

CANADA / JUDGMENT

R. v. Wiwchar

2025 BCSC 2052

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2025 BCSC 2052 R. v. Wiwchar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wiwchar,

2025 BCSC 2052

Date: 20251021

Docket: 27393-A; 27393-220

Registry: Vancouver

Rex

v.

Dean Michael Wiwchar

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Inherent Jurisdiction

Before: The Honourable Madam Justice Ker

Ruling on Voir Dire #11

Notice of Application 220 - Prejudicial Evidence Re: Gang Lifestyle

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Introduction

- [1] This ruling addresses an application ("NOA 220") filed by the accused, Dean Michael Wiwchar, to have several categories of evidence he contends are extrinsic discreditable conduct evidence excluded from his trial (the "extrinsic misconduct evidence"). These categories of evidence, with one minor exception, were previously ruled admissible by Justice Maisonville in 2021, prior to Mr. Wiwchar's severance from the indictment before her on March 7, 2022.[1]
- [2] The indictment before Justice Maisonville charged Mr. Wiwchar and Rabih Alkhalil with the January 17, 2012, first degree murder of Sandip Duhre; Larry Amero with conspiracy to murder Mr. Duhre (Mr. Wiwchar and Mr. Alkhalil were named as unindicted co-conspirators); and all three men with conspiracy to murder Sukhveer Dhak between August 6, 2011 and August 8, 2012.

- [3] As the parties know, Mr. Wiwchar, along with Mr. Amero and Mr. Alkhalil were previously tried by Justice Maisonville and a jury (the "First Trial"). Pre-trial motions occurred between September 2019 and June 2021. The jury trial commenced on June 28, 2021. Mr. Wiwchar was part of that trial until he was severed on March 7, 2022. The trial continued with only Mr. Alkhalil and Mr. Amero before Maisonville J. and the jury. Verdicts were rendered on August 29, 2022.
- [4] The Crown is now proceeding against Mr. Wiwchar for his alleged role in the offences from the original indictment: the murder of Mr. Duhre and conspiracy to murder Mr. Dhak.
- [5] During the First Trial, Justice Maisonville issued numerous detailed rulings during both the pre-trial motions phase of the trial and the trial itself. Most of the impugned evidence on this application was previously found to be admissible by Justice Maisonville in said rulings, which were made when Mr. Wiwchar was still part of the proceedings.
- [6] For this application, the following rulings issued by Maisonville J. in the First Trial are relevant:
- R. v. Alkhalil, 2021 BCSC 1119 (the "Extrinsic Misconduct Ruling");[2]
 - R. v. Alkhalil, 2021 BCSC 1546 (the "Surrey Safehouse Ruling");[3]
 - R. v. Alkhalil, 2021 BCSC 2317 (the "Toronto Surveillance Ruling"),[4]
 - R. v. Alkhalil, 2021 BCSC 2366 (the "Money in the Montreal Penthouse Ruling")[5] and,
 - R. v. Alkhalil, 2020 BCSC 1602 (the "Arrest of Wiwchar Ruling").[6]
- [7] As these rulings were made prior to Mr. Wiwchar's March 7, 2022 severance from the indictment, s. 591(4.2) of the Criminal Code [the "Code"] provides that these rulings are presumptively binding upon this Court. By virtue of NOA 220, Mr. Wiwchar implicitly seeks to revisit those rulings. The burden is therefore on him to persuade the Court that it should revisit the rulings: R. v. Victoria, 2018 ONCA 69.
- [8] Mr. Wiwchar contends that, since he is no longer being tried with Messrs. Amero and Alkhalil, and because his alleged motive for the offences is different to that of his former co-accused, this constitutes a material change of circumstances that rebuts the presumptive binding nature of Justice Maisonville's rulings and permits revisitation of them. Respectfully, I do not agree with Mr. Wiwchar's position.

Background

- [9] Mr. Wiwchar is charged with the first-degree murder of Sandip Duhre which occurred on January 17, 2012, at approximately 8:45 p.m. Mr. Duhre was shot 10 times in the right side of his head in what can best be described as a planned and deliberate execution-style killing. The Crown theory is that the murder of Mr. Duhre was a "paid hit", and that Mr. Wiwchar was the hired shooter or hitman who carried out the "contract" on Mr. Duhre.

- [10] Mr. Wiwchar is also charged with conspiracy to murder Suhkveer Dhak. The conspiracy spanned from August 6, 2011, through August 8, 2012. The Crown theory is that Mr. Wiwchar was, again, hired as a hitman to kill Mr. Dhak. Mr. Dhak was eventually killed by someone else. Mr. Wiwchar is not charged with his murder.
- [11] The motive for the killing and the conspiracy offences is complicated in light of the different roles that Mr. Wiwchar and his former co-accused, Mr. Amero and Mr. Alkhalil, had in the offences.
- [12] Insofar as the overall motive for both offences, the theory of the Crown is that the murder of Mr. Duhre and the conspiracy to murder Mr. Dhak were in retaliation for an August 14, 2011 shooting which resulted in the murder of Jonathon Bacon and the serious injury of Mr. Amero among others. Mr. Amero, Mr. Bacon, and three others were shot in Mr. Amero's Porsche Cayenne as it was starting to drive away from the Delta Grand Hotel in Kelowna (the "Kelowna Shooting"). Mr. Bacon, who died at the scene, was a close friend and associate of Mr. Amero and Mr. Alkhalil. All three were said to be members of the Wolfpack - a criminal group that had rivals in many other criminal groups, including the Dhak / Duhre group.
- [13] The Crown theory in the case at bar is that members or associates of the Dhak / Duhre group were responsible for the murder of Mr. Bacon. Three affiliates of Mr. Dhak were eventually sentenced by Justice Betton for the offences that arose out of the Kelowna Shooting, including Jujhar Khun-Khun. The reasons for sentence succinctly outline the context behind the Kelowna Shooting as well as the events of the offence itself: R. v. McBride, 2018 BCSC 865 at paras. 6-21.
- [14] As the parties are well aware, Mr. Wiwchar was severed from the First Trial on March 7, 2022. It cannot be forgotten that the reason Mr. Wiwchar was severed was because he dismissed his entire defence team, having lost confidence in them in light of unusual circumstances that arose approximately five months into the joint trial. What precipitated that decision was the subject of two rulings by Justice Maisonville, found at neutral citations 2022 BCSC 320 (the "Withdrawal Ruling") and 2022 BCSC 560 (the "Severance Ruling").
- [15] Mr. Wiwchar's application that I am addressing in these reasons was filed by his previous counsel on June 7, 2024, and seeks that "the Court engage in a process to screen the Crown evidence to exclude evidence of discreditable and irrelevant conduct as not having a probative value that outweighs its prejudicial effect". The NOA asserts that the absence of Mr. Amero and Mr. Alkhalil on this indictment constitutes a material change in circumstances such that the prejudicial effect and probative value analysis of the extrinsic misconduct evidence will be different in this proceeding than it was at the First Trial. The filed application makes no mention of s. 591(4.2) of the Code or the fact that the impugned topics of evidence enumerated in NOA 220 have previously been ruled upon by Justice Maisonville.

- [16] In actual argument before me on NOA 2020, Mr. Wiwchar, now representing himself, adopted his former counsel's submission in the filed NOA 220 and pointed to various specific items of evidence that he contends are no longer relevant to his trial given that he is no longer standing trial with his former co-accused. He argues that if they are relevant, they should be excluded as they are more prejudicial than they are probative.
- [17] Mr. Wiwchar also contends that, as he is no longer being tried with his two co-accused and his alleged motive for the offences is different to that of his former co-accused, this constitutes a material change in circumstances that necessitates revisiting the rulings made by Justice Maisonville in the First Trial. As I understood his submission, this point was advanced to rebut the presumptive binding nature of Justice Maisonville's rulings as mandated by s. 591(4.2) of the Code.
- [18] The specific areas of evidence that Mr. Wiwchar contends are no longer relevant or are extrinsic misconduct evidence that ought to no longer be admissible in his trial are as follows:[7]

A. Evidence Concerning Alkhalil and Amero

- (i) Evidence about Alkhalil and luxury vehicles
- (ii) Evidence that Amero and Alkhalil had financial means

B. Evidence Concerning Wiwchar

- (i) Photos of Large Collections of Firearms (the Surrey Safehouse)
- (ii) Paying for items with bundles of cash; [possessing] large amounts of cash
- (iii) Gambling at the casino with high stakes
- (iv) Toronto arrest of June 21, 2012
- (v) Surrey Shooting of September 16, 2011

Governing Legal Principles

Presumptively Binding Nature of the Previous Rulings: s. 591(4.2) of the Code

- [19] On June 26, 2011, the Code was amended by Bill C-2, An Act to amend the Criminal Code (mega-trials).[8] The purpose of this suite of amendments was to address the burgeoning problem of the length and multiplicity of proceedings arising out of mega-trials. The most significant addition through these amendments was the introduction of the case management judge provisions now found in ss. 551.1 through 551.7 of the Code.
- [20] As companion amendments to the implementation of the case management powers, Parliament augmented the Code with s. 591(4.2) and s. 653.1, largely to cover situations where an accused was either severed from the indictment (s. 591(4.2)) or a mistrial was declared (s. 653.1) after a number of rulings on Charter, disclosure or admissibility issues

had been made, but before the stage at which the evidence on the merits is presented. These two provisions make rulings from prior to the severance of an accused or a mistrial, presumptively binding on the parties if and when the Crown elects to resume the proceedings against any of the affected parties.

[21] When Bill C-2 was debated at second reading in Parliament, the Parliamentary Secretary to the Minister of Justice, Ms. Kerry-Lynne Findlay, explained that Bill C-2 had three objectives: strengthening case management; reducing duplication of processes; and otherwise improving criminal procedure.[9]

[22] For the purposes of this ruling, the relevant provisions of s. 591 of the Code are as follows:

Severance of accused and counts

591(3) The court may, where it is satisfied that the interests of justice so require, order

- (a) that the accused or defendant be tried separately on one or more of the counts; and
- (b) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

Decisions binding on parties

591(4.2) Unless the court is satisfied that it would not be in the interests of justice, the decisions relating to the disclosure or admissibility of evidence or the Canadian Charter of Rights and Freedoms that are made before any order issued under subsection (3) takes effect continue to bind the parties if the decisions are made -- or could have been made -- before the stage at which the evidence on the merits is presented.

2011, c. 16, s. 5

[Emphasis added.]

[23] And, although not directly engaged in this application, the wording of s. 653.1 of the Code provides as follows:

Mistrial -- rulings binding at new trial

653.1 In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings relating to the disclosure or admissibility of evidence or the Canadian Charter of Rights and Freedoms that were made during the trial are binding on the parties in any new trial if the rulings are made -- or could have been made -- before the stage at which the evidence on the merits is presented.

2011, c. 16, s. 14

- [24] It is clear that the above provisions were included in the legislation to reduce duplication of proceedings. Numerous commission reports, studies, and appellate decisions all acknowledge that finality is an important value in the criminal justice system. To that end, s. 591(4.2) is one of the mechanisms designed to assist in the reduction of duplication of processes, improve effectiveness, and reduce delays while ensuring trial fairness. Absent exceptional circumstances, such as where fresh evidence is discovered, there is no justification for the constant re-litigation of issues that have been fairly adjudicated. Such duplication of processes is not sustainable by the overburdened resources of the criminal justice system.[10]
- [25] At the hearing of NOA 220, counsel were unable to locate any jurisprudence squarely addressing s. 591(4.2) of the Code. However, *R. v. Victoria*, 2018 ONCA 69 dealt with the fraternal twin of s. 591(4.2): s. 653.1 of the Code - the presumptively binding nature of rulings made prior to a mistrial. In addressing the meaning of "the interests of justice" the decision in *Victoria* notes that the phrase also appears in s. 591(4.2) of the Code.
- [26] In *Victoria*, the Ontario Court of Appeal wrote:
- [53] The phrase "the interests of justice" is not defined in or for the purposes of s. 653.1. Nor does the section list or otherwise describe any or all of the factors relevant to its application. That said, the phrase makes frequent appearances throughout the Criminal Code. It takes its meaning from the context in which it appears and is characteristic of the existence of a judicial discretion to be exercised on a case-by-case basis. The "interests of justice" take into account not only the specific interests of the parties, but also broad-based societal concerns: *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), at para. 16.
- [54] A canvass of precedent interpreting the inscrutable phrase "interests of justice", as it appears elsewhere in the Criminal Code or common law, as for example in ss. 591(3), (4.1) and (4.2) reveals that to determine where the "interests of justice" lie in any case requires a consideration of the cumulative force of all relevant circumstances. No single circumstance or factor is dispositive. Nor is the phrase equivalent to "the interests of the accused" or "the interests of the Crown". Otherwise, Parliament would have said so. Although the interests of the parties are important factors, so too are the interests of the public, including its interests in timely and efficient criminal trials, the effective use of limited court resources, finality and the integrity of the criminal trial process: *R. v. Zvolensky*, 2017 ONCA 273, 135 O.R. (3d) 401, at paras. 250-251. See also, *R. v. Cody*, 2017 SCC 31, 349 C.C.C. (3d) 488, at paras. 37-38; and *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 79 and 82.
- [27] In *R. v. Kang*, 2019 BCSC 2379, I addressed the meaning of the phrase "in the interests of justice", albeit in the context of a contested application for a joint hearing pursuant to the provisions of s. 551.7 of the Code. Nevertheless, the decision in that case assists in informing the meaning of the phrase in the context of this application:

- [35] The real issue is whether a joint hearing is "in the interests of justice". That phrase is used repeatedly throughout the Code and takes its meaning from its surroundings: *R. v. Abbey*, 2013 ONCA 206 at para. 29; *R. v. W.L.*, 2016 ONSC 3341 at paras. 16 to 17.
- [36] In *R. v. Davis*, 2012 ONSC 5526, Justice Baltman examined the phrase as it was employed in s. 653.1 of the Code, which deals with rulings carrying over from previous trials when the trial concludes in a mistrial, and stated:
- [15] To date there has not been any jurisprudence interpreting s. 653.1, and in particular what the phrase "interests of justice" means in this context. However, the identical wording is used throughout the Criminal Code and has been analyzed extensively. Based on a review of those cases I derive the following guidance in interpreting the phrase:
- The phrase "interests of justice" takes its meaning from the context in which it is used and signals the existence of a judicial discretion to be exercised on a case-by-case basis. The interests of justice encompass broad based societal concerns and the more specific interests of a particular accused, including meaningful access to appellate review: *R. v. Bernardo*, [1977] O.J. 5091 (C.A.) at paras. 16 and 19;
 - The expression takes into consideration both the interests of the accused as well as the state: *R. v. Beaulac*, [1999] 1 S.C.R. 768
 - The interests of justice also encompass the integrity of the criminal process, which includes bringing finality to litigation and avoiding the time and expense inherent in the re-litigation of issues: *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 at p. 411; *R. v. Owen*, [2003] S.C.J. No. 31, para. 52; *R. v. Last*, [2009] S.C.J. No. 45, para. 16.
- [37] The phrase "the interests of justice" as used in s. 551.7(3) of the Code is informed by the phrase that follows it: "including ensuring consistent decisions". I acknowledge that the evidence in issue, which maybe excised from the ITO depending on the outcomes of the various voir dres that are to be held on these three indictments, may differ across the indictments, except the jail calls issue. In my view, however, that is not determinative of the matter. Other considerations or factors also inform the interests of justice in the context of the trial management powers captured by ss. 551.3 and 551.7 of the Code. These factors include the need for ensuring consistent decisions and the efficient use of judicial resources: Vallee at paras. 35 and 39.
- [Emphasis added.]
- [28] Both the concept of the efficient use of scarce judicial resources and the need to ensure that there are consistent decisions across trials involving the same offences and facts for the same accused loom large on this application. As I noted previously, Justice Maisonville made considered and comprehensive rulings addressing the admissibility of various categories of extrinsic misconduct evidence. Mr. Wiwchar fully participated in those applications with the assistance of senior, experienced counsel.

- [29] Like s. 653.1, the presumptive rule enacted by s. 591(4.2) of the Code is to encourage the retention of prior rulings, and thereby avoid the time and expense associated with relitigating issues already decided, as well the prospect of conflicting decisions on the same issues and evidence. That said, the section plainly recognizes that circumstances will exist where incorporation of prior rulings is not in the interests of justice.
- [30] Section 591(4.2) focuses on rulings relating to defined subject-matter which were made, or could have been made, before evidence on the merits was adduced in the prior proceedings. Apart from cases in which it would not be in the interests of justice to do so, rulings made on any of the defined subjects bind the parties on the subsequent trial. In order for the presumptive effect of s. 591(4.2) to be engaged, the prior ruling must relate to one of three specific areas:
- i. disclosure;
 - ii. the admissibility of evidence; or
 - iii. the Charter.
- [31] To rebut the presumptive incorporation of prior rulings in subsequent proceedings, a party must demonstrate that "it would not be in the interests of justice" that the prior rulings bind the parties in the later trial. In accordance with general principle, the standard of persuasion imposed on the party opposed to the incorporation of the prior rulings is on a balance of probabilities: *Victoria*, at para. 52.
- [32] Given the parallel, indeed mirroring nature of s. 591(4.2) and s. 653.1 of the Code, it is only logical to apply the same guidance for the relevant factors to consider in respect of the "interests of justice", as outlined in *Victoria*, at para. 55, when considering whether prior rulings ought to remain binding in the subsequent proceeding post-severance:
- [55] In the absence of statutory guidance on the meaning to be assigned to the "interests of justice" in s. 653.1 or of an exhaustive or illustrative list of relevant considerations, relevant factors might include, but not be limited to:
- i. whether any new evidence will be tendered on the proposed rehearing;
 - ii. whether any new arguments will be advanced on the proposed rehearing and the apparent merit, if any, of those arguments;
 - iii. the interests of the parties, including any articulable prejudice fostered or perpetuated by the inability to relitigate any issue previously decided;
 - iv. the public interest in the timely and efficient conduct of criminal trial proceedings and avoidance of unnecessary and duplicative proceedings;
 - v. any changes in the legal principles governing the ruling on which relitigation is proposed;

- vi. the nature of the evidentiary record on the basis of which the prior ruling was made, as for example, viva voce testimony; agreed statement of facts; transcripts of testimony given elsewhere and any differences in the record proposed for relitigation;
- vii. the nature of the issue(s) involved in the prior ruling and proposed relitigation;
- viii. the possibility of inconsistent rulings; and
- ix. any other circumstances relating to the balance of the subsequent trial proceedings that may have an impact on the continued applicability of the prior rulings.

[33] As the parties have addressed their submissions on the applicability of s. 591(4.2) employing the Victoria analytical framework, that is the framework that I will employ.

Discreditable Conduct Evidence

- [34] Discreditable conduct or extrinsic misconduct evidence is evidence of the accused's misconduct beyond what is alleged in the indictment. It is generally inadmissible as it risks triggering general propensity reasoning. It is also presumptively inadmissible to guard against a related human tendency: to punish an accused for past misconduct by finding the accused guilty of the offence charged. A further basis for its presumptive inadmissibility is to avoid drawing the attention of the trier of fact away from the main purpose of their analysis: the offence actually charged: *R. v. Parker*, 2025 BCCA 302 at para. 20, citing *R. v. T.J.F.*, 2024 SCC 38.
- [35] Justice Maisonville's Extrinsic Misconduct Ruling contains a comprehensive review of the governing legal principles that inform the admissibility assessment for this type of evidence. I adopt her recitation of the governing legal principles, as outlined in that ruling at paras. 4-15, and will employ them in my analysis of the issues raised in this case. The following key points can be distilled from that ruling:
- i. evidence of discreditable conduct is presumptively inadmissible (at para. 4);
 - ii. evidence of discreditable conduct may be admissible where it is both relevant to a material issue at trial and its probative value outweighs its prejudicial effect (at para. 5);
 - iii. the onus of proof is on the Crown on a balance of probabilities (para. 5);
 - iv. prejudice comes in two forms: moral prejudice and reasoning prejudice (at para. 6, citing *R. v. Z.W.C.*, 2021 ONCA 116, at para. 101);
 - v. moral prejudice refers to the risk the jury may convict the accused on the basis of "bad personhood" (at para. 6, citing *Z.W.C.*, at para. 102);
 - vi. reasoning prejudice refers to the risk the jury will give the evidence more weight than is logically justified (at para. 6, citing *Z.W.C.*, at para. 103); and

vii. the rule against discreditable conduct is only engaged when the conduct to be examined is that of the accused (at para. 9).

[36] Notably, Justice Maisonville confirmed the framework for determining whether evidence is in fact extrinsic misconduct in the Extrinsic Misconduct Ruling as follows:

[8] Before undertaking the probative value/prejudicial effect analysis, the court must first consider several preliminary questions, as identified in *R. v Luciano*, 2011 ONCA 89 at paras. 227-228:

[227] When evidence of extrinsic misconduct is tendered for admission, courts sometimes proceed directly to the probative value/prejudicial effect analysis upon which admissibility depends. But there are other questions that require response before the crucial balancing need be undertaken:

- Is the conduct that of the accused?
- Is the evidence relevant?
- Is the evidence material?
- Is the conduct discreditable to the accused?

[228] An affirmative response to each question is essential before it becomes necessary to undertake the probative value/prejudicial effect analysis: *R. v. B. (L.)* (1997), 35 O.R. (3d) 35 (Ont. C.A.), at para. 10.

[37] Since the rulings by Maisonville J. were issued, the Ontario Court of Appeal and the Supreme Court of Canada have had occasion to address the admissibility of prior discreditable conduct in *R. v. Chizanga*, 2025 SCC 9, aff'g 2024 ONCA 545.

[38] In *Chizanga*, a majority of the Supreme Court upheld the appellants' convictions for second degree murder, substantially for the reasons of the majority in the Ontario Court of Appeal. The appellate decisions in *Chizanga* affirm the well-established analytical framework that trial judges are to employ when assessing whether to admit into evidence the prior discreditable conduct of an accused that the Crown seeks to tender for certain specified purposes. The approach to the admissibility of prior discreditable conduct evidence in a criminal trial is that it is presumptively inadmissible. To be admissible it must be relevant to a live issue in the trial and its probative value must exceed its prejudicial effect. The governing legal framework remains that set out by the Supreme Court of Canada over two decades ago in the seminal case of *R. v. Handy*, 2002 SCC 56.

[39] In *Chizanga*, the majority decision of the Court of Appeal contains a comprehensive summary of the governing legal principles employed in assessing the admissibility of prior discreditable conduct:

- (a) Governing legal principles

(i) The Handy framework for the admission of prior discreditable conduct

- [17] While the admissibility of prior discreditable conduct has been judicially considered on countless occasions, the governing legal framework remains that set out by the Supreme Court of Canada over two decades ago in the seminal case of *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908.
- [18] Handy affirms the long-established rule that evidence of the accused's prior discreditable conduct is presumptively inadmissible. The policy basis for this general exclusionary rule is that the potential prejudicial effect of such propensity evidence may overwhelm its probative value. The danger is that the trier of fact will convict the accused simply because they believe them to be a person of "bad character" who would likely have committed the offences in question. This impermissible chain of reasoning would undermine the presumption of innocence, which requires that a person may only be convicted where the Crown has proven the specific allegations of misconduct beyond a reasonable doubt. As Doherty J.A. put it succinctly in *R. v. Batte*, "an accused must be tried for what he or she did and not for who he or she is": (2000), 49 O.R. (3d) 321 (C.A.), at para. 100.
- [19] Yet as Handy also affirms, this general exclusionary rule is not absolute. Depending on the purposes for which the evidence is proffered and the strength of the inferences that can be drawn from it, the probative value of the evidence may exceed any prejudicial effect it may have. In these circumstances, "propensity evidence" is nevertheless properly admitted because it goes beyond showing a mere general disposition of the accused and is more probative than prejudicial in relation to a live issue at trial: Handy, at para. 71.
- [20] Handy, at para. 57, further rejected a "categories" approach to the admission of evidence of prior discreditable conduct, under which different legal tests would apply to different categories or types of such evidence. To the contrary, Handy establishes that the admissibility of evidence of prior discreditable conduct must always be determined on the basis of whether the probative value of the evidence outweighs its prejudicial effect.

(ii) Assessing the "probative value" of prior discreditable conduct evidence

- [21] Under the Handy framework, the "probative value" of evidence of prior discreditable conduct requires a consideration of whether the fact that the accused acted in a discreditable way on one or more occasions ("Prior Discreditable Conduct") makes it more or less likely that the accused acted in a particular way on a different occasion ("Live Conduct"), where the proof of the Live Conduct is a material issue at trial.¹ The Prior Discreditable Conduct is probative of the Live Conduct if it renders it more or less probable that the Live Conduct is true than would be the case without evidence of the Prior Discreditable Conduct.
- [22] This understanding of probative value makes plain that the probative value of the Prior Discreditable Conduct cannot be analysed in the abstract. Rather, probative value arises from the relationship between the Prior Discreditable Conduct and Live Conduct. Probative

value becomes more cogent where there is a close connection or "nexus" between the Prior Discreditable Conduct and Live Conduct since, in these circumstances, proof of the Prior Discreditable Conduct makes it more likely that the Live Conduct is also true. Conversely, where that connection or nexus is general or tenuous the probative value of the Prior Discreditable Conduct is diminished, since proof of that Prior Discreditable Conduct may tell us little or nothing about whether the Live Conduct occurred.

- [23] The probative value of the Prior Discreditable Conduct further depends upon the degree to which the Live Conduct is a disputed issue at trial. Those disputed issues are derived from the facts alleged by the Crown and the defences advanced or reasonably anticipated. Where the existence of the Live Conduct is a minor feature of the Crown's case or is a matter that has been conceded by the accused, the probative value of the Prior Discreditable Conduct will be weak or non-existent even if the Prior Discreditable Conduct tends to conclusively establish the Live Conduct: Handy, at para. 74. For this reason, Handy emphasizes the importance of identifying the live issues at trial and of explaining how the evidence which the Crown seeks to admit assists in resolving those live issues.
- [24] Evidence of Prior Discreditable Conduct need not prove conclusively, or even make it more probable than not, that the Live Conduct also occurred. The Prior Discreditable Conduct is probative of the Live Conduct as long as it makes it more or less likely that the Live Conduct occurred: Handy, at paras. 94-97; R. v. Luciano, 2011 ONCA 89, 267 C.C.C. (3d) 16, at para. 205.
- [25] In some cases, the existence of Prior Discreditable Conduct may itself be in dispute, or the evidence relating to it may be unclear or doubtful. In such a case, the court must necessarily consider the strength of the evidence relating to the Prior Discreditable Conduct and consider whether such frailties reduce or eliminate its probative value: Handy, at paras. 133-35; R. v. C. (Z.W.), 2021 ONCA 116, 155 O.R. (3d) 129, at para. 98.
- [26] Handy helpfully set out a non-exhaustive list of factors relevant in determining the degree of connection or nexus between the Prior Discreditable Conduct and the Live Conduct. These factors include: the proximity in time between the Prior Discreditable Conduct and the Live Conduct; any similarities in detail between them; the number of times that each occurred and the circumstances surrounding those occurrence(s); and any distinctive features unifying the different events.
- (iii) Identifying the "prejudicial effect" of evidence of Prior Discreditable Conduct
- [27] Assuming the evidence has sufficient probative value to potentially warrant its admission, its prejudicial effect must then be assessed. "Prejudicial effect" is not simply an increase in the likelihood of conviction since (presumably) any evidence that the Crown seeks to adduce is intended to increase the likelihood that the Crown will prove its case. Rather, "prejudicial effect" in this context involves particular forms of prejudice, namely, "moral prejudice" or "reasoning prejudice", either of which give rise to a risk of an unfocussed trial and a wrongful conviction": Handy, at para. 139 (emphasis in original).

- [28] Moral prejudice arises when the trier of fact infers guilt on the basis of the "bad character" of the accused and convicts them not because the Crown has necessarily proven its case but merely because the accused has committed bad acts in the past. The risk of such impermissible inferences overwhelming the reasoning of the trier of fact is particularly acute where the Prior Discreditable Conduct evidence paints the accused as a person with a general disposition to commit crimes: *Handy*, at para. 85. The risk of impermissible reasoning is also heightened where the Prior Discreditable Conduct evidence is inflammatory or repugnant, thereby potentially leading the trier of fact to convict the accused merely to punish them for such Prior Discreditable Conduct.
- [29] "Reasoning prejudice" arises where the Prior Discreditable Conduct evidence distracts the trier of fact from the real issues in the case: *Handy*, at para. 100. Such prejudice could occur where, as discussed above, the Prior Discreditable Conduct evidence is disputed or unclear. In these circumstances, the trier of fact may improperly focus their attention on the sufficiency of proof of the Prior Discreditable Conduct, rather than on whether the Crown has proven the particular allegations in the indictment before the court beyond a reasonable doubt.
- (iv) Weighing "probative value" versus "prejudicial effect"
- [30] Finally, the probative value of the Prior Discreditable Conduct evidence must be weighed against any likely moral or reasoning prejudice that would result if the evidence were admitted, to determine whether its probative value outweighs its prejudicial effect. There is no simple formula or algorithm that can be employed to make this determination, nor can it be reduced to a mere accounting exercise. Rather, it involves an assessment of the degree to which the Prior Discreditable Conduct evidence will either properly assist or inappropriately prejudice the trier of fact in their findings, considered in light of the positions of the parties and circumstances of the case as a whole and through the lens of logic and human experience: *R. v. Boukhalfa*, 2017 ONCA 660, 350 C.C.C. (3d) 29, at paras. 172-73, leave to appeal denied, [2018] S.C.C.A. No. 50.
- (v) The necessity of proper jury instructions on the permitted and prohibited uses of evidence of Prior Discreditable Conduct
- [31] Because of the dangerous potential of Prior Discreditable Conduct evidence, if such evidence is admitted the trial judge is required to instruct the jury on its use. That instruction should: (i) identify the evidence of Prior Discreditable Conduct; (ii) define the permitted use of the evidence; and (iii) caution the jury regarding its prohibited use: *C. (Z.W.)*, at para. 109.[11]
- [40] With the foregoing principles in mind, I turn to an examination of their application to the issues raised by Mr. Wiwchar in NOA 220.

Analysis

The Preliminary Issue:

Does s. 591(4.2) of the Code Apply

[41] As outlined above, a preliminary issue arises as to whether s. 591(4.2) of the Code applies to the rulings of Justice Maisonville in the First Trial which concern the evidence Mr. Wiwchar now seeks to exclude.

Background

[42] Mr. Wiwchar was originally charged on January 24, 2018, by way of direct indictment, with one count of first degree murder of Mr. Duhre and one count of conspiracy to commit the murder of Mr. Dhak. Mr. Wiwchar was jointly charged with Mr. Amero and Mr. Alkhalil.

[43] All three accused made their first appearance before this Court on January 31, 2018. At that appearance, the Crown sought the assignment of a case management judge. By March 7, 2018, Madam Justice Maisonville was assigned as the case management and trial judge. The parties made their first appearance before her on April 3, 2018. In her ruling dismissing Mr. Amero's post-verdict delay application, Maisonville J. explained the sequence of the trial before her as comprising three distinct phases:

[19] The trial can be viewed as three distinct time periods:

- a) the application screening conference phase (January 24, 2018 to September 2, 2019);
- b) the voir dire phase (September 3, 2019 to June 27, 2021); and
- c) the trial phase (June 28, 2021 to August 26, 2022).[12]

[44] All of the rulings that Maisonville J. issued in respect of the extrinsic misconduct admissibility issues were made prior to Mr. Wiwchar's severance from the indictment. During the hearing of those applications before Maisonville J., Mr. Wiwchar was represented by senior, experienced defence counsel who fully participated in the applications.

Positions of the Parties

[45] Mr. Wiwchar's current application, NOA 220, in seeking to have what he claims to be extrinsic misconduct evidence excluded from this proceeding, implicitly takes the position that the decisions of Justice Maisonville in the First Trial are either not binding or else should be revisited.

- [46] The Crown's primary position is that as Mr. Wiwchar was still on the indictment and fully participated in the hearing of the Crown's application to have discreditable conduct evidence ruled admissible in the First Trial, Justice Maisonville's rulings that impact Mr. Wiwchar's current application are all presumptively binding upon the parties pursuant to s. 591(4.2) of the Code.
- [47] Relying upon the decision in *Victoria*, the Crown contends these rulings address the admissibility of evidence and were made prior to the severance order. Only where the Court is satisfied that it would not be in the "interests of justice" for the prior ruling to be binding can the effect of the prior ruling be voided. The burden of proof is on the party opposed to the incorporation of the prior ruling and the standard is a balance of probabilities.
- [48] Amici advanced a nuanced approach to this part of the application. They contend that s. 591(4.2) of the Code does not apply in respect of the evidence that pertains more to Mr. Wiwchar's former co-accused, Mr. Amero and Mr. Alkhalil (specifically the Kelowna Shooting evidence) as Mr. Wiwchar is now being tried alone and does not appear to have a direct connection to the Kelowna shooting. Relying upon the statutory construction of s. 591(4.2) that refers to binding the parties, Amici notes that, with severance, the parties are now different and that this constitutes a material change of circumstances. Whereas before *Maisonville J.* the parties included three accused, now Mr. Wiwchar is on his own. On this basis, Amici contends that because the parties are now different, it is therefore questionable that s. 591(4.2) applies.
- [49] As an alternative, Amici contends that, if the rulings continue to bind the parties, a material change in circumstances has arisen such that it is in the interests of justice to reconsider the rulings. And, as a further alternative, Amici contends that the Court ought to resort to its residual discretion to limit the scope of the evidence to be adduced in order to avoid veering off the main path in this trial which is to prove identity and intent in the context of the current indictment.
- [50] However, Amici also conceded that the parts of Justice Maisonville's rulings that directly relate to Mr. Wiwchar should likely be found to be presumptively binding.

Discussion

- [51] For ease of reference, I repeat the statutory provision in issue:

Decisions binding on parties

591(4.2) Unless the court is satisfied that it would not be in the interests of justice, the decisions relating to the disclosure or admissibility of evidence or the Canadian Charter of Rights and Freedoms that are made before any order issued under subsection (3) takes effect continue to bind the parties if the decisions are made -- or could have been made -- before the stage at which the evidence on the merits is presented.

[Emphasis added.]

- [52] As the decision in *Victoria* makes clear, rulings made on the admissibility of evidence bind the parties at subsequent trials. In my view, whether the subsequent trial is the product of a mistrial (as s. 653.1 contemplates) or severance, is immaterial. The statutory language is largely identical and the provisions were enacted at the same time to assist in avoiding the unnecessary duplication of proceedings, particularly in the era of the mega-trial.
- [53] Parliament, in its wisdom, recognized that there may well be circumstances where the binding nature of prior rulings in subsequent proceedings might not be fair or desirable. In order to avoid this problem, the legislation provides a safety valve to permit revisiting and relitigating prior rulings in the subsequent proceedings. But the hearing is not a *de novo* process. To avoid the binding nature of the prior rulings or, as noted in *Victoria*, to rebut the presumptive incorporation of prior rulings in subsequent proceedings, the party seeking to do so must demonstrate that "it would not be in the interests of justice" that the prior rulings bind the parties in the subsequent trial. The burden of persuasion imposed on the party seeking to avoid the incorporation of the prior rulings is on a balance of probabilities: *Victoria*, at para. 52.
- [54] The decision in *Victoria* goes on to set out a non-exhaustive list of relevant factors to consider in the assessment of whether the moving party has succeeded in discharging its burden of persuasion. I will address those factors momentarily. Before doing so, however, I will address the main thesis advanced by both Mr. Wiwchar and Amicus: that s. 591(4.2) of the Code does not apply as the parties have changed and the motives for the offences are different as between the previous parties.
- [55] Mr. Wiwchar and Amicus contend that as the two co-accused with the motive for revenge are no longer on the indictment and as Mr. Wiwchar's alleged motive appears to be different - financial instead of vengeful - this changes the calculus for the applicability of s. 591(4.2). They argue that, as the parties are no longer the same as when they were before Justice Maisonneville, it begs the question of the applicability of s. 591(4.2) of the Code in these circumstances.
- [56] Respectfully, this appears to ignore the reference to s. 591(3) within s.591(4.2). Section 591(3) of the Code deals with the ability to sever either accused and / or counts on an indictment and provides:
- 591(3) The court may, where it is satisfied that the interests of justice so require, order
- (a) that the accused or defendant be tried separately on one or more of the counts; and
 - (b) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

- [57] Read together, the provisions of ss. 591(3) and (4.2) contemplate that rulings made while an accused remains on an indictment with other co-accused will continue to bind the severed co-accused and the Crown after the order of severance has been made and once the Crown elects to proceed or re-commence against the severed co-accused. To suggest otherwise is to either invite a more limited resort to severance of co-accused or to create conditions for repeated litigation of issues that have already been decided in respect of the circumstances behind the indictment in issue. Neither result is palatable or consistent with the fair but efficient conduct of trials and the related concept of finality in litigation.
- [58] In this case, Mr. Wiwchar and the Crown are two of the four parties that were involved in the previous rulings. Mr. Wiwchar, then represented by senior and experienced defence counsel, participated fully in the pre-trial applications that Justice Maisonville ruled upon. His severance from the indictment, mid-trial, well after these rulings were made, is exactly the type of situation that s. 591(4.2) was designed to address in order to minimize the impact of such procedural storms.
- [59] Notwithstanding the thoughtful and considered submissions of Amicus, in my view, the previous rulings made by Maisonville J. are presumptively binding upon the parties.
- [60] Therefore, the real issue in this case is whether the Court is satisfied that it is not in the interests of justice to continue to have these rulings bind the parties. It is clear that the onus is on the party seeking relief from the binding nature of the rulings to establish that it is not in the interests of justice to continue in this fashion.
- [61] In Victoria, the ONCA addressed the issue of the presumptive binding nature of rulings made in a trial prior to a successful mistrial application. The mistrial was the result of a voir dire ruling given before argument was heard on said application. In the same ruling, the judge also pronounced on an application to cross-examine the affiant on an information to obtain sworn in support of an application for a search warrant. In the post-mistrial, renewed proceeding against the accused, the rulings made by the previous judge were found to be binding. The accused were convicted.
- [62] On his conviction appeal, the appellant contended that the trial judge erred in concluding that he was bound by the earlier trial judge's ruling denying leave to cross-examine the affiant. The Ontario Court of Appeal dismissed this ground of appeal. The provision of the Code at issue in Victoria was s. 653.1 of the Code.
- [63] The decision of the ONCA in Victoria established an analytical framework to apply in determining whether a ruling on the admissibility of evidence or Charter issues continues to bind the parties in a subsequent trial following the declaration of a mistrial. Considering the mirrored nature of s. 591(4.2) and s. 653.1 of the Code, the factors set out in Victoria, at para. 55, provide a useful framework for assessing the interests of justice in the context of s. 591(4.2) of the Code.

[64] I have found that s. 591(4.2) of the Code applies to Mr. Wiwchar in the circumstances and that the previous rulings of Maisonville J. which are relevant in this application continue to bind the Crown and Mr. Wiwchar. Accordingly, the burden is on Mr. Wiwchar to establish, on a balance of probabilities, that the rulings should not continue to be binding. Employing the analytical framework from Victoria to the circumstances of the current application I note the following as it relates to Mr. Wiwchar:

i) whether any new evidence will be tendered on the proposed rehearing

[65] Mr. Wiwchar did not propose any new evidence on this application. Accordingly, this factor weighs in favour of the presumptively binding nature of Maisonville J.'s rulings and concluding they continue to apply.

ii) whether any new arguments will be advanced on the proposed rehearing and the apparent merit, if any, of those arguments

[66] Mr. Wiwchar advanced no new arguments in his application, apart from the suggestion that, on the Crown theory, his alleged motive was different than that of Messrs. Amero and Alkhalil. Respectfully, this argument ignores the reality of the situation. Although his alleged motive may have been different, all three parties purportedly had the same common intention - a desire to see both Mr. Duhre and Mr. Dhak killed.

[67] The Crown's theory on the motive for the murder of Mr. Duhre, insofar as Mr. Amero and Mr. Alkhalil were concerned, was retaliation for the Kelowna shooting and the Crown's theory of Mr. Wiwchar's alleged motive for being involved was financial. Nevertheless, and with respect, while Mr. Wiwchar was in fact severed from the trial, it is artificial to sever the motives of the three participants. In the absence of the Kelowna shooting, there seemingly would be no motive for retaliation or revenge. And, in the absence of the retaliation / revenge motive attributed to Messrs. Amero and Alkhalil, there would be no need to hire someone to exact the revenge, meaning no alleged financial motive for Mr. Wiwchar to become involved. The parties were all in agreement as to what was to be done: Messrs. Duhre and Dhak were to be killed. Thus, in my view, the two motives are inextricably intertwined. Mr. Wiwchar's different motive does not mean the motive of the two former co-accused is meaningless or irrelevant.

[68] Accordingly, the fact that there are different motives at play for Messrs. Alkhalil and Amero, who are no longer before the court following their convictions for these offences, does not constitute a material change in circumstances that means the prior rulings are to be discarded. Nor does the fact that Mr. Wiwchar's alleged motive differs to that of his former co-accused constitute a factor that assists in displacing the presumptive binding nature of the earlier rulings. At best, Mr. Wiwchar's different motive is a factor to consider in an "interests of justice" assessment. In my view, however, it does not move the needle in favour of revisiting the prior rulings.

[69] Overall, this factor weighs in favour of the presumptively binding nature of Maisonville J.'s rulings and concluding they continue to apply.

iii) the interests of the parties, including any articulable prejudice fostered or perpetuated by the inability to relitigate any issue previously decided

[70] Mr. Wiwchar has not articulated any prejudice as a result of being unable to relitigate the admissibility of the evidence in issue. He advances the same arguments that were advanced previously or could have been advanced previously. Accordingly, this factor weighs in favour of the presumptively binding nature of Maisonville J.'s rulings and concluding they continue to apply.

iv) the public interest in the timely and efficient conduct of criminal trial proceedings and avoidance of unnecessary and duplicative proceedings

[71] This factor weighs heavily in favour of not permitting re-litigation of the admissibility of the various heads of discreditable conduct evidence that Justice Maisonville previously ruled as admissible. If the Extrinsic Misconduct Ruling does not continue to bind the parties, then the Crown would have to re-apply to adduce what is presumptively inadmissible evidence, a time-consuming process that has already been adjudicated upon in comprehensive rulings. Accordingly, this factor weighs in favour of the presumptively binding nature of Maisonville J.'s rulings and concluding they continue to apply.

v) any changes in the legal principles governing the ruling on which relitigation is proposed

[72] The admissibility of the evidence in question is governed by long-established rules of probative value versus prejudicial effect, which have not changed since Justice Maisonville handed down her rulings. Indeed, the latest appellate decision on this topic, Chizanga, affirms the long-standing approach to the assessment of the admissibility of such evidence. Accordingly, this factor weighs in favour of the presumptively binding nature of Maisonville J.'s rulings and concluding they continue to apply.

vi) the nature of the evidentiary record on the basis of which the prior ruling was made, as for example, viva voce testimony; agreed statement of facts; transcripts of testimony given elsewhere and any differences in the record proposed for re-litigation

[73] Mr. Wiwchar has not proposed any changes between the evidentiary record that was before Justice Maisonville and the future potential evidentiary record if the rulings were to be revisited; the facts on this application are generally not in dispute. Accordingly, this factor also weighs in favour of the binding nature of Justice Maisonville's rulings and concluding they continue to apply.

vii) the nature of the issue(s) involved in the prior ruling and proposed relitigation

[74] The issues on this application and the applications determined by Maisonville J. are the same - the probative value versus prejudicial effect of the proposed discreditable conduct evidence. Nothing has changed apart from the fact that Mr. Wiwchar is on his own in respect of the indictment. Accordingly, this factor weighs in favour of the presumptively binding nature of Maisonville J.'s rulings and concluding they continue to apply.

viii) the possibility of inconsistent rulings

[75] Given the overlap between the issues and the evidence as between the First Trial and the current proceeding, there is a risk of inconsistent rulings if the issues of admissibility were to be revisited. Accordingly, this factor weighs in favour of the presumptively binding nature of Maisonville J.'s rulings and concluding they continue to apply.

[76] Overall, after applying the framework from Victoria, I conclude that the interests of justice do not militate in favour of the Court revisiting the rulings made by Maisonville J. prior to severance. Mr. Wiwchar has not met his onus to establish, on a balance of probabilities, that the presumptive binding nature of the rulings is inconsistent with the interests of justice.

[77] I have determined that the prior rulings by Justice Maisonville are binding and that Mr. Wiwchar now being alone on the indictment does not constitute a material change in circumstances such that the rulings should be revisited. However, for completeness, I will briefly conduct the relevance and materiality assessment and the probative value versus prejudicial effect balancing analysis for each of the impugned items of evidence that Mr. Wiwchar contends should be excluded from his trial.

The Proposed Extrinsic Misconduct Evidence

[78] As enumerated above, the extrinsic misconduct evidence that Mr. Wiwchar now seeks to have excluded in his trial covers seven different areas. I will address each in turn.

[79] For ease of reference, I repeat the items of evidence that Mr. Wiwchar seeks to have excluded as he contends their prejudicial effect far exceeds the probative value of the evidence. They are as follows:

A. Evidence Concerning Alkhalil and Amero

- (i) Evidence about Alkhalil and luxury vehicles
- (ii) Evidence that Amero and Alkhalil had financial means

B. Evidence Concerning Wiwchar

- (i) Photos of Large Collections of Firearms (the Surrey Safehouse)
- (ii) Paying for items with bundles of cash; [possessing] large amounts of cash
- (iii) Gambling at the casino with high stakes
- (iv) Toronto arrest of June 21, 2012

(v) Surrey Shooting of September 16, 2011

[80] The analytical framework for assessing the admissibility of extrinsic misconduct evidence is as outlined in *R. v. Luciano*, 2011 ONCA 89, as applied by *Maisonville J.* in the *Extrinsic Misconduct Ruling* at para. 8. I must first determine the following issues and, only if there is an affirmative answer to the four points below, do I then proceed to the second part of the analysis:

- Is the conduct that of the accused?
- Is the evidence relevant?
- Is the evidence material?
- Is the conduct discreditable to the accused?

[81] Of note, is the point that the Crown contends that some of the categories of evidence at issue on this application are not extrinsic misconduct evidence at all. Furthermore, the Crown maintains that all the categories of evidence covered by this ruling are relevant and material to live issues in the trial, most pointedly on the issue of identification of Mr. Wiwchar both as the person who shot Mr. Duhre and as a member of the conspiracy to murder Mr. Dhak. As all of the identity evidence Crown intends to lead against Mr. Wiwchar is circumstantial, the context and overall picture painted by the evidence Mr. Wiwchar characterizes as extrinsic misconduct evidence, will assist the trier of fact in assessing whether it is more probable than not that Mr. Wiwchar committed the offences charged.

[82] Mr. Wiwchar's position generally is that all of the evidence is extrinsic misconduct evidence that is irrelevant to the charges on the indictment, in part because his co-accused are no longer on the indictment with him and because his alleged motive is said to be different than theirs. He also contends that the prejudicial effect of the items of evidence far exceed their probative value. I will address Mr. Wiwchar's concerns in more detail when I analyse each of the seven impugned categories of evidence that he seeks to have excluded.

[83] In their submissions on this application, Amicus advanced a cautionary approach suggesting that while most of this evidence is likely largely admissible for the reasons outlined by the Crown, it should be reviewed in order to ensure that it is limited to what is required and directly applicable to the present case. Amicus notes that there may be some concern that the high volume of material and the multiplicity of events can raise the issue of reasoning and moral prejudice citing *R. v. T.B.*, 2009 ONCA 177, at para. 26. To that end, Amicus acknowledges that the evidence appears to be "sequentially probative" by which I understood him to mean that some evidence is more closely linked and other evidence is more tenuously linked. The further removed the evidence is from the central charges, the more disconnected it becomes so that at some point it becomes collateral. At that stage, the prejudicial effect of the evidence outweighs its probative value.

[84] With the overall import of the submissions of Amicus in mind, I turn now to an examination of the items of evidence that Mr. Wiwchar contends ought to be excluded from his trial.

The Evidence Concerning Alkhalil and Amero and Luxury Vehicles and Financial Means

[85] Mr. Wiwchar seeks to have two areas of evidence about Mr. Alkhalil and Mr. Amero from the previous trial excluded from his trial as no longer relevant to his circumstances, given that his purported motive is different than that of his former co-accused. Those two areas of evidence are: (i) a number of police stops in which Mr. Alkhalil was stopped in luxury vehicles and photos of Mr. Alkhalil's luxury vehicles and (ii) the evidence that Mr. Amero and Mr. Alkhalil had financial means.

[86] As I noted earlier in these reasons (at paras. 55, 66-68, 82) the different motives of Messrs. Alkhalil, Amero and Wiwchar are largely irrelevant, particularly in respect of the conspiracy count. It is the agreement to kill that grounds the offence of conspiracy, not the motive for committing the offence: members of a conspiracy do not have to have the same motive for the object of the conspiracy. Rather, they have to have agreed to commit the offence that is the object of the conspiracy.

[87] Relevant to the Crown's theory that Mr. Wiwchar was the hired hitman that Messrs. Alkhalil and Amero paid for the shooting of Mr. Duhre is the fact that on April 5, 2012, the police located \$140,000 in cash in a safety deposit box that Mr. Wiwchar had rented approximately two weeks after the Duhre homicide. In order to substantiate their theory that Mr. Wiwchar was hired to shoot Mr. Duhre, the Crown intends to lead evidence that Mr. Alkhalil and Mr. Amero had the means to hire and pay a hitman. To do this, the Crown wishes to establish that the two men had access to significant amounts of cash.

Background

[88] The evidence about Alkhalil and luxury vehicles - In the First Trial, Det. Crapigna of the Ottawa Police Service was called to provide recognition evidence about Mr. Alkhalil. He had had a number of encounters with Mr. Alkhalil in Ottawa, including three motor vehicle stops where Mr. Alkhalil was driving either a white or a blue Lamborghini. In addition, photographs extracted from an SD card found on a cell phone (the "9LW phone") seized from Messrs. Alkhalil and Amero's Montreal penthouse suite had pictures of Lamborghinis including one of Mr. Alkhalil sitting in a blue Lamborghini. This device, the investigators learned through the RX extractions, was associated to the PGP moniker of "Where-is-Waldo." Collectively, the evidence was relevant and material to establishing that Mr. Alkhalil was the user of the 9LW phone and was Where-is-Waldo. This evidence is relevant to identification of the users of various devices. Significantly, the Where-is-Waldo device has several PGP message exchanges with the user of the WrathOfTitans device, the latter said to be one of Mr. Wiwchar's encrypted Blackberry cellphones.

[89] The evidence that Amero and Alkhalil had financial means - Insofar as the significant financial means of Messrs. Alkhalil and Amero are concerned, the Crown has several items of evidence they intend to tender in this case, as they did in the First Trial. This evidence includes:

- Mr. Alkhalil being observed driving expensive luxury vehicles (the Lamborghinis) while only 22 years old;
- travel by both men included luxury excursions and expensive hotel rooms (Mr. Alkhalil had a credit card transaction in the amount of \$10,000 for The Cove in Nassau, Bahamas; Mr. Amero paid cash for two nights at the Delta Grand Hotel in Kelowna, where the nightly rate for the room in question, at the relevant time (Aug 2011), was \$2600; Mr. Amero took a 16-day trip to South America in May 2012);
- Mr. Amero driving luxury vehicles (a Porsche Cayenne involved in the Kelowna Shooting; a BMW M6; and a new Mercedes Benz ML Bluetec);
- Mr. Alkhalil having a commercial lease where he agreed to pay an annual rent of \$132,000 for a high-end clothing store in Montreal; and,
- large amounts of money being found in the August 2012 police search of the Montreal Penthouse Suite occupied by Messrs. Alkhalil and Amero (over \$10,000 in Mr. Alkhalil's bedroom; Mr. Amero's cash was far more modest (\$960)).

Position of Mr. Wiwchar

[90] Mr. Wiwchar argues that the evidence is prejudicial to him and it is no longer relevant as Messrs. Alkhalil and Amero are no longer being tried with him. Mr. Wiwchar's relevancy thesis is tied to his misconception that because the motives of Messrs. Alkhalil and Amero were different (revenge/retaliation) to his alleged motive (financial), their involvement is irrelevant to his alleged involvement. But, as noted earlier in this ruling, the alleged motive of the parties is relevant to how Mr. Wiwchar, allegedly, became part of the conspiracy to kill Mr. Dhak and Mr. Duhre.

Discussion

[91] The two facets of Mr. Wiwchar's objection to the admissibility of this evidence can be dealt with summarily. First, this is not conduct of Mr. Wiwchar and is not conduct that is discreditable of him. It addresses the conduct and interactions of his former co-accused; to that end, no objection can be sustained as to the admissibility of this evidence as extrinsic misconduct evidence as the presumption of the inadmissibility of extrinsic misconduct is only engaged when the conduct is that of the accused and is discreditable to the accused: Extrinsic Misconduct Ruling at paras. 8-9, citing Luciano.

- [92] The fact that Mr. Alkhalil drove luxury vehicles, including a Lamborghini, and was stopped on a number of occasions by police in Ottawa is not the conduct of Mr. Wiwchar. Nevertheless, Mr. Alkhalil's penchant for driving such vehicles, Lamborghinis in particular, is relevant and material evidence in this case.
- [93] Establishing Mr. Alkhalil's user identification as Where-is-Waldo is also a piece of relevant and material evidence to establishing the identity of the shooter at the Wall Centre. The Crown will tender evidence that connects Mr. Alkhalil and Mr. Wiwchar, evidence that connects Mr. Alkhalil to the shooting and evidence of the Where-is-Waldo device communicating with a device that is said to be Mr. Wiwchar's. Therefore, the user identification of the Where-is-Waldo device as Mr. Alkhalil will assist in an assessment of whether it is more probable than not that Mr. Wiwchar was the shooter in the Wall Centre.
- [94] To that end, the evidence about Mr. Alkhalil being stopped in Lamborghinis and the photos of the Lamborghinis are relevant to proof of Mr. Alkhalil as being the user of the Where-is-Waldo device. This, in turn, is relevant as a piece of evidence tending to establish the identity of the shooter in the Duhre homicide - the central issue in respect of Count 1 of the indictment.
- [95] Insofar as the evidence about the means of Messrs. Alkhalil and Amero is concerned, evidence of large amounts of cash in their apartment, taking and paying for luxury holidays (sometimes with cash), driving luxury vehicles and the like is consistent with the Crown's theory that Messrs. Alkhalil and Amero had the means to pay a large amount of cash to hire a hitman to kill Messrs. Duhre and Dhak.
- [96] The means evidence, in addition to being evidence that tends to establish that Messrs. Alkhalil and Amero had the means to hire and pay a hitman, also ties into several PGP messages on different devices which, when considered collectively and in context, are pieces of user identification evidence that tend to confirm that:
- Mr. Amero was the user of two different devices: "Birdman" and "SkullBuster"
 - Mr. Alkhalil was the user of the "TNT" device
- [97] These user identification points are germane to establishing both that Messrs. Alkhalil and Amero had access to large amounts of money (e.g. PGP messages where they discuss putting in shares to hire teams to kill Mr. Dhak), that they were communicating with each other about their plans to have Messrs. Dhak and Duhre killed, and that they hired Mr. Wiwchar to shoot Messrs. Duhre and Dhak. There are also communications between the devices connected to Messrs. Alkhalil and Amero and the two devices said to belong to Mr. Wiwchar - WrathofTitans and ManVFood - at various periods of time in the lead up to the shooting of Mr. Duhre and in the time frame of Mr. Wiwchar's alleged involvement in the conspiracy to murder Mr. Dhak.

- [98] Neither the evidence about Mr. Alkhalil's penchant for and access to luxury vehicles nor the evidence addressing the significant means of Messrs. Alkhalil or Amero are evidence about Mr. Wiwchar's conduct and so it is not inadmissible extrinsic misconduct evidence vis-à-vis Mr. Wiwchar.
- [99] Moreover, the evidence is relevant and material to the Crown's case against Mr. Wiwchar in terms of establishing that he was the shooter by showing that Messrs. Alkhalil and Amero had the means to pay a hitman which, when considered with other evidence, tends to make it more likely that they hired Mr. Wiwchar for this purpose.
- [100] The evidence is also relevant and material to assisting with establishing the user identification for various devices and connecting the users to various messages exchanged between them as related to the offences covered by the indictment.
- [101] The Crown additionally points out that, although Mr. Wiwchar is now being tried alone, the alleged involvement of Messrs. Alkhalil and Amero is not irrelevant as it is critical for the development of the Crown's theory of Mr. Wiwchar being a hired hitman to kill Messrs. Duhre and Dhak. Justice Maisonville noted as much in citing *R. v. Sipes*, 2011 BCSC 640 in the Extrinsic Misconduct Ruling at para. 10. In *Sipes*, Justice Smart held:
- [53] In assessing the probative value of the discreditable conduct in this trial, it is essential to recognize that the charged offences are alleged to have been committed by members of a gang for the purpose of advancing the gang's drug business. In other words, the motive for each of the charged offences was a group motive. As such, the structure of the gang and the role in or relationship of each of the accused to the gang is relevant to the Crown's theory as to why the offences were committed and why the individual accused participated in the commission of them. See *R. v. Boucher* (2000), 2000 CanLII 6087, 149 C.C.C. (3d) 429 (Q.C.C.A.) at para. 11.
- [102] I conclude that this tranche of the evidence that Mr. Wiwchar objects to as prejudicial extrinsic misconduct evidence is neither extrinsic misconduct evidence that pertains to him nor is it prejudicial to him. Finally, if there was any prejudicial effect to Mr. Wiwchar, the probative value of the evidence as part of the building blocks of circumstantial evidence the Crown intends to rely upon to establish that Mr. Wiwchar was the shooter in the Duhre homicide substantially exceeds any purported prejudicial effect. The evidence remains admissible in Mr. Wiwchar's trial.

Photos of Large Collections of Firearms (the Surrey Safehouse)

Background

- [103] On or about April 24, 2012, police executed a search warrant at an apartment in Surrey, B.C. that Mr. Wiwchar had been surveilled to by members of the VPD involved in the investigation of the Duhre homicide (the "Surrey Safehouse"). During the search the police located a large cache of weapons. More specifically, they seized 14 firearms of various types

and over 500 rounds of ammunition from the Surrey Safehouse. Mr. Wiwchar (along with a co-accused) was later convicted of possession of firearms offences in relation to these firearms (indexed as 2015 BCSC 973). Mr. Wiwchar's conviction appeal was dismissed by the Court of Appeal in *R. v. Wiwchar*, 2017 BCCA 9.

[104] In the First Trial, Mr. Wiwchar twice sought the exclusion of the evidence of the firearms seized from the Surrey Safehouse. His first attempt was in response to the Crown's application to adduce this extrinsic misconduct evidence. Justice Maisonville addressed this application in her *Extrinsic Misconduct Ruling*, at paras. 70-82. She addressed a renewed application by Mr. Wiwchar to exclude this evidence in the *Surrey Safehouse Ruling*.

Position of Mr. Wiwchar

[105] Mr. Wiwchar contends that the photographs of the weapons located in the Surrey Safehouse are not relevant to either the Duhre homicide or the conspiracy to murder Mr. Dhak as they were found well after the offences in question. Mr. Wiwchar contends that only the photographs of the firearms located in the May 24, 2012, search of his apartment on Jervis St., in Vancouver, should be admitted as those are the only ones relevant to the charges he faces. The thrust of Mr. Wiwchar's objection to the admissibility of the photographs of the Surrey Safehouse firearms is grounded in a submission that the jury will be prejudiced against him as the number and type of weapons found are frightening, terrorist-style weapons that are extrinsic to the offences charged. Mr. Wiwchar's argument on this category of extrinsic misconduct evidence is simply a recapitulation of the arguments advanced before Justice Maisonville in the two rulings I have cited above.

Discussion

[106] In my view, nothing has changed since Justice Maisonville's rulings on this category of evidence. In the *Extrinsic Misconduct Ruling*, Maisonville J. observed:

[80] Authorities such as *Haevischer* at paras. 22 to 25 and the cases cited therein hold that an accused's possession of firearms and ammunition is relevant to means or opportunity to commit the offences charged. Although Mr. Wiwchar contends that the firearms and ammunition seized from the Surrey safe house have no probative value given that the Crown is able to make any of its arguments regarding access and means with reference to the two firearms seized from his residence, I do not agree that is entirely the case. The Surrey firearms demonstrate that Mr. Wiwchar had access to weapons on an ongoing basis, rather than simply one moment in time. Moreover, they are relevant to the Crown's theory that there was a design in place. The fact that they were found some months after the murder does not detract from the relevance of the evidence and their probative value: *Sipes*. Possession of these types of weapons is restricted in the general population. Evidence that the group, and specifically Mr. Wiwchar, was able to access firearms supports the inference that they were able to obtain them for the Duhre homicide and carry out the conspiracies. I

therefore find that the evidence has significant probative value.

[81] I certainly acknowledge that the evidence carries substantial moral prejudice, especially in light of the current gun violence in the Lower Mainland. Nevertheless, on balance, I find that its probative value exceeds the prejudicial effects of its admission.

[107] In the Surrey Safehouse Ruling, Maisonville J. dismissed Mr. Wiwchar's application for her to reconsider her ruling on the admissibility of some of the long guns and ammunition seized from the Surrey Safehouse. She found that the evidence continued to have significant probative value that exceeded any prejudicial effect. She accepted the Crown's argument (again) that all of the firearms seized from the Surrey Safehouse were relevant to the conspirators' (not just Mr. Wiwchar's) access to firearms.

[108] The seizure of the firearms from the Surrey Safehouse occurred in close temporal proximity to Mr. Wiwchar's presence at the World Gym in the Spring of 2012. This tranche of evidence relates to the VPD surveillance teams observing Mr. Wiwchar conducting surveillance in the vicinity of the World Gym, a place Mr. Dhak is said to have frequented. These surveillance observations are relevant as acts in furtherance of the conspiracy and support the inference that Mr. Wiwchar had access to firearms, including long guns and associated ammunition, during the time span of the conspiracy to murder Mr. Dhak.

[109] Justice Maisonville went on to note the following point in the Surrey Safehouse Ruling:

[8] The Crown additionally argues that it is an available inference that several of the PGP messages it alleges were authored by Mr. Wiwchar refer to long guns, and thus evidence of his access to long guns is relevant to put those messages into context. Most notable in this regard is the exchange at text message 107 between WrathOfTitans/Zelda and TNT, whom the Crown alleges to be Mr. Wiwchar and Mr. Alkhalil respectively, which reads in part as follows:

From

To

TNT

WrathOfTitans

Make sure u blow his brains out. Mush head pudding face

Zelda

TNT

I'm using the ak

TNT

WrathOfTitans

Use the m4 maybe. I'm just finding out there might be a second target on site

Zelda

TNT

Ak good guuna get em in there car

TNT

WrathOfTitans

U sure about that? We've missed 90% of the time bro

Zelda

TNT

Ill have hand just in case .keep the chopper on semi

[110] The above analysis should be reviewed with the further context that the Crown advances on this application. In the Crown's written submissions on this application there is the further justification for the relevance, materiality, and significant probative value of the evidence Mr. Wiwchar now seeks to exclude:

47. At trial, the Crown also led a chart listing (for each firearm found in the Surrey apartment) the type of firearm, police exhibit number, photo number, and serial number, along with a small photo of each. The firearms were each briefly described by a firearms expert, Evelyn Pederson, with reference to the Gun Chart. None of the firearms were .40 calibre like the weapon used in the Wall Centre shooting. There was .40 calibre ammunition located in the apartment, but it was "non-toxic" ammunition, as opposed to the "toxic" style used in the shooting.
48. The Crown also tendered a Book of Photographs of the two firearms seized from the apartment at 108 - 1111 Jervis Street where Mr. Wiwchar lived. Ms. Pederson also described those firearms. One of them was a CZ Model 858 Tactical 2V rifle, in 7.62 x 39 mm calibre. It was similar in appearance to an AK-47 rifle. The other firearm was a .45 calibre Ruger pistol. This was related to evidence of an attempt on Dhak's life near a Country Tire in Surrey on May 25, 2012. At 1:25 p.m. (PDT), WrathOfTitans sent a message to Birdman "Ya I might get him in the car I have a chopper and 45". A short time later WrathOfTitans sent a message to TNT "I'm using the ak" (message 28). Read in context, it could be inferred that "chopper" referred to an assault rifle. These messages were sent the day after the police had found the two firearms in the Jervis apartment and disabled them. Mr. Wiwchar was seen leaving the Jervis apartment at 12:22 p.m. on May 25 carrying a brown duffel bag (in which the guns had been located). He was last seen by the surveillance team that day at approximately 12:39 p.m., when he successfully evaded them at the Pacific Centre Mall. Thus, the evidence went not only to the means and capacity to carry out the murder of Dhak, but also to user

identification.[13]

- [111] It is clear that this evidence is relevant and material to the following significant points: establishing that the members of the conspiracy had the means and capacity to carry out the murder of Mr. Dhak, establishing that Mr. Wiwchar had access to firearms, and establishing the user identification of the WrathOfTitans, Birdman and TNT devices.
- [112] Justice Maisonville's reasoning for the admission of this evidence, as outlined in both rulings, is considered and compelling. I adopt it unequivocally. The evidence of the photographs depicting the seizure of a number of firearms from the Surrey Safehouse remains admissible. Its probative value far exceeds its prejudicial effect. And, as Maisonville J. noted, a limiting instruction to the jury on the permissible and impermissible uses of this evidence will neutralize any moral or reasoning prejudice concerns.

Paying for Items with Bundles of Cash and Possessing Large Amounts of Cash

Background

- [113] At the trial before Justice Maisonville, Mr. Wiwchar, through his counsel, made a formal admission that on March 27, 2012, his girlfriend, Ms. Hyslop, went with him to buy a silver Suzuki Grand Vitara XL7. In the First Trial, Mr. Wiwchar admitted that he paid for the vehicle with cash, in bundles with elastics around it.
- [114] When the police searched Mr. Wiwchar's vehicle, they located, in the glove box, a receipt for its purchase. This purchase agreement establishes that Mr. Wiwchar paid \$13,193 for the vehicle.
- [115] Another admission made by Mr. Wiwchar in the First Trial was that, on or about February 3 or 4, 2012, he received a gym bag with cash inside it, although there was no indication as to the amount of cash received.
- [116] Also adduced at the First Trial was evidence of the investigators finding \$140,000 in cash in one of Mr. Wiwchar's BMO safety deposit boxes on April 5, 2012, and, subsequently, finding \$100,000 in a different BMO safety deposit box linked to Mr. Wiwchar on June 22, 2012.
- [117] Another facet of the evidence that the Crown contends supports its theory that Mr. Wiwchar was the paid hitman in the Duhre homicide was a note on a sheaf of papers found in Mr. Amero's Montreal bedroom. On the note, which appears to be a tally sheet or record of expenses, are two notations: "50 zelda" and "150 zelda." The Crown theory is that these two notations relate to payment for the Duhre homicide.
- [118] The Crown intends to adduce other evidence, largely through PGP messages between various devices and some correspondence addressed to Mr. Wiwchar, to establish that "Zelda" was a moniker associated to Mr. Wiwchar.
- [119] Significantly, in late 2011 and early 2012, Mr. Wiwchar was not employed.

[120] Linking all these circumstances together with the various diverse pieces of evidence regarding Mr. Wiwchar's access to large sums of cash, the Crown will argue that this supports its theory that Mr. Wiwchar was the hitman and that he was paid a large amount of cash for his role in the Duhre homicide.

Position of Mr. Wiwchar

[121] Mr. Wiwchar contends that the admission he made at the previous trial about the purchase of the Suzuki is inadmissible due to both its prejudicial effect and because it is irrelevant to the issues at trial. He maintains the same position with respect to the photographs of the cash in the two BMO safety deposit boxes, arguing they too are irrelevant and prejudicial.

Discussion

[122] The Luciano framework is engaged for this piece of evidence and so I must first determine the following issues and, only if there is an affirmative answer to the four points below, do then I proceed to the second part of the analysis:

- Is the conduct that of the accused?
- Is the evidence relevant?
- Is the evidence material?
- Is the conduct discreditable to the accused?

[123] Insofar as the first three questions are concerned, the answers are readily affirmative. The conduct is that of the accused, and the evidence of the large amounts of cash is relevant and material to a live issue in the trial - identification of Mr. Wiwchar as the shooter in the Duhre homicide. While the possession of cash on its own does not identify Mr. Wiwchar as the shooter, it is the possession of it, in the context of the rest of the admissible evidence, particularly the PGP messages and the notes about Zelda with numbers beside the name, that collectively combine as a web of circumstances that the Crown will rely upon to establish that Mr. Wiwchar was the shooter in the Duhre homicide.

[124] Insofar as the fourth question is concerned, it is worth noting that paying for a vehicle in cash and having large amounts of cash in a safety deposit box are not discreditable conduct per se. Paying for items in cash and storing cash in safety deposit boxes are not illegal acts. I am not inclined to find this to be conduct discreditable to the accused. On that basis, it would be admissible without the need for conducting the probative value versus prejudicial effect balancing.

- [125] However, in light of the fact that it is possible that the jury might infer that the cash was received as a result of illegal activity, I also approach the evidence from the perspective of it being characterized as discreditable conduct to the accused. Accordingly, having answered the four Luciano questions in the affirmative, I turn to the second stage of the analysis - the balancing of the prejudicial effect and the probative value of the evidence.
- [126] Mr. Wiwchar received a gym bag of money a little over two weeks after Mr. Duhre was shot and killed. The notes in Mr. Amero's bedroom that include an expense sheet with amounts for Zelda informs the relevance and materiality of this evidence. And, based on the fact that there was a large amount of cash in Mr. Wiwchar's safety deposit boxes, these points all coalesce to inform the relevance and materiality of this evidence. The fact that Mr. Wiwchar is flush with cash shortly after the Duhre homicide is particularly relevant and material to the Crown theory that he was paid a substantial sum of money to shoot Mr. Duhre, especially when considered with other evidence the Crown will tender that seeks to establish that Mr. Wiwchar was in regular communication with Messrs. Amero and Alkhalil at a time proximate to the homicide.
- [127] The real issue here is whether the probative value of this evidence exceeds its prejudicial effect. The probative value of this evidence is fairly significant.
- [128] Mr. Wiwchar appears to take a fairly siloed approach to the issue of the admissibility of the impugned evidence. But, as the majority of the Ontario Court of Appeal made clear, in Chizanga, at para. 22, affirmed by a majority of the Supreme Court of Canada, the probative value of the "prior discreditable conduct" (the misconduct extrinsic to the offence charged in the indictment) cannot be assessed in a vacuum. The probative value of the impugned evidence is assessed in the context of its relationship to the "live conduct" in issue. Here the live conduct in issue is whether Mr. Wiwchar was the person who shot and killed Mr. Duhre on the night of January 17, 2012. The fact that Mr. Wiwchar came into possession of a large amount of cash shortly after the Duhre homicide and there was seemingly a relationship with or connection to Messrs. Amero and Alkhalil, both of whom had a motive for the homicide, makes it more or less likely that Mr. Wiwchar was the person who shot and killed Mr. Duhre.
- [129] It is important for Mr. Wiwchar to understand that the possession of this cash need not conclusively prove that he was the shooter. Nor should the possession of the large amount of cash and paying for items with cash be viewed in isolation. Rather, it is the force of this evidence together with all the other evidence that allegedly ties him to the Duhre homicide that is important. When considered from this perspective, the possession of large amounts of cash and purchasing items like a vehicle with cash is probative of the issue of the identity of the shooter as it makes it more or less likely that Mr. Wiwchar was involved as the shooter: Chizanga, at para. 24.

- [130] In my view, the prejudicial effect of this evidence is exceedingly minimal. And, as the Crown notes, even if the jury might conclude that the case was the result of illicit activity, in the circumstances it does not operate unfairly against Mr. Wiwchar. Indeed, given that in his submissions Mr. Wiwchar suggested that the cash in the safety deposit box was from "ripping off drug dealers" it is difficult to conceive how the evidence is in fact prejudicial at all.
- [131] When the full context of the circumstances are understood, as outlined above, particularly Mr. Wiwchar's lack of employment at the time in contrast to his ability to spend large amounts of cash, I am more than satisfied that the probative value of this evidence far exceeds any minimal prejudicial effect. Accordingly, the evidence about Mr. Wiwchar paying for a vehicle with cash and being in possession of a large amount of cash is admissible in the trial.

Gambling at the Casino with High Stakes

Background

- [132] As part of the VPD investigation, by the end of March 2012, Mr. Wiwchar was under 24-hour surveillance. As part of the evidence gathered in this investigation, the police obtained CCTV evidence from the Edgewater Casino in Vancouver. The footage, from June 8, 2012, depicts Mr. Wiwchar gambling at the Casino. In the First Trial, Mr. Wiwchar admitted that he and his girlfriend, Juanita Hyslop, went to the Edgewater Casino on a couple of occasions, including April 1, 2012, and that he gambled at the high stakes table and lost a lot of money. The Crown also led evidence from police officers involved in the surveillance of Mr. Wiwchar that established Mr. Wiwchar was observed gambling at the Casino on the evening of March 25/26, 2012 and June 8, 2012.
- [133] On June 8, 2012, while Mr. Wiwchar was under surveillance at the Casino, a text message was sent from the WrathOfTitans device to another individual urging that other person to join the user of the WrathOfTitans device as that person was at the casino "getting rich [in] the vip room". This, argues the Crown, is important evidence that is relevant and material to the identification of the user of the WrathOfTitans device. That device is said to contain several incriminating messages that relate to the conspiracy to murder Mr. Dhak.
- [134] Finally, some of the CCTV footage from the Edgewater Casino depicts Mr. Wiwchar walking about the Casino and therefore shows his gait. Using this piece of evidence, the Crown will urge the jury to assess Mr. Wiwchar's gait and compare it as against the gait of the shooter as depicted in the CCTV footage from the Wall Centre Hotel. And so, the imagery of Mr. Wiwchar on the CCTV from the Casino is yet another piece of circumstantial evidence going to the live issue of the identity of the shooter.

Position of Mr. Wiwchar

[135] Mr. Wiwchar contends that this evidence ought not to be admissible as it is irrelevant and prejudicial.

Discussion

[136] Returning to the analytical framework from Luciano and the Extrinsic Misconduct Ruling, I readily find the conduct is that of the accused, and the evidence of Mr. Wiwchar, walking about the Casino and gambling at the high stakes table, is relevant and material to a live issue in the trial - identification of Mr. Wiwchar as the shooter in the Duhre homicide.

[137] Insofar as the fourth question from Luciano is concerned, it is worth noting that gambling at a casino is not illegal. Indeed, licensed gambling is a common and legal activity. High stakes gambling is not suggestive of bad character. And so, in this instance, the fourth question is answered in the negative. It is not conduct discreditable to Mr. Wiwchar. On that basis it is admissible without the need for conducting the probative value versus prejudicial effect balancing.

[138] Even if it could be characterized as evidence that is conduct discreditable to the accused, I have no hesitation in concluding that the probative value of this evidence far exceeds any minimal prejudicial effect.

[139] The evidence of Mr. Wiwchar's attendance at and movement around the Edgewater Casino is highly relevant to the following points:

- Mr. Wiwchar had come into a lot of cash soon after the death of Mr. Duhre and the gambling activity supports the inference that he had significantly more money prior to the discovery of the \$140,000 in his BMO safety deposit box on April 5, 2012;
- The video of him walking in the Casino can be used by the jury for comparison purposes with the gait of the shooter at the Wall Centre; and
- Mr. Wiwchar's attendance at the Edgewater Casino on June 8 is relevant to establishing the identity of the user of the WrathOfTitans device. This device is said to contain several incriminating messages germane to the conspiracy to murder Dhak.

[140] The above three points are pieces of circumstantial evidence that are relevant and material to the issue and essential element of identity on each of the two counts. The evidence is admissible.

Toronto Arrest of June 21, 2012

Background

[141] Mr. Wiwchar was arrested in Toronto, Ontario, on June 21, 2012 for the murder of John Raposo which occurred in Toronto on June 18, 2012. Mr. Wiwchar was arrested again, later on June 21, 2012, by Det. Dungey of the VPD, for both the murder of Mr. Duhre and various firearms offences.

- [142] Justice Maisonville dealt with the lawfulness of Mr. Wiwchar's arrest in her Arrest of Wiwchar Ruling. Briefly, the surrounding circumstances were that John Raposo was shot and killed in an apparent targeted hit while sitting on the patio of the Sicilian Sidewalk Cade in the Little Italy neighbourhood of Toronto on June 18, 2012. Three days later, Mr. Wiwchar was arrested for the murder. At the time of the arrest, Mr. Wiwchar was a passenger in a taxi. Incidental to his arrest, police seized four cell phones. Two of the cell phones were Blackberrys with a PGP messaging application that, when eventually decrypted in 2014, were found to contain evidence related to the murder of Mr. Raposo as well as the murder of Mr. Duhre and the conspiracy to murder Mr. Dhak (Arrest of Wiwchar Ruling, paras. 2, 7, 9)
- [143] In the First Trial, Mr. Wiwchar, through his counsel, was prepared to make a number of admissions about his arrest. However, counsel for his co-accused, Mr. Amero, would not make the admissions and the evidence was therefore called by the Crown. The fact that Mr. Wiwchar was first arrested for the murder of John Raposo was not adduced in the First Trial and the Crown has no intention of adducing it in this trial.
- [144] Of significance from this event, however, is the fact that when Mr. Wiwchar was arrested in a taxi-van on that date, the police located three different Blackberry cellphones (two Blackberry Curves - one white, one black - as well as a Blackberry Bold) and a Nokia C3 cellphone. These devices were all submitted for forensic digital testing. The RDX extractions from those devices established that the white Blackberry Curve was the WrathOfTitans device with an email address of WrathOfTitans@platinumsecure.tv. The black Blackberry Curve was the ManVFood device with an email of address of ManVFood@platinumsecure.tv.
- [145] These two devices, WrathOfTitans and ManVFood, contained several incriminating messages germane to the offences Mr. Wiwchar is now charged with as well as messages sent to and from the Wrath device to the Birdman device, one of Mr. Amero's cellular phones. That they are found in Mr. Wiwchar's possession at the time of his arrest on June 21, 2012, is a critical piece of evidence towards establishing Mr. Wiwchar's identity as the user of those two devices.
- [146] Messages on those devices also tend to establish Mr. Wiwchar was the user of those devices as both contain messages that speak to the fact that the user of the devices was planning to travel to "dot" - a pseudonym for Toronto in popular slang.

Position of Mr. Wiwchar

- [147] Mr. Wiwchar contends that the admission of the circumstances of his arrest in Toronto are prejudicial and ought to be excluded. He reasons that the jury will "Google" him and learn about his arrest for the Raposo murder and his subsequent conviction for that offence and from that they might reason that he is "perhaps guilty of this one (Duhre)" too. Mr. Wiwchar was also concerned that the manner of his arrest, at gunpoint, essentially a "high risk

takedown", would be lead or leak out in the evidence, again causing the jury to be prejudiced against him. However, Mr. Wiwchar did acknowledge in his submissions that the fact that he was arrested in Toronto and cellphones were seized needed to be mentioned but he hoped the Crown would keep it simple.

Discussion

- [148] Mr. Wiwchar's main objection to the admissibility of this evidence stems from his concern and fear that the jury will improperly "Google" him. His submission overlooks the fact that the jury panel and the jury will be instructed not to engage in their own research and that they must decide the case only on the evidence adduced in the trial and nothing else.
- [149] His concerns about the manner of his arrest would have some merit if the Crown intended to lead that evidence. I did not understand that the Crown to be vigorously pushing for that portion of the arrest to be tendered. Although counsel argued they would prefer to have the gunpoint aspect of the arrest adduced, they conceded they would not be prejudiced by it not being adduced.
- [150] In my view, the real issue with this evidence is how much detail about the arrest in Toronto is adduced, not the prejudicial effect versus probative value analysis.
- [151] The evidence of the arrest and the seizure of the four cellphone devices is highly relevant and material evidence to establishing the identity of the user of the WrathOfTitans and ManVFood devices as being Mr. Wiwchar. Messages on both devices connect the user to the conspiracy to murder Mr. Dhak and to the Duhre homicide. And so, this evidence of possession of the devices constitutes more circumstantial evidence to establish the identification of Mr. Wiwchar as the shooter in the Duhre homicide and a member of the conspiracy to murder Mr. Dhak. They are directly linked to the main issue for each count on the indictment: identity. From that perspective, it is clear that the probative value of the evidence of the arrest and seizure of the devices far exceeds the potential prejudicial effect of the fact of Mr. Wiwchar's arrest provided that the prejudicial circumstances of said arrest (at gunpoint, initially for a different murder) are suppressed.
- [152] What is seemingly unnecessary is the fact that Mr. Wiwchar was arrested at gunpoint. I agree that that aspect of it could be prejudicial but note that it would be neutralized with a limiting instruction reminding the jury they could not use that evidence to infer that because Mr. Wiwchar was arrested at gunpoint he must have committed the offences charged on the indictment. Nevertheless, given the amount of evidence about firearms and shootings that will be adduced in any event, reference to Mr. Wiwchar being arrested at gunpoint is largely irrelevant and immaterial to the real issue in this trial: identity.
- [153] There are two solutions to avoiding the gunpoint portion of the arrest. First, Mr. Wiwchar would be well advised to consider making the admissions his previous counsel was prepared to make in the First Trial to avoid any possibility of the manner of arrest slipping out in the evidence of the officers called to establish his arrest. For the benefit of Mr.

Wiwchar, an admission can often "take the sting" out of the evidence and neutralize even the most miniscule point of prejudice. Second, the Crown is directed that if no admissions are forthcoming on this point, they must instruct the witnesses to refrain from providing details of the manner of the arrest employed in this case. Obviously if there is any leakage on this point, the jury would be instructed that they are not to consider that evidence and they are not to reason that because Mr. Wiwchar was arrested at gunpoint it means he must have committed the offences with which he is charged.

[154] Similarly, the Crown is directed to instruct witnesses to guard against leakage of the original offence for which Mr. Wiwchar was arrested in Toronto: the Raposo murder. Mention of that offence has an obvious prejudicial effect and is not probative of anything regarding the charges before this court. Crown, and indeed Mr. Wiwchar, should take care with witnesses regarding the circumstances of Mr. Wiwchar's arrest. It is another point that Mr. Wiwchar may wish to consider avoiding by the use of limited admissions regarding the Toronto arrest.

[155] All sides are directed to tread carefully in how this evidence is adduced if called viva voce but generally, its overall probative value far exceeds its prejudicial effect and so it remains admissible. The fact that Mr. Wiwchar was arrested in Toronto and that four cellphones were found with him either in his luggage or near his seat when he was arrested is admissible. The fact that Mr. Wiwchar was arrested at gunpoint for a different murder is both irrelevant and immaterial. Accordingly, that limited aspect - his arrest at gunpoint for a different murder - is inadmissible.

Surrey Shooting of September 16, 2011

Background

[156] The Kelowna shooting, in which Mr. Bacon was killed and Mr. Amero was injured, is said to be the catalyst for the revenge motive of Mr. Alkhalil and Mr. Amero. They believed that Mr. Dhak and Mr. Duhre were behind the Kelowna shooting. They therefore moved quickly to exact their revenge by mobilizing and putting "teams in place" to kill Mr. Dhak and Mr. Duhre.

[157] At the First Trial, the Crown was permitted to lead evidence of several events said to be acts in furtherance of the conspiracy to murder Mr. Dhak. One such event was a shooting that occurred on the night of September 16-17, 2011, barely a month after the murder of Mr. Bacon. On that date, Mr. Dhak and Mr. Khun-Khun were shot at in Surrey. Mr. Khun-Khun (one of the persons later convicted in the Kelowna shooting) was injured. Mr. Dhak was not, although he was at the scene when the police arrived.

- [158] This shooting was an attempt on Mr. Dhak's life but it failed, in part, because one of the firearms used jammed. The "botched" nature of this attempt was a source of concern for both Mr. Amero and Mr. Alkhalil as their text messages establish. A number of PGP messages refer to this attempt and its aftermath.
- [159] As evidenced in their text messages, Mr. Alkhalil and Mr. Amero determined they needed to pool their resources and come up with a larger sum of money to hire a more sophisticated hitman they believed would be able to execute their plan and achieve their goal - the eradication of Mr. Dhak.
- [160] Justice Maisonville, in the First Trial (in the Extrinsic Misconduct Ruling), found that both the messages pertaining to the Surrey Shooting and the evidence of the shooting itself were acts in furtherance of the conspiracy:
- [166] The messages containing evidence of events in furtherance of the conspiracy to murder Mr. Dhak are just that: acts in furtherance of the conspiracy to murder Mr. Dhak. They are not discreditable conduct. Thus, the attempt to kill Mr. Dhak that resulted in injuries to Mr. Khun-Khun was an act in furtherance of the conspiracy and it is capable of proving the existence of the conspiracy to kill Mr. Dhak and the probable membership of the accused where there is proof by the messages of that conspiracy.
- [161] In the Extrinsic Misconduct Ruling, Justice Maisonville did not address the shooting of Mr. Khun-Khun as a discrete event, as Mr. Wiwchar had submitted she should.

Positions of the Parties

- [162] The Crown does not argue that s. 591(4.2) of the Code should apply to bind this Court with Justice Maisonville's ruling on the Surrey Shooting evidence in the Extrinsic Misconduct Ruling because Mr. Wiwchar was not involved in the Surrey Shooting, which occurred well before Mr. Wiwchar is alleged to have joined the conspiracy to murder Mr. Dhak (allegedly not joining until April 2012). The Crown was not opposed to Mr. Wiwchar re-arguing the admissibility of this aspect of the Extrinsic Misconduct Ruling.
- [163] The Crown maintains, as it did before Judge Maisonville, that this evidence is not Extrinsic Misconduct Evidence. Rather, the Crown contends the Surrey Shooting is an act in furtherance of the conspiracy to kill Mr. Dhak.
- [164] Further, the Crown does not argue that the Surrey Shooting evidence should be admissible to prove Mr. Wiwchar's membership in the conspiracy to murder Mr. Dhak. Rather, the Crown contends that the Surrey Shooting evidence is relevant and admissible to provide context to the conspiracy, which I take to mean the Crown seeks to use it to establish the origin, nature, object and general scope of the conspiracy (step one of the test from *R. v. Carter*, [1982] 1 S.C.R. 938 (the "Carter test")) and to provide context for determining whether Mr. Wiwchar later joined the conspiracy (step two of the Carter test).

- [165] The Crown outlined in their written submissions that, in their view, the Surrey Shooting is relevant for several purposes, including as an act in furtherance of the conspiracy to murder Mr. Dhak; as context to understand the content of PGP messages, as narrative context for the conspiracy to kill Mr. Dhak (demonstrating continuous activity from shortly after the Kelowna shooting); and as further evidence that the conspirators were motivated by revenge for the Kelowna shooting (as evidenced by the targeting of Mr. Khun Khun).
- [166] The Crown contends that, although Mr. Wiwchar was not involved in this shooting, he later became involved in the conspiracy to murder Mr. Dhak of which the Surrey Shooting was an act in furtherance of. The circumstances of the Surrey Shooting, and the messages and texts surrounding its failure, as well as the discussions between the other conspirators (Mr. Alkhalil and Mr. Amero) about putting in more money to hire someone to do it properly, provide context as to how Mr. Wiwchar allegedly became involved in the conspiracy to murder Mr. Dhak. In that respect, then, all the evidence is relevant to establishing the issue of whether there was a conspiracy to kill Mr. Dhak and provides context as to the necessity of Mr. Wiwchar's eventual membership in the conspiracy. The "botched nature" of the Surrey Shooting provides the background and context to how Mr. Wiwchar becomes involved by allegedly joining the conspiracy later on.
- [167] Mr. Wiwchar contends that the evidence about the Surrey Shooting is so prejudicial - describing it as "very scary looking stuff" - that it will overwhelm the jury and bias them against him, particularly in light of the fact that he was not involved in the Surrey Shooting, occurring as it did months before his alleged involvement in the conspiracy. More specifically, Mr. Wiwchar seems to argue that the shooting of Mr. Khun-Khun specifically and photographs of the injuries to Mr. Khun-Khun, as well as the plethora of photographs of the weapons and bullets from the scene, are prejudicial, particularly because he is not charged with conspiring to murder Mr. Khun-Khun. Presumably, Mr. Wiwchar believes that the introduction into evidence of another person who suffered violence in the course of this conspiracy will create moral or reasoning prejudice in the jury, even if he himself is not alleged to have perpetrated the violence.
- [168] Mr. Wiwchar argues, in the alternative, that if the evidence about the Surrey Shooting is determined to be admissible, it needs to be sanitized and reduced to what is truly necessary. He argued that the state of the evidentiary record tendered on the hearing of this application, and presumably to be introduced at trial if the Crown is successful, appeared to be "overkill" in terms of the photographs and text messages the Crown intends to tender.
- [169] Amicus argues that, while the proposed evidence about the Surrey Shooting may well be admissible at step one of the Carter test, to establish existence of the conspiracy, it cannot be directly admissible against a later joining member to establish that individual's membership in the conspiracy, under step two of the Carter analysis.

[170] In that respect then, Amicus cast the issue as being how can the evidence be contained so that there is sufficient context provided for the existence of any conspiracy but that the amount of scary looking circumstances and weapons extrinsic to the acts charged do not overwhelm the reasoning of jury. Essentially, are there ways to minimize the "scary looking stuff" needed to establish the conspiracy and thereby simplify the task for the jury when it comes to the potential mental gymnastics that the second step of the Carter test necessitates.

Discussion

[171] Before analysing the issue of the admissibility of the Surrey Shooting evidence, it is helpful to set out the Carter test which establishes the three analytical steps that the trier of fact must undertake to assess the use of co-conspirators hearsay statements against the accused. They are as follows:

Step One: The trier of fact must consider all of the evidence to determine whether the existence of a conspiracy has been proven beyond a reasonable doubt.

Step Two: The trier of fact considers only the evidence directly admissible against the accused to determine if the accused is probably a member of the conspiracy.

Step Three: Once the first two stages are established, the trier of fact may consider all of the evidence, including the out-of-court acts and declarations of other members of the conspiracy made in furtherance of the conspiracy, to determine if the accused is an actual member of the conspiracy. This determination is beyond a reasonable doubt.

[172] I begin my analysis of the issue around the Surrey Shooting by agreeing with Justice Maisonville that the Surrey Shooting were acts in furtherance of the conspiracy to murder Mr. Dhak. Indeed, counsel for Mr. Wiwchar conceded as much at the First Trial: Extrinsic Misconduct Ruling at para. 63. However, Mr. Wiwchar's counsel contended that the shooting of Mr. Khun-Khun specifically was not an act in furtherance of the conspiracy and therefore was extrinsic misconduct. Justice Maisonville did not deal with this latter point directly in her ruling. However, it is fairly clear that the overall circumstances of the shooting were an effort to kill Mr. Dhak, if not exclusively him. That Mr. Dhak was not killed but someone else was injured does not take away from the fact that this event was an act in furtherance of the conspiracy to kill Mr. Dhak. Accordingly, it is not extrinsic misconduct evidence (not least because it is not conduct of Mr. Wiwchar). Rather it is evidence that goes to whether there was a conspiracy: the origins, nature, object and general scope of it. The fact that Mr. Wiwchar is not alleged to have been a member of the conspiracy when the Surrey Shooting occurred does not render this evidence completely inadmissible against him.

[173] While the first sign of Mr. Wiwchar's alleged involvement in the conspiracy does not arise until April 2012, that does not mean that the acts of co-conspirators committed before a specific accused's involvement in the conspiracy are irrelevant or inadmissible. The acts of

others that pre-date an accused's participation in a conspiracy are in fact relevant, material and admissible at step one of the Carter test to establish the "origin, nature, object, and general scope of the conspiracy": *R. v. Loewen*, 1999 CanLII 18745 (MB CA), at para. 20, *Proulx c. R.*, 2016 QCCA 1425 at para. 69, citing *R. v. Container Materials Ltd.*, [1940] 4 D.L.R. 293 (ONSC), *aff'd* [1942] S.C.R. 147.

- [174] As Amicus noted, *Container Materials*, *Proulx*, and other cases cited by the Crown, stand for the proposition that a conspirator can join a conspiracy after the conspiracy has been formed. Evidence of the origin, nature, object and scope of the conspiracy, that is not directly admissible against the accused, is admissible as proof of the existence of the conspiracy but it cannot be used to impute or establish probable or actual membership of a particular accused.
- [175] However, the courts have subsequently noted that the trier of fact is not required, at step two of the Carter test when assessing the accused's probable membership in the conspiracy, to look at the evidence directly admissible to the accused in a vacuum. In *R. v. Wang*, 2013 BCCA 311, the Court of Appeal held, at para. 53, that the trier of fact is not limited to the bare conversation involving the accused without the context behind the conspiracy.
- [176] Therefore, while only evidence that is directly admissible against the accused can be used to determine an accused's probable membership at step two of the Carter analysis, contextual evidence about the origin, nature, object and general scope of the conspiracy can be used to provide the context for the evidence directly admissible against an accused at step two. However, as the conduct in issue becomes more remote to when an accused is said to have joined the conspiracy, the contextual value at step two of the Carter analysis may well diminish.
- [177] Viewed in this light, the evidence of the Surrey Shooting is admissible as acts in furtherance of the conspiracy to establish the existence of the conspiracy at step one and possibly to provide context to the evidence directly admissible against Mr. Wiwchar at step two of the Carter test. It is also not extrinsic misconduct evidence as it is not conduct of the accused.
- [178] However, as Amicus noted, the question then becomes how much evidence about the conspiracy is too much and what needs to be done to avoid both overwhelming the jury in its task and possibly sidetracking them from the real issue: was Mr. Wiwchar an actual member of the conspiracy? Essentially, Amicus submits that the danger of both moral and reasoning prejudice coming into play in the jury's assessment will rise with the admission of more evidence about acts in furtherance of the conspiracy where individuals were harmed.
- [179] In embarking on a general prejudicial effect vs. probative value analysis of the evidentiary record of the Surrey Shooting as tendered by the Crown on this hearing, I note that the evidence about the Surrey Shooting is highly probative to establishing the existence of a conspiracy and the need, in the minds of Mr. Alkhalil and Mr. Amero, to hire a better hitman than the one who "botched" the Surrey Shooting in September 2011. The text

messages surrounding the "botched shooting" are not the "scary" part and they are relevant to the evolving conspiracy.

- [180] Insofar as the prejudicial effect of this photographic evidence is concerned, I do not fully disagree with Mr. Wiwchar's concerns. When the full evidentiary picture of the Surrey Shooting, as adduced in the materials filed on this application, is examined - the imagery of bullets everywhere, a shot up vehicle, and two intimidating firearms - does appear to have an element of "overkill". Many of the photographs are duplicative of each other. The evidentiary force created through repeated images is potentially prejudicial and unnecessary, particularly since Mr. Alkhalil and Mr. Amero are no longer on the indictment and these acts in furtherance of the conspiracy occurred before Mr. Wiwchar allegedly joined the conspiracy. To that end, the Crown can certainly significantly reduce the number of photographs it tenders and still achieve their stated goal of introducing the Surrey Shooting. In the end, with limitations on the number of photographs addressing the scene that the Crown can adduce about the Surrey Shooting, the probative value of this evidence exceeds the prejudicial effect of this evidence and so it is admissible at the trial.
- [181] Finally, the jury can, and will, be instructed on the limits to which this contextual evidence is useable - i.e. evidence going to prove the existence of a conspiracy (step one of the Carter test) and to possibly to provide context to the conspiracy when assessing whether Mr. Wiwchar was a member of the conspiracy.
- [182] A further related issue that Mr. Wiwchar has alluded to from time to time is that of abandonment of the conspiracy. If Mr. Wiwchar were to make an admission to that effect, the Surrey Shooting might not be so compelling or perhaps even necessary. This is not to suggest Mr. Wiwchar should necessarily go down that road. It is only to note that, depending on what the defence is to this count on the indictment, the probative value of the evidence might diminish considerably. For now, however, it is relevant and material to the issues in this trial and is admissible.

Conclusion

- [183] Insofar as the extrinsic misconduct evidence is concerned, it is also important to recall that where such evidence is admitted, the jury will be instructed on the permissible use of the evidence and cautioned about its prohibited use: Chizanga, at para. 31. In other words, the jury will receive limiting instructions on the permissible and impermissible use of the evidence both at the time the evidence is introduced and in the final instructions.
- [184] I summarize my conclusions on this application as follows:

The applicability of s. 591(4.2) of the Code

[185] Section 591(4.2) of the Code applies in respect of the prior rulings that Maisonville J. made addressing various facets of extrinsic misconduct evidence that are in issue on this application. Mr. Wiwchar has failed to rebut the presumption of their binding nature and has not established that it would be in the interests of justice to assess this evidence *de novo*.

The evidence about Alkhalil and luxury vehicles

[186] The evidence about Mr. Alkhalil's affinity for Lamborghini's is not extrinsic misconduct evidence insofar as Mr. Wiwchar is concerned. It is relevant and material evidence that addresses user identification issues in this trial. It is admissible.

The evidence about the financial means of Alkhalil and Amero

[187] The evidence about the financial means of Mr. Alkhalil and Mr. Amero is not extrinsic misconduct evidence insofar as Mr. Wiwchar is concerned. It is relevant and material evidence that addresses the fact that they had the means to hire a hitman. This evidence is admissible.

The firearms and items seized at the Surrey Safehouse

[188] The evidence about the firearms and ammunition seized from the Surrey Safehouse is admissible. Its probative value far exceeds its prejudicial effect.

The evidence of Wiwchar paying for items with bundles of cash and possessing large amounts of cash

[189] The evidence about Mr. Wiwchar paying for items with bundles of cash and possessing large amounts of cash is not extrinsic misconduct evidence. In the event that it could be characterized as extrinsic misconduct evidence, its probative value far exceeds its prejudicial effect. It is admissible.

The evidence of Wiwchar gambling at the casino

[190] The evidence concerning Mr. Wiwchar gambling at the Edgewater Casino is not extrinsic misconduct evidence. In the event that it could be characterized as extrinsic misconduct evidence, its probative value far exceeds its prejudicial effect. It is admissible.

The evidence about Wiwchar's arrest in Toronto on June 21, 2012

[191] The evidence about Mr. Wiwchar's arrest in Toronto is not extrinsic misconduct evidence. In the event that it could be characterized as extrinsic misconduct evidence, its probative value far exceeds its prejudicial effect. It is admissible. To be clear, the fact that Mr. Wiwchar was arrested in Toronto and four cellphones were found when he was arrested is

what is admissible. The fact that Mr. Wiwchar was arrested at gunpoint for a different murder is irrelevant and immaterial. Accordingly, that limited aspect - reference to him being arrested at gunpoint for a different murder - is inadmissible.

The evidence about the Surrey Shooting on September 16-17, 2011

[192] The evidence about the Surrey Shooting on September 16-17, 2011, is evidence about acts in furtherance of the conspiracy to murder Mr. Dhak, not extrinsic misconduct evidence. It is relevant and material to the first step in the Carter analysis of whether there was a conspiracy and therefore is admissible. It may also have a limited role to play in providing context at step two and three of the Carter test.

"Ker J."

- [1] The one exception relates to an aspect of the Surrey Shooting incident which will be dealt with later in these reasons.
- [2] The Extrinsic Misconduct Ruling addressed the Crown's application to adduce several categories of evidence that might be characterized as extrinsic misconduct evidence: (i) the Kelowna Shooting of August 14, 2011; (ii) Wolfpack Evidence; (iii) Acts in Furtherance of the Conspiracy to Murder Mr. Dhak; (iv) Possession of Firearms by Wiwchar; (v) the Criminal History of the Accused (both Amero and Wiwchar); (vi) Alkhalil's Traveling to Vancouver in January 2012; (vii) Items Seized at the Montreal Search.
- [3] The Surrey Safehouse Ruling addressed Mr. Wiwchar's application to have Maisonville J. revisit her earlier ruling on extrinsic misconduct and exclude the evidence of firearms and associated ammunition seized from the Surrey Safehouse.
- [4] The Toronto Surveillance Ruling addressed Mr. Wiwchar's application to have Maisonville J. limit the extent of the evidence the Crown could adduce in relation to surveillance of him by the Toronto Police Service in May and June 2012.
- [5] The Money in the Montreal Penthouse Ruling addressed the ability of the Crown to elicit evidence from Det. Wu about seizing \$8,500 in cash from the suite that Alkhalil and Amero resided in. An earlier ruling had excluded the photograph of the money as the prejudicial effect of it exceeded its probative value.
- [6] The Arrest of Wiwchar Ruling dismissed Mr. Wiwchar's Charter challenge to his arrest in Toronto.
- [7] Although nine categories of evidence were enumerated in NOA 220, two were removed from consideration during the course of the hearing of the application: (i) the Crown agreed that it would remove the portion of an earlier admission about Mr. Wiwchar and his girlfriend being asked by the police to leave an Earl's restaurant on January 12, 2012; and, (ii) Mr. Wiwchar withdrew his challenge to the admissibility of the extensive evidence of surveillance and alleged countersurveillance measures by him as observed by various

members of the Vancouver Police Department ("VPD") Strike Force and other police agencies.

[8] 1st Sess, 41st Parl, 2011 (with short title: Fair and Efficient Criminal Trials Act, 2011 S.C., c. C-16).

[9] "Bill C-2, An Act to amend the Criminal Code (mega-trials)", 2nd Reading, House of Commons Debates, 41-1, No 10 (16 June 2011) at 1225 (Hon. Kerry-Lynne D. Findlay).

[10]"Bill C-2, An Act to amend the Criminal Code (mega-trials)", 2nd Reading, House of Commons Debates, 41-1, No 10 (16 June 2011) at 1225-1240 (Hon. Kerry-Lynne D. Findlay).

[11] At para. 21 of Chizanga, the majority in the ONCA included an explanation about the terms "prior discreditable conduct" and "live conduct" in a footnote, stating: "We acknowledge that Handy did not employ this "Prior Discreditable Conduct/Live Conduct" terminology in its analysis of the proper methodology for determining the probative value of evidence of prior disreputable conduct. We utilize this terminology in our discussion of the applicable governing principles because we believe it provides a useful shorthand that assists in distilling and clarifying the practical application of the Handy framework."

[12] R. v. Alkhalil, 2023 BCSC 1668 (unpublished).

[13] References to the exhibits supporting these assertions have been omitted for ease of reading.

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