

CANADA / JUDGMENT

R. v. Violette

2008 BCSC 920

COURT

Supreme Court of British Columbia

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2008 BCSC 920 R. v. Violette

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Violette,

2008 BCSC 920

Date: 20080714

Docket: 23500

Registry: Vancouver

Regina

Against

Jean Joseph Violette, Ronaldo Lising,

Randall Richard Potts and John Virgil Punko

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

Ruling on a Voir Dire

Admissibility of Expert Evidence - Jacques Lemieux

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Date and Place of Hearing:

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Vancouver, B.C.

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A. NATURE OF THE APPLICATION

- [1] The Crown seeks to tender retired RCMP Staff Sgt. Jacques Lemieux as an expert witness at trial to give opinion evidence with respect to the following areas:
- a. the nature and characteristics of the Hells Angels motorcycle club (the "HA"); and
 - b. that one of the main purposes of the HA is the facilitation or commission of serious criminal offences for the material benefit of its members.
- [2] The four accused variously contend that some or all of Mr. Lemieux's opinion evidence ought not to be received.
- [3] For the reasons set out below, Mr. Lemieux will be permitted to give opinion evidence with respect to the matters referred to above. However, he will not be permitted to testify to his opinion that all members of the HA commit crime at some point in time.

B. BACKGROUND

- [4] A direct indictment was preferred in this case charging 28 offences against the remaining four accused. Those charges arose from a lengthy police investigation, code named E-Pandora. Each of the four accused is charged with committing offences in connection with a criminal organization contrary to s. 467.12 of the Criminal Code, R.S.C. 1985, c. C-46. Ronaldo Lising, John Punko and Randal Potts are also charged with instructing the commission of an offence in connection with the criminal organization contrary to s. 467.13 of the Criminal Code. The group alleged to be the criminal organization is the same for all of the s. 467.12 and s. 467.13 offences on the indictment: the East End Charter of the Hells Angels (the "EEHA"). All four accused are alleged to be members of the EEHA.
- [5] The Crown seeks to have Mr. Lemieux qualified as an expert in the areas previously mentioned. If he is qualified, he is expected to testify with respect to a number of matters, including:

- a. the interpretation and significance of communications intercepted and items seized during the E-Pandora investigation;
- b. the history and evolution of the HA, the expansion of the HA worldwide, and the criminal records of HA members;
- c. the eight characteristics of outlaw motorcycle gangs ("OMGs") - structure, membership, club rules, colours, clubhouses, intelligence gathering, associates and criminal activities (including that a significant portion of HA members in Canada have criminal records) - and that all of these characteristics are attributed to the HA;
- d. the "power of the patch"; and
- e. that one of the main purposes of the HA, including the EEHA, is the facilitation of criminal offences by its members that affords material benefit to its members.

C. QUALIFICATIONS OF MR. LEMIEUX

- [6] In April 2008, Mr. Lemieux retired from the RCMP at the rank of Staff Sergeant after serving for 33 years. Over the course of his career he gained knowledge about OMGs in general and the HA in particular. His curriculum vitae was filed as Exhibit 1 on this voir dire, and his statement of opinion was filed as Exhibit 2. Both exhibits were disclosed to defence counsel, who cross-examined Mr. Lemieux on the voir dire for two and one-half days.
- [7] Mr. Lemieux's first contact with OMGs occurred between 1978 to 1981 as a drug investigator in Chicoutimi, Quebec. He gathered first hand evidence about these groups through electronic and physical surveillance, undercover operations, and searches of an OMG clubhouse and residences of members where he observed biker paraphernalia. He listened to thousands of hours of intercepted conversations between members and associates of OMGs and was able to learn how an OMG operates, what tasks members performed for the club, and about its structure and jargon.
- [8] From 1981 to 1987 as a drug investigator in the Quebec City region, Mr. Lemieux investigated various bikers gangs, one of which later became a HA chapter. He gathered first hand evidence about these groups through physical surveillance, informants, and undercover operations. As an undercover operator he had direct contact with members of biker gangs, and on several occasions attended the clubhouse of a biker gang.
- [9] From 1987 to 1991, Mr. Lemieux was a criminal intelligence investigator in Quebec City, gathering information and investigating members of organized crime in that region, his mandate being the Quebec City HA chapter. He gathered first hand evidence about the Quebec City HA chapter through electronic and physical surveillance of club members and searches of the clubhouse. He listened to thousands of hours of intercepted communications between HA members and their associates. From this, he obtained first hand information about the chapter's day-to-day operations, structure, its members and executive, the meaning of certain tattoos and patches, and the jargon used by the HA. He

obtained first hand information about the security measures in place in and around the clubhouse, and observed the interaction between the hierarchy where the lower levels did menial tasks for members. He participated in a significant drug investigation involving members of the Quebec City HA.

- [10] From 1992 to 2000, Mr. Lemieux's career entered a new phase when he was a national coordinator for the OMG project at Criminal Intelligence Service Canada. His duties consisted of gathering thousands of documents, correlating and analyzing information received from law enforcement agencies across Canada regarding OMGs and, in particular, the HA. During this time his focus was on gathering, analyzing and disseminating information about the HA nationally. He interviewed former HA members, attended HA biker runs, searched an OMG clubhouse, organized and lectured at expert witness courses on OMGs, lectured on the OMG phenomenon throughout Canada, the United States and Europe, and contributed to publications about OMGs. He met with and received information from investigators from across Canada and around the world and, from the information received, was able to confirm that the HA is a national and global organization, very similar to the HA chapters of which he had first hand knowledge from his days investigating the HA in Quebec.
- [11] From 2000 to 2003, Mr. Lemieux was an investigator in Ottawa at the integrated proceeds of crime section with duties to investigate major organized crime groups, including the HA. From 2003 to 2004 he was the operational NCO at the combined forces special enforcement unit in Ottawa with a mandate to investigate organized crime groups. From 2004 until his retirement in April 2008, Lemieux was in charge of the RCMP's Ottawa drug section. During this time he continued to lecture on OMGs, and attended conferences nationally and in the United States.
- [12] A number of courts have qualified Mr. Lemieux as an expert in the same or similar areas for which the Crown wishes him qualified in this case. These include:
- a. R. v. Christopher Robert Cluney (Sask. Q.B., 2008) - qualified as an expert with respect to the organization, structure, and criminal activities of the HA and its puppet clubs;
 - b. R. v. David Francis Giles (B.C.S.C., 2008) - qualified as an expert with respect to the nature and characteristics of the HA, its main purposes and activities, and whether those activities constitute the facilitation or commission of serious offences that afford a material benefit to its members;
 - c. R. v. Ian Matthew Grant (Man. Q.B., 2007) - qualified as an expert with respect to the nature and characteristics of OMGs; the nature and characteristics of the HA, including its history, organization, structure, practices and criminal activities both in Canada and internationally; the main purposes and activities of the HA, and whether those activities constitute facilitation or commission of serious criminal offences that afford a material benefit to its members;

- d. R. v. David Joseph Pierre Riopel (Man. Prov. Ct., 2006) - qualified as an expert with respect to the organization, structure and criminal activities of the HA and its puppet clubs;
- e. R. v. Daniel James Tokarchuk (Man. Q.B., 2004) - qualified as an expert with respect to the organization, structure, practices and criminal activities of the HA and its puppet clubs, such as the Zigzag Crew;
- f. R. v. Steven Patrick Lindsay and Raymond Lawrence Bonner (Ont. S.C.J., 2004) - qualified as an expert with respect to the nature and characteristics of the HA; the main purposes and activities of the HA and whether they constitute the facilitation or commission of serious criminal offences that afford a material benefit to its members;
- g. R. v. Sean Wolf (Man. Q.B., 2003) - qualified as an expert with respect to the general nature and characteristics of the HA and its puppet clubs, and their main purposes and activities;
- h. R. v. Bonner, Lindsay and Maskel (Ont. Ct. of J., 2002) - qualified as an expert with respect to the main purposes, activities, general nature and characteristics of the HA;
- i. R. v. Maurice Boucher (Que. S.C., 2001) - qualified as an expert with respect to the organization, structure and activities of the HA;
- j. R. v. Cantrill, Farago and McKay (Alta. Q.B., 2001) - qualified as an expert with respect to the general nature and operation of the HA, both nationally and internationally; the organization, structure and general activities of the HA, both nationally and internationally; the national characteristics of the HA; the nature of the HA's operations within Quebec; organization and criminal activities within Quebec; and
- k. Vincent Pelat (Immigration and Refugee Board, Adjudication Division, 2000) - qualified as an expert with respect to the structure and organization of the HA.

[13] I wish to emphasize that these references to other cases are of passing interest only. Notwithstanding that Mr. Lemieux has been previously qualified as an expert, it remains necessary that I scrutinize his qualifications in the specific context of the present case: R. v. K. (A.) (1999), 45 O.R. (3d) 641, 137 C.C.C. (3d) 225 at para. 76 (C.A.) [K. (A.) cited to C.C.C.] and R. v. D.D., 2000 SCC 43, 148 C.C.C. (3d) 41 at para. 12 (although McLachlin C.J. wrote the dissenting judgment, she was not dissenting on this point). As Hill J. noted in R. v. D. (A.), [2003] O.J. No. 4934 (QL), 2003 CarswellOnt 4873 (WLeC) at para. 23 (Ont. S.C.J.), "Qualification in another trial is not a ticket for life to giving expert opinion evidence in all subsequent legal proceedings."

D. POSITIONS OF THE ACCUSED

[14] Mr. Lising opposes the qualification of Mr. Lemieux as an expert as sought by the Crown. However, in light of Mr. Lemieux's extensive experience investigating the HA, Mr. Lising does not object to the admission of Mr. Lemieux's evidence in the following areas:

- (a) identifying the different rankings he opines exist in the HA (i.e. hangaround, prospect, official friend), but excluding his opinion that the commission of crime is required to rise in the ranks;
 - (b) identifying the different patches worn at different stages of membership in the HA, except for the Dequillo and Filthy Few or FFF patches which apparently indicate use of violence and are not relevant to the facts of this case;
 - (c) describing the layout and security features of the HA clubhouses which Mr. Lemieux has searched, surveilled, or visited;
 - (d) describing the national and international structure and meetings of the HA, but excluding descriptions of acts of violence alleged to be committed in other jurisdictions by members or associates of either the HA or other OMGs; and
 - (e) his account of the origins of the HA.
- [15] Mr. Lising opposes the admission of the balance of Mr. Lemieux's evidence, in particular, his "ultimate issue" evidence that the HA is a criminal organization whose main purpose and activity is the commission of serious crime for the benefit of its members. Mr. Lising also objects to the admission of aspects of Mr. Lemieux's opinion that all members of the HA commit crime at some point in time. Given that all of the accused in this case are likely to be found to be members of the HA, this is particularly damning bad character evidence, the admission of which will violate the presumption of innocence which remains "the 'golden thread' woven throughout the web of the criminal law" (per Lamer C.J.C. in *R. v. Pearson*, [1992] 3 S.C.R. 665, 77 C.C.C. (3d) 124).
- [16] Mr. Potts takes the position that Mr. Lemieux is essentially an advocate for the Crown whose evidence is largely argument in the guise of expert opinion. He is biased in favour of his former employer, the RCMP, which has as a goal the successful prosecution and incarceration of members of the HA. Mr. Lemieux's evidence is anecdotal in nature and does not pass any form of scientific scrutiny. Moreover, Mr. Potts submits that much of his evidence is based upon highly prejudicial and unproven hearsay evidence that is not rationally connected to his ultimate conclusions that the HA has been involved in a violent biker war in Quebec and therefore it is a violent organization in this province. Mr. Lemieux has very little knowledge of the HA in British Columbia, and is reliant primarily on what investigators here have told him. For the most part, his evidence amounts to common sense arguments which touch on the ultimate issues in this case. Mr. Potts also says that Mr. Lemieux's opinion is based on impermissible propensity reasoning and assumptions of guilt by association.
- [17] Mr. Potts contends that Mr. Lemieux is one of three expert witnesses the Crown intends to call, the other two being Inspector Richards and Howard Abadinsky. The piling on of experts on the same issue is costly to the trial process and is unfair to the accused. Mr. Lemieux's evidence is also unnecessary as there is a wealth of evidence that will be placed

before the jurors who will be able to draw their own inferences from that evidence after instruction from the court. For example, the jurors will be able to see the elaborate security measures at the EEHA clubhouse for themselves and draw their own inferences from the evidence as a whole as to why such measures would be in place.

- [18] Mr. Potts submits that the cost of admitting Mr. Lemieux's evidence far exceeds its value. Lengthy cross-examination will be required to challenge many improper inferences he makes in support of his opinion and to illustrate his bias against the HA. In addition, a great deal of time will be required by the court to properly instruct the jury on the many prejudicial aspects of his evidence and the use that can be made of it.
- [19] Turning to Mr. Punko, he submits that the proposed opinion evidence of Mr. Lemieux is based upon novel science, theory or technique, as it is in relation to the criminal organization charges which are relatively new to the criminal law. Mr. Lemieux's opinion is personal conclusion based upon his experiences as a police officer wherein he was directly involved in investigations or was receiving intelligence from other law enforcement agencies or police officers. Although his conclusions may have been useful in the conduct of police investigations, they are not sufficiently reliable to be received as expert evidence. Moreover, he has no direct knowledge of the EEHA. Mr. Punko submits that as novel theory or technique, Mr. Lemieux's opinion is subject to special scrutiny to determine whether it meets a basic threshold of reliability. As that opinion approaches an ultimate issue, which it does in this case, it is subject to even stricter scrutiny. Mr. Punko says that Mr. Lemieux's methodology, analysis and conclusions have not been subjected to peer review, and that some of the information upon which he relied in forming his opinion no longer exists or is privileged. He says that the Crown has not discharged its burden of establishing the reliability of the evidence.
- [20] Mr. Punko contends that Mr. Lemieux's evidence is not necessary to enable the jury to form its own independent judgment and could result in distortion of the fact-finding process. Moreover, the jury does not require Mr. Lemieux's assistance to determine whether the EEHA is a criminal organization, as the court will instruct the jury as to the legal definition of a criminal organization and it will hear direct evidence relating to membership, hierarchy, structure, the power of the patch and criminality of the members of the EEHA. This evidence will come through exhibits, intercepted communications and witnesses, such as Michael Plante.
- [21] Mr. Punko submits that the evidence of Mr. Lemieux regarding the criminality of members of the HA who are not members of the EEHA is prejudicial propensity evidence. To then link those individuals to Mr. Punko by their membership in an organization which is not the criminal organization specified in the indictment amounts to guilt by association through propensity. Consequently, that portion of Mr. Lemieux's evidence is inadmissible as it offends the exclusionary rule relating to propensity evidence. Particularly since the court has ruled admissible a considerable body of prejudicial propensity evidence directly related to the criminality of members and associates of the EEHA, the piling on of additional

propensity evidence ought to be denied. The probative value of the evidence is reduced by its relative remoteness from the criminal organization specified in the indictment and the diminishing value of additional propensity evidence.

- [22] Finally, Mr. Violette submits that he should be tried for the offences with which he is charged. He has difficulty understanding why the court should allow the introduction of this highly prejudicial evidence from Mr. Lemieux.

E. LEGAL PRINCIPLES AND ANALYSIS

1. Admissibility of Expert Opinion Evidence

- [23] The law governing the admissibility of expert evidence is well established. Such evidence is admissible where the criteria set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402 [Mohan cited to C.C.C.] are satisfied:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.

- [24] In *K. (A.)*, Charron J.A. (as she then was) explained the rule with respect to opinion evidence and the four Mohan criteria as follows at para. 75:

In a nutshell, the opinion rule can be stated as follows: Opinion evidence is generally inadmissible unless it meets all four criteria set out above. A consideration of the first two criteria, relevance and necessity requires a balancing of the probative value of the proposed evidence against its potential prejudicial effect. The Supreme Court in *Mohan* identifies a number of factors that should be considered in this balancing process. The proposed evidence will only be admissible if its probative value exceeds its prejudicial effect. The third criterion involves a consideration of other applicable rules of evidence. Even if the proposed evidence is sufficiently probative to warrant admission, it may be subject to some other exclusionary rule and further inquiry may be required. Finally, the last criterion requires that expert opinion evidence be adduced solely through a properly qualified expert.

- [25] The onus rests on the party seeking to tender the opinion evidence to satisfy this test, subject to the trial judge's discretion to exclude overly prejudicial evidence: *R. v. Ranger* (2003), 67 O.R. (3d) 1, 178 CCC (3d) 375 (C.A.) [Ranger]. Admissibility is established on a balance of probabilities.
- [26] The trial judge's important gate-keeping function with respect to the admission of expert evidence has been discussed in a number cases, including *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600 at para. 28 [J.-L.J.], per Binnie J. for the majority:

In the course of Mohan and other judgments, the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

[27] I turn now to consider the four Mohan criteria in more detail and to apply those principles to the facts at hand.

a. Relevance

[28] Sopinka J. defined relevance as it applies to expert opinion at 411 of Mohan:

..Relevance is a matter to be decided by a judge as question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs": see McCormick on Evidence (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see R. v. Morris, [1983] 2 S.C.R. 190).

[29] Charron J.A. put it another way in K. (A.) at paras. 77-78, explaining how logical relevance can be determined by asking two questions:

- (a) Does the proposed expert opinion evidence relate to a fact in issue in trial?
- (b) Is it so related to a fact in issue that it tends to prove it?

If the answer to both these questions is yes, the logical relevance of the evidence has been established. This is the basic threshold requirement for the admissibility of any evidence. But, as we know from many rules of evidence, passing the threshold test is not always enough for proposed evidence to gain admission at trial. Depending on the nature of the evidence or its potential effect, policy considerations often require further screening of the evidence before it can be admitted. In the case of expert opinion evidence, the courts have recognized the danger that it may distort the fact-finding process

[30] She referred to the Supreme Court of Canada's caution in Mohan regarding the danger of expert evidence being used to distort the fact-finding process (because such evidence is apt to be accepted by the jury as virtually infallible and having more weight than it deserves), before going on to write as follows at paras. 79-84:

Therefore, although the evidence may be logically relevant to some issue in the case, further inquiry is necessary to determine "whether its value is worth what it costs". In other words, the following question must be asked:

(c) Although relevant, is the evidence sufficiently probative to warrant its admission?

In other words, the evidence, although relevant, will not be admitted unless its probative value outweighs its prejudicial effect. Both the probative value of the evidence and its potential prejudicial effect will depend on a number of factors. The particular inquiries that should be made will depend on the particular facts of the case. The following questions may be useful to consider. The list is by no means exhaustive.

(i) To what extent is the opinion founded on proven facts?

Although the expert is entitled to take into consideration all possible information in forming his or her opinion, the weight to be given to the opinion will depend on the extent to which the facts upon which the opinion is based are proven: see *R. v. Abbey*.

(ii) To what extent does the proposed expert opinion evidence support the inference sought to be made from it?

(iii) To what extent is the matter that the proposed evidence tends to prove at issue in the proceedings?

(iv) To what extent is the evidence reliable?

[31] Applying this analysis to the facts of the present case, I have no hesitation in concluding that Mr. Lemieux's proposed evidence relates to significant matters at issue in this trial. His opinion that one of the main purposes of the HA is the facilitation or commission of serious criminal offences that afford material benefit to its members is relevant to whether the EEHA is a criminal organization as defined in s. 467.1 of the Criminal Code. This is an essential element of the s. 467.12 and s. 467.13 offences. Mr. Lemieux's proposed evidence with respect to the HA hierarchy and its reputation for violence and intimidation relates to such issues as whether some of the underlying offences were committed for the benefit of, at the direction of, or in association with the EEHA. This is another essential element of the s. 467.12 and s. 467.13 offences. In my view, his anticipated evidence is also so related to these facts in issue that it tends, or is some evidence tending, to prove them. Accordingly, I am satisfied that the logical relevance of Mr. Lemieux's evidence has been established. However, that is not the end of the relevance analysis, as it remains necessary to consider whether the probative value of the evidence outweighs its potential for prejudice.

[32] In my view, the probative value of Mr. Lemieux's proposed evidence is high with respect to proving matters which are significant issues in the trial. The evidence also strongly supports the inferences sought to be drawn from it. For example, his opinion that the HA has a reputation for violence and intimidation and that the lower ranks are required to commit criminal acts at the behest of members should the former wish to advance up the ladder of

hierarchy, strongly supports the inference that the EEHA facilitates the criminal activities of its members.

- [33] One of the aspects of Mr. Lemieux's evidence that the accused challenge is its reliability. Mr. Potts, for instance, submits that it is anecdotal in nature and would not pass any form of scientific scrutiny. Similarly, Mr. Punko asserts that Mr. Lemieux's opinions, based both upon his own experiences and upon intelligence received from others, are not sufficiently reliable to be received as expert evidence. Mr. Lising contends that the absence of an independent or objective process for reviewing police opinion evidence should be considered in terms of a failure to meet the standards of scientific method.
- [34] To be qualified as an expert, one does not need to espouse scientific theory or, as submitted by the accused, follow scientific principles. Scientific evidence is but one category of expert evidence, and other types of expert evidence are routinely admitted at trials in Canada. For instance, it is common practice in narcotics cases for experienced police officers to be qualified as experts with respect to drug slang: *R. v. Iordache*, [1991] A.J. No. 978 (QL) (Alta. Prov. Ct.) and *R. v. McBean*, [1996] O.J. No. 1952 (QL), 5 O.T.C. 57 (Ont. Ct. J. (Gen. Div.)). In *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115 [Klassen], a police officer was qualified as an expert with respect to the indicia of trafficking and grow operations. Police officers also testify with respect to the customs and practices of the drug trade. In such cases, the opinion is not measured by the logic and the science behind it, but rather, is derived from knowledge and experience. Where non-scientific evidence of this nature satisfies the Mohan criteria, the expert's evidence is admissible.
- [35] In *R. v. Castillo*, 2004 MBQB 45, 181 Man. R. (2d) 259, Suche J. gave the following rationale for receiving such evidence at para. 29:

Sgt. Ridley's testimony had two components. The first is what, in civil cases, is often called "custom of the trade" evidence. Ridley related details of the illegal cocaine business based on his years of personal experience of investigating drug offences, acting as an undercover officer, speaking to witnesses, informants, and accused persons, as well as other observations made in the course of his duties. He described how it is sold and distributed, the units of sale, the prices for these at the time in question, how financial records are typically kept, what is usually found in such records, (known as a "score sheet"), the practice of, and reason for, bundling money which is unique to the drug trade, and various other practices, methods, objectives, and techniques used by drug dealers.

- [36] She continued at para. 33:

In my view, this "practice of the trade" type of evidence is factual and reliable. For the most part, it was based on personal observation and experience as opposed to theoretical opinion. Much of this evidence is supported by common sense. Armed with knowledge of these facts, I have come to the same conclusions as Sgt. Ridley did.

- [37] See also *R. v. Fougere* (1988), 86 N.B.R. (2d) 93, 40 C.C.C.(3d) 355 (C.A.); *R. v. Joyal* (1990), 55 C.C.C. (3d) 233, 1990 CarswellQue 1085 (WLeC) (C.A.); *R. v. Hillier* (1993), 109 Nfld & P.E.I.R. 92, 1 T.T.R. (2d) 232 (S.C.); *R. v. Hui*, (1988), 32 O.A.C.141, 1988 CarswellOnt 834 (WLeC); *R. v. Ballony-Reeder*, 2001 BCCA 293, 88 B.C.L.R. (3d) 237; *R. v. Li* (No. 2) (1980), 59 C.C.C. (2d) 79, 1980 CarswellBC 681 (WLeC) (S.C.); *R. v. Kwok* (1986), 18 O.A.C. 38, 31 C.C.C. (3d) 196; *R. v. Hope* (1955), 39 Cr.App.R. 33 (C.C.A.) at 36; *R. v. Smith* (1909), 3 Cr.App.R. 87 (C.C.A.) at 90; *R. v. Dixon* (1897), 29 N.S.R. 462, 3 C.C.C. 220 (N.S.S.C.); and *Thompson v. Thompson* (1902), 4 O.L.R. 442 at 444, [1902] O.J. No. 169 (QL) (Div. Ct.).
- [38] The opinion evidence of crime scene investigators based on inferences drawn from their observations at crime scenes is also frequently placed before juries, as Doherty J.A. explained in *R. v. Klymchuk* (2005), 205 O.A.C. 57, 203 C.C.C. (3d) 341 at para. 58 [Klymchuk cited to C.C.C.]:

Opinion evidence based on observations of the crime scene and inferences drawn from those observations by experienced crime scene investigators is commonly placed before juries. These opinions are not generally based on any novel science or theory, but on well accepted practices and the appreciation that experience and training can educate individuals to see things and draw inferences from those observations that the uneducated will neither see nor appreciate. Nor do I see any significant danger that an opinion properly limited to an examination of the crime scene will produce expert evidence that is so difficult to understand or explain as to defy effective cross-examination or invite acceptance of the opinion as a matter of faith.

[Emphasis added]

- [39] Thus, the reliability of all expert opinion evidence need not be measured by scientific standards.
- [40] The accused rely on *Klymchuk* and *Ranger*, dealing with criminal profiling expert evidence, to suggest that an expert cannot opine why an offence was committed or who committed it. Distinctions were made at para. 16 of *Klymchuk* between evidence that addressed the "what" question, and the "why" and "who" questions, where Doherty J.A., speaking for the court, quoted Charron J.A.'s analysis from paras. 71 and 72 of *Ranger*:

Crime scene analysis (which I find useful to label as the "WHAT" referred to earlier) results in many forms of expert opinion evidence that regularly meets the legal requirements for admissibility. A few examples readily come to mind: an expert's opinion in an arson case that a fire was not accidental but, rather, deliberately set; opinion evidence explaining the significance of blood splatters; a pathologist's opinion about the likely cause of death or of injuries observed on a deceased victim; an expert's opinion on how a motor vehicle accident happened. There are many more examples. This kind of evidence assists the trier of fact in understanding WHAT the crime scene shows. The admissibility of that kind of evidence will usually turn on questions of relevance or the witness's particular expertise. Of course, issues may also arise under any other aspect of the Mohan test. However, the scientific basis for this kind of evidence is usually not contentious.

By contrast, attempts to adduce expert opinion evidence about WHY an offence was committed in a particular manner and, more particularly, about WHO is more likely to have committed the offence, that is, the kinds of evidence that I have labelled more particularly as criminal profiling, have generally not met with success, either in this jurisdiction or elsewhere. I will refer to some American and English jurisprudence later in this judgment. However, in so far as Canadian jurisprudence is concerned, the best example is Mohan itself.

[Emphasis added by Doherty J.A. in Klymchuk]

[41] At para. 17 in Klymchuk, Doherty J.A. went on to say:

In Clark at paras. 83 and 84, Moldaver J.A. applied the distinction drawn in Ranger. He characterized expert evidence addressed to the WHAT question as "crime scene reconstruction evidence". That evidence was potentially admissible if relevant and offered through a properly qualified witness. He characterized expert evidence aimed at answering the WHO or the WHY questions as "impermissible criminal profiling evidence".

[42] The accused make comparisons between Mr. Lemieux's evidence and that of criminal profiling evidence going towards the "Who" or "Why" questions. However, I am of the view that, based on the reasoning above from Klymchuk and Ranger, Mr. Lemieux's evidence as to "What" are the nature, characteristics, and main purposes of the EEHA does not extend into the sphere of novel science akin to impermissible criminal profiling evidence.

[43] While authorities such as J.-L.J. express concern with respect to admitting expert evidence based on junk science, I do not consider those concerns to be alive in the case at hand since Mr. Lemieux's evidence is not based on scientific technique or theory. As well, I am cognizant that the authorities also mandate special scrutiny of novel scientific theories or techniques. Again, that concern is not engaged here since the opinion evidence at issue is not of that nature. In *R. v. Dimitrov* (2003), 68 O.R. (3d) 641, 181 C.C.C. (3d) 554 (C.A.), Weiler and Gillese J.J.A. wrote at paras. 37-39:

Novel scientific theories or techniques are subject to "special scrutiny"; so, too, is the novel application of established or recognized scientific techniques. The threshold question that arises in relation to the admissibility of either is well-established: the court must be satisfied that the evidence proffered is capable of being the subject of expert evidence. That is, the court must be satisfied, as a threshold matter, that the proposed evidence is, indeed, "science". The burden is on the party putting forth the expert, in this case the Crown, to establish its reliability on a balance of probabilities. See *R. v. Terceira* (1998), 123 C.C.C. (3d) 1 (Ont. C.A.) at 21; affirmed (1999), 142 C.C.C. (3d) 95 (S.C.C.).

In *R. v. J. (J.-L.)* (2000), 148 C.C.C. (3d) 487 (S.C.C.), at paras. 34 and 28, respectively, the Supreme Court of Canada noted that the admissibility of expert evidence is highly case-specific and that the trial judge is to take seriously the role of "gatekeeper". The court set out the following factors that should be considered in determining threshold reliability: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to

peer review and publication; (3) the known or potential rate of error or the existence of standards; and (4) whether the theory or technique used has been generally accepted within the scientific community.

In *Terceira*, *supra*, this court also held that threshold reliability must be determined in each case and noted that whether the results presented and the methods used are reasonably reliable are factors that may be considered in determining reliability.

[44] In my view, Mr. Lemieux's opinion meets the threshold of reliability as it is the cumulative product of his experiences investigating and gathering information on the HA. It is based on physical and electronic surveillance, participation in searches of clubhouses and arrests of members, the review of investigative materials, as well as information received from informants, undercover agents, and former members of the HA. His methodologies and techniques are not novel nor are they scientific in their application or subject matter. Rather, they are based on accepted police practices and investigative techniques that he employed throughout the course of his 30 year career. Whether his opinions are ultimately reliable can be challenged by the accused through their cross-examination of Mr. Lemieux.

b. Necessity

[45] In order for expert evidence to be "necessary" for the purposes of the Mohan analysis, it is not sufficient that the evidence is merely "helpful" to the jury. Rather, it must provide information "which is likely to be outside the experience and knowledge of a judge or jury": Mohan at 413. At the same time, necessity need not be judged by too strict a standard; absolute necessity is not required.

[46] In *K. (A.)*, Charron J.A. suggested at para. 92 that the following questions be asked when considering necessity:

- (a) Will the proposed expert opinion evidence enable the trier of fact to appreciate the technicalities of a matter in issue? or
- (b) Will it provide information which is likely to be outside the experience of the trier of fact? or
- (c) Is the trier of fact unlikely to form a correct judgment about a matter in issue if unassisted by the expert opinion evidence?

[47] She went on to explain as follows at para. 93:

Where the subject matter of the opinion evidence is technical in nature, it is usually easy to meet the criterion of necessity. No one would dispute that the trier of fact is likely to need expert assistance in understanding the engineering principles involved in the construction of a bridge. However, in cases such as this one, where the proposed opinion evidence is about human behaviour, it is much more difficult to decide whether the opinion will provide information which is likely to be outside the experience of the trier of fact, or whether the trier of fact is unlikely to form a correct judgment about the matter in issue. It is up to the trial judge in each case to make a judgment call on this issue in the context of the particular case and his or her

judgment is entitled to deference.

[48] Charron J.A. referred to the concern that the trier of fact may give the expert evidence more weight than its true usefulness deserves, and that, accordingly, even if the evidence is necessary to assist the trier of fact, a further inquiry must be made before it can meet the necessity criterion. That inquiry asks whether the need for the evidence is sufficient to overcome its potential prejudicial effect. She offered a non-exhaustive list of useful questions to ask in this regard:

- i. To what extent is other evidence available to assist the trier of fact in determining the issue in question?
- ii. What is the level of complexity of the proposed expert evidence? Is it easily understood or is it likely to confuse the average juror?

[49] Turning to the present case, the EEHA is a private organization and details as to its nature, characteristics, and main purposes are not readily available or known to the public at large. Mr. Lemieux has spent much of his career observing, investigating and discussing the HA, and by virtue of his experience, is able to offer special knowledge and ready-made inferences regarding the HA. He will be able to testify about the HA's reputation for violence and intimidation, its hierarchy, and that, as an organization, the HA facilitates its members' criminal activities, primarily drug trafficking. Further, his evidence will assist the jury by providing it with inferences based on the significance of specific characteristics of the HA, including the patches worn by members, the flashers worn by subordinate members denoting their status within the EEHA, the fortifications and security measures implemented in the clubhouses of the EEHA, and the criminality of its membership. In his evidence on this voir dire, Mr. Lemieux testified that he will be able to assist the jury by providing inferences with respect to various other HA attributes, including the significance of the following:

- the HA's reputation in the criminal underworld for violence and intimidation;
- the HA motto AFFA ("Angels Forever, Forever Angels");
- the 5-year rule, which is the rule that prohibits "cops" and "snitches" from entering the HA program;
- photographs depicting EEHA members with members from the rest of Canada, including Quebec, which establish that the HA is a national organization;
- photographs depicting HA members from around the world, which establish that the HA is an international organization;
- the Big House Crew (members of the HA in jail who receive regular correspondence from the HA when serving time); and
- the consequences of unauthorized use of the HA patch and name.

- [50] I observe that in *R. v. Lindsay*, [2004] O.T.C. 896, [2004] O.J. No. 4097 (QL) (S.C.J.) [*Lindsay*], Fuerst J. found that Mr. Lemieux's knowledge and experience with the HA went beyond that of the average trier of fact at para. 24:

Staff Sergeant Lemieux's career in law enforcement spans almost three decades. For the majority of that time, he has investigated, gathered information about, and analyzed outlaw motorcycle clubs. His work has had a specific focus on the Hells Angels. I find that he has a special knowledge about and experience with the Hells Angels, going beyond that of the average trier of fact.

[Emphasis added]

- [51] Similarly, in *R. v. Giles*, 2008 BCSC 76 [*Giles*], MacKenzie J. permitted Insp. Richards to give opinion evidence regarding the same two areas the Crown in this case seeks to elicit from Mr. Lemieux, stating as follows at para. 8:

This is a judge-alone trial. In this case, the expert evidence is necessary to assist me. I anticipate that the expert will give evidence that one of the main purposes and activities of the EEHA is the commission of criminal offences, including drug trafficking. If I were to circumscribe the expert evidence in the manner the defence suggests, I may be deprived of the significance of certain exhibits, documents and materials that were seized from the EEHA clubhouse in Vancouver, and from the clubhouse in Kelowna. Other evidence could be meaningless, or I could ascribe an erroneous meaning to it.

- [52] The same reasoning applies to the jury in the present case. Mr. Lemieux has a special knowledge and experience with the HA that goes beyond that of the average trier of fact. I am satisfied that without the benefit of his evidence, the jury may not be able to appreciate the meaning of many exhibits and intercepts, nor will they have an accurate understanding of the nature of the HA.

- [53] Even if the expert evidence is necessary to assist the trier of fact, the court must also go on to consider whether the need for the evidence is sufficient to overcome its prejudicial effect.

- [54] In this context, the nature of Mr. Lemieux's evidence is relevant. His proposed evidence is with respect to the nature and characteristics of a particular group. He is not advancing any scientific theories or theories about human behaviour that would impact credibility or oath-helping, which might be the type of expert evidence that could overwhelm a jury. As discussed earlier, Mr. Lemieux's opinions are not based on scientific theory, but rather, derive from his experience investigating and gathering intelligence with respect to that particular group. As such, his opinions do not hold the degree of "mystic infallibility" that often accompanies scientific theory and which may unduly captivate the minds of the jurors. Moreover, the foundation or basis for his opinions can be challenged in cross-examination, where alternative inferences can be suggested.

- [55] In my view, Mr. Lemieux's evidence makes a complex case understandable to the jury. Rather than confusing the jury, his evidence will assist in allowing the jury to understand the nature and characteristics of the HA. The nature of the evidence that Mr. Lemieux proposes to give will not overwhelm the jury. The jury can hear from Mr. Lemieux the basis of his opinion, and can draw its own conclusions. At the end of the day, it will be up to the jury to accept all, some or none of his opinions, and it will be given clear instructions in that regard.
- [56] The accused submit that the evidence the Crown seeks to elicit from Mr. Lemieux can be obtained from other witnesses it can call to testify. As well, they say that even without Mr. Lemieux's evidence, there will be evidence of the HA's reputation, for example in the form of statements by Mr. Punko in the Louie and Gill extortion counts.
- [57] With respect to these submissions, it should be recalled that the Crown has considerable discretion in presenting its case at trial. The Crown's decisions with respect to which witnesses it will call will not be interfered with unless the Crown has been influenced by an oblique motive or has exercised its discretion for an improper purpose. For example, see *R. v. Cook*, [1997] 1 S.C.R. 1113, 114 C.C.C. (3d) 481 at paras. 17-20, per L'Heureux-Dubé J.; *R. v. V.H.M.*, 2004 NBCA 72, 189 C.C.C. (3d) 345; and *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751.
- [58] Certainly, there is nothing in the evidence introduced on this voir dire to suggest an oblique motive on the part of the Crown in seeking to tender the opinion evidence of Mr. Lemieux. I have no reason to dispute the position of the Crown when it states at paras. 49-54 of its written submissions:

Lemieux's experience, and the evidence that he can bring to the trial to assist the jury comes from a different perspective than will the anticipated evidence of Inspector Richards, Dr. Howard Abadinsky, and the police agent, Michael Plante.

Richards' experience comes from his career investigating HA members in British Columbia. His experience with the HA is very local. [It should be noted that an application has been filed to challenge the admissibility of Richard's evidence. That issue is to be argued at another time.]

In contrast, Lemieux brings to the trial a much broader perspective from his experience investigating and gathering intelligence on the HA in Quebec, and later gathering information on the HA on a national and global level. It is the Crown's theory that the HA is a national and international organization, that the EEHA is one of 246 HA chapters worldwide, and one of 35 HA chapters in Canada, and that the HA nationally and globally is a criminal organization. Lemieux is the only Crown witness with the experience and knowledge to provide this opinion, and therefore his evidence will be of great assistance to the jury.

Dr. Abadinsky brings an entirely different perspective. He is an academic at a university in the USA, and has conducted research and written a text book on organized crime. He will testify that there are nine attributes indicative of a criminal organization, and that these attributes can be found in the HA.

Michael Plante's knowledge of the HA comes from his experience as an associate and later, for four months, as an official friend of EEHA. He was on the lowest rung of the HA hierarchy, and can testify and give a first hand account of the duties and obligations he experienced at this level. However, he is unfamiliar with many aspects of the organization that might be known by full patched members. As Lemieux testified in cross-examination on May 16, 2008, the degree to which an individual on the EEHA program could give evidence would be limited by the level / rank he acquired. He noted, as an example, that only full patch members were privy to HA church meetings.

The Crown ought not be prevented from calling a qualified expert merely because Plante can also provide evidence about the HA. That Michael Plante can assist the jury with respect to his experience within the EEHA does not in any way trump the evidence of Lemieux. Plante's credibility will be a major issue at this trial, and his evidence with respect to the EEHA organization, its reputation and his obligations within the hierarchy will be challenged by the defence.

[59] I acknowledge that Charron J.A. wrote at para. 99 of K. (A.) that the availability of other evidence on a point may diminish the necessity of expert testimony. Similarly, in R. v. Pascoe (1997), 32 O.R. (3d) 37, 113 C.C.C. (3d) 126 at 143 (C.A.) [Pascoe cited to C.C.C.], Rosenberg J.A. wrote that if evidence is not necessary because the Crown is able to prove its case through less prejudicial means, it should be excluded:

However, whether or not the evidence was "necessary" in the sense of being vital to the prosecution's case was not the sole consideration on the question of probative value. Obviously, if the evidence was unnecessary because the Crown could prove the case through other less prejudicial means then the evidence should be excluded if for no other reason than to avoid undue expenditure of time and confusion of issues.

[60] Nevertheless, on the evidence before me, I am unable to find that the opinion evidence which the Crown seeks to tender through Mr. Lemieux can be established by less prejudicial means.

i. Opinion on the Ultimate Issue

[61] Opinion evidence on the ultimate issue is not excluded on that ground alone: R. v. R. (D.), [1996] 2 S.C.R. 291 at 311, 107 C.C.C. (3d) 289 and R. v. Bryan (2003), 171 O.A.C. 391, [2003] O.J. No. 1960 (QL) [Bryan]. It should be considered as part of the cost/benefit analysis in assessing necessity and reliability. An expert witness can express an opinion on the ultimate issue: R. v. Graat (1980), 30 O.R. (2d) 247, 55 C.C.C. (2d) 429 (C.A.) at 442 and 444, aff'd [1982] 2 S.C.R. 819, 2 C.C.C. (3d) 365 at 381 and R. v. Lavallee, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 [Lavallee cited to C.C.C.]. The witness is not permitted to express an opinion on the ultimate issue in order to facilitate oath-helping or when dealing with the issue of credibility: Mohan at 414, per Sopinka J.; R. v. Burns, [1994] 1 S.C.R. 656, 89 C.C.C. (3d) 193 at 201, per McLachlin J.; and Bryan. Authorities such as J.-L.J. stress that the closer the evidence approaches the ultimate issue, the closer must be the scrutiny to which it is subjected.

[62] Both Fuerst J. and MacKenzie J. considered this issue in their rulings with respect to the admissibility of expert evidence in Lindsay and Giles, respectively. In permitting Mr. Lemieux to give opinion evidence as to the main purposes and activities of the HA, Fuerst J. stated as follows at para. 26 in Lindsay on this point:

Finally, while I am alive to the concerns that underpin the "ultimate issue rule", this is a trial by judge alone. I am well aware that I may accept or reject the opinion of any expert witness in whole or in part, and that I should give any expert opinion only the weight that it deserves. It is for me, and not for Staff Sergeant Lemieux, or any other expert witness who may be called, to make the final decisions on all issues in the case. In the circumstances of this trial, the "ultimate issue rule" does not preclude admission of the evidence of Staff Sergeant Lemieux.

[63] Where a case is heard by a jury, I am satisfied that clear and explicit instructions to the same effect as noted above can offset the concerns that underlie opinion evidence on the ultimate issue.

[64] MacKenzie J. in Giles also considered the ultimate issue concern, quoting from the words of Fuerst J. in Lindsay at para. 23:

The Supreme Court of Canada further emphasized in Burns that the "ultimate issue rule", once considered to bar expert testimony on the very matter before the court, is no longer strictly applied. McLachlin J. (as she then was) observed at page 201 that, "While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court". See also R. v. Mohan, supra, and R. v. Bryan (2003), 175 C.C.C. (3d) 285 (Ont. C.A.).

[65] On the evidence adduced on this voir dire, I do not accept, as Mr. Lising suggests, that Mr. Lemieux's opinion that the HA has a reputation for violence and intimidation goes to the ultimate issue. Rather, it goes to the nature of the HA. His opinion in this regard is highly probative and is one of the pieces of evidence which the Crown will use with other evidence to prove the ultimate issue, which is that the EEHA is a criminal organization. Clear instructions to the jury will alleviate any concern that the jury's role will be usurped by Mr. Lemieux's opinion that one of the main purposes of the HA is the facilitation or commission of serious criminal offences that afford material benefit to its members. Although not strictly an ultimate issue, this is one of the essential elements of a criminal organization within the meaning of s. 467.1.

c. Absence of Any Exclusionary Rule

[66] In reviewing the third pre-condition, the absence of any exclusionary rule, Sopinka J. in Mohan at 414 gave this example of otherwise admissible expert evidence which was excluded because it violated the rule against the admission of disposition evidence:

Compliance with criteria (a), (b) and (d) will not ensure the admissibility of expert evidence if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. For example, in *R. v. Morin*, [1988] 2 S.C.R. 345, evidence elicited by the Crown in cross-examination of the psychiatrist called by the accused was inadmissible because it was not shown to be relevant other than as to the disposition to commit the crime charged. Notwithstanding, therefore, that the evidence otherwise complied with the criteria for the admission of expert evidence it was excluded by reason of the rule that prevents the Crown from adducing evidence of the accused's disposition unless the latter has placed his or her character in issue.

[67] Similarly, expert evidence that offends the similar fact evidence rule is inadmissible on that basis: *K. (A.)* at para. 102.

[68] The accused in the case at bar suggest that the exclusionary rule has been engaged because of the hearsay nature of Mr. Lemieux's evidence, and the propensity or bad character aspect to his opinion. The Crown submits that in the circumstances of this case Mr. Lemieux's evidence does not offend any of these exclusionary rules.

i. Hearsay

[69] It is well established as a general rule that an expert may base his or her opinion on second hand information. However, where that second hand information is not established before the trier of fact, the weight of the opinion may recede accordingly: see for example *Lavallee* at 129-130, per Wilson J. In *Lavallee* at 132, Sopinka J. drew a distinction between:

- i. evidence that an expert obtains and acts upon within the scope of his or her expertise; and
- ii. evidence that an expert obtains from a party to litigation about a matter directly in issue.

[70] In the case of the first scenario, the expert arrives at his or her opinion on the basis of forms of enquiry and practice that are an accepted means of decision within that expertise. However, where the information on which the opinion is formed comes from the mouth of a party, or from any other source that is inherently suspect, independent proof of the information relied upon is required: *Lavallee* at 132-133, per Sopinka J.; *City of Saint John v. Irving Oil Co. Ltd.*, [1966] S.C.R. 581, 58 D.L.R. (2d) 404; and *R. v. Abbey*, [1982] 2 S.C.R. 24, 68 C.C.C. (2d) 394, per Dickson J. [*Abbey* cited to S.C.R.].

[71] The distinction drawn by Sopinka J. in *Lavallee* has been re-affirmed in connection with data compiled by others and used by experts in offering opinions on the results of DNA analysis. For example, see *R. v. Terceira* (1998), 38 O.R. (3d) 175, 123 C.C.C. (3d) 1 (C.A.), aff'd [1999] 3 S.C.R. 866, 142 C.C.C. (3d) 95 and *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678, per Arbour J.

- [72] The nature of the second hand information upon which an expert may rely varies significantly. For example, a psychiatrist whose opinion is sought on an issue of criminal responsibility, or a toxicologist summoned to offer an opinion about a blood alcohol concentration, will often rely on information provided on interview with an accused. On the other hand, experts in the physical sciences may rely on a variety of test results compiled by others in accordance with generally accepted scientific principles.
- [73] While a factor in assessing the weight of an expert's opinion, the degree to which that opinion is based on hearsay alone is not a factor in determining the admissibility of that evidence: *R. v. Palma* (2000), 149 C.C.C. (3d) 150, [2000] O.J. No. 5874 (QL) (S.C.J.) [*Palma*] and *Lindsay*. In *Lindsay*, Fuerst J. observed as follows at para. 22:

It is clear, as a result of the majority decision in *R. v. Lavallee*, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 (S.C.C.), that an expert opinion is admissible, even if based on hearsay. The hearsay is admissible to show the information on which the expert opinion is based, and not as proof of the facts stated. Before any weight can be given to an expert opinion based on hearsay, the facts on which the opinion is based must be proven by admissible evidence. This does not mean that each specific fact must be proven in evidence before any weight can be accorded the opinion, but the more the expert relies on unproven information, the less weight may be given that opinion. To put it another way, in assessing the weight to be given to an expert opinion, the trier of fact is required to take into account that it is based in part on hearsay: see *R. v. Burns*, [1994] 1 S.C.R. 656, 89 C.C.C. (3d) 193 (S.C.C.).

- [74] In her decision convicting the accused in *R. v. Lindsay*, [2005] O.T.C. 583, [2005] O.J. No. 2870 (QL) (S.C.J.), Fuerst J. applied these principles with respect to Mr. Lemieux's expert evidence, stating as follows at paras. 918 and 919:

The expert opinion evidence in these proceedings was based on a mix of hearsay and non-hearsay information. The non-hearsay information included events that the experts witnessed, extensive admissions of fact made pursuant to s. 655 of the Criminal Code, minutes of meetings the admissibility of which was not challenged by the defence, the notes and utterances of Dany Kane that were ruled admissible under the principled exception to the hearsay rule, intercepted communications that were ruled admissible for a limited purpose, and passages from texts that the witnesses accepted as authoritative. The hearsay information included events described by the witnesses to which they were not privy, and various documents reviewed by the witnesses such as documents found in the possession of HAMC members other than Mr. Lindsay or Mr. Bonner.

Hearsay evidence is admissible to show the information on which an expert opinion is based, but it is not admissible to prove the truth of the facts stated. There is no requirement that each and every fact relied on by the expert must be independently proven before the entire opinion can be given any weight. The weight attributable to the expert testimony is, however, directly related to the amount and quality of admissible evidence on which the opinion relies. The more the expert relies on facts not proved in evidence, the less weight may be attributed to the opinion by the

trier of fact: see, *R. v. Lavallee*, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 (S.C.C.).

[75] Much of Mr. Lemieux's evidence is based on his first hand observations. The extent to which his opinions are based on second hand sources is a matter that goes to the weight to be ultimately accorded his evidence. In determining weight, the jury will be entitled to consider the exhibits and intercepts tendered by the Crown and determine to what extent these materials confirm Mr. Lemieux's opinions.

ii. Bad Character Evidence

[76] The accused also contend that portions of Mr. Lemieux's evidence as it relates to the nature, characteristics and main purposes of the HA should be excluded on the basis of the exclusionary rule prohibiting evidence of bad character manifested as "guilt by association".

[77] In *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, Binnie J. summarized some of the dangers of relying upon evidence of the bad character, propensity or disposition of an accused at paras. 37-40:

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

...

It is, of course, common human experience that people generally act consistently with their known character. We make everyday judgments about the reliability or honesty of particular individuals based on what we know of their track record. If the jurors in this case had been the respondent's inquisitive neighbours, instead of sitting in judgment in a court of law, they would undoubtedly have wanted to know everything about his character and related activities. His ex-wife's anecdotal evidence would have been of great interest. Perhaps too great, as pointed out by Sopinka J. in *B. (C.R.)*, supra, at p. 744:

The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.

The policy of the law recognizes the difficulty of containing the effects of such information which, once dropped like poison in the juror's ear, "swift as quicksilver it courses through the natural gates and alleys of the body": *Hamlet*, Act I, Scene v, ll. 66-67....

[78] Later, at para. 144, Binnie J. wrote:

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

[79] These comments, while made in the context of similar fact evidence, are readily transferable to propensity or character evidence: see *R. v. Pollock* (2004), 188 O.A.C. 37, 187 C.C.C. (3d) 213 at paras. 99-111.

[80] In my view, Mr. Lemieux's evidence does not fall within this exclusionary rule, as it is not evidence that is sought to be tendered to establish that the accused are the type of persons likely to have committed the offences charged in the indictment. Rather, his evidence relates to the criminality of a group alleged to be a criminal organization, which is an essential element of the s. 467.12 and s. 467.13 offences.

[81] The accused's argument regarding the potential of "guilt by association" reasoning arose in previous applications in these proceedings, most notably with respect to the admissibility of the intercepted communications, *R. v. Violette*, 2008 BCSC 422. This Court found at para. 52 that:

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.

[82] Further, at para. 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.

[83] At para. 57, this Court noted:

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

- [84] As in *R. v. Lamirande*, 2002 MBCA 41, 164 C.C.C. (3d) 299, such evidence is not presumptively excluded simply because it connects the accused with a gang or group. Further, the direction of Mackenzie J.A. in *R. v. Terezakis*, 2007 BCCA 384, 245 B.C.A.C. 74 resonates within the context of Mr. Lemieux's opinion about the criminality of the EEHA, as all prosecutions pursuant to s. 467.12 and s. 467.13 of the Criminal Code will inherently contain propensity evidence in the nature of "guilt by association". In such cases, it will always be incumbent on the Crown to establish that a group is a criminal organization through the criminality of the group, usually through its members. The exclusion of this kind of evidence would effectively render the criminal organization offences of the Criminal Code very difficult or impossible to prove.
- [85] The accused submit that Mr. Lemieux ought not to be permitted to testify about many aspects of the HA which the Crown contends are highly probative in proving that the HA is a criminal organization. For example, Mr. Lising objects to Mr. Lemieux testifying about the criminal records and criminal activities of HA members across Canada, and making references to the biker war in Quebec.
- [86] In my view, this is the type of evidence which shows the nature of the HA on a national scale. If the Crown were to be prevented from tendering such evidence and were limited to areas suggested by Mr. Lising (identification of rankings, patches, layout and security features of clubhouses and a description of the national and international structure and meetings), the jury might be left with the impression that the HA is simply a structured group whose members enjoy getting together as a group to ride motorcycles. This would amount to sanitization striking at the heart of the truth-seeking process.
- [87] The accused also suggest that Mr. Lemieux's evidence is caught by the exclusionary rule as it is akin to the kind of expert evidence considered in *Pascoe*, where the court excluded a psychiatric opinion that the accused was a homosexual pedophile. In that case, evidence was tendered to establish that the alleged physical act of touching a young boy for one or two seconds on the thigh and back had a sexual purpose. The use of expert evidence was based on a theory of human behaviour to show the accused committed the offences charged. The court found at 144 that the evidence:
- tended only to show a mere propensity or disposition. In view of *R. v. Morin*, the evidence ought, on that ground alone, to have been excluded. The evidence adduced on the voir dire showed little more than that the appellant, as a homosexual paedophile, was the type of person who was more likely to commit this offence.
- [88] Mr. Lemieux's evidence refers solely to the nature and character of an organization, and not of an individual accused. This distinction is significant. His evidence is relevant to the criminality of a group alleged to be a criminal organization, an essential element of the s. 467.12 and s. 467.13 offences, and is not tendered to establish that the accused are the type of persons likely to have committed the offences charged in the indictment.

[89] Mr. Punko raises a related issue regarding the admissibility of propensity evidence. Mr. Lemieux's evidence, he says, relates to the HA in Canada as opposed to the EEHA specifically. Such propensity evidence lies outside the indictment and is therefore not sanctioned by the court's ruling at para. 46 in Terezakis to the effect that criminal organization offences make evidence of general propensity and bad character probative that would otherwise be excluded as prejudicial.

[90] A similar argument with respect to Mr. Lemieux's qualifications was made in Lindsay in the context of the relevancy of Mr. Lemieux's evidence resulting from his limited experience with the HA in Ontario and the Woodbridge Chapter specifically. In qualifying Mr. Lemieux, Fuerst J. stated as follows at para. 25:

I am unable to accept the submission that he should not be permitted to give evidence about the main purposes and activities of the Hells Angels organizations, or whether they constitute the facilitation or commission of serious criminal offences that afford a material benefit to its members. Again, it is clear that Staff Sergeant Lemieux has a great deal of knowledge about the purposes and activities of the Hells Angels organization, he has given expert evidence about this before, and he has special knowledge and experience going beyond that of the average trier of fact. While Mr. Cameron wishes to focus on the Hells Angels as an organization, there are materials concerning the Hells Angels in Ontario that have been made exhibits in this trial, and about which Staff Sergeant Lemieux can be asked to comment. He can be asked to apply his generalized special knowledge about the Hells Angels, to those materials. This he is entitled to do as an expert witness, even if he has no direct experience with the Hells Angels in Ontario. To the extent that any opinion he gives about the Hells Angels in Ontario is based on hearsay information, or is lacking in firsthand experience, or exposes deficiencies in his expertise, these matters go to weight.

[Emphasis added]

[91] It is clear from her ruling that Fuerst J. did not rely on the scope of the indictment, but rather on Mr. Lemieux's experience and expertise with respect to the HA nationally and globally to give opinions about the HA in Ontario. In the same way, Mr. Lemieux's expertise may be applied to the EEHA in these proceedings.

[92] As in Lindsay, Mr. Lemieux will testify here that the HA is a criminal organization operating regionally, nationally and worldwide. This evidence is relevant as it is the Crown's theory that the EEHA is one of many charters within an organization that is, on a national and global scale, a criminal organization.

- [93] Mr. Punko argues that Mr. Lemieux's evidence relating to propensity and bad character of HA members who are not members of the EEHA offends the general rule that propensity evidence is excluded unless the accused places his character in issue. The argument appears to suggest that because Mr. Lemieux's evidence will be based on experiences that are not exclusive to the EEHA, its prejudicial effect as propensity or bad character evidence will be greater than if based solely on the EEHA and its members.
- [94] I observe that Mr. Lemieux's experiences are based on the HA as a national and international organization. The basis for his opinion derives from a variety of sources and experiences not necessarily focused on the EEHA or the accused. As such, the evidence is less prejudicial than evidence that directly pertains to the bad character of the individual accused.
- [95] Accordingly, I am satisfied that there is no exclusionary rule that would bar the admissibility of Mr. Lemieux's evidence.

d. A Properly Qualified Expert

- [96] A person may be qualified as an expert where it is established that he or she has acquired a special or peculiar knowledge through study or experience in the area upon which the witness is asked to testify: *R. v. Marquard*, [1993] 4 S.C.R. 223 at 224, 85 C.C.C. (3d) 193 [Marquard cited to S.C.R.] and *Mohan* at 414. In *Mohan*, Sopinka J. at 413 approved of a passage from *Kelliher (Village) v. Smith*, [1931] S.C.R. 672 at 684, [1931] 4 D.L.R. 102, that "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge." See also *Abbey* at 42; *Lavallee*; and *R. v. McIntosh* (1997), 35 O.R. (3d) 97, 102 O.A.C. 210. The expertise necessary to support the admission of the opinion evidence of an expert is "special knowledge and experience going beyond that of the trier of fact": *Marquard* at 224.
- [97] Charron J.A. described this criterion in these words at para. 103 of *K. (A.)*:

As stated in *Mohan*, "the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify." This criterion is usually not difficult to apply. However, it must not be overlooked. Opinion evidence can only be of assistance to the extent that the witness has acquired special knowledge over the subject matter that the average trier of fact does not already have. If the witness's "special" or "peculiar" knowledge on a subject matter is minimal, he or she should not be qualified as an expert with respect to that subject.

- [98] On the basis of the evidence presented to me on this voir dire, I am satisfied that the Crown has established that Mr. Lemieux possesses "special knowledge and experience going beyond that of the trier of fact". His qualifications derive from 30 years of experience with the RCMP investigating and gathering intelligence on OMGs in general, and the HA in particular. Mr. Lemieux testified that it is from his collective experience and first hand dealings with OMGs, including the HA, from which he has garnered his specialized

knowledge regarding the nature, structure, characteristics of the HA. His opinion as to the main purposes of the HA comes from the cumulative result of his experiences which he testified he has sought to expand and confirm throughout his career.

[99] One of the arguments advanced by the accused is that Mr. Lemieux should not be qualified as an expert because he is not an impartial witness. I do not consider the fact that Mr. Lemieux was employed by the RCMP until April 2008 to detract from his qualifications to give the opinions in the areas with respect to which the Crown seeks to tender him as an expert. The independence of Mr. Lemieux's opinion goes to the ultimate weight of his evidence, not to its admissibility.

[100] In *R. v. Inco Ltd.* (2006), 80 O.R. (3d) 594, [2006] O.J. No. 1809 (QL) (S.C.J.), the summary conviction appeal court overturned the trial judge's decision to non-suit the prosecution under the Ontario Water Resources Act, R.S.O. 1990, c. O.40 on the basis of insufficient expert evidence. Regarding the trial judge's rejection of the Crown's expert evidence on the basis of a lack of independence, Hennessy J. stated as follows at paras. 44 and 45:

The mere fact that the witness in this case was employed in the Investigations & Enforcement Branch as a "technical enforcement specialist" is not a sufficient basis on which to find him incapable of providing an independent opinion. The trial judge did not assess whether the witness' evidence was based on valid assumptions, whether he fully disclosed all material facts or whether his opinion was properly researched and fell within his area of expertise. The witness, himself, testified that his relationship with investigators in his branch was "the equivalent of a police officer going to the Centre of Forensic Studies."

Before rejecting a witness based on a perceived lack of independence, the trial judge should conduct a *voir dire* to test this perception against the actual opinion evidence to be proffered. On a *voir dire*, the trial judge can assess this perception in light of the opinions tested under cross-examination, in particular the assumptions, the disclosure of material facts, the completeness and the level of expertise.

[101] The practical effects of independence on the realities of expert evidence were commented upon by Alan W. Mewett & Peter J. Sankoff, *Witnesses*, vol. 1 (Toronto: Thompson Carswell, 1991) at 10-46.1:

So long as parties are given freedom to choose their own experts, a certain amount of favoritism from these witnesses is simply a reality of the adversarial process. Moreover, it is not entirely clear why partiality should be treated as a precondition of admissibility. Obviously, the expert's ties to the party tendering them will be attacked in cross-examination, and any partiality can be considered as a matter of weight.

[102] In *Klassen*, Scurfield J. discussed this issue in the context of a police officer whose experience as a drug investigator was held to qualify him to give evidence as to the indicia of trafficking and grow operations. At para. 28 he wrote:

In civil cases, some courts have held that for expert evidence to be admissible, the expert must be neutral and objective. See *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (S.C.J.); *Toronto Dominion Bank v. E. Goldberger Holdings Ltd.* (1999), 43 C.P.C. (4th) 275 (Ont. S.C.J.); *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.); J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 624. All courts have held that a lack of objectivity, neutrality and independence has a significant impact on the weight to be afforded that expert. In my view, based on the principles established by *R. v. Mohan*, this is the preferred approach.

[Emphasis added]

[103] Scurfield J. went on to discuss the criteria to be considered in assessing the independence of police expert opinion, stating at para. 31:

Clearly, the degree to which the expert is separated from the investigation is significant. Ideally, the expert should not be an employee of the investigating police service. At minimum, if he works for the same department, he should work independently from the investigating officers. The degree to which the expert is insulated from the investigation should be considered by the court before attaching weight to the expert's evidence. Reliance on the opinion of a witness who carries with him the appearance of bias should be avoided.

[104] The results of such scrutiny go to the weight of the opinion as assessed by the trier of fact, as he stated at paras. 32-33:

When experts are not independent, the weight given to their evidence should vary with the degree to which their opinions are supported or contradicted by other evidence and common sense. Where little or no support exists, the evidence may be rejected. Where it is supported and not contradicted, the trier of fact may choose to rely upon it.

I do not suggest that opinion evidence which does not meet these standards is inherently inadmissible. Rather, it remains for the trier of fact to determine the weight, if any, to attach to it.

[Emphasis added]

[105] In *Palma*, Watt J. (as he then was) described the difference between admissibility and weight to be given to evidence at 158-159:

The admissibility of evidence is a question of law. Issues of admissibility are for the trial judge to decide. Where the tribunal is a divided one, a decision on admissibility merely means that an item of evidence will go to the jury, the trier of fact, for consideration. See for example, *R. v. Gaich* (1956), 24 C.R. 196 (Ont. C.A.) at p. 199, per Mackay J.A.; *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.) at p. 501, sub nom. *R. v. Charette*, per Dubin J.A.; and *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 181 (S.C.C.).

...

On the other hand, the weight of evidence, its sufficiency to prove a proposition in support of which it is offered is a question of fact. See, for example, *R. v. Sunbeam Corp.*, [1969] 2 C.C.C. 189 (S.C.C.) at p. 197, per Ritchie J. In a divided tribunal, questions of fact are for the jury. See, *R. v. Parsons*, supra, at p. 502, per Dubin J.A. Where the tribunal is not divided, issues of weight and other questions of fact are for the trial judge, as the trier of fact.

[Emphasis in original]

[106] It is my view that any concerns about the impartiality of Mr. Lemieux affect the weight of his evidence, not its admissibility. The accused will be able to cross-examine him and expose any biases at trial. It will then be up to the jury to determine what weight ought to be given to his evidence. The jury will be able to take into account various factors, including that Mr. Lemieux was employed by the RCMP, that he was not operating in British Columbia, and that he had no direct involvement with the E-Pandora investigation.

[107] In conclusion, I find that the proposed expert evidence of Mr. Lemieux satisfies the Mohan criteria and is, accordingly, admissible. He will be permitted to give opinion evidence at trial with respect to the nature and characteristics of the HA, and give his opinion that one of the main purposes of the HA is the facilitation or commission of serious criminal offences for the material benefit of its members. There is one exception to the foregoing: Mr. Lemieux will not be permitted to give evidence of his opinion that all members of the HA commit crime at some point in time.

F. INSTRUCTION TO THE JURY

[108] In order to determine what would be an appropriate instruction to give to the jury, it is helpful to consider some of the suggestions from various appellate courts.

1. Appellate Authorities

[109] In *R. v. F.* (D.S.) (1999), 43 O.R. (3d) 609 at 620, 132 C.C.C. (3d) 97 (C.A.), the court approved the following jury instruction with respect to the use that could be made of opinion evidence:

The purpose of such evidence is to assist you in determining whether an inference adverse to the credibility of the complainant should be drawn based on the evidence of the manner and timing and consistency of her disclosure. It may or may not assist you in that respect. Your duty is to consider the evidence of Ms. Sinclair and weigh it in the balance. You must not be overwhelmed or unduly swayed by the credentials of a particular witness just because he or she is permitted to give expert evidence. While her evidence concerning observed behaviours in persons who report abuse in intimate relationships may or may not assist you in assessing the credibility of the complainant in the manner I have described, I emphasize you must not use her evidence and it is not relevant for any other purpose. You may not, for example, use her evidence to increase or bolster the credibility of the complainant. Aside from considering her evidence in relation to the credibility of the complainant in the manner which I have described, you may not use her

evidence for the purpose of assessing the likelihood that the events described by [the complainant] occurred.

[110] In *R. v. Bricker* (1994), 71 O.A.C. 383, 90 C.C.C. (3d) 268, Laskin J.A., for the court, wrote that the jury should be instructed on the limited use that could be made of the criminal record of the accused. He also stated that the jury should be instructed in accordance with the judgment of the Supreme Court of Canada in *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, 79 C.C.C. (3d) 112 at 138-139, in which Iacobucci J., writing for the majority, stated:

It is an obligation on trial judges that they properly instruct juries as to the use that those juries can make of evidence which is highly prejudicial to an accused in relation to the accused's character. In the case at bar the trial judge did not charge the jury with respect to the use they could make of L.L.'s and T.B.'s testimony. Given that the testimony might have a strong prejudicial effect on the jury and that the jury might then convict on the basis that the accused is a bad person of the sort likely to commit the offences in question, clear directions to the jury about the use that they could make of the testimony were essential. More specifically, the judge was required to explain clearly in the instructions to the jurors that they must not infer from the evidence that tended to show the appellant's bad character that the appellant was guilty because he is the sort of person who is likely to commit the offences in question.

[111] The court in *R. v. R. (M.)* (2005), 195 C.C.C. (3d) 26, [2005] O.J. No. 883 (QL) (C.A.) at para. 64, set out the nature of the charge to be given to a jury concerning the prohibited use of propensity 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.

[112] In *R. v. Malanca*, 2007 ONCA 859, 88 O.R. (3d) 570, LaForme J.A., for the court, upheld a limiting instruction that was given to a jury where there was bad character evidence introduced in a jury trial. He stated at paras. 38-42:

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.

[113] In *R v. Chenier* (2006), 207 O.A.C. 104, 205 C.C.C. (3d) 333 at 364-365, Blair J.A., for the court, approved this caution by a trial judge:

I disagree. In my view, the trial judge properly and adequately directed the jurors on how they could and could not use the bad character evidence. First, he identified the bad character evidence. Then, he emphasized several times that the appellants were not charged with or on trial for anything in relation to that evidence (not for the Earl Joe stabbing; not for the Andy Myre assault; not for the purchase or sale of explosives on August 2, 1996; not for drug dealing or drug usage or for association with other nefarious people, or for being bad characters). He went on to tell the jury that the 1994 stabbing of Earl Joe could be used as evidence of Chenier's animus and motive; that the explosives transaction and other evidence of explosives went to Farley's

opportunity and means to engage in the plot, as well as to their evaluation of Boisclair's testimony; and that the evidence of drug use was relevant to their understanding of the background of the offences and to the relationship between the various characters and Farley and Chenier. He was careful to limit the use of the evidence against each accused, instructing the jury that they were not to consider the 1994 stabbing by Chenier as evidence against Farley and the 1996 sale of explosives by Farley as evidence against Chenier. Finally, he stressed repeatedly the danger of using the evidence improperly for propensity reasoning or to convict for something in relation to which the appellants were not charged. As just one example of this, the trial judge said:

But there is a danger that arises out of that background evidence, the evidence that is related to things for which these two men are not on trial. The danger is that that evidence has the potential to reflect badly on the character of Peter Chenier and George Farley.

I want to warn you of that danger and I want you to keep this warning of that danger in mind throughout and I want to make it very clear that you must not allow that evidence to be misused. The danger lies in using evidence of bad character improperly and prejudicially. Pre-judging is to judge without a proper foundation.

Improper and prejudicial use of evidence of bad character would occur if one were to reason this way. Mr. X is a person of bad character. He has done some very unsavoury things, although he is not charged with them. He is charged with this particular crime. Because he is of bad character, I think it is more likely that he may have committed this particular crime.

You see that line of reasoning? That is prejudicial and improper use of bad character evidence.

In my view, this passage, and the trial judge's mid-trial instructions and his instructions on the issue of bad character evidence overall, fully and adequately alerted the jury to the dangers of what the Supreme Court of Canada in *R. v. Handy* (2002), 164 C.C.C. (3d) 481 (S.C.C.), at 520 referred to as "the poisonous nature of propensity evidence, and the need to maintain a high awareness of its potentially prejudicial effect". The jury was directed, with sufficient clarity and focus, to what uses the bad character evidence could and could not be put. The instructions properly left the jury with an understanding of the special concerns that attach to such evidence, as outlined in *R. v. Arp* (1998), 129 C.C.C. (3d) 321 (S.C.C.), at 356, namely, that the jurors must beware of the risk of finding the appellants were bad persons and on that account alone concluding they must be convicted, and that they must avert the risk of convicting the appellants not for the crime with which they were charged but for earlier misdeeds that may have gone unpunished.

[114] In *R. v. Suzack* (2000), 128 O.A.C. 140, 141 C.C.C. (3d) 449 at para. 97, Doherty J.A. stated that the trial judge is required to instruct the jury in such a way as to permit the use of the propensity evidence by the defence while at the same time preventing misuse of the evidence as part of the case for the Crown. He adopted at para. 127 the model charge of the Ontario Specimen Jury Instruction Project, which states the following:

- (2) It is up to you to determine whether the disposition evidence, alone, or together with other evidence, raises a reasonable doubt that (NOA1) committed the offence charged. However you must not use the disposition evidence in any way when you consider whether Crown counsel has proven the case against (NOA2). No one can be convicted of a crime just for being the sort of person who might have committed it.

[115] In *R. v. Diu* (2000), 49 O.R. (3d) 40, 133 O.A.C. 201, Sharpe J.A., for the court, dealt with the issue of the appropriate jury instruction that should be given in cases involving so-called "cut-throat" defences. He stated at para. 139:

Suzack and Valentini, *supra*, establish that where bad character evidence is adduced by one accused to show propensity (i.e. that the co-accused is the type of person more likely to have committed the crime), the trial judge must include a special instruction in the charge to the jury. This instruction should contain both a positive and negative aspect, which are equally important, telling the jury the use the jury may make of the evidence of propensity and the use the jury may not make of such evidence. The positive aspect is that evidence of bad character can be used by the accused leading the evidence (Lam) to raise a reasonable doubt as to that accused's guilt on the basis that the bad character of the other accused (Diu) suggests a propensity of that accused to commit the offence. The negative aspect is that bad character evidence cannot be used by the jury when considering whether the Crown has proved its case against the other accused (Diu). In other words, it was incumbent on the trial judge to instruct the jury that it might consider evidence of Diu's disposition in deciding whether it had a reasonable doubt that Lam committed the crime, but that the jury must not use evidence of the Diu's disposition to find Diu guilty.

2. Proposed Charge to the Jury on Expert Evidence

[116] Having regard to these appellate decisions, CRIMJI and suggestions previously made by the Crown, I propose to include a passage with respect to expert evidence in my written pre-charge to the jury along the following lines:

There is another body of evidence that will assist you in this case. That is the evidence of expert witnesses. As a general rule, witnesses are only permitted to give evidence about what they saw or heard, not express opinions. There is, however, an exception to this rule. Expert witnesses are permitted to give opinions in their areas of expertise. The purpose of expert evidence is to explain matters about which ordinary persons, such as you and I, are unlikely to be able to form a correct judgment without assistance. A firearms expert, for example, could give evidence, if relevant, about how a gun fired. A doctor could give evidence, if relevant, about how a person died.

In this case, I expect that you will hear evidence about the Hells Angels from three expert witnesses: Dr. Howard Abadinsky, a professor in criminal justice and legal studies; retired RCMP Staff Sergeant Jacques Lemieux; and RCMP Inspector Andy Richards. The purpose of their evidence is to assist you in determining whether the Crown has proven, beyond a reasonable doubt, two of the elements of the criminal organization offences, specifically (1) whether the East End Charter is a criminal organization, and (2) whether the offences alleged to have been

committed or the offences alleged to have been instructed were for the benefit of, at the direction of, or in association with the East End Charter. (The criminal organization offences are those that are charged in counts 2, 3, 5, 7, 9, 10, 14, 15, 17, 19, 21, 23 and 25.) You may only use the evidence of the expert witnesses in deciding these issues. You must not use this evidence for any other purpose whatsoever. For example, you must not punish any of the accused by finding them guilty of the offences charged simply because they are members of the Hells Angels.

The expert evidence may or may not assist you in deciding whether the prosecution has proven these two elements beyond a reasonable doubt. It is up to you to decide how much weight you will give to an expert opinion. As jurors, you are entitled to give such weight as you feel reasonably and justly belongs to an expert's opinion evidence. The opinion, however, is not binding upon you, if it is against your own good judgment. This is, after all, as your presence eloquently attests, trial by jury, not trial by expert. You are not and should not become a mere rubber stamp. Do not allow yourselves to become overwhelmed or unduly swayed by the credentials of a witness just because he has been permitted to give expert evidence. You ought recall my earlier instructions. You are the sole judges of the facts. When determining what are the facts, you may believe all or none or only part of the evidence of a witness, any witness. There is no distinction made when applying that general principle of evidence to the evidence of experts. The testimony of experts must be appreciated and weighed in the same manner as the testimony of any other witness. You must be satisfied, in addition, when considering an opinion offered by an expert, that it is substantially based on the facts which otherwise appear in the evidence before you, and not be an opinion that is not supported by the facts. To the extent that it is not supported on the facts which otherwise appear in the evidence which you accept, you may feel the opinion, correspondingly, to be of less weight. It must also fall fairly within the field of the expert's expertise. An expert is no more qualified or able to give opinions beyond his field of expertise than is any other witness.

In the final analysis it is for you to determine which expert evidence you accept, and what weight you wish to attach to it. You ought not, however, simply to cast aside expert evidence without some cogent reason, particularly in the event that the evidence is not the subject of dispute between the parties in the proceeding.

Three Step Process

As you may not find it easy to decide how much weight you should give to the opinion of an expert witness, I would suggest that you use a three-step process.

First, you should consider the qualifications of each expert witness. Examine his training and experience. Ask yourselves whether these qualifications add to or detract from the opinions he expressed.

I also suggest that you ask yourselves whether each expert was impartial, or whether he appeared to favour the party who called him.

Second, you should examine the facts or assumptions that each expert relied upon to form his opinion. The more an expert relies on facts not proved in evidence, the less weight you should give to his testimony. If there is no evidence of any facts or assumptions upon which the expert relied to form his opinion, then you must attach no weight to the opinion.

Consider whether when the expert witness gave his opinion, it was based:

- (a) wholly or in part on statements made to him by others who were not called to give evidence in this trial; and/or
- (b) wholly or in part on certain books and articles written by others who were not called to give evidence at this trial.

If the persons who made statements upon which the expert's opinion was based, or wrote books and articles upon which the expert's opinion was based did not give evidence before you, then the opinion of that expert witness is founded wholly or in part on hearsay evidence.

Normally, hearsay evidence is not admissible for any purpose, but, in the case of an expert, the rule is not quite so strict. You may examine the source of this hearsay evidence for the purpose of deciding the weight you will give to the opinion of the expert witness. You should understand that the hearsay evidence upon which the expert witness relied cannot be regarded as true. If the hearsay evidence is supported by other sworn testimony you heard and accepted, then naturally you should give greater weight to the opinion of that expert witness.

Third, you should examine the opinion itself. You should examine the process the expert used to arrive at his opinion. This, of course, is where the special skill and knowledge of the expert comes in. If you are satisfied with the qualifications and impartiality of the expert and find that the evidence supports the assumptions used by the expert, then you should not reject the expert's opinion without good reason. If, however, you are of the view on a consideration of all of the evidence in the case that the opinion of the expert should not be accepted by you, you are at liberty to reject it.

At this time, I do not know specifically what evidence will be led from the three expert witnesses. In the event there is unanimity in their opinions, you may, nonetheless, after applying the three-step examination of the experts' opinions that I just described, reject their conclusions even though they are uncontradicted. Before you do so, however, you must have a rational foundation that is based upon the evidence you heard.

Once you have considered the evidence of each expert according to this three-stage process, you will be in a position to decide how much weight you will attach to each expert's opinion. Remember that you are not obliged to accept any expert's opinion as conclusive. You may reject an opinion entirely if you find it unreasonable.

[117] This passage is simply a proposal and is subject to the submissions of counsel.

G. CONCLUSION

[118] Mr. Lemieux will be permitted to testify at trial with respect to the nature and characteristics of the HA, and give his opinion that one of the main purposes of the HA is the facilitation or commission of serious criminal offences for the material benefit of its members. There is one exception to the foregoing: Mr. Lemieux will not be permitted to testify to his opinion that all members of the HA commit crime at some point in time.

"Romilly J."

The Honourable Mr. Justice S.R. Romilly

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