SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Beers*, 2022 NSSC 289

Date: 20221014
Docket: CRH 503563
Registry: Halifax

Between:

His Majesty the King

v.

Scott Ronald Beers and Troy Jeremy LeBlanc

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	April 11 – 12; June 27 – 29, 2022, in Halifax, Nova Scotia
Oral Decision:	October 11, 2022
Written Release:	October 14, 2022
Counsel:	Rick Woodburn, for the Crown Peter Planetta, for the Defence (Beers) Alexander MacKillop, for the Defence (LeBlanc)

By the Court (orally):

[1] On October 1, 2017, at approximately 1:38 a.m., three masked individuals broke into the Green Diamond Equipment store ("Green Diamond") located at 270 Horseshoe Lake Drive in Halifax, Nova Scotia. They stole a number of semi-automatic rifles, some high-end rifle scopes, and some backpacks. One of the three individuals has pleaded guilty. His name is Adam Trites.

[2] The Crown says the other perpetrators are the two accused, Scott Ronald Beers and Troy Jeremy LeBlanc. They seek to use similar fact evidence to prove it. Alternatively, the Crown says that its case against the two accused is proven even without the similar fact evidence. The trial proceeded as a blended *voir dire*.

Background

[3] Messrs. LeBlanc and Beers have been charged as follows:

1. That on or about the 1st day of October, 2017, at or near Halifax, Nova Scotia did unlawfully break and enter a place, to wit., a business of Green Diamond Equipment situate at 270 Horseshoe Lake Drive, Halifax, and did commit therein the indictable offence of theft, contrary to Section 348(1)(b) of the *Criminal Code*.

2. AND FURTHER that they at the same time and place aforesaid, did break and enter a certain place to wit., a business, Green Diamond Equipment situate at 270 Horseshoe Lake Drive, Halifax, and did steal firearms located in it, contrary to Section 98(1)(b) of the *Criminal Code*.

3. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, to wit., a Beretta shotgun, without being the holder of a license under which they may possess it, and in the case of prohibited firearm or a restricted firearm or a non-restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 91(1) of the *Criminal Code*.

4. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, to wit., a Beretta shotgun, without being the holder of a license under which they may possess it, and in the case of prohibited firearm or a restricted firearm or a non-restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 91(1) of the *Criminal Code*.

5. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, to wit., a Beretta shotgun, without being the holder of a license under which they may possess it, and in the case of prohibited firearm or a restricted firearm or a non-restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 91(1) of the *Criminal Code*.

6. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, to wit., a Beretta shotgun, without being the holder of a license under which they may possess it, and in the case of prohibited firearm or a restricted firearm or a non-restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 91(1) of the *Criminal Code.*

7. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, to wit., a Beretta shotgun, knowing that they were not the holder of a license under which they may posses it, and in the case of a prohibited firearm or a restricted firearm or a non-restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 92(1) of the *Criminal Code*.

8. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, to wit., a Beretta shotgun, knowing that they were not the holder of a license under which they may posses it, and in the case of a prohibited firearm or a restricted firearm or a non-restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 92(1) of the *Criminal Code*.

9. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, to wit., a Beretta shotgun, knowing that they were not the holder of a license under which they may posses it, and in the case of a prohibited firearm or a restricted firearm or a non-restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 92(1) of the *Criminal Code*.

10. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, to wit., a Beretta shotgun, knowing that they were not the holder of a license under which they may posses it, and in the case of a prohibited firearm or a restricted firearm or a non-restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 92(1) of the *Criminal Code*.

11. AND FURTHER that they at the same time and place aforesaid, were an occupant of a motor vehicle in which they knew that there was at that time a weapon or firearm to wit., a Beretta shotgun, contrary to Section 94(1) of the *Criminal Code*.

12. AND FURTHER that they at the same time and place aforesaid, were an occupant of a motor vehicle in which they knew that there was at that time a weapon or firearm to wit., a Beretta shotgun, contrary to Section 94(1) of the *Criminal Code*.

13. AND FURTHER that they at the same time and place aforesaid, were an occupant of a motor vehicle in which they knew that there was at that time a weapon or firearm to wit., a Beretta shotgun, contrary to Section 94(1) of the *Criminal Code*.

14. AND FURTHER that they at the same time and place aforesaid, were an occupant of a motor vehicle in which they knew that there was at that time a weapon or firearm to wit., a Beretta shotgun, contrary to Section 94(1) of the *Criminal Code*.

15. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, to wit., a Beretta shotgun, knowing that it was obtained by the commission of an offence or by an act or omission that in Canada constitutes an offence, contrary to Section 96(1) of the *Criminal Code*.

16. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, to wit., a Beretta shotgun, knowing that it was obtained by the commission of an offence or by an act or omission that in Canada constitutes an offence, contrary to Section 96(1) of the *Criminal Code*.

17. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, to wit., a Beretta shotgun, knowing that it was obtained by the commission of an offence or by an act or omission that in Canada constitutes an offence, contrary to Section 96(1) of the *Criminal Code*.

18. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, to wit., a Beretta shotgun, knowing that it was obtained by the commission of an offence or by an act or omission that in Canada constitutes an offence, contrary to Section 96(1) of the *Criminal Code*.

19. AND FURTHER that they between the 29th day of September, 2017 and the 2nd day of October, 2017 at the same place aforesaid, did conspire together to commit the indictable offence of breaking and entering to steal firearms, contrary to Section 465(1)(c) of the *Criminal Code*.

i) Green Diamond incident (the subject charges)

[4] Much of the background in relation to the charges which the two accused face in this matter is not in dispute. For example, the two accused and Adam Trites, are from Moncton, New Brunswick. Beers and LeBlanc have known each other since childhood, and Beers, in a statement to police, described Trites as a friend, as well. The tenor of LeBlanc's remarks seemed to relegate the latter to an acquaintance rather than friend.

[5] At this juncture, I point out that all references to something that either accused has "said" has been taken from their videotaped police statements, which were tendered by the Crown. Neither accused testified during this proceeding. Because of that, what each accused has said can only be applied to that individual accused. Nothing that either Mr. Beers or Mr. LeBlanc said individually may be considered *vis a vis* the other.

[6] In any event, the three travelled from Moncton to Halifax Regional Municipality together in a vehicle owned and licensed to one "Elmer Beers", the accused Scott Beers' grandfather. That vehicle was a bright red GMC Sierra pickup truck. The ostensible purpose of the trip, according to Beers, was to look at snowblowers. He said a friend had given him a tip that he could get a good deal on one in town. For his part, Mr. LeBlanc said that he wanted look at rifles, although he acknowledged that he does not have a firearms license.

[7] While in HRM, and during the afternoon of September 30, 2017, the two accused and Mr. Trites visited the Green Diamond store. Security footage from one of the store's surveillance cameras shows all three individuals spending varying amounts of time in the vicinity of the showcase displaying handguns in the store. Next to the handguns was a display case in which some expensive rifle scopes were displayed. Each accused (in his police statement) agreed that they were depicted in that footage, and said the third individual was Mr. Trites.

[8] The aisle in which the handguns and scopes are displayed is intersected at a right angle by another aisle at the end of which is found a display case containing a rack of semi-automatic rifles. As consequence, although in different aisles, the scopes and handguns were literally within a few feet of the rifles.

[9] Across the aisle from the glass handgun and scope display cases, at about a 135° angle, was a display featuring camouflage backpacks. The store employee who testified, Shea Cochrane, described them as "dust collectors", not very high-end, and certainly not very much in demand by customers. They had been there for a while.

[10] Both accused acknowledge (during their statements to police) their identities, as well as that of Adam Trites, in the film footage that was captured during the afternoon of September 30, 2017. Both can be seen spending time looking at the display cases containing the handguns and scopes on more than one occasion, often individually. At one point, LeBlanc and Trites have what appears to be a discussion together in front of those display cases. At another point, all three individuals have what appears to be a discussion while looking at the rifle rack. At another point, the three congregate around the backpacks, taking time to handle them and, on at least two occasions, to pick them up and unzip them.

[11] It is certainly the case that the film footage depicts the three individuals spending time in other parts of the store as well. It is also the case that only this film footage (from the vantage of the security camera located in the vicinity of the firearms) was presented in evidence. Finally, it is a fair observation that plenty of

other people, besides the two accused and Mr. Trites, are also depicted in the footage looking at the handguns and rifles.

[12] The two accused and Adam Trites spent the evening of September 30, 2017, together at a local strip club called "Ralph's". This establishment was (then) located on Main Street in Dartmouth, Nova Scotia.

[13] Sometime into the early morning hours of October 1, 2017, after “last call” the three left the establishment. Beers said that he crawled in the back seat of his grandfather’s truck and fell asleep. He said that he did not know who drove, and that he did not want to "get a DUI". He said that he thought they were going back home to Moncton.

[14] At one point he recalled waking up and seeing a "John Deere" or “Harley” dealership sign. He acknowledged that there is such a dealership close to the Green Diamond store at which the offences occurred. He also recalled people (he did not say who) throwing a backpack into the backseat of the vehicle where he was laying. He could see rifle scopes sticking out of the backpack. He recalls asking sleepily what was going on, and being told "we're looking for the highway". He told the police that he then fell back to sleep. Of course, this evidence can only be considered in relation to him, not Mr. LeBlanc.

[15] The next morning when he woke up in Moncton, Mr. Beers said that he was alone and there was no equipment or backpacks in the truck any longer. He cleaned the truck up and gave it back to his grandfather.

[16] As for Mr. LeBlanc, he said that he did not leave from Ralph's in the car with Trites and Beers. He said he was picked up by a local friend who drove him back to Moncton. This “local friend” did not testify, nor did counsel for Mr. LeBlanc provide notice to the Court or the Crown that he intended to call alibi evidence.

[17] The three individuals who committed the criminal acts in the early morning hours of October 1, 2017, gained entry to the dealership by smashing one of a number of glass windows comprising a large delivery door. During the course of that entry, one of the three individuals cut himself on the broken glass. Upon gaining entry, a dark spot is observed on the (gloved) right hand of that individual, and by the time that individual left the store, the circumference of the circle of blood that had seeped into that portion of the glove covering the back of that hand had grown significantly.

[18] Blood samples were collected by police investigators at the scene. This was shortly after the authorities were notified of the break and enter, when what had occurred was discovered by the first employees attending their shifts the next day. The blood sample taken from the smashed glass on the window through which the three individuals gained access, was analyzed for DNA. It returned a positive DNA match for Adam Trites.

[19] In addition to the above-described film footage taken earlier during business hours on September 30, 2017, the security footage depicting the actual break-in itself was also tendered into evidence. I will briefly summarize what was shown.

[20] Security footage captured from October 1, 2017, shows three individuals entering the store via the smashed window at approximately 1:38 a.m. While this is not the time caption depicted on that film (Exhibit “6”), it was confirmed by both Det./Cst. Mike Sanford, as well as Shea Cochrane (Green Diamond employee) that the time caption was "slow" by one hour and seventeen minutes on that date.

[21] As previously indicated, one of the three, since identified as Adam Trites, is observed to be bleeding after he gains entry to the premises. The other two appear to be of the same height and body type as the other two accused (as they had looked in the earlier security footage captured during the previous day).

[22] The three individuals head straight to the area where the handguns, rifles, and scopes had been located during store hours on September 30, 2017. I say "had been located" because the handguns, and the glass case in which they had been displayed while the store was open, were no longer there.

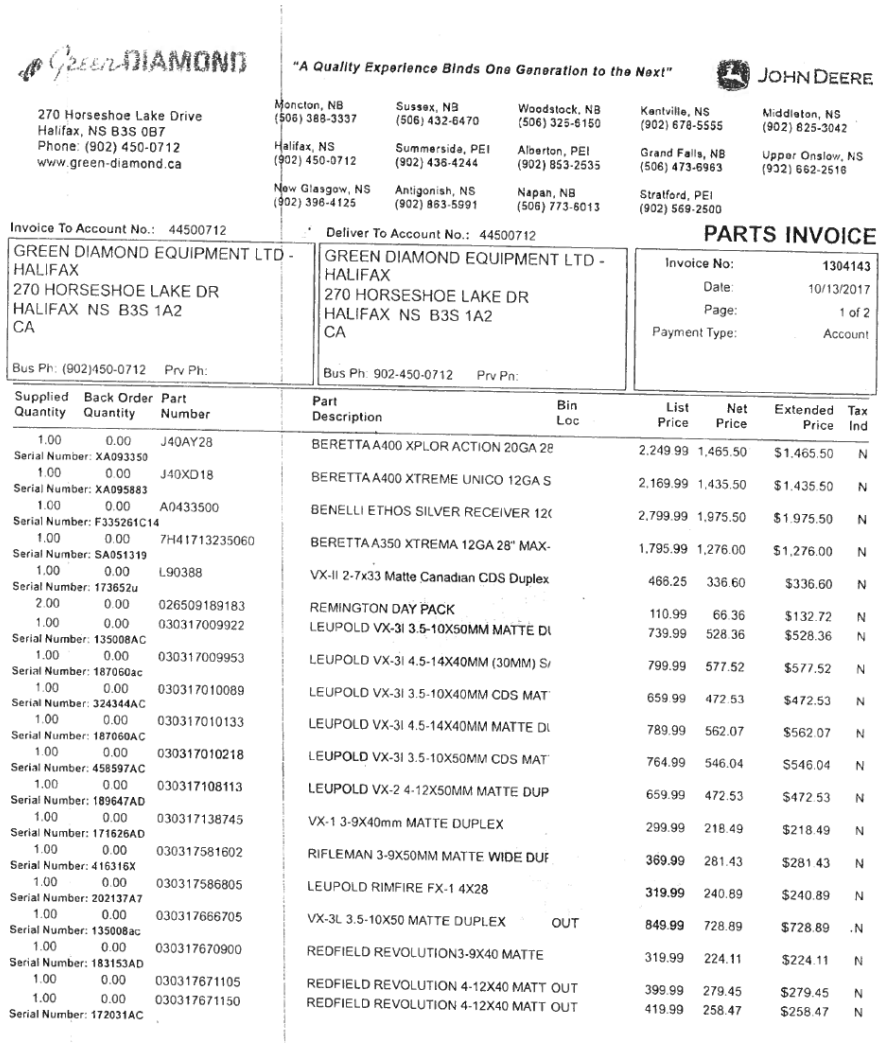
[23] Mr. Cochrane testified that this was because they had become aware of other stores selling handguns having been broken into, with this particular merchandise having apparently been targeted and stolen. As a proactive measure, Green Diamond had recently begun a practice of placing their handguns in a wheeled glass display case. This display case would be out in the open (beside the glass cases displaying the rifle scopes) during the day, and then wheeled back into a secured room behind the counter when the store closed.

[24] As noted, the video footage shows that the three individuals went straight to this area, passing the camouflage backpack display as they did so. The first individual to arrive and run past the backpack display grabbed one without even appearing to pause. The three are masked, wearing hoodies and gloves. There appeared to be some confusion between them, evidenced by gesturing, when they

arrived in the area in which the handguns had been displayed when the store had been open.

[25] One of the individuals is then observed pulling the rifle display case off of its rack, causing it to fall to the floor and smash open. One person then takes at least one rifle, and another individual, the one subsequently identified as Adam Trites, takes multiple rifles. The three then run out with the rifles and loaded backpack and are seen making their egress via the smashed window through which they had initially gained access to the premises.

[26] What follows is a reproduction of the "parts invoice" generated by Green Diamond with respect to the goods lost (written off) by the store as a result of the incident:



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Halifax, NS (902) 450-0712	Summerside, PEI (902) 436-4244	Alberton, PEI (902) 853-2535	Grand Falls, NB (506) 473-6983	Upper Onslow, NS (902) 662-2518
New Glasgow, NS (902) 396-4125	Antigonish, NS (902) 863-5991	Napan, NB (506) 773-6013	Stratford, PEI (902) 569-2500	

Invoice To Account No.: 44500712

GREEN DIAMOND EQUIPMENT LTD - HALIFAX
270 HORSESHOE LAKE DR
HALIFAX NS B3S 1A2
CA

Bus Ph: (902)450-0712 Prv Ph:

Deliver To Account No.: 44500712

GREEN DIAMOND EQUIPMENT LTD - HALIFAX
270 HORSESHOE LAKE DR
HALIFAX NS B3S 1A2
CA

Bus Ph: 902-450-0712 Prv Ph:

PARTS INVOICE

Invoice No: 1304143
Date: 10/13/2017
Page: 1 of 2
Payment Type: Account

Supplied Quantity	Back Order Quantity	Part Number	Part Description	Bin Loc	List Price	Net Price	Extended Price	Tax Ind
1.00	0.00	J40AY28	BERETTA A400 XPLOR ACTION 20GA 28		2,249.99	1,465.50	$1,465.50	N
Serial Number: XA093350								
1.00	0.00	J40XD18	BERETTA A400 XTREME UNICO 12GA S		2,169.99	1,435.50	$1,435.50	N
Serial Number: XA095883								
1.00	0.00	A0433500	BENELLI ETHOS SILVER RECEIVER 12(		2,799.99	1,975.50	$1,975.50	N
Serial Number: F335261C14								
1.00	0.00	7H41713235060	BERETTA A350 XTREMA 12GA 28" MAX-		1,795.99	1,276.00	$1,276.00	N
Serial Number: SA051319								
1.00	0.00	L90388	VX-II 2-7x33 Matte Canadian CDS Duplex		468.25	336.60	$336.60	N
Serial Number: 173652u								
2.00	0.00	026509189183	REMINGTON DAY PACK		110.99	66.36	$132.72	N
1.00	0.00	030317009922	LEUPOLD VX-3I 3.5-10X50MM MATTE DU		739.99	528.36	$528.36	N
Serial Number: 135008AC								
1.00	0.00	030317009953	LEUPOLD VX-3I 4.5-14X40MM (30MM) S/		799.99	577.52	$577.52	N
Serial Number: 187060ac								
1.00	0.00	030317010089	LEUPOLD VX-3I 3.5-10X40MM CDS MAT		659.99	472.53	$472.53	N
Serial Number: 324344AC								
1.00	0.00	030317010133	LEUPOLD VX-3I 4.5-14X40MM MATTE DU		789.99	562.07	$562.07	N
Serial Number: 187060AC								
1.00	0.00	030317010218	LEUPOLD VX-3I 3.5-10X50MM CDS MAT		764.99	546.04	$546.04	N
Serial Number: 458597AC								
1.00	0.00	030317108113	LEUPOLD VX-2 4-12X50MM MATTE DUP		659.99	472.53	$472.53	N
Serial Number: 189647AD								
1.00	0.00	030317138745	VX-1 3-9X40mm MATTE DUPLEX		299.99	218.49	$218.49	N
Serial Number: 171626AD								
1.00	0.00	030317581602	RIFLEMAN 3-9X50MM MATTE WIDE DUF		369.99	281.43	$281.43	N
Serial Number: 416316X								
1.00	0.00	030317586805	LEUPOLD RIMFIRE FX-1 4X28		319.99	240.89	$240.89	N
Serial Number: 202137A7								
1.00	0.00	030317666705	VX-3L 3.5-10X50 MATTE DUPLEX	OUT	849.99	728.89	$728.89	N
Serial Number: 135008ac								
1.00	0.00	030317670900	REDFIELD REVOLUTION3-9X40 MATTE		319.99	224.11	$224.11	N
Serial Number: 183153AD								
1.00	0.00	030317671105	REDFIELD REVOLUTION 4-12X40 MATT	OUT	399.99	279.45	$279.45	N
1.00	0.00	030317671150	REDFIELD REVOLUTION 4-12X40 MATT	OUT	419.99	258.47	$258.47	N
Serial Number: 172031AC								

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Invoice To Account No.: 44500712

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PARTS INVOICE

Invoice No: 1304143
Date: 10/13/2017
Page: 2 of 2
Payment Type: Account

Supplied Quantity	Back Order Quantity	Part Number	Part Description	Bin Loc	List Price	Net Price	Extended Price	Tax Ind
1.00	0.00	686775032455	STEINER SAFARI ULTRASHARP 10X26		249.99	192.27	$192.27	N
Serial Number: 4477 0900								
2.00	0.00	887157014216	SPYPOINT XCEL HD2 HUNTING EDITIOI OUT		349.99	234.36	$468.72	N
1.00	0.00	887157901288	XCEL HD SPORT CAMERA		249.99	170.00	$170.00	N
1.00	0.00	3671	OTHER PARTS		12,843.59	12,843.59	($12,843.59)	N

Invoice Notes:
stolen billed per colin

INVOICE CONTAINS $5,455.43 DISCOUNT

Customer PO No:
Tax Exempt No: Conversion
Salesperson: SHEA COCHRANE

Parts: $12,843.59
Misc: ($12,843.59)
Deposit: $0.00
Total: $0.00

HST No : 849733381

*** DOCUMENT COPY ***

TERMS AND CONDITIONS
FINANCE CHARGE of 2% per month (24% ANNUAL PERCENTAGE RATE) added from first of month following purchase, on past due accounts

Individual Special Ordered Parts under $35 are non-returnable as per our suppliers return policy. Electrical parts are nonreturnable if package is open. All parts must be clean & in original package to be eligible for return. 20% restocking charge on special ordered parts. Clearance Items are non-returnable. Freight charges are non-refundable. Returned goods must be accompanied by this invoice.

Received by: ..... Date: .....

(*Exhibit "11"*)

[27] At a subsequent search of Mr. Trites' residence in Moncton, New Brunswick, some of the above stolen items were recovered. None were recovered at the residences of either Messrs. Beers or LeBlanc.

First similar fact incident

[28] This incident occurred a little over a week later, on October 9, 2017, at 4:24 a.m. at "The Gun Dealer" located at 153 Harvey Road, McAdam, New Brunswick.

Both Messrs. Beers and LeBlanc have subsequently pleaded guilty with respect to it. The town of McAdam is about a three-hour drive from their homes in Moncton. They were with another individual, later identified as Kyle Hooten.

[29] This store doubles as an Irving gas station, and the two accused are seen on still photographs taken from surveillance footage October 7, 2017, purchasing gas for the red GMC Sierra owned by Mr. Beers' grandfather (*Exhibit "1", p. 2*). These photos were introduced through the testimony of RCMP Cpl. Peter Lach, one of the officers who investigated this particular break-in.

[30] In the above referenced photographs, Mr. Beers is observed walking away from the Sierra into the gun store. The third page of the exhibit consists of a photograph depicting him standing in front of the cash register. In the top left-hand side of that photograph is the area in which the firearms are displayed.

[31] The next picture shows Mr. LeBlanc standing beside two glass showcases which display a number of handguns. The final two photographs in Exhibit "1" show both he and Mr. Beers in the process of exiting the store, Mr. LeBlanc doing so after having apparently made a small purchase. At one point, the same silver Impala which is later used in the break-in on October 9, 2017, shows up but no one exits the vehicle. It is observed driving away from the premises with the red GMC Sierra.

[32] As earlier noted, on October 9, 2017, at 4:24 a.m., The Gun Dealer is broken into. Messrs. Beers and LeBlanc enter the store, after having used the Impala vehicle as a battering ram to shatter the glass entrance door, and having used a sledgehammer to finish the job. They run to the display cases containing the firearms and use the sledgehammer once again to smash them open. They have black duffel bags with them, which had earlier been purchased at a local Superstore.

[33] They were interrupted by the RCMP while still in the store. They were able to exit through a rear door, and jump into the silver Impala, which Hooten had pulled around to the rear of the premises upon the arrival of the police. They drove off and a chase ensued, during the course of which both Messrs. Beers and LeBlanc jumped out of the vehicle and fled through adjacent woods on foot. A police dog track led to the arrest of Mr. Beers, but did not result in Mr. LeBlanc being apprehended at the time. During the track, however, the DNA on some recovered clothing confirmed that it had been worn by the latter.

[34] Initially, after the arrest, both accused provided statements to the police saying that they had been in Halifax during the time of the offence. Subsequently, however, as has been previously noted, both accused pled guilty to the McAdam offence.

Similar fact evidence – second incident

[35] Mr. Beers has also pled guilty to this incident, and has been sentenced in relation to it. A summary of the facts with respect to it is provided by the Crown:

> On Tuesday, January 23, 2018, at 4:52 a.m., a break and enter occurred at Target Sports located at 14 Stalwart Industrial Drive, Stouffville, Ontario. The suspects arrived in a dark coloured Dodge Journey – the same make, model, and colour as one stolen in Georgetown, Ontario and forced entry into the building. The suspects appear to be wearing items purchased from Walmart in Burlington, Ontario, observed at theft locations at 408 Maple Avenue, 9989 Trafalgar Road, and 13515 Highway 7 or seized after arrest. Once inside, metal bars also seized after arrest, were used to smash glass storage cases, and a total of 48 firearms are stolen. Black "Team Canada" hockey bags, purchased from Walmart, were used to transport the items from the store to the stolen Dodge Journey. A tag from one "Team Canada" hockey bag was later found inside Target Sports with a UPC # code.
>
> Mr. Beers is arrested several days later driving a red Sierra truck used in the Halifax break and enter. He is still in possession of several of the handguns and a large quantity of cash [taken from Target Sports] at the time of arrest.
>
> (*Crown brief, p. 4*)

A. Admissibility of the similar fact evidence.

i) The Law

[36] It is usual to begin the discussion with reference to *R. v. Handy*, 2002 SCC 56, and, in particular:

> 55. Similar fact evidence is... Presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.

[37] It is generally viewed as a species of evidence of bad character, hence its presumptive inadmissibility. Great care must be taken, when such evidence is being considered by the Court in the course of its "gatekeeping role", to identify the specific relevance of the evidence sought to be admitted within the context of the particular charges which an accused is facing.

[38] In particular, evidence that tends merely to show that the accused is a "bad person" with a tendency to commit criminal acts, or even a particular type of offence like the one(s) with which he is charged, is appropriately stigmatized as evidence of propensity and is almost always inadmissible. Among other things, the probative value of such evidence is invariably less than its prejudicial effect.

[39] Indeed, an especially high level of vigilance is required when similar fact evidence of a "morally repugnant act" is at issue. In *R. v. Shearing*, [2002] 3 SCR 33, the Court pointed out that the potential taint or prejudice to the accused introduced by such evidence requires a more than correspondingly steep probative value in order to overcome it (see paras. 71 – 72).

[40] The Crown has cited *R. v. Lepage*, (1995) Carswell Ont 3 (SCC) which dealt with similar fact evidence within the context of a drug trafficking trial. Throughout that decision, Sopinka, J.'s analysis reveals how close to the line admissible evidence may sometimes come to evidence of mere propensity. For example, consider the following:

> 41. The evidence is not being adduced solely for the purpose of showing that the respondent is likely to have committed the crime because he is the type of person who would be likely to possess drugs. As I stated above, this would be inadmissible character evidence based on the criminal disposition or propensity of an individual. Rather, the evidence of Thelland merely illustrates that someone who is in the business of dealing narcotics has more opportunity and is more likely to be in possession of narcotics. In this regard, the comments of Finlayson, J.A., in dissent, are apposite (at pp. 45-46):
>
> > Weiler J.A. is of the view that much of Thelland's testimony was inadmissible, being evidence of bad character. She criticizes this evidence as being directed at the [respondent's] disposition rather than his specific ownership of the drugs. I respectfully differ in this regard: I accept that Thelland's evidence did cast a shadow on the character of the accused, but it was, I think, highly probative with regard to the matters at issue in this case. Where evidence is very relevant to the principal facts in dispute, it should be admitted with due regard to its possible prejudicial effects.
> >
> > Thelland was a friend of the [respondent] and lived with him in the same house. He stated that the [respondent] was a drug dealer and that he owned the drugs in question. This evidence is highly probative to a charge that the [respondent] had these drugs in his possession for the purposes of trafficking. Any objection would go to possible hearsay with respect to some of it and to weight with regard to all of it. Indeed, a vigorous cross-examination exposed these very frailties in this portion of Thelland's testimony.

[First emphasis added]

[Second emphasis in original]

> 42. ... Furthermore, it should be noted that no objection was taken to the admissibility of Thelland's evidence at trial or at the Court of Appeal. This is another indication which supports the conclusion that the evidence was not simply character evidence but was admissible due to its probative value regarding possession. Given the manner in which the evidence was introduced, I am not prepared to find that it was misused as evidence of disposition merely. Provided its use was so limited, its probative value overbore its prejudicial effect. Therefore, the trial judge was entitled to consider Thelland's testimony, along with the fingerprint evidence, in deciding whether, on the facts of the case, an inference of guilt should be drawn against the respondent.

[Emphasis added]

ii) Analysis – what is the probative value of the evidence of the McAdam and Stouffville incidents?

[41] The Crown has an obligation, at the outset, to identify the probative value of the similar fact evidence to the live issue(s) in the case which the accused must meet. Counsel has done so in the following terms:

> ...the issues relating to similar fact can be enumerated (but not necessarily limited) in the following manner:
>
> 1. Identification of the accused as the perpetrators of the break and enter;
> 2. *Modius [sic] operandi* of the perpetrators;
> 3. To dispel the notion of innocent association;
> 4. To dispel the notion that there is any innocent explanation.
>
> (*Crown brief, p. 8*)

[42] The obvious starting point involves an assessment of the relevance and probative value of the similar fact evidence under consideration in this case. I begin with some observations. For one thing, the Court does not need to fret about whether the facts in the other two scenarios being put forward have actually occurred. We can accept that they did occur, that Mr. Beers was involved in both of them, and Mr. LeBlanc in one of them (the one at The Gun Dealer in McAdam, New Brunswick). We know this because Mr. Beers has pleaded guilty to both of these other incidents, and Mr. LeBlanc has done so as well with respect to the one in which he was involved.

[43] In both the McAdam incident, in relation to which he initially denied that he was responsible, and in the instant case, Mr. LeBlanc claimed to have been picked up by a third-party, who drove him home before the crime in question was committed. In both the McAdam and the Stouffville incidents, the red GMC Sierra owned by Mr. Beers' grandfather, the same one used in the case at bar, played a prominent role.

[44] In McAdam, video evidence placed Mr. Beers exiting the Sierra approximately 40 hours before the break and enter, after purchasing some gas. He then entered The Gun Dealer store, along with Mr. LeBlanc, who also got out of the vehicle. The two of them walked around the store. A still photograph from that video surveillance shows (as a we have already seen) Mr. LeBlanc paying particular attention to the handguns and their display cases, the ones which were subsequently smashed, and the handguns taken during the early morning hours of October 9, 2017. This, it is argued, is the same behaviour exhibited by Beers, LeBlanc, and Trites in "scoping out" the Green Diamond Equipment store the afternoon before it was hit (in the case at bar).

[45] Later, the red Sierra appears to leave The Gun Dealer's premises on October 7, 2017 at the same time as a (later arriving) silver Impala (the one later used to crash into the door of The Gun Dealer during that the break and enter) does.

[46] In the Stouffville, Ontario incident (January 2018) the same red Sierra is used in a similar capacity, which is to say, as an adjunct to a car which was stolen prior to the break-in in that case. Many of the weapons stolen on that occasion from Target Sports were subsequently found in the Sierra, along with a quantity of cash.

[47] What does this all amount to? The Court in *Handy* provides this guidance:

> 91. References to "calling cards" or "signatures" or "hallmarks" or "fingerprints" similarly describe propensity at the admissible end of the spectrum precisely because the pattern of circumstances in which an accused is disposed to act in a certain way are so clearly linked to the offence charged that the possibility of mere coincidence, or mistaken identity or a mistake in the character of the act, is so slight as to justify consideration of the similar fact evidence by the trier of fact…
>
> [Emphasis added]

[48] I pause to observe that the methodology adopted in the similar fact cases does not have to be identical to the process used in the case at bar. It is trite to observe that almost no two crimes could be characterized as such.

[49] So, I consider the fact that one of the similar facts (the McAdam incident) occurred within a week of the incident at the Green Diamond store. It also involved Mr. LeBlanc and Mr. Beers, and the latter's red truck was there. (The third participant, Mr. Hooten, was involved in this incident, but is not alleged to have been involved in the case at bar.) Both accused are observed checking out The Gun Dealer approximately 40 hours before they committed the break and enter, and they also are observed looking at guns at the Green Diamond, in the case at bar, approximately eight hours before that store was broken into. McAdam, New Brunswick is a long drive from Moncton (approximately two to three hours). The trip from Moncton to Halifax is a long drive as well.

[50] As for the Stouffville, Ontario incident, Mr. Beers was involved. He was one of three people to have committed the offences at Target Sports. There is no evidence that Mr. LeBlanc was involved. Mr. Beers' red GMC Sierra was also there with him. Duffel bags were used, which appeared to have been earlier purchased by Beers at a Walmart store. Ontario is a much longer drive from Moncton than either McAdam or Halifax.

[51] Obviously, the hit at the Green Diamond store, and at the other two locations involved some orchestration. Messrs. Beers and LeBlanc were "local" when both the McAdam and the Green Diamond (Halifax) incidents occurred. Mr. Beers was obviously "local" when the Target Sports break-in occurred in January 2018.

[52] Mr. Beers is present at the McAdam and Stouffville incidents. Mr. LeBlanc is only present at McAdam. Mr. Beers' red truck features in all three incidents (to a greater or lesser degree). The McAdam and Stouffville incidents are distinguished by the use of a stolen car to facilitate either the break-in or the getaway. There is no evidence of such being employed in this case in any capacity.

[53] Notwithstanding the fact that Mr. Beers has pleaded guilty with respect to his participation at McAdam and Stouffville, I do not consider the similarities urged by the Crown between the case at bar and the other two incidents to be particularly noteworthy. The fact that a red truck features (to some degree) in the other two is hardly surprising given that it is Beers' method of transportation from Moncton. If he is away from Moncton, he would be driving that truck.

[54] The fact that firearms and associated paraphernalia were targeted in all three instances is not indicative of a relatedness sufficient to connect all three. No evidence has been led as to the ubiquity of crimes targeting handguns or firearms. Moreover, there is nothing before the Court suggesting that they are rare, or that it

is unusual for potential perpetrators to "get the lay of the land", so to speak, beforehand, in order that they may quickly orient themselves while later committing the offence itself.

[55] It appears that different methods were used to gain entry in all three cases. It is true that all three cases involved display cases being smashed. One would expect this to be so given the commonality of the manner in which each shop displayed its wares to the public (i.e., in glass display cases).

[56] Considered cumulatively, the methodology is not distinctive in the three cases, nor is it even particularly similar. Those similarities that do exist are, in my view, more generic than specific or distinctive. None of the descriptors in *Handy*, such as “signature”, “hallmarks”, or “fingerprints”, or “calling cards” are remotely applicable to this evidence.

[57] Among other things, the Crown argues that Mr. Beers' connection to both, and Mr. LeBlanc's connection to one of them, in conjunction with the other circumstances, can be used to dispel the notion of any innocent association or any innocent explanation. What they are really saying is that the other criminal offences demonstrate that when Messrs. Beers and LeBlanc and the red truck are in town together, the two accused are there to do a break-in. With respect, this is unadorned propensity reasoning.

[58] Added to this, I once again observe the fact that only one of the similar fact scenarios proffered by the Crown relates to Mr. LeBlanc. It is very difficult to meaningfully juxtapose the facts in the case at bar with anything, or extract any common patterns or methodologies, when only one comparator is being put forward in relation to him.

[59] If I am wrong, and the other incidents are relevant to the case at bar, their probative value is insufficient. It is vastly outweighed by the prejudice which would accrue to the two accused by the admission of this evidence.

[60] Mr. Beers has pleaded guilty to breaking and entering and stealing dozens and dozens of handguns in the other two cases, Mr. LeBlanc to one. This raises the risk that the evidence could be used to infer guilt as a result of the "...forbidden chain of reasoning... from general disposition or propensity" (*Handy*, at para. 139) notwithstanding the absence of a jury. The authorities establish that the possibility of reasoning prejudice cannot be dismissed out of hand.

[61] The effects of admission of similar fact evidence can be pervasive. Some cases have gone so far as to describe it as "poisonous". As earlier pointed out in *Shearing*, the strength of such evidence, in order to be properly admitted, must rise in proportion to the degree of either moral or reasoning prejudice that it carries along with it.

[62] It is true that this is a Judge alone trial. Sometimes this observation is made to further the suggestion that any potential prejudice may be assuaged or attenuated. After all, Judges are trained to use evidence properly. However, the effect of the authorities on this particular point cannot be said to be unanimous.

[63] Some authorities agree that the risk of prejudice, as a whole, is diminished in a judge alone trial. Consider what the Court said in R. v. B(T), 2009 ONCA 177, at para. 27:

> As the proposed similar fact evidence in this case was related to all the counts in the indictment and the evidence was already before the court, and because this was a non-jury trial, reasoning prejudice was not a real issue. Unlike cases such as *Handy*, this was not a case where the proposed similar fact evidence was extrinsic to the charges before the court and required extra witnesses to present it. The only additional time needed as a result of the similar fact evidence was the time required to argue the motion to admit it. As trial judges are presumed to know the law and the proper and improper uses of evidence, it seems counterintuitive that similar fact evidence could be excluded in a non-jury trial based on the trial judge's determination that the evidence would confuse him or induce him to put more weight on it than is logically justified.
>
> [Emphasis added]

[64] However, at paras. 36 - 37, the Court did go on to make note of:

> 36. Unlike *Handy*, in this case there was no extrinsic evidence tendered as similar fact evidence. The proposed similar fact evidence was already before the court as evidence on the counts in the indictment. There was no likelihood that the evidence would take the defence by surprise. Unlike *Handy*, there was no extrinsic evidence that would capture the attention of the trier of fact to an unwarranted degree. In this non-jury trial, its potential for prejudice, distraction and time consumption was largely absent and its prejudicial effect, if any, did not outweigh its probative value. There was no danger of judging the respondent's actions on the basis of character.
>
> 37. In my view, the evidence of the respondent's misconduct is so relevant and cogent that its probative value in the search for truth outweighs any potential for misuse. The proposed evidence had common characteristics with acts charged in the indictment and, therefore, was admissible as supportive of the evidence of the

> complainants. It was highly probative in that the similarities make it unlikely that the complainants were lying or mistaken about what happened to them. As Binnie J. said in *Handy,* at para. 42:
>
> > In any case, the strength of the similar fact evidence must be such as to outweigh "reasoning prejudice" and "moral prejudice". The inferences sought to be drawn must accord with common sense, intuitive notions of probability and the unlikelihood of coincidence. Although an element of "moral prejudice" may be introduced, it must be concluded by the trial judge on a balance of probabilities that the probative value of the sound inferences exceeds any prejudice likely to be created.

[65] With that said, the potential "impact" of similar fact evidence is not a commodity that may be easily quantified. Consider, for example, *R. v. Villeda*, 2011 ABCA 85 at para. 18:

> Now that we have the *voir dire* reasons of the trial judge, we respectfully endorse the first panel's analysis. We would add only that paras. 18 and 19 of the trial judge's reasons betray a further error of law. The trial judge seems to have proceeded on the basis that the absence of a jury minimized the risk of forbidden reasoning and resulting prejudice to the Appellant. <u>While it is true that judges, by virtue of their training and experience, are better able to instruct themselves regarding the dangers of similar fact evidence, the ability to self-instruct is not a panacea. Human nature and its attendant weaknesses and vulnerabilities may, on occasion, intrude upon the most rigorous and conscientious fact-finding</u>. The spectre of moral or reasoning prejudice is always a concern regardless of who is sitting in judgment of the guilt or innocence of an accused.
>
> [Emphasis added]

[66] Then we have *R. v. Fletcher*, 2013 ABCA 74 at para. 23:

> Nor should we infer that the trial judge did not consider what the prejudicial impact of admitting the similar fact evidence would be from a lack of engagement with the Crown's proposition that the risk of prejudice is reduced where the trier of fact is a judge rather than a jury. The Crown argued that the prejudicial effect of admitting the proposed similar fact evidence in this case could have been adequately offset by the trial judge simply warning herself against the risk of prohibited propensity reasoning. <u>We do not accept that proposition. It implies that similar fact evidence, with any probative value, no matter how little, will always be admissible in judge alone trials, provided that the trial judge gives herself the appropriate warning about prejudice. That is not the law</u>. Similarly, the fact that the admission of similar fact evidence does not compel the conclusion that the trial judge would have convicted had it been admitted does not annul the requirement for an examination of its potentially prejudicial effect.
>
> [Emphasis added]

[67] The facts alleged in this case are reprehensible. They involve the theft of firearms presumably intended for the street, all of which incrementally contribute to the increase of gun violence, including shootings and deaths.

[68] It is true that such evidence does not stir up sentiments as strong as those encountered in a fact scenario like *Shearing*, in which the evidence concerned the sexual abuse of adolescents by a religious authority figure. But it is not neutral by any means.

[69] With great respect, my views are more closely aligned with those previously cited in *Villeda:*

> "Human nature and its attendant weaknesses and vulnerabilities may, on occasion, intrude upon the most rigorous and conscientious fact-finding."

[70] A portion of *Fletcher* also bears emphasis:

> [The proposition] … implies that similar fact evidence, with any probative value, no matter how little, will always be admissible in judge alone trials, provided that the trial judge gives herself the appropriate warning about prejudice. That is not the law.

[71] I have not been persuaded that the evidence in relation to the McAdam and Stouffville is properly admissible in this case. Alternatively, if admissible, the probative value of such evidence is outweighed by the prejudicial effect of its admission. In the circumstances of this case, I deny the Crown's motion to admit similar fact evidence.

[72] As a consequence, the Crown's case against the two accused will be based entirely upon the circumstantial evidence in the case at bar.

What is circumstantial evidence?

[73] First, it is important to articulate the point at which the circumstantial evidence is measured.

[74] In the seminal case of *R v. W.D.*, [1991] 1 SCR 742, the Court articulated the well-known tripartite test. In short, if I believe both accused, or either of them, I must acquit both of them, or the one that I believe, as the case may be. Even if I do not believe either accused, I must still acquit one or both of them if I am left in

reasonable doubt as to the guilt of one or both of them. Finally, even if not left in reasonable doubt by anything they said, I still must determine whether the Crown has proven their guilt beyond a reasonable doubt. In this case, it is this latter stage which will involve the weighing of circumstantial evidence.

[75] To begin, then, it is certainly the case that neither accused elected to testify or offer evidence. Nonetheless, the Crown did enter into evidence the statements that each made to the police in relation to these offences. Mr. LeBlanc told the police that, rather than travel back to Moncton with the two individuals with whom he drove to Halifax (Beers and Trites), he had somebody local pick him up at Ralph's and drive him back to Moncton. He did not provide the Crown with notice that he intended to call alibi evidence. Beers, on the other hand, admits to being in the vehicle but says he was in the backseat, mostly asleep between Halifax and Moncton, does not know who was driving his grandfather's Sierra, and does not know who threw the backpack with the rifle scopes into the backseat with him.

[76] I have considered each accused’s denial of involvement within the context of what they said to the police, as well as within the context of all of the other admissible evidence in this case. I did not believe either of them, nor was I left in reasonable doubt of the guilt of either by virtue of anything that they said to the police. However, the law recognizes that there is no onus upon either accused to offer evidence, explain anything, or "dis-prove" his guilt. This brings us to the third factor outlined in *W.D.*

[77] As the Crown's case is built on circumstantial evidence, relevance was critical to its admission. But there are degrees of relevance. Several pieces of evidence that are only somewhat probative individually, may cumulatively acquire strength through numbers. There is no minimum threshold of relevance or probative value that an individual piece of evidence need attain before it may be admitted and considered in tandem with all of the other evidence.

[78] As the Court stated in *R. v. Arp*, [1998] 3 SCR 339:

> 38. To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue"… As a consequence, there is no minimum probative value required for evidence to be relevant.

[79] Moreover, where one or more elements of an offence are based entirely upon circumstantial evidence (as in this case), I remind myself of something further. In order to convict, I must be satisfied that Messrs. Beers and LeBlanc's guilt is the only reasonable inference that may be drawn from the entirety of that evidence (*R. v. Villaroman,* [2016] 1 S.C.R. 1000, *R. v. Griffin*, [2009] 2 S.C.R. 42).

[80] With respect to the break and enter s. 348(1)(b), there are five components to the charge:

(i) identity of the two accused;

(ii) time and place;

(iii) that the two accused broke and entered the Green Diamond;

(iv) that they intended to do so; and

(v) that they committed the indictable offence of theft when they entered.

[81] With respect to the s. 98(1)(b), break and enter and steals a firearm charge, I must be satisfied that the first four criteria above have been proven, and also that the theft involved firearms.

[82] With respect to the four s. 91(1) charges (possession of firearms) charges, the Crown must demonstrate:

(i) identity of the accused;

(ii) time and place;

(iii) possession of a firearm, prohibited or restricted firearm, or a registered or non-registered firearm; and

(iv) without a license or a registration certificate with respect to same.

[83] With respect to the four s. 92(1) charges, the elements are identical except that, additionally, the possessor must know that they are not the holder of either a license or a registration certificate with respect to the firearm in question.

[84] With respect to the four s. 96(1) charges, all of the elements for the s. 92(1) offences must be present, (it may extend to possession of ammunition) plus the

possessor must know that the weapon or ammunition was obtained through the commission of an offence.

[85] And finally, there is the s. 465(1)(c) charge, to which I will return.

[86] Dealing with all of the charges except the s. 465, for the moment, the only real issue is identity. All of the other constituent elements of the offences are clearly met.

[87] As I consider all of the evidence, I am cognizant that a piecemeal analysis is never appropriate. In addition, I do so mindful of the very helpful guidance offered by the Supreme Court of Canada on the topic, including that contained in *Villaroman*:

> 35. At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
>
> 36. I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
>
> 37. When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how

> irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
>
> [Emphasis added]
>
> 38. Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.
>
> 39. I have found two particularly useful statements of this principle.
>
> 40. The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:
>
> In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed.
>
> [Emphasis in original]
>
> 41. While this language is not appropriate for a jury instruction, I find the idea expressed in this passage - that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative - a helpful way of [page1021] describing the line between plausible theories and speculation.
>
> 42. The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.
>
> 43. Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

[88] So, what do the individual pieces of (relevant) circumstantial evidence add up to?

[89] Having considered the entirety of the evidence, some portions acquire prominence when considered along with everything else:

(a) Beers, LeBlanc, and Trites are at least acquaintances, if not friends, all from the Moncton, New Brunswick area.

(b) All drove from Moncton to Halifax together, during the last few days in September 2017, in a red GMC Sierra owned by Mr. Beers' grandfather.

(c) All of them went to the Green Diamond store on September 30, 2017, spent time looking at the glass display cases holding handguns, rifles, and accessories, and, from the video security footage, appear on occasion, to discuss the wares. They also spent some time at a display featuring relatively low-end camouflage backpacks, picking one up on at least two occasions and examining it.

(d) On the evening of September 30, 2017, Beers, LeBlanc and Trites were together at Ralph's Place in Dartmouth, Nova Scotia. All three stayed until closing, which was either very late that night or shortly after midnight on October 1, 2017.

(e) Some time in the very early morning hours of October 1, 2017, the Green Diamond was hit. Three individuals are shown on the security footage gaining entrance to the establishment by virtue of a smashed pane in a glass delivery door.

(f) One of these individuals cut himself during entry. DNA samples taken from the blood on the broken glass matched that of Adam Trites. Mr. Trites eventually pled guilty with respect to the charges associated with this break and enter.

(g) The video footage taken by the security camera during the break and enter shows three individuals of the same bodily dimensions as those of Beers, LeBlanc and Trites, albeit disguised. This is to say, these dimensions correspond to the height and apparent weight of these individuals as depicted on the security footage taken the previous day, September 30, 2017, when the three visited the Green Diamond Store during business hours.

(h) Security footage of the break and enter shows the three participants running directly to the area of the store containing the handguns and rifles. The first of the three to arrive in the area (it does not appear to be the one with the bleeding hand identified as Trites) grabs a camouflage bag from the stand without even appearing to pause. All three congregate in the area where the handguns had been displayed. Some hesitation on the part of the three is observed, as well as some gesturing.

(i) The handguns, which had been displayed in a glass case at that very spot during the afternoon of September 30th, 2017 (when we know that the two accused and Mr. Trites were in the store) had been moved to a more secure area behind the counter.

(j) One of the three then proceeds directly to the glass rifle display case, pulls it off the rack, smashing it in the process, and removes a rifle. The individual with the bleeding hand, later identified as Mr. Trites grabs several more. The rifle scopes and some of the other accessories reflected in the document later submitted by Green Diamond to its insurers with details of its losses, were also taken.

[90] So, all three are in town, having travelled together from Moncton. All three are at the Green Diamond Store the afternoon prior to the break-in. All three are observed in the areas of the store that afternoon to which the perpetrators head directly after gaining entry early the next morning. All three pay considerable attention to some very low-end camouflage backpacks. All three spend the evening at Ralph's Tavern and leave when the establishment closed. The perpetrators knew the precise location of the backpacks, they appeared to know where the handguns should be, and that the rifles were near by.

[91] This is a circumstantial case, but the evidence is strong. It is capable of supporting a conclusive inference. This is to say that I find that the identity of Messrs. Beers and LeBlanc as the perpetrators of the offences with which they have been charged, is the only reasonable inference available to me on the basis of the evidence as a whole, except for the s. 465(1) charge. Put differently, the degree of probability that the occurrence of the facts proved would be accompanied by Beers and LeBlanc breaking into the Green Diamond Store, in concert with Trites, is so high, that the contrary cannot reasonably be supposed.

[92] I repeat, that in arriving at this conclusion, I have been very mindful that what one accused said in his police statement cannot be considered as evidence in relation to the other.

[93] Now we return to the s. 465(1) charge. It reads as follows:

> 465(1). Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:
>
> > (a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is

> guilty of an indictable offence and liable to a maximum term of imprisonment for life;
>
> (b) every one who conspires with any one to prosecute a person for an alleged offence, knowing that they did not commit that offence, is guilty of
>
> > (i) an indictable offence and liable to imprisonment for a term of not more than 10 years or an offence punishable on summary conviction, if the alleged offence is one for which, on conviction, that person would be liable to be sentenced to imprisonment for life or for a term of not more than 14 years, or
> >
> > (ii) an indictable offence and liable to imprisonment for a term of not more than five years or an offence punishable on summary conviction, if the alleged offence is one for which, on conviction, that person would be liable to imprisonment for less than 14 years;
>
> (c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable; and
>
> (d) every one who conspires with any one to commit an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.

[94] No evidence has been led by the Crown by which it could be established that either accused entered into an agreement to commit the offence. Although elements of planning are present (i.e., disguises, attendance at the scene during business hours), I observe that neither knowledge of, or participation in a crime, *simpliciter,* is sufficient. Absent evidence of the formation of an agreement to act together to achieve the common criminal goal, the charge of conspiracy is deprived of its required underpinning.

[95] I would acquit on the s. 465(1)(c) charge.

Conclusion

[96] As a result, I find the two accused, Scott Ronald Beers, and Troy Jeremy LeBlanc, guilty of all charges except the s. 465(1)(c) “conspiracy”.

[97] I expect that the parties will be able to agree on the application of *R. v. Kineapple*, [1975] 1 S.C.R. 729, with respect to some of the convictions. If not, I will receive written submission, from the Crown, no later than 45 days prior to sentencing, and from the Defence, no later than 30 days prior to sentencing, with a brief reply from the Crown, if necessary, 20 days prior to the imposition of sentence.

[98] Those will be the same filing deadlines that I will impose with respect to sentencing submissions.

Gabriel, J.