plane load of marihuana that was found in his possession.
- [41] With respect to the sentence imposed on Schindler, Crown counsel pointed out that Schindler pled guilty to conspiracy to traffic and not conspiracy to export. They point out that Schindler's involvement in the conspiracy was minor. They point out that he was not involved in the different modes of transport. They point out that Schindler's involvement was as a friend of Doak: he provided some financing and some supplies of marihuana. Crown counsel also pointed out that in addition to the three year sentence imposed on Schindler there was a very significant forfeiture order made against him. This included forfeiture of \$74,000.00 cash, \$10,000.00 (U.S.) cash, an Ultra Lite airplane, a power boat valued at \$52,000.00 and two Harley Davidson motorcycles.
- [42] Crown counsel submits that the guilty plea by Schindler and Richards was a significant mitigating factor in the sentence that was eventually imposed on them. They drew my attention to *R. v. Hoang*, [2002] O.J. No. 1355 (Sup. Ct.) (QL), where Hill, J. wrote at para. 110:

110 The guilty plea on the part of each accused, although not tendered until two years after arrest, is nevertheless a substantial mitigating factor. In *Regina v. Holder*, (1998), 21 C.R. (5th) 277 (Ont. S.C.J.) at 281-2, I observed:

A plea of guilt is generally acknowledged to be a mitigating factor in sentencing: Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (the Martin Committee Report) (August, 1993) at page 310; *Regina v. Beier*, [1995] O.J. No. 2552 (C.A.) at para. 2 per curiam; *Regina v. Sawchyn* (1981), 60 C.C.C. (2d) 200 (Alta. C.A.) at 210 per Laycraft J.A. (as he then was) (leave to appeal to S.C.C. refused (1982) 39 N.R. 617n); *Guilty Pleas*, J. Watson, (1990-91), 33 C.L.Q. 163 at 198.

The effect of a guilty plea in setting the appropriate sentence will vary with the circumstances of each case: *Regina v. Faulds et al.* (1994), 20 O.R. (3d) 13 (C.A.) at 17 per curiam. A plea of guilt, a confession of wrongdoing, may evidence remorse and public acceptance of responsibility for the criminal wrong-doing: *Regina v. Finnis* (1978), 3 C.R. (3d) S-54 (Ont. C.A.) at 54 per Martin J.A.; Martin Committee Report, *supra* at 310. In these circumstances, the prospects for rehabilitation are enhanced.

An early guilty plea is deserving of considerable weight in sentencing disposition: *Regina v. Patterson*, [1998] O.J. No. 937 (C.A.) at para. 1 per curiam; *Regina v. Pitkeathly* (1994), 29 C.R. (4th) 182 (Ont. C.A.) at 184-5 per curiam; *Regina v. T.(R.)* (1992), 17 C.R. (4th) 247 (Ont. C.A.) at 263 per Doherty J.A.; Martin Committee Report, *supra* at pages 310-311; *Regina v. Wijs et al.*, [1998] 2 Cr. App. R. 436 (C.A.) at 439 per Lord Bingham C.J.

A plea of guilt results in a saving of public cost and expense: *Regina v. Johnson and Tremayne*, [1970] 4 C.C.C. 64 (Ont. C.A.) at 67 per Gale C.J.O. Even in those instances where a guilty plea is simply a recognition of the inevitable, the plea brings finality, spares judicial resources, and reduces the trauma and inconvenience to victims and witnesses: *Regina v. Faulds et al.*, *supra* at 17; *Regina v. Santos (J.)* (1993), 67 O.A.C. 270 (C.A.) at 270-271 per curiam. Indeed, a plea of guilt, entered during a trial itself, may be deserving of mitigation of sentence: *Regina v. Garofoli et al.* (1988), 41 C.C.C. (3d) 97 (Ont. C.A.) at 153 per Martin J.A. (affirmed on other bases (1991), 60 C.C.C. (3d) 161 (S.C.C.)).

- [43] Crown counsel submits that the guilty pleas and cooperation of Legree and Fabris were significant mitigating factors in the sentence that they received.
- [44] Crown counsel submits that the kingpin of the organization, Doak, should be sentenced to twelve years' imprisonment. In addition they submit that I should order a fine in lieu of forfeiture against Doak. They submit that a sentence of ten years should be imposed on the accused, Newberry. They submit that a sentence of six years should be imposed on Hamm. They further submit that a sentence of five years should be imposed against Adam and a sentence of four years against Zacharuk.
- [45] The Crown draws my attention to fact that the co-accused, Schindler, who pled guilty to conspiracy to traffic at the outset of this trial, was sentenced to three years' imprisonment for that offence.
- [46] In support of their submissions on this hearing the Crown also drew my attention to the following decisions: *R. v. Larche*, 2006 SCC 56, [2006] 2 S.C.R. 762; *R. c. Larche* (2004), 21 C.R. (6th) 250 (Que. C.A.); *R. v. Newall* (1988), 46 C.C.C. (3d) 253 (B.C.C.A.); *R. v. Newman* (1993), 12 O.R. (3d) 481 (C.A.); *R. v. Saulnier* (1987), 21 B.C.L.R. (2d) 232 (C.A.); *R. v. Blomert* (1993), 79 C.C.C. (3d) 541 (P.E.I. S.C. (App.Div.)); *R. v. Devanney* (1993), 126 N.S.R. (2d) 362 (C.A.); *R. v. Wiggins*, [1990] B.C.J. No. 2526 (C.A.) (QL); *R. v. Guilbride*; *R. v. Thomson*, 2006 BCCA 392, 230 B.C.A.C. 128; *R. v. Readhead*, 2006 BCSC 1566; *R. v. Koenders*, 2006 BCSC 1045; *R. v. Sandhu*, 2003 BCSC 2033; and *R. v. Oliynyk*, 2006 BCSC 572.

E. POSITION OF THE ACCUSED DOAK

- [47] The accused, Doak, is a 33-year-old married man with a dependent wife and child, with no prior convictions. At this hearing, counsel for Doak filed 45 letters of support, including letters stating that he is now going to Alcoholics Anonymous. Rather than try to summarize this volume of letters, I have filed the entire book of letters as an exhibit on this sentence hearing.
- [48] Counsel for Doak submits that for these offences he should be sentenced to a conditional sentence of two years and placed on further probation for a period of three years. Counsel submits that I should consider the fact that Doak has already spent approximately six years under bail supervision. Counsel submits that Doak has had a good rapport with his bail supervisor and that it is obvious that his reformation and rehabilitation is well on its way.
- [49] In his submissions in support of Doak and Adam, Mr. Conroy seemed to re-argue some of the submissions he made in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571. Other authorities brought to my attention by Mr. Conroy include: Cannabis: Our Position for a Canadian Public Policy, Summary Report and Chapter 12, The National Legislative Context (Ottawa: Report of the Senate Special Committee on Illegal Drugs, September 2002); SES Research Inc. poll, October 26th - November 1st, 2004; David Nutt et al., "Development of a rational scale to assess the harm of drugs of potential misuse", (2007) 369 Lancet 1047-1053; Comparing the Perceived Seriousness and Actual Costs of Substance Abuse in Canada, Canadian Centre on Substance Abuse (March 2007); Lynn Zimmer and John P. Morgan, Marijuana Myths, Marijuana Facts: a Review of the Scientific Evidence, (New York: The Lindesmith Centre, 1997); United States, National Drug Intelligence Centre, National Drug Threat Assessment 2005, (2005); a video entitled, "Damage Done: the Drug War Odyssey"; a video entitled, "Waiting to Inhale: Marijuana, Medicine and the Law"; *R. v. Desjardins*, 2006 BCPC 441; *R. v. Hill*, 2005 BCSC 975; *R. v. Malmo- Levine*; *R. v. Caine*, 2000 BCCA 335, 145 C.C.C. (3d) 225, aff'd 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Q.A.M.*, 2005 BCCA 615, 204 C.C.C. (3d) 114; *R. v. Schedel*, 2003 BCCA 364, 175 C.C.C. (3d) 193; *R. v. Smith*, 2006 SKQB 137, [2006] 9 W.W.R. 317; and *R. v. Guilbride*; *R. v. Thomson*.
- [50] In support of his position on sentencing, counsel has also led evidence from a few witnesses, filed a letter from the Neuropsychology Service of the University of Alberta Hospital and further letters from Harparkash Bains and Hardev Randhawa, a director and counsellor of the Pathway to Freedom Addiction Treatment Center.
- [51] Mr. Randhawa confirmed that Doak had checked into their facility for drug and alcohol counselling. Mr. Randhawa testified that Doak checked in on April 27, 2007, and that he has been at that facility for the past 30 days. Mr. Randhawa testified that Doak told them that he was addicted to alcohol, cocaine, heroin and marihuana. Both Mr. Randhawa and his associate, Mr. Finnamore, describe Doak's prospects for rehabilitation as being very good. They submit that he may not be able to avail himself of such a facility in jail. Under cross-examination, both Mr. Randhawa and Mr. Finnamore testified that they had no way of

testing Doak to see if he was really addicted. They simply took his word that he was addicted to the substances to which he said he was addicted.

- [52] Mr. Conroy submits that the sentence imposed on Doak or Adam should not be higher than the sentence imposed on the co-accused, Schindler. He submits that Schindler was one of the leaders of the conspiracy and that he committed other offences while on bail. Mr Conroy also submits that the fact that Doak and Adam did not plead guilty should not be held against them because he acknowledged that they only went through the motions after I ruled on the admissibility of the wiretap authorizations. Mr. Conroy stated that he had to continue with the trial in order to preserve his right of appeal on behalf of Doak and Adam. Mr. Conroy also submitted that I should not consider the sentences imposed on Legree and Fabris in the United States when considering parity of sentencing because those sentences were imposed in another country.
- [53] After reviewing various cases with the court, Mr. Conroy submitted that the range of sentences for exporting this large amount of marihuana is two to four years and that the range for importing this large amount is two to six years.

F. POSITION OF THE ACCUSED NEWBERRY

- [54] Newberry is 52 years old with no previous Canadian criminal record. He claims that these charges and the negative media publicity have had an adverse effect on his real estate enterprises. In his probation report the probation officer writes, "Byron Newberry is a charismatic, hard working individual. He got involved in an illegal venture, lured simply by the notion of "easy money". He now regrets that decision and certainly the consequences that have come with it."
- [55] Counsel for Newberry submits that the range of sentence for the role played by Newberry should be between fifteen months and four years. He submits that Newberry should be sentenced to a conditional sentence. He submits that Newberry's role was no greater than that of Schindler who was sentenced to three years' imprisonment after a guilty plea to conspiracy to traffic in marihuana.
- [56] As I have mentioned, Newberry is 52 years old, divorced, with two children. Mr. Beatch, his counsel, submits that there is no need to impose a deterrent sentence on Newberry.

G. POSITION OF THE ACCUSED ADAM

- [57] The accused, Adam, is a 33-year-old father of three children. Although he is separated from his children's mother, he pays her regular support payments for them. According to his counsel, Adam left home at the age of 14 and is now a commercial helicopter pilot. His boss, Todd Tomecek speaks highly of him. He has no prior record.

- [58] Counsel for Adam points out that he has been out on bail on these charges since 2001. Since that time he has worked diligently to improve his skills as a helicopter pilot. He has had no involvement with violence or hard drugs. He has always paid his taxes and has no outstanding taxes.
- [59] Counsel for Adam submits that he has been rehabilitated and that to send him to jail would reverse his efforts at rehabilitation. Counsel submits that he should be sentenced to a conditional sentence of two years with a further three-year probation period.
- [60] In support of his submission counsel has filed various letters in support of Adam.

H. POSITION OF THE ACCUSED ZACHARUK

- [61] Zacharuk is 31 years old, he has two children aged three and five who live with their mother but he pays support payments for them in the sum of \$300 per month. In his pre-sentence report, the probation officer wrote:

Trevor's association with family members in the Chilliwack area along with his zest for money led to the beginning of his involvement in the drug trade and the subsequent connections and contacts affiliated with such. Initially using his framing experience to help build grow rooms, Trevor was soon promoted to higher roles within the organization as trust developed. Eventually he states that he "got caught up in the lifestyle of big money, lots of action and an ever increasing use of drugs".

Trevor appears to have developed some insight into the ways he must change in order to bring some meaning and direction to his life. He suggested that his arrest was, in hindsight, a positive occurrence as he knows the longer he had continued in that lifestyle and the associations that came with it would have hindered the chance of him ever leading a normal life.

In discussions with Trevor he understands that the charge before the Court is very serious as will be the consequence[s]. He is also of the understanding that a sentence may involve a period of incarceration in a Federal Penitentiary and has expressed that this is his wish and he is prepared for such. Trevor is of the opinion that the likelihood of addressing his addiction issues on his own would be minimal and his only real chance to enact a lifestyle change would be [an] extended period where he is forced to accept counselling and monitoring.

- [62] Mr. Beatch, on behalf of Zacharuk, submits that the range of sentence for the role played by Zacharuk should be between fifteen months and four years. He submits that Zacharuk was just a foot soldier. He was given orders and he carried them out. He collected, he packaged, he delivered. He was not responsible for planning or goal-setting. Mr. Beatch submits that Zacharuk's role was closer to that of Richards.
- [63] Zacharuk admits that he needs the controlled setting of jail in order to deal with his addiction to cocaine.

I. POSITION OF THE ACCUSED HAMM

- [64] Counsel for Hamm drew my attention to the affidavit which he swore in support of the prejudice he suffered because of the delay in proceeding with this trial on an expeditious basis. In that affidavit he had pointed out that he was a pastor and that he was the valedictorian in Bible College.
- [65] Counsel drew my attention to the fact that Hamm became addicted to various drugs and that it was because of this addiction that he got involved in these offences. Counsel submits that the various letters filed on behalf of Hamm speak eloquently about his remorse for having committed these offences. Various members of the community have also indicated a willingness to support Hamm when he is released from jail. Hamm also wrote a letter to the court stating what he wishes to do with his life after he is released from jail.
- [66] Counsel for Hamm submitted that I do not need to consider specific deterrence for Hamm. He submits that he is already deterred. Counsel drew my attention to the history of Hamm's short stint in jail as a result of these offences. Counsel advises me that shortly after his bail was revoked, Hamm was viciously assaulted in the prison yard. The assault was so vicious that he was unable to eat or drink properly for ten days. This more than anything has made him resolve that he will never do anything again that would cause him to go back to jail.
- [67] Counsel has drawn my attention to the fact that since his incarceration, Hamm has been placed by prison officials into the highly coveted Work Block. He has been able to mentor inmates and help them with their applications for legal aid and so forth. I have been advised that the prison authorities have been so impressed with him that he has been given a private room to help other inmates with their various applications. Counsel submits that Hamm should be given a conditional sentence of nine to fifteen months, with double credit for time served and with a probation order. Counsel submits that the appropriate range of sentence for this accused, for this offence, is eighteen months to two years less a day.

J. THE LAW

(i) The Legislation

[68] Section 6 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, states:

6.(1) Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV,V, or VI.

.

(3) Every person who contravenes subsection (1) or (2)

(a) where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life.

[69] Marihuana is a Schedule II drug.

(ii) The Criminal Code Sentencing Provisions

- [70] Section 718 of the Criminal Code states that the fundamental purpose of sentencing "is to contribute ... to respect for the law and the maintenance of a just, peaceful, and safe society." This is to be achieved by imposing sentences which have, among others, the following objectives:
- Separating offenders from society, where necessary;
 - Denouncing unlawful conduct;
 - General deterrence;
 - Rehabilitation; and
 - Promoting a "sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community."
- [71] Section 718.2(d) states that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and s. 718.2(e) states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." Section 718.2(b) indicates that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."
- [72] Finally, s. 718.1 of the Criminal Code states that any sentence imposed must be proportionate to "the gravity of the offence and the degree of responsibility of the offender." This is the fundamental principle of sentencing in Canada.
- [73] The primary principle of sentencing that must be applied in all cases of trafficking in illegal substances must be protection of the public through emphasis on general deterrence. These types of offences are driven by greed. They are considered and planned offences in which the risk involved is weighed against the potential financial gain. As can be seen from the circumstances of this case, those gains can be considerable. Thus, these offences are the types of offences in which general deterrence can work. Simply put, if general deterrence is going to have a chance of being successful, offenders such as these must be certain that significant periods of imprisonment will be imposed for exporting offences.

(iii) Acceptable Range of Sentences for These Types of Offences

- [74] Defence counsel in their eloquent submissions suggested an acceptable range of sentences for these types of offences. I am not convinced that the ranges suggested by them were indeed the acceptable ranges for offences of this type; nevertheless it may be wise for me to articulate my understanding of the law as it applies to an "acceptable range" of sentences.

[75] In *R. v. Shropshire*, [1995] 4 S.C.R. 227 at para. 50, the Supreme Court of Canada adopted the concept of "acceptable range" in relation to similar crimes committed by similar offenders under similar circumstances. In doing so, they adopted the wording of the Nova Scotia Court of Appeal in *R. v. Muise* (1994), 94 C.C.C. (3d) 119 (N.S.C.A.).

[76] In *R. v. Stone*, [1999] 2 S.C.R. 290, Bastarache J. spoke of the role of appellate courts in balancing the need for deference to sentencing courts and the need to minimize disparity in sentences. He said at para. 244:

One function of appellate courts is to minimize disparity of sentences in cases involving similar offences and similar offenders; see *M.(C.A.)*, [[1996] 1 S.C.R. 500] at para. 92, and *McDonnell*, [[1997] 1 S.C.R. 948] at para. 16, per Sopinka J. In carrying out this function, appellate courts may fix ranges for particular categories of offences as guidelines for lower courts. However, in attempting to achieve uniformity, appellate courts must not interfere with sentencing judges' duty to consider all relevant circumstances in sentencing; see *McDonnell*, *supra*, at para. 43, per Sopinka J.; and at para. 66, per McLachlin J. In *Archibald* [(1992), 15 B.C.A.C. 301], McEachern C.J. clearly stated, at p. 304, that it would be wrong to assume that there is any "precise range that will apply to every case". In my opinion, this qualification reveals that the Court of Appeal in *Archibald* correctly intended for trial judges to balance uniformity in sentencing with their duty to consider the circumstances of the particular case.

[77] In *R. v. Bernier*, 2003 BCCA 134, 179 B.C.A.C. 218, a five person court sat because of the apparent conflict of the sentences imposed for "home invasion" in *R. v. D.A.W.*, 2002 BCCA 336, 165 C.C.C. (3d) 535, in which the court upheld a sentence of ten years and *R. v. N.P.D.*, 2002 BCCA 304, 172 B.C.A.C. 1, in which an effective sentence of five and one-half years was imposed. In considering the issue of ranges of sentences for various offences, Newbury J.A. noted, at para. 105 that "they are general guidelines, not hard and fast categories. They do not preclude lesser or greater sentences, if the circumstances or applicable principles in the particular case warrant."

[78] Sentencing "ranges" are useful in promoting the "parity" principle because they provide guidelines to trial judges for the imposition of similar penalties for similar offences of a similar nature involving similar offenders: see *R. v. McDonnell*, [1997] 1 S.C.R. 948; and *R. v. Stone*. As Finch C.J.B.C. pointed out in *R. v. A.J.C.*, 2004 BCCA 268, 186 C.C.C. (3d) 227 at para. 36, relying on *R. v. Bernier*, they are nothing more than guidelines and are certainly not conclusive of the appropriate sentence in any given case. Each sentencing must be conducted as an individualized exercise. This point was underscored by Moldaver J.A. in *R. v. D. (D.)* (2002), 58 O.R. (3d) 788 (C.A.) at para. 33:

Before going any further, I wish to emphasize that the ranges which I have identified are not meant to be fixed and inflexible. On the contrary, sentencing is not an exact science and trial judges must retain the flexibility needed to do justice in individual cases. The suggested ranges are merely guidelines designed to assist trial judges in their difficult task of fashioning fit and just sentences in similar cases.

(iv) Departing from the Acceptable Range of Sentence

[79] In *R. v. Shahnawaz* (2000), 51 O.R. (3d) 29 (C.A.), leave to appeal to the Supreme Court of Canada refused, [2001] S.C.C.A. No. 24 (QL), Laskin J.A., in dissent, dealt with the deference that a court of appeal has to show to the trial judge, even if she or he departs from the acceptable range of sentence. He stated at para. 49:

However, cases will arise where the sentencing judge justifiably decides to depart from a customary range and that decision, too, is entitled to deference on appeal. Such deference finds support in two recent Supreme Court of Canada judgments: *R. v. McDonnell*, [1997] 1 S.C.R. 948, 114 C.C.C. (3d) 436, and *R. v. Stone*, [1999] 2 S.C.R. 290, 134 C.C.C. (3d) 353. In *McDonnell*, the Alberta Court of Appeal interfered with the sentence imposed by the trial judge because it departed from the "starting point" that the appellate court had established for similar offences. In restoring the sentence imposed by the trial judge, Sopinka J. for a majority of the court wrote at p. 450 C.C.C.:

... the sentencing judge took into account all relevant mitigating and aggravating circumstances and arrived at what she considered was an appropriate sentence. Accordingly, the sentence's departure from the Court of Appeal's view of the appropriate starting-point does not in itself imply that the sentence was demonstrably unfit.

Similarly, in *Stone*, Bastarache J., writing for the court on this point, held at p. 450 C.C.C.:

One function of appellate courts is to minimize disparity of sentences in cases involving similar offences and similar offenders. In carrying out this function, appellate courts may fix ranges for particular categories of offences as guidelines for lower courts. However, in attempting to achieve uniformity, appellate courts must not interfere with sentencing judges' duty to consider all relevant circumstances in sentencing.

(v) Conclusion on the Issue of Acceptable Range of Sentence for These Types of Offences

[80] Permit me to say that even if the range of sentences suggested by defence counsel is indeed correct, the case at bar represents a unique set of facts. As such, it mandates a departure for the acceptable range of sentence for these types of offences.

[81] Before I deal with sentencing precedents, I propose to deal with the issue of the relevance of various DVD's and articles that Mr. Conroy seeks to introduce into evidence on this sentence hearing.

K. RELEVANCE OF DVD'S AND ARTICLES WHICH MR. CONROY SEEKS TO INTRODUCE ON THIS HEARING

[82] It is trite law that all credible and trustworthy evidence is admissible at a sentence hearing. This includes hearsay evidence, unless that evidence is seriously disputed by the accused: *R. v. Albright*, [1987] 2 S.C.R. 383; *R. v. Miller* (6 December 1988), Prince George 14636 (B.C. Co.Ct.). This does not mean, however, that the defence or the Crown should be allowed to enter irrelevant evidence at a sentence hearing.

[83] On this sentence hearing Mr. Conroy seeks to introduce, and has played at the sentence hearing, two DVD's. These DVD's are: "Damage Done: the Drug War Odyssey" produced by IMX Communications and the National Film Board of Canada, written and directed by Connie Littlefield and produced by Ann Bernier and Kent Martin (marked as Exhibit 2 at sentencing) and "Waiting to Inhale, Marijuana, Medicine and the Law", produced and directed by Jed Riffe. One-half of the first video has already been played in open court at this sentence hearing.

[84] Mr. Conroy also wishes to introduce into evidence at this sentence hearing the following magazines:

- a Cannabis Canada, No. 11, January/February 1998 (Canada);
- b Cannabis Culture, Issue 57, October/November 2005 (Canada);
- c Cannabis Culture, Issue 65, March/April 2007 (Canada);
- d Green Thumb Magazine, Volume 1, Issue 2, (Bilingual version);
- e High Times Magazine, June 2007 (USA);
- f Best of High Times Hydro Guide 2007 (USA);
- g Red Eye, No. 25, 2007 (UK);
- h Weed World, Issue 67 (UK).

[85] In support of his application to lead this evidence, Mr. Conroy wrote at para. 10 of his submissions:

While the Accused have been convicted as exporters and traffickers of cannabis (marihuana) and not as users, nevertheless the impact of their conduct on the users is relevant both to determine the gravity, scope and seriousness of the offence and the harms or risks of harm presented to the end users by their conduct. Presumably the "export" prohibition came about as a result of our international obligations to prevent harm to persons outside of Canada, [though] the Crown has not put before the Court any evidence of the harms or risks of harm to those outside the country. It is therefore important to attempt to determine what, if any, harms currently exists so that the Court can take this into account as relevant factors to determine what sentence the Court should consider within the range of sentencing options open or available to it. The Court needs to have

the current information in order to tailor its response proportionately and not excessively based on old information, myths and assumptions. Ultimately, the sentence must be reality based.

[86] It is a well known rule of law that all relevant evidence is to be received by the trier of fact unless the evidence is rendered inadmissible by a particular rule of exclusion. The principle was summarized by McLachlin J. (as she then was) in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 609:

In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received, unless its exclusion can be justified on some other ground.

[87] The onus is on the party tendering the evidence to prove relevance by showing a factual nexus between the evidence and a fact in issue. In *R. v. Cloutier*, [1979] 2 S.C.R. 709, Pratte J. said at 731:

For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

(i) Meaning of Relevance

[88] In *R. v. Watson* (1996), 30 O.R. (3d) 161 (C.A.), Doherty J.A. reviewed the law of relevance and pointed out what was required in order to determine if evidence is relevant. He stated at 171-172:

In *R. v. Corbett*, [1988] 1 S.C.R. 670 at p. 714, 41 C.C.C.(3d) 385 at p. 416, La Forest J. (in dissent) described the significance of relevance to our law of evidence:

All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or should otherwise be excluded on clear grounds of law or policy.

In explaining what he meant by relevance, LaForest J. referred to *R. v. Morris*, [1983] 2 S.C.R. 190, 7 C.C.C. (3d) 97, and then said at p. 715 S.C.R., pp. 417-418 C.C.C.:

It should be noted that this passage [from *R. v. Morris*] followed a general discussion of the concept of relevance in which the court affirmed that no minimum probative value is required for evidence to be deemed relevant. The court made it clear that relevance does not involve considerations of sufficiency of probative value. A cardinal principle of our law of evidence, then, is that any matter that has a tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible in evidence, subject, of course, to the overriding judicial discretion to exclude such matters for the practical and policy reasons already identified. [Emphasis added.]

While LaForest J. dissented in the result in *Corbett*, his discussion of the significance and meaning of relevance is consistent with previous and subsequent majority decisions of the Supreme Court of Canada: *R. v. Morris*, supra, per McIntyre J., at pp. 191-92 S.C.R., pp. 98-99, per Lamer J. (dissenting in the result) at pp. 200-01 S.C.R., pp. 105-106 C.C.C.; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at pp. 609-12, 66 C.C.C.(3d) 321 (S.C.C.) at 389-392.

[89] The Supreme Court of Canada in *R. v. Morris*, [1983] 2 S.C.R. 190, defined relevancy in terms of logical probative value. In *R. v. Morin*, [1988] 2 S.C.R. 345, at 370 the Supreme Court of Canada recognized that "[i]t is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence."

[90] In *R. v. Truscott* (2006), 213 C.C.C. (3d) 183 (Ont. C.A.), a five person court held at paras. 22-23:

Evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a material fact in issue more or less likely: *R. v. J.(J.-L.)* (2000), 148 C.C.C. (3d) 487 at para. 47 (S.C.C.); *R. v. Watson* (1996), 108 C.C.C. (3d) 310 at 323-24 (Ont. C.A.); *R. v. B.(L.)* (1997), 116 C.C.C. (3d) 481 at 492-93 (Ont. C.A.), leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 524. Evidence will be irrelevant either if it does not make the fact to which it is directed more or less likely, or if the fact to which the evidence is directed is not material to the proceedings.

Relevance is contextual in that it depends on the facts in issue, the position taken by the parties in respect of those facts, and the other evidence adduced in relation to those facts: see *R. v. Arp* (1998), 129 C.C.C. (3d) 321 at 338 (S.C.C.). Because relevance is contextual, a court will often be unable to determine relevance at the time the evidence is proffered, but will receive the evidence conditionally and determine the relevance of the evidence after the evidentiary picture has been fully developed. It does not follow, however, that because relevance often cannot be determined when the evidence is tendered, that relevance should not be addressed when the evidence is tendered. If a court is satisfied when the evidence is tendered that the evidence is irrelevant, it should so hold and refuse to admit the evidence. A court should not hear evidence on the chance that it might somehow, at some time, in some way become relevant in the proceedings.

(ii) Exclusion of Relevant Evidence When Offered by Defence

[91] Where relevant evidence is offered by the defence in a criminal trial it should only be excluded where the prejudice substantially outweighs the probative value. In *R. v. Watson*, Doherty J.A. pointed out at 176:

A finding that evidence is relevant does not determine its admissibility. Relevant evidence will be excluded if it runs afoul of a specific exclusionary rule, or if a balancing of its probative value against its prejudicial effect warrants its exclusion: *R. v. Corbett*, supra; *R. v. Bevan* (1993), 82 C.C.C.(3d) 310 (S.C.C.) at 326; *R. v. Terry* (1996), 106 C.C.C.(3d) 508 (S.C.C.) at 518-9. Where the evidence found to be relevant is offered by the defence in a criminal case, it will be excluded under the second of these exclusionary rules only where the prejudice substantially outweighs the probative value: *R. v. Seaboyer*, supra, at 391; *R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 (S.C.C.)

at 297.

(iii) Ruling on the Relevance of These Materials which Mr. Conroy Seeks to Introduce on this Sentence Hearing

[92] In my view, after reviewing the law enunciated above, these items which Mr. Conroy seeks to introduce into evidence on this hearing are clearly irrelevant. I will, however, allow them to be entered as exhibits. Mr. Conroy refers to them in a general way in his submissions. I refuse, however, to have the rest of the DVD played in open court, or the second DVD played in open court. It is my view that his material should more properly be taken before a parliamentary committee or before the Supreme Court of Canada. The Supreme Court of Canada, as well as our Court of Appeal, has already ruled on the seriousness of these types of offences. I am bound by those decisions.

L. SENTENCING PRECEDENTS

[93] Because of the submissions made by Mr. Conroy, I feel compelled to begin my analysis with the recent decision of *R. v. Van Santvoord*, 2007 BCCA 23.

[94] In *Van Santvoord*, the accused was convicted of production of marihuana. The amount of marihuana seized had a value of between \$362,981.00 and \$539,635.00. The accused had no previous criminal record. The court imposed a one year sentence. In imposing that sentence Ryan J.A., for the court, wrote at paras. 21-23:

Before setting out the principles of sentencing that he would apply, the sentencing judge referred to excerpts from a book written by an American judge that questioned the effectiveness and consequences of drug laws in the United States. The sentencing judge also made note of the comments of Southin J.A. in *R. v. Schedel* (2003), 184 B.C.A.C. 166, 2003 BCCA 364 where, speaking for herself, she said:

[83] While at one time I accepted the received wisdom that marihuana offences were serious crimes, I now am of a different opinion, having been persuaded to the contrary by, among other writings, the judgment of my colleague, Prowse J.A., in *R. v. Malmo-Levine* (2000), 145 C.C.C. (3d) 225, 34 C.R. (5th) 91, 2000 BCCA 335.

[84] By that, I do not mean that I would have come to the same conclusion in that case as did she. I have not yet abandoned my conviction that Parliament has a constitutional right to be hoodwinked, as it was in the 1920's and 1930's by the propaganda against marihuana, and to remain hoodwinked.

[85] The growing, trafficking in, and possession of marihuana ("Cannabis" in Schedule II to the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19) is the source of much work, not only for peace officers but also for lawyers and judges. Whether that work contributes to peace, order and good government is another matter.

[87] In my years on the bench I have sat on over 40 cases which had something to do with this substance, which appears to be of no greater danger to society than alcohol.

I do not take from these references a reluctance on the part of the sentencing judge to enforce the law as set out in the Controlled Drugs and Substances Act. What is communicated is a frustration with the efficacy of laws that are not universally embraced by Canadian citizens. Whatever a judge's private views, his or her duty requires that judge to enforce the laws that Parliament has lawfully enacted. This is what I understand Southin J.A. to be referring to in para. 84 of her reasons quoted above.

Indeed, there can be no question that the law at issue in this case is a legitimate expression of Parliament. In *R. v. Marmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74 the Supreme Court of Canada dismissed a division of powers and Charter challenge to Parliament's criminalization of the possession of marihuana for the purpose of trafficking. The Court accepted that certain groups in society share a particular vulnerability to the effects of marihuana use. The majority held that advancing the protection of vulnerable individuals through criminalization of the possession of marihuana is a policy choice that falls within the broad legislative scope conferred on Parliament. It is equally open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy. In the end, the Court dismissed challenges under ss. 7, 12 and 15(2) of the Charter.

[95] She continued at para. 38:

Su remains a guideline and has been referred to in many subsequent decisions of this court for the principles that denunciation and deterrence are appropriate sentencing objectives where commercial marihuana operations are involved, for the proposition that a conditional sentence for the owner of the operation is generally unsuitable, and for a guideline range. In *R. v. Vu*, 2003 BCCA 339 the appellant was involved in the commercial production of marihuana on a farm property in Langley. The police seized 1878 plants worth an estimated \$1.4 million. The appellant, a first offender, was sentenced to one year imprisonment by the sentencing judge. At trial, the Crown had suggested a sentence of nine months, while defence counsel sought a conditional sentence. Citing Su, and a number of other cases, this Court dismissed the appeal, noting that while a conditional sentence may be appropriate in other circumstances, it did not, in that case, serve the sentencing goals of denunciation and deterrence.

[96] She concluded at paras. 42-43:

As I said earlier this case called for a sentence with the objects of denunciation and deterrence. Mr. Van Santvoord's crime is a flagrant violation of the law. His motivation was largely the profit he could obtain. While none of the specific dangers set out in the police report seems to be present here, over the years other cases of marihuana production have demonstrated that its illegal production creates the risk that it will attract other illegal activities and dangerous consequences to the community in which it takes place.

The remaining question is whether a term of imprisonment or a conditional sentence should take the place of the fine. But for the lack of criminal record and guilty plea of the offender, there are no mitigating factors in this case; and given the seriousness of the offence and the on-going and large size of the production, I am of the view that deterrence and denunciation would not be adequately addressed by a conditional sentence. I would, therefore, grant leave, allow the appeals, set aside the fine and impose a sentence of 12 months.

[97] In *R. v. Guilbride*; *R. v. Thomson*, Finch C.J.B.C. wrote at paras. 173-177:

In *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74, the Court considered whether criminalization of possession of marijuana was constitutional. Justices Gonthier and Binnie writing for the majority, reviewed the findings of the trial judges in both *Malmo-Levine* and *Caine* as to the harm caused by the use of marijuana as well as Parliamentary reports and held:

60 The Senate and House of Commons Committee Reports are consistent with the conclusions reached by the courts in British Columbia that, while marihuana is not a "harmless" drug, nevertheless the degree and extent of harm associated with its use is subject to continuing controversy, as is the wisdom of the present legislative scheme.

61 We have been shown no reason to interfere with these findings of fact. It seems clear that the use of marihuana has less serious and permanent effects than was once claimed, but its psychoactive and health effects can be harmful, and in the case of members of vulnerable groups the harm may be serious and substantial.

A majority of the Court found that the criminalization of possession of marijuana was constitutional despite evidence indicating decreasing concern over the harm caused by its use.

The majority distinguished between users of marijuana and traffickers of marijuana at para. 136. They noted that the continued criminalization of possession was rationally connected to the goal of "[eliminating] the market for traffickers". Although the majority held at para. 167 "that imprisonment would ordinarily be an unfit sentence for a conviction on simple possession of marihuana" they did not comment on appropriate sentencing for possession of marijuana for the purpose of trafficking.

Harm to users, and the need to eliminate the market for traffickers, were accepted as legitimate legislative goals:

136 The criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug such as marihuana (*Morgentaler*, supra, at p. 70), and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm. In particular, criminalization seeks to take marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers. In light of these findings of fact it cannot be said that the prohibition on marihuana possession is arbitrary or irrational, although the wisdom of the prohibition and its related penalties is always open to reconsideration by Parliament itself.

The Court's view on trafficking was clarified and emphasized in *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52 where the majority stated at para. 57: "Possession of marijuana for the purpose of trafficking remains a serious offence despite continuing debate about the extent of the harm associated with marijuana use: *R. v. Malmo-Levine*". DesChamps J., dissenting, echoed that position at para. 78.

[98] In *R. v. Aslam*, 2007 BCCA 122, the court held that a sentence of two years for unlawful possession of 202 pounds of marihuana was a fit sentence.

[99] In *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, the Court's view on trafficking in marihuana was clarified and emphasized. At para. 57 the majority stated: "Possession of marijuana for the purpose of trafficking remains a serious offence despite continuing debate about the extent of harm associated with marijuana use: *R. v. Malmo-Levine*." In *R. v. Malmo-Levine*; *R. v. Caine*, Deschamps J., dissenting in part, stated at paras. 135-136:

Marihuana is a psychoactive drug "whose use causes alteration of mental function" according to the trial judge. This alteration creates a potential harm to others when the user engages in "driving, flying and other activities involving complex machinery". Chronic users may suffer "serious" health problems. Vulnerable groups are at particular risk, including adolescents with a history of poor school performance, pregnant women and persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies. These findings of fact disclose a sufficient state interest to support Parliament's intervention should Parliament decide that it is wise to continue to do so, subject to a constitutional standard of gross disproportionality, discussed below.

The criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug such as marihuana (Morgentaler, *supra*, at p. 70), and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm. In particular, criminalization seeks to take marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers. In light of these findings of fact it cannot be said that the prohibition on marihuana possession is arbitrary or irrational, although the wisdom of the prohibition and its related penalties is always open to reconsideration by Parliament itself.

[100] In *R. v. Craig*, 2007 BCCA 234, Ryan J.A., in dealing with the issue of sentence for grow operations, had to deal with the issue of whether forfeiture of real estate was part of a sentence. At paras. 52-53 she wrote, for the Court:

In my view, an evaluation of the "nature and gravity of the offence" would include, but is not limited to, such factors as whether there were weapons on the premises, whether the operation was harmful to the neighbourhood, whether the theft of electricity was involved, the number of plants being cultivated, and the sophistication of the enterprise. The "circumstances of the offence" would include whether it was done because of pressure from other members of the community, the financial circumstances of the offender, whether the operation was undertaken for profit alone, whether the offender lives in the house, and other such matters. The fact that the

offender has or does not have a criminal record will also be considered.

Many of these factors will support a forfeiture order where a party is a member of a criminal organization and is operating the enterprise as such. It follows that the presence of organized crime would be a significantly aggravating factor in deciding whether or not to order forfeiture.

[101] At para. 119, Ryan J.A. stated:

Turning first to the nature of the offence, the offence was marihuana production, punishable by seven year's imprisonment and is a serious offence. The offence was also grave in the sense that it consisted of a mid-level, profitable, commercial operation that had been in full production for at least four years. A large section of the Alder Street home was devoted to marihuana production. Ms. Craig was the owner/operator; she hired people to assist her; she answered to no-one. On the other hand, there was no evidence suggesting that the operation was connected to organized crime.

M. AGGRAVATING FACTORS

[102] I accept the aggravating factors pointed out by the Crown in their submissions. The aggravating factors in the case at bar include the scope of the conspiracy in terms of the time resources and the number of persons involved; the nature of the cargo being transported to and from Canada, including guns; the large profits that were realized for the illegal operation; the sophistication of the operation; the length of time the accused were involved in the conspiracy; and the amount of time, energy and money spent by different accused to bring about the plan to commit these offences.

[103] Staff Sgt. MacDonald, who was called as an expert in these proceedings, testified that in British Columbia the marihuana industry is a multi-billion dollar industry. He testified that the court had before it the elite of the marihuana exportation business during the timeframe indicated in the indictment. He testified that from the evidence that was drawn to his attention, during the timeframe in the indictment, the Doak organization was engaged in exporting tons of marihuana. As a result, he opined that during that period of time the Doak organization would be in select company in the hierarchy of the marihuana export trade in British Columbia.

[104] Under this heading, I would like to deal with the criminal record of Newberry.

(i) Criminal Record of Newberry

[105] It was revealed that in 1992 Newberry was convicted in California of two drug offences for which he was placed on probation for 60 months.

[106] While a person should not be convicted twice for the same offence, the past criminal record of the accused should be considered in imposing sentence. It reflects the accused's attitude towards reformation following previous convictions: *R. v. Warner, Urquhart, Martin and Mullen* (1946), 87 C.C.C. 13 (Ont. C.A.); *R. v. Stoddart* (1987), 37 C.C.C. (3d) 351 (Ont. C.A.); *R. v. Marnoch* (1984), 11 C.C.C. (3d) 286 (Ont. C.A.); and *R. v. Fairclough*, [1989] B.C.J. No. 314 (C.A.) (QL).

[107] It is not that a person with a record gets more in terms of sentence than what the crime deserves but rather that he cannot, because of the record, get less: *R. v. Hastings* (1985), 19 C.C.C. (3d) 86 (Alta. C.A.).

[108] In *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, Charron J. wrote at para. 24:

There is no doubt that the court may take prior convictions into account in determining the appropriate sentence. In taking them into account, however, the court must not punish the offender again. The fundamental principle of proportionality requires that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender; a prior conviction cannot, therefore, justify a disproportionate sentence. This principle, which is set out in s. 718.1 Cr. C., assures repeat offenders the right not to be "punished ... again", as guaranteed in s. 11(h) of the Charter. The sentence imposed on a repeat offender may well be more severe, but this is not contrary to the offender's right not to be punished again. From the standpoint of proportionality, the sentence imposed in such a case is merely a reflection of the individualized sentencing process.

[109] With respect to this criminal record of Newberry, I also apply the gap principle. That principle simply states that if there has been a long gap between the last conviction and the present one, the old record should not be given much weight: *R. v. Hodson* (1927), 20 Cr. App. R. 11; *R. v. Harrell* (1973), 12 C.C.C. (2d) 480 (Ont. C.A.); *R. v. Aelick*, [1989] B.C.J. No. 1153 (C.A.) (QL); *R. v. Smith*, [1989] B.C.J. No. 935 (C.A.) (QL); and *R. v. Michel*, [1989] B.C.J. No. 2294 (C.A.) (QL). In view of the "gap" principle, I attach very little weight to this old criminal record of the accused, Newberry.

N. MITIGATING FACTORS

[110] The mitigating factors in this case include the fact that the controlled substance involved was marihuana and not heroin or cocaine. In addition, I should consider as mitigating factors the letters of support for the accused, the inordinate length of time, after being charged with these offences, that the accused had to live in their respective communities pending completion of the trial. I also consider as a mitigating factor the stigma the accused faced and the bad media publicity that the accused faced as a result of these charges being laid against them. I am aware of decisions in other jurisdictions that have not held bad media publicity to be a mitigating factor (see e.g. *R. v. Lussier*, [2005] Q.J. No. 6409 (Prov. Ct.) (QL), at paras. 75-91), but I am satisfied that in this case, the specific nature of the publicity and its concomitant stigma should be taken into some account as a mitigating

factor.

[111] I now propose to deal with the letters of support.

O. LETTERS IN SUPPORT OF THE ACCUSED

[112] With respect to the letters of support that have been filed on behalf of the accused, it is noteworthy that none indicates that the authors of these letters were aware of the nature and scope of the operation for which the accused were convicted. Further, I simply wish to adopt the statement of Mr. Justice K.J. Smith (as he then was) in *R. v. Lising and Pires* (16 July 2001), Vancouver CC980886 (B.C.S.C.) where he stated at para. 82:

[I]t has been said that there are three general classes of people that pass through our criminal justice system. Most are otherwise ordinary citizens who through haste, inattention, indiscretion, or overindulgence have made some understandable error that has transgressed to criminal law. Others are socially unskilled, weak, and ineffective and do not have the strength of character or the will power to avoid their criminal behaviour. Such persons often were, in their upbringing, deprived through no fault of their own of the training and guidance that instils the values and social skills that are necessary to good citizenship. Others are criminals in the true sense. These include persons like you, Mr Lising and Mr. Pires, who enter upon their criminal conduct deliberately and for selfish reasons. In choosing this criminal path, you let down your families and your friends. In particular, you have let down your parents, who have worked so hard to establish themselves in this country and to provide you with a good upbringing and with the opportunities to succeed in life, and you have let down your young friends and relatives who look upon you as role models. It is apparent from the outpouring of respect and affection displayed by your families, friends and associates in the letters that they have written in your support, that each of you have it in you to be law-abiding, responsible, and productive citizens. I sincerely hope that you have learned your lesson and that on completion of your sentences you will choose to follow that path.

[113] In my view these sentiments could equally be applied to the accused in the case at bar.

[114] I now wish to deal specifically with the spate of letters that were introduced on behalf of the accused, Doak.

(i) Letters in Support of Doak

[115] Doak filed 45 letters of support. Crown counsel submits that the letters are filed to show Doak's good character. As such, they submit that they are entitled to lead evidence of charges laid against Doak in 2003. Defence counsel, Mr. Conroy, objected to the introduction of this evidence. In order to resolve this dispute I intend to review my understanding of some of the law that applies to the introduction of circumstances surrounding untried offences at a sentence hearing.

(ii) The Law Surrounding Evidence of Untried Offences at a Sentence Hearing

[116] In *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, the Court recognized that the strict rules of a trial do not apply to a sentencing hearing, because in order to determine the appropriate sentence the judge must have as much information as possible about the accused (para. 30). In *R. v. Angelillo*, Charron J., for the majority, wrote at paras. 18-21:

Every accused person has the right to be presumed innocent. This fundamental right is not only set out in s. 6 Cr. C., but is also guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms. However, the presumption of innocence is not irrebuttable. At the sentencing stage, it has obviously been rebutted with respect to the offence of which the accused has been convicted. There is therefore no question that, in determining the just and appropriate sentence, the judge can consider the underlying facts of the offence that has been proved. Moreover, sentencing is an individualized process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender. I would like to note at the outset that the requirements for admissibility and the standard of proof to be applied in establishing all the relevant circumstances for sentencing purposes are issues that have already been considered by this Court, and that they are not in any way new principles.

In a unanimous decision in *Lees v. The Queen*, [1979] 2 S.C.R. 749, McIntyre J. stated that evidence of facts tending to prove a potential but untried offence was admissible in the circumstances, because the appellant had tendered evidence of good character and because this evidence, called in reply, related to the issue of "the [accused's] character, conduct, and attitude, all proper factors to be taken into consideration on sentencing" (p. 754). The Court therefore held that the trial judge had not erred in admitting a police officer's testimony that, barely a year after the offence in that case, the accused had had a weapon and a mask in his apartment and had admitted that he was considering a further crime. Based on that evidence, the trial judge had said he was "[not] convinced that this man has learned his lesson" (p. 753). McIntyre J. laid emphasis on these reasons of the trial judge in order to distinguish that case from others in which it was clear that the courts had imposed more severe sentences on the basis of uncharged or unproved offences that predated the trial (p. 754).

In *R. v. Gardiner*, [1982] 2 S.C.R. 368, this Court recognized that it is important, at a sentencing hearing, both to obtain all relevant information and to respect the rights of the accused. Dickson J. stated the following (p. 414):

One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.

It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing

hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime.

The Court held that, in order to protect the accused, the standard of proof to be applied in establishing aggravating circumstances is proof beyond a reasonable doubt.

Sentencing has changed a great deal since *Lees and Gardiner*, especially since Part XXIII of the Criminal Code came into force in 1996. Part XXIII is a true penological code within the Criminal Code, and because of it, sentencing issues can now be dealt with far more systematically: see *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 93; *R. v. Proulx*, [2001] 1 S.C.R. 61, 2000 SCC 5, at para. 14. Thus, it is the Criminal Code that establishes the conditions for the admission of facts extrinsic to the offence for which the offender is being sentenced, and all the prior case law must be read in the light of these new provisions. However, as we shall see, the principles established in *Lees and Gardiner* have been retained in the new provisions of Part XXIII.

(iii) Analysis and Decision with Respect to the Letters of Support of Doak

[117] The Crown has stated that they wish to tender evidence of facts tending to prove a potential but untried offence because the accused, Doak had tendered evidence of good character and because this evidence, called in reply, related to the issue of "the [accused's] character, conduct, and attitude, all proper factors to be taken into consideration on sentencing". I agree that on the basis of *Lees* this evidence is admissible on this sentence hearing.

[118] The evidence that the Crown seeks to lead is as follows:

On July 9, 2003 members of the R.C.M.P. set up surveillance outside the home of the accused, Doak at 7:44 a.m. At 10:52 a.m. a vehicle departed the residence. The driver of that vehicle was apprehended. In his pocket was found \$10,990.55. Inside of the vehicle was also found 227.94 grams of green pills.

At 1:40 p.m. another vehicle that was seen leaving Doak's residence was searched. The occupant of the vehicle was found to have \$4,500.00 and an additional \$552.80 in his waist pack.

At 1:55 p.m. another vehicle was stopped after it left the Doak residence. On the person of the driver of that vehicle was found 3 pairs of scissors and 1000 pink pills.

At 2:00 p.m. Julie Doak was arrested as she left Doak's residence.

At 4:38 p.m. the R.C.M.P. executed a search warrant at the Doak residence. In one of the outbuildings they discovered a marijuana cultivation consisting of 976 marijuana plants and 22.42 grams of marijuana bud. They also found 252.7 grams of anabolic steroids.

In a small cottage on Doak's property the police also found 50.29 grams of marijuana.

[119] In my view this evidence certainly neutralizes the evidence of good character that the letters of support seem to demonstrate. In the result, apart from the mitigating factors to which I have already referred, I find that the only additional mitigating factor with respect to Doak is that he does not have a criminal record.

P. ADDRESSING THE SENTENCING OBJECTIVES IN SECTIONS 718, 718.1 AND 718.2 OF THE CRIMINAL CODE

[120] In *R. v. Guilbride*; *R. v. Thomson*, the British Columbia Court of Appeal upheld sentences of from two and a half years to six years for accused who were convicted of importation of multiple tons of marihuana. In arriving at that decision Finch C.J.B.C., for the Court, wrote at para. 180:

I am also of the view that the judge adequately considered and gave due effect to the principle of general deterrence. That is, no doubt, a most important factor in sentencing for offences such as these. It must, however, be weighed in the balance with the other relevant factors.

[121] In addressing the sentencing objectives, I first deal with denunciation. The sentences imposed in this case must serve to denounce the conduct of these accused. More specifically, the sentences must denounce the conscious choices made to make substantial sums of money by engaging in an illegal activity; an illegal activity involving an illegal substance that when used by certain groups may cause identifiable harm. In sentencing these accused, I adopt what was said by my colleague, Arnold-Bailey J., in the sentencing hearing which statement was approved in *R. v. Guilbride*; *R. v. Thomson*:

If a significant number of middle-aged, otherwise employable adults in British Columbia, or elsewhere in Canada for that matter, opted for engaging in activities that provided illegal incomes instead of legal and taxable ones, the quality of life in this province as we know it would substantially deteriorate. These same accused all have families and children who no doubt rely on the state-funded health care and education systems, and will themselves look to the state for pension support in their old age.

In terms of specific deterrence, I accept that all these accused, have experienced such significant personal difficulties as a result of being caught in the commission of the various offences of which they have been convicted, and by being engaged in this lengthy trial that they have been significantly deterred from further related criminal conduct. They also must know that they will be persons of interest to the police in the event that they engage in any related suspicious activities in future. International travel will be difficult, or not possible as a result of being convicted of these offences.

General deterrence is an important aspect of this sentencing. As long as large scale cannabis related offences remain contrary to law, there will be substantial profits to be made. That being so, the penalties for such offences must be such as to deter otherwise law-abiding people from abandoning or substantially supplementing their legitimate sources of income, for large non-taxable sums to be made from large-scale, profit-generating ventures such as this one. To do

otherwise is to subvert the legitimate forms of employment that permit us all to enjoy the benefits and standard of living that we do in our present society.

[122] In my view, in the case at bar, it is necessary to separate the conspirators from society in order to "achieve the fundamental purpose of sentencing, which includes [contributing to] respect for the law and the maintenance of a just, peaceful and safe society".

[123] In my view, the conspirators have largely been rehabilitated by virtue of having to endure the consequence of their arrests, the stigma in their communities, and this marathon of a trial, as well as, in some cases, the expenditures of significant sums to retain and instruct counsel. It is also my view that a custodial sentence, though necessary, would be unlikely to further contribute to their rehabilitation. The offences for which the accused were convicted are serious offences. The offences were also grave in the sense that they consisted of a very profitable, commercial operation that had been in operation for a very long period of time. There is in addition, evidence of guns being present in the operation and more than a suggestion that the operation was connected to organized crime.

[124] There is also the need for proportionate sentencing both between the offenders and in relation to sentences imposed on similarly situated offenders for similar crimes including the sentence imposed against Richards, who was charged in relation to possession for the purpose of trafficking cannabis marihuana. You will recall that earlier in this judgment, I referred to the two year sentence that he received.

[125] I am also acutely aware of the need to impose the least restrictive sanctions appropriate in the circumstances, pursuant to ss. 718.2(d) and (e) of the Criminal Code.

[126] Taking these factors and the aggravating and mitigating factors into consideration, the nature and circumstances of the offences committed by the accused in this case are such that a community based sentence would be inconsistent with the fundamental principles of sentencing. I find that a sentence of less than two years is not appropriate for any of the accused; therefore conditional sentences are not available to any of them: see *R. v. Heidarian*, 2007 BCCA 288 at para. 26.

[127] I am also of the view that given the large scale, sophisticated nature of the planned enterprise and the profits to be made from this conspiracy, it would bring the administration of justice into significant disrepute were sentences to be served in the community.

[128] In determining a fit and proper sentence for the individuals before this court I have considered the following: the circumstances of the various offences for which these accused have been convicted at trial and their varying degrees of culpability; the sentences handed down to Richards, Schindler, Legree and Fabris; the current relevant case law of the country; the inappropriateness of conditional sentences; the relevant purposes and principles of sentencing set out in ss. 718, 718.1 and 718.2 of the Criminal Code as previously articulated; the various aggravating and mitigating factors previously

articulated; and the personal, family, health and business circumstances of each of these accused. To this end, I am also very aware of aspects of their lives and backgrounds by virtue of the s. 11(b) prejudice affidavits filed at the beginning and end of the trial.

Q. CONCLUSION

- [129] The primacy of the proportionality principle to the imposition of just sanctions and its constitutional underpinning cannot be doubted: *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90 at para. 44; and *R. v. Luxton*, [1990] 2 S.C.R. 711 at 722. Careful adherence to the proportionality principle ensures that any particular offender is not unjustly dealt with for the sake of the common good: *R. v. Priest* (1996), 30 O.R. (3d) 538 (Ont. C.A.) at 547.
- [130] The expectation of reasonable and fair-minded people is that punishment will bear some direct proportionality to the moral culpability of the offence: *R. v. Sweeney* (1992), 71 C.C.C. (3d) 82 (B.C.C.A.) at 91. A legal system that condones excessively harsh, or for that matter, lenient sentences, will eventually lose the support of many members of the community. In turn, the repute of the criminal justice system is diminished: *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455 at para. 21; M. Bagaric, "Consistency and Fairness in Sentencing - The Splendor of Fixed Penalties" (2000), 2 Cal. Crim. L. Rev. 1 at para. 21.
- [131] It is also trite to say that no two sentencings are alike and, when imposing a sentence, a judge must sentence a particular offender for a particular offence. Nonetheless, other cases are helpful in determining the appropriate sentence: *R. v. Broekaert*, 2003 MBCA 10, [2003] 4 W.W.R. 402.
- [132] The sentences imposed in this case must be proportionate to the offences committed by the accused and to their degree of responsibility for them. The proportionality principle of sentencing can be infringed by the imposition of a sentence that is too harsh or by the imposition of one that is too lenient. The offences committed by these accused in this case can only be described as extremely serious. They constitute a willful and calculated decision to ignore the law.
- [133] I conclude that the circumstances of these offences should result in the following individual sentences:
- (1) Doak is sentenced to a period of seven years' imprisonment. In addition there will be the following forfeiture order:
 - (a) One Direct TV Model DRD222RD RCA Box, serial #922427583;
 - (b) One Uniden digital satellite receiver, model UDS200, serial #64002168;
 - (c) One DVD satellite receiver model 3700, FCC ID #DKNC01 RDXCMJ04790B;
 - (d) One Kenwood stereo power amplifier, serial #10841433 KM-991;
 - (e) One Technics compact disc changer, model SL-PD787, serial #026HE10471;

- (f) One Technics stereo receiver, model SA-EX700, serial #GT6FA03131;
 - (g) \$18,755.00 in Canadian currency;
 - (h) One JVC TV, model AV-32950, serial #15334076;
 - (i) One Bell Express VU receiver, model 2700, FCC ID #DKNC01 RDXCLK14815G;
 - (j) One RCA Direct TV, model DRD 222RD, serial #925378190;
 - (k) One OBCON Orion speaker sub base;
 - (l) One Dewalt planer, model DW 733, serial #0012-CT0491;
 - (m) One router, model RY0B1 1Y2HP R160, serial #8519149933;
 - (n) Two satellite dishes;
 - (o) One Craftsman Special Edition Mower, model 944608460, serial #011598D001167.
- (2) Newberry is sentenced to a period of five years' imprisonment. In addition there will be the following forfeiture order:
- (a) \$1,030.00 in U.S. currency and \$38,815.00 in Canadian currency found in a black knapsack;
 - (b) One men's black onyx ring found in a black knapsack;
 - (c) One Cash link 2000 money counter, serial #BJ2000101034.
- (3) Hamm is sentenced to a period of three and one-half years' imprisonment.
- (4) Adam is sentenced to a period of three and one-half years' imprisonment.
- (5) Zacharuk is sentenced to a period of three and one-half years' imprisonment. In addition there will be the following forfeiture order:
- (a) Counterfeit \$20;
 - (b) Two sets of electronic scales, Kilo Tech model SW10, serial #000600868 and #000600863;
 - (c) One Kapak heat sealing machine, model 118;
 - (d) One Rubbermaid container with four duffle bags and three rolls of flagging tape;
 - (e) One duffle bag containing one heat sealer, serial #00-03-A-074346;
 - (f) Five rolls of white tape;
 - (g) 12 rolls of coloured flagging tape;
 - (h) One Rubbermaid container with 17 black duffle bags, two blue duffle bags, and six brown duffle bags;

- (i) Eight boxes, each containing 500 plastic heat sealing bags ordered from West Coast Foodpack Systems Ltd.;
- (j) One Impulse heat sealer, model 605.

R. PRE-SENTENCE CUSTODY

[134] Hamm has been in custody since January 10, 2007. Of that portion of pre-trial custody, two weeks were served by him for failure to abide by his bail conditions. Consequently, Hamm has been in pre-sentence custody for this offence for a period of 128 days. Section 719(3) of the Code allows the Court to consider this time period in determining an appropriate sentence. Though pre-sentence custody is normally credited at a rate of two-for-one, no absolute rule applies (see *R. v. Caza*, [2002] O.J. No. 2625 (C.A.) (QL) and *R. v. Mason*, 2002 MBCA 113, 166 Man. R. (2d) 170 at para. 11). In *United States of America v. Adam* (2003), 64 O.R. (3d) 268 (C.A.), for instance, it was noted that there is no "guarantee" that double credit will be granted.

[135] In *R. v. Pangman*; *R. v. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120, many of the numerous exceptions to the general rule were described at para. 66, as follows:

There have been many cases where credit for pre-sentencing custody has been denied or given on a ratio less than 2:1. For example, where the offenders did in fact receive a full range of educational, vocational or rehabilitation programs, less than double time credit was given. (See *R. v. Schoenhalz* (1999), 121 B.C.A.C. 138 and *R. v. Brownlie*, [1997] B.C.J. No. 1972 (S.C.) at para. 37.) Alternatively, where the previous incarceration history suggests that the accused person would be unlikely to obtain early release, the individual was in custody because he repeatedly breached the conditions of his release or the accused is seen to pose a serious danger to society, courts have either departed from the standard 2:1 ratio or denied credit for pre-sentencing custody altogether: *R. v. Mills*, [1999] B.C.J. No. 566 at para. 48; *R. v. Warren* (1999), 127 O.A.C. 193 (C.A.); and *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at paras. 95-96.

[136] In this particular case, I conclude that Hamm should receive double credit for the period of pre-sentence custody he has served. In the result, I order that 256 days be deducted from his three and one-half year sentence.

S. VICTIM FINE SURCHARGE

[137] Considering the financial means of the accused, this is an appropriate case for the imposition of a victim fine surcharge to be waived.

T. WEAPON PROHIBITION

[138] Section 109(1)(c) of the Criminal Code states:

- (1) Where a person is convicted, or discharged under section 730, of

- (c) an offence relating to the contravention of subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act,

the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be.

[139] Accordingly, I hereby prohibit all of the accused from possessing any firearm, ammunition, cross-bow, restricted weapon and explosive substance, for a period of 10 years after their release from imprisonment and from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life. Pursuant to s. 114 of the Criminal Code, the accused are also hereby ordered to surrender, to a peace officer, a firearms officer or a chief firearms officer, anything that is in their possession which is prohibited by this order and every authorization, licence and registration certificate relating to any of those items within two days of today's date.

"Romilly J."

The Honourable Mr. Justice S.R. Romilly

June 1, 2007 - Revised Judgment

Corrigendum to the Reasons for Sentence issued advising that the last sentence of paragraph 136 shall now read:

"in the result, I order that 256 days be deducted from his three and one-half year sentence."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/07/07/2007bcsc0764err1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-adam-et-al-2007>

Prepared on 29 October 2026 · Esheria