PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Smith*, 2022 NSPC 39

Date: 20221028
Docket: 8463989-8464015
8464106-8464125
Registry: Kentville

Between:

His Majesty the King

v.

Shaun Smith and Tina Smith

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	April 27, 2022, May 13, 2022, May 30, 2022, in Kentville, Nova Scotia
Decision	October 19, 2022 (oral) November 16, 2022 (written)
Charges:	117.01(1) x 7, 91(1) x 8, 91(2) x 4, 92(1) x 8, 86(2) x 6, 88 x 6, 354(1)(a) x 8 of the *Criminal Code of Canada* 5(2) x 2, 7.1(1)(b) x 2 of the *Controlled Drugs and Substances Act*
Counsel:	Michael Taylor, for the Crown Alexander McKillop, for the Defendant, Tina Smith Nicholas Fitch, for the Defendant, Shaun Smith

By the Court:

Introduction:

[1] With the Smith property under surveillance, officers observed an individual attend briefly and drive away. They arrested him in possession of eleven grams of cocaine and swiftly executed a warrant to search the Smith's house. They located Mrs. Smith on the doorstep and, once inside the house, Mr. Smith in the living room. He immediately grabbed something from the kitchen counter and fled into a bathroom where he repeatedly flushed the toilet while Cst. Kennedy attempted to stop and detain him. After securing Mr. Smith, police located approximately six grams of cocaine on the wet bathroom floor.

[2] A search of the house yielded purported drug related paraphernalia, a firearm, and a cross bow. A search of a locked seacan located on the property yielded two firearms.

[3] These are indictable matters and the Smiths elected trial in this court, and while the trial commenced with forty-seven counts, by the end that number was reduced to fourteen. As a result, the Crown seeks conviction on nine charges for Mr. Smith including four counts of possessing three firearms and a cross bow,

contrary to a *Prohibition Order*, three counts of possessing three firearms while not holding a licence, possession for the purpose of trafficking- cocaine, and possessing anything intending that it will be used to traffic in a substance contrary to s. 7.1(1)(b) of the CDSA. Mrs. Smith ultimately faced five charges including possess anything intending that it will be used to traffic in a substance contrary to s. 7.1(1)(b) CDSA, possession for the purpose of trafficking- cocaine, and possessing three firearms without being the holder of a licence.

[4] The sole issue, to put it plainly, is whether the Crown has proven possession of the various items necessary to support conviction for the charged offences.

The Burden of Proof in a Criminal Prosecution:

[5] The Crown bears the burden to establish guilt beyond a reasonable doubt. The burden never shifts to Mr. or Mrs. Smith to establish they did not commit the numerous charges before the Court, instead they benefit from the presumption of innocence. They have the right to remain silent and no adverse inference is drawn from their decision to exercise the right.

[6] The Crown must prove each element of each offence beyond a reasonable doubt, and in assessing the evidence the Court considers the credibility and reliability of each witness and may accept some, none, or all of what was said.

Only after considering all of the evidence and hearing submissions of counsel identifying the issues, does the Court make findings.

[7] This case is circumstantial, and the Court is asked to draw inferences and determine if the circumstantial evidence is reasonably capable of supporting an inference other than that the Smiths are guilty of the offences charged. Doing so requires the Court to view the evidence logically and in light of human experience. (See R v Villaroman, 2016 SCC 33).

[8] The Nova Scotia Court of Appeal addressed circumstantial evidence in *R. v. Roberts*, 2020 NSCA 20 at paragraph 25:

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

[9] While the Crown appears to suggest in written submissions that the Smiths bear a burden to rebut the presumption of possession, the law is clear that they need not need to do so if an equally rational inference arises from the evidence. (*R. v. Griffin*, 2009 SCC 28 (CanLII), at paras. 34 and 35.

[10] There are several types of offences in this case, and while the Court did not reach any conclusions on the evidence until it heard and considered all the

witnesses, carefully reviewed the submissions of counsel, and considered the law, it makes sense to address the charges in groups. The first relates to the firearms and the crossbow, the second relates to the cocaine related offences.

Breach a Prohibition Order and possess firearms without being a holder:

[11] An Agreed Statement of Facts filed at the start of trial allowed the Court to focus on the issues. Mr. Smith agrees he was subject to a *Prohibition Order* requiring him not possess firearms or a crossbow on the date of the search and that he was not the holder of a licence to possess firearms. He argues the Crown has not proven he possessed those items as there are other reasonable inferences, other than his guilt, available on the evidence. In particular, he argues it is reasonable to draw an inference that another person such as a teenaged son or Mrs. Smith possessed those items.

[12] Mrs. Smith agrees she was not the holder of a licence authorizing her to possess firearms on the date of the search. Not unlike Mr. Smith, she argues it is reasonable to infer another person was in possession of the three firearms.

[13] The issues being similar, it makes sense to consider here the evidence related to the firearms and cross bow.

Evidence regarding firearms and cross bow:

[14] Cst. Howe testified that the Smith house was under surveillance both physically and by live feed for four months prior to the search. Numerous individuals were observed attending the property, but Cst. Howe was not aware of anyone observed entering the seacan located near the house.

[15] Inside the house, officers seized a boxed firearm from beneath a bed in a basement bedroom, two firearms locked in a black case inside the locked seacan, and a cross bow found hanging on the basement wall near the bedroom.

[16] On cross examination, Cst. Howe agreed that the Smith's teenaged son was present on the property over the course of the search, but the officer could not provide any information as to which, if any, bedroom belonged to him.

[17] Officers unlocked the seacan, although none could recall how they obtained the key. Likewise, there was no evidence from the officers related to how or where they located the key to unlock the case containing the two firearms.

[18] After arrest Mr. Smith was taken outside the house where he required medical assistance. Mrs. Smith was worried about the young children, and an unnamed teenaged son "came back" to take the children away.

Positions of the Parties:

Position of the Crown:

[19] The Crown says Mr. and Mrs. Smith reside at the searched residence, documentary proof connects them to it, and they were present there on the date of the search. As such, there is no logical reason to conclude they were unaware of the seacan located on their property mere feet from their house, and by extension had control over its contents- two firearms. The Crown argues they did not rebut the presumption and the same applies to the crossbow found hanging in the basement. While it is a circumstantial case, possession by the Smiths is the only rational conclusion available on the evidence.

[20] With respect to the firearm located under the bed in the basement bedroom, the Crown argues that firearm was also in possession of the Smiths. While their son's expired drivers' licence was located in the bedroom dresser, its existence there does not support an inference the bedroom belonged to the son such that he had possession of its contents. The licence expired in 2019 and there was no other evidence suggesting the bedroom belonged to the son on the date of the search. Instead, reaching such a conclusion is to engage in speculation.

Position of Mrs. Smith:

[21] Mrs. Smith argues the basement bedroom was clearly not hers, as the evidence of the officers supports a conclusion the primary bedroom was located on the first floor of the house. Cst. Howe testified that he was aware the Smiths had teenaged sons and one named son was on the property at the time of the search. Cst Sehl testified that an unnamed teenage son "came back" to the property during the search to collect the younger children. As a result, it is a reasonable inference, established on the evidence, that teenaged sons exist, and it is equally reasonable to conclude such a child, or children, would have a bedroom in their parent's house. The presence of the drivers' licence, even if expired, supports a child's connection to the basement bedroom. Finally, the firearm was found unassembled, in a box, hidden beneath the bed, and not easily observed without effort.

[22] With respect to the locked seacan, Mrs. Smith submits there is no evidence she ever entered it and prints were not taken from it. Nobody saw her near it over the course of four months' police surveillance. Instead, many people came and "hung around the property" and there was no evidence she provided the key used to open it - the police could not account for where they located the key. The firearms were located inside the locked seacan in a nondescript black case that was also locked and not dusted for prints.

[23] A reasonable inference available on the evidence, other than possession by Mrs. Smith- the guns belonged to Mr. Smith without her knowledge or ability to access and/or the guns belonged to a third party including one or the other teenaged son.

Position of Mr. Smith:

[24] Mr. Smith's arguments largely mirror that of his wife. He also points out that the basement bedroom dresser contained a magazine related to the firearm located there, thus supporting a reasonable inference the son who used the bedroom possessed both items and hid them from view.

[25] Finally, Mr. Smith argues it is reasonable to infer the crossbow found hanging outside the teenager's bedroom was likewise possessed by the child.

Analysis:

[26] Mr. and Mrs. Smith live in the house, and it is reasonable to conclude residents of a house are generally aware of and control its contents.

The cross bow:

[27] The crossbow was located hanging on a basement wall. After reviewing the photographs entered into evidence, the Court notes the other items present in the basement were consistent with household use including: a washing machine, various tools, a neatly kept table with marijuana stickers affixed thereto and various drug related paraphernalia including bongs, a press purportedly used to press marijuana, a weight machine, gloves, knives, a lighter, freezer, scooter, cat litter box, a container of cat litter, and an unrelated compound bow hanging on the wall above the washing machine. As such, it is reasonable to conclude Mr. Smith attended his basement for any number of reasons, and by extension it is impossible to conclude he did not have knowledge of the crossbow hanging on the basement wall. While it is suggested the bow may belong to a teenaged son, there was no evidence a son exclusively used the basement, to the exclusion of Mr. Smith. To conclude Mr. Smith was not in possession of the crossbow hanging on his basement wall would require the Court to engage in speculation.

Firearm beneath the basement bed:

[28] The firearm located in the basement bedroom beneath the bed is, quite simply, in another category to that of the crossbow. Having viewed the photographs of that room and having considered the evidence of the police witnesses, the Court cannot rule out that the bedroom was used by the teenager

whose drivers' licence was located therein. The bedroom contains a dressed bed with laundry on top, a plastic dresser atop which sits a framed photograph, the contents of the dresser were challenging to make out. There was no evidence with respect to what was in the drawers of the plastic dresser or who was pictured in the photograph. A wooden dresser contained [name]'s drivers' licence and atop the dresser one can see bongs, a bag, and a charging cord. It is not unreasonable to conclude the room was being used as a bedroom by the teenaged son.

[29] A teenaged son was present on the property during the search and the drivers' licence links that boy to the room. Viewed logically and in light of human experience and common sense it is reasonable to conclude a teenaged boy would have a bedroom in his parent's house. Given the messy state of the room, it is also reasonable to conclude it was, at the time, occupied. That the occupant was in possession of the unassembled firearm found under the bed, is a reasonable inference as there was also evidence the Smiths slept upstairs in the primary bedroom.

[30] The firearm was not in plain view, it was stored in its box under the bed. The photographic evidence shows a small and somewhat messy bedroom, and it does not seem possible one could readily see beneath the bed. It is reasonable to conclude neither Mr. Smith nor Mrs. Smith was aware of the firearm. It is

reasonable to conclude it was secreted there by the teenaged son. As such, the evidence is “reasonably capable of supporting an inference other than that the accused is guilty" in accordance with *Villaroman* and *Morin* 2022 Sask. CA.

[31] While the Crown is not expected to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused", the basement bedroom belonging to the teenaged son, and as a result that son possessing items contained therein, is neither fanciful nor speculative, but instead a reasonable possibility inconsistent with possession by the Smiths, and not negatived by the Crown. (*Villaroman*, supra at para. 37)

Firearms inside the Seacan:

[32] The photographic evidence supports a conclusion the seacan was located at the top of the driveway near a parked truck. The home is located in a town with a farmer’s market across the street. There was no evidence the property was large nor was the seacan obscured in any way. It accords with common sense that the residents of such a house would be aware of the presence of the seacan located in a conspicuous location.

[33] It also accords with common sense that such a large conspicuous object compares favourably to a garage. As such, a locked seacan located in a driveway

must surely be in possession of the property residents. Unlike the teenager's bedroom, there was no evidence to connect the seacan to anyone other than the Smiths.

[34] After reviewing photographs taken inside the seacan and without engaging in gender-based speculation, it is impossible to connect the items therein to either Smith to the exclusion of the other. It is also not possible to connect the items to other people.

[35] While the police could not say from whom or where they obtained the keys to the seacan and the firearm case, it is an available inference that they obtained the keys from somewhere on the searched property.

[36] Finally, the Court finds that both Smiths possessed the seacan and its contents, firearms, with the knowledge and consent of the other. This is an available inference on the evidence.

Conclusion:

[37] The evidence, viewed in totality, is sufficient to raise a reasonable doubt that the Smiths' possessed the firearm in the basement. That is not the case for Mr. Smith's possession of the crossbow, or the Smiths' possession of the firearms

located in the seacan. Having considered all the evidence with respect to the firearms and crossbow charges, there will be convictions for Mr. Smith with respect to possessing the crossbow while subject to a *Prohibition Order*. There will be a conviction for both Mr. and Mrs. Smith with respect to not being the holders of a licence to possess the firearms located in the seacan and for Mr. Smith breaching the *Prohibition Order* with respect to those two firearms.

Possession for the Purpose of Trafficking – Cocaine:

[38] Section 5(2) of the CDSA provides:

> (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

[39] The central issue is whether the Smiths possessed the cocaine found in the house and truck for the purpose of trafficking. Section 2 of the *CDSA* directs that "possession" means possession as defined in s. 4(3) of the *Criminal Code*. It provides:

> 4(3) For the purposes of this Act,
>
> (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.

[40] There is no question that the allegation is one of constructive possession. The principles relating to constructive possession were set out in *R. v. Pham*, [2005] O.J. No. 5127, an Ontario Court of Appeal decision affirmed by the Supreme Court of Canada at 2006 SCC 26, wherein the majority noted at paragraphs 15-17:

> 15 In order to constitute constructive possession, which is sometimes referred to as attributed possession, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed. See *R. v. Caldwell* (1972), 1972 ALTASCAD 33 (CanLII), 7 C.C.C. (2d) 285 (Alberta Supreme Court, Appellate Division); *R. v. Grey* (1996), 1996 CanLII 35 (ON CA), 28 O.R. (3d) 417 (C.A.).
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> 16 In order to constitute joint possession pursuant to section 4(3)(b) of the Code there must be knowledge, consent, and a measure of control on the part of the person deemed to be in possession. See *R. v. Terrence*, 1983 CanLII 51 (SCC), [1983] 1 S.C.R. 357 (S.C.C.); *R. v. Williams* (1998), 1998 CanLII 2557 (ON CA), 40 O.R. (3d) 301 (C.A.); *R. v. Barreau*, 1991 CanLII 241 (BC CA), 9 B.C.A.C. 290, 19 W.A.C. 290 (B.C.C.A.) and *Re: Chambers and the Queen* (1985), 1985 CanLII 169 (ON CA), 20 C.C.C. (3d) 440 (Ont. C.A.).
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> 17 The element of knowledge is dealt with by Watt J. in the case of *R. v. Sparling*, [1988] O.J. No. 107 (Ont. H.C.) at p. 6:
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> There is no direct evidence of the applicant's knowledge of the presence of narcotics in the residence. It is not essential that there be such evidence for as with any other issue of fact in a criminal proceeding, it may be established by circumstantial evidence. In combination, the finding of narcotics in plain view in the common areas of the residence, the presence of a scale in a bedroom apparently occupied by the applicant, and the applicant’s apparent occupation of the premises may serve to found an inference of the requisite knowledge.

> The court of appeal decision in *R. v. Sparling*, [1988] O.J. No. 1877 upheld the above passage as being sufficient evidence to infer knowledge.

[41] Finally, at paragraph 18:

> 18 The onus is on the Crown to prove beyond a reasonable doubt, all of the essential elements of the offence of possession. This can be accomplished by direct evidence or may be inferred from circumstantial evidence. In *Re: Chambers and the Queen, supra* at 448, Martin J.A. noted that the court may draw "appropriate inferences from evidence that a prohibited drug is found in a room under the control of an accused and where there is also evidence from which an inference may properly be drawn that the accused was aware of the presence of the drug."

[42] To be convicted of constructive possession of the cocaine, it must be proven that the Smiths knew the cocaine was there and that they had some measure of control over it. Possession for the purpose of trafficking requires not only proof of possession but proof the cocaine was possessed for the purpose of trafficking. Proof of subjective fault, not objective fault, is required.

[43] If the Court is not satisfied the cocaine was possessed for the purpose of trafficking, it is possible to find the accused guilty of the included offence of possession.

The evidence:

[44] Mr. Kerry Laffin was arrested after what was described as a quick three-minute visit to the Smith house and police seized eleven grams of cocaine from

him, but no scale. The search of the house occurred simultaneous to Mr. Laffin's arrest.

[45] The Court is asked to infer Mr. Laffin left the house with the drug, and did not instead deliver cocaine to the Smith property.

[46] Cst. Kennedy testified that he entered the house, saw Mr. Smith in the living room, and advised him he was under arrest for possession for the purpose of trafficking. Mr. Smith hesitated a second or two, uttered an expletive and ran to the kitchen where he grabbed something from the kitchen counter and continued down the hallway into the bathroom.

[47] Cst. Kennedy testified that he gave chase and tried to stop Mr. Smith's five or more attempts to flush something down the toilet. The men wrestled over the toilet, and Mr. Smith was subdued once Cst. Sehl joined in. Police later located a chunk of cocaine on the floor behind the toilet near/in water that may have escaped the toilet during the arrest.

[48] The Court is asked to infer that Mr. Smith grabbed a chunk of cocaine from the kitchen counter and tried to flush it down the toilet to avoid seizure by police.

[49] Cst. Sehl's testimony accords with that of Cst. Kennedy. He arrived on the property and followed Cst. Kennedy into the residence. He heard Cst. Kennedy

yell “Stop resisting!” and quickly joined in a scuffle over the bathroom toilet to stop Mr. Smith who was using his free hand to flush and reach behind the toilet. After securing Mr. Smith, officers located what was weighed, tested, and determined to be 6 grams of cocaine from behind the toilet on the wet bathroom floor.

[50] A search of the truck parked in the driveway resulted in police locating four additional grams of cocaine, a package of marijuana edibles, and a Revenue Canada GST document in Mr. Smith’s name. The latter document supports an inference the truck was in possession of Mr. Smith.

[51] Cst. Seebold was qualified as an expert witness “to provide expert evidence in relation to marijuana and cocaine and the possession of cocaine and marijuana for the purpose of trafficking, also to be qualified in the pricing, quantities, paraphernalia, distribution, usage, purchasing, availability, sale and value of cocaine and marijuana.” While I am aware that an expert witness can assist the Court in reaching conclusions, I must also assess the evidence of such a witness in the same manner as other witnesses. I can accept some, none, or all, of the witness testimony.

[52] Cst. Seebold considered the items seized at the house, and it makes sense to address each in turn along with his opinion.

Cell phones:

[53] A number of cell phones were seized, and text messages extracted from one. The expert witness testified that several messages were indicative of drug trafficking and in particular trafficking in cocaine. The words “got any”, “how many”, “soft” and “hard” were, in the opinion of the expert, references to cocaine. He opined that there was also evidence with respect to trafficking in other substances not the subject of the charges before the Court. The expert witness testified that the messages exchanged were the same type of message he has seen numerous times in relation to trafficking operations. It was pointed out that some of the messages had been exchanged on the date of the search including some using the names Sean and Kerry, and he understood eleven grams of cocaine was seized from Kerry Laffin after a short visit to the Smith house. Finally, in the opinion of the expert the messages retrieved from the seized cell phone contained coded language used to indicate desire to purchase hard or soft cocaine.

A 10-gram weight:

[54] While I maybe incorrect with respect to the exact weight, 10 v. 100 grams, there is no consequence to such a difference. A 10-gram weight was seized from the kitchen counter where Mr. Smith grabbed something before racing to the bathroom. The expert witness testified that drug traffickers use such a weight to ensure their own scales are accurate and is commonly found in trafficking cases where scales, such as the digital scale found on the counter, are also located.

Scales:

[55] The set of electronic scales seized from the kitchen counter was sent to Health Canada for testing and determined to contain traces of cocaine and phenacetin. The latter, as testified to by the expert witness, is an adulterant used by traffickers to “cut” or “step on” cocaine. Another set of scales located on the basement workbench was not tested, however the expert witness testified that type of scale is also used by traffickers.

[56] The expert concludes recreational users of drugs do not weigh their purchases because a buyer who brings scales to a drug deal risks violence from the seller, the suggestion being the seller is attempting a rip off. Instead, buyers simply “eyeball it” when they purchase drugs.

Two bags of marijuana, including gummies:

[57] The presence of the large amount of marijuana located on the property supports the expert's conclusion that a trafficker who deals in drugs such as cocaine also deals in other drugs.

Dime bags:

[58] A sizable number of clean dime bags were located and seized, and the expert witness opined that such bags are used to package cocaine for resale. While prepared to concede users would also have such bags in possession, he would expect to find residue remaining in such bags. He did note the packaging seized in the Smith residence was new and unused. On cross examination he agreed the bags are not sold individually but in packages containing large numbers. The Court is asked to infer a buyer might possess such bags to break down a larger purchased amount into smaller units for personal use.

Ziploc bags:

[59] A large clear Ziploc PC bag was also seized, analysed, and determined to contain cocaine residue, it was located in the kitchen where scales and the other packaging material were located.

Two spoons that tested positive for cocaine:

[60] Two spoons seized from the kitchen counter were, in the opinion of the expert, used to chip off cocaine for resale. They tested positive for cocaine residue.

Cash:

[61] Three bundles of cash amounting to $6,983.45 was also seized from the house[1]. The expert witness testified that drug dealing is a cash business, and it is usual, or at least not unusual, to find cash at a searched location. The sheer amount of cash found throughout several locations in the house is not what would be expected in a house absent some logical or obvious explanation- $3,270.00 was found in an envelope located in a safe in the master bedroom. Inside the envelope police located a receipt marked “paid in full” in the amount of $6,000.00 purported to be for the sale of a trailer. The document was undated and unsigned.

[62] Seven hundred dollars cash was located on the kitchen counter, $218.00 cash was also found there inside a facemask bag, along with a taser.

Imitation weapons:

[63] Along with the taser located in the kitchen, police seized from the primary bedroom two replica handguns and the aforementioned safe containing over

[1] An amount of American cash was acknowledged not to be connected to the sale of drugs.

$3000.00 cash. The expert witness testified that the presence of the taser and the imitation handguns are also consistent with possession of cocaine for the purpose of trafficking and used by a seller to protect against robbery- “tools of intimidation”.

Outside the house:

[64] A small plastic bag with white powder residue was located in a cereal box in the outdoor garbage container. The bag was not tested.

Conclusion of Expert:

[65] Based on his review of the items seized and having listened to the evidence at trial, Cst. Seebold concluded possession of cocaine for the purpose of trafficking was occurring in the searched house, albeit at a low level.

[66] Cst. Seebold was thoroughly cross examined and remained unmoved from his ultimate conclusion even excluding consideration of the 11 grams of cocaine seized from Mr. Laffin, even if the weight of the seized cocaine was reduced to account for water and a bag weight, even if some of the cash was related to the sale of a trailer, even if the product found on the digital scale ended up there by transference.

[67] Cst. Seebold, as well as the other police witnesses, was both credible and reliable. Cst. Seebold was prepared to consider all options placed before him. Cst. Seebold says a heavy user of cocaine would use between 2-3 grams a day. Cocaine located in chunk form is not necessarily crack, as cocaine is pressed into a solid form and smaller amounts are chipped off for sale in powder form. He fairly stated that his initial opinion considered twenty-two grams total weight of cocaine, but after deducting the eleven grams seized from Mr. Laffin and accounting for less weight based on unclear weighing evidence, there were still sufficient indicators of possession of cocaine for the purpose of trafficking, such that his opinion was left unchanged. The Court found his opinion helpful, necessary, and reliable.

Position of the Parties:

[68] The Crown argues, just as the items seized point to possession for the purpose of trafficking, it is relevant what was not seen at the house- there was no evidence of personal use. There were no blackened spoons used to cook crack cocaine, nor evidence of paraphernalia used for the ingestion of cocaine. Instead, two spoons containing cocaine residue were seized from the kitchen counter and they tested positive for cocaine and phenacetin. The expert witness testified that spoons in such a state are used to package cocaine for resale.

[69] The Crown says viewing all of the evidence as a whole supports the expert's opinion that the Smiths possessed cocaine for the purpose of trafficking. While the expert testified that the amount of cocaine seized was not an overly significant amount, and that amount could have been for the personal use of a heavy 2-3 gram a day user on a binge, that kind of binge could not be sustained for long.

[70] The Crown asked the Court to conclude that the expert's evidence was unshaken and when all of the evidence is looked at in totality the only conclusion to be drawn from the proven facts is that both Mr. and Mrs. Smith had knowledge and control of the cocaine and paraphernalia in their house, and that those items were possessed for the purpose of trafficking.

[71] The Crown also points out that the eleven grams of cocaine seized from Mr. Laffin supports a circumstantial inference the product had been purchased from Mr. Smith during his short visit at the residence.

Position of Mr. Smith:

[72] Mr. Smith argues the cocaine was not possessed for the purpose of trafficking but was instead possessed for personal use- fewer grams are more likely to support such a conclusion.

[73] Mr. Smith also takes the position that the expert's opinion that cocaine users do not use scales is simply incorrect. The evidence of the expert was clear that people buy cocaine and are constantly undercut and ripped off by the seller, as such it is equally consistent that a buyer would like to be sure their seller is not ripping them off before determining whether they would like to continue buying from that particular person. As a result, it would be logical for a buyer to have 10 g weight to confirm their scale is working properly and accurately before purchasing cocaine.

[74] The defence counsel submits there is other indicia of personal use. He notes that different pipes and bongs used for smoking substances were located in the basement as exhibited through photographs, and also in the kitchen likewise exhibited by photographs. Those items it is submitted are used for the personal use of smoking crack cocaine. While the expert witness was of the opinion there were no indicators of personal use, based on the two spoons that were seized from the residence, it is more than reasonable to believe that there were other spoons or items that were not located during the seizure that could have been used to cook cocaine.

[75] With respect to the dime bags that were seized, defence counsel points out that the cross-examination demonstrated that it is not possible to buy simply one or

two dime bags, instead they are purchased in large packages from local stores. Therefore, if a person needed a few dime bags for their personal use it is a reasonable inference they would have a large package of dime bags and not just a few.

[76] With respect to the cash seized, defence counsel says the total amount is consistent with the sale of a trailer. The receipt indicates that the amount of $6000 was paid in full and some of the funds were located in a bag with an envelope that read ‘bottle money’.

[77] With respect to the text messages from the cell phone located during the search, defence counsel submits the words ‘soft’ and ‘hard’ were subject to cross-examination and Cst. Seybold agreed that soft could pertain to fresh cannabis gummies and hard could pertain to hard cannabis gummies, thereby explaining those particular messages. In that regard defence counsel also points out that there was a large number of cannabis gummies located in the kitchen refrigerator.

[78] Defence counsel asks the Court not to infer the cocaine seized from Mr. Laffin came from the Smith residence. Instead, the only thing that can be concluded is that Mr. Laffin was in possession of cocaine.

[79] Finally, Mr. Smith submits that the cocaine located at his residence was there for personal use and after looking closely at all of the evidence there should be a reasonable doubt as to whether the cocaine at the residence was in possession for the purpose of trafficking. He points out less than 10 grams of cocaine was located in the residence which easily supports personal use given the available interpretations of the significance of various seized items set out by defence counsel.

Position of Mrs. Smith:

[80] Mrs. Smith says with respect to the drug seized from the truck, there was no evidence she used the vehicle. Nor was there DNA or fingerprint evidence connecting her to the cocaine located there or from behind the toilet. A reasonable inference can be drawn that the cocaine located during the seizure was possessed by Mr. Smith alone, to the exclusion of Mrs. Smith.

[81] Importantly, it is an available inference that Mr. Laffin who was arrested a short distance away was not buying cocaine from the residence but was instead selling cocaine to Mr. Smith and delivering it to the house.

[82] The electronic scales seized from the kitchen and testing positive for cocaine, should be considered probably or possibly contaminated during the

search. The expert testified cocaine is highly transferable and that is why care must be taken when handling exhibits. Since the exhibit officer did not testify, the Court can draw the conclusion the exhibit was contaminated during seizure. Without proper evidence of the procedures that were used when the items were seized and weighed the court should determine based on the evidence of high transferability of cocaine that the Crown has not proven the cocaine located on that item was there prior to handling. An alternative explanation for the presence of the scale is that it was used for weighing marijuana rather than cocaine, and the Court should note that there were no dime bags of cocaine located at the scene.

[83] While spoons were seized that contained powdered cocaine, the expert eventually accepted under cross-examination that a spoon could be used for chipping smaller amounts of cocaine off a larger portion of pressed cocaine. This, it is argued, represents a neutral factor with respect to possession for the purpose of trafficking.

[84] While the presence of a large Ziploc bag is indicative of possession of cocaine it does not necessarily follow that the cocaine was possessed for the purpose of trafficking.

[85] Mrs. Smith submits that while the Crown described the cash in the envelope as speculatively as connected to the trailer receipt, it is an available inference on the evidence. And the defence, I am reminded, was not required to call evidence with respect to how the cash was acquired.

[86] The untested bag found outside the house in the cereal box was not tested and is therefore not relevant.

[87] With respect to the cell phone messages suggested to involve Mrs. Smith, there was no evidence her cell phone was searched and as a result there is nothing supporting trafficking or even possession for the purpose of it on her phone.

[88] Ultimately the guarded language used on the cell phone was agreed by the expert as possible communications with respect to marijuana or stolen goods. The expert agreed that the guarded language is really only known between the two people who used it. While hard and soft may be commonly seen in files and have a certain meaning, it cannot be concluded that they have the same meaning in this case. When the messages involving Kerry and Mr. Smith are looked at in connection with Mr. Laffin's attendance at the property, defence submits it appears someone else had reached out to Mr. Laffin with guarded language.

[89] Finally, it is a reasonable inference that Mr. Laffin who was in possession of 11 grams of cocaine was selling cocaine to Mr. Smith.

[90] Looking at all the evidence in the circumstantial case the Court is asked to reach the conclusion the charges related to possession for the purpose of trafficking have not been proved beyond a reasonable doubt as there are other reasonable explanations inconsistent with possession for the purpose of trafficking and in particular consistent with respect to possession for the personal use. Finally the items seized are also consistent with personal use.

Analysis:

[91] In the present case, the cocaine was located and seized from the kitchen counter, behind the toilet after a struggle between Mr. Smith and police, and in the truck associated with Mr. Smith. The evidence establishes that this was Mr. and Mrs. Smith's house. There is evidence establishing the Smiths reside in this family house with their various children.

[92] The truck contained a government document associated to Mr. Smith and was parked in the driveway near the seacan. The Court infers it was Mr. Smith's truck and finds that it was Mr. Smith's truck. The cocaine behind the toilet was grabbed from the kitchen counter where police located a digital scale, a weight,

numerous dime bags, a larger bag with cocaine residue as well as two spoons containing same, cash and a taser. Shortly after police gained access to the house Mr. Smith fled and tried to dispose of the chunk of cocaine. All this evidence, combined with Mr. Laffin's short visit and immediate arrest with eleven grams of cocaine, satisfies the Court that the Crown has proven beyond a reasonable doubt that Mr. Smith had constructive possession of the seized cocaine tested by Health Canada and confirmed as such, for the purpose of trafficking.

[93] Cst. Seebold was qualified as an expert witness and testified that having reviewed the exhibits seized, he formed the opinion that the amount of cocaine, the presence of digital scales, the presence of "dime bags", and the other items that were seized and explained in my earlier consideration, are all consistent with possession of cocaine for the purpose of trafficking. He acknowledged that the volume of cocaine was consistent with low level trafficking.

[94] The Court does not accept, on the facts, that it is reasonable to conclude drug users use scales in the manner suggested by defence counsel. It was considered implausible by the expert and the Court agrees. Having a scale and a weight on the kitchen counter following Mr. Laffin's quick visit accords with selling to Mr. Laffin rather than buying from him and using a scale. There was no evidence items in the house were used to ingest cocaine, the Court will not engage in speculation

in the absence of evidence. The presence of dime bags was just one of many factors that combined to support the conclusion the cocaine was possessed for the purpose of trafficking. The Court does not recall any explanation for the cash located on the counter with the drugs other than consistency with the expert opinion. Finally, the coded language in the texts found on the phone was consistent with the provision and seeking of cocaine, the Court does not agree marijuana gummies and stolen goods are a more reasonable a conclusion based on the constellation of evidence supporting possession for the purposes of trafficking cocaine, and the Court reaches that conclusion. There is no other inference available on the proven facts. As such the Crown has proven beyond a reasonable doubt that Mr. Smith possessed cocaine for the purpose of trafficking.

[95] With respect to Mrs. Smith, the situation is somewhat different. While she resides in the house, it was apparent she was not in it during Mr. Laffin's visit nor when he left. She did not enter the house during the search, instead she asked police to retrieve clothes for one of the group of children under 10 years of age.

[96] Can the Court conclude that the items on the kitchen counter that are clearly in the opinion of the Court used to process cocaine for the purpose of trafficking, within her knowledge or control in the circumstances? There was no evidence she interacted with Mr. Laffin or was present when the drugs were on the counter.

While it is possible to conclude she was outside the house because she was with the young children and wanted nothing to do with what Mr. Smith was doing in the house, that would be to engage in speculation. All the seized items were in her house, with her husband, on the kitchen counter and in plain view. It is difficult to imagine she did not know what was happening in her house. This is particularly so given Mr. Smith did not secure the items away after Mr. Laffin left the house, instead they were located on the kitchen counter when he was found in the living room.

[97] This case is not similar to cases where visitors to a home are found not guilty when it is clear they did not have a connection to a place. Instead, Mrs. Smith resides in the house with her children, it is reasonable to conclude she can enter it at will, and it is likewise reasonable to conclude she exercises control over the kitchen and bedroom area where the distinct items used to process cocaine, and otherwise, were found.

[98] The Court finds she had knowledge of what was happening in her home. In order to constitute joint possession pursuant to s. 4(3)(b) of the *Code* there must be knowledge, consent, and a measure of control on the part of the person deemed to be in possession. The Court finds on the facts that all of those conditions exist with

respect to Mrs. Smith and the cocaine and related items. Even if she simply chose to look the other way, this does not absolve her of criminal liability on these facts.

[99] There will be convictions for both Mr. and Mrs. Smith for possession of cocaine for the purpose of trafficking, and possessing anything intending that it will be used to traffic in a substance, given the items seized in the house, and particularly on the kitchen counter, support the conclusion they were available for such use.

[100] Judgment accordingly.

van der Hoek PCJ