

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Delorey, 2016 NSPC 71

Date: December 9, 2016

Docket: 2931931 to 2931937

Registry: Halifax

Between:

Her Majesty the Queen

V.

Vanessa Delorey and James Melvin

DECISION ON VOIR DIRE

Judge: The Honourable Judge Marc C. Chisholm

Heard: November 16, 2016

Decision: December 9, 2016

Charge s. 5(2) x2; 4(1) x2 *Controlled Drugs and Substances Act*

Counsel: Rick Woodburn and Christine Driscoll, for the Crown
Patrick MacEwen, for the Defendant, Melvin
Luke Craggs, for the Defendant, Delorey

By the Court:

Introduction

[1] The accused are charged that on or about the 18th day of July, 2015, at or near Bedford, Nova Scotia, did, unlawfully have in their possession for the purpose of trafficking, Cocaine, a substance included in Schedule I of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and did thereby commit an offence contrary to section 5(2) of the said *Act*. And further that they at the same time and place aforesaid, did unlawfully have in their possession, not in excess of 30 grams, Cannabis (Marihuana), a substance listed in Schedule II of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and did thereby commit an offence contrary to section 4(1) of the said *Act*. And further that they at the same time and place aforesaid, did unlawfully have in their possession Hydromorphone (dihydromorphinone), a substance included in Schedule I of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and did thereby commit an offence contrary to section 4(1) of the said *Act*. And further that James Melvin at the same time and place aforesaid, did unlawfully have in his possession for the purpose of trafficking, not in excess of three kilograms, Cannabis (Marihuana), a substance included in Schedule II of the *Controlled Drugs and Substances*

Act, S.C. 1996, c. 19, and did thereby commit an offence contrary to section 5(2) of the said *Act*.

[2] The accused elected to be tried in the Provincial Court and pled not guilty. During the Crown case, the Crown sought to introduce similar fact evidence in relation to Mr. Melvin. Counsel for Mr. Melvin opposed the introduction of the similar fact evidence.

[3] The similar fact evidence application was heard on *voir dire*. At the completion of the Crown's case (except for a proposed expert witness), oral submissions on the *voir dire*, were made by Crown counsel and Mr. Melvin's counsel. Written submissions were also made by counsel.

[4] This is the Court's decision on the *voir dire*.

The Law in Relation to "Similar Fact/Act Evidence"

[5] The leading case on similar fact evidence is **R. v. Handy**, [2002] S.C.C. 56 (SCC).

[6] In Hardy the accused was charged with sexual assault causing bodily harm. The circumstances were summarized in the headnote.

[7] At the trial, by jury, the Crown sought to introduce evidence from the accused's ex-wife about seven allegedly similar incidents that occurred during their seven year abusive relationship. The evidence was to the effect that the accused had a propensity to inflict painful sex and when aroused would not take no for an answer. Thus it was tendered to explain why the complainant should be believed when she testified that the assault proceeded despite her protest.

[8] At the trial the ex-wife had testified that she and the complainant had met a few months before the alleged sexual assault took place. The ex-wife told the complainant about the accused's criminal record and the abuse during their marriage. The ex-wife told the complainant that she had received \$16,500 from the Criminal Injuries Compensation Board and agreed when cross-examined that "[a]ll you had to do [to get the money] was say that you were abused". A few months later the complainant met up with the accused at a bar and agreed to accompany him to a motel to have sex.

[9] The trial judge admitted the similar fact evidence. The trial judge ruled that it was not for him to resolve the possibility of collusion between the complainant and the ex-wife. The accused was convicted of the lesser offence of sexual assault. The accused appealed. The Court of Appeal found that the similar fact

evidence was wrongly admitted. The appeal was allowed and a new trial ordered.

[10] The Crown appealed.

[11] The Crown appeal to the Supreme Court of Canada was dismissed. The Supreme Court ruled that the probative value of the similar act evidence could not properly be evaluated without considering the issue of potential collusion. The complainant's credibility and whether she consented were critical issues at trial.

[12] In *Handy*, the Supreme Court of Canada provided a clear statement of the test to be applied by a trial judge and the process of analysis and factors to be considered.

[13] The Court's direction to a trial judge is to begin by recognizing that similar fact evidence is *prima facie* inadmissible. This evidentiary rule is designed to prevent the introduction of evidence as to the accused's general disposition and reasoning prejudice.

[14] The Court also stated that similar fact evidence may, exceptionally, be admitted where the probative value of the evidence outweighs its prejudicial

effect and the evidence relates to specific and not general propensity. The evidence must be relevant to an issue at trial. The issue cannot be framed as broadly as “credibility”.

[15] The burden of proof is on a balance of probabilities and rests on the Crown.

[16] The court must conduct an analysis of the probative value of the proposed similar fact evidence and an analysis of the proposed evidence’s prejudicial effect. Probative value relates to proof of an issue. Prejudicial effect goes to the fairness of the trial.

[17] Similar fact evidence should be admitted when its probative value is “sufficiently great to make it just to admit the evidence”, notwithstanding its prejudicial value. Lord Wilberforce in *Boardman*, at p. 442, also referred to “the interests of justice”. See also *Pfennig, supra*, at pp. 528-29. Justice is achieved when relevant evidence whose prejudice outweighs any probative value is excluded (*R. v. Marquard*, [1993] 4 S.C.R. 223 (S.C.C.), at p. 246) and where evidence whose probative value exceeds its prejudice (albeit in exceptional circumstances) is admitted. Justice includes society’s interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process. A criminal justice system that has suffered some

serious wrongful convictions in part because of misconceived notions of character and propensity should not (and does not) take lightly the dangers of misapplied propensity evidence.

[18] The assessment of the probative value of the proposed evidence must be in light of an issue in dispute at the trial. The probative value analysis includes an assessment of the strength of the similar fact evidence. At par 134, in *Hardy*, the court stated:

134 In the usual course, frailties in the evidence would be left to the trier of fact, in this case the jury. However, where admissibility is bound up with, and dependent upon, probative value, the credibility of the similar fact evidence is a factor that the trial judge, exercising his or her gatekeeper function is, in my view, entitled to take into consideration. Where the ultimate assessment of credibility was for the jury and not the judge to make, this evidence was potentially too prejudicial to be admitted unless the judge was of the view that it met the threshold of being reasonably *capable* of belief.

[19] The court must consider the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused and the connection, if any, of the evidence to issues other than general propensity.

[20] In relation to what factors are relevant to the “connection” of the similar fact evidence to the evidence at trial, the court stated, at para 82:

1. Proximity in time of the similar acts (*D. (L.E.)*, *supra*, at p. 125; *R. v. Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.), at p. 345; *R. c. Huot* (1993), 16 O.R. (3d) 214 (Eng.) (Ont. C.A.) at p. 220;

2. Extent to which the other acts are similar in detail to the charged conduct: *Huot, supra*, at p. 218; *R. v. Rulli* (1999), 134 C.C.C. (3d) 465 (Ont. C.A.) at p. 471; *C. (M.H.), supra*, at p. 772;
3. Number of occurrences of the similar acts: *Batte, supra*, at p. 227-28;
4. Circumstances surrounding or relating to the similar acts (*Litchfield, supra*, at p. 358)
5. Any distinctive feature(s) unifying the incidents: *Arp, supra*, at paras 43-45; *R. v. F. (D.P.)* (1999), 171 Nfld. & P.E.I.R. 183 (Nfld. C.A.), at paras. 104-05; *Rulli, supra*, at p. 472;
6. Intervening events: *R. v. Dupras*, [2000] B.C.J. No. 1513 (B.C.S.C.), at para. 12;
7. Any other factor which would tend to support or rebut the underlying unity of the similar acts.

[21] And at para. 83, the court stated:

On the other hand, countervailing factors which have been found helpful in assessing prejudice include the inflammatory nature of the similar acts (*D. (L.E.)*, at p. 124) and whether the Crown can prove its point with less prejudicial evidence. In addition, as stated, the court was required to take into account the potential distraction of the trier of fact from its proper focus on the facts charged, and the potential for undue time consumption. These were collectively described earlier as moral prejudice and reasoning prejudice.

[22] At para. 26, in **Handy**, speaking in relation to the nature of similar fact evidence, the court stated:

The ex-wife's testimony relates to incidents removed in time, place and circumstances from the charge. It is thus only circumstantial evidence of the matters the jury was called upon to decide and, as with any circumstantial evidence, its usefulness rests entirely on the validity of the inferences it is said to support with respect to the matters in issue.

In discussing the probative value we must consider the degree of relevance to the facts in issue and the strength of the inference that can be drawn. *R. v. R. (J.D.)*, [1987] 1 S.C.R. 918 (S.C.C.), at p. 943

[23] The similar fact evidence need not be conclusive of guilt.

The Trial Evidence

[24] By consent, a registration document for the Howard Johnson Motel, Bedford Highway, was introduced as Exhibit T1. Room #9 was rented under the name of accused, Vanessa Delorey for the period July 17 through 24, 2015.

Cpl. John Berger, RCMP

[25] Cst. Berger testified that, in July 2015, James Melvin Jr., was wanted by police, for the murder of Terry Marriott. On July 18, 2015, the police received information that the accused was staying at the Howard Johnson Motel on the Bedford Highway. Cpl. Berger went to the front desk of the Howard Johnson on the Bedford Highway and confirmed that Room #9 was rented by Vanessa Delorey, girlfriend of Mr. Melvin. He notified the lead investigator who requested a Feeney warrant to enter the premises.

[26] Surveillance of the motel room was initiated.

[27] Before the Feeney warrant was available, Mr. Melvin was seen by other officers exiting the motel room and getting into a motor vehicle. Cst. Berger

and other officers pursued Mr. Melvin to a nearby convenience store where he was arrested.

[28] After the arrest, he and D/Cst. Langille went back to the Howard Johnson motel. Other officers had secured the motel room. He returned to police headquarters.

Cpl. Craig Trudel

[29] Cpl. Craig Trudel was part of the police team who carried out the arrest of James Melvin Jr. after he left the Howard Johnson motel, 636 Bedford Hwy at 8:00 pm, July 18, 2015.

[30] He stated that two or three police vehicles followed the vehicle driven by the accused to a convenience store parking lot of a strip mall at 604 Bedford Highway. He saw Sgt. Astephen go to the driver's door of the vehicle in which the accused was seated in the driver's seat and was the sole occupant.

[31] Sgt. Astephen was heard ordering the accused to keep his hands clear. Cpl. Trudel saw the accused's hands on the steering wheel. An officer smashed the driver's side window of the vehicle in which the accused was seated. Mr. Melvin was then removed from the vehicle and arrested.

[32] Cpl. Trudel “cleared” the vehicle, meaning he checked the back seat and trunk, finding no other person. He was looking for bodies and items in plain view. He did not see the prison packs later found under the driver’s seat.

[33] At 8:15 pm, he attended Room #9 at the Howard Johnson motel on Bedford Highway. He knocked on the door. Vanessa Delorey answered the door. Upon request she stepped out. A few minutes later, he and a second officer entered Room #9 to “clear” it. They did so, finding no one else in the room. He then exited Room #9 remained outside the room maintaining security of it.

[34] While he was in Room #9, he observed, among other things; a crack pipe (depicted in photos 12-13, Exhibit 2); a black cell phone which was “continuously ringing”; seran wrap, not in a box; three pills on a table (photo 17, Exhibit 2); a baseball bat near the door; the television was on; two rolled joints, cannabis marihuana, on table, in tray and a smoked joint; a health card in the name of James Melvin.

[35] He did not detect a smell of cannabis marihuana or cocaine in the room.

[36] On July 19, 2015, at 3:40pm, after having been advised of the discovery of two prison packs under the driver’s seat of the motor vehicle the accused had

been driving, and the illicit drugs found in Room #9 of the Howard Johnson motel, he arrested Mr. Melvin for the current offences.

[37] On cross examination, Cpl. Trudel indicated he had prior dealings with the accused, Melvin, and knew him to be a user of controlled substances.

D/Cst. John Mansvelt

[38] D/Cst. Mansvelt testified that he was one of 5-7 police officers engaged in the apprehension of accused, Melvin, in relation to alleged murder of Terry Marriott.

[39] D/Cst. Mansvelt testified he observed the accused being removed from the vehicle and placed on the ground. The accused was arrested, by him, for the alleged murder of Mr. Marriott.

Cst. Wayne Hunter

[40] Cst. Hunter testified that his role was to secure room #9 of the Howard Johnson motel on the Bedford Highway after the drug officers left the scene. He remained on duty there from 9:00 pm on July 18, 2015 until 3:05 am on July 19, 2015.

[41] During that time, he observed other officers conduct a search of room #9.

No one other than police officers entered the room.

D/Cst. Josh Underwood

[42] D/Cst. Underwood testified that, in July 2015, the police were looking for the accused, Melvin, on a murder charge.

[43] D/Cst. Underwood testified that he talked to Derrick MacPhee, an associate of Mr. Melvin, who was providing information to the police in exchange for immunity on some very serious charges and financial support.

[44] He testified that the police asked Mr. MacPhee to place a call to Mr. Melvin and to try and find out his location. Mr. MacPhee made the call to Mr. Melvin at around 6:45 pm on July 18, 2015. He received a call back. He had a conversation with Mr. Melvin. They had talked previously about Mr. Melvin “doing up a package for him”, “sharing some love” while he, Mr. MacPhee was in the Central Nova Scotia Correctional Centre in Burnside. They talked about who would deliver the package. Mr. MacPhee told the police that during the conversation, Mr. Melvin said that he was at a hotel across from Snake’s place.

Mr. MacPhee knew “Snake” to be the nickname of Gary Boudreau who lived on the Bedford Highway, across from the Howard Johnson motel.

[45] Upon receipt of this information from Mr. MacPhee the police began conducting surveillance of the Howard Johnson motel. An officer went to the motel office and was advised that room #9 in the motel was rented to Vanessa Delorey. Ms. Delorey was known to the police to be the girlfriend of the accused, Melvin.

[46] D/Cst. Underwood testified that shortly before 8:00 pm he observed a female, whom he identified as Vanessa Delorey open the door of room #9. Then a male, identified by him as Mr. Melvin, appeared in the door. Mr. Melvin went out and walked to a parked black Hyunda motor vehicle. He opened the driver’s door, got into the driver’s seat and drove out of the parking lot onto the Bedford Highway. The police pursued. A decision was made to arrest the accused.

[47] The accused pulled up to a convenience store on the Bedford Highway. Police officers pulled in behind.

[48] D/Cst. Underwood testified that, the accused opened the driver’s door. He looked back and saw us approaching. He closed the driver’s door. I proceeded

to the front of the accused's car and pointed my gun at him. I yelled 'you are under arrest'. I could see his body from his elbows and above. I could not see his body below the level of his elbows. Mr. Melvin's hands were out of my view. Mr. Melvin mostly looked at me, but, on two occasions he looked down and tilted his head down. I could not see his hands. I continued to yell directing him to put his hands on the steering wheel. There was a delay of 2 to 5 seconds before he did so.

[49] Sgt. Astephen had gone to the driver's door. He attempted to open the driver's door but couldn't. Another officer smashed the window in the driver's door. The door was opened by the police. Mr. Melvin was removed and put onto the ground where he was arrested.

[50] Within minutes of the arrest, D/Cst. Underwood was advised by Sgt. Astephen that two prison packs had been found under the driver's seat of the black Hyunda. Sometime thereafter he went back to the Howard Johnson motel. The scene was being secured by Cst. Wayne Hunter. There were several other officers present.

[51] On cross-examination, D/Cst. Underwood indicated numerous prior dealings with the accused, Melvin and that, to his knowledge, Mr. Melvin was a drug

user. He believed the accused was a user of prescription pills, alcohol, crack and cocaine.

[52] D/Cst. Underwood stated that Derrick MacPhee was a police informant. He was given immunity on charges including home invasion and robbery. He had been on remand at the Central Nova Scotia Correctional Facility (“CNSCF”) when the police arranged to have him released to their custody to assist in the investigation of the murder of Terry Marriott.

[53] D/Cst. Underwood testified that Mr. MacPhee had provided information to him in the past in exchange for money.

[54] D/Cst. Underwood testified that he did not mention prison packs to Mr. MacPhee before Mr. MacPhee spoke with Mr. Melvin. He stated that the call between Mr. MacPhee and Mr. Melvin was not made while Mr. MacPhee was in the presence of the police. The call was not recorded. The only objective of the call was to locate the accused, Melvin. D/Cst. Underwood instructed MacPhee not to directly ask Melvin where he was staying.

[55] He did not record the words spoken by Mr. MacPhee in relation to the drug package as, at the time, he viewed them as not relevant. The objective was to locate Mr. Melvin to arrest him on the murder charge. They did not expect to

arrest him for a drug offence. He said that MacPhee referred to Melvin delivering to him a prison pack or care package, or showing him some love.

[56] He agreed the prison packs found under the driver's seat of the black Hyundai were not visible without bending down to look under the seat. He agreed that he'd never previously seen Mr. Melvin operating a black Hyundai.

Derrick MacPhee

[57] Mr. MacPhee admitted to having a lengthy criminal record which includes convictions for very serious offences including, theft of cars; illegal possession of guns; shooting someone; firebombing; shooting at a house and a car; and numerous breaches of orders (criminal record was marked as Exhibit #7).

[58] He has served time in a federal penitentiary.

[59] He is currently pending trial, and out on bail, on a charge of break and enter into a commercial property and a breach of his curfew condition.

[60] Mr. MacPhee testified that for years he has provided information to the police for money. Also, on a prior occasion he gave information to the police as part of a deal to gain an advantage for himself in relation to a charge he was facing of firebombing. When he attended court as a witness, he recanted his

statement. He admits he did not tell the truth while under oath. He admits to having committed perjury.

[61] Mr. MacPhee testified that around April 2015 he was arrested and charged with home invasion and robbery. He initially lied to the police denying any involvement in the offences. He testified that he was involved in the offences, but claimed he stayed in the car, (didn't go into the building). He realized he was looking at a long jail sentence, if convicted. He spoke with the police and offered to provide information concerning James Melvin's involvement in the death of Terry Marriott, in exchange for immunity on the home invasion and robbery charges and the murder of Terry Marriott.

[62] He signed an agreement to provide information to the police in relation to the murder of Terry Marriott in exchange for immunity. He gave a statement to police detailing what he knew about the murder. He was accepted into the federal witness protection program. Conditions of the program included a requirement that he not contact people back home or his prior criminal associates. He admitted violating those conditions and consequently was dropped from the federal witness protection program. He then entered into a similar deal with the Halifax Police Service. Under the terms of the agreement

with the Halifax Police Service, he and his common-law partner were each to receive \$1,500 every month. Additionally, he was to get a job, not associate with criminals, not to incur additional offences, etc. He is required to attend court, when necessary and testify consistent with his statement to the police. He agreed that he is being paid for his testimony.

[63] Mr. MacPhee's evidence was unclear regarding the timing of events surrounding the break and enter charge he is now facing. Initially he stated that upon his arrest on the charge of break and enter the RCMP immediately dropped him from the witness protection program. Later he indicated that he was dropped out of the federal witness protection program and entered the Halifax police program six days before being charged with the break and enter.

Mr. MacPhee's evidence relating to the charges before the Court

[64] Mr. MacPhee testified that while in custody at the CNSCF at Burnside on the home invasion, robbery charges, in July 2015, he tried to arrange to have a package of drugs delivered to him in the jail. He said he always did this when he was in custody. He testified that the police did not ask him to contact Mr. Melvin to arrange for drugs to be sent to him in jail.

[65] Mr. MacPhee testified that he contacted the accused, Melvin, to send a package to him in the correctional centre. He stated that they discussed that a guy on the range, ie, in the correctional centre, was about to be released. The man, Richard, was to go to see Mr. Melvin, to pick up the package. Then, he was to be arrested for shoplifting so he'd be taken back to the correctional centre with the package of drugs hidden in his body. Mr. Melvin would prepare or have prepared a "package". Mr. MacPhee said he didn't know exactly what would be in the package. He said it could be tobacco, pills and probably weed.

[66] Mr. MacPhee said he kept calling Mr. Melvin from the phone at the correctional centre to see if the package for him was ready.

[67] MacPhee testified that on July 18, 2015 his police contact asked him to "reach out" to Mr. Melvin to try to find where Mr. Melvin was located. Mr. MacPhee agreed to do so. He initially spoke to Mr. Melvin's girlfriend, Vanessa Delorey, and later to Mr. Melvin.

[68] He stated that during the conversation Mr. Melvin told him he had something for him. Mr MacPhee said he told Mr. Melvin that he was to be, or had been transferred to the correctional centre in Yarmouth. He said Melvin asked what he wanted him to do with the package. They agreed to go ahead

with the plan but have the package delivered to “C.J.” in the Central Nova Scotia Correctional Facility. “CJ” is Clinton Christie who is a co-accused of Mr. MacPhee on the home invasion, robbery charges. Mr. MacPhee understood the delivery would be within the next day or two.

[69] Mr. MacPhee also testified that Mr. Melvin told him that he was staying across from Snake’s house. Mr. MacPhee knew the person nicknamed Snake and knew where he lived, which was on the Bedford Highway across from the Howard Johnson motel. Mr. MacPhee passed the information on to the police. He became aware of the arrest of Mr. Melvin a couple hours after he spoke to him.

[70] Mr. MacPhee was shown Exhibit 4, the two items found under the driver’s seat of the black Hyundai which Mr. Melvin had driven. He said he was familiar with such items and had made plenty himself. He said the items were made up to be sent into the jail.

[71] Mr. MacPhee stated that his evidence was the truth. He acknowledged that he had lied under oath in the past, breached numerous release orders and sentence orders, broke his agreement with the RCMP, breached his agreement with Halifax police, and committed many very serious offences involving guns

and violence, committed offences of dishonesty including pressing counterfeit money.

[72] Mr. MacPhee was an unsavory witness. The credibility of his testimony is a reasonably anticipatable issue at the trial. The finding of Mr. Melvin at the location where Mr. MacKay stated Mr. Melvin told him he was staying, provided some objective corroboration of that aspect of his evidence. The locating of Exhibits 4 and 5 in the vehicle driven by Mr. Melvin provided some objective corroboration of Mr. MacKay's evidence that Mr. Melvin was going to send him a "prison pack".

D/Cst. Parker MacIsaac

[73] D/Cst. Parker MacIsaac testified that he was a participant in the surveillance regarding James Melvin Jr. and an observer of his arrest.

[74] After the arrest of Mr. Melvin, he searched the vehicle driven by the accused, Melvin. He testified to locating two prison packs under the driver's seat, each one 3-4 inches long, 2 inches thick, cylindrical in shape and wrapped tightly in cellophane. They were not visible until he bent down and looked under the seat.

[75] At his direction, one of the prison packs was cut open. On the basis of appearance and smell he believed the contents to be cannabis marihuana.

[76] He testified that the papers for the rental car, the car driven by Mr. Melvin, were not in Mr. Melvin's name.

D/Cst. Pat Tucker

[77] D/Cst. Tucker took the photos in Exhibit 2.

Cst. Brock Brooks

[78] Cst. Brooks testified that he participated in the arrest of Mr. Melvin.

[79] He testified to observing Sgt. Astephan go to the driver's window of the car Mr. Melvin was driving. He heard Sgt. Astephan demand that Mr. Melvin open the door and banged on the driver's window. Mr. Melvin did not do so. He ran to the driver's door and, using a window punch, broke the driver's window. He saw both of Mr. Melvin's hands in his lap area. He grabbed both of Mr. Melvin's wrists. He released Mr. Melvin's wrists when the driver's door was opened and the accused was removed from the car.

[80] On cross-examination, Cst. Brooks indicated he didn't recall other officers demanding the accused put his hands on the steering wheel. He didn't recall seeing the accused's hands on the steering wheel. Before getting to the driver's window he didn't see the accused's hands. The other officers were at the vehicle 6-8 seconds before him. At no time did he see anything in the accused, Melvin's hands.

D/Cst. Curtis Osmond

[81] D/Cst. Osmond testified that, on July 18, 2015, he was asked to prepare an information to obtain a search warrant to search room #9 of the Howard Johnson motel at 636 Bedford Highway for illicit drugs. He did so and was granted a warrant to search the premises. A search was conducted. Found on the premises searched was hydromorphone, cocaine and cannabis marihuana. He detached the items found and the location from which they were seized.

[82] On July 31, 2015, he arrested Mr. Melvin on the current charges.

[83] On June 9, 2015, D/Cst. Osmond attended the Halifax airport car rental outlet from which the vehicle operated by Mr. Melvin had been rented. He

obtained a copy of the paperwork. The renters were Greg and Joyce Lewis, persons unknown to him.

[84] He testified that on July 31, 2015, Ms. Delorey was arrested and charged for the charges she is presently facing, after she voluntarily came to the police station. Those charges were withdrawn by the Federal Crown. On November 17, 2015 she was re-arrested and re-charged by the Provincial Crown.

Cst. John Brown

[85] Cst. Brown testified that he was the exhibit officer for the investigation of the charges before the Court.

[86] His evidence detailed the items seized by the police from room #9, 636 Bedford Highway when those premises were the subject of a warrant search on the evening of July 18, 2015 and from the motor vehicle operated by the accused, Mr. Melvin, which was searched incident to his arrest.

[87] The items seized from the vehicle included the two prison packs found under the driver's seat. An analysis of the contents of those items revealed them to contain 24 grams of cannabis marihuana (Exhibit 5) and tobacco (Exhibit 4) respectively.

[88] Items seized from the hotel room included a cell phone (Exhibit 9); a set of Triton scales in working condition (Exhibit 10) found to have a trace amount of cocaine; two pieces of crack cocaine found on the bedside table (Exhibit 11); one piece of crack cocaine (Exhibit 12); \$240 Canadian cash; three hydromorphone pills (Exhibit 14); a bag containing cannabis 8 grams of marihuana (Exhibit 8); a small piece of cannabis resin (hash) (Exhibit 16); a box of tin foil (Exhibit 17); a roll of saran wrap (Exhibit 18); a plastic grinder with trace elements of hydromorphone (Exhibit 19).

[89] Not seized was a crack pipe seen on the bed; a prescription bottle and pills; a health card in the name of James B. Melvin; drug user paraphernalia (papers) on a tray on desk table; a baseball bat seen behind the door; bristle which could be used to load a crack pipe.

Evidence of Similar Acts

Incident #1 – September 23, 2009

Tyrone David

[90] Tyrone David testified that, as of September 2009, he was a Sheriff with the Nova Scotia Department of Justice. He said he “got in trouble”. He explained

that he was convicted of smuggling illicit drugs into the Central Nova Scotia Correctional Facility in Burnside, contrary to s. 5(2) of the *Controlled Drugs and Substances Act* and was sentenced to 4 years and 9 months imprisonment. It was suggested to him that the date of the offence was October 9, 2009, but he didn't remember the date.

[91] In relation to the offence for which he was sentenced, he testified that he was contacted by Kathleen Kierans who hired him to deliver packages into the correctional centre for money. He said the packages were supposedly for "Mr. Melvin".

[92] Mr. David was shown video recordings of the cell and washroom areas at the Dartmouth Provincial Courthouse made on September 23, 2009.

Video #1

[93] Video #1 shows a sheriff checking the cell washroom area and then leaving shortly after 8:00 am. Between 8:00 am and 9:00 am, there is no activity in the washroom. Between 9:00 am and 9:52 am, a number of people are seen entering and leaving the washroom area. There is nothing suspicious about their behaviour.

[94] At 9:52 am, a black man in a sheriff's uniform entered the washroom/cell area. There is no one else in the room. Mr. David testifies that it "looks like me" and it "looks like I was putting a package there". The person in the video can be seen to be carrying a small white package in his left hand. He goes to the toilet area and puts the item in a "cubbyhole" to the side of the toilet. Cubbyhole was the term used by Mr. David. The sheriff immediately exited the washroom.

[95] At one point in his evidence, Mr. David said he put the item in the cubbyhole, but later he said he could not recall this specific incident. His evidence was inconsistent. Mr. David said he had no idea what was in the packages he delivered for Ms. Kieran.

[96] At 9:54 am, a male is seen entering the cell washroom area.

[97] Mr. David testified that he couldn't identify the person. The man had on a ball cap. He kept his head down. He wore a burgundy jacket with white around shoulders, dark pants and dark shoes. The man was Caucasian. That person was later identified by another witness as the accused, Mr. Melvin.

[98] The man went to the toilet area and reached to the side of the toilet to where Mr. David had apparently placed an item. The man withdraws his hand and

puts his hand to his pants. The man remained in the area of the toilet and sink for more than ten minutes. He can be seen taking a lot of toilet paper off the roll and doing something in his waist area. There was evidence that Mr. Melvin had a colonoscopy bag.

[99] At 10:08 am, the man exited the washroom.

[100] Video #1 continues to 4:20 pm. During that time several other people entered and used the washroom, and left. No one reached down to the side of the toilet.

Video #2

[101] Mr. David was shown Video #2 which, like Video #1, is time stamped September 23, 2009. Mr. David stated he believes the area depicted in the video is the Dartmouth Provincial Courthouse, cell area.

[102] At 7:59 am, the video shows a sheriff's officer, not Mr. David, checking the cell area "for drugs or whatever", according to Mr. David.

[103] By agreement, the video tape was advanced to 10:10:20 am.

[104] At that time, two sheriff's officers are in the cell, cleaning the floor.

[105] At 10:12 am, both sheriffs leave the cell.

[106] Shortly thereafter, the man in burgundy and white jacket identified as Mr. Melvin, is seen in the cell with a number of other prisoners. Mr. Melvin is seen in the washroom of the cell area with his hands in his waist area and under his shirt. Later he can be seen cleaning an object in the sink. Mr. Melvin is facing the washroom wall with his back to the camera. He is there for some eight minutes, occasionally looking over his shoulder. Other prisoners are seen pacing and looking out the window in the cell door as Mr. Melvin is doing whatever he's doing in the washroom area.

[107] At 10:27 am, the accused reached to the top of the dividing wall of washroom area. He appeared to put a small item on top of the wall. One man came over and reached up to that spot. The man appeared to take an item. This action was repeated 3-4 times with a different person each time, reaching up and appearing to take something left on that spot by Jimmy Melvin, the accused.

[108] At 10:30 am, the video ended.

[109] Mr. David was shown Exhibit 2, photo 18. Photo 18 is of the “prison packs” found under the driver’s seat of the car driven by Mr. Melvin. Mr. David stated “looks the same” as what he brought into the jail.

[110] On cross-examination, Mr. David agreed that some “contraband” in jail is not illegal, eg. tobacco. He agreed tobacco in jail was common to see. Mr. David testified that, on the video, he could not see the accused, Mr. Melvin, with drugs in his possession. Mr. David agreed that Exhibit 2, photo 18 was commonly called a “prison pack” carried in a body cavity.

[111] Mr. David was clearly a reluctant witness. He attempted to minimize his conduct. Some of his answers were evasive. His evidence that he had no idea what was in the packages which he brought into the correctional premises was not believable. He was, at best, wilfully blind, as to the contents of the prison pack he brought into the correctional facility on September 23, 2009..

Assessment of the evidence of Incident #1

[112] Video #1, supports a conclusion that the Sheriff’s Officer depicted is Tyrone David. The video is strong evidence that Mr. David placed an item in a cubbyhole beside the toilet.

[113] Videos #2 and #3 depict a man wearing a baseball cap and burgundy and white jacket. That man was identified by former Corrections Officer Janice Berry as James Melvin. She had numerous contacts with Mr. Melvin. Based upon the closeness in time of Videos #2 and #3, the closeness of the locations depicted and the similarity of the clothing, I have no doubt the person in the burgundy and white jacket in each video was the same person. Further, the evidence is strong that the person is James Melvin Jr.

[114] On video #2 at 9:54 am, less than two minutes after Mr. David placed a package by the toilet, the accused, Mr. Melvin, entered that washroom shown on video #1, went to the toilet, reached down to the same side of the toilet to the same area where Sheriff Officer David had left a package. Mr. Melvin can then be seen with something in his hand and puts his hands to his waist area. He remains in the washroom until 10:08 am.

[115] Whatever else he may be doing during that time, he appears to be adjusting/cleaning his colonoscopy bag.

[116] This video provides evidence of a pre-arranged delivery of contraband to an agreed upon location.

[117] On video #3 at 10:12 am, the accused is in the cell area at the same court facility (believed to be Dartmouth Provincial Court) on September 23, 2009. He goes to the washroom area and his hands are working with something. He is clearly shielding his activities from the camera in the cell. He, several times, raised his arm and appears to place something on the top of the washroom divider. In turn, the other prisoners come over, reach up and appear to take something from that spot. In my view, it would be reasonable to conclude that the accused distributed contraband to the other prisoners. Contraband that was delivered to the cell washroom area by Tyrone David and picked up by Mr. Melvin.

[118] Exactly what was in the package is unproven. However, given the activities of Mr. David and Mr. Melvin, a reasonable conclusion is that the package contained contraband.

Incident #2

Correctional Officer Ashley Brown

[119] Ashley Brown, a former Corrections Officer at the CNSCF testified that, when the accused was in the correctional facility, the accused asked him to

bring a package into the facility for money. He did not recall the date. He reported the incident. The report of the incident suggests the date was January 11, 2010.

[120] On cross-examination, Mr. Brown acknowledged there was no discussion of the contents of the proposed packages and it could have been anything that Mr. Melvin wanted to be brought into the institution.

[121] He was then asked about the circumstances of his leaving his employment at the correctional centre. He became defensive and evasive. His responses became curt.

[122] The Crown consented to introduction of the criminal record of Ashley Brown, marked Exhibit V5. The record shows that during the time he was employed as a Corrections Officer, between April 2011 and November 16, 2011 he committed an offence of breach of trust by a public officer contrary to s. 122 of the *Criminal Code*. This offence of dishonesty must be considered when accessing the credibility of Mr. Brown's evidence.

Incident #3

Janice Berry

[123] Janice Berry testified that for 13 years she worked as a Corrections Officer at the CNSCF in Burnside, Nova Scotia.

[124] In that capacity she met the accused James Melvin Jr. whom she identified in court.

[125] She testified that around November 2009 the accused was in a segregation cell in the correctional facility. She saw him, through the cell window, smoking a joint.

[126] On a second occasion, in August 2010, a search of the accused, Melvin's, jail cell in segregation resulted in the discovery of a cannabis marihuana joint and a red pill.

[127] She testified having seen "prison packs" very similar to those depicted in Exhibit 2, photo 18 "many times" during her period of work at the CNSCF, but did not agree it was rampant. She had never seen the accused James Melvin Jr. in possession of a prison pack. While Mr. Melvin was in segregation, all his movements were escorted.

[128] She testified that prison packs were usually cannabis marihuana and tobacco.

[129] She gave no evidence how Mr. Melvin came into possession of the drugs on either occasion.

Incident #4

[130] Exhibit 3 is a transcript of the sentencing of James Melvin Jr. for the offence of conspiracy to traffic cocaine into the CNSCF in 2002

[131] Exhibit 4 is a transcript of the Court of Appeal's decision on Mr. Melvin's appeal of his sentence on the conspiracy to traffic cocaine offence of 2002.

[132] In Exhibit 3, at p. 57, the sentencing judge, His Honour Judge William Digby, stated:

“...In passing sentence upon the individuals, one has to bear in mind that one is sentencing them for what they have done principally and not mainly for who they are. In this particular event we have Mr. Melvin setting into play a chain of events which involves another – a number of other people being involved in the offence of trafficking in cocaine. If successful, it would have resulted in drugs being in a prison, drugs being transferred in part to an individual by the name of Dino who could do with them as he chose. Whether he paid for them or not is not particularly relevant. The difficulty in prisons is that drugs are very expensive. They create a demand for money. They create a sense of indebtedness by users to other inmates. Because of their value, they create the potential for violence in the institution by those who are stronger trying to take them from those who are weaker.”

[133] At p. 33, counsel for Mr. Melvin summarized the case thus:

“We’re talking about a one-way conspiracy here. It’s a conspiracy to traffic. It’s a conspiracy to make arrangements to have drugs delivered to him. And apparently there is an indication that they were.”

[134] I conclude that these transcripts, Exhibits 3 and 4, provide clear evidence that the accused, who, at the time, was in custody at the federal penitentiary, at Renous, did, by telephone, direct a Mr. Jackson to deliver a package of “seven at 7 o’clock and one hundred dollars” to him in the prison. “Seven at 7 o’clock” meant seven grams of cocaine. The package was to be picked up by a man named Billy Colson who was to deliver it to the penitentiary.

Issue Identification

[135] The accused is charged with two counts of possession of a controlled drug and two counts of possession of a controlled drug for the purpose of trafficking.

[136] In relation to the elements of the offences, the identity of the accused is not in issue, nor is the time, date and place of the alleged offences. The nature of the items located by the police does not appear to be in dispute.

[137] The Crown urged the Court to find that the similar act evidence was relevant to four trial issues:

1. Mr. Melvin’s intent to traffic;

2. Knowledge of both the drug trade but “specifically” knowledge of trafficking drugs and illegal contraband within the prison system;
3. The possession of the drugs for the purpose of trafficking; and
4. Mr. Melvin’s actual possession and control of the drugs.

[138] In **Handy**, supra, at para 74, the Court stated:

“The issues in question derive from the facts alleged in the charge and the defences advanced or reasonably anticipated.”

[139] I find that in relation to the drugs found in Room #9 of the Howard Johnson motel and, in relation to the “prison pack” found under the driver’s seat of the car driven by the accused, it is reasonable to anticipate that the element of the accused being in possession of the drugs is in issue. Further, if the accused is found to be in possession of some or all of those drugs, his intention vis-à-vis the drugs, is in issue. I find that the accused’s alleged knowledge of the trafficking of drugs and contraband into a correctional facility is a related trial issue in this case.

[140] Possession is defined in s. 4(3) of the *Criminal Code* (incorporated into the *Controlled Drugs and Substances Act* by s. 2 of the Act):

4. (3) Possession

(3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

R.S., 1985, c. C-46, s. 4; R.S., 1985, c. 27 (1st Supp.), s. 3; 1994, c. 44, s. 3; 1997, c. 18, s. 2; 2008, c. 18, s. 1.

[141] Traffic is defined in s. 2 of the *Controlled Drugs and Substances Act* as:

Traffic means, in respect of a substance included in any of Schedules I to IV,

(a) to sell, administer, give, transfer, transport, send or deliver the substance,

(b) to sell an authorization to obtain the substance, or

(c) to offer to do anything mentioned in paragraph (a) or (b),

otherwise than under the authority of the regulations. (traffic)

[142] “Sell” is defined in s. 2 of the *Controlled Drugs and Substances Act* as:

sell includes offer for sale, expose for sale, have in possession for sale and distribute, whether or not the distribution is made for consideration; (vente)

[143] Possession entails elements of knowledge and control which must be proven by the Crown.

Assessment of the Similar Act evidence in relation to the Issue of Possession

Incident #1

[144] The videos and the evidence of Mr. David (to the limited extent that his evidence enhanced the video evidence), provides strong evidence that on September 23, 2009, Mr. David, then a Sheriff's officer, delivered a package containing contraband drugs to the Dartmouth Courthouse cells, washroom area. Further, that Mr. Melvin was aware of the plan to deliver the contraband to that location on that date and, within minutes of the package being delivered by Mr. David, Mr. Melvin went and retrieved it from appears to have been an agreed upon hiding spot in the washroom. Minutes later, Mr. Melvin was back in the main cell area distributing contraband to the other prisoners. It is reasonable to conclude that it was the contents of the package delivered by Mr. David that was being distributed to the others in the cell.

Similarities/Connections

[145] The evidence of Incident #1 is similar to the factual circumstances of the present case in that:

1. It strongly supports a conclusion that Mr. Melvin was involved in a scheme to have contraband delivered into a corrections facility;

2. The contraband was a small package;
3. Another person, not Mr. Melvin, was employed to bring the drugs to the correctional facility; and
4. According to Mr. David, the packages he delivered to the correctional facility were of a similar size, shape and packaging as Exhibits 4 and 5 in the present case.

Dissimilarities

[146] The circumstances are dissimilar in that:

1. In Incident #1 the contraband was to be delivered to the accused who was in custody, as opposed to contraband being sent, by the accused, to someone in custody;
2. In Incident #1 a corrections officer was employed to transport the drugs into the correctional facility, not another prisoner;
3. In Incident #1, the contents of the package were unknown; and
4. The package was not delivered to the correctional facility in a body cavity.

[147] Incident #1 is alleged to have occurred in September 2009, more than 5 ½ years before the current charges. It is not closely proximate in time to the current allegations.

Incident #2

[148] If the evidence of Mr. Ashley Brown is accepted, in my view, a reasonable inference to be drawn from the evidence is that Mr. Melvin was seeking his assistance to bring contraband into the correctional facility.

[149] Mr. Brown gave clear, simple evidence of his interaction(s) with Mr. Melvin. He filed a report recording the incident. However, he was evasive and defensive when asked questions about the circumstances of his leaving his employment, and he has a conviction for breach of trust by a public officer during the time of his employment as a corrections officer. The credibility of his evidence is an issue.

[150] In **R. v. Handy**, supra, at para 134, the Court stated:

Where the ultimate assessment of credibility was for the jury and not the Judge to make, this evidence was potentially too prejudicial to be admitted unless the Judge was of the view that it met the threshold of being reasonably capable of belief”

[151] While the former corrections officer's evidence raised concern regarding his credibility, the fact that he did make a report of the incident involving Mr. Melvin immediately after it is alleged to have happened is of significance. Further, there was no apparent advantage to Mr. Brown to fabricate the matter relating to Mr. Melvin, nor any evidence of bias against Mr. Melvin.

[152] I find that his evidence regarding his conversation with Mr. Melvin was reasonably capable of belief.

Similarities/Connections

[153] This incident is of an inquiry by Mr. Melvin to bring contraband into a correctional facility in exchange for money.

Dissimilarities

[154] Incident #2 involves the attempted use of a corrections officer to bring contraband into a corrections facility, not a prisoner.

[155] Incident #2 involved an inquiry to bring contraband into the correctional facility where Mr. Melvin was being held rather than Mr. Melvin sending contraband into a correctional facility.

[156] The contraband intended to be brought in was unknown.

Incident #3

[157] Incident #3 involves two occasions when in November 2009 and August 2010, while in segregation, the accused, Mr. Melvin, was found in possession of controlled substances.

Similarities/Corrections

[158] Mr. Melvin, while in a correctional facility was in possession of contraband, i.e. illegal drugs.

Dissimilarities

[159] There is no evidence how Mr. Melvin came to be in possession of the drugs on either occasion.

[160] The evidence is of Mr. Melvin's possession and use of drugs while in the correctional facility.

[161] There is no evidence Mr. Melvin was involved in the planning or executing of a plan to bring the drugs into the correctional facility.

[162] The incidents occurred nine months apart and six and five years respectively before the current charges.

[163] In my view, this incident differs from the other three in that it does not reveal any involvement of the accused in the planning or executing of a scheme to traffic drugs into a correctional facility. The evidence in relation to Incident #3 is of limited weight in relation to establishing the accused's knowledge of the means of trafficking drugs into or within a correctional facility.

[164] The Crown advanced an argument in support of the introduction of the similar fact evidence based upon the Supreme Court of Canada decision in **R. v. LePage**, [1995] 1 S.C.R. 654 (SCC)

[165] In **LePage**, the headnote summarized the facts:

“The accused was charged with possession of LSD for the purpose of trafficking. The accused was renting a house and he had sublet two of the rooms. The police searched the house. Under a sofa in the living-room, the police found a bag containing blotting paper impregnated with 682 hits of LSD. The only identifiable fingerprints on the bag were those of the accused. At the time of the search, one of the subtenants, T, was upstairs in his room. In T's room, the police found LSD blotter paper, a vial of hash oil and 10 hits of LSD in his wallet. T told the police that he was the owner of the bag containing the drugs found under the sofa. Eight months after his arrest, T went to the police station and recanted his previous statement.

The charges against the accused and T were severed. T was tried first and was acquitted. At the accused's trial, T testified on behalf of the Crown. He stated that the LSD found under the sofa belonged to the accused. He testified that

the basis of his knowledge was that the accused was the only major dealer of the house. T testified that the bag in which the narcotics were found could have come from a drawer in the kitchen to which everyone had access, but there was no evidence whether the accused did in fact handle the plastic bags in the kitchen. The accused did not testify.

The accused was convicted. On his appeal, the Court of Appeal set aside the conviction and ordered a new trial. The Crown appealed.

Held:

The appeal was allowed; the conviction was restored.”

The court went on to find:

“The testimony of T might be construed as character evidence relevant to show the disposition of the accused or his propensity to traffic in narcotics. Clearly, this would be an inadmissible purpose for adducing the evidence. However, evidence which demonstrates bad character may nonetheless be admissible if it is also relevant to an issue at trial, apart from propensity or disposition. In the present case, the testimony of T was not merely relevant to the character of the accused, but was also relevant to possession, which was a key issue in the case. There were three people living in the house, and it was clear that the drugs belonged to one of the three. It was relevant to the issue of possession to have one of the three testify that the drugs were not his and to indicate that the accused was in the business and therefore it was more likely that he was the owner of the drugs. The evidence was not being adduced solely for the purpose of showing that the accused was likely to have committed the crime because he was the type of person who would likely possess drugs. This would be inadmissible character evidence based on the criminal disposition or propensity of an individual. Rather, the evidence of T merely illustrated that someone in the business of dealing narcotics has more opportunity and is more likely to be in possession of narcotics.”

[166] In my view, the similar fact evidence of Incident #3 provided no support for the argument that the accused was engaged in the business of dealing narcotics.

[167] I am not persuaded that the test has been met to allow this evidence to be received on the trial of Mr. Melvin. Its probative value, in my view, is quite limited when considered in light of the trial issues and is outweighed by its prejudicial effect.

Incident #4

[168] Incident #4 is evidence of the accused, Mr. Melvin, being sentenced in 2002 for a conspiracy to traffic cocaine. Such evidence has been found to be admissible. (See **R. v. J.R.R.**, [2003] O.J. No. 3444 (Ont. Sup. CA) and **R. v. McLean** (2002), 170 C.C.C. (3d) 330 (Oct. C.A.)

Similarities/Connections

[169] The accused, by means of phone calls, made contact with a person outside the facility who was known to him and trusted by him to request that drugs be sent to him (and another inmate) in the correctional facility.

[170] The person called by Mr. Melvin was to get the package ready to be picked up by an individual whom Mr. Melvin had arranged to bring it into the correctional facility.

[171] In both cases the language used by Mr. Melvin, when referring to the drug or package was disguised.

Dissimilarities

[172] In the 2002 case, Mr. Melvin sought to have drugs delivered to him in the correctional facility.

[173] The package was to include money.

[174] In Incident #4 the drug requested to be brought into the correctional facility was cocaine.

[175] Incident #4 occurred 13 years before the current charges.

Conclusions re: Probative Weight of Similar Fact Incidents

[176] In my view, the evidence of Incident #3 is not of sufficient probative value in relation to the trial issues to justify its admission into evidence on the trial.

[177] In relation to incidents 1, 2 and 4, the analysis of the admissibility of the tendered evidence of similar acts differs in relation to the drugs found in the motor vehicle driven by Mr. Melvin and those found in Room #9 of the Howard Johnson motel.

[178] I will first address the similar fact evidence as it relates to the accused's alleged possession, and intention to traffic Exhibits 4 and 5.

[179] In relation to the drugs found under the driver's seat of the car driven by Mr. Melvin, Exhibits 4 and 5, their size, shape, packaging, contents (and opinions of witnesses as to what they were) was strong evidence that the person(s) in possession of them intended to traffic them into a correctional facility.

[180] In considering incidents 1, 2, and 4, individually and together, I find the similarities to be far more significant than the dissimilarities to the trial evidence. In my view the evidence of Mr. Melvin making inquiries or arrangements or participating in the delivery to and distribution of contraband drugs in a correctional facility is of significant probative value in relation to the issue of whether he was in possession of two "prison packs" found under the driver's seat of the vehicle he was driving.

[181] In my view, the differences regarding the type of drugs, whether they were being sent to Mr. Melvin when he was in the jail or by him to someone in the jail, etc., while relevant, are of much lesser significance and don't alter the overall nature of this evidence, i.e. evidence of planning and executing a scheme to have contraband drugs brought into a correctional facility.

[182] The three of similar acts are alleged to have occurred in 2002, 2009 and 2010. The charges before this Court are alleged to have occurred in July 2015. This is a significant span of time and gap between the incidents, in particular the incident of 2002. However, the degree of similarity between those matters and the current allegations I find to be of substantial probative value despite the dissimilarities and these time gaps.

[183] In my view, evidence tending to show the accused's knowledge of means of transporting illegal substances into a correctional facility and his prior involvement in such activities has strong probative value in relation to the issue of whether he was in possession of the "prison packs" found under the driver's seat of the vehicle he was operating on July 18, 2015.

[184] I turn to the assessment of the similar fact evidence as it relates to drugs found in Room #9 of the Howard Johnson motel.

[185] The Crown alleged that the accused was in possession of these drugs, and in relation to the cocaine, that he possessed the cocaine for the purpose of trafficking. A second person, Ms. Delorey was located in the motel room. The room was rented in Ms. Delorey's name. As in **LePage**, supra, it is reasonable to anticipate that whether Mr. Melvin was in possession of any or all of those

drugs will be in issue. In **LePage**, the majority of the Supreme Court of Canada held that evidence that the accused was “in the business of dealing narcotics” was admissible on the issue of possession as persons in the business of dealing narcotics have more opportunity and are more likely to be in possession of illicit drugs.

[186] Mr. MacKay’s evidence on the trial, if believed, could support a finding that in July 2015 the accused Mr. Melvin, was in the business of dealing in narcotics. The drugs, Exhibits 4 and 5, found under the driver’s seat of the motor vehicle driven by Mr. Melvin, packaged for trafficking into a correctional facility, provided corroboration of the evidence of Mr. MacKay regarding his evidence of a conversation with Mr. Melvin in which Mr. Melvin reportedly agreed to supply drugs to Mr. MacKay. Further objective support for Mr. MacKay’s testimony was the fact that Mr. Melvin was found at the location where Mr. Mackay told the police Mr. Melvin had told him he was located.

[187] The similar fact evidence tends to support a conclusion that in 2002 and 2009 and 2010, Mr. Melvin was in the business of dealing narcotics. Ought that evidence be admitted to establish proof of the Crown allegation that he in July 2015, was in the business of dealing narcotics?

[188] For the reasons previously stated, I find there is considerable probative value to the similar fact evidence as it relates to the issue of the accused's alleged possession of the drugs found under the driver's seat of the car driven by him. I find that the analysis of the similar fact evidence as it relates to whether Mr. Melvin was, in July 2016, in the business of dealing in drugs is the same as the analysis of the similar fact evidence as it relates to the accused's alleged possession of Exhibits 4 and 5.

[189] I find that the similar fact evidence, incidents 1, 2 and 4, provide strong support for the Crown submission that in July 2015, the accused, Mr. Melvin, was in the business of dealing in narcotics.

Prejudicial Effect

[190] Prejudicial effect relates to the issue of trial fairness.

[191] As previously noted, in **Handy**, supra,

“Similar fact evidence should be admitted when its probative value is “sufficiently great to make it just to admit the evidence”, notwithstanding its prejudicial value.”

[192] It is without dispute that the evidence of similar acts is prejudicial to the accused. In relation to the similar fact evidence sought to be introduced in this case, I make the following observations:

1. In relation to the sentencing of the accused, Mr. Melvin, for conspiracy to traffic cocaine into a correctional facility, the essential facts, as I've noted them, are not in dispute; and
2. In relation to Incident #1, it was not disputed that the video recordings are legitimate and show the activities of Mr. David and Mr. Melvin on the morning of September 23, 2009. The only point of dispute was what, if any, inference ought be drawn from the videos; and
3. The evidence of former Corrections Officer, Mr. Brown, must be carefully considered in light of his defensive and evasive answers relating to his leaving his position.

[193] The trial on the present charges is before a Judge of the Provincial Court.

There is no jury. Therefore, there is no risk that a jury would misconstrue or misapply instructions on the use of similar fact evidence.

[194] While the introduction of the similar fact evidence will be prejudicial to the accused, I am satisfied that the similar act evidence of incidents #1, #2 and #4,

is of such probative value in relation to the issue of the accused's alleged possession of Exhibits 4 and 5 that it outweighs the prejudicial effect of the evidence and it is fair to admit that evidence for that purpose. Further, in relation to the prison packs and the drugs seized from the motel room, I find that the similar fact evidence is admissible in relation to the issue of the accused being in the business of dealing in narcotics, and the related issues of his possession of the drugs seized from the motel room and the motor vehicle and his intention vis-à-vis those drugs.

Decision

[195] I find the similar fact evidence of incidents 1, 2 and 4 admissible on the trial in relation to the issue of:

1. The accused, Mr. Melvin's alleged possession of all of the drugs seized;
2. Whether he was in the business of dealing in narcotics in July 2015;
and
3. His intention vis-à-vis the drugs, if found to be in his possession.