SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Howe*, 2018 NSSC 274

Date: 2018-11-07
Docket: *CRH* No. 441632
Registry: Halifax

Between:

Her Majesty the Queen

v.

Duayne Jamie Howe, Patrick Michael James, and
David John Pearce

LIBRARY HEADING

Restriction on Publication: 486.5 CC

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	April 4; May 19; May 24; May 25; May 27; May 30; June 1; November 21 – 25; November 28 – 29; December 2, 5, 7 8, 2016; July 10 – 14; July 31 – August 4; December 4 – 7, 2017; May 7, 2018, June 22, 2018 and October 22, 2018 in Halifax Nova Scotia
Written Decision:	November 7, 2018
Subject:	Sections 467.12 and 346 *Criminal Code* sentencing – extortion by three offenders, in the context of a finding of the offence having been committed "for the benefit of, at the direction of, or in association with, a criminal organization."
Summary:	Messrs. Howe James and Pearce were all members of the Bacchus Motorcycle Club (BMC) in 2012. Between approximately June and August 28, 2012, Mr. James criminally dissuaded RM, a simple motorcycle enthusiast, from starting a motorcycle club (MC) of his own design, bringing a three-piece patch or a one-piece patch Brotherhood

MC chapter to Nova Scotia. RM persisted and was in the process of bringing a one-piece patch Brotherhood MC chapter to Nova Scotia in the weeks preceding August 27, 2012. Mr. James contacted RM once he became aware of this, and successfully demanded forthwith that the existing motorcycling vests carrying the Brotherhood MC patch be destroyed ,the remnants thereof be delivered to him, and that the Brotherhood MC post on their Facebook page that no chapter was coming to Nova Scotia, so he could confirm RM's claim that he would not be bringing a Brotherhood MC chapter to Nova Scotia. RM and the President of the Brotherhood MC complied within a day.

RM thought the matter was settled. However, on September 14, 2012, Messrs. Howe and Pearce wearing their BMC regalia, in the company several other BMC members at a "Bikers Down" charity event committed further offences against RM – *inter alia* he was threatened that he should no longer drive a motorcycle in Nova Scotia or attend any motorcycling events or else he would be seriously assaulted.

Issues:

(1) Do the PSRs of the offenders contain inadmissible statements?

(2) What is the proper ambit of Sections 726 and 726.1 Criminal Code comments by offenders and counsel?

(3) What is the range of sentence for the predicate extortion offence in relation to Mr. James, and Messrs. Howe and Pearce?

(4) What is the range of sentence for the "criminal organization" extortion offence in relation to Mr. James, and Messrs. Howe and Pearce?

(5) After the application of the mitigating and aggravating factors, what is an appropriate sentence for the predicate extortion offence regarding Messrs. James, Howe and Pearce?

(6) After the application of the mitigating and aggravating factors, what is an appropriate consecutive sentence, as

mandated by s. 467.14 *Criminal Code*, for the "criminal organization" extortion offence in relation to Messrs. James, Howe and Pearce?

(7) On the basis that the court will sentence each offender for the predicate extortion offence *and* a consecutive sentence for the "criminal organization" extortion offence, how is the court to reconcile the "double counting" effect of these sentences, which effect is due to the operation of the s. 718.2(a)(iv) aggravating "criminal organization" factor applicable to the predicate extortion offence; and the dictate in s. 467.14 that any "criminal organization" offence "shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events…"?

(8) Should the court grant an order for the forfeiture of offence-related property, and should it include the BMC documents, support gear, jewelry and paraphernalia found at the personal residences of the offenders?

Result:

(1) Although hearsay statements which have sufficient credibility and trustworthiness are admissible, the PSRs do contain some objectionable material, which will be disregarded by the court;

(2) Offender statements should not refer to the circumstances of the offence, yet they may include references to the circumstances of the offender, however if material and disputed, and the court concludes it is in the interests of justice to so require, they must be proved in accordance with Section 723 and 724 Criminal Code. Counsel's representations to a sentencing court may include hearsay, however only in relation to material matters which are not in dispute as between the parties. If they are disputed the representation must be withdrawn or proven;

(3) The range of sentence for extortion in the case of Mr. James is between low-end penitentiary terms of

imprisonment in circumstances where aggravating factors are significantly outweighed by mitigating factors, and penitentiary terms of imprisonment up to six years, or more, depending on the mix and weight of mitigating and aggravating factors; the range of sentence for extortion in the case of Messrs. Howe and Pearce is between medium to maximum terms of imprisonment in a provincial correctional facility;

(4) The range of sentence for "criminal organization" extortion offences is between one and five years' imprisonment;

(5) The appropriate sentences for the predicate extortion offence are: Patrick James – three years in custody; Duayne Howe – two years in custody and three years' probation; David Pearce – 18 months in custody and three years' probation;

(6) The appropriate total sentences for the predicate and "criminal organization" extortion offence are:

(a) Patrick James – two years in custody on the predicate extortion offence, one year consecutive on the "criminal organization" offence for a total of three years imprisonment;

(b) Duayne Howe – one year in custody on the predicate extortion offence, and one year consecutive on the "criminal organization" offence for a total of two years imprisonment and three years' probation (specifically including a term to "abstain from being in the company of, or communicating, directly or indirectly with, any person who is a member, striker, hang around of, or person associated with: the Bacchus Motorcycle Club, the Darksiders MC the Highlanders MC, the Charlottetown Harley Club, the Vagabonds MC, the Para-Dice Riders MC, the Hells Angels MC, or any other self-identifying 1% motorcycle club; and not to possess, wear or display any clothing or paraphernalia, including jewelry and

stickers directly or indirectly associated with any of the aforementioned motorcycle clubs"); and

(c) David Pearce – six months in custody on the predicate extortion offence, and one year consecutive on the "criminal organization" offence for a total of 18 months imprisonment and three years' probation (on the same conditions as Mr. Howe).

(7) The court avoided "double counting" by "downsizing" the predicate offence (by i*nter alia* a notional amount for the s.718.2(a)(iv)"criminal organization" factor) and adding a consecutive "criminal organization" sentence to achieve the same result in total that was appropriate for the predicate extortion offence, "grossed up" by the s. 718.2(a)(iv) "criminal organization" factor;

(8) The court granted a forfeiture order in relation to all items sought to be forfeited, based upon the finding that the BMC is a "criminal organization", otherwise the general circumstances of this case, that the items were "offence - related property" and forfeiture was proportional given the nature and gravity of, and the circumstances surrounding the commission of the offences, as well as any criminal records of the offenders.

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Written decision:	November 7, 2018
Counsel:	Glen Scheuer, for the Crown Patrick Atherton for Duayne Howe Trevor McGuigan for Patrick James Patrick MacEwen for David Pearce

PUBLICATION BAN PROVISIONS

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.

There is a s. 486.5 publication ban regarding the identities of the following persons referred to herein as: RM, DM, HJ, JJ, ME, BE, SH.

By the Court:

Introduction[1]

[1] In 2012, the Bacchus Motorcycle Club, (BMC) in pursuit of its main objectives and purposes as a criminal organization, and specifically in this case, Messrs. Howe, James and Pearce, considered themselves to have the authority to decide, who could start or maintain an independent or existing motorcycle club (MC) in the Province of Nova Scotia, and the punishment for persons, such as RM, who did not respect their self-appointed decision-making power.

[2] The BMC perceived RM's conduct as harmful in a material way to the BMC's interests.

[3] RM's offensive conduct was to ignore the demands of Sgt. at Arms Patrick James, representing the BMC's interests, when he told RM in no uncertain terms that RM was not permitted to bring a (three-piece patch or one-piece patch) chapter of the existing three-piece patch Brotherhood MC to Nova Scotia.

[4] Therefore, they visited their self-appointed power of punishment on RM.

[5] First, Mr. James insisted on destruction of any motorcycle clothing, bearing a Brotherhood MC patch and confirmation from the Brotherhood MC that no chapter of theirs was coming to Nova Scotia. RM, his members, and the Brotherhood MC complied forthwith.

[6] Next, two weeks later at a "Bikers down" event in Lower Sackville, BMC members Messrs. Howe and Pearce harassed, threatened, extorted and intimidated RM, with the result that he was terrified for his life, and the physical safety of his family and property. Mr. Howe demanded that he cease riding his motorcycle, and not be present at any motorcycle events in future. RM and his wife sold their motorcycles and never rode again.

[7] Such interference with the liberties of citizens and the extra-judicial imposition of purported punishment requires that proportionate criminal sanctions

[1] These are my reasons for the sentencing outcomes regarding Messrs. Howe, James, and Pearce, who were found guilty on June 22, 2018 – my reasons for conviction are set out in *R. v. Howe*, 2018 NSSC 156.

be imposed to deter the BMC leadership, its members, and others of like mind and inclination.

[8] The danger of criminal organizations exercising such self-appointed powers[2], which I conclude were permitted to persist over years in this case because of their ability to intimidate members of the public at large, was recognized by Justice Fish in *R. v. Venneri*, 2012 SCC 33:

> 36 Working collectively rather than alone carries with it advantages to criminals who form or join organized groups of like-minded felons. Organized criminal entities thrive and expand their reach by developing specializations and dividing labour accordingly; fostering trust and loyalty within the organization; sharing customers, financial resources, and insider knowledge; and, in some circumstances, developing a reputation for violence. *A group that operates with even a minimal degree of organization over a period of time is bound to capitalize on these advantages and acquire a level of sophistication and expertise that poses an enhanced threat to the surrounding community.*
>
> [My italicization added]

[9] In 2012, the Bacchus Motorcycle Club posed an elevated threat to the residents of Nova Scotia.

[10] Moreover, as Justice Fish insinuated, when recruiting, criminal organizations do not necessarily always look for someone to directly engage in criminality, but rather for what personal characteristics or skill-set a like-minded individual can bring for the benefit of the organization in pursuit of its objectives and purposes.

[11] I accept Sgt. Isnor's expert opinion on the latter point, and that it is common for up to 35% of the membership of a 1% MC criminal organization not to have a criminal record.

Background

[12] Messrs. Howe, James, and Pearce were found guilty on charges that, between January 1 and September 14, 2012, as individuals, *and* as members of a criminal organization (per s. 467.12 *Criminal Code*, ie the Bacchus Motorcycle Club, (BMC)) they:

1. Harassed (s. 264, *Criminal Code*);

[2] Another example would be so-called "protection rackets".

2. Threatened to cause serious bodily harm to (s. 264.1);
3. Intimidated (s. 423); and
4. Extorted (s. 346), RM.[3]

(i) Circumstances of the offences

[13] In 2012, RM was a mature individual, community member and businessman. He was an ordinary motorcycle enthusiast, who wanted to form his own motorcycle club (MC) with some friends, purely for their own enjoyment.[4]

[14] His investigations on the Internet and with individuals in the motorcycling community gave rise to his belief that to have a MC, he would need to have express approval from the dominant 1% MC, the BMC, including approval for the name he sought to use for his club. The only 1% MC with a direct presence in Nova Scotia at that time was the BMC.

[15] In practical terms, he was right about that.

[16] I have concluded beyond a reasonable doubt that in 2012 the BMC considered itself to have exclusive "authority" to approve, or not approve, the creation of any new motorcycle clubs in Nova Scotia, or the opening of new chapters of existing motorcycle clubs from outside Nova Scotia.

[17] However, the BMC had no legal authority or right whatsoever to influence anyone who:

1. Would want to create their own distinctive motorcycle club (MC), with whatever name, logo, and area where the club is based; or
2. Would want to join an existing (Nova Scotia, Canadian, International) motorcycle club, by starting a Nova Scotia chapter thereof.

[18] Why did RM consider it necessary to approach the BMC for such approval?

[19] I have found as a fact that the BMC presented itself as having a reputation for violence.[5]

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[3] Specifically, in relation to the predicate s. 264 and 264.1 offences they also committed those offences in relation to "his family".
[4] SH was also a mature individual, community member and businessman, and ordinary motorcycle enthusiast.
[5] For example, see paragraphs 361 – 372 of 2018 NSSC 156

[20] Since at least 2000, the BMC membership generally had stickers or other items such as support clothing, that clearly were meant to show an association between themselves and the Hells Angels MC.

[21] In 2001, the BMC mother chapter in St. Albert New Brunswick was a probationary (Hang-around) chapter of the Halifax Hells Angels MC chapter. By 2001, the Halifax Hells Angels MC Clubhouse, which was the only one in Atlantic Canada, had been decommissioned through successful prosecutions against its membership. Only since approximately 2015 have the Hells Angels MC *per se* returned to have a presence in the Atlantic Provinces.

[22] In spite of their formal absence, in the years around 2005 –2006 the BMC permitted the presence of Hells Angels MC paraphernalia stores in Charlottetown and two in New Brunswick under the name "Route 81". Moreover, BMC members and associates ran the stores.

[23] In the summers of 2005 and 2006, two Ontario Hells Angels MC members, Stephen Gault and David Atwell, who were acting as police agents under the supervision of Sgt. Isnor and a colleague, were each individually on a motorcycle run through the Atlantic provinces. Each had personal meetings with members of the BMC, and one of them had a significant meeting with Charlie Burrell, BMC President since 1972. Photos in evidence show BMC members sitting inside the perimeter of Hells Angels MC clubhouses elsewhere in Canada.

[24] The clubhouse searches of the mother chapter in St. Albert New Brunswick in 2005 and 2007 revealed a massive collection of Hells Angels chapters' stickers from throughout the world.

[25] Sgt. Isnor testified. He was qualified as an expert in the interpretation of such things, and he was of the opinion that the BMC would only be permitted to display these items if they had the approval of the Hells Angels MC.

[26] As a result of the September 20, 2012 search of the BMC clubhouse in Hants County, and the homes of Messrs. Howe, James, and Pearce, each of them were shown to be supporters of, or associated with, the Hells Angels MC.

[27] In the BMC 40th anniversary (2012) calendar, a photo appears under the heading "BMC Hants County Nova Scotia". Messrs. Howe James and Pearce are all shown therein. Mr. James is wearing a Hells Angels MC support shirt of which one can see the numbers "81" in red and white inside the diamond-shaped emblem,

with what appears to likely be "big red machine" written across the chest. Mr. Pearce is wearing a Highlanders MC logo baseball hat.[6]

[28] As I noted in my earlier decision, "the Hells Angels MC have been repeatedly found to be a "criminal organization" in Canada[7] with a persistent reputation for violence; although I added: "I remind myself however that 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."[8]

[29] Though I do not suggest that each and every member of the BMC were necessarily directly involved in fostering the BMC's reputation for violence, a number of their membership were violent, and many, including the leadership of the BMC chose to closely associate themselves with the Hells Angels MC, thereby associating themselves with the "reputation for violence" that the Hells Angels MC had and has in Canada at the relevant times.

[30] I have concluded beyond a reasonable doubt that RM was led to believe, correctly, that if he did not receive the approvals he sought, and went ahead with making his own, or joining an existing (not 1%) MC, the entire BMC membership in the Atlantic Provinces[9] would be made aware of his disrespect to their self-appointed authority, and there would be violent criminal consequences (to him, his family, and his property).

[31] Simply put, I conclude that RM sought the approval of the BMC because he believed, correctly, that if he did not do so, he would be at real risk of physical violence by members of the BMC.

[32] As a result, he made contact with Patrick James.

[33] The BMC had one clubhouse in Nova Scotia, which had been located in Halifax County, but by September 14, 2012, had relocated to Hants County. That single chapter, with its seven members, claimed its territory as "Nova Scotia"

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[6] I accept the evidence that more likely than not the Highlanders MC are a support club of the Hells Angels MC.
[7] Paragraph 262 of 2018 NSSC 156.
[8] Paragraph 264 of 2018 NSSC 156.
[9] Which was the extent of its membership at that time; though since then it has expanded into Ontario.

according to all indications, including the bottom rocker on the back of vests worn by full members.

[34] Mr. James was the Sgt. at Arms of that chapter. Mr. Howe was the secretary-treasurer. Mr. Pearce was a full member.

[35] RM reasonably believed that Mr. James effectively spoke authoritatively for the BMC in Nova Scotia. For that reason, RM pursued discussions with Mr. James during the Spring and Summer of 2012.

[36] RM told Mr. James that he wanted to start his own MC. I concluded beyond a reasonable doubt that Mr. James criminally dissuaded him from starting his own three-piece patch MC.

[37] After his initial request for approval was a "no go", RM did more investigation into existing clubs. He told Mr. James that he had had contact with a (not 1% MC) existing MC from Montréal, the Brotherhood MC, and he wanted to start a chapter of the Brotherhood MC in Nova Scotia. I concluded beyond a reasonable doubt that Mr. James criminally dissuaded him from starting a three-piece patch Brotherhood MC chapter in Nova Scotia.

[38] I find that the nature of Mr. James's statements throughout, are aptly captured by the tenor and content of the following evidence provided by RM regarding what Mr. James said to him:

> There is no way that this is going to happen... This is not sanctioned. You cannot have a three-piece patch down here... The way it works. You have your own club here. You don't come in with a club. What you do is you start off with a one - piece patch. You're a riding club [RC]. Then, maybe after a couple of years you gain respect in the area and people get to know you. Then we move you up, we give you permission to have possibly a two-piece patch. And then after time... If it seems right that you want to have a three-piece patch, you come to us and we'll decide if you have enough time in and if you were warranted to have a three-piece and turn into an MC... What you're doing is disrespecting all these other clubs that have worked their way up and just you... You just think you come in here and become a full-fledged MC.
>
> (Para. 16, 2018 NSSC 156)

[39] However, RM persisted in spite of Mr. James's dissuasion.

[40] RM believed that the BMC would likely approve a one-piece patch MC, from an existing club. He received special approval, from the President of the

Brotherhood MC, for his club's members to wear on the back of their vests a one-piece Brotherhood MC patch. The large one-piece patch included the Brotherhood MC name, their logo, and Halifax County as the area where the club was situated.

[41] RM and his fellow members attended at the Brotherhood MC's annual meeting outside Montréal during the weekend of August 26, 2012, where they received their official membership, chapter confirmation, and right to wear the one-piece Brotherhood MC patch affixed to their vests.

[42] Again, on or about the weekend of August 26, 2012, Mr. James not only criminally dissuaded RM from continuing to bring a Brotherhood MC (one piece patch) to Nova Scotia, but he also insisted that RM destroy all the vests/jackets of his membership and produce the destroyed remains thereof to him; and ensure that the Brotherhood MC post on their Facebook page that no chapter of theirs was coming to Nova Scotia.

[43] RM and the Brotherhood complied within one day of Mr. James's demands.

[44] RM complied as a direct result of Mr. James's actions, demeanour, and statements to him on August 27, 2012, as described in my earlier decision:

> 164 I find as a fact that, on August 27, 2012, Mr. James rode his Harley Davidson motorcycle, wearing his BMC cut and colours, to RM's workplace, and settled himself into a chair in RM's office, to wait for RM. Once RM arrived and the door was closed, I am satisfied beyond a reasonable doubt that, while looking at RM throughout this time in a "deadly serious" manner, Mr. James said to him, in a serious and raised voice, *inter alia*:
>
> > What the fuck were you thinking? *Do you think that you could get away with something like that?...* I fucking told you that you were not having a fucking Montréal Brotherhood patch down here, and you went ahead and fucking did it. Do you know the kind of shit now that you just started?... *I am giving you a get out of jail free card here. I'm not here with everybody. Do you see my arms? They're not sunburned from just walking around the house. We were driving around the whole weekend looking for you because of that picture that went on Facebook, you guys getting patched over in Montréal. Because those [Brotherhood MC patches] were coming off your back. You fucking disrespected us. You more or less or might as well have told us to go fuck ourselves by putting those patches on your back...* [RM: "as a friend, now as a friend, if you were looking at this and you were talking to me, what do you make of this? What can we do here? What's your opinion?"].

> 165 I accept that RM was honestly and accurately recounting what happened when he described Mr. James's actions as: "he stopped, and he put his head down, and he lifted it up, and he looked at me with a very angry face" [and said to me]:
>
> > Let's get something straight. I am not your fucking friend, and I'm going to say something to you. I'm offering you a get out of jail fucking free card... Do you have the patches here?... You get photographs taken of those patches being cut up. Then we want Montréal to put a notice on Facebook that states that there is no chapter in Halifax... by tomorrow... Do you understand what I'm fucking saying to you? *Do you understand the seriousness of the situation and what's going to happen?... This is your only chance... You have a good job. You're a family man. You have a great daughter [and he pointed at the pictures of RM's family] and a lovely wife*. Why would you put yourself in this fucking position? You got a whole bunch of trouble right now. You'll do better. You get this taken care of. *This needs to be done immediately*.
>
> 166 I further accept that RM honestly and accurately recounted his understanding of what Mr. James had said to him, when RM spoke to the Brotherhood MC representative immediately thereafter:
>
> > ... I told them that this is very bad... My family's at risk here... My kids... [cutting up the Brotherhood MC Halifax County Chapter cut and colours] It's the only way to save our asses"

[45] By August 28, 2012, RM's hopes to have his own MC were finished. However, he and his wife, continued to ride their motorcycles.

[46] The mandatory annual meeting of the BMC was held August 31 – September 1, 2012 at the mother chapter in Albert County New Brunswick. All BMC members were required to attend. I was satisfied that by September 1, 2012, RM's perceived disrespect was known to the general BMC membership, and specifically to the Nova Scotia BMC members.[10]

[47] On September 14, 2012, RM and his wife attended had what was advertised as a charity event organized by the "Bikers down" group, and held in a publicly visible area of a strip mall in Lower Sackville. Approximately 80 to 100 people were in attendance.

[48] RM arrived on his motorcycle. He noticed Mr. Howe in his BMC cut and colours. Within a short period of time approximately 4 to 6 males, visibly dressed as BMC members were present.

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[10] See para. 432, 2018 NSSC 156.

[49] Mr. Howe, in the company of Mr. Pearce, both wearing their BMC cut and colours, approached RM while he was alone. They stood for 5 to 10 minutes within arms-length of him. I found the following facts:

> 101 Mr. Howe continuously confronted RM in a very angry manner, because he, and the BMC, considered RM's presence at the event, and his driving of his motorcycle, to be continued disrespectful behaviour to him and the BMC. Mr. Howe was speaking so loudly, that many people present could hear him. He was very aggressively berating RM, all the while "in his face", shaking his head, and moving about in an unpredictable manner.
>
> 102 Mr. Howe told RM that he had disrespected him and the BMC; that they would not forgive him for that; that he and the BMC did not want to see RM at any more biker events or functions; did not want to see him on his motorcycle again; that they were going to give him a serious beating, which they would have done then if there weren't so many people present; and told him to leave the event right away.
>
> 103 During this time, RM was apologetic, saying things like "I'm sorry man -- I did not mean any disrespect," but his pleas did not calm the situation. Mr. Howe remained extremely angry, loud and intimidating.
>
> 104 As RM stated, which I also accept:
>
> > Everybody was talking, and all of a sudden the whole place was going silent and everybody was watching this... And I said, "look ... I'm not allowed at any events -- we did everything you asked. Is this an authorization [from the club] or is this your opinion?' And [Mr. Howe] looked at me and said 'I'm fucking telling you, you get on your fucking bike and get the fuck out of here. You are not fucking welcome anywhere. What makes you think you can fucking disrespect **us** and then show your fucking face around here?'
> >
> > And I said, 'I didn't respect disrespect **you guys**' [and Mr. Howe said] 'oh, getting the fucking patch from Montréal? You didn't fucking disrespect **us**? I'm telling you, you're going to get the fucking shit kicked out of you. Now get on your fucking bike, and get the fuck out of here, and **we** don't want to see you anywheres at any events in Nova Scotia. You are fucking done.'
>
> 105 I add here my finding that Mr. Howe told RM that if the members of the BMC became aware that he was, or ever saw him, driving his motorcycle again, they would physically assault him. RM did not specifically mention this threat, but he did testify that Mr. Howe said to him: "you get on your fucking bike and get the fuck out of here. You are not fucking welcome anywhere" [I infer that reference to mean, 'in Nova Scotia'].

> 106 ME testified that he heard Mr. Howe say words to the effect that RM was no longer welcome at any biker event in Nova Scotia; he should never ride his bike again; and there would be consequences if any BMC members saw him. HJ's testimony at the preliminary inquiry was to similar effect: members of the BMC did not ever want to see him at such events again; did not want to see him on his motorcycle again- and if *they* did that *they* would (I infer), attack him. JJ testified that Mr. Howe said to RM words the effect that: "don't show your face at any other biker events... No right to drive your bike... *We're* going to kick your ass."
>
> 107 Mr. Pearce was present during the entire interval. He said nothing. But sometimes actions speak as loud as, if not louder than, words. The witnesses described his demeanour in the following ways: standing within an arms' length of RM; staring at RM, with his arms folded; trying to look tough; smirking continuously; and nodding approvingly when Mr. Howe was talking. In summary, he was seen to be "backing up" Mr. Howe -- to show strength and intimidate RM. All the while Messrs. Pearce and Howe were wearing their BMC regalia. At no time did Mr. Pearce make any attempt to verbally or physically restrain Mr. Howe's behaviour. I find Mr. Pearce was fully aware that Mr. Howe's behavior was being watched and heard by many of the members of the public who were there.
>
> 108 I am fully satisfied that RM was, in his words "scared shitless"; as was his wife, DM. As they were leaving, BE testified that, she was "stared down" by Mr. Howe, which also made her fearful.
>
> 109 Within a short period of time, RM arranged for HJ/JJ and BE/ME to accompany him and DM, separately on a circuitous drive home, as he was afraid the BMC might discover where he lived. Upon his arrival at home, he contacted a member of the RCMP, and then gave his police statement on September 16, 2012. According to JJ, RM changed his appearance around September 15 or 16, 2012.
>
> 110 Police arranged for special patrols to check on RM at his home, and at his request had a panic alarm installed in his home on September 20, 2012. RM and DM never rode their motorcycles again. They sold them. I infer that they never attended another bikers' event. On or about September 19, RM confirmed to Sergeant MacQueen that he wished the police to investigate further, and lay charges if appropriate.

[50] Having briefly canvassed the circumstances of these offences, I next turn to examine the circumstances of each of the offenders.

(ii) The circumstances of the offenders

[51] The evidence at trial revealed some information about each of the offenders, such as when they joined the BMC. However, the majority of information

regarding these offenders is derived from the Pre-sentence Reports regarding each of them.

[52] The Pre-sentence Reports (PSRs) for Mr. James and Howe were created by probation services in Nova Scotia. Mr. Pearce's presentence report was created in High Level, Alberta where he is presently resident.

[53] I find there are a number of areas of concern in relation to these PSRs. Therefore, I will firstly address those.

Comments on the proper scope of information provided in PSRs

[54] The authority for pre-sentence reports is found in Section 721 of the *Criminal Code*:

> (1) Subject to regulations made under subsection (2), where an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under Section 730;
>
> (2) The Lieutenant Governor-in-Council of a province may make regulations respecting the types of offences for which a court may require a report, and respecting the content and form of the report;[11]
>
> (3) Unless otherwise specified by the court, the report must, wherever possible, contain information on the following matters:
>
> > (a) The offender's age, maturity, character, behaviour, attitude and willingness to make amends;
> >
> > (b) Subject to subsection 119(2) of the *Youth Criminal Justice Act*, the history of previous disposition under the *Young Offenders Act*…, the history of previous sentences under the *Youth Criminal Justice Act*, and of previous findings of guilt under this *Act* and any other *Act* of Parliament;
> >
> > (c) The history of any alternative measures used to deal with the offender, and the offender's response to those measures; and
> >
> > (d) Any matter required, by any regulation made under subsection (2), to be included in the report.

[11] There are no regulations regarding PSRs prepared in Nova Scotia

> (4) The report must also contain information on any other subject required by the court, after hearing argument from the prosecutor and the offender, to be included in the report, subject to any contrary regulation made under subsection (2).
>
> (5) The clerk of the court shall provide a copy of the report, as soon as practicable after filing, to the offender or counsel for the offender, as directed by the court, and to the prosecutor.

[55] Our courts have commented on what should, and should not, be in a PSR.

[56] In *R. v. Rudyk* (1975), 11 N.S.R. (2d) 541 (S.C.A.D.), Chief Justice MacKeigan stated:

> 15 I respectfully think that the learned judge should not have been influenced, as he obviously was, by the story which Rudyk told the probation officer. That self-serving story was not given to the court by Rudyk himself, when he could have been cross-examined by the Crown…
>
> 16 I would here urge that a presentence report be confined to its very necessary and salutary role of portraying the background, character and circumstances of the person convicted. *It should not, however, contain the investigator's impressions of the facts relating to the offence charged,* whether based on information received from the accused, the police, or other witnesses, and whether favourable or unfavourable to the accused. And if the report contains such information the trial judge should disregard it in considering sentence.
>
> [my italicization]

[57] In *R. v. Bartkow* (1978), 24 N.S.R. (2d) 518 (S.C.A.D.) Chief Justice MacKeigan stated:

> 9 The pre-sentence report of May 30, 1977, most improperly referred in detail to the respondent's illegal activities, although he perhaps cannot in this case complain since his then counsel was equally frank about his actions. The pre-sentence report said:
>
> > The accused has been heavily into drugs for the past five years. It did not take him long to discover that he could double or triple his money selling drugs, particularly the chemical variety. At one stage he was using a lot of chemicals himself and this showed up in his performance at school and around the community through a 'screwed-up' head. For the past year or more he has used mostly cannabis, cleared his head up, and concentrated on selling the chemicals rather than use them. He admitted in interview that since the subject offences were committed that he has continued to smoke a bit.

> The grapevine has had it for the past couple of years that the accused would sell dope to anyone who had the money regardless of age. This was corroborated by his statement in interview that he was selling to 'everyone and his dog'.
>
> 10 I trust that the learned magistrate did not pay any attention to that part of the report. I wish those who prepare such reports would realize that *it is no part of their job to give any information, whether inculpatory or exculpatory, respecting offences which the accused committed, especially ones for which he has not been convicted. Their function is to supply a picture of the accused as a person in society - his background, family, education, employment record, his physical and mental health, his associates and social activities, and his potentialities and motivations*. Their function is not to supply evidence of criminal offences or details of a criminal record or to tell the court what sentence should be imposed.
>
> [my italicization]

[58] In *R. v. Riley* (1996), 150 N.S.R. (2d) 390 (CA) Justice Pugsley stated for the court:

> 11 The purpose of the report is, in the words of Chief Justice MacKeigan of this Court, in *R. v. Bartkow* (1978), 24 N.S.R. (2d) 518, at 522:
>
> > . . . to supply a picture of the accused as a person in society - his background, family, education, employment record, his physical and mental health, his associates and social activities, and his potentialities and motivations.
>
> 12 It was, in my opinion, quite appropriate for the sentencing judge to use the information in the report to assess Mr. Riley's character so as "to relate the offence to the individual" (*R. v. Brown* (1985), 31 Man.R. (2d) 268 per Monnin, C.J., at 274).

[59] In *R. v. Urbanovitch and Brown*, (1985), 31 Man. R. (2d) 268,[12] Monnin, CJ.M., stated in his separate opinion (Matas, J.A. generally concurring):

> 28 From the evidence placed on the record before him, *Lockwood, J. originally found that the acts of Brown were deliberate. Having read the pre-sentence report* - a verbose and prolix assessment of 18 pages prepared by probation officer N. Schwartzman - *he changed his conclusion from deliberate acts to acts committed under the influence of alcohol or drugs and, in fact, reversed his findings on the record that the acts were deliberate to one that the injuries were accidental. He was not at liberty to so do. A pre-sentence report is not evidence on the record. It*

[12] As of right appeal dismissed by brief oral decision- [1987] 2 S.C.R. 693; see also the Court of Appeal's affirmation of that principle in *R. v. Bird*, 2008 MBCA 41.

> *is only information gathered for the benefit of the court in order to assess the character of the prisoner awaiting sentence so as to relate the offence to the individual. Whatever came out of that pre-sentence report certainly cannot now be used as evidence on the record* to bolster the case that Brown did not deliberately commit the acts but did so under the influence of drugs or alcohol.
>
> 29 If pre-sentence reports are to be improperly used, we may have to reconsider their usefulness or at least their contents. This one had value in its length and in some instances it related self-serving evidence of Brown. It certainly did so in the paragraph entitled "ATTITUDE TOWARDS THIS OFFENCE" where it states: "Brown reiterated that her death was accidental." *If Brown wanted that to be on the record, he should have testified. He is not allowed, nor is the court allowed, to bring testimony on the record via a pre-sentence report.* That is a gross misuse of such report.
>
> 30 The paragraph entitled "ATTITUDE TOWARDS THIS OFFENCE" [attitude of the accused] has no place in a pre-sentence report. The record and only the record contains the factual situation pertaining to the case.
>
> [my italicization]

[60] An associated issue is to what extent should hearsay present in PSRs be permissible?

[61] Section 723(5) of the *Criminal Code* reads:

> Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person
>
> (a) has personal knowledge of the matter;
>
> (b) is reasonably available; and
>
> (c) is a compellable witness.

[62] In my opinion, a relaxed approach is appropriate, where one of the parties seeks to introduce a disputed (even material) hearsay statement for the truth of its contents at a sentencing, that is otherwise admissible, provided that the court is satisfied that it is "in the interests of justice" to do so without requiring that party to prove on a balance of probabilities that the statement is "necessary" and more importantly, "reliable", as required by the most recent jurisprudence, including *R. v. Bradshaw*, 2017 SCC 35 and its progeny.[13] Similarly, our Court of Appeal has

[13] I appreciate that during the trial phase, courts have a discretion to relax, and are encouraged to consider relaxing, the stringency of the probative value versus prejudicial effect test when evidence is put forward by a defendant. If the court is not satisfied that the hearsay proffered is sufficiently reliable, it may require formal proof thereof.

shown an openness respecting the acceptance of minor factual matters in sentence appeals, particularly when the evidence is tendered in favour of accused persons: *R. v. Riley* (1996), 150 N.S.R. (2d) 390, at para.18.

[63] Generally speaking, in the sentencing phase, if disputed hearsay statements are presented in a PSR, although there is a relaxation of the test for admissibility, I agree with Justice Code's statement that in sentencing proceedings, "hearsay must be 'credible and trustworthy', at least to some degree, before it can be given any weight".[14]

[64] Section 726.1 reads:

> In determining the sentence, a court shall consider *any relevant information placed before it, including any representations* or submissions made by or on behalf of the prosecutor or the offender.

[65] As officers of the court, counsel are entitled to make representations to a sentencing court regarding any relevant information. Such representations may include hearsay – factual representations intended to be taken for the truth of their contents. However, counsel are thereby under a duty to do so *only* in relation to material matters which are not in dispute as between the parties.[15]

[66] If material representations made by counsel to the court are disputed, the proper course is for the party advancing the "information" to present evidence in support of its position, as required by Section 724 of the *Criminal Code*, or withdraw the representation.

[67] Notably, Section 724 reads:

> (1) In determining the sentence, a court may accept as proved any information disclosed at the trial or at the sentence proceedings and any facts agreed on by the prosecutor and the offender.
>
> …
>
> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

---

[14] *R. v. Esseghaier*, 2015 ONSC 5855, at para. 51.

[15] See for example the court's comments in *R. v. Pahl*, 2016 BCCA 234, which rejects a different approach taken by the Manitoba, and arguably the Ontario Court of Appeal: *R. v. Kunicki*, 2014 MBCA 22; *R. v. Nguyen*, 2012 ONCA 534.

> (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
>
> (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
>
> (c) either party may cross-examine any witness called by the other party;
>
> (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
>
> (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating factor or any previous conviction by the offender.

[68] Section 726 permits offenders to personally make a statement to the court.[16] Such statements should not refer to the circumstances of the offence; they may, in appropriate cases, include references to the circumstances of the offender (including expressions of remorse) – yet where material and disputed, if the court concludes it is in the interests of justice to so require, they must be proved in accordance with Sections 723 and 724 of the *Criminal Code*.

[69] I also proceed on the presumption that if an offender does not object to any aspect of the PSR, then I should be entitled to consider all the contents of that report.[17]

[70] In simple terms, a PSR is intended "to supply a picture of the accused as a person in society – his background, family, education, employment record, his physical and mental health, his associates and social activities, and his potentialities and motivations."- *R. v. Bartkow*, at para. 10.

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[16] Though the wording has changed, a similar wording existed at least as far back as the 1927 *Criminal Code*, c. 36, in Sections 1004 and 1007, which relevant portions read respectively: "If the jury find the accused guilty, or if the accused pleads guilty, the judge presiding at the trial *shall ask him whether he has anything to say why sentence should not be passed upon him according to law*: provided that the omission so to ask shall have no effect on the validity of the proceedings"; and "The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not, after amendment, if any, state any indictable offence. The court may in its discretion either hear and determine the matter during the same sittings or reserve the matter for the Court of Appeal as hereinafter provided. If the court decides in favour of the accused he shall be discharged from that indictment. If no such motion is made, or if the court decides against the accused upon such motion, the court may sentence the accused during the sittings of the court or… to appear and receive judgment at some future court or when called upon."

[17] See *R. v. Webster*, 2016 BCCA 218 at para. 38, and *R. v. Phinn*, 2015 NSCA 27, at paras. 50 and 53-54, per Saunders and Bourgeois JJ.A.

[71] On the Nova Scotia Department of Justice website (Correctional Services), the Department answers the question, "what is the purpose of a PSR?" with the following:

> A PSR supplies a picture of the accused as a person in society which includes their background, family, education, employment record, physical and mental health, associates, social activities, financial means, lifestyle, leisure interests, future plans, their potential and motivation.

[72] Courts should be able to rely upon PSRs in tailoring a fit sentence, as they focus on the circumstances of the offence and the offender, in an effort to address the purpose and principles of sentencing, as reflected in Section 718 of the *Criminal Code*.

[73] Having set out the general principles and law relevant to PSRs, I turn to a consideration of the circumstances of each of the offenders.

Patrick Michael James – DOB March 31, 1967

[74] Mr. James was raised as an only child and experienced "a normal upbringing". After completing high school, Mr. James completed a vocational school business administration program. From 1987 to 1995 he was an assistant property manager, which employment was terminated upon him being found to have defrauded his employer between January 1, 1994, and June 30, 1995. He was sentenced on January 30, 1996, to 3 years' probation and 200 hours of community service.

[75] After his termination in 1995, he had brief periods of employment as an unskilled labourer, in addition to income generated while operating a dog breeding company which he started in 1999. No further details were provided regarding the extent of his dog breeding company's business, nor whether he had any other sources of income between 1999 and 2018.

[76] Dr. Marguerite Cassin, an associate professor at Dalhousie University, and Dr. Lesley Steele, a veterinarian, have known him for approximately 10 years (since 2009) in relation to his dog breeding business. They were very complimentary about Mr. James in that context.

[77] Mr. James has an adult daughter living in the United States with whom he has regular contact. He has been in a relationship with Ms. Cindy Polowanchuk for

approximately 22 years. He has been a caregiver for his father for the last 10 years.[18]

[78] During the September 20, 2012 search of Mr. James's property, photos were taken of a 2011 Harley-Davidson motorcycle he owned (a dark candy root beer/light candy root beer FX DC Dyna Super Glide Custom, Nova Scotia licence 146136);[19] an active automobile insurance card showing as his insured vehicles a 2003 Chevrolet Venture and the Harley Davidson motorcycle; and over $400 cash in his wallet[20] in addition to credit and debit cards.

[79] Mr. James indicated he was forced to put his dog breeding business "on hold" after his female Tosa Inu breeding dog passed away in 2015. His mother passed in 2007 and he was left to provide full-time care for his father.

[80] Presently, Mr. James reported he has no source of income and is relying on his father's pension. He has sold off all his possessions to stay afloat, however, when asked, "he would not discuss his debts". No evidence was presented regarding the magnitude of his dog breeding business, which I infer was modest, or the financial circumstances of Ms. Polowanchuk, who presumably would contribute to household expenses.

[81] Mr. James is in good physical health. He volunteered as a *tae kwon do* instructor from 1987 to 1990. He reports he has "struggled with constant anxiety throughout his life, however since 2012 his anxiety has worsened, which has dramatically changed his life." He has never been prescribed any medications for this anxiety, and I infer no clinical diagnosis was ever made, so that his anxiety may fairly be characterized as an insignificant factor in this sentencing.

[82] He advised he has the occasional beer, but denied alcohol has ever been a problem in his life. In discussing illicit substances, Mr. James denied any drug use at all. He did not identify any issues with gambling or anger management.

[83] Mr. James has maintained his innocence despite being found guilty of the offences herein.

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[18] In photo 42 of Exhibit 18 his father is shown on September 20, 2012, standing in the entrance to Mr. James's residence; two dogs are seen in photo 48 – there is no other evidence of a dog breeding operation.
[19] Photos 19, 31, 40, 41 and 42, Exhibit 18.
[20] Photo 33, Exhibit 18.

[84] Under "Offender profile" in the PSR we find:

> When discussing the offence which is currently before the court, Mr. James prepared this statement,
>
> 'When the police entered our home (where I have resided with my female companion for over 22 years now, without as much as a noise complaint) they did not find a member of organized crime, not even an individual engaged in criminal activity, but merely an innocent member of a motorcycle club in the process of bottle feeding a new litter of puppies and performing the live-in caregiver duties for my now 92-year-old disabled World War 2 veteran father. The only break from my responsibilities at home was the occasional ride, beer and burger with my motorcycle club Brothers.
>
> I'm not a criminal, the only other time I have been before the court was over 22 years ago when uncharacteristic decisions resulted in a crime for which I immediately accepted full responsibility for my actions, turned myself in, pled guilty at first opportunity given, and served my sentence without complaint.
>
> I'm innocent of all charges/convictions currently before the court and have maintained my innocence throughout the six years this case has dragged on in the court system, despite the constant, anxious torment it has caused me, my companion and father. I believe "RM" confirmed my innocence at trial during direct questioning by defence counsel, so I did not see the need to testify in my own defence.
>
> I look forward to a time when this horrible ordeal is finally over. I'm determined to remain positive and will concentrate on better days to come, for example, I just recently became a grandfather.'

[85] This "statement" produced by Mr. James should *not* have been inserted into his PSR. The report is intended to reflect the probation officer's assessment of Mr. James, and but for the probation officer's independent decision to use useful and relevant quotations of the offender's own choice of words, a PSR should be entirely in the candid words of the probation officer.

[86] The content of Mr. James's statement is also objectionable, and I will disregard it, to the extent that it pertains to the circumstances of the offences.

[87] I note that Mr. James has been on conditional release since September 21, 2012. While the conditions of his $5000 recognizance may have changed slightly during that time, in summary they only included the following noteworthy restrictions on his liberty:

1. Do not associate with or be in the company of the following persons: any member, striker, hang around or person associated to the Bacchus Motorcycle Club, the Darksiders MC, the Highlanders MC, the Charlottetown Harley Club, the Vagabonds MC, the Para-Dice Riders MC, the Hells Angels MC; and
2. Not to wear or display any Bacchus related clothing or paraphernalia including jewelry and stickers.

[88] Mr. James has not renounced his past association with the BMC, his support for the Hells Angels MC, nor has he accepted responsibility or shown remorse for the offences for which he has been convicted.

[89] His rehabilitation prospects, given his age and stage of life, and lack of remorse, are poor.

Duayne Jamie Howe - DOB June 25, 1969

[90] He was raised as an only child, "and experienced a normal childhood stating, 'times were tough', but his basic needs were always met." From ages 2 until 7, he lived with his father and grandparents. From ages 7 to 13 he lived with his alcoholic father. Thereafter, he lived with his grandparents on a permanent basis as they "were in a better position to provide a nourishing environment". He moved out on his own at 25 years of age.

[91] For the last 25 years, he has been married to Ms. Shannon Dent. They have a 22-year-old son together.

[92] Mr. Howe and his wife have been separated for approximately seven months, and Mr. Howe "believes that the charges which are presently before the Court had a big impact on the relationship and brought on their separation."

[93] When his mother was asked about Mr. Howe's current situation before the court, she stated she was "surprised, and yet not surprised… I was worried about Duayne's new circle of friends". His half-sister, who is significantly older and did not live in the same residence with him when he was growing up or as an adult, believes his involvement in these offences is "out of character"; that he is battling depression and would benefit from mental health counselling.

[94] His 22 year old son described his father as "a stand- up guy" and noted "the man I know as my father and the man charged are two different guys", adding "this is out of character" for Mr. Howe.

[95] Mr. Howe's criminal record is modest, but relates to time periods when he was between 20 and 31 years of age:

1. Section 348(1)(a), *Criminal Code* – break and enter with intent to commit an indictable offence on March 8, 1989; on May 29, 1989, received one year probation with 50 hours community service;
2. Section 253, *Criminal Code* – impaired driving with blood alcohol concentration greater than 80 mg of alcohol in 100 ml of blood December 11, 1999; on January 26, 2000, sentenced to $800 fine, and an order prohibiting him from driving for a period of one year;
3. Section 259(4), *Criminal Code* – driving motor vehicle while prohibited by court order on February 28, 2000; on May 10, 2000 sentenced to 30 days' custody, to be served intermittently (i.e. on weekends, and by law he was on probation during that time when not in confinement- Section 732, *Criminal Code*).

[96] After finishing Grade 11, Mr. Howe left school for a job of preparing and painting vehicles stating, "the money seemed more appealing than going to school". Thereafter he bounced around the auto-body industry for a few years. He then secured a casual job with Canada Post as a clerk in 1991, and obtained full-time employment with Canada Post in 2002. From 2006 until 2012 he was a letter carrier. From 2012 to 2016 he was on a disability pension for a work-related injury, and now is likely going to retire taking a medical pension and Worker's Compensation benefits. Photos taken at his home indicate that he had a personal "grow operation" pursuant to an authorization to possess dried marijuana for medical purposes up to 150 g, which was issued on April 4, 2012.

[97] In his cautioned statement to the police given September 20, 2012, he indicated "I fell down a set of stairs, dislocated my shoulder, messed up my back, and I'm still fighting with WCB now over my back, close to seven years, it's been almost three since I got my shoulder operated on – I'd been off work permanently now since a year ago May, just past [2011]."

[98] Therein, he also confirmed that he had been a full patch member of the BMC for the last year and was with the club approximately a year before that. I have

already concluded that he was previously a member of the East Coast Riders, MC (Halifax County) when he and their members patched over to become members of the BMC (Halifax County) in January 2010.

[99] In spite of his medical issues, I conclude that Mr. Howe remained committed to driving his motorcycle[21], attending weekly Wednesday "church" meetings of the Nova Scotia BMC chapter (Halifax County and later relocated to Hants County), and was very active as secretary-treasurer of that chapter, as seen in the seized documentary materials.

[100] He is presently facing financial difficulties. The Canada Revenue Agency has begun garnishing his wages [disability pension] to make up for roughly $27,000 owed in back taxes. Given his status with Canada Post, a sophisticated employer, if that was his only source of income, it is unclear how he is now liable for such a large amount of back taxes. He similarly made a generalized claim that he is in the collection process for approximately $15,000 outstanding with unnamed creditors.

[101] He characterizes his alcohol use as "roughly a case of beer on the weekends and that he has never had an issue with alcohol. In relation to illegal drugs, he considered himself a "typical 80s youth" and experimented, but never became addicted to any illegal drugs.

[102] In the "offender profile" the PSR writer stated: "the subject maintains his innocent [sic] and feels he is "not at fault for the charges before the court" adding that he is "not responsible for the crimes for which he was found guilty". Mr. Howe noted that he "feels the legal system has done him an injustice".

[103] I note that Mr. Howe has been on conditional release since September 21, 2012. While the conditions of his $5000 Recognizance may have changed slightly during that time, in summary they included the following restrictions on his liberty:

1. Do not associate with or be in the company of the following persons: any member, striker, hang around or person associated to the Bacchus Motorcycle Club, the Darksiders MC, the Highlanders MC, the Charlottetown Harley Club, the Vagabonds MC, the Para-Dice Riders MC, the Hells Angels MC; and

[21] Seen in Exhibit 17, photo 57.

2. Not to wear or display any Bacchus related clothing or paraphernalia including jewelry and stickers.

[104] Mr. Howe has not renounced his past association with the BMC, or his support for the Hells Angels MC,[22] nor has he accepted responsibility or shown remorse for the offences for which he has been convicted.

[105] His rehabilitation prospects, given his age and stage of life, and lack of remorse, are poor.

David John Pearce – DOB August 1, 1974

[106] A PSR had been previously prepared by the High Level community corrections office in Alberta for a sentencing March 26, 2015 in Dartmouth. Mr. Pearce confirmed its contents were correct. On that date he received a two-year conditional discharge (two years' probation), a five year firearms prohibition order[23], and had to forfeit a firearm pursuant to Section 491 of the *Criminal Code*. It appears that between May 6 and September 19, 2012, he unsafely stored a 9 mm Luger handgun in his residence[24]. He completed his probationary period without incident.

[107] Mr. Pearce indicated that his formative years were "good" and no alcohol abuse, domestic violence or neglect occurred in the family. He is 44 and his siblings are 52, 56 and 60 years of age. Notably, his oldest sibling stated:

> Our childhood was different even though we lived in the same house. When David was a teen my dad was laid off often as the economy and the construction jobs were bad. Money was tight. My dad drank a lot during those years. Then my dad had a stroke on the job and wasn't able to work anymore. They sold their house and moved into an apartment in the next town. David stayed at my house a lot as we were close to his school and he didn't want to change high schools in his last year."

[108] Mr. Pearce married Ms. Tina Miller in approximately 2000. They have a 13-year-old daughter.

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[22] *Inter alia*, see the stickers on his motorcycle shown in Exhibit 17 photo 61.
[23] Which apparently was not entered on the RCMP's national database according to the PSR author.
[24] See photograph 90, Exhibit 2

[109] Ms. Miller and Mr. Pearce began separating in 2010. She confirmed that the marriage had "its ups and downs, but when he joined the Bacchus [BMC] I told him if anything happened, I'm leaving. I left when a member of Bacchus and his wife are killed, I left and never went back… The issue was that he got involved with Bacchus and I didn't want that around me"[25]. I note here that Mr. Pearce joined the BMC in January 2010.

[110] He finished high school, attended Nova Scotia Community College, graduating in 1994 with the diploma in small engine repair.

[111] In 1997 he moved out of the family home to live on his own, and between 1998 and 2010 he was in a relationship with Tina Miller. In August 2011, he moved to High Level, Alberta, for work. As work slowed down for the season he moved back to Halifax in May 2012.

[112] In July, he moved into the Halifax residence of Victoria White, but only stayed until late July as he was preparing to move back to Alberta for work. Thereafter, he lived with Cassie Bellefontaine until the police search in September 2012 caused that relationship to end.

[113] In November 2012, he moved back to Alberta, where in December he began a relationship with Ms. Trina Clarke, and moved in with her and her then seven-year-old daughter in March 2013. On November 27, 2013, he and Ms. Clarke welcomed their son Blake. There been no major changes in his life in the past few years.

[114] Ms. Clarke speaks of him as a "caring person with his family".

[115] Mr. Pearce has always been a diligent worker. He obtained his basic welding certificate through Nova Scotia Community College in 2003.

[116] He worked at Halifax Stanfield International Airport as a facility maintenance worker, and graduated to working in the office with responsibility for various paperwork and audits.

[117] After the murder of Rusty and Ellen Hall, Mr. Pearce believes, the police began treating the BMC as a criminal gang, and that due to that increased police attention he lost his job because he had previously had access to restricted areas of

[25] Mr. Pearce confirmed that this was the murder of Rusty and Ellen Hall which happened in February 2010.

the airport, and "Transport Canada found out that 'I knew people involved in crime' [italics added by the writer as Pearce had raised his two hands with his index and middle fingers symbolically showing the quote] and I could no longer have access to the restricted areas." As a result, he lost his employment there.

[118] He stated:

> Motorcycle clubs are considered terrorists by the police and CSIC [Canadian Security Intelligence Service] and they sent a letter to the airport and I had to leave; I was unionized at the time and they didn't want to touch it. So, I was gone.

[119] In August 2011, he moved to High Level, Alberta, and throughout his time there appears to have worked diligently and acquired further certificates culminating in his level I designation accredited through the International Council for Machinery Lubrication. He reports that "worldwide there are about 1200 of us with this." He indicates an intention to take the required course to obtain his level II designation in October 2018 in Edmonton, Alberta.

[120] His work ethic was lauded by his production manager. This aspect is echoed by his oldest brother.

[121] In the PSR, Mr. Pearce reported that alcohol has never played a large factor in his life, and he is not using illegal drugs.

[122] His monthly expenses[26] reportedly aggregate to approximately $3720. He indicates he has an income of approximately $6000 per month. I note he pays $800 child-support, and a review of the Child Support tables correlates that monthly amount with a $96,000 annual gross income.[27]

[123] Under debts, he states that he owes approximately $60,000 in legal fees and has paid approximately $10,000 per year (since 2011) in travel costs associated with criminal court matters in Nova Scotia. He owns a $75,000 2014 Dodge Ram truck, and a motorcycle[28].

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[26] No information was provided regarding Ms. Trina Clarke's income

[27] From line 150, tax return.

[28] Sgt. Mike Bourguignon, RCMP acting Detachment Cmdr. in High Level, Alberta reported to the PSR author that Hells Angels MC support stickers were present on Mr. Pearce's motorcycle as it sat outside the High Level, Alberta, Provincial Building on July 27, 2018. A similar report was filed by Staff Sgt. Stephen MacQueen to the PSR author that "we have intelligence to say that he still hangs out with OMG members and his Facebook page shows him wearing a Hells Angels support wear including stickers and displaying a Hells Angels support shirt displaying (ACAB) All Cops Are Bastards. The picture was taken and posted during his Criminal Organization trial." I

[124] Mr. Pearce has maintained his innocence despite being found guilty of the offences herein.

[125] Under the title "The subject as an offender", and from other portions of the PSR, Mr. Pearce addresses the court:

> In regards to the current convictions, Pearce maintained that none of the motorcycle clubs that he belonged to in the past "were criminal organizations and they are not in any way part of the 1% groups that the police talk about". In discussing the 1% label he said that "I don't know why cops fixate on that, when you are in a hockey team you don't know what people do outside the hockey game; they have lives outside hockey and sometimes 4% are bad and 96% good, you can't blame the bad apples". He went on to describe being a member of the East Coast riders in 2009 and then being "patched over to Bacchus [Bacchus Motorcycle Club – BMC] in 2010. Since the police saw Bacchus as a 1% club, they [the police] were mandated to shut it down. But I've not been a member of the Bacchus [BMC] since 2012, basically since all of this happened" [the current convictions pertaining to the court matter of October 22, 2018].
>
> …
>
> Pearce attributed "RCMP and government corruption to all this and then when it went to trial and through court, they had to justify how much money they spent on all of this [the court proceeding] and so they need to make a point and bring all of us down. I mean, I've been no trouble for seven years and I'm still dealing with this. I think the police fabricated the story, they want to get their budgets up, there is no proof of anything. I was at a fundraising event for a girl with cancer. A guy wanted to start a club. I was charged because I was a member of Bacchus [BMC]. The witnesses said that I did not say a word. If you saw our so-called victim at trial, you wouldn't believe that this was a guy trying to start a club and a biker" On August 17, 2018 he further went on to state: "all of this [the convictions and resulting court process] is bull-shit, it's ruined my life, health and finances and it's all so the cops can justify themselves. The police wanted Bacchus [BMC] shut

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observed Sgt. MacQueen over numerous days give testimony. I found his evidence highly reliable and credible. I am satisfied that even without the benefit of his cross-examination, his hearsay statement is sufficiently reliable for me to accept it for its truth, regarding Mr. Pearce's past and ongoing affinity for the Hells Angels MC. At the sentencing the Crown introduced as an Exhibit, "S-1" – screenshots of Mr. Pearce's Facebook account showing photos clearly identifying him as an avid supporter of the Hells Angels as seen between March 2015 – September 2018. However, I will disregard his opinion that "Mr. Pearce will attempt to become part of the Hells Angels organization….", that he has "zero remorse"; and the comments of Sgt. Hawlyruk/Cst. Fairbairn as those are conclusions that only the court should draw, and on evidence. I accept that Mr. Pearce has had contact with members of the Hells Angels MC and its associates based on the compelling photographic evidence in Exhibit S-1. Such contacts are in my opinion (on a balance of probabilities) a violation of his bail condition to "not associate with *or* be in the company of…. any member, striker, hang-around, or person associated to [a number of named notorious MCs including the Hells Angels MC." It is not an aggravating factor on sentencing as I am not so satisfied beyond a reasonable doubt. I also accept Sgt. Bourguignon's report as reliable, in part based on the contents of Exhibit S-1.

> down, but I'm not patched to the[BMC] anymore, I live in High Level [Alberta], I don't have a Bacchus patch, you can buy those online… But as for these charges, I was there [clarified as the incident on September 14, 2012 during the Biker's Down event] I was a Bacchus member at the time, but I am not a criminal.

[126] While I commend the writer for the diligence generally exhibited by him, and detailed references provided for the Court's assistance, the extensive above-noted exculpatory quotations from Mr. Pearce, as was the case with Mr. James, are objectionable, and I will disregard them to the extent that they pertain to the circumstances of the offences.

[127] I note that Mr. Pearce has been on conditional release since September 21, 2012. While the conditions of his $5000 Recognizance may have changed slightly during that time, in summary they included the following restrictions on his liberty:

1. Do not associate with or be in the company of the following persons: any member, striker, hang around or person associated to the Bacchus Motorcycle Club, the Darksiders MC, the Highlanders MC, the Charlottetown Harley Club, the Vagabonds MC, the Para-Dice Riders MC, the Hells Angels MC; and
2. Not to wear or display any Bacchus related clothing or paraphernalia including jewelry and stickers.

[128] Mr. Pearce has not renounced his past association with the BMC, or his support for the Hells Angels MC, nor has he accepted responsibility or shown remorse for the offences for which he has been convicted.[29]

[129] His rehabilitation prospects, given his age and stage of life, and lack of remorse, are poor.

Crown position on sentence

[130] The Crown views the extortion (s. 346 *Criminal Code*) offence,[30] which has a maximum sentence of imprisonment for life, as the proper starting point. It notes

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[29] While he stated pursuant to s. 726 that "I just want to say that I regret that it happened", I found that statement to be ambivalent, and inconsistent with his continued affinity for criminal organizations and those that have reputations for violence.

[30] In the consolidated Revised Statutes of Canada 1985, the maximum imprisonment was for 14 years; in 1988 Parliament changed the wording, and increased the maximum to imprisonment for life.

that the remaining offences (ss. 264, 264.1 and 423) arise from similar factual circumstances and would likely be found to be concurrent sentences.

[131] The Crown characterizes this case as a "pure" extortion, noting that RM was not a criminal associate of the BMC, was not a rival of the BMC, has no criminal record, and did not owe a financial debt of any kind to Messrs. Howe, James and Pearce, or the BMC. It says:

> … The extortions committed on RM achieved their purpose. He did not bring a three-piece patch Chapter of the Brotherhood to Halifax. Once confronted again by Patrick James on August 27, 2012, he immediately took efforts to discontinue the one-piece patch Chapter of the Brotherhood that he had begun. The colours were cut up and delivered according to the instructions he had been given. The Facebook message was posted. Unfortunately for him, the Bacchus were not done with him. They had been disrespected. An example had to be made of him. He was confronted at a public event. RM could no longer ride his motorcycles and attend any related events.… He sold his motorcycles and he did not attend any events [thereafter].… [These offences] are extremely serious. They represent the actions of a violent organization intent on maintaining and enhancing its reputation and dominance over the territory that it claimed and controlled.… The threatening and intimidating conduct exhibited towards RM in this matter represents an attack on the fundamental freedoms that ordinary Nova Scotians expect to enjoy. It is submitted that significant penitentiary terms are necessary in this matter in order to give effect to the principles of denunciation and deterrence.

[132] The Crown suggests the actions of Messrs. James, Howe, and Pearce had a significant impact on RM and his family. He and his wife were terrified. He was concerned for his own, and his family's, safety. On September 14, 2012, immediately after his encounter with Messrs. Howe and Pearce, he required an escort home from friends, using a deliberately circuitous route. He was afraid the BMC would find out where he lived. He immediately changed his appearance. He sought the protection of the police. A panic alarm was installed in his home. He and his wife sold their motorcycles, and no longer rode motorcycles or attended any motorcycle-related events.

[133] Regarding Messrs. Howe and Pearce, the Crown argues that their purposeful and public confrontation with RM was done in order to send a message to him and the community at large; namely, retribution on RM for his earlier and ongoing disrespect to the BMC membership, to further the BMC's reputation for violence, with a view to entrenching and enhancing the club's dominance over all other motorcycle clubs in its claimed territory of Nova Scotia.

[134] The Crown suggests the following sentences:[31]

1. Patrick James – 5 to 6 years' prison sentence;
2. Duayne Howe – 4.5 to 5 years' prison sentence; and
3. David Pearce – 4.5 to 5 years' prison sentence.

[135] The Crown also seeks in relation to each of them:

1. DNA order pursuant to Section 487.051(2) for the Section 346 offence; and Section 487.051(3) for the ss. 264, 264.1 and 423 offences;
2. Firearms, ammunition, weapons prohibition order pursuant to Section 109(1)(a) and (b) for the Section 346 and 264 offences beginning on the day the order is made and ending 10 years after the offender's release from imprisonment; and a discretionary order regarding the ss. 264.1 and 423 offences, pursuant to Section 110 (2) beginning on the day the order is made and ending 10 years after the offender's release from imprisonment; and
3. Forfeiture of offence – related property order, pursuant to Section 490.1.

[136] "Offence related property" is defined in Section 2 of the *Criminal Code*:

> means any property, within or outside Canada,
>
> (a) by means or in respect of which an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* is committed,
>
> (b) that is used in any manner in connection with the commission of such an offence, or
>
> (c) that is intended to be used for committing such an offence;

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[31] It relies on the following cases: *R. v. Coates*, [2002] O.J. No. 5871 (S.C.) where 3 to 5 year sentences were imposed; *R. v. Violette*, 2009 BCSC 1557 where a 4 year sentence was imposed, upheld on appeal, 2013 BCCA 31, at para. 43; and *R. v. Widdifield*, 2015 BCSC 643, where a 5 year sentence was imposed, upheld on appeal, 2018 BCCA 62. While I will impose sentences of lesser custodial durations in this case than sought by the Crown, I acknowledge the reasonableness of the Crown's recommendations, but note that here we are dealing with an organization declared criminal for the first time, and which does not carry the same heft and level of elevated threat to society as do individual and the aggregated charters of the Hells Angels MC, for whom more deterrent sentences than imposed here would be appropriate in similar factual circumstances.

[137] The Crown has identified specifically,[32] which of the seized materials it wishes the court to confirm are "offence-related property".

Defendants' positions

Mr. James

[138] His counsel stresses that he has positive personal references in his PSR, only a dated record for a non-violent offence, and that he has been on a judicial interim release for a lengthy period without incident, suggesting that "his prospects for rehabilitation are evidently very promising and there is no need to separate him from society... However, given the court's factual findings and the case law regarding sentencing for such matters, a custodial sentence appears to be the inevitable outcome. The sentence should not be longer than is needed in order to [be] responsive to the goals of sentencing, proportionality, restraint, and totality should result in a sentence that is not devastating or excessive. In light of Mr. James's personal circumstances, a two-year federal sentence of custody is, in total, after considering totality, is sufficient."[33] At the hearing, his counsel conceded that his research suggested the range of sentence for Mr. James is 1 to 3 years imprisonment.

[139] Mr. James argues that in contrast to the case at bar, most criminal-organization sentencings involve a direct connection to prolific drug trafficking, firearms trafficking, prostitution rings, widespread credit card fraud schemes or collection of drug or other debts owing to the organization: "The factual circumstances are somewhat unique [in this case]… This will be Mr. James's first sentence of consequence."

[140] He suggests a sentence of two years custody in a federal penitentiary.

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[32] Attached as the several Appendices "A".

[33] Regarding the range of sentence, he relies upon the following cases: *R. v. Burdon*, 2010 ABCA 171 (suspended sentence); *R. v. Shea*, 2011 NSCA 107 (6.5 years for a home invasion extortion); *R. v. Berry*, 2006 ABCA 275 (30 months custody); *R. v. Ste. Marie*, 2009 ABCA 177 (15 months custody); *R. v. Reed*, 2009 BCPC 201 (18 months custody); *R. v. Barton*, 2010 NBQB 51, (18 months custody); *R. v. Le*, [1996] A.J. No 373 (PC) (12 and 18 months in custody after a two-month remand); *R. v. Lal*, 2010 ABPC 73 (8 months custody consecutive to another sentence); *R. v. Royz*, 2008 ONCA 584 (a conditional sentence order was ordered at trial – I note however that this was an appeal from conviction only*); R. v. Gainz*, 2010 YTSC 15 (90 day intermittent custodial sentence); *R. v. Cromwell*, 2007 BCSC 601 (9 months custody); *R. v. Bohoychuk*, [2005] MJ No. 92 (QB) (22 month conditional sentence order) – which are no longer available as a sentencing option.

Mr. Howe

[141] His counsel notes that he was an employee of Canada Post for 20 years ending with his recent retirement, he has only a dated and unrelated criminal record, and his friends and family describe him as a "social" person and very engaged in his family life.

[142] In relation to the offences, he notes the case at bar does not involve any actual physical violence, nor weapons, and Mr. Howe's involvement occurred for a short time interval at a single event, in a public place. "Mr. Howe did not use threats in order to extort money… His words were intended to induce RM to act in a manner that was "respectful" to Mr. Howe and the BMC. For the foregoing reasons, the defence submits that a global sentence of one year in prison is a fit and proper sentence for Mr. Howe."

[143] Mr. Howe relies on the cases cited by Messrs. James and Pearce, but also: *R. v. Miller*, 2017 ONSC 5479 (15 months imprisonment);[34] *R. v. Zheng*, 2013 ONCJ 806 (one year in prison and three years probation).[35]

[144] He says he has less involvement and engagement with RM (moral blameworthiness) than Mr. James, and should receive a lesser sentence as a result – namely, one year imprisonment.

Mr. Pearce

[145] Mr. Pearce objects to the following contents of his PSR, which are information provided by law enforcement personnel. The probation officer wrote:

> On August 13, 2018, the writer received the following information via email from Staff Sgt. MacQueen:

[34] I note that Mr. Miller had an extensive yet dated criminal record, his most recent conviction being 14 years earlier, and that he was found guilty for "bookmaking for the benefit of a criminal organization contrary to *Section* 467.12… not guilty… [of] extortion contrary to *Section* 346 (1), and "there is no evidence of Mr. Miller being involved in any violence or threats of violence in relation to his activities with Platinum". The case has not been judicially cited nor does it cite any relevant sentencing case law.

[35] The sentencing judge noted that the Crown was only seeking a one year sentence and that "the cases submitted by both counsel show that a sentence for extortion in these circumstances following conviction at trial typically would exceed 12 months imprisonment." It did not involve proof of an actual criminal organization. It involved an unsophisticated extortion by an opportunist predator. The case has not been judicially cited, nor is it helpful in establishing the range of sentence.

> What I can tell you about David Pearce is that he was a full patch member of the Bacchus motorcycle gang in 2012 when the offences occurred. He had become a full patch member of the Bacchus in 2010 when he patched over to the Bacchus from a club called the East Coast Riders. Mr. Pearce was/is fully immersed in the Outlaw Motorcycle Gang lifestyle and *used his patch and his association with criminals to intimidate others.*
>
> *Pearce has shown zero remorse* for his actions which led to the charges against him. *In fact, we have intelligence to say that he still hangs out with OMG members* and his Facebook page shows him wearing Hells Angels support gear including stickers and displaying a Hells Angels support shirt displaying (ACAB) All Cops Are Bastards. The picture was taken and posted during his Criminal Organization trial.
>
> *I have no doubt that Mr. Pearce will attempt to become part of the Hells Angels organization once his conditions allow'*

On August 28, 2018, in speaking with the writer, *Sgt. Mike Bourguignon noted Hells Angels stickers were present on Pearce's motorcycle as it sat outside of the High Level, Alberta Provincial Building on July 27, 2018.* When asked to elaborate further, Sgt. Bourguignon indicated that 'the Hells Angels are all about intimidation, and that's the message he [Pearce] wants to portray'.

When discussing Pearce's involvement in a criminal organization with *Sgt. Angela Hawryluk and Detective Constable Steve Fairbairn* [RCMP and Halifax Regional Police officers], via conference call, they concurred with her summation: '*[Pearce] is infatuated with 81 gangs* [a term used to identify the Hells Angels, the eight being the eighth letter of the alphabet and the one being the first letter of the alphabet, signifying HA or Hells Angels], 1% gangs and OMG [a term signifying outlaw motorcycle gangs] organizations'. Sgt Hawryluk and Detective Constable Fairbairn further agree with her description that Pearce was noted to have 'pictures of him with HA stickers and paraphernalia on the Internet and it seems that *since Bacchus is almost folded and he can't be associated with it, he switched his support to the HA'*. When the writer directly asked Sgt. Hawryluk to offer her concerns, she responded: 'my concern is that the verdict is in, Bacchus is criminal, and he [Pearce] clearly shifted to HA and he is supporting HA because there is no more Bacchus for him. *This process has clearly not stopped him supporting OMG organizations*.'[36]

[36] Earlier in this decision at footnote 28, I stated that I accept that Mr. Pearce had, and still has, an affinity for the Hells Angels MC and its associates. Subject to my earlier comments, I do not find these comments objectionable – they are reliable in my view, and go to the unlikelihood of Mr. Pearce's successful rehabilitation. His prospects for rehabilitation would be enhanced if he renounced the criminal organization lifestyle and milieu, and no longer was associated with, or a member of, a criminal organization, or any self-identifying 1% MC.

[146] His counsel states he has no prior criminal record.[37] He is characterized in the PSR as a diligent and reliable worker, "focused always on his family", who describes himself as a "hard-working" and "loyal" individual.

[147] He reports that alcohol has never played a big part in his life, and that he is not using illegal drugs.

[148] Mr. Pearce relies upon the same cases as Mr. James, and specifically in relation to the "criminal organization" aspect argues that the cases relied on by the Crown involved organizations that were engaged in "very serious and continuous unlawful activity, and as such, the respective offenders were sentenced in relation to same. In the case at bar, the Crown expert, Detective Staff Sgt. Isnor confirmed that he had no evidence that the Bacchus Motorcycle Club were in any way involved in these types of activities,[38] and as such the defence would suggest the sentences in the case at bar should be much lower in keeping with the moral culpability of each offender… [His] actions on the day in question were far less culpable than those of either of his two co-accused... His actions were not premeditated… [He] did not speak at any time throughout the course of the confrontation… We submit that his sentence should be less than that of both of his co-accused… A fit and appropriate sentence for Mr. Pearce in the circumstances is one of six months in custody."

Determining a fit sentence

[149] The most relevant sentencing principles codified in the *Criminal Code* are:

> Section 718-Purpose
>
> The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

[37] He received a two-year conditional discharge on March 26, 2015 for a Section 86(2) *Criminal Code* offence committed between May 6 and September 19, 2012, as well as a five year firearms prohibition order imposed March 26, 2015 [which remains in effect].

[38] This is an overstatement – Sgt. Isnor conceded that there was no direct evidence implicating the BMC as a whole, for example, in large scale drug trafficking, etc., but he was of the opinion based on the circumstantial evidence available that the BMC was an enduring criminal organization.

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community.

718.1-Fundamental Principle

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 – Other Sentencing Principles

A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,[39]

…

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation[40]

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[39]Recently in *R. v. Suter*, 2018 SCC 34, Justice Moldaver reiterated that courts must tailor sentences to the circumstances of the offence and the offender, which may require a sentencing judge to look at collateral consequences. "There is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself… In my view, a *collateral consequence includes any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender*. Though collateral consequences are not necessarily "aggravating" or "mitigating" factors under s. 718.2(a) of the *Criminal Code – as they do not relate to the gravity of the offence or the level of responsibility of the offender* – they nevertheless speak to the "personal circumstances of the offender"… The question is not whether collateral consequences diminish the offender's moral blameworthiness or render the offence itself less serious, but *whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances*… Collateral consequences do not need to be foreseeable, nor must they flow naturally from the conviction, sentence or commission of the offence. In fact '*where the consequences so directly linked to the nature of an offence as to be almost inevitable, its role as a mitigating factor is greatly diminished*"… Nevertheless, in order *to be considered in sentencing, collateral consequences must relate to the offence and circumstances of the offender*."- at paras. 46-49.

[40] See Justice Bateman's comments in *R. v. RTM*, [1996] N.S.J. No. 218 (CA) at para.12 that "even without a victim impact statement, the lasting effect that a sexual assault can have on its victim may be presumed. This was

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

… shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;[41]

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;[42]

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

718.3 – Punishment Generally

…

(4) the court that sentences an accused shall consider directing

…

(b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when

i) the offences do not arise out of the same event or series of events,

…

467.14 -Sentences To Be Served Consecutively (Criminal Organizations)

A sentence imposed on a person for an offence under Section 467.11, 467.111, 467.12 or 467.13 shall be served consecutively to any other punishment imposed

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recognized by Cory J, in *R. v. McCraw*, [1991] 3 S.C.R. 72. In my view, Justice Cory's comments are not limited to cases where "sexual assault" is the offence charged, but include other offences of a sexual nature." I would add that the lasting effect of other forms of violence may also properly be inferred, and in my view, I am satisfied beyond a reasonable doubt that there has been a significant lasting effect on RM and his family flowing from the offences committed by Messrs. Howe, James and Pearce, at least between June 2012 and November 2016 when RM last testified.

[41] See Justice Bateman's comments regarding how one determines the general "range of sentence" in any particular case in *R. v. Cromwell*, 2005 NSCA 137, at paras. 23-26.

[42] See Justice Bateman's comments in *R. v. Adams*, 2010 NSCA 42, at paras. 22-27, regarding the proper approach to totality involving multiple charges.

> on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under any of those sections.

[150] A comparison of Sections 718.2(a)(iv) and 467.14 reveals the similar intention of each of those sections – that is there is statutory authority to reflect the aggravating nature of offences committed "for the benefit of, at the direction of, or in association with a criminal organization" upon sentences. The predicate and "criminal organization" offences herein are "separate offences", and subject to be totality principle as reflected in s. 718.2(c).

[151] In most cases of multiple convictions, it is particularly important to follow the "totality" procedure suggested by Justice Bateman in *R. v. Adams*, 2010 NSCA 42:

> 22 In *R. v. Gallant*, 2004 NSCA 7, Cromwell, J.A., as he then was, described the totality principle with his usual clarity:
>
> > [18] The purpose of the totality principle, said the Court in *R. v. Dujmovic,* [1990] N.S.J. No. 144 (Q.L.) (C.A.) is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate just and appropriate. (See also *R. v. ARC Amusements Ltd.* (1989), 93 N.S.R. (2d) 86; [1989] N.S.J. No. 331 (Q.L.)(C.A.)...
> >
> > 23 In sentencing multiple offences, this Court has, almost without exception, endorsed an approach to the totality principle consistent with the methodology set out in C.A.M., supra. (see for example R. v. G.O.H. (1996), 148 N.S.R. (2d) 341 (C.A.); *R. v. Dujmovic*, [1990] N.S.J. No. 144 (Q.L.) (C.A.); R. v. Arc Amusements Ltd. (1989), 93 N.S.R. (2d) 86 (S.C.A.D.) and R. v. Best, 2006 NSCA 116 but contrast R. v. Hatch (1979), 31 N.S.R. (2d) 110 (C.A.)). *The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced.* (See for example, R. v. G.O.H., supra at para. 4 and *R. v. Best*, supra, at paras. 37 and 38)
> >
> > 24 This Court has addressed and rejected any approach that would suggest that, when sentenced for a collection of offences, the aggregate sentence may not exceed the "normal level" for the most serious of the offences (see R. v. Markie, 2009 NSCA 119 at paras. 18 to 22, per Hamilton, J.A.).
> >
> > 25 *Very recently in R. v. Draper, 2010 MBCA 35, Steele, J.A. succinctly described the proper approach, as follows:*

30 That procedure is for the sentencing judge to *first* determine whether the offences in question are to be served consecutively or not. *Second*, if they are to be served consecutively, then an appropriate sentence for each offence should be determined. *Third*, the totality principle should be applied to the total sentence thereby arrived at to ensure that the total sentence is not excessive for this offender as an individual. In effect, the sentence must be given a "last look." *Fourth*, if the judge decides that it is excessive, then the sentence must be adjusted appropriately. In some cases that might require a significant adjustment.

31 In *R. v. Reader* (M.), 2008 MBCA 42, 225 Man.R. (2d) 118, Chartier J.A. confirmed that this was the approach suggested by the Supreme Court in R. v. M. (C.A.) when it explained the totality principle found in s. 718.2(c) of the *Criminal Code*. He explained at para. 27 that at this stage of the sentencing process, the purpose of this last look is to ensure that the total sentence respects the principle of proportionality (set out in s. 718.1 of the *Criminal Code*) by not exceeding the overall culpability of the offender. *The "last look" requires an examination of the gravity of the offences, the offender's degree of guilt or moral blameworthiness with respect to the crimes committed and the harm done to the victim or victims. ...*

26 Contrast this formulation of the totality principle with that endorsed by the Ontario Court of Appeal in *R. v. Jewell*; *R. v. Gramlick*, [1995] O.J. No. 2213 (Q.L.). There, Finlayson, J.A. describes that Court's application of the principle:

27 In my view, the appropriate approach in cases such as the two under appeal is to first, identify the gravamen of the conduct giving rise to all of the criminal offences. The trial judge should next determine the total sentence to be imposed. Having determined the appropriate total sentence, the trial judge should impose sentences with respect to each offence which result in that total sentence and which appropriately reflect the gravamen of the overall criminal conduct. In performing this function, the trial judge will have to consider not only the appropriate sentence for each offence, but whether in light of totality concerns, a particular sentence should be consecutive or concurrent to the other sentences imposed.

27 In *R. v. A.T.S.*, 2004 NLCA 1, Rowe, J.A., [as he then was] writing for the Court, discussed these different approaches. He concluded that, where a judge gives effect to totality by first fixing the global sentence and then assigning the individual sentences to fit within the whole, s/he is more likely to pass a sentence which is problematic. As he observes, this formulation leads to confusion about the appropriate sentence for the individual convictions, had they been committed alone. It creates further difficulties where some but not all of the convictions are successfully

> appealed. In that instance, there is no guidance for the appellate court as to the appropriate sentence for the remaining offences. I would agree.[43]

[152] In the case at bar, I believe it to be important to acknowledge that the criminal organization offences, aptly represent the crimes committed here – they were committed by members of the BMC to protect its territorial claim to control the motorcycling milieu in Nova Scotia, and to advance its reputation for violence, and other criminal interests. These offences transcend the individuals involved.

[153] Generally speaking, Mr. James is directly responsible for the predicate offences (Sections 264, 264.1, 346 and 423) and their "criminal organization" counterparts (ss. 467.12) between the spring of 2012 and August 28, 2012; whereas Messrs. Howe and Pearce are directly responsible for the predicate offences and their "criminal organization" counterparts, (ss. 467.12) occurring September 14, 2012.

[154] On the other hand, in these unusual circumstances, where I have concluded that the main objectives and purposes of the BMC, which core interests its members are required to support, and enforce if necessary, were directly implicated as the reason for the commission of these offences against RM and his family, Mr. James bears an indirect responsibility for the offences committed by Messrs. Howe and Pearce, and an increased moral blameworthiness overall.

[155] Similarly, Messrs. Howe and Pearce bear an indirect responsibility for the offences committed by Mr. James, and an increased moral blameworthiness overall.

The Range of Sentence

[156] Firstly, it is important to set out how a court should go about determining what is the appropriate "range of sentence" regarding a particular offence.

[157] Implicit in that determination is the necessity for this court to look to the sentencing decisions of other courts, giving the most weight to decisions from our

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[43]The Alberta Court of Appeal favoured the Ontario approach: *R. v. Tremoyne*, 2000 ABCA 322 at para. 9; whereas the Manitoba Court of Appeal favours the Nova Scotia *Adams* approach – *R. v. Traverse*, 2008 MBCA 110, at paras.32-45; see also *R. v. Draper*, 2010 MBCA 35 at paras.30-31, which Justice Bateman in *Adams* (para. 25) characterized as the "proper approach." In Saskatchewan, courts favour the Nova Scotia approach: *R. v. Nahnybida*, 2018 SKCA 72, at paras. 161-162.

Court of Appeal, but having regard to other Canadian jurisdictions for guidance if binding guidance is not available locally.

[158] This process is integral to our legal system. It is an attempt to create a consistent history of judicial decisions that allow those involved to be able to formulate a reasonable expectation of sentencing outcomes in pending criminal cases.

[159] Every day throughout the country, courts and counsel refer to cases they have selected to present at sentencings as "precedents". In doing so they suggest these cases serve as useful touchstones or guidelines in relation to the particular sentencing before a court.

[160] However, a word of caution should accompany any such investigation. Merely calling a reported sentencing decision a "precedent" does not make it so. In *R. v. Martial,* 2018 ABCA 201, the court made the following observations:

> 17 Great care must be exercised when assessing the precedential value of appeal court sentencing judgments. Some appellate opinions reveal the range of sentences that the appeal court believes is fit. Most do not.
>
> 18 The precedential value of an appeal court decision may be substantial if both the Crown and the offender appeal,[7] if the offender appeals and the appeal court concludes that the sentence imposed exceeds the upper limit of the range of reasonable dispositions[8] or if the Crown appeals and the appellate court concludes that the sentence is below the low point marking the spectrum of reasonable options.[9]
>
> 19 The precedential value of an appellate sentencing decision may be negligible if the offender appeals and the appeal court dismisses the appeal on the basis that the sentence is not too severe. This outcome may camouflage the appeal court's view that a more severe sentence would not have been unfit.[10]

[161] Moreover, decisions from trial courts are often so infused with differing facts from the case to be sentenced, as to make them of little value as a true precedent.[44] Nevertheless, sentencing judges should always strive to identify a range of sentence. In some cases, such as this one, it is difficult to do so with precision.

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[44] Regarding *stare decisis,* see the court's comments at para. 26, *R. v. Comeau,* 2018 SCC 15, and at para. 11, in *R. v. Sansalone,* 2013 ONCA 226, leave to appeal denied [2010] SCCA No. 212.

[162] In *R. v. Cromwell*, 2005 NSCA 137, Justice Bateman helpfully pointed out the following in relation to assessing what is the relevant "range of sentences" for a particular case:

> 22 In *R. v. Shropshire* [1995] 4 S.C.R. 227 an "unfit" sentence is described as one that is "clearly unreasonable" (at para. 46 per Iacobucci, J., for a unanimous Court), in other words, "clearly excessive or inadequate" (see also *R. v. Muise* (1995), 94 C.C.C. (3d) 119 (N.S.C.A.)). An unreasonable sentence is one falling outside the range (Shropshire at para. 50 and MacIvor, supra, at para. 31).
>
> 23 In evaluating a joint submission the judge must determine the acceptable range of sentence for the offence before the court. A fit sentence is one that falls within that range. Fixing the range requires a consideration of the general sentencing principles and, for purposes of this case, those of conditional sentencing.
>
> …
>
> 26 *Counsel* for Ms. Cromwell says this joint submission is within the range. He *broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender* ("... sentences imposed upon similar offenders for similar offences committed in similar circumstances ..." per MacEachern, C.J.B.C. in *R. v. Mafi* (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. *This variation creates the range*.
>
> [My italicization]

[163] I consider the extortion offences to be predominant because they are most representative of predicate offences. In discussing whether "extortion" could include demanding "sexual favours", Chief Justice Lamer stated in *R. v. Davis*, [1999] 3 S.C.R. 759:

> 44 Mewett and Manning, supra, take a differing view. Commenting on *R. v. Bird*, they argue at p. 833 that:
>
> Not a great deal of discussion appears in *Bird* on this wide interpretation of "anything", the court being content to say that the word is clear and unambiguous and used in this context is of wide unrestricted application. Yet this is not what is normally meant by "extort or gain". It is true that, in isolation, "anything" can be of the widest meaning, but in the context of "extort or gain", one might have thought that it referred to something of some tangible proprietary or pecuniary nature.

> I respectfully disagree. I do not believe the authors place sufficient weight on the fact that the meaning of "anything" is further qualified by the words "to do anything or cause anything to be done" at the end of the section.
>
> 45 I also find that an interpretation of "anything" that includes sexual favours is suggested by the purpose and nature of the offence of extortion. *Extortion criminalizes intimidation and interference with freedom of choice*. It punishes those who, through threats, accusations, menaces, or violence induce or attempt to induce their victims into doing anything or causing anything to be done. Threats, accusations, menaces and violence clearly intimidate: see *R. v. McCraw*, [1991] 3 S.C.R. 72, at p. 81; *R. v. Clemente*, [1994] 2 S.C.R. 758, at pp. 761-62. *When threats are coupled with demands, there is an inducement to accede to the demands. This interferes with the victim's freedom of choice*, as the victim may be coerced into doing something he or she would otherwise have chosen not to do.
>
> 46 Given this purpose, I find it difficult to accept the appellant's contention that "anything" should be limited to things of a proprietary or pecuniary nature.
>
> [my italicization]

[164] The circumstances of Mr. James's offences are distinguishable from those of Messrs. Howe and Pearce.

[165] Mr. James, directly and continually, criminally interfered with RM's freedom of choice between the Spring of 2012 and August 28, 2012. As a result, RM was dissuaded from creating his own designed MC, and bringing a three-piece patch or one-piece patch Brotherhood MC chapter to Nova Scotia.

[166] Messrs. Howe and Pearce directly, criminally interfered with RM's ongoing freedom of choice on September 14, 2012. As a result, RM and his wife, DM, were dissuaded from driving a motorcycle again- they sold their motorcycles – and did not attend any motorcycle events thereafter.

[167] Although they are distinguishable, I have found that the actions of each of Mr. James and Messrs. Howe and Pearce, were causally linked: their criminal conduct was purposeful, deliberate, and reflected the monolithic will and expectation of a criminal organization as a whole.

[168] I will next turn my attention to identifying cases that most closely involve similar circumstances, similar offences and similar offenders.

[169] The extortion cases presented by counsel, that have sufficient facts articulated to be helpful in this case (eg. not *Burdon*) tend to primarily deal with

legally unenforceable gambling debts owed (*Le*, and *Lal*); drug trafficking debts or associated activity (*Barton*, *Berry*, *Reed*, *Cromwell*, *Violette*, *Shea Ste. Marie*.[45]

[170] I find the most helpful in relation to Mr. James's offences:

1. *R. v. Coates*, [2002] O.J. No. 5871 (SC) – 3 Hells Angels MC offenders sentenced to three, four, and five years' imprisonment – in an unsophisticated scheme, these offenders identified themselves as Hells Angels MC members and visited an individual's business office, threatened him, and demanded that he pay them $70,000 – he did pay $5000 to them;
2. *R. v. Widdifield*, 2018 BCCA 62- Widdifield was a Hells Angels MC member, who was assisted in the extortion by Messrs. Sandhu, Lajeunesse and Benvin who received respectively, five years, four years, three years imprisonment, and time served with one of year probation – at para.6 the trial judge stated: "this case involved a protracted, repetitive, and aggressive extortion involving the actual loss of a valuable asset [a 37 foot Bayliner yacht called Dream Chaser which was later sold by the offenders for $80,000]. Physical violence was used, and if not for the intervention of the police, [the victim, who had a criminal history involving narcotics trafficking] may well have been subjected to further mischief and mayhem of a pronounced and alarming sort." The trial judge also noted at para. 10. that "these associations were a matter of the complainant's personal choice, and I suspect that for most law-abiding citizens, in light of [victim's] history and lifestyle, sympathy will be circumscribed". Widdifield's record was "fairly minor, but also dated"; and
3. *R. v. Lindsay*, 2009 ONCA 532 – Of Mr. Lindsay and Bonner, who were sentenced in an unreported decision, only Mr. Lindsay appealed his sentence. They respectively received six years and three years' imprisonment at trial- see paras. 13 and 38 of the Court of Appeal decision. Both men were Hells Angels MC members, and went to the victim's home, demanded money from him, a dealer in black market satellite television equipment, to cover an alleged debt arising from an earlier sale. He contacted the police and wore a recording apparatus

[45] Although it is not entirely clear at paras. 3 and 6 of *Ste. Marie*, this case was confirmed in a later decision to be in relation to a drug debt collection - see *R. v. Black*, 2014 ABCA 214, at para. 26.

> when he met with them again at a restaurant. There, he was reminded that if they didn't get their money his days were numbered, and Lindsay said he would send people like him to his house to get the money. Lindsay and Bonner were arrested outside the restaurant. Justice Fuerst found Lindsay and Bonner to be members of a criminal organization, in the relevant Hells Angels MC territorial area, and that they committed the extortion with the intent to do so in association with a criminal organization. Notably, the effects of the extortion on the victim and his family were devastating – they were compelled to leave their home suddenly and obtain secure identity changes. The trial judge described their circumstances as: "fear is their constant companion".

[171] There are useful comments about the range of sentence in *R. v. Violette*, 2013 BCCA 31. Violette figured prominently when he and other Hells Angels' MC members lured a drug dealer who was using the Hells Angels' name while dealing, to a secluded location where he was viciously beaten for having done so, in an effort to deter him and others from doing so in future. At trial, in *Violette*, 2009 BCSC 1557, Justice Romilly stated:

> 135 **Sentences for extortion do not generally exceed five to six years**: *R. v. Carter* (1995), 61 B.C.A.C. 161; *R. v. Mills* (1998), 129 C.C.C. (3d) 313, 112 B.C.A.C. 283; and *Payne*, at para. 36.
>
> 136 In *R. v. Saumier*, 2008 BCCA 473, 261 B.C.A.C. 272 [***Saumier*], a three year sentence for extortion was upheld.** Newbury J.A., for the Court of Appeal reviewed a great deal of relevant jurisprudence (at paras. 9-12) including other cases involving members of the Hells Angels: *Coates*. **In *Saumier*, Newbury J.A. found, at para. 13, that the sentence imposed by the lower court "was in the upper range of extortion cases in which violence or organized crime have not featured".** However, issues as to the accused's lack of efforts to rehabilitate, attitude to convictions as a "cost of doing business" weighed heavily in concert with the goals denunciation and deterrence, rehabilitation and reparation. The sentencing judge was to be afforded deference and Newbury J.A. ultimately found that "it cannot be said that the court below erred in imposing an unfit sentence on the extortion charge."
>
> [my emphasis added]

[172] On appeal the sentences were upheld. The court stated:

> 40 As his last ground of appeal, the appellant says the sentence imposed is unfit, and asks us to substitute a sentence in the range of 18 months on the extortion offence and 12 months on the firearms offence, for a global sentence of 30

months in place of the global sentence of six years. He refers to his strong letters of reference, his successful business career and his prospects for continued successful employment, and urges this court to substitute time served in lieu of a further period of incarceration.

41 We have been referred to several sentencing cases for the offence of extortion: *R. v. Cromwell*, 2007 BCSC 601; *R. v. Bohoychuk*, [2005] M.J. No. 92 (Q.B.); *R. v. McAninch* (1994), 53 B.C.A.C. 149; *R. v. Garfield*, 2007 BCCA 300; and *R. v. Saumier*, 2008 BCCA 473. This collection involves cases ranging from nine months' incarceration (*Cromwell*) to three years' incarceration (*McAninch, Saumier*). In *Garfield*, this court upheld a sentence of two years' incarceration and 14 months' incarceration for two counts of extortion (to be served consecutively) involving discipline activity of a "crack ring" that was more violent than the activity here,but committed by a youthful first offender with cognitive and intellectual difficulties. In *McAninch*, this court upheld a three-year sentence imposed on each of one count of assault with a weapon and one count of extortion, to run concurrently. The assault, which caused serious injury, was to further private collection of a debt.

42 **In *Saumier*, the judge imposed a sentence of three years for extortion**, two years consecutive for possession of a loaded firearm, and six months concurrent on a second firearms offence, for a global sentence of five years, which was then adjusted down to take account of pre-trial custody.. **The extortion was of a customer who had purchased cocaine from Saumier in the past and was known by Saumier to have recently purchased a vehicle. Saumier intimidated the customer into signing papers transferring the vehicle to him.** Madam Justice Newbury, for the court, made these observations:

[13] Mr. Garson on behalf of the Crown notes that the crime of extortion has become the subject of increased societal concern in recent years, as reflected by the fact that the maximum sentence is now life imprisonment. I agree that this fact does make some of the older cases to which we were referred less helpful than more recent ones. The Crown submits as well that a dichotomy between extortion cases involving violence and those not involving violence does not properly reflect the broader set of factors that the court is required to consider in sentencing, and that McKinnon J. in this instance implicitly considered those principles - denunciation, deterrence, the separation of offenders from society, rehabilitation, reparation and a promotion of a sense of responsibility in offenders. He found that denunciation and deterrence were most important in this instance, given Mr. Saumier's record, his past convictions for disobeying court orders and other undertakings given to the court, and what Mr. Garson described as his attitude to convictions - as simply a cost of doing business. As for rehabilitation, I have already noted the sentencing judge's skepticism that Mr. Saumier had "any interest in that direction". **As I read his reasons, it was because of these factors that McKinnon J. arrived at a sentence that was in the upper range of extortion cases in which violence or organized crime have not featured**.

> [14] In my view, given the deference to which the sentencing judge is entitled, it cannot be said that the court below erred in imposing an unfit sentence on the extortion charge.
>
> ...
>
> [16] As for the totality principle, given that the three years imposed on the extortion count was a fit sentence, and that, as the defence conceded, two years was also a fit sentence on the firearm charge under s. 95(1) of the *Criminal Code*, I am not persuaded that the sentence in its totality was excessive.
>
> 43 **The circumstances of the offence of extortion can vary greatly, and thus so can the range of sentences. None of the cases just referred to bear the same mix of factors as is present here**. In this case, the judge considered the following to be aggravating factors: the offence involved infliction of violence; there was evidence of some injury; the extortion was planned and premeditated, engaged the conscription of others to help, and involved luring the victim to the location; the location was a dark, remote place where assistance "would purposefully be harder" to obtain; the beating would have been worse but for the chance passing of a vehicle; the victim did not resist, which is a measure of the intimidation factor; the extortion was done on behalf of the East End Charter of the Hells Angels; there was a "businesslike impersonal attitude" to the crime; and the appellant was the leader in the extortion. **Of particular concern in this list of aggravating factors is the group purpose aspect of the offence, the factor at the centre of the first ground of appeal. The judge's observations on this are entirely correct. Criminal behaviour undertaken to advance a collective's pride, reputation, or business is opposite to order in a civilized community, and fully justifies moving the sentence here to a somewhat higher level than has been applied in the cases mentioned earlier.** Even considering the mitigating factors referred to by counsel for the appellant, it does not appear to me that a sentence of four years is unfit in this case.
>
> [my emphasis added]

[173] More recently, in *Widdifield*, the court speaking through Justice Dickson stated:

> 55 There are obvious explanations for the disparity in sentences in this case. Given the judge's findings, it was reasonable for him to take into account the benefit Mr. Widdifield received and his role as the driving and superintending authority behind the extortion when crafting his relatively high sentence. Among other distinguishing features, Mr. Widdifield's leadership role differed significantly from the roles of the other participants, including Mr. Sandhu, who was sentenced two months later by another judge and described as Mr. Widdifield's "junior emissary". In addition, to the extent he pays the restitution award, Mr. Widdifield is entitled to seek contribution from the other responsible offenders.

> 56 Nor, in my view, did the judge err in identifying the appropriate range of sentence, given the authorities and the aggravating factors that were present. **Contrary to Mr. Widdifield's submission, the circumstances in *Violette* were not less serious than those in his case. Most notably, as Justice Baird held in contrasting his case with *Violette*, the extortion of J.H. was "a drawn-out process over several months of increasing pressure and threats, culminating in actual violence."** Additionally, in *Violette*, the firearms offences were unrelated to the extortion and, as a result, Mr. Violette received a two-year consecutive sentence for those offences. He was not ordered to pay restitution because the victim suffered no loss of property.
>
> **57 As this Court noted in *Violette*, the circumstances of the offence of extortion vary greatly and, therefore, so does the appropriate range of sentence: para. 43. Some extortion cases involve violence; others do not; still others involve violence, property loss and organized crime. Where neither violence nor organized crime is involved in an extortion, this Court in *Saumier* identified the upper range of sentence as three years' imprisonment. However, in *R. v. Lindsay*, 2009 ONCA 532, the Ontario Court of Appeal upheld a six-year sentence where the extortion was committed in association with the Hells Angels and, in *R. v. Grant*, 2009 MBCA 9, the Manitoba Court of Appeal upheld a five-year sentence where the offence was committed by a professional extortionist.**
>
> [my emphasis added]

[174] Messrs. Howe, James and Pearce were members of a criminal organization, and purposefully acting in its interests when they committed these offences.

[175] Mr. James was not physically violent toward RM, but his extortive conduct extended over several months, and became increasingly threatening, menacing, and intimidating, including towards RM's family. He caused RM to give up on: having his own personalized MC; a three-piece patch Brotherhood MC chapter in Halifax; or a one-piece patch Brotherhood MC chapter in Halifax.

[176] Messrs. Howe and Pearce, emphatically and expressly threatened RM, albeit they were not physically violent toward RM - as Mr. Howe said, because they were in public- their extortive conduct lasted less than 20 minutes on September 14, 2012. However, they intended to, and did, cause RM and his wife to give up on motorcycling entirely.

[177] From the available case law, it is my considered opinion that the range of sentence for the *predicate* offences committed here by Mr. James (i.e. similar offenders, similar offences, committed in similar circumstances) is between low-end penitentiary terms of imprisonment in circumstances where aggravating factors

are significantly outweighed by mitigating factors, and penitentiary terms of imprisonment of up to six years, or more, depending on the mix and weight of mitigating and aggravating factors.

[178] It is difficult to ascertain a precise range for Messrs. Howe and Pearce,[46] because their direct involvement was limited to one day, however I did conclude that they were indirectly working "hand in glove" with Mr. James as loyal members of the BMC, when they threatened, menaced and intimidated RM beyond what Mr. James had done.

[179] It is my considered opinion that the range of sentence for the *predicate* offences committed by Messrs. Howe and Pearce is between a medium to maximum term of imprisonment in a provincial correctional facility, before the application of mitigating and aggravating factors.

[180] I also sought out sentencing decisions that would provide a basis for determining a range of sentence for their threatening, intimidating and extortive behaviour.

[181] The threats uttered by Mr. Howe were explicit. RM was to cease riding his motorcycle or ever appearing again at any events in Nova Scotia.

[182] In *R. v. Upson*, 2001 NSCA 89, the Court of Appeal confirmed a conviction for uttering threats intended to cause a church congregation of predominantly African-Nova Scotian membership to cease attending church. A "white supremacist" was convicted of three counts of uttering threats contrary to Section 264.1: "to destroy or damage the real property of the Victoria Road United Baptist Church; to cause bodily harm or death to Rev. Elias Mutale; and to cause bodily harm or death to members of the Black race." Her threats, which she claimed at trial were not from her, or the Ku Klux Klan, but rather from God and the Bible, were intended to cause the congregation not to attend church, because: "you people are not supposed to be in the Kingdom and if you continue to meet in this place, you're going to be sorry for what will happen."

[183] Justice Flinn, speaking for the court, stated: "the whole purpose of the appellant's visits… was 'to frighten, intimidate, upset and threaten Rev. Mutale and the congregation in the church'" (para. 34). The Court stayed the conviction

[46] Albeit, I find some guidance in the *Lindsay*, *Coates*, and *Violette* cases.

for threats against Rev. Mutale, and overturned the conviction for threats to destroy or damage the real property of the church.

[184] On the remaining charge, of threatening to cause bodily harm or death to members of the Black race (i.e. the congregation membership),[47] Justice Flinn had to consider what sentence should that Court impose for the one count of uttering threats, which carried a maximum sentence of five years imprisonment. Justice Flinn stated at paras. 60 – 65:

> While each case must, of necessity, be determined by its own circumstances, a general review of the cases dealing with *sentences for uttering threats, not surprisingly, show a wide range of sentences* from probation through to imprisonment for 30 days, three months, six months, one year, etc. Neither counsel nor I have found a case of uttering threats *which was aggravated because of the fact that the threat involved racial hatred.*... The appellant has been in custody since April 2000 [the court's decision was rendered May 24, 2001]… The appellant will have served over 13 months imprisonment. Having considered the submissions of counsel, and the decision of the trial judge on sentencing, it is my opinion that a fit sentence for the appellant under these circumstances is time (served.")[48]
>
> [my italicization]

[185] Having determined the ranges of sentence for the *predicate* offences, I will next consider for each offender the aggravating and mitigating factors that will determine where they sit on the range of sentence.

Patrick James

[186] The aggravating factors in respect of Mr. James include:

1. The deliberation required, and the length of time over which he committed these offences against RM (and his family), given that each occasion required a fresh criminal impulse by him;

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[47] Which was approvingly referred to in *R. v. McRae*, 2013 SCC 68, at para. 13.

[48] I note the significant aggravating factor was that the threat "involved racial hatred" which is a statutory aggravating factor per s. 718.2(a)(i). In the case at bar the significant aggravating factor is that the threats/extortion "was committed for the benefit of, at the direction of or in association with a criminal organization" which is a statutory aggravating factor per s. 718.2(a)(iv). I therefore find the *Upson* case to be a useful comparator, although she had a more recent and material criminal record than Messrs. Howe and Pearce. Her 13 months custody/time-served sentence was effectively, considering it two thirds of her entire sentence, almost a 19.3 months sentence.

2. Section 718.2(a)(iv) deems it an aggravating factor "that the offence was committed for the benefit of, at the direction of or in association with a criminal organization";

3. As Sgt. at Arms for the BMC in Nova Scotia, Mr. James's executive position speaks to his level of commitment to the BMC,[49] which I have found he knew beyond a reasonable doubt was a "criminal organization" at the relevant times;

4. That Mr. James's criminality was "undertaken to advance a collective's pride, reputation, or business" (*Violette*, BCCA);

5. Mr. James's offences were part of his position's responsibilities (intelligence gathering, enforcement, maintaining discipline) with the BMC – his responsibility to "police" the territory of Nova Scotia to ensure no unauthorized clubs were being created, or introduced from elsewhere, meant he was responsible to enforce the BMC's will on such unauthorized actions throughout Nova Scotia – for example see his email contacts with SH.[50] Thus, he (and the BMC) intended to intimidate the motorcycling community at large, and others in Nova Scotia;

6. Mr. James attended at RM's work on August 27, 2012, wearing his BMC regalia, arriving on his Harley Davidson motorcycle, and without invitation entered RM's office and sat down to wait for him to arrive;

7. The nature and extent of the extortion: he dissuaded RM from having a club of his own at any time in the foreseeable future, (until at least November 2016 RM had complied, and he and his wife were robbed of the enjoyment of motorcycling);

8. Mr. James's criminal conduct also targeted RM's family;

9. I conclude beyond a reasonable doubt that Mr. James's conduct was not only intended to interfere with RM's freedom to choose whether to have a motorcycle club in Nova Scotia, but also intended to, and did, interfere with his making a complaint to the police (RM made none until after the incident on September 14, 2012);

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[49] Including that he had Sargeant's stripes tattooed onto his right hand – Admission of Facts filed December 7, 2016.

[50] See paras. 1 – 15, in *R. v. Howe*, 2018 NSSC 156.

10. I observe that all residents of Nova Scotia, including RM and his family, are entitled to expect to feel safe in their homes, and their communities. Although I have no victim impact statement in evidence before me, I conclude beyond a reasonable doubt that RM and his family felt unsafe at least until November 2016, as a result of his interactions with Mr. James, and for reporting the matter to the police.[51] Not only physical violence instills a disproportionate and significant level of fear in victims – for example in the case of break and enters into full- time dwellings where the residents are not present at the time, the feeling of a "violation" and ensuing feeling of insecurity in one's home have been recognized by the courts even without the filing of a victim impact statement – e.g. see Justice Beveridge's comments (as he then was) in *R. v. Stewart*, 2009 NSSC 7:

> 6 *Neither of the victims of these two offences filed a victim impact statement*. The Crown alleges that it is in essence common knowledge that homeowners are impacted in a significant way when someone breaks into their home, violates their most private secure bastion in society, their home, to find it ransacked by a person or persons unknown, fearful that they might return, fearful what would have happened if they had been home when that occurred. Indeed, when Mr. Duffy returned home with his family, he refused to enter the home on his own. He went to a neighbour to call 911, rather than risk going in to find out who might be there.
>
> 7 *I accept, without reservation, the Crown's suggestion that homeowners do feel violated by the commission of this kind of offence. To call it a mere property offence is a mis-description*. If a property is impacted, *it impacts on the feelings of security of not just these particular people, but by others in the community who hear about this* -- and they do hear about it from them. What happened to you? Well, I was a victim of a break and enter. Well, my God, it happened to you.
>
> 8 I do not know if Mr. Stewart has ever spoken to anybody who has been a victim. He has certainly victimized these individuals, along with a long list of others. I am not sure how he would feel if it was his mother who arrived home to find her home ransacked or searched, and her most private possessions, some of them may be irreplaceable. I noticed the heirloom jewellery stolen from the Duffys, not recovered. The jewellery from the

[51] I have specifically concluded earlier that, at specific points in the criminal process herein, and as late as November 2016, RM remained sufficiently fearful of the BMC membership and their associates that he purposefully neutered some of his most inculpatory anticipated evidence against the defendants and the BMC – *R. v. Howe*, at para. 83, 2018 NSSC 156.

> Klimek house, not recovered. *Things like that cannot be replaced, nor can the security, the feeling of being safe in your home. Perhaps it can be recovered over time, but it is a significant impact.* Parliament, I think, has recognized a long time ago by the imposition or the setting of the maximum penalty for this offence to be life imprisonment. This is not a mere property offence.
>
> [My italicization added]

[187] The mitigating factors argued by Mr. James's counsel include:[52]

1. That Mr. James has only a dated and unrelated criminal record;
2. According to the PSR, he has the support of family and friends, and had a noteworthy dog breeding business;[53]
3. That he has been on bail for a lengthy period without incident;[54]
4. That there was no "actual [physical] violence" during Mr. James's interactions with RM.[55] Nevertheless, I agree with the sentiments of Justice Gower in *R. v. Gainz*, 2010 YKSC 15, at para. 26:

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[52] While not an aggravating factor on sentencing, the lack of remorse/acceptance of responsibility once guilt has been established, tends to bring into question the rehabilitative persuasiveness of other potential mitigating factors particularly in the case at bar given the high and consistent level of commitment each of the offenders have shown in the past to the BMC, and their ilk, and given the circumstances of the offences. Their commitment as members required them to *inter alia*: continuously fundraise for the club; sell support gear; attend weekly "church" meetings on Wednesdays at the clubhouse and general meetings in January and July at the Albert County clubhouse; ride their motorcycles over significant distances during the usual 4 to 6 mandatory motorcycle runs each year; according to the written BMC rules (see 12 – 15 and 18) minimum road mileage per calendar year is 5000 km; and generally to uphold the unwritten rules that the club's interests always come first and that members must always come to the aid of any member who requests them to do so.

[53] The adult Tosa Inu is described by the American Kennel Club as usually weighing 100 to 200 lbs., were formerly bred for fighting, but are now commonly used as watchdogs. This is consistent with the dogs shown in Exhibit 18 photograph 48, which Mr. James admitted in open court were the parents of the dogs he sold.

[54] In my opinion, while sometimes courts should put this "into the mix" of "mitigating factors", especially so if house arrest is involved (eg. see *R. v. Adamson*, 2018 ONCA 678 at paras. 106 – 108), frankly good behaviour while on bail is to be expected, and courts should not credit those on minimally restrictive conditions in any material way. Presumably offenders are motivated not to breach their release conditions, so as to not risk being incarcerated until their trial is heard. In the case at bar, the lack of breaches reflect no more than that each of the offenders has sufficient self-control, when their liberty interest hangs in the balance, to not jeopardize their bail status. On the other hand, I fully recognize that the associated stresses of criminal charges lasting over six years is a factor that I should properly give some weight and I do so here. I refer to Justice Duncan's decision regarding "pretrial detention as a mitigating factor", in *R. v. Gibbons*, 2018 NSSC 202, at paras. 66- 73, which comments on to what extent pre-trial bail restrictions should be seen as a mitigating factor. He approved of the Saskatchewan Court of Appeal's position that "generally speaking, time spent on pre-sentence release can reduce an otherwise appropriate sentence only if it involves meaningful hardship or important limitations on the offender's liberty."

> Further, in the cases which I have reviewed, it is not uncommon to find situations where victims have been terrorized or horrified by alternative means of extortion through threats or menaces. Therefore, I find it difficult to accept as a general principle that an actual physical assault is necessarily more aggravating than threats or menacing behaviour. In my view, the degree of aggravation depends on the facts of each case.

Duayne Howe

[188] The aggravating factors in respect of Mr. Howe are:

1. Section 718.2(a)(iv) deems it an aggravating factor "that the offence was committed for the benefit of, at the direction of or in association with a criminal organization";
2. Mr. Howe was the Secretary-treasurer of the Nova Scotia BMC chapter, and knew the BMC was a "criminal organization"; moreover, his actions on September 14, 2012 were "undertaken to advance a collective's pride, reputation, or business" (*Violette*, BCCA);
3. He was wearing his BMC regalia while committing the offences;
4. The nature and extent of the extortion is an aggravating factor: he dissuaded RM from driving a motorcycle, or attending motorcycling events in Nova Scotia; and
5. As a result of the actions of Mr. Howe, I conclude beyond a reasonable doubt that RM and his family felt unsafe at least until November 2016, because of RM's perceived "disrespect" to the BMC membership, and for reporting the matter to the police.

[189] The argued mitigating factors are:

1. Mr. Howe has a dated and unrelated record;
2. He has been on bail for a lengthy period of time without incident[56]
3. That there was no actual [physical] violence" during his interactions with RM;[57]

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[55] While I acknowledge that physical violence can be an aggravating factor, the absence of physical violence is not a mitigating factor, particularly where the offences proved include threats, intimidation, harassment and extortion – each of which would be generally considered to be a "violent" offence.

[56] I repeat my comments made in relation to Mr. James.

4. While presently retired from Canada Post, he had been employed between the years 2002 and 2012; and
5. He has the support of family and friends, who describe the current charges as unusual and out of character.

David Pearce

[190] The aggravating factors in respect of Mr. Pearce are:

1. Section 718.2(a)(iv) deems it an aggravating factor "that the offence was committed for the benefit of, at the direction of or in association with a criminal organization";
2. His conduct on September 14, 2012 was "undertaken to advance a collective's pride, reputation, or business" (*Violette* BCCA);
3. He knew the BMC was a "criminal organization" at the relevant times;
4. He was wearing his BMC regalia while committing the offences;
5. The nature and extent of the extortion is an aggravating factor: he dissuaded RM from driving a motorcycle, or attending motorcycling events in Nova Scotia;
6. As a result of the actions of Mr. Pearce, I conclude beyond a reasonable doubt that RM and his family felt unsafe at least until November 2016, because of RM's perceived "disrespect" to the BMC membership, and for reporting the matter to the police.

[191] The mitigating factors argued are:

1. That there was no "actual [physical] violence" during his interaction with RM;[58]
2. He has no prior criminal record;
3. He has been on bail for a lengthy time period without incident;[59]

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[57]I repeat my comments made in relation to Mr. James, and note that Mr. Howe himself stated to RM: "you didn't fucking disrespect us? I'm telling you, *you're going to get the fucking shit kicked out of you*".
[58] I repeat my comments made in relation to Mr. James.
[59]I repeat my comments made in relation to Mr. James. Moreover, I note that it is common in criminal organization proceedings for them to take up to 4 years to complete [e.g. *Violette*, 2009 BCSC 1557, para. 133 – 4.25 years;

4. He has a significant work history, work ethic and qualifications;

5. He has the support of family, and co-workers, who vouch for him being a good father, partner and "always there for friends or family in need".

[192] Collectively, I will note that for each of Messrs. Howe, James and Pearce this will be their first sentence of consequence. Moreover, they each have families who will in varying degrees be deprived of their presence, assistance and support.

[193] I wish to briefly refer to Justice Moldaver's comments in *Suter* about "collateral consequences", involving as they did how a sentencing court should consider the post – offence circumstances of Mr. Suter, who drove his vehicle onto a restaurant patio, killing a two-year-old child. Ultimately, he was found to have been properly convicted of refusing to provide a breathalyzer sample knowing that he caused an accident resulting in the death - but no more. At the scene he was pulled from his vehicle thrown to the ground and beaten by witnesses. Sometime later he was abducted by vigilantes – three hooded men took him from his home in the middle of the night handcuffed him and placed a canvas bag over his head. The attackers then drove them to a secluded area cut off his thumb with pruning shears and left him unconscious in the snow. His wife was also attacked by vigilantes in a shopping mall parking lot. Both incidents were linked to Mr. and Mrs. Suter's role in the death of the two-year old.

[194] Justice Moldaver noted that:

> Tailoring sentences to the circumstances of the offence and the offender may require the sentencing judge to look at collateral consequences.… There is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself… Prof. Alan Manson notes that they may also flow from the very act of committing the offence:
>
> > As a result of the commission of an offence, the offender may suffer physical, emotional, social, or financial consequences. While not punishment in the true sense of pains or burdens imposed by the State after a finding of guilt, they are often considered in mitigation [emphasis added; p. 136]
>
> I agree with Prof. Manson's observation, much as it constitutes an incremental extension of this court's characterization of collateral [immigration] consequences

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Widdifield, 2015 BCSC 643, para. 45 – 4.5 years; *Lindsay*, 2009 ONCA 532, paras. 5 to 13 – 44 months; *Blok-Andersen*, 2014 NLTD (G) 141, at para. 47 – 4.5 years.

> in *Pham.* In my view, a collateral consequence includes any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender." (paras. 46-47)

[195] A careful review of the circumstances here reveal no material "collateral consequences" that rise to the level "that a particular sentence would have a more significant impact on the offender because of his or her [collateral] circumstances".

[196] Messrs. Howe, James and Pearce face no "collateral consequences" from this sentencing that would make them "unlike" other offenders in any material manner that affects the appropriateness of the sentence for each of them in this case otherwise.

Summary of sentences for the predicate offences

[197] In the case of each of the offenders, the aggravating factors significantly outweigh the mitigating factors.

[198] However, each of the offenders has no criminal record, or an insignificant criminal record,[60] and this will be the first sentence of real consequence for them. The court must exercise as much restraint as possible without unduly compromising the paramount considerations here, which are specific deterrence to these offenders, and general deterrence to those of like mind and intention, and denunciation of this unlawful conduct and its impact on RM and his family, the motorcycling community at large, and the general citizenry of Nova Scotia.

[199] A sentence should not have a crushing effect on the future prospects of an offender. Each of these offenders will emerge from imprisonment back into society. Rehabilitation remains a factor, but I am not optimistic about the necessary attitudinal re-orientations, and the prospect of these offenders turning away from their former peer group and their ilk. Should they maintain their ties, associations and sympathies to such groups and organizations, they will be at much greater risk of committing further criminality in future.[61]

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[60] I observe that is common in criminal organizations offence cases that offenders are older individuals, with no, or modest/dated criminal records, with established employment, business ventures, etc., e.g.: *Blok-Anderson*, 2014 NLTD (G) 141, at paras. 41 – 45; *Violette*, 2009 BCSC 1557, at paras. 122-124; *Widdifield*, 2015 BCSC 643, at paras. 11-13.

[61] The prospects seem the more so bleak for Mr. Pearce. Exhibit S-1 is a series of Facebook photographs covering a time period from March 2, 2015 September 30th 2018. Generally, it is fair to say that people post photos on their Facebook pages in order to present their preferred image of themselves to the world at large. Mr. Pearce has

[200] I keep in mind as well the fundamental principle that an offender's sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Each of these offenders bear a high degree of responsibility for the offences, and the gravity of the offence is very serious, even before considering the aggravating factor, that they were committed for a "criminal organization", which organizations the Supreme Court of Canada has pointed out pose an "elevated threat" to civil society.

[201] Given that the mitigating factors are significantly outweighed by the aggravating factors, and that for the predicate offences, I find that the extortion offence is most reflective of the offenders' criminal conduct, which offence carries a maximum term of imprisonment of life, the fit sentence for each of the offenders is as follows:

1. Patrick James – three years in custody (s. 346 – three years);[62]
2. Duayne Howe – two years in custody and three years probation (s. 346); and
3. David Pearce – 18 months in custody and three years probation (s. 346).

The range of sentence for the "criminal organization" offences

[202] As with the predicate offences, I will focus my attention on the "criminal organization" extortion offence - s. 467.12.

[203] There is very little case law to draw on regarding the range of sentence for such offences.[63] All other things being equal, the application of the principles of

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consistently and repeatedly presented himself as a supporter of the Hells Angels MC between February 2015 and the fall of 2018. He appears in the fall of 2018 sitting on his motorcycle, beer in hand, in his residence, with a Hells Angels MC support t-shirt hanging in the background reading "all cops are bastards"; wearing a "81 Nomads New Brunswick" T-shirt, his Bacchus Motorcycle Club tattoo visible on his left forearm which appears to carry the dates 2010 – 2012; in June 2017, he updated his profile picture to carry an image of his 3 ½-year-old son standing beside Hells Angels MC support gear; December 30, 2016 he has his motorcycle inside his residence, draped over it a Hells Angels MC support t-shirt with a top rocker bearing "Maritime" and underneath it a large "81" all written in red with "support" written in white inside the" 1 " of the "81"; he updated his profile picture: on March 2, 2015, to show his young son wearing a t-shirt "support Downtown Toronto" Hells Angel MC chapter; May 2, 2015, to show his young son wearing a hoodie which bore the emblem of a beast-like creature on the front surrounded by red writing on a white background: "Support 81 WESTRIDGE"; and again on May 16, 2016 showing his young son wearing the same hoodie. According to the PSR his son was born November 27, 2013.

[62] The s. 264.1, s. 264, and s. 423 predicate offences are conditionally stayed for each offender pursuant to the *Kienapple* principle: *R. v. Thomas*, 2015 NSCA 112, at paras. 55 – 86, per MacDonald CJNS and Beveridge JA.

proportionality and totality together should cause the range of sentence for the predicate offences, grossed up by the "criminal organization" statutory aggravating factor in s. 718.2(a)(iv) to bear a strong similarity to the sum of the Section 467.12 offence sentence (which carries a maximum term of imprisonment for not more than 14 years), made consecutive to the sentence for the predicate extortion offence. But must the s. 467.12 offence "stand alone" sentence be ordered as "consecutive" to the "stand alone" sentence for the predicate extortion offence? Would that not amount to "double counting" of the "criminal organization" factor?

[204] In the jurisprudence, there are competing approaches to how to properly interpret and apply the legislative interplay between s.718.2(a)(iv)-the predicate offences grossed up by the "criminal organization" aggravating factor- and the "criminal organization" offence contained in s. 467.12.[64]

[205] Significant to this discussion is that Section 743.6(1.1) states that where an offender receives a sentence of imprisonment of two years or more on a conviction for a criminal organization offence *other than* under sections 467.11, 467.111, 467.12 or 467.13, the court:

> *may order* that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or 10 years, whichever is less.[65]

[206] In contrast, Section 743.6 (1.2) requires that where an offender receives a sentence of imprisonment of two years or more on a conviction for an offence under Sections 467.11, 467.111, 467.12 or 467.13:

> The court *shall order* that the portion of sentence that must be served before the offender may be released on full parole is one half of the sentence or 10 years, whichever is less, *unless* the court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence and the objectives of specific and general deterrence would be adequately served by a

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[63] However, cases suggest a range of 1 to 5 years imprisonment, which range I accept for present purposes. See *Blok-Andersen*, 2014 NLTD (G) 141, at para. 32, per Dunn J. (varied only slightly on appeal 2016 NLCA 9); and *R. v. Beauchamp*, 2009 ONCA, at para. 300, per Cronk JA.

[64] See paras;. 26-33 and 45-56, in *R. v. Blok-Andersen*, 2016 NLCA 9, in contrast to *R. v. Beauchamp*, 2015 ONCA 260.

[65] The predicate extortion offence is included in Schedule I to the *Corrections and Conditional Release Act*, SC 1992, c. 20, per s. 120. Therefore, s. 743.6(1) *Criminal Code* applies and provides a similar discretion to that contained in s. 743.6(1.1).

> period of parole ineligibility determined in accordance with the *Corrections and Conditional Release Act*.

[207] Section 743.6(2) reads:

> For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to those paramount principles.

[208] In the circumstances of this case, where the predicate and "criminal organization" offences are factually and virtually legally identical, I prefer the approach of the court in *R. v. Aube*, 2009 SKCA 53,[66] which is consistent with *Blok-Anderson* and seeks to reconcile the ultimate sentence, based on the predicate offence range and reflect the principle of the totality and the "criminal organization" element including the required consecutive s. 467.12 sentence, by "downsizing" the predicate offence sentence to allow a commensurate additional consecutive s. 467.12 offence sentence.

[209] I conclude that a proper and fit sentence for each offender in totality should not exceed the sentences I would impose for the predicate offences. Therefore, to effect that result, I will exercise my discretion, and *inter alia* place no weight on the s. 718.2(a)(iv) *Criminal Code* factor in determining a revised sentence for the predicate offences of extortion for each offender, and add a commensurate consecutive sentence for the s. 467.12 (extortion) offence. Therefore, I sentence these offenders as follows:[67]

1. Patrick James – on the s. 346 extortion offence – two years imprisonment; on the s. 467.12 (extortion) "criminal organization" offence – one year imprisonment consecutive; and
2. Duayne Howe – on the s. 346 extortion offence- one year imprisonment; on the s. 467.12 (extortion) "criminal organization" offence – one year imprisonment consecutive, and three years' probation;[68] and

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[66] See paras. 20 and 22 – the court found a 2.5 year imprisonment sentence appropriate for *both* the predicate, and combined sentences for the predicate offence with a consecutive "criminal organization" offence arising therefrom.
[67] All the remaining s. 467.12 offences are conditionally stayed by the court as were their predicate offence counterparts.
[68] To come into force according to *Section* 732.2 of the *Criminal Code*, and in accordance with the court's *obiter dicta* comments in *R. v. Smith*, [1999] NSJ No. 96 (CA) per Chipman J.A. at para. 8

3. David Pearce – on the s. 346 extortion offence – six months' imprisonment; on the s. 467.12 (extortion) "criminal organization" offence – one year imprisonment consecutive, and three years' probation.

[210] The following ancillary orders will be issued regarding each offender unless specifically stated otherwise.

1. DNA – Section 487.051(2) of the *Criminal Code*;

2. "Firearms prohibition" – Section 109(1)(a) for the period beginning on the day the order is made and ending 10 years after the offenders' release from imprisonment;

3. Section 743.21 – no direct or indirect contact/communication of any kind during the custodial period of the offenders' sentences (including to "warrant expiry date") with the following persons who are protected by a Section 486.5 *Criminal Code* publication ban, and identified by initials: RM, DM, HJ, JJ, BE, ME, and SH including their immediate family members;

4. Section 743.2 -my conviction and sentence decisions including a copy of Mr. James's PSR will be forwarded to the Correctional Service of Canada;

5. Section 743.6(1) – regarding Mr. James, his sentence is on the low end of the range of sentence given the very serious nature and circumstances of this offence. Intimidation, extortion, harassment, threatening behaviour and physical violence are the "stock in trade" of such criminal organizations. They represent an elevated threat to civil society. It is critical that members of such groups and their associates be profoundly specifically and generally deterred. I find it necessary, in order to properly give effect to the paramount principles of denunciation, specific and general deterrence, to order that he serve one-half of his sentence before he may be released on full parole, rather than being eligible after he has served "the lesser of one third of the sentence and seven years" per s. 120 *Corrections and Conditional Release Act*;

6. Section 737 – a victim fine surcharge in the amount of $400 in total for each offender.

[211] The conditions of probation for both Messrs. Howe and Pearce will contain the statutory conditions in Section 732.1(2) and the following optional conditions:[69]

1. As per Section 732.1 (2) these offenders will comply with subsection (a.1) in relation to the seven individuals (RM, DM, HJ, JJ, BE, ME, and SH) and any members of their immediate family while on probation;

2. Also be subject to the additional conditions set out in Section 732.1 (3):

    (a) Report to a probation officer as directed in the court's order;

    (b) Remain within the jurisdiction of the court (in the case of a transfer of this probation order, the relevant province or territory of Canada) unless written permission to go outside the jurisdiction is obtained from the court or the probation officer;

    (c) Abstain from the consumption of drugs except in accordance with a medical prescription, excessive amounts of alcohol, or any other intoxicating substance;

    (d) Abstain from owning, possessing or carrying a weapon, which is defined as "means anything used, designed to be used or intended for use (a) in causing death or injury to any person, or (b) for the purpose of threatening or intimidating any person, and without restricting the generality of the foregoing, includes a firearm and, for the purposes of Sections 88, 267 and 272 of the *Criminal Code*, anything used, designed to be used or intended for use in binding or tying up a person against their will"

    …

    (h) Abstain from being in the company of, or communicating, directly or indirectly with, any person who is a member, striker, hang around of, or person associated with: the Bacchus Motorcycle Club, the Darksiders MC, the Highlanders MC, the Charlottetown Harley Club, the Vagabonds MC, the

[69] I am prepared to transfer to Mr. Pearce's order to Alberta pursuant to *Section* 733 *Criminal Code*.

> Para-Dice Riders MC, the Hells Angels MC, or any other self - identifying 1% Motorcycle Club; and
>
> not to possess, wear or display any clothing or paraphernalia, including jewelry and stickers directly or indirectly associated with any of the aforementioned motorcycle clubs.

The Crown application seeking forfeiture of offence-related property pursuant to Section 490.1 *Criminal Code*

[212] This application is disputed only insofar as the items seized in the residence of Duayne Howe, (except his BMC vest which he does not challenge as offence-related property). The Crown's application in relation to all other items sought to be forfeited is granted. The Crown had requested forfeiture of the items listed in the several Appendices "A" attached hereto.

[213] Section 2 of the *Criminal Code* defines *offence-related property:*

> means any property, within or outside Canada,
>
> (a) by means or in respect of which an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* is committed,
>
> (b) that is used in any manner in connection with the commission of such an offence, or
>
> (c) that is intended to be used for committing such an offence.

[214] The jurisprudence regarding the forfeiture of "offence-related property" arises most commonly from s. 16 of the *Controlled Drugs and Substances Act*, and Part 15 of the *Criminal Code*, specifically beginning at s. 490.1.[70] The latter is the basis for the forfeiture application by the Crown in this case.

[215] The legislative scheme is quite comprehensive.[71]

[216] For present purposes, the Québec Court of Appeal, in *R. v. Cameron*, 2018 QCCA 301, has succinctly stated the applicable principles:

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[70] See in particular: *R. v. Craig*, 2009 SCC 23; *R. v. Manning*, 2013 SCC 1; *R. v. Hells Angels Motorcycle Corporation*, 2009 ONSC 3503 per Pardu G.I. (as they then were)

[71] See Sections 490.1 to 490.9 attached as Appendix "B".

4. There is no merit to the appeal. The law is well-settled. The forfeiture decision is discretionary and absent any error in principle, failure to consider a relevant factor or an overemphasis on the appropriate factors, appellate Courts will not intervene. Further, the sentence imposed is not a relevant factor in determining whether forfeiture would be disproportionate…
5. Moreover, objectives and principles of sentencing are not applicable to the forfeiture order. The proportionality of the forfeiture order is limited to three factors: the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person convicted of the offence….".

Why I find the property seized to be "offence-related property"

[217] In *Hells Angels Motorcycle Corporation*, Justice Pardu stated:

> 7. Here the Crown concedes that there is no evidence that any of the personal property here in issue was utilized at the moment of the drug transactions and other offences which resulted in the convictions giving rise to this forfeiture application. I see no basis then to conclude that the "offence was committed in relation to that property",and conclude that an order for forfeiture cannot be made under Section 490.1(1) of the *Criminal Code* or 16(1) of the *Controlled Drugs and Substances Act*;
>
> 8. The issue remains, whether the Crown has established beyond a reasonable doubt that the property is "offence-related property" and whether in the circumstances, I ought to make an order for forfeiture.
>
> …
>
> 21. Ricky Ciarniello testified on behalf of the Respondent corporation, and filed an affidavit. He swears that he is a director of the Respondent corporation, and also that he is president of the Vancouver chapter of the Hells Angels in Canada. He largely confirmed the structure of the Hells Angels Clubs in Canada, and the process for admission as a member, as described by the trial judge. He testified that one of the main purposes of the corporate Respondent is to protect the trademarks it has registered. The corporation does not sell items that bear the mark to the general public and only members are allowed to use items that bear the mark. He indicated that a chapter would be licensed to use the mark, on the understanding that individual members would sign documents confirming that the corporate Respondent was the owner of any article bearing the trademarked symbols of the deaths head. At typical licence agreement with a chapter was entered as Exhibit 1, signed by the corporate Respondent and by another, on

behalf of the Niagara Falls chapter. He appends to his affidavit documents signed by eight of the convicted accused, which, with some variations, assert that the corporate Respondent is the owner of any and all articles bearing the trademarked symbols and the words "Hells Angels", and which provide that the member agrees "to grant Power of Attorney to a duly appointed representative of HAMC to sign, correspond, or engage in any necessary action to retrieve any and all of the aforementioned items, seized by any law enforcement agency and/or their representatives". Ricky Ciarniello deposes that the corporation does not in any way encourage or condone illegal activity of its members, though he acknowledged that the corporation does not have members. He further deposes:

> I do verily believe that the members of the Hells Angels Motorcycle Corporation are aware that committing crimes or engaging in any illegal activity while wearing any clothing or articles which bear the Hells Angels logo or insignia is highly prohibited.

22. In his evidence given at the hearing, he said that they do not condone illegal activities by members, although no one has been expelled for criminal conduct, to his knowledge. I reject this evidence. The bald assertions do not stand up to the detailed findings by the trial judge and, indeed, the finding that Hells Angels chapters in Canada constitute a criminal organization. The purpose of the items bearing the trademark is to identify members of Hells Angels chapters to others. Those who cease to become members must remove or obliterate tattoos in the form of the trademarked symbols.

23. Are these items of clothing and jewellery, bearing the deaths head logo "offence-related property"? I find that these items are in a broad sense, "intended to be used" for the commission of indictable offences. Hells Angels chapters in Canada comprise a criminal organization of which one of the "main purposes is the facilitation or commission of serious offences including trafficking in cocaine and other drugs, extortion and trafficking in firearms". McMahon J. stated in his decision of *R.* v. *Ward*, as follows at para. 97:

> Based on the evidence of Mr. Gault and Detective Sergeant Davis, and the words of Mr. Ward himself I am satisfied beyond a reasonable doubt that the Hells Angels Motorcycle Club of Canada is a criminal organization as defined by section 467.1(1) of the Criminal Code. I am satisfied beyond a reasonable doubt that one of the main purposes or activities of the Hells Angels Motorcycle Club in Canada is the facilitation or commission of serious offences including trafficking in cocaine and other drugs, extortion and trafficking in firearms. Further, I am satisfied that the facilitation of these offences has resulted in the direct and indirect receipt of material benefit by the Hells Angels Motorcycle Club and individual Hells Angels Motorcycle Club members who have benefited.

24. The use of these items is intended to further the organizational purposes. It is used to intimidate and extort, and to serve as a badge of trustworthiness in the conduct of drug deals. It matters not, that at the precise moment of extortion, the

> trademark is not displayed, or that the person actually handling drugs does not wear the item. Persons at the upper levels of the Hells Angel's hierarchy ensure that lower level associates do the dirty work.
>
> 25 In *R.* v. *Craig*, the court referred to a statement in the House of Commons by the Minister of Justice introducing the amendments creating the forfeiture provisions of the *Criminal Code*, and noted at para.[21],
>
> > As is apparent from the scheme's wording, the forfeiture provisions were intended to be of general application. However, the above statement by the Minister of Justice indicates that organized crime may be a relevant factor in the forfeiture inquiry.
>
> 26 A narrow reading of "offence-related property" as defined in s. 2(c) "that is intended to be used for committing" indictable offences, to items intended to be in the possession of the accused at the time of a particular drug offence, for example, would subvert the goal of the legislature, to deprive criminal organizations of the means whereby they carry on business, and does not take into account the broad nature of the criminal organization offences, exemplified, for example, by s. 467.11 of the *Criminal Code* which provides that a person who knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an offence.

[218] In a later decision, *R. v. Myles*, 2012 ONSC 6772, Justice Forestell considered a Crown application pursuant to ss. 16(1) and (2) of the CDSA, for forfeiture of alleged offence-related property. Some items were seized in the personal residences of the offenders/members of the HAMC, and others were seized in the Downtown Toronto clubhouse.

[219] The Crown's position was that the actual use of the items was not relevant, but rather the symbolism of Hells Angels Motorcycle Club membership was what was significant.

[220] The HAMC members were found guilty of trafficking and conspiracy to traffic in cocaine, GHB, and oxycodone.

[221] At trial, David Atwell, an ex- member of the HAMC, and then police agent, who was involved in the drug transactions in issue, testified as to the nature of the HAMC. Sgt. Ken Davis was qualified as an expert to testify regarding the alleged "criminal organization" component in relation to the Hells Angels MC. His evidence was accepted.

[222] Notably, there was no finding that the Crown had proved the HAMC, including the Downtown Toronto chapter, was a criminal organization.

[223] Justice Forestell concluded:

> 33 While membership in the Club was clearly "used" to commit the offences, membership cannot be equated with the symbols of membership. This is not a case where any item bearing a symbol of membership was used to extort or intimidate. No item bearing a symbol of membership was used as an assurance of trustworthiness. The participants in the transactions knew each other to be members and had no need of such property as a sign of membership.
>
> 34 Considering the definition of "offence-related property" and the provision for mandatory forfeiture in s. 16(1) of the *CDSA* in the context of the broader legislative scheme, I am not able to conclude that the designated substance offences were "committed in relation to" the property. In my view, s. 16(1) is intended to apply to specific property that is connected to specific designated offences. In this case, membership was used to commit the offences, but the property was not used to commit the offences.
>
> 35 Therefore, I find that the applicant has not proven on a balance of probabilities that the property was offence-related property in respect of which any of the designated substance offences were committed. The next question is whether the applicant has proven beyond a reasonable doubt that the property is offence-related property.
>
> [my italicization]

[224] Justice Forestell observed in relation to the *Hells Angels Motorcycle Corporation* case:

> 38 Pardu J. in *R. v. Hells Angels Motorcycle Corporation*,4, found that personal property seized from the homes of individual accused and from HAMC clubhouses in Ontario bearing the trademarked insignia of the HAMC was offence-related property and subject to forfeiture under s. 16(2) of the *CDSA*.
>
> 39 The application in that case was made after the conviction of various members of the HAMC for trafficking and for criminal organization offences. Pardu J. relied upon the trial judge's finding that the HAMC was a criminal organization. Pardu J. found that the items of clothing and jewelry were, in a broad sense, intended to be used for the commission of indictable offences because the items advanced the objectives of the criminal organization.
>
> 40 *As set out above, it is not open to me to conclude that the offences in this case were committed in association with a criminal organization. Such a finding would be in conflict with the verdicts in each of the underlying cases*. Unlike the case of *R. v. Hells Angels Motorcycle Corporation*, none of the individual respondents in this case was convicted of a criminal organization offence. While membership in the Club played a role in the commission of the offences because of the status of the participants to the transactions, there is no connection between the symbols of membership and any offences.

[my italicization]

[225] In the case at bar, I have concluded that in 2012 the BMC was a "criminal organization". Each of these offenders was knowingly a highly committed member of the BMC, and they wore their BMC regalia during the commission of these offences. They also displayed stickers on their motor vehicles and homes or wore other BMC items that were only available to full members.[72]

[226] I conclude based on the evidence at trial, under sub-sections 490.1(1) and (2) *Criminal Code* that all the documentary evidence, hardcopy and digital, including items such as calendars, seized from the clubhouse and Messrs. James and Pearce, and Mr. Howe's residences are "offence-related property"; as is any member or support gear, and paraphernalia, linked to the BMC, HAMC, and the various other self identifying 1% MCs, *including inter alia* the Highlanders MC, Darksiders MC, Charlottetown Harley Club, the Vagabonds MC, Para-Dice Riders MC.

[227] Similarly, I conclude that any such items of clothing, jewelry etc. "were, in a broad sense, intended to be used for the commission of indictable offences because the items advanced the objectives of the criminal organization", in this case the Bacchus Motorcycle Club.

[228] As required by Section 490.41(3) *Criminal Code*, I am satisfied that the impact of such an order of forfeiture would not be disproportionate to the nature and gravity of the offences, the circumstances surrounding the commission of the offences, and the criminal records of the offenders here.

[229] I note that the BMC written rules in evidence (Exhibit 14) state: "if you leave the club for any reason all club property must be returned".

Conclusion

[72] See also: *R. v. Cook*, 2010 ONSC 5155, at paras. 39 – 45, per Hill, J; *R. v. Paziuk*, 2007 SKCA 63; *R. v. Kopp*, 2011 MBPC 74; *R. v. Trac*, 2013 ONCA 246.

[230] I order as forfeited all items seized by the police (to the extent that they are included in the several Appendices "A" attached hereto) from:

1. The BMC Clubhouse at 9 mile River, Nova Scotia;
2. Patrick James's residence at 79 Renfrew Street, Dartmouth, Nova Scotia;
3. Duayne Howe's residence at 80 Dyke Road, Grand Desert, Nova Scotia;
4. David Pearce's residence at 20A Elmwood Avenue, Dartmouth Nova Scotia.

Rosinski, J.

“Appendix A”

Items Seized from Bacchus Clubhouse – Nine Mile River

1. Two Dianabol steroid pills;
2. Vial of cannabis resin;
3. Grey digital scale;
4. Memory stick (flash drive);
5. Picture of Bacchus members;
6. Christmas card from “Brotherhood MC”; and
7. Three ziplock bags of psylocibin (mushrooms)

Items Seized from 20A Elmwood – Residence of David Pearce

1. Photograph of Bacchus member (Pearce); and
2. Two Bacchus DVD’s.

"APPENDIX A"

Items Seized from Bacchus Clubhouse – Nine Mile River

8. Two Dianabol steroid pills;
9. Vial of cannabis resin;
10. Grey digital scale;
11. Memory stick (flash drive);
12. Picture of Bacchus members;
13. Christmas card from "Brotherhood MC"; and
14. Three ziplock bags of psylocibin (mushrooms)

Items Seized from 80 Dyke Road, Grand Desert – Residence of Duayne Howe

3. Shirts, hats and stickers located in van;
4. Hat and shirt;
5. Sweatshirt and hoodie;
6. Bacchus vest;
7. Support shirt;
8. Club related documents;
9. Sweatshirt and toque;
10. Documents found in living room;
11. Two shirts;
12. Black leather briefcase with notebooks;
13. A Bacchus shirt and Hells Angels support shirt;
14. Brass 1% ring;
15. CD, calendar and documents;
16. Bacchus hats and shirts; and
17. Small notebook.

"APPENDIX A"

Items Seized from Bacchus Clubhouse – Nine Mile River

15. Two Dianabol steroid pills;
16. Vial of cannabis resin;
17. Grey digital scale;
18. Memory stick (flash drive);
19. Picture of Bacchus members;
20. Christmas card from "Brotherhood MC"; and
21. Three ziplock bags of psylocibin (mushrooms)

Items Seized from 79 Renfrew Street, Dartmouth – Residence of Patrick James

18. Two Bacchus vests;
19. Two pictures and one calendar;
20. Bacchus clothing (hoody, short sleeve vest, two t-shirts (black));
21. Garbage bag with Bacchus clothing (three hoodies, six shirts, one ball cap);
22. Two Bacchus DVD's;
23. Two toques (Bacchus and East Coast Riders);
24. Three Bacchus calendars;
25. Bacchus business cards and support stickers;
26. Two white Bacchus ball caps;
27. Bacchus DVD;
28. Photograph of Wolverines patch;
29. Motorcycle support club clothing (four items);
30. Bacchus Home Security sticker; and
31. Two notebooks (church dinners and chapters/members)

“APPENDIX B”

Forfeiture of Offence-related Property

Order of forfeiture of property on conviction

490.1 (1) *Subject to sections 490.3 to 490.41, if a person is convicted, or discharged under section 730, of an indictable offence under this Act* or the *Corruption of Foreign Public Officials Act* and, on application of the Attorney General, *the court is satisfied, on a balance of probabilities, that offence-related property is related to the commission of the offence, the court shall*

> (a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, *order that the property be forfeited* to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and
>
> (b) in any other case, *order that the property be forfeited* to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen’s Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.

(1.1) [Repealed, 2001, c. 41, s. 130]

Property related to other offences

(2) *Subject to sections 490.3 to 490.41, if the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) is related to the commission of the indictable offence under this Act* or the *Corruption of Foreign Public Officials Act* of which a person is convicted or discharged, *but the court is satisfied, beyond a reasonable doubt, that the property is offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.*

Property outside Canada

(2.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Appeal

(3) A person who has been convicted of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act*, or the Attorney General, may appeal to the court of appeal from an order or a failure to make an order under subsection (1) as if the appeal were an appeal against the sentence imposed on the person in respect of the offence.

1997, c. 23, s. 15;
2001, c. 32, s. 30, c. 41, ss. 18, 130;
2007, c. 13, s. 8;
2017, c. 7, s. 64.

Application for *in rem* forfeiture

490.2 (1) If an information has been laid in respect of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act*, the Attorney General may make an application to a judge for an order of forfeiture under subsection (2).

Order of forfeiture of property

(2) Subject to sections 490.3 to 490.41, the judge to whom an application is made under subsection (1) shall order that the property that is subject to the application be forfeited and disposed of in accordance with subsection (4) if the judge is satisfied

> (a) beyond a reasonable doubt that the property is offence-related property;
>
> (b) that proceedings in respect of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* in relation to the property were commenced; and
>
> (c) that the accused charged with the offence has died or absconded.

Accused deemed absconded

(3) For the purpose of subsection (2), an accused is deemed to have absconded in connection with the indictable offence if

> (a) an information has been laid alleging the commission of the offence by the accused,

(b) a warrant for the arrest of the accused has been issued in relation to that information, and

(c) reasonable attempts to arrest the accused under the warrant have been unsuccessful during a period of six months beginning on the day on which the warrant was issued,

and the accused is deemed to have so absconded on the last day of that six-month period.

Who may dispose of forfeited property

(4) For the purpose of subsection (2), the judge shall

(a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and

(b) in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.

Property outside Canada

(4.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Definition of *judge*

(5) In this section and sections 490.5 and 490.8, a judge as defined in section 552 or a judge of a superior court of criminal jurisdiction.

1997, c. 23, s. 15;
2001, c. 32, s. 31;
2007, c. 13, s. 9;
2017, c. 7, s. 65.

Voidable transfers

490.3 A court may, before ordering that offence-related property be forfeited under subsection 490.1(1) or 490.2(2), set aside any conveyance or transfer of the property that occurred after the seizure of the property, or the making of a restraint order in respect of the property, unless the conveyance or transfer was for valuable consideration to a person acting in good faith.

1997, c. 23, s. 15.

Notice

490.4 (1) Before making an order under subsection 490.1(1) or 490.2(2) in relation to any property, a court shall require notice in accordance with subsection (2) to be given to, and may hear, any person who, in the opinion of the court, appears to have a valid interest in the property.

Manner of giving notice

(2) A notice shall

(a) be given in the manner that the court directs or that may be specified in the rules of the court;

(b) specify the period that the court considers reasonable or that may be set out in the rules of the court during which a person may make an application to the court asserting their interest in the property; and

(c) set out the offence charged and a description of the property.

Order of restoration of property

(3) A court may order that all or part of the property that would otherwise be forfeited under subsection 490.1(1) or 490.2(2) be returned to a person — other than a person who was charged with an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* or a person who acquired title to or a right of possession of the property from such a person under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property — if the court is satisfied that the person is the lawful owner or is lawfully entitled to possession of all or part of that property, and that the person appears innocent of any complicity in, or collusion in relation to, the offence.

1997, c. 23, s. 15;
2001, c. 32, s. 32;
2007, c. 13, s. 10;
2017, c. 7, s. 66.

Notice

490.41

(1) If all or part of offence-related property that would otherwise be forfeited under subsection 490.1(1) or 490.2(2) is a dwelling-house, before making an order of forfeiture, a court shall require that notice in accordance with subsection (2) be given to, and may hear, any person who resides in the dwelling-house and is a member of the immediate family of the person charged with or convicted of the indictable offence under this Act or the *Corruption of Foreign Public Officials Act* in relation to which the property would be forfeited.

Manner of giving notice

(2) A notice shall

(a) be given in the manner that the court directs or that may be specified in the rules of the court;

(b) specify the period that the court considers reasonable or that may be set out in the rules of the court during which a member of the immediate family who resides in the dwelling-house may make themselves known to the court; and

(c) set out the offence charged and a description of the property.

Non-forfeiture of property

(3) *Subject to an order made under subsection 490.4(3), if a court is satisfied that the impact of an order of forfeiture made under subsection 490.1(1) or 490.2(2) would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence, as the case may be, it may decide not to order the forfeiture of the property or part of the property and may revoke any restraint order made in respect of that property or part*.

Factors in relation to dwelling-house

(4) Where all or part of the property that would otherwise be forfeited under subsection 490.1(1) or 490.2(2) is a dwelling-house, when making a decision under subsection (3), the court shall also consider

> (a) the impact of an order of forfeiture on any member of the immediate family of the person charged with or convicted of the offence, if the dwelling-house was the member's principal residence at the time the charge was laid and continues to be the member's principal residence; and
>
> (b) whether the member referred to in paragraph (a) appears innocent of any complicity in the offence or of any collusion in relation to the offence.

2001, c. 32, s. 33;
2007, c. 13, s. 11;
2017, c. 7, s. 67.

Application

490.5 (1) Where any offence-related property is forfeited to Her Majesty pursuant to an order made under subsection 490.1(1) or 490.2(2), any person who claims an interest in the property, other than

> (a) in the case of property forfeited pursuant to an order made under subsection 490.1(1), a person who was convicted of the indictable offence in relation to which the property was forfeited,
>
> (b) in the case of property forfeited pursuant to an order made under subsection 490.2(2), a person who was charged with the indictable offence in relation to which the property was forfeited, or
>
> (c) a person who acquired title to or a right of possession of the property from a person referred to in paragraph (a) or (b) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property,

may, within thirty days after the forfeiture, apply by notice in writing to a judge for an order under subsection (4).

Fixing day for hearing

(2) The judge to whom an application is made under subsection (1) shall fix a day not less than thirty days after the date of the filing of the application for the hearing of the application.

Notice

(3) An applicant shall serve a notice of the application made under subsection (1) and of the hearing of it on the Attorney General at least fifteen days before the day fixed for the hearing.

Order declaring interest not affected by forfeiture

(4) Where, on the hearing of an application made under subsection (1), the judge is satisfied that the applicant

> (a) is not a person referred to in paragraph (1)(a), (b) or (c) and appears innocent of any complicity in any indictable offence that resulted in the forfeiture of the property or of any collusion in relation to such an offence, and
>
> (b) exercised all reasonable care to be satisfied that the property was not likely to have been used in connection with the commission of an unlawful act by the person who was permitted by the applicant to obtain possession of the property or from whom the applicant obtained possession or, where the applicant is a mortgagee or lienholder, by the mortgagor or lien-giver,

the judge may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and the extent or value of the interest.

Appeal from order made under subsection (4)

(5) An applicant or the Attorney General may appeal to the court of appeal from an order made under subsection (4), and the provisions of Part XXI with respect to procedure on appeals apply, with any modifications that the circumstances require, in respect of appeals under this subsection.

Return of property

(6) The Attorney General shall, on application made to the Attorney General by any person in respect of whom a judge has made an order under subsection (4), and where the periods with respect to the taking of appeals from that order have expired and any appeal from that order taken under subsection (5) has been determined, direct that

> (a) the property, or the part of it to which the interest of the applicant relates, be returned to the applicant; or
>
> (b) an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

1997, c. 23, s. 15;
2001, c. 32, s. 34.

Appeals from orders under subsection 490.2(2)

490.6 Any person who, in their opinion, is aggrieved by an order made under subsection 490.2(2) may appeal from the order as if the order were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, under Part XXI, and that Part applies, with any modifications that the circumstances require, in respect of such an appeal.

1997, c. 23, s. 15.

Suspension of order pending appeal

490.7 Notwithstanding anything in this Act, the operation of an order made in respect of property under subsection 490.1(1), 490.2(2) or 490.5(4) is suspended pending

> (a) any application made in respect of the property under any of those provisions or any other provision of this or any other Act of Parliament that provides for restoration or forfeiture of the property, or
>
> (b) any appeal taken from an order of forfeiture or restoration in respect of the property,

and the property shall not be disposed of or otherwise dealt with until thirty days have expired after an order is made under any of those provisions.

1997, c. 23, s. 15.

Application for restraint order

490.8 (1) The Attorney General may make an application in accordance with this section for a restraint order under this section in respect of any offence-related property.

Procedure

(2) An application made under subsection (1) for a restraint order in respect of any offence-related property may be made ex parte and shall be made in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or any other person deposing to the following matters:

(a) the indictable offence to which the offence-related property relates;

(b) the person who is believed to be in possession of the offence-related property; and

(c) a description of the offence-related property.

Restraint order

(3) Where an application for a restraint order is made to a judge under subsection (1), the judge may, if satisfied that there are reasonable grounds to believe that the property is offence-related property, make a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in, the offence-related property specified in the order otherwise than in the manner that may be specified in the order.

Property outside Canada

(3.1) A restraint order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Conditions

(4) A restraint order made by a judge under this section may be subject to any reasonable conditions that the judge thinks fit.

Order in writing

(5) A restraint order made under this section shall be made in writing.

Service of order

(6) A copy of a restraint order made under this section shall be served on the person to whom the order is addressed in any manner that the judge making the order directs or in accordance with the rules of the court.

Registration of order

(7) A copy of a restraint order made under this section shall be registered against any property in accordance with the laws of the province in which the property is situated.

Order continues in force

(8) A restraint order made under this section remains in effect until

> (a) an order is made under subsection 490(9) or (11), 490.4(3) or 490.41(3) in relation to the property; or
>
> (b) an order of forfeiture of the property is made under section 490 or subsection 490.1(1) or 490.2(2).

Offence

(9) Any person on whom a restraint order made under this section is served in accordance with this section and who, while the order is in force, acts in contravention of or fails to comply with the order is guilty of an indictable offence or an offence punishable on summary conviction.

1997, c. 23, s. 15;
2001, c. 32, s. 35.

Management order

490.81 (1) With respect to offence-related property other than a controlled substance within the meaning of the *Controlled Drugs and Substances Act*, on application of the Attorney General or of any other person with the written consent of the Attorney General, a judge or justice in the case of offence-related property seized under section 487, or a judge in the case of offence-related property restrained under section 490.8, may, where he or she is of the opinion that the circumstances so require,

(a) appoint a person to take control of and to manage or otherwise deal with all or part of the property in accordance with the directions of the judge or justice; and

(b) require any person having possession of that property to give possession of the property to the person appointed under paragraph (a).

Appointment of Minister of Public Works and Government Services

(2) When the Attorney General of Canada so requests, a judge or justice appointing a person under subsection (1) shall appoint the Minister of Public Works and Government Services.

Power to manage

(3) The power to manage or otherwise deal with property under subsection (1) includes

(a) the power to make an interlocutory sale of perishable or rapidly depreciating property;

(b) the power to destroy, in accordance with subsections (4) to (7), property that has little or no value; and

(c) the power to have property, other than real property or a conveyance, forfeited to Her Majesty in accordance with subsection (7.1).

Application for destruction order

(4) Before a person who is appointed to manage property destroys property that has little or no value, they shall apply to a court for a destruction order.

Notice

(5) Before making a destruction order, a court shall require notice in accordance with subsection (6) to be given to and may hear any person who, in the court's opinion, appears to have a valid interest in the property.

Manner of giving notice

(6) A notice shall

(a) be given in the manner that the court directs or that may be specified in the rules of the court; and

(b) specify the effective period of the notice that the court considers reasonable or that may be set out in the rules of the court.

Destruction order

(7) A court shall order that the property be destroyed if it is satisfied that the property has little or no financial or other value.

Forfeiture order

(7.1) On application by a person who is appointed to manage the property, a court shall order that the property, other than real property or a conveyance, be forfeited to Her Majesty to be disposed of or otherwise dealt with in accordance with the law if

(a) a notice is given or published in the manner that the court directs or that may be specified in the rules of the court;

(b) the notice specifies a period of 60 days during which a person may make an application to the court asserting their interest in the property; and

(c) during that period, no one makes such an application.

When management order ceases to have effect

(8) A management order ceases to have effect when the property that is the subject of the management order is returned in accordance with the law, destroyed or forfeited to Her Majesty.

For greater certainty

(8.1) For greater certainty, if property that is the subject of a management order is sold, the management order applies to the net proceeds of the sale.

Application to vary conditions

(9) The Attorney General may at any time apply to the judge or justice to cancel or vary any condition to which a management order is subject, but may not apply to vary an appointment made under subsection (2).

2001, c. 32, s. 36;
2017, c. 7, s. 68.

Sections 489.1 and 490 applicable

490.9 (1) Subject to sections 490.1 to 490.7, sections 489.1 and 490 apply, with any modifications that the circumstances require, to any offence-related property that is the subject of a restraint order made under section 490.8.

Recognizance

(2) Where, pursuant to subsection (1), an order is made under paragraph 490(9)(c) for the return of any offence-related property that is the subject of a restraint order under section 490.8, the judge or justice making the order may require the applicant for the order to enter into a recognizance before the judge or justice, with or without sureties, in any amount and with any conditions that the judge or justice directs and, where the judge or justice considers it appropriate, require the applicant to deposit with the judge or justice any sum of money or other valuable security that the judge or justice directs.

1997, c. 23, s. 15.