

PROVINCIAL COURT NOVA SCOTIA

Citation: *R. v. Barker*, 2023 NSPC 18

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8353106, 8353108, 8353110, 8353112,
8353114

Registry: Halifax

Between:

His Majesty the King

v.

Nicholas Barker

DECISION ON TRIAL

Judge: The Honourable Judge Elizabeth Buckle

Heard: October 4, 5, 6, 7, 8, 12, 13, 14, 15, 18, 19, 21, 22, November 1, 3, 29, December 17, 2021, April 12, 13, 14, 20, 21, 22, May 6, June 1, July 26, September 20, November 2, 3, 2022

Decision: March 2, 2023

Charges: Sections 333.1(1) x 9; 355(a) x 7, 355(b) x 6, and 353.1x 4 of the *Criminal Code*

Counsel: Shauna MacDonald, Mark Heerema for the Crown
Don Murray for the Defence

By the Court:

Introduction

[1] Nicholas Barker had a trial on 28 charges relating to thefts of motor vehicles, removal of vehicle identification numbers (VINs), and possession of stolen property.

[2] Between January and May of 2019, Mr. Barker and others were under surveillance relating to suspected thefts of motor vehicles. In early May, police observed a vehicle being stolen, arrested two people and took statements. A few days later, they searched properties associated with Mr. Barker. They seized property believed to be stolen, documents and paraphernalia believed to be used to steal and re-VIN vehicles. As a result, Mr. Barker and others were jointly charged with related offences. The others have all resolved their matters without trial and some were called as witnesses in this trial.

[3] The Crown submitted that the direct and circumstantial evidence proves each offence beyond a reasonable doubt. That Mr. Barker was essentially in the business of stealing and re-vinning vehicles for his own use or for re-sale and the individual counts are related and part of that larger enterprise. That submission has to be treated with caution given the evidentiary rules concerning discreditable conduct across counts which I will address later.

[4] The Crown theory is that Mr. Barker, often with the assistance of two of the Crown witnesses, Seth Johnson and Catlin Fredericks, stole vehicles. He also acquired legitimate VINs by purchasing damaged vehicles. These were often purchased at auction using dealership information from Back to New Auto, a business owned by Scott Fraser, another Crown witness. The theory is that Mr. Barker re-vinned the stolen vehicles using the legitimate VINs and/or disguised the stolen vehicles using parts from legitimate vehicles. The stolen vehicles were kept at various properties owned or accessed by Mr. Barker, including a large property owned by Kevin Green, another Crown witness.

[5] The Defence argued that the Crown had not met its burden to prove each element of each offence beyond a reasonable doubt. More specifically, that the evidence did not prove Mr. Barker was involved in any thefts, illegally modified any VINs, was in possession of stolen property and/or knew that any property in his possession was stolen.

[6] The Defence submitted that the alleged accomplices are untrustworthy and, to the extent that their testimony inculpates Mr. Barker, cannot amount to proof beyond a reasonable doubt. Further, the circumstantial evidence does not rule out rational inferences other than guilt. The evidence, including evidence relating to possible conflicting VINs or VINs attributed to vehicle computers, is not inconsistent with rebuilding vehicles from lawfully obtained parts. Finally, in many instances, the evidence does not prove that what was in Mr. Barker's possession was stolen and, where it does, does not prove that he knew it was stolen.

[7] The specific issues vary depending on the elements and circumstances for each offence. They require me to consider the reliability and credibility of alleged accomplices, the extent to which evidence can be used across counts, the principle of 'recent possession', what is a VIN for purpose of a charge of VIN tampering, the weight to be given to expert testimony concerning VINs associated with vehicle computers and, whether possession of part of a stolen vehicle is an included offence in a charge of possession of the vehicle.

General Principles

[8] There are general principles that apply to every criminal trial. Mr. Barker is presumed to be innocent of these charges. The Crown bears the burden of proving each and every element of the offence beyond a reasonable doubt. That requires more than a suspicion of guilt and more than a belief that he is possibly or probably guilty. The Crown does not have to prove guilt beyond any doubt or to an absolute certainty but the standard of proof beyond a reasonable doubt falls closer to absolute certainty than it does to proof on a balance of probabilities. (*R. v. Starr*, 2000 SCC 40; and *R. v. Lifchus*, [1997] 3 S.C.R. 320).

[9] I am entitled to accept all, some or none of the testimony of any witness. I have to assess the testimony of each witness to determine whether it is credible and reliable. Credibility relates to a witness' sincerity – meaning their willingness to tell the truth. Reliability relates to the accuracy of a witness' testimony – meaning whether they accurately observed or perceived events and accurately recalled events when testifying.

[10] Mr. Barker called evidence but did not testify. That is his right. The important question is always whether on the evidence I did hear, I am convinced beyond a reasonable doubt of each element of every offence. That means that

where there is evidence that is inconsistent with guilt, if I believe it or find that it raises a reasonable doubt, I must acquit. Even if I reject that evidence, I must examine the remaining evidence that I do accept and acquit if it leaves me with a reasonable doubt. (*W.(D.)*, [1991] 1 S.C.R. 742; and, *R. v. Dinardo*, 2008 SCC 24).

[11] The offences or constituent elements can be proven through direct or circumstantial evidence or a combination. The burden on the Crown in a circumstantial case is to prove beyond a reasonable doubt that guilt is the only reasonable inference from the evidence (*R. v. Griffen*, 2009 SCC 28, para. 34). There is no burden on the defence to persuade me that there are other more reasonable or even equally reasonable inferences that can be drawn. The “mere existence of any rational, non-guilty inference is sufficient to raise a reasonable doubt.” (*Griffen*, para. 34). Inferences consistent with innocence do not have to arise from proven facts. A reasonable doubt may be logically based on a lack of evidence (*R. v. Villaroman*, 2016 SCC 33, para. 36). I must consider “plausible theories” or “reasonable possibilities” that are inconsistent with guilt (*Villaroman*, para. 37). Speculation and conjecture are prohibited and can be distinguished from plausible theories and reasonable possibilities because the latter are based on logic and experience applied to the evidence or absence of evidence. The question is “whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty”? (*Villaroman*, para. 38). If so, then the accused must be acquitted.

The Charges

[12] At the close of the Crown’s case, counts 1 to 3, 22 and 23 were dismissed at the request of the Crown and many of the remaining counts were amended to conform with the evidence.

[13] The following counts each allege theft of a motor vehicle, contrary to s. 333.1(1) of the *Criminal Code*:

Count 4 – Between February 14 and February 21, 2019 – a Ford Mustang, the property of Greenwood Auto Sales

Count 5 – On February 20, 2019 – Dodge Caravan #1, the property of Enterprise Rent-A-Car

Count 6 – On February 21, 2019 – Dodge Caravan #2, the property of Enterprise Rent-A-Car

Count 7 – Between February 27 and March 2, 2019 – a Honda Civic, the property of Mohammed Zahid

Count 8 – Between February 27 and March 2, 2019 – a Honda Civic, the property of Roxanne MacDougall

Count 9 – Between February 27 and March 2, 2019 – a Honda Civic, the property of Heather Ludlow

Count 10 – On March 2, 2019 - a Ford Cube Van, the property of Enterprise Rent-A-Car

Count 11 – On March 15, 2019 – a Ford Mustang, the property of Carson Exports

Count 12 – On April 30, 2019 – a Honda Element, the property of Mark Belanger

Count 13 – On May 4, 2019 – a Honda Civic, the property of Everette Bergstrum

[14] The following counts each allege possession of property obtained by crime where the subject matter is over \$5,000, contrary to s. 355(a) of the *Criminal Code*:

Count 14 – Between February 15 and May 8, 2019 – a Ford Mustang, the property of Greenwood Auto Sales

Count 15 – Between March 14 and May 8, 2019 – a Ford Mustang, the property of Carson Exports

Count 18 – Between June 30, 2018 and May 8, 2019 – a Dodge Caravan, the property of Enterprise Rent-A-Car

Count 19 – Between June 26, 2018 and May 8, 2019 – a White Jeep Wrangler, the property of Enterprise Rent-A-Car

Count 24 – Between February 27, 2019 and May 8, 2019 – a Honda Civic, the property of Mohammed Zahid

Count 25 – Between April 30, 2019 and May 8, 2019 – a Honda Element, the property of Heather Belanger

Count 26 – Between August 17, 2018 and May 8, 2019 – a Ford RV, the property of Pine Acres RV

Count 27 – Between October 29, 2016 and May 8, 2019 – a Ford Mustang Shelby, the property of Michael Sack

[15] The following counts each allege possession of property obtained by crime where the subject matter is under \$5,000, contrary to s. 355(b) of the *Criminal Code*:

Count 28 – on May 7, 2019 – a Dishwasher, the property of Leon's Furniture

Count 29 – on May 7, 2019 – Microwave #1, the property of Leon's Furniture

Count 30 – on May 7, 2019 – Microwave #2, the property of Leon's Furniture

Count 31 – on May 7, 2019 – a Dryer, the property of Leon's Furniture

Count 32 – on May 7, 2019 – a Washer, the property of Leon's Furniture

Count 33 – LED Lights, the property of Sobeys Inc.

[16] The following counts each allege the removal, without lawful excuse, of a vehicle identification number from a specified vehicle, contrary to s. 353.1 of the *Criminal Code*:

Count 16 – Between June 30, 2018 and May 8, 2019 – a Dodge Caravan

Count 17 – Between June 26, 2018 and May 8, 2019 – a White Jeep Wrangler

Count 20 – Between March 14 and May 8, 2019 – a Ford Mustang

Count 21 – Between August 17, 2018 and May 8, 2019 – a Ford RV

General Evidence

[17] The evidence included: testimony from alleged accomplices, surveillance officers, property owners and Mr. Barker's spouse; messages and photographs from electronic devices and testimony to assist in interpreting that evidence; expert witnesses from the Insurance Bureau of Canada who testified about vehicle identification numbers; documents from the Registry of Motor Vehicles and testimony to assist in interpreting those documents; and, expert witnesses who testified about VINs associated with computers in motor vehicles.

[18] I will start by introducing some of the evidence, witnesses, properties and businesses. Further details will be provided as it becomes relevant to specific counts.

[19] Four electronic devices were seized and analyzed:

- an Apple Iphone 6S, seized from Alesha and Nicholas Barker's residence and associated to Alesha Barker (Ex. 54; Ex. 77, A-1);
- an Apple Iphone 8, seized from Nicholas Barker and associated with 902-719-8804 which Mr. Barker conceded was, at all material times, his cell phone number (Ex. 75; Ex. 77, A-3);
- an Apple Iphone 8, seized from Catlin Fredericks (Ex. 76; Ex. 77, 6-1); and,
- a Blackberry STV, seized from Seth Johnson (Ex. 76; Ex. 77, 6-3).

[20] Alesha Barker (MacIntyre) is Mr. Barker's spouse. She resided with him at 4 Meadowlark Crescent (testimony of Alesha Barker and various police officers; Ex. 2, pp. 86-87). She testified that Mr. Barker worked with automobiles and sometimes worked in the evenings, coming home while she was asleep. She had various vehicles registered in her name; however, they were obtained for her by Mr. Barker.

[21] 4 Meadowlark Crescent was searched on May 7, 2019. Evidence found there included: a large quantity of vehicle keys; a key re-programmer; documents; a licence plate for the van often used by Mr. Barker; and the Jeep that is the subject of Counts 17 and 19 (Ex. 2, pp. 33, 44, 71, 79 – 84; Ex. 22).

[22] Catlin Fredericks is an alleged accomplice of Mr. Barker. He was arrested on May 4th, 2019, gave a statement to police and pleaded guilty to theft of four of the motor vehicles at issue in this trial. He testified and was cross-examined by the Crown, under s. 9(2) of the *Canada Evidence Act*, and Defence. He was clearly a reluctant witness. He provided very little relevant evidence during his testimony and resisted confirmation of his prior statements through both the s.9(2) and *Bradshaw* processes. His statement to D/Cst. Nick Joseph on May 4th was admitted under the principled exception to hearsay (Ex. 91 & 92).

[23] He acknowledged that he knew Mr. Barker. He said they had met through friends and had known each other for a long time, about ten years. He acknowledged that he probably communicated with Mr. Barker by telephone but could not recall using instant messaging with him. He was shown user account information and a phone number associated with the device that was seized from him (Ex. 77 – 6-1). He agreed that the email account listed was his email account in 2019 and that the phone number might be his old number. I am satisfied by the circumstances surrounding the seizure of the phone and the user account information that the device was his. He was shown messages between his device and Mr. Barker's device but maintained that he had no memory of the messages.

[24] He denied knowing others who were allegedly involved with Mr. Barker and who had also pleaded guilty to offences involving some vehicles.

[25] He acknowledged that, in 2019, he drove a black Chevy Silverado ¾ ton truck, but denied it had any modifications. This is relevant to observations made by surveillance officers.

[26] His reliability and credibility are suspect, and I will treat his evidence with a great deal of caution.

[27] In his testimony, Mr. Fredericks professed an almost total lack of recall of what was contained in his statement, his arrest on May 4th, the taking of the statement itself, his life circumstances at the time and his eventual guilty pleas to four charges arising out of his arrest. That lack of recall was, in my view, feigned which demonstrates his willingness to lie under oath. In addition, in some respects, his testimony contradicted things he said in his statement. For example, he testified that he did not know Seth Johnson, whereas in his statement he spoke about being with him.

[28] Further, he testified he was a regular drug user during the time leading up to his arrest which could cause concern about his ability to accurately perceive and recall events. However, he did not appear to be impaired during the police interview; he seemed tired and upset, but lucid, appeared to understand everything that was said to him and provided rational responses (Ex. 91).

[29] These concerns impact his credibility and reliability in general.

[30] The focus is on the credibility and reliability of the evidence contained in his statement. There are additional specific concerns about that. He may have had various motives to lie to the police – he was under arrest, recognized the seriousness of his situation and wanted to be released from custody. However, there is no evidence of any specific motive for Mr. Fredericks to fabricate evidence against the people he named in the statement and nothing in the statement that would suggest bias or animosity against them. In his statement, he acknowledged his own involvement in various thefts of cars and was more reluctant to implicate others. He did not appear to be exaggerating the involvement of others, did not provide last names and did not volunteer information that went beyond the officer's questions.

[31] The Crown argued that there is significant corroboration of his statement and the Defence urged me to carefully assess that evidence to determine whether it truly corroborated his statement and, if so, whether it permitted me to rely on it for proof beyond a reasonable doubt.

[32] Seth Johnson was also an alleged accomplice of Mr. Barker in the theft of vehicles. He was also arrested on May 4, 2019, gave a statement to police and pleaded guilty to theft of four vehicles that are the subject of charges against Mr. Barker. He testified and was cross-examined by the Crown under s. 9(2) of the *Canada Evidence Act*. The Crown did not seek to have his statement admitted under the principled exception to hearsay. He was clearly a reluctant witness.

[33] He acknowledged that he'd pleaded guilty to the thefts, but denied he was guilty, saying he'd pleaded guilty because it was the easiest thing to do. He also denied that Mr. Barker had any involvement in those thefts. He acknowledged he knew Mr. Barker, Mr. Fredericks, Scott Fraser and Kevin Green. He testified he and Mr. Barker were friends and he was paid to do work for Mr. Barker, including repairing and repainting vehicles.

[34] He confirmed that when he worked for Mr. Barker, they communicated by text but he could not remember what his own telephone number was at the time. He was shown photographs from the device seized from him and testified that he thought they were from his phone and that he did sometimes take pictures at work (Ex. 77, 6-3).

[35] He testified that Mr. Barker had a black van, but Mr. Barker didn't usually drive, so when they were travelling together, Mr. Johnson drove. He described Mr. Fredericks' truck in a manner consistent with evidence of surveillance officers.

[36] In his testimony, he was evasive, uncooperative, and lied about his involvement in the offences. I would rely on his evidence only about generic things where he would see no reason to lie or where there was corroboration.

[37] Kevin Green had a large property at 367 Gatehouse Run. Vehicles that are the subject of some of the charges against Mr. Barker were found there on May 7, 2019. Mr. Green was charged with offences arising out of this investigation, but they were withdrawn upon his successful completion of restorative justice. He testified that several people, including Mr. Barker, kept vehicles on his property. He had known Mr. Barker for years. Mr. Barker paid him to store vehicles on his property and would sometimes come there to work on vehicles. When he did, Seth Johnson normally drove him. Mr. Green testified that he was never present when the vehicles arrived. They would just show up with the keys in case he needed to move them.

[38] Scott Fraser owned Back to New Auto Sales, a used car dealership, and worked for his father at Fraser Automotives. Both businesses are located at 767 Old Sambro Road. He was charged with and pleaded guilty to possession of stolen vehicles arising out of this investigation. When he testified, he had not yet been sentenced and the Defence submitted that there is a deal between him and the Crown for a more lenient sentence. He, his counsel and the Crown deny this. There is no evidence of any agreement on sentence in return for Mr. Fraser's cooperation with the Crown. However, I accept that he might perceive that he has something to gain in the form of potential mitigation of sentence if he is cooperative. Mr. Fraser also has a prior criminal record including crimes of dishonesty and was in custody from April to November of 2019.

[39] I will treat his testimony with caution.

[40] Mr. Fraser testified that Back to New Auto primarily buys smashed cars from auction. He had known Mr. Barker for about 15 years. They were friends and they helped each other on car deals. Over the years Mr. Fraser had bought and sold cars from Mr. Barker.

[41] Part of the Crown theory relating to some counts is that Mr. Barker used Back to New to create a paper shield between himself and certain transactions. Mr. Fraser testified that he allowed Mr. Barker to use Back to New's dealership licence to purchase vehicles from auction. However, he was unaware of some of the transactions at issue in the trial that purported to involve Back to New. Further, a temporary licence book for Back to New was found at 110 Kearney Lake Road, a property owned by Mr. Barker (Ex. 56). Mr. Fraser said these are used by purchasers who don't have a licence plate to allow them to operate the vehicle until they can get one. He said he had no idea how Mr. Barker came to have this book. He acknowledged he had written up temporary permits for Mr. Barker in the past but denied that he had ever given him any books.

[42] He testified that Mr. Barker was also interested in smashed up cars, particularly Hondas and 'hard hits' (those with significant damage). He said Mr. Barker wanted parts and VIN numbers. He knew this because some of the vehicles Mr. Barker bought would be towed to his shop (767 Old Sambro Road) for parts/scrap, without serial numbers. He did not know whether Mr. Barker removed these himself.

[43] He testified that Mr. Barker knew how to program keys, taught Mr. Fraser how to reprogram keys for Honda Civics and that it was easy to program keys for Hondas and Dodges.

[44] Mr. Fraser acknowledged he knew Seth Johnson and that both Mr. Johnson and Mr. Barker had been to 767 Old Sambro Road.

[45] Through surveillance and other evidence, Mr. Barker is connected to several properties in addition to his residence at 4 Meadowlark:

- 110 & 112 Kearney Lake Road – a duplex owned by Mr. Barker and Alesha MacIntyre (Barker) where allegedly stolen property was found (Ex. 34; Ex. 11);

- 327 Kearney Lake Road – a workshop/garage rented by Mr. Barker (Ex. 12). Ms. Barker testified that Mr. Barker rented the space, he was frequently seen going there during the investigation and items seized during the search on May 7, 2019 also connected him to the property: a letter, dated February 7, 2016 from NS Department of Transportation and Infrastructure Renewal, addressed to Nicholas Barker at that address (Ex. 36).
- 387 Kearney Lake Road – a residence, outbuildings and junk or scrap yard (Ex. 43 & 79). During the investigation, Mr. Barker was frequently seen going there (D/Cst. Joseph).
- 367 Gatehouse Run – residence and property of Kevin Green (Ex. 4). During the investigation, Mr. Barker was frequently seen going there and Mr. Green and Mr. Johnson both testified he went there.
- 767 Old Sambro Road – location of Fraser Automotive and Back to New Auto Sales. During the investigation, Mr. Barker was frequently seen going there and Mr. Fraser and Mr. Johnson both testified he went there.

[46] On May 7, 2019, police executed warrants at these and other locations seizing a large amount of property.

[47] Other witnesses were significant in the investigation or presentation of the evidence.

[48] D/Cst. Nick Joseph was the lead investigator and was involved in various aspects of the investigation including surveillance and taking a statement from Mr. Fredericks. The Defence submits that I should have concerns about his credibility and/or reliability and this impacts the credibility and reliability of the information in Mr. Fredericks' statement because of the risk that D/Cst. Joseph had discussions with Mr. Fredericks before that statement was taken or otherwise improperly influenced the statement.

[49] The primary cause for concern identified by the Defence is D/Cst. Joseph's evidence relating to his observations of a Jeep that was generally driven by Ms. Barker. The Crown alleged that vehicle was stolen and was originally black but was painted white. The Defence submitted it was originally a lawfully obtained green Jeep. On April 26, 2019, D/Cst. Joseph had an opportunity to look under the vehicle while it was parked at a movie theatre. It was dark out, but he used the

light from his phone. In cross-examination, it was suggested to him that the underside of the vehicle was green, not black. He said he did not recall seeing that and it was not in his notes. He was confronted with a report that had been created by Cst. Holly Murphy which included information that the vehicle appeared to have been originally green but had been painted white. He testified he did not provide Cst. Murphy with that information and was not aware of anyone else looking under the vehicle.

[50] Cst. Murphy testified. She could not specifically recall where she got the information that someone had observed green on the underside of the Jeep. She said she got most of her information from surveillance notes but had checked those notes and they did not include a reference to “green”. She thought she had spoken with D/Cst. Joseph and that he had given her the information, but she could not say where or when. She acknowledged that the information may have been directly received from someone else who had said it came from D/Cst. Joseph.

[51] A Defence application to have the vehicle examined was granted and photographs of the underside of the vehicle show that it does have green metal. So, Cst. Murphy’s information was correct.

[52] Essentially, the Defence submits that D/Cst. Joseph intentionally suppressed the information about the green paint, in his notes and testimony, because it was exculpatory. I am not satisfied that he did. By the time D/Cst. Joseph testified, he knew that there was some evidence that the public VIN was associated with a green vehicle. However, there is no evidence that he knew this at the time of his observations and when the surveillance notes were created. Assuming he ran the public VIN through RMV, those documents do not include that detail (Ex. 67). In the absence of that information, he would not have known that this detail might be exculpatory, so I see no reason for him to have purposefully kept it out of his notes. In the circumstances, I do not accept there was malfeasance in failing to record it in the surveillance notes. I do accept that the information was conveyed to Cst. Murphy, by D/Cst. Joseph or one of the surveillance officers who were with him. I believe that it was probably D/Cst. Joseph who observed the green paint, but I can’t say whether he told Cst. Murphy or if someone else did. In any event, this would have been a relatively minor detail in a relatively long and complicated investigation involving a lot of surveillance and a lot of vehicles. Given that the information was not in the notes from that evening, I accept that D/Cst. Joseph’s failure to recall it at trial was innocent.

[53] Other officers were involved in surveillance and the execution of the search warrants on May 7, 2019. I will refer to them when I discuss the detailed evidence.

[54] Other professionals were involved in the investigation and presentation of evidence.

[55] Kevin MacDougal, an employee of the RCMP digital forensics unit, prepared/interpreted extraction reports for the four cell phones that were seized during the investigation. He testified that the extraction is essentially a mirror of the data on the device. He tested the extractions using various tools and was satisfied that there was no corruption of any data during the extraction. Portions of those extractions were filed with the Court, including user information, text-based messaging, call logs and images stored on the devices (Ex. 77).

[56] Mr. MacDougal explained that the times and dates included in the reports are taken from the device so are accurate if the time on the device was accurate. He was not asked whether these devices were set to automatically acquire time and date from the internet. For the iPhone, he explained that the extractions were done using the time zone the device was set to, such that the times in the reports are the times on the phone. Therefore, the times on the iPhone extractions (Mr. Barker's, Ms. Barker's and Mr. Fredericks') are adjusted for Universal Coordinated Time (UTC) which is -3 during AST and -4 during ADT. For Mr. Johnson's device, the Blackberry, the times did not have that adjustment so need to be adjusted for UTC to obtain local time. For Mr. Johnson's device, there is internal corroboration that the time stamps need to be adjusted for UTC -4 and that they are accurate. There are messages that include references to times. For example, a message saying "just get dropped off at 1030", with a response, time stamped at 2:34 a.m., with an adjusted time of 10:34 p.m., saying "here".

[57] Mr. MacDougal explained how to interpret the data on the devices. For images, he explained that each image has times and dates associated to when it was captured, created, modified and accessed. Some of the images show that they were sent or received from the device as an attachment to a message. When creation/captured/modified/accessed times are identical or within seconds of each other, it essentially means the image was not modified and was only accessed when it was taken and sent. For various types of text-based messaging, he also explained how to identify whether a message had been sent or received by the device and whether there was an attachment.

[58] There were messages found on Mr. Fredericks' and Mr. Johnson's devices which appear to be between those devices and Mr. Barker's phone number.

[59] Neither Mr. Fredericks nor Mr. Johnson acknowledged they sent and received those messages. However, I am satisfied by the entire circumstances that they did. The phones were in their possession when they were seized, they acknowledged either their phone number, email or content from the devices, and there is no evidence that they let anyone else use the devices. Further, for Mr. Fredericks, the content of the messages is entirely consistent with his statement about his role in the various offences and consistent with him being the author/recipient of the messages. For Mr. Johnson, the content of the messages is consistent with his testimony about his work and life circumstances at the time and consistent with him being the author/recipient of the messages.

[60] These messages were not found on Mr. Barker's device and Mr. MacDougal testified that no deletions were detected on Mr. Barker's device. He was not asked to elaborate on this. The Defence submitted that this should raise concerns as to whether the messages on Mr. Fredericks' and Mr. Johnson's devices were exchanged with Mr. Barker's device. Mr. MacDougal did say that the extraction method for Mr. Barker's device was different than the method used for the other devices. He was not asked so I have no evidence of whether that might impact the detection of deleted messages.

[61] As the Defence noted, even if I am satisfied that these messages were exchanged with Mr. Barker's phone number/device, that does not prove that Mr. Barker was using his device and received/authored those messages.

[62] Having reviewed all the circumstances, I am satisfied that the messages retained on Mr. Fredericks' and Mr. Johnson's phones were exchanged with Mr. Barker's phone number/device. I accept that there is no explanation for why they were not found on Mr. Barker's device, but I also have no explanation for how Mr. Barker's phone number could be associated with those messages in the other two devices if they were not exchanged with that number. The messages were clearly generated and were responded to, so they were received by a device associated to Mr. Barker's phone number.

[63] I am also persuaded that Mr. Barker was the author/recipient of these messages. Mr. Barker had the device associated with that number in his possession when he was arrested, and I have no evidence that he had any other device/phone

number or that he let others use his device. Further, the content of some messages when read together with Mr. Fredericks' statement supports that Mr. Barker was the recipient/author of the messages. Finally, the content of some messages corroborates that Mr. Barker was the person receiving and authoring messages: reference to meeting at the "duplex" – Mr. Barker owned a duplex; reference to the "van" – Mr. Barker operated a van; reference to "lights" – lights were found at properties owned by Mr. Barker; and, a reference to "soon as Alesha get home" – Mr. Barker's wife is Alesha.

[64] I am permitted to consider rational inferences from the evidence or from gaps in the evidence, but I am not permitted to speculate about facts. Despite that, I have considered whether it is reasonable or rational that Mr. Barker would permit someone else to use his phone to send messages. I have considered, even though there is no evidence to support this, that he might lend his phone to his spouse or ask someone to send messages if he was driving or otherwise unable to text. In the circumstances, I have concluded that these are either not reasonable inferences, would not be consistent with the content of the messages, or would not be exculpatory for Mr. Barker.

[65] John MacKinnon, an investigator with the Insurance Bureau of Canada, was qualified as an expert able to give opinion evidence in the following areas:

- The interpretation of primary and secondary VINs
- The identification of motor vehicles and motor vehicle parts
- The techniques used by motor vehicle thieves in motor vehicle theft, and,
- The renumbering of stolen motor vehicles and motor vehicle parts

[66] He examined and provided opinion evidence about vehicles. He also identified various tools and items seized from locations associated with Mr. Barker that, in his opinion, could be used to steal and re-VIN vehicles, including: door opening kits (Ex. 12, p. 66 – 327 Kearney Lake Road); lock pick sets; key re-programmers (Ex. 11, pp. 139 – 110 Kearney Lake Road; Ex. 2, p. 71 – 4 Meadowlark Crescent); a large quantity of vehicle keys (Ex. 11, p. 141 – 110 Kearney Lake Rd.; Ex. 2, p. 44 – 4 Meadowlark Cresc.); blank programmable keys; metal stamping sets; photographs of VIN stickers (Ex. 77, A-3 – Mr. Barker's phone); and, cutout VIN plates/stickers and corresponding vehicle permit (Ex. 12, pp. 71, 109, 112; Ex. 63 - 327 Kearney Lake Road).

[67] William Smith, also an auto-theft investigator with the Insurance Bureau of Canada, was qualified as an expert to give opinion evidence in the following areas:

- identification of motor vehicles and their parts
- the interpretation of primary and secondary VINs; and
- techniques and/or mechanisms used to conceal the true identity of vehicles

[68] He examined and provided opinion evidence about one vehicle.

[69] Carla Parker, an employee with Impact Auto, testified that the company works for insurance companies to sell their vehicles that have been declared a total loss. They sell to licensed dealers and registered auto companies. These vehicles include vehicles that are recovered stolen, salvaged (have been in an accident but are repairable) and parts-only (not repairable but parts may be used on other vehicles). Salvaged vehicles are repairable but can't be put on the road until there is a Certificate of Mechanical Fitness. Once they are repaired and certified, they can be registered with the Registry of Motor Vehicles (RMV) as 're-built' and then go back on the road. Previously stolen vehicles are given a clean title in the insurance company's name and then sold. Some vehicles come in without a proper VIN plate. A VIN is obtained from the RMV and placed on the door pillar. She testified that Impact Auto does not remove VINs from vehicles and does not compare VINs in different places on the vehicle.

[70] Pamela Bunker-Dyke is the police services representative with public works and transportation which includes the Registry of Motor Vehicles. She obtained and interpreted documents from RMV relating to the investigation. She described how rebuilt vehicles (vehicles that include parts from different vehicles) are managed in the RMV documents. She was questioned about what VIN would be used to register a rebuilt vehicle that had parts with different VINs. She testified that it depends on how much of the vehicle is rebuilt. A special section of the RMV, 'Operations Support', deals with rebuilt vehicles. It clarifies what is required, reviews all documents and has engineers who can decide if the vehicle is road worthy. Not all rebuilt vehicles have to go through that process and if a vehicle doesn't go through that process, RMV doesn't choose which VIN from the vehicle is used. I understood her testimony to be that to a certain extent the person registering a rebuilt vehicle decides whether to engage that process and, if not, which VIN to register the vehicle under. However, she testified that if someone

were replacing things like the frame, more approval would be required and, presumably, would be expected to engage Operations Support.

[71] Sections 47-48 of the *Motor Vehicle Act*, RSNS, Part II describes some of the rules surrounding rebuilt vehicles. These provisions prohibit anyone from operating a vehicle with a replaced chassis, body or motor without application, an Applicant for registration must mention if a part of the body or chassis bearing the manufacturers serial number has been replaced and if a rebuilt/altered vehicle results in the removal of a serial number, RMV may authorize a new special number.

[72] Two witnesses were qualified as expert witnesses able to provide opinion evidence related to the relationship between a vehicles' computer and its VIN: David Giles, for the Crown; and, Emil Reiss, for the Defence. Understanding their evidence requires some basic understanding of a motor vehicle's computer. Modern vehicles have a VIN that is physically stamped on the vehicle and associated with the vehicle's computer system. The VIN associated with the computer can be read using an onboard diagnostic (OBD) scanner. The computer system is made up of several smaller computer modules that control different functions of the car.

[73] The evidence of Mr. Giles and Mr. Reis is relevant to those Counts where the Crown relies on VINs obtained through an OBD scanner to identify a vehicle and support a finding that the vehicle or some part of it is stolen and/or that the VIN has been tampered with.

[74] The primary effect of Mr. Reiss' testimony would be to render unreliable an electronic VIN associated with a vehicle's computer, recorded through an OBD scanner. He testified that the VIN associated with a module would be changed if software associated with a different VIN were installed. The result would be that a VIN obtained using an OBD scanner would capture the VIN associated with the software, not the physical part or vehicle.

[75] Mr. Giles testified that if only one module was reprogrammed, that module would not interact with other modules because the modules communicate with each other using the VIN. He acknowledged that it was theoretically possible to completely reprogram a car to remove the VIN from the entire electrical system and replace it with another, but it would be highly challenging, time-consuming and most vehicles have security modules that would, in his opinion, render the

vehicle inoperable unless they were also reprogrammed. These security modules could not be re-programmed without a licensed lock smith or assistance from the manufacturer.

[76] He did confirm that if you simply had the chassis of car A, and put all the components of car B into it; the VIN obtained from the vehicle's computer would show the VIN for Car B.

[77] If necessary, I will address their opinions in detail when I deal with those Counts.

[78] Finally, vehicle owners testified about their ownership of specific vehicles and the circumstances under which their vehicles were stolen. Again, I will refer to their evidence when I address specific counts.

The Law

[79] At this stage, I will summarize the applicable law in a general way and identify where there are legal issues. I will address the specific arguments later in my reasons.

Theft of a Motor Vehicle, s. 333.1

[80] To prove theft of a motor vehicle under s. 333.1, the Crown must prove: a theft; and, that the "property stolen is a motor vehicle" (s. 333.1). The offence of 'theft' is described in s. 322 and there is no real dispute in this case that the vehicles that are the subject of the theft counts were stolen vehicles, meaning that they were motor vehicles, were taken without colour of right, and with intent to deprive the lawful possessor. The main issue for the theft charges is whether the Crown has proven that Mr. Barker was a party to the offence.

[81] For some counts, the Crown also alleges that Mr. Barker subsequently possessed the vehicles that were stolen. I will address the legal principles that apply to possession in a moment. However, if I find that Mr. Barker was in possession of a stolen vehicle, the principle of 'recent possession' may be engaged to assist the Crown in proving that he knew the item was stolen and/or was involved in the theft of that vehicle. That principle is not a doctrine, presumption or mandatory inference. It says simply that a trier of fact may (not must) draw inference(s) from the unexplained recent possession of stolen property that the

person in possession of the property knew it was stolen and/or was a participant in its theft (*R. v. Kowlyk*, [1988] 2 S.C.R. 59). Where that inference is drawn, it can be sufficient, even in the absence of other evidence, to establish guilt.

[82] It requires proof that the accused was in possession of the property, there is no innocent explanation for the possession, the property was stolen and the theft was recent (*Kowlyk*; *R. v. Saieva*, [1982] 1 S.C.R. 897).

[83] I will discuss the specific arguments and cases that address how recent is ‘recent’ later in my decision.

Possession of Stolen Property, ss. 354 and 355(a) & (b)

[84] The offence colloquially referred to as ‘possession of stolen property’ is described in s. 354(1)(a). It requires proof that the person had in his possession any property or thing, knowing that all or part of the property or thing was obtained, directly or indirectly, from the commission of an indictable offence.

[85] Possession is defined in s. 4(3) of the *Criminal Code* to include personal, constructive and joint possession. Possession requires knowledge and some measure of control over the item (*R. v. Wallace*, [2016] NSCA 79, at para. 56; *R. v. Pham* (2005), 77 O.R. (3d) 401, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 363; *R. v. Caldwell* (1972), 7 C.C.C. (2d) 285 (Alta. S.C. (A.D.)); and, *R. v. Grey* (1996), 28 O.R. (3d) 417).

[86] Joint possession under s. 4(3)(b) has the added requirement of consent (*Pham* and *R. v. Terrence* (1983), 4 C.C.C. (3d) 193 (SCC) at pp. 197-198). Consent, in the joint possession context, has been interpreted to mean “active concurrence of the accused in the possession by another ... not merely passive acquiescence...” (*Caldwell*, at p. 300). A relevant consideration is whether the facts establish that the accused had the power to decline to consent in an effective way (*R. v. Miller* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.) at p. 86).

[87] Knowledge, both for proof of possession and for proof that the thing possessed was obtained by crime, includes willful blindness which is often described as ‘deliberate ignorance’. Willful blindness imputes knowledge to an accused where the evidence establishes that he became aware of the need for some inquiry but did not make any inquiry because he didn’t want to know the truth. Mere negligence (the failure to take reasonable care) is not enough and it is not

enough for the Crown to show that the accused should have known (*R. v. Briscoe*, 2010 SCC 13). In *R. v. Murphy* (2020 NSSC 35, para. 114, affirmed on appeal, 2022 NSCA 26), the Court described willful blindness in the context of knowledge that property was stolen:

The person must themselves have been suspicious about whether the property was stolen and made the decision not to inquire, to avoid being encumbered with the knowledge that would be gained from such an inquiry. Willful blindness is a conscious choice not to make an inquiry. A person may be so naïve and trusting that they believe almost anything.

[88] Absent an admission, proof of knowledge will generally not be established through direct evidence. However, guilty knowledge, like any other element of an offence, can be proven through direct evidence or by inferences from other circumstances.

[89] The charges under s. 355(a) that allege possession of property with a value over \$5,000 all relate to motor vehicles and each count is particularized to refer to a specific motor vehicle. For example, “a Ford Mustang ... the property of Enterprise Rent-A-Car”. An issue that potentially arises in this case is whether Mr. Barker could be convicted of one of those counts if the Crown proved that he possessed only part of that vehicle but knew that part was stolen. I will address that argument when it arises.

[90] In a prosecution under s. 354(1), to prove that a motor vehicle was obtained by crime, the Crown has the benefit of the statutory presumption in s. 354(2) which provides that where a person is in possession of a vehicle with a wholly or partially removed or obliterated VIN, there is a rebuttable presumption that the vehicle is stolen. Of course, that does not establish knowledge that the vehicle is stolen.

VIN Tampering – s. 353.1

[91] The offence colloquially referred to as ‘VIN tampering’ is contained in s. 353.1 of the *Criminal Code*:

353.1 (1) Every person commits an offence who, without lawful excuse, wholly or partially alters, removes or obliterates a vehicle identification number on a motor vehicle.

[92] This provision provides for different modes of committing the offence. In this case, the charges under this provision particularize the mode of commission as “removal” of the VIN. Having particularized the offence in this way, the Crown is required to prove that particular (See: *R. v. Saunders*, [1990] 1 S.C.R. 1020, para. 5; *R. v. Wong*, 2012 ONCA 432, para. 56; *R. v. Sadeghi-Jebelli*, 2013 ONCA 747, paras. 23-24).

[93] Section 353.1(2) defines “vehicle identification number” as:

(2) ... any number or other mark placed on a motor vehicle for the purpose of distinguishing it from other similar motor vehicles.

[94] A potential issue in this case is whether the VIN associated with a vehicle’s computer and certain other numbers assigned to various parts in the vehicle fall within the definition of VIN in s. 353.1(2) such that their removal would be an offence. Again, I will specifically address that argument when it arises.

[95] Section 353.1 allows for the defence of “lawful excuse”.

[96] Finally, s. 353.1(3) also sets out circumstances in which removal of a VIN will not be an offence. I will address this issue when it arises.

Consideration of Evidence Across Counts

[97] Generally, evidence of discreditable conduct of the accused is not admissible in a trial unless that conduct is the subject of the charge in question. In a multi-count Information, this means that discreditable conduct evidence which is admitted on the count to which it relates cannot be used to prove guilt on another count unless it fits within an exception.

[98] Here, the Crown argues that for some counts, the test for one of those exceptions - ‘similar act’ evidence - is met. However, the Crown also submits that in circumstances involving alleged possession of a large amount of stolen property, it may be open to the Court to consider the evidence globally without strictly adhering to the analysis governing admission of similar act evidence. In support of that position, the Crown has provided cases where courts have looked at the entire circumstance of a case to infer the knowledge requirement for possession of stolen property without specific reliance on ‘similar act’ and without going through a ‘similar act’ analysis. In *R. v. Boyle*, (1983) 41 O.R. (2d) 713 (CA), the Court of Appeal said that:

Guilty knowledge...may, of course, be proved by inferences from other circumstances...For example, the possession of several motor vehicles the vehicle identification numbers of which were obliterated might very well support an inference of guilty knowledge on the basis of the improbability of a person innocently acquiring a number of motor vehicles, the vehicle identification numbers of which had been obliterated.

[99] In *Boyle*, the Appellant had been tried on a single count of possession of a motorcycle so neither the trial court nor the appeal court was required to consider the permissible use of evidence across counts. The issue on appeal was the constitutionality of a statutory presumption of guilty knowledge upon proof that the accused possessed a vehicle with an obliterated VIN. After concluding that the presumption was invalid, the Court discussed other ways that knowledge could be proven, including the paragraph cited above. No context was provided for that statement, so it is not clear whether the Court was considering a situation where an accused is charged with multiple individual counts of possession of stolen property as opposed to the situation where there is one global count encompassing more than one item. In the latter scenario, no similar act application would be required.

[100] However, the Crown argues that similar comments were made in *R. v. Murphy*, 2020 NSSC 35, aff'd by 2022 NSCA 26:

[70] The large quantity of retail merchandise is a significant factor in determining whether it is reasonable to infer that somehow the items made their way to this store legitimately. Coincidences happen. A person might sell their Canadian Tire trolling motor to the pawn shop. Someone else might sell another one. Someone else might sell their tires. All those items might be just like items that were stolen. Someone might sell a large quantity of new undergarments that they somehow obtained. Someone else might sell jeans with security tags still on them. Each of those events is possible but it is just not reasonable to suggest that all those things could happen. There may be an explanation that can be advanced for each item but together they do not allow for an explanation other than that they were stolen property.

...

[109] The volume of retail goods was substantial. The presence of multiple items from each retailer is significant. The fact that each was found in

original packaging is significant. In some case, as with jeans and at least one sheet set, there were security tags still attached. While each individual item might be explainable as an article brought in by a customer who bought it from a retailer, the presence of so many items packaged in that way sets up an overwhelming inference that the items were stolen. There is nothing to suggest by their packaging or otherwise that they were acquired through a bulk resale arrangement. Those retailers do not dispose of inventory in that way. It is not reasonable to infer that they came into the pawn shop individually.

[101] In *Murphy*, the Court was dealing with multiple counts of possession of stolen goods and the Court did not engage in a similar act analysis to determine if evidence relating to different counts could be used to support others. The trial judge apparently used evidence across counts to support inferences that the property was stolen and that the accused knew it was stolen. Mr. Murphy appealed but this issue was not raised or addressed on appeal.

[102] The Ontario Court of Appeal has specifically addressed this issue in a similar context to the one before me. In *R. v. Tsigirlash*, 2019 ONCA 650, the accused had been tried on a multi-count Information relating to possession of stolen property. The Crown did not apply to use evidence across counts as similar act evidence. However, in his reasons, the judge conducted his own similar act analysis and then used the evidence in much the same way as was suggested in *Boyle* – to infer that possession of a large quantity of stolen property supported an inference of knowledge. The Court of Appeal concluded that it was an error for the judge to embark on his own similar act assessment without a request from the Crown. The Court declined to apply the curative proviso and sent the matter back for re-trial. Implicit in the Court’s conclusion is that the evidence could not, otherwise, have been used across counts.

[103] In my view it is possible to rationalize these cases with each other and with the existing law prohibiting cross-count use of discreditable conduct by going back to first principles.

[104] The prohibition on use of evidence across counts relates only to evidence of discreditable conduct (also referred to as bad character evidence or extrinsic misconduct evidence). The purpose of the general prohibition is to prevent discreditable conduct that is extrinsic to a specific count from being improperly used to convict an accused of that count. That kind of evidence is presumptively

inadmissible because of the risk that a person will be convicted based on prejudice and propensity rather than proof.

[105] However, in any trial on a multi-count Information, there will be evidence collected that is relevant to more than one count. If the evidence the Crown seeks to use on multiple counts is not discreditable conduct, it is not presumptively inadmissible. If it is relevant and not otherwise inadmissible, it can be used as circumstantial evidence in support of multiple counts without a similar act analysis. If the evidence is of discreditable conduct of the accused, it is presumptively inadmissible and could only be admitted across counts if it satisfied the requirements of an exception, such as the ‘similar act’ exception.

[106] The label ‘discreditable conduct’ relates to the type of evidence, not the purpose for which the Crown seeks to use it. It “... may be understood as being virtually anything that tends to put someone’s character in a negative light” (*R v G (S.G.)*, [1997] 2 SCR 716). It is not restricted to criminal conduct and can include any conduct or information about the accused that others are likely to find morally objectionable or apt to demonstrate that the accused has a contemptible or reprehensible character (*R. v. Robertson*, [1987] 1 SCR 918 at para 46).

[107] Arguably, in *Murphy*, the Court relied on evidence that was not discreditable conduct evidence – e.g. possession of a large quantity of retail goods – and used it as circumstantial evidence from which he drew inferences. Interpreted in that way, no ‘similar act’ analysis was undertaken because none was required.

[108] Other evidence might be discreditable but is relevant circumstantial evidence for more than one of the charges. If so, it is admissible on the counts to which it relates. This might include possession of items that are potentially the ‘instruments’ or tools of the crimes. For example, evidence that Mr. Barker possessed lock picking equipment, a key re-programmer and multiple key fobs might be viewed as inadmissible ‘bad character’ evidence on a charge of assault. However, for charges of theft of motor vehicles it is direct circumstantial evidence that can be used for those counts.

[109] Other evidence is also discreditable but is admissible across counts by virtue of exceptions other than the ‘similar act’ exception. For example, the principle of ‘recent possession’. On a charge of theft of a motor vehicle, evidence that Mr. Barker later possessed that vehicle is capable of grounding an inference that he was involved in the theft. If I am persuaded that he possessed the stolen vehicle, that is

admissible on the theft charge for the purpose of determining whether I would draw the permissive inference even though it is also evidence of the offence alleged in the ‘possession of stolen property’ count.

[110] That does leave some evidence that, in my view, could not be used across counts unless it fit within the ‘similar act’ exception. This would include evidence relating to theft of one motor vehicle to assist in proving that he was involved in stealing another. The Crown also seeks to use the fact that Mr. Barker allegedly possessed more than one stolen item or vehicle with improper VINs to help infer that he knew other items were stolen. I have considered whether evidence that a person possessed a large number of stolen things is discreditable conduct. Possession of stolen property, absent proof of knowledge, is not criminal. However, the cases are clear that discreditable conduct is not limited to criminal conduct. Arguably, possessing a lot of stolen property could put a person’s character in a negative light or be viewed as morally suspect. As such, it could be considered ‘discreditable’ and would require a ‘similar act’ analysis to use it across counts. Similarly, evidence that Mr. Barker used Back to New to create a fake paper trail for one count would not be admissible on another count unless the Crown met the test for the ‘similar act’ exception.

The Similar Act Exception – Legal Principles

[111] Similar act evidence is bad character evidence and is presumptively inadmissible (*Arp*, para. 40; and *R. v. Handy*, 2002 SCC 56). The burden to admit the evidence is on the Crown to establish on a balance of probabilities to show that the probative value to an issue in the case outweighs its prejudicial effect (*Handy*, paras. 49 - 55; and, *Arp*, para. 41).

[112] The basis of this narrow exception is that in some cases the evidence of extrinsic misconduct "may be so highly relevant and cogent that its probative value in the search for truth outweighs any potential for misuse" (*Handy*, at para. 41). Its “[p]robative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation” (*Handy*, at para. 47). Specific principles and factors are helpful in determining its probative value, however, the overarching principle is that its value is derived from the objective “improbability of coincidence” (*R. v. Shearing*, 2002 SCC 58, at para. 40; *Arp*, paras. 43 & 45; and, *R. v. Trochym*, 2007 SCC 6, para. 78).

[113] Courts have identified a methodology to help guide trial judges in their assessment of admissibility of this kind of evidence: (1) identify and define the issues in the case to which the evidence relates; (2) identify and assess the probative value of the evidence; (3) identify and assess the prejudicial effects of the evidence; and, (4) weigh the probative value against the prejudicial effects (*Handy*, para. 70; *R. v. J.W.*, 2022 ONCA 306, paras. 20 – 36).

(1) The Issue(s)

[114] In this case the Crown broadly identifies two categories of evidence and two different issues.

[115] For the vehicle thefts, this issue is identity. For the possession of stolen property counts, the issue is guilty knowledge.

(2) Identifying and Assessing the Probative Value

[116] The probative value of similar act evidence will vary depending on the issue it potentially relates to. However, the basis of the exception is that in some cases the evidence of other misconduct is sufficiently similar to the charged conduct that it “defies coincidence or other innocent explanation” (*Handy*, para. 47).

[117] In general, probative value will depend on the level of connectedness between the evidence and the issue and the similarity between the evidence (*J.W.*, para. 23).

[118] In *R. v. Tsigirlash*, 2019 ONCA 650, para. 29, the Court said that there must be a:

... logical "*nexus* established between the evidence of similar acts and the offence that the evidence is offered to prove": *MacCormack*, at para. 49. Where the logical nexus depends on the similarity of the similar acts to the act charged, the probative value of the evidence will increase with the degree of similarity, because the probability that the similarity is a result of coincidence will decrease. The court must be satisfied that the "objective improbability of coincidence" has been established: *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 48. This analysis cannot be done in the abstract, but only on the basis of specifically-identified similar acts.

[119] In *Handy*, the Court proposed factors that might be relevant in assessing the similarity of proposed similar act evidence (para. 82).

[120] However, it is clear that while these specific principles and factors are helpful in determining the probative value of evidence, the overarching principle is that its value is derived from the objective “improbability of coincidence” (*R. v. Shearing*, 2002 SCC 58, at para. 40; *Arp*, paras. 43 & 45; and, *R. v. Trochym*, 2007 SCC 6, para. 78).

[121] Further, it is recognized that the degree of similarity required to justify admission of similar act evidence and/or the relative importance of specific similarities or dissimilarities will vary depending on the purpose for which the evidence is tendered (*Handy*, para. 78; and, *R. v. Carpenter*, (1982)1 C.C.C. (3d) 149 (ONCA)).

[122] In *Shearing*, the Court said, at para. 60:

[t]he judge’s task is not to add up similarities and dissimilarities and then, like an accountant, derive a net balance. At microscopic levels of detail, dissimilarities can always be exaggerated and multiplied. This may result in distortion. At an excessively macroscopic level of generality, on the other hand, the drawing of similarities may be too facile. Where to draw the balance is a matter of judgment”.

[123] In *Handy*, the Court proposed seven connecting factors that might be relevant in assessing the similarity of proposed similar act evidence (para. 82):

1. proximity in time of the similar acts;
2. extent to which the other acts are similar in detail to the charged conduct;
3. number of occurrences of the similar acts;
4. circumstances surrounding or relating to the similar acts;
5. any distinctive feature(s) unifying the incidents;
6. intervening events; and
7. any other factor which would tend to support or rebut the underlying unity of the similar acts.

[124] The Court noted that not all factors would be useful in every case and cogency of individual factors would depend on the issues in the case.

(3) Prejudice

[125] The potential for prejudice is significantly reduced, but not eliminated, in a cross-count similar fact application in a judge-alone trial (*R. B(RT)*, 2009 ONCA 177], at para 27; and *R. v. J.H.* 2018 ONCA 245, paras. 23 – 24).

(4) Balancing

[126] I will assess and balance the prejudice and probative value of the specific evidence when it arises.

Specific Allegations

Counts 4 and 14 – Theft and Possession of Ford Mustang from Greenwood Auto

[127] The ‘Greenwood Mustang’ was a 2018 Ford Mustang GT, 5.0L, 8 cylinder, black exterior with VIN ...0403 (Ex. 13). It was purchased by Greenwood Auto, a dealership, on February 12, 2019, from Adesa Auction (testimony of Wayne Fowler, Ex.13 & 14). The ‘cutsheet’ from Adesa showed that the vehicle had two keys, however, the vehicle was delivered with only one (testimony of Wayne Fowler, Ex. 13). The Bill of Sale for the vehicle shows Greenwood paid \$36, 355 plus HST for it (Ex. 14). The dealership received the vehicle, but it wasn’t on the premises on February 21, 2019, when they went to look for it. It was found on May 7, 2019, on the property of Kevin Green at 367 Gatehouse Run (Ex.4, photos 58, 159, 160, 161, and 163; testimony of John MacKinnon).

[128] In Mr. Fredericks’ statement (Ex. 91 & 92), Mr. Fredericks provides the following information that is potentially relevant to this vehicle:

- admitted being involved in a theft of a Mustang from “Greenfield”, which he said was in “the Valley” (p. 27);
- “Nick” and “Seth” had taken him there (p. 27);
- he was given a key, dropped off, jumped in it and left (pp. 27 & 29);
- he thought the location was possibly a dealership (p.33);

- he could not recall the colour of the Mustang, but thought it was maybe black or gray (p. 33); and,
- he recalled that he dropped it off on the side of the road somewhere “up by Kingswood” and “they” took it to a house (p. 34).

[129] Mr. Fredericks described the location as “Greenfield”, not “Greenwood”. The only mention of ‘Greenwood’ came from D/Cst. Joseph when he returned to the subject, asking “...this Mustang, down in Greenwood, do you remember anything about it?” (Ex. 91 & 92, p. 33). Mr. Fredericks then provided further information. I accept that the location described by Mr. Fredericks was Greenwood, not Greenfield. He said it was in “the Valley”. I can take judicial notice of the fact that the Annapolis Valley in Nova Scotia is often referred to as ‘the Valley’ and that Greenwood is in the Annapolis Valley. There is also a ‘Greenfield’ in Nova Scotia, but it is not in the Annapolis Valley. D/Cst. Joseph’s ‘correction’ in the follow-up question was leading but not about any of the details that Mr. Fredericks provided after the question. As such, it had no negative impact on that testimony. My review of the messages exchanged between Mr. Fredericks and Mr. Barker, which I will address in a moment, supports the conclusion that Mr. Fredericks meant Greenwood.

[130] In his statement, Mr. Fredericks did not provide a last name for ‘Nick’. However, I am satisfied he was speaking about Nicholas Barker. When arrested, Mr. Fredericks had a cellular telephone with him. While he was with D/Cst. Joseph, someone identified in his phone contacts as ‘Nickloas’ called him repeatedly (Call Logs for Mr. Fredericks’ phone, Ex. 77, 6-1). In his statement, Mr. Fredericks confirmed that this was the ‘Nick’ he was referring to in the interview (Ex. 92, pp. 13 – 14). The phone number associated with that name is Mr. Barker’s phone number.

[131] The Crown submits Mr. Fredericks’ statement is corroborated by messages and images on Mr. Fredericks’ phone, messages on Mr. Johnson’s phone and objective evidence.

[132] The extraction from Mr. Fredericks’ phone includes instant messages between him and Mr. Barker on February 15, 2019 (Ex. 77, 6-1):

Date/Time	Barker	Fredericks
Feb. 15	Yo	

12:11 a.m.	Journey?	
12:19 a.m.		Yeah
12:19 a.m.	Bout hour and a half Away	
12:19 a.m.		Yeah I'm down just gotta drop groceries off
12:19 a.m.	Ok I gotta go pick up a key. I'll be a while anyway	
12:21 a.m.		Nice one let me know when good to go
1:36 a.m.		It's gunna be to late probly
1:37 a.m.		If parts will still be there tmr can start early
1:38 a.m.	I'm just gettin back now. We can go right now. Upt to u	
1:40 a.m.		Will it be good tmr
1:41 a.m.		I just gotta be in eastern passage for 930 in the morn
1:43 a.m.	I don't kno	
1:44 a.m.	It's greenwood How far is that? 3	We'd get there by 4
1:45 a.m.		It past Middleton
1:46 a.m.		It's hour an a half
1:47 a.m.	130 – 300 Yes	Should I dress warm
1:48 a.m.	Should be pretty easy. But it's up to u. if u gotta get up early n shit I have key. Hop in n go	
4:39 p.m.		Can you get out early
4:45 p.m.	Gonna try for like 8 - 9	
9:42 p.m.		What up

9:42 p.m.	Just gotta check on something then I can turn that engine light out for u	
9:43 p.m.	Bout 30-60 mins?	Sounds good I'm just eatin supper so that's good
11:02 p.m.	Yo	
11:03 p.m.		Just gotta shit then I'll head out
11:10 p.m.	Ok meet me in Sackville	Coo
11:37 p.m.		On way where abouts
11:43 p.m.	Behind old ponderosa	Bedford
11:51 p.m.	Yes. Building behind Doolys	
11:53 p.m.	U close	

[133] Also found on Mr. Fredericks' device were photographs created on February 16, 2019, at 2:03 a.m., 2:05 a.m. and 2:58 a.m. (Ex. 77, 6-1, Image #1, #2, and #5). These photographs are of the dash and/or instrument cluster of a vehicle. Images #1 and #2 appear to be taken by the driver of a vehicle, showing the steering wheel and part of the instrument panel. Mr. MacDougal could not say whether these photographs were taken by this device but testified that they were taken by the same type of device (an iPhone 8). He testified that the images created at 2:03 a.m. and 2:05 a.m. (#1 & #2) were either sent or received by this device, within a second of their creation, as an attachment to an SMS (simple messaging system) message. Image #5 is a closeup of an instrument cluster, created at 2:58 a.m.. There is no evidence that this image was sent or received. Photographs #1 and #5 show the speedometer of the vehicle registering 107 kph and 114 kph, respectively, so appear to have been taken while driving.

[134] Mr. Fowler testified that the dash, instrument cluster and panel depicted in these photos are of a Ford Mustang that was "identically equipped" to the one

taken from his lot (Ex. 16, 17, 18 and 77, 6-1, #1, #2 & #5). One of the photographs shows a paper floor mat which Mr. Fowler testified was the same kind as used in his dealership (Ex. 17). The mileage for the Mustang owned by Greenwood Auto, at the time of purchase, was 25,900 km (Ex. 13). Mr. Fowler testified that the vehicle would have been driven from Adesa to his location after purchase so the mileage of his vehicle when it was taken would have been higher. The odometer in the photographs of the Mustang on Mr. Frederick's device shows 26,157.2 km (Ex. 18, Ex. 77, 6-1).

[135] On February 16, 2019, the following messages were exchanged between Mr. Fredericks and Mr. Barker (Ex. 77, 6-1):

Time	Barker's phone	Fredericks' phone
2:06 a.m.		Hit 200 there
2:09 a.m.	Faaaaaack crazy	
3:08 p.m.	Just gonna grab minvan	Coo

[136] Mr. Johnson pleaded guilty to being a party to the theft of this vehicle. In his testimony, he denied being involved. However, I accept that his guilty plea corroborates Mr. Fredericks' statement that Mr. Johnson was involved.

[137] Messages on Mr. Johnson's phone (Ex. 77, 6-3) show communication between him and Mr. Barker (identified as "Nick" in the contacts) on February 14, 2019. In the following messages I have adjusted the timestamp to local time by subtracting four hours:

Date/Time	Barker	Johnson
Feb. 14, 7:23 p.m.	Those things came	
7:34 p.m.		Nice!
8: 25 p.m.		What's the plan
8:27 p.m.	Prob be an hour	
8:28 p.m.		Ok cool should I get dropped off or wait for you
8:28 p.m.	Just get dropped at 1030	
8:29 p.m.		Ok cool
10:34 p.m.		Here

[138] The Crown submits that these messages confirm that Mr. Johnson and Mr. Barker met the night of the theft. I don't agree. These messages confirm that they were together on the evening of February 14th. However, the messages and images from Mr. Fredericks' phone suggest that he met Mr. Barker around midnight on the 15th and that the theft occurred in the early morning hours of the 16th.

[139] The only potentially relevant messages between Mr. Johnson and Mr. Barker overnight on February 15/16, 2019, adjusted for UTC-4, are as follows (Ex. 77, 6-3):

Date/Time	Barker	Johnson
Feb. 15, 12:47 p.m.	U ready?	Ya
6:29 p.m.	Nice. We will get the plug soon as Alesha get home	
6:30 p.m.		Ok cool Jole was just here now he's over banging Monica
9:00 p.m.		What about the wheels

[140] These messages are not inconsistent with Mr. Fredericks' statement but also do not provide clear corroboration of it.

[141] Aspects of Mr. Fredericks' statement are corroborated by other evidence. The cutsheet for the Mustang showed that it had two keys, however, when Mr. Fowler received it, it only had one (Ex. 13). This suggests a key went missing between when the vehicle was listed by Adesa and when delivered. This is consistent with Mr. Fredericks statement and the messages which establish that he was provided with a key for the Mustang. Further, the Greenwood Mustang was found on Kevin Green's property which corroborates Mr. Fredricks' statement that he left the Mustang on the side of the road in 'Kingswood' and understood 'they' took it to a house. Mr. Green's address is Hammonds Plains, but Cst. Jonathan Beer and D/Cst. Joseph described this location as in or near 'Kingswood'.

[142] This corroboration supports the reliability and credibility of Mr. Fredericks' statement concerning this vehicle. The real issue though is whether the assertion in his statement that Nick was involved and drove him to Greenwood is credible and

reliable and capable, in combination with other evidence, of proving beyond a reasonable doubt that Mr. Barker was a party to that theft.

[143] There is some evidence that is capable of corroborating this specific part of his statement. As I said, I am persuaded that Mr. Barker was the person communicating with Mr. Fredericks and Mr. Johnson. The messages suggest that Mr. Barker had the key, knew about the vehicle, asked Mr. Fredericks to be involved, met with Mr. Fredericks and, I infer, drove him to the location of the vehicle.

[144] Further potential corroboration that Mr. Barker was involved, can be found in the message sent at 3:08 a.m. on the 16th from Mr. Barker saying “gonna grab minivan”, suggesting that the user had access to a minivan. Surveillance over the four-month investigation consistently reported that Mr. Barker drove a minivan. However, there is also evidence that Mr. Johnson drove Mr. Barker’s van.

[145] Finally, Mr. Green’s evidence is capable of corroborating Mr. Fredericks’ statement that Nick was involved in the theft and providing evidence that Mr. Barker was in constructive or joint possession of the stolen Mustang.

[146] Mr. Green identified the Greenwood Mustang as one of the vehicles that he was paid to keep on his property (Ex. 4, p. 158). He testified that he believed that it was Nick Barker who paid him to keep that vehicle on his property but couldn’t recall how much. He recalled being paid a couple of hundred dollars in total but could not remember how many cars that was for. He testified that a lot of people asked to put cars on his property, he did not see that vehicle being dropped off, could not say when it arrived on his property and never saw Mr. Barker driving it or working on it.

[147] The Defence notes that Mr. Green’s evidence about the financial arrangement with Mr. Barker was vague and that his attribution of ownership or ‘control’ of any of the vehicles to Mr. Barker was not clearly based on personal knowledge. Further, the Defence submits that even assuming that Mr. Fredericks was involved in stealing the vehicle, he was familiar with Mr. Green’s services so could have taken the vehicle there without any input or involvement from Mr. Barker. The evidence does not support the submission that Mr. Fredericks was independently familiar with Mr. Green or his property. In his testimony, he denied knowing Mr. Green. In his statement, he mentioned dropping the vehicle in Kingswood but does not mention Mr. Green or say he’d been to the property and

Mr. Green did not testify that Mr. Fredericks was ever there. However, Mr. Johnson was familiar with Mr. Green's property. Mr. Green and Mr. Johnson both acknowledged that he'd been there. So, I accept that if I find that Mr. Fredericks and Mr. Johnson were involved in the theft together, they could have known they could take the vehicle to Mr. Green's property without any involvement of Mr. Barker.

[148] The Defence also notes that there is no objective evidence, such as fingerprints, that Mr. Barker ever had actual possession of the vehicle.

[149] The Crown does not seek to rely on 'recent possession' to support conviction for theft of this vehicle.

Count 5 – Theft, Dodge Caravan #1, Enterprise Rent-A-Car

[150] On May 7, 2019, a red Dodge Caravan was found at 387 Kearney Lake Road.

[151] The vehicle was examined by Mr. Mackinnon. He testified that he observed things consistent with it having been 're-vinned':

- the Public VIN stickers with VIN ...9052 showed signs of tampering and, in his opinion, were not original;
- that VIN coded for a 2012 Dodge Caravan; and,
- a hidden, secondary VIN ...9580 was found engraved in steel, it did not match the public VIN and coded for a 2018 Dodge Caravan.

[152] In his opinion, the true identity of the vehicle was a 2018 Dodge Caravan associated with VIN ... 9580.

[153] The vehicle bearing VIN ...9580 was stolen from Enterprise Rent-A-Car overnight on February 20-21, 2019. Brianne Hampson, the branch manager of the Enterprise location on Windmill Road, testified she received this van back from a customer at 4:30pm on February 20, 2019. Enterprise had both keys for the van. The next morning at 7:30 a.m. she returned to the branch and noticed that the van was gone, at which time she notified the risk manager and the police.

[154] Scot Leblanc, risk manager for Enterprise, testified that this vehicle had belonged to Enterprise, was missing from their inventory, and was valued at approximately \$25,000 to \$30,000 (Ex. 89, Vehicle Permit).

[155] The Crown argues the theft of this vehicle is connected to the theft alleged in Court 6 and that Mr. Barker's involvement in both is supported by messages found on Mr. Frederick's phone.

Count 6 – Theft of Dodge Caravan #2, Enterprise Rent-A-Car

[156] Overnight on February 20/21, 2019, a 2018 Dodge Grand Caravan (VIN ... 2783) was stolen from Enterprise on Kempt Road in Halifax. Dan Comeau, the branch manager for that location, testified that this van was stolen from that location between 6:30pm on February 20 and 6:30am on February 21, 2019.

[157] Mr. Leblanc testified that this vehicle had belonged to Enterprise, was missing from their inventory, and was valued at approximately \$25,000 to \$30,000. He also provided a Quebec Certification for the vehicle (Ex. 85).

[158] This vehicle was not found. However, a copy of the registration for the vehicle (VIN ... 2783) was found on a shelf in the shop at 327 Kearney Lake Road on May 7, 2019 (Ex. 12, p. 119; Ex. 85)

[159] Messages on Mr. Fredericks phone show communication between him and Mr. Barker between February 20 and 21, 2019 (Ex. 77, 6-1):

Date/Time	Barker	Fredericks
Feb. 20 11:43 a.m.	U want to fix it tonight? It's not the mustang it's a couple other things	
11:45 a.m.		Yeah I'm down 100 percent
7:38 p.m.		When you thinkin you wanna fix that
8:18 p.m.	Sooner the better	When cause I'm good to go
8:51 p.m.	Now	
8:54 p.m.		Shutting an on my wavy
9:14 p.m.	Meet me Burger King kept rd	

9:22 p.m.		Coo
9:38 p.m..		I'm here
9:43 p.m.	Come to the Tim Horton's across the street. Better parking	
9:43 p.m.	Park in front of his little garage door	
Feb. 21 12:40 a.m.		Coo

[160] The Crown submits that references in this and other messages to things like fixing vehicles and obtaining parts are coded language for vehicles and thefts. The Defence submits that when the Crown seeks to rely on coded language, it should have an expert. I don't disagree that interpretation of coded language can be supported by an expert (*R. v. Cater*, 2012 NSPC 18; *R. v. Shields*, 2014 NSPC 21; *R. v. Opang*, 2021 ONCA 352). However, I am not aware of any case that says it is necessary. In *Cater*, Judge Derrick (as she then was) had the benefit of an expert, however, she also noted that "logic, common sense and context assisted me in my interpretation of the intercepts and this is all that was necessary to understand some of the conversations." (para. 95).

[161] In my view, the absence of an expert to assist me in interpreting and drawing inferences does not preclude me from using "logic, common sense and context" to do the same. As with any piece of circumstantial evidence, I have to be careful to draw only rational or reasonable inferences and when considering that evidence in the context of all the evidence, have to consider all available rational and reasonable inferences.

[162] The Crown submits that the following messages on Mr. Johnson's phone, adjusted for UTC-4, between him and Mr. Barker show that Mr. Barker wanted and received two mini-van keys not long before the van thefts from Enterprise (Ex. 77, 6-3):

Time	Barker	Johnson
Feb. 19 3:10 p.m.	Any more keys come yet?	
3:10 p.m.		The track shipping said by 8pm today

3:11 p.m.	Nice	
3:12 p.m.	Order two more van ones if you can	
3:13 p.m.		The ones that came first
3:13 p.m.	yes	
3:14 p.m.		Ok can do
4:09 p.m.		I ordered them said they will be here Thursday
4:11 p.m.	Nice	
6:59 p.m.		The other two have arrived
6:59 p.m.	Yesss	
Feb. 20 6:42 p.m.		What time are you thinking of starting tonight
6:43 p.m.	Prob in an hour I'm hoping	
6:43 p.m.		Ok cool
7:33 p.m.		Should I meet you at the duplex for 8
8:13 p.m.		I got dropped at the duplex
8:18 p.m.	Kk 2 min	
8:18 p.m.		K cool

[163] The Crown submits that these references to needing keys are relevant because key re-programmers were found at 4 Meadowlark (Ex. 2, p. 71) and 110 Kearney Lake Road (Ex. 58; Ex. 11, pp. 112, 113, 139), 100 or more keys and key fobs were found at 110 Kearney Lake Road (Ex. 59; Ex. 11, pp. 141-142) and Mr. MacKinnon testified that key fobs can be reprogrammed using these devices. Further, Mr. Fraser testified that Mr. Barker knew how to reprogram keys, taught him how to do it and said that Hondas and Dodges were easy. Mr. Johnson testified that he was familiar with key re-programmers but denied ever having any discussions with Mr. Barker about them.

Counts 7, 8, and 9 - Theft of three Honda Civics, February 27 – March 2

[164] Three Honda Civics were stolen from the same location between February 27 and March 2. Some evidence is potentially relevant to all three theft counts. The Crown submits that communication between Mr. Johnson and Mr. Barker between February 26 and February 27, 2019, adjusted for UTC-4, found on Mr. Johnson's phone is relevant to these three counts (Ex. 77, 6-3):

Time	Barker	Johnson
Feb. 26 5:15 p.m.		Im home now if you want to work tonight just let me know
8:15 p.m.		Yo
9:13 p.m.	Yo. Yes might just need u for a couple mins to move aound sum cars if u around	
9:14 p.m.		I can but I don't have a ride
9:15 p.m.	I shall come	
9:15 p.m.		Ok cool
9:56 p.m.	Fuck it. u wanna just move it tomorrow?	
9:57 p.m.		Ok can do
Feb. 27 7:27 p.m.		You want to work tonight
7:25 p.m.	Yes for a couple hours?	
7:25 p.m.		Ok cool when are you thinking
8:03 p.m.	30 min	
8:04 p.m.		Ok should I get dropped at the duplex
8:17 p.m.	Kk	
8:17 p.m.		On my way
8:35 p.m.		here
8:59 p.m.	Take plate of van	
9:00 p.m.		ok

[165] The Crown submits that the direction to Mr. Johnson to take the plate of the van is a reference to Mr. Barker's van and indicates they are planning something illegal. Further, the reference to "move some cars" suggests more than one car which is consistent with the three Honda Civics being taken during the same time period.

[166] After 9:00 p.m. on the 27th there is no communication between them until February 28th:

Date/Time	Barker	Johnson
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Feb. 28 4:35 p.m.		home now if you want to work tonight
7:32 p.m.		did you want to work tonight
8:43 p.m.		Yo
March 1 9:23 a.m.		How's it going do you think we will be working tonight
11:35 a.m.	Yes	
11:35 a.m.		Ok cool I'll let you know when I'm none here should be by 4

[167] In addition, an image of what appears to be a screen-shot of a social media posting was found on Mr. Barker's phone (Ex. 77, A-3, image #1):

7:14 PM

I think this should be public awareness , 3 -2015 Honda civics were stolen sometime Thursday night , from underground parking at somerset place , 1030 South Park St. Mine was one. But I'd like to Remain Anonymous.

[168] It was created on March 4, 2019 and sent or received by Mr. Barker as an attachment to an SMS message. The Crown submits it defies coincidence that Mr. Barker had this on his phone days after the event, if he wasn't connected to the event.

[169] Mr. Fraser testified that Mr. Barker was interested in Civics. Texts between Mr. Barker and Mr. Johnson also confirm that Mr. Barker was interested in auctions and Civics.

Counts 7 & 24 – Theft and Possession of Honda Civic, Mohammed Zahid

[170] Mohammed Zahid testified that his 2015 Blue Honda Civic (VIN ... 0708) was stolen from the parkade at 1030 South Park Street between February 28, 2019 at 3:30pm and 8:45am, the following day, March 1, 2019. The car had been parked in a covered parking lot in the basement of the building. Entrance to the parkade required a key fob.

[171] When it was stolen, he had both keys with him. It had a start button and the vehicle was in perfect condition when it was stolen.

[172] On May 7, 2019, a blue Honda Civic was found in the detached garage at 110 Kearney Lake Road. The passenger door panel was removed and there was a broken wiper (Ex. 11, pp. 63, 70). Mr. Zahid identified this vehicle as the one that had been stolen from him overnight on February 28th. Documents relating to Mr. Zahid's ownership of his Honda Civic (VIN ...0708) that were normally in the glove compartment were found on the floor of the garage in a recycling bag Ex. 41).

[173] Mr. MacKinnon examined the vehicle and confirmed it was a 2015 Honda Civic with VIN ... 0708. There was only minor damage, a flat tire and a broken wiper, no VINs had been tampered with and there was no disagreement between public and hidden VINs.

[174] A photograph of the VIN sticker from this vehicle was found on Mr. Barker's phone in the DCIM folder (Ex. 77, A-3, image 8; Ex. 11, p. 69). Mr. MacDougall testified this image was either taken by this phone or another Apple product that was associated to this person's account. It was created on April 1, 2019.

[175] Mr. Zahid paid approximately \$27, 578 for the vehicle (Ex. 41).

Count 8 – Theft of 2015 Honda Civic, Roxanne MacDougall

[176] Roxanne MacDougall testified that her 2015 Honda Civic was stolen from the parkade at 1030 South Park Street between February 28th, 2019 and March 1, 2019. The vehicle was locked when she left it and she retained both key fobs for the car, which was a push-button start.

[177] The vehicle was worth approximately \$16,000.

Count 9 – Theft of a Honda Civic, Heather Ludlow

[178] Ms. Ludlow’s evidence was provided through Affidavit (Ex. 105). She declared that her 2015 Silver Honda Civic was stolen from the parkade at 1030 South Park Street between February 23rd, 2019 at 9:00 p.m. and March 2, 2019 at 9:30 a.m. She leased-to-own the vehicle for a total purchase price of \$26,727.80 and she had personal items in the vehicle.

[179] This vehicle was not recovered.

Counts 10 & 33 – Theft of Enterprise Cube Van & Possession of LED Lights, Property of Sobeys Inc.

[180] Robert McIsaac, a regional manager for a lighting installation company, testified that his company was installing commercial-grade lights into a Sobeys store and rented a cube van from Enterprise to transport the supplies, including the lights (Ex. 82).

[181] Mr. McIsaac last saw the van with the lights at his company’s premises at 60 Thornhill Drive in Dartmouth on March 1, 2019, and he became aware it was missing on March 3, 2019. The company still had the keys for the van.

[182] When the van was taken it had lights in it. They were 347-volt with a 6 foot cord, packaged three in a box, along with cables and hooks to install. Each light was worth approximately \$250. Mr. McIsaac testified that these lights cannot be used in residential applications as most homes have 120-volt not 347.

[183] Mr. Leblanc, from Enterprise, confirmed that they owned this vehicle (VIN ... 1128), it was no longer in their fleet and was valued at approximately \$5,000 (Ex. 86).

[184] Messages found on Mr. Fredericks’ phone show communication between him and Mr. Barker on March 1, 2019:

Date/Time	Barker	Fredericks
March 1 9:32 p.m.	Yo	
9:38 p.m.	Yo	
9:38 p.m.	Easy	

9:44 a.m.	10 mins lol	
10:37 p.m.		Sup My bad just looked at my phone Still good to go call me
10:40 p.m.	Yes we can meet in the burn lol	
10:43 p.m.		Alright leavin my house in a cpl mins
10:44 p.m.	Coo	
11:22 p.m.	How long? I'm here	
11:25 p.m.		Less than 10
11:30 p.m.	At mcDonalds	
11:31 p.m.		Aight
11:54 p.m.	??	
11:54 p.m.		At lights You at
11:59 p.m.	That side street across from happy harry's	

[185] Messages on Mr. Johnson's phone also show communication between him and Mr. Barker on March 1, 2019 (Ex. 77, 6-3 – adjusted for UTC-4):

Time	Barker Phone	Johnson Phone
March 1 9:23 a.m.		How's it going do you think we will be working tonight
11:35 a.m.	Yes	
11:35 a.m.		Ok cool I'll let you know when I'm none here should be by 4
5:48 p.m.		Home now so just let me know when you want to start
7:33 p.m.		What time are you thinking of starting
8:09 p.m.	8:30?	
8:09 p.m.		Ok cool

10:50 p.m.	Comin now	
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[186] On May 7, 2019, boxes of lights were found at 110 Kearney Lake Road (Ex. 11, pp. 25 & 28; Ex. 43, pp. 1 – 6) and 387 Kearney Lake Road (Ex. 43, pp. 7, 8 & 9). Mr. McIsaac recognized most of these lights, cables and hanging fixtures as having been in the rental van. One light fixture found at 110 Kearney Lake Road was different and was in a different shaped box. Mr. McIsaac did not recognize that fixture.

[187] Count 33 particularizes the property stolen and possessed as “LED lights”. During submissions, the Crown acknowledged that no evidence had been called that the lights referred to in Count 33 were “LED” and sought an amendment to remove that descriptor from that count or, in the alternative, for a finding that it was surplusage that did not need to be proven. I am satisfied that, despite this issue being raised during submissions, it is appropriate to amend the count to remove the descriptor “LED” (*Criminal Code*, s. 601(2); *R. v. Clark* (1974), 19 C.C.C. (2d) 445 (ABCA)). There is no apparent prejudice to Mr. Barker who did not call evidence relating to this count and who’s submissions at trial did not rely on this defect (*R. v. Campbell and Kotler*, [1986] 2 S.C.R. 376).

[188] Mr. Johnson testified that he was working at 110 Kearney Lake Road and would have moved the lights around as they were in his way. He said the first time he saw them they were in a work van, not Mr. Barker’s van. He said the van would have been in the driveway of the duplex and he needed to use the van so carried the lights into the house. He didn’t ask anyone for permission to do that and did not speak with Mr. Barker about the lights.

[189] Messages on Mr. Johnson’s phone from March 18, 2019, shows communication between him and Mr. Barker about lights (Ex. 77, 6-3 – times adjusted):

Time	Barker	Johnson
March 18 8:10 p.m.	kk. I’ll prob make it before u. but if I don’t. then start taking those lights out of the van into the back bedroom	

8:11 p.m.	Try to keep them in packs of three	
8:11 p.m.		ok

Counts 11, 15 and 20 – Theft, VIN Removal and Possession, Carson Exports Mustang

[190] The ‘Carson Exports’ Mustang was a 2018 Ford Mustang GT, 5.0L, 8-cylinder, silver exterior, with VIN ...0339 (Ex. 5, p. 1). Carson Exports is an automotive retailer and exporter on Windmill Road in Dartmouth. Paul Dyer, General Sales Manager for Carson Exports, testified that they purchased the vehicle on February 12, 2019, from the Adesa Auction (Ex. 5).

[191] The ‘cutsheet’ from Adesa showed that the vehicle had two keys which Mr. Dyer said was desirable (Ex. 5, p. 3). When purchased, its odometer showed 23,556 km (Ex. 5). It was delivered with only one key, which Mr. Dyer said was not unusual. However, after the car was taken, he contacted Adesa and they didn’t have the other key.

[192] Both Mr. Fredericks and Mr. Johnson have pleaded guilty to being parties to the theft of this vehicle. However, in this trial, Mr. Johnson denied responsibility and Mr. Fredericks could not recall. Mr. Fredericks did not discuss this theft in his statement to police.

[193] Mr. Dyer testified that after the vehicle was delivered, it was parked in their showroom for a while. Then it was taken out for a test drive, and he parked it outside. That was the last time it was seen. He came in on a Saturday morning and was told it wasn’t parked where it was supposed to be. He looked for it and realized it was missing. He watched surveillance video from the night before, saw the theft, called the police, and gave them the video when he provided his statement. He testified that the Mustang had been parked in that location for roughly 12 hours before it was taken. He could not recall the exact date it was taken, but thought it was March 13th or 14th and said it was the same date that he reported it to police.

[194] The surveillance video shows someone walking into the lot, then lights in the vehicle come on, indicating the doors are being unlocked, and the car is driven away (Ex. 10). Approximately 30 seconds pass from the time the person enters the

lot to when the vehicle is driven away. When the vehicle is driven away it turns right, which Mr. Dyer testified is toward Bedford.

[195] There is a discrepancy between the date and time stamped on the video and Mr. Dyer's recollection of when the vehicle was stolen. He recalled it was taken around 12:50 a.m. and, after refreshing his memory from his statement to police, he testified that it was stolen overnight on March 15/16, 2019. However, the date and time stamp on the video shows the theft occurring on Sunday, March 17, 2019, at 1:21 a.m. (Ex. 10). Before being shown the video, Mr. Dyer said that the date on the video was accurate, but the time could be off by an hour because of daylight savings time. In re-direct examination, he was asked about the discrepancy in date and time. He said he assumed there must be some issue with calibration relating to date and time. He said he knew that he gave the video to the police officer before the Sunday which is stamped on the video.

[196] The discrepancy in date and time is relevant because of surveillance evidence that puts Mr. Barker and Mr. Johnson at a gas station in the area at 12:20 a.m. on March 16th and communication between Mr. Fredericks and Mr. Barker overnight on the 15th/16th.

[197] I am satisfied that the theft occurred overnight on March 15th/16th, 2019.

[198] In reaching that conclusion, I was assisted by Mr. Dyer's repeated references to 'Saturday' in his evidence. He said the vehicle was missing when he came in on "Saturday" morning, that he reported it to police that "Saturday" and confirmed that he watched the surveillance video on the "Saturday". He also testified that the 17th, the date on the video, was a Sunday. I can take judicial notice of the fact that, in 2019, March 16th was a Saturday. This corroborates his recollection that he watched the video on the 16th which showed the theft from the night before, the night of the 15th/16th, then called police and turned over the video.

[199] Further, D/Cst. Joseph testified that he was conducting surveillance at 12:20 a.m. on March 16, 2019, and later learned that a vehicle was stolen from Carson Exports that evening. His testimony that the theft occurred on the same evening as the surveillance corroborates Mr. Dyer's evidence that the theft occurred on the night of the 15th/16th, not the next night.

[200] The evidence of what time the theft occurred is more difficult to reconcile. I don't have evidence of how Mr. Dyer arrived at his estimate that the theft occurred

at 12:50 a.m. and find that I cannot rely on it. He didn't see the theft, so could only have relied on what he saw in the video which he watched before calling police. The time on the video that was entered into evidence said 1:21 a.m. so, either Mr. Dyer misremembered the time stamp or the time was corrupted after he watched it. Mr. Dyer also said the time in the video could be off by an hour because of daylight savings. The clocks go forward in the Spring, so if the clock on the video was not adjusted for that, in the absence of another error, the time of the theft would be 2:20 a.m.

[201] So, the theft might have occurred at 12:50 a.m., 1:21 a.m., 2:21 a.m. or, given the potential unreliability of the date/time stamp on the video, some other time overnight on the 15th to 16th. The result is that, based on this evidence, I can't conclude more than that the theft occurred during darkness, overnight on March 15th/16th, 2019.

[202] D/Cst. Joseph saw Mr. Barker and Mr. Johnson at the Ultramar gas station on Windmill Road at 12:20 a.m. That station is less than a kilometer away from Carson Exports on the same street. D/Cst. Joseph testified that Mr. Barker was gassing up the black Dodge Caravan, and Mr. Johnson went in to pay.

[203] The Crown submits that there are messages on Mr. Fredericks' phone between him and Mr. Barker showing that in mid-February, Mr. Barker was interested in a Mustang in a showroom (Ex. 77, 6-1):

Date/Time	Barker	Fredericks
Feb. 17 8:22 p.m.	Just checking see if I have that alternator if your around in a little bit?	Yeah, just finished up trimming Can't be late tho
8:34 p.m.	Nah it be soon. I'll go check now. Same deal but a lot closer.	
10:14 p.m.	Fackin on showroom floor!	
10:14 p.m.		Shit that fuckin sucks

10:15 p.m.	Depends on how brave u are lol. Just need a big rock lol	
10:16 p.m.		I was just about to say that smash an go
10:19 p.m.		Check on it tmr see if it changed if not I'll do it
10:32 p.m.	Lol cool	

[204] Then, between February 19, 2019 and February 20, 2019:

Date/Time	Barker	Fredericks
Feb. 19 10:42 p.m.	U want to fix muffler	
10:44 p.m.		1230 I'll be back around
10:45 p.m.	Shit kk	
Feb. 20 1:08 a.m.	Yo	
9:51 a.m.		I was out cold
11:43 a.m.	U want to fix it tonight? Its not the mustang it's a couple other things	
11:45 a.m.		Yeah I'm down 100 percent
7:38 p.m.		When you thinkin you wanna fix that

[205] Then, between March 12, 2019 and March 16, 2019, there are further messages between Mr. Fredericks and Mr. Barker:

Time	Barker	Fredericks
March 12 10:29 p.m.	What up. Just finishing up a job. Prob fix exhaust tomorrow	
March 13		Im good to go

11:19 a.m.		Gotta ask ya about something to
March 14 9:08 p.m.		yo
9:25 p.m.	What is up	
9:27 p.m.		Feel like fixing anything tonight
11:37 p.m.	Haven't found any welding wire yet. I'll keep looking tho	
March 15 3:14 a.m.	Oh man. The other beast is outside now!	
3:14 a.m.	We shall fix that too this weekend	
9:42 a.m.		It has to be tonight cause I'm goin away Saturday morning
7:48 p.m.		Yoo
9:42 p.m.		Gotta get out tonight
10:24 p.m.	Yes we fix it soon	
10:27 p.m.		When you figuring I'm leavin at 630 for pei
10:32 p.m.	Ok ok. I'll call u very soon	
11:31 p.m.	Yo	
11:32 p.m.		Sup
11:33 p.m.	Meet on the ol side?	
11:42 p.m.	Yo	Bedford
11:45 p.m.	Bside Dart	
11:55 p.m.		ohh

March 16		
12:12 a.m.	?	
12:13 a.m.		Almost to bridge
12:27 a.m.	Yo	
1:02 a.m.	Pig at sunny side	
1:03 a.m.	When you get off the buy high	
1:11 a.m.		I'm in Karney
1:12 a.m.	Shit. I just got here. Gimme a min	
2:01 a.m.		I'm here
2:06 a.m.	kk. just lookin for my house keys faaack	
2:15 a.m.	Min	

[206] On March 16, 2019, at 12:56 a.m., a photo of a Silver Mustang was created and then sent or received as an attachment to an SMS text by Mr. Fredericks (Ex. 77, 6-1, #4). Mr. Dyer was shown a printed photograph which, based on my own comparison, is a copy of the digital photo #4 (Ex.6). He testified that the vehicle in the picture is an identical vehicle to the one taken from Carson Motors. At 12:57 a.m., a photo of a Ford key fob was created and then sent or received as an attachment to an SMS text by Mr. Fredericks (Ex. 77, 6-1, #3). Mr. Dyer said a Ford Mustang would have this kind of key fob.

[207] A photograph of the VIN for this vehicle, stamped into metal, was found in a folder on Mr. Barker's phone (Ex. 77, A-3, #2; Ex. 5, p.1; testimony of Mr. Dyer and Mr. MacKinnon). Mr. Dyer testified that this photograph shows the VIN on the floor of the vehicle under where a seat would go. Mr. MacKinnon confirmed that the image looks like the floor pan of a vehicle. He also testified that the digits are a secondary VIN, engraved in steel, and, in his opinion, the quality of the stamping is perfect and consistent with what would be done at the factory.

[208] I am satisfied that Mr. Barker took this photo. Mr. MacDougal testified that it was taken on March 21, 2019 and, because of where it was found in the device and the attached data, he believed it was taken by an Apple device using the same Apple account. Mr. MacDougal testified that Mr. Barker's phone is an iPhone 8 and the photograph was taken with an iPhone 7 (Ex. 77, A-3, #2). He explained that he believed this could happen if the image was taken using an iPhone 7,

images were backed up to iCloud, then the user upgraded to a new phone and the images would be pulled from the cloud to the new device. He was not certain that this would result in the photograph being stored in the specific folder where it was found. He agreed that there were other ways the photograph could get into that folder on that device, however, he was certain it had been taken by an Apple device.

[209] The Defence submits this vehicle was never recovered. The Crown submits that parts of it were recovered but it had been transformed. Determining whether Mr. Barker is guilty of Count 15, the possession charge, will require me to consider whether the Crown has proven that the parts that were found in Mr. Barker's possession were stolen and if so, whether possession of those parts proves the charge as particularized which is as possession of a "a Ford Mustang ... the property of Carson Exports".

[210] A teal green Mustang with a public VIN of "...9697", affixed to the door pillar and the dash, was seized at 327 Kearney Lake Road on May 7, 2019 (testimony of Mr. MacKinnon; Ex. 96, p. 5; Ex. 12, pp. 16, 18,19 & 20). The Crown submits this is substantially the Carson Motors Mustang.

[211] The public VIN belonged to a salvaged 2016 Ford Mustang GT, orange in colour, purchased by Back to New Auto Sales on October 20, 2017 (Ex. 55 & 27). The Bill of Sale for that vehicle was found at Mr. Barker's residence, 4 Meadowlark Crescent. Mr. Fraser testified that Back to New traded an orange Mustang that had been burnt and some other cars to Mr. Barker for a white Ford truck. Mr. Fraser identified the truck as one that was seized from Fraser Automotive on May 7, 2019 and acknowledged that he pleaded guilty to possession of it, knowing it was stolen (Ex. 1, p. 145). He testified that he made the deal with Mr. Barker.

[212] Photos were found on Mr. Johnson's phone and identified by Mr. Johnson (Ex. 77, 6-3): a damaged orange Mustang, taken March 28, 2019 at Fraser Automotive (image #7; Ex. 44); the same vehicle being prepped for paint, taken April 25, 2019 at Mr. Barker's shop (image #9; Ex. 45); the same car being rebuilt, taken April 25, 2019 at Mr. Barker's shop (image #8; Ex. 47); and, an image of the interior of a vehicle that looks to be the same, taken May 2, 2019 (image #10; Ex. 46).

[213] Mr. Johnson testified that he helped Mr. Barker restore this vehicle. He helped take the engine out and it was left at Fraser's. Then, later, he helped Mr. Barker paint it at Mr. Barker's shop on Kearney Lake Road.

[214] Mr. Fraser identified the damaged Mustang in the photos on Mr. Johnson's phone as the one that was part of the trade for the white Ford truck. He acknowledged that the front end of the vehicle had been burnt. He recalled that there was a motor in the vehicle but thought that the motor would not have been good. He testified that the Bill of Sale found at Mr. Barker's residence was probably for this vehicle since it refers to an orange V8 vehicle.

[215] Photographs on Mr. Barker's phone taken on March 28, 30, April 5, 7, 8, 15, 18, 19, 28, 29 and May 2, 2019 show the orange Mustang in the process of being rebuilt (Ex. 77, A-3, images). These photographs show that the body started out as orange and was painted teal. I'm satisfied that the vehicle in these photographs is the one that was found at 327 Kearney Lake Road on May 7th.

[216] Mr. MacKinnon examined the teal Mustang, including using an OBD scanner. The VIN obtained using the scanner did not match the public VIN on the door pillar and the dash. It did match the VIN for the 2018 Mustang stolen from Carson Motors and the VIN in the photograph on Mr. Barker's phone (Ex. 77, A-3, #2). Mr. MacKinnon also found a serial number stamped on the engine (Ex. 96, tab 5, pp. 3, 4, 24, 25, 26). He testified that the engine number, which is the last eight digits of the VIN, agreed with the public VIN and door pillar label. However, in his opinion the engine VIN was not of good quality. He said the numbers were not lined up on the same level, were not spaced evenly and were not what he would expect from Ford. In his opinion, the old VIN number had been ground off. He described striations in the metal which in his experience are consistent with grinding (Ex. 96, tab 5, #3, 4, 24, 25 & 26). He compared the stamping of this serial number with other stamping that was visible in the photograph, which in his opinion was legitimate (Ex. 96, tab 5, p. 24). In cross-examination, he agreed that the only place he found the Carson Motors VIN was through the OBD reader. He did not see that number stamped onto the vehicle or the engine.

[217] He also testified that the public VIN on the vehicle is associated with a vehicle that has a manual transmission, whereas the vehicle he inspected had an automatic transmission. The Carson Motor Mustang had an automatic transmission (Ex. 5, p.1).

[218] Finally, he examined a number of parts on the vehicle and found that they had a manufacture date of 2018 (Ex. 96, tab 5, pp. 7, 8, 13 - 20, and 22). In cross-examination, he acknowledged that it would not be unusual to use newer parts if rebuilding a vehicle in 2019.

[219] On the body and frame of the vehicle, Mr. MacKinnon found what he believed was legitimate Ford labelling consistent with it belonging with VIN ...9697, the burnt 2016 Mustang. However, in his opinion, the engine and front end of the vehicle belonged with VIN ... 0339, the Carson Motors Mustang.

[220] Mr. MacKinnon acknowledged that, for this vehicle, he had changed parts of the opinion provided in his initial report after observing the inspection conducted by a mechanic retained by the Defence. He had originally concluded that the vehicle had previously been silver but later agreed it had been orange. He originally concluded that the public VINs on the dash and door were false, but agreed they were not when he was shown secondary VINs on the frame that matched. As a result, he revised his opinion and concluded that the body was a previously orange vehicle that had been salvaged and sold.

[221] For the charge of removing a VIN under Count 20, the Crown is relying on the removal of the number from the engine block.

[222] This requires me to consider whether this number is a VIN for the purpose of s. 353.1.

[223] Mr. MacKinnon described four sub-categories of numbers associated with a vehicle:

- Primary VIN – a 17 digit alpha numeric number which, since 1981, conforms with international standardization. It is unique to only one vehicle and is the way in which a vehicle can be identified. Each part of the number provides different information: digits 1 to 3 are a world manufacturer identifier; digits 4 to 8 are assigned by the manufacturer to describe the vehicle’s model, trim etc.; digit 9 is a “check digit”, chosen by an algorithm to make sure that number is reliable; digit 10 is the code for the year; digit 11 is the specific plant that the vehicle was manufactured in; and, the last 6 digits are the production sequence number for that specific plant in that specific year;

- Secondary VIN – found in publicly accessible areas and in an area that is not published or easily accessible. The public ones are usually on the dash and the drivers side door pillar. The private ones will be fully engraved/stamped/etched into the car. He said not all cars have the full 17 digits but many do. They typically have an asterisk at either end. The purpose of these secondary VINs is a way to possibly identify a vehicle when the primary VIN has been tampered with;
- Other numbers that are traceable – these include for example, an engine serial number. These vary in length depending on manufacturer. Some manufacturers use unique identifying numbers for parts. For example, Honda uses a 9-digit alpha numeric code on the engine that is a unique number to that car. Other manufacturers do that with other parts. Some manufacturers use serial numbers for parts that are not unique to a specific vehicle; and,
- Electronic – since 1996, an OBD scanner or reader can be connected to the vehicle and read what VIN is associated with the electronics that control that engine. This is a means of identifying that engine.

[224] Mr. Smith testified that the transmission and engine numbers are unique numbers to that vehicle. However, he was speaking about a Dodge and Mr. MacKinnon testified that whether or not a number associated with a part, such as an engine, is unique to the vehicle will depend on the manufacturer.

Counts 12 & 25 – Theft and Possession of a Honda Element, Mark Belanger

[225] The evidence establishes that Mr. Belanger’s Honda Element (VIN ...0204) was stolen from OK Tire while it was there for maintenance between April 25, 2019 and May 2, 2019 (evidence of Kristen Belanger; Ex. 64). OK Tire is located in a business park in Elmsdale, Nova Scotia, about 10 minutes north of the airport. It is visible from highway 102, but not on the highway (evidence of Ms. Belanger). The keys for the vehicle were left at the business and returned to the owner after the vehicle was taken (evidence of Ms. Belanger).

[226] Police were conducting surveillance on Mr. Barker between April 30th and May 1st and observed the following:

- April 30 - 10:40 p.m., Mr. Barker left 367 Gatehouse Run in the black Dodge Caravan, Plate G8T 848 (D/Cst. Joseph);
- May 1– early morning - the van went north on Highway 102, exited at Elmsdale and went through a Tim Horton’s drive through, re-entered highway 102 and went south (Cst. Dave Hill);
- van pulled over on the shoulder of Highway 102, near OK Tire, and person believed to be Seth Johnson got out and ran through the ditch toward the businesses behind the highway (D/Cst. Joseph);
- van then looped around, exiting at Enfield, going back onto Highway 102 northbound, exiting at Elmsdale and going back onto the 102 southbound (Csts. Dave Hill, Robbie Latreille, and Nick Joseph);
- 1:00 a.m. - the van again pulled over on Highway 102, near OK Tire, and someone got into the van (Cst. Latreille);
- Mr. Barker’s unoccupied van was in a lot at Tim Horton’s near the airport which is a 5 – 7 minute drive from the spot on the highway where the person believed to be Mr. Johnson got out of the van (D/Cst. Joseph);
- Around 2:25 a.m. – a Honda Element was seen driving in the Elmsdale Business Park near OK Tire. Cst. Latreille testified that he saw the Element sometime between 1:00 a.m. and 2:30, however, he and D/Cst. Joseph both testified that when he saw it, he radioed D/Cst. Joseph who told him to ignore it. D/Cst. Joseph testified that he received the radio transmission a few minutes before 2:30 a.m., which is when he saw Mr. Frederick’s truck arrive at the Tim Horton’s parking lot (D/Cst. Joseph; Cst. Anderson and Cst. Latreille);
- 2:30 a.m. – Mr. Barker got out of Mr. Frederick’s truck at the Tim Horton’s parking lot and got into his van (D/Cst. Joseph);
- 3:00 a.m. - Mr. Barker’s van and Mr. Frederick’s truck leaving 367 Gatehouse Run (D/Cst. Hill); and,
- 3:07 a.m. - Mr. Barker gets out of his van at his autobody shop at 327 Kearney Lake Rd. (D/Cst. Joseph)

[227] D/Cst. Joseph testified that he told the others to ignore the Element because he did not believe there was a market for stolen Elements so did not think it was related to their investigation.

[228] At the time there was a GPS tracking device on Mr. Barker's van. There is a margin of error for its location data, but it generally corroborates the surveillance evidence and shows that Mr. Barker's van was on highway 102 that night in the vicinity of the airport, Enfield and Elmsdale.

[229] In his statement to police, Mr. Fredericks discussed the theft of the Element. He was told that police had been conducting surveillance on "Wednesday" night, meaning the Wednesday before the date of the interview, and that he'd been seen with Nick and asked if they had gotten into anything. He said:

- A Honda Element;
- Three of them had been involved and agreed it was the same group (meaning Seth, Nick and Mr. Fredericks);
- Nick got into it; and,
- They dropped it off up by Kingswood.

[230] Aspects of Mr. Fredericks statement are corroborated by the surveillance.

[231] Mr. Fredericks' statement and surveillance evidence is also corroborated by messages on Mr. Fredericks' phone between him and Mr. Barker, overnight on April 30 to May 1, 2019 (Ex. 77, 6-1):

Time	Barker	Fredericks
10:39 p.m.	What u doin in 30 mins or so?	
10:39 p.m.		Depends on what's up Find the part ya need
10:47 p.m.	I think so	
10:48 p.m.		Alright let me know I'm just getting home an shit
May 1		

12:32 a.m.	Yo ho	
12:36 a.m.	Gay	
12:36 a.m..		Sup
12:36 a.m.	U wanna fix that muffler	
12:37 a.m.	Homo	
12:40 a.m.		Quick fix
12:42 a.m.	Yes but out airport Me here now	
12:44 a.m.		Will it be there tmr
12:44 a.m.	No	
12:46 a.m.	No go?	
12:50 a.m.		Where am I meeting ya
12:52 a.m.	Oohhh daddy	
12:52 a.m.	Airports	
12:53 a.m.		Alright I'm leavin in 4 mins just shittin
12:53 a.m.	Cooo	
1:29 a.m.		You at I'm at first exit
5:11 a.m.	I left my gear in the bag in your truck	
5:12 a.m.	Careful not to step on it. It's in the pass side	
1:08 p.m.		Yeah its all good I packed it up lastnight

[232] Call logs between Mr. Fredericks and Mr. Barker show brief calls between them on May 1st at 1:33 a.m. 2:21 a.m. and 2:46 a.m. (Ex. 77, 6-1).

[233] Mr. Fredericks' statement that the Honda Element was dropped off in Kingswood is corroborated by the fact that, on May 7, 2019, the Honda Element (VIN ...0204) was found at 367 Gatehouse Run, Mr. Green's property in or near Kingswood (Ex. 4, p. 151-157).

[234] It was parked next to the Greenwood Mustang (Ex. 4, p. 152).

[235] Mr. Green did not recall this vehicle. He acknowledged it was on his property.

[236] Mr. Johnson pleaded guilty to stealing the Honda Element but denied any involvement when he testified. He acknowledged he was driving a Honda Element around that time and was interested in buying one.

Count 13 – Theft of Honda Civic on May 4, 2019, Everette Bergstrum

[237] Everette Bergstrum's 2011 black Honda Civic SE, plate FSS 546 was stolen overnight on May 3, 2019, after approximately 10:30 p.m., from in front of the building at 5651 Ogilvie Street (Ogilvie Towers). The vehicle was locked and he had both sets of keys.

[238] He was notified early the next morning that his vehicle had been stolen and recovered by the police. The steering column had been removed with wires everywhere and there was some damage to the arm rest and centre console.

[239] That night, police were conducting surveillance of Mr. Barker and others and observed the following (times are approximate):

- 11:07 p.m. - Mr. Barker's van pulled into the parking lot of Ogilvie Towers (Cst. Anderson);
- 11:20 p.m. - Mr. Barker driving his van on Brenton Street with a passenger (Cst. Cst. Robbie Latreille);
- 11:50 p.m. - Mr. Barker driving his van with a passenger on South Park Street (Cst. Latreille saw);
- 1:09 a.m. - Mr. Barker's van and Mr. Frederick's truck in Burnside on McCurdy Ave off of Wright Avenue (D/Cst. Joseph);
- 1:32 a.m. - Mr. Frederick's truck at the Tim Horton's in Dartmouth (Cst. Dave Hill);
- 1:51 a.m. - Mr. Barker's unoccupied van on McCurdy Ave. (D/Cst. Joseph);
- 1:59 a.m. - Mr. Fredericks' truck on Bedford Hwy, headed toward downtown Halifax, lost sight of it on Kempt Road (Cst. Dave Hill);

- 2:29 a.m. - Mr. Fredericks' truck in south-end of Halifax, stopped almost behind Cst. Hill on Young Avenue. Cst. Hill on floor in backseat. Truck pulled past, did a U-turn near Oglivie, came back and parked on Young Ave. train bridge (Cst. Hill);
- 2:56 a.m. - a blue or black Honda exited the rear parking lot of Ogilvie Towers, then pulled in behind Mr. Fredericks' truck. The driver of the Honda, a short stocky male, got out of the driver's seat and entered the passenger seat of Mr. Fredericks' truck. The passenger of the Honda, a tall skinny male, got out of the Honda and entered the driver's door of the Honda (Cst. Dave Hill); and,
- the Honda left the area and the truck followed (Cst. Dave Hill).

[240] Cst. Nick Joseph followed the Honda Civic, and arrested the driver, Mr. Fredericks. Cst. Dave Hill later saw an Acura key on the floor of the Honda.

[241] Seth Johnson was arrested later driving Mr. Fredericks' vehicle (Cst. Latrelle). No one was with him at the time.

[242] Mr. Fredericks provided his statement following this arrest. In it, he spoke about the theft of this Honda:

- Nick called him around 10:30 p.m. saying he had to drive something;
- he met Nick and Seth in Burnside;
- they went to an area near Point Pleasant Park in Halifax in his vehicle;
- one of the guys was dropped off to do his "thing";
- Mr. Fredericks was given a key and dropped off at the car, and then drove the car;
- He got into the vehicle on Young Street; and,
- The key he had in possession when he was arrested was an Acura key – he believed the "same key is programmed".

[243] Call logs from Mr. Fredericks phone corroborate an incoming call from Mr. Barker at 10:35 p.m. on May 3rd. Then, an exchange of calls between 2:44 a.m.

and 2:59 a.m. on May 4th, and then a series of missed calls from Seth Johnson and Mr. Barker between 3:11 a.m. and 3:20 a.m. (Ex. 77, 6-1). At the time of the missed calls, Mr. Fredericks was already in police custody.

[244] Aspects of Mr. Fredericks statement are corroborated by the surveillance. Including that he was driving his truck, he was in Burnside at the same time as Mr. Barker's van. Both Mr. Fredericks' statement and surveillance evidence about the sequence of events that led to him being in the stolen Honda are confusing, however, there is corroboration for his statement that someone else was driving the Honda when it was stolen, that person got out and Mr. Fredericks got in and was then driving the Honda when it was stopped.

[245] In his statement, Mr. Fredericks said he had an Acura key and one was found on the floor of the vehicle when he was stopped.

[246] Mr. Bergstrom testified the steering column was damaged when he got his vehicle back. Mr. Fredericks did not speak about that in his statement.

[247] Mr. Fredericks' statement and surveillance evidence is also corroborated by messages on Mr. Fredericks' phone between him and Mr. Barker overnight on May 3rd to 4th, 2019 (Ex. 77, 6-1):

Date/Time	Barker Phone	Fredericks Phone
May 3 10:05 p.m.	Yo	Sup
10:30 p.m.	You available soon	
10:30 p.m.		Now til 12 Or after 1230
10:32 p.m.	Ok. So u not available from 12-1230?	
10:32 p.m.		Yeah but you'd have to pick me up at wk Call me if ya can
11:08 p.m.		Good to go
11:11 p.m.	Maybe. I just passed u lol	

11:11 p.m.		Oh lol I'm smokin one
11:20 p.m.	Just tryin to find a bit better	
11:21 p.m.		Alright coo
May 4 12:05 a.m.		I'm runnin our home way
12:13 a.m.	Ok. Ust come back as son as u can and we can fix that	
12:13 a.m.		Alright won't be long
12:41 a.m.		Leavin house in 5 where you want me to go
12:45 a.m.	That spot By mcdonald's	
12:46 a.m.		Okay okay
1:10 a.m.		You there I'm 2 mi away
1:15 a.m.	Yes	
1:16 a.m.		I'm here

[248] D/Cst. Joseph testified that he had seen Mr. Barker and Mr. Fredericks go to the place on McCurdy before, so the Crown submits that the reference to "that spot" is a reference to the place on McCurdy where D/Cst. Joseph saw Mr. Barker's van and Mr. Fredericks' truck that evening.

Counts 16 and 18 – Possession and VIN Removal - The Barker Dodge Caravan

[249] Throughout the investigation, Mr. Barker used a black Dodge Caravan, license plate GAT 848, as his personal vehicle (evidence of various surveillance officers, Catlin Fredericks, Seth Johnson and Alesha Barker; Ex. 71, p.1 – image from Ms. Barker's phone). Ms. Barker testified that she drove the van for a time and then Mr. Barker drove it. Ownership, insurance and licensing documentation for the vehicle were found at the Barker residence (Ex. 20, 21, 22 & 23).

[250] On May 7, 2019, a van was found on the Fraser Automotive lot, without a plate (Ex. 73, pp. 1 & 5). The plate registered to Alesha Barker and previously

associated to the Barkers' van was found on the kitchen counter at Mr. Barker's residence (Ex. 2, p. 33; Ex. 22). Ms. Barker testified she didn't put it there.

[251] Mr. Smith examined the van that had been found at Fraser's. He testified that there were various anomalies consistent with it having been stolen and 're-vinned' (public VINs replaced with those of a legal vehicle):

- The public VIN on the dash and the Federal Manufacturers Label on the door pillar (...8238) came back to a 2010 Dodge Caravan, which was also what the registration documents said, however the secondary VIN (...3287) did not match the public VIN and came back to a 2018 Dodge Caravan (Ex. 73, pp. 2, 3, 4 & 8; Ex. 22);
- When he ran the secondary VIN on a phone app that IBC investigators have access to, it came back as stolen. He recalled, after refreshing his memory from his report, that it was reported stolen on February 8, 2018 but did not say what the loss date was;
- He was able to easily remove the Federal Manufacturers label, whereas they are designed so that they can't be peeled off without destroying them (Ex. 74);
- He was also able to easily remove the Tire Load Label which includes the last eight digits of the VIN and, again, it should not come off easily; and,
- He saw evidence that the windshield had been removed which, in his experience, often has to be done to remove or attach the dash VIN, however, in cross-examination he acknowledged that it could have been replaced.

[252] He was asked how you know which VIN is the 'birth certificate' of a vehicle with two different VINs that may have parts from different vehicles. He said once you find the secondary hidden VINs, other identifiers, such as transmission and engine numbers, can be checked on databases. He testified that the transmission and engine numbers are unique numbers to that vehicle. Based on the secondary VIN and the corresponding engine and transmission numbers, he concluded the true identity of the vehicle was that associated with the secondary VIN (...3287), the 2018 Dodge Caravan that was listed as stolen.

[253] In cross-examination, he said that he did not know the colour of the vehicle that had been reported stolen, could not say whether there had been repairs done to

the vehicle, whether the hood and windshield were original, and agreed that he had not located the emissions label where it would normally be.

[254] Mr. Leblanc, from Enterprise, testified a 2018 Dodge Grand Caravan, VIN ...3287, valued at \$25,000 - \$30,000, was stolen from their fleet of vehicles (Ex. 88). Dan Comeau, a branch manager for Enterprise on Kempt Rd, Halifax, testified that he recalled this Dodge Grand Caravan being stolen from the lot he was managing in July or August of 2018. Mr. Comeau testified he could not recall calling police in relation to that vehicle. His recollection was that police were contacted in February of 2019, when another van was stolen.

[255] Mr. Smith's evidence that this vehicle was reported stolen in February of 2018 is obviously not consistent with this evidence that it was stolen in July/Aught of 2018 and reported stolen in February of 2019.

[256] A picture of a black van in a garage was found on Alesha Barker's device (Ex. 71, Ex. 77, A-1, image 1). Mr. MacKinnon testified that this message was received by this phone as an attachment to an SMS message on July 16, 2018. He said it was taken on an iPhone 5s and Ms. Barker's device was a 6S. Ms. Barker testified that it looked like "a van that I own" and that there was a "good possibility that is the van that I own, but I can't be sure". She also testified that Mr. Barker got all her vehicles for her.

[257] Documents related to the legal VIN (... 8328, a 2010 Dodge Caravan) purport to show the following history (Ex. 68):

- July 16, 2018 – Back to New purchased the vehicle through Impact Auto Auction, as a Salvage, out of Province, vehicle (pp. 2 – 3);
- July 16, 2018 – Keith Purcell, mechanic with Back to New, certified it as mechanically fit (p. 4);
- July 17, 2018 – Back to New applied to RMV for a permit and a certificate of registration was issued in the name of Back to New as a "Rebuilt Vehicle" (p. 6);
- July 17, 2018 - it was sold to Alesha Barker (p. 7);
- July 17, 2018 - Alicia Barker insured the vehicle (Ex. 68, p. 8 & Ex. 21, p.1);

- August 29, 2018 – sale of vehicle from Back to New to Ms. Barker registered at RMV (p. 1).

[258] Mr. Fraser was in custody when police executed the search warrant at Fraser Automotive and took the photographs in Ex. 1. He testified that he'd never seen the Dodge Caravan shown in those photos (eg. p. 55). He also testified that the signature of the 'buyer' on the Bill of Sale showing the sale from Impact Auto to Back to New and the handwriting and signature on the application for a vehicle permit were not his or his father's and no one else had permission to sign on behalf of the company (Ex. 68, p. 3). Specifically, he said he never gave Mr. Barker permission to use Back to New at the RMV.

[259] He recognized Mr. Purcell's name on the Certificate of Mechanical fitness and acknowledged he was the Fraser Automotive mechanic but testified that he had no knowledge of it being done. He said that a check for mechanical fitness would not require or involve comparing public VINs with private VINs.

Counts 17 & 19 –VIN Removal & Possession of a Stolen White Jeep Wrangler, Enterprise Rent-a-Car

[260] On May 7, 2019, a White Jeep was found at 4 Meadowlark (public VIN:...7872). This vehicle was generally driven by Ms. Barker. The Crown submits that this vehicle purports to be a 2007 Jeep Wrangler Sahara, but is actually a stolen black 2018 Jeep Wrangler Rubicon, a higher end vehicle. The Defence submits that an alternate rational inference from the evidence is that the vehicle is originally a lawfully purchased green 2007 Jeep Wrangler that has been repainted and rebuilt using upgraded parts and Rubicon accessories.

[261] Mr. MacKinnon examined he vehicle and found discrepancies:

- The Public VIN (...7872) coded for a 2007 Jeep Wrangler Sahara whereas the VIN he obtained through the OBD reader showed VIN ... 5747, which coded for a 2018 Jeep Wrangler Rubicon;
- The public VIN on the dash was affixed with glue, rather than being riveted in place which is what would be done at factory (Ex. 97, pp. 1 – 3);
- The Jeep had 'Rubicon' seats which would be consistent with a 2018 Rubicon;

- The vehicle had 2017 engine coils (Ex. 96, tab 4, p. 3);
- A secondary VIN matched the public VIN, but the steel was pitted around the number and it appeared to be welded into the frame rather than being all one piece of steel which is how it would be done at factory (Ex. 96, tab 4, p.4);
- The security label under the hood which includes a partial VIN did not appear have been applied at factory – it was not flat or level (Ex. 96, tab 4, p. 16); and,
- The vehicle showed signs that it had originally been black and was repainted white.

[262] He opined that the proper secondary VIN had been cut out and replaced with the VIN that matched the public VIN and the public VIN did not represent the true identity of the vehicle.

[263] In cross-examination, Mr. MacKinnon acknowledged that Jeeps' general construction was relatively stable over years, such that swapping parts between a Sahara and a Rubicon would not be too difficult.

[264] D/Cst. Joseph testified that he was inside the vehicle and thought it had a 'new car smell'. I appreciate that courts do rely on witnesses' description of odour (eg. in the impaired driving context) and I accept that D/Cst. Joseph smelled something that he associated with a new car. Mr. MacKinnon also testified that the vehicle looked new. I put little to no weight on these subjective opinions. Regular cleaning of the interior, putting in new seats or using scented products (some specifically formulated to smell like a 'new car') could create a scent that would be interpreted as a 'new car smell'. Regular maintenance, regular cleaning, a new paint job, new lights, tires etc, could all create the appearance of a newer vehicle.

[265] On May 7, 2019, a green jeep was found at 387 Kearney Lake Road with no public VIN tags. There is no evidence of what year this jeep is or what the hidden VIN is.

[266] Mr. LeBlanc, from Enterprise, testified that, a black 2018 Jeep Rubicon bearing VIN ...5747 was owned by Enterprise, but reported stolen on June 28, 2018 (Ex. 87).

[267] The history of the vehicle associated with the public VIN (...7872) at RMV is documented in Ex. 67:

- July, 2018 - a document showing a sale from Jeremie LeBlanc to “Back to New Auto Sales” (p. 3).
- March 11, 2019 - a Certificate of Registration issued in the name of Back to New Auto Sales (p. 5).
- March 13, 2019 – sale from Back to New to Alesha Barker (p. 6).
- March 14, 2019 – RMV records vehicle permitted to Alesha Barker (p. 1).

[268] On March 19, 2019, the Certificate of Registration for this vehicle was issued in Ms. Barker’s name (Ex. 55).

[269] Mr. Fraser testified that he had no idea about this Jeep and didn’t recognize the handwriting or signatures on the documents. He testified that the signature on the sales document looked like his but was not. He testified that Back to New Auto Sales only bought their vehicles from the auction, not from private people.

[270] Purchase documents relating to that same VIN were found at 4 Meadowlark (Ex. 25). They show that an army green 2007 Jeep Wrangler with that VIN was purchased on July 30, 2018 from Jeremie Leblanc (Ex. 2, p. 33; Ex. 25).

[271] Mr. Fraser testified he did not recognize those documents (Ex. 25). The mileage noted on the sales document at RMV is 50,000, whereas the Bill of Sale seized from Ms. Barker’s home shows the odometer at 298,000 (Ex. 67, p.3; Ex. 25).

[272] Ms. Barker testified that she received the vehicle from her husband to drive it in the winter and had no idea how much it cost. However, the sales documents associated with the public VIN, showing the purchase price, were seized from behind a blender on the counter in the kitchen of the residence she occupied (evidence of Cst. Monia Thibault; Ex. 2, p. 33; Ex. 25)

[273] Images, which appear to be of the same vehicle were found in the DCIM folder on Ms. Barker’s phone (Ex. 77, A-1, #1 & 2). These photos were created on November 7, 2018 and Ms. Barker insured the vehicle on November 9, 2018 (Ex.

20). Both, before the purported purchase from Back to New in March of 2019 (Ex. 67).

[274] The seized Jeep was examined by a Defence Mechanic, in the presence of Mr. MacKinnon. Photos of the underside of the vehicle show pieces of metal that are green (Ex. 127).

[275] In cross-examination, Mr. MacKinnon was shown photographs of a Jeep Sahara and a Jeep Rubicon (Ex. 98 & 99). He acknowledged that there are structural differences, including the exterior appearance of the front grills, the location of the front indicator lights, the tires, size and location of the brake lights, the style of the bumper etc. He was also shown photographs of the vehicle seized from 4 Meadowlark and asked to compare the exterior of that vehicle with that of the Rubicon and the Sarah (Ex. 2, pp. 78-82; Ex. 98 & 99). He acknowledged that, for all intents and purposes, the exterior of the vehicle looks like a Sahara.

Counts 21 & 26 – VIN Removal and Possession, Ford RV, Pine Acres RV

[276] A Ford RV was found at 367 Gatehouse Run on May 7, 2019 (Ex. 4, pp. 8, 72, 75 & 84). The vehicle permit, found inside the vehicle, and the Certificate of Registration, found at 4 Meadowlark, show that the vehicle was registered in Ms. Barker's name and was issued on March 19, 2019 (Ex. 4, p. 85; Ex. 61; Ex. 55).

[277] The vehicle was examined by Mr. MacKinnon who noted various issues:

- The public VIN on the dash and B Pillar was ...8112 which codes for a 2008, 6.0 litre diesel;
- The last reported mileage for the public VIN vehicle was approximately 118,000, however, the odometer on the vehicle showed 23,916 kilometers (Ex. 96, tab 6, p. 11);
- The public VIN on the dash was glued in place, not consistent with what a manufacturer would do (Ex. 96, tab 6, pp. 6, 7, 12 – 14);
- The B Pillar label was easily peeled off, inconsistent with labels affixed by manufacturers (Ex. 60, evidence of Cst. Lee Cooke, Mr. MacKinnon and Mr. Smith);
- A secondary VIN derivative was found on the engine of *GDC38991*;

- The 17 digit OBD VIN obtained by a scan matched that partial secondary VIN and was inconsistent with the public VINs;
- The secondary VIN and the OBD VIN coded for a 2016 Ford, 6.8 litre gasoline engine;
- The Emission Control Sticker, on the underside of the hood, identified the vehicle as a gasoline vehicle, consistent with the secondary and OBD VIN, and appeared to be scratched out where the year of the vehicle would be displayed (Mr. MacKinnon and Mr. Smith testified that tampering with these labels can be used to conceal the true identity of a vehicle);
- The underside of the hood appeared to have '2016' engraved in it, which would be inconsistent with the year for the public VIN but consistent with the year for the secondary and OBD VIN (Ex. 4, p. 82); and,
- A valve cover showed a manufacturing date of 2015, consistent with the secondary and OBD VIN, and inconsistent with the Public VIN (Ex. 96, Tab 6, p. 10).

[278] Mr. MacKinnon formed the opinion that the true identity of the vehicle was a 2016 Ford with a VIN ...8991, and not a 2008. He believed that the public dash VIN was a real VIN plate taken from a 2008 Ford but fraudulently put onto that vehicle and, that the vehicle had been re-vinned to conceal its true identity.

[279] Matthew Brown, owner and general manager of Pine Acres RV from Moncton, NB testified that his business took a Ford RV in a trade in August of 2018, bearing the VIN ...8991 (Ex. 83). The paperwork identified the vehicle as a 2017 Forest River Sunseeker with 23,000 km, with a value of \$75,000 and indicates it was acquired on August 17, 2018. On October 3, 2018, he noticed the vehicle was gone from their lot.

[280] Mr. Brown testified that photos taken of the RV from Gatehouse Run were of the same make and model as the vehicle stolen from them. However, his vehicle had been white with vinyl graphics and the words 'sunseeker' in multiple places. He testified that the RV in the photographs had been repainted and that it was not a factory paint job (Ex. 84).

[281] Mr. Green testified that Mr. Barker asked him if he could bring the RV to his property to do some work on it because he only had a small garage. He thought it

was brought there before the winter but couldn't recall specifically. He recalled that the vehicle was white before it was taped off and painted. He acknowledged working with Seth (Johnson) on this RV and identified photographs of the vehicle being taped off for painting (Ex. 50, 51 & 52). He testified that Nick worked on the vehicle.

[282] Mr. Johnson testified that he helped paint the RV with Kevin Green and Nick at Mr. Green's residence. He testified it was at Nick's house for a bit.

[283] Images of the vehicle, taped for painting and with people working on it were found on Mr. Johnson's phone (Ex. 77, 6-3). Messages between Mr. Johnson and Mr. Barker in November and December of 2018, refer to painting this vehicle (Ex. 77, 6-3). Of note is one message, on October 22, 2018, where Mr. Barker asked Mr. Johnson, "do u wanna help kevin dig out a truck box. And peel the rest of the rv stickers" (ex. 77, 6-3).

[284] Mr. Barker had pictures of the RV and images of various painting schemes for an RV in the DCIM folder of his phone (Ex. 77, A-3).

[285] Ms. Barker testified that she received this RV from her husband as a present. It was in her driveway at Christmas. She testified that she registered and insured the vehicle. On May 3, 2019, Cst. Hill saw the RV in the driveway at 4 Meadowlark.

Count 27 – Possession of Ford Mustang Shelby, the property of Michael Sack

[286] On May 7, 2019, a Ford Mustang was seized from Unit A52, Cole Harbour storage (Ex. 3, pp. 10-11, 38 & 43). Rental documentation for the unit had Mr. Barker's phone number, but a different name (Ex. 52).

[287] However, found in the glove compartment were documents in the name of Nick and Alesha Barker (MacIntyre) of 4 Meadowlark Cres., including a motor vehicle inspection certificate, insurance card and Vehicle permit for a 2013 Ford Mustang with a VIN ... 2522 (evidence of Cst. Ashraf Meshal; Ex. 29). Insurance, a vehicle permit and certification of registration for a vehicle with VIN ... 2522 were found at 4 Meadowlark (Exhibits 20, 21 & 55).

[288] Images of a similar looking vehicle with the same plate were found on Ms. Barker's phone (Ex. 77, A-1, SMS Images; Ex. 3, p. 44).

[289] Don Morash, manager of Cole Harbour Self Storage, identified Mr. Barker in court as the person who rented the storage unit.

[290] Mr. MacKinnon examined the vehicle and noted things of interest:

- The public VIN and one secondary VIN on the frame behind the dash were all consistent, VIN ...2522;
- This VIN coded for a 2013 Ford Mustang convertible, 3.7L with 6 cylinders;
- He could not find a VIN stamp on the engine;
- A number, D5257695, on the Tremac transmission appeared to be non-factory and “amateur”;
- The VIN from the OBD reader was ...8390; and,
- This VIN did not match the public VIN and coded for a 2014 Ford Mustang convertible 5.8L, v8, described as a Mustang Cobra Shelby, a higher-end, more expensive and much more powerful Mustang that that associated with the public VIN (Ex. 96, tab 7, p. 32).

[291] In cross-examination of Ms. Parker, from Impact Auto, the Defence tendered a ‘webcapture’ for an “irreparable” vehicle 2013 Ford Mustang Shelby GT with VIN ... 257695, listed on Impact Auto Auction site (Ex. 28). The VIN seems to match the partial VIN found on the transmission for the seized vehicle. The image was used in cross-examination as a sample of the kind of information that is available on the website, but no submission was made as to whether this relates to this vehicle.

[292] Mike Sack testified that he purchased the vehicle associated with VIN ... 8390 as a new vehicle and had it in his business in Burnside, “All Credit Auto.” He noticed that the vehicle had been stolen on November 1, 2016. He testified that he made no upgrades or modifications to the car or the computer.

[293] The RMV history of Mr. Sack’s vehicle VIN (...8390) is contained in the documents in Ex. 65.

[294] The RMV history of the vehicle with the public VIN (...2522) is contained in the documents in Ex. 65:

- August 2, 2017 - Back to New purchased a salvaged vehicle, meaning a vehicle that is damaged in some way, from Ontario and registered it (evidence of Ms. Bunker-Dyk);
- August 3, 2017 - It was sold to Ms. Barker;
- August 3, 2017 – Certificate of Mechanical Fitness signed by Keith Purcell; and,
- August 4, 2017 – Certificate of Registration issued to Ms. Barker.

[295] Mr. Fraser testified that he did not recall anything about this vehicle and did not recognize the handwriting or signature on the documents. He said the signature was not his or his father's and no one else had authority to sign at RMV. He testified that he had no discussions with Mr. Barker about this vehicle and was “blindsided” by the number of vehicles that he was not aware of and by the “non-auction” vehicles.

[296] Mr. MacKinnon found that the transmission mounts in the car were changed to accommodate a larger Shelby engine and that the vehicle had many specialty parts associated with a Mustang Shelby: Recaro racing seats, an SVT instrument panel and a steering wheel with cobra insignia. He testified that these would not normally be associated with the vehicle with the public VIN.

[297] D/Cst. Joseph testified that, as a lay person, a Mustang Shelby is “a car you take notice of”. He said he noticed parts on the seized Mustang that he associated with a Shelby: Bilstein shocks, Brembo brakes, Recaro seats, and an SVT instrument panel.

[298] Jeff Whitman, a licenced mechanic, testified that a Shelby GT500 and a V6 Mustang were the same generation of vehicle but agreed that a Shelby is at least double the cost of the base Mustang associated with the public VIN, had double the horsepower, had bigger brakes, a bigger motor, bigger shocks, etc.

Counts 28 – 32 – Possession of Appliances, property of Leon's Furniture

[299] On May 7, 2019, police seized various new, boxed, appliances from 110 Kearney Lake Road and Unit A52 at Cole Harbour Self Storage (Ex. 3, p. 13; Ex. 11, p. 40). The charges only relate to those seized from 110 Kearney Lake Road.

These included: a Dishwasher (Count 28), two Microwaves (Counts 29 & 30), a Dryer (Count 31), and a Washer (Count 32).

[300] Evan Fauteaux, general manager at Leon's Furniture in Dartmouth, testified that on November 10, 2018, a transport trailer, filled with goods that were being shipped to Leon's by VA transport, was stolen from the Leon's loading bay in Dartmouth. On November 12, 2018, he was notified by the police that the trailer was found. Some items remained with the trailer. He concluded that 70 items were missing, the majority of which were Samsung appliances, and provided a list containing the model number, a description and quantity of the missing items (Ex. 30). He testified that each of the stolen appliances had both a model number and a unique serial number (Ex. 32). The labels on the boxes containing the dishwasher, two microwaves, washer and dryer seized from 110 Kearney Lake Road all bear serial numbers that were included in the list of stolen and unrecovered items from the tractor trailer theft in November of 2018 (Ex. 11, pp. 182, 184, 179, 186, 187; Ex. 32, pp. 1, 7; Ex. 97, tab 4).

[301] In its submissions, the Crown referred to evidence suggesting that the appliances found at the storage locker were stolen (Ex. 3, pp. 22, 24, 26 & 28; Ex. 32, pp. 1, 27 & 29). That evidence is only admissible with respect to Counts 28 – 32 if it is treated as general circumstantial evidence or, if discreditable conduct, meets the test for admission of similar act evidence.

[302] Messages on Mr. Johnson's phone, adjusted for UTC-4 (Ex. 77, 6-3) between him and Mr. Barker on November 14, 2018, include the following:

Time	Barker Phone	Johnson Phone
9:47 p.m.		Samsung
9:48 p.m.		Samsung

[303] The dishwasher and two microwaves found at 110 Kearney Lake Road were Samsung brand and this message was sent four nights after the theft. Mr. Johnson testified he had no idea how the appliances got to 110 Kearney Lake Road. Ms. Barker testified that she was not aware of the existence of these items at 110 Kearney Lake Road.

Analysis and Conclusions

Counts 4 and 14 – Theft and Possession of Ford Mustang from Greenwood Auto

[304] I am persuaded beyond a reasonable doubt that Mr. Barker was a party to the theft of the Greenwood Mustang. I have approached Mr. Fredericks' statement with a great deal of scepticism. However, with respect to the theft of this vehicle it is corroborated in specific material particulars. The Greenwood Mustang was stolen between February 15 and 20, 2019. The messages found on Mr. Fredericks' phone corroborate his statement to police that he was provided with a key and driven to Greenwood where he stole a Ford Mustang from a dealership. They also correspond with the time period during which the Greenwood Mustang was stolen. His statement that he was provided with a key for the vehicle is consistent with the fact that the Greenwood Mustang was missing a key.

[305] The messages also corroborate Mr. Fredericks' statement that Nick was involved. They show that it was Mr. Barker who suggested the trip to Greenwood, Mr. Barker who had a key, and that the two eventually met around midnight on February 16, 2019. The images on Mr. Fredericks' device then show that the person taking the pictures was driving a Ford Mustang at highway speeds at 2:05 a.m. and 2:58 a.m. During this time, Mr. Fredericks was communicating with Mr. Barker. The Mustang in the photographs had the same instrument cluster, the same floor mats and approximately the same mileage as the one stolen from Greenwood Auto.

[306] His statement that he dropped the vehicle in Kingswood and it was moved to someone's property is corroborated by the fact that the vehicle was found on Mr. Green's property in Kingswood.

[307] As such, I accept the evidence in his statement about how this theft occurred. The evidence in his statement, together with the messages between him and Mr. Barker around the time of the theft, the photographs found on his phone and the location from which the vehicle was seized, leaves me with no reasonable doubt that Mr. Barker had a key for the vehicle, asked Mr. Fredericks to steal it, drove with Mr. Fredericks and Mr. Johnson to Greenwood where Mr. Fredricks stole the vehicle and drove it to Kingswood where Mr. Barker and/or Mr. Johnson parked it on Mr. Green's property where it was later found. There is simply no other rational inference from all the evidence. I appreciate that individually, no one piece of that evidence would be sufficient for proof beyond a reasonable doubt. For example, alone, I would not be persuaded that the photographs on Mr. Fredericks' phone were of that particular vehicle. However, taken together with the other evidence, the combined circumstances leave no room for coincidence. Therefore, I find Mr. Barker guilty of Count 4.

[308] Some of this evidence is also relevant to Count 14 - the charge of 'possession' of that vehicle. I accept the evidence in Mr. Fredericks' statement that he dropped the vehicle in the Kingswood area and "they", which, from context, can only mean Mr. Barker and Mr. Johnson, took it to a residence. This evidence persuades me beyond a reasonable doubt that Mr. Barker had at least temporary physical possession of the vehicle, knowing it was stolen, on February 16, 2019.

[309] However, I am also persuaded beyond a reasonable doubt that Mr. Barker had continuing constructive possession of the vehicle between that date and May 7, 2019. The evidence establishes that the vehicle found on Mr. Green's property was the stolen Greenwood Mustang. Mr. Green's evidence would not, without more, establish that this vehicle was put there by Mr. Barker, but it is not inconsistent with that. I appreciate that the vehicle was found about three months after the theft and could, in theory, have been sold, traded or moved in the interim such that Mr. Barker no longer had control over it. However, given that the vehicle was found on Mr. Green's property which is in the Kingswood area and that Mr. Barker had a relationship with Mr. Green and paid him to keep vehicles there, the only rational inference is that he and Mr. Johnson put the vehicle on Mr. Green's property on February 16th and it remained there.

[310] Therefore, I am satisfied beyond a reasonable doubt that Mr. Barker had possession of the vehicle, which was valued at more than \$5,000, knowing it was stolen so find him guilty of Count 14.

Counts 5 & 6 – Theft of Dodge Caravans #1 and #2, Enterprise

[311] The two vans that are the subject of these counts were stolen from Enterprise overnight on February 20/21, 2019 – one from Kempt Rd. in Halifax and one from Windmill Road in Dartmouth.

[312] I am addressing them together because there is relevant circumstantial evidence that applies to both: communication between Mr. Fredericks and Mr. Barker and between Mr. Johnson and Mr. Barker on February 20th and 21st; evidence that both vans were stolen overnight on February 20/21; and, evidence about Mr. Barker's possession of key re-programmers and knowledge of how to use them.

[313] The communication between Mr. Fredericks and Mr. Barker includes what the Crown submits is the use of coded/guarded language by Mr. Barker when discussing stealing vehicles. Specifically, “U want to fix it tonight? It’s not the mustang it’s a couple other things”.

[314] After reviewing all communication between Mr. Fredericks and Mr. Barker, I am satisfied that references to car parts and fixing vehicles are often coded language for vehicles. I reach that conclusion using logic and common sense. Many of the messages simply do not make sense if read literally and/or become clear from context that they cannot possibly actually relate to fixing vehicles or acquiring car parts. First, many of these conversations happen at night. I accept that Mr. Barker and the others may very well have been doing car repairs at night, so that, on its own, is not suspicious or indicative of a code. However, the context is important. When read in context, many of these messages could not possibly be about actually fixing cars or looking for car parts.

[315] The messages between Mr. Barker and Mr. Fredericks show that on February 20, 2019, Mr. Barker was looking to ‘fix’ a couple of things that night, instructed Mr. Fredericks to meet him on Kempt Road and, at 9:38 p.m., Mr. Fredericks reported he was there.

[316] The messages between Mr. Johnson and Mr. Barker show that prior to this, Mr. Barker was looking for keys and on February 20th, Mr. Johnson had received two keys. The messages also show that Mr. Johnson and Mr. Barker planned to meet that evening, that Mr. Johnson was dropped off at “the duplex” at 8:13 p.m. where Mr. Barker was to meet him. The property owned by Mr. Barker at 110/112 Kearney Lake Road is described and shown in photographs to be a duplex (evidence of police officers; Ex. 11).

[317] There is also evidence that relates solely to Count 5. I am satisfied, based on Mr. MacKinnon’s evidence, that the Red Caravan bearing public VIN ...9052 that was found at 387 Kearney Lake Road on May 7, 2019 is actually the 2018 Caravan (VIN ...9580) that was stolen from Enterprise on February 20/21 and is the subject of Count 5.

[318] Other evidence relates solely to Count 6. The vehicle that is the subject of Count 6 (VIN ... 2783) was never found. However, its Certificate of Registration was found at 327 Kearney Lake Road (Ex. 12, p. 119).

[319] So, there is evidence that two Dodge vans were stolen on the same night. Mr. Barker met Mr. Johnson that evening and then met Mr. Fredericks in the area of one of the thefts. Prior to that, Mr. Johnson acquired two keys for Mr. Barker. Mr. Barker had the knowledge and tools required to re-program keys and Dodge keys are easy to re-program. Approximately two and a half months after the thefts, the Certificate of Registration for one of the vans was found at Mr. Barker's rental property and the other van was found at property frequented by Mr. Barker.

[320] Given the passage of time, any inference that could be drawn from Mr. Barker's possession of the van would be weak, on its own, but gains strength when combined with the other evidence, including Mr. Barker's possession of the Certificate of Registration for the other van. Even without relying on the Crown's submission about coded language, I am persuaded beyond a reasonable doubt that the circumstantial evidence I just referred to does not permit any rational inference other than that Mr. Barker was involved in the thefts of the vans.

[321] As such, I find him guilty of Counts 5 and 6.

Counts 7 & 24 – Theft & Possession of the Zahid Honda Civic

[322] The Defence does not dispute that Mr. Zahid's vehicle was stolen and that it was in Mr. Barker's possession but argues that the evidence does not satisfy proof beyond a reasonable doubt that he knew it was stolen or that he was involved in the theft.

[323] To prove Mr. Barker was involved in the theft of this vehicle the Crown relies on the text messages between Mr. Johnson and Mr. Barker, the image on Mr. Barker's phone relating to the three thefts, the circumstances associated with his possession and the principle of recent possession.

[324] In my view, the messages found on Mr. Johnson's phone do not add much to the Crown's case because those that the Crown submits are relevant to these thefts were exchanged during the evening on February 27th and the thefts are alleged to have occurred overnight on February 28th. At their highest, the messages on the evening of the 27th suggest that Mr. Barker and Mr. Johnson were planning to steal more than one vehicle. In furtherance of that, they agreed to meet at the duplex and Mr. Barker instructed Mr. Johnson to remove the plate from the van and Mr. Johnson said yes. There is no further correspondence that night, suggesting they did get together that night – overnight on February 27th/28th.

[325] The Crown theory, supported by the social media posting found on Mr. Barker's phone, is that all three vehicles were stolen the same night - overnight on February 28th/March 1st. Mr. Zahid's and Ms. MacDougal's vehicle were both stolen that night and Ms. Ludlow's was stolen sometime between February 23rd, 2019 at 9:00 p.m. and March 2, 2019 at 9:30 a.m.

[326] The messages on Mr. Johnson's phone do not suggest he and Mr. Barker were working or were together that night. In fact, if the dates stamps are accurate, they suggest they did not meet that night. Mr. Johnson messaged Mr. Barker twice on the evening of February 28th, asking him if he wanted to work that night, but Mr. Barker did not reply. He then messaged Mr. Barker again at 9:23 a.m. on March 1st to ask if they would be working that night. Mr. Barker replied to that communication at 11:35 a.m. saying that they would be working that night. However, that was after the Hondas had been stolen.

[327] A few days after the thefts, Mr. Barker acquired what appears to be a screen shot of a social media posting relating to the thefts. The Crown submits that there would be no reason for him to have this image if he was not involved in stealing the vehicles, including Mr. Zahid's vehicle.

[328] The Crown also argues that application of the 'similar act' exception permits evidence from this theft and the thefts of the two other 2015 Hondas from the same place on the same night to be considered together. Even accepting that 'similar act' does apply such that I could conclude that the three vehicles were stolen by the same person, that does not assist me in concluding that person was Mr. Barker, unless I am persuaded beyond a reasonable doubt that he stole one of them. The case against Mr. Barker is strongest for the theft of Mr. Zahid's vehicle. If I am satisfied that he stole Mr. Zahid's vehicle 'similar act' might assist the Crown in proving that he stole the other two. However, given the lack of evidence connecting him to the other two, the circumstances of those thefts do not help prove that Mr. Barker stole Mr. Zahid's vehicle.

[329] I have also considered whether 'similar act' would permit me to consider the circumstances of the theft of the Greenwood Mustang or other vehicles in relation to this charge. I am not persuaded on a balance of probabilities that the circumstances of any of the other vehicle thefts, proven or alleged, are sufficiently similar to satisfy the 'similar act' exception with respect to this allegation. Some of those thefts are relatively proximate in time and involve some similarities in *modus operandi*. For example, when he stole the Greenwood Mustang, Mr. Barker

had a key and did not break the ignition which is similar to the theft of Mr. Zahid's vehicle. However, for the Greenwood Mustang, that key was probably one of the keys that were supposed to be with the vehicle whereas Mr. Zahid had both of his keys. The only other Honda Civic is Mr. Bergstrum's which was stolen about two months after Mr. Zahid's and, unlike Mr. Zahid's, involved damage to the steering column.

[330] Finally, the Crown relies on the principle of recent possession. The Defence has conceded that on May 7th, Mr. Barker was in possession of Mr. Zahid's Civic which was found in the garage at 110 Kearney Lake Road, property owned by Mr. Barker. That was just over two months after the theft. However, a photograph of the VIN sticker on the B-Pillar of this vehicle was on Mr. Barker's phone on April 1st and, according to Mr. MacDougal, was taken by Mr. Barker's phone or another apple product that was associated to Mr. Barker's account. The only reasonable inference is that Mr. Barker took the photo on that date. That proves he had access to the vehicle less than a month after the theft. That does not directly prove it was in his possession at that time but is evidence from which I could draw that inference.

[331] Counsel agree that when assessing recency for purpose of the principle of 'recent possession', there is no specific amount of time beyond which the possession will be too far removed from the theft to allow for the inference to be made. What will be considered "recent" will depend on the circumstances of the case. Regard must be had to the item's, "rarity, the readiness in which it can, and is likely to, pass from hand to hand, the ease of its identification and the likelihood of transferability" (*R. v. Saieva*, [1982] 1 SCR 897).

[332] The Crown and Defence provided many cases where courts have considered the recent possession principle in the context of motor vehicles or parts. I have reviewed them all but will mention only a few.

[333] Those where the Court declined to make the inference of guilty knowledge or theft from possession include the following:

- *R. v. Farnsworth*, 2017 ABCA 358 – a vehicle that was fraudulently obtained from a rental company by a third party was found in the possession of the accused 12 days after the theft – not appropriate to infer guilty knowledge;

- *R. v. Carroll*, 2015 ABPC 141 – a stolen vehicle was found in the possession of the accused three days after its theft. The driver, who was also an unlicensed driver, fled police, the vehicle was not damaged, there was no evidence that the accused did not have the keys to the ignition, the plate on the vehicle was registered to the proper owner, and there were no indicators that the vehicle was stolen (para. 42) – the Court declined to infer guilty knowledge;
- *R. v. Lehl*, 2021 ONSC 7158 – the accused was found in possession of a “a relatively common type of van” a little less than a month after its theft – the Court declined to infer guilty knowledge (para.74);
- *R. v. Normand*, 2013 NBPC 18 – the accused was found in possession of a stolen vehicle about two months after it was stolen – the Court declined to infer guilty knowledge (para.44); and,
- *R. v. Vella*, 2020 ONCJ 485 – the accused was found in possession of vehicle within a few hours of the theft – the Court found guilty knowledge but declined to infer the accused was guilty of the theft (para.65).

[334] Those where the Court did infer guilty knowledge or that the accused had committed the theft include the following:

- *R. v. Bakos*, 2008 ONCA 712 - the accused was found in possession of stolen motorcycle parts within four and a half months after the theft – that was considered recent enough to allow the principle of recent possession to be left with the jury;
- *R. v. Von Innerebner*, 2000 ABPC 140 – the accused was found in possession of a stolen vehicle within three days of the reported theft – the Court made inference of guilty knowledge;
- *R. v. Roach*, 2004 NSSC 14 – the accused was found in possession of a stolen Acura Integra about five weeks after the theft – the Court made inference of guilty knowledge in all the circumstances which included proof that the accused had purchased the wreck vehicle whose VIN was eventually put on the stolen vehicle (at para.33); and,

- *R. v. Robinson*, 2008 ABPC 216 – the accused was found in possession of a stolen Cube van with a cracked ignition about a week after the theft – the Court made inference of guilty knowledge.

[335] The Defence submits that the circumstances before me are most like those in *Carroll* except that the time between the theft and the possession is much longer in the present case.

[336] The Crown submits that *Carroll*, and many of the other cases provided by the Defence can be distinguished. Specifically, unlike in *Carroll*, here there is evidence of damage and evidence that Mr. Barker did not have the keys to the vehicle. However, I note that there is no evidence here that the damage to the Zahid vehicle is related to the theft or suggestive of it being stolen. The damage was not to the ignition. A broken wiper does not suggest a vehicle is stolen. There is no evidence that the removal of the rear door panel (Ex. 11, p. 70) is in any way related to a theft or suggestive of the vehicle being stolen. It is just as likely that some work was being done on the vehicle. I accept that Mr. Barker did not have the keys to the vehicle, however, it is quite possible he did have ‘a’ key to the vehicle. I have heard evidence that Mr. Barker had the means and knowledge to reprogram Honda keys, but I have also heard that it is easy to do. As such, it is possible that he reprogrammed a key to steal the vehicle, but also possible that he received the vehicle with a re-programmed key.

[337] Further, the Crown argues that many of the other cases relied on by the Defence involve possession of a single stolen vehicle. Whereas, here, the entire surrounding circumstances are relevant. I agree that it is appropriate for me to take into account the evidence that Mr. Barker had the knowledge and tools required to re-program a key. However, in the absence of an applicable exception, I am not prepared to consider that Mr. Barker was in possession of other stolen property to infer knowledge or that he was involved in a theft.

[338] I am not persuaded beyond a reasonable doubt that Mr. Barker was involved in the theft of this vehicle. There are very suspicious circumstances: the social media post on his phone which shows an interest in the thefts; the fact that he took a photograph of the VIN on the B pillar about a month after the theft; and his possession of the vehicle about two months after the theft. I have also considered the fact that he had the knowledge and tools required to program a key that would permit the vehicle to be taken without having the actual key and without damage to the ignition. However, that evidence does not rule out the reasonable possibility

that someone else stole it and he purchased it. Even if he had it in his possession when he took the photograph of the B-pillar, a month after the theft, that allowed for ample time for the vehicle to have been sold or otherwise transferred to him. Especially given the evidence I have of his connections to people involved in the theft of motor vehicles.

[339] To prove guilty possession, the Crown relies on evidence that the vehicle was found on property controlled by Mr. Barker, Mr. Barker would not have had a legitimate key to the vehicle, documents associated to the vehicle showing it belonged to Mr. Zahid which had been in the glove compartment were in a bag in the garage, the car had New Brunswick plates on it, it was in a state suggesting it was being worked on, Mr. Barker had an image on his phone of a VIN sticker for the vehicle and, as of March 4, 2019, he was aware that three Honda Civics had been stolen from South Park Street in Halifax.

[340] I am persuaded beyond a reasonable doubt that Mr. Barker knew the vehicle was stolen. Most significant to that conclusion is the fact that he knew and was interested in the fact that three 2015 Honda Civics were stolen in HRM on March 4, 2019. Then, a month later, he took a photograph of the VIN sticker for a 2015 Honda Civic. Within two months of the theft, he acquired a 2015 Honda Civic that had plates on it. Given his experience in the industry, he would have known that plates do not accompany vehicles when they are lawfully sold. Finally, the only reasonable inference is that he removed Mr. Zahid's ownership documents from the glove compartment and threw them away.

[341] Therefore, I find him not guilty of Count 7, but guilty of Count 24

Counts 8 & 9 – Theft of the MacDougal and Ludlow Honda Civics

[342] To prove Mr. Barker was involved in the theft of these vehicle the Crown relies on similar act from Count 7 and between these two counts, the text messages between Mr. Johnson and Mr. Barker and the screen shot image on Mr. Barker's phone relating to the three thefts.

[343] For these counts there is no evidence of recent possession.

[344] For the reasons outlined for Count 7, I find Mr. Barker not guilty of these counts.

Counts 10 & 33 -Theft of Enterprise Cube Van & Possession of Lights, Property of Sobeys Inc.

[345] A Cube van with lights was stolen from a location in Burnside between March 1st and March 3rd. The van was owned by Enterprise Rent-a-Car.

[346] A little over two months later, lights were seized from 110 and 387 Kearney Lake Road.

[347] The Defence argues that the Crown has not proven that these lights were the lights from the cube van. I am persuaded beyond a reasonable doubt that they were. They did not have a delivery address or unique serial numbers associated with them. However, Mr. McIsaac, a professional light installer, identified the lights from photos as those that were in the van when it was stolen. Further, his description of what was stolen was relatively unique and matched what was found - 347 volt lights, with a 6 foot cord, packaged three in a box, along with cables and hooks to install (Ex. 11, pp. 25 & 28; Ex. 43, pp. 1 – 9).

[348] As such I am persuaded that the seized lights were stolen and were in the cube van when they were stolen.

[349] That leaves the issues of whether the Crown has proven Mr. Barker was involved in the theft, that the lights belonged to ‘Sobeys’ as particularized in Count 33 and that Mr. Barker knew they were stolen.

[350] To prove the theft of the cube van, the Crown relies on the messages between Mr. Barker and Mr. Johnson and Mr. Fredericks on the evening of March 1st and the principle of recent possession of the contents of the van (the lights).

[351] The messages relied on by the Crown suggest that Mr. Barker was making plans to meet both Mr. Johnson and Mr. Fredericks on the evening of March 1st. He was on his way to meet Mr. Johnson at 10:50 p.m. and was meeting Mr. Fredericks in Burnside around 11:50 p.m. As noted above, the theft occurred from Burnside between March 1st and March 3rd. In my view, it is unusual to meet in that area at midnight. Certainly there are establishments that would be open. For example, the messages indicate that Mr. Barker is at McDonald’s at one point. However, the next message suggests he wants to meet at a side street across from Happy Harry’s (a business which would not be open at midnight).

[352] At least some of the lights were found in Mr. Barker's possession (he owned 110 Kearney Lake Road) a little over two months later. However, messages on Mr. Johnson's phone suggest that the lights were moved into that property on March 18, less than three weeks after the theft. Mr. Johnson acknowledged being aware that lights were on the property at 110 Kearney Lake Road and that he had moved them from a van that was not Mr. Barker's van into the residence. He denied speaking with Mr. Barker about that but the messages on his phone from March 18th contradict that (Ex. 77, 6-3). They show that Mr. Barker instructed him to remove lights from the van, put them in the back bedroom and try to keep them in packs of three. I have no doubt that in these messages, Mr. Barker is speaking about the lights that were found on May 7th at 110 Kearney Lake Road – they were in packs of three and were found in the back bedroom – and that these lights were the ones from the stolen cube van.

[353] Mr. Barker's possession of the lights on March 18th is, in these circumstances, sufficiently 'recent' to the theft, to trigger an inference that Mr. Barker was involved in the theft. These were not a couple of common residential light fixtures that could have been easily sold in the intervening two weeks. A rough count, based on the photographs, show that at 110 Kearney Lake alone, there were 30 or more boxes of fixtures (Ex. 11, pp. 172-173). Given their size and voltage, the market for resale would have been limited to commercial establishments. Mr. Barker continued to possess the lights on May 7th. The Defence has not pointed to any evidence to explain Mr. Barker's possession of the lights.

[354] The available inference from this recent possession is strengthened by the fact that the van and lights were stolen during a two-day window, the messages establish that Mr. Barker, Mr. Fredericks and Mr. Johnson were in the area from where they were stolen on one of those two nights and their presence in the area at midnight is suspicious.

[355] I am satisfied beyond a reasonable doubt that Mr. Barker was involved in the theft of the van so find him guilty of Count 10.

[356] However, for the charge of possession of stolen property, the count is particularized to refer to lights owned by "Sobeys Inc". The Crown is required to prove that particular (*R. v. Little*, [1976] 1 S.C.R. 20). The evidence I have is that Mr. McIsaac's company was doing a retrofit for Sobeys and the lights were to be installed in a Sobeys. However, I have no evidence that at the point they were

stolen, they were owned by Sobeys. Sobeys contracted Mr. McIsaac's company to install the lights. However, I have no evidence of whether Sobeys had paid for the lights in advance of the installation or in any other way had a property interest in the lights. This is not a case where the evidence simply does not prove the precise entity who was the rightful owner or where the rightful owner is unknown so not named in the charge (eg. see *Little, R. v. Schroder*, [2001] O.J. No. 4104(CA); *R. v. Chung*, 2021 ONCA 188). In this case, the Crown has named an owner and the evidence doesn't prove it.

[357] I am persuaded that Mr. Barker was in possession of stolen property and, in all the circumstances, knew it was stolen. However, the Crown has alleged the property was owned by Sobeys Inc. and has not proven who owned the property. Therefore, I find Mr. Barker not guilty of possession of stolen property in Count 33.

Counts 11, 15 & 20 – Theft, Possession and VIN removal, Carson Exports Mustang

[358] As I said, I am satisfied this vehicle was stolen overnight on March 15th/16th, 2019.

[359] I have no doubt that Mr. Barker was involved in this theft. The circumstantial evidence relating solely to this count is overwhelming and, in my view, the Crown has also met the test to rely on similar act evidence from the theft of the Greenwood Mustang.

[360] The dates and content of the messages between Mr. Barker and Mr. Fredericks and the photos found on the device are almost entirely consistent with the circumstances of the Carson Motors Mustang:

- As of February 17th, Mr. Barker was interested in something that was on a showroom floor (subsequent messages that I will review in a moment make it clear that this was a Mustang). The Carson Mustang was purchased on February 12th and moved outside not long before it was stolen, so would have been still in the showroom on February 17th;
- On March 15th, Mr. Barker discovered “the beast” was outside and the Carson Motors Mustang was moved outside around that date. The message at 3:14 a.m. on the 15th, that the vehicle is “outside now” is not entirely

consistent with Mr. Dyer's testimony about when he recalled moving the Carson Mustang outside. He recalled that he parked it outside after a test drive, about 12 hours before it was stolen. Assuming it was stolen overnight on the 15th/16th, this would mean it was moved outside during the day on the 15th whereas the message suggests it was already outside on the night of the 14th/15th so must have been put there, at the latest, sometime on the 14th. However, Mr. Dyer provided an estimate based on his recollection of events that had taken place about two and a half years before he testified. As such, despite the discrepancy in specific times, I accept that the overall sequence reported in the messages is consistent with the movement of the Carson Motors Mustang;

- Messages sent by Mr. Barker on the 20th confirm that the 'beast' he was referring to was a Mustang - he asked Mr. Fredericks if he wanted to "fix tonight", but specifically said "its not the mustang";
- The locations referred to in the messages are consistent with a theft from Carson Motors on Windmill Road in Dartmouth and a departure route heading toward Bedford. Carson Motors is located on Windmill Road in Dartmouth. Mr. Barker messaged Mr. Fredericks, "Bside, Dart". This clearly means Burnside, Dartmouth. In response to a "?" from Mr. Barker, Mr. Fredericks reported that he was "almost to Bridge" which is consistent with an approach to Carson Motors. Finally, Mr. Dyer testified, and the video shows, that the person who took the Mustang drove toward Bedford (Ex. 10). The message from Mr. Barker at 1:02 a.m. that there is "pig at sunnyside" appears to be a warning that there were police at that location which, from context, I infer is Sunnyside Mall in Bedford. Finally, the message at 1:11 a.m. from Mr. Fredericks that he is at "Karney" together with the later messages from Mr. Barker that the person "just got here" at 1:11 a.m. and then is looking for house keys at 2:06 a.m., is at least consistent with the vehicle having been taken to one of the three Kearney Lake addresses associated with Mr. Barker.

[361] Further, when I review the messages in context, I am satisfied that the references to car parts and fixing vehicles are coded language for stealing vehicles. For example, it makes no sense that Mr. Barker would be looking for an alternator and then report that it was on a showroom floor. He and Mr. Fredericks then joke about a 'smash and go' but decide not to proceed.

[362] The messages also contain clear references to the theft of the Greenwood Mustang - "same deal but a lot closer". These messages occurred only two days after the theft of the Greenwood Mustang. This supports the inference that the vehicle under discussion is a Mustang, that it is closer than Greenwood and that, like with the Greenwood Mustang, Mr. Barker had the key to the vehicle.

[363] Again, in all the circumstances, I am satisfied that the reference to 'other beast' in the March 15th message is a reference to another Mustang. The Mustang is a powerful vehicle so it makes sense that it would be referred to as a 'beast' and the reference to "other" is, again, a reference to the Mustang that was taken from Greenwood.

[364] My conclusion that these messages relate to the theft of the Carson Motors Mustang is supported by the photographs found on Mr. Fredericks' phone. On the night of the theft of a silver Mustang, photos of the same colour Mustang and a Ford key fob were taken and stored on Mr. Fredericks' phone.

[365] Finally, Mr. Barker's interest in the vehicle is further supported by the fact that an image, taken on March 21st, of its VIN stamped into metal was found on his device.

[366] As I said, I am also satisfied that the Crown has met its burden for admission of similar act evidence from the theft from Greenwood Auto to assist in proving the identity of the person who stole the vehicle from Carson Motors. Mr. Barker was involved in the theft of the Greenwood Mustang and the thefts are remarkably similar: both vehicles were Mustangs, they were both purchased from Adesa Auction on the same day, they each were supposed to have two keys and were delivered with only one, both thefts were from dealerships, both occurred overnight, the thefts occurred within a month of each other, and in each case the thief was Mr. Fredericks who used a key to steal the vehicle.

[367] There is no rational inference from the evidence other than that Mr. Barker was a party to the theft of this vehicle. As such I find him guilty of the offence in Count 11.

[368] Based on the messages between Mr. Barker and Mr. Fredericks on the night of March 15th/16th and the photographs of the Carson Motors Mustang VIN on Mr. Barker's phone on March 21st, I am satisfied that Mr. Fredericks took the vehicle to one of the three properties on Kearney Lake Road, Mr. Barker met him there on

that date and that Mr. Barker had physical possession of the vehicle on March 21, 2019 when the photograph of the floor plate VIN was taken on his phone.

[369] On May 7th, a vehicle was found in his possession which the Crown submits included at least the engine and some parts. The VIN on the engine was obtained using an OBD scanner and, as I discussed previously, there is conflicting evidence as to whether that VIN is a true representation of the identity of the engine or just reflects the identity of the software. However, for this count, I do not have to decide whether I accept that it is theoretically possible to change the VIN associated with the OBD for the engine by installing new software.

[370] I am satisfied beyond a reasonable doubt that the engine belongs to the Carson Exports Mustang and was stolen. I say that because Mr. Barker was involved in the theft, the vehicle was taken to a location on Kearney Lake, the engine is consistent with what would have been in the Carson Motors Mustang, the removal of the serial number and the stamping of a different number suggest it was stolen, and the reading obtained from the OBD reader is consistent with all of that.

[371] However, this count is particularized to charge possession of a stolen “Ford Mustang ... the property of Carson Exports”. As I said previously, having particularized the offence in this way, the Crown is required to prove that particular (See: *Saunders*, para. 5; *Wong*, para. 56; and, *Sadeghi-Jebelli*, paras. 23-24). 354(1)(a). Under, s. 354, a person is guilty of possession of the stolen thing if he knew that “all or part of the property or thing was stolen”. I don’t believe that assists the Crown in these circumstances. If the Crown proved that Mr. Barker was in possession of the ‘Ford Mustang owned by Carson Motors’ and that he knew the engine was stolen, he would be guilty of the offence even if he didn’t know the whole vehicle had been stolen. However, on the evidence before me, the Crown has not proven that he was in possession of the vehicle, just the engine from that vehicle. In my view, an engine is not the Ford Mustang and possession of a stolen engine is not an included offence in a charge of possession of a stolen vehicle where the vehicle is particularized.

[372] Therefore, I am satisfied beyond a reasonable doubt that Mr. Barker had possession of the stolen vehicle between March 16 and March 21, inclusive, and knew it was stolen. So, I find him guilty of Count 15 as it relates to that time period, but not the later time period. I make that distinction because of the possible impact of *Kienapple*.

[373] For Count 20, the Crown relies on the removal of the number from the engine of the vehicle. Based on Mr. Mackinnon's evidence, I accept that a number was removed from the engine of this vehicle, and another was put there which was part of the public VIN of the vehicle.

[374] This requires me to consider whether the number that was removed from the engine is a VIN for the purpose of s. 353.1. Vehicle Identification Number, for the purpose of this section, is defined in s. 353.1(2) and has three components: (1) a number or other mark; (2) placed on a motor vehicle; (3) for the purpose of distinguishing it from other similar motor vehicles.

[375] The issue is whether the number that was removed was put there for the purpose of distinguishing the motor vehicle from other similar motor vehicles. I have no direct evidence of how long the number was that was removed from the engine. However, the one that was put back is the last eight digits of a VIN, so I infer that the one that was removed was similar. Mr. MacKinnon described it in various ways in his testimony - as a partial VIN, an engine VIN, an engine serial number and a VIN derivative.

[376] Based on the evidence of Mr. MacKinnon and Mr. Smith, I accept that some engine numbers are unique identifiers that would distinguish a motor vehicle from other similar motor vehicles. However, that varies depending on manufacturer and in the absence of evidence about whether this is the case for Ford, I am not persuaded that the number that was removed from this Ford engine was unique to that vehicle or was put there for the purpose of distinguishing that vehicle from other similar vehicles. As such, I am not persuaded that number fits the definition of a VIN for purpose of s. 353.1 and find Mr. Barker not guilty of Count 20.

Counts 12 & 25 – Theft and Possession of a Honda Element, Mark Belanger

[377] Mr. Fredericks gave his statement on May 4, 2019. In it, he says that he, Nick and Mr. Johnson were involved in stealing a Honda Element on the previous Wednesday. That would have been May 1st. Mr. Belanger's Honda Element was stolen sometime between April 30th and May 2nd. Police saw a Honda Element being driven in the same business park at about 2:30 a.m. on May 1st. I accept that was Mr. Belanger's Honda being stolen.

[378] Police surveillance confirms that in the early morning of May 1st, Mr. Barker's van was back and forth on Highway 102, was seen dropping someone off

and picking someone up on the highway near OK tire, that Mr. Barker's van was unoccupied for a time at a nearby parking lot, and that Mr. Barker was then dropped off by Mr. Fredericks.

[379] The person who stole the vehicle did not have the keys for the vehicle. However, Mr. Barker had the knowledge and tools to reprogram keys and Hondas are easy to reprogram.

[380] The messages on Mr. Fredericks phone confirm that he was meeting Mr. Barker that night near the airport and that Mr. Barker was already in that area at 12:42 a.m. Mr. Fredericks joined him after 1:00 a.m., Mr. Barker was in Mr. Fredericks truck, and left "gear" in it.

[381] I am satisfied that Mr. Barker and Mr. Fredericks were using coded/guarded language in these messages. Mr. Fredericks asked Mr. Barker if he found "the part ya need". Mr. Barker said "I think so". Later, at 12:36 a.m., Mr. Barker asked Mr. Fredericks "U wanna fix that muffler". At that point, surveillance had Mr. Barker's van out near the airport on Highway 102. Mr. Fredericks asked, "quick fix" and Mr. Barker responded, "yes" but "near the airport". It simply doesn't make sense that Mr. Barker was fixing a muffler after midnight near the airport while his van was driving back and forth on Highway 102 and parked at Tim Horton's.

[382] The only explanation for these messages, together with the surveillance and the fact that the Honda Element was stolen that night is that Mr. Barker wanted a Honda Element, found one, and asked for Mr. Fredericks' help to take it.

[383] Mr. Barker was seen getting into his van at the Tim Horton's near the airport at around 2:30 a.m., then at 3:00 a.m., his van and Mr. Frederick's truck were both seen at 367 Gatehouse Run, then at 3:07 a.m., Mr. Barker was seen getting out of his van at 327 Kearney Lake Road. This satisfies me that Mr. Barker drove from the airport area to Gatehouse Run. That is where the stolen Honda Element was found five days later.

[384] As I have said, Mr. Barker paid Mr. Green to keep vehicles on his property. He was not the only person who kept vehicles there, but this vehicle was found next to the Greenwood Mustang which I have found was stolen and possessed by Mr. Barker

[385] The Defence submits that because the police chose not to stop the Element when they saw it being stolen, the Crown should not now be permitted to argue that Mr. Barker was involved. The police have explained why they chose not to stop the vehicle. There is no evidence that they declined to stop the vehicle for any improper purpose such as to avoid collecting exculpatory evidence. I accept that they simply did not think it was related to the investigation.

[386] The circumstantial evidence persuades me beyond a reasonable doubt that Mr. Barker was involved in the theft of the Element, then stored it at Mr. Green's property where it was found on May 7th.

[387] I find him guilty of Counts 12 and 25.

Count 13 – Theft of Honda Civic on May 4, 2019, Everett Bergstrum

[388] The Defence argues that the Crown has not proven that Mr. Barker was the person who stole the Honda and handed it off to Mr. Fredericks or that he was otherwise a party to the theft.

[389] Mr. Fredericks' statement clearly inculcates Mr. Barker in the theft of this vehicle. In most material respects that statement is corroborated by surveillance and by the messages found on Mr. Fredericks' phone. I accept that there is confusion or perhaps inconsistency between the evidence of the surveillance officers and Mr. Fredericks' about how the drivers switched. However, there is consistency that someone other than Mr. Fredericks stole the vehicle and then handed it off to Mr. Fredericks who drove it while someone else drove his vehicle.

[390] The description of the person who was driving the Honda is consistent with Mr. Barker but would not, without more, be enough for proof of identity. Mr. Johnson was arrested driving the truck. Mr. Barker was not.

[391] However, Mr. Barker's van was in the parking lot from where the vehicle was stolen earlier that night, then he was seen driving the van about 15 minutes later. Surveillance and messages between Mr. Fredericks and Mr. Barker confirm they met in Dartmouth, at 1:51 a.m., about an hour before the theft. Mr. Barker's van was seen unoccupied in Dartmouth and Mr. Frederick's truck drove down to the location of the theft.

[392] There was damage to the steering column of this vehicle which is inconsistent with Mr. Barker's ability to reprogram keys. Mr. Fredericks said he was given a key and an Acura key was found in the vehicle when it was stopped. Mr. Fredericks didn't talk about that in his statement, however, I infer that something went wrong during the theft.

[393] Given the significant corroboration of Mr. Fredericks' statement and the circumstantial evidence, I am persuaded beyond a reasonable doubt that Mr. Barker was involved in this theft. At the very least, he located the vehicle, provided Mr. Fredericks with a key, met with Mr. Fredericks in Dartmouth and I believe then drove with Mr. Fredericks and Mr. Johnson to Halifax. I cannot say whether he is the person who actually stole the vehicle, but he is a party to the theft, and I find him guilty of count 13.

Counts 16 and 18 –VIN Removal and Possession - The Barker Dodge Caravan

[394] The Defence does not dispute that the vehicle is actually a stolen 2018 Dodge Caravan or that the public VINs on this vehicle were removed and replaced with the VIN from the legal vehicle. However, the Defence submits that both the 'legal' VIN (... 8238) and physical stolen vehicle (VIN ... 3287) were in the possession and control of Back to New Auto before it was transferred to Ms. Barker. This allows for a reasonable inference that the re-venning was done by Scott Fraser or someone at Back to New, before August 29, 2018, when, the Defence submits, Ms. Barker received it.

[395] The Defence argues that there is no reliable evidence that Mr. Barker re-venned the vehicle and the evidence is equally consistent with Mr. Fraser having done it since the documents show that Back to New had control and actual physical possession of the vehicle from July 16, 2018, when it was purchased until August 29, 2018 when the sale to Ms. Barker was registered with RMV. As such, the evidence is equally consistent with innocent possession by the Barkers and there is no evidence from which I could infer that the Barkers would have known the vehicle was stolen during the period in the Information.

[396] The Defence submits that the only evidence limiting the opportunity to create the false vehicle identity to Mr. Barker is Mr. Fraser's. He denies that he was ever involved, personally, in re-venning vehicles, but the Defence submits that his denial should not be accepted.

[397] One difficulty with this submission is that there is no evidence that the stolen vehicle was in the possession of the Frasers or Back to New Auto prior to August of 2018. The vehicle was stolen in either February 2018 (evidence of Mr. Smith) or July/August 2018 (evidence of Mr. Comeau). On their face, the documents suggest Back to New owned a Dodge Caravan and Mr. Purcell inspected it, but they all refer to the legal VIN associated with a 2010 Dodge. There is no evidence from which I could infer that, even if Mr. Purcell inspected the vehicle, it was the stolen vehicle as opposed to the legal salvage vehicle. Ms. Parker testified that salvage vehicles cannot go on the road without an inspection and require repairs but did not say they were physically inoperable or speak about how much damage would be required to result in a sale as a 'salvage'.

[398] Further, the date the sale to Ms. Barker was registered with RMV is not necessarily the date she took possession of the vehicle. The certificate of sale and application for certificate of registration are dated July 17, 2018 and the statement of insurance associated with this vehicle states that the policy effective date is July 17, 2018 (Ex. 68, pp. 6, 7, 8). This suggests the sale occurred on that date and Ms. Barker intended to take the vehicle on that date and the documents were registered later.

[399] The Crown submits that Mr. Barker had the stolen van in his possession in mid-July when the picture was sent to his wife's phone. He then bought the salvage vehicle and put those public VINs on the stolen vehicle. The documents were created by him as a paper trail to insulate himself and they don't make sense. Essentially, it does not make sense that a salvaged and inoperable vehicle was purchased and found mechanically fit the same day, then permitted as a rebuilt vehicle, sold to Ms. Barker and insured by her the day after that.

[400] I don't have evidence that the legal, salvage vehicle was necessarily inoperable when it was purchased or any evidence about the extent of the damage to that vehicle. However, I accept that a 'salvage' vehicle which is subsequently classified as 'rebuilt' would have required some repairs (Ex. 22).

[401] I am satisfied that Mr. Fraser and Back to New were not involved in the purchase of the salvage vehicle, never had the stolen vehicle and did not re-vin the salvage vehicle. Mr. Fraser testified that neither he nor anyone else authorized by Back to New signed for the purchase of this vehicle or the application for the permit and he had no knowledge of it being re-vinned (Ex. 68, pp. 3 & 5). He denied that he was involved in the transaction involving the legal Caravan or that

he ever saw the stolen Caravan. There is also evidence from Mr. Fraser that Mr. Barker would have had enough information about Back to New to purchase vehicles from Auction using their dealership information. I have treated Mr. Fraser's evidence with caution, however, the circumstantial evidence supports his testimony. Further, Mr. Fraser did acknowledge his company's involvement in the transactions relating to the salvage vehicle in Count 11. This assists his credibility as it shows he is not trying to distance himself entirely from these matters.

[402] Mr. Barker also had tools, that according to Mr. MacKinnon, were associated with re-vinning cars, including metal stamping sets and cutout VINs (Ex. 12, pp. 71, 109, 112; Ex. 63 - 327 Kearney Lake Road).

[403] I am satisfied beyond a reasonable doubt that Mr. Barker removed the VIN from the stolen vehicle and replaced it with the VIN from the public vehicle.

[404] This triggers the need to consider s. 353.1(3), which sets out circumstances in which removal of a VIN will not be an offence:

(3) Despite subsection (1), it is not an offence to wholly or partially alter, remove or obliterate a vehicle identification number on a motor vehicle during regular maintenance or any repair or other work done on the vehicle for a legitimate purpose, including a modification of the vehicle.

[405] At issue is whether there is a burden on the Crown to negate these circumstances or, as the Crown submits, it simply clarifies the scope of the offence.

[406] The Defence argues that s. 353.1(3) requires the Crown to prove beyond a reasonable doubt that the VIN was not removed in any of the listed circumstances. In doing so, counsel acknowledges that there are no cases that specifically say this. Rather, the Defence argues it would be consistent with the criminal law principles that have been applied in other contexts (*R. v. Plesnik*, [1983] O.J. No. 792 (PC), paras. 21 – 26; *R. v. Laba*, [1994] 2 S.C.R. 965, paras. 96 – 98, 111; *R. v. Boyle*, 5 C.C.C. (3d) 193, paras. 56, 59 – 63); but contra, *R. c. Laroche*, 2011 QCCA 1891, paras. 70 – 78).

[407] I have reviewed these cases and conclude that this provision places an evidentiary burden on the Defence. This does not require the Defence to call evidence, but simply to point to evidence in the case that permits a factual finding

that would engage the provision. If that is done, then the Crown would have the burden to prove beyond a reasonable doubt that it did not apply. I view it as analogous to self defence under s. 34(1) of the *Code* which uses similar language. Section 34(1) says “a person is not guilty of an offence if” certain circumstances exist. That provision has been interpreted as putting an evidentiary burden on the accused to show there is an air of reality to the defence. Once that is met, the persuasive burden switches to the Crown to disprove it.

[408] The Crown argues that if it has a burden, it has proven that the work in question was not legitimate. The Crown argues that there is no evidence here to even suggest legitimacy, no evidence that anything was done, during “regular maintenance” or for a “legitimate purpose”. Specifically, that Mr. Barker is not a licensed automotive service technician, as required to perform any of the necessary work (*Automotive Service Technician Trade Regulations*, made under Section 17B of the *Apprenticeship and Trades Qualifications Act*, S.N.S. 2003, c. 1) and if the Defence submission is accurate, it would render ss. 47-48 of the *MVA* redundant and be contrary to Ms. Bunker-Dyck’s evidence about the role of the Operations Support section in relation to rebuilt vehicles.

[409] I agree that the fact that an accused is not a licenced mechanic and did not comply with regulatory requirements would be relevant factors in assessing the credibility of any assertion that they were removing a VIN for a legitimate purpose or determining what inferences were reasonable from the evidence. However, I don’t agree that these factors would be determinative. The provision is not restricted to licenced mechanics and does not incorporate obligations under provincial acts or regulations. A court could believe that an unlicensed backyard mechanic was guilty of violating any number of regulatory requirements but still have a reasonable doubt that he had removed a VIN during regular maintenance.

[410] In the circumstances, there is no air of reality to any assertion that Mr. Barker removed the VINs from the van during regular maintenance or legitimate repair. The evidence, especially his creation of a false paper trail, establishes that he removed the VINs because the vehicle was stolen and because he wanted to replace them with VINs from the legal salvage vehicle that he bought using Back to New’s licence.

[411] I am also satisfied that he possessed the stolen vehicle knowing it was stolen. I would be satisfied of that even if I were not satisfied that he was the person who re-vinned the vehicle. I agree with the Crown that Mr. Barker cannot

be viewed as an ordinary naïve citizen who is unwittingly duped when purchasing a single used car. He is in the business of buying, repairing, and selling cars. The vehicle in his possession from July of 2018 until May of 2019, was a 2018 vehicle that was in good shape, but he submits it was sold to him as a salvaged 2010 vehicle. He would have known the difference in years and would certainly have known there had been no previous damage. Further, he essentially abandoned this vehicle at Fraser Automotive after removing its plate which is suggestive that he knew ‘the heat was on’ and knew it was stolen.

[412] In reaching my conclusions I have not relied on the Crown submission that might engage discreditable conduct that is extrinsic to these counts, such as whether Mr. Barker had a pattern of using Back to New or that he possessed multiple re-vinned vehicles.

[413] I find him guilty of Counts 16 and 18.

Counts 17 & 19 – Removal of a VIN & Possession of Stolen White Jeep Wrangler

[414] I accept Mr. MacKinnon’s opinion that the proper secondary VIN in the frame of this vehicle was cut out and replaced with the VIN that matched the public VIN. His opinion is well supported by the surrounding circumstances and specifically the photographs of that VIN (Ex. 96, tab 4, p.4).

[415] The issue for Count 17 is whether the evidence proves beyond a reasonable doubt that Mr. Barker did that. Mr. Barker was in possession of a white jeep on May 7, 2019. That vehicle had the VIN removed from its frame and replaced with a VIN that matched the public VIN of the vehicle. That vehicle had an OBD VIN associated with a 2018 black Jeep Rubicon that was stolen in June of 2018 and a public VIN that was associated with a 2007 green Jeep Sahara that was sold in July of 2018. Ms. Barker had photos on her phone that were taken in November of 2018 that appear to be of the same white jeep as was seized and in the same month she insured the vehicle. Ms. Barker insured the vehicle in November of 2018.

[416] The documents report that Back to New did not sell the vehicle to Ms. Barker until March of 2019.

[417] It does not make sense that Ms. Barker would have a photo of the vehicle and insure it before she had it in her possession. Therefore, I accept that the

Barkers had the vehicle in November of 2018 and by that time, it was a white jeep with a similar appearance to the one that was seized.

[418] Mr. Fraser denies that he or his company had anything to do with this sale. This vehicle was bought from an individual and he testified that his company bought cars from auctions, not from individuals. His evidence has to be treated with caution. However, that statement seemed particularly credible – it was spontaneous, not self-serving, and not challenged. Further, the objective evidence supports his testimony that neither he nor Back to New had anything to do with the purchase of the vehicle that is associated with the public VIN: the original paperwork for the sale from an individual in Quebec was found on the counter in the Barkers' home; the Barkers had the vehicle in its 'rebuilt' state within four to five months after the public VIN vehicle was sold and the OBD VIN vehicle was stolen; and, the dates on the paperwork simply don't make sense for a sale from Back to New to the Barkers.

[419] So, I am convinced beyond a reasonable doubt that Mr. Barker is the person who removed the VIN from the vehicle's frame. In that conclusion, I am supported by the evidence of metal stamping sets and cut-out VIN plates found in property controlled by him (Ex. 12, pp. 71, 109, 112; Ex. 63 - 327 Kearney Lake Road).

[420] As such, I find him guilty of Count 17.

[421] Count 19 requires the Crown to prove that the Jeep that was seized is the Jeep Wrangler that was the property of Enterprise Rent-a-car.

[422] The Crown submits that the vehicle that was seized is the Enterprise vehicle, that Mr. Barker painted it and put public VINs on it that he acquired from the jeep he purchased using Back to New. The Crown suggests that the public VIN could have come from the green jeep that was found at 387 Kearney Lake Road with no public VIN tags. That is possible, but there is no evidence of that vehicle's year or hidden VIN and, while Mr. Barker accessed this property, there is no evidence that he had exclusive access to it.

[423] The Defence submits that an alternate rational inference from the evidence is that the vehicle is originally a lawfully purchased green 2007 Jeep Wrangler that has been repainted and rebuilt using upgraded parts and Rubicon accessories.

[424] Given that the VIN was removed from the frame of the vehicle, I accept that it was stolen. Given the OBD VIN associated with the engine, I accept that the engine probably belonged to the vehicle stolen from Enterprise. That, together with the upgraded and new parts all creates a great deal of suspicion that the vehicle is the Enterprise vehicle. However, there is evidence that some parts of the vehicle's frame had originally been green which is not consistent with the Enterprise vehicle. Further, given concessions made by Mr. MacKinnon in cross-examination and comparison of the photographs of the Jeep that was seized with photographs of a Jeep Sahara and Jeep Rubicon, I cannot be certain that the vehicle that was seized is the same model as the one stolen.

[425] So, while I'm satisfied that the frame was from a stolen vehicle, I am not satisfied beyond a reasonable doubt that the vehicle that was seized is the jeep that was stolen from Enterprise. Even if I was persuaded beyond a reasonable doubt that the engine belonged to the Enterprise vehicle, I would not convict. As I said previously, in my view, proof of possession of a stolen engine is not proof of possession of the vehicle where the vehicle is particularized.

[426] As such, I find Mr. Barker not guilty of Count 19.

Counts 21 & 26 –VIN Removal and Possession, Ford RV, Pine Acres RV

[427] I accept Mr. MacKinnon's opinion that the public VINs associated with this vehicle were real but fraudulently affixed to the vehicle. That opinion is well supported by the evidence of how these VINs were attached to the vehicle (Ex. 60, evidence of Cst. Lee Cooke, Mr. MacKinnon and Mr. Smith; Ex. 96, tab 6, pp. 6, 7, 12 – 14).

[428] Implicit in that is the inference that the real public VINs were removed. There is no air of reality to the Defence submission that they may have been removed during maintenance or repair so as to fit within s. 353.1(3). Two public VINs were improperly affixed – the dash and the B-Pillar. The only evidence of repair or maintenance is that the vehicle was painted. That might impact the VIN on the B-Pillar, but I have no evidence of how that could impact the VIN on the dash.

[429] Therefore, at issue for Count 21 is whether the Crown has proven that Mr. Barker is the person who removed the VINs.

[430] I am satisfied that Mr. Barker acquired the vehicle on or before October 22, 2018, that its true identity is that of the RV that was stolen from Mr. Brown sometime between August 17, 2018 and October 3, 2018 and that Mr. Barker had it in possession at least from October 22, 2018 until it was seized.

[431] I reach that conclusion about when Mr. Barker obtained it because of the message on Mr. Johnson's phone from October 22, 2018, photos on Mr. Johnson's device and the testimony of Mr. Green and Ms. Barker. I am satisfied that the message on Mr. Johnson's phone on October 22, 2018 where Mr. Barker asked Mr. Johnson, to "peel the rest of the rv stickers" is a reference to this RV (ex. 77, 6-3). Mr. Green testified that the vehicle was brought to his property before winter, the photographs show that work was being done on it when there was snow on the ground and Ms. Barker testified that the vehicle was a Christmas gift. So, I have no doubt that Mr. Barker acquired it on or before October 22, 2018, then painted it between then and December 25, 2018.

[432] There is no evidence of the history of the public VIN, so I don't know whether or when that vehicle was sold or its condition.

[433] I accept the opinion of Mr. MacKinnon that the true identity of this vehicle is that of the stolen 2016 Ford with a VIN ...8991. That was the VIN obtained from the OBD scanner. Even if I accept that may not always accurately reflect the true identity of the engine, it is confirmed by the partial VIN that was stamped on the engine, so there is no doubt that the engine is from the stolen RV. Of course, that does not mean the rest of the vehicle is that vehicle. However, there is a great deal of evidence that confirms it is: the mileage on the odometer is consistent with the stolen vehicle and not with the public VIN; '2016' is stamped on the underside of the hood which is the year associated with the stolen vehicle and not with the public VIN; the public VINs on the body of the vehicle had been removed, giving rise to an inference that it was stolen; and, the public VIN coded for a diesel engine whereas the the Emission Control Sticker, on the underside of the hood, identified the vehicle as a gasoline vehicle which is consistent with the stolen vehicle.

[434] This is relevant to the question of whether Mr. Barker removed the proper public VIN since it shows that he was in possession of the vehicle within three weeks of when it was discovered missing and within two months of the earliest possible date it could have been stolen.

[435] Mr. Barker also had various paraphernalia in his possession that is consistent with removal and replacement of VINs.

[436] Despite that, given the absence of direct evidence that he removed the VINs and the possibility that the vehicle was stolen as early as August 18 and did not come into Mr. Barker's possession until October 22nd, I am not persuaded beyond a reasonable doubt that Mr. Barker removed the VINs from this vehicle. So, I find him not guilty of Count 21.

[437] This leaves the question of whether Mr. Barker knew or was willfully blind to the fact that the vehicle was stolen. The Defence submits that there was no obvious sign that the vehicle was stolen and Mr. Barker could not possibly have known that the public VINs were false. Mr. Barker had OBD scanners in his possession so could easily have obtained the VIN from the engine (Ex. 59; Ex. 112, p. 112). Leaving that aside, as I have previously noted, Mr. Barker is not an unsophisticated purchaser of vehicles. He was in the industry. The vehicle in his possession was a 2016 vehicle with approximately 23,000 on the odometer. The Certificate of Registration purports that it is a 2008 vehicle with 142192 on the odometer. I do not accept it is possible that he did not know he had a two year old vehicle as opposed to a 12 year old vehicle. Added to this is the fact that he removed all stickers and repainted the vehicle. On its own, repainting a two-year-old vehicle might be the result of an aesthetic choice. However, combined with the other circumstances, it leaves me persuaded beyond a reasonable doubt that Mr. Barker knew or was willfully blind to the fact that the vehicle in his possession was stolen.

[438] Therefore, I find him guilty of Count 26.

Count 27 – Possession of Ford Mustang Shelby, the property of Michael Sack

[439] The Crown theory for this vehicle is that the frame is a legally acquired donor frame but that the things added, such as the engine, are all stolen and are essentially what make a car a car.

[440] The Defence submits that the vehicle is a rebuilt vehicle and the evidence does not prove that the engine in the vehicle or any other part of it is stolen.

[441] The Crown also submits that this vehicle fits within Mr. Barker's *modus operandi* of using Back to New without Mr. Fraser's knowledge to shield himself

from transactions. That submission requires a similar act analysis. If I agreed, that would assist the Crown in proving guilty knowledge, however, it does not help the Crown prove that what was seized is what is alleged in this count – “A Ford Mustang, the property of Michael Sack”.

[442] The VIN obtained from the OBD scanner is associated to Mr. Sack’s vehicle. Other parts on the vehicle are consistent with a Shelby, however, the evidence does not establish that they are stolen or are from Mr. Sack’s Shelby. Even if I accept that the VIN obtained through the OBD scanner is the VIN from the engine and it is Mr. Sack’s engine, the charge has been particularized to refer to a “Ford Mustang”. I appreciate that a vehicle is the sum of its parts such that at some point if the Crown proves enough parts are stolen, it has proven that what is possessed is a stolen vehicle. However, here, even relying on the VIN obtained from the OBD scanner, I could only be certain that the engine was stolen. As I have said, in my view an engine is not ‘a Ford Mustang’, so the Crown has not proven the charge as particularized. Therefore, I find Mr. Barker not guilty of Count 27.

Counts 28 – 32 – Possession of Appliances, property of Leon’s Furniture

[443] The Defence disputes that these items have been proven to be the property of Leon’s or that they were part of the 70 stolen and unrecovered items from the truck theft. However, the boxes containing the dishwasher, two microwaves, washer and dryer seized from 110 Kearney Lake Road all bear serial numbers that were included in the list of stolen and unrecovered items from the tractor trailer theft in November of 2018 (Ex. 11, pp. 182, 184, 179, 186, 187; Ex. 32, pp. 1, 7; Ex. 97, tab 4). I am satisfied beyond a reasonable doubt that they were part of the truckload of items stolen on November 10, 2018.

[444] The issue, therefore, is whether the Crown has proven that Mr. Barker knew (including willful blindness) they were stolen.

[445] The photos of 110 Kearney Lake Road show that it was in the process of being renovated. The Defence submits, and I agree, that the presence of a single new dishwasher, washer and dryer in a unit under renovation is not suspicious. Similarly, since there is evidence that Mr. Barker owned both units, the presence of two microwaves is also not suspicious. There is also no direct evidence of the circumstances under which Mr. Barker came to possess them – for example, how much he paid.

[446] The message from Mr. Johnson saying “samsung” is suspicious, however, there is no context for this message and Mr. Barker did not reply. It is also suspicious that Ms. Barker was not aware of the appliances being there.

[447] However, even if I consider the appliances found in Mr. Barker’s possession at the storage locker in my assessment of whether the Crown has proven beyond a reasonable doubt that Mr. Barker knew or was wilfully blind that these appliances were stolen, I am not persuaded. The circumstantial evidence simply does not remove the reasonable possibility of innocent possession.

[448] Therefore, I find Mr. Barker not guilty of Counts 28 – 32.

Conclusions By Count

Count 4 – s. 333.1 – theft of Greenwood Mustang – Guilty

Count 5 – s. 333.1 – theft of Enterprise Dodge Caravan #1 – Guilty

Count 6 – s. 333.1 – theft of Enterprise Dodge Caravan #2 – Guilty

Count 7 – s. 333.1 – theft of Zahid Honda Civic – Not Guilty

Count 8 – s. 333.1 – theft of MacDougal Honda Civic – Not Guilty

Count 9 – s. 333.1 – theft of Ludlow Honda Civic – Not Guilty

Count 10 – s. 333.1 – theft of Enterprise Ford Cube Van – Guilty

Count 11 – s. 333.1 – theft of Carson Exports Mustang – Guilty

Count 12 – s. 333.1 – theft of Belanger Honda Element – Guilty

Count 13– s. 331.1 – theft of Bergstrum Honda Civic – Guilty

Count 14 – s. 355(a) – possession of Greenwood Mustang – Guilty

Count 15 – s. 355(a) – possession of Carson Exports Mustang – Guilty

Count 16 – s. 353.1 – VIN removal - Dodge Caravan – Guilty

Count 17 – s. 353.1 – VIN removal - White Jeep Wrangler – Guilty

Count 18 – s. 355(a) – possession of Enterprise Dodge Caravan - Guilty

Count 19 – s. 355(a) – possession of White Jeep Wrangler – Not Guilty

Count 20 – s. 353.1 - VIN Removal – Ford Mustang – Not Guilty

Count 21 – s. 353.1 –VIN Removal - Ford RV – Not Guilty

Count 24 – s. 355(a) – Possession of Zahid Honda Civic –Guilty

Count 25 – s. 355(a) – Possession of Belanger Honda Element – Guilty

Count 26 – s. 355(a) – Possession of Pine Acres RV – Guilty

Count 27 – s. 355(a) – Possession of Sack Mustang Shelby – Not Guilty

Count 28 – s. 355(b) – Possession of Dishwasher – Not Guilty

Count 29 – s. 355(b) – Possession of Microwave #1– Not Guilty

Count 30 – s. 355(b) – Possession of Microwave #2 – Not Guilty

Count 31 – s. 355(b) – Possession of Dryer – Not Guilty

Count 32 – s. 355(b) – Possession of Washer – Not Guilty

Count 33 – s. 355(a) – Possession of Sobeys Lights – Not Guilty

[449] I will hear from counsel at the time of sentencing as to whether any counts should be stayed pursuant to *R. v. Kienapple*, [1975] 1 S.C.R. 729.

Elizabeth Buckle, JPC.