NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Pearce; R. v. Howe*, 2021 NSCA 37

Date: 20210428
Docket: CAC 482444 and CAC 482839
Registry: Halifax

Between:

David John Pearce

Appellant

v.

Her Majesty the Queen

Respondent

And

Duayne James Howe and Patrick Michael James

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Section 486.5 of the *Criminal Code*

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	January 26, 2021, in Halifax, Nova Scotia
Subject:	s. 11(b) Delay; Standard of Review; Application of *R. v. Jordan*, 2016 SCC 27. Trial fairness. Admissibility of criminal records. Admissibility of expert evidence; Fresh evidence. Commission of offence for a criminal organization, s. 467.12 of the *Criminal Code*.

Summary:

In 2012, Duayne Howe, Patrick James and David Pearce were members of the Bacchus Motorcycle Club ("BMC"). Their interactions with RM, who wanted to start a recreational motorcycle club, led to them being charged criminally with a number of serious offences alleged to have occurred between January 1 and September 15, 2012. The preliminary inquiry and trial took many months to complete. At trial there were evidentiary disputes concerning: production to the Crown of a statement taken from RM by a defence investigator; the admissibility of the Appellants' criminal records during the Crown's case-in-chief; whether the Crown's "outlaw motorcycle club" expert, Detective Sergeant Leonard Isnor, was qualified to give expert opinion evidence about the BMC; and whether the BMC was a criminal organization as defined in the *Criminal Code*. Messrs. Howe, James and Pearce also sought to have their charges stayed on the basis of delay.

The Appellants were convicted of all the charges: extortion, threats to cause serious bodily harm to RM or his family, intimidation and engaging in threatening conduct toward RM as well as offences under s. 467.12 of the *Criminal Code*, establishing the offences had been committed for the benefit of, at the direction or, or in association with a criminal organization, the Bacchus Motorcycle Club.

Issues:

(1) Should the trial judge have applied *R. v. Jordan* in his analysis of the s. 11(b) delay application? If so, should this Court apply *Jordan* to determine if a stay of proceedings is warranted due to delay?

(2) Did the trial judge err by ordering production by the Appellants to the Crown of a statement given by RM to a private investigator the Appellants retained prior to trial?

(3) Did the trial judge err by admitting the criminal records of the Appellants into evidence during the Crown's case-in-chief?

(4) Did the trial judge err in finding D/Sgt. Isnor was an impartial expert and qualifying him to give opinion evidence? And, in relation to this issue, should the fresh evidence tendered by the Appellants be admitted?

(5) Did the trial judge err in relying on D/Sgt. Isnor's opinion evidence to determine the BMC was a criminal organization?

Result: Appeals dismissed per reasons for judgment of Derrick, J.A.; Bryson and Scanlan, JJA., concurring.

Issue #1 – The trial judge should have done a *Jordan* analysis as the case was still "in the system" when his decision on the Appellants' delay application was under reserve. The *Jordan* analysis undertaken on appeal determined that the total delay was 68 months, 34 of which were attributable to defence conduct. The net delay of 34 months was 4 months over the *Jordan* ceiling of 30 months for a superior court trial. The presumption of unreasonable delay was rebutted by the complexity of the case. There was no violation of the Appellants' s. 11(b) rights.

Issue #2 – The trial judge's order that RM's statement to the private investigator was to be provided to the Crown was consistent with ensuring trial fairness. The circumstances which led to the order for production of the statement were fact specific. The defence decided to put portions of the statement to RM in cross-examination with a view to contradicting his trial testimony. Having done so, trial fairness required production of the full statement to the Crown.

Issue #3 – The trial judge situated his analysis of the criminal record evidence in the context of the charges against the Appellants as members of the Bacchus Motorcycle Club. He noted they were charged with committing certain offences "for the benefit of, at the direction of, or in association with, a criminal organization". He correctly determined the criminal record evidence was potentially relevant to the criminal

organization charges and that its probative value outweighed any prejudicial effect.

Issue #4 – The fresh evidence – the transcript of D/Sgt. Isnor's testimony as a complainant at the preliminary inquiry of a member of the Hells Angels Motorcycle Club – failed the second and fourth requirements of *Palmer v. The Queen*, [1980] 1 S.C.R. 759. It did not bear on a decisive or potentially decisive issue in the trial and it could not have affected the result. There was no merit to the Appellants' claim that D/Sgt. Isnor was biased and should not have been qualified to give expert opinion evidence. The record established that D/Sgt. Isnor understood his duty to assist the court as a fair, unbiased and objective expert witness.

Issue #5 – The trial judge was correct in his articulation and application of the law for qualifying expert evidence and affording it weight. D/Sgt. Isnor was highly qualified to provide opinion evidence on which the trial judge relied in concluding the Bacchus Motorcycle Club was a criminal organization.

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Appellants

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Restriction on Publication: pursuant to s. 486.5(1) of the *Criminal Code of Canada*

Judges:	Bryson, Scanlan and Derrick, JJ.A.
Appeal Heard:	January 26, 2021, in Halifax, Nova Scotia
Held:	Appeals dismissed as per reasons for judgment of Derrick, J.A.; Bryson and Scanlan, JJ.A., concurring
Counsel:	Peter D. Planetta, for the appellant David John Pearce Leonard Hochberg, for the appellants Duayne James Howe and Patrick Michael James Glenn A. Hubbard, for the respondent

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Reasons for judgment:

Introduction

[1] In 2012, Duayne Howe, Patrick James and David Pearce were members of the Bacchus Motorcycle Club ("BMC"). Their interactions with RM, who wanted to start a recreational motorcycle club, led to them being charged criminally with a number of serious offences alleged to have occurred between January 1 and September 15, 2012. The preliminary inquiry and trial took many months to complete. At trial there were evidentiary disputes concerning: production to the Crown of a statement taken from RM by a defence investigator; the admissibility of the Appellants' criminal records during the Crown's case-in-chief; whether the Crown's "outlaw motorcycle club" expert, Detective Sergeant Leonard Isnor, was qualified to give expert opinion evidence about the BMC; and whether the BMC was a criminal organization as defined in the *Criminal Code*. Messrs. Howe, James and Pearce also sought to have their charges stayed on the basis of delay.

[2] The trial, conducted by Justice Peter Rosinski, concluded with convictions against each of the accused on all eight counts in the Indictment.

[3] The guilty verdicts against Messrs. Howe, James and Pearce were rendered on June 22, 2018. Four of the offences fell under s. 467.12 of the *Criminal Code*, establishing they had been committed for the benefit of, at the direction of, or in association with a criminal organization, the BMC. These were the offences of extortion contrary to s. 346 of the *Criminal Code*; uttering threats, contrary to s. 264.1 of the *Criminal Code*; intimidation contrary to s. 423(1) of the *Criminal Code*; and criminal harassment contrary to s. 264(2) of the *Criminal Code*.

[4] Convictions for these four offences required the trial judge to have been satisfied beyond a reasonable doubt that the BMC was a criminal organization. That finding is being challenged in this appeal.

[5] Messrs. Howe, James and Pearce were also convicted of extortion of RM, contrary to s. 346 of the *Criminal Code*; threats to RM to cause serious bodily harm to him or his family, contrary to s. 264.1 of the *Criminal Code*; intimidation of RM for the purpose of compelling him to abstain from starting a motorcycle club and participating in motorcycle events, contrary to s. 423(1) of the *Criminal Code*; and engaging in threatening conduct toward RM, causing him to fear for his safety or the safety of his family, contrary to s. 264(2) of the *Criminal Code*.

[6] In the course of the trial, in addition to his decision on the merits (*R. v. Howe*, 2018 NSSC 156), the trial judge rendered decisions on the evidentiary issues I mentioned above: production to the Crown of the statement obtained from RM by the defence investigator (*R. v. Howe*, 2016 NSSC 328); the admissibility of the Appellants' criminal records (*R. v. Howe*, 2017 NSSC 210); and the admissibility of D/Sgt. Isnor's opinion evidence about the BMC (*R. v. Howe*, 2017 NSSC 213). The trial judge also decided a mid-trial application for a stay due to s. 11(b) delay (*R. v. Howe*, 2016 NSSC 184). Each of these issues, and the determination by the trial judge that the BMC is a criminal organization, will be dealt with in these reasons.

[7] Messrs. Howe and James filed a Notice of Appeal dated November 29, 2018. Mr. Pearce's Notice of Appeal had been filed as a prisoner's appeal on November 15, 2018. It was later agreed there would be a common appeal for all three Appellants dealing with the same issues. Mr. Pearce accepted the issues as stated by Messrs. Howe and James as the issues in his appeal.

[8] The Appellants also filed a motion for the admission of fresh evidence. The fresh evidence relates to the trial judge's decision to admit the opinion evidence of D/Sgt. Isnor. The Appellants say that D/Sgt. Isnor was biased and should not have been qualified as an expert. Three witnesses testified on the fresh evidence motion: Mr. Howe, and trial counsel for Mr. James (Trevor McGuigan) and Mr. Pearce (Patrick MacEwen). As is the practice in this Court, the fresh evidence was admitted provisionally to be considered along with the appeal. I will discuss the nature of the evidence in due course.

[9] As for the facts, I do not intend to review them in detail as the trial judge did so comprehensively in his decision on the merits. I will include in these reasons the facts required to address each ground of appeal and the basis for the fresh evidence motion. Under each ground of appeal I will also address the positions of the parties and the applicable standard of review.

[10] I would not admit the fresh evidence. As I later explain, it was not relevant to a decisive issue and would have had no impact on the outcome of the trial, requirements the Appellants had to meet for a successful fresh evidence motion. I have further concluded the trial judge did not fall into error in his evidentiary rulings, his determination that D/Sgt. Isnor's evidence should be admitted and given weight, and his finding that the BMC is a criminal organization. I would dismiss the appeals.

A Summary of the Essential Facts

[11] In 2012, RM lived in the Halifax Regional Municipality and was a motorcycle enthusiast. He wanted to start a club for other enthusiasts like himself. He was interested in having a three-piece patch[1] for members to wear on the back of their jackets. He sought out Patrick James, whom he understood was a representative of the BMC, the dominant motorcycle club in Nova Scotia. Mr. James was the Sergeant-at-Arms for the BMC.

[12] Mr. James was emphatic that RM's approach was not acceptable. RM was told the BMC would decide when a locally-grown motorcycle club had earned the right to wear a three-piece patch. Mr. James told him that purporting to be a full-fledged motorcycle club with a three-piece patch was disrespectful and would not be tolerated.

[13] Significant problems arose for RM when, notwithstanding Mr. James' warning, he pursued the patronage of a motorcycle club based in Montreal known as the "Brotherhood". In the trial judge's recitation of the developments, RM was approved by the Brotherhood "to incorporate the elements of their three-piece patch all in one patch, for his intended local chapter" (Conviction Decision, at para. 9). RM and two members of his fledging club flew to Montreal to visit members of the Brotherhood and formally receive the new patches.

[14] What happened next, which led to the Appellants being charged, is described in the Crown's factum:

> 4. Patrick James was a member of the BMC in Halifax at this time. Mr. James was known as the Sergeant-at-Arms of the club. It was one of Mr. James' duties to monitor local activity and keep an eye out for any potential threat to the BMC. Once he learned of R.M.'s desire to create a Halifax chapter of the Brotherhood, Mr. James took action.
>
> 5. When R.M. returned from Montreal, Mr. James showed up uninvited to R.M.'s place of work. Mr. James was wearing his BMC colours and regalia. Mr. James made it clear to R.M. that the BMC would not tolerate R.M. opening a new chapter of the Brotherhood Motorcycle Club in Halifax. Mr. James intimidated R.M. into denouncing his prior conduct, going so far as to require the

[1] The trial judge described a three-piece patch as sewn on to the back of a leather vest or jacket. The top patch identifies the name of the motorcycle club, the middle patch is the club's logo, and the bottom patch identifies the territory claimed by the club as its own, e.g. Nova Scotia.

> Brotherhood members in Montreal to publicly declare that no Brotherhood chapter would be opening in Nova Scotia.
>
> 6. Mr. James then required R.M. to cut up the Brotherhood patch he had brought back with him to Halifax and send photographs of the destroyed patch to Mr. James as confirmation. R.M. complied.
>
> 7. Believing the matter had been dealt with, R.M., along with his wife, later attended a local charitable function for motorcycle enthusiasts in Sackville, NS. R.M. was soon confronted by the Appellants, each wearing their BMC colours.
>
> 8. In front of the entire gathering, the Appellants proceeded to posture, threaten and intimidate R.M.. R.M. was told that he should not have attended the gathering. R.M. was told that he had disrespected the BMC and that if he showed his face at such a function in the future, or was seen to be riding a motorcycle ever again, it would be at his peril.

[15] RM and his wife fled the scene. RM contacted the police. Search warrants were executed and shortly afterwards, the Appellants were charged.

[16] The trial judge found beyond a reasonable doubt that at the Bikers Down charity event on September 14, 2012:

> [43] …both Mr. Howe and Mr. Pearce threatened RM with serious bodily harm; engaged in threatening conduct causing RM to reasonably fear for his safety; and intimidated and extorted RM to abstain from participating in motorcycle events and from riding his motorcycle thereafter.

[17] Mr. James' interactions with RM had occurred during the period of January to August 2012 when RM had attempted to organize a three-piece patch motorcycle club. The trial judge was satisfied beyond a reasonable doubt that:

> [160] …Mr. James intentionally and purposefully caused RM to give up on:
>
> a. His plan of having a three-piece patch MC of his own design;
>
> b. His efforts to bring a three-piece patch Brotherhood MC chapter to Halifax County;
>
> c. Continuing the plan he had successfully put in place in order to have a one-piece patch Brotherhood MC chapter in Halifax County; and
>
> …But for Mr. James's harassing, threatening, intimidating and extortive conduct towards him, RM would have followed through on his plans.

The Issues

[18] The appeals proceeded on the basis of the issues as stated in the Howe and James' Factum:

1) Did the Trial Judge err in dismissing the s. 11(b) application without considering or applying *R. v. Jordan*?

2) Did the Trial Judge err by ordering that the defence provide reciprocal disclosure to the Crown (a statement provided by a Crown witness to a defence Private Investigator?)

3) Did the Trial Judge err by admitting the criminal records of the appellants?

4) Should the motion to adduce fresh evidence be granted?

5) If the fresh evidence is admitted, did the Trial Judge err in finding that Detective Staff Sergeant Isnor was qualified to give expert evidence?

6) Did the Trial Judge err in concluding that the Bacchus Motorcycle Club was a criminal organization?

[19] I will re-state the issues as follows:

1) Should the trial judge have applied *R. v. Jordan* in his analysis of the s. 11(b) delay application? If so, should this Court apply *Jordan* to determine if a stay of proceedings is warranted due to delay?

2) Did the trial judge err by ordering production by the Appellants to the Crown of a statement given by RM to a private investigator the Appellants retained prior to trial?

3) Did the trial judge err by admitting the criminal records of the Appellants into evidence during the Crown's case-in-chief?

4) Did the trial judge err in finding D/Sgt. Isnor was an impartial expert and qualifying him to give opinion evidence?

5) Did the trial judge err in relying on D/Sgt. Isnor's opinion evidence to determine the BMC was a criminal organization?

[20] The fresh evidence issue will be addressed in the context of Issue #4 – whether D/Sgt. Isnor should have been qualified to give opinion evidence.

Issue #1 - Should the trial judge have applied *R. v. Jordan* in his analysis of the s. 11(b) delay application? If so, should this Court apply *Jordan* to determine if a stay of proceedings is warranted due to delay?

Background

[21] The bookends of the prosecution against the Appellants are September 12, 2012 and May 7, 2018. As I explain, the 68 months between those dates is the timeframe in which the s.11(b) issues in this appeal will be examined. The following broadly explains the timeframe.

[22] An original set of Informations laid on September 12, 2012 were replaced on January 3, 2013 with a single joint Information naming all three accused. They were committed to trial following a preliminary inquiry that began in December 2013 and concluded in July 2015. A joint Indictment was filed and the trial was originally scheduled for May 19 to June 3, 2016. Pre-trial motions were to be heard over 10 days from April 4 to 14, 2016. The trial ultimately did not proceed according to the intended timetable.

[23] At the Appellants' request, the pre-trial motions were moved to the May 19 to June 3, 2016 trial dates. The s. 11(b) application alleging unreasonable delay was heard on May 19, 2016. It was the first of the pre-trial motions.

[24] The trial judge reserved his decision on the delay application. Before he rendered it on July 20, 2016, the Supreme Court of Canada released *R. v. Jordan*, 2016 SCC 27.

[25] The trial judge acknowledged in an endnote to his decision (*R. v. Howe*, 2016 NSSC 184) ("Delay Decision") that *Jordan* was a s. 11(b) game-changer. However, he concluded he should assess the defence application on the basis of the law as it had existed before *Jordan* was decided:

> The proper analytical framework has been significantly revised by the July 8, 2016 release of *R. v. Jordan*, 2016 SCC 27. I have reviewed this decision and concluded that given the parties' reliance on the pre-existing jurisprudence in their conduct, and in their legal positions to this court, it is in the interests of justice to apply the *Morin* principles [*R. v. Morin*, [1992] 1 SCR 771], including the spirit of *R. v. Vassell*, 2016 SCC 26.

[26] It was the heading in the trial judge's reasons "How to conduct the legal analysis in such cases" that he endnoted with the reference to *Jordan*. He made no further mention of *Jordan* and sought no input from Crown or defence counsel on the new paradigm for delay applications.

[27] The trial judge dismissed the delay application using the pre-*Jordan* analysis laid out in *R. v. Morin*, [1992] 1 S.C.R. 771. Under *Morin* he assessed inherent delay, institutional delay and Crown and defence delay and examined the issue of delay-related prejudice caused to the Appellants.

[28] The trial proceeded through 2016 and 2017 with the evidence concluding in December 2017. Final submissions were made on May 7, 2018. This marks the end of the trial for the purposes of a s. 11(b) analysis under *Jordan* (*R. v. K.G.K.*, 2020 SCC 7, at para. 3).

The Position of the Parties

[29] The Appellants asked this Court to conduct a *Jordan* analysis and determine whether the delay in their case was reasonable. The Appellants say the trial judge should have asked the parties for submissions on *Jordan* and then applied *Jordan* in his delay analysis. The Crown should have been required to justify the reasonableness of the delay which exceeded the presumptive limit established by *Jordan*. The burden should not have been on the Appellants under *Morin* to demonstrate the delay was unreasonable.

[30] In the Crown's submission, the trial judge was correct to have done his analysis under the *Morin* principles and correct in his analysis. And, even if the trial judge should have done a *Jordan* analysis, taking defence conduct into account, the delay was justified.

Should the Trial Judge Have Applied Jordan?

[31] The trial judge should have applied *Jordan*, not *Morin* in assessing the delay application. The parties should have been invited to make submissions on the new framework. In a *Jordan* analysis, this case qualifies as a transitional case, a case that was "in the system" when *Jordan* was decided.

Is this Court required to Undertake a Jordan Analysis of the Delay in this Case?

[32] Upon the release of *Jordan*, the trial judge should have assessed the delay to that point according to the new framework of analysis laid out by the Supreme Court of Canada. *Jordan* requires this Court to now determine if there was unreasonable delay in this case. I need to determine the net delay and whether it exceeded the presumptive ceiling, which in the case of a Supreme Court trial is 30 months. Delay that exceeds the ceiling can be justified on the basis of exceptional circumstances, that is, discrete events or the complexity of the case.

Why is a Jordan Analysis Required in this Appeal?

[33] *Jordan* directed that its framework for analyzing s. 11(b) delay was to apply to cases that were "in the system" prior to July 8, 2016, when the decision was released (*Jordan*, at para. 95). A case is "in the system" for the purposes of *Jordan* once the charges are laid.

[34] Cases remain "in the system" until available routes of appeal have been exhausted. Appellate courts must decide s. 11(b) delay grounds of appeal in accordance with *Jordan* even where the delay application was decided before *Jordan*'s release (*R. v. Baron*, 2017 ONCA 772, at para. 38; *R. v. Gopie*, 2017 ONCA 728, at para. 110; *R. v. Reinbrecht*, 2019 BCCA 28, at para. 6).

[35] The trial judge recognized in his endnote mentioning the *Jordan* decision that the parties relied on pre-existing jurisprudence in how they conducted the proceedings. It was for this reason he decided "in the interests of justice to apply the *Morin* principles". However, in a *Jordan* analysis the trial judge would have been able to take the parties' reliance on *Morin* into account, particularly in considering the "transitional case" exception provided for by *Jordan*.

[36] This preferred approach was taken by other courts with s. 11(b) delay decisions under reserve when *Jordan* was released. In *R. v. Kennedy*, 2016 ONSC 4654, the accused's application for a judicial stay on the basis of alleged delay was heard on June 30, 2016. The trial judge reserved his decision. Following the release of *Jordan*, he sought the parties' submissions on the impact of the decision. Applying a *Jordan* analysis, he ultimately dismissed the application. Other examples are: *R. v. Mastronardi*, 2016 BCSC 1289, at paras. 88-99; *R. v. Lam*, 2016 ABQB 489, at para. 3.

[37] *Jordan* became the law while the trial judge had his decision on the Appellants' delay motion under reserve. *Jordan* mandated a very different approach. He was bound to apply it. We must now do so.

[38] I will now discuss: the *Jordan* framework and principles relevant to this appeal and the standard of review for this appeal which I apply in analyzing the delay examined by the trial judge for the s. 11(b) application and the delay that followed his dismissal of the application.

The Jordan Framework

[39] For the purposes of this appeal, the following steps in the *Jordan* analysis are relevant:

- A determination of the total length of time between the charge and the anticipated or actual end of trial.

- An assessment of whether portions of the total delay were waived or caused solely by the defence. Any such portions are subtracted from the total delay. A waiver by the defence can be explicit or implicit but in either case, it must be informed, clear and unequivocal (*Jordan*, at para. 61; *R. v. Cody*, 2017 SCC 31, at para. 27).

- If the net delay exceeds the applicable presumptive ceiling – in this case, 30 months – the Crown must justify the delay by showing there were exceptional circumstances. Exceptional circumstances include discrete, unforeseen events, or general case complexity.

[40] *Jordan* explained how the majority of the Court came to decide on 30 months as the presumptive ceiling for a trial in superior court. Inherent time requirements of the case and the increased complexity of cases since *Morin* were amongst the factors taken into account (*Jordan*, at para. 53).

[41] Delay will be counted against the defence where its conduct directly caused the delay or was employed deliberately to create delay, such as frivolous applications or requests (*Jordan*, at para. 63). Delay caused by the defence not being available when the court and the Crown are ready to proceed will also go on to the defence-delay side of the ledger (*Jordan*, at para. 64). Allowance is to be made for defence preparation and actions "legitimately taken to respond to the charges" as this accords with an accused person's right to make full answer and defence (*Jordan*, at para. 65).

[42] The Supreme Court of Canada in *Cody* recognized there is a "potential tension between the right to make full answer and defence and the right to be tried

within a reasonable time – and the need to balance both…" (at para. 34). Actions taken by defence in the course of the trial will be scrutinized on a s. 11(b) application to determine whether they were legitimately taken to respond to the charges or designed to delay. Furthermore, defence actions that exhibit "marked inefficiency or marked indifference toward delay" may well be counted against the defence in a s. 11(b) analysis (*Cody*, at para. 32).

[43] Defence counsel have a responsibility to safeguard their client's s. 11(b) rights by "actively advancing their right to a trial within a reasonable time, collaborating with the Crown when appropriate, and using court time efficiently" (*R. v. Potter*, 2020 NSCA 9, at para. 271, citing *Cody*, at para. 33 and *Jordan*, at para. 138).

[44] Not only defence but all participants in the criminal justice system have been directed by *Jordan* to coordinate efforts to achieve "reasonably prompt justice, with a view to fulfilling s. 11(b)'s important objectives" (at para. 5). Trial judges as well as counsel have an obligation to conduct the proceedings efficiently and proactively in order to ensure unreasonable delay is avoided.

[45] Exceptional circumstances that the Crown could not reasonably foresee, avoid or mitigate will reduce the total delay. The trial judge is best suited to determine whether circumstances are "exceptional" and within which category they fall: discrete events and particularly complex cases (*Jordan*, at paras. 69 and 71). *Jordan* recognized that "more complex cases will often be those involving serious charges, such as…organized crime, and gang-related activity" (at para. 81).

[46] As I mentioned earlier, this was a transitional case. Where the net delay exceeds the presumptive ceiling, the Crown may be able to demonstrate that the delay was justified due to the parties' reasonable reliance on the state of the law pre-*Jordan* (*Jordan*, at para. 96). This is where the parties' reliance on *Morin* is taken into account.

[47] The transitional exceptional circumstance will apply if the delay exceeds the 30-month presumptive ceiling and the Crown has been unable to justify the delay on the basis of discrete events or complexity (*Cody*, at para. 68, citing *Jordan*, at para. 96). The Crown is required to satisfy the court that the delay involved was occasioned by "the parties' reasonable reliance on the law as it previously existed" (*Jordan*, at para. 96).

[48] *Jordan* held the transitional exceptional circumstance assessment must be contextualized, "sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice…" (at para. 96).

[49] In *Cody*, the Supreme Court of Canada again addressed the considerations that apply where the transitional exceptional circumstance is in play:

> [71] When considering the transitional exceptional circumstance, trial judges should be mindful of what portion of the proceedings took place before or after *Jordan* was released. For aspects of the case that pre-dated *Jordan*, the focus should be on reliance on factors that were relevant under the *Morin* framework, including the seriousness of the offence and prejudice…
>
> [72] In this case, the entire proceedings at trial pre-dated the release of *Jordan*. The Crown must therefore show that the 36.5 months of net delay was justified in light of its reliance on the previous state of the law under *Morin*.

[50] For transitional cases, *Jordan* does not operate to "automatically transform what would previously have been considered a reasonable delay into an unreasonable one" (at para.102). Determining whether the delay was reasonable will be informed by the circumstances in which the delay occurred. In this case, the delay occurred both before and after *Jordan* reframed the analysis for s. 11(b) determinations.

[51] I pause here to focus on the factors I have found apply in this case. As I will explain, I have concluded the net delay exceeded the presumptive ceiling of 30 months. The defence conduct did not seek to deliberately create delay. Throughout the 68 months there was however a lack of defence effort to advance the Appellants' s. 11(b) rights. Delay was given only lip service by the defence. Defence conduct did not change following the release of *Jordan*. No discernable adjustments were made by defence post-*Jordan* in relation to the Appellants' s. 11(b) rights. This contrasted with the efforts by the trial judge and the Crown to achieve greater efficiencies and reduce delay. As I explain, I find the net delay to have been justified on the basis of the complexity of the case and discrete events outside the Crown's control. A finding of complexity rebuts the presumption of unreasonable delay and makes it unnecessary to address the transitional case exception.

[52] I will now discuss the standard of review and then examine the proceedings during the period assessed by the trial judge in his s. 11(b) delay decision, and

following that, to the trial's conclusion. I have applied *Jordan* in determining that the delay in this case did not amount to a violation of the Appellants' s. 11(b) rights. [55]

Standard of Review

[53] The standard of review for s. 11(b) appeals is a three-step process as this Court has stated previously: palpable and overriding error for findings of fact and the categorization or attribution of delay, and correctness for the allocation or characterization of the delay and the ultimate determination of whether the delay was unreasonable and warrants a judicial stay. Deference is owed to a trial judge's assessment of responsibility for the delay because it involves findings of fact.

[54] Appellate courts must show deference to a trial judge's underlying findings of fact and to the judge's determination of the legitimacy of defence conduct. Those decisions are "by no means an exact science" and "first instance judges are uniquely positioned to gauge" whether the defence actions were legitimately taken to respond to the charges (*Jordan*, at para. 65; *Cody*, at paras. 31-32).

[55] Trial judges dealing with s. 11(b) applications will be required to make underlying findings of fact and/or draw inferences from facts in determining what happened in the course of the case. Trial judges must also determine what caused the delay – was the defence conduct legitimate and not frivolous, was the case complex, had the parties reasonably relied on the law as it was before *Jordan*. As this Court noted in *R. v. Brown*, 2018 NSCA 62, at para. 46, and *R. v. Ellis*, 2020 NSCA 78, at para. 80, the trial judge's categorization of the delay – the finding of who or what caused the delay – is entitled to deference, subject to palpable and overriding error.

[56] A trial judge's allocation of the delay under the *Jordan* framework, also referred to as the characterization of the delay, which includes calculating the total delay, subtracting the delay assessed against the defence, and then comparing the net delay to the applicable *Jordan* ceiling, is subject to a standard of correctness. Also subject to a standard of correctness is the judge's ultimate determination of whether the delay was unreasonable and violated s. 11(b).

[57] The above accords with the Supreme Court of Canada's recent statement in *R. v. Yusuf*, 2021 SCC 2, that the Ontario Court of Appeal, in the decision being appealed from (cited as *R. v. Pauls*, 2020 ONCA 220), had "applied the appropriate standard of review. In *Pauls*, the standard of review was described:

> [40] …Deference is owed to a trial judge's underlying findings of fact. Characterizations of periods of delay and the ultimate decision concerning whether there has been unreasonable delay are reviewable on a standard of correctness (cites omitted).

[58] Inconsistent terminology has led to some confusion about what various courts have meant in discussing the standard of review for s. 11(b) appeals. This has been true for our Court. Where other appellate courts (e.g. Ontario and British Columbia) have used "characterization" to refer to the allocation of the delay, in this Court's recent decision in *Ellis*, "characterization" was used as a synonym for "categorization". "Categorization" is a term that has been used by this and other appellate courts at the first step of the *Jordan* analysis, the attribution of the delay – who caused it and why.

[59] Recognizing the potential for confusion, we believe these terms should be distinguished in the steps on the *Jordan* analytical ladder: categorization or attribution refer to what a trial judge does when they decide, based on the facts before them, who caused the delay and why it was caused. These determinations are subject to a deferential standard of review. Characterization or allocation refer to what a judge does when they determine who should "wear" the delay and what constitutes the net delay. This is assessed on a correctness standard.

[60] The terminology issue was recently addressed by the British Columbia Court of Appeal in *R. v. Virk*, 2021 BCCA 58. *Virk* provides a helpful explanation of the use of attribution or categorization (standard of review – palpable and overriding error) and allocation or characterization (standard of review – correctness):

> [13] …When a judge determines what caused a delay or whether steps were taken with the intention of delaying proceedings and was thus illegitimate, the judge is making a finding of fact or drawing an inference. This attribution of responsibility is therefore owed deference on appeal. Allocation is distinct from attribution. Allocation involves the application of legal principles to the facts found concerning the cause of delay, in order to categorize the period of delay within the *Jordan* or *Morin* framework. Attribution (deciding who or what caused a delay) will often effectively determine allocation (under *Jordan* whether that delay will be deducted), but that is not always so. They are distinct steps, and different standards of review apply to each step.
>
> [14] The distinction between attribution and allocation can be demonstrated by way of example. If a judge were to find that defence counsel caused a period of delay by not being available to set trial dates when both the Crown and court were, that is a finding of fact to which deference is owed. But if the judge were, at that point, to decide that the resulting delay should not be allocated to defence

> delay because defence counsel cannot be expected always to be available, that would be an error of law. There is an established principle that such delay is to be allocated to defence delay: *Jordan* at para. 64.

[61] *Virk* points out that its own court has used "characterization" in discussing whether defence conduct was legitimate or not, a determination that is owed deference. That determination should be more properly termed a "categorization" exercise. The interchangeable usage of these terms has made the process of reading *Jordan* decisions more challenging. Indeed, even in *Virk*'s very clear explanation there is a description of step two of the *Jordan* analysis as follows: "[a]llocation of periods of delay - categorizing periods of delay as either defence delay or as an exceptional circumstance" (at para. 23). As I have explained, categorization is the terminology to be used in the analysis of a trial judge's attribution of responsibility for the delay, a determination that is owed deference.

[62] *Virk* notes, "Reasons for judgment must be read in light of the issues before the court in a particular case" (at para. 12). For example, the live issue before this Court in *Ellis* was the trial judge's attribution of responsibility, i.e., who or what had caused the delay. The factual determinations by the trial judge in that case were accorded deference (*Ellis*, at paras. 103-105).

[63] When conducting a *Jordan* analysis, this Court will be endeavouring to use consistent terminology as described above for each component of the *Jordan* three-step analytical process. As stated in *Virk*: "Different standards of review apply depending on the particular component of the assessment being challenged" (at para. 20). In this case, the lens through which the delay will be examined, that is, the standard of review to be applied, will depend on the live issues that are before us.

> *Assessing the Delay – The Period Examined by the Trial Judge, September 20, 2012 to December 8, 2016*

[64] The first court appearance was on September 20, 2012. Trial dates were set for Messrs. Howe and Pearce in Provincial Court for December 2013. The Appellants knew additional charges were pending, including the criminal organization charges.

[65] The replacement Information laid on January 3, 2013 contained the criminal organization charges. On January 7, 2013, at the Appellants' first appearance on the new Information, the defence was looking for a "significant amount of

disclosure". The trial judge noted the nature of the disclosure was not identified by defence counsel. He said it appeared defence counsel had received "initial disclosure" as counsel for the Crown told the court "it is my understanding that we'll be getting a letter from defence counsel with respect to any kind of outstanding things that they believe that weren't sent" (Delay Decision, at para. 22).

[66] On April 29, 2013, Messrs. Howe, James and Pearce returned to Provincial Court on the replacement Information, and elected to have a trial before a Supreme Court judge without a jury. They requested a preliminary inquiry which was scheduled for the December 2013 dates that had been reserved for the Howe and Pearce trial.

[67] The trial judge found the January 7 to April 29, 2013 period to be "inherent delay". Under *Morin*, inherent delay is neutral in the delay analysis as "there are inherent requirements…common to almost all cases" (*Morin*, at para. 42).

[68] The trial judge embarked on his assessment of the May to December 2013 period by characterizing the case as "extraordinary…in terms of the time required for it to be processed by our courts" (Delay Decision, at para. 27).

[69] As for the setting of the preliminary inquiry dates, the trial judge found the defence made no inquiry about whether earlier dates were available. He inferred they were "content with those dates" (Delay Decision, at para. 29). That was a reasonable inference based on the record.

[70] The trial judge noted the Appellants' counsel were primarily criminal defence lawyers, "and as experienced counsel, are in high demand". He was satisfied they would have had "numerous previous professional and private obligations between May 2013 and December 2013" making it difficult for them to all be available "for five consecutive days at the same time much before September 2013" (Delay Decision, at para. 30).

[71] The trial judge made a finding of waiver by the Appellants:

> [34] I am satisfied that Crown counsel did not have material scheduling issues comparable to those of the defendants' counsels. The real constraints on getting earlier days lie with either the court or defence counsel.
>
> [35] Based on the evidence available to me I conclude that the defendants were not merely acquiescing to the inevitable on December 10, 2012 or April 29, 2013. While the parties appeared to have thought five days would be sufficient, there

> was no request to hear the matter in segments (for example two days in succession and perhaps three days in succession on a later date) and so obtain earlier start dates. Neither were there such inquiries made on April 29, 2013.
>
> [36] I recognize that the Crown bears the burden of establishing waiver by the defendants. Some measure of waiver by the defendants is appropriately inferred here. I infer that they waived four months of delay [May - August 2013, inclusive].

[72] These determinations are entitled to deference.

[73] The next events were on September 17 and October 23, 2013, when the judge conducting the preliminary inquiry held focus hearings in her Chambers.

[74] There was a further focus hearing on November 6, 2013. The trial judge noted Mr. Howe's counsel presented the Crown with a statement of issues and witnesses: "all civilian witnesses relied upon by the Crown for the purpose of committal and any and all expert witnesses relied on by the Crown" (Delay Decision, at para. 39). The Appellants had indicated committal was in issue on all counts, except for Mr. James on the s. 264.1 charge.

[75] The Crown had previously given notice it would conduct a "paper" preliminary inquiry under s. 540(7) of the *Criminal Code* by providing the evidence of six named Crown witnesses through their police statements. Mr. Howe's counsel indicated on behalf of the defence that he would be seeking an order pursuant to s. 540(9) of the *Code* to cross-examine the six Crown witnesses (Delay Decision, at paras. 41 and 42).

[76] The preliminary inquiry proceeded on the scheduled dates, December 10, 11, 12, 16 and 17, 2013. RM was the Crown's first witness. He was a reluctant witness who professed to have limited recall of the critical events. He refused to adopt portions of his statement to police. The Crown was obliged to make a *Khelawon* application (*R. v. Khelawon*, 2006 SCC 57) to have the statement admitted for the truth of its contents. This *voir dire* consumed the time that had been set aside for the preliminary inquiry.

[77] The *Khelawon* application created delay that was outside the Crown's control.

[78] Allowing time for written submissions from counsel, the preliminary inquiry judge set March 26, 2014 for her decision on the Crown's *Khelawon* application. A further five days were scheduled for the continuation of the preliminary inquiry –

July 14, 15, 16, 17 and 18, 2014. The trial judge found that: "The availability of the court and counsel between December 18, 2013 and July 14, 2014, were not the subject of discussion in open court on December 17, 2013" (Delay Decision, at para. 47).

[79] This is correct. On December 17, 2013, when court opened, the preliminary inquiry judge indicated she had received word that a further five days would need to be scheduled. At the end of the day, counsel for Mr. Pearce noted the court had dates open from July 14 through 18, 2014. He indicated defence counsel were "all available on those days which is pretty rare". He also suggested another focus hearing, advising he was "likely to file an amended Statement of Issues and Witnesses just to clarify exactly who we hope to hear from".

[80] The March 26 date for the preliminary inquiry judge's decision on the *Khelawon voir dire* proved to be unfeasible. She re-scheduled her decision to May 29, 2014, still well ahead of the July dates for the continuation of the preliminary inquiry. She allowed the Crown's *Khelawon* application and admitted RM's police statement.

[81] The preliminary inquiry started up again on July 14. On July 16 and 17, unforeseen problems arose in relation to several witnesses. The trial judge noted that on July 17, 2014, the Appellants indicated a consensus that more time would be needed. Mr. Howe's counsel was unavailable for dates in October the preliminary judge had been able to find. He confirmed that three dates in November were fine – November 19, 20 and 21.

[82] The preliminary inquiry proceeded on July 17 with evidence from S/Sgt. MacQueen. In the course of cross-examination, counsel for Mr. Pearce, joined by counsel for Mr. Howe and Mr. James, made a disclosure request seeking notes and reports S/Sgt. MacQueen had prepared. The Crown observed that the defence had had S/Sgt. MacQueen's "can-say" statement for seven months. No disclosure request had been made until this point. The Crown did not object to obtaining and vetting the sought-after disclosure.

[83] Counsel for Mr. Pearce requested the disclosure be provided for review in advance of him concluding his cross-examination. The Crown asked that the disclosure request be put in writing to ensure what was being sought was properly identified. Mr. Pearce's counsel undertook to do so.

[84] S/Sgt. MacQueen was excused, his cross-examination to be continued when the preliminary inquiry resumed in November. The parties discussed the remaining evidence to be called at the preliminary inquiry. The Crown indicated a willingness to try and book time prior to November for the evidence of two witnesses by video-link. These were witnesses who were to have testified on July 16 until it was discovered that video-conferencing facilities were unavailable at their end.

[85] The parties appeared before the preliminary inquiry judge on October 1 and 24, 2014 to discuss developments since July. The video-link witnesses were not required. On October 24, the judge was advised that November 19 could not be put to use: S/Sgt. MacQueen was returning from a family vacation on that date which had been booked prior to the November continuation dates being set. The Crown had not been aware of his unavailability. Although the Crown was prepared to have their expert, D/Sgt. Isnor, start testifying on November 19, the defence wanted to complete S/Sgt. MacQueen's evidence first because, "a large portion of the expert's opinion comes from information which he has gathered from Sergeant MacQueen".

[86] Defence counsel made the choice not to proceed with any portion of D/Sgt. Isnor's evidence despite the opportunity to do so and use the available dates.

[87] At the October 24 focus hearing, counsel for Mr. Pearce raised a concern about delay, saying: "…at this point in time, you know, we're balancing a number of things here and delay is obviously very real issue here" [*sic*]. However, he had just acknowledged his failure to follow through on putting into writing the request for the disclosure from S/Sgt. MacQueen: "I was to follow-up with my friend and I have to admit I was less than diligent about that but I did speak to him yesterday and it appears that they're still moving forward with gathering the documents that we had asked for during the course of the cross-examination [of S/Sgt. MacQueen on July 17, 2014]".

[88] The preliminary inquiry resumed on November 19, 2014, but was quickly off the rails. S/Sgt. MacQueen's cross-examination was to have continued on November 20, 2014. The disclosure requested by defence had been provided on November 17. Counsel for the Appellants explained to the court there had not been sufficient time to review it. They asked for an adjournment, describing the request as made reluctantly given the preliminary inquiry had been "dragging on… for an eternity".

[89] The Crown explained the disclosure had been “quite difficult to obtain”. It involved reviewing material from other Provinces and required significant vetting. Crown counsel noted the letter from defence counsel “crystallizing their request…never came”. He told the court some of the disclosure had “very, very limited relevancy” to the investigation, but was provided to defence “in a spirit of co-operation”. It was his submission the preliminary inquiry could continue as scheduled with S/Sgt. MacQueen being called at the end of the week to afford defence counsel time to review the disclosure.

[90] The preliminary inquiry judge placed the onus on the defence to determine how the hearing should proceed. She said she was “looking to the Defence counsel…to really move this matter”. She was “getting really concerned about the delay here for sure”.

[91] Defence counsel were not amenable to continuing S/Sgt. MacQueen’s cross-examination at the end of the week. Taking account of the defence concerns about having time to review the disclosure, the judge reluctantly adjourned the preliminary inquiry. The Crown was available for recently freed-up dates in the court’s docket. The defence was not.

[92] The preliminary inquiry was adjourned to three days at the end of January 2015, the next available dates in the court’s docket.

[93] The trial judge reviewed the significance of the defence’s disclosure request and the delay created from July to November, 2014. He found:

> [58] The defendants did not receive the materials until November 17, 2014, because the defendants did not formalize their request, or follow-up by giving the Crown any notice of the precise nature and extent of the disclosure they were seeking. The materials were not handily available, straightforward or easily discerned. Nevertheless, the Crown made good faith efforts to collect what it understood might be of interest to the defendants. Having done so, does not amount to a tacit acknowledgement that the Crown failed in its disclosure obligations…(cites omitted)

[94] The trial judge concluded the delay was the result of defence conduct:

> [62] These four months of delay arose because of a vague and not diligently pursued defence request for incidental materials. I find the earlier lack of disclosure of those materials was not capable of constituting a breach of the defendant's right of full answer and defence. This delay is attributable to the defence or considered waived by the defence.

[95] The trial judge also considered the delay of the preliminary inquiry from November to January. He concluded that too was due to defence conduct:

> [65] Even for this period under review, it is important to recall that the preliminary inquiry was adjourned on July 17, 2014 to November 19, 2014, to allow the defendants to particularize their request and receive further incidental disclosure. Until October 23, 2014, they had not followed up in any fashion with the Crown. That lack of follow-up directly caused them to be unprepared for the November 19-21, 2014 resumption of the preliminary inquiry, and their perceived need to adjourn the hearing further to January 26, 27, and 28, 2015.
>
> [66] The actions or inactions of the defendants caused the delay of the preliminary inquiry from November 19, 2014 to January 26, 2015. These two months are properly characterized as defence delay or waiver.

[96] The preliminary inquiry proceeded on January 26 and 28, 2015. The further cross-examination of S/Sgt. MacQueen by defence counsel took a half-hour (Delay Decision, at para. 68). The preliminary inquiry was adjourned on January 27 because of a snowstorm. As a result it was necessary to conclude the inquiry on March 27.

[97] The evidence for the preliminary inquiry had taken 12 days. The defence reiterated it was contesting committal to trial. Crown counsel indicated his preference for oral argument stating his belief that "we'd be able to set an earlier date" than would be possible if time was set aside for the preparation of written submissions. The judge noted that Mr. Pearce's counsel wanted to proceed on the basis of briefs. The court preferred that as well so dates were set for this purpose: the end of April for the Crown brief and the end of May for the defence.

[98] The judge scheduled June 23, 2015 for her decision on committal.

[99] The late filing of briefs from counsel led to the judge re-scheduling her decision by approximately three weeks to July 13, 2015 when she committed all the Appellants to trial. They appeared in the Nova Scotia Supreme Court on August 6, 2015. There was a pre-trial conference on August 31, 2015. On September 10, 2015, dates were set for pre-trial motions – April 4 to 14, 2016, and for trial – May 19 to June 3, 2016, to be heard by the same judge. Defence indicated these dates were fine.

[100] The trial judge held that in September 2015 defence counsel were unlikely to have been available sooner than February 2016 for the pre-trial motions and April 2016 for the trial. He attributed 3 months to institutional delay, that is delay that

occurs when “the parties are ready for trial but the system cannot accommodate them” (*Morin*, at para. 47). I note, however, that on September 10, 2015, defence counsel spoke to the court clerk and identified the April pre-trial motion dates and the May/June trial dates as suitable. None of the defence counsel indicated any dissatisfaction with those dates. There is no indication in the record of defence concerns about delay at that point.

[101] At the August 31, 2015 pre-trial conference the Appellants advised they would be making a motion for a judicial stay of proceedings based on alleged violations of sections 7 and 11(b) of the *Charter*.

[102] The delay motion did not proceed on April 4, the first day on which pre-trial applications were to be heard. In his Delay Decision the trial judge explained why:

> [81] The defendants knew by September 10, 2015, that the hearing was to start in April 2016. They advised the court on February 25, 2016 that the preliminary inquiry transcripts had not yet been completed; and on March 4, 2016 that the "outstanding transcripts will be available the week of March 21, 2016."
>
> [82] On April 1, 2016, the defendants filed the transcripts for the preliminary inquiry dates: May 29, 2014 – July 13, 2015; yet though they were in receipt of those transcripts for December 10-17, 2013, they did not file those with the court until May 19, 2016.
>
> [83] As a result of the defendants' late filing of relevant transcripts, the pretrial motions could not be heard as scheduled. On April 4, 2016, the court adjourned the pretrial motions to the times set aside for trial: May 19 – June 3, 2016.

[103] The trial judge concluded the resulting delay was due to defence conduct.

[104] With the pre-trial motions moved to the scheduled trial dates, new dates for trial had to be found. Crown counsel did not consent to adjourning the trial and indicated his availability for any time in 2016 except September and October. The trial judge reviewed what defence counsel advised was their availability and concluded they would not have been available “until November – December 2016, in any event” which is when the adjourned trial would be proceeding (Delay Decision, para. 88). In fact, counsel for Mr. Howe was unavailable for the first three weeks of November. New trial dates were set for November 21 to December 8, 2016.

[105] The trial judge found the delay between when the trial was supposed to proceed – May 19 to June 3, 2016 – and the new dates of November 21 to December 8, 2016, was due to defence conduct:

> [89] It is because of the actions/inactions of the defendants that the necessary transcriptions were not ready for the originally scheduled pretrial motions. Thus the actions of the defendants caused the delay of the trial from May 19 – June 3 to November 21 – December 8, 2016.

[106] As I indicated earlier, on July 20, 2016 the trial judge dismissed the Appellants' s. 11(b) delay motion. No subsequent motion for delay was ever brought. The trial proceeded on the merits in November 2016, concluding on May 7, 2018.

[107] The trial judge assessed delay over the period of September 20, 2012 to December 8, 2016, the presumed conclusion of the trial. He found there were nine months of delay that could be attributed to the Crown or institutional factors (Delay Decision, at paras. 91 and 92). He noted this was "well within the 18 months' "guideline" mentioned in *Morin*…(paras. 27-29)". The guideline he was referring to was the allowable 18 months under *Morin* for institutional delay for a superior court trial.

[108] The trial judge rejected defence submissions that there was an additional 18 months of institutional delay on top of the 9 months he had identified. After assessing the issue of prejudice, he was satisfied that even a 27-month delay did not violate the Appellants' s.11(b) rights:

> [111] Even if I accepted that there is here a total period of institutional delay of 27 months, I find that the impact of any inferred/actual prejudice to be immaterial to my conclusion whether there is an unreasonable delay here which violates s. 11(b) of the *Charter*.

[109] The trial judge made findings of fact about defence conduct for the period of September 20, 2012 to December 8, 2016, a total of 50.5 months from when the Appellants were first charged to the anticipated conclusion of the trial. He attributed 26 months of this delay to defence conduct including: waiver, unavailability for available dates, an unmeritorious defence disclosure request (that brought S/Sgt. MacQueen's preliminary inquiry evidence to a standstill and was found by the trial judge to relate to "incidental materials" not meaningfully connected to making full answer and defence), inaction (failure to particularize the disclosure request in a timely fashion), and laches (the failure to have the preliminary inquiry transcripts ready in time for the scheduled s. 11(b) application). His underlying findings of fact and his attribution of responsibility for that delay is entitled to deference. I have found no palpable and overriding error to justify appellate interference.

[110] I also find no error in the trial judge's *Morin* analysis. The trial judge found this case did not warrant a stay under *Morin*. I find he made no error in coming to that conclusion.

[111] I am also satisfied, applying a *Jordan* analysis, that the trial judge's findings of fact in relation to the 26 months' delay are entitled to deference. His allocation of this delay to the defence was correct. The 24.5 months of net delay was under the *Jordan* presumptive ceiling.

Assessing the Delay – The Period from July 21, 2016 to May 7, 2018

[112] The next period of delay to be examined is the delay that occurred after the trial judge's s. 11(b) decision. I will not be revisiting the trial judge's assessment of the delay during the period of July 21 to December 8, 2016 which he took into account. He found the defence was not ready for the s. 11(b) application scheduled to proceed on April 4, 2016. This required the trial to be adjourned to dates in November/December when defence counsel were next available. The trial judge's factual findings attract deference and his allocation of this period as defence delay was correct.

[113] My purpose in describing what happened after the trial judge's decision on July 20, 2016 is to show the continued pattern of defence conduct. There was no concerted effort to expedite the trial. This was in contrast to Crown counsel, who offered to be available for earlier dates and proceed more promptly with oral as opposed to written submissions.

[114] After the trial judge rendered his decision on the Appellant's s. 11(b) delay motion on July 20, 2016, the trial was adjourned until November 2016. It proceeded on 11 dates in 2016: November 21, 22, 23, 24, 25, 28, 29 and December 2, 5, 7, 8. The trial continued for 10 days in July and August 2017: July 10, 11, 12, 13, 14, 31 and August 1, 2, 3, and 4. It concluded following evidence on December 4, 5, 6, and 7.

[115] A review of the record reveals the reasons for the trial stretching over 17 months from when the trial judge had anticipated it would conclude to May 7, 2018 when it did.

[116] By November 29, 2016 it was apparent to the trial judge the trial was not going to finish in December. Mr. Pearce's counsel was not available for a proposed continuation date of December 16. He had a full day trial for a client in custody. In

any event, additional dates were going to be necessary. The trial judge directed counsel for both Crown and defence to provide by December 7 a copy of all their available dates between December 16, 2016 and May 30, 2017. He intended to compare the information with the court calendar to find additional dates.

[117] On December 8, there was an evidentiary issue to be navigated. A *Khelawon voir dire* had been conducted in relation to RM's police statement. The trial judge needed to make a decision on the admissibility of the statement for the truth of its contents. Defence counsel asked to provide written submissions and wanted a transcript of RM's testimony in the *voir dire*. Crown counsel expressed concern about the time involved in obtaining a transcript and filing submissions and offered to make oral submissions "today or, quite frankly, any time that the court wishes, you know, to hear the matter". Pointing to defence counsel having previously filed briefs on the issue, presumably referring to the preliminary inquiry, the Crown said:

> I'm prepared to deal with it. I'm concerned about the timeframe we're under. I would like to have this matter proceed as quickly as possible and, to that extent, I'm certainly prepared to deal with this as quickly as possible…

[118] The trial judge decided all concerned – the court and counsel – would benefit from a transcript "given the nature of the argument and the importance of the issue regarding the statement of [RM]". The preparation of the transcript was estimated to take four to eight weeks. The discussion that followed led to a consensus by counsel that an additional eight days would likely be necessary to complete the trial, taking into account the potential for defence evidence.

[119] The December 8 "available dates" discussion between the trial judge and counsel led to the scheduling of several clusters of future trial dates. Although the Crown and D/Sgt. Isnor were available in January 2017, defence counsel together could offer very few dates before the end of June. Mr. Pearce's counsel in particular had a schedule congested with other trials. A collective examination of the available options led to reserving April 7, 2017 and dates in June (June 12-16), July (July 10-14), and July 31-August 4, 2017 to continue the trial. Counsel for Mr. Pearce was not certain another trial scheduled for the June dates would resolve, but he noted those dates offered by the trial judge in the event it did.

[120] After December 8, 2016, the trial was next scheduled to continue on April 7, 2017. Counsel appeared in court to advise that Air Canada had cancelled Mr. Pearce's flight from Alberta where he was working. The rescheduled flight was not

going to get him to Halifax until April 8. This unforeseen event left no alternative but to adjourn the trial to the July dates.

[121] The trial proceeded on July 10 to 14. D/Sgt. Isnor, the Crown's final witness, began testifying on July 31 in a contested qualifications *voir dire*. The *voir dire* concluded by mid-afternoon on August 1 with submissions. The trial judge indicated he would deliver his decision at 2 p.m. the following day.

[122] On August 2, the trial judge gave a bottom-line decision qualifying D/Sgt. Isnor as the Crown had requested. Although D/Sgt. Isnor's direct examination commenced promptly, by the end of the day it was apparent his evidence would not conclude in the remaining two days reserved for the trial. Crown counsel indicated that concluding the trial was a priority. He was "prepared to move almost everything in my schedule in terms of accommodating the hearing of this matter". Counsel for Mr. Pearce, speaking on behalf of defence counsel, proposed returning the next day, August 3, to discuss dates as this would afford time for defence counsel to compare their calendars and identify their collective availability.

[123] In response to counsel for Mr. Pearce asking if the court was looking to schedule four consecutive days, the trial judge said although not strictly necessary, it was probably more efficient. Mr. Pearce's counsel agreed.

[124] On August 3, counsel for Mr. Pearce advised that defence counsel were all "fairly busy" and indicated the first available "block" of four days for completing the trial was the week of December 4, 2017. December 4-7 were set to continue the trial.

[125] On August 4, there was discussion about finding additional dates beyond December. Counsel for Mr. Howe indicated he was available for four days in the week of January 15, 2018. Crown counsel was also available. The trial judge was not available due to a scheduled jury trial. Counsel for Messrs. James and Pearce did not advise about their availability. The conversation turned to when defence counsel could be available after January. The week of May 7, 2018 was identified as their earliest availability.

[126] Mr. Pearce's counsel expressed concerns about reserving the additional dates in May. He said this would preclude him from using the dates for another matter: "And I do have to keep other people's *Jordan* rights in mind as well". He suggested the need for these further dates be revisited when the trial continued in

December. He also expressed optimism that D/Sgt. Isnor would be finished during the dates in December.

[127] D/Sgt. Isnor's testimony was completed on December 7, 2017. The Crown closed its case. Defence evidence consisted of one witness called by counsel for Mr. Howe. None of the Appellants testified. This concluded the evidence portion of the trial.

[128] The discussion that followed led to May 7, 2018 being set for final submissions. The trial judge asked for written submissions in advance, saying they would be of great assistance. Defence counsel requested a transcript of D/Sgt. Isnor's evidence. Crown counsel said concluding the case was "a priority"; he was prepared to make oral argument the next day. In the alternative, describing deadlines as "very motivating", he proposed two weeks to turn around submissions. He indicated he would make himself available sooner than the May 7 date, "for any earlier date that was offered in relation to the matter".

[129] The trial judge decided final submissions would proceed on May 7. He declined to order the transcript requested by defence and set brief filing dates for March and April. Crown counsel reiterated his willingness to make final oral argument "tomorrow or in May, whatever suits the court". Defence counsel made no objection to the filing of written submissions or the May 7 date.

Net Delay Analysis

[130] As I will explain, by the time the trial concluded on May 7, 2018, an additional 17 months later than the trial judge had expected, the delay was well above the *Jordan* ceiling of 30 months. I am satisfied, however, that there was no violation of the Appellants' s. 11(b) rights despite the very long time this case took to complete.

[131] As I indicated earlier in these reasons, the total delay clocks up at 68 months. The trial judge's factual findings underpinning his determination that 26 months was attributable to defence conduct are entitled to deference. That leaves 42 months of delay to be assessed now.

[132] Of that 42 months, I find eight months' delay should be attributed to the defence for unavailability between December 9, 2016 and July 10, 2017 and again, between August 4 and December 4, 2017.

[133] For that first period, I find that four of the seven months of delay should be assessed as defence delay. For the second period, the full four months counts against the defence. I find the defence implicitly waived the delay from August 4 to December 4, 2017 by proposing the trial proceed for the week of December 4 as defence counsel indicated they were “fairly busy” until then.

[134] The 7 month delay from December 9, 2016 to July 10, 2017 should not all be attributed to the defence.

[135] The continuation of the trial on July 10, 2017 following its adjournment on December 8, 2016 came about as a consequence of defence counsel, having consulted their calendars, indicating their availability for the July dates. This was more than simply agreeing to trial dates which was viewed in *R. v. Askov*, [1990] S.C.J. No. 106, as potentially sufficient, by itself, to constitute waiver (at para. 65). It was more than “mere acquiescence in the inevitable” (*Morin*, at para. 38). There was no request by defence for the earliest dates the court could offer. The trial timetable was being driven by what defence counsel decided they could accommodate within their busy calendars.

[136] Despite what I find to be implicit waiver by the defence, I am of the view that only four months of the delay between December 9, 2016 and July 10, 2017 should be attributed to them. It was the trial judge’s decision to order transcripts of the *Khelawon voir dire* and accept written submissions on the admissibility of RM’s police statement. Taking into account the time that was estimated for the preparation of the transcripts, an outer limit of two months, and allowing an additional month for the preparation of briefs, I am not counting three months of that period as defence delay.

[137] I acknowledge there was a discrete event during the December 9, 2016 to July 10, 2017 period. On April 7, 2017, a trial continuation day, Mr. Pearce’s flight was cancelled by Air Canada and the day was lost. This was an unexpected and unavoidable event. It was also inconsequential given that a single day would not have advanced the trial to any meaningful extent.

[138] The eight months of delay I have attributed to the defence involved implicit waiver of the Appellants’ s. 11(b) rights. The defence proposed dates to continue the trial that took account of the other demands on their time. This was consistent with the approach taken by the defence throughout the trial. The defence approach never evolved to "actively advancing their clients' right to a trial within a

reasonable time..." (*Jordan*, at para. 138). It was an approach that contributed to delay and has implications for the *Jordan* analysis.

[139] The Appellants were represented by busy defence counsel. They were obviously in high demand and conducted this case while discharging their obligations to other clients. This did not neutralize their responsibilities in this case under the new *Jordan* framework. There was time after *Jordan* was released for defence counsel to have corrected the approach they had been taking. They did not do so. They were well aware of *Jordan* – as Mr. Pearce's counsel noted on August 4, 2017, he had to keep other clients' "*Jordan* rights in mind" when reserving additional dates in 2018.

[140] Not only was there was no fresh delay application made on behalf of the Appellants after *Jordan* was handed down, the defence did not make s.11(b) rights a priority at any point during the proceedings. There were occasional, tepid concerns expressed about delay, but never any indication of urgency or concerted effort to expedite the proceedings.

[141] The Crown brought more momentum to the pace of the trial. Crown counsel opposed adjournments, pressed for earlier dates, offered to be available sooner, and at various junctures, argued in favour of making oral rather than written submissions.

[142] Delays in this case were not caused by the trial judge or the unavailability of the court. The judge tackled each evidentiary issue with unstinting efficiency. The issues typically arose in the midst of a witness' testimony. The trial judge responded with consistent diligence. He was remarkably prompt in rendering his decisions, often as a bottom-line so the evidence could proceed without being delayed. Through his concerted efforts, the trial did not lose ground or momentum waiting for rulings that were required before a witness' evidence could continue.

The Net Delay of 34 Months is Justified by the Complexity of the Case

[143] Taking the eight months I am allocating as defence delay into account, the net delay in this case was 34 months, four months over the *Jordan* ceiling. (To recap: the total delay was 68 months. The trial judge allocated 26 months as defence delay. I have allocated a further eight months as defence delay. The net delay is therefore 34 months.) Exceeding the 30 month ceiling triggers the presumption the delay was unreasonable. The complexity of a case can rebut that presumption. I find it does in this case.

[144] That this case was complex is indisputable. Everyone recognized it was. Counsel for Mr. Howe on August 2, 2017 said "…it's already a long complicated case" during a discussion concerning whether D/Sgt. Isnor's report was to be marked as an exhibit. (The trial judge upheld a defence objection and ruled the report was to be used only as an *aide memoire*.) Complexity is why the trial judge ordered transcripts of the *Khelawon voir dire* and agreed with defence counsels' request for written briefs for final submissions.

[145] The case also falls within the class *Jordan* identified as most likely to be complex: cases involving serious charges such as those applicable in organized crime prosecutions (*Jordan*, at para. 81). As with many such cases, here there were multiple accused and counsel.

[146] In addition to unexpected evidentiary issues, for example, RM resiling from his police statement which then required the Crown to make a *Khelawon* application, numerous other *voir dires* had to be conducted. Expert evidence was required for the criminal organization charges, not previously prosecuted in Nova Scotia.

[147] The Crown's conduct of the case is a relevant factor in assessing whether complexity rebuts delay that exceeds the presumptive ceiling (*Jordan*, at para. 79). The record indicates the prosecution was conducted in an organized and efficient manner. As I have noted, Crown counsel proposed ways to minimize the delay. To the extent the Crown could control the case and move it forward, it did.

[148] I am satisfied the complexity of this case rebuts the presumption that the 34 months of delay was unreasonable.

Conclusion

[149] Of the delays that stretched the case over 68 months, starting in 2012 and finishing in 2018, 34 months lie at the feet of the defence. The net delay of 34 months is justified on the basis of the complexity of the case. As I have found the presumption against unreasonable delay is rebutted on the basis of complexity, there is no need for me to examine the "transitional exceptional circumstance" (*Cody*, at para. 67).

[150] I would give no effect to this ground of appeal. There was no violation of the Appellants' rights under s. 11(b).

Issue #2 – Did the trial judge err by ordering production by the Appellants to the Crown of a statement given by RM to a private investigator the Appellants retained prior to trial?

Background

[151] This ground of appeal relates to an evidentiary issue that arose during the cross-examination of RM by Mr. Howe's trial counsel, Patrick Atherton. In the course of his cross-examination, Mr. Atherton produced a statement RM had given on December 5, 2013 to Mr. Mott, a private investigator retained by the defendants.

[152] Mr. Atherton put it to RM that he had previously testified about the Bikers Down event (an obvious reference to the fact that RM had testified at the preliminary inquiry) and also given at least two statements. RM acknowledged he had done so. RM had given a lengthy statement to police on September 16, 2012. He told Mr. Atherton he had been trying to be truthful when he spoke to the private investigator. Mr. Atherton then started to cross-examine RM on what Mr. Howe had said to him at the event.

[153] Mr. Atherton's questioning eventually led to an objection by the Crown. The following excerpt sets out the context in which this occurred:

> **Atherton:** Okay. I'm going to suggest to you, sir, that when Mr. Howe approaches you, he just – he asks you could he have a word with you or something like – to that effect?
>
> **RM:** Yes.
>
> **Atherton:** And that initially there's just you and him there together?
>
> **RM:** Ah, no, it was him and, um, David was there.
>
> **Atherton:** Okay. And they told – he told you that you weren't welcome there?
>
> **RM:** Correct.
>
> **Atherton:** And then he raised his voice and said, "You just need to get out of here"?
>
> **RM:** Ah, yes, but with more direct language, yeah.
>
> **Atherton:** What was the language, "Get the fuck out of here," or something like that?
>
> **RM:** Yes. Yes.

Atherton: Okay. And that [*sic*] you said, "Look, I want to, you know, make my donation and chat to my friends a bit."

RM: Yes.

Atherton: And he told you, "You need to go"?

RM: Yes.

Atherton: And he raised his voice…

RM: Correct.

Atherton: …so that other people could look at him?

RM: Correct.

Atherton: And then you said, "I didn't mean to disrespect you," anything like that?

RM: Correct.

Atherton: I'm going to suggest to you, he never said to you that he was going to beat the shit out of you, correct?

RM: Ah, I can't say that that's correct. I think he – he, um, said that, "If there wasn't a lot of people around, I'd beat the shit out of you," yeah.

Atherton: Okay. Sure about that, are you?

RM: I'm pretty sure about it.

[154] At this point, Mr. Atherton was poised to show RM the statement he had given the private investigator. He made his approach:

Atherton: I'm going to show you – I'll get you to read from line 22…

Crown: I'm not certain what my friend is proposing to show the witness.

The Court: Yeah.

Atherton: I'm showing him a copy of his statement he gave to Mr. Mott.

The Court: Oh.

The Crown: The Crown doesn't have a copy of that statement. If he's going to show it to the witness, the Crown needs a copy of that, My Lord.

The Court: It's the only way, I guess, the Crown could really try to see if the witness has said something else somewhere else, I suppose, in redirect.

Atherton: Well, I mean let's see if he identifies it first. I don't believe I'm obliged to give it to the Crown. He can either adopt it or not.

[155] The trial judge told Mr. Atherton he needed to establish through RM the circumstances under which the statement came to be made. Once that had been

done, Mr. Atherton read out a question from the statement that had been put to RM by the investigator. The Crown objected:

> **The Crown:** Well, My Lord. I'm not certain about the appropriateness of reading it aloud at this point in time, but beyond that, I don't think it's appropriate for this witness – for my friend to be going over a statement with this witness that is not in the possession of another party to the proceedings. I just – to the extent that he is now wishing it to form part of the record here to the extent that he's drawing this witness's attention to it. The Crown is entitled to a copy of that document.

[156] What followed was a discussion about the procedure that was in play, which the trial judge identified as s. 10 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. After an additional back and forth with Mr. Atherton and the Crown, the judge posed the question that was under debate: "…as a matter of maybe substantive rights, whether the Crown is entitled in advance of questioning of R.M…to have a copy of the full statement provided by him purportedly to Mr. Mont or Mott, I think, December 5th, 2013".

[157] The Crown argued that once Mr. Atherton drew RM's attention to the statement, it became appropriate for the Crown to be provided with a copy. Mr. Atherton insisted the statement was protected by litigation privilege and there was no obligation on defence to disclose it to the Crown. His intention was to use the statement to impeach RM and contradict his trial testimony about the Bikers Down incident.

The Trial Judge's Decision

[158] The trial judge ordered the statement produced to the Crown. He found that any litigation privilege had been waived. He noted that where a party relies on a document in open court, any privilege in the document is waived and cited *R. v. Dunn*, 2012 ONSC 2748, at paragraphs 76-91.

[159] In his reasons the trial judge:

- Explained the procedure involved in using statements to cross-examine a witness, including to impugn credibility.
- Indicated his understanding that the defence does not have disclosure obligations like the Crown.

- Referenced s. 657.3 of the *Criminal Code* and the limited defence disclosure obligation where an expert witness will be testifying as part of the accused's case.

[160] The trial judge found that:

> [25] The defence has cited no persuasive reasoning, or case law that is binding upon, or persuasive to this court, regarding their position that in circumstances such as these, there is no obligation on the defence to produce the statement of December 5, 2013, to the Crown.

[161] He went on to state:

> [28] Whether the defence merely intends to have R.M. acknowledge he made a previous inconsistent statement, or that he adopted it as past recollection recorded, or should they wish to engage a *Khelawon* application – in each of those circumstances, and particularly in relation to the latter two – as a matter of fundamental fairness, the Crown ought to be put in a position to allow it to effectively ask redirect questions of R.M., arising from the introduction on cross-examination by the defence, of his December 5, 2013, statement.
>
> [29] It would be unfair to place the Crown in the position of being unable to ask cogent questions of the complainant in redirect, as a result of not having the December 5, 2013 statement of R.M.

[162] The trial judge concluded that if the defence intended to put to RM on cross-examination any portion of the statement RM had given to the private investigator, the full statement would have to be disclosed to the Crown.

The Position of the Parties on Appeal

[163] The Appellants argue there is "absolutely no obligation to assist the state with its prosecution" (Howe and James factum, para. 43). They submit the trial judge's decision compromised their fair trial rights.

[164] The Crown says the trial judge's ruling was without error. It was an order for production of RM's statement that was conditional on the course of conduct that had been undertaken by defence counsel.

[165] The Crown says it raised the production issue appropriately, at the point when the statement was read into the record by Mr. Atherton to RM in the witness box. In the Crown's submission, the trial judge was "completely alive to the lack of disclosure obligation" on an accused (Respondent's factum, para. 90).

Standard of Review

[166] The standard of review concerning the existence and waiver of litigation privilege are questions of law. The standard of review is correctness (*R. v. Mitchell*, 2018 BCCA 52, at para. 27).

Analysis

[167] Contrary to the Appellants' position, I find the trial judge's order that RM's statement to the private investigator be provided to the Crown was entirely consistent with ensuring the trial was conducted fairly. The trial judge properly recognized it is not only accused persons who are entitled to a fair trial: the trial must also be fair in relation to the Crown.

[168] I would not, however, term this as "disclosure". This was an order requiring the defence to produce the statement to the Crown. It did not create a reciprocal disclosure obligation on the defence.

[169] The order was context-specific; it sprang from the decision by the Appellants to put parts of the statement to RM on cross-examination. It was made with the trial judge's clear-eyed view of the fair trial rights of accused persons:

> [20] The court is well aware that accused persons have constitutional rights, as enshrined in, and then developed by jurisprudence flowing from the common law and the Charter of Rights. The defence is not required by law to provide "disclosure" of its investigations, etc., in the same way that the Crown is obligated to provide disclosure -- see *R. v. Stinchcombe,* [1991] 3 S.C.R. 326; *R. v. McNeil*, [2009] 1 S.C.R. 66, their progeny, and other cases in that respect.

[170] In the circumstances in which the issue arose in this case, ordering the defence to provide the Crown with a copy of the statement being put to RM was the only way of ensuring the trial was conducted fairly. Had production of the statement not been ordered, RM's cross-examination would have continued without the Crown having any access to the context for the questions being put to him. The defence could have cherry-picked from the statement with the Crown left entirely in the dark about what else RM may have said to the investigator.

[171] I do not accept the Appellants' submissions that the judge should have only ordered production of that portion of the statement being used by defence counsel in cross-examination. The Crown was entitled to conduct a re-examination of RM and without the statement would have had no ability to do so effectively.

[172] The Appellants argue that *R. v. Peruta* (1992), 78 C.C.C. (3d) 350, is authority for their position the statement should not have been ordered produced. In their submission, the Quebec Court of Appeal ruled that s. 10 of the *Canada Evidence Act* governs cross-examination on a prior inconsistent statement "but does not give the adverse party the right to obtain the statement" (Howe and James' Factum, para. 47).

[173] *Peruta* is not analogous. The court said:

> …the written declaration of a defence witness kept confidential is not a public document; that the crown attorney in this case had no right to possession or communication of the statements of defence witnesses in possession of defence attorneys…

[174] RM was not a defence witness. More importantly, the statement he gave to the private investigator retained by the defence was not kept confidential. Mr. Atherton brought it out into the open when he started to cross-examine RM on it.

[175] *Mitchell* is an analogous case. The British Columbia Court of Appeal upheld the trial judge's decision to order defence counsel to produce to the Crown, during the cross-examination of a defence witness, notes prepared of his interview of the witness. The witness acknowledged he had reviewed the notes in preparation for his testimony.

[176] The trial judge in *Mitchell* found the notes constituted a "statement" for the purposes of s. 10(1) of the *Canada Evidence Act*, as an oral statement that had been reduced to writing. She concluded the witness had refreshed his memory from the notes and ordered them produced to the Crown because they had a bearing on the weight to be given to the witness' testimony. She accepted the notes were subject to litigation privilege as defence counsel had made them in preparation for trial, but found the privilege had been waived. Waiver resulted when defence counsel provided a copy of the notes to the witness and then called him to testify.

[177] In *Mitchell* the court expressly rejected the suggestion that the trial judge's order constituted "disclosure to the Crown" (at para. 50). The court noted, as did the trial judge in this case, that the Crown has disclosure obligations, but "there is no reciprocal obligation on the defence" (at para. 51). Production of the defence counsel's notes was ordered in the context of litigation privilege having been waived by the creation of what was effectively a statement, given to the witness who then used it to refresh his memory prior to testifying.

[178] *Mitchell*, noting what Proulx, J.A. said in concurring reasons in *Peruta*, further confirms how that case does not assist the Appellants:

> [64] Other situations can occur during cross-examination; the situation, for example, where the witness would need to refresh his memory with the help of his prior statement, in which case both the party examining him and the adverse party would be allowed to examine the document. Finally, the trial judge, in the exercise of his discretion and in the superior interest of justice, can allow access to the statement, and even order its production, which can then work in favour of the prosecution.

[179] The circumstances which led to the trial judge's order for production of RM's statement to the Crown were fact specific. The defence obtained a statement from RM by having a private investigator interview him. They decided to put portions of the statement to RM with a view to contradicting his trial testimony. Usually defence counsel would be undertaking this strategy with a statement or statements provided by a Crown witness to the police. The Crown would have these statements, and they would have been provided as disclosure to the defence. In such circumstances, both the defence and the Crown would know what was contained in the statement.

[180] Production of RM's statement to the Crown during defence cross-examination simply ensured the fairness of the trial in the specific circumstances of this case. The trial judge was correct to have ordered the statement produced.

[181] There are two aspects of the trial judge's reasons that, although they do not bear on the correctness of his decision, merit comment.

[182] The trial judge said in his reasons that "accused persons are not entitled to a perfectly fair trial, but only to a fundamentally fair trial". This statement is correct in law, but it leaves the impression the judge's order involved some balancing of the Appellants' fair trial rights against other principles. It did not. Once the Appellants decided to use the statement in cross-examination, trial fairness required that it be produced to the Crown. This did not in any way dilute or diminish the Appellants' fair trial rights. The Appellants' fair trial rights did not include the right to use RM's statement in cross-examination and not provide it to the Crown.

[183] As I mentioned earlier, the trial judge referred in his reasons to s. 657.3 of the *Criminal Code* and the reciprocal disclosure obligations that exist in relation to expert evidence. The trial judge noted that when the defence intends to rely on an

expert report at trial, “it is clear that to allow the Crown to properly scrutinize the expert opinion evidence, it must have had it disclosed to it before the witness testifies” (para. 23).

[184] The trial judge went on to say, this “reasoning thread” was, in his view, “also applicable to the present circumstances of an ordinary witness like R.M.” (para. 24).

[185] With respect, there is no analogy between the statutory requirements for the reciprocal disclosure of experts’ reports and the situation which arose when Mr. Atherton brought out RM’s statement and began to employ it in his cross-examination. As I have said, trial fairness obliged the defence in these circumstances to provide the statement to the Crown. This was an obligation to produce the statement being used. It bore no relationship, by analogy or otherwise, to the very limited disclosure requirements imposed on defence by s. 657.3.

Conclusion

[186] I would dismiss this ground of appeal.

Issue #3 – Did the trial judge err by admitting the criminal records of the Appellants into evidence during the Crown’s case-in-chief?

Background

[187] The admissibility of the Appellants’ criminal records arose during the Crown’s direct examination of S/Sgt. Stephen MacQueen. In 2012, when RM contacted police about the encounters with the BMC, S/Sgt. MacQueen was a member of the RCMP and the Sergeant Unit Commander of the Combined Forces Intelligence Unit (CFIU) in Halifax. The CFIU was responsible for collecting intelligence on outlaw motorcycle clubs in Nova Scotia.

[188] The Crown gave notice to the Appellants under the *Canada Evidence Act* of its intention to introduce into evidence through S/Sgt. MacQueen printouts from the Canadian Police Information Centre (“CPIC”) and the Province’s Justice Enterprise Information Network (“JEIN”) records that included the criminal records of the Appellants. The Appellants objected. The trial judge invited written submissions on the issue. There were no oral submissions.

[189] The Crown acknowledged as a general rule the Crown cannot adduce character evidence for the purpose of proving propensity to commit the offences that are being tried. This was not the purpose of the evidence. The Crown's submissions to the trial judge explained the criminal record evidence was relevant to the opinion anticipated from D/Sgt. Isnor, the Crown's expert witness:

> …the criminal record evidence is admissible at trial as it is relevant to an issue at trial. It is relevant to establishing the nature of the Bacchus Motorcycle Club and, therefore, is relevant to the essential elements of establishing that the Bacchus Motorcycle Club is a criminal organization as defined in section 467.1 of the *Criminal Code* and that the offences in question were committed for the benefit of, at the direction of, or in association with that criminal organization.

[190] The Appellants argued the criminal records constituted bad character evidence and did not come within any of the exceptions to the general prohibition against admissibility. Furthermore, the prejudicial effect of the records outweighed any probative value. They relied on *R. v. Borden*, 2017 NSCA 45, which I discuss below.

The Trial Judge's Decision

[191] The trial judge admitted the records. The general principles were not in dispute. The trial judge zeroed in on the central question: was the probative value of the proposed "bad character" evidence outweighed by the prejudicial effect of the admission of that evidence on the Appellants' fair trial rights?

[192] In analyzing the defence objection, the trial judge located the evidentiary question in the context of the Appellants' right to a fundamentally fair trial:

> [6] For present purposes that means a trial at which the Crown is limited to presenting relevant evidence, whose probative value outweighs any prejudicial effects to the fair trial rights of the defendants, and which is not excluded on any other basis – e.g. a rule, principle (simple or constitutional), or statutory basis.

[193] He explained how the evidence could be relevant:

> [10] The Crown will attempt to qualify as an expert witness, Staff Sgt. Leonard Isnor. He has previously been qualified by this court in an earlier *voir dire* as an expert witness in relation to the Hells Angels Motorcycle Club. The proposed qualification regarding the Bacchus Motorcycle Club is in identical language:

> As an expert in the area of organized crime -- outlaw motorcycle gangs, able to give opinion evidence in relation to the Hells Angels Motorcycle Club and Bacchus Motorcycle Club in the following areas:
>
> 1 - The general nature and characteristics of the clubs;
>
> 2 - The history, organization, structure and hierarchy of the clubs;
>
> 3 - The culture, values and practices of the clubs [including the main purposes/activities of the clubs; and
>
> 4 - The language and symbols of the clubs.
>
> [11] The criminal records of the defendants may therefore arguably be relevant to providing a foundation for the expert opinion evidence (if qualified) of Staff Sgt. Isnor, as well as to the specific charges pursuant to s. 467.12 Criminal Code. The evidence can reasonably be expected to be probative (i.e. logically relevant and material to the issues in this case). I say this because counsel have not yet disclosed to the court the nature and extent of the defendants' criminal records.

[194] The trial judge noted the Appellants had not been specific about what prejudice would flow from admission of the records. He emphasized his intention, as a judge sitting without a jury, to take care that the criminal records evidence was utilized appropriately. He understood he could determine at a subsequent point in the trial that the evidence should be excluded. He indicated his expectation that experienced defence counsel would object to impermissible questioning in relation to the records and would make any necessary submissions on what use could be made of them:

> [12] The defendants did not identify with any great precision what prejudice they argue would arise from admission of the proposed evidence. I infer that they did not want me to see the criminal record information before ruling herein that they are admissible. They took a similar position regarding Staff Sgt. Isnor's expert [*sic*] when I was asked to consider whether he is properly qualified to give opinion evidence regarding the BMC.
>
> [13] Although not entirely failsafe, I would respectfully suggest that the fact that this is a judge alone trial, greatly diminishes the danger that the criminal record evidence, if admitted, would be misused by the court as succinctly discussed at paras. 2-4, in *R. v. Granados-Arana,* 2017 ONSC 2113, per K L Campbell J.
>
> [14] I intend throughout the remainder of the trial to carefully respect the boundary between the permissible and impermissible uses of the defendants' criminal records, in light of the dangers of misuse associated therewith. It may yet turn out that the records are of no probative value, or that their probative value is outweighed by the prejudicial effect of considering them (partially or wholly) to the fair trial rights of the defendants.

> [15] I expect that the defendants' experienced counsels will interject if they believe questioning in relation to the criminal records is inappropriate, and make interim and closing submissions regarding the permissible uses of the defendants' criminal records.

[195] The Appellants raised no further challenge to their criminal records being in evidence. In final submissions, Mr. James' counsel referred to the criminal records of Bacchus' members generally as evidence that undermined the Crown's allegation that the BMC was a criminal organization. He made no mention of concerns about prejudice:

> And it may very well be that some of the members are engaged in criminal activity, but that's not the test. The test isn't even are most of the members engaged in criminal activity? And I would caution the court that, when looking at the records, frankly, the expert was not able to say when certain people joined the club, when their record occurred, but we're talking about some individuals who have records older than I am long before there was ever a Bacchus Motorcycle Club or they were a member thereof, and often for things that have nothing to do with material gain, impaired driving, spousal assaults. These things are clearly not crimes of opportunity, they're not crimes of material gain, and that was confirmed on the record. There is evidence of that. One wouldn't expect an impaired driving would in any way benefit the member who was charged with impaired driving or the club, in general.
>
> So I would suggest to the court, when looking at the definition of criminal organization, there's simply not evidence before the court to substantiate that one of the main purposes, doesn't have to be the main purpose, the case law is clear, but one of the main purposes is the commission of serious offences for material benefit. It's just not there, My Lord, I would suggest.

Position of the Parties on Appeal

[196] The Appellants argue their criminal records were not required for D/Sgt. Isnor's evidence. In their submission, introducing their criminal records cast aspersions on their characters, compromised their fair trial rights and was improper.

[197] As they had at trial, the Appellants rely on *Borden* in support of their position. They refer to *Borden*'s inventory of when an accused's bad character evidence is admissible: (1) as a result of a successful similar fact application by the Crown; (2) by the accused putting their character in issue – usually by calling evidence of their good character; (3) where the evidence is relevant to a key element in the Crown's case, such as motive, opportunity or means; and (4) where

the accused testifies, opening themselves up to cross-examination on prior convictions pursuant to s. 12 of the *Canada Evidence Act* (at para. 154, cites omitted).

[198] The Appellants submit the criminal record evidence was nothing more than bad character evidence that should only have been admitted in accordance with one of the *Borden* criteria.

[199] In the Crown's submission, the Appellants' criminal records were relevant to the criminal organization charges and had a probative value that exceeded any prejudicial effect, particularly where the Appellants were being tried by a judge alone. They cited *R. v. Hobbs*, 2008 NSSC 206 (affirmed 2010 NSCA 53), as a very similar case.

Standard of Review

[200] The admissibility of bad character evidence raises a question of law and the standard of review, therefore, is correctness [*R. v. Hobbs*, 2010 NSCA 53, at para. 64].

Analysis

[201] The trial judge situated his analysis of the criminal record evidence in the context of the charges against the Appellants as members of the BMC. He noted the Appellants were charged with committing certain offences "for the benefit of, at the direction of, or in association with" a criminal organization.

[202] The definition under s. 467.1 of the *Criminal Code* of a criminal organization includes that one of "the main purposes or main activities" by the group that constitutes the organization or its members is the facilitation or commission of serious offences with the likely result being a material benefit. In this context, the Appellants' criminal records had some probative value in relation to the Crown's allegation that they were members of a criminal organization.

[203] The trial judge correctly determined the criminal record evidence was potentially relevant to the criminal organization charges and that the probative value of the evidence outweighed any prejudicial effect. He noted the Crown's reliance on *Hobbs*.

[204] Mr. Hobbs was on trial in the Nova Scotia Supreme Court for possession for the purpose of trafficking in marihuana and production of marihuana. In its case-in-chief, the Crown was permitted to introduce evidence that in July 2005, Mr. Hobbs had been arrested in a New York hotel room with 100 pounds of marihuana and a very significant amount of mainly U.S. currency. He pleaded guilty to felony possession of marihuana and received a sentence of imprisonment. The Crown was also allowed to present evidence that in August 2005 Halifax police had discovered a fully operational marihuana grow operation in the basement of a house rented by Mr. Hobbs.

[205] Mr. Hobbs argued the evidence was inadmissible as mere bad character evidence intended to show propensity.

[206] This Court upheld the trial judge's admission of the evidence, holding the evidence was directly relevant to the issue of Mr. Hobbs' knowledge of the source of the $32,000 seized from his luggage and that the source was drug trafficking. The trial judge was found to have understood the evidence could only be used for a limited purpose and to have satisfied himself that its probative value outweighed its prejudicial effect.

[207] *Hobbs* is a direct answer to the Appellants' complaint about the admission of their criminal records during the Crown's case-in-chief. Even *Borden*, relied on by the Appellants, refers to bad character evidence being admissible if relevant to "a key element of the Crown's theory of the case…" (*Borden*, at para. 154). *Borden* primarily focused on the scope of cross-examination and did not establish an exhaustive list of when bad character evidence is admissible.

[208] In permitting the Crown to introduce the Appellants' criminal records, the trial judge correctly instructed himself on the applicable law. He was well-aware of the limitations on the use to be made of the evidence. He understood the Crown could not adduce bad character evidence for the purpose of proving that an accused is the type of person to have committed the offence with which they have been charged. He appropriately assessed the evidence as "arguably relevant" to D/Sgt. Isnor's anticipated opinion evidence and to the s. 467.12 charges, and as reasonably likely to be probative (para. 11). He made no error in admitting it.

Conclusion

[209] I would give no effect to this ground of appeal.

Issue #4 - Did the trial judge err in finding D/Sgt. Isnor was an impartial expert and qualifying him to give opinion evidence?

Background

[210] The Appellants took aim at D/Sgt. Isnor's impartiality before the trial judge, challenging the Crown's application to have him qualified. They brought a motion for fresh evidence at appeal, asserting that evidence they had come across after the trial showed D/Sgt. Isnor could not have been an impartial expert. The Appellants say that had the fresh evidence been available at trial, the Crown's application to qualify D/Sgt. Isnor would have failed.

[211] The Crown sought to have D/Sgt. Isnor qualified as follows:

> [2] …As an expert in the area of organized crime – outlaw motorcycle gangs, able to give opinion evidence in relation to the Hells Angels Motorcycle Club and the Bacchus Motorcycle Club in the following areas:
>
> 1) The general nature and characteristics of the clubs;
> 2) The history, organization, structure and hierarchy of the clubs;
> 3) The culture, values and practices of the clubs (including the main purposes/activities of the clubs); and
> 4) The language and symbols of the clubs.

[212] The trial judge explained in his decision qualifying D/Sgt. Isnor that the Crown had elaborated on what D/Sgt. Isnor's evidence would address: "the relationship between the HAMC [Hells Angels Motorcycle Club] and the BMC; the evolution of so-called "outlaw motorcycle gangs" [OMGs] in general and BMC specifically; a comparison between the HAMC and the BMC over time…". He went on to say: "it will be suggested that the BMC was modelling itself after the HAMC – that they were "what the BMC wanted to become and what it [now] is" (para. 3).

[213] The Appellants took issue with D/Sgt. Isnor being qualified to give the proposed opinion evidence. They argued he had no experience with the BMC prior to the trial. He had never been qualified to give expert evidence about the BMC and had never had any direct dealings with the club. They had a further concern: opinion evidence about the HAMC was irrelevant and would be highly prejudicial to the Appellants.

[214] The trial judge qualified D/Sgt. Isnor. He was satisfied D/Sgt. Isnor had the necessary expertise, an issue I will address under Issue #5 in these reasons, and was unbiased.

[215] The trial judge noted he had qualified D/Sgt. Isnor as an expert witness regarding the HAMC in an earlier *voir dire* that dealt with a Crown application for the admission of documents under the principled exception to the hearsay rule (*R. v. Howe*, 2017 NSSC 199). The earlier *voir dire* concerned HAMC meeting minutes and a letter from 2002, both relating to the BMC. The trial judge admitted the documents into evidence for the truth of their contents finding they tended to corroborate that the BMC was a HAMC hang-around chapter but did not progress to prospect status. That decision has not been appealed.

[216] The trial judge returned to the bias issue when addressing D/Sgt. Isnor's trial testimony in his decision convicting the Appellants:

> [217] Sergeant Isnor's objectivity was not expressly questioned by the defendants' counsel. However, there were allusions to that issue, stemming from the fact that he was a police investigator, and supervisor for intelligence gathering regarding OMGs in Ontario, and elsewhere in Canada, for a lengthy period of time. Sergeant Isnor testified for many days, over many months. During his entire testimony, there was no hint of material bias. I am entirely satisfied that Sergeant Isnor, in giving his testimony, and in forming his opinions, took to heart the duty on experts to be fair, objective and non-partisan. He was impartial, independent, and unbiased in the sense that, while called as a Crown witness, he did not unfairly favour the Crown's position over that of the defendants…I am satisfied that he passes the "acid test" referenced by Justice Cromwell in *White Burgess Langille Inman v. Abbott and Halliburton Co.*, 2015 SCC 23, at para. 32: "The acid test is whether the expert's opinion would not change regardless of which party retained him or her".

[217] The Appellants say the trial judge would not necessarily have taken this view of D/Sgt. Isnor's evidence if he had known about the fresh evidence.

The Appellants' Fresh Evidence Motion

[218] The Appellants' fresh evidence motion was supported by affidavits from Mr. Howe, and trial counsel for Mr. James (Trevor McGuigan) and Mr. Pearce (Patrick MacEwen). Mr. Howe's affidavit attached a transcript of D/Sgt. Isnor's testimony at a preliminary inquiry held in Saskatoon. D/Sgt. Isnor testified as a witness for the Crown in the prosecution of Hal Porteus, a member of the HAMC. Mr. Porteus

had been charged with threatening D/Sgt. Isnor at an HAMC gathering that occurred on July 20, 2012.

[219] Before I discuss the testimony from the fresh evidence motion – the Crown cross-examined each of Mr. Howe, Mr. McGuigan, and Mr. MacEwen – I will describe the fresh evidence the Appellants put forward in the form of the preliminary inquiry transcript.

[220] On July 20, 2012, as part of his job with the Criminal Intelligence Service of Canada, D/Sgt. Isnor was at the Ramada hotel in Saskatoon for the Canada Run gathering of the Hells Angels, collecting intelligence on the HAMC. Also in attendance were Winnipeg police officers and Biker Enforcement Unit officers from Ontario. The police wanted to record motorcycle licence plate numbers from motorcycles parked in the hotel parking lot. As this information was being collected, D/Sgt. Isnor and another officer kept watch. Hal Porteus came out and wanted to know what the police were doing, and who was in charge. D/Sgt. Isnor, the senior office on the scene, said he was in charge. Mr. Porteus asked why this was necessary as there had been a traffic stop the day before. D/Sgt. Isnor told Mr. Porteus "…We don't have to negotiate, we're just doing our job, and…we have a right to be here…" Mr. Porteus was a little upset and wanted the police to leave. D/Sgt. Isnor testified that Mr. Porteus nodded his head and the police officers were surrounded by fifteen to twenty bikers. Mr. Porteus became very agitated when he was told the police intended to continue to do their job. He then asked D/Sgt. Isnor how they felt, did they feel intimidated, "We're surrounding you here, are you feeling scared…is the hairs [*sic*] on the back of your neck starting to stand up…" D/Sgt. Isnor felt "very intimidated".

[221] D/Sgt. Isnor made a criminal complaint against Mr. Porteus which led to him testifying at the preliminary inquiry.

[222] Mr. Howe says he discovered after his trial that D/Sgt. Isnor had Mr. Porteus "charged with intimidation" for the July 2012 incident. The Appellants submit that D/Sgt. Isnor should have disclosed at their trial his involvement as a complainant in the prosecution of Hal Porteus.

[223] In their affidavits, Mr. McGuigan and Mr. MacEwen used identical language to say their trial strategy would have changed had they known D/Sgt. Isnor had "experienced intimidation by a member or members of the Hells Angels Motorcycle Club". "I would have utilized this information in cross-examination to

determine whether Len Isnor was biased against ‘bikers’ generally, especially those charged with Criminal Organization offences”.

[224] In their affidavits, Mr. McGuigan and Mr. MacEwen each stated their belief that the fresh evidence:

> …could have affected the outcome of the trial as the Learned Trial Judge may have determined that Len Isnor was biased and partial against [the Appellants] and therefor unable to give expert opinion evidence.

[225] Mr. McGuigan’s responses to the Crown’s cross-examination on the fresh evidence motion illuminated how defence counsel would have utilized the preliminary inquiry transcript in the Appellants’ trial had they known about it. The issue of D/Sgt. Isnor’s involvement with Hal Porteus would have been raised at the qualifications *voir dire* into the admissibility of the proposed opinion evidence. Mr. McGuigan explained D/Sgt. Isnor’s personal victimization by members of an outlaw motorcycle club would have given defence counsel traction to argue his evidence was inadmissible as he was not impartial. Or, if he was qualified to give expert opinion evidence, that it should not be accorded much weight.

[226] Mr. McGuigan acknowledged defence counsel did not make any argument about partiality at the *voir dire*. The Appellants say they had nothing to work with. That only changed once they had D/Sgt. Isnor’s preliminary inquiry testimony in relation to the Hal Porteous incident.

[227] The Appellants argue the fresh evidence raises a further concern about D/Sgt. Isnor:

> …the discovery of this evidence calls into question whether Detective Staff Sergeant Isnor was objective in his testimony. However, even more important, his failure to disclose this information raises questions with respect to his honesty, integrity and his obligation, as an expert to be neutral and unbiased.
>
> (Howe and James Factum, para. 65)

[228] The Appellants say D/Sgt. Isnor was deceitful in not mentioning the 2012 incident with Hal Porteus and deliberately avoided revealing his *animus* toward outlaw motorcycle clubs.

Analysis of the Fresh Evidence Motion

[229] It is settled law that an expert must be fair, objective and non-partisan. A witness who is unable or unwilling to fulfill their duty to assist the court impartially, does not merit qualification as an expert and should be excluded (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at para. 46).

[230] *White Burgess* established that once a proposed expert has attested to their objectivity and impartiality:

> [48] …the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence.

[231] The trial judge in his decision qualifying D/Sgt. Isnor to provide expert opinion evidence, found he:

> [16] …understood his duty to the court, to act not as an advocate, but that he was to assist the trier of fact, and emphasized that his evidence would be fair, unbiased and objective…

[232] I have not been persuaded by the Appellants that had they known about the Porteus preliminary inquiry, they could have undermined D/Sgt. Isnor's sworn evidence that he understood his role as an impartial witness whose duty it was to assist the court. I find the fresh evidence fails the second and fourth requirements of the *Palmer* test (*Palmer v. The Queen*, [1980] 1 S.C.R. 759).[2] It does not bear on a decisive or potentially decisive issue in the trial and it could not have affected the result.

[233] The second *Palmer* requirement obliges the Appellants to tie the fresh evidence to a decisive trial issue. They note the centrality of D/Sgt. Isnor's trial evidence to the issue of whether the BMC qualified as a criminal organization. As I understand their arguments, a finding of bias against D/Sgt. Isnor would have excluded him from being able to give the opinion evidence relied on by the trial judge in determining the BMC was a criminal organization.

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[2] The first and third requirements under the *Palmer* test are that the fresh evidence could not have been available for trial and that it be reasonably capable of belief. I am satisfied these criteria are not in issue here.

[234] The Porteus preliminary inquiry evidence dealt only with the issue of whether there was sufficient evidence to commit Mr. Porteus to trial for intimidation. D/Sgt. Isnor's testimony at the preliminary inquiry in direct and cross-examination was a simple recitation of facts. It disclosed no bias or *animus*. The mere fact that D/Sgt. Isnor made a criminal complaint against a member of the HAMC for intimidation does not establish partiality that should have precluded him from providing expert opinion evidence at the Appellants' trial.

[235] The same observations apply to the requirement for the Appellants to show that the fresh evidence could have affected the outcome of the trial. The most the Appellants can say is that the preliminary inquiry transcript would have given them a focus for questioning D/Sgt. Isnor on the issue of bias. They have not shown how the preliminary inquiry evidence, or even the fact that D/Sgt. Isnor was a complainant in a prosecution against a member of the HAMC, would have revealed him to be biased against outlaw motorcycle clubs, such as the BMC. There is no basis for a finding that the fresh evidence could have affected the trial judge's determination that the BMC was a criminal organization and the Appellants' guilt had been proven beyond a reasonable doubt.

[236] At the time of the *voir dire* on the issue of whether D/Sgt. Isnor could be qualified to give expert opinion evidence, the defence were well-informed about his pedigree. They knew D/Sgt. Isnor had extensive involvement as a senior police officer investigating outlaw motorcycle clubs. He had developed his knowledge and expertise about OMC's through his role in law enforcement. His role as a complainant in a prosecution for intimidation was not where he acquired his knowledge that outlaw motorcycle clubs are involved in criminal activity. He was well-versed in that knowledge already.

[237] The trial judge was well-aware that D/Sgt. Isnor had only ever testified as an expert for the Crown, never the defence. D/Sgt. Isnor confirmed in cross-examination at the qualifications *voir dire* that he had previously provided expert opinion evidence for the Crown in proceedings against the Hells Angels, FU Crew, Red Devils and Outlaws.

[238] Appellants' counsel on appeal pointed to statements D/Sgt. Isnor made in his trial testimony as evidence of partiality against OMC's. When D/Sgt. Isnor responded to certain questions he did so in a manner consistent with his law enforcement experience. Taken in context, it would be unrealistic to expect a

police officer to have neutral views about homicide and major drug trafficking. There was nothing inappropriate about these responses on cross-examination:

- When asked about a BMC member's 666 pin (said to denote the member has killed for the club) and the fact the member had no homicide convictions on his record: "He'd probably be in jail if we'd convicted him, yes."

- When asked if he had knowledge of a search at a HMAC clubhouse in British Columbia and the seizure of $20 million: "I'd certainly know that. That would be – that would be a great bust".

- When asked about the seizure by police of drugs, firearms and money from a Black Pistons clubhouse in 2013 and his earlier evidence that OMC rules prohibit storing anything in a clubhouse that relates to criminal activity: "Sometimes we get lucky, yes".

[239] The trial judge made no error in finding the *White Burgess* criteria for admitting expert opinion evidence had been satisfied. D/Sgt. Isnor testified he understood his duty to assist the court as a fair, unbiased and objective expert witness. The Appellants put nothing forward at trial or in this appeal to throw that testimony into question.

[240] For the reasons given above, I would not admit the fresh evidence.

Conclusion

[241] I would give no effect to the Appellants' argument that D/Sgt. Isnor was biased and should not have been qualified to give expert opinion evidence.

Issue #5 Did the trial judge err in relying on D/Sgt. Isnor's opinion evidence to determine the Bacchus Motorcycle Club was a criminal organization?

Background

[242] As I have noted, the Appellants unsuccessfully opposed the Crown's application at trial to have D/Sgt. Isnor qualified to give expert opinion evidence about the BMC. They were subsequently unable to persuade the trial judge he should not accord weight to D/Sgt. Isnor's opinion that the BMC had the characteristics of a criminal organization.

[243] At the qualifications *voir dire*, in response to questions from the Crown, D/Sgt. Isnor confirmed he anticipated giving evidence on the following subjects: the relationship between the BMC and the HAMC; the evolution of OMC's in general and, specifically, the evolution of the BMC; comparing the HAMC with the BMC; and the BMC modelling itself after the HAMC.

[244] The defence took no issue with D/Sgt. Isnor's expertise in relation to the Hells Angels. They accepted he was well-qualified to provide opinion evidence about the HAMC (in a case where it was relevant), but not in relation to the BMC about which, in their submission, he had minimal knowledge. At the *voir dire*, Mr. Howe's counsel put the argument in these terms: remove the Hells Angels from D/Sgt. Isnor's suite of expertise and there is "very little left upon which [he] can found his opinion".

The Trial Judge's Decision on Qualifying D/Sgt. Isnor

[245] The trial judge qualified D/Sgt. Isnor as requested by the Crown to give expert opinion evidence about the BMC. He noted that D/Sgt. Isnor's testimony was "expected to lead to his opinion, and the inference that the BMC is a criminal organization" (*R. v. Howe*, 2017 NSSC 213, at para. 15).

[246] The trial judge observed the defence had not reiterated in oral argument what had been said in written submissions that evidence from D/Sgt. Isnor regarding the HAMC was irrelevant and highly prejudicial nor had they clarified how such evidence might be prejudicial to the their right to a fundamentally fair trial. He concluded it would not be appropriate to exclude that evidence on a probative value/prejudicial effect basis. This aspect of the trial judge's decision qualifying D/Sgt. Isnor has not been appealed.

[247] The trial judge's analysis relied on leading case law on expert evidence, including: *R. v. Sekhon*, 2014 SCC 15, at paras. 43-47; *R. v. Mohan*, [1994] 2 S.C.R. 9; and *White Burgess*, 2015 SCC 23. He also quoted from *R. v. Venneri*, 2012 SCC 33, at paras. 36-41, on the definition of a criminal organization and *R. v. Villaroman*, 2016 SCC 33, at paras. 25-43, on circumstantial evidence and the drawing of inferences. He concluded that D/Sgt. Isnor was qualified to give opinion evidence about the BMC and inventoried his reasons (*R. v. Howe*, 2017 NSSC 213):

> [30] In essence, the defendants say that Sgt Isnor does not have sufficiently *reliable* "specialized knowledge" about the BMC; nor does he have sufficient

education, training regarding, and experience with the BMC specifically, such that he can be considered to have the required "specialized knowledge"; therefore, he cannot give opinion evidence about the BMC.

[31] I disagree with the defendant's reasoning, I find Sgt. Isnor has specialized knowledge about so-called "outlaw motorcycle gangs/clubs". He has made a study of their general nature and characteristics, history, organization structure and hierarchy, culture, values and practices, including the main purposes and activities of the clubs, and their language and symbols.

[32] As I understand his proposed evidence based on his specialized knowledge, he has an understanding of these issues, which he could apply to the factual matrix available at trial regarding the BMC, and give opinion evidence about the significance of such matters individually and collectively, such that it would be of assistance to this court in determining the issue, whether the BMC was in 2012 demonstrably a "criminal organization" as defined in s. 467.1. So qualified, he could testify in this regard without having extensive personal knowledge regarding the BMC.

[33] However, in any event, he has an extensive personal knowledge and stores of reliable information received regarding the BMC (including specifically from the very extensive trial evidence of Sgt. MacQueen), *inter alia*:

1. The BMC mother chapter in Albert County, New Brunswick, started operation in 1972; thereafter other chapters followed (the Cursed MC located in St. John New Brunswick became the St. John BMC chapter in 2003; The Mariners MC located in St. George, New Brunswick area became the St. George BMC chapter January 9, 2010, the same day that the East Coast Riders MC became the Halifax BMC Chapter.

2. The HAMC Halifax, Nova Scotia chapter ceased operation in approximately 2002. There was some form of relationship between the HAMC and BMC in the years 2000 -- 2002: see the Christmas card sent by the HAMC Halifax chapter in 2001 to the Albert County BMC; the February 18, 2000 HAMC East Coast Canada minutes referencing "we [the Halifax chapter] have just formed a Atlantic coalition with other MC clubs in the Maritimes. Bacchus MC (NB), Highlanders MC (NS), CHC (PEI), Cursed MC (NB)." seized March 28, 2001; and the January 11, 2002, HAMC national meeting minutes - [under the Halifax HAMC chapter report to the national meeting] "Bacchus MC from Moncton proposed for Prospect. If you [*sic*] charter votes No, send the votes to Michael within 30 days. If there aren't any No votes they will make them prospects" --seized February 26 2004; there is also photographic evidence in Exhibit 40 page 53 showing the BMC were a Hells Angels Hang Around Chapter; some form of relationship continued thereafter given the visible HAMC "support gear" and congratulatory plaques to the BMC, photographs showing members of the BMC and HAMC together (for example in

the Sherbrooke, Québec HAMC clubhouse) , in calendars and otherwise, as found in searches of the Albert County BMC clubhouse in 2005 and 2007, and the Route 81 store in Charlottetown which was being run by Albert County BMC member, Dean Huggan;

3. Sgt. Isnor became the Ontario Tier 3 coordinator in 2001 regarding the national OMG strategy, and would have thereafter received a continuous flow of information regarding OMG activities in Atlantic Canada;
4. Sgt. Isnor was familiar with, and had personal dealings with members of OMGs in Ontario, who then moved to the Atlantic provinces and joined the BMC there - Tero Rampanen, Matthew Foley, Art Belson, Brian Schofield, Clinton Murray; he also had insights as a result of his close contacts with David Atwell and Stephen Gault, HAMC Ontario members who travelled to the Atlantic Provinces, and had connections with BMC; as well as the fact that the Ontario Red Devils had an association with BMC since 1995, and during the years 2005 - 2014, they wore respective affiliation badges, until the Red Devils patched over to HAMC in 2014;
5. While serving on the CISC [Criminal Intelligence Service Canada], Sgt. Isnor would have had even greater insights into the activities, characteristics and status of the BMC, including the vetting by analysts of raw data, so that only reliable information was generally disseminated;
6. Sgt. Isnor also reviewed the materials seized and photographed in the 2005 and 2007 searches of the Albert County BMC clubhouse, and the 2012 Hants County clubhouse search, as well as debriefed with Sgt. MacQueen (and others) who provided very extensive reliable, and first-hand information to assist Sgt. Isnor in formulating his opinion;
7. Sgt. Isnor has personally attended in the Atlantic provinces to see some BMC clubhouses, and view their membership in person.

[248] The trial judge concluded he was "very satisfied" D/Sgt. Isnor, whose curriculum vitae he described as impressive, had "the necessary education, training, experience and specialized knowledge" to permit him to be qualified as the Crown proposed. He found no reason "to restrict or preclude his anticipated evidence on a probative value/prejudicial effect basis" (at para. 34).

The Trial Judge's Decision to Accord Weight to D/Sgt. Isnor's Opinion

[249] The trial judge accepted D/Sgt. Isnor's evidence that the BMC had modelled themselves after the HAMC. He described the evidence as showing "a remarkable

degree of similarity" (Conviction Decision, at para. 261). Noting the HAMC had been found to be a criminal organization by trial and appellate courts on numerous occasions, the trial judge was careful to remind himself that:

> [264] …even if the Hells Angels MC was found to be a "criminal organization" by numerous courts between 1997 and 2006, these factual findings, standing alone, cannot be used as evidence by me that, as an organization, the BMC was pursuing a criminal path at that time, or since.

[250] The trial judge examined the BMC through the lens of the eight characteristics common to OMC's. In doing so, he accepted D/Sgt. Isnor's evidence about the applicability of these characteristics to the BMC:

> [267] Based on his experience, Sergeant Isnor has found the eight characteristics to be helpful in assessing whether the BMC is a criminal organization, although he acknowledged other approaches exist. I agree that an examination of these characteristics is helpful. I accept his evidence regarding the BMC.
>
> [268] Those eight common characteristics are: structure, membership, written and unwritten rules, associates, colours, clubhouses, intelligence gathering, and criminal activity. I will consider them each in turn.

[251] What follows in nearly 100 paragraphs of the trial judge's reasons is a meticulous and comprehensive examination of the evidence, including what had been provided by D/Sgt. Isnor. He found the BMC, at the material times, to be a "criminal organization" (Conviction Decision, para. 360).

[252] I note the defence conceded at trial that D/Sgt. Isnor was entitled to refer to the factual evidence about the BMC provided by S/Sgt. MacQueen in his testimony. The trial judge stated he had no difficulty in D/Sgt. Isnor relying on S/Sgt. MacQueen's evidence about the BMC, describing S/Sgt. MacQueen as a "very reliable source" and "a very credible candidate to be an expert in relation to [the BMC]".

[253] The trial judge accepted D/Sgt. Isnor's opinion that:

> [361] …at the material times, the BMC condoned and encouraged serious criminality by its members in order to maintain its reputation as the dominant 1% MC in the Atlantic provinces, and to reap material benefits for its members, individually and collectively. He was of the opinion that the BMC has several intertwined main purposes or activities: most importantly is protection of its reputation – the "power of their patch"; others include, the commission of serious

> criminal offences, and protection of the organization's survival, and taking any steps necessary to ensure that the BMC not only survives, but flourishes…[3]

[254] The trial judge proceeded to examine each of the main purposes or activities identified by D/Sgt. Isnor. He then explained why he concluded beyond a reasonable doubt that in 2012, the BMC was a criminal organization as defined in s. 467.1 of the *Criminal Code*. He found this to be the only reasonable inference on all the evidence.

[255] In reaching this conclusion, the trial judge accepted D/Sgt. Isnor's opinion about the BMC's "several main purposes or activities": protection of the BMC reputation for violence ("the power of the patch"); the commission of one or more "serious offences"; and protecting its "territorial dominance in the motorcycling milieu" (para. 380).

The Position of the Parties on Appeal

[256] On appeal, the Appellants have reiterated their "minimal knowledge" objection to D/Sgt. Isnor's evidence and the weight given to his evidence by the trial judge. They have asked this Court to view this deficiency in D/Sgt. Isnor's qualifications – that he was not a "properly qualified expert" – alongside their bias argument. I have already addressed the latter issue.

[257] In the Appellants' submission, D/Sgt. Isnor brought an attenuated and stale opinion to the table and the trial judge erred in finding otherwise. They submit the evidence offered by D/Sgt. Isnor about the HAMC was irrelevant to a proper assessment of the BMC. They say his opinions about the BMC should not have been given any weight:

- He had minimal expertise in relation to the BMC;
- Most of the information he had about BMC was "hearsay or outdated";
- He had no "inside information" about the workings of the BMC, unlike the informant/agent information he obtained about the Hells Angels;

[3] The trial judge explained in a footnote to paragraph 8 of his Conviction Decision the meaning of the 1% designation used by motorcycle clubs: "Motorcycle clubs wearing the 1% patch are considered to be emulating clubs that originated in the USA, most notably the Hells Angels MC, which portray themselves as part of the hypothesized of [*sic*] 1% of citizens that do not, and will not, abide by societal rules and norms, including not abiding by criminal law prohibitions".

- He had had limited opportunity to investigate the BMC because at the time there were no Ontario chapters;
- He had limited knowledge of the Appellants until this case; and
- The information made available to him about the BMC came from search warrants.

[258] The trial judge dealt with each of these issues in his reasons for qualifying D/Sgt. Isnor that I recited above.

[259] The Appellants also rely on the decision of *R. v. McGean*, 2016 ONSC 1460, where the court declined to qualify a police officer, proposed by the Crown as an expert, because he only had general knowledge and experience with OMC's. Final written submissions by trial counsel for Mr. Pearce referenced *McGean*. I address *McGean* below.

Standard of Review

[260] The framework for admitting expert evidence is set out in *White Burgess*. The threshold requirements to be met for the admission of D/Sgt. Isnor's evidence were: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) a properly qualified expert. It is the fourth criterion that is in issue in this appeal. The Appellants reiterate the argument they made to the trial judge; that on the issue of the BMC, D/Sgt. Isnor was not a properly qualified expert and should not have been qualified.

[261] The admissibility of expert evidence is a question of law reviewable on a correctness standard. The trial judge must have correctly articulated and applied the legal requirements (*R. v. Potter*, 2020 NSCA 9, at para. 438). However, absent a finding of admissibility that is "clearly unreasonable, contaminated by error in principle, or reflective of a material misapprehension of evidence" a trial judge is owed deference for their decision to admit or exclude expert evidence (*R. v. Shafia*, 2016 ONCA 812, at para. 230, referring to *Mohan*).

[262] In *Potter*, this Court described the required approach for trial judges determining whether to admit expert evidence:

> [441] Trial judges are required to engage in a two-step inquiry to determine the admissibility of expert evidence. This must be done in the context of the factual

> matrix of the case and according to the requirements of *Mohan* and *White Burgess*. The evidence must clear the threshold requirements for admissibility and, even if it does, the trial judge must then undertake an analysis of whether the benefits of receiving the evidence outweigh any costs.

Analysis

[263] In addition to describing D/Sgt. Isnor's 33-page curriculum vitae as impressive, the trial judge noted in his decision following the qualifications *voir dire* how well-qualified D/Sgt. Isnor was to give the expert opinion evidence sought by the Crown:

> [25] His CV, and testimony, clearly establish that he is a nationally and internationally recognized authority on OMG's in Canada. He is a long-standing attendee and presenter, provincially and nationally at conferences in Canada, as well as internationally, regarding OMG's.
>
> [26] He developed, and continues to maintain an active role in, a cross-Canada training program to ensure qualified expert witness personnel regarding OMG's are available to testify in court.
>
> [27] Since April 2015, when he discontinued his 5-50% CISU/BEU [Criminal Intelligence Service Canada/Biker Enforcement Unit] dual role, he has returned to be the Operations Manager of the BEU.
>
> [28] His CV outlines when and where he was qualified to present expert evidence on OMGs in Canada. He has been previously qualified in similar manner to that proposed here, in relation to the HAMC, the Outlaws, Satans Choice and the Red Devils among others.
>
> [29] He has specifically been qualified to testify in a similar manner to that proposed here in relation to the BMC: by the preliminary inquiry judge herein, Provincial Court Judge Flora Buchan; and recently in the unreported decision in *R. v. Casola*, May 2 – 4, 2017, Provincial Court in Sudbury, Ontario, by the Honourable Judge Lalonde presiding. His CV summarizes that he was "qualified to present expert testimony…in regards to the structure, organization, membership and activities of Outlaw Motorcycle Gangs in general, and specifically regarding Bacchus Motorcycle Club, HAMC, Outlaws Motorcycle Club, and the Red Devils Motorcycle Club…further qualified to testify on the interrelationships between the aforementioned clubs, their intelligence gathering activities, and the reasons for intelligence gathering".

[264] I find no error in the trial judge's assessment of D/Sgt. Isnor as a "properly qualified expert". He did not materially misapprehend the evidence nor make any error of principle. He addressed the arguments advanced by defence. His decision to qualify D/Sgt. Isnor was eminently reasonable.

[265] Furthermore, the considerable weight the trial judge placed on D/Sgt. Isnor's opinions was amply justified and is entitled to deference. He set out and addressed the defence arguments challenging the proposition the BMC was a criminal organization. He conducted an assessment of the issue based on the whole of the evidence before him and made factual findings that were fully supportable in the record. These included:

> [382] I accept that the BMC and its members, deliberately cultivate and foster a reputation for violence (including having all their paraphernalia and support gear bear intimidating or violent imagery and messaging).
>
> [383] I accept that the BMC have their clubhouses fortified, constantly monitor the outside of their premises, and equip themselves with devices such as radio frequency detectors and police scanners.
>
> [384] I accept that the BMC and its members, aggressively pursue a culture of secrecy, including having ubiquitous reminders in writing in their clubhouses, to the effect that that they may be "bugged", and that "what is said here, stays here."
>
> [385] I accept that the BMC and its members have an *animus* or hostility to anyone (including its members, associates, or persons who are not associated with the club, but may have information about the club and its activities) who has contact with, or speaks to, the police or other law enforcement personnel.
>
> [386] I accept that the BMC and its members gather intelligence (photos, addresses, vehicle identification and license plate information etc.) about police personnel, and materials such as police investigation instruction manuals.
>
> [387] I accept that an unusually high proportion of the BMC members have criminal records, and they have a specific rule anticipating that, not only will their members commit criminal offences, but that they will go to jail.
>
> [388] I accept that for those of its members that have received convictions for serious criminal offences, there has been no negative impact on their membership status; or alternatively, they were promoted within the organization.
>
> [389] I accept that there is an elaborate and structured recruitment process. No one can join without significant scrutiny.

[266] On appeal, the Appellants repeated arguments made at trial that D/Sgt. Isnor had formed his opinions without regard for what the defence said were anomalous features of the BMC, features that were inconsistent with the characteristics of an OMC that is a criminal organization. The Appellants cited several examples, all of which had been addressed by the trial judge.

[267] The Appellants suggest the BMC tolerated law enforcement-related associates. The trial judge had dealt with this in an extensive footnote to his decision:

> The defendants have suggested that the BMC are not averse to having law enforcement related personnel as members -- they cite RM, for his involvement in the Citizens on Patrol; Theodore (Ted) and Gail Baker, a member of Correctional Services Nova Scotia, and Deputy Warden of the federal jail, Nova Institution for women, respectively, for their involvement as a striker/prospect and friend to the BMC approved East Coast Riders MC when in 2006 they were stopped by police on their way to a BMC event in Albert County; and a member of the Department of Natural Resources offices in New Brunswick who was a member of the Mariners MC and patched over to the BMC. However, as the Crown points out, RM was never offered the chance to become a member of the BMC outright. Mr. James merely suggested he consider "joining", by which I infer he meant RM could join as a hangaround -- guaranteeing RM nothing, but allowing the club to monitor his suitability; the Bakers were not members of the BMC, and Ted Baker's status as a Prospect for the East Coast Riders MC in August 2006 is distinguishable from being a striker/prospect for the BMC; and the New Brunswick DNR and Mariners MC member was permitted to avoid the recruitment process, which is commonly done, as a result of a wholesale patch-over to the BMC, and shortly thereafter he left the BMC in any event.
>
> (Conviction Decision, at footnote 136)

[268] The Appellants point to members of the BMC cooperating with a police investigation contrary to the unwritten OMC rule against doing so. The trial judge described the circumstances of this cooperation in a footnote which elaborated on his statement that he accepted D/Sgt. Isnor's and S/Sgt. MacQueen's "credible evidence that the BMC culture includes an antisocial antipathy toward persons who cooperate with the police under any circumstances…":

> An exception to this general conclusion, occurred in response to the murder of Rusty Hall and his wife on February 25, 2010. Sergeant MacQueen contacted Charlie Burrell, the National President of the BMC, and received approval for BMC members to give statements to the police *exclusively* in relation to the murder of Rusty Hall and his wife. Sergeant MacQueen confirmed that BMC members had never before cooperated with the police, and this was a "one off" extraordinary situation. I accept his evidence on this point…
>
> (Conviction Decision, at para. 317 and Footnote 156)

[269] The trial judge did not regard it as a distinction that the BMC Hants County clubhouse was not fortified as most OMC clubhouses are. He accepted that the

clubhouse "was still under construction as the explanation for why more enhanced security measures, including active video surveillance, fortification, etc., were not in place by September 20, 2012" (Conviction Decision, at para. 343). He was satisfied the unfinished building was the BMC clubhouse of the Hants County BMC. (In 2012 there was only one BMC chapter in Nova Scotia, the Halifax/Hants County chapter to which the Appellants belonged.)

[270] I will now address the Appellants' submission that *McGean* is a comparator case. This argument is wholly unpersuasive. *McGean* concerned a Crown application to have a police investigator, Robert McCleary, qualified to give opinion evidence "in the fields of the culture and structure of outlaw motorcycle gangs, the nature of support clubs, the history and background of the Black Pistons Motorcycle Club ("the Black Pistons") and the Outlaws Motorcycle Club ("the Outlaws"), and whether the Black Pistons constitute a criminal organization" (at para. 3). McGean faced charges for drugs and weapons and that he had committed criminal offences for the benefit of, at the direction of, or in association with a criminal organization, alleged to be the Black Pistons, contrary to s. 467.12 of the *Criminal Code*.

[271] The Black Pistons investigation was the first ever investigation into that OMC. Otherwise, McCleary had been involved in a total of three police investigations into OMCs.

[272] Justice Henderson was satisfied McCleary was qualified, based on his knowledge and experience, to provide opinion evidence about the history, culture and structure of OMCs generally and in relation to the Outlaws. As for the Black Pistons, he limited McCleary's opinion evidence to a historical overview of this relatively new OMC. The judge viewed McCleary as a properly qualified expert within these parameters, noting that:

> [31] I find that McCleary has general knowledge and experience with respect to OMG's, the Outlaws, and the Black Pistons. I accept that McCleary's knowledge and experience is greater than that of the trier of fact, and many aspects of his proposed evidence will be useful. However, I also accept the accused's submission that, for some parts of the proposed evidence, McCleary's peculiar or special knowledge is minimal.
>
> [32] McCleary's knowledge about motorcycle clubs has only been directly acquired since January 2011 when he joined the BEU [Biker Enforcement Unit], and he began to attend annual conferences about OMGs. I accept that during the four years between the start of his work with the BEU and the date of his expert

> report McCleary acquired general knowledge about OMGs, the Outlaws and the Black Pistons. But, McCleary clearly does not have the same extensive knowledge about any particular motorcycle club as, for example, the RCMP officer in the case of *R. v. Lindsay*, [2004] O.J. No. 4097, who provided expert evidence with respect to the Hell's Angels based on 30 years of police work, most of which was spent investigating the Hell's Angels.

[273] The judge went on to note that McCleary acknowledged some of what he knew about the Black Pistons and the Outlaws had come from literature and internet articles, which he could not show were reliable. In some instances, McCleary did not know the identity of the authors.

[274] McCleary was not qualified to give opinion evidence on whether the Black Pistons was a criminal organization as defined by the *Criminal Code*.

[275] There is a stark contrast between the knowledge and experience of McCleary and that of D/Sgt. Isnor. In addition to the paragraphs I recited earlier from the D/Sgt. Isnor qualifications *voir dire* decision, the Crown neatly encapsulates the difference in its factum:

> Contrast this with Staff Sgt. Isnor's 24 years of experience dealing with OMG's in Canada, culminating in his appointment as one of two national co-ordinators for the Criminal Intelligence Service of Canada. In his role with the CISC, Sgt. Isnor dealt exclusively with OMG's both nationally and internationally, including the BMC. Staff Sgt. Isnor published a book, while employed with the Biker Enforcement Unit division of the Organized Crime Enforcement Bureau in Ontario, utilized by law enforcement across Canada as a training manual to assist front-line law enforcement in dealing with OMG members…

Conclusion

[276] The trial judge was correct in his articulation and application of the law for qualifying expert evidence and affording it weight. D/Sgt. Isnor was highly qualified to provide the opinion evidence on which the trial judge relied in concluding the BMC was a criminal organization.

[277] I would give no effect to this ground of appeal.

[278] Although I am satisfied the trial judge committed no reversible error in relation to this ground of appeal, I wish to address a question he put to D/Sgt. Isnor near the conclusion of his testimony. It sought to elicit, and elicited, an opinion from D/Sgt. Isnor that approached the ultimate issue the trial judge had to decide.

[279] Following the completion of D/Sgt. Isnor's examination by Crown and defence, the trial judge had some questions about his testimony. An exchange relating to the issue of whether the BMC was a "criminal organization" issue went as follows:

> **The Court**: Okay. Right. You – I just want to understand your opinion, because a direct question hasn't been put to you. But, and this is partly because obviously I don't have your report, so I don't have that, but what – let me just start with this initial question. What is your opinion, just so I make sure I understand it, after everything, you know, everything you've considered, your evidence here in court specifically, you know, you've now had direct, cross-examination and redirect. At the end of that, what is your opinion about the allegation that the Bacchus Motorcycle Club in 2012 specifically, which is the time period here, was or was not a criminal organization as defined in the *Criminal Code*?
>
> **D/Sgt. Isnor**: My opinion?
>
> **The Court**: Yes.
>
> **D/Sgt. Isnor**: What is my opinion whether they are a criminal organization? Is that correct? You're putting it right on the line there?
>
> **The Court**: Yes.
>
> **D/Sgt. Isnor**: I believe they are a criminal organization

[280] It is my view this question should not have been asked. Whether the BMC was a "criminal organization" was an issue the trial judge had to decide, based on all the evidence. D/Sgt. Isnor had testified on direct and under cross-examination over a number of days, giving comprehensive evidence as a qualified expert. The trial judge was well-equipped to determine whether or not the BMC was a criminal organization as defined in the *Criminal Code*. It was unnecessary for him to have asked for D/Sgt. Isnor's opinion.

[281] D/Sgt. Isnor did not seek to offer his direct opinion on whether the BMC was a criminal organization. The trial judge asked him for it. He asked for his opinion on an issue that was his to decide. It is well-advised to keep in mind the Supreme Court of Canada's caution in *Sekhon* about the respective roles of expert and trier of fact:

> [75] At the same time, this Court has repeatedly cautioned that expert evidence must not be allowed to usurp the role of the trier of fact. The trier of fact, whether a judge or a jury, is responsible for deciding the questions in issue at trial. Judges must be especially cautious where the testimony of police expert witnesses is concerned, as such evidence could amount to nothing more than the Crown's

> theory of the case cloaked with an aura of expertise. The courts have clearly recognized the risk that expert evidence could usurp the role of the trier of fact in the assessment of credibility, and even in the decision on the ultimate issue of guilt or innocence. I see no reason to believe that this danger is less real where the evidence is given by a state agent like a police officer rather than by a scientific expert.
>
> [76] The *Mohan* requirement of necessity is the primary safeguard against the inappropriate proliferation of expert evidence. But even where the expert's evidence is broadly necessary, as in this case, it should be assessed with special scrutiny as it approaches the "ultimate issue": *Mohan*, at p. 24; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 37. The decision to qualify an expert witness does not end the need for scrutiny of the expert's evidence. A properly qualified expert could stray into expressing inadmissible opinions about the guilt of an accused, and the trial judge must ensure that the expert's testimony stays within the proper boundaries of such evidence and maintain the integrity and independence of his or her own fact-finding function as regards the credibility of witnesses and the guilt or innocence of the accused.

[282] In this case, I do not find the trial judge's question constituted reversible error. Despite the trial judge's question of D/Sgt. Isnor, the integrity and independence of his own fact-finding remained intact. He gave the "criminal organization" issue a comprehensive analysis, drawing from the extensive and admissible evidence of an obviously well-qualified expert.

[283] The trial judge began his examination of the "criminal organization" issue by noting D/Sgt. Isnor's opinion that the BMC had modeled themselves after the HAMC. He said: "I agree that one could draw that conclusion, and I find there is a remarkable degree of similarity" (Conviction Decision, at para. 261). He went on to note that even if the HAMC has been found to be a criminal organization by numerous courts between 1997 and 2006, "…these factual findings, standing alone, cannot be used as evidence by me that, as an organization, the BMC was pursuing a criminal path at that time, or since" (Conviction Decision, at para. 264). He proceeded to review and assess in considerable detail at paragraphs 260 to 375 of his Conviction Decision the evidence from the trial, including D/Sgt. Isnor's testimony. He explained at paragraphs 376 to 413 why he had concluded beyond a reasonable doubt that the BMC was a "criminal organization". His decision establishes he formed his own conclusion about the "criminal organization" issue based on the detailed evidence he had before him and not because of D/Sgt. Isnor's answer to his question.

[284] The trial judge concluded his questions of D/Sgt. Isnor by asking Crown and defence counsel if they had any questions. They did not. He expressed relief that

he “didn’t kick a hornet’s nest”. Asking an expert to provide his opinion on an issue the trial judge must decide might well do that, although in this case it did not.

[285] It is not my intention to discourage appropriate questioning by trial judges of witnesses, including expert witnesses, to clarify what was said and ensure a firm grasp of the evidence. Such questioning may be essential to trial judges effectively discharging what is required of them. However, great caution must be exercised where questioning approaches the ultimate issue. Here, that caution should have restrained the trial judge from asking D/Sgt. Isnor whether, in his opinion, the BMC was a “criminal organization”.

Disposition

[286] For the reasons given, I would dismiss the appeals and uphold the convictions.

Derrick, J.A.

Concurred in:

Bryson, J.A.

Scanlan, J.A.