SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Green*, 2020 NSSC 148

Date: 20200526
Docket: Hfx No. 490960
Registry: Halifax

Between:

Her Majesty the Queen

v.

Daniel Gerald Shawn Green

Restriction on Publication: Sections 517(1) and 539(1) of the *Criminal Code*

DECISION: *Voir Dire* 1
Admissibility of discreditable conduct evidence

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	February 11 and 12, 2020, in Halifax, Nova Scotia
Final Written Submissions:	February 20, 2020
Counsel:	Suhanya Edwards, for the Crown Paul Neifer, for the Defence

Overview

[1] Daniel Green is charged with unlawfully possessing proceeds of crime and money laundering. The trial for those charges is scheduled to commence on December 7, 2020. He is separately charged with possession of cocaine for the purpose of trafficking and other drug- and firearms-related offences. The trial for those charges is scheduled to commence on April 6, 2021. The events giving rise to the proceeds and laundering offences pre-date the events leading to the drug and firearm charges. Mr. Green has therefore not yet had a trial on any of these charges.

[2] The Crown proposes to use the evidence going to the subsequent trafficking and firearms offences at the earlier proceeds and money laundering trial. Mr. Green objects. Both parties agree that the sole issue for determination on this application is the threshold admissibility of this discreditable conduct evidence.

Facts

[3] In relation to the proceeds and money laundering charges, Mr. Green's indictment states:

> 1. THAT on or about the 18th day of October, 2017 at or near 24 Cockburn Drive, Lower Sackville, Nova Scotia, did unlawfully possess property or any proceeds of any property of a value exceeding $5,000, to wit: approximately $269,895 in Canadian currency, knowing that all or part of the property or those proceeds was obtained or derived directly or indirectly as a result of the commission in Canada of an offence punishable by indictment pursuant to section 354(1)(a) of the *Criminal Code* thereby committing an offence contrary to section 355(a) of the *Criminal Code*; and
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> 2. FURTHERMORE on or about the 18th day of October, 2017 at or near 24 Cockburn Drive, Lower Sackville, Nova Scotia, did use, transfer the possession of, send or deliver, transport, transmit, alter, dispose of or otherwise deal with, in any manner and by any means, any property or any proceeds of any property, to wit: approximately $268,900 in Canadian currency with intent to conceal that property knowing or believing that all or part of the property was obtained or derived directly or indirectly as a result of the commission in Canada of a designated offence, pursuant to section 462.3l(l)(a) of the *Criminal Code*, thereby committing an offence contrary to section 462.31 (2) of the *Criminal Code*.

[4] An agreed statement of facts relating to the trafficking and firearms charges was presented to the court solely for consideration on this application. It states:

The following facts are admitted without need for further proof for the limited purpose of the pre-trial application to admit evidence at trial:

1. On November 22, 2018, Daniel Green was under police surveillance and the following was observed:

> a. Daniel Green drove to Truro, Nova Scotia. At 1459 hours, he met in a retail parking lot with an unknown male driving a vehicle bearing a Quebec licence plate. Green entered the Quebec vehicle, stayed for less than one minute, and then both vehicles left the area. The police did not see any packages being exchanged. Green returned directly to Sackville, Nova Scotia without making any stops.
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> b. At 1549 hours, Green parked at 23 Hamilton Drive in Middle Sackville, Nova Scotia. He used a key to enter the residence. He was carrying a kit bag by the handles that appeared to be bearing weight. Twenty-five minutes later, he exited the residence, locked the door with a key and left. He was still carrying the same kit bag but it was crumpled in his fist and appeared empty. The police maintained surveillance on Green and the residence.

2. At 1630 hours, Green was arrested and searched incidental to arrest. Police found and seized three bags of cocaine weighing 11.5 grams, 2.2 grams and 3.3 grams; two cell phones; a key ring with a key to the residence at 23 Hamilton Drive in Middle Sackville, Nova Scotia and $2630 in cash. From Green's vehicle, the police seized the kit bag seen earlier. Search warrants were obtained to search the cell phones seized but the results are not yet available.

3. Police obtained a search warrant and searched Green's residence at 24 Cockburn Drive in Sackville, Nova Scotia. They seized $710 in cash from a shoe box in the closet of Green's bedroom. No other evidence was seized from Mr. Green's residence.

4. Police obtained a search warrant and searched 23 Hamilton Drive in Middle Sackville, Nova Scotia. The police seized:

> a. 1085.9 grams of cocaine in a Ziploc bag inside a large black pot in the kitchen;
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> b. 5552 grams of cutting agent (a substance commonly used to dilute the purity of cocaine to increase profit) in a gym bag on the living room couch;
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> c. a cocaine press from a storage area in the basement;
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> d. a cocaine press in the kitchen cupboard;
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> e. a 9 mm gun with 7 rounds in the clip and 6 boxes of ammunition all in the bedroom #1 closet. This gun was reported stolen in Grande Prairie, Alberta.

> f. a .40 calibre hand gun with 6 rounds in the clip and a box of ammunition, in a punch code locked safe within a plastic shopping bag in the bedroom #1 closet. The gun was registered to another person.
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> 5. The police also observed and photographed the following items at 23 Hamilton Drive in Middle Sackville:
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> a. a nutri-bullet in the kitchen with white powder in it; and
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> b. a cocaine press in a bedroom #2 closet;
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> c. a dinner plate in the kitchen with white powder residue on it and a credit card in [sic] Matthew Macfadyen's name on it.
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> 6. Green was charged with drug and weapons offences on November 22, 2018. A copy of the Indictment is attached. The charges are still before the court. The trial is presently scheduled for April 6-12, 2021 with a *Charter voir dire* set for February 8-12, 2021.
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> 7. Matthew MacFadyen is the registered owner of 23 Hamilton Drive in Middle Sackville, Nova Scotia. No one was present at 23 Hamilton Drive when the police searched the residence. MacFadyen left Halifax by plane to Alberta on November 19, 2018; he returned to Halifax on December 16, 2018.
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> 8. From July 4, 2018 until his arrest on November 22, 2018, the police were tracking Green's cell phone under the authority of several tracking warrants and transmission data recorder warrants. The grounds to obtain the warrants included the evidence seized on October 18, 2017. Tracking data placed Green in the general area of 23 Hamilton Drive on numerous occasions during the course of the investigation. Transmission Data Recorder information shows multiple contacts between phone numbers associated with Green and MacFadyen.
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> 9. In relation to the proceeds of crime and money laundering charges before this court, Cpl. David Lane prepared an expert report addressing the evidence including text messages found on Mr. Green's cell phone. He opined that the evidence is consistent with the indicators of mid-level drug trafficking.
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> 10. In relation to the drug charges, Cpl. Tyson Nelson prepared an expert report addressing the use of stash houses, cutting agents, cocaine presses, weapons and ultimately opining that the evidence gathered is consistent with possession of cocaine for the purpose of trafficking at the mid-high level.
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> Dated at Halifax, this 11th day of February, 2020.

Law

Essential Elements

[5] Section 354(1)(a) of the *Criminal Code* provides that "[e]very one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the

proceeds was obtained by or derived directly or indirectly from (a) the commission in Canada of an offence punishable by indictment...".

[6] The essential elements were summarized in *R. v. Henderson*, 2016 ONSC 1070 (where the Crown had particularized the relevant property as a truck with a value over $5000):

> [17] For me to find Ms Henderson guilty of the offence, Crown counsel must prove each of the following essential elements beyond a reasonable doubt:
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> i. that Ms Henderson was in possession of the relevant property, (i.e., the vehicle);
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> ii. that the property (the vehicle) was obtained by a crime;
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> iii. that Ms Henderson knew the property had been obtained by crime; and
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> iv. that the value of the property exceeded $5,000.

[7] Section 462.31(1)(a) of the *Criminal Code*, as it stood in October 2017, stated:

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

[8] The amendment under S.C. 2019, c. 29, s. 103, effective June 26, 2019, changed the description of the mental element to "knowing or believing that, or being reckless as to whether, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of...".

[9] The essential elements of the prior version of s. 462.31(1) were summarized in *R. v. Kalair and Panchbhaya*, 2019 ONSC 3471:

> [33] In order to establish the offence of money laundering, the Crown must prove each of the following essential elements beyond a reasonable doubt: that the accused dealt with property (in this case, money); that the money was obtained by crime (in this case, fraud); that the accused knew or believed that the money had

> been obtained by crime; and that the accused intended to conceal or convert the money.
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> [34] The elements of an offence under s. 462.31(1) of the CC are broad. Those elements are "captur[ed] by a broad array of activities involving property or the proceeds of property. Almost anything done with property will satisfy the conduct component of the offence".

[10] At trial, the Crown must prove beyond a reasonable doubt that the money seized on October 18, 2017, was obtained from the commission of an indictable offence. The Crown does not have to prove the commission of any specific offence or indictable crime having generated the alleged proceeds of crime.

Evidence of discreditable conduct

The Crown's position

[11] The Crown says that it can rely on circumstantial evidence in proving proceeds and money laundering offences. Most commonly, the Crown relies on evidence to show that an accused person committed a revenue generating crime before, during or after the possession of the alleged proceeds period. In *R. v. Cazzetta*, (2003) 173 C.C.C. (3d) 144 (Que. C.A.), Chamberland J.C.A., for the court, commented on the evidence the Crown had elicited to prove that the property in question was proceeds of crime:

> 20 The trial judge allowed the prosecution to disclose evidence of Giovanni Cazzetta's guilty pleas to earlier narcotics charges: the first, a conviction handed down on January 11, 1994 for trafficking 3 kg of cocaine (a sentence of four and one-half years' imprisonment, discharged on January 9, 1997); the second, a conviction ordered on April 14, 1998 on charges of trafficking and conspiracy for the purpose of trafficking in cocaine between January and May 1997 (nine years' imprisonment).

[12] Justice Chamberland discussed the principles surrounding the admissibility of the prior trafficking convictions, and stated:

> 25 Similar fact evidence introduced solely for the purpose of establishing the propensity of the accused to commit the offence of which he is accused is absolutely inadmissible... On the other hand, and this is the first of the three exceptions mentioned above, evidence of prior misconduct of the accused may be admitted when it is not solely introduced to establish the propensity of the latter to commit the crime of which he is accused, where it is relevant to an issue in the case and its probative value exceeds its prejudicial effect. Evidence relates to an

> issue in the case where it aims to establish an element comprising the relevant offence or a fact in support of the grounds of defence raised by the accused...
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> 26 In the present matter, the accused were tried on 28 counts of conspiracy to possess and possession of property obtained by crime. The trial judge concluded that evidence of two prior criminal offences was relevant to establish the criminal origin of the property possessed by Giovanni Cazzetta which is referred to in the charges of property obtained by crime. The evidence of these two prior trafficking convictions and the circumstances underlying the offences discloses the extent of the accused's involvement in the drug trade and was no doubt relevant as circumstantial evidence. It certainly tends to prove that the property possessed by Giovanni Cazzetta and referred to in the indictment was purchased with proceeds of drug trafficking.
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> 27 Prosecution evidence aimed to demonstrate that, between 1989 and 1997, Giovanni Cazzetta had acquired and possessed, alone or with other persons, buildings, jewellery, luxury automobiles and considerable sums of money. During the course of the same period, the income which he reported to the tax authorities was entirely disproportionate to the cost of his purchases, not to mention that, between 1994 and 1997, he was in prison and thus had no employment income. Furthermore, this evidence tended to demonstrate the extent of the involvement of the accused in drug trafficking throughout the period referred to in the indictments.
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> 28 Evidence of convictions and circumstances relating to the two offences are therefore, in my view, elements of circumstantial evidence which would tend to convince jurors beyond a reasonable doubt that the property acquired and possessed by Giovanni Cazzetta was facilitated directly or indirectly by his involvement in drug trafficking. [Citations omitted.]

[13] The court then examined the probative value versus the prejudicial effect of the evidence:

> 29 There is no doubt however that this evidence risks having a prejudicial effect. The trial judge was well aware of that [translation]:
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> > Admitting prior convictions or criminal misconduct of an accused person as evidence in chief carries with it the risk of diverting the debate towards the criminal reputation of the individual, which could lead the jury to adopt the following reasoning: since the accused are drug traffickers and one of them pleaded guilty on two occasions to offences related to drug trafficking, they are therefore more likely to commit the offences of which they are accused, i.e. possession of property obtained by crime.
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> 30 The judge weighed this risk against the probative value of the evidence, prior to concluding, correctly in my view, that the latter should prevail over the first criterion. It should be re-emphasized that the risk of prejudicial effect which

> justifies application of the rule of exclusion is not due to the probability of a conviction, but rather the risk that this conviction might be based on the simple propensity of the accused to commit the crime of which he is accused. In the present matter, the judge concluded that the substantial probative value of the evidence should prevail over the potential prejudice associated with such evidence, particularly in view of the fact that at the relevant time, she immediately addressed the issue of properly instructing the jurors concerning the use that they could make of such evidence. She in fact did give such instructions during the final phase of the trial.
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> 31 The decision to admit or not admit any such evidence basically depends upon the discretion of the trial judge. Considerable deference should be allowed to the trial judge's ruling and assessment of the probative value of evidence in relation to prejudicial effect... [Citations omitted.]

[14] The evidence in *Cazzetta* included convictions for the relevant offences. In *R. v. Cruikshank*, [1992] B.C.J. No. 1372 (S.C.), MacDonell J. considered the admissibility of evidence of trafficking where the Crown argued that it could call circumstantial evidence to prove its case without being able to point to a specific crime producing a specific amount of money:

> 2 … The bone of contention between the Crown and the defence is that the Crown takes the position that it can rely on circumstantial evidence to prove its case without being able to produce specific evidence of a specific crime resulting in a specific amount of money. This is done by leading evidence to show the life-style of the accused, which in this case involves traffic in narcotics, coupled with the large sums of money in the accused's hands on particular dates and times as specified in the indictment which are unexplainable through the normal earnings of the accused and through his company. The Crown says that the inference to be drawn is that the monies, or wealth, are the proceeds of crime. The defence argues that all of this depends on inadmissible evidence and such an inference is not open to the Court.
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> 3 After considering the evidence and the submissions of counsel, I conclude that that evidence is admissible as both relevant and cogent in laying the foundation or groundwork for a circumstantial evidence case. I accordingly rule that the evidence is admissible.
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> 4 Now, the defence as well has moved a motion of no evidence at the end of the Crown's case and again relies on the same arguments: that there has been no nexus between the monies in the possession of the accused and the counts in the indictment and proof is lacking of *Narcotic Control Act* offences that account for the monies in question.
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> 5 I have considered all of the evidence and conclude that there is evidence for the Court to weigh which would entitle it to conclude that the monies in the

> possession of the accused are from the proceeds of crime. This, of course, is not necessarily the conclusion to which the Court will come, but it is open to the Court, if it accepts the evidence of the Crown and finds the witnesses credible, to reach that conclusion. With respect to the various counts in the indictment, the Crown concedes that it is not able to attribute the bulk of the funds to any one of a number of offences but, as in the case of *Streu v. The Queen*, the accused may be guilty of the offences charged where the accused has laundered the proceeds of crime, which that case was about, without the Crown proving from which specific crime those proceeds came. The crime we are dealing with is possession with knowledge. I conclude that there is evidence that a properly instructed jury could consider and from which such a jury could convict. Accordingly, the motion is denied.

[15] In *R. v. Tortone*, [1993] 2 S.C.R. 973, [1993] S.C.J. No. 86, Major J., speaking for the majority, explained that the Crown does not need to particularize the proceeds deriving from a drug transaction as long as they can prove that at least one drug transaction resulted in proceeds being generated:

> 28. ... In this case, it was necessary for the trial judge to determine not only whether the Crown had proven that the specific amounts particularized in the various proceeds counts were the proceeds of narcotic trafficking, but also whether, even if there were a reasonable doubt on all the other proceeds counts, the Crown had proven the global count beyond a reasonable doubt. A finding that there was reasonable doubt as to all the other proceeds counts would not necessarily lead to a conclusion that there was also reasonable doubt on the global count.
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> 29. It was open to the trial judge to conclude that although he could not identify which of the transactions particularized in the various proceeds counts involved the proceeds of narcotic trafficking, the Crown had proven beyond a reasonable doubt that at least one of those transactions involved the proceeds of narcotic trafficking. If so, the result should have been to convict the appellant on the global count, and to acquit him on all the other proceeds counts.

[16] The *Tortone* decision was applied in *R. v. Lanteigne* (1999), 215 N.B.R. (2d) 310, [1999] N.B.J. No. 316 (C.A.), where the court reiterated that where the property is specified the Crown does not need to relate it to a specified crime:

> 18 For an accused to be found guilty of the offence created under paragraph 19.1(1)(a), the prosecutor must establish beyond a reasonable doubt the following three essential elements: the accused had in his possession, within the meaning of subsection 4(3) of the *Criminal Code*, property or the proceeds of property; the property or the proceeds of property were obtained or derived, in whole or in part, directly or indirectly, from narcotic trafficking. These two elements constitute the

> *actus reus* of the offence. As to the third element, the *mens rea* of the offence, that is the knowledge that the accused must have that the property or the proceeds of property effectively derives from narcotic trafficking.
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> 19 In *R. v. Tortone* ... the Supreme Court of Canada examined the essential elements of the offence of possession of proceeds of narcotic trafficking under paragraph 19.1(1)(a) and dealt with the obligation of the Crown to prove that the amounts or proceeds specified in a count are derived from certain criminal activities also specified therein. In this case, several separate counts alleged unlawful possession of money or specified proceeds deriving from specified criminal activity which allegedly occurred on specified dates; in addition, a global count alleged unlawful possession of the proceeds of narcotic trafficking during the same period. The trial judge acquitted the accused on all counts. Major, J., on behalf of the majority, held that despite the acquittal on each of the particularized counts, the trial judge had a duty to assess all the evidence relating to the global count...
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> 20 There are also several other decisions by Canadian courts dating before or after *Tortone*, in which it was held that it is not necessary that in a count specified property or proceeds of property be related to specified criminal transactions from which the property or proceeds of property could have been obtained...
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> 21 These cases show that it is open to a trial judge in determining that an asset is truly a proceed of crime or, like in this case, proceeds of narcotic trafficking, to take into account and to assess the evidence as a whole, including circumstantial evidence, and to deduct therefrom, if need be, that certain property is in fact derived from crime in the absence of direct evidence linking the specific property or profits to specified criminal activity. [Citations omitted.]

[17] The Crown was permitted to rely on subsequent criminal charges to support an earlier proceeds charge in *R. v. Hobbs*, 2010 NSCA 53, leave to appeal refused, [2010] S.C.C.A. No. 294. Justice Saunders, for the court, reviewed the factual background:

> [5] On April 8, 2005 the appellant attended the Halifax International Airport planning to board a flight to Vancouver. The police discovered that he had checked a suitcase containing $32,000.00 in Canadian currency. The money was bundled and packaged in a heat sealed bag. On August 19, 2005, he was charged with possessing, and transporting proceeds of crime. On July 28, 2005, Mr. Hobbs was arrested in a hotel room in New York City where he and two other individuals were found with 100 pounds of marihuana and $178,000.00 in U.S. currency. Eight days after that police in Halifax discovered a commercial marihuana grow operation in a Clayton Park home rented in the name of the appellant.
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> [6] Mr. Hobbs had not reported any income to the Canada Revenue Agency between the years 2002 and 2004. The Crown theorized that the $32,000.00 in

> the appellant's suitcase was the proceeds of his illicit drug activity. Mr. Hobbs testified that the money had been earned playing poker. The appellant was convicted of possession, and transportation, of property obtained by crime. He was sentenced to nine months concurrent on each charge and probation for two years. The money was the subject of a forfeiture order.

[18] One of the issues for consideration by the court was the admissibility of subsequent discreditable conduct on the part of Mr. Hobbs:

> 65 It will be recalled that at the request of defence counsel the trial judge gave an advance ruling which permitted the Crown to introduce evidence relating to the appellant's conduct several months after the seizure of the $32,000 from his luggage. First, the Crown was permitted to introduce evidence describing Mr. Hobbs' arrest on July 28, 2005, in a New York City hotel room which ultimately led to his plea of guilty to a felony conviction for possession of 100 pounds of marihuana and forfeiture of $178,000 US currency. Second, the Crown was allowed to introduce evidence that on August 5, 2005, Halifax police discovered a fully operational marihuana grow op in the basement of a house rented to the appellant. The appellant complains that the admission of this evidence and the use to which it was put by Cacchione J. constitutes reversible error.

[19] In explaining why such evidence was admissible, Saunders J.A. stated:

> 67 The evidence in question is directly relevant to the Crown's theory with respect to the source of the funds, and directly linked to proof of the fact that the currency in question was derived from the illicit drug trade. A reading of Justice Cacchione's comprehensive decision makes it clear that he properly instructed himself on the law. He understood that the evidence in question could not be used to determine guilt simply on the basis that the appellant might be the type of person to commit such an offence. *R. v. Arp*, [1998] 3 S.C.R. 339. He was alive to the fact that this evidence could only be used for a limited purpose. The evidence was relevant to the issue of Mr. Hobbs' knowledge of the source of the funds found in his suitcase. It was also relevant to establish the criminal origin of the property found. The trial judge satisfied himself that the probative value of the evidence outweighed its prejudicial effect. He was correct in his application of the law.
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> 68 Mr. Hobbs also complains that the impugned "subsequent" evidence was inadmissible in that it related to events which occurred after the search of his luggage at the Halifax Airport in April, 2005. Thus -- in Mr. Hobbs' submission -- he ought not to have been prosecuted on charges relating to "proceeds of crime" since, at the time of the search, he had never been convicted of a "crime".
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> 69 The appellant's submission is flawed. A conviction for possession of the proceeds of crime, or for transporting the proceeds of crime, pursuant to ss. 354(1) and 462.31(1) respectively, does not oblige the Crown to prove that the

> proceeds originated from a crime committed by the person who transports, or who is found in possession. On the contrary, each of the operative sections states:
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> > ... any property or any proceeds of any property ... obtained by or derived directly or indirectly ... (from/as a result of) "... the commission in Canada of ... an offence."
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> 70 It was not a prerequisite that Mr. Hobbs be proved to have committed the initial crime which then led to his being found in possession, or transporting the proceeds thereof. On the contrary, it was open to the Crown to lead evidence from which the trial judge might then reasonably conclude that Mr. Hobbs had the necessary knowledge (in the case of possession) or knowledge or belief (in the case of transporting) of the spurious character of the proceeds. The essential question for Justice Cacchione to answer was whether the money found in Mr. Hobbs' suitcase constituted proceeds of crime? The Crown's theory was that the appellant was involved in the drug trade. They led considerable evidence to establish that he was a "player". Police officers testified that Mr. Hobbs had been under surveillance in Canada and the United States for some time. When he was arrested at the hotel in New York City, Mr. Hobbs was in possession of close to $200,000 and 100 pounds of marihuana. Evidence at his trial confirmed that such a quantity of drugs would fill four or five hockey bags or six large suitcases. Photographs taken at the time of his arrest showed Mr. Hobbs and his associates with their suitcases stacked high in a corner of the hotel room. Such a quantity of cash and drugs suggested a network of international trafficking connections. [Emphasis added]

Mr. Green's position

[20] Mr. Green objects to the admissibility of the discreditable conduct evidence. In doing so, he relies on various cases that discuss the admissibility of evidence of "extrinsic misconduct" or "bad character", most of which are the result of "similar fact" applications. The starting point for analysis of this line of cases is *R. v. Arp*, [1998] 3 S.C.R. 339, where Cory J. said, for the court:

> 38 The rule allowing for the admissibility of similar fact evidence is perhaps best viewed as an "exception to an exception" to the basic rule that all relevant evidence is admissible. Relevance depends directly on the facts in issue in any particular case. The facts in issue are in turn determined by the charge in the indictment and the defence, if any, raised by the accused... To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". See Sir Richard Eggleston, *Evidence, Proof and Probability* (2nd ed. 1978), at p. 83. As a consequence, there is no minimum probative value required for evidence to be relevant...

> 39 Evidence of propensity or disposition (e.g., evidence of prior bad acts) is relevant to the ultimate issue of guilt, in so far as the fact that a person has acted in a particular way in the past tends to support the inference that he or she has acted that way again. Though this evidence may often have little probative value, it is difficult to say it is not relevant. In this regard, I disagree in part with Lord Hailsham's judgment in *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421. He wrote, at p. 451 that "[w]hen there is nothing to connect the accused with a particular crime except bad character or similar crimes committed in the past, the probative value of the evidence is nil and the evidence is rejected on that ground". I think this statement may go too far, and find the approach taken by Lamer J., as he then was, in *Morris, supra*, is more accurate. He stated, at p. 203:
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> > Disposition the nature of which is of no relevance to the crime committed has no probative value and ... for that reason excluded. But if relevant to the crime, even though there is nothing else connecting the accused to that crime, it is of some probative value, be it slight, and it should be excluded as inadmissible not as irrelevant. [Emphasis in original]
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> 40 Thus evidence of propensity or disposition may be relevant to the crime charged, but it is usually inadmissible because its slight probative value is ultimately outweighed by its highly prejudicial effect. As Sopinka J. noted in *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, at pp. 127-28, there are three potential dangers associated with evidence of prior bad acts: (1) the jury may find that the accused is a "bad person" who is likely to be guilty of the offence charged; (2) they may punish the accused for past misconduct by finding the accused guilty of the offence charged; or (3) they may simply become confused by having their attention deflected from the main purpose of their deliberations, and substitute their verdict on another matter for their verdict on the charge being tried. Because of these very serious dangers to the accused, evidence of propensity or disposition is excluded as an exception to the general rule that all relevant evidence is admissible. [Some citations omitted.]

[21] In *R. v. Handy*, 2002 SCC 56, Binnie J. further discussed this issue, for the court:

> 33 Subsequently, and most famously, the general exclusionary rule was laid down by Lord Herschell L.C. *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 (P.C.), in these terms, at p. 65:
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> > It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.
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> …

> 37 The policy basis for the exclusion is that while in some cases propensity inferred from similar facts may be relevant, it may also capture the attention of the trier of fact to an unwarranted degree. Its potential for prejudice, distraction and time consumption is very great and these disadvantages will almost always outweigh its probative value. It ought, in general, to form no part of the case which the accused is called on to answer. It is excluded notwithstanding the general rule that all relevant evidence is admissible...

[22] Justice Binnie confirmed that evidence of discreditable conduct can be admissible if it is so highly relevant and cogent that its probative value outweighs its prejudicial effect:

> 41 While emphasizing the general rule of exclusion, courts have recognized that an issue may arise in the trial of the offence charged to which evidence of previous misconduct may be so highly relevant and cogent that its probative value in the search for truth outweighs any potential for misuse, *per* Sopinka J., dissenting, in *B. (C.R.), supra*, at p. 751:
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> > The fact that the alleged similar facts had common characteristics with the acts charged, could render them admissible, and, therefore, supportive of the evidence of the complainant. In order to be admissible, however, it would be necessary to conclude that the similarities were such that absent collaboration, it would be an affront to common sense to suggest that the similarities were due to coincidence ... . [Emphasis in original]
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> …
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> 44 The criminal trial is, after all, about the search for truth as well as fairness to an accused. Thus Lord Herschell L.C., in what is called the second "branch" of *Makin, supra*, said at p. 65:
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> > On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.
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> …
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> 47 The policy basis for the exception is that the deficit of probative value weighed against prejudice on which the original exclusionary rule is predicated is reversed. Probative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation.

[23] The court in *Handy* expanded on this reasoning by describing when such evidence can be relevant and admissible:

> 60 One of the virtues of *B. (C.R.)* is its candid acknowledgment that "evidence of propensity, while generally inadmissible, may exceptionally be admitted" (p. 732) to help establish that the accused did or did not do the act in question (at pp. 731-32):
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> > While the language of some of the assertions of the exclusionary rule admittedly might be taken to suggest that mere disposition evidence can never be admissible, the preponderant view prevailing in Canada is the view taken by the majority in *Boardman* -- evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury. [Emphasis in original.]
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> …
>
> 64 I emphasize the reference in *Arp* to "usually inadmissible". Cory J. recognized, as did McLachlin J. in *B. (C.R.), supra*, that disposition evidence could unusually and exceptionally be admitted if it survives the rigours of balancing probative value against prejudice.
>
> …
>
> 66 In *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, Sopinka J. further confirmed his approach to propensity evidence at p. 120:
>
> > *Cross on Evidence* (6th ed. 1985) contains a concise statement of the "similar facts rule" at p. 311 with which I agree:
> >
> > > ... evidence of the character or of the misconduct of the accused on other occasions ... tendered to show his bad disposition, is inadmissible unless it is so highly probative of the issues in the case as to outweigh the prejudice it may cause.

More recent cases

[24] Justice Watt, writing for the court, discussed the handling of "evidence of extrinsic misconduct" in *R. v. Luciano*, 2011 ONCA 89:

> 217 Evidence of extrinsic misconduct by the person charged may be relevant and material in a criminal prosecution. This evidence may demonstrate a motive on the part of the accused to commit the offence, or his possession of the instruments used to commit the crime. Thus, evidence of extrinsic misconduct may help to establish an accused's participation in an offence, as well as his or her state of mind when committing it. Sometimes, evidence of extrinsic misconduct completes the narrative of or provides context for relevant events.

> 218 Evidence of extrinsic misconduct includes conduct that occurs before, at the same time or after the conduct that forms the subject-matter of the charge. The reasoning process involved in the inquiry into relevance or materiality may be different depending on when the extrinsic misconduct occurred in relation to the crime charged.
>
> 219 But evidence of extrinsic misconduct brings baggage to the trial. Prejudice. Of two kinds. Moral prejudice - the risk of an unfocused trial and a wrongful conviction. The trier of fact may follow a chain of reasoning the law forbids - inferring of guilt from general disposition or propensity. The verdict may be based on prejudice, rather than proof and the accused convicted because of what he is, rather than what he did...
>
> 220 Evidence of extrinsic misconduct generates reasoning prejudice. Introduction of this evidence distracts jurors from their proper focus on the charge particularized in the indictment and lengthens the trial process...
>
> 221 Relevant and material evidence of extrinsic misconduct is generally inadmissible when tendered by the prosecutor... The exclusionary rule generally prohibits prosecutorial use of character evidence, and evidence of extrinsic misconduct to establish character, as circumstantial proof of conduct...
>
> 222 Like other admissibility rules, the rule that generally excludes evidence of extrinsic misconduct tendered by the prosecutor allows its introduction by exception. The exception becomes engaged when the probative value of the evidence exceeds its prejudicial effect... [Citations omitted.]

[25] In conducting the probative value versus prejudicial effect balancing analysis, Watt J.A. explained in *Luciano*:

> 226 To invoke the exception to the general rule that excludes evidence of extrinsic misconduct, a prosecutor must establish, on the balance of probabilities, that the probative value of the proposed evidence exceeds its prejudicial effect...
>
> 227 When evidence of extrinsic misconduct is tendered for admission, courts sometimes proceed directly to the probative value/prejudicial effect analysis upon which admissibility depends. But there are other questions that require response before the crucial balancing need be undertaken:
>
> *Is the conduct that of the accused?
>
> *Is the evidence relevant?
>
> *Is the evidence material?
>
> *Is the conduct discreditable to the accused?
>
> 228 An affirmative response to each question is essential before it becomes necessary to undertake the probative value/prejudicial effect analysis...

229 The balancing process begins with an assessment of the probative value of the proposed evidence.

230 To determine probative value, the judge should first determine the issue to which the proposed evidence relates. After all, probative value does not exist in the abstract. Like relevance, probative value is a relative concept to be determined in the context of the case being tried... An assessment of probative value requires consideration of several factors including the strength of the proposed evidence, the extent to which the proposed evidence supports the inference the prosecutor seeks to have drawn from it and the extent to which what the evidence tends to establish is at issue at trial...

231 The second step in the balancing process involves an assessment of the prejudicial effect of the proposed evidence.

232 The term "prejudice" does not refer to the risk of conviction, rather has to do with the risk of an unfocussed trial and a wrongful conviction through an impermissible chain of reasoning - to infer guilt from general disposition or propensity... Propensity reasoning uses evidence of character or disposition as circumstantial evidence of conduct. An accused is convicted because of what he is, rather than because of what he has done. Prejudice is a surrogate for proof, character for conduct.

233 No closed list of factors occupies the field in the inquiry into prejudicial effect. Both moral prejudice, the risk of an unfocussed trial and wrongful conviction, and reasoning prejudice, distraction of the trier of fact from the focus of the trial by the introduction of evidence of extrinsic misconduct and the time taken to introduce that evidence, have a place in the assessment... Important considerations include the extent of the discreditability disclosed by the conduct, the extent to which the conduct may support an inference of guilt based exclusively on bad character, the extent to which the evidence may confuse rather than help to decide issues and the ability of the accused to respond to the evidence...

234 The final step in the decision about admissibility requires the judge to balance probative value and prejudicial effect and to determine where the balance falls... In the absence of a legal error, a misapprehension of material evidence or an unreasonable result, a trial judge's decision on where the balance falls between probative value and prejudicial effect attracts substantial deference on appeal...

235 In the assessment of the prejudicial effect of evidence of extrinsic misconduct, further, in the determination of where the balance falls between probative value and prejudicial effect, a trial judge must keep in mind that evidence of limited admissibility requires jury instructions that explain both the permitted and prohibited use of the evidence. And what is more, the difficulty encountered by a trial judge in composing limiting instructions does not yield a commensurate deficit in adherence to and application of them by jurors. To make too much of the risk of jury misuse of evidence of limited admissibility, for that

> matter to assume jurors will not adhere to their oath, is legally wrong... [Citations omitted.]

[26] In *R. v. McDonald*, 2017 ONCA 568, Watt J.A., for the court, again discussed relevance in the context of evidence of extrinsic misconduct:

> 65 Relevance is a bedrock concept in the law of evidence. But it is not an inherent characteristic of any item of evidence. Attaching a label to an item of evidence, in this case, "extrinsic misconduct", does not establish its relevance. For relevance is relative. It exists as a relation between an item of evidence and a proposition of fact that the proponent of the evidence seeks to establish by its introduction...
>
> 66 Relevance is a matter of everyday experience and common sense. An item of evidence is relevant if it renders the fact that it seeks to establish slightly more or less probable than that fact would be without the evidence, through the application of everyday experience and common sense...
>
> 67 It follows that, to be relevant, an item of evidence need not conclusively establish the proposition of fact for which it is offered, or even make that proposition of fact more probable than not. All that is required is that the item of evidence reasonably show, by the application of everyday experience and common sense, that the fact is slightly more probable with the evidence than it would be without it...
>
> 68 A final point about relevance. We assess relevance in the context of the entire case and the positions of counsel. Relevance does not exist in the abstract or in the air... Hence the importance that the proponent identify the issue(s) to which the evidence is relevant... [Citations omitted.]

[27] Justice Watt went on in *McDonald* to discuss when such evidence of extrinsic misconduct will be admissible:

> 76 Evidence of extrinsic misconduct or similar acts is *prima facie* inadmissible. The rule generally prohibits character evidence from being used circumstantially to prove conduct. This prohibits an inference from the extrinsic misconduct or similar acts to propensity or disposition (character) to do the acts charged, and a second inference from propensity or disposition (character) to guilt of the offence charged...
>
> 77 The policy basis for the exclusionary rule is well-established. Despite the relevance of propensity inferred from extrinsic misconduct or similar acts, this evidence may also capture the attention of the trier of fact, especially a jury, to an unwarranted degree. Its potential for prejudice, distraction and time-consumption is considerable and nearly always outdistances its probative value. And so it is that, generally at least, evidence of extrinsic misconduct or similar acts supportive

> of an inference of propensity or disposition is excluded from the case an accused has to answer...
>
> 78 However, evidence of extrinsic misconduct or similar acts is not shown the exit door on every occasion on which it is tendered for reception. Sometimes, an issue may arise in a trial on which evidence of extrinsic misconduct or similar acts may be so highly relevant and cogent that its probative value in the search for the truth outweighs its potential for misuse by the trier of fact. In these cases, it falls to the Crown to establish, on a balance of probabilities, that the probative value of the evidence exceeds its prejudicial effect... The policy basis for the exceptional admission of this evidence is that the deficit of probative value weighed against prejudicial effect on which the prophylactic approach is predicated is reversed. Probative value exceeds prejudicial effect, because the force of similar circumstances defies coincidence or other innocent explanation... [Citations omitted.]

[28] Justice Watt expanded on the prejudicial effect versus probative value assessment:

> 80 Essential to a determination of probative value, thus to settling the probative value-prejudicial effect balance, is the need to identify the issue to which the evidence of extrinsic misconduct or similar acts relates. Probative value, like relevance, cannot be assessed, much less determined in the abstract. The issues that arise in any given case derive from or are a function of the allegations contained in the indictment and the defences advanced by the person charged... We reject a category approach to admissibility in favour of a general principle that assesses, then balances, probative value and prejudicial effect...
>
> 81 The initial assessment of the similarity between the extrinsic misconduct or similar acts and the offence(s) charged must be based on the acts themselves and not on evidence of the accused's involvement in those acts...
>
> 82 Turning now to the prejudice associated with the introduction of evidence of extrinsic misconduct or similar acts. There are two general kinds.
>
> 83 Moral prejudice refers to the stigma of "bad personhood", a verdict based on prejudice, rather than proof. This involves a forbidden chain of reasoning where guilt of the offence charged is inferred from the general disposition or propensity established by the extrinsic misconduct or similar acts... A related concern is that the jury may also tend to punish an accused for the other misconduct by finding him guilty of the offence(s) charged through the application of a less demanding standard of proof...
>
> 84 Reasoning prejudice refers to the distraction of jurors from their proper focus on the offence(s) alleged by the introduction of evidence of extrinsic misconduct... Jurors might become confused as they concentrate on resolving whether the accused actually committed the similar acts or engaged in the

> extrinsic misconduct. Their attention may be deflected from the main purpose of their deliberations, the allegations contained in the indictment... This distraction is aggravated by the consumption of time required for the introduction of this evidence... [Citations omitted.]

[29] During the course of this application, I invited counsel to provide supplementary submissions in light of the recent decision in *R. v. Calnen*, 2019 SCC 6. *Calnen* is the most recent decision from the Supreme Court of Canada discussing after-the-fact conduct evidence. In *Calnen*, the court discussed broad principles of admissibility in determining whether, and how, after-the-fact conduct could be used to prove essential elements in a charge of murder. In that case, while Martin J., dissented in part, the majority adopted her view of the law as it related to relevance and admissibility. Justice Moldaver said for the majority:

> 10 I agree with my colleague's articulation of the legal principles governing the admissibility of discreditable conduct evidence and its potential for moral and reasoning prejudice. However, for reasons I will develop, I respectfully disagree with her application of those principles to the facts of this case.

[30] Justice Martin explained the relevance inquiry as follows:

> 108 Relevance involves an inquiry into the logical relationship between the proposed evidence and the fact that it is tendered to establish. The threshold is not high and evidence is relevant if it has "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence": *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 36, quoting D.M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 31. In other words, the question is whether a piece of evidence makes a fact more or less likely to be true. Relevance does not require a "minimum probative value": *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38. As the admissibility of after-the-fact conduct evidence is, "[a]t its heart", one of relevance, determining the relevance of any piece of after-the-fact conduct evidence is necessarily a case-by-case, "fact-driven exercise": *White (2011)*, at paras. 22 and 42; see also *R. v. White*, [1998] 2 S.C.R. 72, at para. 26.
>
> 109 To establish materiality, the evidence must be relevant to a live issue; if it is not relevant to a live issue, it must be excluded or the jury should be instructed that the evidence is of no probative value: see *White (2011)*, at para. 36.
>
> 110 Trial judges retain the general discretion to exclude relevant evidence when its potential prejudice exceeds its probative force: see *White (2011)*, at para. 31. Counsel for Mr. Calnen sought the exclusion of the after-the-fact conduct evidence in a *voir dire*, on the basis that its prejudice outweighed its probity. The trial judge admitted portions of Mr. Calnen's statement to the police and found that the probative value of the evidence outweighed any prejudicial effect.

[31] Justice Martin explained how these principles relate to circumstantial evidence in the context of after-the-fact conduct evidence and said:

> [111] After-the-fact conduct is circumstantial evidence. Like other forms of circumstantial evidence, after-the-fact conduct allows a fact finder to draw particular inferences based on a person's words or actions... This process of inductive reasoning is a cornerstone of the law of evidence, and is used frequently to draw inferences from circumstantial evidence, as well as to assess credibility and to determine the relevance and probative value of evidence...
>
> [112] In order to draw inferences, the decision maker relies on logic, common sense, and experience. As with all circumstantial evidence, a range of inferences may be drawn from after-the-fact conduct evidence. The inferences that may be drawn "must be reasonable according to the measuring stick of human experience" and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence: *R. v. Smith*, 2016 ONCA 25, 333 C.C.C. (3d) 534, at para. 77. That there may be a range of potential inferences does not render the after-the-fact conduct null... In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. "It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact conduct": *Smith*, at para. 78. [Some citations omitted.]

[32] Discussing the use of circumstantial evidence more generally, in *R. v. Villaroman*, 2016 SCC 33, Cromwell J. said, for the court:

> [29] An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence... This is the danger to which Baron Alderson directed his comments. And the danger he identified so long ago — the risk that the jury will "fill in the blanks" or "jump to conclusions" — has more recently been confirmed by social science research... This Court on occasion has noted this cautionary purpose of a circumstantial evidence instruction...
>
> [30] It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. No particular language is required. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. It may be helpful to illustrate the concern about jumping to conclusions with an example. If we look out the window and see that the road is wet, we may jump to the conclusion that it has been raining. But we may then notice that the sidewalks are dry or that there

> is a loud noise coming from the distance that could be street-cleaning equipment, and re-evaluate our premature conclusion. The observation that the road is wet, on its own, does not exclude other reasonable explanations than that it has been raining. The inferences that may be drawn from this observation must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. [Citations omitted.]

[33] Justice Cromwell went on to discuss the level of proof required to raise a doubt in the course of trial where circumstantial evidence is involved:

> [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd, [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28,335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
>
> [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.
>
> [39] I have found two particularly useful statements of this principle.
>
> [40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:
>
> > In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, <u>according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed</u>. [Emphasis in original]
>
> [41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage — that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative — a helpful way of describing the line between plausible theories and speculation.

> [42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.
>
> [43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

The conduct of the accused being considered

[34] Mr. Green concedes in his brief that the evidence the Crown seeks to admit points to discreditable conduct:

> 12. On this Application, the Crown is seeking the admission of evidence in an attempt to establish that Mr. Green committed the offence of possession of cocaine for the purpose of trafficking on November 22, 2018. The alleged criminal misconduct is that of the accused, which is clearly discreditable.

[35] The agreed statement of facts establishes (for the limited purpose of determining threshold admissibility) the details of the police investigation leading to the drug and weapons charges. For the limited purpose of the threshold analysis being undertaken on this application there is evidence that the discreditable conduct at issue is that of Mr. Green.

Is the evidence material and relevant?

[36] In his brief, Mr. Green concedes that "the criminal origin of the proceeds" is a material issue, and says the "only remaining preliminary question is whether the evidence is relevant to that issue, other than by general propensity." He argues that considering the circumstantial nature of the evidence as described in the agreed statement of facts, and the large temporal gap between the two allegations, relevance is not established:

> 25. In summary, while the proposed evidence is certainly relevant to determining whether Mr. Green was in possession of cocaine for the purpose of trafficking on November 22, 2018, it is respectfully submitted that it is not directly relevant to a determination of whether the money found in 2017 was proceeds of crime. It is too remote.

[37] Mr. Green is charged with having property that is the proceeds of crime on October 18, 2017. According to *Hobbs* and *Luciano*, evidence of discreditable conduct evidence that occurs before, at the same time as, or after the subject matter of the charge could be relevant, although the reasoning process may differ depending on when the alleged misconduct occurred.

Threshold admissibility

[38] Justice Martin explained in *Calnen* that although multiple inferences may be available from an item of circumstantial evidence, the court must be mindful of the distinction between threshold admissibility and the Crown's ultimate burden of establishing guilt beyond a reasonable doubt. A trial judge must not usurp the role of the jury at the threshold stage. While Mr. Green has elected to be tried by a judge sitting alone, Martin J.'s comments apply to the admissibility analysis of the proposed evidence. She stated:

> 124 After-the-fact conduct evidence will not always or necessarily be equally consistent with two offences, and it is open to the trier of fact to conclude that the conduct is more consistent with one offence than the other... The key is therefore determining what "equally explained by" or "equally consistent with" means. This Court has never said that every time multiple possible explanations for conduct are proposed, they become "equally probable" and the evidence in question therefore loses relevance (because it does not make any fact more or less likely). The existence of alternative explanations for the accused's conduct does not mean that certain evidence is no longer relevant. The overall conduct and context must be such that it is not possible to choose between the available inferences as a matter of common sense, experience and logic. This is a composite standard in which the three considerations interact and one may take on greater significance in a particular case. For example, when hypothetically it could be one offence or another, common sense and experience may support one inference over the other. Pure logic is not the only, or even primary consideration. Any threshold determination of relevance must also respect that it is normally the function of the trier of fact to determine what inference is accepted and the weight to be given to it, and "[f]or the trial judge to interfere in that process will in most cases constitute a usurpation of the jury's exclusive fact-finding role"...
>
> …
>
> 134 Not only is it an error to relegate after-the-fact conduct evidence to a supporting or secondary role, there is also a need to maintain the distinction between the threshold admissibility of evidence and the separate issue of whether the Crown has met its ultimate burden of establishing the guilt of the accused beyond a reasonable doubt. The test for the admission of evidence is first focussed on relevance, and the tendency of the evidence, as a matter of logic, common

> sense and human experience, to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence. After-the-fact conduct evidence, when admitted, simply adds that piece of evidence as a building block in the Crown or Defence case. It is at the end of the case, when all the evidence has been heard, that the fact finder is required to determine how much, if any, weight they will place on this evidence, how it fits with other evidence, and whether, based on the totality of the evidence, the Crown has proved the charges beyond a reasonable doubt. Conflating these standards means that those charged with the difficult task of weighing evidence and determining innocence or guilt may be deprived of relevant evidence. [Citations omitted.]

[39] In *R. v. Taweel*, 2015 NSCA 107, the court considered the admissibility of evidence of discreditable conduct and explained:

> 63 It is settled law that a trial judge's decision to admit similar fact evidence is owed considerable deference on appeal. Nonetheless, the ultimate decision to allow the introduction of such evidence obliges the judge to properly assess its relevance, its probative value, and its prejudicial effect, and then carefully balance that probative value against the prejudicial impact of the evidence, were it admitted. In *Handy*, Justice Binnie explained it this way:
>
> > 153 A trial judge has no discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value. Nevertheless, a trial judge's decision to admit similar fact evidence is entitled to substantial deference... In this case, however, quite apart from the other frailties of the similar fact evidence previously discussed, the trial judge s refusal to resolve the issue of collusion as a condition precedent to admissibility was an error of law. A new trial is required. [Underlining in original]
>
> 64 Watt J.A. put it similarly in *R. v. Stubbs*, 2013 ONCA 514 at para58:
>
> > 58 Fourth, when evidence of other discreditable conduct is excluded under the general rule, or admitted by exception, the standard applied on appellate review is deferential... Appellate courts will defer to the trial judge's assessment of where the balance falls between probative value and prejudicial effect unless an appellant can demonstrate that the result of the analysis is unreasonable, or is undermined by a legal error or a misapprehension of material evidence: *Handy*, at para. 153; *James*, at para. 33. [Underlining in original][Citations omitted.]

[40] Discussing the process that should be followed if the Crown wants to rely on evidence of discreditable conduct in *R. v. C.J.*, 2011 NSCA 77, in that case similar fact evidence, Fichaud J.A. said, for the court:

> 41 In *Handy*, Justice Binnie said ... the "onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case

> the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies reception". Justice Binnie outlined the process to be followed:
>
> > 74.... It is therefore incumbent on the Crown to identify the live issue in the trial to which the evidence of disposition is said to relate. If the issue has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded.
> >
> > ...
> >
> > 81.The decided cases suggest the need to pay close attention to similarities in character, proximity in time and frequency of occurrence.
> >
> > ...
> >
> > 82.The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves.
>
> 42 No such process occurred here. At the trial the Crown identified no live issue to which a fact that may be inferred from the evidence would be relevant. So the defence had no opportunity to admit that fact at the heart of that live issue. The judge did not perform the functions that the balancing test called on him to perform. At the trial there was no acknowledgement by the Crown, defence or judge that there even was a process to be followed before this evidence could be admitted. Neither did the judge's decision acknowledge the process, or attempt to perform those functions that he was called upon to perform. Yet the judge's decision used the problematic evidence in his reasoning that led to the convictions...

[41] The Court of Appeal declined to decide the issue, holding that if the Crown sought to introduce the evidence at a retrial, the trial judge "should be free to perform what is properly a trial judge's analysis at first instance, without advance fettering by the appeal court" (para. 44). Additionally, the court held that the accused should not be deprived of the opportunity to admit the relevant fact:

> 45 Second, as Justice Binnie said in *Handy*..., once the Crown identifies the fact in the live issue to which the similar fact evidence pertains, the defence has the option of admitting that fact, in which case "the evidence is irrelevant and it must be excluded". This option might have come into play in C.J.'s case. After the Crown's witnesses testified about C.J.'s prior use of televised pornography, on his direct examination C.J. admitted having watched pornography... If the Crown tenders the same evidence at a new trial then:
>
> > (a)The Crown will have to identify the live issue for which the evidence has probative value.

> (b)The judge will have to determine whether the point of the evidence is (i) just "general disposition" in disguise or "propensity by another name", in which case the evidence will be excluded, or (ii) whether the evidence is probative of a fact pertinent to a live issue, as the Crown suggests.
>
> (c)If the evidence is probative of a fact relevant to the live issue, then the defence will have the option to admit that fact.
>
> (d)If the defence does not make the admission, the judge would balance probative value against potential prejudice to determine whether the evidence is admissible.
>
> (e)If the defence makes the admission, the similar fact evidence will be excluded. If the evidence is excluded in C.J.'s case, then the evidence would not be available to challenge C.J.'s credibility, the use for which the judge here employed the similar fact evidence...

[42] Therefore, if I determine that the evidence from the trafficking and firearms charges is relevant to a live issue, Mr. Green will have the option of admitting those facts. If I so find, and if he does not admit those facts, then in an effort to use court time efficiently, as we have been directed to do in *R. v. Jordan*, 2016 SCC 27 and *R. v. Cody,* 2017 SCC 31, because counsel have already argued the probative value versus prejudicial effect of the evidence, I will go on to rule on that issue to reduce further unnecessary use of court time.

Analysis

[43] Mr. Green argues that the facts admitted in the agreed statement of facts are too remote temporally, and too tenuous factually, to have any relevance or materiality. He says in his brief of February 3, 2020:

> 16. The question., therefore, is whether the evidence can reasonably show, by the application of everyday experience and common sense, that the suggested inference that "the money seized from Mr. Green on October 18, 2017 was proceeds of crime" is slightly more probable. It is respectfully submitted that proposed evidence does not meet this test.
>
> 17. The evidence shows that Daniel Green unlocked Matthew MacFadyen's residence, went inside with a bag that "appeared to be bearing weight", stayed briefly, and then left with the same bag crumpled in his fist. Inside the residence, the police later found approximately one kilogram of cocaine hidden inside a large, black pot in the kitchen, other drug paraphernalia, and firearms in the bedroom closet. There is no evidence showing Daniel Green's knowledge that the

> items seized by the police even existed. The proposed evidence does not establish possession for the purpose of trafficking as a fact.
>
> 18. The Crown is making a series of inferences that amounts to speculation. Evidence of discreditable conduct involves a double inference: first, the accused is the type of person who engages in certain behaviour, and second, the accused behaved in that manner with respect to an issue in dispute in the case at bar. In this case, the Crown is contending for a triple inference: one must first draw the inference that Daniel Green was actually in possession of a kilogram of cocaine before proceeding with the propensity reasoning.
>
> 19. The ultimate inference sought by the Crown is too far removed from the evidence that it proposes to call and clearly requires speculation.
>
> 20. Daniel Green was not found holding a kilogram of cocaine. His presence in Matthew MacFadyen's home on November 22, 2018, where the kilogram of cocaine was later found, does not reasonably make it more probable that the money seized from Mr. Green on October 17, 2017 was proceeds of crime. Mr. Green could have simply been checking on Mr. MacFadyen's home while he was away and feeding his cat.
>
> …
>
> 25. In summary, while the proposed evidence is certainly relevant to determining whether Mr. Green was in possession of cocaine for the purpose of trafficking on November 22, 2018, it is respectfully submitted that it is not directly relevant to a determination of whether the money found in 2017 was proceeds of crime. It is too remote.
>
> …
>
> 28. As discussed above, the Crown is asking to tender evidence in support of a triple inference. On the basis of the proposed evidence, the Crown would be asking the court to first infer that Daniel Green was in possession of cocaine for the purpose of trafficking in November of 2018, then draw the inference that Mr. Green is a "player" in the drug trade and had been since 2017, and then draw the inference that the money that the police seized, a year earlier, was in fact proceeds from Mr. Green's alleged involvement in the drug trade.

[44] Mr. Green again asserts in his supplementary brief of February 18, 2020, that the proposed evidence is not relevant to a material issue:

> ... The fact that Mr. Green was seen entering Mr. MacFadyen's house, in 2018, where drugs were later found, is not relevant to the source of the money seized from his own residence in 2017. There is no evidence that he had knowledge of the cocaine in Mr. MacFadyen's home, such that a reasonable inference could be drawn with respect to possession. The proposed evidence may support an allegation of possession for the purpose of trafficking in 2018, but that allegation is not a fact from which inferences can then be drawn. Unlike in *Calnen*, the

> Crown in this case is proposing two additional inferential leaps in its chain of reasoning. If the defence attempted to enter evidence of a similar nature at trial, it would likely offend the collateral fact rule.
>
> Even if the Crown's proposed evidence is relevant, it is respectfully submitted that the possible inference that Daniel Green possessed cocaine for the purpose of trafficking in 2018 is of little probative value to the material issue of whether the money found a year earlier was proceeds of crime. It certainly does not warrant the potential prejudice involved.

[45] In the agreed statement of facts Mr. Green admitted for the purpose of this application that, in relation to the proceeds and money laundering charges, the Crown expert opines that the evidence is of mid-level drug trafficking. Mr. Green also admitted that another Crown expert has provided an opinion in relation to the drug charges that the evidence is consistent with possession of cocaine for the purpose of trafficking at the mid-high level.

[46] The drugs and guns were seized by the police approximately one year after the proceeds charges were initiated. Circumstantial evidence of discreditable conduct can be relevant and material no matter whether it relates to a matter before, during or after the predicate offence. For determination of threshold admissibility, as I am dealing with at this stage, the date of discovery does not make the evidence too remote to admit at a threshold level.

[47] One inference from the proposed evidence is that if Mr. Green was a mid-high level cocaine trafficker in November 2018, the evidence makes it more likely that Mr. Green knew the cash seized from him in October 2017 was obtained by the commission of an indictable offence. There are other inferences that can be drawn from the November 2018 evidence, however, at the threshold stage, I am not to usurp the role of the trier of fact on the ultimate issue. This remains the appropriate approach even if the trial will be before a judge alone.

[48] Considering the direction from the various appellate courts, including the Nova Scotia Court of Appeal in *Hobbs*¸ *C.J.*, and *Taweel*, the Ontario Court of Appeal in *Luciano* and *McDonald*, and the Supreme Court of Canada in *Arp*, *Grant*, *Handy*, and *Calnen*, I conclude that at the threshold level, the proposed evidence of the 2018 surveillance of Mr. Green, as well as the guns, drugs and other evidence seized on November 22, 2018, is relevant and material to the issue of whether the Crown can prove beyond a reasonable doubt that the cash seized from Mr. Green on October 18, 2017, was obtained from the commission of an indictable offence.

Balancing probative value versus prejudicial effect

[49] The proposed evidence regarding the November 2018 possession for the purpose of trafficking and related charges has significant probative value at the threshold level. It goes directly to one of the essential elements the Crown must prove. On a threshold analysis level, the agreed statement of facts circumstantially shows that Mr. Green may have been involved in cocaine trafficking. Cocaine trafficking could generate revenue considered to be proceeds of crime.

[50] Put simply, one inference that can be drawn from those facts at the threshold level is that Mr. Green was a mid-high level cocaine trafficker at that time. That evidence could support an inference that he knew the cash he had in October 2017 was obtained from the commission of an indictable offence.

[51] In assessing the prejudicial effect of this evidence, although the trial is by way of a judge sitting without a jury, I am cognizant that both moral prejudice and reasoning prejudice can be engaged when dealing with evidence of discreditable conduct. As the court noted in *Taweel*:

> 73 In then applying his framework to the facts of that case and in particular the second step which was to assess the prejudice of the proffered evidence, Binnie J. highlighted the dangers associated with the admission of such evidence. His comments are particularly apt in this case:
>
> > 138 The poisonous potential of similar fact evidence cannot be doubted. Sopinka, Lederman and Bryant, *supra*, at s.11.173, refer to the observations of an English barrister who has written of that jurisdiction:
> >
> > > Similar fact evidence poses enormous problems for Judges, jurors and magistrates alike. The reason for this is the headlong conflict between probative force and prejudicial effect. Often, in the Crown Court, it is as close as a Judge comes to singlehandedly deciding the outcome of a case. [Emphasis added, in original.]
> > >
> > > (G. Durston, "Similar Fact Evidence: A Guide for the Perplexed in the Light of Recent Cases" (1996), 160 *Justice of the Peace & Local Government Law* 359, at p. 359)
> >
> > Canadian trial lawyers take the same view.
> >
> > (a) Moral Prejudice
> >
> > 139 It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a wrongful conviction. The forbidden chain of reasoning is to infer guilt from general disposition or propensity. The evidence, if believed, shows

that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.

140 The inflammatory nature of the ex-wife's evidence in this case cannot be doubted. It is, to the extent these things can be ranked, more reprehensible than the actual charge before the court. The jury would likely be more appalled by the pattern of domestic sexual abuse than by the alleged misconduct of an inebriated lout in a motel room on an isolated occasion. It may be noted that s. 718.2 of the *Criminal Code*, R.S.C. 1985, c. C-46, reflects society's denunciation of spousal abuse by making such abuse an aggravating factor for the purposes of sentencing.

...

143 I conclude that this evidence has a serious potential for moral prejudice.

(b)Reasoning Prejudice

144 The major issue here is the distraction of members of the jury from their proper focus on the charge itself aggravated by the consumption of time in dealing with allegations of multiple incidents involving two victims in divergent circumstances rather than the single offence charged.

145 Distraction can take different forms. In *R. v. D. (L.E.)* (1987), 20 B.C.L.R. (2d) 384 (C.A.), McLachlin J.A. (as she then was) observed at p. 399 that the similar facts may induce

> in the minds of the jury sentiments of revulsion and condemnation which might well deflect them from the rational, dispassionate analysis upon which the criminal process should rest.

146 Further, there is a risk, evident in this case, that where the "similar facts" are denied by the accused, the court will be caught in a conflict between seeking to admit what appears to be cogent evidence bearing on a material issue and the need to avoid unfairness to the right of the accused to respond. The accused has a limited opportunity to respond. Logistical problems may be compounded by the lapse of time, surprise, and the collateral issue rule, which will prevent (in the interest of effective use of court resources) trials within trials on the similar facts. Nor is the accused allowed to counter evidence of discreditable conduct with similar fact evidence in support of his or her credibility (as discussed in Sopinka, Lederman and Bryant, *supra*, at s. 11.74). Thus the practical realities of the trial process reinforce the prejudice inherent in the poisonous nature of the propensity evidence itself.

> 147 In my view, the evidence of the ex-wife had the potential to create, in addition to moral prejudice, significant reasoning prejudice at the respondent's trial. [Underlining in original]

[52] The court in *Taweel* then went through the balancing process:

> 74 Applying the final step of the requisite analysis which requires a careful balancing of the probative value versus prejudicial affect, Binnie J. said:
>
> (3)Weighing Up Probative Value Versus Prejudice
>
> 148 One of the difficulties, as McHugh J. pointed out in *Pfennig, supra*, at p. 147, is the absence of a common basis of measurement: "The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial." The two variables do not operate on the same plane.
>
> 149 As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite directions on the admissibility issue and their conflicting demands must be resolved.
>
> 150 In *Director of Public Prosecutions v. P.*, [1991] 2 A.C. 447 (H.L.), at p. 460, Lord Mackay suggested that similar fact evidence should be admitted when its probative value is "sufficiently great to make it just to admit the evidence", notwithstanding its prejudicial value. Lord Wilberforce in *Boardman*, at p. 442, also referred to "the interests of justice". See also *Pfennig, supra*, at pp. 147-48. Justice is achieved when relevant evidence whose prejudice outweighs any probative value is excluded (*R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 246) and where evidence whose probative value exceeds its prejudice (albeit an exceptional circumstance) is admitted. Justice includes society's interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process. A criminal justice system that has suffered some serious wrongful convictions in part because of misconceived notions of character and propensity should not (and does not) take lightly the dangers of misapplied propensity evidence.
>
> 151 In this case, the similar fact evidence was *prima facie* inadmissible and I agree with Charron J.A. that the Crown did not discharge the onus of establishing on a balance of probabilities that its probative value outweighed its undoubted prejudice. The probative value of the evidence, especially with respect to potential collusion, was not properly evaluated. The potential of such evidence for distraction and prejudice was understated. The threshold for admission of this sort of evidence was set too low.

...

> 75 Considering the misplaced emphasis on the PEI evidence in this case, I am satisfied it became a distraction from the proper consideration of the charge before the Court. It was applied in such a way as to undermine Mr. Taweel's presumed innocence by attaching an unintended moral prejudice and reasoning prejudice to the analysis of the record. It caused the judge to discredit the appellant's testimony and then apply that reasoning to proof of guilt on the offence as charged.

[53] It should be emphasized that the principal error attributed to the trial judge in *Taweel* was improper use of the similar-fact evidence. In this case, at the threshold level, I conclude that the probative value of this evidence outweighs its prejudicial effect, in particular if the law is applied properly and the prejudicial evidence is not used for an improper purpose. In other words, the probative value of the evidence on the proceeds and laundering charges (which I have described above) outweighs any unfairness occasioned by its admission into evidence at trial. I do not believe there is a significant risk of the trial judge being distracted by moral or reasoning prejudice in the context of this evidence.

Conclusion

[54] The Crown has shown that the subsequent evidence of drug trafficking is material and relevant to a live issue. The evidence is not just "general disposition" in disguise or "propensity by another name", but is probative of a fact pertinent to a live issue in relation to the proceeds and laundering charges. At the threshold stage, the evidence is admissible.

[55] Mr. Green now has the option of admitting the evidence at trial by way of an agreed statement of facts. If he chooses to follow this route, any further evidence on the issue will be irrelevant. However, as will be discussed below, some consideration will have to be given by counsel as to the possible impact of how any such agreed statement of facts (or direct evidence depending on Mr. Green's position) might impact on his ability to defend the subsequent trafficking and firearms charges.

[56] If Mr. Green does not choose to admit the evidence by way of an agreed statement of facts, for the purposes of determining its admissibility at this stage, I find that the probative value of this evidence outweighs its prejudicial effect, and such evidence would be admissible at trial, subject to the additional considerations detailed below.

Additional considerations

Fair trial issue

[57] Mr. Green says that if the discreditable conduct evidence the Crown intends to rely on is tendered he may be forced to testify at the proceeds and money laundering trial in order to defend himself against the trafficking allegations. This, he says, would infringe on his right to silence and would violate the principle against self-incrimination. In making this claim he relies solely on *R. v. Dorsey*, 2012 ONCA 185, where the court stated:

> 46 An accused's right to remain silent is an anchor in protecting his *Charter* rights. In this case, the appellant submits that he was coerced "into the box" to testify by the trial judge's decision to allow the severance of the D.T. counts, and then to later allow the similar fact evidence application regarding D.T.'s evidence.
>
> 47 There is merit to the appellant's position. By deciding to sever the D.T. counts, the trial judge properly allowed the appellant to control his own defence. However, by then allowing the similar fact application regarding the D.T. evidence, the trial judge, in effect, nullified the protection she had previously concluded was necessary when severing the counts.
>
> 48 The two rulings conflicted with each other. The similar fact ruling likely had the unintended, yet unfortunate, effect of at least influencing the appellant to testify on all counts, if not leaving him no choice but to do so. This violated the principles described in *Last*, and removed from the appellant his ability to control his own defence, thereby violating his ss. 7 and 11(c) *Charter* rights. The appellant's counsel expressed the appellant's "surprise" and frustration that the inevitable result of the two rulings was that he felt he had to testify on all counts. His counsel then advised the court that the appellant reluctantly had decided to give evidence in response to all counts he faced. While the result was no doubt unintended, it nevertheless resulted in infringing the appellant's right to a fair trial.

[58] In response to Mr. Green’s position on this issue the Crown said in their letter of February 20, 2020:

> Finally, Mr. Green again raises the possibility that the admission of this evidence may impact his right to silence. As the Crown argued in its oral submissions, *R v Dorsey* 2012 ONCA 185 (RBOA at tab 2) is distinguishable. There, the trial judge ordered severance because the accused stated that he intended to testify in support of his position that one of the complainants consented to the sexual activity; he was not making the same claim in respect of the other complainants (para 33). The primary reason for the trial judge severing was “the timing, significance and apparent legitimacy of that intention” (para 34). The trial judge

> reconciled her ruling on severance and the admission of similar fact evidence by limiting the Crown's cross-examination of the accused to only the events involving that one complainant. The accused then reluctantly decided to give evidence in relation to all of the other incidents. The Court of Appeal concluded that the solution offered by the trial judge (limited cross-examination) was not satisfactory because even with a limiting instruction, the jury "may have been left wondering" why the accused did not testify and deny the other incidents (para 49). The Court of Appeal specifically cautioned against overextending the ratio and noted that in every case, the assessment must be fact specific (para 50).
>
> Mr. Green has not stated any intention to testify in defence of either charge, he simply raises the spectre of such an approach. Further, this is not a jury trial and the court is able to avoid improper reasoning especially given that counsel has alerted the Court to the concern.

[59] Mr. Green's objection on this issue was not thoroughly canvassed by either counsel in their briefs or in oral argument. Now that the threshold test has been determined, counsel will need to address this issue in greater detail. The impact of an agreed statement of facts about the trafficking and firearms charges at the proceeds and money laundering trial on his subsequent trafficking and firearms trial might also need to be addressed, depending on whether Mr. Green chooses to proceed in that fashion.

Scheduling concerns

[60] On October 1, 2019, the trial in relation to the proceeds and money laundering charges was scheduled, at the suggestion of both counsel, for three days starting December 7, 2020. The *Jordan* deadline for the proceeds and money laundering matter is December 29, 2020. The Crown says that if the discreditable conduct evidence is ruled admissible (and, I will add, if Mr. Green does not then agree to proceed by way of an agreed statement of facts) then two additional days will be required for trial. If such evidence is to be tendered the Crown proposes "repurposing" the dates for all of Mr. Green's outstanding matters, including his pre-trial motions on the trafficking and firearms charges, in order to accommodate their interest in calling the discreditable conduct evidence. The Crown proposes that Mr. Green's trial on the proceeds and money laundering charges be re-scheduled to commence on February 8, 2021, which is after his *Jordan* date on those charges. Counsel note as an additional complicating factor that Mr. Green has a co-accused, Matthew MacFayden, on the trafficking and firearms charges, and Mr. MacFayden might not be in agreement with or available for any proposed rescheduling of that matter.

[61] Adding to the scheduling issues, Mr. Green says that if the discreditable conduct evidence is ruled admissible he may choose to bring a five-day pre-trial application to exclude the trafficking and firearms evidence due to an alleged violation of s. 8 of the *Charter*. That *Charter* application, if it is required, will have to be heard well in advance of the proceeds and money laundering trial.

[62] We are in the midst of the COVID-19 pandemic. This pandemic has impacted all facets of society, provincially, nationally and world-wide. Nova Scotia has declared a state of emergency. Courts are currently working in an essential services mode. Therefore, many court hearings, both criminal and civil, have been adjourned until the health authority advises that things can return to normal or until technology provides us with more options. Court time is at a premium and will be even more so once we move past the essential services mode. Counsel will need to fully address these issues.

Additional submissions and hearings

[63] I have determined that the Crown has met the threshold test for the admission of the evidence of subsequent trafficking. The Crown will now be faced with the choice of whether they want to actually call that evidence. The Crown

must make that determination and notify the court within one week of the release of this decision. Mr. Green will then be required to advise the court whether there will be an agreed statement of facts and whether he wants to bring a s. 8 *Charter* application relating to the trafficking and firearms evidence within one week of the Crown's decision.

[64] If the Crown proposes to call the discreditable conduct evidence, and/or if Mr. Green wants to pursue the additional considerations relating to the hearing of this evidence, then we will schedule further and more fulsome arguments on the remaining issues.

Arnold, J.