

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Howe*, 2017 NSSC 210

**Date:** 20170809

**Docket:** CRH No. 441632

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

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

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**LIBRARY HEADING**

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**Restriction on Publication: Section 486.5**

**Judge:** The Honourable Justice Peter Rosinski

**Heard:** July 31, 2017, in Halifax, Nova Scotia

**Written Decision:** August 9, 2017

**Subject:** Admissibility of criminal records of individual defendants, members of the Bacchus Motorcycle Club, as part of the Crown's case-in-chief.

**Summary:** The individual defendants were charged with threats and extortion as having acted "for the benefit of, at the direction of, or in association with a criminal organization, to wit the Bacchus Motorcycle Club contrary to s. 467.12 Criminal Code". The Crown proposed to call expert opinion evidence regarding whether the BMC was a criminal organization, and argues that therefore exceptionally the criminal records are relevant and their probative value outweighs the prejudicial effect of their admission.

**Issues:** (1) Are the criminal records admissible?

**Result:** They are provisionally admissible.

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**Counsel:** Glen Scheuer, for the Crown  
Patrick Atherton for the Defence  
Trevor McGuigan for the Defence  
Patrick MacEwen for the Defence

**By the Court:****Introduction**

[1] The Crown alleges that each of the individual defendants are full patch members of the Bacchus Motorcycle Club, which itself is a criminal organization as defined in s. 467.1 Criminal Code. That definition was elaborated upon in *R. v. Venneri*, [2012] 2 S.C.R. 211, per Fish J.; and in *R. v. Beauchamp*, 2015 ONCA 260. The Crown wishes to introduce the criminal records of each of the defendants at trial. This *voir dire* decision addresses the dispute. All written arguments had been filed by July 28, 2017.

**Position of the parties**

[2] The Crown argues that the criminal records of each of the defendants is admissible in this trial. It recognizes that the general rule is that the Crown is not permitted to present character evidence of an accused person for the purpose of proving that they are the type of person likely to have committed the offences in question (e.g. s. 12 CEA – *R. v. Corbett*, [1988] 1 S.C.R. 670 and its progeny, including most recently, *R. v. Borden*, 2017 NSCA 45, at paras. 154-55). However, it reiterates to the court the long-standing general exception that such evidence is admissible if it is relevant to an issue in the case, and the probative value thereof is not overborne by the prejudicial effect of admitting the evidence on the fair trial rights of the defendants- e.g. *R. v. FFB*, [1993] 1 S.C.R. 697.

[3] The Crown points out that the exceptional admission of criminal record evidence against the defendants here may be justified on the basis that the defendants individually are all charged with having committed these offences (i.e. ss. 264(2), 264.1, 346 and 423 Criminal Code) while also representing or publicly wearing the very distinctive regalia of the Bacchus Motorcycle Club, and consequently charged with commission of those offences “for the benefit of, at the direction of, or in association with” the criminal organization that is the Bacchus Motorcycle Club – s. 467.12 Criminal Code. They rely on, *inter alia*: *R. v. Hobbs*, 2008 NSSC 206 (affirmed, 2010 NSCA 53); *R. v. Cazzetta*, (2003) 173 CCC (3d) 144 (Que CA); *R. v. Morin*, 2009 QCCA 1131 (leave to appeal refused November 19, 2009) at paras. 205-216; *R. v. Pangman*, [2000] MJ No. 91 (QB) - (see also footnote 4 in *R. v. Howe*, 2016 NSSC 267, specifically in reference to Mr. James regarding the evidence of SH); *R. v. Terezakis*, 2007 BCCA 384, at para. 46

(regarding whether the criminal organization offence sections were overly broad or vague).

[4] The defence argues that, while criminal records of non-accused third parties alleged to be members of the same criminal organization may be received in evidence (e.g. *R. v. Lindsay* [2005] O.J. No. 2870 (SC) per Fuerst J.) here, the prejudicial effect of the admission of the defendants' criminal records outweigh any probative value thereof – *R. v. Borden*, 2017 NSCA 45, at paras. 154 – 55 and 178.

**Why, as a general proposition, the criminal records of the defendants are admissible**

[5] I observe here that, the defendants may yet make a so-called *Corbett* application - s. 12, *Canada Evidence Act*. I conclude that the court must consider the concerns in the *Corbett* decision at this juncture in any event.

[6] All accused persons are entitled to a fundamentally fair trial. For present purposes, this means a trial at which the Crown is limited to presenting relevant evidence, whose probative value outweighs any prejudicial effects to the fair trial rights of the defendants, and which is not excluded on any other basis – e.g. a rule, principled (simple or constitutional), or statutory basis.

[7] The defendants rely on general principles, and cited only one authority directly: *R. v. Borden, supra*.

[8] Counsel did not present any cases dealing with the specific issue in question here: are the individual defendants' criminal records admissible as against them, as part of the Crown's case-in-chief, where the allegations include that they committed offences "for the benefit of, at the direction of, or in association with" a criminal organization (the Bacchus Motorcycle Club)?

[9] There is no dispute about the general principles. The dispute is centred on the application of those principles to the circumstances of this case, and specifically whether the probative value of the proposed "bad character" evidence outweighs the prejudicial effect of the admission of that evidence on the defendants' fair trial rights.

[10] The Crown will attempt to qualify as an expert witness, Staff Sgt. Leonard Isnor. He has previously been qualified by this court in an earlier *voir dire* as an

expert witness in relation to the Hells Angels Motorcycle Club. The proposed qualification regarding the Bacchus Motorcycle Club is in identical language:

As an expert in the area of organized crime – outlaw motorcycle gangs, able to give opinion evidence in relation to the Hells Angels Motorcycle Club and Bacchus Motorcycle Club in the following areas:

- 1 - The general nature and characteristics of the clubs;
- 2 - The history, organization, structure and hierarchy of the clubs;
- 3 - The culture, values and practices of the clubs [including the main purposes/activities of the clubs; and
- 4 - The language and symbols of the clubs.

[11] The criminal records of the defendants may therefore arguably be relevant to providing a foundation for the expert opinion evidence (if qualified) of Staff Sgt. Isnor, as well as to the specific charges pursuant to s. 467.12 Criminal Code. The evidence can reasonably be expected to be probative (i.e. logically relevant and material to the issues in this case). I say this because counsel have not yet disclosed to the court the nature and extent of the defendants' criminal records.

[12] The defendants did not identify with any great precision what prejudice they argue would arise from admission of the proposed evidence. I infer that they did not want me to see the criminal record information before ruling herein that they are admissible. They took a similar position regarding Staff Sgt. Isnor's expert when I was asked to consider whether he is properly qualified to give opinion evidence regarding the BMC.

[13] Although not entirely failsafe, I would respectfully suggest that the fact that this is a judge alone trial, greatly diminishes the danger that the criminal record evidence, if admitted, would be misused by the court as succinctly discussed at paras. 2-4, in *R. v. Granados-Arana*, 2017 ONSC 2113, per K L Campbell J.

[14] I intend throughout the remainder of the trial to carefully respect the boundary between the permissible and impermissible uses of the defendants' criminal records, in light of the dangers of misuse associated therewith. It may yet turn out that the records are of no probative value, or that their probative value is outweighed by the prejudicial effect of considering them (partially or wholly) to the fair trial rights of the defendants.

[15] I expect that the defendants' experienced counsels will interject if they believe questioning in relation to the criminal records is inappropriate, and make

interim and closing submissions regarding the permissible uses of the defendants' criminal records.

**Conclusion**

[16] I find that the probative value of the defendants criminal records outweighs any prejudicial effect upon their fair trial rights, and rule them generally admissible, and provisionally admit them as evidence.

Rosinski, J.