SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. MacDonald*, 2018 NSSC 218

Date: 2018-09-14
Docket: CRK 467684
Registry: Kentville

Between:

Her Majesty the Queen

vs.

David Joseph MacDonald

Judge:	The Honourable Justice Gregory M. Warner
Heard:	May 22, 23 and 24, continuing July 12 and 13, 2018, in Kentville, Nova Scotia and the Windsor satellite courtroom
Oral Decision:	September 14, 2018
Counsel:	Rachel Furey, Crown attorney Ian Hutchison, counsel for the accused

By the Court:

Part I *Background*

[1] David Joseph MacDonald is charged with four offences:

1. possession for the purpose of trafficking of cannabis marihuana, a *Controlled Drug and Substance Act* ("*CDSA*") Schedule II substance;

2. possession for the purpose of trafficking psilocybin, a *CDSA* Schedule III substance;

3. possession for the purpose of trafficking of methamphetamine, a *CDSA* Schedule I substance; and,

4. simple possession of cocaine, a *CDSA* Schedule I substance.

[2] In a written decision (2018 NSSC 81), following a two-day *voir dire* in March, the court dismissed the accused's *Canadian Charter of Rights and Freedoms* ("*Charter*") application to exclude the evidence obtained in a search of the accused's tractor and flatbed trailer on September 30, 2015.

[3] On May 22, 2018, the accused changed his plea to guilty of simple possession of cocaine and, with the consent of the Crown, who reduced the charge of possession of methamphetamine from possession for the purpose of trafficking to simple possession, changed his plea to guilty to the possession of methamphetamine. The trial proceeded on the first two counts.

[4] When the accused's vehicle was searched, the police found in three crates under a tarp on the back of the flatbed about 1315 half-pound vacuum-packed bags of cannabis (marihuana) and three 500-gram bags of psilocybin ('magic mushroom').

[5] An Agreed Statement of Fact was filed that effectively reduced the real issue for trial to whether the accused knew that the three crates on the flatbed he was hauling from British Columbia to Nova Scotia contained cannabis marihuana and psilocybin.

[6] The Crown called 10 witnesses. The accused called none.

Part II *Governing Principles*

[7] In making my decision, I have considered and applied the following principles.

[8] *R v Lifchus*, [1997] 3 SCR 320 ("*Lifchus*"), relates to the standard of proof. It sets out the principle that the accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until the Crown has, based on the evidence, satisfies me beyond a reasonable doubt that the accused is guilty.

[9] The term "reasonable doubt" has been used for a very long time. It is a part of our history and traditions of justice.

[10] A reasonable doubt is *not* an imaginary or frivolous doubt; it is *not* based upon sympathy or prejudice. It is based on reason and common sense. It is logically derived from the evidence or the absence of evidence.

[11] Even if I believe the accused is likely guilty, that is *not* sufficient. In those circumstances, I must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy me of the guilt of the accused beyond a reasonable doubt.

[12] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

[13] To make my decision, I have considered all the evidence presented during the trial. I have chosen how much or how little I believed and relied upon each witness.

[14] In assessing the reliability and credibility of each witness's evidence, I have considered these factors:

a) honesty;

b) interest (not status);

c) accuracy and completeness of observations;

d) circumstances of the observations;

e) memory;

f) availability of other sources of information;

g) inherent reasonableness of the testimony;

h) internal consistency, including consistency with other evidence; and,

i) demeanour, but with caution.

[15] In *R v Menard*, [1998] 2 SCR 109 ("*Menard*"), the court determined that the standard of proof beyond a reasonable doubt applies only to the final evaluation of guilt or innocence. It is not to be applied piecemeal to the individual items or categories of evidence.

[16] In *R v Noble*, [1997] 1 SCR 874 ("*Noble*"), Justice Sopinka for the majority warned trial courts with respect to the evidentiary significance of the failure of the accused to testify at trial or present defence evidence. It reads:

> 53 Sopinka J. -- This appeal concerns the evidentiary significance of the failure of the accused to testify at trial. While it is plain that the accused has a right not to testify at trial, may the trier of fact consider this silence in arriving at its belief in guilt beyond a reasonable doubt? In my view, the right to silence and the presumption of innocence preclude such a use of the silence of the accused by the trier of fact. It is apparent in the present case that the trial judge did place independent weight on the accused's failure to testify in reaching his belief in guilt beyond a reasonable doubt, which in my view constituted an error of law. Consequently, I would dismiss the appeal and confirm the decision of the Court of Appeal ordering a new trial.
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> …
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> 103 The appellant submitted that since it is permissible for appellate courts to consider silence in assessing the verdict, it must be permissible for the trier of fact to consider silence in reaching a verdict. In my view, the appellate review cases do not contradict the conclusion that silence may not be placed on the evidentiary scales, either by the trier of fact or by appellate courts. Rather, the cases hold that appellate courts, like triers of fact, may refer to the silence of the accused as indicative of the absence of an exculpatory explanation; silence is not inculpatory, but nor is it exculpatory. Nowhere do the appellate review cases outlined above explicitly state that silence may be used as a "make-weight" by the trier of fact, but there is wording that suggests that silence may be used simply in the limited sense of not providing an innocent explanation. In *Steinberg*, for example, the court stated that the accused's "failure to testify does not prove his guilt", but rather the absence of an innocent explanation may be a

> factor in assessing the reasonableness of the verdict in the face of strong inculpatory evidence. As noted above, in *Corbett*, the majority of this Court cited with approval the following statement of the Court of Appeal:
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> > The accused did not testify. He was under no duty to do so and was entitled to rely upon the presumption of innocence and the fact that the Crown had to prove his guilt beyond a reasonable doubt. *The fact that he did not testify* did not relieve the Crown of the duty of proving his guilt beyond a reasonable doubt, but where as here there was evidence of a direct nature which inculpated him and which the jury accepted as truthful *then this Court may well consider his failure to testify as a factor in disposing of this appeal.* [Underlining added.]
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> This passage, in my view, is entirely consistent with the analysis above. If the jury accepted as truthful the inculpatory evidence, the conviction was based not on the failure to testify but on the Crown's case, and the absence of an innocent explanation of the inculpatory evidence is a factor for the Court of Appeal to consider in assessing the reasonableness of this conclusion. The failure to testify was not used by the jury to find guilt beyond a reasonable doubt, but in the face of evidence which convinced the jury of guilt beyond a reasonable doubt subject only to the existence of an innocent explanation, the absence of an innocent explanation may be considered by the jury, and by an appellate court reviewing the jury's decision, in entering or upholding a conviction.

[17] This principle has been frequently cited and applied by the Nova Scotia Court of Appeal. Decisions include: *R v Ward*, 2011 NSCA 78, at paras 68 to 71; *R v Henderson*, 2012 NSCA 53, at paras 38; *R v Murphy*, 2014 NSCA 91, at para 87; and *R v Hood,* 2018 NSCA 18, at paras 71 to 73.

[18] Evidence may be direct or circumstantial. As Justice David Watt writes in "Watt's Manual of Criminal Evidence 2018" (Toronto: Thompson Reuters, 2018), beginning at p. 48: "Direct evidence is evidence which, if believed, resolves a matter in issue. … The only inference involved in direct evidence is that the testimony is true."

[19] In this case, the Agreed Statement of Facts, the exhibits entered, and the oral evidence of the Crown witnesses establish, beyond a reasonable doubt, by direct evidence, all the elements of the offence except whether the accused knew that

what he was transporting to Nova Scotia in the three crates on the back of the flatbed was cannabis marihuana and psilocybin.

[20] Watts writes at p. 49 that circumstantial evidence is any item of evidence, testimonial or real, other than the testimony of an eye witness to the material fact. It is any fact from which the existence of which the trier of fact may infer the existence of a fact in issue. It is for the trial judge to determine whether circumstantial evidence is relevant.

[21] Justice Watts identifies an important feature in circumstantial reasoning as follows:

> Where evidence is circumstantial, it is critical to distinguish between inference and speculation. An *inference* is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be *no* inference without objective facts from which to infer the facts that a party seeks to establish. If there is *no* positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture.

[22] Among the case law that he cites as relevant to the general principle of proof by circumstantial evidence are: *R v Stewart*, [1977] 2 SCR 748, to the effect that the trier of fact must consider all the evidence together, not each item separately; and *R v Elmosri* (1985), 23 CCC (3d) 503 (ONCA), for the seminal proposition that in a criminal case, the Crown must satisfy the jury or the trier of fact beyond a reasonable doubt that the accused's guilt is the only reasonable inference to be drawn from the proven facts.

[23] In *R v Villaroman*, 2016 SCC 33 ("*Villaroman*"), the court stated that in assessing circumstantial evidence, the court or jury should generally be cautious about too readily drawing inferences of guilt.

Part III *Essential Elements*

[24] The two outstanding counts both relate to possession for the purpose of trafficking contrary to s. 5(2) of the *CDSA*. I incorporate in my analysis Final Instruction 476 from *Watts Manual of Criminal Jury Instruction*, 2nd Edition (Toronto: Carswell, 2015), as an accurate description of the essential elements of the offence.

[25] The Crown must prove each of the following four essential elements beyond a reasonable doubt in respect of each of the two substances:

1. That the accused was in possession of the substance.

2. That the substance was, as specified, a controlled substance as alleged in each of the two counts.

3. That the accused knew that each of the substances was a controlled substance.

4. That the accused had possession of the two substances for the purpose of trafficking.

[26] If the Crown has not satisfied me beyond a reasonable doubt of each of these four essential elements in respect of each of the two separate substances, I must find the accused not guilty of possession for the purpose of trafficking.

[27] The first essential element – possession, per s. 4(3) of the *Criminal Code*, provides that a person has anything in possession when he has it in his personal possession or knowingly has it in the actual possession or custody of another person or has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person. Possession includes proof that the accused was aware of, or reckless or wilfully blind to, the presence of the substance and of its character.

[28] A person may have a substance in his possession in a number of different ways. Usually possession is described as personal, or constructive, or joint.

[29] With respect to the second essential element, the Crown must prove that the substances were cannabis marihuana and psilocybin, and that the accused had possession of the two substances for the purposes of trafficking.

[30] As noted above, it is not contested that the accused had physical possession of the substances and that that the substances were cannabis marihuana and psilocybin. The evidence of the Crown's witnesses substantiates the Agreed Statement of Facts beyond a reasonable doubt.

[31] With respect to the fourth essential element, it is not contested, and the evidence clearly establishes, that if the accused knew the substances were controlled substances, that the volume of the substances and the fact that they were being transported, proves that possession was for the purpose of trafficking.

[32] The real issue before the court is whether the accused knew that what he was transporting to Nova Scotia were controlled substances - cannabis marihuana and psilocybin.

[33] Knowledge is the state of mind of the accused. With regards to the accused's knowledge, in his *Manual of Criminal Jury Instructions* at p. 1117, Justice Watts writes that there are two ways the Crown can prove his knowledge of the nature of the substance. One way is to prove that he actually knew or was aware that the substance was cannabis marihuana and psilocybin. The second way is to prove this essential element is to prove that the accused was aware of the need to make an inquiry about the nature of the substance, but deliberately failed to do so, because he did not want to know the truth. With respect to the second way, Justice Watt cites *R. v Rai*, 2011 BCCA 341.

[34] To determine the accused's state of mind, what he knew about the substance that he was transporting, I have considered what he did or did not do as well as how he did or did not do it.

[35] Because the accused did not present evidence at trial, the court has relied upon the documents in the possession of the accused and his conduct throughout the events leading up to his arrest at Brooklyn, Hants County. These, and the circumstances in which they happened, have shed light on what the accused knew about the nature of the substances.

Part IV *Review of the evidence*

[36] Many of the Crown witnesses were members of the Halifax Regional Police Service or the RCMP members who were , on September 30, 2015, members of the Halifax Integrated Drug Unit (IDU). They had spread out over the major highways in Nova Scotia to search for the accused's Peterbilt tractor and flatbed trailer as a result of a tip received that day by Constable Wagg ("Wagg"). A confidential informant had advised that the accused was in Nova Scotia at that time hauling a load of marihuana in crates on the back of a flatbed trailer under a tarp. The same confidential informant had previously advised Wagg that the accused, a self-employed trucker from Antigonish, Nova Scotia, went out West to pick up marihuana and delivered it to Nova Scotia in crates covered with a tarp on the back of an open flatbed truck.

[37] Constable Simmonds ("Simmonds") received a call about 3:39 p.m. on September 30, 2015, from the Windsor RCMP detachment to be on the look out

for the accused's Peterbilt tractor hauling a flatbed with crates under a tarp. Simmonds was stationed at the Rawdon RCMP detachment on Highway 14, a two-lane paved road that connects Highway 104/102 (the divided-highway running southerly from the New Brunswick border to Halifax) to Highway 101 (the mostly divided-highway running west from Halifax to the western end of Nova Scotia via the Annapolis Valley) at Windsor.

[38] Shortly after Simmonds positioned himself to watch, the accused's tractor and flatbed trailer passed by travelling west towards Windsor and Highway 101. He reported the sighting and was asked to follow the accused until other officers could arrange to intercept the vehicle. Simmonds followed the accused in his police vehicle in plain sight for several minutes. When arrangements were in place, Simmonds signalled the accused to pull over in front of the Department of Transportation Depot at Brooklyn, Hants County. He approached the cab and asked the accused for his license, at which point two other officers (Constable Brown ("Brown") and Constable Osmond ("Osmond") of IDU) approached the vehicle and took over from Simmonds.

[39] It appears that none of the officers involved in the interception of the accused and his vehicle were in charge of, or lead investigators for, this operation. Wagg was the one who received the confidential informant tip and organized other members of the IDU to fan out on the highways to search for the accused and his vehicle, but shortly after that event, he left IDU.

[40] Constable Brown testified about the arrest of the accused. At the accused's request, he permitted the accused to use a white iPhone under the supervision of himself and Osmond to try (unsuccessfully) to find the contact information for his BC lawyer. Brown and Osmond drove the accused to the Halifax detachment where he was questioned. Brown arranged for the return to the accused of his Peterbilt truck and flatbed, as well as the return of the working documents and permits that the accused needed to continue his trucking business.

[41] In October 2016, at Wagg's request, Brown reviewed the data that had been abstracted from the white iPhone by Corporal Bromley ("Bromley"), the tech crime expert, and make notes about the contents that he thought might be significant. Among the contents were: four photographs of bundles of money, some packaged in vacuum sealed bags, and two photos of the accused's tractor and flatbed taken at about 7:00 pm on September 22, 2015 near Manning Alberta, showing a large skidder on the flatbed and, behind the skidder, crates covered by a dark tarp or tarps.

[42] In October 2016, Brown also investigated two Day & Ross bills of lading, that were found by Constable Giffin ("Giffin") with other papers in the cab of the accused's vehicle. Brown attempted to locate, and call the phone numbers of, the shipper (J & J Collectibles of Kelowna) and recipients (Music Sounds Inc and Pinnacle Music Ltd of Dartmouth). A year later neither shipper nor recipients could be located, and the phone numbers were not in service.

[43] He reviewed many of the business records seized, including the records of the kilometres driven each day, fuel purchased, and other expense receipts, as well as the September 29, 2015, receipt for the delivery of a skidder (depicted in the two photos stored in the white iPhone) from Manning, Alberta to Lanark, Ontario.

[44] Neither Simmonds, Brown nor Osmond searched the tractor and flatbed trailer on September 30.

[45] The tractor and flatbed trailer were searched by the other IDU officers who had participated in the search for the accused's vehicle that afternoon.

[46] Constable Whynott ("Whynott") (IDU) became the exhibit officer. He received, catalogued, and photographed the exhibits. He identified and described 44 exhibits. He provided the particulars of the packaging and weights of each of the approximately thirteen hundred 1,000 gram (half-pound) vacuum-sealed packs of marihuana, which packs were in turn packed in vacuum-sealed, plastic sleeves (four packs per sleeve), which sleeves were marked with various spray-painted colours (white, red, orange, yellow, purple, blue, yellow & blue, white & red), and of the three plastic bags of mushrooms (psilocybin) (each bag weighed slightly under 500 grams), and of 22 sheets of what were thought (wrongly) to be LSD. He testified as to where all the exhibits came from. He caused the drugs to be sent for analysis and introduced the certificates of analysis. Much of his evidence is included in, and supports, the Agreed Statement of Facts.

[47] Constable Bergman ("Bergman") (IDU) arrived shortly after the interception of the vehicle. His job was to search the sleeping area behind the driver's seat of the cab. He seized a logbook in the driver's side door in which he found the Day & Ross bill of lading (Exhibit #26) erroneously dated "10/21/15", another iPhone in a box between the driver and passenger seat, a Blackberry behind the driver's seat, an iPad, insurance papers, packages containing cocaine and different forms of methamphetamine, and other exhibits identified and tendered through Whynott.

[48] Bergman did not find the hidden compartment in the cab where, as a result of directions given to him on October 1st, he searched and found a 45-calibre revolver. He could not recall if it was secured by a trigger lock. Whynott testified

that, when he received it, it was trigger-locked. The gun was not loaded. The ammunition was found nearby in the cab.

[49] Constable Apa ("Apa") (IDU) was part of the search party looking for the accused's vehicle on Highway 102 inbound to Halifax. He participated in opening the three crates under the black tarp on the back of the flatbed. He described in detail the vacuum-sealed plastic sleeves, most of which were spray painted in various colours, each of which vacuum-sealed, plastic sleeves contained four half-pound sealed bags of cannabis marihuana. He found the box that contained the three bags of psilocybin (mushrooms). He described how the three crates were secured with screws.

[50] RCMP Constable Giffin (IDU) was part of the search party looking for the accused's Peterbilt vehicle. He participated in the search of the Peterbilt cab. He identified and seized the iPad mounted on the front dash (the console) to the right of the driver. He found the receipt where the truck passed through the toll booth at Cobequid Pass on Highway 102 earlier in the afternoon. He found the black book containing several documents on the passenger door of the cab. All of these were marked by him and handed to the exhibit officer.

[51] On cross-examination, he was referred to some of the documents included in the black book marked as Exhibit #20. When asked to agree that there were no hidden compartments in the cab, he specifically disagreed and said that the firearm was found in a storage cabinet that he did not encounter in his search.

[52] Detective Constable Wagg was a member of IDU and was the source handler of the confidential informant involved in this case. He organized the search for the accused's vehicle on the basis of a tip received on September 30th. He arrived at the scene where the accused's vehicle was stopped about five minutes after the stop.

[53] Wagg's role was as source handler. For that reason, he did not handle any of the exhibits or participate in the search. He stated that the event was not a "major crime triangle" event, for which a lead investigator was assigned. He did discuss with Brown about making inquiries: from the interprovincial trucking authorities; in respect of the data that could be obtained from the iPhones and iPads; and regarding the Day & Ross bills of lading found in the cab.

[54] He was cross-examined about who was responsible for the investigation if he was not responsible. He was unable to answer this question clearly. He acknowledged that he, Brown and Whynott were the only IDU officers involved in the investigation between the take down and when he left IDU in January of 2016.

[55] He confirmed that each province makes its own rules respecting interprovincial trucking. He confirmed that the fingerprint found on one of the sleeves of marihuana in one of the three crates was tested by the forensic lab and found not to match that of the accused.

[56] He had not had any experience with respect to tool markings and had not caused the screws that had secured the three crates to be matched with the tools on the accused's flatbed, nor had he tasked a handwriting expert to examine the handwriting on the bills of lading.

[57] He had not examined the contents of the black book (Exhibit #24), except for the bills of lading.

[58] On the stand, he was shown the contents of two envelopes, found in the black book, and acknowledged that in one of them there were fuel receipts that showed the dates and addresses of the gas bars, and in another envelope, other receipts including in particular a motel receipt from the Manning Motor Inn dated September 22, 2015 and the Westar Logistics Statement dated September 29, 2015, for the accused's delivery of a skidder from Manning, Alberta to Lanark, Ontario.

[59] He acknowledged that the accused was not charged with an offence related to the hand gun seized from the hidden compartment in the cab on October 1, 2015.

[60] Corporal Todd Bromley was qualified to give opinion evidence respecting the recovery, search, analysis, classification, extraction, exportation and presentation of digital information obtained from mobile devices.

[61] Before joining the RCMP, he had received post-secondary education in computer science, and been certified and worked as an IT system specialist. Since joining the RCMP in 2008, he had attended several specialized computer forensic programs. He was employed by the RCMP over the past several years as a tech crime investigator. He has been qualified to give expert opinion evidence in various courts in respect of the forensic analysis of computers and mobile devices.

[62] In December 2015, he received five devices found in the accused's tractor cab: two locked iPads, one locked iPhone, a Blackberry and an unlocked iPhone 6. In March 2016, he started work on these devices.

[63] The Blackberry had been reset and the data wiped, so no data was available for examination. At the time, in March 2016, he had no tools available to him to unlock the two locked iPads and the locked iPhone. He did recover and analyse the data from the unlocked iPhone 6 (Exhibit #39). It was not password protected.

[64] He explained various types of data extraction, and identified the type performed on this iPhone as a "advanced logical extraction", whereby he was able to analyse some of the deleted data.

[65] The Apple ID for this phone was that of the accused. Based on his evidence and report (exhibit 49), I find that this phone belonged to the accused.

[66] Bromley testified that the volume of data and videos on the phone was extensive – over 100 gigabytes. He provided the investigators with a disc which contained all the SMS messages, instant messages, e-mails, notes, and records of incoming or outgoing phones, but only one of 621 videos, some of the photographs and none of the audio found on the iPhone. In his report, he converted to, and showed the timelines for all the communications on the phone in, Halifax time.

[67] Both Crown and defence counsel extracted from Bromley's report the potentially relevant data and put it on a CD. By agreement, it – the electronic version (Exhibit #49) was marked as an exhibit, the printed version presented as an aid. Bromley's direct oral evidence followed the outline and contents of the exhibits. It has eight parts:

1. A summary of the extraction report, which identified the particulars of the phone, including the fact that it was not encrypted as well as a summary of the contents under the various categories;

2. The ZRT report;

3. 2,862 SMS text messages identified as to whether they were incoming or outgoing, the phone and name associated with the phone for each message, the time of the message (converted to Halifax time), whether the message was read, unread or unknown, the contents of the message (where extractable) and whether the message had been deleted;

4. The call log of 1,813 calls, identifying whether they were incoming, outgoing or missed, the phone number and the name associated with the phone (where available), the time of the call and the duration of the call;

5. 41 notes entered in the "notes" section of the iPhone, including when they were created or modified, their title, contents as well as identifying the 16 that were deleted by the user;

6. 19 user accounts for social media, primarily for social media, associated with the phone;

7. 38 of the 11,969 instant messages to and from the phone - two of the messages included attached photographs that were entered as Exhibits #50, #51

and #53 - with the date and time of the photographs, the phone and name of the sender, the message and whether the message was deleted; and

8. 124 of 12,202 images on the iPhone, including detailed information and metadata associated with each image. Four of the images of vacuum sealed bundles of money were reproduced as Exhibit #46.

[68] Exhibits #50 and #51 were two photographs attached to messages on the accused's iPhone 6. The photographs are of the accused's Peterbilt tractor and flatbed trailer. On the front of the flatbed trailer is a skidder and on the back are containers covered by a tarp or tarps.

[69] Bromley provided copies of the two photographs with the metadata as to when and where the photographs were taken. His evidence is that they were taken at 7:17 and 7:25 p.m. on September 22, 2015 at or near Manning, Alberta. One document in an envelope in the blueline book, entered as an exhibit, was a receipt from Manning Motor Inn, in Manning, Alberta, showing that the accused checked in at 9:57 p.m. on September 22 and checked out again at 3:26 a.m. on September 23. These times are local, Alberta times.

[70] Also, in the images on the accused's iPhone, Bromley found four photographs of bundles of money lying on a bed. The photographs were separately reproduced and marked as Exhibit #46. The bundles are in denominations of $100s, $50s and $20s. Each bundle is wrapped in two or more elastic bands. Most bundles are neatly packed in what appears to be vacuum-packed, clear plastic bags.

[71] Bromley used the metadata associated with the four photographs to determine that three of the four images were created on an iPhone 6 and a fourth created on an iPhone 4S, and was able to identify the date and time of day the photographs were created. Images #16, #92 and #93 were all created; that is, taken, on an iPhone 6, on March 11, 2015, at the following times that were converted by Bromley to Halifax time: Image #16 at 4:12:09 a.m.; Image #92 at 4:12:10 a.m.; and, Image #93 at 4:12:10 a.m. Image #91 was created; that is, taken, on an iPhone 4S (but situate in the images on the iPhone 6) on August 25, 2014, at 10:36:51 p.m. (Halifax time).

[72] On cross-examination, Bromley acknowledged that there was no encryption device or software on the iPhone 6 he analysed but did state that there was a "photo safe" program that hid the location of the images included in his report.

[73] He was referred to Note #41 on the accused's phone, in which note, the writer complained:

1. about the cost to borrow money to get a trailer "so that I could put a shitty paying load on it to take out west, cause the stuff out there would make up for it coming back";

2. about DOT for all of that on a "blits" [sic: blitz] across Canada that they would check everything; and,

3. that he really needed stuff done to the truck, but he was out of money and not having any load from the people out west because he could not give them an answer about when he could go "witch was goin to be every month."

The note had been deleted from the iPhone but recovered by Bromley. He acknowledged that the note was undated and does not state who created the note.

[74] Bromley was questioned about the photographs of bundles of money. He confirmed that the "created" time was when the photographs went into the photo safe program and that the "capture" time was when they were taken.

[75] Stacey Walton ("Ms. Walton") is the invoice resolution manager for Day & Ross, a national trucking company with 34 terminals across the country.

[76] She commenced evidence on May 23rd but did not complete her direct examination when it was noted by defence counsel that she created and was relying on some documentation for which defence counsel had not received notice in the minimum required time. The court granted a defence objection to her reliance on the new materials. I agreed and offered an adjournment for her testimony on that information; as a result, she completed her evidence on July 12, 2018.

[77] Ms. Walton has worked for Day & Ross for 22 years, mostly at its head office in New Brunswick. She started as a data clerk, then went for a couple years to the accounts payable department, then moved to the human resources department as the assistant to the vice president, then moved back to the payroll department as senior payroll administrator, then moved to the operations division as head of quality control for the McCain's account. It was at this time that she started creating and giving training programs, and creating standardized operating procedures for Day & Ross. In this role, she worked closely with the Day & Ross terminals. She next became the Day & Ross billing manager; then, she became the operations manager.

[78] Ms. Walton then spent four years, including September 2015, as the freight flow manager. In this role, she supported the 34 Canadian terminals and ensured that the company's procedures and processes were in order, and travelled to the terminals, trained the staff and conducted meetings.

[79] About a year-and-a-half ago, she became the invoice resolution manager. In this role, she and her staff process all invoice questions and disputes and review the accuracy of invoices.

[80] Ms. Walton's evidence was credible and reliable. It is very important evidence relating to the bills of lading marked as Exhibits #25 and #26, found in the possession of the accused at the time of his arrest.

[81] On July 12, 2018, she gave evidence in respect of Exhibit #52, business records of Day & Ross introduced pursuant to s. 30 of the *Canada Evidence Act*.

[82] She is familiar with the Halifax regional Day & Ross terminal, located at 10 Isnor Drive, Dartmouth, Nova Scotia, and the Kelowna, British Columbia terminal, located at 760 McCurdy Road.

[83] She described the different types of terminals operated by Day & Ross across Canada. The terminal for the Halifax Regional Municipality is a medium-sized transfer terminal. Transfer terminals are capable of handling less than truck load ("LTL") shipments.

[84] LTL shipments can be dropped off at a transfer terminal by the shipper and weighed, or are picked up at the shipper's location by a Day & Ross pickup and delivery truck and brought to the transfer terminal to be offloaded, then reloaded onto a line-haul trailer for delivery to another Day & Ross terminal, where the LTL shipment is offloaded to be picked up by the consignee or reloaded onto another Day & Ross pickup and delivery vehicle for delivery to the consignee.

[85] Not all loads are weighed at the terminal if the bill of lading shows the weight, but dock workers are very experienced and careful about weight. If the bill of lading has no weight on it, they weigh the shipment. If the weight on the bill of lading is rounded (for example, 500 pounds), they reweigh it. If the weight on the bill of lading does not appear close to what the dock workers are loading, unloading or reloading, they reweigh the shipment.

[86] The weight of the shipment is very important. Customers are invoiced, and a freight-hauling business makes its money, on the basis of the weight and size of the shipment. A second reason the weight is important is because trucker needs to load its truck in a manner that ensures it is within the legal weight limits for tractor-trailers in all the jurisdictions across Canada through which the vehicle will travel. For the same reason, all drivers or brokers must know the weight of the shipments to ensure that the load they are hauling is within the legal limits when they cross provincial scales or DOT checkpoints on their route.

[87] The bill of lading does not tell anyone whether the shipment is an LTL shipment but, from her 30 years of experience, a full load would be 40,000 pounds or more.

[88] Day & Ross has about 2,494 closed van trailers or reefer trailers. It has a flatbed division of about 35 units, all of which units are broker-owned. Broker-owned means an independent contractor owns and maintains his or her own tractor and trailer. Day & Ross has a record of these 35 flatbed brokers.

[89] To become a broker for Day & Ross, the broker and driver for the broker go through a screening process.

[90] One of their brokers cannot broker a Day & Ross load to another broker, only Day & Ross can do that. Day & Ross keeps a business record of every transactions involving brokers.

[91] Ms. Walton checked with the manager of the office that keeps the records of current and past drivers and brokers for the name "David MacDonald". Her evidence is that there were three David MacDonald's in their system – two were active; one was not. On July 12th, the Crown introduced, pursuant to s. 30 of the *Canada Evidence Act*, as business records, four affidavits and attached computer records of Day & Ross.

[92] One was the affidavit of Laura Pickinson, who was, at the time she searched the business records relating to Day & Ross's brokers and drivers, the manager of the compliance department that keeps and has access to these records.

[93] These records confirm that there are or were only three David MacDonald's who had been driver or brokers with Day & Ross. David S. MacDonald of Charlottetown, who is 13 years older than the accused, and David Wayne MacDonald of Moncton, who is 21 years older than the accused, were the only active David MacDonalds who are drivers or brokers for Day & Ross. David (no middle name in system) MacDonald, associated with the terminal at 170 Van Kirk, Brampton Ontario, was the third driver or broker. He was no longer an active driver-broker; his birthdate is more than 12 years prior to that of the accused.

[94] The substance of the evidence of Ms. Walton and the business records is that the accused was not at any time, and is not, a driver or broker who would have hauled freight for Day & Ross.

[95] Day & Ross do use contract brokers, who own their own tractor and who transport freight to customers in Day & Ross owned van or reefer trailers. These

arrangements are usually for transport of freight between Day & Ross terminals. Day & Ross uses its own pick up and delivery drivers for local pickups from shippers and deliveries to consignees of LTL shipments.

[96] A bill of lading is a term used in the freight industry. It means an agreement between a freight company, such as Day & Ross, and their customer to pick up freight specified in the bill of lading at the shipper's location and deliver it to the consignee's location. When signed by the pick-up driver and the shipper, it becomes a legal contract.

[97] Each bill of lading has several sections.

[98] There are sections for the identification of the name, address and phone number of the shipper and consignee respectively. Normally the shipper completes the bill of lading. If not, the driver completes it before picking up the freight.

[99] The driver must have a bill of lading before picking up freight. The bill of lading contains the pick-up date and the Day & Ross reference pro-bill number, a unique number assigned to each shipment to help Day & Ross identify the shipment internally.

[100] The pro-bill number is recorded on both the bill of lading and recorded in the Day & Ross computer systems. The number is used to enter the bill of lading details into their computer system, both to track or trace freight, as well as to invoice the customer.

[101] Shippers can use their own bills of lading or the Day & Ross bill of lading. About 20 to 25% of the Day & Ross customers use the Day & Ross bill of lading. It can be downloaded from their website; it is provided to regular customers in books; or it can be provided by the Day & Ross driver prior to or at time of pick up of the shipment.

[102] When the bill of lading for an LTL shipment is completed, the driver brings the bill of lading and the freight to the Day & Ross terminal to be unloaded from the pick-up van and loaded onto a line-haul trailer for transport to a terminal near the final destination. The pick-up driver gives the bill of lading to the P&D check-in clerk at the terminal, who scans the bill of lading into the Day & Ross "datamagine" system. The billing department at the Day & Ross head office then keys the information from the scanned bill of lading into the AS400 computer system.

[103] The datamagine system retains images of all bills of lading, proofs of delivery and related documents. Day & Ross has a record of every shipment. While

the AS400 system used for billing is purged every 2 to 2½ years, the datamagine system retains copies of all documents and pro-bill numbers.

[104] Ms. Walton identified and explained how and with what information each section of the bill of lading is completed, using both Exhibit #26, the purported Day & Ross bill of lading dated 10/21/15 [sic,9/21/15], and Exhibit #25, the purported Day & Ross bill of lading dated 08/12/15.

[105] She first dealt with Exhibit #26. She identified Exhibit #26 as the standard form of Day & Ross bill of lading in 2015. On the top left-hand corner, the first space calls for the date of the pick up of the freight from the shipper. While a shipper may handwrite into that space a future date (in this case, erroneously as 10/21/15 instead of 9/21/15), it would show as an error when the bill of lading was imputed into the computer system at the Kelowna terminal and be corrected.

[106] The sticker on the top right of the form contains the Day & Ross "pro-bill" number. The first three numbers "KEL" identify the pro-bill as being associated with the Kelowna terminal.

[107] Below this on the left is the section for the shipper's name, telephone number, pick-up address location, city, province and postal code of the address. Exhibit #26 shows the pick-up address as "760 McCurdy Road, depot, Kelowna, BC V1X2P7." This is the address of the Day & Ross terminal, not the address of J & J Collectibles, the purported shipper. Ms. Walton said that this would "insinuate" that the freight was dropped off by the shipper at the Kelowna terminal, where the dock employee would check the freight, match it to the bill of lading and image it into the Day & Ross datamagine system.

[108] From the business record evidence in Exhibit #52 and the evidence of Ms. Walton, it is clear that neither bill of lading (Exhibit #25 or #26) nor the pro-bill numbers were ever entered into the Day & Ross datamagine system or the AS400 billing system. I find that the bills of lading are not legitimate Day & Ross bills of lading -they were fraudulent documents.

[109] The consignee's section on Exhibit #26 shows the consignee as "Musical Sounds Inc." and its phone number. The delivery address is not the delivery address of the consignee; 10 Isnor Drive, Dartmouth, Nova Scotia, is the address of the Halifax regional Day & Ross terminal. Ms. Walton states that this entry would indicate that the consignee was going to pick up the freight at the Day & Ross Dartmouth terminal.

[110] The next space underneath: "method of payment", is marked prepaid. Ms. Walton stated this meant that the shipper would pay the freight. If he did not have an account number with Day & Ross, it would require payment up front by cash or by secured credit card payment. J & J Collectibles did not and does not have an account. In addition, the space on the bill of lading to enter the shipper's account number is blank.

[111] The evidence of Ms. Walton, and the affidavit containing business records entered in Exhibit #52, establish that there is no record on the Day & Ross computer systems of a customer with the name J & J Collectibles, J J Collectibles or anything similar. The shipper was not a customer of Day & Ross. Day & Ross was not prepaid for any freight described in Exhibit #26.

[112] The section below the payment method space provides for a description of the number of pieces, the cargo description, the weight, the declared value and the dimension of the freight. On Exhibit #26 the number of pieces is identified as three. The description of the freight reads: "skid-refurnished piano, instruments, antique, *fragile*". There is nothing in the spaces for the weight, declared value or dimensions.

[113] Ms. Walton stated that "skid" meant that the freight was a commodity.

[114] Ms. Walton testified that the fact that the weight box was blank is an obvious red flag. As noted earlier in this decision, if the driver picks up freight, he or she would know that he/she must know the weight. A driver is expected to complete the bill of lading and, if the weight is missing, to ask the shipper for the weight. If the shipper does not know the weight, it would be noted as such on the bill of lading and that it would be weighed at the dock at the terminal. If the shipment went to 760 McCurdy Road, Kelowna, it would have been weighed by Day & Ross at the dock and the weight would have been entered on the bill of lading.

[115] The court finds that it would be a red flag to any driver of a fraudulent bill of lading that the weight was not shown on the bill of lading.

[116] On the bottom left of the bill of lading is a place for the shipper's reference number (if it has one), for the signature of the person who drops off the freight at the terminal or gives it to the driver at the shipper's location, and for printing the name of the person who signs as the shipper. In Exhibit #26, the shipper's reference number is blank, the signature space contains illegible writing that does not appear to be a signature, and the person who was to sign as shipper did not

print his or her name, contrary to what Ms. Walton said is required to be completed.

[117] If, as Exhibit #26 insinuates, the shipment was dropped off by the shipper at the Day & Ross Kelowna terminal, the dock clerk would have required the person to sign and print their name. Furthermore, if a shipment was dropped off at a Kelowna terminal, as suggested on the bill of lading marked as Exhibit #26, it would be given a dock number that would be placed on the bill of lading and entered into the Day & Ross system. There is no dock number on the bill of lading and, most significantly, there is no record in the Day & Ross system showing that the pro-bill numbers on Exhibit #25 or #26 were ever used in connection with a shipment.

[118] Ms. Walton was shown Exhibit #25 and asked to explain it, as well as some of the differences between that bill of lading, dated 8/12/15, and Exhibit #26. The shippers address on Exhibit #25 is shown as Adams Road, Kelowna, not the Day & Ross Kelowna terminal. This means that the shipment would have been picked up at a location other than the Kelowna Day & Ross terminal. For an LTL shipment, it means that the shipment had to go to the terminal at Kelowna, where Day & Ross would move it via one of their line-haul trailers to Nova Scotia.

[119] The method of payment on Exhibit #25 is shown as "collect". This means that the consignee would be responsible for the freight charges. If it had not opened an account with Day & Ross, it would secure a credit card payment before the shipment was accepted by Day & Ross. From the tendered business records, it is clear that there was no record of any customer of Day & Ross with the consignee's name or any name similar to it.

[120] Exhibit #25 describes four pieces as "skid - keyboards, brass/percussion refurb/string". Ms. Walton said that this cargo would not be shipped on a flatbed trailer by Day & Ross. This statement would also apply to the freight described on Exhibit #26, which freight was marked "fragile". These LTL shipments would only be shipped in van trailers. Flatbeds are used for items that do not fit inside van trailers. Normally a flatbed is used for deliveries to a single customer where the item is too big to place in line-haul trailers.

[121] This evidence is significant. As a matter of common sense, it would not be reasonable to haul across the country a fragile refurbished piano, and antique instruments (Exhibit#26) or keyboards. brass/percussion, refurbished/ stringed (Exhibit#25), in crates on open flatbed trailers.

[122] The fact that on Exhibit #25 the weight of the product is shown as 2,400 pounds signified to Ms. Walton that the shipment was an LTL shipment. She stated that this kind of shipment would not be outsourced to a third-party broker for transport on a flatbed trailer.

[123] Ms. Walton's direct evidence continued July 12, 2018.

[124] Ms. Walton testified as to how the business records contained in Exhibit #52 were gathered and what the records attached to the four affidavits meant.

[125] One of the affiants, Laura Dickinson, was the manager of the compliance department that had access to and provided the records with respect to the three David MacDonalds, who are in their system as brokers or drivers for Day & Ross, as well as their personal information. The accused name and particulars did not match any of the particulars of any of the David MacDonalds on those records. This establishes that at no time relevant to these proceedings was David Joseph MacDonald the accused, a driver or broker doing business with Day & Ross.

[126] The affiant Nicholas Pinta was the manager of the accounts payable department and had access to the records to any drivers or brokers transporting freight for Day & Ross. Ms. Walton asked Mr. Pinta to review those records to see if there were any payments made to David MacDonald. The records produced showed that there were no payments to any David MacDonald, except to the David MacDonald of East Royalty, PEI, with the last payment being made to him in the amount of $226.16 on October 10, 2007.

[127] This supports the previous affidavit to the effect that Day & Ross had no business relationship with David MacDonald for transporting any freight.

[128] Ms. Walton added that if Day & Ross had sold or contracted the transportation of freight referred to in Exhibits #25 and #26 to an independent broker, there would be a record in the Day & Ross system of the contract. Mr. Pinta's affidavit confirms that there was no such arrangement.

[129] Ms. Walton's own affidavit in Exhibit #52 refers to her personal search through the Day & Ross system for any customer's name, whether shipper or consignee, that matched or was similar to the names in Exhibits #25 and #26. As noted in her affidavit, her search was under not just the names on the two bills of ladings but words that form part of those names. The result of her search, and her evidence, was that none of the names: J & J Collectibles; J J Collectibles, Pinnacle Music Limited, Musical Sounds Inc., or any name incorporating parts of their names, had been customers of Day & Ross.

[130] Ms. Walton's search included a search of the pro-bill numbers shown on the stickers on the top right-hand side of Exhibits #25 and #26. She testified that neither pro-bill number existed in any Day & Ross system, neither the datamagine or the AS400 system.

[131] Ms. Walton was cross-examined. She confirmed that since the accused, David Joseph MacDonald, of Antigonish, did not appear in the Day & Ross system as a driver, broker or customer, that he would have no familiarity with the business practices of Day & Ross.

[132] She agreed that in BC, a bill of lading is no longer required to be carried in the vehicle transporting goods, except for the transportation of dangerous goods or the transportation of goods to the United States. However, a bill of lading is always required for a shipment.

[133] She added that when truckers are stopped at scales or DOT checkpoints, issues and problems arise when the inspectors ask for the bill of ladings and they are not on the truck. As a result, Day & Ross made a business decision to have drivers carry bills of lading with them.

[134] Ms. Walton was referred to the two photographs (Exhibits #50 and #51) of a tractor and flatbed taken near Manning, Alberta on the evening of September 22, 2015. She acknowledged that what looked like a big piece of equipment with freight behind it, would be an oversized load. She acknowledged that transport of an oversized load would, in her experience, require permits and be subject to travel restrictions. She did not know what the travel restrictions might be.

[135] She was asked what she meant by "brokering a load". She answered that when Day & Ross did not have enough trucks to haul shipments, they will sell them to other carriers; that is: "We broker the loads to them. They will haul the freight and invoice Day & Ross for the service." She added that there was another category of brokers who were contractors in the Day & Ross system. She added that, while not what she calls a "brokered load", sometimes a shipment to a point in Canada or United States that is not directly serviced by Day & Ross, will be handed off to one of their "interline" carriers to take the load to its final destination.

[136] She agreed that there as nothing on the face of bill of lading to indicate that the load could not be brokered.

[137] She repeated that a bill of lading form is readily available from their terminals and can be completed by the customer or the driver, but it must be signed by both.

[138] She stated that a driver does not have the ability to weigh a load when placed on a trailer; that has to be done at the terminal.

[139] In the case of a full load, the shipment can be transported without being taken to a terminal to be weighed, but that circumstance does not apply to LTL shipments, such as those described in Exhibits #25 and #26.

[140] Ms. Walton determined that J & J Collectibles, Musical Sounds Inc, Pinnacle Musical Ltd, or any similar names, were not customers of Day & Ross by looking at the company's computer database.

[141] When asked whether only a driver from Day & Ross could obtain the "pro-bill sticker" for a bill of lading, she said no. Regular customers have a supply of pro-bill stickers, so they can label their freight and be ready for pick up by Day & Ross. Pro-bill stickers on placed on the load at the shipper's location, not at the terminal. While they are not readily available to anyone, they are handed out to customers that do a lot of business with Day & Ross.

[142] She acknowledged that the pro-bill stickers give an air of authenticity to a bill of lading. She acknowledged that other than the absence of the weight on Exhibit #26, neither bill of lading, on first appearance, gave her cause for concern.

[143] Ms. Walton was redirected. In answer to whether there were any obvious red flags on the bill of lading, other than the absence of weight on Exhibit #26 and the rounded weight on Exhibit #25, and, in particular, whether the type of tractor or trailer, that is flatbed or closed container, was apparent on the face of the bill of lading. Ms. Walton indicated no but added that musical instruments would only be transported in a closed van trailer.

[144] Ms. Walton was asked to clarify her answer to defence counsel's question in which he asked whether she agreed with his understanding that in British Columbia a bill of lading is no longer required to be part of a commercial haulage transaction. She had earlier answered that she understood that a bill of lading had to be signed by both parties to be a valid contract, but she understood that a bill of lading was not required to accompany the driver transporting freight with the two exceptions of dangerous goods and goods going to United Statements; however, she stated that it was a Day & Ross business decision to provide copies to the driver to avoid the troubles and delay that occur when inspectors at scales and DOT check points want to check loads.

[145] In redirect, she clarified that while she was not certain if or when provincial rules changed, it was never provincial legislation that all bills of lading accompany

the freight, but rather a business decision to provide copies because of the problems and issues at scales and checkpoints.

[146] She stated that Day & Ross provided direct service at Kelowna, British Columbia and Dartmouth, Nova Scotia, implying there was no reason for Day & Ross to broker out freight between these two terminals.

[147] The last witness was Constable Peter Hurley ("Hurley"). A *voir dire* was held to determine whether to qualify him to give expert opinion evidence in relation to cannabis use, the unlawful possession of cannabis for the purposes of trafficking, psilocybin usage, the unlawful possession of psilocybin, the unlawful possession of psilocybin for the purpose of trafficking, drug chain of distribution, methods used to avoid police detection, pricing, purchasing, value, drug transportation methods and packaging methods.

[148] The court qualified him to give opinion evidence. He was not qualified to give opinion evidence regarding violence associated with the drug trade.

[149] The accused objected to the evidence in the *voir dire* becoming evidence in the trial. It has not been considered in this decision.

[150] By agreement, Hurley's *curriculum vitae* was admitted as Exhibit #54.

[151] In his direct testimony, Hurley testified directly regarding his involvement in drug investigations since he became a police officer 14 years ago. His evidence followed that described in Exhibit #54. He had approximately 7 years experience as a drug investigator; he had participated in at least 10 undercover criminal and/or narcotic operations. He had assisted in the execution of over 100 search warrants under the authority of the *CDSA* and *Criminal Code*. He had assisted in the take down of at least 25 grow ups. He was the author of no less then 75 *CDSA* and *Criminal Code* search warrants. He had handled no less then 48 confidential informants, who provided information on a regular basis regarding illicit drugs, packaging, pricing, quantities, street terminal, paraphernalia, distribution, drug networks, organized crime rings, etc. He had regular contact with drug users, drug traffickers, undercover operators and drug investigators, as well as being an active liaison with drug investigators across the province as to current trends.

[152] Hurley had participated in drug trafficking investigations in Nova Scotia and other parts of Canada, involving high level, large operations with hundreds of pounds of marihuana ("high-end trafficking"), mid-level trafficking and street-level trafficking. He regularly did surveillance and monitoring of wire taps.

[153] As set out in his *curriculum vitae,* he has participated in several professional training and development programs directed at drug trafficking, handling confidential informants, and organized crime. Among those courses was a 2011 five-day course involving Canadian and US agencies that detailed interdiction techniques used by Canadian and American officers in relation to search and seizure of illegal narcotics, weapons and other types of contraband transported by large, commercial vehicles - the *Advanced Commercial Vehicle Pipeline Convoy Criminal Interdiction Techniques* (called 'Pipeline' course).

[154] Hurley's extensive list of investigations raised from those involving street-level trafficking, that lasted less than one week, to high-level trafficking operations involving organized crime that lasted over ten months, as well as undercover operations, including specifically in Kelowna, British Columbia, respecting the transport of cannabis from Kelowna to Nova Scotia. Much of his knowledge comes from his interactions and experience in high-level transactions, including one undercover operations in which interactions took place about the possibility of transporting 500 pounds of marihuana from Kelowna, British Columbia to Fort McMurray, Alberta.

[155] Hurley expanded on some of the operations listed as part of his experience in Exhibit #54, explaining his role in them. In the particular undercover operation involving the proposed transportation of 500 pounds from Kelowna to Fort McMurray, the target of the investigation discussed offering the driver $100.00 per pound for transporting the contraband.

[156] More than ten of his operations involved purchases of very large quantities of drugs using undercover agents. These investigations involved exchanging cash for drugs. For many of these large-scale purchases, Hurley arranged for sealed bundles of cash, each bundle in the same denomination, usually $10,000.00 per bundle, secured by rubber bands.

[157] When he was assigned by the co-ordinator to review this investigation for the purpose of an opinion, Wagg provided him with a sealed package that included the entire file and, in particular, the exhibit log (but not the exhibits themselves), the officer's notes and all of their reports. He was not permitted to, and did not, speak with Wagg or any of the other officers involved with the file. He had no knowledge or awareness of the accused David Joseph MacDonald before this assignment.

[158] Hurley stated that he would only write an opinion report if, on his review of the file, he agreed with the charges. Otherwise he would send an e-mail back indicating that he did not agree with the charges. He stated that it was common in

IDU investigations that persons in his position would not agree with the investigator, after which charges were usually either withdrawn or reduced.

[159] In preparation for his evidence, he sat in court for all of the evidence, except that of Bromley; he listened to the audio of Bromley's evidence.

[160] Hurley described Canada as one of the major world producer of cannabis marihuana. British Columbia is the traditional supplier, but recently Ontario has become a large supplier.

[161] The production of cannabis marihuana occurs in a three-stage cycle, where the plants take 8 to 12 weeks to produce the "bud", the chemical which gives the euphoric feeling. He described some of the characteristics of indoor and outdoor grow ops.

[162] In large-scale grow ops, where the product is sold to high-level traffickers, after cannabis has been grown and hung to dry, it is packaged by growers in half-pound packages, which are in turn vacuum sealed in sleeves of from two-and-a-half to five pounds. The THC concentration in cannabis marihuana varies from a low of 6% to a high of 27%. British Columbia and Ontario are the source of higher concentrations. Usually cannabis grown indoors has higher THC concentrations than plants grown outdoors.

[163] There are many ways that cannabis marihuana gets to Nova Scotia: air, trucks and personal vehicles. All high-level growers and traffickers use runners or couriers. These are usually people with no criminal record and not into trafficking themselves. The most important characteristic of runners is that they be trusted. Traffickers do not want to lose their drugs. They usually recruit runners from family or friends.

[164] Hurley described the usual packaging and transportation of cannabis using Exhibit #2, photographs 10 to 13, which showed the sleeves containing four half-pound plastic bags of cannabis marihuana. He said the photograph was typical of the packaging by large-scale grow ops for high-level traffickers. Because there are very many strains of cannabis marihuana, the different colours of spray paint on the sleeves are used to differentiate different strains and different batches.

[165] Hurley was asked the value of a shipment of about 700 pounds in Nova Scotia. He said that it varied with the supply and demand in the province at the time, as well as the quantity or THC concentration.

[166] He estimated that the value of each sleeve (two pounds) bought in bulk at between $1,700.00 and $2,000.00. The low end of value of a large quantity of

cannabis purchased in bulk was $1,100.00 for a two-pound sleeve. He estimated the value of this shipment of marihuana, as between a large, high-level grow op and high-level trafficker, at between $600,000.00 and $1,100,000.00.

[167] Hurley stated that the value of a gram on the street in Nova Scotia was between $5.00 and $10.00, depending on the quality. At the lower end of the quality range - $5.00 to $6.00 per gram, this works out to between $2,200.00 and $2,700.00 per pounds or $1,600,000.00 for 700 pounds.

[168] Hurley described the psilocybin shown in Exhibit #2, photographs 16 and 17, commonly called "magic mushroom". It is a hallucinogenic drug, usually consumed in tea. It is grown outdoors, must be dried and is packaged in one-pound bags, which are sold at the retail level in dime bags consisting of one-gram each. Its growth and packaging are similar to that of cannabis marihuana. The cost of 10 grams in Halifax is about $200.00 or $20.00 for a dime bag of one gram.

[169] It is a rare drug in Nova Scotia. He has only seen it about 20 times. He opined that an average user of psilocybin could consume up to three grams in 24 hours.

[170] Hurley opined that the photographs of bundles of money, shown in Exhibit #46, reflect how drug money, when used to purchase large quantities of drugs, is packaged: bills of the same denominations, wrapped in rubber bands and often vacuumed sealed in bulk.

[171] In the Pipeline course, he learned that "dead heading", sometimes called an "empty float", means driving a commercial vehicle empty to pick up a load. He described this as not a common practice, as it was too expensive to drive empty.

[172] Hurley testified that it is typical that drug runners carry multiple cell phones. He has seen up to 12 phones on a single runner. His explanation for the reason was that runners avoid communicating with different involved people on the same phone. Part of this is to avoid association between members of a group and to avoid police detection as a working group.

[173] Hurley was asked to comment on whether the fact that the blood stain found on one of the sleeves in one of the sealed crates did not match that of the accused. He stated that it was not significant. Based on his experience and specialized training, truck drivers are responsible for securing the load to the truck, but not packaging.

[174] Most truck driver couriers are involved in regular legitimate trucking. This makes them useful for running drugs. Keeping log books, log records and expense

receipts make their activity appear legitimate. Based on his training, truck drivers hauling illegal contraband try to avoid check points.

[175] On cross-examination, Hurley acknowledged that he works with Constable Brown and socializes with him "probably weekly, depending on our schedules", but denied discussing this file with him. Hurley, as lead investigator, and Brown, as lead cover officer, worked in a 2017 ten-month undercover operation called Operation Harley, involving the Hells' Angel motorcycle gang and trafficking cocaine and cannabis between British Columbia, Ontario, New Brunswick and Nova Scotia.

[176] Hurley acknowledged that his 2011 Pipeline course was his only training regarding commercial trucking and, as part of that training he had stopped three vehicles, but he had never taken down a truck transporting cannabis.

[177] He agreed that a delay of 13 months in the investigation is not normal.

[178] Hurley confirmed that he received and reviewed a copy of all the documents, including the log book, photographs, papers and reports. He reviewed the electronic version of police reports, can-say reports, supplementary report and Crown summary, as they are easier to read online. He did not look at the cell phones but was given and reviewed the disc from Bromley. He acknowledged that Brown thought there was nothing of significance in the phone record but he (Hurley) did.

[179] He acknowledged that Simmonds was transferred to the serious crime unit and they worked together on Operation Harley and, since 2018, work on the same team. He socializes with him occasionally and texts with him frequently. He also works with Osmond, with whom he socializes once every six months. He has worked on prior brief occasions with, but never socialized with, Wagg, Apa, Bergman and Whynott.

[180] Hurley was not sure how Corporal Lane, the drug expert coordinator, came to assign him this file. There were no written communications of which he was aware.

[181] He was not well versed in bills of lading. He had never been deployed at an airport, harbour or border location, nor trained respecting the importation or exportation of goods.

[182] He has no experience with "blind couriers", persons who unknowingly transport contraband in a suitcase or vehicle. When asked whether there would have been an advantage for drug traffickers to use blind couriers, he opined that in

his experience, traffickers fear loss of their product. They would want to know or have an established relationship with and a level of trust in, in any courier and would not risk transporting with a blind courier. Counsel put to Hurley and he acknowledged that advantages to using a blind courier might be that they would not be able to implicate the trafficker, there would be no cost to the trafficker, and the courier could not intentionally disclose what they were doing.

[183] Hurley acknowledged that the methamphetamine found in the cab was a stimulant, the use of which would permit the driver to travel as quickly as possible to his destination. When asked if drivers moving illegal contraband often take drugs, Hurley replied that the use of stimulants is common in the trucking industry.

[184] Counsel lead Hurley through a series of exhibits to suggest that instead of taking the quickest route from Kelowna to Nova Scotia, the accused appeared by those documents to not be in a hurry to deliver the drug cargo to Nova Scotia. The exhibits included:

1. The bill of lading, suggesting that the three crates containing the drugs were loaded in Kelowna on September 21, 2015;

2. The receipt from the Manning Motor Inn of Manning Alberta (Exhibit #24) showing that the accused checked in at 8:00 p.m. on September 22nd and out at 3:26 a.m. on September 23rd and, per Exhibit #53, the metadata extracted from the accused's phone respecting two photographs of the tractor and trailer carrying a large skidder and crates covered with a dark tarpaulin, suggest that the accused and three crates were on the flat bed near Manning, Alberta – a long way north of Kelowna, at 7:17 p.m. on September 22, 2015;

3. The receipt from the Westar Logistics (in Exhibit #24) dated September 29th for transport of the skidder from Manning, Alberta to Lanark, Ontario;

4. The video on his phone showing the accused pulling into the weight scales on the TransCanada Highway at Amherst on September 30th (the Crown objected that there was no evidence of this video being taken on September 30th.);

5. A receipt (Exhibit #22) found in the accused's cab show that he went through the Cobequid Pass Toll Plaza on the TransCanada Highway at 2:31 p.m. on September 30th; and,

6. The accused was arrested shortly after 4:00 p.m. on Highway 14, at Brooklyn, Hants County, Nova Scotia.

[185] Based on these, counsel asked the witness whether assuming the drugs were loaded in Kelowna, British Columbia and the accused travelled from Kelowna to Manning, Alberta, that the accused was not in fact travelling the speediest route across Canada to Nova Scotia with the cargo of drugs. Hurley agreed, although he was not familiar with normal trucking routes.

[186] Counsel asked Hurley whether he was aware of the restrictions in carrying heavy loads and that oversized loads required in Ontario special permits and can only be transported in daylight hours. Hurley replied that he was not aware of any of this.

[187] Hurley agreed that a trucker would want to maximize his pay load to earn income and it was not profitable to drive without a load.

[188] Hurley agreed that since the marihuana was in vacuum sealed packages, it would be very hard to detect.

[189] Hurley was asked whether the police investigated where the pro-bill stickers on the bills of lading came from. Hurley replied that he did not note any follow up investigation in his review of the file.

[190] When asked to comment on the fact that the accused did not modify his driving during the 15 minutes that Simmonds followed him on Highway 14, Hurley replied that when one is transporting drugs, one tries to drive by the book.

Part V *Submissions*

A. Crown's submissions

[191] The Crown's submission focused on the issue of knowledge and control. The Crown acknowledged that it was relying upon circumstantial evidence to prove knowledge. It cited *Villaroman* for the standard of proof; that is, guilty knowledge must be proven to be the only reasonable inference but, on the other hand, the Crown need not negate every possible conjecture.

[192] In looking at the evidence, as required by *R v Sekhon*, 2014 SCC 15 ("*Sekhon*"), the Crown identified the major facts it was relying on to support the inference of guilty knowledge by the accused. They are as follows:

1. The amount of marihuana was substantial, in the million dollar plus range, and this is a relevant consideration as noted in the cases referred to at the end of Crown's submissions.

2. The Crown dismissed the idea that high-level traffickers would transport such a large quantity via a blind courier. It cited caselaw to that effect.

3. The possession of two fraudulent bills of lading, the second of which did not even show the weight of the cargo, an obvious red flag to a driver with the experience of the accused, is problematic. A person with the accused's experience would not be easily fooled by the two fraudulent bills of lading.

4. The fact that Day & Ross had no record of the shipment, of the accused ever being a driver or broker for any Day & Ross shipment, and of Day & Ross having no record of the shipper and consignees, is significant.

5. When the police checked a year later, the phone numbers on the bills of lading of the shipper and consignees were out of service.

6. The fact that Day & Ross had no record of either bill of lading, and the fact that the second bill of lading (Exhibit #26) on its face was dated October 21, 2015, a date in the future.

7. The text messages and photographs on the accused's cell phone, found in his possession, are circumstantial evidence of the accused's association with drug trafficking (See *R v Black*, 2014 BCCA 192). The items on the accused's phone included deleted texts dated September 21, 2015, about the loading of crates in Kelowna.

8. The accused's log found in his cab contained errors as to the month; that is, that it showed dates in September 2015, written as the 10th month of 2015.

9. The fact that the accused was not heading to Dartmouth along the normal route - Dartmouth being the destination on the bill of lading, but rather left the normal route to drive down a "side road" is significant.

10. Admissions against interest are contained in his SMS messages on his cellphone, especially on Exhibit 49, message #77, in which, at 2:15 p.m. on September 30th, he texted "to deliver the rest of the load".

11. The photographs (Exhibit #46) of sealed bundles of cash found in the iPhone, taken in March 2015 and August 2014 on an iPhone is significant evidence of knowledge of the drug trade.

12. Ms. Walton's evidence that piano and musical instruments would not be shipped on a flatbed.

13. If the accused was a blind courier, he would have known from the bill of lading of August 12, 2015 (Exhibit #25) that he was not going to be paid by Day

& Ross and it makes no sense that he would thereafter transport a second shipment on a purported Day & Ross bill of lading on September 21, 2015, when he had no basis to expect that he would be paid by Day & Ross.

14. Bromley stated that the video, taken of the accused's truck as it approached the weight scales near Amherst, had no metadata that would show when it was taken. The only thing he could say was that it was sent, attached to a message on September 30, 2015. Because the accused's load was light, there was no need for him to stop at the Amherst weight scales. The sign in the video only required vehicles carrying over 4,500 kilograms or pounds to stop at the weight scales, and we know that his cargo weighed about 700 pounds.

15. The handgun concealed in the cab of the truck is relevant context.

16. In the "notes" section of the accused's iPhone, Bromley was able to recover some deleted notes, including one undated note (#41) in which the accused complained about being ruined for things that included having no loads going one way and "shitty" loads, with the cost of operating his truck. The nature of the note confirmed Hurley's opinion that time is money for a trucker.

17. The accused's record show that he was in Kelowna for three days, from September 19th to 21st. There would be no reason for him to wait three days to pick up a legal load from the Day & Ross terminal in Kelowna. This suggests that he was not waiting to pick up a load from Day & Ross, but rather an illegal load.

18. The accused was in possession of five mobile devices, four of which were locked and encrypted. The court should not assume that the accused's only communications were on the one iPhone that Bromley was able to examine.

19. The accused was an experienced trucker, who had many trips between Kelowna and Nova Scotia, according to the data on his iPhone. He had been a trucker since at least 2011. It would not have been easy to fool him with the two fraudulent bills of lading.

[193] The Crown referred the court to the following decisions, mostly relating to the approach for analysis of circumstantial evidence of knowledge and, in particular, in the context of the blind courier defence:

1. *R v Bains*, 2015 ONCA 677. This case involved the offence of possession of one kilogram of cocaine for the purpose of trafficking. The relevant paragraphs include paras. 154 to 157, and 169 to 177. Counsel referred the court to para. 173 for the proposition that the quantity and value of the drug in the vehicle

"would not have been left unattended or entrusted to someone who did not know the nature of the content of the bag".

2. *R v Ukwuaba*, 2015 ONSC 2953 (Hill J.). This was another possession for the purpose of trafficking case. Counsel referred the court to para. 102 for the general principle that apply to proof of unlawful possession of an illicit substance or contraband and, in particular, to para. 102(6) where the court stated: "A fact-dependent circumstance which may contribute to common-sense inference-drawing in an unlawful possession case is the value of the item/substance which is in the custody of the accused but which, in light of the accused's denial of knowledge, is said to be the property of a third party".

3. *R v Olvedi*, 2018 ONSC 1166. Crown referred to this case for its review of the doctrine of wilful blindness, beginning at para. 18. Crown argued that the facts in this case negate the accused being a blind courier.

4. *R v DaCosta*, 2017 ONCA 588. In this case, the Ontario Court of Appeal upheld Hill J. as a trial judge in respect of a smuggling of cocaine charge. Crown referred to paras. 20 and 21, in which the Court of Appeal upheld the trial judge for finding that the cocaine was "not likely to be placed under the exclusive control of an unknowledgeable courier".

5. *R v Knezevic*, 2016 ONCA 914. In this case, the Court of Appeal overturned an acquittal where the trial judge relied upon conjecture to find a reasonable doubt as to knowledge. The court was referred to paras. 30 to 34.

Defence's Submissions

[194] Defence counsel provided the court with copies of *Villaroman*, *Sekhon* and *R v Dhillon*, 2016 BCPC 427 ("*Dhillon*") (specifically paras. 6 to 16).

[195] Counsel submits that the accused did not know the contents of the three crates was anything other than a refurbished piano and antique instruments, and that a reasonable doubt exists as to whether the accused was a "blind courier", based on reason and common sense, logically based on the evidence or lack of evidence.

[196] The facts upon which the accused relies are the following:

1. There was nothing about the three crates that would indicate that they did not contain a piano or antique instruments. The crates were secured by steel bands and screws and, while the accused had a tool box on the flatbed, the police did not forensically compare the tools to the screws. The photographs on the

accused's phone (Exhibits #50 and #51) show the crates were on the flatbed on September 22, 2015, at Manning, Alberta, covered in a black tarp, in the same manner as they were covered when the accused was stopped by the police at Brooklyn on September 30, 2015.

2. The accused's DNA was not on the blood stain on the sleeve in one of the crates.

3. Respecting the texts of September 21st, why would the accused send texts that he was loading crates if he knew they contained an illegal cargo. (The court notes that the text, like many others, had been deleted.)

4. The court should give no weight to the fact that the bill of lading was fraudulent. It was not clear whether the intent was to deceive a weight scales checkpoint or the accused.

5. While Ms. Walton testified that a bill of lading is not transferrable, and brokering is not allowed by Day & Ross, the court cannot impute Ms. Walton's knowledge of the Day & Ross practice to the accused. Per *Villaroman*, the possibility need not be based on any facts, but only on reason and common sense.

6. The court should discount the evidence that the names and phone numbers for the shippers and consignees on the two bills of lading did not exist, because the inquiries were not made in a timely manner, but rather 13 months after the seizure.

7. Based on Hurley's experience, drivers use stimulants to remain awake to take the quickest way across the country. The evidence in this case is that after picking up the crates in Kelowna on September 21st, the accused drove north to Manning, Alberta to get another load for transport to Lanark, Ontario. He did not take the speediest route to Nova Scotia.

8. Hurley testified that in his experience truckers are paid $100.00 a pound to transport cannabis marihuana. Defence counsel asked why the accused would take nine days to deliver that cargo across the country if it was illegal.

9. When the court asked counsel to explain why, if an accused would be expected to take the speediest road to his destination, he diverted off Highway 102 onto Highway 14, instead of continuing along the shorter route to Dartmouth. Counsel replied that the delivery of the load was not time sensitive. In addition, he referred the court to two SMS messages and the phone log in Exhibit #49. In one SMS message, on September 25 at 8:06 p.m. Nova Scotia time (5:06 p.m. prairie

time, the accused states that he is just outside "Edm" [sic Edmonton] and that oil is leaking again from the oil pan. In a SMS text on September 26th at 1:54 a.m. Nova Scotia time (10:45 p.m., September 25th prairie time), the accused writes that he might need to get an oil pan. In addition, the telephone log contains entries #43 to 45, show phone calls lasting 15 seconds, 6 seconds and 36 seconds respectively, between 3:25 and 3:26 p.m. Nova Scotia time (12:36 p.m. prairie time) on September 26th to "Peterbilt NS". Counsel suggests that maybe the accused was going to get work on his vehicle or to pick up another load when he diverted from Highway 102 to Highway 14.

10. When the accused was being followed by Simmonds on Highway 14, he did not attempt any evasive action. He suggests that this means that the accused knew that he was doing nothing wrong.

11. The accused was not avoiding a weight scale by taking Highway 14. He suggested that while Bromley was unable to identify when the video on the accused's phone on the approach to the Amherst weight scales was taken, the time it was sent with a text message was consistent with when he would have passed by it.

12. The revolver in the locked safe was not loaded; the court should draw no inference from the way it was stored. The accused lived on the road and the sleeping section of his cab was like a home.

13. Brown noticed nothing significant arising from Bromley's examination of the accused's cell phone, except the photographs of the bundles of cash, which photographs he notes were taken months before (in March 2015). At the time of his arrest, no cash was found.

14. The fact that the police did not investigate in a timely manner, and that their failure to do a forensic examination of whether the tools on the flatbed matched the tools securing the crates, show that the police themselves had some doubts about the investigation, which should lead the court to find that the Crown has not proven that the only reasonable inference was that the accused knew that he was transporting cannabis marihuana and psilocybin.

[197] He cited *Dhillon*, paras. 87 to 90, for that court's analysis of the advantages to a drug organization using a blind courier.

[198] In reply to the Crown's submissions and case law, to the effect that the value of the drugs might support an inference that the drugs would not be entrusted to a

stranger, he cites *Sekhon*, at para. 91, where the court noted that, on the facts of that case, that "that is not the only conclusion that could be drawn from it".

[199] Counsel concluded that where there are competing inferences, there is a reasonable doubt.

Crown's Reply

[200] In reply, the Crown noted that where the truck was stopped was important. While the accused was supposedly heading to Dartmouth, and texted that he was going to deliver his load, he in fact turned off in another direction.

[201] It was pure speculation to suggest that on September 30th the accused turned off Highway 102 onto Highway 14 towards Annapolis Valley to fix his oil pan, when the issue related to his oil leak predated September 25th, when he was still in Alberta.

[202] The Crown repeated that an experienced trucker like the accused would know that one would not transport a piano on a flatbed.

[203] There is no basis in the evidence to support the submission that twice – on August 12th and on September 21st, the accused could have subcontracted the hauling of the crates on Day & Ross bills of lading from another broker, and on neither occasion be aware that the bills of lading, deficient on their face, were not fraudulent. The documents found in the accused's cab at the time of his arrest included legitimate bills of lading for the Mercedes Benz transported from Halifax to Calgary on September 11th and the skidder that was transported from Manning to Lanark.

Part VI *Analysis*

[204] The central issue in dispute in this case is whether the accused knew that what he was transporting was cannabis and psilocybin.

[205] I am satisfied that all of the other elements of the offence, whether admitted or not, were proven beyond a reasonable doubt. There is no doubt that he had physical possession and control of the cargo or that the cargo was cannabis marihuana and psilocybin, which are Schedule II and Schedule III drugs respectively.

[206] Based on the quantity of the cannabis marihuana and psilocybin found in the three crates, the court is satisfied that, if the accused was aware of the nature of the cargo, he in fact had possession of the cargo for the purposes of trafficking.

[207] There is no direct evidence of what the accused knew. As noted earlier in this decision, the onus is on the Crown to prove, by circumstantial evidence, that the accused's knowledge that the cargo was illegal contraband is the only reasonable inference to be drawn from the all the proven facts.

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

[209] The only document relating to the transport of the three crates from at or near Kelowna, British Columbia to Nova Scotia was Exhibit #26, the bill of lading in the accused's possession on September 30, 2015. As noted before, it purports to be dated "10/21/15", but that date is clearly in error and the date was September 21, 2015. It is consistent with all of the other circumstantial evidence. October 21, 2015 is a date 21 days after the seizure of the cargo at Brooklyn, Nova Scotia by the RCMP.

[210] The bill of lading purports to be a Day & Ross bill of lading, where the shipper is J & J Collectibles of Kelowna, British Columbia, and the consignee, Musical Sounds Inc. of Dartmouth. On its face, it is for delivery of a refurbished piano and antique instruments, described on the bill of lading as 'fragile'. On its face, the bill of lading shows that it was to be shipped from the Day & Ross terminal at 760 McCurdy Road, Kelowna, British Columbia to the Day & Ross terminal at 10 Isnor Drive, Dartmouth, Nova Scotia.

[211] Based on the evidence of Stacey Walton of Day & Ross, whose evidence I accept as both credible and reliable in every respect, the accused could not have picked up the cargo at the Day & Ross Kelowna terminal as the bill of lading purports. He had to know that.

[212] Day & Ross have no record of the accused ever making a delivery for it, either as a driver or a broker. His name is not in their system; neither was the name of J & J Collectibles, J J Collectibles, Musical Sounds Inc., Pinnacle Music Inc., or any combination of the words similar to that in their system as customers.

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

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

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

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

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

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

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

[220] Another important circumstance related to the obvious falseness of the bill of lading, and my conclusion that the accused knew the contents of the cargo to be other than as stated in the bill of lading, is the fact that it was, in my view, the accused who very likely completed Exhibit #26 – the September 21st, 2015 bill of lading. The reason for this conclusion is the mistake as to the date on the bill of lading "10/21/15". This mistake is identical to the mistake respecting dates that the accused entered on the pages of his 'driver's daily log'(DDL) and 'driver's daily

vehicle inspection reports'(DDVIR), each of which were signed by him, for each of the 16 days in September 2015 that he drove. They are found in Exhibit #20.

[221] These records are consistent, as to time and place, with the other records and receipts in his possession. They establish where the accused and his truck were in September 2015.

[222] For example, the Mills Heavy Hauling straight bill of lading of September 11, 2015, (the last three pages of Exhibit #24) shows transport by the accused for the broker Mills Heavy Hauling of a new Mercedes-Benz cab and chassis that came off the "Atlantic Compass" at Halifax Harbour on September 11, 2015, for transport to Rhode & Liesfeld Canada Inc. at Calgary, Alberta. The consignee acknowledged receipt from the accused in good condition on September 16, 2015. There are several other records of purchases, including for gas, for repairs, and for a motel, that confirm that the DDLs and the DDVIRs accurate reflect the accused's route from Halifax to British Columbia and back.

[223] The significance of the date is that on all of the DDVIR reports, the accused signed and dated the reports, describing the dates respectively as "SEPT. 11/15" at Halifax, "SEPT. 12/15", "SEPT. 13/15", "SEPT. 14/15", "SEPT. 15/15", "SEPT. 16/15", "SEPT 17/15" (at Calgary), "SEPT 21/15" (at Kelowna), "SEPT 23/15" (at Manning), "SEPT 24/15", "SEPT 26/15", "SEPT 27/15", "SEPT 28/15", "SEPT 29/15" and "SEPT 30/15". On the DDL logs (on the same page as each of the DDVIR reports), the accused also signed each DDL and wrote dates for each as follows: for September 11, 2015, he wrote under the space for day/month/year: 11/09/15. But for September 12, 2015, and each of the following 14 dates, he wrote the day and year correctly, but each month incorrectly; for example: where the DDVIR date was September 12/15, he wrote: "12/10/15". He made the identical error on all the September DDL records including September 21, 2015 at Kelowna, when he wrote the date on the DDL as "21/10/15". It is not surprising that, if he was entering the wrong month (10 instead of 9) on his daily logs, he would record it inaccurately on Exhibit #26 the month/day/year as "10/21/15". It is a significant objective fact from which I draw an inference that he completed at least the date on the false bill of lading and was present when it was completed.

[224] The evidence of Ms. Walton is that all less than truckload cargos are picked up by pick-up vehicles of a local Day & Ross terminal to be delivered to the Day & Ross terminal, where they are put in van or reefer trailers to be shipped to the Day & Ross terminal near the consignee, where they are delivered by local pick-up vehicles to the consignee. Her evidence is that less than truckload cargos and, particularly, cargos marked "fragile" would not be delivered on the back of an

open flatbed. The accused had two very similar Day & Ross bills of lading with pro-bill stickers in his possession that reflected the delivery of less than truckload fragile piano parts and musical instruments on the back of his open flatbed. Whether he knew of the Day & Ross business practice or not does not cause me to doubt that he would, as a matter of common sense and experience, know that the shipment of a fragile cargo, on the back of a flatbed, on which he loaded a large skidder, as shown on the photographs taken at Manning, Alberta on September 22, 2015 -stashed in a hidden app on his phone, would not make sense.

[225] While the court treated with caution the opinion evidence of Constable Hurley because of his relationship to some of the officers involved in this case, his opinion that high-level traffickers use as runners commercial truckers that carry regular cargos because this would draw less attention to those truckers and their cargo, is consistent with common sense, and I accept it.

[226] The accused transported, in accordance with a bill of lading in his possession, a Mercedes Benz cab and chassis from the Halifax waterfront to Calgary between September 11 and 16. He purports to pick up three crates from the Day & Ross terminal at Kelowna on September 21st. The photographs extracted by Bromley from the accused's unencrypted iPhone show a large skidder on the same flatbed as the fragile musical instruments, and the Westar Logistics receipt of September 29th confirms delivery of the large skidder from Manning, Alberta, leaving early on September 23rd and arriving in Lanark on September 29th. This activity is logical cover for transport of drugs.

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

instruments destined for the Dartmouth Day & Ross terminal -only a short distance away when he left Highway 102, but a large quantity of drugs – cannabis, in particular, for a destination to the west.

[228] Another fact suggests that the accused knew that the cargo was something other than a piano and antique instruments destined for the named consignee in Dartmouth via the Day & Ross terminal. Neither the names nor the addresses (Adams Road) of the shipper, or of the consignees or any entity with a similar name, existed in the Day & Ross customer system. When the police, a year later, attempted to find the shipper or consignees, neither of them were found to exist and none of the phones were in use. This fact is of limited weight because of the passage of one year, but it is still a circumstance that adds to the totality of the circumstances.

[229] Another bothersome relevant circumstance, of limited weight, is the fact that the accused kept a handgun in a hidden compartment in his cab and ammunition close by. As a matter of common sense in Canada, maybe unlike the United States, people do not generally carry handguns unless they expect violence or some other trouble.

[230] Another circumstance relevant to the inference I have drawn is that the accused had in his possession two iPhones, a Blackberry, and two iPads. One of the cellphones and the two iPads were encrypted and could not be examined for their contents. The Blackberry had been reset, and the data wiped. The court notes that Simmonds followed the accused in full sight for 15 minutes before he pulled him over on Highway 14. Added to these facts is the evidence of Hurley that couriers and high-level traffickers often have more than one phone for the reasons he explained. Collectively, these support the inference that I have drawn. In particular, the fact that the Blackberry had been reset and the data wiped.

[231] The photographs of bundles of cash, some of which were in vacuum-sealed plastic, found in a hidden photo stash on the accused's phone, combined with the Hurley evidence as to how large quantities of drugs are paid for, is a circumstance that supports the inference that the accused has a familiarity with high-level trafficking.

[232] The weightiest circumstances in this case were the false bills of lading that would be obvious to the accused, the fact that he was purporting to transport a fragile LTL load for Day & Ross with whom he carried on no business, and that after texting on the afternoon of September 30th that he was heading to deliver the

rest of the load, he turned of Highway 102, near the destination on the bill of lading, and heading by a “side road” towards western Nova Scotia.

[233] The accused submitted that he was a “blind courier”. His actions unequivocally say otherwise. The matrix of this case differs significantly from that in *Dhillon.* Dhillon was a long-haul driver who picked up cargo for his employer from three warehouses. Only a portion of the total cargo contained cocaine. In that case there were competing inferences and gaps in the evidence which do not exist in this case.

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

[235] I find the accused guilty on both counts.

Warner, J.