

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

CRAIG MacNEARNEY and KIM MacNEARNEY

Transcript of the Reasons for Sentence delivered by The Honourable Justice V. A. Schuler, in Yellowknife, in the Northwest Territories, on the 16th day of January, 2014.

APPEARANCES:

Mr. R. Carrier: Counsel on behalf of the Crown
Mr. J. Martin:

Ms. A. Crowe: Counsel on behalf of the Accused

Charges under s. 5(2) CDSA and s. 7 CDSA

1 THE COURT: The purpose of today's session
2 is to deal with the sentencing of Craig and Kim
3 MacNearney. They have each been found guilty by
4 a jury of simple possession of marihuana and
5 production of marihuana.

6 The basic facts are as follows:

7 In February 2009, Social Services received
8 an anonymous report that there was a marihuana
9 grow-op in the MacNearneys' home in a residential
10 neighbourhood here in Yellowknife. Social
11 workers went to the home to check on the welfare
12 of the MacNearneys' two children and, as is their
13 practice, they went with a police escort.

14 Sergeant Landry testified that as soon as he
15 entered the home after the door was opened by
16 Craig MacNearney in response to a knock, he could
17 smell fresh marihuana. The police conducted a
18 search and found 729 grams of harvested marihuana
19 and also 20 marihuana plants. The plants were in
20 a locker or closet set up for the purpose of
21 growing marihuana. The harvested marihuana was
22 in various containers in the bathroom of the home
23 and on the shelf in a storage area. There was
24 also a large bag of harvested marihuana sitting
25 on the bathroom counter.

26 The MacNearneys were arrested the same day,
27 February 19, 2009.

1 At trial, Kim MacNearney testified that she
2 has had back pain for many years. She had
3 surgery in 1996 and over the years was on various
4 medications - Tylenol 3 and 4 and Naproxen - to
5 alleviate the pain from her condition. She
6 testified that she had trouble with the
7 side-effects from the medications. She found
8 some improvement with the pain by a change in
9 diet and exercise regime, and in 2002 or 2003 she
10 began to smoke marihuana and found that it helped
11 alleviate the pain. She did not take any steps
12 to obtain an authorization to possess marihuana
13 under the Marihuana Medical Access Regulations
14 which first came into effect in 2001 and pursuant
15 to which authorizations were issued in the
16 Northwest Territories beginning in 2002, as shown
17 in the Agreed Statement of Facts filed as Exhibit
18 1 at the trial.

19 Kim MacNearney testified that in
20 approximately 2008 she and her husband Craig
21 decided to grow marihuana in their home, a small
22 trailer home where they reside with their young
23 children. I accept that they did this so that
24 Kim MacNearney would have a readily available
25 supply of marihuana and would not have to buy it
26 of unknown quality from drug dealers. They built
27 a partition wall in their home so as to convert

1 part of a small room into a growing room. They
2 bought supplies and began to grow marihuana in
3 early 2008, trying different strains and tracking
4 the growth. Both Sergeant Adamitz and Eric Nash,
5 the expert witnesses, gave the opinion that it
6 was a small, unsophisticated operation.

7 Although the MacNearneys were charged with
8 possession of marihuana for the purpose of
9 trafficking, the jury convicted them of
10 possession only on that count, meaning that the
11 jury was not satisfied that the MacNearneys were
12 growing the marihuana for other than personal
13 use. I accept that finding. However, part of
14 the context of this case is that, as admitted by
15 Kim MacNearney and heard in the evidence at
16 trial, they did share the marihuana with friends,
17 and Craig MacNearney also smoked it.

18 After their arrest, Kim MacNearney took
19 steps to obtain an authorization to possess and
20 was granted one on February 1st, 2010. Her
21 authorization to possess has been renewed yearly
22 since then. She is currently entitled to possess
23 at any time 360 grams of dried marihuana.

24 Craig MacNearney obtained a production
25 licence in October 2013 and pursuant to that
26 licence is entitled to have a maximum of 59
27 plants under production and a maximum of 2,655

1 grams stored at the residence at any time. The
2 amounts that he is now entitled to have exceed
3 the amounts seized by the police in 2009.

4 The MacNearneys admitted at the jury trial
5 that they were in possession of marihuana and
6 that they produced marihuana. They sought to
7 avail themselves of the defence of necessity,
8 however I ruled that, based on the evidence,
9 there was no air of reality to that defence and
10 so it was not put to the jury.

11 Kim MacNearney is 39 years old. She
12 attended university and has a B.A.. She and
13 Craig MacNearney have been married for 12 years
14 and have lived in Yellowknife for 11 of those
15 years, having moved here from Nova Scotia. She
16 worked in Human Resources in the Government of
17 the Northwest Territories for approximately five
18 years but was demoted and moved to the Department
19 of Finance as a result of the charges. Since
20 late 2011, she has stayed at home looking after
21 the couple's three children, now ages seven, six,
22 and one year.

23 Craig MacNearney is 45 years old. For the
24 past 16 years he has worked as a delivery driver
25 for various companies, and for the last four
26 years of that for a local pizza restaurant as a
27 driver. He has also stayed at home looking after

1 the children when Kim MacNearney is working.

2 Two of Kim MacNearney's work colleagues
3 testified that she was a very good employee,
4 innovative, and caring. One of them described
5 her as a well-liked member of the community.

6 A next door neighbour described the
7 MacNearneys as quiet neighbours who did not have
8 many people coming and going from their home, and
9 he also observed them to be caring and concerned
10 parents.

11 The children's kindergarten teacher
12 described the MacNearneys as very interested,
13 active, and involved parents who have worked well
14 with their children's teachers.

15 A friend from Nova Scotia who has known the
16 MacNearneys for some time and has discussed the
17 charges primarily with Kim MacNearney, testified
18 that, from her observations, they understand that
19 what they did was wrong and they regret it.

20 The MacNearneys come before the court as
21 first-time offenders.

22 There is of course no victim impact
23 statement in this case and the facts of this case
24 are not what this court usually sees in drug
25 cases. But, we all know that drugs are a problem
26 in this community and that they lead to family
27 problems, violence, and other crimes. It is fair

1 to say that cocaine is the biggest drug problem
2 in this community, and courts generally treat
3 marihuana, being considered a soft drug, more
4 leniently, so I do take that into account.

5 It is clear to me from the testimony she
6 gave at the trial that Kim MacNearney sees
7 herself as somewhat of a victim in this case. I
8 do not see it that way at all. She and her
9 husband are adults and they chose to do what they
10 did. They made no attempt prior to being
11 arrested to comply with the law. Instead, they
12 very deliberately broke the law. That led to a
13 number of I would say predictable events,
14 starting with someone complaining that they had a
15 grow-op in their home, then Social Services and
16 the police coming to investigate, Social Services
17 getting involved and, sadly, the MacNearneys'
18 children being taken into care for two weeks.

19 Although there was evidence at the trial
20 from Sergeant Adamitz that there are certain
21 health risks associated with a grow-op and other
22 risks such as home invasion, there is no evidence
23 that the MacNearneys' children were not otherwise
24 well-cared for, and the Agreed Statement of Facts
25 of Dr. Mattas' evidence is that they were well
26 cared for.

27 The children being taken into foster care

1 was obviously traumatic for the MacNearneys and
2 for the children, but it has to be said that it
3 happened because the parents decided to break the
4 law. The children are really the victims in this
5 case, and I am sure that the MacNearneys regret
6 that.

7 I accept that Kim MacNearney suffered from
8 pain and that marihuana helped her deal with it.
9 The fact that she was subsequently granted an
10 authorization to possess marihuana for medical
11 purposes and that it has been renewed over the
12 years corroborates that. However, I find that
13 there is no logic at all in what she says was her
14 thinking at the time - that she and her husband
15 decided to grow marihuana illegally in their home
16 rather than admit to her doctor that marihuana
17 had helped her and that she would like to be able
18 to possess it legally. I find it incredible that
19 she would think that the same severe consequences
20 that flow from illegally growing marihuana in her
21 home would flow from legally possessing it or
22 just asking about how to possess it legally. I
23 think that Kim MacNearney has perhaps convinced
24 herself of that after the fact in an attempt to
25 justify the fact that she and her husband broke
26 the law and did not make any attempt to comply
27 with it until after they were caught.

1 The Criminal Code provides that for the
2 crime of possession of less than three kilograms
3 of marihuana in 2009 when the events occurred,
4 the maximum sentence is five years less a day in
5 jail. For the crime of production of marihuana,
6 the maximum sentence is seven years in jail. I
7 emphasize that those are the maximum sentences.

8 The Criminal Code also directs that the
9 court must consider the various purposes and
10 principles of sentencing, such as denunciation,
11 that is, showing society's rejection of the
12 criminal conduct, general and specific
13 deterrence, public safety, rehabilitation,
14 restoration, proportionality, disparity,
15 totality, and restraint.

16 Aggravating and mitigating factors must also
17 be taken into account.

18 The additional considerations that come into
19 play when the subject of the offence is
20 controlled drugs, the use of weapons or violence
21 are not relevant in this case.

22 I accept that it is a mitigating factor in
23 this case that the marihuana was grown for Kim
24 MacNearney's use to alleviate the pain from her
25 back condition. However, it is also a fact that
26 it was shared with others, including Craig
27 MacNearney. There is no evidence before me that

1 any of the others with whom it was shared had a
2 medical reason for using it, so that tempers the
3 mitigation somewhat.

4 I also consider it a mitigating factor that
5 the MacNearneys now have licences, she to
6 possess, and he to produce and possess. This is
7 more of a mitigating factor in the case of Kim
8 MacNearney, since Craig MacNearney's licence was
9 not obtained until over four years after the
10 events in question.

11 The decision to grow marihuana in their home
12 illegally is something the MacNearneys thought
13 about and planned albeit, as conceded by Sergeant
14 Adamitz, it was not a sophisticated attempt and
15 it was really "try as you go". However, the
16 evidence is that by the time they were arrested
17 they had been doing it for a year and there had
18 been multiple crops, so that is an aggravating
19 factor.

20 It is also an aggravating factor that the
21 MacNearneys carried out their illegal activity in
22 their home exposing their young children to it
23 and to the various risks associated with a
24 grow-op; for example, mold, and traces of
25 fertilizer and the drug itself in the home. I
26 emphasize that those were risks because,
27 fortunately, the home was not found to be

1 contaminated, nor were the children found to have
2 suffered any ill effects. I also note that
3 although Kim MacNearney testified that the
4 children were kept from the grow room by a
5 baby-gate, there was evidence of scribbling on
6 the lower part of the walls, suggesting that the
7 older child was in the room at some time. There
8 was also marihuana found by the police in a bag
9 and in open sight in the bathroom. So the
10 children were exposed to potential risks, and of
11 course the risk that they were exposed to that
12 did materialize was that when the illegal
13 activity was discovered, their lives were
14 disrupted and adversely affected by being taken
15 away from their parents. The children were
16 young, too young to understand what was going on,
17 but carrying on an illegal activity in the home
18 is a terrible example for any parent to set.

19 The fact that their children were taken into
20 care and the traumatic effect that also had on
21 Kim and Craig MacNearney is the main reason why
22 it is unlikely that they would engage in this or
23 other illegal activity again. They have now
24 taken the legal route and obtained
25 authorizations, so that is another reason to
26 think that it is unlikely that they would go back
27 to acting illegally. Deterrence of the

1 MacNearneys themselves is not a significant issue
2 on sentencing in this case, but deterrence of
3 other people has to be one of the goals of the
4 sentences I impose, as does denunciation, to
5 signal to others that this kind of activity will
6 not be dealt with lightly.

7 In terms of proportionality, the crimes are
8 serious. The fact that there is a way to possess
9 and produce marihuana legally does not make doing
10 so illegally less serious. When one makes a
11 deliberate, reasoned choice to act illegally, the
12 moral blameworthiness, the responsibility of the
13 offender, is high. It is not a case of spur of
14 the moment actions or being overwhelmed by
15 emotion or urgency.

16 Crown counsel seeks a jail term of four to
17 six months concurrent on each count for Kim
18 MacNearney, and six to eight months concurrent
19 for Craig MacNearney, and does not oppose the
20 sentences being served in the community rather
21 than in prison. Defence counsel seeks
22 conditional discharges, which would mean that if
23 periods of probation are served without incident,
24 neither of the accused would have a criminal
25 record.

26 I have reviewed all of the cases submitted
27 by counsel. Many of the cases are from British

1 Columbia where grow-ops are a significant
2 problem. From the cases one can conclude that a
3 significant factor in determining sentence is
4 whether the marihuana was produced or possessed
5 for commercial purposes - to make money - or for
6 personal reasons; and if the latter, for medical
7 issues.

8 There are a number of cases that fall into
9 the last category where conditional discharges
10 were granted. For example, R. v. Hogan, [2003]
11 B.C.J. No. 3196, a Provincial Court decision
12 which involved simple possession of 26 marihuana
13 plants by an individual with no record who was
14 willing to plead guilty to that charge. The
15 individual grew the marihuana for his own use due
16 to chronic pain from a knee injury. He was
17 granted a conditional discharge with probation
18 for one year and community service work.

19 Another case is R. v. McPherson, 2011 BCPC
20 482, also a Provincial Court decision which
21 involved a guilty plea to production of 673
22 plants grown because of chronic pain from
23 numerous motor vehicle accidents. The accused in
24 that case subsequently obtained a licence but for
25 less than he had been growing. He was given a
26 conditional discharge.

27 R. v. Placek, 2012 BCSC 1660, is a case

1 where the accused pled guilty to growing
2 marihuana, and it was accepted that he did so for
3 research purposes out of scientific curiosity.
4 So that was a unique set of circumstances. He
5 was granted a one year conditional discharge.

6 In *R. v. Young*, 2008 MBPC 50, a Manitoba
7 case, the accused pled guilty to production of 80
8 to 90 plants on a rural property where his
9 teenage daughter also lived. He used the
10 marihuana for pain from a back injury. He was
11 granted a two year conditional discharge. There
12 were potential immigration issues for the
13 accused, who was a long time resident but not a
14 citizen of Canada.

15 In *R. v. Reed*, 2012 ABCA 272, a decision of
16 the Alberta Court of Appeal, the accused acted as
17 a crop-sitter for a medical marihuana grower who
18 had a licence for a certain number of plants but
19 more were being grown. On the charge of
20 cultivation the accused was given a six month
21 conditional discharge, which was upheld by the
22 Court of Appeal which described it as "lenient
23 and borderline but not demonstrably unfit". The
24 trial judge had found in that case that the
25 accused was naive and was misled by the licence
26 holder.

27 The remaining cases referred to me involve

1 commercial operations or personal use that was
2 not medical, or as in R. v. Flahr from the Yukon
3 Court of Appeal, 2009 YKCA 13, an individual who,
4 although he claimed to use the marihuana because
5 of pain from amputation of his leg, also had an
6 extensive, though somewhat dated, record. His
7 jail term was changed to a conditional sentence,
8 not a conditional discharge, on appeal.

9 The Provincial Court cases are, of course,
10 not binding on this court nor are the cases from
11 other jurisdictions, although cases of the
12 Alberta Court of Appeal are quite persuasive. I
13 note that in all but one of the cases where a
14 conditional discharge was given there was a
15 guilty plea. The exception is the Reed case, but
16 that can be distinguished on the basis that the
17 accused was acting for and apparently misled by
18 someone who had a licence.

19 The fact that the MacNearneys did not plead
20 guilty in this case does not mean that they are
21 to be treated more harshly, but a prompt guilty
22 plea is almost invariably a significant
23 mitigating factor because it indicates that the
24 offender is remorseful and is taking
25 responsibility for what he or she did. Any
26 individual has, of course, the right to plead not
27 guilty, but they do not then receive the

1 mitigating effect that the guilty plea would
2 bring.

3 Defence counsel emphasized that the
4 MacNearneys admitted that they were in possession
5 of marihuana and that they produced it, and they
6 did admit that and a number of other facts at the
7 trial. There are reasons, however, why I do not
8 view that as equivalent to a guilty plea or
9 worthy of the same mitigation.

10 The MacNearneys made several applications
11 over the four years since they were charged in
12 2009 to have evidence excluded and to have these
13 proceedings stayed. They were entitled to bring
14 those applications; I do not criticize them for
15 that. But having decided to proceed that way and
16 considering the effect that those applications
17 had on getting this case to trial, and I do
18 acknowledge that they are not the only reason
19 that it took as long as it did for the case to
20 get to trial, I do not feel that I can give much,
21 if any, mitigating effect to the fact that four
22 years after the events in question, the
23 MacNearneys admitted most of the Crown's case.
24 That is what, to my mind, distinguishes this case
25 from the cases where a conditional discharge was
26 granted. As I said, in those cases there were
27 guilty pleas; there was a clear taking of

1 responsibility by the individuals charged.

2 In this case, although they admitted
3 possession and production, the MacNearneys
4 throughout the proceeding sought to justify why
5 they broke the law and sought to have the jury
6 accept that they were justified and to absolve
7 them of responsibility. The justification put
8 forward included the surprising suggestion,
9 without any foundation, that their family doctor
10 might breach doctor/patient confidentiality and
11 tell others about Kim MacNearney's past and
12 proposed marihuana use. It also included the
13 suggestion that because the police or the fire
14 department made a mess when they were in the
15 MacNearney's home, that that justifies their
16 illegal actions. Those were among the
17 consequences identified by Kim MacNearney as
18 being what she feared when she decided not to
19 take the legal route. I have already said that I
20 find that thinking illogical. In my view, it
21 amounts to an attempt to deflect blame rather
22 than take responsibility for having broken the
23 law and the consequences of that. I accept that
24 the MacNearneys are sorry for the consequences to
25 their family, but I do find that there has been a
26 refusal on their part to take responsibility for
27 their actions. That does not provide any

1 mitigation, and it differentiates this case from
2 the cases that counsel submitted where
3 conditional discharges were granted.

4 The only other case I am aware of from this
5 jurisdiction that bears any similarity to this
6 one is the case of R. v. Mair, 2006 NWTSC 46, in
7 which the accused had an arthritic condition and
8 used marihuana to help him sleep. He was charged
9 with possession and production involving nine
10 plants and an unspecified amount of harvested
11 marihuana. His underage son lived in the home
12 and was found to have some marihuana, although
13 there was no evidence that the father supplied
14 it. The accused was given one day in jail for
15 production and a \$2,000 fine for possession.
16 That is, as I have said, apparently the only case
17 of production in this jurisdiction so it cannot
18 be said that there is a specific sentencing
19 practice for cases of this nature.

20 Each case is, of course, different and the
21 court has to look at every individual
22 individually, while bearing in mind parity, so
23 that offenders who commit similar crimes in
24 similar circumstances should not be treated
25 differently without good reason.

26 I have considered whether there should be a
27 conditional discharge for either or both of the

1 MacNearneys. In order to grant a conditional
2 discharge, the court has to be satisfied that it
3 would be in the best interests of the accused and
4 that a discharge would not be contrary to the
5 public interest. I have considered the case of
6 R. v. Fallofield, [1973] B.C.J. No. 559, which
7 expanded on those requirements. It will almost
8 always be in the best interests of an accused
9 individual who has no previous record to be given
10 a discharge so that they do not now have a
11 record. One of the considerations is whether the
12 entry of a conviction against an accused may have
13 significant adverse repercussions. Travel and
14 work are often cited, as here, and that would
15 apply to any individual. The only repercussions
16 specific to the MacNearneys is that if they have
17 a criminal record they will not be eligible to
18 volunteer at their children's school. That would
19 be unfortunate, but I do not think it qualifies
20 as a significant adverse repercussion in the way
21 that, for example, deportation for a long-time
22 resident of Canada would.

23 The requirement that a discharge not be
24 contrary to the public interest is of greater
25 concern in this case. As we who sit in the
26 courts see almost every day, there are people in
27 this community who are extremely vulnerable to

1 drugs and drug abuse. We need to discourage
2 people from using, possessing, and producing
3 drugs unless they are legally entitled to do so.
4 We need to discourage people from setting up
5 illegal grow-ops in the neighbourhoods of this
6 community, whatever their reason for doing so.
7 We need to discourage people from deliberately
8 breaking the law. In my view, a discharge in the
9 circumstances of this case is unlikely to serve
10 those aims and may in fact send a signal that one
11 can break the law without incurring consequences
12 of any real significance, such as a criminal
13 record.

14 I also take into account that the context of
15 this case includes use of the marihuana not
16 solely by Kim MacNearney but also by Craig
17 MacNearney and by sharing it with others, that
18 context detracting somewhat from the mitigating
19 effect of the reason they decided to grow the
20 marihuana in the first place, in other words the
21 medical reason.

22 For those reasons, I am not persuaded that a
23 conditional discharge is appropriate in this case
24 for either of the MacNearneys.

25 Because the Crown is seeking sentences of
26 less than two years, which I think is reasonable,
27 in other words I think it is reasonable for the

1 Crown to be seeking sentences of less than two
2 years, a conditional sentence is available. It
3 is not opposed by the Crown. A conditional
4 sentence is one served in the community rather
5 than in a prison. It does result in a criminal
6 record. One of the requirements for a
7 conditional sentence is that the court be
8 satisfied that there will be no danger to the
9 community if the accused serve their sentence in
10 the community. I am satisfied of that. For the
11 reasons I have already given, I do not think it
12 is likely that the MacNearneys will re-offend.

13 I also have to consider whether a
14 conditional sentence would be consistent with the
15 fundamental purpose and principles of sentencing,
16 and the principles that are of most concern here
17 are denunciation and deterrence. I am satisfied
18 that conditional sentences will serve those
19 principles in the context of this case,
20 considering that the marihuana grow-op was
21 undertaken for a medical reason and that the
22 MacNearneys did, albeit after the fact, take
23 steps to be able to do legally what they had been
24 doing illegally. I am satisfied in the
25 circumstances of this case that there is no need
26 to have the MacNearneys serve their sentence in
27 jail, but others will be aware that this is not a

1 matter the court is treating lightly.

2 As far as the ancillary orders requested,
3 each of the MacNearneys will be subject to a
4 firearms prohibition order because that is, and
5 was, mandatory under section 109(1)(c) of the
6 Criminal Code prohibiting them from possessing
7 the items specified in that section for a period
8 of time that commences today and continues for
9 ten years. Any such items are to be surrendered
10 forthwith to the RCMP.

11 Also, the items seized by the RCMP in the
12 investigation will be forfeited to the Crown at
13 the expiry of the appeal period, or if an appeal
14 is taken, when all appeals have been determined.

15 Stand up, please.

16 Mr. and Mrs. MacNearney, since you both
17 embarked on the grow-op for the same reason and,
18 as I said, I accept that that was because of
19 Mrs. MacNearney's medical issues, I am going to
20 treat you the same as far as sentencing goes.
21 You are each sentenced to five months to be
22 served in the community on a conditional sentence
23 order.

24 You may sit down while I tell you what the
25 conditions are because that will take some time.

26 Each of the MacNearneys will have a
27 conditional sentence order. I am directing that

1 the clerk prepare two separate orders. The
2 conditions, however, will be included in both of
3 the orders.

4 First, there are mandatory conditions that
5 must be in every conditional sentence order, and
6 they are:

7 1. You will keep the peace and be of good
8 behaviour.

9 2. You will appear before the court when
10 required to do so.

11 3. You will report to a conditional
12 sentence supervisor here in Yellowknife within
13 two working days after the making of this order,
14 and thereafter when required by the supervisor
15 and in the manner directed by the supervisor.

16 4. You will remain within the jurisdiction
17 of the court, in other words within the Northwest
18 Territories, unless written permission to go
19 outside the Northwest Territories is obtained
20 from the court or the conditional sentence
21 supervisor.

22 5. You will inform the court or the
23 supervisor in advance of any change of name or
24 address, and promptly notify the court or the
25 supervisor of any change of employment or
26 occupation.

27 In addition to those mandatory conditions, I

1 have decided to impose the following conditions:

2 Each of you will perform 100 hours of
3 community service work within the five months to
4 the satisfaction of the conditional sentence
5 supervisor and at a rate satisfactory to the
6 supervisor. You will also provide proof of
7 completion of the community service hours at such
8 times and in such form as directed by the
9 supervisor.

10 As with any conditional sentence order there
11 has to be a punitive effect to the sentence, so I
12 am going to add a condition for house arrest. I
13 have decided to keep it to a shorter period of
14 time so as to affect your children's lives as
15 little as possible. For the first three months
16 of the conditional sentence order you will remain
17 in your residence or on its grounds at all times
18 except for the following, and I will now list the
19 exceptions to that:

20 If employed outside the home, when at your
21 place of employment or at any location where your
22 employment requires you to be.

23 For purposes of work, and for travelling
24 directly to and from work.

25 For performing your community service hours,
26 and for travelling directly to and from your
27 residence for that purpose.

1 When authorized by your supervisor to be
2 absent from your residence.

3 When attending court, as required.

4 When attending to medical emergencies
5 involving yourself or your immediate family.

6 When reporting to your supervisor.

7 When accompanying your children to or from
8 school, and when attending activities at their
9 school.

10 When accompanying your children to medical
11 appointments.

12 A further exception to the house arrest
13 condition is that you may attend with one or more
14 of your children, a children's activity outside
15 your home once per week, for no more than three
16 hours. I just want to make it clear that each of
17 the MacNearneys is entitled to do that. So, in
18 effect, what it means is the children can be with
19 the parents outside the home for no more than
20 three hours, twice a week, because they each have
21 three hours. Whether the parents do the activity
22 together or whether they do it separately, they
23 only have three hours. So if they together go
24 with the children and they are out for three
25 hours, that uses up three hours for each of them;
26 in other words, it is not added on to become six
27 hours.

1 Also, you may attend a store for groceries
2 and other necessities of life for you and your
3 children for a total of no more than three hours
4 each week.

5 You will provide a copy of your work
6 schedule to your supervisor and notify the
7 supervisor immediately of any changes to that
8 schedule.

9 Those house arrest conditions apply for the
10 first three months.

11 The condition regarding providing a copy of
12 the work schedule will apply throughout the
13 entire five months.

14 Also, the following conditions will apply
15 throughout the full five months:

16 You will not permit other people to use or
17 possess marihuana in your home unless they are
18 legally permitted to do so under the Marihuana
19 Medical Access Regulations.

20 You will facilitate the supervision of your
21 compliance with the preceding conditions of this
22 order when you are in your residence as required
23 by this order, by presenting yourself at the door
24 of your residence when requested to do so, and by
25 answering or coming to the telephone when the
26 supervisor calls.

27 You will carry on your person at all times

1 when not in your residence a copy of this
2 conditional sentence order.

3 In the case of each of the MacNearneys, the
4 conditional sentence will apply on each of the
5 two counts for which they were convicted,
6 concurrent.

7 Do you understand the conditions?

8 THE ACCUSED CRAIG MACNEARNEY: Yes.

9 THE ACCUSED KIM MACNEARNEY: Yes.

10 THE COURT: All right.

11 Now, in accordance with section 742.3(3), I
12 direct that a copy of the conditional sentence
13 order be given to each of Kim and Craig
14 MacNearney, in other words, that they each
15 receive a copy of their order.

16 I also have to advise them that under
17 section 742.4 of the Criminal Code, your
18 supervisor may, on notice to you and the
19 prosecutor and under certain conditions, request
20 a change to the conditions other than the
21 mandatory ones, and if that happens there are
22 procedures for a hearing. I am talking about
23 changes to the conditions that I impose that are
24 not included in every conditional sentence order
25 that is made by a court.

26 Under section 742.6 of the Criminal Code, a
27 breach of any of the conditions of the

1 conditional sentence order may result in your
2 arrest and you may be ordered to serve the rest
3 of your sentence in jail, so you have to be aware
4 of that. The clerk will explain that further to
5 you and will also explain to you the procedure by
6 which you may apply under section 742.4 to
7 request a change to the conditions that I have
8 imposed.

9 I am not going to waive the victim surcharge
10 in this case, so there will be a \$100 surcharge
11 payable by each within three months.

12 I think that covers everything, counsel. If
13 I have omitted anything, please let me know.

14 MR. CARRIER: Your Honour, on the last date
15 the Crown submitted a copy of the forfeiture
16 order. I've spoken with my friend yesterday and
17 this morning. There were three items on the list
18 of items to be forfeited that my friend has asked
19 be returned to the MacNearneys. I've spoken with
20 the RCMP, they don't take issue with that. I
21 could list them by number and just identify them,
22 Your Honour.

23 THE COURT: Sorry, did you say that you
24 had submitted a copy, because I don't remember
25 that.

26 MR. CARRIER: I think we raised the issue.
27 I can submit it now, I have copies.

1 THE COURT: All right, that's fine. I'll
2 have a look at it.

3 MR. CARRIER: I provided a copy to my friend
4 as well.

5 The items, Your Honour, that would be struck
6 from appendix -- the attached schedule are
7 numbers 64, which is horticultural books; number
8 66, magazines also related to horticulture
9 apparently; and number 68, which is a Blackberry
10 telephone. The RCMP don't have any issue with
11 returning those items. They're in RCMP
12 possession now.

13 THE COURT: All right, so are you simply
14 asking that they be deleted from this draft
15 order?

16 MR. CARRIER: Yes, Your Honour.

17 THE COURT: All right, that's fine. I
18 will delete items 64, 66, and 68, and I will sign
19 the order once we are finished here.

20 MR. CARRIER: That's all, Your Honour.

21 MS. CROWE: I do have an application, Your
22 Honour.

23 Your Honour, at the beginning of your order
24 you ordered that all items seized would be
25 forfeited and so that's been amended somewhat by
26 that order. There are a number of items seized
27 that were completely unrelated to the issue at

1 bar and they're not listed in my friend's
2 appendix, including a journal that was kept by
3 Mr. MacNearney which had nothing to do with the
4 grow-op. And so I would ask that the court order
5 simply, that is that the court order forfeiture
6 pursuant to the document that my friend has
7 tendered and that items not on that document or
8 not removed from the document be returned to the
9 MacNearneys.

10 THE COURT: So you're simply seeking an
11 additional clause that any other items be
12 returned to the MacNearneys.

13 MS. CROWE: That's correct, Your Honour.

14 THE COURT: At the expiry of the appeal
15 period.

16 MS. CROWE: That's correct, Your Honour.

17 MR. CARRIER: The Crown takes no issue with
18 that, Your Honour. We've checked with the RCMP
19 whether there were other items. As of yesterday
20 they looked through what they had and they didn't
21 find anything else, but Crown's happy to ask them
22 to look again if there's any items that the
23 MacNearneys think the RCMP might have.

24 THE COURT: Well if you're satisfied to
25 add the clause that I've just referred to, what
26 I'm going to do is I'm going to have the clerk
27 return this to you and you can add that clause.

1 MS. CROWE: And I can sign off on it, Your
2 Honour, if my friend wishes me to.

3 THE COURT: If you want to sign off on it,
4 that's fine. Otherwise if it's resubmitted, I'll
5 assume that you're both content with the order.

6 MR. CARRIER: Yes, Your Honour.

7 MS. CROWE: Your Honour, one other point.
8 With respect to the issue of the house arrest,
9 the house arrest means inside the dwelling or on
10 the property; is that correct, Your Honour?

11 THE COURT: Correct.

12 MS. CROWE: So that every day they can
13 have some fresh air essentially.

14 THE COURT: Yes. I think what I said was
15 "in the house or on its grounds", meaning within
16 the property of the house.

17 MS. CROWE: If I can just consult with my
18 clients briefly, Your Honour.
19 Thank you very much, Your Honour.

20 THE COURT: All right. If there's nothing
21 further then, there is going to be another matter
22 proceeding when we adjourn here and so the clerk
23 will be dealing with that or she'll be here in
24 court for that, so I'm going to direct that your
25 clients return at two o'clock this afternoon to
26 sign the conditional sentence order.

27 MS. CROWE: Certainly, Your Honour.

1 THE COURT CLERK: Thank you, Your Honour.

2 THE COURT: Thank you, counsel. We'll

3 close court.

4

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6 Certified to be a true and
7 accurate transcript pursuant
8 to Rule 723 and 724 of the
9 Supreme Court Rules of Court.

9

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Annette Wright, RPR, CSR(A)
11 Court Reporter

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