

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Calder, 2011 NSSC 96

Date: 20110310

Docket: CRH 316393

Registry: Halifax

Between:

Her Majesty the Queen

Plaintiff

v.

Anne Calder

Defendant

DECISION

Judge: The Honourable Justice Kevin Coady

Heard: January 10th - 20th, 2011, in Halifax, Nova Scotia

Decision: March 10, 2011

Counsel: Paul Adams, for the plaintiff
Craig Garson, QC, for the defendant

By the Court:

BACKGROUND:

[1] On July 14, 2009 Anne Calder was a practicing member of the Nova Scotia Barristers Society. She was primarily a criminal defence lawyer. The majority of her clients possessed legal aid certificates and were on remand at the Central Nova Scotia Correctional Center. Thomas Izzard was one of Ms. Calder's remanded clients.

[2] On this date Ms. Calder had an afternoon appointment to visit three clients, one of whom was Mr. Izzard. Lawyers visiting the facility are permitted to have direct contact with their clients in a room designed for that purpose. These professional visits are captured by a video camera and the images can be immediately viewed by staff.

[3] The uncontradicted evidence of Correctional Officers Geddes and Beaton describe how Ms. Calder and Mr. Izzard met on July 14, 2009. She arrived at the facility at 2:45pm. She was signed in, she passed through a metal detector and her briefcase was cursorily searched. She was led to an empty interview room. When asked if she had anything that she planned to give to a client, she identified

several papers. Mr. Izzard was then brought to the interview room and both were locked inside.

[4] Correctional Officer Beaton observed the visit from the reception area. He noted behaviour that he described as “suspicious.” He observed Mr. Izzard take something off the table and put it in his pants pocket. He then pulled up the images on his screen and felt that his suspicions were confirmed. He contacted his supervisors’ McNamara and Dominix and advised them of his concerns. Mr. Beaton suggested they view the video of Ms. Calder’s contact with Mr. Izzard.

[5] Captain Dominix viewed the video from her office. It depicted Ms. Calder and Mr. Izzard sitting across a narrow table from each other. She observed Ms. Calder bending over and reaching into her bag and then putting an object on the table. The object was pushed toward Mr. Izzard who “fumbled around” and then put his hand under the table. Correctional Officer McGammon was invited to view the video and came to the same conclusion; a transaction had occurred. Captain Dominix decided to terminate the visit.

[6] Mr. Izzard was then removed from the interview room and Ms. Calder was directed to remain. Captain Dominix directed Correctional Officers LeFort and Mrvelk to conduct a search of Mr. Izzard in another room. The officers first observed that Mr. Izzard was placing his hand in his pants. He was told to cease that activity. A pat down search was conducted and produced nothing. Mr. Izzard's insistence on placing his hand in his pants prompted the officers to conduct a strip search. After Mr. Izzard stripped to his briefs, one officer told him to produce whatever he was hiding. Mr. Izzard then produced a cylindrical object wrapped in cellophane. The object was immediately recognized as a "prison package," a term used to describe the delivery of contraband into the facility through the human rectum.

[7] The package was three to four inches long and very tightly wrapped. Mr. Mrvelk took the package without examination. He delivered it to Captain Dominix just outside the search room. Mr. Izzard was then dressed, hand cuffed and taken to a cell in the segregation area. Ms. Calder remained in the initial interview room.

[8] Captain Dominix testified that when she took possession of the package she was unable to see anything but tobacco. Upon opening it she found a small package inside a bigger package. Suspicion prompted her to open the package. She found what she described as loose tobacco, rolling papers, a pill capsule and a granular substance. Subsequent analysis established that the granular substance was hydromorphone, often referred to as dilaudid. Captain Dominix then put the package in an exhibit bag, gave it to Correctional Officer McNamara, and called the police.

[9] In the meantime Correctional Officer Beaton and Captain Dominix entered the interview room and confronted Ms. Calder. There was a brief exchange and Ms. Calder was escorted out of the facility. She was told that her visitation privileges were suspended. Approximately 90 minutes later the police arrived and took possession of the package, a video of the exchange and the initial notes/reports of staff involved in the events of the day.

[10] Detective Cst. Carmichael, then a member of the integrated drug unit, was dispatched to the Central Nova Scotia Correctional Center on July 14, 2009. He understood that a package had been seized from an inmate after a contact visit with

Ms. Calder. He met with Captain Dominix who provided him with the package and a copy of the video. He viewed the video at the facility and then returned to the police station. Once in his office he took the package apart. He conducted a preliminary test which determined that the granular substance was 2.6 grams of dilaudid beads. Cst. Carmichael felt he had grounds to arrest Ms. Calder and made arrangements for that to happen. The evidence establishes that Ms. Calder returned to her home/office after leaving the facility.

[11] On the evening of July 14th Detective Cst. Carmichael and Sgt. Kelly attended at Ms. Calder's to effect an arrest. Upon arrival they determined that she was asleep on her couch. In time, Ms. Calder came to the door and was advised of their intentions. She appeared sleepy and upset. Ms. Calder asked for one hour. She was told that she would be arrested when she came out of her residence. Cst. Carmichael remained outside of the residence while Sgt. Kelly returned to the station to prepare a "feeney" warrant. In time Ms. Calder came out of her residence and was arrested for trafficking. Cst. Carmichael advised Ms. Calder that she would likely be released after processing and he drove her vehicle to the station. Once at the station Sgt. Kelly conducted a lengthy interview. The purpose

of this interview was to establish grounds for a search warrant. Ms. Calder was not released until late the following day.

[12] A search team entered Ms. Calder's residence/office on the evening of July 15, 2009. Access was obtained by a key voluntarily provided by Ms. Calder. The only thing seized on the ground floor was a "thank you" card from Mr. Izzard. In Ms. Calder's upstairs law office the search produced two "bubble wrap" envelopes. The larger opened envelope contained a tobacco pouch and a smaller sealed envelope. The tobacco pouch contained two cylindrical "prison packs" and the sealed envelope one. The smaller sealed envelope was addressed to Ms. Calder with Mr. Izzard's name and an address on the upper left hand corner.

[13] The two packages found in the tobacco pouch were tightly sealed and very much resembled the package taken from Mr. Izzard the previous day. One contained hydromorphone and the other marijuana.

[14] Ms. Calder was arrested at 9:15pm on July 14, 2009. Upon arrival at the police station she was placed in an interview room. At 9:31pm Sgt. Kelly entered the room and provided the usual cautions and right to counsel. Ms. Calder

declined to call legal counsel. The interview continued until approximately 11:00pm. This statement was admitted as evidence in this trial by consent.

MS. CALDERS STATEMENT TO POLICE:

The following passages are the most probative to the issues in this trial:

Q. Okay. So ... so ya were arrested for trafficking in a controlled substance.

A. Which I know nothing about.

Q. There's a lot of good lawyers in this province.

A. There are? There are. And I might possibly call someone in New Glasgow, but ahhh ... not now. Maybe tomorrow. Or later tonight. Umm ...I ... am not trafficking. I don't even know what drugs look like. I thought Dilaudid came through a thing in the ... in the hospital drip line.

Q. . . . And that substance, we've tested it, and it is a prohibited substance that ahhh . . . you're only supposed to have by prescription. Ahhh . . . and it's controlled under the Controlled Drugs and Substances Act. Okay?

A. Umm . . . and all I will say right now is what I said earlier, I . . . I thought it was tobacco.

Q. And how did you come into possession of that substance?

A. Ahh . . . um, some acquaintance of Thomas', and I have no idea who, umm . . . dropped . . . Actually, it was the second package and I can't even remember. My assistant, I think, opened both packages and I don't know where the first package went. Probably right in the garbage. But it . . . The first package was . . . had like a cig' . . . cigarette carton around it. And ahh . . . and it seemed to be some green on it or something. I didn't really look at it. And when she opened it she sorta went, ooh . . . I don't . . . Or I don't know what she said, but anyway, I looked at it and said, no, don't want anything to do with that. And then this one came in. . . There was a card with it. It was just a very non-specific type of card. It didn't say anything or instruct anything. Umm . . . and it had . . . It was a Canada Post Priority Mail envelope.

A. And I honestly can't remember if I opened it or my assistant did but I kind of think she did because I think . . . She . . . she picks up the mail and I think she showed it to me and I made the same comment because it was

just a few days later and I went, ah, no, no, no, no, don't wanna know about it, don't wanna see it. And . . . I don't have the envelope, but it . . . I'm ... I'm as sure as I can be because I didn't really pay a lot of attention at the time because it was busy. Umm . . . (stutters) ... but it ... but it didn't ... it just had an address to, umm ...me, not to Thomas. But Thomas had called me, as is normal, umm ...about matters we're dealing with and he asked if a parcel had come or a package had come from Canada Post or ...I don't know if he said Canada Post, but did a parcel come? Umm ... it would be left in your mailbox. And I said that there had been one and he just asked if I could bring it to him. And at the time I said absolutely not. And why I did in the end, I don't know. And I honestly don't know where the other one went. I don't know if it went in my garbage or ... I have no idea where the other one went, the first one. And I don't know ... That was the one that had the cigarette package around it, which made me think it was cigarettes. Umm ... and I just thought this was tobacco. And I don't know who put it in my mailbox. I ... It was left in my mailbox and he asked me if something had been left. I think he actually called before it was left in my mailbox and I said, no, there's nothing ... nothing's been dropped off. He didn't mention what it was. And then umm ... he ... he never did mention what it was. And then umm ...a day or two later when he called he wanted to know if ... Or I ... I mean ... And I don't even ... I don't recall precisely, but he could've asked or I might of even said, umm ... that package you were asking about was ... is in my ... was dropped off in my mailbox. But I'm pretty sure it was my assistant who opened it and ... because I remember looking at her and going, like, oh, no, no, no, I don't want anything to do with that. But again, thought it ... I thought it was umm ... tobacco cigarettes. And I didn't look in anything. I don't ... I don't know what other drugs look like. I couldn't tell ya what a marijuana plant looks like. I couldn't tell you what a piece of ahh ... hash looks like. I can only guess what umm ... cocaine looks like 'cause ya see it on TV. Umm ... and if it ... if I saw anything like that well I would've stayed a hundred miles away from it. Naively and stupidly I shoulda stayed away from this but I thought it was tobacco and it was for smokes. And ... That's all I know. I put it in ... like in his file and didn't pay any attention to it for quite some time because I was working on other stuff. And then when I was putting his file together yesterday, his file and a couple of others, to go over there I put it in. And I wasn't sure when I put it in what I'd do with it, if anything. But I'm ahh ... I'm a ... a softie. And I thought it was, if any ... I ... I just thought it was tobacco. It looked like tobacco. I mean, I didn't examine it, but it looked like it was tobacco. So I ... When you say there was umm ... Dilaudid in it, like I said, I don't even know how ... what kinda ...how that comes other than in umm ... (Stutters) ... And I only know from in the hospital cause I've had it for surgery and it was in a drip and umm ... I wouldn't have a clue what it looked like.

A. . . . It's her job to pick up the mail and open the mail. Umm ... and ... and I know she just left it on the counter. Ya know, she ... she sorta went, oop, and I ... and I ... and I don't even know if she said it looks like cigarettes or I just myself thought it looks like cigarettes. Umm ... part of me thinks she said it, but I can't be sure. Umm ... and ... but I do remember going like, oh, no, no, no, I don't want anything to do with that and sort of pushed it aside. And I don't have any idea where the other, the first package, umm, is. I'm assuming it went into the garbage, but I honestly don't know.

Q. Okay, so the one that ya took today, so when that package arrived, who would've opened that package, you or ...?

A. Leah, also ... well Leah opened it and I was right there with her.

Q. Okay. So what was inside the envelope?

A. Umm ... almost the ... it looked like what, to me, would be tobacco. I mean, I don't even smoke tobacco, but ... and it was wrapped in cellophane and that was it.

Q. So a parcel arrived. And there was absolutely nothing in it other than the package that you delivered to ... to him?

A. I don't believe there was anything else in it.

Q. So what made ... what made you make that connection between that package and delivering it to him?

A. (Clears throat) ...

Q. How would ya know that was even for him?

A. Umm ... just 'cause of his phone call. Cause he said it would come. He mentioned that it would probably ... it would come Priority Post.

Q. So ... so why ... why would you ...? Why would you go through the effort of bringing that into him?

A. I know it sounds ridiculous, but it's ... And it's probably ... (Sighs) ... not ... not the greatest quality for what I am doing, but I ... (Stutters) ... I'm very sympathetic to people and I feel. ... Well, I mean, I have some clients that are jerks, in there, and some of them I feel are ... have been, umm ... screwed, so to speak. He's one of them. And it was just stupidity and naivety, I guess, that I thought I was helping him. Or helping someone in a way, but I didn't think it was anything worse than ... I thought it ... it was tobacco. In fact I wondered how the heck he was going to smoke it. But then I thought they probably wrap ... I mean, they're very inventive in there. Well they can wrap it up in a napkin if they want to.

Q. So, does it ... does it make sense to you that somebody would send a small quantity of tobacco by Priority Post to a lawyer to have them ...? Why ... why wouldn't they just go and drop it off?

A. Well, 'cause you can't ... because ... and I mean, that's ... I know ... they can't bring ... they can't give them tobacco there.

Q. Did you know that ya weren't supposed to do what you did today?

A. To a degree. I know that sounds ... (UNINTELLIGIBLE). I don't wanna be ... I'm not tryin' to be evasive, but ... because I didn't think they could get cigarettes ... (UNINTELLIGIBLE) ... tobacco inside of the canteen or anywhere, umm ... although, as I said, I'm constantly hearing of people smoking and smelling people smoking and all that. Umm ... I ... I just ... it was a weak moment today. That's all I can say. Because I ... I know initially when we opened ... Well, the first package, which is ... which has gone, which I have no idea where it went and I went, no, no, no ... well I said the same thing to both, but I just umm ... I hadn't seen him for a while, I also felt a bit guilty because we were set for a bail review in Antigonish last week and I think he had, based on new evidence we had, I think he had a fairly good chance of getting bail. I think that he's ... I really do believe, I mean, 'cause I think alotta ... well I see alotta, I think he was being set up, umm ... for specific reasons and I was sick last week and he had to ... he went to Antigonish. Well he had to go anyway because he had to be re-remanded and I called early in the morning, but I'd been sick for several days. It was with this ... (UNINTELLIGIBLE). And umm ... there was just no way. Ah, even Leah was willing to drive me but I couldn't. I was not well enough to even perform, ya know, to do

what I ... my ... what I had to do. So I think part of me probably was feeling kinda guilty cause I screwed that up for him and now he's got to wait two months for ... (Stutters) ... the next bail review.

- Q. And the manner in which, when he took possession of it that he kept it concealed under the table. It doesn't make a whole lotta sense. And this ... the quantity of tobacco is so small that it would make no sense that somebody would send that through the mail, ahh ... Priority Post without any information ... (UNINTELLIGIBLE) ... with it.
- A. Well I guess I ... I mean I never even thought about quantity or anything. I guess, if I did think about quantity the only thing I would've ... I would've found it strange if it was a large quantity because ... what are ya gonna do with a large quantity? Umm ... so it didn't strike me as strange that it wasn't a large quantity. Umm ... and as I said, it ... it was wrapped up and I didn't ... I didn't ... I mean, I ... (Stutters) ... he didn't ask for matches and he didn't ask for papers. (Stutters) ... Not that I had those. But I was thinking ... And that's what I was thinking, but I ... I ... Well I just ... For a minute I thought ... (UNINTELLIGIBLE). It crossed my mind at some point, how ... how is he s'posed to use this? But then, as I said, I ... I know they come up with everything under the sun and ...
- Q. Did you ever suspect there were drugs contained in there?
- A. No. Not at all.

Q. Did you and Leah have any conversation about these packages arriving?

A. The only conversation was when I went, oh, no, no, no, no.

Q. So what does that mean? (UNINTELLIGIBLE) ...

A. Oh, no, no, no. no? Well ...

I guess, essentially, I don't wanna be ... I don't wanna touch that.
I don't wanna be involved with that.

Q. So what ... what did you think it was? For you to say, oh, no, no, no, no?

A. Tobacco. Cigarettes.

- Q. Would it surprise you that there would be drugs in a package like that?
- A. Yes.
- Q. You're a lawyer. You know the types of people that you deal with. You know what takes place in the correctional centre. Um, would it ... would it not make abundant ... ah, wouldn't it be abundantly clear that somebody would try to transport drugs into the correctional centre?
- A. I didn't think people would do it that, um, openly. I don't know how people get their drugs in there but I ... (Stutters) ... I've always assumed it was more secretively. Umm ... and I ... I didn't ... (Stutters) ... I really, I never ... I never thought someone would leave drugs in my mailbox, like on the outside of my house, in an unfastened mailbox.
- Q. ... Okay. And nothing ... nothing prompted you to question what could be in that package?
- A. Other than ... Other than tobacco, no. Honestly.
- Q. Common sense didn't step in? I received a package in the mail, ah, to take to a correctional institution.
- A. No because it just looked like it was tobacco. And as I said, I didn't think anyone would just drop ... Well I didn't even think about there being

anything else, but it ... I mean, I just wouldn't of thought anyone would drop drugs off in someone's outside mailbox.

Q. Does it surprise you that there were drugs in it?

A. Yeah, I had no idea.

Q. Have ya ever done that before?

A. No.

THE CHARGES:

[15] The amended indictment alleged the following three offences:

1. **THAT** on or between July 12, 2009 and July 16, 2009, at or near Halifax Regional Municipality, in the Province of Nova Scotia, she did unlawfully traffic in *Hydromorphone (dihydromorphinone)*, 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**;
2. **AND FURTHER THAT** on or between June 1, 2009 and July 16, 2009, at or near Halifax Regional Municipality, in the Province of Nova Scotia, she did unlawfully have in her possession for the purpose of trafficking, *Hydromorphone (dihydromorphinone)*, 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. **AND FURTHER THAT** on or between June 1, 2009, and July 16, 2009, at or near Halifax Regional Municipality, in the Province of Nova Scotia, she did unlawfully have in her possession, for the purpose of trafficking, *not in* excess of three kilograms, *Cannabis (Marihuana)* a substance included in Schedule II 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**.

[16] The first count related to the package removed from Mr. Izzard. The second and third counts relate to the packages found in Ms. Calder's Law Office.

LEGAL BURDENS:

[17] The crown bears the burden of proving all the essential elements of each offence beyond a reasonable doubt. Ms. Calder testified and, as such, *R. v. W.D.* applies. If I believe Ms. Calder's claim that she thought the packages contained only tobacco, then she must be found not guilty. If I do not believe Ms. Calder, but her evidence leaves me in a state of reasonable doubt, then she must be found not guilty. I can only convict Ms. Calder if I am satisfied beyond a reasonable doubt, on all the evidence, that she knew drugs were contained in the packages or was wilfully blind to that likelihood.

SIMILAR FACT EVIDENCE:

[18] The crown successfully applied to have the evidence concerning count # 1 apply to the “for the purpose of trafficking” element of counts # 2 and #3.

THE EVIDENCE OF TRACY DOMINIX:

[19] On July 14, 2009, Tracy Dominix was the Deputy Supervisor of Operations at the Central Nova Scotia Correctional Centre. She was responsible for general security issues. Approximately one hour after Mr. Izzard was removed from the room, Captain Dominix and Correctional Officer McGammon entered the room and spoke to Ms. Calder. On direct examination she testified that when Ms. Calder was told drugs were involved Ms. Calder stated “ I do not know what was in the package.” On cross examination it was pointed out to Captain Dominix that at Ms. Calder’s first trial she testified that the words spoken by Ms. Calder were “I thought it was just tobacco.” Captain Dominix recognized this conflict in her sworn testimony and would not agree that her earlier testimony is likely to be more accurate than her present evidence. When confronted with this conflict, Captain Dominix stated “I don’t know why I would have said that.” She insisted that her

present testimony was the accurate version. In my view Captain Dominix's evidence does not resolve this conflict in her testimony.

[20] On direct examination Correctional Officer McGammon testified that Ms. Calder stated she did not know what was in the packages. He acknowledged on cross examination that he was unable to provide a verbatim account of what was said to Ms. Calder. Yet, it was his evidence that he had no recollection of Ms. Calder saying "I thought it was just tobacco" and does have recall of her stating that she did not know what was in the package.

[21] Detective Cst. Carmichael testified that he interviewed Correctional Officer McGammon during the investigation. His notes of that interview suggest that he said Ms. Calder made an utterance that she thought it was tobacco.

[22] Ms. Calder in her direct examination stated that when she was told tobacco and drugs were found on Mr. Izzard, she said "I thought it was just tobacco." She further testified that when the police arrived at her residence to arrest her, they told her dilaudid was found and her response was "I thought it was tobacco." Ms.

Calder, in her cautioned statement, insisted that she thought it was tobacco but did not say if she stated that to Captain Dominix at the material time.

[23] I am not persuaded that very much depends on whether Ms. Calder said “I thought it was tobacco” or “I do not know what was in the package.” The more critical issue is whether Ms. Calder’s utterance amounted to a true statement or a guise to deflect any perceived involvement in an offence. Given that the credibility of both Ms. Calder and Captain Dominix are in issue, the crown must prove that Ms. Calder said she did not know what was in the package. After reviewing all of the evidence, I am not satisfied that this represented her utterance. I am satisfied that Ms. Calder’s words were “I thought it was tobacco.” This was Ms. Calder’s position throughout the investigation and trial and was supported by Detective Cst. Carmichael.

THE EVIDENCE OF GORDON VAIL AND DEAN JOBB:

[24] In the July 14, 2009 cautioned interview Ms. Calder went to considerable lengths to distance herself from drugs and the drug culture. Several examples appear in this decision. There is absolutely no evidence that Ms. Calder has ever

used or trafficked in illegal drugs. The point she advances in her statement is that she would not recognize any kind of illegal drug even if she saw it. The crown obviously takes issue with this assertion and called Messrs Vail and Jobb to refute this evidence.

[25] In 2006 Ms. Calder was a student in the Journalism Program at the University of Kings College in Halifax. She was assigned to write an article on the prevalence of crystal meth in this region. She was referred to Gordon Vail of the RCMP who met her at his home for approximately 2 ½ hours. Officer Vail did not personally know Ms. Calder but was aware that she was a former crown attorney and defence lawyer. Officer Vail described this session as educational and extensive. He testified that they discussed crystal meth and ecstasy and the production and distribution of such substances. Officer Vail also testified that after that meeting he invited Ms. Calder to his office where he showed her a power point presentation on drugs and drug labs.

[26] In 2006 Dean Jobb was a professor of journalism at The University of Kings College. Ms. Calder was a student in his investigative journalism course. He testified that Ms. Calder chose the topic of whether crystal meth was making its

way into Nova Scotia. He was involved with her throughout the project and was aware of her contact with the RCMP. Mr. Jobb testified that Ms. Calder did a “good job” but that he could not recall much about the end product.

[27] I do not find that this evidence assists the crown in proving that Ms. Calder either knew there were drugs in the package or was wilfully blind to such a possibility. The school project was focused on crystal meth and there is no reliable record of what was discussed in the two meetings with Officer Vail. I cannot conclude that any information conveyed during the meetings would result in the kind of knowledge the crown wishes to attribute to Ms. Calder. The *actus reas* of count #1 involves a very different activity than anything attributed to the two meetings.

[28] I do not see this conclusion having any impact on the ultimate outcome of this trial. The fact that Ms. Calder was a 15 year criminal lawyer is more probative of knowledge or wilful blindness than her Kings College project. I will not be relying on this evidence in determining Ms. Calder’s intentions on July 14, 2009.

THE PHILIP NEWHOOK FILE:

[29] In her statement to the police Ms. Calder left the impression that her law practice did not include drug prosecutions or defences. On cross examination Ms. Calder was presented with the written decision in *R. v. Newhook*. She acknowledged that this was a drug trial that lasted 2-3 days and involved 16 individually wrapped packs of cocaine. Ms. Calder acknowledged that she was Mr. Newhook's defence lawyer on that case and said "I completely forgot that." She testified that she recalled this case "two months later" but did not tell her counsel. It was later located by the crown and sent to defence counsel.

[30] Once again, I do not find this evidence particularly probative of the issues of knowledge or wilful blindness. The fact that Ms. Calder was a practicing criminal lawyer is more probative on these issues than the defence of one drug case. I will not be relying on this evidence in determining Ms. Calder's intentions on July 14, 2009.

DELIVERY OF PACKAGES TO MS. CALDER'S OFFICE:

[31] The evidence satisfies me that Mr. Izzard was the engineer behind the delivery of the packages to Ms. Calder's residence/office. I do not have any concern that Ms. Calder was a conventional trafficker in 2009. I accept her evidence that she has never been into drugs, either personally or commercially. I am also satisfied that the packages were delivered to Ms. Calder's mailbox without her knowledge.

[32] Support for this conclusion is primarily found in the evidence of Leah Whitehead who was Ms. Calder's legal assistant between March and July, 2009. Ms. Whitehead was a very credible witness.

[33] Ms. Whitehead's duties included retrieving the daily mail from the mailbox on the exterior of Ms. Calder's residence. She testified about collecting two packages from the mailbox. She stated that toward the end of May, or in early June, she found a plastic grocery bag in the mailbox. She did not see anyone put it there and she was not expecting its arrival. There was no indication as to who it

was for or who it was from. Ms. Whitehead described the contents of the grocery bag as a “green carton of cigarettes” or a “cigarette package.” She stated that she did not examine the package further and placed it on a kitchen counter where she always left the mail. She has no recall of alerting Ms. Calder to this delivery. Ms. Whitehead testified that on June 4, 2009 Mr. Izzard called from the Correctional Centre to inquire about the delivery of a package.

[34] On cross examination Ms. Whitehead acknowledged that the first package may have arrived as late as June 17/18, 2009 which casts some doubt on the date of Mr. Izzard’s call. It is my conclusion that Ms. Whitehead was confused as to these dates. Other than this confusion, her credibility remains intact.

[35] Ms. Whitehead testified that the second package arrived at Ms. Calder’s residence in late June, early July 2009. She received a phone call from an unknown female asking if she could drop off a package for Mr. Izzard. Ms. Whitehead responded “fine.” The next morning she retrieved a package from the mailbox. She described it as an unsealed bubble wrap envelope. She testified she could feel something in the envelope but did not examine it. She placed it in the

usual mail spot and never saw it again. She had no recall of there being any identifier on the envelope.

[36] Ms. Whitehead was very clear that she did not place either of the delivered packages in the upstairs law office. Ms. Calder was unable to offer any explanation as to how the seized packages found their way to a shelf in her upstairs law office.

[37] Detective Cst. Carmichael was present for the search of Ms. Calder's residence and office. He testified that the police located an unsealed bubble envelope from a shelf in Ms. Calder's office. Inside of that envelope was a cigarette pouch with two prison packs inside and a smaller sealed bubble envelope. When the police opened the sealed envelope, they discovered another prison package. The smaller sealed envelope was addressed to Ms. Calder and Mr. Izzard's name appeared in the upper left hand corner.

[38] There is no absolute proof that the first package received by Ms. Whitehead is the same package that was seized from Mr. Izzard. There is no absolute proof that the prison packages seized from Ms. Calder's office were in the envelope collected by Ms. Whitehead in late June, early July 2009. There are sufficient

proven facts to support an inference that they were the same. The evidence does not support a different explanation. It is unlikely that any other conclusion would favour Ms. Calder.

DR. ROSENBERG'S EVIDENCE:

[39] The defence called Dr. Edwin Rosenberg who was qualified as an expert in general adult psychiatry. He has practiced adult psychiatry for 45 years and is highly regarded in his profession. He assessed Ms. Calder on October 8, 2009 and reviewed her prior psychiatric records. He also reviewed the crown disclosure, the video of the transaction and considered various third party information.

[40] Dr. Rosenberg offered a two-prong diagnosis of Ms. Calder. The primary diagnosis was a “major depressive disorder recurrent, of moderate severity with features of anxiety.” The secondary diagnosis was a “personality disorder not otherwise specified with features of dependant and avoidant type predominating.” It was Dr. Rosenberg’s opinion that these conditions were present on July 14, 2009, and before.

[41] I accept that Ms. Calder suffered from these mental illnesses in 2009. I am satisfied that she experienced all the classic symptoms of depression as enumerated by Dr. Rosenberg. I accept that Ms. Calder's personality disorder interfered with her normal functioning. I accept that she was prone to go to excessive lengths to obtain the support and approval of others. I also accept Dr. Rosenberg's opinion that Ms. Calder was not fit to practice law in 2009.

[42] It was Dr. Rosenberg's opinion that all the stress in Ms. Calder's life in 2008/2009 impacted negatively on her depression. Ms. Calder testified about a long list of stressors. I accept that all these stressors were present and that they had a tremendous impact on her personal and professional life. Dr. Rosenberg opined that these stressors contributed to a worsening of Ms. Calder's symptomology, impaired her ability to make rational judgments and limited her ability to foresee the consequences of her actions.

[43] Dr. Rosenberg's opinion is best captured from the notice provided to the crown:

At the time of these alleged offences, Ms. Calder was suffering from an increase in depressive symptomology in the aftermath of various stressors in her life. Ms.

Calder's decision to bring a package of what she believed to be tobacco to her client who was incarcerated was to relieve the feeling of guilt she was experiencing for having missed (due to her illness) a bail review hearing for the client the previous week. Ms. Calder's feeling of guilt was the result of a combination of deficits in her concentration related to the clinical consequences of depression and the accentuation of characteristics of her personality disorder.

[44] He also felt that Ms. Calder's condition on July 14, 2009 was such that she would not have been aware of the need to make some inquiry as to the content of the package.

[45] On cross examination Dr. Rosenberg acknowledged that some people with depression and personality disorders can function well. He accepted that the video indicated a surreptitious transfer between Ms. Calder and Mr. Izzard. He testified that the act of avoiding attention could mean that they understood the consequences of what they were doing and were trying to hide it. Dr. Rosenberg admitted that he accepted the information provided to him by Ms. Calder and that if she is not truthful, then his opinion goes away. Consequently the weight of Dr. Rosenberg's opinion is dependent on Ms Calder's credibility.

THE EVIDENCE OF ANNE CALDER:

[46] Ms. Calder's fundamental position is that she thought the package she gave to Mr. Izzard was nothing more than tobacco. It is her further evidence that she thought the packages found in her office contained only tobacco. She testified that she knew tobacco was contraband but she delivered it out of a sense of guilt and an attempt to make up for her failings in representing him.

[47] Much of Ms. Calder's position is set out in her interview with Sgt. Kelly and does not need to be repeated.

[48] Ms. Calder testified that the first time she became aware of a package for Mr. Izzard was between early and mid June 2009. She stated that Ms. Whitehead told her that a female had called asking if they could drop off a package for Mr. Izzard. She testified that nothing came out of that conversation. She recalled that sometime later Ms. Whitehead approached her and said "I just got this package out of the mailbox." Ms. Calder testified she opened the top part and looked in and saw what "looked like a cigarette package with cellophane around it" she said she

did not know where it went, what Ms. Whitehead did with it, and never saw the package again.

[49] Ms. Calder testified about a second package that was delivered to her mailbox. She testified that she was not surprised by its arrival as Mr. Izzard had called earlier advising that a package was coming. She stated that she showed the package to Ms. Whitehead. She said she was sure there was something in it but concluded in her mind that it was tobacco. She said she never looked inside the envelope and did not know what happened to the package.

[50] Ms. Calder testified that the item she gave to Mr. Izzard was a tubelike object. She stated that on July 13, 2009 she found the tube in a briefcase in her law office. She said it looked like tobacco. She stated that she has no idea how it got there. She testified that the next day she took a different briefcase to the facility. She said she did not look at what she moved from one briefcase to the other before leaving for the correctional facility.

[51] Ms. Calder stated she was feeling guilty about missing Mr. Izzard's bail review when she arrived at the facility. She said she thought the tube was only

tobacco, that it never crossed her mind that it could be anything but tobacco, and, as such decided to give it to Mr. Izzard. She said she knew tobacco was not allowed but “did not think it was such a terrible thing.” She said she did not think it was “a big thing.” She stated that her guilt was the only reason to deliver the package to Mr. Izzard.

[52] Ms. Calder testified that she knew the tobacco would be taken from her if it was discovered. She stated that she knew she would have to conceal it to effect the transfer. She said she did not think of the transfer details until Mr. Izzard asked her about the package.

[53] On cross examination, Ms. Calder stated that when she found the tube in her briefcase on July 13, she thought “maybe I will give it to him, maybe I won’t.” She testified that it never entered her mind that there might be drugs in the packages delivered to her residence. She said “it never raised any concerns in my mind.” She admitted she was aware of the drug problem in the correctional centre. She said she felt that if drugs were going into that facility, it would be done in a more secretive way.

THE LAW OF WILFUL BLINDNESS:

[54] Glanville Williams in the text “Criminal Law, The General Part, 2d ed.”

described wilful blindness at page 59:

The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.

[55] In *R. v. Briscoe* 2010 SCC 13 the Supreme Court of Canada canvassed wilful blindness. Charron J offered the following analysis at paragraphs 20 and 21:

20 In essence, Mr. Briscoe argues that wilful blindness is but a heightened form of recklessness which is inconsistent with the very high *mens rea* standard for murder under s. 229(a) of the *Criminal Code*. He argues further that allowing fault for murder, as either a principal or party, to be established by wilful blindness could run afoul of the principle that “subjective foresight of death” is the minimum standard of fault for murder under s.7 of the *Canadian Charter of Rights and Freedoms*: *R. v. Martineau*, [1990] 2 S.C.R. 633, at p.645. The Court of Appeal rejected these arguments and, in my view, rightly so. As I will explain, wilful blindness, correctly delineated, is distinct from recklessness and involves no departure from the subjective inquiry into the accused’s state of mind which must be undertaken to establish an aider or abettor’s knowledge.

21 Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para.103), “[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?”

[56] In *Sansregret v. The Queen, supra*, McIntyre J. stated at page 584:

. . . while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry.

[57] Professor Don Stuart in his text *Canadian Criminal Law: A Treatise* (5th ed. 2007) offered the following analysis at page 228:

Our courts have generally insisted that the concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused’s mind. It involves deliberate ignorance or an actual process of suppressing a suspicion. Where, for example, a second-hand goods dealer buys goods he actually suspects are stolen, but refrains from making inquiries, he is wilfully blinding himself to the circumstance which would make his act of possession unlawful. The expression “deliberate ignorance” seems more descriptive than the “wilful blindness” metaphor, but the latter is already widely used.

ANALYSIS:

[58] The thrust of Ms. Calder's defence is that she did not know that the package she delivered to Mr. Izzard contained anything other than tobacco. I do not believe Ms. Calder's evidence on this point and it does not leave me in a state of reasonable doubt. In light of these conclusions, I must then determine, on all of the evidence, whether the crown has proven beyond a reasonable doubt that she knew the package contained drugs or was wilfully blind to that likelihood.

[59] The fact that Ms. Calder was a practicing criminal lawyer is a significant piece of evidence. She has worked as both a prosecutor and a defence lawyer over a 15-year period. The evidence clearly establishes that in the first half of 2009 most of her clients were on legal aid certificates and were incarcerated at the Central Nova Scotia Correctional Centre. The correctional staff evidence indicates that Ms. Calder was a regular visitor to their facility and was familiar with the protocol surrounding professional visits. The fact that a lawyer must sign in, pass through a metal detector, place personal items in a locker and submit their bag to a search suggests that even the most naive person would be aware that nothing is to

be passed to an inmate during visits. It is inconceivable that Ms. Calder would not be on the alert to the very real likelihood that the package contained drugs as well as tobacco.

[60] I find that given all the evidence surrounding the package, from the mailbox to Mr. Izzard, Ms. Calder knew that the package contained drugs. She likely did not know the kind of drugs but she knew it contained drugs. I do not accept that she believed it was tobacco.

[61] While I do not doubt that Ms. Calder possessed knowledge of what was in the package, I will comment on wilful blindness. If Ms. Calder persuaded herself it was tobacco, which I very much doubt, she would have to deliberately ignore her instincts and her past experiences.

[62] The next factor supporting my conclusion is the evidence from the video of the visit with Mr. Izzard on July 14, 2009. There can be no doubt that the transfer was done surreptitiously. Ms. Calder explains that she acted this way because she knew tobacco was contraband. On the other hand, she testified that she agreed to smuggle tobacco because she did not view that activity as particularly serious.

[63] I find that Ms. Calder and Mr. Izzard's efforts to conceal their activity speaks of hiding more than tobacco. Ms. Calder testified that when she arrived at the facility, she was, in a way, hoping it would be detected at reception thereby relieving her of the decision of delivering or not. That would suggest that a lesser degree of disguise would be appropriate. The movements of Ms. Calder and Mr. Izzard suggests concern of a much higher risk. In assessing the video my focus has been on the activities of Ms. Calder.

[64] The next factor supporting my conclusion is the appearance of the package delivered to Mr. Izzard. It was a cylindrical object similar to a cigar. It was very tightly wrapped in cellophane. It did not resemble any common place object. Even if I accept that Ms. Calder did not know what a prison package looked like, the make up of the package would trigger an inquiry as to what it included.

[65] The correctional staff immediately recognized the object as a prison package. They described that these tubes were the preferred way to smuggle drugs into their facility. On all of the evidence I find that Ms. Calder knew these tubes were used to get drugs to inmates. Should I be wrong in this conclusion, the

principles of wilful blindness would apply. If she did not have knowledge, then she strongly suspected drugs and shut her eyes to that likelihood. However, I see no way that anyone could see these tubes as a way to smuggle tobacco. The fact that Ms. Calder was a non-smoker does not change this conclusion.

[66] The next factor supporting my conclusion is found in Ms. Calder's cautioned statement. When Sgt. Kelly asked how she came into possession of the prison package, she made the following responses:

"And when she opened it . . . I looked at it and said, no, don't want anything to do with that."

"I went, ah, no, no, no, no, don't want to know about it, don't want to see it."

"But I do remember going like, oh, no, no, no, no, I don't want anything to do with that and sort of pushed it aside."

[67] Sgt. Kelly asked Ms. Calder whether she and Ms. Whitehead had any conversation about the packages arriving at her residence. Ms. Calder replied:

"The only conversation was when I went oh, no, no, no.no. I guess, essentially, I don't wanna be . . . I don't wanna touch that. I don't wanna be involved with that."

[68] When Ms. Calder discussed the phone call from Mr. Izzard she stated:

“And I said there had been one and he just asked if I could bring it to him. And at that time I said absolutely not. And why I did in the end, I don’t know.”

[69] These are not the kinds of responses of a lawyer who has been asked by a client to bring tobacco into the facility. I find as a fact that Ms. Calder knew the tubes contained drugs and her better sense was coming out in these utterances.

[70] Dr. Rosenberg’s testimony was called to support a conclusion that Ms. Calder’s diagnosis, and the various stressors in her life, somehow deprived her of the level of intent required for a conviction. Given my findings of fact on the critical issue, Dr. Rosenberg’s evidence does not have that effect. I can accept that Ms. Calder’s mental and physical health, as well as her many stressors, might have impacted on her resolve. I can also accept that these factors may have dimmed Ms. Calder’s view of consequences. However, that does not equate to a lack of intent. Ms. Calder knew she was being asked to traffic to Mr. Izzard, was ambivalent about it for some time and then decided to take her chances on not getting caught. This decision was misguided but rationally made after considering the balance between her sense of guilt and her view of the risks.

CONCLUSION:

[71] On count #1, I am satisfied that the crown has proven the charge beyond a reasonable doubt and I convict Ms. Calder.

[72] During this trial I ruled that the evidence on count #1 would be admissible on counts 2 and 3. The prison packages seized in Ms. Calder's office contained illegal drugs. The crown must prove that Ms. Calder possessed these packages and she knew, or was wilfully blind, as to the presence of drugs in those packages. The crown must also prove that such possession was for the purpose of trafficking.

[73] I find that Ms. Calder possessed these packages as possession is defined by section 2 of the **Controlled Drugs Substance Act** and section 4(3) of the **Criminal Code**. They were delivered to her home and brought to her attention. Ms. Calder's reactions to those deliveries and the evidence as a whole satisfies me that she knew the packages contained drugs or was wilfully blind to that likelihood.

[74] I am also satisfied that Ms. Calder possessed these substances for the purpose of trafficking. I am satisfied that she is neither a user nor a seller of these substances. Her intent was to smuggle them to Mr. Izzard. The evidence on count 1 supports this conclusion.

[75] On counts 2 and 3, I am satisfied that the crown has proven these charges beyond a reasonable doubt and I convict Ms. Calder of these offences.

J.