2009 CarswellOnt 1842
Ontario Superior Court of Justice

R. v. Riley

2009 CarswellOnt 1842, [2009] O.J. No. 1374, 84 W.C.B. (2d) 580, 84 W.C.B. (2d) 696

HER MAJESTY THE QUEEN and TYSHAN RILEY, PHILLIP ATKINS and JASON WISDOM

M. Dambrot J.

Heard: February 11,27, 2009; March 17, 2009
Judgment: April 3, 2009
Docket: P299-07

Counsel: Suhail Akhtar, Maureen Pecknold, Scott Childs, Michael Passeri, Lesley Pasquino, Patrick Clement for Crown
David Midanik for Tyshan Riley
David Berg, Jody Matthew for Philip Atkins
Maurice Mirosolin, Emma Rhodes for Jason Wisdom

Subject: Evidence; Criminal

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Evidence --- Character — Admissibility for purpose other than to show character

Three accused were allegedly members of criminal gang (gang) — Gang allegedly formed ride squads to drive into territory of rival group and kill its members — Two complainants were shot while driving in territory of rival group — Crown alleged that accused carried out shooting as members of ride squad under mistaken belief that complainants were members of rival group — Accused were charged with murder, attempted murder, and committing those offences for benefit of criminal organization — Accused brought pre-trial application to exclude some Crown evidence as inadmissible evidence of bad character — Application granted in part — Evidence could be led about existence of gang and commission by its members of drug trafficking, gun trafficking and robbery offences (specified offences) — This evidence was relevant to proving existence of "criminal organization" as defined by Criminal Code (Code) — However, such evidence was to be limited to offences associated with gang, which were those involving more than member, committed under direction of another member, or where benefit was shared with other members — Further, such evidence was to be limited to offences committed in months immediately prior to shooting — Evidence could also be led about accused's participation in gang and commission of specified offences, subject to same two limitations — This evidence was relevant to proving that accused committed murder and attempted murder "for benefit of, at the direction of, or in association with" criminal organization as defined by Code — Evidence could also be led about war between gang and rival group, as well as about ride squads and accused's participation in them — This evidence was highly relevant to narrative on all counts, particularly to allegation that shooting was part of larger scheme — This evidence was also relevant to decision by certain gang members to testify for Crown — This evidence was also relevant to accused's animus towards members of rival group, to accused's motive for harming them, and to issue of planning and deliberation — Evidence could be led regarding threats made by one accused against gang member who failed to deliver drugs to him in jail — This evidence was essential to understanding this gang member's decision to testify for Crown, was not terribly discreditable, and did not support inference of guilt.

Evidence --- Hearsay — Exceptions — Co-conspirators

Conspiracy to conceal murder weapon.

Evidence --- Opinion — Admissibility

Accused, R and W, were allegedly members of criminal gang — Accused allegedly shot complainants they believed were members of rival group, killing one — Accused were charged with murder, attempted murder, and committing those offences for benefit of criminal organization — Another gang member, E, was Crown witness at preliminary hearing — E testified that he spoke to W shortly after shooting and that W seemed jumpy and more upbeat than usual — E further testified that W confessed to him later that evening that accused shot complainants — E also testified to reaction of second accused, R, when news report about shooting came on television — E testified that when complainants were named, R was angry — Accused took position that E's testimony was inadmissible demeanour evidence — Accused brought application to exclude E's testimony and other evidence — Application granted in part — E's evidence was admissible — E's evidence was sufficiently unambiguous and demonstrative of relevant state of mind to overcome concerns that demeanour of either accused would be equated with guilty mind — Concerns about misuse of evidence regarding W shrank to virtual insignificance given his alleged confession to E — Evidence of R's anger was not ambiguous in its nature — Further, emotional response to newscast was less likely to be misunderstood than emotional response to allegation of wrongdoing — Further, circumstances surrounding R's anger, including word he spoke, made its meaning clear.

Table of Authorities

Cases considered by *M. Dambrot J.*:

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R. v. Abbey (2007), 2007 CarswellOnt 1378 (Ont. S.C.J.) — referred to

R. v. Assoun (2006), 244 N.S.R. (2d) 96, 774 A.P.R. 96, 2006 NSCA 47, 2006 CarswellNS 155, 207 C.C.C. (3d) 372 (N.S. C.A.) — referred to

R. v. B. (C.) (2008), 2008 CarswellOnt 3652, 2008 ONCA 486, 237 O.A.C. 387 (Ont. C.A.) — considered

R. v. B. (F.F.) (1993), 18 C.R. (4th) 261, [1993] 1 S.C.R. 697, 120 N.S.R. (2d) 1, 332 A.P.R. 1, 79 C.C.C. (3d) 112, 148 N.R. 161, 1993 CarswellNS 271, 1993 CarswellNS 13 (S.C.C.) — referred to

R. v. B. (L.) (1997), 102 O.A.C. 104, 35 O.R. (3d) 35, 9 C.R. (5th) 38, 1997 CarswellOnt 2711, *(*sub nom. *R. v. G. (M.A.))* 116 C.C.C. (3d) 481 (Ont. C.A.) — followed

R. v. Ball (1911), [1911] A.C. 47, 6 Cr. App. R. 31 (U.K. H.L.) — considered

R. v. Barbour (1938), [1938] S.C.R. 465, 1938 CarswellNB 25, 71 C.C.C. 1, [1939] 1 D.L.R. 65 (S.C.C.) — considered

R. v. Baron (1976), 14 O.R. (2d) 173, 31 C.C.C. (2d) 525, 73 D.L.R. (3d) 213, 1976 CarswellOnt 530 (Ont. C.A.) — followed

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R. v. Graat (1982), 1982 CarswellOnt 101, [1982] 2 S.C.R. 819, 1982 CarswellOnt 745, 18 M.V.R. 287, 31 C.R. (3d) 289, 2 C.C.C. (3d) 365, 144 D.L.R. (3d) 267, 45 N.R. 451 (S.C.C.) — considered

R. v. Handy (2002), 1 C.R. (6th) 203, 2002 SCC 56, 2002 CarswellOnt 1968, 2002 CarswellOnt 1969, 290 N.R. 1, 164 C.C.C. (3d) 481, 213 D.L.R. (4th) 385, 61 O.R. (3d) 415 (note), 160 O.A.C. 201, [2002] 2 S.C.R. 908 (S.C.C.) — considered

R. v. Jackson (1980), 57 C.C.C. (2d) 154, 1980 CarswellOnt 1276 (Ont. C.A.) — considered

R. v. Jacobson (2009), 2009 CarswellOnt 665, 2009 ONCA 130 (Ont. C.A.) — considered

R. v. Kinkead (2003), 2003 CarswellOnt 3397, 178 C.C.C. (3d) 534, 109 C.R.R. (2d) 346, 67 O.R. (3d) 57, 14 C.R. (6th) 282 (Ont. C.A.) — considered

R. v. Levert (2001), 159 C.C.C. (3d) 71, 150 O.A.C. 208, 2001 CarswellOnt 3479 (Ont. C.A.) — considered

R. v. Lewis (1979), [1979] 2 S.C.R. 821, 98 D.L.R. (3d) 111, 27 N.R. 451, 12 C.R. (3d) 315 (Fr.), 47 C.C.C. (2d) 24, 10 C.R. (3d) 299 (Eng.), 1979 CarswellBC 520, 1979 CarswellBC 531 (S.C.C.) — considered

R. v. Lindsay (2005), [2005] O.T.C. 44, 2005 CarswellOnt 103 (Ont. S.C.J.) — considered

R. v. Ma (1978), 44 C.C.C. (2d) 511, 1978 CarswellOnt 1226 (Ont. C.A.) — considered

R. v. MacDonald (1990), 54 C.C.C. (3d) 97, 38 O.A.C. 9, 75 C.R. (3d) 238, 1990 CarswellOnt 82 (Ont. C.A.) — considered

R. v. Merz (1999), 1999 CarswellOnt 3620, 30 C.R. (5th) 313, 127 O.A.C. 1, 46 O.R. (3d) 161, 140 C.C.C. (3d) 259 (Ont. C.A.) — referred to

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R. v. R. (J.D.) (1987), 75 N.R. 6, *(sub nom. R. v. R.)* [1987] 1 S.C.R. 918, *(sub nom. R. v. R.)* 39 D.L.R. (4th) 321, *(sub nom. R. v. R.)* 58 C.R. (3d) 28, *(sub nom. R. v. R.)* 20 O.A.C. 200, *(sub nom. R. v. R.)* 33 C.C.C. (3d) 481, 1987 CarswellOnt 96, 1987 CarswellOnt 965 (S.C.C.) — considered

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R. v. Schell (1977), 33 C.C.C. (2d) 422, 1977 CarswellOnt 982 (Ont. C.A.) — referred to

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R. v. Trochym (2007), 43 C.R. (6th) 217, 221 O.A.C. 281, 2007 SCC 6, 2007 CarswellOnt 400, 2007 CarswellOnt 401, 216 C.C.C. (3d) 225, 85 O.R. (3d) 159 (note), 276 D.L.R. (4th) 257, 357 N.R. 201, [2007] 1 S.C.R. 239 (S.C.C.) — considered

R. v. Trotta (2004), 190 C.C.C. (3d) 199, 2004 CarswellOnt 4363, 191 O.A.C. 322 (Ont. C.A.) — considered

R. v. Vetrovec (1982), [1983] 1 W.W.R. 193, 27 C.R. (3d) 304, 136 D.L.R. (3d) 89, 41 N.R. 606, 1982 CarswellBC 663, [1982] 1 S.C.R. 811, *(*sub nom. *R. v. Gaja)* 67 C.C.C. (2d) 1, 1982 CarswellBC 682 (S.C.C.) — considered

R. v. Walker (1994), 1994 CarswellOnt 898, 70 O.A.C. 148, 18 O.R. (3d) 184, 90 C.C.C. (3d) 144 (Ont. C.A.) — considered

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46
s. 467.1(1) "criminal organization" [en. 2001, c. 32, s.27] — referred to

Rules considered:

Rules of the Ontario Court of Justice in Criminal Proceedings, SI/97-133
R. 30 — referred to

R. 31 — referred to

APPLICATION by accused charged with murder and attempted murder for benefit of criminal organization to exclude certain Crown evidence prior to trial.

***M. Dambrot J.*:**

1 Tyshan Riley, Phillip Atkins and Jason Wisdom are being tried by me, with a jury, on charges of first degree murder, attempt murder, and committing murder and attempt murder for the benefit of a criminal organization. The charges relate to the shooting of Brenton Charlton and Leonard Bell on March 3, 2004, resulting in the death of Mr. Charlton and the wounding of Mr. Bell.

2 The three accused bring this application for the exclusion of evidence largely on the basis that much of it is inadmissible evidence of bad character that is not relevant to any issue in this trial, or, to the extent that it is relevant, its probative value exceeds its prejudicial effect. In addition, the accused say that some of the evidence in issue should be excluded because it is inadmissible hearsay evidence, opinion evidence or evidence of demeanour. They have identified literally hundreds of instances in which they argue that I should exclude evidence. These instances are derived from the statements made by the witnesses to the police, their evidence at the preliminary inquiry, and the transcripts of intercepted private communications.

Background

3 The Crown's position in this trial may be summarized as follows.

4 At the time of the shooting of Charlton and Bell, the Kingston Galloway Boyz were a youth gang operating in the south-eastern portion of Scarborough. The gang was said to have been engaged in criminal activity including thefts, street robberies, drug trafficking and homicides.

5 The Malvern Crew, a similar youth gang operating in the nearby Malvern area of Scarborough, was at "war" with the Galloway Boyz. The animosity between the gangs dates back perhaps as far as the year 2000. In 2002, Marcus Allen, known as Bolu, a one time leader of the Galloway Boyz, was murdered in Malvern. As a result, the tension between the two gangs exploded into violence. Some of the Galloway Boyz formed a group called the Throw Backs. Members of this group formed Ride Squads that began going into Malvern on "rides," intending to shoot and kill rival gang members, and possibly others who lived in the area. Riley was the leader of the Throw Backs. Atkins and Wisdom were members, and participated in rides.

6 On March 3, 2004, the Crown argues, the three accused drove into Malvern in a black Nissan Pathfinder on one such ride. At around 5:00 p.m., Brenton Charlton was driving a blue Chrysler Neon southbound on Neilson Road in the Malvern area of Toronto. Leonard Bell was in the front passenger seat. Mr. Charlton came to a stop in the passing lane at a red light at Finch Ave. The three accused pulled up in the curb lane in the Pathfinder, slightly behind the Neon, and, believing the two men in the Neon to be Malvern gang members, began shooting at it. Mr. Charlton got out of the vehicle and attempted to run, but was shot in the back and killed. Mr. Bell, who remained in the car, was shot several times, but survived.

7 Charlton and Bell were not in fact members of the Malvern gang.

8 The Crown intends to prove its case, in large measure, by adducing the evidence of several former Galloway gang members or associates, whom I will refer to as Vetrovec witnesses, [1] as well as a body of intercepted private communications. The Crown has disclosed to the defence several lengthy videotaped statements given to the police by the various Vetrovec witnesses as well as transcripts of the intercepted private communications. The accused also have the transcripts of the preliminary inquiry, at which most of the Vetrovec witnesses testified. There is a great deal in these statements and transcripts that relates to the criminal activities of the Galloway gang in general and the three accused in particular. It is the admissibility of this sort of evidence that lies at the heart of this dispute.

9 As I have already noted, it is the position of the defence that much of this is inadmissible evidence of bad character that is not relevant to any issue in this trial, or, to the extent that it is relevant, its probative value exceeds its prejudicial effect. In addition, the accused submit that some of the evidence in issue should be excluded because it is inadmissible on other grounds.

10 It is the position of the Crown that evidence about the general nature and activities of the gang, evidence of specific acts of misconduct on the part of the three accused and other members of the Galloway Boyz, including gun offences, robbery offences and drug trafficking offences, evidence of the history of the dispute with the Malvern gang and evidence of the organization and activities of the Ride Squads is not being led as evidence of bad character. Rather, it is being lead as an essential part of the narrative of the shooting of Charlton and Bell, which is central to the proof of all three offences, and is admissible for that reason. In addition, much of this testimony is evidence of *animus* or motive in relation to the shooting. As a result, in addition to being essential to the unfolding of the narrative, some of it is relevant to the issues of identity and planning and deliberation, and so is admissible on that basis as well. The Crown submits that even the specific evidence of gun offences, drug trafficking offences and robbery offences is admissible on all counts because it establishes the nature of the gang and the membership of the accused in it, and confirms some of the evidence of the Vetrovec witnesses on these subjects. This evidence is particularly relevant to the criminal organization count because it tends to establish essential elements of that offence: the existence of a criminal organization, and the connection of the accused to that organization. In addition, the gun evidence is relevant and admissible because it also establishes that the three accused had the knowledge, experience and means to participate in the Ride Squads and fulfil its, and their purpose.

11 Many of the objections to the admissibility of evidence to be given by the Vetrovec witnesses raised on this motion are the sort of objections that are ordinarily raised when the witnesses are in the witness stand testifying before the jury. They have been raised before the selection of the jury in this case for a variety of reasons.

12 First, counsel for the accused are fearful of the consequences of failing to comply with Rule 31 of *Criminal Proceedings Rules* of the Superior Court of Justice of Ontario which requires them to give notice of any application they may bring to exclude evidence that the Crown is likely to lead at this trial that is presumptively admissible at common law, and to file a record. They also fear, in view of the volume of the evidence, that the jury will be severely inconvenienced by frequent absences from the courtroom while these issues are resolved, and may punish the accused if they appear to be responsible for the absences, Finally, the are concerned that unless these issues are dealt with now, the risk of prejudicial evidence being adduced in the presence of the jury before there is time to object is high.

13 In my opinion, many of the matters raised on this application require no notice. As I stated in a ruling released on January 5, 2009 in this case, neither Rule 31 nor Rule 30, which concerns applications to admit presumptively inadmissible evidence, require notice or the filing of a record when the issue is relevance. Ordinarily, when a simple question of relevance arises in respect of a piece of evidence, it is raised at the time the evidence is tendered, and dealt with expeditiously, usually on the basis of submissions. If Rule 30 or 31 require otherwise, it would tend to defeat their very purpose — to improve trial efficiency. In addition, many objections made on the basis of relevance are best dealt with when the witnesses are testifying before the jury because the trial judge will, at that time, have a better grasp of the evidentiary landscape in which the admissibility of the evidence must be measured. I was persuaded to deal with these issues before the jury is empanelled, however, because of the risk of frequent interruption before the jury, with the result that the jurors may become impatient, may have difficulty following fragmented evidence, and may inadvertently hear evidence that prejudices the accused.

14 I recognize the down side. A criminal trial is a dynamic enterprise. Some of the Crown's evidence may come out differently than the Crown expects. The defence may attack the Crown's evidence in ways that the Crown does not anticipate. Some of the defence attacks, anticipated or not, may be formidable, and may have a greater impact on the Crown's case than the Crown expects. Non-issues, or unexpected issues, may become live issues. And it may simply be that as the trial proceeds, it becomes apparent that some of my hypothetical rulings were based on a misunderstanding of the Crown's case. For some or all of these reasons, it may be necessary to revisit some of my rulings. As a result, I must leave it open to the parties to raise them again, not to reargue them, but to put them in a new light as a result of trial developments. This is a troubling potential inefficiency in dealing with these issues in this manner. But I am of the view that the upside, the minimizing of jury interruptions and of the inadvertent prejudicing of the accused, outweighs these concerns. On balance, it is better to attempt to deal with these issues now.

15 That said, I have come to realize, in writing these reasons, that the task I was persuaded to undertake is unmanageable. While counsel for Atkins organized his objections transaction by transaction, for the most part the issues were presented to me in an item by item manner that resulted in the same ground being covered repeatedly, in a disorganized fashion. As a result, I have dealt with this application somewhat differently, as my reasons will illustrate.

My Approach

16 I propose to deal with this application as follows. First, I will analyze some of the principles that must be applied in determining the admissibility of the impugned evidence. Next, I will consider in detail the application of the principles to some of the evidence proffered by the Crown. I have performed this exercise in relation to categories of evidence and, in a few instances, in relation to specific incidents. I will then ask the parties to make their own effort to reconsider their hundreds of objections, and to each prepare a list of those that they feel are not covered by my ruling, or that they are in doubt about, and identify in a few words the precise basis for the objection or the reason that they are in doubt. I will expect to receive copies of those lists prior to the date when these case is scheduled to continue, and will undertake the exercise of considering those remaining issues at that time.

17 A word of caution. Counsel for the accused have identified a great many instances in which Crown witnesses gave morsels of evidence in their recorded interviews with the police, in their statements, or at the preliminary inquiry, that the accused say were hearsay or opinion evidence and have asked me to rule on these matters. This approach, in my view, is entirely wrong-headed. The previous statements and testimony of the witnesses are not scripts of the evidence they will give at trial. I say this for the following reasons, all of them obvious. First, these prior statements should not be seen as a dry run of the trial. There is absolutely no reason why the police cannot elicit hearsay or opinion evidence from potential witnesses. Similarly, it is not unusual for counsel for the accused to elicit such answers from witnesses at preliminary inquiries, or to refrain from objecting when the Crown elicits it, in order to obtain full disclosure of the Crown's case. Second, witnesses are not permitted to simply adopt their previous statements in examination-in-chief. As a result, it seems to me that it would be an utter waste of time to scrutinize these prior statements in order to correct small instances of a failure to abide by the rules of evidence, when there is no reason to expect these transgressions to be repeated. Crown counsel are aware of the rules of evidence. I am confident that they will make their best effort to avoid asking questions that call for answers that amount to inadmissible hearsay or opinion evidence. If they err, that will be the time to consider these matters.

Some Principles

18 I propose next to consider, at some length, the principles that I must apply in this application, under two headings: (1) bad character, and (2) probative value versus prejudicial effect.

Bad Character

19 Much of the evidence under consideration on this application might be characterized, from one point of view, as evidence of bad character of one or more of the accused. Membership in a street gang engaged in criminal activity, participation in a gang war, membership in a subgroup of the gang dedicated to seeking revenge on another gang, as well as the commission of drug, gun and robbery offences are all activities that will reflect poorly on the accused in the eyes of the jury. It is evidence of their bad character.

20 Character evidence that shows only that an accused is the type of person likely to have committed the offence charged is usually inadmissible. (See, for example, *R. v. G. (S.G.)* (1997), 116 C.C.C. (3d) 193 (S.C.C.) at para. 63).

21 However evidence that tends to show that the accused is a person of bad character but which is also relevant to an issue in the case does not fall within this exclusionary rule. (See *R. v. B. (F.F.)* (1993), 79 C.C.C. (3d) 112 (S.C.C.) at para. 71).

22 As Lamer J. (as he then was) stated in *R. v. Morris* (1983), 7 C.C.C. (3d) 97 (S.C.C.) at p. 106-7:

> This is not to say that evidence which is relevant to a given issue in a case will of necessity be excluded merely because it also tends to prove disposition. Such evidence will be admitted subject to the judge weighing its probative value to that issue (e.g., identity), also weighing its prejudicial effect, and then determining its admissibility by measuring one to the other.

23 In other words, evidence that tends to show bad character or a criminal disposition on the part of an accused is admissible if (1) it is relevant to some other issue beyond disposition or character, and (2) its probative value outweighs its prejudicial effect.

24 Similar fact evidence, which is excluded in all but narrow circumstances, is nothing more than a particularly dangerous example of bad character evidence. It is particularly dangerous because it so readily gives rise to propensity reasoning: if the accused committed an earlier murder, he probably committed this one too. This danger was described by Binnie J. in *R. v. Handy* (2002), 164 C.C.C. (3d) 481 (S.C.C.) at para. 37 as follows:

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

all relevant evidence is admissible: *Arp*, *supra*, at para. 38; *Robertson*, *supra*, at p. 941; *Morris*, *supra*, at pp. 201-2; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 613.

25 While the danger of propensity reasoning may not be as acute with some instances of bad character evidence as it is with similar fact evidence, it is still most important to bear in mind the candid acknowledgment repeated in *Handy* (see paras. 59-75) that just because similar fact evidence can be related, in a particular case, to an issue other than mere propensity or general disposition does not mean that the evidence ceases to be propensity evidence. The true character of the evidence must be kept front and centre when the Court performs the prejudice/probative value assessment. The same applies to all bad character evidence.

26 I turn next to the issues to which the bad character evidence might be relevant in this case. There are several of these.

Criminal Organization Charge

27 The accused are charged with committing murder and attempt murder "for the benefit of, at the direction of, or in association with, a criminal organization." Subsection 467.1(1) of the *Criminal Code* provides that:

> 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.

28 It is plain that in order to prove that the accused are guilty of this charge, the Crown must prove that:

- a group of individuals of a least three in number in the Galloway neighbourhood in Toronto constitutes a criminal organization, that is, it has as one of its main purposes or activities the commission of one or more serious offences that, if committed, would likely result in the receipt of material benefit by the group or the individuals in the group
- the accused committed murder and/or attempt murder for the benefit of, at the direction of, or in association with the criminal organization

29 As a result of the first of these two points, the Crown is entitled to lead evidence of the existence of the gang and its purpose and activities. In this case, this means that the Crown can lead evidence of the existence of the Galloway gang, and the commission of drug trafficking, gun trafficking and robbery offences by members of the gang that might result in material benefit to the group.

30 This can only mean that the Crown can lead both general and specific evidence of the commission of the three types of offences I have mentioned by members of the gang. I place two caveats on this statement.

31 The first caveat is that the offences that the Crown may lead evidence of must in some way be associated with the gang. This prerequisite would be satisfied where more than one member of the gang is involved in the offence. It would also be satisfied where only one member of the gang committed the offence, but where there was evidence that it was committed under the direction of another member, or that the benefit obtained by the commission of the offence was shared with other members of the gang. It is not open to the Crown to prove every act of trafficking or robbery committed by each individual member of the gang.

32 The second caveat is that there must be some temporal restriction on the proof of offences. The issue in this case is whether or not the murder and attempt murder were committed for the benefit of a gang. As a result, what must be established

is that the gang existed at the time of the murder and attempt murder. Of course, a criminal organization does not spring to life in an instant. In order to prove that the gang existed, and was a criminal organization at the relevant time, the Crown must be permitted to lead evidence of the history of the gang, how it emerged, and the activities it has engaged in. But to the extent that the Crown proposes to prove specific criminal acts by members of the gang committed prior to the shooting, these will have sufficient probative value to be admitted in evidence only where they are reasonably proximate to the time of the shooting. I would not create an arbitrary time frame on it, but surely the limitation must be measured in months.

33 The period of time after the murder is more problematic. I concede that proof, for example, that the gang existed three months before the shooting, coupled with proof that it existed three months after the shooting, could lead to the inference that it existed at the time of the shooting. But I hardy think that the Crown needs to draw on such an inference in this case. I will not permit the Crown to prove crimes committed by the gang after the shooting for this purpose, subject to what I will say in a moment about proof of crimes after the murder by the accused.

34 I turn next to the second point, that is, that the Crown is entitled to lead evidence that the accused committed murder and/or attempt murder for the benefit of, at the direction of, or in association with the criminal organization. To do this, the Crown, once again, must be entitled to prove that the accused were associated with the gang by tendering general evidence of their membership and participation in the activities of the gang, and by specific evidence of their commission of drug and gun trafficking and robbery offences. The same caveats as I have just described (connection to the gang, and temporal restriction) must be placed on this statement as well, with the following exception.

35 There are certain criminal acts that were allegedly committed by one or another of the accused after the Charlton and Bell shooting that, in my view, are of exceptional probative value. I have in mind Atkins possession of a Glock later in the day after the murder, the evidence of the drug toss, and certain other evidence that I will mention in these reasons. Subject to the probative value/prejudicial effect analysis, I consider evidence of those acts to be admissible despite the temporal restriction I have placed on such evidence.

Essential to the Unfolding of the Narrative

36 As I have noted, the Crown submits that some of the impugned evidence is admissible because it is essential to the unfolding of the narrative of the Charlton and Bell shooting. I admit to some discomfort in admitting evidence on the basis of the claim that it is evidence of the narrative because "narrative" is a label that is too easily abused. Just because a piece of evidence can be labeled in this way does not make it admissible. But I do think that it is of fundamental importance that the Crown be permitted to lead the evidence of an alleged crime in a manner that permits the jury to understand and evaluate what actually transpired. A jury should not be expected to undertake an exercise that still has the search for truth as its goal by searching for that truth without the ability to understand what it is alleged that the accused were actually doing, and why they were actually doing it.

37 I find support for this view in *McWilliams Canadian Criminal Evidence* (4th ed. 2003), at pp. 9-19-9-20, under the heading "Lifestyle Establishing Involvement, Means or Opportunity." The learned authors state:

> Sometimes the lifestyle of the accused will be inextricably tied to the commission of the offence alleged, as is often the case with prosecutions involving organized crime or drug-related offences. While such evidence can be highly discreditable, its absence may render the trier of fact unable to put into context the accused's opportunity or means to commit the offence. Thus, in some cases, it is unavoidable that the prosecution adduce evidence as part of its case to set the milieu and activity of the accused and the other witnesses to show the context or narrative even though it reveals that they have been involved in criminal activity.

38 In this case, in my view, leaving aside the criminal organization charge, the Crown must be entitled to lead evidence that the accused were in a gang, that the gang was in a war with another gang, and that at least in part as a result of the killing of their leader, some of the gang members formed a squad with the general purpose of finding and shooting rival gang members. It will be recalled that the victims of this shooting were not in fact members of the rival gang. There will be evidence lead by the

Crown that the accused were intending to shoot rival gang members on this occasion, and shot non-members in error. Without this background, the jury will be left to puzzle over an allegation of a senseless shooting by individuals who had no motive to do it. They will inevitably be invited by the accused to find a reasonable doubt on the basis of the absence of motive when in fact, evidence of motive exists. While it is imperative that limits be placed on the bad character evidence sought to be introduced by the Crown, and that strong instruction be given to the jury about how to use the evidence that is admitted, I do not think that the jury should be expected to decide this case on the basis of some artificially crafted, antiseptic version of the case.

39 The question is, then, does the law support this approach? I think that it does. But I note that the cases that consider narrative evidence often mix it with a consideration of evidence of motive or *animus.* While these types of evidence generally overlap, I find it useful to first consider narrative in isolation.

40 I will begin with a reference to the consideration of bad character as evidence of criminal conduct in *McCormick on Evidence* (6th ed. 2006), vol. 1, at pp. 752-768. After stating and explaining the rule against using character evidence to prove conduct on a particular occasion in criminal cases in a manner that is, I think, quite consistent with the modern development of the Canadian law on the subject, the learned author proceeds to list, and explain the ten principal purposes for which the prosecution may introduce evidence of the bad character of the accused despite this rule, subject to balancing the probative value of the evidence and its prejudicial effect. The first two of McCormick's exceptions to the rule bear on the issue of narrative.

41 The first of McCormick's ten permissible uses of bad character evidence is "[t]o complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings." He also refers to cases which permit evidence of other offences arising out of the same transaction or series of transactions as the charged offence. This rationale should be applied, McCormick says, only when reference to other crimes is "essential to a coherent and intelligible description of the offence at bar."

42 It might be argued that much of what is sought to be introduced as narrative here lacks the quality of near contemporaneity necessary to fit within this permissible purpose. But I do not think that that is the case. Contemporaneity is a relative concept. Where, as here, the shooting is said to be part of a general plan to shoot rivals that continued over a considerable period of time, the concept of contemporaneity must be understood to relate to that entire period. Indeed, the circumstances here may more aptly be seen as an example of McCormick's second permissible use of bad character evidence, that is, "to prove the existence of a larger plan, scheme, or conspiracy, of which the crime on trial is a part." That is precisely the purpose advanced by the Crown here. The alleged shooting of Charlton and Bell by the three accused can only be understood in the context of a large plan by the three men, as Galloway Boyz in general, and as members of the Ride Squad in particular, to ride into Malvern and shoot members of the Malvern Crew.

43 Is the Canadian case law consistent with this approach? In my view, despite some differences in the language used in the jurisprudence, it is.

44 I begin by returning to the decision of the Supreme Court in *R. v. G. (S.G.)* In that case, the appellant had been convicted of second degree murder. A young adolescent boy was brutally beaten and then murdered in the appellant's house. It was not disputed that the killing was carried out by three other adolescent boys. The Crown's theory was that the appellant, who was the mother of one of the boys, had incited the boys to assault and kill the victim because she thought he had "ratted" to the police about either her drug activities or the illegal activities of the boys. The only testimony directly implicating the accused in the killing was that of B.R., another of the boys involved in the killing.

45 The trial judge [1994 CarswellBC 978 (B.C. C.A.)] allowed the Crown to lead evidence of the presence of stolen property in the appellant's house on the basis that it was relevant to the Crown's theory of the appellant's motives for murdering the victim. The trial judge also ruled that the Crown should be permitted to cross-examine the appellant on her sexual relationship with H.M., the third boy involved in the killing. The trial judge was of the view that this evidence was relevant to the Crown's theory that S.G.G. had control over H.M. and could direct his actions, and that the prejudicial effect of admitting the evidence did not outweigh its probative value.

46 The Supreme Court concluded that the trial judge made no error in concluding that the evidence was relevant. In view of the fact that a new trial was required on other grounds, the majority did not address the probative value/prejudicial effect issue. The dissenting judges, however, who would have upheld the conviction, concluded that there was no basis to interfere with this exercise of the trial judge's discretion. With respect to relevance, Cory J. stated, for the majority:

> 64 Evidence which incidentally demonstrates bad character can also be directly relevant to a key element of the Crown's theory of the case, such as motive, opportunity or means: see *R. v. Davison* (1974), 20 C.C.C. (2d) 424 (Ont. C.A.); *Hinchey*, *supra*, at para. 135. Evidence of motive, for example, is always relevant in that it makes it more likely that the accused committed the crime, although it is not an essential element of criminal responsibility: *Lewis v. The Queen*, [1979] 2 S.C.R. 821.
>
> 65 Evidence which is directly relevant to the Crown's theory of the case is admissible even though it may also demonstrate the bad character of the accused, as long as its probative value outweighs its prejudicial effect: *B. (F.F.)*, *supra*, at p. 731. Even if evidence is admissible under this exception, it is clear that it still cannot be used to determine guilt simply on the basis that the accused is the type of person to commit the crime: *B. (F.F.)*, *supra*. The trial judge has a duty to charge the jury in this regard, and to warn them against the improper use of the evidence.

47 I underscore that the Supreme Court held that bad character evidence may be admissible where it is relevant to the Crown's theory, particularly where it is evidence of motive, opportunity or means.

48 It may be thought that *R. v. G. (S.G.)* is not the clearest example of the admissibility of bad character evidence simply on the basis that it is essential to a coherent and intelligible description of the offence charged. If so, then reference might usefully be had to the decision of the Supreme Court of Canada in *R. v. R. (J.D.)* (1987), 33 C.C.C. (3d) 481 (S.C.C.), at 483. Robertson was charged with sexual assault of a young woman who shared a flat in a house with a girlfriend. The Crown called evidence that the accused had made earlier sexual advances to the roommate. This earlier event was not similar to the offence with which he was charged, which concerned non-consensual intercourse involving considerable physical force. But the Court concluded that it did involve discreditable conduct. The accused put his arm around the roommate after she refused to have sex with him. He would not leave her apartment despite repeated requests. He pinned the roommate against a wall and said that he could never love her before finally leaving her alone.

49 In confirming that this evidence was properly admitted at trial, Wilson J. stated, at p. 499:

> In discussing the probative value we must consider the degree of relevance to the facts in issue and the strength of the inference that can be drawn. The bulk of Eileen's testimony is, of course, highly relevant to the case. It provides the background for the circumstances in which the assault occurred. It makes it clear how the respondent came to arrive at the complainant's doorstep on the morning in question, how he knew to use Eileen's name, why he might be interested in the victim, and why he could have anticipated that the complainant would be home alone at the relevant time.

50 Similarly, in *R. v. F. (D.S.)* (1999), 132 C.C.C. (3d) 97 (Ont. C.A.), O'Connor J.A., as he then was, held that the trial judge did not err in permitting the complainant in an assault case to testify about assaultive behaviour of the accused that fell outside of the allegations covered in the indictment. He stated, at para. 22:

> In this case it was important to put the complainant's evidence supporting the charges in the context of the overall relationship. The complainant's evidence was that the allegations underlying the charges were consistent with the attitude and behaviour that the appellant exhibited towards her throughout the one year period that they lived together. The challenged evidence would enable the jury to more fairly evaluate the complainant's evidence regarding the specific allegations. Excluding that evidence would have left the jury with an incomplete and possibly misleading impression of the relationship. In my view, the disputed evidence was relevant for the purpose of setting forth the contextual narrative in the course of which the alleged events occurred.

51 In *R. v. Jacobson*, [2009] O.J. No. 522 (Ont. C.A.), the Court of Appeal affirmed the admission of evidence that the appellant and an accomplice participated in a home invasion, and that the appellant brought a gun to the home invasion. Since there was abundant evidence that the appellant's motive for killing the deceased in that case was to prevent him from testifying against the appellant on the home invasion charge, evidence concerning the home invasion was properly admissible as part of the narrative, and in particular as evidence of motive. The Court also held that the evidence that the appellant brought the gun to the home invasion was some evidence that he owned the gun and brought it to the killing, and as a result that he was the killer.

52 And in *Handy*, Binnie J. considered, hypothetically, the admissibility of evidence of a prior stabbing of the deceased in that case by the accused, who was being tried for subsequently shooting her to death. He stated, at para. 80:

> On the other hand, in a case where the issue is the *animus* of the accused towards the deceased, a prior incident of the accused stabbing the victim may be admissible even though the victim was ultimately shot — the accused says accidentally (Rosenberg, supra, at p. 8). The acts could be said to be dissimilar but the inference on the "issue in question" would nonetheless be compelling.

53 Two older decisions of the Ontario Court of Appeal are also instructive. The first of these is *R. v. MacDonald* (1990), 54 C.C.C. (3d) 97 (Ont. C.A.). In that case, the appellant and one Gray were jointly charged with the first degree murder of Benjamin Daniello. Daniello's body was discovered in an area of dense bush north of Sault Ste. Marie. Daniello had sustained five bullet wounds. There was evidence that on the day of the killing Gray, Daniello and the appellant had gone out together to fish. After arriving at the river where they were going to fish Daniello and Gray went immediately to the water's edge. The appellant returned to the car to get some beer. He heard shots, and began to walk toward the river. When he arrived at the water, he saw Daniello's dead body. Carter, an accomplice who supplied the gun used in the killing and later disposed of it, testified that the appellant had arranged for Gray to shoot the deceased and was aware that the shooting was to occur when he and Gray drove the victim to the river.

54 On appeal, MacDonald argued that the Crown should not have been permitted to adduce evidence of the appellant's bad character. The Crown had been permitted to lead evidence that the appellant was involved in drug trafficking, including testimony that he was using a van that belonged to Daniello in his trafficking business. Daniello was putting pressure on the appellant to return the van. Gray, who actually shot Daniello, was aware that Daniello had been pressuring the appellant and had made comments about taking care of the matter.

55 The Court concluded that this evidence was properly admitted. Zuber J.A. stated, for the Court, at p. 106:

> The evidence of the appellant's involvement in narcotic trafficking was admissible evidence that provided the context for the homicide.

56 The decision of the Court in *R. v. Walker* (1994), 90 C.C.C. (3d) 144 (Ont. C.A.) is particularly instructive. Walker was charged with the first degree murder of Monique Cloutier. The appellant and the deceased lived together in a common law relationship for approximately ten years up to the time that Cloutier disappeared. At the time of her disappearance, the two were living together in a rooming-house. Both were heavy drug users, particularly of cocaine, and Cloutier's income as a prostitute was used to support their joint habit and their living expenses.

57 The theory of the Crown was that the appellant killed Cloutier while in an angry rage. He was angry because Cloutier, after doing a "trick", did not bring back enough money to satisfy his need for drugs. The key evidence for the Crown was that of four thoroughly unsavoury persons who were part of this drug and prostitution sub-culture.

58 When the Crown's theory of first degree murder was substantially undermined by the failure of one of the witnesses to testify as expected, the Crown, according to the Court of Appeal, pressed too hard for a conviction on the evidence that was left. Of particular relevance here, Crown counsel was said to have overreached by embarking upon a cross-examination of the appellant with respect to the details of his lifestyle and his mistreatment of the deceased that went beyond what was necessary to support the Crown's theory.

59 The Court had the following to say about the bad character evidence, at paras. 19 and 20:

> 19 At the outset, I agree that the Crown was entitled to lead evidence as to the relationship between the appellant and the deceased even though it involved evidence of the appellant's mental and physical abuse of Cloutier in the years prior to her death. The fact that she was a prostitute and he was her pimp was central to the Crown's theory that he killed her because he was having trouble controlling her and feared that she would leave him. His dependency upon her for money for drugs and his physical abuse of her provided evidence of both motive and *animus* to kill her, either deliberately or on the spur of the moment while in a drug-induced rage. This background, however, was already established in the narrative of the Crown's case in chief and it was not disputed by the appellant when he testified. The appellant's lifestyle was not on trial and it should not have been emphasized beyond what was necessary to delineate the relationship between the appellant and the deceased. Otherwise, the concern is that the jury's natural prejudice against a man of the appellant's character may be elevated to the point where it improperly influences their deliberations on the only question in issue: namely, did the appellant kill Monique Cloutier?
>
> 20 This cross-examination by Crown counsel went much too far. It was designed to portray the appellant as a callous, unfeeling and exploitative brute who would be just the kind of person who was likely to have committed this crime.

60 I say that this case is instructive because it makes clear that the Crown is entitled to lead narrative evidence, that is, evidence that tells the story of a crime in a manner that makes it possible for the jury to properly carry out its fact finding function. At the same time the case sounds a note of caution. It warns against going too far. What is particularly important, in my view, is the lesson that evidence of bad character that is relevant, and bears a probative value that outweighs its prejudicial effect, can become more prejudicial than probative if it is abused. This lesson has application in this case in determining the limits that must be placed on the evidence that the Crown wants to adduce. Mr. Midanik rightly warned me in his submissions of the danger that flows from the cumulative effect of a great volume of otherwise admissible bad character evidence.

61 Finally, on this issue, I should note that the decision of the Supreme Court in *R. v. Perrier* (2004), 188 C.C.C. (3d) 1 (S.C.C.) was pressed on me as placing limits upon the admissibility of evidence of gang activity. In that case, the appellant was charged with offences arising from three separate incidents of gang home invasions that occurred in the same area over a four-week period. The method of operation adopted by the gang on each of these occasions was distinctive. Membership in the gang rotated, and the specific roles played by the members varied. The issue at trial was the appellant's identity. The trial judge instructed the jury that evidence admitted with respect to each of the three incidents was admissible in proving the guilt of each accused on the others. The jury convicted the accused on all counts. The majority of the Court of Appeal upheld the convictions. The Supreme Court set aside the conviction and ordered a new trial.

62 The Court held that the trial judge erred in directing the jury that they could consider the evidence from one incident as similar fact evidence with respect to identification, not of the gang but of the accused, with respect to the other incidents. Similar fact evidence of group activities is admissible in order to identify a group or gang responsible for a particular crime. Where several crimes were committed with a unique *modus operandi*, and the objective improbability of coincidence is high, the trier of fact should be permitted to draw an inference that the same gang committed the acts. However, where evidence of similar offences committed by a gang is being introduced not just to identify the gang itself but to identify a particular member, a sufficient connection between the individual and the crimes of the group must be established. Where, as here, membership in the group is not constant, this additional requirement will be satisfied if either the accused's role was sufficiently distinctive that no other member of the group or other person could have performed it; or there is independent evidence linking the accused to each crime. Without this additional link, the required nexus between the similar fact evidence and the acts of a particular accused is absent, and it will not have sufficient probative value to outweigh the prejudice caused.

63 In my view, this judgment is of no assistance to the accused. *Perrier* is what I would call a classic similar fact case, where one or more offences proved to have been committed by the accused is strikingly similar to the crime charged, and as a result is admissible to identify the accused as the person who committed the crime charged. *Perrier* simply provides appropriate

restraints on the application of the principles concerning such cases in the situation where it is the gang's method of operation that is unique, and not the method of operation of an individual. This is not such a situation.

64 In this case, the gang evidence is not being tendered to prove identity on the basis of the uniqueness of the crime. It is being lead as part of the narrative of the case, and for the various other purposes that I am about to outline. As will be seen, none of these uses depends on the uniqueness of the crime for its probative value. *Perrier* has nothing to say about these issues.

65 Having regard to all that I have said, again even leaving aside the criminal organization charge, I am of the view that the Crown is entitled to lead evidence of the existence of the Galloway gang and the general nature of its activities, of the membership of the accused in it, of the leadership role of Riley, of the "war" between the Galloway gang and the Malvern gang, of the heightened level of hostility flowing from the killing of Norris Allen, of the formation, purpose and activities of the Ride Squad, and of the membership and participation in the Ride Squad of the three accused. This evidence is highly relevant to all three counts, as part of the narrative, to provide essential context to the Crown's allegations, particularly the allegation that this shooting is a part of a larger overall scheme, and to provide the jury with a coherent and intelligible description of the offence charged. This evidence is admissible for other reasons as well, as I will soon explain, and the probative value of some of it clearly outweighs its prejudicial effect.

66 Nonetheless, the potential prejudicial effect of this evidence must be controlled not only by strong and careful instruction to the jury, but also by placing some limits on what will be admitted to prove these assertions. I will turn to that issue after I discuss the other possible grounds upon which this evidence might be admissible.

Essential to the Unfolding of the Narrative in Relation to the Cooperation of Unsavoury Witnesses

67 The Crown also submits that some of the impugned evidence is admissible because it is essential to the unfolding of the narrative in respect of the decision of certain of the former gang members and associates to cooperate with the police and testify for the Crown. The credibility of these witnesses will undoubtedly be subject to sustained attack, and in any event, I will inevitably warn the jury of the dangers of relying on their evidence. The jury is required to examine all of the circumstances surrounding their decision to testify in assessing their credibility, and is entitled to a full picture of their decision to cooperate.

68 I do not doubt that the this sort of evidence is relevant on this basis, and that where it is also evidence of the bad character of the accused, it may still be admitted if it passes the probative value/prejudicial effect analysis. Without question, in this case, some of the evidence has to be admitted. In the end, it is necessary to make a judgment about how far the Crown should be permitted to go.

69 There is some support for my view of the matter in the case law. In particular, I refer to the judgment of the Ontario Court of Appeal in *R. v. B. (C.)*, [2008] O.J. No. 2434 (Ont. C.A.). In that case, the appellant confessed to a police officer that he had sexually assaulted the victim. The confession was made at a CCAS office, after the accused had been confronted by an intake worker with an allegation made by the victim to another intake worker that he had sexually assaulted the victim. The accused had then admitted the allegation in part, and had threatened to commit suicide. The police officer arrived after the worker called 911 as a result of the suicide threat.

70 The Crown was permitted to adduce evidence from the intake worker to whom the victim had complained about the circumstances in which the complaint had been made to her by the victim. This included the fact that the appellant was attending at the CCAS office on the day of his confession in connection with an unrelated matter in relation to which he was required to go to court. In the circumstances, Gillese J.A. was doubtful that the impugned evidence could be prejudicial. She continued, however, at paras. 30-1:

> 30 Even if the impugned evidence amounts to discreditable conduct, there was no error in admitting it. Evidence of discreditable conduct may be admissible where it provides narrative required to provide some context to the evidence directly relevant to the charges before the court and the probative value of the impugned evidence outweighs its prejudicial effect.

> 31 In the present case, it was essential that some evidence of the circumstances in which the admissions were made was before the jury in order for the jury to determine what weight it should give to those admissions. I draw from the jurisprudence on confessions in so concluding. In deciding what weight, if any, to attach to a confession, the jury must be told to take into consideration all the circumstances leading up to and surrounding the making of the confession. Similarly, the discreditable conduct evidence was necessary to give the jury the circumstances in which the admissions were made so that it could determine the reliability of such admissions.

71 While that case involved the need for all of the circumstances leading up to the giving of a confession to be considered by the jury, an equally strong case for the admission of such evidence can be made where, as is the case here, the jury needs to evaluate the cooperation and testimony of an unsavoury witness. In addition, the need for the jury in this case to know some of the details of the evidence of bad character is far greater than it was in *B. (C.)* In that case, the evidence really provided little more than background or context. Here, as will be seen, some of the bad character allegations stand at the very heart of the decision made by the witness to cooperate.

72 I note that in her probative value/prejudicial effect analysis, Gillese J.A. took into account the editing of the information undertaken by the Crown. She stated:

> 32 In terms of the assessment of prejudicial versus probative value of the impugned evidence, I begin by noting that the Crown took reasonable steps to adduce only sufficient narrative to provide context as to how the admissions came to be made. The involvement of the appellant with the CCAS was referred to only as an "unrelated matter" and no evidence was led to suggest the nature of that matter.

73 It may be that some editing will be necessary here as well, but I observe that the importance of the impugned evidence will have an effect on the nature and extent of the editing that can be done, as will the positions taken by the accused in cross-examining these witnesses.

Animus and Motive

74 *Animus* and motive are not the same thing, but it is very difficult to discuss them in isolation form each other. In general, it might be said that *animus* towards another individual is simply a step in the formation of a motive to do harm to that individual. I will begin, however, with a discussion of motive.

75 Evidence of motive, in the sense of ulterior intention, purpose or object, is universally thought to be relevant in a criminal trial. As Duff C.J.C. noted in *R. v. Barbour* (1938), 71 C.C.C. 1 (S.C.C.) at pp. 19-20:

> If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well.

76 Dickson J., as he then was, expanded on the significance of motive in a criminal trial in *R. v. Lewis* (1979), 47 C.C.C. (2d) 24 (S.C.C.), where he formulated a number of propositions based upon the authorities, namely:

> (1) As evidence, motive is always relevant and hence evidence of motive is admissible.
>
> (2) Motive is no part of the crime and is legally irrelevant to criminal responsibility. It is not an essential element of the prosecution's case as a matter of law.
>
> (3) Proved absence of motive is always an important fact in favour of the accused and ordinarily worthy of note in a charge to the jury.
>
> (4) Conversely, proved presence of motive may be an important factual ingredient in the Crown's case, notably on the issues of the identity and intention, when the evidence is purely circumstantial.

(5) Motive is therefore always a question of fact and evidence and the necessity of referring to motive in the charge to the jury falls within the general duty of the trial judge "to not only outline the theories of the prosecution and defence but to give the jury matters of evidence essential in arriving at a just conclusion."

(6) Each case will turn on its own unique set of circumstances. The issue of motive is always a matter of degree.

77 *Lewis* was confirmed in *R. v. G. (S.G.)*, where Cory J. stated, at para. 64:

Evidence which incidentally demonstrates bad character can also be directly relevant to a key element of the Crown's theory of the case, such as motive, opportunity or means: see *R. v. Davison* (1974), 20 C.C.C. (2d) 424 (Ont. C.A.); *Hinchey*, *supra*, at para. 135. Evidence of motive, for example, is always relevant in that it makes it more likely that the accused committed the crime, although it is not an essential element of criminal responsibility: *Lewis v. The Queen*, [1979] 2 S.C.R. 821.

78 This statement of the law is subject to two provisos.

79 First, where motive is proved circumstantially by other acts of the accused, there is a two step reasoning process involved. The jury must first find that the other acts establish a motive. The jury may then typically treat the evidence of motive as circumstantial evidence of identity and intent. (See *R. v. Merz* (1999), 140 C.C.C. (3d) 259 (Ont. C.A.) at paras. 57-59). In some cases, however, the evidence of motive may be excluded because of an absence of a temporal or factual nexus to the offence charged. In other words, when the acts, when reasonably viewed, cannot tend to prove motive, they should not be admitted. (See *R. v. Barbour* (1938), 71 C.C.C. 1 (S.C.C.) at pp. 19-20).

80 Second, in some cases other acts of the accused of which the Crown proposes to introduce evidence are morally neutral. But sometimes they amount to discreditable conduct. In those cases, they are subject to the probative value/prejudicial effect balancing. As Cory J. stated in *R. v. G. (S.G.)*, at para. 65:

Evidence which is directly relevant to the Crown's theory of the case is admissible even though it may also demonstrate the bad character of the accused, as long as its probative value outweighs its prejudicial effect: *B. (F.F.)*, *supra*, at p. 731.

81 There are many examples of evidence of discreditable conduct being admitted in evidence for the purpose of showing motive. See, for example, *F. (D.S.)*; *R. v. Shepherd* (2001), 54 O.R. (3d) 199 (Ont. C.A.); *R. v. Schell* (1977), 33 C.C.C. (2d) 422 (Ont. C.A.); and *R. v. Redd* (2002), 165 C.C.C. (3d) 412 (B.C. C.A.).

82 I turn next to *animus.*

83 In *R. v. Ball*, [1911] A.C. 47 (U.K. H.L.), Lord Atkinson stated:

Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life.

84 More recently, in *Handy*, at para. 80, Binnie J. recognized the relevance of *animus* on the part of the accused towards the deceased in a murder case. I have already quoted this paragraph for a different purpose, but will repeat it here for ease of convenience. Binnie J. stated:

On the other hand, in a case where the issue is the *animus* of the accused towards the deceased, a prior incident of the accused stabbing the victim may be admissible even though the victim was ultimately shot — the accused says accidentally (Rosenberg, supra, at p. 8). The acts could be said to be dissimilar but the inference on the "issue in question" would nonetheless be compelling.

85 The admissibility of evidence of discreditable conduct to show *animus* has been confirmed in several appellate judgments. For example, in *F. (D.S.)*, O'Connor J.A. stated, at paras. 23-25:

> 23 The trial judge also held that the discreditable conduct evidence was admissible for the purpose of demonstrating the motive or animus of the appellant in committing the offences alleged. It is well established that evidence of motive is admissible to prove the doing of an act as well as the intent with which the act is done. *R. v. Jackson* (1980), 57 C.C.C. (2d) 154 (Ont. C.A.) at p. 167.
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> 24 On several occasions courts have held that evidence of discreditable conduct, in particular evidence of abusive behaviour towards a complainant, is admissible for this purpose. *R. v. Summerbell*, [1996] O.J. 795 (C.A.); *R. v. MacDonald* (1974), 20 C.C.C. (2d) 144 (Ont. C.A.); *R. v. Pheasant*, [1995] O.J. No. 1215 (Gen. Div.) and *R. v. S.B.*, *supra*.
>
> 25 In this case, the evidence, which in general terms described a pattern of abusive behaviour towards the complainant, if accepted, was capable of assisting the jury in understanding why the appellant did what was alleged in the indictment. This evidence demonstrated an animus on the appellant's part towards the complainant that was consistent with the offences with which he was charged. The trial judge was correct in holding that the impugned evidence was relevant for this purpose.

86 More recently, Simmons J.A. explained the relevance of evidence of *animus* in *R. v. Chapman* (2006), 204 C.C.C. (3d) 449 (Ont. C.A.) at para. 27. She stated:

> Evidence of animus (or motive) is capable of contributing to the proof that an act occurred, as, of course, is the intent with which an act is done: *R. v. F.(D.S.)*, supra, at paras. 22-25. See also *R. v. Handy*, *supra*, at paras. 76-80, indicating that evidence of prior acts of violence may be admissible on the issue of *animus*, even where the prior act is quite dissimilar to the act in question. This is because the factors driving the cogency of the inferences sought to be drawn from the similar fact evidence are different from the factors driving cogency in relation to other issues. Moreover, I am satisfied that the probative value of the evidence from other counts on the issue of *animus* outweighed its potential prejudicial effect.

87 In this case, proof of the existence and nature of the Galloway gang, the membership of the accused in that gang, the gang's war with the Malvern gang, the passions roused by the killing of Norris Allen, the formation and purpose of the Ride Squad and the membership of the accused in that squad taken together is evidence of *animus* on the part of the accused towards members of the Malvern gang, and provides a motive for them to do harm to members of that gang. This, in turn, is evidence that they participated in the shooting of Charlton and Bell. It is relevant to all three counts.

88 I note that in most cases, the motive or *animus* that the Crown is permitted to attempt to demonstrate relates to the victim as an individual, and not as a member of a group. This, however, is a difference without a distinction. A more general motive can have as much significance as a specific motive.

89 I note that in *R. v. Ma* (1978), 44 C.C.C. (2d) 511 (Ont. C.A.) the Ontario Court of Appeal specifically addressed the issue of the admissibility of an accused's membership in a gang to establish motive. The Court held that such evidence is admissible when it is tendered by the Crown to prove motive. In that case, Ma was charged with an attempt to obstruct justice. He was alleged to have threatened witnesses who were required to testify against his associates. On appeal, Ma argued that the trial judge erred in admitting evidence with respect to his alleged association with a criminal organization known as Kung Lok, part of the secret Triad Society then operating within the Chinese community in Toronto. The Court stated, at para. 20:

> The evidence objected to would be clearly inadmissible if it proved nothing more than the bad character of the appellant, and thus that he was more likely to commit the offence. But when it was tendered for the purpose of allowing the jury to draw an inference of motive, a material issue in this case, it became admissible.

90 The Court found that evidence of Ma's connection with the Kung Lok group of the Triad Society, an organization engaged in criminal activities and whose every member was obligated to come to the assistance of his fellow member, was relevant and of substantial probative value with respect to his motive for approaching the alleged victims.

91 Archibald J. reached a similar conclusion in *R. v. Abbey*, [2006] O.J. No. 4985 (Ont. S.C.J.). Ironically, in that case, as in this one, the Crown alleged that the Malvern Crew and the Galloway Boyz were rival criminal street gangs in Scarborough, and were engaged in a turf war resulting in shootings and retaliation. In that case, however, the accused was a member of the Malvern Crew, and the deceased was a member of the Galloway Boyz. The accused was alleged to have gunned down the deceased in broad daylight because he had trespassed on Malvern territory. The defence argued that the Crown should not be permitted to lead evidence that the accused was an associate of the Malvern Crew. The trial judge did not agree. He stated:

> 24 In this case, the question is whether the evidence that Mr. Abbey is an associate of the Malvern Crew makes the existence of the fact that Mr. Abbey may have had a motive to kill Simeon Peter more probable than without it. If it does, then Mr. Abbey's associate membership in the gang is relevant to motive.
>
> 25 The admission that Mr. Abbey is an associate of the Malvern Crew makes the existence of the material fact that Mr. Abbey may have had a motive to kill Mr. Peter, an alleged member of the Galloway Boys, more probable. As such, it is a relevant fact.

92 The trial judge went on to conclude that the probative value of the evidence outweighed its prejudicial effect, and concluded that it was admissible.

93 In this case, I reach the same conclusion as did Archibald J. in *Abbey*, and I do so with an appreciation of the fact that Charlton and Bell were not members of the Malvern gang. But if, as the Crown hopes to prove, the choice of victim here was in error, and that the accused intended to shoot members of the Malvern Crew, this does not detract from the significance of the evidence of *animus* and motive.

94 Finally, with respect to motive, as will be seen, I am of the view that much of this evidence survives a probative value/ prejudicial effect analysis.

Planning and Deliberation

95 The accused are charged with first degree murder. To secure a conviction for this offence, the Crown must show that the killing of Charlton was planned and deliberate. Evidence of *animus* and motive can also be relevant to planning and deliberation. As I have already noted, in *F. (D.S.)*, O'Connor J.A. stated, at para. 23, that it is well established that evidence of motive is admissible to prove the doing of an act as well as the intent with which the act is done.

96 In *R. v. Jackson* (1980), 57 C.C.C. (2d) 154 (Ont. C.A.), a case relied on by O'Connor J.A. in support of this statement, Martin J.A. stated, at p. 167:

> Motive, in the sense of an emotion or feeling such as anger, fear, jealousy and desire, which are likely to lead to the doing of an act, is a relevant circumstance to prove the doing of an act as well as the intent with which an act is done. The relevant emotion may be evidenced by
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> (a) conduct or utterances expressing the emotion,
>
> (b) external circumstances which have probative value to show the probable excitement of the relevant emotion, and
>
> (c) by its prior or subsequent existence (if sufficiently proximate) ...

97 This point may also be found in the ten permissible uses of bad character evidence listed in McCormick. He notes that evidence of motive may be probative of "the identity of the criminal or of malice or specific intent."

98 In this case, the evidence that I have outlined is not only circumstantial evidence of planning and deliberation because it shows *animus* and motive, but it is also direct evidence of planning and deliberation. The evidence of the creation and purpose

of the Ride Squad is direct evidence of planning and deliberation in respect of the larger overall scheme to shoot Malvern gang members, of which this shooting is alleged to be a part.

99 Again, in addition to the evidence in question being relevant to the issue of planning and deliberation, which is an issue in counts one and three, much of it survives the probative value/prejudicial effect analysis.

Opportunity and Means — Guns

100 Just as evidence of motive is always relevant in a criminal case, so is evidence of the accused's opportunity and means to commit the offence. While opportunity and means are not elements of the offence, proof of opportunity or means makes it more likely that the accused committed the crime. I have already mentioned that in *R. v. G. (S.G.)*, at para. 64, Cory J. referred to the common sense proposition that evidence that incidentally demonstrates bad character can also be directly relevant to a key element of the Crown's theory of the case, such as motive, opportunity or means.

101 In this case, membership in the Galloway gang and, in particular, in the Ride Squad is evidence of the opportunity and means of the accused to have committed the offences in question. Of particular significance is the evidence that the Crown proposes to lead of their possession and use of guns. Needless to say, evidence of possession of the murder weapon, before or after the shooting, would be relevant and admissible. But no murder weapon was unequivocally identified in this case. Examination by forensic experts of the bullets retrieved from the victims and bullet fragments retrieved from the scene of the shooting permits them to say no more than that the bullets retrieved were of a particular calibre. This limits to some degree the possible firearms from which the bullets could have been shot, but leaves open the possibility that a Glock was one of the firearms used in the commission of the offence. As a result, for the most part the Crown proposes to adduce evidence involving guns possessed or used by the accused generally. It is necessary to examine the law in order to inform discussion of the admissibility of such evidence.

102 I begin with a consideration of *R. v. Kinkead* (2003), 67 O.R. (3d) 57 (Ont. C.A.). Marsha and Tamara Ottey were brutally stabbed to death in the basement of their home. Ranger, who was Marsha Ottey's boyfriend, and Kinkead, who was Ranger's cousin and close friend, were separately tried for the murder. Two pieces of a knife hilt were recovered at the scene. The pieces were specific to a particular type of knife — a medium-sized, lock-back, folding knife with a single-edged straight blade. Five to ten thousand of these might have been sold in Toronto.

103 A former girlfriend of Kinkead testified that for the first six months of their relationship, he had a habit of carrying a folding knife with a silver blade and black handle that he sharpened all the time. After that, he didn't have that knife any longer, and instead had a big kitchen knife.

104 An acquaintance of Kinkead testified that about three years before the murder, Kinkead got upset with her and pulled a knife from his waist and started to come at her. The knife had a black handle, was two to four inches long and two inches wide. She did not know whether it was a folding knife.

105 The trial judge admitted this evidence on three bases: to demonstrate the likelihood that Kinkead possessed the necessary "tool" for committing the crime; to show that Ranger knew the type of person with whom he was associating; and to rebut the defence of innocent association.

106 On appeal, Kinkead argued that this evidence should not have been admitted. He said that the prior possession of a knife had little probative value, since the murder weapon was a common type of knife. Evidence that he once possessed a similar knife contributed little to the proof that he was carrying such a knife on the day of the murders. Finally, he argued that whatever probative value the evidence had required impermissible propensity reasoning.

107 Simmons J.A. concluded that the evidence was properly admitted. She agreed with the trial judge that if Kinkead was present at the murder, the impugned evidence was relevant to the issues of whether or not he possessed the murder weapon, and his motive for being there, and had some probative value to these issues. She stated, at para. 76:

> ... In the event the jury were to find that Kinkead was present in the Ottey home at the time of the murders, Daniel's evidence that Kinkead had a habit of carrying a knife similar to the murder weapon(s) would have some probative value on the issue of whether Kinkead possessed or supplied the murder weapon. Further, the fact that Ranger was present when Kinkead used a knife to threaten Burey (and was therefore aware of Kinkead's potential for violent behaviour) added some credence to the likelihood that Ranger recruited Kinkead to assist him in committing murder and therefore to the likelihood that, if Kinkead was present at the murder scene, it was not for an innocent purpose but rather because Ranger had recruited him.

108 As for the suggestion that the use of the discreditable conduct evidence to draw these inferences required impermissible reasoning, she stated, at para. 77:

> ... As was pointed out in *Handy*, where discreditable conduct evidence is relevant to and probative of specific inferences relating to live issues at the trial, the fact that the probative value of the evidence arises from propensity reasoning does not, in itself, make the evidence inadmissible.

109 I see very little to distinguish this case from *Kinkead.* If anything, the association of the three accused with guns is more compelling than in *Kinkead*. The extent of the evidence far exceeds the evidence in *Kinkead*. Some of the evidence here is also more proximate to the offence in time than was the evidence in *Kinkead*. I recognize that it cannot be definitively said that any particular gun possessed by any of the accused is the same type of gun as was used in the murder, but that was also true in *Kinkead* with respect to the knives, and in any event diminishes only marginally the force of the evidence. At the very least, the evidence shows that the accused had access to guns and knew how to use them. This in turn is relevant to whether or not the accused could have participated in the shooting, and so is relevant to all three counts. As will be seen, some of this evidence survives a probative value/prejudicial effect analysis.

110 I note that similar evidence in respect of guns was admitted in *R. v. Assoun* (2006), 207 C.C.C. (3d) 372 (N.S. C.A.)and in *R. v. Abbey*, [2007] O.J. No. 855 (Ont. S.C.J.). For another example of the admissibility in a murder case of possession of a gun at a time remote from the murder, see *Jacobson*, which I have referred to above.

Probative Value Versus Prejudicial Effect

111 In considering the limits that should be placed on the evidence, I have been struck by a distinction that I have not seen considered in the cases. On the one hand, the Crown has direct evidence of the matters I have enumerated, such as the existence of the Galloway gang, its activities, the dispute with the Malvern gang, and so on. There are Crown witnesses who were associated with the gang and its members in one way or another who will give evidence of these matters. They will testify to things they observed, and things said to them by the three accused.

112 In addition, the Crown has evidence of acts of the accused that I have already made reference to (I do not call them similar acts because, for the most part, they bear little resemblance to the shooting of Charlton and Bell) that might be considered to be circumstantial evidence of the existence of the Galloway gang, membership of the accused in it, and the existence of the Ride Squad and membership in it, including other acts of the accused that the Crown will argue are acts in furtherance of the mandate of the Ride Squad. It seems to me that there is a greater potential for prejudice to result from admitting evidence of some of these acts than there is from admitting more general evidence.

113 Where general evidence is admitted, the jury will either believe it or they will not. If they believe it, then the evidence will, of necessity, have probative value. But with the other specific acts of the accused, the jury might believe the evidence, but find that it does not advance the Crown's position. In that event, the evidence will have prejudicial effect, but no probative value. In other words, the risk of prejudice would be greater.

114 At the same time, the Crown has a legitimate concern about the exclusion of these other acts. Much of the general bad character evidence comes from the Vetrovec witnesses. It hardly needs stating that there will be a strong attack on their character and credibility. The Crown will need to find whatever confirmation of their evidence it can. The richest source of

that confirmation will no doubt be the specific acts of the accused that are consistent with the evidence about them given by these witnesses.

115 That is the minefield in which I must weigh the probative value and prejudicial effect of the evidence in issue. How then should I evaluate prejudice? What should my approach be?

116 In *Handy*, the Supreme Court reminded us that in assessing prejudice, it is necessary to evaluate both moral prejudice (i.e., the potential stigma of "bad personhood") and reasoning prejudice (including potential confusion and distraction of the jury from the actual charge against the respondent). In doing so, I find it useful to consider the questions posed by Charron J.A., as she then was, for considering the possible prejudice that might flow from the admission of bad character evidence in *R. v. B. (L.)* (1997), 116 C.C.C. (3d) 481 (Ont. C.A.). She stated, at para. 24:

> In assessing the prejudicial effect of the proposed evidence, consideration should be given to such matters as:
>
> (i) how discreditable it is;
>
> (ii) the extent to which it may support an inference of guilt based solely on bad character;
>
> (iii) the extent to which it may confuse issues; and
>
> (iv) the accused's ability to respond to it.

117 As I have already stated, I do not propose in these reasons to consider each and every item of evidence challenged by the accused individually. I will deal with some of the evidence by specific transaction, and some by category, and then give the accused the opportunity to ask me to consider additional specific individual items of evidence. I will begin by addressing certain specific transactions.

Application of the Principles

Specific Transactions

The Hyatt and Patrong Shooting

118 Riley and Atkins are charged with the shooting of Hyatt and Patrong in a separate indictment. It is the position of the Crown that that shooting is an example of the activities of the Ride Squad. The Crown, however, has not applied to have that shooting admitted into evidence at this trial as similar fact evidence. But on any view of the case, the investigation of the Hyatt and Patrong shooting is interwoven with the investigation of the Charlton and Bell shooting. I do not say inextricably interwoven, but it is close. It is primarily on that basis that the Crown says that this evidence must be admissible. It is necessary to understand why this is so.

119 I have already described the shooting of Charlton and Bell that took place on March 3, 2004, at around 5:00 p.m. No one was arrested for this offence for several months.

120 On April 19, 2004, shortly before 1:00 p.m., Koffi Patrong and Chris Hyatt, who were each 19 years old, were on the back porch at Patrong's residence in a townhouse complex at 70 Alford Crescent in the Malvern area. Hyatt had seen a silver or white SUV on Alford on his way over. Hyatt heard footsteps rustling in the leaves. He looked up and saw a black man. The man was armed with a .40 calibre pistol. He discharged approximately eight shots at Hyatt and Patrong. Patrong was hit twice in the left leg. Hyatt was hit in the left hand, the foot and the buttocks. Both men survived. Neither Hyatt nor Patrong were members of a street gang.

121 At 12:36 p.m., shortly before the shooting, Riley was observed by surveillance officers entering a silver Audi bearing licence number ATDD 851 which was parked outside of 4298 Kingston Road. A second man entered the vehicle with him. At 12:40 p.m., Riley drove the vehicle onto Kingston Rd. with the second man on board. At 12:44, Riley stopped at Kingston Road

and Lawrence Avenue East, and the second man left the vehicle. Riley continued driving the Audi eastbound on Kingston Road at a high rate of speed. He was lost at 12:50 p.m. while driving west on Murison Boulevard. He was located again at 12:52 p.m. eastbound on Coltman Crescent, still traveling at a high rate of speed. He was lost again driving northbound on Brenyon Way.

122 One person who resided on Alford St. noticed a silver, sporty car with two black male occupants slowly cruising through the area at least three times between 9:30 and 10:30 p.m. that day. Several individuals who were on Alford St. at the time of the shooting saw a silver sporty car drive away at a high rate of speed immediately after the shots were fired.

123 At 2:03p.m., the silver Audi bearing licence number ATDD 851 was observed by surveillance officers driving into the Morningside Mall parking lot. At 2:04 p.m. the Audi drove off. It was followed to Oshawa. At 2:42 p.m. the police commenced a high-risk stop of the Audi. The three occupants ran. Ultimately all three were arrested. They were identified as Riley, Atkins and Marlon Wilson. Riley was charged with attempt murder using a firearm, and all three men were charged with numerous other weapons offences.

124 At 8:17 p.m., Wilson, who has a lengthy criminal record, gave a videotaped statement to the police in which he denied any involvement in the shooting and implicated Riley and Atkins. He said he had been hanging out with Riley and Atkins, who was his cousin, for two or three months. He had borrowed the Audi from Herzel Shamilov, a friend of his, and had let Riley borrow it for the night. Atkins had called Wilson in the morning and said that Riley was going to pick him up, and then they would pick Wilson up. Wilson was in his house when Riley and Atkins arrived. They all left together. Riley and Atkins told him that they had been in Malvern and had shot someone. They drove to Atkin's girlfriend's house at 166 Morningside Ave. so that Atkins could shower. Riley handed a gun to Atkins, who took it inside the residence. Wilson and Riley left Atkins there and drove off.

125 Wilson said that they drove to a carwash at Kennedy Rd. and Eglinton Ave. East, then returned and picked up Atkins and drove to the Morningside Mall where Riley gave some guy some money. They then drove to Oshawa where Riley said he had to pick up some money at a complex. When they got there, someone tried to run them over. Wilson started running, and was arrested with Atkins in the parking lot.

126 Wilson said that Riley, Atkins and others were in a Galloway gang called the Get Mad Crew. He said that Riley was a bad guy who always had a gun and was always shooting people, although Wilson had never been around Riley when he shot anyone. He said that he would call Riley or Atkins if he needed a gun, because they knew where to get them.

127 Wilson was interviewed again at 3:35 a.m. on April 20, 2004. In the course of this interview, he said, "They do it when they're bored. Go up to Malvern and pop someone, doesn't matter who. Just anyone in Malvern because of Norris Allen."

128 After some time had passed, and while they remained in custody, Riley and Atkins had an opportunity to review the Crown's disclosure in relation to the shooting of Hyatt and Patrong, which, through inadvertence, included Wilson's statements. As a result, Riley and Atkins became aware that Wilson would be testifying against them in the Hyatt and Patrong case.

129 The private communications of Riley and Atkins were intercepted pursuant to a judicial authorization while they were in jail.

130 Riley and Atkins communicated with others who were outside the jail in an effort to prevent Wilson from testifying through violent means. These communications were recorded by the police.

131 On October 27, 2004, while Wilson was still in custody, the police played some of the intercepted private communications for him in which the alleged threats against Wilson were made. After hearing these interceptions, Wilson made a statement implicating Riley and Atkins in the Charlton and Bell shooting.

132 Wilson has subsequently given several other statements in relation to these offences in which he has amplified his original statements.

133 Wilson testified at length at the preliminary inquiry.

134 It is apparent, based on my comments above, that I consider much of the evidence of Wilson to be relevant. His evidence about the gang, the membership in the gang of the accused and others, their possession and use of guns, and their rides into Malvern to shoot Malvern gang members in retaliation for the shooting of Norris Allen is relevant for the reasons I have already explained. But it is the Hyatt and Patrong shooting that is in issue here.

135 The Crown submits that evidence of the Hyatt and Patrong shooting is admissible for two reasons. First, the Crown says that Wilson must be permitted to testify about the shooting in order to fully explain his cooperation with the Crown, for which he will be strongly attacked. In addition, the Crown says that it should be permitted to lead other evidence of the shooting in order to confirm the truthfulness of Wilson's evidence about the shooting.

136 It is plain that some of the events that I have outlined concerning Wilson played a role in his decision to tell the police about the involvement of Riley and Atkins in the Charlton and Bell shooting, and his ultimate decision to testify against them. In particular, I have in mind the arrest of Wilson with Riley and Atkins in connection with the Hyatt and Patrong shooting for which he claimed to be innocent; the failure of Riley and Wilson to tell the police that he was innocent; Wilson's decision to testify against Riley and Atkins in the Hyatt and Patrong case; and the playing by the police of a recording of Riley and Atkins making threats against Wilson because of his intention to testify. Their can be no doubt that the Crown is entitled to lead evidence of the circumstances that resulted in Wilson testifying at this trial to assist the jury in assessing his credibility, which inevitably will be subjected to a withering attack.

137 What is more, there can be no doubt that independent evidence of the Hyatt and Patrong shooting could go some distance in confirming Wilson's evidence.

138 But while the evidence is relevant on the basis that the Crown suggests, and has considerable probative value, the involvement of Riley and Atkins in the Hyatt and Patrong shooting is probably the piece of bad character evidence that poses the greatest risk of prejudice to the accused. Why is it so prejudicial?

139 I will assess the prejudice in this instance, and all remaining instances, with due regard to the considerations that I have already mentioned, and that were stated by Charron J.A. in *R. v. B. (L.)* In light of the frequency with which I must assess the prejudicial effect of evidence, I will not specifically mention these considerations in each instance.

140 In my view, despite the fact that there will be considerable other evidence heard by the jury of Riley and Atkins being involved in violent crime, the evidence relating to the Hyatt and Patrong shooting is particularly discreditable. I say this because it involves the shooting of two young men who were not gang members, who appeared to be unknown to the accused, and who were apparently shot simply and solely because they lived in Malvern. The shooters were cold, calculating killers who obviously placed no value on human life. The fact that Hyatt and Patrong were not killed can be attributed only to bad shooting or good fortune. Jurors who are satisfied that the accused committed that crime might be tempted to convict them of this crime despite any small doubt they might harbour based on the evidence.

141 In addition, the Hyatt and Patrong incident is particularly susceptible to supporting an inference of guilt based solely on bad character because it is so similar to this incident. In both cases, men obviously trolling the Malvern neighbourhood intent on shooting Malvern gang members because of their animosity to that gang ended up victimizing young black men unknown to the shooters for no reason other than that they were present in Malvern. While the Crown does not argue for the admission of evidence of the Hyatt and Patrong incident as similar fact evidence, some jurors might be tempted to use it in that way.

142 I am also of the view that there is a risk that this evidence will confuse the issues, particularly if I permit the Crown to call evidence to confirm the Hyatt and Patrong shooting. The evidence is at least circumstantial in part, and includes evidence of after the fact conduct. Any consideration by the jury of the guilt of the accused of the Hyatt and Patrong shooting based on that evidence will, at the very least, be a significant diversion from the issue at hand.

143 In the end, I conclude that Wilson will not be permitted to testify about the Hyatt and Patrong shooting, and the Crown will not be permitted to adduce other evidence about it. At the same time, some accommodation is necessary to permit Wilson

to explain how he came to be testifying at this trial, similar to what was endorsed by the Court of Appeal in *B. (C.)* at para. 32. He must be permitted to say that he was arrested in a motor vehicle with Riley and Atkins, and charged with a serious offence, that all three of them were detained in custody, that he was innocent of the crime, and that he chose to cooperate with the police for the reasons I have outlined. He will not be permitted to name the specific charges that the three men faced, or describe the substance of the allegations. I may be spoken to if additional guidance is required.

144 But I must sound a word of warning. This is a preliminary ruling. It is open to the parties to ask that it be revised if the circumstances change. If, for example, Wilson is cross-examined in a manner that suggests that he was guilty of the charges he faced arising out of the Hyatt and Patrong shooting, or that Riley and Atkins were not guilty of those charges, or that he only cooperated with the police to get himself out of trouble that he deserved to be in, then the situation may change. The Crown might then be entitled, in re-examine, to permit Wilson to explain his position by telling the "true" story.

The Call Down

145 This evidence is related to the Hyatt and Patrong evidence. As I have already mentioned, after Riley, Atkins and Wilson were arrested for the Hyatt and Patrong shooting, Wilson gave statements to the police implicating Riley in that offence. Through inadvertence, the Crown's disclosure included Wilson's statements. That disclosure fell into the hands of Williams, Riley's girlfriend, who advised Riley that Wilson had informed on him.

146 Riley and his associates discussed what Wilson had done, and how to deal with it. In the end, they arranged what the Crown calls a "call-down." In effect, Wilson was called down to meet with Riley in the jail. The purpose of the meeting was to intimidate Wilson and persuade him to change his story. These discussions were intercepted by the police.

147 Wilson testified that the call-down did in fact take place. He said that upon being confronted by Riley, he immediately agreed to change his story and make things "O.K."

148 In addition, these interceptions were played for Riley before he made his October 27, 2004 statement to the police concerning the Charlton and Bell shooting.

149 The Crown argues that the interceptions are admissible as part of the explanation for Wilson's cooperation with the police, and to explain any changes that Wilson made to the information he provided to the police in the course of his dealings with them. In addition, the Crown says that it is evidence of the criminal organization and how it worked.

150 I agree with the Crown that this evidence is relevant to the issues that the Crown advances. On the other hand, I note that the call-down relates to Wilson's evidence in relation to the Hyatt and Patrong shooting, and that it took place long before Wilson provided information to the police about the Charlton and Bell shooting. While it might be highly relevant in the Hyatt and Patrong trial, it has much more limited relevance here.

151 On the prejudice side, I note that in the course of the discussion about Wilson, Riley enumerates the number of crimes that he and Atkins had been convicted of, and that there is also considerable discussion about doing physical harm to Wilson because of his "ratting" to the police about the Hyatt and Patrong shooting. Admittedly, these parts of the interceptions could be edited out. Nonetheless, it is my view that for the most part, the prejudicial effect of this evidence outweighs its probative value.

152 I am, however, prepared to permit Wilson to testify that as a result of a confrontation with Riley in the jail, he became aware that Riley knew that he was informing against him in the Hyatt and Patrong matter, that Riley was displeased about it, and that he told Riley he would change his story. I might also permit Wilson to give some evidence about the playing of tapes for him prior to giving his statement on October 27, 2004, but I will need to hear counsel's submissions on this point. I will not permit the Crown to play the pertinent interceptions before the jury.

153 I add this caveat. It is possible that the balance will shift. In the cross-examination of Wilson, should counsel suggest that there was no such meeting with Riley, or should counsel question Wilson about changes in his statements to the police that may relate to the call-down, then the door to adducing this evidence might be opened.

The Drug Toss

154 The Crown intends to call Roland Ellis as a witness. Ellis was a member of the Galloway Boyz. After Riley was arrested for the Hyatt and Patrong shooting, he was detained in custody. While he was in custody, McCrae J. granted an authorization to intercept his private communications in relation to the Charlton and Bell shooting. Upon a review of a series of intercepted private communications of Riley, Atkins, Ellis and others beginning on June 11, 2004, it is apparent that at Riley's request, Ellis had delivered drugs to Riley in the Toronto East Detention Centre on one occasion by throwing them over the barbed wire fence. When asked to do it a second time, however, Ellis refused, claiming that promises made to him for doing it the first time were not fulfilled. According to Ellis, Riley then made a threat against Ellis's life. In another intercepted private communication, it is apparent that Ellis reneged on an earlier agreement to "take responsibility" for a quantity of drugs seized from Dana Williams' residence on April 20, 2004. Williams was Riley's girlfriend. In subsequent intercepted private communications, Riley discussed killing Ellis as a result of these actions on his part.

155 In February, 2005, Ellis agreed to be interviewed by the police. On February 22, 2005, in the course of the interview, the interceptions in which Ellis's life was threatened were played for him. Following this, Ellis gave a series of statements to the police in which he discussed the gang-related activities of the accused. In particular, he provided incriminating evidence in relation to the Charlton and Bell shooting. He subsequently testified for the Crown at the preliminary inquiry.

156 The Crown takes the position that the evidence of the two drug tosses, in particular the refusal by Ellis to do the second drug toss, as well as his refusal to take responsibility for the drugs seized at Williams' residence, followed by the threats made against him by Riley, is essential to an understanding of the breakdown in the relationship between Ellis and Riley, and the decision made by Ellis to cooperate with the police and ultimately to testify for the Crown. In turn, the Crown argues, the evidence is essential for the jury's assessment of the credibility and reliability of his evidence.

157 I agree. In fact, it should be noted, this evidence cuts two ways. While it may explain Ellis's cooperation, it also demonstrates an *animus* on his part towards Riley, which may undermine his credibility. Indeed I find it hard to imagine how the accused could cross-examine Ellis without touching on some of the evidence that they challenge in this application.

158 The probative value of this evidence, although it does not directly relate to the elements of the offence, is very high. On the other hand, for the most part, its prejudicial effect is not great. The bad character evidence is not terribly discreditable in comparison to the offences being tried, except for the death threat. The discreditable nature of even the death threat is minimized by the fact that it never went beyond talk. This evidence is not of a nature that would support an inference of guilt. In addition, this evidence is not particularly distracting. It is completely tied to the assessment of Ellis's credibility, an issue that the jury will have to focus on in any event, and will not consume an inordinate amount of time. I will admit it.

The Money Mart Robbery

159 On July 9, 2004, an attempt to rob a Money Mart in Pickering occurred. It is the Crown's position that Megan Brinton, who was the girlfriend of a gang member named Sheldon Nugent, was the "mastermind" (surely an overstatement) behind this attempted robbery. She is said to have had an inside contact who orchestrated the robbery with her. There was evidence that, in addition to Nugent, other gang members including Wisdom, Ernesto Gayle and Mark Malcolm participated in the robbery. The police were aware in advance that the robbery was to take place, and were able to thwart the scheme and arrest the robbers.

160 This offence took place four months after the shooting of Charlton and Bell, and three months after the arrest of Riley and Atkins. It falls afoul of the general rule I have developed that crimes committed after the shooting should not be admitted. This crime, however, has heightened probative value.

161 Many of the crimes committed by gang members are open to being characterized as *ad hoc* crimes committed by alleged gang members, but not amounting to gang activities. As a result, it could be argued, they do not tend to establish the existence of a criminal organization, or the membership of any individual in a gang. Nor do such crimes demonstrate how the gang or its members benefited from their activities. The Crown says that this offence is different. Mr. Akhtar stated, in argument, that this

offence "is probably the microcosm of how the criminal organization works." He went on to explain that one gang member, Nugent, learned of an opportunity to commit a lucrative robbery, put out a call to other gang members, and in short order had them assembled and ready to commit the crime. This is strong evidence that these individuals were more than just friends who committed crimes together. It is strong evidence in support of the criminal organization charge, and it contributes to the proof of gang membership on the part of the accused on the murder and attempt murder charges, in aid of proving motive.

162 I agree with Mr. Akhtar that this evidence has great probative value on the criminal organization charge, for the reasons he states. Its force is only marginally diminished by the fact that the robbery took place four months after the shooting, and while Riley and Atkins were in custody. Its probative value on the murder and attempt murder charges is not as great. Still, the evidence contributes to the proof that the Galloway gang was in fact an organized criminal gang, and as a result could well have been in a deadly dispute with a Malvern gang. Accordingly, it assists in proving the motive for the Charlton and Bell shooting.

163 I turn then to the question of prejudice. Undoubtedly this evidence reveals something of the bad character of Wisdom. But it is not terribly discreditable, and it is not likely that the jury would infer from his participation in a botched robbery that he committed a murder. My biggest concern is that this evidence could prove to be somewhat time consuming, and will be a distraction for the jury, but, I conclude, not excessively so. On balance, I conclude that the probative value of the Money Mart evidence outweighs both the limited moral and reasoning prejudice that could arise from its admission.

Categories of Evidence

Gang Evidence

164 I have already expressed my view that the Crown is entitled to lead evidence of the existence of the Galloway gang and the general nature of its activities; of the membership of the accused in it; of the leadership role of Riley; of the "war" between the Galloway gang and the Malvern gang; of the heightened level of hostility flowing from the killing of Norris Allen; of the formation, purpose and activities of the Ride Squad; and of the membership and participation in the Ride Squad of the three accused. In addition to providing proof of essential elements of the criminal organization charge, this evidence is highly relevant to all three counts as part of the narrative, to provide essential context to the Crown's allegations, particularly the allegation of this shooting being a part of a larger overall scheme, and to provide the jury with a coherent and intelligible description of the offence charged. This evidence is admissible for other reasons as well, as I have explained. In particular, it is evidence of *animus*, motive, and opportunity, and of planning and deliberation. The evidence is so essential to the Crown's case that the probative value of much of it exceeds its prejudicial effect.

165 On the other hand, the prejudicial effect of some of the evidence exceeds its probative value. I have already considered certain transactions that fall into that category. I will now explain my approach to certain other categories of evidence, specifically evidence relating to guns and to trafficking.

Guns

166 I have already concluded that evidence of the possession, use and trafficking of guns by gang members, including the accused, is relevant and admissible in this prosecution, subject to a probative value/prejudicial effect analysis. Specifically, as I have already explained, it is admissible:

- as part of the narrative on all counts to show the existence of the gang and its purpose and activities and to show that the accused were members of the gang and participated in its activities

- to show the opportunity and means the accused had to commit the offences of murder and attempt murder

167 I have also said, however, that there must be some temporal restriction on the evidence admitted as proof of specific offences. Although I addressed this restriction in connection with relevance, it may be better considered to be an exercise of the discretion to exclude evidence where the prejudicial effect exceeds the probative value. In any event, I have said that proof of specific criminal acts prior to the shooting must be reasonably proximate to the time of the shooting, and that this limitation

must be measured in months. And I have said that I will not permit the Crown to prove crimes committed by the gang after the shooting for this purpose, with certain exceptions.

168 I except from this temporal restriction evidence that might tend to connect any of the accused to one of the weapons used in the shooting. In particular, I have in mind the evidence about Atkins' possession of a gun later in the day of the shooting, the origin of that gun and its subsequent fate. The following is an incomplete description of that evidence.

169 Wilson is expected to testify that in February 2004 he committed a robbery with Riley, Atkins and Shamilov in Woodbridge. They obtained the gun for that robbery at a condominium in Woodbridge. The gun was a Glock .357. After the robbery, Wilson gave the gun to Atkins.

170 On March 3, 2004, a few weeks after the robbery, the shooting of Charlton and Bell took place. Forensic evidence establishes that some of the projectiles seized from the scene of the shooting were fired from a polygonally rifled barrel, such as the barrel of a Glock. This type of barrel tends not to leave marks on the projectiles, and accounts for the popularity of the Glock on the street.

171 Ellis is expected to testify that later on the day of the shooting, a celebration party was held at Smokey McPherson's house. Ellis described Atkins sitting at the kitchen table with a black .357 firearm in front of him. Ellis overheard Atkins tell Wisdom that he would really like a revolver.

172 Riley and Atkins were arrested on April 19, 2004 in relation to the Hyatt and Patrong shooting. Their private communications were intercepted at the East Detention Centre beginning in June 2004.

173 Soon after, on June 23, 2004, Riley was intercepted speaking to Denae Nichols. He asks Nichols if "that's still in the house?" Nichols replies that she's moved it to her other residence. She explains that nobody was living in the house, and that the apartment was empty. She was apparently living in a hotel, and paid $150 per month for the apartment. Riley asked how long "it" was going to stay in the apartment. She said, "Until I'm ready to give it up." Riley asked why she didn't move into the apartment. She explained that the apartment was completely empty, and she didn't have the money to move in. She reassured Riley that nobody else had the key to the apartment.

174 Riley was extremely anxious about who was paying the rent, and who owned the premises. He said, "... you gotta talk to me..., it's my life." Nichols replied, "Exactly! And your life is in my hands and I'm gonna take care of it while it's in my hands." Later Riley insists that: "No man can be around with his thing." Nichols confirms that no man was.

175 On July 5th, 2004, Nichols was intercepted speaking to Damian Walton. Walton asked Nichols if she had talked to "him" yet. Nichols said that she had not. Walton asks whether "it" was with her or at her mother's residence. Nichols confirmed that it was with her.

176 Later that day they spoke again. Walton demanded that Nichols get it and bring it to him. He asked her if it was on "turf." She confirmed that it was, and reassured him that "...nobody can get it where it is." She asked Walton if "he" was pressuring him. He confirmed that "he" was. Walton asked if she had visited "him." She said that she had not, because he always wanted money, and she was broke.

177 Walton asked if it was in the white building at 4301. Nichols replied that she didn't want it there, and in fact, the day after she moved it, there had been a fire, and if it had been there, it would have been found.

178 Still later that day Walton and Nichols spoke again. Nichols asked Walton why "he" was pressuring Walton to get it. Walton replied, "I dunno." Nichols asked, "Why doesn't he want it to stay where it is?" Later Nichols said, "You know it's in a shoe box right now eh, 'cause I had to take it from this house and take it there."

179 On July 7th, Walton and Nichols spoke again. This time, Walton told Nichols that he would tell "him" that "it is safe where it is."

180 On July 10, Walton told Nichols that "he" asked if he had gotten "the thing" from her. Walton said that he told "him" to leave it where it was. Walton then told Nichols that "he" was going to call her.

181 On July 21, 2004, Riley spoke to Nichols. Riley asked Nichols about her other house and why she didn't move into it. Nichols said that it had no privacy, and she had no money to put anything in it, and that she paid $149 per month to rent it.

182 I depart briefly from my recitation of the evidence concerning Riley, Nichols and Walton to mention a private communication of Atkins intercepted on August 5, 2004 that is relevant to this issue. On that occasion, Atkins was recorded as saying, "They didn't find no guns or nothing in my house." Later, he said, "They left everything. They found it and just left it there ... my baby mother went to the back of the house. But then she got arrested again so they like ... they sealed off the house. Because they ... if a ... if, if, if, its three fifty seven clip. For a Glock. So if they find any three fifty seven shells ..."

183 Crown counsel argues that in this call, Atkins was referring to a search of the residence of his baby mother, Elaine Nolan, at 166 Morningside Drive on April 20, 2004. The police arrived at the premises, secured it while a search warrant was obtained, and then conducted a search. Atkins, the Crown says, was referring to the fact that the police failed to find a .357 clip or shells for a Glock associated with him during that search.

184 On September 21, 2004 Det./Sgt. Comeau and Det./Cst. Wilson paid Nichols a visit at her mother's house. They told Nichols that a female tipster had called the police and had told them that Nichols knew all about the Charlton and Bell shooting, that the shooters used a black Pathfinder, and that one of the shooters was known as Nid and Greeze. Nid and Greeze are two of Riley's nicknames.

185 Later that day, Riley had a long conversation with Nichols and Walton. As soon as Nichols got on the phone, Riley asked her, "What are you on?" She replied, "I said nothing." Later Riley asked Walton what they said to her. He said, "A tip ... they got information from a girl." Walton also said, "They came to see her at 7:30 in the morning, two of them, a black one and a white one." Wilson is black. Comeau is white. Clearly, the discussion is about the police visit to Nichols. Later, Walton said "... they bring up this C thing yes, that's why they're trying to..." "C" obviously is a reference to Charlton. Riley replied, "Yeah because on this one they don't have nothing." And later, he said, "They don't have nothing; they have that little idiot," an apparent reference to Wilson. After that, Riley instructed Walton to "move that for me."

186 On September 22, 2004, the police ascertained from the Toronto Housing Corporation that Nichols had had a subsidized apartment in her name since May 24, 2004, at apartment 1411, 4301 Kingston Road, a large white building in the Galloway area, for which she paid $150 a month in rent.

187 On September 23rd, 2004, the police executed a search warrant at that address. The apartment had no furniture, and the cupboards, drawers and refrigerator were all empty. In the bedroom closet they located a Glock .357 with ammunition. The gun was inside a shoe box, which in turn was inside several bags. There was a red circular stamp on the box that said "Pye," which was the nickname for Gary Reid, and "December 8, 2003," the date that Reid was shot.

188 The firearm seized from Nichols' apartment was tested for DNA. At least two major profiles were identified. One was the profile of Atkins; the other was the profile of Wilson.

189 From this evidence, it would be open to the jury to conclude that one of the guns used in the shooting of Charlton and Bell was the Glock seized from Nichol's apartment. It was obtained by Wilson several weeks before the shooting, and given to Atkins, who had it in his possession shortly after the murder. Initially, it was left with Atkins' baby mother at 166 Morningside Drive, or at least the clip and shells for it were. Ultimately, it was left with Nichols, who concealed it. Riley was aware that Nichols had the gun, and was very concerned that it not be found by the police. He knew that the police were investigating the Charlton and Bell shooting. Ultimately, the jury might conclude from this evidence that Riley and Atkins participated in the shooting of Charlton and Bell.

190 This evidence is exceptionally probative. Its probative value easily outweighs any prejudicial effect that evidence that Riley and Atkins were involved with guns may have. But a couple of issues about the admissibility of this evidence remain.

191 First, the interception of Atkins' private communication on August 5, 2004, also includes an obvious reference to the seizure of money and drugs from the residence of Williams. I have found that the money and drugs in question were obtained in a manner that violated the *Charter*, and I have excluded that evidence at this trial. The accused say that the reference to this evidence must also be excluded, since it flows directly from the evidence I have excluded. There is much to this argument, but I need not decide it. The reference in this private communication to evidence seized from Williams is irrelevant. If the accused want it to be edited out of this interception, then I will require the Crown to do so. Similarly, although it is out of context to mention it here, I would require the Crown to edit the reference to the search of "D's" house out of the interception of Wisdom's private communication on August 24, 2004. That communication is otherwise admissible.

192 In addition, Mr. Midanik argues that the discussions between Nichols and Walton are hearsay. Mr. Akhtar counters that they are admissible as acts in furtherance of a common design to conceal the Glock that was used in the shooting of Charlton and Bell.

193 Of course, acts to conceal a murder weapon after a killing are not ordinarily acts in furtherance of the common design to commit a murder. But this does not mean that a subsidiary conspiracy to conceal a murder weapon could not be proved where such evidence existed. In such a case, the co-conspirator's exception to the hearsay rule would apply to that subsidiary conspiracy. To support this proposition, I need go no further than to refer to the judgment of Martin J.A. in *R. v. Baron* (1976), 31 C.C.C. (2d) 525 (Ont. C.A.) He stated, at para 78:

> To engraft a conspiracy to avoid detection and prosecution, as a matter of law, on every conspiracy to commit a crime would have far-reaching implications. The effect of such a doctrine would be to extend the duration of the conspiracy and to make the attempted bribery of a police officer or the subornation of a witness by one conspirator admissible against the other as an act done in furtherance of the presumed subsidiary conspiracy to escape detection and punishment. *Such a conspiracy could, of course, like any other conspiracy, be established by evidence.* (Emphasis added.)

194 This is such a case. It would be entirely open to the jury to conclude, beyond a reasonable doubt, that there was a common design to conceal the Glock. Based on the declarations directly admissible against each of Riley, Walton and Nichols, it would be open to the jury to conclude, on a balance of probabilities, that each of them was a participant in that common design. As a result, the jury would be entitled to use the declarations of Walton and Nichols as evidence against Riley in determining whether or not he was a participant beyond a reasonable doubt. The jury could then, in turn, use the evidence against Riley in relation to the offences charged. No other concern was raised by the defence about the use of this evidence.

195 With respect to gun offences, I add an additional restriction. I will not permit the Crown to adduce specific evidence of any of the accused actually shooting at any person other than Charlton and Bell. I note that, other than the shooting of Hyatt and Patrong, the Crown has very fairly refrained from seeking to adduce any such evidence.

196 I underscore that this exclusion relates to instances of the accused shooting at other persons, and nothing more. It does not reach instances of pointing a gun where no shooting took place. I have in mind, in particular, the following incident.

197 Omar Reid was a member of the Malvern Crew, and will be a Crown witness in this trial. It is expected that he will testify that some time in early 2004, he saw Riley and another Galloway gang member driving in the Malvern area in a black Lexus. Riley was in the driver's seat, with the seat pushed back. He lowered his window and asked, "Where you from?" He then laughed and said "Galloway" and pointed a .45 calibre firearm at a group of Malvern gang members, who began running. Reid, who did not run, asked Riley if he was trying to murder him. Riley said that when he saw it was Reid he never let off a shot. Despite the hostility between the two gangs, Riley and Reid apparently had an amicable relationship. Riley then drove away.

198 In my view, the probative value of this evidence exceeds its prejudicial effect. It is evidence that tends to confirm the evidence of the Crown witnesses that there was hostility between the Malvern and Galloway gangs, and that Riley and others

had formed a Ride Squad to drive into Malvern and shoot Malvern gang members, which in turn, as I have already explained, is evidence of motive, means and opportunity. I have ruled that the Crown cannot lead evidence of other shootings by the accused in Malvern because the prejudice is too great. This incident, however, includes no shooting. While it retains its probative value despite the absence of a shooting, the prejudicial effect is much reduced. As a result, I will admit this evidence.

Trafficking

199 The Crown proposes to introduce general and specific evidence of trafficking in drugs by the accused and other Galloway members. This evidence is relevant to the criminal organization count, because it tends to establish the existence of the gang, its membership and the way in which the gang and its members benefitted from the gang's criminal activities. It is also relevant to the murder and attempt murder counts because it tends to confirm the existence of the gang and its membership, which in turn helps to establish the reason for the *animus* between the Galloway and Malvern gangs, and the motive for the shooting. Undoubtedly, the probative value of this evidence is greater in relation to the criminal organization charge. On the other hand, while there is some potential prejudicial effect, particularly because the association between drug trafficking and the use of guns is not unknown to the public, nevertheless the prejudicial effect is not great. The jury is not likely to conclude that someone who sells drugs is necessarily a person who would commit a murder of the nature of this one.

200 Some of the trafficking evidence, however, takes place after the shooting, or appears to involve only one member of the gang. Such evidence has a diminished probative value, while the prejudicial effect is not reduced. I conclude that in these instances, the prejudicial effect is greater than the probative value, and the evidence must be excluded.

201 The Crown also proposes to introduce general and specific evidence of trafficking in firearms. This evidence is relevant in the same manner as is the evidence of drug trafficking. In respect of the murder and attempt murder counts, it also contributes to the proof of means and opportunity. I reach the same conclusion as I did with respect to drug trafficking when I balance probative value against prejudicial effect, with the same restrictions.

Hearsay And Opinion Evidence

202 I have already explained why I will not, in these reasons, deal with the arguments raised about morsels of evidence that the accused say were hearsay or opinion evidence in the recorded interviews of the Vetrovec witnesses, in their statements, or at the preliminary inquiry.

203 There is one aspect of this issue, however, that bears some discussion. In some instances, Crown witnesses who were members of, or associated with the Galloway gang will discuss the history of the gang, its membership, its activities and the like. In some instances, they have not said, and likely will not say, precisely how they acquired that information. Counsel for Atkins says that this evidence is inadmissible hearsay. Counsel for Riley, more appropriately I think, characterizes it as inadmissible opinion evidence. In my view, however, much of this evidence is admissible.

204 I readily acknowledge that these witnesses cannot say, for example, that Riley participated in a particular shooting on the basis that another gang member told them that he did. But general testimony about the gang, its history, its membership and the nature of its activities stands on a different footing.

205 In a number of criminal organization trials, the Crown has adduced expert evidence to assist in establishing the existence and nature of a criminal organization. A good example of this is *R. v. Lindsay*, [2005] O.J. No. 61 (Ont. S.C.J.) and No. 2870. In that case, Lindsay and Bonner were charged with extortion and committing extortion for the benefit of, at the direction of, or in association with a criminal organization. They were alleged to have been members of the Hells Angels.

206 In support of the criminal organization charge, the Crown relied primarily on the evidence of five witnesses, four of whom were qualified to give expert evidence. Two of the expert witnesses were police officers, and a third was a retired police officer. The police officers were permitted to give opinion evidence about the nature and characteristics of the Hells Angels organization, the main purposes and activities of the Hells Angels organization and whether these activities constituted the facilitation or commission of serious criminal offences that afford a material benefit to its members. The opinion evidence

was based on a mix of hearsay and non-hearsay information. The hearsay information included hearsay statements of Hells Angels members.

207 The trial judge admitted this evidence and relied on it extensively. I do not doubt that she was correct to do so. In my view, however, it would be anomalous if a police officer who has interviewed members of a gang could, based on those interviews, testify about the existence, nature, history, membership, characteristics, purposes and activities of that gang, while the members themselves could not. Of course, the question is not whether it is anomalous. The question is, do the rules of evidence permit it. I conclude that they do. In my view this is an instance when non-expert opinion evidence is admissible.

208 In *R. v. Graat* (1982), 2 C.C.C. (3d) 365 (S.C.C.), Dickson J., as he then was, stated, at p. 379, that he accept the following passage from *Cross on Evidence* (5th ed. 1979) as a good statement of the law as to the cases in which non-expert opinion is admissible:

> When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury:
>
> > Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe.
>
> There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, speed, weather, handwriting and identity in general.

209 In my view, this is also such a case. Here the witnesses know about the nature, membership and activities of the gang with which they are associated from a considerable array of sources. These include, depending on the witness: observation of gang activities; observation of gang members with guns; participation in gang activity with other members; presence at celebrations after gang activities; discussion about gang matters amongst members overheard by members; admissions against interest of the accused and other gang members; and many other sources. No witness could be expected to recall, certainly with any useful degree of detail, the precise source of this kind of information. I will admit such evidence in this case.

Demeanour

210 Counsel for the accused took exception to the admissibility of what they referred to as demeanour evidence. The first example of this related to the evidence of Ellis. In one of his statements to the police, he said that at a gathering of gang members at McPherson's residence after the Charlton and Bell shooting, everyone was celebrating. When a news report about the shooting came on television, everyone was quiet. When the victims were named, the mood changed, and people said, "Who's that?" Ellis said, specifically, that Riley was "cheesed" and "mad", and said: "Fuck." Counsel characterize the reference to Riley being angry as demeanour evidence that should not be admitted into evidence. Mr. Berg said that he didn't see how Ellis could know the emotional response of Riley.

211 In a number of cases, the courts have expressed concern about evidence of the reaction of accused persons to allegations of wrongdoing. In particular, the courts have been skeptical about adducing an unusually calm reaction to such allegations as evidence of consciousness of guilt. In *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.), Rosenberg J.A. stated, at para. 27:

> The probative value of this type of evidence is highly suspect. In the two recent cases of Susan Nelles and Guy Paul Morin use of the accuseds' demeanour was found to have played a part in the wrongful prosecution. *The Report of The Commission on Proceedings Involving Guy Paul Morin*, 1998, vol. 2, pp. 1142 to 1150, contains an extensive discussion of the dangers of admitting such demeanour evidence. The expert and other evidence introduced at the Commission strongly suggests that this evidence can be highly suspect and should be admitted at a criminal trial with caution. Perceptions of

> guilt based on demeanour are likely to depend upon highly subjective impressions that may be difficult to convey to the jury and in any event the significance of the reaction will often be equivocal.

212 But *Levert* does not create a rule excluding demeanour evidence. Courts considering the matter subsequent to *Levert* have noted that much depends on the circumstances. In *R. v. Trotta* (2004), 190 C.C.C. (3d) 199 (Ont. C.A.), Doherty J.A. observed, at para. 41:

> Evidence of demeanour offered as evidence indicative of a state of mind must be received with caution: *R. v. Levert* (2001), 159 C.C.C. (3d) 71 at paras. 27-28 (Ont. C.A.). The circumstances surrounding the proffered evidence must be such as to make that evidence sufficiently unambiguous and demonstrative of a relevant state of mind so as to overcome concerns that a trier of fact may too easily equate what is perceived to be an "unusual" reaction with a guilty mind.

213 Similarly, Charron J., (in dissent, but not on this issue), stated in *R. v. Trochym* (2007), 216 C.C.C. (3d) 225 (S.C.C.), at para. 164:

> That said, there has been growing concern with respect to the use of demeanour evidence to support inferences of consciousness of guilt because of the highly subjective nature of such evidence: see *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.); *R. v. Bennett* (2003), 179 C.C.C. (3d) 244 (Ont. C.A.); and *R. v. Stark* (2004), 190 C.C.C. (3d) 496 (Ont. C.A.). A higher level of intervention on the part of the trial judge may be called for, given the potential for this sort of evidence to be quite prejudicial. However, I would avoid making a general pronouncement about the admissibility of this type of evidence. A case-by-case assessment of such evidence, considering relevance and weighing probative value against the prejudicial effect, is the proper approach. In the case at bar, while there was some evidence led regarding the appellant's unemotional demeanour when speaking about Ms. Hunter's murder to police and her friends, the vast majority of the post-offence conduct presented at trial was not demeanour evidence, and its admission did not impact trial fairness.

214 I have no doubt that if Ellis repeats what he said in his statement about Riley's demeanour, it is admissible. We are concerned here with evidence of anger. Evidence that a person was angry is far different than evidence that a person was unusually calm. Anger is ambiguous neither in its nature, nor in its significance. Identifying, and attributing meaning to unusual calm is much different than identifying and attributing meaning to anger. Moreover, an emotional response to an allegation of wrongdoing is more likely not to be easily understood by an observer than is an emotional response to information in a newscast. Finally, the circumstances surrounding the anger testified to by Ellis, including the word spoken by Riley, make its meaning clear. The evidence is sufficiently unambiguous and demonstrative of a relevant state of mind so as to overcome concerns that the triers of fact may too easily equate Riley's reaction with a guilty mind.

215 The accused also took issue with certain descriptions of the demeanour of the accused testified to by Ellis at the preliminary inquiry. I will consider these descriptions next.

216 Ellis testified that at 6:30 p.m. on the day of the Charlton and Bell shooting, he observed Riley driving a dark Pathfinder, with Atkins and Wisdom as his passengers. Riley dropped Wisdom off near 4311 Kingston Rd., close to where Ellis was standing. Wisdom walked over to Ellis and spoke to him. Ellis said that Wisdom seemed jumpy and fidgety, and more upbeat then usual. They then walked together to Maxine McPherson's apartment. Later that evening, while still at the apartment, Wisdom told Ellis that he, Riley and Atkins had shot Charlton and Bell.

217 In my view, this evidence of Wisdom's demeanour is sufficiently unambiguous and demonstrative of a relevant state of mind so as to overcome concerns that the triers of fact may too easily equate Wisdom's demeanour with a guilty mind. In fact, given that Ellis says that Wisdom confessed to him soon after, any concern that there might be about the misuse of this demeanour evidence shrinks to virtual insignificance.

218 Ellis also testified about Riley's reaction to the television broadcast of the Charlton and Bell shooting on the night of the shooting that he had earlier described in one of his statements to the police. On this occasion, Ellis described him as saying "what the fuck, what the fuck," shaking his head and looking stressed and confused. He also said that Riley was "thinking real hard," and that he was "grabbing his head, he was just sitting there and thinking really long to himself," and that he was

"fidgety, yeah, he was frustrated. He seemed like he was confused. Like he was going through a lot of — he was just thinking, his mind was racing a lot."

219 Admittedly Ellis went a bit too far when he said that Riley was "thinking real hard," and that "his mind was racing a lot," undoubtedly because he was being pressed by counsel to provide a detailed description. But overall, if this turns out to approximate Ellis's description of Riley's demeanour at trial, I am satisfied that it is sufficiently unambiguous and demonstrative of a relevant state of mind so as to overcome concerns that the triers of fact may too easily equate Riley's demeanour with a guilty mind.

Disposition

220 In these reasons, I have ruled on the admissibility of evidence of certain transactions impugned by the accused, and have developed principle that will apply to a variety of categories of evidence. I expect that counsel will be able to extrapolate from these principles the admissibility of many of the items that they have raised that I have not dealt with specifically. To the extent that they cannot, I have asked counsel to make their own effort to reconsider their hundreds of objections, and to each prepare a list of those that they feel are not covered by my ruling or that they are in doubt about, identifying in a few words the precise basis for the objection or the reason that they are in doubt. I will expect to receive copies of those lists prior to the date when this case is scheduled to continue, and will undertake the exercise of considering those remaining issues at that time.

Application granted in part.

Footnotes

1 In *R. v. Vetrovec* (1982), 67 C.C.C. (2d) 1 (S.C.C.), the Supreme Court of Canada provided guidance concerning the circumstances in which a trial judge must give the jury a warning about the danger of convicting on the basis of the unconfirmed evidence of untrustworthy witnesses. For that reason, I will refer to such witnesses, of which there are several in this case, as Vetrovec witnesses.

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