CITATION: R. v. COOK, 2010 ONSC 1188
COURT FILE NO.: CRIMJ(P)2171/07
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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
HER MAJESTY THE QUEEN	D. Rowcliffe, A. Weiler, for the Crown
- and -	
SHELDON COOK	P. Ducharme, for the Defence
	HEARD: November 10, 12-14, 17, 19-21, 24-6, 28, 2008; February 2-5, 18-19, 25-27/ May 6, 13, 19/ June 15/ August 17-21, 28, 2009; January 12, 14, 2010

JUDGMENT

HILL J.

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PART I

INTRODUCTION

[1] Sheldon Cook's residence was searched on November 18, 2005 by RCMP officers armed with a search warrant. Seizures were made resulting in his arrest. At the time, Cook was a police officer.

[2] This trial proceeded on charges relating to three seizures: 15 packages of white powder (unlawful attempt to possess a scheduled *C.D.S.A.* substance for the purpose of trafficking, breach of trust by an official), 21 MP3 players (theft, unlawful possession of stolen property, breach of trust by an official (x2)), and marihuana (possession for the purpose of trafficking).

[3] The prosecution alleged that the accused, while on duty, took advantage of his position as a peace officer to steal contraband out of police custody – the MP3 players and, about 100 days later, the packages of fake or ersatz cocaine. It was alleged that the marihuana was knowingly possessed by the accused.

[4] Three separate defences emerged at trial. The defence submitted that the 15 packages of ersatz cocaine were lawfully in Sheldon Cook's possession on orders from superior officers. The MP3 players were lawfully purchased by the accused's brother and were temporarily stored at the accused's residence. Unknown to both the accused and his brother, the marihuana was in one of a number of boxes of belongings of a former tenant of the accused's brother as the boxes were stored at the accused's home.

PART I I

THE EVIDENCE

Project Ocaper

[5] In the fall of 2005, authorities in Peru informed the Royal Canadian Mounted Police (RCMP) of a criminal conspiracy on the part of a drug cartel in Peru to export over 100 kg. of cocaine into Canada through the Pearson International Airport (PIA) in Toronto.

[6] RCMP Project Ocaper commenced with officers led by RCMP Sgt. K. Nicholson dispatched to Lima, Peru on November 10, 2005 to coordinate a joint forces investigation with Peruvian authorities.

[7] With the assistance of a non-police agent under the apparent control of the Peruvian police, a shipment of cocaine was intercepted by police investigators in

Lima. The identity of conspirators in Canada was unknown. In furtherance of setting up a controlled delivery to Canada, the cocaine was seized and replaced with flour packaged in 146 bricks or packages wrapped in brown tape each weighing, more or less, one kilogram.

[8] Five of the packages, each invisibly marked, contained 1.2 g. of cocaine. In addition, the RCMP Special I Branch outfitted packages of the surrogate cocaine with a total of five sophisticated devices for satellite tracking together with audio-receiving capabilities. Each device had a unique signature signal for tracking.

[9] Delivered to the Lima airport for export were 88 cardboard boxes each containing mangoes. Thirteen of the boxes contained the specially prepared bricks or packages covered by fruit. Only two of those boxes contained the GPS tracking devices.

[10] By the early morning hours of November 16, 2005, the 146 packages, the RCMP officers and Peruvian officials were in Canada. The load of mango boxes cleared Customs into an Air Canada Cargo warehouse at the PIA. Through the GPS tracking devices, RCMP surveillance was maintained on the shipment awaiting efforts to pick up the boxes for delivery to the Canadian cocaine distributors.

The Load Disappears

[11] During the afternoon of November 16, 2005, two employees of CDS Couriers, in receipt of $400.00 cash and documentation from an unknown person, attended the Air Canada Cargo warehouse with a 5-tonne truck. Between 6-7:00 p.m., they unloaded, from two large steel airline containers, 88 mango boxes onto four wooden skids or pallets. The courier employees shrink-wrapped the stacked boxes on each skid to keep the boxes from shifting in transit. The truck then headed out for its delivery address of 689 Alness Road in Scarborough.

[12] At about 7:00 p.m., Air Canada Security telephoned Sgt. Nicholson to ensure the police were aware that the mango shipment had left the warehouse. When Sgt. Nicholson checked with his surveillance team he discovered they remained in the vicinity of the warehouse. The RCMP tracking devices gave no indication that the mango boxes had left the warehouse and were on the move.

[13] According to Sgt. Douek of Special I Branch, environmental conditions can obstruct the transmitting signal of the GPS tracking devices.

[14] Understandably, Sgt. Nicholson experienced a feeling of panic. The load was lost. Unable to get the RCMP airplane in the air from London, Ontario, Special I teams armed with special receivers began grid searches of the Peel and Toronto regions by vehicle hoping to again pick up signals from the mango boxes.

The Couriers Panic Too

[15] On route to Scarborough, the couriers received a phonecall from an unknown person claiming that the original destination was closed requiring the mango load to be redirected to a new address, 570 Hazelhurst Road in Mississauga.

[16] On arrival at the new location, the couriers observed a mini-van there flash its headlights. The area was in darkness and there was no loading dock. Heard from the driver's area of the silver van were the words: "Are you coming or not?" The van then moved further into a truck trailer yard. Feeling nervous and suspicious, the couriers elected not to follow the van. Before driving away, they identified the van as a Dodge Caravan and recorded the vehicle's licence plate number.

[17] As the truck proceeded east on Lakeshore Blvd., the couriers next received a cellphone call directing them to deliver the mango boxes to the Highway #401 and Keele Street area. At about 7:20 p.m., the employees spotted the Peel Regional Police Service (PRPS) Community Policing Station (CPS) on Lakeshore Blvd. in Mississauga. They stopped the truck and went inside where they met Const. R. Bryant and related their story. They were nervous the mini-van might be following them.

[18] The CPS was scheduled to close at 8:00 p.m. Const. Bryant took the truck driver's keys and exited the CPS. The courier truck was parked directly out front of the building on the north side of Lakeshore Blvd. In the box or back of the truck, the officer found four skids of mango boxes. He opened the flaps of some boxes observing packages in brown wrapping. He suspected cocaine.

[19] The constable locked the roll-down door at the rear of the truck and re-entered the CPS. He asked Const. Murphy , the only other officer on duty at the

CPS, to drive the area to look for the silver mini-van while he remained with the courier employees.

[20] Const. Bryant contacted Detective Sgt. Phillips at the Criminal Investigation Branch (CIB) of PRPS 12 Division, reporting that he might have a truck full of cocaine outside the Lakeshore CPS.

The CIB is Deployed

[21] On November 16, 2005, Det. Sgt. Phillips was the officer in charge of 12 Division's CIB, both the general assignment unit and the break and enter unit. Shortly after 8:00 p.m., Const. Bryant phoned in the report of a possible truck-load of drugs. Phillips directed the young officer to ensure the truck was locked and to wait for the arrival of CIB officers.

[22] From the CIB general assignment unit, after a short briefing, Det. Sgt. Phillips assigned Consts. Warren Williams, Sheldon Cook and Jeff Chamula to immediately proceed to the Lakeshore CPS. As the senior constable in the CIB general assignment unit, Williams was the Acting/Detective on shift. As a participant in the TIPS program, the accused had been in the CIB for about a month. Chamula was also on a temporary assignment having come to the CIB general assignment unit at the beginning of November.

[23] Constables Williams and Chamula departed from 12 Division before the accused. Williams drove an unmarked CIB van, a Dodge Caravan, with Chamula as his passenger. On the short drive to the CPS, Williams used his cellphone to obtain additional information from Bryant. Chamula used a CIB Mike phone to alert other officers of the description of the van which may have followed the courier truck. At about 8:15 p.m., Williams parked his vehicle in front of the CPS behind the courier truck also facing west.

[24] The accused, driving an unmarked CIB car, an Impala, arrived at the CPS within five minutes of Williams and Chamula who were already inside speaking to Bryant and the courier employees. Cook was alone as, on this occasion, his usual partner, Const. Chaytor, remained at 12 Division working on a separate investigation. The accused, also outfitted with a Mike phone, parked his vehicle behind the CIB van facing west. On the accused's evidence, there was about a car-length gap between the truck and the van and the same distance between the van and the Impala. The accused testified that he had a black satchel bag with a strap in the trunk of his vehicle containing a daytimer, a phone list, release papers and other documents.

[25] To Det. Sgt. Phillips' recall, it was close to 9:00 p.m. when he approached Detective Marty Rhykoff, the shift supervisor in the CIB break and enter unit, requesting that he too attend the CPS scene. He did so being of the opinion that Rykhoff, having previously worked in the Morality Branch, would have expertise which might prove useful if the truck in fact contained drugs.

[26] According to Det. Rykhoff, after hearing from his supervisor, Det. Sgt. Phillips, about a load of mangoes "full of dope" at the Lakeshore CPS, he thought marijuana might be involved. He telephoned Const. Williams who was at that point the on-scene supervisor. After securing information from Williams, according to Rykhoff:

> I – I told him at that time that this load of dope, that – that was explained to me, it might be something that was re – related to some information that I had received and that I'd passed on to Morality, and I told him that the target of that information lived in the Lakeshore area. And then I departed by myself and went down to the Lakeshore Community Station.

Rykhoff testified that he did not take a Mike phone to the CPS.

Search of the Courier Truck

[27] For a period of about one (1) hour, roughly between 8:30 p.m. and 9:30 p.m., the CIB officers (Rykhoff, Williams, Cook and Chamula) and Const. Bryant were for the most part, in the CPS or the rear of the courier truck. Largely because the CIB officers made no contemporaneous notes of this period and of what went on during the remainder of their shift, precise reconstruction of events, times, and comings and goings is sacrificed to reliance on human memory. Rykhoff, Williams and Chamula were subsequently disciplined under the *Police Services Act* (the *P.S.A.*) for neglect in failing to make timely notes.

[28] Const. Chamula acknowledged his neglect, informing the court he did not make notes because other things were going on. The witness described a process of notes made as a group: "…it's something that we try to do to make sure that we're all on the same page and recalling everything accurately". He expected an opportunity to sit down with the other officers – an opportunity which never arose.

[29] At about 8:30 p.m., Const. Bryant unlocked the rear door of the courier truck and retained the keys. There was an interior dome light overhead in the back of the truck. Bryant showed Williams, Chamula and the accused the mango box or boxes he had opened revealing packages beneath mangoes. He then

exited the truck to watch over the courier employees and may also have stood between the double glass doors at the front of the CPS as a look-out for the silver van.

[30] Const. Chamula, as did the others, observed four skids of cardboard mango boxes. Each box had four top flaps. There were packages in brown or beige packaging tape in a box identified by Bryant. Const. Williams recalled that about eight feet of floor space was clear inside the truck's back door before one encountered the skids of boxes.

[31] The evidence of the CIB officers, as well as Const. Bryant, was not consistent with respect to the timing or order of events during the search of the back of the courier truck. Nor was there precise consistency regarding the number of exits and entries to the truck or when phonecalls were made to 12 Division and to the PRPS Morality unit. What is clear is that at no time was any one officer alone in the courier truck. Over a period of no more than about 60 minutes, a proportion of the load of mango boxes was separated with boxes just containing the suspicious packages placed at the right rear corner of the back of the truck.

[32] At some point, the suggestion was made to slice open one of the packages. The accused testified it was Acting/Det. Williams' idea to do so, soon after they first entered the truck, in order to see what they were dealing with. Const. Chamula recalled the discussion, 5 or 10 minutes after they entered the truck, but could not recall who raised the idea. Const. Williams testified that it was not his suggestion and that some time later, in his words, "Sheldon and Marty had nicked a bag and were looking at the substance that was inside".

[33] Sheldon Cook testified that he left the truck to obtain gloves and a knife. Det. Rykhoff was not on scene when, on his return, and acting on Williams' "order", he made a small slit in one package. He saw a white, chalky, powdery substance. He then rubbed a bit of the powder between his thumb and index finger. On the accused's evidence, from his experience in the Street Crime Unit, this type of "street level sort of feel test" was used to see if oily resin would appear consistent with cocaine. The accused testified in-chief that with no oily residue in the rub test, the lack of an acetone odour in the truck and the dull non-crystalline appearance of the substance, he did not believe it to be drugs. In cross-examination, the accused added that he told Williams his view. He also added the observation that the powder appeared "floury" and a little greying and therefore not as white as cocaine. Const. Chamula testified that once the package was opened, "it was basically agreed that…it was drugs" and most likely

cocaine. Chamula had no recall of anyone touching the powder. To his recall, Cook suggested labelling the box from which the package was removed as Box #1.

[34] According to Warren Williams, he was not paying attention during the rub test. In his in-chief testimony, he stated he thought it was Det. Rykhoff doing the test. In cross-examination, the witness maintained that the accused was doing the rub test. Under further questioning, Williams claimed he could not recall who performed the test.

[35] All the officers, excepting Const. Bryant, participated in some way in the search and sort process. The CIB officers were all within a few feet of one another.

[36] It appears on the evidence that the CIB officers were initially in the truck anywhere from 15 to 30 minutes during which some additional boxes were opened and searched. According to Const. Williams, he believed that given the way the non-commercially wrapped packages were concealed, they were likely dealing with drugs. To his recall, on the first skid there were boxes with just mangoes and some containing packages and mangoes.

[37] The accused and Const. Chamula testified that after this first session of inspection of the truck's cargo, the officers all left the truck and re-entered the CPS as it was clearly a matter for the Morality unit which dealt with illicit drugs beyond street level quantities. Const. Bryant believed that the three CIB officers came back into the CPS at about 9:00 p.m. To the accused's recall, Williams had phonecalls with Det. Sgt. Phillips and Det. Rykhoff. Williams said that Rykhoff was on his way and that he had information on a target in the area.

[38] On Const. Williams' evidence, when Det. Rykhoff arrived on scene, he climbed up into the back of the truck. Williams did not have a recall of having left the truck prior to Rykhoff's arrival. On Williams' evidence, from a telephone discussion with Rykhoff prior to entering the truck the first time, he knew the detective was coming to help. Det. Rykhoff testified that when he arrived, he replaced A/Det. Williams as the scene supervisor. He saw the three CIB officers were in the back of the truck. On his evidence, he climbed into the truck and observed a number of packages discovered in the mango boxes. He was shown the sliced-open package and was advised by the accused that it was possibly coke or heroin.

[39] The witnesses expressed varying recollection and opinions about the lighting in the back of the courier truck where there was an overhead dome light.

Chamula described the visibility as, “it wasn’t very bright”. The witness recalled that he was holding a flashlight. The accused testified that with the truck’s rear door closed, the lighting was still sufficient to see what they were doing. Det. Rykhoff described it as very dark in the back of the truck. Const. Williams recalled an orange glow from streetlights with a good light inside the truck.

[40] Sheldon Cook testified that the mangoes were rotting with mango juice on some of the packages. On his evidence, some mango boxes were soggy and some broke in the truck. Det. Rykhoff described the mangoes as sticky, ripe and moist but he had no recall of any boxes falling apart. Const. Williams recalled rotting mangoes and some boxes dampened and weak. Const. Chamula had no recall of any boxes falling apart.

[41] Det. Rykhoff testified that after 5 minutes in the truck he left to telephone Morality as Williams had not yet done so. He could not recall whether any of the officers re-entered the CPS with him. He telephoned Det. McTiernan at Morality and informed him that an unknown substance had been discovered in a load of mangoes. On Rykhoff’s evidence, McTiernan said he would send officers to the scene.

[42] Const. Chamula recalled Rykhoff’s arrival occurring after the truck had been re-locked. To his recall, from perhaps 9:00 to 9:30 p.m., there was a sorting of the mango boxes by the CIB officers with the truck door pulled down to within a foot of being closed, as a security measure. Boxes with just mangoes had been placed toward the left rear of the truck near the back sliding door and reconstituted boxes of just packages were at the right corner.

[43] The accused testified that after Williams discovered two wired packages, and Det. Rykhoff stated that he thought he might know who was responsible and that he “was going to go and make some checks” or phonecalls, Rykhoff rolled up the truck’s back door, jumped out, pulled a box of separated packages from the right rear corner, rolled the door back down and left. He did not see where the detective went. According to the accused’s testimony, because Rykhoff was the ranking detective on scene, he “fully expected he had a reason” for taking the box. When Det. Rykhoff returned to the truck after 10 to 15 minutes, he did not return with the box.

[44] Det. Rykhoff testified that he never removed a box of sorted packages from the truck when he left to use the CPS telephone. Const. Chamula had no recall of Det. Rykhoff leaving the truck with a box.

[45] Const. Williams recalled a point when Det. Rykhoff left the courier truck to go and call Morality. He saw the detective leave. Asked in his evidence in-chief if Rykhoff took anything with him, Williams answered, “I don’t remember him taking anything with him”. In cross-examination, when the suggestion was put that Rykhoff removed a box before he called Morality, Williams stated: “I didn’t see that”.

[46] Sheldon Cook testified that, while the CIB officers were in the back of the truck sorting packages from mangoes, and before the Morality unit was notified, Det. Rykhoff stated that he had received some previous information about a party in the area who was to receive a large shipment of cocaine. At trial, Det. Rykhoff denied that he made any comment about knowing who might be responsible or that he had information on a target who was expecting a large shipment of cocaine. Const. Williams testified that Rykhoff did say something about one of his guys possibly having some knowledge of a drug thing – “of something happening down the shore”. He had no recall of the detective speaking of anyone expecting a large shipment of cocaine. Const. Chamula had no recall of Rykhoff suggesting he knew who might be responsible or that he had information about someone expecting a large shipment of cocaine.

[47] The accused testified that it was Const. Williams who first suggested two wired packages he located could potentially be a bomb and that when Rykhoff heard this, the detective observed that it may be a GPS device and mentioned that they may be dealing with a “GPS load” which Rykhoff described as a dry run by criminals who would send a benign substance to look like drugs to see if and when it might be intercepted by the police. The accused informed the court that at the time he had no idea what a GPS device looked like.

[48] Const. Williams recalled someone mentioning a GPS device but heard nothing about a dry run. Const. Chamula also did not hear a dry run discussion.

[49] Det. Rykhoff informed the court that when Williams showed him the wired packages, he “believed it was a tracking device that…the culprits would have inserted so that they can track their load”. The witness admitted that he had actually never been involved in a drug investigation where criminals had used tracking devices. He was not familiar with the devices but he knew they “involved wires”. The witness testified that he at no point talked about a “dry run”. Rykhoff testified that he expressed the opinion, in phone conversations later that evening with Morality Det. McTiernan and Duty Insp. Mark Marple, that the wired packages contained a tracking device.

[50] Det. Sgt. Phillips recalled Det. Rykhoff's phonecall to him reporting the discovery of the wired packages. The witness did not describe Rykhoff as mentioning a GPS device. Det. Sgt. Phillips was concerned about a booby-trap and he ordered that the officers leave the truck. Insp. Marple's testimony made no mention of hearing about a GPS device – he was told about the wired packages and he too was concerned about the presence of an explosive booby-trap. Det. McTiernan testified that he called the Explosives Disposal Unit (EDU) on Det. Rykhoff's suggestion after Rykhoff telephoned to report that green wires had been discovered between two of the suspicious packages. McTiernan's testimony made no reference to Rykhoff mentioning a GPS.

[51] On Warren Williams' evidence, he discovered in quick succession the two pairs of wired packages. Once he located the second set of similarly wired packages, and with the spectre of explosives present, and Morality and the EDU contacted, a final decision was made to stop the search of the truck.

[52] At trial, the CIB officers were all questioned as to whether they held an opinion, at the time they were at the CPS scene, as to whether the taped packages concealed in the mango boxes contained illicit drugs.

[53] Const. Chamula acknowledged that he had minimal drug investigation experience. He recalled a discussion that the packages likely contained cocaine. He "always" thought they were dealing with a large shipment of drugs. Const. Williams, who described himself as having "nil" drug experience, informed the court that when he left the truck he was "still dealing with it as if it was drugs". Det. Rykhoff, an officer with considerable Morality service experience, who telephoned Morality on November 16, 2005 to take the case over as a drug investigation, and who expressed the view that the truck might contain drugs with GPS devices inserted by "the culprits", testified that he did not know what the packages contained although he assumed it to be drugs – it was "a good possibility". He did not think the truck contained a police "controlled shipment" because no agency had called to tip off the PRPS. Morality Det. Furoy's understanding from a Rykhoff phonecall to Det. McTiernan at about 9:10 p.m. on November 16 was that 20 to 30 "keys" of cocaine were being investigated by 12 Division.

[54] Sheldon Cook, who had "limited" experience dealing with street-level drugs, had not before been involved in a case with a vehicle-load of suspected drugs. He testified in-chief that for a number of reasons he formed the view that the packages did not contain drugs – "I really didn't think we were dealing with a controlled substance…I just thought it was a suspect substance, you know, held

out to be maybe cocaine or heroin". The accused was vigorously cross-examined on these assertions. The witness acknowledged on two occasions that he was "not an expert" and further acknowledged, "I have limited experience when it comes to *Controlled Drugs and Substances Act*". He had never dealt with opium, ketamine, crystal methamphetamine or powdered ecstasy. He did not know what precursors were. He further agreed that the circumstances were suspicious and that he had not been "certain" the packages did not contain cocaine or heroin. Had he been in charge, he too would have called Morality. The examination continued:

> Q. So when you – when you say you don't believe it is cocaine or heroin, that's leaving open a myriad of possibilities that it's some other type of serious controlled substance, isn't it?
>
> A. Sir, you know what, in my policing career I've encountered numerous drugs. What we encounter on a sort of frequent basis is – at the street level is cocaine, marihuana. I mean they're both very prolific drugs in society. So you know, that – that's my experience. You're right, there's a myriad of drugs that this could have been…

[55] Asked why he had switched from saying he did not believe the packages contained "drugs" to saying he hadn't believed cocaine or heroin were present, the accused responded that those were the only two drugs he was aware of in a white powder form although he was not sure among the "myriad of drugs out there" whether others might also come in a white powder form. The accused confirmed that he wrote in his notes (Ex. #67), made much later in the evening, "removed several boxes of suspected drugs" and "1 of packages […] appeared to be white powder – suspect cocaine/heroin" and "move boxes containing drugs to back of McTiernan's/Furoy's vehicle". The witness said that he did so because the Morality officers were referring to "drugs" and the packages were being handled in the manner of a controlled substance:

> Q. So it could be cocaine, yes or no?
>
> A. Yes.
>
> Q. It could be heroin, yes or no?
>
> A. Could be. My belief, it wasn't.
>
> Q. Could be methamphetamine?
>
> A. My belief, it wasn't.
>
> Q. And how could you possibly know whether or not it was methamphetamine, you've never see – you've never done a methamphetamine investigation?

A. You're right, but just in the appearance of this, it looked like a white chalky powder that looked like flour, so I – I didn't believe it to be a drug.

Q. So why didn't you put that in your notes?

A. That's why I put a suspect substance, because, you know, in police investigations sometimes we have information…and until we find out definitively, it's just suspect…I could have been wrong…

The Boxes are Moved to the CIB Van

[56] After the wired packages were discovered, and discussion in the CPS as to the potential for the presence of an explosive device, Det. Rykhoff decided that the sorted packages should be moved to the CIB van to preserve the evidence in the event of an explosion or destruction of the whole load by the EDU water cannon. This was after the EDU had been called.

[57] According to Const. Bryant, there was a search for additional empty boxes. He located a Xerox paper box in the CPS. He also briefly searched the street where other properties had their recycling materials at the sidewalk. Const. Chamula recalled seeing Bryant with a cardboard box that that held photocopy paper. It was used to hold additional packages being removed from the courier truck.

[58] Bryant testified that shortly after 9:00 p.m., CIB officers walked the boxes between the courier truck and the CIB van placing them in the side sliding door and the rear hatch of the van. The vehicles, both facing in a westerly direction, were only feet apart. Const. Bryant testified that one officer remained up in the courier truck to pass the boxes down to street-level – while he was not positive, he thought it was Const. Williams, not the accused, up in the truck. This process only lasted a couple of minutes. Bryant had no recall of the weakness of the boxes being an issue. To Bryant's recall, "several" boxes were off-loaded, perhaps "about 10". He had no recollection of Det. Rykhoff, who was then in charge, participating in the transfer of the boxes.

[59] Const Chamula testified that Const. Williams had the keys to the CIB van. Because of a hand injury, Chamula observed but did not carry any boxes. He recalled Rykhoff, Williams, Cook and Bryant being present but was unable to recall who carried boxes from the right rear corner of the back of the truck to the van. He had no recall of mango boxes falling apart or weakened by moisture from the fruit. Chamula saw 4 to 6 boxes in total loaded into the rear hatch and

sliding side door of the CIB van. No one took an inventory count of the number of packages transferred.

[60] Det. Rykhoff testified that after the decision was made to move separated packages to the CIB van, Const. Williams moved the van closer to the courier truck. The boxes transferred were positioned in the truck at the right rear corner. To Rykhoff's recall, although he was far from certain, he and Williams and the accused and perhaps Bryant carried boxes between the two vehicles. Rykhoff said in his statement to the RCMP that he put at least one box into the CIB van. When the suggestion was put to Rykhoff in cross-examination that the accused remained in the courier truck in the off-loading process to pass out boxes, the witness stated that "could be very well correct".

[61] No count of packages was done. Rykhoff believed that 7 boxes went into the CIB van – he made a note of this about a week later – therefore, although he had no recall at trial of actually counting the boxes, in Rykhoff's words, "I would have counted the boxes as they would have went into" the van. In his December 2, 2005 statement to the RCMP, Rykhoff stated to RCMP Sgt. Nicholson:

> Q. Okay. You think there's seven boxes?
>
> A. I thought there were seven boxes, I mean – and I wasn't – and I didn't…

Rykhoff accepted that he said these words but asked in cross-examination to explain what he was trying to convey to Nicholson, Rykhoff replied, "I have no idea what that means".

[62] Const. Williams informed the court that the officers were in the courier truck when the decision to move boxes of sorted packages occurred and someone said, "Grab the boxes". The witness maintained that at the time he remained quite focussed on the possible presence of a bomb. He unlocked the doors of the CIB van which was parked 6' behind the truck. According to Williams, as the officers jumped out of the back of the truck, "everybody was grabbing a box" from the corner where they were situated on the floor near the back door of the truck. Williams testified that he grabbed "some". These were the boxes of separated packages. Rykhoff, the accused, Chamula and he were involved. According to Williams, the accused did not remain in the truck sliding boxes to those standing on the street – "No, I understand that everybody got out at the same time". No inventory of packages was done. At the time, Williams also did not count or "see" the number of boxes which were placed in his CIB van. All off-loaded boxes went just to the van. Once the transfer was complete, he locked the CIB van.

[63] Sheldon Cook's evidence, stated on more than one occasion in his testimony, was that Det. Rykhoff suggested the sorted packages be moved to the CIB "vehicles". To his recall, the only two vehicles were his Impala and William's van. The accused testified that the CIB van was "directly in behind the truck".

[64] At this point, on the accused's testimony, there was a build-up of packages where Williams was positioned about half to three quarters of the way back in the truck. According to the accused, as he stood in the courier truck toward the front and furthest from the back door, Rykhoff, who was standing on the street, asked for his car keys. He then physically threw his car keys using his left hand along the passenger side of the truck, the box of which was about 20' in length. He assumed Rykhoff was going to use his vehicle to hold some of the packages. Det. Rykhoff testified that he never asked the accused for his car keys. Asked at trial whether Rykhoff asked the accused for his keys, Williams testified, "I don't know". Const. Chamula testified that he had "no idea" whether Rykhoff ever had the Impala keys.

[65] The accused testified that his participation in the off-loading process was to pass "the boxes out" with separated packages to Rykhoff, Chamula and Williams who were then on the street. The accused testified that at the time boxes were removed from the courier truck, he had no information as to the "quality of the boxes" into which the sorted packages had been placed. He did not count the number of boxes removed from the truck. In his *voir dire* testimony, the accused indicated that the "sorted packages…were at the right side towards the back of the truck". At trial, according to the accused, because of his location in the courier truck, he "did not see where the boxes were going". In his in-chief evidence, the accused stated:

> I didn't physically see where the packages – the sorted boxes were put. I assumed it was in the vehicle.

In cross-examination, the accused stated that:

> I was off loading – passing those boxes out to the guys, they were putting them – taking them out to the vehicles…
>
> . . .
>
> No, I – my – my part, sir, was passing the boxes out to be put in the van, so just so I'm clear, I was at the front of the truck; when I was told that we were going to offload these I came to the back of the truck to offload the boxes that were on the right…
>
> . . .
>
> …I don't know what vehicles they went into…I didn't physically see it…

. . .

Could have been vehicle or vehicles.

[66] At some point, Rykhoff said, “That’s enough, let’s just go”. The accused testified that he was the last to exit the courier truck. He rolled the back door down. Rykhoff still had the Impala keys when everyone re-entered the CPS at about 9:30 p.m. Const. Bryant testified that he locked the courier truck and retained the key until the Morality officers arrived on scene.

Events Prior to Evacuation of the CPS

[67] The Lakeshore CPS, a one-storey building with a basement, has a waist-high counter separating the long, narrow, open-concept office area from the public side of the facility. There are floor-to-ceiling windows across the front of the CPS facing the sidewalk. There are stairs from the first floor which go to the basement. There is access to the exterior of the building from the basement. There are desks in the office area with telephones. Some had computers.

[68] From roughly 9:30 to 10:30 p.m., the CIB officers and Const. Bryant remained in the CPS awaiting the EDU and Morality. It ordinarily takes some time for the EDU officers to deploy as they must equip themselves to attend a scene. Morality officers were occupied interviewing the courier truck employees at 12 Division where they had been transported by Const. Murphy.

[69] Det. Rykhoff was seen to participate in a number of phonecalls. Sheldon Cook worked at one of the computer terminals. There were ongoing discussions.

[70] Const. Williams described the accused sitting toward the front of the CPS office by the windows while he sat at a desk at “the back”.

[71] Const. Bryant testified that there may have been occasions when he left the office area to use the washroom. As well, he could not recall what everyone was doing at all times:

> Q. Now were there periods of time through the course of that evening after Detective Rykhoff showed up that you don’t know where he was?
>
> A. Well there are times that I don’t remember what either of them – sorry, and by ‘them’ I mean Constable Cook and Rykhoff – were doing.

[72] Det. Rykhoff testified with respect to the other four officers in the CPS, that he had no recall "exactly [of] their comings and goings". At another point in his evidence, the witness stated: "I wasn't keeping track of officer movements". Const. Williams too "wasn't keeping track of everybody…everybody does their thing".

[73] According to Warren Williams' evidence, as the officers were sitting and talking, within 10 to 15 minutes of loading the boxes into the CIB van, there was discussion of moving the van away from the courier truck as a further protective measure in the event of a bomb. There was no specific discussion concerning where the van should be moved. Williams testified in-chief that when the accused volunteered to move the van, at around 10:00 p.m. he gave the keys to him.

[74] The witness, in direct examination by Crown counsel, described the transfer of the keys:

> Q. How did you give him the keys?
>
> A. I think I threw them from where I was sitting at that desk, and he was sitting by the front window, and I just threw them to him.
>
> Q. Did he catch them, do you remember?
>
> A. I don't know.
>
> Q. So you throw him the keys. Do you watch what he does at that point?
>
> A. He left; he walked out of the Community Station.

[75] The constable was extensively cross-examined at this point:

> Q. Right. And what I want to ask you about now with this exhibit in front of us, is that you say that you threw the keys – from this back desk to Sheldon Cook at the front of this room – to the CIB van, do I have that right?
>
> A. I didn't throw them like that. I mean, he – he volunteered to move the vehicle and I gave him the keys.
>
> Q. But you said, Sheldon Cook was up at the front and you were at this desk and you threw them from the desk to where he was, did you not?
>
> A. No. The way it came across was that the Crown Attorney said, "Did you throw them at him?" And I said that I threw them at him but I could have approached him closer. I mean, I didn't throw them from the desk to him.
>
> . . .

Q. Do you have a specific recollection of approaching him?

A. I remember giving him the keys. Did I throw them, I believe it was – Mr. Rowcliffe's words, did I throw them at him, I gave him the keys. That's what I was looking at.

Q. So you're pinning those words 'throwing them' on Mr. Rowcliffe because they were his words, not yours, is that what you're saying?

A. At that point, it was indicated that I had given him the keys. And whether he said, did I throw them at him, I can't remember. What he – I was referring to is, I had given him the keys. Did I remember standing back and throwing them overhand, or did I lob them to him, I don't know. But I gave him the keys.

. . .

I remember giving Officer Cook the keys. I don't recall whether I threw them at him overhand, whether I walked halfway through the room and lobbed them to him, I know Officer Cook had the keys.

. . .

He was at the front of the window. How I gave him the keys, I don't know whether I lobbed them to him, I don't know.

. . .

Q. Well why didn't you say that yesterday when you were asked specifically? Why didn't you say that – 'I don't know how I gave him the keys', why didn't you say that?

A. It was a minor issue. I don't know. I made a mistake.

. . .

Q. Is that the most detail that we can get about this transaction? You must have given him the keys, is that it?

A. Yes, I gave him the keys.

. . .

Q. And I suggest to you that when Mr. Rowcliffe asked you whether or not he caught the keys when you threw it yesterday, what you should have said is "I don't remember at all how that even happened'. Isn't that what you should have said?

A. I guess that's what I should have said, yes.

[76] To Williams' recall, the van was right out front when the accused said he would move the vehicle. At trial, the witness stated that he did not recall seeing the accused leave the CPS but later on the accused returned to him the CIB van keys. Const. Williams could recall no details of the return of the van keys by the accused. Williams also claimed that the accused was not gone long – it "seemed like just a couple of minutes".

[77] Const Williams testified that the van keys were returned about 5 minutes before he and Const. Chamula left the CPS to buy some food. The accused did not say where he had moved the van.

[78] Sheldon Cook testified that the CIB van keys were never tossed to him. He at no point had possession of the van keys. Asked at trial if Const. Williams had the CIB van keys "at all times", Const. Chamula responded that he did.

[79] Sheldon Cook testified that after the re-entry to the CPS and about 10 minutes of discussion and phonecalls, Consts. Williams and Chamula departed to get food. According to the accused, as those officers walked to the front door of the CPS to leave, Det. Rykhoff directed them to park the van away from the truck when they returned. To the accused's recall, as the officers were on their way out, Det. Rykhoff stood up and said he was, "going to go and make a few phone calls". At that point, Rykhoff went downstairs. The accused testified that he saw the CIB van lights come on and the vehicle drove away from the front of the CPS. About 10 minutes later, on the accused's evidence, Det. Rykhoff returned to the main floor of the CPS through the front door from the sidewalk on Lakeshore Blvd. The accused could not recall if Const. Bryant was right there at this time.

[80] Because Const. Williams, a diabetic, required food, a decision was made that he and Const. Chamula would go out to obtain take-out food. Const. Chamula described their 2 to 3-minute drive as leaving from where the CIB van was still parked right in front of the CPS behind the courier truck, then going east on Lakeshore in that van containing the suspected cocaine to a Subway shop at Lakeshore Blvd. and Cawthra Road. To the witness' recall this occurred between 9:30 and 10:00 p.m. The van was parked and locked and visible to the two officers when they were ordering food. To Chamula's recall, he was gone from the CPS for about 15 to 20 minutes.

[81] Williams testified that when he and Chamula left the CPS to get sub sandwiches he did not know where the CIB van was parked. The witness could not recall whether the accused in some manner pointed him in the direction of the van. Williams spotted the van parked on Brant Avenue backed into a parking space. Beside the van was Cook's Impala also backed into a space. Williams testified, "I assumed he moved it when he moved mine".

[82] Const. Williams' recall was that the food run took 10 to 15 minutes with a return to the CPS at about 10:30 p.m. Williams confirmed that the locked van was visible to him as he ordered food at the Subway outlet. On return to the area of the CPS, he parked in the same spot he left from. His recall was that he

probably did not back into the spot. Const. Chamula testified that after picking up the food, Const. Williams parked the CIB van on Brant Avenue where it could not be seen from the CPS. The witness had no recall of any conversation with Williams as to why he parked the van there.

[83] Const Bryant's recall was that Williams and Chamula were gone about 10 to 15 minutes on the run to get food.

[84] Det. Rykhoff agreed that Const. Williams left the CPS to get food. He saw him exit. He could not recall if he went on his own. He had no idea where Williams went once he went out the front door of the CPS. Rykhoff testified that he mostly sat with his back to the CPS front windows. As a witness, he had no recall how long Williams was gone or what vehicle he used. Although he was not watching the vehicles parked out front, Rykhoff did not recall seeing the CIB van move. The witness' recollection was that the CIB van remained where it was. Rykhoff believed the locked courier truck and the locked CIB van adequately protected the boxes of suspected drugs – "if one of those vehicles all of a sudden were to disappear I would assume somebody would notice it".

[85] In cross-examination, it was suggested to Det. Rykhoff that, when Williams and Chamula were out getting food, he left the CPS one or two times. The witness responded that he had no recall of leaving and would have "no reason to leave".

[86] Const. Bryant was questioned at trial as to whether the accused or Det. Rykhoff left the CPS while Williams and Chamula were absent to obtain the food. The witness' responses were:

> I believe both officers were – I – I don't specifically know if they had left and come back; I just know that they were up and down and I – but I – I don't know specifically if they left.
>
> . . .
>
> I don't recall…

Questioned again on the same subject, Const. Bryant stated:

> Q. And while they were gone, Office Cook stayed right in that station with you?
>
> A. Well like I said, I don't recall specifically if he came or went – or came or went – or came or left. I – I don't remember him being there while I was waiting for my sub.

[87] According to Det. Rykhoff, at a point in time closer to 11:00 p.m. than 10:00 p.m., as Williams was seated eating his dinner, and following a discussion that the CIB van which he saw in front of the CPS should perhaps be moved away from the courier truck, the accused left the CPS to move the van. Rykhoff could not recall whether he directed that the van be moved. According to Rykhoff's in-chief testimony, "I just recall Williams flipping the keys" to the accused:

> That just stands out in my mind that he's [Williams] sitting there and he just sort of tosses the keys over to Constable Cook.

[88] In cross-examination, Det. Rykhoff stated that Williams grabbed the CIB van keys and "tosses them to Officer Cook" – "he tossed them, as opposed to handing them to him". The witness could not recall if the accused was seated or standing when the transfer of keys occurred.

[89] Det. Rykhoff testified that he did not see the accused get into the CIB van. He did not hear the vehicle engine start. He noticed the vehicle had been moved. The accused was out of the CPS a "couple of minutes". After he returned to the CPS, Rykhoff could not see the van. He hoped it would be parked across the street so that the vehicle could be seen from the CPS. To the witness' recall, he walked out of the CPS to see if he could see the van. He observed the CIB van parked on Brant Avenue. This was shortly before the decision to evacuate the CPS.

[90] Const. Williams testified that, at some point, Det. Rykhoff went to the basement. Before Rykhoff went downstairs in the CPS and out of sight, he was told by the detective that he was going to be calling the EDU and Morality. Williams agreed there were telephones on the main floor of the CPS from which those calls could be made. He had no idea why Rykhoff would go downstairs to make phonecalls. Asked how long the detective was absent from the main office, Williams replied that he had no idea – "I wasn't keeping track of everybody".

Waiting for Morality and the EDU

[91] Witnesses agreed that after less than an hour in the CPS, Det. Rykhoff decided they should not continue to remain in the building, with its glass front windows, facing a truck potentially containing a bomb. The decision appears to have followed upon a phonecall from Morality Det. McTiernan to Rykhoff passing

on the Duty Inspector's direction to evacuate the CPS. Const. Bryant described the process of setting the alarm and locking up the CPS.

[92] Constables Williams, Chamula and Bryant exited the CPS and walked west to Brant Ave. According to Bryant, he observed the CIB van and an unmarked silver CIB car he understood to be driven by Const. Cook, parked beside one another on Brant Ave. north of Lakeshore. The vehicles were parked in an east/west direction with the CIB van north of the car. The witness had no idea how the vehicles came to be parked at that location. The van was facing west into its parking spot. Bryant could not recall which way the car was facing.

[93] According to Williams' testimony, when he left the CPS he did not see where Det. Rykhoff and the accused went. According to Const. Chamula, he went into Williams' van but he "didn't observe the other officers going to other vehicles" so he did not know where they were parked.

[94] According to Const. Bryant's recall, Const. Cook got into the silver CIB vehicle and drove to some location east of the CPS.

[95] Det. Rykhoff testified that when he exited the CPS he thought the other CIB officers had all come to the scene together. He could see the CIB van parked on Brant Ave. Rykhoff recalled that he walked to his vehicle still parked "in front" of the CPS. He entered his vehicle and backed it up several parking spaces in an easterly direction. It was only when the accused pulled in behind his own car in an unmarked police vehicle that he realized another CIB car was on the scene.

[96] Sheldon Cook testified that when he exited the CPS, Det. Rykhoff said, "Cookie, we're over here" and pointed west to Brant Ave. This was the first that he knew his police vehicle had been moved. The Impala was backed into a parking space facing east alongside the CIB van also backed into a space. The accused's recall was that Williams, Chamula and Bryant were at this point near the CIB van and that as he and Rykhoff reached the Impala, Rykhoff said, "Cookie, I'm going to take you on a tour". At that point, Rykhoff unlocked the driver's door with a key, the accused got into the front passenger seat, and Rykhoff drove south on Brant, turned left to go east on Lakeshore, and east of the CPS made a U-turn around Mohawk Ave. parking on the north side of Lakeshore behind another unmarked police vehicle which he believed belonged to Rykhoff.

[97] Witnesses were unable to provide precise times as to when the CPS was locked up or how long the wait was for Morality officers to arrive on scene.

Const. Bryant estimated exit from the CPS at 9:45 to 10:00 p.m. and about a 30-minute wait before Dets. McTiernan and Furoy arrived. Const. Chamula recalled a 20 to 30-minute wait for Morality. Det. Rykhoff reported evacuation of the CPS at about 10:55 p.m. and an arrival of Duty Inspector Marple within about 5 minutes. Const. Williams recalled exit from the CPS after 10:30 p.m. with about a 15-minute wait for Morality and the EDU. The accused variously testified that he waited with Rykhoff taking up a position to the east of the CPS, before the Morality officers arrived.

[98] With Const. Williams driving, the CIB van was parked west of Brant Ave. on the south side of Lakeshore facing east toward the direction of the CPS and the truck. Const. Chamula was seated in the front passenger seat and Const. Bryant in the second row of seats with boxes beside and behind him.

[99] Const. Williams recalled that after he parked, he called over his Mike phone to Det. Rykhoff and to the accused so they would know his location. According to the witness' in-chief evidence, he believed their vehicles were parked east of the truck, one on each side of Mohawk Ave. In cross-examination, Williams stated: "I didn't even know where they were parked". Const. Bryant, who had locked the CPS and retained the courier truck keys, believed the accused was then in a CIB vehicle several metres east of the courier truck on the north side of Lakeshore.

[100] Det. Rykhoff informed the court that after a couple of moments, at about 11:00 p.m., he decided to go and sit in the accused's vehicle. He sat in the front passenger seat. There was brief small talk about their children. Rykhoff rejected a defence suggestion that he also said to the accused that the entire investigation was a waste of time because they weren't dealing with drugs – "I wouldn't have said that because I didn't know what the substance was at that point". He did not say to Cook that the substance looked like flour. There was no discussion of anyone Rykhoff thought may have been expecting a delivery because he had no such information. Within only "a couple of minutes" of entering Cook's car, also described as "in the neighbourhood of five minutes or less", Duty Insp. Marple arrived and began to speak to them. On the witness' evidence, as the discussion with the Inspector was ongoing, the Morality detectives arrived. In cross-examination, Det. Rykhoff denied the suggestion that after leaving the CPS, with continuing possession of Cook's keys, he drove the Impala to the north side of Lakeshore east of the courier truck.

[101] According to the accused, they remained in a holding pattern awaiting the Morality officers. The wait was variously described to be about 45 minutes

(in-chief) or 20 to 30 to 45 minute (cross-exam) or 1 hour (further cross-exam). There was general and casual discussion about family. The witness recalled Rykhoff saying that the investigation was a waste of time and that Morality would not be impressed, that "he didn't even know if we were dealing with drugs", with EDU coming it would be a circus, and he was going to need a cocktail when it was all over. Neither officer engaged in note-making – in the accused's words, "[t]ypically what we'd do is we would get together and, you know, exchange and complete our notes". On the evidence, this was a view shared by Rykhoff, Williams and Chamula.

[102] The accused testified that when Insp. Marple arrived and drew even with the Impala, he leaned past Rykhoff to say hello to the Inspector.

[103] According to the accused, the Duty Inspector then drove to the east. Within minutes, Morality Detectives McTiernan and Furoy arrived in their vehicle. To the witness' recall, he and Rykhoff exited the Impala as the detectives were approaching on foot from where they had parked their Jeep vehicle just west of the Impala.

[104] Insp. Marple testified that when he arrived on scene, Det. Rykhoff and the accused were in a truck, also described as an Intrepid, 30 to 40 metres east of the CPS. He had no recall where they were seated in the vehicle.

[105] Warren Williams testified that within about 15 minutes of waiting (in-chief) or 20 to 30 minutes (cross-exam), the Morality detectives arrived. The EDU arrived. Det. Rykhoff called him on a Mike phone to move the CIB van over. He did so, parking behind the Morality SUV at about 11:00 p.m. The accused testified that Det. Rykhoff used his own Mike phone to contact Williams.

The Turn-over to Morality

[106] Morality officers McTiernan and Furoy arrived at the Lakeshore CPS in their Jeep vehicle at about 10:50 p.m. on November 16, 2005. Det. McTiernan was the shift supervisor for an investigative team of Morality officers. To his recall, McTiernan parked the Jeep behind an unmarked Chev Impala which was situated a few car lengths to the east of the courier truck on the north side of Lakeshore Blvd. At trial, McTiernan and Furoy identified Cook and Rykhoff as the officers seated in the Impala. According to McTiernan, "I have noted the driver was Detective Rykhoff and the passenger was Sheldon Cook". It was clear to Furoy that McTiernan appeared to know Rykhoff "pretty well". Furoy could not recall who was seated in the driver's seat of the Impala. McTiernan

and Furoy testified that all officers exited their vehicles and spoke briefly at the curb prior to entering the CPS.

[107] All the Morality and CIB officers entered the CPS. According to McTiernan, following a further short briefing of the Morality officers, he and Rykhoff, Furoy and Cook walked outside to view the truck which was closed and secured.

[108] According to Furoy, once inside the CPS, he received property obtained from the driver of the truck from Bryant and copies of witness statements. Furoy testified, from a notebook entry he had made, “I’ve indication that McTiernan took the keys from Sheldon Cook”. In cross-examination, Furoy conceded that his note was possibly in error. In re-examination, Furoy testified that his notes were made at the scene some time later while the EDU worked at the courier truck. As to his note regarding the accused transferring the truck keys, Furoy also stated, “I wouldn’t put it in there if I didn’t believe it certainly”.

[109] Det. McTiernan testified that at about 11:05 p.m., as officers stood on the sidewalk, he inquired about the nature of the wiring discovered by the 12 Division B. & E. officers. He was informed by Rykhoff that a quantity of “the brick cocaine” had been moved to the CIB van and that when one of the bricks was opened a white powder was discovered inside.

[110] About this time, when the EDU and Duty Inspector Marple were arriving on scene, McTiernan informed Rykhoff that Morality would “take over the investigation because it’s a drug matter”. McTiernan testified as follows:

> I said to him, ‘You might as well turn the exhibits over to us then’, that we would take control of them, which included the boxes that were located in their van.

[111] Warren Williams testified that he drove the CIB van to the north side of Lakeshore Blvd. at “around” 11:00 p.m. and parked behind Det. McTiernan’s vehicle. He then turned his attention to speaking to the EDU officers. As he was involved in this discussion lasting at least 5 minutes, someone asked him for the CIB van keys so that it could be unloaded. According to Williams, as he continued to describe to the EDU officers the wiring he had found:

> A count was done from the vehicles – from my CIB van to the Morality, and Marty – sorry, Detective Rykhoff was standing there watching, supervising that. He said seven boxes – I remember seven boxes. I was – I didn’t do any counting…it’s just conversation, that’s all I heard, because my focus was on the bomb – bomb guys.
>
> . . .

> I heard Detective Rykhoff then tell me that there was – well, not – he didn't say it directly to me, he says there was seven boxes that was turned over to – to Morality and the time, the turn-over time was, 2310.
>
> …I remember Marty saying seven boxes, because I know that at some point we're going to need inventory and numbers – I remember seven boxes.
>
> . . .
>
> …Marty was right there, he said there were seven boxes. He's not going to lie. I mean what – what good would that do, right? He said seven boxes, so I believe seven boxes came out of that van.

Williams testified that he was not involved in the transfer of boxes to the Morality vehicle and did not see who carried out the transfer. At one point, as one of the boxes sat on the tailgate of the Morality vehicle, he showed the EDU officers the nature of the packages.

[112] Det. Rykhoff confirmed that Const. Williams parked the CIB van near the Morality vehicle. Rykhoff had no note of who was involved in transferring the boxes shortly after 11:00 p.m. between vehicles. He testified that:

> I believe we were all involved in transferring the seven boxes over to the Morality vehicle.

[113] Det. Rykhoff was questioned about the number of boxes transferred:

> Q. Do you recall how many boxes came out of the van?
>
> A. I know there were seven.
>
> Q. And how do you know that?
>
> A. There were seven went in, seven went out.
>
> . . .
>
> Q. But you had to count them to get to seven.
>
> A. Presumably.

[114] Rykhoff, who testified before Warren Williams, was not questioned about whether he spoke out loud about seven boxes being transferred as the transfer process was underway.

[115] Rykhoff recorded in his notes, only made some days later, that seven boxes were turned over to Morality.

[116] Det. Rykhoff testified that he related to Det. Furoy that there were probably more boxes with packages remaining in the courier truck.

[117] Sheldon Cook testified that Det. Rykhoff directed the CIB officers to transfer the boxes from the CIB van to the Morality vehicle. Speaking of himself, Williams and Chamula, the accused stated: "we moved the boxes…it was literally five boxes, so you know, each one of us grabbed a box; somebody grabbed two". The accused informed the court that the box he transferred he obtained from the passenger side door of the van placing it in the rear hatch area of the Jeep. The accused saw 5 boxes in the Jeep. He heard no one saying or giving a number as to the count of boxes transferred.

[118] Const. Bryant testified to a recall that he, as well as Williams, Chamula and the accused, transferred the boxes from the CIB van to the Morality vehicle shortly after 11:00 p.m. While the witness recalled a collective working to do the transfer, he was unsure as to who exactly carried the boxes which he recalled to be fewer than 10 in number. A number of other officers were standing watching the transfer process.

[119] Const. Chamula testified that after the CIB van was parked behind the Morality vehicle, boxes were transferred between the vehicles. According to the witness, "I believe I moved one of the boxes from the CIB van to the Morality van". To Chamula's recall, 4 to 6 boxes were transferred. As the transfer occurred, many officers stood by watching the process. Chamula testified that "a time was agreed on of 11:10 that the property had been…transferred from us to Morality".

[120] To McTiernan's recall, the CIB van was pulled up by Warren Williams directly behind his Jeep. Then, at about 11:15 p.m., on the witness' evidence, "[w]e walked to their van, the CIB van, unloaded the boxes and put the boxes in the Cherokee we were driving". To McTiernan's recall, he transferred one (1) box. He witnessed the off-loading as a cooperative effort from the rear hatch of one vehicle to the rear hatch of the other. He also made a note that 5 boxes were turned over to Morality. Asked who else transferred boxes, McTiernan testified:

> I have noted the B. & E. officers but I don't have exactly who unloaded it… Maybe the rest of them by the CIB officers but I don't recall exactly who did…

As the boxes were transferred between vehicles, McTiernan heard no one counting out loud.

[121] It was Det. Furoy's recall in his in-chief testimony that, at 11:10 p.m., he and McTiernan took custody of the suspected drugs from Det. Rykhoff by way of a transfer of 5 boxes from the Impala vehicle occupied by Rykhoff and Sheldon Cook. In cross-examination, Furoy conceded that the boxes may have been removed from the CIB van. Furoy testified that he did not actually participate in the transfer of boxes into the back of the Morality Jeep including the folded-down right rear passenger seat. Furoy heard no one calling out the number of boxes during the transfer process. The witness described the 5 boxes as in the rear cargo area of the Jeep and the folded-down right rear passenger seat.

[122] After the boxes were transferred to the Morality Jeep, all CIB responsibilities on scene were at an end. According to Det. Rykhoff, when the investigation was turned over to Morality he "assumed" the seized packages contained drugs – in his mind, that was a "good possibility".

[123] When the EDU officers asked to have Lakeshore Blvd. cleared in the area of the courier truck, Det. McTiernan parked his Jeep facing south on the east side of Brant Ave., just to the west of the CPS and about 40 metres north of Lakeshore. Det. Furoy was in the front passenger seat and Const. Bryant in the rear left passenger seat. Furoy recalled the EDU truck parked south of their position also on Brant Ave.

[124] Det. Furoy testified that Const. Bryant, standing outside the Morality vehicle, under his supervision, counted the packages in the 5 boxes – there were 60 in total. Const. Bryant confirmed this duty on his part. Furoy recalled that one package had a small opening in it. Bryant recalled that, by the end of the count, the 60 packages may have been placed into just 2 boxes for ease of storage.

[125] Det. McTiernan, an experienced narcotics investigator, estimated that the packages weighed about 1 kg. each. The circumstances of the load's arrival and the white powdery appearance of the contents contributed to his belief that the packages contained cocaine. Det. Furoy, describing himself as not being an expert respecting cocaine, suspected the packages contained cocaine. Const. Ippolito recalled McTiernan and Furoy advising him that they had 60 kg. of cocaine in the back of their vehicle. Const. Kirkpatrick expected that if the packages contained cocaine that there would be an odour. There was not and he found the packages soft to the feel not a compressed feel he associated with cocaine. Const. Padilla, based on the absence of odour and the lack of "repressed" hard format to the packages, suspected ketamine, heroin or methamphetamine, not cocaine.

[126] As the EDU officers went about their task while the Morality officers waited, Det. McTiernan dispatched Consts. Kirkpatrick and Padilla back to the Derry Road Morality offices to obtain some NIK testers. This is a roadside chemical test for such drugs as cocaine and heroin. Consts. Kirkpatrick and Padilla returned and performed the NIK tests in their vehicle also parked on Brant Ave. Kirkpatrick testified that NIK tests were done for cocaine, heroin, methamphetamine, MDMA (ecstasy), codeine and morphine. All tests registered negative. He reported the results to Dets. McTiernan and Furoy.

[127] To McTiernan's recall, the NIK tests were completed 30 to 45 minutes prior to EDU turning the scene over to Morality at about 2:20 a.m. Const. Kirkpatrick's recall was that the NIK tests were done at about 2:00 a.m.

[128] Although the NIK tests came back negative for cocaine, heroin and methamphetamine, from his experience, Det. McTiernan formed no final opinion as to whether drugs were involved:

> I wouldn't rely completely on the NIK tests, whether it was cocaine or heroin or methamphetamine, but it's possible that it's low grade cocaine or other drugs.

[129] Det. Furoy testified that while some doubts set in as to whether it was cocaine in the packages with the absence of odour and negative NIK tests, he was unable to say whether there was cocaine mixed with another drug – he was not a hundred percent sure it was not cocaine. Const. Kirkpatrick still considered that they were dealing with "some sort of suspicious material" based on all the circumstances including the interviews of the courier employees. After the tests by Kirkpatrick and himself, according to Const. Padilla:

> …we didn't know what type of drug it was, whether it was ketamine or – we still thought it was a drug shipment, but what type of drug, we didn't know.

[130] Det. McTiernan testified that he had previously worked with Det. Rykhoff for about 3 years in Morality. McTiernan informed the court that around 2:00 a.m., as he sat in the parked Jeep waiting for the EDU to complete its work, Det. Rykhoff appeared on foot and stopped at the driver's window of the Jeep. McTiernan thought that Rykhoff had departed earlier with the other CIB officers at about 11:15 p.m. Rykhoff seemed surprised that Morality was still on scene. McTiernan testified that he commented to Rykhoff that the EDU was very meticulous and slow and that he had no idea how long things would take. He had no idea why Rykhoff was still in the area. Asked whether the NIK test results were discussed with Rykhoff, McTiernan testified: "We didn't discuss that really,

it was just more talk about that we're sitting there, waiting for EDU"…"My recollection is there was no conversation about the NIK tests which had already been completed." To McTiernan's recall in his in-chief evidence, Furoy and Bryant were in the Jeep at the time of the conversation he had with Rykhoff. In cross-examination, Det. McTiernan was questioned as to his confidence level that Const. Bryant was present when Rykhoff came to the Jeep:

> I spoke to Marty at the car – whether or not Bryant was in the back seat I can't say a hundred percent.

McTiernan testified that he smelled no alcohol on Rykhoff's breath. He did not see in which direction Rykhoff went when he walked away. McTiernan gave this evidence:

> Q. …you'd never have some mistaken impression as to someone else; you know who you're talking about?
>
> A. Oh, it was Marty, yes.

[131] Det. Furoy testified that he had no information of Det. Rykhoff returning to the scene. Furoy agreed that it was possible that Rykhoff was there without his knowledge as there were times when he stepped out of the Jeep to speak to the EDU officers. He was also in the EDU truck. Const. Bryant testified that when he was not at the Morality vehicle he stood at the corner of Lakeshore Blvd. and Brant Ave. watching the actions of the EDU officers.

[132] Const. Ippolito testified at trial that he and his partner, Const. Barnes, parked their vehicle on Brant Ave. at about 12:10 a.m. In the witness' in-chief evidence, 45 minutes to an hour later, close to 1:00 a.m. in his estimation, he observed Det. Rykhoff on the east sidewalk of Brant Ave. speaking to the two detectives. Ippolito was unsure where Rykhoff came from. With the vehicle he and Barnes were occupying parked parallel to the Jeep, he said 'hello' to Rykhoff through the rolled-down driver's window of the vehicle in which he was seated and in turn through the rolled-down windows of the Jeep parked alongside. In cross-examination, Ippolito was prepared to adopt what he said in his November 2005 statement to the RCMP – "Marty showed up a couple of times" on foot. The witness accepted that he had given accurate and truthful information when his memory was fresher.

[133] On refreshing his memory from a transcript of his November 23, 2005 videotaped statement to the RCMP, Const. Barnes testified that he observed

Det. Rykhoff, between midnight and 2:30 a.m., standing off to the side of the Morality Jeep perhaps talking to Det. McTiernan. He said "Hi" to Rykhoff.

[134] Ippolito and Barnes both thought that the NIK tests were concluded prior to Rykhoff appearing on Brant Ave.

[135] Det. Rykhoff, who testified that McTiernan knew him well, denied speaking to McTiernan on Brant Ave. – on the witness' evidence, he had been back at 12 Division since about 12:15 a.m.

Re-attendance at 12 Division

[136] Const. Chamula testified that between 11:00 and 11:15 p.m. he rode back to 12 Division with Warren Williams driving the CIB van. It was about a 10-minute direct route which did not pass the Brogue Bar at the northwest corner of Lakeshore Blvd. and Hurontario St. To his recall, Chamula saw Sheldon Cook in the CIB office shortly after he returned to 12 Division. He saw Williams doing paperwork in the office.

[137] The Brogue Bar is a short distance west of the Lakeshore CPS. Det. McTiernan described the pub as within walking distance of the CPS. The evidence at trial established that the Brogue Bar was a place where police officers often socialized.

[138] Warren Williams testified that once the CIB officers were cleared to leave the Lakeshore area by Det. Rykhoff, at about 11:10 p.m., he drove Const. Chamula back to 12 Division. In his in-chief evidence, Williams stated that after leaving the CPS area, he did not again see Det. Rykhoff for "over a week". In cross-examination, asked again whether he saw Rykhoff at 12 Division, Williams responded: "No, I don't recall…I didn't discuss anything with him". Because earlier in the shift he was pressed by Insp. Patrick to complete certain accident reports, he worked at his desk in the CIB office until his shift ended at 2:00 a.m. The witness testified that he did not speak to Sheldon Cook after his return to 12 Division. Earlier in the shift, there had been discussion about the accused having court the following day.

[139] Marty Rykhoff testified that after the other CIB officers left the Lakeshore area to return to 12 Division, he stayed in the area for about another 45 minutes – "just to see how things were playing out". Asked whether he wanted to see EDU "water cannon" the load, Rykhoff responded that, "[t]here was a lot of curiosity" on his part. Being curious, he went to the EDU truck and saw an x-ray

of one of the packages. He spoke to Kirkpatrick and Ippolito – they said they still did not know what "it" was. Questioned as to whether he was being paid to remain in the area when he was not fulfilling any assigned police role, Rykhoff replied, "that's our job to be curious". In cross-examination, the witness denied the suggestion that he hung around the scene of the courier truck's location because he had secretly stolen some of the suspected packages of cocaine earlier in the evening and was anxious to confirm their contents.

[140] According to Rykhoff's in-chief testimony, he left the area at about midnight and made the 10 to 15-minute drive back to 12 Division without any stops. He could not recall the actual time of his arrival at the Division and he had no note of the time. The witness testified that he had no recall of attending the Brogue Bar. He knew its location and had been there "[l]ots of times" before. Pressed in cross-examination, Rykhoff stated that it was "possible" that he had stopped there.

[141] According to Rykhoff, he went to the B & E office and spoke to his officers there and then went to the CIB office where he spoke to Det. Sgt. Phillips and saw Warren Williams working on reports. Rykhoff testified that he "assumed" Williams and the others had not completed their notes as the incident "was moving fairly quickly down there". According to the witness, "my intention was to do the notes with everybody that was involved". He therefore said to Williams, "Let's do our notes". Because Williams was busy and the accused wasn't there, no notes were done – a misconduct matter for which Rykhoff was subsequently disciplined under the *P.S.A.* – "I should have done my notes. I have no excuse why I didn't do my notes". In his in-chief testimony, the witness stated that he saw Const. Chamula and other officers he could not recall at trial. In cross-examination, Rykhoff stated that he was not certain he saw Chamula back at the Division. The witness also testified that he learned from Phillips that he had authorized Sheldon Cook to go home early because he had court the next day.

[142] Det Rykhoff testified that when he was back in the CIB office, those in the body of the office were listening to a portable police radio keyed into the communications channel for 12 Division. The radio was on top of a filing cabinet in the centre of the office. In this way, officers were listening to the developments at the CPS. Rykhoff again informed the court that he did not have a Mike phone the night of November 16/17, 2005.

[143] Rykhoff testified that he went off-duty at about 2:00 a.m. which was the normal end for his shift. He did not return to the Lakeshore CPS scene. In a 15

to 20-minute drive, he went straight home without stopping. He could not recall when he arrived home or how much sleep he had.

[144] Const. Chamula testified that when he was in the CIB office from about 11:30 p.m. onward prior to going off-duty at 2:00 a.m., he heard a communication from Det. Rykhoff by Mike phone broadcasting that the EDU was shutting down traffic on Lakeshore Blvd. Warren Williams had no recall of hearing Rykhoff on a Mike phone describing what was occurring at the Lakeshore scene. Chamula did not see Rykhoff back at 12 Division prior to going off-duty.

[145] Det. Sgt. Phillips testified that, by midnight, Rykhoff, Williams, Cook and Chamula had returned to 12 Division. Questioned further on the matter, the witness stated that he had no specific recall of speaking to Rykhoff. He was testifying having refreshed his memory from his November 24, 2005 statement to PRPS Internal Affairs officers where he had said that "everybody" had returned. At trial, Phillips could not recall if he saw Rykhoff back at the Division. In cross-examination, the witness gave this evidence:

> Q. But it's different with Detective Rykhoff, you don't have any specific recollection of seeing him or speaking to him that night before you left at one o'clock, do you, officer?
>
> A. No.
>
> Q. And so while it was your impression they all came back, when you search your memory, you do not actually remember Detective Rykhoff being back at 12 Division before you left at one o'clock in the morning, do you?
>
> A. From my memory, no; from my interview, that's the only thing I go by.
>
> Q. Right. And even at your interview this was the impression that you had, that they all came back, fair enough?
>
> A. Yes.

[146] Det. Sgt. Phillips told Williams to complete two outstanding accident reports. He gave the accused permission to leave two hours early, meaning "he left at midnight". He had no recall of telling Cook prior to this point in the shift that he could leave early. According to Phillips, with his own shift ending at 1:00 a.m., it was Rykhoff's duty to supervise until the 2:00 shift-end for the CIB shift. Before leaving, Phillips confirmed that Morality had taken over the investigation – there was, therefore, no need for CIB to submit an occurrence report regarding the seizure.

[147] Sheldon Cook testified that when Det. Rykhoff released the CIB officers from the CPS scene, he said that the detective knew he had court the next day. They had discussed this as they sat in the car awaiting Morality. It was at this point that Rykhoff handed him back the keys to his police vehicle. Rykhoff's evidence was that he ever only had the keys to his own police vehicle. On the accused's evidence, when he asked Rykhoff whether he had left anything in the car, he received a negative reply.

[148] The accused testified that he drove directly back to 12 Division, taking about 15 minutes, driving west on Lakeshore Blvd. and then north on Hwy. #10/Hurontario Street. As he drove past the Brogue Bar, an establishment where he had had drinks before, he observed Det. Rykhoff standing in the parking lot north of the bar at the rear of his unmarked police vehicle just closing the trunk. He then walked toward the bar.

[149] In his November 12, 2008 evidence, the accused testified that the notes that he did make were made while waiting for Morality and the EDU to arrive at the CPS as well as later at 12 Division. In his August 2009 testimony, the accused stated that he remained at the scene until about 11:30 p.m. as he first made notes about what had occurred at the Lakeshore scene after getting his keys back from Rykhoff. Only after extended cross-examination on the subject, did the accused acknowledge that his prior testimony was "inaccurate". Despite the general inadequacy of his notes, the accused related to the prosecutor in cross-examination that all the circumstances were "emblazoned in [his] mind".

[150] Sheldon Cook testified that he remained in 12 Division for 30 to 45 minutes preparing for court the following day. He made some additional general notes as his notes made earlier at the scene were incomplete. Times still remained to be entered in his notes. He had obtained Det. Sgt. Phillips' authorization earlier in the shift to leave early because he had to attend court the next morning.

[151] On the accused's evidence, after securing his firearm and obtaining his court package, he looked for the keys to his personal vehicle. He then recalled the keys were in his satchel which remained in the trunk of the cruiser. He retrieved the police vehicle car keys hanging in the CIB office.

[152] Once in the 12 Division parking lot, he opened the vehicle trunk. His satchel bag was at the right rear corner of the trunk where he had left it. Pushed forward in the trunk was a mango box. He was surprised to see it there – he thought 'how did the box get in my car?'

[153] Sheldon Cook testified that he pulled the box forward, opened it, and observed that it contained what appeared to be sorted packages of the type they had "offloaded to the CIB vehicles". In cross-examination, the accused was unable to answer how full the box was – "I'd be guessing if I said, you know, it was, you know, half full, three-quarter full". On seeing this, according to the accused, he did not know what to do. As a temporary transferee in the CIB office, he "immediately" went back into 12 Division to tell his supervisor, Acting/Det. Williams, saying, "Warren, there's a box of packages in the trunk of my car". On the accused's evidence, Williams looked a little surprised and said, "Show me".

[154] According to the accused, Williams came outside with him. As they walked to the Impala, he asked Williams if he had seen anyone put the box in the vehicle. Williams replied that he hadn't. He showed him the box. They together counted the packages. There were 15. The witness testified that Williams said to him that, "there was [were] no wires on the packages so he thought it was a box of the sorted packages". In any event, according to the accused, he thought "all the wire packages were left in the truck".

[155] In Sheldon Cook's words, he then asked Williams, "if he could bring it back down to the scene because I was just literally just going out the door to – because I had court the next day". The accused testified that Williams replied that he was working on reports he had to finish but he would "beep up" "Marty" to find out what they "should do with them".

[156] According to the accused's testimony, as they stood in the parking lot at the back of the vehicle, Williams then used a Mike phone to beep up Rykhoff on his Mike phone. The phone was set in such a way that he could clearly hear both Williams and Rykhoff. In his November 12, 2008 evidence, the accused summarized the conversation in this way. After Williams related that "we" had found "one of those boxes" in the vehicle containing 15 sorted packages, Rykhoff said, "What do you mean?" At this point, Williams' response was that, "we had the box there and that it was in the back of the car, and I was leaving to go home, to go to court, and he wanted to know what we should do with the packages". After Rykhoff, who appeared to be at the scene, described what a circus it still was at the Lakeshore CPS, he stated that they should "secure the box" until the morning and he would make arrangements to have the box brought back to Morality. Rykhoff added that "it looked as though the substance was benign". According to the accused, after Williams acknowledged what he had heard:

> Williams just basically said that – he just acknowledged that he turned to me, and I was – I had my bag there with my court packages, and I told him that I couldn't -- I – I couldn't

> fit the box inside of my locker. There's no storage facility in the division *per se* where we could go in, have access to and lock up a box of these packages. And the way that Rykhoff had put it to me, it was as though it wasn't anything to really be too overly concerned about; that it was – it appeared to be a benign substance and that he knew and he was going to let Morality know. So I said that I was – I had court in the morning, I would take the box and bring it back to Morality before I attended court, because court – or the Morality office is directly on my route to court, the following day.

[157] In his August 2009 testimony, the accused testified that when Williams reported to Rykhoff, "I'm with Cookie, we're here in the parking lot; there's a mango box in the trunk of the vehicle with packages inside it", Rykhoff "really didn't sound surprised". According to the accused, Rykhoff said that the box should be secured – "What I want you to do is to hold onto those packages, don't lodge them in 12 Division, I'll make the arrangements to have them returned on Thursday". Rykhoff added that, "it looked like the stuff wasn't even drugs, not to worry". The accused testified that after Williams made an acknowledgement to Rykhoff, he said, "Well listen, if you – if you want I'll drive it back down there because I'm leaving to go to court" to which Williams replied, "Listen, this is what we'll do, I want you to take the box with you, you're going right by the Morality office in the morning, you drop them off in the Morality lock-up and I'll get hold of Rykhoff, let him know that you're going to do that first thing in the morning". This made sense to the accused. He knew where Morality was as he had been there several times. He expected to be "going right by there" the following day. In his in-chief evidence, the accused described his state of mind:

> …when Williams said to me, 'Listen, why don't you just take this up to the Morality lock up the next day', it wasn't as though I thought I was leaving with, you know, a – a trunk load of drugs, or a box full of drugs. I just thought, you know, Rykhoff was still down there at the scene; this is the information coming from him. He's obviously privy to a lot more information than I have. You know, being in the police culture, it's like a paramilitary, sometimes you don't have all the details, but when you're given an order and you're given direction, you follow it. And that's what I did.

[158] Sheldon Cook testified that while he had never received a "direction" of this type, he did not consider it to be unlawful. The accused testified that he then removed the mango box and carried it no more than 20 yards to his personal Honda Odyssey van and placed the box in the trunk. He believes he gave the keys to the Impala to Williams. Then, leaving at about midnight, he drove directly home arriving at about 1:00 a.m. In his in-chief evidence, the accused stated the trip home was 45 to 50 minutes with minimum traffic. In cross-examination, the time was re-estimated to 30 to 35 minutes. Once at home, he carried the box from the van which was parked in the driveway and placed it in the trunk of his Nissan Maxima parked in the garage. According to the accused, his wife typically drove the van and she would be leaving for work first the next day.

[159] Asked why he switched the box to the second vehicle, the accused also stated:

> Because I was taking the other vehicle to work in the morning, and I was going to court, and I was going to do just as I was instructed to, I was going to drop the box with the packages off at the Morality office, and then I was going to go to court, and my route of travel would be the 401 – the next day it would be – the 401 to Hurontario Street, north on Hurontario Street and then I would drop the packages off at Derry Road, and then I would continue on to this building [the courthouse].

[160] On a later day at trial, in cross-examination, the accused testified that he had heard Rykhoff say over the Mike phone that, "it looks like the stuff's flour". At one point, the witness described Rykhoff as giving "instructions" as the detective "said what the arrangements would be to return it" – "Rykhoff, had given us instruction on how it was going to be put back into Morality's possession" – "Detective Rykhoff…gave us instruction" – Williams "fulfilled his obligation by referring it to Rykhoff" – "he [Williams] went through the chain of command" – "the chain of command at that point would have been for me to…take it to Williams, he would take it to Rykhoff, and Rykhoff would liaise with Morality" – he "was given instructions by [his] superiors". He did not ask either Rykhoff or Williams how the box ended up in the trunk of his police vehicle – "I didn't really feel the need to try and, you know, ask the whys then".

[161] According to the accused's evidence, he believed the 15 packages did not contain drugs – he "would never take a box of what [he] suspected to be drugs home". The witness agreed that the packages were "potentially evidence". In cross examination, the accused gave this evidence:

> Q. …taking evidence home and not keeping it in a secure police facility is not the right thing to do, is it?
>
> A. Ideally, sir, no…

Also in cross-examination, the accused gave this evidence:

> …it's going to be returned in the morning, I'll keep it with me and I'll put it in the – in – in the locker…
>
> . . .
>
> …I don't think that at the time Detective Rykhoff was asking me to do anything, or Detec – or Acting Detective Williams was asking me to do anything that was criminal in nature…
>
> . . .

> …I didn't believe – at that point there would be any consequences because I was operating with the direct knowledge and authority of my two immediate – my immediate supervisor, being Williams, and my full ranking detective, Rykhoff…I took it as I was instructed to do and I went home.
>
> . . .
>
> I was satisfied, after hearing Rykhoff's instructions, to – to do as I was instructed to do and just hang on to it.
>
> . . .
>
> …I was told to take that box home by Detective – or Acting Detective Williams and it was done at the direction of Detective Rykhoff…
>
> . . .
>
> …I was ordered to do it by not one but two supervisors, and that's what I did.

[162] Crown counsel pressed the subject further when the accused stated that, after the Mike phone call with Rykhoff, he asked Williams if "he wanted me to take this back down there" and Williams responded 'no', that he should hang onto the box for delivery to Morality later that day and that he (Williams) would make the arrangements. The prosecutor referred the accused to his November 2008 evidence stating that there was no storage capability at 12 Division. The accused testified that he gave that evidence early in the trial but, in his words, that "in the fullness of my preparation, the answers that I have given today encompass my full recollection and the evidence I wish this court to consider". The accused conceded that storage facilities did exist at 12 Division in 2005.

[163] Warren Williams testified that he had no discussion with the accused in the 12 Division parking lot in the early hours of November 17, 2005. At that time, he had no idea Sheldon Cook was in possession of 15 packages of suspected cocaine. Det. Rykhoff testified that he had no communications with Williams on that date about a box of packages in Cook's police vehicle.

EDU Clears the Truck

[164] Const. D. Hatcher of the PRPS EDU and his partner, Const. M. Philips, arrived on scene at the Lakeshore CPS at about 11:05 p.m. on November 16, 2005. Warren Williams initially testified that the EDU truck arrived with its lights flashing – "[q]uite a show". He subsequently stated to not recalling the truck

lights being on. Hatcher and Philips testified that they arrived at the Lakeshore CPS without flashing lights. The EDU officers were briefed by Det. McTiernan and Det. Furoy. The EDU officers heard no discussion suggesting there might be tracking devices in the courier truck cargo.

[165] At trial, Const. Philips described the courier truck being guarded by officers at perimeter points away from the vehicle. He and Hatcher were given to understand that the truck likely contained a shipment of narcotics, possibly cocaine, together with two suspicious sets of wired packages.

[166] The EDU set up a command post at 11:45 p.m. Philips believes he received the key to unlock the courier truck from a plainclothes officer. The EDU officers began to examine the remaining contents of the courier truck. A pair of packages with exposed wires, found on the floor of the truck, was x-rayed. A power source within was identified as well as components the officers could not identify. Although there did not appear to be an explosive present, at about 1:30 a.m., the EDU fired on the packages with a 29 mm. Nutrex water cannon which operates on the theory of water at high pressure entering a suspicious object fast enough to disrupt the device before any electrical circuit can complete itself. The package was rendered safe through its destruction by the cannon.

[167] At 1:15 a.m., when a second set of packages found sitting on top of a skid of boxes was x-rayed and found to contain the same components, no positive action, other than hand-dismantling, was taken respecting the item.

[168] Hatcher recalled 10 to 15 boxes at the rear of the truck that appeared to have “already been dealt with”. They appeared dishevelled but intact, with their lids off. He and his partner searched through the remaining 25 to 30 boxes of mangoes. Philips’ recall was that about half the load of boxes remained for the EDU to search. Their search of the truck for similar devices proved negative. In terms of the integrity of the mango boxes on the truck, according to Hatcher, he didn’t pay much attention to their condition but “[s]ome were better than others” with some boxes appearing to be “kind of falling apart”. Philips testified that the mango boxes were “not in any tattered shape at all really” although some were “ripped”. The mangoes looked fine to him. The officer had no recall of some of the mangoes being soft and rotting.

[169] Once an identification officer had taken photographs, at about 2:30 a.m., the EDU officers turned the scene back over to Morality. Having been informed the courier truck was safe, McTiernan, Furoy and Bryant then approached the back of the vehicle. McTiernan observed a large amount of white powdery substance on the floor of the truck. Furoy and Bryant swept the floor of the truck.

[170] The Morality officers located 3 boxes at the back of the truck containing only taped bricks or packages of the same shape, size and appearance as those already in the Morality Jeep. These boxes had apparently been sorted by the EDU officers during their clearing process. Consts. Kirkpatrick and Padilla transported one (1) of the boxes to the Morality office while Const. Ippolito retrieved 2 boxes for transport to the Derry Road facility.

[171] At about 3:30 a.m. on November 17, 2005, the PRPS Morality officers arrived back at their offices on Derry Road. A total count of the seized packages was then undertaken. There were 102 packages accounted for (98 + 4 destroyed to retrieve GPS devices) as well as a tracking device blown up by the water cannon and a second device dismantled by the EDU. When all the packages were secured in a locked compartment by 4:00 a.m., the RCMP were unaware that their controlled delivery was in the custody of another police force and that 44 packages of surrogate cocaine and three of their special tracking devices were still missing.

The Next 24 Hours: November 17
7a.m. to November 18, 2005 7:00 a.m.

[172] RCMP Const. Deanne Tucker was at home on November 16, 2005 when she received the information from someone on her force that the controlled delivery from Peru had gone missing. She related this to her husband, PRPS Const. Mike Langdon. After Langdon reported for work the morning of November 17, he read “the majors” detailing significant events of the prior few hours, and concluded that the Lakeshore CPS seizure might relate to the RCMP lost load. He informed his wife who contacted Cpl. Boutilier who in turn contacted Sgt. Nicholson.

[173] On November 17, Det. McTiernan began to receive messages at home. When he called PRPS Det. Checchia back, he learned that the CPS seizure related to an RCMP investigation and that the RCMP wanted to speak to him. McTiernan phoned Sgt. Nicholson who wished to view the seizure and tracking devices.

[174] On Det. Rykhoff’s evidence, he telephoned PRPS 12 Division on November 17 at about 7:30 a.m. and spoke to Const. Sajben. He was scheduled to work that day and November 18. He called in sick stating that he would not be reporting for work for the 4:00 p.m. shift. This was a lie. According to Rykhoff, he was one of a group of four, with plane tickets purchased September 21, who

was to travel to Halifax for the weekend to see a football game. Rykhoff was subsequently sanctioned under the *P.S.A.* for this misconduct.

[175] Rykhoff arranged by phone with A/Det. Van Bokhorst to cover for him on the November 17 shift.

[176] Sheldon Cook testified that he awoke on November 17 shortly before 7:00 a.m. and prepared to leave to take his Maxima in for a pre-scheduled service appointment at 401/Dixie Nissan and to attend court.

[177] Constable Williams testified that on November 17, at "around" 8:00 a.m., also described as "around 8:30" a.m., he received a phonecall from Det. Rykhoff. It lasted 3 or 4 minutes. Williams recalled that he was at the time busy getting his daughter ready for school. Rykhoff was upset about something. He also said he would not be coming in to work because his mother was sick and that he had to go see her. According to Williams' evidence, Rykhoff asked him to contact Morality "to find out what the inventory was for us to do our notes" – to "find out what the inventory totals were", and to ensure "that everything was okay with them". He agreed to do so when he went on shift.

[178] Det. Sgt. Phillips testified that once Morality had taken over the investigation the night before, no follow-up or further reports were required of the CIB officers.

[179] In his evidence, Marty Rykhoff denied that he telephoned Williams early in the morning of November 17 to tell him to inform Cook not to drop off the packages in his possession to Morality on his way to court.

[180] According to Det. Rykhoff's testimony, after receiving a page from Morality officer Dimitroff, he returned the call and in that conversation asked him out of curiosity what "the stuff" turned out to be from the night before. He spoke to Det. Checchia at about 9:00 a.m. and asked him the same question. Checchia disclosed that the seized load was an RCMP controlled delivery. Checchia asked about the amount of packages seized the night before. According to Rykhoff, he responded that he had no idea because he had left the scene before the search was completed. He told Checchia that McTiernan would have the information. Rykhoff testified that he felt upset because he assumed the RCMP must have had the load under surveillance without informing the PRPS as they dealt with the courier truck.

[181] Const. Williams testified that at about 8:50 a.m., using his cellphone, he left a message on Sheldon Cook's cellphone to call him back. Williams denied

the suggestion that he left Cook a message to hold onto the packages until the Morality guys came in at which time "we'll get them back to them".

[182] Just before 10:00 a.m., according to Williams' testimony, Cook returned his call using his cellphone while at the courthouse. At the September 2007 preliminary inquiry, Williams professed to have no recall of this conversation. At trial, the witness stated that subsequent review of his phone records refreshed his memory as to the existence of the call and its contents. In Williams' view, it was "a very minor thing" and, as two years went by, he forgot things.

[183] According to Williams, they discussed that Rykhoff would not be coming in for shift because his mother was sick. According to Williams, knowing that Cook had a Morality-based drug case in court that day, and having in mind Rykhoff's instructions, he said to Cook that if he happened to go by Morality, could he stop in to see if there was anything they could do "[a]nd to get the total". In his in-chief testimony, Williams both stated that Cook didn't seem to think that he'd be going to Morality as he had no evidence to pick up and that he would not be going to Morality. It was left that Williams would do the follow-up when he went on shift. In cross-examination, Williams described Cook's position as saying that he wasn't sure whether he would actually be going to Morality.

[184] In a pre-trial interview with a Crown prosecutor on November 25, 2008, Williams reported that, in this November 17, 2005 phonecall, Cook "advised…that if the opportunity arose he would go to Morality for me". Confronted in cross-examination at trial with varying versions, Williams stated that the "opportunity was still there" and that Cook's position was that "[i]f he had the opportunity to go, he would".

[185] Williams was certain that he spoke live to Cook on the morning of November 17 and that their communication was not limited to leaving messages for one another. Williams rejected the suggestion that Cook left him a message that his car was in the shop and that "the box" broke as he was moving it after which he put the packages in the Sea Doo in his garage. Williams testified that there was no follow-up to any discussion from the 12 Division parking lot the night before as no such conversation had occurred.

[186] Sheldon Cook testified that he received a voice mail message to his cellphone from Warren Williams at 8:42 a.m. saying "Cookie, it's Punchie, hold onto those packages until the afternoon Morality guys come in, and I'll see you at work". This made sense to him as it was the Morality afternoon shift which came on at 2:00 p.m. which had taken over from the CIB on November 16.

[187] According to the accused's evidence, because he was rushing around "trying to get the house cleaned up and…get out the door", he did not answer his cellphone.

[188] Asked at trial where the packages were at the time Williams called, the accused stated that they were in the trunk of his Nissan Maxima parked in the 2-car garage. In his in-chief testimony, the accused described his plan:

> Well my plan was to initially go to drop the packages off, then go to court, at which point I was going to drop the vehicle off for service prior to going to report for duty, which my scheduled shift was at four o'clock – to commence at four o'clock. So I – I decided at that point I didn't – I didn't want to leave the box in the trunk of the car while it was in for service, so I went to remove the box from the trunk of the car, to put it on the floor, and at that point the bottom of the box broke open, and I had the packages scatter across my garage floor.

[189] The accused testified that he looked about for something to put the packages into. In his words, "I was rushing to try and get to court, my concern was I was going to be late".

[190] In cross-examination, the accused agreed that a regular-sized garbage bag would quite easily have held the 15 bricks. Cook agreed that garbage bags were available in his house – in his words, "Perhaps I could have grabbed a garbage bag, they would have been available". It would have taken less than 5 minutes to get a bag and put the packages inside and be on his way.

[191] The accused testified that his Sea Doo, parked on the other side of the garage, together with a number of other items, was in the process of being winterized. Its cover was pulled back to the handlebars, to facilitate the drying process, exposing the front hatch compartment which was open for airing. At this point, in haste and out of convenience, he threw all the packages into the Sea Doo hatch compartment and closed it. To his recall, he left the cover pulled back with the hatch closed. According to the accused, "…I was going to be returning them to the afternoon shift…which would come in after I started. My original intent was to return and pick them up and bring them back in". The accused testified that he "didn't think for a minute that other packages were missing and that anybody had done anything untoward".

[192] In cross-examination, the accused stated that 12 Division is only one to four blocks south of the Nissan dealership and that to travel from the courthouse in Brampton to the dealership is less than 5 minutes from the Morality offices on Derry Road.

[193] The accused testified that he drove directly to court arriving "shortly before ten". His PRPS Court Appearance Card shows a punch-in at 9:35 a.m. Asked how long he was at court, the accused replied, "[a] few hours". It wasn't a lengthy case and ended up being put over. He also testified that he left the courthouse shortly after 11:00 a.m. The Court Appearance Card records a punch-out at 11:08 a.m.

[194] Sheldon Cook testified that after he arrived at court he called Williams from a phone at the courthouse between 10:00 a.m. and 11:00 a.m. leaving a message on his phone, "Warren, I'm at court now" and describing that he had left the packages at home in his Sea Doo after the bottom of the box broke open. He further communicated that he "would return at some point later on in our afternoon shift" once he received "direction who was taking the packages".

[195] Det. Rykhoff testified that at about 11:00 a.m., and no earlier, on November 17, he phoned Warren Williams to advise him that the load seized at the Lakeshore CPS was part of an RCMP controlled delivery. This was the only call with Williams on November 17. He called Williams as he had been the acting detective "in charge of…that whole production…that night". He told Williams he would not be coming in to work that afternoon. In a *voir dire*, Rykhoff claimed to have "told several officers that I wasn't coming into work". At trial, the witness testified that he had no recall of telling Williams that his mother was ill. In cross-examination, Rykhoff stated that he had booked November 17 as "a family day" which related to his mother being sick not him. Under further questioning, he agreed that his *P.S.A.* charge guilty plea related to him falsely calling in sick. The witness went on to assert that a family day could be considered the same as a sick day before agreeing that he had no need of a family day as the conflict with work attendance related to his trip to Halifax.

[196] In the same phonecall, on Rykhoff's evidence, he told Williams that he should raise "a stink" about the Peel officers wasting their time and resources while under RCMP observation. In Rykhoff's words, "I just assumed that they watched this play out". To Rykhoff's recall, this was a short conversation in which Williams agreed to raise their concerns. Under cross-examination, Rykhoff acknowledged that it was possible that he may have asked Williams to speak to Morality about an inventory of what was seized the night before and to see if Morality required anything further of them such as their notes. Later in cross-examination, on another court day, Rykhoff was asked whether he told Williams on November 16 that he would not be in to work the following day or whether, at the outset of the November 17 shift, Williams would be expecting his arrival:

Q. Well could it be that Officer Williams was waiting around at the station, thinking you were coming in?

A. I - - I'm not certain of that, wheth – whether he was waiting for me. I don't know. You'd have to ask him.

Q. Well I will, but I'd like to hear your response to it. You just have no recollection of when you told Officer Williams, 'I'm not coming in', none?

A. I don't recall specifically when I told him, or if I told him, no.

Q. So not when or if you told him?

A. I don't recall sir.

[197] On the accused's evidence, on leaving court, he next drove to the Nissan dealership. The dealership records show the Maxima checked in for service at 11:41 a.m. The dealership shuttle transported the accused to 12 Division. The accused agreed in cross-examination that had he placed the 15 packages in a garbage bag he easily could have transported them back to the Division in the shuttle vehicle. Prior to the 4:00 p.m. start of shift, to the accused's recall, he dealt with paperwork and worked out in the Division gym.

[198] Shortly after noon on November 17, McTiernan and Kirkpatrick met with Nicholson and his technical support people at the Derry Road Morality office. To McTiernan's recall, Nicholson did a briefing regarding the RCMP investigation including speaking of the very expensive GPS units. He had no recall of Sheldon Cook's name being mentioned. Nicholson was permitted to view the 8 boxes seized the night before. The RCMP technical personnel took custody of one tracking device. 98 packages and a second GPS device were turned over to Nicholson. Nicholson was also given the statements taken from the courier truck witnesses.

[199] Constable Kirkpatrick recalled that Sgt. Nicholson mentioned to him that the RCMP were picking up a signal from a missing GPS device. Kirkpatrick testified that he shared this information with McTiernan, Furoy, Barnes, Padilla and Ippolito.

[200] Const. Padilla testified that Kirkpatrick briefed the other Morality officers after noon on November 17 about what he had learned from the RCMP including that there were "missing packages" from the controlled delivery and that a signal was being received from a tracking device suggesting the packages were in the Cambridge area. Ippolito's notes reflected that when he attended for his shift on November 17, he received information that the seizure was a controlled delivery

from a foreign country and that there were tracking devices and one of them was tracking packages in Cambridge.

[201] Warren Williams recalled that at the outset of the November 17 4:00 p.m. CIB shift, with Cook, Chamula, Phillips, Van Bokhorst and others present, there was discussion for about half an hour about the RCMP investigation – the controlled delivery and the loss of the load after it left the airport. Someone said that the packages only contained flour. There was discussion of GPS tracking devices in the shipment. Williams testified that he asked Det. Sgt. Phillips after the outset of the shift if everything for Morality had been taken care of and was informed that it had been. As a result, he decided he need not go to Morality as Rykhoff suggested.

[202] Constable Chamula also went back on shift at 4:00 p.m. on November 17. While in the PRPS CIB office, with Williams and Cook present, he learned that the seizure of the night before was an RCMP controlled delivery and that tracking devices were in the load not a bomb. To the witness' recall, someone stated that about 40 packages were still missing as well as more tracking devices.

[203] The accused recalled Van Bokhorst talking about the mangoes load being a missing RCMP controlled delivery lost after it left the airport. There was no mention of anyone searching for more packages or tracking outstanding packages. The accused testified that everyone present knew the packages contained flour just as Rykhoff had said when they left the prior evening. At this point, the accused believed someone had put a box of the packages in his police vehicle "in error, or by mistake". He did not disclose this information during the discussion. Cook testified that had anyone said that Morality was missing packages, he "would have been the first one to step up and say…here's 15 right here; if you don't know about them, these are the 15 that I have". On the accused's evidence, his belief as to the packages he had, from his discussions with Rykhoff and Williams, "…was just a matter of getting them back to them" (Morality). According to the accused, "I had every reason to believe that he [Rykhoff] had made the arrangements, as discussed and as Williams had told me".

[204] Rykhoff testified that his flight to Halifax departed from the Hamilton airport at 5:00 p.m. on Thursday, November 17.

[205] Const Kirkpatrick recalled that, during his 2:00 p.m. to midnight shift, probably between 5:00 and 6:00 p.m., he received a phonecall from Williams reporting that he had received a call at 12 Division from the owner of the courier

truck about the mangoes remaining in his truck. On Kirkpatrick's evidence, he told Williams that Morality was done with the investigation of the mangoes and that the matter had been turned over to the RCMP as it related to a controlled delivery that had gone bad for them. Williams did not ask if anything could be done by the CIB to assist Morality nor did he make mention of the "inventory". Prior to this call with Williams, to Kirkpatrick's recall, he may have received a phonecall from Sgt. Nicholson inquiring about the correctness of the PRPS count of the packages and whether any could have been left in the courier truck.

[206] According to Kirkpatrick, "I don't think the specifics of any signals or anything like that were discussed with Constable Williams". At trial, Kirkpatrick maintained that he had not spoken to Williams about GPS tracking devices even after viewing in court an excerpt of his November 19, 2005 statement to the RCMP:

> Q. Did you mention like a GPS tracking device to him at that time, that there was a GPS tracker involved?
>
> A. I don't think so.
>
> Q. Yeah.
>
> A. I don't think I mentioned GPS tracking at all.

[207] According to the accused, as he and Williams were on the main floor of the Division about to exit to their cars to go for dinner, he asked Williams, in what he did not consider a "secret" conversation, whether he had heard from Rykhoff and "who we were supposed to get these packages back to". The accused testified that Williams knew from the night before about the "boxes in the trunk of the car". Cook testified in-chief that Williams informed him:

> …that what we were going to do was hang on to them, and I told him I still didn't have my car. He just [said] we'd hang on to them and drop them off at the end of the shift.

In cross-examination, the accused stated:

> …as we were walking out the door to go to dinner, I spoke to Williams and he confirmed for me again that in fact the arrangements had been made to move those packages of flour – or bring them back to the Morality office.

[208] Williams testified that at about 5:30 p.m., as officers were preparing to leave the CIB office to go to dinner, he was approached by Sheldon Cook who took him to a staircase off the main hallway. According to Williams:

> And he advised me that he had a box at home. And I remember saying "What?" And – and then he says "Yeah, I have a box at home". And I said "Well go get it". And he says, "Yeah I'll get it" and he's going to take it to Morality, and I said, "Good." And then I left, I walked away.

The witness also described the conversation as Cook reporting that he had some flour and that he was taking it back.

[209] In his in-chief testimony, Williams said that he was taken by surprise in this short conversation. This was the first he had heard about a box. There was no discussion as to why Cook had the box. Looking back, Williams felt that he did not handle the situation very well – he should have asked questions. The witness stated that he considered it to be Cook's "issue". Williams considered that the box would have been evidence and would have become an exhibit. According to Williams, when Cook said he would be taking the box to Morality, "that made sense to me, that it had to go back. It had to be part of the inventory". Williams testified that Cook did not ask whether Rykhoff was still making arrangements to meet with Morality about the packages in Cook's possession. In cross-examination, Williams rejected the further defence suggestion that Cook asked him who in Morality the packages were to be returned to. Cook did not say his car was in the shop. Cook did not say, "I'll drop them off at the end of my shift unless they need it earlier than that". Williams further denied saying he would "call Rykhoff again and let him know" or that he told Cook that Morality knew "we have 15 packages" and that he should not worry as they would get the packages back that night. According to Williams, Cook made no mention of a breaking box or packages being stored in his Sea Doo. As a supervisor, Williams believed he had no further obligations because Cook said he would return the packages to Morality.

[210] In re-examination, Crown counsel put to Williams, that even on his own account of the pre-dinner conversation with the accused, given his supervisory role for a part of November 16, 2005, he could be seen as complicit in wrongdoing:

> Q. -- you were letting – by not doing anything at that point, you were essentially condoning, letting Mr. Cook get away with, at best, a very negligent action, or at worst, a criminal offence. Why did you not do something in the stairwell?
>
> A. He said he was going to take it back. I believed him.
>
> Q. Even if he took it back, it didn't necessarily mean he hadn't done anything wrong, so why didn't you pursue it at that point?

A. Like I said, I wish I had the opp – opportunity to do this over again. I would have asked him a lot of questions. I didn't ask him any questions about it. He said he was going to take it back, and I believed him.

Q. How many – how many other times has an officer done something wrong, that you've become aware of, and you turned a blind eye, hoping that it – he – it would somehow get fixed?

A. Well unfortunately that's a very general sta – statement. Mistakes happen. I mean the – then they've got to be corrected. And I believed he was going to take it back, so therefore correcting the mistake.

Q. But how did you know it was just a mistake?

A. I didn't. I mean he told me that – I mean he approached me; he told me that it was at his house. I said, fine, go get it, and he said he was going to take it, and take it back to Morality, and that's where it was supposed to be.

. . .

Q. How many times while you've been a police officer have you become aware of another officer doing something wrong – and I'm not suggesting whether it's just criminal or *Police Services Act*, or negligent police activity, and you've simply turned a blind eye, thinking that, well, it'll take care of itself? And I'm not asking for particulars, I'm just saying have you – have you done that before, and how many times?

A. People make mistakes in – all the time, and then they get corrected. I mean I can't give you a number, I don't know. People make mistakes all the time and – I don't know. I can't remember the last time – well it was – obviously the last time was – was this incident, that's the one that sticks out in my mind.

Q. But have you done it before?

A. I can't recall right now. I can't recall a specific incident where something has happened that I turned a blind eye.

Q. So we're – we-re now into the same scenario that Mr. Ducharme and yourself found yourself in – you can't say it didn't happen, you just don't remember – have a specific recollection of doing it?

A. Well exactly. It's not something that I dwell on. I mean if a mistake happens, it gets corrected, and the – that's all I can say. I don't know. I – nothing comes to mind right now.

. . .

Again, mistakes happen. I don't know. It – it's not a common occurrence, no, but it does happen.

[211] Det. Sgt. Phillips testified that he made it clear to the CIB officers that he was to be kept "in the loop" about the courier truck investigation – if Rykhoff or

Williams had information about the location of any of the packages those details should have been provided to him.

[212] Warren Williams informed the court that the CIB officers, including Cook, then went to a nearby restaurant for dinner remaining for an hour or so. The witness testified that he then left 12 Division on his own to undertake surveillance. At 11:00 p.m., he went to Milton to play hockey. He told no one he was going to play hockey. According to Williams, the drive to the arena is 20 minutes each way and he played hockey for 60 minutes. He was apparently paid for this 100 minutes as though he were on duty. Det. Sgt. Phillips considered this to be improper. An officer is entitled to play hockey only if he books off on his lunch hour. Following hockey, he returned to 12 Division at about 1:30 a.m. on November 18.

[213] Warren Williams testified that prior to the CIB office starting to work overtime after the usual 2:00 a.m. shift-end on an arson investigation involving a fatality, he did not have a conversation in which Cook asked whether there was yet "any word from Marty". There was no discussion at this time in which he told Cook that Rykhoff had not come into work that night. He also did not say that he would get hold of someone at Morality about the packages being run up to the Morality lockers after shift. As well, Cook did not inquire of him as to the identity of anyone he should see at Morality.

[214] According to the car dealership records, Sheldon Cook's vehicle was ready for pick up at 3:52 p.m. To the accused's recall, a fellow officer drove him to the dealership after dinner. He picked up the Maxima and returned to 12 Division. To the accused's recall, after dinner he was assigned by Williams to take witness statements relating to a nightclub shooting or stabbing. The assignment took him to Toronto and to Mississauga.

[215] The accused did not seek to call Rykhoff himself. In his evidence in-chief, the accused described his state of mind at the time:

> I wasn't – Acting Detective Williams was the – I mean the – the senior officer on the shift; I – again my – in my mind, the packages were already inventoried because throughout the shift – I mean we went to dinner; no-one from Morality called saying, where are those packages; no-one called to say, hey, we're tracking packages. In my mind's eye they were already accounted for. They physically weren't returned but Rykhoff, again from my understanding, had communicated the information to whoever was – whoever he was dealing with with regards to their return. And I think Williams detailing me to do other things, again in my mind's eye, spoke to that.

[216] Cook testified that while he had yet to see Rykhoff, he expected him to be at work on November 17:

> Because he had told us he was going to make arrangements to have these packages brought back, and I – I didn't see him. Later on in my tour of duty on the 17th I'd inquired with Constable Williams again, is – if he heard anything, and I told him that if I didn't hear anything at the time – I was trying to follow the protocol in terms of the chain of command, but I told Constable Williams that if I had not heard anything I was just going to bring them back and put them in the Morality locker, and I'd get a hold of a detective in the unit and let them know.

[217] The accused testified that toward the end of the shift, around 1:30 a.m., when he asked Williams, he learned that Rykhoff had not come into work. The witness informed the court that he was thinking he might leave a little early to go home, get the packages, "and bring them right back to the Morality locker". He told Williams his plan. Williams said, "Don't worry, just when we finish…work, you know, just get the packages and bring them back" – since such a return would be after 2:00 a.m. there would be no Morality officers there so the accused "assumed" that the return would be to the "general Morality locker". According to the accused, Williams said "to hold off" because of the need for the CIB to then participate in the fire investigation. In cross-examination, the accused stated:

> A. When I spoke with Detective Williams he told me that Morality knew that we were going to bring those packages in. There was nobody specifically given to me. There's a general Mo – Morality locker, and I want to make sure we're clear on this, is that the Morality teams have their own lockers where only the Morality officers would go to. There's like a general evidence lock up; Morality related property is dropped off there. That's where I understood these items to be returned to. At no point would – did Williams tell me specifically that there was a person in Morality that was going to take the packages, it's just that they were going to be returned there.
>
> . . .
>
> Q. Based on – in – based upon that answer, Mr. Cook, I take it you would agree with me that there would be absolutely no problem leaving those…15 packages at the building that Morality is located, and that's the one at 180 Derry Road, I believe, is that correct?
>
> A. It is located at 180 Derry Road.
>
> Q. That really at any time you could put those packages somewhere in that exceptionally large building?
>
> A. Correct. Well I wouldn't say somewhere, I would say that in the evidence – the general evidence locker room at 180 Derry Road you can leave Morality related property there, yes. But I want to make it also clear that that was not the direction that was given to me, okay. It was later in the evening – and just so I'm absolutely clear on this, it's later in the evening, at 1:30 – yes, the teams are off

> at two o'clock – that's when I assumed that we were going to leave it in one of these lockers, because you're right, nobody would be there. Prior to that, during the shift, I believe that if we were – you know there was somebody to – if we'd returned it before two there may very well have been somebody to turn it over specifically to, but that wasn't communicated to me and – and the – the context of that 1:30 conversation with Williams is that we were going to then leave them in the Morality general lock up.

[218] In cross-examination, the accused attributed to Williams a statement that as long as "we had it back" by the beginning of the November 18 afternoon Morality shift "that would be fine". The witness testified that his plan, however, was to drive home, obtain the packages, and "go right back out".

[219] Warren Williams denied the suggestion that, at about 5:30 a.m. on November 18, Sheldon Cook told him he was headed home to get the packages so that he could return with them to bring them to the Morality locker. He also rejected the suggestion that at this time he told Cook he would call the afternoon guys at Morality so that the packages could be taken in when that shift was present.

[220] In his evidence in-chief, in describing the overtime worked on November 18 after the usual 2:00 a.m. shift-end, Warren Williams testified that, "[w]e worked through 'til six o'clock in the morning". Asked in cross-examination whether he left 12 Division at 5:30 a.m., Williams replied that he could not remember what time he left. The witness was then referred to two calls made from his cellphone at 6:08 and 6:10 a.m. routed through a cell-tower in Freelton, Ontario located in the direction of his residence in Guelph. Williams testified that he placed those calls to his wife. Under further cross-examination, Williams acknowledged that when he was questioned by investigators on November 23 about when he left 12 Division on the morning of November 18, he responded that he was "signed out" for 7:00 a.m. He also informed investigators they were there dealing with the arson investigation until seven in the morning. According to Williams, "that's what time on paper we were there 'til". He gets "signed out by other people". Williams testified that it was a common occurrence for officers to get signed out "to the next hour" by whoever is in charge. He ultimately acknowledged that that was not "accurate" and that he was party to a false compensation claim for the additional claimed overtime:

> Q. So you're collecting money that's not due to you. You weren't working 'til 7:00 a. – a.m. in the morning?
>
> A. That's correct.

Det. Sgt. Phillips testified that if Williams was not working between 5:30 a.m. and 7:00 a.m. he should not be paid or receive compensating time payback for that time. Phillips testified that when he subsequently initialled Williams' 7:00 a.m. off-duty time in the Daily Time Keeping Exception Form 12 Division CIB 'C' Platoon, he did so based on a trust factor that the time was accurately recorded. Williams ultimately stated that he may have left 12 Division just before 6:00 a.m. He maintained that he was not trying to trick or mislead the investigators.

[221] Williams was further confronted with his statement to RCMP investigators that, on the morning of November 18, they had worked "though 'til, er, we had a meeting at about, er, twenty after six in the morning" – he agreed that could not be true because he was already on his way home. Williams guessed that he arrived home between 6:30 a.m. and 7:00 a.m.

[222] Williams denied that he travelled through Oakville on November 18 on his way home to Guelph or that he was in communication with Rykhoff as he drove home. Williams denied putting any packages from the courier truck into a Blinds To Go dumpster in the vicinity of Rykhoff's residence.

[223] In cross-examination, with the assistance of phone records, Williams was challenged on his repeated assertion that the two phonecalls shortly after 6:00 a.m. were to his wife. Faced with the records, the witness admitted that at 6:08 a.m. he called his own cellphone to check for messages and, at 6:10 a.m., called back to the Division. He could provide no reason why he called the Division – he did not contact Rykhoff by having Communications connect him with Rykhoff.

The Dumpster Packages

[224] A Blinds To Go (BTG) retail outlet is located in a shopping plaza located at 3235 Dundas Street West in Mississauga. At the time of these events, in an alley at the back of the plaza, accessible to service vehicles, were large metal dumpsters about 10' x 6' in dimension and about 5' high.

[225] During the evening of November 17, 2005, shortly after 8:00 p.m., Sgt. P. Douek, a member of the RCMP Special I unit, was engaged in using two pieces of electronic equipment in an effort to zero in on a signal from one of the tracking devices missing from the recovered Peru shipment. His search led him to a dumpster behind BTG.

[226] When Douek lifted the lid on the dumpster, he observed that it was filled with dark coloured garbage bags. The officer climbed into the dumpster and rooted about to locate the device. Noticing a bag with some white powder residue, he emptied its contents and discovered packages of the type he had seen in Peru when the controlled delivery shipment was assembled. The garbage bag was knotted shut at the end but it's side was ripped.

[227] Douek recalled finding 2 or 3 bricks or packages in the bag. Buried in one, not visible from the exterior, was one of the RCMP tracking devices which remained functional. The packages themselves had obviously been slit open to gain access to the contents.

[228] Additional officers participated in the search of the dumpster. In all, 8 of the missing packages were discovered and seized. Each of the packages appeared to have been sliced open according to RCMP Cpl. Boutilier.

[229] Det. Rykhoff, who resides in Oakville, about 2.8 miles and 6 minutes' drive from the BTG store on Dundas Street, testified that he had no familiarity with the location of BTG. The witness acknowledged being sternly questioned by investigators about the bricks located in the BTG dumpster. On Rykhoff's version of events, he did not steal packages from the controlled delivery, he only learned that packages were missing during a phonecall with Det. Sgt. Phillips on the weekend of November 19-20, 2005, and he did not abandon packages in the BTG dumpster because he feared the packages would be discovered or because he learned that their contents were not a valuable narcotic.

[230] At trial, the prosecution specifically stated that it was not alleging that Sheldon Cook discarded the 8 packages into the BTG dumpster.

Sheldon Cook is Arrested

[231] The accused variously testified that it took him 50 minutes to reach 12 Division from home "on a good day", and that it could take longer, and that it could be done in 40 minutes or less. Cook and his family moved to 95 Glazebrook Cres. in Cambridge in May 2005.

[232] The RCMP Special I officers traced the signal from one of their missing tracking devices into the Cambridge area and eventually to 95 Glazebrook Cres. By the early hours of November 18, RCMP surveillance was set up on the Cook residence and a search warrant application was commenced.

[233] Sheldon Cook testified in-chief that he arrived home at about 7:00 a.m. on November 18, 2005 after about a 1-hour drive from 12 Division. The PRPS Daily Time Keeping Exception Form recorded an off-duty time from the Division of 7:00 a.m. The witness agreed that given an RCMP surveillance team observed his arrival home at 6:25 a.m., that his stated time could not be correct. Rhonda Cook, the accused's wife, recalled seeing her husband at about 6:45 a.m. as she exited the shower intending to go to work in Kitchener where she was employed as an educational assistant.

[234] The accused testified that on speaking to his wife he learned that Friday, November 18 was a PD (Professional Development) Day for his children and that, with Rhonda leaving for work, arrangements for dropping the children off were set for 11:00 a.m. at a friend's home. The accused agreed that his in-laws who resided in the basement of his home helped with day-care. According to the accused, Rhonda had said no one else was available to look after the children. Ms. Cook testified that her parents had doctors' appointments that day.

[235] Rhonda Cook testified that her husband looked exhausted when he arrived home. After explaining his late arrival home on account of the fire investigation, according to the witness' evidence, the accused said he had to return to work right then "and return some flour packages". Ms. Cook didn't ask any questions about the packages. She said that he needed to sleep and look after their girls until 11:00 a.m. The accused testified that, in the circumstances, he planned to sleep until he could drop his children off and then, in his words, "just take the packages back to the Morality Unit and I would sleep in my car until my shift started at four".

[236] RCMP Cpl. P. Martin, one of the surveillance officers, had the Cook residence under scrutiny as of about 5:30 a.m. At 10:40 a.m., he observed a male, later identified as Sheldon Cook, exit the residence with two children. On direction from Cpl. Boutilier, Martin moved his unmarked cruiser to block the bottom of the driveway at 95 Glazebrook. Martin exited his vehicle and approached Cook on foot and identified himself as an RCMP officer. The accused in turn identified himself as a PRPS officer. Boutilier then arrived on scene. The accused explained that he was about to drop his children off at the nearby home of a friend. With RCMP cars following, the accused was allowed to drop off his children and drive back to the driveway of his home.

[237] Sheldon Cook testified that Cpl. Martin, after approaching and identifying himself as an RCMP officer, stated that a GPS signal was being received from his residence. On the accused's evidence, he immediately said:

> Listen, if this has anything to do with this load of mangoes, I work with Peel and I worked on that investigation.

[238] On the accused's evidence, when Boutilier arrived in the driveway, Martin informed him that the accused was with Peel. The accused agreed that he was permitted to drop off his children.

[239] Cpl. Boutilier arrested Sheldon Cook, then a 14-year service PRPS constable, and told him why the RCMP were there. The accused nodded as if he understood and mentioned that he was aware of the incident and investigation that week. He was afforded his s. 10(b) *Charter* rights and was permitted to contact PRPS Association representatives and counsel. The accused was permitted to move around the main floor of his residence but with RCMP accompaniment. He was informed that a search warrant application was underway for his residence.

[240] The accused agreed that he invited Boutilier and Martin into his home after Boutilier stated, "Listen I want to talk to you about this". Once inside, when he was arrested by Boutilier for conspiracy to import cocaine, he "was floored" – he couldn't believe it. He recalled Boutilier suggesting that he say nothing and get a really good lawyer. According to the accused, his first thought was to get hold of Rykhoff or Williams to have them clear up the matter. He did not. The accused recalled phoning his inspector, his wife, and a Police Association lawyer.

[241] RCMP Const. F. Wong entered the front foyer of the Cook residence at 11:35 a.m. where he met RCMP officers Boutilier, Martin and Marlow. Boutilier informed Wong that Cook had been arrested for conspiracy to import cocaine and given his *Charter* rights and that he was to keep an eye on the accused. Wong and RCMP Cpl. Marlow spelled each other off guarding Cook.

[242] Const. Wong testified that Sheldon Cook requested to call 12 Division to report that he would be late coming in. Wong confirmed with the accused that he was a Peel police officer. Wong permitted the accused to make several calls including to his lawyer. Wong informed the court that he asked the accused at about 12:05 p.m., when they were in the kitchen area, how he knew about the mango load. In his notes made "pretty well immediately" after, and with an attempt at exact note-taking, Wong recorded Cook's reply that he had been working on the investigation and that a driver pulled up to his Community Station, 12 Division, two days ago saying there was a suspicious load of mangoes. At trial, the accused recalled speaking to Wong telling him that he worked for CIB

and that the courier truck had come to the police station and the driver was suspicious of his load.

[243] In a phonecall with her husband, Rhonda Cook was asked to come home right away as the RCMP were at their house. By about 1:30 p.m., Ms. Cook was home where she met Cpl. Boutilier who informed her that her husband had been arrested for conspiracy to import. On her evidence, she was in complete shock and began to cry. She was permitted to speak to her husband inside the residence. The accused told her that it was a misunderstanding; it was not the truth, and that she should not worry.

[244] The search warrant for the Cook residence arrived on scene at about 4:50 p.m. The warrant was executed and a number of items quickly seized, as more particularly described below, including 15 of the bricks or packages missing from the Peru shipment as well as an RCMP tracking device.

[245] Cpl. Boutilier testified that, shortly after 5:00 p.m., he then re-arrested the accused and advised him of his right to counsel and his right to remain silent. He was informed that he could again call his lawyer. With notebook and pen in hand, Boutilier advised the arrestee that the objects of the warrant had been seized – the tracking device and the substituted cocaine. According to Boutilier, Cook appeared to act surprised and indicated he didn't know what Boutilier was talking about and that he had "nothing to do with anything related to our search". While not purporting to report a verbatim quote, Boutilier recorded the accused's response in his notebook "almost immediately afterwards", within seconds after the words were spoken, in 30 to 60 seconds, and considered his note to be "as close as possible to what he said" – "it was definitely said to me". Boutilier testified that it was his practice, in making an arrest, to make his notes as to comments made during the arrest as soon as possible. Boutilier's recall was that RCMP Const. Thomas would have been present for the exchange and off to his left about 10' into the small front sitting room. Boutilier testified that Cook's comment was "a typical comment that we hear all the time" and therefore had no particular significance when it was made. Boutilier was unaware of the earlier conversation between the accused and Const. Wong – he heard about this for the first time as he was questioned at trial.

[246] Boutilier compared the statements provided to him by the accused:

> I've spoken with Mr. Cook; I've indicated that we had a wire in the load and – with a tracking device, and he nodded as if he understood and mentioned that he was aware of the project regarding the incident earlier this week. And – and by that we're – we're talking about how the load was recovered by the Peel Police Service. So he's indicating to me that he has knowledge of what – of what I'm talking about. And then at the time of

> – when I arrest him again for the second time, he indicates – it – he – he appears surprised and indicates that he did not know what I was talking about and that he had nothing to do with anything related to our search. So you know, at the first arrest he's indicating that he has knowledge of what I'm talking about, and then the second arrest, there he's indicating that he has no knowledge of what I'm talking about.

[247] To the extent that the accused's response on re-arrest, which Boutilier did not believe, could be seen as inconsistent with Cook's comments when first arrested, Boutilier was not surprised – arrested persons frequently claim the police have arrested the wrong person.

[248] Const. Wong's recall was that the accused was re-arrested in the small front room by Const. Thomas. Wong did not hear what the re-arrest was for and he heard no utterances by the accused when he was re-arrested. He was walking by as Thomas handcuffed Cook.

[249] Const. Thomas testified that part of his duties on November 18 was to guard Sheldon Cook in the front sitting room. The accused for the most part remained seated in that room. The witness recalled Boutilier speaking to the accused at one point but he did not overhear exactly what the two were saying. He heard broken phrases but made no notes and was unable to recall at trial what he heard. Thomas described his actions as walking back and forth in the hallway never further than 10 to 15' from the arrestee keeping Cook in sight.

[250] The accused testified that he was at no point re-arrested.

[251] Rhonda Cook testified that she returned to her residence at about 7:00 p.m. She spoke to her husband who said that everything was going to be okay. The accused was removed from the house in handcuffs. Ms. Cook testified to a discussion on the front porch of the residence with Cpl. Boutilier, with her sister (Kelly Ann Walker) and brother (Roger O'Toole) present. Boutilier described where her husband was being taken and the anticipated arraignment the next morning. She was informed that the accused was to be charged with conspiracy to import cocaine involving a shipment of cocaine intercepted in Peru and replaced with flour packages. On Ms. Cook's evidence, when she heard this, she said "oh, wait a second, this must have something to do with what he told me this morning about the flour packages he had to return to work". There was no response from Boutilier. At trial, Kelly Ann Walker testified that her sister Rhonda told Cpl. Boutilier that the accused had said something about flour that morning. Cpl. Boutilier was not questioned by the defence about these conversations.

Cook's House is Searched

The Surrogate Cocaine Bricks

[252] At about 5:00 p.m. on November 19, on the authority of a warrant to search the Cook home, and based on the strength of the RF readings being received, Sgt. J. Roskam of the RCMP Special I unit and RCMP Const. Tucker entered the garage of the Cook residence. Roskam moved from the location of an ATV to the Sea Doo on a trailer where the signal was stronger. He suspected that the missing tracking device was in the Sea Doo which was "covered" in a fabric cover. Roskam testified that the Sea Doo was then "untarped" to permit further investigation. Const. Tucker testified that a nylon cover was over the Sea Doo and that after she removed that cover, Const. Stewart assisted in unlatching the hatch where 15 brown-wrapped packages were discovered. Roskam recognized the packages from the controlled delivery shipment which left Peru.

[253] The packages removed from the Sea Doo had not been opened or altered. Roskam located the tracking device hidden in one of the packages.

[254] Const. Tucker located registration papers in the accused's name in the glove compartment of the Sea Doo. On November 21, Tucker weighed each of the 15 packages – each weighed more than 1 kilogram with none over 1100 g. except for the one weighing 1160 g. which also contained the tracking device.

[255] RCMP Sgt. Holowka, a qualified expert respecting controlled substances such as cocaine and marihuana, and their valuation, testified that in November of 2005, a kilogram of cocaine sold within the range of $21,000. to $36,000. On this basis, fifteen (15) kilograms of cocaine were valued at $315,000. to $540,000. or more if the sale were at the gram level or if an adulterant was added to the narcotic.

Marihuana

[256] Constable Tucker, in her search of the Cook garage at about 5:20 p.m., located a cardboard box on the top of a shelving unit at the rear of the garage on the same side as the Sea Doo trailer and to the left of a door leading to the home's interior. No photos were taken prior to the officer removing the box from its location. Const. Tucker testified:

> …when I looked up and saw it [the box] and I started to pull it down I could see that there was a bag, so the bag was – it was almost half in the box and half sitting above the box – it was in the box but it was peeking a – out above the top of it I guess.

. . .

The bag was – it was in that box but it was kind of sitting up in the box.

. . .

There may have been a lid but it wasn't closed.

. . .

…so the bag was – it was almost half in the box and half sitting above the box…

[257] To Tucker's recall, the box may have been situated over 6' above the garage floor. She stretched and tilted the box to get it down. Once the box was lowered, the officer discovered two plastic Food Basics bags one inside the other. The outer bag was "kind of closed over, pushed down almost". Tucker had to pull the bag open whereupon she found that the innermost bag contained shrink-wrapped packaging surrounding two Ziplock bags containing brown buds later tested to be cannabis marihuana. The Food Basics bags were situated atop other unspecified contents in the cardboard box.

[258] Constable Tucker seized the narcotic and the bags and packaging but not the cardboard box. It was left in the garage.

[259] The seized marihuana weighed 443 g.

[260] Fingerprinting of plastic bags is a normal investigative procedure as they are, according to RCMP Sgt. Holowka, very good preservers of fingerprints. Fingerprinting of the seized plastic materials revealed no identifiable fingerprints.

[261] Asked in cross-examination whether she noticed any writing on the outside of the cardboard box, Const. Tucker stated that she was unsure – there may have been manufacturer print on the box. She could not say one way or the other whether there was writing, for example an address, written on the outside of the box.

[262] Sgt. Martin, after returning home to get his own camera, photographed a cardboard box on top of a shelving unit at the rear of the Cook garage with some Food Basics bags on top. The box pictured in the photo (Ex. #59) is very likely the one taken down by Tucker and replaced by someone for the purpose of having an *in situ* photo taken. On the two sides of the box visible in the photo, there does not appear to be any hand-printing or handwriting.

[263] RCMP Sgt. K. Holowka testified that marihuana is ordinarily stored in a refrigerated setting to maintain the THC level or potency as time goes on.

Vacuum sealing retards decay. The expert considered the circumstances of the marihuana seizure from the accused's garage to be "borderline" for proof of possession for the purposes of trafficking taking into account that:

(1) no scales, debt lists, small baggies, or cutting agents were located

(2) the quantity of marihuana seized would be about a 2-month supply for a heavy user.

In these circumstances, the prosecution stated an intention to attempt to prove simple possession only.

[264] Sheldon Cook testified that prior to the search of his home he had no knowledge that there was marihuana in his garage. The accused informed the court that he had never handled the cardboard box located by Const. Tucker or gone through its contents. He never smelled an odour of marihuana in the garage. If he had become aware that marihuana was in the box, he would not have agreed to his brother placing the box in the garage.

[265] Darren Cook, the accused's older brother, testified that in the Spring of 2005 he leased a property he owned at 122 Baronwood Court in Brampton to Susan Brake for a one-year period. In the late summer of 2005, Ms. Brake notified him that she was vacating as she had taken a position out of province. Ms. Brake sought permission for her cousin, Shannon Brake, to remain on the premises as he had been residing with her. On Darren Cook's evidence, after meeting and interviewing Shannon, he agreed that Shannon could stay on as the tenant commencing in September 2005.

[266] Mr. D. Cook testified that by the end of September he was made aware by one of the utility companies servicing the property, Enbridge, that the tenant had vacated. Mr. Cook phoned Shannon Brake who confirmed that he had left the property and was returning to Newfoundland because his father was sick.

[267] According to Mr. Cook, he went by the property the same day and found it in a state of disrepair as though someone had moved in a hurry. There were a number of boxes left behind, packed and ready to go. The witness described seeing "drug paraphernalia" including rolling papers and a water-pipe on a coffee table. He bagged those items and threw them away.

[268] Mr. Cook testified that there were about 10 boxes in total and that:

> Two of them, the flap was open. I had a quick look; I observed some personal items…CDs, some DVDs, items of clothing.
>
> . . .
>
> I looked at two of them – the flaps were open, I had a quick look at them.
>
> . . .
>
> I looked in two of them.

In cross-examination, the witness stated that he observed "some CDs, some videotapes, some clothing".

[269] According to his testimony, Mr. Cook made further attempts to contact Shannon Brake by phone. When his calls went unreturned, he decided by mid-October to prepare the house for a new rental. He needed to store Brake's boxes in the event he returned to collect them. Cook was in the process of getting ready to move from his own condo apartment so he had no storage facilities for himself and did not want to pay a storage facility to store Brake's boxes.

[270] Mr. Cook testified that he marked each of the boxes '122 Baronwood Court' on a top flap or on the side of each box and contacted the accused, explained the situation to him, and asked if he could store "some of these boxes at his house in Cambridge" and borrow his mini-van to transport them. Sheldon Cook confirmed this request and his agreement to permit the boxes to be stored in his garage.

[271] Darren Cook testified that he drove 10 boxes to the accused's home in October 2005 and stored them in his garage and in a shed in the backyard at 95 Glazebrook Cres. Asked to point out in one of the photos entered as an exhibit at trial (Ex. #86) which boxes were Brake's, the witness pointed to three items – a blue recycling box on a shelf containing what might be a saw, a large box on the garage floor with manufacturer's printing including the words "Box Bros", and an empty spot where Const. Tucker reported finding a cardboard box containing marihuana. No handwriting or hand-printing is visible on any of the receptacles. Mr. D. Cook testified that he had no idea what was in the box he placed at the location of Tucker's seizure.

[272] Cross-examined as to why he looked in only 2 of the 10 boxes, having found Brake in possession of drug paraphernalia, with the risk of illicit items in the boxes, Mr. D. Cook replied that he assumed Brake "would have taken his drugs and left".

[273] The accused testified that some of the boxes stored for his brother, all of which were labelled, were on the floor of the garage along the wall on the side where the Sea Doo was parked. The box located by Const. Tucker was clearly labelled, '122 Baronwood Court'. According to the accused, he at some point moved some of the boxes to his basement.

[274] According to Darren Cook, he was only required to store Brake's boxes for 30 days. In December 2005, he disposed of the boxes – he donated them without ever looking in the boxes he had not previously examined.

MP3 Players

[275] In the garage, RCMP Const. Tucker located a Xerox box on top of a snow blower directly behind the Sea Doo. She removed the lid of the box and saw what looked to be approximately 20 MP3 players all in their original packaging. They were Creative Labs brand MuVo Mix 256 megabyte devices. She did not seize the items.

[276] RCMP Const. Stewart, after seeing the MP3 players in the garage, proceeded to participate in the search of the residence. In the master bedroom, he searched one of the bedroom's two walk-in closets. Male clothing and police uniforms were hung in the closet. In the closet, Stewart located an exhibit bag bearing a file #, an exhibit #, and Sheldon Cook's name and badge #. Also in the closet was a single Creative MuVo MP3 player in its new packaging. Four (4) similarly packaged MP3 players were located under the bed.

[277] On direction from Cpl. Boutilier, Const. Stewart seized the 5 MP3 players from the home and the 16 which were in the Xerox box in the garage. To Stewart, the MP3 players all looked to be brand new.

[278] Const. Tucker, the exhibits officer for the search, received 21 MP3 players from Const. Stewart on November 18 after return to the Milton RCMP Detachment.

[279] Examination of the Xerox box for fingerprints by the RCMP Forensics Unit resulted in a finding of no identifiable prints.

[280] On November 28, 2005, Tucker created a list (Ex. #51) recording the identifying #'s on the packages of each of the MP3 players.

12 Division After the Arrest

[281] When Det. Sgt. Phillips reported to 12 Division at 2:30 p.m. on November 18, he was informed by Det. Sgt. Labute that Cook had been arrested. He was shocked. The Divisional Superintendent and PRPS Internal Affairs officers were at the Division. When Phillips checked the time sheets for November 17, he found that Det. Rykhoff had not reported for duty. When Phillips checked with Van Bokhorst, he was told that Rykhoff had taken a family day and that he had covered for Rykhoff. Phillips was concerned as Rykhoff had not followed the chain of command – had he known Rykhoff would be away, he would have arranged for someone else to have substituted or he would not have taken November 17 as a day off.

[282] At the 4:00 p.m. start of the CIB shift, Phillips gathered everyone together and informed them of Sheldon Cook's arrest. Because he was lacking in details, he asked if anyone could tell him what had happened. No one, including Williams, reported any facts which would justify the arrest. To Phillips' recall, he was told that someone had called from Morality the day before about "stuff missing".

[283] Warren Williams testified that he arrived late for the commencement of the 4:00 p.m. CIB shift. On arrival, Det. Sgt. Phillips was doing a briefing regarding Sheldon Cook's arrest. According to Williams' evidence, he assumed Cook had already returned the box of packages to Morality.

[284] With Rykhoff still away, Det. Sgt. Phillips called Rykhoff's home on November 18 but got no answer. He left a message. Subsequently, Rykhoff returned the call and reported that he was with his mother in a nursing home in Dunnville, Ontario. Because Rykhoff was taking family days, Phillips assumed his mother must be sick. Rykhoff confirmed that his mother was unwell and that he would be with her for the entire weekend. Phillips testified that officers reporting to him were under an obligation to report truthfully. Phillips testified that when he told Rykhoff that Cook had been arrested Rykhoff was shocked. Rykhoff was unable to provide any information as to what may have gone wrong at the scene.

[285] Det. Rykhoff testified that he received a call on Friday, November 18 in Halifax from his wife reporting that Det. Sgt. Phillips had called looking for him. When he called Phillips back at about 5:00 p.m., he learned that drugs were missing and Cook had been arrested. He was shocked. According to Rykhoff's

testimony, when he asked Phillips if he wanted him to come in, he was told that was not necessary. Rykhoff said he would be in on Sunday.

[286] By the time Det. McTiernan received a phonecall on November 18 at 6:15 p.m. from Det. Rykhoff, he was aware from PRPS Insp. Asanin that the accused had been arrested. Asanin had asked McTiernan to keep the information quiet except for his own team. Accordingly to McTiernan, Rykhoff wanted to know if he knew of the arrest. McTiernan testified that he had no idea where Rykhoff was phoning from nor any idea of his intentions beyond reporting Cook's arrest.

[287] Det. Rykhoff testified that on Sunday, November 19 at about 3:00 p.m. his wife phoned saying Phillips again wanted to speak to him. To his recall, when he phoned Phillips back he was asked if he had heard anything information about Cook's arrest. Phillips said that he wasn't getting any information about the investigation and was unsure whether drugs had been seized from Cook's house. Phillips' testimony confirmed a call with Rykhoff during which Rykhoff maintained that he was still in Dunnville with his sick mother.

[288] Det. Sgt. Phillips testified that he spoke to Rykhoff on Monday, November 21 and to Williams and Chamula on Tuesday, November 22 regarding their option to have a lawyer present when they were interviewed in the ongoing criminal investigation. Phillips informed the court that in his call with Williams that officer said nothing regarding his knowledge of Cook having packages at home – that should have been reported to Phillips as Williams' supervisory officer.

[289] Det. Sgt. Phillips testified that after Williams was interviewed on November 23, the officer came to him and revealed that "they" had made no notes of the events of November 16. Phillips directed that it was too late to make notes with the failure to make them contemporaneously and that the interview itself would have to stand in the place of notes.

Post-Arrest Contacts Between Williams and Cook

[290] During a pre-trial motion, Sheldon Cook testified that, after his arrest, he had contact with Warren Williams including a number of telephone conversations.

[291] There were 10 to 15 conversations, some lasting longer than 15 minutes. According to the accused's evidence:

> …I could tell you that each of those conversations were exactly the same – all I asked him to do was to come forward and let somebody know that we had counted those packages the evening on the 16th.

[292] Warren Williams, on the other hand, admitted, only at the time of trial, to phone conversations and other contacts with the accused. In his November 23, 2005 interview with the RCMP, Williams was questioned about conversation with the accused following commencement of the mangoes investigation:

> Q. All right. Since that time what, if any conversation, have you had with Sheldon?
>
> A. None, absolutely.

[293] Williams testified in a trial *voir dire* that he had understood Sgt. Nicholson's question to relate only to discussions about "the products in…the load". Under cross-examination during his trial evidence, Williams again claimed that he understood Nicholson's inquiry to relate to any discussions with Cook about the load. Under further questioning, Williams testified that:

> I believe what my answer was in regards to that is that, since the time of the arrest I hadn't had any conversation with Sheldon about the arrest.

[294] At the preliminary inquiry, on November 19, 2007, Williams was questioned by Alan Gold, then Sheldon Cook's counsel, about communications with his client:

> Q. Do you have any recollection of contacting Mr. Sheldon Cook on the morning of November 17th, 2005 for any reason?
>
> A. No.
>
> Q. Did you do so?
>
> A. No.
>
> Q. Would you be prepared to consent to providing your cell phone and home phone long distance records only for the morning of November 17, 2005?
>
> A. Sure.

[295] According to Williams' in-chief testimony in a *voir dire* held November 28, 2008, he misunderstood the question he was asked at the preliminary inquiry – he thought the question related just to the arrest so, in his words, "I responded 'no' to any communication with Constable Cook after the arrest". He would not

therefore describe his preliminary inquiry testimony as inaccurate. In cross-examination in the same *voir dire*, Williams claimed refreshed memory, rather than corrected misunderstanding, for the need to change his response at the preliminary inquiry. In cross-examination, the witness stated that, after the preliminary inquiry, he obtained a copy of his own cellphone records. This refreshed his memory when, a couple of months prior to testifying at the November 28, 2005 *voir dire*, he recalled having a telephone conversation with the accused on the morning of November 17, 2005 – "that conversation in my mind was very minor", and as to the answer at the preliminary inquiry, "it's not that it's not accurate". Williams testified on that *voir dire* that he told no one of the inaccuracy until a witness preparation meeting with Crown counsel held November 25, 2008. He had "no particular reason" for not alerting the Crown earlier to the inaccuracy.

[296] During cross-examination at trial, Const. Williams again explained his answer at the preliminary inquiry as a matter of not remembering the November 17 call until he reviewed his phone records received in the early summer of 2008.

[297] Under cross-examination at trial, Williams agreed that in the November 25, 2008 witness preparation meeting with Mr. Rowcliffe he did not disclose the November 17, 2005 phonecall with Sheldon Cook until the prosecutor specifically asked him about phonecalls with the accused on that date. This was the first time he had ever telephoned Sheldon Cook. He did not inform the Crown earlier because he knew "we'd be meeting before the trial" or at least he "assumed [he] would be interviewed again" and, in any event, the call was to him "irrelevant" – in his words, like his non-disclosure of a November 17, 2005 morning call with Rykhoff, these calls "to me were nothing", "…it was a moot – it was a minor point".

[298] At the preliminary inquiry, Warren Williams gave this evidence:

> Q. And after his arrest, did you make any attempts to communicate with Officer Cook?
>
> A. No.
>
> Q. Did you place phonecalls to him for any reason related to his arrest?
>
> A. No.

[299] Cross-examined at trial on this evidence, Williams initially stated that he thought he was being questioned only about conversations with the accused about the arrest. Under persistent questioning, Williams acknowledged: "My

answer was false" but that he had not understood the first question he had been asked. The witness testified that when he was questioned at the preliminary inquiry he knew he had had post-arrest conversations with the accused but there was "no content to those conversations" and "[n]othing came of those conversations".

[300] Warren Williams testified that he had not adopted a course of trying to conceal his conversations with Sheldon Cook.

[301] Sequentially questioned over time about conversations with the accused which occurred after the night of November 16, 2005, Williams provided these various responses:

(1) "None, absolutely" (Nov. 23, 2005 statement to the RCMP)

(2) No conversation with Sheldon Cook on Nov. 17, 2005 (Nov. 19/07 preliminary inquiry)

(3) A phonecall with Cook on Nov. 17, 2005; no disclosure of in-person meetings (Nov. 23/08 witness prep. meeting with Crown counsel)

(4) A "couple of calls" were made to a number in Cambridge to speak to the accused (Nov. 28/08 *voir dire*)

(5) "a couple" of phonecalls between Nov. 16 and Nov. 25/05 (Nov. 28/08 *voir dire*)

(6) "Only 5 or 6" phonecalls between Nov. 16 and Nov. 25/05 (Nov. 28/08 *voir dire*)

(7) "Several conversations" between Nov. 16 and Nov. 25/05 (Nov. 28/05 *voir dire*)

(8) a telephone call to the accused at the Re/Max office of his brother, Darren Cook (Nov. 28/05 *voir dire*)

(9) post-arrest phonecalls with Cook: "Three, maybe – maybe five…it wasn't that many" (Feb. 5/09 trial testimony)

(10) "We had five to six conversations" prior to the preliminary inquiry (Feb. 5/09 trial evidence)

(11) telephone records and other evidence disclosing telephone contacts on Nov. 30, Dec. 2, 3, and 6 (x2), 2005; and Jan. 13 and 15 (x 2), 2006

(12) other telephone calls made by Williams to Cook not disclosed in available telephone records (Feb. 17/09 trial testimony)

(13) only one in-person meeting with Cook: prior to the preliminary inquiry, likely in July 2007, a few minutes' discussion in a parking lot at Hurontario and Derry Rd. (Feb. 5/09 trial testimony)

(14) meetings with Cook at Re/Max and at Home Depot (Feb. 5, 17/09 trial testimony).

[302] Apart from proffering explanations such as misunderstanding a question asked, a lack of recollection, being consumed by the stress that all PRPS officers would believe that he was a "rat" who "squealed" on Sheldon Cook, or considering withheld matters to be minor or irrelevant, Williams testified that he "did not lie" or mislead anyone.

[303] In cross-examination of Warren Williams, and other testimony at trial, evidence emerged as to these phone contacts between Williams and the accused, contacts all reflected in phone records:

November 30, 2005	• Williams, at his parents' home, phoned Cook at 7:59 p.m. • Cook called back at 8:04 p.m. and a 19-min. conversation ensued
December 2, 2005	• at 7:38 p.m., Williams called the phone number of Cook's sister-in-law, Lesley O'Toole, leaving a message with numbers at which Cook could return the call (his mother-in-law's ph. # and his parents' ph. #) • at 7:42 p.m., Williams spoke to Ms. O'Toole, again looking for Cook • at 9:09 p.m., Williams dialled the same ph. # • at 9:37 p.m., Cook called Williams back for a 16-min. conversation

December 3, 2005	• after a contact call from Cook to Williams at 4:12 p.m., Williams called back at 4:25 p.m.
December 6, 2005	• from his parents' house, Williams phoned Cook at 8:27 p.m., for a 5-min. conversation • at 8:32 p.m., Williams called again for a 9-min. conversation
January 13, 2006	• at 11:56 a.m., Williams called for Cook at Darren Cook's Re/Max office for a 3-min. conversation
January 15, 2006	• at 2:06 p.m., Williams called Cook at the O'Toole residence with a 1-min. call • at 2:33 p.m., Williams called again for a 4-min. conversation • at 2:40 p.m., Williams called a third time with an 18-min. conversation

[304] Williams professed to have no real recall of the contents of the phone conversations – "we had conversations; I don't know when they were…I don't know what the conversations were about". The witness testified that he just wanted to find out from the accused what had actually happened – "whether he had taken something or whether this was a big misunderstanding". He hoped to get the accused talking. He kept to himself the fact that he was making these calls. Williams felt that he could stimulate conversation but not ask direct questions of the accused as an individual arrested and cautioned. On his evidence, he was not stalling the accused.

[305] Williams testified that he at no time stated to the accused that he had told the RCMP the truth about seeing the box in the trunk of his police vehicle and the two of them counting the 15 packages. He never suggested Rykhoff would be coming forward to deal with the matter. He did not declare that he and Rykhoff were concerned they would be charged if they came forward. He never told the accused that Rykhoff was paranoid about being followed and his phones being tapped.

[306] After extensive cross-examination using phone records, including questioning about phonecalls on the dates described in para. 303, Mr. Ducharme put this suggestion to Williams:

> Q. Now those are just the calls that we can show by the phone records. You made other calls to Officer Cook that are not part of the phone records; do you agree with that?
>
> A. Yes.

> Q. So in total then you would agree that there are many, many phone calls to Officer Cook after his arrest?
>
> A. There's a number of – a number of actual phone calls being made. However conversations, there is four or five that I – four or five, six conversations in total.
>
> Q. I suggest to you that there were many more than just four or five conversations with Officer Cook?
>
> A. No.

[307] Despite the limited consent for release of phone records sought by Mr. Gold at the preliminary inquiry, Williams testified that he assumed that consent led to disclosure of all his phone records. At some point after the preliminary inquiry, Williams provided a written consent to investigators. This court ordered the release of records relating to a more extensive series of phone numbers, including ones used by Williams, on November 10, 2008.

[308] According to Williams, seeing his cellphone records refreshed his memory – "it pointed out that I had made phone calls" and "[i]t clarified a lot of the …conversations we had". The records, he claimed, not only assisted his recall that phone conversations occurred but also the contents of the calls. The witness also testified that apart from the records, he "had recollection of the calls" even at the preliminary inquiry.

[309] Warren Williams testified that his post-arrest contacts with the accused really originated on the evening of November 22, 2005 when he received a phonecall from a former PRPS officer, Chris Marple, who advised that he had been speaking with the accused. The message was that the accused wanted Williams to call him and Marple provided a phone number in Cambridge where the accused could be reached the morning of November 23.

[310] According to Williams, because he was "looking for answers", he phoned the accused. He took no steps in advance to see if such contact was permitted by the terms of the accused's bail. Williams placed the call at about 9:00 a.m. from his mother's house. Asked why, Williams testified in cross-examination:

> Well Officer Cook had gone through a third party to approach me, so I wanted to make sure that, you know, if he was concerned about tap[p]ed lines, I didn't know what was going to be said, so I went to my parents' place.

Williams' parents' home is 5 to 6 minutes' drive from his own residence. A female relative of the accused answered and, when he asked for the accused, she said she would go and get him. There was a long wait. Williams described his conversation with the accused which lasted only a couple of minutes:

> And he says – I said – basically we had conversation about – about how he was doing and then he said "Okay, I understand that you have an interview today". And I said "Yes". And he says, "Is there anything that you need to talk about or anything that you need to refresh your memory about?" and I said, "No, I'm good". And then we hung up. The conversation was real short. We didn't talk about any evidence at all and then we hung up.

[311] Const. Williams testified that he phoned the accused a couple of weeks later at the same number, "they went to get him", and then he had a light conversation with the accused about his family, how things were going, and rumours at work because the accused was interested in that. When he spoke of ongoing discussions about rumours of the wrong type of warrant being used to search the accused's house, according to Williams, he was "hoping that he would then turn around and start talking about what had actually happened".

[312] In his in-chief trial testimony, Williams recalled only 3 to 5 phone conversations with the accused after his arrest. All were of a general nature without the accused ever explaining whether "he was innocent or the other way". Then, according to Williams, "[b]asically, I wasn't getting any information from him so I stopped". In cross-examination, Williams stated that he had 4 or 5 calls with the accused.

[313] Sheldon Cook testified that after his release on bail on Saturday, November 19, 2005, he telephoned Det. Rykhoff and A/Det. Williams at their homes leaving a message for each to call. He did so from his home phone where he had a phone plan essentially giving free long distance calling. He had had no social relationship with either officer. Then, on Sunday or Monday, he received a phonecall from Chris Marple. He knew him as an acquaintance but understood he was a friend of Warren Williams. Marple's message was that he was calling on Williams' behalf who was reluctant to call him at home or his cellphone and wanted to know if there was another way to make contact. According to the accused, he told Marple to pass on to Williams that after he signed in at PRPS 22 Division pursuant to his bail order on Monday, November 21, he would be going to his brother's office.

[314] The accused testified that on the Monday he was phoned by Warren Williams while he was at his brother's Re/Max office near 22 Division. They arranged to meet the next day.

[315] Sheldon Cook testified that he thereafter had many post-arrest conversations with Warren Williams. Darren Cook recalled 8 to 10 phonecalls to the Re/Max office from Warren Williams within the month after his brother's arrest looking to speak to the accused.

[316] Lesley O'Toole testified that after Sheldon Cook's arrest, he asked if it would be alright if a friend contacted him through their phone number. Thereafter, she received "multiple" phonecalls, perhaps 15 to 20, from an individual identifying himself as Warren. To Ms. O'Toole's recall, these calls began shortly after her brother-in-law's arrest and continued into late winter. According to the witness, though pregnant with her third child, she would take a message and immediately drive the message and contact number to the accused's home. Amongst the messages delivered was Warren's request that the accused meet him in the lumber aisle at the Cambridge Home Depot. Her husband delivered a couple. Ms. O'Toole never asked why Warren was calling – she had the impression he was a friend or colleague helping to clear up the misunderstanding which had occurred.

[317] According to the accused, Warren Williams called the O'Toole residence leaving a message for him to meet him on November 29 in the lumber aisle at the Home Depot in Cambridge, a location about 5 minutes' drive from the accused's home. The accused testified that they met on that date at about 8:00 p.m. and spoke for 15 to 20 minutes. Williams said that he selected that site as the Re/Max office was next door to the Internal Affairs office also situated across from 22 Division. Williams reported that Rykhoff had been suspended but that they had reached consensus on coming forward with the information although Rykhoff wasn't prepared to do anything at that point fearing he may be prosecuted for the matter. Williams didn't say he would not come forward, although he too was concerned about prosecution. There was other discussion. Williams said that he told Rykhoff about the broken box and why the packages ended up in the Sea Doo as Cook had been rushing to get to court. According to the accused, at this meeting, it "became abundantly clear" that he wasn't getting Rykhoff and Williams to come forward. Williams though did agree to meet with the private investigator the defence had retained in November 2005.

[318] Sheldon Cook described a November 30 lengthy phonecall with Williams in which he said that he had met the private investigator, and he had

told the RCMP about the finding of the packages in the trunk. He was going to see Rykhoff, who he described as paranoid about being followed and his phones being tapped, to see if he would meet with the private investigator.

[319] According to the accused, he called Williams back on December 2 and asked if he had a date when he could meet the defence investigator. The accused wanted Williams to tell the investigator what he maintained he had already told the RCMP – there would then be a formal statement for communication to his lawyer. Williams seemed to want to come forward at the same time as Rykhoff.

[320] On December 3, according to the accused's testimony, Williams called him back and said that he was not coming forward with a formal statement and that he needed to find out more about some internal investigation before he did anything.

[321] In December 6 phonecalls, it was the accused's perception that Williams was continuing to make excuses "to not just formalize the statement". He was not getting cooperation.

[322] On January 13, 2006, according to the accused, Williams telephoned the Re/Max office and reported that he had heard about an Internal Affairs investigation at 12 Division relating to a seizure of MP3 players. In the accused's words, "I told him I knew of no such instance". The accused testified that he again told Williams in no uncertain terms that he expected him to come forward right away with the information related to the finding of the packages in the vehicle trunk.

[323] Sheldon Cook testified that in a January 15 phonecall with Williams, he again said he had not decided about coming forward to give "any formal statement". When Williams stated that the Internal Affairs investigation was going through extraordinary measures relating to the accused, he told Williams that he had "absolutely no knowledge of any of that".

[324] According to Sheldon Cook's evidence, by January 15, 2006, he was "sick" of the calls – it had become apparent in conversations with Williams that Rykhoff was not coming forward to explain "his orders that evening on November the 16th". Asked in cross-examination why he didn't tape-record any of his phonecalls with Williams or in-person meetings, the accused stated that he should have but that he believed Williams and Rykhoff would come forward with their information. In cross-examination, the accused also acknowledged that he made no notes of the contents of his communications with Williams.

[325] Warren Williams was asked in-chief at trial by the prosecutor about any in-person contacts with the accused. He described one instance only:

> Q. Did you ever – after his arrest, after Mr. Cook's arrest, did you ever meet with him?
>
> A. No. Oh, we – our paths crossed at going down Hurontario Street prior to the preliminary hearing, and we pulled into a parking lot just south of Derry Road and we spoke then for a few minutes, mostly about family, stuff like that. How the family was doing, because it had been – it had been going on for quite awhile then.

[326] This response was consistent with Williams' will-say statement of his witness prep meeting with Crown counsel on November 25, 2008 when asked about his post-arrest conversations with Sheldon Cook. No disclosure was made of any other meetings with the accused.

[327] In cross-examination, Warren Williams was questioned as to the accuracy of his answers given to Crown counsel. Initially, Williams claimed, "I don't remember exactly how or who I met". When Mr. Ducharme suggested to the witness that he had met with the accused at Darren Cook's Re/Max office, Williams stated, "it's possible that I went to see him". The witness denied that he had Chris Marple contact the accused prior to such a meeting. With further questioning, Williams testified, "I don't remember going into the office". The witness then stated, "I don't remember why I went … I may have stopped by to see him … I remember going to the Re/Max". As counsel's cross-examination continued, Williams was prepared to say that the attendance was not on November 22, 2005 and that he "was in and out the door in no time at all" – "there was no meeting" and no "discussions". He could recall no purpose in going there. He did not discuss with the accused the events of November 16 and 17, 2005 and the accused did not say that he and Rykhoff needed to come forward as soon as possible and tell the truth about those events. Warren Williams further denied saying that Rykhoff was hesitant and not wanting to draw attention to himself because he had falsely booked off sick on November 17 and feared being disciplined or that Rykhoff feared his phones were tapped. He also did not tell the accused that he and Rykhoff wanted to come forward but both feared being charged criminally or under the *P.S.A.* Williams did not say that he thought the charges against the accused would not stand because of all the mistakes the investigators had made. There was no discussion about meeting with a defence investigator.

[328] In cross-examination, a piece of paper (Ex. #30) was produced to Warren Williams. He identified the document he had given to Sheldon Cook as

bearing his handwriting including a phone number and an access code or password number. The purpose was to provide the accused instructions as to how he could leave messages for Williams and retrieve messages at a Kitchener company owned by Williams' parents and managed by his brother. In cross-examination, Williams denied that he gave the accused the paper during the Re/Max attendance. Then, in re-examination, Williams stated that he believed he gave the accused the paper about the voicemail system at the Re/Max attendance. Within minutes, the witness' memory was even clearer:

> Q. --- what was the purpose of going to Re/Max?
>
> A. To give him that piece of paper.

[329] Williams testified that he and the accused had set "a trend of not calling from our phones" so he continued that trend – "[i]t was to open up an avenue of communication", simply another avenue, and not to avoid anyone listening to their calls. According to Williams, this message system was never used to communicate with the accused.

[330] Sheldon Cook testified that he met Williams on Tuesday, November 22 at Darren Cook's Re/Max office. Darren Cook confirmed an attendance by Warren Williams at the Re/Max office in late November of 2005. He gave his brother and Williams access to the conference room for about 45 minutes. The accused thought the meeting lasted about 30 minutes. Darren Cook gave this evidence:

> Well he [Williams] came to my office – Sheldon was there. He --- we had arranged a meeting, and he came. They paged me at the front; I came out and met him at the reception, with Sheldon. He shook my hand, we spoke briefly and we had --- we had talked about --- about why --- just a --- a short conversation as to why all the calls to my office, and they joked and he said, well you never know the --- you never know who's listening. So they were concerned about the phones being tapped.

Darren Cook further testified that he perceived that Williams, who had a smirk, had been joking and speaking in jest.

[331] The accused testified that he prevailed upon Williams at the Re/Max office to come forward with the information about the packages being discovered the night of November 16/17 and about the information received from Rykhoff to hang on to them. The accused said it was the right thing to do. He asked Williams to get Rykhoff to come forward with his information. According to the accused, Williams said that Rykhoff was reluctant to come forward because he

had feigned illness to get off the Thursday and Friday shifts and didn't want to draw attention to himself. Williams spoke of Rykhoff fearing his phones were tapped. Williams spoke of his own fears of being charged criminally or under the *P.S.A.* When Williams asked if there was another number or way of contacting him, he gave the phone number of his sister-in-law and brother-in-law. They reside in the same subdivision as the accused. On the accused's evidence, Williams provided him the piece of paper with the voicemail information as a way to contact him. According to the accused, the Re/Max meeting concluded with Williams assuring him that he would come forward with the information and that he would be in contact with Rykhoff.

[332] In further cross-examination, it was suggested to Warren Williams that he met Sheldon Cook on November 29, 2005 at the Home Depot on Pine Bush Road in Cambridge. Williams' response was, "I remember it happening" – "I'd forgotten about this Home Depot meeting until you mentioned it to me". Asked how he came to meet the accused there, Williams testified, "I don't have a clue". Williams claimed that he could not recall the time of day they went, the length of the meeting, what was discussed or where they met in the store. He initially stated that he recalled nothing about the meeting.

[333] With the Re/Max and Home Depot meetings proven in cross-examination, Warren Williams nevertheless testified that he had not withheld information from Crown counsel in the November 25, 2008 witness prep interview – "Whether it didn't come to me that night, I don't know". In re-examination of Williams, essentially at times a cross-examination by Crown counsel of his own witness deliberately uninterrupted by the court, Mr. Rowcliffe repeated parts of defence counsel's questioning:

> Q. And Mr. Ducharme's question to you was, why did you not tell Mr. Rowcliffe about the Re/Max meeting?
>
> A. Because it was a nothing meeting.
>
> Q. But when we met, and based upon our discussions, was there any doubt in your mind at that time that the Crown wanted to know about every contact you had?
>
> A. It was an absolute nothing thing. I --- I didn't see any value in it at all. I don't know. I mean it --- the --- again, there was no value in it at all. I ---
>
> Q. No value to who?
>
> A. Well there was nothing there. I mean I gave him a piece of paper with --- in order to contact me. We did not discuss any of the --- any --- anything to do with --- the case. It was just there, it just happened. That's --- I gave him the piece of paper, if he wanted to contact me then he could.

> Q. How would the Crown or --- how --- how would the Crown know about the set up of the voice mailbox; how would the Crown know about that without you telling the Crown about the Re/Max meeting?
>
> A. I don't think it was --- I don't think I ever told you about it.

[334] Williams testified that in early December 2005, at Sheldon Cook's request, he met with the private investigator retained by the defence. They met at a Starbucks in Milton. He declined to have his interview with the investigator audio or videotaped. He also told the investigator he would not give a formal statement. He took that approach because he had given the RCMP a statement and didn't want to give another statement.

Williams/Rykhoff Contacts

[335] At trial, Det. Rykhoff described Warren Williams as an "associate" or "colleague" and not a good friend – he never met Williams' family, went to his house or socialized with him. Prior to November 16, 2005, he had not worked with Williams on any assignments. According to Williams, prior to the events of November 16, 2005, he had not been to Rykhoff's house – "… we weren't exactly close friends beforehand".

[336] In his November 23, 2005 interview with the RCMP, Warren Williams was asked by Sgt. Nicholson about what transpired after the night of November 16 – "What, if any, conversation have you had with Marty [Rykhoff] since that night?" Williams' response was that he had paged Rykhoff without any conversation. Warren Williams testified that he paged Marty Rykhoff on November 19, 2005 leaving his house phone number. He did not receive a call back. In his response to Sgt. Nicholson, Williams made no reference to his phone conversation with Rykhoff on the morning of November 17. Williams' explanation for the omission was that he did not then recall that phone conversation as he was consumed with fear that other Peel police officers would find out that he had said something about the accused. Williams denied the suggestion that he misled the RCMP to protect his own career because he knew, on the night of November 16/17, that the accused was taking the packages home.

[337] Asked where he next saw Det. Rykhoff after the night of November 16, Williams at first responded that it was at Rykhoff's residence. He corrected that answer to indicate that he saw Rykhoff in passing at the law office of the Police

Association lawyer on Tuesday, November 22. They did not speak to one another.

[338] According to Rykhoff, Warren Williams came by his house unexpectedly on Tuesday, November 22 – it was "a surprise visit". He testified both that he could not recall the time of day and that it was 2:00 p.m. when Williams arrived. Williams said he was on his way back from the Police Association. Williams stayed 10 to 15 minutes. Under subsequent questioning, Rykhoff stated that it was a quick conversation in the foyer of his home lasting maybe five minutes. The witness stated that there was no discussion of what evidence they might be giving in court. Rykhoff provided qualification of that position:

> Q. My understanding is that Officer Williams went to your home and that you and he met and talked about this very case?
>
> A. That's correct, after --- after Sheldon Cook was charged he did come to my house, that's correct.
>
> . . .
>
> A. We didn't discuss what evidence we --- we would --- were giving to the court. I asked him one particular question about the circumstances the --- of the night of the 16th, yes.
>
> Q. And tell us what that was?
>
> A. I asked him if he saw Cook remove anything from the truck.
>
> Q. And that's it, that's all you asked him?
>
> A. That's all I asked him. Just let --- let me review --- that's all I asked him and he gave me an answer.
>
> . . .
>
> Q. Right at the bottom [of Rykhoff's notes]. And – and what does it tell us about what was discussed between you and he at your house on that day – would you just read it out for us?
> . . .
>
> A. I asked if he ever was in the truck alone. Williams advises he moved the CIB van from the truck after evidence was seized. Parked vehicle beside his, by the music store. Van moved as a precaution – bomb in the truck, if there was in fact a bomb in the truck. Williams gave keys to Cook and he moved the van by himself.

[339] Questioned about the matter on a different day at trial, Rykhoff reported that he asked Williams, "if he [Cook] was ever in the truck alone?" meaning the CIB van. Ultimately, the witness was unable to say whether the note of his conversation with Williams related to the cargo truck or the CIB van. On

Rykhoff's evidence, he "just wanted to know if there was an opportunity there for Officer Cook to take something". There was discussion about when they would complete their notes and they agreed to complete them on November 23. In his testimony, Rykhoff claimed that he stated to Williams on November 22 that he assumed the investigators would not want any appearances that they were getting together to do their notes.

[340] Questioned about the visit to Rykhoff's home, Williams provided a variety of answers as to when the meeting occurred: "I couldn't even give you a ballpark"; "it was not November 22"; after November 16, 2005 …"It was a while. I --- I don't know"; he next saw Rykhoff "over a week later"; a "couple of days" after his November 23, 2005 RCMP interview; "I have no idea of the date".

[341] Williams testified that he had never been to Rykhoff's house before. He thought he may have obtained Rykhoff's home address from a police data-base. Asked why he had not simply phoned Rykhoff, Williams testified that, "it's not something you do over the phone" – it needed to be done face-to-face. In a November 28, 2008 *voir dire*, Williams stated that he and Rykhoff had a beer and were "sitting around, talking". In his February 5, 2009 evidence, Williams testified that he began speaking to Rykhoff inside his front door before they went to the basement and spoke for a few minutes more. He was at the house 5 to 10 minutes. Twice the witness stated that he had no recall of having a beer. Challenged with his earlier evidence, Williams stated that it was "possible" he had a beer – he considered it "a minor detail".

[342] Asked the purpose for going to Rykhoff's home, Williams testified that it was not an attempt to get their stories straight but because they had just been interviewed by the RCMP and he wanted to know what was going on – whether Rykhoff had seen anything because he had not. Had Rykhoff seen anything suspicious? Had he seen Cook take anything? He had no idea why the accused had been arrested. Williams recalled that Rykhoff said that he hadn't seen anything. Williams testified that Rykhoff did not ask him whether there was ever a time that the accused had access to the CIB van. Williams had no recall of discussing the giving of the van keys to Cook. According to Williams, the home meeting was not an effort by Rykhoff and him to create a false story about the accused having access to the van. There was no discussion about a transfer of "7" boxes to Morality.

[343] Marty Rykhoff testified that on November 24, 2005 he began making notes in relation to events of November 17 onwards.

[344] Det. Rykhoff was questioned at trial as to what other contact and conversations he had had with Warren Williams after November 16, 2006. Rykhoff testified that he and Williams had no ongoing cases together. In his November 28, 2008 *voir dire* evidence, the witness stated that he had "a couple" of telephone conversations with Williams in the prior three years not about evidence but whether he had heard anything about the status of the case. Under cross-examination as to whether, as indicated in phone records, Williams had paged him on December 6 and 7, 2005 and February 14, 2006, the witness professed to have no recall of those contacts – "I can't comment on what he spoke to me about or what I spoke to him about". Rykhoff accepted that he would "generally" return the call of any page received from a fellow officer. In his testimony at trial, Rykhoff recalled that Williams telephoned him on November 22, 2005 at about 5:30 p.m. to say that he and Const. Chamula were not going into work the following day which Rykhoff believed was on account of their RCMP interviews set for November 23. Rykhoff was initially unable to recall whether he received any phonecalls during the period of his suspension (Nov. 23/05 to Jan./06) from Warren Williams. Asked at trial if he ever received pages from Williams after November 16, the witness responded that he had, but when asked to say how many he replied, "I don't recall". Rykhoff was pressed on the point in cross-examination:

> Q. But would it be two or a hundred?
>
> A. I don't know.
>
> Q. No idea?
>
> A. A --- a hundred seems a little excessive, but I have no idea on how many times he would have paged me.
>
> Q. How about you put a maximum number on it?
>
> A. I have no idea.

[345] Rykhoff was further cross-examined from phone records suggesting Williams had made phone contact with phone numbers associated to him on December 6 and 7, 2005 and on February 14 and 15, 2006. Rykhoff was unable to recall the circumstances or contents of those communications. He added, "I can't say for sure if I returned all his messages". Rykhoff denied setting up an arrangement for Williams to leave a page or voicemail with a phone number to call back to avoid the calls being monitored. According to Rykhoff, he had no fear that he was being followed or that his telephone was tapped. Rykhoff also

denied that he was using Williams to contact Sheldon Cook on his behalf or that Williams was reporting back his conversations with Cook.

[346] According to Det. Rykhoff, when he came off suspension in January, 2006 and was transferred to uniform at 21 Division, his path crossed with Williams at times at work. He could not recall where. There was general conversation only and not about their evidence – "what have you heard … what's going on with the trial, have you heard anything from Internals" all by way of update. It seemed to Rykhoff that Williams was not getting any information either.

[347] In his *voir dire* evidence on November 28, 2008, Warren Williams gave this evidence:

> Q. And have you had any contact with Officer Rykhoff about the matters before the court in the last three or four weeks?
>
> A. We have had some minor discussions – not about the case itself; general police conversations, we've --- our paths have crossed. Just general, to see how things are going, when --- when --- have we heard any news. Just general stuff. … Nothing about direct evidence or anything like that.

[348] Williams then testified in cross-examination that after November 16 he did not have "many" conversations with Rykhoff. Pressed in cross-examination, the witness disclosed that, "we had a few discussions, a few phone calls, that would be about it". Asked directly in the same proceeding whether at about the time of post-November 16 contacts with Sheldon Cook he would telephone Rykhoff to describe those conversations, Williams responded, "I don't think so. No."

[349] At trial, in describing his next contact with Rykhoff after the meeting at Rykhoff's home, Williams testified that, "We may have spoken on the phone". Asked why that would have occurred, the witness stated: "I don't know, maybe to find out has he heard anything different. I don't know".

[350] In his in-chief testimony at trial, Williams was directly asked how many times he may have spoken to Rykhoff after Cook's arrest to which the witness responded: "I don't know a couple of times. We'd run into each other at work, stuff like that. We'd speak. Couple [of] phone calls, you know, "Have you heard anything new?", stuff like that".

[351] In cross-examination, it was suggested to Williams that, apart from occasional chance meetings in the workplace, he had had many conversations

with Rykhoff after Cook's arrest. The witness acknowledged that, "We did speak on the phone, sure". Asked how often and how that came to be, Williams replied, "I don't know. Somebody would have phoned or --- he'd phone or I'd phone him". Pressed on the purpose of any such calls, Williams stated that they had been involved "in an incident" and were trying to get information as to what was going on and what was new. No direct evidence was discussed. Williams recalled a conversation with Rykhoff as to whether he should speak to Sheldon Cook's investigator.

[352] Telephone records revealed that Warren Williams paged Rykhoff on December 6, 2005 at 8:41 p.m. within two minutes of speaking to Sheldon Cook by phone for several minutes. Asked why he paged Rykhoff, Williams testified, "I have no idea". The witness was cross-examined further:

> Q. But you're not even working with him anymore, are you? There's no reason to page Officer Rykhoff at all?
>
> A. No.
>
> Q. Other than what you discussed with Officer Cook?
>
> A. I don't recall.

The MP3 Players

The Stolen Property Seizure

[353] On August 7, 2005, at about 7:40 p.m., PRPS Const. Robinson, a member of the Neighbourhood Policing Unit (NPU), stopped an SUV Tahoe vehicle in Mississauga. In dealing with the driver, the officer observed a large quantity of suitcases and electronic equipment in the vehicle. After brief investigation, Robinson arrested the driver for possession of stolen property.

[354] Const. Robinson radioed for assistance to transport the seized property to 12 Division. Both Const. Midghall and A/Sgt. Canapini responded. Property was unloaded from the Tahoe into all three cruisers.

[355] Robinson drove to 12 Division with the prisoner as well as a green garbage bag and a duffle bag full of MP3 players. On arrival at the Division, the constable drove into the sallyport and the outer door of the building was closed. The officer's unlocked cruiser remained in the sallyport during the 15 to 25 minutes it took to process the arrestee.

[356] Const. Robinson then drove his cruiser to the police parking lot outside 12 Division and parked the vehicle. To the officer's recall, he made two trips over about 5 minutes carrying the seized property to the NPU office on the main floor of the Division. He saw no others in the lot as he moved the property. Robinson testified that, when he brought the property inside, Const. Chapman, Const. Baker and A/Sgt. Sheldon Cook were present in the NPU office. Midghall and Canapini arrived shortly afterward. According to Robinson, the accused was his direct supervisor in the NPU on August 7, 2005.

[357] Const. Canapini transported one bag and one suitcase of property in his cruiser. On arrival at 12 Division, making one trip only, he carried the property to the NPU office and turned the items over to Const. Robinson. He saw the accused and others in the NPU office.

[358] Const. Midghall recalls that he transported about 8 of the receptacles of the seized property to 12 Division. He parked in the police parking lot and carried the property inside to the NPU office making 3 or 4 trips. The witness could not recall whether he locked his cruiser between trips.

[359] The NPU office included a common work area about 30' square with four desks as well as four enclosed offices accessible from the common area each about 10' x 10' for two sergeants, a staff sergeant and a community liaison office.

[360] Const. Robinson placed the seized property on the floor in the common area between the desks.

[361] The officers transporting the remainder of the seized property placed it in the same location. According to Robinson, he discussed the circumstances of his traffic stop with Cook, Chapman and Baker in the NPU including his belief that the seized property had been stolen.

[362] From about 9:30 to 10:00 p.m. until midnight, Const. Chapman assumed the lead in the process of counting the number of MP3 players which had been seized. She was assisted by Const. Baker. Chapman recalled the accused being in the office. An inventory was prepared. The MP3 players were not removed from their plastic packaging. No identifying #'s on the packaging were recorded.

[363] Const. Baker testified that he counted over 90 of the MP3 players as he removed the devices from various receptacles. Baker could not recall the exact

time he went off duty from 12 Division. When he left, Cook and Chapman and Robinson were still in the NPU office.

[364] Const. Chapman testified that when she went off duty at about midnight, Cook and Robinson remained in the office. She had totalled the number of seized MP3 players at 444.

[365] Const. Robinson helped with unloading some of the bags but did not assist in the property count. He observed nothing out of the ordinary in the treatment of the MP3 players that night. To Robinson's recall, he was probably the last person to leave after 1:00 a.m. By that point, all the seized property was placed in Sgt. Clements' office, one of the offices opening onto the NPU common area, and the door to that office locked automatically when it was closed. According to Robinson, Clements would have a key to the office door and master keys existed in the Division.

[366] Sheldon Cook testified in-chief with respect to the August 7, 2005 seizure:

> I – I know nothing about the – that particular seizure, the specifics of it.
>
> . . .
>
> I know that when I was in the Neighbourhood Policing Unit that there was a – an MP3 player seizure; I didn't handle any of the property so I couldn't tell you what they look like…

[367] In cross-examination, the accused acknowledged that, as an A/Sgt. in the NPU in the summer of 2005, he was not "on the road". He described the office as "a very tight working space". He could not recall if he was on-duty on August 7, 2005. The accused would not agree with the suggestion that an officer under his command would necessarily consult with him about a major seizure of stolen property. In most instances, the accused would expect to be informed about an arrest by one of his officers. The accused was further questioned in cross-examination:

> Q. And would you agree with me if there were at least two officers, maybe three, counting over 400 MP3 players in the Neighbourhood Policing Unit, anybody who was there couldn't really miss that that was going on?
>
> A. That's right. I don't think anybody could miss that that was going on, and I would find it near impossible for items to go missing in such a tight working space.

[368] Const. Robinson recalled that he was absent from the NPU office lodging the arrestee, briefing the CIB, and speaking to the Division's on-duty staff sergeant. Const. Chapman testified that during the counting process, Baker, Cook, Robinson and Canapini were present and others were coming in and out of the office. The constable recalled leaving the NPU office to find out where she could secure the MP3 players. She may also have left the office to go to the washroom. To Const. Baker's recall, as the count was ongoing, the accused was "in and out of the office at various times".

[369] The next day, August 8, Const. Robinson carried the bags of seized MP3 players, one or two bags at a time, from the sergeant's office to the Divisional property room downstairs. He filled out a property continuity log sheet and lodged the property with the civilian property clerk.

[370] The seized MP3 players were subsequently moved to the PRPS central property lock-up at 180 Derry Road in Mississauga. The defence agreed at trial that no continuity issue existed respecting the seizure of these 444 MP3 players.

Linking the MP3 Players Seized August 7, 2005 to Cook's Residence

[371] Det. D. Coughlan of PRPS Internal Affairs testified that he accessed the MP3 players seized the night of August 7, 2005. On opening two or three of the packages, he determined in each case that the identifier # above a barcode on the cardboard insert within the plastic packaging matched the identifier # on the MP3 player itself.

[372] As well, Det. Coughlan created a list of the identifier #'s (Ex. #'s 63, 65) for 443 of the seized MP3 players. There were two main sequences of numbers beginning with '522' or '525'. The 444th seized MP3 player was unavailable to Coughlan as it was in the possession of the original investigators dealing with the August 7, 2005 arrest.

[373] Frank Walsh, the Vice President Operations for the European and Americas for Creative Labs Inc., testified at trial by video-link from Dublin, Ireland. Mr. Walsh had a degree in production engineering from the University of Limerick, an M.B.A. from Cal. Lutheran University and a diploma in strategic management from the Irish Management Institute. The witness was intimately acquainted with Creative's business operations.

[374] Mr. Walsh identified the company's headquarters as located in Singapore together with the Research and Development (R & D) centre which

manages manufacturing sites across Asia. Product is built at various manufacturing sites in Singapore, Malaysia and primarily in China.

[375] Some years ago, the witness implemented a standardized operational model for efficiency such that any step or operational process could be replicated throughout the world. This included a template for the manufacturing cycle or processes as well as the generation of serial #'s for Creative products.

[376] Shown one of the packaged MP3 players made an exhibit at trial, Mr. Walsh identified his company's retail packaging called a blister pack made of clear plastic moulded around the MP3 player. As well, from the manner in which the MP3 player was positioned in the packaging, and the labelling of the cardboard insert, the witness identified the device as Creative product.

[377] Asked how serial #'s are created, Mr. Walsh described the standardized process at Creative. He had directly observed examples in Dublin and at the manufacturing plant in Quing Dao, China:

> It's part of the manufacturing process for our products, in this case our MP3 player products, and effectively as the product is built on a production line, it passes a stage in the production line after the basic assembly process and there is a serial number generator which prints out a serial number grouping for a particular product which is applied to that product and in addition to being applied to the product, there are additional labels that are printed at this time which accompany the product to the end of the production line where the product is packaged. The matching serial number is applied to the packaging, the retail packaging and also to a packing box which the products are placed into. So as each product is built it's given a serial number. There is a matching serial number printed at that time to be applied to the retail pack, as you have there. And then the last step in the process is that retail pack is boxed into a brown box which contains, depending on the product, in this case probably four units which are placed into a brown box and the serial number of the units that are applied to that – that are put into that brown box are also applied to that. And that's the end of the manufacturing cycle.

[378] In describing the serial number generator employed wherever Creative product is manufactured, the witness stated:

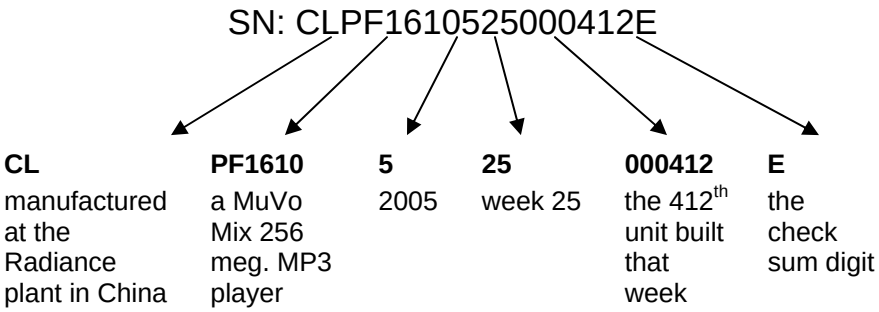
> -- to put it in simple terms, it's a – a printer which effectively prints out the little serial number, bar codes, which is connected to a PC which has software in it which effectively generates serial numbers as it passes a little gate, it's called a gate, and it spits out a serial number in sequence which is started at the beginning of the week. And that range of serial numbers though, the first product build on Monday morning is serial number, number one and as every product passes down past this gate or point in the manufacturing process, a subsequent serial number is printed out until the end of business at the end of the manufacturing week. That is then reset so the next week there is a change to the week of manufacture and then the next range of products are built, so on the following week which might be week ten or week 11, again a new set of serial

> numbers are generated as each product passes down the production line, each moment of that manufacturing week.
>
> . . .
>
> The software that's used is a corporate generated software with proprietary serial number generator software technology in there, and the reason – the reason that is the case is that we need to be able to guarantee that the serial number that's on the product is verifiable as a genuine Creative product. So in the software there's a what we call at the last – the last digit in the serial number, it's an 18 digit serial number, so the last digit is what we would call a "check sum value". And basically that's an internal proprietary piece of software written to insure that the serial number as it's on the product is a genuine serial number for a Creative product. So, yes, the software is company and corporate developed. It's developed by our R and D group, our research and development group.
>
> . . .
>
> …the second piece is the actual just printer itself. It just prints out the label, and that's a – very much like a printer for your PC. They are industrial printers which prints out the serial number. So, those are not company proprietary because they basically are taking the instructions from the software to generate the particular number and serial number. So, there's two pieces. One is company proprietary and company generated, that's the software end and then the hardware piece that just prints out the labels is not company proprietary. It's an industrial printer.

[379] With respect to the proprietary software, there is a standardized format and a standardized approach across all manufacturing sites including at the plant of Creative's sub-contractor, Radiance. The company's standardized processes are audited by quality control teams "who visit each of the plants to ensure consistency…of the process, quality and overall activity for building…a product". The serial # is important for two reasons – warranty and traceability.

[380] Each Creative serial # has 18 digits. The first two digits identify the manufacturing plant (i.e. EI (Dublin), CL (the Radiance plant in China)). The next six digits are the model number (i.e. a MuVo Mix 256 meg. capacity MP3 player). Then a single digit gives the year of manufacture (i.e. 8 = 2008). The next two digits record the calendar week of manufacture with week 1 as the first week of January. The next six digits identify the actual unit number with sequential assignment of numbers (the first unit built in the manufacturing week would attract the number 000001). The 18th and last digit is the check sum number which is randomly generated by the proprietary software excluding I and O.

[381] Taking the serial # on Ex. #64, Mr. Walsh was asked to interpret the digit sequence. He did so in this way:



[382] Product is "built in sequence" on the production line with each unit "picked off the end of the production line…[and] it's put in sequence into the brown box, and then built on the pallets in obviously built sequence". A pallet of 50 to 60 boxes is wrapped and ready for shipment.

[383] Because it is important to Creative to check a product that is returned anywhere in the world, the company's return management team in Singapore has a centralized data base of all product serial #'s:

> -- at the end of each production cycle, the – the software that is used to generate the serial numbers are downloaded to a data base, and this data base is what will be eventually used for the warranty validation. So that's then – that's a centralized data base with all the serial numbers recorded for all the products built, so when the product then is returned at a later stage, it can be verified from that data base that the product was, you know, a Creative built product or an authentic serial number or an authentic product.
>
> . . .
>
> So we have a centralized, we call them returns management team in Singapore, and they would take the feeds from the factories for those data bases and keep a repository knowledge information which records those serial numbers.

Then, to authenticate the serial # on any product returned to Creative:

> …the serial number would be either scanned or entered into our computer system which would reference back to the data base…to make sure that it is a genuine product.

[384] Product for North America is shipped through the distribution centre in Freemont, California and from there (1) directly to a large retailer such as Best Buy or (2) to a distribution partner in Canada who would stock the product and from whom smaller store operations would buy or (3) to an end-user through Creative's small on-line business. Creative's system was not capable of tracing how the MP3 players in this case were distributed in Canada.

[385] Det. Coughlan provided Mr. Walsh the list of serial #'s of the MP3's in this case and the witness determined, by directing staff in Singapore to undertake the necessary searches, that none had been returned to the company.

[386] Paul Murphy, the European Reverse Logistics Analyst for Creative, also testified by video-link from Ireland. Mr. Murphy, who had previously worked for the company as a Field Quality Analyst, received the list of MP3 serial #'s from his boss, Frank Walsh, corresponding to the serial #'s of the MP3 players in this trial. He was asked to verify whether the serial #'s were Creative Lab serial #'s. After forwarding the list to Singapore, Mr. Murphy received back about 450 pages of computer screen shots from Creative's worldwide serial number database system. The witness compared a large sample, perhaps 40 to 50% of the screen shots against the serial # list, and all verified as Creative MP3 serial #'s. He observed no screen shots recording an invalid serial number error message. To Mr. Murphy's knowledge, the Radiance factory runs its own quality control system which then reports back to Creative Labs in Singapore.

[387] On the basis of the evidence from the Creative Lab witnesses, MP3 players seized from Sheldon Cook's home and in the August 7, 2005 arrest were manufactured at the Radiance plant in China in week 22 and 25 of the manufacturing cycle. In addition, as can be seen from the chart below, the serial #'s of the 21 MP3 players seized at Sheldon Cook's residence were within the range of serial #'s of the MP3 players seized by Const. Robinson on August 7, 2005:

21 MP3 Players Seized from Cook's Home	**Creative's 2005 Week of Manufacture**	**Relevant Digits of Serial #**	**Profile of Serial # Sequencing**
1	22	039	037, 038, **039**, 040, ---, 069, 070, 071, 072, ---, 097
2	22	897	893, 894, 895, 896, **897**, 898, ---, 900, ---, 957, 958
3, 4	25	037, 039	031, 032, --, **037**, ---, **039**, 040, 041, 042, 043, 044
5	25	068	063, 064, 065, ---, 067, **068**, ---, 074, 075, 076, 077
6	25	077	074, 075, ---, **077**, ---, 079, 080, ---, 113, 114, 115
7, 8	25	137, 138	127, 128, --, **137, 138**, 139, 140, ---, 150, 151, 152

9, 10	25	259, 266	257, ---, **259**, 260, ---, 265, **266**, 267, 268, 269, 270
11, 12, 13	25	658, 660, 662	**658**, ---, **660**, 661, **662**, 663, 664, 665, 666, 667, 668
14	25	737	724, ---, 729, ---, 731, 732, ---, **737**, ---, 766, 767
15	25	844	---, 842, 843, **844**, 845, 846, 847, 848, 849, 850, 851
16, 17, 18	25	881, 883, 884	877, 878, 879, ---, **881**, 882, **883**, **884**, ---, 889, 890
19	25	959	952, ---, 956, ---, **959**, ---, 961, 962, 963, 964, ---
20, 21	25	994, 996	982, 983, 984, ---, **994**, ---, **996**, 997, 998, 999, 1000

The Defence Explanation For Possession of the MP3 Players

[388] Sheldon Cook testified that his brother, Darren, brought a number of boxes in late October 2005 to his home for storage. His brother told him that he had purchased MP3 players for his good real estate clients and that if he wanted some for the kids he could take a few as well. The accused testified that he took 4 – 2 as gifts for his children who he variously testified were about 3 or 4 or 5 and 7 or 8 years of age respectively in November 2005, 1 as a gift for his 12-year-old niece, and 1 for his personal use. The accused informed the court that the three MP3 players to be given as Christmas gifts he kept under the bed in his bedroom. The MP3 player for his own use he kept in his gym bag which counsel's questioning suggested was at his workplace. According to the accused, "I hadn't touched the ones in the garage, and just the three that were in ---in my home, under my bed". Sheldon Cook testified that he had no knowledge of the MP3 players being stolen property.

[389] Darren Cook testified that he had a very close relationship with the accused. About a year older than his brother, the witness was godfather of one of the accused's daughters. The two brothers sold real estate out of the same Brampton Re/Max office prior to the accused becoming a police officer. Mr. D. Cook testified that about a week prior to his September 28th birthday in 2005 he was present at a flea market at Steeles Avenue and Airport Road in Brampton.

His Re-Max office operated a booth at the market. About a 5-minute walk from the Re-Max booth, in another building on the market property, he purchased 25 MP3 players. Asked if he recalled the business name, Mr. Cook testified that it was "[j]ust…a vendor at the Flea Market".

[390] Mr. Cook testified that he bought the MP3 players with the intention of giving them as Christmas gifts for some of his good clients which exceeded 20 in number. He received the MP3 players from the vendor in two plastic bags. According to the witness, he arranged to pay $25.00 per MP3 player or a total $625.00 cash sale. He did not obtain a receipt. Mr. Cook was asked why he did not get a receipt:

> Q. If it was your intention to give the MP3 players as gifts, why not get a receipt from the chap at the Flea Market?
>
> A. Well when I purchased them we negotiated a cash – a cash price of $625.00 for 25 MP3 players, cash, and it was a volume discount; that was our arrangement, so I said that's fine. I paid $625.00 cash, I made my own receipt and that's what I used come tax time.
>
> Q. All right. So did you bring that receipt to court with you today?
>
> A. I did not, no.
>
> Q. All right. And is there any reason why you can't have a receipt for a cash transaction?
>
> A. Yes, it was cash; they didn't – tax was not included, it was – it was all based on the price. He agreed to sell me 25 units at $25.00 for an amount of $625.00 if I paid cash.
>
> Q. And you paid cash on the understanding that you would not be paying any tax to him?
>
> A. Correct.
>
> Q. And he would not be paying any tax to Canada Revenue Agency?
>
> A. If that was his understanding, fine. My understanding with him was I was paying $625.00 cash for 25 MP3 players; that was my understanding.

[391] According to Darren Cook, when his own condo was delayed in completion into 2006 he moved in with his mother placing his furniture in a small rental storage unit in Brampton. He took additional of his own boxes to the accused's home in October 2005 where he was permitted to store them. Sheldon Cook confirmed that he allowed his brother additional storage at his home.

[392] Darren Cook informed the court that prior to October 26, 2005, when he was moving, he put the two bags of MP3 players in a cardboard banker's box and that box was among those he dropped off at the accused's home for storage. The witness testified that he told his brother he would be storing some MP3 players in the garage "and to take some for the – for himself and the kids". Within a couple of days, the accused informed him that he had taken four (4). The witness identified one of the MP3 players seized on November 18, 2005 from the accused's garage, shown to him in the witness box, as a representative sample, as being "exactly the same" as what he purchased and stored at 95 Glazebrook Cres.

[393] Asked in cross-examination why he did not store the MP3 players in the storage locker he rented for his own belongings, Darren Cook replied:

> Well the – it was a small storage locker, as I – as I mentioned, and I had just made the decision that I was going to store these smaller items at Sheldon's house and my furniture in the storage locker.

[394] According to Darren Cook, at some point prior to Christmas, he intended to cut through each of the manufacturer's blister packs and affix a label directly to each MP3 player with his name, business name and phone number. Each player would then be wrapped or placed in a bag and dropped off to the recipient. The witness was cross-examined as to his plan for preparing the labels:

> Q. -- what was you plan?
>
> A. -- it – it would – it depend – it would depend on – on, you know, who was – who could do it at that time. I – I can't say for certain – I would – I would have had to check around. That was the intent.
>
> Q. Okay. So it's fair to say you didn't have a specific plan with respect to those labels?
>
> A. Well I wouldn't say I didn't have a plan. I did have a plan, I didn't have a company in place to print them; but I did have a plan that I was going to get them made up and stuck on the MP3 players.
>
> Q. All right. And so to do that of course you would have to show the company the MP3 players, isn't that true?
>
> A. Correct.
>
> Q. All right. So you would have had to drive from your residence, or your real estate office to Sheldon Cook's house, get an MP3 player and then give it to your promo guy?
>
> A. Correct.

[395] Mr. Cook testified that he expensed the purchase of the MP3 players as a business expense on his income tax return when his accountant, Sheldon Derrick, prepared his tax return. He did so, even though they remained under police seizure and were not in fact given as gifts to business clients. In the words of the witness, to assist his accountant, when he buys something and pays cash and has no receipt, "I'll make my own receipt, just a note to myself to remember to include it when I do my taxes". In his in-chief testimony, the witness produced a letter dated January 29, 2007 addressed to "WHOM IT MAY CONCERN", and signed by his accountant, which read:

> When preparing Mr. Darren Cook's personal tax return for 2005, an amount of $2,054.51 was expensed for gifts. Included in this total was $625, which he informed me were for 25 MP3 players.

[396] Sheldon Derrick, a chartered accountant, testified that he became Darren Cook's accountant in 2002 or 2003. He identified the January 29, 2007 letter he authored as written after he was contacted by Darren Cook saying "he needed a copy of his tax return because of some court case for his brother". According to Mr. Derrick:

> He called me and I remember the conversation – he said to me, do you remember those MP3 players that I deducted on my two thousand and, yes, five tax return. And I – I couldn't remember. And – and then when he came back he showed me – he told me which – what is was on these schedules he gave me, and that's where I wrote this letter for him…

He took his client's "word for everything".

[397] Mr. Derrick informed the court that in preparation of Darren Cook's 2005 tax return he received, in mid-April 2006, schedules from his client which, under the heading "Gifts 2005", listed an unparticularized $625 along with other amounts for a total of $2,054.51 which the accountant's office included within an expenditure for "Advertising". The $625 was declared as an expense of business activities on the tax return.

[398] Under cross-examination, Mr. Derrick agreed that he had explained to Darren Cook that it was important to document all business expenses he intended to deduct in his tax return. It was unlikely when he and his staff prepared Mr. Cook's 2005 tax return that they asked him what the $625.00 amount represented – in the witness' words, "we would have just taken these things, added them up, accepted the number".

Handling Evidence/Exhibits

[399] PRPS Det. McTiernan testified that he has never taken exhibits home. It should not be done for any reason – "It's against procedures; it's not a secure facility". Const. Kirkpatrick agreed that it was completely against procedure to take evidence home. On the witness' evidence, a supervisor would never suggest taking suspected drugs home – "it's just wrong…it's against the law". According to RCMP Const. Stewart, "[t]here's no reason to take an exhibit home" – they are kept in a vault. Even Warren Williams agreed that taking evidence home would be against procedure – "There's procedures – for dealing with it".

[400] Dets. Coughlan and McTiernan, and Constables Chapman, Williams and Robinson, all testified to the set up at PRPS 12 Division for the storage of evidence. In 2005, there were property intake lockers in the Division basement. At any time of the day, officers could access the 25' x 30' property room where the lockers are situated – 12 small lockers (10" x 12" x 17"), six medium-sized lockers (16" x 17" x 32 ½") and a wall of tall lockers (16" x 17" x 66 ¾"). Evidence bags and property tags are in the room. Seized property can be dropped off by an officer into one of the self-locking lockers with entry in the intake book of name, badge number, date and an occurrence number. In the morning, the property clerk processes the deposited evidence.

[401] There is daily 24-hour access for PRPS officers to the general evidence lockers at the Morality Unit site at 180 Derry Road in Brampton. According to Det. McTiernan, with an off-hours seizure by non-Morality officers, "normally the course of business would be to do it at your own division".

[402] In his evidence, the accused agreed that it would not be normal to have a box of evidence taken home out of a secure police facility. The accused understood the concept of "continuity" was important to the introduction of evidence in court and to counter any allegation of tampering. Cook testified that he did not think he was taking drugs home – Rykhoff said it was flour and his own field test in the courier truck confirmed that.

[403] In cross-examination, Sheldon Cook agreed that the evidentiary continuity of the 15 packages at his house was completely compromised. The accused further observed that, "if I had the chance to do it over again, I would definitely have done things differently". The accused testified that he acted as he did because of the information from Rykhoff and on "taking the direction from Acting Det. Williams".

[404] Rhonda Cook testified that she was unaware of the accused ever bringing evidence to their home.

PART III

POSITIONS OF THE PARTIES

The Prosecution

[405] The Crown's submission is that Sheldon Cook, an on-duty police officer, on two occasions, took advantage of his position as an "official" to steal contraband which properly belonged in the custody of the PRPS. It was argued that in one instance, the accused unlawfully took 15 packages of what was believed to be cocaine, a substance of significant value, and, on an earlier occasion, stole 21 MP3 players from a police seizure of at least 465 such devices.

[406] Unaware that the 15 packages stolen on November 16/17, 2005 contained only ersatz cocaine, as well as a GPS tracking device, the accused was caught when the RCMP unexpectedly traced the device's signal to the accused's home. The 15 packages, the MP3 players, and a quantity of marihuana were discovered in the knowing possession of the accused.

[407] The prosecutors stressed the highly unusual circumstance of a police officer taking evidence home. It became unsecured and continuity was lost. The Crown further submitted that the accused's evidence shifted over the course of the trial as to why the 15 packages were taken home. An original false excuse about a lack of exhibit storage space at 12 Division became a claim of volunteering to keep custody of the packages and finally evolution to an equally false justification of acting on orders from a superior officer.

[408] It was submitted that the accused sought unconvincingly to support his account of why evidence was at his residence by repeated reference to rank structure, superior orders and **A/Det.** Williams. Further, in an effort to support the reasonableness of having the packages at home, the accused advanced an unbelievable story that he understood the contents of the packages not to be an illicit narcotic. On the evidence, he stood alone in stating that view.

[409] The Crown argued that, when found, the packages were concealed and not on their way back to police custody. Prosecution witnesses described the accused's Sea Doo as fully covered not partially covered. A convenient 'broken

box' story made little sense where other receptacles existed to transport the packages. It was submitted that the accused's changing evidence as to why the packages had not been returned prior to his arrest demonstrated fabrication.

[410] Crown counsel submitted, with examples, that the accused's testimony was incredible. It was internally inconsistent, at odds with other testimony in the trial, failed to acknowledge obvious facts, and departed from reason and logic.

[411] The prosecution emphasized that with the accused admitting possession of the packages, proof of opportunity is not an essential element of the alleged crimes involving the ersatz cocaine. However, the Crown submitted that the accused could have acquired the 15 packages in more than one way including when he moved the CIB van or through conspiratorial cooperation with another police officer. Officers were not constantly keeping watch on each other at the CPS.

[412] The Crown submitted that reasonable doubt does not arise either from the testimony of the principal prosecution witnesses, Det. Rykhoff and Const. Williams. That said, the Crown's written submissions note that given aspects of Rykhoff's testimony and conduct, it was easy for the defence to "cast aspersions" on his evidence and that "it might be unpalatable" for the trier of fact to accept all of the witness' evidence. Further, the Crown's material acknowledges that the court might also have concerns about accepting all of Williams' evidence considering significant testimonial deficiencies exposed in his cross-examination.

[413] Bringing the matter into sharper focus, the Crown's factum states the position that the notion that another police officer may also be guilty of the crimes relating to a taking of ersatz cocaine packages does not operate to exonerate the accused:

> …it is far more sensible to accept that more than one person was engaged in criminal activity at the Community Police Station on the evening of November 16th, 2005 (on any version of the events); Mr. Cook had a co-conspirator, perhaps a cleverer one, one who has evaded capture, but a co-conspirator nonetheless. That fact, of course, cannot serve to acquit Mr. Cook on the cocaine charge.

[414] In oral submissions, the prosecution again acknowledged the real prospect that more than one CIB officer stole packages from the RCMP load:

> And others, it seems, likely helped themselves also.
>
> . . .
>
> …at least one other person was so convinced that the substance was drugs that they stole eight other packages of them.

. . .

Cook was not the only one involved in the scheme.

. . .

CROWN COUNSEL: They (Rykhoff, Williams) may be guilty of stuff, but it doesn't necessarily mean they are guilty of criminal conduct.

THE COURT: It doesn't necessarily mean that, but that is an open inference?

CROWN COUNSEL: It's an available inference, yes.

[415] According to the argument, this reality, "[t]he fact that Williams and Rykhoff were perhaps in on this…doesn't exonerate Mr. Cook. That just means the three of them were in on it".

[416] As to the criminal participation of Marty Rykhoff, the Crown submitted:

MS. WEILER: So we have Cook on his own evidence saying he rubbed the substance in his fingers. Marty Rykhoff was present. The next image we have is Cook throwing the keys to Marty Rykhoff while the van was being unloaded. The third image we have on Cook's own evidence is Cook sitting in the car with Marty Rykhoff for an hour before the bomb squad came. Marty Rykhoff, the man who Mr. Cook attempts to portray as the real bad guy in this offence. Those are my submissions on those points.

THE COURT: I have these three images here, what is it I am supposed to draw from them or see?

MS. WEILER: I don't think it's – it has to be implicit. I think in both of our submissions and our oral submissions we accept the fact that there was a co-conspirator.

THE COURT: And that the evidence points towards Rykhoff, not Williams?

MS. WEILER: That is correct.

. . .

MR. ROWCLIFFE: And you quite squarely put the question to Ms. Weiler, you know, where is the Crown on Rykhoff's involvement on this?

THE COURT: Well, she drew three images and…

MR. ROWCLIFFE: Yes.

THE COURT: …I wanted to hear directly what the implication was. I understood, I thought, what she was saying.

MR. ROWCLIFFE: And – and the implication is this as she rightly pointed out, that the circumstantial evidence would seem to suggest if – if someone else was involved, it most likely was Rykhoff, but the thing is, again, and I go back to this point of if I was in Vegas and I got to make a bet that I didn't have to worry about the threshold of criminal liability, yes, I would bet that Officer Rykhoff perhaps was involved in this with Mr. Cook. But, there is no requirement on the Crown in these proceedings to prove on a criminal standard whether or not he was involved.

THE COURT: No, there isn't, but still the trier of fact has to make a total assessment of the testimony of Williams and Rykhoff and Ms. Weiler is quite right, some things may not be all that important in the end, but – and the Crown doesn't have to sort of prove every minute of what was happening down at the community police station, and at the end of most criminal cases you can't figure out exactly what the true story is. It's always a reconstruction.

MR. ROWCLIFFE: Yes.

THE COURT: But the trier of fact still has to come to some assessment as to what role Williams and Rykhoff did play in terms of what interest they had testimonially in advancing the stories they did under oath.

MR. ROWCLIFFE: And – and based upon the evidence, and based upon all the submissions up to this point in time, I – I think it would be fair for Your Honour, for this court to be very suspect of Rykhoff's evidence in its entirety.

You also are, and should be, troubled by the various problems with Williams' evidence…

[417] As to Williams' role on November 16/17, 2005, the oral submissions of the prosecution stated that:

> …why exactly was Warren Williams shy to testify about his contact with Cook after the incident. Could he be a co-conspirator? If so, did he conspire in a crime, a cover-up? Could he be afraid to rat out his colleague, or in some instances could he have simply been confused about what counsel was asking him. We don't know, not for sure.

Crown counsel's preferred view of the case was that Williams, who may well have been caught in lies in his testimony, was a dupe, trying to help others and to not be seen as a person who would "rat" on another police officer.

[418] The Crown sought to have the court apply similar fact reasoning regarding the 15 packages, and, the 21 MP3 players:

> Other similarities, apart from the location of their discovery, obtain:

- In both instances, Sheldon Cook was on duty when the items were taken;
- in both instances, the contraband taken was part of a larger load, the bulk of which was properly submitted into evidence;
- both cocaine and the MP3s are marketable goods;
- the theft of both the cocaine and the MP3s can be characterized as spontaneous and opportunistic;
- both were taken in the context of a breach of trust;
- in each case Mr. Cook took advantage of an unique opportunity available to him as a police officer to take contraband that was otherwise under police control.

[419] Ms. Weiler submitted that the force of similar fact inference-drawing should work in this way:

> Similar fact is, I think an available option for the Crown, and I urge you to accept the similarities between the two crimes and use them to help you make your decision with respect to the MP3 players, because I would suggest that it's the cocaine that's influencing the MP3's, not vice-versa. I am not saying because the MP3 players are there it's more likely he stole the cocaine. I am actually saying the reverse.
>
> We know he took the cocaine. He said he did, or the [c]ocaine, the fake cocaine. We know he took it and we know he put it there, because he said it. So, the fact of that is an uncontroverted fact can, in my view, assist you in – in examining and colouring the evidence with respect to the MP3 players.

[420] Crown counsel did not seek to use similar fact reasoning to prove unlawful possession of the marihuana.

[421] The prosecution argued that even if the court was unpersuaded to apply the similar fact analysis to demonstrate systemic conduct and to rebut advanced innocent explanation defences:

> …in the larger context…similar fact evidence doesn't occupy the field of coincidence…all this contraband was found in a very small area – three different pieces of contraband, three different defences…

[422] In addition to encouraging the court to reject the credibility of the account of the accused and his brother respecting the MP3 players, the prosecution relied on these points to support proof of the MP3 charges:

- As the Acting Sergeant on the evening of August 7th, 2005, Mr. Cook had the opportunity to commit the theft of 21 MP3 players;

- The 21 MP3 players seized in the Cook home are the same make as the 444 which were lodged into the evidence room as 12 Division;

- The 21 MP3 players seized in the Cook home were the same model as the 444 which were lodged into the evidence room at 12 Division;

- The 21 MP3 players seized in the Cook home are from the same production weeks (22 and 25) as those which were lodged into the evidence room at 12 Division;

- That a comparison of the serial numbers of the 21 MP3 players found in the Cook home to the 444 logged by the police gives rise to a very powerful inference that the 21 MP3 players were among the larger load brought to 12 Division;

- That having 21 MP3 players in his home, alone, is unusual, and one of the many circumstances that can be weighed when finding facts and drawing inferences;

- That storing them in the garage is another such fact;

- That the presence of 16 MP3 players in the garage in close proximity to goods recently taken from 12 Division (the fake cocaine) is another fact which militates in favour of drawing the inference that the MP3 players were taken from 12 Division; and

- That the presence of 16 MP3 players in the garage in close proximity to a bag of marijuana is another fact and circumstance that can be weighed in determining the provenance of the MP3 players.

[423] The prosecution did not seek to characterize the seized marihuana as a substance originating from PRPS custody or otherwise obtained by the accused in the execution of police duties. It was argued that the presence of the substance in the garage of the accused's dwelling, proximate to other contraband, was in the knowing possession of the accused.

The Defence

[424] The defence submitted that the prosecution failed to prove all charges beyond a reasonable doubt. Sheldon Cook's evidence was credible and raised a reasonable doubt. In any event, the Crown's case respecting the ersatz cocaine was built on two witnesses who were neither credible nor reliable – indeed they perjured themselves and were likely the true perpetrators of the theft of the packages.

[425] While recognizing that the accused in a criminal case is under no obligation to show wrong-doing or motive to fabricate on the part of a principal

prosecution witness, Mr. Ducharme squarely described the defence position in his written materials:

> It is the position of the Defence that Rykhoff and Acting Detective Williams…are the true perpetrators of the crimes referred to in Counts 1 and 2 of the indictment. Rykhoff, probably with the assistance of Williams, took boxes of packages from the mango shipment. We say *probably* because it is difficult to determine precisely when Williams began assisting Rykhoff. The most likely time that Williams began assisting Rykhoff is at or near the time of Williams and Chamula going to the sub shop to pick up food in the CIB van. Williams upon his return, parked the van on Brant Street. It is unlikely that Williams parked the van there without instructions to do so. The Defence suggests that he did so, on Rykhoff's instructions. In this location the van was out of sight of the officers in the Lakeshore Community Police Station ("the CPS") and Williams could, if he was involved at this stage, leave it unlocked for Rykhoff. Rykhoff had the keys to Cook's vehicle so Rykhoff could arrange to have the two vehicles (the CIB van and Cook's vehicle) right next to each other, both out of sight. Rykhoff at this stage had already begun his maneuvering of people, vehicles and cargo.
>
> (footnotes omitted)
> (emphasis of original)

[426] Mr. Ducharme submitted that Det. Rykhoff's statement in the courier truck about a "dry" run and later in Cook's police vehicle about the load not containing drugs were all part of his plan to steal what he suspected was cocaine. With no alert or call from any other police force, there would be no risk of stealing from a police controlled delivery.

[427] It was submitted that the court ought to accept Sheldon Cook's evidence of seeing Det. Rykhoff remove a box of the separated packages from the rear of the cargo truck:

> Rykhoff taking a box with packages makes sense for an entirely different reason. He was the thief. The circumstantial evidence of this case allows for the inference that Rykhoff placed this box into Cook's Chevy Impala on the evening of November 16, 2005.

[428] The subsequent off-loading of the boxes to the CIB van did not involve a count of boxes or packages:

> Rykhoff ordered, supervised and participated in the off-loading of the delivery truck. Yet, Rykhoff did not mark or count or otherwise inventory the packages that were taken from the cargo truck. Why? The failure to take an inventory of the packages, in retrospect, was not mere sloppiness. Instead, the actions of this experienced officer provide evidence to support the conclusion that he was involved in criminal activity. Inventories are only for those intending to accurately document an event. Accurately recording this event was the furthest thing from Rykhoff's mind.

[429] On the defence interpretation of the evidence, the following events transpired:

Rykhoff instructed the officers to off-load the boxes with packages into the CIB van. At this time Rykhoff asked Cook for his keys to the Chevy Impala. Cook tossed his keys to Rykhoff along the passenger side of the truck. Rykhoff maintained custody of Cook's keys for the remainder of the investigation, not returning them until Cook was required to return to the CIB office.

It is respectfully submitted that sometime during the evening Rykhoff placed a box of packages in the trunk of Cook's Chevy Impala. Rykhoff either placed the box that he had taken from the back of the courier truck, or, another box of packages he removed from the CIB van while it was parked on Brant Street. In the first scenario, that is, referring to the box taken from the courier truck, a likely and opportune time for this to have occurred was when Williams and officer Chamula left the CPS to purchase food. During this time Rykhoff maintained possession of the keys to the Chevy Impala, left the CPS office, descended a set of stairs that offered an exit to outside, and was absent from the CPS office for about ten minutes.

Rykhoff orchestrated the positioning of the CIB van and Cook's vehicle to be parked in close proximity to one another on Brant Street. Williams parked the CIB van there upon returning from the sub shop. Why? He was instructed by Rykhoff to do so prior to his return.

. . .

Rykhoff claimed that his reason for the new parking spots for the police vehicles was that the cargo truck could possibly contain a bomb and therefore the packages that were already separated should be protected from a possible explosion. Now, with the CIB van moved away from the front of the CPS, Rykhoff could access the van by going downstairs and out the back of the CPS.

. . .

The suggestion that Rykhoff may have gone downstairs to make telephone calls also defies common sense. Any discussions he had concerning this case were part of the overall investigation. Even Rykhoff does not suggest that he had to go downstairs for the purpose of making telephone calls. There were several telephones upstairs and the business was not private in the presence of these other investigating officers. This is not to suggest that Rykhoff might not have made a phone call from downstairs that *he* determined had to be in private. For example, he could have called Williams while Williams was gone for food to tell Williams to leave the van unlocked when he parked it on Brant Street. The Defence only suggests that there is no logical or legitimate reason for Rykhoff to go downstairs to make telephone calls, other than to advance his criminal activity.

On Rykhoff's instructions, the van was parked in a position where it was out of sight of those that were sitting in the CPS.

(emphasis of original)

[430] According to the defence, the box of separated packages in the trunk of the Impala, placed there by someone other than Sheldon Cook, served a purpose:

> Rykhoff or Williams placed this box in the trunk of the Chevy Impala perhaps as a "floater" or a safety valve, in the event that things went awry. Rykhoff and/or Williams was personally in possession of other boxes/packages that were eventually found in the dumpster at 'Blinds-to-Go' in Oakville just 3 minutes away from Rykhoff's residence. If these were discovered later, and either or both of these police officers were investigated for their connection with these other packages, they could point to the box in the Chevy Impala as proof that boxes were off-loaded from the delivery truck and placed in *vehicles* other than the CIB van. In other words, it provided them with a possible future explanation of an innocent mistake. They could claim that the off-load was done so quickly, and amidst much confusion so that the boxes could have been placed anywhere. In this scenario many individuals may have had an opportunity to have access to them. Or better, suspicion would point, not to them, but to the new guy: Cook. Cook had only been assigned to CIB for about one month at this stage. If this particular box with its 15 packages was *not* discovered, Rykhoff or Williams could later retrieve it with impunity.
>
> Rykhoff was not expecting Cook to discover the box of packages on the evening of November 16, 2005. Cook's discovery of the 15 packages, and his immediate report to Williams, caused Rykhoff, and perhaps Williams also, to improvise. The plan at this stage was not carefully considered. The requirement to improvise only made the plan worse.
>
> (footnotes omitted)
> (emphasis of original)

[431] It is an available inference on the evidence of McTiernan, Ippolito, Barnes and the accused, that Det. Rykhoff remained in the area of the CPS and the Morality vehicles after Rykhoff maintained he had left the area. It was submitted that Rykhoff, already in possession of stolen packages, remained in the area in an effort to check on any information or testing of the suspected substance in the hands of the Morality officers.

[432] Mr. Ducharme submitted that the accused acted entirely properly, and as would be expected, in reporting his discovery of the box to his immediate supervisor, A/Det. Williams. In the ensuing Mike call, the "two central figures in the prosecution's case were in the throes of improvisation". Rykhoff lied at trial about not having a Mike phone. The defence asks, "Why would Rykhoff and Williams not accept Cook's offer to immediately drive the 15 packages back to the scene of the investigation?" "Why would Rykhoff and Williams instead tell Cook to maintain possession of the packages?":

> Why? Because Rykhoff did not say anything to the Morality officers or any other investigators at the scene about the 15 packages. He had no intention of ever saying anything about them. He wanted distance and separation from those packages, not connection with them. Rykhoff and Williams used Cook as a pawn. They used him to shield themselves from any potential criminal responsibility. Naïve and gullible, new to CIB, and compliant to orders – perfect. Better him than us. A sacrifice on the altar of necessity. By pleading guilty to *Police Services Act* charges just a few months later, Rykhoff and Williams hoped the worst was over for them. This was Cook's problem now. They were now Crown witnesses.

[433] It was argued that Det. Rykhoff did not want the packages brought back into police custody. Cook followed the chain of command and "Rykhoff and Williams were that chain of command" and "Rykhoff and Williams both played a part in the instructions to Cook to take the packages home". It was not only the chain of command which led the accused to take the packages home, but also his belief in the benign nature of the packages' contents, Rykhoff's statement that he would arrange a return to Morality, and the fact that since the accused was going to court the following morning he would be able to drop the box off to Morality.

[434] The defence submitted that Sheldon Cook believed, at the scene of the CPS and thereafter, that the courier truck packages contained a benign substance. His own field test, the lack of odour, the appearance of the substance, the feel of the substance in its packaging, etc. led to this belief confirmed by Det. Rykhoff's characterization of the mango shipment as a dry run. Rykhoff referred to the substance as not being drugs. Other officers too did not note the odour of cocaine. Det. Furoy's observations relating to the seized substance suggested the substance was not cocaine or heroin. This was subsequently confirmed by the NIK tests. Further, Det. Rykhoff's allowance of Const. Williams using the CIB van containing the off-loaded boxes to drive to buy take-out food suggested the ranking officer's view was that drugs had not been seized.

[435] In the Mike phone communication between Rykhoff and Williams in the accused's presence in the 12 Division parking lot, Rykhoff, a former Morality officer, stated that the substance "wasn't even drugs". With the detective still at the CPS scene the accused reasonably believed Morality had confirmed that fact.

[436] The defence submitted that, "[t]aking packages of a benign substance home is significantly different than taking packages of drugs home". What the accused believed he was taking home was flour, not drugs. The accused stole no packages. He was not involved in a crime with other officers he had worked with for only a few weeks. He reasonably followed the chain of command.

[437] The accused submitted that the additional 29 packages were "in the possession of Rykhoff and/or Williams" until it became known they were valueless at which time 8 were discarded in the BTG dumpster and the never-located 21 thrown away, likely on the morning of November 17 or 18/05, at an undetermined location – "Rykhoff may have discarded the packages, or used

Williams to discard the packages". The defence does not accept that Det. Rykhoff used his plane ticket to leave the jurisdiction from November 18 to 20, 2005.

[438] Then, with the big score unrealized, instructions to the accused changed during the morning of November 17, 2005. That morning, there were communications between Rykhoff and Williams, unrecalled or lied about by the witnesses, and then a change of plans reported to Sheldon Cook who was strung along with further and different instructions for another day left alone with the packages and an active GPS device and a pending RCMP arrest which would point any blame away from Rykhoff and Williams.

[439] Sheldon Cook, again following Williams' direction to hold onto the packages on November 17, 2005, and not wanting to take his car in for scheduled service with the box in the trunk, attempted to move the box to his garage floor. The box broke. He was rushing. The decision to store the packages in the nearby Sea Doo "was a matter of convenience":

> The nylon cover to the Sea-doo was pulled back to the handlebars, and the front hatch was uncovered and exposed, but closed. Cook closed the hatch and left for Court. When the RCMP searched the garage they found Cook's Sea-doo exactly as Cook described it in evidence. If Cook was trying to hide the packages to evade criminal detection, he might have covered the front hatch to make the Sea-doo appear untouched. He did not. (footnote omitted)

[440] Unlike the "dumpster" packages, those located in Sheldon Cook's garage had not been cut open. They were "in perfect condition" awaiting return to Morality.

[441] The defence submitted that the defence perspective of the case is supported by the subsequent conduct of Det. Rykhoff and Const. Williams:

(1) There was a November 22, 2005 meeting at Rykhoff's home. The witnesses gave different accounts of the meeting. It was an attempt, prior to RCMP interviews, to try to get stories straight. Agreement was reached to deflect blame and to keep the investigatory focus on Sheldon Cook by promoting the lie that he had the CIB van keys and moved the van.

(2) Despite Williams' lies to the contrary, he continued to have phonecalls and in-person contact with the accused. He did so in an effort to further stall the accused, keep the truth

concealed and report back to Rykhoff. Rykhoff, too, was not forthcoming in his evidence regarding ongoing contact with Williams in the post-arrest phase.

(3) While Sheldon Cook hired an investigator and pleaded with Warren Williams to come forward and to have Marty Rykhoff do likewise, his two superiors simply protected themselves by doing nothing.

[442] Mr. Ducharme submitted, with respect to the MP3 players, that:

(1) the prosecution evidence failed to prove that the PRPS seized any more MP3 players on August 7, 2005 than the 444 counted by Const. Chapman

(2) therefore, the 21 MP3 players stored at Sheldon Cook's residence were not "missing" from PRPS custody and were not otherwise established to be stolen property

(3) even adding the serial #'s of the 21 MP3 players located at the accused's home into the sequence of serial #'s in the August 2005 PRPS seizure, it is apparent that many other MP3 players in the overall sequence are undocumented

(4) the evidence demonstrated that the MP3 players seized from the accused were manufactured by Creative Labs or were the "products of a Singapore company that sold them on the black market as though they were products of Creative Labs"

(5) even if the MP3 players in the accused's possession were stolen, "that fact does not mean that stolen MP3 players could not have been sold at the flea market as legitimate, and purchased innocently by Darren [Cook] as a *bona fides* purchase for value"

(6) with an absence of any evidence of the value of a MuVo Mix 256 meg. MP3 player, "[t]he value that was paid by Darren Cook does not even raise the issue of wilful blindness".

[443] As to the application of similar fact principles to the ersatz cocaine and the MP3 charges, the defence argued that the application for such reasoning ought to have been made at the outset of the proceedings or at the conclusion of the Crown's case. By the prosecution not having done so, the defence was prejudiced "because the Defence could have led evidence and/or directly challenged the Crown's evidence respecting this issue".

[444] The defence submitted that the marihuana in Sheldon Cook's garage was Shannon Brake's property. It was stored in the garage when Brake's landlord, the accused's brother, was permitted to store Brake's belongings. The "Brake boxes" had been at the accused's home less than a month. Neither Darren Cook nor the accused knew what was in the Food Basics bags in the box on the highest shelf in the garage. The accused never handled the box. The marihuana was not in plain view and there was no odour. The accused's fingerprints were not found in examination of the wrapping for the drug.

PART IV

ANALYSIS

Overarching Principles

[445] The court may believe all, none or some of a witness' evidence: *R. v. Francois*, [1994] 2 S.C.R. 27 at para. 14; *D.R. et al. v. The Queen* (1996), 107 C.C.C. (3d) 289 (S.C.C.) *per* L'Heureux-Dubé J. (in dissent in the result) at 318; *R. v. M.R*., 2010 ONCA 285 at para. 6; *R. v. Hunter*, [2000] O.J. No. 4089 (C.A.) at para. 5*; R. v. Abdallah*, [1997] O.J. No. 2055 (C.A.) at para. 4, 5. Accordingly, a trier of fact is entitled to accept parts of a witness' evidence and reject other parts, and similarly, the trier can accord different weight to different parts of the evidence that the trier of fact has accepted: *R. v. Howe*, [2005] O.J. No. 39 (C.A.) at para. 44.

[446] However, a verdict of guilty may, in appropriate cases, be safely founded on the evidence of a single witness, regardless of the offence or offences charged: *The Queen v. G.(A.),* [2000] 1 S.C.R. 439 at 453-4; *Vetrovec v. The Queen* (1982), 67 C.C.C. (2d) 1 (S.C.C.) at 8.

[447] A determination of guilt or innocence must not, however, devolve into a mere credibility contest between two witnesses or a bipolar choice between competing prosecution and defence evidence. Such an approach erodes the

operation of the presumption of innocence and the assigned standard of persuasion of proof beyond a reasonable doubt: *W.(D.) v. The Queen* (1991), 63 C.C.C. (3d) 397 (S.C.C.) at 409; *Avetsyan v. The Queen* (2000), 149 C.C.C. (3d) 77 (S.C.C.) at 85-87. However, as recognized in *R. v. Chittick,* [2004] N.S.J. No. 432 (C.A.) at para. 23-25:

> It is not an error for a judge to make a finding of credibility as between the complainant and the accused, particularly where they provide the bulk of the evidence as to what happened. This is a necessary part of the judge's duty. While it is not the end of the journey of decision-making, it is a necessary intermediate step along the way. Indeed, the first two elements in a proper jury instruction on this issue as set out in *W.(D.)* assume that the jury should decide whether or not they believe the exculpatory evidence of the accused. Those first two steps are:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Accordingly, it was not an error for the trial judge here to assess the credibility of the accused in relation to that of the complainant.
>
> . . .
>
> An error under the *W.(D.)* principle is committed where the judge treats the matter as concluded once this assessment of credibility has been completed. To do so misses the third and critical step in the application of the burden of proof. As described in *W.(D.),* that last crucial step is as follows:
>
> > Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[448] It must be emphasized that mere disbelief of the accused's evidence does not satisfy the burden of persuasion upon the Crown: see *W.(D.) v. The Queen, supra* at 409. In other words, to use disbelief of the accused's evidence as positive proof of guilt by moving directly from disbelief to a finding of guilt constitutes error: *R. v. Dore*, (2004), 189 C.C.C. (3d) 526 (Ont. C.A.) at 527; *R. v. H.(S.),* [2001] O.J. No. 118 (C.A.) at para. 4-6. The court must be satisfied on the totality of the evidence that there is no reasonable doubt as to the accused's guilt. The obligation of *W.(D.)* analysis was summarized in *R. v. Minuskin* (2004), 181 C.C.C. (3d) 542 (Ont. C.A.) at 550:

> It is important to stress that trial judges in a judge alone trial do not need to slavishly adhere to this formula. This suggested instruction was intended as assistance to a jury and a trial judge does not commit an error because he or she fails to use this precise form of words. Nor is the trial judge expected to approach the evidence in any particular

> chronology, for example, looking first at the accused's evidence and then at the rest of the evidence. It should, however, be clear from an examination of the reasons that at the end of the day the trial judge has had regard for the basic principles underlying the *W. (D.)* instruction. One of those principles is that it is not necessary for the trier of fact to believe or accept the defence evidence for there to be a reasonable doubt. Even if the trier of fact believes the prosecution witnesses, the evidence as a whole may leave the trier of fact with a reasonable doubt. As it was put by Cory J. in *W. (D.)* at p. 757, the trier of fact must acquit even if he or she does not believe the accused's evidence because they have a reasonable doubt as to the accused's guilt "after considering the accused's evidence in the context of the evidence as a whole".

See also *R. v. Turmel*, [2004] B.C.J. No. 2265 (C.A.) at para. 9-17.

[449] The court must be satisfied beyond a reasonable doubt on the issue of credibility where the case turns on the evidence of two conflicting witnesses: *R. v. Selles* (1997), 101 O.A.C. 193 (C.A.) at 207-8; *M.(N.) v. The Queen*, [1994] O.J. No. 1715 (C.A.) at para. 1 (affirmed [1995] 2 S.C.R. 415). Where there are significant inconsistencies or contradictions within a principal Crown witness' testimony, or when considered against conflicting evidence in the case, the trier-of-fact must carefully assess the evidence before concluding that guilt has been established: *R. v. S.W.* (1994), 18 O.R. (3d) 509 (C.A.) at 517 (leave to appeal to S.C.C. refused [1994] 2 S.C.R. x); *R. v. Oziel*, [1997] O.J. No. 1185 (C.A.) at para. 8, 9; *R. v. Norman* (1993), 87 C.C.C. (3d) 153 (Ont. C.A.) at 172-4.

[450] Demeanour evidence alone cannot suffice to found a finding of guilt: *R. v. K.(A.)* (1999), 123 O.A.C. 161 (C.A.) at 172.

[451] To the extent that credibility assessment demands a search for confirmatory evidence for the testimony of a principal Crown witness, such evidence need not directly implicate the accused or confirm the complainant's evidence in every respect – the evidence should, however, be capable of restoring the trier's faith in the complainant's account: *Kehler v. The Queen* (2004), 181 C.C.C. (3d) 1 (S.C.C.) at 5-6; *R. v. Betker* (1997), 115 C.C.C. (3d) 421 (Ont. C.A.) at 429 (leave to appeal refused [1998] 1 S.C.R. vi); *R. v. Michaud*, [1996] 2 S.C.R. 458 at 459. There is no absolute rule that tainted or suspect witnesses cannot corroborate each other's evidence provided the prosecution has disproved collusion: *R. v. Winmill* (1999), 131 C.C.C. (3d) 380 (Ont. C.A.) at 409; *R. v. Linklater*, [2009] O.J. No. 771 (C.A.) at para. 11-12; *R. v. Delorme*, [2010] N.W.T.J. No. 28 (C.A.) at para. 26-30; *R. v. Potvin*, [1989] 1 S.C.R. 525 at 554; *R. v. Naicker* (2008), 229 C.C.C. (3d) 187 (B.C.C.A.) at para. 34 (leave to appeal refused [2008] S.C.C.A. No. 45); *R. v. Korski* (2009), 244 C.C.C. (3d) 452 (Man. C.A.) at para. 146; *R. v. G.(W.G.)* (2002), 158 C.C.C. (3d) 305 (Ont. C.A.) at para. 3, 5.

[452] Where evidence of the accused's good character is introduced into evidence at trial, it is relevant to both the accused's credibility as a witness and to the improbability of his or her involvement in the commission of the alleged offence(s): *R. v. Charlebois*, [2000] 2 S.C.R. 674 at para. 29.

[453] Where a trier of fact is satisfied that an out-of-court statement made by an accused is false, the circumstances in which the statement was made and the content of the statement may reasonably permit the trier of fact to conclude that the statement was not only false but was fabricated to conceal the accused's involvement in the offence – a finding of fabrication cannot flow automatically from a finding that the statement should be rejected as false: *R. v. Polimac*, [2010] O.J. No. 1983 (C.A.) at para. 90-94, 105-6; *R. v. Paul*, [2009] O.J. No. 2184 (C.A.) at para. 23-5 (leave to appeal refused [2009] S.C.C.A. No. 450); *R. v. Hazel*, [2009] O.J. No. 1818 (C.A.) at para. 11-24; *R. v. O'Connor* (2002), 170 C.C.C. (3d) 365 (Ont. C.A.) at para. 17-27.

[454] The existence or absence of a motive by an accuser or principal Crown witness to fabricate is a relevant factor to be considered: *The Queen v. K.G.B.* (1993), 79 C.C.C. (3d) 257 (S.C.C.) at 300; *R. v. Prasad*, [2007] A.J. No. 139 (C.A.) at para. 2-8; *R. v. K.(A.), supra* at 173; *R. v. M.(W.M.),* [1998] O.J. No. 4847 (C.A.) at para. 3*; R. v. Jackson*, [1995] O.J. No. 2471 (C.A.) at para. 4, 5. I make this observation, sensitive to the fact that the burden of production and persuasion is upon the prosecution and that an accused need not prove a motive to fabricate on the part of a principal Crown witness. Evidence of a witness' motive to lie is relevant as well to the accused *qua* witness: *R. v. Laboucan*, 2010 SCC 12 at para. 12, 16; *R. v. Murray* (1997), 99 O.A.C. 103 (C.A.) at para. 11-14.

[455] Similar fact evidence is presumptively inadmissible largely because of the dangers of reasoning prejudice and moral prejudice arising from the circumstantial use of propensity disposition: *R. v. Handy*, [2002] 2 S.C.R. 908 at para. 37-40. On occasion, similar fact evidence may be exceptionally admitted because it is sufficiently relevant and cogent that its probative value in the search for truth, in the balance, outweighs the potential for misuse. The exception for admission remains narrow and circumscribed. The prosecution bears the burden of establishing admissibility. The purpose for admission, the proffered value for the evidence, must be identified and must clearly transcend general discreditable character or disposition reasoning. The required degree of similarity for admission is dependent upon the issues in the case, the purpose for which the evidence is sought to be introduced, as well as the other evidence at trial. Ordinarily, generic details of only broad similarity fall short of necessary similarity.

In assessing whether the degree of similarity is compelling upon the issue as to whether the objective improbability of coincidence has been established, the court is obliged to consider relevant dissimilarities.

[456] In addition, in *Handy*, at para. 82, the court provided non-exhaustive guidelines relating to analysis of the appropriate connection of the similar fact evidence to the facts alleged in a charge in the indictment:

> The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. Factors connecting the similar facts to the circumstances set out in the charge include:
>
> (1) proximity in time of the similar acts: *D. (L.E.), supra,* at p. 125; *R. v. Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.), at p. 345; *R. v. Huot* (1993), 16 O.R. (3d) 214 (C.A.), at p. 220;
>
> (2) extent to which the other acts are similar in detail to the charged conduct: *Huot, supra*, at p. 218; *R. v. Rulli* (1999), 134 C.C.C. (3d) 465 (Ont. C.A.), at p. 471; *C. (M.H.), supra*, at p. 772;
>
> (3) number of occurrences of the similar acts: *Batte, supra*, at pp. 227-28;
>
> (4) circumstances surrounding or relating to the similar acts (*Litchfield, supra*, at p. 358);
>
> (5) any distinctive feature(s) unifying the incidents: *Arp, supra*, at paras. 43-45; *R. v. Fleming* (1999), 171 Nfld. & P.E.I.R. 183 (Nfld. C.A.), at paras. 104-5; *Rulli, supra*, at p. 472;
>
> (6) intervening events: *R. v. Dupras*, [2000] B.C.J. No. 1513 (QL) (S.C.), at para. 12;
>
> (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

[457] Countervailing factors in assessing the potential prejudice of admission, for example, potential distraction of the trier of fact from proper focus on the facts charged, the potential for undue time consumption, and risk of a lack of adherence to the limits of admission, are generally more attenuated in a judge-alone trial: see *R. v. J.M.* (2010), 251 C.C.C. 325 (Ont. C.A.) at para. 88; *R. v. T.B.* (2009), 243 C.C.C. (3d) 158 (Ont. C.A.) at para. 26-7, 29-30, 33, 36; *R. v. Cresswell*, [2009] O.J. No. 363 (C.A.) at para. 10.

[458] Two charges before the court relate to the ersatz cocaine located in Sheldon Cook's garage. The prosecution submitted that, during the course of

the PRPS investigation of the courier truck, the accused intended to steal packages he thought contained drugs and that the subsequent presence of the packaged ersatz or fake cocaine in his garage amounted to the crime of an unlawful attempt to possess a *C.D.S.A.*-scheduled substance for the purpose of trafficking: see *R. v. Chan* (2003), 66 O.R. (3d) 577 (C.A.) at para. 47-70 (leave to appeal refused [2003] S.C.C.A. No. 453). To establish a full possession offence, the Crown must prove knowledge of the presence, and character, of the forbidden substance and some measure of control over it. It is unnecessary for the prosecution to demonstrate that the accused knew he possessed the very proscribed drug identified in the indictment provided he believed the drug was a controlled substance: *R. v. Williams* (2009), 244 C.C.C. (3d) 138 (Ont. C.A.) at para. 19.

[459] The charge of breach of trust by a public officer requires proof that an "official", as defined in s. 118 of the *Criminal Code*, committed an act, beyond a mere mistake or error in judgment, which amounted to a serious and marked departure from the standard of responsibility and conduct expected of an individual in the accused's position of public trust with the intention to use his or her office for a purpose other than the public good, "for example, for a dishonest, partial, corrupt, or oppressive purpose": *R. v. Boulanger*, [2006] 2 S.C.R. 49 at para. 47-58.

[460] Ordinarily, evidence that an on-duty police officer, and therefore a sworn constable appointed to discharge a public duty, took for personal use items which were seized in the course of a police investigation, a matter in connection with the duties of his or her office, would constitute proof of the crime. A police officer in the execution of his or her duties, is justified in doing what he or she is authorized to do by a superior officer, on risk of discipline for refusal, provided the order followed is not one which is manifestly unlawful: see generally, *R. v. Finta*, [1994] 1 S.C.R. 701 at para. 239, 260-1; *R. v. Ribic* (2008), 238 C.C.C. (3d) 225 (Ont. C.A.) at para. 67; *R. v. Matusheskie*, 2009 CMAC 3 at para. 13-5; *R. v. Devereaux* (1996), 112 C.C.C. (3d) 243 (Nfld. C.A.) at para. 43.

The Ersatz Cocaine

[461] The parties were in agreement that credibility determinations within the trier of fact's function, together with application of *W.D.* principles, would drive the analysis and conclusions in this trial. There was no dispute that if the prosecution's essential factual allegations were proven, that misconduct would, as a matter of law, constitute the crimes charged in the indictment.

[462] With the passage of time to trial, the lack of notes or recordings by police witnesses, the inconsistencies within some witnesses' testimony and when compared to the sworn evidence of others, instances of deliberate deceit by witnesses, as well as missing evidence (21 packages of ersatz cocaine and a fifth GPS tracking device), any precise reconstruction of the events of November 16 and 17, 2005 and thereafter is simply not possible. That said, not every factual conflict or mystery need be resolved in a criminal trial before a finding of guilt can safely be concluded, provided no reasonable doubt can be said to exist on account of irresolvable circumstances.

[463] Marty Rykhoff and Warren Williams are not on trial in this case. Sheldon Cook is. Nevertheless, some preliminary and general observations are warranted respecting the credibility and reliability of these witnesses.

[464] Det. Rykhoff was an unimpressive witness in many respects. He testified with a sort of indifference to the process. After he was excluded from the courtroom during Sheldon Cook's testimony in a *voir dire* in which the accused disclosed his defence, he improperly, and with his counsel's concurrence, accessed and read a transcript of that evidence prior to testifying at trial. In addition, other significant concerns exist as to the credibility and reliability of Rykhoff's evidence including that:

(1) The witness had no contemporaneous notes of the events of November 16/17, 2005 though duty-bound to make such notes.

(2) During his testimony at trial, the trier of fact was treated to a steady cadence of "I don't recall" and "I don't know". Some of the professed lack of information appeared genuine, some did not.

(3) Although it was overwhelmingly clear on the evidence that everyone at the CPS knew that Const. Williams was permitted to drive to a fast-food outlet in the CIB van, which may have contained one to two million dollars worth of suspected cocaine, Rykhoff was unprepared to admit at trial that he, as the scene supervisor, had knowingly allowed that to occur.

(4) The witness misled his employer, and Det. Sgt. Phillips, through lies as to his whereabouts on November 17 and 18, 2005.

(5) The weight of credible evidence, accepted by the court, caught the witness in what can only be described as a number of lies, some of which may not seem that significant. For example, the witness testified that he had no Mike phone the night of November 16/17. Other witnesses contradicted that assertion and both parties in their submissions accepted the untruth of the witness' testimony.

(6) On the other hand, there were instances of the witness seriously misleading the court. Det. Rykhoff testified that from shortly after 11:00 p.m. on November 16 until about midnight, he remained at the CPS scene, being paid to be "curious", before driving straight back to 12 Division. The credible testimony of Det. McTiernan and the witnesses Ippolito and Barnes, places Rykhoff on Brant Ave. well after midnight in a position to potentially see and hear the results of the NIK tests and to see whether the EDU water cannon destroyed any chance for someone to later count the total number of packages which had been in the courier truck.

(7) The witness was highly evasive when questioned about the extent of his communications with Warren Williams after the accused's arrest.

(8) Rykhoff was ambiguous about several aspects of the meeting with Williams at his home. He changed his testimony about knowing the time of day of the meeting, how long it lasted, and what was discussed. He was vague in interpreting his notes of the meeting.

(9) Eight (8) of the packages from the courier truck, all slit open as though first tested by whoever chose to discard them, were located by the RCMP in a dumpster 2.8 miles from former Morality Det. Rykhoff's house about 20 hours after the detective left the Lakeshore CPS area. In its submissions, the Crown accepted that it was probable that Rykhoff was involved with the accused in skimming a number of bricks of suspected cocaine from the bad guys' load.

[465] I agree with the prosecution admonition that the court ought to be “very suspect of Rykhoff’s evidence in its entirety”.

[466] Warren Williams presented as an uncomfortable and at times evasive witness in the content of his responses and his demeanour in the witness box. This would have been obvious to everyone in the courtroom. While his memory was very poor, his professed lack of recall on many issues was transparently untrue. Additional credibility and reliability concerns subsist:

(1) The witness made no contemporaneous notes of events of November 16/17, 2005 although he was duty-bound to do so.

(2) Williams was prepared to represent to his employer that he should be paid as though working although he was not – playing hockey on the taxpayers’ time and leaving work at 5:30 a.m. and misrepresenting to both the PRPS, and RCMP investigators, that he worked to 7:00 a.m. on November 18, 2005.

(3) The witness distinguished himself in misleading the court with ease. For example, he misrepresented the circumstances of the November 18, 2005 6:08 a.m. and 6:10 a.m. phonecalls. He claimed Det. Sgt. Phillips was participating in a November 17, 2005 briefing and discussion when Phillips was not even on duty.

(4) From time-to-time during his testimony, Const. Williams would change answers on the same subject, apparently when he could not recall his prior response. For example, the witness described Rykhoff doing the rub test and later professed to no recall of who did the test. He drank beer at Rykhoff’s home; he didn’t have beer; possibly he did. The Ex. #30 voicemail access code information was not given to the accused at the Re/Max meeting, and then it was.

(5) Williams misled the RCMP investigators by claiming to have had no conversation with the accused from the night of Nov. 16/17 until the date of his interview on November 23, 2005.

(6) Williams misled Sgt. Nicholson by stating in the same interview that he had had no conversation with Rykhoff between the night of November 16 and the interview.

(7) In the witness' preliminary inquiry testimony reproduced at para. 294 and 298, he perjured himself in declining to disclose post-arrest communications with the accused. Williams' explanations for what he now acknowledges to be inaccurate answers were at times equally convoluted and not creditworthy.

(8) In his sworn testimony at trial, the witness was prepared to simply shrug off discrepancies in his evidence and contradictions in which he was caught as, in his view, minor or irrelevant.

(9) In addition to the witness' original non-disclosure of phonecalls with the accused and Rykhoff on the morning of November 17, 2005, it took relentless cross-examination by Mr. Ducharme to drag out of the witness the existence of additional telephone calls with accused. Confronted with telephone records ordered released at the start of this trial, the witness was trapped into further testimonial disclosure.

(10) Williams misled the prosecutor in a pre-trial witness preparation interview and lied in his evidence in-chief when answering the prosecutor's question as to whether he had met with the accused after his arrest. The response was talk of some innocuous crossing of paths while driving on Hwy #10. Only when confronted in cross-examination with the Re/Max and Home Depot meetings was there an admission of attendances at those meetings. It is inconceivable that the witness had forgotten these meetings.

(11) Warren Williams was evasive about the extent of his contacts with Det. Rykhoff after the accused's arrest.

(12) Despite claiming to have knowledge that the accused had a box of packages in his possession the day after the courier truck seizure with no explanation as to why, and with evidence that Det. Sgt. Phillips was to be kept up to date on relevant

> information relating to the case, Williams was prepared to turn a blind eye to a "mistake", and not to disclose anything to Phillips.

[467] The Crown agreed that an "available" inference was that Const. Williams was himself guilty of criminal conduct and that the court ought to be troubled by various problems with the witness' evidence. I agree with these observations.

[468] Shocking as it may be to many, in my view the two principal Crown witnesses, both sworn police officers, must be treated as suspect or tainted witnesses, no different than *Vetrovec* disreputable witnesses, whose testimony the trier of fact must treat with caution and being well-advised to look to independent confirmation before accepting either of the witness' testimony.

[469] While the credibility of Sheldon Cook's evidence will be dealt with in the context of the specific allegations, some general comments are warranted.

[470] In his testimony, in cross-examination, the accused advanced evidence of his good character including his statement that he would never be involved in "any sort of theft or drug dealing" and stating "that's not who I am" in denying that he would secretly take suspected drugs home. As well, a number of witnesses testified to being shocked on hearing that the accused had been arrested and charged. While this evidence was not stated in the conventional form of a witness relating knowledge of an accused's general reputation for honesty and other admirable character traits, I am prepared to accept that this evidence was a compendious way of advancing good character evidence on the accused's behalf.

[471] That said, Sheldon Cook testified with what appeared to be a scripted and rehearsed approach. The Crown described this as the accused "speechifying". At times, he was adversarial in his responses. The witness' repeated references to "Acting Detective" Williams, in referencing his superior orders situation, appeared artificial. The accused's few and incomplete notes of November 16/17, 2005 were of little help in refreshing his memory. Even considering various proffered explanations, there are troubling features within the accused's testimony of which the following are examples:

(1) The accused did not disclose at the November 17, 2005 CIB briefing/discussion that he had a box of packages to bring in.

(2) The accused initially testified that he arrived home at about 7:00 a.m. on November 18, 2005. His time sheet recorded him off-duty as of 7:00 a.m. on November 18, 2005. Confronted with the RCMP surveillance at his residence, it was apparent that the accused left 12 Division closer to 5:30 a.m.

(3) The accused gave two versions under oath as to where and when he made his notes the night of November 16/17, 2005.

(4) Although the accused claimed that he took phonecalls from Williams at the O'Toole residence because Williams had used Marple as a third-party intermediary and also called from his parents' home, the accused did not explain why his pregnant sister-in-law was required to drive phone messages to his Cambridge residence as opposed to phoning them in to his residence.

(5) If Warren Williams stated, as the accused testified, that he had told the RCMP about the finding of the box in the trunk, why would he characterize subsequent phonecalls with Williams as continuing to press him to come forward with the real story? The accused had to know that what Williams told the RCMP would be disclosed to him and his counsel.

(6) According to the accused's testimony, he knew as of the November 29, 2005 Home Depot meeting that Rykhoff and Williams were not going to come forward. Yet when asked why neither he nor his investigator took any steps to record his subsequent phonecalls with Williams, the reply was "I believed they would come forward with that information". This response made little sense.

[472] The 15 packages of suspected cocaine seized from Sheldon Cook's residence were a part of the 44 packages missing from the RCMP load when the PRPS Morality officers took control of the truck seizure from the 12 Division CIB on November 16, 2005. The accused admits that he was in possession of the packages.

[473] Starting with a broad context to the discovery of the 15 packages of ersatz cocaine in Sheldon Cook's garage, those items were evidence in an ongoing police investigation. The packages were at the accused's residential property since the early morning hours of November 17, 2005.

[474] On the evidence, not surprisingly, consensus emerged that evidence, and certainly suspected contraband, is never taken to a police officer's home even for temporary storage. To do so would be contrary to procedure and, as some witnesses observed, against the law. Seizures by police officers in the course of their duties are stored in secure police facilities. This ensures security against loss or tampering and maintains continuity. Under cross-examination, the accused's own testimony recognized these realities.

[475] The accused admitted possession of the 15 packages of white powder. The prosecution submitted that against this background, the case is actually relatively simple – having police evidence concealed in a private residence, nearly two days after it was seized in the course of a police investigation, amounts to criminal conduct. On the prosecution evidence, there was no lawful authority or justification for part of the RCMP controlled delivery to be in Sheldon Cook's personal possession.

[476] The simplicity of this approach has a certain attraction. It does not require the trier of fact to conclusively determine the precise opportunity by which the accused came to possess the 15 packages or who else may be criminally culpable for theft of other missing packages. It does, however, oblige the court to carefully scrutinize the evidence, all of the evidence, to determine whether, beyond any reasonable doubt, the Crown has disproved the existence of direction to the accused from a superior officer upon which he was entitled to rely in taking and maintaining possession of the subject packages.

[477] I do not believe Sheldon Cook's evidence that the 15 packages were taken to his residence and kept there on November 17 and 18, 2005 because he was complying with what he considered to be lawful and reasonable directions from superior officers. Nor does the accused's evidence raise a reasonable doubt on this issue. Further, on the whole of the evidence, even taking into account deficiencies in the Crown's case, I am satisfied beyond a reasonable doubt that the prosecution has established that the accused's possession was not as a result of compliance with directions from superiors.

[478] The accused's evidence as to conduct motivated by directions from superiors was unbelievable in its content and manner of presentation for a number of reasons. Before returning to discussion of issues such as opportunity

and phonecalls, some of these reasons will be developed, seizing on certain foundational aspects of the defence submissions.

[479] A cornerstone of the accused's account as to why the 15 packages travelled home with him was his belief, from his own examination of the substance in the slit-open package and statements by Det. Rykhoff, that the packages did not contain an illicit narcotic. Not only would holding such a perception be against the weight of credible evidence at trial as to what the police at the CPS scene believed but also, given the unconvincing manner in which Sheldon Cook presented his opinion in this regard, particularly in cross-examination, his evidence must be rejected in this respect.

[480] The combined testimony of Rykhoff, Williams and Chamula is that those in the courier truck believed that packages of drugs were concealed in the mango boxes. The circumstances of the concealment of the packages in those boxes, the reports of the courier employees, and the appearance of the packages all pointed quite dramatically toward this conclusion. No one heard the accused say drugs were not present. Only the accused claims to have heard Rykhoff speak of a "dry run" suggesting that no drugs were in the shipment. On the weight of the evidence accepted by the court, Rykhoff made no such statement. The Morality officers, even in light of the negative NIK tests, given all the circumstances and the limits of the NIK testing and the potential for the presence of another drug like ketamine, came to no final conclusion on scene as to the presence of illicit drugs.

[481] The accused performed a common but crude field test for cocaine. His in-chief expression of opinion that the officers were not dealing with a controlled substance or drugs relied on that test and the appearance and feel of the substance and the absence of odour. By the time of extended cross-examination on the point, the accused was no longer speaking of white, chalky powder – he was describing a "floury" substance more "greying" than white cocaine. The witness was forced to acknowledge he was not an expert respecting controlled substances and that he had no knowledge regarding many illicit drugs. The accused's attempt to limit the meaning of his early reference to "drugs" to those appearing to be a white powder was particularly unworthy of belief. Further, I am satisfied that the references in the accused's notes to "drugs" were because he, like the others, held a belief that illicit drugs were in the mango boxes, not because only the others were treating the packages in that fashion. In addition, on the evidence accepted by the court, Det. Rykhoff, in the early stages, suspected drugs were in the courier truck. I find that there were no references by

Rykhoff in Cook's vehicle or over a Mike phone stating that the powder was benign or flour or unlikely to be drugs.

[482] Accordingly, I find as a fact that Sheldon Cook believed, as did everyone else on November 16, 2005, that the courier truck might contain illicit drugs.

[483] Det. Rykhoff and Const. Williams both denied any participation in a 12 Division parking lot discovery of 15 packages in the trunk of Sheldon Cook's police vehicle. The accused testified to a different version of events. Only the accused's evidence described such an unexpected discovery. Close scrutiny of the accused's evidence about this pivotal issue leads the court to reject his testimony on this point having regard to the following:

(1) The notion of a CIB officer independent of the accused planting a box of packages in Cook's police vehicle, as a type of insurance policy for his own criminality, or for later retrieval, is far-fetched in the extreme. The defence submissions in this regard were speculative and illogical.

(2) If the accused routinely took his satchel on the road and placed it in the trunk of his police vehicle, why would he have forgotten to remove it on returning to 12 Division from the CPS?

(3) Why would Williams take a Mike phone to walk out into the police parking lot at 12 Division?

(4) Considering how surprised the accused claimed to be on finding the box, why would he never ask Rykhoff or Williams if they knew how the box came to be in the trunk of the Impala?

(5) Why would the accused, self-described as recalling details and circumstances without difficulty, be unable to say how much of the box was filled by the 15 packages?

(6) The accused provided different descriptions of Rykhoff's alleged response to hearing of discovery of the box. In the accused's *voir dire* testimony, the detective's immediate reply was, "What do you mean?". Then at trial, the accused described Rykhoff as not seeming surprised when informed of

the box with the detective going “right into” describing the scene at the Lakeshore and then giving instructions.

(7) In testimony during a pre-trial motion, evidence which counsel agreed to be part of the trial evidence, the accused advanced as part of the justification and reasonableness of his conduct in taking the packages home, that the box would not fit in his own locker and that 12 Division did not have a storage facility he could access to lock up the packages. This was manifestly untrue and known to the accused to be false. There was abundant secure storage at 12 Division for the 15 packages. After the *voir dire* and hearing a number of Crown witnesses testify at trial explaining the evidence-storage facilities at the Division, in a change of testimony from the *voir dire* account, in his in-chief evidence the accused claimed that it was Rykhoff who directed, “…don’t lodge them in 12 Division”. The accused’s explanation in cross-examination led to the remarkable and troubling explanation for his earlier evidence that he had not then been fully prepared for trial – this response by a witness who claimed elsewhere that all of the circumstances were “emblazoned” in his mind.

(8) In his *voir dire* testimony, the accused testified that because of the inadequate evidence storage facilities at 12 Division, he volunteered to take the box of packages as he could drop it off to Morality prior to attending court in the morning. In describing the parking lot events, there was no reference at all to orders from Rykhoff or Williams to take and keep custody of the packages other than in a police facility. Only in his subsequent testimony at trial did the accused incorporate the feature of superior orders on this point. This inconsistency, like the 12 Division storage facilities excuse, is profoundly destructive of the accused’s credibility.

(9) The accused’s testimonial obsession with following orders and the chain of command as governing the manner in which he dealt with the packages became a problem for consistency in his testimony. In both his *voir dire* evidence and at trial, the accused attributed to Det. Rykhoff statements that the box should be “secured”, and, that he, Rykhoff, would make arrangements to have the packages taken back to Morality.

> At times in his evidence, the accused described the communications by Rykhoff as "orders" ("I was ordered to do it…by two supervisors"; "his [Rykhoff's] orders that evening"; "it was done at the direction of Detective Rykhoff"; "Rykhoff was still down there at the scene…sometimes you don't have all the details, but when you're given an order…you follow it"). Yet the accused never secured the box and, on his evidence, immediately after Rykhoff's statement that he would make the arrangements, the accused challenged his "order" by supposedly volunteering to drive the box back to the CPS scene. Caught in this dilemma, the accused would backslide at times, reducing the description of Rykhoff's role to something less than an order ("this is the information coming from him"; "Rykhoff had said…the next day, we'll drop it off…I took the information that I was given and the instruction and I acted on it") or he would change the source of the directions he followed to be those said to be given by Williams even though they were at odds with Rykhoff's order to secure the box.

[484] On review of the whole of the record, including the evidence of phonecalls after the night of November 16, 2005, there was no 12 Division parking lot surprise discovery of the 15 packages, no Mike phone phonecall, and no order/direction/instruction/ information as to what Sheldon Cook should do with the packages. On his own, he placed the packages in his Honda mini-van and drove them out of police custody to his home. He drove the 15 packages to his residence believing that the packages contained cocaine or some other controlled substance and, as he also informed the court, that "all the wire packages were left in the truck". That amount of illicit narcotics would have significant value.

[485] Sheldon Cook's account of how the box of 15 packages ended up in the closed hatch of his Sea Doo was simply not credible for a number of reasons.

[486] The accused pegged his decision to remove the box from the Maxima on not wanting it to remain in that vehicle's trunk while it was in for servicing. I accept that the car had a service appointment on November 17, 2005. But with immediately available garbage bags, and apparently no shortage of boxes at the Cook residence, the packages could easily have been placed in a different receptacle, taken to court and kept with the accused in the shuttle between the

dealership and the Division as opposed to, as the accused maintained, being left in an unsecured location where no police officer was present, for him to reacquire later in the day by making a round-trip of 1½ to 2 hours between Brampton and Cambridge to get them to Morality. The accused's version provided no real plan as to how he would be assured of getting the packages to the 2:00 p.m.-to-midnight Morality shift since he was to attend court, he would be without his car while it was being serviced, and his own shift was 4:00 p.m. to 2:00 a.m.

[487] While there was mixed evidence at trial that some of the boxes of mangoes were soggy with mango juice, there was no indication that all boxes were in that condition. It is not reasonable to believe that those boxes would be the ones selected by the CIB officers to house the separated packages. There was no credible evidence that boxes of sorted packages broke open in the courier truck, and no indication at all that boxes of sorted packages broke during transfer to the CIB van, during transfer to the Morality Jeep, during transfer to the Morality locker on Derry Road, or in the transfer to RCMP Sgt. Nicholson. The accused's account that he had the one bad box in his possession is unbelievable. Even on his own version of events, the accused apparently had no difficulties carrying the only partially full box 20 yards in the 12 Division parking lot and a short time later transferring it from his Honda vehicle in the driveway of his house to the Maxima parked in the garage. The "broken" box story is simply implausible.

[488] The evidence of Const. Tucker and Sgt. Roskam satisfies the court that the accused's evidence that the Sea Doo was not fully covered must be rejected. Roskam described the Sea Doo as "covered in a" fabric cover and Tucker observed "a cover that was over" the Sea Doo. Contrary to the written submission of the defence that photo exhibits at trial support the accused's position, that is not the case. On the evidence, the Sea Doo was untarped and the hatch opened by the RCMP shortly after 4:59 p.m. on November 16, 2005. The packages were viewed but not removed from the Sea Doo. Cpl. Martin arrived with his camera at 5:26 p.m. After photos were taken, the packages were seized by Roskam and Tucker at 5:54 p.m. Cpl. Martin's photos were taken after the cover had been removed and the packages located. The front hatch was fully covered when the RCMP entered the garage. Therefore, contrary to the defence submission quoted at para. 439, the packages were well concealed in a Sea Doo fully covered by a tarp or fabric cover when the RCMP traced the GPS signal to the Sea Doo.

[489] Turning to the evidence of the accused's statements to the RCMP, I accept Cpl. Boutilier's testimony as to what he recorded the accused saying to

him. I reject the accused's evidence to the contrary. Boutilier presented as a calm and professional witness, unshaken in cross-examination. He, unlike the PRPS CIB officers in this case, made contemporaneous notes. He did re-arrest the accused. He recorded the accused's utterance and made no error as he did so. On the evidence, in a pre-arrest statement, the accused told Cpl. Martin he had worked on the mangoes investigation, and when he was first arrested and told why the RCMP were at his home, the accused expressed his understanding to Boutilier and an awareness of the investigation. In a post-arrest statement to Const. Wong, the accused related that he had worked on the investigation. But 4 or 5 hours later, with a search warrant granted to the RCMP after an earlier refusal, not having said anything about the location of the 15 packages, or that Det. Rykhoff and A/Det. Williams were in the course of arranging their return to Morality, or that Morality must have already accounted for the packages as Det. Rykhoff had reported their discovery, the accused did not continue to rely on his right to silence but chose instead to tell Boutilier, in an apparent reference to the discovered packages, that he had nothing to do with anything related to the RCMP search. This was untrue.

[490] The packages of ersatz cocaine were placed in the Sea Doo by the accused. To suggest to Boutilier, as I find he did, that he had nothing to do with the investigation of the RCMP was a desperate response suggesting that the accused had yet to concoct the Rykhoff/Williams superior orders scenario.

[491] These crucial findings, that (1) on November 16, 2005 the accused took possession of the 15 packages; (2) he suspected them to contain cocaine or some other controlled substance which, by their weight, had significant value; (3) no 12 Division parking lot "discovery" and "orders" ever occurred; (4) there was no broken box; and (5) storage in a covered Sea Doo was a deliberate concealment of stolen property, point convincingly toward liability on the accused's part.

[492] But that said, is there anything on a broader review of the trial record, for example whether any opportunity existed for Sheldon Cook to have come into knowing possession of the packages at the CPS scene which might cast doubt on this conclusion?

[493] The Crown argued that it did not need to prove opportunity on Sheldon Cook's part to steal the box of ersatz cocaine packages. Knowledge and control of the property was proven by discovery of police property in the unsecured location of the accused's private residence. Quite rightly, the prosecution submitted that it did not have to "prove every minute of what was happening" at

the CPS. I further agree with Mr. Rowcliffe's observation that one does not expect "police to be looking over their shoulder keeping an eye on what their colleagues are doing, where they are going, what time they are doing things".

[494] Officers were in and out of the courier truck, for example, Bryant to remain with the courier employees, Cook to obtain gloves and a knife, Rykhoff to make phonecalls, and Chamula to assist in looking for additional empty boxes. I accept that the reality of what was transpiring was best captured by the testimony of Const. Chamula as to what was occurring during some of the time: "[t]here was certain points when I left the truck, other people left the truck, people were kind of coming and going". Packages need not have disappeared only when carried away in a box. This was November 16. Const. Chamula described the evening weather as "chilly". The bulkiness or nature of the clothing worn by the officers was not canvassed at trial.

[495] Similarly, during times in the CPS, there is no reason to believe officers were maintaining close surveillance on one another. The evidence of Det. Rykhoff and Consts. Bryant and Williams as to not keeping track of one another, I believe to be most representative of what really went on. The absence of relevant notes for any of the officers further puts doubt to the reliable ability of anyone to detail exactly who was where and when.

[496] The prosecution, correctly in my view, submitted that the question is not precisely how the packages came into the accused's possession at the CPS scene, but whether it was impossible for them to have knowingly come into his possession at that point, however that may have occurred. If it was impossible or entirely unreasonable, then the accused's account of how and why the packages ended up at his residence could not be dismissed. However, on the evidence, opportunity existed for the accused acting alone, or otherwise, to steal packages of the suspected drugs. This conclusion, more fully developed below, in light of the proven possession of the packages in the accused's personal custody and the entirely discredited story of acting on superior orders, establishes criminal liability.

[497] Forty-four (44) packages of ersatz cocaine were stolen from the RCMP load. The individual, or individuals, responsible were sure to have acted furtively with a view to not being discovered by honest police officers on scene. This fact alone makes reconstruction of how the theft occurred quite challenging. Indeed, to successfully achieve the theft would likely involve stealthy conduct to avoid detection.

[498] The CIB officers at the Lakeshore CPS scene never for a moment contemplated that the packages of suspected drugs were under police surveillance. Why would they? Once the truck was parked in front of the clearly marked CPS and the uniformed Const. Bryant and others began to deal with the load, and the boxes' voyage in the community had ended, no other police agency drove up or called. This was then a wayward shipment of drugs, lost to the criminals expecting to take delivery by the actions of the couriers in driving away from the drop site and alerting the PRPS. For anyone disposed to help themselves to valuable illicit narcotics, it would be easy to exploit the situation – there was no "victim" to complain.

[499] In his testimony, Det. Rykhoff did little to dissuade the trier of fact from believing he was involved in the taking of missing packages. The witness' evidence that he believed "all along" that tracking devices had been discovered in the courier truck when he knew next to nothing about such devices, or about investigations using such technology, was not credible. Contrary to Rykhoff's evidence, neither Const. Bryant nor Det. Sgt. Phillips had said anything about a load of "dope" – those witnesses spoke of drugs or cocaine. It was Rykhoff who testified to thinking that the EDU team might blow up the whole load with its water cannon – an action which would defeat any subsequent attempt at counting the number of packages originally in the courier truck.

[500] While it is not necessary to conclusively decide, it appears likely that Det. Rykhoff did remove a box of sorted packages from the courier truck, as described by the accused, when he left to phone Morality. That would provide opportunity to place the receptacle in the trunk of his police vehicle parked on Lakeshore while the other CIB officers remained in the truck sorting through the mango boxes.

[501] Given my views as to the generally non-surveillant attitude of the CIB officers in terms of watching one another, packages could have been taken and concealed at various points by anyone bent on doing so. It is certainly the case that someone could have removed packages from the courier truck and concealed them nearby, for example amongst the garbage placed at the sidewalk by other nearby buildings, for later retrieval and placement in a vehicle. A taking of packages may have been accomplished by someone with immediate access to two vehicles one of which had packages and a second to receive and conceal them. The two known vehicles with packages were the courier truck and the CIB van. The two of three CIB vehicles able to conceal the suspected drugs were the accused's and Rykhoff's vehicles. The third CIB vehicle, Williams' CIB van, had no trunk, was emptied by the turn-over to Morality, and was a two-

occupant vehicle with Const. Chamula as its second occupant – it seems that it could not realistically have been used to hide packages.

[502] On the evidence, Det. Rykhoff had access to the courier truck and his own police vehicle. On the evidence, he did not have solitary access to the CIB van. If one accepts the accused's evidence of giving Rykhoff his car keys, supported to some extent by Det. McTiernan's description of the seating arrangement in the Impala when he arrived on scene, then, with Const. Bryant having the keys to the courier truck after it was locked up, Rykhoff had access to the accused's vehicle to place packages in it at the moment of the off-load to the CIB van or subsequently when he left the CPS by going downstairs and outside and transferring a box to Cook's vehicle from his own vehicle or some other location such as was speculated by the defence – the unlocked CIB van which the defence suggests Williams may have deliberately left unlocked.

[503] I accept the evidence of Rykhoff and Williams, supported by Chamula and Bryant, that the boxes were off-loaded from the courier truck only into the CIB van. It is only the accused's evidence which sought to pull in Rykhoff's vehicle as a possible storage location used during the off-load process. The accused's testimony suggesting that he had no idea where the boxes were going which were off-loaded from the courier truck made little sense. The evidence was clear that the CIB van was parked only a few feet behind the open back door of the courier truck. Assuming the accuracy of the accused's evidence that he was the one CIB officer who remained in the truck to pass out boxes of separated packages, he had to have seen, from the height of the courier truck, where the boxes were going. As well, although the accused's evidence sought to place himself at the front of the truck farthest from the roll-up door, the evidence of the other officers, which the court accepts, is that the sorted boxes to be off-loaded were at the right rear corner in the back of the courier truck. Indeed, that is where the accused said the boxes were in his *voir dire* evidence. In his trial testimony, the witness had moved himself deeper into the truck where, I find, there were in fact no boxes to be passed out. This shift in the accused's evidence, in my view, sought to deflect blame from himself exclusively to Rykhoff. As it was, the accused's evidence in describing where the boxes were transferred, also flip-flopped between talking about a vehicle, vehicles and "the van". I find as a fact that no boxes were placed in the accused's police vehicle during the off-load process and that the accused had to be aware of this fact.

[504] I agree with Ms. Weiler's submission that it made little sense for Det. Rykhoff, acting alone, to subsequently deposit a box of packages in the trunk of Sheldon Cook's police vehicle for later retrieval at 12 Division or as a permanent

insurance policy of sorts. This approach would convert the probability of a successful rip-off of criminals, never to be found or never to complain, to the prospect of an honest officer finding the box, turning it in, and the risk of investigation of all involved that the CIB had shorted the turn-over to Morality.

[505] Accordingly, assuming Rykhoff to have had access to the keys to the accused's vehicle, the opportunity existed for a sharing of packages between Cook and Rykhoff for example when the two unmarked vehicles were parked in the vicinity of Mohawk Avenue some distance from the CIB van parked west of Brant Avenue. The defence is certainly correct that the accused had only been in the CIB a short time and had no long-term relationship with Det. Rykhoff. But the temptation of a million dollars of suspected and untraceable cocaine can ruin an unblemished reputation and be too much to resist for more than one person. The GPS tracking devices were inserted by the RCMP in just two mango boxes. Only about 30% of the load went missing. Const. Williams found and left two GPS tracking devices in quick succession just before the CIB officers left the truck. The two individuals the parties accept that the court could find had possession of ersatz cocaine packages, the accused and Rykhoff, both ended up, by coincidence or not, with a population of packages each having a tracking device.

[506] On the approach of the Crown, the accused's access to make a withdrawal from the CIB van is dependent on his receipt of the keys from Williams and his transfer of packages from the van to his own police vehicle. For this to occur on Brant Avenue, out-of-sight of those in the CPS, the accused would need to have his car keys, not Rykhoff. Otherwise, the accused, if acting alone, would need to have hidden packages at a nearby location for transfer to the Impala when his car keys were returned by Rykhoff. The inference is available on the evidence that the accused volunteered to move the CIB van and that Rykhoff did not have the accused's car keys, thereby allowing an opening to transfer packages.

[507] At the end of the day, despite the accused's only recent transfer into the CIB, the conflicting evidence as to access to the sorted packages to clandestinely transfer some to personal possession, and as to when and where vehicles were moved, and who had what keys, it cannot be said that Sheldon Cook had no opportunity to knowingly take packages at the CPS scene either alone or in concert with Det. Rykhoff. The inability to say exactly how the accused acquired the packages does not raise a reasonable doubt that he came into unknowing possession of the packages.

[508] What of the phonecalls on November 17, 2005 and thereafter? On that date, with the finding that Det. Rykhoff was hanging around Brant Avenue in Mississauga at about 2:00 a.m. not yet having returned his police vehicle to 12 Division or driven home to Oakville, it is unlikely that he was home much before 3:00 a.m. According to the witness' evidence, rather than sleeping for seven or eight hours, he called in sick to 12 Division at about 7:30 a.m. in relation to his 4:00 p.m. shift. It seems that Rykhoff limited himself to about four hours' sleep because he had other matters on his mind apart from packing to leave the jurisdiction.

[509] Without necessarily accepting Rykhoff's stated order of his subsequent phonecalls the morning of November 17, he inquired of officers Dimitroff and Checchia about the nature of the contents of the packages in Morality's custody and directed an intermediary, Warren Williams, to contact Morality about "what the inventory was" and, according to Williams, whether everything was okay with Morality – all of this, despite Rykhoff's evidence he already knew the number of boxes turned over to Morality and, as can be accepted on Det. Sgt. Phillips' testimony, no further role or "paper" was required of the CIB once Morality took over the investigation.

[510] This conduct on Rykhoff's part is consistent with someone with an unusual interest in the nature of the contents of the packages and whether there existed any numbers reconciliation issues insofar as the packages in Morality's custody. The best view of the evidence on the totality of the record, including the proximity of the discarded packages to Rykhoff's residence, is that by the point in the phonecall with Checchia that it was revealed that the courier truck contained an RCMP controlled delivery, Rykhoff knew that he had to divest himself of the packages he had taken, at least 8 in number. Those packages, each sliced open for apparent testing purposes by their possessor, were then placed in a garbage bag and disposed of.

[511] In my view, much of Warren Williams' conduct throughout this case, as submitted by the prosecution, was driven by his desire not to be seen as telling on a fellow officer. As dangerous and warped a code of behaviour as this is understood to be by any right-thinking person, it motivated Williams' actions. This includes non-disclosure on his part to Det. Sgt. Phillips or others in authority at 12 Division, the prosecutors, the RCMP investigators, misleading the courts, and, his ongoing contact with the accused after his arrest.

[512] Certainly by the time of the 4:00 p.m. CIB briefing/discussion on November 17, the RCMP controlled delivery was being openly discussed in the

presence of Williams and the accused. It was announced that the packages contained flour. By this point, the Morality officers knew there were "missing" packages. Const. Chamula recalled, though others who were asked at trial did not, a mention in the CIB briefing about missing packages.

[513] I accept, without doubt, that prior to the pre-dinner discussion, Williams had given no instructions to the accused about the 15 packages. Williams was unaware that they were off-inventory and in Sheldon Cook's possession. Rykhoff was in the air on route to Halifax. Williams had stolen no packages of ersatz cocaine the night before and I am satisfied beyond a reasonable doubt that he was not involved in a conspiracy with Rykhoff to have Rykhoff undertake the overt act of stealing packages on their behalf. All Williams had done was to try to lay off on the accused the task Rykhoff had assigned him of getting a total form Morality.

[514] By dinner-time on November 17, 2005, I find that the accused communicated to Williams that he had a box of packages at home. It is quite properly asked why the accused, if he had stolen the 15 packages, and then became knowledgeable for the first time that they contained flour and were worthless, would not simply keep quiet and discard the packages once he got home. On the whole of the evidence accepted by the court, it appears that the accused decided the safer course was to speak up to initiate, through notice to Williams, reintegration of the packages in his possession into Morality's custody as an additional box accidentally untransferred from the CIB the night before. Thinking that because the packages contained only flour there would be no concern about the CIB making a late hand-over of additional packages, the accused made no miscalculation of the operation of the informal police code – he told a supervisor who, without asking questions or telling anyone, simply said the box should be returned.

[515] With the shift-end for the CIB changing, through unforeseen circumstances, from 2:00 a.m. to about 5:30 a.m., by the time the accused got home the RCMP had traced their packages to the GPS signal at 95 Glazebrook Cres. Presented with the immediate need to care for his children, no opportunity existed to reverse the process before the RCMP descended on his residence.

[516] Close scrutiny of the evidence of Det. Rykhoff and Const. Williams relating to their ongoing contact after November 16/17, 2005, leads me to believe that both were interested, for their own and different reasons, in finding out as much information as possible about the ongoing case involving the accused. Some of the motivation was undoubtedly natural curiosity. From Rykhoff's

perspective, given the circumstances revealed by the evidence, there may well have been an interest in assessing his jeopardy for being charged. The Rykhoff residence meeting was an opportunity for the two officers to try to figure out what had happened at the CPS scene. I am unable to conclude, nor do I have a reasonable doubt on the issue, that the two colluded to tailor their evidence and to frame Sheldon Cook as alleged by the defence. There was next to no prior relationship between the two and as said, on the totality of the record, there is no credible basis for believing that Williams engaged in any criminality or was co-opted into a cover-up of some type.

[517] On numerous occasions in his testimony, Const. Williams referred to his near pathological fear that fellow officers would link Cook's arrest to having spoken to him (Williams) only a few hours earlier on November 17 in their pre-dinner discussion. He would be labelled as a rat. He had told Internal Affairs what he knew, and, prior to testifying in court, those investigators had kept the matter quiet. My observation of the witness as he spoke on this subject led me to believe that he had true discomfort and fear of being seen to have turned the accused in.

[518] I am satisfied that Warren Williams' continued communication with the accused, albeit from different phones and at times through in-person meetings, was not motivated by his and/or Rykhoff's efforts to control or stall the accused. I reject the accused's testimony suggesting that, post arrest, he and Williams discussed a finding of packages in a vehicle trunk in the 12 Division parking lot. The accused's testimony about such an event was contrived. Williams was not communicating with the accused for simple moral support – he wanted to know whether the accused had done anything wrong – he wanted to assess whether it was likely to all come out that the accused was arrested a short time after telling him that he had a box at home. In light of the findings, nothing is to be gained by examination of every post-arrest communication between the various officers.

[519] The account of Sheldon Cook that he had possession of the 15 packages following the lawful orders of superior officers is demonstrably unbelievable. His evidence fails to raise a reasonable doubt. Despite the caution needed to approach the testimony of Rykhoff and Williams, on the whole of the evidence, I am satisfied beyond a reasonable doubt that Sheldon Cook knowingly took personal possession of the 15 packages on November 16, 2005 without any lawful authority.

The MP3 Players

[520] There is no admissible evidence that the MP3 players seized by Const. Robinson on August 7, 2005 or the MP3 players seized from Sheldon Cook's garage on November 18, 2005 were in fact property stolen from a warehouse, a store or an individual.

[521] The evidence of the witnesses Walsh and Murphy establishes that all of the MP3 players identified in this case were manufactured by Creative Labs Inc. Defence objections relating to deficiencies of proof on this issue properly went to weight alone.

[522] Given the charges before the court relating to the 21 MP3 players admitted to have been in the possession of the accused, the prosecution is required to establish, beyond a reasonable doubt, that those devices were part of the PRPS seizure on August 7, 2005.

[523] Although it is true that no formal count-to-count similar fact application was advanced by the Crown until the point of final submissions, from the outset of the case the prosecution spoke in terms of the "coincidence" of the RCMP discovering what were alleged to be three different, unlawfully possessed items in the garage of the accused's personal residence. I am satisfied that the defence was sufficiently on notice that similar fact considerations were in play that it could not be taken by surprise. As well, though asserting prejudice, the defence submissions did not particularize in any way what evidence may have been adduced, or questions asked, beyond the adversarial challenges mounted at trial, which might ground the alleged prejudice. Aside from its procedural argument, the defence made no challenge in its oral or written submissions on the merits to application of similar fact reasoning in the circumstances of this case.

[524] Against the backdrop of the court being satisfied beyond a reasonable doubt that the accused was in unlawful possession of the ersatz cocaine, it is necessary to examine the factors said to connect that transaction to the alleged circumstances of the MP3 possession. These similarities exist:

(1) both the ersatz cocaine and the MP3 players involved PRPS 12 Division investigations

(2) the seizures were at night about 100 days apart

(3) the accused was on-duty when the police seized the contraband in each case

(4) the accused had access to both seizures which were being investigated by numerous responders

(5) the alleged thefts were spontaneous and opportunistic

(6) in each instance, as noted by the Crown, the product was marketable

(7) only some of the contraband was taken

(8) the 15 packages and the majority of the MP3 players were stored a few feet apart in the accused's garage.

[525] Dissimilarities exist not only in the defences to unlawful possession of the distinctly different items but also in the attendant circumstances:

(1) the ersatz cocaine packages went missing from an investigative scene while the MP3 players are alleged to have vanished at a police facility

(2) the accused was in the 12 Division NPU when the MP3 players were taken and in the 12 Division CIB when the 15 packages were taken

(3) the accused held a supervisor's position on August 7 but not on November 16.

[526] Nevertheless, in this judge-alone trial, despite dissimilarities, the similarities between the proven transaction and the alleged transaction are sufficiently relevant and cogent in relation to the inferences sought to be drawn as to the truth of the innocent explanation in the evidence relating to possession of the MP3 players so as to permit similar fact admissibility. The trier of fact function should be entitled to consider whether that possession, alleged to share very situation-specific characteristics with the established circumstances of the 15 packages, has a similar non-innocent origin or, coincidentally, does not.

[527] While recognizing the burden of proof upon the Crown, it should be noted that certain circumstances point away from any unlawful taking or possession on the part of the accused including the following:

(1) Sheldon Cook testified that the 21 MP3 players were at his residence because he gave his brother, Darren, permission to store the box containing the devices, along with other boxes of his belongings pending Darren's move to his new condo. The accused testified that he did not steal from the August 7, 2005 PRPS seizure of MP3 players.

(2) Darren Cook testified that the MP3 players he sought permission to store at the accused's home were purchased as promotional gifts for good real estate clients. Residing in a small apartment with his mother while awaiting his move to a condo still under construction, he stored a number of boxes of his property at 95 Glazebrook Cres.

(3) No witness testified that on August 7, 2005, the PRPS seizure of suspected stolen MP3 players included the 21 seized at the accused's home. Put differently, Const. Chapman recorded a count of only 444 devices seized on August 7 all of which remained in PRPS custody at the time of the search of the Cook residence.

(4) Even placing the serial #'s of the 21 MP3 players into the sequence of serial #'s for the large August 2005 seizure, there are numerous serial number gaps attributable to Creative Lab devices not included in either seizure. Accordingly, sources of Creative Labs MP3 players from weeks 22 and 25 of its 2005 manufacturing cycle existed other than the 444 seized by Const. Robinson in the August 2005 vehicle stop.

(5) There was no evidence that the NPU office on August 7, 2005 was ever occupied by the accused alone during the count of the MP3 players and prior to their lock-up in Sgt. Clements' office.

[528] However, on careful scrutiny of the trial record, I reject the evidence of the accused and Darren Cook. On the totality of the evidence, the Crown has

proven the MP3 charges. No reasonable doubt of the accused's guilt exists. These conclusions taken into account the following:

(1) The 16 MP3 players stored in the accused's garage were in a box only feet away from 15 concealed packages of ersatz cocaine unlawfully taken by the accused in the course of a PRPS investigation only 101 days after the August 7, 2005 PRPS MP3 seizure.

(2) The count of the contents of the receptacles of MP3 players at 12 Division on August 7, 2005 took some hours to complete. The exact count of what had been seized, or what remained of what had been seized, was 444. The accused was the A/Sgt. in the NPU office the night of the Robinson seizure and had opportunity to access and take MP3 players prior to completion of Const. Chapman's count. Once Const. Baker went off-duty, other than the accused, Consts. Robinson and Chapman remained in the NPU both of whom left the office at times.

(3) The MuVo Mix 256 meg. MP3 players seized in the August 7 vehicle stop and from the accused's home were all manufactured in week 22 or 25 of Creative Labs' 2005 manufacturing cycle. The clear majority of the MP3 players seized from the accused's residence have a serial # immediately adjacent to a serial # within the sequence of serial #'s for the August 7 PRPS seizure. Indeed, in four (4) instances, the serial # of a device seized from the accused's home falls within a sequence of such numbers with no numerical gap on either side (see para. 387 chart). Given the testimony of Walsh relating to the sequential serial # assignment and boxing of Creative's MP3 players, the serial # proximity is **a** compelling circumstance suggesting connectedness between the two seizures and challenging the coincidence of separate histories for the two populations of MP3 players as of August 2005.

(4) In his evidence, Sheldon Cook was clearly straining to distance himself from any association with the August 7, 2005 seizure. He was in charge of the NPU office on the date of the seizure – a small office with few officers. Yet the accused

testified to being unsure whether he had been on duty on August 7, 2005 and professed, with no credibility at all, to have little, if any, recall of the huge seizure of MP3 players.

(5) Darren Cook is very close to the accused. They are brothers and have worked together. This alone is no reason to suspect the witness' evidence but he could not be considered an entirely independent witness. Darren Cook's account of being the purchaser, owner and storer of the MP3 players at his brother's home was transparently unconvincing in content and presentation for a number of reasons including:

(a) the witness had no receipt for the flea market purchase

(b) he could not identify the name of the vendor

(c) the witness was purporting to buy Christmas gifts in September for commercial promotion intending to dismantle all the packaging surrounding the device and the instructional material in order to label and rewrap the devices

(d) in his evidence, the witness seemed to stutter ambiguously through the description of the labelling plans

(e) in October 2005, Mr. D. Cook had storage space in Brampton for furnishings – why store MP3 players in Cambridge especially when the alleged labelling process would require access?

(f) the $625 figure in the schedule provided to the accountant was unparticularized – like the absence of a receipt, the schedule, and the accountant's letter and testimony do not substantiate a purchase of MP3 players

(g) on the evidence, the purchased MP3 players, 25 in number, were stored at the accused's home – that number x $25.00 per unit conveniently fit the $625.00 unparticularized figure in the witness' business

expenses schedule – however, only 21 were accounted for in the evidence at trial.

(6) Quite apart from the circumstantial inference reasonably available from the proximate presence to the 16 MP3 players in the garage of the ersatz cocaine packages unlawfully taken during the course of a separate investigation, the accused's evidence was unbelievable. Leaving aside why the box of MP3 players was sitting on a snow blower, and the likelihood or not that one would give a 3 or 4 or 5-year old an MP3 as a gift, and that gifts for children would be stored under a bed as opposed to somewhere like a high shelf in a closet, there were not 25 MP3 players located at the accused's residence. Although the defence written submissions state at one point, "Even assuming the 25 MP3 players found in Cook's residen[ce]…", there were only 21 of the devices at the accused's home. There was no evidence from the accused explaining what happened to 4 of Darren's other MP3 players. That is because there were not 25 to start with.

(7) While the accused's testimony suggested 3 MP3 players were under his bed and he had a fourth for personal use, on the straight-forward and credible evidence of RCMP Const. Stewart, 1 MP3 player was located in a master bedroom closet and 4 under the bed in that room.

[529] The storage and gifts story was a clear fabrication. In the result, the prosecution has proven the allegations of breach of trust, theft and unlawful possession, all beyond any reasonable doubt.

The Marihuana

[530] With the prosecution declaring its intention not to have the trier of fact consider whether the 443 g. of marihuana seized from the accused's garage was possessed for the purpose of trafficking, the issue devolved to whether the accused was in simple possession of the controlled substance.

[531] The marihuana was located in the garage of Sheldon Cook's residence. The Cook family had lived there for less than half a year. Photos of the garage

show a relatively tidy environment. This is a dwelling in which the accused, his wife, his in-laws and the Cooks' two young children resided. At a purely circumstantial level, the location of the controlled substance on a shelf immediately beside the door leading into the house raises the inference that the accused had knowledge of its existence and control over its presence.

[532] As earlier discussed, the defence relies on various matters in the trial record submitted as defeating reliance on such an inference as proof beyond a reasonable doubt including the following:

(1) Sheldon Cook testified that he had not handled the box containing the marihuana and had no knowledge of its contents.

(2) The box was positioned on a high shelf in the garage and there was no odour from the controlled substance. The accused's fingerprints were not discovered in the examination process.

(3) Not only was the marihuana not in plain view as the box sat on the shelf, had the box sat on the floor of the garage the substance could not be seen given the way the Food Basics bags were folded over.

(4) The accused described the origin of the box containing the marihuana as placed in the garage, with his permission, by Darren Cook, who needed to store boxes of a tenant's belongings.

(5) Darren Cook confirmed the accused's account of how the box came to be in his brother's garage. His tenant, Shannon Brake, vacated the accommodation rented by the witness to that tenant leaving boxes of belongings behind. The premises were cleaned up, Brake's drug paraphernalia discarded, and the premises re-rented. As the landlord, Darren Cook was obliged to safeguard Brake's possessions. With no place to store the boxes, given his own between-residences circumstances, he sought and received permission to store the boxes at the accused's home. He, too, testified to a lack of knowledge of the presence of marihuana.

[533] While accepting that Darren Cook rented to a tenant named Shannon Brake in the fall of 2005, the account of storage of his tenant's boxes, founding unknowing or inadvertent presence of marihuana in the 95 Glazebrook Cres. garage, is not credible considering:

(1) Darren Cook claimed to find drug paraphernalia in the rented premises. He believed it belonged to Brake but, incredibly, did not search the contents of the tenant's boxes to ensure no illegal or objectionable contents remained of which he was taking possession.

(2) Darren Cook described Brake's boxes as "packed and ready to go" with 2 of the 10 boxes having their flaps open. He checked the 2 open boxes seeing their contents. He did not see any marihuana. The Food Basics bags were discovered by Const. Tucker sitting half in a box and half out without the top of the box being closed. Since this item was not described as being among the contents of the 2 boxes Darren Cook did examine, it would have to be a third, now-opened box, by someone.

(3) Darren Cook could not describe the contents of the 10 boxes because he donated them to charity without checking for valuables or anything else. This too seems improbable.

(4) Both Darren Cook and the accused informed the court that '122 Baronwood Court' was written/printed on each of the boxes belonging to Brake. The accused did not preserve the box from which the marihuana was seized on November 18, 2005. Darren Cook purported to point out 2 of Brake's boxes in the Ex. #86 photo – while the tops and all sides are not visible in the photo, on the box exteriors which can be seen, there is no hand-printed or written street address.

[534] The defence evidence is not believable. Nor does it raise a reasonable doubt. On the whole of the evidence, the prosecution has proven beyond a reasonable doubt that Sheldon Cook was in knowing possession of the marihuana seized from his residence garage.

PART V

CONCLUSION

[535] The accused is found Guilty of counts #'s 1, 2 and 4 to 7 in the indictment. The accused is found Not Guilty on count #3 but guilty of simple possession contrary to s. 4(1) of the *C.D.S.A.* Submissions will be scheduled respecting the application of *R. v. Kienapple*, [1975] 1 S.C.R. 729 to counts 4 to 7.

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HILL J.

Released: June 23, 2010

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

SHELDON COOK

JUDGMENT

HILL J.

Released: June 23, 2010