PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Alvarado-Calles*, 2020 NSPC 38

Date: 2020-07-28
Docket: 8260204, 8260205, 8020206, 8260207, 8260208, 8260209, 8060210, 8260211, 8260212, 8260213, 8260214, 8260215, 8060216, 8260217, 8260218
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

NELSON RICARDO ALVARADO-CALLES
MATTHEW ROSS LAMBERT
DARCY PETER BAILEY
DANGIS SEINAUSKAS

DECISION ON TRIAL

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	May 7-10, 14-16, 24; June 18, 20, 21; July 3, 22- 25, 30, 31; August 1, 2; December 2, 3, 6, 30, 31 2019; January 2, 3, 6-10, 13, 14, 15, 17, 28, 30; February 24 2020 in Halifax, Nova Scotia
Decision:	October 6, 2020 (written) July 28, 2020 (oral)
Charges:	Sections 5(1) & 5(2) *Controlled Drugs and Substances Act* Section 465(1)(c) *Criminal Code* x 2
Counsel:	Jeff Moors & Angela Nimmo, for the Crown David Bright, Q.C., for Nelson Alvarado-Calles Joel Pink, Q.C. & George Franklin, for Matthew Lambert Patrick MacEwen, for Darcy Bailey

Stanley MacDonald, Q.C. & Paul Neifer, for Dangis Seinauskas

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By the Court:

Introduction

[1] The accused were charged with conspiracy to import cocaine, possession for the purpose of trafficking cocaine, trafficking cocaine, and conspiracy to traffic cocaine. Those charges relate to the discovery of 157 kg of cocaine on the Arica, a commercial cargo vessel.

[2] The Arica's first Canadian port of call was Montreal. While there, authorities saw a small boat with a man diving near her. The Arica then came to Halifax. Upon her arrival, authorities again saw a small boat in her vicinity, and underwater inspection revealed anomalies on one of her sea chests (an underwater chamber in the hull). It was suspected she was being used to smuggle contraband. Through the day, authorities saw men, identified as the accused, in or around a small boat with diving equipment and diving from a beach near the Arica. In the early evening, Mr. Bailey and Mr. Lambert were arrested in a vehicle leaving the beach, where Mr. Bailey had been diving. No smuggled contraband was found in the vehicle. However, a short time later, the cocaine was discovered in the Arica's starboard sea chest. Mr. Seinauskas was arrested that evening at a local hotel and Mr. Alvarado-Calles was arrested some weeks later in Ontario.

[3] Following the seizure of the cocaine, the investigation continued. Electronic devices were seized from the vehicle and hotel room, documents were seized from residences, business records and video surveillance footage were obtained, and witnesses interviewed. Evidence presented at trial established that prior to the Arica's arrival in Montreal, Mr. Bailey was tracking her voyage and knew her itinerary. Mr. Bailey and Mr. Lambert knew she was destined for Montreal, had details of her sea chests, and had researched and purchased diving equipment and tools that would permit them to access the sea chests. The evidence also established that the four accused had a prior association with each other, were in the boat that had been seen near the Arica in Montreal, and had been in or around the boat, diving gear and the beach in Halifax.

[4] The specific arguments made by counsel will be addressed later in my reasons. In summary, the Crown argues that the only reasonable inference from the evidence is that the four accused agreed to import cocaine into Canada using the Arica and

planned to sell it or transport it for sale. The Crown theory is that they planned to remove the cocaine in Montreal. That plan was thwarted because of bad weather and strong currents, so they came to Halifax where they tried again. In Halifax, the plan was again thwarted, this time by the authorities.

[5] Individual accused make specific arguments based on the evidence they say is admissible against them. They all admit the substance found onboard the Arica is cocaine. However, they dispute all other elements of the offences. They dispute that the Crown has proven they agreed to import anything into Canada, were trying to remove anything from the Arica, or knew there was a controlled substance onboard the Arica. They argue that the admissible evidence is equally consistent with an innocent explanation, that the accused were diving for algae in relation to Mr. Bailey's business venture which involved ocean plastics.

[6] This decision is divided into five parts. First, I will address the admissibility of evidence against individual accused. Second, I will summarize the evidence that I have concluded is admissible against one or more of the accused. Third, I will summarize the legal principles. Fourth, I will consider the impact of the co-conspirators exception to decide whether evidence admissible against individual accused is also admissible against others. Finally, I will consider the evidence admissible against each accused to decide whether the Crown has met its burden against each individual accused on each charge.

Part 1: Admissibility of Evidence

[7] Not all evidence heard during the trial is admissible against all accused or for all purposes. As a result of pre-trial rulings with reasons provided separately, some evidence was not admitted against some accused, either because it was not proven to be voluntary or because it was excluded under s. 24(2) of the *Charter*. That evidence is potentially admissible against other accused for some purpose.

[8] The earliest available information concerning activity that the Crown attributes to the accused comes from documents and electronic devices. Before I address the potential inculpatory information found there, I must determine whether the evidence is admissible against any of the individual accused and, if so, for what purpose. The Crown argues the information is admissible against individual accused as admissions or under the "documents in possession" doctrine, so can be used as circumstantial evidence and, in some instances, also for a hearsay purpose. The

Crown also argues that some of this evidence is admissible against all accused under the co-conspirator's exception.

[9] I will address the co-conspirator's exception later in my reasons. At this stage, I will address the admissibility of evidence against individual accused as admissions or under the documents in possession doctrine.

Legal Principles - Admissions and Documents in Possession

[10] Under the admissions doctrine, where the Crown tenders the oral or written words or conduct of an accused, it is admissible against that accused for its truth (David Watt, *Manual of Criminal Evidence*, (Toronto: Thomson Reuters Canada, 2019) at para. 27.10). The doctrine also permits adoptive admissions where an accused's silence, words or conduct acknowledges the truth of a statement made by someone else to him or in his presence.

[11] Under the "documents in possession" doctrine, a document that is or has been in the personal, constructive or joint possession of an accused is generally admissible against him as original circumstantial evidence and potentially admissible for the truth of its contents as an exception to the hearsay rule (*R. v. Wood*, 2001 NSCA 38, at para. 114; and, *R. v. Bridgman*, 2017 ONCA 940, at paras. 68 - 70). As circumstantial evidence, the document is admissible to show an individual's knowledge of the contents and connection or complicity in the subject matter of the document. If it is established that he has recognized, adopted or acted on the document, it is admissible against him as an exception to the hearsay rule (essentially as an adopted admission) and can be considered for its truth (*Wood*, at para. 114; and, *Bridgman*, at para. 69 - 70).

[12] The admissions exception and the "documents in possession" doctrine have been extended to apply to information (including text-based communication) found on electronic devices such as computers or cell phones (see: *R. v. Ansari,* |2015 ONCA 575; *Bridgman*, at para. 71; *R. v. Hersi*, 2014 ONSC 1368; and, *R. v. Ahmad*, [2009] O.J. No. 6154).

[13] A pre-requisite to admissibility under the 'documents in possession' doctrine is proof that the document was in the possession of the accused. Possession is defined by reference to s. 4(3) of the *Criminal Code* to include actual, constructive or joint possession (*Wood*, at para. 119; and, *R. v. Caccamo*, [1976] 1 S.C.R. 786 at para. 50). The nuances of possession will be discussed later in this decision, but, in

summary, possession requires proof of knowledge of the existence and nature of the thing coupled with control or a right of control over the thing or the premises where it is found (see: *R. v. Wu*, 2010 BCCA 589, at para. 20; *R. v. Wallace*, 2016 NSCA 79, at para. 56).

[14] Possession can be proven from direct or circumstantial evidence (see: *R. v. Black*, 2014 BCCA 192). Sometimes, knowledge and control can be inferred from proof that an accused occupied a residence or part thereof. However, the circumstances need to be examined carefully and mere occupancy is not necessarily sufficient in cases of non-exclusive possession (*R. v. MacLeod (J.M.) et al.*, 2013 MBCA 48).

[15] Electronic devices can hold a great volume and variety of information. In many cases, proof of possession of the device will be sufficient to establish possession of the individual pieces of information on it. However, there are circumstances where the possessor of a device might not be aware of everything on it. Therefore, it is important to consider the circumstances (the type of information, where it was found on the device and how it came to be there) before concluding that the possessor of the device necessarily possessed all information on it.

[16] If I conclude that a document is admissible against an individual accused under the "documents in possession" doctrine, it is also potentially admissible against the other accused if the requirements of the co-conspirator's exception are met, including that the document was intended to further the conspiracy (*R. v. Russell* (1920), 33 C.C.C. 1 (Man. C.A.), at para. 16).

Electronic Devices

[17] The Crown seeks to rely on the contents of four electronic devices:

1. Samsung GSM SGH-i337 Galaxy S4 cellphone seized from Room #327 at the Future Inn in Halifax on June 10, 2018 (Ex. 81 (identified as police exhibit (PE) 64) – "the Samsung S4");
2. Samsung SM-G930W8 Galaxy S7 cellphone seized from a Cadillac Escalade on June 11, 2018 (Ex. 57 (identified as PE 52) – "the Samsung S7");

3. Acer Laptop seized from Room #327 at the Future Inn in Halifax on June 10, 2018 (Ex. 64 (identified as PE 61) – "the Acer Laptop");
4. Samsung GT-P3113TS Galaxy Tablet seized from Room #327 at the Future Inn in Halifax on June 10, 2018 (Ex. 86 (identified as PE 68) – "the Samsung Tablet").

[18] The defence does not dispute the continuity of these devices or the information obtained from them. Data was extracted, analyzed, and filed as exhibits during the trial. To assess the reliability of that information, it is necessary to review the process used to extract and analyze it.

[19] Gilles Marchand, a civilian employee with the RCMP, was qualified as an expert to give opinion evidence on the forensic extraction and analysis of computers, cellular telephones, their content, data and operating systems and the use of software to analyze these devices (Ex. 122 – statement of qualifications; Ex. 123 – C.V.).

[20] He testified about how the information from the devices was collected, analyzed, and produced. For the Samsung cellphones, he used the Cellbrite 'Universal Forensic Extraction Device' (UFED) software to extract the data. The program identifies and indexes the data into various categories to allow browsing and keyword searches. The categories assigned to the data could include: autofill information; cached information such as passwords; call logs; chats such as "WhatsApp" chats; contacts; device locations; emails; SMS messages; user account information; and, data files (audio, images and videos).

[21] The program can recover deleted data. When data is deleted but not yet overwritten by new data, it is kept in unallocated space on the device. It is not available to the user but the Cellbrite software can still identify and capture it. When the program captures deleted data, it identifies it as such in the reports.

[22] Where a message has been deleted and the package of data associated with that message is no longer complete, the program is unable to recover all data, but uses a process called "carving" to extract what is available. This data is identified in the reports as "carved" which differentiates it from intact data.

[23] Where information has been deleted and entirely overwritten, it is no longer available at all and there would be no record of that information in the extraction reports.

[24] If a message in an extraction shows as "deleted" without more, it is a message that had been deleted by the user of the device but was still intact, meaning its data was complete. If a message is identified as "carved", the data associated with that message is incomplete and it is not possible to know what is missing. However, Mr. Marchand testified that the process does not add data. In cross-examination, he acknowledged that where a text 'conversation' is recovered through carving, it is possible that messages in the communication chain are missing because they could not be recovered. Mr. Marchand's opinion was that messages might be missing from a sequence but those that remained would be in order by date and time. He testified that he had never seen a situation where part of an individual text message was missing.

[25] The information in the devices contains time and date stamps. Those may or may not be accurate, depending on the settings on the device. Mr. Marchand testified that when he did the extractions, he checked to see if the device was set to automatically update to local time. Most devices are set to automatically update when they access the internet. However, he has analyzed devices with the date and time incorrectly set. He testified that the time stamp on a text message would reflect the time set on the phone at the time the message was sent or received. If the device was set to automatically update, the time on the message would be accurate. However, if the time on the device was set manually, there would be no way to know if the time stamp on the message was accurate. Further, the mere fact that a device was set to automatically update when it was seized would not mean that it had always been set that way so would not mean that historic date/time stamps were necessarily accurate. Finally, the time stamp in the extraction reports generally refers to "UTC-3" for all content. "UTC" is coordinated universal time or Greenwich Mean Time and "UTC-3" refers to Atlantic Daylight Time (evidence of Cst. Duane Roule and Cst. Troy LaPlant). The evidence establishes that at times the devices were in Vancouver or Montreal when the content (communication, photograph etc.) was created. It is not clear whether the devices adjusted the time to Atlantic time when the device was used here or if the Cellbrite program did so because the extraction occurred here. In either case, the actual time in the extraction and reports would have to be adjusted to the correct time zone corresponding with the location.

[26] The Samsung S4 was set to automatically update time and date. However, Mr. Marchand could not say whether the Samsung S7, the Samsung Tablet and the Acer laptop were.

[27] In some cases, the content corroborates the need for the time-zone adjustment and corroborates the accuracy of the time stamp on the device. For example, in communication from May 30th occurring when the Samsung S4 (Ex. 81) was in British Columbia, there was discussion about needing to get to a store by 6:45 p.m. At time stamp 7:23 p.m. (UTC-3), one of the participants wrote that this allowed about 3 hours to get there. The content suggests the conversation was taking place about 3 hours before 6:45 p.m. which fits with a local time of 3:23 p.m. (UTC-7-Pacific Daylight Time).

[28] Mr. Marchand testified that the full extraction from four electronic devices, subject to vetting for things such as privileged information, was copied onto a hard drive (Exhibit 126). For the Acer laptop, Mr. Marchand extracted the data and generated a report for the court with information that had been flagged by the investigator. For the other devices, investigators used the software to analyse the data and prepare reports. These reports contain subsets of data in accordance with parameters set by the investigator. These investigators were not qualified as experts. They testified based on their examinations of the extracted data and their general knowledge.

[29] Subject to specific comment about individual pieces or categories of information, I am generally satisfied that information extracted from the electronic devices is reliable, meaning that it accurately represents the information on the device.

1. Samsung S4

[30] The Samsung S4 (ex. 81) was seized during the execution of a search warrant at room #327 of the Future Inn, Halifax, on June 10, 2018. The data from this device was entered into evidence in various forms (Ex. 126 is a hard drive containing the full extraction from the device; Ex. 127 is a printed 3 page excerpt from an extraction report; Ex. 128 is a printed extraction report prepared by defence; Ex. 137 is a printed timeline report; and Ex. 138 is a USB containing an extraction report for the device).

[31] D/Cst. Duane Roule analysed the data extracted from this device. He was asked about some of the categories of data stored on the device. He testified that "Autofill" data is stored by applications like web browsers to allow certain fields to be filled in automatically with information the user has previously used. He agreed that this data simply reflects what has been entered by the user of the device.

[32] The data files on the device (audio, images and videos) have three dates associated with them: created; modified; and, accessed. D/Cst. Roule could not say whether, for a photo or video, these dates would correspond to the date the photo was taken, the date it arrived on the device from another source or something else. The expert, Mr. Marchand, was not asked about the dates associated with data files.

[33] The Crown argues that Darcy Bailey used/possessed the Samsung S4 during the relevant time period, that all information found on it is admissible against him as circumstantial evidence and most is admissible against him for a hearsay purpose because he authored or created it or recognized, adopted or acted on it. Mr. Bailey does not concede his possession/use of the device. The Crown also argues that the contact identified on the device as "Dr. Ross" is the accused, Matthew Ross Lambert, so communication between the user of the device and "Dr. Ross" is also admissible against Mr. Lambert for its truth as admissions or adopted admissions. Mr. Lambert's counsel disputes that Mr. Lambert is "Dr. Ross".

a. Use/Possession of the Samsung S4

[34] This device was not found in Mr. Bailey's personal possession. Room #327 was not occupied when the warrant was executed on June 10th. Mr. Bailey, Mr. Lambert and Mr. Seinauskas were all in police custody, having been arrested the day before. However, I am satisfied that the evidence connects all three to that room.

[35] The room was booked through the same travel company that had booked flights for Mr. Bailey, Mr. Seinauskas and Mr. Lambert, was registered in Mr. Lambert's name and paid for by credit card associated with him (Ex. 1, 2, 3, 91 & 195; and, evidence of Scott MacDonald, general manager).

[36] Mr. Seinauskas was arrested in the room on the evening of June 9, 2018 and the room was secured until the next day when the warrant was executed and the devices seized (Evidence of Scott MacDonald, Sgt. Glode and Cpl. Campbell). When Mr. Lambert was arrested, a key card holder for room #329 (not #327) was found in his pocket (Ex. 40; evidence of D/Cst. Josh Underwood). However, an employee of the Future Inn testified that at about 8:00 p.m. on June 9th, she made a room change for a man who was staying in #329 because of a problem with the lock. About 30 minutes later, Sgt. Glode arrested Mr. Seinauskas in #327. So, I am satisfied the man in #327 was Mr. Seinauskas and, based on the employee's

observations of the room when she delivered the new key card to him, that he moved the contents from #329 to room #327 shortly before he was arrested.

[37] Documents in Darcy Bailey's name were found in the room when it was searched (an envelope and card addressed to Darcy Bailey – Ex. 87; and, an Air Canada boarding pass and receipt in the name of Darcy Bailey - Ex. 92).

[38] An invoice in the name of Matthew Lambert, for room #327, was found on the floor inside the door (Ex. 91; evidence of Scott MacDonald; evidence of Sgt. Nancy Mason).

[39] When the warrant was executed, closed suitcases, coats and electronic devices were found on the beds and floor (Sgt. Mason; photographs - Ex. 4 & Ex. 8, Tab 2A). I am satisfied that each of the items seized (suitcases, documents, and electronic devices) belonged to one of either Mr. Bailey, Mr. Seinauskas or Mr. Lambert.

[40] This puts the Samsung S4 in the constructive, joint or past possession of one or all of the three men but does not assist in connecting it to any one of them. Its contents do. The information on the device is admissible to establish a connection between the device and a specific individual.

[41] The Samsung S4 was set to automatically adjust date and time. As I have said, it is possible that feature was not always activated on the device, however, I am satisfied based on my review of specific content in the context of other evidence that the date and time stamps on the device are accurate.

[42] Information on the device suggests that in 2016 it was used by Matthew Lambert. Autofill information from April of 2016 has Mr. Lambert's name. A video apparently from May of 2016 (the title of the clip includes "20160510" and this date is also listed as the created, accessed and modified date), taken using the device contains a clear image of Mr. Lambert holding the device reflected in a mirror.

[43] However, all information on the device from May 24, 2018 until it was seized is consistent with Darcy Bailey being the only user: an email addressed to cdarcyb@gmail.com from Air Canada on May 24, 2018; user accounts on the device for google drive, google client ID, True Caller, Facebook, and Gmail all contain variations of the name "Darcy Bailey" in the identifier; the Facebook user account contains a photograph of Mr. Bailey; autofill information from May 31, 2018 shows the name "Darcy" and a user email address of "cdarcyb@gmail.com"; incoming

emails contain the salutation, “Darcy,…”; outgoing emails include “Darcy Bailey, P.Eng” on the signature line; an outgoing email from the Gmail address to “oceanplasticalliance@gmail.com” attaches Mr. Bailey’s passport; there are multiple “selfies” (pictures obviously taken by the user of the device) of Mr. Bailey in the images folder; and, in a message sent on June 6, 2018, the sender of the message identifies himself as Darcy Bailey (Ex. 126 & 138). Assessed in isolation, any one of these things would not necessarily be determinative of possession; assessed together, they lead to the sole rational conclusion that the device was used/possessed by Mr. Bailey.

[44] Further, a signed contract found in the Lennox Lane residence (which, for reasons I will provide later, I am satisfied was Mr. Bailey’s residence) shows “D. Bailey” was associated with phone number 250-329-9211 (Exhibit 167). As I will explain later, I am satisfied that information is admissible for its truth under the documents in possession doctrine. That phone number, along with a WhatsApp address using the same digits and email addresses (“cdarcyb@gmail.com” and “darcybailey@shaw.ca”) all appear in the user accounts for the Samsung S4 and are interconnected or cross-referenced. For example, the Facebook user account also lists this phone number and the two email addresses.

[45] I am satisfied that Mr. Bailey possessed the device as of May 24, 2018 and is associated with these phone numbers and addresses.

b. Is “Dr. Ross” Matthew Ross Lambert?

[46] In the device, the contact name “Dr. Ross” is assigned to phone number “(604) 723-9811”. The Crown argues this contact is also associated to 17788624814@s.whatsapp.net (“4814whatsapp”) and is Matthew Lambert.

[47] First, I am satisfied that the “Dr. Ross” contact, number “(604) 723-9811” and the 4814whatsapp address are the same person. I say this because of the following series of messages between Dr. Ross and Mr. Bailey, using SMS and WhatsApp. On May 29, 2018, Mr. Bailey sent an SMS message to Dr. Ross saying, “Hey I wanna send you a video in what's app”, followed by “Can I have your call sign?”. Dr. Ross responded, “It's a dif number”, followed by “Message me on that now it's not fully safe but harder for them to read”. Mr. Bailey replied, “No biggie, I wanted to show you how aggressive the filter whirlpool is on my hot tub!”, followed by “I remember you saying "what's app" sends better quality videos then normal text”. About 5 minutes later, a message was received from 4814whatsapp, saying “yoyo”,

followed by "I have sep number here". Over the next couple of hours there is communication from which I infer that Mr. Bailey was having difficulty finding Dr. Ross on WhatsApp. Then, Mr. Bailey sent a message to 4814whatsapp saying, "Lol found ya" and "Stand by for video". Then, Mr. Bailey sent a video of active whirlpool jets in a hot tub to 4814whatsapp. The only reasonable inference from this sequence is that Dr. Ross at (604) 723-9811 and 4814whatsapp are the same person.

[48] So, the remaining question is whether the evidence establishes that this person is Matthew Lambert. I am satisfied it does. I say this based on the following analysis.

[49] The Crown refers to the similarity of name – Mr. Lambert's middle name is "Ross". As was acknowledged by D/Cst. Roule, a name attributed to a number in the "contacts" category is simply the name chosen by the user to identify that number and is not necessarily an accurate identifier for the person. The similarity of name is consistent with a finding that Mr. Lambert is "Dr. Ross" but would not be determinative on its own. However, my conclusion is supported by the content of the communication in the context of other evidence. Information from emails and messages (Ex. 138) suggests that in May of 2018, Mr. Bailey lost his phone and started to use the Samsung S4. An email from Air Canada to Mr. Bailey, dated May 24, 2018, refers to this. Mr. Bailey did not respond to SMS messages on May 24 and 25, 2018, and then, sent a message to contact "Jessica – daughter" saying, "I have a phone again…". He then sent an SMS message to Dr. Ross saying, "your old phone is my new phone". As I said earlier, autofill information on the Samsung S4 from April of 2016 and a video from May of 2016 establishes that Matthew Lambert previously owned/used this device. The link between the "Dr. Ross" contact and Matthew Lambert is supported by other information. On May 31, 2018, a message from 4814whatsapp to Mr. Bailey contained a link to a video with the title "nyetandmatthew". Mr. Bailey responded, "…for the record, your speech is just as well written as Nyet's". The video's title and Mr. Bailey's response suggests that the video relates to people named Matthew and Nyet. Matthew Lambert's wife's name is Nyet Siow (Evidence of Cpl. Campbell).

[50] The content and context of subsequent communication between Mr. Bailey and Dr. Ross and/or 4814whatsapp also corroborates that Mr. Lambert is the user of 4814whatsapp, (604) 723-9811 and identified as "Dr. Ross" in Mr. Bailey's device (the details of this communication will be reviewed later). There is no evidence that

is inconsistent with that conclusion and it is the only reasonable conclusion when the evidence is viewed cumulatively.

c. Conclusions re: Information on the Samsung S4

[51] I am satisfied that as of May 24, 2018, Mr. Bailey authored all outgoing correspondence (SMS messages, WhatsApp messages, and emails) so these are admissible against him for their truth. I am also satisfied that he had knowledge of all images/video and received correspondence on the device bearing a date of May 24, 2018 or after, so that evidence is admissible against him as circumstantial evidence and where the evidence discloses that he acknowledged incoming correspondence or created/acknowledged images/video, it is also admissible against him for its truth.

[52] I am also satisfied that all correspondence authored or acknowledged by "Dr. Ross" is admissible against Mr. Lambert for its truth.

[53] Information on this device is also potentially admissible against all accused under the co-conspirator's exception.

2. Samsung S7

[54] The Samsung S7 cellphone (Ex. 57) was discovered in a compartment of a Cadillac Escalade that was seized following the arrest of Mr. Bailey and Mr. Lambert on June 9, 2018. The device was discovered on June 11, 2018. Following a *Charter* Application, I excluded the evidence as against Mr. Bailey and Mr. Lambert. Therefore, any evidence on this device would only be admissible against Mr. Alvarado-Calles and Mr. Seinauskas.

[55] The data from this device was entered into evidence (Ex. 126 - the full extraction; and Ex.139 - a USB containing an extraction report).

[56] D/Cst. Troy LaPlant analysed the data extracted from this device and testified about aspects he thought were significant.

[57] One of the contacts in this device is identified as "Spanish". This contact is associated with mobile 647-964-5133 and 6479645133@s.whatsapp.net ("5133whatsapp"). Another contact "Spanish W" is associated with a different WhatsApp address. The Crown argues that "Spanish" is Nelson Ricardo Alvarado-Calles. The Defence disputes this.

a. Is "Spanish" Nelson Ricardo Alvarado-Calles?

[58] The path from "Spanish" to Mr. Alvarado-Calles is not direct. The Crown argues it is established primarily through communication between the owner of the device and three contacts: a contact identified as "Ms. Poo"; a contact identified as "Yasmin3"; and, the contact identified as "Spanish".

[59] The Crown's argument requires me to: (1) identify the owner/user of the device; (2) identify "Ms. Poo"; (3) identify "Yasmin3" and (4) review communication between that group during a day identified by the device as February 4, 2018.

(1) Owner/User of the Samsung S7

[60] I am satisfied that the owner/user of the device is Matthew Lambert. That conclusion is based on the following:

- There are a number of photographs of Mr. Lambert on the device that were clearly "selfies" (Ex. 139 – Images);
- The WhatsApp address in the user account ("17788624814@s.whatsapp.net") and one of the three phone numbers associated with the device ("(604) 723-9811") is the same as the one associated with the "Dr. Ross" contact on Mr. Bailey's device which I have already concluded was Matthew Lambert (Ex. 139 - user account and device info; and Ex. 138);
- The autofill information on the device includes variations of the names "Matthew", "Ross" and "Lambert" and an address of 5711 Colville Road which Mr. Lambert has admitted was his residence (Ex. 139 – autofill; and Ex. 195);
- In an outgoing message on April 2, 2018, the user of the device says "yeah Ross is my middle name it says on Tinder though that my name is Matt";
- The photograph associated to the WhatsApp user account for "Ross" is also found in the images folder on the device; and,
- The device was found in a vehicle which was occupied by Mr. Lambert.

(2) Identity of "Ms. Poo"

[61] I am satisfied that "Ms. Poo" is Nyet Siow who is Matthew Lambert's wife. That conclusion is based on the following:

- Cpl. Sherri Campbell testified that she met Nyet Siow and viewed a marriage licence which showed she was married to Mr. Lambert;
- The phone number associated with "Ms. Poo" in this device (778-991-0141) was the number police intercepted for Nyet Siow in the wiretap authorizations (Evidence of Cst. LaPlant; Ex. 139 – contacts);
- That same phone number is associated with the contact identified as "Dr. Ross wife" in Mr. Bailey's cellphone (the Samsung S4) and I have concluded that Dr. Ross is Mr. Lambert (Ex. 138); and,
- The content and context of communication between "Ms. Poo" and Mr. Lambert which will be discussed in more detail later corroborates that she is his wife.

(3) Identity of "Yasmin3"

[62] I am satisfied that "Yasmine3" is Yasmine Shahlavi who is Mr. Alvarado-Calles' wife. That conclusion is based on the following:

- Cpl. Sherri Campbell testified that she met Yasmin Shahlavi and viewed a marriage licence which showed she was married to Mr. Alvarado-Calles;
- The content and context of communication on the device confirms that Yasmin3 is married to someone she refers to as "Ric";
- The phone number associated with Yasmin3 in this device (416-700-2388) is the same number that police intercepted for Yasmin Shahlavi in the wiretap authorizations (Evidence of Cst. LaPlant); and,
- The image associated with the Yasmine3 contact is a photograph of a woman. That picture is consistent with the photograph on Ms. Shahlavi's passport (Ex. 139; Ex. ID 1334).

(4) Communication on February 4, 2018

[63] The evidence relied on by the Crown to show that Mr. Alvarado-Calles is "Spanish" primarily comes from text-based conversations involving the owner of the device (Mr. Lambert), Ms. Poo (Ms. Siow), Yasmine3 (Ms. Shahlavi) and "Spanish" which took place, according to the date stamp created by the device, on and around February 4, 2018. Because Cst. Marchand could not confirm that the

device was set to automatically update time and date, I would require context to say for certain what the date was. However, what is important is the sequence and content of communication, not the date on which it occurred. Telephone calls are interspersed amongst these text conversations. The content of those calls is not known, but some inferences can be drawn from their timing in relation to the text communication.

[64] The phone number associated with "Spanish" on Mr. Lambert's device (647-964-5133) was not one of the numbers the police intercepted for Mr. Alvarado-Calles (Evidence of Cst. LaPlant). However, despite that, I am satisfied, based on my review of the communication on the device in the context of the other evidence, that the contact identified as "Spanish" is Mr. Alvarado-Calles.

[65] I will review the communication contained in Ex. 139 in some detail, but, in summary, I am satisfied that on the date identified in the device as February 4, 2018, there was a flurry of communication involving Ms. Siow, Ms. Shahlavi, Mr. Lambert and Spanish because of a conflict that had arisen between Ms. Siow and Ms. Shahlavi. That conflict related to their efforts to transfer money and resulted in a series of unpleasant messages between the two women. Ms. Siow reported the conflict to Mr. Lambert. This resulted in Mr. Lambert communicating with Ms. Shahlavi and Spanish about the conflict. The only reasonable inference from the content and timing of the communication is that the contact identified as Spanish is Ms. Shahlavi's husband who is Mr. Alvarado-Calles. The details that support my conclusions follow.

[66] When Ms. Siow ("Ms. Poo") first complained to Mr. Lambert, she referred to the other woman as "Yas". I have concluded that "Yas" is Yasmine Shahlavi. This conclusion is supported by the context and content of the discussion but also because later in their communication, Ms. Siow gave Mr. Lambert a phone number for "Yas". That number is associated with the contact "Yasmin3" in the device which I have already concluded is Yasmine Shahlavi.

[67] The content of the initial text communication between Ms. Siow and Mr. Lambert is relevant to identify the participants of other conversations: Ms. Siow reported that "Yas is getting bank draft"; they then discussed the transfer of money and referred to swift codes; Ms. Siow mentioned she is on hold with BMO; and, complained that Yas is "bitching" at her and doesn't want to wait in line. Later Ms. Siow reported to Mr. Lambert that Yas is yelling at her, asked him to contact Yas

and provided her phone number. A few minutes later, Spanish called Mr. Lambert using WhatsApp and then Ms. Siow called Mr. Lambert using WhatsApp.

[68] Mr. Lambert and Spanish then had a text-based conversation that was clearly about the conflict between the two women. That communication was not recovered from the device. However, Mr. Lambert took a screen shot of communication which is identified in the banner as being from Spanish. Mr. Lambert then sent the screen shots to Ms. Siow as an attachment to a WhatsApp message. That conversation with Ms. Siow, with the attachment, and the image of the screenshot were recovered from the device. In the communication from Spanish to Mr. Lambert, Spanish repeatedly expressed his displeasure at how Mr. Lambert's wife spoke to "my girl", commented on the money transfer and "codes", and told Mr. Lambert to tell "your wife" "not to bitch at us". It is clear from this content that Spanish is speaking about the same conflict that Ms. Siow had reported to Mr. Lambert.

[69] After seeing these screenshotted messages, Ms. Siow wrote to Mr. Lambert and said, "It's not worth you and ric starting an argument". This suggests that Spanish is also referred to as "ric".

[70] Then Mr. Lambert received two calls from Spanish.

[71] Following this, Mr. Lambert sent Ms. Siow a series of screenshots of a text conversation between him and Yasmin (Yasmin's phone number is on the banner in the images). Again, this communication between Yasmin (Ms. Shahlavi) and Mr. Lambert was not recovered directly from the device. However, the conversation between him and Ms. Siow with the attachments and the images of the attachments, were recovered from the device. In this communication between Ms. Shahlavi and Mr. Lambert, she expressed her upset that he had contacted "Ric" and that he and Ric had gotten involved in an issue between her and "Nyet", making it a bigger issue and Mr. Lambert defended Nyet. This further corroborates that Spanish is also known as Ric and that Ms. Poo is Nyet Siow.

[72] This is followed by a further call from Spanish and then further communication between Ms. Siow and Mr. Lambert, apparently still about the conflict with Yasmine.

[73] Then Mr. Lambert sent Ms. Siow another series of screenshots of conversations between himself and Yasmin where they continue to discuss the conflict. In one of these conversations, Mr. Lambert and Yasmin argued about who

started the conflict/name calling between her and Nyet. He then embedded a screen shot of another conversation. Apparently, to support his argument that Yasmin had started it by calling Nyet dumb.

[74] Comments made between the participants in this 'second level' embedded conversation are significant to identify Spanish. The participants are not identified, but I am satisfied for the following reasons that they were Ms. Siow and Ms. Shahlavi. This conversation and other screenshotted conversations found in Mr. Lambert's image folder have a distinct appearance that differentiates them from the other screenshots on the device (they have the same wallpaper, same colour boxes for the participants and all involve a participant who is identified as "Yasmine"). Because of this, the content of the conversation, and the time noted on the images, I am satisfied that the participants are the same and the series of eight screenshots relate to a single conversation. In reaching the conclusion that this conversation is between Ms. Shahlavi and Ms. Siow, I have not relied on the fact that one of the participants is identified on the screen as "Yasmine" because I have no information about where that identifier came from. I am satisfied of the identities of the participants because of the context in which Mr. Lambert used this conversation in his communication with Ms. Shahlavi and because the conflict between the participants that is revealed in this communication is clearly the same conflict that was reported by Ms. Siow. Mr. Lambert used the embedded communication to support his argument that Ms. Shahlavi had started the name-calling by suggesting his wife, Ms. Siow, was dumb. Immediately before he embedded the conversation, he and Ms. Shahlavi had been arguing about who started "it". In the portion of the conversation that Mr. Lambert embedded, the participant I have identified as Ms. Shahlavi, wrote "… R u dumb?"….". Mr. Lambert followed this immediately by writing "called her dumb first" to which Ms. Shahlavi responded, "I asked her a awusdrion", "question". It is also clear from the content of the series of screenshots that this communication shows the genesis and escalation of the conflict between Ms. Siow and Ms. Shahlavi: the two participants are clearly upset with one another; there is reference to one being on hold with "BMO" and waiting for swift codes; there are repeated references to Matt and Ric; one of the participants complained that the other is telling Matt and Matt is "bitching at Ric"; and, in one message, one of the participants wrote, "Hurry Nyet please tell me what u want me …". This supports the conclusion that Ric is Ms. Shahlavi's husband.

[75] In that 'second-level' embedded conversation, the participant I have concluded is Ms. Shahlavi referred to "Ric" as "my husband" and as I have said, it is clear from other communication that "Ric" is also Spanish.

[76] The only reasonable interpretation of the communication between Spanish and Mr. Lambert, when viewed in the context of the other communication, is that they were speaking about the conflict that had arisen between their respective spouses. Since it has been proven that Yasmin Shahlavi is married to Mr. Alvarado-Calles and Nyet Siow is married to Mr. Lambert, I am satisfied that Mr. Alvarado-Calles is "Spanish".

b. Other Evidence on the Samsung S7

[77] Six short videos were discovered on the device. The videos were recorded by a person holding the device whom I infer was Mr. Lambert. The Crown submits that Mr. Seinauskas and Mr. Alvarado-Calles can be identified in some of these videos. Where that is the case, the video is admissible against the person(s) identified to show an association between the people in the video and between that person and Mr. Lambert and to establish the presence of the person(s) at a particular location at a particular time.

[78] Videos identified as being from May 21, 2018 and May 24, 2018 were referred to by Cst. LaPlant, but the Crown made no argument in support of their admissibility.

[79] A video identified as being from June 2, 2018, narrated by Mr. Lambert, shows two men in a hotel room. Mr. Seinauskas is identifiable as one of the men. As such the video is admissible circumstantial evidence against him. The Crown argues that an utterance made by Mr. Lambert to the effect that he wants to fix a bracelet so he has good luck and doesn't "end up in jail, just joking" is admissible against Mr. Seinauskas as an adopted admission. The video was sent to someone using WhatsApp and it is clear that Mr. Lambert's narration is for the benefit of the person he is sending it to. Mr. Seinauskis is present but Mr. Lambert is not addressing him and he doesn't respond to the comment. Silence can constitute an adoptive admission where denial or disagreement is the only reasonable course in all the circumstances. However, in these circumstances, I am not satisfied that Mr. Seinauskas heard the comment or that it necessarily called for a response. As such, his silence cannot be interpreted as acknowledgement and the comment is not admissible against him.

[80] In a second video from June 2, 2018, again narrated by Mr. Lambert, two men are shown in the same hotel room. Mr. Seinauskas is not clearly identifiable solely from this video. However, I am persuaded it is him based on my identification of him in the other video.

[81] A video identified as being from June 3, 2018, shows four men on a speed boat on the water. The Crown argues that Mr. Seinauskas and Mr. Alvarado-Calles can be identified. I will address the question of identification later, but if they are identified as present, the video is admissible against them as circumstantial evidence.

[82] The final video, identified as being from June 4, 2018, is also from a boat. The motor is not running, and the boat is on the shoreline. Two men can be seen wearing blue nylon rain suits and there are fishing rods on the bottom of the boat. The Crown seeks admission of this video against Mr. Seinauskas, arguing that he can be identified by clothing and context. Again, I will address the issue of identity later, but if it is Mr. Seinauskas, the video is admissible against him.

c. Conclusion re: Information on the Samsung S7

[83] I am satisfied that that all correspondence on this device authored or acknowledged by "Spanish" is admissible against Mr. Alvarado-Calles for its truth.

[84] Other information is potentially admissible against Mr. Seinauskas and/or Mr. Alvarado-Calles as circumstantial evidence.

3. Acer Laptop

[85] The Acer Laptop was seized from Room #327 at the Future Inn in Halifax on June 10, 2018 (Ex. 64). Its contents were downloaded and filed as an exhibit and a summary prepared and filed of the web searches the Crown viewed as relevant (Ex. 126; Ex. 138).

[86] Its discovery in room #327 puts the device in the constructive, joint or past possession of one or all of the three men but does not assist in connecting it to any one of them. Nothing about its location in the room or contained on the device assists in identifying the owner/user of the device. I am satisfied that one of the three accused owned/used the device and conducted the searches. However, the Crown has not established which. Therefore, the information is not admissible against any of the accused solely under the admissions or documents in possession doctrine.

However, because I have concluded that one of the three had knowledge/created the information, it is potentially admissible under the co-conspirator's exception.

4. Samsung Tablet

[87] The Samsung Tablet was seized from Room #327 at the Future Inn in Halifax on June 10, 2018 (Ex. 86). Its contents were downloaded and filed with the court (Ex. 138 & Ex. 126).

[88] The discovery of this device in room #327 puts the device in the constructive, joint or past possession of one or all of the three men but does not assist in connecting it to any one of them.

[89] There is nothing about the Tablet's location in the room that assists with identifying its owner/user. However, its contents connect the device to Darcy Bailey. Historic information and communication on the device (2013) suggest that it was at one point owned/used by Donna Bailey. Her name appears in the User account folder and in an email address. Donna Bailey is Darcy Bailey's mother (Ex. 192 – recorded calls). More recent information on the device lists Darcy Bailey's email address in the user account information and in the password. Some of the contacts and pseudonyms for contacts are the same as those in Mr. Bailey's cellphone, the Samsung S4 (eg. "AAA – Sara Cell", "Avril Bailey", and "Dr. Ross").

[90] I am satisfied that Darcy Bailey possessed this device. The Crown seeks to rely on web searches and installed applications as evidence of Mr. Bailey's interest in the subject matter they deal with. The contents are admissible against him for that purpose and potentially admissible against the other accused if the requirements of the co-conspirator's exception are met.

Physical Documents

[91] Following the seizure of cocaine and arrest of the accused, search warrants were executed at various residences. The Crown seeks to rely on documents discovered at three residences:

1. 4900 Lennox Lane, Unit 4204, Burnaby, British Columbia;

2. 5711 Colville Road, Richmond, British Columbia; and,

3. 2 Sable Road, Richmond Hill, Ontario.

[92] Evidence from these locations was entered in the form of originals of the documents together with a USB (Ex. 159) and/or exhibit book containing scanned/printed copies of documents and photographs taken during the searches. The evidence of Cst. Duane Tegart, the "exhibit officer" at the search sites was filed as an agreed statement of facts and establishes where within the residence each item was discovered (Ex. 195 - ASF). Two exhibits, Tab B of Exhibit 120 and Exhibit 164 were entered on consent but later withdrawn by the Crown when it was discovered that they contained inadmissible material (Proceedings of February 24, 2020).

[93] None of the documents were found in the physical possession of any accused. So, the Crown relies on past, constructive, or joint possession and inferences to support conclusions that an accused authored, acknowledged, adopted or acted on a particular document.

1. 4900 Lennox Lane, Unit 4204

[94] One of the residences where documents were seized is 4900 Lennox Lane, Unit 4204, Burnaby, British Columbia. The search warrant was executed there on July 20, 2018. Along with the USB containing photographs and scanned documents, original documents were also entered into evidence (Ex. 159; Ex. 160 – 188). The residence is described as an open-concept kitchen/living/ office area with two bedrooms, two bathrooms, a storage room, laundry closet and wrap around balcony with hot-tub (Evidence of Cst. Tegart - Ex. 195).

[95] The Crown argues that Mr. Bailey and Mr. Seinauskas occupied that residence and, therefore, documents found there are admissible against them as circumstantial evidence and, in many instances, for a hearsay purpose under the documents in possession doctrine.

[96] Neither Mr. Bailey nor Mr. Seinauskas concede that they occupied that residence.

[97] There is no evidence of whether anyone was present when the warrant was executed and there are no ownership or tenancy documents linking either Mr. Bailey or Mr. Seinauskas to the residence. However, they are each connected to it through other evidence.

<u>Darcy Bailey</u>

[98] I am satisfied that Darcy Bailey was the principal occupant of the residence.

[99] Documents, notebooks, and binders connected to Mr. Bailey were found in the larger bedroom and on and around the desk in the office area. Many of these were very personal documents such as passport, financial documents, and legal papers. Items found in the larger bedroom included: boarding pass found in a book on a window ledge (Ex. 160; Ex. 159, document #3394); correspondence concerning an insurance policy, documents from the Canadian Revenue Agency, banking documents, legal documents, bills, and a current Canadian passport with Mr. Bailey's photograph, all found in a binder on a night table (Ex. 167; Ex. 159, document #2030). Further material relating to Mr. Bailey was found near or on the desk located in the office area: a notebook with his name on it and labelled "IV UN Marine Litter Course Feb 2018" (Ex. 162; Ex. 159, document #3427); a red scribbler, labelled "Ocean Plastic II", with Mr. Bailey's name, telephone number and email address on the inside cover (Ex. 166; Ex. 159, document #3423); a letter addressed to Darcy Bailey, dated February 19, 2018 (Ex. 180; Ex. 159, document 3404). Numerous documents related to "Oceans Plastics Alliance" were also found in the larger bedroom (Ex. 170; Ex. 182; and, Ex. 159, document 2049, 3406, 3429). Mr. Bailey is connected to that entity through a luggage tag and various documents and emails found on his cellphone (Ex. 41; Ex. 138).

[100] A "Central Intelligence Agency" photo ID with Mr. Bailey's picture was found in the storage room (Ex. 159, photo 3743).

[101] In addition, a video found on Mr. Bailey's cellphone connects him to the residence (the Samsung S4; Ex. 138 and Ex. 121). The video was taken by a person walking through Unit 4204, 4900 Lennox Lane and appears to have been recorded in late May or June 1, 2018 (the video's title includes "20180526" and the information associated with the video shows it was created, accessed and modified on "2018-06-01"). The location was identified by Sgt. Glode who viewed the video and participated in the search of that residence. His evidence is corroborated by photographs taken during the search which clearly show the same residence as that in the video.

[102] In the video, the person holding the recording device can be seen reflected in glass. I am satisfied based on my own comparison of Mr. Bailey and the person in the video, that it is Mr. Bailey who is holding the device and walking through the residence (*R. v. Nikolovski*, [1996] S.C.J. No. 122 (SCC)). I am satisfied that the video has not been altered and is an accurate depiction of what it records. The video

is generally of very good quality. The three sequences where the camera person can be seen in reflections - in a bathroom mirror, a glass shower stall and a window - are relatively brief, the image of the individual is not in focus and the camera is moving. However, during my deliberations, I was able to replay the video and stop it to examine those frames and am satisfied the person holding the device is Mr. Bailey. Sgt. Glode also identified Mr. Bailey as the person holding the camera. However, in my view, his opinion is not admissible to assist me because Sgt. Glode is not, as a result of any prior acquaintance with Mr. Bailey, in a better position than I am to identify him (*R. v. Leaney*, [1989] 2 S.C.R. 393, *R. v. Berhe*, 2012 ONCA 716). This has been a long trial and I have had the opportunity to observe Mr. Bailey over many days and I have also seen photographs and other video of him.

[103] Some of the documents seized from Lennox Lane show other addresses for Mr. Bailey. For example, documents addressed to Mr. Bailey in 2015 show an address of 6152 Rowantree Ave, Fort St. John, BC (Ex. 159, document 2030). However, it appears that as of February 1, 2016, he was no longer living there (Residential Tenancy Agreement showing Mr. Bailey as the landlord for that same address – Ex. 159). There is also some evidence connecting Mr. Lambert to the residence. A video from May of 2016 shows Mr. Lambert walking through this same residence and correspondence found in a kitchen drawer, dated July 18, 2018, is directed to the attention of "Matt Lambert" (Samsung S4 – Ex. 138; Ex. 159, photo 3729; Cst. Taggert's evidence – Ex. 195). The correspondence is from "Arzene Holdings" and relates to "Unit 4204-The Park". It gives notice that the unit will be accessed on July 19, 2018. I infer that "unit 4204-The Park" refers to the residence that was searched.

[104] This suggests that Mr. Bailey did not reside in this unit in 2015, that Mr. Lambert had a connection to it in May of 2016 and that Mr. Lambert was recognized as legally connected to it in July of 2018. However, this is not inconsistent with a conclusion that Mr. Bailey resided there in May/June of 2018 and does not overcome the overwhelming evidence to support that he did.

[105] I am satisfied that Mr. Bailey possessed the documents found in the residence other than those in the smaller bedroom. I am satisfied that he was the sole occupant of the larger bedroom, was the principal occupant of the residence, and used the storage area, office area and desk. As such, I infer knowledge and control over the documents in those two areas.

[106] I am also satisfied that Mr. Bailey authored many of the documents found in the residence. Many of the binders and notebooks had his name on them or related to "Ocean Plastic Alliance". I will focus on the more significant evidence. The packing lists were found in a notebook in his bedroom (Ex. 159; document 2049, pp. 49 & 50). Loose pages found on the desk include information about the Arica (dates she would be in Montreal and the terminal she would be docked at and a list of dates with cities and countries that correspond to her itinerary) (Ex. 179; Ex. 159, document 3403). I will discuss this in more detail later, but evidence found on Mr. Bailey's electronic devices show that he conducted web searches relating to the Arica and had ship-tracking applications. Some of the documents on the desk or in the office area were connected to Mr. Seinauskas. However, there is evidence that Mr. Bailey possessed some of them. Mr. Bailey signed as the guarantor for Mr. Seinauskas' passport application, two copies of which were found on the desk, one in a folder with other documents (Ex. 159, document 3409 & 3395).

[107] I am satisfied that all documents found in the residence other than those in the smaller bedroom are admissible against Mr. Bailey for a circumstantial purpose. Based on his control over the premises, his connection to some individual documents and the links between information in documents and information found on his cellphone, I am also satisfied that he authored or otherwise adopted/acknowledged most other documents so they are admissible against him for their truth.

Dangis Seinauskas

[108] I am satisfied that between May 15, 2018 and June 1, 2018, Mr. Seinauskas was staying at the Lennox Lane unit and occupied the "smaller bedroom" (Ex. 159, photo 3661 – 3662).

[109] Items bearing his name were found in that bedroom, including a baggage tag, a YMCA membership card, a UPS receipt for marine equipment, an Air Canada Boarding Pass, and a credit card activation notice (Ex. 159, documents 3400, 3405, 3408; Ex. 173, 176,181 and 187).

[110] Some material connected to Mr. Seinauskas was found in the storage room (a box containing miscellaneous household items and a prescription bottle in his name and brochures, owner's manuals and a survey/valuation apparently related to the sailboat purchase from James Kennedy (Ex. 188, Ex. 159, photo 3717 & 3718 & document 3396).

[111] Other documents related to Mr. Seinauskas, including some personal documents, were found in the office area of the residence. A plastic folder was located on the floor next to the desk (Ex. 165; Ex. 159, photo #3668 & document #3395). The folder is labelled "Maryke Project 2018". It contained a bill of sale for the sale of a boat, the "Miss Maryke", from James Kennedy to Dangis Seinauskas, various other documents related to that boat, a temporary pleasure Craft Operator Card for Dangis Seinauskas (issued May 5, 2018), a passport application for Dangis Seinauskas and a receipt from Passport Canada (both dated May 11, 2018), indicating the passport would be ready for pickup on May 16, 2018. A receipt for a storage unit, another passport application and documents from U.S. Homeland Security referring to Mr. Seinauskas were found on the desk along with other papers, including miscellaneous notes and a document from a Vancouver marina related to storage of a boat for "James Anthony Kennedy" for a boat arriving May 9, 2018. (Ex. 159, document 3409). As noted above, Mr. Bailey signed as the guarantor for Mr. Seinauskas' passport application, so must have had it in his possession at one point.

[112] Mr. Seinauskas' occupancy of the residence is also corroborated by information discussed during an intercepted call between Mr. Lambert and Ms. Siow on July 9, 2020 (Ex. 192, Tab 22). As will be discussed later, part of that call is admissible against Mr. Seinauskas as an adopted admission.

[113] The Crown also argues that a person referred to as "Brooks" or "Brooxie" in communication between Mr. Lambert and Mr. Bailey and between Mr. Lambert and Mr. Alvarado-Calles is Mr. Seinauskas. On May 29, 2018, Mr. Bailey wrote to Mr. Lambert that he'd been up for hours and "brooxie is still sleeping". On May 31, 2018, Mr. Bailey wrote to Mr. Lambert, "Brooke and I are gonna head out. To the boat here pretty soon". If admissible against, Mr. Seinauskas this would corroborate that he was living with Mr. Bailey on those two dates.

[114] Despite the documents found in the residence, I am not satisfied that Mr. Seinauskas was a long-term resident. It did not appear that he had fully moved into the smaller bedroom. The two closets contained empty hangers, a few items of clothing on the shelf and floor, cardboard boxes, a few large items and garbage bags (Ex. 159, photo 3663 - 3665). Further, none of the documents in Mr. Seinauskas' name list Lennox Lane as his address. For example, a receipt from "Storguard Burnaby", dated May 15, 2018, a UPS Receipt, dated December 4, 2017, and an undated credit card activation notice all list his address as 255 Newport Drive, Port Moody, B.C. (Ex. 159, document 3400, 3405, and 3413; Ex. 175, 181 and 187). A

passport application, dated May 11, 2018, lists his home address as Ajax Ontario and mailing address as 255 Newport Drive, Port Moody, B.C. (Ex. 184; Ex. 159, document 3395). The Storguard receipt relates to rental of a storage unit/locker for the period May 15, 2018 to June 14, 2018 with attached Lease Agreement that was entered into on May 15, 2018 (Ex. 159, document 3400, p.2-3).

[115] This suggests that Mr. Seinauskas had been living at 255 Newport Drive until May 15, 2018 and that he then put his belongings into storage. I conclude that he then stayed at the Lennox Lane unit for at least part of the period between May 15, 2018 and June 1, 2018, when he left British Columbia (Evidence to be discussed later, including records from Air Canada, Ex. 33). The evidence suggests that for at least some portion of this two-week period, he was in Toronto. A boarding pass in his name, found in the smaller bedroom, relates to a flight from Toronto to Vancouver on May 25th (Ex. 159, document 3408).

[116] I am satisfied based on my conclusion that Mr. Seinauskas occupied the smaller bedroom and that he possessed the documents found there (Ex. 159, document 3405, 3408, 3410). I am also satisfied that Mr. Seinauskas possessed some of the documents found in the office area of the unit. Specifically, those documents that directly relate to him (passport application, Homeland Security documents, documents found in the folder "Maryke Project 2018"). However, I am not satisfied that documents found in the larger bedroom, the kitchen drawer or other documents in the office area were in his possession. I have reached this conclusion because I am not satisfied that Mr. Seinauskas had knowledge of these documents or control of those items or places.

[117] As a matter of human experience, it is highly unlikely that Mr. Seinauskas would have accessed the larger bedroom which I have found was occupied by Mr. Bailey. A significant piece of evidence, a "Packing List" which includes diving gear was found in that bedroom (Ex. 159; document 2049, pp. 49 & 50).

[118] The presence of some of Mr. Seinauskas' documents in the office area does not, in the circumstances, lead me to infer that he knew of the presence of all other documents in that area, some of which were inside folders or in binders. In reaching that conclusion I have considered the nature of Mr. Seinauskas' occupancy in the residence. His presence as a temporary over-night guest does not lead to the inference that he had control of the desk area or had knowledge of all the documents there. It would be unusual for a temporary guest to open folders or binders or inspect documents in piles on a desk. I have also considered the specific circumstances here.

After examining the evidence carefully, even if I assume that Mr. Seinauskas put his documents in the office area, I cannot conclude that he had knowledge of the other items.

[119] If documents were in plain view on the desk when Mr. Seinauskas was in the residence, I could perhaps infer knowledge of their existence. The evidence of Cst. Taggert and the photographs taken during the search provides general evidence of where the documents were at the time the search was conducted. However, I can't be satisfied they were in the same location on June 1, 2018, the last time Mr. Seinauskas could have been in the residence.

[120] The evidence establishes that Mr. Seinauskas left Vancouver on June 1, 2018 and was not in the residence again before the search warrant was executed (he was in Montreal, then Halifax where he was arrested and not released from custody until July 26, 2018). I am satisfied that someone was in the residence between June 1st and July 20th. When the warrant was executed, a letter/notice dated, July 18, 2018 was found in a kitchen drawer (Ex. 159, photo 3729; Cst. Taggert's evidence - Ex. 195). Someone must have placed the letter there between July 18 and July 20. The photographs taken at the time of the search also suggest recent occupation. The photos of the kitchen island show an open box of cereal, numerous plastic glasses, and what appear to be alcohol bottles. Towels are draped over kitchen chairs and beds are unmade. Both Mr. Bailey and Mr. Lambert had a connection to the residence. Both were released from custody on July 19, 2018 (both were subsequently arrested again, but not until after July 20th) so could have gone to the residence before the warrant was executed on the 20th. I can't say that either of them was in the residence, but I believe someone was, so can't be satisfied that documents weren't moved.

[121] Even if I assume that the documents were not moved between June 1 and July 20, I still have to carefully consider the circumstances to determine whether I could infer that Mr. Seinauskas knew the documents were present. I will focus on the most significant documents found in that area, the two loose papers containing hand-written notes which include the Arica's name, identifying information and her itinerary (Ex. 179; Ex. 159, document 3403). They were found "on office desk among misc. papers" (Evidence of Cst. Taggert – Ex. 195). Photograph 3734 shows the pages on the desk and photograph 3668 shows the general area. One document in that group includes a handwritten note, "bartokuda@". This is part of Mr. Seinauskas' email address (passport application, Ex. 159, document 3409 & invoice from Precision Sails Ltd, Ex. 159, document 3395). The documents were grouped

under one document identification and were photographed together, so I assume they were found together. If Mr. Seinauskas wrote his email address on the paper, it would connect him to that paper and potentially others that were found in proximity. However, I am not satisfied that he wrote the email address. It appears as a hand-written note on a page with phone numbers and doodles. When considered using human experience, I find it more likely that Mr. Bailey wrote it after being provided with the phone numbers and email address by someone, perhaps Mr. Seinauskas.

[122] Finally, I am not satisfied that the page containing the reference to the Arica would have been visible. In the photograph taken during the search, the only page of the group of documents that is entirely visible has a list of dates with corresponding cities and countries. A document containing a drawing is partially visible underneath.

[123] I am satisfied that the documents found in the smaller bedroom are admissible against Mr. Seinauskas. The primary value of most of these is as circumstantial evidence to show a connection between him and the matters referred to in the documents. For example, the name "James Anthony Kennedy" in a Residential Lease Application, a note that refers to "bartokuda", a note that refers to "Coleville Rd"., a note with an email address for "nelsonralvarado" (Ex. 159, document 3405, 3410, 3413). I am satisfied that he used the boarding pass (document 3408) so that document is admissible against him for its truth.

[124] I am also satisfied that documents found in the office area that directly relate to him (passport application and documents related to the sale of a boat) or that were found in the folder that contained some of those documents ("Maryke Project 2018") are, except for the Homeland Security document, admissible against him for both a circumstantial and hearsay purpose. The Homeland Security document was the subject of an admissibility hearing. My findings in relation to that document are the next part of this decision.

[125] I am not satisfied that any other documents found in the office area are admissible against him for any purpose. I am not persuaded that he knew of their existence or that he authored them. In reaching that conclusion, I have carefully considered the documents in document ID 3403 and shown in photograph 3734. These documents are potentially inculpatory. As I have said, I am satisfied that Mr. Bailey authored these documents. Even if I accept that Mr. Seinauskas saw the page with dates and cities, I could not infer that the document would have had any

significance to him. Nor could I infer that he acknowledged the document in a way that would make it admissible against him for its truth.

Admissibility of Homeland Security Document

[126] One of the documents seized at Lennox Lane was a document entitled "Withdrawal of Application for Admission/Consular Notification" (contained within Ex. 184; Ex. 159, document 3409). I am satisfied that document was in Mr. Seinauskas' possession and that he acknowledged it, by signing. As such, under the documents in possession doctrine, it would be admissible against him for its truth and would establish that on April 26, 2018, he attempted to fly to Columbia through the United States. However, in a ruling given on January 18, 2020, with reasons to follow, I concluded that most of the information contained in the document was the result of a statement to a person in authority which the Crown could not prove was voluntary. As such, those portions were not admissible against Mr. Seinauskas for their truth. These are my reasons.

[127] The document includes a summary prepared by Jason Lewis, an officer with the United States Department of Homeland Security, and a "Record of Sworn Statement" given by Mr. Seinauskas to Officer Lewis.

[128] The Defence argued that the information contained within the document was a statement given to a person in authority. As such it was not admissible for its truth unless the Crown could prove it was voluntary. The Crown argued that it was not required to prove voluntariness because the document was admissible under the "documents in possession" doctrine or under the principled exception to the hearsay rule and because Officer Lewis was not a person in authority.

[129] The Crown's argument is essentially that the "documents in possession" doctrine and/or the principled exception to the hearsay rule are a complete answer to admissibility of the document, such that if the requirements of either are met, the document is admissible regardless of other admissibility hurdles. I do not agree.

[130] A similar issue was considered in *R. v. Erven,* [1979] 1 SCR 926. In that case, the court was dealing with admissibility of a statement to a person in authority that was also *res gestae*. At trial, the statement had been admitted without a voluntariness *voir dire*. The Court found this to be an error, saying:

> 24 Statements should not slip in without a voir dire under the pretext that they form part of the res gestae: see R. v. Spencer, supra; R. v. Toulany, supra. The rules regarding res gestae are substantive rules regarding hearsay and the admissibility of evidence. They do not affect the procedure by which decisions are to be made regarding admissibility of statements made to persons in authority. Statements constituting part of the res gestae are admissible as exceptions to the general rule excluding hearsay. As with all statements by an accused, they are subject to the general requirement of voluntariness. In order to determine whether they are voluntary, as well as whether they are, in fact, part of the res gestae and otherwise admissible, such statements must be considered by the judge on a voir dire in the absence of the jury.

[131] In my view, this statement of the law applies equally to the hearsay exceptions at issue here. Like the *res gestae* exception, the two exceptions argued by the Crown in this case are exceptions to the general prohibition against admission of hearsay evidence. Their criteria are designed to overcome dangers associated with admission of hearsay evidence and do not overcome other dangers that may be associated with the admission of a particular category of evidence. Specifically, they do not address the dangers associated with admission of an involuntary statement (reliability, risk of false confession, and fairness).

[132] I agree with the Defence argument that neither of the exceptions relied on by the Crown provide an exception to the general requirement to prove voluntariness of an accused's statement, where that statement is made to a person in authority. As such, regardless of whether the document is admissible hearsay under one of these exceptions, because the content of the document is a statement from an accused, I have to follow the normal procedure for determining admissibility of a statement from an accused.

[133] The Crown is only required to prove a statement was voluntary if it was made to a "person in authority". The Crown argues that Officer Lewis was not a person in authority because he is not in a category generally recognized as such and because going to the airport is voluntary so the characteristics generally associated with a person in authority are not present.

[134] In *R v Hodgson*, [1998] 2 SCR 449, at para 32, Justice Cory explained the test to determine whether someone is a person in authority:

> "Person in authority" typically refers to those persons formally engaged in the arrest, detention, examination or prosecution of the accused: see B. (A.), supra, at p. 26. However, it may take on a broader meaning. Canadian courts first considered the meaning of "person in authority" in R. v. Todd (1901), 4 C.C.C. 514 (Man. C.A.). In that case, the accused made a statement to two men he believed to be fellow prisoners, but who were in fact acting as agents of the police. It was held, that at pp. 526-27
>
> > A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him.... [T]he authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe, and so in some degree to overcome the powers of his mind.... [Emphasis added.]
>
> Thus, from its earliest inception in Canadian law, the question as to who should be considered as a person in authority depended on the extent to which the accused believed the person could influence or control the proceedings against him or her. The question is therefore approached from the viewpoint of the accused. See also R. v. Roadhouse (1933), 61 C.C.C. 191 (B.C. CA.), at p. 192

[135] Mr. Seinauskas had the evidential burden to establish whether Officer Lewis should be deemed a person in authority (*Hodgson*, at para. 37). That burden is defined as an "obligation to ensure that there is some evidence on the record to make it a live issue." (*Hodgson*, at para. 37). If he meets that burden, the burden shifts to the Crown to prove that Officer Lewis was not a person in authority (*Hodgson*, at para. 38). The relevant inquiry is whether the accused reasonably believed the person he was speaking to was a person in authority (*Hodgson*, at para. 32).

[136] The evidence to satisfy the burden can come from the case for the Crown or the defence (*Hodgson*, at para. 37). Mr. Seinauskas did not testify, so the only information about whether Officer Lewis was a person in authority comes from the document and the inferences that can be drawn from it.

[137] On application for admission to the United States as a tourist visitor, Mr. Seinauskas "was referred to secondary for further inspection" (Withdrawal of Application for Admission, p.1). He was then questioned by Officer Lewis, who is identified in the document as an "officer of the United States Department of

Homeland Security" who was "authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States" (Record of Sworn Statement, p.1). On the final page of the document, Mr. Seinauskas acknowledged, by signing, that the statement was a full, true and correct record of the "interrogation".

[138] I am satisfied that Mr. Seinauskas met his evidential burden. Officer Lewis had legal authority to question Mr. Seinauskas and I infer that he also had authority to determine his admission into the United States. In that context, which included a referral to secondary inspection and a formal "interrogation, this is a sufficient evidentiary basis to make the "person in authority" issue a live one. This shifted the burden to the Crown to satisfy to me that Mr. Seinauskas did not reasonably believe that Officer Lewis had authority over him or the process he was engaged in. I am not persuaded. The fact that Officer Lewis is not in one of the traditional categories of person in authority, "persons formally engaged in the arrest, detention, examination or prosecution of the accused", is not determinative. The fact that going to the airport is a voluntary activity also does not, given the circumstances of this statement, persuade me that Mr. Seinauskas did not reasonably believe Officer Lewis was a person in authority. As such, the Crown must prove the voluntariness of Mr. Seinauskas' statement and have conceded that they cannot. Therefore, the statement is not admissible against him. This includes his answers to questions during the interrogation and any information contained in the summary that would reasonably have come from those answers.

[139] Other portions of the document that did not come from his statement are admissible against him for their truth. However, those portions establish only that on April 26, 2018, Mr. Seinauskas attempted to enter the United States, by airline, at the Port of Vancouver and it appeared he was not admitted.

[140] If I am wrong in concluding the statement was inadmissible, the evidence that Mr. Seinauskas attempted to go to Columbia on April 26, 2018 would have had marginal impact on the case. There is evidence that Mr. Bailey was in Columbia around that time, however, the only evidence that the cocaine came from Columbia is evidence from the expert, Mr. Tomeo, that Columbia is one of the source countries for cocaine. There is no evidence that the cocaine seized in this case was from Columbia or that the Arica was in Columbia at any time.

2. 5711 Colville Road, Richmond, British Columbia

[141] On July 18, 2018, a search warrant was executed at 5711 Colville Road, Richmond, British Columbia. Mr. Lambert has admitted that he occupied that address as of the date of the search (ASF, Ex. 195). Originals and scanned copies of documents found inside the residence and in a vehicle parked in the driveway were provided to the court (Ex. 156; Ex. 157; Ex. 158; and Ex. 159). The evidence suggests he lived there with his wife and child and there is no evidence of any other occupant.

[142] I am satisfied that the documents found in the residence were possessed by Mr. Lambert and are admissible against him.

[143] During the search, documents were seized from a vehicle parked in the driveway. The vehicle had Ontario plates. Documents related to Mr. Seinauskas were seized from the vehicle. Mr. Lambert would have known of the presence of the vehicle. However, there is no evidence that he knew of the presence of the documents. The documents are not, in and of themselves admissible against Mr. Lambert. However, the presence of a vehicle containing Mr. Seinauskas' documents links him to Mr. Seinauskas.

3. 2 Sable Road, Richmond Hill, Ontario

[144] On August 15, 2018, a search warrant was executed at 2 Sable Road, Richmond Hill, Ontario. Cst. Mirko Markovic, the Exhibit officer at the search, testified and original documents and photographs taken during the search were provided to the court (Ex. 141 – 153; Ex. 154).

[145] I am satisfied that this residence was occupied by Mr. Alvarado-Calles and his spouse. Documents bearing his name, including very personal documents such as banking documents and passports, were found throughout the residence: Toronto Dominion Visa Document; TD Investment account document; Real Estate documents; Lease Agreement; credit card application; boarding pass; luggage tag; passport; cheque book; and CRA documents. There is no evidence of any adult occupant other than Mr. Alvarado-Calles' spouse.

[146] I am satisfied that the documents found in the residence were in his possession and are admissible against him.

Part 2: Summary of Evidence

[147] In this part I will summarize the evidence that I have concluded is directly admissible against individual accused. To understand the significance of some of the evidence, I have to start by summarizing where the cocaine was found. Then, to the extent possible, I will review the evidence in chronological order according to the narrative of the alleged offences. I have divided the chronology into phases: pre-Montreal (April/May 2018); Montreal (June 1 – 5, 2018); Halifax (June 6 – 9); and post-arrest. Then, I will address the evidence related to "Ocean Plastic Alliance" and algae collection, prior associations between the accused, and financial circumstances of individual accused. Finally, I will summarize the evidence of the expert, Joseph Tomeo.

The Location of the Cocaine

[148] The cocaine was discovered on June 9, 2018 in an underwater chamber (sea chest) in the hull of a commercial cargo vessel, the MV Arica, in the port of Halifax. It weighed about 157 kg and was packaged in individual bricks inside three duffel bags that were tied to the structure of the Arica.

[149] A sea chest (also referred to as a "sea bay") is a standard part of a vessel. It is a water intake vent / chamber in the hull of a vessel, below the waterline, where sea water can be drawn into the vessel for engine cooling purposes. The compartment is covered by a grate to prevent debris or fish from being sucked into the vent (evidence of Canadian Border Services (CBSA) Investigating Officer (IO) Brian Gillespie, IO Kenda White, Matthew Foster and Gary Grundy).

[150] Information about the Arica's sea chests came from Matthew Foster, a commercial diver retained by CBSA who discovered the cocaine, and from a video that records his dive to inspect the Arica (Ex. 6). During his dive, Mr. Foster had a video camera mounted on his head. Gary Grundy, the dive supervisor, was on the surface directing Mr. Foster and monitoring the video feed. The audio/video recording was played in court and entered into evidence (Ex. 6). Counsel consented to the admission of the audio for its truth.

[151] The Arica's sea chests were covered by hinged grates which were bolted shut. Mr. Foster found that the aft grate on the Arica's starboard sea chest had no locking wire and one missing bolt. Two of the remaining bolts were loose and a third was tighter but could be removed with hand force. The bolts were size 15/16 or 23 – 24

mm. When the bolts were removed, Mr. Foster was able to open the grate and enter the sea chest. He estimated the size of the opening as three by three feet. He was able to enter wearing a backup air tank which he testified would be similar in size to a normal scuba tank. He did not think that having a double tank would interfere with the ability to enter the sea chest. The video shows that the opening to the sea chest was large enough for Mr. Foster to enter and manoeuvre once inside (Ex. 6).

[152] All witnesses who were familiar with sea chest operation acknowledged that, when active, the suction created by the sea chest could be dangerous for a diver. A diver could be held against the grate or, if inside, could be unable to escape. Mr. Foster testified it could be fatal if the engines were turned on while the diver was in the sea chest.

[153] The evidence about the normal status of sea chest suction when a vessel is in port was not entirely clear or consistent. Neither was the evidence concerning the status of the Arica's sea chests when she was in port in Halifax. I understood that the sea chest is normally active even when a vessel is in port because the vessel has to maintain some operations so requires water intake for cooling. However, I understood that they may be operated at lower power with lower suction. IO Brian Gillespie testified that when vessels are searched or inspected using the Remote Operated Vehicle (ROV) or divers, sea chests are turned off (locked out) so as not to damage equipment or create a risk for a diver. The sea chest suction can be turned off or switched from starboard to port, but this must be done from inside the vessel.

[154] In cross-examination, Mr. Foster agreed that the Arica's engines were "locked out" before the dive because it could be dangerous to be around the sea chest if they were still operational. However, in re-direct, he testified that he believed one of the intakes was still running for the ship's generator. He recalled that it was supposed to be switched over to the other side but when he entered the sea chest, it was still on. I am satisfied that the suction in the starboard sea chest was still running when he was inside the compartment. Early in the dive, Mr. Grundy can be heard telling Mr. Foster to approach the starboard sea bay with caution because it was still active (Ex. 6, at 6:30 minutes). While Mr. Foster was inside the sea chest, Mr. Grundy again told him to be careful because the suction was still on. Later, while still in the compartment, Mr. Foster said he'd located the suction. There is no indication that the force of the suction caused any problem for Mr. Foster. IO Kenda White testified that at 7:57 p.m., she received a call asking to have the sea chest suction switched.

[155] Locating the sea chests and getting inside took time. It was very dark in the water around the Arica's sea chests and Mr. Foster had difficulty manipulating tools etc. (Evidence of Mr. Grundy and Mr. Foster; Ex. 6). Mr. Foster wore a headlamp and was being directed by Mr. Grundy who had been shown a diagram of the vessel and had a general idea of where they would be. Mr. Grundy also testified that the sea chests are in the same general location on most vessels. It took Mr. Foster approximately 25 minutes to reach the starboard sea chest. However, on the way, he was inspecting other openings and sea chests. His inspection of the starboard sea chest was interrupted when he was removed from the water because of an approaching diver. He was able to open the hinged grate and enter the compartment and discovered the bags.

[156] During Mr. Foster's dive, he was connected to surface air by a hose and had a tank only for back up. He testified that a typical scuba tank at that depth would have enough air for less than an hour. He agreed that the swim from Black Rock Beach to the Arica and then to locate the sea chest would be more than an hour. He was not asked about the time required by a diver with a propulsion device.

Chronology

April – May 2018 - Pre-Montreal

[157] Mr. Bailey visited Cali, Columbia on April 27, 2018 (boarding pass, receipts and Columbian funds – Ex. 159, document 3397; Ex. 160, 161, 167, 172, and 180, acted on by Mr. Bailey so admissible for their truth). The expert, Joseph Tomeo, testified that Columbia is one of four source countries for cocaine and Cali is the home of the head quarters of a powerful drug cartel which is involved in international trafficking of cocaine. He acknowledged that there would also be legitimate reasons to visit Cali.

[158] Information from documents seized from Mr. Bailey's residence and the Samsung S4 show that Mr. Bailey had an interest in the Arica and her movements by May 29, 2018 and, probably as early as March 25, 2018 (Ex. 159, document 3403; and, Exhibit 138, images and timeline). On May 29, 2018, Mr. Bailey used the Samsung S4 to conduct a web search for "arica vessel". This search resulted in a picture and vessel details for the Arica on a "marine traffic" site. Undated documents seized from the desk in his residence include the Arica's name, the notation "M – June 4; L June 6" and "@ CAST TERMINAL" which corresponds with the dates the Arica was scheduled to arrive and leave Montreal and the terminal where she

was docked (Ex. 179; Ex. 159, document 3403). The piece of paper containing a list of nine dates from March 25 to May 20, with associated cities generally corresponds with the Arica's itinerary (Ex. 33).

[159] Documents found in his residence and information found on his cell phone establish that he was planning a trip to Montreal and would be purchasing and taking diving equipment and tools. A notebook found in his bedroom contained a "Packing List" which includes diving gear and, the next page which is dated "May 29/18", "Packing List II", includes lists of "tools", "Craigslist/Kijiji", "diving gear" and "gear" (Ex. 159; document 2049, pp. 49 & 50). Mr. Bailey's cell phone contained numerous photographs of various pieces of diving equipment and clothing, including a photo of himself wearing a dive harness with carabiners attached (Exhibit 138, images and timeline).

[160] Communication between him and Mr. Lambert found on Mr. Bailey's cellphone establishes that Mr. Lambert was part of the planning. On May 30th, in a conversation by SMS Message, Mr. Lambert wrote, "wheels up tom bro" and reported that he had found a "water scooter where we going" and that it is a "Hollis 160". They then discussed the relative merits of that brand of scooter. Mr. Bailey asked if Mr. Lambert had "any luck with the wrench issue". Mr. Lambert also wrote, "I'm excited I've always wanted to do some awesome coral reef diving".

[161] After this conversation, Mr. Bailey made a call to a number associated with the "International Diving Centre". He then advised Mr. Lambert that he'd found a shop in town that had "the manifold and the tank bands" and quoted a price. Mr. Bailey asked Mr. Lambert if he wanted to pay by credit card and have Mr. Bailey pick it up, but Mr. Lambert said they would use cash and they agreed that both would go pick up the gear which had been set aside. Mr. Bailey also advised Mr. Lambert that they couldn't fly with dive tanks so would have to work with a local dive shop to rent tanks and have them set up the dual tank manifold. During a subsequent "WhatsApp" conversation, Mr. Bailey advised Mr. Lambert that a dive shop on Sherbrooke Ave is open 7 days a week and Mr. Lambert responded, "Mtl", "Good".

[162] During their earlier SMS conversation, Mr. Bailey had asked Mr. Lambert if he had any luck on the "wrench issue". This issue came up again during their "WhatsApp" conversation. Beginning May 31, at 1:56 a.m. (UTC-3) they discussed bolt sizes:

Lambert	Yo got info

Lambert	It a just bolts
Lambert	20-30mm are the sizes we will bring every size everything attached to strings
Lambert	We will get exact size tom he's meeting with guy who closed it and every detail
Lambert	I know where it is tho
Bailey	Is that 20mm & 30mm?
Bailey	Either way we will go over it all in detail tomorrow
Lambert	Between

[163] Later, on May 31, 2018, at 5:50 p.m. (UTC-3), also on WhatsApp, Mr.

Lambert provided more information:

Lambert	Yo it was more than 2 months ago
Lambert	Buddy we were wirh was on site when it was done
Lambert	We gpod
Bailey	Excellent
Bailey	Never doubted it...
Bailey	Does he know how big the door is?
Bailey	If it's on a hinge?
Lambert	It's pretty big bro
Lambert	Not to much please
Lambert	Please
Lambert	On hinge
Bailey	How about none...
Bailey	😁
Bailey	We are collecting the last few pieces of our gear
Bailey	Ypu gonna stop by today?
Lambert	Idk bro need to fit tools
Lambert	Fine
Lambert	Find

[164] On June 1, 2018 at 1:00 a.m. (UTC-3), Mr. Lambert sent Mr. Bailey a video of a hand manipulating an adjustable or universal socket wrench. The stamp on the

side indicates it adjusts from 7/16” to 1 ¼” (11 mm – to 32 mm). This was followed by the following WhatsApp conversation:

Bailey	Perfect
Bailey	Is it 1/2" drive?
Lambert	Ya
Lambert	0o5nlt thing you need as long as divit isn't to tight
Lambert	Only
Bailey	It won't be that small that's for sure
Bailey	They will leave enough room around the bolt to be able to torch it off if needed... without having to damage the hull

[165] Then, beginning at 2:24 a.m. (TC-3), Mr. Lambert sent the following:

Lambert	Kk so we go loaded wirh this on the wrench and then we good but have other for back up..
Lambert	Bro 12 hours at mine
Lambert	Less than
Lambert	11.5

[166] Followed, about an hour later with:

Bailey	I think we bring all the tools. No surprises
Bailey	We need to be able to fix her little red wagon or she will never forgive us
Lambert	We have all the tools
Lambert	All those on the string and carribeaners
Lambert	We good
Lambert	See u at 945 donr be late

June 1 – 5, 2018 - Montreal

[167] The Arica departed Antwerp, Belgium on May 25th and arrived in Montreal on June 4th at 2:43 a.m. (Ex. 195, ASF; Ex. 31 & 32). She experienced no delays in this part of her voyage (Ex. 31 & 32). While in Montreal, she was docked at the

CAST terminal at the Montreal Gateway Terminals (MGT) (Ex. 195; Ex. 31 & 32; evidence of Dujon Bailey).

[168] On June 9, 2018, when the four men were in Halifax, Mr. Lambert complained to Mr. Alvarado-Calles that "you stupid mother fukers you took my phone charger…", "of they want me going in water tom I need my chargers before I go to sleep", followed by "Brooks on hes way" (Mr. Lambert's cell phone, Ex. 139).

[169] On June 1, 2018, Mr. Bailey, Mr. Lambert and Mr. Seinauskas flew from Vancouver to Montreal. The airline tickets were purchased on May 30, 2018 using the same travel agency, have sequential numbers and were paid for by cheque. According to airline records, the tickets were used (Ex. 33; Ex. 195 – Admissions).

[170] Mr. Pink, on behalf of Mr. Lambert conceded that his client was in Montreal.

[171] Mr. Bailey's presence in Montreal is corroborated by information on his cellphone (Ex. 138) and his Samsung Tablet (Ex. 86; Ex. 138). Communication on the cellphone between Mr. Bailey and Mr. Lambert refers to "car rental", "arrivals", "zones" and "bags" and is consistent with them trying to locate each other at an airport. Photographs on Mr. Bailey's cellphone taken on June 1st, 2nd and 5th show highway signs for Montreal and a plaque for a Montreal hotel (Ex. 138). Information on Mr. Bailey's tablet shows web searches for dive shops in Montreal on June 2, 2018 and visits to websites for Montreal dive shops and hotels on June 2 and 3, 2018.

[172] Mr. Seinauskas' presence in Montreal is corroborated by two video clips in the media folder of Mr. Lambert's phone which show that he was with Mr. Bailey and Mr. Lambert in a hotel room on June 2, 2018, a time when they were in Montreal (Galaxy S7; Ex. 57; Exhibit 139).

[173] On June 3, 2018, Mr. Alvarado-Calles flew from Toronto to Montreal. His ticket was purchased on June 1, 2018. According to airline records, the ticket was used. (Ex. 33; Ex. 195 – Admissions). His presence in Montreal, is corroborated by information on Mr. Lambert's cellphone which establishes that he was with Mr. Lambert and Mr. Bailey at a time when they were in Montreal (Samsung S7; Exhibit 139). A video on the device, dated, June 3, 2018, shows an individual I have identified as Mr. Alvarado-Calles on a speed boat (wearing black pants, black ball cap and hoodie with grey arms and hood and black and white body). I infer the video was taken by Mr. Lambert and Mr. Bailey can also be clearly seen (wearing black pants, orange and black shirt and sunglasses). The video is of good quality. I was

able to watch it numerous times and freeze on individual frames without degradation of the image. The image of Mr. Alvarado-Calles' face is fleeting, however, when frozen it provides a clear view of his face. I have had the opportunity to observe Mr. Alvarado-Calles in the courtroom over many days of trial. Further, communication between him and Mr. Lambert on June 4, and 5, 2018, during which they discuss meeting in the lobby and their plans for the evening, also confirms that they were in the same location.

[174] Evidence on Mr. Bailey's tablet and cellphone confirms that he continued to have an interest in the Arica and her movements when he was in Montreal. The tablet contains Installed Applications: "Marine Traffic Aquatic Radar" (installed, June 3, 2018); "Marine Traffic Free LIVE – Weather & Streetview" (installed, June 3, 2018); "Marine Traffic Radar – Ship Tracker"; and ""FindShip" (installed, May 31, 2018). His cellphone contained images which appear to have come from these applications (Ex. 138, Images). One of those images contains the words, "Marine Traffic.com and shows a map of Montreal with locations marked along the river and a box with information about the Arica, including her status and estimated arrival time in Montreal (created June 4, 2018). Another of the images also shows a map of Montreal with points marked along the river and a smaller box containing information about the Arica (created June 4, 2018).

Boat Rental in Montreal

[175] In June of 2018, Steve LaRoche owned a boat rental company located at the Boucherville Marina in Boucherville, Quebec. The Marina is on the south shore of the St. Lawrence, near Montreal (Ex. 17). The Port of Montreal and Montreal Gateway Terminal (MGT) are on the north shore (Evidence of Mr. LaRoche; Ex. 17).

[176] I am satisfied that on June 3, 2018, Mr. LaRoche rented a small boat to Matthew Lambert who was accompanied by Mr. Bailey, Mr. Alvarado-Calles and Mr. Seinauskas. I am also satisfied from context that the arrangements for the rental were made by Mr. Lambert by telephone a few days before the rental. Mr. LaRoche testified that a few days before the rental, a male caller calling from a Vancouver area code inquired about the possibility of renting the boat after hours for the night. Mr. LaRoche was reluctant, but eventually agreed in return for a larger than normal deposit. On June 2nd, the same person with the same number called again and asked if he could rent the boat that day but did not come that day. On June 3rd, in the

morning, the same person with the same number called and said he would come that day. Around 1:00 p.m., Mr. Lambert arrived, accompanied by three men.

[177] Mr. Pink concedes that the person Mr. LaRoche rented the boat to was Mr. Lambert. That concession is supported by the evidence. He identified himself to Mr. LaRoche as Matthew Lambert, produced a driver's license bearing that name and signed that name on the rental contract. Mr. LaRoche took a photograph of the license, a copy of which was entered into evidence (Ex. 16). The photograph in the license matches the accused before the Court and Mr. LaRoche picked Mr. Lambert's photo out of a photo-lineup and identified him in court.

[178] Mr. LaRoche identified Mr. Bailey, Mr. Alvarado-Calles and Mr. Seinauskas as the three men who were with Mr. Lambert when he rented the boat. That has not been conceded, so I have to carefully review the circumstances of his identification and the related circumstantial evidence.

[179] Mr. LaRoche had never met any of these men before. He testified that he spent about 30 minutes with them during the initial meeting. During that time, he was taking care of the formalities of the rental with Mr. Lambert. The other men were nearby but he had no direct dealings with them at that time.

[180] After that, Mr. Lambert and the man identified by Mr. LaRoche as Mr. Seinauskas went to a nearby café and were gone for about 15 minutes. During that time, Mr. LaRoche was on the boat with the men he identified as Mr. Bailey and Mr. Alvarado-Calles. While on the boat, they were in relatively close proximity and had some conversation. He again saw the man identified as Mr. Alvarado-Calles for about 15 – 20 minutes at 1:00 a.m. on June 5th when the boat was returned. At that time, it was dark. He testified that he had very little interaction with the man he identified in court as Mr. Seinauskas. He observed him for at most a few minutes when discussing the rental with Mr. Lambert. During that time, the man was sitting at a picnic table about 50 feet away.

[181] He provided physical descriptions of the four men. He described Mr. Lambert as tall, 6'2" – 6'3", in good physical shape, with blonde or light-coloured hair. He recalled that Mr. Lambert was wearing a t-shirt and had a beautiful watch that was larger than normal. He said the second person, identified in court as Mr. Bailey, looked older than Mr. Lambert, not as big but in good physical shape, short dark brown hair, and a little beard which Mr. LaRoche referred to as a soul patch. He recalled that Mr. Bailey was wearing a t-shirt, sporty glasses and a sports shirt.

He said the third male, identified as Mr. Alvarado-Calles appeared to be Hispanic, had tattoos on his arm or arms, had short practically shaved hair, was also in good physical shape and looked like Aaron Hernandez from the New England patriots. He recalled that the man had tattoos and believed they were probably on both arms but could not recall for certain. He said the fourth male, identified as Mr. Seinauskas, was older, advanced 40s, white and "unlike" the other three. He had no recollection of that person's hair.

[182] On July 3, 2018, Mr. LaRoche identified Mr. Bailey, Mr. Lambert and Mr. Alvarado-Calles in a photo lineup. He did not identify Mr. Seinauskas. Cst. Emilie Gendreau described the lineup procedure and documents associated with the lineup were entered into evidence (the form used – Ex. 19; the photo pack for each accused – Ex. 20 – 23; and, the audio and transcript of the procedure – Ex. 3 on the *voir dire*). The defence does not argue that the line-up procedure was improper. In cross-examination, after being presented with a transcript of the line-up procedure, Mr. LaRoche agreed that he had told the officer that the Hispanic man had a beard and that he had used that feature as a means to identify the man. He agreed that the person in the photo did not have a beard but explained that he used the French word "la barbe" to mean unshaven, not a full beard. I accept that explanation.

[183] In court, Mr. LaRoche identified the four accused as the men who were present on June 3rd. At the time of the in-court identification, Mr. Bailey and Mr. Lambert were seated on the prisoner's bench with sheriffs and Mr. Alvarado-Calles and Mr. Seinauskas were the only men in the body of the court who were not in Sheriff uniform.

[184] Mr. LaRoche acknowledged that in the month between when he dealt with the men on June 3rd and when he viewed the photo line-up on July 3rd, he dealt with dozens of other people renting boats. He said he was 100% sure of his identification of Mr. Lambert, was "sure" of his identification of Mr. Bailey and not sure of the other two. He said he was "very confident" when he picked Mr. Bailey's photo out of the lineup and "confident enough" when he identified him in court.

[185] I accept that Mr. LaRoche was an honest witness. I did not detect any of the traditional indicators of deception in his evidence, there were no significant contradictions, and he appeared to be impartial. In a couple of instances, he was perhaps overly helpful (checking his telephone records over a break). I believe that was indicative of a desire to be accurate and a lack of understanding of the court process, rather than a sign of partiality. However, his honesty and confidence in his

identification is not determinative. Honest and confident identification witnesses can be wrong. It is the reliability of the identification that is most important, so I have to carefully examine the case-specific factors that impact his identification. I am satisfied that Mr. LaRoche's identification of Mr. Lambert, Mr. Bailey and Mr. Alvarado-Calles is reliable. He spent time near them, provided detailed and accurate descriptions which included some distinguishing features, picked them out of a lineup and his identification is supported by circumstantial evidence. I recognize that Mr. LaRoche described Mr. Alvarado-Calles as probably having tattoos on both arms and, according to the testimony of Cpl. Campbell, he has tattoos only on his right arm. However, given the other details of the description, this discrepancy does not detract from the reliability of the identification. Further, the identification of Mr. Alvarado-Calles as one of the men present when the boat was rented and later returned, is corroborated by the video on Mr. Lambert's cell phone, from June 3, 2018 showing Mr. Alvarado-Calles on a speed boat (Samsung S7; Ex. 139). Three other people are with him on the boat and a dive suit can be seen. Mr. LaRoche testified that the men put diving gear onto the boat before they left with it.

[186] Based on Mr. LaRoche's identification alone, I cannot be satisfied that Mr. Seinauskas was the fourth man. In the circumstances, his in-court identification is entitled to very little weight. Mr. LaRoche spent relatively little time with the individual he identified as Mr. Seinauskas, did not pick him out of the photo line-up and provided only a vague description.

[187] The Crown relies on other evidence to argue that Mr. Seinauskas was the fourth man. Two photographs taken from surveillance footage of a café near the marina were entered into evidence (Ex. 15, tab 1; Ex. 195 - Admissions). The Crown submits that Mr. Seinauskas is in one of those photographs. Mr. LaRoche testified that he directed Mr. Lambert to the Café D'Art, located in the community centre near the marina. He saw Mr. Lambert and the man he identified as Mr. Seinauskas go in that direction and they came back later with food. The Café D'Art had surveillance cameras. On July 3, 2018, Cst. Jonathan Racicot met with an employee and viewed the surveillance footage for the afternoon of June 3, 2018. Before looking at the footage, he had reviewed the descriptions provided by Mr. LaRoche and photographs of the four accused. He saw a person he believed to be Mr. Lambert and a person he believed to be Mr. Seinauskas and took photographs of those images on the screen. Apparently, the video surveillance footage was not obtained, but the two photographs were entered into evidence (Ex. 15, tab 1; Ex. 195 - Admissions). The photographs are not high-quality images. Both are photographs of a frozen

image on a computer screen. I recognize the person in photo 1 as Mr. Lambert (Ex. 15, tab 1). Photo 2 is less clear. The person is side-on to the camera, so his face is mostly in profile and he is captured in mid-stride. As such, the image is blurred and somewhat distorted. I could not recognize Mr. Seinauskas from this image alone. Assuming Cst. Racicot's belief that the image in the photograph is Mr. Seinauskas is admissible, I would give it little weight. The image in the footage he reviewed was no doubt of better quality than the photograph that was entered into evidence. However, Cst. Racicot had no previous acquaintance with Mr. Seinauskas and made his identification based solely on a photograph of him with the description provided by Mr. LaRoche. That description would have helped Cst. Racicot identify the person in the footage as the person Mr. LaRoche had seen but would not help identify that person as Mr. Seinauskas. Cst. Racicot's identification is also potentially tainted by the fact that his task was to look at the footage to see if any of the four men in the photos he had been provided with were present. That creates a risk of confirmation bias.

[188] There is also some circumstantial evidence that supports Mr. Seinauskas being the fourth man. He was present in Montreal at the time and was sharing a room with Mr. Bailey and Mr. Lambert (Samsung S7; Ex. 139). Further, the person identified as Mr. Seinauskas in the Café D'Art photograph and the fourth man from the June 3rd speed boat video is wearing grey sneakers with orange accents. Similar sneakers were seized on June 10, 2018 from a bag in a hotel room in Halifax which had been occupied by Mr. Seinauskas, Mr. Bailey and Mr. Lambert.

[189] The evidence supporting a conclusion that Mr. Seinauskas was the fourth man when the boat was rented includes that he was in Montreal at the time, had travelled with Mr. Bailey and Mr. Lambert and was staying in a room with them, and the fourth man was wearing similar sneakers to those found in the hotel room in Halifax. The cumulative impact of this evidence leads me to conclude that Mr. Seinauskas was the fourth man present when the boat was initially rented and that he was the man on the boat in the video from Mr. Lambert's cellphone.

[190] Mr. LaRoche testified that Mr. Lambert told him they were testing the water around Boucherville for plastics as part of a foundation called Ocean Plastics Alliance and pointed to Mr. Bailey as the real expert. The men put fishing rods and diving gear, including tanks and a propulsion device, onto the boat. Around 2:30 p.m. on June 3rd, the four men left the Marina in the boat. They agreed to return the boat by 10:00 p.m., but they returned it around 8. p.m. When they returned, only Mr. Bailey, Mr. Lambert and Mr. Alvarado-Calles were on the boat.

[191] Mr. Lambert said they would return to get the boat the next day, June 4, 2018, at 4 a.m. It was agreed that they could keep the keys and pick up the boat. When Mr. LaRoche arrived at 8 a.m. the next day, the boat was gone.

[192] Mr. LaRoche testified that June 4th was not a good day to be on the water. It was gray and rainy. He was concerned about the weather and spoke with Mr. Lambert at various points during the day. He was told the boat was moored at Belleriver Park. Mr. LaRoche marked the location of the park on the map. It is on the north shore, near the western end of the MGT (Ex. 17). Just before dark, Mr. LaRoche received a GPS notification that his boat was in motion. The boat was returned to the marina after midnight. Mr. Lambert and Mr. Alvarado-Calles were onboard.

[193] Another video from Mr. Lambert's cellphone identified as being from June 4, 2018, is also from a boat (Ex. 139). The motor is not running, and the boat is on the shoreline. Two men can be seen wearing blue nylon rain suits and rubber boots and there are fishing rods on the bottom of the boat. The men's faces cannot be seen well enough to identify them.

[194] Mr. LaRoche identified a photograph of the boat he rented to Mr. Lambert (Ex. 18 and Ex. 15, tab 4, photo 395) and all counsel conceded that the pontoon boat in that photograph is the boat that Mr. LaRoche rented to Mr. Lambert and that the serial number QC4350801 (shown in photo 396, Ex. 15, Tab 4) is associated with that boat.

Port of Montreal – Montreal Gateway Terminals

[195] Witnesses from the Port of Montreal – Montreal Gateway Terminals (MGT) testified and photographs, diagrams and surveillance video from the port were entered into evidence (Ex. 6, 11 – 14).

[196] On June 4, 2018, the Arica was docked at MGT in section 77.

[197] Pascal Babin was the supervisor of security for MGT. On that date, he received reports from agents relating to a pontoon boat and looked at video surveillance from the Port's security cameras. He captured still images from that footage. Those images were entered into evidence (Ex. 11). He also viewed portions of the video, confirmed that the date and time stamps were accurate and identified

various landmarks (Ex. 6). Mr. Babin identified the Arica in the video and marked her location on a diagram of the Terminal (Ex. 12).

[198] Patrick Charbonneau and Dujon Bailey also worked at MGT on June 4, 2018. Mr. Bailey referred to his area as the "CAST Terminal", one of the container terminals that is part of MGT. Mr. Charbonneau was on patrol in a security vehicle when he intercepted a conversation on the radio. From the conversation, he believed a person was about to dive which he found odd because the only ship docked was a container ship, the Arica. After hearing the conversation, he went to the site. At about 11:16 a.m., he arrived at the back end of the Arica and saw a pontoon boat with a diver in the water holding on to one of the floats of the pontoon boat. The pontoon boat drifted a bit and started to turn, so he lost sight of the diver. He testified that he saw two people on the boat, both wearing rain gear. He then saw the diver get on board. The pontoon boat was about 800 – 900 metres from the Arica at that time. After the diver got on board, the pontoon boat returned to where Mr. Charbonneau was standing, and they had a discussion.

[199] By that time, Mr. Charbonneau's colleague, Dujon Bailey, had arrived in another vehicle. Mr. Bailey spoke with the occupants of the boat because they were speaking English and Mr. Charbonneau's English was not so good.

[200] Both Mr. Charbonneau and Mr. Bailey testified that the diver on the boat said he was a military diver. Mr. Charbonneau testified this information was volunteered, but Mr. Bailey testified it was in response to a question from Mr. Charbonneau, asking the person if he was military.

[201] Mr. Charbonneau testified that after the diver got onboard, he saw four people on the boat, three were dressed in marine gear and the diver was in a wet suit. He and Mr. Bailey provided the registration number for the boat which is the same registration number associated with the pontoon boat rented to Mr. Lambert by Mr. LaRoche (Ex. 15, Tab 4, photo 396). It appears that Mr. Charbonneau's recollection of the registration number may not have been an independent recollection. However, that information is corroborated by Mr. Bailey, who made a note at the time.

[202] Mr. Charbonneau testified that, after the conversation, he asked the people in the boat to leave and they left. Mr. Charbonneau marked the location of the Arica and the pontoon boat on a diagram of the Terminal (Ex. 13).

[203] After the pontoon boat left, Mr. Charbonneau briefed his supervisor because he thought the event was suspect: the weather wasn't good; he'd only seen one diver; he did not see any diving flags; and, he would normally have been told in advance of this type of event.

[204] Mr. Bailey testified that on June 4, 2018 the weather was rough with high winds, rain and fog. In cross-examination, he said it was choppy with two to three-foot swells. Around 11:14 a.m., he heard someone call on the radio and understood someone was in the water and believed the person would be cold because of the weather. He learned the location of the diver and knew it was near the Arica so went there. The Arica was at dock 77 and he saw a pontoon boat near dock 78 (identified on Ex. 14). When he arrived, the boat was drifting, and someone was in the water. He testified that four people were in the boat when he first arrived, and the diver was struggling to get back into the boat. This is not consistent with the evidence of Mr. Charbonneau who testified there were four people in the boat after the diver got in. It is also not consistent with the video evidence which shows four people in the boat, including the diver. Mr. Bailey said the current was strong near the dock and the boat was drifting along the dock. It drifted from dock 78 to dock 80 where there is less current, and the diver was able to get onto the boat. Once the diver boarded, the boat came to where Mr. Bailey and Mr. Charbonneau were, and they spoke. The diver said he was ok, that he was military and was diving for algae near the dock. Mr. Bailey told the diver that he hadn't been informed there would be any military divers. The diver said that was his "bad". The boat left after that. Dujon Bailey said he saw only one dive rig, no back-up diver and no flags in the water. He said this seemed a little "off" as navy divers always have flags, the weather was bad for diving and they didn't have a back-up diver. The others on the boat were all wearing identical dark track suits with rain boots.

[205] He testified that the Arica was the only vessel at the terminal that day, however, there are other terminals nearby.

[206] The video from the Port of Montreal shows a small boat in the vicinity of the Arica at various times on June 4, 2018 (Ex. 6):

- 11:15 a.m. - a pontoon boat drifting from right to left near the dock. The pontoon boat continues to move slowly toward the end of the dock. According to witnesses, the boat is moving away from the Arica's location.

- 11:18 a.m. - Initially, three figures can be seen on the boat. One is seated, apparently at the controls, and the other two are at the bow bending over the water. One appears to be handling a line. At about 11:20 a.m., a figure can be seen in the water next to the boat (video 1343).

- 11:23 a.m. - the pontoon boat is near the dock where the two uniformed security officers are standing. Four people can be seen onboard the boat, including the person identified as the diver who has a bare head and steps forward (video 1349).

- 3:11 p.m. – 3:15 p.m. - a small boat can be seen passing by from left to right (video 1350).

- 3:50 p.m. - a hull is visible (identified by Mr. Babin as the Arica) and a pontoon boat can be seen coming in close to the dock and within about 20 feet of the Arica, before leaving (video 1354).

- 4:02 p.m. - the Arica can be seen with a small boat near (video 1353).

- 4:08 – 4:09 p.m. - a small boat again passes (video 1356 – 1359)

- 4:21 – 4:22 p.m. - a small boat passes back in the direction of the Arica (video 1361 – 1363)

- 4:24 p.m. - a boat can be seen going in a different direction (video 1364)

[207] It is not clear whether all of the images showing a small boat are the same pontoon boat. However, it is clear that some are. I find that the pontoon boat that was around the MGT and the Arica on June 4th 2018 was the one Mr. Lambert rented from Mr. LaRoche. One of the occupants was diving near the Arica. From the video, the diver appears to be Mr. Bailey. When the boat was near the dock and the diver was speaking with the security staff, there were four occupants.

[208] The only reasonable inference from this evidence is that the four men who rented the boat are the same four men who were on her when she was near the Arica at MGT.

[209] On June 5, 2018, Mr. Lambert sent Mr. Alvarado-Calles a youtube video of Blackrock Beach in Halifax. Mr. Alvarado-Calles responded “just saw video that’s money” (Mr. Lambert’s cellphone; Ex. 139).

[210] Mr. Bailey left Montreal by vehicle on June 5th and drove overnight to Halifax (Exhibit 81; Exhibit 138, images, SMS communication and timeline). An image taken on June 5th in the evening shows Montreal highway signs. Photographs on his cellphone overnight on June 5/6, 2018 show highway signs for the turnoff for Woodstock, NB, then St. John NB and on the morning of June 6, the approach to Halifax/Dartmouth, NS. Communication from him to various third parties on June 5th also confirms he was going to Halifax. He wrote to one contact, "Currently driving from Montreal to Halifax". He was trying to make arrangements to have something sent to him and told contacts to have it sent by FedEx to Halifax. In the early morning on June 6th, he wrote "Lol we are 30 mins outta Halifax!".

[211] Overnight on June 5/6, while communicating with a contact identified as "AAA – Sara Cell" about the delivery, he wrote, "I have some big things in the works down here and I need to be good as can be" … "I'm down here to collect a 4 million dollar score", "Friday is game day", "I have one shot!", "500,000 is for me", and "Ps delete all that asap" (Ex. 138). He later wrote, "this trip is fuckin serious like life & death shit! Not exactly the time for trial and error if ya know what I mean" and re-iterated his request to delete what he'd said earlier.

June 5 – 9, 2018 - Halifax

[212] Mr. Lambert checked into the Future Inn, Halifax, on June 5, 2018 (Registration, Invoice and credit card receipt, Ex. 2, 3 & 91). Later that evening, he sent a video to Mr. Bailey using WhatsApp showing a hand putting a key into a light fixture outside room #329. This is followed by instructions to Mr. Bailey, "Don't knock or check in", "Just park and come to room to try not to wake me up", and further discussion between Mr. Lambert and Mr. Bailey confirming it is the Future Inn, room 329 (Samsung S4, Ex. 138).

[213] Mr. Bailey arrived in the morning on June 6, 2018. He sent a message to Mr. Lambert using WhatsApp, saying "we are at the door", followed by "card key is not here" and "Halp" (Samsung S4; Ex. 138).

[214] There is no direct evidence of how Mr. Seinauskas got to Halifax or when he arrived. However, I infer that he drove with Mr. Bailey. On June 9, 2018, police seized and subsequently searched a Black Cadillac Escalade with Quebec plates which was occupied by Mr. Bailey and Mr. Lambert. Evidence was excluded against Mr. Bailey and Mr. Lambert but not against Mr. Seinauskas and Mr. Alvarado-Calles. The rental documents for that vehicle, list Dangis Seinauskas as an

additional driver. This is admissible as circumstantial evidence connecting him to the vehicle. If Mr. Seinauskas is the person referred to as "Brookes" or "Brooxie", communication on Mr. Bailey's and Mr. Lambert's cell phone on June 8th and 9th, if admissible against Mr. Seinauskas confirms that he was in Halifax (Ex. 138 & Ex. 129).

[215] Mr. Alvarado-Calles flew from Montreal to Halifax on June 6th. The ticket was purchased on June 5th, 2018 through the same Aeroplan account as the earlier ticket. Airline records confirm the ticket was used (Exhibit 195 – Admissions). His flight was scheduled to arrive in Halifax on June 6th at 9:58 p.m. (AST). The hotel registration in his name shows he arrived on June 6, 2018 and was in room #432 (Ex. 4). This arrival date is confirmed on the credit card receipt associated with this booking (Ex. 5).

[216] The Arica left Montreal on June 6th to travel to Halifax (Ex. 195; Ex. 31 & 32).

[217] One of the occupants of room #327 (Mr. Bailey, Mr. Lambert or Mr. Seinauskas) used the Acer Laptop to conduct web searches related to "seachest suction", "Halifax Harbour depth", and "container ship boat sea chest" (Ex. 138). According to the date stamp, these searches were conducted on June 7, 2018. Mr. Marchand could not say whether this computer was set to automatically update date and time. He testified that most computers are, but he has come across computers that were not. Given the computer was possessed by one of the three men, I'm satisfied the search was conducted by one of them, but I can't be certain when it was conducted or by which one.

Boat Rental in Halifax

[218] In June of 2018, Jason Turnbull owned a boat rental company near Halifax. He testified that on June 8th, 2018, he rented his maroon and white, "Princecraft" pontoon boat, named "Liquid Liability", to four men. I am satisfied, based on context and the events that occurred after, that those four men are the four accused before the court.

[219] Mr. Turnbull testified that he dealt with a person who identified himself as "Matthew". That person filled out and signed the Renters Responsibility/Liability Agreement (Ex. 9) and provided a British Columbia photo drivers licence. Mr. Turnbull testified that the renter put his telephone number and drivers licence

number on the Agreement. He said the phone number was the number used to contact him. A seven-digit number entered on the Agreement matches Mr. Lambert's driver's licence number in the photograph of the licence taken by Mr. LaRoche in Montreal (Ex. 9 & Ex. 16).

[220] He described "Matthew" as having short blonde hair and identified Mr. Lambert who was seated on the prisoner's bench. I don't give that identification much weight. He had very little interaction with the others and the only description of them provided by Mr. Turnbull was that they were between 35 and 40 and appeared to be divers. He had never met them before.

[221] He could not recall when he was contacted about the rental, but someone called before the 8th and they arranged to meet at approximately 7 p.m. at a public boat launch in Bedford. During the call, the caller said he had a device for cleaning harbours and would be demonstrating and experimenting here.

[222] He said the men showed up in a black Cadillac Escalade with Quebec plates. In cross-examination, it was suggested that it was unusual that he would remember, after the passage of time, that there were four men, that the vehicle was a Cadillac Escalade or that it had Quebec plates. He acknowledged that when the police contacted him, they said things that helped trigger his memory. For example, they may have asked if he recalled dealing with a group of four people driving an Escalade with Quebec plates. I believe his recollection about these details may not have been an independent recollection. However, other evidence also connects the four accused to the pontoon boat and the Escalade.

[223] He testified that after the agreement was signed, he was paid and gave them the keys. Then, they loaded bags and a device that looked like a propulsion device into the boat. He had no other discussion with the men. Three of the men got into the boat and left. The fourth man drove the Escalade and followed Mr. Turnbull to a pier near the Bicycle Thief restaurant in downtown Halifax, the agreed upon return location for the boat.

[224] The rental was for June 9th, but they wanted the boat early on the 9th so he gave it to them on the 8th to avoid having to meet them at 6 a.m. on the 9th.

<u>June 8, 2018</u>

[225] Information on Mr. Bailey's and Mr. Lambert's cellphones and eye-witness testimony establishes that during the June 8 - 9, 2018 period, all four accused were connected to the pontoon boat and diving gear and that some were involved in diving at Black Rock Beach.

[226] Mr. Bailey clearly planned to dive in Halifax. On June 6th, he received a message from a third party saying "dive?" and later responded, "Yes onto the bottom of the Halifax harbour" (Ex. 138).

[227] A photograph on Mr. Bailey's cellphone shows that on the afternoon of June 8th, he was in a boat on the Halifax Harbour. In the photo, the boat's wake can be seen with part of the Halifax Waterfront in the background (Exhibit 138, images and timeline).

[228] Correspondence recovered from Mr. Bailey's cellphone and admissible against him and Mr. Lambert shows them discussing boats and the Arica on June 8, 2018, on WhatsApp (Ex. 138):

> Lambert - "Yo", "What's the boat called"
>
> Bailey - "Arica IMO # 9399741"
>
> Lambert - "Bro man are you kidding me", "I can't believe you just fucking sent that", "The fuckinf spewed boat you Moran fuck", "Speed", "Use your fucking head man"
>
> Bailey - "Capri"
>
> Lambert - "Omg bro seriously I have to rethink doing this now that you just sent that", "Holly fuck msn", "Man", "Like I'm just in dissvelif you sent that I've this rn", "Dude idk if I'm gona do it now"
>
> Bailey - "I thought it strange why you would ask sorry it's deleted"
>
> Lambert - "Your retarded man"
>
> Bailey - "I can see that"
>
> …
>
> Lambert - "Doesn't matter already rucjinf sent it"
>
> Bailey - "Want me to start packing?"

Lambert - “Use your head man”, “Fuck sakes”, “I don’t think I wanna be here when you get back”

Bailey - “I’m sorry I know how stupid that was”

Lambert - “Bro I’m not like you 2 I have heat on me”, “Who knows who’s watching me”

Bailey - “Bayliner Capri”

Lambert - “U need other phone”

Bailey - “I know I know fuck that was retarded fuk me”

Lambert - “Send that shit on buddies phone not this”

Bailey - “I’m already packing”

Lambert - “Any names”, “Why are you taking”, “Packing”

Bailey - “I’m not”

Lambert - “No one asked you to leave ya wierdo”

Bailey - “But I’m seriously not looking forward to your return”

Lambert - “Why I’m not that mad bro just don’t do stupid shit”

Bailey - “I thought this was encypted”

Lambert - “It’s safer than text but like I said they can watch my screen”, “They could of caught that”, “And who knows what else they can do”

Bailey - “Never ever again and if I’m not sure what your adding I’ll ask for details”

Lambert - “Never names or numbers like that on personal phones”

Bailey - “I knew putting that out was risky but when you ask I do”

Lambert - “Yes duhhh”

Bailey - “Just fucked up”

Lambert - “Well I didn’t think there would have to be a first time saying that but now that’s the first time don’t let it happen again bro.”, “This isn’t a joke”

Bailey - “Do you have a room key?”

Lambert - “Yes”, “You don’t need to go anywhere I need you here for this”, “I’m not mad your not well rn and not thinking stright"

Bailey - “I know what’s at risk. It was stupid I can see that I’m very sorry”

Lambert - “It’s fine just think safer from now on please”, “All good”

Bailey - “Still I should have known better”

Lambert - “Rookie mistake bro”

[229] In correspondence on Mr. Lambert’s cellphone between him and Mr. Alvarado-Calles on June 8th, 2018, admissible against Mr. Alvarado-Calles, they discussed a planned dive. Mr. Lambert sent messages to Mr. Alvarado-Calles that he was “filling tanks” and Mr. Alvarado-Calles asked “whats eta?”. Later on the 8th or early morning on the 9th, Mr. Lambert messaged Mr. Alvarado-Calles about their wake-up time, “Waking 630 am see you then I wanna be at dock in boat by 730 suited up”. Mr. Alvarado-Calles responded, “ok” (Ex. 139).

June 9, 2018

[230] The Arica arrived in Halifax on June 9th at around 7:00 a.m. (Ex. 31 & 32; Evidence from Justin Gillespie). While in Halifax, she was docked at Halterm Container Terminal. The Terminal is in Halifax’s inner harbour, at the outer end of the Halifax waterfront, near Point Pleasant Park (Ex. 7). Point Pleasant Park has a small beach, Black Rock Beach, which is close to Halterm terminal, divided from it on land by a seawall, a parking lot and a fence (Ex. 7 and evidence of various witnesses). The beach is open to the Harbour. A boat exiting Black Rock Beach and turning right would be heading toward the outer harbour and the open ocean. A boat that turned left from the beach would pass Halterm and be heading further into the inner harbour toward the piers of downtown Halifax and eventually to Bedford Basin.

[231] Halterm Terminal has two piers for container vessels (Evidence of IO Brian Webber; Ex. 7). The piers are continuous. The Arica was at the end closer to downtown with room for another vessel between her and the end of the dock closest to Point Pleasant Park. Her starboard side was alongside the pier and her bow pointing toward Point Pleasant Park (Evidence of Brian Webber; Ex. 118; evidence of Sgt. Glode).

[232] Before the Arica's arrival, information from Montreal had been passed on to Cpl. Sherri Campbell (then constable) with the RCMP Federal Serious and Organized Crime unit (FSOC) in Halifax and CBSA was alerted to the vessel's impending arrival.

[233] Beginning around 9:00 a.m., CBSA investigators conducted an inspection of the Arica's underwater hull using a ROV. IO Justin Gillespie and IO Stephan Jeddry both described the ROV. They testified it is yellow, approximately 2 feet by 4 feet, with bright headlights and a camera. It is attached by a yellow tether. IO Jeddry said the lights are powerful and would be clearly visible to someone who was under water. It has a video camera. One officer monitors the video feed and maneuvers the ROV from inside a CBSA truck and another officer stands on the dock and handles the tether.

[234] On the morning of June 9th, IO Gillespie monitored the video feed from the ROV. He observed that the starboard sea chest on the Arica was missing an anti-tamper wire and the bolts seemed to be mismatched in that some looked newer than others.

[235] Starting around 8:45 a.m., CBSA investigators on the bridge and deck of the Arica (IO Gillespie, IO Stephan Jeddry, and IO Vissers) observed a pontoon boat in the area. Their observations are not identical or entirely consistent with each other. However, the inconsistencies are not indicative of lack of credibility or reliability. It is not unusual for honest and attentive witnesses to observe, pay attention to and recall details differently or recall different details and it is also not unusual for witnesses to lack precision when estimating time and distances. What is significant, and what I accept from their evidence, is that from 8:45 a.m. to 12:45 p.m., a burgundy and white Princecraft Pontoon boat with 2 – 4 occupants was within eyesight of the Arica.

[236] Around 8:45 a.m., IO Gillespie saw a white pontoon boat with red accents pass by the Arica from downtown. Around 10:00 a.m., CBSA IO Amanda Vissers

saw a pontoon boat in the harbour between George's Island and the Logistics terminal which is adjacent to Halterm toward downtown Halifax. She could see it with the naked eye but also used binoculars. She described it as a "Princecraft" pontoon boat with a burgundy canopy. From 10:00 a.m. until 12:43 p.m., she saw the pontoon boat at various locations forward and aft of the Arica. The closest she saw it come to the Arica was about the length of a football field which she agrees was about 110 yards. She testified that during this time, she sometimes saw two heads in the boat, sometimes three and sometimes four. She could not see what the people on the boat were doing. IO Jeddry testified that he first saw the pontoon boat around 10:10 a.m. He said it was difficult to gauge distance on the water, but he thought it was ½ km to ¾ km away at a 45-degree angle off the Arica's stern. He could not be sure how many people were onboard, but he guessed there were two to four. Initially he was using his naked eye but then went to the wheelhouse and used binoculars. Between 10:00 a.m. and 11:45 a.m., he saw it change positions from stern to bow and back to the stern. At one point he observed one of the occupants looking toward the Arica using binoculars. The last time he saw the pontoon boat was at 11:45 a.m. He said the pontoon boat was unusual because he'd never seen one on the waterfront before and because it was shifting back and forth. At around noon, he left to get lunch and was relieved by IO Kenda White. Before he left for lunch, he saw the pontoon boat leave and go toward downtown Halifax. IO Gillespie testified that between 12:30 p.m. and 1:00 p.m., he also saw the ponton boat at various points in the harbour.

[237] IO Vissers testified that at 12:43 p.m., she lost sight of the pontoon boat for a time. IO Gillespie testified that at 12:45 p.m., he saw the pontoon boat head in the direction of downtown Halifax.

[238] This information was provided to Cpl. Campbell who briefed her supervisor, Sgt. Nancy Mason. Sgt. Mason approved Cpl. Campbell to conduct surveillance and Sgt. Aaron Glode (then corporal), was called in to assist.

[239] Cpl. Campbell and Sgt. Glode went to the Halifax waterfront to look for the pontoon boat. Around 1:00 p.m., they located a pontoon boat at a pier in downtown Halifax near the Bicycle Thief restaurant. It matched the description and a photograph of the pontoon boat that had been observed around the Arica. It contained diving gear and a hand-held radio. Cpl. Campbell took photographs of the boat (Ex. 130, 131 and 132). Copies of these photographs also appear in Ex. 8, Tab C at pp. 2 – 4 which were identified by Mr. Turnbull as the boat he rented to Matthew Lambert on June 8th, 2018.

[240] A short time later, two men, later identified as Mr. Bailey and Mr. Seinauskas boarded the boat. Cpl. Campbell and Sgt. Glode spoke to the men. In previous *Charter* and voluntariness rulings, I concluded that information provided by the men during this interaction was not admissible against them. The Crown does not seek its admission against the other two accused.

[241] At about 1:50 p.m., Cpl. Campbell and Sgt. Glode left the dock area to return to their vehicle and Mr. Bailey and Mr. Seinauskas left in the pontoon boat.

[242] A photograph found on Mr. Bailey's cellphone taken on June 9th, apparently a "selfie", shows him standing on a pier on the Halifax waterfront with a white and burgundy pontoon boat (QJTS0068C202) behind him. That number is also visible on Cpl Campbell's photographs of the boat, identified by Mr. Turnbull as his (Ex. 8, Tab C, photo 3).

[243] After Mr. Bailey and Mr. Seinauskas left downtown Halifax in the pontoon boat, they went to the Black Rock Beach area. A man identified at trial as Mr. Lambert had been diving there and a man identified at trial as Mr. Alvarado-Calles was on the beach.

[244] Around 1:55 p.m., IO Vissers was still onboard the Arica and testified that she saw the pontoon boat re-appear, traveling from the direction of downtown Halifax, past the Arica toward Point Pleasant Park. She saw it stop midway between the Black Rock Beach and the Arica.

[245] IO Kenda White testified that she went to Point Pleasant Park to monitor the area near the beach, arriving around 1:40 p.m. She was in an unmarked car. At around 2:00 p.m., she saw a pontoon boat come up close to the shore at Black Rock Beach. She was then told to return to the Arica so left around 2:08 p.m. When she left, the pontoon boat was still close to the shore. She couldn't say how many people were onboard.

[246] IO Gillespie also testified that he saw the pontoon boat return and come in close to Black Rock Beach, but believed it was around 2:30 or 3:00 p.m.

[247] When Sgt. Glode and Cpl. Campbell left downtown Halifax, they drove to Black Rock Beach arriving at about 2:00 p.m. Sgt. Glode got out of the vehicle and walked to the beach area. He testified that he saw a diver, whom he later identified as Matthew Lambert, just coming out of the water and another man, later identified as Nelson Alvarado-Calles, on shore. He also saw the pontoon boat, just off the

beach. He took a photograph of the pontoon boat (Ex. 117) and another showing the two men on the beach, with the pontoon boat offshore and the Arica at the Terminal (Ex. 118, taken at 2:04 p.m.). One of the men in the photograph is wearing diving gear; Sgt. Glode identified him as Mr. Lambert. The other is wearing black pants and a hoodie; Sgt. Glode identified him as Mr. Alvarado-Calles. The pontoon boat left the area, heading in the direction of downtown Halifax. Sgt. Glode testified he saw the two men he identified as Mr. Lambert and Mr. Alvarado-Calles load the dive gear into a black Escalade with Quebec plates and leave the parking lot at approximately 2:10 p.m.

[248] Cpl. Campbell testified that she saw the pontoon boat, with individuals she recognized as Mr. Bailey and Mr. Seinauskas onboard, just backing away from the beach. When she first saw the boat, it was pretty close to the beach. Sgt. Glode came back to the vehicle and he saw two men get into an Escalade and drive out. Because of where she was sitting, she was not able to see the men clearly.

[249] Sgt. Glode and Cpl. Campbell followed the Escalade to a parking lot on the waterfront in downtown Halifax near the Bicycle Thief restaurant.

[250] They both testified that when they got there, the pontoon boat returned to the pier with Mr. Seinauskas and Mr. Bailey onboard. They saw the men they identified as Mr. Lambert and Mr. Alvarado-Calles get out of the Escalade, meet the other two men and then the four unloaded diving gear from the pontoon boat and put it into the Escalade. The vehicle then left the parking lot with the four men in it.

[251] Both were cross-examined on the circumstances of their identification of the two men on Black Rock Beach and in the Escalade. Neither knew the men prior to seeing them that day. Both identified them based on their dealings with the accused later.

[252] Cpl. Campbell did not see the men at Black Rock Beach well enough to identify them there. Based on her observations at the Pier, she described the man identified as Mr. Lambert as tall with blond hair. She said the other was slightly shorter, Hispanic looking, with dark hair. She said that at one point, the men were standing around and the man she identified as Mr. Lambert looked directly at her and Sgt. Glode from a distance of about 25 feet. She acknowledged that when she saw the person she identified as Mr. Alvarado-Calles, she was approximately 25 feet away from him and the area was quite busy with pedestrians. She said she had a clear view of him. She continued watching him until he assisted the others in

unloading the boat and loading the Escalade. She didn't take any pictures of him and acknowledged that she had the means to do so but didn't think it was appropriate. She next saw him when he was arrested in Ontario about 2 months later. At that time, he was turned over to her by the arresting officers so she had a clear view of him.

[253] She testified that she first clearly saw the person she identified as Mr. Lambert in front of the Bicycle Thief and had a good look at him when he was unloading the boat. She next saw the same man later that day when they went back to Point Pleasant Park and she saw him disposing of something in the woods. She then saw him after his arrest that evening when he was at the police station.

[254] Sgt. Glode was out of the vehicle so was able to see the two men at Black Rock Beach and while they loaded the Escalade. He testified that he recognized them when he saw them at the Bicycle Thief parking lot. He said that the individual he identified as Mr. Lambert made eye contact with him and smiled when he was about 20 feet away. Sgt. Glode was sitting on a bench watching when the four men came together, loading the Escalade. He next saw Mr. Lambert back at the Beach and then saw him briefly that evening at the police station and then some time later in British Columbia. Sgt. Glode did not see Mr. Alvarado-Calles in person until the trial.

[255] I am satisfied that Mr. Alvarado-Calles and Mr. Lambert were the men the officers saw at Black Rock Beach and meeting Mr. Bailey and Mr. Seinauskas near the Bicycle Thief. I would not be satisfied based solely on the identification made by the officers. However, it is supported by the other evidence and surrounding context. The four men had been together in Montreal and all came to Halifax, they were staying at the same hotel, a group of four men went to pick up the boat, Mr. Bailey and Mr. Seinauskas were in the boat, Mr. Lambert and Mr. Alvarado-Calles were conversing about diving and arranging to meet that day to do so, and the rather distinctive hoodie worn by the dark haired man in the photo taken by Sgt. Glode from Black Rock Beach (dark body with grey sleeves and hood) is consistent with what was worn by Mr. Alvarado-Calles on the video from Montreal found on Mr. Lambert's cell phone (Ex. 139).

[256] Mr. Turnbull testified that at around 3 p.m. on the 9th, he received a call from the same number as the previous calls relating to the pontoon boat. The caller said they had returned the boat because they hadn't needed it for the whole day. In cross-

examination he agreed that the caller said they had been stopped by police and told they were diving without a proper diving buoy.

[257] After the Escalade was loaded, the four men left in that vehicle. The officers tried to follow but lost it in traffic. Cpl. Campbell said this was around 2:30 p.m. The officers went back to Black Rock Beach and then went to the Future Inn Hotel in Bayers Lake. They located the Escalade, but it was unoccupied.

[258] Surveillance footage from the Future Inn in Bayers Lake on June 9, 2018 shows a Black SUV pulling up to the front door at about 3:23 p.m. (Ex. 6). Four men got out of the vehicle. Two enter the hotel lobby quickly. Their appearances are consistent with Mr. Seinauskas and Mr. Alvarado-Calles and the hoodie worn by the person who looks like Mr. Alvarado-Calles appears the same as the one worn by him in the Montreal video (Ex. 130). The two other men remain near the vehicle for longer so are on video for longer. They are clearly identifiable as Mr. Lambert and Mr. Bailey. Mr. Lambert entered the hotel lobby carrying a small kitbag and Mr. Bailey walked away from the vehicle, down the driveway. Sgt. Glode testified that after they located the Escalade, they went to a nearby gas station where he went inside to use the washroom and saw Mr. Bailey.

[259] Sgt. Glode and Cpl. Campbell were joined by two CBSA investigators, IO Adam Delvalano and IO Sean Foster, who had been brought in to assist with surveillance.

[260] During this time, CBSA investigators on the Arica were continuing their efforts to inspect her sea chests. IO Gillespie testified that around 3:00 p.m., CBSA put the ROV back into the water. Nothing new could be seen in or on the sea chest. As a result, CBSA called in the commercial divers to more closely inspect the Arica's hull and sea chests. They arrived at the Arica at approximately 4:30 p.m.

[261] The Escalade eventually left the hotel and was followed back to Black Rock Beach. IO Foster and IO Delvalano followed it into the parking lot nearest the beach. Sgt. Glode and Cpl. Campbell parked in an outer lot, located at the entrance to the beach parking lot. D/Cst. Steve Fairbairn and D/Cst. Josh Underwood, who had been assigned to assist with surveillance, arrived shortly after and parked in the parking lot nearest the beach.

[262] IO Foster, IO Delvalano, and D/Cst. Fairbairn all testified at a global *voir dire* and all counsel and accused agreed to have their evidence from the *voir dire* apply

to the trial proper. Mr. Alvarado-Calles had been excused from attending the *voir dire* at his request pursuant to s. 650(2)(b). He was not involved in the applications, his attendance in Halifax would have caused hardship to him and his family, and his counsel attended on a watching brief. This created a problem when counsel proposed that evidence from the *voir dire* could be applied to the trial. An important reason for my decision to excuse him from attending the *voir dire* was that his legal interests were not engaged and he had no standing to ask for any relief. In the trial, that was obviously different. In effect, admitting the *voir dire* evidence into the trial would again engage s. 650(1). I gave Mr. Alvarado-Calles an opportunity to speak with counsel and obtain independent legal advice. He provided a waiver stating that he had received advice, understood his rights and wished to have the evidence admitted at trial. I exercised my discretion under s. 650(2)(b) to admit the evidence. I provided oral reasons at the time, but in summary my decision was based on the following: there were legitimate reasons for the original request to be absent; there were legitimate benefits to admitting the evidence at trial, including reducing legal fees, making it possible to finish the trial in the time set aside, and contributing to justice efficiencies; Mr. Alvarado-Calles had the benefit of very experienced counsel; an Associate of Mr. Alvarado-Calles' counsel was present during the taking of the evidence; all counsel, including the Crown, consented; transcripts of the evidence were provided to Mr. Alvarado – Calles and his counsel; and, the three witnesses were available for cross-examination by Mr. Alvarado-Calles' counsel if he wished to cross-examine.

[263] Each witness took the stand and adopted the evidence they had given during the *voir dire* and the transcripts were entered into evidence (Ex. 100 – transcript of D/Cst. Fairbairn's testimony; Ex. 101 – transcript of IO Delvalano's evidence; Ex. 102 – Transcript of IO Foster's evidence). A number of photographs and maps that had been entered through those witnesses at the *voir dire* were also entered (Ex. 104 – Ex. 114).

[264] IO Foster and IO Delvalano, D/Cst. Fairbairn and D/Cst. Underwood all observed the beach area and lower parking-lot from their vehicles or on foot. Sgt. Glode and Cpl. Campbell generally remained in their vehicle in the upper parking lot. There were inconsistencies between these witnesses and some concerns with their evidence. However, these were most relevant to issues that were important on the *voir dire* so I will not address them in detail here. To the extent that those issues impact the reliability or credibility of the evidence, I am satisfied that the testimony

I rely on has been corroborated by other witnesses, photographs or objective evidence.

[265] I am satisfied that Mr. Bailey and Mr. Lambert were in the Escalade that was followed to Black Rock Beach. Once, they arrived in the lower parking lot, they got out and walked along the sea wall in the direction of where the Arica was docked. A fence separated the Container Terminal from the seawall. They then returned to the Escalade where Mr. Bailey put on dive gear. Members of the surveillance team saw him enter the water and start swimming out from the beach which was the direction of the Arica. He was using a propulsion device.

[266] D/Cst. Fairbairn spoke to the man on the seawall, Mr. Lambert. He asked what was going on and Mr. Lambert said they were diving for algae for "ocean plastics".

[267] IO Vissers, who was still on the Arica, testified that at approximately 6:00 p.m. she saw an individual near a black SUV parked at Point Pleasant Park putting on diving gear and heading toward the beach. When she saw the diver heading toward the beach, she advised other CBSA officers of a possible diver in the water. IO Jeddry testified that when IO Gillespie received the call from IO Vissers, the commercial diver was taken out of the water and the ROV was put back in. IO Gillespie testified that this was around 6:30 p.m. IO Jeddry was manning the tether attached to the ROV and IO Gillespie was watching the video feed.

[268] IO White was on the bridge of the Arica monitoring the water when, around 6:13 p.m., she saw a diver's flipper on the surface of the water between the Arica and Black Rock Beach area.

[269] At approximately 6:30 p.m., while Mr. Bailey was in the water, Mr. Lambert drove the Escalade to the outer parking lot where Sgt. Glode and Cpl. Campbell were located. They saw him take something out of the vehicle, throw it into the woods and then drive back to the beach area. The item was retrieved and found to be a socket set connected by an orange bungee cord with a carabiner attached (Ex. 39).

[270] IO Gillespie testified that at approximately 6:45 p.m., he observed a diver on the ROV screen. The diver waved at the camera on the ROV and then left, using a propulsion device. Given all the circumstances, I am satisfied that the diver IO Gillespie saw on the ROV screen was Mr. Bailey. IO Gillespie could not say precisely where in relation to the Arica the ROV was at the time or how close the

diver was to the sea chest. IO Jeddry confirmed that the ROV with lights would have been visible to the diver. He and IO Gillespie confirmed that the CBSA presence on shore was also visible to anyone who looked. The ROV truck had emergency lights and CBSA markings, there were other CBSA vehicles around and CBSA personnel who were wearing uniforms with high visibility vests.

[271] IO White testified that at 6:54 p.m., she again saw a diver from the bridge of the Arica. This time she saw an air tank and a diver's head just above the surface. Again, it was between the Arica and Black Rock Beach.

[272] Shortly after, Mr. Bailey came out of the water. Mr. Lambert and Mr. Bailey carried the gear up the beach and put it into the back of the Escalade. They got into the vehicle and drove away quickly.

[273] D/Cst. Underwood followed the Escalade and after receiving instructions from Sgt. Glode to stop the vehicle, contacted Sgt. Perry Astephen, a uniform member of Halifax Regional Police, for assistance. At approximately 7:10 p.m., Sgt. Astephen stopped the vehicle and D/Cst. Underwood arrived moments after. D/Cst. Underwood arrested the driver, Mr. Lambert. An access card for the Future Inn was found in his pocket.

[274] Sgt. Astephen arrested Mr. Bailey who was still wearing a wet dive suit. The Escalade was searched incident to arrest and investigators discovered a Hollis brand propulsion device, dive tanks, dive suits, bags, a socket ratchet wrench, an allen wrench, orange twine and various other items. The Escalade was seized and eventually searched again pursuant to a warrant. In an earlier decision, I concluded that the initial search of the vehicle incident to arrest was lawful so photographs and observations of these items at the time were admissible. However, the continued detention of the vehicle and subsequent search were not, and anything discovered as a result of that detention and search was not admissible against Mr. Bailey or Mr. Lambert. This included the results of analysis of a cellular device which was subsequently discovered in the vehicle.

[275] After the vehicle stop, Sgt. Glode and Cpl. Campbell went to Future Inn to try to locate the other two men. They knew from the access card folder seized from Mr. Lambert that he was staying in room #329. When they arrived, they were told that staff had assisted in moving the occupants of that room to #327 due to a faulty lock.

[276] During this time, Mr. Foster who was still inspecting the Arica found the locking wire and one of the four bolts missing from her aft starboard sea chest. He accessed the sea chest using a wrench to take the bolts off. He identified the size of the bolts as 15/16 or 7/8 or 23 – 24 mm. Once the bolts were removed, he opened the hinged grate and entered the sea chest. Inside, he discovered three bags strapped/tied inside the starboard sea chest.

[277] The bags were found to contain 130 bricks of cocaine, with a total weight of 157.28 kg (346.75 pounds). The bricks were of approximately equal weight, and were individually wrapped, some with different colours and some with markings. The cocaine had a purity of between 79% and 91%.

[278] Cpl. Campbell, Sgt. Glode and members of the Emergency Response Team arrested Mr. Seinauskas inside Room #327 at the Future Inn. The room was secured and, on June 10, 2018, searched pursuant to warrant. Luggage and various electronic devices were seized and subsequently searched pursuant to warrant. In addition to the electronic devices which have already been discussed, the following notable items were seized: Montreal tour guide books (Ex. 67 & 71); flashlight, rope, compass, dive gloves, headlamps and other miscellaneous items (Ex. 69 -77); a user's guide for a Hollis H320 propulsion device (Ex. 78); correspondence addressed to Darcy Bailey (Ex. 87); boarding pass in Mr. Bailey's name (Ex. 92); Future Inn Invoice in Mr. Lambert's name (Ex. 91); and, underwater glow sticks, binoculars, scuba tools (Ex. 95 – 97).

[279] Subsequently, search warrants and production orders were executed resulting in the seizure of documents from various residences and the production of business records.

[280] On June 9, 2018, a ticket was purchased for Nelson Ricardo Alvarado Calles for travel on June 9, 2018 from Halifax to Toronto. That ticket was used (Ex. 195).

[281] On June 9, 2018, airline tickets were purchased for Matthew Lambert for travel from Halifax to Toronto and from Toronto to Vancouver on June 9, 2018. Those tickets were not used. (Ex. 33; Ex. 195 – Admissions). Mr. Lambert's tickets were purchased using the same credit card that had been used to pay for the room at the Future Inn (Ex. 3).

Post - Arrest

[282] Following their arrests, Mr. Bailey, Mr. Lambert and Mr. Seinauskas were held in custody for a time. Mr. Bailey and Mr. Lambert's telephone calls were intercepted while in custody and after release and a recording device placed in Mr. Lambert's residence. These recordings were admitted at trial on consent (Ex. 192, 193 & 194). Subject to relevance, those recordings are admissible against either Mr. Bailey or Mr. Lambert.

Darcy Bailey

[283] On June 30, 2018, Mr. Bailey spoke to an unknown male. In that call he acknowledged that his calls were being monitored. At the beginning of the call, Mr. Bailey asked the male if he'd been able to get through to an account. It is clear from the call that Mr. Bailey was asking the male to try to access Mr. Bailey's telephone account to get rid of text messages. Near the end of the call he told the male that he needs to do something about the account and reminded him to "take that a little bit seriously 'cause ah there is something around that area there that could make things really difficult . . . like for the next fifteen to twenty" (Ex. 192, Tab 1).

[284] On August 20, 2020, Mr. Bailey was back in custody. In a call to his mother, he referred to Matthew Lambert appearing in court that day and told her they picked up Rick [Avelaro] who "was the fourth member of our team in Halifax" (Ex. 192, tab 2).

Matthew Lambert

[285] Interceptions of Mr. Lambert's calls show that he was helping arrange for lawyers and bail for Mr. Bailey and Mr. Seinauskas (Ex. 193, calls between June 13, 2018 and June 25, 2018). It is also clear that Mr. Lambert's wife and an unknown male were trying to get money from someone they referred to as "Spik". I am satisfied that the person referred to as "spik" is Mr. Alvaraldo-Calles. The nickname is used in connection with the name "Rick" and with the name "Yasmine" who is Mr. Alvarado – Calles' wife's first name.

[286] In later conversations (July 3, 2018 – July 16, 2018) Mr. Lambert and unknown males engage in cryptic conversations. In my view, the meaning of these calls is informed by a discussion between Mr. Lambert and Ms. Siow on July 3, 2018:

- July 3, 2018 (Tab 51) – In a conversation between Mr. Lambert and Ms. Siow, Mr. Lambert told her that they're going to send the police in to dive for algae traps and suggests the charges might get dropped. He told her to make sure Alex finishes his job, that there is only one shot and charges might get dropped and he has to give the coordinates to the police;

- July 7, 2018 (Tab 53) – in a conversation between Mr. Lambert and a male, the male complains that a third party is dropping the ball and hasn't sent him any information and he can only do it as fast he the other party gets "it" to him. Later he said that he had a guy "down there that's waiting on these …as long as it gets to him by tomorrow he should be able to do it". Mr. Lambert asked him if he was good to go and the male replied that "theyre . . . gonna build it and do everything like that". Then later the male said "I need the information to get it to these guys", "… so I have a guy down there … that I'm gonna send the thing to, he's going to everything and then just do it". Mr. Lambert asks, "he's gonna whip it up?" and the male replied, "yeah, he's like, he's uh, he's a builder and … a boater";

- July 7, 2018 (Tab 54) – in a conversation between Mr. Lambert and a male, where they are clearly using references to a girl as code, Mr. Lambert instructs the male to "make sure she gets dropped off at the right location. You know what I mean?". Mr. Lambert then refers to getting a picture and says "she's got a tattoo of a star with a circle around it" … "two tattoos with a star with a circle around it …That's where fuckin at .. . Yeah, Xmarks the spot";

- July 7, 2018 (Tab 55) – in a conversation between Mr. Lambert and a male, the male says he got it passed off and is waiting for a response. Mr. Lambert told him that he would get buddy to text the male a list and on the second page on the bottom there would be an exclamation mark with a little cross with an "x" and he should pay close attention to the wording beside that. Mr. Lambert then asked the male if he saw the girl's tattoos and the male said the tattoos were easy to spot;

- July 8, 2018 (Tab 56) - in a conversation between Mr. Lambert and a male, the male told Mr. Lambert that "they backed out on me" and that they're saying they're busy and have no way to get a boat and asked if Tuesday would be ok;

- July 8, 2018 (Tab 57) – in a conversation between Mr. Lambert and a male, the male told Mr. Lambert that he got help, made arrangements, and –they discuss dressing the girl up and dropping her off;

- July 9, 2018 (Tab 58) – in a conversation between Mr. Lambert and a male, the male told Mr. Lambert that he added something to the design that "helps it stay";

- July 14, 2018 (Tab 49) – In a conversation between Mr. Lambert and a male, the male reported that "they went and looked, they couldn't even find the other one". The male suggested the navy were out and may have picked it up and suggested that "buddy" check at places that clean up the harbour, they might have gone downstream somewhere, might have been picked up. He suggested they could try again and Mr. Lambert said it was a huge waste of money;

- July 14, 2018 – In a conversation with Ms. Siow, Mr. Lambert told her that divers weren't able to find those things, that the "diver" wasn't able "to find the traps", and "buddy put it in the first time and it popped out" because the ground isn't regular;

- July 15, 2018 – In a conversation between Mr. Lambert and a male, the male reported that he hasn't gotten back to me and that he'd given him directions on what to do. Mr. Lambert was very disappointed;

- July 16, 2018 - In a conversation between Mr. Lambert and a male, the male still hasn't heard back from "our friend".

[287] In other conversations, Mr. Lambert is clearly concerned that authorities might discover something. On July 9, 2018 (Tab 22), he told Ms. Siow, "remember when I was away and messaging you from my work line – go through and tell me if there's anything stupid". She told him that they're deleted and that he didn't say anything stupid, just about his day-to-day with Darcy. Mr. Lambert reiterated that he is worried he'd said something direct/stupid. On July 21, 2018, Mr. Lambert told Ms. Siow that he was concerned about WhatsApp and whether they can listen.

<u>Dangis Seinauskas</u>

[288] The Crown alleges that during a call on July 9, 2020 (Ex. 192, Tab 22), when Mr. Lambert was speaking with Ms. Siow, Mr. Seinauskas was present with Mr. Lambert. The Crown argues that comments made by Mr. Lambert during the call are admissible against Mr. Seinauskas as adopted admissions. The defence does not admit that the person was Mr. Seinauskas and disputes that he said anything that would acknowledge Mr. Lambert's comments.

[289] At the beginning of the call, Mr. Lambert explained to his wife that there is something at the place he rented for "these guys" that might cause a problem if it was found. He told her that "Dan" said his key for their place is in the van and wants her to look. She was unable to locate the key. Mr. Lambert told her that "Dan" is up on the top floor and asked her to hold on a second, "Dan's coming down right now". It is clear that "Dan" is not present for the early part of the call, so that part would not be admissible against Mr. Seinauskas.

[290] Once the person is present, Mr. Lambert questioned him about the location of the key and passed the information on to Ms. Siow. When the search warrant was executed at Mr. Lambert's residence, a van was found in the driveway with documents that are connected to Dangis Seinauskas. I am satisfied this is the van Ms. Siow was asked to search for the key, so am satisfied that "Dan" is Mr. Seinauskas. I am also satisfied that he acknowledged the comments made to him during the conversation. This corroborates that Mr. Seinauskas had a key to a place rented by Mr. Lambert.

[291] In the Intercepted calls, there are also references to Brooks":

- June 13, 2018 – In a conversation between Mr. Lambert and Nyet Siow, she mentioned "brooks" and "darcy" and bail and Mr. Lambert responded that they can sit for a couple of days while "I get out and I figure it out for them". He goes on to say that the bail is there, he just needs someone to post it and "only me and brooks are allowed out together" . . . "remember me and brooks and darcy are here together";
- June 20, 2018 – in a discussion between Mr. Lambert and Nyet Siow about money and lawyers, she asked about "Brooks'" lawyer.

<u>Nelson Alvarado - Calles</u>

[292] Mr. Alvarado Calles was arrested on August 15, 2018 at a cottage in Ontario. At the time of his arrest, he threw two cell phones into the water. The Crown argues

that this was done to destroy evidence which would be consistent with guilt. The defence argues that there is an equally plausible innocent explanation, and, in any event, the phones were seized and there is no evidence that there was anything inculpatory on them.

[293] The arrest was made by an Emergency Response Team. Cst. Rene Khun, a member of that team, was hidden in the woods near the cottage and observed events through a spotting scope. Mr. Alvarado-Calles was on a dock at the cottage. The entry team, seven or eight police officers, entered through the cottage. Cst. Khun testified that when Mr. Alvarado-Calles saw the police, he threw the phones in the water. He testified the entry team wore protective equipment, including helmets and were armed, possibly including carbines. He could not recall whether their weapons were drawn and could not recall if any commands, such as "drop it" were shouted.

Ocean Plastics

[294] A great deal of evidence connects Mr. Bailey to a venture called "Ocean Plastic Alliance" and an interest in ocean pollution, particularly pollution from plastics. An email address for "oceanplasticalliance" appears on his cell phone on March 7, 2018 and subsequent emails use that address. Numerous documents, notebooks and binders were found in his residence relating to that venture or ocean plastics (Ex. 159, document 3427, 3423, 2049, 34293406; Ex. 166, 170). Luggage tags with Ocean Plastic Alliance and the name "Darcy Bailey", were found on the boat the four men rented in Montreal and on a piece of luggage seized from the Future Inn (Ex. 15, Tab 4; Ex. 41). According to notes in his Canada Revenue Agency (CRA) file, he advised them he was working, cleaning up the ocean, removing plastic from the ocean (Ex. 30).

[295] Mr. Lambert and Mr. Bailey each told witnesses in Montreal and in Halifax that their diving was related to ocean pollution. When he rented the boat in Montreal, Mr. Lambert told Mr. LaRoche that they were taking water samples to test for plastics and spoke about a "foundation", which Mr. LaRoche recalled as "Alliance Plastic". When renting the boat in Halifax, Mr. Lambert told Mr. Turnbull that they were testing/demonstrating a device for cleaning up the harbour. When D/Cst. Fairbairn spoke with Mr. Lambert on the seawall at Black Rock Beach, Mr. Lambert also told him that they were diving for algae in connection with ocean plastics.

[296] The Crown presented evidence which it argues is relevant to discount the argument that the activities of the accused were associated with collecting algae or

ocean plastics. During the search of Mr. Lambert's home, six empty black steel boxes were found in the garage and sketches or diagrams were found in his residence (Ex. 120; Ex. 156). During the search of Lennox Lane, sketches or diagrams were also found (Ex. 159, document 2049, 2050, 3411; Ex. 163; Ex. 170; Ex. 186). The Crown argues that the diagrams show boxes on chains attached to the hull of a vessel, that the boxes in the drawings match the boxes found in Mr. Lambert's garage and that they are parasites (used to attach contraband to a vessel for transport). In no way do they correspond to the method used to transport the drugs in this case. The Crown acknowledged that this evidence would be completely inadmissible as bad character evidence or as evidence of other possible offences, but argued it is relevant to rebut any assertion by the defence that they were involved in a legitimate business or of lack of knowledge of parasites. The boxes were described as having bolts welded to them where something could be attached (Evidence of Sgt. Glode). I could not say they are parasites. The drawings are simplistic and amateur. It is possible that they depict what the Crown says they do but I cannot be certain. If they do depict parasites, they would be admissible to rebut an argument that the accused were not aware of the use of parasites. However, I do not see how they rebut an argument that the accused were involved in a legitimate business involving diving for algae or ocean plastic. No evidence was called to suggest a lack of knowledge of parasites, so this evidence essentially plays no part in my analysis.

[297] Similarly, the Crown presented evidence of a diagram in a notebook found in the kitchen drawer of Mr. Bailey's residence (Ex. 168; Ex. 159, document 3425). The diagram appears to show drugs being moved from western Canada to eastern Canada and money being moved by truck from eastern Canada to western Canada. This is not evidence of the offence before me. It is evidence of bad character and potentially indicative of another offence. In its brief, the Crown argued it is relevant to show an interest in the business and a motive. I do not agree and give it absolutely no weight.

Associations between Accused

[298] The accused clearly had connections to one another before they met in Montreal. Mr. Seinauskas resided with Mr. Bailey from at least mid-May until they left Vancouver on June 1, 2018. Documents with the name "Dan Sein" and Dangis Seinauskas were found in a vehicle parked in the driveway at 5711 Colville Road, Mr. Lambert's residence (Ex. 157; Ex. 159, document 1964). The document with the name "Dan Sein" had a listed email address of bartokuda@gmail.com, the email

address listed for Mr. Seinauskas in his passport application (Ex. 159). "Colville Rd" was written on a document found in the bedroom occupied by Mr. Seinauskas at Lennox Lane. Mr. Alvarado-Calles' email address was written on a document found in the night-table of the bedroom occupied by Mr. Seinauskas at the Lennox Lane address (Ex. 187; Ex. 159, document 3413). Documents found at Lennox Lane connect Mr. Seinauskas to the sale of a boat from a "James Kennedy". A remittance return and vessel insurance in the name of "James Kennedy" was found at 2 Sable Road, Mr. Alvarado-Calles' address (Ex. 146 & 147; Ex. 159, document 3413, 3395)

[299] Mr. Seinauskas flew from Vancouver to Montreal on the same flight as Mr. Bailey and Mr. Lambert and the flights were booked by the same travel company.

[300] Mr. Bailey and Mr. Lambert were communicating with each other in May. It is clear from their communication that they had a close relationship.

[301] Mr. Lambert has conceded that he and Mr. Alvarado-Calles were friends and knew each other for some time. Mr. Alvarado-Calles has not conceded that, but it is established in the evidence. For example, in communication between "Spanish" (who is Mr. Alvarado-Calles) and Mr. Lambert, Mr. Alvarado-Calles refers to the strength of their relationship.

[302] Mr. Alvarado-Calles is connected to Mr. Bailey through the documents in the name of "James Kennedy" that were found in both their residences, and a photograph of Mr. Alvarado – Calles with Mr. Lambert and others was found on Mr. Bailey's cell phone with the title "the parents" (Ex. 138, email, dated May 10, 2018).

Financial Information

[303] CRA information for each accused was filed on consent and with a *CEA* Affidavit (Ex. 30).

[304] Mr. Bailey was under financial pressure at the time of the alleged offences. This is supported by CRA information and documents from collections agencies, bills in arrears, and mortgage foreclosure documents (Ex. 167) as well as communication on his cell phone (Ex. 138).

[305] According to CRA records, Mr. Lambert received little to no employment income from 2014 to 2018 but received annual taxable dividends (Ex. 30).

[306] CRA had no recent assessment information for Mr. Alvarado-Calles.

[307] CRA had no recent information for Mr. Seinauskas.

Expert Evidence

[308] Mr. Tomeo was qualified as an expert in international cocaine trafficking and importation (Ex. 189 – Statement of Qualifications). He provided evidence 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. 190).

[309] There are four source countries for cocaine (Columbia, Ecuador, Peru and Bolivia). The Arica came to Montreal from Antwerp, Belgium. Mr. Tomeo acknowledged that none of the countries visited by the Arica in the month before the seizure were source countries for cocaine (Abidjan, Antwerp, Rotterdam, and Wilhelmshaven - Ex. 31 & 32).

[310] Mr. Tomeo testified that the method used by the alleged importers in this case, "hopping a ride" on a legitimate carrier by attaching the drugs (a parasite) to the vessel under the water line, is unusual for cocaine and logistically more difficult than other methods. When used, the importers use a vessel with an established route so they can retrieve the cocaine somewhere along that route.

[311] He explained that the roles in an international trafficking scheme are the same as in a legitimate company: supplier and buyer; sometimes a broker to introduce supplier to the buyer; a transport team; a recovery team; a stash house; and a means of distribution once in Canada using runners and local buyers.

[312] He testified that it is common for people involved in the illegal drug trade to have a complete cover story prepared to explain their presence. This can include fake companies, email addresses etc.

[313] The contract is negotiated between the buyer and the supplier. It will establish quantity, payment, price per kg, and means of importation. Generally, the supplier has to agree to the means of importation and will want names of participants.

[314] The cocaine is usually sold before it comes to Canada. The price of cocaine for importation in Montreal would be $44,000 - $48,000 per kg. However, when reputation is established, the seller will front the majority of the cocaine to the buyer such that a deposit is paid to cover cost of production and then the rest is due within 30 days of receipt of the drugs. Where the drugs are fronted, the seller will want an

assurance that they will be paid. This can be addressed through conditions in the contract. For example, the seller could require that they have a person on the buyer's vessel to accompany the cocaine to Canada and someone from the buyer's organization to be their guest until payment has been made.

[315] The importer normally negotiates the contract with the supplier and takes care of the logistics of bringing the product into the country, including arranging the transport, retrieval/recovery, runners and payment.

[316] Mr. Tomeo was provided with a hypothetical (Ex. 191). He testified that the circumstances in the hypothetical are consistent with the attempted extraction of the parasite (the drugs) from the vessel.

[317] In cross-examination, Mr. Tomeo was asked about drugs that might have been moved through European ports. He testified that heroin primarily comes from southeast Asia and MDMA from Mexico, Canada, U.S. and Europe. He testified that he did not think an importer would use the means chosen here to import MDMA because it would not be financially worth it. He acknowledged that the three duffel bags seized here could hold millions of MDMA pills but disputed there would be a market for that much MDMA.

[318] He also acknowledged in cross-examination that it is possible to have different groups involved in an importation, with one group transporting the drug to port and another taking the drug from the port to its destination. He agreed that groups could seek to insulate themselves by hiding identities from each other, but said it was more common that they would know each other's identities.

[319] He agreed that normally the people holding important roles in the importation would be somewhat sophisticated – familiar with encrypted communication, guarded/coded conversation and counter surveillance. He agreed that some of the conversation in the hypothetical was not guarded. However, he pointed out that the other participant in the conversation was upset and clearly recognized the unguarded conversation was a mistake.

[320] He agreed that there were unusual features to the facts here: apparently attempting to retrieve the product during the day at a busy park; and, persisting in efforts after aware that police were interested.

[321] He also agreed that contraband sometimes goes missing during importation process. If that happened, someone might be sent to recover it.

[322] He did not agree that thefts of drugs were common at the international importation level; he said he'd never seen it.

Part 3 – Legal Principles

The Charges and Positions of the Parties

[323] Originally, all four accused were charged that on and between December 1, 2017 and June 9, 2018, at or near Halifax, Nova Scotia, they did:

1. conspire together and with others unknown or unnamed to import into Canada, Cocaine, a substance included in Schedule I of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, contrary to section 6(1) of the said Act, and did thereby commit an offence contrary to section 465(1)(c) of the Criminal Code;
2. have in their possession, for the purpose of trafficking, Cocaine, a substance included in Schedule I of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and did thereby commit an offence contrary to section 5(2) of the said Act;
3. traffic in Cocaine, a substance included in Schedule I of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and did thereby commit an offence contrary to section 5(1) of the said Act; and
4. conspire together and with others unknown or unnamed to traffic in cocaine, a substance included in Schedule I of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, contrary to section 5(1) of the said Act, and did thereby commit an offence contrary to section 465(1)(c)of the Criminal Code.

[324] As a result of a directed verdict motion, count 1 was dismissed against Mr. Alvarado-Calles and count 3 was maintained against all accused as an attempt to traffic cocaine.

[325] All accused concede that the substance seized from the Arica was cocaine.

[326] The Crown argues that under the co-conspirator's exception, much of the evidence is admissible against all accused and the only reasonable inference from that evidence is that the accused agreed to import and traffic a substance, knowing it was cocaine. The Crown argues that all four accused joined in an agreement to import the cocaine before the object of the agreement, the importation, was complete. In making that argument, the Crown submits that the importation was not

complete until the cocaine reached the Port of Montreal. Alternatively, the Crown argues that even if I conclude the importation was complete when the Arica entered Canadian waters, the evidence establishes that the accused joined the agreement before that point. Further, the Crown argues that the evidence establishes that the four accused also agreed and planned to remove the cocaine from the Arica with the only reasonable inference being that they intended to transport it for the purpose of sale. The Crown also argues that the elements of the substantive offences are proven. While the Crown acknowledges the cocaine was never in the physical possession of the accused, they argue that the accused were in constructive or joint possession with the intent to traffic so are guilty of possession for the purpose of trafficking. Finally, the Crown argues that their efforts to remove the cocaine from the Arica went well beyond mere preparation and that they had the intent to traffic the cocaine, so are guilty of the attempt to traffic.

[327] In general, the defence argues that the Crown has not proven beyond a reasonable doubt that guilt is the only reasonable inference from the evidence, especially given the evidence capable of supporting an innocent explanation. More specifically, the Defence dispute that the requirements of the co-conspirator's exception have been met. However, even if it has, they argue that the evidence fails to meet the criminal standard of proof for any of the charges against any of the accused. They argue that the Crown has not proven that any accused had the requisite knowledge of the commodity to satisfy proof of that element for any of the charges. They further argue that the evidence does not establish that the accused knew of any conspiracy to import or became involved in it before the importation was complete, which they argue was when the Arica entered Canadian waters. Further, they argue that the admissible evidence does not establish that the accused agreed or planned to remove anything from the Arica or that their purpose was to traffic. If the evidence does show they were trying to remove something from the Arica, their efforts fall short of the acts required for an attempt. Finally, they argue that the Crown has not proven the requisite degree of control over the cocaine to establish constructive or joint possession.

[328] Broadly, my task is to determine whether the Crown has proven beyond a reasonable doubt that guilt is the only reasonable inference from the evidence. To do that, I have to determine whether:

1. Each accused had the requisite knowledge of the commodity for the conspiracy and/or the substantive charges;

2. Each accused conspired to import, which requires consideration of when the importation was complete;

3. Each accused had the requisite control to establish constructive or joint possession of the cocaine;

4. Any steps taken by the accused to remove the cocaine from the Arica's sea chest went beyond mere preparation so as to establish an attempt to traffic cocaine;

5. Each accused had the intent to traffic; and,

6. The requirements of the co-conspirator's exception are met, for which evidence and which accused.

[329] These arguments apply to all accused but have to be assessed with respect to each of the accused individually having regard to the evidence that is admissible against that specific accused.

[330] 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.

Knowledge

[331] All charges require the Crown to prove knowledge to some degree. For "trafficking" and "possession for the purpose of trafficking", the Crown does not have to prove that the accused knew the substance was cocaine but does have to prove that each 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] SCR 531; *R. v. Blondin* (1971), 2 C.C.C. (2d) 118 (B.C.C.A.), *per* McFarlane J.A. at p. 121, affd 4 C.C.C. (2d) 566 (SCC); and, *R. v. Ukwuaba*, 2015 ONSC 2953, at para. 101(2)).

[332] Both conspiracy charges are particularized to allege that the conspiracy relates to "cocaine".

[333] The Defence argue that where the substance in a conspiracy charge is particularized, the Crown must prove that the accused knew the agreement related to that specific substance. In making that argument they rely on the case of *R. v.*

Saunders,[1990] 1 S.C.R. 1020, and my comments in *R. v. Cheverfis*, 2018 NSPC 60, where I relied on *Saunders* to reach that conclusion.

[334] The Crown disputes this interpretation of *Saunders*, arguing that the knowledge requirement for a conspiracy is the same as for a substantive offence, knowledge that the commodity is a controlled substance. The Crown argues that *Saunders* should be limited to its facts and *Blondin* is of more general application.

[335] In *Blondin*, the Supreme Court addressed the knowledge requirement for the substantive offence of importing a narcotic. That decision has been generally applied to other substantive offences. In *Saunders*, which was decided after *Blondin*, the accused were charged with conspiracy to import a narcotic, "to wit: heroin". One of the accused testified that he believed the conspiracy related to cocaine. The trial judge directed the jury that it was irrelevant whether the accused conspired to import heroin or cocaine so long as the conspiracy related to narcotics. At the Supreme Court of Canada, McLachlin, J. writing for the Court, said the following: "The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized.".

[336] She went on to say,

> "There must be a new trial in this case, not because a conviction for conspiracy to import a narcotic cannot be supported without proof of the type of narcotic involved, but rather because the Crown chose in this case to particularize the drug involved and failed to prove the conspiracy thus particularized. "

[337] The Crown argues that *Saunders* stands for the basic principle of trial fairness that, where particularization of the controlled substance is necessary to clearly inform the accused about the transaction with which he is charged, the Crown must prove the charge as particularized. The Crown argues that the case before me is factually different and there is no indication of transactional confusion, so *Saunders* does not apply. In making that argument, the Crown relies on the decisions in *R. v. Rai*, 2011 BCCA 341, at paras.16-18, leave to appeal refused, and *R. v. Langille*, 2007 QCCA 74 at paras. 20-24.

[338] In my view, these decisions do not help the Crown. *Rai* did not involve a conspiracy charge. It involved importing and trafficking. In that case, the defence argued that *Saunders* had modified the ruling in *Blondin* such that the Crown was required to prove knowledge of the specific substance even in a substantive offence.

In that context, the court discussed the limitations of *Saunders,* and said that *Blondin* applied and had not been modified by *Saunders*.

[339] In *Langille*, the court was dealing with an appeal in a conspiracy case and did distinguish *Saunders* but went on to say that the trial judge had properly instructed the jury that they "had to be satisfied beyond a reasonable doubt that the Crown proved all of the elements of the offences stated in the indictment, which she said included Mr. Langille's knowledge that the imported substance was cocaine" (para. 24, emphasis added).

[340] To my knowledge, neither *Rai* nor *Langille* has been relied on to support the argument made by the Crown.

[341] I agree that the case before me is factually different than *Saunders* and there is no indication here of a risk of transactional confusion or evidence that any accused believed a different substance was involved. However, the case before me is not different in this respect from the facts in *R. v. Clyke,*[2002] O.J. No. 5319 (C.A.). That case involved alleged conspiracies to import hashish and marihuana. There was no evidence of transactional confusion but the Ontario Court of Appeal unanimously concluded that the trial judge had erred in instructing the jury that the Crown need only prove knowledge of a conspiracy to import a narcotic, rather than the narcotic specified.

[342] *Clyke* has been relied on (including in British Columbia, the jurisdiction where *Rai* was decided) as support for the principle that, in a conspiracy where a drug is specified, the Crown must prove knowledge that the agreement relates to that specific drug. Knowledge of a narcotic, without specificity, is not sufficient (*R. v. Giles,* 2016 BCSC 1800, at para. 508; and, *R. v. Henareh*, 2014 ONSC 2588).

[343] In the absence of guidance from the Nova Scotia Court of Appeal as to how *Saunders* should be interpreted, I am persuaded by the views expressed by the Ontario Court of Appeal in *Clyke*. The Crown in this case did not have to particularize the substance in the conspiracy charges as "cocaine". However, having done so, in my view, they must prove that the conspiracy related to that substance and that each accused knew or were wilfully blind to that fact.

[344] Knowledge, including knowledge of the specific substance, may be inferred from the surrounding circumstances (*Ukwuaba*, at para. 101; *R. v. Bains*, 2015 ONCA 677 at para. 157, leave to appeal ref'd [2015] S.C.C.A. No. 478).

Possession for the Purpose of Trafficking

[345] All four accused are 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 each accused: (1) possessed the substance; (2) the substance is cocaine; (3) each knew the substance was a controlled substance; and, (4) each possessed it for the purpose of trafficking.

[346] The cocaine was not found in the physical possession of any of the accused, 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.

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

[348] 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).

[349] In this case, the cocaine was found on a container vessel. The accused had no ownership or right to control that vessel. However, 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). 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; also see *R. v. Fisher*, 2005 BCCA 444, at paras. 22 - 24). Similarly, in *R. v. Wu*, 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.

Attempt to Traffic Cocaine

[350] Attempts are criminalized in s. 24 of the *Criminal Code*. Pursuant to that section, anyone who intends to commit an offence and does anything for the purpose of carrying out that intention, is guilty of an attempt to commit the offence.

[351] It requires the Crown to prove: the intent to commit the offence; and, conduct, which is more than merely preparatory acts, for the purpose of carrying out the intention to comment the offence (*United States of America v. Dynar*, [1997] 2 S.C.R. 462, [1997] S.C.J. No. 64, at paras. 49-50; *R. v. Root*, 2008 ONCA 869, 241 C.C.C. (3d) 125, at para. 92).

[352] Whether an act constitutes mere preparation is a matter of common-sense judgment and involves the relationship between the nature and quality of the act and the nature of the completed offence. Trial judges should consider the relative proximity of the act – i.e., proximity in time, location, and what remains to be accomplished – in relation to the completed offence (*Deutsch v. The Queen*, [1986] 2 S.C.R. 2, at p. 23 & 26 – 27).

[353] The intent requirement for an attempt is the intent to commit the complete offence (*Dynar*, at para. 74). Here, the offence at issue is trafficking a controlled substance. So, the Crown must prove that the accused knew the commodity in the Arica's sea chest was a controlled substance, that they intended to traffic it, acted

for the purpose of carrying out that intent, and their conduct was more than mere preparation.

[354] "Traffic", as defined in s. 2(1)(a) of the CDSA, means, "to sell, administer, give, transfer, transport, send or deliver" a controlled substance. Trafficking by "transport" has been limited by the rule in *R. v. Harrington* (1963), 1 C.C.C. 189 (B.C.C.A.) as interpreted in subsequent cases, to mean more than simply moving a drug from one place to another. The moving must be to further or advance the distribution of the drug. (*R. v. Larson* (1972), 6 C.C.C. (2d) 145 (B.C.C.A.).

Conspiracy

[355] The accused are charged with two conspiracies: conspiracy to import cocaine; and conspiracy to traffic cocaine.

[356] The gist of the offence of conspiracy is the agreement by two or more persons to perform an illegal act or to achieve a result by illegal means (*R. v. O'Brien*, [1954] S.C.R. 666 at pp. 668-669; and, *R. v. Douglas*, [1991] 1 S.C.R. 301 at p. 316). The essential elements are: (1) an intent to agree; (2) 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*, *supra*, at para. 86; *R. v. Potter; R. v. Colpitts*, 2020 NSCA 9, at para. 575; and, *R. v. Root*, *supra*, at paras. 65 - 66, Application for leave to appeal, dismissed, [2009] S.C.C.A. No. 282).

[357] The *actus reus* is the "fact of agreement" (*R. v. Cotroni & Papalia*, [1979] 2 S.C.R. 256 at 276-77). In *Cotroni*, the Court went on to say:

> ... 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. …

[358] The *mens rea* for conspiracy requires the intention to agree, the intention to achieve the common 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).

[359] Establishing each accused's membership in the agreement does not require evidence that 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. As was said in *Cotroni*, personnel and method may change without ending the conspiracy (at pp. 276-277). New people may join and 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 (*R. v. J.F.*, 2013 SCC 12, at para. 54).

[360] Proof of the existence of the agreement and an accused's participation in it will generally be proven through circumstantial, not direct, evidence.

[361] Establishing that an accused knew about a plan and/or committed acts to further the plan does not necessarily establish they were part of the agreement. However, as was stated by Justice Doherty in *R. v. Alexander*, (2005), 206 C.C.C. (3d) 233 (Ont.C.A.), at paras. 46 – 47, leave to appeal ref'd [2005] S.C.C.A. No. 526), knowledge and acts in furtherance, "particularly where they co-exist", provide evidence from which the existence of an agreement may be inferred". The importance of this was emphasized by Justice Moldaver in *R. v. J.F.*:

> 52 In my view, where a person, with knowledge of a conspiracy (which by definition includes knowledge of the unlawful object sought to be attained), does (or omits to do) something for the purpose of furthering the unlawful object, with the knowledge and consent of one or more of the existing conspirators, this provides powerful circumstantial evidence from which membership in the conspiracy can be inferred. To be precise, it would be evidence of an agreement, whether tacit or express, that the unlawful object should be achieved. Ultimately, that issue is one for the trier of fact, who must decide whether any inference other than agreement can reasonably be drawn on the evidence. But, as I will explain, the case at hand illustrates how a constellation of such facts can make a finding of membership a virtual certainty.
>
> 53 In so concluding, I note that conspiracies are often proved by way of circumstantial evidence. Direct evidence of an agreement tends to be a rarity. However, it is commonplace that membership in a conspiracy may be inferred from evidence of conduct that assists the unlawful object. Justice Rinfret made this basic point in *Paradis v. The King* (1933), [1934] S.C.R. 165, some eight decades ago:
>
> > Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. [p. 168]

Conspiracy to Import Cocaine

[362] First, dealing with conspiracy to import cocaine. To prove guilt against each accused, the Crown must prove that accused was part of an agreement to import cocaine, intended to enter that agreement, and intended to achieve the goal of importation, knowing the substance was cocaine.

[363] The crime of conspiracy continues until the unlawful purpose or object of the conspiracy is achieved or the agreement is otherwise terminated. So long as there is a continuing overall dominant plan, it survives changes in membership and method. An accused who joins the conspiracy late or has a lesser role in it can still be convicted (*Papalia*; *R. v. Sethi*, 2015 ONSC 5806, at para. 29). However, there must be evidence that an accused joined the conspiracy before the conspiracy was terminated (*R. v. Buttazzoni*, 2019 ONCA 645, at para. 41; and, *R. v. Vrany* (1979), 46 C.C.C. (2d) 14).

[364] This point was made by the Ontario Court of Appeal in *Buttazoni*, a case involving conspiracy to import cocaine:

> 41 In this case, the charge was conspiracy to import cocaine, and the law remains that the Crown was required to prove that the appellant joined that conspiracy before it was terminated - here, by the completion of its object, which was the importation of the cocaine.
>
> 42 Therefore, in order to properly ground a conviction for conspiracy to import, it was necessary for the trial judge to find that the appellant joined the conspiracy to import before the object of the conspiracy, the importation of the cocaine, was complete. To do so, he had to find what date the appellant entered the conspiracy.

[365] There are many examples of cases where accused have joined a conspiracy late, but still been convicted. For example, *R. v. Murphy*, 2012 NSCA 92, 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 *Murphy*, it was murder; in *Parsons* it was trafficking cocaine), with knowledge of what the principal object was and having agreed to take part in the execution of the common design.

[366] Evidence gathered after the object of the conspiracy is complete may be used to infer the existence of the conspiracy and the membership of the accused in the

conspiracy (*R. v. Rai, supra* at para. 23 per Hall J.A., leave to appeal ref'd [2011] S.C.C.A. No. 452; and *United States of America v. Shanker*, 2011 ONCA 452 at para. 7, leave to appeal ref'd [2011] S.C.C.A. No. 310).

[367] The object of the conspiracy alleged here is the importation of cocaine, so there must be some evidence that each accused joined before the completion of that object. An accused cannot agree to do something after that thing has been done.

[368] That requires me to consider when importing is complete.

[369] In *R. v. Bell*, [1983] 2 S.C.R. 471, 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.

[370] The conclusion in *Bell* that importing is not a continuing offence is still the law that I am required to apply.

[371] According to *Bell,* 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 the country.

[372] The Court in *Bell* did not define what it means to "enter the country". 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.

[373] 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. 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 so the accused could not be

committed to stand trial on the importing charge. A similar view was taken by the Nova Scotia Supreme Court in *Jagodic & Vagogic* on a motion for directed verdict on a charge of importing and by the Supreme Court of Prince Edward Island in *R. v. Martel*, [1986] 61 Nfld. & P.E.I.R. 219.

[374] Other decisions in other provinces have taken a different view of when goods enter the country. Those differences may depend in part on the individual circumstances of the case, including the circumstances in which the goods enter the country (by land, sea or air, accompanied or unaccompanied, by a person acting alone or by many acting together, 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).

[375] However, *Banky* and *Jagodic & Vagogic* were decided in the general context that I am dealing with, drugs entering Canada by sea. Therefore, the doctrine of *stare decisis* requires me to apply the law as pronounced by those courts (*R v R.S.*, 2019 ONCA 906 at paras 68-75). As was stated by the Ontario Court of Appeal in *R.S.*:

> The doctrine of stare decisis compels courts who are subject to the supervisory authority of higher courts to apply the law as pronounced by those higher courts. That obligation exists to promote order, certainty and efficiency. The justification for the doctrine applies equally to decisions on questions of law made on prerogative writ applications as it does to decisions on questions of law made on appeals." (R v R.S., supra at para 73). The doctrine of *stare decisis* compels courts which are subject to the supervisory authority of higher courts to apply the law as pronounced by those higher courts. This includes decisions on questions of law made not only on appeals, but also on applications for prerogative writs. (para. 73)

[376] So, I am required to conclude that the drugs entered Canada when the Arica crossed into Canadian waters. That is when the *actus reus* of the offence was complete.

[377] As I said above, McIntyre, J., in *Bell* said that importing is complete and terminates when the *actus reus* and *mens rea* coalesce and the *mens rea* is satisfied by proof of knowledge and intent to bring the contraband into Canada.

[378] In *Banky*, the Court concluded that the marijuana entered the country in the custody of people who had the *mens rea* to import, so the *actus reus* and *mens rea*

coalesced when the drugs entered Canadian waters. Deciding when the *actus reus* and *mens rea* coalesce may be more complicated where drugs are transported into Canadian waters by an innocent carrier. This was noted by Justice Freeman in *Banky*, where he said:

> In the present case the marijuana entered the country in the custody of persons with the mens rea to import, unlike contraband cargo carried innocently by a chartered carrier. That may prove to be a necessary distinction to make in the interpretation of the effect of the Bell case, though it need not be considered for present purposes.
>
> . . .
>
> Here, if my interpretation of the Bell case is correct, the offence was complete when the goods entered the country. The fact they were in the possession of the actual importers simplifies the analysis.
>
> The *mens rea* and the *actus reus* had their conjunction when the Sealayne 60 crossed into Canadian waters. The crew, assuming their knowledge of the cargo they carried, committed the offence at that instant. So did those who caused the Sealayne 60 to cross into Canadian waters carrying marijuana. The guilt to be determined at trial is the guilt that fixed itself upon the perpetrators at that moment.

[379] I interpret Justice Freeman as allowing for the possibility that, where the contraband is carried innocently, the *mens rea* and the *actus reus* may not coalesce until a later point. In the case before me, the rational inference is that the crew of the Arica did not know she was carrying cocaine. Those who arranged for the transport of illegal drugs by innocent carrier have knowledge and intent and can be convicted of importing when the drugs cross into Canada, regardless of whether the importer is with the drugs on the journey, at the point of expected arrival or elsewhere (*Bell*, at p. 490). So, it seems that in most cases, the *mens rea* and *actus reus* for importing will coalesce at the same time, when the drugs enter Canada.

[380] Given that I am bound by *Banky*, the drugs on the Arica entered Canada when she crossed into Canadian waters so the *actus reus* was complete then. After seeking submissions from counsel, I have concluded, for purpose of this decision, that Canadian waters is 12 nautical miles (territorial sea over which Canada claims jurisdiction -*Oceans Act*, S.C. 1996, c. 31). If the *mens rea* for importation existed at that time, the two elements coalesced and according to *Bell* and *Banky*, the importation was complete.

[381] The Crown argues that the importation was not complete until the Arica arrived in Montreal. Based on my interpretation of the law, that could only be the case if the *mens rea* and *actus reus* did not coalesce until that time.

[382] Assuming the importation was complete when the Arica entered Canadian waters, to be a member of the conspiracy to import the cocaine, it would have to be proven that the accused joined the conspiracy before that happened.

Conspiracy to Traffic Cocaine

[383] For the charge of conspiracy to traffic cocaine, to prove guilt against each accused, the Crown must prove that accused was part of an agreement to traffic cocaine, intended to enter that agreement, and intended to achieve the objective (to traffic), knowing the substance was cocaine.

[384] The requirements of trafficking are addressed above. In summary, the Crown must prove that each accused agreed to sell or transport the cocaine for sale.

Part 4: Co-Conspirator Exception to the Hearsay Rule

[385] Evidence has been admitted against individual accused that would be hearsay, and presumptively inadmissible, against other accused. The Crown seeks to admit that evidence against all accused under the "the co-conspirator exception" or the "common purpose" exception. That exception permits statements and acts by a person engaged in a common unlawful design to be admitted against others who were acting in concert, if made while the common unlawful design was ongoing and if made in furtherance of the common objective (R. v. Mapara, 2005 SCC 23, para. 8; and, R. v. Potter & Colpitts, supra, at para. 500).

[386] While commonly applied in cases where a conspiracy is charged, it can also apply to substantive crimes where a common unlawful design is alleged (R. v. Tran, 2014 BCCA 343, at para. 88; R. v. Koufis, [1941] S.C.R. 481).

[387] The first step is to clearly identify what the Crown seeks to have admitted under this exception.

[388] In its Brief (para 43), the Crown identified the following acts or declarations and admissible under the co-conspirator exception:

- All communications on exhibit 81 re planning, wrench, door on hinges and size, discussion re how to communicate, guarded conversations etc. that occurred prior to and after June 4th;

- Tracking of the Arica on exhibit 81, seized from the hotel room;

- Web search for sea chest suction on June 7, 2018 found on exhibit 64 (Acer laptop), seized from the hotel room rented by M Lambert, and occupied by D Seinauskas, D.Bailey and M.Lambert;

- All travelling by flight to Montreal prior to June 4th, all purchasing tickets on May 30th and May 31st;

- Obtaining and bringing equipment used for extracting the cocaine from the Arica including messages on exhibit 81 (and exhibits 64 and 86, also found in the hotel room) re gear, purchase of gear from Montreal dive shop on June 2nd (emailed receipt found on exhibit 81);

- All evidence of the four men travelling to Halifax and arriving on June 5th and June 6th (N.Alvarado-Calles purchased ticket on June 5th), and bringing equipment to Nova Scotia;

- The rental of the pontoon in Montreal on June 3rd, loading boat and unloading boat;

- The rental of the pontoon in Halifax on June 8th, loading and unloading boat;

- Rental of the two hotel rooms at Future Inn on June 5th and 6th, both reserved until June 10th;

- Packing lists, diagram, notes about dive gear and dive shops, and notes about the Arica, and diagram of hull of ship with stick figures - found in Lennox Lane;

- Documents found in Lennox Lane re travel to Colombia in the April and May of 2018, and admission by D.Bailey to CRA that he was in Colombia on May 2, 2018;

- Document found in Lennox Lane re Colombia trip connected to D.Seinauskas in April, 2018;

- Utterances by M.Lambert and/or D.Bailey re the cover-story (to MTG Dujean Bailey, Steve LaRoche, Jason Turnbull, Steve Fairbairn, Future Inn registration form, CRA) and acquiescence by others in group regarding collecting algae and being military (Montreal – four men on boat when diver spoke to Dujean Bailey, mm 1349 on exhibit 6), and ocean plastic research (Halifax – D.Seinauskas on pontoon);

- Messages on M.Lambert's phone re planning, activities, video sent (all content that was in furtherance are admissible against N.Alvarado-Calles and D.Seinauskas only);

- SUV contents (admissible against Calles and Dangis only) including dive equipment; and,

- N.Alvarado-Calles pitching cell phones into lake upon arrest (activities can be in-furtherance where they relate to covering up activities).

[389] This list does not differentiate between acts that are intended to communicate a message (sometimes referred to as assertive acts) which have a hearsay aspect, so subject to the co-conspirator exception, and acts that do not communicate a message which are simply facts without a hearsay aspect, so admissible without resort to the co-conspirator exception (see: *R. v. Tran*, *supra*, at paras. 90 – 93; and, *R. v. Badgerow*, 2014 ONCA 272; leave to appeal refused, [2014] S.C.C.A. No. 254). Because that issue was not argued before me, I will apply the requirements of the co-conspirator exception to the evidence identified by the Crown. Rather than identify the precise words or acts at this stage, I will discuss the evidence in detail when that becomes necessary.

Carter **Analysis**

[390] Where the Crown relies on the co-conspirator exception, the evidence must be assessed using the three-stage process outlined by the Supreme Court of Canada in *R. v. Carter*, [1982] 1 S.C.R. 938:

1. I must consider "all of the evidence" to determine whether the Crown has proven beyond a reasonable doubt that the alleged conspiracy/common design existed;
2. If the alleged conspiracy is found to exist, then I must consider only the evidence directly admissible against each accused, to determine whether the Crown has proven that each individual accused was a probable members of the conspiracy; and,
3. If these requirements are met, I can use the acts and declarations of the probable members of the conspiracy that were made in furtherance of its objectives and while it was ongoing to determine whether the Crown has proven guilt for each accused beyond a reasonable doubt.

[391] There is no doubt that, in the ultimate analysis, only acts or declarations made "in furtherance" of the conspiracy can be used to determine guilt. In this case, the defence argued that the "in furtherance" requirement is a threshold issue. Essentially, they argue that acts and declarations that are not "in furtherance" cannot be considered at stage one. This issue has been the subject of debate in cases where the evidence sought to be admitted is from an unindicted co-conspirator so is not admissible under the normal rules of evidence and is only provisionally available for possible use under the co-conspirator exception (See: *R. v. Smith*, 2007 NSCA 19, at paras. 238 – 244; and, *R. v. Puddicombe*, 2013 ONCA 506, 299 C.C.C. (3d) 543, leave to appeal ref'd, [2013] S.C.C.A. No. 496). However, the situation is different where, as in this case, the out of court statement (or act) is from an accused. In that case, it is admissible against the maker and is available at step one to prove the existence of the conspiracy without proof that it is in furtherance (*Smith*, at para. 205 – 208; *Puddicombe*, at para. 111; and, *Tran*, at paras. 105 – 107). Essentially, "all the evidence" in stage one includes evidence that is properly admissible under the rules of evidence (*Puddicombe*, at para. 112; and, David Paciocco & Lee Stuesser, *The Law of Evidence, 7th ed*. (Toronto, Irwin Law, 2015), at p. 169). In any event, in this case there is very little evidence identified by the Crown that does not meet the "in furtherance" requirement so, the decision I have to make at stage one can be made without reference to the evidence that is in dispute.

Stage 1 - Proof of the Existence of the Alleged Conspiracies

[392] The specific charges are set out above. In summary, it is alleged that between December 1, 2017 and June 9, 2018, at or near Halifax, Nova Scotia, the accused conspired with each other and with others to import cocaine into Canada and to

traffic cocaine, trafficked cocaine and possessed cocaine for the purpose of trafficking.

[393] At this stage, I am not required to identify the participants in the conspiracy or common unlawful design, just be convinced beyond a reasonable doubt that one of those alleged in the Information existed (*R. v. Barrow*, [1987] 2 S.C.R. 694). As I said, in making that determination, I can consider all admissible evidence, including the acts or declarations of those alleged to be involved in the conspiracy (*Smith*, at paras. 225-233; *R. v. Wu*, [2010] A.J. No. 1327 (C.A.) at paras. 40 - 41; and, *Puddicombe*, at paras. 111-112).

[394] The alleged conspiracy to import cocaine requires proof that two or more individuals intended to agree and did agree to bring cocaine from outside Canada into Canada with an intent to put the agreement into effect.

[395] There is no dispute that the substance found on the Arica in Halifax is cocaine. There is also no dispute that its quantity was 157.28 kg (346.75 pounds) with a purity of between 79% and 91%. Some information about the Arica provides necessary context. She departed Antwerp, Germany on May 25th and arrived in Montreal on June 4th at 2:43 a.m. While in Montreal, she was docked at the CAST terminal at the Montreal Gateway Terminals (MGT). She departed Montreal on June 6th and arrived in Halifax on June 9th. While in Halifax, she was docked at Halterm, near Black Rock Beach. Her itinerary was introduced into evidence for approximately a month prior to the seizure of the cocaine and she was not in a source country for cocaine during that time. The cocaine was discovered in the Arica's sea chest - an underwater compartment, covered by a hinged grate that was bolted shut with size 15/16 or 23 – 24 mm. bolts. The sea chest compartment was big enough to accommodate a diver and was accessible by a diver even when the suction was activated at "in port" levels.

[396] The defence does not concede that the evidence establishes the existence of either of the alleged conspiracies or common design offences beyond a reasonable doubt.

[397] I am persuaded beyond a reasonable doubt that the cocaine found on the Arica originated outside Canada. Canada is not a source country for cocaine and the quantity and purity of the cocaine is consistent with it being from a source country (Evidence of Mr. Tomeo). I am also satisfied that the method of transport (secreting the cocaine in the Arica's sea chest) is consistent with international transport and

inconsistent with domestic transport. Mr. Tomeo testified that the method of transport used here is consistent with importation. He was not asked whether it was inconsistent with domestic transportation. However, he described the method as logistically complicated. The location of the cocaine in this case made the method even more challenging because it could only be accessed by diving, was behind a bolted grate in an area that was difficult to locate and potentially dangerous for placement and recovery. The Arica came to Canada from Antwerp and was in Montreal for approximately 48 hours. In my view, it is not reasonable to infer that the cocaine was put in the Arica's sea chest in Montreal for the purpose of transporting it to Halifax. The only reasonable inference is that it was there when the Arica entered Canada.

[398] The evidence also persuades me that international transport of this quantity of cocaine using this method would have required agreement and planning involving two or more people. According to Mr. Tomeo, a great deal of logistical planning was required. A contract would have been negotiated, full payment or a deposit would have been paid, method of transport would have been agreed upon, important roles assigned, a vessel chosen with a route that included the intended destination and the vessel tracked so the drugs could be recovered. In this case, arrangements would also have been made to place the drugs in the sea chest, communicate details of the location, and make necessary arrangements to recover the drugs at the intended destination. So, there is no doubt that someone conspired to import the drugs to some country.

[399] The charge is conspiracy to import cocaine into "Canada". The focus of defence submissions at this stage was to argue that the Crown had not proven that any existing conspiracy to import cocaine was a conspiracy to import into "Canada" as opposed to another country. They submit it is plausible that third parties agreed to import the cocaine into another country and the drugs were only passing through Canada when they were found by authorities. There is no direct evidence of the initial contract to purchase and transport the cocaine from the source country. In the absence of evidence of communication and activity in Canada directed toward the Arica and her sea chest, I would say it would be plausible that the cocaine was not intended for Canada, either at the time of its original purchase or later. However, the evidence shows that there was a great deal of interest in Canada on the Arica's sea chest. For reasons I will address in detail later, the only rational inference from that evidence is that individuals in Canada knew what was in the Arica's sea chest

and wanted to remove it. Given that, it is not a rational inference that the cocaine was simply passing through Canada.

[400] However, this doesn't end the analysis of this submission. It is tied to alternate theories that were suggested by the defence, either through cross-examination of Mr. Tomeo or in submissions. The defence suggests that even if I am persuaded that individuals were trying to remove the commodity from the Arica while she was in Canada, it remains plausible that there was no conspiracy to import into Canada. They argue that it is still plausible that the original purchasers agreed to import the drugs into a different country and the group who agreed to remove the drugs in Canada were simply taking advantage of her presence here. If they agreed to remove the drugs in Canada, that is not a conspiracy to import unless they joined an existing conspiracy or formed a new conspiracy before the cocaine entered Canada. The defence suggests that the Canadian group may have been trying to steal the commodity that was destined for somewhere down the line or recover/salvage the commodity that had been destined for, but not retrieved from, some country the Arica had visited earlier. In support of that submission, the defence points to the absence of direct evidence of an original plan to bring the drugs to Canada, evidence that the Arica was in a number of non-source countries before coming to Canada, and evidence that she was leaving Canada after Halifax.

[401] As I said, I am persuaded beyond a reasonable doubt that at least some of the accused had an interest in the commodity in the Arica's sea chest, agreed to remove it in Montreal and took steps to carry out that plan. There is no other rational inference available from the evidence when reviewed cumulatively.

[402] Communication between Mr. Bailey and Mr. Lambert and documents found in Mr. Bailey's residence, interpreted in light of the evidence about the location of the cocaine, shows they had met with someone who was present when the cocaine was put in the Arica's sea chest. They knew the commodity was on the Arica and knew they would have to dive to get it. Subsequently, they obtained details necessary to retrieve it, including information about the bolts and the door. Their subsequent actions demonstrate that this information was acquired so they could remove the commodity in Canada. Mr. Bailey tracked the Arica's voyage. He and Mr. Lambert researched and purchased diving equipment and the tools required to access the sea chest. One of the accused researched sea chest suction. The four accused flew to Montreal where they rented a boat and Mr. Bailey dove near the Arica. The weather was bad, the currents were strong and port authorities became

interested in them. The Arica's next port of call was Halifax, so all accused travelled to Halifax where they again rented a boat and were seen diving near the Arica.

[403] This evidence allows for various scenarios. In one, the information about the cocaine's location was provided to Mr. Lambert and Mr. Bailey because they were the purchasers or acting on behalf of purchasers who always intended to import the cocaine into Canada. In this scenario there is no doubt there was an agreement to import the commodity into Canada and that agreement was made at the time of the purchase.

[404] The argument made by the defence suggests other scenarios: the information was provided so they could steal the commodity that was destined for a future port; the information was provided so they could, for their own benefit, "salvage" a commodity that was intended for an earlier port but hadn't been retrieved there; or, the information was provided so they could, for the benefit of the sellers or purchasers, recover the commodity that had been intended for an earlier port but hadn't been retrieved.

[405] In my view, the evidence does allow for the reasonable possibility that the original agreement, formed at the time of purchase, was to import the drugs into another country. However, I do not agree that theft or "salvage" are plausible. Mr. Tomeo acknowledged that thefts occur during domestic drug trafficking but testified that he had never seen a theft of drugs at the importation level. He spoke about the level of violence in that industry, especially outside Canada and I infer that theft is uncommon because of the serious consequences that would result. He did acknowledge that drugs are sometimes lost during transport and if that happened, attempts would be made to recover the lost product. He gave examples of containers with hidden drugs being lost overboard during storms or bales of drugs being lost during 'at sea' offloads to smaller vessels. In my view, in light of Mr. Tomeo's testimony, theft is not a plausible scenario. If the plan was to steal the product on the Arica, the thieves would have known what it was. It doesn't make sense to plan and expend resources to steal an unknown product of unknown value. It is not plausible that the plan was to steal millions of dollars worth of cocaine from international drug traffickers. Given the circumstances, salvage is also not a plausible scenario. This was not "lost" cargo. It did not fall off a container ship or get dropped during an 'at sea' transfer; it was put in the sea chest of the Arica and remained there until found by authorities. Even if the third-party importers missed their opportunity to remove it at its intended destination, the location of the

commodity was known, and it is not reasonable that they would have abandoned it. In that context, salvage would equate with theft.

[406] However, recovery is plausible. It is a reasonable possibility that the original conspiracy involved importation into another country, but that failed because the product couldn't be retrieved there, resulting in a modified or new plan to retrieve the drugs in Canada. Therefore, it possible that the information was provided to Mr. Lambert and Mr. Bailey so they could recover the product in Canada on behalf of the owners.

[407] However, whether the plan was always to import into Canada or there was a new plan formed after a failed attempt elsewhere, in both scenarios there was an agreement to import the drugs into Canada. In the former there was one ongoing conspiracy to import cocaine into Canada. In the latter, there was either a new conspiracy or a substantial change in the old conspiracy (a new object – to import into a different country - and probably a change in membership to engage a local recovery team).

[408] To prove the existence of the alleged conspiracies, the Crown also has to prove that the agreements related to cocaine, as opposed to some other commodity. I am satisfied beyond on a reasonable doubt that at least some of the participants in the agreement to import the commodity on the Arica into Canada, knew it was cocaine. If there was one ongoing conspiracy to import the commodity into Canada, there is no doubt that the seller and the purchaser knew the product was cocaine. If the original agreement was to import the cocaine into another country and the second agreement was to recover it on behalf of the purchaser or seller, then I am still satisfied beyond a reasonable doubt that the members of that agreement knew the product was cocaine. The owner who arranged the recovery would have known, the person who was present when the cocaine was put in the sea chest and was providing information knew and I am satisfied that Mr. Lambert and Mr. Bailey knew or were wilfully blind. Mr. Lambert was entrusted with specific information about the product's location and the details necessary to remove it. As a matter of common sense, and given the evidence of Mr. Tomeo, it would not be reasonable to conclude that he was given that information and agreed to retrieve the commodity from the Arica without knowing what it was. He and Mr. Bailey were planning what gear they would need to retrieve the commodity. That planning would have required information about its properties (size weight, how it was packed etc.). Mr. Bailey believed the commodity was worth four million dollars and his share would be $500,000. This estimate is conservative, but in the range of the actual value of the

cocaine estimated by Mr. Tomeo. This evidence, together with the fact that the product turned out to be cocaine and the evidence of Mr. Tomeo limiting other possible commodities, leads me to conclude that the only rational inference is that, even if this was a recovery operation, the owners who requested the recovery, the person(s) who passed on information and Mr. Lambert and Mr. Bailey knew the product was cocaine.

[409] As such I am satisfied beyond a reasonable doubt that the conspiracy to import cocaine alleged in the Information existed.

[410] The evidence referred to above also establishes an agreement to remove the cocaine from the Arica. There is no direct evidence of what the accused intended to do with the cocaine after it was retrieved. However, the only rational inference, given the quantity involved, is that the participants also agreed to sell it or transport it for sale.

[411] As such, I am persuaded that the first step in the *Carter* analysis is satisfied for both the alleged conspiracies and it is not necessary to consider whether it would also be satisfied for the potential common purpose associated with the substantive offences.

Stage 2 - Probable Membership in the Alleged Conspiracies

[412] Using only evidence that is directly admissible against each accused, I now have to determine on a balance of probabilities whether each was a probable member of the alleged conspiracies.

[413] I cannot assess the evidence in isolation; I have to examine each accused's acts and utterance in the context of all of the evidence where that context is necessary to understand the individual accused's acts and utterances (*R. v. Smith, supra* at para. 209; *R. v. Wang*, 2013 BCCA 31; *R. v. Tran, supra* at paras. 116 – 118; *R v. Filiault,* [1981] O.J. No. 132 (C.A.) at paras. 14 and 17, aff'd *R. v. Kane*, [1984] 1 S.C.R. 387). Of course, at this stage, I am not permitted to use any of the hearsay that was permitted at stage one.

[414] The evidence referred to above concerning the cocaine, its location on the Arica and the Arica's itinerary is admissible against all accused.

<u>Nelson Ricardo Alvarado-Calles</u>

[415] Evidence directly admissible against Mr. Alvarado-Calles includes the following:

- He was close with Mr. Lambert and associated with Mr. Bailey and Mr. Seinauskas;

- On May 31, 2018, he purchased a flight from Toronto to Montreal and arrived on June 3, 2018;

- On June 3, 2018, he was with the other three accused when Mr. Lambert rented the pontoon in Montreal. He was on the boat and helped load equipment, he was on the boat with the other three accused later in the day and present with Mr. Lambert and Mr. Bailey when the boat was returned that night;

- On June 4, 2018, he was on the boat with the other three accused when Mr. Bailey was diving near the Arica at MGT;

- On June 5, 2018, he was with Mr. Lambert when the boat was returned to the Marina and helped remove equipment from the boat, he booked a flight from Montreal to Halifax, and responded to a video of Black Rock Beach by saying, "just saw video that's money" (Black Rock Beach is near where the Arica was docked and where accused were seen diving on June 9th);

- On June 6, 2018 he arrived in Halifax and registered at the same Halifax hotel as Mr. Lambert. His reservation had a scheduled departure date of June 10th (the day after the Arica was scheduled to leave Halifax);

- On June 8, 2018, he was with the other three accused when Mr. Lambert rented the pontoon boat and helped load gear onto the boat;

- On June 8th and 9th, he and Mr. Lambert corresponded about meeting and diving;

- On June 9, 2018, he was at Black Rock Beach while Mr. Lambert was diving and when Mr. Bailey and Mr. Seinauskas approached the beach in the pontoon boat;

- He later helped the other three accused unload the pontoon boat and load the SUV;

- He was with the three accused when they returned to the hotel;

- He flew back to Toronto on June 9, 2018; and,

- When arrested, he threw his phones into the water.

Matthew Lambert

[416] Evidence directly admissible against Mr. Lambert includes the following:

- Mr. Lambert was close to Mr. Bailey, was good friends with Mr. Alvarado-Calles and knew Mr. Seinauskas;

- Communication with Mr. Bailey from May 30 – May 31st demonstrates they were planning a trip to Montreal, were researching and purchasing diving gear, including the purchase of a Hollis Scooter (the brand of propulsion device that was used in Halifax);

- Communication between him and Mr. Bailey from May 31, 2018 to June 1st demonstrates that they knew they needed a specific type of wrench, that he had some information that the bolts were size 20 – 30 mm, that he would get more information because someone would be "meeting with guy who closed it", Mr. Lambert had obtained an adjustable socket wrench, that Mr. Lambert obtained more information that "it was more than 2 months ago" and "buddy we were with was on site when it was done", that the door is pretty big and is on a hinge, that the bolt they were interested in is on a "hull" and that Mr. Lambert had tools on a string with carabiners (the bolts closing the Arica's sea chest grate were 23 – 24 mm and affixed to her hull; the grate on the Arica's sea chest was hinged and big enough to admit a diver with tanks; and, a socket set on a string with carabiners was discarded by Mr. Lambert near the beach in Halifax);

- On June 1, 2018, he flew to Montreal with Mr. Bailey and Mr. Seinauskas where they stayed together in a hotel room;

- On or about June 1, 2018, he made calls to rent a boat, requesting to keep it over night, and on June 3, 2018, he rented a boat;

- On June 4, 2018, he was on the boat with the three other accused, while Mr. Bailey was diving at the MGT near the Arica;

- On June 5, 2018, he flew to Halifax where he registered at a hotel, paid for the room and provided information to Mr. Bailey so he could join him. He then stayed in the room with Mr. Bailey and Mr. Seinauskas. His scheduled departure date was June 10th (the day after the Arica was scheduled to leave Halifax);

- On June 8, 2018, he rented a pontoon boat in Halifax and advised the owner that he wanted it for early on the 9th so took it on the 8th, he became very upset when Mr. Bailey used the name "Arica" in communication and said "I have to rethink doing this now that you jus sent that";

- On June 9, 2018, he was diving from Black Rock Beach with Mr. Alvarado-Calles on shore when Mr. Bailey and Mr. Seinauskas approached the beach in a pontoon boat. He and Mr. Alvarado-Calles then drove to a pier in downtown Halifax where they met Mr. Bailey and Mr. Seinauskas and loaded gear from the boat into a Cadillac Escalade, the vehicle that Mr. Bailey and Mr. Seinauskas had driven to Halifax;

- Later, on June 9, 2018, he was on shore while Mr. Bailey was diving from Black Rock Beach and helped Mr. Bailey carry his gear to the Escalade after the dive. While Mr. Bailey was in the water, Mr. Lambert discarded a socket set connected by an orange string with a carabiner in the woods;

- He was arrested in the Escalade after leaving the beach area. He was with Mr. Bailey. A Hollis brand propulsion device, dive tanks, dive suits, bags, a socket ratchet wrench, an allen wrench, and orange twine were observed during the search of the vehicle incident to arrest; and,

- After his arrest, his recorded communications show that he was helping arrange lawyers and money for Mr. Bailey and Mr. Seinauskas and that he was trying to arrange for someone to plant algae traps in Halifax Harbour that could be found by police, thereby supporting an innocent explanation for his presence in Halifax.

Darcy Bailey

[417] Evidence directly admissible against Mr. Bailey includes the following:

- Mr. Bailey was close to Mr. Lambert, had Mr. Seinauskas staying with him for a time and knew Mr. Alvarado – Calles;

- Mr. Bailey travelled to Cali, Columbia in late April of 2018;

- On May 29, 2018, he searched for information about the Arica;

- Documents found in his residence show that he made notes of the Arica's itinerary from March 25 to May 20, noted that she would be in Montreal from June 4 – June 6, and that she would be at the CAST Terminal;

- On or around May 29, 2018, he made packing lists of diving gear and tools;

- Communication with Mr. Lambert from May 30 – May 31st demonstrates they were planning a trip to Montreal, were researching and purchasing diving gear, including the purchase of a Hollis Scooter (the brand of propulsion device that was used in Halifax);

- Communication between him and Mr. Lambert from May 31, 2018 to June 1st, 2018 demonstrates that they knew they needed a specific type of wrench, that he was advised that Mr. Lambert had some information that the bolts were size 20 – 30 mm, that Mr. Lambert would get more information because someone would be "meeting with guy who closed it", Mr. Lambert had obtained an adjustable socket wrench, that Mr. Lambert obtained more information that "it was more than 2 months ago" and "buddy we were with was on site when it was done", that the door is pretty big and is on a hinge, that the bolt they were interested in is on a "hull" and that Mr. Lambert had tools on a string with carabiners (the bolts closing the Arica's sea chest grate were 23 – 24 mm and affixed to her hull; the grate on the Arica's sea chest was hinged and big enough to admit a diver with tanks; and, a socket set on a string with carabiners was discarded by Mr. Lambert near the beach in Halifax);

- On June 1, 2018, he flew to Montreal with Mr. Lambert and Mr. Seinauskas, where they stayed together in a hotel room;

- While in Montreal he continued to be interested in the Arica's location and knew where she was in the Port of Montreal;

- On June 3, 2018, he was present when Mr. Lambert rented a boat, he was on the boat during the day and present when it was returned that evening;

- On June 4, 2018, Mr. Bailey was on the boat with the three other accused, was diving near the Arica at the MGT and told a security officer that he was with the military;

- On June 5, 2018, he messaged a contact and told her he had some big things in the works, that he would be collecting a 4 million dollar score, that his share would be 500,000, that he only had one shot and the trip is life and death shit;

- On June 5, 2018, he drove to Halifax in a Cadillac Escalade, he received information from Mr. Lambert about the location of the hotel and room and he stayed in a hotel room with Mr. Lambert and Mr. Seinauskas;

- On June 6, 2018, he confirmed in communication with a third party that he would be diving in Halifax Harbour;

- On June 8, 2018, he was present when Mr. Lambert rented a pontoon boat and later was on the boat in Halifax Harbour;

- On June 8/9, 2018, he responded to a question from Mr. Lambert about the name of the boat, by saying "Arica" and then acknowledged that using the name was stupid;

- On June 9, 2018, he was with Mr. Seinauskas onboard the pontoon boat at a Halifax pier shortly after it had been seen in the vicinity of the Arica for a few hours, he then went to Black Rock Beach where Mr. Lambert was diving with Mr. Alvarado-Calles on shore, and then went back to the pier where he helped load gear from the boat into the Escalade;

- Later, on June 9, 2018, he was diving from Black Rock Beach while Mr. Lambert watched from shore. Mr. Bailey was close enough to the Arica that he was captured by the camera on the ROV that was inspecting her hull;

- He was arrested in the Escalade after leaving the beach area. He was wearing a wet dive suit. A Hollis brand propulsion device, dive tanks, dive

suits, bags, a socket ratchet wrench, an allen wrench, and orange twine was observed during the search of the vehicle incident to arrest;

- After his arrest, he communicated with a third party to try to have information on an electronic device deleted because it would cause him a difficulty, “like for the next fifteen to twenty”; and,

- He was under financial strain.

Dangis Seinauskas

[418] Evidence directly admissible against Mr. Seinauskas includes the following:

- He resided for a time with Mr. Bailey and had some connection with Mr. Alvarado-Calles and Mr. Lambert;

- He possessed a temporary boat operating card;

- On June 1, 2018, he flew to Montreal with Mr. Lambert and Mr. Bailey, his ticket was booked along with theirs and, in Montreal, he stayed in a hotel room with them;

- On June 3, 2018, he was present when Mr. Lambert rented a boat and was on the boat at some point during the day;

- On June 4, 2018, he was on the boat with the three other accused when Mr. Bailey was diving near the Arica at the MGT;

- He was in Halifax and stayed in a hotel room registered to Mr. Lambert, with Mr. Bailey and Mr. Lambert;

- On June 8, 2018, he was present when Mr. Lambert rented a pontoon boat;

- On June 9, 2018, he was with Mr. Bailey onboard the pontoon boat at a Halifax pier shortly after it had been seen in the vicinity of the Arica for a few hours, he was then in the pontoon boat as it approached Black Rock Beach where Mr. Lambert was diving with Mr. Alvarado-Calles on shore, and he then helped load gear from the boat into the Escalade;

- He returned to the hotel with Mr. Bailey, Mr. Lambert and Mr. Alvarado-Calles; and,

- He was arrested in the hotel room later that evening.

[419] I am satisfied, using only the evidence directly admissible against Mr. Bailey and Mr. Lambert, that they were probable members of both conspiracies. I will discuss the evidence in more detail at the final stage of my analysis. However, I am persuaded that Mr. Bailey had information causing him to be interested in the Arica by March 25th. From May 29th until their arrest on June 9th, they were planning and preparing to remove the cocaine from the Arica. I am satisfied that conduct was the result of an agreement that was reached earlier. That agreement was either the original agreement formed at the time of purchase or an agreement formed later. In either case, I am satisfied they agreed before the cocaine entered Canadian waters to facilitate its importation into Canada and then acted with the intent to carry out that agreement.

[420] In support of their probable membership in the conspiracy to traffic, the evidence shows extensive planning and preparation to remove the cocaine from the Arica. There is no doubt from their communication that they agreed to work together to remove the cocaine from the Arica. For the reasons previously given, I also conclude they knew the product was cocaine and the only rational inference available is that they intended to traffic it.

[421] I am persuaded that Mr. Seinauskas was a probable member of a common design to attempt to traffic cocaine. I infer, based on all the circumstances, that he probably knew the Arica contained a controlled substance and probably agreed to help remove it with the purpose of transporting it for sale. He flew to Montreal and was present on the boat when Mr. Bailey was diving near the Arica. He then came to Halifax and was again present on a boat and knew that others were diving near the Arica. There is no direct evidence that he knew the product was cocaine and no evidence that allows me to make that inference. I am not persuaded that he would have been told what the precise commodity was. Mr. Tomeo acknowledged that it is not uncommon to keep information from some members of a group to protect the group. I am persuaded that he knew the group was there to recover something from the Arica and probably knew it was a controlled substance. Therefore, I conclude he was a probable member of a common design to commit a substantive offence.

[422] I am also persuaded that Mr. Alvarado-Calles was a probable member of the common design to attempt to traffic cocaine. Based on the circumstances known to him, it would have been apparent that the group was interested in the Arica and was trying to recover something from her. He acknowledged in his response to the video

of Black Rock Beach that there was money associated with the endeavour. I infer, based on all the circumstances, that he probably knew the Arica contained a valuable product, the most likely being a controlled substance, and that he agreed to help remove it with the purpose of transporting it for sale.

[423] As a result, hearsay acts and declarations made by individual accused during the life of the proven conspiracy or common design and in furtherance of it are available for me to determine whether the Crown has proven beyond a reasonable doubt that each accused is guilty of each offence.

Alleged Common Enterprise Still Ongoing?

[424] The alleged conspiracy to traffic and the attempted trafficking (a common enterprise) involved the removal of the drugs from the Arica for subsequent transport and/or sale. That alleged common unlawful design continued until the drugs were removed or the design abandoned. The alleged conspiracy to import ended earlier, but any acts or declarations made while one of the alleged common enterprises was ongoing satisfies this criteria.

[425] The Crown does not seek to admit any of the intercepted communications under this exception. However, in its written brief, the Crown argued that Mr. Alvarado-Calles' act of throwing the phones away upon arrest was admissible under the co-conspirator exception. That would only be so if the conspiracy/common design was still ongoing at the time. I accept that a conspiracy to commit a crime could also include agreement to cover it up and that broader agreement could extend the life of the conspiracy beyond the accomplishment of its main objective (*R. v. Bogiatzis*, 2010 ONCA 902; *R. v. Sauvé* (2004), 182 C.C.C. (3d) 321 at paras. 115-118; and *R. v. Vrany, supra,* at p. 26). However, where the Crown seeks to rely on a broader agreement, it must be proven (*Bogiatzis*, at para. 33). Courts have cautioned against grafting a conspiracy to avoid detection and prosecution on every conspiracy to commit a crime because of the far reaching implications of doing so (*R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525; and, *R. v. Trudel* (*Sauvé)* (2004), 182 C.C.C. (3d) 321, at para. 118).

[426] Even if I accept that there was an agreement to avoid detection while the main objective of the conspiracy was alive, I am not persuaded that it continued to the time of Mr. Alvarado-Calles' arrest, about two months after the main conspiracy was terminated by seizure of the cocaine and arrest of three of the alleged co-conspirators.

[427] All other evidence identified by the Crown would survive this requirement.

In Furtherance?

[428] A statement or act is in furtherance of the conspiracy or common unlawful design if it is made for the purpose of advancing its objectives or if it constitutes a step in furtherance of the common design (*R. v. Lynch* (1978), 40 C.C.C. (2d) 7 at 23-24 (Ont. C.A.); *R. v. Colpitts*, 2018 NSSC 40 at para. 675, upheld without reference to this point 2020 NSCA 9). It does not include statements that are pure narrative but can include acts taken or declarations made to instruct, re-assure, or update another member of the conspiracy or for the purpose or avoiding detection (*R. v. Colpitts*, at para. 675; *Baron and Wertman*, at pp. 547-51; *Vrany*, at p. 26; and, *Sauvé*, at paras. 115 - 119).

[429] Some of the evidence relied on by the Crown, does not meet the in furtherance requirement: communication between Mr. Lambert and Mr. Bailey about roof racks being removed, a gate hitting a vehicle, Dan checking "z" and being at the grocery store, "brooxie" being "off"; and, photos and videos on Mr. Bailey's phone showing street signs and himself on the Halifax waterfront which appear to be simply recording his adventure. If Mr. Alvarado-Calles' act of throwing the phones away had met the requirement that it was during the life of the conspiracy, I would not be satisfied it was in furtherance of the conspiracy. Given the circumstances surrounding that act, I am not satisfied he threw the phones to destroy evidence.

Part 5 – Analysis and Conclusions

General Principles

[430] At this stage, I remind myself of the general principles that apply to every criminal trial.

[431] Each accused is presumed to be innocent of these charges.

[432] The Crown must prove each element of the offences beyond a reasonable doubt. 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.).

[433] 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. Griffin*, [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. 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.

Analysis and Conclusions for Each Accused on Each Charge

[434] There is no doubt that 157 kg. of cocaine was imported into Canada using the Arica's sea chest. I have no doubt that there was an agreement to import cocaine into Canada and an agreement to remove that cocaine from the Arica in Montreal and then Halifax. The evidence establishes that the accused had a prior association. It also establishes that one or more of them had an interest in the Arica, knowledge of her movements, knowledge of the location where the cocaine was secreted on the Arica, and knowledge of what equipment and tools would be needed to access that location. Armed with that knowledge, one or more of them researched and purchased the necessary equipment and tools necessary to access the sea chest. One of them researched sea chest suction, information that would be necessary to safely remove the product from that location. They all flew to Montreal just prior to the Arica's scheduled arrival, rented a boat and were seen diving near the Arica. They then travelled to Halifax, which they knew to be the Arica's next port of call, where some of them were on a boat with diving gear in her vicinity and diving from a beach near where she was docked.

Matthew Ross Lambert

[435] Mr. Lambert is not listed first in the Information however, I will address the evidence against him first because the evidence presented in this trial establishes his early involvement.

[436] Mr. Lambert can only be convicted of any of the offences if his guilt is the only rational inference from the evidence. The defence argues that it is reasonably possible that Mr. Lambert's planning and activity were not directed at the commodity on the Arica, but instead was connected to a business venture relating to ocean plastics. In support, the defence points to the evidence that Mr. Bailey had an interest in the subject, was associated to a business name "Ocean Plastic Alliance" and that he and Mr. Lambert told various people that their diving related to plastics or algae. They also point to the fact that the accused's activities near the Arica were conducted entirely in the open and they persisted in those activities even after it would have been clear to them that the authorities were interested in them. Port Authorities in Montreal spoke to them, and still they came to Halifax. Sgt. Glode and Cpl. Campbell spoke with Mr. Bailey and Mr. Seinauskas in Halifax, and still Mr. Lambert and Mr. Bailey went back to dive near the Arica in the afternoon. They dove in Halifax from a popular beach on a sunny day with people around. The presence of the CBSA on the dock near the Arica and the ROV in the water would have been obvious and, in fact, Mr. Bailey waved to the ROV.

[437] Mr. Tomeo testified that it is not uncommon for those involved in drug trafficking to have a cover story to explain their presence and these covers can be relatively elaborate. He also testified that those involved in illegal activity will sometimes try to normalize their activity or their presence. For example, diving at night might be suspicious but diving during the day would be acceptable.

[438] I accept that Mr. Bailey and Mr. Lambert may have had a genuine interest in ocean pollution and plastics. However, it is not reasonably possible that their communication, preparation, travel and activities in Montreal and Halifax were related to that interest. I agree with the Crown that if they were planning a dive to collect algae or otherwise research ocean plastics, there would have been no need for secrecy and I find a great deal of evidence of Mr. Lambert's efforts to maintain secrecy. On May 30, 2018, he instructed Mr. Bailey to stop talking on SMS and they switched to WhatsApp where they discussed the strengths and weaknesses of that platform for avoiding detection. On June 8, 2018, Mr. Lambert became angry

with Mr. Bailey when Mr. Bailey mistakenly used the vessel name, "Arica", in response to a question from Mr. Lambert inquiring about the name of the boat. In conversations with his wife after his arrest, he expressed concern that he may have said something stupid when speaking with her. I also have no doubt that Mr. Lambert's interest and activity were specifically focused on the Arica and her sea chest. He and Mr. Bailey discussed the need for a tool of a specific size which turned out to be the exact size needed to access the Arica's sea chest, he flew to Montreal shortly before the Arica arrived, he was in a boat when Mr. Bailey was diving near the Arica, he left Montreal shortly before the Arica left, he flew to Halifax which was the Arica's next port of call, and then was twice associated with diving in the vicinity of the Arica. Individually, each of those things might be innocent coincidence, but viewed cumulatively and in the context of Mr. Bailey's tracking of the Arica, the possibility of innocent coincidence is removed. Any interest in plastics would not explain this focus on the Arica. So, I have no doubt that Mr. Lambert's activities were the result of an interest in what was on the Arica and his intent to remove it.

[439] I also accept that their conduct in Halifax on June 9th was in the open in full view of the public and continued even after they probably knew they were under suspicion. I agree with defence that this is unusual and it does not make sense that they planned to drag three duffel bags of cocaine out of the water at a public beach in broad daylight. However, this wasn't their original plan. I am persuaded by the evidence that they planned to remove the drugs in Montreal. They came to Halifax only because they were not successful in Montreal. Halifax was their last opportunity to remove the drugs in Canada and it is reasonable to infer they would have been desperate. Their first dive from Black Rock Beach was before the RCMP spoke with Mr. Bailey and Mr. Seinauskas, so before it was clear they were under surveillance. During their second dive, Mr. Bailey saw the ROV and he and Mr. Lambert left the beach, perhaps abandoning the plan. The fact that their plan had to be adjusted and eventually abandoned, does not mean that there was no plan to begin with. This evidence does not cause me to have a reasonable doubt that Mr. Lambert's intent was to remove the drugs from the Arica.

[440] I have concluded beyond a reasonable doubt that the alleged conspiracy to import cocaine into Canada existed, and that Mr. Lambert was a probable member of it. I am also persuaded beyond a reasonable doubt that he was a member of that conspiracy.

[441] Communication between Mr. Lambert and Mr. Bailey shows that they had received detailed information about the location of the commodity on the Arica, were making plans together to remove it and then acted on those plans. The only rational inference is that this was the result of an agreement involving at least Mr. Bailey, Mr. Lambert and the person who provided the information to them.

[442] Mr. Lambert may have been provided with this information because he was part of the original plan which was to import the drugs into Canada or because he was engaged later to recover the drugs after the original plan to import the drugs into a different country failed.

[443] There is some evidence suggesting that Mr. Lambert and Mr. Bailey were part of the original plan. Mr. Bailey visited Cali, Columbia at the end of April 2018. Columbia is a source country for cocaine and Cali is the headquarters of a drug cartel that is involved in the international trafficking of cocaine (evidence of Mr. Tomeo). However, there is no evidence that the Arica visited Columbia and no evidence that the cocaine seized from the Arica originated from Columbia. Therefore, in the absence of other evidence concerning the original agreement, I cannot be convinced that Mr. Lambert or Mr. Bailey were involved in the original purchase.

[444] However, I am convinced beyond a reasonable doubt that, even if Mr. Lambert was working for others to retrieve the cocaine in Canada or recover it because the original plan to retrieve it elsewhere failed, he became part of that agreement before the Arica entered Canada. Mr. Bailey recorded the Arica's itinerary on a piece of paper that was found in his residence. That itinerary included her location starting on March 25th. In my view, the only rational inference is that he made that note sometime before that date. No reason has been suggested for why he would record the Arica's past locations. Given the subsequent evidence establishing Mr. Bailey's interest in the Arica, there is a clear reason he would have recorded her future locations. This shows knowledge of the Arica and an interest in her movements well before she entered Canadian waters. Based on all the evidence, I am convinced that this was done in conjunction with Mr. Lambert. All available communication and evidence show they were working together on their venture involving the Arica. By May 29th plans to recover the product from the Arica were well underway. Mr. Bailey was searching for information about the Arica and making a packing list that included diving gear. This indicates he already knew the commodity was on the Arica and in a location that would involve diving. By May 30th, tickets to Montreal had been booked for Mr. Lambert, Mr. Seinauskas and Mr. Bailey. This, together with tracking applications on Mr. Bailey's tablet and the note

on his desk recording that the Arica would be at the CAST terminal in Montreal, confirms their interest and intent to meet her. On May 30th, Mr. Bailey and Mr. Lambert were also discussing the need for a specific wrench. This indicates more detailed knowledge of the specific location of the commodity. By May 31st, Mr. Lambert and Mr. Bailey were discussing details of the tools they would need. Mr. Lambert's language, "Buddy we were with was on site when it was done" suggests that he and someone else had met with the person sometime before that date. These actions were in furtherance of an agreement which would have been reached before the actions were taken. In my view the agreement was made before March 25th, but at the very latest, the agreement was made sometime before May 29th.

[445] The Arica was still in European ports on March 25th, when Mr. Bailey first recorded her location. She left Antwerp, Belgium on May 25, 2018 and arrived in Montreal on June 4, 2018. Documents show no delays during her voyage from Antwerp to Montreal. There is no direct evidence of when she entered Canadian waters. However, by May 29th, when Mr. Bailey was making packing lists and he and Mr. Lambert were discussing diving gear, she was four days out of Antwerp and still six days from Montreal. Applying common sense, a general knowledge of geography and using the 12-mile territorial limit as the limit on Canadian waters, the only reasonable inference is that she had not yet entered Canadian waters at that point.

[446] The evidence of their subsequent conduct satisfies me beyond a reasonable doubt that they intended to act on the agreement and took steps to obtain its objective. They researched and purchased equipment, flew to Montreal, rented a boat, were diving near the Arica, traveled to Halifax where they again rented a boat and were diving near the Arica.

[447] The only rational inference from Mr. Lambert's communication and conduct is that he agreed, at the very least, to retrieve the drugs in Canada. That agreement occurred before the Arica entered Canadian waters. Mr. Lambert was either involved at the time of the original purchase of the cocaine which involved a plan to import it into Canada or agreed later to assist the owners to recover drugs that had been destined for another country. In either case, he agreed to help import the cocaine into Canada and I conclude that he joined that agreement before the cocaine had entered Canada. By agreeing to facilitate the importation of drugs into Canada before the object of the agreement, the importation, was complete, he became a member of a conspiracy to import cocaine into Canada. The possibility of some

earlier agreement to import the cocaine into some other country is of no consequence.

[448] I am also satisfied beyond a reasonable doubt that Mr. Lambert knew the product he was agreeing to help import was cocaine, as opposed to another commodity. Mr. Tomeo testified that the method used to transport the cocaine was logistically complex and would only be worthwhile for a valuable commodity. He discounted marijuana because it was not valuable enough and was too bulky. He discounted MDMA because he doubted there would be a market for the volume required to make the venture worthwhile, especially given that MDMA is also produced in Canada and the United States. He narrowed it down to heroin or cocaine. The product turned out to be cocaine.

[449] Mr. Lambert knew the location was logistically challenging. He expended time and resources to be able to access it, indicating knowledge that it was valuable. He was also entrusted with specific information about the product's location and the details necessary to remove it. As a matter of common sense and given the evidence of Mr. Tomeo, it would not be reasonable to conclude that he would be trusted with that information, but not told what it was. It also doesn't make sense that he would agree to retrieve the commodity from the Arica without knowing what it was. This, together with the fact that the product turned out to be cocaine and Mr. Tomeo's evidence limiting the options that would be lucrative enough to justify the method used, leads me to conclude that the only rational inference is that even if this was a recovery operation, Mr. Lambert knew the product was cocaine.

[450] Therefore, I am satisfied beyond a reasonable doubt that Mr. Lambert conspired to import cocaine into Canada and find him guilty of that charge.

[451] I am also satisfied that he conspired to traffic cocaine. The evidence establishes that he agreed with others to remove the cocaine from the Arica. Despite the absence of any direct evidence of what his plan was after it was removed, given the quantity, there is no rational inference other than he intended to sell it or transport it for eventual sale. Therefore, I find him guilty of that charge.

[452] Finally, I am also satisfied that he attempted to traffic cocaine. His conduct went well beyond mere preparation. His conduct before Montreal was preparation. However, once in Montreal and Halifax, he took active steps to remove the cocaine from the Arica, including renting boats and diving in the vicinity of the Arica or assisting Mr. Bailey during his dives. Therefore, I find him guilty of that charge.

[453] I am not persuaded he possessed the cocaine. In my view the evidence falls short of establishing control or a right of control over the drugs. However, I am satisfied beyond a reasonable doubt that he attempted to possess the cocaine for the purpose of trafficking.

[454] Therefore, I find Mr. Lambert guilty of count 1, count 2 and the included offences of attempt to possess and traffic cocaine in counts 3 and 4. I will hear submissions from counsel on the impact, if any, on the decision in *R. v. Kienapple,* [1975] 1 SCR 729, on these verdicts.

Darcy Peter Bailey

[455] For the same reasons, I am also persuaded beyond a reasonable doubt that Mr. Bailey is guilty of conspiracy to import cocaine, conspiracy to traffic cocaine, attempt to traffic cocaine and attempt to possess cocaine for the purpose of trafficking.

[456] The evidence does not allow for a rational or reasonable inference that Mr. Bailey was involved in innocent activity. He was aware of the need to maintain secrecy. In addition to the communication between he and Mr. Lambert that I've already referred to, Mr. Bailey also asked a contact on June 5, 2018, to delete information he had sent her about what he was doing in Halifax and followed up the next day to make sure.

[457] Again, I accept that Mr. Bailey may have had an interest in ocean pollution and ocean plastics. I don't need to decide whether Mr. Bailey's interest in plastics and "Oceans Plastic Alliance" was genuine or was created as a cover story. I have concluded that any such interest does not explain his communication or conduct relating to the Arica and does not raise a reasonable doubt.

[458] For the reasons referred to above, I am persuaded beyond a reasonable doubt that Mr. Bailey agreed with Mr. Lambert and others to assist in the importation of the commodity on the Arica into Canada and that he made that agreement before the Arica was in Canada. By doing so, he joined a conspiracy to import the cocaine into Canada.

[459] I am also persuaded beyond a reasonable doubt that Mr. Bailey knew or was willfully blind to the fact that the commodity he was agreeing to help import was cocaine. In addition to the evidence referred to above, there is additional evidence

that shows that Mr. Bailey knew the commodity was very valuable. He reported to a contact that it was a $4 million dollar score and his share would be $500,000. For the reasons outlined above, I am convinced that the only commodity that rationally fits the circumstances is cocaine.

[460] For these reasons, I am satisfied beyond a reasonable doubt that Mr. Bailey conspired with Mr. Lambert and others to import cocaine into Canada and find him guilty of that charge.

[461] I am also satisfied that he conspired to traffic cocaine. The evidence establishes that he agreed with others to remove the cocaine from the Arica. Despite the absence of any direct evidence of what his plan was after it was removed, given the quantity, there is no rational inference other than he intended to sell it or transport it for eventual sale.

[462] Finally, I am also satisfied that he attempted to traffic cocaine. His conduct went well beyond mere preparation. His conduct before Montreal was preparation. However, once in Montreal and Halifax, he took active steps to remove the cocaine from the Arica, including loading gear and diving in the vicinity of the Arica.

[463] I am not persuaded he possessed the cocaine. In my view the evidence falls short of establishing control or a right of control over the drugs. However, I am satisfied beyond a reasonable doubt that he attempted to possess the cocaine for the purpose of trafficking.

[464] Therefore, I find Mr. Bailey guilty of count 1, count 2 and the included offences of attempt to possess and traffic cocaine in counts 3 and 4. As with Mr. Lambert, I will hear submissions on the impact, if any, of the decision in *R. v Kienapple* on my verdicts.

Nelson Ricardo Alvarado-Calles

[465] Mr. Alvarado-Calles knew Mr. Lambert and Mr. Bailey prior to June 2018. His first involvement with this venture was on May 31, 2018 when he purchased a flight to Montreal. I have concluded that, at that time, Mr. Bailey and Mr. Lambert were involved in a conspiracy to import and traffic the cocaine that was on the Arica.

[466] In dismissing the conspiracy to import cocaine charge against him at the directed-verdict stage, I said I was not satisfied that he entered that agreement during

the life of the agreement. Even if I were to accept the Crown's submission that the importation was not complete until the Arica reached Montreal, in my view, Mr. Alvarado-Calles' involvement before the importation was complete does not lead to a single rational inference that he was knowingly assisting in the importation. His only involvement before that time was to fly to Montreal, be present when a boat was rented and help load diving gear onto the boat. I could not infer from all the evidence that he knew of a conspiracy to import or joined any conspiracy before the importation was complete.

[467] The situation is different for the conspiracy to traffic. Mr. Alvarado-Calles clearly did tasks that furthered the conspiracy to traffic cocaine, while that conspiracy was ongoing. He assisted in loading and unloading gear, was present when Mr. Bailey was diving around the Arica at the MGT in Montreal, flew to Halifax, was again present when a boat was rented, again helped load and unload gear and was present on the Beach near the Arica when Mr. Lambert was diving.

[468] As the cases make clear, proof that an accused did things in furtherance of a scheme does not necessarily equate with proof of the *actus reus* and *mens rea* of a conspiracy. It is not necessary to establish that Mr. Alvarado-Calles was aware of all the details of the scheme, it is necessary to establish that he was aware of the general nature of the common design and agreed to adhere to it.

[469] I am satisfied that Mr. Alvarado-Calles was brought in by Mr. Bailey and/or Mr. Lambert to help them remove the cocaine from the Arica. That was their purpose but does not equate to his knowledge. I am satisfied that he knew that what he was doing was connected to the Arica as opposed to general diving in connection with some legitimate business. I do not accept that a rational inference exists that he thought they were diving for algae or in relation to ocean plastics. He heard Mr. Bailey give that explanation, however, the evidence of their dealings with the Arica displaces any reasonable inference that they were involved in general diving in connection with some legitimate business.

[470] The evidence also shows that he knew that what he would be doing in Halifax would be lucrative; when he saw the video of Black Rock Beach, he said "there's the money". There is also evidence that Mr. Lambert and Mr. Alvarado-Calles had financial dealings with each other during the time leading up to the offence (communication on Mr. Lambert's cellphone). The Crown did not ask that I make inferences from that evidence.

[471] There is no direct evidence that Mr. Bailey and Mr. Lambert entrusted Mr. Alvarado-Calles with information. As such I have no direct evidence that he knew anything other than that they were planning to dive to recover something from the Arica. I can make certain inferences. He knew it was a container vessel so probably knew it had come from another country. He probably knew it was not legal. He knew there was money involved, so either had a share or was being paid for his work. I have concluded that Mr. Bailey and Mr. Lambert knew the product was cocaine. Mr. Tomeo was asked about the sharing of information amongst people involved in the illegal drug trade. He testified that some information must be provided to ensure that people are careful but that not everyone involved knows everything or knows everyone else involved. The cases make it clear that, in the courier context, knowledge of a commodity can be inferred from possession of it. The reason is that, to ensure the person carrying something valuable and illegal is careful, they need to be told what it is. That reasoning does not apply to this situation. There is no evidence that Mr. Alvarado-Calles was to be in possession of the product. In fact, the evidence suggests otherwise as he had booked a return flight from Halifax and it is unlikely he was going to fly with that quantity of cocaine.

[472] Ultimately, I believe that he knew he was doing something in relation to the Arica. I believe that he probably knew that was illegal, probably knew it involved an illegal commodity and probably knew it was a controlled substance. I believe it is even possible, given the evidence of financial dealings between him and Mr. Lambert, that he had some financial interest in the venture and knew details about it. However, based on the evidence, I am not persuaded beyond a reasonable doubt that he knew the plan, or knew or was willfully blind that the substance was cocaine or a controlled substance.

[473] As such, I find him not guilty of all charges.

Dangis Seinauskas

[474] The evidence against Mr. Seinauskas is similar to that against Mr. Alvarado-Calles.

[475] Mr. Seinauskas stayed with Mr. Bailey for a time and had a closer connection to him. Unlike Mr. Alvarado-Calles, there is no direct evidence that Mr. Seinauskas knew he was engaged in something lucrative.

[476] Like Mr. Alvarado-Calles, I infer that Mr. Seinauskas was brought in by Mr. Bailey and/or Mr. Lambert to help them remove the cocaine from the Arica. That was their purpose but does not equate to his knowledge.

[477] I am satisfied that he knew that what he was doing was connected to the Arica as opposed to general diving in connection with some legitimate business. I do not accept that a rational inference exists that he thought they were diving for algae or in relation to ocean plastics. I accept that he heard Mr. Bailey give that explanation and probably was generally aware that Mr. Bailey had those interests. However, the evidence of their dealings with the Arica displaces any reasonable inference that they were involved in general diving in connection with some legitimate business. He was with the group around the Arica in Montreal, came to Halifax, and was on the pontoon boat in Halifax when, again, they were around the Arica.

[478] There is no direct evidence that Mr. Bailey and Mr. Lambert shared their knowledge with him or that he knew the commodity on the Arica was cocaine.

[479] Ultimately, I believe that he knew he was doing something in relation to the Arica. I believe that he probably knew that was illegal, probably knew it involved an illegal commodity and probably knew it was a controlled substance. However, based on the evidence, I am not persuaded beyond a reasonable doubt that he knew the plan, or knew or was willfully blind that the substance was cocaine or a controlled substance.

[480] As such, I find him not guilty of all charges.

Elizabeth Buckle, JPC.