NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Cater*, 2014 NSCA 74

Date: 20140813
Docket: CAC 392039
Registry: Halifax

Between:

Kyle Joseph Cater

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Fichaud and Beveridge, JJ.A.
Appeal Heard:	June 10 and 11, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Beveridge, JJ.A. concurring.
Counsel:	Elizabeth Cooper, for the appellant Timothy S. O'Leary, for the respondent

Reasons for judgment:

[1] A massive joint police operation, code named *Operation Intrude* was launched in 2007 to investigate the activities of a criminal organization known as the Spryfield Mob ("SMOB") for a variety of crimes including attempted murder and other violent offences under the **Criminal Code of Canada,** R.S.C. 1985, c. C-46, as well as offences under the **Controlled Drugs and Substances Act,** S.C. 1996, c. 19, as amended. Its principal objective was to gather intelligence and evidence which would lead to the arrest and conviction of known or suspected drug and gun traffickers. In November 2008, as part of its investigation, police obtained a Part VI **Criminal Code** authorization to intercept the private communications of named individuals believed to be involved. One of those named targets was the appellant, Kyle Cater, then attending high school in Spryfield.

[2] The authorization was still in force on January 15, 2009, when police intercepted a call from the appellant's stepmother, Ms. Torina Lewis. She called him early that morning with the news that the police had raided the home she shared with Kyle's father, Paul Cater. In a series of calls later that day she told the appellant that the police were obviously looking for guns. Their search warrant was based primarily on intercepted telephone conversations which led police to believe that there were firearms inside the home. Subsequent intercepts satisfied the police that the appellant knew about and had some measure of control over the guns and ammunition in his father's house.

[3] On January 15, 2009, Paul Cater, Torina Lewis and Kyle Cater were all charged in a joint Information listing 11 offences relating to firearms and ammunition. Later, on April 29, 2009, as a result of the Part VI authorized intercepts, Kyle Cater was solely charged with 12 firearms trafficking offences pursuant to ss. 100(2) and 99(2) of the **Criminal Code**, said to have occurred between the dates of November 18, 2008, and January 16, 2009.

[4] In December 2011, Paul Cater and Torina Lewis pleaded guilty to various charges relating to the guns seized from their residence. On April 18, 2012, Paul Cater was sentenced to a term of imprisonment of five years. For her part, Torina Lewis was sentenced to two years less a day to be served in the community.

[5] All of the charges against the appellant set out in the two Informations were tried before Provincial Court Judge Anne S. Derrick. Broadly speaking, the

alleged offences fell into three categories: storage and possession of firearms contrary to ss. 86(1), 88(1), 92 and 95(1); possession of firearms for the purpose of trafficking (by offering to transfer them) contrary to s. 100(2); and trafficking in firearms (by offer to transfer) contrary to s. 99(2) of the **Criminal Code**. Before the actual evidentiary phase of the trial which began on February 13, 2012, Judge Derrick conducted a series of *voir dire* hearings and filed multiple written decisions disposing of a variety of pre-trial and **Charter** motions, most of which had been initiated at the behest of the defence.

[6] After a 15-day trial, Judge Derrick filed a comprehensive written decision (2012 NSPC 18) in which she convicted the appellant on most of the charges, and entered acquittals or stays on the remainder. On May 4, 2012, Judge Derrick sentenced the appellant to eight years in a federal penitentiary which, after a two-year credit for pre-sentence custody, resulted in a sentence of six years on a "go-forward" basis (2012 NSPC 38).

[7] The appellant filed appeals against both his conviction and his sentence. The two appeals have been severed. This decision relates only to his appeal against conviction. The date for his sentence appeal has not yet been determined.

[8] After carefully reviewing the record and counsels' submissions, I am satisfied that there is no reason for us to intervene. I would dismiss the appeal. Before addressing the numerous issues raised on appeal, I will summarize the background leading up to the appellant's arrest and prosecution.

Background

[9] The best summary of the facts comes from Judge Derrick's own words which I will repeat here from her trial decision:

> [1] January 15, 2009 began eventfully for Kyle Cater. His stepmother, Torina Lewis, called him early in the morning with the news that there had been a police raid on the home she shared with Kyle's father. In a series of calls that morning, she told Kyle what had happened. The police had made apparent what they were looking for: they were looking for guns.
>
> [2] Kyle Cater's father, Paul Cater, and Torina Lewis lived at 80 Cavendish Road in Spryfield, a neighbourhood in Halifax. Kyle did not live there. He lived with his mother, Barbara Cater, on Purcells Cove Road, also in Spryfield. The search warrant for 80 Cavendish Road was primarily based on intercepted telephone conversations from December 2008 that led the police to believe there were guns at the residence.

[3] The search of 80 Cavendish Road occurred in the context of a much wider police investigation, Operation Intrude. Operation Intrude was investigating suspected criminal activity involving drugs and guns. On November 18, 2008, police investigators had obtained a Part VI *Criminal Code* authorization to intercept the private communications of named targets believed to be involved in the drug trade. One of the named targets was Kyle Cater.

[4] Operation Intrude's Part VI authorization was still up and running on January 15, 2009. Monitors were listening to calls to and from Kyle Cater's cell phone as well as the land line where he was living. Calls between Torina Lewis and Kyle Cater on January 15 after the police began their search of 80 Cavendish led investigators to believe Kyle Cater knew about and had some control over the guns located at his father's residence.

[5] Paul Cater, Torina Lewis, and Kyle Cater were all charged on January 15 with charges relating to firearms and ammunition that were found by police at 80 Cavendish. Also as a result of the Part VI authorized intercepts, on April 29, 2009, Kyle Cater was charged with trafficking firearms. Intercepted private communications constitute the primary evidence offered against Kyle Cater on all the charges.

[6] I will note here that, without any disrespect intended, on occasion in these reasons I refer to Kyle Cater as Kyle and Paul Cater as Paul so as to avoid any confusion. For symmetry I will also be referring to Ms. Lewis by her first name.

The Charges

[7] The joint information against Kyle Cater, Paul Cater and Torina Lewis lists eleven charges. They are: the unlawful storage of a sawed off Cooey 84 shotgun, a Lakefield Mark II rifle, and an AA Arms Model AP 9 handgun, and ammunition, in a careless manner (contrary to *Criminal Code* section 86(1) x 3), unlawful possession of the sawed off Cooey 84 shotgun, the Lakefield Mark II rifle and the AA Arms Model AP 9 handgun (contrary to *Criminal Code* section 88(1) x 3), unlawful possession of a loaded prohibited weapon -- the AA Arms Model AP 9 handgun, and unlawful possession of a loaded prohibited firearm -- the sawed off Cooey 84 shotgun (contrary to *Criminal Code* section 95(1) x 2), unlawful possession of the sawed off Cooey and the AP 9 handgun, knowing that possession is unauthorized (contrary *to Criminal Code* section 92(1) x 2), and unlawful possession of two over capacity magazines, a prohibited device (contrary to *Criminal Code* section 92(2)).

[8] Kyle Cater is also solely charged with twelve (12) firearms trafficking charges pursuant to sections 100(2) and 99(2) of the *Criminal Code*, for the between dates of November 18, 2008 and January 16, 2009.

...

[12] Five substantive case management conferences were held in this matter, primarily to deal with issues raised in relation to Kyle Cater. Trial dates were set, a number of which were used for *voir dires*. Kyle Cater agreed that the firearms

possession and his firearms trafficking charges could be heard together and the case proceeded on this basis.

[13] On December 20, 2011, Paul Cater and Torina Lewis pleaded guilty to various charges relating to the guns seized at 80 Cavendish Road. These pleas were entered following my decision on the validity of the search of 80 Cavendish. (*R. v. Cater, [2011] N.S.J. No. 691*) Sentencing is scheduled for April 18, 2012. I have heard no facts, evidence, or submissions relating to these pleas. This decision is in relation to the charges against Kyle Cater.

...

[16] I conducted eight *voir dires* in advance of the evidentiary phase of the trial commencing on February 13, 2012. All but two of these *voir dires* were for Defence applications. The Crown made two applications for the summary dismissal of Defence motions. My decisions on the voir dires are reported as follows: *R. v. Cater, [2011] N.S.J. No. 561* (plea negotiation privilege); *R. v. Cater, [2011] N.S.J. No. 610* (delay); *R. v. Cater, [2011] N.S.J. No. 624* (disclosure); *R. v. Cater, [2011] N.S.J. No. 708* (Crown application for summary dismissal of *Garofoli* application/Defence application for leave to cross-examine Affiant); *R. v. Cater,* [*2011] N.S.J. No. 626* (*Garofoli* application); *R. v. Cater, [2011] N.S.J. No. 627* (Crown motion for summary dismissal of abuse of process and arbitrary detention applications); *R. v. Cater, [2011] N.S.J. No. 691* (section 8 challenge to the validity of the search warrant for 80 Cavendish Road); and *R. v. Cater, [2012] N.S.J. No. 22* (section 8 challenge to the search of Kyle Cater's cell phone).

[17] As a result of certain of the decisions mentioned above, I admitted into evidence the firearms seized from 80 Cavendish Road, intercepted private communications obtained pursuant to the Part VI authorization, and the contents of the cellular phone seized from Kyle Cater on his arrest. In the course of the trial I also heard submissions and ruled on the admissibility of hearsay evidence contained in the intercepts and the text messages from the cell phone. (*R. v. Cater, [2012] N.S.J. No. 111*) I admitted into evidence the communications of the Part VI authorized intercepts for the truth of their content.

...

[21] Cpl. Mark Cameron was the Exhibit Officer for the search of 80 Cavendish Road. Police officers searching the residence brought to his attention a number of items which he then seized. These items were: a .22 calibre Mark II rifle, serial number 68355 with a loaded magazine and a catridge in the chamber; a box of ammunition (50 rounds of .38 special ammunition); 2 loose rounds; a box of shotgun shells; a 30-30 Winchester bullet; a 20 gauge Cooey sawed off shotgun, serial number 82867, loaded with one shell; three 20 gauge shotgun shells; an unloaded AP 9 Luger fully automatic, serial number 049948; a fully loaded magazine and a single shotgun shell.

[22] The Mark II rifle was located, propped up, to the right of the headboard in the master bedroom on the third level of 80 Cavendish. The AP 9 Luger was in the second (bottom) drawer of the night table next to where the rifle was found. The loaded magazine for the AP 9 was in a television stand behind a set of ceramic hands which had two little roses decorating their wrists. Cpl. Cameron estimated the distance between the location of the AP 9 and the magazine to be a little more than six feet, close enough to be readily accessible. A single 20 calibre shotgun shell was found sitting on top of the dresser in the bedroom. Three 20 gauge shotgun shells were found in the first (top) drawer of the night table which held the AP 9. The Cooey shotgun was seized from the kitchen, in Cpl. Cameron's estimation, about eight feet from the main entrance into the home. The boxes of ammunition -- the .38 special rounds and the shot gun shells were found high up in a kitchen cupboard, about 7.5 feet off the floor. The two loose rounds of .38 special ammunition were also found in this location as was the 30-30 Winchester bullet. In a drawer in the kitchen table police found, and Cpl. Cameron seized, four 20 gauge shotgun shells.

...

[32] There is also no evidence that refutes Mr. Champion's opinion as to the classification of the 80 Cavendish firearms and ammunition in accordance with section 84(1) of the *Criminal Code*. I accept that the Mark II Lakefield rifle is a non-restricted firearm, the sawed-off Cooey shotgun is a prohibited firearm, the fully automatic AP 9 is a prohibited firearm, the cartridge magazine found in the master bedroom of 80 Cavendish is a prohibited device within the meaning of section 84(1) of the *Criminal Code* and section 4 of Part 4 of the Regulations.

[33] I also note that in Martin Champion's report (Exhibit 31), he indicated that the cartridge magazine to the Mark II Lakefield rifle "has a capacity of up to thirty (30) 7.62 x 39 mm Russian calibre cartridges." (Exhibit 31, page 2, #9 under Results) As Mr. Champion concluded in his report, this makes that rifle magazine a prohibited device within the meaning of section 84(1) of the *Criminal Code* and section 4 of Part 4 of the Regulations. (Exhibit 31, page 3, #9 under Conclusions)

[34] I am wholly satisfied that the guns seized from 80 Cavendish are firearms within the meaning of the *Criminal Code* and that they and the two magazines have been correctly identified and classified in the charges against Kyle Cater, Paul Cater and Torina Lewis. I am also wholly satisfied that Kyle Cater did not have, at any time material to the charges, a Firearms Acquisition Certificate or any other kind of license for possessing firearms nor did he have a valid registration certificate for any of the 80 Cavendish firearms or any firearms.

[35] Therefore, the essential issue on the charges against Kyle Cater in relation to the 80 Cavendish Road firearms and ammunition is whether Kyle had constructive and/or joint possession of the loaded Mark II Lakefield rifle, the loaded Cooey sawed-off shotgun, the unloaded fully automatic AP 9 nine

millimeter pistol, and the two over-capacity magazines. In due course I will address the law and evidence relating to the possession issue.

...

[62] The Crown tendered 60 Part VI intercepts in total for voice identification purposes and a 911 call from December 26, 2008. 57 intercepts are found in Exhibit 4, and have been tendered also as evidence of Mr. Cater's guilt. Only two of these intercepts do not involve a speaker who has been identified as Kyle Cater: Intercept 6 (session #869) is a conversation that involved third parties and Intercept 8 (session #2589) is a text. This means 55 of the substantive intercepts (Exhibit 4) involve a speaker that has been identified as Kyle Cater. In addition the Crown tendered three intercepts for voice identification purposes only. Therefore, 58 intercepts played at this trial are said to contain Kyle Cater's voice.

...

[75] In the 55 substantive intercepts, that is intercepts the Crown submits contain proof beyond a reasonable doubt of the offences with which Kyle is charged, a voice I accept to be Kyle Cater's voice can be heard speaking. This is the same voice that makes the 911 call on December 26, 2008 identifying himself as Kyle Cater. I found listening to the intercepts was an experience that mirrored that of Det/Cst. Pepler: you get to know these people. After listening to 58 intercepts (55 substantive intercepts and the three intercepts tendered for voice identification purposes only) I am satisfied that I have got to know Kyle Cater's voice and recognize it as the voice Det/Cst. Pepler identified as belonging to him. I acquired the same sense of familiarity with respect to the voices of Paul Cater and Torina Lewis.

...

[92] The expert called by the Crown was Special Firearms Officer Michael Press. After a qualifications *voir dire*, I qualified Mr. Press to give opinion evidence in firearm identification, classification, test firing, firearms and ammunition trafficking, illegal movement of firearms including crime guns sources, firearm concealment, street and coded language relating to firearms including illegal street prices of firearms and ammunition. The Defence conceded his qualifications in all categories proposed by the Crown except street and coded language relating to firearms and the illegal street prices of firearms and ammunition. Following submissions on the issue, I qualified Mr. Press as I have indicated.

...

[94] I can say that I have accorded substantial weight to Mr. Press' opinions, including on the possible meanings to be given the coded language on the intercepts. ...

[96] Michael Press listened to all 56 intercepts before me (Exhibit 4), viewed the text message in Exhibit 4 and the photographs of guns obtained from Kyle Cater's cell phone. He was also shown the firearms seized from 80 Cavendish

> Road. Besides observing the physical condition of the seized firearms, their manufacturers, make and calibre or gauge, Mr. Press indicated that the AP 9, manufactured by AA Arms is very similar in appearance and function to a Tec 9, manufactured by Intratec. The AP 9 and Tec 9 barrels have a similarly menacing and distinctive look, very similar handgrips, and can function with high capacity magazines. Although manufactured to be semi-automatic, the AP 9 and the Tec 9 can be modified to be fully automatic. The AP 9 has a street value according to Mr. Press of $4500-$5500. Full automatic machine pistols are designed to kill people.

[10] For greater clarity and to assist the reader, I will attach the Information which lists the 11 offences charged jointly against the appellant, his father, and his stepmother as Appendix "A" to this decision. These are the storage and possession of firearms charges in contravention of ss. 86, 88, 92 and 95 of the **Criminal Code**. I will refer to those 11 offences as being contained in the "joint Information" or the "January 15, 2009 Information". In terms of the 11 charges in that joint Information, Judge Derrick acquitted the appellant on Counts #1, 2 and 3; and convicted him on Counts #4 through 11. She later stayed the convictions on Counts #4, 6, 9 and 10.

[11] I have also attached as Appendix "B" the Information which lists the 12 offences for which the appellant was solely charged. These charges relate to the weapons trafficking or possession for the purpose of trafficking offences pursuant to ss. 99 and 100 of the **Criminal Code**. I will refer to those 12 offences as being contained in the "sole Information" or the "April 29, 2009 Information". Having regard to that list of 12 charges, Judge Derrick convicted the appellant on Counts #1 through 8. She acquitted him on Counts #9 through 12. She entered a judicial stay of proceedings on Count #2. She found that the appellant's possession of the .45 calibre handgun on December 28 satisfied Count #1 of this sole Information.

[12] As will be apparent, the charges against Mr. Cater involve a variety of guns said to have been "stored", "possessed" or "trafficked in" by him on specific dates, or during a specified period of time. In the reasons that follow, I will provide further details of the firearms or the ammunition when I consider the charge or issue to which the particular firearm relates.

Issues

[13] The appellant challenges virtually every factual finding, conclusion or ruling of the trial judge. It would be pointless to address the substance of Mr. Cater's appeal on that basis. Instead of responding to the appellant's seemingly endless

list of criticisms point by point, I prefer to follow the convenient list of issues identified by Mr. O'Leary in his factum on behalf of the Crown. On questioning by the panel at the hearing, Ms. Cooper agreed that this list was accurate and complete. Besides the host of subjects identified in the Crown's list of issues I must also deal with the separate written decisions filed by the trial judge in which she disposed of the appellant's many pretrial and **Charter** motions. To provide structure and clarity to the discussion that follows, I will streamline the analysis by restating the issues and sub-issues as a series of key questions. In my reasons I will also link each of Judge Derrick's impugned decisions to the particular question to which it relates.

1. Are the verdicts with respect to the charges of possessing the firearms at 80 Cavendish Road unreasonable or not supported by the evidence?
2. Are the verdicts with respect to the charges of possessing firearms for the purpose of offering to transfer them under s. 100 of the **Criminal Code** unreasonable or not supported by the evidence?
3. Are the verdicts with respect to the charges of offering to transfer firearms under s. 99 of the **Criminal Code** unreasonable or not supported by the evidence?
4. Did the judge err in ruling that details of plea negotiations were privileged and should be removed from the appellant's October 21, 2011 **Charter** application?
5. Did the judge err in finding that there had not been an unreasonable delay pursuant to s. 11(b) of the **Charter**?
6. Did the judge err in refusing to order disclosure that had been requested by the appellant?
7. Did the judge err in refusing to permit the appellant to cross-examine the affiant of the affidavit filed in support of the authorization to intercept private communications?
8. Did the judge err in finding that the interception of the appellant's private communications was not an unreasonable search pursuant to s. 8 of the **Charter**?
9. Did the judge err by summarily dismissing the appellant's abuse of process argument which supported his application for a stay of proceedings?

10. Did the judge err in finding that the search of the appellant's cell phone was not unreasonable under s. 8 and that the information found during the search would not be excluded under s. 24(2) of the **Charter**?

11. Did the judge err by finding that the intercepts were not inadmissible hearsay?

12. Did the judge err by not permitting the appellant's counsel to question his high school teacher concerning his "potential" after ruling that such a line of questioning was irrelevant?

[14] I am in substantial agreement with the thorough and persuasive arguments advanced by the Crown in its factum. Accordingly, I will dispose of most of the appellant's complaints by endorsing and repeating much of the Crown's position which I find to be correct in law and fully supported in the record.

[15] Before addressing the list of questions as I have framed them, let me state at the outset that all of Judge Derrick's decisions which form the basis of Mr. Cater's appeal against conviction stand as a model of scholarship and clarity. Each reflects a prodigious amount of work, a keen appreciation of the law, a meticulous attention to detail, and an admirable threshold for patience and reserve. I agree with the Crown that Judge Derrick should be commended for the manner in which she presided and conducted herself during the numerous pre-trial conferences, *voir dire* hearings, and the trial itself over the course of these protracted, taxing, and difficult proceedings.

Standard of Review

[16] Many of the questions I have framed attract a distinct standard of review and so I propose to identify the proper standard as I consider each of the issues in the analysis that follows.

Analysis

[17] Before addressing the list of rhetorical questions I have posed, I wish to dispense with two matters that permeate practically all of the submissions made by the appellant's counsel on appeal (she having also served as Mr. Cater's lawyer at trial).

[18] The first point relates to a lack of clarity or ambivalence as to the appellant's main ground of appeal and the standard of review to be applied to it. As noted earlier, counsel has attacked practically every factual finding, ruling and conclusion of the trial judge on the basis that it was "unreasonable" and therefore the verdicts of guilty must themselves be unreasonable. As part and parcel of that argument, Mr. Cater's counsel insisted that the judge erred "in law and in fact in making her findings or in drawing her inferences". When pressed at the hearing, Ms. Cooper at times seemed to resile from that position and concede that her principal basis of appeal was that the judge had reached a verdict that was unreasonable and not supported by the evidence. Yet, immediately after making such a "concession", counsel would back away from that position and return to the argument that the verdicts could not stand because they were both unreasonable and because the trial judge had "erred in law by not applying the proper standard" when finding the facts, or drawing inferences from those facts.

[19] I reject at the outset any argument that these convictions ought to be overturned because Judge Derrick "erred in law" by "failing to properly apply the correct legal standard" in arriving at those verdicts. There is absolutely no merit to such a submission. In my respectful opinion, the trial judge's decision reflects a sound appreciation and application of the law to the evidence and the issues before her.

[20] Accordingly, I will confine my analysis to the appellant's principal complaint that the verdicts are unreasonable or are not supported by the evidence.

[21] The second point relates to how Ms. Cooper has chosen to characterize her client and his conduct throughout these proceedings. It is to be remembered that Mr. Cater elected not to testify. His upbringing, his personality, and his character were never verified by admissible evidence – suitably tested in the crucible of cross-examination – but were solely presented through the words of his lawyer. Throughout the trial and the appeal, Mr. Cater has tried to portray himself as an innocent 18-year-old high school student who did nothing more than speak to other people on the telephone. He says he was only convicted and sentenced to prison because of where he lived and who his father happened to be. Judge Derrick was having none of that. Nor would I.

[22] Respectfully, such a characterization is illusory and frustrates any meaningful consideration of the many serious issues on appeal. It ignores virtually every factual finding, every inference, every ruling and every decision of the trial judge. It fails to acknowledge the very strong case mounted by the Crown. It

urges this Court to adopt an interpretation of the evidence which is fanciful and unrealistic. In her sentencing decision, Judge Derrick found that the appellant was a "player" in a prominent Halifax gang and that he could be counted on to supply firepower and ammunition to his many criminal cohorts who were involved in this city's drug trade. Her rejection of Mr. Cater's repeated attempts to self-identify as an "innocent kid from Spryfield" is made explicitly clear in Judge Derrick's sentencing decision, 2012 NSPC 38, where she said in part:

> [20] Kyle Cater was centrally involved in all the offences for which he has been convicted. He was well aware of how illegal his activities were. The evidence at trial established how careful he was about having any firearms in his actual possession. ...
>
> [22] The evidence also revealed that Mr. Cater was a gun trafficker. . . . In relation to all the offences, Mr. Cater was not a naïve school boy merely caught up in the criminal conduct of others. He was a controlling force, a "player", to borrow a term he used in one of the intercepts.
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> . . .
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> [25] There is not much in the way of mitigating factors in this case. Mr. Cater is young, just 18 at the time of these offences, and only 21 now. ...
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> [30] ...letters have also been filed for my consideration. Mr. Cater is consistently described as kind, respectful, polite, honest, dependable, and selfless. ...
>
> [31] The young man depicted in the support letters, which I want to say I have no reason to question, is not the young man I was introduced to through the evidence in this case. At no time has Mr. Cater expressed any responsibility for what was starkly revealed in the intercepts. He continued to deny responsibility in his pre-sentence report interview, describing himself as "just a kid from Spryfield." Kyle Cater, the Boy Scout, a persona also reflected in Ms. Cooper's submissions, does not square with the intercepts. What, for example, does Mr. Cater suppose I should make of his statement on November 21, 2008 (Intercept 3, session #119) where he tells a friend looking for "a clip", that he's not to worry because he can "get those myself... I got people that live out Edmonton and they send them down like it's nothing, cuz."? What does he think the people who wrote the support letters would say if they listened to the intercepts? They might well say that a person conducting themselves as Mr. Cater did is not a person they would want living in their neighbourhood. The person they express such genuine fondness and respect for is not in evidence in the intercepts.
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> ...
>
> [42] Mr. Cater will have noticed that certain individuals with whom he was involved during the period of the Part VI interceptions are now serving lengthy penitentiary sentences because of their use of handguns. (*R. v. Jeremy LeBlanc*,

> *[2010] N.S.J. No. 490 (S.C.)*; *R. v. Aaron Marriott*, *[2011] N.S.J. No. 602 (S.C.)* Another target of the Part VI investigation is also doing a long prison sentence for multiple firearms offences. (*R. v. Joseph Chan, [2011] N.S.J. No. 711 (S.C.))*
>
> [43] Anyone familiar with the LeBlanc, Marriott, and Chan cases will know their crimes involved intentionally shooting at their victims. Mr. Cater is not charged with ever using any of the guns referred to in the Informations nor has he been charged in relation to any of the shootings that have occurred in the Halifax Regional Municipality. But what the intercepts make clear is that he was a source for guns, valued as a potential supplier by individuals looking for working guns, guns that offered his confederates the opportunity to employ deadly force. My point is this: Mr. Cater was not possessing and trafficking guns so that friends and associates could engage in recreational target practice at a local gun club. He fitted into a network of criminal associates whose interest in firearms included using them for violent purposes.

[23] These are the findings of the trial judge, based upon the evidence, and expressed in clear, strong and unequivocal language. That is the evidential context within which my analysis of the issues on appeal will be conducted.

[24] I will incorporate, as part of this decision, the list set out by the Crown in its factum that conveniently itemizes the important findings of fact made by the trial judge, as well as the inferences she drew from those facts which explain her conclusions and anchor her verdicts. The bracketed paragraph references track Judge Derrick's reported decision ("the conviction decision") 2012 NSPC 18.

- The appellant was having guarded telephone conversations using coded language. (para. 88)
- The only reasonable inference to be drawn from the intercepts is that the speakers are talking about guns. (para. 101)
- The only reasonable inference to be made is that the appellant is viewed as someone who can supply a firearm. He is stashing his guns elsewhere, reducing the risk of having them found in his possession. (para. 112)
- The intercepts reveal the commercial nature of the appellant's activities. During the material time, the appellant was engaged in the illegal gun trade. (paras. 187-189)
- Some of the intercepted conversations refer to specific firearms. They are the .410 shotgun, the little Derringer, the .308 Cal rifle, and the .45 calibre gun. (paras. 137-142)

- The December 7, 2008 intercepted calls between Paul Cater, Torina Lewis and the appellant make several references to "Tracey". The only reasonable inference is that Tracey is a gun. (para. 159)
- There were a number of intercepts on January 15, 2009. The appellant and Torina Lewis refer to the "Tec" at 80 Cavendish Road. It was similar in appearance to a Tec 9. The gun that was seized was actually an AP-9 mm pistol. It was obvious that the appellant knew there was a prohibited firearm, the AP-9, at 80 Cavendish Road. (paras. 162-166)
- The "Tracey" calls and the January 15th calls indicate that the appellant had much more than merely a passive or quiescent knowledge of the firearms and ammunition at 80 Cavendish Road. (para. 168)
- There were a number of indicators the appellant had a measure of control over the firearms at 80 Cavendish Road. (para. 171)
- The Crown had established beyond a reasonable doubt that the appellant was in possession of the firearms, magazines, and ammunition at 80 Cavendish Road, both constructively and jointly. (para. 178)
- The appellant had possession, likely constructive possession, of the .410 gauge shotgun. The appellant offered to transfer it in a December 2, 2008 conversation. (paras. 193-194)
- The appellant had possession, likely constructive possession, of a Derringer pistol. The appellant offered to transfer it in a December 4, 2008 conversation. (para. 195)
- The appellant had possession, constructive possession, of a .308 calibre rifle. The appellant offered to transfer it in a December 4, 2008 conversation. (para. 196)
- The appellant obtained actual possession of a .45 calibre handgun on December 28, 2008. He gained possession of the .45 calibre handgun for the purpose of transferring it. (para. 197)

[25] The numerous charges against the appellant all arose from the police intercepts of telephone communications. Having thoroughly reviewed the record, I agree with the trial judge's assessment that the intercepts provided clear and convincing circumstantial evidence that Mr. Cater possessed the firearms and

ammunition in question. The intercepts also provided direct evidence that the appellant trafficked in firearms by offering to transfer them.

#1 Are the verdicts with respect to the charges of possessing the firearms at 80 Cavendish Road unreasonable or not supported by the evidence?

[26] This question concerns the possession and storage charges relating to the weapons seized by the police when they raided the appellant's father's home at 80 Cavendish Road. The guns seized were: an AA Arms model AP 9 handgun; a sawed off Cooey 84 shotgun; a Lakefield Mark II rifle; together with ammunition found in two overcapacity magazines.

[27] On the facts of this case the operative parts of the provisions relating to these offences are:

> **86.**(1) **Careless use of firearm, etc.** – Every person commits an offence who, without lawful excuse .... stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition ... in a careless manner ...
>
> **(3) Punishment** – Every person who commits an offence under subsection (1) ...
>
> (a) is guilty of an indictable offence and liable to imprisonment;
>
> (i) in the case of the first offence, for a term not exceeding two years,
>
> (ii) in the case of a second or subsequent offence, for a term not exceeding five years; ...
>
> …
>
> **88. Possession of weapon for dangerous purpose –** (1) Every person commits an offence who carries or possesses a weapon, ... or any ammunition ... for a purpose dangerous to the public peace or for the purpose of committing an offence.
>
> **Punishment** (2) Every person who commits an offence under subsection (1)
>
> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; …
>
> …
>
> **92.**(1) **Possession of firearm knowing its possession is unauthorized** – …every person commits an offence who possesses a firearm knowing that the person is not the holder of
>
> (a) a licence…

> (b) in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.
>
> (2) **Possession of prohibited weapon, device or ammunition knowing its possession is unauthorized** – …every person commits an offence who possesses a prohibited weapon, a restricted weapon, a prohibited device . . . or any prohibited ammunition knowing that the person is not the holder of a licence under which the person may possess it.
>
> (3) **Punishment** – Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable
>
> (a) in the case of a first offence, to imprisonment for a term not exceeding ten years; …
>
> …
>
> **95.**(1) **Possession of prohibited or restricted firearm with ammunition** – **…**every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm . . . together with readily accessible ammunition…
>
> (2) **Punishment** – Every person who commits an offence under subsection (1)
>
> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of
>
> (i) in the case of a first offence, three years, …

[28] Judge Derrick acquitted the appellant on all charges under s. 86 (Counts #1-3 of the joint Information). She convicted him of unlawful possession of the sawed-off Cooey shotgun, the Lakefield Mark II rifle, and the AA Arms model AP 9 handgun, contrary to s. 88(1) of the **Criminal Code** (Counts #4, 5 and 6 of the joint Information). She also found him guilty of unlawful possession of a loaded prohibited firearm, the sawed-off shotgun, contrary to s. 95(1) of the **Criminal Code** (Count #7) and of unlawful possession of an unloaded prohibited firearm, the AA Arms AP 9 handgun, together with readily accessible ammunition capable of being discharged in the firearm, contrary to s. 95(1) of the **Criminal Code** (amended Count #8). The trial judge convicted the appellant of unlawfully possessing the sawed-off shotgun and the AP 9 handgun, knowing their possession was unauthorized, contrary to s. 92(1) of the **Criminal Code** (Counts #9 & 10). She found him guilty of unlawfully possessing a prohibited device (two overcapacity magazines), contrary to s. 92(2) of the **Criminal Code** (Count #11). In light of his convictions on Counts #7 and 8, the trial judge stayed the convictions on Counts #4 and 6.

[29] The appellant says the convictions should be set aside and acquittals entered because the verdicts are unreasonable or are not supported by the evidence.

[30] In the context of such a complaint, the standard of review expressed by this Court in **R. v. Izzard**, 2013 NSCA 88 at ¶39 applies:

> [39] To test if a verdict is unreasonable or cannot be supported by the evidence, an appellate court must re-examine, and to some extent, re-weigh the evidence, and consider its effect. The question to be answered is: whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. An appellate court may also find a verdict unreasonable if a trial judge has drawn an inference or made a finding of fact essential to the verdict that is plainly contradicted by the evidence relied upon by the judge in support of the inference or finding; or is shown to be incompatible with evidence that is not contradicted or rejected by the trial judge (*R. v R.P.*, 2012 SCC 22 at para. 9).

[31] So too does this Court's direction in **R. v. Henderson**, 2012 NSCA 53 at ¶17-18:

> [17] The standard of appellate review on a question of law is correctness. Factual issues are reviewed for any palpable and overriding error. A trial judge's application of the law to the facts is reviewed as a question of fact unless an extricable error of law is identified. See for example, **R. v. C.J.**, 2011 NSCA 77.
>
> [18] The standard of review of verdicts based on circumstantial evidence is whether a properly instructed jury, acting judicially, could have reasonably concluded that the guilt of the accused is the only rational conclusion to be reached from the whole of the evidence. Within such an inquiry, the standard of review for error is correctness. The standard of review of possible inferences that may be drawn from the evidence is palpable and overriding error. See, for example, **R. v. Shea**, 2011 NSCA 107.

[32] As explained earlier, the intercepted calls led to the host of charges against the appellant. Expert evidence was led at trial as to the meaning of certain code words used by the conversants, as well as the voice identification of the individuals whose conversations were being intercepted and later transcribed. Besides that expert evidence, Judge Derrick also listened carefully and repeatedly to the intercepts herself, prompting her to confirm in her decision:

> [86] I am left with no doubt as to who was speaking on these intercepted calls. After listening to the intercepts, I can identify the voices of Kyle Cater, Paul Cater, and Torina Lewis which I find to be readily recognizable. I accept the opinions of Det/Csts. Pepler and Mansvelt on the identity of all the voices on the

> intercepts, although I have to say that self-identification, identification by others, and context permitted me to draw my own firm conclusions ...

[33] The appellant stresses the fact that his father Paul Cater pleaded guilty to possessing the firearms which were found inside his home and that therefore Judge Derrick ought to have found that his father possessed them and not the appellant. I reject that submission. It was not necessary for the appellant to have had exclusive control over the firearms at 80 Cavendish Road in order to possess them under s. 4(3) of the **Criminal Code**. A measure of control over objects by one individual does not exclude the control required to establish possession of those same objects on the part of another individual. See **R. v. Bremner**, 2007 NSCA 114.

[34] Judge Derrick instructed herself properly as to the law of constructive possession. Paul Cater's guilty pleas did not preclude the Crown from proving that his son knew the location of the firearms in question and had some measure of control over them.

[35] There was ample evidence to support Judge Derrick's finding that the appellant had joint and constructive possession of the AP 9. At ¶177 of her reasons the judge said:

> [177] I also draw the inference that Kyle had exercised control over his father's possession of the nine millimeter on a previous occasion. On December 4, Shawn Shea was looking for "the ninja." Kyle follows up the request by talking to Paul. Paul can't produce the gun because he needs more notice to get it back into his possession. Kyle issues a command: "Well get it and then keep it around." I find that is a reference to the nine millimeter, called "Tracey" by Paul and Torina, that is subsequently seized by police on January 15.

[36] In her reasons, Judge Derrick outlined the evidence which satisfied her as to the appellant's knowledge and measures of control over this firearm. She summarizes the series of intercepts from December 7, 2008 capturing the frantic exchanges among the appellant, his father, and stepmother concerning the AP 9 valued between $4500-$5500 which had "gone missing". She explains her finding that the appellant was well aware of the hiding places for firearms and ammunition at his father's residence.

[37] In my view, the judge's conclusion that the appellant had knowledge and some measure of control over the AP 9 was virtually irresistible. While the evidence concerning the appellant's joint or constructive possession over the Lakefield rifle, the Cooey sawed-off shotgun, and the magazine clips was perhaps not as clearly defined as it was for the AP 9, the only rational conclusion having

regard to all of the evidence was that the appellant also had the requisite knowledge and measure of control over these other items. This becomes clear when one considers Judge Derrick's reasons as a whole.

[38] For example, as noted earlier, she found as a fact that the appellant was aware of the hiding places at his father's home. The magazine for the AP 9 was found on a shelf behind a pair of ceramic hands adorned with roses on the wrists. The appellant had referred to that location in a conversation with his father on December 28, 2008. He mentioned it just after his father had asked, using code, what the appellant "Did with that". As well, the Lakefield rifle and the Cooey sawed-off shotgun were found in plain view. They were not hidden inside the house. Judge Derrick found as a fact from photographic as well as other evidence that the appellant was "obviously very much at home even though he was not a resident" at 80 Cavendish Road.

[39] In addition, at ¶167 of her reasons, the judge stated:

> [167] Kyle's knowledge of the firearms at 80 Cavendish is also confirmed by his exchange with Torina on January 15 when he calls her back after she has told him about the police raid. (Intercept 55, session #4058) Torina in a clear reference to Paul, tells Kyle: "... and the thing about it, I told him the other day. Get rid of everything 'cause I got a feelin." Kyle observes: "I said that too." This exchange with Torina demonstrates Kyle's knowledge of the guns at 80 Cavendish. He obviously also tried to exercise a measure of control, telling his father to get rid of what was there, to no avail. That Paul Cater apparently did not re-locate the guns at Torina's and Kyle's prompting does not offset the evidence that indicates a measure of control by Kyle over these firearms. I will return to this issue shortly.

[40] From these and the other facts found and inferred by Judge Derrick, it was undoubtedly reasonable and logical for her to conclude, as she did, that the appellant was in possession of the firearms, magazine and ammunition at 80 Cavendish Road, both constructively and jointly.

[41] I am satisfied these verdicts were reasonable and fully supported by the evidence.

#2 Are the verdicts with respect to the charges of possessing firearms for the purpose of offering to transfer them under s. 100 of the Criminal Code unreasonable or not supported by the evidence?

[42] These are the firearms the appellant is alleged to have possessed for the purpose of trafficking (by offering to transfer) them contrary to s. 100(2) of the

Criminal Code. The weapons were: a .410 gauge shotgun; a Derringer pistol; a .308 cal. rifle; a .45 cal. handgun; and a Smith and Wesson.

[43] The operative provisions relating to these charges state:

> **100. (1) Possession for purpose of weapons trafficking** - Every person commits an offence who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition . . . for the purpose of
>
> ...
>
> *(b)* offering to transfer it,
>
> knowing that the person is not authorized to transfer it...
>
> **(2) Punishment – firearm** - Every person who commits an offence under subsection (1) where the object in question is a firearm, a prohibited device, any ammunition or any prohibited ammunition is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of
>
> *(a)* in the case of a first offence, three years; and
>
> *(b)* in the case of a second or subsequent offence, five years. ... [Underlining mine]

[44] In order to obtain convictions on the s. 100(2)(b) charges, the Crown was required to prove that the appellant possessed objects, that the objects were firearms as defined in s. 2 of the **Criminal Code**, that he possessed them for the purpose of offering to transfer them, and that he knew his offer was unauthorized.

[45] Here the appellant challenges the convictions on two main fronts. First he says the Crown was "under a legal obligation" to produce evidence including "testing the firearms" in order to prove beyond a reasonable doubt that each of the firearms was a fully functioning gun. Second, he says that the intercepts "prove nothing" other than that Kyle Cater was (at worst) trying to "facilitate things", that any discussions were only "preliminary", that he "never came through" and that there was never a definitive offer, let alone a consummated sale. I reject all of the appellant's arguments.

[46] It cannot be seriously suggested that it was incumbent upon the Crown to produce "testing scores" or "certificates" to "prove" that these guns could be fired, in order to convict the appellant. The Crown is under no such obligation (or limitations) in marshalling its evidence and presenting its case. It is up to the trier

of fact, based on the totality of the evidence, to determine if a gun is a firearm, as defined by s. 2 of the **Criminal Code**. The circumstances surrounding the transactions, the words used, and the conduct of the accused are obviously highly relevant. A judge is entitled to draw the inference that a gun is operable, and thus within the definition of "firearm", provided sufficient evidence is presented to permit such a conclusion. Obviously, the conclusion must be based on evidence and not speculation or conjecture. See for example **R. v. Wills**, 2014 ONCA 178 and **R. v. Polley**, 2014 NSCA 71.

[47] I agree with Mr. O'Leary in his submissions on behalf of the Crown that people do not use code to describe toy guns, or replicas. Neither do they spend their time searching for safe hiding places to "stash" guns that cannot be fired. The appellant and his cohorts were not bartering over fine wine, chocolates, flowers or tickets to the opera. Based on any reasonable interpretation of the intercepts, the appellant could only have been talking about fully functioning firearms.

[48] I am perfectly satisfied there was sufficient evidence offered in this case to allow Judge Derrick to infer that the guns in question were operable firearms and permit her to say as she did at ¶204 of her reasons:

> [204] The photographs do not decide the issue for me, the intercepts do. The intercepted communications provide me with all the evidence I need to be satisfied beyond a reasonable doubt that the guns being discussed in the intercepts, including the .410 gauge shotgun, the Derringer pistol, the .308 calibre rifle, the .45 calibre handgun, and the Smith and Wesson, were "firearms" under the *Criminal Code* definition. Kyle Cater and his associates all talked about the guns in a manner that makes it clear these were operable, functioning firearms. The use of coded language, concerns about police detection, stashing, references to large amounts of money, and enthusiasm for something that is "fresh", "clean", and "beautiful", lead me to the irresistible conclusion that it was firearms that were being discussed. It is a ridiculous proposition that D.S, "C.", D.M., or L.S. were looking to Kyle Cater for inoperable, broken or facsimile weapons. They wanted something that would go "bop-bop" or not be "loud" or clothe them with protection when they were "naked." They knew, as did his other associates, that he dealt in real, working guns. I have no hesitation in finding the Crown has proven beyond a reasonable doubt that the guns referred to in the intercepted conversations were "firearms" as defined in the *Criminal Code*.

[49] Having found that the .410 gauge shotgun, the Derringer, the .308 calibre rifle, the 45 calibre handgun, and the Smith and Wesson were all firearms as defined in the **Criminal Code**, the judge then had to decide whether the appellant possessed them, and if so, for what purpose.

[50] The intercepts provided a strong evidential basis to support the judge's conclusion that there was a genuine offer to transfer the .410 gauge shotgun; the Derringer, and the .308 calibre rifle. And, of course, finding that there had been a genuine offer with respect to those firearms was certainly relevant to whether the appellant possessed those firearms, and for what reason. Clearly, based on the intercepts, the appellant had knowledge of them. The intercepts also demonstrated that he had some measure of control over them. Besides these important facts we also have the judge's earlier findings that the appellant was risk adverse; was well aware of the police presence in his neighbourhood; that he stashed guns and ammunition in safe places to avoid having them in his personal possession if ever stopped by the police; and that the appellant was seen to be a "go to" guy, someone who could supply a firearm, when asked. Given those findings, it was reasonable for the judge to conclude that the appellant, during the intercepts, was demonstrating power and authority over these firearms and was consenting to the potential buyers acquiring the specific firearms as the intended and direct result of his offer.

[51] Mr. Cater's knowledge, power and authority was not in any way diminished because these firearms were likely stashed outside of his physical possession. The judge found that he had constructive possession of these firearms and that the genuine offers he made to transfer the .410 gauge shotgun, the Derringer, and the .308 calibre rifle established his purpose in possessing these guns. The judge's careful scrutiny of the evidence and its conformity to the dates particularized in the counts is reflected in her finding that there was no offer to transfer the .45 calibre handgun in early December. That only happened later. As she observed at ¶197-98 of her decision:

> [197] Kyle Cater is charged that he had possession on or about December 7 of a .45 calibre handgun. I infer from the intercepted communications with I.E. (Intercepts 23 and 24) that he and I.E. discussed a .45 calibre handgun on December 7, 2008. I find Kyle did not have possession of the handgun until December 28 when he rendezvoused with I.E., a rendezvous captured by the intercepts (Intercepts 41-46) and observed by the police surveillance team. On December 28 I find that Kyle Cater had actual possession of the .45 calibre handgun for the purpose of offering to transfer it, in other words, his purpose in possessing the gun conforms to the *Criminal Code* definition of "transfer." It was a firearms trafficking purpose.
>
> [198] As the Crown conceded in final submissions, there is no evidence that Kyle offered to transfer the .45 calibre handgun. The only evidence is that he was interested in acquiring it and met with I.E. to examine the merchandise.

[52] As the evidence reveals, the appellant and I.E. had agreed upon a price, $2,500, for the .45 calibre handgun. The appellant went to meet I.E. but once at the rendezvous site (which was observed by a police surveillance team) the appellant kept "jumpin' in and out of cars" presumably to avoid police detection. In these circumstances, the only rational inference was the one drawn by Judge Derrick, that the appellant obtained possession of the .45 calibre handgun on December 28, 2008, fully intending to complete the transaction he had negotiated and given the commercial nature of his illegal firearms operation, he had obtained the gun on that date for the purpose of transferring it.

[53] I am satisfied these verdicts on charges brought pursuant to s. 100 of the **Criminal Code** were reasonable and fully supported by the evidence.

#3 Are the verdicts with respect to the charges of offering to transfer firearms under s. 99 of the Criminal Code unreasonable or not supported by the evidence?

[54] These trafficking charges relate to the same five firearms as enumerated in ¶42, *supra*, but this time they were said to have been weapons which the appellant offered to transfer contrary to s. 99(2) of the **Criminal Code**.

[55] The operative provisions state:

> **99. (1) Weapons trafficking** - Every person commits an offence who
>
> *(a)* ...transfers, whether or not for consideration, or
>
> *(b)* offers to do anything referred to in paragraph (*a*) in respect of
>
> a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition . . . knowing that the person is not authorized to do so ...
>
> **(2) Punishment – firearm** - Every person who commits an offence under subsection (1) where the object in question is a firearm, a prohibited device, any ammunition . . . is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of
>
> *(a)* in the case of a first offence, three years; and
>
> *(b)* in the case of a second or subsequent offence, five years. [Underlining mine]

[56] Here again the appellant says the verdicts cannot be supported on the record.

[57] I disagree. The intercepts do provide strong evidence of the offers. The appellant simply doesn't like the trial judge's interpretation of those conversations. That of course is not the test. I see nothing wrong in the judge's analysis or conclusions.

[58] At trial and on appeal, Mr. Cater's counsel pressed the position that he could not be convicted because the Crown had failed to prove the existence of any firearm(s); or that he had ever possessed such prohibited weapons; or that the objects of the intercepted telephone communications were functioning, operable firearms; or that the conversations amounted to a genuine offer; or that he was ever in a position to conclude the transaction by effecting the transfer. The appellant insists that all he ever did was "talk on the telephone" and that his conversations were little more than exaggerated boasting and puffery. As part of that submission, the appellant said cases such as **R. v. Ralph**, 2011 ONSC 3558, affirmed on other grounds, 2014 ONCA 3, leave to appeal to SCC requested [2014] SCCA No. 262; and **R. v. Farhat**, 2011 ONSC 6494, which were cited by the Crown in its books of authorities, had been "wrongly decided" because the trial judges in those cases had "erred" by adopting and applying the drug "offer" jurisprudence to the weapons "offer" scenario. We were urged not to apply those precedents in this case.

[59] For its part, the Crown asks that we follow the approach taken in these two Ontario trial court decisions. While I would agree that the application of drug trafficking "by offer" jurisprudence to cases involving weapons trafficking (by offer to transfer) has some attraction and may appear sensible at first glance, I need not decide the question for the purposes of this appeal. Unlike the accused in those cases, Mr. Cater was found to have been in possession of multiple prohibited weapons which he offered to sell knowing full well what he was selling, as did the recipient of the offer. The appellant had the firearms. He hid them. He used code to describe them. They were fully operational. His words showed a clear intent to sell them and went well beyond exaggerated boasting. He was shown to be a reliable gun trafficker with ties to a criminal organization. Both he and his buyers were anxious to complete their transactions as quickly as possible. Their conversations were conclusive. No further steps were needed to advance the offer. On the evidence before her, Judge Derrick was satisfied that both the act (by conduct in making the offer) and the requisite intent (to have that offer received as being serious and genuine) were established beyond a reasonable doubt, based on the context of the intercepted communications and all the other surrounding circumstances, as she found them. I would add, of course, that Judge Derrick did

not rely upon **Ralph** or **Farhat** in convicting the appellant and did not refer to either case in her reasons.

[60] Trafficking by offer is a conduct offence. The crime as defined by Parliament in s. 99 does not require that any consequence flow from the prohibited conduct. The crime is made out upon proof that the accused offered to traffic in a firearm and in doing so intended that his offer be taken to be a genuine offer by the recipient. Whether the offeror actually had the item in hand so as to be able to complete the transfer is irrelevant. See for example, **R. v. Murdock**, [2003] O.J. No. 2470 (C.A.), at ¶14; **R. v. Crain**, 2012 SKCA 8, at ¶22-24.

[61] Before leaving this point, I note the irony in the appellant's assertion that **Farhat** and **Ralph** had been "wrongly decided" as contrasted with his insistence that the "facts and the outcome" in **Farhat** "support his acquittal" because – so his counsel argued – Mr. Cater (like Mr. Farhat) was "incapable of carrying out his offer" and had engaged in nothing more than idle "boasting and exaggerated puffing". I reject that submission. A cursory review of the facts in **Farhat** shows that there is nothing in the circumstances of that case which would assist the appellant.

[62] There, undercover police officers went to a barber shop where the accused worked and had a conversation with him about guns. The accused said he could sell the officer an illegal handgun. When the officer attempted to follow up, the accused referred him to his employer, later telling the officer that he could not help him. In acquitting the accused on a charge of offering to transfer contrary to s. 99(2) of the **Criminal Code**, Justice C.D.A. McKinnon said:

> **29** No evidence connecting the accused to firearms was found in either his parents' home, his apartment in Gatineau, his computer or his cell phone.
>
> ...
>
> **42** Mr. Farhat's conduct must be judged contextually in order to determine whether he in fact did make an offer that was meant to be taken as genuine. I find as a fact that the conversation with Corporal Miller occurred in circumstances that were influenced by the James Bond movie that was being played while Corporal Miller was getting his haircut. The conversation occurred in a "hip-hop" environment where boasting and exaggeration are commonplace. The conversation was inconclusive because Mr. Farhat was required to take further steps to advance the offer. At no time did Mr. Farhat seek out any identification or contact information from the undercover officers. It was the other way around. Detective Sergeant Griffiths asked for his contact number so that he could purchase "free to air" signals for a Bell satellite dish. Even then, he was provided

> with an incorrect number. Following the initial conversation it was Corporal Miller who continually attempted to contact Mr. Farhat. Mr. Farhat was brushing him off, and ultimately, Mr. Farhat told him that there was a misunderstanding and apologized because he could not help Corporal Miller.
>
> **43** On these facts, I find that Mr. Farhat had no genuine intent to offer to transfer a firearm to Corporal Miller. I would conclude that the initial conversation would not give rise to a belief by Corporal Miller that the offer was genuine, as evidenced by his constant attempts to re-initiate contact with Mr. Farhat. Mr. Farhat's lack of response would have suggested to Corporal Miller that no genuine offer had been made.
>
> **44** In these circumstances, the most that can be said is Mr. Farhat was "puffing" and personally incapable of carrying out his offer. ...
>
> **45** Given these findings, the Crown has failed to satisfy me beyond a reasonable doubt that the accused intended that his offer be taken as genuine, and he is acquitted of the charge. [Underlining mine]

[63] Such findings have no application whatsoever to the circumstances of Mr. Cater's case where Judge Derrick was satisfied that the appellant was an experienced and committed gun trafficker who had strong ties to a criminal organization, knew exactly what he was selling, and had the obvious authority and capacity to complete the transaction.

[64] Returning to the facts in this case, Judge Derrick convicted the appellant of offering to transfer three different firearms: a .410 gauge shotgun; a Derringer handgun; and a .308 calibre rifle (Counts #4, #6 and #8 respectively as contained in the April 29, 2009 Information). Each conviction is fully supported by the evidence.

[65] The December 2, 2008 intercept provided ample proof of the offer to transfer the .410 gauge shotgun.

[66] The December 4, 2008 intercept provided ample proof of the offer to transfer the Derringer.

[67] Another December 4, 2008 intercept provided ample proof of the offer to transfer the .308 calibre rifle.

[68] In her reasons, Judge Derrick rejected the appellant's reliance upon **R. v. Sinclair**, 2006 ABQB 438, that being the second trial heard by Bielby, J. (as she then was) and its various antecedents (e.g., Sinclair's first acquittal November 4, 2004, Docket No. 021341474Q; and the decision of the Alberta Court of Appeal

allowing the Crown's appeal and directing a new trial 2005 ABCA 443). Judge Derrick, found that those decisions had no application to this case. I agree.

[69] In **Sinclair**, during an undercover police operation, an officer purchased four de-activated handguns from the accused, a gun shop employee. All four of the guns were inoperable at the time of sale, although the missing firing pins needed to make the guns operational, along with other work, were supplied for two of them. Each of the guns was subsequently made operational by an RCMP firearms expert using tools, equipment and replacement parts from the RCMP firearms laboratory and the extensive RCMP firearms collection in Edmonton. Thus, the question in **Sinclair** was what was required of the Crown in order to secure a conviction under s. 99(1)(a) in circumstances where, at the time of the transaction, the firearms were inoperable. In the retrial, Bielby, J. (as she then was) citing the Supreme Court of Canada's decision in **R. v. Hasselwander**, [1993] 2 S.C.R. 398, and her own Court of Appeal's decision in **Sinclair**, 2005 ABCA 443**,** explained in ¶47 of her decision:

> **47** Therefore, before an accused may be convicted of an offence under s. 99(1)(a) of the *Criminal Code* for transferring a firearm without authorization to do so where the firearm in question has been rendered un-operational the Crown must show that it was "capable of conversion to an operating weapon in a relatively short time period with relative ease". I will refer to this as "the required standard". Both those qualities, relatively short time and relative ease must be established to make out the required standard. [Underlining mine]

[70] None of this assists Mr. Cater. The firearms he was found to have possessed and trafficked were not "deactivated" nor "rendered un-operational". On the contrary, Judge Derrick upon the whole of the evidence was satisfied beyond a reasonable doubt that these guns were fully operational and were weapons that Mr. Cater intended to sell and his cohorts intended to buy.

[71] Neither does the Supreme Court's decision in **R. v. Grant**, 2009 SCC 32 assist the appellant. Obviously, on the facts of this case, Judge Derrick was well satisfied that Mr. Cater's actions were a great deal more than the "simple movement of a firearm from one place to another". His intercepted calls proved a genuine offer to transfer a lethal weapon – precisely the kind of transaction Parliament clearly meant to criminalize.

[72] To recap, context is always important. The judge was satisfied that the offers were genuine. The context of these offers was that the appellant was an active player in the illegal firearms business. People do not pack Derringers, automatic

assault pistols, or sawed-off shotguns for a weekend hunting trip. They are made to maim and kill people. Listening to these intercepts as she did, it was inconceivable to Judge Derrick that that the appellant was, as suggested by his lawyer, just playing games with his friends and engaged in nothing more than "innocent" banter or "typical boasting" by teenage boys.

[73] The trial judge rejected any such characterization. I think she was right to do so.

[74] In my opinion, these verdicts on charges brought pursuant to s. 99 of the **Criminal Code** were reasonable and fully supported by the evidence.

[75] In summary, the trial judge acquitted Mr. Cater on the three counts of careless storage relating to the firearms seized from 80 Cavendish Road, as she was not satisfied proof had been offered that he was responsible for how the guns were stored when they were found during the raid. As for the other possession and trafficking charges, the Crown presented a strong case. It was one that cried out for an explanation from the appellant. He chose not to testify. It is a well-established principle that, when considering the reasonableness of verdicts, an appellate court is entitled to treat an appellant's silence at trial as an indication that he could not provide an innocent explanation for his conduct. See for example, **R. v. Henderson, supra** at ¶38-40. In argument the appellant suggested a number of alternative interpretations of the intercepts, which he says makes the verdicts unreasonable. The trial judge rejected these alternative interpretations as being fanciful at best. So do I. Having re-examined and, to some extent, re-weighed the evidence, I am satisfied that there was a sound evidential basis to support all of the judge's findings of fact and the inferences she drew from those facts. Based on those facts and inferences, the convictions are perfectly reasonable and unassailable.

A Procedural Issue Relating to the Conviction for Offering to Transfer the .45 cal. handgun under the generic Count #1

[76] Before undertaking a review of Judge Derrick's interlocutory decisions, I wish to address a procedural matter which caused me some initial concern but, upon reflection, I find it to be unobjectionable because it did not prejudice Mr. Cater in his defence.

[77] In the discussion that follows it will be helpful to refer to Appendix B. As previously explained, the appellant was charged with possession of a .45 cal.

handgun for the purpose of offering to transfer it on or about December 7, 2008, contrary to s. 100(2) of the **Criminal Code** (Count #9). Judge Derrick acquitted Mr. Cater on that charge and instead convicted him of possession of a firearm for the purpose of offering to transfer it between November 18, 2008 and January 16, 2009 (Count #1). In my view, considering the circumstances of this case, there was nothing wrong with Judge Derrick's approach where she saw fit to acquit the appellant for having possessed the specified handgun for the purpose of transferring it on a single day in December (December 7 ~ Count #9), but convict him of possessing that handgun for such a purpose during the weeks particularized in the general charge (Count #1). While it might have been preferable for the trial judge to have communicated more explicitly her intention to address the offence related to this particular handgun in that way, it cannot be seriously suggested that Mr. Cater suffered any prejudice by the manner in which the judge chose to deal with it. I will explain.

[78] A thorough review of the transcript suggests to me that there were three different Crown "theories" presented at various points during the trial as to why Mr. Cater should be convicted on Count #1. Those theories were:

1. At the close of the Crown's case, the Crown's theory to secure a conviction on Count #1 appears to have rested on photographs found on Mr. Cater's cellphone which were taken in October 2008. The Crown proposed amending the Information to change the dates, but abandoned the idea after discovering that the amendment would result in the Crown alleging offences that took place when Mr. Cater was a youth as well as an adult.

2. Subsequently, during closing submissions, the Crown appears to change tack to allege that Count #1 of the sole Information actually referred to the guns found at 80 Cavendish Road. It subsequently abandoned this argument the following day (at p. 3153 of the Appeal Book) "in an effort to be as fair as [the Crown] can possibly be".

3. Finally, the Crown seems to indicate to the trial judge that she could use Count #1 if she found that any of the dates for the specific weapons trafficking offences were not proven. This is precisely what Judge Derrick did.

[79] The Crown provided notice at the start of the trial (p. 1169 of the Appeal Book) that it intended to request the judge to amend the sole Information to change

the beginning of the period to run from October 1, 2008 rather than November 18, 2008. The Crown subsequently sought an amendment to three different Counts (#1, 5 and 6) of the sole Information at the close of its case (at pp. 2443-45). The Crown states with reference to Count #1 (at p. 2445):

> …I would adopt the same representations I made on the other charges [Counts #5 and 6], Your Honour, most particularly in terms of the disclosure of the cell phone report and the metadata that's been referred to variously throughout. It's been well known to defence for some time that the Crown was alleging he was in possession of firearms that are pictured on his cell phone, from the Crown's perspective. And that forms the basis as well of the amendment application for count number 1. [Emphasis added]

[80] Therefore, it appears that when the Crown closed its case it sought to rely on the October 13, 2008 photographs on Mr. Cater's cellphone for a conviction on Count #1, which is why they then voiced the intention to amend the Information to run from October 1, 2008 rather than November 18, 2008. Judge Derrick asks the defence for its submissions on the proposed amendment and her comments suggest that this is how she interprets the Crown's position on this count (at p. 2447):

> **THE COURT**: Mr. Hartlen has said that the Crown is relying on the cell phone photographic evidence which is contained in Corporal Gallagher's report and the metadata in that report that accompanies those photographs that indicates dates when photographs were taken in this particular instance of October 2008. That's what I understand the Crown is referencing as the trial evidence underpinning this requested amendment. Am I right, Mr. Hartlen?
>
> **MR. HARTLEN**: Yes, Your Honour ….

[81] However, after a short recess, the Crown later abandons this sought-after amendment (at p. 2450) when it realized that an amendment to October 1, 2008 would "potentially create jurisdictional issues . . . that would go past Mr. Cater's date of birth [October 28, 1990] in terms of making the allegations span both youth allegations and adult allegations…".

[82] The Crown put forward its second theory once all the evidence had been presented. The Crown interrupts the defence's closing submissions to suggest (at p. 2954) that Count #1 in the sole Information actually refers to guns that Mr. Cater possessed at 80 Cavendish Road, which of course were the subject of the 11 charges in the joint Information. We see this exchange:

> **THE COURT**: I -- yes, I see. All right. Well, it would be fair to say I had not had the understanding that the Crown is seeking to prove that Kyle Cater's possession of the 80 Cavendish guns was anything other than a possession.
>
> **MR. HARTLEN**: It's the Crown's position that any gun that Mr. Cater possessed during the entire period which the charges are before the court, he possessed for the purpose of trafficking.
>
> **THE COURT**: Purpose of trafficking. Okay.
>
> **MR. HARTLEN**: The Crown's -- I'll be very clear, the Crown's position is that during the time, all time periods relevant to this proceeding, Mr. Cater was a gun trafficker.

[83] As a result, Judge Derrick again summarizes her understanding of the Crown's revised position (at pp. 2954-5):

> …in relation to the 80 Cavendish guns, I obviously have to determine if the Crown has proven beyond a reasonable doubt, first of all, whether Kyle Cater had possession of those guns, and if I were to determine that he did, then I would still have to determine whether the Crown's proven beyond a reasonable doubt that his possession of those guns was for the purpose of trafficking.

[84] At pp. 2955-8 and pp. 3005-6, Ms. Cooper suggests that if this is the Crown's position and Count #1 of the sole Information actually relates to the 80 Cavendish Road joint Information, this would be unfair because the Crown would be changing the position it had held throughout the case that these were two separate Informations.

[85] Judge Derrick was clearly concerned about Count #1. At the outset of the Crown's final submissions, she asks the Crown (at pp. 3033-4) the following question: "…with respect to the firearms trafficking information, and specifically counts 1 and 2, does the Crown have a factual sufficiency problem with respect to those two counts and, if not, why not; and if so, then what does the Crown say should be done about it?"

[86] Perhaps responding to Ms. Cooper's concerns, the Crown then recants from its second theory later in its closing submissions. It acknowledges (at p. 3153) "We're not going to be urging the court to find that the guns from 80 Cavendish are caught up in counts 1 and 2." Judge Derrick then asks (at p. 3154) "…what is the Crown going to ask me to consider doing with respect to counts 1 and 2?"

[87] It is at this point that the Crown proposes its third theory. The subsequent exchange between the Crown and Judge Derrick reveals that there were two bases upon which the Crown believed there was "still life" in Counts #1 and 2.

[88] The first related to the type of firearm. The second related to the time period. It is here that the Crown's position was solidified. Judge Derrick recognized that the Crown was saying: if you find the evidence lacking with respect to any of the other five weapons possession counts which all addressed a specified time period (since Counts #3, 5, 7, 9 and 11 all specified a particular date on which the offence took place), the general Count #1 provides another avenue for conviction because it is between two dates.

[89] As I see it, there are at least four reasons why it was open to Judge Derrick to acquit Mr. Cater of the specific possession for the purpose of trafficking charge and convict him instead under the generic charge.

[90] The first is that Count #1 in the sole Information was always before the Court. As a result, Mr. Cater and his counsel were well aware of his jeopardy on Count #1 from the outset. Indeed, as I have highlighted above, Mr. Cater's jeopardy on Count #1 was discussed at several different points throughout the trial. The wording of the count did not change. Even after the Crown agreed that it would not ask the Court to find that the guns from 80 Cavendish were "caught up in counts 1 and 2", it is obvious that the Crown never considered withdrawing Count #1 at any point.

[91] Even if Mr. Cater did not understand the exchange between the Crown and Judge Derrick regarding his jeopardy on Count #1 during the Crown's closing submissions (at pp. 3154-5), Ms. Cooper could have asked the Court or the Crown to clarify how there was still life in this count during her 45 minute-long submissions in reply to the Crown's closing arguments. But, she never raised the issue. While counsel for Mr. Cater strongly objected when the Crown said it might seek a conviction on Count #1 for the guns found at 80 Cavendish Road, once the Crown conceded that it was no longer relying on this theory, defence counsel made no objection to the fact that a conviction on Count #1 was still available. While the failure to object is not fatal to Mr. Cater raising the issue on appeal, this Court can nevertheless take it into account.

[92] Furthermore, regardless of whether Mr. Cater understood the exchange between the Crown and the trial judge, he certainly grasped the Crown's 'concession' that it was not relying on the firearms found at 80 Cavendish Road to

ground a conviction on Count #1. Fortified by this concession but aware that the Crown maintained that Count #1 still "had life", Mr. Cater should have deduced that he was only in danger of being convicted under Count #1 of possessing one of the five named firearms on the weapons trafficking charges. On the basis that Counts #3, 5, 7, 9 and 11 all related to possessing five specific firearms under s. 100(2) of the **Code**, defence counsel should have been aware that Mr. Cater could not be convicted on one of the specific counts as well as the general Count #1 for possessing the same firearm. In these circumstances, one of the charges would have to be stayed under the *Kienapple* principle that prohibits more than one criminal conviction for the same wrong: see **R. v. R. K.**, 2005 O.J. No. 2434 (Ont. C.A.), at ¶27-30. Thus, the only way that Mr. Cater could be convicted under Count #1 and not have that verdict 'Kienappled' would be if he were acquitted on at least one of Counts #3, 5, 7, 9 or 11. This is indeed what happened. Ultimately, there would be no distinction in law if Mr. Cater were convicted under Count #1 of a s. 100(2) offence with respect to the .45 cal. handgun or a s. 100(2) offence for the same gun under Count #9; the Crown must prove the same essential elements of the offence.

[93] Second, Mr. Cater never requested particulars. If he or his counsel were truly concerned that Count #1 of the sole (weapons trafficking) Information did not furnish him with sufficient information to know which "firearm" he was accused of possessing with the intention of trafficking, he could have made a request under s. 587(1)(g) of the **Criminal Code** to "further describ[e] … [the] thing" referred to in the Indictment. As the British Columbia Court of Appeal recognized in **R. v. McCune** (1998), 131 C.C.C. (3d) 152 (B.C.C.A.) at ¶37, "…the Crown's theory of a case is different from a particularized indictment and it is only the indictment which defines the factual transaction which the Crown must prove for a conviction". Thus, all the Crown had to prove beyond a reasonable doubt on Count #1 was that Mr. Cater possessed a firearm for the purpose of trafficking, contrary to s. 100(2) of the **Code**, sometime between November 18, 2008 and January 16, 2009. The following statement of the Ontario Court of Appeal in **R. v. Khawaja**, 2010 ONCA 862, (at para. 149) is especially relevant in this case:

> The appellant elected not to testify or lead any evidence in answer to the Crown's case. Nor did he seek from the Crown formal particulars of any of the offences charged. Of course, had he done so, the Crown would have been bound to prove any particulars provided. While the appellant was entitled to make these tactical decisions, he cannot now complain that he was denied the opportunity to know, and to attempt to meet, the Crown's case as established by the evidence actually led at trial.

[94] On a related note, I do not think that there is any issue about the factual sufficiency of Count #1. As shown above, Judge Derrick first raised this point with the Crown. I reject the appellant's submission before us that Count #1 is void for vagueness. With respect, there is nothing vague about it. Section 581(3) of the **Code** prescribes that a count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to. The Crown thoroughly addressed the factual sufficiency of Count #1 at pp. 3150 *ff.*, in response to Judge Derrick's question. The Crown referenced the Supreme Court of Canada's decision in **R. v. Saunders**, [1990] 1 S.C.R. 1020, at ¶5-6, and the Ontario Court of Justice decision in **R. v. Willis**, 2007 ONCJ 605. As the Crown pointed out (at p. 3152), "… it is entirely open to the Crown to not particularize the actual type of firearm or specific firearm in question."

[95] Thirdly, it bears emphasis that there is a difference between a count that is duplicitous and a count that duplicates or overlaps with another count. This case clearly involves the latter. In **Ontario (Ministry of Labour) v. Black & McDonald Ltd.**, 2011 ONCA 440, an employee with Black & McDonald was killed at a construction site. Five charges were laid; three against the general contractor, Fuller, and two against Black & McDonald. The trial judge convicted each company of one offence and dismissed the other three counts, holding (at para. 4) that "…they were "duplicitous" and "fail to disclose an offence, in clear and simple terms"." The Ontario Court of Appeal reversed. Justice Laskin explained the judge's error (at ¶20-21 and 27-28):

> **20** The trial judge appears to have confused a count that is duplicitous with a count that duplicates or overlaps another count. A count is duplicitous if it offends the single transaction rule - that is, it joins separate and distinct offences in the same count: see *R. v. Papalia,* [1979] 2 S.C.R. 256; *R. v. Selles* (1997), 34 O.R. (3d) 332 (C.A.). …
>
> **21** Here, each count alleges a single offence. No count offends the single transaction rule. Neither Fuller nor Black & McDonald suggested otherwise. Additionally, a number of counts in an information, each arising out of the same incident and even overlapping or duplicating each other, does not create a duplicitous charge. A single incident may give rise to multiple charges.
>
> . . .
>
> **27** I accept that some of these counts overlap with others; however, that does not make any of the counts objectionable. A single incident may give rise to more than one charge. As Cory J.A. said in *Milberg* at p. 49, "It is manifest that many

> offences are capable of being committed in more ways than one under the provisions of the Code."
>
> **28** The trial judge should have adjudicated on all five counts and made findings on each of them. If he convicted either or both defendants on all charges, he could then decide whether to conditionally stay one or more charges under the rule against multiple convictions: see *R. v. Kienapple*, [1975] 1 S.C.R. 729; *R. v. Provo*, [1989] 2 S.C.R. 3.

[96] In this case, Count #1 is certainly not duplicitous; only one offence is alleged against Mr. Cater in each count of the Information. Regardless of what the Crown's theory of the case may have been at the outset of the trial, it seems that its theory at the end of the case meant that Count #1 may overlap with Counts #3, 5, 7, 9 and 11. As **Black & McDonald** explains, this is not objectionable. As a result, as discussed above, if the appellant was convicted on a general count and a specific count with respect to the same factual or legal nexus, one of the charges would be subject to the *Kienapple* principle and conditionally stayed.

[97] Fourth, instead of Judge Derrick acquitting on the specific Count #9 and convicting on the general Count #1, she could have convicted Mr. Cater on Count #9 without amending the Information. The date in Count #9 for possessing the handgun was December 7, 2008 rather than December 28, 2008. Section 601(4.1)(a) of the **Criminal Code** specifies that "a variance between the indictment or a count therein and the evidence taken is not material with respect to the time when the offence is alleged to have been committed…". As a result, it was arguably open to the trial judge to decide that a three-week discrepancy may not have been material in circumstances where time was not an essential element of the offence and provided there was no prejudice to the defence. This common law rule was set out in the Supreme Court of Canada's decision in **R. v. B. (G.)**, [1990] 2 S.C.R. 30, where Wilson J. held (at pp. 49 & 52) that:

> [I]t is clear that it is of no consequence if the date specified in the information differs from that arising from the evidence unless the time of the offence is critical and the accused may be misled by the variance and therefore prejudiced in his or her defence.
>
> . . .
>
> If the time specified in the information is inconsistent with the evidence and time is not an essential element of the offence or crucial to the defence, the variance is not material and the information need not be quashed.

[98] This Court has applied **B.G.** and has found that the date or time of an offence is not material. See for example **R. v. D.M.S.**, 2004 NSCA 65, at ¶23-33 and **R. v. Robinson**, 2005 NSCA 65, at ¶11-21.

[99] In the alternative, Judge Derrick could have amended on her own motion, either Count #1 or Count #9 of the Information "to make the count . . . conform to the evidence, where there is a variance between the evidence and a count in the indictment as preferred," under s. 601(2) of the **Code**. Of course, in order to take this step, a judge must first consider the factors in s. 601(4). However, if she assessed the factors and determined that there was no prejudice to the defence, Judge Derrick could have amended:

(1) Count #1 to refer to a .45 cal. handgun instead of a "firearm".

(2) Count #9 to change the date of the offence from December 7, 2008 to either the date that she found that Mr. Cater had possession (December 28, 2008) or to the dates on Count #1 (November 18, 2008 to January 16, 2009).

[100] With hindsight, such a course of action in this case may have been preferable but it is hardly a fatal flaw requiring our intervention.

[101] Having regard to the circumstances and the obvious care taken by the trial judge to ensure that Mr. Cater received a fair trial, it cannot be seriously suggested that the appellant suffered any jeopardy, risk or prejudice by Judge Derrick's approach. I say that for three reasons.

[102] First, the time of the offences was never an essential element of Mr. Cater's defence to any of these charges. Rather, his position throughout was that there was no evidence he ever possessed any of the guns for the purpose of trafficking and that the guns were not operable in any event. As a result, it is difficult to conceive how Mr. Cater could have been prejudiced by a conviction under Count #1 as opposed to Count #9, as the variance of three weeks was not material to his defence.

[103] Second, the issue of prejudice was never raised at trial. Defence counsel could have asked for particulars or she could have sought clarification from the trial judge or the Crown in her closing submissions regarding the appellant's jeopardy on this count. When the Crown insisted that there was 'still life' in Count

#1 during its final submissions, Mr. Cater's lawyer had a further opportunity to seek clarification in her argument in 'reply'. She did not.

[104] Neither am I persuaded by the appellant's submissions on appeal. In oral argument Ms. Cooper could not articulate how Judge Derrick's approach to Count #1 had prejudiced Mr. Cater's defence. In his factum the appellant argued:

> 36. In addition to being convicted of the .45 calibre handgun under the unidentified count in the information, the Appellant was convicted of possession for the purpose of offering to transfer, and offering to transfer, an unidentified weapon under this count (count #1). There was no evidence to determine the weapon or whether the Appellant was in possession of it or offered to transfer it. There was no evidence led by the Crown as to which unidentified firearm the charge is in relation to and no weapon or factual scenario was referred to by the learned trial judge in convicting him of this charge. There was no way to defend it.
>
> . . .
>
> 66.(a) Convictions must be based purely on the wording of the information in order to allow the accused to be reasonably informed of the alleged transaction against them and have the opportunity for a full defence and a fair trial. (*Criminal Code* S. 581; *R. v. Saunders* [1990] 1 S.C.R. 1020).
>
> (b) The conviction is based purely on speculation. In the learned Trial Judge's own words (Trial decision, para. 198): "The only evidence is that he (the Appellant) was interested in acquiring it and met with [I.E. – anonymized by trial judge in her decision] to examine the merchandise." [Emphasis in original]

[105] With respect, ¶36 is difficult to understand. It is not clear whether Ms. Cooper's reference to the "unidentified count in the information" is the same as Count #1, where there was a conviction for possession of "the unidentified weapon". Her statement that there was "no evidence led by the Crown as to which unidentified firearm the charge is in relation to" is not supported by the record and ignores Judge Derrick's strong and unambiguous findings. Paragraph 204 of the trial judge's reasons for conviction is a complete answer to the second part of Ms. Cooper's statement that "no weapon or factual scenario was referred to by the learned trial judge in convicting him of this charge".

[106] My response to paragraph 66(a) in the appellant's factum is that the conviction was based on the wording of the Information in this case. The trial judge did not unilaterally alter or amend the Information. She did not speculate. She considered the evidence on the s. 100(2) offences with respect to each weapon

and found that the possession of the handgun charge fit better under Count #1 rather than Count #9. I have already explained that she did not err in doing so.

[107] Paragraph 66(b) solely relates to a challenge to the evidence supporting a conviction on Count #1. I am satisfied there was ample evidence to support Judge Derrick's conclusion that Mr. Cater was guilty under Count #1 of being in possession of the .45 cal. handgun on December 28, 2008 for the purposes of trafficking. The appellant has not shown any palpable and overriding flaw in the judge's factual analysis.

[108] Finally, there is no different basis of liability here. Mr. Cater was acquitted of a charge under s. 100(2) under Count #9, but was convicted of the same offence under Count #1. As the Crown made very clear (Appeal Book, p. 2954, and supra, para. 82), "the Crown's position is that during the time, all time periods relevant to this proceeding, Mr. Cater was a gun trafficker." Therefore the relevant time period was the duration of Count #1 – from November 18, 2008 to January 16, 2009. Whether Mr. Cater possessed the .45 cal. handgun for the purpose of trafficking on December 7, 2008 or December 28, 2008 is largely immaterial for the purpose of his defence, which was that there was no evidence he possessed the guns at all.

[109] In conclusion, the evidence provided a factual basis for possession of a firearm within the two-month period under Count #1; the defence was not in any greater jeopardy under Count #1 than Count #9; and defence counsel neither requested particulars, nor has pointed to anything it would have done differently had it known that Judge Derrick was going to approach Counts #1 and #9 in the way that she did. I cannot conceive of any prejudice, risk, unfairness or jeopardy to Mr. Cater in such circumstances.

[110] I will turn now to a consideration of the appellant's challenges to the trial judge's rulings on several **Charter** and other pre-trial motions initiated by the defence. Here again, I propose to dispose of the appellant's various arguments rather summarily, having satisfied myself that each of Judge Derrick's decisions was sound and fully supported by the evidence. I have not seen any flaw that would warrant this Court's intervention.

#4 Did the judge err in ruling that details of plea negotiations were privileged and should be removed from the appellant's October 21, 2011 Charter application?

[111] This section of my analysis concerns Judge Derrick's decision dated October 24, 2011, and reported at 2011 NSPC 75.

[112] The question before the trial judge was whether plea negotiations between the appellant and the Crown could be used by the appellant to support a **Charter** application for a stay of proceedings on the basis of abuse of process. At a pre-trial case management conference on October 11, 2011, Judge Derrick gave certain instructions which included a direction to defence counsel to file any briefs and supporting materials for her motions not later than October 21. When Ms. Cooper sent her brief electronically it contained details about plea negotiations between the Crown and defence counsel for all three accused: the appellant, his father and his stepmother. The Crown opposed defence counsel's release of such information and the matter was argued before Judge Derrick.

[113] Whether plea negotiations are privileged is a question of law. Thus, the standard of review applied by this Court in assessing the judge's ruling is one of correctness.

[114] At trial and again on appeal, the appellant placed great reliance upon the decision of the Supreme Court of Canada in **R. v. Nixon**, 2011 SCC 34. Judge Derrick readily distinguished that case on the basis that it had no application to this one. I agree. **Nixon** was a case where the accused was charged with several offences, including dangerous driving causing death, dangerous driving causing bodily harm, and related charges for impaired driving. Counsel entered into a written agreement regarding a plea to a charge of careless driving. The acting Assistant Deputy Minister, based on subsequent legal opinions, concluded that Crown counsel's assessment of the strength of the case was flawed and that a plea to careless driving in the circumstances was contrary to the interests of justice. He instructed Crown counsel to withdraw from the resolution agreement and to proceed to trial on the dangerous driving charges. Nixon brought an application under s. 7 of the **Charter** seeking a court direction requiring the Crown to follow through on the agreement. The application judge concluded that the Crown's repudiation of the plea agreement amounted to an abuse of process in breach of the accused's rights. The application judge directed the Crown to honour the agreement. The Alberta Court of Appeal overturned the application judge's decision, holding that the repudiation of a plea agreement is a matter of

prosecutorial discretion, reviewable only for abuse of process. It held that the application judge erred in testing Crown counsel's decision against a "reasonably defensible" standard. Rather, he should have reviewed the circumstances surrounding the subsequent decision to repudiate the plea deal. Nixon appealed that decision to the Supreme Court of Canada which dismissed his appeal. The principal question before the Supreme Court of Canada was the proper test to apply when considering an alleged violation under s. 7 of the **Charter** based on an abuse of process. Writing for a unanimous Court, Charron, J. explained:

> [62] ...there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. . . . it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. ...
>
> [63] However, the repudiation of a plea agreement is not just a bare allegation. It is evidence that the Crown has gone back on its word. . . . The repudiation of a plea agreement is a rare and exceptional event. In my view, evidence that a plea agreement was entered into with the Crown, and subsequently reneged by the Crown, provides the requisite evidentiary threshold to embark on a review of the decision for abuse of process. ...
>
> [64] ...Acts of prosecutorial discretion are not immune from judicial review. Rather, they are subject to judicial review for abuse of process. Depending on the circumstances, the repudiation of a plea agreement may well constitute an abuse of process, either because it results in trial unfairness or meets the narrow residual category of abuse that undermines the integrity of the judicial process. ...

[115] By contrast, there was never a negotiated plea agreement in this case, let alone a repudiation of the deal by the Crown. Nor was there anything detected by Judge Derrick during her close and careful scrutiny of the record to even remotely raise any concerns about trial unfairness or matters which would undermine the integrity of the judicial process.

[116] In her reasons Judge Derrick explained why Mr. Cater had failed to satisfy the necessary evidential threshold which would permit her review of the Crown's exercise of prosecutorial discretion in this case. She said:

> [26] What was not regarded by the Supreme Court of Canada in *Nixon* as reviewable is the decision of the Crown to proceed with a prosecution. In *Nixon*, the issue was the Deputy Attorney General's decision that *Nixon* should be tried on charges of dangerous driving, overriding Crown counsel's intention to proceed with a lesser charge of careless driving. The Court held: "... the ADM's decision to resile from the plea agreement falls within the scope of prosecutorial discretion. In the absence of any prosecutorial misconduct, improper motive or bad faith in

> the approach, circumstances, or ultimate decision to repudiate, the decision to proceed with the prosecution is the Crown's alone to make." (*Nixon, paragraph 68*)
>
> [27] As has been confirmed in submissions, this is not a case of a concluded plea agreement that has now been repudiated by the Crown. The evidentiary threshold required for a review of prosecutorial discretion has not been satisfied. There is no evidence that establishes prosecutorial misconduct, bad faith or improper motive to justify setting aside the privilege cloaking the negotiations. What Ms. Cooper alleges is stated in her email dated October 23 discussing the *Nixon* case: "In essence, the defence position is that Mr. Cater committed no offence and the state is trying to put him away. Mr. Cater has been abused as the case started from nothing and they have attempted to create an offence. Plea negotiations are relevant."
>
> [28] This assertion by Ms. Cooper does not satisfy the requirements for a review of the prosecutorial discretion to prosecute Kyle Cater nor does it supply what would be necessary for a setting aside of the plea negotiation privilege that applies in this case. There are no grounds to justify removing the privilege over the objections of the Crown. The fact that Kyle Cater asserts that he will not be prejudiced if the plea negotiations are revealed does not resolve the issue: as I earlier explained, he cannot unilaterally waive the privilege that protects the negotiations.
>
> [29] Another problem raised by the plea negotiations issue is the fact that the Crown advises that it does not wholly accept Ms. Cooper's version of what happened during the back-and-forth discussions that took place, some of which occurred when Kyle Cater was represented by earlier counsel, Geoff Newton and Warren Zimmer, now a judge of this Court. This raises the potential that removing the privilege would necessarily lead to evidence having to be called to establish what exactly did occur between the defence lawyers for Kyle Cater, Paul Cater and Torina Lewis and Crown counsel. There is a plain public interest in avoiding these proceedings being diverted to this extent and in this manner.

[117] On appeal to this Court, Ms. Cooper took the position (citing **Nixon**) that all she had to do was allege misconduct on the part of the Crown and, once made, the "onus shifted to the Crown to show that it had not misconducted itself in the exercise of its prosecutorial discretion". I reject the appellant's submission. That is not the law. To satisfy the required evidential threshold Mr. Cater could have produced affidavit evidence from his two earlier counsel, Mr. Newton, or Mr. Zimmer (then himself a newly appointed judge of the Provincial Court) whereby either or both affiants would be made available for cross-examination. And, if Ms. Cooper had been party to such discussions, there was nothing to prevent her from filing her own affidavit and presenting herself for cross-examination, (recognizing of course that such a move might well have forced her to withdraw as counsel, in

which case Mr. Cater would have had to hire a fourth lawyer). None of that was done. Judge Derrick applied the law correctly, and her direction that Ms. Cooper file a new brief with all references to the plea negotiations expunged, was sound.

[118] Before leaving this issue I will add one further comment in answer to the Crown's objection before this Court to both the material filed by the appellant for this hearing, and the submissions made by his lawyer with respect to it. Mr. O'Leary, for the Crown, put it this way in his factum:

> 82. There are two preliminary remarks the Crown must make before discussing this issue.
>
> a. The Appellant makes an allegation in paragraphs 82 and 83 of his factum. He alleges, in part, the Crown attempted to extort the Appellant by threatening to have Torina Lewis go to jail for five years unless the Appellant pled guilty. The allegation in paragraphs 82 and 83 was never placed before the Trial Judge. It was not in the October 21st Brief. It was never made orally before the Trial Judge. It is improper for the Appellant to be making this allegation for the first time before this Court.
>
> b. At no point has the Appellant actually provided admissible evidence of what the plea negotiations were. The basic requirements of admissibility require that relevant evidence be in an admissible form and not be subject to an exclusionary rule. (See **R. v. Laffin**, 2009 NSCA 19 at para. 29). Setting out allegations in his October 21st Brief and his factum does not constitute evidence in an admissible form.

[119] When the appeal hearing began, we noted the Crown's objection on the record and advised counsel that we would consider their filings on this matter to have been in compliance with certain specific directions given earlier by my colleague Justice Beveridge sitting in Chambers. On that basis we were prepared to provisionally receive the impugned material, reserving on the question as to whether it would later be considered, and if so, what weight would be given to it, until such time as the panel had dealt with the merits of the appeal during its eventual deliberations. Having done so, I would simply state here that we have ignored any allegations of impropriety that were never placed before the trial judge or were never backed up by admissible evidence. Put simply, we agree with the Crown's submissions as reflected in ¶82 of its factum, reproduced above.

[120] In conclusion, the appellant's allegation of abuse of process, bad faith or improper conduct on the part of the Crown finds no support in the record. The judge's ruling stands.

#5 Did the judge err in finding that there had not been an unreasonable delay pursuant to s. 11(b) of the Charter?

[121] This section of my analysis concerns Judge Derrick's decision dated November 10, 2011, and reported at 2011 NSPC 80.

[122] The appropriate standard of review was summarized by this Court in **R. v. Hiscoe**, 2013 NSCA 48:

> [21] See also *R. v. R.E.W.*, 2011 NSCA 18 at ¶29 - 35 where Justice Beveridge reiterated that whether a *Charter* right has been infringed or denied is a question of law reviewed on a standard of correctness, but added that not every factor that goes into deciding such a question attracts that standard. Findings of fact, or of mixed law and fact, without an extricable legal component are entitled to deference unless the trial judge made a palpable and overriding error, and he or she is also owed deference when balancing competing interests.

[123] Derrick, P.C.J. correctly followed the analytical framework set out in **R. v. Morin**, [1992] 1 S.C.R. 771. She said the length of delay was 38.5 months from the laying of the joint Information in January 2009 to the anticipated conclusion of the trial in March 2012. She reviewed the reasons for delay. While the judge found that disclosure was slow in coming, the Crown was suitably diligent in providing disclosure. This was a complicated case with voluminous disclosure. The wiretap evidence had to be reviewed prior to disclosing it because it was connected to other cases. Two preliminary inquiries were scheduled. There were a number of pre-trial appearances or conferences. The appellant changed counsel three times. He provided no evidence that his fair trial rights had been prejudiced. As I have already explained, the principal evidence in this case was obtained from the police intercepts. The passage of time did not affect their reliability. Any risk to the appellant's fair trial rights was minimal. Until his bail was revoked following his arrest on new charges in May 2011, the appellant had never applied to vary his bail conditions and in fact he had consented to those bail conditions. He finished high school and for a period of time had his own apartment which he shared with his girlfriend.

[124] After a careful consideration of all of the circumstances the judge said:

> **Conclusion**
>
> [117] Mr. Cater has been waiting a long time for trial. That fact alone does not mean he has experienced an unconstitutional delay. Most of that time he was proceeding on the basis of an election to the Supreme Court and intending to have

> a full-blown preliminary inquiry on each set of charges. Mr. Cater exercised his entitlement to make decisions and choices that influenced the conduct of his case. The transcripts of proceedings disclose that concerted efforts were made throughout by all parties, the Court, and Legal Aid to keep the matters moving ahead. The loss of Mr. Cater's first two lawyers was confronted with resolve. Any prejudice he has experienced as a result of the delay does not come close to tipping the scales in favour of a stay of proceedings over the societal interest in seeing these charges proceed to trial. There is no evidence of any impairment of his right to make a full answer and defence. I do not find there has been any unreasonable delay in bringing Mr. Cater to trial, his *Charter* rights under section 11(b) have not been violated, and his application for a stay of proceedings is dismissed.

[125] There is nothing here which would cause me to question the judge's factual conclusions or application of the law. Her ruling stands.

#6 Did the judge err in refusing to order disclosure that had been requested by the appellant?

[126] This section of my analysis concerns Judge Derrick's decision dated November 17, 2011, and reported at 2011 NSPC 86.

[127] The question of whether the Crown has met its disclosure obligations is subject to a correctness standard (see **R. v. Anderson**, 2013 SKCA 92 at ¶52).

[128] There were two parts to the appellant's lengthy disclosure request. The first part sought disclosure of all records showing every occasion when a police officer had ever stopped and/or searched the appellant. The second part related to specific information about two confidential informants, E. and F. The appellant said the requested disclosure was relevant for his **Garofoli** application and his abuse of process application.

[129] Judge Derrick found that evidence of the stops and searches was not relevant to the **Garofoli** application or to the abuse of process allegation. At most, the evidence of the stops and searches could only show that the appellant was never found with firearms or drugs in his actual possession. The judge said that fact was irrelevant to whether there were reasonable grounds to believe that the intercepts would provide evidence of offences. The judge was correct.

[130] As to the sought-after information about the two confidential informants, E. and F., Judge Derrick said:

> [35] The information being sought by Ms. Cooper could potentially identify the confidential sources. The Crown is obliged to prevent their identities from being disclosed. ...
>
> . . .
>
> [38] As noted by the Supreme Court of Canada in *Named Person*, there is to be no disclosure of a confidential informer's identity in public or in court. And no matter what their motivations may be, confidential informers are entitled to have their identities protected. ...
>
> [40] The questions Ms. Cooper wishes to have answered seek to elicit information that could potentially identify the confidential sources. Certain of the inquiries are such that there is a very strong likelihood Mr. Cater would be able to identify who these sources are. ...
>
> . . .
>
> **Conclusion**
>
> [45] Kyle Cater has not made out a case for the disclosure of the information he is seeking. As noted earlier in these reasons, the principle of relevance applies to his requests. Significantly, Mr. Cater is not entitled to information that could reveal the identities of the confidential police informers and, even aside from that, he is not entitled to obtain answers to questions about the content of the ITO that he could only ask if leave was granted to do so. Nothing has been offered to demonstrate that cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization and the inquiries being advanced by Ms. Cooper are effectively a circumvention of the requirement to obtain leave to question the Affiant.
>
> [46] Mr. Cater's application for additional disclosure as set out in Ms. Cooper's November 14 Brief is dismissed.

[131] In this I am reminded of the comments of the Saskatchewan Court of Appeal in **Anderson** which seem especially apt in this case. The Court observed at ¶75:

> **75** The right to make full answer and defence does not entitle Mr. Anderson, after tens of thousands of pages of disclosure already given, to make general requests for every last piece of paper involved in the investigation based on speculation that it is relevant or that somewhere in the great morass of investigatory documents yet to come lies the pearl of inappropriate police behaviour which may form the basis of a constitutional argument. This much is evident from the comments of Doherty J.A. in *Girimonte*:
>
> > 12 Disclosure demands which are no more than "fishing expeditions", seeking everything short of the proverbial kitchen sink undermine the good faith and candour which should govern the conduct of counsel. ... It would be obvious to anyone that the prosecution would resist compliance with such a far-fetched demand. Disclosure demands like some of those

> made in this case seem calculated to create needless controversy and waste valuable resources rather than to assist the accused in making full answer and defence.

[132] Again there is nothing here which would warrant our intervention. The judge's ruling stands.

#7 Did the judge err in refusing to permit the appellant to cross-examine the affiant of the affidavit filed in support of the authorization to intercept private communications?

[133] This section of my analysis concerns Judge Derrick's decision dated November 21, 2011, and reported at 2011 NSPC 100 as well as her decision dated November 22, 2011 and reported at 2011 NSPC 89.

[134] Some background is in order. The appellant brought a **Garofoli** application regarding the authorization granted to intercept his private communications. As part of that application, he sought leave to cross-examine the police officer who swore the affidavit on which the authorization was granted. The Crown sought a summary dismissal of the appellant's **Garofoli** application.

[135] In 2011 NSPC 100, Judge Derrick rejected the Crown's application to summarily dismiss the application, but also explains why she is denying the appellant's request to cross-examine the affiant. In 2011 NSPC 89, Judge Derrick determined that the appellant's s. 8 **Charter** rights were not violated by the granting of the authorization. I will refer to the latter decision in my discussion of **Question # 8** below, but my analysis of this ground of appeal necessarily requires me to refer to both decisions.

[136] In the context of a **Garofoli** application, the decision to grant leave to cross-examine the affiant is a discretionary one. It will only be set aside if the discretion has not been exercised judicially. See **R. v. Mangat**, 2012 ONCA 415, at ¶12.

[137] At this point it would be helpful to consider the nature and magnitude of this police operation. In support of their application for a Part VI authorization to intercept communications, the police filed an Affidavit and Information To Obtain consisting of 246 pages comprising 237 paragraphs sworn by a senior RCMP officer on November 14, 2008. In her affidavit the affiant (who was then seconded to the Halifax RCMP Federal Drug Section) offers a startling glimpse at the types of characters who inhabit the underbelly of Canadian society. Through the voices of Corrections officials, prison guards, confidential informants, detectives and

undercover police officers, the sworn affidavit provides a shocking chronicle of organized crime in Nova Scotia, linking 13 named individuals to a slew of offences ranging from conspiracy and the sale of illicit drugs, to robbery, weapons trafficking, and attempted murder. Listed among the 13 individuals is the appellant Kyle Joseph Cater (D.O.B. 1990-10-28) a young man who the affiant swears is believed to have committed or is committing one or more of the 23 crimes described therein. The affidavit presents a virtual warehouse of information related to the criminal activity and interaction between these named individuals and others, both here and across Canada, whether in a penitentiary or on the street. It describes their plotting, their habits, and their "fronts", as revealed by covert surveillance, wiretaps, befriending by undercover police officers, use of confidential police informants, intercepted prison communications; etcetera.

[138] Judge Derrick was obviously impressed by the substance and reliability of what she read. She described the affidavit as "very extensive, detailed and comprehensive", "full and frank", and "not misleading". It did "not overstate or misrepresent the source's reliability" and offered "an ample basis on which the authorizing justice could have concluded that there were reasonable and probable grounds to believe that Kyle Cater was engaged in drug trafficking activities with or on behalf of other named targets and other individuals". She obviously accepted the Crown's submission that the affidavit provided details of "an intricate web of individuals acting in concert to commit criminal acts" and placed the appellant as being a member of YMOB, a group of males who were recruited to work for SMOB. Their duties included carrying firearms, drug trafficking, running crack and weed shops, and assisting members of the SMOB in acquiring and maintaining their drug territory.

[139] Two of the confidential informants identified in the affidavit as "Source E" and "Source F" provided Mr. Cater's cell phone number and home address; described previous incidents of his selling drugs from particular motor vehicles; said he was very short, small and prone to wearing "a lot of expensive jewellery" as well as a bullet-proof vest; and that he answered to the name "Peanut".

[140] Testimony at trial revealed that *Operation Intrude* led to 64,000 intercepted communications. One of the lead investigators Det/Cst. Pepler listened to all of them. Judge Derrick listened assiduously to the 58 intercepts that contained the appellant's voice. One can say that they are laced with profanity and the sort of street punk swagger and *faux* bravado one would see in a cheap B flick. The discourse between those persons whose conversations were captured in the

telephone intercepts would be laughable but for the deadliness of the items they are talking about.

[141] Senior investigators set January 15, 2009, as "take-down" day for *Operation Intrude*. At 4:30 that morning, approximately 100 police officers assembled at RCMP Headquarters and were given their respective assignments in fanning out to conduct a series of orchestrated raids and arrests across the city. In his evidence at trial, Det/Cst. Pepler testified that he could have arrested the appellant on January 15, 2009, but he had higher priorities at that time. He said that ultimately the level of violence in the metropolitan area led police to decide that the take down of the *Operation Intrude* targets had to be accelerated. This Court can take judicial notice of the fact that this massive police operation came in the midst of an escalating drug war marked by a series of brazen daytime drive by shootings on busy city streets.

[142] This then forms the background to defence counsel's request to cross-examine the RCMP officer as the declarant of the Affidavit and Information To Obtain.

[143] The appellant's reasons for seeking leave were similar to his request for disclosure. He wanted to cross-examine the affiant about whether sources E. and F. were reliable, whether "Named Persons" or targets in the affidavit were also confidential police sources, and whether there were "material omissions" (relating to searches of the appellant by police with negative results) that might undermine the judicial authorization for the intercepts.

[144] Judge Derrick reviewed the leading authorities. She applied the correct legal principles. She explained how the proposed cross-examination would not assist in the determination of whether the authorization could have been granted. She refused to grant leave to cross-examine the affiant. She judicially exercised her discretion. The use of her discretion is owed deference. See **R. v. Pires**; **R. v. Lising**, 2005 SCC 66, at ¶46-47. It is not this Court's role to second guess the exercise of that discretion, or substitute ours for hers.

[145] Again, I see nothing here which would cause me to intervene. The judge's ruling stands.

#8 Did the judge err in finding that the interception of the appellant's private communications was not an unreasonable search pursuant to s. 8 of the Charter?

[146] This section of my analysis concerns Judge Derrick's decision dated November 22, 2011, and reported at 2011 NSPC 89.

[147] It is settled law but bears repeating that the purpose of a **Garofoli** review is not to second guess the authorizing judge. Rather, a reviewing judge is expected to examine the material that was before the authorizing judge to see whether there was any basis to issue the authorization to intercept private communications. As the Supreme Court explained in **R. v. Garofoli**, [1990] 2 S.C.R. 1421, at p. 1452:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[148] In bringing a **Garofoli** application, the onus was upon Mr. Cater to establish that there was no basis for issuing the authorization. The question Judge Derrick had to decide was whether there was at least some evidence that, if reasonably believed, the authorization could have been issued. See **R. v. Araujo**, 2000 SCC 65 at ¶51.

[149] In answering that question, as I alluded to earlier, Judge Derrick reviewed the affidavit and made the following findings:

> [42] The Affidavit I have reviewed is a very extensive, detailed and comprehensive Affidavit. It does not rely on boiler plate. It is not misleading. It is full and frank. It contains information obtained from police officers carrying on the investigation and handling the confidential informants. The limitations of the source information are apparent on a reading of the Affidavit and the Affidavit sets out the limitations of various investigative options, including the limitations inherent in the use of confidential sources.

[150] She concluded at ¶45:

> [45] The Affidavit provides an ample basis on which the authorizing justice could have concluded that there were reasonable and probable grounds to believe

> that Kyle Cater was engaged in drug trafficking activities with or on behalf of other named targets and other individuals and that the interceptions being sought may assist in the investigation of these activities. Mr. Cater's section 8 *Charter* rights were not violated by the granting of the authorization and the evidence obtained as a result of the authorization is not excluded from Mr. Cater's trial.

[151] I am satisfied that Judge Derrick applied the correct legal principles. Her decision that the authorizing judge could have granted the authorization is owed deference. She found that the intercepts were not an unreasonable search under s. 8 of the **Charter**. They were made pursuant to a valid authorization.

[152] Again, there is nothing here which would warrant our intervention. Her ruling stands.

#9 Did the judge err by summarily dismissing the appellant's abuse of process argument which supported his application for a stay of proceedings?

[153] This section of my analysis concerns Judge Derrick's decision dated November 23, 2011, and reported at 2011 NSPC 90.

[154] At the appeal hearing Ms. Cooper conceded that she was not attacking this decision whereby the judge granted the Crown's motion for the summary dismissal of the appellant's abuse of process and arbitrary detention applications.

[155] Accordingly, I need not deal with that ruling except to repeat, in part, portions of Judge Derrick's remarks because they add important colour and context to many of the other criticisms, issues and arguments raised by the appellant:

> [16] In her submissions, Ms. Cooper accuses the police of "creating evidence to get this man" – referring to Kyle Cater. . . . There is not a shred of evidence that the police created any evidence in targeting or investigating Mr. Cater. ...
>
> [17] Ms. Cooper has made very serious allegations against the police without any evidence to support them. The seizing of weapons from a home under a search warrant and the laying of charges against someone who does not live there does not represent "creating" or "manufacturing" evidence. The use of such language is reckless. ...
>
> . . .
>
> [19] I reject Ms. Cooper's submission that the investigation of Kyle Cater discloses any conduct that could be characterized as an abuse of process. . . . I have found no basis – nothing – to support these accusations. They apparently

> represent how Ms. Cooper and Mr. Cater view his experiences but they are presented without any factual foundation. ...
>
> . . .
>
> [21] As far as an abuse of process is concerned, there is nothing, not an iota of evidence, that would support entertaining the application for a stay of proceedings. The application is without any merit and I dismiss it summarily. ...
>
> . . .
>
> [24] This is a criminal trial. Mr. Cater's claim of being arbitrarily detained is suggestive of a civil claim for wrongful arrest and detention. He has not established that he has been subject to an arbitrary detention in the context of these criminal proceedings. If Mr. Cater was unhappy with the results of his bail hearing that is a matter for a bail review. This application is also dismissed summarily.

#10 Did the judge err in finding that the search of the appellant's cell phone was not unreasonable under s. 8 and that the information found during the search would not be excluded under s. 24(2) of the Charter?

[156] This section of my analysis concerns Judge Derrick's decision dated January 13, 2012, and reported at 2012 NSPC 2.

[157] The standard of review applicable to this issue is the same as that which I described in relation to Issue #5. It was explained by this Court in **Hiscoe, supra**. at ¶19-21, and I need not repeat it here.

[158] The appellant was arrested on January 15, 2009. His cell phone was seized during the booking process at the police station. An officer collected the phone later that day and removed the battery to prevent damage to evidence stored inside. The phone was sent for forensic analysis on January 22, 2009. The analysis and subsequent report were completed by April 1, 2009. The police did not obtain a search warrant before sending the phone off for forensic analysis.

[159] No cursory search was performed on the cell phone. Police officers were ordered not to examine the device, or thumb through the text messages or phone calls because doing so could corrupt potential evidence. In argument at the appeal, Mr. O'Leary took the position that the data, text and digital photos seized from Mr. Cater's cell phone were not crucial to the Crown's case. He said they had all they needed to convict the appellant from the bounty of evidence obtained through the intercepted telecommunications.

[160] Judge Derrick declared the following at ¶38 of her decision (2011 NSPC 2):

> [38] The search of Kyle Cater and the seizure of his cell phone did not, in my view, cross any constitutional lines. I am thoroughly satisfied that Mr. Cater was lawfully arrested on January 15 for possession of a restricted firearm, that he was legitimately searched incident to his arrest and that this cell phone was lawfully seized in that search. The evidence also satisfies me that on January 15 Mr. Cater was arrestable for weapons trafficking. The essential question is whether the police were entitled to have Mr. Cater's phone subjected to a forensic analysis without first obtaining a search warrant.

[161] Judge Derrick found that the subsequent forensic analysis was a search of the cell phone that was truly incidental to the arrest of the appellant and that it was conducted reasonably. Accordingly, a warrant was not required. There was no breach of s. 8 of the **Charter**. I agree.

[162] That said, it is acknowledged that the law with respect to the search of cell phones incidental to arrest is unsettled. On May 23, 2014, the Supreme Court of Canada heard the appeal from **R. v. Fearon**, 2013 ONCA 106. Its decision is on reserve. In due course it may be anticipated that the Supreme Court will clarify this important and unresolved legal issue by stating whether or not a cell phone exception ought to be created for the established common law power of search incidental to arrest. Even if it were later determined, on the basis of the Court's disposition in **Fearon**, that Judge Derrick was wrong to uphold the constitutionality of the search, I would not intervene because I agree with her analysis under s. 24(2) of the **Charter** and her conclusion that the evidence obtained in the search should not be excluded from Mr. Cater's trial. Incidentally, at the appeal hearing, Mr. Cater's counsel could not identify any error in Judge Derrick's refusal to exclude the evidence under s. 24(2).

[163] Judge Derrick conducted the necessary 3-step analysis under **R. v. Grant**, **supra**. She found that if Mr. Cater's s. 8 **Charter** rights had been breached, the breach could only be described as inadvertent and not serious. The police officers had acted in good faith and the law with respect to the search of cell phones was evolving at the time of this search. She accepted the police officers' testimony that the seizure of all arrestees' cell phones was essential to the investigation. Based on their experience, the cell phones could provide valuable evidence. Therefore, the search and seizure was necessary to discover and preserve evidence while at the same time ensuring the evidence would not be destroyed.

[164] She found that the search of Mr. Cater's cell phone had a modest impact upon his s. 8 **Charter** rights and that the subsequent forensic search, in the absence of a warrant, was a technical breach. She found that the police clearly had the

grounds to obtain a warrant and, had they done so, the evidence would have been discovered.

[165] Judge Derrick also found that the evidence would have been discovered, had the police conducted a cursory search of his phone. She did not consider the delay between the appellant's arrest and the forensic analysis to be excessive or unwarranted. Based on the uncontradicted evidence, the judge was satisfied that it would have been highly risky to perform a cursory search of the cell phone which may well have corrupted its contents. The best practice was to wait for a forensic analysis to be completed. The judge found that the delay to have the forensic analysis completed did not render the search unreasonable. The purpose of the forensic analysis was to discover, preserve and protect evidence from the cell phone. The evidence revealed that the appellant's cell phone was not a Smart phone. It had a very limited capacity. Judge Derrick distinguished its features from the circumstances considered by this Court in **Hiscoe**, **supra**. Mr. Cater's cell phone did not have any of the distinctive qualities cited by the Supreme Court in **R. v. Vu**, 2013 SCC 60. Judge Derrick concluded that Mr. Cater's cell phone was the technological equivalent of an unlocked brief case containing correspondence (text messages), an address book (contact information), and photographs (digital images).

[166] Concerning the third and final step in the **Grant** analysis, Judge Derrick concluded that the evidence in his cell phone (which included text messages, contact information and digital images of firearms), while not dispositive of the Crown's case against him, was valuable to the prosecution and that the truth-seeking function of the criminal trial process would be better served by the admission of the contents of his cell phone than by its exclusion. She reasoned (2012 NSPC 2):

> [74] ...Exclusion of this relevant and reliable evidence would undermine the public's confidence in the trial's fairness, thereby bringing the administration of justice into disrepute. (*Grant, paragraph 81*)
>
> *Conclusion on Section 24(2)*
>
> [75] I am satisfied that even if it was found that a *Charter* breach had occurred because a warrant was not obtained for Cpl. Gallagher's search of the cell phone, consideration of all the circumstances leads me to the conclusion that the evidence obtained in the search should not be excluded from evidence.
>
> [76] I have of course determined that no *Charter* breach occurred. The search of the Samsung cell phone was a search incident to Mr. Cater's lawful arrest. The

> contents of the phone as extracted by Cpl. Gallagher, including the metadata, are admissible at Mr. Cater's trial for weapons possession and weapons trafficking.

[167] I am satisfied Judge Derrick considered the proper factors. Her findings are reasonable. I therefore defer to her decision in refusing to exclude the evidence from the appellant's trial pursuant to s. 24(2). See as well **R. v. Côté**, 2011 SCC 46; **R. v. Cole**, 2012 SCC 53; **R. v. Wright**, 2014 CMAC 4; **R. v. Mann**, 2014 BCCA 231; and **R. v. Spencer**, 2014 SCC 43.

[168] Accordingly, this challenge brought by the appellant also fails.

#11 Did the judge err by finding that the intercepts were not inadmissible hearsay?

[169] This section of my analysis concerns Judge Derrick's decision dated March 5, 2012, and reported at 2012 NSPC 15.

[170] During the course of any trial, judges are called upon to decide the admissibility of evidence. Often an objection is made based upon an assertion of hearsay. Trial judges are well placed to assess the extent to which hearsay dangers are of concern in any particular case and whether they can be adequately and fairly managed. Rulings on admissibility are generally entitled to deference provided they are informed by the proper application of correct legal principles. See **R. v. Couture**, 2007 SCC 28; **R. v. Shea**, 2011 NSCA 107, leave to appeal ref'd [2012] S.C.C.A. No. 298.

[171] At trial, and again on appeal, the appellant's counsel insisted the intercepts were hearsay and inadmissible. Ms. Cooper said the Crown was obliged to call every available witness to testify instead of relying upon the intercepts.

[172] Judge Derrick accepted that the out-of-court statements captured in the police intercepts and which were relied upon for the truth of their contents, constituted hearsay. But she ruled they were admissible both as admissions by the appellant, and because they were necessary and reliable under the principled approach to hearsay. She was right to do so.

[173] I agree with Judge Derrick that the intercepts were inherently reliable because of the circumstances in which they were obtained. The participants did not know that they were being recorded. There was no motive for them to lie. The statements were spontaneous. They were made contemporaneously with ongoing events. They were accurate. They were complete.

[174] The necessity to receive this evidence arose because it was the best evidence available. It was better than calling witnesses three years after the events occurred. It was better than calling witnesses whose testimony would be imbued with unreliability and subject to **Vetrovec** warnings.

[175] The Supreme of Canada's statement in **Couture** at ¶98 is especially apt in this case:

> 98 When there is no real concern about a statement's truth and accuracy because of the circumstances in which it came about, there is no good reason why it should not be considered by the trier of fact, regardless of its hearsay form.

[176] In argument the appellant's counsel stated explicitly that the Crown was under "a legal obligation" to call witnesses such as Paul Cater, Torina Lewis, and Shawn Shea to "prove" the contents of the intercepts. The Crown is under no such duty. It has the discretion to call whomever it wants to offer testimony as part of the Crown's case. See **R. v. Cook**, [1997] 1 S.C.R. 1113. Nothing prevented the appellant from calling Paul Cater, Torina Lewis, Shawn Shea and other individuals if he felt they had evidence to offer which would prove helpful to his defence. People exposed to the record in this case would not be surprised by his reticence in doing so.

[177] The appellant's challenge to the judge's ruling is without merit.

[178] I will now turn to the last question which deals with an issue that developed during argument at the hearing.

#12 Did the judge err by not permitting the appellant's counsel to question his high school teacher concerning his "potential" after ruling that such a line of questioning was irrelevant?

[179] After the Crown closed its case, Ms. Cooper called as her first witness, Ms. Jean Wright-Popescul, an English teacher at the appellant's high school in Spryfield. The seventh question Ms, Cooper asked in her direct examination was:

> Q. And in your experience, Ms. Wright-Popescul, what qualifies you to assess a student's potential?

Counsel's eighth question was:

> Q. And from your experience, what happens when a student loses potential?

followed by:

> Q. My next question was going to be what do you experience when a student -- what have you experienced when a student's potential is saved, but perhaps you've already answered that question.

[180] Obviously this line of questioning perplexed Judge Derrick who interrupted and asked Ms. Cooper:

> (Vol. 5, p. 2459, line 18)
>
> **THE COURT**: Ms. Cooper, I'm very sorry to interrupt you with respect to this, and I certainly appreciate, even from the little I've heard from Ms. Wright-Popescul so far that she has a tremendous amount of experience that she can share about the issues that she's addressing, but I'm not getting a picture of how this is relevant to this trial with no ...

[181] The witness was asked to withdraw from the courtroom so that counsel and Judge Derrick could address the judge's concern. Ms. Cooper explained:

> Vol. 5, p. 2461, line 10
>
> **MS. COOPER:** I just want to explain that I think the type of person that Mr. Cater is and what his potential is is highly relevant to these charges. You're being asked to determine on the basis of inferences from his phone calls that he's a criminal. We take the opposite position, that he's not a criminal.

[182] Judge Derrick makes clear her concerns:

> Line 16
>
> **THE COURT:** Right. Well, let's immediately address that, because I certainly had a concern about relevance, ... (p. 2462, line 5) but I'm now going to raise another concern I have with respect to this evidence, and I will hear from the Crown. And that it just sounds like good character evidence to me. And if -- if you are going to introduce good character evidence into this trial, then that does open the door for rebuttal evidence of bad character. . . . (line 15) The other relates to my concern that then this trial is going to go on forever, because this is not -- this is not a process whereby the contest is going to be can the defence produce witnesses who can say glowing things about Mr. Cater, and then the Crown will respond by calling evidence potentially of whomever, police officers or whatever, to talk about other potentially bad evidence. And how is that -- any of that going to be relevant to my determination of the issues before me, and isn't that then going to be just this, in a sense, out of control expanding case?

After considering further submissions from Ms. Cooper and the Crown attorney, Judge Derrick gave her ruling:

> Vol. 5, p. 2503, line 9
>
> **THE COURT:** I just -- I cannot see how it's relevant. I can't see how it's relevant, Ms. Cooper. You haven't persuaded me that it's relevant to any of the issues that I have to determine in this case. I'm not going to allow this evidence to be elicited.
>
> …
>
> p. 2505, line 14
>
> **THE COURT:** …I really can't see under any construction we've been discussing how any evidence concerning potential, given that this is not evidence being offered by anyone who's being qualified as an expert, could possibly be admissible. So I'm not going to permit questions of what Mr. Cater's English teacher thinks or thought his potential is or was. I cannot see how that could be admissible in these circumstances. ...

[183] After giving her ruling Judge Derrick recessed so that Ms. Cooper could reconsider her position. When court reconvened she asked Ms. Cooper to continue her questioning of Ms. Wright-Popescul. We see this exchange:

> Vol. 5, p. 2508
>
> **MATTER RESUMED** **(time 2:42 p.m.)**
>
> **THE COURT:** Please be seated. Ask Ms. Wright-Popescul to come forward, Ms. Cooper?
>
> **MS. COOPER:** I think we're just going to have Ms. Wright-Popescul dismissed. We're finished with our questioning.
>
> **THE COURT:** The question about literacy, did you ...
>
> **MS. COOPER:** I think, you know, Mr. Cater has high school, so I think that's -- we don't need to ask this question.
>
> **THE COURT:** You're satisfied with that. So no further evidence from Ms. Wright-Popescul?
>
> **MS. COOPER:** No. That's right, Your Honour.
>
> **THE COURT:** All right. Thank you. Well, thank you for your attendance, Ms. Wright-Popescul.
>
> **MS. WRIGHT-POPESCUL:** Thank you.

[184] I think Judge Derrick's ruling was absolutely correct. Counsel's questioning of the appellant's school teacher as to his "potential" was completely irrelevant to the many issues the trial judge was bound to decide. Quite apart from relevance, the judge wisely reminded defence counsel of the grave risk she ran in introducing evidence of her client's good character and reputation within the community which would then have opened the door to the Crown presenting evidence of Mr. Cater's bad character and disreputable reputation within the community.

[185] For all of these reasons, the appellant's criticism of the judge's ruling is without merit.

Conclusion

[186] Judge Derrick's strong findings of facts and inferences drawn from those facts are fully supported in the evidence. Her interpretation and application of the law is unassailable. Her analysis is meticulous and beyond reproach. Her reasons are a model of clarity and scholarship. The verdicts are reasonable, lawful and sound. I see no cause to intervene.

[187] I would dismiss the appeal.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.

Appendix "A"

Kyle Joseph CATER1990-10-28
Paul Gary CATER 1960-07-17
Torina Lynn LEWIS 1973-08-28

1. THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did without lawful excuse, store a firearm, to wit., sawed off cooey 84 shotgun S# 82867, and ammunition in a careless manner, contrary to Section 86(1) of the Criminal Code;

2. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did without lawful excuse, store a firearm, to wit., lakefield mark II rifle #68355, and ammunition in a careless manner, contrary to Section 86(1) of the Criminal Code;

3. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY, did without lawful excuse, store a firearm, to wit., AA Arms model AP 9 handgun S#049948, and ammunition in a careless manner, contrary to Section 86(1) of the Criminal Code;

4. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did unlawfully have in their possession, a weapon, to wit., sawed off cooey 84 shotgun S# 82867, contrary to Section 88(1) of the Criminal Code;

5. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did unlawfully have in their possession, a weapon, to wit., lakefield mark II rifle #68355, contrary to Section 88(1) of the Criminal Code;

6. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did unlawfully have in their possession, a weapon, to wit., AA Arms model AP 9 handgun S#049948, contrary to Section 88(1) of the Criminal Code;

7. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did unlawfully possess a loaded prohibited firearm, to wit., sawed off cooey 84 shotgun S# 82867, contrary to Section 95(1) of the Criminal Code;

8. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did unlawfully possess a loaded prohibited firearm, to wit., AA Arms model AP 9 handgun S# 049948, contrary to Section 92(1) of the Criminal Code;

9. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did unlawfully possess a firearm knowing its possession is unauthorized, to wit., sawed off cooey 84 shotgun S# 82867, contrary to Section 92(1) of the Criminal Code;

10. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did unlawfully possess a firearm knowing its possession is unauthorized, to wit., AA Arms model AP 9 handgun S#049948, contrary to Section 92(1) of the Criminal Code;

11. AND FURTHER THAT ON OR ABOUT THE 15th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did unlawfully possess a prohibited device, to wit., 2 over capacity magazines, contrary to Section 92(2) of the Criminal Code.

Appendix "B"

Kyle Joseph CATER 1990-10-28

1. THAT ON OR BETWEEN THE 18th day of November, 2008, and 16th day of January, 2009 AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did possess a firearm for the purpose of Offering to transfer it, while knowingly not being authorized to do so under the Firearms Act or any other Act of the Parliament or any regulations made under any Act of Parliament, contrary to Section 100, subsection (2) of the Criminal Code of Canada;
2. AND FURTHER THAT ON OR BETWEEN THE 18th day of November 2008 and 16th day of January, 2009, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did offer to transfer, with or without consideration, a firearm, while knowingly not being authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 99, subsection (2) of the Criminal Code of Canada;
3. AND FURTHER THAT ON OR ABOUT THE 2nd day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did possess a firearm to wit: a .410 gauge Shotgun, for the purpose of Offering to transfer it, while knowingly not being authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 100, subsection (2) of the Criminal Code of Canada;
4. AND FURTHER THAT ON OR ABOUT THE 2nd day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did offer to transfer, with or without consideration, a firearm to wit: a .410 gauge shotgun, while knowingly not being authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 99, subsection (2) of the Criminal Code of Canada;
5. AND FURTHER THAT ON OR BETWEEN the 4th day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did possess a firearm to wit: a Derringer handgun, for the purpose of Offering to transfer it, while knowingly not being authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 100, subsection (2) of the Criminal Code of Canada;
6. AND FURTHER THAT ON OR ABOUT THE 4th day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did offer to transfer, with or without consideration, a firearm to wit: a Derringer handgun, while knowingly not being

authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 99, subsection (2) of the Criminal Code of Canada;

7. AND FURTHER THAT ON OR ABOUT THE 4th day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did possess a firearm to wit: .308 cal Rifle, for the purpose of Offering to transfer it, while knowingly not being authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 100, subsection (2) of the Criminal Code of Canada;
8. AND FURTHER THAT ON OR ABOUT THE 4th day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did offer to transfer, with or without consideration, a firearm to wit: .308 cal rifle, while knowingly not being authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 99, subsection (2) of the Criminal Code of Canada;
9. AND FURTHER THAT ON OR ABOUT THE 7th day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did possess a firearm to wit: .45 cal handgun, for the purpose of Offering to transfer it, while knowingly not being authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 100 subsection (2) of the Criminal Code of Canada;
10. AND FURTHER THAT ON OR ABOUT THE 7th day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did offer to transfer, with or without consideration, a firearm to wit: .45 cal handgun, while knowingly not being authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 99, subsection (2) of the Criminal Code of Canada;
11. AND FURTHER THAT ON OR ABOUT THE 16th day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did possess a firearm to wit: smith and wesson, for the purpose of Offering to transfer it, while knowingly not being authorized to do so under the Firearms Act, or any other Act of Parliament or any regulations made under any Act of Parliament, contrary to Section 100, subsection (2) of the Criminal Code of Canada;
12. AND FURTHER THAT ON OR ABOUT THE 7th day of December, 2008, AT OR NEAR HALIFAX, HALIFAX REGIONAL MUNICIPALITY did offer to transfer, with or without consideration, a firearm to wit: a smith and wesson, while knowingly not being authorized to do so under the Firearms Act or any other Act of Parliament or any

regulations made under any Act of Parliament, contrary to Section 99, subsection (2) of the Criminal Code of Canada.