

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Maiholz*, 2020 NSPC 30

**Date:** 20200731

**Docket:** 8075425, 8075426

**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Karen Maiholz

**Judge:** The Honourable Judge Ronda van der Hoek

**Heard:** July 10, 11, 19, 2018, December 20, 2018;  
June 19, 2019, September 3, 5, 2019, October 25, 2019,  
November 7, 2019, December 16, 2019; and  
January 6, 2020, in Kentville, Nova Scotia

**Decision** July 31, 2020

**Counsel:** James Fyfe, for the Crown  
Ken Greer, for the Defendant

**By the Court:**

***Introduction:***

[1] Ms. Maiholz was the head cashier/assistant manager at the Berwick Foodland grocery store where, it is alleged, she committed a fairly sophisticated theft involving manipulation of the financial accountability system. A loss prevention analysis conducted by Sobeys, the parent company, concluded Ms. Maiholz generated false refunds at the store cash registers and recorded cash loans to balance the system. The cash loans, not needed to pay the false refunds, were presumably pocketed by Ms. Maiholz. She is before the Court charged with one count of theft over \$5,000.00 contrary to section 334 of the *Criminal Code* of Canada between August 8, 2016 and November 17, 2016. Also included in the charge is theft of a package of cigarettes. The Crown proceeded by indictment.

[2] During closing submissions, the Crown conceded it did not prove theft over \$5,000.00 and asked for a conviction for theft under \$5,000.00.

[3] This trial took place over 11 days, due in large part to late and ongoing disclosure of financial records, various applications, laboriously long and detailed examination of witnesses conducted over many days, and tediously slow

manipulation and playing of associated store video surveillance tapes. The initial estimate of two days for trial proved a grievous understatement.

[4] The Crown called five witnesses: Greg Pulsifer, the franchisee owner, Evelyn Hill, a Sobeys Loss Prevention Analyst, Kim d'El, the store employee who replaced Ms. Maiholz, and Constables Bushey and Morrison, the investigating officers. Ms. Maiholz elected not to call evidence.

[5] Applications related to document admissibility and disclosure were raised and decided during the trial, and I will not mention those decisions except in so much as they relate to my final determinations.

***Position of the Parties:***

[6] The Defence says the evidence is not compelling. The investigation was lacking, and the Court is asked to accept on faith that an offence occurred. Defence counsel says witnesses engaged in selective retention of short bits of video. This, combined with a failure to produce relevant corporate customer accounts that could have shed light on the suspect transactions, combined with late disclosure at trial of various documentary evidence, resulted in untrustworthy testimony, that hampered Ms. Maiholz ability to respond to the charges.

[7] Defence counsel says evidence of money actually leaving the store is scant and deficient and, in any event, there are innocent, exculpatory conclusions to be reached on each of the twelve transactions that should result in a reasonable doubt.

[8] The Crown says the reports Ms. Hill ran from the store on the Navistor program, are compelling and reliable. While video evidence did not support every transaction, the Court should infer a pattern of theft based on the transactions that are supported by video recorded activity. He also says four videos clearly show Ms. Maiholz secreting cash from the cash room drawer.

[9] The Crown says the Defence explanations for her actions are speculative, do not find support in the evidence, and should be discounted. Store records such as the refund book, the loan book and the communications binder do not record the suspect transactions, therefore supporting the unlawful purpose of those transactions.

***Issues:***

1. What use can the Court make of the exception reports generated by the Sobeys Navistor program?
2. What use can the Court make of the documentary business records from the Berwick store?

3. Does the oral testimony of the witnesses impact the documentary evidence, raising a reasonable doubt as to its strength?

***Decision:***

[10] After assessing all the evidence, considering both the credibility and reliability of each witness, as well as the technology – videos and computer data – and making findings of facts, I have concluded the Crown has proven the case beyond a reasonable doubt.

[11] I do not intend to address each individual transaction to the scrupulous level of detail described in the trial evidence, instead counsel should know that I listened carefully, reviewed my notes, listened to lengthy portions of the audio transcript, and reviewed the portions of transcript prepared for counsel. Before setting out my findings of facts, I will explain the general principles that guided my determinations.

***General Principles:***

[12] The role of the trier of fact, nicely described in a recent decision of Renwick J. in *R. v. D.D.*, 2020 ONCJ 102, and slightly modified to accord with the particulars of this case, are as follows:

[5] The onus in a criminal trial begins and ends with the prosecution to prove guilt beyond a reasonable doubt. Every person charged with a criminal offence is presumed innocent and that presumption remains throughout the whole of the trial, unless and until the Court is satisfied that the charge has been proven beyond a reasonable doubt. The prosecution's burden of proof never shifts during the trial. In this case, if at the end of my consideration of the evidence and submissions I am not satisfied that the prosecution has proven any single element of an offence charged beyond a reasonable doubt, and more specifically, if I have a reasonable doubt that the Defendant [Ms. Maiholz] committed the offence, she will not be found guilty of it.

[6] A reasonable doubt is not an imaginary or frivolous doubt. It must be based upon reason and common sense and logically derives from the evidence or lack of evidence adduced during the trial. While likely or even probable guilt is not enough to meet the criminal standard, proof to an absolute certainty is inapplicable and unrealistic. The Supreme Court of Canada has cautioned that there is no mathematical precision to proof beyond a reasonable doubt, instead it lies much closer to absolute certainty than to proof on a balance of probabilities. If after considering all of the admissible evidence, I am sure the Defendant [Ms. Maiholz] committed theft, I must convict her since this demonstrates my satisfaction of guilt beyond a reasonable doubt. Likewise, if I am not sure, then I have a reasonable doubt and cannot convict.

[13] The case involved credibility and reliability assessments of the witnesses. In assessing same, I considered the general capacity of each witness to remember and explain what they perceived, and their ability to accurately testify to those recollections. I considered whether the witness was trying to tell the truth and assessed whether they were sincere, candid, biased, reticent, and/or evasive. Throughout I am aware I can accept some, none, or all of what a witness says while testifying. Further from *R. v. D.D.*:

[8] A valuable means of assessing the credibility of any witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions. I must also assess what is testified to in the context of all of the evidence in the case and not on an isolated basis. This is true for any inconsistencies and whether these are inconsequential or significant to the

case. If the inconsistency is significant, then I must pay careful attention to it when assessing the reliability of the witness' testimony.

[14] There was no testimony or evidence from the Defence, but I am nonetheless required to consider the alternate explanations suggested in cross examination.

[15] As a result, I must apply the framework provided by the Supreme Court of Canada in *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] S.C.J. No. 26, as it is now understood. As further outlined in *R. v. D.D.*:

I rely heavily upon the article written by Paciocco J.A. entitled, "Doubt about Doubt: Coping with W.(D.) And Credibility Assessment" found at 2017 22 Canadian Criminal Law Review 31. Justice Paciocco breaks down the W.(D.) principles into five propositions:

- (i) I cannot properly resolve this case by simply deciding which conflicting version of events is preferred;
- (ii) If I believe evidence that is inconsistent with the guilt of the Defendant, I cannot convict the Defendant;
- (iii) Even if I do not entirely believe the evidence inconsistent with the guilt of the Defendant, if I cannot decide whether that evidence is true, there is a reasonable doubt and the Defendant must be acquitted;
- (iv) Even if I entirely disbelieve evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and
- (v) Even where I entirely disbelieve evidence inconsistent with guilt, the Defendant should not be convicted unless the evidence that is given credit proves the Defendant's guilt beyond a reasonable doubt.

[11] In the next part, I will outline some of the evidence and provide an assessment of the testimony, with references to specific portions of the evidence. Although I will not refer to all of what a witness said, I listened to each witness carefully, I have taken detailed notes, and I have assessed all testimony for intrinsic and extrinsic consistency, plausibility, balance, possible interest, and the witness' ability to recall and communicate.

[16] Although the words in the decision might suggest I reached conclusions before the end, I did not do so before thoroughly reviewing all the evidence in the case, and I reached no conclusions about any of the testimony I heard until all the closing submissions were heard and I completed a laborious review of all the evidence.

***The Evidence and Findings of Fact:***

***Uncontroverted Evidence:***

[17] At all relevant times Mr. Gregory Pulsifer was the franchise owner of the Berwick Foodland and Ms. Maiholz, his trusted employee, was responsible for the front end of store. She held this position of authority during his five-year tenure and was being considered by Sobeys to take over when he retired in 2016. That would not be the case because relatives of franchise owners sometimes receive priority consideration and Mr. Pulsifer's son was ultimately granted the franchise. The granting occurred in October and Ms. Maiholz was prepared to leave but was convinced to stay on.

[18] Every thirteen weeks an outside agency conducted an in-store audit of the Berwick store's inventory. Following the November audit, Mr. Pulsifer says he was advised to investigate the cause of a drop in the store profit margin.



[19] He contacted Sobeys, asked them to engage a review, they did so through Ms. Evelyn Hill, and he was invited to the head office in Stellarton to consider their findings. At the meeting, among other things, he watched some security videos taken from his store and, armed with what he learned, returned to the Berwick store where he watched as much additional video footage as was contained in his store cameras, ever conscious that the automatic 21 day overwrite feature would engage and he would lose forever whatever footage he did not save. He identified and recorded specific information to a CD that he provided to the RCMP.

[20] Mr. Pulsifer also scheduled an immediate meeting with Ms. Maiholz and a member of the Sobeys security team. His intention, to ask her about some suspect transactions and view related video footage, was thwarted when she declined his invitation, walked out and later quit her position.

[21] Ultimately, he gathered various business documents located in the store and provided them to the police – a refund book, a loan book, and Weekly Physical Cash Totals for the Store.

[22] During the trial he located and provided additional documents to the Crown and Defence – envelopes containing weekly refund receipts, and a communications binder.

[23] Cst. Richard Bushey was the investigating officer who met with Mr. Pulsifer, obtained his complaint of theft, received the CD of video material that the two watched while Mr. Pulsifer explained to the officer what was happening in each scene. On cross-examination, Cst. Bushey says the CD contained only snippets and he has no idea whether he could have viewed more video footage because he did not know how long surveillance videos were retained at the store.

[24] On cross-examination, Cst. Bushey did not dispute a lack of follow-up on his part, noting Evelyn Hill of Sobeys also provided material for his review, and after a month when the matter was assessed as somewhat complicated for a general duty officer, the lot was turned over to Cst. Mike Morrison of the General Investigative Section (GIS). The lot consisted of the two CDs containing video footage from the store and documents provided from the Sobeys head office and Mr. Pulsifer.

[25] Cst. Bushey was clear and articulate and testified as a careful and frank witness. His evidence is non-contentious.

[26] Constable Mike Morrison, of the RCMP GIS unit, confirmed that he took over the case and received documents from Cst. Bushey, who remained on the file to assist. Cst. Morrison reached out to Mr. Pulsifer for more information and met with him to try to wrap his own head around the complaint. Mr. Pulsifer provided supporting documents, including a large binder.

[27] He watched the videos taken from the cash office camera and those from the front end of the store cash register areas. On one video, taken in the cash office, he observed Ms. Maiholz count money and put it in a jacket pocket.

[28] He compared loans from the cash office and transaction records to see if they corresponded with the refund documents. His review led him to believe that there were grounds to charge theft. He completed the court package.

[29] On cross-examination, he confirmed scanning and uploading the disclosure package, and he took no issue with the Defence description of the materials being a “bit disorganized and out of a discernable order”. He also clarified that he did not write any of the comments present on the disclosure materials, instead confirming they were present on the original documents that he received from Mr. Pulsifer’s binder.

[30] As for the videos he watched, he says he reviewed the ones provided by the store. While he requested all videos from the store, some were not available because of the automatic 21-day overwrite.

[31] Since Mr. Pulsifer called police on November 21, the store would have had video footage for the past 21 days, back to November 1, 2016. Any videos from an earlier time would have come from the CD provided by Ms. Hill who started her review earlier than Mr. Pulsifer. I note, her overall review of transactions went back to August 2016, but video footage was only available for the last three weeks.

[32] Overall, it was clear that the police officers did not engage an in-depth analysis of the case and were content to rely on the store records. They did not interview store employees present in videos or mentioned in the refund and loan transactions, nor did they engage outside expertise to analyze the store records.

***The Evidence Requiring Findings of Fact:***

***The Sobeys Analysis:***

[33] Ms. Evelyn Hill testified that for the past ten years she worked as a Loss Prevention Analyst for Sobeys' Loss Prevention Department. Before accepting her current position, much like Ms. Maiholz she started her career as a cashier, was promoted to supervisor, and then to front-end manager.

[34] Ms. Hill testified over days and at one point in her evidence, a disruption for disclosure and consideration of a third-party records application delayed the trial. Overall, she testified on July 10, 11, 19, 2018 and June 19, 2019.

[35] She is situated at the Sobeys Head Office in Stellarton where she is tasked to run reports for all the Atlantic regional stores under the Sobeys umbrella, including Co-op and Foodland.

[36] When Sobeys purchased the “front-end exception tool” Navistor, the retail experts who sold it trained Ms. Hill on its use. She explained that Navistor is a computer program used to monitor store “front ends”, which refers to the cash offices and cash registers at the various stores. “Exception” refers to any variations from the norm baselines for a certain store type.

[37] Ms. Hill was not proposed as an expert witness, and the Court is asked to rely on the information contained in the Navistor program, which she uses daily, and her testimony about its reliability and significance.

[38] On a weekly basis she monitors “exception reports” generated by Navistor. The reviews allow her to determine if “there are things above average”. She also runs reports for store managers, although each store can review their own information.

[39] Importantly, neither she nor the individual store managers can modify the information collected by Navistor. Manipulation of the Navistor data is limited to changing “exception parameters” such as trend length or threshold limits used during searches.

[40] She explained that she starts a search by looking for key performance indicators (KPIs) such as line voids and cancelled transactions. She provided the example of a store processing a high number of bottle returns. She investigated and ultimately determined the exception was caused by poor water quality in the local community resulting in higher than normal water bottle sales and a correspondingly high level of bottle returns. In aid of her investigation, she also contacted the store manager who told her about the water quality issue.

[41] She explained that Navistor records “everything” that takes place at a store cash register and in the cash room office: log ins, log offs, sales, refunds, etc. Every transaction is stored for 18 months.

[42] Curiously, she explained that the “information” “goes through a system called Market Basket that distributes the information to various systems and then it goes into Navistor”. She knows nothing more about Market Basket.

[43] She also said, “ACS is the system they use”, and she does not know what it stands for. On cross-examination, she suggested ACS records a detailed electronic journal with detail of each individual grocery item purchased in a store transaction. Navistor, on the other hand, records the total transaction purchase price of the full grocery order.

[44] Ms. Hill says it took a long time to review and copy the videos and Navistor exception reports for this case, and she did not think it necessary for her purpose to also obtain an electronic journal for each suspicious refund. She says it would have been time consuming to do so suggesting “I would still be doing it”.

[45] Ms. Hill says it is not unusual to find as many as 1500 Navistor exceptions, presumably in one day, although her evidence on that point was less than clear. After deciding which of the numerous exceptions to “dig into”, her routine involves applying filters and sorting them while applying something called a “Z system”. She looks at the transaction level details, for example the bottle returns in the previous example, to determine when a bottle was purchased thus allowing her the opportunity to better understand the return. If she sees a problem, she accesses, from her desk, the store video surveillance to see what happened at the time the exception occurred, explaining she has access to all video footage captured in the stores including near cash registers and in the back of store cash rooms.

[46] For her Berwick analysis, she asked an IT person to download the Navistor data to an Excel spreadsheet and save it to a memory stick, because she was aware the data is overwritten every 18 months. That Excel file, she says, contains “all dates from Berwick” that are “broken out by month because there is too much information for the Excel spreadsheet to capture”. She thinks “there is 12 months worth of data on the stick Excel sheet”. (Exhibit #1)

[47] Ms. Hill says the Excel spreadsheet contains all the data from the Berwick store including log ins, log offs, all transactions that go through the ASC system to Navistor for example debit sales, completed transactions, sale amounts, coupon amounts, total amounts, refunds, air miles, transaction numbers, cashier numbers, etc. There are thousands of pages of this information – 47,127 lines of transactions. From that information she generated her transaction-specific sheets entered into evidence.

[48] She uses all the aforementioned information to determine which cashier was involved in the transaction and she can also access payroll records to find more particular details. She ultimately hands her final report to the Loss Prevention Manager for action.

***Cashier or Transaction Reconciliation (for a cashier):***



[49] She also reviewed reconciliation reports in Navistor and determined all the cashiers involved in the suspect transactions had balanced cash registers on each relevant date. This information would find support in Exhibit 33 entered by Mr. Pulsifer — Physical Cash Totals for the Store by week.

[50] In November 2016, Ms. Hill was tasked to look at some details in Navistor to find an explanation for a “bad margin” at the Berwick store. She explained that a “bad margin” refers to the inventory of a department, but “bad” she could not specifically explain.

[51] She began her task by looking at KPIs (key performance indicators) and exceptions including “open department sales”, voids and refunds. She found “a lot of high-end refunds being processed for over \$100” which she did not expect to see in a grocery department. She reviewed this situation at the weekly level and then looked further out for a trend. She concluded the refunds were being processed by Karen Maiholz, and the cashier number used in the refund transactions was not one assigned to her.

[52] To confirm her concerns, she also watched video footage associated with the refunds. Ms. Hill explained that she had visited the store a year or two earlier and met Ms. Maiholz while providing training on Navistor. She says the video footage

showed Ms. Maiholz processing refunds at cash registers without customers present and money was not leaving the cash register to make the refunds, as should have been the case. Finally, there were no overages in the cash register drawers, which she expected based on customers not receiving refunds.

[53] Her next step was a review of the back of store cash office functions where she says she concluded matching loans were being processed that would result in the cash registers balancing. Loans, she explained are used if a customer returns an item and there is insufficient cash in the cashier's drawer to complete the transaction. A loan would come from a manager at the back of store cash office and be given to the cashier to complete the refund.

[54] She explained that loan transactions from the cash office are also captured in Navistor, as a supervisor would have to be "logged in" at the cash room computer to "do a loan". Finally, she advised that the cash office computer where loans are recorded has a cash drawer below it from which the cash is removed and brought to the cashier. While she watched videos from the cash room office, she did not find any footage of cash loans leaving the office and going to the cash registers for the suspect refunds.

[55] Asked why the twelve specific transactions concerned her, Ms. Hill says while size of store affects levels of refunds, she would expect a couple hundred dollars a week in total refunds at a Foodland, not the amounts she found.

[56] Ms. Hill was asked to review a Navistor Trend Report from April 2016 to January 2017; she testified that on August 13, 2016 there were \$1,240.61 in refunds for the week, and they continued at a high level, i.e. November 19, 2016 \$1,416.45, going down to \$436.00 the week ending November 26, 2016 and remaining thereafter in the low hundreds.

[57] She ran the report with key performance indicators (KPI) chosen by her, but the document was not entered as an exhibit. I will rely on the evidence detailing the charge before me, aware that an unnamed employee was fired at some point in 2016 for stealing from the store, although I was told no more than that firing occurred some eight months prior to the offence before the Court.

[58] Addressing the concerning transactions, Ms. Hill testified that the refunds she reviewed were all recorded to the “open department” and therefore lacked an item number or description of what was being returned/refunded. She explained that every item in the store has a bar code, and “open” simply means lacking a bar code. While it does sometimes happen if, for example, a label was wet and the

number had to be typed in by hand, there really should not be any store items that do not have either a bar code or a UPC code.

***Process for Refunds:***

[59] Ms. Hill explained the process for returning products to the store. She says it starts with a cashier scanning the item through a frontend cash register. At the cash register, a cashier presses a button to record the refund transaction, and in turn the machine generates two slips: one for the store and the other for the customer. The customer gets her money back from the cash drawer, keeps one slip and signs the store's copy of the refund slip. The store slip is left in the cash register drawer to be brought to the cash room at the end of a shift. Once in the cash room, the refund slip, along with others, is bundled to be sent to the head office in Stellarton at the weekend.

[60] In aid of her investigation, Ms. Hill requested all the physical refund slips for the relevant time period. She made the request because she wanted to see if the refund slips she saw generated, were signed by customers. Sobeys was unable to locate any refund slips for the suspect transactions. During his testimony, Mr. Pulsifer would locate and bring the envelopes from his storage unit containing presumably the same weekly bundles reviewed by Sobeys.

[61] Asked if there were exceptions to the refund process outlined above, she testified that it could happen that a customer has only the receipt and not the product when seeking a refund. While the transaction would be recorded to an “open department”, there would still be an indication in the system that it was, for example, an apple and therefore be recorded as “produce code 2”. Another deviation involves refunds over five dollars, which always require supervisor involvement. A supervisor would be present at the cash register to swipe the override card authorizing the refund.

[62] As already stated, she says refund transactions may require a loan from the cash office if the cashier does not have enough money in the cash register to process the refund. Loans are recorded in Navistor at the cash room computer, and she located one that she could associate with each of the twelve suspect transactions.

[63] Asked if the loans are recorded anywhere else, she did not know. On cross-examination, she agreed that she would not be aware of refund or loan books that Berwick might use in their cash room, and in any event, she did not look at such things.

[64] Before addressing the Navistor “exception reports” run by Ms. Hill for the twelve concerning transactions, I will address, based on her testimony, the use I can make of the Navistor data.

***Computer Data:***

[65] A court can accept this type of evidence for the truth of its contents if it is first established to be accurate and reliable, and the information contained therein was gathered in the normal course of business. That would seem to be the only function of the Navistor program as testified to by Ms. Hill. It collects data contemporaneous to an action at the cash registers and in the cash office. It can then be organized and analyzed but cannot be changed.

[66] That said, it is only as accurate as the data entry that created it. I am told mistakes are also corrected at the store level, such as means of payment errors, and I can expect the act of correction will also be recorded by Navistor.

[67] In many respects this is the type of computer data that is difficult to dispute. However, the Defence asked perfectly acceptable questions about the use the Court can make of the data. I do note that a *voir dire* was not requested, and the information came before the Court uncontested. I was asked to consider the weight I would give to it.

[68] Ms. Hill says she relied on the Navistor exception reports to conclude money is missing from the store. She ran exception reports for each suspect transaction that she presented in court as screen shots, and she testified using the 2016 Navistor raw data contained on the Excel spreadsheet. I also reviewed the raw data that Ms. Hill entered in evidence and reviewed for the Court; I located all the suspect refunds and corresponding loans.

[69] Defence correctly pointed out that the Excel spreadsheet data can be manipulated and changed because it is not locked. While I agree this is the case, I can dispense with this issue by finding that I accept Ms. Hill's testimony that she located a corresponding loan for each refund, which is the reason she identified them in the first instance. Finally, I accept that the Navistor data was saved to the Excel spreadsheet without manipulation as a copy of a business record of activity at the store.

[70] I find, generally speaking, the Navistor data is reliable information accurately entered by employees contemporaneous to their duties at the business who had no reason to enter incorrect data. However, I am also aware by admissible videotaped evidence that an employee used Ms. Maiholz's manager identification card to transact an entry at a cash register, so I am hard pressed to accept, without

video evidence in support, that all actions attributable to Ms. Maiholz can necessarily be proven without more.

[71] So, I accept the raw data information in Navistor, I accept the screenshots of the exception reports, all subject to considerations of what they may mean.<sup>1</sup>

***Ms. Hill's Analysis:***

[72] Ms. Hill testified about each of the twelve concerning transactions, and for each one she reviewed the following:

- (1) a screen shot printout taken from Navistor organizing information on the relevant date for each refund and, in some cases, loan, (exception reports)
- (2) videos of either the cash register or cash room or both, if available,
- (3) Exhibit #1 - the raw data from the Excel Spreadsheet including refund and loan information, and<sup>2</sup>
- (4) the Operator Authorization Report, generated on December 15, 2016, (Exhibit #5) containing employee names associated to cashier and manager numbers.

---

<sup>1</sup> While CEA notice was provided for the Navistor documents, I also note the common law rule for admissibility of records as articulated in *R. v. Monkhouse*, 1987 ABCA 227, and *R. v. Wilcox*, 2001 NSCA 45, recently reiterated in *R. v. Keats*, 2016 NSCA 94, by Duncan J.

<sup>2</sup> DVD Exhibit #1 Berwick EJ (Electronic Journal) for November 2015- November 2016 containing all store transactions. DVD Berwick Video One Exhibit #2. DVD Berwick Video Two Exhibit #3)



[73] Since the transactions are very similar, the first will be outlined in much more detail than the others. It was also subject to much scrutiny by Defence and so serves as a bellwether for the other transactions.

***1. October 31, 2016 transaction for \$150.00:***

***The Refund:***

[74] Ms. Hill showed the Court a screenshot of an exception report she captured from Navistor that contained the following information: On October 31, 2016, a refund was processed at cash register #3 at 10:19 am, the transaction number is 601, the refund involved one item, the item was described as “open department”, the value of the refund was \$149.99, it was a cash refund, the cashier who transacted the refund was #100, the manager who processed the refund was #800.  
(Exhibit #4)

***The Loan:***

[75] Ms. Hill also collected a screenshot from the Navistor exception report containing the following information: On October 31, 2016, a loan was made from the cash room (cash drawer #201), it was processed at 9:57 am, for cashier #100, by manager #800, for \$150.00 cash.

**Operator Authorization Report:**

[76] To determine the identity of cashier 100 and manager 800, Ms. Hill reviewed an Operator Authorization Report, generated from Navistor on December 15, 2016, (Exhibit #5). The report identified Tanya as cashier 100 and Karen Maiholz as cashier 120 and manager 800. The reliability of that Report is worth considering since it was generated after the offence dates. I will say more about this later.

***Concerns arising from the Exception Reports:***

[77] Ms. Hill believes the two transactions are exceptional for a number of reasons: (1) it is not the normal process to make a loan (9:57 am) before processing a refund (10:19 am), and so she concludes the former was done to make the cash register balance, (2) she was unable to determine what item was refunded because the transaction was recorded to an “open department”, and (3) the value of the item was, in her opinion, very large for a Foodland store.

[78] On cross-examination, she was asked if there was any reason why Ms. Maiholz could not process a loan before a refund and Ms. Hill agreed she could do so.

**Store Videos:**

***(i) Cash Register Area:***

[79] After reviewing the Navistor information, Ms. Hill also watched numerous videos from the store recordings, seeking footage that matched the various transactions. She identified and narrated one that is time stamped October 31, 2016 at 9:19 am (Exhibit #2: video sixteen).

[80] Asked why the video is time stamped 9:19 am when the concerning transaction is alleged to have occurred at 10:19 am, she testified that the time noted on the video is, in her opinion, “off by one hour” because the video player clock was not reset to account for daylight savings time. Curious, since the clock resets on November 6, 2016, but I will say more on this later. She explained that this is a frequent problem she encounters with store videos and she sends a reminder email to stores sometime in October to make sure they make the change to accord with the correct time. She did not enter such an email into evidence, and I am asked to accept her suggestion and am presumably also asked to conclude the Navistor program times are correct.

[81] Ms. Hill says the video she captured shows the frontend cash register area. Ms. Maiholz is at the cash register, without a customer, processing a refund by

swiping twice what appears to be a manager card. Two swipes, she says, are required for any return over \$5 and that also requires supervision by a manager—one swipe for the refund and one swipe for the manager override.

[82] Ms. Hill says you can see the cash register generating two slips. As she earlier explained, the process for completing a refund requires generation of one slip for the customer and one for the store. During Ms. Maiholz's actions at the cash register, she says the cash drawer is held shut by her body. Troubling because a refund requires an open cash drawer to provide money to a customer.

[83] Finally, Ms. Maiholz takes the slips from the cash register and walks away.

[84] Ms. Hill says the video is concerning for a number of reasons: (1) lack of a customer, (2) lack of an item being returned, and (3) money not coming out of the cash register.

[85] Defence counsel pointed out that Ms. Maiholz left the register and walked in the direction of a person who was off to the side.

[86] On cross-examination, Ms. Hill confirmed that the camera does not pick up the spot where a customer would stand in the checkout line. However, she adds that Ms. Maiholz does not extend her hand into that area holding cash, and a slip is not provided to or signed by a customer. Finally, Tanya is not at the register

conducting the transaction recorded under her name. Using Tanya's cash register in such a manner is also concerning because doing so is contrary to store policy.

[87] On cross-examination, she was asked to watch the video again; she agreed that she was not sure the identity of the other person present. It was suggested to Ms. Hill that the woman is Kim, another supervisor, who is seen talking to Ms. Maiholz. Ms. Hill agrees, adding that conversation occurred after Ms. Maiholz completed the transaction and the refunds slips were in her hand.

***(ii) Cash Room Video:***

[88] Ms. Hill also watched a video (Exhibit # 2) taken in the back of store cash room on October 31, 2016 starting at 8:55:01 am. The cash room is a small room with a long desk and two computers. The safe is located there as well as a counter over which office staff can be seen above the head of a person sitting at either cash room computer. One computer is the cash computer, on the left, and the other is the ISD business computing tool.

[89] Reminding the Court that Navistor recorded a loan at 9:57 am, and the videos are, in her opinion, off by one hour, Ms. Hill says she sees Ms. Maiholz making an entry on a computer at 8:56 am. What she does not see is cash leaving the cash office drawer to go to the cashier's tray.

[90] Speaking to the ultimate issue, Ms. Hill says theft arises because an actual refund recorded in this manner, should have resulted in the cashier's tray being, "over by the amount [of the refund] because no money was processed" out of the register and given to a customer.

[91] The loan to the cash register, she says, makes the cash register balance and she would expect the cash office would then be "out" if that money did not go to a cash register and on to a customer. A cash office loan was created solely to balance the cash register.

[92] Ms. Hill concludes that in all the suspect cases, the cash office reflects money loaned to a cash register to offset a refund, and as a result the cash register appears correct, however, because the refunds are fictitious the loan money is actually missing from the cash office. So, in the October 31, 2016 example, the cash office would be \$150.00 short.

[93] On cross-examination, Ms. Hill agreed there is a five-minute gap between the first and second videos. She explained that she was capturing what she thought relevant and disagrees that the five-minute gap has any relevance because she ultimately captured the two transactions. She cannot say whether she looked at the

intervening period, adding her job is to capture transactions and give the information to the Loss Prevention Officer or Mr. Pulsifer.

[94] She assumes someone could have talked to people visible in the videos, but that it is not her job. She also does not disagree with Defence suggestion that video footage captured weeks before also could have been addressed with those people.

[95] Asked to watch the cash room video once again, it is pointed out that Tanya is present there. And Ms. Hill says she does not know what Ms. Maiholz is doing at the cash room desk with books and papers and does not know where Tanya went when she walked away.

[96] Ms. Hill was asked if Ms. Maiholz was on the keypad at 8:57 am, she says yes, adding the transaction on Navistor is close to 9:57 am. She also agrees the large ledger is seen being put away but does not know what the large ledger is. She also agrees that Ms. Maiholz put another document into the filing cabinet. Defence suggests the writing in the ledger and the document placed in the file cabinet all seem connected to what she is doing, yet Ms. Hill cannot say what Ms. Maiholz did with those other items.

[97] Defence also points to a gap in the video where Ms. Maiholz leaves the cash room and Tanya returns to the business office. Ms. Maiholz is seen talking to

Tanya who ultimately leaves at 9:06 am. Ms. Maiholz comes into the cash room and opens the business computer screen, but Ms. Hill says she does not know that system anymore and cannot comment on what Ms. Maiholz is doing.

[98] Defence shows a portion of the video timestamped 9:03 am and asks Ms. Hill if she sees Ms. Maiholz put something on the counter that Tanya took. Ms. Hill says she does not know what that was, but agrees Tanya took it and was talking to Ms. Maiholz and they left the area at 9:04 am.

[99] She also agrees there is a five-minute gap in the video. Ms. Maiholz is in and out of the area and at 9:06:12, Ms. Maiholz comes in with a piece of paper that she sets down with her supervisor card. She then picked it up and took it with her when she left. Asked if she saw Ms. Maiholz's arm come across the counter and into the cash area taking those papers, Ms. Hill agreed she did. Finally, at 9:13:30 Ms. Maiholz goes into the cash room drawer where she counts money—appears to be three \$20s — and leaves.

[100] Ms. Hill agrees there is no video of what happened at a cash register with that money. And agrees the next video does not start until 9:19 am at a cash register.



[101] Asked to agree that there is a cashier dealing with her throughout, Ms. Hill says “sure” there is talking between Ms. Maiholz and Tanya but she is firm that Tanya is not at the cash register.

[102] Mr. Greer says that may be true, but you do not know what they were doing 8 minutes before the transaction; we only have Ms. Maiholz standing at the cash register; and we do not know where Tanya is. Ms. Hill agrees she could be anywhere just off screen. Reluctantly she accepts that she could have captured more video footage.

[103] Finally, Defence counsel introduces to Ms. Hill a video of Ms. Maiholz time stamped 6:17 am on October 31, 2016 with a cash drawer on her lap in the cash office. She is moving it from the safe to the cash drawer. Asked if this is fairly normal behaviour, Ms. Hill says she is not sure why she captured that video, surmising she may have been asked to do so. When the Crown suggested Ms. Hill was asked to capture any images of Ms. Maiholz handling money, Ms. Hill could not answer because she sees nothing untoward in the video.

[104] I note that Ms. d’El would later testify that the store opens at 7:30 am, making the assertion that the time is off by one hour plausible since the cash tray, I am also told is brought from the safe to the cash drawer before the store opens.

[105] Mr. Pulsifer was also shown the cash room video on cross examination. He watched Ms. Maiholz's actions closely and agreed with Defence that it did not look like she was processing a loan at 8:57 am. This contradicted his evidence on direct examination.

[106] The video taken at the cash register was also shown to Mr. Pulsifer. He agreed that Ms. Maiholz took \$40 from the cash drawer at 9:15 am and left the room with cash (not the amount in the allegation — \$150.00). Next video starts at 9:19 am and she puts money in the cash room drawer when she came back.

[107] Ms. d'El testified for the Crown that she worked in the store in 2016 and now holds Ms. Maiholz's former position. She was cross-examined after watching the cash register video. She says Ms. Maiholz punched numbers on the keyboard and swiped to override something and took receipts. She thinks it is a return, or "if something was not rung in properly you have to enter it in and correct it". She says it could have been a charge account refund. In the case of a charge account refund, she would type in her supervisor number, not a cashier's number. But she says, "it looks like two slips came out, not three", as would be the case for a corporate refund. She also said there would never be a loan if the transaction was on a corporate account. If it was a refund, we should see a slip go in the cash register drawer, but that did not happen in this video and the cash drawer did not open.

[108] For some reason, the Crown led evidence of the transactions out of chronological order during trial, but suffice to say, they continue in the same manner on eleven more occasions.

***2. November 4, 2016 Transaction for \$300.00:***

[109] *Loan:* The Navistor report recorded a loan at **11:36 am** (Exhibit #6) to cashier Debbie, from Ms. Maiholz for \$300.00 from the cash room (Exhibit #5).

[110] *Refund:* Ms. Hill searched the Navistor raw data (Exhibit #1) for a refund that she believed matched the loan, finding one at **11:34 am** on the same date for \$299.99 by cashier Debbie authorized by Ms. Maiholz.

[111] *Videos:* Ms. Hill located videos (Exhibit #2) from the same date. The first starts at **10:32:22 am** (again the daylight savings issue occurs). It shows customers purchasing goods at a cash register, the cashier completes a transaction, Ms. Maiholz arrives in the area from the front door area, walks by, looks at cashier, they talk, the cashier hands Ms. Maiholz a piece of paper and Ms. Maiholz waits for the transaction to conclude before taking over the register using her supervisor swipe card, collects receipts in her hand, and leaves for the cash office. Money is not turned over to a customer.

[112] The next video (Video Exhibit #3, snippet #8) taken in the cash office at **10:34 am** shows Mr. Pulsifer present sitting at the ISP computer doing paper work, Ms. Maiholz comes into the cash office with something in her hand that appears to be papers, she tears them up and appears to throw them away somewhere off screen at **10:34:32** then she logs into the ASC system and the video ends at 10:34 am.

[113] On direct, Mr. Pulsifer testified that he believed the papers were thrown into a garbage can sitting just outside the screen. I note I cannot tell what she is tearing up or where she is putting it, but it is plausible as suggested that they are the slips taken from the register.

[114] The next video starts at **10:36 am**. Ms. Hill says Ms. Maiholz is at the cash office computer system logging into the computer. Her screen opens and she enters something into the computer.

[115] Ms. Hill points out none of the videos show Ms. Maiholz taking cash from the cash office and bringing it to a cashier. Ms. Hill is satisfied that Ms. Maiholz is transacting both the refund and the loan as recorded in Navistor.

[116] Ms. d'El watched the video from the cash room and could not understand why Ms. Maiholz would process a transaction at the register and then take slips to the cash room where they were ripped up and trashed.

[117] A final video located by Ms. Hill is time stamped 6:08 am that day. She says it shows Ms. Maiholz in the cash office with the cash tray on her lap while she is counting money. Ms. Hill says she sees Ms. Maiholz put something in the pocket of a jacket hanging on a nearby chair — the suggestion is cash from the cash drawer.

[118] When Ms. d'El watched the same video, she began to cry and needed a break. This witness was very demure and emotionally flat until overcome at this point.

[119] On cross-examination, Defence counsel asked Ms. Hill how she knows the cash registers balanced. She said after last day in court she went back to Navistor and confirmed the cashiers balanced but did not think she could share that information with Defence counsel. This led to an application that was dismissed when disclosure was made to the Defence.

***3. November 5, 2016 Transaction for \$200.00: (~daylight savings starts November 6~)***

[120] *Loan*: Navistor records a loan (Exhibit #7) to cashier Megan (Exhibit #5) at **8:30 am** for \$200 from Ms. Maiholz.

[121] *Refund*: Ms. Hill looked at Exhibit #1, noting an **8:15 am** refund is processed for \$199.99 by cashier 133 and authorized by Ms. Maiholz.

[122] Ms. Hill is satisfied these transactions are connected.

[123] *Videos*: Ms. Hill located a video of a cash register at **7:13 am** with a customer who leaves and a cashier cleaning the area. Ms. Maiholz arrives and goes to the register where she swipes her card, obtains receipts, all while the cashier watches and Ms. Maiholz walks away.

[124] Ms. d'El watched the video at the cash register, and said she saw no reason to do a refund before the store opened. Her evidence supports Ms. Hill's testimony that the video times are one hour earlier than the actual time. She was the only witness to say the store opens at 7:30 am. I accept and find the videos predating daylight savings time on November 6, 2016 are inaccurate by one hour.

[125] The next video shown and narrated is the cash room at **7:13:30 am** where Ms. Maiholz enters and sits at the computer. She takes off her coat puts it on the chair. Mr. Pulsifer is also there. Ms. Maiholz enters something in a computer 15 minutes later at approximately **7:30 am**. Ms. Hill approaches the screen while

testifying and squinting hesitantly says she thinks she sees the loan screen visible on the computer screen.

[126] Ms. Maiholz opens the cash tray, but Ms. Hill cannot determine whether she took anything out. In any event, she does not see Ms. Maiholz take money out of the cash room to give a cashier.

[127] The next video starts at **7:33:16 am**. Ms. Maiholz counts cash from the cash room cash drawer, assumed to be \$20s, places it into an envelope and into her store jacket pocket. Mr. Pulsifer left the cash room at 7:33 am.

[128] On the surface. Ms. Hill says all seems fine because the cash register balances. The truth: because a refund was not actually given to a customer, either a cashier should be over, or the cash room is short. Since the cash register balances, money was missing from the cash room.

[129] Mr. Pulsifer testified that while Ms. Maiholz can use cash for stamps and the like, she would have no reason to put the cash in an envelope. In any event such uses of cash are to be documented. There was no evidence before the Court about documenting purchases for stamps.

***4. November 7, 2016 Transaction for \$400.00:***

[130] *Loan*: Ms. Hill entered a Navistor Report for November 7, 2016 (Exhibit #8) wherein a loan for \$400 was processed for cashier 102, Tristan, by Ms. Maiholz at **10:27 am** from the cash office.

[131] *Refund*: Ms. Hill checked Exhibit #1 where she confirmed a refund transaction for the same day at **11:53 am** by cashier 102 of \$399.99.

[132] She is satisfied the refund connects to the loan.

[133] *Videos*: A video time stamped **10:26 am** shows Ms. Maiholz in the cash room, she opens the cash drawer, her back is to the camera, but it appears that her hand is in the drawer, and she puts her arms in the air and then into a jacket pocket. She closes the drawer.

[134] Ms. Hill reviewed a second video (Exhibit #3) of the front end of the store at **11:53 am**. Ms. Maiholz is alone at a cash register; she uses her override card and two receipts come off the register. She takes them and leaves the area.

[135] Another video from the cash office time stamped **11:57:20 am** shows Ms. Maiholz with nothing in her hands when she enters the office.

[136] In a longer version of video two, time stamped 11:52:30 am, Ms. Maiholz walks by a cash register and out of sight. She reappears at a cash register, swipes



her override card, two receipts print at the register, she removes them and walks out of view toward the exit where a man can be seen. She has paper in her hand. At 11:53 am she comes back in and goes to the back of the store.

[137] The register balanced that day.

[138] Defence asked about the man and where Ms. Maiholz went. On cross examination Mr. Pulsifer confirmed the man is Richard and he has a corporate account. Ms. Hill testified that Ms. Maiholz would not need to do a refund for him at the cash register at the front. Both agreed the court does not have the corporate accounts to see what Richard was doing in the store and if it related to his corporate accounts. Ultimately there is no video footage of the two at the door area.

[139] Ms. d'El testified contrary to Ms. Hill, saying corporate Gala Days refunds are done at the cash register. She recognized Richard, a corporate client, who she points out would not walk through the line if he were doing a refund without first processing it at the cash register.

***5. November 9, 2016 Transaction for \$150.00:***

[140] *Loan*: Ms. Hill identified a Navistor report for November 9, 2016 at **11:24 am** (Exhibit #9) recording a loan from Ms. Maiholz to Tanya for \$150.00.

[141] *Refund*: She reviewed Exhibit #1 and confirmed what she believes to be a corresponding refund transaction of \$149.99 by Tanya at **11:22 am authorized by Ms. Maiholz**.

[142] *Videos*: A video (Exhibit #3) starting at **11:21 am** shows Ms. Maiholz go to a cash register at the front end where she swipes a card twice, pulls receipts and walks away. Ms. Hill says the video and the Navistor data match. There is no customer at the cash register refunding an item and there is no cashier at the cash register.

[143] The next video of the cash room shows Ms. Maiholz logging onto the cash office system and making a keypad entry at **11:24 am** that ends at 11:25 am. She says this action also matches the Navistor information.

[144] Another video starting at **6:45 am** in the cash room shows Ms. Maiholz taking a cash tray from the office safe and putting it into the cash drawer. Mr. Pulsifer watches this video and thinks he saw Ms. Maiholz secret some cash. After review, I cannot say I saw the same thing. Defence suggests it looks like she put her cigarettes in her pocket — I cannot reject that suggestion.

[145] Ms. Hill says while there was no cash taken from the cash room and brought to the cash register at the front end, based on the Navistor documents she would expect the cash room to be showing an overage because the cash register at the front end balanced.

***6. November 14, 2016 Transaction for \$400.00:***

[146] *Loan:* Ms. Hill entered a Navistor exception report for November 14, 2016 at **10:57 am** (Exhibit #10) wherein Ms. Maiholz authorizes a cash loan of \$400.00 to Tanya.

[147] *Refund:* Ms. Hill locates in the Navistor raw data (Exhibit #1) at **10:56 am** refund for \$399.99 by Tanya authorized by Ms. Maiholz.

[148] *Video:* One video (Exhibit #3) starting at 10:56 am shows Ms. Maiholz walking to a cash register, there is no customer present, she types on the screen, swipes a card, removes two slips and walks to the back of the store. The cash register balanced that day.

[149] There was no cash room video shown.

***7. November 15, 2016 Transaction for \$500.00:***

[150] *Loan*: Ms. Hill entered a Navistor exception report for November 15, 2016 (Exhibit #11) at **11:55 am** wherein Ms. Maiholz authorizes a loan of \$500.00 to cashier 111.

[151] *Refund*: In the Navistor raw data she confirmed a refund at **11:53 am** processed by cashier 111 authorized by Ms. Maiholz for \$499.00.

[152] *Video*: A video starting at 11:52 am, shows the front of store where Ms. Maiholz is at a cash register performing an override. The cash drawer opens, she closes it and slips come out. She takes them and walks away.

[153] Another video starting at **11:54:32 am** in the cash office shows Ms. Maiholz at the cash office system main screen punching the keypad number section.

[154] Ms. Hill's conclusion once again, a refund is conducted without a customer present and the cashier would balance due to a loan being issued. She says the cash office should be over when next balanced.

***8. November 17, 2016 Transactions for \$250.00:***

[155] *Loan*: Ms. Hill presents a November 17, 2016 (Exhibit #12) exception report for two loans. The first at **9:34 am** loans cashier 100 \$150.00 from **manager 807**. The second loan occurs at the same time, **9:34 am**, to cashier 103 for \$100.00 from

manager 807. Ms. Hill does not have available to her any information as to who holds number 807. Mr. Pulsifer also testified that he does not know who holds #807 and the Operator Authorization Report exhibit cuts off at #801.

[156] *Refund/return*: Ms. Hill reviews the Exhibit #1 Navistor raw data and confirms the loans and two refunds for \$149.99 by manager 800 (Ms. Maiholz) at 9:33 am to cashier 100, and a return for \$99.99 to cashier 103 at **9:34 am from 807**.

[157] *Videos*: Ms. Hill reviewed a video taken from the front of store at **9:32:18** am. It shows Ms. Maiholz going to a vacant cash register where she engages in what has now become routine actions. This time she is engaged in the actions when a customer arrives at the register and she walks away without interacting with the customer.

[158] She is seen going toward the cash office, the office door at 9:33:05. She then leaves the cash office, returns to a different cash register where she engages in the same routine, leaves with receipts in hand at **9:34 am**.

[159] Ms. Hill concludes that she is watching Ms. Maiholz perform the Navistor recorded transactions on the video.

[160] In another video she described Ms. Maiholz coming into the cash office and sitting at the terminal appearing to balance a tray on her lap at **9:37 am**. It does not capture Ms. Maiholz processing a loan at the computer, but then Navistor recorded the loan a few minutes earlier.

***9. October 17, 2016 Transactions for \$370.00:***

[161] *Refunds*: Ms. Hill shows the Court a Navistor Report for October 17, 2016 (Exhibit #13). This one shows two refunds, one at **8:41 am** and the other at **10:41 am by manager 807** followed by manager 800 for \$300.45 and \$69.95 respectively to cashier 100.

[162] *Loans*: The Navistor Report also shows loans from manager 800 of \$300.00 and \$70.00, the first at **9:41 am** the other at **10:40 am** to cashier 100.

[163] Ms. Hill matched both sets of transactions in the Navistor raw data (Exhibit #1).

[164] There are no videos supporting these transactions.

[165] The Court is asked to infer that manager 800 is Ms. Maiholz as well as manager 807 since the loans are comparable to the refunds.

***10. October 20, 2016 Transactions for \$400.00:***

[166] *Refunds*: The Navistor Report for October 20, 2016 (Exhibit #14) shows two refunds, the first to cashier 100 and the other to 129, Hannah, from 800 for \$299.98 and \$99.98 at 9:36 am and 11:11 am.

[167] *Loans*: Ms. Hill located corresponding loans of \$300 and \$100 by 800 to cashiers 100 and 103 at 9:38 am and 11:11 am.

[168] There are no videos to support the transactions.

***11. October 24, 2016 Transactions for \$330.00 and \$250.00:***

[169] *Refunds*: The Navistor Report for October 24, 2016 (Exhibit #15) at **10:28 am** shows a refund involving cashier 118 for \$330.49 and to cashier 100 at **12:53 am** for \$249.99, both from manager 800.

[170] *Loans*: Ms. Hill located corresponding loans of \$330.00 at **10:29 am** and \$250.00 at **12:50 am** approved by 800.

[171] *Video*: Ms. Hill located and captured video from **9:27 am** showing Ms. Maiholz at a cash register without a customer swiping and obtaining receipts as before. There is no cashier present as she walks away at 9:28 am.

[172] Once again, the Court finds the video camera time is off by an hour due to daylight savings time.

[173] There is no video from the cash room for this date.

***12. October 25, 2016 Transaction for \$250.00:***

[174] *Loan:* Ms. Hill located a Navistor Report for October 25, 2016 (Exhibit #16) at **11:23 am** of a cash loan to cashier 102 by 800 for \$250.00.

[175] She also confirmed the loans for the same time for cashier 102 by 800 for \$250.00 and another at the same time for \$100.00 in Exhibit #1.

[176] *Refund:* Ms. Hill reviewed Exhibit #1 confirming a refund at **11:24 am** processed for cashier 102 by 800 for \$249.99.

[177] Ms. Hill explained that she sorted the Navistor information by dollar amount looking for an amount that corresponded to \$250.00, and the lower amount (\$100.00) was left off the Exhibit #16 report. She says during her investigation she is trying to correspond with the refund amount.

[178] On her exhibits she says you will see any high transactions amount, not just loans and refunds because of the parameters she set.

[179] *Videos:* Ms. Hill captured a video from the frontend at **10:23:28 am** wherein Ms. Maiholz comes to a cash register with a cashier present and processes something at the register, while the cashier deals with the customer, she swipes and



another employee comes in behind the counter, then a customer comes to the lane after Ms. Maiholz used the register.

[180] Defence counsel took issue with the Crown not showing the minute earlier in the video. The Crown rewound the tape and showed the minute prior. There are two employees behind the counter, another in the background and Ms. Maiholz walks away. She returns and does the transaction on the cash register at 10:22:11 am.

[181] On cross-examination, Mr. Greer correctly suggests we do not know what they discussed because they were not interviewed.

[182] In another video in the cash room starting at **10:22 am** Ms. Maiholz is seen logging into the cash system and leaving.

[183] Another video in the cash room time stamped **5:51 am** shows Ms. Maiholz in the cash room with a tray, she opens the cash drawer and puts it in. She closes the door “a bit” and talks to another employee for awhile.

[184] Another video shows her come into the cash room where she takes approximately \$100 in \$5s and \$10s at **10:22 am**. Ms. Hill thinks the \$100 she took is connected to the \$100.00 loan also shown in Navistor for that day. She says

money did not come out of the cash room for the larger amount and go to a cash register.

***13. November 3, 2016 Transaction for \$500.00:***

[185] *Loan:* Ms. Hill located a transaction on November 3, 2016 (Exhibit #17) at **9:11 am** a loan for \$600 to cashier 102 by Ms. Maiholz.

[186] *Refund:* In the Navistor raw data (Exhibit #1) she confirmed a refund for \$499.99, at **9:12 am** recorded for cashier 102 with manager override by Ms. Maiholz.

[187] She believes these transactions are connected because the dollar amount is so high for this refund, and she matches the \$600.00 because the amount is high and close enough to be linked. She speculates the extra \$100.00 could have been a real loan to a cashier for change.

[188] *Videos:* Ms. Hill located a video from the frontend cash area wherein Ms. Maiholz goes to a cash register where there is a customer and a cashier. The customer gets change, Ms. Maiholz takes over the register, overrides and swipes, and removes slips. This occurred at **8:11 am**.

[189] Another video in the cash room shows Ms. Maiholz log onto a computer, take the cash drawer, and count out some money before leaving. Ms. Hill infers it is \$5s and \$10s, probably the extra hundred. Ms. Maiholz leaves the room at **8:11 am**.

[190] Another video at **8:09 am** shows Ms. Maiholz in the cash room safe. She goes into the cash and counts out small bills. She logs into the cash office system and uses the keypad.

***14. October 27, 2016 theft of tobacco:***

[191] In this last video on October 27, 2016, Ms. Hill described Ms. Maiholz going to a cash register at 6:49 am. She comes into the screen and goes to the tobacco counter where she takes something in her hand and puts something in the garbage. She leaves.

[192] Mr. Pulsifer was also shown the video and had to agree with Defence counsel's suggestion that Ms. Maiholz left something on the cash register. He is skeptical because he says she should have paid for the cigarettes because there were others in the store available to ring in the purchase, but I do not see others and I know protocols are not always followed in this store.

[193] I find that I see her leave something on the register, not mentioned by Ms. Hill, and I accept that I cannot find beyond a reasonable doubt that she stole cigarettes; Kim d'El's evidence supports that doubt as well. She says it was not uncommon for people to leave a note to pay later. And there was no transactional evidence supporting non-payment at a later point that day.

**Detailed Position of the Defence:**

[194] Defence counsel certainly challenged the testimony of the Crown witnesses over many days. His questioning focused on the following points which I will fully address:

***1. Efficacy of Exhibit #1 the Navistor Raw Data:***

[195] Ms. Hill agreed that none of the subject transactions were initially picked up by Navistor as an exception, instead she located them when she did the requested analysis. I can certainly find, and I do, that this is not unexpected since the registers and cash room balanced each day and the allegation is that cash was removed in support thereof.

[196] While the suggestion was made that information could have been changed in the Navistor data saved to disc, I do not accept that proposition because I find that

Ms. Hill discovered the exceptions before she had the data stored and in any event she did not manipulate it. Her exception reports were run from the Navistor program from which she took screen captures and confirmed an exception report of a corresponding loan.

[197] During her testimony she laboriously located the expected information in Exhibit #1 and there were no examples of it not being there.

[198] Ms. Hill was not an interested witness. She presented as a person doing her job. Her testimony was intrinsically and extrinsically consistent, plausible, and balanced. I did not discern an effort to mislead, and while she did speak to the ultimate issue, that was done in the context of explanation. She readily accepted suggestions that she may have done something she could not remember and that gave her testimony an added dimension of truthfulness.

***2. The Client, or Corporate, accounts and their possible connection to the transactions:***

[199] It cannot be ignored that the Defence made repeated requests for the corporate accounts both before and during the trial. The Defence asked pointed questions of the three civilian witnesses aimed at determining their significance. The Crown maintained the position they are not relevant to the charges. Defence says they could shed light on the November 5 transaction when a corporate

customer is seen interacting with Ms. Maiholz shortly after she transacted a refund at a nearby cash register. He also asks the Court to remember in one version of the video that man is edited out by a shorter video clip, suggesting that may have been the objective of Mr. Pulsifer or Ms. Hill when they chose the portion to record.

[200] From the evidence of Ms. d'El, on cross-examination she recalled being asked to print off for Mr. Pulsifer between 50 and 52 corporate charge accounts, their specific charges, refunds etc. She did not print all the charge accounts for the store, just the ones he asked her to print. She has no idea what happened to print outs.

[201] The Defence asks the Court to consider what was in them. Could they have offered explanation for what is seen on the videos? To answer this question, I can and do rely on the complete evidence of Ms. d'El.

[202] She testified that she would not expect to see a loan transacted in connection to a corporate client refund. Instead the corporate accounts are simply credited, and cash would not be needed to effect such a transaction.

[203] She also testified that three, and not two, receipts would be produced at the cash register in the case of corporate account refunds. The standard two and one

for the corporate file. She also testified that she would not type in a cashier number for a corporate return but instead she would use only her manager number.

[204] Ms. d'El was a former colleague to Ms. Maiholz, it was apparent she did not want to testify. She was quiet and appeared almost sad. At one point, as previously mentioned, she cried when she watched a video purporting to show Ms. Maiholz put cash in her pocket in the cash room. She needed a break from testifying. At the same time, she appeared buoyed when she did not see cash being secreted by Ms. Maiholz in a different video. She eagerly answered Defence counsel questions, almost as if hoping her insight could assist Ms. Maiholz. However, her testimony did not serve that purpose, instead addressing possible alternative explanations for her actions but clarifying, on this point, the lack of support for corporate refunds being the true function of Ms. Maiholz's actions.

[205] I cannot conclude that a corporate refund explains these transactions.

***3. The lack of individual electronic journals to explain the details of the refunds:***

[206] Defence counsel argues the Navistor data should have been supplemented by detailed ACS electronic journals for each refund transaction in aid of identifying the item refunded. He showed Ms. Hill an example of electronic journals (Exhibit

#18) exhibiting minute details regarding, for example, the brand of soup purchased in a grocery order.

[207] Ms. Hill reviewed the electronic journal and did not agree she needed to produce or examine that level of detail for a refund to an open department. She agreed the electronic journals contain more information than Navistor with minute detail but said, “timewise” it was counterproductive to collect them because she already had what she needed from Navistor. She also pointed out that she compared transactions to video for additional support.

[208] She also testified that she cannot get that information because she has access to look but she cannot print it, instead the stores would have to do that. Pressed, she says it is possible she may have looked at that level of detail but is unsure, if she collected it, she would have given it to Mr. Pulsifer and on to the Crown. However, it would make no difference for these transactions.

[209] I have the choice to accept her at her word that she did not need that level of detail to assess what she says is a false refund. I must ask what I can infer from the absence of those journals. I would be speculating to conclude that they would have shed more light on the nature of the transactions. There was no evidence that such a document could have provided any clarity since the refunds were recorded to an



open department. I cannot conclude that there would be some level of detail in a journal that could raise a doubt. Finally, the Defence could have made application for these documents and taken steps to prove their relevance but did not. It would be somewhat unpalatable for me to engage in speculation that they are “smoking guns” in the face of that decision.

#### ***4. Accuracy of the videos:***

[210] Defence argues the videos are not as telling as some witnesses would have the Court believe. For example, the October 31, 2016 video, Mr. Pulsifer disagreed with the Crown theory of the case and thought Ms. Maiholz was checking accounts at the cash room computer and not making a loan. Defence says this suggests inaccuracies with the cash room loan computer and Navistor.

[211] With respect to a different video, Ms. d’El was visibly relieved when she concluded Ms. Maiholz was not secreting cash but possibly handling her cell phone.

[212] I find that all the videos are difficult to see and understand. The computer screens are not clear, words cannot be seen. The cash denominations cannot be ascertained. There was no evidence of how the cash is organized in the cash room cash drawer, allowing an inference that taking from one side would result in taking

lower or higher bills. I simply cannot speculate in the absence of evidence. For example, even the safe I am told is in the room is difficult to see. As a result, I cannot accept Mr. Pulsifer's evidence that Ms. Maiholz is not transacting a loan. My perception is he was trying to be helpful.

[213] Defence reminds the Court there are no videos of Ms. Maiholz removing cash from the store. And in the instances where the video shows her counting bills, it is not clear how many or in what denominations she does so. He notes that theft requires her to ensure the amount taken matches the amount on the transaction or there would be a deficit. As a result, the Court is left to guess how money got out of the store. He says Sobeys and Mr. Pulsifer had access to all the videos but chose to record only snippets.

[214] To this I would add that it is a circumstantial case, and the case does not fail simply because the Crown did not show Ms. Maiholz walk out with cash. I can accept that the work involved in following every movement for an entire shift could make locating video supportive of cash leaving the store difficult if not impossible to find. The video footage is generally difficult to see and follow, as with most surveillance video it is grainy.

[215] Ultimately Ms. Maiholz had legitimate reason to handle cash all day while she worked, I am able to infer that the allegedly stolen cash came out of the store as a result of her frequent handling of it, and that may not represent speculation in the face of the evidence that the transactions were false and the money is missing.

[216] Defence asks why not save the videos showing where Ms. Maiholz went after transacting each refund. He also asks why there are only four videos where she allegedly handled cash in a surreptitious manner. How can a conclusion be reached if one does not see video of normal days in order to compare?

[217] Even those videos are subject to reasonable explanation since as testified to by Mr. Pulsifer reluctantly and Ms. d'El more assertively, Ms. Maiholz has authority to take money out of the store to pay bills and buy produce from suppliers. Likewise, she can take money out to pay a bill to an outside party.

[218] So, it is open to me to conclude that money going into an envelope or into the pocket of her work jacket is not suspicious. Defence points out the counting happened in front of the camera, and not surreptitiously. Sometimes it is not even clear she put money in a coat, there is also a cell phone in play.

[219] Ultimately, I agree, one can see what one wants in the low-quality videos, and you can never be sure how many bills are being counted and in what denominations. I cannot find that the videos show her secreting cash.

[220] Defence says there was not enough video saved and people in them were not interviewed. As a result there is doubt as to what Ms. Maiholz was doing. He provides the example of October 31 when Tanya and Kim are present after a transaction with Ms. Maiholz, but no one interviewed them. There are gaps when we see Ms. Maiholz leave the cash office with cash but none to show where she went. One must question why the rest of the video was not recorded.

[221] Defence says there is no explanation for why there is no cash room video for November 14, for example, instead the Court is asked to accept that Ms. Maiholz entered the cash room and transacted a false loan.

[222] As for the slips put in the garbage, Defence says without interviewing the cashier who was present when they printed, how can the Court conclude they were refund slips and not something else that does not need to be retained?

[223] Defence says Ms. Hill did not testify that the November 17 transactions resulted in the cash office missing money, no witness mentioned it. Ms. Hill's evidence was not that clear. And in any event, there is no evidence that manager

807 is Ms. Maiholz. I note Exhibit 33 and her testimony about checking the cashier balancing reports supports balancing.

[224] Defence says the videos are not clear as to how many slips are printed and taken. In one video, she reaches back for a third slip on November 7, 2016. He says this is consistent with a corporate receipt. However, after reviewing the videos I find I cannot be sure of that.

[225] On November 9, 2016, Defence says it looks as though Ms. Maiholz took only one slip if you look closely. What does that mean, there was no evidence of what a single slip means? Once again, the video is not clear.

[226] I am not prepared to speculate on these issues. It is not clear what alternative inferences I am permitted to draw. I do not accept that some other type of transaction was occurring on the videos, given the support found in the Navistor report for the transaction set out on each day.

***5. Why she believes the cashiers balanced:***

[227] Ms. Hill testified that she reviewed cashier reconciliations to determine that the cashier trays balanced. She said they may have been off by a few dollars or cents, but they balanced. She says she did not capture those transactions.

[228] The process to balance was explained by Ms. d'El. A cashier rings in transactions, if they need change or bills they get a loan, if too much money is taken from them, it is counted electronically and at the end of the shift, they count the cash register to the office and count it down to the basic amount, enter into the ACS system and the computer will say if they are over or under.

[229] Defence was concerned about a lack of cashier till sheets. I am told the ones from the months before the allegations and after were reviewed and only 6 or 7 were attributable to Ms. Maiholz. Ms. d'El thought that was unreal and did not make sense. She says she completes these all the time in Ms. Maiholz's former position. She says they record errors and are an important part of the manager's job. Ms. d'El says she "does" till sheets by putting cash into their drawers. I confess her evidence was less than clear, or I failed to understand what she was getting at.

[230] Defence asks how does Ms. Maiholz face these charges fairly without the till sheets? I confess this issue was bewildering and not clearly explained, and I am not prepared to make anything of it. To do so would be to engage in speculation because it was confusing, I will not do so. If the suggestion was the suspect loans were simply monies placed in cashier cash registers each day, I find the Navistor raw data (Exhibit #1) did not bear that out.

**6. Fixing Errors, the Next Day:**

[231] Ms. Hill was asked “What if I leave a problem overnight for the next day to get balanced?” She says she cannot speak to this issue of what happened at the store.

[232] She could however say it is possible an error can be fixed the next day at the store level.

[233] All civilian witnesses agreed Ms. Maiholz was a go-to person to fix problems. Asked if she considered such a scenario and looked, Ms. Hill agreed she saw things off and balanced the next day. She looked back when she saw a refund to days previous to see if there was a connection; she found none. She explained that she checked the reconciliation, sorted by dollar amount, and would expect to see the amount three times, she did not. The store policy at the time was to reconcile in 24 hours.

[234] The cash office does the reconciliation, some stores require cashier present, some do not. She does not know what Berwick does. I accept her evidence as confirmed in Exhibit #1 and find there were no corrections associated with the suspect transactions.

***7. Accuracy of the Refund Slip Search:***

[235] Defence says continuity is an issue for the receipts from **November 5, 2016** found by Mr. Pulsifer in his storage unit. He says the sticky note regarding the \$200.00 receipt: “took this one” was unexplained and could have shed light on the transaction.

[236] Defence highlights the fact that the receipts and the communications book came to court only after Ms. Hill testified and on the eve of Mr. Pulsifer’s testimony. As a result, his client was left to try to figure out what happened without all the information.

[237] While Mr. Pulsifer produced the envelopes containing those refund slips over the course of testifying after locating them in his storage unit, and I was concerned that they had not been located and disclosed in the regular course, ultimately I am not prepared to conclude he hid them. He was simply too forthcoming in his testimony about looking for them.

[238] That said, the level of disorganization was apparent when the sticky note was found on one stating someone had removed receipts from the envelope and not returned them. No satisfactory explanation could be provided for same. I am asked to consider that an explanation could have been found in the missing document. I



cannot speculate that would have been the case. Instead I must consider the nature of the loan/refund scenario on November 5, 2016 and I reach a conclusion that both were transacted without a corresponding truth to them.

***8. Do large bulk purchases go through as open department:***

[239] Ms. Hill denied that institutional purchases are transacted to “open department” sales because they could affect your margin. Various scenarios were proposed and likewise rejected. Ms. Hill says she was not looking for sales but refunds.

[240] Ms. d’El testified that it is possible to do a large return for a corporate account by scanning in the receipt and doing the refund by typing into their accounts. She says this can be done to an “open department”, but noted it is rare to transact in this manner. I am however, left without proof that this is what Ms. Maiholz was doing. It is impossible to believe that each time a refund is transacted with a matching loan that this was a corporate refund that does not require loans, and the values match in time and cashier number.

***9. Mr. Pulsifer’s evidence is not reliable and should be rejected:***

[241] Mr. Pulsifer was an interested witness. He claimed an insurance loss in the range of \$13,000.00 arising from 2016 losses at his store. The defence argues that included \$568.00 and \$200.00 transactions that were not losses, but errors he asked Ms. Maiholz to fix. He also agreed that he was prepared to confront Ms. Maiholz with one of those transactions with Sobeys security, only realizing the error much later. It was never made completely clear to my satisfaction why these transactions were errors, but nonetheless Mr. Pulsifer was reluctant and reticent to admit that he filed a compromised insurance claim. He says he relied on Sobeys for the numbers. He also denied knowledge that the insurance company was seeking reimbursement from Ms. Maiholz for the full amount. He was prepared to admit that some of the manager numbers attributable to the losses were not Ms. Maiholz's numbers. For example, confirming he does not know who held number 807, a number connected to the suspect refunds and loans before the Court.

[242] During his testimony he provided clarity as to some store operations. He provided documents not accessible to Ms. Hill including a Loan Log, a Refund Log, photocopies of which were entered as exhibits, and a communications binder. After reviewing all the suspect transactions and comparing them to the entries in the logs, he concluded none of them were listed therein. He explained that the loan and refund books are located in the cash room near the computers. Those

documents did not assist when it became clear, and I find, the employees and Ms. Maiholz were not faithfully using them to record store activities. Point of fact, using the Navistor raw data (Exhibit #1) I was able to quickly locate loans and refunds, not the focus of this case, that were not recorded in the refund and loan books.

[243] I find, based on all the foregoing as well as the evidence of Ms. Hill and Mr. Pulsifer that they were not necessarily reliable. This includes the loan book, refund book, the staff schedule, and communications book.

[244] One important piece of information he provided was the Physical Cash Summaries by Week (Exhibit # 33). He reviewed them each for the relevant weeks. He explained that the information contained therein was based on the store information entered daily and printed weekly from their computer and sent to Stellarton. He and Ms. Maiholz were tasked to review it and the summaries balanced every relevant week but for a few cents here and there.

[245] He confirmed that the video footage saved to CDs containing description such as “money in pocket” were saved by him after working 14-hour days looking at the motion activated video footage to determine what happened in his store. He

explains why he did not save more, citing how long it took to save each clip and the laborious effort involved in doing so.

[246] He agrees the cashiers have passwords but believes Ms. Maiholz knows all the passwords. This is of course hearsay and speculation, but I cannot dismiss the video evidence of Ms. Maiholz recording refunds at cash registers without a cashier under various cashier numbers, and Ms. d'El's testimony that they all shared passwords in 2016, a practice since halted, resulting in this rising above speculation and becoming a reasonable inference.

[247] With respect to the interaction near cashiers while transacting the suspect refunds, he says no cashier would have ever questioned anything Ms. Maiholz did on a cash register and he could not see why interviewing them would have added anything to the case.

[248] On cross-examination, a video was shown to Mr. Pulsifer starting at 6:53 am. He watched with surprise as cashier Tanya does her own refund and gives slips and a swipe card to Ms. Maiholz in the cash room. She is not a manager and did this action before the store was open, and Ms. Maiholz did nothing with the slips but continued her own work. He says Ms. Maiholz takes pride in her work, but he agreed store processes were not followed there with Tanya.

[249] He also agreed that he does not always follow store rules himself, and instead writes information on sticky notes to be properly recorded at a later time. He also agreed that loans can be entered later than when they occur.

[250] Finally, Defence says it was clear the police deferred to Mr. Pulsifer, there was no independent investigation. There were no interviews with cashiers seen in the videos.

[251] Mr. Pulsifer also down played tension between him and Ms. Maiholz, asserting everything is perfect, everyone follows the rules and there were no problems at his store. But on cross-examination, the personnel file was raised wherein he addressed deficits involving Ms. Maiholz- she did not do all the paperwork as she should.

[252] Mr. Pulsifer spent the weekend reviewing videos, and he was not forthcoming that he reviewed more than he saved. Some are gone, some he kept in the form of snippets for the police, and more than he gave was reviewed. The Court does not know what the rest would have shown, and his explanation for why he did not save it all was somewhat weak.

[253] Overall I cannot accept the defence assertion. While Mr. Pulsifer was an interested witness to a degree, I cannot accept that he sought to undermine Ms.

Maiholz by not obtaining sufficient video. I must place this argument in time and place. The place is a busy grocery store with numerous transactions occurring at cash registers throughout the store. To expect him to record whole days worth of mundane transactions when he was addressing refund and loans said to connect, seems a stretch I am not prepared to engage in. Just like Ms. Hill, he focused on the transactions.

***The Law:***

***Elements of theft:***

[254] The offence of theft is defined in section 322(1) of the *Criminal Code*. For the purposes of this trial, section 322(1)(a) is the applicable section. It states as follows:

(1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent

(a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it.

***Circumstantial Evidence:***

[255] Justice Romilly in *R. v. Lee*, 2012 BCSC 1489 (CanLII), [2012] B.C.J.No. 2075, reviewed the law on circumstantial evidence:

[40] ...

The essential component of an instruction on circumstantial evidence is to instill in the trier of fact that in order to convict he/she/they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty.

[41] In a case which is based wholly on circumstantial evidence, the finding of guilt must be founded on the conclusion that there was no other rational explanation for the circumstantial evidence but that the defendant committed the crime: see, *R. v. Charemski*, 1998 CanLII 819 (SCC), [1998] 1 S.C.R. 679.

[42] ...

In *R v. Cooper*, 1977 CanLII 11 (SCC), [1978] 1 S.C.R. 860, the Supreme Court of Canada reformulated the circumstantial evidence rule departing from the formula expressed in *Hodge's Case* (1838), 1838 CanLII 1 (FOREP), Lewin 227, 168 E.R. 1136. The Supreme Court of Canada said,

“It is enough if it is made plain to the members of the jury that before basing a verdict of guilty on circumstantial evidence they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts”: see also, *R. v. Butler*, 2007 BCCA 526.

[43] The test to be applied in cases that are based on circumstantial evidence underscores the need for proven facts from which to draw reasonable inferences in deciding whether the Crown has proved its case beyond a reasonable doubt. Reasonable inferences to be drawn from proven facts must be distinguished from mere speculation. Doherty J.A., in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 97 C.C.C. (3d) 193 (Ont. C.A.) at 209, described the distinction in this fashion:

The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation.

[256] In *R. v. Villaroman*, 2016 SCC 33, the Supreme Court of Canada said:

In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts...Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by

considering all of the evidence. *The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it.* If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[257] The Court held that a trial judge assessing circumstantial evidence must consider "other plausible theories...inconsistent with guilt":

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt...I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, 1971 CanLII 13 (SCC), [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[258] Paccioco J. and Lee Steusser (The Law of Evidence, 6th ed. (Toronto: Irwin Law, 2011)) described circumstantial evidence at paragraph 27:

Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would appear to be in the absence of that evidence. To identify logically irrelevant evidence, ask, "Does the evidence assist in proving a fact that my opponent is trying to prove?"

***Conclusions:***

[259] In some respects, this case is quite clear, and yet it involved a level of detail and consideration of missing detail that required me to consider alternative explanations for the evidence led by the Crown.



[260] There is no doubt that I am required to review the documentary evidence.

Having done so, I find I can accept and rely upon the Navistor data. I do not accept and rely on the accuracy of the physical business records located in the store: Loan Book, Refund Book, and Communications Binder. Nor am I convinced it is particularly important that I accept the contents of the work schedules presented by the Crown, because it is apparent Ms. Maiholz was regularly at work in the store and on each date of a suspect transaction.

[261] The case is also circumstantial in that I am asked to surmise based on the documentary evidence, combined with witness testimony and video recordings, when available, that the Crown has discharged its burden to prove Ms. Maiholz transacted false refunds and took cash matching them.

[262] As mentioned, I also reviewed Exhibit #1 in detail. A quick comparison of Exhibit #1 and the loans revealed a loan involving Ms. Maiholz for \$100.00 on November 7 at 1:00 pm that was not in the loan book and not subject to this case. I can easily conclude that Ms. Maiholz was not in the habit of recording in the loan book. I also located a refund for \$349.00 that was not in the refund book. As I said, I will not rely on these records.

[263] I also acknowledge that Ms. Hill did not produce electronic journal one-page documents detailing each refund transaction. They may have proved material. But without them, I must rely upon what was produced, and I cannot speculate that they would have shown more detail than Navistor recorded.

[264] I cannot ignore that Mr. Pulsifer was an interested witness. Ms. Maiholz was passed over in October for the franchise. He expressed surprise that his son wanted it and received it, although he was quick to point out his son's myriad qualifications for same. I am asked to consider whether he was motivated to help Ms. Maiholz move along once the news came out in October, and as a result made up the allegation of theft to clear the floor for his son. I am not prepared to reach that conclusion.

[265] That the police did very little in the way of investigation, I can agree.

However, is it their responsibility to hire a forensic accountant when the Navistor data is capable of supporting the case in combination with the video footage? I cannot say that they needed to do more. Is the Crown required to turn every leaf in providing disclosure? No, they provide what they have to disclose. It is clear the Crown did not have items sought by Defence and when they came into possession during the course of the trial, they were provided. Certainly not to be encouraged,

but it can happen as a case unfolds. Having heard it, I am not convinced any of the late disclosure raised questions sufficient to shake the Crown's theory of the case.

[266] Some questions may never be answered, such as how the money left the store. Did Ms. Maiholz take it in some of the four videos or at other times? I find it is not necessary to show the Court video of her taking the money. The theft was committed when she took the money by recording a false refund and corresponding loan. Those transactions being false, resulted in her converting those amounts to her own use.

[267] Defence says if she were in line for the franchise why would she commit the crime? I do not need to determine why people commit offences, and despite the fact that Defence counsel says she did not look suspicious when handling cash, I have already determined that I did not see her take any in the videos. I agree the amounts she took each day certainly required careful counting, but all the videos were not before the Court and she was authorized to handle cash all day while she remained employed as a manager at that store before and after she was passed over for ownership.

[268] I find the Crown has established that Ms. Maiholz transacted refunds and corresponding loans that were false. I find support that she was manager 800 and

as well manager 807 based on the video footage. There were no lawful refunds conducted and the videos support this conclusion in the myriad detail expected at each transaction as outlined in Navistor. Where they do not, the theme of the offence is clear and holds a circumstantial degree of trustworthiness that same also occurred on dates when video was not available. That theme is a reliable indicator that all the suspect transactions were engaged in by Ms. Maiholz, whose manager number was on them, and nothing was returned to the store. The loans were transacted to cover the false refunds and Ms. Maiholz took the cash for same. It is not necessary to see her take it or know when it left the store; I accept the drop in store profitability that preceded the Sobeys analysis was the indicator money was being siphoned from the cash room. The cash registers and cash room balancing in the face of the noted transactions confirmed same.

[269] There are no rational inferences inconsistent with guilt in this case. I am drawing proper inferences from my findings of fact, based on the evidence and after examining all of the evidence. I am satisfied beyond a reasonable doubt that guilt is the only rational conclusion or inference to be drawn on the whole of the evidence. I find Ms. Maiholz guilty of theft.

[270] Judgment accordingly.

van der Hoek J.