NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. MacDonald*, 2020 NSCA 69

Date: 20201029
Docket: CAC 485734
Registry: Halifax

Between:

David Joseph MacDonald

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Anne S. Derrick

Appeal Heard: September 28, 2020, in Halifax, Nova Scotia

Subject: Criminal Law. "Blind" courier defence. Circumstantial evidence. Factual evidence not constituting opinion evidence. Misapprehension of evidence. Mandatory forfeiture pursuant to s. 16(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

Summary:

The Appellant appealed convictions for possession for the purpose of trafficking cannabis marijuana and psilocybin, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. He also sought leave to appeal the mandatory forfeiture order for his Peterbilt commercial tractor (truck). Under s. 16(3) of the *CDSA*, this constituted an appeal against sentence.

The Appellant, a long-haul truck driver, was arrested while transporting under false bills of lading three crates containing a very significant quantity of illegal drugs. He argued the trial judge made a series of errors in convicting him by misapplying

the law relating to circumstantial evidence; improperly treating the evidence of a lay witness as expert evidence; and misapprehending the evidence of police expert, a cell phone technician. The Appellant also said his truck should not have been subject to mandatory forfeiture as offence-related property as he used it as a temporary place of residence. He argued the trial judge should have found the truck was real property and, accordingly eligible to be exempted from forfeiture.

Issues:

(1) Did the trial judge misapply the law as it relates to circumstantial evidence?
(2) Did the trial judge treat the evidence of the lay witness as evidence of an expert without her having been qualified as an expert?
(3) Did the trial judge misapprehend the evidence of the police officer qualified as a cell phone technician?
(4) Did the trial judge fail to find the Appellant's truck was a residence, and therefore real property, qualifying it for exemption from mandatory forfeiture?

Result:

Appeal against convictions dismissed. Leave to appeal forfeiture order granted; appeal against forfeiture dismissed. The trial judge did not err. He correctly identified and applied the law relating to circumstantial evidence in concluding that guilt was the only reasonable inference to be drawn from the evidence. He considered all the evidence and found the inferences he was urged to consider by the Appellant did not raise a reasonable doubt. The lay witness' evidence was factual in nature. Her technical evidence about the trucking industry was grounded in her knowledge and experience. She was not asked for and did not give opinion evidence. The trial judge did not misapprehend the police expert's evidence. The truck was not real property and there was no basis in law for exempting it from mandatory forfeiture as offence-related property.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 27 pages.

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. MacDonald*, 2020 NSCA 69

Date: 20201029
Docket: CAC 485734
Registry: Halifax

Between:

David Joseph MacDonald

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Wood, C.J.N.S., Van den Eynden and Derrick, JJ.A.
Appeal Heard:	September 28, 2020, in Halifax, Nova Scotia
Held:	Appeal against convictions dismissed; leave to appeal forfeiture order granted, appeal dismissed; per reasons for judgment of Derrick J.A.; Wood, C.J.N.S. and Van den Eynden J.A. concurring
Counsel:	Ian D. Hutchison, for the appellant Rachel Furey, for the respondent

Reasons for judgment:

Introduction

[1] David MacDonald appeals convictions for possession for the purpose of trafficking cannabis marijuana and psilocybin, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. He also seeks leave to appeal the mandatory forfeiture order for his Peterbilt commercial tractor (truck). Under s. 16(3) of the *CDSA*, this constitutes an appeal against sentence.

[2] Mr. MacDonald, a long-haul truck driver, was convicted of the *CDSA* offences by Justice Gregory Warner in the Nova Scotia Supreme Court on September 14, 2018. The order for the forfeiture of his Peterbilt truck was made on January 31, 2019.

[3] At the start of his trial, Mr. MacDonald pleaded guilty to two counts of simple possession, one for cocaine and one for methamphetamine, substances that were seized from the cab of his truck on arrest. These convictions are not at issue in this appeal. Also, Mr. MacDonald is not seeking leave to appeal his sentence of 30 months' incarceration.

[4] Mr. MacDonald was arrested on September 30, 2015 as a result of a tip received by a member of the Halifax Integrated Drug Unit (IDU). He was driving his Peterbilt truck in the direction of the Annapolis Valley, having returned to Nova Scotia that day from a cross-Canada trip. He was hauling a flatbed with crates secured under a tarpaulin. He was in possession of two bills of lading in the name of the shipping company Day & Ross. A search of the crates by police located approximately thirteen hundred vacuum-sealed packages of marijuana with a total weight of 316.6 kilograms (697.9 pounds) and three plastic bags of psilocybin weighing 1450.9 grams (3.19 pounds).

[5] The estimated street value of the marijuana was six hundred thousand to one million dollars. A pound of psilocybin was estimated to fetch in the range of $2500 to $3500.

[6] The case against Mr. MacDonald was purely circumstantial: there was no direct evidence he knew he was transporting marijuana and psilocybin to Nova Scotia. He did not admit to the possession of the drugs. Although Mr. MacDonald did not testify at trial, the defence claimed he had been a "blind courier" with no

knowledge the crates contained controlled substances. (A "blind courier" may be used by drug traffickers to transport illegal drugs unknowingly: *R. v. Sekhon*, 2014 SCC 15)

[7] The issue of Mr. MacDonald's knowledge was, as the trial judge noted, the sole issue at trial.

[8] In Mr. MacDonald's submission, by rejecting his claim to be a "blind courier" and convicting him, the trial judge made a series of errors. He misapplied the law relating to circumstantial evidence, improperly treated evidence from a Day & Ross employee, Stacey Walton, as expert evidence, and misapprehended the evidence of Corporal Todd Bromley, a cell phone technician. In addition, Mr. MacDonald says his truck would not have been forfeited had the trial judge recognized it as real property on the basis that it was used by Mr. MacDonald as a dwelling when he was on the road.

[9] For the reasons that follow, I have concluded the trial judge made none of the errors alleged by Mr. MacDonald. I would dismiss the appeal against the convictions. I would grant leave to appeal the mandatory forfeiture order and dismiss the appeal.

Mr. MacDonald's Trip across Canada, September 11 – 30, 2015

[10] The two Day & Ross bills of lading in Mr. MacDonald's possession indicated he had a cargo of fragile, antique musical instruments. He had loaded the cargo in British Columbia and, according to the bills of lading, its ultimate destination was an address in Dartmouth. In the course of travelling back to Nova Scotia, Mr. MacDonald made stops in Alberta and Ontario to pick up and deliver a piece of heavy equipment.

[11] After crossing the Nova Scotia border, Mr. MacDonald drove to the Cobequid Toll booth on TransCanada Highway 102. Shortly before arriving there he was asked, in a text message conversation he had been having, where he was headed. He replied: "To deliver the rest of the load".

[12] Mr. MacDonald's journey continued on Highway 102 until he turned onto a secondary road, Highway 14, toward the Annapolis Valley. When police pulled Mr. MacDonald over just after 4 p.m. on September 30, he was in Hants County near Windsor. He was not headed in the direction of the Day & Ross terminal in

Dartmouth. To reach Dartmouth, Mr. MacDonald would have had to continue on Highway 102.

[13] Exhibits tendered by the prosecution at trial indicated the following about Mr. MacDonald's cross-country trip:

- Between September 11 and 16, 2015, Mr. MacDonald transported a Mercedes Benz cab and chassis from Halifax to Calgary;
- Mr. MacDonald's "driver's daily log" indicated he arrived in Kelowna, British Columbia on September 19 and picked up the three crates in which the police found the drugs on September 21, 2015.
- He checked into a motel in Manning, Alberta at 8 p.m. on September 22, 2015 and checked out at 3:26 a.m. the next morning.
- The stop in Manning was to load a large piece of heavy equipment (a "skidder"). Mr. MacDonald continued east, hauling the skidder as well as the three crates.
- Mr. MacDonald delivered the skidder to a company in Lanark, Ontario on September 29, 2015.
- By 2:31 p.m. on September 30, 2015, Mr. MacDonald was in Nova Scotia, passing through the Cobequid Pass Toll Plaza on the TransCanada Highway.
- Mr. MacDonald was arrested shortly after 4 p.m. on Highway 14 in Brooklyn, Hants County, Nova Scotia.

Items Seized from Mr. MacDonald on Arrest

[14] Items seized by police from Mr. MacDonald's truck included: the two Day & Ross bills of lading found in his daily logbook that was located in the driver's side door of the truck, an iPhone 6, an unloaded .45 calibre revolver, ammunition, 1.3 grams of cocaine and a quantity of methamphetamine. Police also seized a locked iPhone and two locked iPads from which they were unable to obtain any data, and a Blackberry that had been reset and its data wiped.

[15] One of the Day & Ross bills of lading (Exhibit #26) was incorrectly dated October 21, 2015.

[16] The bills of lading (Exhibits #25 and 26) were filled out to show the shipper for the musical instruments Mr. MacDonald was purportedly transporting as J&J Collectibles in Kelowna, B.C. The consignee was listed as Pinnacle Music Ltd. in Dartmouth, Nova Scotia. Exhibit #25 described four items “skid – keyboards, brass/percussion refurb/string”. Exhibit #26 described a refurbished piano and antique instruments and was marked “fragile”.

[17] The unlocked iPhone 6 was analyzed by Corporal Todd Bromley. Cpl. Bromley was qualified to give opinion evidence on the recovery, search, analysis, classification, extraction, exportation and presentation of digital information from mobile devices. He testified that the phone contained a significant volume of data, over 100 gigabytes, including 2,862 SMS text messages and a large number of photographs. The trial judge was satisfied the phone was Mr. MacDonald’s, based on its Apple ID and Cpl. Bromley’s evidence. This finding has not been disputed.

[18] The text messages on the phone included Mr. MacDonald’s response, in a casual texting conversation he had been having over a number of hours, that he was on his way, “To deliver the rest of the load”.

[19] Four images, hidden on the iPhone 6, and recovered by Cpl. Bromley, were of bundles of money lying on a bed. The bundles of money, denominations of 100, 50 and 20 dollar bills, were wrapped in two or more elastic bands, and, in the trial judge’s description, “neatly packed in what appears to be vacuum-packed, clear plastic bags”. (*R. v. MacDonald*, 2018 NSSC 218, at para. 70) Cpl. Bromley was only able to say that an iPhone 6 had taken three photograph on March 10, 2015 and one by an iPhone 4S on August 25, 2014. No such cash was seized from Mr. MacDonald on arrest.

The Bills of Lading

[20] Stacey Walton, the invoice resolution manager for Day & Ross Freight, had worked for the company for over 22 years. The trial judge described her evidence as credible and reliable and “very important evidence relating to the bills of lading marked as Exhibits #25 and #26” found in Mr. MacDonald’s possession. (*MacDonald*, at para. 80)

[21] Ms. Walton testified about the practices of Day & Ross in relation to bills of lading and the transport of goods. She talked about what she would expect to see on a bill of lading. Shown the bills of lading seized from Mr. MacDonald, she identified

what she viewed as indicators they had not been completed in accordance with Day & Ross practices.

[22] More specifically, Ms. Walton testified that:

- Mr. MacDonald's cargo did not accord with the Day & Ross practices and records. Day & Ross would have shipped the fragile cargo listed on the bills of lading in an enclosed trailer, not a flatbed trailer, to protect it from the elements.

- Day & Ross had no record of any shipment corresponding with the bills of lading seized from Mr. MacDonald - the shipper (J&J Collectibles) was not known to Day & Ross nor was the consignee (Music Sounds Inc. and Pinnacle Music Ltd.).

- Day & Ross shipments are made terminal to terminal. The shipper was not a customer of Day & Ross and Day & Ross had not been prepaid for the shipment of the items listed in Exhibit #26, the refurbished piano and antique instruments.

- There were anomalies in Exhibits #25 and #26 that included: the bills of lading were not signed by either the shipper or the driver as required by Day & Ross to create a binding contract; the weight noted in Exhibit #25 was a rounded number, which was highly unusual; and Exhibit #26 had no weight listed, a significant omission given the relationship of weight to customer invoicing and the need for drivers to know the weight of their cargo to ensure they are within provincial Department of Transportation weight limits. Had the goods in Exhibit #26 been at the Day & Ross Kelowna terminal, they would have been weighed and the weight entered on the bill of lading.

- Exhibit #26 showed a pick-up date of October 21, 2015 rather than September 21, 2015. Had this been scanned into the computer at the Kelowna Day & Ross terminal, it would have been corrected as the computer would reject a future pick-up date.

- Ms. Walton also testified that David MacDonald was not one of the three David MacDonald's who had either a current or past relationship with Day & Ross as a driver or a broker.

[23] When arrested, Mr. MacDonald had legitimate bills of lading in the name of Mills Heavy Hauling for the Mercedes Benz he had delivered to Calgary, and for the skidder he hauled from Manning, Alberta to Lanark, Ontario.

Text Messages Extracted and Analyzed by Corporal Todd Bromley

[24] Corporal Todd Bromley testified for the Crown as an expert in cell phone analysis. He identified the type of data extraction performed on the unlocked iPhone 6 as "advanced logical extraction" enabling him to extract and analyse previously deleted data on the phone. He produced a report for the 2,862 text messages that identified whether they were incoming or outgoing; the name and phone number associated with each message (Party); the time (converted to Halifax time) of the message (Time); the status of the message – read, unread or unknown (Status); where extractable the contents of the message (Message); and whether the message had been deleted.

[25] On September 30, Mr. MacDonald had an ongoing text message conversation throughout the day with S.A. that included flirtation and general chit-chat. On three occasions, Ms. A. asked Mr. MacDonald about his trip. At 9:06 a.m., she wondered if he had driven all night. (Text #161) He responded he had. (Text #160) She then asked him how far he had left to go. (Text #141) Mr. MacDonald told her that it had turned into "a little longer trip now wouldn't you know…" (Text #140) And at 2:14 p.m., Ms. A. asked: "Where are you heading now?" (Text #78) Mr. MacDonald replied: "To deliver the rest of the load". (Text #77)

[26] Corporal Bromley was asked by the Crown about the reliability of the information produced by the extraction software in relation to the previously deleted text messages that included the texts to which I just referred. Specifically, the Crown asked him about the categories "Party", "Time". "Status" and "Message":

> **Crown**: …So going back to my earlier questions about reliability of the messages, if it was deleted what can that tell you, if anything, about the rest of the information? I know I'm going backwards, but the information in the other columns – Message, Status, Time, Party?
>
> **Cpl. Bromley**: If it's previously deleted, portions of that data can be overwritten and need to be taken with a grain of salt.

[27] In his cross-examination of Cpl. Bromley, Defence counsel sought to clarify what he meant by the "grain of salt" statement:

> **Defence counsel**: Okay. My friend, Ms. Furey, asked you some questions about the SMS messages and the extraction process. And at one time, at one point in your testimony you used the term “a grain of salt”. What were you referring to? I didn’t quite catch what you were saying?
>
> **Cpl. Bromley**: Certainly. If a message is being deleted and we’re getting that on the screen and it indicates that it was deleted, it’s pulling that information up. And the information that it contains, portions of it may have been deleted or altered…
>
> **Defence counsel**: Okay.
>
> **Cpl. Bromley** : …by the software automatically.
>
> **Defence counsel**: Okay. So when we refer to something that’s deleted on Mr. MacDonald’s…I’m going to call it Mr. MacDonald’s phone for the sake of this conversation…but on Mr. MacDonald’s phone, when the entry is deleted, there’s a possibility that what we see on this report may not necessarily be 100 percent accurate?
>
> **Cpl. Bromley**: That is correct.

The “Weightiest” Evidence

[28] The trial judge referred to a number of circumstantial indicators of guilt in convicting Mr. MacDonald. He found the bills of lading to be fraudulent and was satisfied that a trucker with Mr. MacDonald’s experience would have been alive to the anomalies in them. The bills of lading and Mr. MacDonald turning off the TransCanada onto Highway 14 and not in the direction of Day & Ross were persuasive to the trial judge, as was the fact that Mr. MacDonald was purporting to transport fragile goods for Day & Ross with whom he had no relationship:

> 227 A significant fact that the bill of lading called for delivery of the three crates to the Day & Ross terminal at 10 Isnor Road, Dartmouth, Nova Scotia, for delivery to Musical Sounds Inc. If the accused was not aware of the true cargo he was carrying, it makes no sense when he left St. Pascal, Quebec on the morning of September 30th and entered Nova Scotia through New Brunswick, via the TransCanada Highway near Amherst and passed through the Cobequid Pass toll booth at 2:31 p.m. on September 30th, that instead of proceeding directly to Isnor Drive, Dartmouth, a short drive from the intersection of Highway 102 and Highway 14, he turned off the limited access highway onto Highway 14 heading west towards Windsor and the Annapolis Valley, more than an hour away. In reply to a text at 2:14 pm on September 30 asking: "Where are you heading now?", he relied [*sic*] at 2:15 pm: "To deliver the rest of the load". He did not suggest that he was going

> somewhere to deal with an oil pan leak.[1] The only load at that point was cannabis and psilocybin, or a refurbished piano and antique instruments. The only logical inference is that he knew that the cargo was not a piano and antique instruments destined for the Dartmouth Day & Ross terminal -only a short distance away when he left Highway 102, but a large quantity of drugs -- cannabis, in particular, for a destination to the west.
>
> …
>
> 232 The weightiest circumstances in this case were the false bills of lading that would be obvious to the accused, the fact that he was purporting to transport a fragile LTL [“less than truck load”] load for Day & Ross with whom he carried on no business, and that after texting on the afternoon of September 30th that he was heading to deliver the rest of the load, he turned of [*sic*] Highway 102, near the destination on the bill of lading, and heading by a "side road" towards western Nova Scotia.

The Issues

[29] The issues in this appeal are:

(1) Did the trial judge misapply the law as it relates to circumstantial evidence?

(2) Did the trial judge treat Stacey Walton’s evidence as the evidence of an expert without her having been qualified as an expert?

(3) Did the trial judge misapprehend the evidence of Corporal Todd Bromley?

(4) Did the trial judge fail to find Mr. MacDonald’s truck was a home, that is, a dwelling house, and therefore real property, qualifying it for exemption from mandatory forfeiture?

Standard of Review

[30] The trial judge was obliged to apply the law as it relates to circumstantial evidence correctly. Where it is alleged, as it is here, that the trial judge failed to

---

[1] Defence counsel submitted at trial that Mr. MacDonald may have been travelling on Highway 14 for the purpose of getting his oil pan fixed as text messages showed that he was having problems with it in Alberta. While it is correct that on September 25, 2015 Mr. MacDonald was experiencing oil pan issues, on September 27, he said in an instant message there was no oil leaking and he was continuing to head east. He reported no further oil pan problems.

consider other reasonable inferences arising from the evidence, the proper approach for appellate review is as summarized in *R. v. Villaroman*, 2016 SCC 33, at para 71:

> …it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable…

[31] In a circumstantial case, a trial judge must have concluded that guilt was the only reasonable inference to be drawn from the evidence. (*Villaroman*, at para. 30)

[32] While it would have constituted an error of law for the trial judge to have allowed Ms. Walton to give opinion evidence without requiring her to be qualified as an expert, I find Ms. Walton gave no such evidence. Mr. MacDonald has misconstrued the nature of her evidence, making it unnecessary to undertake a standard of review analysis. (*R. v. Potter*, 2020 NSCA 9, at para. 380)

[33] As for the misapprehension of evidence issue, Mr. MacDonald must establish a misapprehension of evidence that played a central role in his convictions. This Court held in *R. v. Izzard*, 2013 NSCA 88:

> [40] To obtain a remedy on appeal based on an allegation that a trial judge misapprehended the evidence, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence – that is, she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to the evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in the decision to convict. (cites omitted)

[34] Later in these reasons I will address the standard of review on the forfeiture issue.

Issue #1 The Trial Judge's Application of the Law Relating to Circumstantial Evidence

[35] Mr. MacDonald submits the trial judge failed to consider inferences available on the evidence that supported him having no knowledge the crates he was hauling contained illegal drugs. He says the competing inferences should have raised a reasonable doubt.

[36] In Mr. MacDonald's submission, the trial judge erred by not considering the inferences supporting his innocence that could be derived from the evidence about his cell phone, and the meandering route he took for his return to Nova Scotia. He

also says the trial judge relied on an inference about the handgun to support the convictions and then engaged in contradictory reasoning when deciding the handgun should not be subject to forfeiture.

The Law relating to Circumstantial Evidence

[37] Where proof beyond a reasonable doubt is based on circumstantial evidence, a trial judge must guard against "too readily drawing inferences of guilt". An inference of guilt "drawn from circumstantial evidence should be the only reasonable inference that such evidence permits." (*R. v. Villaroman*, at para. 30) Reasonable, alternative inferences other than guilt must not be overlooked. As established by the Supreme Court of Canada in *Villaroman*, "[i]f there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt". (at para. 35)

[38] In assessing circumstantial evidence, a trial judge is to consider alternative plausible theories and reasonable alternative inferences inconsistent with guilt. Evidence or the lack of evidence may support a reasonable, alternative inference. *Villaroman* requires trial judges to conduct their analysis in accordance with the "basic question":

> 38…whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

The Circumstantial Evidence relied on by the Trial Judge

[39] As I noted earlier, the trial judge found the fraudulent bills of lading, the purported transporting of a fragile load for Day & Ross and the detour off Highway 102 toward the Annapolis Valley to be the "weightiest" evidence against Mr. MacDonald. His analysis that the circumstantial evidence established Mr. MacDonald's guilt beyond a reasonable doubt also included the following:

- Mr. MacDonald had repeated the same error in his driver's daily log and driver's daily inspection reports (Exhibit #20) that appeared on Exhibit #26. He entered the wrong month (10 [October] instead of 9 [September]). Exhibit #26 had been completed with the Kelowna pick-up date recorded as 10/21/15. The dual errors led to the trial judge concluding:

> …It is not surprising that, if he was entering the wrong month (10 instead of 9) on his daily logs, he would record it inaccurately on Exhibit #26 the month/day/year as "10/21/15". It is a significant objective fact from which I draw an inference that he completed at least the date on the false bill of lading and was present when it was completed. (*MacDonald,* 2018 NSSC 218, at para. 223)

- Commercial truckers carrying regular cargos are used as couriers by high-level drug traffickers "because this would draw less attention to those truckers and their cargo". (*MacDonald*, at para. 225) The trial judge accepted this evidence from the Crown's drug expert, Cst. Peter Hurley, as consistent with common sense.

- Mr. MacDonald's transport of the skidder from Alberta to Ontario while en route back to Nova Scotia was "logical cover for transport of drugs". (*MacDonald*, at para. 226)

- The shipper and consignee were not Day & Ross customers, a fact confirmed by Day & Ross customer records. The police were unable to find either company and the phone numbers supplied on the bills of lading were not in service. The trial judge referred to the police evidence in this regard as of "limited weight" because the inquiries were conducted 13 months after Mr. MacDonald's arrest but said "it is still a circumstance that adds to the totality of the circumstances". (*MacDonald*, at para. 228)

- Mr. MacDonald's possession of multiple phones and tablets (two iPhones and two iPads, and a Blackberry) was viewed by the trial judge as circumstantial evidence consistent with what Cst. Hurley described as commonplace for high level drug traffickers and couriers. The trial judge noted that one of the phones and the two iPads were inaccessible to police investigators and the Blackberry had been reset and its data deleted.

- The photographs of the sealed bundles of money, secured by rubber bands, found hidden on Mr. MacDonald's phone suggested an association with drug-trafficking. The trial judge found the photos,

  > …combined with the Hurley [Cst. Peter Hurley] evidence as to how large quantities of drugs are paid for, is a circumstance that supports the inference that the accused has familiarity with high-level trafficking. (*MacDonald*, at para. 231)

[40] Mr. MacDonald says the trial judge should have found reasonable doubt in the evidence. He attacks the inferences drawn by the trial judge from the evidence about the photographs found on the iPhone, his route back to Nova Scotia, and the seized handgun. He submits the trial judge should not have accorded the text messages extracted by Cst. Bromley any weight as this evidence was inherently unreliable.

[41] Mr. MacDonald complains the trial judge inferred his knowledge of the crated drugs from the fact that "his phone contained pictures of large quantities of cash". He says it was not established who took these photographs. He says the trial judge ignored the evidence from the drug expert (Cst. Peter Hurley) and the investigating officer (Cst. Jonathan Brown) that, other than the photos, they saw nothing of significance to the investigation on Mr. MacDonald's iPhone. In effect, Mr. MacDonald is saying the trial judge erred by inferring guilt from the photographs, the provenance of which was unknown, and disregarding the evidence from Csts. Hurley and Brown that the iPhone offered nothing of evidentiary value.

[42] There are several points worth noting about the bundled money photographs that the trial judge inferred were evidence of Mr. MacDonald's involvement in drug trafficking: (1) this was just one piece of evidence considered by the trial judge; (2) there was evidence from Cst. Bromley as to when four of the photographs were taken; (3) the photographed money did not play a significant role in the trial judge's analysis; and (4) if it is removed from the analysis, the totality of the remaining circumstantial evidence he considered amply supported his finding that Mr. MacDonald's guilt was the only reasonable inference capable of being drawn.

[43] The text message evidence was far more significant to the trial judge's analysis of the circumstantial evidence. Cst. Brown and Cst. Hurley did not conduct an in-depth analysis of the contents of Mr. MacDonald's iPhone. The cell phone expert, Cpl. Bromley, did. He testified it would take an investigator weeks, at least, to examine the full contents of the phone. Cst. Brown spent a "couple of hours" going through the phone. Neither he nor Cst. Hurley was asked about the relevance of text messages on the phone. Specifically, they were not examined on the possible relevance in a drug investigation of Mr. MacDonald's text reply on the afternoon of September 30 - that he was headed "to deliver the rest of the load"- as he drove in a direction that would not take him to the Day & Ross terminal.

[44] When I address the misapprehension of evidence issue, I will discuss Cst. Hurley's "grain of salt" statement, which Mr. MacDonald says is evidence the

extracted text messages were not reliable and should not have been relied on by the trial judge.

[45] Mr. MacDonald submits the trial judge should have accepted that his "prolonged and meandering" return to Nova Scotia was inconsistent with how a drug courier would act and therefore inconsistent with his guilt. He notes Cst. Hurley's testimony that it appeared Mr. MacDonald had not travelled the fastest, shortest route back to Nova Scotia from Kelowna. It was Cst. Hurley's evidence that a drug courier would want to be in possession of the contraband for as short a time as possible to avoid the risk of being caught with it.

[46] Cst. Hurley acknowledged on re-direct examination that he did not know if the route Mr. MacDonald took was actually longer. He said someone familiar with the roads would know the shorter routes; he did not.

[47] Cst. Hurley did not say that drug couriers always and without exception take the shortest, fastest route to deliver the drugs. He testified a truck driver may choose a route that avoids checkpoints and weigh scales or allows for the collection of other cargo to maximize profit by having a full load. Cst. Hurley also said legitimate haulage can serve as cover for illegitimate cargo.

[48] The trial judge noted Cst. Hurley's evidence and the route Mr. MacDonald drove from British Columbia to Nova Scotia. He viewed the hauling of the skidder from Manning, Alberta to Lanark, Ontario as "logical cover for transport of drugs". (*MacDonald*, at para. 226) He had Cst. Hurley's expert evidence to support this inference. It was an inference he was entitled to rely on in his analysis of whether the Crown had satisfied its burden of proof. Furthermore, Mr. MacDonald's route was only one piece of evidence. The trial judge properly considered the totality of the circumstantial evidence in his analysis.

[49] The handgun police seized from a hidden compartment in the cab of Mr. MacDonald's truck was another piece of circumstantial evidence considered by the trial judge. As I noted earlier, Mr. MacDonald submits he took an inconsistent approach to this evidence. I will explain why I am not persuaded by this argument.

[50] The trial judge referred to the handgun and "ammunition close by" as "another bothersome relevant circumstance, of limited weight". All he said about these items in his reasons was that:

> As a matter of common sense in Canada, maybe unlike the United States, people do not generally carry handguns unless they expect violence or some other trouble". (*MacDonald*, at para. 229)

[51] The handgun was before the trial judge again at the forfeiture hearing. The Crown was seeking its forfeiture on the basis it was offence-related property. The trial judge was not convinced on a balance of probabilities and declined to make the order:

> It's a close call. I'm not satisfied based on the evidence that I heard in the trial with regards to the fact that it was hidden away. It was secure, the ammunition was in another location and not stored with the handgun. And whatever it is that I wrote with respect to the difference between Canadian acceptance of firearms in vehicles versus the U.S. approach which I'm sure I dealt with in the decision, although I can't put my finger on it this minute, I'm not satisfied on a balance of probability that that is an offence-related property, and therefore do not order its forfeiture.

[52] Mr. MacDonald submits the trial judge's finding at the forfeiture hearing that the gun was not "offence-related property" was at odds with his assessment at trial. He says this "contradictory approach" undermines the trial judge's treating the gun as a piece of circumstantial evidence that supported Mr. MacDonald's guilt as a drug courier.

[53] As I noted above, the trial judge, in his analysis of the circumstantial evidence at trial, regarded the hidden handgun as a "bothersome relevant circumstance" but one of "limited weight". He saw it as consistent with anticipating "violence or some other trouble". He had nothing more to say about it. It went into the mix but was not accorded more than this passing reference. It was of negligible significance to his overall analysis of the circumstantial evidence. At the forfeiture hearing the trial judge, acknowledging he had commented on the gun in his reasons at trial, described his dismissal of the Crown's application for forfeiture as "a close call".

[54] There was nothing inconsistent in the trial judge's treatment of the handgun. In reviewing the evidence at trial, he expressed a tepid if suspicious view of the gun. In deciding the issue of forfeiture, he viewed its condition – secured (there was evidence it may have had a trigger lock), and unloaded with the ammunition stored elsewhere – as suggesting it may not have been offence-related property. At trial, he was reviewing all the circumstantial evidence and determining whether there was any reasonable inference to be drawn from it other than Mr. MacDonald's guilt. The handgun was a small item in the totality of that evidence. At the forfeiture hearing, the trial judge was required to focus more closely on it. Doing so led him to find the

Crown had come close but not close enough to convincing him the gun was "offence-related property". This does not throw into question his conclusion at trial that Mr. MacDonald's guilt was the only reasonable inference to be drawn from the totality of all of the circumstantial evidence.

Conclusion on Issue #1

[55] Mr. MacDonald says the trial judge misapplied the law as it relates to circumstantial evidence. This complaint has no support in the record. The trial judge conducted a thorough and careful review of the testimony and documentary evidence and the characterization of it by the Crown and Defence. He well understood the competing inferences being advanced for him to consider. He correctly applied the requirements of *Villaroman*, and concluded that:

> 208 …the Crown has proven beyond a reasonable doubt, based on the totality of the objective facts proven in this case, that there is no other reasonable inference than that the accused knew that he was transporting three crates of cannabis marihuana and psilocybin on his flatbed trailer from Kelowna, British Columbia to Nova Scotia.

[56] After his comprehensive analysis of the circumstantial evidence he was satisfied that:

> 234…based on the totality of the circumstances, that the only reasonable inference is that the accused knew he was transporting cannabis marihuana and psilocybin in the three crates. He was aware that the bill of lading in his possession was false.

[57] The trial judge committed no legal error in his application of the law or his analysis of the evidence. There was "a web of circumstantial evidence", carefully considered in its totality by the trial judge, from which he found Mr. MacDonald could not escape. (*Sekhon*, at para. 56) I would dismiss this ground of appeal.

Issue #2 – The Evidence of Stacey Walton

[58] Stacey Walton, the 22 year employee of Day & Ross, did not give expert evidence. The evidence she gave was factual in nature. Technical evidence grounded in experience, without more, does not constitute expert evidence. [*R. v. Potter*, 2020 NSCA 9, at paras. 411-423; *R. v. Ajise*, 2018 ONCA 494, at para. 23] Ms. Walton was not asked to offer, and did not offer, opinion evidence.

[59] Ms. Walton was called as a witness by the Crown to talk about the practices of Day & Ross in relation to bills of lading and the shipping of goods. Her evidence was based on her extensive experience working for the company.

[60] Ms. Walton's factual evidence about transport of goods under the auspices of Day & Ross and the documentation that would be required to accompany them was relied on by the trial judge as a basis for inferences he drew concerning Mr. MacDonald's knowledge that the crates contained drugs.

[61] The trial judge accepted Ms. Walton's evidence as "credible and reliable in every respect". (*MacDonald*, at para. 211)

[62] Mr. MacDonald did not object to Ms. Walton's evidence. On cross-examination, his counsel asked Ms. Walton about provincial trucking regulations and weight restrictions for an overweight load. She was unable to answer certain questions and said the information was outside the scope of her knowledge.

[63] Mr. MacDonald complains the trial judge treated Ms. Walton's testimony as expert evidence concerning the trucking industry in general and used this evidence to support the inferences he drew. Mr. MacDonald argues that as the evidence established he had no association with Day & Ross the trial judge should not have inferred he would have appreciated there were anomalies in the bills of lading.

[64] Ms. Walton was shown the two bills of lading seized from Mr. MacDonald. She identified indicators, some of which I discussed in paragraph 22, that they had not been filled out in accordance with Day & Ross practices. She was not asked her opinion on their authenticity. The inference they were fraudulent was one the trial judge drew from the evidence. It was a reasonable inference he was entitled to make. It was not an opinion elicited from Ms. Walton.

[65] The trial judge went on to conclude Mr. MacDonald, an experienced trucker, would have known the bills of lading were fakes:

> 211 Based on the evidence of Stacey Walton of Day & Ross, whose evidence I accept as both credible and reliable in every respect, the accused could not have picked up the cargo at the Day & Ross Kelowna terminal as the bill of lading purports. He had to know that.
>
> 212 Day & Ross have no record of the accused ever making a delivery for it, either as a driver or a broker. His name is not in their system; neither was the name of J & J Collectibles, J J Collectibles, Musical Sounds Inc., Pinnacle Music Inc., or any combination of the words similar to that in their system as customers.

213 The accused could not subcontract from another Day & Ross driver or broker without it being in their system. It was not.

214 Counsel for the accused submits that because the accused was not in the Day & Ross records as a driver or broker, he would not know the business practices of Day & Ross related to their bills of lading. That submission does not explain the fact that the September 21st bill of lading shows that the cargo was purportedly dropped off at the Day & Ross, Kelowna terminal at 760 McCurdy Road. The accused did not pick up the load at the Day & Ross, Kelowna terminal, as the bill of lading purports.

215 He asks me to infer that the accused would not have understood the patent falseness of not only that bill of lading, but of Exhibit #25, the bill of lading in his possession for August 12, 2015, for delivery from J & J Collectibles of Adams Road, Kelowna to Pinnacle Music Limited of Isnor Road, Dartmouth of 4 crates of similar goods.

216 Based on his experience as a trucker, the accused would know, as a matter of common sense, irrespective of any lack of knowledge of Day & Ross's business policies, that the shipper or consignee would pay Day & Ross, who would pay him. He was never on Day & Ross's system as a broker or driver and would have known that before any transport of goods under either of the bills of lading in his possession.

217 There are several other aspects of the bill of lading that convince the court of the accused's knowledge of the falseness of the September 21st bill of lading.

218 As Ms. Walton testified, a driver or broker (in this case the accused is self-employed, so he wore both hats) gets paid by weight and volume. All drivers know this. It makes no sense that the bill of lading contained no record of the weight. This was a red flag to Ms. Walton and I find that it would be a red flag to any trucker with the experience of the accused.

219 In addition, only when a bill of lading is signed by the shipper and the driver is there a contract. I am satisfied that the accused as an independent driver broker would know this. Neither the bill of lading of September 21st, 2015, nor the bill of lading of August 12th, 2015, are signed by either the shipper or the driver.

220 Another important circumstance related to the obvious falseness of the bill of lading, and my conclusion that the accused knew the contents of the cargo to be other than as stated in the bill of lading, is the fact that it was, in my view, the accused who very likely completed Exhibit #26 -- the September 21st, 2015 bill of lading. The reason for this conclusion is the mistake as to the date on the bill of lading "10/21/15". This mistake is identical to the mistake respecting dates that the accused entered on the pages of his 'driver's daily log'(DDL) and 'driver's daily vehicle inspection reports'(DDVIR), each of which were signed by him, for each of the 16 days in September 2015 that he drove. They are found in Exhibit #20.

[66] The trial judge also made the reasonable inference that Mr. MacDonald would have known, as a matter of experience and common sense that fragile musical instruments would not be shipped on a flatbed trailer which was also hauling a large skidder.

[67] There was ample support in the evidence to establish Mr. MacDonald knew he was hauling an illegal cargo under cover of phony documentation. There was no requirement for evidence that Mr. MacDonald was familiar with the practices of Day & Ross. Certain features of the bills of lading such as weight and signatures are commonplace in the trucking industry, as evidenced by the legitimate Mills Heavy Hauling bill of lading Mr. MacDonald possessed for the Mercedes Benz he took to Calgary. Furthermore, there was the trial judge's reasonable inference that Mr. MacDonald had a hand in creating the fraudulent bill of lading, Exhibit #26.

Conclusion on Issue #2

[68] The trial judge made no error in relying on Ms. Walton's factual evidence and drawing inferences from it. She was not asked for, and did not give, opinion evidence. I would dismiss this ground of appeal.

Issue #3 – Did the Trial Judge Misapprehend Corporal Bromley's Evidence?

[69] Mr. MacDonald says in his factum that the trial judge made two errors in relation to Cpl. Bromley's evidence about the devices seized from him on arrest. He points to a misstatement by the trial judge but places greater significance on what he claims was a misapprehension of the evidence.

[70] Mr. MacDonald notes the trial judge described him being in possession of a cell phone and two iPads that were "encrypted" making them inaccessible to investigators. Cpl. Bromley did not testify that any devices were "encrypted" but the trial judge's use of this terminology is inconsequential. What is relevant is that these devices could not be unlocked because they were password protected. The police did not have the tools to gain access to their content. I find nothing turns on how the trial judge described this fact.

[71] Mr. MacDonald places greater emphasis on his claim the trial judge misapprehended Cpl. Bromley's testimony about text messages he retrieved from the unlocked iPhone. Mr. MacDonald says Cpl. Bromley testified the texts "could not be given any forensic evidential weight". This is a reference to Cpl. Bromley having said, as I noted earlier, that the contents of the phone could be overwritten

and “need to be taken with a grain of salt”. As I will explain, I find Mr. MacDonald’s characterization of what Cpl. Bromley said is not endorsed by the record.

[72] Mr. MacDonald argues that, given Cpl. Bromley’s “grain of salt” evidence, the trial judge should not have placed any reliance on the text message – Text #77 - that he was going “[t]o deliver the rest of the load”. The text, taken with the rest of the circumstantial evidence, satisfied the trial judge that Mr. MacDonald knew he was hauling drugs.

[73] The trial judge considered Text #77 in context. He noted it came directly after a text message inquiry about where Mr. MacDonald was headed. He was not headed to the Day & Ross terminal. He still had a load to deliver, which, as the trial judge observed, at that point had to be either cannabis and psilocybin or a refurbished piano and antique instruments. The trial judge found the “only logical inference” was that Mr. MacDonald knew he had drugs in the crates.

[74] The record does not support Mr. MacDonald’s claim that the trial judge misapprehended Cpl. Bromley’s testimony and should have understood it to impugn the reliability of Text #77. There are several points to be made in dismissing this ground of appeal:

1) Cpl. Bromley never testified that Text #77 had no evidentiary value. He was never asked about the reliability of that text, either in direct or cross-examination.

2) Cpl. Bromley’s testimony about retrieved texts that had been deleted needing to be taken “with a grain of salt” related to the possibility that, in the process of recovery, some of the information in deleted messages could be overwritten with incorrect information. He never said this applied to Text #77 and that its content needed to be taken with a grain of salt.

3) There is no basis for a suggestion that Text #77 should have been viewed by the trial judge with skepticism. The context in which it occurred supported its reliability. It was sent in the course of an ongoing conversation that spanned a number of hours. It was a direct response to a direct question – “Where are you heading now?” Mr. MacDonald had not off-loaded the crates. He was still travelling to his destination, wherever that ultimately was to have been. As the trial judge found, it could not have been the Day & Ross terminal.

4) Text #77 was referred to in the Crown's final submissions with the trial judge asking for the time of the message. The Defence made no mention of the text in final submissions.

[75] Mr. MacDonald never challenged the admissibility of the text messages. In fact, he relied on them to establish the timeline for his return trip from British Columbia to Nova Scotia and to show he had been dealing with oil pan issues outside of Edmonton. In final submissions, it was suggested that Mr. MacDonald, having had oil pan problems, may have been headed at the time of his arrest to a garage in the Annapolis Valley for service. (The Annapolis Valley is west of, and a considerable distance away from, Mr. MacDonald's home in Antigonish.) The trial judge was urged to view the oil pan repair as a competing inference for Mr. MacDonald not proceeding to the Day & Ross Dartmouth terminal on the afternoon of September 30 when he returned to Nova Scotia.

[76] The reliability of the text messages was not challenged by Mr. MacDonald beyond his reliance on Cpl. Bromley's generalized "grain of salt" comment. The trial judge's use of the retrieved texts in support of inferring Mr. MacDonald's knowledge he was hauling a cargo of drugs was a reasonable inference he was entitled to draw.

Conclusion on Issue #3

[77] The trial judge did not misapprehend Cpl. Bromley's "grain of salt" caution about the electronic evidence. He was required to take a contextual approach to the text messages and made no error in relying on Text #77 as evidence that supported the inference Mr. MacDonald knew he was transporting drugs. I would dismiss this ground of appeal.

Issue #4 – Did the trial judge fail to find that Mr. MacDonald's truck was a home, that is, a dwelling house, and therefore real property, which should have exempted it from mandatory forfeiture?

[78] Following Mr. MacDonald's convictions for possession for the purpose of trafficking in cannabis and psilocybin, the Crown sought forfeiture of his Peterbilt truck. Forfeiture was mandatory under s. 16(1) of the *CDSA* once the Crown established on a balance of probabilities that the truck was offence-related property. This was not in issue.

[79] Mr. MacDonald asked the trial judge to find an exception under s. 19.1 of the legislation. Under that section, forfeiture of real property can be avoided if the impact of forfeiture "would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record" of the offender. (s. 19.1(3), *CDSA*) Mr. MacDonald, relying on the definition in the *Criminal Code*, R.S.C. 1985, c. C-46, for "dwelling house", argued the truck was a dwelling house and therefore real property, allowing a proportionality assessment to be made pursuant to s. 19.1(3) of the *CDSA*.

[80] Mr. MacDonald's argument called upon the trial judge to undertake an interpretative exercise: did Mr. MacDonald's truck qualify as real property within the forfeiture regime of the *CDSA*? This is a question of law and attracts a correctness standard of review. (*Housen v. Nikolaisen*, 2002 SCC 33, at para. 8) In short, was the trial judge correct in determining that the truck was not real property and therefore not eligible to be exempted from forfeiture?

[81] I find that he was. For the reasons that follow, I would dismiss this ground of appeal.

[82] The *CDSA* does not define real property. Mr. MacDonald's reasoning started with the *Criminal Code* definition for dwelling house as a basis for establishing the truck qualified as real property. If it was real property, under s. 19.1(3) of the *CDSA* and the proportionality considerations I described earlier, it could be exempted from mandatory forfeiture.

[83] The *Criminal Code* defines a dwelling house as:

> …"the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes
>
> (a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passage-way, and
>
> (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence.

[84] It was Mr. MacDonald's submission his truck – a "mobile unit" he used as a "temporary residence", a home on the road - satisfied this definition which he said should apply to the forfeiture proceedings under the *CDSA*. Mr. MacDonald said his analysis was assisted by s. 19.1(4) of the *CDSA* which allows a dwelling-house to be exempt from forfeiture if certain circumstances are established.

[85] Section 19.1(4) of the *CDSA* provides that where all or part of the property targeted for forfeiture is a dwelling-house, the court shall take into account the impact on the immediate family of the offender if the dwelling-house was the family member's principal residence. This could lead to a dwelling house being exempted from what might otherwise have been mandatory forfeiture.

[86] The trial judge described Mr. MacDonald's argument as inviting him to take a "novel approach" in dealing with the truck. He rejected Mr. MacDonald's approach and found the truck was offence-related property and subject to mandatory forfeiture.

[87] The *CDSA* has a broad definition of offence-related property:

> "Offence-related property" means, with the exception of a controlled substance, any property, within or outside Canada,
>
> (a) by means of or in respect of which a designated substance offence is committed,
>
> (b) that is used in any manner in connection with the commission of a designated substance offence, or
>
> (c) that is intended for use for the purpose of committing a designated substance offence.

[88] The trial judge's reasons for rejecting Mr. MacDonald's characterization of his truck as "real property" included the following, with references to the *Criminal Code* definition, and ss. 19.1(3) and (4) of the *CDSA*:

> …It's clear that the definition of dwelling house in the *Criminal Code* was not necessarily intended to relate to the issue of whether it was real property or personal property in the sense that it might be a trailer or a car. And I've known many people who've been clients of mine or appeared before me who've slept in their car. And I'm not going to parse that any more than to say that the definition of dwelling house as it relates to the discretion has to be a dwelling house related…a dwelling house that forms part of real property. And there's no possible way in which this trailer can be considered under any stretch of the imagination to be related to or form part of real property, and sub-section 3 as a precondition to number 4.
>
> Now furthermore and probably more important, the evidence that this Court heard both in the *Charter* motion and during the trial, and the documents that were entered as exhibits identifying the accused's address all related to his address at or near Antigonish or in Antigonish County, Nova Scotia. I'm satisfied that, while long-haul truckers spend a lot of time on the road, his principal residence at all the relevant periods of time was not his truck on the road, but was 2285 Highway 316, Antigonish County, Nova Scotia.

[89] Referring to the Saskatchewan Court of Appeal decision in *R. v. Paziuk*, 2007 SKCA 63, the trial judge concluded it would be an error of law to apply the proportionality test to Mr. MacDonald's truck.

[90] I will return to *Paziuk* shortly.

[91] Mr. MacDonald says the trial judge made the following errors in his determination that his truck should be subject to mandatory forfeiture:

- Finding a truck could not be real property under s. 19.1(3) of the *CDSA* or a dwelling house under s. 19.1(4) of the *CDSA*;

- Finding that for s. 19.1(4) of the *CDSA* to be applicable, the residence in question had to be the principal residence of the Appellant.

[92] Mr. MacDonald characterizes his truck as "his temporary place of residence" on the basis that, when hauling goods across the country, he would "live and sleep" in it. He reiterates on appeal the arguments he made to the trial judge: his truck should have been dealt with according to an expansive treatment of what constitutes real property and a dwelling-house and exempted from forfeiture.

[93] As I have noted, Mr. MacDonald also challenges the trial judge's reasoning in relation to s. 19.1(4) *CDSA*. He correctly points out that s. 19.1(4) requires a court to consider the impact of forfeiture on family members of the offender where the dwelling-house slated for forfeiture is their principal residence. He notes the trial judge talked about s.19.1(4) in terms of whether the truck was Mr. MacDonald's principal residence, concluding it was not because the evidence established his principal residence was in Antigonish County.

[94] The trial judge's consideration of s. 19.1(4) in his analysis was misplaced. The provision requires the court to consider the impact of a forfeiture order of a dwelling house on "any member of the immediate family" of the offender if the dwelling-house is the principal residence of the member (and was the member's principal residence at the time the charge was laid). This had no application to the forfeiture of Mr. MacDonald's truck. Mr. MacDonald was not making an argument that any immediate family member used his truck as a principal residence. The section simply did not apply in Mr. MacDonald's case. Furthermore, nothing in s. 19.1(4) assists Mr. MacDonald in making a case for his truck to qualify as real property.

[95] Having said that, the trial judge's reference to s. 19.1(4) had no effect on his conclusion that Mr. MacDonald's truck was subject to mandatory forfeiture. What he correctly found was that the truck was not real property and, consequently, was not eligible for a proportionality assessment under s. 19.1(3).

[96] It does not matter that Mr. MacDonald used his truck to "live and sleep" while he was on the road. Doing so did not transform the truck into real property. The proportionality assessment in s. 19.1(3) that Mr. MacDonald sought to invoke to exempt his truck from mandatory forfeiture only applies to real property.

[97] Real property is fixed and immovable. "…[T]he term 'immovables' comprises land and anything affixed thereto or part thereof including leaseholds. 'Real property' may be similarly defined except that it does not include leaseholds."[2] Property is either real property or personal property.[3]

[98] The *Criminal Code* definition of "dwelling house" has no application to the forfeiture provisions of the *CDSA*. These statutes do not operate interdependently. For example, the sentencing principles under the *Criminal Code* do not apply to the imposition of forfeiture orders under the *CDSA*. (*R. v. Craig*, 2009 SCC 23, at paras. 47-48) The main focus of forfeiture orders under the *CDSA* "is on the property itself and its role in past and future crime". (*Craig*, at para. 40)

[99] The Supreme Court of Canada in *Craig* has made it clear that forfeiture of offence-related property pursuant to the *CDSA* is "a discrete inquiry" separate from the sentencing of the offender under the *Criminal Code*. (at para. 13) The discrete inquiry is conducted according to specific provisions contained in the *CDSA*. The *Criminal Code* definition for "dwelling house" has no application in forfeiture proceedings under the *CDSA*. And although it is beside the point, even under the *Criminal Code* definition, a truck with sleeping quarters is not a dwelling-house.

[100] Forfeiture pursuant to the provisions of the *CDSA* can be punitive. It is intended to take offence-related property "out of circulation…rendering it unavailable for future designated substance offences". (*Craig*, at para. 22)

---

[2] Anne Warner LaForest, *Anger & Honsberger Law of Real Property*, 3rd ed. (Toronto: Thomson Reuters Canada Ltd., 2019) (loose-leaf updated October 2020, release 24) ch 1 at 7.

[3] "Property law may be divided into a number of components. The central distinction that is drawn is between real property (meaning, mainly, rights in relation to land) and personal property (things other than land)." Bruce Ziff, Principles of Property Law, 7th ed. (Toronto: Thompson Reuters, 2018) at 87

[101] The trial judge made no error in concluding forfeiture was mandated for this offence-related property. As found by the trial judge, by no stretch of the imagination can Mr. MacDonald's truck be considered real property. It is not, as suggested by Mr. MacDonald, eligible for exemption for forfeiture because he used it as sleeping quarters when transporting goods over long distances.

[102] I return now to the Saskatchewan Court of Appeal's decision in *Paziuk*, relied on by the trial judge. *Paziuk* is directly on point. The court overturned a trial judge's determination there should be no forfeiture order for the truck, used by Mr. Paziuk to transport ecstasy pills and marijuana into Saskatchewan. Mr. Paziuk's truck was subject to mandatory forfeiture under the *CDSA* and not eligible for a proportionality assessment under s. 19.1(3).

[103] As the court explained in *Paziuk* allowing the Crown appeal:

> 10 It is clear the truck is "offence-related property" in that it was used in connection with the commission of a designated substance offence. The sentencing judge failed to consider the definition under the *Act*. Upon conviction, the first step he ought to have taken was to determine whether the property was "offence-related property" within the meaning of the *Act*. The sentencing judge was then required, pursuant to s. 16 , to order the property be forfeited because the section mandates the same…
>
> …
>
> 13 There is no reference to proportionality in regard to personal property and it is only in regard to forfeiture of real property that the judge can take into account the impact of an order of forfeiture and whether it is proportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record of the person charged or convicted.

[104] This same reasoning applies to Mr. MacDonald's truck. The *CDSA* definition for "offence-related property" is what the trial judge was required to consider. He did so. The trial judge was correct to have found that the truck was used in the commission of the offences for which Mr. MacDonald was convicted, and therefore subject to mandatory forfeiture under s. 16(1).

Conclusion on Issue #4

[105] The trial judge made no error in rejecting Mr. MacDonald's novel approach to the truck. The truck was personal, not real, property. The order for the mandatory forfeiture of the Peterbilt truck was correct in law. I would give no effect to this ground of appeal.

Disposition

[106] I would dismiss Mr. MacDonald's appeal of his convictions. I would grant leave to appeal the mandatory forfeiture order for the truck and also dismiss that appeal.

Derrick, J.A.

Concurred in:

Wood, C.J.N.S.

Van den Eynden, J.A.