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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CAROL BANAYOS and OLIVER BANAYOS

Accused

) **APPEARANCES:**

)

) Anne Turner,

) Janna Hyman and

) Haley Hrymak

) for the Crown

)

) Katherine Smith

) for the Accused

) Carol Banayos

)

) Evan Roitenberg

) for the Accused

) Oliver Banayos

)

) Judgment delivered:

) June 28, 2017

PERLMUTTER A.C.J.Q.B.

Introduction

[1] The accused Oliver Banayos is charged with one count of conspiracy to traffic cocaine and one count of trafficking cocaine. Mr. Banayos and his sister, the accused Carol Banayos, are jointly charged with one count of conspiracy to possess proceeds of crime, one count of possessing proceeds of crime, one count of conspiracy to launder proceeds of crime, and one count of laundering proceeds of crime. While Philip Nguyen

was also jointly charged on the indictment with respect to the two counts involving cocaine and the two counts involving proceeds of crime, the trial only involved Mr. Banayos and Ms Banayos. These charges arise from a Winnipeg Police Service investigation referred to as "Project Sideshow" that took place from early 2012 to February 5, 2014.

[2] For easier reading, at the outset, I have outlined the positions of the Crown and defence. As well, because of the manner in which the case was presented by the Crown, I have reviewed much of the evidence and my findings with respect to this evidence prior to my analysis of where and how this evidence fits within the applicable legal principles.

Crown Position

[3] It is the Crown's position that Mr. Banayos was the directing mind of a cocaine trafficking operation wherein Mr. Banayos directed others to supply cocaine at the quarter-kilogram to kilogram levels to his customers for further distribution and to collect money from these customers. It is the Crown's position that the cash collected as profits from these cocaine sales was then circulated through Mr. Banayos's automated teller machine (ATM) business to "launder" these proceeds with the assistance of Ms Banayos.

[4] The Crown's case is circumstantial and largely relies on discussions in intercepted communications, police surveillance, financial evidence and an agreement of facts. As well, the Crown relies on expert evidence of Blake Wawryk in the areas of the cocaine

trade, cocaine prices, the way cocaine exchanges are arranged and completed, and the meaning of particular lingo or jargon in some of the intercepted communications. The Crown also relies on expert evidence of Staff Sergeant Paul Gilligan of the Royal Canadian Mounted Police (RCMP) regarding possession of proceeds obtained by crime and money laundering. In addition, the Crown called two police officers to testify regarding some of their involvement in surveillance, a Royal Bank of Canada (RBC) employee and a Bank of Montreal (BMO) employee. The Crown seeks to admit several communications of individuals, other than the accused, which Crown counsel say were in furtherance of the conspiracy to traffic cocaine, and, to do so, rely on the co-conspirators' exception to the hearsay rule. As such, in the trial, some evidence was heard pending my ruling on admissibility based on this exception.

Defence Position

[5] It is the defence position that the communications and surveillance relied upon by the Crown only support the Crown's position if viewed through the "lens" that cocaine trafficking was involved and that the Crown's position is based on "circular" reasoning. Defence counsel says that, at best, the intercepted communications are suspicious, which does not meet the Crown's burden of proof, and it cannot be concluded that the only reasonable inference is that these communications involved drug trafficking. It is the defence position that the Crown has not proven the source of cash placed in Mr. Banayos's ATMs and that it may reasonably be inferred that the operation of the ATMs was part of a legitimate business.

[6] Defence counsel also argues that the Crown called expert evidence to fill in the evidentiary gaps, and essentially this evidence should be given little weight. The defence disputes the admissibility of those communications of individuals, other than the accused, which the Crown seeks to admit in reliance on the co-conspirators' exception to the hearsay rule.

Overview of the Evidence

[7] I will start by more specifically outlining the positions of the parties.

[8] It is the Crown's position that Mr. Banayos was the directing mind of a cocaine trafficking operation involving Nguyen, Narindar Singh, Michael Flora and others, who, at Mr. Banayos's direction, supplied cocaine at the quarter-kilogram to kilogram level to Mr. Banayos's customers and collected money from these customers. It is alleged that these customers included Somkit Phommarath, Colin Agland and Ronald Morrison, who further distributed this cocaine. It is alleged that Morrison distributed cocaine through Robert Lafond and Mervin Winestock. To whom Phommarath and Agland distributed cocaine is unknown. However, it is the Crown's position that given the quarter- and half-kilogram amounts purchased by Phommarath and Agland and comments made by them in the course of communications intercepted by police, it can be inferred that they were further distributing cocaine to those below them in the drug trafficking hierarchy.

[9] It is the defence position that the Crown is asking the court to presume that the words spoken and the tenor of the conversations in the intercepted communications relied upon by the Crown are coloured by a drug milieu even though Mr. Banayos was

not found with drugs or cash and no drugs or cash were found in relation to the intercepted communications. Defence counsel argues that the Crown is assuming that drugs are involved and then referencing text communications that may appear suspicious as evidence of coded communications. Similarly, defence counsel argues that there is no evidence showing Mr. Banayos speaking with Nguyen, Singh or Flora and that it is flawed reasoning to suggest, as Crown counsel have, that such communications are absent because Mr. Banayos was insulating himself as the leader of this alleged conspiracy.

[10] Defence counsel also argues that essentially Wawryk's evidence should be given little weight because Wawryk was given the Crown's theory and asked to point in the direction of those aspects of evidence that support this theory.

[11] While defence counsel acknowledged that selling drugs for purpose of resale may in some cases be a design in common, in the case at hand there is no evidence that the sale of drugs depended on an expectation of resale. Moreover, defence counsel argues that if I am led to believe that Mr. Banayos was involved in trafficking, a conspiracy has not been proven as there is insufficient evidence of a unity of intention amongst the alleged co-conspirators. As well, defence counsel says that the indictment joins Mr. Banayos and Nguyen as conspiring with others, but there is no evidence of a meeting of the minds between them. In addition, defence counsel argues that if there is evidence of a conspiracy, the Crown called evidence of more than one conspiracy and it has not been shown that Mr. Banayos was involved in the one conspiracy envisioned in the charge.

[12] It is useful to begin with Wawryk's expert testimony and the evidence regarding Nguyen as provided in the agreement of facts and the reports of police surveillance filed by consent.

Wawryk's Expert Testimony

[13] Wawryk was qualified as an expert to give opinion evidence in the areas of trafficking cocaine in Manitoba between 2012 and 2014, including sources of cocaine and interprovincial trafficking; methods of concealment and avoiding police detection used by drug traffickers, including the use of stash persons and couriers, the use of PGP phones and other techniques; the hierarchy of drug trafficking and the roles of various parties involved in drug trafficking; proceeds of crime from drug trafficking; and the interpretation of jargon, lingo and coded language used by drug traffickers.

[14] I found Wawryk to be credible and his testimony to be reliable. He testified in a candid and straightforward manner. If he was uncertain about a question, he asked that it be rephrased. At times, he would pause to reflect upon his answer. When he had more or less experience with, for example, a particular term or observation in the drug trade, he said so. On cross-examination, he made reasonable concessions. He voluntarily noted when he was unable to offer an opinion. For example, when asked about the size of what was indicated to be a photograph of a full kilogram "brick" of cocaine, he testified that there was no scale reference and so he did not know how big the object was. When asked if certain numbers represented weights of cocaine, he testified that he could not say definitively in the situation presented to him. When

asked if he could say where an individual who is apparently seen accessing a "stash location" would fit in the hierarchy of the cocaine trade, he testified that he could only say the individual had a key for the door and would need more context to provide an answer. I accept Wawryk's evidence regarding certain practices of those involved in trafficking drugs.

[15] In his evidence about the hierarchy of the cocaine trade in Winnipeg, Wawryk testified that at the bottom is the street dealer who sells cocaine at the transaction level. He or she can work for him or herself or other street level traffickers or as part of a pyramid, where a "supervisor" supplies him or her with cocaine to sell. A supervisor can supervise several dealers, and above the supervisor are people that procure larger amounts of cocaine to give to the supervisor. Depending on the organization, there might be somebody who is solely responsible for delivery of cocaine to sellers and somebody solely responsible for collecting of money from sellers and taking it back to the upper levels of the organization, while in some organizations one person may have both roles. There are also roles that involve sourcing supply, shipment and hiring trusted people to act as couriers of cocaine or cash. He testified that people at the upper end of the hierarchy essentially insulate themselves from police detection.

[16] Wawryk testified that subordinates or "couriers" are used to provide a level of protection to the ultimate dealer by touching the drugs and collecting the money, such that they assume the risk of being in possession of the drugs and money. Wawryk testified that couriers are given specific instructions and decision-making is not part of

the equation. Couriers are compensated by whoever is asking for the courier to do the work.

[17] Wawryk testified that an overarching tenet of the drug trafficker is that he or she believes the police are watching and listening all the time. I accept Wawryk's testimony that one of the strategies used by those at the highest level of the drug trafficking trade to thwart efforts to listen to them or gain anything meaningful from their conversations is to speak in locations where it is difficult to intercept, such as public places, and when communicating on a phone, to use codes so that the police will not know what is being talked about. Wawryk testified that one will not say the word cocaine and will substitute other vernacular that is exclusive to the trade, sometimes exclusive to the group of people that do this business, and sometimes exclusive to two people having a trafficking relationship. He testified that the words used can be anything as long as when they speak or message, it is mutually understood. For example, he testified that if they replace the word "cocaine" and call it an object, they can communicate. Wawryk also testified that while there are peculiar words to the group that is having its communications intercepted, he has found that some lingo is common or universal through different drug trafficking organizations. He testified about his experience and understanding of the following words heard in the intercepted communications in the case at hand, bearing in mind that he acknowledged that the meaning of these terms was dependent on the context or circumstance:

- "Work" – Wawryk testified that this is a universal phrase to the drug trade and that "work equals drugs". He testified that the business of the drug

trafficker is selling drugs and that drugs are referred to as work as they are what make money.

- "Papes" – Wawryk testified that the terms "papes" or "paper" commonly refer to money.
- "Files" – Wawryk testified that he is familiar with this term and in the context of the intercepted communications in the case at hand, "files" means money.
- "Dox" – Wawryk testified that he is familiar with this term and, in the context of the case at hand, it refers to money.
- "Q" – Wawryk testified that this is representative of the word "quarter" and is a weight reference in drug trafficking, although to know what weight it is a quarter of requires context. For example, in this case, he testified that because "Q" is used in the context of intercepted communications which refer to \$15,000 or \$15,500, "Q" would refer to a quarter kilogram of cocaine given that the value of a quarter kilogram of cocaine around this timeframe was approximately this price. Looking at the packaging and pricing of other drugs in Winnipeg at the time, he testified that it is not indicative of any other substance at a quarter-kilogram level.
- "Short" or "Shortage" – Wawryk testified that often someone will have a short or shortage, which refers to less product or cash than was expected.
- "Buddy" – Wawryk testified that the point of "buddy" is that when people are speaking where they can be intercepted, to protect themselves from police, they will not say a person's name. The use of the word "buddy", where both

parties appear to know who is being referenced, indicates an attempt to hide the person's identity.

- "Press" – Wawryk testified that when a brick of cocaine is taken to powder form, adulterant is added and it is repackaged. This is a "repress" and "press" is a reference to this repressed product. While he agreed on cross-examination that "press" also refers to a machine used to compress under great weight a kilogram brick of cocaine, in the case at hand it is not this instrument that is referred to.
- "Garbage" – Wawryk testified that this term commonly refers to inferior or poor quality drugs.
- "Primo" – Wawryk testified that this term is commonly an indicator that it is the "best" drugs. This term is not specific to cocaine.
- "G" or "Gs" – Wawryk is familiar with these. However, context is required to define them because they could stand for a thousand dollars, and in the drug trafficking milieu, Gs are common gram weights. For example, Wawryk testified that in an intercepted text message on March 13, 2013, at 9:07 p.m. from Agland to Mr. Banayos, "... buddy is coming to me now. I was gunna pick up another g on the way to polo ...," "g" references \$1,000. Similarly, Wawryk testified that in another intercepted text message on March 22, 2013, at 2:50 p.m. from Agland to Mr. Banayos, "Still 2gs short. Wiating for two buddies to get off work so I can grab that," the phrase "2gs short" referred to \$2,000.

[18] As acknowledged by Wawryk, the meaning of the terms defined by him is dependent on the context. In the case at hand, while I find Wawryk's opinions as to the meaning of the foregoing terms enabled me to interpret and appreciate some of the jargon and lingo, his opinions about these terms were not determinative of the meaning I attributed to particular text messages or conversations. In my analysis of some of these communications, I have referred to Wawryk's opinions.

[19] Wawryk also testified as follows about the price, purchase and sale of cocaine in the 2012-2013 timeframe in Winnipeg:

- The price to purchase a kilogram of cocaine was in the range of \$60,000;
- \$15,000 or \$15,500 was the going rate for a quarter kilogram of cocaine;
- It is common for different purchasers to get different cocaine prices based on their relationship with the seller;
- For a simple transaction of one person selling one kilogram of cocaine that he or she owned (and not just as a courier) to another person, the seller should gain a profit of \$2,000 to \$3,000, although this can be more complicated if, for example, a courier is employed or there are transport or other related costs; and
- Purchasers of half or quarter kilograms of cocaine are not purchasing for personal use and are selling this cocaine in a complete state or breaking it down for sale in lesser fractions.

Nguyen

[20] The agreement of facts, surveillance reports that were tendered by consent and intercepted communications include evidence about the involvement of Nguyen.

[21] To summarize the agreement of facts, it is admitted that in the salient timeframe Nguyen had meetings with cocaine couriers (the Toronto Couriers) who arrived in Winnipeg from Toronto. A Toronto Courier arrived in Winnipeg driving a vehicle rented in Toronto, Nguyen and the Toronto Courier met, often in a Winnipeg hotel, and later police covertly entered the Toronto Courier's checked luggage at the Winnipeg airport to find cash in the range of \$185,000 to \$400,000, bundled with elastic bands, in vacuum-sealed bags.

[22] Based on the agreement of facts and surveillance reports, both around the timeframes that Nguyen met with the Toronto Couriers and on other occasions, he attended an apartment on Wilkes Avenue (the Wilkes Suite) in Winnipeg. The Crown alleges that this was a "stash suite" operated by Nguyen. Wawryk testified that a stash site is generally an apartment rented for the purpose of storing drugs or money and as a workplace to weigh cocaine into different amounts for sale. It is a secret place for the drug trafficker to go to have some comfort that his or her activities are not being intercepted. If the police raid it, the drug trafficker will ensure there are no identifying materials present, no fingerprints and no DNA. Someone does not actually reside in the stash site.

[23] I find that the Wilkes Suite was used by Nguyen as a stash site for the purpose of storing cocaine and money and as a workplace to weigh cocaine into different

amounts for sale and this cocaine was further distributed by Nguyen. I make this finding for the following reasons.

[24] Based on the surveillance reports, on several occasions, when police covertly entered the Wilkes Suite, they found minimal toiletries, no food or beverages, and no dishes, except Ziploc bags of several sizes and Tupperware containers. Given these observations by police, I find that nobody was residing in the Wilkes Suite.

[25] Based on the surveillance reports, when police covertly entered the Wilkes Suite on several occasions, their observations also included the following inside a safe located in this suite:

- February 13, 2013 – Police smelled cocaine and found a digital scale and a garbage bag with food saver bags, a roll of tape, five pieces of wet torn brown wrappers with writing “VNS 80”, “1030”, “2”, and a Ziploc bag.
(Wawryk testified that it is common for someone having a stash house to keep their garbage as a way to protect them because the drug trafficker at this level most likely is aware that once at the curb police take garbage to gather evidence. He testified that the packaging photographed by police on this occasion is consistent with kilogram wrappers of cocaine.)
- February 26, 2013 – Police again noted a garbage bag with numerous used vacuum-sealed bags and a strong odour of cocaine emanating from the bag, with several pieces of packaging material inside with numbers on them. Police also noted seven one-kilogram bricks of cocaine with a series of numbers on each. Swabs were taken from two bricks.

- March 13, 2013 – Police noted a strong smell of cocaine. Police also noted a large vacuum-sealed food saver bag of bundled Canadian currency. There were seven large bundles. In each large bundle, there were 10 sub-bundles wrapped with two elastics each. Police estimated the sub-bundles to contain \$1,000 each and the large bundles to have \$10,000 each, for a total of \$70,000. There was also a Ziploc bag containing a broken “brick” of cocaine estimated to weigh half a kilogram (from which a sample was obtained).
- March 14, 2013 – Police noted three one-kilogram bricks of cocaine, a bag with a quarter-kilogram brick of cocaine (from which a sample was obtained), a Ziploc bag with a half brick of cocaine (from which a sample was obtained), an empty kilogram package, a garbage bag and an Infyniti digital scale.
- March 27, 2013 – Police noted the smell of cocaine, a garbage bag with empty torn kilogram cocaine wrappers inside, a small plastic bag containing approximately one gram of cocaine and an Infyniti digital scale.
- April 10, 2013 – Police noted one gram of powder cocaine inside a plastic baggie (from which a sample was obtained), a large vacuum-sealed brick of cash of approximately \$70,000, in seven large bundles with 10 sub-bundles each of \$1,000, and the same working digital scale as on previous entries to the suite.

[26] In those cases where police seized cocaine, it is admitted in the agreement of facts that the substance seized was cocaine. Where cocaine was observed (and not

seized or sampled), it is admitted that the officers who observed the substance were of the view that the substance was consistent in appearance with cocaine.

[27] When police covertly entered the Wilkes Suite on several occasions, they also typically observed elastic bands, an "X-Acto" knife, tape, "Windex", paper towel and an Infyniti digital scale. Wawryk, whose testimony I accept, testified that:

- Tupperware containers can be used as a receptacle in which to smash or break up "pressed" or "pure" kilograms of cocaine to portion out different amounts or to mix adulterants into those amounts.
- Ziploc bags are common packaging for sub-kilogram weights of cocaine.
- Elastic bands are used for packaging bundles of money.
- An "X-Acto" knife can be used to cut into a kilogram of cocaine.
- Often someone will use a knife to cut a "window" in a cocaine package, perform an integrity test and repackage it with tape.
- "Windex" and paper towel are used for cleaning up, including fingerprints and DNA, and washing things down when they are done.
- The Infyniti digital scale observed by police is common in stash locations.

[28] The following are some examples of evidence based on the agreement of facts and surveillance reports regarding Nguyen's access of the Wilkes Suite in relation to his meetings with the Toronto Couriers:

- On February 26, 2013, David Ly arrived in Winnipeg driving a vehicle rented in Toronto. He checked into a room at the Sandman Hotel. Nguyen met Ly in the lobby of the hotel. Nguyen then travelled directly to the Wilkes Suite.

- The tracking device that was installed in Nguyen's vehicle showed that he returned to the hotel. On February 27, 2013, Ly checked out of the hotel and went to the Winnipeg airport. Police covertly entered his luggage while at the airport and found it contained approximately \$230,000. On February 28, 2013, at approximately 1:36 p.m., Nguyen was observed entering the Wilkes Suite with a bag. He left the Wilkes Suite approximately a minute later with the bag. The same day, at 5:55 p.m., Nguyen was observed again entering and exiting the Wilkes Suite with a bag.
- On March 17, 2013, after receiving a text from Ly that he would be flying to Winnipeg that afternoon, Nguyen went to the Wilkes Suite and left with a duffle bag at 12:46 p.m. Ly arrived at the airport at 1:44 p.m. Nguyen picked Ly up at the airport. Nguyen's vehicle travelled to a hotel, where it remained for five minutes. Ly returned to the airport later that afternoon, at which time police found his luggage contained approximately \$350,000. One of the packages of money showed a marking that police had put on the package during a covert entry to the Wilkes Suite on March 13, 2013.
 - On April 22, 2013, on video, Nguyen was observed in the Wilkes Suite placing three large packages of money into the safe. On April 23, 2013, in the safe in the Wilkes Suite, police observed numerous empty wrappers and three large vacuum-sealed bricks of currency, each containing seven large bundles, with 10 sub-bundles of approximately \$1,000, for a total of about \$210,000. Later in the day, Nguyen attended the Wilkes Suite with two other

individuals, removed the safe and moved it to the residence of Nguyen's friend.

[29] There is compelling evidence based on the agreement of facts and surveillance reports that Nguyen was in fact giving these Toronto Couriers the cash that was later found by police in their suitcases. For example:

- On March 17, 2013, as noted, one of the packages of money found by police in Ly's luggage showed a marking that police had put on the package during a covert entry to the Wilkes Suite on March 13, 2013.
- On March 28, 2013, Nguyen was observed on covert video installed in a hotel room handing Ly what appeared to be a vacuum-sealed bundle of money. Later that day, police covertly entered Ly's luggage at the airport and found it contained approximately \$276,000.
- On October 11, 2013, video within a hotel room where Nguyen met with Denny Cao showed Nguyen remove a large vacuum-sealed bag containing cash and throwing it on the bed. Cao then removed a large black bag from his suitcase and gave it to Nguyen. On December 22, 2013, Cao was arrested when he arrived in Winnipeg driving a car rented in Ontario and found to be in possession of six kilograms of cocaine.

[30] In summary, given the foregoing, including my finding that Nguyen was using the Wilkes Suite as a stash site and Nguyen's meetings with the Toronto Couriers, I infer that Nguyen was collecting cocaine from the Toronto Couriers, providing them with payment and this cocaine was further distributed by Nguyen. As well, given the

quantity of cocaine observed by police on their covert entries into the Wilkes Suite and the amounts of cash typically in the range of approximately \$185,000 to \$400,000 found in the luggage of the Toronto Couriers and the manner in which this cash was usually bundled with elastic bands, in vacuum-sealed bags, coupled with Wawryk's testimony that the price of cocaine around this time was about \$60,000 a kilogram, I find that Nguyen was trafficking cocaine at the multi-kilogram level. Based on Wawryk's testimony, which I accept, these amounts of money are indicative of cocaine trafficking at the multi-kilogram level.

Intercepted Communications and Surveillance Tendered as Context for these Communications

[31] In support of its conspiracy allegations, the Crown relies on intercepted communications and surveillance that give some context for these communications. These intercepted communications captured text messages and phone conversations. Surveillance reports tendered by consent include police observations, video recordings and the use of a tracker in Nguyen's vehicle.

[32] Defence counsel says that, at best, the intercepted communications are suspicious, which does not meet the Crown's burden of proof, and it cannot be concluded that the only reasonable inference is that these communications and surveillance involved drug trafficking.

[33] While some of the intercepted communications and encounters observed on surveillance might have been innocuous, in my view, many of them, when looked at in the context of all the intercepted communications, surveillance and evidence as a

whole, are indicative of an agreement, and an intention to put a common design into effect, to traffic cocaine. Indeed, there are many communications among the alleged co-conspirators, including Mr. Banayos, that make little sense if not related to cocaine trafficking activities. In light of Wawryk's testimony, police surveillance and the context of the evidence as a whole, I am satisfied that these include specific code or jargon indicative of an agreement to obtain and deliver quantities of cocaine and the related collection of cash. Examples of these communications and surveillance may be broken down as follows:

- Mr. Banayos communicating with Phommarath, and Nguyen communicating with and/or being observed with Phommarath;
- Mr. Banayos communicating with Agland, and Nguyen or Singh communicating with and/or being observed with Agland; and
- Mr. Banayos communicating with and/or being observed with Morrison, and Singh or Flora being observed with Morrison.

[34] In each case, it goes without saying that the interpretation of each exchange of communication and surveillance is not to be done discretely, but in the context of all of the evidence.

Mr. Banayos, Phommarath and Nguyen

[35] On February 28, 2013, there were the following intercepted communications involving Mr. Banayos, Nguyen and Phommarath:

- At 3:25 p.m., Phommarath texted Mr. Banayos, "... its got to b later. my buddy said they making him work over time."
- At 3:26 p.m., in an intercepted telephone call originated by Phommarath to Nguyen, Phommarath said, "... is this Buddy's is this Buddy's buddy?" and indicated the same information that he indicated to Mr. Banayos that "... my buddy says uh they're makin' him work overtime ..., I just text I actually just texted Buddy but uhm I'm gonna see exactly when uh it's gonna be a little bit later is that okay?"

[36] In my view, it is significant that Phommarath was communicating with repeated reference to "buddy", as opposed to a person's name. As explained by Wawryk, this is, in his opinion, done to protect those who are speaking from police interception, with no suggestion in the text messages that Nguyen had any difficulty in understanding who Phommarath was referring to. Also on February 28, 2013:

- At 5:55 p.m., Nguyen was observed entering and exiting the Wilkes Suite with a bag.
- Around 6:45 p.m., in an intercepted telephone call originated by Nguyen to Phommarath, Phommarath stated, "... does seven thirty work for you at the ... usual store ...," to which Nguyen replied, "The bookstore?," and Phommarath replied, "Yeah that one."
- At 7:33 p.m., Nguyen texted Phommarath, "Np, done."

- At 7:36 p.m., police observed Nguyen with a backpack in the parking lot of the Chapters Book Store on Empress Street get into a vehicle with Harvard Sung and back out again with his backpack.

[37] In my view, the foregoing reveals an ongoing relationship between Phommarath and Nguyen because there was an understanding, without having to talk about it, of which bookstore was being referred to. Wawryk testified about meetings in public places, such as parking lots, and quick transactions being common within the sale of cocaine. As noted, I have found that the purpose of the Wilkes Suite was the storing and processing of cocaine and the storage of money by Nguyen. In summary, I infer that Nguyen picked up cocaine from the Wilkes Suite, went to the "bookstore" as arranged by Phommarath and provided cocaine to Sung, who Phommarath sent.

[38] Defence counsel argues that there is no evidence from the foregoing to indicate that Mr. Banayos was involved because it is apparent that he is not "buddy" or "Buddy's buddy", Phommarath set up his own meeting with Nguyen, and there is no evidence that Mr. Banayos received Phommarath's 3:25 p.m. text to Mr. Banayos, "... its got to b later. my buddy said they making him work over time." However, Phommarath sent his text to Mr. Banayos at 3:25 p.m. and then shared essentially the same information with Nguyen, a minute later, namely that a meeting had to occur later. So, I infer that in this text, whether received or not, Phommarath was attempting to let Mr. Banayos know that the foregoing cocaine trafficking which took place involving Nguyen, Sung and Phommarath was going to be later than expected. Indeed, the fact

that a meeting took place that day between Nguyen and Sung further corroborates this inference.

[39] The following communications also took place days later involving Phommarath, Mr. Banayos and Nguyen that are, in my view, indicative of them communicating about the payment of money for drugs:

- On March 5, 2013, Phommarath texted Mr. Banayos, "If I have ur dox todady do u want me to holler at ur buddy?" and "Or u want me to bring to u instead," and Mr. Banayos texted Phommarath, "My buddy pls."
- On March 7, 2013, Mr. Banayos texted Phommarath, "U see my bud," to which Phommarath texted back, "No today for sure."
- On March 8, 2013:
 - At 11:04 a.m., Phommarath texted Mr. Banayos, "Yo I tried to txt ur buddy yesterday but no answer," to which Mr. Banayos texted, "I will MSG him."
 - At 11:37 a.m., Phommarath texted Nguyen, "Just grabbed dox got to count than I meet wit u wherever bro," and Nguyen texted Phommarath, "Sure, when can u be at the usual spot?"
 - At about 1:51 p.m., police intercepted a telephone call originated by Phommarath to Nguyen wherein they arranged to meet at a Pizza Hut on Henderson Highway.
 - At 2:00 p.m., Nguyen texted Phommarath, "I'm on my way."
 - At 2:15 p.m., Phommarath texted Nguyen, "Here".

- At 2:16 p.m., Nguyen texted Phommarath, "I'm not far tho."
- At 2:18 p.m., Nguyen texted Phommarath, "Sorry, I would say like 6-7 min."
- At 2:32 p.m., police saw Nguyen drive to this Pizza Hut, where Nguyen entered the passenger side of what I infer from the foregoing text messages between Nguyen and Phommarath was Phommarath's vehicle and then got back out right away with a white plastic bag in hand and got back into his own vehicle and left.
- At 7:44 p.m., Phommarath texted Mr. Banayos, "All g."

[40] I infer that the use of the words "buddy" and "dox" was an attempt to conceal who and what were actually being discussed and that in the context, with reference to Wawryk's testimony, "dox" referred to money. It is apparent that there was a mutual understanding amongst the parties to the communications where "buddy" was used about who they were talking about. As well, in the context of Phommarath's text to Mr. Banayos that he had his "dox", Mr. Banayos's text to see his "bud", Mr. Banayos's text that he would "MSG" him when Phommarath texted that Mr. Banayos's "buddy" had not answered, the arrangements to meet between Phommarath and Nguyen, and then the meeting between them, I infer that Phommarath had money (dox) to pay to Mr. Banayos and Mr. Banayos directed him to contact Nguyen. Phommarath and Nguyen made arrangements to meet, at which time Nguyen received money on behalf of Mr. Banayos. As well, this cryptic language used must be interpreted in the context of the agreement of facts that Nguyen was meeting with drug couriers at the relevant

time and the evidence from police surveillance of the Wilkes Suite. In my view, this all indicates an agreement among Mr. Banayos, Phommarath and Nguyen to traffic in cocaine.

[41] Similarly, the following text messages between Phommarath and Mr. Banayos are, in my view, indicative of a trafficking in cocaine:

- On March 19, 2013, at 6:51 p.m., Phommarath texted Mr. Banayos that “Lmao n u gave my buddy the good one n me the garbage jerk.”
- On March 24, 2013:
 - At 3:44 p.m., Mr. Banayos texted Phommarath, “Hey bro can u get a hold of ur buddy.. Gotta grab those files off him.”
 - At 5:30 p.m., Mr. Banayos texted Phommarath, “If u get a hold of him can u grab the papes of him..”
 - At 7:52 p.m., Phommarath texted Mr. Banayos, “Just got hold of him. I will pic up dox from him n bring it over as soon as he get it tnight.”
- On March 25, 2013:
 - At 10:45 a.m., Mr. Banayos texted Phommarath, “Yooooo my work in tmr u want u a q.” “Or half.”
 - At 10:47 a.m., Phommarath texted Mr. Banayos, “Heysrry didn’t come by. I still have almost a q n bunch of press. I can wait a bit.”

[42] The foregoing text messages between Phommarath and Mr. Banayos include numerous words which, when taken in context, having regard to Wawryk’s definitions of these words, make little sense if not related to cocaine trafficking activities. Wawryk

testified that "garbage" often refers to inferior quality of drugs, "press" refers to repressed cocaine, "files", "papes" and "dox" refer to money, "work" refers to drugs, and "q" refers to a quarter. Given the context in which Mr. Banayos used the terms "work", "q" and "half" in his text to Phommarath, which context includes Phommarath texting Mr. Banayos two minutes later, "I still have almost a q n bunch of press. I can wait a bit", I infer that Mr. Banayos was asking Phommarath whether he wanted a quarter or a half kilogram of cocaine.

Mr. Banayos, Agland, Nguyen and Singh

[43] On February 28, 2013, there were the following surveillance and intercepted communications involving Nguyen and Agland:

- On February 28, 2013, at approximately 1:36 p.m., Nguyen entered the Wilkes Suite with a bag and left approximately a minute later with the bag. As I have found, the purpose of the Wilkes Suite is the storing and processing of cocaine for distribution and the storage of money by Nguyen.
- At about 2:15 p.m., Nguyen went to the Royal Fork Restaurant parking lot near Panet Road and Reenders Drive, as arranged with Agland.
- During this time, Nguyen and Agland were texting back and forth trying to meet up with each other:
 - At 2:23 p.m., Nguyen texted Agland, "Your at royal fork? I can pick you up in front of there if you are," and Agland texted Nguyen, "Yup".

- At 2:29 p.m., Nguyen drove up to a male in this parking lot, who I infer from the foregoing text communications was Agland.
- At 2:31 p.m., Nguyen was driving down Panet Road as the only occupant in his vehicle.

[44] Based on these text messages and police surveillance, I infer that there was a meeting between Nguyen and Agland. Given these communications between Nguyen and Agland and the timing of Nguyen's attendance at the Wilkes Suite, along with Wawryk's testimony about meetings in public places and quick transactions, I infer that Nguyen picked up cocaine at the Wilkes Suite and met with Agland in the Royal Fork Restaurant parking lot to deliver this cocaine. The next day, on March 1, 2013, Agland texted Mr. Banayos, "... Will need Sunday or Monday again." Given the timing and the context, and the following later March 13th communications between Agland and Mr. Banayos, I infer that Agland texted Mr. Banayos that he would need more cocaine Sunday or Monday. The following March 13th communications involving Mr. Banayos, Agland and Nguyen are, in my view, indicative of coded communications regarding an agreement among them to traffic in cocaine:

- At 4:05 p.m., Mr. Banayos texted Agland, "Holler at my bud for the files.. I will get my other buddy to see u for the other."
- At 4:38 p.m., Agland texted Nguyen, "Yo bro. Buddy says to see you for files?"

[45] In the context of this case, in light of Wawryk's testimony, I find that "files" means money. Also relevant is Wawryk's testimony that there might be somebody who

is responsible for delivery of cocaine to the sellers and somebody responsible for collecting of money from the sellers and taking it back to the upper levels of the organization. As well, given the contents and timing of these two text messages, I infer that Nguyen is the "bud" that Agland was told by Mr. Banayos to "Holler at". The following text messages further corroborate this inference:

- At 8:25 p.m., Agland texted Nguyen, "Can u meet around same area?"

(Given that Nguyen later went to the Royal Fork Restaurant parking lot to meet Agland, I infer that this refers to the "same area" as their meeting on February 28th at the Royal Fork Restaurant. In my view, this reference to meeting in the "same area" in itself reveals an ongoing relationship between Agland and Nguyen.)

- At 8:26 p.m., Agland texted Mr. Banayos, "Just msged ur buddy again to come by," to which Mr. Banayos replied, "Did u get a hold of him," and at 8:29 p.m., Agland texted Mr. Banayos, "Ya. He said he was gunna grab a bite then meet up with me."

(These text messages further confirm my inference that Nguyen is the "bud" referred to by Mr. Banayos in his 4:05 p.m. text to Agland because of Agland's 8:25 p.m. text to Nguyen to meet, followed by Agland's text to Mr. Banayos a minute later, "Just msged ur buddy again to come by," and because of Agland's 8:29 p.m. text to Mr. Banayos that "... He said he was gunna grab a bite ..." in light of Nguyen's 6:02 p.m. text to Agland, "... I might go out to eat with some friends.")

- At 9:08 p.m., Mr. Banayos texted Agland, "The buddy coming to see u is only for files another buddy is going to see u for the other."
(This text, which was around the same time that Agland and Nguyen were texting about where and when they would meet, is consistent with what later occurred and makes little sense if not related to an agreement among them to traffic in drugs.)
- At 9:26 p.m., Nguyen parked in the lot of the Royal Fork Restaurant and then the parking lot of Magic Sushi 2 Restaurant.
- At 9:28 p.m., Agland walked up to Nguyen's vehicle and got into the passenger side. Nguyen drove with Agland until 9:39 p.m., when he was dropped off and Agland entered the passenger side of a Toyota Tacoma truck that drove away.

[46] I infer that during this meeting between Nguyen and Agland, Agland gave Nguyen cash for Mr. Banayos given the text messages beginning at 4:05 p.m. as discussed above and that this cash purported to be \$13,500 because:

- At 10:02 p.m., Mr. Banayos texted Agland, "U gave only 13310 u told my guy 13500 when its suppose to be 15k."
- At 10:03 p.m., Agland texted Mr. Banayos, "That's why I wanted to wait til tmrw. I gave him 13.5. Just grabbed another g. And will have another in hour or two."

[47] These text messages further confirm my inference that Nguyen is the "bud" referred to by Mr. Banayos in his 4:05 p.m. text to Agland given Mr. Banayos's

reference in his 10:02 p.m. text to Agland referring to Mr. Banayos's "guy" in light of the close timing of the meeting between Nguyen and Agland and this 10:02 p.m. text message from Mr. Banayos to Agland. In addition, given Wawryk's evidence that at the time about \$15,000 was the price for a quarter kilogram of cocaine, I infer that Nguyen, on behalf of Mr. Banayos, picked up payment from Agland for a quarter kilogram of cocaine and that it was a quarter kilogram of cocaine that Nguyen, on behalf of Mr. Banayos, delivered to Agland when they met on February 28th.

[48] Mr. Banayos and Agland continued their text messages:

- At 10:04 p.m., Mr. Banayos texted Agland, "Ur short 290 bucks plus 1500."
- At 10:07 p.m., Mr. Banayos texted Agland, "Opps 190 short and my guy going to see u for that work already.. Just give the rest of the file that u owe on the 1st to my buddy u gave the files too."

[49] Given the context of the continued communication about being "short 290 bucks plus 1500" and "Opps 190 short" with Nguyen picking up \$13,310 and the approximate \$15,000 price of a quarter kilogram of cocaine in light of Wawryk's evidence that "work" is a common universal term for drugs, in my view, these text messages further corroborate that Agland bought quarter kilograms of cocaine from Mr. Banayos.

[50] The following arrangements were then made between Agland and Mr. Banayos for a further meeting, in which I infer that Mr. Banayos was directing Agland when and where to meet:

- At 10:08 p.m., Agland texted Mr. Banayos, "... Im in theatre. Hllr when I should go out."

- At 10:10 p.m., Mr. Banayos texted Agland, "He's there go out he was lookin for ur ride."
- I infer that around this same time, Mr. Banayos and Singh were communicating because police observed Singh driving around the parking lot of the Silver City Polo Park Movie Theatre and once the details of the vehicles were confirmed through Mr. Banayos and Agland, Agland entered Singh's vehicle for about 30 seconds, re-entered his truck and walked back to the movie theatre.

[51] From the foregoing, I infer that, as arranged by Mr. Banayos, Singh dropped off a quantity of cocaine to Agland.

[52] The following text messages between Agland and Mr. Banayos reinforce my inference regarding their agreement for Agland to pay the shortage of money that he continued to owe Mr. Banayos following his March 13th meeting with Nguyen and that Singh delivered a quarter kilogram of cocaine to Agland at the movie theatre (as discussed above) given the references to "15" and "shortage":

- On March 19, 2013, at 4:52 p.m., Mr. Banayos texted Agland, "Kk just give my buddy the short.. Another guy will grab the other 15 not unless u give the 15 to skinny.. Cause he has to give me his files also."
- On March 24, 2013:
 - At 7:46 p.m., Agland texted Mr. Banayos, "I have shortage and the 15. Do I give both to same guy?"

- At 7:51 p.m., Agland texted Mr. Banayos, "K ima give it to our buddy. Just talked to him."
- At 9:00 p.m., Agland texted Mr. Banayos, "K giving him 16.650. And ima give an extra 5bill on next round for being slow."

[53] Defence counsel argues that the foregoing inference that Nguyen picked up payment from Agland ignores that there is no evidence of a transaction observed between Nguyen and Agland and ignores the surveillance evidence that after the meeting between Nguyen and Agland at the parking lot of Magic Sushi 2 Restaurant and before the text messages between Mr. Banayos and Agland about Agland being "short", Agland attended at the "Portuguese Club". Defence counsel argues that it may be that Agland shorted someone at the Portuguese Club and it had nothing to do with the meeting between Nguyen and Agland. Defence counsel argues that if the inference that Agland met with Nguyen to provide money to him is displaced, there is no other connection between Nguyen and Mr. Banayos.

[54] However, when the evidence is considered as a whole, for the reasons discussed herein, even if it was at the Portuguese Club that Agland delivered the money about which Mr. Banayos later texted was short (and it was not in his meeting with Nguyen), I find that the evidence is otherwise revealing of an agreement among Mr. Banayos, Nguyen, Agland and Singh to traffic in cocaine. Without detracting from my other findings about Nguyen's role, assuming that Agland delivered money to the Portuguese Club (that was later suggested to be "short"), this does not displace my finding of Nguyen's involvement in collecting money from Agland. This finding was not only

based on the text messages between Agland and Mr. Banayos wherein there was a discussion about Agland being short. This finding was also based on the other March 13th text communications between Mr. Banayos and Agland between 4:05 p.m. and 9:08 p.m. that are indicative of a meeting between Nguyen and Agland for “files” (in this context and considering Wawryk’s testimony, I find that “files” means money), followed by the 9:28 p.m. meeting between them and the related text messages between Nguyen and Agland in this same timeframe. Nor does this displace my inference of Mr. Banayos’s involvement in facilitating the meeting between Agland and Singh, which, given the price references reflective of the price of quarter kilograms of cocaine in the text communications between Mr. Banayos and Agland in this same timeframe, is all indicative of an agreement to traffic in cocaine.

[55] Similarly, I find that the following March 25th text messages between Mr. Banayos and Agland are indicative of coded communications related to an agreement whereby Mr. Banayos is offering Agland a quarter or a half kilogram of cocaine and Agland requesting a half:

- At 1:08 p.m., Mr. Banayos texted Agland, “Yoooo I’m gone for 10 da ys u want a q or half.”
- At 8:57 p.m., Agland texted Mr. Banayos, “H please.”

Mr. Banayos, Morrison, Singh and Flora

[56] The Crown also relies on Wawryk’s evidence that particular words may be used in communications between two people having a trafficking relationship that are

mutually understood by them but would thwart police efforts to gain anything meaningful from their conversations to argue that the following suggest such a relationship between Mr. Banayos and Morrison, as part of the broader alleged conspiracy:

- On February 20, 2013:
 - At 8:03 a.m., Morrison texted Mr. Banayos, “.... Hows it looking regarding work?”
 - At 3:50 p.m., Morrison texted Mr. Banayos, “.... Haws it looking re next painting job.”
- On March 22, 2013:
 - At 4:45 p.m., Morrison texted Mr. Banayos, “.... Homeowners loved colour & gloss of paint.”
 - At 4:47 p.m., Morrison texted Mr. Banayos, “Paint lot be available in a few days.”
- On March 23, 2013:
 - At 10:46 a.m., Morrison texted Mr. Banayos, “.... Hoping there will b more paint.”
 - At 11:04 a.m., following Mr. Banayos’s text message at 10:36 a.m. “I’m gone for 2 weeks,” Morrison texted Mr. Banayos, “with out communications makes it difficult. Everything secure. I guess my painters get a well deserved holiday.”

[57] Crown counsel argues that there is no evidence that Mr. Banayos was working at a paint store and that it can be concluded that this and other painting references in the communications between Mr. Banayos and Morrison are references to cocaine. Defence counsel points to evidence that in intercepted communications involving Mr. Banayos, he said that he bought and sold property and had property investments, and that the financial evidence includes a cheque dated October 12, 2013, payable to Mr. Banayos from Ronnie McKay Homes Ltd. Defence counsel argues that it is unknown what Morrison did for a living and that in a meeting where it was observed that Morrison gave something to Flora, a reasonable explanation is that it had nothing to do with drugs. As such, defence counsel argues that there is no basis to conclude that paint and related references to renovations in fact refer to cocaine and that Crown counsel is inviting the court to "look at it all through the cocaine tinted lens."

[58] For the following reasons, I find that the references to paint and related concepts are in fact references to cocaine and that Mr. Banayos's relationship with Morrison was in furtherance of an agreement to traffic cocaine. Several text communications between Mr. Banayos and Morrison surrounding the use of "paint" and related references are indicative of an agreement to traffic cocaine. For example, there are several text messages between Mr. Banayos and Morrison that refer to "files":

- On March 13, 2013, Morrison texted Mr. Banayos, "... Files r complete & secure."
- On March 23, 2013, Morrison texted Mr. Banayos, "... Not 2 worry files will b secured. Hoping there will b more paint."

- On March 24, 2013, Mr. Banayos texted Morrison, "Can u get files in today...," and Morrison texted Mr. Banayos, "... Still need a few days 2 complete final touchups. Files are secure not to worry."
- On March 25, 2013, Mr. Banayos texted Morrison, "A friend will msg u on Wednesday for the files and hopefully give you more paint."

[59] Wawryk testified that in the context of the intercepted communications "files" means money. Indeed, in my view, the use of the term "files" in the context of a painting job makes little sense unless this term is used to disguise what is really being talked about and in this context I find that "files" means money.

[60] Surveillance of Mr. Banayos and Morrison on March 13, 2013, beginning at about 2:00 p.m., at Santa Lucia Restaurant, followed by text messages between them on March 13 and 14, 2013, and surveillance of Morrison on March 14, 2013, in my view, also reveal an agreement to traffic in cocaine. Officer Kurt Kozyra, who was in this restaurant while Mr. Banayos and Morrison were present, gave testimony regarding his observations of them, including the following:

- Upon Mr. Banayos sitting down, Morrison immediately slid a black bag that he had entered the restaurant with over to Mr. Banayos underneath the table and Mr. Banayos accepted this bag.
- Morrison stated to Mr. Banayos that he felt he was being shorted particular items and Mr. Banayos told him to let him know when he feels this is happening because he needs to track it and tell his guy.

- Mr. Banayos explained to Morrison, "This is normal. It is never a full 1,000 grams. It's usually about 990 and so if you are getting a Q," "it's 247.5 every time."
- After Mr. Banayos explained to Morrison the weights of the items he was receiving, Morrison sounded confused in his tone and said, "I don't know why I'm not getting this. I don't know if it's just me or what" and "I don't want to cause a problem you know because I consider us friends."
- While parts of their conversation were inaudible to Officer Kozyra, he testified that based on what he could hear and the tone, he believed that they were arguing over product amounts and the way they were doing business. Mr. Banayos continued to try to explain the situation to Morrison and said, "k, listen, it's 36 ounces in a kilo and there's 28 grams in an ounce, that doesn't add up to a 1,000." Morrison still did not appear to understand the situation Mr. Banayos was explaining to him.
- Later in the conversation, Mr. Banayos said at the end of the month he was leaving and that he was going to Costa Rica for two weeks.
- At another point, Morrison began talking about a business opportunity he wanted Mr. Banayos to invest in, saying it would profit Mr. Banayos \$71,000, and Morrison said for Mr. Banayos to "give him a kilo and a half for his share" and it is a good opportunity, but Mr. Banayos refused to answer this question. Morrison waited a bit and said, "I can understand why you wouldn't want to answer that right now, but think about it." At this point

Mr. Banayos changed the subject and asked, "So what is it you want?" Morrison replied, "A kilo or approximately a kilo." He was laughing as he said this and Officer Kozyra took that to refer to the conversation they had previously about the amounts being disputed. Mr. Banayos said "ok", and he began texting again on his phone. Morrison said, "So when do you think, not today hey?," and Mr. Banayos answered, "Maybe actually. I'll ask my guy and see. Tomorrow for sure though." Morrison then said, "Will it be the same guy," and Mr. Banayos said, "Yes, same guy as before, at the restaurant." Mr. Banayos asked, "71, right?," and Morrison responded, "71, ya."

- Both Morrison and Mr. Banayos shook hands with each other and Mr. Banayos left through the back door carrying the bag that Morrison entered the restaurant with and previously had given to him. Morrison left the restaurant carrying nothing in hand.

[61] I find that this conversation and what followed are indicative of Mr. Banayos being party to an agreement with Morrison to supply quarter kilogram amounts of cocaine to Morrison for the following reasons:

- In reply to Morrison's feeling that he was being shorted, Mr. Banayos explained why he was not, with reference to weights reflecting Wawryk's testimony about the most consistent packaging in Canada for cocaine being the kilogram and sales in the quarter-kilogram level being typical around this timeframe. This is reflected in Mr. Banayos's statement, "This is normal. It is

never a full 1,000 grams. It's usually about 990 and so if you are getting a Q ... it's 247.5 every time." Bearing in mind Wawryk's testimony that in drug trafficking a "Q" is a quarter when in the proper context, Mr. Banayos referred to 1,000 grams (which is a weight reference and is one kilogram) and Mr. Banayos referenced 247.5, which is in fact one-quarter (a "Q") of the 990 referenced by Mr. Banayos ($990 \div 4 = 247.5$). As such, in this conversation, I infer that "Q" is in fact a reference to a quarter kilogram of cocaine.

- In reply to Mr. Banayos's inquiry of what Morrison wanted, Morrison replied, "A kilo"
- Later in the day, at 8:21 p.m., Mr. Banayos texted Morrison, "Didn't u buy a counter ?? Cause it came out 390 short 15110." "390 short" of 15,500 is 15,110, which, based on Wawryk's testimony, is reflective of the price of a quarter kilogram of cocaine in this timeframe of \$15,000 or \$15,500.
- Morrison sliding Mr. Banayos a bag underneath the table at the restaurant reflects an opportunity for Morrison to have given Mr. Banayos money.
- Further text messages and surveillance on March 13 and 14, 2013, indicate that in fact Mr. Banayos arranged a meeting with Mr. Banayos's "guy", who I infer from the following was Singh:
 - On March 13, 2013, at 8:28 p.m., Mr. Banayos texted Morrison, "... my guy can see u tmr during the day."

- On March 14, 2013, at 3:01 p.m., Morrison met with Singh in a Salisbury House parking lot, at the passenger side of Singh's vehicle, where Singh handed a bag to Morrison, who put it inside his jacket, and the two parted ways. With this meeting taking place in a parking lot and with the hand-off of the bag from Singh to Morrison, this meeting reflects Wawryk's testimony about the commonality of such meetings occurring within the sale of cocaine. After this meeting, at 3:31 p.m., Morrison texted Mr. Banayos, "Thank you. The painter."

[62] I agree with Crown counsel that none of the foregoing makes sense if Mr. Banayos and Morrison were actually talking about paint.

[63] In summary, I infer that Morrison paid Mr. Banayos for a quarter kilogram of cocaine, although Morrison was short \$390, and in accordance with his arrangement with Mr. Banayos, Morrison met with Mr. Banayos's "guy", who was Singh, to receive cocaine. Also underlying my inference that Mr. Banayos agreed to arrange the supply of quarter kilogram amounts of cocaine to Morrison are the following:

- On March 25, 2013, at 1:59 p.m., Mr. Banayos texted Morrison, "My friend will be there at the location at 3pm Wednesday for the files so be there and u can make arrangements with him for paint.."
- On March 27, 2013, at 3:03 p.m., Morrison again attended the Salisbury House parking lot, and at 3:05 p.m., met with Flora, to whom he handed a red bag, and the two parted ways.

[64] In light of Wawryk's evidence about meetings in public places, along with the coded language of "files" and "paint", I infer that Morrison delivered money ("files") to Flora as arranged by Mr. Banayos.

Other Surrounding Circumstances

[65] There are also other significant surrounding circumstances that provide context to the evidence and, in my view, when viewed cumulatively as part of all the evidence, reveal an agreement to traffic cocaine, including the following:

- Many communications (including those reviewed above) between Mr. Banayos and each of Phommarath, Agland and Morrison, and between Nguyen and each of Phommarath and Agland, were guarded and cryptic, as evidenced by the regular use of words which I determined were to attempt to conceal who and what were actually being discussed, with a mutual understanding between the parties to the communications about who and what they were communicating about. For the reasons discussed, the only reasonable inference is that they were communicating about cocaine and payment for this cocaine, with an effort to ensure that if they were being intercepted or overheard, the meaning would not be apparent. As indicated in Wawryk's testimony, which I accept, the overarching tenet of drug traffickers is that they believe their phones are tapped all the time and they use specific terms which, when considered in their context and in view of

Wawryk's testimony about terminology, weights and prices, in the present case, reflect terms employed in trafficking cocaine.

- Mr. Banayos's April 6, 2013 text to Agland wherein he indicates, "... After this we gotta switch phones up.." The need to "gotta switch phones" again reflects Wawryk's testimony about the drug trafficker's belief that the police are watching and listening all the time, as are the following:
 - Phommarath's April 7, 2013, 10:10 a.m. text to Mr. Banayos, "... Cali said to switch numbers," followed by Mr. Banayos's text, "Hate having burners for a long time," and Phommarath's text to Mr. Banayos at 10:11 a.m., "... Cuz he told me that n also new guy met up with him so I though mayb something happen." Wawryk testified that "burner" is a common term for a throw-away phone, which is a cheap phone that can be used for a little while and simply discarded.
 - On April 5, 2013, at 5:34 p.m., Phommarath texted Mr. Banayos, "Hook me up whit that pgp." From this, I infer that Mr. Banayos had access to pgp device technology that Wawryk testified is a device that came "on the scene" in Winnipeg around 2011-2012 and was a method of communication that police could not intercept.

Law on Conspiracy and Co-Conspirators' Exception to the Hearsay Rule

[66] Section 465(1)(c) of the *Criminal Code* provides that:

Conspiracy

465 (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

.

(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable; ...

.

[67] The principles regarding the offence of conspiracy are summarized by Hamilton J. (as she then was) in **R. v. Neves**, 2000 MBQB 126, 149 Man.R. (2d) 1, aff'd 2005 MBCA 27, 192 Man.R. (2d) 223, as follows (at paras. 82-85):

Conspiracy is the agreement of two or more people to do an unlawful act. The offence of conspiracy is complete at the formation of the agreement. It is not necessary for the unlawful act to be completed. The essence of the offence of conspiracy was stated by Cory, J. in **R. v. Douglas** (1991), 63 C.C.C. (3d) 29 (S.C.C.) at p. 40:

The essence of the offence of conspiracy is the agreement to perform an illegal act or to achieve a result by illegal means. In this case, those accused of the conspiracy must be found to have agreed to traffic in cocaine. How that agreement is to be carried out, that is to say, the steps taken in furtherance of the agreement (the overt acts) are simply elements going to the proof of the essential ingredient of the offence, namely, the agreement.
...

Dickson, J., in **R. v. Cotroni; Papalia v. R.** (1979), 7 C.R. (3d) 185 (S.C.C.), wrote at p. 190:

... The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme, while others may drop out. So long as there is a continuing, overall, dominant plan, there may be changes in methods of operation, personnel or victims without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. ...

Conspiracy is separate and distinct from the offence or manifested illegal act which might be the object of the conspiracy. Once it can be seen (inferentially or directly through the words, actions and conduct of the parties) that the agreement is made, conspiracy is committed. It does not matter whether the agreement is carried out [*R. v. Kravenia* (1955), 21 C.R. 232; 112 C.C.C. 81]. Furthermore there is no requirement to the offence of conspiracy that all conspirators must personally commit or intend to personally commit the offence which they have agreed should be committed. The mental element of the offence is proven where it is intended by the group that one party will actually commit the substantive offence [*R. v. Genser* (1986), 27 C.C.C. (3d) 264 (Man. C.A.); affd. (1987), 39 C.C.C. (3d) 576 (S.C.C.)].

A conspiracy involves the finding of three things based upon direct or indirect evidence (often circumstantial evidence; the cumulative conduct, words, actions, and seizures touching the parties):

- 1) an agreement to achieve a particular illegal object;
- 2) an intention to achieve that object;
- 3) the agreement and the intention must be proved against at least two persons.

[68] In *R. v. Dritsas*, 2012 MBQB 339, 286 Man.R. (2d) 191, aff'd 2014 MBCA 85, 310 Man.R. (2d) 80, McKelvey J. wrote the following regarding the *actus reus* and *mens rea* of the offence of conspiracy (at paras. 116-17):

With respect to the *actus reus* of a conspiracy, there must be an agreement between one or more persons to carry out an offence. The *actus reus* is the fact of the agreement, along with a meeting of minds and a common design. Conspiracy is often referred to as a "preliminary crime" as the offence is complete before any actions are taken that go beyond mere preparation to actually put the common design into effect. Conspirators not only must intend to agree, but also must intend to carry out their common design. There can be changes in the methods of operation and personnel involved during the course of a conspiracy.

The *mens rea* of the crime of conspiracy is an intention to agree and an intention to put a common design into effect by a number of people. An individual becomes a conspirator in an ongoing conspiracy by adopting the common design as his/her own and by consenting to participate in achieving it

[69] The Crown seeks to admit several communications of alleged co-conspirators, which are hearsay, as evidence against Mr. Banayos with respect to the charge of

conspiracy to traffic cocaine. As the Crown relies on the co-conspirators' exception to the hearsay rule, like Justice Hamilton's approach in *Neves* (para. 80) and Justice McKelvey's approach in *Dritsas* (para. 123), in determining the admissibility of this evidence as against Mr. Banayos, I am guided by the approach identified in *R. v. Carter*, [1982] 1 S.C.R. 938, and affirmed in *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, which, in the case at hand, requires the following determinations:

1. Based on all of the evidence, is there proof beyond a reasonable doubt of the existence of a conspiracy to traffic cocaine?
2. If the answer is "yes" to question No. 1, on the basis of the evidence directly receivable against Mr. Banayos, is there a probability that Mr. Banayos was a member of the conspiracy?

[70] It does not always follow that evidence that falls within the co-conspirators' exception will be received at trial. The indicia of necessity and reliability, while generally satisfied under the exception and the regime in *Carter*, may be lacking in rare cases. See *Mapara*, para. 15.

[71] If the evidence that falls within the co-conspirators' exception is admitted, then I am to look at this evidence and the other admissible evidence to consider whether I am satisfied beyond a reasonable doubt that Mr. Banayos conspired to traffic cocaine.

1. *Based on all of the evidence, is there proof beyond a reasonable doubt of the existence of a conspiracy to traffic cocaine?*

[72] At this stage, I am entitled to consider all of the evidence, including hearsay comments (*Dritsas*, para. 124). In *Neves*, Justice Hamilton noted (at paras. 92-93):

Conspiracy, by its very nature, has long been acknowledged by the courts to be difficult to prove and conspiracies are often only proved by circumstantial evidence and the use of inferences. For example, in 1934 Rinfret, J., in ***Paradis v. The King*** (1933), 61 C.C.C. 184 (S.C.C.), wrote at p. 186:

... Conspiracy like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. Ordinarily the evidence must proceed by steps. The actual agreement must be gathered from "several isolated doings" (Kenny, *Outlines of Criminal Law*, 13th ed., p. 294) having possibly little or no value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.

It is important to remember that the trier of fact does not apply the standard of proof beyond a reasonable doubt to each individual piece of evidence which comprises the Crown's case. The burden of proof beyond a reasonable doubt is to be decided by the trier of fact on all the evidence viewed cumulatively.

[73] On the basis of all of the evidence, including hearsay, the inescapable inference is that there was an agreement, an intention to agree and an intention to put a common design into effect between Nguyen and others to traffic cocaine. These others include Phommarath and Agland, both of whom communicated and met with Nguyen, who I have found was trafficking cocaine, and whose meetings and communications with Nguyen, in light of Wawryk's testimony, are indicative of this agreement. Some of these communications and conduct examined on their own appear to have little probative value. However, when each one is considered in relation to the whole, in relation to each other, and taken together, cumulatively, in light of all the surrounding circumstances, I am led to conclude that the only reasonable inference is a conspiracy to traffic cocaine. Accordingly, I am satisfied beyond a reasonable doubt on all of the evidence of the existence of a conspiracy among these individuals to traffic cocaine.

2. If the answer is "yes" to question No. 1, on the basis of the evidence directly receivable against Mr. Banayos, is there a probability that Mr. Banayos was a member of the conspiracy?

[74] Like Hamilton J. in *Neves* (para. 104), it is not my intention to repeat a summary of the evidence directly receivable against Mr. Banayos. The evidence directly receivable against Mr. Banayos as outlined above, particularly the numerous intercepted communications to which he was a party with Phommarath and Agland, satisfies me that Mr. Banayos was probably a member of this conspiracy to traffic cocaine. In making this finding, I evaluated Mr. Banayos's acts and communications in the context of the evidence and the inferences I have drawn from this evidence.

Necessity and Reliability

[75] Defence counsel argues that the communications to which Mr. Banayos was not a party ought not to be admitted under the co-conspirators' exception to the hearsay rule because the necessity criterion underlying this rule is not met. Defence counsel points to the following quotation from *Mapara* (at para. 18):

I first address the appellant's main argument – the co-conspirators' exception to the hearsay rule does not reflect the necessary indicia of necessity and reliability. In *R. v. Chang* (2003), 173 C.C.C. (3d) 397, the Ontario Court of Appeal, *per* O'Connor A.C.J.O. and Armstrong J.A., rejected this argument. The criterion of necessity poses little difficulty. As stated in *Chang*, "necessity will arise from the combined effect of the non-compellability of a co-accused declarant, the undesirability of trying alleged co-conspirators separately, and the evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy" (para. 105).

[76] Defence counsel argues that there is no evidence that a co-accused declarant is “non-compellable” and there is no issue of “the undesirability of trying alleged co-conspirators separately.” In turn, Crown counsel point to the following quotations from **R. v. Lepage**, 2008 BCCA 132, 232 C.C.C. (3d) 411, and **R. v. Y. (N.)**, 2012 ONCA 745, 113 O.R. (3d) 347:

Telephone conversations between participants in a conspiracy furnishes cogent and reliable evidence of the very essence of the conspiracy. It is undeniably the best evidence that exists concerning what is occurring between the conspirators. The ability to record conversations and communications between parties engaged in a conspiracy greatly altered the evidentiary landscape in conspiracy prosecutions. Unlike the situation in earlier times where the evidence had to be adduced from participants who may have been granted immunity or inferred from observations of the actions of alleged participants, in the wiretap era, the whole framework and details of the criminal enterprise can now be exposed to view. It is difficult to see how one could obtain evidence of similar quality by calling unindicted co-conspirators or parties not charged to testify to what they said at an earlier time. [**Lepage**, para. 42]

Whether the “far superior” nature and quality of co-conspirators’ declarations in furtherance of the conspiracy are sufficient in themselves to meet the requirements of the co-conspirators’ exception or to overcome necessity concerns need not be addressed in this case. The combination of that consideration with the second ground for the trial judge’s decision that necessity concerns had been met – the declarants would likely be uncooperative witnesses – is sufficient, in my view. [**Y. (N.)**, para. 95]

[77] Defence counsel argues that in **Y. (N.)**, the court did not have to deal with this criterion, and in **Lepage**, unlike in the case at bar, the court found that the seizure of cocaine verified the evidentiary value of the declarations by the co-conspirators in the intercepted communications. Defence counsel argues that in the case at hand, there was no seizure that verified the evidentiary value of the intercepted communications and these communications were so unclear that expert testimony was admitted for the purpose of interpreting some phrases. Defence counsel also argues that the Crown is

relying on the expert's interpretation of these intercepted communications as informed by the Crown's theory rather than calling the makers of these statements to determine what they meant and that this approach "should strike at the heart of necessity and reliability."

[78] In *R. v. Kler*, 2017 ONCA 64, 345 C.C.C. (3d) 467, Watt J.A. explained the following regarding the circumstances when evidence that falls within the co-conspirators' exception will not be received at trial because the indicium of necessity is lacking (at paras. 75, 77, 79, 92, 94):

.... ... [T]he *Mapara* court characterized the exception as available in "rare cases". And second, the onus falls upon the party seeking exclusion to establish that the evidence, admissible under the co-conspirators' exception, does not meet the requirements of necessity and reliability and, thus, should be excluded

... [N]ecessity. This indicium refers to the availability of the evidence, not the availability of the hearsay declarant as a witness This court has declined to adopt a bright line rule that the physical availability of the declarant puts paid to any claim of necessity

A final point. It is difficult to conclude that evidence falling under the *Carter* rule would lack the indicia of necessity and reliability required for the admission of hearsay under the principled approach. Apart from the most exceptional cases, the argument is exhausted where the traditional exception is found to be compliant with the principled approach

As a matter of general principle, the co-conspirators' exception meets the necessity and reliability requirements of the principled approach.

.... ... [T]hose who seek exclusion under the principled approach of evidence admissible under the co-conspirators' exception bear the burden of doing so. Presence is a factor, not a disqualifier. It is the availability of evidence of equivalent value that is crucial, not the availability of the witness.

[79] With Watt J.A.'s comments in mind, I am not satisfied that Mr. Banayos has established that this is one of those cases where the evidence otherwise admissible

under the co-conspirators' exception does not meet the requirement of necessity. In *Kler*, the Ontario Court of Appeal made it clear that the indicium of necessity criteria does not refer to the availability of the hearsay declarant as a witness. In the case at hand, the defence has not demonstrated the availability of evidence of equivalent value.

[80] Having concluded that there is proof beyond a reasonable doubt of the existence of a conspiracy to traffic cocaine, and that on the basis of the evidence directly receivable against Mr. Banayos, there is a probability that he was a member of the conspiracy, as noted by McKelvey J. in *Dritsas* (paras. 139-40), I am now permitted to consider evidence of a co-conspirator's acts and declarations (Nguyen, Phommarath and Agland) in furtherance of the object of the conspiracy as against Mr. Banayos.

Am I satisfied beyond a reasonable doubt that Mr. Banayos conspired to traffic in cocaine?

[81] Quite apart from the evidence that is admissible against Mr. Banayos pursuant to the co-conspirators' exception, on the direct evidence admissible against Mr. Banayos I find beyond a reasonable doubt that he conspired to traffic cocaine. I make this finding based on the communications to which he was actually a party for the reasons discussed above in "Overview of the Evidence" and discussed below under the headings "Mr. Banayos's Leadership Role" and "Expectation of Resale", all in light of Wawryk's expert evidence and the police surveillance. Bearing in mind that all that is required for a conspiracy is the agreement of two or more people to do an unlawful act, I am satisfied beyond a reasonable doubt that Mr. Banayos is guilty of being a member of the following conspiracies to traffic cocaine:

- Mr. Banayos with Phommarath;
- Mr. Banayos with Agland and Singh; and
- Mr. Banayos with Morrison, Singh and Flora.

[82] In each case, based on the nature and contents of the communications to which Mr. Banayos was a party, in light of the other evidence admissible against Mr. Banayos, it is clear that he agreed with these individuals to traffic cocaine. Based on Mr. Banayos's communications with Agland and the police surveillance, I infer that Singh was also a party to Mr. Banayos's agreement with Agland. As well, based on Mr. Banayos's communications with Morrison and the police surveillance, I infer that Singh and Flora were parties to Mr. Banayos's agreement with Morrison. In addition, my finding of more than one agreement further corroborates the existence of each agreement. In my view, the existence of multiple agreements corroborates my inference that each agreement is an agreement to traffic in cocaine and that Mr. Banayos was a party to each such agreement.

[83] Notwithstanding my conclusion based on the direct evidence admissible against Mr. Banayos that it has been established beyond a reasonable doubt that Mr. Banayos conspired to traffic cocaine, I have also considered whether the Crown has met its burden by including the evidence admissible against him based on the co-conspirators' exception. In doing so, I am able to consider the evidence of the acts and declarations performed and made by those who I have identified as members of the conspiracy in furtherance of the object of the conspiracy. A statement will be "in furtherance" if it is made for the purpose of advancing any of the objectives of the conspiracy, as opposed

to a mere narrative about the conspiracy. As noted by Judge Joyal (as he then was) in **R. v. Duncan** (2002), 168 Man.R. (2d) 184 (Prov. Ct.) (at paras. 45-46):

If the trier of fact is satisfied beyond a reasonable doubt that a common design did exist and that the accused was a member of that common design, then the acts and/or declarations of any members of the common design, done or uttered in furtherance of the common design, are admissible not only as against the actor or declarant but against all members of the common design, including the accused.

The Crown may not rely on statements that are simply descriptive or narrative of the conspiracy. In this regard, Martin, J. discussed the “in furtherance” requirement in **R. v. Lynch, Malone and King** (1978) 40 C.C.C. (2d) 7 (Ont. C.A.) at page 24:

The “in furtherance” requirement implies that ... the declaration of one conspirator is admissible against a co-conspirator only if it is made for the purpose of advancing the objects of the conspiracy, or constitutes a step in furtherance of the common design, as distinct from a mere statement about the conspiracy made by a conspirator during the course of the conspiracy.

[84] Included with the admission of this evidence as against Mr. Banayos is Nguyen’s trafficking activities discussed above and the communications discussed herein involving Nguyen and the other members of the conspiracy (Phommarath and Agland). These acts and declarations were all “in furtherance” of the conspiracy to traffic cocaine. I make this finding because, as discussed, with respect to these acts and communications, they were for the purpose of advancing the object of the conspiracy and a step in furtherance of this common design, namely an agreement to distribute cocaine, often at the quarter-kilogram level or above, and the related collection of money.

[85] When I consider the evidence directly implicating Mr. Banayos (as reviewed above), which includes conversations between Mr. Banayos and each of Phommarath, Agland, and Morrison, which conversations often inferentially reference declarations and

acts of Nguyen, Phommarath, Agland, Singh and/or Flora, as intercepted and observed by police around the same timeframe, along with the clear evidence of a conspiracy among Nguyen, Phommarath, and Agland to traffic cocaine, I am satisfied beyond a reasonable doubt that Mr. Banayos conspired to traffic cocaine.

Multiple Conspiracies

[86] Defence counsel also argues that by calling evidence of multiple conspiracies with no unifying feature among them, the Crown has not proven the one conspiracy that is alleged in the actual charge. In support of this position, defence counsel points to the following quotation from ***Carter*** (at p. 946):

The trial judge must bear in mind that in order to convict an accused upon a charge of conspiracy the jury, or other trier of fact, must be satisfied beyond a reasonable doubt that **the conspiracy alleged in the indictment existed**, and that the accused was a member of it.

[emphasis added]

[87] Defence counsel also points to the following from ***Papalia v. The Queen; The Queen v. Cotroni***, [1979] 2 S.C.R. 256:

.... The Crown contends that the "object" was the indictable offence of having possession of funds knowing they were obtained by extortion, that there existed only one conspiracy to achieve one object and hence that all four accused may be convicted of conspiracy. This view overlooks the essential point that, in order to have a conspiracy, one must have agreement between the co-conspirators. There was simply *no* evidence of agreement between the four alleged conspirators. There was not the common purpose of a single enterprise, but rather the several purposes of two separate adventures. [at pp. 283-84]

A distinction must be drawn between a conspiracy count which charges the accused with two or more conspiracies, and a count which charges one conspiracy only but is supported by proof during trial of more than one conspiracy. The former gives rise to questions of duplicity. The latter raises the

question of whether the Crown has proven the conspiracy charged against two or more of the accused notwithstanding evidence of a second conspiracy. It is the latter situation with which we are concerned in this case. [at p. 285]

Where several conspiracies are shown to have been committed, the problem arises of determining which one of these conspiracies is that envisaged by the charge. [at p. 286]

Whether any or all of the conspiracies that have been proven to have been committed are covered by the indictment depends on the construction of the charge. [at p. 287]

[88] In the case at bar, there is no suggestion of duplicity. Furthermore, unlike in *Papalia*, there is no concern that this court lacks territorial jurisdiction. Whether there should be a conviction depends upon whether my findings of fact fit within the scope of the charges alleged. Defence counsel's suggestion that the evidence of several conspiracies is different than the one conspiracy envisioned by the actual charge ignores the wording of the count, which alleges that Mr. Banayos and Nguyen conspired with those listed, including Singh, Flora, Morrison, Agland and Phommarath, "the **one with the other or others of them**" (emphasis added). I have no question that on the wording of the indictment Mr. Banayos had reasonable notice of the offences charged. Similarly, in my view, the evidence of multiple conspiracies with fewer co-conspirators than alleged is not fatal to the Crown's case. In *R. v. Douglas*, [1991] 1 S.C.R. 301, Cory J. commented on this issue as follows (at p. 322):

.... If the conspiracy proven includes fewer members than the number of accused or extends over only part of the period alleged, then the conspiracy proven can still be said to be the same conspiracy as that charged in the indictment. In order to find that a specific conspiracy lies within the scope of the indictment, it is sufficient if the evidence adduced demonstrates that the conspiracy proven included some of the accused, establishes that it occurred at some time within the time frame alleged in the indictment, and had as its object the type of crime alleged.

Mr. Banayos's Leadership Role

[89] It is the Crown's position that Mr. Banayos was in a leadership role in this conspiracy. Defence counsel argues that Mr. Banayos was not in a leadership role because there are intercepted communications, including some of those quoted above, where it is apparent that Phommarath, Agland and Nguyen were making their own arrangements to meet without Mr. Banayos's involvement.

[90] While it is unnecessary for my finding that it has been proven beyond a reasonable doubt that Mr. Banayos conspired to traffic cocaine, I have considered his role in this conspiracy.

[91] I agree with Crown counsel that Mr. Banayos's role in this agreement to traffic cocaine can be inferred in part from what occurred when he was away for 10 days at the end of March. On March 25th, at 1:08 p.m., Mr. Banayos texted Agland, "Yoooo I'm gone for 10 da ys u want a q or half." As well, this is reflected in Agland's March 25th text of 9:37 p.m. to Mr. Banayos, "Hopefully you didn't leave yet," and when Agland received no response, on March 26, 2013, Agland texted Nguyen, "Hey did buddy leave city already?" In my view, the evidence surrounding Mr. Banayos's time away reveals his leadership role by arranging the distribution of cocaine and the collection of cash. For example, I infer from the following evidence that, unlike Nguyen's previous involvement with Phommarath and Agland (discussed above), when Mr. Banayos was away, Nguyen did not assist in the distribution of cocaine to Phommarath. On March 28, 2013, Nguyen met with Ly, who was a Toronto Courier, and handed him a vacuum-sealed bundle of money. Later that day, police found in Ly's luggage

approximately \$276,000. Based on this and Nguyen's other involvement with the Wilkes Suite and the Toronto Couriers, I infer that Nguyen received cocaine from Ly. However, from the following intercepted conversations involving Nguyen and Phommarath, I infer that Nguyen did not distribute this cocaine while Mr. Banayos was away:

- On March 30, 2013, Phommarath and Nguyen texted as follows:
 - At 1:18 p.m., Phommarath texted Nguyen, "... Is there work around." I infer from Wawryk's testimony and the circumstances that, here, "work" is cocaine.
 - At 1:19 p.m., Nguyen texted in reply, "No sorry" and "I think this week just don't know when for sure."
 - At 1:20 p.m., Phommarath texted Nguyen, "When... buddy told me msg u while he gone."

[92] The following text messages following Mr. Banayos's return also reveal Mr. Banayos's leadership role and are inconsistent with defence counsel's suggestion that arrangements were being made with Nguyen to meet Phommarath and Agland without Mr. Banayos's involvement. From the following communications and events, I infer that when Mr. Banayos returned from his 10-day trip away, Phommarath and Agland soon made arrangements with Mr. Banayos to get quarter and half kilograms of cocaine:

- On April 4, 2013:
 - At 9:34 p.m., Mr. Banayos texted Agland, "Yooooo".

- At 11:38 p.m., Agland texted Mr. Banayos, "Finally I miss ya. Lol.. This been shitty ten days."
- On April 5, 2013:
 - At 1:46 a.m., Mr. Banayos texted Agland, "What happen."
 - At 2:06 a.m., Agland texted Mr. Banayos, "Lol just a lot peeps needed. U think for tmrw?"
 - At 7:57 a.m., Mr. Banayos texted Agland, "Yea".
 - At 6:18 p.m., Mr. Banayos texted Agland, "U want half?"
 - At 6:19 p.m., Agland texted Mr. Banayos, "Sure".

[93] Around this time, the following similar communications also took place between Mr. Banayos and Phommarath:

- On April 4, 2013:
 - At 9:34 p.m., Mr. Banayos texted Phommarath, "Just got back."
 - At 9:36 p.m., Phommarath texted Mr. Banayos, "... Can we get bak to work soon."
 - At 10:33 p.m., Mr. Banayos texted Phommarath, "U need q right?"
- On April 5, 2013:
 - At 12:31 p.m., Phommarath texted Mr. Banayos, "Amd what time work available. My guy free now."
 - At 6:24 p.m., Nguyen texted Phommarath, "Hey can you come to the bookstore," which I infer is the "bookstore" where their meeting took place on February 28th.

- At 6:26 p.m., Mr. Banayos texted Phommarath, "Buddy should see u soon for work."
- At 6:27 p.m., Phommarath texted Mr. Banayos, "Ye he just txt."
- At 6:27 p.m., Mr. Banayos texted Phommarath, "Kk good."

[94] From these text messages, I infer that the "Buddy" who Mr. Banayos indicated to Phommarath at 6:26 p.m. should see him "soon for work" was Nguyen because of Phommarath's 6:27 p.m. text to Mr. Banayos, "Ye he just txt," in light of Nguyen's 6:24 p.m. text to Phommarath about coming to the bookstore. My inference is reinforced by the evidence that a meeting arranged between Phommarath (who from the text messages I infer sent his "guy" or "buddy") and Nguyen in fact took place. On April 5, 2013, at 6:27 p.m., Phommarath texted Nguyen, "My buddy said he can make it there at 745." At 7:40 p.m., Phommarath texted Nguyen, "He there," to which Nguyen replied, "Yea I see him. In my way," and Phommarath replied, "K thx." The vehicle tracker on Nguyen's vehicle showed travel to the Chapters Book Store at Polo Park at 7:49 p.m.

[95] Defence counsel points to a text message which was also sent on April 5, 2013, at 6:22 p.m., from Mr. Banayos to Agland, "Fuck my dude had to go to work.. At 6pm I totally forgot.. But tmr morning till 6pm.. 100 percent my bad."

[96] Based on this text message, defence counsel argues that Mr. Banayos could not have been talking about Nguyen because around this same time Nguyen and Phommarath were making arrangements for Nguyen to meet at the bookstore (see above). Defence counsel essentially argues that this is of some import because it

refutes any inference that Mr. Banayos was controlling Nguyen, who was in possession of cocaine. Defence counsel argues that Nguyen was making his own deals that had nothing to do with Mr. Banayos. However, I disagree that this evidence alters the foregoing inference. There is no evidence about who Mr. Banayos was referring to as "my dude" in his 6:22 p.m. text message to Agland. Given my inference that in Mr. Banayos's text messages around this time with Phommarath, Mr. Banayos was referring to Nguyen as the "Buddy" who should see Phommarath "soon for work," it is reasonable to infer that Mr. Banayos was referring to someone else as "my dude" in his text message to Agland. In my view, these inferences are reasonable to be drawn on the evidence. Also indicative of Mr. Banayos's communications with Phommarath being about Mr. Banayos's agreement to supply cocaine are Phommarath's text messages of April 6, 2013, at 1:38 p.m., to Mr. Banayos, "Is this time really good though. Last wasn't so good. Had to pond it off," and "Lol dnt lie lol. Just makesure its primo jerk."

[97] From this, I infer that Phommarath continued complaining about the quality of the cocaine he previously received (having texted Mr. Banayos on March 19, 2013, at 6:51 p.m. (above) that "Lmao n u gave my buddy the good one n me the garbage jerk") and wanted better quality from Mr. Banayos. Wawryk testified that "primo" is commonly an indicator that it is the best drugs.

[98] I also find that Mr. Banayos played a leadership role in this agreement to traffic cocaine because of his acknowledgment in his text message on April 6, 2013, at 1:34 p.m., to Phommarath that "I make 750 for every q u grab plus I pay for delivery." With the context of Wawryk's testimony that the common profit margin for cocaine at

the time of these incidents was between \$2,000 and \$3,000 for every kilogram of cocaine, with Mr. Banayos making "750 for every q," which I infer is a quarter kilogram of cocaine based on the context and Wawryk's testimony of the definition of "q", this fits within this profit range (\$3,000 per kilogram divided by 4 (quarter kilogram)). Wawryk also testified that couriers are paid by the person asking them to make the delivery. As such, my finding is reflective of Mr. Banayos indicating in his text "... I pay for delivery." Given the evidence as a whole, I infer that it is Nguyen, Singh and Flora who Mr. Banayos was referring to when he texted "... plus I pay for delivery."

[99] The following communications involving Agland and Mr. Banayos between April 8 and 14, 2013, are, in my view, further revealing of Mr. Banayos's leadership role in arranging the distribution of cocaine and the collection of cash:

- On April 8, 2013:
 - At 2:45 p.m., Agland texted Mr. Banayos, "Yo u think I can see buddy for another q? I can dish it to more guys that way. I lined more peeps up cuz I thought I was getting h."
 - At 5:59 p.m., Mr. Banayos texted Agland, "I thought u got half."
 - At 6:01 p.m., Agland texted Mr. Banayos, "No he only brought q. He told me I can go by same place to grab the other q. But I want to make sure u knew before I did that."

[100] From the foregoing, including Agland's statement "I want to make sure u knew before I did that," I infer that Agland wanted to ensure that he had Mr. Banayos's approval before he got additional cocaine. Moreover:

- On April 9, 2013, at 8:52 p.m., Mr. Banayos texted Agland, "Yea what about the files for the last q."
- On April 11, 2013, at 9:40 p.m., Mr. Banayos texted Agland, "U have any files."

[101] Having regard to the broader context (discussed above), I infer that Mr. Banayos and Agland were discussing that Agland owed Mr. Banayos money ("files") for a quarter kilogram of cocaine ("the files for the last q").

[102] Mr. Banayos's involvement and leadership role in an agreement to traffic cocaine is, in my view, again evident by the following intercepted communications between him and Morrison around the time that Mr. Banayos returned from his time away:

- On April 4, 2013:
 - At 8:58 p.m., Morrison texted Mr. Banayos, "Still have not heard from your foreman after giving him the files last Wednesday. Losing many of my workers due to not paint."
 - At 9:34 p.m., Mr. Banayos texted Morrison, "Just got back."
 - At 9:37 p.m., Morrison texted Mr. Banayos, "K. No one contacted me re work."
 - At 9:42 p.m., Mr. Banayos texted Morrison, "K let me fix that."
- On April 6, 2013:
 - At 2:10 p.m., Morrison texted Mr. Banayos, "Might have to go else where."
 - At 2:10 p.m., Mr. Banayos texted Morrison, "The portugese lounge."

- At 2:13 p.m., Morrison texted Mr. Banayos, "Whenthankyou".
- At 2:15 p.m., Mr. Banayos texted Morrison, "Soon just arranging it."
- At 2:24 p.m., Mr. Banayos texted Morrison, "U gotta park in the back go through the red door buddy is working the bar just ask for the porksandwiches so he knows it u.m pretend to pay and he will g..."
- At 2:36 p.m., Morrison texted Mr. Banayos, "Willtheguyknowme".
- At 2:41 p.m., Mr. Banayos texted Morrison, "No he's working the bar just ask for pork sandwiches so he knows its u.. I told him ur coming."

[103] It is my view that these communications, including Mr. Banayos's use of the term "buddy" and the direction to attend the Portuguese lounge, ask for pork sandwiches and pretend to pay, make little sense if Mr. Banayos and Morrison were in fact talking about paint. This leads to the inference that it was something other than paint that was being referred to in the intercepted communications between Mr. Banayos and Morrison. I infer that the parties were intending to speak about something illicit as otherwise there would have been no need to speak in code and behave secretly. These kind of coded communications fit squarely within the kind of coded communications as described by Wawryk that are used by drug dealers so that the police will not know what is being talked about. As well, in the context of the previous intercepted communications and surveillance, I infer that Morrison's reference to "giving him the files last Wednesday" refers to his March 27th attendance at the Salisbury House parking lot where he met with Flora and handed him the red bag, which corroborates my inference (above) that, at that time, Morrison delivered money ("files") to Flora as

arranged by Mr. Banayos. Like the communications involving Mr. Banayos, Phommarath and Agland, when Mr. Banayos was away, I infer that Morrison was without cocaine and upon Mr. Banayos's return, Morrison was contacting Mr. Banayos for "work" (drugs), as evidenced by his text to Mr. Banayos, "... No one contacted me re work."

[104] While the evidence presented at trial did not include intercepted communications between Mr. Banayos and any of Nguyen, Singh or Flora, there are examples in the evidence when:

- Mr. Banayos made arrangements with Phommarath, and Nguyen showed up to meet with Phommarath;
- Mr. Banayos made arrangements with Agland, and Nguyen or Singh showed up to meet with Agland; and
- Mr. Banayos made arrangements with Morrison, and Singh or Flora showed up to meet with Morrison.

[105] I agree with Crown counsel that the absence of intercepted communications amongst Mr. Banayos, Nguyen, Singh and Flora in itself also shows a level of insulation that Mr. Banayos enjoyed. In my view, defence counsel's argument that a lack of such intercepted communications or surveillance placing Mr. Banayos, Nguyen, Singh and Flora together negates the finding of an agreement to traffic cocaine disregards Hamilton J.'s observation in *Neves* (para. 92) (quoted above) that conspiracies are often only proved by circumstantial evidence. I must consider the cumulative effect of "several isolated doings", each possibly having little value taken on its own. As noted

by Judge Joyal in *Duncan*, quoting *Reference re R. v. Truscott*, [1967] 2 C.C.C. 285 at 360-61 (S.C.C.) (at para. 33):

The case against Truscott was predominantly but not exclusively one of circumstantial evidence. I recognize fully that guilt can be brought home to an accused by circumstantial evidence; that there are cases where circumstances can be said to point inexorably to guilt more reliably than direct evidence; that direct evidence is subject to the every day hazards of imperfect recognition or imperfect memory or both. **The circumstantial evidence case is built piece by piece until the final evidentiary structure completely entraps the prisoner in a situation from which he cannot escape. There may be missing from that structure a piece here or there and certain imperfections may be discernible. But the entrapping mesh taken as whole must be continuous and consistent. The law does not require that the guilt of an accused be established to a demonstration but is satisfied where the evidence presented to the jury points conclusively to the accused as the perpetrator of the crime and excludes any reasonable hypothesis of innocence.** The rules of evidence apply with equal force to proof by circumstantial evidence as to proof by direct evidence. The evidence in both instances must be equally credible, admissible and relevant.

[emphasis added]

[106] As well, defence counsel's related argument about the absence of direct communications among all of the co-conspirators is largely answered by the following quotation from *R. v. Parnell and Others* (1881), 14 Cox C.C. 508 at 515, as noted by Judge Joyal in *Duncan* (at para. 28):

It is unnecessary that there should be express proof a conspiracy such as that the parties actually met and laid their heads together, and then and there actually agreed to carry out a common purpose ... **It may be that the alleged conspirators have never seen each other, and have never corresponded, one may never have heard the name of the other, and yet, by the law, they may be partners to the same common criminal agreement.**

[emphasis added]

Expectation of Resale

[107] While defence counsel acknowledged that selling drugs for purpose of resale may in some cases be a design in common, he argues that in the case at hand, there is no evidence that the sale of drugs depended on an expectation of resale. However, in my view, there is compelling evidence that this was for resale, including:

- The evidence from the intercepted communications and related inferences from the terminology and prices involved, as discussed above, that quarter-kilogram quantities of cocaine were involved.
- Wawryk's testimony that purchasers of these quantities are not purchasing for personal use and are selling the cocaine.
- Specific references in some of the text messages which reflect resale, including the following examples:
 - March 13, 2013, at 10:03 p.m., text from Agland to Mr. Banayos, "... I gave him 13.5. Just grabbed another g. And will have another in hour or two."
 - March 23, 2013, following Mr. Banayos's indication at 10:36 a.m. "I'm gone for 2 weeks," at 11:04 a.m., Morrison texted Mr. Banayos, "... I guess my painters get a well deserved holiday."
 - April 4, 2013, at 8:58 p.m., text from Morrison to Mr. Banayos, "Still have not heard from your foreman after giving him the files last Wednesday. Losing many of my workers due to not paint."
 - April 5, 2013:

- At 2:06 a.m., text from Agland to Mr. Banayos, "Lol just a lot peeps needed. U think for tmrw?"
- At 6:18 p.m., text from Mr. Banayos to Agland, "U want half?"
- April 8, 2013, at 2:45 p.m., text from Agland to Mr. Banayos, "Yo u think I can see buddy for another q? I can dish it to more guys that way. I lined more peeps up cuz I thought I Was getting h."

Conclusion – Conspiracy to Traffic Cocaine

[108] In summary, I am satisfied beyond a reasonable doubt that Mr. Banayos is guilty of conspiracy to traffic in cocaine as alleged in count 1 of the indictment.

Conspiracy to Possess Proceeds of Crime – Mr. Banayos

[109] For the same reasons that I have found the hearsay evidence discussed above is admissible against Mr. Banayos with respect to the offence of conspiracy to traffic cocaine, I find that this hearsay evidence is also admissible against Mr. Banayos with respect to the charge of conspiracy to possess proceeds of crime. As well, for the same reasons that I have found Mr. Banayos guilty of conspiracy to traffic in cocaine, which includes my finding of the payment and collection of cash for this cocaine, I am satisfied beyond a reasonable doubt that Mr. Banayos is guilty of conspiring with these same individuals to possess proceeds derived from the sale and resale of cocaine, and that these proceeds exceeded the value of \$5,000. I find that the value of these proceeds exceeded \$5,000 because of my finding that the agreement to distribute

cocaine was at the quarter-kilogram level and above and Wawryk's testimony that the price of a quarter kilogram of cocaine at the material time was in the range of \$15,000 or \$15,500. Accordingly, I am satisfied beyond a reasonable doubt that Mr. Banayos is guilty of conspiracy to possess proceeds of crime of a value exceeding \$5,000 as alleged in count 3 of the indictment.

Trafficking

[110] As discussed by Hamilton J. in *Neves* (at para. 131):

It is well accepted that the co-conspirators' hearsay exception applies not only to charges for crimes of conspiracy but to any offence committed pursuant to a common design. Mr. Gindin argues, however, that this principle does not extend in this case to the two counts of trafficking. He provided no cases on point. I agree with the Crown that the hearsay exception is applicable in my analysis of these counts as well. The exception applies to all crimes where it is alleged that there was a common design or a joint criminal enterprise and applies whether or not the co-conspirator whose evidence is sought has been indicted [*Cloutier v. The King* (1939), 73 C.C.C. 1 (S.C.C.)]. In this case the two trafficking counts (5 and 6) are substantive offences alleged to have occurred during the course of the ongoing conspiracy to traffic in cocaine. Accordingly, it was appropriate that the acts and declarations of the co-conspirators (of the conspiracy to traffic in cocaine) be considered in determining whether the Crown has proved each of these offences beyond a reasonable doubt.

[111] As noted by McKelvey J. in *Dritsas* (at para. 72):

.... **To traffic means to** sell, administer, give, transfer, transport, send or deliver something to someone or to **offer to do so. A person may offer to traffic in a substance even if not in possession of the substance at the time of the offer or have the capacity to carry out that activity.** Further, it does not matter whether money or anything else of value actually changed hands **as long as Dritsas possessed cocaine and provided it, or offered to provide it to someone else,** which I am satisfied that he did.

[emphasis added]

[112] Based on all the evidence, and in particular Mr. Banayos's communications with Phommarath, Agland and Morrison which I have inferred for the reasons set out above referred to supplying cocaine at the quarter-kilogram level and above, and being paid cash in return, I am satisfied beyond a reasonable doubt that, in the course of the conspiracy to traffic cocaine, Mr. Banayos was trafficking cocaine. Wawryk testified that it is generally cash that is exchanged for cocaine and that the cocaine comes down the hierarchy and cash goes back up the chain. As noted, I have found that Mr. Banayos was in a leadership role in this cocaine trafficking hierarchy.

[113] In summary, I am satisfied beyond a reasonable doubt that Mr. Banayos is guilty of trafficking cocaine as alleged in count 2 of the indictment.

Money Laundering

[114] Section 462.31(1) of the *Criminal Code* provides the following regarding the offence of laundering proceeds of crime:

Laundering proceeds of crime

462.31 (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a designated offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

[115] It is the Crown's position that the cash collected as profits from cocaine sales was circulated through Mr. Banayos's ATM business to "launder" these proceeds with the assistance of Ms Banayos, who it is alleged had knowledge of the drug money or was wilfully blind. Crown counsel says that Mr. Banayos and Ms Banayos were also provided assistance by Farhad Walji, who acted as a consultant with the technicalities, workings and business aspects of the ATMs.

[116] Specifically, it is the Crown's position that proceeds from cocaine sales were loaded into the ATMs. Crown counsel says that Ms Banayos was a nominee of Mr. Banayos to launder these proceeds of crime as, for example, her name was provided as the owner of the ATMs to banks and a third party service provider for ATMs known as Calypso. In addition, she controlled the bank accounts into which funds that were withdrawn by bank cardholders using the ATMs were then reimbursed by Calypso as the entity responsible to settle the funds received from the use of the ATM. Crown counsel also suggests that far more cash was loaded into the ATMs than was put through these bank accounts, with the difference largely being attributed to the laundering of profits from the sale of cocaine.

[117] With respect to the money laundering charges, financial evidence was filed by consent, which included banking statements and documents submitted by Ms Banayos to RBC, BMO and Calypso. In addition, Crown counsel relies on evidence from intercepted communications involving Mr. Banayos and Ms Banayos, as well as Walji. In the agreement of facts, it is admitted (and I agree) that all of the intercepted communications that relate to the ATM business in any way are admissible against

Mr. Banayos and Ms Banayos, regardless of whether they were a party to the call or not, on the basis of the co-conspirators' exception to the hearsay rule. The Crown also called as witnesses an employee from RBC and an employee from BMO. As well, RCMP Staff Sergeant Paul Gilligan gave expert testimony regarding possession of proceeds obtained by crime and money laundering.

[118] It is the defence position that the Crown has not proven the source of cash placed in Mr. Banayos's ATMs and that it may reasonably be inferred that the operation of the ATMs was part of a legitimate business. While the defence acknowledged that it was falsely indicated to the banks and Calypso that Ms Banayos was the owner of the ATMs, defence counsel argues that this was only to assist Mr. Banayos in the operation of his business as she was able to obtain the criminal record check necessary to operate the ATMs. Similarly, it is Ms Banayos's position that, regardless, her role was limited to assisting Mr. Banayos in withdrawing cash from the bank for the purpose of loading the ATMs. Ms Banayos's counsel argues that she had no indication that the source of funds being loaded into the ATMs and then reimbursed into the bank accounts that she controlled was from an illegitimate source. To the extent that it is suggested that Ms Banayos's careless approach to handling this money is indicative that the ATM business was illegitimate, it is her position that it only means that she was naïve.

Money Laundering by Mr. Banayos

[119] Having concluded beyond a reasonable doubt that Mr. Banayos was trafficking in cocaine and receiving money as payment for this cocaine, for the purpose of

determining whether Mr. Banayos is guilty of money laundering, the issue is whether I am satisfied beyond a reasonable doubt that Mr. Banayos placed some of these proceeds from drug trafficking into his ATMs.

[120] It is the Crown's position that money collected from Phommarath, Agland and Morrison was put into the ATMs owned by Mr. Banayos in order to launder it and get it into the legitimate banking system. The Crown's theory is that money was "cycled" through the bank accounts controlled by Ms Banayos when this money was reimbursed, with the assistance of Calypso, into these accounts from the accounts of bank cardholders who withdrew cash from Mr. Banayos's ATMs. It is also the Crown's position that the only way that the balance of Ms Banayos's RBC account (the RBC account), into which these reimbursements were being made for a period of time, increased to the extent it did was from Mr. Banayos loading cash from the sale of cocaine into these ATMs.

[121] It is the defence position that the Crown did not prove the source of the funds used to load the ATMs and that it is reasonable to conclude that there was a legitimate source of these funds. As well, it is the defence position that forensic accounting evidence was required to properly explain the accounting in the RBC account, and, in any event, fees paid with respect to ATM transactions are a reasonable explanation for why the RBC account increased as it did.

[122] I infer that Mr. Banayos placed some of the proceeds derived from his drug trafficking into his ATMs based on the following:

- Wawryk's testimony that in cocaine trafficking, generally, cash is exchanged for cocaine and that cocaine comes down the hierarchy and cash goes back up the chain.
- My finding that Mr. Banayos was in a leadership role in this cocaine trafficking hierarchy.
- The price of the quarter kilograms of cocaine which I have found Mr. Banayos was supplying and for which he was paid in cash, from which I infer Mr. Banayos had a significant amount of cash on hand.
- The admission in the agreement of facts that during the Project Sideshow investigation, police did not observe Mr. Banayos ever attend a job or employment. There were also no intercepted communications indicating that Mr. Banayos attended to or spoke about any employment, other than an indication that he was involved in the selling of health products through Zija. There was no evidence of payroll deposits or other income deposits for Mr. Banayos to any of the bank accounts identified by police.
- As admitted in the agreement of facts, Mr. Banayos's ownership and operation of several ATMs and his related responsibility for obtaining cash and loading the ATMs with cash.
- The admission in the agreement of facts that when an ATM was low on cash, Mr. Banayos would direct one of his associates to meet Ms Banayos to pick up money and attend to fill the machine or Mr. Banayos would fill the machine himself.

- I infer that Mr. Banayos's first ATM (at Opera Lounge) was set up with approximately \$14,000 in cash without any cash balance in the RBC account from which it was declared by Ms Banayos to Calypso would be the source of the funds for the cash loaded into the ATM. I make this inference based on:
 - Ms Banayos's October 18, 2012 declaration to Calypso that the RBC account would be the source of the funds for the cash loaded into the ATM. As indicated in the financial evidence filed by consent and as admitted in the agreement of facts, Calypso was the transaction network services company responsible for settling funds received from the use of the ATM. That is, a cardholder with a bank account with any bank on the Interac network (as all major Canadian banks are) could withdraw money from a "white label" ATM (the kind owned by Mr. Banayos) by paying an additional fee. Calypso would reimburse Mr. Banayos, as the owner of the ATMs, for the amount dispensed to the cardholder from the ATM plus appropriate related fees. Calypso would deposit all of the reimbursement and the fees to bank accounts as directed by Mr. Banayos. All of the reimbursements were deposited initially to the RBC account in the name of Ms Banayos.
 - On October 17, 2012, the RBC account balance was "0".
 - The first deposit from Calypso into the RBC account was on October 23, 2012, in the amount of \$2,200, with reference to the terminal number of this first ATM (at Opera Lounge).

- The first withdrawal from the RBC account was on October 30, 2012, by which point the balance exceeded \$14,000 based on deposits from Calypso.
- Accordingly, over \$14,000 was reimbursed into the RBC account without any amount having been first withdrawn from the RBC account to fill the first ATM (at Opera Lounge). It follows that the only available inference is that the source of this initial \$14,000 amount was from outside of the RBC account.
- \$14,000 reflects the indication on Ms Banayos's declaration to Calypso that the maximum capacity of the ATM with the terminal number at Opera Lounge is 700 notes. There is evidence in the intercepted communications that the ATM was filled with \$20 notes, which equates to \$14,000 (700 x \$20).
- When the RBC account was frozen, Mr. Banayos nevertheless had access to other funds and was concerned about putting money in the ATMs when the account was frozen. On July 18, 2013, Mr. Banayos texted Moslehi, "... I don't want to put any money in the machines when the account frozen." From this statement, I infer that Mr. Banayos had access to funds outside of the RBC account. Indeed, on July 19, 2013, the ATM at Opera Lounge was loaded with \$2,940.

[123] Defence counsel argues that because some of the fees generated by users of the ATMs were paid from Calypso to the bank account of Connect Cash, controlled by Walji,

and some of the intercepted communications among Walji, Mr. Banayos and Ms Banayos indicate that Walji was involved in the business of the ATMs, it is common sense that it was Walji who was the source of the initial funds for the first ATM (at Opera Lounge). Similarly, defence counsel argues that it is unknown what cash was on hand and it can be inferred that there were other legitimate sources to load the ATM when the RBC account was frozen, such as taking cash from one ATM and moving it to another. Mr. Banayos's counsel points to the financial records relied upon by the Crown to argue that these records also indicate that there were times when there was adequate cash on hand to fill the ATMs notwithstanding that the RBC account was frozen. Overall, defence counsel argues that there are inferences to be drawn from the financial records and intercepted communications which raise a reasonable doubt. Given the availability of these inferences, along with the lack of forensic accounting evidence by the Crown, it is the defence position that the Crown has not proven its case to the requisite standard.

[124] However, in my view, based on the evidentiary record, defence counsel's arguments are, at best, theories. There is an absence of evidence that Walji was the source of the initial funds for the first ATM (at Opera Lounge). There is no credible evidence of another legitimate source of the funds used for the initial set-up of the first ATM (at Opera Lounge) or the actual source of cash used to load the ATM on July 19, 2013, when the RBC account was frozen.

[125] Accordingly, I am satisfied beyond a reasonable doubt that Mr. Banayos placed some of the proceeds from his drug trafficking into his ATMs and that this amount was

over \$5,000. As such, he is guilty of laundering money of a value exceeding \$5,000 as alleged in count 6 of the indictment.

Possession of Proceeds of Crime by Mr. Banayos

[126] Section 354(1) of the *Criminal Code* provides as follows regarding the offence of possession of proceeds obtained by crime:

Possession of property obtained by crime

354 (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

- (a) the commission in Canada of an offence punishable by indictment; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

[127] In the circumstances of *Dritsas*, McKelvey J. explained what the Crown must prove beyond a reasonable doubt as to the essential elements of this offence (at para. 80):

- (1) that Dritsas was in possession of proceeds of property, being monies;
- (2) that the proceeds of property, being Canadian currency of a value exceeding \$5,000, were obtained by crime;
- (3) that Dritsas knew that the proceeds of property had been obtained by crime (trafficking in cocaine);
- (4) that the value of the proceeds of property exceeded \$5,000.

[128] Having found that Mr. Banayos placed some of the proceeds derived from his drug trafficking into his ATMs, I am also satisfied beyond a reasonable doubt that

Mr. Banayos is guilty of possessing proceeds of crime of a value exceeding \$5,000 as alleged in count 4 of the indictment.

Possession of Proceeds of Crime and Money Laundering by Ms Banayos

[129] As the RBC account holder, Ms Banayos had exclusive control over the money in this account. This is corroborated by several of the intercepted communications between Ms Banayos and Mr. Banayos which indicate that Ms Banayos was the only person who could withdraw money from the RBC account. Therefore, the question is whether it has been proven to the requisite standard that Ms Banayos knew or was wilfully blind about the source of the money being initially placed in the first ATM (at Opera Lounge) and/or the source of later amounts placed into the ATMs, which amounts were then reimbursed into the RBC account for a period of time.

[130] It is Ms Banayos's position that she wanted to help Mr. Banayos set up a lawful ATM business and this is what she did. Given that a criminal record check was required by Calypso, Ms Banayos became Mr. Banayos's nominee for the ATM business. While Ms Banayos assisted Mr. Banayos with his ATM business, she was not involved in its day-to-day operation and her role was limited to getting cash from the bank at Mr. Banayos's instruction. Ms Banayos's counsel argues that Ms Banayos had no basis to believe that there was any illegitimate source of cash and she did not receive any red flags or communications about an influx of unaccounted cash that would have caused her to make any inquiries. As well, Ms Banayos's counsel argues that there is no evidence that Ms Banayos profited in any way from the sale of cocaine or from the ATM

business. Moreover, her counsel argues that while she may have been naïve and foolish, including in the manner with which she dealt with some of the cash involved, this does not equate to a criminal intention.

[131] The knowledge requirement under s. 462.31 of the **Criminal Code** can be satisfied by proving that an accused chose to remain wilfully blind about the source of the proceeds. In **R. v. Tejani**, [1995] O.J. No. 3895 (QL), the Ontario Court of Appeal addressed the relationship between wilful blindness and laundering proceeds of crime as follows (at para. 8):

.... [The trial judge] did not make it clear to the jury that, to convict the accused of the offences under ss. 19.1 and 19.2 [of the **Narcotic Control Act**] with which he had been charged, the accused had to know or be wilfully blind to the fact that the money came from the commission of an offence under ss. 4 or 5 of the Narcotic Control Act. This, in our view, was an error, and contradicted the applicable law, as set out in Glanville Williams, *Criminal Law: The General Part*, 2nd ed. (1961), at p. 159, approved by the Supreme Court of Canada in *R. v. Sansregret* (1985), 18 C.C.C. (3d) 223:

... A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.

[132] I find that Ms Banayos was wilfully blind to the fact that the source of some of the money being placed in the ATMs was from the trafficking of cocaine, which led to the reimbursement by Calypso into the RBC account. It is apparent to me that Ms Banayos would have suspected and realized the probability that the source of the funds was from the sale of drugs, but refrained from obtaining the final confirmation

because she wanted to be able to deny knowledge. I make this finding because of the following:

- While Mr. Banayos was the actual owner of the ATMs, Ms Banayos falsely indicated on the source of funds documentation for Calypso that she owns ATMs and it was her RBC account that was being used as the source of funds for the cash loaded into the ATMs.
- There are several indications that cause me to infer that the ATMs were not part of a legitimate business and that Ms Banayos would have known that the operation of the ATMs was not part of a legitimate business, including:
 - The fact that Ms Banayos falsely indicated that she owned ATMs.
 - Ms Banayos made several declarations on her source of funds documentation that she provided to Calypso in support of her request for Calypso's service with respect to the ATMs, which information she indicated was "true, correct, and complete", when in fact it was false, including that:
 - Ms Banayos was the ATM operator;
 - The RBC account was the source of funds for the cash loaded into the ATM; and
 - Ms Banayos was the transporter of the funds.
 - In my view, if this was a legitimate business and Ms Banayos wanted to help Mr. Banayos set up a lawful ATM business, as suggested by defence counsel, it could be expected that Ms Banayos would be careful not to put

the business at risk by providing false information. The fact that, in these circumstances, Ms Banayos provided this false information and created a risk to the business corroborates my inference that this was not a legitimate business and Ms Banayos would have realized this probability.

- As the named RBC account holder, Ms Banayos would have known that the initial amount in the first ATM at Opera Lounge did not come from the RBC account (for the reasons discussed above). I expect that this would have prompted some inquiry from her to Mr. Banayos.
- I infer from the fact that Ms Banayos did not disclose the actual source of at least the initial funds loaded into the first ATM at Opera Lounge, and instead indicated that it was the RBC account, that these funds were from an illegitimate source. If the source of these funds was legitimate, such as Walji, I expect that Ms Banayos would have indicated this source. No reason has been demonstrated for her not to have done so.
- Similarly, the fact that when Ms Banayos moved to an account that she controlled at BMO she also misled BMO, like Calypso, about her involvement in the ATM business causes me to infer that Ms Banayos did not believe this was a legitimate business. For example, Ms Banayos was listed with BMO as 100% owner of Cash Connect Inc., whose name was on the BMO account. BMO employee Glenda Tan testified that when she asked Ms Banayos about the reason for the account, Ms Banayos told her that she had various ATMs at different bars and she loads them up. Similar information was also included

in Ms Banayos's documentation she provided to BMO on June 22, 2013. In fact, based on the agreement of facts, Mr. Banayos was the owner of the ATMs and when an ATM was low on cash, Mr. Banayos would direct one of his associates to meet Ms Banayos to pick up money and attend to fill the machine or Mr. Banayos would fill the machine himself.

- Based on the intercepted communications between Mr. Banayos and Ms Banayos, it is apparent that she was aware that he was filling the ATMs with cash. For example, there are text messages between them where Mr. Banayos asks Ms Banayos to get money (often referred to as "pera", which it is admitted is Tagalog for "money"), "order 20's for this week" and "take out more then the 20 I have new machines coming," and on June 21, 2013, when Ms Banayos texts Mr. Banayos, "... .. they won't let me take out pera anymore. ...," he texts, "Holy crap carol u should have told me. Damn gotta load machines today shit."
- I also infer from Ms Banayos's casual attitude in dealing with significant amounts of cash that she knew that this was not a legitimate business. For example, when Tan expressed to Ms Banayos that she was concerned about security given some of the large amounts of cash being withdrawn by Ms Banayos, Ms Banayos never arranged for the guard service suggested by Tan to assist in the transportation of funds withdrawn from the bank. On July 26, 2013, Ms Banayos attended the bank to pick up \$100,000 in cash, took it out of the bank in a cardboard box and placed this box on the rear

seat of her vehicle. In intercepted communications on September 7, 2013, between Mr. Banayos and Ms Banayos, Ms Banayos described giving thousands of dollars in a "Dollarama" bag to an individual she met at Salisbury House. If this was a legitimate business, I would expect Ms Banayos to have been more careful in dealing with these significant amounts of cash.

[133] There are several intercepted communications between Ms Banayos and Mr. Banayos in which it is apparent that they had a relatively close relationship. The fact that in none of these communications did Ms Banayos ever question Mr. Banayos about the legitimacy of the ATM business in light of the foregoing or the reason why false information was being provided to Calypso or to the banks reinforces my inference that Ms Banayos was wilfully blind about the source of the funds.

[134] Ms Banayos's counsel essentially argues that Ms Banayos was simply attempting to help Mr. Banayos because of the criminal record check required by Calypso, had no basis to suspect that the funds were from drug trafficking, did not profit in any way and was essentially naïve. Appreciating defence counsel's argument, for the reasons discussed above, I am satisfied that the only rational inference based on the evidentiary record is that Ms Banayos was wilfully blind about the source of these funds.

[135] Given that I am satisfied beyond a reasonable doubt that Ms Banayos was wilfully blind about the source of some of the funds placed in the ATMs being from the trafficking of cocaine and that some of these funds were reimbursed into the RBC account for a period of time, I am also satisfied beyond a reasonable doubt that, as the

RBC account owner, Ms Banayos possessed proceeds of crime and is guilty of laundering these proceeds of crime. Based on at least the initial \$14,000 amount involved, the value of the proceeds exceeded \$5,000. As such, I find Ms Banayos guilty of counts 4 and 6 of the indictment.

Conspiracy to Possess Proceeds of Crime by Ms Banayos and Conspiracy to Money Launder

[136] I infer that these circumstances would have only come about with Ms Banayos's agreement with Mr. Banayos. As such, I am also satisfied beyond a reasonable doubt that Ms Banayos conspired with Mr. Banayos to possess proceeds of crime with a value exceeding \$5,000, and Mr. Banayos and Ms Banayos conspired to launder these proceeds of crime. Therefore, Ms Banayos is also guilty of count 3 of the indictment (Mr. Banayos has already been found guilty of this count based on my finding of a conspiracy involving Phommarath et al.) and both Mr. Banayos and Ms Banayos are guilty of count 5 of the indictment.

Conclusion

[137] In conclusion, I am satisfied beyond a reasonable doubt that:

- Mr. Banayos is guilty of conspiracy to traffic cocaine and trafficking cocaine (counts 1 and 2 of the indictment); and
- Both Mr. Banayos and Ms Banayos are guilty of conspiracy to possess proceeds of crime, possessing proceeds of crime, conspiracy to launder

proceeds of crime and laundering proceeds of crime (counts 3 to 6 of the indictment).

_____ A.C.J.Q.B.