SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Piatt*, 2021 NSSC 20

Date: 20210111
Docket: CRT 492311
Registry: Truro

Between:

Her Majesty the Queen

v.

Jonathan Edgar Piatt

Defendant

DECISION

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	August 10 and October 23, 2020, in Truro, Nova Scotia
Oral Decision:	January 11, 2021
Written Release:	January 19, 2021
Counsel:	LeeAnn Conrod, Federal Crown Counsel Trevor McGuigan, Defence Counsel

By the Court (Orally):

[1] Jonathan Piatt is charged with possession of 133 pounds of cannabis for the purpose of trafficking. I want to begin by commending counsel for their pre-

trial work in narrowing the issues and reaching reasonable agreements. This allowed a streamlined process to proceed in a blended fashion. Efforts of this nature are said to be an expectation under the Supreme Court of Canada jurisprudence in *Jordan* and *Cody*, but very often this seems more aspiration than reality. This case provides an example of how the process can be better focused and proceed more efficiently through the pre-trial efforts and cooperation of counsel.

[2] As this was a blended voir dire and trial, the decision is structured accordingly. I will address the evidentiary and *Charter* challenges first followed by consideration of proof beyond a reasonable doubt with respect to the elements of the single count Indictment.

[3] The Defendant is advancing a section 8 *Charter* challenge alleging the violation of his right to be free from unreasonable search and seizure as it relates to certain courier packages in this case, which admittedly contained the 133 pounds of cannabis. The Crown raises a threshold issue and argues the Defendant has no standing to advance the *Charter* challenge as he enjoyed no reasonable expectation of privacy in relation to the seized packages. The courier boxes in this case were shipped pursuant to a Terms of Service document which the Crown submits operated to entirely eliminate any such expectation. This

issue will be addressed first followed by consideration of the statement voluntariness issue.

Issues

***Charter* Voir Dire**

1. **Did the Defendant have a reasonable expectation of privacy?**
2. **If yes - Was there a section 8 violation?**
3. **If yes - Is the evidence excluded under section 24(2)?**

Statement Voir Dire

4. **Has Crown proved voluntariness beyond reasonable doubt?**

Trial Proper

5. **Has the offence been proven beyond a reasonable doubt?**
    - **Consideration of circumstantial evidence standard.**
    - **Has possession been proven?**

Evidence

[4] A Statement of Admissions from the Defendant became the first exhibit in the proceeding. In summary, agreement was reached as to the nature and quantity of the substance and further that, if possession were to be proved, such possession would be acknowledged to have been for the purpose of trafficking.

[5] In detail, the admissions were as follows:

1. The photographs of the boxes, their contents and the packing labels are an accurate depiction of the items. Admission of the photographs into evidence dispenses with the need to enter the physical exhibits.
2. On October 10, 2018, police seized three (3) boxes from Purolator at 42 Parkway Drive in Truro Heights, Nova Scotia. The total weight of the contents of the boxes were as follows:

   Box 1: total weight of cannabis (minus packaging weight) = 21.61kgs

   Box 2: total weight of cannabis (minus packaging weight) = 21.78 kgs

   Box 3: total weight of cannabis (minus packaging weight) = 17.4kgs

   Plus 2,000 grams of commercial cannabis shatter packs.

   Total: cannabis marihuana = 60.53 kgs (or 133.45 pounds)

3. The contents of the boxes were cannabis. The proof of the nature of the substance will be accepted by copies of the certificates of analysis.
4. The continuity of all exhibits is admitted.
5. This quantity of cannabis was possessed for the purpose of trafficking.
6. Jonathan Piatt attended at the Purolator courier Warehouse located at 42 Parkway Drive in Truro Heights, Nova Scotia on October 11, 2018 to pick up the three (3) boxes described above.
7. Jonathan Piatt provided his drivers license as identification to an employee clerk of Purolator, William Elliott, at the front counter in order to pick up his packages.
8. William Elliott instructed Jonathan Piatt to go to the second bay door of Purolator's facility to get his packages.

Summary of Witness Evidence

[6] Having considered the Statement of Admissions, I intend to move on to summarize the other evidence introduced at trial. I want to note that in offering this overview of the evidence I am not attempting to produce a transcript or recite back all points covered in questioning. It is my intention to focus on central issues of relevance and elements necessary to put the Court's conclusions in context. I have, however, considered and weighed all the testimony, and each of the exhibits, in reaching my determinations, even if each is not specifically set out and referred to here.

[7] This was not a testimony heavy case. The Crown produced three witnesses, these being a representative of the courier company and two police witnesses. The Defence elected not to call evidence.

Darren Leslie

[8] Darren Leslie is a Loss Prevention Manager for Purolator Courier with responsibility for Atlantic Canada. He has held this position for over 15 years. In describing how he became involved in this matter, Mr. Leslie indicated the shipper was an entity out of British Columbia, Bio-Script, which had previously

been flagged in the Purolator system for shipping suspected unauthorized cannabis. This led to the creation of an alert on the shipper within the Purolator system.

[9] On October 10, 2018, three boxes came into the Truro Purolator depot from this same British Columbia shipper. The existence of the alert resulted in Mr. Leslie being notified. He attended the depot and observing the boxes which he described as identical in appearance to the earlier flagged packages.

[10] Mr. Leslie indicated that he conducted online research on the shipper. He found nothing which alleviated his concerns. They were not a Health Canada approved shipper of cannabis. He described proceeding to open and inspect one of the boxes. He stated that it contained what appeared to him to be vacuum sealed marijuana. He was familiar with this, having seen it previously in his employment. He advised that he went on to call the authorities as this would be an illegal shipment. He opened only one of the three boxes. The other two were never opened by him. This only occurred later at the RCMP detachment after the boxes were removed to there by the police.

[11] He was asked for further details on the research he conducted on the shipper. He testified that prior to opening the package he researched the company. He

could not find the shipper on the address in Google. He could not find it on the Health Canada list as an authorizing shipper. The receiver was Jonathan Piatt. The address for the receiver was the address of the Truro Depot, being 42 Parkway Drive. The packages were marked 'hold for pickup' which meant the recipient would receive notice when they arrived and were ready for delivery.

[12] In cross-examination Mr. Leslie was asked further about the steps he took to investigate the shipper after the earlier occasion when a staffer had raised issues about marijuana smells emanating from its shipped packages. He reiterated that he did Google and Health Canada searches intended to determine whether it was an authorized cannabis shipper.

[13] Mr. Leslie was asked about the source of his authority to inspect packages in the Purolator network. He stated the company has authority under the Terms and Conditions of Service (the "Terms of Service"). The relevant provision in the Terms of Service was reviewed. It provides as follows:

> Purolator reserves the right to open and inspect any Shipment tendered to it for carriage, at any time, without notice. Governmental authorities may also open and inspect any Shipment, at any time, without notice.

[14] Mr. Leslie was asked how a shipper or receiver would be directed to this provision. He indicated that on the back of the waybill label, which would be

attached to the package, is a notice directing the user to the Purolator website where the detailed terms could be found. The shipper or receiver would be required to go look for them online as they are not produced in the normal course for a routine shipment. He confirmed that Purolator has both drop boxes that receive packages for shipping and counters or depots with agents. He acknowledged that he could not speak to whether a receiver of a package would be aware of the 40 pages of conditions in the Terms of Service document.

[15] Mr. Leslie was asked a series of questions about the events that unfolded on October 10th after the police arrived in response to his call. He indicated that he was present when Cst. Burcham assessed and seized the boxes. He had a limited recollection of the steps the officer took with respect to inspecting the boxes. He agreed that the contents of the boxes could not be seen without lifting the top of the box and reinforced liner of the package. The packages were seized by police on October 10 and removed to the RCMP detachment.

[16] As noted, the package had been coded as "hold for pickup" in the Purolator system. In the normal course the intended recipient would have likely received electronic notice on October 10th that the packages were ready. Due to the circumstances of the inspection and involvement of the police the delivery was

first noted as “delayed” on the 10th and then on October 11th had its status changed to ready for pickup.

[17] The following day, October 11th Mr. Piatt arrived at the depot to claim and collect the boxes. He presented himself to the counter of the depot and produced identification confirming him as the intended receiver on the waybill. Mr. Leslie indicated this meant he was entitled to take possession of the packages.

[18] Cst. Burcham had been at the depot for some time prior to the Defendant’s arrival. After presenting his ID Mr. Piatt was told by the staff person to go around to the side bay door of the facility purportedly to receive and load the boxes. Of course, the boxes had actually been removed to the RCMP depot the day prior. The Defendant did move his vehicle around to the bay doors as instructed. He was subsequently arrested by Cst. Burcham.

[19] In cross examination Mr. Leslie agreed that it was possible he might have called the police before opening the packages. He believed he searched prior to calling but he could not be sure. He stated he did not believe he would have because he was not required to call them prior as he had full authority to search.

[20] Mr. Leslie was asked to identify the factors which lead him to make a decision to inspect a package. He said he would consider exercising his inspection rights if he deemed something to be potentially harmful or suspicious.

[21] Mr. Leslie agreed that he and Cst. Burcham had a subsequent email exchange pertaining to Purolator's right to inspect. This occurred some days after the arrest. He indicated that he emailed the officer a 'cut and paste' portion of the online inspection terms from the company website. He agreed that the terms are quite sweeping and would extend even wider than simply packages found to be suspicious or harmful. Essentially the right to inspect could extend to every package in the Purolator system. While accepting this, Mr. Leslie said that in practice the security department is far too busy to inspect packages other than those considered to be harmful or suspicious.

[22] Mr. Leslie was asked further as to how a shipper or receiver would become aware of the Terms of Service. He acknowledged that a shipper is not required to read the roughly 40-page terms and conditions document in order to make a shipment. The waybill label contains a printed notice directing the reader to the web site where the full Terms of Service could be found.

[23] Mr. Leslie agreed that on October 10, he did not smell anything emanating from the packages. He noted the contents were vacuum sealed. He was asked what he did to inspect the single box which he opened. He described opening some of the brown wrapping paper and peeking in. He reviewed scene photos and identified images of the relevant package which he had partially opened in the depot.

[24] Mr. Leslie was asked whether he was present when Cst. Burcham did his own assessment of the contents of the box. He said he believed he was. He agreed the lid and liner had to be lifted and held up out of the way in order to be able to look inside.

Constable Joshua Burcham

[25] Cst. Joshua Burcham was called by the Crown. Cst. Burcham is a 17-year RCMP officer currently with the Bible Hill Detachment. The officer testified that on October 10, 2018 he learned of a call from Mr. Leslie of the Purolator Loss Prevention Department. He attended at the depot and observed three boxes, one of which appeared to have been previously opened. The officer reviewed a series of photographs with images of the previously opened box

together with two unopened boxes. He stated the named shipper was a BC entity, Bio-Best.

[26] He was questioned on the process which was followed and the plan which was developed. The officer confirmed that on arrival at the Purolator Depot he could see the boxes but not their contents. One box appeared to have some wrapping removed. He agreed it appeared to be a partially opened box and on initial observation he could not see into the package. He testified that to see inside you had to physically lift the box flap and MDF board which formed a liner in the box. To obtain the pictures that were in evidence someone had to lift the box flap and MDF liner.

[27] Cst. Burcham described the process of taking the boxes from the Purolator Depot to the RCMP detachment. This was done on October 10th. The intention, he testified, was to seize and remove the boxes back to the RCMP facility. Purolator was instructed to take their usual steps to notify the intended receiver, in this case Mr. Piatt, that the shipment was ready for pick up.

[28] The officer described the events of October 11th. The status of the packages was changed in the Purolator system to ready for pickup. Mr. Piatt did present himself to the depot with the required identification. Cst. Burcham indicated

that he had attended and been at the depot for some hours prior to his arrival. After Mr. Piatt moved around to the side door to pick up the boxes the officer moved in and arrested the Defendant for possession for the purpose of trafficking. He indicated that he provided Mr. Piatt his Charter of Rights and police caution.

[29] Mr. Piatt asked to be able to alert his spouse that he would be unable to pick her up from Walmart and this was allowed to happen. Subsequently Cst. Burcham turned Mr. Piatt over to a third officer, Cst. Wood at 2:55 pm. He testified that Cst. Wood had custody of the Defendant from that point, 2:55, until 3:45, approximately 15 minutes before the statement commenced. During that time Cst. Wood was responsible for him and Cst. Burcham testified he had no contact with the Defendant in that period.

[30] In cross-examination the officer confirmed that at no time did he seek or obtain judicial authorization for the steps he took regarding the seizure in this case. When asked whether he even considered doing so he stated that, in these circumstances, he did not consider it. Earlier in direct he had commented that he had been advised that Purolator had the right to inspect and that he viewed the steps taken as lawful based on this. He was asked various questions about what he believed his legal authority to search and seize had been.

[31] Approximately 14 days after the seizure, on October 24, 2018, the officer did a s. 489.1 Report to Justice which is in evidence. In that Report Cst. Burcham refers to a "plain view" seizure of cannabis from boxes obtained from a private company. He was asked to indicate why the Report to Justice took 14 days to file. He advised he was in a very busy time with other investigations.

[32] The officer was cross-examined about the Report to Justice and, specifically, regarding the delay in filing it. The officer agreed the report was a two-page standard form document. He accepted it would not be a complicated task to fill this out. He accepted that others could have assisted with the task. He was not the only one who could have completed the document.

[33] The officer also described certain aspects of the exhibit sampling process which took place in January 2019. I do not intend to dwell on those matters as I view them as subsumed in the Statement of Admissions.

[34] Cst. Burcham was asked whether he recalled subsequently asking Mr. Leslie via email if there was a bill of lading signed by Mr. Piatt. He testified that he learned from Mr. Leslie there was no such bill of lading signed by the Defendant. He did agree as well there was nothing directly on the packages that specifically contained the right of inspection language.

[35] Cst. Burcham agreed that on October 11, 2018, Mr. Piatt did not ever come into physical possession of the boxes. In fact, the boxes were, at that point, back at the detachment. The issues of possession, constructive or joint possession, and attempted possession are dealt with later in these reasons.

Constable Terry Brown

[36] Cst. Terry Brown is an officer with the Bible Hill RCMP and has been with the force for 11 years. He described his involvement with this matter. He took the original call from Mr. Leslie of Purolator. He understood that Mr. Leslie made the call to police as he was on the way to the depot to inspect a shipment of suspected marijuana. Mr. Leslie said that he had the authority to inspect and intended to do so.

[37] Cst. Brown testified that he did not direct Mr. Leslie to do anything except to call him back if he found anything. A short time later Leslie did call again and indicated he had in fact identified cannabis. As Cst. Brown was not available to respond due to other duties he asked Cst. Burcham to attend the depot.

[38] Cst. Brown went on to testify that later on October 10th, Cst. Burcham brought three boxes back to the RCMP Detachment. The next day he and Cst. Burcham returned to the depot.

[39] The officer described how events unfolded at Purolator on October 11th. He confirmed that on the 11th he and Cst. Burcham did not bring the boxes back from the RCMP lock up to the depot. They did take the waybill labels back with them. He indicated he was unsure whether they might be necessary for any reason.

[40] On arrival at the counter the accused had presented acceptable ID and a staff person directed Mr. Piatt around the side of the depot to a set of bay doors. This was as reflected in the Statement of Admissions.

[41] He testified that the officers observed as Mr. Piatt pulled his vehicle around to the side bay door and opened the rear hatch of the vehicle. After he pulled to the side door, parked and opened the rear hatch the officers moved in and arrested him.

[42] The officer testified that he and Cst. Burcham were present at the arrest. Cst. Burcham gave Piatt his *Charter* caution. Cst. Brown described the clothing

he was in as plain clothes with a vest marked Police. He also had a sidearm which was never deployed. The same went for Cst. Burcham.

[43] After the arrest Mr. Piatt asked to call his spouse as she was going to have to be advised that he was not going to be coming for her. He was permitted to make this call while the officers listened on speakerphone.

[44] Cst. Brown discussed the process followed at the scene. It was established that Mr. Piatt had been provided his *Charter* and police caution. It was then determined to turn Piatt over to a third officer, Cst. Wood, as Cst. Burcham and Cst. Brown were attending to the vehicle that Piatt had driven to the scene. They conducted a search of that vehicle and arranged for its transport back to a secure bay at the detachment. Cst. Wood took custody of the accused and brought him to the RCMP detachment in Bible Hill. Wood was also apparently going to be responsible for facilitating his contact with counsel as well.

[45] Cst. Brown testified that while Cst. Wood left with the Defendant, he and Cst. Burcham dealt with the removal of the Piatt vehicle back to the lock up. Cst. Brown was asked how long the time was between his leaving the scene at Purolator to when he entered the room to interview Mr. Piatt. He estimated between half an hour to an hour.

[46] He was asked what happened on arrival at the detachment. He described securing the van into the secure bay. He was asked if had further contact with Cst. Wood. He said he did. He indicated he could not recall the details of what they spoke about, but he knows he learned that Mr. Piatt had communicated with a lawyer. Wood has also apparently placed Piatt in an interview room. He said he spoke to Piatt just to advise him he would be interviewing him.

[47] At this point in his testimony the hearing moved into a voir dire on statement voluntariness.

[48] Cst. Brown confirmed all matters related to what the officers were wearing, and how they were identified as police. He described his own situation as being in plain clothes but with a police vest and sidearm that was never out of the holster. Cst. Burcham was the same.

[49] On the subject of counsel, Cst. Brown testified that Piatt had indicted at the scene of the arrest that he wanted to consult a lawyer. Brown was asked to confirm that the accused had consulted counsel. He said he had this confirmed by Cst. Wood in a conversation in the hallway at the detachment.

[50] He was asked about the interview room where the interview took place. He described the physical arrangements which were later evident on the video.

These were quite conventional. He was not wearing the police vest in the interview. He stated that he made no observations that suggested Mr. Piatt was in physical pain or discomfort. He testified that he had a practice of discussing with interviewees how they could let him know if they needed a drink or to go to the washroom. He said he would have done the same in this case.

[51] He testified he never threatened, coerced, or made inducements to Mr. Piatt nor saw others do so. He never saw Mr. Piatt in distress or subjected to coercive tactics. The officer was cross-examined on all these points.

Video Statement

[52] As noted, the officer provided testimony on the physical arrangements and condition of the interview of the Defendant. The video of the interview was played in its entirety. The physical layout and conditions were as described. The officer began the interview by confirming that Mr. Piatt's right to counsel had been given and that the officer knew he had talked to a lawyer and that the lawyer had advised him not to talk to the police. When the officer gained this knowledge was not given. I infer it may have been in his short drop into the interview room that he described as letting Piatt know he was going to interview him.

[53] As he gives his opening comments to Piatt the officer also mentions to him some other information about payment that he says came from Piatt earlier. The circumstances of this are not explored on the tape and had not come out in questioning to this point. The issue is returned to later following the playing of the tape. Also, in opening comments, the officer goes on to share with Piatt that he views him as a low-end runner and the process of the low-key interview continues.

[54] With respect to the overall course of the interview and the impression given by Mr. Piatt, I would say as follows:

- Mr. Piatt confirmed to the officer that he had been advised not to talk to the police. The officer continued to attempt to engage him with a conversational non-confrontational approach. It is accurate that Mr. Piatt never evidences any obvious signs of distress.

- Mr. Piatt eventually began to engage with the officer. In response to questions, he began to discuss what had led him to be at the Purolator depot. He indicated he was paid to pick up packages from the depot and deliver them to a building attached to a marijuana dispensary in Newfoundland. He

was offered $7,000.00 to do this. He was given $2,000.00 up front and was to get $5,000.00 on completion of the delivery.

- Mr. Piatt remained apparently relaxed throughout this interview. The officer responded with a similar laid-back approach. Much of the back and forth consisted of Mr. Piatt discussing and expanding on his views of the cannabis scene in the current regime of legalization and regulation.

- This was not a brow beating interview. This was not necessary. Low key questions elicited responses from Mr. Piatt. At the end of the interview Mr. Piatt asked to be able to have a cigarette. The officer indicated he would see that he had this chance.

- The accused appeared to be coherent, capable of understanding the questions that were put to him and was in complete and total control of his faculties. Operating mind considerations were not in issue.

[55] After the video was played Crown asked the officer about the reference at the beginning of the video to the payment issue. Cst. Brown indicted that back at the scene of the arrest, after the rights to counsel had been given but before the right had been exercised, Mr. Piatt made certain statements in this regard.

[56] Finally, he confirmed that the demeanour evidenced by Mr. Piatt in the interview was the same as exhibited throughout his dealings with the Defendant.

[57] In cross-examination on the voluntariness *voir dire,* defence counsel directed Cst. Brown to the timeline of events on October 11. He confirmed that the officers were at the depot and alerted around 2:30 pm that Piatt had arrived at the counter of the depot. The arrest took place soon thereafter. He reiterated, in response to questioning, that Cst. Burcham was the officer who administered the right to counsel.

[58] He confirmed Cst. Brad Wood was called to the scene with a marked cruiser. This was for purposes of transporting Mr. Piatt to the detachment. At approximately 2:55 pm the accused was turned over to Cst. Wood. We have limited direct information on dealings with Mr. Piatt between 2:55 pm and 3:45 pm. We know he apparently goes back to Cst. Burcham's custody at 3:45. At 4:02 pm the taped interview began.

[59] He agreed that Cst. Wood would have been alone with Mr. Piatt as he transported him from the depot to the RCMP detachment.

[60] Counsel asked him if he saw Piatt between 2:55 pm on his departure with Wood and 4:02 pm when he appears on the video. He agrees that this is accurate.

[61] Cst. Brown was questioned with respect to the taking of the statement. He confirmed that as part of his RCMP training he had taken instruction on best practices for the taking of statements. He confirmed that one best practice is to video or audio the statement, which was done here. He further agreed that best practice is to either give right to counsel or confirm on video that the right to counsel has been given. This was given here he testified.

[62] The same was confirmed to be the case with respect to the police caution, he testified. He agreed that the substance of the police caution was to convey to the interviewee that the officer is not promising, threatening or attempting to induce them in any way. Doing this on video would be best practice, he agreed.

[63] The officer was questioned about the secondary caution as well. He confirmed the nature of this caution as it related to possible interaction with other officers and how the suspect should have nothing to fear, no promises, no threats based on any interactions with those officers. He agreed that if appropriate this ought to be done on video as well, although he testified there is

no legal obligation to do so. But if appropriate he agreed he would try to do so on video.

[64] He acknowledged the secondary caution specific to prior interactions with other officers was not done in this case on video or otherwise.

[65] Those witnesses together with the exhibits constituted the evidence on the hearing. I intend to turn to addressing first the s. 8 *Charter* matter followed by the voluntariness voir dire.

***Charter* Voir Dire - Section 8**

Was there a Reasonable Expectation of Privacy?

[66] Section 8 of the *Charter* protects individuals against unreasonable search and seizure. To establish an infringement of their s. 8 rights the person advancing the claim must first establish, on a balance of probabilities, that he or she enjoyed a reasonable expectation of privacy in the thing searched or seized: see *Canada (Director of Investigations & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 at p.159.

[67] Whether any claimed expectation is reasonable is to be assessed on the basis of the "totality of the circumstances": see: *R. v. Wong*, [1990] 3 S.C.R. 36, p.62; *R. v. Edwards*, [1996] 1 S.C.R. 128, para. 45.

[68] The totality of the circumstances test is one of substance, not form. Four lines of inquiry make up the test:

1. An examination of the subject matter of the alleged search;
2. A determination as to whether the claimant had a direct interest in the subject matter;
3. An inquiry into whether the claimant had a subjective expectation of privacy in the subject matter;
4. An assessment as to whether the subjective expectation was objectively reasonable having regard to the totality of the circumstances. See: *R. v. Cole*, 2012 SCC 53, para. 40.

[69] The factors to be considered in assessing the totality of the circumstances include, but are not limited to, the accused's presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of a subjective expectation of privacy, and the objective reasonableness of the expectation: see *R. v. Edwards*, [1996] 1 S.C.R. 128, para 45.

[70] The Court must undertake a threshold inquiry engaging two questions:

(1) Did the accused have a subjective expectation of privacy?

(2) Was the expectation reasonable?

[71] The hurdle of demonstrating the subjective expectation has been called a low one. Case law confirms that a defendant may rely on the Crown's theory of the case and evidence to underpin the existence of their subjective expectation: see *R. v. Jones*, 2017 SCC 60 at para 19.

[72] On the facts of this case I conclude the subjective expectation is satisfied in that it carried the capacity to reveal personal information relative to the accused's lifestyle (see *R. v. Marakah*, 2017 SCC 59 at para 54; *R. v. Washington*, 2007 BCCA 540 at para 68 where the interest in a shipped wrapped package is characterized as informational privacy). The real question is whether the expectation was reasonable in all the circumstances.

[73] Where the Court answers these questions in the affirmative the inquiry goes on to consider whether the conduct of the police amounted to an unreasonable intrusion into the privacy right which has been identified.

[74] In this case the Crown argues that the Defendant had no reasonable expectation of privacy and therefore his s. 8 right is not triggered.

[75] The Supreme Court of Canada has provided guidance on the weighing of the threshold question. In *R. v. Dyment*, [1998] 2 S.C.R 417 it was said that s. 8 should not be interpreted or constrained "...by narrow legalistic classifications based on notions of property."

[76] The issue was canvassed again by the Supreme Court of Canada in *R. v. Buhay*, 2003 SCC 30, a case in which security guards opened a locker at a bus depot from which they had detected a strong odour of marijuana. When their suspicions were confirmed, the guards locked it back up and called the police. The police had the guards reopen the locker and seized the drugs. Justice Arbour speaking for the Court commented as follows:

> 33 The appellant initially had a reasonable expectation of privacy regarding the contents of his locker. His privacy was invaded by the security guards. The guards then placed his belongings back in the locker. The appellant's reasonable expectation of privacy was continuous. Just because the security guards violated his privacy once does not mean that any subsequent violations will be permissible. The conduct of the police — opening of a locked locker over which the appellant still had lawful control and taking possession of its contents — constituted a 'search' within the meaning of s. 8 as well as a 'seizure', the essence of which is the 'taking of a thing from a person by a public authority without that person's consent': *R. v. Dyment*, [1988] 2 S.C.R. 417 (S.C.C.), *per* La Forest J., at p. 431.
>
> This Court has held that in certain circumstances, the mere 'transfer of control' of evidence from a private citizen to police can constitute a seizure within the meaning of s. 8. In *Dyment, supra*, La Forest J. said, at p. 435:
>
> If I were to draw the line between a seizure and a mere finding of evidence, I would draw it logically and purposefully at the point at which it can reasonably be

> said that the individual had ceased to have a privacy interest in the subject-matter allegedly seized.
>
> 34 In this case, it cannot reasonably be said that the appellant had ceased to have a privacy interest in the contents of his locker. The subsequent conduct of the police should be considered a seizure within the meaning of s. 8. I see no basis for holding that a person's reasonable expectation of privacy as to the contents of a rented and locked bus depot locker is destroyed merely because a private individual (such as a security guard) invades that privacy by investigating the contents of the locker. The intervention of the security guards does not relieve the police from the *Hunter* requirement of prior judicial authorization before seizing contraband uncovered by security guards. To conclude otherwise would amount to a 'circumvention of the warrant requirement' (*Law*, *supra*, at para. 23). The security guards' search of the locker, which is not subject to the *Charter*, cannot exempt the police from the stringent prerequisites that come into play when the state wishes to intrude the appellants' privacy (*R. v. Colarusso*, [1994] 1 S.C.R. 20 (S.C.C.), at p. 64; *Law*, *supra*, at para. 23).

[77] The conclusions of *R. v. Buhay*, *supra* were considered in *R. v. Washington*, *supra*. In this case a Helijet employee opened a package that contained what he suspected was cocaine. He resealed the package and called the police who reopened the package. The contents were ultimately determined to be crystal meth. Ryan J.A., for the majority, adopted the *Buhay* principles and concluded that the accused owner of the packet retained a privacy interest in its contents even after the non-state search. At para 57, she referred to several Supreme Court of Canada decisions (*R. v. Wise*, [1992] 1 S.C.R. 527, at 533; *R. v. Evans*, [1996] 1 S.C.R. 8 at para 11; and *Tessling* at para 18) which had "defined such a 'search' as state activity that invades a personal expectation of privacy."

[78] I note that the trial and appeal courts found that there was no evidence of a right to inspect parcels in the contract of shipping apparently employed in this scenario. This is a point of difference with the present case.

[79] I have also considered the decision of the Supreme Court of Canada in *R. v. Cole,* 2012 SCC 53. In this case a teacher was charged with various offences related to the contents of a laptop used by him but owned by the school board. The school board had various policies which meant it could have access to the laptop's contents and hard drive at any time. Notwithstanding this fact, the Supreme Court found a diminished but reasonable expectation of privacy was enjoyed by the defendant in that case.

[80] Justice Fish commented:

> 9 A reasonable thorough diminished expectation of privacy is nonetheless a reasonable expectation of privacy, protected by s.8 of the *Charter*. Accordingly, it is subject to state intrusion only under the authority of a reasonable law.

The Court went on to weigh the diminished nature of the expectation within the s.24(2) analysis. In the event it becomes relevant this would be done here as well.

[81] The situation in *Cole* is analogous in some respects to the present case. Mr. Cole knew others had the right to review or inspect the contents of his laptop.

This did not prevent the Supreme Court however from concluding he had a reasonable, albeit reduced, expectation of privacy in its contents which meant the police had to obtain a warrant, which they had not. Like Mr. Cole, Mr. Piatt arguably knew or ought to have appreciated that the contents of the packages in the courier system could be inspected. For purposes of this analysis I find this to be the case.

[82] To similar effect are the following comments *R. v. Marakah*, *supra*. at para 132 (while in the dissenting reasons of Moldaver, J. this summary of the law does not appear to be in contention):

> 132 Control does not need to be exclusive. For example, in *Cole*, this Court considered whether a teacher had a reasonable expectation of personal privacy in the informational content of his school-issued computer, over which he did not have exclusive control. The school owned the computer and retained the right to monitor its use at any point in time (paras. 50 and 55-56). In assessing whether Mr. Cole had a reasonable expectation of personal privacy, the Court concluded that his lack of exclusive control "diminished [his] privacy interest in his laptop, at least in comparison to the personal computer at issue in [*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 (S.C.C.)], but ... did not eliminate it entirely" (para. 58). That is consistent with this Court's prior conclusion that a reasonable expectation of privacy may exist in a hotel room, even when an individual is aware that hotel staff or other guests will have access: *Buhay*, at para. 22; *Wong*, at p. 51.

Courier cases

[83] In *R. v. Fry* [1999] N.J. No. 352 (Nfld. C.A.) the Court considered the issue of privacy as it related to a courier package. The majority concluded both

sender and recipient can reasonably intend or expect privacy. Of course, the majority in *Fry* did note that the analysis is a contextual one and in paragraph 42 they allowed that the presence or absence of a contractual right to inspect may impact the weighing of the factors.

[84] I am aware of the decision of the British Columbia Court of Appeal in *R. v. Godbout*, 2014 BCCA 319. This is a courier case as well and one in which the Court concludes the terms of carriage entirely eliminate the reasonableness of the expectation of privacy. To this extent it is something of a different conclusion to that reached in *Fry*, which found contractual language would be one factor in the analysis.

[85] The appeal court in *Godbout* approved of the trial judge's analysis which was largely based in contract principles. The trial court had concluded that the terms of the shipping contract negated the privacy interest. The appeal court declined to interfere with the conclusions. The appeal decision in *Godbout*, despite being approximately seven years old, has not been affirmatively followed by any other court in a reported decision. It has also been subject to scholarly criticism in 20 Can. Crim. L. Rev. 111 [Canadian Criminal Law Review (December 2015)] *Contracts, Legislative Frameworks and the*

Reasonable Expectation of Privacy: Rethinking Section 8 in the Service Provision Context, where at page 127 the author noted:

> *R. v. Godbout*, recently handed down by the BC Court of Appeal, is a case in point. Godbout's acquaintance arranged for the shipment of a wrapped parcel via a private courier service; his behaviour raised the suspicion of the courier employee, who subsequently opened the package and found large quantities of cocaine inside. The courier alerted the RCMP to the package's contents. The RCMP inspected the package and obtained a tracking warrant on the basis of that inspection; they took control of the package and ultimately delivered it to Godbout before arresting him for narcotics trafficking. Godbout was convicted and appealed his conviction on the grounds of a section 8 violation.
>
> In a short decision, the BCCA unanimously rejected the appeal, finding no reasonable expectation of privacy in the package's contents on the sole basis that such disclosure to police was explicitly provided for in the service contract signed by the sender. That contractual provision, in effect, allowed for unfettered search by both the courier and government agents, without notice and at their sole discretion. Thus, the court reasoned, any expectation of privacy that Godbout's acquaintance might have had was not objectively reasonable, and Godbout could not have a greater expectation of privacy than the signor of the contract.
>
> Despite two consecutive references to the "totality of the circumstances" test early in the judgment, the court in *Godbout* is plainly looking to one sole circumstance: the contract that clearly reserves to police and courier the right to uncontrolled search of packages. In fact, no other circumstance is even discussed beyond an elliptical reference to the sender's subjective expectation (which was held not to be objectively reasonable, following the same problematic logic as in the concurring *Gomboc* decision). It seems obvious that, if the question requires a consideration of all circumstances, one such circumstance ought to be the nature of the thing inspected. Is a wrapped package the sort of thing we are entitled to expect privacy over, irrespective of whether we believe this agent will tear it open and look into it anyway? Furthermore, is it not potentially relevant that Godbout, as the package's intended recipient, had no way of subjectively knowing the contractual terms and conditions governing the transaction? Perhaps a vigorous analysis of the threshold inquiry would result in the same finding reached by the BCCA in *Godbout*, but it would at least do so after consideration of the totality of the circumstances, as the test requires. Because the contractual provision is so well-defined vis à vis the rights it purports to reserve, it occupies an almost exclusive position within the court's analysis, at the expense of a careful normative analysis of Godbout's privacy interests.
>
> *Godbout* pointed to the SCC's decision in *R v. Buhay*, as well as the BCCA's own decision in *R v. Washington*, as supporting a reasonable expectation of privacy

> within similar service-contract schemes. The BCCA distinguished both *Buhay* and *Washington* by noting that in those cases there was no functionally similar contractual provision allowing for unfettered inspection. Yet neither *Buhay* nor *Washington* were decided on the sole basis of contractual provisions, or lack thereof. Both cases involved an extensive examination of the totality of the circumstances, of which the lack of contractual authorization played a fairly minor role.

[86] This commentary captures my thoughts about the treatment of the issue in the case much better than I could. Additionally, it can not be ignored that in *Godbout* the information that was obtained as a result of the intervention of the company was used to justify the obtaining of a warrant for further police activity. The same did not happen here and thus is potentially relevant to the reasonableness stage of the inquiry.

[87] I want to briefly touch on other cases referred to in written or oral submissions. These include *R. v. Snow*, 2005 NLTD 158, a case which like all those reviewed has some similarities but, on the facts, more dissimilarities with the present situation. I have reviewed the British Columbia Provincial Court decision in *R. v. Epp*, 2001 BCPC 294. I do not find the reasoning compelling. It is a 20-year-old case. I note that it predates a great deal of Supreme Court of Canada jurisprudence that I conclude has relevance to various aspects of the analysis. I conclude the Provincial Court in that case made the analytical leap from “diminished expectation” to “no expectation” (on this point see annotation

of Prof. Stephen Coughlan published with the Supreme Court of Canada decision in *R. v. Cole*, para 4).

[88] The Ontario case of *R. v. Brown*, [2000] OJ No. 2536; appeal dismissed [2001] OJ No. 2863, again predates much evolution in the Supreme Court jurisprudence and approach to these issues. The six-paragraph appeal decision, for instance, does not refer at all to the expectation of privacy issue. The decision there is largely directed to whether the employee had become a state agent and whether a mischief had been committed in opening the package. This is an odd issue that appears for a short time in the older case law before being completely rejected as an argument and ceasing to be raised as a concern.

[89] Returning to the arguments of the parties, the Crown argues the Right of Inspection contained in the shipping terms extinguished any possible expectation of privacy. The document is in evidence and its terms have been the subject of much written and oral submissions. The wording does purport to allow Purolator employees and/or governmental authorities to open and inspect any shipment at any time without notice.

[90] I note that any terms of shipment at the shipping end would presumably have been seen only by the sender and not the intended recipient, Mr. Piatt.

[91] I have carefully considered the Crown's arguments around the effect of the written contract entered into by the shipper here and its impact. It occurs to me that the teacher in the *Cole* case, who had a contractual relationship with his employer, was also aware that he had agreed and acknowledged that the employer had the right to inspect the contents of the work laptop at any time. This did not prevent the Supreme Court from finding a substantially reduced but still reasonable expectation of privacy in the contents.

Conclusion – Reasonable Expectation

[92] Every situation must be weighed and determined on its own unique facts. I have concluded that the Defendant here has a diminished but reasonable expectation of privacy. I have arrived at this conclusion after application of the principles discussed above.

[93] Mr. Piatt had a diminished but reasonable expectation of privacy in the contents of the package. This however is merely the threshold question. It does not, of course, answer the question as to whether the section 8 right has been violated.

Was there a s. 8 breach?

[94] Section 8 of the *Charter* directs that every person has the right to be secure against unreasonable search and seizure. The section does not protect the individual from all searches, but only those deemed to be unreasonable: *R. v. Simmons* (1988), 45 C.C.C. (3d) 296 (S.C.C.) para. 40.

[95] A warrantless search is presumptively unreasonable and contrary to section 8. In the absence of an authorizing warrant, compliance with section 8 requires the Crown establish on a balance of probabilities that the search was authorized by law (statue or common law), that the law itself is reasonable; and the manner of the search was carried out reasonably: *R. v. Campanella* (2005), 195 C.C.C. (3d) 353 (Ont. C.A.) para. 15; *R. v. Nolet*, [2010] 1 S.C.R. 851, para. 21.

[96] Where the Crown can demonstrate this, the warrantless search will be deemed to have been reasonable: *R. v. Mann*, [2004] 3 S.C.R. 59 para. 36. This three-part formulation was originally set out in *R. v. Collins, [1987] 1 S.C.R. 265,* in relation to searches, but was subsequently determined to apply to seizures as well: see *R. v. Chang* (2003) 80 C.C.C. (3d) 330 (Alta. C.A.).

[97] A warrantless search may be authorized either by legislation or at common law: see *R. v. Caslake,* [1998] 1 S.C.R. 51 para. 10. The lack of a search warrant in either case, even where one might have been obtained, does not

automatically result in a section 8 violation. It does, however, create a presumption of constitutional invalidity: see *R. v. Munro* (2005), 220 B.C.A.C. 102 (B.C.C.A.), para 12.

[98] It is this presumption which the Crown in this case is seeking to overcome. The presumption can be overcome where it is demonstrated the search was conducted pursuant to the statutory or common law authorization, that the authorization is reasonable, and it was carried out in a reasonable fashion.

[99] Under the first branch of the *Collins* test a search will be authorized by law if it is authorized by a valid police power either under some common law power or statutory provision.

[100] It is recognized that at common law police are permitted to conduct warrantless searches in a specified and restricted number of situations. The general doctrine of ancillary police powers under our common law is designed to allow the police to effectively carry out their proper duties.

[101] This doctrine was discussed by the Supreme Court of Canada in *R. v. Dedman*, [1985] 2 SCR 2. The two-stage test requires the consideration of whether:

i. The conduct falls within the general scope of any duty imposed by statute or recognized by common law; and

ii. Involves an unjustifiable use of powers associated with the duty.

[102] Police have a common law duty to protect health and safety and to prevent crime. In *Dedman* the Court commented at para 69: "It has been held that at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and property". This however does not create an unfettered power to search and seize in furtherance of these objectives.

[103] The Crown acknowledges that the power is not unbridled but argues that the circumstances of this case establish the reasonableness required to be considered a lawful search. The submit that a non-state actor acting on his own initiative and with contractual authority acted and discovered the cannabis. The authorities were then called and acted to seize the illicit product being illegally transported through the courier service.

[104] The Crown submits a crime was occurring which the police had a lawful duty to prevent. They suggest Cst. Burcham had authority under common law to prevent the crime from continuing.

[105] In an extension of this argument the Crown relies on the seizure powers in s. 489(2) of the Criminal Code to like effect.

[106] For its part, the Defence argues there was undoubtedly a search and seizure and it was not authorized by law. The actions of the security staff at Purolator does not immunize the police from stringent and well settled *Charter* requirements.

[107] The actions of the police in this case amount to a search. Cst. Burcham had to have the box lid and liner lifted or moved aside in order to gain a view of the contents. The boxes were seized and removed to the detachment where they were later fully opened and explored, photographed, weighed and sampled.

[108] These actions took place without judicial authorization. This mirrors the situation in *Cole* where the Supreme Court commented at para 65 that while they accepted the reasonableness of the police actions in removing the laptop bearing the child pornography from the school board site, the failure to then obtain judicial authorization before proceeding further was found to have fallen into error and a breach of s.8.

[109] It appears that the police adopted the view that this seizure was based on some aspect of the "plain view" doctrine. The s. 489.1 Report to Justice

prepared some two weeks later adopts this formulation in categorizing the seizure: “Plain view resulting from search of suspicious package by private company”. It does appear that this conception of their authority informed how they proceeded from the point of being called to the depot and following.

[110] I do not intend to spend a great deal of time on this point. I appreciate that the Crown is not pressing this issue. But the relevance is how the officer’s view of plain view impacted their thinking and decision making at the relevant point. It clearly did impact their decision not to seek judicial authorization after securing the packages back to the detachment or else it would not have appeared in the Report.

[111] The plain view doctrine is a seizure doctrine, not a search doctrine. As was summarized by the Ontario Court of Appeal in *R. v. Jones*, 2011 ONCA 632 there are four criteria to be applied in determining whether the doctrine is operative:

1. Whether the police were lawfully positioned relative to where the item(s) were found;
2. Whether the nature of the evidence was immediately apparent as constituting an offence;
3. Whether it was discovered inadvertently; and
4. Whether the item(s) were visible without any exploratory search.

[112] Interestingly in the *Buhay* case the Supreme Court also had reason to deal with this doctrine. It commented as follows:

> 37 The Crown also contends that the seizure was justified under the "plain view" doctrine, because the actions of the security guards put the contraband in plain view of the police. This argument must fail. It is not sufficient to argue that the evidence was in plain view at the time of the seizure. Indeed, it will nearly always be the case that police see the object when they seize it (citations omitted). It stretches the meaning of "plain view" to argue that an item placed in a duffel bag inside a locked locker is somehow in plain view of the police. The "plain view" doctrine requires, perhaps as a central feature, that the police officers have a prior justification for the intrusion into the place where the "plain view" seizure occurred (citations omitted). The police did not come upon the marijuana during the course of a routine patrol or by the ordinary use of their senses. The police had no prior authorization to enter into the appellant's locker. While, in the circumstances of this case, they could lawfully enter the bus station, they could not lawfully enter the locker itself without a warrant. It follows the contraband was clearly not in plain view of the police so as to justify the legality of the seizure within the "plain view" doctrine.

[113] The police were clearly entitled to be where they were at the invitation of Purolator. From that point on the plain view doctrine falters and fails. Presumably this is why the Crown is adopting the stance they are. The contents of the boxes here could not be viewed without lifting and holding out of the way the box top and MDF liner. The defence would argue that the initial reliance on this now abandoned justification by the police could impact aspects of the reasonableness analysis under 24(2)

Report to Justice

[114] A s. 489.1 Report to Justice with respect to seized property is required to be filed as soon as practicable. In this case this occurred some 14 days later. The Defendant argues this compounds the alleged s. 8 breach. The Crown points to various factors which explain the delay.

[115] In all the circumstances while this delay may tend to be on the longer side, I do not find much support in case law for the proposition that a great deal turns on the matter on these facts.

[116] Returning to the main analysis, I conclude that the police fell into error in the manner in which they proceeded after the removal from the depot. At that point there was no urgency. They needed to consider their position and set aside the notion that the plain view doctrine authorized them to proceed in the manner they did. Only one of the boxes had been opened at all. They had ample grounds. The failure to seek authorization to proceed further was not reasonable in all the circumstances: see *Cole*, *supra* para 65.

[117] I conclude that the evidence was obtained in a manner that resulted in a violation of the Defendant's s. 8 rights. Whether the incorporation of the plain view doctrine in their thinking contributed to this is not for me to say. The fact that they had more than ample grounds to seek and obtain authorization once

they had secured the boxes is a factor that will be weighed at the next stage of the analysis.

Section 24(2) Analysis

[118] I have concluded the Defendant enjoyed a diminished but still reasonable expectation of privacy in the courier packages. The seizure and further searches took place without judicial authorization. This mirrors the situation in *Cole* where the Supreme Court accepted the reasonableness of the police actions in removing the laptop bearing the child pornography from the school but faulted them for how they proceeded from that point forward. I have concluded the same here.

[119] Evidence obtained in violation of a *Charter* protected right will be excluded under s. 24(2) if, considering all the circumstances, its admission would bring the administration of justice into disrepute. This determination requires a balancing assessment involving three broad inquiries:

1. The seriousness of the *Charter* infringing stage conduct;
2. The impact of the breach on the *Charter* protected interests of the accused; and
3. Society's interest in the adjudication of the case on its merits.

See: *R. v. Grant*, 2009 S.C.C. 32, para. 71.

Seriousness of *Charter* Infringing Conduct

[120] The consideration of this factor focuses on the severity of the state conduct that led to the *Charter* breach, which includes an analysis of whether the breach was deliberate or wilful, and whether the officers were acting in good faith.

[121] We must consider whether the conduct is such that the court is required to denounce the behavior by separating itself from the conduct. The greater the level of state misconduct, the greater will be the need for the Court to disassociate itself from the conduct. Wilful or flagrant *Charter* violations will tend to support exclusion.

[122] Any violation of a constitutionally protected right is serious. Where it may fall on the spectrum is a matter of context and evidence. Good faith errors must be reasonable: *R. v. Paterson*, 2017 SCC 15 at para 44.

[123] There was no element here of intrusive or abusive personal search of an individual. This did not involve a residence. The absence of such factors may tend to move the violation away from the most serious end of the spectrum.

[124] I find that the police decision making, while far from ideal, was not at the severe end of the spectrum. Why do I say that? The law respecting seizure in the courier context is somewhat complicated. Differences of interpretation may exist even between different courts.

[125] It is the case that the police believed they were acting within their proper powers and lawful authority. There is no question the police had the grounds to apply for further judicial authorization. This factor can cut both ways depending on the circumstances and the motivation behind the decision making of the authorities.

[126] All these factors can have a role at the balancing stage in determining how important it is for the Court to distance itself from the impugned conduct where a violation has been found to exist.

Impact on Protected Interests

[127] Under this second stage of the analysis the inquiry involves the extent to which the breach actually undermines the interests protected by the right infringed: (*R. v. Grant, supra*, para. 76) In the context of a s.8 breach, the focus is on the magnitude or intensity of the individual's reasonable expectation of privacy, and on whether the search demeaned his or her dignity: *R. v. Belnavis*,

[1997] 3 S.C.R. 341 (S.C.C.), at para. 40. This latter consideration can not be said to have been engaged in these circumstances.

[128] In *R. v. Cole*, at para 92, the Supreme Court found it was essential, in weighing the impact on the *Charter* protected right, to consider the fact that the expectation of privacy in question had been found to have been reasonable but diminished. This consideration pertains in this case as well, and in fact is a critical consideration, as I believe it was to the majority in *Cole*.

[129] The Court in *Cole* went on to address a further issue as follows:

> 93 Moreover, the courts below failed to consider the impact of the "discoverability" of the computer evidence on the second *Grant* inquiry. As noted earlier, the officer had reasonable and probable grounds to obtain a warrant. Had he complied with the applicable constitutional requirements; the evidence would necessarily have been discovered. This further attenuated the impact of the breach on Mr. Cole's *Charter* protected interests. (*Cote*, at para. 72).

Again, this factor is relevant in the present case.

[130] The Ontario Court of Appeal has just recently reemphasized this factor in the case of *R. v. West*, 2020 ONCA 473. They commented:

> 34 The second line of inquiry under *Grant* "calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed": *Grant*, at para. 76. In the context of s.8 of the *Charter*, the interests at issue are those of "privacy, and more broadly, human dignity": at para. 78. The seriousness of a breach resulting from an unreasonable search will reflect the level of privacy to which the individual was entitled to reasonably expect in the circumstances: at para. 78. Pursuant to the concept of discoverability, however, the impact of an illegal search on an individual's privacy and dignity will be

> lessened where the police could have demonstrated to a judicial officer that they had sufficient grounds to conduct a valid search: *R. v. Cote*, 2011 SCC 46, [2011] 3 S.C.R. 25, at para. 72.

[131] Of course, it would be an error to over emphasize this point. Police authorities cannot be permitted free rein to ignore their obligation to seek judicial authorization. Discoverability is only one factor. While it cannot be ignored neither can it be allowed to overwhelm the balancing of all the considerations.

[132] Importantly the interests engaged here were not core privacy interests such as biographical data, conscripted personal evidence such as DNA, nor a confession. Rather it was real evidence. This all tends to lessen the seriousness of the impact for balancing purposes, but certainly without entirely eliminating it.

[133] In many cases this second factor can be the one which weighs most heavily in favour of exclusion. Due to the particular circumstances here and the reasonable but reduced nature of the privacy interest, this factor weighs less heavily than it might otherwise.

Society's Interest in Hearing on Merits

[134] Society's interest in the adjudication on the merits is significant. The evidence constitutes highly reliable and probative evidence in the prosecution of a serious offence. Its exclusion "would result in the absence of evidence by which the appellant could be convicted": *R. v. Plant,* [1993] 3 S.C.R. 281.

[135] The considerations under this third inquiry must not be permitted to overwhelm the s. 24(2) analysis (*R. v.* Côté, 2011 SCC 46 at para. 48; *R. v. Harrison, 2009 SCC* 32 at para. 40). They are nonetheless entitled to appropriate weight and, in the circumstances of this case, they clearly weigh against exclusion of the evidence.

Balancing of Factors

[136] As was pointed in *R. v. Harrison*, the companion case to *Grant*:

> 36 The balancing exercise mandated by s.24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance to determine whether having regard to all the circumstances admission of the evidence would bring the administration of justice into disrepute. Disassociation of the justice system from police conduct does not always trump the truth-seeking interest of the criminal justice system. Nor is the converse true. In all cases it is the long-term repute of the administration of justice that must be assessed.

[137] If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admission: *R. v. McGuffie,* 2016 ONCA 365, at para 63

[138] I have considered the factors on each side. The diminished nature of the expectation is highly material to the analysis. The officer subjectively believed he was acting in a way that respected the rights of the accused. In doing so he erred. I can not conclude that this was a willful or flagrant violation. The existence of Purolator's right to inspect clouded the issue. The diminished nature of the privacy interest clouded the issue. To refer one last time to *Cole*, it should be remembered that the majority in that case, having found a s. 8 violation, did save the evidence under s. 24(2), despite what they found to be the missteps of the authorities.

[139] In all the circumstances and on balance, I have concluded that the evidence ought not to be excluded. On these particular facts, its admission would not tend to bring the administration of justice in disrepute. The drugs are admitted into evidence on the trial proper.

Voluntariness Voir Dire

[140] The Crown seeks to have Mr. Piatt's audio recorded statement of October 11, 2018 admitted into evidence.

[141] I adopt the recent and comprehensive analysis of the law respecting voluntariness found in *R. v. Garnier*, 2020 NSCA 52.

[142] At the heart of the common law confessions rule is a concern about reliability. In the leading case of *R. v. Oickle*, [2000] 2 S.C.R. 3. The Supreme Court of Canada confirmed these principles:

> The admission of a defendant's statement to a "person in authority" requires the Crown to prove, beyond a reasonable doubt, that, in light of all of the circumstances, the statement was voluntary. "Voluntary" means the defendant made a free choice to speak, rather than having her will overborne by threats or promises, oppressive circumstances or a lack of an operating mind.
>
> The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.
>
> The concern about oppressive circumstances is that if police create conditions that are sufficiently distasteful a suspect may confess simply to end his/her ordeal or be induced to make unreliable admissions.
>
> Determining whether the defendant has an "operating mind" is a low threshold; it requires simply that the knows what she/he is saying and that it is being said to the police who can use it to his/her detriment.

[143] The law is captured in the following general proposition, set out in David M Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015), 346:

> In order for most statements made to a person in authority to be admissible, the Crown must establish beyond a reasonable doubt in light of all the circumstances that the will of the accused to choose whether to speak has not been overborne by inducements, oppressive circumstances, or the lack of an operating mind. In addition, there must not be police trickery that unfairly denies the accused's right to silence.

[144] It is entirely non-controversial that the Crown bears the burden of proof beyond a reasonable doubt on these points. It is also clear that there is no

absolute rule that every person in authority who came in contact with the accused must be produced on the voluntariness voir dire. Every analysis must be contextual and will turn on its own facts: see *R. v. R.J.S.*, 1996 NSCA 210; *R. v. Menezes*, 2001 CanLII 28426 (ONSC).

[145] In this case the Defence does not contest that Mr. Paitt's statement was the product of an operating mind. This concession is entirely appropriate in the circumstances. This is evident on the record.

[146] Similarly, there are no concerns whatsoever on subjects such as access to food, water, comfort, facilities or sleep deprivation which concerns sometime appear in case law. Once again, these issues do not present on the record.

[147] The Defence has narrowed the voluntariness issue here to the Crown's alleged failure to produce all persons in authority who had meaningful contact with the accused. Only three officers potentially had such contact. These were Cst. Burcham, Cst. Brown and Cst. Wood. The first two were called and cross examined. Cst. Wood was not. I appreciate that the Defence at one point may have suggested that Burcham was not offered on the voir dire and was only called in the *Charter* voir dire. This was not pressed by them and I think that is

correct. Burcham was cross examined on the relevant issues. The real issue advanced by the Defence it that pertaining to Cst. Wood.

[148] Defence argues this creates a fatal gap in the Crown evidence. The Crown maintains this is not the case.

[149] On this point I accept as authoritative the following statement of the law as expressed in *R. v. Socobasin*, [1996] NSJ No. 387 (CA), leave to appeal refused [1996] SCCA No. 4:

> 73 The accused's position is that the prosecution is obliged to call every witness who had anything to do with the accused who makes a confession from the moment of his first contact with the police until the statement has been given. In my opinion, the proposition stated in those terms is too broad.
>
> ....
>
> 78 The trial judge must look at the circumstances and determine whether the Crown called as a witness on the voir dire **every person in authority likely to have been in a position to influence the giving of the statement by the accused** and, if not, was that person's absence from testifying explained satisfactorily.
>
> ....
>
> 108 The question that must be asked is how far does the Crown have to go to meet this burden so as to have the statement admitted at trial. Based on the case law, the Crown must call or explain the failure to call all persons in authority who reasonably may have been in the position to influence the accused by threats or promises to give a statement. The facts of a particular case will dictate how far the Crown must go.

[150] In this case Cst. Wood was not called. He was the officer who took control of the accused on October 11, 2018 at the Purolator depot site at approximately 2:55 pm just following the arrest and giving of rights by Burcham. Wood

transported him to the Bible Hill RCMP detachment and then continued to have him in his custody for some time. Cst. Burcham eventually assumes custody again at 3:45 pm in advance of the start of the statement at 4:02 pm.

[151] Cst. Wood and the accused were alone during this transport. We do not know exactly how long the transport took. We do know that Cst. Brown next saw Mr. Piatt at the interview room and we know that in the interim Mr. Piatt reportedly spent an undetermined portion of the time alone consulting counsel (or at least I am prepared for these purposes to assume he was alone, there was no evidence on this point).

[152] The position of the Crown is that the failure to call Cst. Wood is of no consequence. He was merely the transporting officer they submit. I do note as well however that it appears he was, in addition to being the transporting officer, also an officer who had a not insignificant length of time to engage with the accused It also appears he was the officer who was responsible for access to counsel and made arrangements in that regard. I can not offer definitive times for these steps as none were offered in evidence.

[153] The Crown argues none of this is of any consequence. They submit that the contents of the tape speak for themselves. It shows a man who is in no evident

distress who exhibits a cooperative attitude and is not being abused by police. Further they note that Mr. Piatt confirms that at some point after arrival at the detachment he exercised his right to counsel.

[154] The Defence submits that how Mr. Piatt presents on the tape is not an answer to the missing evidence. With Cst. Wood missing from the equation we have no way of knowing why Mr. Piatt may have opted to adopt the stance he did. Perhaps threats and abuse can be excluded based on demeanour but not promises, inducements or quid pro quo.

[155] The Defence goes on to note that the exercise of the right to counsel is not a substitute for calling the persons in authority. The fact that the accused's s. 10(b) rights have been fulfilled is not a proxy for proof of voluntariness: see *R. v. Oickle, supra* at para 31. Justice Rosenberg at the Ontario Court of Appeal in *R. v. Holmes*, [2002] OJ No. 4178, observed (para 20) "The fact that the suspect was able to consult with a lawyer is simply one, albeit important, circumstance."

[156] I have carefully reviewed the recent decision of Rosinski, J. in *R. v. Shamsuddin*, 2017 NSSC 30 where he excluded a statement on the basis that certain evidence had not been called. I fully adopt his overview and discussion

of the applicable legal principles. As is acknowledged in that case and throughout the case law, every situation will obviously turn on the application of the principles to its own individual circumstances.

[157] In this case the following is troublesome. The contact between Cst. Wood and the Defendant is close in time to the giving of the statement, as opposed to being remote. The accused goes into his custody at approximately 2:55 pm and on the evidence is with Cst. Brown again in the interview room at 4:02 pm when the interview process commences. I accept the Defence point that the Defendant's time spent with Cst. Wood is close in time and not remote to the taking of the statement. This can be distinguished from the circumstances in some of the case law where the impugned contact is removed by many hours or in some cases the day previous.

[158] There is little evidence to assist the Court in allocating the time between 2:55 pm and 4:02 pm as between time spent alone with Cst. Wood and time spent in consultation with counsel. There obviously was an allocation but I have examined the record and do not see that I have definitive evidence on the point. As noted, there was obviously some period of one on one time between Wood and Piatt in the vehicle during the transport. Then time was spent at the detachment and some time was spent exercising his right to counsel. I lack

definitive information to allocate that time or be sure who was with him or not at various points. The issue will be whether and how this may impact the reasonable doubt standard.

[159] In submissions counsel provided different perspectives on the relevance of the length of the alleged evidentiary or time gap here. The Crown noted that, unlike in *Shamsuddin,* and other cases where the gap was many hours long, in this case we are considering a span of just under an hour, albeit a span of time located in immediate proximity to the taking of the statement.

[160] I am aware of the following passage quoted by Justice Rosinski in *Shamsuddin, supra* and taken from the Saskatchewan Court of Appeal in *R. v. Wilkinson*, 2013 SKCA 46:

> 12 Here, at the core of the decision, the trial judge concluded the Crown had failed to discharge the onus of establishing a sufficient record of the interaction between the police and Mr. Wilkinson so as to eliminate any reasonable doubt as to the voluntariness of the statement. True, the judge said the Crown had not called or made available all of the police officers who had had contact with Mr. Wilkinson from his arrest to the taking of the statement (some 17 1/2 hours), but, in doing so, the trial judge was particularly pointing to two clear gaps in the evidence adduced by the Crown: (1) Sergeant Kennedy, who had transported Mr. Wilkinson from the place of his arrest to the police station, was not called to testify; and (2) there was simply no evidence as to how Mr. Wilkinson had come to call Legal Aid or who had facilitated that call for Mr. Wilkinson and, particularly, there was necessarily then no evidence as to what had been said by persons in authority to Mr. Wilkinson during this interaction. In fact, the Crown did not even know the name of the police officer(s) who had facilitated Mr. Wilkinson's call to Legal Aid.

> 13 The completeness, accuracy and reliability of the record of an accused's interactions with the police are inextricably tied to a trial judge's inquiry into and scrutiny of the circumstances surrounding the taking of a statement. Here, the Crown adduced no evidence of a 17 1/2 hour delay between the arrest and the taking of the statement during which time Mr. Wilkinson was in police custody and, more importantly, during which time the police clearly had some significant interaction with him. I do not see how the trial judge could come to "understand the circumstances surrounding the taking of the [statement]" (Oickle) in the face of that significant gap in the evidence. In the circumstances, the Crown itself could not have made an assessment of the relevance or probative value of that unavailable evidence. And, given the nature of proof beyond a reasonable doubt and the fact that proof of voluntariness lies with the Crown, the judge could not be expected to give the benefit of the reasonable doubt arising from the clear gaps in the evidentiary record to the Crown.
>
> 14 In the result, I find no error in the trial judge's conclusion that the Crown had not met its burden of proof as to the voluntariness of Mr. Wilkinson's statement or in the judge's decision to exclude the statement from evidence. I would, therefore, dismiss the appeal.

[161] Of note in *Wilkinson* is the Courts specific reference to the failure to call the transporting officer in that case. It appears reasonable to suppose that it is the suggestion of one on time between a transporting officer and an accused which seems to enhance the importance of the absence of this officer in the mind of the Court. Similar is the reference to the officer who was involved with the exercise of the right to counsel.

[162] I want to make clear I have understood the argument of the Crown. They argue the contents of the statement and demeanour of the accused in the tape are so obvious as to negate any worries or concern entirely. They suggest that to require the calling of Cst. Wood would be to elevate form over substance and

return to the bad old days of having to call all 25 police officers who may have passed the accused in the hallway or been on duty in the police lock up. I emphasize, this is not the case.

[163] I am left however with my reading of the case law which suggests the potential importance of material time spent between accused and officer in proximity to the taking of the statement as being likely relevant to the weighing process. The same caselaw creates a clear distinction between truly incidental contact (passing in the hallway or delivering the accused a sandwich) and material contact. The issue is whether the person in authority was in a likely position to influence the giving of the statement.

[164] I have carefully reviewed the case law submitted by both sides and believe I have an appreciation for the competing tensions at play in the caselaw.

[165] I am not operating under any misapprehension that every person in authority must be called by the Crown. It would be a mistake to read these reasons in such a fashion. There may be many officers or persons in authority who have inconsequential contacts and it is of no importance that they are not called (or the failure to call is adequately explained). These have no bearing on the reasonable doubt analysis. Such examples in case law are many and to attempt

to make a comprehensive list of what constitutes inconsequential contact would be to miss the point. Persons who were not in a likely position to influence the giving of the statement are outside the scope. This includes those who had merely incidental or *de minimis* contact or those for whom an adequate explanation for the failure to produce is given.

[166] I can not conclude that this includes the officer who had responsibility for the accused for the vast majority of the hour prior to the statement, who transported the accused alone in the hour prior and who apparently was the one who controlled the arrangement for the exercise of counsel in the hour adjacent to the statement. No satisfactory explanation for the failure to produce him was provided. The suggestion is the tape speaks for itself. This has an element of a circular argument about it. The viewing of the video alone can not be a substitute in these circumstances for all the reasons set out in caselaw.

[167] I take the Crown's point that the video arguably may give comfort that the person has not been subject to abuse or threats overbearing the will but it may not operate the same for promises, inducements or quid pro quo. I conclude that Cst. Wood, who was responsible for the accused in the one hour prior to the statement, who transported the accused alone in the hour prior and who was involved with the accused in the exercise of his right to counsel in the hour

preceding the statement, was a person who was "likely to have been in a position to influence the giving of the statement by the accused" as referenced at para 78 of *Socobasin.*

[168] It must be emphasized, as was the case in *Shamsuddin*, and is often said in these cases, that this is not to suggest anything untoward was done by Cst. Wood. That is not the test and that is not the finding of the Court. What is being addressed is nothing more and nothing less than a failure to meet the reasonable doubt standard.

Secondary Caution

[169] One method that is sometimes used to diminish the importance of contacts between the maker of the statement and prior persons in authority is for the interviewing officer to provide the secondary caution. The secondary caution addresses a suspect's prior contacts with other officers. In general, it informs the accused that nothing said by the police prior should influence the accused in the decision to make a statement. It negates promises or inducements made in those contacts. Such was not done in this case.

[170] I appreciate this is not a legal requirement. It can however be best practice, as was acknowledged by the officer in cross-examination. For consideration of this issue see: *R. v. R.J.S.*, *supra* para 109.

[171] As the practice was not employed in this case, I conclude it would not be productive to speculate on whether or how its use may have impacted the analysis.

Reasonable Doubt Standard Applies to Voluntariness

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

[173] On the other hand, it must be remembered that 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.

[174] The issue here is not that the failure to call the officer results in a ‘gotcha’ moment where a technical error results in an automatic failure to prove voluntariness. The issue is how the absence of the testimony impacts the Crown’s ability to prove voluntariness to the standard of proof beyond a reasonable doubt.

[175] In these circumstances, the absence of the officer is material to the weighing process. It is simply not possible to call it a *de minimis* contact. It is not possible to call it remote in time or location. It is too substantial and too proximate in time. For the reasons expressed in *Shamsuddin (para 49)*, I can not use the contents of the tape to negate the Court's concerns. The Court is left in doubt with respect to the period immediately proximate to the statement, contacts the accused may had that overbore his will, involved a promise, a quid quo pro, or otherwise undermined his right to silence.

[176] As a consequence of the Court's conclusion that the reasonable doubt standard has not been met, the statement is not admissible.

Trial Proper

Legal Principles

Presumption of Innocence

Proof Beyond a Reasonable Doubt

[177] The fundamental protection in every criminal trial is the presumption of innocence. This is the primary and irreducible foundation of our criminal justice system. It has to be appreciated that this principle is not a slogan to be

quoted and then forgotten. It must remain at the core of the entire analysis to be conducted.

[178] To be presumed innocent until proven guilty by the evidence presented in court is the fundamental right of every person accused of criminal conduct. Running together with this presumption of innocence is the standard of proof against which the Crown evidence must be measured. To secure a conviction in a criminal case, the Crown must establish each essential element of the offence to the point of proof beyond a reasonable doubt.

[179] This standard has rightly been called an exacting one. It is a standard far higher than the civil threshold of proof, being a balance of probabilities. The law recognizes various standards of proof depending on the nature of the proceeding. The criminal standard towers above those other lesser standards.

[180] The Nova Scotia Court of Appeal and Supreme Court of Canada have provided clear direction on the issue of what is meant by proof beyond a reasonable doubt. They have instructed as follows:

- A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

- Even if it is believed the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances the Court must give the benefit of the doubt to the accused and acquit because the Crown has failed to prove the guilt of the accused beyond a reasonable doubt.

- On the other hand, it must be remembered that 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.

- In short, if based on the evidence before the Court, you are sure that the accused committed the offence you should convict because this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

- It has to be remembered that the burden of proof never shifts to the defendant. This is irrespective of whether the defendant himself gives evidence.

- In this case the Defendant did not testify. Whether an accused testifies or not, at no time does the burden of proof shift to him. The resolution of any criminal case does not turn on the court picking which version of the facts it prefers or finds more believable. That would be to erroneously displace the burden onto the accused and would represent a fundamental misapprehension of the Court's proper role.

[181] A foundation for reasonable doubt can be found in any witness's testimony. So too, a finding of guilt may be safely grounded on the evidence of a single witness if, of course, it is found sufficiently credible and persuasive to meet the exacting burden of proof.

[182] It is my obligation to ensure that all these core principles are employed throughout the entire analysis to follow.

The Offence

[183] Conviction for this offence requires proof beyond a reasonable doubt that the accused: (1) possessed the substance; (2) the substance is cannabis; (3) the Defendant knew the substance was a controlled substance; and, (4) he possessed it for the purpose of trafficking.

[184] Date, identity, jurisdiction, and proof of the substance are admitted. Given the quantity, if possession is proved, that such possession would have been for the purpose of trafficking is not contested.

[185] Accordingly, the Court can come to what are the critical remaining issues. These are the questions of possession and the mental element as to the nature of the contents of the packages.

[186] Possession requires proof beyond a reasonable doubt of both knowledge and control. Possession can be either personal, constructive, or joint.

[187] The Crown submits this is a case of constructive or joint possession. The Defence argues possession has not been proved in any form.

[188] Mr. Piatt was never in actual physical possession of the cannabis contained in the three boxes as these had been seized by the police and removed to the RCMP detachment.

[189] The parties do not disagree on the law as it pertains to possession. Of course, they have fundamental disagreement as to its application to the facts.

[190] The element of possession can be proven through constructive or joint possession. "Possession" for purposes of the *CDSA* is defined as:

> 4(3) (a) a person has anything in possession when he has it in his personal possession or knowingly:
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) 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; and
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[191] In addition to knowledge, both constructive and joint possession require that the accused has some measure of control over the item to be possessed (See: *R. v. Wallace,* 2016 NSCA 79, at para. 56).

[192] The Crown is not required to prove ownership or control over the premises where the drug is located so long it can otherwise prove control over the drug. Neither is the Crown required to prove that the power or control was actually exercised (*R. v. Wallace, supra* at para. 56). It is sufficient for the

Crown to prove control or a "right of control over the goods" (*R. v. Caldwell*, (1972), 7 C.C.C. (2nd) 258 (Alta. C.A.) at para. 26 and see also *R. v. Bremner*, 2007 NSCA 114.

[193] The British Columbia Court of Appeal dealt with this issue in *R. v. Lee*, 2010 BCCA 589, where it was stated:

> 20 ... What the Crown must prove is that an accused had the ability to exercise some power (i.e., some measure of control) over the item in issue. It is not necessary for the Crown to prove that such power was in fact exercised: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 (S.C.C.), at 15 -17, 137, 138; *R. v. Webster*, 2008 BCCA 458, 238 C.C.C. (3d) 270 (B.C. C.A.) at paras. 42-44.

[194] Proof of a right of control with respect to the packages is sufficient to establish the measure of control necessary for a finding of constructive possession.

[195] The Defendant here had the right to pick up the packages. This was clearly established in the evidence. But for the intervention of the police he would have done so. He took all the steps necessary to go into actual physical possession. I am satisfied that this more than satisfies the element of possession. But this is only the beginning of the analysis. The remaining contentious point at issue is the necessary proof of the mental element.

[196] Mr. Piatt must be proved to have knowledge of the nature of the substance as a controlled substance. This must be proved beyond a reasonable doubt. Can this standard of proof be achieved on this record?

Treatment of Circumstantial Evidence

[197] As noted earlier in this decision, the facts in this case require the consideration of the law respecting circumstantial evidence.

[198] Consequently, I must bear in mind the Supreme Court of Canada's direction in *R. v. Villaroman*, 2016 SCC 33 regarding how triers of fact must approach such cases:

> 37 When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: [citations omitted]. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": [citation omitted]. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[199] Cases applying *Villaroman* indicate that the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence. Circumstantial evidence does not have to totally exclude every other conceivable inference. The trier of fact must decide if any proposed alternative

way of looking at the case is reasonable enough to raise a doubt. Put another way, the circumstantial evidence does not have to exclude entirely other conceivable inferences, but rather such alternatives must not raise a reasonable doubt.

[200] As the Nova Scotia Court of Appeal commented recently in *R. v. Roberts*, 2020 NSCA 20:

> 25 If reasonable inferences other than guilt can be drawn from circumstantial evidence the Crown has not met the standard of proof beyond a reasonable doubt. Reasonable doubt can be logically based on the evidence or lack of evidence, must be reasonable given that evidence or lack thereof, and assessed logically in light of human experience and common sense.

[201] Case law further develops the concept of how the Court must approach the weighing of "other plausible theories" and "other reasonable possibilities" which are inconsistent with guilt. It is recognized that the line between a "plausible theory" and "speculation" is not an easy one to draw. The fundamental question is whether the circumstantial evidence, assessed in light of human experience, excludes any other *reasonable* alternative. Put another way, the alternative inferences sought to be drawn must be reasonable and rational in the circumstances of the matter — not merely possible.

[202] At para 42 of *Villaroman,* Justice Cromwell comments on this point with a reference to *R. v. Dipnarine*, 2014 ABCA 328, he adopts the court's comments at paras 22, 24-25, as follows:

> [22] Circumstantial evidence does not have to totally exclude other conceivable inferences . . .
>
> [24] Alternative inferences must be reasonable and rational, not just possible . . .
>
> [25] But the logic of the circumstantial evidence analysis is that if a trier of fact considers a postulated alternative interpretation of the circumstances taken as a whole to be unreasonable or irrational, the trier of fact is not bound to give effect to that alternative just because it is impossible to exclude it entirely. The law does not require such proof to absolute certainty . . .

[203] Other rational inferences need only be sufficient to raise a reasonable doubt. There is no onus on the accused to advance or develop alternative theories that may be equally rational inferences from the evidence as the theory of the Crown: *R. v. Griffin*, [2009] S.C.J. No. 28 (S.C.C.) at paras. 34 and 35.

[204] Nevertheless, a reasonable doubt must be a logical one, based on the evidence or on the absence of evidence: *R. v. Lifchus*, [1997] 3 S.C.R. 320.

[205] It is the cumulative weight of the facts that must prove the accused guilty beyond a reasonable doubt and not each individual fact examined separately: *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.).

[206] The direction from the Supreme Court in *R. v. Villaroman* is that conclusions, alternative to the guilt of the accused, need not be based on proven

facts. In the past this has been the subject of confusion. Presumably for this reason Justice Cromwell, for the Court, addressed this in some detail:

> 35 At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[207] The law as set out in *Villaroman* and the well known principles enumerated by the Supreme Court of Canada in the case of *R. v. W.D.* (modified by necessity to account for the fact the accused did not testify) operate together.

[208] As was said by the Ontario Court of Appeal in *R. v. D.(B.)*, 2011 ONCA 51:

> 114 What I take from a review of all of these authorities is that the principles underlying *W.(D.)* are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep.

[209] I must go on to consider whether on the whole of the evidence, and considering the application of the *Villaroman* principles, the Crown has proven the Defendant’s guilt beyond a reasonable doubt.

[210] The Crown argues the balance of the evidence does allow the carrying of its burden with respect to the accused's knowledge of the content of the boxes, or at least his wilful blindness. Defence submits that on the evidence in the record the Crown can not prove the mental element of the offence charged.

[211] There is no direct evidence that Mr. Piatt knew of the illegal contents of the packages. Therefore, in order to convict the Court must be satisfied on the basis of the circumstantial evidence that the only reasonable inference is one consistent with guilt. If there are any other reasonably available inferences, an acquittal must follow.

[212] In the case of *R. v. Oddleifson*, 2010 MBCA 44 the Manitoba Court of Appeal discussed proof of possession in a circumstantial evidence context. They found that in such a case the Crown must satisfy the Court that the "only reasonable or rational inference that could be drawn from the proven facts was that the accused had knowledge of and control over" the illicit substance.

[213] It is known that the package was directed to the accused and he arrived to pick it up and had sufficient ID to establish his right to do so. The unknown evidence however extends to what is the relationship between the sender and the Defendant, what he was told or not told, and what his intentions were.

[214] In some cases, police arrange for controlled deliveries of illicit packages or packages with the contraband removed or largely removed except for a small portion (see for eg. *R. v. Kwok*, [2012] BCJ No. 2882; *R. v. Bond*, [1999] OJ No. 72; R. v. Harrison (1982), 67 C.C.C. (2nd) 401 (Alta. C.A.); and *R. v. Gambilla*, 2019 ABQB 68 a recent case which engages in a detailed analysis of controlled delivery). This was not the course followed in this case. This may have been due to the fact the product was cannabis rather than some other substances, which may have led to a different operational plan.

[215] In submissions, the defence raised issues in relation to the lack of a controlled delivery and the fact the Defendant never actually came near the drugs. I do not subscribe to the view that controlled deliveries are necessary to prove possession. They can however result in the gathering of additional information with respect to intention, in that greater knowledge may be gained on intended destination, who may come in contact with a package and other information.

[216] In the case of *R. v. Bonassin*, 2008 NLCA 40 the drugs in a large package had been replaced with an equal weight of books. The majority there discussed why this was not a bar to a conviction for possession for the purpose of trafficking. Justice Rowe, then of the Newfoundland Court of Appeal, speaking

in dissent, raised some conceptual issues, but noted that in any event the Defendant would have been guilty of an attempted possession for which the sentence would have been the same in any event (see also *R. v. Chan*, [2003] OJ No. 3233 (Ont. C.A.)).

[217] I have assessed the evidence we do have with respect to Mr. Piatt and the packages. He received an email and responded to the depot with a vehicle large enough to receive three bulky boxes. He presented sufficient ID and attempted to collect the packages.

[218] I have weighed the full balance of evidence in the record. I can not conclude that the only reasonably available inferences on the evidence is the guilt of the accused. Accordingly, the Crown has failed to carry proof of the mental element to the exacting standard of proof beyond a reasonable doubt.

Summary of Conclusions

[219] With respect to the alleged breach of the section 8 right to be free from unreasonable search and seizure, I have determined the Defendant did have a reasonable expectation of privacy in the packages and these were seized in violation of his section 8 rights. However, under the application of the section 24(2) test the evidence was not excluded from the trial as its admission would

not bring the administration of justice into disrepute in all the circumstances. The real evidence and associated certificated of analysis are admitted into evidence.

[220] With respect to the statement of the accused, it is the conclusion of the Court that the Crown has in all the circumstances failed to carry its burden to prove voluntariness beyond a reasonable doubt.

[221] On the trial proper, I have weighed all the elements necessary to prove the single count in the Indictment. This is a circumstantial case and requires the consideration of the *Villaroman* principles. Constructive possession has not been proved by the Crown beyond a reasonable doubt.

[222] Accordingly, Mr. Piatt, please stand up. The Court enters a finding of not guilty on the single count on the Indictment. As a consequence, the recognizance is discharged.

[223] Counsel, do we believe there is anything further we have to address?

J.