EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT TIMARU

I TE KŌTI-Ā-ROHE
KI TE TIHI-O-MARU

CRI-2018-045-000435
[2020] NZDC 10236

THE QUEEN

v

[DANIEL PRESSER]

Hearing:	27 May 2020
Appearances:	A McRae for the Crown S Grey for the Defendant
Judgment:	19 August 2020

RESERVED DECISION OF JUDGE P S ROLLO
[On application for discharge without conviction]

Result

[1] Last Friday, 14 August 2020, when this matter was called before me, I discharged the defendant without conviction and ordered court costs of $130 and made a direction for forfeiture. I said I would deliver my reasons in writing soon thereafter.

[2] I do so now.

Reasons

[3] [Daniel Presser] is a poacher who would be gamekeeper.

[4] It is an admirable aspiration, but is this an appropriate case for the Court to assist him with such a career-changing transition?

Background

[5] On 30 October 2018, Police attended at Mr [Presser]'s Timaru home intending to speak to him about an allegation from a member of the public that he had been selling cannabis to young people.

[6] I should say from the outset that the Police now accept that there is no evidence to support that allegation. But the informant was warm to the scent, for on speaking to Mr [Presser], he invited the Police into his home to discuss the matter.

[7] They readily accepted the invitation, soon noticing in Mr [Presser]'s parlour various paraphernalia associated with cannabis use readily and openly visible.

[8] The officers invoked warrantless search powers under the Search and Surveillance Act 2012, informing their host, Mr [Presser], accordingly. He was apparently not phased and directed them to where he had two small, indoor growing operations yielding 25 cannabis plants growing, of minimal to modest height and maturity. Those growing operations included the usual lights and heat lamps.

[9] As a consequence, Mr [Presser] has been charged with cultivation of cannabis.

[10] He has promptly pleaded guilty to the charge. He now, however, seeks a discharge without conviction. The Police, represented by Mr McRae, the Crown Solicitor, oppose the application.

[11] The grounds of his application, confirmed in live evidence I have heard, is that a conviction for such small scale, personal use cultivation, where the accepted use was for medicinal treatment only, primarily for himself, might adversely affect his intended application, under the new legalised medicinal cannabis law[1], for a licence.

[12] The sought-after licence (which individually or jointly may be to grow, to nurse, to research, to possess for manufacture or to supply medicinal cannabis or medicinal cannabis products)[2] may be issued by the Director-General of Health to an individual who meets the criteria set out in r 29 of the Regulations. A licensee may then lawfully undertake the licensed medicinal cannabis activity, or activities, subject to the conditions and controls within the Act and Regulations.

[13] A past conviction under the Misuse of Drugs Act 1975 (unless excused by the ameliorating provisions of the Criminal Records (Clean Slate) Act 2004, which generally requires a seven-year conviction-free rehabilitation period to clean the slate of qualifying convictions) prima facie excludes the issue of such a licence unless the applicant is "approved by the Minister" [of Health][3]. Neither the Act nor the Regulations prescribe grounds for or against such approval.

Context

[14] In his exuberant candour with the police, Mr [Presser] admitted that he had been pursuing the growing of the perfect strain, or strains, of medicinal cannabis, over an apparent 14-year period, to treat himself and likeminded aficionados of their aches and ailments. In his case, as an affidavit from his general practitioner confirms, in effect, Mr [Presser] suffers medical conditions, including mental health issues, such

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1 Misuse of Drugs Act 1975 [the Act] and the Misuse of Drugs (Medicinal Cannabis) Regulations 2019 [the Regulations].
2 R 22.
3 R 29; s 2(1) and s 14 MDA.

as depression and anxiety, that are apparently ameliorated, if not treated, by modest applications of medicinal cannabis (again, a circumstance accepted by the police).

[15] Further, I understood Mr [Presser]'s evidence to be that the medicinal cannabis used by him to treat himself resulted from his personal and international research, his own cross-bred plants and his trials of medicinal cannabis strains resulting from those efforts.

[16] It should be noted, however, that the charge before the court only relates to the 25 modest plants located by Police on the offence date, not to any alleged previous growing at any other time.

[17] So, the issue in this case is whether I should help facilitate Mr [Presser]'s intended application for a licence to become a gamekeeper/grower of medicinal cannabis? The alternative is that I relegate him once more to the category of poacher, albeit one with aspirations, but also as someone with a wealth of personal knowledge that perhaps the very success of this newly legalised medicinal cannabis cultivation industry will be reliant on, at least initially.[4]

[18] Mr [Presser] had two previous minor drug convictions, from 2013, for possession of cannabis and possession of a utensil for smoking cannabis. Both resulted in a conviction and a modest fine, as was the practice in the courts in those times.

[19] Soon there is to be a national referendum contemporaneously with the pending general election. As a society, we will be asked to decide whether to authorise the new government, whomever that might be, to legalise the possession of a small, regulated maximum amount of cannabis for personal recreational (or medicinal) use at home or in licensed premises. The referendum also contemplates legalising personal cultivation at home of two cannabis plants per person (to a maximum of four per household) for personal recreational (or medicinal) use.

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[4] Rr 23(2)(b)(iii) and 35(2) permit licensed cultivation of up to 50 seeds or 20 cannabis plants 'of a variety established in New Zealand', encompassing unlawfully grown cannabis plants becoming part of a licensed cultivator's stock.

[20] The poll is yet to take place and the political posturing is yet to come fully to fruition, but what is of great interest to this case, is the advertised position of the New Zealand Drug Foundation. It is a registered charitable entity under the Charities Act 2005 supported by state-funding and other funding from both corporate and community sources and from individuals. It is a 'specialist' organisation in the area of the use and misuse of drugs. As I understand it, the Drug Foundation is actively, but conservatively, promoting the affirmation of the poll, to authorise the legalisation of regulated, restricted quantities of personal use cannabis. Its website also refers to "key findings" in a "new report of the Prime Minister's Chief Science Adviser" purportedly "supporting the Drug Foundation's view that legislation is the best public health response to cannabis use in Aotearoa".

[21] So, come election day night, the course of the law may be contrary to today's position, as the people of this land may have voted for the legalisation of modest personal possession and modest cultivation of cannabis plant whether for recreational or medicinal use.

[22] Of course, the outcome is unsure until the ballots are counted and declared, and then, if the referendum is a 'Yes' vote, it would require the new government to promote and pass the requisite amending Act, whenever that might be. But there is the argument before me from Ms Grey that it would be a travesty to punish a modest transgression by an open and guileless medicinal grower/researcher (to wit, our hapless defendant) whom the police accept is not a supplier of recreational cannabis to children and young people, but who is a true believer in the personal health and well-being benefits of medicinal cannabis.

[23] And strangely, it seems, after many years of campaign and struggle to convince various governmental and other institutions that medicinal cannabis is a viable, safe and beneficial weapon in the battle against illness, pain and suffering, whether physical or mental, within our communities, such usage has now been effectively legalised and made available for appropriate cases, with the passing of the Misuse of Drugs (Medicinal Cannabis) Amendment Act 2018.

[24] The Misuse of Drugs Act 1975 always vested the jurisdiction in the Minister, inter alia, to permit the use of cannabis for medicinal purposes, but such cases, prior to the 2018 Amendment Act, have been exceedingly rare. But as current legal changes, and potential changes, illustrate, there has been a vast mind-shift socially, medically and politically in New Zealand these last few years. The pending referendum is a further manifestation of this.

[25] And there is strong commercial interest in the potential returns to be had in New Zealand from (licensed) commercial exploitation of medicinal cannabis, not just nationally but also internationally. Some pundits have been known, if the media is to be believed, to promote New Zealand as a future world leader in medicinal cannabis cultivation for an international market. And so, we now have the essentially dormant provisions of the Act, enlivened by the Regulations, which could well facilitate this hoped-for harvest of potential wealth.

[26] At the heart of Mr [Presser]'s application is the question whether he will be allowed the opportunity to realise this possible profit-making and profit-taking, whether personally or as an officer of a company holding a relevant licence? The Regulations deal with authorising licence-holders, not the curtailing of the involvement of licensees' employees of dubious past exploits who may have disqualifying previous convictions.

[27] There are many court cases where various District Court Judges and appellate High Court judges have discharged cannabis growers without conviction for growing a few plants essentially for their own medicinal requirements. Ms Grey, counsel for Mr [Presser], has provided me with a lengthy list of these cases. I am, of course, grateful to her.

[28] So, as usual with any discharge application, it comes down to 'usual' principles. Should I discharge Mr [Presser], or would that be a step too far in all the circumstances?

[29] The gateway to a s 106 discharge is via the threshold test in s 107 of the Sentencing Act 2002. That test may be summarised as involving a three-step process, affirmed in *R v Hughes,* where the Court of Appeal said:[5]

> The Court must consider first, the gravity of the offending; secondly, the consequences of the conviction; and finally, whether those consequences are out of all proportion to the gravity of the offending identified at step one.

[30] The Court continued at [17], emphasising that the inquiry is one that:

> …[must] refer to all the circumstances that are relevant in the particular case before the Court. It must have due regard to the nature of the offence and to the gravity with which it is viewed by Parliament; the seriousness of the particular offending; the circumstances of the particular offender in terms of the effect on his career, his pocket, his reputation and any civil disabilities consequential on conviction; and to any other relevant circumstances.

[31] Further assistance was provided by the Court of Appeal in *Z (CA447/2012) v R*[6] where it said:[7]

> [When] considering the gravity of the offence, the court should consider all the aggravating and mitigating factors relating to the offending and the offender; the court should then identify the direct and indirect consequences of conviction for the offender and consider whether those consequences are out of all proportion to the gravity of the offence: If the court determines they are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge (although, as this Court said in *Blythe*, it would be a rare case where a court will refuse to grant a discharge in such circumstances).

[32] Mr [Presser]'s plea is that he not be further disadvantaged in his pursuit of a licence under the Regulations, that is, specifically, that he not receive a conviction for the current cultivation charge.

[33] Because of his two previous minor drug convictions, and subsequently his unrelated driving convictions, he is not yet eligible for the Criminal Records (Clean Slate) Act 2004 to waive his (minor) convictions. Generally, a seven-year (offence-

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5 *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 223 at [16].
6 *Z (CA447/2012) v R* [2012] NZCA 599.
7 At [27].

free) rehabilitation period is required[8] so he will still have to seek the approval of the Minister for an effective waiver of disqualification arising from his previous convictions under the Misuse of Drugs Act to be eligible for any licence to commercially grow or otherwise deal with medicinal cannabis.

[34] Mr McRae has referred me, quite properly, to that line of cases, including in the higher courts, that have held that where there is specialist body authorised to determine, inter alia, fitness and propriety to receive a licence or similar concession, the courts should not hide relevant proven offending from such a body by discharging an applicant without conviction[9]. But the courts, including the higher courts, have then not infrequently found exceptions to this principle in appropriate cases.

[35] It is debatable whether there is, in fact, a specialised body in the case of the Regulations. It is new law. It prescribes mandatory information to be included in any applicant's licence application. That requires a declaration of eligibility[10] including an absence of relevant convictions. Relevant convictions are drug convictions under the Misuse of Drugs Act 1975 or 'any other drug-related offence'[11] (which is not defined), but also, it would seem, equivalent drug offences committed in any overseas jurisdiction[12], which do not overtly require approval by the Minister. These may be taken into account, as may dishonesty convictions, by the Director-General in deciding whether or not to approve a licence application.

[36] The Regulations do not set out any grounds on which the Director-General is to exercise his or her discretion whether or not to approve a licence if the mandatory eligibility criteria are otherwise met. Neither are there any grounds set out in the Regulations on which the Minister is to decide whether or not to approve an applicant who may have a conviction, or convictions, under the Misuse of Drugs Act or for any other drug-related offence.

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8 Criminal Records (Clean Slate) Act 2004, s 7.

9 *Maraj v Police* [2016] NZHC 279, at [9]; see also *Graves v Police* HC Rotorua CRI-2010-463-57, 28 February 2011, referred to by Mr McRae.

10 R 32(2)(d).

11 R 29(c)(ii).

12 R 31(d)(ii) and r 40(3)(b).

[37] This seems unreasonable. First, I did not detect any prescribed form of application in the Regulations for any person who may have disqualifying convictions to seek the approval of the Minister. Mr McRae does refer to clause 2.2.3 of the Ministry of Health 'Guideline on Regulation of Medicinal Cannabis in New Zealand – Part 4 Guidance for Applicants for a Medicinal Cannabis Licence' (April 2020). This clause does include the advice that where an applicant is ineligible due to prior convictions, "…the entity may wish to submit additional information with their application to explain why it should be eligible for a licence."

[38] However, this is but a guideline. It is the Regulations which should prescribe the right of an applicant to provide further relevant material to the Minister on which the Minister's approval might be based. And it is not a submission on eligibility, as the Guideline says, that is the province of the Director-General, but a submission on ministerial approval.

[39] Second, the fact that the Director-General has a residual discretion whether or not to approve an applicant (given he or she can have regard to any dishonesty conviction in New Zealand or elsewhere, or any drug conviction elsewhere), conceivably creates a 'fit and proper person' criterion, which again, in my view, the Regulations should clearly and unequivocally specify.

[40] Third, if the eligibility test does include whether or not an applicant is a fit and proper person to hold a licence, then simply deciding, prima facie, on possible approval or eligibility based on a previous drug conviction under the Misuse of Drugs Act 1975 or otherwise does not necessarily, with respect, address whether or not a person is, in fact, a fit and proper person to hold such a licence.

[41] The Dunedin and the Christchurch Longitudinal Studies each report data that the majority of New Zealand adults have used, and in some cases continue to use, cannabis.[13] Mr [Presser] is one of those. Unlike many New Zealanders, he has been caught, and previously convicted of minor offences against the Misuse of Drugs Act

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[13] *Journal of the Royal Foundation of New Zealand, Volume 50, 2020* - 'Patterns of recreational cannabis use in Aotearoa-New Zealand and their consequences: evidence to inform voters in the 2020 referendum.'

(including this present charge, which, as Ms Grey's caseload illustrates, is also properly characterised as very minor offending). That begs the question concerning all the other adult New Zealand drug users who have used, or continue to use, cannabis or, indeed, other drugs but have not been caught? Is the approval test, as a fit and proper person, to relate to an applicant's unlawful misuse of drugs, or simply just to those who have been caught and successfully prosecuted to conviction for the unlawful misuse of drugs? Or is this distinction just too Clintonesque?

[42] Of course, I am referring to minor drug use, not serious, commercial drug offending, including more than minor drug dealing offending.

[43] The distinction between those caught and those not caught, although undertaking the very same actions, does seem unduly discriminatory and inherently unfair.

[44] And further, if the referendum results in a 'Yes' vote, and results in the adoption of the Bill legalising possession and cultivation of maximum modest prescribed amounts, the offences for which Mr [Presser] presently has Misuse of Drugs Act convictions (possession of cannabis and of a utensil) may no longer remain as offences.

[45] Returning to the principle that judges should be loath to hide proven offending from specialist bodies created to assess any such applicant, is the 'specialist body' in this case, who is the Minister, going to take such matters into account or simply not approve an applicant such as Mr [Presser] because of the misdemeanours of his past?

[46] As the judge seized with this sentencing, I have no way of knowing, with respect, whether any such ministerial decision will be principled (and if so, what are those principles?) or arbitrary? The Regulations and the Act themselves are silent as to whether explanations to assist the Minister in making such a determination are permitted or required to be provided by an applicant, perhaps of the scale and circumstances of the previous offending, the ameliorative effects of maturity and regret, testimonials of character otherwise, and perhaps of experience in dealing with the anticipated business to which the sought-after licence relates?

[47] An applicant subject to the Minister's approval is not told in the legislative instrument. A departmental guideline is not a legislative instrument.

[48] Judges also are highly specialised persons determining fitness and appropriateness of persons appearing before them for a raft of outcomes, under innumerable Acts, including the Sentencing Act 2002, which, as I have noted, contains clear grounds for the determination of any discharge[14].

[49] And I remind myself that the Sentencing Act says nothing about judges deferring to the opinions or assessments of others in deciding sentencing cases before them, although to the contrary, it does say that judges must consider, in all sentencing cases, before entering a conviction, whether a discharge of a defendant would be more appropriate outcome[15]. And I accept, as I have noted, that can only be through the threshold of s 107 factors.

[50] In the case of *[Case 1] v NZ Police*[16] Duffy J considered the same issue relating to [the defendant]'s application, when seeking a discharge without conviction on a charge of unlawful sexual conduct with a young person. [The defendant]'s application for employment with the New Zealand Defence Force would be significantly compromised if he had such a conviction. Duffy J noted that there is no parliamentary bar to admission to the New Zealand Defence Force for those with convictions, and no such statutory or professional body with relevant expertise in that regard. She went on to state:

> [58] … I consider the Court should also be aware that Parliament has seen fit to provide it with authority to discharge without conviction. I acknowledge that prospective employers may well be placed to know the type of qualities they seek in an employee including whether there has been criminal offending or not. But, unlike them the Court has a greater familiarity with criminal cases and the variety of circumstances that can underly criminal conduct. Accordingly, it is well placed to determine the occasions when such conduct should not attract a conviction. It follows that when such occasions arise the Court should be careful not to shy away from exercising the responsibilities and the authority that Parliament has placed upon it on the grounds that others with an interest in employing someone are better placed to make determinations on his or her character and suitability for employment.

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14 Sentencing Act 2002, ss 106 and 107.
15 Sentencing Act 2002, s 11.
16 *[Case 1] v NZ Police* [2019] NZHC 533, at [58].

[51] Of course, Duffy J was referring to an application for employment. That is not the case in this instance with Mr [Presser], but the gravamen of Duffy J's comments, in my opinion, emphasise the jurisdiction of judges to determine discharge without conviction applications on legal and principled grounds set out in the Sentencing Act and relevant case law.

[52] This cannot be said, in my view, for the jurisdiction of the Minister or the Director-General in exercising their new responsibilities under the Regulations where there is no statutory or regulatory guidance as to the discharge of those jurisdictional responsibilities, nor any case law or accumulated professional experience to call on when making such decisions.

[53] There is a further salient factor relevant to this application, namely rehabilitation. I have been a Judge in the District Courts of New Zealand variously sentencing a variety of people on an almost daily basis for 20 years now. Whilst sentencing, theoretically, has several objectives, including punishment and retribution, mostly, it seems to me, it is about finding the key factor that will positively change the person before you from further offending (ie, rehabilitation). Put another way, it is mostly about trying to convert the law breaker into a law abider, the poacher into a gamekeeper, particularly someone who can utilise their skills and past experiences of life (often bad, frequently unlawful) in the pursuit of positive, law-abiding activities that advance their own well-being, that of their family and also that of the wider community.

[54] Mr [Presser]'s actions were unlawful in cultivating the 25 modestly sized cannabis plants, but his motive was self-medication and advancing his body of knowledge of medicinal strains of cannabis.

[55] I assess his offending as of low, to very low, culpability. I also find that Mr [Presser]'s internet pages are not relevant to the determination of this application for a discharge. Neither is the fact that he has existing, albeit minor, drug convictions from 2013 relevant to the application. Mr [Presser] will have to declare those extant drug convictions when applying for a medicinal cannabis licence and, as Mr McRae also commented, when seeking entry as a traveller to overseas countries, such as the USA.

But with respect, the present application deals only with the gravity of this admitted offending, the consequences of conviction for this offending, and the proportionality assessment that arises from that focussed consideration.

[56] I am satisfied that there is a real and appreciable risk that the consequences of conviction for Mr [Presser] might well be significant. The licensing regulations might exclude him, with a further conviction under the Misuse of Drugs Act for minor cultivation, from ministerial approval and eligibility as a fit and proper person to hold a licence to lawfully grow or process medicinal cannabis himself. In my considered judgment, that would be not only unfair for the reasons I have traversed above, but also a consequence out of all proportion to the gravity of his offending.

[57] Second, the imminent referendum might bring in a result that effectively leads to the legitimising of cannabis cultivation (albeit for only two to four plants) for personal use, whether for medicinal use or recreational use. Convicting Mr [Presser] for his low-level actions would again seem unfair if there were to be a change in the law that would make his actions (although not the scale of them) effectively lawful (again, acknowledging the legislative bill's proposed limitation on cultivated plant numbers).

[58] Third, putting the regulations and the referendum completely to one side, having regard to the cases Ms Grey has referred me to where other judges have discharged personal medicinal cannabis growers in like circumstances, I cannot say that the usual detrimental consequences of conviction, as identified in the exemplar case of *Nash*[17], would not significantly adversely affect Mr [Presser], notwithstanding his previous convictions.

[59] Other cannabis cases can be helpful comparators even when not entirely alike. Such an example is the case in the Court of Appeal of *Vela v R*[18], which concerned an appellant who had pleaded guilty to one charge of possession of cannabis for supply. He had been found with approximately 30.39 grams of cannabis and had accepted that he had bought the cannabis for his own use and for the purpose of supplying others,

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17 *Nash v Police* HC Wellington CRI-2009-485-000007, 22 May 2009.
18 *Vela v R* [2010] NZCA 440.

particularly friends. There was no suggestion of any further commercial element in the offending. The offending was categorised as falling within category one of *Terewi*. The Court of Appeal noted that while any supply of drug is serious, this offending was in the lowest category of supplying cannabis offending.

[60] The appellant was 22 years of age, and his father lived in the United States. The Court of Appeal was satisfied a conviction would impact his ability to travel to the United States and see or live with his father.

[61] The Court of Appeal found the minor non-commercial nature of the offending, coupled with the appellant's age and the connection he had with the United States, provided special circumstances where a discharge without conviction was appropriate. The impact of the conviction on the appellant's ability to travel to the United States was seen to carry consequences out of all proportion to the gravity of the offence.

[62] The appellant was discharged without conviction but ordered to pay $1000.

[63] The seriousness of the cannabis offending by Mr Vela was at least as great as that of Mr [Presser]. I take judicial notice of the commonly known fact that Immigration officers on the American border, as on the New Zealand border, are specialist officers with jurisdiction to determine whether those who have admitted or been found guilty of proven drug offending should be eligible for admission into their country. The practical effect of the *Vela* decision was to actively conceal from those statutory officers information which, it has been argued, ought properly to come before them.[19] Put another way, the Court's judgment on the merits of the case was paramount.

[64] The gravity of Mr [Presser]'s offending was minor. He has been admirably co-operative with the Police. He assisted them with their enquiries and made ready admissions to them. He pleaded guilty at an early stage and has co-operated with the process of the prosecution. His other offending, not particularly recent, is unrelated and minor. He suffers from some health issues and his motivation for the cultivation,

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19 See *Roberts v Police* (1989) 5 CRNZ 34 (HC) at 36.

as I have noted, was genuinely for self-medication but also to increase his knowledge of medicinal cannabis strains.

[65] When Mr [Presser] pursues his goal of seeking a licence under the Regulations, he will still have the hurdle of the Minister's approval to overcome. As I have commented, this is because of his pattern of earlier drug and more recent traffic convictions has prevented the Clean Slate law from waiving his past convictions, minor as they are. But that is not a reason to deny the discharge application. Each application must be determined on its own nuanced facts, and seen in the round, not just the specific.

[66] At the end of the day, taking into account the combined effect of all factors, I am satisfied that this is an appropriate case for me to exercise my discretion to discharge Mr [Presser] without conviction. I consider that Mr [Presser] deserves the chance, at his time of life, and in his current circumstances, to succeed at something he aspires to achieve and something he has invested a great deal of time and research into. He *wants to go legit'* and I support him in that aspiration and his having that opportunity. It could be the making of him, his rehabilitation, perhaps even his fortune.

[67] Put more formally, I am satisfied that the probable consequences, direct and indirect, of conviction for Mr [Presser] are out of all proportion to the gravity of his offending.

[68] Of course, if the Minister were to approve a licence for Mr [Presser], Mr [Presser] would have to demonstrate and maintain clear and uncompromising adherence to the rules and regulations governing all aspects of the licensed activity or activities. Failure to do so would undoubtedly result in the suspension and possible revocation of licence, a step from which I imagine there is no going back.

[69] So, he has a possible chance, but almost certainly, it is one chance, and one chance only!

Result

[70] I discharge Mr [Presser] without conviction on the charge of cultivation of cannabis pursuant to s 106 of the Sentencing Act 2002.

[71] I order him to pay court costs of $130.00.

[72] There will be an order for the forfeiture of the plants and growing paraphernalia.

Judge P S Rollo
District Court Judge

Date of authentication: 19/08/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.