

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Howe*, 2018 NSSC 156

Date: 2018-06-22

Docket: CRH No. 441632

Registry: Halifax

Between:

Her Majesty the Queen

v.

Duayne Jamie Howe, Patrick Michael James, and
David John Pearce

Restriction on Publication: Section 486.5 CC

Judge: The Honourable Justice Peter P. Rosinski

Heard: April 4; May 19; May 24; May 25; May 27; May 30; June 1;
November 21 – 25; November 28 – 29; December 2, 5, 7 8,
2016; July 10 – 14; July 31 – August 4; December 4 – 7,
2017; May 7, 2018, in Halifax Nova Scotia

Written decision: July 18, 2018

Counsel: Glen Scheuer, for the Crown
Patrick Atherton for Duayne Howe
Trevor McGuigan for Patrick James
Patrick MacEwen for David Pearce

Editorial Notice: The electronic version of this judgment has been modified to remove identifying information.

PUBLICATION BAN PROVISIONS

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

There is a s. 486.5 publication ban regarding the identities of the following persons referred to herein as: RM, DM, HJ, JJ, ME, BE, SH.

By the Court:

Introduction

[1] Sometimes the connections between related matters are not immediately apparent. Often this is because the information necessary to see those connections is not assembled in an orderly manner.

[2] The Prussian-born explorer and naturalist, Alexander von Humboldt, spent his entire life (1769 – 1859) looking for meaning in what he found in nature. He was driven to find connections. After embarking on relentless international expeditions, gathering huge collections of flora and fauna, observing existing and past cultures, and consulting with many other great minds, von Humboldt was the first to conclude that Nature was a web of inter-connected systems throughout the world. He recognized the importance of making this accumulated knowledge available to ordinary citizens: “with knowledge comes thought, and with thought comes power”.¹

[3] RM and SH do not know each other. In 2012, both were simple motorcycle riding enthusiasts.

[4] The collective experiences of the individuals involved in this matter provide an insight into a sinister, and in my view criminal, reality in the motorcycling milieu in Nova Scotia, and the other three Atlantic provinces.

[5] As SH questioned during his testimony, after being asked how the encounters with the Darksiders’ members, and then Patrick James, made him feel:

It made me wonder how somebody would feel that they had that kind of authority over a whole province, that they could tell somebody – “you can’t have the name Nova Scotia on the back of your vest”, you can’t have this on your vest. It perturbed me a bit. My uncle and some of my close neighbours were in World War II, and they went and fought for our freedoms and our rights and here was an individual trying to deny me freedoms and rights... How can somebody genuinely say something like this. If they have a mindset that they have this kind of authority, what would they try to do to enforce it? Didn’t want to go somewhere where I was going to get into any kind of trouble.

¹ “The Invention of Nature – Alexander von Humboldt’s New World”, Andrea Wulf, 2015, Alfred A Knopf, New York, USA, at p. 193

Overview

[6] In 2012, Patrick James, Duayne Howe and David Pearce were all members of the Bacchus Motorcycle Club (“BMC”). They are each charged with committing the following criminal offences in relation to RM or his family between January 1 and September 14, 2012: s. 264.1- threats to cause serious bodily harm; s. 423-intimidation; s. 346-extortion; s. 264(2) criminal harassment.

[7] SH created a fictitious motorcycle club for the fun of it. He was its only member. He created a three-piece patch, so-called because it contained three elements: name - Wolverines; logo-a menacing Wolverine-like skull; and a bottom rocker reading “Nova Scotia”; with “MC”² beside the logo.

[8] The description, “a three-piece patch” MC, refers to an MC whose members wear on the back of a leather vest or jacket three sewn-on patches: the top patch identifies the club name – in this case, “Bacchus”, derived from the Roman God of Wine, who is associated with the notion of unrestrained consumption; the middle patch identifies the club logo – a helmeted fearsome looking skeletal Roman soldier; the bottom patch identifies the territory claimed by the club as its own – “Nova Scotia”; and somewhere thereon is also a small patch with the letters MC on it (to identify the group as a “Motorcycle Club”). In addition, 1% MC members wear that patch on the front of their vests/jackets – it is a diamond-shaped patch containing only “1%”.³

² Motorcycle Club.

³ Motorcycle clubs wearing the 1% patch are considered to be emulating clubs that originated in the USA, most notably the Hells Angels MC, which portray themselves as part of the hypothesized of 1% of citizens that do not, and will not, abide by societal rules and norms, including not abiding by criminal law prohibitions. While I accept that the mere fact that some motorcycle clubs self-identify as a 1% club is not evidence that they are therefore presumptively criminal organizations, however, in Sergeant Isnor’s opinion, they invariably do have the characteristics of “outlaw motorcycle gangs”. These eight characteristics of “outlaw motorcycle gangs” were first cited by Provincial Court Judge Pepler in *Re-King’s Crew Motorcycle Club*, [1988] AJ No. 725. He was referencing Magistrate Parkins statement that “outlaw motorcycle gangs” are “any group of motorcycle enthusiasts who have voluntarily made a commitment to band together and to abide by their organization’s rules enforced by violence, who engage in activities that bring them and their club into repeated and serious conflict with society and the law.” Judge Pepler noted eight significant descriptive elements of what is in fact an “outlaw motorcycle gang”: structure, club rules, membership, associates, colours, clubhouse, intelligence gathering and criminal activity. I note that in *R. v. Lindsay*, [2005] OJ No. 2870, at paras.846-865, Justice Fuerst qualified as an expert, a professor of criminal justice and legal studies whose field of study was professional and organized crime. He identified eight common characteristics of criminal organizations which included: the group is non-ideological; hierarchical; limited or exclusive membership; perpetuates itself; exhibits a willingness to use illegal violence and bribery; demonstrates a specialization or division of labour; is monopolistic; and governed by explicit rules and regulations.

[9] RM attempted to start a Motorcycle Club (MC) of his own design, and later, a chapter of an existing MC, in Halifax County. He obtained the approval of the Brotherhood MC⁴ based in Montréal, Québec, to incorporate the elements of their three-piece patch all on one patch, for his intended local chapter. He flew with two co-members of his new club to Québec to visit with members of the Brotherhood MC and officially receive their new chapter's patches.

[10] Both RM and SH had jarring interactions with Patrick James, Sergeant at Arms of the Halifax/ Hants County Chapter of the Bacchus Motorcycle Club (BMC), which was at that time the only BMC chapter in Nova Scotia.

[11] SH testified. I found his testimony to be credible, honest and reliable.

[12] SH stated that in the fall of 2011 he had shown his Facebook profile picture noted above to a local motorcyclist who stored his motorcycle at SH's workshop. That person told him that he would not be able to wear his vest publicly. SH shrugged that off. In the Spring of 2012, that person and another attended at SH's workshop. He knew them both to be members of the Bridgewater Darksiders MC.⁵

[13] SH showed them his vest. They told him he would not be able to wear it, alluding to the fact that somebody already claimed "Nova Scotia" as their own territory. He questioned why he should not be able to wear his fictitious MC motorcycle vest patches. They told him if he did not remove the patch, other parties might try to do so, and if he did not abide by their demands, they could use guns.

⁴ Not a 1% MC, and from which BMC Hants County had received a Christmas card - it was prominently displayed on September 20, 2012 - see photos of their clubhouse interior, Exhibit 2/Pages 47, 66 - 7, 106, and 111 - 12; moreover in his statement given September 20, 2012, Mr. Howe says that he has the Brotherhood "on my Facebook... I don't know any of them." - Exhibit 31 Transcript, Page 7.

⁵ Sergeant Stephen MacQueen testified, and I accept, that he was very familiar with the "Wind Demons" riding club, from Bridgewater, Nova Scotia, and he personally observed them patch over to become "South Shore Darksiders MC" before SH testified. Sergeant Isnor confirmed that they started out as the Dartmouth Harley Club, a Hells Angels MC support club, but changed their name in 2009 to the Darksiders MC Dartmouth. The original chapter remained in existence at Dartmouth, Nova Scotia. Among the stickers Mr. James had at his home on September 20, 2012, were ones that read: "Support Darksiders MC Dartmouth": - Ex. 18, p. 1 The Wind Demons riding club is mentioned in the BMC Hants Co. minutes: Exhibit 16 - January 4, 2012, under "new business...wind demons three-piece patch?"; January 11, 2012 - "old business:... wind demons ok" / "new business... were in touch with wind demons (ok)", albeit this second reference is crossed through; and on April 18 and April 25, 2012 - "pick up plaque for five-year wind demons"/ "wind demons party Saturday", and May 2 and 9, 2012 - "wind demons plaque delivered"/ "Al paid for plaque (wind demons) \$57".

[14] In unsolicited emails between June 22 and 23, 2012, Patrick James⁶ stated to SH, someone he did not know and had never contacted before:

PJ – The MC on your patch indicates that you have a clubhouse. Let me know the clubhouse address, otherwise; I will pop in your home/work address whenever I am close. Later.

SH – Hi Pat. I do not have a clubhouse or a club. Is this some kind of a joke? I know some of the guys in some of the local clubs, but I do not want to join a club. Thanks for asking.

PJ – It is not a joking matter. Your profile photo shows a patch (Wolverines) with a Nova Scotia bottom Rocker. Is this you... If not... Who?

SH – It is me. Standing on my sundeck looking back over my field. Why? I am afraid I do not understand where you are going with this. Did I somehow break some unwritten code of conduct here? If I did just let me know. I don't have a motorcycle club, as I said before. Just have a Harley and like to ride. I don't wear my patch when I am riding... And I don't belong to any of the clubs.

PJ – That is exactly what you have done and a lot of people are/would/will be extremely insulted, by that photo/vest. Patches like you are carelessly wearing (three-piece MC) are earned through a lot of time, blood and sweat. Those that have put in the effort for the right to wear such a patch (three-piece MC) will not react favourably to such a slap in the face. From what you have told me I would assume that you did not have any bad intentions (merely ignorance of patch protocols). Now that you have been informed otherwise, I suggest that you remove the bottom rocker (Nova Scotia) and MC patches as they indicate a lot more than you are aware. Please also remove the photo from your Facebook as it can only prove to cause bad feelings (some may feel it an act of provocation).

SH – Thank you for filling me in on this protocol. I have never been in any bike clubs and do not know the ins and outs of the riding rules of the road...

PJ – Thank you for taking down the photo. No need to block me. I will not be harassing you. I just wanted to educate you to the patch protocol as some can be very extreme when dealing with such infractions and there is no need for incident if no disrespect was intended. Please just send a short reply to confirm that the requested alterations to the vest (removal of Nova Scotia and MC patches) have been carried out and your assurance that nobody will see it again as it previously was and there will be no need for me to contact you in the future... Thanks.

...

⁶ i.e. BacchusHfxPat@eastlink.ca, which is corroborated by a printout of SH's Facebook profile picture found at Mr. James's residence with handwriting thereon – see exhibits 3, 18 (photo 20) and 24; the email also been confirmed by RM in his transcribed statement from his phone which he had with him at the time he gave his police statement – see p. 47(21)-48(14) – Transcript of RM's statement

SH – I just put my Harley Eagle patch on my vest. I don't need to have a patch on my back to show I like to bike....

PJ – Exactly (BTW... I was not using ignorance as an insult... Just a lack of knowledge on the subject). Thank you for the quick response to my recommendations.

[15] Notably, a photograph of SH's Facebook profile picture showing him standing on his deck with his three-piece "Wolverines" patch on his leather vest was found at Patrick James's home on September 20, 2012, with handwriting thereon as follows: "[SH](asshole) works at [...]. He has been warned and says he doesn't have to ask anybody anything." I infer the handwriting is that of Mr. James, based on the previous communication and where the picture was found.

[16] RM had an experience similar to that of SH. In the spring of 2012, RM repeatedly had contact in-person with Patrick James - believing him to be the appropriate person, as a representative of the BMC, which he believed was the dominant MC in Nova Scotia - to seek approval for a three-piece MC that RM wished to create for the simple pleasure of having his own club. Mr. James told him that he could not start his own three-piece patch MC – nor could he start a chapter of an existing three-piece patch MC, such as the Brotherhood MC from Montréal, in Nova Scotia. He told him:

There is no way that this is going to happen... This is not sanctioned. You cannot have a three-piece patch down here... The way it works. You have your own club here. You don't come in with a club. What you do is you start off with a one - piece patch. You're a riding club [RC]. Then, maybe after a couple of years you gain respect in the area and people get to know you. Then we move you up, we give you permission to have possibly a two-piece patch. And then after time... If it seems right that you want to have a three-piece patch, you come to us and we'll decide if you have enough time in and if you were warranted to have a three-piece and turn into an MC... What you're doing is disrespecting all these other clubs that have worked their way up and just you... You just think you come in here and become a full-fledged MC.

[17] In spite of that warning and others, RM obtained approval from the Brotherhood MC to start one of its chapters in Nova Scotia. RM and two members of the new Brotherhood MC Chapter received their official one-piece Brotherhood MC patches in Quebec over the August 25 – 26, 2012 weekend. Mr. James was furious. He texted RM and insisted on meeting in person in RM's office, once RM was back at work on August 27, 2012. He threatened RM, and told him that within a day, RM had to provide the destroyed Brotherhood MC patches to Mr. James, and the Brotherhood had to post on its Facebook page that no chapter of its was

coming to Nova Scotia.⁷ RM complied, as did the Brotherhood MC. Having done what Mr. James asked, on August 28, 2012, RM believed the matter was behind him.

[18] On September 14, 2012, RM rode his motorcycle to a “Bikers Down” event in Lower Sackville. It is alleged that there, Messrs. Howe and Pearce, speaking through Mr. Howe, confronted RM, for his disrespect to the BMC and them personally. They threatened, criminally harassed, intimidated, and extorted RM to ensure he never again rode a motorcycle, or attended any motorcycle events, in Nova Scotia.

[19] RM contacted the police, and search warrants were executed by September 20, 2012. Shortly thereafter charges were laid.

The BMC in 2012

[20] From its beginnings in Albert County, New Brunswick in 1972, the BMC has publicly proclaimed itself to be a 1% Motorcycle Club. In 2012, the BMC had chapters in the following locations:⁸

- i) *Murray River PEI* – the Kings County clubhouse – including members and associates:⁹ Members – Ian Kennedy, George, Kenneth (Boyd) MacLeod, Eddie (Gary Edward) Brown, (Albert) Lance MacDonald, Gordie, Paul; strikers – Lorne (William) Butler and Mervin (Robert) Mills;
- ii) *Grand Falls-Windsor(GFW) Newfoundland* – including members and associates:¹⁰ President Franklin Folkes, Corey Fudge, Jason Fudge, Brendan Saunders, Jerome Ballard and Donald Pardy (retired in good standing in the Fall of 2012, or later);

⁷ See pages 38(24) – 40(12), RM’s Statement Transcript.

⁸ As well as testimony at trial, I rely on documentary and other evidence found in the possession of BMC members or at their residences or clubhouses. Generally speaking I find those (e.g. “business cards”) to be admissible as necessary and reliable evidence for the truth of their contents, based on the principled exception to the hearsay rule, or “business records”, and related concepts as are referred to in *R. v. Howe*, 2017 NSSC 199; and the “documents in possession” rule recently summarized in *R. v. Bridgman*, 2017 ONCA 940, between paras. 66 and 92, per Fairburn JA.

⁹ See last page in Exhibit 18 containing a business card from that chapter with its members listed thereon and Exhibit 33 criminal records of PEI BMC chapter as well as a Christmas card from Cerberus MC whose members had patched over to the BMC in January 2012 – Exhibit 2 – p. 101.

¹⁰ See testimony of RCMP Cpl. Jill Lunnan, Exhibits 36 and 37, being the criminal records of members of Newfoundland BMC chapters and a partial business card seen at Exhibit 2 page 38.

- iii) *St. John's Newfoundland* – including members and associates, David Burry, Bernard Chard, Mark Marsh, Paul Janes, James Curran, Glen Burry, Trevor Linehan, and strikers Mitchell Burry, Brad Summers, and Jerome Quigley, who all went on to become full members;¹¹
- iv) *Albert County, New Brunswick* – the “Mother chapter” – this original chapter of the BMC, was founded by Charlie Burrell and others. He was and remains National President of the BMC.¹² In 2012, its members and associates included: Charles Burrell, Peter Burrell, Peter (“repeat”) Elliott, Art (“Kentucky”) Belson, Kimball Phinney, Kevin (“crime wave”) Floyd, Andy Parker, John Rossiter, Greg Lemke, Jason Prosser, Sean (“Stinger”) Campbell, Jeff Graves, Michael (“Lee”) Burrell, Robert Walsh, Terrell (Tero) Rampanen, and Derek Dean Huggan (who was still incarcerated on September 14, 2012);
- v) *St. John New Brunswick* – including members and associates:¹³ President Matt Foley, Wesley Thibodeau, Chris (“Buster”) Bustard, Stephen (“sniffer”) Wallace, Clinton Murray, Ronald Richard, Tom Starkey, Harold Wilkins, Max Fairley, Brian Schofield, Mike MacLeod, Ryan Wallace, Byron Marley, Jeffrey (“magic”) Wand, Ronnie Bastarache, Bruce LeBlanc and striker Jason Andrews;
- vi) *St. George New Brunswick* – including members and associates – Tim Guthrie, James (“Scamper”) Henry, Morton Cooke, Eric Richard, Franklin Glen Connolly, Corey (“Curly”) Brake, Bradley Hanson, Michael Hanson;¹⁴

¹¹ This chapter closed in the late spring or early Summer of 2013 according to the reliable testimony of Cpl. Lunnen.

¹² Sergeant MacQueen had extensive personal experience policing there, as well as his access to intelligence gathering information, including listening to wiretaps and confidential informant source debriefings; see also criminal records of New Brunswick BMC members found at exhibits 38, 39 and 47, and the sentencing transcript of Matt Foley - Exhibit 50.

¹³ See Exhibit 12, St. John BMC business card with names thereon; testimony of RCMP Constable Sebastian LeBlanc, and Staff Sergeant Stephen MacQueen in particular for all New Brunswick BMC Chapter members and associates.

¹⁴ According to the reliable testimony of Sergeant MacQueen; see also Christmas card from that chapter found at the search September 20, 2012, Exhibit 2, page 103.

- vii) *Halifax County, Nova Scotia* – Membership and greater details as follows.

[21] In 2012, the only BMC chapter in Nova Scotia was located in Waverley, Halifax County;¹⁵ it moved to Nine Mile River in Hants County.¹⁶ At that time, it had the following full members and associates, confirmed, *inter alia*, by Sergeant MacQueen’s testimony.¹⁷

President-Paul Fowler

Secretary-treasurer – Duayne Howe (a.k.a. Rum Runner)

Sergeant at Arms – Patrick James

Full members: Howard (Scoober) Anthony Fowler; David (a.k.a. Saran Wrap) John Pearce; Christopher Lloyd White (Kriss); Allan James MacLeod (Al); Michael MacDonald; Daniel Carter (Dan); Gary Chipman (Gary); Derek Dean Huggan (Dean);¹⁸ Hangarounds – David (James) Bishop; Darren (Jacob) Hebb.¹⁹

¹⁵ Sergeant MacQueen testified, and I accept, that he first saw members of the East Coast Riders from Halifax, in New Brunswick associating with the BMC while wearing a one-piece BMC patch with a bottom rocker (patch) only, while he was stationed in New Brunswick between 1998 and 2005. Their banner was found at the BMC Hants Co clubhouse September 20, 2012 – Exhibit 2 photo 92. A photo of them was found on the wall of Pat James’s residence showing Pat James and David Pearce to be members – Exhibit 18 photo 50. A photo of their support T-shirts at Pat James’s home are seen in Exhibit 18 page 21. Of note is a comparison of that photo of the East Coast Riders, and a photo from the BMC Hants Co. clubhouse – see Exhibit 2 pages 48 and 113. There was evidence that Mr. Howe was also a member of the East Coast Riders when they patched over to BMC. Sergeant MacQueen observed them progress from a one-piece to two-piece club and ultimately a three-piece patch club when they became the Halifax chapter of the BMC January 9, 2010

¹⁶ See the sketch of the club property created by Nova Scotia Land Surveyor, Michael Allison, December 9, 2010, found at the back of Exhibit 15 (material seized from Mr. Howe secretary-treasurer of the chapter) – showing it as owned by Paul Roderick Fowler, Christopher Lloyd White, and Allan James MacLeod. On September 20, 2012 it remained under construction.

¹⁷ Sources include the BMC Nine Mile River Chapter business cards found at Pat James’s home on September 20, 2012- Exhibit 18 photo 37; and a photocopy of a letter sent to Matt Foley, imprisoned President of the St. John, New Brunswick BMC chapter, who was ultimately sentenced to 10 years in custody for manslaughter on August 15, 2012 (Exhibit 15 page 1 – minutes of meetings and receipts found in possession of Duayne Howe, who is the secretary-treasurer), which I am satisfied was signed by Paul Fowler, Pat James, David Bishop, Dean Huggan, Duayne Howe (Rum Runner), Howard (Scoober) Fowler, Allan MacLeod, Mike MacDonald and Chris (aka Kriss) White; as well as relevant criminal records found at Exhibit 45 and 46; and Mr. Howe’s police statement in which he indicates he had been a full patch member for one year and previously with the BMC in Nova Scotia for a year before that – transcript, Exhibit 31 page 30; Exhibit 13, 40th Anniversary of BMC calendar, shows Hants County members in 2012.

¹⁸ An Albert County, New Brunswick member, who was serving a six year sentence for trafficking cocaine, and when that ended in November 2012, he thereafter joined the Hants County BMC as its President.

¹⁹ The September 5, 2012, minutes found in Exhibit 15 (located in Duayne Howe’s possession) indicate that “[David James] Bishop and Dean Official hang-arounds”; although I note that Sergeant MacQueen testified that David Bishop and Darren Jacob Hebb were the two Hants County BMC hangarounds in 2012 – and I note a tabulation of fees paid, maintained by Sec. Duayne Howe in Exhibit 18 (at the back of that binder) indicates that “Bishop” and

[22] It is alleged that Messrs. James, Howe and Pearce committed serious criminal offences while members of a “criminal organization”, namely the BMC. The Crown alleges that the BMC, as a criminal organization, includes all of its chapters in the Atlantic Provinces extant January 1- September 14, 2012.

Evolution of the BMC

[23] The BMC claims it was started in Albert County on August 13, 1972. Since that time, it had expanded into all four Atlantic provinces. This expansion was by way of “patching over” existing MC’s into BMC Chapters.²⁰ These clubs each had long-standing periods of association with, though were subordinate to, the BMC. Patching over would mean that they immediately had the right and obligation as full members, to wear their three-piece BMC patch and 1% insignia. Those clubs are as follows:

The Cursed MC – St. John, NB - 2003;

The Forerunners MC – PEI - 2005;

The Mariners MC – St. George, NB - January 9, 2010;

The East Coast Riders MC – Halifax, NS - January 9, 2010;

Easton’s Crew MC – Grand Falls-Windsor, NL - January 2011;

Hakapiks MC – St. John’s, NL - January 2012;

Cerberus MC – Kings County, PEI - January 2012.

[24] In 2012, the BMC had approximately 80 members, and chapters in all four Atlantic provinces. In each of those provinces, there was no other three-piece patch MC using a bottom rocker designating their territory as the province in question. The BMC were the dominant club in each province. Each chapter was subordinate to the mother chapter in Albert County, where the President of all BMC chapters was based. The president has always been Charlie Burrell.

[25] The evidence indicates that, in and around 2001, the Albert County Chapter was a Hells Angels Hangaround Charter.²¹ Their close association with the Hells

“Lil Dean” began paying fees on September 19, 2012; I accept Sgt MacQueen’s evidence thereon that clarifies they are: [David] Bishop and [Lil] Dean [i.e. Darren Jacob Hebb] official hangarounds.

²⁰ In similar fashion the Hells Angels convinced the majority of what Sergeant Isnor referred to as “outlaw motorcycle gangs” in Ontario to patch over simultaneously on or about December 29, 2000.

²¹ See my decision *R. v. Howe*, 2017 NSSC 199; a “Hells Angels Hangaround Chapter” (specifically created for the Albert County BMC) Christmas card found at the clubhouse during the October 7, 2005, search confirms this – Exhibit 40 (pp 51 – 53) – signed by (the signatures verified by Sergeant MacQueen whose evidence thereon I accept) Brad Prosser, Bruce Getsen, Peter “big Pete” Burrell, Andy Parker, Shawn Campbell, Daniel “Doc” Carter,

Angels appeared to continue after they were rejected as a Prospect chapter of the Hells Angels in 2002, given all the Hells Angels support gear continuously present until 2012.²²

[26] By 2005, the BMC only had chapters in Albert County and St. John New Brunswick.²³ I accept Sergeant MacQueen's testimony that the Cursed MC members from St. John, New Brunswick, patched over to become the BMC Chapter in 2003.

[27] The photos of the 2007 search of the clubhouse and Charlie Burrell's residences suggest there was then still a relationship with the Hells Angels MC.²⁴

[28] Sergeant Isnor had the advantage of information directly supplied to him from continuing Hells Angels members who had become police informants: Stephen Gault (Oshawa, Ontario, Chapter) and David Atwell (downtown Toronto Chapter) in 2005 and 2006. They were debriefed almost daily in detail by their police handlers for the purpose of intelligence-gathering. He had the benefit of information received directly from each of them independently, during 2005 – 2006, respectively, when they accompanied other Hells Angels on a run to the Atlantic provinces, where they had confidential contacts with Albert County and other BMC chapters' members. His observations, and what Atwell and Gault related to him, confirmed there was still a close association between the Hells Angels' and the BMC at that time.

[29] The BMC also developed a close association with the Red Devils MC of Ontario.²⁵

Stirling "smoke" Matthews, Greg Lemke, Kevin "Crime Wave" Floyd, Peter "RePete" Elliott, and Pres. Charles "Charlie" Burrell. The Hells Angels chapter in Halifax reciprocated with a Christmas card as seen in Exhibit 43 photos pages 79-81, found during the April 4, 2007, search of the Albert County clubhouse/ Charlie Burrell's residence (stamp-signed by Mike (McCrea), Neil (Smith), Wolf (Carroll), Dany (Kane), Bernie, Paul, Speedy, Art, Grub and Frenchie).

²² Ex.40 pp 23, 37-8, related momentos (eg see all the Hells Angels chapters stickers p. 73), photos of BMC (Charlie Burrell, Peter Burrell, Sean Campbell, Wayne Brooks, Kevin Floyd) associating with members at the Sherbrooke chapter of the Hells Angels (p 62).

²³ See also Exhibit 40 p. 35.

²⁴ See Exhibits 42, pp. 59- 68 and exhibit 43- pp 5 (Hells Angels sticker on Charlie Burrell's motorcycle's windshield: containing the slogan "Fuck you- I've got enough friends" written in red on a white background, which are the Hells Angels official and exclusive colours) and pp. 48-52, 72-73; see also the evidence of Sgt MacQueen who testified about the BMC having Hells Angels support gear "Route 81" stores in Moncton (run by Charlie Burrell's wife, Linda McDuff, in March 2005) and Charlottetown PEI (run by BMC member Dean Huggan in November 2006)-see photos of the store in Charlottetown at Exhibit 44, which is typical and shows the BMC and Hells Angels support gear sold.

[30] The BMC association with the Hells Angels continued into 2012. In the BMC 40th Anniversary photo taken at Albert County on August 31 or September 1, 2012, Sergeant MacQueen testified, Mr. James is wearing a Hells Angels' support shirt under his BMC vest. The search of his home shortly thereafter revealed items showing his support for the Hells Angels. The search of Mr. Howe's and Mr. Pearce's homes revealed similar support gear.²⁶

What happened on September 14, 2012?

What happened in the months before September 14, 2012?

[31] It is important to understand the background circumstances preceding September 14, 2012. Unless stated otherwise, I find the following facts.

[32] RM and his wife DM both started driving motorcycles, in 2010. RM wanted to have his own motorcycle club (MC). He was led to believe that to do so, he had to receive the approval of the "dominant" motorcycle club in the area. He believed the BMC were the dominant motorcycle club. They were also a so-called 1% MC. Between January and August 2012, he had numerous contacts with Patrick James, the Sergeant at Arms of the Halifax/Hants County BMC. He did not wish to join their club, but wanted their approval for a three-piece MC patch and club of his own design. Mr. James told him he could not start out having his own full-fledged three-piece patch MC. Mr. James did not suggest that RM speak to anyone else, within or outside of the so-called "biking community", to obtain the approval he sought. Mr. James spoke about this with RM in person over months.

[33] RM then had contact with the Brotherhood MC, which was founded, and its main chapter still located, in Montréal, Quebec. They permitted him to have a three-piece Brotherhood patch for Nova Scotia. The BMC got word of RM's

²⁵ Which is Canada's earliest 1% MC - see photographs 111 and 61, Exhibit 17- respectively a sticker on Duayne Howe's door and sticker on his motorcycle; see also Red Devils' patches on the two BMC vests found at Pat James's home Exhibit 18 photo 53, and also at the BMC clubhouse Exhibit 2 photos 81(on BMC vest) and 158 (photos on October 2012 calendar); and confirmatory testimony from Sergeant MacQueen, and particularly Sgt Isnor who has personal experience with their association through his Ontario and National connections.

²⁶ In David Pearce's home - see Exhibit 19, photos 9, 41, 43, 44, 45, 49 (I add here that the evidence also satisfies me that the Hells Angels use various substitute means to publicly represent themselves on paraphernalia etc.: eg. the combination of exclusively red lettering and white background; reference to "81" - being HA, the eighth and first letter of the alphabet "Big Red Machine"; "SYL 81 (support your local Hells Angels); the "Nomads" reference is to a distinct subsection of the Hells Angels membership) - in Duayne Howe's home - see Exhibit 17, photo 61 being stickers on his motorcycle - in Pat James's home - see Exhibit 18, photos 4,16, 23, 24; and at the BMC Hants Co. clubhouse a computer therein has a Hells Angels sticker - Exhibit 2, photo 57.

intention of forming a MC with a three-piece Brotherhood patch for Halifax County.

[34] Very soon thereafter, around the first week of July 2012, Patrick James told RM that the (BMC) club trusted his opinion, and his opinion was that RM would not be permitted to have a three-piece patch MC in Nova Scotia. He stated to RM:

There is no way that this is going to happen... **This is not sanctioned.** You cannot have a three-piece patch down here... I don't give a fuck what [the Brotherhood Chapters] New York thinks or what Montréal fucking thinks. You're not having a three-piece MC fucking club here... Look [RM], you're putting yourself in a position that's not a very good position. This could be very dangerous... *We have not*²⁷ *informed Albert County of this...* I'm telling you, **I'm trying to keep it local so nothing gets out of hand... but this is not going to happen... There's a lot of people upset right now at the clubhouse**".

[35] Mr. James suggested a one- patch riding club would be appropriate: **The way it works** you have your own club here. **You don't come in with a club,** what you do is, **you start off with a one- piece patch.** You're a riding club. Then maybe after a couple of years you gain respect in the area and people get to know you. Then **we** move you up, **we** give you permission to have possibly a two-piece patch. And then after time... if it seems right that you want to have a three-piece patch, you **come to us and we'll decide** if you have enough time in and if you were warranted to have a three-piece and turn into an MC... You don't come in... **What you're doing is disrespecting all these other clubs that have worked their way up and just you... You just think you come in here and become a full-fledged MC...**

[36] RM believed that if they had a one-piece patch, carrying the Brotherhood logo, name, and chapter location, all together, which had been approved by the Brotherhood MC, the BMC would not be offended. He received permission from the Brotherhood MC to start a chapter in Nova Scotia with that kind of one-piece Brotherhood MC patch.

[37] Over the weekend of August 24-26, 2012, RM and two of his club members attended in Québec to officially receive their one-piece Brotherhood MC patches. Photos of RM, his two co-members, and the new one- piece Brotherhood MC

²⁷ While the transcript does not clearly reflect "not", all counsel accept that the audiotape does tend to confirm this as accurate. The audiotaped recording is the best evidence in relation to the statements of RM and Mr. Howe, and HJ's preliminary inquiry testimony. Nevertheless, reliance on authenticated transcripts is permissible in proper circumstances – see Justice Beveridge's fulsome treatment of this issue in *R. v. W.J.M.*, 2018 NSCA 54, at paras. 27-49.

Chapter patch, had been posted on Facebook.²⁸ While waiting at the Montréal airport to return to Nova Scotia, RM received disturbing text messages from Mr. James:

Was hoping to run into you today. If I don't hear from you, I will just pop into your office tomorrow. Talk soon. [August 26, 2012 2:54 PM];

RM responded at 3:37- "Pardon Pat? I'm not in town today. What can I do for you?"²⁹

Mr. James responded almost immediately: "In Montréal, by chance"?

From there the exchange went as follows

RM : "Yes, in Montréal."

Mr. James: "Will see you as soon as you get back. Don't waste your dollars on any souvenirs."

RM: "What? I don't understand".

Mr. James: "Saw you three come out of the closet on Facebook."

RM: "Out of the closet? LOL no, I was just being a brother".

Mr. James: "When will you be back at the office? I don't want to freak out your coworkers by showing up every day".

RM: "Well, that would not be a good thing. I'll call you when I get in. No problem, Pat."

Mr. James : "I will stop by your office tomorrow anyway, just by chance"

RM: "I should be in around lunchtime. Call me first please to make sure I'm in.

[38] On his return to work Monday, August 27, 2012, RM found Mr. James, wearing his Bacchus MC 1% cut and colours, sitting in his office waiting for him. He looked at RM, "deadly serious" and said:

What the fuck were you thinking? Do you think that you could get away with something like that? I fucking told you that you were not having a fucking Montréal Brotherhood patch down here, and you went ahead and fucking did it. Do you know the kind of shit now that you just started... I'm giving you a get out of jail free card here. I'm not here with everybody... We were

²⁸ Testified to by JJ and RM. Notably Mr. Howe admitted in his statement that he had heard of the Brotherhood, "they're on my Facebook" –p.7, statement Transcription; the interactions between Mr. James and SH also confirm that Mr. James had a Facebook presence.

²⁹ These exchanges are found at pp. 36 – 38, transcription RM's statement of September 16, 2012; notably RM confirms that he is reading the text messages from his phone as they were on September 16, 2012, "verbatim" – page 37(7).

driving around the whole weekend looking for you because of that picture that went on Facebook, you guys getting patched over in Montréal... because **those [cut and colours] were coming off your back... You fucking disrespected us.** You more or less might as well have told us to go fuck ourselves by putting those patches on your back.

[39] Patrick James continued:

You understand the seriousness of the situation what's going to happen? **I'm offering you a get out of jail free. And this is your only chance...** Why would you ever fucking think, look at this, you have a good job. You're a family man. You have a great daughter..."; [And then he pointed at family photos RM had in his office and continued], "and a lovely wife"... "Why would you put yourself in this fucking position... You'll do better. You get this taken care of. This needs to be done immediately.

[40] Mr. James's solution, his "get out of jail free card", required RM to provide to the BMC the shredded vests and patches which RM and his co-members had accepted in Montréal, and the Brotherhood MC to put a notice on its Facebook site that there would be no chapter of theirs in Halifax.

[41] RM got approval from the Brotherhood MC to allow the destruction of the Brotherhood MC patches, and their agreement to post on Facebook, as required by Mr. James. After he personally cut up the vests and patches, RM ensured that BMC received proof that they were destroyed. He gave them to RF, his Sergeant-at-Arms, to deliver them to Mr. James. The Brotherhood MC posted the requested notice on their Facebook page.

[42] RM believed that the matter had thereby been settled. However, the events of September 14, 2012, would deny him any continued comfort that that was the case.

[43] On that date, I am satisfied beyond a reasonable doubt (as I will explain below) that both Mr. Howe and Mr. Pearce threatened RM with serious bodily harm; engaged in threatening conduct causing RM to reasonably fear for his safety; and intimidated and extorted RM to abstain from participating in motorcycle events and from riding his motorcycle thereafter.

The evidence of those who were present on September 14, 2012, at the Bikers Down event in Lower Sackville

[44] Mr. Howe's statement to police, taken September 20, 2012, was admitted in evidence by consent. In it he admits that he was present at the event, and spoke to

RM in the company of David Pearce, but denied saying or doing anything threatening to RM. Mr. Howe did not testify.³⁰

[45] Not only do I not believe Mr. Howe's denials, but they do not raise a reasonable doubt in my mind, and when considered cumulatively in my assessment of all the evidence, including that of Mrs. Roach, I am left satisfied beyond a reasonable doubt that he is guilty of the offences charged.³¹

[46] Others present that afternoon who testified were Marlene Roach; RM, and JJ, HJ (his evidence from the preliminary inquiry was admitted as his evidence at trial), BE, and ME.

[47] Marlene Roach was called by the defendant, Mr. Howe. She testified that in 2007 she started the non-profit organization, "Bikers Down", in memory of her husband Michael (aka "Toad") Ryan Roach, who passed away on January 22, 2007. By September 14, 2012, it appeared that these events were also largely organized by Jimmy and Sally Swinamer, the co-owners of "Riding in Style" whose storefront abutted the parking lot where the event was taking place. Mrs. Roach testified that she and her husband ran "Toad's Cycle Works" for 35 years. She continued it in operation after his passing. The shop was a source of used and aftermarket parts for motorcycles. She noted that they served BMC members there, including both Mr. Howe and Mr. Pearce.

[48] In direct examination on December 7, 2017, Mrs. Roach was asked whether she recalled an "event that happened over five years ago at a Bikers Down event?" Her immediate answer was "yes". Notably, she was never asked, and never provided a date – not the day, the month, or the year.

[49] Mrs. Roach stated that Bikers Down fundraising events happened once a week, each year, from June until October (weather permitting), and they were

³⁰ To be clear, the evidence of his statement is only relevant to his own circumstances – not those of the co-accuseds, except possibly insofar as proof of the "criminal organization" element of the offences may be concerned.

³¹ See *R v B.D.*, 2011 ONCA 51, as summarized in *R v Moore*, 2017 ONCA 947, at para. 30: "There is no legal obligation on a trial judge to recite the language in *W.(D.)*: see *R. v. Dayes*, 2013 ONCA 614, 301 C.C.C. (3d) 337, at para. 54; and *R. v. McCracken*, 2016 ONCA 228, 348 O.A.C. 267, at paras. 90-91. There is, however, a legal obligation to properly instruct the jury on reasonable doubt. In many situations, a proper instruction on reasonable doubt must include a description of the middle ground described in *W.(D.)*, that is, the possibility of a doubt based on exculpatory evidence where that evidence, while not believed, is not rejected. The exculpatory evidence may arise from the testimony of the accused, other defence-led evidence, or evidence favourable to the defence led as part of the Crown's case: see *R. v. B.D.*, 2011 ONCA 51, 266 C.C.C. (3d) 197, at paras. 105 and 114."

generally in the same location in Lower Sackville Nova Scotia, at the strip mall where, among other stores, Jimmy and Sally Swinamer's "Riding in Style" motorcycle enthusiasts' accessories shop was located. She stated that she was generally always present at these fundraisers.

[50] On the day Mrs. Roach was describing, she did not recall David Pearce being present. She did recall seeing Mr. Howe there, but "did not notice Duayne there till he gave me a goodbye hug". She said she did not see any confrontation that day involving Duayne Howe. She added that in the 35 years she was involved with the motorcycle shop, she had never "witnessed" an incident. She was not asked to define what she meant by "an incident". She had heard the name RM, but could not pick the individual out of a crowd.

[51] On the day Mrs. Roach was describing, she was working at a table, primarily collecting money from patrons paying for food that was being barbecued to the right of her table. She claimed to have been there from start to finish from 5:00 p.m. – 8:30 p.m. She was there with her boyfriend, Danny Boudreau, who was new to the event. From her position there, she said she was "facing the crowd and did not see anything", nor did she hear any "shouting".

[52] Her testimony is completely at odds with that of the Crown witnesses who testify that the incident involving RM happened between 6:00 and 6:30 p.m. on September 14, 2012. Even Mr. Howe, in his statement, acknowledged that he was there with David Pearce, and did talk to RM that day, although he denied physically or verbally threatening or intimidating RM.

[53] I find Mrs. Roach's evidence unreliable or unbelievable, and possibly both. She was either not there that day, or if she was present, she could not accurately recall the events of that day; or was not being truthful, or some combination thereof.

[54] The descriptions provided consistently by the Crown witnesses, whose evidence I accept, paint a picture of a ten-minute period during which Mr. Howe confronted RM, and raised his voice to such an extent that many of the people present had turned to see what was going on. This, I find, did take place in the general location described in the diagrams of JJ and RM.³² If Mrs. Roach was present at the table beside the barbecue area, she must have been no more than 50

³² Trial Exhibits 1 and 23.

feet away from the confrontation involving Mr. Howe, Mr. Pearce, and RM. It is not believable that she would not have noticed that commotion.

[55] Mrs. Roach did not identify with precision the date in question. If nothing remarkable happened, how reliable is her memory of the day she described? It was never suggested to her that it was on September 14, 2012. She very well may have been testifying about another of the many weekly Bikers Down events that had taken place each summer, “over five years ago”.

[56] Her attention was not drawn to Duayne Howe that day, until he came up and gave her a goodbye hug. She did not recall what he was wearing. She did not see David Pearce there. She claimed to be there throughout the event, “facing the crowd”, and collecting money from patrons who ordered barbecued hotdogs and hamburgers. She “did not see anything” and did not hear any “shouting”.

[57] The credibility of her testimony also suffers because:

1. She felt it necessary to add, of her own accord, that in her 35 years in the motorcycle shop business she “never” witnessed an incident. I infer she meant to convey that, motorcyclists generally, and members of the BMC specifically, are unlikely to be involved in threatening, intimidating, or violent behaviour. Her testimony also suggests that, on more than one occasion, she had Duayne Howe and David Pearce as customers. In photo Exhibit 17, item 111, Duayne Howe’s home window pane has the following collection of stickers in close proximity to each other: “Toad’s Cycle Works Ltd, Dartmouth, NS 462 – 0681”; “Bikers Down Society”; and “Support your local Bacchus”- with references to their chapters in Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island. In Exhibit 7, a notebook seized from Mr. Howe, her name and telephone number appear on a page titled “Duayne”. I conclude that she is partial to the defendants’ positions; and
2. She was asked in cross-examination whether she had attended any BMC functions. She responded that she had attended at the 9 mile River, Hants County, location for a pig roast, when her husband “first passed away”. Her reliability about this date is suspect. He passed away in January 2007. There were no BMC chapters in Nova Scotia

until the East Coast Riders³³ patched over to the BMC in January 2010. Duayne Howe was the treasurer of the BMC Hants County in 2012. In his statement,³⁴ Mr. Howe agreed his nickname was “Rum Runner”, and he had been with BMC for approximately two years before September 20, 2012, which is consistent with other evidence.

[58] In contrast, unless I specify otherwise, I found the Crown witnesses who testified before me (JJ, BE, ME, RM), to be honest and reliable. Their testimony was internally and externally consistent. They were not shaken in cross-examination. Though they were friends at the time, I detected no basis for concluding that they were colluding, or that JJ, HJ, BE or ME were favouring RM when they testified.

[59] The trial evidence of HJ consisted of an audio recording of his preliminary inquiry evidence given July 16, 2014. At that time he was cross-examined by counsel for each of the three defendants. Although I did not have the advantage of observing him testify in person before me, and therefore cannot visually assess his manner of testimony, I had the benefit of the audio recording, thus giving some measure of life to his words, by use of inflections, tone, etc. I note that his testimony confirms, consistent with the other Crown witnesses’ evidence, that he had a good opportunity to have observed what went on between RM and Messrs. Howe and Pearce. He had good recall on that date of the events in question. In the circumstances, I found his evidence to be credible and reliable.

[60] For each of the Crown witnesses, that day was memorable – what happened was very much out of the ordinary. The result was to cause an end to any friendship between couples, RM/DM and JJ/HJ. RM requested that his friends, JJ/HJ and BE/ME accompany him and his wife back to their home by a circuitous route so they would not be followed. They did so.

[61] JJ and her husband HJ had been friends with RM and DM as a couple only for perhaps one month at the time of the incident. The connection was JJ and HJ knew DM during her first marriage. JJ testified that sometime before September 14, 2012, she saw a Facebook posting of a photo of RM and two others with “Brotherhood” patches on the backs of their vests/jackets. She produced a diagram

³³ Including Pat James and David Pearce Exhibit 18 – photo 50, at Pat James’ home; see also Banner at Hants County clubhouse, photo 92, Exhibit No. 1.

³⁴ P. 30 transcript – used for convenience, recognizing the video/audio recording is the best evidence.

of where everyone was standing.³⁵ JJ stated that she was less than 25 feet away from RM, Mr. Howe, and Mr. Pearce, and had a clear view of, and could hear, what was going on. She and her husband had arrived there about 20 minutes before RM and DM arrived. She estimated that they stayed for about 15 minutes more. She identified Messrs. Howe and Pearce in court as the two BMC members (wearing BMC vests or other apparel) who approached RM. She did not lose sight of the three of them, and they were standing within arms-length of each other. Mr. Howe did all the talking, and at one point had a cell phone in his hand and was moving around a lot. Mr. Pearce had his arms folded, was smirking continuously, and nodded approvingly when Mr. Howe was talking. Their serious demeanour and the looks on their faces kept her attention. She moved to a point closer to them when she realized “something not good was happening”. She described the encounter as the two BMC members dealing with RM in a very aggressive manner, bullying him, and not accepting an apology from him. She testified that the conversation quickly got louder. “Within the first 20 seconds I could hear the words ‘disrespect... no forgiveness... Don’t show your face at any other biker events... no right to drive your bike... We’re going to kick your ass... Get your stuff and leave...”.

[62] JJ stated that RM was repeatedly apologetic, saying things like, “I’m sorry man” and “I did not mean any disrespect”, but his pleas did not calm the situation. It got louder as time went on. She noted there were several other members visibly dressed as BMC in the crowd. Upon Messrs. Howe and Pearce and RM disengaging, she characterized RM and DM as “both really shaken up”. RM was so concerned that he asked JJ/HJ and BE/ME to escort him and his wife home. He drove his Harley Davidson motorcycle, while his wife took her car. They took a circuitous route, and stopped at a store at one point to ensure that no one was following them.

[63] Shortly after the incident, JJ noted that RM and his wife DM sold their motorcycles, and she never saw RM on a motorcycle again.³⁶

[64] HJ testified at the preliminary inquiry that at the event on September 14, 2012, he observed one BMC member on his cell phone. Approximately 10 minutes later, RM showed up, and then about 10 minutes after that, five or six other BMC

³⁵ Not to scale – Trial Exhibit 1.

³⁶ Although, JJ reviewed her preliminary inquiry transcript and police statement before trial, I accept as she stated that all of her testimony was what she remembered, based on her independent or refreshed recollection.

members pulled in on their motorcycles. There were 85 to 100 people in total there. At some point his wife kicked him in the foot to tell him to turn around. When he did, he watched RM in argument with one of the BMC members. At that time he was 20 to 25 feet away “and they were just more or less going back and forth – ‘you disrespected me you disrespected our club you know...’; ‘ No, I didn’t disrespect you, I didn’t disrespect your club.’ It was just kind of a heated back-and-forth argument there”.

[65] In HJ’s opinion, “it was loud enough for everybody to hear it”. He heard Mr. Howe telling RM “that he didn’t want to see him at any more of these parties, the biker parties, or any of the functions, to more or less stay away. I don’t want to ever see you around here again, don’t want to see you on your bike again...” They said that if they saw him at another biker party or anything that they were going to get him. He estimated the confrontation that he observed lasted for 3 to 4 minutes. He confirmed that Mr. Pearce “was kind of standing in behind RM and looking over top of him with his arms folded, and wasn’t saying anything, you know, just had a grin on his face and was standing there over top of RM... while he was arguing with the other fellow that was standing in front of him”. In his opinion RM was scared. RM requested an escort home.

[66] BE had started riding motorcycles in 2007. She and her husband ME arrived at the Bikers Down event on September 14, 2012, at about 6:00 p.m. Her attention was drawn to the two BMC members who were wearing BMC regalia. She found it unusual for them to be doing so. Mr. Howe was wearing his BMC cut and colours. Twenty minutes later she saw RM arrive on his motorcycle. She noticed that Mr. Howe “never took his eyes off RM while he parked”; she then noticed him make a phone call, and not long after that Mr. Pearce, who was wearing BMC member colours, arrived and stated to Mr. Howe: “I’m here now”.

[67] Thereafter, the two of them approached RM. There was a confrontation lasting approximately 10 minutes. Mr. Howe was “in his face”, and gesturing, and leaned forward. She said: “You could tell that he was mad”. Mr. Pearce was standing 2 feet away from Mr. Howe and about 3 feet away from RM, slightly to the back of Mr. Howe. BE was about 20 feet away from the confrontation and did have some difficulty hearing at times because of loud traffic. However, she was firm that “Mr. Howe was doing the talking and gesturing – shaking his head and was in RM’s face,” while RM was “just standing, leaning back – eyes wide open”. She identified both Mr. Howe and Mr. Pearce in court. BE described Mr. Pearce’s

involvement as “all puffed out – chest out – trying to look tough” – and “a smirk on his face”.

[68] Immediately after the confrontation, in BE’s opinion, “RM was scared – pale as a ghost”. RM went to talk to Jimmy Swinamer, and he agreed that it was a good idea that RM leave soon. She testified that they went with RM to escort him home because “we felt that RM was in danger”.

[69] As they left, RM first, HJ second, and BE and her husband last, she was “stared down by Mr. Howe” which made her “fearful”.³⁷

[70] ME testified that he had been a motorcycle enthusiast and rider since 2005. His testimony is generally consistent with that of his wife. In particular, he confirmed the confrontation, which, he said “seemed to last forever - at least 10 minutes”, and that approximately 15 minutes later they actually left the area, escorting RM to his home. He heard Mr. Howe tell RM he was not welcome there and that he wasn’t welcome generally. Mr. Howe appeared to be “taking it as a personal offence to him,” that RM was there. Mr. Howe was, “in his face” making lots of hand gestures, and was “quite upset and very angry” with RM. ME also heard Mr. Howe tell RM that he was no longer welcome at any biker event in Nova Scotia, he should never ride his bike again, and that there would be consequences if any BMC members saw him.

[71] Even after the confrontation, he said RM was “still very upset”.

[72] ME described David Pearce’s involvement as follows: he “stood back – watched things unfold – gave RM a look, as if to say ‘pay attention to what was going on’, and had a ‘silly grin””, which ME considered consistent with ‘he meant business’. Based on his observations he concluded that “the second guy backed him [Mr. Howe] up – to show strength – and intimidate RM – that they did not agree with what he was doing”.

[73] RM testified. In addition, the court also admitted for the truth of its contents, finding it necessary and reliable, RM’s September 16, 2012, audiotaped police statement.³⁸ I was satisfied that there were sufficient circumstantial

³⁷ She testified from her recollection, but did have the benefit of her September 20, 2012, police statement to refresh her memory.

³⁸*R. v. Howe*, 2017 NSSC 177.

guarantees of trustworthiness that substantially negated the possibility that RM was being untruthful or mistaken when he gave his police statement.

[74] *R. v. Bradshaw*, 2017 SCC 35, was released two days after my decision admitting RM's statement. It refined the principles regarding hearsay statements. Under that analysis, I would still find RM's statement to be admissible for the truth of its contents. *Bradshaw* is neatly summarized in *R. v. Johnston*, 2018 MBCA 8:

98 *Bradshaw* reaffirmed many of the basic principles of law surrounding hearsay as set out in *Khelawon*. It is, however, narrower in focus than *Khelawon*. *Bradshaw* is focussed on the role of corroborative evidence in evaluating threshold reliability.

99 The Supreme Court explained that a party seeking to rely on hearsay evidence can prove threshold reliability either by establishing that "(1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability)" (*Bradshaw* at para 27). Procedural reliability relates to adequate substitutes for testing the evidence where cross-examination in court is not possible. So, for example, video recording of the statement, the presence of an oath or a warning about the consequences of lying might substitute for lack of ability to cross-examine the declarant.

100 This was a case about substantive reliability. The statement could not meet the requirement of procedural reliability (see *Bradshaw* at para 28). The statement was not taken under oath or videotaped and the complainant was not warned of the consequences of not telling the truth.

101 Substantive reliability relates to proof of a high standard that the statement is inherently trustworthy. *The corroborative evidence must go to the trustworthiness or accuracy of the material aspects of the hearsay statement and cannot simply relate to the likelihood of the accused's guilt.* The material aspects are those relied on by the moving party for the truth of their contents.

102 It would seem that *Bradshaw* places some restrictions on the open-ended approach to corroborative evidence advocated in *Khelawon*. *Not only must the corroborative evidence corroborate the statement itself and not merely the party's case, but the corroborative evidence, when considered as a whole and in the circumstances of the case, must establish on a balance of probabilities that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.* See *Bradshaw* at para 40.

103 The approach a judge is to take on the substantive reliability inquiry was summarized this way in *Bradshaw* (at para 57):

1. Identify the material aspects of the hearsay statement that are tendered for their truth.

2. Identify the specific hearsay dangers raised by those aspects of [the] statement in the particular circumstances of the case.
3. Based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement.
4. Determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

104 In *Bradshaw*, the corroborative evidence relied on by the judge, i.e., the accurate description of the murders and the weather on the night in question, did not actually implicate Bradshaw in the murders. Those corroborative details were equally consistent with the possibility that the declarant was lying about Bradshaw's participation.

105 Again, in the case of *R. v. W(N)*, 2017 NSPC 33, the Court declined to admit a videotaped statement for the truth of its contents. Judge Derrick (as she then was) held that the evidence could have been corroborative of the truthfulness of the witness's statement, but it could also have been equally consistent with other hypotheses including the desire of the witness to go home, something which he had indicated multiple times throughout the interrogation (see para 31).

[My italicization added]

[75] Regarding procedural reliability,³⁹ RM was not under oath or affirmation, was not expressly warned about the consequences for not being truthful, and not videotaped.

[76] The circumstances of the statement-taking were in the hands of Corporal David Astephen and Sergeant Stephen MacQueen, who were at that time members of the Combined Forces Intelligence Unit (CFIU). The CFIU did not investigate crimes. Its mandate was to gather intelligence on organized crime groups, including suspected OMGs. They met RM in the late evening of September 15, 2012. RM attended the RCMP detachment the next day at 2:00 p.m. to give his audiotaped statement. Cpl. Astephen alone conducted the interview. He agreed that, in hindsight, it would have been preferable to have taken a videotaped *KGB* statement, but he noted that the CFIU's interest was primarily intelligence-gathering; RM had already verbally confirmed the outline of what would become

³⁹ i.e. - Whether there are adequate substitutes for testing truth and accuracy such as the declarant being subject to cross-examination and under oath or affirmation, including the videotaping of statement, or if not, are they warned about the consequences for untruthful statements, and the seriousness of being truthful.

his audiotaped statement the next day; and RM was not expected to be a difficult witness in the future. Nevertheless, I am very satisfied that RM understood the importance of being accurate and truthful, and the solemnity of giving that statement to the police.⁴⁰

[77] Regarding substantive reliability,⁴¹ *Bradshaw* tells us to do the following:

1. Identify the material aspects of the hearsay statement that are tendered for their truth;⁴² and
2. Identify the specific hearsay dangers raised by that statement. The possible concerns were identified by Justice Fish in *R. v. Baldree*, 2013 SCC 35, at paras. 31-2:

31 In short, hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion. Apart from the inability of the trier of fact to assess the declarant's demeanour in making the assertion, courts and commentators have identified four specific concerns. They relate to the declarant's perception, memory, narration, and sincerity: *Ibid*, at para. 2; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 159.

32 First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false assertion*. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination.

[78] I will briefly address each of these concerns:

- a) The inability of the trier of fact to assess RM's demeanour in making the assertion: while I could not assess his demeanour both visually and audibly at the time of statement making, I could effectively assess his demeanour by listening to the audiotape;

⁴⁰ RM was a member of a local Citizens on Patrol group that was supervised by the RCMP.

⁴¹ i.e. whether there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy.

⁴² The Crown sought to introduce the entire two-hour (91 pages) long statement. In these circumstances, especially in order to preserve the context, I am satisfied that it was "necessary" to admit the entire statement.

- b) Might RM have misperceived the facts to which the statement relates: given RM's lengthy face-to-face contacts with Patrick James, and the unusual nature and tenor of those contacts, it is not likely that he in any material way misperceived the facts he recited regarding their interactions; similarly the events of September 14, 2012, were fresh in RM's mind and highly unusual – and corroborated;
- c) Even if not misperceived, could RM have wrongly remembered the facts to which the statement relates: the events of September 14, 2012, were fresh in his mind and highly unusual; while the interactions with Pat James were over a lengthier period of time, the core allegations in his statement arise during the period mid-June – September 14, 2012, in relation to his September 16, 2012 statement;
- d) RM may have narrated the relevant facts in an unintentionally misleading manner: by all credible accounts thereof this is not likely, given *inter alia*, the simple nature of those portions of his statement regarding the events of September 14, 2012; and, regarding his interactions with Pat James, it is not likely that RM in any material way narrated the relevant facts in an unintentionally misleading manner. Their interactions were simple. They were focused on RM's desire to have a MC. They form a continuum in time of the choices made by RM in response to, and in violation of, Mr. James's warnings. Moreover, he provided a confidential statement to the defendants' investigator on December 5, 2013, just before the preliminary inquiry, and was available for cross-examination at the preliminary inquiry, *voir dire*, and trial, so this issue could be addressed before trial;
- e) RM may have knowingly made a false assertion: while this is always possible, such statements could be tested

for veracity, since he was available for cross-examination at the preliminary inquiry, *voir dire*, and at trial.

[79] Insofar as the requirement that I consider alternative, even speculative, explanations for RM's statements on September 16, 2012, I make the following observations:⁴³

1. While RM had not taken an oath or affirmation or been warned of the consequences of making untruthful statements, and there was no cross-examination of RM at the time he gave his statement, those procedural reliability concerns are mitigated by the following factors: his availability thereafter to be examined about the material aspects of his statement; the statement was audiotaped; he provided the defendants' investigator an opportunity to question him when he gave a confidential statement before the preliminary inquiry; in relation to both of which he was available to be cross-examined variously at the preliminary inquiry, *voir dire*, and trial;
2. Regarding his interactions with Pat James, at the time of making his statement: RM produced to Corporal Astephen text messages sent to him by Mr. James and RM's responses, which corroborate some of the material aspects of his statement.⁴⁴ From an original on his phone he also showed email received from Mr. James - BacchusHfxPat@eastlink.ca.⁴⁵ Similarly, the fact and date of Facebook posts of the Brotherhood MC regarding its new Halifax chapter corroborate some of the material aspects of his statement. While more concerned with ultimate reliability (paras. 42 and 44,

⁴³ While the court in *Bradshaw* (at paras. 48-57), used the term "speculative", which term is generally eschewed when engaging in factual assessments, it must be borne in mind that it did so in relation to an examination of whether there are alternative explanations or "hypotheses" for the making of the statement, which undermine a conclusion that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. Justice Cromwell's comments in *R. v. Villaroman*, 2016 SCC 33 at paras 35-43, shed light on the line between a "plausible theory" and "speculation". Justice Karakatsanis stated in *Bradshaw*: "*Corroborative evidence is of assistance in establishing substantive reliability if it shows that these alternative explanations are unavailable, if it 'eliminates the hypotheses that cause suspicion' ... corroborative evidence that is 'equally consistent' with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance.*" The corroborative evidence itself must also be trustworthy, and sufficiently so that I am able to rule out on a balance of probabilities any alternative explanations for RM having made the material aspects of the statement. The court also noted that corroborative physical evidence is more trustworthy than other statements by witnesses.

⁴⁴ Pp. 28, 32, 37, 46(8)-48(11), Transcription.

⁴⁵ At p. 47-8, Transcription.

Bradshaw), I note that Mr. James's interactions with SH also tend to corroborate related material aspects of RM's statement. For example, RM says that, in response to RM's suggestion that he have a one-piece "Brotherhood" patch, Mr. James told him: "Brotherhood – it's a good name. We are all brothers of the biking community." Mr. James continued: "the EZZY 7 is a brotherhood." Corroborative of that comment by Mr. James, are the photos taken at his home on September 20, 2012, which show stickers that say "support your local sailor EZZY SEVEN Brotherhood"⁴⁶ and the BMC Hants Co. minute book⁴⁷ for February 22, 2012, which says "new business: Rusty's memorial Saturday night, . . . Food: EZZY 7, chili or chowder . . . Pat to check with EZZY 7 on chaffing dishes, tarps, Bacchus banner"; and at the back of that same binder notation showing that the "Niners" and EZZY 7 clubs both bought one book of BMC annual pig roast tickets (10 tickets each);⁴⁸

3. Regarding his interactions with Messrs. Howe and Pearce: Mr. Howe's own statement confirms he was present and had contact with RM that day; the witness statements of JJ, HJ, BE, and ME, individually and collectively corroborate significant material aspects of RM's statement;
4. Witnesses confirmed that the next day, September 15, 2012, RM had changed his appearance;
5. Witnesses confirmed that RM and DM sold their motorcycles and had not since ridden motorcycles;
6. RM identified Messrs. Howe and Pearce by photos (Exhibits 20, 21 and 22) signed on the back by him on Saturday 17, 2012: "100% ID" and "threatened me on Friday September 14, 2012".⁴⁹

[80] I remain of the view that RM's audiotaped statement to police given September 16, 2012, is admissible, being necessary and reliable. I rely on corroborative evidence as well to conclude, when the relevant evidence is considered as a whole in the circumstances of the case, that the only likely

⁴⁶ Exhibit 18, pp.1 and 3.

⁴⁷ Exhibit 15.

⁴⁸ A photo of the June 15, 2013 tickets show they were then \$100 each – Exhibit 2, photo 87.

⁴⁹ Usually permitted as an exception to the hearsay rule only as proof of identity of an accused.

explanation for the hearsay statement by RM is his truthfulness about it, and the accuracy of it, insofar as the material aspects of the statement are concerned. The matter of the weight to be given to it is for me in my role as the trier of fact.

[81] I have also considered the residual discretion regarding the probative value versus prejudicial effect of admission upon the fair trial rights of the defendants. I conclude that the probative value of RM's audiotaped statement significantly outweighs any prejudicial effect to the fair trial rights of the defendants, particularly since they have had repeated opportunities to cross-examine him thereon, as well as Corporal Astephen and Sergeant MacQueen.

[82] All counsel agreed that the original transcription of RM's audiotaped statement was accurate.⁵⁰

[83] Although, I did not have the advantage of observing him provide his statement, I had the benefit of the audio recording, which gives one an enhanced appreciation of his words, including his emotional state, use of inflections, tone, etc. I am very familiar with the circumstances surrounding the giving of that statement, and in my opinion, generally speaking, it is the most credible, reliable, and truthful record provided by RM of what happened between January 1 and September 14, 2012, inclusive. Having said that, I do also consider his testimony before me. Where his testimony before me materially conflicts with his September 16, 2012, statement, I accept his statement over his testimony, unless I state otherwise. After hearing RM testify, and the other credible evidence that I accept from the trial, I repeat what I stated in *R. v. Howe*, 2017 NSSC 177:⁵¹

56 While R.M. did display some signs of *animus* against the police and Crown [e.g. pp. 465 and 610, trial transcript, regarding what he considered "police dishonesty"; and his belief that the Crown attorney was asking him trick questions -- pp. 178 and 643], this may be the result of how his relationship with the police evolved after he gave his statement -- e.g. he testified that as a result of his

⁵⁰ Except page 21 (8-9) which should read "we have *not* Informed Albert County"; moreover as I noted in my June 27, 2017 decision at paras. 76-78, all counsel agreed that the anticipated evidence of attending police officers Corporal Astephen and Sergeant MacQueen on the (statement made by RM on Sept 16, 2012) *voir dire* would be applied to the trial as part of the trial evidence, and that RM's *voir dire* evidence would also be considered to be part of his evidence at trial.

⁵¹ In *R. v. Figliola*, 2018 ONCA 57, the court canvassed the applicable legal principles regarding when, and how, the Crown may properly cross-examine its own witness. Justice Doherty expressly recognized that "A blanket rule against requiring [those who the Crown anticipates could be 'adverse' to the Crown position] to testify, would not further the search for the truth and would lead some to believe that witness intimidation works." (paras. 59-60).

closeness to the BMC and Patrick James, he was "stripped of all my credentials" associated with being a member of the Citizens on Patrol.

57 However, I am satisfied and make a factual finding that the material motivation for R.M.'s purposefully neutering some of his most inculpatory anticipated evidence as against the defendants is his fear of them, or their ilk, should he testify in a manner that tends to, or actually, does place any of them at risk of conviction. R.M. confirmed specifically that the laying of the "criminal organization" charges did make him concerned for his safety (p. 651, transcript). From my observations, of R.M. during testimony, the manner and the content of his testimony, and the other relevant circumstances herein, I am fully satisfied that R.M. believed in August and September 2012, and believes to this day, that the members and supporters of the BMC remain a safety concern to him and his family and friends.

[84] I appreciate that RM was cross-examined by the Crown in relation to parts of his police statement, and to the extent that he adopted as his evidence statements from his police statement, those also constitute his evidence. Similarly, to the extent that RM's testimony satisfied the prerequisites to the "past recollection recorded" exception, his doing so also constitutes part of his evidence on those points.⁵²

[85] At trial, RM drew a diagram of everyone's locations at the Bikers Down event on September 14, 2012.⁵³ It is consistent with the evidence of the other Crown witnesses. I observe as well that sometimes "actions speak louder than words". On September 14, 2012, RM requested an escort home, because he was afraid he would be followed by members of the BMC. He did not want them to know where he lived. Listening to his September 16, 2012 statement, it is clear that he was very scared by what had happened. Detective Constable Bruce Bentley testified that on September 20, 2012, he went to RM's residence where he stood by as a panic alarm was installed by RCMP personnel. Requesting, and allowing, a panic alarm to be installed at his home is telling, in relation to RM's state of mind at that time.

[86] RM testified that he and his wife each had motorcycles, and after September 14, 2012, they never rode them again, but sold them and did not replace them.

⁵² *R. v. Louangrath*, 2016 ONCA 550, at paras. 42 – 45.

⁵³ Exhibit 23.

[87] Regarding what happened at the Bikers Down event, RM effectively adopted discrete portions of his September 16, 2012 statement. For example, he agreed he had present recollection at trial of the following:

... Everybody was talking, and all of a sudden the whole place was going silent and everybody was watching this... And I said, 'look ... I'm not allowed at any events? We did everything you asked. Is this an authorization or is this your opinion?' And he [Duayne Howe] looked at me and said 'I'm fucking telling you, you get on your fucking bike and get the fuck out of here. You are not fucking welcome anywhere. What makes you think you can fucking disrespect us and then show your fucking face around here?'

And I said, 'I didn't disrespect you guys' [and he said] 'oh, getting the fucking patch from Montréal? You didn't fucking disrespect us? I'm telling you, you're going to get the fucking shit kicked out of you. Now get on your fucking bike and get the fuck out of here, right fucking now...'. He said 'listen, you go fucking say your hellos, put your money in, and get on your bike and get the fuck out of here, and we don't want to see you anywheres at any events in Nova Scotia. You are fucking done. [RM said] 'well I'm going to go over and I'm going to talk to these people and say my goodbyes. And when I'm finished then I'll leave' so when I turned around DM was almost in tears and I was scared shitless. And I went over right quick... And then ME came over to me and HJ and his wife JJ. I said 'look guys, I need an escort because I'm scared. I need an escort home. Because something's going to happen. I'm in trouble.'

[88] During his testimony in November 2016, RM repeatedly asserted that he did his best to be truthful in his statement. I conclude that he was doing his best to be generally truthful when he recounted what he did therein.

[89] At trial, RM's manner of giving his evidence, his choice of words and the content of his answers in relation to the questions asked, gave me the distinct sense that, at times, he was being purposefully vague, or was only purporting not to clearly recall matters that he had earlier described in his police statement, which would tend to be unfavourable to the interests of the defendants or the BMC.

[90] In summary, generally RM was doing his best to testify truthfully at trial, but where he sensed an opportunity to interpret the words in his police statement in a more favourable manner to the defendants or BMC, without blatantly compromising his duty to testify truthfully, he would do so. I am fully satisfied that where he did so on material matters, he was motivated by fear of reprisal from members or supporters of the BMC.

[91] I observe as well that the inconsistencies between RM's trial testimony and his police statement, relate to matters of specificity and nuance, which do not materially diminish the core factual matrix that he recounts in his police statement. For example, in cross-examination by Mr. Howe's counsel, it was put to him that, "you never *said* you were *threatened* in that [December 5, 2013, defendants' private investigator]⁵⁴ statement – *because no one threatened you* in September 14, 2012 did they?" He answered "... Now you have me second-guessing myself... [It was a year later]... I can't tell you for sure whether anyone told me that they would beat the fucking shit out of me".

[92] Given the vagueness of the question, not attached to a verbatim recitation of his words in that statement, nor the statement being shown to him, and given my findings regarding his motivation to neuter some of his more damning evidence against the defendants or the BMC, I give that answer little weight.

[93] In relation to Mr. Pearce, in his testimony RM confirmed that Mr. Pearce was smiling throughout, and did not say anything on September 14, 2012.

Summary of findings regarding September 14, 2012

[94] As stated earlier, I generally accept RM's police statement of September 16, 2012, as the most truthful and reliable account by him of what happened on September 14, 2012, two days earlier. That statement is confirmed by the testimony of the other Crown witnesses who were present at the bikers' event. RM's actions thereafter are consistent with his fear of the BMC, not just Messrs. Howe or Pearce.

[95] Therefore, based on the testimony of all the witnesses whose evidence I accept, including a consideration of RM's statement and that of Mr. Howe, I find as follows regarding September 14, 2012.

[96] Each of HJ, JJ, BE, and ME were present at the Bikers Down event, all having arrived between 5:30 and 6:00 p.m. RM and his wife DM had arrived separately at approximately 6:15 p.m. He was driving his Harley Davidson motorcycle, and she was driving her car. Between 6:00 p.m. and 7:00 p.m. there were approximately 80 to 100 people present.

⁵⁴ On November 29, 2016, Exhibit J –1, RM's December 5, 2013 statement, which was given to the defendants' investigator, was made a judicial exhibit to ensure a record existed, if an appeal should proceed. I have not examined that exhibit, because the statement was only used for cross-examination by the defendants.

[97] Mr. Howe was wearing his BMC regalia when he caught RM's attention. When RM arrived on his motorcycle, Mr. Howe never took his eyes off of him.⁵⁵

[98] RM noticed Mr. Howe doing something with T-shirts. Shortly thereafter he saw Mr. Howe, still by himself, on his phone texting. He then made a phone call. Not long after that, Mr. Pearce, who was also wearing his BMC regalia, arrived and stated: "I'm here now." Shortly thereafter, three or four more arrived, bringing the total to five or six males identifiable as BMC members.⁵⁶

[99] Messrs. Howe and Pearce deliberately walked a significant distance to where RM was standing alone. They were within arms-length distance of him for approximately 5- 10 minutes.⁵⁷

[100] During that interval, witnesses saw and heard slightly different things, but I am satisfied beyond a reasonable doubt that what happened was as follows:

[101] Mr. Howe continuously confronted RM in a very angry manner, because he, and the BMC, considered RM's presence at the event, and his driving of his motorcycle, to be continued disrespectful behaviour to him and the BMC. Mr. Howe was speaking so loudly, that many people present could hear him. He was very aggressively berating RM, all the while "in his face", shaking his head, and moving about in an unpredictable manner.

⁵⁵ There is no clear evidence that suggests that Mr. Howe knew RM by sight beforehand, although in his statement he said he "knows" RM because he came to the clubhouse a couple of times with his friend, Joel – Howe statement Transcript Exhibit 31, page 8(13) and 10(13), which is confirmed by RM in his statement at page 70(5-8); see also photos from Pat James's home, Exhibit 18, page 5. However, *I note that* after Mr. James's August 27 encounter with RM (where he demanded, and received by August 28, 2012, the three destroyed Brotherhood cut/colours and Brotherhood Facebook posting advising there would be no Halifax chapter) the 40th annual anniversary BMC party at the Albert County mother chapter which all its members are required to attend, took place *August 31 – September 1, 2012. I infer that RM's actions were discussed at that time among at least some BMC members generally, and certainly among all those of the Hants Co. Chapter.* Interestingly, the September 5, 2012, minutes read: "internal issue resolved".

⁵⁶ I accept HJ's testimony on this point.

⁵⁷ I find it more likely than not that Mr. Howe asked Mr. Pearce to accompany him, because in part as Mr. Howe candidly stated in his police statement, which I accept: I got a bad shoulder. I'm waiting for surgery on my back. Heavily medicated most days. I'm not in a threatening position.... [Q. "You didn't threaten to beat the shit out of him...?"] ... I'd have to be in... at least the physical shape to do it, because I'd look like a real idiot. then, wouldn't I?" – pp. 13 and 18 – 19, and 21, Transcript of his statement. Mr. Howe had a personal-use, production licence – Dried marijuana for medical purposes in his name, valid to April 4, 2013, which permitted him to, as he did, grow 25 plants indoor/6 plants outdoors and have no more than 1125 grams stored indoors – see photos, Ex. 17, pp. 34 – 51; I infer this was for pain reduction relief.

[102] Mr. Howe told RM that he had disrespected him and the BMC; that they would not forgive him for that; that he and the BMC did not want to see RM at any more biker events or functions; did not want to see him on his motorcycle again; that they were going to give him a serious beating, which they would have done then if there weren't so many people present; and told him to leave the event right away.⁵⁸

[103] During this time, RM was apologetic, saying things like “I’m sorry man – I did not mean any disrespect,” but his pleas did not calm the situation. Mr. Howe remained extremely angry, loud and intimidating.

[104] As RM stated, which I also accept:

Everybody was talking, and all of a sudden the whole place was going silent and everybody was watching this... And I said, “look ... I’m not allowed at any events – we did everything you asked. Is this an authorization [from the club] or is this your opinion?” And [Mr. Howe] looked at me and said ‘I’m fucking telling you, you get on your fucking bike and get the fuck out of here. You are not fucking welcome anywhere. What makes you think you can fucking disrespect **us** and then show your fucking face around here?’

And I said, ‘I didn’t respect disrespect **you guys**’ [and Mr. Howe said] ‘oh, getting the fucking patch from Montréal? You didn’t fucking disrespect **us**? I’m telling you, you’re going to get the fucking shit kicked out of you. Now get on your fucking bike, and get the fuck out of here, and **we** don’t want to see you anywheres at any events in Nova Scotia. You are fucking done.’

[105] I add here my finding that Mr. Howe told RM that if the members of the BMC became aware that he was, or ever saw him, driving his motorcycle again, they would physically assault him. RM did not specifically mention this threat, but he did testify that Mr. Howe said to him: “you get on your fucking bike and get the fuck out of here. You are not fucking welcome anywhere” [I infer that reference to mean, ‘in Nova Scotia’].

[106] ME testified that he heard Mr. Howe say words to the effect that RM was no longer welcome at any biker event in Nova Scotia; he should never ride his bike again; and there would be consequences if any BMC members saw him. HJ’s testimony at the preliminary inquiry was to similar effect: members of the BMC did not ever want to see him at such events again; did not want to see him on his

⁵⁸ I find beyond a reasonable doubt, that the threat “to beat the fucking shit out of” RM includes an assault that at least rises to the level of “serious bodily harm”.

motorcycle again- and if *they* did that *they* would (I infer), attack him. JJ testified that Mr. Howe said to RM words the effect that: “don’t show your face at any other biker events... No right to drive your bike... *We’re* going to kick your ass.”

[107] Mr. Pearce was present during the entire interval. He said nothing. But sometimes actions speak as loud as, if not louder than, words. The witnesses described his demeanour in the following ways: standing within an arms’ length of RM; staring at RM, with his arms folded; trying to look tough; smirking continuously; and nodding approvingly when Mr. Howe was talking. In summary, he was seen to be “backing up” Mr. Howe – to show strength and intimidate RM. All the while Messrs. Pearce and Howe were wearing their BMC regalia. At no time did Mr. Pearce make any attempt to verbally or physically restrain Mr. Howe’s behaviour. I find Mr. Pearce was fully aware that Mr. Howe’s behavior was being watched and heard by many of the members of the public who were there.

[108] I am fully satisfied that RM was, in his words “scared shitless”; as was his wife, DM.⁵⁹ As they were leaving, BE testified that, she was “stared down” by Mr. Howe, which also made her fearful.

[109] Within a short period of time, RM arranged for HJ/JJ and BE/ME to accompany him and DM, separately on a circuitous drive home, as he was afraid the BMC might discover where he lived. Upon his arrival at home, he contacted a member of the RCMP, and then gave his police statement on September 16, 2012. According to JJ, RM changed his appearance around September 15 or 16, 2012.

[110] Police arranged for special patrols to check on RM at his home, and at his request had a panic alarm installed in his home on September 20, 2012. RM and DM never rode their motorcycles again. They sold them. I infer that they never attended another bikers’ event. On or about September 19, RM confirmed to Sergeant MacQueen that he wished the police to investigate further, and lay charges if appropriate.

The charges against Mr. Howe

[111] The essential elements of the *Criminal Code* offences alleged against Mr. Howe, may be summarized by asking the following questions, to which the answers must be “yes” beyond a reasonable doubt, to ground a conviction:

⁵⁹ RM had had a heart attack in 2009, and DM had one in the spring of 2012.

Section 264.1⁶⁰

[112] The allegation reads that Mr. Howe: “did knowingly utter a threat to RM to cause serious bodily harm to RM or his family”. I am satisfied that the essential elements have been proved beyond a reasonable doubt.

i) Did Mr. Howe utter a threat to RM? Yes.

[113] Mr. Howe stated to RM: “you’re going to get the fucking shit kicked out of you”. On consideration of the circumstances in which the words were used, the manner in which the words were communicated, the person to whom they were addressed, and the plain and ordinary meaning of the words used, a reasonable person would perceive these words as a threat to RM.

ii) Did Mr. Howe utter a threat to cause serious bodily harm to RM or his family? Yes.

[114] On consideration of the circumstances in which the words were used, the manner in which the words were communicated, the person to whom they were addressed, and the plain and ordinary meaning of the words used, a reasonable person would perceive the words, “you’re going to get the fucking shit kicked out of you”, as a threat to assault RM and cause him serious “bodily harm”.⁶¹

iii) Did Mr. Howe make the threat knowingly (that is to intimidate or to be taken seriously)? Yes.

[115] In the context of all the circumstances, Mr. Howe’s words, “you’re going to get the fucking shit kicked out of you”, were intended by Mr. Howe to intimidate RM or to be taken seriously by him.

Section 264(2)(d)⁶²

[116] The allegation reads that Mr. Howe: “did engage in threatening conduct directed at RM, thereby causing RM, reasonably in all the circumstances, to fear

⁶⁰ Regarding the essential elements of this offence, see *R. v. McRae*, [2013] 3 S.C.R. 931; *R v O’Brien*, [2013] 1 S.C.R. 7; *R. v. Clemente*, [1994] 2 S.C.R. 758; *R. v. McCraw*, [1991] 3 S.C.R. 72.

⁶¹ As defined in s. 2, *Criminal Code* – bodily harm “means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature”.

⁶² *R. v. Cromwell*, 2008 NSCA 60, at para. 20; *R. v. Kosikar*, (1999) CCC (3d) 217 (Ont. CA), leave to appeal denied [1999] SCCA No. 549; *R. v. KK*, (2009) 241 CCC (3d) 284 (Ont. CA), leave to appeal denied, (2009) 243 CCC (3d) vi (SCC); *R. v. Hyra*, (2007) 221 CCC (3d) 494 (Man. CA); *R. v. Hawkins*, (2006) 215 CCC (3d) 419 (BCCA); *R. v. Roode*, 2016 SKCA 34, at para. 7.

for his safety or the safety of his family”. I am satisfied that the essential elements have been proved beyond a reasonable doubt.

i) Did Mr. Howe engage in threatening conduct toward RM? Yes.

[117] Mr. Howe stated to RM: “you’re going to get the fucking shit kicked out of you”; continuously during the surrounding 5 to 10 minutes, he very angrily and loudly spoke at RM, and gestured in an unpredictable manner, which ended with Mr. Howe directing RM: “now, get on your fucking bike, and get the fuck out of here, and we don’t want to see you anywheres at any events in Nova Scotia. You are fucking done.”

[118] On consideration of the circumstances in which the words were used, the manner in which the words were communicated, the person to whom they were addressed, and the plain and ordinary meaning of the words used, as well as the unpredictable and agitated bodily motions made by Mr. Howe in close quarters to RM, a reasonable person would perceive Mr. Howe’s words and conduct, as “threatening conduct”.

ii) Was Mr. Howe’s conduct (words and actions) without lawful authority?
Yes.

[119] No evidence of lawful authority was presented, nor can it otherwise be inferred.

iii) Was RM harassed? Yes.

[120] I conclude that as a result of Mr. Howe’s conduct (words and actions), RM was caused to feel threatened, and that he was, and would be, subject to an ongoing state of harassment which involved him being "tormented, troubled, worried continually or chronically, plagued, bedevilled and badgered"- per Goudge J.A. in *R. v. Kosikar*.

[121] I note that “evidence of a single incident that carried the real future prospect of the continuing tormenting of the complainant” can be sufficient, and I find that it is so here.⁶³

⁶³*R. v. O’Connor*, 2008 ONCA 206, per Simmons J.A., at paras. 4 and 5.

- iv) Did Mr. Howe know, or was he reckless, or wilfully blind⁶⁴ regarding whether RM was harassed?

[122] I am satisfied that Mr. Howe intended, and knew, that his bellicose harangue of RM would cause RM to feel harassed.

- v) Did Mr. Howe's threatening conduct cause RM to *reasonably* [subjectively and objectively viewed] fear for his safety? Yes.

[123] In the context of the circumstances, including the earlier events regarding RM's perceived "disrespect" to the BMC and its members, that Mr. Howe was present with Mr. Pearce immediately nearby, as well as 3 to 4 other members of the BMC in the crowd, RM feared for his safety, and a reasonable person would perceive Mr. Howe's conduct (actions and words) as threatening, which would cause RM present, and ongoing, reasonable fear for his safety.

Section 346⁶⁵

[124] The allegation reads: that Mr. Howe did, "without reasonable justification or excuse, commit extortion of [RM]". Extortion includes the making of "threats, accusations, menaces or violence." I am satisfied that the elements of the offence have been proved beyond a reasonable doubt.

- i) Did Mr. Howe induce RM to not ride a motorcycle again in Nova Scotia, or not attend any biker events in future? Yes.

[125] Although the charge does not particularize what it is alleged that RM was induced to do, or not do, in response to Mr. Howe's threatening words and actions, it is clear that the Crown position is that RM was induced to never again ride a motorcycle in Nova Scotia, or appear at any biker events.⁶⁶

[126] While the defendants suggest that it was the advice of the RCMP that caused RM to decide not to ride a motorcycle thereafter, I am satisfied beyond a reasonable doubt that, but for Mr. Howe's words and actions on September 14,

⁶⁴ *R. v. Briscoe*, 2010 SCC 13, at paras. 19 – 25.

⁶⁵ See: *R. v. Davis*, [1999] 3 S.C.R. 759; *R. v. Naturelli and Volpe*, [1967] SCR 539; *R. v. Alexander*, (2005) 206 CCC (3d) 233, leave to appeal denied [2005] SCCA No 5 to 6; and *R. v. Barros*, 2011 SCC 51, at paras. 53 – 55 and 60-61, per Binnie J.

⁶⁶ See *R. v. Dagenais*, 2018 ONCA 63, at para. 55, where the court concluded that *even if* this had not been the Crown's position in this case, "subject to due process concerns, a conviction may be founded on a theory of liability that has not been advanced by the Crown, provided that theory is available on the evidence [citations omitted]".

2012, RM would have continued to ride his motorcycle – therefore RM did not ride a motorcycle again as a direct result of, and in response to, Mr. Howe’s words and actions.

- i) Did Mr. Howe use threats, menaces or violence to induce RM to not ride a motorcycle, or attend any biker events in Nova Scotia again? Yes.

[127] I found as a fact earlier that Mr. Howe told RM that he and the BMC membership would not tolerate RM riding his motorcycle in Nova Scotia again, or him appearing at any biker events, and if he did so he would be physically attacked by them.

- ii) Did Mr. Howe do so with the intention of inducing RM to not ride a motorcycle in Nova Scotia again, or not attend at any biker events in future? Yes.

[128] In the context of the circumstances, including the earlier events regarding RM’s perceived “disrespect” to the BMC and its members and that Mr. Howe was present with Mr. Pearce immediately nearby, as well as 3 to 4 other members of the BMC in the crowd, I conclude that Mr. Howe’s words and actions were driven by a purpose. Mr. Howe intended to make an example of RM. The means to do so included prohibiting him from riding a motorcycle in Nova Scotia again, or appearing at any biker events.

- iii) Were Mr. Howe’s words and actions made without reasonable justification or excuse? Yes.

[129] In *R. v. Foster*, 2018 ONCA 53, Watt J.A. stated:

Excuses

90 In the criminal law, excuses, like justifications, are general defences which, if raised successfully, result in a verdict of not guilty. Each operates despite the proven existence of the *actus reus* and *mens rea* of the offence in issue. At the risk of oversimplification, an act is justified when it is permitted, and excused when society disapproves of it, but thinks it not right to punish the actor. A justification speaks to the rightness of the conduct. An excuse relates to the circumstances of the actor.

91 Excuses represent a legal conclusion that conduct is wrong, undesirable in our society, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him. Excuses do not destroy blame, rather shift it from the actor to the excusing conditions. Excuses focus on the actor, justifications on the acts. Acts are justified, actors excused.

[130] No reasonable justification or excuse was presented in evidence, nor can one otherwise be inferred.

[131] Exhibits 29 and 30 are Mr. Howe's police statement and transcription. Therein, he admits to talking to RM with David Pearce present. He characterized it as a "quick conversation, probably, 'hello how are you... Goodbye' ... You know... Thanks for showing up type of thing".⁶⁷ He specifically denies threatening RM, including threatening to beat the shit out of him.

[132] To reiterate, in relation to each of the offences charged, I have considered his statement and generally reject it as not credible, in those respects, nor does it raise a reasonable doubt by itself or together with the other evidence or absence of evidence regarding the essential elements of these offences.⁶⁸

Section 423⁶⁹

[133] The relevant portions of this allegation are that Messrs. Howe and Pearce did "wrongfully and without lawful authority for the purpose of compelling RM to abstain from... participating in motorcycle events, which RM had a lawful right to do, intimidate RM, contrary to Section 423(1) Criminal Code". I am satisfied that the elements of the offence have been proved beyond a reasonable doubt.

i) Did Mr. Howe use violence towards, or utter threats of violence, namely serious bodily harm, to RM? Yes.

[134] As noted above, the threats of violence were uttered to RM.

ii) Did Mr. Howe utter threats of violence, intending that the words spoken or conveyed intimidate, or be taken seriously by RM? Yes.

[135] A reasonable person, fully aware of the circumstances in which the words were uttered or conveyed, would perceive them to be a threat of (serious) bodily harm.

⁶⁷ P.9, Transcription.

⁶⁸ As a general rule, Mr. Howe's statement can only be used as evidence to exculpate or implicate Mr. Howe himself – *R. v. Waite*, 2014 SCC 17; see also: *R. v. Parberry* (2005) 202 CCC (3d) 337 Cont. CA, per Rosenberg, J.A., at paras. 15 – 29.

⁶⁹ See: *R. v. Basaraba*, (1976), 24 CCC (2d) 296 (Man CA); *R. v. Armstrong*, 2012 BCCA 248, leave to appeal denied, [2012] SCCA No 529; *R. v. Tatton*, 2015 SCC 33 (regarding specific intent offences).

iii) Did Mr. Howe utter the threats for the purpose of compelling RM to abstain from participating in motorcycle events, which RM had a lawful right to do?
Yes.

[136] The words used and the circumstances support this conclusion.

[137] Mr. Howe angrily told RM, in words to the effect that, “you are not allowed at biker events anymore”; “we don’t want to see you on your bike anywheres.” RM asked “I’m not allowed at any events? We did everything you asked. Is this an authorization [from the club] or is this your opinion?” Mr. Howe responded: “I’m fucking telling you... you are not fucking welcome anywhere. What makes you think you can fucking disrespect us and then show your fucking face around here?”

[138] RM then stated: “I didn’t disrespect you guys.” Mr. Howe responded “oh, getting the fucking patch from Montréal? You didn’t fucking disrespect us? I’m telling you, you’re going to get the fucking shit kicked out of you... and we don’t want to see you anywhere at any events in Nova Scotia. You are fucking done.”

iv) Were Mr. Howe’s words and actions made wrongfully and without lawful authority? Yes

[139] No reasonable justification, excuse or lawful authority was presented in evidence, nor can one otherwise be inferred.

The role of Mr. Pearce – is he a party to the offences committed by Mr. Howe, or a bystander?

[140] There is no evidence that Mr. Pearce said anything to RM. However, I find that he did the following:

- i. Shortly after Mr. Howe was observed making a phone call from his position at the Bikers Down event, Mr. Pearce arrived wearing his BMC cut and colours, and said to Mr. Howe, who was similarly dressed: “I’m here now” (shortly thereafter, 3 or 4 more BMC members wearing their cut and colours arrived);
- ii. He accompanied Mr. Howe, in a deliberate walk towards RM who was then alone near his motorcycle (and who remained so throughout);

- iii. He remained with Mr. Howe within arms-length distance of RM between 5 and 10 minutes;
- iv. Throughout, he stared at RM, with his arms folded, smirking continuously, and nodding approvingly when Mr. Howe was berating, threatening, harassing, intimidating, and extorting RM.

[141] I conclude that BE accurately summarized Mr. Pearce’s involvement throughout as “all puffed out – chest out – trying to look tough.” I accept the stated observations of the other credible witnesses, which lead me to conclude that Mr. Pearce’s intention, and the effect of his presence, was to provide immediately available extra “muscle” for Mr. Howe so he could harass, threaten, extort and intimidate RM.

[142] I recognize that mere presence at the scene of an offence is not sufficient to ground liability pursuant to Section 21 *Criminal Code*.⁷⁰

[143] I am not satisfied beyond a reasonable doubt that Mr. Pearce specifically attended the Bikers Down event in order to confront RM. However, once there, I am satisfied that he knowingly accompanied Mr. Howe, with the intention of aiding and abetting Mr. Howe with his threatening, harassing, intimidating, and extortive behaviour towards RM. I am satisfied beyond a reasonable doubt that once near RM, Mr. Pearce’s actions, including his demeanour and presentation of nonverbal cues, were intended to aid and abet⁷¹ Mr. Howe in his threatening, harassing, intimidating, and extortive words and actions directed at RM. I am also satisfied therefore that Mr. Pearce is a party pursuant to⁷² the “common unlawful purpose” basis for liability.⁷³

[144] It must be borne in mind that at the time of these offences in 2012, the *only* BMC chapter in Nova Scotia was the one in Halifax County, later relocated to Hants County.

⁷⁰ *R. v. Dunlop and Sylvester*, [1979] 2 SCR 881.

⁷¹ Section 21(1), *Criminal Code*. I find that Mr. Howe requested Mr. Pearce to accompany him, and Mr. Pearce as a fellow BMC member considered himself obligated to do so, and thereby recognized he may have to come to Mr. Howe’s aid to protect the reputation of the BMC.

⁷² Section 21(2), *Criminal Code* – see *R. v. Kelly*, 2017 ONCA 920, at paras. 22-26, per Doherty J.A.

⁷³ e.g. *R. v. Patel*, 2017 ONCA 702, at paras. 37-44; somewhat similarly, see Justice Fuerst’s reasons in *R. v. Lindsay*, [2005] O.J. No. 2870, at paras. 168 -185; albeit, I acknowledge Mr. Bonner was more involved, in that he also did speak to the victim briefly and that they did confront the victim at his home – see para. 175.

[145] Unless I state otherwise, I accept the expert opinion evidence of Staff Sergeant Isnor.⁷⁴ He testified that, based on his personal knowledge and the credible evidence presented at this trial, in his opinion, which I accept on this point, the most important rule of the BMC is that members must uphold “the power, persona and reputation of the club”, because that is considered by its members as critical to maintaining their position within the motorcycle community, including that element that is involved in illegal activities.⁷⁵

[146] That general rule is supplemented by another: that any member *must* come to the aid of another member upon request. I find the evidence clearly establishes that before September 14, 2012, members of the BMC (specifically including Messrs. James, Howe, and Pearce) were aware of, and felt very offended and disrespected by, RM’s actions in attempting to form a Motorcycle Club (MC) in their claimed territory (Nova Scotia) without their express approval.⁷⁶

[147] In conclusion, I am satisfied beyond a reasonable doubt that Mr. Pearce is guilty of offences as charged pursuant to ss. 264.1, 264(2)(d), 346, and 423 of the *Criminal Code*.

The charges against Mr. James

[148] I am satisfied beyond a reasonable doubt that Mr. James is guilty of the offences charged pursuant to Sections 264, 264.1, 346 and 423 of the *Criminal Code*.

[149] I have previously outlined⁷⁷ some of the court’s factual findings regarding Mr. James.⁷⁸

⁷⁴ I note that on August 2, 2017, Crown and defence counsel agreed to let his evidence from his qualifications *voir dire* apply to the trial – July 31 – August 1, 2017.

⁷⁵ Which can include non-*Criminal Code* unlawful activity such as smuggling contraband cigarettes-see *R. v. O’Reilly*, 2017 QCCA 1283, at paras. 192 – 194; leave to appeal denied [2017] SCCA No. 409.

⁷⁶ Notably, RM was not thereby challenging the BMC’s territorial claims per se. His Brotherhood MC was to have a bottom rocker that read “Halifax County” not “Nova Scotia.”

⁷⁷ In the section “what happened in the months before September 14, 2012”.

⁷⁸ I have also explained why I accept the core allegations set out in RM’s police statement as honest and reliable, and note that my assessment of all the evidence presented concludes with me remaining satisfied of that finding—having also taken into account his adoption at trial of portions of that statement as accurate, and the application of the doctrine of “past recollection recorded,” such that I rely upon his testimony and other reliable evidence to conclude that I am, sure, that is, satisfied beyond a reasonable doubt, that Mr. James committed the offences with which he is charged.

[150] RM testified that he sought out the dominant MC,⁷⁹ which he believed to be the BMC. With this belief in mind, he had numerous interactions with Mr. James, who I find at all material times RM believed to be the Sergeant-at-Arms for the BMC in Nova Scotia.

[151] Mr. James's counsel makes, among others, the following arguments.

[152] He argues that RM sought out "advice" about, rather than "approval" for, starting his own MC, and Mr. James merely provided him with such "advice". This characterization is at odds with statements I accept were made by Mr. James himself:

- i. After he emphatically told RM that he could not independently start his own three-piece patch MC, when asked whether that was his opinion or the BMC's opinion, Mr. James answered: "*the club trusts my opinion*";⁸⁰
- ii. At another point, Mr. James told RM that if he wanted approval for a club, he would have to come to the BMC *clubhouse* and make his presentation;⁸¹
- iii. After Mr. James found out, in or around July 2012, that RM had received permission from the Brotherhood MC to have a three-piece patch MC in Nova Scotia, he stated in part:⁸²
 There is no way that this is going to happen... *This is not sanctioned. You cannot have a three-piece patch down here...* I don't give a fuck [what the Brotherhood MC chapter in New York or Montréal] fucking thinks... You're putting yourself in a position that's not a very good position. This could be very dangerous... *We have not informed Albert County of this...* I'm trying to keep it local so nothing gets out of hand... But this is not going to happen... There's a lot of people upset right now *at the clubhouse*

⁷⁹ Transcription, p. 6(3)-(22) to obtain "approval" for starting his own MC, and later to start a Brotherhood MC chapter in Nova Scotia.

⁸⁰ Transcription pp. 11-13 / p. 15(5) and 16(16), i.e. Mr. James speaks for the BMC. Any and all approvals must come from the BMC.

⁸¹ Transcription pp.14(20) ;15(20) and 26(8).

⁸² Transcription, pp. 20-21.

...

The way it works, you have your own club here. You don't come in with a club. What you do is you start off with a one-piece patch. You're a riding club. Then maybe after a couple of years you gain respect in the area and people get to know you. Then we move you up, we give you permission to have possibly a two-piece patch. And then after time... If it seems right that you want to have a three-piece patch, you come to us and we'll decide if you have enough time in and if you were warranted to have a three-piece and turn into an MC... What you're doing is disrespecting all these other clubs that have worked their way up... You just think you come in here and become a full-fledged MC...

- iv. When Mr. James became aware of RM and his two friends going to Quebec to obtain their one-piece patch Brotherhood MC vests, he told RM by text message that he would meet him at RM's office on August 27, 2012. During that meeting, Mr. James said to RM:

Do you think you could get away with something like that? ... I fucking told you were not having a fucking patch... I fucking told you that you were not to have a fucking Montréal Brotherhood patch down here, and you went ahead and fucking did it. Do you know the kind of shit now that you just started?... I'm giving you a get out of jail free card here. *I'm not here with everybody*. Do you see my arms? They're not sunburned from just out walking around the house. *We were driving around the whole weekend looking for you because of that picture that went on Facebook, you guys getting patched over in Montréal.* [RM: why were you looking for us?] *Because those [Montréal Brotherhood MC patches] were coming off your back. You fucking disrespected us. You more or less might as well have told us to go fuck ourselves by you putting those patches on your back.*⁸³

- v. Moreover, RM himself said in his statement, which I accept, that he had been seeking approval from the Bacchus MC:

⁸³ Transcription, pp. 40-41.

And then in talking with Montréal [the Brotherhood] and that, they were upset, because I guess *we had been talking for now six months or eight months with Bacchus*, and it's been, well, they look at it, then it's like I held off because I had this issue, not enough guys [i.e. less than the six – he understood six were required to start any kind of motorcycle club]. *And then Bacchus is saying*, 'well we might look at it'. 'Well, no, *I don't think this is going to be approved.*' Montréal came at the end of June because it was going back-and-forth. It's like 'we'll look at it, well, you might be able to have a one patch' around the end of May or June [2012] [Mr. James] said a one patch, quite possibly... And I said [to the Brotherhood MC President in Montréal] 'well, *I'm talking to Bacchus and they're saying that, you know we can look at the patch.*' And then I tell Montréal, 'well, they said they're going to look at the idea of it [a one-piece Brotherhood MC patch]. *But I'd have to come to the clubhouse.*'⁸⁴

[153] For similar reasons, *inter alia*, I reject the notion, put forward by all the defendants' counsel that Mr. James was merely a messenger of "patch protocols", or etiquette from the general "biking community". There was no credible evidence of such a phenomenon.

[154] The only generalized "biking" group referred to in evidence was the so-called "Maritime Biker Federation", and its successor, the "Atlantic Coalition of Clubs." I accept the evidence of Sergeant MacQueen and Sergeant Isnor that both of these organizations were controlled by three-piece patch 1% MCs, depending on which club was the dominant club (the Hells Angels MC or the BMC), and that they are not open to the public.⁸⁵

⁸⁴ Transcription, pp. 14(5)-15(21).

⁸⁵ Notably, Mr. James had prominently displayed in his home [Exhibit 18 photo 50] a framed photograph of the Maritime Biker Federation party in PEI, not unlike the 2005 Maritime Biker Federation party photo in St. John, New Brunswick, found April 4, 2007, in Charlie Burrell's residence during a search (Exhibit 42, photo 85 – a review of the clubs represented shows as present: the Hells Angels MC; the Para-Dice Riders MC; the Red Devils MC; the Vagabonds MC; the East Coast Riders MC; the Highlanders MC; Bacchus MC).

[155] I bear in mind the admissible evidence regarding the minutes of meetings of the Hells Angels MC,⁸⁶ wherein I admitted six pages of minutes of a meeting of February 18, 2000, which reads in part:

We have just formed an Atlantic coalition with other MC clubs in the Maritimes. Bacchus MC (NB), Highlanders MC (NS), CHC [Charlottetown Harley Club] (PEI), Cursed MC (NB). What we are trying to do with these clubs is have a meeting with their members every two months. We had our first one last month. We are teaching them to show more support and how to understand our way. The first meeting went very well.

[156] Moreover, I accept RM's words in his statement, that Mr. James said to him:

[RM], the problem is [not?] with you- regardless of who you are, you're bringing in a club from Montréal... [RM it's not like as if we are coming in to take over territory] It doesn't matter. You have to listen to me. It's going to appear like Montréal is moving in... Brotherhood of Montréal is moving in on this territory... And what's going to happen is that right now everything's very nice and quiet. We have no problem with the law enforcement, everybody gets along and it's no trouble. Once they see that patch down here, they're going to start stirring up trouble [RM]. They are going to go to you, and they're going to say that 'Bacchus is upset with you [RM], and they're [i.e. the BMC] going to do something to you or they have a hit on you' and they're going to come to us and say Montréal... The police are going to try to incite a war... For all you know, there's officers up on that hill with a microphone, listening to our whole conversation... The reason why they do that is so they can stir up trouble which increases propensity, which increases their budget, which means they have more guys working, and that's the whole point behind them, what they're doing, in order to justify their jobs. And that gets more money. If everything's quiet, their money starts to shrink up and they don't have enough guys.... So, I don't think it's a very good idea for you to do this... And I don't think it would be approved.⁸⁷

[157] The evidence I accept establishes that, in 2012, the BMC was the dominant and only (three- piece patch) 1% MC with chapters in each of the Atlantic provinces.

[158] The suggestion that Mr. James had innocent contact with RM arguably triggers the application of the rule regarding similar act evidence (i.e. that of Mr.

⁸⁶ *R. v. Howe*, 2017 NSSC 199

⁸⁷ Pages 11-13, Transcription.

James's interactions with SH), which may be used to rebut such suggestions.⁸⁸ As Justice Pigeon stated for the court in *R. v. Guay*, [1979] 1 S.C.R. 18:⁸⁹

On the admissibility of similar fact evidence, I think it should be said that it is essentially in the discretion of the trial judge. In exercising this discretion, he must have regard to the general principles established by the cases. *There is no closed list of the sort of cases where such evidence is admissible. It is, however, well established that it may be admitted to rebut a defence of legitimate association for honest purposes, as well as to rebut evidence of good character. Where the evidence is admissible on the first mentioned basis, it may be admitted as part of the case for the prosecution.*

Secondly, where similar fact evidence is thus admissible, the evidence on each similar count may also be used to corroborate the evidence for the prosecution on each of the other counts. Seeing that similar fact evidence may be used to rebut the kind of defence above mentioned, the evidence on each count becomes admissible to rebut the defence on each of the other counts. It cannot obviously be necessary to have it repeated for this purpose; it is enough to say that it may be taken into account.

[159] Courts must also however conduct a probative value/prejudicial effect analysis, the burden of which is upon the Crown in this case. I am satisfied that the probative value outweighs any prejudicial effect on the fair trial rights of the defendants here.

[160] In summary, I am satisfied beyond a reasonable doubt that:

- a. Mr. James intentionally and purposefully caused RM to give up on:
 - a. His plan of having a three-piece patch MC of his own design;
 - b. His efforts to bring a three-piece patch Brotherhood MC chapter to Halifax County;

⁸⁸ This evidence may also go to rebut any claims by Mr. James that his statements to RM were not criminal by way of reasonable justification, excuse or lawful authority.

⁸⁹ Reaffirmed in *R. v. FFB*, [1993] 1 S.C.R. 697-though both were cases of alleged sexual offences involving multiple victims, there are numerous cases dealing with the application of similar act evidence regarding alleged criminal gangs: e.g. *R. v. Perrier*, [2004] 3 S.C.R. 228, which involved proof of the "signature" of a criminal group who operated with a distinctive *modus operandi*. There the court limited its ambit to proof of the signature of the group, so that individual membership in the group, and association with an offence, must still be proved. My ruling regarding the evidence of SH is contained in *R. v. Howe*, 2016 NSSC 267.

- c. Continuing the plan he had successfully put in place in order to have a one-piece patch Brotherhood MC chapter in Halifax County; and
- b. But for Mr. James's harassing, threatening, intimidating and extortive conduct towards him, RM would have followed through on his plans.

Section 264.1

[161] Mr. James is charged that he "did knowingly utter a threat to RM to cause serious bodily harm to RM or his family." I am satisfied that the essential elements of the offence have been proved beyond a reasonable doubt.

i) Did Mr. James utter a threat to RM or his family? Yes.

[162] In July 2012, Mr. James stated to RM:

This is not sanctioned. You cannot have a three-piece patch [MC] down here... You're putting yourself in a position that's not a very good position. This could be very dangerous... We have not informed Albert County of this... There's a lot of people upset right now at the clubhouse...⁹⁰

[163] Nevertheless, RM obtained permission from the Brotherhood MC to have a one-piece patch chapter in Halifax County. He received their official approval during his trip to Québec (August 24 – 26, 2012). On his way back, at the Montréal airport, he received a text messages from Mr. James, which included the following:

In Montréal, by chance?

Will see you as soon as you get back. Don't waste your dollars on any souvenirs...

Saw you three came out of the closet on Facebook...

When will you be back at the office? I don't want to freak out your co-workers by showing up every day....

I will stop by your office tomorrow anyway, just by chance.

[164] I find as a fact that, on August 27, 2012, Mr. James rode his Harley Davidson motorcycle, wearing his BMC cut and colours, to RM's workplace, and

⁹⁰ P. 21, Transcription.

settled himself into a chair in RM's office, to wait for RM. Once RM arrived and the door was closed, I am satisfied beyond a reasonable doubt that, while looking at RM throughout this time in a "deadly serious" manner, Mr. James said to him, in a serious and raised voice, *inter alia*:

What the fuck were you thinking? *Do you think that you could get away with something like that?*... I fucking told you that you were not having a fucking Montréal Brotherhood patch down here, and you went ahead and fucking did it. Do you know the kind of shit now that you just started?... *I am giving you a get out of jail free card here. I'm not here with everybody. Do you see my arms? They're not sunburned from just walking around the house. We were driving around the whole weekend looking for you because of that picture that went on Facebook, you guys getting patched over in Montréal. Because those [Brotherhood MC patches] were coming off your back. You fucking disrespected us. You more or less or might as well have told us to go fuck ourselves by putting those patches on your back...* [RM: "as a friend, now as a friend, if you were looking at this and you were talking to me, what do you make of this? What can we do here? What's your opinion?"].

[165] I accept that RM was honestly and accurately recounting what happened when he described Mr. James's actions as: "he stopped, and he put his head down, and he lifted it up, and he looked at me with a very angry face" [and said to me]:

Let's get something straight. I am not your fucking friend, and I'm going to say something to you. I'm offering you a get out of jail fucking free card... Do you have the patches here?... You get photographs taken of those patches being cut up. Then we want Montréal to put a notice on Facebook that states that there is no chapter in Halifax... by tomorrow... Do you understand what I'm fucking saying to you? *Do you understand the seriousness of the situation and what's going to happen?*... *This is your only chance...* *You have a good job. You're a family man. You have a great daughter [and he pointed at the pictures of RM's family] and a lovely wife.* Why would you put yourself in this fucking position? You got a whole bunch of trouble right now. You'll do better. You get this taken care of. *This needs to be done immediately.*⁹¹

[166] I further accept that RM honestly and accurately recounted his understanding of what Mr. James had said to him, when RM spoke to the Brotherhood MC representative immediately thereafter:

⁹¹ Pp. 38 – 44 Transcription – I add here that listening to the audiotape, which is the best evidence in any event, brings a greater measure of life to the words on the page.

... I told them that this is very bad.... My family's at risk here... My kids...
[cutting up the Brotherhood MC Halifax County Chapter cut and colours] It's the
only way to save our asses"⁹²

[167] I also accept that RM showed Cpl. Astephen, from his phone, a series of text messages from Mr. James starting at 12:17 a.m. on August 28, 2012:

“What time should I stop by the office tomorrow?”

10:56 AM – “Any news”

11:16 AM – “Text me when it's so”

[168] Sometime thereafter Mr. James also sent him an email, “please also Facebook message. A link to the online Facebook announcement.”

[169] At 1:43 p.m., RM sent him an email:

The announcement's not up yet, but it will be soon.

[170] Mr. James responded shortly thereafter: “K” [for okay].⁹³

[171] RM stated that that was the last communication between himself and Mr. James.

[172] The threats uttered by Mr. James were not as explicit as those uttered by Mr. Howe. In *R. v. Barros*, 2011 SCC 51, the court concluded that Mr. Barros's acquittal should be overturned and a new trial ordered in relation to an extortion count. That charge read:

Did, without reasonable justification or excuse and with intent to obtain an end to criminal proceedings against [IQ], by threats, accusations, menaces or violence to induce or attempt to induce Detective Kevin Brezinski to take steps to cease criminal proceedings against [IQ]...

[173] Though that case dealt with s. 346 of the *Criminal Code* (“extortion”), I find helpful the references to “veiled threats”. Justice Binnie, speaking for the majority stated:

60 It is true that Mr. Barros did not come right out and say that if the police did not drop the charges against Qureshi the "source" would suffer bad consequences.

⁹² Transcription, pp. 44 – 45.

⁹³ Transcription pp. 46- 48.

On the other hand, the law does not require the person accused of extortion to act clumsily and without subtlety. *What is required is that the message be sent in words definite enough to convey to a person of ordinary intelligence in the position of Sergeant Brezinski, taking into account his shared police background with Mr. Barros, a threat of harm to his "secret source" if the prosecution was not ended. The trial judge was not prepared to view the alleged threat of Mr. Barros in this broader context. She stated:*

With respect to dropping the charges, in particular, there was no request made, not even Brezinski said so, that Barros asked for the charges to be dropped. The dropping of the charges was an interpretation that Brezinski made of Barros' intention in raising the issue of the informant with Brezinski. [A.R., at p. 10]

61 The key element, as the Court recognized in *R. v. Davis*, [1999] 3 S.C.R. 759, is the relationship between the alleged threats, etc. and the complainant's freedom of choice:

Extortion criminalizes intimidation and interference with freedom of choice. It punishes those who, through threats, accusations, menaces, or violence induce or attempt to induce their victims into doing anything or causing anything to be done... . [T]he victim may be coerced into doing something he or she would otherwise have chosen not to do. [References omitted; para. 45.]

Accordingly, a veiled reference may constitute a threat if it is sufficient, in light of all the circumstances, to convey to the complainant the consequences which he or she fears or would prefer to avoid: *R. v. McClure* (1957), 22 W.W.R. 167 (Man. C.A.), at p. 172. The courts have elsewhere adopted a similar contextual interpretation: *R. v. Hodson*, 2001 ABCA 111, 92 Alta. L.R. (3d) 262, at paras. 11-13; *R. v. Pelletier* (1992), 71 C.C.C. (3d) 438 (Que. C.A.).

[174] The words uttered by Mr. James on August 27, 2012, that constitute the threat are captured by the following:

1. Do you think that you could get away with something like that?... Do you know the kind of shit now that you just started?... I'm not here with everybody.... We were driving around the whole weekend looking for you because.... those [Montréal Brotherhood MC] patches were coming off your back....
2. Do you understand the seriousness of the situation and what's going to happen?... I'm offering you a get out of jail free card. This is your only chance... You have a good job. You're a family man. You have a great daughter [and he pointed at the pictures of RM's family] and a lovely wife.

[175] Mr. James told RM that, had the BMC members come upon RM and his Brotherhood MC club members that weekend, “those [Brotherhood MC patches] were coming off your back.”

[176] Shortly thereafter, he asked the rhetorical question: “Do you understand the seriousness of the situation what’s going to happen [if you do not do exactly as I say]? I’m offering you a get-out-of-jail-free card. This is your only chance.”

[177] I am satisfied beyond a reasonable doubt that, looking at all the circumstances, Mr. James was effectively saying to RM: “you, and your family, are at risk of suffering serious bodily harm” if RM did not immediately produce all the (destroyed) Brotherhood MC cut and colours, *and* ensure that the Brotherhood MC posted a message on Facebook confirming that there would be no Brotherhood MC chapter coming to Nova Scotia.

ii) Did Mr. James utter a threat to cause serious bodily harm to RM or his family? Yes

[178] I bear in mind that, strictly speaking section 264.1 only requires a threat “to cause death or bodily harm to any person”, but the Crown has alleged “serious bodily harm”. The definition of “bodily harm” in s. 2 of the *Criminal Code* reads:

Means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.

[179] I am satisfied beyond a reasonable doubt that the threat conveyed amounted to one of serious “bodily harm”.

iii) Did Mr. James make the threat knowingly (that is to be taken seriously or to intimidate)? Yes

[180] In the context of all the circumstances, Mr. James’s words and demeanour, were intended by him to be taken seriously by, or to intimidate, RM.

Section 264(2)

[181] The allegation is that Mr. James “did engage in threatening conduct directed at RM, thereby causing RM, reasonably in all the circumstances, to fear for his safety or the safety of his family”.

[182] I am satisfied that the essential elements of the offence have been proved beyond a reasonable doubt.

i) Did Mr. James engage in threatening conduct towards RM? Yes

[183] I am satisfied beyond a reasonable doubt that Mr. James engaged in escalating threatening conduct towards RM from the spring of 2012 until August 28, 2012. As RM persisted in trying to set up a club,⁹⁴ Mr. James's words and actions constituted criminal harassment.

[184] Mr. James texted to RM in August 26, 2012, when RM was at the Montréal airport: "Will see you as soon as you get back. Don't waste your dollars on any souvenirs... When will you be back at the office? I don't want to freak out your co-workers by showing up *every day*..."

ii) Was Mr. James's conduct (words and actions) without lawful authority?
Yes

[185] No lawful authority was presented in the evidence, nor can it otherwise be inferred.

iii) Was RM harassed? Yes

[186] I conclude that, as a result of Mr. James's conduct, RM was caused to feel threatened, and that he was, and would be, subject to an ongoing state of harassment which involved him being "tormented, troubled, worried continually or chronically, plagued, bedeviled and badgered" – per Goudge J.A. in *R. v. Kosikar*.

iv) Did Mr. James know, or was he reckless, or wilfully blind regarding whether RM was harassed? Yes

[187] I conclude that Mr. James intended and knew that RM was harassed by his conduct.

vi) Did Mr. James threatening conduct cause RM to reasonably (subjectively and objectively viewed) fear for his safety or that of his family? Yes

[188] I conclude that Mr. James's harassment during, and after, both of RM's attempts, without Mr. James's or the BMC's approval, to start a three-piece patch

⁹⁴i.e., his dream of having his own MC; seeking a three-piece Brotherhood MC patch and chapter; and, after being unlawfully dissuaded from that by Mr. James, then seeking a one-piece Brotherhood MC patch and chapter, and again being unlawfully dissuaded from that by Mr. James.

and a one-piece patch Brotherhood MC chapter in Nova Scotia, caused RM to reasonably fear for his safety or that of his family.

Section 346

[189] The allegation is that Mr. James did “without reasonable justification or excuse, commit extortion of [RM]”.⁹⁵

[190] I am satisfied that the elements of the offence have been proved beyond a reasonable doubt.

i) Did Mr. James induce RM to abandon his plans to:

(a) start a three-piece patch MC of his own design in Nova Scotia?

Yes;

(b) start a three-piece patch Brotherhood MC chapter in Nova Scotia? Yes;

(c) start a one-piece patch Brotherhood MC chapter in Nova Scotia? Yes.

ii) Did Mr. James use threats, menaces, or violence to induce RM to not to do so? Yes

[191] I have found as a fact beyond a reasonable doubt that Mr. James, by threats, menaces, or violence, ensured that RM did not create his own three-piece patch MC, or bring a three-piece (or one-piece patch) Brotherhood MC chapter to Nova Scotia.

[192] Mr. James, speaking on behalf of the BMC,⁹⁶ told RM in no uncertain terms that the BMC, which was the dominant MC in Nova Scotia, would not approve RM’s plan to start an MC in Nova Scotia.

iii) Did Mr. James do so with the intention of inducing RM to not:

(a) start a three-piece patch of his own design in Nova Scotia? Yes;

(b) start a three-piece patch Brotherhood MC chapter in Nova Scotia? Yes;

⁹⁵ Since the Crown has not particularized the allegation further, therefore in this case, the means of extortion can include “by threats, accusations, menaces or violence”.

⁹⁶ I conclude that this was subjectively believed by RM, and it was objectively a reasonable conclusion, that Mr. James was speaking on behalf of the BMC in not approving RM’s requests.

(c) start a one-piece patch Brotherhood MC chapter in Nova Scotia? Yes.

[193] The common thread in the evidence that I accept is that Mr. James, who I find was speaking on behalf of the BMC, told RM that the only proposal put forward by RM that would be approved was one which involved him creating a one-piece patch Riding Club (RC) in Nova Scotia.

iv) Were Mr. James's words and actions made without reasonable justification or excuse? Yes

[194] No reasonable justification or excuse was presented in evidence, nor can one otherwise be inferred.

Section 423

[195] The allegation is that Mr. James "did wrongfully and without lawful authority, for the purpose of compelling RM to abstain from starting a motorcycle club..., which RM had a lawful right to do," intimidate RM.

[196] I am satisfied that the essential elements of the offence have been proved beyond a reasonable doubt.

[197] Although not particularized in the indictment, the positions taken by counsel, and the nature of the evidence presented, make only two paragraphs of s. 423 applicable, namely ss. (1)(a) and (b):

423 (1) Everyone is guilty of an indictable offence... who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing,

(a) uses violence or threats of violence to that person or his or her spouse or common-law partner or children, or injures his or her property;

(b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged.

[198] In the circumstances of this case, I would reduce the common essential elements of those two provisions to the following questions:

- i) Did Mr. James use violence towards, or utter threats of violence to RM, his spouse or children, or otherwise intimidate RM? Yes

[199] I reiterate on my findings and comments made in relation to the questions of the analysis regarding whether Mr. James committed the ss. 264.1, 264(2), and 346 offences.

- ii) Did Mr. James utter threats of violence, or conduct himself towards RM in an intimidating manner, intending that the words spoken or conveyed intimidate, or be taken seriously by RM? Yes

[200] I find that Mr. James's conduct was purpose-driven. He was the Sergeant at Arms for the only BMC chapter in Nova Scotia. The responsibility for protecting the BMC's interests, and enforcing their will in Nova Scotia, fell primarily on the members of the Hants County Chapter, and specifically on Mr. James.

[201] The BMC did not want any MCs not approved by the BMC to be located in Nova Scotia. The BMC especially did not want any three-piece patch MCs, including the Brotherhood MC, not approved by the BMC, to be located in Nova Scotia.

[202] Mr. James's conduct towards RM was rooted in his role as the Sergeant-at-Arms for the BMC Hants County Chapter. Throughout his conduct towards RM, he continually maintained that RM would not be permitted to create his own three-piece MC chapter in Nova Scotia, or to bring an existing three-piece MC chapter, or a (Montréal-based) Brotherhood MC chapter, to Nova Scotia.

[203] I find that Mr. James was also personally offended that RM had not followed his warnings not to attempt to bring a Brotherhood MC chapter to Nova Scotia. RM openly questioned the authority of the BMC, and he resolved to do something about RM's perceived offences.

[204] It mattered not only to him personally, but more significantly to his status as Sergeant at Arms within the BMC, and the status of the BMC, which saw itself as the 1% MC dominant club in the Atlantic Provinces. Mr. James had to ensure that RM would not complete his plan to bring a Brotherhood MC chapter to Nova Scotia. To that end, he had to ensure that RM would take his threats and intimidating conduct seriously.

[205] When they met in July 2012, after Mr. James had found out that RM was attempting to bring a three-piece patch Brotherhood MC chapter to Nova Scotia, Mr. James was emphatic, saying to RM, *inter alia*:

There is *no way* that this is going to happen... *This is not sanctioned*. You cannot have a three-piece patch down here... *You're putting yourself in a position that's not a very good position. This could be very dangerous... We have not informed Albert County of this... I'm trying to keep it local so nothing gets out of hand... But this is not going to happen... There's a lot of people upset right now at the clubhouse.*⁹⁷

[206] Mr. James insisted⁹⁸ on meeting RM in his office on August 27, 2012, following RM's return from Montréal. During that meeting Mr. James elevated the intensity and specificity of his threats and intimidating conduct to RM:

Do you think that you could get away with something like that?... I fucking told you that you were not having a fucking Montréal Brotherhood patch down here, and you went ahead and fucking did it... *I'm giving you a get out of jail free card here. I'm not here with everybody. Do you see my arms? They're not sunburned from just walking around the house. We were driving around the whole weekend looking for you because of that picture that went on Facebook, you guys getting patched over in Montréal. Because those [Brotherhood MC patches] were coming off your back. You fucking disrespected us. You more or less, or might as well have told us to go fuck ourselves by putting those patches on your back... You get photographs taken of those patches being cut up. Then we want Montréal to put a notice on Facebook that states that there is no chapter in Halifax... by tomorrow... Do you understand what I'm fucking saying to you? Do you understand the seriousness of the situation and what's going to happen?... This is your only chance... You have a good job. You're a family man. You have a great daughter [and he pointed at the pictures of RM's family] and a lovely wife... You get this taken care of. This needs to be done immediately.*⁹⁹

[207] RM's actions speak volumes. He had planned to start an MC of his own design, but after his meetings with Mr. James, RM did not go through with his plan.

[208] After his earlier meetings with Mr. James, RM persisted, contrary to Mr. James's clear prohibition against a three-piece patch Brotherhood MC chapter in

⁹⁷ Transcription, pages 20 – 21.

⁹⁸ "If I don't hear from you, I'll just pop into your office tomorrow.... We'll see you as soon as you get back.... When will you be back at the office? I don't want to freak out your co-workers by showing up every day".
Transcript, RM's statement, pp. 38-39.

⁹⁹ Transcription, pp. 38 – 44.

Nova Scotia. But then RM relented again, and did not start a three-piece patch Brotherhood MC chapter. He advised the Brotherhood MC he was giving up that plan. However, in seeking a one-piece Brotherhood MC patch and club, RM persisted, contrary to Mr. James's clearly declared prohibition. After receiving text messages from Mr. James, and after the in-office August 27, 2012, meeting with Mr. James, RM relented again. He persuaded the Brotherhood MC to allow him to destroy the one-piece patches he and his other two club members, had received from them just days before, and to post a Facebook notification that there would be no Brotherhood MC chapter coming to Nova Scotia.

[209] I am satisfied beyond a reasonable doubt that Mr. James, by his conduct (words and actions) intended to stop RM from starting a three-piece patch MC, or bringing a Brotherhood MC chapter to Nova Scotia.

[210] As RM's persistence grew, so did Mr. James's threats and intimidation. RM finally relented, entirely.

iii) Did Mr. James utter the threats or intimidate RM for the purpose of compelling RM to abstain from starting his own three-piece patch MC or bringing a Brotherhood MC chapter to Nova Scotia? Yes

[211] This is a specific intent offence.¹⁰⁰ I am satisfied that the Crown has proved, beyond a reasonable doubt, that Mr. James intended to intimidate RM, and that RM took his threats seriously, for the purpose of compelling RM to abstain from starting his own three-piece patch MC or bringing a Brotherhood MC chapter to Nova Scotia.

[212] I rely on my reasons throughout this decision.

iv) Were Mr. James's words and actions made wrongfully and without lawful authority? Yes

[213] No reasonable justification, excuse or lawful authority was presented in evidence, nor can one be otherwise inferred.

The expert evidence of Det. Staff Sergeant Leonard Isnor

¹⁰⁰ *R. v. Tatton*, 2015 SCC 33.

[214] Sergeant Isnor has been a police officer since 1984. His “specialized knowledge” arises from his long career in law enforcement, his vast personal experience with so-called “Outlaw Motorcycle Gangs” (OMGs), and his study of that phenomenon.¹⁰¹

[215] Some may question his impartiality.

[216] The law in relation to concerns of bias in the area of expert evidence has recently been succinctly stated by Justice Pardu in *R. v. Natsis*, 2018 ONCA 428:

11 I extract the following principles concerning the admissibility of expert evidence from *White Burgess*, at paras. 46-54:

- (a) Expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If the witness is unable or unwilling to fulfill that duty, their evidence should be excluded.
- (b) An expert's attestation or testimony recognizing and accepting their duty to the court will generally suffice to meet the threshold for admissibility as it relates to bias.
- (c) The burden rests on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable or unwilling to comply with their duty to the court.
- (d) If the opposing party establishes that there is a realistic concern, then the party proposing to call the evidence must establish that the expert is able and willing to comply with their duty to the court on a balance of probabilities. If this is not done the evidence, or those parts of it that are tainted by a lack of independence or impartiality should be excluded.
- (e) Even if the evidence satisfies the threshold admissibility inquiry, any concern about the expert's impartiality and independence is still a relevant factor in weighing the *R. v. Mohan*, [1994] 2 S.C.R. 9 factors for admissibility -- such as relevance, necessity, reliability, and absence of bias. Bias remains a factor to be considered in determining whether the potential helpfulness of the evidence is outweighed by the risk of the dangers associated with that expert evidence.
- (f) Expert evidence will rarely be excluded for bias; anything less than clear unwillingness or inability to provide the court with fair, objective, and non-partisan evidence should not result in exclusion. Rather, bias must be taken into

¹⁰¹ Interestingly, in the field of “scientific” experts, testifying in civil cases, the court at paras. 61-62 in *Westerhof v. Gee Estate*, 2015 ONCA 206, leave to appeal refused [2015] SCCA 198, notionally proposed three separate more precise characterizations thereof – those who are to testify as: “fact witnesses”; “experts retained by the parties” to give opinion evidence, and “participant-experts”, who testify to facts and give opinion evidence. Sergeant Isnor would fit into the latter category.

account in the overall weighing of the costs and benefits of receiving the evidence. Context is important. Both the extent of the expert's alleged bias and the nature of the proposed evidence are relevant.

[217] Sergeant Isnor's objectivity was not expressly questioned by the defendants' counsel. However, there were allusions to that issue, stemming from the fact that he was a police investigator, and supervisor for intelligence-gathering regarding OMGs in Ontario, and elsewhere in Canada, for a lengthy period of time. Sergeant Isnor testified for many days, over many months. During his entire testimony, there was no hint of material bias. I am entirely satisfied that Sergeant Isnor, in giving his testimony, and in forming his opinions, took to heart the duty on experts to be fair, objective and non-partisan. He was impartial, independent, and unbiased in the sense that, while called as a Crown witness, he did not unfairly favour the Crown's position over that of the defendants. I am satisfied that he passes the "acid test" referenced by Justice Cromwell in *White Burgess Langille Inman v. Abbott and Halliburton Co.*, 2015 SCC 23, at para. 32: "The acid test is whether the expert's opinion would not change regardless of which party retained him or her."

[218] Sergeant Isnor was qualified¹⁰² "as an expert in the area of organized crime/outlaw motorcycle gangs, able to give opinion evidence in relation to the Hells Angels Motorcycle Club and the Bacchus Motorcycle Club in the following areas: the general nature and characteristics of the clubs; the history, organization, structure and hierarchy of the clubs; the culture, values and practices of the clubs, including the main purposes and activities of the clubs; and the language and symbols of the clubs."

[219] Throughout the trial, and in particular while he was presenting his evidence, I kept in mind Justice Moldaver's words in *R. v. Sekhon*, 2014 SCC 15, where the court had to consider whether a properly qualified expert, a police officer familiar with the organization of the illegal drug trade, had strayed beyond the proper scope of expert testimony. He said, at para. 46:

It is not enough to simply consider the *Mohan* criteria at the outset of the expert's testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence... The trial judge must both ensure that an expert stays within the proper

¹⁰² See *R. v. Howe*, 2017 NSSC 213.

bounds of his or her expertise, and that the content of the evidence itself is properly the subject of expert evidence.

[220] When Sgt. Isnor was qualified, I relied on his *curriculum vitae* and associated testimony. That evidence remains significant insofar as my assessment at trial of the weight to give to his opinion. I believe it is helpful to repeat my findings from that decision:¹⁰³

17 His curriculum vitae is impressive. In his testimony, he elaborated upon that. He has been with the Ontario Provincial Police since 1984. Between 1987 and 1991 he worked with the drug enforcement branch, mostly as an undercover officer. By 1995 he became part of the so-called "special squad" which was part of the intelligence group of the Ontario Provincial Police. Their focus was on so-called outlaw motorcycle gangs or clubs (OMGs). During that time the unit covered all OMG events where members and their supporters attended. They also conducted investigations in relation to OMG members. During that time he refined the concept of "special support groups" (SSGs), which involved members from all Ontario major police forces being involved in traffic stops that were routine in relation to OMG events - see for example, *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No 5274 (Ont CA), affirming [1996] O.J. No. 1271 (SC) per DS Ferguson J. Coincidentally, one of the members of the Para-dice Riders Motorcycle Club involved in that litigation, was Tero Rampanen, who had by the early 2000s joined the Albert County, NB Chapter of the BMC while living in Truro, Nova Scotia. In somewhat similar fashion: Matthew Foley, who had been a member of the Satans Choice MC in Ontario left in the year before the patch over to HAMC on December 29, 2000, and became a member of the St. John, New Brunswick chapter of the BMC; Art "Kentucky" Belson who was also with the Para-Dice Riders MC between 1995 and 2000 became a member of the Albert County BMC; Clinton Murray who had been a member of the Loners MC in Ontario became a member of the Albert County BMC. Brian Schofield, who was a member of the Satans Choice MC Hamilton, Ontario, chapter, then the Keswick chapter, left Ontario before all of the remainder of the Satans Choice patched over to the HAMC on December 29, 2000, and became a member of the Albert County BMC.

18 As noted, on December 29, 2000, most of the major OMGs in Ontario patched over to become members of the HAMC, creating a monolithic motorcycle club in Ontario overnight. Resources were dedicated in 2000 to the creation of a Biker Enforcement Unit (BEU) which was part of the larger OPP intelligence group, the Organized Crime Enforcement Bureau. Between 2001 - 2008 he was the team leader and responsible for between 40 to 100 full-time investigators. Though he had administrative duties as well, he was the operational leader of the

¹⁰³ *R. v. Howe*, 2017 NSSC 213; which evidence by consent was applied to the trial.

unit. In that capacity, he oversaw all investigations in Ontario into OMG's, and reviewed all intelligence reports, which raw reports analysts reduced to reliable summary materials available for dissemination to authorized law enforcement personnel.

19 Sergeant Isnor was the handler for informant Stephen Gault who was the secretary-treasurer of the Oshawa, Ontario HAMC chapter. Gault became an agent for the police, and as a result, for a period of 18 months in 2005- 2006 Sergeant Isnor "knew everything going on in his life". He debriefed with him on a daily basis, and videotaped statements were taken weekly in relation to everything that Gault had seen and heard regarding OMGs that would be of interest to law enforcement. This led to operation "Develop" in Ontario at which time the BMC also came to the attention of the OPP. The BMC-Ontario connection caused the RCMP to create operation "J -- Develop", which targeted the Albert County, New Brunswick, BMC chapter, and which was one of the few BMC chapters in existence at the time. Sergeant Isnor had the benefit of close communication and interaction with the investigators in project "Develop", who were relying on an HAMC member informant, turned agent, David Atwell, however, Sergeant Isnor was not directly operationally involved therein. During the same time, Sergeant Isnor was himself directly involved with Project "Tandem" in Ontario using Stephen Gault's access to the inner workings of the HAMC to gain an understanding and insight into the collective operation of the HAMC in Canada. Sergeant Isnor also became involved in project "Legalize", which targeted Dean Huggan, an Albert County, New Brunswick, BMC member living at that time in Charlottetown, Prince Edward Island, and running a "Route 81" HAMC support store. In the summer of 2005, the sergeant travelled to Charlottetown in conjunction with, HAMC Ontario member Stephen Gault who was on a motorcycle "run" with others around the Maritime Provinces. The Sergeant visited the Route 81 store at that time. David Atwell (who had been a Para-dice Riders member until December 29, 2000 when he patched over to the HAMC) travelled with other HAMC members from Ontario to PEI, Nova Scotia and New Brunswick in the summer of 2006. During that trip, Atwell made many contacts in the Atlantic provinces, and met with the President of the Albert County BMC chapter, Charlie Burrell. He reported to his handlers in the BEU that they engaged in conversation about the BMC supplying Percocet, cocaine, and marijuana, though none of these arrangements came to fruition. Charlie Burrell was arrested at that time, however, the charges were later stayed by the Crown.

20 Since at least 1996, there had been a national OMG law enforcement strategy, with representatives from every province/territory. In his role at the BEU, he substantially contributed to a booklet for frontline law enforcement officers across Canada intended to provide guidance on how to deal with OMG members -- he identified a true copy thereof (2006 edition), six of which copies were found at the home of Charlie Burrell in October 2007 -- see Exhibit 43, page 83. The booklet contained the personal telephone numbers and names of all Tier 3 law enforcement liaison OMG investigators for each province/territory. A copy

was also found at the residence of Rusty Hall in Barrs Settlement, Nova Scotia, in February 2010. Hall was then Vice President of the BMC Halifax Chapter - he and his wife were the victims of a double homicide.

21 Sergeant Isnor and Sergeant MacQueen were listed therein as the responsible persons for Ontario and Nova Scotia. Since 2001, Sgt Isnor was the Tier 3 contact (i.e. operationally the primary inter-provincial and intra-provincial contact person), for Ontario regarding OMG matters. Between 2008 and 2011, he had the responsibility in his position at the BEU, to review every search warrant and results of all OMG clubhouse searches in Ontario. Sergeant MacQueen indicated that from approximately 2005 to 2014 he was the Tier 3 coordinator for Nova Scotia.

22 The Tier 3 provincial/territorial coordinators would keep each other advised of developments and share information weekly, and at a minimum monthly, although more often if circumstances required it. I am satisfied that this interaction and exchange of information was continuous, and sufficient to keep Sergeant Isnor apprised of the activities, membership, and characteristics of the BMC in Atlantic Canada.

23 Sergeant Isnor also advised "the Americans are very interested in BMC because they travel into the USA", and that he has had continual contact with his American counterparts. He noted that presently, in Canada, the BMC is the second-largest OMG based on membership.

24 He has routinely seen BMC representation at motorcycle runs throughout various parts of Canada -- most recently, he saw them taking part in the HAMC Canadian run in Calgary on July 21 - 23, 2017.

25 His CV, and testimony, clearly establish that he is a nationally and internationally recognized authority on OMGs in Canada. He is a long-standing attendee and presenter, provincially and nationally at conferences in Canada, as well as internationally, regarding OMGs.

26 He developed, and continues to maintain an active role in, a cross-Canada training program to ensure qualified expert witness personnel regarding OMGs are available to testify in court.

27 Since April 2015, when he discontinued his 50-50% CISC/BEU dual role, he has returned to be Operations Manager of the BEU.

28 His CV outlines when and where he was qualified to present expert evidence on OMGs in Canada. He has been previously qualified in similar manner to that proposed here, in relation to the HAMC, the Outlaws, Satans Choice and the Red Devils among others.

29 He has specifically been qualified to testify in a similar manner to that proposed here in relation to the BMC: by the preliminary inquiry judge herein, Provincial Court Judge Flora Buchan; and recently in the unreported decision in *R. v. Casola*, May 2 --4 2017, Provincial Court in Sudbury, Ontario, by the

Honourable Judge Lalonde presiding. His CV summarizes that he was "qualified to present expert testimony... in regards to the structure, organization, membership, and activities of Outlaw Motorcycle Gangs in general, and specifically regarding Bacchus Motorcycle Club, HAMC, Outlaws Motorcycle Club, and the Red Devils Motorcycle Club... further qualified to testify on the interrelationships between the aforementioned clubs, their intelligence gathering activities, and the reasons for intelligence gathering.

[221] Given the sheer volume of relevant information he has been exposed to throughout his lengthy career, I was impressed by Sgt. Isnor's command of matters relevant to this proceeding, without significant reference to *aides memoire* to refresh his memory. This is not surprising, given that he is from the "specialized knowledge" subset of expert categories. He has acquired his knowledge and expertise, continuously over 22 years, by dedicating himself to studying and understanding the people and organizations associated with what the police have identified as Outlaw Motorcycle Gangs in Canada, and internationally.

[222] During the trial, I carefully listened to and observed Sergeant Isnor give his testimony. I have no hesitation finding him to be a credible (honest and reliable) fact witness. Similarly, I have no hesitation in accepting the material aspects of his opinion evidence.

*What does the term "within the expertise of" a "specialized knowledge" mean, such that they can testify to factual matters upon which they base their expert opinion?*¹⁰⁵

[223] In relation to the disclosure required to be made to the defendants, to assist them in challenging an expert's reliance on such factual foundation, I note Justice Pardu's comments in *Natsis*:

33 More recently, Juriansz J.A. described the consequences of a failure to make disclosure in *R. v. Tossounian*, 2017 ONCA 618, 354 C.C.C. (3d) 365, at para. 15:

¹⁰⁴ Courts recognize three kinds of experts: scientific, technical and "specialized knowledge." Each of which, can be acquired by education, proper training and experience.

¹⁰⁵ Some details may not have been specifically disclosed by virtue of the sheer volume of Sergeant Isnor's knowledge base arising from his very extensive international, national, and provincial experience in the realm of law enforcement intelligence-gathering, particularly regarding so-called Outlaw Motorcycle Gangs (OMGs). However, I note that he did prepare a very lengthy report which he provided to the Crown and which was disclosed to the defendants, along with whatever else insofar as disclosure was required. The defendants did not complain to the court that there was a failure to disclose anything material. The defendants persuaded me that I should not examine his report, and I have not done so – though it is part of the record as a sealed judicial exhibit.

The appellant has the constitutional right to disclosure of all material that could reasonably be of use in making full answer and defence of the case against her as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*. At this stage, in order to be entitled to a remedy under s. 24(1) of the *Charter*, the appellant bears the onus of establishing two things. First, she must establish on a balance of probability that the Crown breached its obligation to make proper disclosure. Second, if she does so, she must go on to establish that the Crown's failure to disclose impaired her right to make full answer and defence: *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 31.

[224] In this case, no such wholesale objection was raised, nor was a specific motion made by the defendants. I infer that this was because they were generally satisfied with the Crown disclosure. However, they argued that, as a matter of evidence, while Sergeant Isnor could give opinion evidence based on hearsay, insofar as the factual evidence he might give in support of his opinion, he ought to be restricted to matters of personal knowledge *or* those “within his expertise”. Defendants’ counsel urged that the ambit of the latter should have a very restrictive meaning.¹⁰⁶

[225] The defendants also specifically objected that Sergeant Isnor should not be permitted to testify to the underlying information contained in detailed debriefings he received from Hells Angels MC members Stephen Gault and David Atwood in 2005 – 2006, after they had direct contacts with BMC members in the Atlantic provinces while they were “police agents”, as opposed to confidential informants.¹⁰⁷

¹⁰⁶ Justice Beveridge canvassed the latter aspect in the context of a DNA reporting scientist in *R. v. Keats*, 2016 NSCA 94, at paras. 80-94; and defendants’ counsel referenced this concern at trial transcript pages 1378- 1383, from July 13, 2017, during the *voir dire* regarding Sergeant Isnor’s qualifications. I recognize that some of what Atwell and Gault were told may have been hearsay to them – *R. v. Baldree*, 2013 SCC 35. For 18 months in 2005 – 2006, Sergeant Isnor was Stephen Gault’s handler and debriefed with him usually daily – frequently, Gault gave KGB statements. Sgt Isnor was also closely connected with and privy to the information obtained from David Atwell through Atwell’s handler, a colleague of Sergeant Isnor’s. The information provided by Gault and Atwell formed a significant part of the “Information to obtain” filed in support of search warrants that led to the 2007 searches at Jeff Graves’s home, the Albert County Club house, and Charlie Burrell’s residences.

¹⁰⁷ At trial, without the benefit of extensive research that I now have, I accepted the defendants’ position. I am now of the view that I should not have done so as a general proposition. That Stephen Gault and David Atwood were continuing members of the Hells Angels, but acting as police agents over a continuous period of time, and were very carefully supervised and monitored by Sergeant Isnor and others, is a significantly distinguishing feature; there was some level of circumstantial guarantees of trustworthiness regarding the reliability of the information they were provided by BMC members at that time. Arguably, there would have been lessened concerns about Atwell and Gault’s honest and accurate recitation of what they were told by the BMC members. As noted, Sergeant Isnor was not permitted to testify thereto, so I am without that evidence.

[226] Let me address that issue with particular reference to the expertise of Sergeant Isnor and his position of access to national law enforcement intelligence gathering regarding so-called OMGs, including information he derived from his detailed debriefings of David Atwell and Stephen Gault.

[227] In *Keats*, Justice Beveridge articulated the law that applies, and specifically how it applies in the case of a “scientific” expert:

83 In *Lavallee*, Justice Wilson, drawing on *R. v. Abbey*, summarized the principles that govern the admissibility and weight of expert opinion where the expert has relied on information not otherwise proven in court (para. 66):

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

84 Justice Sopinka, in a concurring judgment, expressed concern over the apparent contradiction in saying an expert's opinion is admissible, but is entitled to no weight. He drew a distinction between evidence that an expert obtains and acts upon within the realm of their expertise, and evidence that an expert gets from someone, such as a party to the litigation. The lack of independent proof of the former type of information or evidence need not sap the weight of the opinion; but with the latter, absence of proof may obliterate the weight of the opinion. He wrote:

[82] The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of St. John*), and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey*).

[83] In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would

be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner*, [1970] S.C.R. 608. In *R. v. Jordan* (1984), 39 C.R. (3d) 50 (B.C.C.A.), a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that *Abbey* does not apply in such circumstances. (See also *R. v. Zundel* (1987), 56 C.R. (3d) 1 (Ont. C.A.), at p. 52, where the court recognized an expert opinion based upon evidence "... of a general nature which is widely [page 900] used and acknowledged as reliable by experts in that field.")

[84] Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. In this respect, I agree with the statement of Wilson J. at p. 896, as applied to circumstances such as those in the present case:

... as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

85 In *R. v. B.(S.A.)*, *supra*. paternity testing by DNA evidence was crucial to the Crown's case. Much of the litigation centered on the constitutional challenge to the DNA warrant provisions. There was also an issue about the Crown's DNA expert. She testified about the test results of the accused's DNA to that of the child of the complainant. There were nine samples. Two were used as controls. Analysis was conducted on the remaining seven. One was damaged. Five samples were consistent with the appellant being the father, with it being ten million times more likely he was the father than another random Canadian male.

86 One sample was inconsistent. The expert opined that this was a mutation. They are well-documented in paternity testing, and international guidelines provide that at least two exclusions have to be found before "parental exclusion can be determined". She opined it was forensically significant that five samples showed a match.

87 Berger J.A., in dissent in the Alberta Court of Appeal, would have ordered a new trial on the basis that there was no independent proof that the inconsistent sample was a mutation.

88 Justice Arbour wrote the unanimous reasons for judgment in the Supreme Court. She rejected the proposition that the expert could not rely on the international guidelines for her opinion that the incongruent result was a mutation. In doing so, she referred with approval to Justice Sopinka's reasoning in *Lavallee*:

[62] The appellant submits that the trial judge ought to have given no weight to the DNA expert's evidence, as it relied on an unproven assumption that the non-matching test sample was a mutation. Sopinka J. in his concurring judgment in *R. v. Lavallee*, [1990] 1 S.C.R. 852, at p. 899, stressed that courts ought to distinguish between evidence that an expert obtains and acts upon within the scope of his or her expertise, and evidence that an expert obtains from a party to the litigation touching a matter directly in issue. He suggested that where the expert relies on the former type of "unproven" evidence, the weight of the expert opinion need not be discounted.

[63] In my view, it is clear that the expert's reliance on the international guidelines was reliance on information obtained and acted upon within the scope of her expertise. It was entirely open to the appellant to challenge the expert on that issue. Absent such a challenge, the expert was entitled to refer to the sources within her field of expertise to explain and support her conclusions. Berger J.A., dissenting at the Court of Appeal, is correct that the record offers little information about the international guidelines referred to by the DNA expert (para. 131). However, her expert evidence was tested according to the normal processes of the adversarial system. Dr. Szakacs was cross-examined by the defence, and the trial judge was satisfied that the current standards in technology and competence had been met. It was open to the trial judge to give the opinion of the expert the weight that he considered appropriate and there is no basis upon which this Court could interfere with his assessment of that evidence. The trial judge was alive to his obligation to weigh carefully and appropriately the evidence tendered by the DNA expert. ...

89 These principles are relied upon in *Terceira*, *Worrall*, and *Prosser*. The law appears to be the same in the United Kingdom (*Kennedy v. Cordia (Services) LLP, supra*). In all of these, the expert relied upon the work of others, or knowledge, within the expert's field. I am not satisfied that is the case here.

90 Ms. Murphy gave opinion evidence interpreting the significance of DNA profiles. There was insufficient biological material to develop a DNA profile from what was described as semen found on the swab. The work done by Ms. Janssens, and the application of her skilled knowledge and training to find semen, was not relied upon or used as a building block for Ms. Murphy's opinion.

91 The trial judge's qualification of Ms. Murphy as a "forensic laboratory specialist" was broad. I earlier quoted the terms. For ease of reference, I repeat them:

... a forensic laboratory specialist (reporting scientist) in the Biology Section, RCMP National Forensic Laboratory Services, dealing with the interpretation of body fluid and hair examination results, the interpretation and comparison on human DNA typing profiles, and the application of statistical significance to forensic DNA typing.

92 However, when asked about characteristics of semen, Ms. Murphy said she did not really know, as she was not an expert in semen (*infra*. para 36). In the circumstances of this case, I would not rely on the authorities cited by the Crown as justifying admission of the evidence that semen was present on the vaginal swab. But that is not the end of the analysis. In my view, the information set out in Ms. Janssens' notes is admissible based on both the modern view of the admissibility of hearsay, and the common-law exception for business records. My analysis follows.

[228] The potential challenges to the admissibility of hearsay information relied on by scientific experts is not often controversial. That assessment in relation to “scientific” experts, by its nature, is seen by courts generally to permit a more readily discernible reliable outcome due to the use of “established science”, “the scientific method” and “peer reviews”.¹⁰⁸ In the case of “specialized experts”, particularly where they have acquired their expertise over a lengthy period of time, drawing on the fruits of observation by virtue of their immersion in a continuum of information throughout that period, it is more difficult to delineate what factual matters may be relied upon by such experts as “within their expertise”.

[229] Of most assistance for present purposes, are the approaches taken by courts in relation to similar “specialized knowledge” criminal organization experts.

[230] In *R. v. Giles*, 2016 BCSC 294, Justice Ross was dealing with a very similar situation. Mr. Giles was alleged to be involved in a conspiracy to traffic cocaine for the benefit of, at the direction of, or in association with a criminal organization, the Hells Angels Motorcycle Club. Jacques Lemieux, was the proposed expert. He was a long time member of the RCMP, and had previously been qualified as an

¹⁰⁸ However, courts must be mindful that the mere stamp of scientific method and peer review, on occasion, have been shown in dramatic fashion as illusory guarantors of accuracy and validity in the case of some facets of “established science” – e.g. regarding the bacterium *H. pylori*, until the work of Drs. Barry Marshall and Robin Warren in 1982 corrected misconceptions.

expert in such matters.¹⁰⁹ The Crown sought to qualify him to give expert opinion evidence as to:

- a. The nature and characteristics of the Hells Angels organization including its origin, structure, composition, purpose, and activities; and
- b. The main purposes and activities of the Hells Angels and whether these include the facilitation or commission of serious offences that afford material benefit to its members.

[231] The Crown anticipated that his opinion would be that the Hells Angels MC is a “criminal organization”.

[232] Justice Ross held that Mr. Lemieux was permitted to testify with restrictions. She noted he relied on multiple sources:

17 Mr. Lemieux relied upon a number of sources in coming to his opinion. **First** is his personal firsthand experience in conducting investigations including physical surveillance, listening to intercepted communications, attending rides of the Hells Angels and conducting searches of clubhouses. A **second source** of information is the review of documents and physical evidence, some seized in the course of searches in which he was involved as an investigator, some provided from other law enforcement agencies, some part of disclosure in unrelated cases and finally, some seized during the course of this investigation. A **third source** is information obtained during conversation with other members of law enforcement and at workshops and lectures.

18 Mr. Lemieux has interviewed confidential agents, informants and ex-members of Hells Angels, some named and some unnamed. Mr. Lemieux has reviewed certain transcripts of testimony given by agents. He has read some Canadian decisions related to criminal organization cases and reviewed some Hell Angels websites. Finally, Mr. Lemieux has read some books and articles on the subject of the Hells Angels. This reading did not follow any systematic approach and was not part of any course of study. He has not reviewed the academic literature.

[233] She went on to observe that Mr. Lemieux “did not provide any material in support of his opinion or anything that could be described as his file in relation to the opinion” (para. 19). Justice Ross found that the nondisclosure of material foundational to his opinion, was part of his duty to the court as an expert, and “a consideration of the extent to which these duties and responsibilities have been

¹⁰⁹ See e.g. *R. v. Giles, Revell and Rempel*, 2008 BCSC 76; *R. v. Violette*, 2008 BCSC 920.

discharged is an important aspect of the second stage review,¹¹⁰ which involves consideration of the question whether the evidence is sufficiently beneficial to the trial process (material and probative) to warrant admission, despite the potential harm that its admission may entail to the fair trial rights of the defendants, given the possibility that the “consumption of time, prejudice and confusion” to the trier of fact is not worth the effort.

[234] Justice Ross concluded by stating what Mr. Lemieux would be entitled to testify to, and what he would not be entitled to testify to:¹¹¹

174 I have concluded that Mr. Lemieux will be permitted to testify concerning the structure and composition of the Hells Angels, including a description of the formal structure of the club at the international, national, regional and chapter level, the structure of governance at each of those levels, meeting, voting, categories of membership, written rules, symbols used by the club as markers of its identity and categories of membership, clubhouses including what is, in his experience, typically found in clubhouses. He will be permitted to refer to the term Big House Crew and to describe the use of photographs and newsletters in that regard. *He will be entitled to rely on hearsay, for the truth of the propositions, in relation to these opinions.*

175 *Mr. Lemieux will not be permitted to express the following opinions:* the opinion with respect to the main purposes and activities of the Hells Angels Motorcycle Club, including that the club is engaged in a pattern of criminal activities primarily, but not exclusively, drug trafficking, that the organization's main purpose is to facilitate the criminal activities of its members, the reputation of the Hells Angels organization in the "criminal milieu". This includes opinions with respect to the unwritten meaning or significance of the club's formal written rules, the unwritten purpose of the Big House Crew activities, the meaning of patches including the 1%er patch, the Filthy Few patch, the unwritten roles of the president and sergeant at arms, that sanctions for breaches of club rules can include murder, that prospects are introduced to criminal activity and can be ordered to commit crimes, that members use white boards and hand gestures to discuss criminal activities at meetings at the clubhouse, that the recruitment process is an aspect of the Hells Angels' involvement in criminal activity.

¹¹⁰ Per Justice Doherty's comments at paras. 76 – 79, in *R. v. Abbey*, 2009 ONCA 624.

¹¹¹ In her conclusion in the second stage inquiry, Ross J. found Mr. Lemieux had breached two duties required of an expert: 1) failure to state the facts upon which the opinion is based; and 2) non-production of the materials relied upon by the expert (both of which would affect the ability of a defendant to test the evidence); and there were also concerns about his objectivity. Consequently, she determined that he would not be permitted to give evidence which she had characterized as “the second component of his opinion” (paras. 114 and 173).

[235] Regarding whether an expert such as Sergeant Isnor can rely on factual assertions not directly observed by him or her, Justice Ross concluded that the facts provided to the expert can be presented to the court by the expert *if* such hearsay represents the product of "general study or accumulated knowledge" as distinct from an assertion relating to a fact at issue in the case:

Hearsay

39 Hearsay has relevance in two aspects in relation to an expert opinion. The first is as one source of the expert's expertise. In Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 2d. ed., (Toronto: Butterworths, 1999) at S 12.88, the authors note:

An expert's knowledge is made up of the distilled assertions of others not before the court. Recognition of this hearsay basis of expertise has been acknowledged by Canadian courts for some time. One example is a New Brunswick decision in which it was said:

A doctor, chemist, professional man or any other person who qualifies as an expert is not confined to opinions based solely on his personal experience of observation, but may draw on information obtained from lectures during his education in his particular field, textbooks, as well as from discussions with other persons learned in the same field. The weight to be given to any opinion is always a matter for the consideration of the trial Judge.

Reference Re Sections 222, 224 and 224A of the Criminal Code (1971), 18 D.L.R. (3d) 559 (N.B.C.A.)

40 The second way in which hearsay has relevance is in relation to the factual basis of an expert's opinion. **There are three potential sources for the opinion offered by an expert.** The **first** source is facts which are the direct observations of the expert; for example, a physician's observations of the physical condition of the person examined. The **second** source is *facts provided to the expert*; for example, the contents of an interview conducted by the expert. The **third** potential source is a hypothetical provided to the expert by counsel. *The second source, which consists of information which serves as a factual foundation for the opinion that is outside the expert's own observation engages considerations of hearsay.*

41 In *Abbey 1982*, the Court articulated principles concerning the admissibility and weight of an expert's opinion in relation to an expert's report based in whole or in part on hearsay. These principles were described by Wilson J. in *R. v. Lavallee*, [1990] 1 S.C.R. 852 [*Lavallee*] at 893 as follows:

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.

2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

42 In *Lavallee*, Justice Sopinka, in a concurring decision, suggested refinements to the treatment of the issue of hearsay relied upon by the expert. At 898 and 899, Justice Sopinka distinguished between opinion based upon forms of enquiry and practice that are accepted as a means of decision within that expertise where there are strong circumstantial guarantees of trustworthiness, with those which rely upon a source which is inherently suspect, such as a party to the litigation. In both cases the hearsay is admissible to show the basis of the opinion. However, in the case of the former, independent proof of the hearsay will not be required, but independent proof of those facts will be required in the case of the latter.

43 In *R. v. S.A.B.*, 2003 SCC 60 [*S.A.B.*], the Court adopted the distinction described by Sopinka J. In that case the DNA expert had relied upon international guidelines to explain and support her conclusion that the non-matching test sample was a mutation. The Court held that the expert was entitled to rely upon such sources within her field without the necessity for independent proof of those sources. Another example of the application of this distinction is the case of *City of Saint John v. Irving Oil Co. Ltd.*, [1966] S.C.R. 581, in which the issue was the reliance by an appraiser upon information of comparable transactions he had investigated in coming to his opinion.

44 By contrast, examples of situations in which independent proof of the hearsay relied upon by the expert has been required include: statements of the accused, complainant, friends or relatives, see *Abbey 1982*; and *Lavallee*.

45 In *Myers v. The Queen*, [2015] UKPC 40 [*Myers*], the Privy Council addressed this issue in the particular context of police expert evidence in relation to gang activity. Lord Hughes, for the Board, noted at paras. 63 and 64:

It is well established that an expert is entitled, in giving his evidence, to draw upon the general body of knowledge and understanding in which he is expert, notwithstanding that some (or even all) of the material may have been assembled by other students of the subject.

It does not, however, follow that because the witness is an expert he is immune from all inhibition on hearsay. He is not.

46 At para. 66 a suggested division was proposed:

The test of whether evidence based upon hearsay material can be given is better seen to be whether it ceases to be the expounding of general study

(whether by the witness or others) and becomes the assertion of a particular fact in issue in the case. The first is expert evidence, grounded on a body of learning or study; the second is not, even if it may be given by someone who is also an expert. The line between the two is case-specific, but it will usually be possible to discern it.

47 In that case evidence about the places of association, the culture of the gangs or the signs used to communicate by gang members was based in part upon personal observation, supplemented by information accumulated by the officer's unit from many sources. The court observed that such evidence would be legitimately given but added the proviso that such evidence, depending on the context, could pass the point at which it was no longer a matter of general study or accumulated knowledge. Lord Hughes noted that:

That is one reason why it is essential that a witness such as Sergeant Rollin sets out from the beginning the sources on which he has relied...

48 Justice Trafford, in *R. v. Sappleton and Eubank*, 2010 ONSC 5704 [*Sappleton*] at 86, adds a qualification that is of particular importance in the context of a criminal proceeding; namely that hearsay will not be admissible, even for the limited purpose of proving the foundation of the opinion, where there are constitutional or other legal principles precluding its admissibility:

Where there are constitutional or other legal principles that preclude the admissibility of some or all of that information, it is not admissible, even for the limited purpose of proving the foundation of the opinion. In this case, the information from the confidential informants and the debriefing of arrestees has not been the subject of judicial summaries. To permit the Crown to include their information in the foundation of the opinion would unduly interfere with the right of the defendants to make full answer and defence.

49 Thus, it appears to be settled that an expert is entitled to rely on secondary sources as part of the factual foundation for his or her opinion:

- (a) where there are no other constitutional or legal impediments to preclude the admission; in particular, the right of the accused to make full answer and defence;
- (b) where such sources are referred to as part of the forms of enquiry and practice accepted within the expertise.

50 Where hearsay is admissible in this context, the court must address whether the hearsay is admissible through the expert only as evidence of the foundation of the opinion, such as the statements made to a psychiatrist in *Abbey 1982*, or as evidence of the facts asserted without the need for independent proof, such as the international guidelines in *S.A.B.*

51 The critical inquiry in this regard is the question of sufficient circumstantial guarantees of trustworthiness. The extent to which the hearsay represents the

product of "general study or accumulated knowledge" as distinct from an assertion relating to a fact at issue in the case will be one important factor in this determination. Another important factor will be the methodological rigour of the process of study and accumulation of knowledge. Finally, in my view, the closer the subject matter of the opinion is to an ultimate issue in the case, the greater scrutiny will be required in making this determination.

[My italicization added]

[236] Notably, hearsay held to be admissible as “general study or accumulated knowledge” was found to include, in *Myers v. R.* [2015] UKPC 40, at paras. 62 and 65:

It is well-established that an expert is entitled, in giving his evidence, to draw upon the general body of knowledge and understanding in which he is expert, notwithstanding that some (or even all) of the material may have been assembled by other students of the subject ... *experts often give evidence of observable fact and such evidence may legitimately be and very often it is, informed by the accumulated body of knowledge collected by others as well as by the witness's own experience.* The expert in the social and political conditions in a foreign country, who is a witness before an immigration judge gives evidence of fact, and much of it will not be his personal experience... [such] evidence relies on the work of researchers and of published data rather than on their first-hand knowledge.

[my italicization added]

[237] It must be borne in mind that, in *Myers* (which was a trilogy of cases, each with different facts), the evidence was admitted to prove motive to kill, in cases of murder and attempted murder, and the convictions were upheld - it was not a case involving proof of the existence of an alleged “criminal organization,” which intrinsically involves a much more complex factual examination. In the case at bar, Sergeant Isnor is relying on his own personal observations, combined with police intelligence which he received after a significant vetting process, to ensure its reliability, and evidence supplied to the court specific to the BMC.

[238] Another example of police intelligence relied upon to establish specific criminal offences, (aggravated serious criminal trespass, and aggravated endangering of life) can be found in *R. v. Cluse*, [2014] SASFC 97, a decision of the Supreme Court of South Australia – Court of Criminal Appeal. As Chief Justice Kourakis stated, at paras. 2, 9, and 14-15:

When it is proposed that a police officer give opinion evidence about the practices of criminals, it is important to distinguish between evidence of facts relating to those practices observed in the course of that police officer's duties, to which I

will refer as direct evidence, *and the giving of opinion evidence about matters of which the police officer has no direct personal knowledge. Evidence of the latter kind must be founded in a course of study or special experience and must be informed by reliable data*"(para 2)... In Australia, authoritative discussions of the admissibility of opinion evidence as to the nature, structure and conduct of biker gangs is sparse (para 9) ...internecine conflicts will be admissible to provide the jury with the context in which to evaluate that direct evidence." (paras. 14-15)

[my italicization added]

[239] In a concurring opinion, Justice Vanstone stated, at paras. 47 -49:

In the case of [*R. v. Hawi*, (No 1),(2011) 220 A Crim R 452] cited above, members of the Comanchero MC were charged with inflicting grievous bodily harm on one or more members of the Hells Angels at Sydney airport. The trial judge, RA Hulme, J ruled that the prosecution was permitted to call evidence from police officers regarding the structure of the Comanchero MC , its hierarchy of command, the duties and responsibilities associated with the positions within the hierarchy, the process of nomination and qualification as a full member, the rules of the club, including not talking about club business outside the club and never talking to the police, as well as evidence of previous animosity between the Comanchero and the Hells Angels. *The evidence was admitted as being relevant to whether or not there had been a joint criminal enterprise and, if so, what was its scope.* The fact that the accused men were members of an organization which had rules and *from which it might be inferred that they would show loyalty to fellow members was said to be relevant to whether they joined in the enterprise.* Previous animosity was also said to bear on that question.

As already set out, Featherby [the police witness] gave *evidence of the culture of the two clubs and their operations. This was not opinion evidence*, but was knowledge gleaned from long observation and study. In my view, it was properly admitted.

However, in my opinion, Featherby should not have been permitted to give evidence of the specific instances of violence between motorcycle gangs, in circumstances where he was neither a direct observer nor involved in the investigation of those incidents. It is one thing to allow a police officer to give evidence of his knowledge of practices in the drug trade or his knowledge of the culture of motorcycle gangs where the witness's knowledge of such matters may well be based on a mass of information, some of it hearsay. *Yet it is quite another to allow a witness simply to relate the details of specific incidents which he has learned from secondary sources.*

[My italicization added]

[240] I should note that Justice Vanstone had earlier noted, at para. 42:

As to the specific incidents outlined by Featherby, [defence counsel on appeal] argued that, quite apart from their hearsay nature, they were based on anecdotal and imprecise information; the Hells Angels were not always identified as the perpetrators of the violence; indeed one incident involved gangs which were shown not to be the Hells Angels. In addition, counsel argued that incidents of violence subsequent to the attack at Semaphore were irrelevant.

[241] Regarding references to the limits of Sergeant Isnor’s reliance on hearsay, the permissible bounds of which are characterized as, “where such sources are referred to as part of the forms of inquiry and practice accepted within the expertise”, I agree with Justice Ross in *Giles* that:

51 The critical inquiry in this regard is the question of sufficient circumstantial guarantees of trustworthiness. The extent to which the hearsay represents the product of “general study or accumulated knowledge” as distinct from an assertion relating to a fact at issue in the case will be one important factor in this determination. Another important factor will be the methodological rigour of the process of study and accumulation of knowledge. Finally, in my view, the closer the subject matter of the opinion is to an ultimate issue in the case, the greater scrutiny will be required in making this determination.

[242] Justice Ross commented about experts such as Sergeant Isnor as follows:

132 The Crown submits that Mr. Lemieux is not a social scientist, and his opinion should be judged against the methods and standards of police evidence, not that of social science. I agree.... *Moreover, I agree that in appropriate circumstances, expert opinion evidence from a police expert witness could be found to present sufficient guarantees of trustworthiness to warrant treatment in the same manner as the evidence of Dr. Totten [in Abbey (2009)].*

133 However, it is also clear that the court must address the threshold reliability of the proposed opinion. I note, in addition, that in several cases in which such evidence has been considered by the court, the expert offered much more detailed evidence concerning the processes used by the police to confirm and test information; see for example, *Sappleton and Gager*...¹¹²

134 The issue of reliance on hearsay in the context of police expert evidence dealing with an issue related to gangs or criminal organizations has been directly addressed in the number of cases in Canada, some of them involving the evidence of Mr. Lemieux:

...

f) In *R. v. Gager*, 2012 ONSC 388, at para 221, Justice Clark concluded that much of the proposed expert’s testimony was, in fact, not strictly speaking,

¹¹² I note that those cases, only two years apart, dealt with the same police expert witness, Detective Backus.

opinion, but general factual information. He permitted the expert to testify and to rely upon hearsay in doing so in relation to these “factual” matters which were:

For greater certainty, then, [Detective] Backus may testify, and in so doing may rely on hearsay, concerning the following matters:

- (i) the phenomenon of the street gang;
- (ii) the structure and organization of gangs generally, including the affiliation of many local gangs to the overarching Bloodz and Cripz organizations;
- (iii) the symbols and graffiti commonly used by gangs;
- (iv) *the concept of a street gang having a core territory*;
- v) the use of graffiti by gangs to denote their territory;
- (vi) the proposition that, for fear of reprisal, a gang member would not likely enter the territory of a rival gang absent a compelling reason to do so;
- (vii) *typical gang responses to perceived infringement of territoriality*; and
- (viii) the existence of such gangs in Toronto.

Justice Clark treated the balance of the proposed evidence of the expert as opinion proper. This included: the existence of the Doomztown Cripz and Driftwood Cripz as gangs; opinions concerning gang membership of different individuals, and whether there was a gang war between [the two gangs]. With respect to this aspect of the proposed evidence, Justice Clark treated the hearsay relied upon by the expert as, at best, admissible to show the basis of the opinion.¹¹³

[my italicization added]

[243] The following cases deal most specifically with a similar situation to that of Sergeant Isnor: *R. v. Alcantara*, 2012 ABQB 225, per Greckol J., affirmed, 2017 ABCA 56, (see para. 3 for the history); *R. v. Sheriffe*, 2015 ONCA 880, leave to appeal denied, [2016] SCCA 299.

[244] In *Alcantara*, Justice Greckol was considering qualifying as an expert, RCMP Staff Sergeant Jacques Lemieux. He was to testify on the nature and characteristics of the Hells Angels MC and the main purpose and activities of the Hells Angels MC. His testimony was to cover areas relating to the Hells Angels’ structure and size, the meaning of patches and jargon, the reputation of the Hells Angels in the criminal milieu, and the involvement of the Hells Angels in the drug business. Regarding his qualifications the court stated:

¹¹³ He specifically dealt with local police occurrence reports, confidential informant information received, and reviewed wiretaps, see paras. 255 – 266.

5 Mr. Lemieux does not have a university degree or any post-secondary courses or diplomas. He has no formal education in sociology, anthropology, statistics, or science. He does not subscribe to academic journals, nor has he pursued academic study in the area of what he refers to as outlaw motorcycle gangs (OMGs), which he distinguishes from "biker enthusiast clubs." He is a career law enforcement officer, having worked 33 years with the RCMP.

6 Mr. Lemieux's relevant post-secondary training is comprised, in part, of courses taken at the Canadian Police College, including the following: Drug Investigative Techniques (2/3 week in 1979); Police Studies (one week in 1979); Proceeds of Crime Investigative Techniques - focus on money laundering (one week in 1985); Criminal Intelligence - gathering and use of information and intelligence (two weeks in 1988); and Major Case Management - how to investigate major cases (one week in 2003). He also took a course entitled Operation Drug Techniques in Vancouver, British Columbia for three weeks in September 1980, as well as several courses at RCMP Headquarters in Ottawa, including: Effective Presentations - training to teach (1992); Intelligence Analysts - organized crime focus (one week in 1993); and Police Managers - for development of managerial skills (1994).

7 Mr. Lemieux acknowledged that the courses referred to above were developed and presented by police officers for police officers; that is, for law enforcement personal, and were not open to the public.

8 In July 2006, Mr. Lemieux attended a course on expert witnesses.

[245] The court canvassed his police duties and responsibilities between paras. 9 and 42. The upshot was that his career had similarities with that of Sergeant Isnor, though I would suggest that for present purposes, Sergeant Isnor's qualifications are superior. Notably, not only from 2008 to 2015, did Sergeant Isnor work with the Criminal Intelligence Service of Canada as one of two National coordinators for the Outlaw Motorcycle Gang Project, but he was much more actively engaged in policing throughout the duration of this trial. With respect to Mr. Lemieux, Justice Greckol accepted that:

28 From May 1992 to October 2000, Mr. Lemieux worked with the Criminal Intelligence Service of Canada (CISC), a national police organization, as one of two national co-ordinators for the Outlaw Motorcycle Gang Project. He testified that in that capacity, he received, correlated and analyzed information from municipal, provincial and federal law enforcement agencies across Canada and the world regarding OMGs, and in particular the HAMC. He then disseminated that information to law enforcement agencies across Canada. He said that his focus became more national and international with this job.

29 Mr. Lemieux's evidence was that when he received information during the course of his work on this project, he would call the source to verify the

information before disseminating it. He said that as national co-ordinator, he was sent copies of documents and information seized in the course of investigations across Canada, including Alberta, and the world (minutes of HAMC meetings at local, regional, national and international levels, photographs of HAMC members, club rules, phone lists, membership lists, details of runs (organized rides); details of investigations in the provinces; intelligence reports from agents and informants; and reports from law enforcement agencies across the Canada, the United States and Europe, as well as Canada Customs.

30 Mr. Lemieux said that while he was working on this project, he attended national and international conferences and talked to investigators from Europe, Australia, and the United States about OMGs and the HAMC, including the HAMC in Alberta.

31 Mr. Lemieux testified that he spoke with a former member of the HAMC, Gilles LaChance, who was in witness protection. LaChance confirmed information Mr. Lemieux previously had about the HAMC, including its structure, the hierarchy, tattoos, patches, graduation within the organization, its business of drug importation and trafficking, and the meaning of the "filthy few" patch.

32 Mr. Lemieux also testified that he reviewed the sworn evidence and debriefing reports of Yves Trudeau, a former member of the Laval Chapter of the HAMC, who testified in court concerning details of the organization. Mr. Lemieux said the information from Trudeau confirmed other information Mr. Lemieux had gathered over the years about the HAMC.

33 Mr. Lemieux also spoke to Anthony Tait, a full member of the Anchorage, Alaska Chapter of the HAMC, who was an agent of the FBI. Mr. Lemieux reviewed FBI debriefing reports and interviewed Tait on a number of occasions. According to Mr. Lemieux, this opportunity too provided confirmatory information. Tait spoke of the HAMC organization, structure, club business, executive role and criminal activities.

34 Mr. Lemieux also searched the clubhouse of the Jokers, a puppet club of the HAMC in St Jean Sur le Richelieu, Quebec. He testified that the search provided him with information relating to the HAMC membership structure, the executive across Quebec, the steps to be taken for full membership, and security measures taken by the club.

35 Mr. Lemieux testified that in 1998, he observed HAMC members at a 50th anniversary HAMC run in San Bernadino, California, and he spoke with members from the United States, Canada and Europe. He also attended the world run at Ventura, California.

36 Mr. Lemieux said that while he worked at CISC, which had a bureau in each province, he received monthly updates of the OMG situation in each province. As a result, he expanded his knowledge base of the HAMC beyond Quebec to the whole of Canada.

[246] From October 2000 to August 2003, Mr. Lemieux worked as an investigator for the RCMP Integrated Proceeds of Crime (IPOC) section in Ottawa. From August 2003 to August 2004 he worked with the Combined Forces Special Enforcement Unit of the RCMP, involved in the investigation of organized crime. Between August 2004 and April 2008 he was in charge of the Ottawa Drug Section of the RCMP. He supervised 40 investigators who reported to him weekly, some of whom were seconded to investigations involving the Hells Angels. In April 2008, he retired. From April 2008 to April 2012, he has been a temporary civilian employee with the RCMP, working on average 3 to 4 days a week and in the process of developing a National Expert Witness Program respecting the roles and responsibilities of expert witnesses.¹¹⁴

[247] The court discussed the factual bases Mr. Lemieux relied upon in formulating his opinion:

49 Mr. Lemieux agreed that the process he has employed in forming his opinion on the HAMC has included talking to other police officers, informants and agents; reading magazines, books, intelligence reports from provincial, national and international sources and investigative reports from different parts of Canada, including Alberta; and from his first-hand knowledge through surveillance, participation in searches and listening to wiretap interceptions. He reviewed the minutes of HAMC meetings identifying guidelines for dispute resolution.

50 He acknowledged that he had no formal process for testing his information, but said that he would make sure the information was factual by calling sources to confirm the information before he disseminated it. If it was information from investigations, he would wait until the investigations were complete or court decisions rendered. Mr. Lemieux said that sources used by the RCMP were classified as "believed to be" reliable, reliable or confirmed. Reliable sources are those who have provided information in the past that has been corroborated by other means. Agents were former members of the HAMC that were part of the organization or worked with them buying or selling drugs. Informants received information from members or other agents within the criminal milieu.

[248] The court summarized Mr. Alcantara's argument regarding the extent to which Mr. Lemieux could rely upon information he received, but which underlying facts were not directly observed by him:

73 Alcantara contends that expert opinion based on second-hand evidence may be admissible, if relevant, but it should be accorded no weight if the facts on

¹¹⁴ The list of his previous qualifications as an expert witness regarding the Hells Angels is captured at para. 48.

which the opinion is based are not proved (*R. v. Abbey*, [1982] 2 SCR 24 at para 17; *R. v. JJ*, 2000 SCC 51, [2000] 2 SCR 600 at para 59).

74 He maintains that if Mr. Lemieux is qualified, he should be limited to giving opinion evidence based on his personal experience together with other evidence admitted in the trial. Alcantara asserts that the basis for Mr. Lemieux's opinion regarding other aspects of the nature and characteristics of the HAMC and its main purpose and activities is based on hearsay from informants, civilian agents, ex-members of the HAMC, debriefing reports and reports of other police officers.

[249] Justice Greckol concluded:

119 The Accused contend that expert opinion based on hearsay should not be admitted or should be accorded no weight. They suggest that much of Mr. Lemieux's opinion has been formed on the basis of hearsay.

120 In *Lavallee*, at paras. 82-84, Sopinka J discussed the issue of an expert's reliance on hearsay and clarified that there is a practical distinction between evidence that an expert obtains and acts on within the scope of his or her expertise and evidence that an expert obtains from a party to litigation touching a matter directly in issue:

In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner*, [1970] S.C.R. 608. In *R. v. Jordan* (1984), 39 C.R. (3d) 50 (B.C.C.A.), a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that *Abbey* does not apply in such circumstances. (See also *R. v. Zundel* (1987), 56 C.R. (3d) 1 (Ont. C.A.), at p. 52, where the court recognized an expert opinion based upon evidence "... of a general nature which is widely used and acknowledged as reliable by experts in that field.")

Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with Abbey, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it

will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. In this respect, I agree with the statement of Wilson J. at p. 896, as applied to circumstances such as those in the present case:

... as long as there is some admissible evidence to establish the foundation for the expert's opinion, *the trial judge cannot* subsequently instruct the jury to *completely ignore the testimony.* The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

121 *In Lindsay at paras. 22-23, Fuerst J interpreted this to mean:*

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

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

122 *Mr. Lemieux has based his opinion on the HAMC on first-hand experience* as an investigator, including thousands of hours of surveillance on members of the HAMC and HAMC clubhouses, thousands of hours of listening to intercepted communications involving HAMC members, searches of HAMC clubhouses and reviewing documents seized from the search of the clubhouses.

123 He also has based his opinion *on information he has acquired from other sources.* He testified that the *informants he spoke with were considered reliable*

by the RCMP (they previously had provided information that later was corroborated), and they *obtained their information from members of the HAMC. The agents he debriefed also obtained their information from members of the HAMC.* He spoke with former members of the HAMC and reviewed the transcript of interviews with other former members. According to Mr. Lemieux, where the information was new, *he took steps to confirm it.*

124 In my view, as in *Lavallee*, *Mr. Lemieux has arrived at his general opinions "on the basis of forms of enquiry and practice that are accepted means of decision within that expertise."*

125 I agree with the Crown that his partial reliance on hearsay goes to weight rather than admissibility and that the assessment of weight will be influenced by the other evidence called at trial that corroborates his opinion (*Violette*, at para 75).

[My italicization added]

[250] Another such case is *R. v. Sheriffe*, 2015 ONCA 880; leave to appeal denied [2016] S.C.C.A. 299. In *Sheriffe*, one of the appeal grounds was: Did the trial judge err by allowing hearsay evidence provided by confidential informants through a police witness who was qualified as a gang expert? The court particularized the challenge to the expert as follows:

84 *Sheriffe* takes issue with the admissibility of part of the evidence of Det. Nasser, who was qualified as an expert and gave opinion evidence about street gangs in the Jamestown area and their characteristics.

85 *Sheriffe* does not question the relevance of Det. Nasser's opinion evidence or the necessity for it to assist the trier of fact. Det. Nasser, admittedly, is a properly qualified expert. But an exclusionary rule -- the hearsay rule -- should have prevented Det. Nasser from repeating to the jury what two confidential informants told him about *Sheriffe's* gang affiliation.

[251] The court rejected the challenge:

The Governing Principles

98 The issue *Sheriffe* raises involves general principles governing the admissibility of expert opinion evidence. It also relates to a subject -- gang membership and activities -- that has become of greater importance in recent years as a result of the enactment of several *Criminal Code* provisions creating a variety of offences associated with the activities of criminal organizations.

99 It is helpful to clear away at the outset what is not in issue here. In this case, no dispute arises about:

- (i) the relevance, materiality and admissibility of expert opinion evidence about gang membership, culture and activities;
- (ii) the relevance, materiality and admissibility of gang membership as a motive to commit an offence against a member, or a person thought to be a member, of a rival gang; and
- (iii) the qualifications of Det. Nasser to give expert opinion evidence about gang membership, culture and activities in this case.

100 The controversy here focuses on the intersection of two exclusionary rules of the law of evidence -- the opinion rule and the hearsay rule -- and their application to the evidence admitted here.

Expert Opinion Evidence and the Hearsay Rule

101 In general terms, the admissibility of expert evidence is determined by the application of a two-step or two-stage process. The first step is concerned with the threshold requirements of admissibility. The second -- the discretionary gatekeeping step -- requires the judge to balance the potential risks and benefits of admitting the evidence: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at paras. 19, 22-24; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at paras. 43-44.

102 Among the threshold requirements for the admissibility of expert opinion evidence is the absence of an exclusionary rule, other than the opinion rule itself. Usually, the exclusionary rule that intercedes is the character rule, which generally prohibits the Crown from introducing evidence of an accused's bad character in proof of guilt: *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 25. But another exclusionary rule, such as the hearsay rule, could also intervene.

103 A trial judge must take seriously the role of gatekeeper assigned by the authorities. And this is so at not only the second or gatekeeper stage, but also at the threshold stage and as the evidence is given: *Sekhon*, at paras. 46-47; *R. v. J.(J.-L.)*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 28.

104 It is well established that expert opinion evidence may be founded, in whole or in part, on the basis of statements made to the expert by others. For example, a psychiatric opinion about criminal responsibility is frequently based, at least in part, on what an accused told the expert about relevant events. But in order for the out-of-court account to be admitted as evidence of the truth of what was said, that account must be established by admissible evidence: *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 46 (Abbey 1982). See also: *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499, at para. 31; *R. v. D.(D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 55.

105 Where the factual premise of the expert's opinion includes out-of-court statements made by others that are not established by otherwise admissible evidence, as for example by a listed or the principled exception to the hearsay

rule, the opinion is entitled to less, and in some cases to no, weight: *Abbey* 1982, at p. 46; *R. v. Lavallee*, [1990] 1 S.C.R. 852, at p. 893.

106 A final point has to do with the capacity of an expert to give evidence of firsthand observations that she or he makes that may be relevant to issues at trial. *The opinion rule does not bar an expert from giving evidence of fact: Abbey* 1982, at p. 42. Put another way, *an expert is not confined by the opinion rule to expressing opinions only. The expert is entitled to give evidence of firsthand observations*, including for example, those made during a psychiatric interview by a psychiatrist called to proffer an opinion on criminal responsibility.

Expert Evidence about Gangs and their Culture

107 The enactment of legislation targeting criminal organizations and their activities has required courts to consider how gang membership and related issues can be proven without an undue risk of a conviction rooted in prejudice not proof.

108 *One type of evidence proffered in proof of various features of gang culture relevant to a particular case is expert opinion evidence. The admissibility of this evidence is governed by the two-step process adumbrated in R. v. Abbey, 2009 ONCA 624, 246 C.C.C. (3d) 301, leave to appeal refused, [2010] S.C.C.A. No. 125 (Abbey 2009), and approved in White Burgess: Abbey 2009, at paras. 75-76; White Burgess, at paras. 22-24; Sekhon, at paras. 43-44.*

109 The expert in *Abbey 2009* was a sociologist. He was qualified as an expert in the culture of urban street gangs in Canada. Crown counsel proposed to have the expert give his opinion about the meaning of a teardrop tattoo within the urban street gang culture and to give his opinion on the meaning of Abbey's teardrop tattoo. The basis of the opinion included:

- (i) research projects conducted over ten years;
 - (ii) a review of the relevant literature;
 - (iii) information gained through a 25-year clinical practice involving long-term relationship with gang members in and out of custody; and
 - (iv) detailed interviews with persons who lived in the gang culture.
- See *Abbey 2009*, at paras. 37-38.

110 *Nothing in the decision in Abbey 2009 suggests that the expert gave evidence of the contents of anything said to the expert on interview or that any of those interviewed gave evidence at trial.*

111 *In other jurisdictions, some courts have permitted experts to rely upon hearsay as a constituent of their knowledge base in the area of their expertise, but invoked the exclusionary rule to bar reception of specific statements related to the facts of a case. Two authorities illustrate this distinction. The latter suggests, however, that specific statements related to the facts of a case can be admitted if in accordance with an established hearsay exception.*

112 In *R. v. Cluse*, [2014] SASCFC 97, 120 S.A.S.R. 268, a home invasion and shooting of an occupant by a gang of intruders was alleged to form part of ongoing violence between two motorcycle gangs. A police officer with experience in dealing with gangs, including motorcycle gangs, gave evidence at trial. The officer's testimony included information on the culture and history of outlaw motorcycle clubs and several specific incidents of violence between motorcycle gang members. On appeal, the admissibility of the officer's evidence was challenged on the basis, among others, that it was based in part on hearsay.

113 The court concluded that the officer's evidence about the culture of the specific clubs and their operations was not opinion evidence, rather evidence of knowledge of facts gleaned from long observation and study. The court held that the witness' evidence about specific episodes of inter-gang conflict not based on his own direct observation was not admissible. Vanstone J. made the following distinction in para. 49:

It is one thing to allow a police officer to give evidence of his knowledge of practices in the drug trade or his knowledge of the culture of motorcycle gangs where the witness's knowledge of such matters may well be based on a mass of information, some of it hearsay. Yet, it is quite another to allow a witness simply to relate the details of specific incidents which he has learned from secondary sources. Even expert witnesses in the traditional sense do not do that as a basis for expression of an opinion. I consider that the evidence given by Featherby of specific episodes of inter-gang conflict was, with some possible exceptions based on direct observation, inadmissible.

114 In *Myers v. The Queen*, [2015] UKPC 40, [2015] 3 W.L.R. 1145, three appeals involving apparently motiveless shootings were heard together. Two victims died. One survived. In each case, the Crown called a police officer assigned to a unit that targeted criminal gangs to give evidence as an expert on gangs in Bermuda. The witness identified the gunman and victims as members of rival gangs and gave evidence about the criminal activities and culture of the gangs, including violent retaliation against a random member of a rival gang in response to a perceived insult or an attack on one of its own members. The evidence was received as expert opinion evidence and challenged on appeal, in part, as inadmissible hearsay.

115 The Privy Council affirmed the general rule that an expert may rely on information gathered from a variety of sources (hearsay) in formulating an opinion within the subject-matter of his or her expertise: *Myers*, at para. 63. But a witness' status as an expert does not immunize him or her "from all inhibition on hearsay": *Myers*, at para. 64. After a brief reference to *Cluse*, the Privy Council formulated a test to determine whether an expert can give evidence based on hearsay material:

The test of whether evidence based on hearsay material can be given is better seen to be whether it ceases to be the expounding of general study

(whether by the witness or others) and becomes the assertion of a particular fact in issue in the case. The first is expert evidence, grounded on a body of learning or study; the second is not, even if it may be given by someone who is also an expert. See *Myers*, at para. 66.

116 The Privy Council went on to suggest that assertions of fact that fell on the particular as opposed to the general side of the line could be proven by admissible hearsay: *Myers*, at para. 67.

The Principles Applied

117 Several reasons persuade us to reject this ground of appeal.

118 First, the fact that Det. Nasser's opinion was founded in part on hearsay did not, without more, render his opinion inadmissible, although it was a factor the jury could take into account in assessing the weight to assign to that opinion.

119 Second, the trial judge recognized the *information provided by the confidential informants to Det. Nasser was hearsay and properly required either a listed or principled exception to permit jury consideration of evidence of the truth of what the informants said.*

120 Third, the trial judge applied the principled exception to the statements made by the informants. He concluded that the necessity requirement was met because the confidential informant privilege rule rendered the informants' testimony unavailable. As for reliability, Det. Nasser's evidence about the informants' history in providing accurate and truthful information to the police was sufficient to satisfy the threshold reliability requirement. These findings of the trial judge are grounded in the evidence, untainted by legal error and entitled to deference in this court.

121 Fourth, *the trial judge correctly instructed the jury on the manner in which they were to assess the weight, if any, they would assign to the out-of-court statements of the confidential informants.* No personal appearance. No oath. No cross-examination. Circumstances accompanying the statement. Accuracy of reporting.

122 Finally, there was ample evidence identifying Sheriffe as a member of the "Hustle Squad", none of which was dependent on the truth of the confidential informants' say-so. Asfaha said so. The photograph, exhibit 40, showed it. And Sheriffe met the criteria for gang membership of the TPS.

[my italicization]

[252] It must be borne in mind that in *Sheriffe*, the purpose of the expert testimony was merely to establish the accuseds' membership in a specific criminal gang. In that respect, it bears resemblance to the Privy Council's decision in *R. v. Myers*, which involved expert evidence vis-à-vis proof of gang membership and motive for murder.

Summary of the relevant applicable principles

[253] I favour the views taken in *R. v. Giles*, at para. 51,¹¹⁵ and in *Alcantara*,¹¹⁶ as reflective of a sound policy considerations and the persuasive jurisprudence in Canada.

[254] When a court qualifies a “specialized knowledge” expert such as Sergeant Isnor to testify based on his significant experience with an identifiable alleged criminal culture, he may give factual evidence in support of his opinion, based on his “observations”¹¹⁷ in relation to the general nature and characteristics of the particular sub-culture and group in question; the history, organization, structure and hierarchy of the group; patterns of conduct, as well as the culture, values and practices of such groups, including the main purposes and activities of the group; and the language and symbols of the group. Such testimony is not strictly speaking traditional opinion evidence – it is better seen as, in essence, factual evidence. It will be subject to the probative value/prejudicial effect review by a court nevertheless.

[255] The expert witness’s “observations” can be based upon information acquired from other sources – that is, not observations he has personally made in each case. This may be conveniently referred to as “the product of general study or accumulated knowledge” within the expertise of the witness.¹¹⁸ For present purposes, these could also go so far as to include:¹¹⁹

¹¹⁵ I agree with Justice Ross’s general approach to the admissibility of such hearsay/expert opinion evidence. However, it must be recognized that in *Giles*, Mr. Lemieux was not permitted to testify as expansively relying on hearsay, as in hindsight, I could have permitted Sergeant Isnor to do in this case. That difference flows from weaknesses in Mr. Lemieux’s preparation for, and his presentation at the *Giles* trial, not matters of law.

¹¹⁶ At paras. 119-125.

¹¹⁷ Which I consider to be factual observations based on his personal direct knowledge and his findings/factual conclusions which arise from his personal direct knowledge, *and* a body of hearsay information that he considers to be, and is, sufficiently reliable by virtue of having sufficient circumstantial guarantees of trustworthiness. Sgt. Isnor had vast experience in relation to the so-called OMG phenomenon. He was head of the Ontario BEU and one of the two National Co-ordinators of the CISC at the material times herein. He had access to the most reliable and current information on OMGs in Canada, including the BMC. His role included vetting and assembling reliable information. In turn, this information was relied upon to make significant decisions about perceived threats from OMGs and the allocation of resources to best usages and formed the basis of information made available to police throughout Canada to assist them in their duties.

¹¹⁸ An example of the least contentious of such “observations” is courts taking judicial notice of significant events from the World War II era; *R. v. Zundel*, (1987) 31 CCC (3d) 97 (Ont.CA; leave to appeal refused, [1987] 1 SCR xii. More generally, as Justice Watt elaborates in *Watt’s Manual of Criminal Evidence*, 2017, Thomson Reuters at p. 466: “an expert may also give evidence based on material of a general nature that is widely used and acknowledged as reliable by experts in the field”. An example of a more discrete hearsay fact that is readily acceptable as having

- 1- Reliable information received from, *inter alia*, existing or former members of the group in question; existing or former police agents who have relevant and material access to, or interactions with, members of the group; confidential informants who have relevant and material access to, or interactions with, members of the group;
- 2- Reliable Surveillance and Wiretap records;
- 3- Results of properly issued searches: including photographs of persons, things or premises; and reliable reports arising from searches of persons, things (e.g. electronic devices) or premises.¹²⁰

[256] However, when material information upon which an expert relies for the truth comes from an inherently suspect source, generally independent reliable proof thereof will be required, if any degree of significant weight is to be assigned thereto.

[257] As the second-hand information relied upon for the truth of its contents by the expert becomes more factually discrete, specific, relevant, and material to the case at bar, the less likely it is that it will already have been subjected to scrutiny for reliability (e.g. as is done in the scientific field), and therefore generally its reliability may not be able to be established, without demonstrable independent proof. Such information will not be “within the forms of inquiry and practice accepted within the expertise”, which phrase references information that has already been scrutinized for reliability.

[258] We should not lose sight of the fundamental considerations involved: that information that becomes evidence at trial is sufficiently reliable to be worthy to be placed before the trier of fact; that an accused has a fundamentally fair opportunity to challenge such evidence; and that we do not unnecessarily create barriers to the effective prosecution of complex or difficult cases.

been catalogued by police is the so-called CPIC system’s contents, regarding offenders’ criminal records insofar as indictable offences are concerned, and which rely on fingerprinting offenders, and other reliable methodology regarding the accuracy of its contents. Once admissible, courts must still only assign the weight to such “observations” that is justifiable.

¹¹⁹ Not intended to be an exhaustive listing.

¹²⁰ At his qualifications *voir dire*, Sgt. Isnor stated that although he had only seen in person the outsides of the BMC clubhouses at Cupids/St. John’s; Grand Falls Windsor, NL and Hants County, NS (including the photos of Albert County), he has seen the Informations to Obtain (ITOs) search warrants and results of “pretty much every search warrant regarding the BMC”.

[259] A final safeguard exists in any event, because courts have the responsibility to residually consider whether the probative value of the proposed evidence is outweighed by the potential prejudicial effect on the defendants' fair trial rights, before admitting the evidence.

An examination of Sergeant Isnor's opinion that the BMC is a "criminal organization"¹²¹

[260] Sergeant Isnor testified, and I accept his evidence, that MCs that self-identify as 1% clubs have, in his experience, consistently been involved in serious criminality. However, he acknowledges that whether they qualify as "criminal organizations" as defined in the *Criminal Code* must be demonstrated on a case-by-case basis.

[261] Sergeant Isnor is of the opinion that the BMC have modeled themselves after the Hells Angels MC. I agree that one could draw that conclusion, and I find there is a remarkable degree of similarity.¹²²

[262] The Hells Angels MC have been repeatedly found to be a "criminal organization" in Canada:

1. *R. v. Lindsay*, [2005] O.J. No. 2870 (SC), per Fuerst J. – "Mr. Lindsay had a Woodbridge chapter card in his possession on arrest. Members of the Woodbridge chapter, in addition to Mr. Lindsay and Mr. Bonner, included John Gray, Robert Gray and Lorne Brown. Intercepted telephone communications of [Wolf] Carroll and [Mike] McCrea, and Emond and Mayrand around the time of the patch over [December 29, 2000] indicated that these Ontario individuals were well regarded by prominent members of the HAMC in Québec (para 1061) ... There is no evidence that the HAMC requires its members to

¹²¹ I am very satisfied that Sergeant Isnor's evidence was given honestly, and is reliable, unless I state otherwise.

¹²² More recent evidence in support of that contention may be found in the facts that: the BMC was a Hangaround chapter of the Hells Angels, and sought to become a Prospect chapter of the Hells Angels in 2000-2001; although the colours of the BMC are black and gold, in 2005 and 2007, when their clubhouse was searched (see for example, photo 51) one sees it has an entirely red roof with white siding – which are the colours of the Hells Angels; *inter alia*, searches of their Mother chapter clubhouse in Albert County, and BMC members' affinity for wearing Hells Angels support gear show a close association with the Hells Angels over the years; according to Sergeant Isnor, among 1% MCs only the Hells Angels and the BMC have in common: the reference to being "86'd" in their rules – which is a reference to a section of the military regulations from World War II, indicating one is "suspended; and having a "hangaround" status in their club hierarchy. Their organizational structures, and other similar practices, symbols and values also reflect this modelling effect, according to Sergeant Isnor.

commit any criminal offences. In particular, there is no such written rule to this effect. That does not, however, prevent members from engaging in criminal activity nor does it preclude the commission of crime as a main activity, of the group (para. 1071) ... I acknowledge that there is no direct evidence about similar activities by members of the HAMC in other provinces. There is, however, evidence of a close association and communication between the various Canadian chapters (para. 1078) ... It is a reasonable inference from the evidence, and one that I draw, that one of the main activities of the HAMC as it existed in Canada during the relevant time period, January 2002, was the commission of one or more serious offences for the economic benefit of its members, in particular drug trafficking (para 1079) ... I am satisfied beyond a reasonable doubt that during the time period specified in Count two of the Indictment, the HAMC as it existed in Canada was a criminal organization” - affirmed 2009 ONCA 53; Leave to appeal denied, [2009] S.C.C.A. 490;

2. *R. v. Drecic*, 2011 ONCA 118, at para. 8: “Finally, no issue can be taken with the trial judge’s finding that the Hells Angels motorcycle club is a criminal organization. The evidence in that regard is overwhelming.”;
3. *R. v. Beauchamp*, 2005 QCCA 580 – while this was a sentence appeal, the conviction was not appealed; at trial the accused was found guilty of drug trafficking and participating in the activities of a criminal organization, the Hells Angels MC;
4. *R. v. Bodenstein*, 2011 ONCA 737 – “The trial judge found that the totality of the evidence heard overwhelmingly demonstrated that the Hells Angels motorcycle club is a criminal organization” – the appeal from conviction was dismissed – Leave to Appeal denied, [2011] S.C.C.A. 560;
5. *R. v. Stockford*, 2009 QCCA 1573 – “There was an admission that the appellants were members of the Québec chapter of the Hells Angels Nomads. The existence of a vast conspiracy to kill members of rival gangs or independent drug dealers who refused to buy their drugs from the Hells Angels was also admitted”; *R. v. Stadnick and Stockford*, [2004] Q.J. No. 7163, per Zigman J., at para. 321: “the parties admitted that the Hells Angels Motorcycle Club and its affiliates, including the Nomads Québec chapter and its puppet club,

the Rockers of Montréal, are a ‘criminal organization’ as defined by section 2 of the *Criminal Code*.” (specifically during the period May 14, 1997 – March 27, 2001);

6. *R. v. Rudge*, 2014 ONSC to 41, per Hambly J. - “This organization [the Hells Angels MC] is not only a criminal organization, it is an organization which is a threat to the stability of the State. The Hells Angels and similar organizations will continue to seek to service that [market for illegal drugs] because it is so lucrative. The temptation of the profits to be made is so great that members of the Hells Angels or similar organizations will go to any lengths to guarantee success. This includes the murder of rivals to solidify control over the supply of drugs in urban areas where the market is strong. It also includes the murder of judicial officials.”;
7. *R. v. Wagner*, [2008] O.J. No. 5490 – “As an executive member of the Hells Angels Oshawa chapter, Mr. Stephen Gault became a police agent. In the summer of 2005, [he] contacted Mr. Gerald Ward who is a senior member of the Niagara chapter of the Hells Angels... Ward then arranged to have Mr. Wagner, a full patch member of the Hells Angels, to arrange for the cocaine to be delivered by Hells Angels, associates, prospects or hang-arounds” (paras. 8 – 9) “...I found the Hells Angels to be a criminal organization and that Mr. Wagner is a full patch member who quarterbacked the delivery of these drugs by using Hells Angels associates, prospects and hangarounds to do the real dirty work.” (para. 30)

[263] Insofar as there are previous findings of courts that the Hells Angels are a “criminal organization”, as a matter of judicial comity, I should give serious consideration to accepting the findings of superior and appellate courts in other provinces.¹²³ As Justice Scanlan stated in *BCE Inc. v Gillis*, 2015 NSCA 32, a case involving multiple applications for class-action certifications in different provinces

¹²³ Though I accept that individual chapters of the Hells Angels are autonomous (except to the extent that the organization has national or international rules that every chapter must follow or that the supreme chapter of the worldwide Hells Angels MC gives directions to individual chapters- (see also *Lindsay* at para 1068), the concept of “issue estoppel”, writ large across the Hells Angels MC organization, also may be arguably applicable here, because the Hells Angels are not the subject of this prosecution. I note that “issue estoppel” has been held to have a very limited application in criminal law matters. In *R. v. Punko*, 2012 SCC 39, the issue was, “is the Crown estopped from seeking to prove that the East End Chapter of the [HMAC] is a ‘criminal organization’ on the basis that the issue was decided adversely to the Crown in a prior [criminal] jury trial?”

by the same plaintiffs' counsel, where some had previously concluded with unfavourable results:

80 I also refer to *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 where the court refers to comity as a bedrock principle. LaForest, J., writing for the Court, described comity as follows: (p. 1096):

"Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws . . .

81 Justice LaForest went on to say at pages 1100-1101:

...For present purposes, it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and *that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation*. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the constitution.

[My italicization added]

[264] I remind myself however, that even if the Hells Angels MC was found to be a “criminal organization” by numerous courts between 1997 and 2006, these factual findings, standing alone, cannot be used as evidence by me that, as an organization, the BMC was pursuing a criminal path at that time, or since.

[265] Next, I propose to examine Sergeant Isnor’s evidence regarding the allegation that the BMC is a criminal organization.

[266] While the Supreme Court of Canada in *R. v. Venneri*, 2012 SCC 33, generally favours a less structured analysis of whether a group of individuals collectively are a “criminal organization”, they did not reject the usefulness of such a “checklist”. Some have criticized the use of the eight characteristics.¹²⁴ However, in *Venneri*, at paras. 37-8, Justice Fish stated:

¹²⁴ e.g. *R. v. Giles*, 2016 BCSC 294, at para. 88, and *R. v. Myles*, [2011] OJ No 4559 (SC), at paras. 36-40.

The ‘common’ characteristics of criminal organizations identified in *Lindsay* [2005] OJ No. 2870 (SC) per Fuerst J. may well be ‘common’ to highly sophisticated criminal entities, such as notorious motorcycle gangs, Colombian drug cartels, and American “crime families”. Care must be taken, however, not to transform the shared attributes of one type of criminal organization into a “checklist” that needs to be satisfied in every case none of these attributes are explicitly required by the Code, and a group that lacks them all may nonetheless satisfy the statutory definition of ‘criminal organization’.

[267] Based on his experience, Sergeant Isnor has found the eight characteristics to be helpful in assessing whether the BMC is a criminal organization, although he acknowledged other approaches exist. I agree that an examination of these characteristics is helpful. I accept his evidence regarding the BMC.

[268] Those eight common characteristics are: structure, membership, written and unwritten rules, associates, colours, clubhouses, intelligence gathering, and criminal activity. I will consider them each in turn.

1. Structure of the BMC

[269] The organizational structure is vertical and has paramilitary characteristics. Individual chapters are relatively autonomous, but the BMC National President, Charlie Burrell, has the final say about anything that individual chapters or the organization will do, should he decide to become involved. Each individual chapter must follow the BMC rules (written and unwritten), and the lead of the Mother chapter in Albert County, New Brunswick.

[270] Each chapter, and the organization itself, has a territory.

[271] Sergeant Isnor indicated that the BMC has formed chapters in Ontario. As a result, since March 13, 2015, all BMC Chapters in Ontario and in the Atlantic provinces, have started wearing a bottom rocker indicating “Canada” as their territory.¹²⁵

[272] In 2012, in each of the Atlantic provinces, BMC members wore a bottom rocker indicating their respective province as their territory; and they would identify their local chapter specifically with a small patch on the front of their motorcycle vest.

¹²⁵ Transcript, pp. 1531 – 32.

[273] Each chapter had officers: the President had absolute power and veto over any vote; the Vice-President (sometimes this position was vacant) was an alternate, when the President was unavailable; the Sergeant-at-Arms was the right-hand man of the President. He kept order at meetings and otherwise, ensured members respect the rules, and if they did not, he was responsible for imposing any sanctioned discipline, which could include fines, suspensions and physical beatings. He was in charge of gathering intelligence for the club. He was responsible for protecting the club, and typically had access to weapons. The Secretary-Treasurer was responsible for taking minutes of meetings, collecting dues, and otherwise paying the bills and receiving monies due to the chapter. The so-called “Road Captain” was responsible for ensuring that members maintained their motorcycles and attended mandatory “club runs”, which he was heavily involved in organizing.

[274] In 2012, at the Halifax County/Hants County Chapter for example, the following persons were in these positions:

1. President – Howard Fowler;
2. VP – Vacant;
3. Sergeant-at-Arms – Patrick James;¹²⁶
4. Secretary-Treasurer – Duayne Howe;
5. Road Captain – (not specifically referenced in the evidence, but Sergeant Isnor’s view was that Patrick James likely performed this role).

[275] In 2012, each BMC chapter’s relevant members were expected to hold or attend meetings as follows:

- Regular weekly or “church” meetings regarding local matters-all members required to attend each Wednesday;
- Special Officers’ meetings – held as necessary (these involved local officers going to the Mother chapter);
- National meetings – held twice a year (usually in January and July at the Albert County chapter – all members are required to attend these meetings).

¹²⁶ Who by Agreed Statement of Facts admits that at the time of these allegations he had tattooed Sergeant’s stripes on his right hand, which can also be clearly seen in Exhibit 13, where the Hants County Chapter membership is shown in the BMC 40 year Anniversary calendar.

[276] I conclude that Sergeant Isnor's testimony about the BMC structure is reliable.

2. Membership of the BMC

[277] Any person who wishes to become a member of the BMC must go through the recruitment process, and be sponsored by an existing member.¹²⁷

[278] Recruitment is progressive. One starts out as a hangaround, then moves to being a striker or prospect, and after a successful probationary period, if one has 100% membership approval, one becomes a full member. Only full members have full privileges, including voting, etc.

[279] During the different stages of recruitment, those persons wear progressively more elaborately adorned vests to signify their progression. Only full members are entitled to wear the 1% patch and the three-piece patch of the BMC.

[280] There was no direct evidence about what prospective members would have to do to advance through the ranks of hangarounds and prospects to become full members. In his June 2012 email communications with SH in response to SH's question "did I somehow break some unwritten code of conduct here?... I don't have a motorcycle club... I don't wear my patch when I am riding... and I don't belong to any of the clubs", Patrick James stated:¹²⁸

This is exactly what you have done and a lot of people are/would/will be extremely insulted by that photo/vest. *Patches like you are carelessly wearing (three-piece MC) are earned through a lot of time, blood and sweat. Those that have put in the effort for the right to wear such a patch (three-piece MC) will not react favourably to such a slap in the face.* From what you told me I would assume that you did not have any bad intentions (merely ignorance of patch protocols)... Thank you for taking down the photo... I just wanted to educate you to the patch protocol as some can be very extreme when dealing with such infractions and there is no need for incident if no disrespect was intended. Please just send a short reply to confirm that the requested alterations to the vest (removal of Nova Scotia and MC patches) have been carried out and your

¹²⁷ Unless they are members of an existing MC, who are patched over to BMC without the necessity of going through the full recruitment process, as was the case for the East Coast Riders, Cerberus, Cursed, Mariners, Easton's Crew, and Haka-piks motorcycle clubs. I conclude their memberships effectively passed through a progressive recruitment wholesale process as "clubs" – they were approved over time as riding clubs, one piece patch, two piece patch clubs until they joined and became 3 piece patch BMC members.

¹²⁸ Exhibit 24.

assurance that nobody will see it again as it previously was and there will be no need for me to contact you in the future.

[281] Sergeant Isnor stated that based on his experience and knowledge of the BMC, he would expect that the BMC would test hangarounds by having them do errands, run the bar, maintain motorcycles and generally do whatever was requested by members. If they achieved Prospect status, during this phase their loyalty would be tested more, and there would be a criminality test – were they prepared to commit criminal acts on behalf of the BMC?

[282] There was evidence that David Bishop, while a Prospect for the BMC, was convicted of trafficking in cocaine while wearing his Prospect BMC vest.

[283] I note that Mr. James, being the Sergeant at Arms of the only Nova Scotia chapter of the BMC at that time, felt it necessary to contact SH and admonish him about the dangers of creating a fictitious three-piece patch MC in Nova Scotia. Others would be very upset and feel disrespected because such patches “are earned through *a lot of time, blood and sweat*... have put in the effort for *the right to wear* such a patch (three-piece MC)”.

[284] What could those full patch members have done in the form of “time, blood and sweat” that would make them feel so disrespected by SH’s actions? SH was not wearing a BMC cut and colours. He was merely wearing his own design of a three-piece patch, with a bottom rocker indicating “Nova Scotia”.

[285] Why did Mr. James have a photograph of SH wearing his “Wolverines MC” leather jacket in his home, with writing on it: “[SH] (*asshole*) works at [...] *He has been warned* and says he doesn’t have to ask anybody anything”?

[286] Similarly, why did Mr. James feel it necessary to admonish and thereafter go on to threaten, harass, extort, and intimidate RM, as I have concluded he did, particularly when he disregarded Mr. James’s direction not to start up a three-piece patch Brotherhood MC chapter in Nova Scotia, and not to continue without approval from the Brotherhood MC to start a one-piece patch Brotherhood MC chapter in Nova Scotia? Why did Messrs. Howe and Pearce threaten, harass, extort, and intimidate RM in public to never ride a motorcycle again, or attend biker events in Nova Scotia?

[287] I conclude that to become a member of the BMC one must have to do something quite extraordinary, *inter alia*, in order to justify the reactions given by BMC members to SH and RM between June to September 2012.¹²⁹

[288] I conclude there is a basis in the collective evidence provided to me, including my above-noted observations, to reasonably infer, and it is an inference I find as a fact, that the BMC demands as proof of loyalty to the club, that Prospects engage in criminal activity.

[289] There are three main forms of full member status – members who are:

- i) “In” – i.e. full member in good standing;
- ii) “Out” – i.e. full member in bad standing (until this is rectified, the member is not allowed to have contact with the membership anywhere and has to return all their property so that nothing will identify them as members of the BMC);
- iii) “Left” – i.e. full members in good standing who leave for personal reasons, including if they are “retired” – however upon leaving they must date stamp as “out” their BMC tattoos to show that they are no longer members, as of a certain date, and turn in all their BMC paraphernalia.¹³⁰

[290] There is evidence of numerous members being convicted of offences of serious criminality. Some were members of the BMC at or about those times. There is, however, no evidence that the BMC disapproved of members’ criminal conduct, and no record of any BMC member being “out” of the BMC, as a result of being in bad standing for *any* reason.

[291] On the other hand, not long after finishing his last jail and probation term for serious offences, Darren Hebb was considered suitable to be a hangaround, while David Bishop and Dean Huggan each advanced within the organization, and Howard (Scoober) Fowler became a member after being convicted of serious offences:

¹²⁹ It is also odd that one must return to the club all BMC logo clothing, jewelry, and paraphernalia upon leaving the club. Why does it matter, especially if one has retired in good standing; or otherwise?

¹³⁰ I accept Sergeant Isnor’s evidence on this. See for example the third page of Exhibit 16 regarding “Scott – retired July 7, 2010.”

- i. Darren Hebb joined as a hang-around sometime before September 2012. His criminal record¹³¹ includes convictions for possession of a weapon for a dangerous purpose (s. 88) and assault with a weapon (s. 267(a)), March 12, 2007, sentenced October 29, 2007, to a 6-month conditional sentence followed by one year probation and a firearms prohibition order, under s. 109; two counts of trafficking contrary to s. 5(2) CDSA, and possession of a prohibited weapon, s. 91(2) *Criminal Code*, sentenced October 20, 2008, to 30 months custody in a federal institution; April 11, 2008, breach of release conditions, s. 145(3), sentenced October 20, 2008, to 30 days custody consecutive to the 30 months sentence imposed; October 16, 2010, assault causing bodily harm, s. 267(b), 5 months custody concurrent followed by 18 months' probation;
- ii. David Bishop joined as a hangaround before September 2012.¹³² Thereafter, while wearing his BMC colours as a Prospect/Striker, he was convicted of two counts of trafficking, s. 5(2) CDSA, on February 13, 2013; and possession of a firearm while prohibited, s. 117.01(1), *Criminal Code*, on March 25, 2013, sentenced April 11, 2013, to 2.5 years in custody. According to the evidence of Sergeant MacQueen, after his release from custody, he returned to become a full member of the BMC;
- iii. According to Sergeant MacQueen's evidence, Dean Huggan took over the President's position at the only Nova Scotia BMC chapter in November 2012, yet had been convicted of two counts of possession for the

¹³¹ Exhibit 46.

¹³² See for example in Exhibit 15, page 1, which was seized on September 20, 2012, wherein he had already signed the letter to Matt Foley, who had only been in custody since on or about July 15, 2012, in relation to the manslaughter charge – see Exhibit 50; and Exhibit 15, September 5, 2012, new business minutes that “Bishop and Dean official hang-arounds”; moreover he was considered a suitable hangaround with a record that included (Exhibits 45 and 46): – assault causing bodily harm sentenced March 8, 2012, to a 6-month conditional sentence and 18 months' probation; in Cochrane, Alberta, assault s. 266, carrying a concealed weapon, (s. 89), and failure to comply with release conditions, (s. 145(3)) *Criminal Code*, sentenced July 23, 2009, to 30 days custody followed by one year probation, and a 10 year prohibition on firearms.

purpose of trafficking, s. 5(2), CDSA, and sentenced to 9 months' custody, August 29, 2001; three counts of conspiracy to traffic in (respectively) schedule I, schedule II, and schedule III substances, and possession of schedule I and II substances for the purpose of trafficking, CDSA - sentenced July 17, 2007, in Charlottetown, P.E.I., to 5 years custody, in addition to remand time, his warrant expiry date being July 17, 2012;¹³³

- iv. According to Sgt. MacQueen's evidence, while Howard (Scoober) Fowler was a Valhalla Reapers MC member in Halifax, Sgt. MacQueen conducted a search of his residence in downtown Halifax on Young Street, where drugs and firearms were seized.¹³⁴ Regarding the March 19, 2009 offence date, he was sentenced October 1, 2010, on two counts, s. 5(2) CDSA (trafficking); s. 86(2) *Criminal Code*, careless use/storage firearm; s. 95(1), possession of prohibited or restricted: 36 months custody, served by remand credit of two days for each day served as pre-sentence custody (18 months in pre-sentence custody); consecutive sentence of 17.5 months remaining to be served, his warrant expiry date being around the end of May 2010. As early as January 2012, he had completed the recruitment process and was a member of the BMC Halifax/Hants County Chapter.¹³⁵

[292] I accept Sergeant Isnor's evidence that the recruitment process is designed to keep police, their agents, and rivals out of the club.¹³⁶ To ensure this, the BMC do

¹³³ Paul Fowler was President of the Hants County Chapter in September 2012, and had been a member of the BMC as early as in October/November 2010. Since he was paying dues, and buying "members gear" – see Exhibit 16, pp. 5 and 14-17, which both have "Paul" written at the top, which I infer was a reference to Paul Fowler, which is consistent with other trial evidence. However, by November 2012, he was replaced by Dean Huggan.

¹³⁴ Exhibit 46, JEIN criminal record report.

¹³⁵ See Exhibit 16, the January 4, 2012, minutes reference him as being involved as a *member* of the Hants Co BMC chapter.

¹³⁶ The defendants have suggested that the BMC are not averse to having law enforcement related personnel as members – they cite RM, for his involvement in the Citizens on Patrol; Theodore (Ted) and Gail Baker, a member of Correctional Services Nova Scotia, and Deputy Warden of the federal jail, Nova Institution for women, respectively, for their involvement as a striker/prospect and friend to the BMC approved East Coast Riders MC when in 2006 they were stopped by police on their way to a BMC event in Albert County; and a member of the

background checks in the community, gather intelligence, and insist that each prospect member have a sponsor, who remains responsible if the member betrays or embarrasses the club. I also accept that, when recruiting, the club does not necessarily look for someone to engage in criminality. This is also consistent with the comments of Justice Fish in *R. v. Venneri*, 2012 SCC 33:

36 Working collectively rather than alone carries with it advantages to criminals who form or join organized groups of like-minded felons. *Organized criminal entities thrive and expand their reach by developing specializations and dividing labour accordingly*; fostering trust and loyalty within the organization; sharing customers, financial resources, and insider knowledge; and, in some circumstances, developing a reputation for violence. A group that operates with even a minimal degree of organization over a period of time is bound to capitalize on these advantages and acquire a level of sophistication and expertise that poses an enhanced threat to the surrounding community.

[My italicization added]

3. Written and unwritten rules

[293] The written rules of the BMC are contained in Exhibit 14. The written rules for strikers/prospects are specifically mentioned as applicable to the BMC, Albert County, St. John, and St. George, N.B.; Hants County, N.S.; and Grand Falls – Windsor, N.L. chapters.¹³⁷

[294] The following rules may seem odd to a recreational motorcyclist:

- i) Strikers will be issued one T-shirt, which *must be worn at all times*. If he wants one more T-shirt or sweater he must purchase it his self [sic] [**with permission**] *no other striking accessories will be permitted*. [**Hats, belts, coats, etc.**];

Department of Natural Resources offices in New Brunswick who was a member of the Mariners MC and patched over to the BMC. However, as the Crown points out, RM was never offered the chance to become a member of the BMC outright. Mr. James merely suggested he consider “joining”, by which I infer he meant RM could join as a hangaround – guaranteeing RM nothing, but allowing the club to monitor his suitability; the Bakers were not members of the BMC, and Ted Baker’s status as a Prospect for the East Coast Riders MC in August 2006 is distinguishable from being a striker/prospect for the BMC; and the New Brunswick DNR and Mariners MC member was permitted to avoid the recruitment process, which is commonly done, as a result of a wholesale patch-over to the BMC, and shortly thereafter he left the BMC in any event.

¹³⁷ I infer that the PEI Chapter, which was patched-over to BMC in January 2012, is also intended to be included therein, but because it joined in January 2012, which is somewhat recently before these offences, and before documents were seized on September 20, 2012, that the rules had not yet been updated.

- ii) Strikers *must do* what every member requests within reason, or be challenge[d];
- iii) Hang-around period will be decided on an individual basis.¹³⁸

[bolding in original-my italicization]

[295] These general written rules for the same Atlantic provinces' chapters may also seem odd to a recreational motorcyclist:

- i) Rule 6 – strikers *must* carry out any request made by a member
- ii) Rule 7 – if any strikers actions are questioned it will be brought up at the next meeting
- iii) Rule 10 – club tattoos will be permitted after one year of membership, five years for a back patch, *and club tattoos must be dated if you leave in good standing, removed or covered if in bad standing.*
- iv) Rule 11 – if you leave the club for any reason *all club property must be returned.*
- v) Rule 16-No disrespecting members or strikers *in public*
- vi) Rule 17 – *if a member goes to jail the club covers his dues and sets up a visitation roster*
- vii) Rule 23-any new charters will need **100%** vote from all existing charters¹³⁹ to strike and the same for membership.

[bolding in original-my italicization]

[296] Sergeant Isnor testified that the BMC rules, while less sophisticated and less numerous than those of the Hells Angels MC, are unusually similar.

[297] Sergeant Isnor testified that there are, for the BMC, as there are for the Hells Angels MC, unwritten rules.¹⁴⁰ I agree that there are.

[298] He suggests that the most important rule of all is that members must uphold the “power, persona and reputation of the club.”¹⁴¹ This is most cogently reflected

¹³⁸ See the reference to the monthly dues owing as of January 11, 2012: for members \$100; strikers \$80; hang-arounds, \$60 – Exhibit 16, p. 32.

¹³⁹ I infer that this means any proposed full members must receive the approval of every BMC member regardless of territory before being eligible to become a full patch member.

¹⁴⁰ See paras. 529-532 in *R. v. Lindsay*.

in the BMC's conduct in relation to the formation of any riding clubs or motorcycle clubs in its claimed territory. Controlling the creation of new clubs is the signature power of the dominant club, and essential to that club's continued dominance.

[299] I agree with his opinion that in 2012, the BMC, as the only 1% MC in *all* the Atlantic provinces,¹⁴² was the dominant MC; and the dominant MC in a given territory determines whether motorcycle enthusiasts who are aspiring club members can start a riding club, or if in an existing riding club, they can become a two-piece or three-piece MC.

[300] I accept the evidence of RM that Mr. James told him the following, and I infer that Mr. James was being forthright with RM when he did so:

A-[RM], the problem is [not?] with you- regardless of who you are, *you're bringing in a club from Montréal...* [RM - it's not like as if we are coming in to take over territory] It doesn't matter. You have to listen to me. It's going to appear like Montréal is moving in... Brotherhood of Montréal is moving in on this territory... And *what's going to happen is that right now everything's very nice and quiet. We have no problem with the law enforcement, everybody gets along and it's no trouble. Once they see that patch down here, they're going to start stirring up trouble* [RM]. They are going to go to you, and they're going to say that 'Bacchus is upset with you [RM], and they're [i.e. the BMC] going to do something to you or they have a hit on you' and they're going to come to us and say Montréal... The police are going to try to incite a war... *For all you know, there's officers up on that hill with a microphone, listening to our whole conversation... The reason why they do that is so they can stir up trouble which increases propensity, which increases their budget, which means they have more guys working, and that's the whole point behind them, what they're doing, in order to justify their jobs. And that gets more money. If everything's quiet, their money starts to shrink up and they don't have enough guys....* So, I don't think it's a very good idea for you to do this... And I don't think it would be approved.”¹⁴³

B-There is no way that this is going to happen... *This is not sanctioned. You cannot have a three-piece patch down here...* I don't give a fuck [what the Brotherhood MC chapter in New York or Montréal] fucking thinks... You're

¹⁴¹ The Hells Angels MC have what Justice Fuerst referred to as a “deliberately fostered reputation for violence” which “facilitates illegal transactions, and so provides pecuniary benefit to the organizations members who use it to their advantage, particularly within the criminal milieu”-see paras. 1011 – 1029, in *R. v. Lindsay*.

¹⁴² Only the 1% Outlaws MC who had a chapter in Newfoundland, were otherwise present in the Atlantic provinces, but they did not have sufficient territoriality throughout the Atlantic provinces to be the dominant MC.

¹⁴³ Pages 11-13, Transcription, RM's statement.

putting yourself in a position that's not a very good position. This could be very dangerous... *We have not informed Albert County of this...* I'm trying to keep it local so nothing gets out of hand... But this is not going to happen... There's a lot of people upset right now *at the clubhouse*

...

The way it works, you have your own club here. You don't come in with a club. What you do is you start off with a one-piece patch. You're a riding club. Then maybe after a couple of years you gain respect in the area and people get to know you. Then we move you up, we give you permission to have possibly a two-piece patch. And then after time... If it seems right that you want to have a three-piece patch, you come to us and we'll decide if you have enough time in and if you were warranted to have a three-piece and turn into an MC... What you're doing is disrespecting all these other clubs that have worked their way up... You just think you come in here and become a full-fledged MC..."

C-Do you think that you could get away with something like that?... I fucking told you that you were not having a fucking Montréal Brotherhood patch down here, and you went ahead and fucking did it... I'm giving you a get out of jail free card here. I'm not here with everybody. Do you see my arms? They're not sunburned from just walking around the house. *We were driving around the whole weekend looking for you because of that picture that went on Facebook, you guys getting patched over in Montréal. Because those [Brotherhood MC patches] were coming off your back. You fucking disrespected us.* You more or less, or might as well have told us to go fuck ourselves by putting those patches on your back... You get photographs taken of those patches being cut up. Then we want Montréal to put a notice on Facebook that states that there is no chapter in Halifax... By tomorrow... Do you understand what I'm fucking saying to you? Do you understand the seriousness of the situation and what's going to happen?... This is your only chance... You have a good job. You're a family man. You have a great daughter [and he pointed at the pictures of RM's family] and a lovely wife... You get this taken care of. This needs to be done immediately.¹⁴⁴

[301] The conclusion that Mr. James said this to RM is supported by Mr. James's unusual interest in SH, and what he said to SH:

PJ – The MC on your patch indicates that you have a clubhouse. Let me know the clubhouse address, otherwise; I will pop in your home/work address whenever I am close. Later.

SH – Hi Pat. I do not have a clubhouse or a club. Is this some kind of a joke? I know some of the guys in some of the local clubs, but I do not want to join a club. Thanks for asking.

¹⁴⁴ Pages 38 – 44, Transcription, RM's statement..

PJ – it is not a joking matter. Your profile photo shows a patch (Wolverines) with a Nova Scotia bottom Rocker. Is this you... If not... Who?

SH – it is me. Standing on my sundeck looking back over my field. Why? I am afraid I do not understand where you are going with this. Did I somehow break some unwritten code of conduct here? If I did just let me know. I don't have a motorcycle club, as I said before. Just have a Harley and like to ride. I don't wear my patch when I am riding... and I don't belong to any of the clubs.

PJ – that is exactly what you have done and a lot of people are/would/will be extremely insulted, by that photo/vest. *Patches like you are carelessly wearing (three-piece MC) are earned through a lot of time, blood and sweat. Those that have put in the effort for the right to wear such a patch (three-piece MC) will not react favourably to such a slap in the face.* From what you have told me I would assume that you did not have any bad intentions (merely ignorance of patch protocols). Now that you have been informed otherwise, *I suggest that you remove the bottom rocker (Nova Scotia) and MC patches as they indicate a lot more than you are aware.* Please also remove the photo from your Facebook as it can only prove to cause bad feelings (some may feel it an act of provocation).

SH – thank you for filling me in on this protocol. I have never been in any bike clubs and do not know the ins and outs of the riding rules of the road....

PJ – thank you for taking down the photo. No need to block me. I will not be harassing you. I just wanted to educate you to the patch protocol as some can be very extreme when dealing with such infractions and there is no need for incident if no disrespect was intended. *Please just send a short reply to confirm that the requested alterations to the vest (removal of Nova Scotia and MC patches) have been carried out and your assurance that no buddy will see it again as it previously was and there will be no need for me to contact you in the future...*
Thanks.

...

SH – I just put my Harley Eagle patch on my vest. I don't need to have a patch on my back to show I like to bike....

PJ – exactly (BTW... I was not using ignorance as an insult... Just a lack of knowledge on the subject). Thank you for the quick response to my recommendations.

[302] Notably, a photograph of SH's Facebook profile picture showing him standing on his deck with his three-piece "Wolverines" patch on his leather vest was found at Patrick James's home on September 20, 2012, with handwriting thereon as follows:

[SH](asshole) works at [...]. He has been warned and says he doesn't have to ask anybody anything" [which handwriting I infer is that of Mr. James].

[303] SH testified. I found his testimony to be credible, honest and reliable.

[304] He stated that in the fall of 2011 he had shown his Facebook profile picture, as noted above, to a local motorcyclist who stored his motorcycle at SH's workshop. That person told him that he would not be able to wear the three piece patch MC publicly. SH shrugged that off. In the Spring of 2012, that person and another attended at SH's workshop. SH knew them both to be members of the Darksiders MC.¹⁴⁵ SH showed them his vest. They told him he would not be able to wear it, alluding to the fact that somebody already claimed "Nova Scotia" as their own territory. He questioned why he should not be able to wear his fictitious MC motorcycle vest patches. They told him if he did not remove the patch, other parties may try to do so and, if he did not abide by their demands, they might use guns.

[305] Mr. James's August 27, 2012, meeting with RM made it clear that the BMC membership was prepared to physically attack RM and forcibly remove the offending Brotherhood MC three-piece patches from RM and his fellow members ("those [patches] were coming off your back").

[306] Notably as well, Mr. James told RM that, "we have not informed Albert County... I'm trying to keep it local so nothing gets out of hand." I accept this evidence, and infer that this confirms that it is the Albert County Chapter that has the final say on such matters.¹⁴⁶

[307] Sgt. MacQueen testified to his personal observations of the progression from one-piece to two-piece patch clubs, regarding the Nova Scotia based East Coast Riders, the New Brunswick based the Cursed and Mariners, and the P.E.I. based Forerunners – all of whom which ultimately became three- piece patch BMC clubs.

[308] Notably, on February 26, 2010, Sergeant MacQueen was involved in the search of the residence of "Rusty" Hall at Barr Settlement, near to Nine Mile

¹⁴⁵ Sgt. MacQueen testified, and I accept, that he was very familiar with the "Wind Demons" riding club, from Bridgewater, Nova Scotia, and he personally observed them patch over to become "South Shore Darksiders MC". Sergeant Isnor also confirmed that they started out in Dartmouth in 2009 and the original chapter remained in existence at Dartmouth Nova Scotia. The Wind Demons club is mentioned in the BMC Hants Co minutes: Exhibit 16 – January 4, 2012, under new business "wind demons three-piece patch?"; January 11, 2012 – "old business:... wind demons ok" /" new business... were in touch with wind demons(ok,)" albeit this second reference is crossed through; and on April 18 and April 25, 2012 – "pick up plaque for five-year wind demons"/ "wind demons party Saturday" and May 2 and 9, 2012-" wind demons plaque delivered"/ "Al paid for plaque (wind demons) \$57".

¹⁴⁶ More evidence regarding the progression of clubs in the Atlantic Provinces and the territorial/dominance claim by the BMC appear in the documentation and testimony.

River, Hants County, Nova Scotia. Mr. Hall and his wife had been killed in a double homicide the day before. Mr. Hall was the Vice President of the Halifax BMC. The East Coast Riders, who had progressed from a one patch Riding Club to two-piece patch MC, had patched over to become full members of the BMC on January 9, 2010. Doing so made them the only BMC chapter in Nova Scotia, and as such, the only 1% MC in the province.

[309] Sgt. MacQueen recalled, and I find he did so reliably, that he found and read a one-page letter from a self identifying “military group” of individuals calling themselves the “EZZY 7” Brotherhood, who had written to Mr. Hall asking the East Coast Riders MC for permission to have a patch as a Riding Club.¹⁴⁷

[310] Mr. James made reference to the “EZZY 7” in his statements to RM: “[RM: but what I would like is, would you guys have a problem if we had ‘Brotherhood’... Like as a one-piece, [patch], with Brotherhood on the top? And at that time, he said to me...] No. Brotherhood, it’s a good name. We are all brothers of the biking community. [He said] the Easy 7 is a Brotherhood.”¹⁴⁸

[311] The BMC Hants County documentation found in the possession of its Secretary-Treasurer, Mr. Howe, on September 20, 2012 also contains references to:

1. “Rustie Hall RIP February 25, 2010;”¹⁴⁹
2. “[January 4, 2012] New business... Rustie’s memorial at clubhouse at 4 PM 25 February;”¹⁵⁰
3. “[February 22, 2012] New [business]: Rustie’s memorial Sat night, need shitter {Chris} food: EZZY 7 chilly or chowder, Charmaine to cook turkey, Pat ribs, meal tray, sandwich trays, Paul meatballs,

¹⁴⁷ At trial, the defendants objected and I ruled that the reference to the letter did not seem relevant, because at the time it was sent it was addressed to Mr. Hall in his capacity with the East Coast Riders, and because it appeared that the purpose was to establish the contents of the letter for its truth. After hearing the entirety of the evidence, I am satisfied that that reference by Sergeant MacQueen should have been permitted, because I have concluded that the East Coast Riders MC at that time were the representatives of the BMC in Nova Scotia, and insofar as the purpose thereof is to demonstrate that this group of motorcycle enthusiasts, believed that they needed to submit their request to start a riding club, to the East Coast Riders MC. Also, ME testified that he had spoken to an ex-member of the BMC, who confirmed that the BMC controlled who may start riding clubs and motorcycle clubs – pp. 312(4) – 314(13), Transcript.

¹⁴⁸ Moreover, at the search of his home on September 20, 2012, photographs were taken which show he had stickers saying “support your local sailor – EZZY 7 Brotherhood” [Exhibit 18, photo 1 and 7].

¹⁴⁹ Page 4, Exhibit 16.

¹⁵⁰ Page 33, Exhibit 16.

scallop potatoes, wings, Scoob[er] cakes and pies, barstools, drink glasses, Pat to check with EZZY 7 on chaffing dishes, tarps, Bacchus banner;” and

4. “Duayne – pig roast tickets – 151 – 160 Saints and Sinners 2 books Niners – 1 book EZZY 7 - 1 book”.

[312] This evidence confirms that the BMC Halifax/Hants County chapter had a relationship with the so-called “EZZY 7 Brotherhood”. I conclude that it was one of a dominant (BMC) and a subservient club.

[313] In summary, I am satisfied beyond a reasonable doubt that, in 2012, the BMC considered itself, and was seen in the motorcycling community, as controlling who could start riding and motorcycle clubs in each of the Atlantic provinces.

[314] Other than law-enforcement clubs¹⁵¹, which they cannot intimidate, the BMC would not tolerate any new riding clubs, existing MC clubs upgrading to two or three patch status, nor any three-piece patch clubs starting new chapters in the Atlantic provinces without their approval.¹⁵²

[315] I conclude that the BMC has “unwritten” rules, or expected patterns of behaviour for its members, which include the following:¹⁵³

1. Most importantly, all members must uphold the power, persona and reputation of the club;¹⁵⁴
2. Everyone who wishes to start, or upgrade a club, needs BMC approval for a motorcycle riding clubs and motorcycle clubs in territories in which the BMC is the dominant club;

¹⁵¹ See for example exhibit D-1, a photo of the Blue Knights, Nova Scotia I club, which carries no RC or MC patch.

¹⁵² Although the Outlaws 1% MC did start a chapter in Newfoundland, I infer that the BMC tolerated this provided the Outlaws recognized the BMC as the dominant club. The credible testimony of Sergeant MacQueen and Sergeant Isnor establish that the Hells Angels and their support clubs have more recently formed chapters in New Brunswick, Nova Scotia, Newfoundland, and PEI.

¹⁵³ I accept the credible evidence, of *inter alia*, Sergeant MacQueen and Sergeant Isnor in support of that finding.

¹⁵⁴ I interpret references to the “reputation of the club” by Sergeant Isnor as references to a “reputation to resort to violence, if the club’s, or its members’, interests are challenged, or are in jeopardy.” I further accept his opinion that “beatings are the norm” for disrespecting the club – examples include Mr. James’s statements to RM on August 27, 2012, that “those [Brotherhood MC patches] were coming off your back”; Messrs. Howe and Pearce confronting and threatening RM on September 14, 2012; and the photo of SH wearing his jacket, 3 piece MC found at Mr. James’s home with writing: (asshole) he has been warned...”

3. No police or law enforcement-related persons (or members, associates or sympathizers of rival clubs) are allowed to be members of the BMC;
4. No cooperation with law enforcement – this includes: no speaking to the police without another member present; no provision of witness statements to the police; no testifying for the Crown; no calling the police (e.g. 911) to assist in the resolution of any matters.¹⁵⁵

[316] There is also evidence of a BMC suspicion of, and *animus* against, police personnel, e.g., Mr. James’s comments to RM that:

We have no problem with the law enforcement, everybody gets along and it’s no trouble. Once they see that [Brotherhood MC] patch down here, they’re going to start stirring up trouble RM... *The police are going to try to incite a war... For all you know, there’s officers up on that hill with a microphone, listening to our whole conversation... The reason why they do that is so they can stir up trouble which increases propensity, which increases their budget, which means they have more guys working, and that’s the whole point behind them... If everything’s quiet, their money starts to shrink up, and they don’t have enough guys.*

[317] I also bear in mind that the BMC collaborated with the Hells Angels in the running of two “Route 81 Canada” stores, and that the wares in the one in Prince Edward Island were representative of both – these can be seen in the Exhibit 44 photographs, at pp. 2 and 12: T-shirt with words - “where we come dial 911”; - a sticker - “a fish wouldn’t get caught if it kept its mouth shut”. I also accept Sergeant Isnor’s and Sergeant MacQueen’s credible evidence that the BMC culture includes an antisocial antipathy to persons who cooperate with the police under any circumstances, and that they are called derogatory names, including “rat”, and “snitch,” that statements such as “snitches get stitches” and the like are commonplace, and that persons who cooperate with the police are often targeted with threats, property damage, and personal violence.¹⁵⁶

¹⁵⁵ Examples of evidence to this effect comes from Sgt MacQueen’s testimony about his experiences with BMC membership, associates and sympathizers; see also the array of signs and stickers at the Albert County clubhouse, which I infer is representative of all BMC clubhouses: photos Exhibit 40, 2005: pages 11-“we don’t dial 911”; 72 – the doormat “come back with a warrant”; photos Exhibit 42, 2007: pages 66 – an aerial photo taken by police during the 2005 search made into a poster and placed on a 5 gallon water jug for donations. See also trial Exhibit 41 “support your local Bacchus MC defence fund – help fight the bullshit (photo supplied by RCMP)”.

¹⁵⁶ An exception to this general conclusion, occurred in response to the murder of Rusty Hall and his wife on February 25, 2010. Sergeant MacQueen contacted Charlie Burrell, the National President of the BMC, and received approval for BMC members to give statements to the police *exclusively* in relation to the murder of Rusty Hall and

4. Colours of the BMC

[318] The “colours” of the BMC are black and gold. Wearing one’s “colours” is also a reference to wearing the leather vest adorned with club insignias and patches. Only members may wear the colours. Only one vest is issued per member. They remain the property of the club.¹⁵⁷

[319] The purpose of the colours is to identify individuals as a “member”, and reinforce respect for the wearer and the club. They also remind the public and rivals, that a challenge to one member, is a challenge to them all.¹⁵⁸

[320] The logo of the BMC has a fearsome quality. The 1% patch is widely recognized publicly and believed to represent those who will not live by society’s rules, including prohibitions against criminal conduct.

[321] BMC authorized support gear also supports the BMC’s presentation as a fearsome organization. Only members can wear “soft colours” which have the BMC logo thereon. The messaging is always intimidating: “the Black and Gold will never fold” with a skeleton driving a motorcycle¹⁵⁹; the home protection stickers¹⁶⁰; “where we come dial 911”¹⁶¹; a T-shirt “Bacchus... Coming to a town near you”¹⁶², which is suggestive of their continued fearsome expansion.

[322] Items that do not carry the BMC logo, but merely show support, for example, for your “local Black and Gold” etc., are available for sale to the public.¹⁶³

his wife. Sergeant MacQueen confirmed that BMC members had never before cooperated with the police, and this was a “one off” extraordinary situation. I accept his evidence on this point. Moreover, I say “antisocial antipathy” because all citizens have a general interest to allow, and an inherent obligation to assist, the police during their investigations to “unearth as much evidence as possible” in a timely manner – “the public interest requires prompt and thorough investigations of potential offences... [which] is essential to promoting a safe, peaceful and honest society”: *Canadian Oxy Chemicals Ltd. v. Canada (Attorney-General)* [1991] 1 S.C.R. 743, at paras. 19-24.

¹⁵⁷ The vests seized here are Exhibits 8 and 9.

¹⁵⁸ The evidence I accept persuades me that the Hells Angels use the acronym AFFA – “Angels Forever Forever Angels”; the BMC use the acronym BFFB – “Bacchus Forever, Forever Bacchus”, and that both promote and rely upon this unwritten rule.

¹⁵⁹ e.g. Exhibit 18 p 22.

¹⁶⁰ Seen in Exhibit 18, photos 17 and 26.

¹⁶¹ Exhibit 44, p. 9; Exhibit 10.

¹⁶² Exhibit 17, photo 74.

¹⁶³ Exhibit 17, photo 81.

[323] By buying and wearing such items, what are BMC supporters supporting? There is no direct evidence regarding what are the main purpose(s) and activities of the BMC. The defendants argue that no one but members could testify to the main purposes or activities of the BMC. Yet notably, given the defendants' claims that the BMC membership is just a group of guys who like to party and ride motorcycles, no members testified to that effect. I acknowledge that there are various posters in evidence that announce "parties" – e.g. 40th Anniversary BMC, August 31 – September 1, 2012:¹⁶⁴ "Events – womens mud wrestling, wet t-shirt contest... Bands: Loaded Dice, Dizzy G." Nevertheless, I put little weight on the assertion that they "merely" like to party.

[324] The club promotes a culture of exclusivity – only those who have earned their way to become full members of this fearsome group will be entitled to wear its colours, etc. For this reason, the club cannot tolerate any challenges to its exclusive membership, or territorial claims. Nor can it tolerate challenges to its individual members.

[325] This is why the colours/vests of members and all other items carrying the BMC logo are the property of the club, and must be returned upon death, retirement, or leaving the club in good standing, or bad standing.

[326] The club also must exert its dominance in order to stay dominant. Increases in membership tend to promote continued dominance. Expansion tends to promote continued dominance.

[327] Examples of the club exerting its dominance, are seen in the interactions between Pat James and SH and RM (*inter alia*, Mr. James's statements that "those patches were coming off your back"); and the interaction between Messrs. Howe and Pearce and RM which were, I find, made purposefully in a very public manner. A further example is the Niners MC members all showing up with BMC President Dean Huggan at the courthouse in a raucous manner for the sentencing of BMC member David Bishop in the spring of 2013. The Niners were showing respect to the dominant club, the BMC. Sergeant Isnor and MacQueen testified that the Niners became BMC members on June 7, 2014.

[328] The phenomenon of sending congratulatory plaques among clubs on their anniversaries is another example of respectful acknowledgement of the hierarchy.

¹⁶⁴ Exhibit 2 – pp. 19 and 45. As Sgt. Isnor testified, women are not allowed as members.

[329] The Maritime Biker Federation/Atlantic Coalition of Clubs are examples of a vehicle through which the dominant club can manage subservient clubs in a particular territory.

[330] Similarly, the BMC must maintain a suitable and respectful relationship with the Hells Angels MC which is the largest OMG in Canada. Examples of the cultivation of that relationship are strewn throughout the photos in evidence, the sales of BMC and Hells Angels' wares in Route 81 stores, the Hells Angels support gear found in the homes of BMC members and clubhouses, as well as the visits back-and-forth.

[331] Members of the BMC must have loyalty to the club uppermost in their minds at all times. To ensure that members remain loyal, the club must continue to provide them with persuasive reasons to support the club.

[332] The written rules specifically provide that "if a member goes to jail, the club covers his dues and sets up a visitation roster." This is an example of the club creating a feeling of belonging to an exclusive community, which is also intended to ensure the continued loyalty of the member in jail. I recall the letter of encouragement written by BMC members to Matt Foley¹⁶⁵; the "Free Matt" defence fund monies shown in Mr. Howe's home¹⁶⁶, as well as the references in the documents seized from Mr. Howe¹⁶⁷ on the page entitled "Duayne", which references "free Matt" and payments being made by Hants County members Paul, Chris, Al, Pat, Dave, and Mike; and the many "free Matt" stickers seen throughout the photographic exhibits.¹⁶⁸

[333] The culture also requires that members respect the duty to come to the aid of any other member, no matter the circumstances. Members have the benefit of that assistance, and the obligation to render it as requested.

5. Clubhouses of the BMC

[334] Sergeant Stephen MacQueen is presently District Commander of RCMP policing for the South Shore area of Nova Scotia. He began policing as an

¹⁶⁵ Exhibit 15 page 1.

¹⁶⁶ Exhibit 17, photo 95.

¹⁶⁷ Exhibit 15.

¹⁶⁸ On Mr. Howe's motorcycle – Exhibit 17 photos 27 and 60; on the door to Mr. Pearce's home and on a riding helmet – Exhibit 19, photos 2 and 51; and at the BMC Nine Mile River clubhouse Exhibit 2, Photo 116.

auxiliary Constable in 1998, and became a regular member of the RCMP in 2001. He was posted to the greater Moncton, New Brunswick, area between then and 2005. During that time, he was a constable on general duties in the area, including Albert County, New Brunswick, where the Mother chapter of the BMC has been located since 1972. In 2004, he was seconded to the RCMP Criminal Intelligence unit for New Brunswick.

[335] From 1998 onward, he had dealings with all members, associates, and some family members of the BMC in New Brunswick.¹⁶⁹ Whenever he could, he would become involved in conducting surveillance of BMC events and the clubhouse area. He was personally involved in searches at the Albert County clubhouse and Charlie Burrell's personal residences,¹⁷⁰ as well as at the Hants County, N.S. clubhouse location on September 20, 2012. He also had the benefit of having been inside Hells Angels' clubhouses in Ottawa, in 2009 and 2010,¹⁷¹ and all five Québec clubhouses -Sherbrooke, Montréal, Québec City, Trois-Rivières, and the South Chapter. His observations were that the Albert County clubhouse had significant similarities with those of the Hells Angels, and that the Albert County clubhouse is a model for the other BMC chapters.

[336] Throughout his career, Sgt. MacQueen has been present for surveillance around BMC clubhouses, and traffic stops of BMC members and members of other 1% MCs travelling to and from, BMC clubhouses and the Atlantic provinces – including the Maritime Biker Federation¹⁷² annual runs in July, which in 2005/2006 attracted a typical variety of other 1% MCs: the Hells Angels, the Red Devils, the Vagabonds, and local clubs the BMC, Highlanders, East Coast Riders, Charlottetown Harley Club, Mariners, Easton's Crew, and Forerunners.

[337] From 2006 to 2014, he was posted to the Combined Forces Intelligence Unit (CFIU) in Halifax, Nova Scotia. This is a unit comprised of RCMP, Halifax Regional Police, and Canadian Border Services Agency (CBSA) personnel. One of

¹⁶⁹ At that time the BMC had chapters only at Albert County and St. John, New Brunswick.

¹⁷⁰ Pursuant to operations "Jet Set" (October 7, 2005) and "J-Develop" (April 4, 2007), which arose as a result of HAMC members David Atwell and Stephen Gault's information as police agents.

¹⁷¹ After the Halifax Hells Angels' Chapter closed due to insufficient full patch members in 2001-02, none of their chapters remained in the Atlantic Provinces until they re-appeared as such late in 2016.

¹⁷² I accept the opinions of Sergeant MacQueen and Sergeant Isnor, that at all material times, this organization, and its successor the Atlantic Coalition of Clubs, was exclusively open to so-called OMGs, and its events were not open to public attendance. See also Sergeant Isnor's comments at pp. 1432(7) to 1434(22) August 3, 2017, transcript. See also the 2003 "Federation Events" calendar which carries a logo and name of a fictional organization "KAOS" and statement "from your evil friends at KAOS Inc", being a reference to the 1960's "Get Smart" TV-series.

their responsibilities is to collect intelligence on organized crime, including OMGs.¹⁷³

[338] During 2006-2014, he was the Tier 3 Provincial Coordinator¹⁷⁴ and representative regarding OMGs for purposes of national coordination of law enforcement policy and activities, through the Criminal Intelligence Service of Canada (CISC), where he would have had significant and continuous contact with Sgt Isnor, who was one of two National Representatives, while at times, alternating as the Ontario Tier 3 representative.¹⁷⁵

[339] Sgt. MacQueen noted that the 2005 and 2007 searches of the Albert County BMC clubhouse revealed very similar premises. He personally observed that the property had the following features:

1. An outdoor surveillance camera with two related monitors inside the clubhouse;¹⁷⁶
2. A “scanner” that picked up police communications;¹⁷⁷
3. Heavy duty wire mesh on the exterior windows;
4. Two successive sets of doors had to be opened to gain entry to the inside of the building (the second set of which have deadbolts);

¹⁷³ In 2006, he was personally involved in operation “Legalize” which targeted the drug trafficking activities of Albert County, New Brunswick, BMC member, Dean Huggan, in Prince Edward Island, and resulted in the dismantling of his cell of fellow criminals involved in the trafficking of schedule 1, 2 and 3, CDSA drugs— see Dean Huggan’s record – sentenced July 17, 2007, to 5 years’ custody after remand time considered – Exhibit 39.

¹⁷⁴ E.g. see my reasons at paras., 20- 22 in *R. v. Howe*, 2017 NSSC 213.

¹⁷⁵ Based on all the evidence I heard in the trial, including Sergeant MacQueen’s own testimony in which he related that he had been qualified to give expert opinion evidence in relation OMGs in the cases of Dean Huggan’s bail hearing following operation “Legalize”, and the sentencing of Howard Fowler in 2010, I remain of the opinion stated in footnote 7 of *R. v. Howe*, 2017 NSSC 213: “As I noted to counsel during argument, I was amply satisfied that Sergeant MacQueen is himself ‘a very credible candidate as an expert witness regarding the BMC.’”

¹⁷⁶ The sergeant had also seen evidence of such equipment at other BMC locations-e.g.: surveillance video system in a box, and a RF detector at the residence of Rusty Hall, VP of the BMC Halifax Chapter, when it was searched on February 28,2010. Moreover, the minutes of the Hants County BMC chapter repeatedly reference “security cam hardware”: Exhibit 15 – February 8, 2012; “Dan to check on security cam hardware”; February 15, 2012 – “Dan to get back to me on security cams”; February 22, 2012 – “talked to security cam guy {Colin}”; March 3, 2012 “Dan sporting new Black and Gold vest”; Sergeant MacQueen testified that the East Coast Riders clubhouse in Fall River burned down in 2006. It was rebuilt and video surveillance was installed, which remained there once they patched over to become the BMC Halifax Chapter, January 9, 2010.

¹⁷⁷ See e.g. Exhibit 40, p.31; Sergeant MacQueen testified that his background was as an engineering technologist; he was therefore very familiar with such electronic equipment, including radio frequency detectors, which can detect if any mobile devices are transmitting signals in the area (such as listening devices or cell phones etc.) one of which had been shown to him by Mariners MC VP Bobby Richardson in 2008 - Richardson came to the Sergeant’s unmarked police car being used for surveillance and showed him a radio frequency detector, and that it was operating.

5. An electric fence around the property perimeter;¹⁷⁸
6. Numerous signs within the premises;¹⁷⁹
7. A “patch holders only”/full members only restricted area.¹⁸⁰ I also note that Sgt. Isnor testified that each clubhouse has a “watch” which requires that one member at all times to be present in the clubhouse to watch out for uninvited persons who might approach the clubhouse;¹⁸¹ and
8. Erasable whiteboards;¹⁸²

[340] Particularly significant, and troubling, is that the searches of the BMC Albert County clubhouse in 2005 and 2007, respectively, showed that they had confidential, “for police eyes only”, written materials intended to assist investigators dealing with OMGs: namely, in 2005,¹⁸³ “Outlaw Motorcycle Gangs – in Canada,” RCMP Gazette magazine at pp. 74-75; and in 2007¹⁸⁴ (found in Charlie Burrell’s residence), six copies of the January 2006 CISC “Outlaw Motorcycle Gangs – Reference guide to help stop, identify, prosecute and gather intelligence on OMG members” – “for law enforcement use only”,¹⁸⁵ issued as “Protected A.”

¹⁷⁸ I infer that this is exceptional due to that clubhouse’s remote location, and it being the “mother” chapter.

¹⁷⁹ E.g. “No cell phones”, “we don’t dial 911”, “watch what you say”, and “house is bugged”; photos see Exhibits 40, 42 and 43. On the outside, Exhibit 40, pp. 13-14, one sees a sign “clubhouse under 24-hour video surveillance”; see Exhibit 40, p. 30.

¹⁸⁰ E.g. Exhibit 42, pp 105 – 110.

¹⁸¹ See Exhibit 42, p. 69, 2007 calendar on the wall near the scanner; and Exhibit 40, pp. 64 – 71, March – October 2005 calendar with names written thereon/and similarly as found at the BMC Hants Co. chapter September 20, 2012 Exhibit 2 –p. 91 and 162. See also Exhibit 15 Hants County “new business” minutes July 29, 2012 – “club watch starts 30th of July”.

¹⁸² The Sergeant testified: “I’ve never been in a clubhouse that didn’t have whiteboards”. In the Hants County clubhouse, Exhibit 2, see photos: 71, 78, 114, 117, 118, 124, 125, 127, 128, 129, 132 – and a number of them together at page 133, 149 (I note also the use of paper for doodling and construction references at pp. 53, 93, 95, 121 – 22, 123). In order not to have a record of any conversations that might take place at the clubhouse and involve discussions of criminal conduct by members, associates, or friends, it is common for a 1% MCs to use coded language, erasable whiteboards to temporarily convey messages between members, or to go for a walk outside the clubhouse in a small group in order to avoid being surveilled and recorded.

¹⁸³ Exhibit 40.

¹⁸⁴ Exhibit 43, pp. 63-5 and 83-4.

¹⁸⁵ During the search at Rusty Hall’s residence February 28, 2010, when he was VP of the BMC Halifax, in addition to finding a .303 semi-automatic rifle with an illegal 30-round clip and a semi-automatic .22 calibre firearm and illegal bulletproof vest, police also found another copy of the booklet “Outlaw Motorcycle Gangs – reference guide to help stop, identify, prosecute and gather intelligence on OMG members – for law enforcement use only.” At the back of each booklet were listed all the Provincial coordinators and National representatives’ names, and personal phone numbers. Both Sergeant MacQueen’s and Isnor’s personal information were listed there.

[341] Sgt. MacQueen also noted that in the 2005 search, within a derelict truck body, what appeared to be a 9mm handgun, was found hidden and wrapped in cloth. I accept that it was more likely than not a fully functioning handgun.¹⁸⁶

[342] Clubhouses also tend to have posted in their bar area, where the video surveillance monitor is located, photographs of police officers, and individuals who are suspected of being informants. Sgt. MacQueen and Sgt. Isnor both testified that OMGs try to obtain photographs of, and information about, police officers who might be involved in their surveillance and investigation. For example, he had his photo taken at a traffic stop near the Canso Causeway by BMC St. John member, and then Sergeant at Arms, Matt Foley in 2006; he also found a surreptitiously taken photo of himself in court during the 2009 Howard Fowler case, at the home of Rusty Hall during the February 28, 2010, search. Moreover, also found there was disclosure from Howard Fowler's 2009 criminal case to which was attached a statement of opinion by Sergeant MacQueen in that case; and a record of the vehicle type and license plate for RCMP Constable Knockwood's personal vehicle in a notebook. Posted at the Albert County clubhouse bar area, were photos of individuals¹⁸⁷ whom Sgt. MacQueen identified as police officers whose duties included investigating the BMC; and though blacked out in the exhibit, there were also pictures of civilians suspected of being informants.

[343] I accept the fact that the Hants County clubhouse was still under construction as the explanation for why more enhanced security measures, including active video surveillance, fortification, etc., were not in place by September 20, 2012.¹⁸⁸ Nevertheless, I am satisfied that it was the BMC clubhouse of the Hants County BMC.¹⁸⁹

[344] As defence counsel pointed out in their cross-examinations, no large amounts of money, significant caches of drugs, firearms, or weapons were found in BMC clubhouses.

¹⁸⁶ See Exhibit 40 – Photo 114.

¹⁸⁷ Shown in Exhibit 42, pp. 66, 139 –142.

¹⁸⁸ I note there was also no apparent landline telephone – although there are numerous cell phones within the premises; e.g. pp. 78, 150.

¹⁸⁹ It did have the BMC logo on its roof – Exhibit 2 – Photo 1; and the minutes repeatedly referred to the “clubhouse” being built; and as noted in the last pages of Exhibit 15 found in possession of Mr. Howe, Secretary-Treasurer of the Chapter- the owners according to the sketch created December 9, 2010 by Michael A. Allison, Nova Scotia Land Surveyor No. 538, references the “lands of Paul Roderick Fowler, Christopher Lloyd White, and Allan James MacLeod” – all members of the Halifax/Hants County BMC Chapter.

[345] In summary, I accept that all BMC clubhouses are generally based on the Albert County clubhouse model in the construction of the clubhouse itself, and its features, which are similar to those of Hells Angels MC Clubhouses.¹⁹⁰

[346] I accept Sergeant Isnor's opinion evidence, and find the necessary facts to support it, that a BMC clubhouse is not only a private meeting place for members, but also signals the club's territorial claim of dominance.¹⁹¹

6. Intelligence-gathering by the BMC

[347] Sergeant Isnor testified that 1% MCs gather intelligence on rival clubs, the police, and their own members. Knowing about rival clubs, permits the BMC to avoid unnecessary confrontations with them, and to maintain their area of geographical dominance and influence. When the VP of the Halifax BMC, Rusty Hall, and his wife were murdered February 25, 2010, Charlie Burrell, the National President of the BMC, uniquely permitted all BMC members to provide statements to police investigators in order to determine the identity of the responsible party. Sergeant Isnor was aware that a rival OMG suspect was identified, but not charged, and believes the BMC somehow became aware of that individual's identity.

[348] Knowing who are the police personnel (by gathering names, addresses, associations, vehicle descriptions, and license plate numbers) tasked with surveilling and investigating them gives the club the ability to be on the lookout for such persons, particularly if they see other members of the club, or non-members who may have knowledge of the club and its members, speaking to those police officers.¹⁹²

¹⁹⁰ There is no precise evidence about the condition of other BMC clubhouses in the Atlantic Provinces in 2012 – namely, St. John (although Sergeant MacQueen had seen inside it during a search), St. George, NB, St. John's, Grand Falls – Windsor NL, and Kings County, PEI (I infer that when these clubs patched over to the BMC they maintained, and likely upgraded their clubhouses). Nevertheless, I am satisfied that, given the strict hierarchical structure of the BMC, and its limited number of clubhouses, they would have all been required to be, and are, modelled upon the Albert County, “mother chapter”, clubhouse and premises, as testified to by both Sergeant Isnor and Sergeant MacQueen. I do note that Sergeant Isnor did attend at the Grand Falls-Windsor location with Cpl. Lunnen and she testified that they encountered Corey Fudge, requested to speak to its President, Frankie Folkes, who came outside to speak with them. On the door of the clubhouse was a sign that read: “What happens here, or is said here, stays here”.

¹⁹¹ The geographical territory claimed by the BMC, is also identified by virtue of the patch on the front of the BMC members' vests, regarding their local chapter, or the bottom rocker thereof regarding the province, as the case may be.

¹⁹² Sergeant Isnor cited an example of a Bacchus member in Ontario who, concurrently as a member of the Canada Revenue Agency, was discovered checking on personal information regarding police members of the Biker Enforcement Unit (BEU). He also testified that there are OMG friendly magazines, such as “Riders Mag”, published

[349] Sergeant Isnor also emphasized that the role of women (who are not permitted to be members of the club) in intelligence gathering can often be overlooked, and they have been used by OMGs to obtain sensitive information. He provided an example where an investigative reporter focusing on OMG matters, Michel Auger, working for the Québec newspaper *La Presse*, was tracked down and seriously wounded after being shot six times through information provided by a woman working for the Québec Ministry of Transport (akin to our Access Nova Scotia Motor Vehicle branch).

[350] In 2006, Gail Baker, was stopped on her way to a BMC event with her husband Ted Baker, who was a Striker/Prospect for the East Coast Riders. At that time, she was Deputy Warden at the Nova Institution in Truro, Nova Scotia (the Atlantic provinces' federal Correctional Institution for women). Her position would provide ready access to jail records, CPIC, and other sensitive information, as well as permitting information and possibly contraband to be funnelled to inmates.

[351] Sergeant MacQueen had his picture taken while he was inside the courtroom as an expert witness in the Howard Fowler case. Crown disclosure from Howard Fowler's case was found at Rusty Hall's residence on February 28, 2010. Sergeant Isnor indicated that in his experience, Crown disclosure is frequently found at OMG clubhouses, and that it is a very sought-after source of information, because it allows members to become informed about police investigative techniques, the status of persons in the criminal milieu, and other investigations that may be of interest to them.

[352] Having significant background information on their members allows OMGs to recruit like-minded members who will remain loyal to the club at all times, and will reveal vulnerabilities that its members have (e.g. – who are their loved ones etc.), should they question their loyalty to the club.

in Ontario, which has done numerous articles on the HAMC, BMC, and Outlaws MC. It also has a section where they take pictures of BEU officers and publish them, asking the public to identify the officers, and then they publish the names in the next issue. Other examples of intelligence gathering, include reading law enforcement materials – e.g. the presence of the RCMP Gazette magazine at the Albert County location in 2005; the presence of multiple copies of the OMG Police Handbook found at the Albert County location in 2007, and at Rusty Hall's residence on February 28, 2010; photographs of investigating officers and suspected informants at the Albert County location; information regarding the vehicle type and license plate of Constable Knockwood's vehicle found at Rusty Hall's residence.

[353] Sgt. Isnor cited examples of background investigation regarding the Hants County BMC in 2012.¹⁹³ I agree with his observation that Mr. James was always “one step ahead” of RM’s plans. I infer that he was “one step ahead” because Mr. James made it his business, through human intelligence assets, and Facebook, to surveil and monitor RM between the spring of 2012 and September 15, 2012. Perhaps the best example of this is Mr. James being aware of the photo on Facebook showing RM and others wearing the Brotherhood MC patches they had received in Québec, on August 25, 2012, evidenced by his texting RM August 26, 2012, “In Montréal by chance?... will see you as soon as you get back. Don’t waste your dollars on any souvenirs... saw you three come out of the closet on Facebook.” RM had earlier advised Mr. James about other persons who were attempting to start up a club (without BMC knowledge or approval, I infer), which he believed would be of interest to, and ingratiate him with, Mr. James.

[354] Sergeant Isnor also testified that “every [OMG] clubhouse has newspaper articles” regarding other OMGs, themselves, or the police and investigations of OMGs. There was evidence of that in this case.¹⁹⁴

7. Associates of BMC

[355] Sergeant Isnor also testified that OMGs have various forms of associates. The BMC have, or have had, associations with:

- i. Other 1% MC clubs (e.g. the HAMC, Red Devils, Vagabonds);
- ii. Subservient clubs (Forerunners, East Coast Riders, Cerberus, Easton’s Crew, Hakapiks, Mariners, Cursed, Highlanders, Wind Demons, Darksidiers (presently

¹⁹³ Bearing in mind that the Sergeant-at-Arms is specifically responsible for intelligence gathering for each chapter, it is noteworthy that, in June 2012, Mr. James, who I accept was the Sergeant at Arms for the BMC in Nova Scotia, had unsolicited contact with SH, inquiring whether he had a club and a clubhouse, and he dissuaded SH from maintaining his fictitious MC Facebook profile picture, caused him to remove his fictitious MC three-piece patch from his vest (on Sept. 20, 2012, he still had the Facebook profile picture of SH in his residence with the hand - writing thereon, “(asshole)... He has been warned...); and in 2012 Mr. James repeatedly dissuaded RM from, starting his own designed three-piece patch MC; starting a three-piece patch Brotherhood MC chapter in Nova Scotia; and starting a one-piece patch Brotherhood MC chapter in Nova Scotia.

¹⁹⁴ E.g. found at Pat James’s home was a newspaper with such an article dated July 30, 2011 – “Police will keep an eye on bikers”, Exhibit 28; Exhibit 2, pp. 86 and 88, found at the BMC Hants County clubhouse was a copy of the “One Percenter Encyclopedia – The world of outlaw motorcycle clubs from abyss ghosts to zombies elite”.

Dartmouth and South Shore chapters), Niners, Ezzy Seven Brotherhood, etc.); and

- iii. Members of the public who want a perceived association with an OMG, although often times visibly so for criminal purposes such as appearing to have the protection of the club when they are trafficking drugs, or the general association by being in their midst, and having the weight of the Club behind them.

[356] The evidence is clear that the BMC have had an ongoing “affiliation” during the material times here, with the Ontario Red Devils MC. More recently the Red Devils have patched over to become BMC Ontario chapters.

8. Criminal activity

[357] I bear in mind, to the extent that associates (i.e. subservient clubs, or individual members of the general public) are able and willing to engage in criminal activities for the benefit of the BMC, the more so are members of the BMC themselves insulated against criminal convictions.

[358] Notably, Sergeant Isnor’s testimony underlines that subservient clubs will generally associate themselves with the dominant club, if one is discernible. Thus, between 2012-14 in Nova Scotia, the Niners¹⁹⁵ and others associated themselves with the BMC, and began their progression through the recruitment process.¹⁹⁶

[359] Since the Hells Angels have re-emerged, first in the form of puppet clubs, such as the Gatekeepers, and more recently with Hangaround chapters, it appears that the Niners and Darksiders have been openly associating with the Hells Angels.

[360] Though using the so-called Pepler eight-characteristic model as his means of examining the information available to him, and giving an opinion about whether the BMC was a criminal organization in 2012, Sergeant Isnor was well aware that

¹⁹⁵ Who appeared in numbers, to show support for BMC member David Bishop at his sentencing in the spring of 2013, and patched over to become full members of BMC (Chapter 333) by the Summer 2014, although by the time of Sergeant Isnor’s testimony (2017), they were Niners again, and a Hells Angels MC Support Club.

¹⁹⁶ Eg. - the EZZY 7 Brotherhood, which has members with military backgrounds. On the other hand, regarding the Wind Demons, who were mentioned in the 2012 BMC Hants Co. chapter minutes of meetings, which I infer confirms they had a very close association with the BMC at that time, I accept Sergeant MacQueen’s testimony that he personally observed them patch over to become the “South Shore Darksiders MC” in 2014, and are now a Hells Angels Support Club.

the court must consider the definitional parameters found in ss. 467.1 – 467.13 of the *Criminal Code*, and therefore he has also oriented himself to considering that definition. He concluded that, at the material times, the BMC was a “criminal organization”. I agree.

[361] In Sergeant Isnor’s opinion, at the material times, the BMC condoned and encouraged serious criminality by its members in order to maintain its reputation as the dominant 1% MC in the Atlantic provinces, and to reap material benefits for its members, individually and collectively. He was of the opinion that the BMC has several intertwined main purposes or activities: most importantly is protection of its reputation - the “power of their patch”; others include, the commission of serious criminal offences, and protection of the organization’s survival, and taking any steps necessary to ensure that the BMC not only survives, but flourishes. Let me briefly examine each of those.¹⁹⁷

i) Protection of the BMC’s reputation (“power of the patch”)

[362] Whether entirely deserved or not, the BMC had the reputation of being a group that was to be feared, especially by members of the public who interfere with its members or activities.¹⁹⁸

[363] I am satisfied that the BMC, as a 1% MC, had a deliberately-fostered reputation for violence in 2012. As will become clearer, I am also satisfied that Mr. James, and Messrs. Howe and Pearce, committed the criminal offences herein

¹⁹⁷ I will examine this in more detail in the section entitled: “Why I conclude that the BMC was a criminal organization in 2012”.

¹⁹⁸ All their club insignias (the cut and colours, including the 1% patch; the fearsome logo etc.), “soft colours”, support gear, and home-security stickers, convey a simple message – “don’t you dare mess with us – or else...”. This reputation was expressly referred to by RM in his statement: “Everybody’s scared of them, apparently. And I don’t know if it’s going to be easy to get a lot of people to talk [about what happened at the Bikers Down event September 14, 2012]”; and “[in deciding that he would go to the clubhouse in Hants County with his buddy for the annual pig roast] I didn’t want Bacchus to know my license plate of my vehicle. So, I rented a red truck... Because I didn’t trust them, because well, just everything you see and everything else...”: pp. 74 and 84, RM’s statement transcript; SH in his testimony could see that Mr. James’s email identified him as BMC, and SH stated: “it made me wonder how somebody would feel that they had that kind of authority over a whole province, that they could tell somebody – ‘you can’t have the name ‘Nova Scotia’ on the back of your vest’, you can’t have this on your vest... If they have a mindset that they have this kind of authority, what would they try to do to enforce it? Didn’t want to go somewhere where I was going to get into any kind of trouble”; JJ stated in her testimony: “I saw a 1% patch... I’ve just been told that that’s the worst of the worst... Because [what] my husband told me then, when I saw people with 1% patch, is not to go over there and get friendly and invite them to the barbecue and all that... you better be afraid of it”: pp. 128 – 129 Transcript; BE testified that Mr. Howe’s vest “had a 1% patch on the front... To me, it means that they do what they want; when they want; to whoever they want”: p. 241, Transcript.

in order to uphold that reputation, and specifically to uphold the dominance of the BMC in the motorcycling milieu of the Atlantic provinces, and beyond.

ii) At the material times, the BMC condoned and encouraged serious criminal conduct.

[364] One reference point in assessing this statement is the criminal records of BMC members. It must be borne in mind that, for each of those convictions, members were proved to have committed the offences beyond a reasonable doubt, or admitted the offences by pleading guilty.

[365] I bear in mind Sergeant Isnor's testimony that OMGs do not require on an ongoing basis that every member commit criminal offences, but that they seek members who have various qualities, training, experience or other means available to them that will benefit the club.¹⁹⁹ Justice Fish made this point in *Venneri*, at para. 36:

Working collectively rather than alone carries with it advantages to criminals who form or join organized groups of like-minded felons. Organized criminal entities thrive and expand their reach by developing specializations and dividing labour accordingly...

[366] I have earlier referred to the examples of Howard Fowler, Dean Huggan, Darren Hebb, and David Bishop.²⁰⁰

[367] There were approximately 80 members of the BMC in 2012. Although the nature of the offences and when they were committed vary within the criminal records of those BMC members who have been convicted of criminal offences, it is nevertheless significant that almost 60% of the membership had criminal records.²⁰¹ This is comparable to the Outlaws MC, and common to many other

¹⁹⁹ An example cited by the Sergeant was Mike McCrea, who was the Canadian National Secretary of the Hells Angels, a member of the Nomads, and the Halifax Chapter until at least 2001 –2. His initial primary contribution was to ensure the Hells Angels had the most up-to-date technology, including secure email, telephone and computer services. Another example was David Atwell of the Hells Angels, who progressed in the organization because of his electronics ability, including his ability to manage technology to “sweep” and make secure sensitive meeting places such as clubhouses of the Hells Angels.

²⁰⁰ See also the criminal records and associated testimony regarding Bradley Summers, and Jeffrey Graves who, as a member in 2007, while being arrested, putting his child on a school bus, was carrying a loaded revolver in a strapped holster, and was in possession of a marijuana grow operation – Exhibits 36/37, and Exhibits 38/39 respectively.

²⁰¹ Notably, although a number of those were not recent, and received while those offenders were not BMC members, I also keep in mind that, given the 1% reputation, a number have convictions pursuant to the *Excise Act*, and for quasi-criminal matters such as repeated motor vehicle infractions, etc. I accept that this statistic is a crude measure, which has short-comings, but nevertheless find it of some value.

clubs, although the Hells Angels membership is closer to 70% with criminal records.

[368] I also accept Sergeant Isnor’s evidence that once an individual becomes a member of a 1% MC, it is more difficult to successfully prosecute them for alleged criminal and quasi-criminal offences,²⁰² because they are insulated, either by virtue of subservient club members or associates doing their bidding, or because due to their reputation, witness statements or testimony is not forthcoming; witnesses recant their statements to police; or they are actively interfered with.²⁰³

[369] I observe that in August 2012, the President of the St. John BMC, Matt Foley, shot a man to death, pleaded guilty to manslaughter, and received a 10-year sentence; I have found that each of Messrs. James (Sergeant at Arms), Howe (Secretary-Treasurer) and Pearce from the only Nova Scotia BMC Chapter committed violent offences vis-à-vis RM; before he was associated with the BMC, on March 8, 2012, David Bishop was sentenced for assault causing bodily harm to 6 months custody and 18 months’ probation, and thus was on probation at the time he achieved hang-around status with the BMC; and to 30 months custody (in April 2013) for two counts of trafficking and possession of a firearm while prohibited; in March 2013 Paul Fowler was sentenced for careless use of a firearm, assault with a weapon, assault, and death threats arising on December 31, 2012; on October 10, 2012, Kimball Phinney was sentenced to 60 days custody for a number of offences including possession of a prohibited weapon (Black Cobra stun gun), carrying that concealed weapon, and occupying a motor vehicle with a prohibited weapon; (on February 23, 2012); Ryan Wallace was sentenced to a 45 day conditional sentence and 12 months’ probation for assault causing bodily harm, and (on January 29, 2014) for possession of a firearm knowing its possession is unauthorized, a three month conditional sentence.²⁰⁴

[370] There is no evidence that the BMC discourages criminality by its membership.²⁰⁵

²⁰² In *O’Reilly*, (2017) the Québec Court of Appeal included activities such as smuggling tobacco as capable of being criminal activities engaged in by “criminal organizations”.

²⁰³ Which is reinforced by the culture of hostility to those that speak out, and the associated sinister and derogatory references: “snitches get stitches”; “rat”.

²⁰⁴ I also accept that BMC Halifax VP Rusty Hall had a marijuana grow-op in his basement, and semi-automatic rifles with illegally-sized clips and an illegal bulletproof vest, when his home was searched on February 28, 2010.

²⁰⁵ Its open hostility to law enforcement personnel is consistent with this observation, as is BMC members wearing conspicuously the 1% patch, self-identifying with its well documented origins and intended meaning between 2001-2012.

[371] I am satisfied beyond a reasonable doubt that the BMC deliberately fosters a reputation for fearsomeness, which incorporates a component of resorting to “serious offence” violence, and that its members know this. For convenience, I have referred to this as “a reputation for violence”. This reputation enables the provision of a direct or indirect material benefit to the club, and its individual members through the facilitation or commission of one or more serious offences.

[372] As I observed earlier, BMC members Matt Foley, David Bishop, Paul Fowler, Kimball Phinney, and Ryan Wallace were all sentenced around the material times herein for committing serious offences of violence or weapons offences. I have found Messrs. James, Howe, and Pearce guilty of serious offences contrary to ss. 264(2), 264.1, 346 and 423 of the *Criminal Code* in 2012.

[373] Those are eight of the approximately 80 members of the BMC in 2012.

[374] Regarding serious offences under the CDSA, I observe that at the time he and his wife were murdered in their home, Rusty Hall had prohibited firearms, a bullet-proof vest, and a marijuana grow operation in his residence (February 25, 2010); Jeffrey Graves was carrying a holstered loaded handgun when arrested putting his child on to a school bus near his home, wherein he had a marijuana grow operation (October 7, 2005); Brian Schofield trafficked in or had possession of Schedule I or II substances for the purpose of trafficking on August 14, 2013, and was sentenced December 30, 2013, to a two-year sentence; Dean Huggan was sentenced to 6 years less one year remand credit for his PEI drug trafficking offences (in 2007); and David Bishop was convicted for trafficking drugs/cocaine on February 12, 2013, and sentenced to 30 months in custody on April 11, 2013.

[375] The level of serious criminality among members of the BMC in and around 2012 is remarkable.²⁰⁶

Why I conclude beyond a reasonable doubt that the BMC was a “criminal organization” in 2012

[376] The general principles were recently set out in *R. v. O’Reilly*, 2017 QCCA 1283.²⁰⁷

²⁰⁶ As I have indicated earlier, I accept Sergeant Isnor’s evidence that, generally speaking, it is more difficult to successfully prosecute members of 1% MCs who engage in serious criminality because they have the protection of having underlings and subservient clubs’ members doing their bidding.

SXTH GROUND OF APPEAL: THE ABSENCE OF A CRIMINAL ORGANIZATION

166 Provisions dealing with criminal organization were introduced into the *Criminal Code* in 1977⁹⁴ and significantly amended in 2001.⁹⁵ Notably, the minimum number of persons required to form a criminal organization was reduced from five to three.

167 It bears mentioning that Canada was one of the first signatories of the November 30, 2000, *United Nations Convention against Transnational Organized Crime*⁹⁶ ("*Convention*"). In this *Convention*, the term "organized criminal group" is defined as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences in order to obtain, directly or indirectly, a financial or other material benefit.⁹⁷

168 Section 467.1 of the *Criminal Code* defines "criminal organization" for the purposes of domestic Canadian law. This definition is inspired by the *Convention*. Ss. 467.1(1) and s. 467.12 of the *Criminal Code* set forth the following:

467.1(1) The following definitions apply in this Act

"*serious offence*" means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.

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

(a) is composed of three or more persons in or outside Canada; and

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

It does not include a group of persons that forms randomly for the immediate commission of a single offence. (*organisation criminelle*)

[...]

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

²⁰⁷ Leave to appeal denied – [2017] S.C.C.A. Nos. 409 and 410.

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

* * *

467.1(1) Les définitions qui suivent s'appliquent à la présente loi.

« infraction grave » Tout acte criminel -- prévu à la présente loi ou à une autre loi fédérale -- passible d'un emprisonnement maximal de cinq ans ou plus, ou toute autre infraction désignée par règlement. (serious offence)

"organisation criminelle" Groupe, quel qu'en soit le mode d'organisation :

- a) composé d'au moins trois personnes se trouvant au Canada ou à l'étranger;
- b) dont un des objets principaux ou une des activités principales est de commettre ou de faciliter une ou plusieurs infractions graves qui, si elles étaient commises, pourraient lui procurer -- ou procurer à une personne qui en fait partie -- , directement ou indirectement, un avantage matériel, notamment financier.

La présente définition ne vise pas le groupe d'individus formé au hasard pour la perpétration immédiate d'une seule infraction.

[...]

467.12 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque commet un acte criminel prévu à la présente loi ou à une autre loi fédérale au profit ou sous la direction d'une organisation criminelle, ou en association avec elle.

(2) Dans une poursuite pour l'infraction prévue au paragraphe (1), le poursuivant n'a pas à établir que l'accusé connaissait l'identité de quiconque fait partie de l'organisation criminelle.

169 To constitute a "criminal organization" a "group" must be composed of "three or more persons" and, even if this is not expressly set out at ss. 467.1(1), have a certain structure and continuity, as provided by the definition in the Convention.⁹⁸ It is these elements of structure and continuity that distinguish a criminal organization from a simple conspiracy involving three or more persons and thereby avoid attributing an overbroad scope to the Criminal Code provisions relating to criminal organizations.⁹⁹

170 This is how Justice Fish described the importance of structure and continuity in *Veneri*:¹⁰⁰

[27] Some trial courts have found that very little or no organization is required before a group of individuals are potentially captured by the regime: see *R. v. Atkins*, 2010 ONCJ 262 (CanLII); *R. v. Speak*, 2005 CanLII 51121 (Ont. S.C.J.). Others, properly in my view, have held that while the definition must be applied "flexibly", structure and continuity are still important features that differentiate criminal organizations from

other groups of offenders who sometimes act in concert: see *R. v. Sharifi*, [2011] O.J. No. 3985 (QL) (S.C.J.), at paras. 37 and 39; *R. v. Battista*, 2011 ONSC 4771, at para. 16.

171 The structure and continuity of criminal organizations thus distinguish them from criminal conspiracies. Stripped of continuity and structure, "organized crime" would simply be any serious offence committed by a group of three or more persons seeking material gain.¹⁰¹ This was not Parliament's purpose.

172 Under ss. 467.1(1), one of the "main purposes" or "main activities" of the organization must be the "facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit." The Court of Appeal for Ontario recently explained in *R. v. Beauchamp* that the adjective "main" is qualitative and not necessarily quantitative; consequently, depending on the context, even a finding that the organization is primarily engaged in legal activities does not constitute a bar to finding, if the circumstances allow, that its illegal activities are also "main" activities:¹⁰²

[170] We agree with Crown counsel that there is no requirement to weigh criminal purposes and activities against non-criminal purposes and activities before making a "criminal organization" designation. While we would not say that such evidence may never be relevant, nothing in the language, purpose or objects of the criminal organization provisions mandates such an inquiry. Such an inquiry would also be unworkable.

[171] The language of the definition of "criminal organization" in s. 467.1 is instructive. It requires that a group have as "one of its main purposes or main activities" the facilitation or commission of the serious crimes described. This tells us a number of things. First, it tells us that *such a group may have more than one "main" purpose or activity*. Second, *there is a distinction between "purposes" and "activities", and either one or the other can qualify*. Third, *only one of the purposes or activities of the group need be the criminal purpose or activity*. Finally, *it is not any purpose or activity that counts, but only a main one*.

[172] A number of things follow logically from these observations. First, the criminal purposes or activities of the organization need not be quantitatively or numerically dominant, because multiple activities cannot all fall into that category. Second, *a group may have legitimate "purposes" but still have "main activities" that are illicit*. Third, *the impugned "purpose" or "activity" must be at least more than a de minimus feature of the endeavour at least in a qualitative, if not quantitative, sense*.

[173] These implications all work against the quantitative comparison analysis proposed by the appellants.

[...]

[182] In our view, "main" is used in s. 467.1 in a qualitative sense. It is the importance of the criminal purpose or activity to the perpetrators and not its quantitative relationship with other non-criminal aspects of the group's activities that determines whether it is a "main" purpose or activity. Serious ongoing criminality is still serious ongoing criminality even if it is camouflaged under a cover of non-criminal activity, however quantitatively significant that non-criminal activity may be.

[183] As is evident from the above, importance should not be determined quantitatively. *An important purpose or activity will be one in which the members of the group, individually or collectively, have invested significant efforts.* The nature and degree of effort invested in the purpose or activity will be a telling marker whether the purpose or activity is a "main" one. The broader circumstances -- such as the scope of the illegal activities and the environment in which the group operated -- will also be relevant.

173 The organization's serious offences must also "result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group." *That a single member receives a material benefit is sufficient to engage this definition.*

174 One of the questions raised here is under what conditions a person may be considered a member of a criminal organization. This question is important since, under ss. 467.1(1) of the Criminal Code, there is no criminal organization without a group "composed of three or more persons".

175 To this end, the analysis must concentrate on the effective links between those alleged to be members of the group. *These persons must have links of interdependency within the organization.* It is not necessary that the link be related to a decision-making role within the organization.¹⁰³ Nevertheless, *the members must play a role within the organization that establishes their interdependence*¹⁰⁴ and not simply be *associated* to the organization for the purposes of "an arm's length, mutually beneficial arrangement."¹⁰⁵

176 In this respect, several factors may be considered:

(a) Nature of the link: does the person perform clearly defined functions under the control or direction of another member of the organization or in co-operation with such other member, or on the contrary, does the person operate with a high degree of independence denoting the absence of a link of dependency with the organization?;¹⁰⁶

(b) Degree of loyalty and commitment: does the person show a certain degree of loyalty or continued commitment to the organization or, on the contrary, is the person's participation sporadic?;¹⁰⁷ indeed, the links between members of the group should normally be "ongoing and organized" given that the purpose of the legislation "is to identify and undermine groups of three or more persons that pose an elevated threat to society due to the ongoing and organized association of their members";¹⁰⁸

(c) Interest: does the person have a direct or indirect interest in the viability of the organization, notably a financial interest?¹⁰⁹

These factors are neither cumulative nor exhaustive. All circumstances must be considered in determining whether a person is a member of a criminal organization.

177 To establish the guilt of an accused under s. 467.12 of the Criminal Code, in addition to the *actus reus* and the *mens rea* of the underlying offence, the prosecution must also prove the existence of a criminal organization and the accused's knowledge that the offence was committed for the benefit of, at the direction of, or in association with this organization. However, as Justice Fish confirmed in *R. v. Venneri*, it is not necessary to establish that the accused was actually a member of the criminal organization:¹¹⁰

[53] The phrase "*in association with*" should be interpreted in accordance with its plain meaning and statutory context. It is accompanied here by the terms "*at the direction of*" and "*for the benefit of*". These phrases are not mutually exclusive. On the contrary, they have a shared purpose and will often overlap in their application. *Their common objective is to suppress organized crime. To this end, they especially target offences that are connected to the activities of criminal organizations and advance their interests.*

[54] Considered in this light, the phrase "in association with" captures offences that advance, at least to some degree, the interests of a criminal organization even if they are neither directed by the organization nor committed primarily for its benefit. [...]

[55] The phrase "in association with" requires a connection between the predicate offence and the organization, as opposed to simply an association between the accused and the organization: [...]

[56] As mentioned earlier, an offender may commit an offence "in association with" a criminal organization of which the offender is not a member. Membership in an organization, however, remains a relevant factor in determining whether the required nexus between the offence and the organization has been made out (see *Drecic*, at para. 3).

[57] The Crown must also demonstrate that an accused knowingly dealt with a criminal organization. The stigma associated with the offence requires that the accused have a subjective *mens rea* with respect to his or her association with the organization (see *Lindsay* (2004 S.C.J.), at para. 64).

[My italicization added]

[377] Not seriously in dispute are the facts, which I find are proved, that in 2012 the BMC had three or more members, had a structure and hierarchy, and had

continuity. However, can it be said that one of the “main purposes” or “main activities” of the BMC was the “facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit by the group or any of the persons who constitute the group”?²⁰⁸ Yes, that can be said.

[378] The position of the defendants regarding the “criminal organization” element may be summarized as follows:

1. Factually, there is no direct information about the BMC’s activities from persons who are close enough to know about the inner workings of the BMC such as members, ex-members, reliable confidential informants, police agents, or from wiretaps or seizure of electronic or hard copy documentation outlining serious criminality engaged in by the BMC. There is therefore insufficient evidence in relation to the Crown’s argument that serious criminality exists as part of the BMC’s main purposes or main activities in 2012;²⁰⁹
2. Insofar as members of the BMC were shown to be involved in serious criminality, e.g. Dean Huggan’s trafficking conviction in PEI in 2007, there was no evidence of how the criminality was connected to the BMC, beyond the mere fact that those persons were at the time, members of the BMC;
3. In none of the searches conducted at BMC clubhouses, were weapons/firearms, large amounts of cash, or drugs found;
4. Although some members of the BMC do have criminal records for serious offences, most of those occurred before or after they were BMC members;
5. There is either no evidence, or insufficient evidence, that any member of the BMC received a direct or indirect material benefit from the commission of serious criminal offences;
6. There is no evidence to establish a connection between the BMC’s “reputation” and any material benefit for any of its members.

[379] I will similarly briefly answer each of these propositions in order:

²⁰⁸ There is no reason why the main purposes or activities cannot change over time, yet still qualify as criminal under s. 467.1 of the *Criminal Code*.

²⁰⁹ E.g., as referenced by Justice Fuerst in *Lindsay* at para 1076 in relation to the Hells Angels.

1. As this is a factual matter, it is for the trier of fact to determine whether, considering all the evidence that I accept, it is a reasonable inference that the BMC's main purposes or activities include serious criminality; and, if that is a reasonable inference on a balance of probabilities, can I go on to conclude beyond a reasonable doubt that it is the *only* reasonable inference? As will be evident shortly, I conclude beyond a reasonable doubt, that among the BMC's main activities and purposes are to protect and maintain its reputation for violence, and to maintain its territorial dominance in the motorcycle club milieu in the Atlantic provinces, through its reputation for violence and the commission of serious offences;
2. This is also a factual matter, which involves a consideration of the evidence as a whole;
3. As with my assessment whether the BMC's main purposes or activities were criminal, I must look at the evidence as a whole, and not address it in a piecemeal fashion. I observe that marijuana grow operations with evidence of associated serious criminality, were found at the personal residences of BMC members Jeffrey Graves and Rusty Hall. I bear in mind Sergeant Isnor's evidence regarding the more recent phenomenon that OMG criminal organizations deliberately do not have possession of sensitive information (and, I infer, anything else that could compromise the continued liberty of their members from criminal prosecution), at their clubhouses;
4. This is a factual matter, and I bear in mind Justice Fish's comments in *Venneri* about the specialization and division of labour in criminal organizations, as reiterated by Sergeant Isnor in his testimony, giving the examples of Mike McCrea of the Halifax Hells Angels chapter and David Atwell of the downtown Toronto Hells Angels chapter;²¹⁰
5. The material benefit received from the commission of serious criminal offences, can take many forms, and need only benefit a single member, although based on the whole of the evidence I find many benefited in the circumstances of this case;

²¹⁰ Criminal records from before their BMC membership (unless perhaps if they were in a club overseen by the BMC) are not relevant other than to the examination of BMC recruitment choices of members.

6. The connection is based on my consideration of the whole of the evidence and may be shown to exist without the equivalent of a “paper trail”.

[380] I accept Sergeant Isnor’s opinion that the BMC has several main purposes or activities:

- i) Protection of the BMC’s reputation for violence (also referred to as protecting the “power of the patch”);
- ii) the commission of one or more “serious offences”,²¹¹ which could include, e.g., drug trafficking, s. 5 CDSA²¹² involving Schedules I, II or III substances; s. 6, CDSA, importing and exporting involving Schedules I, II, III, or VI substances; s. 7 production involving Schedules I, II, or III substances; and *Criminal Code* offences, such as the following, which I have generically characterized:
 - a. s. 85- use of a firearm or imitation in the commission of an offence;
 - b. s. 87-pointing a firearm at another person;
 - c. s. 88-possession of a weapon for a purpose dangerous to the public peace or for the purpose of committing an offence;
 - d. s. 90-carrying a concealed weapon;
 - e. ss. 91, 92, 93, 94, 95, 96, 99 and 100-unauthorized possession of a firearm; possession of a firearm knowing possession is unauthorized; possession of a firearm/weapon at unauthorized place; possession of a firearm/weapon in a motor vehicle; possession of a restricted or prohibited firearm with ammunition; possession of a prohibited or restricted firearm/weapon, device or ammunition, obtained by crime; firearms/weapons trafficking; possession of firearms/weapons for the purpose of trafficking;

²¹¹ Per s. 467.1 (1): “means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.” This could include offences under the *Excise Act*, 2001, S.C. 2002, c.22. at ss.214-219.

²¹² *Controlled Drugs and Substances Act*, SC 1996, c.19, as amended.

- f. s. 117.01-possession of a firearm/weapon while prohibited from doing so by court order or any Act of Parliament;
- g. s. 139(2)-obstructing justice; and
- h. More obvious cases, though not intended to be an exhaustive list, but including- murder, manslaughter, criminal harassment, threats, assault (including assault causing bodily harm, aggravated assault, assaulting or resisting a peace officer), extortion and intimidation.

iii. Protecting its territorial dominance in the motorcycling milieu.

[381] At this juncture, it is helpful for me to summarize some of the important findings I have made.

[382] I accept that the BMC and its members, deliberately cultivate and foster a reputation for violence (including having all their paraphernalia and support gear bear intimidating or violent imagery and messaging).

[383] I accept that the BMC have their clubhouses fortified, constantly monitor the outside of their premises, and equip themselves with devices such as radio frequency detectors and police scanners.

[384] I accept that the BMC and its members, aggressively pursue a culture of secrecy, including having ubiquitous reminders in writing in their clubhouses, to the effect that that they may be “bugged”, and that “what is said here, stays here.”

[385] I accept that the BMC and its members have an *animus* or hostility to anyone (including its members, associates, or persons who are not associated with the club, but may have information about the club and its activities) who has contact with, or speaks to, the police or other law enforcement personnel.

[386] I accept that the BMC and its members gather intelligence (photos, addresses, vehicle identification and license plate information etc.) about police personnel, and materials such as police investigation instruction manuals.²¹³

²¹³ The fact that multiple copies were found in 2007 at Charlie Burrell’s residence, which is nearby to the clubhouse, suggest that they are especially important to him, as President of the BMC; the other individual copy was found on February 28, 2010, at VP Rusty Hall’s residence.

[387] I accept that an unusually high proportion of the BMC members have criminal records, and they have a specific rule anticipating that, not only will their members commit criminal offences, but that they will go to jail.

[388] I accept that for those of its members that have received convictions for serious criminal offences, there has been no negative impact on their membership status; or alternatively, they were promoted within the organization.

[389] I accept that there is an elaborate and structured recruitment process. No one can join without significant scrutiny.

[390] I accept that Mr. James, who was Sergeant-at-Arms for the only BMC chapter in Nova Scotia in 2012, told SH that:

Patches like you are carelessly wearing (three-piece patch MC) are *earned through a lot of time, blood and sweat*. Those that have put in the effort for *the right to wear such a patch* (three-piece patch MC) will not react favourably to such a slap in the face;

[391] And RM that:

You don't come in with a club... The way it works... You start off with a one-piece patch... Riding Club... Then, maybe after a couple of years you gain respect in the area and people get to know you. Then we move you up... to have possibly a two-piece patch... If it seems right... you come to us and we'll decide if you have enough time in, and if you were warranted to have a three-piece and turn into an MC... What you're doing is disrespecting all these other clubs that have worked their way up...?²¹⁴

[392] I accept that Messrs. James, Howe and Pearce were violently angry with, and felt disrespected by, RM after he tried to create his own unique three-piece patch MC, and, without express BMC permission, bring a (not-1%) Brotherhood MC chapter to Nova Scotia.

²¹⁴ I accept that Mr. James made these statements to SH and RM that that he was being candid. This is direct evidence from a BMC member and Sergeant at Arms for Nova Scotia, confirming that the BMC is territorially dominant, and decides what clubs are approved, and if not approved, the BMC will resort to violence: "those [patches] were coming off your back." All the BMC chapters extant in 2012 had followed this progression. I accept the reliable evidence of Sgts. MacQueen and Isnor to this effect. Not one of these clubs, or any others in the Atlantic Provinces, became or held themselves out as independent 1% three piece patch MCs. Found at the search of the BMC Hants County Clubhouse were "Niners" "Halifax MC" patches, which according to the reliable evidence of Sgt. MacQueen he had never seen them wearing, and is consistent with the BMC having control over whether that club would progress to become the "Niners MC – Halifax" or not – see Exh. 2, photo 120.

[393] What was required by the BMC of other clubs' members, who "worked their way up" in terms of "time, blood and sweat" to earn the right to be "respected"?²¹⁵

[394] I accept that the BMC likely requires members of those clubs to engage in serious criminality.

[395] I accept that the BMC was treated as the "dominant" MC in the Atlantic provinces, such that other clubs (eg. Niners, Wind Demons, EZZY 7 Brotherhood) acted in a subservient manner to them, doing menial tasks at BMC functions, and showing up at criminal court in support of BMC members.

[396] I accept that the Maritime Biker Federation was dominated by the BMC, and publicly advertised as "not open to the public – club members and close affiliations only".²¹⁶

[397] I accept that the BMC treated the Atlantic provinces as its territory, over which it *alone* would decide which persons could start clubs, and which clubs could advance from riding club to two-piece patch and then to three-piece patch MCs.

[398] To be satisfied that the BMC in 2012 was a criminal organization, I must be satisfied beyond a reasonable doubt that:

1. It had three or more members, and sufficient structure and continuity;²¹⁷
2. It had as one of its main purposes or main activities,²¹⁸ the facilitation or commission of one or more serious offences (indictable offences

²¹⁵ I accept Sergeant Isnor's evidence that the notion of "respect" in the 1% MC milieu is extremely important – hence many members sign their Christmas or greeting cards of well wishes, "M L & R" meaning "much love and respect"; the letter to Matt Foley is signed in that fashion by each of David Bishop, Dean, Howard (Scoober) Fowler, Mr. Howe (Rum Runner), Mike MacLeod, and Chris MacDonald; found in David Pearce's home, Exhibit 19, photos 41 and 40 are support T-shirts for the Ontario Hells Angels, Nomads, and the Nova Scotia Highlanders MC which respectively reference: "loved by few – hated by many – respected by all"; and "loyalty – honour – respect"; found at Pat James home, Exhibit 18, photos 23 and 24 is a support T-shirt for the Ontario Hells Angels Nomads which reads: "come with respect or get wrecked". I remind myself that each of the clubs patched-over to BMC status went through a "respectful" progression from one patch to two patch clubs before becoming members of the 3-piece patch 1% BMC: East Coast Riders; Mariners; Cursed; Cerberus; Forerunners; Easton's Crew. I conclude that they all did the bidding of the BMC until they themselves were BMC members. I also conclude that sometimes the BMC required of them acts of serious criminality.

²¹⁶ See the poster for the 2007 Maritime Federation party August 3, 4, and 5, 2007, "hosted by Bacchus MC", located during the search of the BMC clubhouse in 2007 – Exhibit 42, photos 52 and 54.

²¹⁷ As I have already indicated, I am satisfied in these respects.

under any Act of Parliament for which the maximum imprisonment is five years or more, or an offence prescribed by regulation); and

3. That if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.²¹⁹

[399] In summary, I find that from 2001 until at least the end of 2013, the BMC was virtually the only, and clearly the dominant, 1% three-piece patch MC in the Atlantic provinces. It was the most powerful MC in the hierarchy of clubs it perpetuated. It determined what clubs could be created as riding clubs, and which of those, if any could progress from a one-piece patch to a two-piece patch MC. It groomed some clubs to ultimately become members of the BMC in their respective provinces, to solidify its territorial dominance and pursue its main purposes and activities.

[400] No independent three-piece patch MC clubs of note existed during that time interval in the Atlantic provinces. It remained unchallenged in its position of dominance.

[401] The BMC deliberately fostered a reputation for ready resort to violence in order to maintain its dominance in the motorcycling milieu. Some persons and clubs likely resented their dominance and challenged the BMC. As was very evident in 2012 in the case of SH and RM, these challenges would have been met with violent responses if further warnings from the BMC were not heeded. Such violent responses would have involved the commission of serious offences.

[402] The BMC sought to maintain its territorial dominance in the Atlantic provinces because that status provided it, and any one or more of its members, with a direct or indirect material benefit.

[403] As Justice Fish stated in *Venneri*:

²¹⁸ As noted in *Beauchamp*, (paras. 171-183) “the impugned ‘purpose’ or ‘activity’ must be at least more than a *de minimus* feature of the endeavor at least in a qualitative, if not quantitative, sense... It is the importance of the criminal purpose or activity to the perpetrators and not its quantitative relationship with other non-criminal aspects of the group’s activities that determines whether it is a ‘main’ purpose or activity... An important purpose or activity will be one in which the members of the group, individually or collectively, have invested significant efforts. *The nature and degree of effort invested in the purpose or activity will be a telling marker whether the purpose or activity is a ‘main’ one. The broader circumstances – such as the scope of the illegal activities and the environment in which the group operated – will also be relevant.*”

²¹⁹ I note that there must be an articulable material benefit, but it need not necessarily be a “financial” benefit.

36 Working collectively rather than alone carries with it advantages to criminals who form or join organized groups of like-minded felons. Organized criminal entities thrive and expand their reach by developing specializations and dividing labour accordingly; fostering trust and loyalty within the organization; sharing customers, financial resources, and insider knowledge; and, in some circumstances, developing a reputation for violence. *A group that operates with even a minimal degree of organization over a period of time is bound to capitalize on these advantages and acquire a level of sophistication and expertise that poses an enhanced threat to the surrounding community.*

[My italicization]

[404] It is telling that the BMC has:

1. A remarkable number of members who had criminal records when they became members, or acquired criminal records while they were members;
2. A very exclusive membership, who are carefully vetted before becoming members, and who shun law enforcement personnel;
3. Very unusual written rules which expressly anticipate that its members will go to jail, and place a premium on maintaining strict control over who may represent themselves to the public as a full member (requiring the return of any BMC logo-ed paraphernalia, garments, accessories, and the date stamping of BMC tattoos);
4. An extraordinary sensitivity to any perceived disrespect to the club or its members, and extraordinary hostility to any persons associated with law enforcement or in contact with law enforcement;
5. A culture of secrecy surrounding every facet of the club (clubhouse premises have visual surveillance systems, fortification, devices to detect radio frequency emissions, warnings to members that the premises may be bugged, and an expectation that members will not speak to police, provide witness statements, testify in court, or call 911); and
6. An extraordinary need to obtain intelligence about law enforcement personnel methodologies, practices, and personal information of those locally involved in monitoring the activities of the club and its members.

[405] I am satisfied beyond a reasonable doubt that the BMC enforced its territorial dominance in the motorcycling milieu through the commission of serious offences.

[406] I am further satisfied beyond a reasonable doubt that the BMC, or one or more of its members, materially benefited as a result of the BMC's territorial dominance; and that its dominance facilitated the commission, by one or more of its members, of serious offences.

[407] In summary, I am satisfied beyond a reasonable doubt that in 2012, the BMC, posed an elevated threat to society due to the ongoing and organized association of their members.

[408] I am satisfied beyond a reasonable doubt that, in 2012 one of the main purposes of the BMC was to maintain its territorial dominance in the motorcycle club milieu in the Atlantic provinces, and in support of that purpose, one of the main activities of the BMC was ensuring, through the commission of serious offences,²²⁰ that it protected its reputation for violence.²²¹

[409] I am further satisfied beyond a reasonable doubt that maintaining its dominance over existing or potential rivals for this territory was seen as necessary, and was effected by the BMC facilitating the commission of serious offences by its members and associates.²²²

[410] I am further satisfied beyond a reasonable doubt that, if committed, such serious offences, would likely result in the direct or indirect receipt of a material benefit by the BMC, and by one or more persons who constitute the BMC.

[411] Serious offences of violence would be of material benefit by establishing and maintaining the BMC's dominance, *inter alia*, over existing or potential rivals in the Atlantic provinces; and serious offences such as drug trafficking would provide tangible and intangible (monetary and other), material benefits to its members. I note here as well that maintaining its reputation for violence would also likely cause its support gear to be sold in greater quantities, as well as making its fundraising efforts, such as annual pig roasts etc., more likely to generate greater revenue. Moreover, I infer that the direct or indirect material benefits

²²⁰ Such as the offences committed against RM.

²²¹ i.e. the "power of the patch" – see also para. 1021, *Lindsay*.

²²² e.g., such as drug trafficking – see also paras. 952, 1011 and 1079, *Lindsay*.

would likely include garnering goodwill or acquiescence from other criminal groups, including non-rivals; increasing the BMC's exposure to potential suppliers, and drug trafficking customers; protecting BMC associates who are involved in drug transactions from the chances of being victims of "drug rips"; and the intimidation of witnesses, thereby diminishing the risk of successful prosecution. Each of the Atlantic provinces have significant access to open water and ports, which historically have been drug and other contraband importation points for criminals, and provide a significant incentive for motivated criminals to be the dominant presence in that geographic area.

[412] In 2012, the BMC was a criminal organization.²²³

[413] It is a reasonable inference, and I am satisfied beyond a reasonable doubt that it is the only reasonable inference. When I examine and assess the evidence as a whole (including the absence of evidence), and consider it "logically and in light of human experience", and common sense, I have concluded beyond a reasonable doubt that all reasonable inferences otherwise have been excluded – *R. v. Villaroman*, 2016 SCC 33, at paras. 35-42, per Cromwell J.

Why I am satisfied beyond a reasonable doubt that Messrs. James, Howe and Pearce committed the offences herein for the benefit of, at the direction of, or in association with the BMC, a criminal organization

[414] The relevant charges allege, that they:

Between the first day of January 2012 and the 15th day of September 2012 at, or near Dartmouth and Lower Sackville, in the County of Halifax, and elsewhere in the Province of Nova Scotia did commit the indictable offence of [uttering threats, s. 264.1; harassment s. 264; extortion, s. 346; and intimidation, s.423, *Criminal Code*] for the benefit of, at the direction of, or in association with, a criminal organization, to wit: the Bacchus Motorcycle Club, contrary to section 467.12 of the *Criminal Code*.

[415] I have found each of them to have committed the predicate offences- ie contrary to ss. 264.1, 264, 346, and 423 of the *Criminal Code*. I have concluded that the BMC is a "criminal organization". The remaining question is whether any one of them has committed those offences "for the benefit of, at the direction of, or in association with," the BMC.

[416] Section 467.12 can become applicable in the circumstances of this case, in relation to the commission of *any* indictable criminal offences - the section is not restricted to the commission of a “serious offence” as defined in s. 467.1(2). Nevertheless, each of the offences committed by Messrs. James, Howe, and Pearce, fall within the definition of “serious offence”.

[417] It is not necessary for a person to be a member of the criminal organization in question to attract liability under section 467.12. Nevertheless, each of Messrs. James, Howe, and Pearce were members of the BMC, a criminal organization.²²⁴

[418] The meaning of s. 467.12 was elaborated upon by Justice Fish in *Venneri*:

51 The fact that Venneri was not a member of Dauphin's organization does not preclude a conviction on this count. And, in my view, the evidence fully supports the trial judge's finding that Venneri operated "in association with" the organization when he acted as its client and its supplier.

52 Section 467.12 of the *Code* provides:

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

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

53 *The phrase "in association with" should be interpreted in accordance with its plain meaning and statutory context. It is accompanied here by the terms "at the direction of" and "for the benefit of". These phrases are not mutually exclusive. On the contrary, they have a shared purpose and will often overlap in their application. Their common objective is to suppress organized crime. To this end, they especially target offences that are connected to the activities of criminal organizations and advance their interests.*

54 Considered in this light, the phrase "in association with" captures offences that advance, at least to some degree, the interests of a criminal organization --

²²⁴ I should add here that I am satisfied beyond a reasonable doubt that each of Messrs. James, Howe and Pearce could also have been found guilty, had they been so charged, under s. 467.11 of the *Criminal Code* – the so-called “participation” offence section. See, e.g. *R. v. Beauchamp*, 2015 ONCA 260; i.e. proof of the existence of a “criminal organization” is established; the accused must have known that the organization in question was a “criminal organization”, and how his or her participation in, or contribution to (in a sense of a more than *de minimis* conduct), that organization would enhance the ability of the criminal organization to commit or facilitate an indictable offence.

even if they are neither directed by the organization nor committed primarily for its benefit. As noted by Miles Hastie:

The phrase "in association with" should capture, like its siblings, an interest of the criminal organization in the predicate offence. *The accused need not carry out the predicate offence exclusively for the criminal organization: the accused may (and, as an organization member, will usually) entertain other selfish motives.* But offences committed for wholly selfish purposes should not generate liability. *On some level, the offence must only capture actions with and for the criminal organization.* [Emphasis added; emphasis in original deleted; footnote omitted.]

("The Separate Offence of Committing a Crime 'In Association with' a Criminal Organization: Gang Symbols and Signs of Constitutional Problems" (2010), 14 *Can. Crim. L. Rev.* 79, at p. 91)

55 *The phrase "in association with" requires a connection between the predicate offence and the organization, as opposed to simply an association between the accused and the organization: see R. v. Drecic, 2011 ONCA 118, 276 O.A.C. 198, at para. 3. In R. v. Lindsay (2004), 70 O.R. (3d) 131 (S.C.J.), aff'd 2009 ONCA 532, 245 C.C.C. (3d) 301, the trial judge, correctly in my view, interpreted the phrase "in association with" as follows:*

The phrase "in association with" is not impermissibly vague. The phrase is intended to *apply to those persons who commit criminal offences in linkage with a criminal organization, even though they are not formal members of the group.* The Oxford English Dictionary (10th ed.) defines the phrase "associate oneself with" to mean, "allow oneself to be connected with or seen to be supportive of". The phrase "in association with" requires that the accused commit a criminal offence in connection with the criminal organization. Whether the particular connection is sufficient to satisfy the "in association with" requirement will be for a court to determine, based on the facts of the case. [Emphasis added; para. 59.]

56 As mentioned earlier, an offender may commit an offence "in association with" a criminal organization of which the offender is not a member. *Membership in an organization, however, remains a relevant factor in determining whether the required nexus between the offence and the organization has been made out* (see *Drecic*, at para. 3).

57 The Crown must also demonstrate that an accused *knowingly* dealt with a criminal organization. The stigma associated with the offence requires that the accused have a subjective *mens rea* with respect to his or her association with the organization (see *Lindsay*, (2004 S.C.J.) at para. 64).

[My italicization added]

[419] I conclude beyond a reasonable doubt that each of Messrs. James, Howe, and Pearce knew at the time of the commission of these offences that the BMC was a “criminal organization”.

[420] I have found that each of them have committed (serious) indictable offences. Next I will individually examine their specific circumstances.

a) Patrick James

[421] I am satisfied beyond a reasonable doubt that Mr. James committed the offences for which he has been found guilty, “in association with”, and “for the benefit of” the BMC.

[422] Mr. James’s position regarding these issues is as follows:²²⁵ The Crown has not shown a connection, during January 1 – September 15, 2012, between his words and actions and the BMC; and Mr. James was not speaking on behalf of the BMC when he had contact with RM, and in any event, was merely giving “advice”, which could have been confirmed by the BMC as an organization, if RM attended at the clubhouse to present his proposals (which RM did not do). I have earlier considered and rejected this position.

[423] He committed the offences “for the benefit of” the BMC. As I have outlined elsewhere, what I will collectively call his criminal “dissuasion” of RM from starting his own club, or bringing a Brotherhood MC chapter to Nova Scotia, was intended to maintain, and had the effect of maintaining, the position of the BMC as the dominant MC, controlling what clubs might be created or permitted to progress within the motorcycling community; and the BMC’s fearsome reputation, in Nova Scotia and the Atlantic provinces. As the Sergeant-at-Arms for the only Nova Scotia BMC chapter, he was largely responsible for accomplishing these objectives. All his contacts with RM were rooted in his being a member, and specifically Sergeant-at-Arms, for the BMC in Nova Scotia.²²⁶

²²⁵ At p. 7 in his written brief April 30, 2018, he argues that there is no proof beyond a reasonable doubt, and specifically also relies upon the arguments advanced by his co-accuseds.

²²⁶ Moreover, on August 27, 2012, Mr. James deliberately went to RM’s office. Mr. James was not just out riding his Harley, wearing his BMC cut and colours, as he might otherwise do. I conclude he wore his full regalia that day to make clear to RM that he was there representing the BMC, and had the full weight of the club behind him.

[424] I conclude that accomplishing these objectives, would allow the BMC to facilitate or commit one or more serious offences that, if committed, would likely result in a direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

[425] He also committed the offences “in association with” the BMC.

[426] As a member of the BMC, visible to the public by virtue of his BMC cut and colours and other associated symbols, etc., there is a clear linkage between Mr. James and the BMC. Moreover, I am satisfied that his motivation and intention was to advance the interests of the BMC, and commission of these offences did advance those interests. These offences were committed “with” and “for” the BMC.

[427] His status and membership in the BMC is the reason why he committed the predicate offences. I am satisfied beyond a reasonable doubt that Mr. James’s conduct falls within the wording of s. 467.12 in relation to each of the offences he committed.²²⁷

b) Messrs. Howe and Pearce

[428] I am satisfied beyond a reasonable doubt that Messrs Howe and Pearce committed each of their offences on September 14, 2012, “for the benefit of” “in association with”, and “at the direction of” the BMC.

[429] Next I will address the positions of the defendants Howe and Pearce regarding whether each of them have committed these offences “for the benefit for, at the direction of, or in association with” the BMC.

[430] Mr. Howe says the Crown has not shown a connection between his words and actions on September 14, 2012, and the BMC, given that:

- a. Mr. Howe did not invoke the BMC name – he was speaking for himself alone;
- b. Because RM had already destroyed the Brotherhood MC patches, and they posted on Facebook that there would be no

²²⁷ As a result of his membership and status in the BMC, the allegation that he committed the offences “at the direction of” the BMC is also proved beyond a reasonable doubt. I accept Sgt. Isnor’s evidence that the hierarchical structure of the BMC and nature of the circumstances necessarily required Mr. James to have received the direction from the Mother chapter regarding how to handle RM’s persistence.

chapter coming to Nova Scotia, there was nothing further to be gained by the BMC from Mr. Howe's personal comments.

[431] As I noted in my earlier findings of fact, I was satisfied that Mr. Howe was speaking as a member of the BMC, and for the BMC.²²⁸

[432] I am satisfied that this matter was on the radar of the Mother chapter before August 31, 2012, and that it was discussed at the time of the 40th anniversary meeting (August 31 – September 1, 2012)²²⁹ which all members were required to attend. Before those dates, RM had received approval from the Brotherhood MC to have a three-piece patch, and had been dissuaded by Mr. James from creating a three-piece patch MC of his own design and from bringing a three-piece patch Brotherhood MC to Nova Scotia. After August 28, 2012, the Hants County chapter had “Church” meetings regularly scheduled for Wednesdays, on August 29, and September 5, and 12, 2012. I am satisfied that all members of the Nova Scotia chapter of the BMC were well aware of RM's activities in this respect. Mr. Howe's own words, *inter alia*, that RM had “disrespected us” by receiving Brotherhood MC patches in Quebec, August 24 – 26, 2012, confirm that word thereof had spread among BMC members, and I infer to the Mother Chapter, and others who attended the August 31 – September 1, 2012, meeting.

[433] Sergeant Isnor testified that in his opinion, which I accept, given RM's repeated perceived disrespectful behaviour in spite of warnings by Mr. James, who was speaking for the BMC, his destruction of the patches and the Facebook posting by the Brotherhood MC would not be sufficient to appease the BMC. The confrontation by Messrs. Howe and Pearce with RM on September 14, 2012, was purposeful.²³⁰

[434] I am satisfied that RM's persistence in rejecting Mr. James's criminal dissuasion, was known to both Messrs. Howe and Pearce before September 1, 2012. I conclude that they knew that RM had twice attempted to bring a

²²⁸ I am similarly satisfied that Mr. Pearce was deliberately present with Mr. Howe, and that he also intended to send a message to RM from the BMC, that they were not finished with punishing him for his transgressions against and disrespect to the BMC, and also against them personally.

²²⁹ See Ex. 2, photos 19 and 45.

²³⁰ The defendants suggest that because the BMC membership had no interactions with RM in the interval between August 29 – September 13, 2012, that the BMC had put RM's disrespect behind them. I disagree, and find that the inactivity does not, more likely than not, lead to that conclusion. During his testimony, Sergeant Isnor opined that the BMC will likely still retaliate against RM at some point in the future.

Brotherhood MC chapter (three-piece patch, and one-piece patch) to Nova Scotia after RM knew that the BMC did not approve.

[435] I am further satisfied that the BMC determined an example had to be made of RM. This opportunity presented itself when RM arrived at the Bikers Down event on September 14, 2012.

[436] I am satisfied that Messrs. Howe and Pearce were also personally offended by RM's disrespect, and that he had the gall to show up at the Bikers Down event riding his motorcycle.

[437] Their membership in the BMC is the reason why they committed these criminal offences. RM's disrespect happened in their territory and "on their watch". By committing those offences, Messrs. Howe and Pearce intended to make an example of RM by prohibiting him from ever again riding a motorcycle or attending motorcycling events in Nova Scotia. They intended to effect this by committing the predicate offences. Their motivation was to maintain the reputation of the BMC, in a similar manner to the offences committed by Mr. James. Thus, they acted "for the benefit of" and "at the direction of" the BMC. They also acted "in association with" the BMC. They were wearing their cut and colours when they publicly committed the predicate offences. Mr. Howe referenced the disrespect to "us", which I find was meant to include all members of the BMC, a number of whom were present on September 14, 2012

[438] I am satisfied beyond a reasonable doubt that Messrs. Howe and Pearce's conduct falls within the wording of s. 467.12 in relation to each of the offences they committed.

Summary of findings

[439] I find Messrs. Howe, James and Pearce guilty on all counts.²³¹

Rosinski, J.

²³¹ This result was delivered in open court on June 22, 2018, with reasons to follow. The sentencing is set for October 22, 2018.

