PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Chevrefils*, 2018 NSPC 60

Date: 20181207
Docket: 8168818
8168819
8168820
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

LUC CHEVREFILS

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	August 13, 14, 15, 16, 17, November 27, 2018, in Halifax, Nova Scotia
Decision:	December 7, 2018
Charges:	Section**s** 5(2) & 6(1) *Controlled Drugs and Substances Act* Section 465(1)(3) *Criminal Code*
Counsel:	Glen Scheuer, Stephen Lichti, for the Crown Patrick Atherton for the Defence

By the Court:

Overview

[1] On September 3rd, 2017, investigators from the Canadian Border Services Agency (CBSA) located the "Quesera", a vessel they were interested in, at a marina in Hubbards. When they arrived, the Quesera was docked but not occupied. The captain, Jacques Grenier, arrived later, alone in a car. After receiving information from Captain Grenier, investigators searched the vessel and found 250 kg of cocaine along with other items, including cell phones, documents and a "log" which documented the vessel's voyage to Hubbards. Investigators also searched the vehicle driven by Captain Grenier and found 10 new hockey bags in the trunk and a rental agreement in the glove box.

[2] Information from Captain Grenier and the rental agreement led to the arrest of Luc Chevrefils in a hotel room in Dartmouth. A boarding pass, a receipt and a cell phone were found in the room.

[3] Captain Grenier did not testify. The Crown seeks to rely on his pre-arrest statement given to investigators, documents found onboard the Quesera, documents found in the vehicle and documents and text messages found in Mr. Chevrefils' hotel room. If admissible against Mr. Chevrefils, these would prove that: the Quesera with the cocaine had come from St. Maarten; Mr. Chevrefils flew from Montreal to Halifax; both he and the cocaine arrived in Nova Scotia on September 3rd; Mr. Chevrefils received instructions from an unidentified contact; based on those instructions, he rented a vehicle, purchased hockey bags and delivered both to Captain Grenier; Mr. Chevrefils and Captain Grenier agreed that Captain Grenier would unload the cocaine and deliver it to Mr. Chevrefils the next day; Mr. Chevrefils knew the cocaine had come from outside Canada; and, Mr. Chevrefils intended to transport the cocaine.

[4] Mr. Tomeo, an expert in international cocaine trafficking and importation, provided evidence about the usual business structure of importers and the roles occupied within that

structure. In his opinion, someone in Mr. Chevrefils' position would have been involved in the plan to import the cocaine.

[5] Mr. Chevrefils is now charged with possession for the purpose of trafficking cocaine, conspiring with Jacques Grenier and others to import cocaine and importing cocaine.

Position of the Parties

[6] The Crown acknowledges that the cocaine was never in the physical possession of Mr. Chevrefils but argues that he was in constructive or joint possession with the intent to traffic so is guilty of possession for the purpose of trafficking. The defence concedes that the substance is cocaine and that the Crown has proven that Mr. Chevrefils attempted to possess it for the purpose of trafficking but disputes the full offence. He argues the Crown has not proven Mr. Chevrefils had the requisite control necessary to establish constructive or joint possession.

[7] The Crown argues that the only reasonable inference from the evidence is that Mr. Chevrefils agreed with others, including Captain Grenier, to import and distribute cocaine and then carried out that agreement by causing the cocaine to be imported into Canada. The Crown argues that the offence of importing is a continuing offence which was not complete until either: the Quesera cleared customs; the cocaine was unloaded; or, the cocaine reached its ultimate destination in Canada. As such, even if I am not satisfied that Mr. Chevrefils was part of the agreement to bring the cocaine to the dock, providing the bags and the car and agreeing to transport the cocaine makes him a part of the conspiracy to import and liable as a principal or party to the offence of importing. Alternatively, even if I conclude that the importing was complete at an earlier point, the only reasonable inference from the evidence is that Mr. Chevrefils was part of the importing.

[8] The focus of the defence submission is that the Crown has not proven that Mr. Chevrefils was part of the importation, either as a conspirator, a principal or a party. He argues that the offence of importing was complete, at the very latest, when the Quesera docked and the evidence does not establish that Mr. Chevrefils played any role in bringing the cocaine to that point. As

such, his proven involvement would constitute an offence connected to the distribution of the cocaine in Canada, but he cannot be convicted of any offence related to the importation.

[9] Broadly speaking, my task is to decide if the Crown has proven Mr. Chevrefils' guilt on each charge. The Crown has the burden to prove every element of each offence unless specifically conceded by the defence. My reasons will address the evidence supporting each of those elements. However, I will focus on those areas identified by counsel as significant:

1. Has the Crown proven that Mr. Chevrefils had the requisite control to establish constructive or joint possession of the cocaine as opposed to an attempt?
2. When was the offence of importing complete?
3. Does the evidence prove beyond a reasonable doubt that Mr. Chevrefils was a member of a conspiracy to import cocaine?

General Principles

[10] There are general principles that apply to every criminal trial:

1. Mr. Chevrefils is presumed to be innocent of these charges;
2. The Crown must prove each element of the offences beyond a reasonable doubt; and,
3. Proof beyond a reasonable doubt is a high standard. It is more than suspicion of guilt or probable guilt. It is not proof to an absolute certainty but falls much closer to absolute certainty than to proof on a balance of probabilities. It is not proof beyond any doubt. It is not proof to an imaginary or frivolous doubt. It is based on reason and common sense, and not on sympathy or prejudice. (*R. v. Starr,* [2000] S.C.J. No. 40; *R. v. Lifchus*, [1997] 3 S.C.R. 320.)

Offences

[11] Mr. Chevrefils is charged (as amended) that between July 4, 2017 and September 4, 2017 at or near Halifax, Nova Scotia, he did:

> Count 1: Possess a substance included in Schedule I to wit: Cocaine for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*;
>
> Count 2: conspire together with Jacques John Grenier, and other parties known and unknown, to commit the indictable offence of importing a controlled substance to wit:

> cocaine, included in Schedule I into Canada contrary to Section 465(1)(c) of the *Criminal Code*; and,
>
> Count 3: unlawfully import a controlled substance to wit: cocaine, a substance contained in Schedule I of the *Controlled Dugs and Substances Act*, contrary to section 6(1) of the *Controlled Drugs and Substances Act.*

[12] Each of these offences has its own elements which must be proven beyond a reasonable doubt, unless conceded. I will address the specific elements of each offence later in my reasons but there are also elements that are common to all three charges.

[13] All charges require the Crown to prove knowledge to some degree. For "importing" and "possession for the purpose of trafficking", the Crown does not have to prove that Mr. Chevrefils knew the substance was cocaine but does have to prove that he knew or was willfully blind to the fact that it was a controlled substance as opposed to some other illegal item (*R. v. Beaver* (1957) 118 CCC 129 (SCC); *R. v. Blondin* (1971) 4 CCC(2d) (SCC)); *R. v. Ukwuaba*, 2015 ONSC 2953, at para. 101(2)). For the conspiracy offence, because the conspiracy alleged is particularized as a conspiracy to import cocaine, the Crown must prove that Mr. Chevrefils conspired to import that drug (*R. v. Saunders*, [1990] 1 S.C.R. 1020).

[14] The charges can be proven through direct evidence or through circumstantial evidence. Absent an admission, proof of intent, knowledge and agreement will generally not be established through direct evidence. The burden on the Crown in a circumstantial case is to prove beyond a reasonable doubt that guilt is the only reasonable inference from the evidence (*R. v. Griffen*, [2009] S.C.J. No. 28, para. 34). There is no burden on the defence to persuade me that there are other more reasonable or even equally reasonable inferences that can be drawn.

[15] The "mere existence of any rational, non-guilty inference is sufficient to raise a reasonable doubt." (*Griffen*, para. 34). Inferences consistent with innocence do not have to arise from proven facts. A reasonable doubt may be logically based on a lack of evidence (*R. v. Villaroman*, 2016 SCC 33, at para. 36). I must consider "plausible theories" or "reasonable possibilities" that are inconsistent with guilt (*Villaroman*, at para. 37). Speculation and conjecture are prohibited and can be distinguished from plausible theories and reasonable possibilities because the latter are based on logic and experience applied to the evidence or

absence of evidence. The question is "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty"? (*Villaroman*, at para. 38). If so, then the accused must be acquitted.

Evidentiary Issues

[16] Defence counsel conceded the continuity of exhibits and they were entered on consent through an exhibit officer. Unfortunately, when they were entered there was no discussion of the purpose for which they were being admitted or the path to admissibility for that purpose.

[17] Of significance were a "log" and documents found onboard the Quesera, documents found in the rental car, and documents and the contents of a phone found in Mr. Chevrefils' hotel room. Some have relevance and would be admissible as circumstantial evidence. Others have minimal or no relevance other than for the truth of their contents (a hearsay purpose). It became clear during submissions that the Crown was seeking to rely on some of the evidence for a hearsay purpose and the consent of the defence did not extend to that use. The evidence would not be admissible for that purpose unless it fit within a recognized exception or was admissible under the principled exception.

[18] The Crown also seeks admission of Captain Grenier's pre-arrest statement to investigators.

[19] I will address the admissibility of each of these pieces of evidence later in my reasons.

Facts

[20] The Quesera is a sailing vessel. It was of interest to CBSA who were updated on the vessel's international movements. On September 3rd, 2017, CBSA Officer, Sean Foster, learned it had arrived at the East River Marina near Hubbards. He alerted other CBSA investigators and arranged to meet them at the dock. Investigating Officer (IO) Webber, IO Visser, IO McDougall, IO White, and IO Foster arrived at the marina a little after 8:30 p.m.

[21] When they arrived, the Quesera was tied up at the dock. No one was on board and the investigators saw that the vessel did not have a "report number" posted in any of its windows.

To IO Webber, this meant it hadn't reported in to customs. He testified that normal procedure for a private vessel once making landfall or weighing anchor was to call in and make a primary customs declaration. If a vessel had reported, they would receive a report number which would be posted in a window on the vessel, generally dockside.

[22] The investigators learned that a white vehicle had been there earlier and left. At 10:08 p.m., a white vehicle arrived. It was a white Chrysler 300, driven by Jacque Grenier. There was no one else in the vehicle. Mr. Grenier was questioned by CBSA investigators and responded. The content of the statement made by Mr. Grenier prior to his arrest is the subject of the Crown's application for admission under the co-conspirators exception to the hearsay rule which I will address later in my reasons.

[23] Other CBSA and RCMP investigators arrived and the vessel was searched. 250 kg of cocaine was found hidden on it. The cocaine was packaged in 1 kg bricks, most of which were inside larger bales. The bales and loose bricks were well hidden throughout the boat.

[24] A number of items were observed, photographed and/or seized from the Quesera. Of note are the following:

1. US and Canadian passports for Jacque Grenier (Ex 13);
2. a blackberry curve phone (the s. 655 Statement of Admissions (Ex. 34) includes an admission that no data could be recovered from this phone as it had reverted to factory settings prior to be being analysed - Ex. 14);
3. $2400 in Canadian currency (Ex. 15);
4. $1001 in U.S. currency (Ex. 16);
5. a black mead notebook (the "log") (Ex. 17);
6. single sheet of loose-leaf with email address "be41tk21@cryptocloud.mobi" on one side and set of co-ordinates on the other (Ex. 18);
7. a document from the "Simpson Bay (Lagoon), St Maarten. Referencing Capt. Jacques Grenier, Quesera, Newfoundland, dated August 14, 2017 (Ex. 19);
8. a document from Horizon Car Rental N.V., St. Maarten, for a car rental in the name of Jacques Grenier, from April 28th, 2017 to May 12, 2017 (Ex. 20); and,

9. A glass dish containing three electronic items embedded in a soft substance (photograph of item - Ex. 26).

[25] Various witnesses were questioned about Ex. 26, a photo of what appeared to be three electronic devices in a glass dish. IO McDougall was familiar with the device in the middle of the photo. She identified it as a "Spot Tracker". She described it as a GPS tracking device, used by adventurers, that is capable of sending pre-programmed messages confirming that the carrier is ok and with a location or, it can be used to send an SOS or help messages. It can also be set to track the carrier. Someone with access to the account, could track the device in real time. The device was not tested and there is no evidence that it was operational.

[26] Phones and SIM cards other than Ex. 14, referenced above, were seized from the Quesera but no evidence of their contents was produced.

[27] Whether the documents found onboard the Quesera are admissible for their truth will be addressed later, but, the fact that passports and other documents in the name of Jacque Grenier were found on the Quesera establishes a connection between him and the vessel.

[28] Jacque Grenier was arrested, and the vehicle was seized and searched pursuant to warrant. In it, were found the following:

1. Avis car rental agreement in the name of Luc Chevrefils (Ex. 8);
2. A blank "bob's taxi" receipt with "485 herring cove road" written on the back (Ex. 7); and,
3. 10 "Warrior" brand, hockey bags (in the trunk) (Ex. 21 & 22).

[29] Sgt. Nancy Mason (RCMP) testified that when she processed Mr. Grenier to be lodged in cells, she found $600 in his wallet. She noted that the cash was dry, but the other contents of the wallet were wet. In the RCMP exhibit report which was entered as an exhibit at trial (Exhibit 35), this money is recorded as having been seized from Mr. Chevrefils. However, I believe this is an error and it was actually seized from Mr. Grenier.

[30] Mr. Chevrefils has admitted (agreed statement of facts, Ex. 34) that he rented a Chrysler 300 vehicle from Avis Car Rental on September 3, 2017.

[31] As a result of information provided by Captain Grenier, Mr. Chevrefils was located at a local hotel and arrested.

[32] RCMP Sgt. Mason seized $2,920.00 and some Canadian Tire money from Mr. Chevrefils.

[33] Found in his hotel room were:

1. Canadian Tire Receipt (Ex. 1);
2. Blackberry Phone plugged into a wall outlet (Ex. 2);
3. WestJet Boarding Pass (found in a backpack) (Ex. 3);
4. Hotel paper containing a phone number with "514" area code (Ex. 4); and,
5. $2920 in cash and 30 cents in Canadian Tire money (Ex. 6).

[34] The phone (Ex.2) was analysed pursuant to warrant and text-based messages were discovered. Sgt. Duane Flynn was qualified as an expert to give opinion evidence in the analysis of electronic devices and the recovery and interpretation of electronic data. He was able to capture information from the phone, including contacts and messages. Exhibit 32 contains screen shots of that information along with translations of the French messages. The Crown and defence have agreed the translations are accurate except for one word in one message. Exhibit 32A contains the untranslated messages in a single document with colour coding for conversations with different contacts.

[35] Sgt. Flynn testified that the Blackberry seized from Mr. Chevrefils' hotel room is a PGP encrypted device. He explained that people who want to protect their info can buy a service online that protects a group of devices so that they are locked down and can only send encrypted emails. The receiver of a message requires a key/password to decrypt the message.

Admissibility of Text Messages and Documents Found in Hotel Room and Vehicle

[36] The information contained in the text messages and documents found in the hotel room and vehicle is crucial to my determination of what facts have been proven by the Crown. Therefore, I will address their admissibility now.

[37] Any document found in Mr. Chevrefils' personal or constructive possession is admissible against him to show his knowledge of and connection to its contents and his state of mind with respect to the subject matter of the document. Further, if it is established that he has recognized, adopted or acted on the document, it is admissible against him for the truth of its contents as an exception to the hearsay rule (*R. v. Wood*, 2001 NSCA 38, at para. 114).

[38] Recently, the Ontario Court of Appeal, in *R. v. Bridgman* (2017 ONCA 940), applied the "documents in possession" rule to text messages found on a cell phone in the possession of the accused. Essentially, the court concluded that text-based messages could be treated as "documents" subject to this rule. Messages proven to have been composed by the accused are admissible against him as admissions. Messages shown to have been received by him are admissible against him to establish his knowledge of, connection to or complicity in a matter. Where it is proven that the accused "recognized, adopted or acted upon" the messages, the received messages are admissible for their truth.

[39] I have concluded that Mr. Chevrefils had the requisite control and knowledge to establish actual or constructive possession of the contents of the hotel room and vehicle. He was the sole occupant of the hotel room, has admitted that he rented the vehicle and I infer that he drove it, at least from the rental location. The documents were all discovered in areas where they were visible or in circumstances where knowledge can otherwise be inferred. The cell phone was plugged in to an outlet in his hotel room, while he was present and there is no evidence to suggest anyone else occupied the hotel room or had access to the phone.

[40] Dealing first with the documents. I am satisfied that he "recognized, adopted, or acted on" each of the documents so the information contained in each is admissible against him for its truth. The car rental agreement was found in the Chrysler 300. Mr. Chevrefils admitted that he used his driver's licence with a number ending in 5808 to rent a Chrysler 300 from Avis on September 3rd (Ex.34). I am satisfied that the vehicle seized from Mr. Grenier and searched is the vehicle rented by Mr. Chevrefils and that the only reasonable inference is that the rental agreement was executed by Mr. Chevrefils. The boarding pass found in Mr. Chevrefils' possession is in his name. The only reasonable inference is that he acted on it by using it for

travel. The Canadian Tire receipt was found in Mr. Chevrefils' hotel room. The Canadian Tire security video (Ex. 28) and evidence from Susan Forsyth, an employee of that store, establishes that Mr. Chevrefils went through the checkout at the store identified on the receipt, at the time printed on the receipt and was carrying items consistent with those described in the receipt. The only reasonable inference from this is that the Canadian Tire receipt was received by Mr. Chevrefils for purchases he made at the store.

[41] Dealing next with the contents of the cell phone. I am satisfied that the phone found in his hotel room was used by Mr. Chevrefils and by him alone and that he had knowledge of the messages contained therein. It contained 5 contacts and approximately 40 text-based messages. There were messages from three of the contacts: Niss3; Jol; and, Steel03. The messages from and to "Jol" are predominantly in French.

[42] I am satisfied that he composed the "sent" messages so they are admissible against him for their truth.

[43] On June 9, 2017, there is a single message from "Niss3" which says "Hello". That message was not responded to and there are no further messages to or from that contact. That message is admissible to establish that the phone was active as of that date.

[44] On September 3rd, 2017, there is a back and forth "conversation" with "Jol" and with "Steel03". These exchanges, in the context of the other evidence, clearly show that Mr. Chevrefils acknowledged the received messages by responding to them and then acting upon them. Therefore, those messages are admissible for their truth.

Evidence From Phone and Documents

[45] I am satisfied that the contact identified as "Steel03" is Jacque Grenier and Jacque Grenier is the Captain of the Quesera. These are the only reasonable inferences given his connection to the vessel, the circumstances of his arrival at the dock and these messages between "Steel03" and Mr. Chevrefils:

1. "Steel03" asked Mr. Chevrefils if he had a car for him and Mr. Chevrefils said he would bring his car to "Steel03" (Ex. 32, Tabs 26 & 27);

2. "Steel03" and Mr. Chevrefils agreed to meet and at 5:58 pm, "Steel03" provided his address as "East River Marine, 137 Endeavour Ave. Hubbards, NS, in front of the travel lift" (Ex. 32, Tab 28). CBSA investigators confirm that the Quesera was docked at the travel lift at this address;
3. At 7:48 p.m., Mr. Chevrefils sent a message to "Steel03" to say he'd arrived (Tab 35). After this there is no further text-based communication between "Steel03" and Mr. Chevrefils but Mr. Chevrefils sent a message to "Jol" at 9:05 pm. saying he is with "the captain" (tab 37); and,
4. CBSA Investigators confirm that at 10:08 p.m., Jacque Grenier returned to the Quesera, driving a white Chrysler 300 which I have concluded was the vehicle rented by Mr. Chevrefils.

[46] The messages between Mr. Chevrefils and "Jol" and Captain Grenier together with the other evidence provide a chronology of Mr. Chevrefils' activity and communication on September 3rd.

[47] Mr. Chevrefils traveled from Montreal to Halifax, with a scheduled arrival time of 12:01 p.m. (Boarding Pass, Ex. 3). He then rented the white Chrysler 300 from Avis at Bell Boulevard in Enfield Nova Scotia (Statement of Admissions, Ex.34 & Rental Agreement, Ex. 8).

[48] At 3:25 p.m., he received his first message from "Jol" (Ex. 32, Tab 3). Most of the messages are self explanatory. However, some require interpretation. First, not surprisingly, the messages do not explicitly refer to cocaine. In the first message, "Jol" references the need to have very strong duffel bags, capable of carrying "a full 5 gal. jerry jug each" (Tab 3). Then, later, Mr. Chevrefils asks "Jol" if he will be bringing the "5 gallons" back on his own (Tab 6). In later messages, the product is simply referred to as "it" (Tab 10) or "things" (Tab 26). Through Mr. Chevrefils' concession that he is guilty of an attempt to possess cocaine for the purpose of trafficking, he has acknowledged that he knew he would be receiving a controlled substance. From the context and the evidence of the expert, Mr. Tomeo, I am satisfied that these references are to the cocaine that was onboard the Quesera.

[49] Sgt. Flynn explained some of the technical language seen in the exhibits. For instance, the words "received by desktop pgp" does not mean the message was received from a traditional desktop computer. That is just the language used in the system and refers to another pgp

encrypted device. Similarly, when a user refers to their "PGP", they are referring to their contact info.

[50] The messages do not contain much punctuation. In some cases, the lack of punctuation means that the message is capable of more than one interpretation. For example, the first communication from "Jol" at 15:25:

> Ok bonne news il ma repondu lit et va acheter cela !!!!!If Your guy did not bring duffel bags, He should go shopping today. Need 10 very strong ones that can carry a full 5 gal. Jerry jug each. Preferably used, of different colors. There is a huge price value, salvation army, sv de p all close together near a giant canadian tire on Purcell cove road. If He does not know Hali, He should hire a taxi for the morning. A bargain for the local, traffic knowledge and stress reduction service

[51] The first sentence is translated as "Ok good news he answered me read and go buy that!!!!".

[52] The Crown argues that the content and grammatical construction of this message should be read literally as an instruction to Mr. Chevrefils to have a third person, "your guy", go buy things. The necessary inference being that Mr. Chevrefils had a helper in Halifax. The defence argues that the most sensible interpretation of this message is that the English portion was received from someone else and simply copied and pasted into the message from "Jol" to Mr. Chevrefils. The French opening words could be punctuated as follows: "Ok, good news. He answered me. Read and go buy that.". This would be "Jol", speaking in French to Mr. Chevrefils, telling him to read the pasted message and buy what is suggested. "Jol" then pasted the English message that he had received. Interpreted in this way, it is just an instruction from "Jol" to Mr. Chevrefils to do things. I agree with the defence submission. Interpreted in this way, the message makes sense and is more consistent with the other evidence. For instance, "Jol" communicated with Mr. Chevrefils in French in all the other messages, there are no other references in the messages to Mr. Chevrefils having anyone with him and Mr. Chevrefils did not have someone else carry out these instructions, he did so himself. Therefore, I conclude that "Jol" received the English portion of this message from someone else, probably Mr. Grenier, and then provided it as instructions to Mr. Chevrefils.

[53] Following this, there is a text discussion between Mr. Chevrefils and "Jol" about arrangements. During these discussions, "Jol" instructs Mr. Chevrefils to give his "guy" money when they meet. Mr. Chevrefils agreed to take a cab to see if stores were open to buy the bags. At 4:21 p.m., Mr. Chevrefils informed "Jol" that their first choice for the purchase of bags was closed. At 4:26 p.m., Mr. Chevrefils sent a message to "Jol" saying that he would buy Canadian Tire Hockey Bags (Tab 14). The Canadian Tire receipt (Ex. 1), together with the video (Ex. 28) and evidence of Ms. Forsyth who reviewed and interpreted the video and the receipt, establishes that Mr. Chevrefils purchased the bags at 5:03 p.m.

[54] During this time "Jol" asked if he wanted his "guy's" contact information. Mr. Chevrefils told him to give the guy his email (Tab 18) and "Jol" said the "guy" would contact Mr. Chevrefils. At 5:11 p.m., "Jol" told Mr. Chevrefils that the "guy" would call him soon (Ex. 20) and at 5:13 p.m., the contact identified as "Steele03", who is Mr. Grenier, contacted Mr. Chevrefils by text message (Tab 21).

[55] A single sheet of paper with "be41tk21@cryptocloud.mobi" written on it was found in the navigation area of the Quesera (Ex. 18). This is the email address associated with the Blackberry phone seized from Mr. Chevrefils' hotel room (Ex. 2 & Ex. 32, Tab 1). The Crown argues that the piece of paper is evidence of a prior association between Mr. Grenier and Mr. Chevrefils. I disagree. A far more probable inference from the evidence is that "Jol" gave Captain Grenier Mr. Chevrefils' email address as he said he would, that Captain Grenier wrote it down on the piece of paper to remember it and then contacted Mr. Chevrefils. I'm satisfied this happened between 4:40 p.m. and 5:13 p.m. on September 3rd.

[56] Captain Grenier and Mr. Chevrefils then communicated about meeting (Tab 21). Mr. Chevrefils was booking his room and dropping off his bag and was ready to meet at 5:34 p.m. (Tabs 22, 24 & 25). Captain Grenier asked if Mr. Chevrefils had a car for him and suggested he would "get things ready and bring it in the morning". He continued, "Tomorrow is Labour Day. Everything is closed. Sounds like a good time to get things done. What do you think?" (Tab 26). I believe that in this message, Captain Grenier is suggesting that he would get the cocaine ready

and deliver it to Mr. Chevrefils the next day. Mr. Chevrefils agreed and told Captain Grenier he could bring him the car (Tab 27).

[57] Captain Grenier provided his address at the marina (Tab 28) and Mr. Chevrefils went there, arriving at 7:48 p.m. (Tab 35). Prior to Mr. Chevrefils' arrival at the marina, "Jol" asked Mr. Chevrefils "did you talk to each other???" (Tab 31). From the context, I believe he is referring to Captain Grenier. Mr. Chevrefils confirmed that they had talked and "Jol" told Mr. Chevrefils not to tell Captain Grenier "Jol's" real name (Tab 33).

[58] At 9:00 p.m., "Jol" asked Mr. Chevrefils if everything is good (Tab 36) and he responded at 9:05 p.m., saying he was with the captain (Tab 37). "Jol" then asked "… are you planning your day tomorrow????...."

[59] As mentioned earlier, at 10:08 p.m., Captain Grenier arrived alone at the marina in Mr. Chevrefils' rental car and Mr. Chevrefils was subsequently arrested in his hotel room. The Crown submits that the $600 found in Captain Grenier's wallet was given to him by Mr. Chevrefils. I am persuaded that it was. The fact that the money was dry and the other contents of the wallet were wet is suggestive of it having been put in there recently but I note that Captain Grenier had Canadian currency with him on the Quesera so this fact alone does not rule out the reasonable possibility that it came from there. However, Mr. Chevrefils was instructed by "Jol" to give him money and it is a significant amount of money for Captain Grenier to have taken with him if he was going out to meet Mr. Chevrefils and perhaps have dinner.

[60] From the evidence, I find that Mr. Chevrefils picked up Captain Grenier at the marina, gave him the $600 that was found in Captain Grenier's wallet, gave him the vehicle with the bags in the trunk, Captain Grenier drove Mr. Chevrefils back to the hotel and then returned to the Quesera. I believe he planned to unload the cocaine and deliver it to Mr. Chevrefils the next day. Mr. Chevrefils planned to then take the cocaine to a location secured by "Jol" where it would be prepared for further distribution according to instructions from "Jol" and Mr. Chevrefils would then play some part in that further distribution.

Possession for the Purpose of Trafficking

[61] Mr. Chevrefils is charged with possession of cocaine for the purpose of trafficking, contrary to section 5(2) of the *CDSA.* Conviction for this offence requires proof beyond a reasonable doubt that: (1) Mr. Chevrefils possessed the substance; (2) the substance is cocaine; (3) he knew the substance was a controlled substance; and, (4) he possessed it for the purpose of trafficking.

[62] Mr. Chevrefils has conceded that the substance was cocaine and that the Crown has proven that he attempted to possess cocaine for the purpose of trafficking. By necessary implication, his admission that he is guilty of the attempted offence includes a concession that he knew the substance was a controlled substance and that his intended possession was for the purpose of trafficking.

[63] The issue, therefore, is whether he possessed it. It was not found in his physical possession, but this element can also be proven through constructive or joint possession. "Possession" for purposes of the *CDSA* is defined in 4(3) of the *Criminal Code* as:

> (a) a person has anything in possession when he has it in his personal possession or knowingly
>
> > (i) has it in the actual possession or custody of another person, or
> >
> > (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[64] In addition to knowledge, both constructive and joint possession require that the accused has some measure of control over the item to be possessed (*R. v. Wallace,* |2016 NSCA 79, at para. 56; *R. v. Pham* (2005), 77 O.R. (3d) 401, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 363; *R. v. Caldwell* (1972), 7 C.C.C. (2d) 285, [1972] 5 W.W.R. 150 (Alta. S.C. (A.D.)); and, *R. v. Grey* (1996), 28 O.R. (3d) 417, [1996] O.J. No. 1106 (C.A.).

[65] Joint possession under s. 4(3)(b) has the added element of consent (*Pham* and *R. v. Terrence* (1983), 4 C.C.C. (3d) 193 (SCC) at pp. 197-198). Consent, in this context, has been

interpreted to mean "active concurrence of the accused in the possession by another … not merely passive acquiescence…" (*Caldwell*, at p. 300). A relevant consideration is whether the facts establish that the accused had the power to decline to consent in an effective way (*R. v. Miller* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.) at p. 86).

[66] In the case before me, there is no evidence to suggest that Mr. Chevrefils accessed, occupied or controlled the Quesera or had any right to do so. There is also no evidence to suggest that he exerted or asserted control over the cocaine by giving direction or orders to Captain Grenier. However, in my view, the Crown is not required to prove control over the premises where the drug is located if it can otherwise prove control over the drug. Nor is the Crown required to prove that the power or control was in fact exercised (*R. v. Wu* 2010 BCCA 589, at para. 20; *Wallace*, at para. 56; *R. v. Morelli*, 2010 SCC 8, at paras. 15-17; and, *R. v. Webster*, 2008 BCCA 458, at paras. 42-44).

[67] In *Caldwell*, the court said that it was sufficient for the Crown to prove control or a "right of control over the goods" (para. 26, emphasis added). Similarly, in *R. v. Wu* (2010 BCCA 589), Justice Frankel said that to prove constructive possession, the Crown must prove that an accused had "the ability to exercise some power (i.e., some measure of control) over the item in issue." (para. 20, emphasis added). The language of these cases suggests that proof of a right of control over the drugs would be sufficient to establish the measure of control necessary for a finding of constructive or joint possession.

[68] A few cases have addressed constructive or joint possession in circumstances that are somewhat analogous to that before me. In *R. v. Bonassin* (2008 NLCA 40), the accused was found to be in joint possession of drugs in circumstances where he and another had agreed that he would accept delivery of a package of drugs. The police removed the drugs before the package was delivered to the accused. The court found that before the police removed the drugs, the accused and the other both had knowledge of the drugs, both intended or consented to have possession of the drugs and had control over them until they were seized by police (para. 27).

[69] In *R. v. Bremner* (2007 NSCA 114), the accused was found to be in constructive possession of drugs in circumstances where he, while incarcerated, arranged for Mr. Jackson to deliver drugs to him. He was convicted despite that it was not proven the drugs had been delivered. The court found that he knew Mr. Jackson had the drugs, had control over him, placed an order for delivery of the drugs, and Mr. Jackson acted on the order. In the circumstances, his control over Mr. Jackson meant control over the drugs sufficient to establish constructive possession.

[70] In the case before me Mr. Chevrefils has admitted that he intended to take possession of the drugs, knowing they were drugs. Evidence relating to his control or right of control over the drugs comes from the evidence of the expert and the text messages. Mr. Tomeo testified that in the normal course, a deposit would have been paid for these drugs before they were shipped, and the remainder would have been fronted. The $600 paid by Mr. Chevrefils to Captain Grenier was for his personal use and not payment for his services or for the drugs.

[71] The text messages between Mr. Chevrefils and Captain Grenier and "Jol" establish that the plan was for Captain Grenier to deliver the drugs. There is no suggestion that any further money needed to change hands before delivery. If there was still money owing or some other condition that had to be satisfied before the drugs were delivered, the messages would have reflected that fact. The evidence of Mr. Tomeo, along with the text messages between Mr. Chevrefils and "Jol" and Captain Grenier, persuade me that the only intervening act required before Mr. Chevrefils took physical possession of the drugs was that they be unloaded and delivered to him by Captain Grenier. Therefore, at the point where Captain Grenier and Mr. Chevrefils were arranging for delivery, the drugs already "belonged" to the buyer. Mr. Chevrefils was acting, directly or indirectly, for the buyer. As such, I am satisfied that Mr. Chevrefils had a right to possess and control the cocaine.

[72] I also find that the cocaine was left on the boat with the consent of "Jol", communicated through Mr. Chevrefils. The text messages reveal that at 3:32 p.m., Mr. Chevrefils asked "Jol" if he would be bringing the drugs back on his own and "Jol" told him not to bring anything back. Later, at 5:42 p.m., Captain Grenier suggested to Mr. Chevrefils that he would get things ready

and bring it (the drugs) to Mr. Chevrefils in the morning. He then asked, "what do you think?" and Mr. Chevrefils responded that it "sounds good". This exchange demonstrates Mr. Chevrefils' consent to allow the drugs to remain on the Quesera and his apparent ability to withhold that consent.

[73] I am satisfied beyond a reasonable doubt that Mr. Chevrefils had knowledge of the drugs, had a right to possess/control the drugs, intended to take physical possession of the drugs and consented to the drugs remaining on the Quesera. Therefore, I find that Mr. Chevrefils had constructive or joint possession of the cocaine on the Quesera. He has conceded his intent to traffic the drugs. Therefore, I find him guilty of the full offence in count 1, not just the attempt.

Importing

[74] Because my decision on the conspiracy charge relies on the legal analysis necessary to decide the importing charge, I will address the importing charge first.

[75] To convict Mr. Chevrefils of importing cocaine, the Crown must prove that: (1) The substance was cocaine; (2) The cocaine was brought from outside Canada; (3) The accused brought or caused the cocaine to be brought into Canada; and (4) The accused knew or was willfully blind that the imported item was a controlled substance.

[76] Mr. Chevrefils has conceded that the substance is cocaine. He has also conceded knowledge that the item is a controlled substance. The focus of the defence submission was that the Crown had not proven Mr. Chevrefils' involvement in the importing. However, he did not concede that the drugs originated from outside Canada so that element must be proven.

Did the Cocaine Originate from Outside Canada?

[77] If the statement of Captain Grenier and the documents found on board the Quesera (log, passports, docking certificate, and car rental agreement) are admissible hearsay, there is overwhelming evidence that the boat and the cocaine were brought to the dock in Hubbards from St. Maarten. If that evidence is not admissible for that purpose, the Crown argues that this element of the offence is proven by other evidence: the evidence of CBSA investigators about

the state and provisioning of the vessel which was consistent with it having been on a long and difficult voyage (state of disarray, numerous diesel and water cans); the fact that cocaine is not produced in Canada so all cocaine originates from outside Canada; the opinion evidence from Mr. Tomeo about cocaine importation; and, a message from "Jol" to Mr. Chevrefils referencing the need for Captain Grenier to clear "customs" (Ex. 32, tab 7). In response to a message from Mr. Chevrefils asking "Jol" if he would be bringing the drugs back, "Jol" said:

> "For now don't bring anything back he will give them to you and you go park at the hotel while he clears customs and we'll think I have a plane helicopter etc." (emphasis added)

[78] The Crown argues that the statement and the "log" are admissible under the co-conspirators' exception to the hearsay rule and, alternatively, the "log" and the documents were admissible under what the Crown described as an exception for "documents found in possession of an individual in a common enterprise offence" which he argued is similar to the "documents in possession" rule.

[79] In my view neither the documents nor the "log" would be admissible under the "documents in possession" doctrine. I am not aware of any expansion of that doctrine to permit documents found in possession of one conspirator to be admitted against another conspirator. The case the Crown relies on in support of this argument, *R. v. Howe* (2017 NSSC 199), does not, in my view, stand for this proposition. In that case, Justice Rosinski considered whether documents (Minutes and a letter) seized from a Hells Angels Clubhouse and residence in Quebec were admissible against the accused, members of the Bacchus Motorcycle Club in Nova Scotia. Justice Rosinski admitted the documents as business records under both s. 30 of the *Canada Evidence Act* and the common law (*Ares v. Venner*) and under the principled exception to the hearsay rule. He did not admit the documents under an exception for documents found in the possession of someone in a common enterprise. In the context of deciding whether the documents met the threshold reliability standard, he said:

> If these documents were presented in a prosecution against the Hells Angels, having been found in premises occupied by the Hells Angels, they would be arguably receivable as "documents in possession" of the Hells Angels, which possession entitles the court to draw inferences about their knowledge of the

> contents and state of mind about the transaction to which the documents relate - *R. v. Caccamo*, [1976] 1 S.C.R. 786. (at para. 50)

[80] In this statement, which is *obiter*, Justice Rosinski seems to be suggesting simply that documents found in the possession of "the Hells Angels" as an organization could be used in a prosecution against "the Hells Angels" as an organization. Further, in the case cited by Justice Rosinski as support for his statement (*Caccamo*), the Crown sought admission of notes found in the home of the accused against that same accused. Those notes were in the possession of the accused. As such they were admissible against him under the traditional "documents in possession" rule without any expansion of that doctrine.

[81] The Crown here also argued that the documents were found on the vessel and "speak for themselves". To the extent that they have evidentiary value as circumstantial evidence that is true. For example, the presence of documents on the boat bearing Jacque Grenier's name would be admissible to show a connection between him and the vessel. However, to rely on stamps in the passport or dates in car rental document to establish he'd been in a particular country at a certain time would be a hearsay purpose. With respect to the passport, the Crown referenced a "notice" that had been provided to the defence and the fact that it was the property of the Government of Canada. This was not expanded upon and the Crown did not argue that the passports or other documents were admissible under any provision in the *Canada Evidence Act*. The Crown also did not argue for their admission under the principled exception and, because the issue did not arise until submissions, no *voir dire* was held so the evidentiary record is not adequate for a proper assessment of necessity.

[82] The principled exception permits the admission of hearsay evidence, despite its dangers, where it is shown, on a balance of probabilities, that the requirements of reasonable necessity and threshold reliability are met (*Khelawon*, at para. 47 *R. v. Kahn*, [1990] 2 S.C.R. 531, *R. v. Smith*, [1992] 2 S.C.R. 915, *R. v. Khelawon*, [2006] 2 S.C.R. 787, *R. v. Starr* [2000] 2 S.C.R. 144, and *R. v. Bradshaw* 2017 SCC 35). Threshold reliability is met where there are adequate substitutes for testing the truth and accuracy of the statement (procedural reliability) or sufficient

circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability) (*Bradshaw* at para. 27, *Khelawon*, at paras. 61-63).

[83] I am satisfied that the documents and the "log" would meet the threshold test for reliability under that exception. The documents were all prepared by third parties with no apparent motive to lie. In general, they were prepared by businesses or government agencies in the usual and ordinary course of their business and with the intent that they be relied on. The log was prepared by Captain Grenier. CBSA IO McDougal had training and experience dealing with skipper's logs and identified Exhibit 17 as such a log. She said that keeping such a log was standard procedure. Its purpose was to allow the captain to track his progress and record a last known position which could be used if he become lost or disoriented. As such, its accuracy was important to his safety.

[84] However, I am not satisfied, on the limited evidence before me, that the documents and the log meet the test for reasonable necessity under the principled exception. The documents originate from St. Maarten so, presumably, witnesses would reside there so there would be expense in bringing them here. However, I have no evidence about why the witnesses couldn't be available to testify by video or why requirements of the *Canada Evidence Act* couldn't have been met which might have made the documents admissible in that way. The "log" was apparently created by Captain Grenier. He is a compellable witness and I understand would have been available to testify but the Crown chose not to call him.

[85] I have concluded that both the statement and the "log" are admissible under the "co-conspirators' exception" which will be discussed later in my reasons. The primary relevance of that statement and the "log", at this stage, is to prove that the Quesera and cocaine had come from outside Canada.

[86] In his statement to investigators, Captain Grenier said that he sailed the Quesera from St. Maarten. CBSA IO McDougal had experience and training reading coordinates and was able to interpret the "log". She testified that the longitudes and latitudes recorded in it, document a

voyage that originated south of Canadian waters, proceeded in a generally northerly direction into Canadian waters, and eventually ended at a point about 60 miles from Halifax.

[87] Based on this evidence and the text message referencing "customs", I am satisfied that Captain Grenier, the Quesera and the cocaine arrived in Nova Scotia from outside Canada and that Mr. Chevrefils knew that. The only reasonable inference from the text message and its context is that Mr. Chevrefils and "Jol" are speaking about Captain Grenier and the drugs and that it is Captain Grenier who must clear customs. The only reason Captain Grenier would need to clear customs would be because he was coming from outside Canada.

Was Mr. Chevrefils involved in the Importing?

[88] The more contentious issue and the focus of the submissions was whether Mr. Chevrefils participated in the importing, either as a principal or a party.

[89] "Importing" is not defined in the legislation. In *R. v. Bell* ([1983] 2 S.C.R. 471), it was defined as "to bring into the country or to cause to be brought into the country."

[90] To convict Mr. Chevrefils as a principal or a party, the Crown does not have to prove that he physically carried the cocaine into Canada. He could be convicted as a principal if he arranged for the cocaine to be brought in, even if he didn't carry it and was not present at the point of entry. Alternatively, he could be convicted as a party if he aided or abetted the importer. The law of party liability as it applies to the offence of importing was summarized by Justice Hill in *R. v. Ukuaba* 2015 ONSC 2953:

> 104 An importer can be a principal or one who is a party to the offence. A person may be found to have aided and abetted the crime where he or she assisted the principal and intended to do so -- the accused need not know all details of the crime provided he or she is aware of the type of crime committed and knew the circumstances necessary to constitute the offence he or she is accused of aiding: *R. v. Roach* (2004), 192 C.C.C. (3d) 557 (Ont. C.A.), at para. 34; *R. v. M.R.*, 2011 ONCA 190, at paras. 34-40, 46.
>
> 105 As a general rule, "[t]o prove that a recipient is guilty of importing, something more than receipt and knowledge of receiving a controlled drug is required to prove that the recipient was either a principal in, or a party to, importing": *R. v. Atuh*, 2013 ABCA 350, at para. 7; *Schwengers*, at paras. 85-90.

> That said, the taking of a controlled delivery with proven knowledge of its contents and foreign origin is frequently viewed as an important circumstantial fact in the overall assessment as to whether the accused is criminally liable for the commission of an unlawful importation: see *R. v. Rodriguez*, 2014 ABCA 190, at paras. 13-15; *R. v. Ifejika*, 2013 ONCA 531, at paras. 2, 5-8; *R. v. Ratmani*, 2013 ONCA 130, at paras. 16-18; *R. v. Khan*, [2009] O.J. No. 2902 (S.C.), at para. 15.

[91] In *Bell*, McIntyre, J., writing for the majority, clearly stated that the offence of importing is not a continuing offence. It is complete and terminates when the *actus reus* and *mens rea* coalesce (*Bell*, at p. 489; *R. v. Foster*, 2018 ONCA 53, at paras. 100 - 101, Application for leave to appeal dismissed (without reasons) [2018] S.C.C.A. No. 127). McIntyre, J., (at p. 489) put it this way:

> The offence is complete when the goods enter the country. Thereafter the possessor or owner may be guilty of other offences, such as possession, possession for the purpose of trafficking, or even trafficking itself, but the offence of importing has been completed and the importer in keeping or disposing of the drug has embarked on a new criminal venture.

[92] The Crown argues that more recent authorities (*R. v. Vu*, 2012 SCC 40 and *Foster*) have called into question, modified or interpreted *Bell* such that it may be no longer correct to say that importing ends at the point the contraband enters the country.

[93] In this case, the Quesera and the cocaine had crossed into Canadian waters and were at the dock when CBSA interceded. The plan was for Captain Grenier to unload the cocaine and transport it to Mr. Chevrefils. The bags and car provided by Mr. Chevrefils were to be used at least to transport the cocaine to Mr. Chevrefils and an available inference is that the bags were also to be used to unload the cocaine from the vessel. Mr. Chevrefils would be involved in transporting it to another destination(s), probably including Montreal.

[94] The Crown argues that the decisions in *Vu* and *Foster* mean that it is open to me to conclude that importing is a continuing offence which was not complete in fact until the drugs, at its earliest, were unloaded or, at its latest, reached their ultimate destination.

[95] In my view, the conclusion in *Bell* that importing is not a continuing offence is still the law that I am required to apply. That conclusion would have to be explicitly overturned by the

Supreme Court of Canada and it has not been (See: *R. v. Vu*, 2012 SCC 40, at paras. 52-56; *Foster*, at paras. 99 - 103; *R. Henareh*, 2017 BCCA 7; and, *R. v. Ukuaba* 2015 ONSC 2953, at para. 102;). In *Vu*, Moldaver, J. did comment on *Bell* but did not say it had been wrongly decided for the offence of importing (*Vu*, paras. 52-56). He simply said that the reference to kidnapping in *Bell* was *obiter*. He went on to conclude that the offence of kidnapping is a continuing offence which could be complete in law at a certain point in time but not yet complete in fact. In *Foster*, Watt, J.A., writing for the Court, considered the offence of importing in light of the decisions in *Bell* and *Vu*. He incorporated the *Vu* analysis into his decision and expressed a preference for the reasoning of the minority in *Bell*, but explicitly said he was applying the majority finding from *Bell* that importing is not a continuing offence.

[96] Prior to *Bell*, the Nova Scotia Court of Appeal had concluded that importing was a continuing offence (*R. v. Whynott* (1975), 12 N.S.R. (2d) 231; and *R. v. Salvador, Wannamaker, Campbell and Nunes* (1981), 45 N.S.R. (2d) 192). In light of *Bell*, those decisions are clearly no longer authoritative on that point.

[97] So, according to *Bell*, the offence of importing is complete and terminates when the *actus reus* and the *mens rea* coalesce. If, when the Quesera and the cocaine were sitting at the dock, the *actus reus* and *mens rea* had not yet coalesced, then the offence of importing was not yet complete.

[98] The *actus reus* of importing is satisfied when the contraband "enters the country". The *mens rea* is satisfied by proof of knowledge and intent to bring the contraband into Canada.

[99] The Court in *Bell* did not define what it means to "enter the country" and I have not discovered any decisions from the Nova Scotia Court of Appeal where this aspect of *Bell* has been interpreted However, two Nova Scotia Superior Court decisions have interpreted this requirement in the context of an importation by sea (*R. v. Banky* ((1988), 86 N.S.R. (2d) 347; and *R. v. Jagodic & Vagogic* ((1985), 69 N.S.R. (2d) 19). Both concluded that the goods entered the country when the ship carrying the goods entered Canadian waters.

[100] In *Banky*, the accused helped unload drugs from a vessel and was committed to stand trial on a charge of importing. His application for *Certiorari* was granted on the basis of the ruling in *Bell*. The reviewing court concluded that the offence of importing was complete when the drugs crossed the international border and there was no evidence to suggest that the accused had arranged for or participated in that.

[101] Similarly, in *Jagodic & Vagogic*, Vagogic's motion for directed verdict on a charge of importing was granted. In doing so the court stated the law as:

> 5 As set forth by MacIntyre, J. in R. v. Bell, supra, the offence of importing narcotics is complete when the goods enter the country. Consequently, the actus reus of the offence of importing was completed when the ship carrying the Porsche 911, and in which the cocaine was found, entered Canadian waters. In order to convict, the evidence must show that Vajagic either arranged for the Porsche 911 to be imported into Canada or that he was a party with the co-accused Jagodic or others to such an arrangement. The Crown must also prove that Vajagic had knowledge at the time the actus reas occured that the Porsche 911 contained narcotics.

[102] A similar view was taken by the Supreme Court of Prince Edward Island in *R. v. Martel* ([1986] 61 Nfld. & P.E.I.R. 219).

[103] The Crown referred me to a decision from the Nova Scotia Court of Appeal which, it argues suggests that the Court of Appeal does not agree that importing by sea is complete when the vessel enters Canadian waters (two related decisions: *R. v. Sunila* (1986), 71 N.S.R. (2d) 300 & (1987), 78 N.S.R. (2d) 24). In that case, drugs had been brought into Canadian waters by one ship, the "Ernestina", and then transferred to another ship, the "Lady Sharrell", which took the drugs to port. In the context of addressing the legality of the arrest of the "Ernestina", the Court commented that the "Lady Sharrell" had "completed" the importation by bringing the drugs to port. This suggests that the Court of Appeal did not accept that the importation had been complete when the "Ernestina" crossed into Canadian waters. However, the case does not provide much assistance to me in interpreting *Bell* because the Court was not dealing with the specific issue of when the offence of importing ends, was not deciding whether the crew of the "Lady Sharrell" would be guilty of importing and did not mention *Bell.*

[104] The British Columbia Court of Appeal, in *R. v. Miller* ((1984), 12 C.C.C. (3d) 54 (B.C.C.A.)) applied *Bell* in the context of an importation by sea and interpreted it to mean that the offence of importing was not complete when the vessel crossed into Canadian waters but rather was complete only when it arrived at its first stop in Canada and the goods were unloaded (p. 83).

[105] In *Foster,* the contraband was carried on the person of an airline passenger. The plane had landed in Toronto. Ms. Foster had passed through primary inspection and the drugs were discovered before she had cleared secondary inspection. That context was relevant to Justice Watt's decision that the drugs had not entered the country and the offence was not factually complete. He said that because she had not cleared customs, both she and the drugs "remained in limbo" at the time of her arrest. As such, "the object of the importation -- to bring cocaine from Jamaica to a Canadian recipient -- had not concluded." (*Foster,* at para. 108).

[106] It is difficult to reconcile the results in the post-*Bell* cases or find a unifying rule that explains them. What is clear, is that the factual and legal context of the importation is important to the determination of both the point at which the *actus reus* and the *mens rea* coalesce (the offence ceases to be inchoate) and the point at which the goods are said to have actually "entered the country".

[107] It may be that a "bright line" rule is not practically feasible because of the varied means by which contraband enters the country and the varied legal contexts in which the issue arises. Contraband can be brought to Canada in different ways: by land, sea or air; accompanied or unaccompanied; through a controlled or uncontrolled entry; carried on a person or placed in a vehicle/checked baggage; through an initial destination inside Canada before being routed on to an ultimate destination or directly to the ultimate destination; delivered directly to the intended recipient or held in a customs/bond warehouse/pickup station until released to the intended recipient; and, arranged by and carried to completion by one person acting alone or by many acting together.

[108] It is clear from most of the recent cases, and especially those involving customs, that entering the country is more than being geographically within the borders of Canada. It incorporates some requirement that the goods be available to a recipient in Canada, physically or in a legal sense (See: *Foster*, at para. 106).

[109] Were I at liberty to decide (not bound by *Banky* and *Jagodic & Vagogic*), I would say that importing is complete when the goods first become "available" for possession in Canada. The point at which that happens depends on context. Where goods are brought by a traveller on her person through a controlled entry, such as an airport, it would be after the person with the goods has passed out of the "limbo" of customs and are both geographically and legally "in Canada" (eg. *Foster*). Where goods are brought by an air traveler in checked baggage, it would be when the bag is available for pick-up on the baggage carousel (eg. *R. v. Tan* (1990), 44 O.A.C. 324). Where goods are sent unaccompanied, it would be when they are delivered to the door of the intended recipient (eg. *R. v. Onyedinefu*, 2018 ONCA 795) or, having cleared customs, are picked up by the recipient at a courier or cargo warehouse (eg. *R. v. Gill*, 2017 ONSC 3558). Where goods are brought by land across an uncontrolled border, it would be when the person and the goods cross the border.

[110] Here, the goods were brought by sea to what I would describe as an uncontrolled port. I accept, based on the evidence of CBSA IO Webber and the pre-arrest statement of Captain Grenier which I have concluded is admissible, that Captain Grenier was required by law to report in, that he had not yet reported in and so had not cleared customs. However, that did not create the kind of customs "limbo" that was referred to in Foster. In Foster, until the person carrying the drugs had cleared customs, the drugs were not available to Canada. Here, the drugs were available to Canada whether the legal requirement to report to customs was complied with or not. In fact, Captain Grenier intended to unload them the night of September 3rd.

[111] Left to my own interpretation or applying the *Foster* analysis, I would say that the importing here was complete when the vessel made landfall since that is when the drugs could have been removed and so were available to Canada. However, *Banky* and *Jagodic & Vagogic*, in a similar context, both say that the *actus reus* of importing is complete when the goods enter

Canadian waters. Given the absence of clear direction from the Nova Scotia Court of Appeal, these decisions from the Superior Court of this province are at least highly persuasive (I am not certain whether *Banky* is binding on me given that the court was exercising a judicial review function and not, strictly speaking, an appeal function).

[112] Accepting the law as it is stated in *Banky* and *Jagodic & Vagogic*, the importation here was complete when Captain Grenier and the *Quesera* entered Canadian waters.

[113] On either interpretation, Mr. Chevrefils could only be convicted of importing if he was involved, as a principal or party, in bringing the cocaine into Canadian waters or to the dock.

[114] There is no direct evidence of Mr. Chevrefils' involvement before September 3rd, the day the Quesera and the cocaine arrived at the dock. He flew to Halifax that day and there is no evidence of when the ticket was booked or paid for. The cell phone in his possession was activated as of June 9th, 2017 but there is no evidence of use by Mr. Chevrefils until September 3rd. I am satisfied by Sgt. Flynn's evidence, that no messages were sent or received on this phone between June 9th and September 3rd.

[115] The surrounding circumstances, including Mr. Chevrefils' post-importation activity, can provide circumstantial evidence of involvement in the importation. The evidence of the expert, retired RCMP S/Sgt. Joseph Tomeo, can assist me in interpreting that evidence and arriving at reasonable inferences.

[116] Mr. Tomeo provided useful information about how drug organizations typically import drugs, including the structure, hierarchy, and roles of the various people involved. His background and experience are summarized in his C.V. (Ex. 33). He also provided his opinion about Mr. Chevrefils' role in this importation and what he would expect someone in that role to know and be responsible for.

[117] He testified and was cross-examined extensively on whether Mr. Chevrefils held the position of "receiver" or "courier". The significance of the distinction is that typically the receiver would have been identified weeks before the date the drugs arrived and would be much

more knowledgeable about the import operation than a courier. In his opinion, Mr. Chevrefils filled the role of "receiver". However, even assuming these roles are clearly defined in the "industry", the evidence does not persuade me that they were in this organization. Mr. Chevrefils' actions and apparent level of knowledge seems to blur the line between "receiver" and courier such that I cannot impute him with the knowledge and other attributes typically associated with the "receiver". According to Mr. Tomeo, his purchase of the bags and rental of the vehicle is consistent with him being the receiver. He also testified that a receiver would normally want to isolate himself from risk so would not be present at the recovery point or personally involved in transporting the drugs. Mr. Chevrefils did not plan to be at the marina to help unload the drugs (the recovery point) but was apparently intending to be personally involved in the transportation of the cocaine to the ultimate destination. Mr. Chevrefils was clearly retained by the buyer and trusted by "Jol" (he knew his real name and was entrusted with receiving millions of dollars worth of drugs) but this is equally consistent with either being a receiver or a trusted courier. According to Mr. Tomeo, the receiver would typically have a place to examine the product and prepare it for distribution (a stash house). In this case, it appears from the text messages that "Jol" was organizing that, not Mr. Chevrefils. Mr. Tomeo testified that the receiver would typically know the type and quantity of product. Here I'm satisfied that Mr. Chevrefils knew the drug was cocaine but the text messages suggest he didn't know the quantity. For example, "Jol" told him how many and what type of bags to buy and Mr. Chevrefils asked "Jol" if the vehicle he rented would be big enough, implying he didn't know how much there would be.

[118] Even if I were convinced that Mr. Chevrefils was more of a receiver than a courier, that is not determinative of the issue of whether he was involved in the importation. Mr. Tomeo acknowledged in cross-examination that, while the role of receiver would usually be filled before the importation commences, he has seen a receiver be brought in at the last minute and he could not rule that out in this case.

[119] Based on the evidence, including the opinion of Mr. Tomeo, I accept that Mr. Chevrefils was retained by the buyer, was trusted, came to Halifax knowing that cocaine was being

imported on a certain date, purchased bags and rented a vehicle knowing both would be used to transport the cocaine, gave Captain Grenier spending money, planned to go to a stash house where he would divide up the cocaine according to instructions and would be involved in some way in transporting the cocaine to another destination.

[120] It is of some significance that in the text messages, Mr. Chevrefils, "Jol" and Captain Grenier are relatively unguarded in their communication about the plan to prepare for and transport the drugs, however, nothing is said that would suggest that Mr. Chevrefils had been involved in any way before September 3rd. He knew "Jol's" real name which suggests a prior relationship between them but that does not establish a prior role for Mr. Chevrefils in this importation.

[121] I am not persuaded that the only reasonable inference from the evidence is that he was involved in any way in getting the cocaine from outside Canada to the dock. An equally reasonable inference is that he was retained, perhaps even at the last minute, to come to Halifax to transport the cocaine.

[122] As such, I am not persuaded beyond a reasonable doubt that he was a principal or party to the importing as I have defined importing.

[123] Even if the importing was not complete until the drugs were unloaded, I am not persuaded beyond a reasonable doubt that Mr. Chevrefils was a party. He provided bags which, if provided for the purpose of assisting to unload the cocaine, would make him guilty as a party. An alternate reasonable inference is that they were to be used simply to transport the drugs from the dock. The photographs of the cocaine show that most of the individual bricks were already in bales which could have been removed from the vessel without the need for the bags.

Conspiracy

[124] "The essence of criminal conspiracy is proof of agreement" (*R. v. Cotroni & Papalia*, [1979] 2 S.C.R. 256 at 276-77). The Crown must prove: (1) an intent to agree; (2) the completion of the agreement; (3) a common unlawful design; and (4) an intention to put the

common unlawful design into effect (*United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 86; and, *R. v. Root*, 2008 ONCA 869, at paras. 65 - 66, Application for leave to appeal, dismissed, [2009] S.C.C.A. No. 282).

[125] In addition to proving the unlawful agreement alleged, the Crown must also prove the accused's participation or membership in it (*R. v. Carter* (1982), 67 C.C.C. (2d) 568 (S.C.C)).

[126] Here, the object of the conspiracy is identified in the Information as the importation of cocaine, so the Crown must prove that Mr. Chevrefils knew there was an agreement to import cocaine, intended to enter into the agreement to import cocaine, and did enter into the agreement with the intent to put it into effect.

[127] In discussing the *actus reus* for conspiracy, the court in *Cotroni & Pappalia*, said:

> ... The *actus reus* is the fact of agreement: *D.D.P. v. Nock* [[1978] 3 W.L.R. 57 (H.L.)], at p. 66. The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. …

[128] Courts have stressed that the agreement "to act together in pursuit of a mutual criminal objective" and the resulting "meeting of the minds" is central to proof of a conspiracy (*R. v. Alexander* (2005), 2006 C.C.C. (3d) 233 (Ont.C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 526). Knowledge of the existence of the plan and acts committed to further the plan can provide evidence from which the existence of an agreement may be inferred but do not prove the *actus reus* of the conspiracy (*Alexander*, at para. 47).

[129] The *mens rea* for conspiracy requires both the intention to achieve the object of the conspiracy and knowledge of the general nature and scope of the agreement (*R. v. Nova Scotia Pharmaceutical Society* (1992), 74 C.C.C. (3d) 289 (S.C.C.), at p. 22).

[130] The Crown is not required to prove the accused knew all the details of the plan, knew the identity of everyone involved in the plan, or communicated with all members of the conspiracy. Further, an accused who joins the conspiracy late or has a lesser role in it can still be convicted (*R. v. J.F.*, 2013 SCC 12; *R. v. Sethi*, 2015 ONSC 5806. at para. 29). As was noted in *R. v. Genser* ((1986), 39 Man. R. (2d) 203 (C.A.), aff'd [1987] 2 S.C.R. 685), any degree of assistance in the furtherance of the unlawful object can lead to a finding of membership as long as agreement to a common plan can be inferred and the requisite mental state has been established.

[131] Clearly, the agreement and the accused's participation in it will rarely be proven through direct evidence. It will normally rely on inferences from isolated pieces of evidence, assessed together, the interpretation of which can be informed by the expert opinion.

[132] In Carter, the court outlined a three-stage process for analysing conspiracy prosecutions. At the first stage, the Crown must prove beyond a reasonable doubt that the conspiracy charged in the Information exists. At this stage, the court can consider all the evidence, including any acts and declarations of the alleged co-conspirators made in furtherance of the alleged conspiracy. At the second stage, the Crown must establish on a balance of probabilities that Mr. Chevrefils was a member of the conspiracy using only evidence that is directly admissible against him. If probable membership in the conspiracy is established, the court can move on to the third step. At the third stage, the court can use the acts and declarations of any member of the conspiracy made in furtherance of the objectives of the conspiracy to decide whether guilt on any of the charges in the Information has been proven beyond a reasonable doubt.

Stage 1 - Proof of the Conspiracy

[133] I am convinced beyond a reasonable doubt that the conspiracy charged in the Information, to import cocaine into Canada between July 4, 2017 and September 4, 2017 existed.

[134] Based on all the evidence, interpreted using common sense and the opinion evidence of Mr. Tomeo, I have no doubt that importing 250 kg of cocaine by vessel would have required advance agreement and planning. According to Mr. Tomeo, this agreement would have been

made at least four weeks before the vessel arrived and there would have been a great deal of logistical planning required. The seller and the purchaser would have agreed on a price and the method of transportation, a deposit would have been paid, important roles, such as the Captain of the vessel would have been in place, and the vessel provisioned for the voyage. At this stage, I am not required to identify who was part of that conspiracy (*R. v. Barrow*, [1987] 2 S.C.R. 694) but it would have included at least a buyer and a seller.

[135] For purposes of applying the co-conspirators' exception, the Crown may rely on an actual agreement that is broader than the conspiracy alleged in the Information (*R. v. Bogiatzis*, 2010 ONCA 902; *R. v. Sauvé* (2004), 182 C.C.C. (3d) 321 at paras. 115-118; and *R. v. Vrany* (1979), 46 C.C.C. (2d) 14 at p. 26). This is an evidentiary rule only and does not change the offence the Crown has to ultimately prove, which is the one set out in the Information.

[136] In relation to admissibility of the statement, the Crown defined the conspiracy as a conspiracy to import cocaine, which he argued would, by necessity, also include a conspiracy to avoid detection until its objective had been accomplished.

[137] The law is clear that where the Crown seeks to rely on a broader agreement for the purpose of the co-conspirators' exception, the Crown must prove that broader agreement. In *Bogiatzis*, the court said:

> . . . in my view, for the declarations of co-conspirators made in the context of the broader conspiracy to be admissible against the accused, the Crown must prove the existence of the broader conspiracy beyond a reasonable doubt at stage one, and prove the accused's probable membership in the broader conspiracy at stage two. As this court said in *Sauvé* at para. 118, the scope of the conspiracy "does not depend on the definition of the particular crime charged but the nature of the agreement". Therefore, if the Crown seeks the forensic advantage of the broader agreement, it must prove that agreement and the accused's probable membership in that agreement, not just the agreement alleged in the indictment.

[138] I am persuaded that, for purpose of application of the co-conspirators' exception, the conspiracy included agreement to avoid detection.

<u>Stage 2 - Probable Membership in the Conspiracy to Import Cocaine</u>

[139] Using only evidence that is directly admissible against Mr. Chevrefils, I am persuaded on a balance of probabilities that he was a probable member of the conspiracy to import cocaine. In coming to that conclusion, I am relying on his possession of a PGP encrypted cell phone that was activate as of June of 2017, his flight to Halifax on the date the cocaine arrived, his communication with "Jol" and Captain Grenier, and his post-importation activity. From that evidence, with the assistance of Mr. Tomeo, I infer that Mr. Chevrefils probably: was retained by the buyers before the Quesera arrived in Hubbards; knew the product was cocaine; knew it was being imported; knew there was a plan to import; and, knew that his actions were furthering that plan.

[140] None of this directly establishes that he was part of the agreement to import. However, it is evidence from which the existence of an agreement, and Mr. Chevrefils' probable participation in it, can be inferred.

Stage 3 - Membership in the Conspiracy Beyond a Reasonable Doubt

[141] At this stage, in determining whether the Crown has proven Mr. Chevrefils' membership in the conspiracy beyond a reasonable doubt, I am entitled to rely on acts and declarations of co-conspirators that were in furtherance of the conspiracy.

Co-conspirators' Exception

[142] The Crown seeks to rely on the contents of the "log" found on board the Quesera and the pre-arrest statements made by Mr. Grenier to CBSA investigators on the evening of September 3rd, 2017.

[143] Captain Grenier has not been called to testify so his statement and the information contained in the log, which I am satisfied he prepared, is hearsay and presumptively inadmissible against Mr. Chevrefils. However, the co-conspirators' exception to that general rule provides that statements made by a conspirator are admissible against his co-conspirators if the statements were made while the conspiracy was ongoing and in furtherance of the common objective.

[144] The first step is to clearly identify what the statements are that the Crown wants admitted. The log contains co-ordinates and written comments. In summary, the first entry establishes that

on August 23rd, Captain Grenier was headed for Bermuda. Thereafter, the log records him being in sight of or stopping at St. Maarten, Grenada, Dominica, St. Barts, and Guadelupe. Then, on September 3rd, at 2:00 pm. he records "voyage done". During the voyage, Captain Grenier records having experienced a number of storms. The co-ordinates, as interpreted by IO McDougal, corroborate the general track of the voyage of the Quesera.

[145] Captain Grenier's pre-arrest statement was not recorded. Five CBSA investigators testified (Sean Foster, Brian Webber, Amanda Vissers, Kenda White and Janice McDougal) about what was said by Mr. Grenier. Not all were present for all of the conversation or exclusively focussed on the conversation and I have no evidence as to whether any of them recorded what was said in a notebook. As is to be expected, their recollections are not identical. Their evidence is that Mr. Grenier said the following: he was the owner and/or captain of the Quesera; he had arrived in the vessel at 2:00 p.m. that day (September 3rd, 2017); he had come from St. Maarten and it had taken about two and a half weeks to get here; he had not reported in and intended to report in the next day; he'd borrowed the vehicle from a friend, Luc Chevrefils, from Montreal who had rented it for him; his friend was staying at the Hampton Inn; and, his friend had picked him up there (at the marina).

[146] The relevance of the log and the statement at this stage is to help establish: the duration of the voyage which would assist in establishing the time frame for the conspiracy; that Captain Grenier had been in St. Maarten, which according to Mr. Tomeo is a transit point for cocaine; the vehicle, which contained the hockey bags, came from Luc Chevrefils; and, he had been picked up and dropped off by Luc Chevrefils.

[147] Only acts or declarations made "in furtherance" of the objectives of the conspiracy would be admissible against Mr. Chevrefils.

[148] I accept that the log was prepared by Captain Grenier while the voyage and the conspiracy were ongoing and that it assisted in the safe transport of the drugs to Canada so was made in furtherance of the conspiracy.

[149] I have concluded that the importation, which was the principal object of the conspiracy, was completed at the time Captain Grenier made the statement to the CBSA investigators. However, I am satisfied the statement was made for the purpose of avoiding detection which was an essential part of the common design and was in furtherance of that common design. Therefore, the statement satisfies the requirements of the co-conspirator's exception (*R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525 at pp. 547-51; *Vrany*, at p. 26; and, *Sauvé* at paras. 115 - 119).

[150] The co-conspirators' exception to the hearsay rule must be interpreted subject to the requirements of the principled approach (*Starr,* at para. 213; *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.), at para. 62; and *R. v. Simpson*, 2007 ONCA 793 at para. 16, leave to appeal refused, [2008] S.C.C.A. No. 32).

[151] The co-conspirators' exception, in general, meets the requirements of the principled approach (*R. v. Mapara,* 2005 SCC 23, para. 31). However, evidence that falls within the co-conspirators' exception may, in rare cases, be excluded because the particular circumstances don't satisfy the necessity and reliability requirements of the principled approach (*Mapara*, at paras. 15 & 34).

[152] The co-conspirators' exception generally satisfies the requirement for threshold reliability under the principled exception because the *Carter* rule for admissibility provides its own circumstantial indicators of reliability (*Mapara,* paras. 21 - 27; *Chang,* paras. 122 - 124). Necessity is generally established because of "the combined effect of the non-compellability of a co-accused declarant, the undesirability of trying alleged co-conspirators separately, and the evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy" (*Mapara,* para. 18; *Chang,* para. 105). In *Chang*, the court specifically acknowledged the more difficult question that would arise when a co-conspirator declarant is available and left resolution of that question to another case (paras. 107 - 110).

[153] This was exactly the question before the court in *Simpson*. The declarant had previously pleaded guilty so was a compellable and available witness. The declarant's statement met the

requirements of the co-conspirators' exception but the appeal court concluded that it should have been excluded because the circumstances did not meet the requirement of necessity or reliability. Necessity was not satisfied because the conclusion in *Chang* that a co-conspirator's statement would generally be necessary rested on the "combined effect" of three factors, two of which did not apply when the declarant was available (para. 28). In addressing the argument that the declarant was unlikely to be cooperative if called, the court acknowledge that this is a relevant factor but said it is not determinative of whether the statement should be admitted (para. 47). In the circumstances, the court said, the Crown should have called the witness and used the procedures under the *Canada Evidence Act* if he recanted or gave evidence that was not consistent with the statement the Crown sought to have admitted (para. 54).

[154] Like in *Simpson*, in the case before me, the declarant is not a co-accused so is a compellable witness for the Crown, the declarant is apparently available to testify, and the Crown chose not to call him. The Crown argued that it was unlikely that Captain Grenier would be cooperative because people in his situation usually aren't. Whether Captain Grenier would be co-operative is a relevant factor since it is the availability of the evidence, not the availability of the witness that is the important consideration when determining whether the hearsay is reasonably necessary.

[155] The Crown could have called Captain Grenier and, if necessary, resorted first to the procedures in the *Canada Evidence Act* and then to reliance on the hearsay evidence. That would have had the benefit of mitigating some of the hearsay dangers by allowing for cross-examination of the declarant.

[156] Unlike in *Simpson*, there is nothing in the circumstances here that would suggest Captain Grenier would be motivated to be cooperative. Also unlike in *Simpson*, I do not have concerns about the threshold reliability of the statement, given the circumstances under which it was taken or its content.

[157] When a party seeks to admit evidence under the principled exception that would be otherwise inadmissible, that party bears the burden to show it meets the requirements. The

situation is different here. Where a traditional exception meets the requirements of the principled exception and the evidence would normally be admissible under that traditional exception, the party challenging the admissibility of the evidence bears the burden of showing it is inadmissible (*Starr*, para. 214).

[158] Therefore, while I view this as a borderline case on the issue of necessity, given that the burden is on the party challenging admissibility, I am not satisfied the circumstances justify exclusion under the principled exception. Therefore, the evidence of both the log and Captain Grenier's statement to CBSA investigators is admitted.

Analysis and Conclusion on Conspiracy

[159] So, the next step is to determine on all the evidence, including the statement and the "log", whether there is proof beyond a reasonable doubt that Mr. Chevrefils was a member of the conspiracy to import cocaine.

[160] The Crown argued that Mr. Chevrefils was a member of the conspiracy to import on three alternative bases: (1) that the importation was not complete until the cocaine was unloaded or reached its ultimate destination so Mr. Chevrefils' agreement to provide the bags and car and transport the cocaine makes him a member of the conspiracy to import; (2) that the conspiracy included a conspiracy to import and traffic; or, (3) that the only reasonable inference from the evidence is that he was part of the agreement to bring the cocaine to Canada.

[161] First, I have concluded that the importation was complete when the cocaine crossed into Canadian waters or, at the latest, when it docked at a Canadian port. Therefore, Mr. Chevrefils subsequent actions and agreement may be used to infer membership in the conspiracy to import but they do not constitute direct evidence of his agreement to import.

[162] Second, the Crown argues that the actual agreement was broader than that alleged in the Information and included agreement to import and distribute cocaine and that Mr. Chevrefils' agreement to distribute the cocaine makes him part of the broader conspiracy. To convict him of conspiring to import under this heading, the Crown must prove that there was one conspiracy with the common design to import and transport, that Mr. Chevrefils knew that was the common

design, agreed to assist in that common design and intended to put that common design into effect. That requires proof beyond a reasonable doubt that the accused was part of the agreement to import, not just the agreement to distribute after the importation is complete.

[163] I am not satisfied on the evidence that a single broader conspiracy to import and traffic existed. While the evidence establishes that there was a conspiracy to traffic, the Crown has not persuaded me that this was the same conspiracy as the conspiracy to import. In my view, an equally plausible inference from the evidence is that the "buyer" side of the importation conspiracy made a separate agreement with others to take care of the transportation and distribution in Canada.

[164] Other acts may be subsidiary objects of a conspiracy. However, participation in a subsidiary object of the conspiracy does not, without more, make a person a party to the conspiracy to achieve the principal object specified in the Information (*Vrany*, at para. 22 - 27). Even if there was a plan to both import and traffic drugs, an individual accused who agrees only to traffic is not part of the plan to import, even if he knew about the plan to import (*Vrany*; *R. v. Tanney* (1976), 31 C.C.C. (2d) 445 (Ont. C.A.); and, *R. v. Randall* (1983), 7 C.C.C. (3d) 363 (N.S.C.A.).

[165] Here, transporting the cocaine may have been a subsidiary object of the conspiracy to import and Mr. Chevrefils clearly agreed to be involved in that. However, Mr. Chevrefils could not join the conspiracy to import after the principal object of that conspiracy was completed (*Tanney*). In other words, he could not agree to do something, after that thing was done.

[166] Third, I am not satisfied beyond a reasonable doubt that the only reasonable inference is that Mr. Chevrefils was part of the conspiracy to bring the cocaine into Canadian waters or to the dock.

[167] The only direct evidence of an agreement is the communication between Mr. Chevrefils and Captain Grenier and between Mr. Chevrefils and "Jol". Those communications establish an agreement to remove drugs from the Quesera, to deliver them to Mr. Chevrefils who would take them to an apartment, and then to decide how to move them along to their ultimate destination.

[168] The Crown relies on the many of the general authorities already cited but also specifically *R. v. LeBlanc* (2012), 291 C.C.C. (3d) 47 (N.S.C.A.) and *R. v. Parsons* |2017 NLCA 64. In both, the accused were convicted of conspiracy having joined late and without full knowledge of all acts committed by other conspirators. However, in both, the accused were found to have joined the conspiracy before the principal object of the conspiracy was complete (in *LeBlanc*, it was murder; in *Parsons* it was trafficking cocaine), with knowledge of what the principal object was and to have agreed to take part in the execution of the common design.

[169] Here, the Crown relies on the following:

1. The expert's evidence that an importation like this one is a sophisticated operation which can take 6 - 12 months to plan with important roles, such as the receiver, being identified and filled before the vessel leaves port;
2. The presence of the "spot tracker" on the boat which is suggestive that the boat's progress was being monitored;
3. Mr. Chevrefils arrived on the same date the Quesera arrived which is suggestive of advance knowledge of the arrival date;
4. Mr. Chevrefils' possession of a PGP encrypted phone with contacts in it which is suggestive of being part of a group of people involved in illegal activity;
5. Mr. Chevrefils' communication with both "Jol" and the Captain about both the offload and the transportation of the drugs which is suggestive of involvement in both the importation and the distribution;
6. HIs purchase of the bags and rental of the vehicle, all consistent with what you would need to transport 250 kg. of cocaine;
7. He gave money to Captain Grenier;
8. His communication suggests he planned to receive the drugs, go to the stash house and assist in transporting them further;
9. He was clearly trusted by "Jol";

10. The use of the word “we’ll” in the text message suggests that “Jol” and Mr. Chevrefils are making decisions together concerning how to transport the cocaine;

11. The piece of paper on the Quesera with Mr. Chevrefils’ email address written on it which is suggestive that the Captain knew of Mr. Chevrefils before he docked; and,

12. He picked up the Captain and gave him the bags, vehicle and spending money which, again, is suggestive of a relationship with the import side of the operation.

[170] I have to assess the cumulative weight of all of this evidence and determine whether, taken together, it leaves me with the single reasonable inference that Mr. Chevrefils was part of the plan to import the cocaine. That task requires me to look at some of the evidence individually. For instance, I do not believe that the presence of Mr. Chevrefils’ email address on the boat means the Captain had it prior to his arrival. It is clear from the text messages that “Jol” gave Captain Grenier the address between 4:40 p.m. and 5:13 p.m. which was about 3 hours after Captain Grenier arrived.

[171] As I have said, I am not satisfied that Mr. Chevrefils filled the role of “receiver” or that being in that role would necessarily mean that he was engaged before the boat landed or part of the plan to import. There are aspects of the receipt and distribution side of this operation that seem last-minute. For example, Mr. Chevrefils arrived around the same time as the vessel, didn’t know what he needed to buy, hadn’t arranged a stash house and “Jol’s” message about a plane or helicopter suggests that the method of transportation hadn’t been sorted out.

[172] The evidence does not convince me beyond a reasonable doubt that the only reasonable inference is that Mr. Chevrefils was part of the agreement to import the cocaine. It is just as consistent with him being a trusted courier, retained (perhaps at the last minute) to come to Halifax and transport the drugs. That would make him guilty of conspiracy to traffic but not conspiracy to import.

Conclusion

[173] In conclusion, I am satisfied that Captain Grenier imported 250 kg of cocaine onboard the Quesera. He arrived here on September 3rd, 2017. On that same date, Mr. Chevrefils flew to Halifax. Acting on instructions from "Jol", he rented a car and purchased duffel bags. "Jol" provided his contact information to Captain Grenier and contact was made. They agreed that Mr. Chevrefils would deliver the car and the bags to Captain Grenier, that Captain Grenier would unload the cocaine from the vessel and deliver it to Mr. Chevrefils the next day. "Jol" planned to rent a house which would be used to prepare the cocaine for transport.

[174] Mr. Chevrefils never had actual personal possession of the cocaine. However, I am satisfied that the only reasonable inferences from the evidence are that he knew the substance on the vessel was cocaine, that he had a right to possess or control the cocaine, and that he consented to the cocaine remaining on the vessel until it could be prepared for delivery. As such, I am convinced beyond a reasonable doubt that he was in constructive or joint possession of the cocaine. I am also satisfied that Mr. Chevrefils intended to transport or participate in the transport of the cocaine in a manner that would satisfy the requirements of trafficking. Therefore, I find him guilty of the full offence set out in count 1, possession for the purpose of trafficking, not simply an attempt.

[175] I am satisfied beyond a reasonable doubt that the cocaine was imported, that Mr. Chevrefils knew the cocaine had been imported, that he intended to take delivery of the cocaine and that he provided Captain Grenier with the bags and vehicle, knowing they would be used to deliver the cocaine to him. The law in Canada, as set out by the Supreme Court of Canada in *Bell* is that importing is not a continuing offence. It is complete when the goods enter Canada. What it means to enter Canada has been inconsistently applied across the country. In Nova Scotia, it has twice been interpreted by the Supreme Court as meaning when the goods enter Canadian waters. On that interpretation, Mr. Chevrefils could be convicted of the offence of importing cocaine only if I was convinced beyond a reasonable doubt that he had participated in, arranged for or assisted in getting the cocaine to that point. I am not persuaded that he did.

[176] The Crown has argued that the importing was not complete when the cocaine entered Canadian waters but rather at a later point: after the vessel had cleared customs; after the

cocaine had been unloaded; or, when the cocaine reached its final destination which would include transporting the drugs to a safe house and then on to Montreal or points unknown. If that interpretation is correct, then Mr. Chevrefils would be guilty, at the very least, as a party to the offence of importing. However, even if I were permitted to take a more expansive view of what it means to "enter Canada" than the view taken by the decisions of the Nova Scotia Supreme Court, I would not accede to the Crown's argument. As I have said, were I at liberty to decide what it means to enter Canada, I would say that goods enter Canada when they become available to Canada. In my view, this interpretation is most consistent with decisions from other provinces. The point at which that occurs will vary depending on the circumstances of the case. In the case before me, the cocaine arrived at an uncontrolled port. As such, the cocaine was available to Canada when the vessel docked. I would therefore say that the importation was complete when the Quesera docked and Mr. Chevrefils actions in providing the bags and vehicle and agreeing to take delivery of the cocaine does not make him part of the importation, either as a principal or a party. Therefore, I find him not guilty of count 3.

[177] The conspiracy charged has, as its principal object, the importation of cocaine into Canada. I am satisfied beyond a reasonable doubt that a conspiracy existed to import cocaine into Canada and that the cocaine was in fact imported. The agreement underlying that offence may have included an agreement to distribute the cocaine beyond the point of landing. However, that is not the only reasonable inference from the evidence. It is equally possible in my view that the agreement to import the cocaine was simply to get it to the point of landing and there was a separate conspiracy to distribute it beyond that point. Distribution of the cocaine beyond the point of entry into Canada may have been a subsidiary object of the conspiracy to import and I am satisfied that Mr. Chevrefils agreed to and did participate in that subsidiary object. However, participation in a subsidiary object of the conspiracy does not make him a part of the conspiracy to achieve the principal object specified in the Information. I am not satisfied that the only reasonable inference from the evidence is that Mr. Chevrefils was part of the conspiracy to import cocaine. Therefore, I find him not guilty of count 2 in the information.

Elizabeth Buckle, JPC.