QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2013 SKQB 337**

Date: **2013 09 16**
Docket: Q.B.J. No. 68 of 2012
Judicial Centre: Battleford

BETWEEN:

HER MAJESTY THE QUEEN

- and -

PAUL MARY LEROUX

Counsel:

Michel L.J. Piché	for the Crown
Paul Mary Leroux	on behalf of himself

SIMILAR FACT EVIDENCE APPLICATION — ACTON J.
September 16, 2013

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[1] This is an application by the Crown for a ruling respecting the admissibility of the transcript of the evidence of the trial of Paul Leroux held in Inuvik in the Northwest Territories on the 4th to the 15th days of August 1998, to be entered into these proceedings for its truth. The Crown argues that this evidence is admissible as similar fact evidence and that the evidence on each count in the indictment be evidence on all counts in the indictment.

[2] The law with respect to similar fact evidence is set out by the Supreme Court of Canada in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908.

[3] The general exclusionary rule is as set forth by McLachlin C.J. at para. 31:

> 31 The respondent is clearly correct in saying that evidence of misconduct beyond what is alleged in the indictment which does no more than blacken his character is inadmissible. Nobody is charged with having a "general" disposition or propensity for theft or violence or whatever. The exclusion thus generally prohibits character evidence to be used as circumstantial proof of conduct, i.e., to allow an inference from the "similar facts" that the accused has the propensity or disposition to do the type of acts charged and is therefore guilty of the offence. The danger is that the jury might be confused by the multiplicity of incidents and put more weight than is logically justified on the ex-wife's testimony ("reasoning prejudice") or by convicting based on bad personhood ("moral prejudice"): Great Britain Law Commission, Consultation Paper No. 141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996), at § 7.2.

[4] McLachlin C.J. goes on further to set forth the policy basis for the exclusion at paras. 37 to 42 inclusive:

> 37 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* [*R. v. Arp*, [1998] 3 S.C.R. 339], *supra*, at para. 38; *Robertson*, [*R. v. Robertson*, [1987] 1 S.C.R. 918], *supra*, at p. 941; *Morris* [*R. v. Morris*, [1983] 2 S.C.R. 190], *supra*, at pp. 201-2; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 613.
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> 38 If propensity evidence were routinely admitted, it might encourage the police simply to "round up the usual suspects" instead of making a proper unblinkered investigation of each particular case. One of the objectives of the criminal justice system is the rehabilitation of offenders. Achievement of this objective is undermined to the extent the law doubts the "usual suspects" are capable of turning the page and starting a new life.

39 It is, of course, common human experience that people generally act consistently with their known character. We make everyday judgments about the reliability or honesty of particular individuals based on what we know of their track record. If the jurors in this case had been the respondent's inquisitive neighbours, instead of sitting in judgment in a court of law, they would undoubtedly have wanted to know everything about his character and related activities. His ex-wife's anecdotal evidence would have been of great interest. Perhaps too great, as pointed out by Sopinka J. in *B. (C.R.)* [*B. (C.R.)*, [1990] 1 S.C.R. 717], *supra*, at p. 744:

> The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.

40 The policy of the law recognizes the difficulty of containing the effects of such information which, once dropped like poison in the juror's ear, "swift as quicksilver it courses through the natural gates and alleys of the body": *Hamlet*, Act I, Scene v, ll. 66-67.

41 While emphasizing the general rule of exclusion, courts have recognized that an issue may arise in the trial of the offence charged to which evidence of previous misconduct may be so highly relevant and cogent that its probative value in the search for truth outweighs any potential for misuse, *per* Sopinka J., dissenting, in *B. (C.R.)*, *supra*, at p. 751:

> The fact that the alleged similar facts had common characteristics with the acts charged, could render them admissible, and, therefore, supportive of the evidence of the complainant. In order to be admissible, however, it would be necessary to conclude that the similarities were such that absent collaboration, it would be an affront to common sense to suggest that the similarities were due to coincidence ... . [Emphasis added.]

42 The "common sense" condemnation of exclusion of what may be seen as highly relevant evidence has prompted much judicial agonizing, particularly in cases of alleged sexual abuse of children and adolescents, whose word was sometimes unfairly discounted when opposed to that of ostensibly upstanding adults. The denial of the adult, misleadingly persuasive on first impression, would melt under the history of so many prior incidents as to defy innocent explanation. That said, there is no special rule for sexual abuse cases. In any case, the strength of the similar fact evidence must be such as to outweigh "reasoning prejudice" and "moral prejudice". The inferences sought to be drawn must accord with common sense, intuitive notions of

probability and the unlikelihood of coincidence. Although an element of "moral prejudice" may be introduced, it must be concluded by the trial judge on a balance of probabilities that the probative value of the sound inferences exceeds any prejudice likely to be created.

[5] The court went on further to state at paras. 51 and 52:

51 The Court thus affirmed that evidence classified as "disposition" or "propensity" evidence is, exceptionally, admissible. McLachlin J. continued at p. 735:

In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. The judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception.

52 McLachlin J. formulated the test for admissibility of disposition or propensity evidence, at p. 732:

... evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

[6] In discussing probative value of evidence, the court states at paras. 99 to 101:

99 Under this heading it is necessary first to determine the precise "*issue in question*" for which the Crown seeks to adduce the similar fact evidence. I will then address the *cogency* of the similar fact evidence in relation to that particular question. This will require consideration of the various *connecting factors* which the Crown considers persuasive, together with those factors which the defence regards as fatally weakening the inferences desired by the prosecution. An important element of the probative weight analysis is the issue of potential *collusion* between the complainant and the ex-wife. I agree with the respondent that it was part of the trial judge's "gatekeeper" function to consider this issue because collusion, if established to the

> satisfaction of the trial judge on a balance of probabilities, would be destructive of the very basis on which the similar fact evidence was sought to be admitted, namely the improbability that two women would independently concoct stories with so many (as the Crown contends) similar features.
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> 100 Under this heading, 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). Of importance in this respect is the inflammatory nature of the sexual and domestic abuse alleged by the ex-wife, and the need for the jury to keep separate consideration of the seven "similar fact" incidents from the only charge they were asked to decide, the sexual assault alleged by the complainant.
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> 101 The starting point, of course, is that the similar fact evidence is presumptively inadmissible. It is for the Crown to establish on a balance of probabilities that the likely probative value will outweigh the potential prejudice.

[7] In the *Handy* decision, the credibility of the complainant was in issue as it is in the present case before the court which is spoken of in paras. 115 and 116:

> 115 The Crown says the issue generally is "the credibility of the complainant" and more specifically "that the accused has a strong disposition to do the very act alleged in the charges against him", but this requires some refinement. Care must be taken not to allow too broad a gateway for the admission of propensity evidence or, as it is sometimes put, to allow it to bear too much of the burden of the Crown's case (Sopinka, Lederman and Bryant [John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999)], *supra*, at § 11.26). Credibility is an issue that pervades most trials, and at its broadest may amount to a decision on guilt or innocence.
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> 116 Anything that blackens the character of an accused may, as a by-product, enhance the credibility of a complainant. Identification of credibility as the "issue in question" may, unless circumscribed, risk the admission of evidence of nothing more than general disposition ("bad personhood").

[8] The court is also aware of para. 134 of the *Handy* decision which states:

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

[9] In assessing prejudice, the court must also be cognizant of para. 138 of the *Handy* decision which states:

> 138 The poisonous potential of similar fact evidence cannot be doubted. Sopinka, Lederman and Bryant, *supra*, at § 11.173, refer to the observations of an English barrister who has written of that jurisdiction:
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> > Similar fact evidence poses enormous problems for Judges, jurors and magistrates alike. The reason for this is the headlong conflict between probative force and prejudicial effect. Often, in the Crown Court, it is as close as a Judge comes to singlehandedly deciding the outcome of a case. [Emphasis added.]
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> (G. Durston, "Similar Fact Evidence: A Guide for the Perplexed in the Light of Recent Cases" (1996), 160 *Justice of the Peace & Local Government Law* 359, at p. 359)
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> Canadian trial lawyers take the same view.

[10] In dealing with prejudice, there are two types of prejudice which must be considered; firstly "moral prejudice" and secondly "reasoning prejudice". The *Handy* decision discusses moral prejudice most succinctly, wherein it states at paras. 139 to 143:

> 139 It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a *wrongful* conviction. The forbidden chain of

> reasoning is to infer guilt from *general* disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.
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> 140 The inflammatory nature of the ex-wife's evidence in this case cannot be doubted. It is, to the extent these things can be ranked, more reprehensible than the actual charge before the court. The jury would likely be more appalled by the pattern of domestic sexual abuse than by the alleged misconduct of an inebriated lout in a motel room on an isolated occasion. It may be noted that s. 718.2 of the *Criminal Code*, R.S.C. 1985, c. C-46, reflects society's denunciation of spousal abuse by making such abuse an aggravating factor for the purposes of sentencing.
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> 141 Some model studies of jury behaviour have put into question the effectiveness of the trial judge's instruction as to the limited use that may be made of propensity evidence: R. L. Wissler and M. J. Saks, "On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt" (1985), 9 *Law & Hum. Behav*. 37, at p. 43; S. Lloyd-Bostock, "The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study", [2000] *Crim. L.R*. 734, at p. 742; and K. L. Pickel, "Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help" (1995), 19 *Law & Hum. Behav*. 407. This is not to undermine our belief in the ability of the jury to do its job, but it underlines the poisonous nature of propensity evidence, and the need to maintain a high awareness of its potentially prejudicial effect.
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> 142 To some extent, the prejudice could be contained by limiting the extent and nature of the ex-wife's evidence, even if some of it were admitted, by a process analogous to that followed in *R. v. Corbett*, [1988] 1 S.C.R. 670, with respect to criminal convictions. That approach was adopted here only to the limited extent that the fact of the respondent's jail time for two sexual assaults on other parties was suppressed by agreement of counsel.
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> 143 I conclude that this evidence has a serious potential for moral prejudice.

[11] The court goes on further to deal with reasoning prejudice wherein it states at paras. 144 to 146:

> 144 The major issue here is the distraction of members of the jury from their proper focus on the charge itself aggravated by the consumption of time in dealing with allegations of multiple incidents involving two victims in divergent circumstances rather than the single offence charged.
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> 145 Distraction can take different forms. In *R. v. D. (L.E.)* (1987), 20 B.C.L.R. (2d) 384 (C.A.), McLachlin J.A. (as she then was) observed at p. 399 that the similar facts may induce
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> in the minds of the jury sentiments of revulsion and condemnation which might well deflect them from the rational, dispassionate analysis upon which the criminal process should rest.
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> 146 Further, there is a risk, evident in this case, that where the "similar facts" are denied by the accused, the court will be caught in a conflict between seeking to admit what appears to be cogent evidence bearing on a material issue and the need to avoid unfairness to the right of the accused to respond. The accused has a limited opportunity to respond. Logistical problems may be compounded by the lapse of time, surprise, and the collateral issue rule, which will prevent (in the interest of effective use of court resources) trials within trials on the similar facts. Nor is the accused allowed to counter evidence of discreditable conduct with similar fact evidence in support of his or her credibility (as discussed in Sopinka, Lederman and Bryant, *supra*, at § 11.74). Thus the practical realities of the trial process reinforce the prejudice inherent in the poisonous nature of the propensity evidence itself.

[12] In reaching its decision, the court must weigh the probative value versus the prejudice.

[13] With respect to the transcript of the Inuvik trial, this court has no doubt that to allow the inclusion of this transcript would so overwhelm the jury that it would deflect its consideration from the evidence, credibility of complainants and other issues directly before it with both moral prejudice and reasoning prejudice against the accused.

[14] It is also noted that the offences in the Inuvik decision took place in a significantly different time period in a different location with older young men and where

the accused's position of authority was only as a supervisor of a hostel and not as a dorm supervisor, physical education instructor and choir and music director. To allow this evidence to be presented to the jury would totally annihilate any possibility of the accused having a fair trial.

[15] The prejudice strongly outweighs the probative value of the evidence.

[16] In the decision *R. v. L.W.*, 2000 NWTSC 59 and 2000 NWTSC 60, [2000] N.W.T.J. No. 65 (QL), Vertes J., in dealing with two pre-trial motions, (a) being a motion by the Crown to admit evidence with respect to each count in the indictment as similar fact evidence with respect to each other count, and (b) a motion by the defence to sever the counts in the indictment and directing separate trials on charges relating to each complaint, stated at para. 2:

> 2 It is not uncommon to have these two types of applications heard at the same time. They overlap in certain ways. The *Criminal Code* allows any number of counts for any number of indictable offences to be joined in the same indictment: s. 591(1). The *Code* does not require that offences charged in the same indictment meet the standard of similar fact evidence. Joinder of a number of counts does not make the evidence on one count admissible on the other counts. Each count must be considered separately by the trier of fact. The *Code* further provides that an accused may be tried separately on one or more counts "if the interests of justice so require": s. 591(3). One of the considerations in deciding whether counts should be severed, however, is the admissibility of similar fact evidence. But, as noted by the Supreme Court of Canada in *R. v. Arp* (1998), 129 C.C.C. (3d) 321 (at 345-346), the question of severance must be kept distinct from the issue of admissibility of similar fact evidence. On a motion for severance, the accused bears the burden of establishing on a balance of probabilities that the interests of justice require severance of counts. The Crown, however, bears the burden of demonstrating that similar fact evidence should be admitted. One does not necessarily predetermine the other. A trial judge may refuse severance of the multi-count indictment yet still not allow the use of similar fact evidence as between the counts.

[17] The judge also referred to *R. v. Huot* (1993), 16 O.R. (3d) 214, 66 O.A.C. 155 (Ont. C.A.), appeal dismissed [1994] 3 S.C.R. 827, 21 O.R. (3d) 224, wherein he stated at paras. 14 and 15:

> 14 In some ways this case is similar to *R. v. Huot* (1993), 16 O.R. (3d) 214 (C.A.), appeal dismissed [1994] 3 S.C.R. 827. In that case, the accused was convicted of sexual offences against two adolescent boys who were residents of a reform school where the accused served as a supervisor. The acts alleged were different and the circumstances of each boy were different. The trial judge admitted the evidence on each count as similar fact evidence in order to support the credibility of the complainants and to supply corroboration. The Court of Appeal dismissed the accused's appeal from conviction but held that the trial judge erred in allowing similar fact evidence. Arbour J.A. (as she then was), writing on behalf of the majority, said:
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> > In the present circumstances, I am of the opinion that similar fact evidence was not admissible. The similarity of the acts alleged by each of the two complainants, in my opinion, was not sufficient to allow the admissibility of the evidence, taking into account the numerous and important differences between their allegations. The probative value of the evidence had to do essentially with the propensity of the appellant to commit homosexual acts with adolescents; with respect to this alone, the evidence was certainly inadmissible. Nothing else in this evidence tended to demonstrate the improbability that the allegations of the two young men resulted from a coincidence... Although each of the two complainants report several different occurrences, it is not possible here to say that there was a plan or a system. I am of the opinion that similar fact evidence confirmed the credibility of the complainants only because it disclosed the propensity of the appellant to perform such acts; it should have been declared inadmissible for this purpose. To say that similar fact evidence could be used as corroboration, seems to me also to be erroneous. Similar fact evidence was not evidence which implicated the accused with respect to an essential element of the offence, as is traditionally meant by the word corroboration. Therefore, it seems that the judge used the word corroboration as meaning simply the confirmation of the credibility of the complainants.
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> The Supreme Court of Canada confirmed that there was no substantial error in the result but did not address specifically the similar fact evidence issue.
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> 15 In my opinion, just as in *Huot*, the evidence of the complainants in this case, if used as similar fact evidence, would confirm nothing more than the propensity of the accused to commit these types of crimes. As such it has significant potential for prejudice.

[18] The court also made reference to the use of similar fact evidence to bolster credibility. The court confirmed that where the purpose of the similar fact evidence is solely or primarily to enhance the credibility of an adult complainant, the court should reject the use of the similar fact evidence. The court goes on further to summarize its position in para. 18 where it states:

> 18 In this case, to allow one complainant's evidence to confirm another complainant's evidence, when each offence relates to a distinct act, would increase the potential danger that the trier of fact would resort to propensity reasoning. As I noted before, there is nothing particularly distinctive about the specific acts alleged against the accused by each complainant. This is not to impose a requirement of "striking similarity", as that term was used in older cases, but simply a recognition that the greater degree of similarity there is then the more probative the evidence is to support the credibility of the complainants. The various allegations have some similarities and some dissimilarities but certainly nothing like a pattern of behaviour or a consistent context so as to overcome the high degree of prejudice associated with the evidence of propensity.

[19] The court does accept this reasoning and the law as set forth herein. The evidence on each count is not admissible as similar fact evidence on the other counts. The evidence has some probative value but far greater prejudicial value. It should not be allowed.

[20] The fact that the trial includes 14 complainants and 17 charges makes it imperative that the jury stay focussed on the evidence relating to each separate count. Members of the jury must not be swayed into a global view of the inherent prejudice in propensity thinking as stated in the decisions quoted. The crux of the current application is the distraction of the members of the jury from the proper focus on the charge itself aggravated by the consumption of time in dealing with allegations of 17 offences involving 14 victims in divergent circumstances rather than each single offence charged.

[21] For these reasons, the application for the inclusion of similar fact evidence on each count as evidence in each other count is denied.

J.
M.D. ACTON