

CANADA / JUDGMENT

R. v. Violette

2008 BCSC 422

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 422 R. v. Violette

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Violette,

2008 BCSC 422

Date: 20080414

Docket: 23500

Registry: Vancouver

Regina

Against

Jean Joseph Violette, Ronaldo Lising,

Randall Richard Potts and John Virgil Punko

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Pursuant to the inherent jurisdiction of the Court, there is a ban on the publication, including on television, radio, Internet, or other form of media, of any and all within proceedings, including all voir dire and trial proceedings, until the ban is lifted by this Court.

Correction Notice: These Reasons for Judgment were amended by further Reasons for Judgment dated June 6, 2008. The June 6, 2008 Reasons for Judgment have been appended to these Reasons for Judgment and both these Reasons for Judgment and the June 6, 2008 Reasons for Judgment should be read together.

Before: The Honourable Mr. Justice S.R. Romilly

Ruling on a Voir Dire

Editing of Intercepted Communications

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Date and Place of Hearing:

January 9-11, 14-18,

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A. NATURE OF THE APPLICATION

- [1] The accused apply to exclude from evidence certain intercepted private communications, or portions thereof, on the basis that they are irrelevant, hearsay or that their prejudicial effect exceeds their probative value.

[2] For the reasons discussed below, the following challenged intercepts, or portions of intercepts, will be excluded from the evidence at trial:

- a. All portions of intercepts dealing with the use of steroids by the accused;
- b. All portions of intercepts dealing with the apparent infidelity of Ronaldo Lising;
- c. All portions of intercepts suggesting that any of the accused, including Lising, have previous convictions and/or have spent time in prison;
- d. Tab 472: intercepted communications of Randall Potts and Kathryn Noon from January 20, 2005 at 1148 hours;
- e. Tab 473: intercepted communications of Randall Potts and Kathryn Noon from January 20, 2005 at 1222 hours;
- f. Tab 277: intercepted communications of Randall Potts and Darren Hoffman from January 20, 2005 at 1738 hours;
- g. Tab 164: intercepted communications of Randall Potts and Michael Plante from January 20, 2005 at 1847 hours;
- h. Tab 201: intercepted communications of Randall Potts and Karson Noon from October 6, 2004 at 1824 hours - the passage where Potts tells his daughter that the barrels in the garage contained animal feed supplements will be excluded;
- i. Tab 647 (520): intercepted communications of Michael Plante and John Punko from May 4, 2004 at 2215 hours - the following passages will be excluded:

Pages 41/26 to 45/24;

Pages 63/20 to 65/11;

Pages 46/2 to 51/11.

- j. Tab 129: intercepted communications of Michael Plante and John Punko et al. from May 10, 2004 at 2045 hours - the following passages will be excluded:

Pages 5/9 to 10/12

Pages 11/9 to 16/13;

Pages 19/24 to 25/4;

Pages 25/5 to 27/13; and

Pages 9/27 to 10/3.

- k. Tab 130 (522, 576): intercepted communications of Michael Plante and Randall Potts from May 26, 2004 at 1943 hours - the following passages will be excluded:

Pages 36/17 to 38/17; and

Page 41, lines 16-17.

- l. Tab 50: intercepted communications of Michael Plante, Ryan Renaud, John Punko, and an unknown male from June 13, 2004 at 1844 hours - the following passages will be excluded:

Pages 17 to 35/23; and

Pages 37/7 to 38/4.

- m. Tab 648 (51): intercepted communications of Michael Plante, John Punko, Ryan Renaud and an unknown male from June 27, 2004 at 1000:20 hours - Pages 14/8 to 50/3 will be excluded;
- n. Tab 678: intercepted communications of Michael Plante and John Punko from June 30, 2004 at 1444 (sic) hours - Page 4, lines 11 to 14 will be excluded;
- o. Tab 131(52): intercepted communications of Michael Plante and Randall Potts from July 7, 2004 at 1942:33 hours - Pages 62/17 to 91/21 will be excluded;
- p. Tab 699: intercepted communications of Michael Plante, Ryan Renaud, and John Punko on August 22, 2004 at 1625 hours - the following passages will be excluded:

Pages 61-62; and

Page 89.

- q. Tab 684: intercepted communications of Michael Plante and Randall Potts from September 2, 2004 at 1634 (sic) hours;
- r. Tab 685: intercepted communications of Michael Plante and Randall Potts from September 6, 2004 at 2124 hours;
- s. Tab 686: intercepted communications of Michael Plante and Randall Potts from September 18, 2004 (sic) at 1304 hours;
- t. Tab 702: intercepted communications of Michael Plante, Randall Potts, John Groves and others from October 21, 2004 at 1924 (sic) hours - Pages 38/16 to 39/19 will be excluded;
- u. Tab 197: intercepted communications of Michael Plante and Randall Potts from November 16, 2004 at 1123 (sic) hours - the following passages will be excluded:

Page 9, line 8; and

Page 11, lines 6-19;

- v. Tab 705: intercepted communications of Michael Plante, John Punko and others from November 18, 2005 at 1911 hours - the following passages will be excluded:

Page 17, lines 7-8;

Page 18, lines 15-23;

Page 22, lines 5-13;

Pages 48/23 to 49/12; and

Pages 80/13 to 81/6.

- w. Tab 787: intercepted communications of Michael Plante and John Punko et al. from November 19, 2004 at 1257 - the following passages will be excluded:

Pages 4/5 to 8/3;

Pages 12/6 to 14/21;

Pages 18/15 to 19/19;

Pages 73/21 to 75/5; and

Pages 80/21 to 81/12.

- x. Tab 706: intercepted communications of Michael Plante, John Punko, Ryan Renaud, Randy Halldorson and unknown persons from November 23, 2004 at 1256:15 hours - the following passages will be excluded:

Pages 27 to 34;

Page 38, lines 11-24.

- y. Tab 789: intercepted communications of Michael Plante and John Punko from November 30, 2004 at 0859:06 hours - the following passages will be excluded:

Pages 3/18 to 4/12; and

Pages 5/13 to 6/25.

- z. Tab 707: intercepted communications of Michael Plante, John Punko et al. from December 8, 2004 at 2143:45 hours - the following passages will be excluded:

Pages 5 to 7; and

Pages 11 to 17.

aa. Tab 271: intercepted communications of Michael Plante and Randall Potts from January 6, 2005 at 1941 hours - Pages 2/4 to 4/17 will be excluded;

bb. Tab 712: intercepted communications of Michael Plante, John Bryce Jr., John Punko et al. from January 14, 2005 at 1413:38 hours - Pages 5-6 will be excluded;

cc. Tab 325 (775, 740): intercepted communications of Nima Abbrasian-Ghavami, John Punko and Ryan Renaud from January 25, 2005 at 2145 hours - Page 1, lines 1 to 12 will be excluded; and

dd. Tab 330: intercepted communications of John Punko et al. on January 29, 2005 at 1235 hours - Pages 31/9 to 32/12 will be excluded.

[Where specific page references are not noted, the entire excerpt is excluded.]

[3] The remaining intercepts in question, as edited by the Crown, are admissible.

B. BACKGROUND

[4] The Indictment charges 28 counts against the four accused as follows:

Count 1

Ronaldo LISING, between the 18th day of April, 2004 and the 9th day of September, 2004 at or near Vancouver, Kelowna, Hope and elsewhere in the Province of British Columbia did commit extortion of a person known as Clint Paulishyn, contrary to Section 346(1.1)(b) of the Criminal Code.

Count 2

Ronaldo LISING, between the 18th day of April, 2004 and the 9th day of September, 2004 at or near Vancouver, Kelowna, Hope and elsewhere in the Province of British Columbia, committed the indictable offence of extortion contrary to Section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 3

Ronaldo LISING, between the 18th day of April, 2004 and the 9th day of September, 2004 at or near Vancouver, Kelowna, Hope and elsewhere in the Province of British Columbia, being one of the persons who constitute a criminal organization, to wit the East End Charter of the Hells Angels, knowingly instructed, directly or indirectly, Michael Plante to commit the indictable offence of extortion contrary to Section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with the said criminal organization, contrary to Section 467.13 of the Criminal Code.

Count 4

John Virgil PUNKO, on or about the 26th day of May, 2004 at or near Vancouver, Surrey, Burnaby and elsewhere in the Province of British Columbia, unlawfully counselled Michael Plante to commit the indictable offence of mischief, to wit to wilfully destroy or damage property contrary to Section 430 of the Criminal Code, which offence was not committed, contrary to Section 464(a) of the Criminal Code.

Count 5

John Virgil PUNKO, on or about the 26th day of May, 2004 at or near Vancouver, Surrey, Burnaby and elsewhere in the Province of British Columbia, being one of the persons who constitute a criminal organization, to wit the East End Charter of the Hells Angels, knowingly instructed, directly or indirectly, Michael Plante to commit the indictable offence of mischief, to wit to wilfully destroy or damage property contrary to Section 430 of the Criminal Code, for the benefit

of, at the direction of, or in association with the said criminal organization, contrary to Section 467.13 of the Criminal Code.

Count 6

John Virgil PUNKO, Ronaldo LISING and Leroy Serra PEREIRA, between the 7th day of February, 2004 and the 16th day of July, 2005 at or near Vancouver, Surrey, Burnaby and elsewhere in the Province of British Columbia, did unlawfully conspire together and with George Pires and Brian Jung, the one with the other, or others of them and with a person or persons unknown, to commit the indictable offence of extortion of a person known as Parminder Gill contrary to Section 346(1.1)(b) of the Criminal Code, and did thereby commit an offence contrary to Section 465(1)(c) of the Criminal Code.

Count 7

John Virgil PUNKO, Ronaldo LISING and Leroy Serra PEREIRA, between the 7th day of February, 2004 and the 16th day of July, 2005 at or near Vancouver, Surrey, Burnaby and elsewhere in the Province of British Columbia, committed the indictable offence of conspiracy to commit extortion contrary to sections 346(1.1)(b) and 465(1)(c) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 8

Randall Richard POTTS, between the 1st day of October, 2004 and the 1st day of April, 2005 at or near Surrey and elsewhere in the Province of British Columbia did without lawful excuse have under his care and control an explosive substance, to wit, grenades with intent thereby to endanger life or cause serious property damage or to enable another person to endanger life or cause serious property damage, contrary to Section 81(1)(d) of the Criminal Code.

Count 9

Randall Richard POTTS, between the 1st day of October, 2004 and the 1st day of April, 2005 at or near Surrey and elsewhere in the Province of British Columbia without lawful excuse did have under his care and control an explosive substance, to wit grenades, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 82(2) of the Criminal Code.

Count 10

Randall Richard POTTS, on or about the 11th day of October, 2004 at or near Surrey and elsewhere in the Province of British Columbia, being one of the persons who constitute a criminal organization, to wit the East End Charter of the Hells Angels, knowingly instructed, directly or indirectly, Michael Plante to commit the indictable offence of possession of explosive substances contrary to Section 82(1) of the Criminal Code, for the benefit of, at the direction of,

or in association with the said criminal organization, contrary to Section 467.13 of the Criminal Code.

Count 11

Randall Richard POTTS, between the 1st day of October, 2004 and the 1st day of April, 2005 at or near Surrey and elsewhere in the Province of British Columbia did possess:

- a loaded restricted firearm, to wit a Colt .45 calibre semi-automatic pistol,
- a prohibited firearm, to wit an Intratec 9 mm calibre semi-automatic pistol with readily accessible ammunition that is capable of being discharged in the firearm, and
- a prohibited firearm, to wit a Ruger .22 calibre semi-automatic rifle with readily accessible ammunition that is capable of being discharged in the firearm

without being the holder of authorizations or licences under which he may possess the firearms in the places and registration certificates for the firearms, contrary to Section 95(1) of the Criminal Code.

Count 12

Randall Richard POTTS, between the 1st day of October, 2004 and the 1st day of April, 2005 at or near Surrey and elsewhere in the Province of British Columbia did possess firearms, to wit a Colt .45 calibre semi-automatic pistol, a Ruger .22 calibre semi-automatic rifle, an Intratec 9 mm calibre semi-automatic pistol, a Franchi .22 calibre semi-automatic rifle, a Voere bolt action rifle and a Ruger .44 magnum calibre revolver, knowing that he was not the holder of licences under which he may possess the firearms and registration certificates for the firearms, contrary to Section 92(1) of the Criminal Code.

Count 13

Randall Richard POTTS, between the 1st day of October, 2004 and the 1st day of April, 2005 at or near Surrey and elsewhere in the Province of British Columbia did possess prohibited devices, to wit, one magazine for an Intratec 9 mm semi-automatic pistol, one suppressor for a Colt .45 calibre pistol, one suppressor for an Intratec 9 mm semi-automatic pistol, one suppressor for a Franchi .22 calibre semi-automatic rifle and one suppressor for a Ruger .22 calibre semi-automatic rifle, knowing that he was not the holder of licences under which he may possess them, contrary to Section 92(2) of the Criminal Code.

Count 14

Randall Richard POTTS, between the 1st day of October, 2004 and the 1st day of April, 2005 at or near Surrey and elsewhere in the Province of British Columbia committed the indictable offence of possession of firearms contrary to section 92(1) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 15

Randall Richard POTTS, on or about the 11th day of October, 2004 at or near Surrey and elsewhere in the Province of British Columbia, being one of the persons who constitute a criminal organization, to wit the East End Charter of the Hells Angels, knowingly instructed, directly or indirectly, Michael Plante to commit the indictable offence of possession of firearms contrary to Section 91(1) of the Criminal Code, for the benefit of, at the direction of, or in association with the said criminal organization, contrary to Section 467.13 of the Criminal Code.

Count 16

Randall Richard POTTS, on or about the 20th day of January, 2005 at or near Surrey in the Province of British Columbia did commit extortion of a person known as Big Rob, contrary to Section 346(1.1)(b) of the Criminal Code.

Count 17

Randall Richard POTTS, on or about the 20th day of January, 2005 at or near Surrey in the Province of British Columbia committed the indictable offence of extortion contrary to section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 18

Jean Joseph VIOLETTE, between the 17th day of January, 2005 and the 21st day of January, 2005 at or near Burnaby in the Province of British Columbia did commit extortion of a person known as Glen Louie, contrary to Section 346(1.1)(b) of the Criminal Code.

Count 19

Jean Joseph VIOLETTE, between the 17th day of January, 2005 and the 21st day of January, 2005 at or near Burnaby in the Province of British Columbia, committed the indictable offence of extortion contrary to section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 20

John Virgil PUNKO, between the 22nd day of January, 2005 and the 9th day of March, 2005 at or near Burnaby and elsewhere in the Province of British Columbia did knowingly utter or convey threats to Michael Plante, to cause death or bodily harm to Michael Plante, contrary to Section 264.1(1) of the Criminal Code.

Count 21

John Virgil PUNKO, between the 22nd day of January, 2005 and the 9th day of March, 2005 at or near Burnaby and elsewhere in the Province of British Columbia, committed the indictable offence of threatening contrary to section 264.1(1) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 22

Randall Richard POTTS, on or about the 31st day of March, 2005 at or near Vancouver and elsewhere in the Province of British Columbia did knowingly utter or convey a threat to cause death or bodily harm to Michael Plante, contrary to Section 264.1(1) of the Criminal Code.

Count 23

Randall Richard POTTS, on or about the 31st day of March, 2005 at or near Vancouver and elsewhere in the Province of British Columbia, committed the indictable offence of threatening contrary to section 264.1(1) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 24

Randall Richard POTTS, between the 27th day of October, 2004 and the 17th day of December, 2004 at or near Langley and elsewhere in the Province of British Columbia did commit extortion of persons known as Brad MacElhinney and Douglas Brewer, contrary to Section 346(1.1)(b) of the Criminal Code.

Count 25

Randall Richard POTTS, between the 27th day of October, 2004 and the 17th day of December, 2004 at or near Langley and elsewhere in the Province of British Columbia committed the indictable offence of extortion contrary to section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 26

Ronaldo LISING, on or about the 15th day of July, 2005 at or near Burnaby in the Province of British Columbia did possess loaded prohibited firearms, to wit:

- a Rossi model M877 revolver in .357 Magnum calibre, and
- a Walther model PPK/S semi-automatic pistol in .380 Auto calibre

without being the holder of authorizations or licences under which he may possess the firearms in the place and registration certificates for the firearms, contrary to Section 95(1) of the Criminal Code.

Count 27

John Virgil PUNKO, on or about the 15th day of July, 2005 at or near New Westminster in the Province of British Columbia did possess a loaded prohibited firearm, to wit a Smith & Wesson Model 39-2 semi-automatic pistol in 9 mm Luger calibre without being the holder of an authorization or a licence under which he may possess the firearm in the place and a registration certificate for the firearm, contrary to Section 95(1) of the Criminal Code.

Count 28

Jean Joseph VIOLETTE, on or about the 15th day of July, 2005 at or near Burnaby in the Province of British Columbia did possess:

- a loaded prohibited firearm, to wit a Beretta model 20 semi-automatic pistol in .25 Auto calibre, and
- a prohibited firearm, to wit a Ruger model SP 101 revolver in .357 Magnum calibre together with readily accessible ammunition that is capable of being discharged in the firearm

without being the holder of authorizations or licences under which he may possess the firearms in the place and registration certificates for the firearms, contrary to Section 95(1) of the Criminal Code.

[5] The theme unifying the counts is that each accused is charged with committing offences for the benefit of, at the direction of, or in association with an alleged criminal organization, the East End Charter of the Hells Angels (the "EEHA"). The Crown alleges that the accused Ronaldo Lising, John Punko, and Jean Violette were members of the EEHA throughout the period of the police investigation, and that Randall Potts was a prospect who became a member in October 2004.

[6] A direct indictment was preferred in this case. As a result, the trial will proceed before a judge and jury. However, the Crown has stated on the record that it is willing to consent to a trial by judge alone.

- [7] The charges at issue arose from a lengthy police investigation (code named E-Pandora) that started in July 2003 and was ongoing at the commencement of the present group of trials. In the course of the investigation, the police used an agent, Michael Plante, to infiltrate the EEHA. Extensive wiretap intercepts, mostly from a body pack worn by Plante, were obtained from April 2004 to July 2005 pursuant to a valid authorization. During the 16 month wiretap phase of the investigation, the police intercepted approximately 385,000 calls and 19,500 text messages. The Crown seeks to introduce approximately 700 of those intercepted communications in this trial. Most involve the agent or the accused themselves. A small number are communications of other EEHA members.
- [8] On this voir dire, the accused led me painstakingly through the almost 700 intercepted communications the Crown seeks to tender, and identified those communications, or portions thereof, that they sought to have edited.
- [9] The material filed on this application was voluminous. As an example, Mr. Violette's list of impugned intercepts is marked as Exhibits 22, 22A and 22B on this voir dire. His challenges and the position of the Crown on those challenges are set out in Exhibit 36, and are alone 49 pages in length. Not to be outdone, the Crown also took pains to analyze each of the impugned intercepts, and gave detailed submissions as to why they should be admitted into evidence. The Crown's submissions are marked as Exhibit 35 on this voir dire, and detailed submissions as to the admissibility of many of the impugned intercepts are included in an appendix to its submissions. This appendix is marked as Exhibits 33 and 33A, and deals with these impugned intercepts under the following headings:

Tab A - Criminality of Members - Invocation of the Power of the Patch

Tab B - Underlying Offences - Paulishyn Extortion (counts 1, 2 and 3)

Tab C - Underlying Offences - Gill Extortion (counts 4 to 7)

Tab D - Underlying Offences - Guns and Grenades (counts 8 to 15) and Agent Threats - Potts (counts 22 and 23)

Tab E - Underlying Offences - Louie Extortion (counts 18 and 19)

Tab F - Underlying Offences - MacElhinney Extortion (counts 24 and 25)

Tab G - Agent Threats - Punko (counts 20 and 21)

Tab G(1) - Krayem Extortion (counts 16 and 17)

Tab H - Criminality of Members - Drugs

Tab I - Criminality of Members - Generally

Tab J - Non-criminal Intercepts

Tab K - Criminality of Members - Punko guns

Tab L - Criminality of Members - Dagg Extortion

Tab M - Criminality of Members - Assisting HA Alberta Nomad Dino

Tab N - Criminality of Members - Pepperoni

[10] These tabs accord with the manner in which the notice of intention to introduce the intercepted communications was provided to the accused. By categorizing the list of intercepted communications under the above mentioned headings, the accused were made aware of which intercepted communications the Crown intended to use and for what purpose. The use by the Crown of electronic disclosure and the manner in which the disclosure was made to the accused illustrate quite clearly that the Crown on this case learned from the mistakes made in *R. v. Chan*, 2003 ABQB 759, 15 C.R. (6th) 53.

[11] I should also mention that during the course of oral submissions, the Crown agreed to very significant edits of the intercepted communications. Those edits are contained in Exhibit 37 on this voir dire, which is 19 pages in length. They include such matters as racial comments and references to the accused's personal habits and alleged violent tendencies that have no bearing upon issues in this trial. In addition to these edits, the Crown also advised the accused of other intercepts, or portions thereof, which it does not currently seek to tender. This includes Tab 531, which is a communication between Plante and Punko regarding a plan to shoot a former EEHA member. The Crown conceded that the admission of this evidence might unduly prejudice the accused and could result in an unfair trial.

[12] I am indebted to the Crown for its many concessions, as they have made my task on this voir dire much easier.

C. POSITIONS OF THE PARTIES

1. Position of the Crown

[13] Each of the four accused is charged under s. 467.12 of the Criminal Code with committing an offence at the direction of, for the benefit of, or in association with a criminal organization, the EEHA. That section provides:

Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[14] An essential element of the offence is the existence of a "criminal organization" as defined by s. 467.1(1):

"criminal organization" means a group, however organized, that

(a) is composed of three or more people; and

- (b) has one of its main purposes or activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

[15] The Crown, through seized documents and materials, intercepted communications, surveillance, expert evidence, and the testimony of Plante, anticipates no difficulty in proving that the EEHA is a group composed of three or more members. It contends that the EEHA has a hierarchal structure, with up to 18 members at the top and two hangarounds at the bottom, and a clubhouse in Vancouver. Members are identified by their official emblem, commonly called "colours" or "patches".

[16] The Crown says that the bulk of its evidence will be led to establish that the Hells Angels ("HA") has as one of its main purposes or activities the facilitation of serious offences which benefits its members. That will include evidence relating to the criminality of the EEHA's members, expert evidence about the HA, the testimony of the agent, and intercepted communications.

[17] With respect to the evidence of the criminality of members, the Crown intends to show the following:

Punko (member) was involved in: trafficking and production of methamphetamine, trafficking in cocaine, committing and counselling extortion, threatening the agent, and possession of a firearm. He was also interested in purchasing dynamite for the club; Potts (member) was involved in: trafficking and production of methamphetamine, trafficking in cocaine, committing several extortions, and keeping firearms and grenades for the club; Lising (member) was involved in: two extortions, possession of firearms, and possession of methamphetamine for the purpose of trafficking; Violette (member) and Jonathon Sal Bryce (hangaround) were involved in extorting and assaulting someone who used the HA name; Violette was also involved in the possession of firearms, and had planned with Punko to transport cocaine from Vancouver to Ontario; Bryce was also involved in trafficking cocaine; David Francis Giles (member) was involved in the possession of cocaine for the purpose of trafficking.

[18] The Crown's experts will testify that one of the main purposes of the HA is to facilitate the commission of crime, and that:

The HA has a reputation for violence and intimidation; One of the most powerful tools that the members of the HA have at their disposal is the intimidation factor; The deathhead symbol of the HA instils fear in those who recognize it, and empowers the member who wears it (the "power of the patch"); Members use this reputation to serve their pecuniary interests; and A member's affiliation with the HA provides the basis for involvement in criminal activity at a level and depth that otherwise would not be possible without the affiliation.

- [19] The Crown anticipates that Plante will similarly testify about the reputation of the HA, and how he used his affiliation with the HA and its reputation to engage in criminal activities on behalf of members, such as collection/extortions and drug trafficking. Plante commenced his official status with the EEHA in October 2004 when he went "on the program" and became an official friend, the beginning of what could have been the climb up the hierarchy to "full patch" member. Previously, he had been a friend of the EEHA and associated with many of its members, which included participating in criminal activities with them.
- [20] With respect to the intercepted communications, it is anticipated that Plante will provide context to these intercepts by identifying the HA members and associates, and testifying about the structure and hierarchy of the EEHA, his role and responsibilities within the EEHA, the power of the patch, his criminal and other activities on behalf of members, such as collection/extortions, firearms and explosive offences and drug trafficking, and his discussions thereof with its members, including the accused. Plante will be asked to identify the voices on the intercepts. He will also identify persons in some of the photographs and put context to some of the other exhibits such as HA patches, colours, and HA contact lists. The credibility of Plante will be hotly contested. He has already been on the witness stand for 28 days in other proceedings arising from the E-Pandora investigation.
- [21] Finally, the Crown intends to lead evidence of the specific declarations of EEHA members to prove that a main purpose or activity of the EEHA is to facilitate criminal activity, and to connect the criminal organization to the underlying offences. It is these declarations that are the subject of the present application. The Crown seeks to tender them as proof with respect to the following three issues:
- a. the EEHA is a criminal organization within the definition of s. 467.1 of the Criminal Code;
 - b. the underlying offences are connected to the EEHA within the meaning of ss. 467.12 or 467.13 of the Code; and
 - c. the accused had knowledge of these two elements.
- [22] In the submission of the Crown, the relevance of the intercepts falls into four broad categories.
- a. Members' criminal activities facilitated by the EEHA
- [23] The Crown submits that the intercepted communications show that members of the EEHA are engaged in criminal activities, primarily drug trafficking but also extortion/threats and weapons offences. It says these activities are facilitated by the EEHA, and that such facilitation is a main purpose or activity of the organization. It is the theory of the Crown that the accused's membership in the HA, with the consequential association to the HA's reputation for violence and intimidation, provides the basis for their involvement in criminal activity at a level and depth that would not be possible without that membership.
- b. Power of the patch

[24] The Crown submits that interwoven through many of the challenged intercepts is the theme that, as an organization, the HA fosters a reputation for violence and intimidation. Evidence of this power of the patch is relevant to establishing that the HA, including the EEHA, facilitates the criminal activities of its members through perpetuation of this reputation for violence and intimidation. The Crown says that it is the members' affiliation with the EEHA and their possession of the power of the patch that provides the basis for their involvement or success in criminal activities at a level and depth that otherwise would not be possible. This, in and of itself, is evidence that the underlying offences, particularly those of extortion and threats, were committed by the accused "in association" with the criminal organization. Moreover, the Crown says that as a result of the members' affiliation to the power of the patch, there exists a culture of violence within the EEHA that is necessary to maintain and perpetuate its fearsome reputation. The employment of and requirement to use violence additionally proves that the underlying offences, particularly of extortion and threatening, were committed by the accused "in association" with the criminal organization.

c. Criminal activities of members

[25] One of the essential elements of the ss. 467.12 and 467.13 offences is proof that a main purpose or activity of the alleged criminal organization is the commission or facilitation of crime. It is the position of the Crown that the criminal nature or purpose of the EEHA can be established through the criminal activities of its members. To that end, evidence of the planning, commission, and discussion of offences by members and associates is relevant. Through such evidence, the Crown seeks to establish a number of propositions, including that the HA has a hierarchical structure, maintains an exclusivity with respect to membership, fosters a reputation for violence and intimidation which its members use to serve their interests, provides benefits to its members, is monopolistic and territorial, and engages in criminal mentorship of subordinates.

d. Criminal drug activities

[26] Many of the challenged intercepts include discussions between members regarding the planning and commission of drug offences, including the production and trafficking of illegal narcotics. The Crown submits that such evidence is relevant in that it establishes that a main purpose or activity of the EEHA is the facilitation of the criminal drug activities of its members, and that it also tends to establish that the accused had knowledge of this main purpose or activity. The Crown additionally contends that the intercepts are relevant in establishing a connection between the underlying offences and the EEHA through its hierarchical structure. It says that the hierarchical structure of the EEHA, which includes evidence of Plante's role in the criminal drug activities of the accused, is probative in establishing this connection in that the accused (excluding Violette) all used EEHA subordinate Plante to assist them in their criminal drug activities and to insulate them from police detection. Plante was obliged to participate in the criminal activities if he wished to ascend the ladder of hierarchy in the EEHA. The Crown says that the use by EEHA members of trusted recruits like Plante when engaged in criminal activities, including drug activities,

demonstrates the connection between such activities and the criminal organization.

[27] The Crown identifies several bases upon which it says the challenged intercepts are admissible:

- a. as admissions - a passage in an intercept to which one of the accused is a party is admissible for and against that accused with respect to anything that he, as the declarant, says or adopts;
- b. any intercept to which Plante is a party is admissible if, as the Crown anticipates, he adopts the statements he made in the intercepts when he testifies at trial;
- c. as evidence of state of mind - intercepts which contain a statement by the declarant that permits an inference to be drawn with respect to his state of mind is admissible as original testimonial evidence, and is not hearsay;
- d. as verbal acts - certain of the intercepts are admissible as the verbal component of an act. Such statements are not offered as proof of any assertions they contain, and do not constitute hearsay; and
- e. as part of the evidentiary basis upon which Crown experts may rely in supporting their opinions. The Crown submits that if found admissible for the limited purposes outlined above, the intercepts will be available for the experts to reply upon in forming their opinions. Less weight may be given to their opinions to the extent that the Crown is not permitted to tender the challenged intercepts.

[28] It is the position of the Crown that the challenged intercepts are highly probative, and that that probative value far outweighs their potential for prejudice. Any residual prejudice can be addressed by means of limiting instructions to the jury.

2. Position of the Accused

[29] Each of the accused made separate submissions on this voir dire. For purposes of economy, I have taken the liberty of treating their positions collectively in this summary.

[30] Following from the Court of Appeal's reasons in *R. v. Terezakis*, 2007 BCCA 384, 223 C.C.C. (3d) 344, the accused accept that the prosecution of criminal organization offences will lead to some evidence that would normally be inadmissible being considered relevant and sufficiently probative to be admitted. Nevertheless, they contend that does not make evidence of discreditable conduct automatically admissible simply because the indictment charges criminal organization offences. Admissibility continues to depend upon the Crown demonstrating relevance, and the survival of the evidence upon the application of the probative versus prejudice balancing test.

[31] Although the Crown contends that it is not seeking the admission of the intercepts for their truth, the accused submit that in many instances that is just what is happening. For instance, the Crown says with respect to certain intercepts that "reference to Potts and his

activities are not led for the truth of their contents, but is evidence of Punko's state of mind that he is aware that Potts, a fellow EEHA associate was involved in drug trafficking, and thus establishes Punko's shared knowledge of the criminal activities of other EEHA associates". The accused respond that if state of mind evidence is being led to prove shared knowledge of the criminal activities of other EEHA associates, then that knowledge must rest upon fact, and, despite the Crown's disclaimer, the references to Potts and his activities are being led for the truth of their contents. The mere belief on the part of an accused that EEHA associates are committing offences is irrelevant and inadmissible; what is relevant is knowledge of that fact, and the Crown must therefore prove that offences are being committed. Accordingly, the Court's gate keeping function should be exercised so as to disallow state of mind evidence unless the Crown has first demonstrated that there is independent and admissible evidence to prove the fact of the offence itself.

- [32] The accused similarly submit that many of the intercepts that the Crown seeks to lead as verbal acts do not properly fall within that definition, as most are merely declarative statements or recitations of past events. As well, in most cases, their probative value is dependent upon their truth.
- [33] The accused contend that the protection of fair trial rights in the present case also demands recognition of an essential distinction between an individual and an individual who is acting in his capacity as an EEHA associate. Evidence of an offence committed by an individual acting independently is irrelevant to, and, for that reason, inadmissible in respect of whether the EEHA has as one of its main purposes or activities the facilitation or commission of one or more serious offences. The only offences relevant to primary purpose or activity are those committed by EEHA associates in their capacity as EEHA associates. The Court should therefore require the Crown to prove relevance by proving that an offence was committed by an EEHA associate in his capacity as an EEHA associate, that is, in connection with the group. The rationale for imposing this test for admissibility at the outset, rather than having the evidence admitted and allowing the jury to decide what, if anything, it might prove is that the evidence of other offences is evidence of discreditable conduct. It is for that reason prejudicial and its admissibility creates a risk of misuse. Further, that risk is enhanced as the quantity of this type of evidence increases. While the Crown may seek to introduce evidence of discreditable evidence for only a limited purpose, the "piling on" of such evidence creates a risk that the jury's fact finding process will become distorted.
- [34] Although the Crown takes the view that the most important issues in this case are those related to the criminal organization offences, the substantive offences represent serious charges for the accused. They submit that there is no basis for prioritizing issues related to criminal organization over the other charges the Crown is prosecuting on this Indictment, and that they are entitled to a fair trial with respect to every count on the Indictment. In that regard, it is significant that most of the evidence challenged on this application is inadmissible and potentially prejudicial to the accused on the substantive offences.

- [35] In addition to the substantive offences, the accused are also charged with committing those offences either for the benefit of, at the direction of, or in association with a criminal organization, the EEHA. They submit that while the most obvious prejudice of the discreditable conduct evidence the Crown intends to lead with respect to the criminal organization counts is with respect to the substantive offences, there is also a risk of significant prejudice to the accused's rights to a fair trial on the criminal organization charges themselves, particularly on the issue of whether it is proven that the substantive offences were committed for the benefit of, at the direction of, or in association with the organization. For instance, evidence that an accused committed other crimes in connection with the organization invites the prohibited reasoning that he was therefore more likely to have committed the offences alleged in connection with the organization.
- [36] The accused point to the allegations of drug dealing as an example. The evidence the Crown wishes to lead is the foundation of a separate indictment charging Potts with committing those very offences in connection with the alleged criminal organization. He is not charged with respect to the drug offences on this Indictment. The challenged intercepts invite classic propensity reasoning along the lines that since he committed serious drug offences in connection with the organization, he probably also committed the substantive offences alleged in connection with the organization. Accordingly, the accused submit that whether they committed the charged offences in connection with a criminal organization should be capable of rising or falling on the evidence regarding the alleged offences themselves.
- [37] The accused contend that even if the Court finds that evidence of alleged criminal behaviour outside of that charged on this Indictment is probative with respect to whether the EEHA is a criminal organization, the probative value of the evidence on that issue is far outweighed by the potential prejudice on the issue of whether the offences charged have been proven to have been committed in connection with the criminal organization. That prejudice derives from the potential for misuse, the significant distractions from the volume of evidence involved and the attendant need on the defence to attempt to rebut these additional alleged connections. As well, since the defence challenges much of what the Crown contends can be taken from the intercepts, the jury will be caught up in a battle of competing inferences on a multitude of intercepts relating to criminality which is not charged on the Indictment. The accused already face a crowded indictment which will require very complex jury instructions; the addition of this large volume of evidence will require even further complicated instructions, and risks distracting the jurors from focussing on the charges on the Indictment.

D. APPLICABLE LEGAL PRINCIPLES

- [38] In determining the admissibility of the challenged intercepts, I must consider their relevance and any applicable rules of evidence, and then assess whether their probative value exceeds their potential for prejudice.

1. Relevance

- a. Generally

[39] It is a basic rule of law in Canada that all evidence that is relevant is admissible unless it is excluded by a rule of evidence: see, for example, *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 609, and *R. v. Corbett*, [1988] 1 S.C.R. 670 at 714-5. In this latter decision, La Forest J. wrote:

The organizing principles of the law of evidence may be simply stated. All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy. Questions of relevancy and exclusion are, of course, matters for the trial judge, but over the years many specific exclusionary rules have been developed for the guidance of the trial judge, so much so that the law of evidence may superficially appear to consist simply of a series of exceptions to the rules of admissibility, with exceptions to the exceptions, and their sub-exceptions.

[40] In *R. v. Truscott* (2006), 213 C.C.C. (3d) 183 at paras. 22-23, 216 O.A.C. 217, the Court explained relevance in these terms:

Evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a material fact in issue more or less likely: *R. v. J.(J.-L.)* (2000), 148 C.C.C. (3d) 487 at para. 47 (S.C.C.); *R. v. Watson* (1996), 108 C.C.C. (3d) 310 at 323-24 (Ont. C.A.); *R. v. B.(L.)* (1997), 116 C.C.C. (3d) 481 at 492-93 (Ont. C.A.), leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 524. Evidence will be irrelevant either if it does not make the fact to which it is directed more or less likely, or if the fact to which the evidence is directed is not material to the proceedings.

Relevance is contextual in that it depends on the facts in issue, the position taken by the parties in respect of those facts, and the other evidence adduced in relation to those facts: see *R. v. Arp* (1998), 129 C.C.C. (3d) 321 at 338 (S.C.C.). Because relevance is contextual, a court will often be unable to determine relevance at the time the evidence is proffered, but will receive the evidence conditionally and determine the relevance of the evidence after the evidentiary picture has been fully developed. It does not follow, however, that because relevance often cannot be determined when the evidence is tendered, that relevance should not be addressed when the evidence is tendered. If a court is satisfied when the evidence is tendered that the evidence is irrelevant, it should so hold and refuse to admit the evidence. A court should not hear evidence on the chance that it might somehow, at some time, in some way become relevant in the proceedings.

[41] Whether evidence is relevant will depend upon the issues raised by the case. The test for relevancy is not high: *R. v. Clarke* (1998), 129 C.C.C. (3d) 1, 18 C.R. (5th) 219 (Ont. C.A.).

- b. Relevance of Members' Acts and Statements in Relation to an Organization

[42] The criminal organization provisions of the Criminal Code are a departure from the traditional norms of criminal liability. While individuals associated to the organization are charged, the organization itself is not. As Chiasson J.A. observed in *Terezakis*, at para. 54,

"The law's focus appears to have been on the individuals who comprised the criminal organization and their criminal activities." The artificial entity, which is the focus of the legislation and a key issue for the Crown at trial, remains in the background. Rather than create liability, the concept of "criminal organization" is, instead, an organizing principle that mediates liability and only becomes meaningful when taken in context of one of the three criminal organization offences: David Freedman, "The New Law of Criminal Organization in Canada" [2006] 85 Can. Bar Rev. 171 at p. 205.

- [43] It is the position of the Crown that like the determination of corporate liability, the main purposes and activities of the EEHA can best be established through the words and actions of its members. In support of its position, it cites *R. v. Lindsay*, [2005] O.J. No. 61 (QL) (Ont. S.C.J.) [Lindsay], as well as a number of authorities regarding corporate liability, including *Lennard's Carrying Company, Limited v. Asiatic Petroleum Company, Limited*, [1915] A.C. 705 at 713-14, as cited in *Hart Building Supplies Ltd. v. Deloitte & Touche*, 2004 BCSC 55, 41 C.C.L.T. (3d) 240 and *Canadian Dredge & Dock Co. Ltd. et al. v. The Queen*, [1985] 1 S.C.R. 662. In this latter decision, for instance, Estey J. outlined the foundation of corporate criminal liability in Canada at para. 13:

As a corporation may only act through agents, there are basically only three approaches whereby criminal intent could be said to reside or not reside in a corporate entity:

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(iii) a median rule whereby the criminal conduct, including the state of mind, of employees and agents of the corporation is attributed to the corporation so as to render the corporation criminally liable so long as the employee or agent in question is of such a position in the organization and activity of the corporation that he or she represents its de facto directing mind, will, centre, brain area or ego so that the corporation is identified with the act of that individual. There is said to be on this theory no responsibility through vicarious liability or any other form of agency, but rather a liability arising in criminal law by reason of the single identity wherein is combined the legal entity and the natural person; in short, a primary liability. This rule stands in the middle of the range or spectrum. It is but a legal fiction invested for pragmatic reasons.

[Emphasis added]

- [44] The Crown stresses that it does not present this analogy to suggest that it must establish the directing mind of the EEHA; rather, it does so to demonstrate that just as courts have looked to identifying individuals as the directing minds of corporations from whom they can impute criminal liability onto the corporation, evidence as to the main purpose and activities of the EEHA is available from its membership, which are those individuals who create, sustain, and compose the EEHA. Those members are the "directing minds and will" of the EEHA, its "very ego, and centre of the personality."

- [45] Lising challenges the Crown's analogy to corporate criminal liability as flawed. He contends that the Crown clearly recognizes the importance of concepts such as "ego" and "personality" but resists against the possibility that such concepts must be defined through a person such as a "senior representative". This must be reconciled with the Crown's theory of hierarchy with respect to the EEHA, which is that the underlings receive and respond to orders rather than give orders themselves. For this reason, Lising submits that an underling cannot reasonably be described as the "ego" or "centre of the personality" of the EEHA, nor can the words or actions of an underling reasonably be said to be defining of the "ego" or "personality" of the group. Therefore, even on the Crown's own position, only some persons, by virtue of their status or position within the EEHA, will have authority such that the person's words or actions may be used as a basis upon which to define the "ego" or "personality" of the EEHA.
- [46] Lising also submits that to the extent that reference to corporate criminal liability is a useful analogy here, it is necessary to look at the text of s. 22.2 of the Code. That section permits criminal liability for a fault-based offence to attach to an organization only through the acts and intentions of a senior officer acting within the scope of his authority. Lising additionally contends that the differentiation between an individual qua senior officer and acting in a personal or other capacity has applicability to the present context, and that the only offences relevant to the primary purpose or activity of the EEHA are those committed by EEHA associates in their capacity as such.
- [47] In my view, it is entirely proper to turn to the words and actions of the members of the EEHA as evidence that may be relevant with respect to the main purpose and activities of the organization. Although the Crown has cited authorities that address corporate liability, and corporate criminal liability in particular, it is neither necessary nor appropriate to slavishly apply those principles to the present context. It must be remembered that liability does not attach to the criminal organization under the offences in question here. It is for this same reason that I am not persuaded by the submissions of Lising. Section 22.2 of the Criminal Code is concerned with an organization as a party to an offence. Again, that is not the situation with respect to the criminal organization offences.
- [48] When it comes to ascertaining the collective nature of an organization, it is only reasonable that the beliefs and states of mind of individuals who comprise that organization will have relevance in that regard. I draw support from Fuerst J.'s comments in Lindsay, at para. 13:

A material issue in this case is whether Mr. Lindsay and Mr. Bonner committed extortion in association with a criminal organization, identified by the Crown as the HAMC [Hell's Angels Motorcycle Club]. Determining whether the HAMC is a criminal organization requires consideration of its main purposes and main activities. Statements by its members and affiliates about the organization's purposes and activities are relevant to whether the group is a criminal organization. Statements by members and affiliates about their purposes and activities as members and affiliates of the organization also are relevant to whether the group is a criminal organization. Given the defence position that the HAMC is composed of autonomous chapters,

and is not the overarching entity that the Crown contends, statements about the structure and operation of the HAMC also are relevant.

[Emphasis added]

[49] Fuerst J. admitted evidence on this basis, and wrote at para. 101:

Several of the intercepted communications demonstrate Miller's [a non-accused member of the HAMC] understanding, and to a lesser extent the understanding of his club associate Rob Barletta, of the HAMC as an organization akin to a corporation, its drive for dominance over other motorcycle clubs, the illicit nature of its business, the profitability of its business both in and outside of Quebec, and the influence and control of Quebec chapters in Ontario. Inferences can be drawn that these members of the HAMC hold the belief that involvement in illicit business is a main purpose and activity of the organization, and that they have knowledge of the affairs of chapters beyond their own.

[50] Accordingly, I find that statements that pertain to the knowledge and beliefs of members as to the criminality of their colleagues and of the EEHA itself, the willingness of members to use violence, the hierarchical structure of the organization, the organization's limited or exclusive membership, the rules and regulations of the organization, as well as its monopolistic and territorial nature, are relevant to the issue of whether the EEHA is a criminal organization. (I am advised that the Crown intends to lead expert evidence that these are some of the attributes of a criminal organization.)

[51] With respect to Lising's submission that it is necessary to distinguish between an individual and an individual acting in his capacity as a member of the EEHA, that is a matter to be left with the trier of fact, as liability only attaches under s. 467.12 when the offence in question is committed "for the benefit of, at the direction of, or in association with" the criminal organization.

c. Evidence of Bad Character

[52] Character evidence which shows only that the accused is the type of person likely to have committed the offence in question is inadmissible. Evidence which demonstrates bad character may, however, be admissible if it is also relevant to an issue at trial apart from propensity or disposition. In *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716, Cory J. described three circumstances in which evidence of the bad character of the accused may be adduced at para. 63:

- (1) where the evidence is relevant to an issue in the case: see, for example, *Morris*, supra, at p. 202; *B. (F.F.)*, supra, at p. 731. See also *R. v. Lepage*, [1995] 1 S.C.R. 654, at pp. 672-74; *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 135, per Cory J.
- (2) where the accused puts her character in issue: see, for example, *R. v. McNamara et al. (No.1)* (1981), 56 C.C.C.(2d) 193 (Ont. C.A.) at p. 352, leave to appeal granted on other grounds (1981), 56 C.C.C. (2d) 576 (S.C.C.);

- (3) where the evidence is adduced incidentally to proper cross-examination of the accused on her credibility: see, for example, *Lucas v. The Queen*, [1963] 1 C.C.C. 1 (S.C.C.); *R. v. Chambers*, [1990] 2 S.C.R. 1293.
- [53] Thus, such evidence is admissible so long as its probative value outweighs its prejudicial effect. See also *R. v. Lamirande*, 2002 MBCA 41, 164 C.C.C. (3d) 299, and *R. v. Grandinetti*, 2003 ABCA 307, 178 C.C.C. (3d) 449.
- [54] In the context of a criminal organization prosecution, the comments of Mackenzie J.A. in *Terezakis* are significant. The accused in that case had submitted that an accused's right to a fair trial would be impaired by bad character evidence, otherwise inadmissible, of past criminal behaviour by the accused and his associates introduced to prove the accused's connection with a criminal organization. He had further argued that a jury instruction limiting the use that could be made of such evidence would be inadequate to remove the prejudice of guilt by association resulting from the evidence. Mackenzie J.A. addressed this submission at para. 46:

Criminal organization offences make evidence of general propensity and bad character probative that would otherwise be excluded as prejudicial. No doubt such evidence will present challenges for jury instruction in trials of criminal organization offences. The balance between probative value and prejudice was discussed in depth by Binnie J. in the context of similar fact evidence in *R. v. Handy*, [2002] 2 S.C.R. 908 at paras. 31-55 and later considered by Major J. in *R. v. Perrier*, [2004] 3 S.C.R. 228 at paras. 31-34 in the context of an identity issue. While the concern about unfair prejudice is real, I am not persuaded that it is so compelling as to preclude a fair trial and fatally compromise the constitutional legitimacy of the criminal organization offences. The Attorney General of British Columbia accepts that a trial judge retains a residual discretion to exclude evidence where the prejudicial effect outweighs its probative value and the scope for the exercise of this discretion may be more extensive in the context of criminal organization offences. The fair trial submission was not strongly pressed in argument by counsel for Mr. *Terezakis* and if the issue is to be revisited in a later case, in my view, it would be helpful to do so in the context of particular facts.

- [55] Other appellate courts have similarly upheld the admissibility of evidence of discreditable conduct in prosecutions of this nature. *R. v. Couture*, 2007 QCCA 1609, [2007] J.Q. No. 13091 (QL), concerned a prosecution under the former s. 467.1 offence of participating in the activities of a criminal organization (the accused were also charged and convicted of drug trafficking and conspiracy to murder) where it was alleged that the Nomad chapter of the HA and its puppet club, the Montreal Rockers, were a criminal organization. The Court of Appeal upheld the admissibility of bad character evidence, including the following:

- a. A statement of a co-accused was to the effect that some in the lower ranks of the alleged criminal organization who wanted to rise quickly had become "killing machines". The Court held that this evidence was admissible as an overt act to encourage a subordinate to commit crimes in order to climb the ladder more quickly, and was thus evidence of the existence of a gang (paras. 82 to 85).
- b. One of the Crown witnesses (a subordinate in the alleged criminal organization) testified that in order to get promoted within the alleged criminal organization, he took part in the assassination of two correctional guards ordered by one of the influential members of the alleged criminal organization, Maurice Boucher. The reason for the murders was to put an end to members having turned informants by destabilizing the judicial system. The Court held that this evidence was admissible to prove the existence of a gang, as well as proof of criminal acts by the organization's members, both of which were key elements of the former s. 467.1 criminal organization offence (paras. 86 to 88).
- c. One of the Crown witnesses (a subordinate in the alleged criminal organization) testified that he and a named co-conspirator (a member of the alleged criminal organization) had plotted to murder a lawyer. The Court held that this evidence was admissible, in part to prove the importance of hierarchy (para. 94).
- d. One of the Crown witnesses (a subordinate in the alleged criminal organization) testified that he and a named co-conspirator (a member of the alleged criminal organization) had plotted to murder a police informer. The Court held that this evidence was admissible to prove the commission of criminal acts by members of the gang during the five years preceding the date of the offence (para. 95).
- e. One of the Crown witnesses (a subordinate in the alleged criminal organization) testified that he and a named co-conspirator (a member of the alleged criminal organization) had murdered an infiltrated police agent. The Court held that this evidence was admissible to prove the commission of criminal acts by members of the gang (para. 96).
- f. The Crown tendered evidence of an assault with firearms in which one of the accused had been involved. The Court held that this evidence was admissible to prove the commission of criminal acts (para. 100).
- g. One of the Crown witnesses testified, "To become a Hells Angels Nomad, you have to kill. Everyone knows that." The Court held this evidence was admissible to understand the nature of the alleged criminal organization and its hierarchical rules (as well as to prove the existence of a murder plot), and because its probative value surpassed the prejudice it may have caused to the accused (paras. 102 to 105).

[56] R. v. Boucher (2000), 149 C.C.C. (3d) 429, 38 C.R. (5th) 342 (Que. C.A.), involved the killing of two correctional guards, as noted above in Couture. The Crown led evidence of the accused's leadership role in a criminal organization, the HA Nomads, and that the accused lived off crime. At paras. 10 and 11, the Court acknowledged the relevance of the evidence in the context of that case:

The appellant [the Crown] submits that the trial judge did not adequately instruct the jury [translation] "on the inferences which they could draw from the fact that the accused was the head of an extremely hierarchical, structured and violent criminal organization and that he was the direct superior of Tousignant and Fontaine, Stephane Gagne's two accomplices".

As mentioned above, the Crown's theory of the case was that the respondent had ordered the murders of two prison guards, murders carried out by members of the criminal organization which the respondent directed and for the end of this organization because it was so acting in order to prevent members from becoming informants. Therefore, the evidence of the respondent's status within this organization was admissible [footnote citing R. v. G. (S.G.)] and the trial judge correctly instructed the jury on the effect of this evidence by indicating that the jury could "infer" therefrom that the actions of the members of the organization were done [translation]:. . . not only to the knowledge, but with the concurrence or desire of the person or persons who are at the upper echelons (of the organization). This is an inference which you may possibly make.

[Emphasis added]

[57] Finally, an accused's membership in a gang was held to be admissible on charges of manslaughter and robbery in Lamirande. It had been argued that evidence of an accused's membership in a gang called the Indian Posse was highly prejudicial as it branded the accused a criminal, and that there was no evidence that the robbery was done in association with the gang. The Court upheld the admissibility of this evidence, setting out its reasons at para. 66:

The evidence of Lamirande's relationship with the Indian Posse was essential to enable the jury to understand how the four persons came together to do the robbery, since neither Starr nor Lamirande were well known to Desjarlais. The jury had to be told how it was that two apparent strangers were so readily and quickly taken into the group. The robbery did not just happen; it was planned. The four persons were the participants and it was part of their business of crime. It is also relevant to sec. 21(2) of the Criminal Code (the Code) and the issue of foreseeability of harm concerning the offence of manslaughter.

2. Admissibility

[58] There are several bases upon which the challenged intercepts are admissible.

a. Direct Evidence

[59] The general principle regarding direct evidence is set forth in Watt's Manual of Criminal Evidence (Toronto: Thomson Carswell, 2006), at p. 41:

Direct evidence is evidence which, if believed, resolves a matter in issue. Direct evidence from a qualified witness offered to help establish a provable fact cannot be excluded as irrelevant. The only inference involved in direct evidence is that the testimony is true.

[60] In *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828 at para. 22, the Supreme Court of Canada adopted some of the foregoing quotation from Watt's Manual of Criminal Evidence. The Court, in the context of analyzing the proper test at a preliminary inquiry to commit accused to trial, stated the following with respect to direct evidence:

The test is the same whether the evidence is direct or circumstantial: see *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at pp. 842-43; *Monteleone*, supra, at p. 161. The nature of the judge's task, however, varies according to the type of evidence that the Crown has advanced. Where the Crown's case is based entirely on direct evidence, the judge's task is straightforward. By definition, the only conclusion that needs to be reached in such a case is whether the evidence is true: see Watt's Manual of Criminal Evidence (1998), at par. 8.0 ("[d]irect evidence is evidence which, if believed, resolves a matter in issue"); McCormick on Evidence (5th ed. 1999), at p. 641; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at par. 2.74 (direct evidence is witness testimony as to "the precise fact which is the subject of the issue on trial"). It is for the jury to say whether and how far the evidence is to be believed: see *Shephard*, supra, at pp. 1086-87. Thus if the judge determines that the Crown has presented direct evidence as to every element of the offence charged, the judge's task is complete. If there is direct evidence as to every element of the offence, the accused must be committed to trial.

[61] With respect to the present case, any intercept to which Plante is a party is presumptively admissible on the expectation that he will adopt his statements in those intercepts when he testifies at trial. (The admissibility of the statements of others in those intercepts falls to be determined on other bases.) As Mackenzie J. noted with respect to Plante's evidence in the trial of *R. v. Giles*, 2007 BCSC 1894, at para. 4:

Michael Plante was a witness on this "Plante voir dire" and adopted his own statements made in the intercepted private communications. He will be cross-examined on his statements. There is no hearsay issue with respect to Plante's own statements. In *R. v. Khelawon*, 2006 SCC 57 at para. 38, 274 D.L.R. (4th) 385, the court noted that:

When the witness repeats or adopts an earlier out-of-court statement, in court under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination.

[62] Thus, for instance, Plante's anticipated testimony with respect to the criminality of members of the EEHA, which may include evidence about the criminal activities he engaged in with the various accused, is admissible with respect to whether the EEHA is a criminal organization.

b. Admissions

[63] Admissions, which in the broad sense refer to any statement made by a declarant and tendered as evidence at trial by the opposing party, are admissible as an exception to the rule against hearsay: *R. v. Foreman* (2002), 169 C.C.C. (3d) 489, 62 O.R. (3d) 204 (C.A.), citing J. Sopinka, S. Lederman and A. Bryan, *The Law of Evidence in Canada*, 2nd ed. (Markham, Ont.: Butterworths, 1999), at p. 291. The Court in *Foreman* went on to quote from Sopinka J. in *R. v. Evans*, [1993] 3 S.C.R. 653, at p. 664:

The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-6, quoted in McCormick on Evidence, *ibid.*, p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

[64] The basic principles are also captured at pp. 327-328 of Watt's *Manual of Criminal Evidence* 2006:

The admissions doctrine is more likely a product of the adversary system than the result of the application of the principles of necessity and reliability. Admissions are presumed truthful because they have been made by D and are tendered by P to advance its case. They are received as an exception to the hearsay rule as evidence of the truth of their contents.

Admissions may be made orally, in writing, or by conduct by or on behalf of D. They need not be against D's interest when made. It is left to P to determine whether they will be tendered in evidence. D need not have personal knowledge of the fact(s) admitted, provided s/he exhibits a belief in the truth of the information conveyed. Admissions are evidence both for and against their maker, D, who is entitled to offer explanation(s) for having made them.

Silence may also constitute an admission, at least where a denial would be the only reasonable course if D were not responsible as alleged. The principle does not apply, however, where D is in the presence of police at the material time.

Failure to deny an accusation is not the only form of adoptive admission. Any words, conduct, action or demeanour that amounts to an acknowledgement of the truth of an accusation, in some instances even a denial, may constitute an adoptive admission, depending upon all the circumstances.

The trial judge must determine whether there is any evidence that D, by words, action, conduct, or demeanour, has adopted a statement made in his/her presence as his/her own, before the trier of fact may find it to be an admission and make use of it as such.

All the circumstances must be considered. The weight of the admission is for the trier of fact.

[65] Accordingly, a passage in an intercept to which one of the four accused is a party is admissible for and against that accused with respect to anything he, as the declarant, says or adopts. The evidence is admissible as an exception to the hearsay rule as evidence of the truth of its contents. However, it is binding only as against the declarant, and cannot be used as evidence against a co-accused unless the co-accused was present and assented, or is deemed under the circumstances to have assented when he might reasonably have been expected to make a denial.

c. Evidence of State of Mind

[66] As the Crown does not seek to tender the challenged intercepts as hearsay evidence, it is not necessary for me to canvass the law as it relates to that issue. I will, however, review the legal principles that govern the non-hearsay bases upon which the Crown does contend the intercepts are admissible, that is, as evidence of state of mind and as verbal acts.

[67] The law with respect to state of mind evidence was articulated in *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965 at 970 (P.C.) and adopted by the Supreme Court of Canada in *R. v. Smith*, [1992] 2 S.C.R. 915 at para. 19 as follows:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

[68] Lamer C.J.C. held at para. 20 of *Smith* that such statements, when tendered simply to prove that they were made, "fall out of the definition of hearsay". He continued:

What is important is that the evidentiary dangers traditionally associated with statements by persons not called as witnesses -- principally, the unavailability of the declarant for cross-examination -- are not present, or are present to a far less significant degree, when the relevance of such statements lies simply in the fact that they were made.

[69] Evidence of state of mind is not tendered for its truth, but rather, as circumstantial evidence of the declarant's state of mind, including his knowledge, purpose and intention respecting the issues addressed. As the House of Lords observed in *R. v. Blastland*, [1986] A.C. 41 at 54, in a passage adopted by Lamer C.J.C. at para. 23 of *Smith*:

It is, of course, elementary that statements made to a witness by a third party are not excluded by the hearsay rule when they are put in evidence solely to prove the state of mind either of the maker of the statement or of the person to whom it was made. What a person said or heard said may well be the best and most direct evidence of that person's state of mind. This principle can only apply, however, when the state of mind evidenced by the statement is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial.

[70] Doherty J. (as he then was), also explained the nature of evidence admitted for state of mind at p. 341 of *R. v. P. (R.)* (1990), 58 C.C.C. (3d) 334, [1990] O.J. No. 3418 (QL) (Ont. H.C.J.):

If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule. If those statements permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred. The result is the same whichever route is taken, although circumstantial evidence of a state of mind poses added problems rising out of the inference drawing process.

[71] This passage was quoted with approval by the British Columbia Court of Appeal in *R. v. Mafi* (1998), 130 C.C.C. (3d) 329, at para. 11, 21 C.R. (5th) 139.

[72] Once admitted as circumstantial evidence imputing the declarant's state of mind, a further inference may be drawn that the declarant acted in accordance with that state of mind where either the state of mind itself or the resulting action is relevant to a fact in issue. Fuerst J. commented upon this chain of inferences at paras. 97-98 of *Lindsay*:

A statement that is an explicit statement of the declarant's state of mind is admissible as an exception to the hearsay rule when that state of mind is in issue. A statement by the declarant that permits an inference to be drawn as to his or her state of mind is regarded as original testimonial evidence (non-hearsay). It is admitted as circumstantial evidence from which a state of mind can be inferred: *R. v. P. (R.)*, supra; *R. v. Smith*, supra. A statement introduced on this basis cannot be relied on for the truth of its contents.

Further, a declarant's state of mind may in turn be circumstantial evidence that he or she acted in accordance with that state of mind. Accordingly, a statement that the declarant had a particular intention is circumstantial evidence that he or she acted in accordance with the stated intention, where it is reasonable to draw that inference: *R. v. P. (R.)*, supra; *R. v. Smith*, supra.

- [73] There are limitations on the use that may be made of evidence admitted on this basis. As Fuerst J. observed at para. 99, the evidence is not admissible to show the state of mind of a person other than the declarant (unless that person was aware of the statement, as in the case of the recipient), to show that other persons acted in accordance with the declarant's stated intention, or to establish that past acts or events referred to in the statement did occur.
- [74] In the present case, the Crown seeks to tender many of the intercepted communications as circumstantial evidence from which the states of mind of members and associates of the EEHA may be inferred. It says that inferences about the main purposes and activities of the EEHA that involve the facilitation or commission of criminal activities for material benefit may then be drawn from the states of mind of the members.
- [75] Lindsay provides an example of evidence being used in this fashion. There, Fuerst J. admitted several intercepted communications of a William Miller, a non-accused member of the HA, as circumstantial evidence of his state of mind. At paras. 101-104, she summarized those communications and the inferences which could be drawn from them:

Several of the intercepted communications demonstrate Miller's understanding, and to a lesser extent the understanding of his club associate Rob Barletta, of the HAMC as an organization akin to a corporation, its drive for dominance over other motorcycle clubs, the illicit nature of its business, the profitability of its business both in and outside of Quebec, and the influence and control of Quebec chapters in Ontario. Inferences can be drawn that these members of the HAMC hold the belief that involvement in illicit business is a main purpose and activity of the organization, and that they have knowledge of the affairs of chapters beyond their own. I exclude the communication at Tab 10, referred to at page 41 of the Crown's factum. It is purely an account of a past event, and not a statement of Miller's state of mind.

The intercepted communications also show Miller's understanding, and to a lesser extent the understanding of his club associates Barletta and Paris Christoforou, of the relationships between the HAMC and other motorcycle clubs, and concern about the activities of other clubs. In the context of the evidence adduced from the experts about the link between territoriality and illicit business activities, this understanding and concern can give rise to inferences about the purposes and activities of the HAMC.

Two intercepted communications demonstrate concern about police infiltration or investigation on the part of Miller, and also Barletta, Rob Hamilton and Shawn Boshaw who were either prospects or full members of the Hells Angels. It could be inferred that concern about the police was a result of the HAMC's involvement in illicit activities.

The intercepted communications I have identified, with the exception of the excerpt from Tab 10 at page 41 of the Crown's factum, are admissible as circumstantial evidence from which a state of mind of Miller, and his associates Barletta, Christoforou, Hamilton, and Boshaw can be inferred.

[76] In her reasons convicting the accused of the s. 467.12 offence (R. v. Lindsay and Bonner, [2005] O.J. No. 2870 (QL) (Ont. S.C.J.)), Fuerst J. found the HA to be a criminal organization in accordance with the s. 467.1 definition, and concluded that a main purpose or activity of the HA was the facilitation of crime. Her conclusion drew upon various pieces of evidence, including the intercepted communications of Miller:

In an intercepted communication in December 2002, William Miller indicated his understanding that the Niagara chapter was in the business of drug trafficking. John Coates had ties to the Sherbrooke chapter, which was involved in drug dealing. He transferred from the London prospect chapter to Niagara in July 2002. [para. 1052]

...

Intercepted communications of Miller revealed that he regarded North Toronto and London as one expansive chapter, and considered London to be a lucrative area for the Hells Angels. They also revealed his understanding of the HAMC as a large, pervasive organization involved in drug dealing. [Para. 1059]

[77] The Crown seeks the admission of a great many of the challenged intercepts on the basis that it is evidence of state of mind. With the exception of the intercepts that I have excluded, I have accepted the Crown's submissions with respect to the remaining intercepts that it says are admissible as evidence of state of mind.

d. Verbal Acts

[78] Another basis upon which the Crown in Lindsay had sought the admission of statements made by members or affiliates of the HA was as verbal acts. Fuerst J. concisely summarized the law in this regard at paras. 119-121 of her ruling on admissibility:

The term "verbal act" is defined by Wigmore as an utterance that "accompanies conduct to which it is desired to attach some legal effect. The conduct or act has intrinsically no definite significance, or only an ambiguous one, and its whole legal purport or tenor is to be more precisely ascertained by considering the words accompanying it. The utterance thus enters merely as a verbal part of the act": Wigmore on Evidence, Chadbourn Revision, Volume 6, page 267. Examples given by Wigmore include the delivery of goods sold, which may consist of a manual transfer and words stating its purpose, or the making of an arrest, which may consist of a manual touching along with an utterance by the police officer.

An utterance that is a verbal act is not offered as proof of any assertion it contains, and so is non-hearsay.

Wigmore identified four limitations on the use of utterances as verbal acts:

1. The conduct to be characterized by the words must be independently material in the case, as a fact directly in issue, or as incidentally or evidentially relevant to the issue;
2. The conduct must be equivocal;

3. The words must aid in giving legal significance to the conduct, meaning that they complete and define the act by serving as a part of it; and
4. The words must accompany the conduct.

[79] Fuerst J. admitted a number of intercepted communications as verbal acts, as she described at para. 123:

Several of the intercepted communications are between Miller and/or other members or associates of the HAMC. Contact between members or associates of the HAMC from different chapters is relevant to the issue of the structure of the organization and the Crown's position that the HAMC functions as an integrated whole, rather than as autonomous chapters. The mere acts of communication between Miller and others are ambiguous, however, in that they do not reveal the purpose of the contacts. The accompanying words complete and define the acts in that they reveal that the communications concern operations of the HAMC, leaving aside the truth or falsity of any assertions they contain.

[80] She also declined to admit an intercept which the Crown had contended was admissible under the verbal act doctrine. The intercept was a conversation between Miller and Christoforou, both of the same HA chapter, in which they discussed the potential commission of an assault on members of another motorcycle club. Fuerst J. rejected the Crown's submission that the intercept was admissible under the verbal act doctrine as constituting the commission of a criminal offence, writing that that submission placed reliance on the truthfulness of the assertions in the conversation.

[81] Fuerst J. observed in her ruling that in the case of a trial by jury, there may be cause for concern that statements admitted under the verbal act doctrine may be misused and the assertions impermissibly relied upon for their truth. As she was hearing the trial alone, she held that this concern did not arise such that the probative value of the evidence admitted as verbal acts was outweighed by its prejudicial effect.

[82] The basis of admissibility advanced by the Crown for a number of the challenged intercepts in the present case is as a verbal act. With the exception of the intercepts I have excluded, I have accepted the Crown's submissions with respect to the admissibility of the remaining intercepts that it says are verbal acts.

e. Basis for Expert Testimony

[83] The challenged intercepts that have not been excluded on this application may be used by the Crown's experts to support the basis of their opinions.

3. Drawing Inferences

[84] In a paper prepared for the National Judicial Institute in 2000 entitled "Truth and Proof: The Basics of the Law of Evidence in an 'Obligation-Based' System", David Paciocco wrote:

Even if an item of evidence is found to be safe in the sense that it is truthful and accurate, it may have to be further evaluated to see how compelling or important it is. This will be true of "circumstantial evidence" but not "direct evidence" .. Circumstantial evidence requires a further form of weighing. "Circumstantial evidence" is proof that depends for its relevance on an inference . A trier of fact will have to weigh circumstantial evidence, then, in the sense of determining how compelling the evidence is by evaluating the strength of the inference that the evidence supports.

[85] The Crown submits that the intercepted communications it seeks to tender are the most reliable and compelling evidence of the EEHA's purposes and activities. I accept its position that whether those statements are characterized as direct or circumstantial evidence, they are highly probative, and ought to be admitted subject to the recognized rules of exclusion, as stated by Dickson C.J.C in Corbett, at para. 50:

I agree with my colleague, La Forest J., that basic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. The evidence may carry much weight, little weight or no weight at all. If error is to be made it should be on the side of inclusion rather than exclusion and our efforts in my opinion, consistent with the ever-increasing openness of our society, should be toward admissibility unless a very clear ground of policy or law dictates exclusion.

[86] Counsel for Punko drew my attention to the following passage from Watt's Manual of Criminal Evidence 2006 at p. 95:

An inference is a deduction of fact which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that may, not must be drawn in the circumstances.

[87] Counsel pointed out that equally important was the author's observation that "the boundary that separates permissible inference from impermissible speculation in relation to circumstantial evidence is often a very difficult one to locate."

[88] While I agree with defence counsel that there is a possibility that the jury may in some cases draw inferences from the challenged intercepts that amount to impermissible speculation, I am not satisfied, however, that that remote possibility should, by itself, be cause for my editing the intercepted communications as suggested by defence counsel.

4. Residual Discretion

[89] Even where evidence is relevant and presumptively admissible, the court retains a residual discretion to exclude it if its probative value is slight and undue prejudice might result to the accused and the trial process by its admission. This residual discretion was described in *R. v. Adam*, 2006 BCSC 1355, [2006] B.C.J. No. 2042 (QL), at para. 296, in the context of admitting the prior recorded statements of two co-accused under the principled exception to the hearsay rule:

Even though a statement demonstrates sufficient necessity and reliability to be admitted into evidence, the trial judge still has a residual discretion to exclude the statement if the prejudicial effect outweighs the probative value. The Supreme Court of Canada discussed this discretion in *Hawkins* at para. 85:

... Even where a particular hearsay statement satisfies the criteria for necessity and reliability under the reformed framework, the statement remains subject to the judge's residual discretion to exclude the statement where "its probative value is slight and undue prejudice might result to the accused": *Smith*, supra, at p. 937. The existence of this discretion, of course, is constitutionalized by the guarantee of a fair trial under s. 11(d) of the Canadian Charter of Rights and Freedoms: *R. v. Harrer*, [1995] 3 S.C.R. 562, at p. 579. And as underscored by McLachlin J. in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 610, the meaning of "prejudice" must be broadly understood as encompassing both prejudice to the accused and prejudice to the trial process itself.

[90] Courts look at a number of factors in assessing both the probative value and the prejudicial effect of proposed evidence. These were set out in *R. v. B. (L.)*; *R. v. G. (M.A.)* (1997), 116 C.C.C. (3d) 481 at paras. 23 and 24, 35 O.R. (3d) 35 (C.A.), where Charron J.A. (as she then was) stated:

In assessing the probative value of the proposed evidence, consideration should be given to such matters as:

- (i) the strength of the evidence;
- (ii) the extent to which the proposed evidence supports the inference(s) sought to be made from it (this factor will often correspond to the degree of similarity between the prior misconduct and the conduct forming the subject-matter of the charge); and
- (iii) the extent to which the matters it tends to prove are at issue in the proceedings.

In assessing the prejudicial effect of the proposed evidence, consideration should be given to such matters as:

- (i) how discreditable it is;
- (ii) the extent to which it may support an inference of guilt based solely on bad character;
- (iii) the extent to which it may confuse issues; and

(iv) the accused's ability to respond to it.

These lists are not meant to be exhaustive. The matters that should be considered depend largely on the particular circumstances of the case.

[91] In the context of admitting what was found to be relevant bad character evidence, the Court in *R. v. Grewall*, 2000 BCSC 1370, [2000] B.C.J. No. 2384 (QL) analyzed whether the probative value of the evidence outweighed its prejudicial effect. The Court's analysis in this regard is set out at paras. 44-50:

R. v. Pascoe (1997), 113 C.C.C. (3d) 126 (Ont. C.A.) Rosenberg J.A. stated that the mere fact that the evidence was necessary to prove the prosecution's case was not the sole consideration on the question of probative value. He stated at p. 143:

The real problem in considering the probative value of the evidence was the need to scrutinize the evidence to "determine its tendency to establish the proposition that it is offered to prove" (*McCormick on Evidence*, 4th ed. vol. 1 (1992) at p. 774)

The question was not whether the prosecution needed the evidence but the degree to which the evidence would prove the fact in issue for which it was tendered.

In *Pascoe* the court also pointed out that in considering the probative value of the evidence the trial judge should also consider the frailties in the evidence.

In *R. v. B.(L.)*; *R. v. G.(M.A.)* (1997), 116 C.C.C. (3d) 481 at 494 (Ont. C.A.), Charron J.A., writing for the court, indicated certain factors to be considered when assessing the probative value of proposed evidence. While acknowledging that the matters to be considered depend largely on the particular circumstances of the case, Charron J.A. suggested the following factors be considered when assessing the probative value of evidence:

- (1) the strength of the evidence;
- (2) the extent to which the proposed evidence supports the inference(s) sought to be made from it; and
- (3) the extent to which the matters it tends to prove are at issue in the proceedings.

In my view, the proposed evidence comes from someone who was in the best position to assess the nature of the relationship between herself and the accused, Ajit Grewall. The proposed evidence does in fact support the inference sought to be made from it. Lastly, the proposed evidence tends to prove an issue in these proceedings.

Assessing the prejudicial effect of the evidence

Placing evidence of an accused's bad character before a trier of fact can fundamentally prejudice the fact-finding process. Sopinka J. set out in *R. v. D.(L.E.)* (1989), 50 C.C.C. (3d) 142 at 161-2 (S.C.C.) that bad conduct evidence can have three different types of prejudicial impact in a proceeding:

- (1) the trier of fact may find that the accused is a "bad person" who is likely to be guilty of the offence charged;
- (2) the trier of fact may punish the accused for past misconduct by finding the accused guilty of the offence charged; or,
- (3) the trier of fact 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.

Where bad character evidence suggests an accused's involvement in serious offences or highly immoral conduct, its potential prejudicial effect will increase. Accordingly, its probative value must be that much greater to warrant admission: see *R. v. Pierre* (1995), 61 B.C.A.C. 99 at 108; *R. v. B.(C.R.)*, (1990), 55 C.C.C. (3d) 1 (S.C.C.) at 25.

In *R. v. B.(L.)*; *R. v. G.(M.A.)*, supra at 494, Charron J.A. indicated that factors to be considered when assessing the prejudicial effect of proposed evidence include the following:

- (1) how discreditable it is;
- (2) the extent to which it may support an inference of guilt based solely on bad character;
- (3) the extent to which it may confuse issues; and
- (4) the accused's ability to respond to it.

5. Editing Statements

[92] In *R. v. Leland* (June 9, 1997) Vernon No. 30061 (B.C.S.C.), Davies J. summarized the law as it applies to the editing of voluntary statements. After reviewing the authorities, he summarized them as follows at para. 36:

- (1) Editing of a statement may at times be necessary because of the inclusion of irrelevant or unnecessarily prejudicial evidence but such editing must not affect the tenor of a relevant statement: *R. v. Beatty* (1944), 81 C.C.C. 1 (S.C.C.), *R. v. Kanester* (1966), 4 C.C.C. 231 (B.C.C.A.), reversed on other grounds by the Supreme Court of Canada at (1967), 1 C.C.C. 97 (S.C.C.). (See also *R. v. Marcotte* (1950), 9 C.R. 209 (Que.C.A.); *R. v. Kennealy* (1972), 6 C.C.C. (2d) 390 (B.C.C.A.); *R. v. Deol* (1981), 58 C.C.C. (2d) 524 (Alta.C.A.); *R. v. McLeod* (1983), 6 C.C.C. (3d) 29 (Ont.C.A.); *R. v. Nielson and Stolar* (1984), 16 C.C.C. (3d) 39 (Man.C.A.) and *R. v. Aubin*, [1997] A.Q. No. 2441 (July 24, 1997) (Que.C.A.) leave to appeal to the Supreme Court of Canada refused October 29, 1998.

- (2) edited statements must be free from unnecessary prejudice, but the remaining portions must retain their proper meaning: *R. v. Kanester*;
- (3) the jury should have as much as possible of a statement said to constitute an admission in order to place it into context for the purpose of determining its truth: *R. v. Simms* (1995), 59 B.C.A.C. 64 (B.C.C.A.);
- (4) even though substantively irrelevant, contextual evidentiary relevance may allow admission: *R. v. Dubois* (1986, 27 C.C.C. (3d) 325 (Ont.C.A.); and
- (5) the extent of the admissibility of that contextual evidence and probative value must still, however, be weighed and balanced against its prejudicial effect: *R. v. Dubois*; *R. v. French* (October 13, 1995) Nanaimo Registry 301311 (B.C.S.C.).

6. Trial Fairness

- [93] Fairness of the trial process must be made "from the point of view of fairness in the eyes of the community and the complainant" and not only that of the accused: *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, per Cory J. at p. 198. In *Seaboyer*, McLachlin J. stated at p. 603:

The principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns. Section 7 must be construed having regard to those interests and "against the applicable principles and policies that have animated legislative and judicial practice in the field" (Beare, [[1988] 2 S.C.R. 387], at p. 402-3 per La Forest J.). The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice.

- [94] In *R. v. Mills*, [1999] 3 S.C.R. 668, the Court referred to the need to avoid viewing any particular principle in isolation from others. McLachlin and Iacobucci JJ. stated at para. 73:

This spectrum of interests reflected in the principles of fundamental justice highlights the need to avoid viewing any particular principle in isolation from the others. As La Forest J. stated in *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 14:

As in other cases involving broad concepts like "fairness" and "principles of fundamental justice", one is not engaged in absolute immutable requirements; these concepts vary with the context in which they are invoked: see Lyons, at p. 361. Specifically here, one is engaged in a delicate balancing to achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice; see my remarks in *Thomson Newspapers Ltd v. Canada* (Director of investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at 539.

- [95] Section 7 does not guarantee a particular type of process for all situations where a person's liberty is affected; it guarantees a fair process, having regard to the nature of the proceedings: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; and *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77.

[96] In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, 85 C.C.C. (3d) 289 at p. 309, L'Heureux-Dubé J. stressed that a fair trial must encompass a recognition of society's interests. She stated at p. 312:

Based on this Court's pronouncements that the principles of fundamental justice reflect a spectrum of interests from the rights of the accused to broader social concerns, a fair trial must encompass a recognition of society's interests. Our Canadian society has a vested interest in the enforcement of criminal law in a manner that is both fair to the accused and sensitive to the needs of those who participate as witnesses. In *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740, this Court recognized the need to balance the accused's interests in a criminal trial with the interests of society: (see also *R. v. Seaboyer*, [[1991] 2 S.C.R. 577] at pp. 603-4 and 622).

E. DISCUSSION

[97] As earlier noted, the Crown has organized the intercepts at issue by subject matter in an appendix. Under each tab it has detailed the challenged intercepts and set out the bases upon which it contends they are relevant and the inferences it says can be drawn from them. The reply submissions of the accused track the Crown's submissions, and make detailed responses to the Crown's assertions. They challenge many of the inferences that Crown says ought to be drawn from the intercepts.

[98] Given the number of intercepts at issue, it is simply not feasible for me to summarize their content in any detail or set out the submissions of the parties with respect to each. Accordingly, for the purposes of this Ruling, I will simply indicate the intercepts, or portions thereof, that I have determined ought to be excluded by their tab number and date. Nevertheless, the parties can be assured that I have read the transcript of each intercept, and have also carefully considered their submissions with respect to each.

[99] Permit me to say that the intercepts, or portions thereof, that the Crown has already agreed to excise and those that I have decided to excise do not bear upon evidence that may be led by an accused against another accused, either through cross-examination of Crown witnesses or through the calling of evidence. I also wish to stress that it is possible that the evidence at trial may unfold in a way that will render certain intercepted communications more probative than they are presently. I have in mind, in particular, intercepts that may take on a greater probative value as a result of challenges to Plante's credibility. Simply because I have ordered on this application that an intercept or portion of an intercept will be excluded does not mean that I have ruled that evidence to be inadmissible for all purposes. In the event that the Crown wishes at a later time to revisit the admissibility of the intercepts that I have excluded, it will be at liberty to do so.

[100] Having reviewed each of the challenged intercepts, I am satisfied that with the exception of references to Lising's apparent infidelity and to Potts' apparent lie about the barrels containing animal feed, each is relevant for the reasons advanced by the Crown. I also find that each is presumptively admissible, again, for the reasons the Crown has put forth in its submissions on this application. Thus, the admissibility of the intercepts ultimately falls to

be decided by a weighing of their probative value against their potential for prejudice. In conducting this exercise, I apply the factors identified by Charron J.A. in *R. v. B. (L.)*; *R. v. G. (M.A.)*.

- [101] I find that the intercepts are highly probative. The most significant factor informing this conclusion is the fact that they largely emanate from the mouths of the accused themselves. The intercepts are capable of supporting the inferences the Crown contends ought to be drawn from them. Those inferences, in turn, are relevant to important issues at trial including whether the EEHA is a criminal organization, whether the underlying offences were committed "for the benefit of, at the direction of, or in association with" the criminal organization, and the accused's knowledge with respect to these matters. The essence of a criminal organization is a group that has a fundamental criminal character, which character comes from its members. This makes their words and acts in the criminal context highly probative to the criminal organization elements of the ss. 467.12 and 467.13 offences.
- [102] As evidence of discreditable conduct on the part of the accused, the intercepts have a prejudicial effect. Although the Crown submits that the fact that the intercepts are being offered for only a limited purpose minimizes the concern for prejudice, this submission misses the point that evidence of off-Indictment discreditable conduct will be before the jury. Moreover, the large number of intercepts increases the potential for prejudice, both in terms of moral prejudice and reasoning prejudice by distracting the jury from its proper focus. Nevertheless, I am satisfied that a careful instruction to the jury as to the limited use of the individual intercepts is sufficient to manage this prejudice.
- [103] It is often the case in multiple accused trials that the Crown leads evidence of criminal activity on the part of one accused charged with a particular count which is not admissible against another accused not charged on that count. In such circumstances, the court provides a limiting instruction to the jury about how it may and may not use the evidence. In that same way, the jury in the present case will be instructed that it may use the criminal activity of one accused, not against the other accused on the predicate offences, but only for the limited purpose of determining whether the EEHA is a criminal organization, and whether the predicate offences were committed in connection with the EEHA.
- [104] Limiting instructions to a jury with respect to discreditable conduct evidence contain strong admonitions about not using the evidence to punish the accused person other than for the offences charged or to reason that the accused person is the type of person to commit the offences charged and is therefore more likely to be guilty. For example, in *R. v. M.R.* (2005), 195 C.C.C. (3d) 26, at para. 64, [2005] O.J. No. 883 (QL), the Ontario Court of Appeal set out the nature of the charge to be given to a jury concerning the prohibited use of such evidence:

Trial judges have an obligation to instruct juries properly on the use of prior discreditable conduct evidence. This court has held that where such a limiting instruction is required, it is preferable for trial judges to direct the jury that it may not use evidence of prior disreputable

conduct to reason from general disposition or character to guilt. In other words, the jury may not rely on such evidence to reason that because an accused is a person of general bad character, he or she is more likely to be guilty of the offence charged. In addition, the jury may not use such evidence to punish the accused for past misconduct by finding the accused guilty of the offence charged: see *R. v. B.(C.)* (2003), 171 C.C.C. (3d) 159 (Ont. C.A.) at paras. 34 and 35.

[105] To like effect is *R. v. Malanca*, 2007 ONCA 859, at paras. 38-42, 232 O.A.C. 269, where LaForme J.A., for the Court, upheld a limiting instruction that had been given to a jury in a case where bad character evidence had been introduced:

The appellant submits that there are two mandatory components to a limiting instruction regarding evidence of prior discreditable conduct. He argues that the jury must be instructed that they are not to use the evidence in two ways: (i) to punish the accused person other than for the offences charged; and (ii) to reason that the accused person is, by virtue of his involvement in other discreditable conduct, the type of person to commit the offences charged and is therefore more likely to be guilty.

A most telling portion of the trial judge's charge to the jury, and which I believe addresses the grievance of the appellant, is as follows:

Again, there was a concession, and counsel did not suggest that these people were up to something that was legal. In fact, quite the opposite, that they may well have been up to something illegal.

Further, it is most likely that Malanca and Blewitt were involved in the drug trade. However, they are not charged with being involved in the drug trade. You are not here to punish them for things they did quite outside anything that is alleged against them here. So, because they may have trafficked with Magic or taken his pails or done something, it has nothing to do with what is going on here and you are not to punish them by convicting them of these charges because they appear to have made some admission about something that had gone [on] historically in the past. That is a given.

They can only be convicted after the Crown has proven beyond a reasonable doubt that they conspired to import, and in fact, imported the specific drugs named in the three counts. That is important.

These instructions, especially in the context of the charge read as a whole and with what I say below, provides ample warning to the jury as to the limited use that could be made of any character or propensity evidence: *R. v. Ruddick* (1980), 57 C.C.C. (2d) 421 (Ont. C.A.). In sum, it was clear in the jury instructions that the appellant was not to be found guilty for being a bad person. A precise statement to this effect was unnecessary.

Second, there was no risk that the jury was confused about the possible uses of general propensity evidence. The appellant asserted at trial that the conversations were about unrelated discreditable conduct. It was the appellant who tactically chose to put his own general character in issue. The appellant's theory itself would, therefore, impress upon the jury the limited use that could be made of any evidence found to be associated with other drug activity.

Finally, this court's decision in *R. v. Farrah* (2004), 186 C.C.C. (3d) 347 does not assist the appellant. In *Farrah*, unlike here, there was no instruction whatsoever as to how the jury should deal with the accused person's admission that he was a drug dealer.

[106] Thus, the jury in the present case will also be instructed that it must not punish any of the accused other than for the offences charged, and that it must not rely on the discreditable conduct evidence to reason that any of the accused are persons of general bad character, and, therefore, more likely to be guilty of the offences charged.

[107] I am fully confident that appropriately worded limiting instructions given to the jury at the outset of the trial, at the time the evidence is led and in the final charge are sufficient to manage the prejudicial effects of the challenged intercepts. While the instructions may be complex, courts consistently recognize and accept that a jury will govern itself in accordance with the directions of the trial judge. Indeed, this was the conclusion in *R. v. Grewall*, 2000 BCSC 1451, [2000] B.C.J. No. 2386 (QL), where in admitting a statement which had prejudicial overtones that raised concern as to the ability of a jury to follow instructions, the Court reviewed a number of authorities on this issue at paras. 44 and 45:

In *R. v. Suzack*, *supra*, Doherty J.A. recognized that there is always a concern regarding the ability of the jury to understand complex legal instructions, and even the willingness of the jury to follow instructions. He concluded, however, at para. 128:

... I do not pretend that there is no risk that the jury would not follow that instruction. Like any limiting instruction, there is a risk that the jury will not abide by it. As long as we maintain trial by jury, however, courts must proceed on the basis that juries accept and follow the instructions given to them by the trial judge: *R. v. Corbett*, 41 C.C.C. (3d) 385 at p. 401; *R. v. Eng* (1999), 138 C.C.C. (3d) 188 (B.C.C.A.), at 201-202. That is not to say that in a specific case a trial judge could not decide that the risk of misuse of propensity evidence offered by one co-accused could not be adequately addressed by a limiting instruction. If a trial judge reaches that conclusion, he or she will have no choice but to order severance. It would, however, be wrong for a trial judge to accept as a general proposition that a jury would not or could not abide by a limiting instruction.

In *R. v. Lane and Ross*, [1970] 1 C.C.C. 196, 6 C.R.N.S. 273, [1970] 1 O.R. 681 (Ont. H.C.J.), Addy J. stated at p. 201:

I feel that it is quite possible as has been done in many cases in the past, to explain clearly to the Jury, in such a way that they will govern themselves in accordance with the directions of the Judge, that the confession of one accused in a joint trial is not evidence against his co-accused. The danger of a miscarriage of justice clearly exists and must be taken into account, but, on the

other hand, I do not feel that, in deciding a question of this kind, one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence of this type or of acting in accordance with it. If such were the case there would be no justification at all for the existence of juries, and what has been regarded for centuries as a bulwark of our democratic system and a guarantee of our basic freedoms under the law would in fact be nothing less than a delusion.

[108] In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, Cory J. noted at para. 133 that confidence in the good will and good sense of jurors prevails, quoting the following passage from *R. v. W. (D.)*, [1991] 1 S.C.R. 742 at p. 761:

Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions. The following passage from *R. v. Lane and Ross* (1969), 6 C.R.N.S. 273 (Ont. S.C.), at p. 279, approved in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 695, is apposite:

The danger of a miscarriage of justice clearly exists and must be taken into account but, on the other hand, I do not feel that, in deciding a question of this kind, one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence of this type or of acting in accordance with it. If such were the case there would be no justification at all for the existence of juries. . . .

[Emphasis in original]

[109] The Crown in the present case has suggested language for an instruction to the jury, as follows:

During this trial, the Crown introduced certain evidence to show that the accused are members of the East End Charter of the Hells Angels. You have been told about the criminal activities of the accused and other members of the East End Charter, that are in addition to the alleged criminal activities that are the subject of the counts in the Indictment. You also have been told about their concern with law enforcement and their criminal mentoring of associates, their discussion of criminal activities, the power of the patch and the Hells Angel's reputation for violence and intimidation, the culture of violence that is a part of the Hells Angels, and that some members of the Hells Angels, including East End Charter members have criminal records.

That evidence can only be used for a limited purpose. It is only relevant to proving two elements in the counts alleging a criminal organization (counts 2, 3, 5, 7, 9, 10, 14, 15, 17, 19, 21, 23 and 25) -- that is, whether or not the East End Charter is a criminal organization, and whether the offences alleged to have been committed or the offences that allegedly were instructed were for the benefit of, at the direction of, or in association with the East End Charter. That was the only purpose for admitting the evidence.

You must not use this evidence for any other purpose. In particular, for counts 1, 4, 6, 8, 11, 12, 13, 16, 18, 20, 22, 24, 26, 27 and 28 which do not allege involvement of a criminal organization, you must not infer guilt on the charge by association with another accused, individual or organization.

Similarly for counts 2, 3, 5, 7, 9, 10, 14, 15, 17, 19, 21, 23 and 25 which allege the commission or instruction of an offence for the benefit of, at the direction of, or in association with the East End Charter, you must not infer guilt on the underlying offences by association with another accused, individual or organization.

For instance, you must not conclude that just because an accused was associated with the East End Charter or committed or discussed other crimes, he must have committed the crimes charged such as uttering threats, extortion, and unauthorized possession of firearms or explosives.

Further, if there is evidence that you find tends to prove that any of the accused are of bad character, or that they have committed other crimes for which they have not been charged, or that an accused has associated with other people who have committed crimes or who have a bad character, such evidence absolutely cannot be used to support or prove any element in any offence with which the accused are charged, apart from the issue of whether or not the East End Charter is a criminal organization or whether the offences alleged to have been committed or the offences that allegedly were instructed were for the benefit of, at the direction of, or in association with the East End Charter.

You must not conclude from evidence of the character of the accused or another person that he is a person of bad character and therefore more likely to have committed the offences with which he is charged. No one can be convicted of a crime for being the sort of person or associating with the sort of people who might have committed it.

[110] I incline to the view that an instruction along these lines would be appropriate, though I would add to it that the jury must not punish any of the accused other than for the offences charged and must not punish them for the off-Indictment conduct by finding them guilty of the offences charged. I would also remove any reference to the accused members of the EEHA having criminal records.

[111] In terms of the accused's ability to respond to the evidence, the intercepts are largely tendered not for their truth, but as evidence from which the jury will be invited to draw various inferences with respect to the EEHA. Those inferences are inherently subject to challenge, whether by expert opinion, the testimony of other witnesses, including the accused themselves, or through argument. Thus, the accused are able to respond to the evidence, given the limited purpose for which it is being admitted.

[112] I have just discussed the intercepts collectively, and my comments were therefore general. I turn now to the specific tabs. All of the intercepts that the Crown seeks to tender at Tab A as relevant to the power of the patch are admissible, with the exception of four: Tabs 472, 473,

277 and 164. These four intercepts will be excluded. This series of communications relates to Potts' attendance at his daughter's school to essentially intimidate a group, referred to as the Young Guns, who had been bullying his daughter and her friends. While I find that they have some probative value as demonstrating Potts' belief in the power of his status as a member of the HA, I have already admitted other intercepts that serve that same purpose. On the other hand, their potential for prejudice is significant, in that they show Potts trying to intimidate and bully a group of young teenagers. Accordingly, I conclude that their prejudicial impact outweighs that probative value, and they will be excluded.

- [113] All of the intercepts at the various tabs dealing with the underlying offences are admissible, with the exception of one passage from an intercept at Tab D. Specifically, the passage at Tab 201 where Potts explains to his daughter that the barrels in the garage contained animal feed supplements will be excluded. This excerpt shows Potts lying to his teenage daughter, which is conduct of no relevance to charges in question but which carries the potential for prejudice. As well, all of the intercepts at the various tabs dealing with criminality of members (not including Tab H which I discuss separately below) are admissible.
- [114] The largest number of challenged intercepts is found at Tab H. They pertain to the criminal drug activities of the accused. The Crown contends they are relevant in proving (a) a main purpose or activity of the EEHA by establishing that the primary offences facilitated by the EEHA were the drug offences committed by its members; and (b) a connection between the underlying offences and the criminal organization through the hierarchical structure of the EEHA. I agree that they are relevant in both regards.
- [115] The accused submit that evidence of drug activities is prejudicial while, at the same time, unrelated to the substantive charges on the Indictment. On this point, the Crown advises that, to the contrary, the theme of drug trafficking and production is a "golden thread" that weaves its way through those substantive offences. It says that some of the substantive offences were motivated by drugs in the sense that proceeds from those offences were intended for investment in criminal drug activities, and that this renders the accused's involvement in drug activities highly relevant to those charges. The Crown explains the connection between drugs and the substantive offences as follows:

§ The Paulishyn extortion (Counts 1, 2 and 3) is all about drugs. First, the reason HA members were hired to collect from Paulishyn was to collect money owing for a load of marijuana that had gone missing. Second, during the time of the collection, Lising also was involved in purchasing a quantity of methamphetamine through producer Ryan Renaud, using the police agent as a middle man. Lising also used the police agent as a middle man in the Paulishyn extortion. When the police agent collected \$5000 from Paulishyn in Hope, B.C. on September 8, 2004, Lising allowed the agent to keep the money received from Paulishyn as payment for the drugs.

§ In the Gill extortion (Counts 4 to 7), Punko intended to use the proceeds he expected from Gill to invest in methamphetamine production.

§ The MacElhinney extortion (Counts 24 and 25) is all about drugs. It is alleged that MacElhinney "ripped-off" marijuana grow operations and Potts was hired to collect for the individuals from whom MacElhinney had stolen the marijuana. Further, Potts intended to use the proceeds he expected from MacElhinney to invest in methamphetamine production.

§ The "Big Rob" Krayem extortion (Counts 16 and 17) arose from the alleged harassment of Potts' drug distributor James Groves (Grover) by Big Rob (Krayem) and Cowboy Trevor (Lyons), as well as from money owed by a friend of Potts (Hoffman) to Krayem. The extortion was further motivated by Krayem's use of Potts' restricted telephone number that was reserved exclusively for use between Potts and his main drug distributor, Wissam Ayach, the unauthorized use of which constituted a breach of Potts' security in his criminal drug activities.

§ The Louie extortion (Counts 18 and 19) was motivated by someone using the HA name while selling drugs. Violette heard that Glen Louie was using the HA's name when Louie was selling drugs on a reserve in North Vancouver. Consequently, Violette enlisted Bryce Jr., and Plante, both at the time official friends in the EEHA, to assault Louie in order to intimidate Louie from using the HA name again.

§ Potts' motivation to instruct the police agent to take possession of the guns and grenades (counts 8 to 15) pertains to drugs. As a result of the search of the residence of Potts' estranged common law wife, and the seizure by the police of a chemical that could be used to manufacture methamphetamine (had it not been fake), Potts enlisted Plante to retrieve guns and grenades from the residence of Potts' parents in fear that this residence would also be searched by the police. Later, Potts' need to retake these guns and grenades from the agent in turn motivated Potts to issue threats against the agent (Counts 22 and 23) after the agent suddenly left the EEHA on January 21, 2005.

§ Punko also was affected by the sudden departure of the agent due to the fact the agent would not be "moving" or trafficking in cocaine and methamphetamine for Punko, and this motivated, in part, his threats to the agent (Counts 20 and 21).

[116] On the basis of these allegations by the Crown, I agree that drug activity does indeed form a significant component of the tapestry (to continue the Crown's metaphor) of the Indictment. That said, I do have concerns about the effect upon the jury of, in essence, "piling on" evidence of this nature, as it increases the potential for prejudice. It is necessary that I be mindful of the cumulative effect of individually admissible pieces of evidence, so as to ensure that the jury is not distracted from focusing on the primary task at hand, which is determining guilt with respect to the specific charges on the Indictment. I am also of the view that as the number of intercepts relating to drug activity increases, the probative value of successive intercepts decreases.

[117] Accordingly, I will exclude certain intercepts, or portions thereof, to minimize the potential for prejudice. In doing so, I apply Rosenberg J.A.'s comments in *R. v. Batte* (2000), 145 C.C.C. (3d) 498 at para. 51, 34 C.R. (5th) 263 (Ont. C.A.), where he stated:

One final comment on this issue. Mr. Wright submitted that it was improper to sanitize the record as it meant that the appellant and his brother were forced to give untrue testimony. I do not agree. There is ample authority for a trial judge to edit a criminal record to limit its prejudicial effect. Usually, as in *R. v. P.(G.F.)*, or *R. v. T.(D.B.)* (1994), 89 C.C.C. (3d) 466 (Ont. C.A.), this takes the form of editing out certain convictions. However, I see nothing wrong with convictions for sexual offences as committed by this appellant on the D. sisters being described as assaults to attempt to minimize some of the prejudicial effect. Those offences were a form of assault. The appellant and his brother were not thereby compelled to give false testimony.

[118] To similar effect were Binnie J.'s comments at para. 142 of *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908:

To some extent, the prejudice could be contained by limiting the extent and nature of the ex-wife's evidence, even if some of it were admitted, by a process analogous to that followed in *R. v. Corbett*, [1988] 1 S.C.R. 670, with respect to criminal convictions. That approach was adopted here only to the limited extent that the fact of the respondent's jail time for two sexual assaults on other parties was suppressed by agreement of counsel.

[119] On the authority of these decisions, I exclude the following intercepts:

Tab 647 (520): intercepted communications of Michael Plante and John Punko from May 4, 2004 at 2215 hours - the following passages will be excluded:

Pages 41/26 to 45/24;

Pages 63/20 to 65/11;

Pages 46/2 to 51/11.

Tab 129: intercepted communications of Michael Plante and John Punko et al. from May 10, 2004 at 2045 hours - the following passages will be excluded:

Pages 5/9 to 10/12

Pages 11/9 to 16/13;

Pages 19/24 to 25/4;

Pages 25/5 to 27/13; and

Pages 9/27 to 10/3.

Tab 130 (522, 576): intercepted communications of Michael Plante and Randall Potts from May 26, 2004 at 1943 hours - the following passages will be excluded:

Pages 36/17 to 38/17; and

Page 41, lines 16-17.

Tab 50: intercepted communications of Michael Plante, Ryan Renaud, John Punko, and an unknown male from June 13, 2004 at 1844 hours - the following passages will be excluded:

Pages 17 to 35/23; and

Pages 37/7 to 38/4.

Tab 648 (51): intercepted communications of Michael Plante, John Punko, Ryan Renaud and an unknown male from June 27, 2004 at 1000:20 hours - Pages 14/8 to 50/3 will be excluded;

Tab 678: intercepted communications of Michael Plante and John Punko from June 30, 2004 at 1444 (sic) hours - Page 4, lines 11 to 14 will be excluded;

Tab 131(52): intercepted communications of Michael Plante and Randall Potts from July 7, 2004 at 1942:33 hours - Pages 62/17 to 91/21 will be excluded;

Tab 699: intercepted communications of Michael Plante, Ryan Renaud, and John Punko on August 22, 2004 at 1625 hours - the following passages will be excluded:

Pages 61-62; and

Page 89.

Tab 684: intercepted communications of Michael Plante and Randall Potts from September 2, 2004 at 1634 (sic) hours;

Tab 685: intercepted communications of Michael Plante and Randall Potts from September 6, 2004 at 2124 hours;

Tab 686: intercepted communications of Michael Plante and Randall Potts from September 18, 2004 (sic) at 1304 hours;

Tab 702: intercepted communications of Michael Plante, Randall Potts, John Groves and others from October 21, 2004 at 1924 (sic) hours - Pages 38/16 to 39/19 will be excluded;

Tab 197: intercepted communications of Michael Plante and Randall Potts from November 16, 2004 at 1123 (sic) hours - the following passages will be excluded:

Page 9, line 8; and

Page 11, lines 6-19;

Tab 705: intercepted communications of Michael Plante, John Punko and others from November 18, 2005 at 1911 hours - the following passages will be excluded:

Page 17, lines 7-8;

Page 18, lines 15-23;

Page 22, lines 5-13;

Pages 48/23 to 49/12; and

Pages 80/13 to 81/6.

Tab 787: intercepted communications of Michael Plante and John Punko et al. from November 19, 2004 at 1257 - the following passages will be excluded:

Pages 4/5 to 8/3;

Pages 12/6 to 14/21;

Pages 18/15 to 19/19;

Pages 73/21 to 75/5; and

Pages 80/21 to 81/12.

Tab 706: intercepted communications of Michael Plante, John Punko, Ryan Renaud, Randy Halldorson and unknown persons from November 23, 2004 at 1256:15 hours - the following passages will be excluded:

Pages 27 to 34;

Page 38, lines 11-24.

Tab 789: intercepted communications of Michael Plante and John Punko from November 30, 2004 at 0859:06 hours - the following passages will be excluded:

Pages 3/18 to 4/12; and

Pages 5/13 to 6/25.

Tab 707: intercepted communications of Michael Plante, John Punko et al. from December 8, 2004 at 2143:45 hours - the following passages will be excluded:

Pages 5 to 7; and

Pages 11 to 17.

Tab 271: intercepted communications of Michael Plante and Randall Potts from January 6, 2005 at 1941 hours - Pages 2/4 to 4/17 will be excluded;

Tab 712: intercepted communications of Michael Plante, John Bryce Jr., John Punko et al. from January 14, 2005 at 1413:38 hours - Pages 5-6 will be excluded;

Tab 325 (775, 740): intercepted communications of Nima Abbrasian-Ghavami, John Punko and Ryan Renaud from January 25, 2005 at 2145 hours - Page 1, lines 1 to 12 will be excluded; and

Tab 330: intercepted communications of John Punko et al. on January 29, 2005 at 1235 hours - Pages 31/9 to 32/12 will be excluded.

[120] In addition to the foregoing, portions of intercepts dealing with the following topics, regardless of tab, will be excluded from the evidence at trial:

- a. the use of steroids by any of the accused;
- b. any apparent infidelity on the part of Lising; and
- c. suggestions that any of the accused have previous convictions and/or have spent time in prison.

[121] In my view, evidence regarding these issues has a potential for prejudice that exceeds any probative value it may have.

[122] In summary, although I have a residual discretion to exclude evidence of this nature where its probative value is outweighed by its potential for prejudice, I am satisfied that most of the challenged intercepts do not warrant exclusion on this basis. A small number are properly excluded, and I have identified those above. I find the balance of the intercepts highly probative, primarily with respect to the essential elements of the offences in question. While I acknowledge that the intercepts carry a risk of misuse by the jury, I am satisfied that that prejudice can be managed by detailed limiting instructions to the jury at the outset of the trial, at the time the intercepts are played, and in the final charge.

"Romilly J."

The Honourable Mr. Justice S.R. Romilly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Violette,

Date: 20080606

Docket: 23500

Registry: Vancouver

Regina

Against

Jean Joseph Violette, Ronaldo Lising,

Randall Richard Potts and John Virgil Punko

BAN ON PUBLICATION

Pursuant to the inherent jurisdiction of the Court, there is a ban on publication, including on television, radio, Internet, or other form of media, of any and all within proceedings, including all voir dire and trial proceedings, until the ban is lifted by this Court.

Before: The Honourable Mr. Justice S.R. Romilly

Addendum to Ruling re: Editing of Intercepted Communications

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Larry Fleming

Date and Place of Hearing:

May 28, 2008

Vancouver, B.C.

- [1] In R. v. Violette, 2008 BCSC 422 (the "earlier ruling"), I ordered that certain intercepted communications, or portions thereof, be excluded from the evidence at trial. The Crown requests, pursuant to para. 99 of the earlier ruling, that I revisit my order with respect to the exclusion of a number of intercepts, specifically, those at Tabs 277, 129, 130, 787 and 271.
- [2] My reasons for ordering the exclusion of those portions of the intercepts were explained in the earlier ruling. However, after hearing the submissions of the Crown and defence, I agree that certain changes to the order are appropriate. Accordingly, where the following tab numbers are referenced at paras. 2 and 119 of the earlier ruling, they should now read as follows:

Tab 271: intercepted communications of Michael Plante and Randall Potts from January 6, 2005 at 1941 hours - the following will be excluded:

Page 2, lines 5 - 19;

Page 4, lines 7 - 18; and

All references in the intercept to Percocet.

Tab 277: intercepted communications of Randall Potts and Darren Hoffman from January 20, 2005 at 1738 hours. Only the following is admissible:

Page 1, lines 1 - 11; and

Pages 1/22 to 3/5.

Tab 129: intercepted communications of Michael Plante and John Punko et al. from May 10, 2004 at 2045 hours. The following passages will be excluded:

Pages 5/9 to 10/12;

Pages 11/9 to 15/15;

Page 16, lines 7 - 13;

Pages 19/27 to 25/4;

Pages 25/7 to 27/13; and

Pages 9/27 to 10/3.

Tab 130:(522, 576): intercepted communications of Michael Plante and Randall Potts from May 26, 2004 at 1943 hours, with the exception of Page 41, lines 16 - 17, which are admissible.

[3] Tab 787 will not be changed.

[4] The Crown additionally seeks clarification with respect to two aspects of the earlier ruling, both of which pertain to para. 120. I thus order that notwithstanding subpara. (a) of para. 120, Michael Plante is permitted to testify that he provided steroids to members of the East End Charter of the Hells Angels, provided that he does not name any of the accused as having been recipients. Further, notwithstanding subpara. (b) of para. 120, the Crown is permitted to lead evidence from Michael Plante with respect to a meeting between Lising and Paulishyn on July 14, 2004, and to tender the videotape of that meeting.

"Romilly J."

The Honourable Mr. Justice S.R. Romilly

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