

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Howe*, 2017 NSSC 177

Date: 2017-06-27

Docket: CRH No. 441632

Registry: Halifax

Between:

Her Majesty the Queen

v.

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

LIBRARY HEADING

Judge: The Honourable Justice Peter P. Rosinski

Heard: November 22 – 29, 2016, and December 8, 2016, in Halifax, Nova Scotia

Final Written Submissions: April 10, 2017

Written Decision: June 27, 2017

Subject: Admissibility of audiotaped police statement of alleged victim regarding criminal organization offences

Summary: R.M. wished to start his own local three-piece patch motorcycle club. Allegedly, Mr. James, a Sergeant at Arms of the local chapter of the Bacchus Motorcycle Club, intimidated and threatened R.M. from starting a club of his choice. However, R.M. set in motion the creation of a Halifax chapter of the Brotherhood MC, a Montréal-based recreational motorcycle enthusiasts club. Shortly after this became known to the Bacchus Motorcycle Club, R.M. was allegedly threatened at a public event, by two other members of the local chapter, Mr. Howe, with Mr. Pearce by his side. R.M. sought police assistance as he was fearful for himself and his

family. He provided an audiotaped statement to police detailing his contacts with Mssrs. James, Howe and Pearce. At trial, the Crown requested a *voir dire* to determine the admissibility for the truth of its contents of R.M.'s audiotaped statement.

Issues:

- (1) Is the admission of the statement “necessary”?
- (2) Is the admission of the statement sufficiently “reliable”?
- (3) If provisionally admissible, does consideration of the probative value thereof, considered in relation to the prejudicial effect of its admission on the fair trial rights of the defendants require it to be excluded in any event?

Result:

The statement is admitted for the truth of its contents.

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

By the Court:

Introduction

[1] Every criminal case has a complainant or victim. It is not uncommon for witnesses to resile, in part or in whole, from the content of their prior statements.

[2] When Crown counsel is of the view that a witness is resiling from significant portions of the content of their prior statements, they may request that a *voir dire* be held. The purpose of the *voir dire* is to determine whether a prior statement of a complainant or victim should be admitted for the truth of its contents. Such statements may be admitted under the traditional hearsay exceptions, or upon the Crown's demonstrating that the statement is reliable enough for consideration by the trier of fact, and that its admission is "necessary" for the court have a proper appreciation of the alleged facts in the case.

[3] In this case, R.M. is the complainant. He has testified on various occasions throughout the proceedings. The Crown argues that his September 16, 2012, audiotaped statement to the police should be admitted for the truth of its contents. The defendants vigorously disagree- they say that the statement is not reliable, and more significantly, that it is not "necessary" because R.M. has testified in a sufficiently fulsome manner.

[4] For the following reasons, I conclude that the statement, in whole, is admissible – it is both reliable and "necessary" as required by the jurisprudence, even after consideration of its probative value versus prejudicial effect on the fair trial rights of the defendants.

Background

[5] R.M. intended to start his own "motorcycle club" (MC) with some acquaintances. It was to be a "three-piece patch" MC – that is, the club would have a distinctive name; a logo; and a territory (eg Halifax) from which it would draw its membership, with the initials "MC" visibly sewn onto leather motorcycle riding garments to identify the wearers as being members of the club.

[6] I will summarize the allegations as I understand them, which are largely drawn from R.M.'s police statement given September 16, 2012.

[7] Between January and September 2012, R.M. says, he had numerous contacts with Patrick James, who he believed was the Sergeant at Arms for the Bacchus Motorcycle Club (BMC), and from whom he believed he must seek approval. R.M. has no criminal record and no apparent criminal inclination. The Crown position is that BMC is a criminal organization. Furthermore, they say that Mr. James intimidated and threatened R.M., with the intention and effect of dissuading him from forming a local motorcycle club. Between June and August 2012, R.M. also had discussions with the “Brotherhood MC”, a Montréal-based recreational motorcycle club. They agreed to him starting a “Brotherhood” chapter in Halifax. R.M. and took active steps to do so, including payment for the production of a “Halifax” chapter Brotherhood, three piece “patch” to represent, and be publicly worn by, members of his local club. The components of that patch were sewn onto the leather garments of R.M. and his acquaintances. Within a week of photos of those garments being posted on Facebook, however, R.M. had turned over all of those leather garments displaying the Halifax chapter “Brotherhood” patch to the control of Patrick James. R.M.’s belief was that only thereby could Patrick James/BMC be satisfied of the destruction of the jackets/vests and those patches which Mr. James/BMC would not tolerate being worn in Nova Scotia. The Crown alleges that R.M. only did this at the insistence of Mr. James/BMC. Having done so, R.M. believed he had made amends for his perceived disrespect to BMC, without getting their express approval for his attempting to start a “Brotherhood” chapter in Nova Scotia.

[8] On September 14, 2012, R.M. encountered BMC members Mr. Howe and Mr. Pearce at a charity event attended by many motorcycle enthusiasts, as well as four other members of BMC also wearing their BMC regalia. It is alleged that Mr. Howe, with Mr. Pearce aiding or abetting him, threatened R.M., and that R.M. was led to believe that BMC had decided he was no longer permitted to ride a motorcycle anywhere in Nova Scotia due to his disrespect to BMC in starting a Brotherhood chapter. R.M. took the threatening words and behaviour very seriously. He contacted the RCMP, and in the late evening on September 15, 2012, Cpl. David Astephen and Sgt. Steven MacQueen spoke to R.M. and family members at his home about his options. On September 16, 2012, R.M. gave a two-hour audiotaped police statement regarding his contacts with Patrick James, members of the Brotherhood, and what happened on September 14, 2012, between himself and Mssrs. Howe and Pearce.

[9] R.M. has testified numerous times in relation to the allegations before this court. The Crown argues that, although R.M. has not entirely resiled from the

contents of his police statement, which they say is “reliable” evidence, he has sufficiently neutered important aspects thereof, such that its introduction as an exception to the hearsay rule is “necessary” to permit the court to have a proper appreciation of the facts relevant to the allegations. I agree. I will now explain why.

The legal principles relevant to determining whether R.M.’s police statement is “reliable” and “necessary”

[10] In *R. v. Lawlor*, 2015 ONSC 6700, Justice Kenneth Campbell succinctly described the general considerations in determining whether a previous statement of a witness may be admitted at trial for the truth of its contents (some citations omitted):

35 While the jurisprudential development of the principled approach to the admissibility of hearsay evidence has greatly expanded the admissibility of such evidence, based upon the principles of necessity and reliability, such evidence remains presumptively inadmissible, with the onus cast on the party tendering the hearsay evidence to establish its admissibility on a balance of probabilities...

36 The courts have made it clear that on the issue of necessity, the relevant question is not whether the admission of the tendered hearsay evidence is necessary in an absolute sense, but rather whether the hearsay evidence is reasonably necessary in the circumstances. In this context "necessity" has been given a broad and flexible definition capable of covering diverse factual circumstances. As Lamer C.J.C. observed in *R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 933-934, the required necessity may arise where: (1) the person whose hearsay assertion is tendered is dead, out of the jurisdiction, insane, or otherwise unavailable; or (2) where the hearsay assertion is such that it is unreasonable to expect to obtain evidence of the "same value from the same or other sources."...

37 On the issue of reliability, the courts have made it clear that the relevant question is not whether the tendered hearsay evidence is actually true, or even probably true, but whether the evidence is sufficiently reliable to justify its admission for consideration by the trier of fact. In *R. v. Khelawon*, the Supreme Court of Canada confirmed the importance of the distinction between threshold and ultimate reliability. Charron J., delivering the judgment of the court, at paras. 2-4, 49-55, 61-66, held that the reliability requirement will generally be met in two situations: (1) where the circumstances in which the hearsay statement came about are such that there is no real concern about the reliability of the statement, and contemporaneous cross-examination of the declarant would add little if anything to the process; and/or (2) where there is no real concern about the hearsay form of the statement because its truth and accuracy can be sufficiently tested by means other than contemporaneous cross-examination...

Why the court is satisfied that the Crown has demonstrated that the police statement of R.M. is reliable.

[11] The alleged offences took place between January 1 and September 15, 2012. Mr. James had direct contacts with R.M. between January 1 and approximately August 31, 2012. Mssrs. Howe and Pearce had no significant contact with R.M. except on September 14, 2012.

[12] R.M.'s audiotaped and transcribed 91-page statement was given to (then) Cpl. Astephen at the RCMP detachment between 2:30 – 4:30 p.m. on September 16, 2012. R.M. had a very detailed recollection at that time regarding the allegations against the defendants and BMC. Not once did R.M. claim to have no recollection in relation to any of the allegations. To the extent that R.M. claimed while testifying that he had no reliable recollection of material facts, I am fully satisfied that the prerequisites of the doctrine of “past recollection recorded” have been met in this case—those portions of R.M.'s audiotaped police statement are properly seen to be an exception to the inadmissibility of such hearsay: *R. v. Louangrath*, 2016 ONCA 550, at para. 43.

[13] R.M. sought out the advice of the RCMP, regarding his options, given the very serious concerns he had for his own, and his family members', safety.

[14] While in the company of his close family, and in his home, for approximately 2 ½ hours, R.M. spoke with Cpl. Astephen and Sgt. MacQueen in the late evening of September 15. He recounted to them the generalities of what he then detailed more specifically in his September 16, 2012, statement.

[15] In my earlier decision on the s. 7 Charter *voir dire* (2016 NSSC 151, at para. 95) I found that the officers advised R.M. that his two basic options were to do nothing and take his chances on what, if anything, more BMC members might do to him/his family; or to provide the police with his statement, and they would investigate the matter, which would likely lead to charges, and that they would do their best to protect R.M. and his family should he decide to go this route. I have herein carefully considered the *viva voce* testimony of Cpl. Astephen and Sgt. MacQueen given in this *voir dire* (which by agreement is to be applied as their trial evidence). Their evidence is consistent with that given during the s. 7 Charter *voir dire*. I find them both credible herein as well.

[16] R.M. confirmed to the officer on the morning of September 16, 2012, that he wanted to give a statement that day. At 2:00 p.m., he arrived in his own vehicle at the RCMP detachment. He had called ahead to request permission to drive directly into the garage so his car would not be seen sitting in the parking lot. Upon entering the building, he noticed what he considered an unusually large presence of plain-clothed and uniformed RCMP personnel present for a Sunday. He was at that time still a member of Citizens on Patrol, an auxiliary volunteer group overseen by the RCMP.

[17] The defendants remind the court that R.M.'s statement was not videotaped; he was not sworn; and nor did the police warn him of possible sanctions if he was untruthful, or expressly reiterate to him the importance of telling the truth. I am satisfied, however, that the solemnity of providing a formal police statement was well apparent to R.M. that day. He fully understood how important, and why, it is to tell the truth in a police statement. He was aware that he was being audio-recorded, and that the Cpl. Astephen was also concurrently taking handwritten notes.

[18] Although no oath or affirmation preceded R.M.'s giving the statement, at the end thereof there is the following exchange between he and Cpl. Astephen:

Q- Is everything that we talked about today true and accurate to the best of your knowledge?

A- A hundred percent.

Q-Is there anything at this time that you wanted to change or add to what we talked about?

A- Not right now off the top of my head. Everything that I did say, I did tell you to the best of my ability without changing anything.

Q-If at any point while I'm looking into this and investigating it, if I have more questions about this to clarify, do you mind me coming to see you, or calling you and talking to you about this again in the future?

A-... Call me first. Come to my house. You're welcome any time.

[19] R.M. did have continued cooperative contact with the RCMP thereafter, and confirmed that he was in agreement with the laying of charges against the defendants on or about September 19, 2012.

[20] At no point did he contact the RCMP or the Crown Attorney's office to change the contents of his September 16, 2012, statement. He was consistent during his testimony throughout these proceedings that he was telling the truth to

the best of his ability when he gave his statement. I find he had no motive to fabricate or exaggerate the contents of his police statement. I find that the events described therein were sufficiently fresh in his mind, as evidenced by his lengthy, detailed, and consistent recitation of what he says happened.

[21] R.M.'s statement was audiotaped, and that is the "best evidence" here. Listening to that tape brings life to the words that one finds in the transcript. It is evident that Cpl. Astephen allowed R.M. great latitude in expressing himself without interruption, in response to non-leading questions. Listening also gives one a sense of R.M.'s demeanour in giving his statement. He is conversational, yet serious and conscientious as to detail and the accuracy of what he is saying. On a number of occasions his emotions are apparent. The emotions are appropriate responses given the circumstances, and indicative of the seriousness with which he is giving his statement. His statement is internally consistent, and responsive in a measured manner to the questions being asked.

[22] Some of R.M.'s statement contents are directly corroborated:

- i. His recounting of the events of September 14, 2012, were generally testified to at trial by other witnesses who were present: the court permitted as admissible the audiotaped preliminary inquiry evidence of HJ in substitution for him testifying in person; the testimony of JJ, BE and ME;
- ii. His statement is consistent with text message conversations between R.M. and Patrick James as evident on R.M.'s telephone on September 16, 2012 – p. 37(4) of his statement.

[23] In *R. v. Baldree*, 2013 SCC 35, Justice Fish identified five concerns that he characterized as "difficulties inherent in testing the reliability of the declarant's assertion" and the basis for why hearsay evidence is presumptively inadmissible: "apart from the inability of the trier of fact to assess the declarant's demeanour in making the assertion, courts and commentators have identified four specific concerns. They relate to the declarant's perception, memory, narration, and sincerity..." (*Baldree*, at para. 31. See also Justice Doherty's comments in *R. v. Dupe*, 2016 ONCA 653, at para. 44).

[24] I am satisfied that those difficulties are not present in this case in any material way.

[25] In *R. v. Youvarajah*, 2013 SCC 41, Justice Karakatsanis, speaking for the majority, stated:

[22] Where a witness recants from a prior statement, necessity is established: *Khelawon*, at para 78.

...

[28] In *KGB* at p. 787, Lamer CJ stated that the focus of the reliability inquiry when dealing with prior inconsistent statements, “is on the comparative reliability of the prior statement and the testimony offered at trial, and so additional indicia and guarantees of reliability... Must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.”

[29] Accordingly, Lamer CJ held, at pp. 795 – 96, that a prior inconsistent statement of a non-accused witness may be admitted for the truth of its contents if the so-called *KGB* reliability indicia are met (1) the statement is made under oath or solemn affirmation after a warning as to possible sanctions if the person is untruthful; (2) the statement is videotaped or recorded in its entirety; (3) the opposing party has a full opportunity to cross-examine the witness on the statement...

[30] However, the *KGB* indicia are not the only means of establishing threshold reliability. The prior inconsistent statement’s threshold reliability may be established by: (1) the presence of adequate substitutes for testing truth and accuracy (procedural reliability); and (2) sufficient circumstantial guarantees of reliability or an inherent trustworthiness (substantive reliability): *Khelawon*, at paras. 61-63. These two principal ways of showing threshold reliability are not mutually exclusive: *R. v. Devine*, 2008 SCC 36... at para. 22.

[26] R.M. has been repeatedly available for cross-examination by the defendants during these proceedings, so much so that on December 8, 2016, they confirmed that R.M. was not required to come back for any further testimony as I could consider all the trial evidence to date as *voir dire* evidence, including that of R.M. R.M. also reached out to, and made himself available to the defendants’ private investigator and gave another recorded statement, the contents of which is unknown to the court, and was only revealed to the Crown on November 28, 2016 (p. 450, trial transcript).

[27] In examining all the relevant circumstances, particularly the circumstances of the taking of R.M.’s police statement, and those relating to my present ability to properly evaluate this hearsay, including the opportunities for cross-examination, I am very satisfied that it is more probable than not that the police statement exhibits

sufficient indicia of reliability so as to afford me, as trier of fact, a satisfactory basis for evaluating the truth of the statement.

[28] The reliability criterion is amply satisfied.

Why the court is satisfied that the Crown has demonstrated that the police statement of R.M. is “necessary”

[29] On September 14-15, 2012, R.M. sought out the RCMP for advice on how to handle what he considered was a very serious situation, given his belief, that the membership of BMC had taken aim on him, as a result of his efforts to start a local motorcycle club.

[30] In order to assess whether it is more likely than not that R.M.’s police statement is “necessary”, it is helpful to examine what statements he provided, and the nature and extent of his court testimony to date.

(i) R.M.’s audiotaped police statement given September 16, 2012

[31] He met with (then) Cpl. Astephen and (then) Sgt. MacQueen at his home on the evening of September 15. On September 16, he attended at approximately 2:00 p.m. at the RCMP detachment, and provided his audiotaped statement to Cpl. Astephen. While the audio tape thereof is the best available evidence, a transcription, considered generally accurate by all parties, was entered as exhibit VD1-3.

[32] On September 19, 2012 the RCMP effected arrests and searches in relation to the allegations that R.M. had made against BMC and the individual defendants. Charges followed.

(ii) R.M.’s statement given to a private investigator (hired by the defendants) on December 5, 2013

[33] Before December 5, 2013, R.M. reached out through his own legal counsel, and provided a statement to a private investigator hired by the defendants. He did not make the police or Crown counsel aware of this until much later (see pp. 450 – 51 and 608 – 610, trial transcript). Only after my November 28, 2016 ruling was the Crown provided a copy.

(iii) R.M.’s testimony at the preliminary inquiry - December 10 – 11, 2013

[34] R.M. testified at the preliminary inquiry on December 10 and 11, 2013 (pp. 29 – 152, transcript: direct examination). The Crown at that point sought to have his police statement admitted under the past recollection recorded exception to the hearsay rule, as well as under the principled exception to the hearsay rule, requiring proof that it was more likely than not that his police statement was “reliable” and “necessary” (p 153(16)).

[35] A *voir dire* was held in which Cpl. Astephen and Sgt. MacQueen both testified. R.M.’s testimony to date at the preliminary inquiry was included as *voir dire* evidence by consent (pp. 385(15) and 386(6)). R.M. also testified on direct examination by the Crown (pp 395-420). He was cross-examined by defendants’ counsel (pp. 421-506), and examined in redirect by the Crown (pp 507-519). The Crown called no further evidence, and the defence called no evidence.

[36] In her May 29, 2014, decision, Judge Buchan, concluded that R.M.’s police statement was admissible under the principled exception to the hearsay rule:

A comparison of the *viva voce* testimony of R.M. during the *voir dire* to the statement to the police reveals a variety of contradictions and inconsistencies, albeit R.M. testified that he was being truthful to the best of his ability when giving a statement to the police. During his testimony, he stated frequently that he had no memory or a faulty memory of certain events that he had previously described to the police in detail during his statement to them. Throughout his testimony in the *voir dire* R.M. would distance himself from what he had said in a statement (p. 4, May 29, 2014) ... On the *voir dire* R.M. could not remember many of the events nor much detail of many of these events which he had related to the police during the giving of a statement, while at the same time testifying that he was being truthful to the best of his ability when giving his statement to the police. The quality and extent of his recall of events in his statement is in clear contrast to the quality and extent of his limited recall of the same events in his testimony during the *voir dire*. Therefore, on the criterion of necessity, I am satisfied that the evidence of R.M. at the *voir dire* falls into that second category of necessity referred to by Chief Justice Lamer in *Smith*, and, as such, one could not expect to get evidence of the same value from the same or any other source. (p. 9)

[37] To summarize, at the preliminary inquiry R.M. testified as follows:

1. December 10 – 11, 2013 (pp. 29-152) in direct examination for the Crown, until the Crown requested (p. 153(16)) that his police statement be admitted under the past recollection recorded exception

to the hearsay rule (as well as the principled exception to the hearsay rule);

2. The *voir dire* commenced, and the Crown called then Cpl. Astephen and Sgt. MacQueen (pp. 171-381);
3. Counsel agreed that R.M.'s testimony to date at trial should be included as *voir dire* evidence (p. 385(15) and 386(6));
4. R.M. testified in direct examination for the Crown (pp. 395-420);
5. R.M. was cross-examined by the defendants' respective counsel (pp. 421-506) followed by Crown redirect examination (pp. 507-519).

The *voir dire* ended, and the defence called no evidence.

6. After Judge Buchan permitted R.M.'s statement to be entered for the truth of its contents, in the hearing proper, he was further cross-examined by the defendants' counsel.

(iv) *R.M.'s testimony as the sole witness for the defendants at the s. 7 Charter/abuse of process application: May 19 – June 1, 2016*

[38] The defendants were committed to stand trial on July 13, 2015. They made a pre-trial motion in this court, arguing for a judicial stay of proceedings or exclusion of evidence which would effectively terminate the prosecution, based on alleged violations of s. 7 of the *Charter of Rights and Freedoms*, and as an abuse of process and trial unfairness. In summary, they argued that the police were negligent in not taking a full statement from R.M. on September 15, 2012, rather than September 16, 2012, and that they intimidated R.M. to give a statement against the defendants and BMC, by exaggerating the threat that the latter posed to R.M. Their application was denied – *R. v. Howe*, 2016 NSSC 151.

[39] Notably, the defendants called only one witness in support of their case on the pretrial motion- namely R.M. The defendants sought an advance ruling from the court that they should be entitled to cross-examine R.M., as he would be hostile to their position. Their application was ruled premature and denied - *R. v. Howe*, 2016 NSSC 140.

[40] R.M. testified on May 27, 2016. On the disputed discrete factual issues in that motion, I concluded that R.M.'s relevant testimony was "insufficiently reliable", and that the testimony of the Crown witnesses, Cpl. Astephen and Sgt.

MacQueen was “more reliable, where a conflict in the evidence exists between them and R.M.”.

[41] On that occasion, having observed R.M.’s manner of giving his evidence, his choice of words, and the content of his answers in relation to the questions asked, particularly by the Crown attorney, I got the distinct sense at times that he was being purposefully vague, or was only purporting not to recall matters that he had described in his September 16, 2012, police statement and that would tend to be unfavourable to the interests of the defendants or BMC, in contrast to a similar examination of his answers in response to questioning by the defendants’ counsels.

(v) R.M.’s testimony at the trial proper – November 22 – November 29, 2016

[42] R.M. also testified at the trial proper, in November 2016: November 22 (Crown direct), 23 (direct), 25 (Crown cross-examination, after successful s. 9(2) *Canada Evidence Act* application by the Crown), 27 (continued Crown cross-examination), 28 (Crown direct continued) and 29 (defendants’ cross-examination, and Crown re-direct).

[43] At my direction, the Crown particularized what portions of the September 16, 2012, police statement it alleged were inconsistent with R.M.’s testimony at trial. After receipt of those in writing, at 7:49 a.m. on November 24, 2016, I gave further directions as to which of those the court considered to be inconsistent, and therefore only to that extent could R.M. be cross-examined thereon - see *R. v. Marshall*, (1982) 8 CCC (2d) 329 (NSCA) at para. 52, and *R. v. Venoit*, 2011 NSCA 120, at para. 30.

[44] I permitted the following references in his police statement to be put to R.M. in cross-examination (as verbatim identified by the Crown in its email to the court):

1. Page 6 (4-13) – the statement discusses how the Bacchus are the power down here. They are an elite group. They rule the area that they are in.

In his testimony, R.M. indicated that he talked to a number of clubs. He mentioned speaking to other clubs and indicates the Gatekeepers as a big club as well. None of this is indicated in his statement. He describes the Bacchus has having knowledge of the colours of other motorcycle clubs, but does not acknowledge their authority.

2. Page 11(18-21) - R.M. indicates that Patrick James is concerned that it is going to appear that Montréal is moving in on this territory.

In his testimony, R.M. indicates that trouble will be caused, but resists saying that it is a “territory“ issue.

3. Page 13 (1-10) - R.M. discusses the needing the approval of the Bacchus and Pat James indicates the club trusts his opinion.

In his testimony, R.M. discusses the “community of bikers” and indicates that Patrick James is not acting on behalf of the club.

4. Page 14 - R.M. discusses dealing with the Bacchus and being told that they didn’t think this was going to be approved

In his testimony, R.M. discusses that this would not go over well with the community of bikers.

5. Page 15 - R.M. discusses that they don’t want an outside club coming in – the reference is to the Bacchus.

In his testimony R.M. discusses the community of bikers.

6. Page 16 – R.M. clearly discusses being told that he is not going to be doing this and that’s it. That the club trusts Pat James opinion. Bacchus does not want a chapter here.

[R.M.’s] testimony discussed the community of bikers not the Bacchus, and being told that the community would not like it, not that the Bacchus does not want to chapter here.

7. Page 19 (11) - page 23- [R.M.] describes the situation as going to DEFCON 3. He is told he is not in a very good position – this could be very dangerous – we have informed “Albert County” of this. I am trying to keep it local so it doesn’t go out of hand. It’s not going to be good. A lot of people at the club are going to be upset. They don’t want it. R.M. indicates that it could be bodily harm. He is told that if he shuts it down nothing bad will happen.

In his testimony, R.M. talks again of the community of bikers. He mentions feeling different things. Pat James' seriousness may have caused him to have a threatening feeling. No mention of being told he is in danger – his feeling of impending bodily harm. This is inconsistent with his statement. He also doesn't know what "Albert County" is and believes it is the local chapter.

8. Page 36 – 45 [Mr.] James tells R.M. that he will show up every day at his office. He indicates he is scared. James says "what the fuck were you thinking? I fucking told you that you were not having a patch. Do you know what kind of shit you started?" R.M. indicates that he almost shit himself. R.M. asks if Albert County [allegedly the New Brunswick mother chapter of the BMC] knows about this. R.M. is told that they were looking for them because the patches were coming off their backs. [on their return after the weekend of August 25, 2012, when R.M. and his acquaintances had flown to Montréal to formally acknowledge and celebrate their joining the Brotherhood]. You disrespected us. Might as well have told us to go fuck ourselves. R.M. is very scared. Do you understand the seriousness of the situation and what's going to happen? This is your only chance. You got a whole bunch of trouble right now. R.M. went into panic mode. His wife and family are at risk. It is a very bad thing. Cutting up the patches is the only way to save our asses.

R.M. testifies that the incident left him with conflicting emotions. He does not indicate that he was scared. He does not reference that the Bacchus club is upset with him. Again there is this notion of the community of bikers. He testified that he doesn't know what "Albert County" is. This is obviously inconsistent with the account in his statement.

9. Page 46 – 47 – [Mr.] James talks of dropping by his office again which scares the shit out of him. James tells him that cutting up the patches is the cost of doing business.

R.M. does not indicate that he was scared. He indicates the cutting up the jackets instead of just the patches is what is done as opposed to being told by James that it is the price for his actions.

10. Page 49 – 50 – R.M. discusses "church", with details of their meeting schedule and the[local] Bacchus president being called to Albert

County. He had the fear of God put into him. His wife is scared that he is going to get killed.

R.M. does not indicate that he is scared. Does not know what “Albert County” is and has little knowledge of church beyond that being their meetings. He is not consistent with the notion that the “community of bikers” is upset with him.

11. Page 56 – 59 -- the only reason **we** don't kick the shit out of you is there are too many people around. R.M. was scared but didn't want to show it. What makes you think you can disrespect **us**? **We** don't want you anywheres in Nova Scotia. R.M. is scared shitless. I'm scared, I need an escort home.

R.M. again indicates that he had conflicting emotions, including anger. He does not mention anger in a statement. He does not mention the level of fear. He testified in the singular not the plural. He did not recount the same level of threats as in his statement. He indicated that he stayed at the function for 20 minutes after the confrontation.

12. Page 62 – 64 – the statement recounts more discussions about threats uttered in the plural as in “before we beat the shit out of you”, etc. The full patch from Montréal is also discussed again. R.M. is scared.

Again, R.M. does not testify in the plural. He does not “remember” and is unable to recount these levels of threats.

13. Page 66 – 67 – I just wanted to get the hell out of there. He reacted right away to get me out of there.

R.M. testified that he stayed at the event for 20 minutes after the confrontation. This is mentioned nowhere in his statement.

14. Page 88 – discussed church meeting from his conversations with the Bacchus. Indicated he didn't want to go to the Bacchus Clubhouse because he was concerned for his safety there.

His knowledge of the meetings as expressed in his testimony is inconsistent with his statement. He indicated that the only reason he didn't want to go to the clubhouse is because he didn't have enough members [he believed that six are required to form a motorcycle club].

15. Page 89 – 90 - he was acknowledging my family was involved. I think I'm going to get killed. I'm scared for my life. That's why I came to you guys. I just wanted it to stop and them leave me and my family alone.

He did not acknowledge a threat to his family. His fear was not recounted in his statement. He stated that the first reason that he hasn't gone to any biker events was because of the RCMP. This is inconsistent with the statement.

R.M. indicated that he did not remember or could not refresh his memory in relation to most of the areas noted above. Lack of memory can be found to be an inconsistency.

[45] In his continued testimony, R.M. reiterated, as he has consistently done throughout, that he was attempting to be truthful in his police statement of September 16, 2012. At p. 297(14), testimony transcript:

Q - Were you being truthful when you gave that statement to the police?

A - Was I being truthful?

Q - Yeah

A - Yes

Q - Pardon me, what was your answer, sir?

A - Yes

[46] At the trial proper, after cross-examination and direct examination of R.M. by the Crown, cross-examination by the defendants, re-direct examination by the Crown, and the examination by the court, the Crown confirmed that it remained ready to make a *Khelawon* application to have R.M.'s police statement of September 16, 2012, admitted into evidence for the truth of its contents.

The position of the defendants

[47] The defendants argue that R.M.'s statement is not sufficiently different from his testimony in court (e.g. see the ten-point detailed responses to the Crown's ten points, in Mr. James's brief), that it can be said to be "necessary" to allow it to be admitted at trial for the truth of its contents. They point out that R.M. did not recant or disavow the earlier statement. In summary, they say:

The fact that the defence made inroads with the Crown's witness in cross-examination cannot result in the witness' prior statement being admissible... The

reliability of some of his evidence was challenged and reduced, the surrounding circumstances of the information provided in the statement and direct testimony were questioned and further information was elicited that cast the case in a different light. This is a normal part of the criminal trial. The Crown seeks to introduce a statement which it sees as the most consistent with its theory of the case despite the explanations given by [R.M.].

[Mr. James's April 2, 2017 brief]

This is a situation where a witness has recanted their direct testimony on cross-examination.... The facts which the Crown seeks to introduce via the out-of-court statement were already provided in [R.M.'s] *viva voce* evidence during direct testimony, and during the Crown's cross-examination pursuant to s. 9(2) of the *Canada Evidence Act*.

[Mr. Howe's March 31, 2017 brief]

A closer examination of why the “necessity” criterion has been satisfied

[48] Importantly, I keep in mind that hearsay evidence, once admitted for the truth of its contents, may be notionally properly characterized procedurally as the direct evidence of the declarant, particularly where the declarant is available to testify – *R. v. Dionne*, 2004 ABCA 400, at para. 8. Thus, the defendants are correct to point out that my focus in assessing whether the “necessity” criterion has been satisfied regarding R.M.'s police statement, must be focused upon the extent and quality of the comparator direct evidence (including Crown cross-examination of him) given by R.M. at trial.

[49] Although courts have commented that it is the unavailability of the witness's direct testimony that underlies a proper finding of “[reasonable] necessity”, it must be remembered that the *raison d'être* of the necessity criterion is society's interest in getting at the truth, and it is to be given a flexible definition - *R. v. Khelawon*, 2006 SCC 57. In *R. v. Napope*, 2015 ABCA 27, the court stated at para. 28:

Necessity may thus arise in many different types of situations. That includes the situation where the witness recants;... the necessity of adding significant details, repudiation, the absence of memory, claimed memory loss, agreeing a statement must have been truthful without recollection of underlying events; or a situation where the witness admits to making a statement but refused to state whether it was true or false, are all additional situations in which necessity may arise.

[50] While neither the defendants or the Crown mentioned it in their briefs, I keep in mind that the court has a residual discretion respecting, and therefore an obligation to consider, the exclusion of otherwise admissible evidence if its

probative value is overborne by the prejudicial effect to the fair trial rights of a defendant.

[51] The Crown also provides specific examples arising during the cross-examination of R.M. by the respective defendants' counsel, in support of its argument that R.M.'s testimony is sufficiently inconsistent with his police statement to be considered "necessary", in its helpful brief [see the 10 point listing in the Crown's March 13, 2017 brief, at pp. 15-20].

[52] In *R. v. WJF*, [1999] 3 S.C.R. 569, at para. 31, McLachlin J. (as she then was), stated for the court that hearsay evidence may be necessary "to enable all relevant and reliable information to be placed before the court so justice may be done."

[53] Cases bearing similarities to this one, have permitted as "necessary" prior statements of witnesses whose evidence, despite reasonable efforts, is otherwise unavailable, and where permitting the hearsay evidence is the only reasonable way to get reliable information about a necessary fact before the court, where the interests of justice are better served by admitting the evidence:

- i. *R. v. EJF (Fleet)*, 2001 NSCA 158, at paras. 36, 54-55;
- ii. *R. v. Dionne*, 2004 ABCA 400, at paras. 4-5 and 9-10;
- iii. *R. v. Thomas*, 2009 MCBA 85, at para. 21 and 29;
- iv. *R. v. Kopalie*, 2009 NUCJ 8, at para. 22:

The witness was clearly resisting the requirement to testify for unknown reasons. The charge was a spousal assault as was the previous situation where the complainant had recanted.... It is reasonable to infer that the complainant avoided court because she was fearful of retaliation. In an extensive review of the necessity requirement, Romilly J. stated in *R. v. Adam*, 2006 BCSC 1355 [at para. 122]:

Without making any comment on the case before me, I do not believe that the test of necessity should provide an incentive for witness intimidation. To rule that necessity is not founded when a witness refuses to participate meaningfully in judicial proceedings would provide just such an incentive. The test is meant to operate flexibly, and I see no reason why necessity should not include circumstances where the witness refuses to assist the court.

- v. *R. v. Napope*, 2015 ABCA 27, at paras. 38-9, 41 and 51:

We observe that to accept defence counsel's argument on the admission of hearsay evidence would be to accept that the recanting witness can once again defeat the public's interest in prosecuting criminal behaviour, and hold the court hostage by simply refusing to answer questions at trial about the accuracy of statements earlier made... It would again put vulnerable witnesses at risk of being subject to the risk of threat or violence, or being misled by representations of affection, aimed at having them recant their evidence of criminal conduct at trial. These abuses were, in large measure, blunted with the introduction of the principled exception to hearsay in *Khan*.

vi. *R. v. Leland*, 2016 ONCJ 265, at paras. 13 and 39

vii. *R. v. Glowatski*, 2001 BCCA 678, at para. 29:

Necessity was clearly established by [the witness's] change in testimony. It was not material whether she was a recanting or merely a forgetful witness. Here I accept the Crown submission that the test for necessity is whether something had "radically changed between the time when the statement was made and the trial"... And indeed, something had changed dramatically in this case.

viii. *R. v. Palmer*, [2004] OJ 6291 (Sup Ct.) per Mossip J., at paras. 24 and 27:

In my view there is no difference in when the witness "holds the truth hostage" or recants from the evidence they have previously given in a KGB statement. Particularly, in the circumstances of this case, it would be a complete distortion of the evidence for the triers of fact to be left with snippets of the former KGB statement that came out both in chief and in cross examination and not to view the entire testimony in her statement, not see the demeanour in which Mrs. Palmer gave that statement, nor listen to the detail with which she gave that statement, in assessing the reliability and credibility of Hopie Palmer overall, and in weighing her trial evidence with her now prior inconsistent statement... If the Crown was not allowed to admit the KGB statement of Hopie Palmer... the jury would receive a completely distorted picture of the testimony of this witness.

ix. *R. v. Johnston*, 2014 BCCA 144, at paras. 31 – 32:

... [In testimony the witness] stated that he did have an independent recollection about some things and not about others. I have reviewed the testimony. It is somewhat chequered. I am not confident that the evidence establishes a

foundation to conclude that [the witness] had a sufficiently independent recollection to obviate the need to consider the admissibility of the KGB statement.

In any event, while concluding that [the witness] had some independent recollection, the trial judge relied on the statement in convicting the appellant. The appellant conceded that the threshold criterion of necessity was established.

[54] In this case, I am satisfied it is more probable than not that the admission of R.M.'s police statement is necessary because "something has radically changed between the time when the statement was made and the trial" [per Lamer CJ., in *R. v. KGB*, [1993] 1 S.C.R. 740, at p. 799], and the interests of justice are better served, if as part of the trial, I am allowed to weigh both the testimony and the statement of R.M..

[55] If R.M.'s police statement is not admitted into evidence, I find as a fact that, by having available only his direct evidence (including Crown cross-examination of him) at trial, I would be left with a significantly distorted picture of the relevant facts.

[56] While R.M. did display some signs of *animus* against the police and Crown [e.g. pp. 465 and 610, trial transcript, regarding what he considered "police dishonesty"; and his belief that the Crown attorney was asking him trick questions – pp. 178 and 643], this may be the result of how his relationship with the police evolved after he gave his statement – e.g. he testified that as a result of his closeness to the BMC and Patrick James, he was "stripped of all my credentials" associated with being a member of the Citizens on Patrol.

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

[58] As pointed out earlier, it would be a sad irony if, without cogent reasons, the court too readily refused to consider a fearful witness's reliable earlier statement inconsistent with their present testimony. As Justice Moldaver stated, albeit in dissent, in *R. v. Baldree*, 2013 SCC 35, at paras. 96 and 109, respectively:

... What we have said is that “necessity and reliability should not be considered in isolation” because “[o]ne criterion may have an impact on the other... Indeed we have recognized that “[i]n the interest of seeking the truth, the very high reliability of [a] statement [can render] its substantive admission necessary” (at para 86 *Khelawon*).

...

At bottom, the point is that the necessity criterion is not meant to stifle the admission of reliable evidence. Rather, it is “founded on society's interest in getting at the truth” (*Khelawon*, at para. 49). Necessity should be viewed as a servant of the truth, not its master.

[59] I now turn to an examination of R.M.'s direct evidence and the Crown cross-examination under s. 9(2) of the *Canada Evidence Act*, at trial. I believe a sampling of several of the representative suggested inconsistencies preceding the Crown's successful s. 9(2) application is indicative of a general trend in R.M.'s testimony.

[60] **1. Q** - Did [Mr. James] mention anything to you about the club [proposed by R.M.] being approved by the Bacchus?

A- to my recollection, that exact quote I can't say 100% definitely. He said that he would take it to the guys in the club and have them look at it, but as far as them approve it, may be. I... And it was more or less under the grounds to make sure that we weren't duplicating anybody... Well, you can't have two cars or two bike clubs named Mazda and they're both black... like the Ottawa Rough Riders and Saskatchewan Rough Riders.

p. 119-120 transcript

Q-I earlier asked you a question in relation to whether Patrick James had discussed approvals with you... Or the notion of your patch being approved and you indicated that you didn't recall those words. After having reviewed that portion, does that refresh your memory in relation to the notion of approvals being raised at your meeting with Mr. James?

A - in my statement here it does show... conversation alluding to approvals, absolutely.

Q-Does that refresh your memory?

A- of it actually happening? I can't say 100%.

Q-what can you say about it?... focus... on your meeting with Patrick James when you were still contemplating, at that point, getting a three-piece patch from the Brotherhood...

A- yeah, it refreshes my memory that a three-piece patch wasn't coming down here...

Q-what did Patrick James say to you then about it being approved or not?

A-in his opinion **he didn't think it would be approved by anyone in the biking community** because of the Montréal attachment which I think I explained earlier.

...

Q- did Patrick James mention... you've just discussed the general biking community. Did he mention about it not being approved by any specific clubs?

...

Q-... Did he reference any specific clubs providing approval in your conversation?

...

A-my recollection from that is what I get from my statement is that the three-piece patch would not be approved and it refers to the Montréal thing.

...

The Court – I guess the key question is, what is your present recollection as best you can determine it, which can be assisted by your actual statement from September 16, 2012?

A-and I think I answered that question. My best recollection I said that he was talking about the motorcycle clubs and the clubs in general and also his club, but at the same time I stated that there was a member of his club who was all for the idea and I think I answered that question”

pp 131 – 137 trial transcript

[61] **In his police statement, R.M. stated:**

A lot of the clubs around here just didn't appeal to us because they... we are business guys and you know, businessmen, and we just felt that we didn't want to... And I'm sorry if I say something bad about somebody but we didn't think we were part of the dirty aspect of that because we were business guys and we just loved our bikes and that kind of thing... So at a certain point, **we decided to start looking on the Internet to see what would be good clubs that, you know, support veterans, support, you know, different things, good organizations. And I found the Brotherhood in Montréal, Brotherhood. MC.** And they are big supporters of the veterans and of child autism and it looked like they seemed like good guys to us so I proceeded to contact them... So when I came back the initial guys said... We had a falling out, because they didn't really want to do certain

things... as in joining a club in that kind of thing. So I let it go..... From reading on the Internet... I guess **there's rules that happen that when you have to speak to, they call it, the dominant club of the area to get permission to have a patch... Bacchus motorcycle club here,...** I figured that might be a good time to approach the guy that I thought looked serious enough. His name was Pat James. And I came to understand after the fact that he was the Sgt. at Arms. I approached Pat and said... There's a few of us that are looking at starting up a motorcycle club... From that, **he stated to me that well when... really you have to come to the clubhouse and present what you're doing...** Through the fall and the winter I saw Pat different times and we met for coffee... Time and time again we talked. He said, well **are you ready to come out to the club?**... From everything that I... **being respectful to like Bacchus, because they are the guys that are in power down here. And everything that you read in the newspapers or online about motorcycles and that, there is an elite group, they're called "one percenters". And these guys rule the area wherever they are in. And they say what you can and what you can't to do. So I figured that's who I have to talk to, and that's why I talked to them because, you know, I didn't want any trouble...**

Q - And as a result of some of the research you do, you realized that you have to reach out to the Bacchus?

A - Yeah

Q - To get some **approval.**

A - Yes [see also his February 2012 and later springtime conversations with Pat James at pp. 9(18)- 15(21)]

pp. 3-7, R.M. statement.

[62] 2- [After speaking to Mr. James in February 2012, R.M. continued to seek a three-piece patch from the Brotherhood around June 2012 – see references at p. 106(22) to 107(17) and 111(2) to (16) and 139(1-7) and 147(10) trial transcript]

A- I started moving forward to get a three-piece patch done... **Word was given out that I was making a three-piece patch and I was contacted by Pat...** to meet for coffee and he said "what are you doing"? And I explained to him that I talked to Montréal... They thought it was okay to go ahead and do it. Then at that point in time Mr. James informed me that he told me **he didn't feel this was going to fly and by force handing a Montréal club here, it more or less isn't going to fly and it isn't going to be looked upon very greatly by anyone, let alone his club, any of the clubs down here.**

Q-And what was the demeanour of Mr. James at that point in time?

A- Direct

Q-... Did you find his behaviour threatening at all at that point in time?

A - at that point in time I didn't find it threatening... I was a little shocked that his... How serious he was of the fact that Montréal, that something from Montréal would not go well down here... Just being direct, that like this isn't going to work down here, I told you [R.M.], Montréal, three-piece patch, nobody's going to accept this, it's just not going to fly. There was too much shit with anything from Montréal. **It's not looked upon in the biker community as a very good deal what happened in Montréal years ago.**

pp. 140-141 transcript

[63] **In his police statement, R.M. stated:**

A-... In midwinter... and Pat said, well, you know, for that say, why would you go with an outside club? Why don't you join somebody like us? And I said... all due respect,... I'm not 1% material... I'm a business guy. I have a family, I can't do that kind of commitment... It's not me. It's not for me.

...

A-... So then it was coming up **around the end of June, and... When Pat said, "you're not going to be doing this and that's it. Forget about it." And I said, "well is that the club's opinion?" Again, he said, "that is my opinion and the club trusts my opinion and that's it. There is no three-piece patch."** So I call Montréal and I said, "it's not going to happen here. **Bacchus does not want me to have a chapter here"**

pp. 7(16)- 16 statement

[After consultations with the Brotherhood's main chapter in New York through its Montréal chapter around the July 1, 2012 weekend, R.M. received approval to have a three-piece Brotherhood patch]

A-... **Then word got out somehow. Bacchus found out that we were planning on getting a three-piece patch.** So when I sat down one day at Carl's place, Al, a Bacchus member... I don't know his last name... He sat down and had a lot of questions to ask me about the brotherhood because Carl sort of gave him a little background. And so I spent an hour or so talking to Al and trying to let him know that this isn't about bad stuff or drugs or territory. This is about me, local guy with some local guys wanting to get together, have a club and do things right and nice and work on a charity event that we can help out and help out other things like bikers down and that kind of stuff... But I was also explaining the position that Pat was giving me. And he was surprised at the time, because it was in his opinion, Al's opinion, that the more the merrier... And he couldn't understand why Pat would think that way, he said, but you know, you know, he said, I'm not one of the officers and that he said, but it hasn't even been brought to the club, really... So I thought that was kind of odd... **And then word got out somehow that... The patches were being made and we were going to go ahead and do**

an MC club. And then all of a sudden, it went from sunshine to black skies. It was like DEFCON 3 . I was getting texts and messages, more or less “what the heck are you thinking”?... I was asked to erase my text messages. Pat asked me to erase my text messages from him. But I showed all my text messages to Al when I was talking to him. Al was surprised at some of the things that were being said on the text messages by Pat... Pat called me when these patches... and he said I need to meet with you.... So I met with him shortly and he said, “there’s no way that this is going to happen [R.M.]” he said, “this is not sanctioned. You cannot have a three-piece patch down here... New York doesn’t fucking tell us what to do. I don’t give a fuck what New York thinks or what Montréal fucking thinks. You’re not having a three-piece MC fucking club here...” He said, “look, [R.M.], you’re putting yourself in a position that’s not a very good position. This could be very dangerous.” He said, “we have informed Albert County of this.” He said, “ I’m telling you, I’m trying to keep it local so nothing gets out of hand he says, but this is not going to happen... He said there’s a lot of people upset right now at the clubhouse...” I said, I can always call Montréal and tell them know we can’t do a three-piece. They don’t want it. And he said more or less, I’d better do pretty much exactly that because it’s not going to be good. And I said okay. **So I called Montréal and I said... Things are very, very bad here. I said it’s not good for us. The guys... It could be bodily harm... We got to stop this three piece patch... If I do this, will it shut this down, anything bad happening? And he said “yes, but you got to do that now and let me know when you do it. So I said okay. So I called Montréal and I said “look we are in jeopardy here... So then when I finished that conversation I talked to Pat... Texted him I think it was. And I said look “it’s done. It’s over. There is no three-piece patch coming to Nova Scotia”. And his response was “good. Just in the nick of time” I think it was on my text messages.”...**

So after that, it was like our guys... My guys that wanted to ride motorcycles and be part of a club were upset. **Everybody was upset that we were more or less told that you can’t do what you want to do. And this is early July, like first week of July.”**

pp. 17-23 statement

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

And he said... “the thing is, you should really look at making your own one piece patch and that’s it.” And I said “well, okay fine”. So a little bit of time went by. Not long.... The guys... We decided that we were going to do one of two things. Either try to talk to Montréal and see if they’ll allow us a Brotherhood one piece patch or we come up with one of our own. And we decided let’s talk with **Montréal** to see if they would let us do a one piece patch with an MC on it and, if not, then we’ll come up with their own patch... So they **gave us permission to be a one piece if we wanted to... So Pat ended up texting me not too long after the conversation I had with Montréal, maybe a day or so, and asked me in the text did I come up with a patch yet?** And I said at that time no... But what I would like is would you guys have a problem if we had a Brotherhood... like a one piece, with Brotherhood on the top. At that time, **he said to me, “No. Brotherhood it’s a good name...”** Brotherhood is good okay. **So then I said** to him well I said, **what if we put the Montréal skulls on the middle of the patch?** It’s a one piece patch, but have the Montréal skulls.... And **then we do like maybe “Halifax” underneath** all attached to it. **He said “no, you’re not doing any Halifax stuff....** Brotherhood no problem, he says, **but your putting that Montréal crest on? Number one, I’m going to tell you is that in order for that to happen, you’re going to have to come out to the clubhouse and meet** and you’re going to have to get a letter from Montréal stating that they’re allowing you to use their patch is a one piece patch.”

pp. 23-26 statement

[64] **3 - Q - Are you familiar with the phrase “Albert County”?**

A - Yes

Q-And what does that phrase mean to you?

A - That’s where Bacchus had a clubhouse... I believe. Am I right?... One second. Albert County, is that the one out in 9 mile River, is that Albert County? Well I don’t want to say that I know Albert County when I’m thinking Albert County is out in 9 mile River here in Nova Scotia – is that correct or wrong? I just... one second. I’m referring Albert County to the clubhouse and 9 mile River.

pp. 141-142 transcript

[65] **In his police statement R.M. stated:**

[On or about August 26, 2012]

A - I’m reading these from text messages [sent from Pat James phone] off my phone right now. I’m reading them verbatim. So he responded at 337, almost immediately after I sent that text of asking what can I do for you. He asked “in Montréal by chance?”... He said “will see you as soon as you get back. Don’t waste your dollars on any souvenirs... Saw you three come out of the closet on Facebook”

...

I already knew that there was five of them at Carl's house like moments before that. So that put a little bit of fear in me, because I know they're looking for us now.

...

I was trying to see if I could defuse the situation.

...

[On Monday, August 27, 2012] I ended up coming into the office, when I arrived, because I was a little shaken up and kind of scared that morning... **When I arrived there at 1030, he was already in my office, waiting for me in his Bacchus cut...** And I was a little nervous because I didn't know what was going on.

...

Q-When you say he had his "big cut on...

A- it's his Bacchus... What you call it... Leather patch and, you know he has the ropes and all that on **it that shows that he's Bacchus 1%, that... the vest that they all wear... Colours...** Pat had the colours on. And so he came into my office. He sat down... He looked at me. He rolled his head and eyes, and he put his head down and **he looked at me deadly serious. He opened up his hands and he looked at me and he went, "what are the fuck were you thinking?" And right then, and I almost shit myself from the expression on his face,** because I figured "I'm in big trouble here". He goes "what the fuck were you thinking?"... **"Do you think that you could get away with something like that? I fucking told you that you were not having a fucking patch."** And I said, **"Pat you told me no three-piece. You told me that the Brotherhood name was okay".** And he said **"I fucking told you that you were not to have a fucking Montréal Brotherhood patch down here and you went ahead and fucking did it. Do you know the kind of shit now that you just started ..."** And I said, **"well does Albert County know about this?"** And he just stared at me and **didn't answer.**

And I said "well is it bad.?" He said "yeah, it's fucking very bad. I'm giving you a get out of jail free card here. **I'm not here with everybody. Do you see my arms? They're not sunburned from just walking around the house. We were driving around the whole weekend looking for you because of that picture that went on Facebook, you guys getting patched over in Montréal."** And I said, "well why were you looking for us?" He said, "because those were coming off your back... You fucking disrespected us. You more or less or might as well have told us to go fuck ourselves by putting those patches on your back."

So at that point I'm pretty fucking scared... I said, "well Pat, listen... Now as a friend, if you were looking at this and you were talking to me, what do you make of this? What can we do here, what's your opinion?"

And he stopped, and he put his head down and he lifted it up and looked at me with a very angry face. And he said "let's get something straight. I'm not your fucking friend, and I'm going to say something to you. I'm offering you a get out of jail fucking free card... Do you have the patches here?... You get photographs taken of those patches being cut up. Then we want Montréal to put a notice on Facebook that states that there is no chapter in Halifax. And that's it. Those pictures are out on the Internet [R.M.]they're going to be there for life. We want proof and don't try to screw around pretending that those patches are cut up. We know what they look like. So we want the photographs etc. etc. and that the letter if you... And by tomorrow..." And I'm like "well Pat I gotta talk to these guys and find out what Montréal is saying." He looked at me. He said "do you understand what I'm fucking saying to you? **Do you understand the seriousness of the situation and what's going to happen? I'm offering you a get out of jail free. And this is your only chance... Why would you ever fucking think, look at this, you have a good job. You're a family man. You have a great daughter..."** And he pointed at the pictures, "and a lovely wife", which scared me because he's pointing at my family and I didn't know what he meant by that. And he said "why would you put yourself in this fucking position... You'll do better. You get this taken care of. This needs to be done immediately." So I said "okay." And I shook his hand and he got up and he left.

So I went into panic mode, kind of fuckin scared... I called Montréal... I told them that this is very bad. I said "my family's at risk here." I said my kids... "[Cutting up the Brotherhood patches] it's the only way to save our asses."

pp. 37-45 statement

[66] Q-What if anything occurred the next day [after they returned from Montréal]?

A - the next day I arrived at my office Mr. James was there waiting for me... sat down, and Pat asked me what the hell I was thinking... "What you did is disrespect all of us..." And the only way that he saw fit to rectify the situation was to appease everybody was to pass over these cuts to let everybody know that there is no Montréal club coming here.

Q- ... In order to appease everyone, do you have any knowledge from your conversation as to who "everyone" was?

A - I would say it was everyone from Bacchus to all the bike clubs around here because it was looked upon as the Montréal thing....

That a lot of bikers would probably end up holding me personally responsible for doing something that I shouldn't have done.

pp. 160 – 163, trial transcript

[67] **In his police statement R.M. stated:**

A-So then my Sgt. at Arms [Reg Forbes] contacted me. And he said “[R.M.] it's bad. It's very serious”... Reg ended up talking to Pat and offered up our cuts actually in person... Would that appease, would that be even better. And Pat said yes, that would make a heck of a lot of difference.

Q-So Reg talked to Pat and made that arrangement?

A - Yes... And the thing is, is that they were supposed to have church... Their meeting on that Wednesday night. And **because of all this stuff coming down the pipe, church was cancelled and Paul, the [local 9 Mile River Club's] Pres. of Bacchus, was called up to Albert County.** And from what was said to me from Reg , is that he was called up there and it had to do with us. So **that really put the fear of God in me. Because that's the mother chapter. They've been around for a long time.**”

pp. 48-49 statement

[68] **4 - Q-Were you given any indication as to why the cuts or the leather vest was to be cut up?**

A- Apparently in the biker community, that is the one surefire way to show that this club or any club, that was not going to form, that it was not going to be a club. It's more or less to show that, okay that club is not coming here.

Q-**What was Mr. James' demeanour during this conversation**[in R.M.'s office on or about August 27, 2012- see p. 36(21) statement and p. 160(12) transcript of his testimony]?

A - **He was very direct. He was angry at times.**

Q-**How did you feel during this conversation?**

A- I would say several things – **shocked, nervous** not knowing how this needed to be handled, **and angry with myself**

Q-Why were you angry with yourself?

A- Because I didn't listen. The months leading up to me just going ahead and doing what I was going to do anyway.

Q-**Did you find any portion of your conversation with Mr. James that day to be threatening?**

A - I guess interpretation, it could be some of it construed as that. Other times, it was construed chastising, as in an elder sort of giving a child the proverbial “what the hell were you thinking?” kind of thing as well

Q- In relation to the portions that you said could be construed to be threatening, what did you find to be threatening about the conversation?

A - Ahh, when he... Well, he was angry at points. **He had an angry face.** And when he... You know, “what the fuck were you thinking?” Yeah that throws anybody off. [What if it?] happened the same as if you were sitting in front of me and you were swearing at me. [Witness chuckles]

Q - Anything else threatening in relation to that?

A- Not off the top of my head. I apologize [after having the opportunity to refresh his memory from his police statement he is asked:]

Q-You were asked previously in relation to whether you found the meeting with Mr. James and the communications to be threatening, and you indicated in part “yes” and in parts other feelings or emotions. **After reviewing your statement, is your memory refreshed in relation to aspects of the conversation that may have caused you to feel threatened?**

A - It stays the same way that I answered it the first time, yes.

Trial transcript pp. 165(11)- 180(1)

[69] **In his police statement, R.M. stated** [at pages 37 – 45 (see also item 3 above)] *inter alia*:

that Pat James had told him “it’s very fucking bad”; “you fucking disrespected us. **You more or less might as well have told us to go fuck ourselves by putting those patches on your backs.**” Moreover, R.M. “went into panic mode” and almost immediately told members of the Montréal Brotherhood in a telephone call that his family’s safety was at risk, and that **cutting up the Brotherhood patches “is the only way to save our asses”.**

[70] Although during the Crown’s cross-examination of R.M. (p. 299-370, trial transcript), there are occasions when he could arguably be said to be adopting some portions of his statement put to him by the Crown, overall I find that R.M. displayed a pattern of purposefully neutering his more inculpatory anticipated evidence (based on the clear language, content, and associated intonations and emotional responses of his police statement) as against the defendants. During his cross-examination by defendants’ counsel, he had even greater opportunity to distance himself from inculpatory the defendants, and he did so on several occasions:

- i) It was put to him (pp. 458-460) that in his December 5, 2013 statement,

Q-You didn't say you were going to get the shit kicked out of you or beat out of you, correct?

A - No, I did not say that." ...

Q - And I'm going to suggest to you that that's because in fact, Mr. Howe never told you he was going to beat the shit out of you, correct?

A - Now you have me second-guessing myself. It was a year later. There was a lot of "fucks" going around. I can't... I can't be... I can't tell you for sure 100%.

Q - Well, your evidence today is that you're not sure whether or not anybody ever told you they were going to beat the fucking shit out of you,correct?

A - Correct

- ii) It was put to him (pp. 496-497):

Q- the information you're getting from Pat James was that there are reasons why the way you're seeking to do this is not going to work for the biking community at large right?

A - Yes.

- iii) It was put to him (pp. 497-501)

Q-You'd agree with me that Pat never threatened to cause you harm right?

A - No.

Q- He never suggested to you that he was going to get other people to cause you harm right?

A - No...

Q- And do you recall being asked some questions about having a conversation with Pat James and then contacting Montréal... And using words like "this could be bodily harm?"

A - Yes

...

Q-Now when you testified on Friday you agreed that that was in your statement... and you were explaining that you when you were saying those things to the Brotherhood members in Montréal, what you were

trying to do was sort of appease... persuade them that you could not move forward with the club as you wanted right?

A - Yes

Q-Pat James never said that he was going to cause you bodily harm right? Pat never said that to you?

A - No

...

Q-The Crown on Friday also asked you whether or not you felt that you were in any physical danger right?

A - Yes

Q-And you answered that well yes, bringing the motorcycle club in from Montréal... When you think back to that time frame, do you remember feeling that, or were you just saying yes because you saw those words in your statement?

A - Ahh, words in my statement, yes, about 80%.

...

Q-What I'm asking is: were you actually feeling like there could be bodily harm, or are you just saying that for other reasons?

A - No, there was about 20% that I was feeling that that was a possibility. And the majority of it was to let them [Montréal] know that this wasn't going to work down here.

...

Q-The sort of 20% that you're feeling that, there could be bodily harm... You're not saying that's bodily harm from Pat right? That's not how you felt?

A- No, no. What was said to me, if I can recall, is that I've told you [R.M.], you can't do this here, you're going to upset a lot of other bikers, it's not going to go over well. It wouldn't be good for you...[And to the extent that you feel apprehensive, scared, concerned about harm that might come to you, it's not harm from Pat; it's harm from other people right?] Yes... Yes ,and I apologize for not catching on quick enough."

iv) It was put to him (pp. 512-513):

Q - you testified about Pat during that meeting referencing your family right?... saying... "Why would you get involved in something like this when you have so many other good things going on in your life?"

A - Correct

...

Q-But that's the essential message he was passing to you right?

A - Correct

Q - Not a situation where Pat threatened your family. That's not how you took it right?

A - Ahh, I wasn't sure. But looking at it, that's what he was... He... I... just shocked by the fact that I put my... I have so many things going for me, and I put my family in this kind of position

v) It was put to him (pp. 517-518)

Q-he's telling you, you should make it clear to Montréal that you're not going to do this, right? Yes?... Tell them to cut up the patches and jackets right?

A - Yes

...

Q-It was not a situation where Pat James is saying to you, you, [R.M.], must do these things, cut up the patches, or else I will harm you in some way. That was not what he was saying to you right?

...

A-No.

vi) It was put to him (pp. 593-594)

Q- ... You had actually at one point asked Mr. Howe, like, 'is this from you or is this from the club?'

A- Yes

Q-And I'm going to suggest to you that Mr. Howe said, "I'm telling you, get on your bike and leave".

A - Quite possibly so, yes.

Q - Do you recall him indicating that he was not speaking for the club because...

A - He never said he was speaking for the club

[71] I should point out here that, in his September 16, 2012 police statement R.M. stated, as part of a long stream of un-interrupted commentary, without being asked a leading question:

[Mr. Howe] looked at me and his face changed from this is going to be a nonchalant conversation to a look of utter hatred towards me. And he stated "get on your fucking bike and get the fuck out of here now before we beat the fucking shit out of you. The only reason why we don't beat the fucking shit out of you is

because there's too many fucking people here. You're not welcome at any biking events in Nova Scotia. Do not show your fucking face and get the fuck out of here. I'm telling you now... And I looked at him and **I said "is this a ... When did this authorization come down? And he didn't answer that question.** What he did do, he said "I'm fucking telling you to get on your fucking bike and get the fuck out of here before **we** beat the living shit out of you... You think putting on a fucking patch from Montréal and then you have the fucking balls to come down here and show your fucking face in public?... And I'm not telling you again. Now do it.

[72] These representative examples comparing R.M.'s 2016 direct testimony (including cross-examination by the Crown on inconsistencies pursuant to my ruling under s. 9(2) *Canada Evidence Act*) with his September 16, 2012 audiotaped police statement, support the conclusion that the admission of R.M.'s police statement is "necessary".

[73] I find R.M.'s police statement (audiotape) both reliable and reasonably necessary, and would provisionally admit the tape (and a transcript for convenience) into evidence.

Consideration of probative value and prejudicial effect

[74] Even where courts find that a prior inconsistent statement is reliable and "necessary", they must still scrutinize the proposed admissible hearsay evidence by evaluating the probative value thereof, and the prejudice that might reasonably be occasioned to the fair trial rights of the defendants.

[75] As noted above, on November 28, 2016, the Crown made a s. 9(2) *Canada Evidence Act* application (p. 422 trial transcript); I found a number of inconsistencies, and permitted the Crown to cross-examine R.M. thereon.

[76] The Crown confirmed on November 29, 2016 (p. 696(2)) that rather than commencing a *Khelawon voir dire* at the end of R.M.'s testimony, it would be appropriate to hear from other Crown witnesses who have been present during the proceeding for some time and have travelled significant distance in order to testify. There was no objection by the defendants' respective counsel.

[77] On December 7, 2016 the Crown began its *Khelawon voir dire* seeking to have R.M.'s audiotaped police statement entered into evidence for the truth of its contents.

[78] All counsel agreed that the anticipated evidence of Cpl. Astephen/Sgt MacQueen will be entered also into evidence as their trial evidence, and that I can consider all the trial evidence in the *voir dire* and specifically R.M.'s trial evidence is to be considered his evidence on the *voir dire*.

[79] Initially, each defendants' counsel objected to the Crown, at this point in the trial, attempting to put R.M.'s statement into evidence for the truth of its contents. After a break, counsel agreed that the Crown could do so, but they argued that the court should first consider the "necessity" criterion before considering the reliability criterion on the basis that the former could be dealt with by mere comparison of R.M.'s statement and his in-court testimony, whereas the latter required *viva voce* testimony. However, counsel recognized that even determining "the necessity criterion" requires some consideration of reliability. The court determined it appropriate to hear evidence in relation to both criteria simultaneously, as is the usual course.

[80] I find that the probative value of R.M.'s audiotaped police statement is very significant. I am amply satisfied that his police statement is reliable. A comparison of the manner, nature, and extent of his testimony, with his police statement, also amply satisfies me that not only is the introduction of his police statement into evidence "necessary", but its admission does not materially prejudice the fair trial rights of the defendants.

[81] I say this, in part, because the defendants have had the benefit of an audiotape and transcription of R.M.'s police statement, as well as having had him speak to their own private investigator on December 5, 2013 before the preliminary inquiry hearing. They also had the benefit of cross examining him there; his examination- in- chief at their s. 7 Charter *voir dire*; and cross-examination of R.M. at trial to date about the substance of his allegations.

Conclusion

[82] After a very careful consideration of the relevant evidence, and bearing in mind that our Courts should, strive to ensure that defendants have a fundamentally fair trial, and be permitted to hear "all relevant and reliable information" concerning material facts as society has an interest in getting at the truth, I find as a fact that, if R.M.'s police statement is not admitted into evidence, the court would be left with a significantly distorted appreciation of the relevant facts, and there is no material prejudice to the fair trial rights of the defendants in admitting R.M.'s statement into evidence.

[83] I admit for the truth of its contents R.M.'s audiotaped police statement and the transcript (for convenience).

Rosinski, J.