

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Alan D. MacInnes
Madam Justice Janice L. leMaistre

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>R. L. Rankin</i>
)	<i>for the Appellant</i>
<i>Appellant</i>)	
)	<i>G. R. Champagne</i>
<i>- and -</i>)	<i>for the Respondent</i>
)	
<i>ELIJAH LEE WENAUS</i>)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
<i>(Accused) Respondent</i>)	<i>June 16, 2017</i>

LEMAISTRE JA (for the Court):

[1] The Crown seeks leave to appeal, and appeals, a one-year conditional discharge for a guilty plea to the offence of production of marihuana.

[2] The accused had 19 plants in the basement of his home that he was growing for his personal use. In ordering the conditional discharge with 50 hours of community service, the sentencing judge considered his youth (he was 23 years old), the fact that he had no criminal record and that he had been working full time for three and one-half years prior to the sentencing.

[3] The accused is Aboriginal, and it would be fair to say that *Gladue* factors were glossed over (see *R v Gladue*, [1999] 1 SCR 688). At the sentencing hearing, the Crown sought a fine of \$1,900 (based on \$100 per plant). At the appeal hearing, the Crown indicated it was amenable to any

disposition other than a custodial sentence. The Crown fairly acknowledged that a suspended sentence with 50 hours of community service is the closest sentence to reflect the intended sentence by the sentencing judge.

[4] The reason for the appeal is that the conditional discharge is an illegal sentence and is not available in light of section 7(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 and section 730 of the *Criminal Code*. The accused acknowledges the illegality of the sentence. Conditional discharges are not available for an offence where the maximum sentence is 14 years to life imprisonment. The maximum sentence for the offence of production of marihuana is 14 years' imprisonment.

[5] Accordingly, leave to appeal is granted. The conditional discharge is set aside and we would substitute a suspended sentence of nine months with 50 hours of community service. The suspended sentence will be supervised only for the purpose of the community service. In all other respects, the ancillary orders imposed by the sentencing judge will stand.

leMaistre JA

Hamilton JA

MacInnes JA
