

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Bateman*, 2023 NSPC 25

Date: 20230310

Docket: 8291356, 8291357, 8291360, 8291361, 8291362

Registry: Halifax

Between:

HIS MAJESTY THE KING

v.

DARREN BATEMAN and ORLANDO SMITH

DECISION ON TRIAL

Judge: The Honourable Judge Elizabeth Buckle

Heard: March 22, 23, 24, 25, 26, 29, 30, 31, April 1, 19, 20, 21, 22, 23, 21, June 10, 21, October 25, 2021, February 22, 2022, July 12, 2022

Decision: March 10, 2023

Charge: *Criminal Code* ss. 354(1), 380(1)(a), 423.1(1)

Counsel: Shauna MacDonald, Mark Heerema for the Crown
Joel Pink, for the Defence for Darren Bateman
David Iannetti for the Defence for Orlando Smith

By the Court:

Introduction

[1] Darren Bateman and Orlando Smith are each charged with defrauding a numbered company doing business as Summit Hyundai of an amount over \$5,000 and with possessing proceeds of that crime. Mr. Smith is also charged with intimidation of a justice participant.

[2] The complainant company, a new and used car dealership, was incorporated by Kenneth Barrett who was its sole director. Mr. Barrett was the Crown's main witness.

[3] Mr. Smith and Mr. Bateman worked with Summit. Mr. Smith started as an employee in the role of General Sales Manager and then became a shareholder/partner. Over time, Summit developed a used car problem – they were overpaying so couldn't sell without showing a loss and their inventory ballooned. Because of how car inventory financing works, this had significant negative financial implications for Summit. Mr. Bateman was brought in under contract to help deal with the used cars. His efforts to reduce inventory were not successful. So, with the knowledge of Mr. Barrett and Mr. Smith, he and Summit engaged in a series of car/cheque swapping deals designed to extend financing and reduce inventory. Mr. Bateman used a company he operated, 'Justincredible Motors' (Justincredible), to do this.

[4] In 2017, Mr. Barrett sold the dealership to a third party. He testified that while liquidating assets to pay creditors, he discovered that 24 used vehicles were missing from Summit's lot. The resulting investigation also led to a forensic review of the car/cheque swapping deals. The alleged fraud relates to the 24 vehicles and the car swapping deals.

[5] The charge of intimidation of a justice participant relates to Mr. Bateman's brother, Richard Bateman, and his common-law partner. Richard Bateman was also involved in the used car business and played a significant role in some of the transactions at issue in the case. He was interviewed by police and testified at trial for the Crown. He and his common-law partner testified that after they were interviewed by police in relation to the investigation, they were threatened by Mr. Smith.

Positions of the Parties

[6] The Crown alleges, in general, that during the final years before Summit's sale, Mr. Bateman and Mr. Smith engaged in a systematic and persistent pattern of dishonest dealings with Summit that benefited them and financially disadvantaged Summit. The Crown argues that this is demonstrated by: accounting records showing that the car swapping deals consistently benefitted Justincredible to the detriment of Summit; and proof that Summit paid Justincredible for the 24 vehicles in question and the vehicles were not in its inventory at the time of its sale. The Crown alleges that Mr. Smith was directly involved in the fraud or, alternatively, was a party to Mr. Bateman's fraud. The Crown submits that Mr. Smith essentially represented Summit on these deals and benefitted both directly and indirectly from the lopsided deals. The Crown submits that he benefitted directly through payments from Justincredible, and he also hoped to benefit indirectly by reducing the value and resulting purchase price of Summit, which he wanted to purchase.

[7] The Crown further argues that the proceeds of the fraud went into the account of Justincredible and then were disbursed to Mr. Bateman and/or his family and Mr. Smith and/or his family.

[8] Mr. Bateman and Mr. Smith argue there was no fraud - no deceit, dishonesty or otherwise fraudulent transactions between Mr. Bateman/Justincredible and Summit.

[9] Both submit that Mr. Barrett was the operating mind of the complainant company, was fully aware of the transactions between Justincredible and Summit, there were no false documents used, and everything was done openly with Mr. Barrett's approval. The Crown disputes that Mr. Barrett was complicit but submits that his complicity would not relieve Mr. Bateman and Mr. Smith of culpability because the alleged victim is the corporate entity. As such, at best Mr. Barrett is an uncharged party in the fraud against the company.

[10] Mr. Smith further argues that there is virtually no evidence that he was a party to any of the allegedly fraudulent transactions between Justincredible and Summit and, essentially, all he did was co-sign some cheques on behalf of Summit.

[11] If there was no fraud, there were no proceeds of crime. However, Mr. Smith further argues that if there was a fraud, there is no link between the proceeds of that offence and the funds disbursed to him and/or his family from Justincredible.

[12] Mr. Smith argues that the testimony of Richard Bateman and his partner is not sufficiently credible to amount to proof beyond a reasonable doubt.

General Principles

[13] There are general principles that apply to every criminal trial.

[14] Mr. Bateman and Mr. Smith are presumed to be innocent of these charges. The Crown bears the burden of proving each element of the offences beyond a reasonable doubt. That requires more than a suspicion of guilt and more than a belief that they are 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; *R. v. Lifchus*, [1997] 3 S.C.R. 320).

[15] 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. In this case, all witnesses were recalling events from between five and ten years ago. This would challenge the recollection of any witness, especially for peripheral details that might not have seemed important at the time. Demeanour and manner of testifying can be relevant in assessing credibility and reliability, however, in general, they are not reliable indicators of either. Demeanour can be deceiving, and manner of testifying can say more about a witness' education, sophistication, confidence or experience as a witness than about his/her credibility or reliability. As such, in assessing the evidence of all the witnesses, I have focussed on the more objective means of assessing credibility and reliability: internal consistency; external consistency; and plausibility – whether the evidence accords with logic, common sense and human experience.

[16] Darren Bateman testified. Two statements from him were also tendered by the Crown. One, a formal interview with police on November 30, 2018 (Ex. 21; transcript in aid – Ex. 22). The other, an attachment to correspondence from his counsel to the Crown, dated July 22, 2019 (Ex. 27, Appendix 'A'). In addition, a recorded conversation involving Mr. Bateman, Mr. Smith and Mr. Barrett was admitted at the request of the Crown (Ex. 7, transcript in aid, Ex. 36).

[17] The out-of-court words of the two accused, whether inculpatory or exculpatory, is evidence only in relation to the person who uttered the words (*R. v. Srun*, 2019 ONCA 453, paras. 111-129; *R. v. Waite*, 2013 ABCA 257, 309 C.C.C. (3d) 255, aff'd 2014 SCC 17, [2014] 1 S.C.R. 341.) So, I can use Mr. Bateman's out-of-court statements both for and against him, but not either for or against Mr. Smith.

[18] A criminal trial is not about simply choosing whether I prefer the testimony that supports guilt over that which does not. 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; *R. v. Dinardo*, 2008 SCC 24).

[19] The charges can be proven through direct evidence or through circumstantial evidence or a combination. Absent an admission, proof of intent or knowledge will generally not be established through direct evidence.

[20] The burden on the Crown in a circumstantial case is to prove beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from the evidence (*R. v. Griffen*, [2009] S.C.J. No. 28, paragraph 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. A reasonable doubt may be logically based on a lack of evidence (*R. v. Vilaroman*, 2016 SCC 33, at para. 36). I am permitted to draw logical or common sense inferences, but only where those inferences are grounded in or flow from the evidence (*R. v. Pastro*, 2021 BCCA 149). 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" (*Vilaroman*, at para. 38). If so, then the accused must be acquitted.

Charges and Legal Principles

[21] Mr. Smith and Mr. Bateman are each charged that between December 1, 2015 and February 1, 2017, they did:

Count 2 - by deceit, falsehood or other fraudulent means defraud 3095480 NS Ltd, doing business as Summit Hyundai, of money of a value exceeding \$5000, contrary to s. 380(1)(a) of the *Criminal Code*.

[22] To convict either Mr. Bateman or Mr. Smith of fraud pursuant to s. 380, the Crown must prove beyond a reasonable doubt that:

- He committed a prohibited act – an act of deceit, a falsehood or some other fraudulent means;
- The prohibited act caused a deprivation or risk of deprivation (risk of prejudice to the economic interests) to 3095480 NS Ltd; and,
- He knowingly undertook the act which constituted the deceit, falsehood or other fraudulent means, and knew that the act could result in deprivation or risk of deprivation.

(*R. v. Riesberry*, 2015 SCC 65; *R. v. Olan*, [1978] 2 S.C.R. 1175; *R. v. Zlatic*, [1993] 2 S.C.R. 29; and, *R. v. Theroux* [1993] 2 S.C.R. 5, para. 27 and 39)

[23] The Supreme Court of Canada has said that “other fraudulent means” has a broad meaning and encompasses all dishonest means that are not “in the nature of falsehood or a deceit” (*Olan*; *R. v. Riesberry*, para. 23-25). It can include “the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property.” (*Zlatic*, para. 31). The question under this category of fraud is whether the act can “properly be stigmatized as dishonest” (*Olan*; *Zlatic*, para. 32).

[24] The Crown does not have to prove the accused knew or believed their actions were dishonest, immoral or wrong, just that the act is objectively dishonest, meaning a reasonable person in the position of the accused would believe it to be dishonest (*Olan*, *Zlatic*, para. 32; *Theroux*, at paras. 17, 18 and 22 - 25).

[25] The Crown does have to prove that the accused was subjectively aware that he was engaging in conduct “that could cause deprivation in the sense of depriving another of property or putting that property at risk” (*Theroux*, para. 24). It is not enough to show a reasonable person would have foreseen the consequences of the act (*Theroux*, para. 21). However, the Crown does not have to prove the accused actually intended the consequences or were reckless about whether the consequences occurred (*Theroux*, para. 28; and, *Zlatic*, para. 27).

[26] The question is whether “the accused intentionally committed the prohibited act (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation)” (*Theroux*, at para. 24). As McLachlin, J., writing for the majority, said in *Zlatic*, “What is essential is not the formalities of profit or actual pecuniary loss, but that dishonest commercial practices which subject the pecuniary interest of others to deprivation or the risk of deprivation be visited with the criminal sanction” (para. 38).

[27] Of specific relevance in this case is whether the corporate entity can be a victim if Mr. Barrett, its operating mind, was complicit. In other words, can the act be characterized as dishonest if the operating mind of the company knew what was going on and agreed, so was not deceived? The answer seems to be ‘yes’; even if Mr. Barrett was ‘in on it’, the act could be dishonest in relation to the alleged corporate victim.

[28] First, as a general principle, fraud committed through ‘other fraudulent means’ does not require deception. As was stated by Justice Cromwell in *Reisberry*, “[f]raudulent conduct for the purposes of a fraud prosecution is not limited to deception, such as deception by misrepresentations of fact” (para. 23). Justice Cromwell also said, “... where the alleged fraudulent act is not in the nature of deceit or falsehood, such as a misrepresentation of fact, the causal link between the dishonest conduct and the deprivation may not depend on showing that the victim relied on or was induced to act by the fraudulent act” (para. 24).

[29] Further, specific to the facts in this case, the Crown is not required to prove that Mr. Barrett, as the operating mind of the complainant company, was deceived. This was made clear by Cartwright, J. in *R. v. Cox and Paton* ([1963] 2 C.C.C. 148 (SCC) at 161-2). In that case, the two accused argued they could not be convicted of fraud because the individual who was still in control of the company knew the transaction was not bona fide so was not deceived. That argument was rejected. In doing so, Cartwright, J. said:

If all the directors of a company should join in using its funds to purchase an asset which they knew to be worthless as part of a scheme to divert those funds to their own use they would, in my opinion, be guilty of s. 323(1). Even supposing it could be said that, the directors being "the mind of the company" and well knowing the true facts, the company was not deceived (a proposition which I should find it difficult to accept) I think it clear that in the supposed case the directors would have defrauded the company, if not by deceit or falsehood, by other fraudulent means'.

[30] Other cases have confirmed that directors of a corporation, including one that is a ‘one man company’, can be convicted of defrauding that company (*R. v. Marquardt*, (1972) 6 C.C.C. (2d) 372 (BCCA); *R. v. Sharma* 1999 BCCA 460; and, *R. v. Schafer*, 2000 SKQB 177). Implicit in these decisions is a conclusion that fraud on a corporation does not require that its operating mind be deceived.

[31] So, I agree with the Crown that a finding that Mr. Barrett was aware of the circumstances relied on to support the fraud charge, was in no way deceived and/or was a party to a fraud on the corporate victim would not relieve Mr. Bateman or Mr. Smith of liability as long as there is proof of objectively dishonest conduct that risked Summit’s financial interest and which they knew could risk Summit’s financial interest.

[32] The Crown submits that Mr. Smith is guilty either as a principal because he actually committed the prohibited act with the requisite knowledge/intent, or as a party. A person can be a party to an offence committed by another if he abets (encourages, instigates, or promotes) that person in committing the offence or does or omits to do anything for the purpose of aiding (assisting or helping) that person in committing the offence (s. 21(1)(a) & (b); *R. v. Briscoe*, 2010 SCC 13, at para. 14; and, *R. v. Greyeyes*, [1997] 2 S.C.R. 825, at para. 26.).

[33] There has been some disagreement about the specific requirements for party liability for fraud. In *R. v. Roach*, 192 C.C.C. (3d) 557, Borins, J.A., writing for the Court, concluded that recklessness does not satisfy the intent requirement under s. 21(1)(b) (para. 29). The Court reached this conclusion because of the language of that provision which requires that the party’s action or inaction must be “for the purpose of aiding another to commit” the offence (s. 21(1)(b); *Roach*, paras. 29 – 44).

[34] I accept that if Mr. Smith is not a principal, he could only be convicted as a party if he knew (including wilful blindness) or intended that his acts would aid Mr. Bateman (*R. v. F.W. Woolworth Co. Ltd.* (1974), 18 C.C.C. (2d) 23 at 34 (Ont. C.A.); *R. v. McDaid* (1974), 19 C.C.C. (2d) 572 (Ont. C.A.); and, *R. v. Dunlop*, [1979] 2 S.C.R. 881 at 111).

[35] The Crown does not have to prove that Mr. Smith knew of all the details of the crime but does have to prove he knew that a crime of a certain type was intended (*Briscoe*, at para. 17).

[36] In summary, to hold Mr. Smith responsible as a party to fraud, I must be persuaded that:

- Mr. Bateman committed a fraud;
- Mr. Smith knew or was wilfully blind that Mr. Bateman intended to commit fraud; and,
- Mr. Smith acted or failed to act with the intention to assist or encourage him in that offence.

Roach; Briscoe, at para. 14 and 16 – 18; *R. v. Greyeyes*, [1997] 2 S.C.R. 825, at para. 26; and, *R. v. Pickton*, 2010 SCC 32, at para. 76).

[37] Mr. Bateman and Mr. Smith are also charged that during this same period they did:

Count 1 - Have in their possession money (Canadian currency) of a value exceeding \$5000 knowing it was obtained by the commission in Canada of an offence punishable by Indictment contrary to s. 354(1) of the *Criminal Code*; and,

[38] To convict either or both of ‘possessing the proceeds of crime’, contrary to s. 354(1), the Crown would have to prove:

- They possessed Canadian currency;
- All or part was obtained by or derived directly or indirectly from the commission of an indictable offence; and
- They knew this, including recklessness and wilful blindness.

[39] Mr. Smith is further charged that:

Count 3 - on or about August 27, 2018 at or near Berwick Nova Scotia, he did without lawful authority and with intent to provoke a state of fear in Richard Bateman and Heather Young, threaten to use violence against Richard Bateman and Heather Young, both justice system participants, in order to impede the administration of justice, contrary to s. 423.1(1) of the *Criminal Code*.

[40] The required elements of ‘threatening a justice system participant’, contrary to s. 423(1)(b) and the more general offence of ‘uttering a threat’ were canvassed in *R. v. Armstrong* 2012 BCCA 248 (relying on *R. v. McCraw*, [1991] 3 S.C.R. 72;

and, *R. v. Clemente*, [1994] 2 S.C.R. 758; also see: *R. v. Gaete*, 2011 ONSC 2957).

[41] To convict Mr. Smith of that offence, the Crown must prove that:

- Mr. Smith, through words or deeds, threatened to do violence or other injury to Richard Bateman and/or Heather Young;
- His intent was to intimidate or instill fear in them;
- They were, at the time, justice system participants as defined in s. 2 (includes a potential witness); and,
- He had the required specific intent, meaning that the alleged threat was for the purpose of impeding either or both of them in the performance of their duty as justice system participants.

[42] The Crown is not required to prove that Richard Bateman and Ms. Young were in fact intimidated, that they took the gesture seriously or that Mr. Smith intended to act on his words. However, the Crown is required to prove that the gesture would be interpreted by a reasonable person as conveying a threat and that it was “meant to intimidate or to be taken seriously” (*R. v. McRae*, 2013 SCC 68, para. 17, citing *Clemente*, and para. 10 citing, *McCraw*)

Overview

[43] Before I turn to the evidence related to the transactions that are the subject of the charges, I will provide some general background. Because Darren and Richard Bateman have the same last name, to avoid confusion, I will generally use their first names.

[44] Ken Barrett started Summit Hyundai (Summit), the operating name for the complainant company, in 2005 and sold it in 2017. The dealership sold new Hyundais and all makes of used vehicles that it took in trade.

[45] Mr. Barrett had worked most of his life in the automobile industry, was owner or part owner of two dealerships before Summit and had experience in most aspects of the car industry.

[46] The complainant numbered company was owned by Mr. Barrett. In 2005, it purchased the assets of an existing Hyundai dealership and Mr. Barrett was granted

dealership rights from Hyundai Canada. There was a financial investor, but Mr. Barrett was the operating mind of the company and had operational control of the dealership.

[47] The dealership operated under conditions imposed by Hyundai Canada and the bank that provided its financing. Hyundai Canada, in consultation with Summit, set annual and monthly targets for new car sales. Summit had to accept and sell a certain number of new cars per month.

[48] Summit financed their vehicle inventory through two asset-backed revolving credit lines: a new car floor plan; and a used car floor plan. Essentially, the bank loaned Summit money to purchase inventory vehicles for resale. The new car financing was fully guaranteed by Hyundai Canada, however, the used car financing was not.

[49] There were terms associated with the financing. The bank required Summit to maintain a ratio of 1.1:1 of current assets (inventory, accounts receivable, cash) to liability. When a floor-plan vehicle was sold, the bank had to be repaid within a short period. If a vehicle was not in inventory and the bank had not been paid for the financed portion of it, the dealership was 'out of trust' with the bank. This would have dire consequences. Summit had to do regular inventory reports to the bank and the bank did regular audits to ensure that vehicles listed on the inventory were actually in Summit's inventory.

[50] A vehicle, new or used, could only stay on the respective floor plan for a specified period. This meant the financed portion of the vehicle had to be paid out within that time, whether it had been sold or not. If the vehicle was sold, the bank would simply be paid from the money received on the sale. If the vehicle was not sold during the period, the bank would be paid from the dealership's own funds. The evidence was not entirely clear on the details, but upon expiry of the specified time period (most witnesses referred to six months for used cars), Summit would either have to pay out the entire amount for the vehicle or start paying down the financed portion of that vehicle in a series of monthly payments called 'curtailments'. Each curtailment represented a percentage of the financed amount with the result that the entire loan for that vehicle would eventually be repaid.

[51] The used car financing plan had additional parameters: vehicles could only be put on the floor plan if they were within a specified age and/or mileage; and, the bank would only finance the lesser of the amount paid for the vehicle or the

Canada Black Book value (a valuation guide for vehicles created by an independent third party and generally accepted in the industry for wholesale value). Any brand or type of automobile could be put on the floor plan, but special permission might have to be obtained for other types of vehicles, such as a motorcycle. Vehicles that were too old or other assets, such as boats or land, might be taken in trade but could not be financed through the used car floor plan. Their purchase would come from the dealership's own funds.

[52] Generally, good quality vehicles taken on trade would be accepted into inventory and sold in the retail market. Poor quality vehicles, those that were old or had been damaged, would be sold in the wholesale market at auction. A vehicle that was intended for retail would be reconditioned which would involve detailing and often minor repairs and parts. The amount paid (credited to the customer on the trade) plus the value of these parts and services would be reflected in the dealership's books as the cost of the vehicle. To make a profit, the vehicle would have to be sold for more than that total cost. If it was sold for less, Summit's books would show a real loss on the vehicle.

[53] Mr. Barrett testified that between 2005 and 2010, the dealership was profitable and grew. The partner who had invested in the original purchase was paid out and Mr. Barrett became the sole owner.

[54] Mr. Barrett had other businesses and interests and testified that he left the day-to-day running of the dealership to his managers. He would generally go to the dealership every day to check-in but was not involved in the minutiae. He was paid monthly from that business and others.

[55] The people in managerial positions changed but, in general, the dealership had: a controller (responsible for the financial and administrative matters); a controller's assistant; a fixed operations manager (responsible for parts and service); a sales manager; a finance and insurance manager; sales staff; repair technicians; and, car detailing staff.

[56] The managers were generally paid a salary plus performance bonus which could be based on sales, volume or average profit per deal.

[57] The controller's responsibilities included: making sure the financial statements were done at the end of the month, providing these to Mr. Barrett and the sales manager, and submitting them to Hyundai Canada; processing purchases

of vehicles; and, taking care of the floor plans, including deciding whether a used car was eligible for the floor plan and making sure the bank was paid out when a vehicle was sold or the curtailment was up.

[58] The controller until September of 2015 was Wendy Rafuse. Rebecca Shaw had worked with Summit starting in 2010 as Ms. Rafuse's assistant. She took over the position of controller when Ms. Rafuse left.

[59] The sales manager would be responsible for deciding how much to sell a new or used car for and how much to offer for a trade. Either the sales manager, the finance and insurance manager or the controller would put a new or newly acquired used car into the computer inventory. The sales manager would be responsible for any registrations that were required at the Registry of Motor Vehicles (RMV).

[60] In 2010, Mr. Barrett hired Orlando Smith (referred to as 'Lando') as general sales manager. When he was hired, Mr. Smith was operating a used car lot with a partner and both came to work for Summit.

[61] According to Mr. Barrett, when Mr. Smith was hired, he insisted on a condition that he be permitted to run the sales department the way he wanted to, so he did, with little to no involvement by Mr. Barrett. Mr. Barrett testified he agreed to that because Mr. Smith had very high sales when he had worked for a competing dealership and because Mr. Barrett trusted Mr. Smith's partner who recommended him.

[62] Mr. Barrett testified that Mr. Smith was responsible for running the sales side of the dealership. His duties included overseeing the selling of new and used vehicles sales, overseeing the finance and insurance office, advertising, inventory control for new and used cars, and ordering new cars from Hyundai.

[63] Mr. Smith set the value for vehicles taken on trade and the price for sale. Mr. Barrett testified that from 2010 to 2017 when the dealership was sold, Mr. Barrett did not personally ever negotiate any deals with customers or value their vehicles for trade. Ms. Rafuse, who was there until 2015, confirmed that the trade-in value of a used car would be set by Mr. Smith, as the sales manager, and the salesperson who took in the vehicle. To her knowledge, Mr. Barrett did not have any involvement in that.

[64] Mr. Smith's compensation was based, at least in part, on a percentage of new and used car sales.

[65] Mr. Barrett testified that Mr. Smith had an employment contract (Ex. 3). The document in evidence was signed by Mr. Barrett but not by Mr. Smith. Mr. Barrett testified there was a signed copy in existence and the terms in the document corresponded with his recollection of the agreement between he and Mr. Smith. Mr. Barrett testified that when Mr. Smith was hired, he said he wanted to become a part owner in the dealership. Exhibit 3 includes two hand-written additions. The first says that effective January 1, 2011, Mr. Smith had the opportunity to purchase shares in Summit, based on performance and Hyundai's approval. The second says that a year-end bonus would be given per vehicle sold and subject to performance.

[66] Hyundai Canada required owners to have the title of General Manager. So, to make it possible for Mr. Smith to become a part owner, about a year after he was hired, he was given that title. According to Mr. Barrett, that was essentially a change in title only and his responsibilities did not change.

[67] In approximately 2012, Mr. Smith was given the opportunity to purchase shares in the complainant company. He and Mr. Barrett agreed to freeze the valuation of the company at 2.5 million and Mr. Smith paid \$1.00 for 25% of any value above that amount. So, if the company was subsequently sold for more, Mr. Barrett would take the first 2.5 million and Mr. Smith would get 25% of anything above that. After that, Mr. Smith was paid a dividend rather than commission. He and Mr. Barrett were equally paid – Mr. Barrett as the investor and Mr. Smith as the operator. They each got a base amount and equally shared performance compensation if targets were met.

The Used Car Problem

[68] Mr. Barrett testified that for a couple of years after Mr. Smith joined, Summit continued to do well, especially on the new car side. However, he started to notice a trend that Summit was giving new car customers too much credit for their trade-in. This incentivised customers to buy the new car but resulted in Summit having used cars that were over-valued on the books and could not be sold without recording a loss. As a result, the used car inventory grew. According to Mr. Barrett, before Mr. Smith joined Summit, the dealership would have an inventory of about 25 to 35 used cars. After he joined, they were selling more

used cars per month and should have had an inventory of around 50. However, the inventory number began to creep up, eventually growing to about 200 vehicles.

[69] According to Mr. Barrett, in apparent acknowledgement of the used car problem, in late 2010, Mr. Smith brought in Darren Bateman to deal with it. Mr. Barrett testified that Mr. Smith knew Darren and arranged for him to join Summit. Mr. Barrett understood that Darren was a used car specialist, specifically a wholesale specialist. He believed Darren could reduce their losses by doing deals with other dealers and avoiding auction fees. Darren testified that it was Mr. Barrett who invited him to join the company at the same time he hired Mr. Smith and his partner. He testified that he initially worked there part-time – setting his own hours and brought in his own inventory. His job was to help move used cars in the wholesale market. In approximately 2011, his work with Summit became full-time, and he was paid \$4000 per month on contract. He testified that he negotiated that rate with Mr. Barrett who also signed his cheques. Mr. Barrett acknowledged that Darren was paid on contract and said he believed it was a good investment if it solved the used car problem.

[70] Darren operated through a company, ‘Justincredible Motors’. The company was owned by his son, Justin, but operated by Darren. It was set up after he began doing business with Summit. The company had no employees and between December 1, 2015 and February 1, 2017, more than half of the deposits into Justincredible were from Summit (Ex. 26, p. 6).

[71] Darren had been in the car business for about 35 years. He described himself as a “broker” for used cars, rather than a dealer. He testified that as a broker, he would find deals and broker them between dealers, whereas a dealer would have a retail lot with vehicles for sale. He did not hold a dealer’s licence. As such, he was not recognized as a ‘dealer’ for RMV purposes, and his activity was not supervised by the regulator to ensure compliance with requirements for licenced dealers. In Nova Scotia, a dealer’s licence is required if you reassign (sell or trade) more than four vehicles in a 12-month period (evidence of Tony Colwell, Nova Scotia Department of Transportation).

[72] Summit also operated a used car lot at a separate location on land owned by Mr. Barrett through another company. It operated as a separate company and, over time used various names, including Apex Motors. Darren initially had an office at that site. When the site closed, he moved up to Summit.

[73] Darren was responsible for managing the wholesale side of the used car inventory. He dealt with other dealers and auctions to get rid of used vehicles that could not be sold on the retail market, brought in new vehicles when necessary and generally managed the used car lot. He was not responsible for the retail side of the used car business. He did not set the valuation for vehicles accepted on trade or set the price for used vehicles sold in the retail market, however, he provided advice on both.

[74] Summit had a fairly large used car floor-plan, and for a time were well within the limit and had good cash flow. So, they could absorb the losses associated with selling the used cars for less than the 'cost' or pay it out when it came up for curtailment. Mr. Barrett testified that if a floor-planned vehicle could not be sold in the retail market within the curtailment period, it would be sold, still at a loss, in the wholesale market by selling to another dealer or sending the vehicle to auction.

[75] Mr. Barrett, Darren, Ms. Rafuse and Ms. Shaw all agreed there was a used car inventory problem. Mr. Barrett testified that he became very concerned about it and it became the subject of regular discussions and conflict with Mr. Smith. Mr. Barrett testified that Mr. Smith's response to his concerns was essentially to brush him off, saying 'don't worry about it' and blaming Darren. When he discussed the problem with Darren, Darren would tell him to talk to Mr. Smith since he was the one deciding the value of a trade-in vehicle. Darren testified he would tell Mr. Smith what value to offer for a trade and then after the deal was done, he would learn that more had been given. He said he would also tell Mr. Barrett that it was impossible to sell the used cars for the inflated cost but Mr. Barrett refused to sell them at a loss.

[76] The practice of overpaying for trades resulted and the resulting ballooning used car inventory created multiple problems for Summit.

[77] Only the Black Book value of the used car could be financed through the floorplan, so if Summit paid more, the difference was carried by Summit. If the vehicle was sold for less than the cost reflected in the books, Summit showed what Mr. Barrett called a "real" loss on the vehicle – a loss of "real money". Mr. Barrett testified that Mr. Smith did not want to do that. Darren testified that Mr. Barrett did not want to do that. The result was that the over-valued vehicles remained on the lot. The vehicles continued to depreciate as they sat on the lot, so the longer they were held, the less they could be sold for, exacerbating the problem.

[78] These over-valued vehicles were reflected in Summit's books as an asset which may have helped with the asset to liability ratio required by the bank. However, if they were on the floorplan, they created another problem – when the curtailment period came due, the bank would have to be paid out. If the vehicle wasn't sold within that period, Summit would have to pay the bank the entire financed amount out of its own funds.

[79] Ms. Rafuse testified that at year-end in 2014, she became concerned with cashflow because she saw that a lot of money was tied up in used car inventory. She testified that she brought her concerns to everyone's attention and started doing a report, a curtailment list, so they could see what was in inventory and how long it had been there (Ex. 14). This list was provided to Mr. Barrett, Mr. Smith and Darren and both Mr. Barrett and Darren recalled receiving the reports. The report provided monthly information about the cycling of the inventory, the number of days a vehicle had been in inventory, and when the curtailment would be due.

[80] Ms. Rafuse, Mr. Barrett and Darren all essentially agreed that the curtailment list would be used to identify which vehicles needed to be sold first because the curtailment was coming due. Darren testified that when he was at the Apex lot, Mr. Barret would bring it down and they would go over the list. Darren would arrange bulk sales of cars – five or ten at a time - to another dealer, directly or through Justincredible. Darren testified that he did not set the price for these vehicles himself. Mr. Barret or Mr. Smith would set the price they wanted, and he would have to go back to them if a dealer made a lower offer.

[81] Ms. Rafuse testified that between year-end 2014 and when she left the business in September of 2015, she did not see much of a change in the used car inventory problem. The dealership had too much used car inventory, it was not being sold and there was too large a variance between value of inventory and liabilities. The report for May of 2015 showed a variance of \$685,861.54 between the value of the inventory and the liabilities.

Car Swapping

[82] So, every month, Summit would have a new batch of vehicles that had reached their curtailment deadline and had to be paid out. Summit had overpaid for them, so they couldn't be sold except at a loss and, in the last year or so of the business, Summit did not have the cash flow to pay out the curtailments. A

method of trying to address this was ‘car swapping’. Mr. Barrett and Darren described it. If a floor-plan vehicle was sold before its curtailment date, the bank could be paid. The same result could be obtained without a real sale by essentially swapping cars and exchanging cheques. A used car that was coming up for curtailment could be ‘sold’ to a dealer and the bank paid out and then a replacement used car of equal value could be ‘purchased’ from the same dealer and put on Summit’s floor plan, restarting the curtailment clock.

[83] Summit’s problem was bigger than one or two cars, but batches of cars that were coming due for curtailment could also be swapped with batches of cars that could be put on the floor plan. So, Summit and Justincredible started swapping batches of used cars. However, Summit’s cars were over-valued on their books. If the actual value of the vehicles was used in the transaction, Summit incurred and had to show on the books an actual loss on the vehicle they were ‘selling’. Losing large amounts of money continually over time would have put the company below the threshold that the bank required to maintain financing. The risk was that the bank would pull the floorplan and demand repayment of the entire amount – about \$4.6 million. However, this could be avoided if Summit and Justincredible swapped overvalued cars for similarly overvalued cars. For example, Summit would ‘sell’ Justincredible a batch of cars worth \$70,000 and buy a batch of cars worth \$70,000, but the transaction would be recorded as a ‘sale’ of \$100,000 worth of vehicles and a purchase of \$100,000 worth of vehicles.

[84] In theory, Darren, through Justincredible, would buy batches of vehicles for the over-invested amount and then ‘sell’ Summit a batch of vehicles that were worth the same, for the same elevated value.

[85] This benefitted Summit: it did not have to show a ‘real’ loss by selling the overvalued vehicles in the retail or wholesale market; it could maintain the inflated values on its books which helped keep its asset to liability ratio high enough to maintain financing; and, it could restart the curtailment clock which delayed payment to the bank and gave Summit more time to try to sell the over-valued cars, hopefully at less of a loss.

[86] The car-swapping didn’t fully address Summit’s problems. For instance, it could still only floorplan the newly acquired cars at the Black Book value, so Summit still had to carry the difference, but this cost Summit much less than paying out the entire curtailment.

[87] There may be legitimate reasons for dealers to swap used cars. For example, moving a car that isn't selling to a different lot exposes it to a new market and allows dealers to 'freshen' their inventory. That was not the purpose of the practice between Summit and Justincredible and I am satisfied that their large-scale car swapping was known and condoned by Mr. Barrett, Darren and Mr. Smith. When the practice involved equally over-valued vehicles, it did not result in a profit to either Summit or Justincredible.

[88] The practice of swapping over valued vehicles to avoid curtailments or artificially increase assets as a potential fraud on the bank is not the subject of the charges before me. However, many of the transactions and vehicles that are the substance of the fraud charge are related either directly or indirectly to car swapping. Further, an important part of the Crown theory is that these swaps, that were supposed to be value-neutral to Summit and Justincredible, benefitted Justincredible.

The Sale of the Dealership

[89] Mr. Barrett testified that his relationship with Darren was cordial, casual and amicable, but the used car problem did not go away. It caused him to have conflict with Mr. Smith and almost daily conversations with Darren about his frustration over the used car valuations.

[90] As a result, Mr. Barrett decided to look at selling the dealership. In 2015, he had a serious potential buyer who made a written offer in September of 2015 (Ex. 4). That deal did not go through. Not long after, Mr. Smith raised the idea of purchasing the business and they started working on that.

[91] Mr. Smith's efforts, with Darren's assistance, to come up with the money to purchase the business and the resulting negotiations with Mr. Barrett are intertwined with the fraud allegations. The Crown argues, in part, that Mr. Smith was motivated to devalue the business so that he could get Mr. Barrett to sell it for less. The Defence argues that some of the vehicles that are the subject of the alleged fraud were part of deals that were connected to Mr. Smith's effort to purchase the dealership.

[92] These arguments require me to review the evidence relating to Mr. Smith's attempt to purchase the dealership.

[93] Mr. Barrett testified that, initially, they discussed a purchase price of around 3.7 million for the shares for the business only. He insisted it had to be a share purchase because Mr. Smith had created a financial mess which would become Mr. Smith's problem if he purchased the shares.

[94] Mr. Barrett testified that he understood that Mr. Smith could come up with the money to buy – he had been earning well for a few years and Mr. Smith told him that Darren had wealthy friends who would be investors.

[95] The initial agreement was verbal with notes. Mr. Barrett testified that for a little over a year, he thought Mr. Smith was going to purchase the business. However, ultimately Mr. Smith presented a written agreement from his lawyer that was substantially less than what they had agreed on.

[96] He said that, in the interim he had interest from other potential buyers but would tell them he wouldn't negotiate with them until Mr. Smith had a chance to buy.

[97] During that year, the business continued in a downward spiral and the used car problem continued. Mr. Barrett looked at the monthly financial statements and got regular or semi-regular bank or cash reports and or bank statements from their controller, so was aware that used car inventory was creeping up and cash flow was dwindling. However, he continued to let Mr. Smith run the operation.

[98] He was asked why he did not step in between 2010 and 2017. He said for the first two years, he thought they could work their way through it. For the next two years, Mr. Smith was a partner so it would have been more difficult to get rid of him. In the last two years, he believed Mr. Smith was going to buy the dealership so it didn't make sense to get rid of him. Essentially, he stopped worrying about the business because he believed that Mr. Smith would be buying the shares.

[99] During the last year, Mr. Barrett was having almost daily conversations with Mr. Smith and sometimes with Darren about the progress of their offer. Mr. Smith also continued to negotiate the purchase price for the shares in the business. Mr. Smith's offer was reduced to about 2.7 million and then to under 2 million.

[100] Eventually, Mr. Barrett insisted on a deposit from Mr. Smith. They agreed on \$100,000 (the actual amount provided in September or October of 2016, was \$98,600). Some of this money was provided by Darren.

[101] Mr. Barrett testified that in December of 2016, Mr. Smith presented an offer through his lawyer of \$1.00 to purchase the shares in the company. As a result, Mr. Barrett contacted a potential buyer who had previously shown interest. He reached an agreement with that buyer which ended up being 8 million dollars, 3.2 for the operating company and 4.8 for the land and building. The deal was finalized sometime in January of 2017, and everything was finalized on March 21st, 2017.

[102] Mr. Barrett testified that in early January of 2017, he told Mr. Smith that he was selling the business to someone else. He recorded part of the conversation between him, Mr. Smith and Darren (Ex. 7; transcript in aid, Ex. 36). During that meeting, Mr. Smith was upset and suggested he would call Hyundai Canada, the Bank and RMV to report various improper practices that Mr. Barrett had been engaged in. Mr. Barrett testified he was concerned because any one of those entities could close the dealership and make it less attractive to the buyer. Mr. Smith and Mr. Barret asked for return of their deposit. He agreed to pay it back and suspended Mr. Smith with pay from January to the time of the sale. He testified that he asked Darren to come back to help straighten out the used vehicles, but he didn't return. Darren testified he was told to leave and stay away.

[103] Mr. Barrett knew the dealership was 'out of trust' with the bank, meaning they owed the bank for vehicles they no longer had so, subsequently, Mr. Barrett contacted the bank himself and told them there were issues. The bank sent in auditors, took over the business, and froze accounts. He was allowed to continue to operate under a forbearance agreement but had to increase his personal guarantee to 100% and inject personal money to run the business from January until it sold. Darren testified that Mr. Barrett was adamant that he not come to the dealership while the auditors were there.

[104] The matter was eventually reported to police by Mr. Barrett. According to him, Summit's outstanding debts exceeded the sale price by \$400,000. He had to try to generate funds to pay his creditors. The used vehicles inventory was not part of the sale and they were all he had left to try to satisfy the shortfall. So, he tried to locate all used vehicles that were supposed to be in Summit's inventory with the plan to sell them to make up the shortfall. He discovered that vehicles that were supposed to be in inventory were not. Eventually, his bank did an investigation and charged him for it. He had insurance for professional fees that would cover that expenditure but was told the claim could not move forward unless the matter was reported to police. So, he reported it to police.

Industry Practices and Documents

[105] To understand the specific allegations, it is necessary to understand a bit about the business of new and used car sales. Often, documents, especially those created close in time to the events are reliable objective evidence of the transactions they purport to record, and the absence of a document can be reliable evidence of the absence of a transaction. In this case, unfortunately, that is not always the case. During the trial, I heard testimony from many witnesses who are experienced in various facets of the car selling business (Jack MacDonald, Roy Meech, John Pothier, Shane MacDougal, Richard Bateman, and Darren Bateman). That evidence established that most dealers/brokers view the paperwork as secondary to the ‘deal’. As a result:

- Agreements are sometimes made by handshake and payment is often not immediate;
- Those who regularly do business with each other use IOUs or ‘set offs’ that are frequently resolved through trades of vehicles rather than cash payments. These ‘balance sheets’ that record the credits and debits of deals can remain open for months or years;
- Bills of Sale are sometimes viewed as a contract, agreement to sell or offer to purchase rather than a recording of a sale that has taken place. This can occur when a dealer ‘pre-sells’ a vehicle, meaning a dealer finds a buyer for a vehicle they know about but don’t yet own. Once the dealer has what he believes is an agreement to purchase, the dealer create a bill of sale between them and the purchaser, then arranges for purchase of the vehicle from the dealer who still owns it. Title is transferred, sometimes directly to the intended purchaser and sometimes through the dealer who arranged the purchase. This often makes it appear that a vehicle is sold by a dealer before the dealer has purchased it and means that a Bill of Sale might be exchanged with another dealer who is a potential buyer of the same vehicle;
- Bills of Sale, when they do record a past sale, are not infrequently prepared some time after the transaction;
- Bills of Sale, when they are between dealers, are frequently unsigned;
- Cars are frequently moved around between brokers or dealers without documentation of the transfer until the vehicle gets to a ‘civilian’ buyer;

- Dealers and brokers often don't register vehicles in their names - the vehicles simply pass through them, with the only documentary record being a bill of sale;
- Vehicles are regularly placed with another dealer on 'consignment'. Essentially, a vehicle would be placed with another dealer without payment and without a change in title. If the vehicle is sold, the consignee pays the consignor what they wanted for the vehicle and keeps any profit. If the vehicle doesn't sell, it goes back to the consignor; and,
- Information about a vehicle, including its VIN etc., is regularly provided to a dealer/broker who is a potential buyer before purchasing the vehicle. It is apparently common in the industry for dealers to contact each other about potential sales/purchases. If another dealer might be interested in a vehicle, the seller would send the potential purchaser information, including the VIN, to check out a vehicle.

[106] Some of these practices are either condoned or explicitly permitted by the RMV. In his position with the Nova Scotia Department of Transportation, Mr. Colwell deals with RMV documents. He interpreted some of the documents at issue in the trial using examples from Ex. 1:

- 'Client Ownership History' – a print screen from the RMV data base showing the history of a vehicle identification number (VIN). Every time a transaction relating to a specific VIN is registered with RMV it shows up in the history (p. 7);
- 'Application for Ownership, Permit and Plates' (Form 2) – a 'multiple use' form used by Access Nova Scotia. The Applicant fills out their information, indicates what is requested, signs and dates it (p. 12);
- Certificate of Registration – a Nova Scotia ownership paper for a vehicle. The front includes the owner's name, vehicle details and date of issuance. The back is used to reassign (selling or otherwise) a vehicle. Part 1 is used by private individuals. It requires seller's signature, date of sale and name of purchaser. Part 2 is for licensed dealers only. It allows a licenced dealer to reassign (selling or otherwise) a vehicle to another dealer or another person without putting it in their name first. Part 3 is a continuation of Part 1,

where the purchaser/applicant signs to request the vehicle to be registered to the purchaser (pp. 15 & 16);

- Dealer Transfer Form (AKA 'yellow form') – printed on yellow paper - allows licensed dealers to transfer ownership of a vehicle without registering the vehicle in their name. This document is used instead of Part 2 on the back of the Certificate of Registration. It requires the dealer to say why they are using this form. It could be because the vehicle has been transferred between dealers numerous times so the space in Part 2 is filled up or because the original certificate of registration is not available, perhaps because it has been lost (p. 18);
- Certification for Court purposes – RMV can certify information from its database (p. 33);
- Interprovincial Record Exchange – when a vehicle is transferred from outside Nova Scotia, RMV obtains information about the vehicle from the other province (p. 45);
- Certificate of Origin – comes from the manufacturer and is used for a brand-new vehicle that has never been registered before (p. 74);
- New Vehicle Information Statement (NVIS) – comes from the manufacturer and is used, together with a Form 2 to obtain a certificate of registration for vehicles that have never been registered (p. 117);
- Dealer Notice of Sale Form – used by licenced dealers to track the vehicles they've sold. They are required to regularly report all vehicles sold to RMV so use this form and then file it with RMV (p. 121);
- Vehicle Import Form (Form 1) – used when a vehicle is imported into Canada to show it crossed the border properly (p. 183); and,
- Statement of Insurance – required in order to obtain or renew a licence plate or register one to a new vehicle (p. 186);

[107] Dealers can use Part 2 and the Dealer Transfer form to transfer ownership multiple times without the vehicle being registered in any of their names. The form does not have to be sent to RMV until the end purchaser wishes to register

the vehicle in their name. RMV vehicle history would not show the ‘middleman’ dealers, but their involvement would be recorded in Section 2 and a bill of sale.

[108] Where the ‘yellow form’ is used, if the dealer reports that this form is being used because the certificate is ‘lost’, the vehicle can be registered without having the permit or other verification.

[109] The practice of putting vehicles on another dealer’s lot on consignment leads to particularly problematic document trails. If the consignee sells the vehicle, a bill of sale is created between the consignee and the purchaser and title is transferred to the purchaser (the vehicle’s registration documents often accompany the vehicle to the consignee). After the sale, the consignee pays out the consignor and a bill of sale is usually created for that transaction. However, the bill of sale to the customer would show an earlier date than the bill of sale between the consignor and the consignee. As such, it would appear, just from the bills of sale, that the consignee sold a vehicle he didn’t own. Tracking the vehicle is further complicated by the fact that the consignee’s role in the transaction may not show up in the vehicle history. It would be recorded only on the bill of sale and the dealer transfer portion of the Certificate of Ownership.

[110] The result of all of this is that the paperwork is frequently not a reliable record of what happened or when it happened.

Specific Evidence

Car-Swapping Between Summit and Justincredible

[111] There was a great deal of evidence concerning the specifics of the various car-swapping deals.

[112] During the last year before Summit’s sale, there were a series of transactions between Summit and Justincredible where batches of cars were swapped and cheques totalling over \$1,000,000 were exchanged. Mr. Barrett estimated that the swapping of over-valued vehicles eventually resulted in Summit’s books showing inventory worth more than \$1 million dollars above the actual/real value of the inventory – the books showed \$2.8 million dollar inventory for used cars that were worth less than \$ 1.8 million.

[113] I accept that the origin of Summit’s used car problem was Mr. Smith, but it was exacerbated by Mr. Barrett. Mr. Barrett, Darren, Ms. Shaw and Ms. Rafuse

agree that Mr. Smith decided how much to offer when taking a vehicle on trade. Presumably to incentivise customers to purchase new cars and increase his sales, Mr. Smith offered too much for trades. Mr. Barrett, for a variety of reasons, would not sell the trades at a loss. The problem continued because of the attitudes and action or inaction of Mr. Smith and Mr. Barrett. I accept that this was not something that Darren had control over. I accept his evidence that he offered advice to Mr. Smith on the value of vehicles take on trade or for resale, but he did not set the price and that he told Mr. Barrett and Mr. Smith that the over-valued used cars could not be sold without a loss, but they would not permit that.

[114] I accept that Mr. Barrett and Darren discussed the car swapping scheme. However, since Summit and Mr. Barrett had the most to gain, I believe he was the driving force behind it. Mr. Barrett was fully aware of the benefits to Summit – delaying paying the bank and maintaining the ‘book value’ of assets – which were all benefits to Summit and Mr. Barrett, not to Darren.

[115] I accept Mr. Barrett’s testimony, that the original scheme was supposed to be a financial “wash” for Summit and Justincredible – neither was supposed to be financially advantaged or disadvantaged.

[116] The Crown submits these deals were lopsided in favour of Justincredible and that Darren and Mr. Smith did that knowingly and intentionally. The Defence submits they weren’t lopsided and if they were, it was not orchestrated by Darren and Mr. Smith, since Mr. Barrett signed off on all the deals.

Were the Deals Lopsided?

[117] Roberta Sullivan, a forensic accountant and certified fraud examiner, was qualified as an expert to:

- give opinion evidence based on the auditing, analysis, interpretation and summarization of financial data; and
- opinion evidence on complex financial and business-related issues, including the tracing of monetary funds and their use.

(Ex. 24; CV – Ex. 25)

[118] Her two Reports and an addendum were entered on consent (Ex. 26, 27 and 28). After the initial report (Ex. 26), she was provided with correspondence from Darren Bateman, through his counsel, and, in response, prepared a second report,

dated December 24, 2019 (Ex. 27). Then, she prepared an addendum, dated April 15, 2021, which amended the initial report by incorporating analysis of documents that were subsequently obtained (Ex. 28). A USB containing her supporting documents and a flipchart she used during her testimony were also entered into evidence (Ex. 29 and 30).

[119] She described her initial mandate as being to determine if Summit had paid for the vehicles that Mr. Barrett claimed were missing, quantify the loss to Summit and benefit to Justincredible, and determine where the funds received by Justincredible for the vehicles went. To do that she examined bank statements and source documents relating to bank accounts and financial and ownership documents related to the vehicles.

[120] Her mandate for the second report was to review and respond specifically to the information provided by Darren Bateman and his counsel in their correspondence.

[121] The Defence conceded her qualifications but identified some aspects of her qualifications, mandate and methodology that they argue weaken her opinion. Many of the criticisms do not relate to the ‘car swapping’ and ‘cheque swapping’, so will be addressed later. Of general note is the fact that she was not certified as a Fraud Examiner until after she filed her Reports.

[122] Ms. Sullivan found that from December 1, 2015 to February 1, 2017, Justincredible received payments from Summit, totaling \$2,971,634 and made payments to Summit, totaling \$3,352.664 (Ex. 26, pp. 5 & 6).

[123] Her focus was on the transactions that related to the 24 vehicles in question and the cheques that were exchanged from December 7, 2015 to December 23, 2016.

[124] To quantify any losses and gains associated with the transactions, she had to assign values to the vehicles that were part of each transaction. Her expertise is in accounting, not car valuation. However, to do so she used the Canadian Black Book values, and I am satisfied that where there was a range of available values, she used the value that would give the benefit to the accused.

[125] Ms. Sullivan concluded that the car swapping/cheque exchanges between Summit and Justincredible were not ‘a wash’ or value neutral. She reviewed 16 cheques from Summit to Justincredible, dated from December 7, 2015 to

December 23, 2016, and 16 cheques from Justincredible to Summit, dated from February 29, 2016 to December 23, 2016. The cheques to Justincredible, pre-tax, totalled \$1,181,800. The cheques to Summit, pre-tax, totalled \$1,335,600.

[126] Justincredible paid more to Summit than Summit paid to Justincredible. However, the problem was the values of the cars that were swapped. In her opinion, there was a significant difference in the value of the vehicles. Summit paid \$1,181,800 for vehicles that were worth approximately \$613,303; whereas Justincredible paid \$1,335,600 for vehicles that were worth approximately \$1,213,362 (Ex. 27, p. 6).

[127] In the result, both Summit and Justincredible overpaid for the vehicles. However, Summit overpaid by approximately \$568,497.00 and Justincredible overpaid by between \$8,228.00 and \$128,000. The range is because there were some vehicles purchased by Justincredible from Summit for which Ms. Sullivan could not obtain Black Book values. The lower amount is obtained when Ms. Sullivan did not include those vehicles in her assessment and the higher is obtained if the vehicles are included but assessed as having a value of \$0.00 (testimony of Ms. Sullivan; Ex. 27, p. 6).

[128] I am satisfied that the value of the vehicles Justincredible obtained was significantly greater than the value of the vehicles that Summit obtained, that the amount by which Summit overpaid for the vehicles was significantly higher than the amount by which Justincredible overpaid and, in the result, the deals favoured Justincredible.

[129] Further, the evidence suggested that Justincredible benefitted even on specific vehicles by re-purchasing vehicles it had previously sold to Summit at significantly reduced cost. One example noted by the Crown is a Ford Taurus sold by Justincredible to Summit for \$15,000, then re-purchased 76 days later for \$8000 (Ex. 27, Schedule 1, line 5). I accept Ms. Sullivan's evidence that Summit obtained no benefit from this deal. The vehicle was not yet up for curtailment and Summit realized an immediate loss of \$8,571 on the deal.

Who Approved the Deals?

[130] The Crown argues that these deals were between Darren, on behalf of Justincredible and Mr. Smith, on behalf of Summit. The Defence argues that Mr. Barrett was fully involved and approved the deals on behalf of Summit. More

specifically, that he knew what vehicles were being traded, knew their value and knew that, for some vehicles, Justincredible was providing VINs to be used as assets for Summit's books and/or floorplan but would never be owned by Summit or physically transferred to Summit. Counsel for Mr. Smith argues that he had nothing to do with these deals except co-sign some cheques. Counsel for Darren Bateman argues that he did nothing without the approval of Mr. Barrett and/or Mr. Smith.

[131] Mr. Barrett knew and approved, in general, that cars were being swapped at grossly inflated values.

[132] Mr. Barrett testified that Mr. Smith and Darren were completely responsible for making up the deals and he was not involved in deciding which vehicles Summit was getting or how much was paid for them. He acknowledged he was aware that they were doing the deals, was aware the values were inflated and signed some of the cheques but said he was not aware of the specific vehicles that were involved.

[133] I find that Mr. Barrett did know the specific vehicles that Summit was trading to Justincredible. The curtailment list (Ex. 14) that was prepared by the controller went to Mr. Smith, Darren and Mr. Barrett. It identified which vehicles were coming up for curtailment and I accept that it was used to determine which vehicles had to be sold. I believe that, armed with that information, Mr. Barrett set the priorities for sale of Summit's vehicles. I accept Darren's testimony that Mr. Barrett would bring the list to him, and they would go over the cars that needed to be sold. I also accept Darren's testimony that he could not sell vehicles without getting a price from Mr. Smith and/or Mr. Barrett.

[134] I also find that Mr. Barrett knew both the actual value and the value recorded on Summit's books for the vehicles that Summit was trading to Justincredible. The 'book' value of the vehicles was on the curtailment list and, given Mr. Barrett's experience in the industry, I believe he would have been generally aware of their real value.

[135] The Defence submits that Mr. Barrett was also aware of the specific vehicles that Summit was receiving from Justincredible and their value and knew that, in some instances he was not getting a 'real' vehicle.

[136] I find that Mr. Barrett knew some of the vehicles and knew that some were not 'real'. However, I do not accept that Mr. Barrett knew every specific vehicle that Summit was receiving from Justincredible.

[137] Mr. Barrett signed several cheques for the car swapping deals (e.g. Ex. 1A, pp. 1, 28, 36, & 129; and Ex. 1B, pp. 173 & 300). However, I accept his evidence (subject to comments later about some specific vehicles) that this was based on a superficial knowledge of the deals and an initial belief that, in general, the deals would be equal.

[138] Mr. Barrett testified that he would be presented with a cheque to sign for the purchases and that he never really knew what specific vehicles Summit was buying until after the deal was done. He testified that when he was presented with a cheque to sign, he would have the cheque, the stub ("skirt" attached to the cheque) and sometimes a bill of sale. For some of the cheques in evidence, the skirt also includes a hand-written list of the year and make/model of the vehicles (e.g. Ex. 1, Tab 1, p. 2). Mr. Barrett acknowledged that he wrote this information on the documents. If he made these notes at the time the cheques were signed, it would be clear evidence that he did know the specific vehicles that Summit was purchasing. However, he testified that these notes were not made until after the exchanges, when he was trying to reconcile the transactions and find the vehicles. I accept that testimony. It is supported by the fact that some of the cheques signed by Ms. Shaw and Mr. Smith also have these same notes. These cheques were not given to Mr. Barrett at the time, so the presence of his notes on these cheques supports his testimony that he added the notes later.

[139] Mr. Barrett's testimony about how cheques were presented to him is also consistent with the general practice in the business and his lack of involvement in the day-to-day running of the business which was described by him, Ms. Shaw and Ms. Rafuse.

[140] Mr. Barrett's testimony that he did not know all the specific vehicles that Summit was receiving from Justincredible was also not specifically contradicted. Darren's evidence suggests that Mr. Barrett knew what Summit was getting from Justincredible on the car swaps but is either equivocal or not based on personal knowledge. He said that he and Mr. Barrett would have lengthy daily discussions about cars and his evidence is clear that he and Mr. Barrett would go over the cars that Summit needed to sell. He was also clear that either Mr. Barrett or Mr. Smith would, generally, set the price for the cars that Summit sold and he needed Mr.

Barrett's permission to do a deal for 'inflated' prices. He also said that he never did a deal without Mr. Barrett's permission and knowledge. However, his evidence was much less clear about Mr. Barrett's specific knowledge of the vehicles that Justincredible was providing to Summit for the car swaps. He said that he would prepare a list of the vehicles that Justincredible was proposing to give to Summit to replace the ones they wanted to move, and he would run the deal by Mr. Smith. His understanding was that Mr. Smith would then take it up to Mr. Barrett and they would decide whether they were going to do the deal. Darren testified to a belief that Mr. Barrett knew exactly what was going on and he provided details about discussions with Mr. Barrett about some specific vehicles that Justincredible was trading to Summit. However, he did not say that he had direct knowledge that Mr. Barrett knew what each vehicle was.

[141] I accept that Mr. Barrett: knew, specifically, which vehicles Summit was getting rid of; and, generally, set the parameters of the deal, meaning that he determined and approved the inflated value of the deals. I also accept that Darren discussed with Mr. Barrett the details of some of the vehicles that Justincredible was purporting to trade to Summit.

[142] I find that Mr. Barrett did not know all the cars that Justincredible was purporting to trade to Summit and did not know that, generally, Summit was receiving substantially less value than it was giving. To the extent that Darren's evidence contradicts that, I do not believe it.

[143] I also have to consider the evidence relating to Mr. Smith's role, if any, in these deals. The car-swapping cheques that were not signed by Mr. Barrett, were signed by Mr. Smith and Ms. Shaw (e.g. Ex. 1A, pp. 67, 109 & 153; Ex. 1B, pp. 189, 227; Ex. 1C, pp. 429 and 470). Of course, like with Mr. Barrett, the mere fact that Mr. Smith signed cheques does not mean that he knew the details of the deals.

[144] To determine Mr. Smith's role, I have carefully considered the evidence about the division of responsibilities in the dealership, Darren's testimony about the deals and Mr. Smith's utterances in the recorded conversation.

[145] Ms. Rafuse and Ms. Shaw testified that Mr. Smith ran the sales side of the business. Ms. Shaw testified that she dealt with Mr. Smith for day-to-day operations including the setting prices for vehicles that were being sold or taken on trade, the deal files, and purchasing of used vehicles. Mr. Barrett did not usually look at day-to-day sales deals or individual deals, just the month-end numbers.

She also testified that when Mr. Barrett wasn't present, Mr. Smith was her boss and the two of them had authority to sign cheques together.

[146] Darren testified that, in general, he required approval from Mr. Smith and/or Mr. Barrett when selling used cars. He was asked specifically about Mr. Smith's role in the car swapping deals:

Q. Did Orlando Smith have any role in the bulk car sales swap between Summit Hyundai and Justincredible motors?

A. yes

Q. What was his role in the swapping of cars?

A. I would do up a list of vehicles that I would have to give Summit Hyundai in replace of the ones that they wanted to move, I would run the deal by Lando and he would take it upstairs and run it by Ken, and they would decide whether we're doing the deal or not.

[147] That is direct evidence that Mr. Smith saw the list of vehicles, that Darren discussed the deals with him, and that Mr. Smith then communicated approval of the deal to Darren. Darren's evidence about Mr. Smith's role was not challenged in cross-examination. While I accept that Darren might have a motive to spread the blame, there is no evidence of any animosity between him and Mr. Smith or that he was motivated to lie to harm Mr. Smith. There is no direct evidence that Mr. Smith discussed any deals with Mr. Barrett. Further, the evidence suggests that Mr. Smith and Ms. Shaw signed cheques when Mr. Barrett was not present, so for the transactions where they signed the cheques, it seems likely that Mr. Barrett would not even have been present for Mr. Smith to have discussed the deals.

[148] I have also considered Mr. Smith's words as recorded by Mr. Barrett (Ex. 7 and Ex. 36). It is often difficult to understand what the parties are discussing. However, it is clear that Mr. Smith was part of the building deal and knew about the overvalued swaps (Ex. 36, pp. 56 – 60). During the conversation, there is an exchange where Mr. Barrett asserts that 800,000 was traded for 150,000 and questions where the 150 is, Darren responds that its in the building and says "we were borrowing the money on the building ... to pay these cars out as the long-term goal, wasn't it, Londo?". Then the following exchange takes place:

Smith: Because you know that. You know that because I had to go and get an appraisal done on the fucking building to get the money. You were the one that came up with idea, not me or him.

Barrett: so what I'm saying is ...

Smith: You said put the cars, hold on – what you said was put them cars in. It's better to put the cars in and not the building because it's liquid assets. We can get rid of that, they wouldn't like that. So put whatever you have to put in, and then we take the building, "you go borrow the money, Londo, on the building." I got the appraisal done. That's exactly what happened.

(Ex. 36, pp. 57-58)

...

Darren: But you know what I did here. We all know what I did, even Rebecca knows. We all know what I did and how we got to there is all I'm saying.

Barrett: I appreciate that but that's not going to work out so we need the money now.

Darren: We already did it, though. It's not going to work out but we already did the deal. It's all done.

Barrett: So who...

Darren: The deal is all done.

Smith: The deal is all done, Ken.

(Ex. 36, pp. 58-59)

[149] Later there are portions where Mr. Smith denies being involved in at least some deals which I believe to be the over-valued car swapping:

Barrett: ...at the end of the day there is Londo Smith. There is Ken Barrett. There is Summit Hyundai. It's illegal to take a piece of Summit Hyundai out and give it to either one of us. You can't do that. So, this whole transaction, to me, and please correct me if I'm wrong, it looks like we took something out of Summit Hyundai and moved it over to Londo Smith.

Smith: No, not technically, no...

Barrett: No, I'm just saying – technically this is exactly what happened.

Smith: No, there's no paper trail there, Ken. There's nothing there. The building doesn't even exist to you. If you want to really be – if you're trying to get – if you're saying legally is what you're saying, right? Is that what you're saying, legally? Okay, legally the building doesn't exist. That's the ..

Barrett: So legally who is paying us this 800,000 worth of cars?

Smith: They're there, I don't know. I didn't do it. You and, Ken – you and him did it. I had nothing to do with it.

Barrett: No, no, no, no. If we sell 800,000 in cars, we get paid for that how? that's what I'm saying. It's all that – and you're saying it's the building but you're saying the building doesn't belong to us. Well then how do we get paid for it? If you're saying the building paid for it, and you're saying the building doesn't exist, we didn't get paid for it so where did our 800,000 worth of cars go?

Smith: You were never getting paid for it. That's the problem. You knew that.

Barrett: No, no, no, no, no. I would – who in their right mind would say give us this 800,000 and then get nothing? Who would say that?

Smith: You.

Barrett: Well...

Smith: How much money did we lose in used cars?

Barrett: 1.1 million so far.

Smith: Right. And who signed the cheques?

Barrett: I did.

Smith: Right, so why do you say who in their right – we lost 1.1 million. You, in your right mind, done it. I didn't do this deal.

Barrett: No.

Smith: And I'm being very calm about that. I had nothing to do with that.

Barrett: Okay, you and I disagree, that's fine.

Smith: That's fine.

Barrett: We're fine.

Smith: Darren knows that I had nothing to do with that deal.

Barrett: You and I disagree. We gave up \$150,000 worth of ...

Smith: I don't even know how much it is. Could be 75,000 or 120,000, whatever it is, whatever it is.

(Ex. 36, pp. 60-63)

[150] In these passages, Mr. Smith appears to be denying involvement in the car swapping scheme that is connected to the building deal. However, his reference to Mr. Barrett writing the cheques suggests that he is speaking only about those transactions where Mr. Barrett signed the cheques. There is no mention during this discussion about the transactions where Mr. Smith signed the cheques.

[151] Assuming they are discussing the car swapping transactions, Mr. Smith's denial of involvement in this recording suggests that there were some deals that he was not involved in. However, given the general lack of clarity and the specific reference to Mr. Barrett signing the cheques, I cannot conclude his words are a denial of involvement in all transactions that make up the car swapping scheme.

[152] Further, Darren's testimony, which I accept on this point, establishes that Mr. Smith reviewed the list of vehicles to be traded to Summit, that Darren ran the deals by Mr. Smith and Mr. Smith then communicated approval to Darren. This contradicts Mr. Smith's comments on the recording that he had nothing to do with the deals.

Summary and Conclusions for Car-Swapping Scheme

[153] I accept Mr. Barrett's testimony that the original intent of the car-swapping scheme was that the deals would be a financial "wash" and that, in general, he thought Summit and Justincredible would be trading vehicles of equal value.

[154] I find that Mr. Barrett knew the details and values of the vehicles that Summit was providing but did not know the details and values of all vehicles that Justincredible was providing. As I will discuss later, I have concluded that as time went on, he knew and accepted that some of the VINs he was being provided were not for vehicles that Summit could actually take ownership of.

[155] I accept that Darren was told by Mr. Barrett what cars Summit needed to get rid of and then came up with the vehicles (or VINs for vehicles) that Justincredible would swap. As such, there is no doubt that Darren knew both sides of the deal, meaning he knew the details and value of the vehicles that Summit was providing and knew the details and value of the vehicles that Justincredible was providing.

[156] I am also persuaded beyond a reasonable doubt that Darren knew, or was willfully blind, that Justincredible was receiving more value than it was providing to Summit. He knew the vehicles and was an expert in car valuations.

[157] I am also persuaded beyond a reasonable doubt that Mr. Smith knew the details of the car-swapping deals, meaning that he knew the details and listed values of the vehicles on both sides of the swap. Further, given Mr. Smith's experience in the industry, I am also persuaded that Mr. Smith knew the actual values of the vehicles that were being swapped and knew that Summit was not being adequately compensated.

[158] For the deals where Mr. Barrett signed the cheques, I accept that Mr. Smith communicated approval of the deals to Darren. However, I believe it is possible that he obtained some input or approval from Mr. Barrett for those deals. I don't have direct evidence of that, but Mr. Barrett signed the cheques, Darren understood that Mr. Smith "went upstairs" to talk to Mr. Barrett and Mr. Smith's comments on the recording suggest that he felt that at least some parts of the deal were between Mr. Barrett and Darren. As such, while I accept that Mr. Barrett was not fully aware of the details, I find it probable that he communicated approval to Mr. Smith for some of the car swapping transactions.

[159] For those deals involving cheques signed by Mr. Smith and Ms. Shaw, I am persuaded beyond a reasonable doubt that Mr. Smith approved the deals on behalf of Summit without input from Mr. Barrett. The evidence establishes that Darren provided him with the information about the deals, that he communicated approval of the deals to Darren and there is no direct evidence that contradicts Mr. Barrett's testimony that he was not involved in those deals.

The 24 Subject Vehicles

[160] Ms. Sullivan attempted to trace the ownership of the 24 vehicles in question. The Defence criticized her methodology. Specifically arguing that the framing of her mandate assumes that vehicles were not delivered to Summit so

there was a loss and then seeks to quantify it. Further, her analysis is based solely on her review of transaction histories reflected in documents. In doing so, she made assumptions about the lack of documented 'ownership' and the effect of bills of sale, cheques and cost sheets.

[161] I accept that the language used to describe her mandate includes an assumption of loss to Summit and benefit to Justincredible. That could lead to a search for evidence of guilt, rather than an investigation to determine whether there has been a crime, so I have reviewed Ms. Sullivan's evidence carefully. Despite the language in the mandate, I fully accept that she understood her role as an expert and fulfilled that role.

[162] I also accept that when she conducted her ownership analysis, she did not have the benefit of hearing from witnesses or the evidence I have summarized above that reduces the reliability of information in documents. As such, in some instances, I may reach a different conclusion than she did about ownership.

[163] Included in the total funds that Ms. Sullivan concluded had been received by Justincredible from Summit is \$1,359,070 (\$1,181,800 cost plus \$177,270 HST) that relates to the 24 vehicles that were allegedly paid for by Summit and not received (Ex. 26, p. 5).

[164] Mr. Barret testified that the 24 vehicles listed in Exhibit 2 were purchased by Summit from Justincredible but were not in Summit's inventory in 2017 when he was trying to liquidate all his assets to pay creditors. Ms. Sullivan's evidence was that no records show that any of these vehicles were sold by Summit.

[165] The Crown argues that their absence is the result of various types of fraud by Darren Bateman/Justincredible: selling vehicles to Summit that it did not own; failing to deliver vehicles to Summit; and selling vehicles owned by Summit to third parties without paying Summit.

[166] There does not appear to be any dispute that the 24 vehicles were not on Summit's lot in 2017. The Defence argues that their absence was not the result of deceit, dishonesty or other fraudulent means, that there were no false documents, and all deals were done openly with full knowledge and approval of Mr. Barrett, the operating mind of the company.

[167] More specifically, the Defence submits that: Mr. Barret had full knowledge of the circumstances of the 24 allegedly missing vehicles; some of the vehicles

were part of the failed 'building deal'; Mr. Barrett knew the Lotus Evora was not owned by Justincredible and would not be delivered but wanted the VIN to boost Summit's assets; Mr. Barrett knew that some vehicles the put on the floor plan were leased/rented so were not owned by Justincredible but put them on the floor plan anyway; some vehicles were not delivered because they related to deals that fell through; some vehicles would have been delivered to Summit but Mr. Barrett didn't want them and/or would not allow Darren back on the lot after his relationship with Summit ended; some vehicle were placed on other lots on consignment and if they were subsequently sold, they were sold without Darren's knowledge; all other vehicles were delivered to the Smith's Cove lot with Mr. Barret's knowledge or at his request so were essentially delivered into Summit's control, just not to the Summit lot; and, any that were eventually sold by Richard were done so with no involvement by Darren or Mr. Smith.

General Evidence

[168] Ms. Shaw testified that after the auditors came in, she and Darren spoke about the vehicles that had been part of the vehicle / cheque swaps and he told her that some of the vehicles weren't even his. She said she did not know that before. He did not provide any specifics except for the Lotus.

[169] As I have said, part of the rationale for the car swaps was to restart the curtailments and delay paying the bank. The majority (15 out of 24, with a paper value of \$800,000) of the vehicles sold to Summit were too old to be put on the floorplan so were of no benefit in that regard (testimony of Ms. Sullivan). These vehicles, especially with their inflated values, would, however, have helped with Summit's asset sheet.

[170] Neither Darren nor Mr. Barrett were responsible for putting vehicles on the floor plan. The controller oversaw both plans. When presented with a used vehicle to go on the floorplan, she would have the bill of sale and would determine whether the vehicle could go on the plan based on its age and then would determine how much could go on the plan based on the lower of the Black Book value or the amount actually paid.

[171] Ms. Shaw testified that if a used car was eligible for the floor plan and there was room on the plan, it went on the plan. She also testified that to put a car on the floor plan, a certificate of ownership was required, and she usually had that. She

said she was essentially responsible for ensuring things on the floor plan met the criteria.

[172] Mr. Barrett testified that all the vehicles going from Summit to Justincredible were real vehicles and he believed at the time that the vehicles coming from Justincredible to Summit were also real. However, he said he later learned they were not. Darren testified that eventually, Mr. Barrett did not care whether they were real vehicles or not or who owned them, he just wanted VINs that he could put in his inventory and/or on his floor plan.

[173] Ms. Rafuse testified that when she was authorizing cheques for payment for used cars, she needed the bill of sale and the registration showing transfer of title. She did not always have the registration, so would issue the cheque anyway and then wait for the registration and try to follow up to make sure she got it. She did not like that so voiced her concern to Mr. Smith, Mr. Barrett, and Ms. Shaw and tried to change the process. Mr. Smith told her not to worry and they had some discussions that were not friendly. She testified that Mr. Barrett would not be part of those discussions.

[174] She testified that she had some interaction with Darren about cheques issued to him for used vehicles when she hadn't been provided with registrations. Sometimes, she expressed frustration to him and eventually it would be presented, sometimes days or weeks later.

[175] She testified that before Darren started working at Summit, the accounting department would fill out the required paperwork for RMV and send it over. However, that changed in 2015. After that, Darren would sign the RMV documents on behalf of Summit and then have another employee deliver it.

[176] Ms. Shaw described the process for recording used cars in a computer program that tracked inventory. There was a physical file of documents related to the vehicles that was kept in Darren's office.

[177] Darren testified that some of the vehicles that Summit could not sell were placed with other dealers on consignment and Mr. Barrett was fully aware of this. Mr. Barrett testified that he knew that some vehicles were at different locations, including Roy Meech's store, No Bull Auto and a place in Digby owned by Richard Bateman. However, he said he was not personally involved in arranging

any consignments between 2010 and 2017. He said Mr. Smith would have made those arrangements with the help of Darren.

[178] Ms. Shaw testified that the dealership's computerized inventory system did not track vehicles that were out on consignment, so not physically on Summit's lot. She testified that Darren kept track of it and, to her knowledge, Darren would be the only person who would know where those vehicles were located.

Cars at the 'Apex' lot and 'The Building Deal'

[179] For a time, Summit had a used car lot that operated on the former site of Mr. Barrett's Kia dealership on Commercial Street. It operated as a separate company and at one time was called 'Apex Motors'. It was closed sometime between 2013 and 2015 (Mr. Barrett thought it was 2013 or 2014 and Darren thought it was around 2015).

[180] Mr. Barrett and Darren agree that when it was closed, it still had a lot of used cars. Darren estimated there were about 175 vehicles, of all makes and models. They agree that many of the vehicles were moved to Summit and some stayed on the old Apex lot.

[181] Darren testified that about 40 - 50 cars were left on the Apex lot. Some had already been there for 1,000 or more days. After the lot was closed, they were left out in the elements for a year or more and were not maintained, so weren't worth much.

[182] He testified that he, Mr. Smith and Mr. Barrett went to the lot together and agreed the remaining cars were worth approximately \$150,000. Mr. Barrett agreed that the three of them had gone to the lot but testified that Darren had assigned the \$150,000 value to these cars. They both agreed that these vehicles were valued at \$600,000 on Summit's books.

[183] Darren testified that he had offered to buy all the vehicles remaining on the Apex lot for what they were worth, \$150,000. However, the 'cost' of the vehicles on Summit's books was \$600,000 and Mr. Barrett refused to sell them for \$150,000 because it would create a \$450,000 shortfall in the company. Darren told Richard about Mr. Barrett's predicament and Richard suggested that he could take the vehicles in trade for his Smith's Cove building.

[184] Mr. Barrett, Darren and Richard all testified about a complex series of offers, discussions, agreements, or deals involving vehicles and a building. Darren also referred to the 'building deal' in his statements and it was discussed by him, Mr. Barrett and Mr. Smith in the recorded conversation. The evidence is consistent that there was some discussion amongst the four of them to use Richard's building in some way in a deal with Summit and that the deal never actually happened. The details are not consistent.

[185] The building was owned by Richard Bateman and located in Smith's Cove, Digby. He testified he purchased it in approximately 2014 for \$50,000 and moved his used car dealership, 'Carzone Inc', there.

[186] The 'building deal' is significant to the Defence. It is central to Darren's explanation for why some of the 24 vehicles at issue in this trial were not in Summit's physical possession. He testified that he and Mr. Barrett discussed trading the building to Summit in return for the old used cars on the Apex lot. That did not happen. However, for a time, Darren thought it would. While he was waiting for the building deal to go through, Summit needed to get rid of the vehicles and needed 'cars' to put on its books to replace them. As a result, at Mr. Barrett's direction, Justincredible included cars to be swapped to Summit that were intended only as 'place holders' for the building. Meaning, they could be used by Summit for their books but would never have to be delivered because the building would satisfy Justincredible's side of the swaps. These 'place holder' vehicles include some of the 24 missing vehicles.

[187] This was during a time when Mr. Smith was trying to buy the dealership. Darren said that Mr. Smith and Mr. Barrett were initially interested. Mr. Smith had the building appraised and, he understood the initial appraisal wasn't high enough and they wanted another because they had planned to mortgage the building to pay out the inventory.

[188] However, after checking with his accountant, Mr. Smith reported back that the deal would not work for him.

[189] Darren testified that Mr. Barrett wanted to proceed with the deal anyway. So, Darren then understood that he was trying to work out a deal where the vehicles on the Apex lot would be traded for Richard's building. Then, Ms. Shaw and Mr. Barrett told him that they could not trade the cars for the building because of how these types of assets were listed on statements, so there had to be cars on

the deal. Darren did not completely understand the reasons but was told there had to be cars on the deal.

[190] Mr. Barrett wanted Justincredible to put up \$150,000 worth of vehicles as another car swap. Darren would be putting up \$150,000 worth of vehicles to swap for the Apex vehicles that were worth the same amount, and they would exchange cheques for \$600,000, the book value of the Apex vehicles. Darren said that Mr. Barrett was telling him to come up with vehicles, even if they were not real vehicles, suggesting he could just take numbers (presumably VIN numbers) from the computer. He said he didn't want to do that so he talked to his brother and between the two of them, they came up with 10 cars (or VINs) that could be put on the deal for the Apex cars. For some, his brother just sent him serial numbers.

[191] According to Darren, the plan was that Darren would take the 40 or 50 vehicles from the Apex lot and provide Summit with VINs for ten vehicles that were worth the same amount. The ten vehicles were intended to be "filler" or "placeholders" for the building. The intent was never that Summit would take ownership of the vehicles. They were supposed to be paid out when the building got financed. When he provided the information about the vehicles that could, on paper, be traded to Summit, he thought the building deal would get done.

[192] Darren testified that Mr. Barrett and Richard arranged for Kirk Mullane, a truck driver, to move the vehicles from the Apex lot to Richard's lot in Smith's Cove.

[193] Darren testified that once the vehicles were moved, he and Summit had to exchange cheques. He told Ms. Shaw that if he received a \$600,000 cheque from Summit, his bank would hold it. She agreed to do the cheques in smaller amounts. So, they exchanged five cheques, totaling about \$600,000 over a period of time. He referred to five cheques from Summit to Justincredible Motors, signed by Mr. Barrett, dated from November 25, 2016 to December 22, 2016 and five cheques from Justincredible Motors to Summit, signed by Justin Bateman, dated from November 23, 2016 to December 30, 2016 (Ex. 31, Tab 21). Darren testified that the cars listed on the back of the cheques to Summit, listed the Apex cars that were meant to relate to the deal.

[194] Kirk Mullane, a tow truck operator, testified that he moved at least 50 cars for Summit from the Apex lot in New Minas to a building in Digby. He made 15 to 20 trips and had a friend helping him. He remembered some of the specific cars

he'd moved. He looked at the list of missing cars (Ex. 2) and said he recalled moving a boat and trailer and a lot of older cars. He specifically remembered moving a boat and trailer from Richard's residence to St. Margaret's Bay. In cross-examination, he said he thought it was just before winter of 2016/2017 and Richard had told him it was going in for storage. He recalled a Sante Fe that went to Carzone, an EZ trailer, and several motorcycles that went into the Carzone showroom. He said the motorcycles were in really good shape and one was customized. He said he did not move a Subaru Impreza or any Dodge Rams but did move a lot of other cars that were not listed on Exhibit 2.

[195] He testified he was paid by Mr. Barrett, through cheques, and by Richard, mostly in cash. He could not recall how much he was paid and said cheques were written in his girlfriend's name and picked up at Summit. He believed he had received a lot more payments from Summit than the two cheques in evidence (Ex. 10).

[196] He said he knew Mr. Barrett and when he got the keys for the vehicles, Mr. Barrett was there with Richard at the Apex lot.

[197] He said he didn't buy any of the vehicles but sold a couple for Richard, a Mercedes and an SUV, on commission. He didn't get the permits and when he called Richard, he got the runaround.

[198] He also did some other work for Darren Bateman, moving two Yamaha motorcycles and picking up cars at an auction in New Brunswick. He was not familiar with Justincredible and knew Darren to be affiliated with Summit. He was asked about payments from Justincredible to him and his girlfriend but could not recall that. He said he probably did also move some vehicles for Darren during that time frame.

[199] In cross-examination, he acknowledged he'd known Darren since he was 16 and that his brother, Kyle, who was affiliated with 'No Bull Auto', also did work with Darren.

[200] Richard testified he knew Mr. Mullane and agreed that Mr. Mullane had done some vehicle transports to his site in Smiths Cove. He agreed that he paid Mr. Mullane for transporting vehicles and believed it was approximately three times.

[201] Mr. Barrett testified that he did not know anyone named Kirk Mullane and had no involvement with him. He also testified that he did not know a company called "Ocean Titus". He was shown two cheques from Summit to Ocean Titus, both listing "transporting vehicles" in the memo - one for \$1,000, dated December 15, 2016, signed by Rebecca Shaw and Orlando Smith, and the other in the amount of \$980, dated January 12, 2017, signed by Mr. Barrett (Ex. 10). Ms. Shaw testified that the names Kirk Mullane and Ocean Titus sounded familiar to her and identified the cheques as Summit cheques.

[202] Mr. Barrett testified about the vehicles on the Apex lot and the 'building deal'. He said the building first came up because Mr. Smith mentioned he could get the building to assist with his purchase of the dealership. Mr. Barrett didn't want the building so suggested Mr. Smith mortgage it and use the case for the purchase of the dealership. That didn't happen.

[203] Mr. Barrett agrees that the building came up again when a large number of older, low-value cars were sold from the Apex lot to Justincredible. He said Summit did not receive payment for these cars and Mr. Smith and Darren offered the building as payment. Mr. Barrett testified that when they made that offer, he was in the process of selling the dealership and needed cash to pay his creditors so still did not want the building. He testified that he told them if they couldn't get cash, they should get the cars back. He was told the cars were gone and they couldn't pay him for the cars, so then he told them that, worst case, he would take the building.

[204] Mr. Barrett testified that he did not understand why Richard Bateman's building would be used by Mr. Smith and Darren to pay for cars that had been transferred to Justincredible. He denied that he had made a deal with Richard whereby the vehicles were sold to him for the building and denied that he and Richard had arranged for the cars to be sent to Digby. He said he never had any conversations with Richard about purchasing cars and when asked if he ever had a conversation with Mr. Smith or Darren Bateman about Richard buying the cars, he said "not to my knowledge".

[205] Mr. Barrett denied knowing that any of the cars that Summit agreed to accept as in return for the Apex cars were not real.

[206] Richard also testified about the building deal. He testified that Darren and Mr. Smith came to him. Darren said, "we need to bury some money". He testified

that he was told there were a lot of cars missing off a lot and they had to cover off what they owed Mr. Barrett on those cars. Their suggestion was that they would buy the building “cheap” and sell or give it to Mr. Barrett to cover the missing vehicles to make the deal flow smoothly. He said they told him they had to have “something tangible” for the money they were trying to cover off. He thought Darren and Mr. Smith owed money to Mr. Barrett.

[207] He confirmed Darren’s evidence that, while they were in discussions about a possible deal for the building, Mr. Smith arranged for an appraisal of the building. He testified that after the appraisal, Mr. Smith called him and said the appraiser would have to appraise it again because the value wasn’t high enough for his purpose. Richard testified that he had a brief discussion with Mr. Smith about the building and the amount they needed from the building. Mr. Smith told him that they were trying to “cover up” about \$500,000 and he was trying to sell the building to Mr. Barrett for around \$600,000.

[208] Richard testified that the building was full of antique cars. He did not own the cars; he was storing them for Darren and understood that Darren owned them. Darren showed him a list of cars and said he would “apply those cars against the building”. Richard was reluctant to agree, apparently because he felt that Darren owed him money for previous deals. In any event, there was discussion about either selling the vehicles that were in the building to pay for the building or trading the vehicles for title to the building. However, it never happened because the building wouldn’t work for what they were trying to use it for. Richard testified that while the deal was still in discussion, he wanted to get \$150,000 out of the building.

[209] The recorded conversation confirms that Mr. Barrett, Darren and Mr. Smith were all involved in discussions concerning the building (Ex. 7; Ex. 36). In that conversation, they each state their understanding/recollection of various aspects of the deal. Mr. Smith and/or Darren say that Mr. Barrett told them it would be better to have cars on the deal because they were “liquid assets” and because it was better for “the books”, and that the cars were put on the deal but everyone knew they didn’t exist and were only put there for the building (pp. 53 – 54). On the recording, Mr. Barrett did not dispute his knowledge that the cars didn’t exist. In fact, he agreed by saying “yeah”, “right”, and “sure” and then spoke about how Summit had traded real cars for fake cars. He does say he didn’t know the particulars of all the deals and repeatedly raised concerns about how Summit

would be made whole, given that Summit had traded real cars for fake cars (p. 55 – 56, 59 - 61).

[210] Later, Mr. Barrett said “I thought we were getting paid for our cars, but whatever”. Darren replied, “See, you knew they were fictitious cars right from the beginning ... and we changed cheques. You did get paid. You got paid and we got paid” (pp. 74 – 75, the transcript attributes this comment to Mr. Smith, however, having listened to it, I believe that is an error and it is Darren who says this). In the recording, Mr. Barrett did not dispute this statement or disagree with Darren, and they went on to discuss some of the specific vehicles.

[211] Eventually, Mr. Barrett asked whose name is on the title to the building. Initially, there is a suggestion that Mr. Smith’s is but then it is clarified that legal title had not been transferred to Mr. Smith. They then went on to argue about whether the person who owned the building owed Summit the building or the value of the cars.

The Negotiations for the Sale of the Dealership

[212] Mr. Barrett testified that the discussions about Mr. Smith’s purchase of the dealership continued for a year, and the deal changed over time. At the beginning, Mr. Smith and Darren told him the purchase price of the dealership was \$2.5 million, then \$1 million and finally, Mr. Smith suggested he get it for free. Over time, Mr. Smith suggested he had different investors including Richard and various friends of Richard’s.

[213] Richard testified that during this time, he did not have any discussions with Mr. Barrett about the sale because he was told by Mr. Smith and Darren not to. Darren denied this.

[214] Neither the purchase of the dealership nor the building deal materialized and eventually, Richard sold the building to an unrelated party.

[215] Richard testified that he went to the dealership not long before Mr. Smith and Darren were “let go”. Darren told him it was over and that he should take his cars. At that time, Richard had about 20 cars on the Summit lot. He removed them days before Christmas Eve. The vehicles were taken to his house and to Digby.

[216] He testified that, at the time, he barely knew Richard and had spoken to him only in passing a couple of times. He knew about “Carzone” and agreed that Summit had done business with Carzone for a number of years before he learned that it was owned by Darren Bateman’s brother. He did know, at the time, that Carzone was owned by Richard. In cross-examination, he agreed that over the four years between 2016 and the trial, he and Richard had “become closer”. He agreed that when Richard gave his statements to police, it was at Mr. Barrett’s house and that he had discussed the situation with Richard numerous times.

History Between Darren and Richard Bateman

[217] Explanations offered by Darren for some of the specific car deals involve his brother and moneys owed between them over years.

[218] Richard testified that he kept a running total of money owed by Darren to him resulting from various things including money he kept in Darren’s account when he was going through a divorce, the value of a truck that Darren took and didn’t return and various other car deals over the years.

[219] He initially testified that he never owed Darren money but later said he might have temporarily owed Darren money for a specific deal that he needed cash for instead of just subtracting it from the running total, but the running account between them was never in Darren’s favour.

[220] He was shown a cheque from Carzone to Darren Bateman’s wife, Brenda Bateman, in the amount of \$12,000, dated January 25, 2012 (Ex. 20). The notation on the cheque says, “loan back”. He denied this cheque was for repayment of a loan from Darren to him, said he didn’t recognize the handwriting and it wasn’t his.

[221] Darren denied that he ever owed his brother money and testified that there were times when Richard owed him money. Darren testified that he lent Richard \$12,000 which came out of his wife’s bank account and the cheque from Richard in that amount was repayment of that loan (Ex. 20). He said the handwriting was his brother’s. He also testified there were times when he lent his brother money to help with bills.

Specific Vehicles

Vehicle 1 – 1963 Custom Ford Econoline Pickup

[222] Justincredible sold this vehicle to Summit on December 6, 2016, for \$74,175, by cheque dated December 8, 2016, signed by Ken Barrett (Ex. 1A, Tab 1; Ex. 27, Sch. 1). It was not listed on Summit's used car floorplan.

[223] The documented history of the vehicle is contained in Ex. 1A, Tab 1:

- April 30, 2014 – Bill of Sale from Pothier to Justincredible, \$10,000 plus tax (pp. 22-26);
- April 30, 2014 – “yellow form” Dealer Title Transfer, including Pothier's master number stamp, showing transfer from Pothier to Carzone, April 30, 2014 (p. 18);
- September, 2014 – Undated Carzone ‘cost sheet’ with handwritten note that the vehicle was purchased from Justincredible and delivered to Carzone by Pothier (p. 20);
- December 6, 2016 – Bill of Sale from Justincredible to Summit, \$64,500 plus tax (p.3);
- January 17, 2017 - Carzone registered the vehicle with RMV (p. 21); and,
- April 20, 2018 – Carzone sold the vehicle to Autolane Cycle (p. 27).

[224] The Crown alleges that the vehicle was owned by Carzone, so Justincredible did not own it when it was sold to Summit and did not deliver it. The Defence does not dispute that it sold the vehicle to Summit, and it was not delivered to the Summit lot but submits that the vehicle was owned by Justincredible when it was sold and the vehicle was subsequently stored at the warehouse in Digby with Mr. Barrett's knowledge.

[225] Darren testified that Justincredible purchased this vehicle, stored it in Digby where it remained after it was sold to Summit at an inflated price as part of the building / Apex lot deal. He denied he'd sold the vehicle to his brother. In cross-examination, he acknowledged that he told police he might have given Richard the Registration for this vehicle but said he could not recall whether he had given it to him or just left it in the glove box. He said it would not be uncommon for him to give his brother a Registration if he thought his brother might have a consignment sale for the vehicle. Darren was aware that his brother had sold the vehicle, despite that he did not own it. His brother never paid him for the vehicle. He did not pursue this with his brother, since by that time, they were not speaking, and he was out of Summit.

[226] Richard testified that he found the vehicle at Pothier and when he asked John Pothier about it, he was told that Darren had purchased it. He then went to Darren and Darren agreed to let him have it, so Pothier delivered it to him. He said the cost, which he believed was \$10,000, came from the running total that Darren owed him so no money changed hands. When he registered it, he used the “yellow form” to show his ownership of the vehicle. The reason for not having the original permit, recorded in handwriting on that document, is “lost”. He testified that he had it for about six years, never sold it back to Justincredible and never asked Darren to sell it for him. Richard testified that he probably registered it in his name with RMV in January 2017 because he was selling it. However, it was sold more than a year later (Ex. 1A, Tab 1, p. 27).

[227] In cross-examination, it was put to him that he did not purchase the vehicle from Justincredible and he disagreed. He was asked if he could produce a Bill of Sale showing the purchase and he could not.

[228] John Pothier, owner of Pothier Motors testified. He recalled this vehicle. He said he owned it for about a year and then sold it to Justincredible. He recognized the name and signature of the person who signed, on Pothier’s behalf, the Bill of Sale showing the sale to Justincredible (p. 26). He reviewed the Dealer Title Transfer document and said it appeared that Justincredible had transferred title to Carzone. When reviewing that document he said “I’m not sure how that got in there, what ... who signed that off, but ...”. He was not asked whether he recognized the ‘seller’s’ signature on that document. He could not recall where the vehicle was taken after it was sold.

[229] Shane MacDougall, owner of Autolane and Cycle, testified that he saw the Econoline vehicle in Richard’s warehouse in Digby, was interested in it and bought it.

Vehicle 2 – 1966 Buick Special

[230] Justincredible sold this vehicle to Summit on November 30, 2016, for \$74,175, by cheque dated December 1, 2016, signed by Ken Barrett (Ex. 1A, Tab 2; Ex. 27, Sch. 2). It was not listed on Summit’s used car floorplan.

[231] The documented history of the vehicle is contained in Ex. 1A, Tab 2:

- March 9, 2012 – Carzone purchased vehicle from individual in U.S. (pp. 34 - 35);

- November 30, 2016 – Bill of Sale from Justincredible to Summit (p. 29);
- May 9, 2018 – NS RMV Certificate saying vehicle never registered in Province (p. 33).

[232] The Crown alleges that the vehicle was owned by Carzone, so Justincredible did not own it when it was sold to Summit and did not deliver it. The Defence does not dispute that it sold the vehicle to Summit, and it was not delivered to the Summit lot but submits that the vehicle was owned by Justincredible and went to the warehouse in Digby with Mr. Barrett's knowledge.

[233] Darren says Justincredible acquired the vehicle from Carzone on trade. He traded a 2001 Orange Plymouth Prowler for this vehicle, the 1977 Cadillac (vehicle 3) and \$14,375. The vehicle was and, to Darren's knowledge, still is in the warehouse in Digby. Darren produced documents relating to this transaction, including a Bill of Sale which purports to record the transaction with Carzone (Ex. 31, Tab 2). These show that Justincredible: purchased a 2001 Plymouth Prowler from Pothier Motors on October 7, 2016; traded it to Carzone on December 1, 2016 for the 1966 Buick Special, the 1970 Cadillac and \$14,375; and, Carzone sold the Plymouth Prowler to Pothier Motors on May 16, 2017. The Bill of Sale purporting to show the trade with Carzone was not shown to Richard when he testified which impacts my ability to rely on it. The Crown has conceded the authenticity of the Pothier documents which show that Carzone did possess and then sell the Prowler.

[234] In cross-examination, Darren was asked about his statement to police where in response to being asked about the Buick Special, he said "that was my brother's car" and went on to tell the officer how he had told his brother that they needed fictitious cars for the deal and this was one of the serial numbers his brother sent (transcript, p. 96). He explained that he meant it had been his brothers, but then it was traded to him and then it was sold to Mr. Barrett. He said his brother wasn't giving it to him for free, so they worked out the trade. He acknowledged that he did not tell the officer that the Buick Special had been traded for the Prowler. In his testimony, he explained that he just told the officers where the car came from. Like the others, this car was not meant to go to Summit; it was meant to be a 'place holder' for the building.

[235] Mr. Pothier recalled that he had purchased the Plymouth Prowler from a dealer in Toronto, sold it and then it came back to him from Carzone.

[236] Richard testified that he purchased the Buick Special and had it for eight or nine years. He denied he'd ever sold or traded it to Darren or gave Darren permission to use the vehicle in any kind of deal with Mr. Barrett. He said he never registered it, and Darren wouldn't ever get into a vehicle like this one - it had a big motor, did not have proper seats and was made for drag racing.

[237] In cross-examination, he denied he ever traded the Buick and a 1970 Cadillac to Darren for the Plymouth Prowler, saying, "if you know Darren at all ... you would never get a Prowler out of him for those two cars."

[238] However, he acknowledged that he did get the Plymouth Prowler from Darren and then sold it to Pothier Motors. He could not recall exactly what he'd given Darren in return for the Prowler, saying it might have been a Hyundai Sante Fe or a different vehicle and it "came off my running total". However, he was adamant it was not the Buick and the Cadillac, as the Prowler would have been worth way more.

Vehicle 3 – 1970 Cadillac Deville (VIN ...3827)

[239] Justincredible sold the 1970 Cadillac Deville to Summit on November 30, 2016, for \$74,175, by cheque dated December 22, 2016, signed by Ken Barrett (Ex. 1A, Tab 3; Ex. 27, Sch. 3). It was not listed on Summit's used car floorplan.

[240] The documented history of the vehicle is contained in Ex. 1A, Tab 3:

- November 5, 2014 – acquired by Pothier Pontiac (p. 51);
- November 6, 2014 – registered to Pothier Pontiac (p. 52 & 59);
- May 6, 2015 – Sale and transfer from Pothier Pontiac to Carzone; (pp. 54 - 57);
- September 7, 2017 – Sale from Autolane & Cycle Inc. to individual (p. 63);
- September 13, 2017 – Sale and dealer transfer from Carzone to Autolane & Cycle Inc. (pp. 54 & 62); and,
- November 30, 2016 – Bill of Sale from Justincredible to Summit, \$74,175(p. 37).

[241] The Crown alleges that Justincredible did not own this vehicle when it was sold to Summit. The Defence does not dispute that Darren sold it to Summit and

that it was not on the lot at Summit but submits that Justincredible owned it when it was sold.

[242] Darren says he acquired this vehicle and cash from Carzone in the trade for the 2001 Orange Plymouth Prowler. The vehicle was part of the building deal and, to his knowledge, it remained in the warehouse in Digby. Darren produced documents relating to this transaction which are reviewed under Vehicle 2. In his statement, Darren said this vehicle was Richard's, a vehicle Richard had put up as part of the building deal (Ex. 22, p. 99).

[243] Richard testified he bought the Cadillac from Pothier, kept it for a few years and then sold it to Autolane. He said he never sold it to Darren, gave it to Darren to sell or gave Darren permission to use it in any deal with Mr. Barrett. In cross-examination, he denied he'd traded the Cadillac for the Prowler.

Vehicle 4 – 2008 Loadrite Boat Trailer and 2005 Chapparral Boat

[244] Justincredible sold the Loadrite Trailer and Chapparral Boat to Summit on October 6, 2016, for \$86,250, by cheque dated October 6, 2016, signed by Ms. Shaw and Mr. Smith (Ex. 1A, Tab 4; Ex. 27, Sch. 4). It was not listed on Summit's used car floorplan.

[245] The documented history of the vehicle is contained in Ex. 1A, Tab 4:

- February 25, 2015 – acquired by Pothier Pontiac (p. 51);
- February 26, 2016 – transferred to Carzone (p. 52 & 59); and,
- October 6, 2016 – Bill of Sale from Justincredible to Summit (pp. 54 - 57);

[246] The Crown alleges that Justincredible did not own these when they were sold to Summit. The Defence does not dispute the sale or that they were not delivered to the Summit lot, but submits they were owned by Justincredible at the time of sale and were left at Richard's residence with Mr. Barrett's knowledge.

[247] Darren says he acquired the boat and trailer from Carzone in trade for a 1970 Camaro. The boat and trailer were at Richard's residence and remained there because Mr. Barrett didn't want them delivered to the Summit lot. Darren produced documents relating to this transaction, including a Bill of Sale which purports to record the transaction with Carzone (Ex. 31, Tab 4). These show that

Justincredible purchased an orange 1970 Camaro from Automac Automotive Sales Inc. on September 14, 2016, and, on October 6, 2016, traded it to Carzone for a Chapparral boat and trailer. Mac Ashe, owner of Automac Automotive Solutions, confirmed that he'd sold Darren the Camaro.

[248] Again, the Bill of Sale purporting to show the trade with Carzone was not shown to Richard when he testified which impacts its weight.

[249] Darren had the VIN for the boat, however, Michael Thomas, an employee of Summit, testified that Darren sent him to Richard's residence to get the VIN from the boat.

[250] In cross-examination, Darren acknowledged that when policed asked him about the boat and trailer, he told them he'd had the permit but signed it off and when the police suggested "Justincredible never owned that vehicle did they?", he said "no". However, later in his statement, he explained the deal with the Camaro and went on to say "I own a Camaro and I don't have it back. My brother took my Camaro". The Crown submits these portions of the statement are an admission that at no time did Justincredible own the boat or the Camaro. I agree that is an available interpretation. However, having listened to Darren in direct, cross-examination, his statement and the recorded conversation, I believe he uses a number of idiomatic expressions. One is his use of the word 'never'. At various times during the trial, his use of phrases like, "I never did" caused confusion. Ultimately, I believe that when he says, "I never did ..." or someone else "never did ...", he does not mean that it did not happen at any time. He means, at that time it did not. In my experience, that is common in Newfoundland and parts of Nova Scotia. For example, if asked "did you go to the store yesterday", the response, "I never went to the store" would mean the person didn't go to the store yesterday, not that they did not ever go to the store.

[251] Mr. Barrett could not recall the Summit purchasing the boat and trailer.

[252] Richard testified that he purchased the boat and trailer from Pothier Motors, used the boat, kept it and the trailer at his residence and still had them. He said he never sold them to Darren and never gave Darren permission to use them as part of any deal with Mr. Barrett. He denied he'd traded the boat and trailer to Darren for the Camaro. He acknowledged he had owned the Camaro and traded it to someone. He also acknowledged that the boat and trailer had been in the driveway of his residence for some time.

[253] Mr. Mullane's evidence may be relevant as he testified moving a boat and trailer from Richard's to St. Margaret's Bay which is consistent with Richard's evidence that he used the boat.

Vehicle 5 – 2008 Harley Buell

[254] Justincredible sold the 2008 Harley Buell to Summit on December 21, 2016, for \$66,125, by cheque dated December 1, 2016, signed by Mr. Barrett (Ex. 1A, Tab 5; Ex. 27, Sch. 2). It was not listed on Summit's used car floorplan.

[255] The documented history of the vehicle is contained in Ex. 1A, Tab 5:

- 2014 – Inventory/cost sheet for Carzone records purchase from Justincredible (p. 105);
- November 30, 2016 – Bill of Sale from Justincredible to Summit (p. 100); and,
- May 9, 2018 – RMV Certificate that vehicle never registered in Nova Scotia (p. 104).

[256] The Crown alleges that Justincredible did not own this motorcycle when it was sold to Summit. The Defence does not dispute the sale or that it was not delivered to the Summit lot, but submits it was owned by Justincredible at the time of sale and was moved from the Apex lot to the Digby Warehouse with Mr. Barrett's knowledge.

[257] Darren says that Justincredible obtained the motorcycle as payment of a debt. He denies that he ever sold it to Richard. He said the motorcycle was on the Apex lot and was moved to the Digby warehouse. Robert Ferguson testified he traded this motorcycle to Darren for other vehicles in late 2010 or 2011. It was still in the box, and he delivered it to a dealership in the Valley. In his statement, Darren said that he'd taken the bike on trade from his brother. In cross-examination, he said that when he spoke to police, he must have been thinking of a different motorcycle.

[258] Richard testified that he saw the Harley Buell in the showroom at Carnival of Cars/Fitzpatrick's (a used car lot run by Darren). It had been taken apart, had parts removed and other parts added to it for racing, so could not be driven on the street. Darren told him he had no registration for it, but it was not stolen. He did not say when that was. He believed he did not give Darren any cash or cheque for it, but simply took the \$8,000 off what Darren owed him. He identified a still image, Ex. 1A, Tab 5, p. 108, as coming from video on his phone and showing the

motorcycle in his garage on August 31, 2013. He said it was always tucked up against the wall because you couldn't drive it. Richard said he kept it for a long time and eventually sold it to Shane MacDougall, owner of Autolane and Cycle, for \$2,500. He denied that he'd ever given the bike back to Darren or given Darren permission to use it in any deal with Mr. Barrett. In cross-examination, he said he owned the motorcycle for seven years. He acknowledged he had no Bill of Sale or cheque showing the purchase from Darren.

[259] Shayne MacDougal testified that he first saw the motorcycle in the showroom at Carzone, just inside the door, possibly in the window, parked off to the side. He was shown the image that Richard had said showed the Buell. He identified the space as Richard's garage but could not tell whether the vehicle was the Buell.

[260] Mr. Mullane did not speak about specific motorcycles but did say that he moved two nice motorcycles from Apex to Digby and one of them was custom.

Vehicle 6 – 2010 Ford F-150 Truck

[261] The 2010 Ford F-150 was purchased by Summit from Justincredible, for \$20,125, by cheque dated December 23, 2016, signed by Ms. Shaw and Mr. Smith (Ex. 1A, Tab 6; Ex. 27, Sch. 5). It was not listed on the Floor Plan for Summit.

[262] The documented history of the vehicle is contained in Ex. 1A, Tab 6:

- December 12, 2016 – acquired by MacDonald Chrysler (p. 125);
- December 20, 2016 – cheque from Justincredible to MacDonald Chrysler, \$7,360 (p. 112);
- December 21, 2016 – Bill of Sale from MacDonald Chrysler to Justincredible, \$7,360 (p. 126);
- December 21, 2016 – Bill of Sale from Justincredible to Summit, \$20, 125 (p. 111);
- December 21, 2016 – Dealer transfer from MacDonald Chrysler to 3274232 NS Ltd. (p. 122); and,
- January 27, 2017 – vehicle registered to 3274232 NS Ltd. (p. 116).

[263] The Crown alleges that Justincredible sold this vehicle to Summit, then placed it with Driving Time Auto, and then picked it up and kept it without paying

Summit for it. The Defence does not dispute that this vehicle was sold to Summit and was not in Summit's physical possession. However, the Defence submits that the vehicle was placed on the lot of Driving Time Auto (3274232 NS Ltd.) on consignment and when it did not sell, Mr. Barrett did not want it back.

[264] Darren's explanation is that Justincredible purchased the vehicle from MacDonald Chrysler and sold it to Summit. Then, Justincredible took possession of it on behalf of Summit and placed it on Roy Meech's lot, Driving Time Auto, on consignment. Mr. Barrett knew that was done and the understanding was that, when it sold, the proceeds would go to Summit. It did not sell and when Darren's relationship with Summit ended, Mr. Barrett told Darren not to come back to the lot while the auditors were there so he felt he couldn't return it. Mr. Barrett told Darren to deliver the vehicle to the lot in Digby. Darren still has the vehicle in storage, and it has always been available for pick up by Mr. Barrett.

[265] Mr. Meech, owner of 3274232 NS Ltd. (operating as 'Simply Automotive' and then as 'Driving time Auto'), testified. He has worked in the industry for about 30 years and knew Darren, Justincredible and Mr. Smith. He reviewed documents relating to this vehicle. He testified that the 'yellow form' for this vehicle showed a sale of the vehicle from MacDonald Chrysler to his company (p. 122). He recalled the vehicle. He testified that it was on his lot, they were going to sell it but it didn't pass inspection, so they gave it back. Because he couldn't sell it, he was no longer interested in buying it so 'unwound the deal' and gave it back to Summit or Darren. He could not recall specifics, saying "they went and ... come and took it ... it's gone .. I don't have it...". He could not recall who took it.

[266] In cross-examination, he agreed he took the vehicle on consignment from Summit and that he'd never received a Bill of Sale from Summit for it.

[267] He testified that he did a fair amount of business with Justincredible and with Summit. He paid both by cheque. His point of contact for both was Darren Bateman. He knew they were different companies.

Vehicle 7 – 2011 Hyundai Sante Fe

[268] The 2011 Sante Fe was purchased by Summit from Justincredible, on February 29, 2016, for \$12,075, by cheque dated March 2, 2016, signed by Mr. Barrett (Ex. 1A, Tab 7; Ex. 27, Sch. 6). It was not listed on the Floor Plan for Summit.

[269] The documented history of the vehicle is contained in Ex. 1A, Tab 7:

- May 5/11, 2011 – Summit sold the vehicle to the Turnbulls (pp. 136 – 137 & 149);
- October 24, 2015 * – Turnbulls transferred it back to Summit (Ex. 27, Sch. 6, & p. 139);
- November 24, 2015 – Bill of Sale from Carzone to Automac Automotive (p. 148);
January 22, 2016 – Bill of Sale from Automac Automotive to Carzone (pp. 144 & 146);
- February 29, 2016 - Bill of Sale from Justincredible to Summit (p. 130);
- October 25, 2016 – registered to Summit (p. 141);
- November 18, 2016 – dealer transfer from Summit to Carzone (p. 143); and,
- January 17, 2017 – registered to Carzone (p. 145)

* See below for discussion of a discrepancy as to whether this happened in 2015 or 2016

[270] The Crown alleges that this vehicle was not owned by Justincredible when it was sold to Summit, Summit paid for it and the vehicle was never delivered. The Defence does not dispute that Summit paid for the vehicle but submits that Justincredible owned it when it was sold and delivered it to Summit.

[271] Darren testified that he bought the Sante Fe from Summit and then sold it back to them. I see no document showing that he purchased the Sante Fe from Summit. In his letter to the Crown, he said that Justincredible “took the Sante Fe back” from Carzone on November 16, 2016 in trade for a ‘Jimmy’ that he’d purchased from No Bull Auto. He said Richard was also supposed to pay him additional money when the ‘Jimmy’ sold. He says Richard later sold the ‘Jimmy’ but never paid him the money. Justincredible then sold the Santa Fe to Summit.

[272] In his letter to the Crown, Darren claims to have a Bill of Sale and permit showing the trade of the Santa Fe with Richard, however, none was produced (Ex. 27, Appendix A, p. 72).

[273] Mr. Barrett testified that the vehicle was found in the possession of either Richard or his friend, John, who did not relinquish it to Summit.

[274] Richard did not initially recall where he originally got the Sante Fe but thought he may have purchased it from Automac. After reviewing the documents

showing he'd sold Automac the vehicle, he said he believed there was a problem with the vehicle so after he'd sold it to Automac, he bought it back. He then thought he'd purchased it from Summit and denied it had been given to him on consignment only. He said he kept the vehicle and drove it until he eventually sold it at auction. He said he never gave permission to Darren to use it as part of any deal with Mr. Barrett.

[275] Mr. Ashe, of Automac, confirmed he'd bought the Sante Fe from Carzone and sold it back to them. His recollection of the circumstances was different than Richard's. He recalled that Richard had seen he still had the vehicle and asked to buy it back. In cross-examination, he confirmed that when he bought the vehicle from Carzone, he would not have required proof of ownership.

[276] The documents for this vehicle are confusing. Ms. Sullivan, in her analysis, reports that the Turnbulls transferred the vehicle back to Summit on October 24, 2015 and, in the documents produced by Darren there is a document showing the Turnbulls transferring something on October 29, 2015 (Ex. 27, Sch.6 and Ex. 31, Tab 7, p.2). That date is more consistent with the subsequent activity. However, the Dealer Title transfer document and the Client History summary record the transfer of the Sante Fe to Summit as occurring on October 24/25 2016 (Ex. 1A, pp. 134 &139).

Vehicle 8 – 2012 Chevrolet Orlando

[277] The 2012 Chevrolet Orlando was purchased by Summit from Justincredible on September 8, 2016 for \$15,525, by cheque dated September 9, 2016, signed by Ms. Shaw and Mr. Smith (Ex. 1A, Tab 8; Ex. 27, Sch. 7). It was listed on the Floor Plan for Summit.

[278] The documented history of the vehicle is contained in Ex. 1A, Tab 8:

- September 8, 2016 – Imported from New Brunswick by Justincredible, but using Summit master number (pp. 159 & 160 - 162);
- September 8, 2016 – Bill of Sale from Justincredible to Summit (p. 155);
- September 9, 2016 – Cheque from Summit to Justincredible (p. 158);
- September 16, 2016 – Summit Application for Certificate of Registration (p. 164);
- November 18, 2016 – Bill of Sale from Justincredible to 3274232 NS Ltd. (p. 170);

- November 18, 2016 – Bill of Sale from 3274232 NS Ltd. to individual (p. 168);
- November 22, 2016 – Dealer Transfer from Summit to individual (p. 166); and,
- November 23, 2016 – Certificate of Registration issued to individual (p. 169).

[279] The Crown alleges that Justincredible sold this vehicle to Summit and then sold it to Simply Auto (3274232 NS Ltd.), collected the money and didn't pay Summit. The Defence does not dispute that Summit paid for the vehicle but submits that Justincredible sent it out on consignment only so if it was subsequently sold, Summit should have been paid.

[280] Darren explains that Justincredible bought the vehicle at auction, then sold it to Summit, and subsequently he delivered it to Simply Auto (Mr. Meech's lot) on consignment. He believes that Mr. Meech must have sold it but did not pay Justincredible or Summit for it.

[281] Mr. Meech recalled that he purchased the vehicle and sold it to a woman who had issues with it after the purchase which he fixed, and she retained the vehicle. In cross-examination, he agreed that the vehicle was originally taken on consignment from Summit and that he'd never received a Bill of Sale from Summit for it. He agreed he'd sold the vehicle. He was asked whether he'd ever turned over any money for the vehicle to Summit or Justincredible and responded, "I don't recall". He agreed it was possible he hadn't turned money over to either of them. He agreed that he had asked Summit to come to his lot to remove the vehicle and had no idea what happened to it after.

[282] There is a Bill of Sale showing that Justincredible sold the vehicle to Simply Auto (Roy Meech) and Darren signed the dealer transfer document on behalf of Summit, authorizing the transfer to the individual through Simply Auto (p. 166 & 170). However, there is no evidence of any deposit into Justincredible's account from Simply Auto in the amount of the sale.

Vehicle 10 – 2012 – Lotus Evora S

[283] The 2012 Lotus Evora S was purchased on November 24, 2016 by Summit from Justincredible, for \$120,750, by cheque dated November 25, 2016, signed by Ken Barrett (Ex. 1B, Tab 10; Ex. 27, Sch. 8). It was not listed on the Floor Plan for Summit.

[284] The documented history of the vehicle is contained in Ex. 1B, Tab 10:

- March 27, 2012 – Purchased and registered by individual (pp. 177 - 188); and,
- November 24, 2016 – Bill of Sale from Justincredible to Summit for \$120,750 (p. 175).

[285] The Crown alleges that this vehicle was not owned by Justincredible when it was sold to Summit, Summit paid for it and the vehicle was never delivered. The Defence does not dispute any of that but submits that Mr. Barrett knew all of this.

[286] Darren explains that Mr. Barrett wanted to purchase the Lotus but the deal was never completed. When Mr. Barrett was looking for value to add to the building deal, he instructed Darren to include this vehicle even though Darren didn't own it. Mr. Barrett's plan was to buy it from Summit when he got the money. The building deal fell through, but Darren had the serial number for the Lotus from Richard. He testified that this vehicle was intended to be a place holder only and everyone knew that. In his statement to police, Darren said that Richard had given him this one to use on the building deal (Ex. 22, p. 122).

[287] Mr. Barrett testified that he recalled purchasing the Lotus. He said he and Darren had discussed the vehicle about a year before the purchase. Darren knew someone who owned it, Mr. Barrett wanted it but didn't have the money at the time. Then, when Darren and Mr. Smith were proposing vehicles to give him to reduce the volume of his inventory, this vehicle came up again. He felt if he had to take the vehicles, it might as well be the Lotus so agreed to take it. On November 26, 2016, Mr. Barrett texted Darren asking for pictures of the Lotus because "you got me thinking" (ex. 5). Darren provided pictures but Mr. Barrett never saw the actual vehicle. Mr. Barrett testified that at that time, he wasn't aware the deal was already set up and there was already a Bill of Sale for the Lotus.

[288] In cross-examination, Mr. Barrett acknowledged he knew that Darren Bateman was trying to negotiate the purchase of a Lotus from Richard. He denied knowing that Richard did not actually have ownership of the Lotus.

[289] Richard testified that he had a friend who owned a Lotus and told Darren about it. Darren said he would try to sell it to Mr. Barrett and Richard told him he would want a commission if the deal went through. He gave Darren the VIN so he could check it out and he called back the same day with an offer. The deal never went through, and he didn't hear anything else about it until after Summit was closed and Mr. Barrett came to ask about the car. In cross-examination, he agreed

he'd asked his friend if he wanted to sell and found out how much he'd sell it for but denied that he'd ever prepared a Bill of Sale.

[290] Darren produced an unsigned Bill of Sale for the Lotus on Carzone letterhead (Ex. 31, tab 9). This document was never shown to Richard so he had no opportunity to dispute its authenticity. In the circumstances, I find I can put no weight on it.

[291] Daniel Leblanc, the owner of the Lotus, testified that he had some discussions about selling the Lotus but did not sell it to Richard and did not give Darren permission to sell it.

[292] Ms. Shaw testified that she understood the Lotus was part of Darren's personal collection of vehicles that Summit was buying and then he was buying back. She understood that Darren was holding onto the ownership because he would be purchasing the vehicle back. Near the end, Darren told her he did not own the Lotus.

Vehicle 11 – 2013 Dodge Ram 1500 (VIN ...0734)

[293] The 2013 Dodge Ram 1500 (VIN ...0734) was purchased on November 2, 2016 by Summit from Justincredible, for \$24,150, by cheque dated November 4, 2016, signed by Ms. Shaw and Mr. Smith (Ex. 1B, Tab 11; Ex. 27, Sch. 9). It was listed on the Floor Plan for Summit.

[294] The documented history of the vehicle is contained in Ex. 1B, Tab 11:

- October 25, 2016 – acquired by MacDonald Chrysler (p. 206);
- November 2, 2016 – Bill of Sale from Justincredible to Summit (p. 191);
- January 6, 2017 – cheque from Justincredible to MacDonald Chrysler (p. 207);
- January 13, 2017 – Bill of Sale from MacDonald Chrysler to Justincredible (p. 205);
- January 17, 2017 – transfer from MacDonald Chrysler to 3274232 NS Ltd. (p. 201);
- January 19, 2017* – Bill of Sale from Driving Time Auto to Mills Motors (p. 204);
- January 20, 2017 – Bill of Sale from Justincredible to 3274232 NS Ltd. (p. 203); and,
- January 24, 2017 – 3274232 NS Ltd. Application to register vehicle (p. 201).

* Mr. Meech testified he mistakenly put 2016 as the year but it should have been 2017

[295] The Crown alleges that this vehicle was not owned by Justincredible when it was sold to Summit, that Summit paid for it, and it was not delivered. The Defence does not dispute that this vehicle was not delivered to the Summit lot but submits that Justincredible owned it when it was sold and then sent it out on consignment so Summit should have been paid if it was sold.

[296] Darren testified that he had paid MacDonald Chrysler for the vehicle when he sold it to Summit but did not have physical possession of the vehicle because MacDonald Chrysler hadn't cashed the cheque. Mr. MacDonald was not asked about this when he testified. In his letter to the Crown, Darren said that Justincredible did have the vehicle in its possession when it was sold to Summit on November 2, 2016. He said he acquired it from MacDonald Chrysler and paid for it later, which was not unusual. Once Justincredible was paid by Summit, the vehicle was delivered to Summit. It did not sell, so was sent to Driving Time Auto on consignment. Darren says that if Driving Time Auto sold it, the proceeds should have gone to Summit.

[297] However, there is a Bill of Sale showing a sale of the vehicle from Justincredible to Driving Time Auto, for \$16,388, dated January 20, 2017.

[298] Mr. Meech reviewed documents related to this vehicle. He recalled that he'd sold the truck to a dealer in Ontario. Based on the Dealer Title transfer document, he initially recalled that he'd purchased a Ram Truck from MacDonald Chrysler. He said this document allowed him to have the vehicle in his name, which he would send to the buyer and allow him to transfer to the vehicle to the buyer. After reviewing the Bill of Sale between Justincredible and his company, he recalled that was where he actually bought the vehicle from.

[299] In cross-examination he agreed, he'd taken the vehicle on consignment. He agreed he'd sold the vehicle. He was asked whether he'd ever turned over any money for the vehicle to Summit or Justincredible and responded, "I don't recall". He agreed it was possible he hadn't turned money over to either of them.

[300] He acknowledged that the dates on the documents made it appear that he'd sold the vehicle before he purchased it. He explained that this was an instance where he had 'pre-sold' the vehicle, so he billed the customer right away, and then got the ownership quickly after that so that title could be transferred.

[301] He recognized his wife's signature on the Bill of Sale with Justincredible but could not say who had prepared the document.

Vehicles 12, 14 & 18 - 2013 Dodge Ram (VIN ...4708), 2014 Dodge Caravan, and 2014 Toyota Tacoma

[302] I am treating these vehicles together because the Crown and Defence theory for each is similar.

[303] The Crown alleges that these vehicles were not owned by Justincredible when they were sold to Summit, Summit paid for them, and they were not delivered. The Defence does not dispute this but submits that these deals were entered into with good faith, then fell through so were not completed and that Summit was made whole for their value.

[304] The 2013 Dodge Ram 1500 (VIN ...4708) was purchased by Summit from Justincredible, for \$29,900, by cheque dated November 4, 2016, signed by Ms. Shaw and Mr. Smith (Ex. 1A, Tab 12; Ex. 27, Sch. 9). It was listed on the Floor Plan for Summit.

[305] The documented history of the vehicle is contained in Ex. 1A, Tab 12:

- October 28, 2016 – acquired by MacDonald Chrysler (p. 219);
- November 2, 2016 – sold to Alva Construction (pp. 219 & 222);
- November 2, 2016 – Alva Construction registered it (p. 223); and,
- November 2, 2016 – sale from Justincredible to Summit for \$26,000 plus tax (p. 210).

[306] The 2014 Dodge Caravan was purchased by Summit from Justincredible, for \$25,875, by cheque dated December 21, 2016, signed by Ms. Shaw and Mr. Smith (Ex. 1A, Tab 14; Ex. 27, Sch. 5). It was not listed on the Floor Plan for Summit.

[307] The documented history of the vehicle is contained in Ex. 1B, Tab 14:

- November 17, 2016 – acquired by Chrysler MacDonald;
- December 21, 2016 – Bill of Sale from Justincredible to Summit (p. 260); and,
- March 15, 2017 – sold from MacDonald Chrysler to MacPhee Ford (pp. 269 & 281)

[308] The 2014 Toyota Tacoma was purchased by Summit from Justincredible, for \$27,600, by cheque dated December 21, 2016, signed by Ms. Shaw and Mr. Smith (Ex. 1A, Tab 14; Ex. 27, Sch. 5). It was not listed on the Floor Plan for Summit.

[309] The documented history of the vehicle is contained in Ex. 1A, Tab 18:

- December 14, 2016 – acquired by Chrysler MacDonald (p. 343);
- December 21, 2016 – Bill of Sale from Justincredible to Summit (p. 338);
- March 28, 2017 – MacDonald Chrysler registered the vehicle (p. 347); and,
- March 28, 2017 – sold from Macdonald Chrysler to MacPhee Ford (pp. 349 & 350).

[310] Darren explained that these deals fell through so were not completed. However, he and Mr. Barrett reached agreement for repayment by setting off money that Summit/Mr. Barrett owed Darren relating to three personal loans that Justincredible had paid off for Mr. Barrett, 17 x \$1,000 bills that Darren had acquired for Mr. Barrett, and Darren agreed to ‘write off approximately \$18,000 that Summit owed Justincredible relating to the ‘building deal’.

[311] In his letter to the Crown, he provided further details (Ex. 27, Appendix A, pp. 62-63 & 76 - 79). He said that Jack MacDonald at Chrysler asked him if he was interested in these vehicles. He checked with Mr. Barrett and they agreed to buy them. Mr. MacDonald faxed him the vehicle information. Summit paid Justincredible approximately \$80,625.00 for them. Summit and Justincredible exchanged cheques (p. 79). However, he was delayed getting down to pick up the vehicles and when he got there, they had been sold to another buyer.

[312] Jack MacDonald, owner and president of MacDonald Chrysler in Antigonish, testified. He had an ongoing and long-term professional relationship with Darren. He trusted him, felt he was a man of his word and in all their dealings he was always paid by Darren. He confirmed that he would call Darren about vehicles he had and might send him information about a vehicle, such as a VIN, in advance. He agreed that over the years, if he had a car that Darren might be interested in, he would call him and would also have sent him a bill of sale.

[313] After reviewing the documents, Mr. MacDonald recalled that one of his salesmen sold vehicle 12 to Alva Construction a few days after it was purchased by MacDonald Chrysler. He was asked whether it was possible that in the intervening

days, he could have sold it to someone else. He said it was possible. He explained that he might have been talking to somebody about it and had a potential to sell it to someone else but didn't because it was sold to Alva. The vice-president of Alva Construction confirmed that his company purchased the truck in November of 2016 and took possession of it shortly after.

[314] After reviewing the documents, Mr. MacDonald agreed that it appeared that his dealership sold vehicle 14 to MacPhee Ford about four months after they acquired it. Mr. MacDonald had some recall of this vehicle. He agreed he had the potential to sell the vehicle to someone else but didn't. He was asked if he ever spoke to Darren about this vehicle and said he might have given him a price on it and sent him a serial number so he could check it out and do a Carfax on it.

[315] After reviewing the documents, Mr. MacDonald agreed that his dealership sold vehicle 18 to MacPhee Ford about three months after acquiring it. He agreed he had the potential to sell the vehicle to someone else but didn't. He had little recall about this vehicle. He was asked if he ever spoke to Darren about this vehicle and said it was possible, but he had no specific recollection. He said he and Darren talked about a lot of different cars, as many as ten or fifteen a month.

[316] In cross-examination, Mr. MacDonald was asked if he ever had a situation with Darren where Darren agreed to purchase three vehicles, Mr. MacDonald sent him a bill of sale, Darren did not show up for a few months, and in the meantime, Mr. MacDonald had sold those cars to others. He responded "I did once or twice, yeah. I know what you're saying, yeah. I didn't wait for him. If somebody else come back with more money, I would call him and say "I can get money," he would say "Go ahead and sell it. ..."And I'll make up the difference to you somewhere, on another vehicle." That happened, yes."

[317] Darren also provided further details about the loans he paid off and the \$1,000 bills he acquired. He said that Mr. Barrett had three loans with National Bank for Seadoos. On November 5, 2015, Justincredible wrote three cheques to National Bank to pay out Mr. Barrett's Seadoo purchases. They were all written on the same day but did not clear on the same day. He said that two cleared right away but there was a delay with the other because National Bank did not want to accept payment from a third party. He said Mr. Barrett did not pay him back for these.

[318] Darren also testified that Mr. Barrett liked collecting \$1,000 bills and at times had asked him to acquire them. Darren had learned that Mr. MacDonald had some or could obtain some from a local bank, so he got 17 from Mr. MacDonald and gave them to Mr. Barrett.

[319] Darren produced documents to support his testimony about the loans he paid off. They were not shown to Mr. Barrett which may impact the weight I can give them. They include three loan payout statements that Darren said Mr. Barrett gave him so that he could pay out the loans. They show that as of November 4, 2015, “Kenneth Barrett” owed National Bank \$10,823.08 for “water ski”, \$14,720.27 for “water ski”, and \$15,092.85 for “water ski” (Ex. 31, Tab 12). Also included are three cheque stubs which Darren testified were from Justincredible’s account showing payments to National Bank in those amounts.

[320] Ms. Sullivan reviewed three loan documents for National Bank, executed by Ken Barrett – one for an ATV and two for Seadoos (Ex. 27, p. 34). However, the Defence documents clearly show three loans related to Seadoos, each with different interest rates and different balances owing as of November 4, 2016 (Ex. 31, tab 12). Ms. Sullivan only found evidence of one payment from Justincredible to National Bank, dated January 14, 2016 for \$15,093. However, the bank statements in evidence for Justincredible do not include November of 2015 and she testified that she did not look at anything outside the time period she was examining. The deposit she did find corroborates Darren’s evidence that one payment was deposited later.

[321] Mr. Barrett denied having any conversation with Darren about vehicles that Mr. MacDonald had sold to someone else after Darren had agreed to buy them.

[322] He did confirm that Seadoo loans were paid out by Justincredible. He initially denied it and insisted that Summit had paid for the Seadoos. However, after checking his records overnight, he corrected his previous testimony and said that he’d found a cheque showing that Justincredible had paid out the loan. He maintained that he’d bought the Seadoos from Summit, so believed that Summit had purchased them from Justincredible. He had no document to support that and it appears to be contradicted by the loan documents which show loans from National Bank to Mr. Barrett, individually. Those documents suggest that Mr. Barrett had a personal loan for the Seadoos which Justincredible paid off, for a total of approximately \$40,000.

[323] Mr. Barrett also acknowledged that he collected \$1000 bills and when asked if Darren had given him 17 of them, he said “he may have”.

[324] Mr. MacDonald testified that Darren was at his dealership one day and asked him about \$1,000 bills. He told Darren that he had some but wouldn't sell them, however, he could get them from the bank once in a while. About a month or two later, the bank called and said they had 40 of them, so he called Darren who said he'd take them all. Mr. MacDonald was not prepared to let him have all of them but agreed to sell him 17 of them and kept the remainder for himself. He could not recall when that happened.

Vehicle 13 – 2013 Subaru Impreza

[325] The 2013 Subaru Impreza was purchased by Summit from Justincredible on August 18, 2016 for \$14,720, by cheque dated August 24, 2016, signed by Ms. Shaw and Mr. Smith (Ex. 1B, Tab13; Ex. 27, Sch. 10). It was listed on the Floor Plan for Summit.

[326] The documented history of the vehicle is contained in Ex. 1B, Tab 13:

- June 21, 2016 – Bill of Sale from Church of LDS to Automac (p. 253);
- July 28, 2016 – Justincredible takes vehicle on trade from Automac (p. 251);
- August 18, 2016 – Bill of Sale from Justincredible to Summit (p. 229);
- October 31, 2016 – transfer from Church of LDS to Summit (p. 242);
- November 16, 2016 – Bill of Sale from Justincredible to No Bull Auto (p. 254);
- January 5/11, 2017 – transfer from Summit to No Bull and registered (p. 264);
- October 16, 2017 – Bill of Sale from No Bull to individual (p. 257); and,
- October 19, 2017 – transfer from No Bull to individual (p. 170)).

[327] The Crown alleges that this vehicle was sold by Justincredible to Summit, Summit paid for it, the vehicle was never delivered and Justincredible sold it again to 'No Bull'. The Defence does not dispute that Summit paid for the vehicle but submits that the vehicle was delivered to Summit.

[328] Darren testified that he, on behalf of Summit, sent the vehicle to Driving Time Auto but it didn't sell. Driving Time Auto sent it to auction where it did sell. However, it was returned because of frame damage and went to the Auction arbitration. Darren testified that once the frame damage was discovered, Mr. Barrett did not want the vehicle back, so Darren arranged for it to go to No Bull. They picked it up, sold it and were supposed to turn the money over to Summit. They did not.

[329] Instead, they paid Justincredible. Ms. Sullivan notes that 'No Bull' wrote a cheque to Justincredible for \$11,500 (the value noted for the trade on the Bill of Sale, p. 251) and the cheque was deposited into Justincredible's account.

[330] Darren acknowledged that he was paid and that he should have given Summit the money or the vehicle. He did not.

[331] Darren testified that he went back to Mr. Barrett but, at that time, the dealership was winding down and Mr. Barrett wanted nothing to do with Darren, so essentially told him it would get sorted out later. In his letter to the Crown, Darren said that No Bull sold the vehicle for about \$8,000 and when he told Mr. Barrett that No Bull had sold the vehicle and had not turned the money over to Summit, Mr. Barrett told him not to worry about it and he was writing it off (Ex. 27, Appendix "A", p. 80). In his letter, he did not disclose that No Bull had actually paid Justincredible a little over \$11,000 for the vehicle.

Vehicle 15 – 2014 EZ Hauler Exec 5x8 Trailer

[332] The EZ Hauler Trailer was purchased by Summit from Justincredible on November 30, 2016 for \$74,175, by cheque dated December 22, 2016, signed by Mr. Barrett (Ex. 1B, Tab15; Ex. 27, Sch. 3). It was not listed on the Floor Plan for Summit.

[333] The documented history of the vehicle is contained in Ex. 1B, Tab 15:

- October 10, 2013 – purchase by Mr. and Mrs. Brown (p. 290);
- March 25, 2014 – registered to Mr. and Mrs. Brown (p. 294);
- September 29, 2014 – transfer from Mr. and Mrs. Brown to Adam Smith (master # ...3017) (p. 296);
- October 2, 2014 – 'Notice of Sale' - Pino Smith (master # ...1016), purchaser (p. 293);

- May 14, 2015 – registered by Smith (master #... 3017) (p. 289); and,
- November 30, 2016 – Bill of Sale from Justincredible to Summit (p. 287).

[334] The Crown alleges that this vehicle was sold by Justincredible to Summit, Summit paid for it, and the vehicle was never delivered. The Defence does not dispute that Summit paid for the vehicle and it was not delivered to the Summit lot but submits that the vehicle was delivered to Digby with Mr. Barrett's knowledge.

[335] Darren explained that Justincredible purchased the trailer from Adam Smith, sent it to Richard and then to the Digby lot with the rest of the vehicles on Mr. Barrett's instruction. Later Richard asked him for the permit because it had been stolen and the police wanted the permit, so Darren copied the permit and sent it to him.

[336] Ms. Sullivan questioned how Adam Smith could have sold the trailer to Justincredible when it was registered to Pino Smith at the time. I note that, in the documents, Pino Smith and Adam Smith have the same address, but different master numbers, so it is probable that they are related to each other (pp. 293 & 296). Further the client history for the VIN shows that the vehicle was registered to Adam Smith's master number September 2014 and May 2015.

[337] Darren produced documents relating to this transaction (Ex. 31, Tab 14). Adam Smith also testified. His testimony and the supporting documents suggest that Adam Smith owned the trailer and sold it to Darren in 2016. Adam Smith testified that, at Darren's instruction, he delivered the trailer to Richard's and left it there.

Vehicle 16 – 2014 Harley Davidson V-Rod Muscle

[338] The 2014 Harley Davidson V-Rod Muscle was purchased by Summit from Justincredible, on November 24, 2016 for \$64,400, by cheque dated November 25, 2016, signed by Ken Barrett (Ex. 1B, Tab 16; Ex. 27, Sch. 11). It was not listed on the Floor Plan for Summit.

[339] The documented history of the vehicle is contained in Ex. 1B, Tab 16:

- April 2, 2015 – Purchased and registered by Richard Bateman (pp. 306 – 313); and,
- November 24, 2016 – Bill of Sale from Justincredible to Summit (p. 301);

[340] The Crown alleges that this vehicle was not owned by Justincredible when it was sold to Summit, Summit paid for it and the vehicle was never delivered. The Defence does not dispute that the V-Rod was sold to Summit but submits that Justincredible did own it when it was sold to Summit and that Richard was supposed to deliver it to Summit.

[341] In his statement to police, Darren said he obtained the V-Rod in exchange for four vehicles: a 2011 Kia Soul; a 2013 Elantra; a Sonata; and a Mazda Tribute.

[342] In his letter to the Crown, he said that, in June of 2016, he agreed to trade three vehicles to Carzone for this motorcycle: a 2013 Elantra; 2011 Kia Sol; and, a 2011 Mazda Tribute (Ex. 27, Appendix A, p. 82). He said, at the time of the trade, Richard still owed \$13,000 on the bike but said he would pay off the loan when he sold the three vehicles. Richard wanted to keep the motorcycle and permit to take a trip to Florida. When he got back, he was supposed to deliver both to Summit and did not.

[343] Darren testified that he obtained the V-Rod from Richard for \$20,000 and the three vehicles, with no money owing either way. Darren produced documents relating to this transaction, including a Bill of Sale which purports to record the transaction with Carzone (Ex. 31, Tab 15). These show that on September 9, 2016, Justincredible traded a 2013 Elantra, a 2011 Kia Sol, and a 2015 Elantra to Carzone for a 2014 Harley V-Rod and (p. 4). Of note is that the Bill of Sale reports a sale in September of 2016, whereas Darren's letter suggested this sale occurred in June of 2016. The Bill of Sale purporting to show the trade with Carzone was not shown to Richard when he testified which impacts the weight I can give it.

[344] Darren also produced documents showing how he obtained the three vehicles he traded for the V-Rod: a bill of sale, dated September 9, 2016 showing the sale of a 2013 Hyundai Elantra from Summit to Justincredible; a bill of sale, dated July 12, 2015, showing the sale of a 2015 Elantra from Summit to Justincredible; and, a bill of sale, dated November 23, 2016, showing the sale of the Kia Soul from Summit to Justincredible.

[345] Darren produced further documents which purport to show that Carzone sold a 2011 Kia Sol, 2013 Hyundai Elantra and a 2015 Hyundai Elantra to Pothier Motors in February and June of 2016. These were not shown to Richard or Mr. Pothier, so were not identified and are not admissible. In any event, if the date on

the Bill of Sale for the trade between Darren and Richard is correct, it would mean that Carzone sold the vehicles it acquired from the trade before the trade happened. Darren was asked about that in cross-examination and explained that the vehicles were placed with Carzone on consignment and when Darren went looking for them, Richard said they'd been sold and he didn't have the money to pay Justincredible so agreed to traded the V-Rod.

[346] Darren was also asked about a further discrepancy in dates for the Kia Sol. According to the dates on the documents, Justincredible did not purchase it from Summit until November of 2016 but traded it to Carzone for the V-Rod in September of 2016. Darren's explanation was that there were two Kia vehicles and he had made an error with the serial numbers so paid out the wrong vehicle. He eventually realized his error and paid Summit for the correct vehicle, albeit after he'd traded it to Carzone.

[347] Richard testified that his partner and her father had put a deposit down on the Harley V-Rod as a Christmas gift to him. It was in his own name, not Carzone's. He kept the motorcycle until about two months before he testified at trial. He never traded or sold it to Darren and never gave Darren permission to use it in any deal with Mr. Barrett. In cross-examination, he denied that he'd traded the motorcycle to Darren in June of 2016 for the previously mentioned vehicles. However, the details of Darren's recollection – that the vehicles were put with him on consignment, that he sold the vehicles to Pothier and couldn't pay Darren, and the trade then occurring in September – were not put to him and he was not shown the documents.

Vehicle 17 – 2014 Kawasaki Custom Motorcycle

[348] The 2014 Kawasaki Custom Motorcycle (VIN ...8533) was purchased by Summit from Justincredible on December 6, 2016, for \$64,975, by cheque dated December 8, 2016, signed by Ken Barrett (Ex. 1B, Tab 17; Ex. 27, Sch. 1; Ex. 28). It was not listed on the Floor Plan for Summit.

[349] The documented history of the vehicle is contained in Ex. 1B, Tab 17:

- July 19, 2016 – acquired by Justincredible at auction, for \$6,198.50 (pp. 334 - 336);
- July 22, 2016 – Ownership Certificate showing Justincredible as owner (p. 321);
- September 27, 2016 – application for transfer to Summit (p. 323 - 325);

- November 21, 2016 – Certificate of Registration issued to Summit (p. 331);
- November 22, 2016 – dealer transfer from Summit to 3274232 NS Ltd. (p. 333);
- November 30, 2016 – Bill of Sale from Justincredible to Summit, \$71, 415 (p. 223);
- December 6, 2016 – Bill of Sale from Justincredible to Summit, \$64,975 (p. 316); and,
- December 8, 2016 – cheque from Summit to Justincredible, \$64,975 (p314 – 315).

[350] The Crown alleges that this vehicle was sold to Driving Time before it was sold to Summit and was not delivered Summit. The Defence does not dispute that the motorcycle was paid for by Summit and was not delivered to the Summit lot. However, Darren says it was delivered to the warehouse in Digby on Mr. Barrett's instruction.

[351] Darren testified that this motorcycle was part of the 'building deal'. In his letter to the Crown and testimony, he said it was delivered to Digby where it should still be, so was effectively delivered to Summit.

[352] Richard testified that he had a 2014 Kawasaki and still had it at the time of trial but that police had confirmed the one he had was not the one at issue. He testified he had no dealings with Darren with respect to any 2014 Kawasaki.

[353] The documents for this vehicle are very confusing. It appears that Justincredible purchased the vehicle from auction in New Brunswick, but Darren signed on behalf of Summit to register it in Summit's name. At that point, the documents do not show that Summit actually paid for it but registering it with Summit may have been because it had to be registered to a dealer. Darren then signed on behalf of Summit to transfer the motorcycle to Driving Time Auto (pp. 325 & 333). This is before Summit paid Justincredible for the motorcycle. In cross-examination of Ms. Sullivan, it was suggested that this may have been Summit 'pre-selling' the vehicle it anticipated purchasing. However, Ms. Sullivan was unable to locate any payment from Driving Time to Summit for this vehicle. She did locate a payment to Justincredible, dated November 24, 2016 in the amount of \$6,927.50 that referenced "Auction Processing Sale". The timing and amount of this would be consistent with it being a payment for the motorcycle.

[354] Darren's explanation that Justincredible 'sold' this motorcycle to Summit as part of the building deal and then transferred it to Digby doesn't fit with these

documents that suggest Summit or Justincredible sold it to Driving Time in November of 2016.

[355] Mr. Meech could not recall this vehicle at all. He said he did not have a licence to sell motorcycles. So, he could buy one, but would have to pay tax on it because he would not be a licenced dealer who could be a ‘pass-through’ dealer. He said it might have been one that he did before he learned the regulations but was just speculating. He recognized his company number and address on parts 2 and 3 of the transfer document but did not recognize the handwriting and said it was not his signature on the line for signature of applicant for permit (p. 333).

Vehicle 19 – 2015 Chevrolet Silverado

[356] The 2015 Chevrolet Silverado was purchased by Summit from Justincredible, for \$45,425, by cheque dated December 7, 2016, signed by Ms. Shaw and Mr. Smith (Ex. 1C, Tab 19; Ex. 27, Sch. 12). It was listed on the Floor Plan for Summit.

[357] The documented history of the vehicle is contained in Ex. 1C, Tab 19:

- September 29, 2014 – acquired by Enterprise (p. 358 - 360);
- November 20, 2015 – Enterprise transferred to Carzone (p. 367);
- November 24, 2015 – registered to Carzone (p. 368);
- December 7, 2015 – Bill of Sale from Justincredible to Summit (p. 355);
- December 31, 2015 – transfer from Carzone to Summit (p. 370);
- February 4, 2016 – Bill of Sale from Carzone to Pothier Motors (p. 374);
- February 4, 2016 – transfered from Summit to Pothier Motors (p. 371); and,
- March 1, 2016 – Bill of Sale from Pothier Motors to unrelated company (p. 373).

[358] The Crown alleges that this vehicle was not owned by Justincredible when it was sold to Summit and was never delivered to Summit. The Defence does not dispute it was sold to Summit but submits it was owned by Justincredible and was delivered.

[359] Darren says Justincredible bought the vehicle from Carzone on December 7, 2015 but the title was simply not transferred to Justincredible. He says it was delivered to Summit's control.

[360] Darren produced documents relating to this transaction, including a Bill of Sale which purports to show that Justincredible purchased the vehicle from Carzone on December 7, 2015 for \$40,250 (Ex. 31, Tab 17). These were not shown to Richard when he testified which impacts my ability to rely on them.

[361] Mr. Pothier could not recall this vehicle but reviewed the documents. He interpreted them as meaning that Pothier Motors had purchased the vehicle from Carzone but that Summit had owned it at one time. He said "so it came from Summit Hyundai right to us, so it didn't ... he didn't run it through, which sometimes happens. They don't have to run it through the ... the two or three dealers if it's a dealer to dealer.". He acknowledged that the dealer transfer document did not have his Dealer stamp on it but said the signature was that of his business manager (p. 371). The Crown pressed him on this, asking him to compare the signature on this document with others that had been signed by his business manager that did contain the stamp, and he responded, "It's a little different but it's hard to say, really".

[362] He said he had no dealings with Justincredible or Darren Bateman in relation to this vehicle, that the vehicle had come directly from Carzone and that's who he had written the cheque to (p. 375).

[363] Richard did not recall this vehicle, did not acknowledge that Carzone had ever owned it but testified that he hadn't given Darren permission to use it in any deal with Mr. Barrett. He reviewed the documents transferring this vehicle from Enterprise to Carzone and did not recognize the signature of the person who had signed for Carzone (p. 367). He was asked if he recalled anything about this vehicle which was registered to Carzone and he did not. He recalled something about a Silverado that Darren had owed money to someone named Ralph Hamilton for but there is no evidence that this is that vehicle. He looked at the document transferring the vehicle from Carzone to Summit and said the signature for Carzone did not look like his or Ms. Young's and it did not include his stamp (p. 370).

[364] In cross-examination, he acknowledged that according to the registration, Carzone had owned it. However, he said it wasn't his signature on the documents and, if he did own it, denied he'd sold it to Justincredible.

Vehicle 20 – 2015 Harley Davidson Road Glide Motorcycle

[365] The 2015 Harley Davidson Road Glide Motorcycle was purchased by Summit from Justincredible on November 24, 2016, for \$64,400, by cheque dated November 25, 2016, signed by Mr. Barrett (Ex. 1C, Tab 20;). It was listed on the Floor Plan for Summit.

[366] The documented history of the vehicle is contained in Ex. 1C, Tab 20:

- October 14, 2016 – purchase date recorded in Carzone cost sheet/inventory (p. 399);
- November 10, 2016 – transferred from Mr. Leblanc to Carzone (p. 387);
- November 24, 2016 – Bill of Sale from Justincredible to Summit (p. 378);
- April 10, 2017 – registered to Carzone (p. 388);
- April 10, 2017 – Bill of sale from Carzone to Kustom Creations Cycle (p. 402);
- April 12, 2017 – transferred from Carzone to Kustom Creations (p. 390); and,
- April 20, 2017 – registered to Kustom Creations (p. 391);

[367] The Crown alleges this vehicle was not owned by Justincredible when it was sold to Summit and was never delivered to Summit. The Defence does not dispute it was sold to Summit but submits it was owned by Justincredible and was delivered to the lot in Digby with Mr. Barrett's knowledge.

[368] Darren says Justincredible bought this motorcycle from Carzone on November 17, 2016 for \$25,000 which was paid by trade of another motorcycle worth \$10,000. He produced documents relating to this transaction, including a Bill of Sale which purports to record the transaction with Carzone (Ex. 31, Tab 18). The Bill of Sale purports to show that on November 17, 2016, Justincredible traded a 2005 Harley Davidson to Carzone and received in return a 2015 Harley Road Glide with a balance owing from Justincredible to Carzone of \$17,250 (p. 2). The Bill of Sale purporting to show the trade with Carzone was not shown to Richard when he testified which impacts my ability to rely on it.

[369] Richard confirmed he purchased this motorcycle, which was orange, from Mr. Leblanc, the same man who'd owned the Lotus, and sold it to Kustom Creations. Mr. Leblanc confirmed he'd sold it to Richard. In cross-examination, Richard denied he'd sold it to Justincredible.

Vehicles 22, 23, 24, 25 & 26 – The “Rentals” - 2016 Dodge Ram 1500, 2016 Dodge Ram 3500 Laramie, 2016 Jeep Wrangler and 2017 Dodge Ram 3500 Longhorn

[370] The Crown alleges that Justincredible Motors sold Summit rental vehicles and passed them off as vehicles it owned. The Defence does not dispute that these vehicles were rentals and that Pothier Motors held title for these vehicles but denies that Darren passed them off as vehicles that he owned.

[371] The documented histories for these vehicles are contained in Ex. 1C, Tabs 22 – 26. In summary, all vehicles were owned by Pothier Motors and were never sold to Summit or Justincredible. Despite that, there are Bills of Sale showing these vehicles were sold from Justincredible to Summit:

- Vehicle 22 - July 25, 2016 - Bill of Sale from Justincredible to Summit, \$68,425 (p. 405);
- Vehicle 23 - October 6, 2016 – Bill of Sale from Justincredible to Summit, \$86,250 (p. 431);
- Vehicle 24 - July 21, 2016 – Bill of Sale from Justincredible to Summit, \$85,100 (p. 456); and,
- Vehicle 25 - November 2, 2016 – Bill of Sale from Justincredible to Summit, \$54,050(p. 472); and,
- Vehicle 26 - Undated – Bill of Sale from Justincredible to Summit, \$86,250 (p. 472) - October 6, 2016 – Cheque from Summit to Justincredible referencing this vehicle (p. 498)

[372] Vehicles 22, 23, 25 and 26 were leased/rented to Darren Bateman. All but vehicle 26, were on the floor plan for Summit. Vehicle 24 was leased/rented to Carzone. It was listed on the floor plan for Summit.

[373] Richard testified that he leased or rented a number of trucks from Pothier Motors over the years, none of these trucks were ever part of the building deal and

he didn't give permission to Darren or Mr. Smith to do anything with any of the trucks.

[374] Mr. Pothier testified that he had a rental fleet of vehicles that Mr. Barrett's dealership would rent or lease from him for six months and then return. His dealership got a benefit from the manufacturer (a rebate or a preferential interest) for vehicles that were rented for six months and had 12,000 km on them before they were sold. As such, he would rent them and would never sell them before those two conditions were met.

[375] Darren testified that Mr. Barret knew these vehicles were leased/rentals, it was his idea to put them on the floor plan and he came up with a scheme to treat them as assets of Summit during the period of the rental.

[376] Darren testified that when he first came to Summit, he was leasing a new truck from Pothier Motors. Mr. Barrett and Mr. Smith knew he leased/rented it from Pothier Motors. Eventually, he, Mr. Smith and Mr. Barrett all drove Dodge Ram trucks and the Jeep which they all knew were rentals/leases. Mr. Barret asked if he could put the trucks on the floor plan and Darren told him he didn't think so since they were owned by Pothier Motors. However, Mr. Barrett did put them on the floor plan. In his letter to the Crown, he described it as a "flip flop for the bank" (Ex. 27, Appendix A, p. 86).

[377] Darren described that he would rent/lease trucks from Pothier Motors and pay the rental fees. Mr. Barret would put them in Summit's inventory, put them on the floorplan and drive them for about six months. At the end of six months, the vehicle would be returned, and the vehicle removed from the floorplan. Mr. Barrett would 'sell' the vehicle back to Justincredible Motors – providing an Invoice - and Justincredible would pay Summit for the value of the vehicle, less the cost of the rental, by cheque. That money would be used to pay out the bank. When the truck was returned to Pothier Motors, they would rent/lease Darren a new truck, he would prepare a bill of sale for Summit, Summit would pay Justincredible. He said, they essentially, just exchanged bills of sale. Summit never owned the trucks. The plates and registration would be in the name of Pothier Motors, but the certificate of registration would be with the vehicle. Darren believed that Mr. Barret used the bill of sale and/or information from the registration to put the vehicles on the floor plan.

[378] He testified that the scheme went on for about five years and, in his letter to the Crown, said that, in total, Summit paid Justincredible \$333,563 and Justincredible paid Summit \$351,900.

[379] Mr. Barret testified that he did not know these vehicles were leased/rented vehicles.

[380] Mr. Barrett's testimony is contradicted by his comments or lack of response during the recorded conversation (Ex. 7; Ex. 36). During that discussion, Mr. Barrett, Mr. Smith and Darren are discussing a list of vehicles including some that Mr. Barrett claims he should have but can't be found. Mr. Barrett refers to the Rams, the Wranglers and the Silverados, saying they are not on the lot. Darren responds, "no, but these Ram trucks, I've been flipping them for three years". Mr. Barrett, then responds, "but obviously I don't know where ... all the money has gone" (p. 65 – 67). Then Mr. Barrett presses for information about what vehicles are real on the ground and asks for ownership papers. Mr. Smith responds that they don't have what Mr. Barrett is asking for, saying "... you know that because them Rams don't exist. Them cars don't exist. You flip flop". Mr. Barrett does not express surprise or otherwise dispute the statements of Darren and Mr. Smith that the Rams don't exist, that Mr. Barrett knew the Rams don't exist and Darren has been flipping the Rams for years (pp. 65 - 68).

Possession of Proceeds of Crime

[381] Ms. Sullivan's analysis shows that money resulting from the fraud went into the Justincredible account and that money came out of that account to Mr. Smith, Mr. Smith's wife, a company owned by Mr. Smith's wife, his son, Darren Bateman and his wife.

[382] During the 14-month period of the review, Mr. Smith, Renee King (Mr. Smith's wife) and Livewell Fitness and Tanning ('Livewell, Ms. King's company) received \$58,800 from Justincredible (Ex. 26, p. 9; Ex. 27, p. 7). Mr. Smith's son also received funds from Justincredible but the Crown does not argue that that amount is part of the alleged benefit to Mr. Smith. During that same period, Darren and his wife received \$162,000 (Ex. 26, p. 9).

[383] The Defence argues that the report does not trace specific funds or even correlate the timing of payments that could be attributed to the 24 cars with the

timing of payments to the alleged beneficiaries of the fraud. The Defence argues that when that is done, the analysis shows there is no correlation.

[384] Ms. Sullivan agreed that most of the transactions for the 24 vehicles and most of the high single vehicle payments flowing from Summit to Justincredible occurred in the last quarter of 2016. As a result, the bulk of payments from Summit to Justincredible was concentrated in that time period. In fact, almost \$1 million of the total \$1.3 million that Summit paid Justincredible attributable to these vehicles was paid in the last quarter of 2016. She also agreed that the payments to Mr. Smith and Ms. King were spread evenly throughout 2016 with at least one transaction in every month except April of 2016 (Ex. 26, Sch. 2.8).

[385] The Defence further notes that the first payment to Livewell Fitness and Ms. King for \$4,500 was before the first transaction relating to the 24 vehicles. The earliest payment was December 2, 2015, by cheques dated November 17 and 30, 2015 (Ex. 26, Sch. 2.8). Whereas the earliest transaction relating to the 24 vehicles was December 7, 2015 (Ex. 26, table 6.1). After that December 7, 2015 transaction, the next vehicle transaction was February 11, 2016, when two vehicle sales were recorded (Ex. 26, Table 6.0). During that period, there were five additional payments to the Smiths (Ex. 26, Sch. 2.8). The earliest payment to Mr. Smith was January 22, 2016, by cheque dated January 21, 2016 (Ex. 26, Sch. 2.8).

[386] The only explanation for the payments comes from Darren's out of court statement(s). Those statements are hearsay in relation to Mr. Smith, so are presumptively inadmissible and Mr. Smith did not apply to admit them under the principled exception (see: *Srun*, paras. 111-129; *Waite*, 2014 SCC 17, para. 4). As such, even if Darren's out-of-court explanation was exculpatory in relation to Mr. Smith, I cannot use it for that purpose (see: *Srun*, para. 121; *Waite*).

[387] Of course, Darren's in-court testimony is available to potentially assist Mr. Smith. In cross-examination by Mr. Smith's counsel, Darren was asked whether money that went from Justincredible to Mr. Smith or his family related to "missing cars or anything to do with Summit Hyundai" and he said "no". He was not asked what it was for, so the explanation provided in his out-of-court statements is not available to Mr. Smith.

[388] The bank records show no funds coming from Ms. King, her business or Mr. Smith to Justincredible's account, so, if there were loans, there is no evidence they were repaid. There is also no corroboration that Justincredible had borrowed

money from Mr. Smith to buy cars. Of course, if Darren had borrowed cash from Mr. Smith to purchase the vehicles, that would not be reflected in Justincredible's bank statements. However, the relative balances in the Justincredible bank account and Mr. Smith's bank account make it unlikely that Darren would need to borrow money from Mr. Smith or that Mr. Smith would have been in a position to loan money to Darren.

Threatening a Justice System Participant – s. 423.1

[389] Richard testified that Mr. Smith and Darren had both told him that he had better not be speaking with the police.

[390] A couple of months after Darren and Mr. Smith parted company with Summit, Richard met with Cst. Wayne Ross from the RCMP. He met him at Mr. Barrett's house. After that, he met him there for interviews another two or three times.

[391] He described an incident in Berwick, Nova Scotia when he was in the liquor store parking lot and had an altercation with Mr. Smith. He couldn't recall when that occurred but said it was after he'd spoken to the police three or four times. A receipt for a purchase at the liquor store that day was entered into evidence, showing August 27, 2018 at 5:54 p.m. (Ex. 19).

[392] He testified that he and Ms. Young were shopping. He didn't know that Mr. Smith lived in the area. They were pulling out of the liquor store parking lot when a Jeep cut across in front of him and slowed. He looked and saw it was Mr. Smith driving. Mr. Smith made a "gun gesture" with his hand and pointed it at him. It was like he pulled the trigger and made a shot. Then, he leant around and pointed it at Ms. Young and did the exact same thing. Then Mr. Smith pulled ahead and he believed that Ms. Young called 911.

[393] He said it made him feel nervous.

[394] In cross-examination, Richard agreed that he lived near Kentville and would normally have gone to the liquor store in Kentville so Berwick was a little out of his way. He said he believed that Mr. Smith, his wife and son all worked in Kentville so wanted to avoid them and didn't know he lived near Berwick.

[395] Heather Young testified that she was with Richard that day in Berwick. She said they went there because the liquor store in Kentville is only small and its

normally busy. The Crown asked her if before going to Berwick, she had thought about the possibility of running into Mr. Smith, she said “no”. She went into the liquor store and when they were leaving the parking lot a Jeep cut off in front of them. It pulled alongside and Mr. Smith put his fingers up like he was shooting a gun and pretending to pull the trigger twice in the direction of Richard and her. She recalled Mr. Smith was wearing a blue shirt. She thought the windows were closed and said that no words were exchanged. She was in shock after.

[396] She had spoken to police about these matters before the incident in Berwick.

[397] In cross-examination, she acknowledged that she and Richard had discussed the incident. She also acknowledged that she knew that Mr. Smith lived near Berwick, on the other side of the highway, not toward the liquor store. She agreed she’d been outside Mr. Smith’s house once with Richard picking up a motorcycle.

Credibility

[398] I have addressed specific issues with credibility and reliability as I reviewed the evidence. Overall, I have serious concerns about the credibility and/or reliability of the testimony of Mr. Barrett, Richard and Darren Bateman.

[399] I will summarize my reasons for those concerns. However, before I do that, I need to address a specific issue concerning Mr. Barrett. In assessing his credibility, I have considered his knowledge and/or participation in the financial practices at Summit. Some of that conduct might constitute a fraud on the bank who provided his financing or inculcate him, as a party, to any fraud on the company. However, it is important to note that he was not on trial in this proceeding. As such, he did not have the benefit of counsel or the presumption of innocence. If he had been charged, with either a fraud on the bank or the company, then I would have to decide whether his guilt was proven beyond a reasonable doubt. He was not charged, and the purpose of this trial was not to determine whether he is guilty. As such, any comments I make cannot be taken as either establishing his innocence or a deciding hat he would have been proven guilty, if charged.

[400] In summary, my reasons for doubting their reliability/credibility include the following.

[401] For Mr. Barrett:

- He engaged in business practices which, in my view and based solely on the evidence before me in this proceeding, were unethical and perhaps fraudulent with respect to the company and the bank that provided his inventory financing, including, swapping cars to delay paying the bank at curtailment, and overvaluing cars to increase his assets and protect his financing;
- His testimony that he could not recall who came up with the idea for the car swapping scheme was not credible. I believe he came up with it. He was familiar with the intricacies of floor-plan financing and had much more to gain from the scheme than Darren (accepting its original intent was value-neutral swapping). Given the financial, and potential legal implications of the practice, I also believe that he would remember whose idea it was;
- His evidence concerning his lack of knowledge that the cars that Justincredible was providing as part of the car swap were not real was not consistent with his reactions and responses when this was discussed during the recorded conversation;
- His testimony that he did not know the Ram trucks/Jeep were leased/rented is not plausible and not consistent with his reactions and responses when they were discussed during the recorded conversation; and,
- His initial professed lack of recall that Darren had paid out his loans for the skidoos was not credible.

[402] For Darren Bateman:

- Justincredible collected HST on vehicle transfers but did not remit and his testimony about this was not consistent with comments in the recorded conversation. He testified that he was not required to remit because he was entitled to a refund, however, in the recorded conversation he acknowledged that the cheques to his company for “rigs” that never existed would have negative tax consequences to him on the GST, that he would owe thousands of dollars (Ex. 36, p. 91);
- He created false documents for the rental/lease vehicles and participated in the vehicle/cheque swapping at inflated values;

- He professed to have detailed recollections about transactions and conversations that one would not expect him to have given the passage of time; and,
- Many of his explanations for various specific car-deals were inconsistent either internally or as between his statement, letter to the Crown and testimony.

[403] For Richard Bateman:

- His lack of recall for some transactions appeared feigned as compared to his detailed recollection about others;
- His evidence concerning his previous financial relationship with Darren was contradicted by objective evidence that I accept;
- At least in the years since the events, he and Mr. Barrett have formed a relatively close relationship and have specifically discussed the matters before the Court; and,
- He demonstrated some animosity toward his brother and Mr. Smith.

Analysis and Conclusions

Car-Swapping

[404] I am satisfied beyond a reasonable doubt that the vehicle/cheque swapping transactions were lopsided. The cheques were generally equal but the value that each side acquired was not. I accept Ms. Sullivan's analysis on values as fair and reasonably accurate. As a result, Justincredible benefitted, to Summit's detriment, by between \$440,497 and \$560,269 over the course of the period that cheques were being exchanged.

[405] The question is whether, as a result, Mr. Bateman and/or Mr. Smith are guilty of fraud.

[406] I have no doubt that there was a deprivation to Summit.

[407] The issues are whether Mr. Bateman and/or Mr. Smith committed an act that was objectively fraudulent, whether they knowingly undertook that act and whether they knew it could result in a deprivation.

[408] I am satisfied beyond a reasonable doubt that Mr. Bateman and Mr. Smith participated in the vehicle/cheque swapping that constitute the act in question. I accept Mr. Bateman's evidence that he was told which of Summit's vehicles had to go and that he found vehicles or VINs for the exchanges. In that way, he essentially proposed the trade. However, I also accept that he required approval from Mr. Smith and/or Mr. Barrett for the 'inflated' deals and ran them by Mr. Smith. Summit was represented on these deals by Mr. Barrett and by Mr. Smith. Mr. Smith's responsibilities included setting prices for vehicles that were sold and taken on trade, he signed many of the cheques and Mr. Bateman testified that he ran the deals by him. As I have said, at least for the deals where Mr. Smith and Ms. Shaw signed the cheques, he was representing Summit on the deal and knew both sides of the deal.

[409] So, all three were aware on a general level what was going on. As I said, there is no requirement that the Crown show that Mr. Barrett was deceived. The question of whether Mr. Barrett knew the specific vehicles that were being exchanged and knew their values is only relevant to the extent that it might impact whether the actions were objectively fraudulent.

[410] I have concluded that the vehicle/cheque exchanges were objectively fraudulent. The deals were supposed to be revenue neutral. No one was supposed to come out financially ahead. I accept that Mr. Barrett was generally aware of what vehicles were being exchanged and generally approved the deals. Given everything that was going on at the time, I do not believe that, even when he signed the cheques, he knew every specific vehicle that Summit was receiving or did a value comparison. My sense is that he was so desperate to keep in good with the bank that he would have signed almost anything that would buy time. For the transactions where he did not sign the cheques, there is no evidence that he knew all the vehicles that Justincredible was putting forward.

[411] At the very least, the deals took advantage of Mr. Barrett's desperation or lack of attention to the details of the deals and were exploitative. A reasonable person in Mr. Bateman's or Mr. Smith's shoes would know it was wrong to engage in a series of business deals that everyone expected/agreed to be an equal exchange and come out \$450,000 ahead. I have no doubt that these deals, in the words of

the Supreme Court in *Zlatic*, amounted to “dishonest commercial practices which subject the pecuniary interest of others to deprivation or the risk of deprivation (para. 38).

[412] I also have no doubt that Mr. Bateman and Mr. Smith intentionally committed the acts. The Crown does not have to prove the accused knew or believed their actions were dishonest, immoral or wrong, just that the acts were wrong, and the accused intentionally committed them. I have concluded they both knew they were engaged in these deals with Summit.

[413] The question of whether Mr. Bateman and/or Mr. Smith undertook the act, knowing it could result in a deprivation is more challenging.

[414] As I said, the Crown does not have to prove that Mr. Bateman and Mr. Smith engaged in the deals with the intent to cause financial harm or risk of harm to Summit (*Theroux*, para. 28; and, *Zlatic*, para. 27).

[415] However, the Crown does have to prove that each was subjectively aware that he was engaging in conduct “that could cause deprivation” or risk of deprivation to Summit (*Theroux*, para. 24). It isn’t enough to show a reasonable person would have foreseen the consequences of the act (*Theroux*, para. 21).

[416] All three of the main players were experienced in the automotive industry, including the used car part of that industry. Based on the evidence I have about their backgrounds and experience, all were well versed in valuing cars. One would not expect that every deal would be exactly even. One exchange might favour Summit, and another might favour Justincredible. However, simple lack of attention, recklessness or negligence, would still generally result in things evening out over time. That didn’t happen here. Given the knowledge and experience of Mr. Bateman and Mr. Smith and given the gross disparity in valuations, there is no way they didn’t know that the cars Justincredible was trading to Summit were worth less than the cars it was getting back. Knowing that, they knew that the deals were financially hurting Summit. If they did not, it is because they chose not to consider it or were wilfully blind.

[417] As such, I am also persuaded beyond a reasonable doubt that Mr. Bateman and Mr. Smith knew or were wilfully blind to the fact that their activity caused a deprivation or risk of deprivation to Summit. It is possible that Mr. Barrett also knew that and was so focussed on keeping things afloat with the bank that he

didn't care, however, that does not change Mr. Smith's and Mr. Bateman's culpability.

[418] When I ask the question posed by the Supreme Court of Canada in *Theroux* - did "the accused intentionally committed the prohibited act (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation)" (*Theroux*, at para. 24) - I am persuaded beyond a reasonable doubt that the answer is "yes".

[419] As such I find them each guilty of fraud in relation to the vehicle/cheque swapping scheme.

The 24 Vehicles

[420] I am satisfied on all the evidence that all parties, Mr. Barrett, Mr. Smith, Darren and Richard, were all at one point working toward a building deal. I am also satisfied that as the deal began to fall apart, they were scrambling to come up with vehicles and/or VINs to help prop up Summit. That had two purposes: to increase Summit's assets so it could maintain its asset to debt ratio for the bank; and, to have vehicles to put on the floor plan to delay having to pay out on curtailments. I accept that Mr. Barrett agreed to send Apex vehicles to the lot in Digby, that everyone knew that Kirk Mullane was moving those vehicles and that Mr. Mullane was probably paid by Summit, Richard and Justincredible to do that.

[421] I also accept that many of the vehicles on the list of missing vehicles were part of that arrangement, that at one point in the deal, the vehicles offered by Justincredible were intended to be 'place holders' for the deal so no one, including Mr. Barrett, cared whether they were real physical cars or who owned them.

[422] I also accept that Mr. Barrett was aware that vehicles would sometimes go to other dealers or lots on consignment without ownership being transferred.

[423] I have credibility and reliability concerns about all of the main witnesses – Mr. Barrett, Darren Bateman and Richard Bateman - and many of the supporting witnesses. The documents are often not of assistance in corroborating or contradicting testimony because the way the business operates makes the documents and records secondary to the 'deal'. As such, the documents often cannot be relied on to accurately capture whether something happened and when it

happened. The records from RMV are also not always determinative because so many aspects of a transaction can occur without being recorded with RMV.

[424] For the transactions relating to individual vehicles, I am not persuaded for most vehicles that Mr. Smith was involved in the selection of specific vehicles for Justincredible's side of the transaction or that he would otherwise know whether Justincredible held title.

Specific Vehicles

Vehicle 1 – 1963 Ford Econoline

[425] I am not satisfied that Justincredible did not own this vehicle when it was sold to Summit.

[426] I do not necessarily believe Darren's evidence. However, I also do not have faith in Richard's evidence and the documents are not determinative of ownership.

[427] The vehicle history with RMV would make it appear that the vehicle went directly from Pothier to Carzone. However, the actual documents and evidence show that, at the very least, it passed briefly through Justincredible first. The issue is whether Justincredible ever actually sold it to Carzone. The documents supporting that are the yellow dealer transfer form, the Carzone Costsheet and the Certificate of Registration in Carzone's name (Ex. 1A, Tab 1, pp. 18, 20 and 21).

[428] I am not persuaded that the vehicle was ever sold to Richard. Mr. Pothier seemed surprised when he saw the dealer transfer showing the transfer to Carzone, said he didn't know who signed it and was not asked any further questions. The yellow form allows a vehicle to be registered without having the original registration. It is a process that appears open to fraud. For example, in another example, Richard alleged that a yellow form had been used to register a vehicle that he owned, by simply filling out the document using his information and forging his signature (Ex. 1A, Tab 1A, p. 166). The fact that Richard registered this vehicle in January of 2017 is suspicious. I accept that a dealer might choose not to register a vehicle when it is purchased because of the time and cost involved. However, Richard's explanation was that he probably chose to register it when he was ready to sell it. However, it wasn't sold until 14 months later. Further, it was sold to a dealer, so he would not have had to register it prior to sale. He could have just used Part II of the Dealer Title Transfer document. The timing of his

Registration of the vehicle is much more consistent with him wanting to take title of this vehicle when things started to go badly for Darren at Summit.

[429] I do accept that the vehicle was not on the Summit lot. However, I am not persuaded that it was supposed to be. I don't accept Mr. Barrett's evidence that he did not know that cars were stored or transferred to the Digby lot. I have a reasonable doubt that the vehicle was supposed to be stored there and that Richard used the yellow form to sell it without permission.

[430] As such, I am not satisfied beyond a reasonable doubt that Darren committed a fraud with respect to this vehicle because the evidence raises a doubt that he owned it when he sold it and then believed it to have been delivered to Summit's control.

Vehicle 2 – 1966 Buick Special

[431] Darren's testimony and the documents he provided suggest that he acquired the Buick on December 1, 2016, which is in the midst of the exchange of cheques for the building deal. I cannot entirely reject his explanation, even when assessed in the context of his statement to police. I accept that he did not tell police that the Buick was eventually his, and that is odd. However, it is not exactly inconsistent with his evidence. Accepting, as I have, that there was a genuine belief in the possibility of a 'building deal', I cannot reject his evidence that: he acquired the VIN from his brother so that this vehicle could be added to the deal; and, his brother then required something in return so he traded the Prowler for the Buick, the Cadillac and money. Richard admitted he'd gotten the Prowler but could not recall how. I don't believe that. He had tremendous recall of vehicles and recognized how special this vehicle was. I don't accept that he wouldn't remember where he got it.

[432] Again, I am not satisfied beyond a reasonable doubt that Darren committed a fraud with respect to this vehicle because the evidence raises a doubt that he owned it when he sold it and then believed it to have been delivered to Summit's control.

Vehicle 3 – 1970 Cadillac Deville (VIN ...3827)

[433] For the same reasons as for Vehicle 2, I am not satisfied beyond a reasonable doubt that Darren committed a fraud with respect to this vehicle. I recognize that he did not provide a complete explanation to police and that aspects of his

explanation are inconsistent, but his testimony and documents raise a reasonable doubt.

Vehicle 4 – 2008 Loadrite Boat Trailer and 2005 Chapparal Boat

[434] Darren's testimony and the documents he provided suggest that he acquired the boat and trailer in exchange for a Camaro. Mr. Ashe corroborates that he sold him the Camaro. Richard agreed he acquired the Camaro and traded it to someone. He was not asked where he got it but denied he'd gotten it on trade for the boat and trailer.

[435] I agree with the Crown that portions of Darren's statement, on the surface, can be interpreted as suggesting that he kept ownership of the Camaro and Richard kept ownership of the boat and trailer. However, I believe that when those comments are assessed in the context of the whole statement and given what I believe is a specific colloquial, and perhaps regional, use of language, it is open to a different interpretation – one that is not inconsistent with his testimony.

[436] I have given less weight to the documents Darren produced that could not be put to other witnesses. However, his evidence, supported by the documents he produced, provide a reasonable doubt that he owned the trailer and boat when he sold them to Summit and that they were left with Richard with Mr. Barrett's agreement.

Vehicle 5 – 2008 Harley Buell

[437] I accept Darren's testimony, as corroborated by Mr. Ferguson, that he obtained the motorcycle from Mr. Ferguson. I believe he was mistaken in his statement when he said he got it from his brother.

[438] The evidence does not persuade me beyond a reasonable doubt that this motorcycle was sold to Richard. His evidence is not sufficiently credible to allow me to be certain and he has no bill of sale or other paperwork to support his assertion.

[439] He identified the bike in a still from a video that he says was recorded in 2013 and says the bike was in his garage. Mr. MacDougal said he saw it in the showroom near a window. It's not clear whether that is the same location, but in any event, Mr. MacDougal could not identify the bike in the still from the video.

Mr. Mullane's evidence is capable of supporting Darren's that the motorcycle was at Apex and moved to Digby with the other vehicles.

[440] As such I have a doubt that Darren owned the vehicle when it was sold and that he delivered it into the control of Summit, so I am not persuaded he committed a fraud with respect to this vehicle.

Vehicle 6 – 2010 Ford F-150 Truck

[441] Justincredible owned this vehicle and sold it to Summit. The documents make it appear that it was also sold to Mr. Meech's business. Mr. Meech's evidence corroborates Darren's explanation that the vehicle was taken there on consignment. Mr. Meech transferred the vehicle in anticipation of selling it, but couldn't, so he 'unwound' the deal and gave the vehicle back.

[442] I am not persuaded that Darren sold the vehicle twice. The evidence also leaves me with a doubt about what happened to the vehicle. It is reasonably possible that Darren offered to return it and made it available for pickup by Summit. As such, I am not persuaded Darren committed a fraud with respect to this vehicle.

Vehicle 7 – 2011 Hyundai Sante Fe

[443] The documents show that Justincredible did not own the vehicle when it was sold to Summit. For this vehicle, Darren's testimony together with his statement in the letter to the Crown don't make sense. In court, he said he bought the vehicle from Summit and sold it back to them. There is no explanation or document to support his original acquisition from Summit.

[444] He did not testify that it was sent to Carzone on consignment but, in cross-exam of Richard, that was suggested. However, in his statement, Darren said he got it back from Carzone on trade. That makes no sense. If the vehicle was only ever supposed to be with Carzone on consignment, why would Darren feel he needed to trade anything to get it back.

[445] Other than Darren's testimony, there is no evidence to support his assertion that Justincredible owned this vehicle at any time either as a purchase from Summit or as a trade from Carzone. In light of the contradictory evidence and documents and my general concern about the credibility and reliability of his

testimony, I reject his evidence on this. I am convinced beyond a reasonable doubt on the evidence I do accept, that Justincredible did not own the vehicle when it was sold to Summit and Darren knew that, so this transaction was fraudulent.

[446] I am not satisfied beyond a reasonable doubt that Mr. Smith knew Justincredible did not own the vehicle.

Vehicle 8 – 2012 Chevrolet Orlando

[447] The evidence of Mr. Meech corroborates Darren's evidence that this vehicle initially went to Mr. Meech on consignment. There is a bill of sale from Justincredible for this vehicle but, given the testimony I have from various sources, I cannot rely on that document as a record of what happened. It could easily be an agreement or contract for a sale. I accept that Mr. Meech sold the vehicle and should have paid Summit, but he could not recall whether he had and there is no evidence that he paid Justincredible for this vehicle.

[448] As such, it is plausible that Darren placed this vehicle with Mr. Meech on consignment on behalf of Summit, Mr. Meech sold it without Darren's knowledge and then failed to pay Summit for it. As such, I am not persuaded that Darren committed a fraud in relation to this vehicle.

Vehicle 10 – 2012 – Lotus Evora S

[449] For the Lotus, I accept that Mr. Barrett knew this vehicle had not been acquired and was not actually available for purchase at the time it was put on the floorplan. As such, Mr. Barrett had no true belief that this vehicle should have been on the Summit lot. He knew it was just a VIN to increase his paper assets for the bank. Darren also knew that. His failure to deliver that vehicle was not a deception of Mr. Barrett or a fraud against him personally, however, it was a fraud against the company. He knew there was no asset but knowingly participated in a scheme to pretend there was by listing the asset on Summit's books. That is objectively dishonest and a deprivation of the complainant company. He may not have intended that, but he knew or was wilfully blind that was the result.

[450] As such his actions with respect to the Lotus amounted to a fraud on the company. I am not persuaded beyond a reasonable doubt that Mr. Smith knew about or participated in this specific fraud.

Vehicle 11 – 2013 Dodge Ram 1500 (VIN ...0734)

[451] Despite the inconsistencies between Darren's testimony and statement in his letter to the Crown, I have a doubt that Justincredible owned the vehicle when it was sold to Summit and, similar to vehicle 8, the evidence of Mr. Meech corroborates Darren's evidence that this vehicle initially went to him on consignment. There is a Bill of Sale from Justincredible for this vehicle which suggests it was actually sold. However, given the testimony from various sources, I cannot rely on that document as a record of what happened. It could easily be an agreement or contract for a sale. I accept that Mr. Meech sold the vehicle and should have paid Summit. He could not recall whether he did and there is no evidence that he paid Justincredible for this vehicle.

[452] As such, I am not persuaded the dealings with this vehicle constituted a fraud by Mr. Bateman.

Vehicles 12, 14 & 18 - 2013 Dodge Ram (VIN ...4708), 2014 Dodge Caravan, and 2014 Toyota Tacoma

[453] These are the deals that Darren says fell through, that he told Mr. Barrett about this, and they reached an agreement for set off of any money's owing between Justincredible and Summit. Darren's evidence about the set off is in many respects corroborated. His evidence about how the deal fell through is not entirely consistent with the evidence I do accept. For example, some of the vehicles were sold months, not days, after any inquiry by Darren.

[454] I have concluded that despite the issues, I cannot reject Darren's testimony about how this happened.

[455] I have considered whether Darren's evidence relieves him of culpability for a fraud against the company, since the debt was to the company and the setoff arrangement benefitted Mr. Barrett personally, not the company. In these specific circumstances, I believe it does. Essentially, the Crown has not proven that Darren knew that reaching this agreement with Mr. Barrett could result in a detriment to the company. Mr. Barrett was representing the company and agreed to the deal. In my view, Darren was not required to go further and ask whether Mr. Barrett would make the company whole.

[456] So, I am not persuaded beyond a reasonable doubt that Mr. Bateman committed fraud in relation to these vehicles.

Vehicle 13 – 2013 Subaru Impreza

[457] This vehicle belonged to Summit. Justincredible was paid for it by No Bull and did not, despite having lots of time, compensate Summit. Darren's explanation in his letter and in court are not consistent. I don't accept his evidence that Mr. Barrett specifically told him not to worry about the money and don't believe he told Mr. Barrett that No Bull had paid Justincredible for this vehicle.

[458] I am satisfied beyond a reasonable doubt that his failure to pay back Summit was fraudulent.

Vehicle 15 – 2014 EZ Hauler Exec 5x8 Trailer

[459] I am satisfied that Adam Smith was the registered owner of the trailer as of May 14, 2015 and that he sold it to Justincredible. There is no admissible evidence that it was ever delivered to Summit's control. However, Darren testified that he believed it was delivered to Digby as part of the building deal. I do not reject that evidence and it creates a reasonable doubt that the trailer was delivered into the control of Summit. So, I am not persuaded that Mr. Bateman's actions were fraudulent in relation to this vehicle.

Vehicle 16 – 2014 Harley Davidson V-Rod Muscle

[460] The issues for this vehicle include whether Justincredible owned the vehicle when it was sold to Summit and whether Darren believed it was or would be delivered to Summit's control.

[461] Darren explained that he acquired the motorcycle on trade for three vehicles. As the Crown noted, one of the vehicles he purported to trade for this motorcycle was not owned by Justincredible when it was allegedly traded. He provided an explanation for this in his testimony. In relation to the overall transaction, he produced documents and provided explanations that had not been provided before or put to witnesses who could have provided evidence. Some parts of his explanation were inconsistent between his testimony, his statement to police, his letter to the Crown and his testimony in a civil matter.

[462] Darren's evidence is, at best, unreliable and I reject it. In the result, there is simply no credible and reliable evidence to contradict the history for this vehicle shown in the documents. Further, while I have reservations about Richard's testimony in general, his testimony about this vehicle was reliable and credible. He had a clear recollection of how he obtained it and sold it and it is credible that, because it was a gift, he would not have traded it.

[463] I am persuaded beyond a reasonable doubt that Justincredible did not own the V-Rod when it was sold to Summit and that Darren did purport to own it so committed a fraud by selling it to Summit. I am not persuaded that Mr. Smith had specific knowledge that Justincredible did not own this vehicle when it was sold.

Vehicle 17 – 2014 Kawasaki Custom Motorcycle

[464] The Crown submits that this vehicle was sold to Roy Meech before it was sold to Summit and was never delivered to Summit. The Defence does not dispute that the motorcycle was paid for by Summit and was not delivered to the Summit lot. However, Darren says it was delivered to the warehouse in Digby on Mr. Barrett's instruction and, to his knowledge, remained there.

[465] Darren's explanation for this vehicle does not explain the documents and is unreliable or incredible.

[466] In the absence of a reliable or credible explanation, the documents speak for themselves and persuade me that Darren either sold the motorcycle to Roy Meech or sold it to someone else using Mr. Meech's dealership information as the intermediary. There is no evidence that it ever went to Digby except Darren's testimony which I reject.

[467] He could not then sell it to Summit. As such, I am persuaded beyond a reasonable doubt that this transaction was fraudulent. I am not persuaded that Mr. Smith knew about the specifics of this transaction.

Vehicle 19 – 2015 Chevrolet Silverado

[468] Given the lack of recall and the lack of corroboration provided by documents, I cannot be certain who owned this vehicle and when. As such, I cannot be certain that Justincredible didn't own it when it was sold to Summit. It appears that Carzone had physical possession of it when it was sold to Pothier,

but I can't be certain that Carzone actually owned it then. As such, I am not persuaded that Darren committed fraud in relation to this vehicle.

Vehicle 20 – 2015 Harley Davidson Road Glide Motorcycle

[469] Darren's testimony about this transaction is not consistent with his statement to police in which he says he traded multiple other vehicles for this one.

[470] Given that, I am highly suspicious of this transaction, but am not convinced beyond a reasonable doubt that it is fraudulent given the documents Darren produced showing a sale from Carzone to Justincredible. I realize that Richard was not shown them and might very well have said they were not legitimate. However, given my overall concerns with Richard's reliability and credibility, I would still have had a reasonable doubt. As such, I do not find this transaction was fraudulent.

Vehicles 22, 23, 24, 25 & 26 – The "Rentals" - 2016 Dodge Ram 1500, 2016 Dodge Ram 3500 Laramie, 2016 Jeep Wrangler and 2017 Dodge Ram 3500 Longhorn

[471] I am persuaded beyond a reasonable doubt that Mr. Barrett, Darren and Mr. Smith knew these vehicles were rentals and despite that, Mr. Barrett put them in inventory and on the floor plan. Darren testified that all three knew what was happening. That statement about their knowledge is credible. These vehicles were discussed during the recorded conversation and the comments or lack of comments by Mr. Barrett and Mr. Smith are entirely consistent with them having knowledge. Given the circumstances surrounding these vehicles and their respective roles in the organization, it is not plausible that they did not know the vehicles were leases or rentals. I am persuaded beyond a reasonable doubt that they all knew they didn't own the vehicles and, I also knew that putting them into inventory and on the floor plan was dishonest. Darren, who knew the least of the three about the floor plan, admitted it and admitted creating false documents. I also have no doubt that Mr. Smith knew it was dishonest. During the operation of the scheme there was a constant risk of deprivation to the company. Once the scheme collapsed, there was an actual deprivation. They knew that or were willfully blind to it.

[472] I am satisfied that these transactions were fraudulent acts committed by or participated in by both Mr. Bateman and Mr. Smith.

Count 2 - Fraud

[473] I find Mr. Bateman and Mr. Smith Guilty of:

Count 2 in relation to the general car swapping / cheque exchange and the following specific vehicles: Darren Bateman - Vehicles 7, 10, 13, 16, 17, 22 – 26; and, Orlando Smith - Vehicles 22 – 26.

Possessing Proceeds of Crime

[474] Ms. Sullivan's initial report is focussed on a 'source and use' analysis for funds in Justincredible's account to try to determine who benefited from the alleged fraud. However, funds relating to car-swapping and the 24 vehicles were co-mingled with other funds and her report does not trace those specific funds.

[475] I am satisfied that proceeds of the general and specific frauds went into the bank account of Justincredible and then to Darren Bateman, so he possessed the currency and, since I am persuaded he was a direct participant in the fraud(s) that created the funds, he also knew the funds were derived at least in part from the commission of that offence.

[476] The evidence shows payments from Justincredible to Mr. Smith, his wife, and her company during the time that I have found there was fraudulent activity. Darren testified that these payments did not have anything to do with 'missing cars or anything to do with Summit Hyundai'. He was not asked to elaborate or provide any further evidence on the payments.

[477] Even if Darren's out-of-court statement about the reasons for the transfers to Mr. Smith were admissible, I would reject it as incredible. Further, even if true his explanations of the reasons for the payments would not change the character of the funds if they were the proceeds of crime.

[478] I accept that the payments to Mr. Smith and his family do not specifically correspond to the receipt by Justincredible of funds from Summit that I have found were fraudulently obtained. In that sense, there is no dollar-for-dollar tracing. However, I am satisfied beyond a reasonable doubt that at least some of the funds paid out to the Smiths came from fraud and Mr. Smith knew that since he knew that there were fraudulent deals during that time.

[479] Therefore, I also find Mr. Bateman and Mr. Smith guilty of Count 1.

Intimidation of a Justice System Participant

[480] As I've said, I have concerns about Richard Bateman's credibility such that his evidence alone would not satisfy me beyond a reasonable doubt. His evidence is supported by Ms. Young. Other than possible tainting by conversations with Richard, I have no reason to doubt her credibility or reliability, so I accept that they saw Mr. Smith and that he made some gesture that Ms. Young interpreted in the way she described.

[481] The most authoritative review of what must be proven to obtain a conviction under this provision, comes from that of the British Columbia Court of Appeal in *Armstrong* and the older cases from the Supreme Court of Canada on uttering a threat in general.

[482] The evidence does not convince me that, in all the circumstances, the gesture was "meant to intimidate or to be taken seriously" (*McCrae*, para. 17, citing *Clemente*), that Mr. Smith had the specific intent to intimidate a justice participant, or that he knew at the time that they were justice system participants.

[483] As such I find Mr. Smith not guilty of Count 3 - intimidation of justice participants.

Elizabeth Buckle, JPC.