PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Shea, 2014 NSPC 78

Date: September 29, 2014

Docket: 2197479

Registry: Halifax

Between:

Her Majesty the Queen

v.

Shawn Michael Shea

DECISION – DANGEROUS OFFENDER APPLICATION

Judge: The Honourable Judge Anne S. Derrick

Heard: March 24, 25, 27, April 1, 2, 3, 9, and June 23, 2014 in Halifax, Nova Scotia

Decision: September 29, 2014

Charge: Section 268(1), Criminal Code of Canada

Counsel: Shauna MacDonald and Mark Heerema, for the Crown

Luke Craggs, for Shawn Shea

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By the Court:

Introduction

[1] On August 30, 2011, Shawn Shea was found guilty with a co-accused (Adam LeBlanc) of aggravated assault as a result of a stabbing at the Central Nova Scotia Correctional Facility (CNSCF) on June 15, 2010. The stabbing victim was another prisoner at the CNSCF.

[2] Following Mr. Shea's conviction the Crown gave notice that it would be seeking to have him declared a dangerous offender pursuant to the provisions of section 753 of the Criminal Code.

[3] Judge Pamela Williams heard the Shea/LeBlanc trial on June 28 and 29, 2011. Following her appointment as Chief Judge of the Nova Scotia Provincial and Family Courts on February 26, 2013, she concluded that these new duties precluded her being able to continue with the case. Section 669.2(a) of the Criminal Code provides that if the original provincial court judge "is for any reason unable to continue" the proceedings, they can be continued before another provincial court judge. Crown and Defence consented to Mr. Shea's sentencing being conducted by me.

The Organizational Structure of These Reasons

[4] My reasons are organized into nine parts: Part I is a broad overview of the dangerous offender legislation; Part II discusses how courts have considered the patterns of behaviour requirements in section 753.1(a)(i) and (ii) of the *Criminal Code*; Part III deals with the admissibility and relevance of in-custody conduct; Part IV describes Mr. Shea's predicate offence, the aggravated assault of June 15, 2010; Part V reviews Mr. Shea's criminal history, as a youth and as an adult

offender; Part VI reviews the records of Mr. Shea's conduct in provincial and federal correctional institutions; Part VII describes the evidence of witnesses called in the proceedings and Mr. Shea's statement to the court at sentencing; Part VIII contains my analysis of Mr. Shea's convictions and in-custody conduct in relation to the issue of whether the Crown has established the patterns of behaviour required by sections 753.1(a)(i) and (ii) of the *Code*; and Part IX deals with the disposition of the Crown's dangerous offender application and sentencing options.

[5] I have attached as an Appendix a summary of the evidence concerning the Correctional Service of Canada (CSC) programming for violent offenders.

The Evidence Called in these Proceedings

[6] The evidence in these proceedings has come from witnesses and documentation. Two experts testified: Dr. Scott Theriault, a forensic psychiatrist, who prepared the court-ordered assessment, and Dr. Andrew Strazomski, a forensic psychologist, who was called by the Defence. I also heard testimony from Stacey MacKenna, Mr. Shea's former common law partner, Matt Lohnes, a local businessman who had rented him an apartment approximately ten years ago, and Deputy Sheriff Salvator Auvolese, who had dealings with Mr. Shea at the Central Nova Scotia Correctional Facility (CNSCF). I will indicate here that the evidence of Ms. McKenna, Mr. Lohnes and D/S Avolese is not directly relevant to the pattern analysis I must undertake although it assists in contextualizing aspects of Mr. Shea's history and personality.

[7] The Crown called evidence about incidents involving Mr. Shea during the time when the dangerous offender proceedings were underway. Evidence was also led, at my request, about CSC's programming for violent offenders.

Crown Onus and Concessions by Mr. Shea

[8] The onus is on the Crown to prove beyond a reasonable doubt that Mr. Shea meets the criteria for a dangerous offender designation.

[9] It has been conceded by Mr. Shea that the essential conditions precedent for the dangerous offender application have been satisfied: he has been convicted of a "serious personal injury offence" as defined by sections 752(a)(i) and 752(a)(ii) of the *Criminal Code*; an assessment was ordered and prepared in accordance with sections 752.1(1) and 752.1(2), that being the assessment of Dr. Theriault dated May 6, 2012; and the notice of the dangerous offender application and consent of the Attorney General as required by section 754(1) of the *Code* have been served on Mr. Shea and filed with the Court.

PART I – The Dangerous Offender Legislation

The Purpose of the Dangerous Offender Provisions

[10] The dangerous offender legislation is aimed at offenders who, "in the interest of protecting the public, ought to be sentenced according to considerations which are not entirely reactive or based on a "just deserts" rationale." The legislation has been held to "accord with the fundamental purpose of the criminal law generally, and of sentencing in particular namely, the protection of society." (*R. v. Lyons, [1987] S.C.J. No. 62, paragraph 26*) The preventative detention that flows from a dangerous offender designation "simply represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased." Dangerous offender legislation "merely enables the court to accommodate its sentence to the common sense

reality that the present condition of the offender is such that he or she is not inhibited by normal standards of behavioral restraint so that future violent acts can quite confidently be expected of that person." (*Lyons, paragraph 27*) "Broadly speaking, the legislation was found to pursue the historical purpose of the criminal law, that is, to protect the public from those determined to be dangerous to an unacceptable degree." (*R. v. Neve*, *[1999] A.J. No. 753, paragraph 55*)

The Dangerous Offender Designation Post-2008

[11] Amendments to the *Criminal Code* in 2008 introduced "significant changes to the wording, structure and application of the dangerous offender designation." (*R. v. Paxton, [2013] A.J. No. 1451, paragraph 14 (Q.B.)*) Other judges have very ably discussed the pre-2008 dangerous offender sentencing regime so I do not intend to do so. (see, for example, *R. v Paxton* and *R. v. Szostak, [2014] O.J. No. 95 (C.A.)*)

[12] The 2008 amendments removed a judge's discretion not to make the dangerous offender designation where the offender fits the definition. (*Szostak, paragraph 35*) Judicial discretion is now confined to determining whether to impose a sentence other than an indeterminate sentence if certain criteria are satisfied. (section 753(4), *Criminal Code*)

[13] What the 2008 amendments mean for Mr. Shea is that: (1) a dangerous offender designation is now mandatory if the statutory criteria are established. The threshold discretion previously available to judges has been removed and replaced by a requirement that the dangerous offender designation be imposed on offenders who meet the terms set out in section 753 of the *Code*; and (2) judicial discretion has been shifted to the sentencing stage as there are now three possible sentences

to be considered once an offender has been designated a dangerous offender. The sentencing options under the 2008 amendments are: an indeterminate sentence – which the Crown is seeking for Mr. Shea; a determinate sentence followed by a long-term supervision Order; and a determinate sentence.

[14] As a result of the requirement that mandates a dangerous offender designation where the criteria have been met a broader group of offenders will receive the designation. The amendments "have made the dangerous offender designation and an indeterminate sentence more easily available." (*Paxton, paragraph 25*) Martin, J. observed in *Paxton*:

> … As the terms of the designation have been widened and the designation was made mandatory when the statutory criteria are met, it is clear Parliament intended these provisions to have a wider scope. Thus, while the group may remain small relative to other offenders, it is likely that a greater number of offenders who pose a future threat to the physical and mental well-being of the public will likely fall within the ambit of the new provision…(*paragraph 25*)

[15] The 2008 amendments notwithstanding, decisions interpreting and applying them make it clear that sentencing in the context of a dangerous offender application is not a formulaic exercise. "…even in the presence of particular designations, judicial restraint is an important guiding principle in all sentencing matters." (*Paxton, paragraph 25*) In *Szostak*, the Ontario Court of Appeal held that the legislation "must be interpreted in the spirit of *Lyons*[1] and bearing in mind the sentencing principles and objectives in ss. 718, 718.1 and 718.2…" while

acknowledging that "Parliament meant to broaden the group of persons to be labelled as dangerous offenders…" (*paragraph 54*)

[16] The majority of the Supreme Court of Canada in *Lyons* recognized that dangerous offender legislation "embodies a complex of penological objectives" and stated:

> …I do not think it can be argued, either as a matter of logic or of common sense, that by virtue of a decision to sentence an offender according to considerations based primarily on prevention, other equally valid, subsisting penal goals cease to be relevant. To reiterate, protecting society from the dangerous offender never wholly supplants the other legitimate objectives about embodied in a Part XXI sentence. (*Lyons, paragraph 53*)

[17] Furthermore, the majority in *Lyons* viewed discretion as the hedge against the legislated provisions being impermissibly arbitrary. It was noted that the imposition of sentence following automatically upon conviction had "disturbed" the Court in *R. v. Smith, [1987] S.C.J. No. 36*. (*Lyons, paragraph 65*)

[18] And while the scope of legislative reach has expanded, the guiding framework for the dangerous offender designation continues to mean that,

> Not everyone who is a criminal or for that matter a danger to the public is a dangerous offender. In the spectrum of offenders, the dangerous offender legislation is designed to target – and capture – those clustered at or near the extreme end. Were this otherwise, constitutionality might stumble. In other words, the dangerous offender legislation is not intended to be a process of

> general application but rather of *exacting selection*. (emphasis added) (*Neve, paragraph 59*)

The Significance of an Indeterminate Sentence

[19] The Supreme Court of Canada has acknowledged that "the effects of an indeterminate sentence…must be profoundly devastating" to the offender. (*Lyons, paragraph 46)*) An indeterminate sentence has been described as "a drastic sentence" (*R. v. Roberts, [2007] O.J. No. 297, paragraph 44 (C.A.)*) and "perhaps the most serious punishment in the *Criminal Code*." (*R. v. Allen, [2007] O.J. No. 2226, paragraph 15 (C.A.)*) Ruby on Sentencing (8th edition) observes:

> …It is noteworthy that the Code does not at any time envisage the eventual disappearance of the indeterminate sentence, and, in this sense, preventative detention bears a strong resemblance to a sentence of life imprisonment. Eventual release and continued liberty of a dangerous offender depend upon the parole authorities for the rest of the offender's life. (§17.33, *Ruby*)

[20] As the Supreme Court of Canada has recognized: "For the offender undergoing an indeterminate sentence…the sole hope of release is parole." (*Lyons, paragraph 47*)

The Legislated Criteria for a Dangerous Offender Designation

[21] The Crown submits that Mr. Shea qualifies for a dangerous offender designation under either of sections 753.1(a)(i) or (ii) of the *Criminal Code*. Those sections are as follows:

753.(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

(a) that the offence for which the offender has been convicted is a serious personal injury offence…and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour, [or]

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour…

[22] So the component parts of the criteria for a dangerous offender designation under section 753.1(a)(i) – what I will be calling the "repetitive behaviour pattern section" - are:

- A threat to the life, safety or physical or mental well-being of others on the basis of evidence establishing -
    - A pattern of repetitive behaviour that shows,
        - A failure to restrain his behaviour and
        - A likelihood of causing death or injury to others, or of inflicting severe psychological damage on others.

[23] The predicate offence must form a part of the repetitive pattern.

[24] The Supreme Court of Canada has held that the "likelihood" standard in dangerous offender applications is not a certainty or probability standard and is consistent with the proof beyond a reasonable doubt requirement in dangerous offender proceedings. (*Lyons, paragraphs 93 and 94*)

[25] The component parts of the criteria for a dangerous offender designation under section 753.1(a)(ii) - what I will be calling the "persistent aggressive behaviour pattern" section - are:

- A threat to the life, safety or physical or mental well-being of others on the basis of evidence establishing -
    - A pattern of persistent aggressive behaviour that shows,
        - A substantial degree of indifference on the offender's part for the reasonably foreseeable consequences to other persons.

[26] Once again, the predicate offence must form part of the persistent aggressive behaviour pattern.

[27] A substantial degree of indifference can be established by evidence of "a conscious but uncaring awareness of causing harm to others…over a period of long duration involving frequent acts and with significant consequences…" (*R. v. Bunn, [2012] S.J. No. 637, paragraph 19 (Q.B.)*) Repeat offending can provide proof of a substantial degree of indifference.

[28] For a section 753.1(a)(ii) dangerous offender designation, the Crown must prove beyond a reasonable doubt that the evidence discloses a likelihood that "this type of aggressive behaviour will continue in the future" (*Neve, paragraph 115*) and that it will be accompanied by "a substantial degree of indifference" to the reasonably foreseeable consequences for others. (*R. v. Camara, [2013] O.J. No. 4580, paragraph 486*)

[29] There are two broad components to the pattern analysis: a present/past conduct requirement and a future conduct requirement. The future conduct aspect is considered once the requisite pattern of behaviour has been proven beyond a reasonable doubt. Both the present conduct and the future conduct components of the dangerous offender provisions must be proven beyond a reasonable doubt. (*R. v. P.G., [2013] O.J. No. 490, paragraphs 17 and 50 (S.C.J.)*)

The "Lesser Measures" Options

[30] Upon making the dangerous offender designation, the options of a determinate sentence, with or without a long-term supervision Order, are not available unless the sentencing judge is satisfied they will adequately protect the public. Section 753(4.1) provides as follows:

> The court shall impose a sentence of detention in a penitentiary
> for an indeterminate period unless it is satisfied by the evidence

> adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[31] The reasonable expectation of "successful treatment" has been held to be "of limited application in determining whether the person is a dangerous offender." It is "significant in choosing the appropriate disposition." (*Szostak, paragraph 36*)

[32] As I mentioned, the "lesser measures" available under section 753 (4)(b) or (c)…" are a determinate sentence with a long-term supervision Order or simply a determinate sentence. As Martin, J. held in *Paxton*:

> …the 2008 amendments mean that under the current regime a judge shall find an offender to be a dangerous offender if the statutory criteria are met, and in such a case there is a presumption that an indeterminate sentence is the appropriate sentence. This presumption can be displaced by sufficient evidence, with the result that the judge has the discretion to impose either of the other two available forms of sentence.

PART II - *What Constitutes a Pattern of Behaviour for the Purposes of Dangerous Offender Designations?*

The Rationale for the Pattern Requirement

[33] The Supreme Court of Canada in *Lyons* explained the rationale for the pattern requirement: "…it must be established to the satisfaction of the court that the offence for which the person has been convicted is not an isolated occurrence, but part of a pattern of behavior which has involved violence, aggressive or brutal

conduct…" If a pattern of conduct is found, then "it must be established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others…" (*Lyons, paragraph 43*)

[34] The "pattern" stage is "arguably the most complex, requiring the judge to measure the offender's past conduct against the exacting requirements of the *Code* under s. 753." (*Neve, paragraph 93*)

No Pattern, No Threat

[35] It is only if the judge finds the requisite pattern, which in this case has to come within the threshold sections of section 753.1(a)(i) or (ii), that the threat requirement can be established. "No threat can be found without proof of past behavior which meets at least one of the…separate thresholds under [now ss. 753.1(a)(i) or (ii) for the purposes of this case]…If any one is met, then the judge is able to go on and determine whether the offender is, based on that evidence, a threat to the life, safety or well-being of others as described in [now section 753.1(a)]. If none is met, then the judge cannot find the person to be a "threat" under [s. 753.1(a)] (*Neve, paragraph 102*) The judge deciding a dangerous offender application must 'be alive to the need to ensure that one of the past conduct thresholds has been met on the evidence." (*Neve, paragraph 105*)

[36] As the Alberta Court of Appeal stated is *Neve*: "…the threat must rest on the concrete foundation of past behaviour. Put simply, no pattern, no threat." (*paragraph 127*)

[37] In *Neve*, the Alberta Court of Appeal examined whether the pattern of behaviour analysis had been properly conducted. Their critique at paragraphs 121 and 122 is instructive:

> What happened here? As already observed, in finding N. to be a threat, the sentencing judge did not address how the various convictions and other past conduct fit together to form a pattern of behavior sufficient to satisfy the requirements of either s. 753(a)(i) or 753(a)(ii). Nor did the sentencing judge articulate which conduct he found fell within s. 753(a)(i) or s. 753(a)(ii) or why. It is true that he summarized N.'s criminal behavior and other evidence at length. But no analysis of how the stated offenses constituted a pattern under ss. 753(a)(i) or (ii) was undertaken other than a general finding of violence and aggression. And while violence and aggression, depending on degree, may very well be sufficient, here that finding was not tethered to any assessment of the degree of harm, whether physical or psychological, caused or threatened by the criminal conduct found to constitute the pattern of behavior.
>
> While the absence of this analysis need not be fatal, the problem is that a careful review of the reasons for judgment reveals two difficulties. First, offences which do not belong on the pattern scale were placed on it. Second, the pattern assessment and the threat assessment were effectively treated as one. And while the reasoning process employed may result in a telescopic finding that an offender is a threat, the judge must be

> alive to the fact that the Crown must prove that one of the threshold patterns of behavior under s. 753 has been met. Then and only then can the sentencing judge go on to decide whether, on the basis of that evidence, the person is a threat.

What is a Pattern?

[38] Hill, J. of the Ontario Superior Court of Justice in *R. v. Naess, [2005] O.J. No. 936*, paragraph 61, has set out a helpful description of a pattern: "…a repeated and connected design or order of things as opposed to a differentiated or random arrangement. Repetitive or persistent connotes "constantly repeating"... or "renewal or recurrence of an action or event"; "Continuous; constantly repeated"; "Existing continuously in time; enduring"… and referred to *R. v. Yanoshewski, [1996] S.J. No. 61 (C.A.)*, paragraph 25 and the Shorter Oxford English Dictionary. (*Yanoshewski* is also cited in *Neve, paragraph 67*; *R. v. Solano, [2010] O.J. No. 2394, paragraph 56 (S.C.J.)* and *Camara, paragraph 494 (O.C.J.),* cases cited by the Crown in this application.)

[39] The British Columbia Court of Appeal has noted in *Dow* that a pattern consists of three components - repetitive behavior; dangerous behavior that was not restrained in the past; and a likelihood that the same behavior in the future will not be restrained and will cause death or injury. (*Dow, paragraph 22, referring to section 753(a)(i)*) The Court went on to say that,

> …in any particular case, for the purposes of describing the pattern, each of the three elements may be particularized in a way that gives individuality to the pattern by indicating specific similarities between one incident at another. But it is important

> that the process of particularization not result in a level of detail which obscures the common characteristics which embody and reveal the three essential elements of the pattern." (*Dow, paragraph 23*)

[40] The *Dow* Court held: "if any of those three elements is missing, then there may be a pattern but it will not be a relevant pattern. But if all three are present then the essential elements of a relevant pattern are revealed." (*paragraph 24*)

Features of a Pattern of Behaviour

[41] Other courts have discussed what constitutes "a pattern of behaviour":

- The focus at the pattern stage of the analysis is on past conduct, not character. (*Neve, paragraph 203*)
- For the predicate offence to be part of the requisite pattern of behaviour, the past behavior must also have involved some degree of violence or attempted violence or endangerment or likely endangerment (whether more or less serious than the predicate offence). (*Neve, paragraph 110*)
- Not every element of the pattern needs to be expressed in the predicate offence; (*Solano, paragraph 4, citing R. v. Lewis, [1984] O.J. No. 3203, (C.A.)*)
- The pattern does not need to be based on prior offences or conduct that would necessarily meet the standard of admissibility as similar fact evidence; (*Solano, paragraph 44, citing R. v. Hartling, [2005] O.J. No. 545 (S.C.J.)*)

- Repetitive behaviour under s. 753(a)(i) and persistent aggressive behaviour under s. 753(a)(ii) can be established on two different bases: the first is where there are similarities in terms of the kind of offences; the second where the offences themselves are not similar in kind, but in results, in terms of the degree of violence or aggression inflicted on the victims. Either will do. Thus, the mere fact that an offender commits a variety of crimes does not mean that no pattern exists. (*Neve, paragraph 111*) There is no requirement that the past criminal actions all be of the same or similar form, order or arrangement, though if this has occurred it may well suffice. (*Dow, paragraph 27*)

- As few as two occurrences can constitute a pattern provided there is sufficient similarity; (*Solano, citing R. v. Langevin, [1984] O.J. No. 3159, paragraph 30 (C.A.)*) In *R. v. Jones, [1993] O.J. No. 1321*, the Ontario Court of Appeal explained *Langevin*: "The emphasis [in *Langevin*] on the offences being remarkably similar was not intended as an expansion of the requirement of s. 753(a)(i) of the Code. He was simply commenting that, in *Langevin*, the fact that the similarity was remarkable, compensated for there being but two offences relied on by the Crown."

- To qualify as a pattern of "persistent aggressive" behaviour [section 753.1(a)(ii)] the behaviour must be both persistent <u>and</u> aggressive.

- Under section 753.1(a)(ii), a judge must not only identify a pattern, she must consider whether the pattern is persistent. Finding a pattern of behaviour is not enough. (*R. v. Fulton, [2012] O.J. No. 6569, paragraphs 11 and 13 (C.A.)*)

[42] In divining whether a pattern exists, context is a critical consideration: "…to determine if specific offences fall within the proscribed patterns under s. 753, it is essential to assess the offences in context, having regard to what actually happened and why." (*Neve, paragraph 165*)

[43] In *Neve*, the Alberta Court of Appeal carefully reviewed the facts surrounding threats made by Ms. Neve and concluded they should not have been included in the sentencing judge's pattern analysis. The Court found there was no evidence Ms. Neve intended to carry out the threats, made any effort to do so or, in two instances, intended for them to be communicated. An examination was undertaken of the circumstances out of which the threats emerged. In one instance Ms. Neve, a young sex worker at the time, used threats in an attempt to defend her friend, another vulnerable sex worker, from an assaultive pimp. Other threats were made in the presence of police officers, causing the Court to say: "…the very fact that they were made directly to the police in their presence speaks volumes about how effective they were and how likely it was that they would result in injury to anyone. Realistically, these threats ended to the only way they could – with N's arrest and conviction." (*Neve, paragraphs 172 – 179*)

[44] *R. v. Camara, [2013] O.J. No. 4580* is an example of a judicial finding that a pattern of behaviour existed to support the designation of Mr. Camara as a dangerous offender:

> …there are remarkable similarities between these two incidents, notwithstanding some obvious factual differences, such as the type of weapon used, the time of day that the offences took place, the age and background of the victims, and Mr. Camara being accompanied by others on New Year's Eve but alone at

> the sports bar. This does not detract from the essential facts that on each occasion Mr. Camara, in a grossly intoxicated, drug and alcohol induced state, used a weapon against an unarmed stranger in a drinking establishment, after he took offense to the others treatment of him. The violence used by Mr. Camara in each case was severe, permanent in its impact on the victims, and entirely disproportionate to the events leading up to the incident; each assault occurred, in fact, when the victim was neither in a position to defend himself, nor would have expected to be attacked. (*Camara, paragraph 463*)

[45] In *Camara,* Libman, J. concluded the pattern of Mr. Camara's conduct showed that he had failed to restrain his behavior in the past, that this has led to serious and permanent injuries to his victims, and that there existed a likelihood of causing death, injury or severe psychological damage through a failure to restrain that behavior in the future. (*Camara, paragraph 466*)

[46] In *Szotstak*, the Ontario Court of Appeal recently discussed what is required to establish a pattern pursuant to sections 753.1(a)(i) or (ii):

> [Mr. Szotstak's] repeated resort to force that caused serious injuries shows the necessary pattern under either para. (i) or (ii). There were sufficient relevant similarities to demonstrate the pattern called for in these paragraphs. As the court said in *Neve* at para. 113: "Similarity… can be found not only in the types of offences but also in the degree of violence or aggression threatened or inflicted on the victims." Over a very short period, four years, [Mr. Szotstak] seriously injured three different

> people. He resorted to weapons and three of the offenses and inflicted serious injuries… Breaking a beer bottle over a person in a bar because of a dispute about standing in line; slashing a person with a pair of scissors because [Mr. Szotstak] mistakenly thought the victim had some time earlier been involved in an altercation with him; beating an acquaintance so badly that he needed to go to the hospital; and a year later slashing that same person with a knife across the face causing permanent injury demonstrate the very type of pattern intended to be captured by paras. (i) and (ii). (*Szostak, paragraph 63*)

[47] To avoid a less serious "last straw" offence leading to a dangerous offender designation, the pattern of repetitive behaviour "that includes the predicate offence has to contain a number of the same elements of unrestrained dangerous conduct to be able to predict that the offender will likely offend in the same way in the future. This will ensure that the level of gravity of the behavior is the same…" (*R. v. Hogg, [2011] O.J. No. 5963, paragraph 40 (C.A.)*) cited in *Szostak, paragraph 56*)

PART III - *Conduct in Custody for Establishing Patterns of Behaviour*

[48] The Supreme Court of Canada has held that "the greatest possible range of information" should be placed before the Court hearing a dangerous offender application. This serves "… the public interest in safety and the general sentencing interest of developing the most appropriate penalty for the particular offender…" and ensures the Court is in the best position possible "to make an accurate evaluation of the danger posed by the offender." (*Jones, paragraphs 123 and 124*)

[49] Evidence in a dangerous offender proceeding must be both relevant and admissible. "Relevant evidence is evidence which tends to prove that a fact issue is more likely than not." (*Jones*, *citing R. v. Seaboyer, [1991] S.C.J. No. 62* and *R. v. Watson, [1996] O.J. No. 2695 (C.A.)*)

[50] Institutional behaviour involving threats and abusive treatment of correctional staff and other prisoners has been considered in pattern analysis and viewed both as a failure to restrain, even while incarcerated, aggressive and assaultive conduct, and as indicating a substantial degree of indifference with respect to reasonably foreseeable consequences for others. (*R. v. Shorting, [2011] M.J. No. 162, paragraph 28 (Q.B.)*; *R. v. Cook, [2010] M.J. No. 327, paragraph 192 (Q.B.)*; *R. v. Casemore, [2009] S.J. No. 440, paragraph 240 (Q.B.)*; *Camara, paragraphs 488 and 494*; *R. v. Middleton, [2014] O.J. No. 776, paragraphs 27 – 29, (S.C.J.)*; *R. v. Gregoire, [1998] M.J. No. 447, paragraph 71 (C.A.)*)

[51] Institutional misconduct by an offender that has not been the subject of criminal charges may become evidence at a dangerous offender proceeding by consent. (*Shorting, paragraph 18)*

[52] Conduct in custody evidence has been admissible via other routes as well. In *Gregoire*, institutional records were held to be "clearly admissible as an exception to the hearsay rule." (*paragraph 63*) The Manitoba Court of Appeal made the following observations about the records:

> …All of the authors of the documentary evidence had extensive personal knowledge of the accused because it was part of their job to acquire such information. It was also part of their job to make reports about the accused's activities and progress within

> the prison system that became part of the official record for the purposes of parole and prison discipline…(*paragraph 63*)

[53] Section 30(1) of the *Canada Evidence Act* and the common law – *Ares v. Venner, [1970] S.C.R. 608* (*Gregoire, paragraph 62*) also ground the admissibility of documentation dealing with institutional behaviour.

[54] Mr. Shea's records from the Correctional Service of Canada and provincial correctional jails – the Central Nova Scotia Correctional Facility and the Cape Breton Correctional Facility – were entered by consent.[2] They were referred to by the expert witnesses, Drs. Theriault and Starzomski, in the preparation of their reports. While I do not accept that they are admissible under the more elastic rules of evidence for sentencing hearings permitting hearsay evidence (*section 723(4), Criminal Code*), I find they are admissible on several bases including as a principled exception to the hearsay rule. As in *Gregoire*, it was the job of correctional staff to document Mr. Shea's behaviour and make reports about him "for the purposes…of prison discipline." (*Gregoire, paragraph 71*)

[55] However, records of institutional behaviour that have been admitted into evidence must still be examined carefully to determine what they establish. Evidence of untried criminal offences which the Crown seeks to rely on to establish a pattern of behaviour is subject to the proof beyond a reasonable doubt standard. (*Neve, paragraph 133*) The quality and detail of the records will determine whether this standard has been met. In some instances institutional records relating to Mr. Shea were prepared on the basis of observations made by correctional officers witnessing events or viewing CCTV footage. This constitutes reliable evidence that establishes basic facts relevant to these proceedings, that is, specific instances of Mr. Shea engaging in assaultive behaviour while incarcerated.

[56] Mr. Shea has objected to his institutional records being used in the pattern analysis. He consented to their admission although my review of the record for the July 3, 2013 "pre-trial" where the issue was addressed suggests that neither Mr. Shea nor his counsel may have fully appreciated the role they would play in these proceedings. (*see Endnote 2*) And while I am satisfied these records are admissible and can be mined for evidence for the pattern analysis, I must still assess what they establish about specific incidents - to be taken into account or not - in determining whether the Crown has proven the requisite pattern of behaviour beyond a reasonable doubt. (*R. v. Ziegler, [2012] B.C.J. No. 1755, paragraph 76 (C.A.); R. v. Pike, [2010] B.C.J. No. 1803, paragraphs 48 – 51 (C.A.)*)

[57] With these legal principles in mind, I will now describe Mr. Shea's predicate offence, the aggravated assault, which underpins this sentencing, and then review his criminal and institutional record. In Part VIII of these reasons I will discuss what I have found to be the convictions and incidents that belong in the pattern analysis under sections 753.1(a)(i) and (ii).

PART IV - *Facts of the Predicate Offence – Aggravated Assault on June 15, 2010*

[58] On June 15, 2010, Mr. Shea, his co-accused, Adam LeBlanc, and their victim, Keithen Downey, were all prisoners at the CNSCF, housed on N-3, a unit consisting of 16 cells, several showers, and a common room. Prisoners were permitted, in rotations, to spend designated periods of time in the common room. Shea and LeBlanc were scheduled to use the common room in the rotation after Downey. For reasons that were not made clear at the trial, Downey had hidden in a shower at the end of his group's rotation at about 8:45 p.m. instead of returning to his cell as required. Downey returned to the day room when Shea and LeBlanc

were on their rotation. A violent encounter erupted shortly after Downey appeared and lasted approximately two and a half minutes. During this time Downey was stabbed.

[59] The altercation was captured on video with no audio (*Trial Exhibit #4*). The video shows Downey approaching LeBlanc's open cell door. Shea is standing outside his cell nearby. The trial judge found that "presumably" there was a short verbal exchange.

[60] Within seconds, Downey backs out of LeBlanc's cell doorway as Shea and then LeBlanc approach him. Shea and LeBlanc become physically aggressive with Downey. Downey grabs Shea and they fall to the floor. Getting back on their feet they fight each other. Shea backs off for a time but then rejoins the altercation on several subsequent occasions.

[61] It is readily apparent from the video that both Shea and LeBlanc are holding something in their right hands and using these objects to strike Downey in downward motions from time to time. The trial judge was unable to see anything in Downey's hands. I also watched the video and could not see anything. At one point when LeBlanc is on the floor on top of Downey, Shea delivers several blows to Downey with his foot.

[62] In her oral decision the trial judge described what she observed in the video:

> …Moments before Correctional Officers arrive, Shea is seen turning his back to the camera and has his hands down his pants. LeBlanc retreats to his cell. Shea and Downey square off again and Shea actually delivers a blow to Downey in the presence of the guards…

[63] The trial judge found there was no air of reality to the section 34(1) defence advanced by Shea and LeBlanc. She concluded that neither of them could claim that the force they used was not intended to cause grievous bodily harm. She found that the only reasonable inference from the evidence was that the objects being wielded by Shea and LeBlanc had caused the five puncture wounds sustained by Downey. She held that there was no air of reality to the suggestion that Shea and LeBlanc used no more force than was necessary. She noted that Shea "entered and exited the fight at will and was never pursued by Downey." The trial judge further satisfied herself that the Crown disproved self-defence by Shea and LeBlanc.

[64] Downey received five small puncture wounds. One wound, about the size of a quarter, was to his chest and required stitches. Stitches were used to close a wound to his cheek and he had a slash on his arm.

PART V - *Conflict with the Law - Shawn Shea's Criminal History*

[65] Mr. Shea has a criminal record of 58 offences, including offences committed when he was a youth.

Mr. Shea's Family Background

[66] Mr. Shea was born on October 3, 1979 to Margaret Shea and Michael Graham. It is unclear to me from the records when his parents stopped living together but whenever it was, Michael Graham appears to have played no part in Mr. Shea's life. Mr. Shea was brought up by his mother in Halifax. At some point his father moved away to Ontario and established another family. A pre-disposition report prepared in June 1992 indicates that by that time Mr. Shea had not seen his father for three years. His mother described Mr. Graham as an alcoholic who

subjected her to a lot of physical and mental abuse. She also said he had been in and out of jail.

[67] Mr. Shea grew up hard. His mother was on social assistance and struggled with a mental illness, described as a bipolar disorder. They often moved and Mr. Shea spent time in foster homes when his mother was unwell. The frequent moves meant that Mr. Shea went to a number of different schools. A half-brother lived in Ontario with Ms. Shea's mother and a half-sister was eventually taken into care and adopted.

Conflict with the Law as a Youth

[68] Mr. Shea's first offence was committed on March 6, 1992. He was 12 years old. He was sentenced for arson on July 22, 1992 and given six months' probation. He gave a statement to police and pleaded guilty to using aerosol cans and a lighter to set fire to the gymnasium door at his school. The other two children with him at the time, one of whom assisted in setting the fire, were under 12 years old and were not charged. Mr. Shea told police that the door was not on fire when they left the scene because they had put snow on it. In a pre-disposition report dated June 24, 1992, prepared for his sentencing, Mr. Shea said it had been "a stupid thing to do." (*Exhibit 17, page 148*)

[69] In the June 24, 1992 pre-disposition report Mr. Shea's mother described him as difficult to bring up as he was "at the stage that he wants to come and go as he pleases." She found Mr. Shea, "hard to handle and communicate with." At the time Mr. Shea was going to counselling at the Atlantic Child Guidance Centre. Ms. Shea expressed great concern about her son and is reported to have just wanted

him "to be a normal 12 year old youth who will follow the rules and do as he is told." (*Exhibit 17, pages 147 and 148*)

[70] The pre-disposition report contains information about Mr. Shea's school performance at the time. He was in Grade 7 and according to his homeroom teacher was functioning well academically in all subjects with the potential to do even better. He was described as a good reader who read with expression. His homeroom teacher told the author of the pre-disposition report that when Mr. Shea was asked to settle down in class he would usually comply. (*Exhibit 17, page 148*)

[71] The school principal reported that Mr. Shea had made "a few trips to the office" for disruptive behaviour in the classroom. He was described as silly at times and a bit of a bully with the younger kids. (*Exhibit 17, page 148*)

[72] The pre-disposition report refers to the counselling Mr. Shea was receiving from the Atlantic Child Guidance Centre. He first saw a counsellor there on January 8, 1992 following a referral by his mother. She had had concerns about behaviour problems at home such as Mr. Shea not listening to her, and "some problem areas at school". (*Exhibit 17, page 149*) There had been individual sessions and sessions with Mr. Shea and his mother together. The focus was on Mr. Shea's feelings and "pointing him in the right direction regarding his behaviour." The counsellor felt that Mr. Shea was "getting a better grip on the situation at home". The plan was to continue to work on "behaviour management." (*Exhibit 17, page 149*)

[73] Mr. Shea's next offence was a theft. On June 21, 1993 he was sentenced to 9 months' probation for stealing a Sony Walkman from Sears in January. (*Exhibit 17, page 151-153*)

[74] The pre-disposition report update of June 1993 reports that Mr. Shea was in voluntary care with the Children's Aid Society. His home life with his mother had unravelled in February 1993 and Mr. Shea had had placements in a group home and a foster home. His foster mother described Mr. Shea as having a mind of his own - "he likes to do what he likes to do." He could be "sneaky" when he didn't get his own way. She thought of Mr. Shea as "smart, although his attention span can be short." (*Exhibit 17, page 157*) In his foster mother's view, Mr. Shea needed someone to help him learn the basic skills needed to get along.

[75] Mr. Shea was interviewed for the June 1993 pre-disposition report update. He indicated he did not feel good about the theft incident of January 29 (stealing the Sony Walkman from Sears.) He also said, when asked about school: "I am not too fond of school." (*Exhibit 17, page 158*)

[76] Mr. Shea's school principal was contacted for comments. In his words: "It's been a bit of a roller coaster ride." He viewed Mr. Shea's behaviour as ranging from well-behaved to "bizarre." He thought Mr. Shea was "fairly bright" although he wasn't making much of an effort. He described Mr. Shea as a kid who "talks tough but is quite sensitive." (*Exhibit 17, page 158*)

[77] The June 1993 pre-disposition report update reported that Mr. Shea's mother was planning to relocate on July 1, 1993 to Calgary to be near relatives. She intended to get settled and then arrange for Mr. Shea to join her.

[78] Mr. Shea did relocate to Calgary to live with his mother. But the arrangement was fraught. In January 1994 he received 10 months' probation for possession of a weapon. (*Exhibit 17, page 263*) He had produced a knife in

October while having a dispute with his mother and threatened her with it. (*Exhibit 5, page 32*)

[79] In August 1995 Mr. Shea was 15 and effectively homeless. A note on the Confidential Instructions for the Crown relating to theft charges of August 16 indicates in the bail section: “Accused on the run re other charges. Has no place to live. Accused just returned from Ottawa after getting caught in stolen car.” (*Exhibit 17, page 238*)

[80] The Confidential Instructions for the Crown for August 23 charges for theft and mischief contain the following notation: “Should hold in custody. Subject not wanted at home (this from Children’s Aid) and has already refused to stay in a shelter. Subject NEEDS SAFE PLACE TO STRAIGHTEN OUT HIS LIFE.” (*Exhibit 17, page 258, emphasis in the original*)

[81] Cst. Robert Wall had a brief conversation with the 15 year old Shawn Shea after his arrest for the August 23 theft. The notes from this conversation indicate the officer’s views on Mr. Shea’s situation: “Even in those brief moments it was very apparent that the accused was lost. He told me, reluctantly, that he left home and admitted that his step-father and he do not get along. Also stated that his birth father took off when he was very young. The last time he saw him was six years ago…At any rate, it appears he needs more that being TAXIED to a youth shelter and in this case incarceration may insure (sic) that he makes it to school this fall and gets a chance to rebuild.” (*Exhibit 17, page 260, emphasis in the original*)

[82] Convictions for the thefts and mischief charge netted Mr. Shea 4 months in custody. A string of thefts committed in the period of April to August 1995 added additional weeks of custody at a sentencing that took place on September 13, 1995.

At the September sentencing Mr. Shea was also sentenced for the July breach of a curfew condition in an undertaking and uttering threats on August 3, 1995.

[83] The threats offence was committed when Mr. Shea was spoken to by the shift manager of the McDonald's restaurant on Herring Cove Road about being on the property. (The police report indicates that Mr. Shea had been loitering on the property and being a nuisance.) Mr. Shea reacted to the shift manager by threatening to kill him and "his whole fucking family." According to the police report while making the threat Mr. Shea was banging a large stick on the ground. (*Exhibit 17, page 225*) Before he walked away, Mr. Shea also pointed out the shift manager's vehicle and told him he knew where he lived. (*Exhibit 17, page 235*)

[84] 1995 ended with Mr. Shea, now 16, being sentenced on December 14 for a September theft and a breach of his release conditions. He received concurrent time to the custodial time he had accumulated at the September 13 sentencing.

[85] In 1996, Mr. Shea was sentenced on three occasions – once in April and twice in October. His offences took place in February, July, and August. They continued to be non-violent offences: taking a motor vehicle without consent, public mischief (providing a false name), breaches, theft, possession of stolen goods, and unlawful use of a credit card. He received more time in youth custody.

[86] The police report of the February car theft incident indicates that during the pursuit of the speeding vehicle, when one of the police officers was alongside, the vehicle swerved toward his cruiser. While it is reasonable to infer from the police report that this was deliberate, there is nothing in the records that establishes Mr. Shea was the driver. Shortly afterwards the stolen vehicle went out of control and came to a stop. All five occupants jumped out through the passenger side and ran

into the woods. Mr. Shea was one of four youths who pleaded guilty to stealing the car. (*Exhibit 17, pages 284 and 294*)

[87] A Sheriffs' transport to court of Mr. Shea and other young persons on February 21, 1996 went very badly. Mr. Shea is documented as starting to punch at a sheriffs' officer who entered the cell to speak with him about handing over his sneakers. Even once the sheriffs had Mr. Shea down, he continued to punch, kick, and swear. Capsicum spray was used and Mr. Shea had to be decontaminated. He and the other youths continued to be very verbally abusive toward the sheriffs' officers and smashed their food all over the cell area. During the trip from Shubenacadie Court to the cells at Spring Garden Road, the youths continued to use abusive language and tried to break the van door down by kicking at it. They also tried to spit on the sheriffs' officer who reported never experiencing such behaviour and abusive language before even in his experience with Federal prisoners. He noted: "I have to remind myself that these were just children and that makes it all the harder to believe." (*Exhibit 17, Sheriffs' Incident Report of February 21, 1996, pages 289 and 290*)

[88] Mr. Shea's April 11, 1996 sentencing proceeded with the benefit of a presentence report dated March 27, 1996. (*Exhibit 17, pages 305 – 309*) It noted that Mr. Shea was now 16. He had a Grade 8 education. The report indicated that Mr. Shea had lived in Calgary with his mother for about 18 months until they returned to Halifax in May 1995. Mr. Shea advised that since July 1995 when he left the group home he had been placed in he had been living on the streets except for an occasional return to stay with his mother.

[89] Mr. Shea's mother was interviewed for the presentence report and described Mr. Shea as "a good and normal child who was quiet, full of fun, and quiet with

strangers." She advised that he no longer lived at home because of his refusal to abide by rules at home, his refusal to attend school, and his lack of maturity in terms of employment. (Mr. Shea indicated to the presentence report author that he had never had any employment other than delivering newspapers for two weeks.) Ms. Shea said her son was "a good boy who is out of control because he wants his own way." She also said she did not believe he was abused as a child although she felt "there is something wrong deep-down inside." Ms. Shea thought that her son should have a psychological assessment and that he needed "involvement in programs or counselling to deal with his behaviour and the underlying issue that may be going on inside him."

[90] The author of the presentence report contacted George MacDonald, a probation officer, for comments on Mr. Shea. Mr. MacDonald had authored the predisposition report of June 1992 and the update of June 1993. His views were not positive. It was his opinion that Mr. Shea was "emotionally-hardened" with "a serious attitude problem and a negative reputation in the community."

[91] The conclusions in the March 27, 1996 presentence report reference Mr. Shea's "disregard for the rights and dignities of others, his lack of insight into his behaviour, and the absence of any commitment to make changes to his general conduct…" This unhappy profile was Mr. Shea at 16.

[92] Mr. Shea's second sentencing in 1996, on October 16, generated an updated pre-sentence report dated September 30, 1996 attaching a pre-disposition report. By the time of the presentence report, Mr. Shea had been living on the streets, in the Waterville Youth Centre, and occasionally at home with his mother. He had a strained relationship with his mother's new husband and he had not been attending school. He had not found a job and told a probation officer that he committed

crimes in order to support himself and buy clothes as the financial support he received from his mother, who was on social assistance, was minimal. (*Exhibit 18, page 364*) Mr. Shea also made the observation that he did not think before he committed the car theft in February 1996 and, as reported in a pre-disposition report prepared for that sentencing in April, "…with some emotion [he said] 'I'm sorry."

[93] The author of the September 30 presentence report spoke to Mr. Shea's mother about how Mr. Shea had done since his release in May 1996 from the Waterville Youth Centre. She advised that her son "did not do much of anything upon his release" and soon became re-involved with the "old crowd" with whom he had got into trouble previously. She expressed exasperation that Mr. Shea continued to break the law and associate with negative peers. Her efforts to assist him had been unproductive: she had tried to involve Mr. Shea in counselling (presumably referring to the Atlantic Child Guidance counselling that Mr. Shea stopped attending), had become involved in the Tough Love program and had arranged for Mr. Shea to have a "big brother". She felt that Mr. Shea "was given numerous opportunities to prove himself but, once again, got himself into trouble…" (*Exhibit 18, pages 360 and 361*) He rebelled, and would not listen or participate. Ms. Shea saw the future as bleak for Mr. Shea if he did not make better choices, saying: "I'd rather see him stop now than end up doing a lot of time in jail." (*Exhibit 18, page 361*)

[94] Ms. Shea told the author of the presentence report that her son knew he could not blame his troubles on peer pressure. He was making his own decisions and was aware that he might have to "learn the hard way." She thought the fact that

Mr. Shea had only seen his biological father approximately three times in his life might be having a negative effect on him. (*Exhibit 18, page 361*)

[95] In 1997 Mr. Shea was sentenced twice: on September 2 for failure to comply with his sentence and on October 15 for possession of stolen goods over $5000. He received additional time in custody; in the case of the stolen goods offence, 8 months concurrent in the Waterville Youth Facility ("Waterville"). The stolen property consisted of camera equipment and a valuable laptop computer taken from the Halifax Herald offices. It was located and returned. (*Exhibit 18, pages 453 and 454*)

[96] On January 7, 1998, Mr. Shea was sentenced for a failure to comply with his sentence from September 1997. He received concurrent time to the sentence he was serving.

[97] Other offences from 1997 caught up with Mr. Shea in 1998. He was sentenced in late January, March, April, and May for break and enters from the previous summer, possession of stolen goods over $5000, theft over $5000, and a breach of release conditions. An incident on July 6, 1997 led to a charge of resisting/obstructing police for which Mr. Shea was sentenced on April 14, 1998.

[98] A presentence report dated January 22, 1998 was prepared for Mr. Shea's sentencing on January 28. This PSR noted that Mr. Shea had spent several custodial terms in Waterville and otherwise had been living with Debbie Melvin when in the community. Mr. Shea indicated to the author of the presentence report that he believed his mother was living in Ottawa. He was not in contact with her and according to the PSR had not heard from her since she left the area "while he was in custody about one year ago." (*Exhibit 18, page 710*)

[99] Mr. Shea had been introduced to Debbie Melvin in May 1997 by her son, Jimmy. She had taken Mr. Shea in as he had been sleeping in a bus shelter. She told the author of the presentence report that Mr. Shea had followed the rules in her home and "enjoyed playing with her other children during the summer." (*Exhibit 18, page 720*) Of course Mr. Shea's criminal record indicates that during the summer of 1997 he was also committing crimes, notably a break and enter in June and another one in July.

[100] Ms. Melvin indicated that an arrangement had been made for Mr. Shea to attend school in October 1997 and she "stressed the need for him to become involved in school and work in order to do well in the community." (*Exhibit 18, page 710*) Ms. Melvin had visited Mr. Shea at Waterville and was willing to provide ongoing support to him.

[101] Mr. Shea showed little insight in his interview for the January 22, 1998 presentence report, indicating that he had had no recent contact with a mental health professional and felt he did not need counselling. (*Exhibit 18, page 711*) Although Mr. Shea described himself as "smart", explaining this to mean if he wanted to do something he could usually figure out a way of doing it, he was unable to identify how he could stay out of trouble. Describing the break and enter on July 23, 1997 as "somewhat impulsive" he said he should not have done it and said that "he knows that he would not get involved in such an event again because he would think of the consequences of his behaviour." However he was unable to explain to the author of the presentence report how this consequence-awareness had developed or changed since being in custody. (*Exhibit 18, page 712*)

[102] Interestingly, despite the Waterville Incident Reports I discuss below, the comments from Waterville in the presentence report are quite positive. Mr. Shea

was housed in the unit that carried out daily maintenance in the institution. Mr. Shea was described as "a person who does good work" and someone who was doing well in completing a correspondence course. The following was noted: "In a structured environment he is responding well, though he does have at times an argumentative and defiant nature that sometimes flares up in the form of bad temper. He is considered very street-wise and is not considered to be particularly trustworthy, though he is conducting himself on a day-to-day basis in a way that helps him evade negative consequences in the institution." (*Exhibit 18, pages 712 to 713*)

[103] Despite Mr. Shea's stated plans to go to school and get a job once released, which he saw as opportunities to give him something to do and avoid trouble, the author of the presentence report concluded with these comments: "…there is no indication as to how he would be able to do any better at accomplishing his stated objectives than he was in the past…[particularly in light of] his lack of insight into his misbehaviour in the community." (*Exhibit 18, page 713*)

[104] As I noted earlier in these reasons, various 1997 offences committed by Mr. Shea did not get resolved until 1998 while he was serving a sentence in Waterville. This included a "resist arrest" charge that arose out of an altercation with police in July 1997. Police had attempted to arrest Mr. Shea for various *Motor Vehicle Act* offences associated with riding a bicycle without a helmet and dangerously. (*Exhibit 19, page 728*) When police officers eventually caught up with Mr. Shea who had fled from them, a struggle ensued and it took several officers to restrain Mr. Shea and handcuff him. (*Exhibit 19, page 729*) Even in police custody, Mr. Shea was out of control, swinging his head at the officer placing him in the patrol

car and "thrashing" around inside the vehicle once secured behind the "silent partner." (*Exhibit 19, page 729*)

[105] In October 1998 there was a review of Mr. Shea's January 28 twelve month custodial youth sentence for break and enter. His sentence was scheduled to expire on January 16, 1999. A letter dated October 8, 1998 from the Program Administrator of the Spryfield Continuing Education Program indicated that Mr. Shea had been accepted into the Spryfield Continuing Education GED preparation course. The course was to be from November 1998 to April 1999 and Mr. Shea was to be registered to write the GED in May of 1999. (*Exhibit 19, page 756*)

[106] A progress report dated October 8, 1998 was filed for Mr. Shea's sentence review. Mr. Shea was interviewed at Waterville for the report. He advised that it was his intention to move back in to Debbie Melvin's home once he was released. Ms. Melvin had been visiting Mr. Shea in Waterville regularly as had her husband and their children. In the summer of 1998 Mr. Shea had been visited three times by his mother when she was in Nova Scotia. (*Exhibit 19, page 763*)

[107] Mr. Shea told the author of the progress report that he had been working in the kitchen at Waterville and also in the maintenance detail. He said he had learned to bake. He had dropped out of a correspondence course and was now preparing for his GED exams. (*Exhibit 19, page 764*)

[108] Debbie Melvin was interviewed for the progress report and expressed her belief that Mr. Shea had "in her presence…shown a change of attitude." It seems that it was Ms. Melvin who arranged for Mr. Shea to complete his GED and she advised that she and Mr. Melvin were prepared to offer him "employment and housing so long as he does his part." They were also "prepared to provide the strict

supervision" that they felt would help him re-adjust to the community, this time as a law abiding citizen. (*Exhibit 19, page 763*)

[109] Mr. Shea seems to have had plans for making some changes in his life. He said he wanted to return to Grade 12 after writing his GED exams. He indicated an interest in getting a trade, maybe as a carpenter or a cook. He planned to get his license so he could drive a truck in his employment with Mr. Melvin, Sr. He intended to be self-sufficient financially while living with the Melvins. (*Exhibit 19, pages 763 – 764*)

[110] The progress report noted Mr. Shea's generally poor behaviour in Waterville and the "underlying negative attitudes" that were reflected "in his resistance to programs and his minimal participation in meaningful sentence plan opportunities…" And although the progress report described Mr. Shea as "a positive worker in the kitchen during the past several months…" as the Waterville reports themselves reveal, he was not an unmitigated success in this role. (*Exhibit 19, page 763*) However Mr. Shea's Custodial Report, which I discuss at paragraph 115, does contain very favourable comments about his kitchen work.

[111] The progress report noted that Mr. Shea had been unreceptive to counselling or programs, lacked insight into his behaviour, and failed to control his temper "…escalating minor conflicts into potentially violent episodes as a result of his failure to accept responsibility for his behaviour." (*Exhibit 19, page 763*)

[112] The progress report viewed Mr. Shea as having chosen not to deal with his "underlying issues" through programming at Waterville. It noted that Mr. Shea was "doing his time…showing signs of his anger, his insensitivity to others, and his

lack of respect for authority." The report concluded that "the most significant change since sentencing has been the passage of his time in custody."

[113] Mr. Shea's October 1998 sentence review also had the benefit of a Nova Scotia Youth Centre Custodial Report (undated). (*Exhibit 19, pages 757 to 760*) Prepared by Ben Hachey, a youth worker, the Report notes that Mr. Shea was remanded to Waterville on September 28, 1997 and ultimately received 15 months in custody. Mr. Hachey reported that staff reports for Mr. Shea indicated "an argumentative and aggressive youth, which could characterize his term while at the Nova Scotia Youth Centre." (*Exhibit 19, page 757*) It was noted that Mr. Shea's placement, on October 10, 1997, on the Maintenance Unit, "immediately" led to difficulties "primarily as a result of arguing over insignificant points, an inability to see another's point of view, and lack of respect for authority." Mr. Hachey stated that: "Staff reports consistently describe a difficult and obstinate youth who has stuck to his anti-social beliefs and actions throughout his stay." (*Exhibit 19, page 758*)

[114] Peer interactions were characterized as problematic as Mr. Shea was said to attempt "to intimidate and control his fellow residents, especially the small and weak." This led to "physical conflicts" and concerns about "loss of face".

[115] As contrasted to the Incident Reports I am about to review, Mr. Hachey reported that Mr. Shea "has done notably well in the Vocational Kitchen Program and has earned consistently good reports from supervisory staff." Mr. Shea was described as "diligent in the performance of his kitchen duties and is quick to volunteer for extra shifts." Mr. Shea responded best to immediate rewards such as money but "struggles" where "gratification or benefit is delayed." (*Exhibit 19, page 758*)

[116] Mr. Shea was described in the Custodial Report as "immature, aggressive and impatient, with little effort recorded to curb his anti-social behaviours." It was noted that "little meaningful growth has been seen." (*Exhibit 19, page 758*)

[117] Mr. Shea's sentencing plan at Waterville had been focused on education, anger management and vocational training. There had been little progress in any of these areas. He had been taking a correspondence course but abandoned it once the assignments became more difficult. His Custodial Report saw him as capable of doing the work but refusing to ask for help and giving up "quickly…if the answer is not obvious." (*Exhibit 19, page 759*)

[118] As for anger management, no progress was reported. Mr. Shea was said to be "comfortable with his lifestyle and sees no need to control his temper if it can be useful in certain circumstances." One on one counselling was "utilized to little effect, to the point of outright refusal by the young man to participate." (*Exhibit 19, page 759*)

[119] Mr. Shea's kitchen work was what the Custodial Report mentioned in the context of vocational training. He was described as "quite an asset as a kitchen worker…who has received glowing reports from his supervisors." It was thought he had developed "some skills which could become useful upon release." These skills were not identified. His inconsistency as a maintenance worker was noted and it was reiterated that staff reports describe "a moody and angry young man at times." (*Exhibit 19, page 759*)

[120] The Custodial Report concludes by saying that Mr. Shea "can be determined and hard-working…" It suggested that "given the ideal circumstances" he could lead a life free of crime…" but would have to be dedicated to achieving that goal.

It is impossible to know exactly what Mr. Hachey meant when he referred to Mr. Shea needing "ideal circumstances" in order to live a crime-free life, especially as Mr. Shea's circumstances had always been far from ideal.

[121] Exhibit 18, at pages 529 to 665 contain incident reports relating to Mr. Shea when he was in custody at the Waterville Youth Centre from October 1997 to October 1998. The reports record incidents of unacceptable horseplay with other youths, disruptive, immature behaviour, abusive language toward staff members, and acting out in response to perceived unfairness. For example on November 14, 1997, Mr. Shea failed to respond to repeated directions to stop banging on his door and encouraging other youths to "go off." Mr. Shea later explained that his behaviour was a reaction to his perception that a disciplinary sanction was unjustified. Waterville staff writing up the incident report told Mr. Shea that if he "wanted to present his case in a more appropriate manner…" he would be listened to. (*Exhibit 18, page 650*)

[122] The Waterville incident reports are an early indication that Mr. Shea could become upset when he thought he was being treated unfairly. His disciplinary record as an adult offender contains similar examples of Mr. Shea reacting to perceived injustices.

[123] By January 1998 Mr. Shea had made some progress in terms of managing his behaviours. An incident report from January 22, 1998 contains the following comments: "[Youth Worker] states that YO [Young Offender] Shea did accept responsibility and has shown that he is making gains in regards to displaying more appropriate behaviour and some self-control." When sanctions were imposed it was noted that Mr. Shea accepted the sanctions "and was informed that his improved behaviour has not gone unnoticed." (*Exhibit 18, page 645*)

[124] That being said, the reports continue to document verbally belligerent, argumentative and defiant behaviour by Mr. Shea. He was quite resistant to doing chores and appears to have been lazy and indifferent about work. A May 13, 1998 Information Report contained this note: "In the opinion of this writer YO Shea is too irresponsible and argumentative to be effective as a maintenance worker." (*Exhibit 18, page 628*)

[125] An Incident Report dated July 5, 1998 noted that Mr. Shea had garnered his third sanction in six days for disrespectful behaviour with staff. The writer commented about the sanctions: "Obviously he does not take them seriously."

[126] The Incident Reports refer to Mr. Shea showing a better side of himself in the context of kitchen work at the facility. For example, an Incident Report of July 20, 1998, states that Mr. Shea had been conducting himself in a manner that contrasted unfavourably with his behaviour in the kitchen: "YO Shea has demonstrated out of control behaviour that it not in keeping with his role as a trusted kitchen worker. YO Shea must learn that he cannot do whatever he wants, especially when it is disruptive to the swim lesson program." (*Exhibit 18, page 573*)

[127] Mr. Shea's defiance of staff continued throughout his time in Waterville from October 1997 to October 1998. On October 5, 1998 when he finally complied with a staff request to move some storage boxes his attitude was poor: "I'm not your bitch" he said to the youth worker. (*Exhibit 18, page 537*)

[128] An Incident Report on October 8, 1998 referenced a staff investigation into gambling and muscling on Mr. Shea's unit. Staff reported that their investigation pointed to Mr. Shea having punched another youth "several times over gambling

debts." Mr. Shea denied any involvement and was "cocky and sarcastic" when he was told that Waterville would be recommending his transfer to an adult correctional facility. Mr. Shea is reported to have responded with: "Good, I want to go and I'll sign whatever I have to…I can't wait to go to the Correctional Centre." (*Exhibit 18, page 530*)

Conflict with the Law as an Adult

[129] Mr. Shea was nineteen when he drew his first federal sentence of imprisonment. Charges for break and enter, breach of probation, and possession over $5000 from May 12, 1999 led to Mr. Shea being sentenced on June 1, 1999 to two years in prison. He received two years on the break and enter and concurrent custodial sentences on the other offences.

[130] Older charges, from November 23, 1998 of assault and assault causing bodily harm, took longer to make their way to disposition. Mr. Shea was sentenced in Provincial Court on June 14, 2001 for these offences and received 60 day concurrent jail sentences with one years' probation for each. The alleged offence occurred at the Waterville Correctional Facility. Mr. Shea and others approached another resident who was going to bed. They advised him that he "may as well face it now." (*Exhibit 6, page 98*) The victim's mattress was pulled on to the floor. Mr. Shea is alleged to have run across the room and "drop kicked" the victim. A friend of the victim attempted to intervene and was also assaulted by the group. Mr. Shea was also charged for punching one of the victims numerous times in the head.

[131] The November 23, 1998 assaults were Mr. Shea's first convictions for actual (as opposed to threatened) violence. He was just 19 when they were committed.

[132] On April 18, 2001 Mr. Shea committed another break and enter. In September he was charged with possession crack cocaine for the purpose of trafficking. His sentencing for both of these offences took place on November 23, 2001. He pleaded guilty and received his second federal term of imprisonment on the drug charge – two years – with a one year consecutive sentence for the break and enter.

[133] On May 29, 2002, Mr. Shea was sentenced for a second time for violence. On April 8, 2001 he was observed by a security officer at the Shopper's Drug Mart in Herring Cove attempting to shoplift. When the security officer identified himself and told Mr. Shea not to return, Mr. Shea "raised his hand in a fighting stance." In response to the security officer making it appear that he was calling the police on his cell phone, Mr. Shea picked up a 3-inch rock and threw it at the security officer's head. (*Exhibit 19, page 930*) Mr. Shea was sentenced to one month consecutive for this assault with a weapon. At the time Mr. Shea was on Statutory Release from Renous (Atlantic Institution).

[134] Mr. Shea's third federal term of imprisonment was imposed for conspiracy to traffic drugs, an offence committed during the dates of June 16 and July 11, 2002 during which time he had been conspiring to have drugs brought into Springhill Institution. On July 14, 2005 Mr. Shea received a sentence of two years and six months.

[135] A presentence report dated July 11, 2005 (*Exhibit 23*) was prepared for Mr. Shea's July 14 drug conspiracy sentencing. It canvased information that had been referenced in earlier presentence reports about Mr. Shea's childhood. Some new details were added about his mother's poor health – Mr. Shea said she had been diagnosed with schizophrenia and had epilepsy – and how that impaired her ability

to care for him. As I noted earlier in these reasons, this led to foster home and group home placements and eventually Mr. Shea stopped living with his mother altogether after she remarried. At the time of this presentence report Mr. Shea said he hadn't spoken to his mother, who lived in Ottawa, in about two years.

[136] Mr. Shea informed the author of the presentence report that when in 2001 he had been given a federal prison sentence totaling 3 years, he had first gone to Springhill and was then transferred to Renous after which he was sent to Millhaven in Ontario. He was returned to Nova Scotia and released on parole in December 2003. He stayed with Debbie Melvin. Mr. Shea said in March 2004, while awaiting sentencing, he went "on the run." He was arrested in May 2005 and placed in custody at the CNSCF.

[137] When the presentence report was being prepared in July 2005, Mr. Shea told the author that from March 2004 to May 2005 he lived with his current girlfriend, Stacey McKenna. Ms. McKenna was interviewed and seems to have confirmed what Mr. Shea said. She talked about how Mr. Shea regretted his involvement with the criminal justice system and "was happy and finally had a family." She also said that "During their time together…[they] got along great and did everything together." She described the relationship as "normal…he worked everyday and I worked every day." She told the author of the presentence report that when Mr. Shea returned to the community he had a full-time job waiting for him with Matt Lohnes whom she described as Mr. Shea's former employer.

[138] As I will discuss later in these reasons, the details provided in the presentence report by Mr. Shea and apparently confirmed by Ms. McKenna are at odds with Ms. McKenna's evidence at this hearing. I will be describing her testimony more fully but in brief, Ms. McKenna testified in these proceedings that

Mr. Shea did not live with her in 2004 and 2005 although they were seeing each other during that time. Matthew Lohnes, another witness in these proceedings, whose evidence I will be reviewing also, has testified that Mr. Shea rented an apartment in his home in 2004/2005.

[139] In his interview for the July 11, 2005 presentence report, Mr. Shea said he had been employed for approximately one year doing snow removal and lawn care for Matthew Lohnes. He claimed to have been making $11 an hour. This information is inconsistent with the evidence given in these proceedings by Mr. Lohnes.

[140] In the July 2005 presentence report Ms. McKenna was either eager to portray Mr. Shea as anxious to reform or she believed he was prepared to. She said he was looking forward to reintegrating back into the community and that he would take any available programs to help him prior to his release from incarceration. Perhaps Mr. Shea was sincere when he said to the author of the presentence report that he really wanted "to get out of jail and go to school."

[141] The presentence report did note that Mr. Shea "has experienced a lot of hardship during his formative years which he does not appear to have received counselling for." It went on to say: "In order to aid Mr. Shea with this, he should attend assessment and/or counselling from a mental health professional."

[142] Chief Justice Kennedy was characteristically blunt when he sentenced Mr. Shea on July 14, 2005 for the conspiracy to bring cocaine into Springhill. He observed that Mr. Shea was lucky the drug trade had not led to his untimely end. He referred to the "miserable little world of the drug trafficker. Brutal, miserable little lives, where scores have to be settled with violence and intimidation." He

remarked on Mr. Shea's "terrible background" and went on to note "that most of the people we deal with…have had difficult backgrounds." He picked up on Mr. Shea's statements from the presentence report that he wanted to get his life together but, he warned Mr. Shea if he continued to "participate in the drug trade…it will just be more federal time every time you are back before the court…" He said: "You have to ask yourself…if this is all there is. Is this all there is? Is this all your life is ever going to be about, Mr. Shea? This mess…" He pointed out that Mr. Shea could choose to blame his hard lot or he could "overcome it. It's up to you. Not going to be easy." He wished Mr. Shea luck: "It's going to be tough, but he wants to do better. Let's see." (*Exhibit 19, pages 938 - 942*)

[143] Between his July 14, 2005 sentencing and February 2, 2010 when Mr. Shea received a fourth penitentiary term, he was before the courts to be sentenced only once – on April 17, 2007 for resisting/obstructing a peace officer.

[144] The resist arrest offence occurred on February 26, 2007. Mr. Shea was on Statutory Release from Renous. Police had source information that Mr. Shea was in possession of a gun and was looking to harm someone. When pulled over by police, Mr. Shea refused to comply with their demands even though the police had their handguns drawn. Mr. Shea was hauled out of the car as he would not get out voluntarily and had to be wrestled to the ground where he was handcuffed. (*Exhibit 19, page 949*)

[145] On February 2, 2010, Mr. Shea was sentenced for offences that occurred between January 1 and January 11, 2009. On two counts of extortion he received concurrent sentences of six years and six months and three years concurrent for

forcible confinement. He was also sentenced on February 2, 2010 to four months concurrent for failing to comply with a condition of release.

[146] Mr. Shea's convictions for forcible confinement and extortion arose out of his efforts to recover a Lincoln motor vehicle that he had purchased and parked at 40 Wheatstone Heights where he lived with Ms. McKenna. The car was removed on January 9, 2009. In the decision following his trial, LeBlanc, J. made the following factual findings: Shawn Shea and Chad Stevenson went to Luke Hersey's residence on January 10, 2009, for the purpose of forcing Mr. Hersey to disclose the location of the Lincoln motor vehicle. Mr. Hersey said that while Mr. Shea and Mr. Stevenson were at his residence, they were in possession of a firearm. As a result of their presence at the residence, Luke Hersey directed his brother to return the Lincoln to Mr. Shea.

[147] Mr. Shea was arrested on January 10, 2009 with Mr. Stevenson and Ms. McKenna who was driving the vehicle they were in.[3] An investigation by police at Luke Hersey's residence discovered property damage and injuries to Mr. Hersey – a bruised lip and a swollen upper face. Police located a sawed-off shotgun near the steps leading to the residence and two knives in the vicinity of the residence. LeBlanc, J. found that Mr. Shea had held Luke Hersey at his residence until arrangements were made for the Lincoln to be returned. He found that Mr. Shea used threats to achieve his objective of getting the Lincoln back and that he made "a clear and unmistakable statement of intention to injure…" (*Exhibit 20, page 1280*) LeBlanc, J. summarized the case by saying:

> …Mr. Shea and Mr. Stevenson being unable to recover possession of the vehicle by peaceful means before going to Luke Hersey's residence on 12A Panavista Drive on January

> 10, 2009, armed with a firearm and weapons. While they were in the residence they threatened Mr. Hersey with weapons and actually assaulted him causing him to have a bleeding lip and a swollen face…I am satisfied that Mr. Shea and Mr. Stevenson by words and conduct threatened Luke Hersey with violence if he failed to deliver the vehicle. The clear and logical inference to be drawn is that by threatening Luke Hersey with physical violence they made him change his position from being unwilling to return the Lincoln to directing [J.H. or J.S.] to return the vehicle to Shea…(*Exhibit 20, pages 1281 and 1282*)

[148] The extortion and forcible confinement sentencing was Mr. Shea's third sentencing for violent offences. He was previously sentenced on two occasions for resisting/obstructing a peace officer. (April 14, 1998 and April 17, 2007)

[149] On April 8, 2010, Mr. Shea was sentenced for weapons offences committed on January 21, 2008. He was arrested in possession of brass knuckles (that formed a belt buckle he was wearing) and charged with possession of a prohibited weapon knowing he was not licensed to possess it and two counts of possession of a weapon while prohibited as he was subject to two separate section 110(2) weapons prohibition orders. (*Exhibit 20, page 1378*) The sentencing judge took into account "the very significant sentence" that Mr. Shea was already serving and imposed a consecutive fourteen day sentence and two 14 day concurrent sentences. (*Exhibit 15, page 1938*)

[150] The sentencing judge was critical of Mr. Shea's decision to wear a belt buckle that was a set of brass knuckles. She noted that he had been "in and out of the criminal justice system often enough" to know that he should have made sure

this was not something he was prohibited from possessing. If he didn't know, she said, he should have ensured he wasn't getting himself into further trouble. "You know that. You're smart enough to know that." (*Exhibit 15, page 1938*)

[151] Mr. Shea was sentenced for separate mischief incidents on April 30, 2010 and May 3, 2010. He received 6 months consecutive for mischief on April 8, 2009 and 30 days concurrent for mischief that occurred on December 7, 2009. The December 7 incident involved Mr. Shea damaging a metal detector chair at the CNSCF after being informed that due to an altercation in the Sheriffs' van during transport he was going to be sent to segregation. (*Exhibit 22, page 1770*)

[152] On April 8, 2009 while in the Central Nova Scotia Correctional Facility during the time his extortion/forcible confinement charges were working their way through the courts, Mr. Shea became involved in a riot. On April 30, 2010 he was sentenced for mischief and received six months consecutive to the sentence he was serving and six months' concurrent for the offence of being a rioter.

[153] Although the Crown Brief Report alleged that Mr. Shea had participated in the riot by starting a fire in North 6 and assaulted correctional staff by spraying them with a yellow fluid believed to be urine (*Exhibit 21, page 1417*), at sentencing his role was described as follows:

> ...one of the inmates in North 6 who refused to lock up both before and after the [riot] proclamation was read. He was present in the day room when the fire was started and involved in causing some of the property damage including window smashing and…trays being thrown at the ceiling to smash the lights. (*Exhibit 41, Sentencing Transcript, page 7*)

[154] CNSCF Records contain more serious allegations about Mr. Shea's misconduct during the riot (*Exhibit 12, pages 820, 829, 830 and 839*), however I am treating the description given by the Crown at his sentencing and accepted by Mr. Shea, as the evidence of his role.

[155] Mr. Shea was charged with 7 other prisoners. He was not alleged to have started the riot and was not charged with assaulting a correctional officer with a homemade axe, as was one of his co-accused. (The co-accused was charged with swinging the axe, made from a broken light fixture, at the shield of a correctional officer. (*Exhibit 20, page 147)*)

[156] On May 3, 2010 Mr. Shea was sentenced to 30 days concurrent on a mischief charge from December 7, 2009.

[157] Mr. Shea had another sentencing in 2010, for offences committed in the period of November 18 to December 21, 2008 and on December 20, 2008. On December 15, 2010, he received a two year sentence consecutive to the time he was serving for conspiracy to traffic in cocaine, with two years' concurrent for a second offence of conspiracy to traffic. He was also sentenced to six months' concurrent time on a failure to comply with release conditions.

[158] As noted earlier in these reasons, on August 30, 2011, Mr. Shea was convicted of the predicate offence of aggravated assault in the wounding of another prisoner at the Central Nova Scotia Correctional Facility. Mr. Shea's Statutory Release date for this offence was September 2, 2014. His warrant expiry is December 15, 2016.

PART VI – ***Mr. Shea's In-Custody Conduct***

Shawn Shea's Provincial Remands and Sentences – the Records of the Central Nova Scotia Correctional Facility (CNSCF) and the Cape Breton Correctional Facility (CBCF)

[159] Mr. Shea's time in the provincial correctional system has been characterized by the behaviours that are also noted in his youth and federal prison records. Violence, disrespect of staff and disregard for rules have been consistent themes. On June 22, 2001 at the Central Nova Scotia Correctional Facility (CNSCF), Mr. Shea was observed by surveillance camera punching another prisoner who was lying down. (*Exhibit 10, page 314*) He was transferred to the Cape Breton Correctional Facility for other unspecified reasons before the incident was adjudicated. (*Exhibit 10, page 313*) On October 19, 2001 he was written up by CNSCF staff for being verbally abusive and aggressive with staff, biting a correctional officer, throwing objects and scalding hot water at staff. (*Exhibit 10, pages 271 and 273*) A report written on October 26, 2001 about Mr. Shea's verbally abusive conduct states: "This offender has a total disregard for Institutional protocol, staff, and authority in general." (*Exhibit 10, page 228*) On November 20, 2001, Mr. Shea was said to have been threatening and disrespectful toward correctional staff although it was also noted that subsequently he was calm and expressed regret for having acted out. The report on his misconduct also noted that his complaint – the failure of the institution to supply enough juice for 16 prisoners – may have had merit. (*Exhibit 10, pages 223 - 225*)

[160] On August 14, 2002, Mr. Shea punched a correctional officer at the CNSCF while the officer was trying to control him. (*Exhibit 10, page 156*) On October 17, he punched another prisoner in front of a correctional officer because he believed him to be a Protective Custody prisoner. (*Exhibit 10, pages 118 and 119*) He made

"a sudden dash around the correctional officer and punched [KG] in the face." (*Exhibit 10, page 118*)

[161] In June 2003 Mr. Shea was found to be in possession of marijuana and tobacco. On June 12, 2003, a correctional officer observed a prisoner (WB) "running out of" Mr. Shea's cell. As WB "was making his way to the front of the day room Shea was punching and kicking at [him]" (*Exhibit 10, page 70*)

[162] Mr. Shea was defiant and disrespectful and on June 28 was sent to segregation for 15 days. (*Exhibit 10, pages 35, 39, and 38*) On July 2 and 3, 2003 Mr. Shea verbally abused and threatened correctional officers ("Wait 'til I get out in two years. I'll see you on the street and I will beat you.") and called one correctional officer an offensive, pejorative name. (*Exhibit 10, pages 25, 27, and 28*)

[163] On April 14, 2007, Mr. Shea had covered his cell window and camera. Correctional officers entered to find him with contraband tobacco. Mr. Shea is reported to have threatened staff by making a gun noise –"click, click, bang" and saying: "I'll get you. I won't be in here forever. I'll see you on the outside." (*Exhibit 11, page 455*) At his Review Board Hearing Mr. Shea admitted to making the "gun noise" but said it did not mean anything. Although he claimed the statements were not threats, he admitted to being verbally abusive (*Exhibit 11, page 463*) and was informed his conduct fell within the institution's "Intimidation Policy." (*Exhibit 11, page 458*)

[164] On November 3, 2007, Mr. Shea was observed on camera "having a verbal and small physical altercation" with another prisoner. It appeared to correctional stuff that some punches had to being thrown but that Mr. Shea and [MB] stopped

fighting when they saw that correctional officers were watching. (*Exhibit 11, pages 411, 413, 414*)

[165] On March 14, 2009, Mr. Shea was observed on surveillance video punching another CNSCF prisoner in the eye. (*Exhibit 12, pages 815-818*) He received 10 days in segregation.

[166] In addition to the criminal charges for the April 8, 2009 riot at the CNSCF, Mr. Shea received an institutional sentence totaling 15 days in segregation. (*Exhibit 12, pages 829 and 839*)

[167] On May 26, 2009, Mr. Shea filed a complaint with the Office of the Nova Scotia Ombuds stating that after the riot, which he denied being involved in, he had been sent "to the hole" for 30 days and then moved to another segregated unit for a further 17 days "and counting." Mr. Shea's complaint is very polite but emphatic. He says that he wants to get out of "this 23 hour lock-down" and doesn't see any light at the end of the tunnel. He concludes by saying: "Thanks for taking the time to read my complaint and mabee (sic) someone can see and hear how it works in here and there's a lot more that happens that goes on behind the scenes that is not right." (*Exhibit 12, page 1093*)

[168] Mr. Shea told the Ombuds in his complaint that the response of the CNSCF to his situation was to tell him: "You will be in here for life!" (*Exhibit 12, page 1092*) There is nothing to indicate how Mr. Shea's complaint was dealt with.

[169] On September 15, 2009, Mr. Shea, with other prisoners, protested being locked down by throwing various items from his door slot into the day room of North 4. (*Exhibit 13, page 1358*) For this he was confined to his cell for 10 days. (*Exhibit 13, page 1361*)

[170] Mr. Shea's complaints shed some light on the frustrations he experienced in the provincial correctional system. He filed three complaints on September 23, 2009 while incarcerated at the Cape Breton Correctional Facility (CBCF). He complained about having a camera in his cell, describing it as an invasion of "the little bit of privacy I get. It feels like I'm getting strip searched 10 times a day." He went on to say: I feel violated every minite. (sic) I know I am in jail but this is going to (sic) far." The institutional response was to indicate that prisoners were permitted to "put a blanket or sheet up when using their washroom." (*Exhibit 13, pages 1378 and 1379*)

[171] Mr. Shea also complained about being shackled and handcuffed during recreation in segregation at CBCF. He pointed out that it was impossible to exercise properly in restraints and said: "No jail does this anywhere except here why does this jail degrade and punish us all the time. This jail needs someone on the outside looking in." (*Exhibit 13, page 1381*) The institutional response was terse: "Standing (sic) Operating Procedure for this facility if an offender is in isolation unit for disciplinary sanctions." (*Exhibit 13, page 1382*)

[172] Mr. Shea's third complaint questioned why he was not getting an hour of recreation a day. He noted the conditions in segregation: "We are locked up all day with nothing to do. No activities, no board games, no video games nothing. Sometimes you don't even get a half hour…" (*Exhibit 13, page 1384*) The institution responded: "Our recreation program for maximum security has always been ½ hour outside recreation." There was to be no action as the "present protocol does not need to be amended." (*Exhibit 13, page 1385*)

[173] In November 2009 Mr. Shea was once again in the Cape Breton Correctional Centre. He was written up in a disciplinary report for assaulting a fellow prisoner.

The details were described as follows: "Shawn Shea was seen on camera [by a correctional officer] assaulting [a fellow prisoner, A.S.] in his cell. After reviewing the cameras it did show Shea assaulting [A.S.] on 2 separate occasions within 5 minutes apart. [A.S.] was sent out to the Hospital with facial injuries due to the assaults…" (*Exhibit 14, page 1785*)

[174] As a result of the assault of A.S. on November 13, 2009, Mr. Shea lost a week's worth of privileges and was sent to segregation for 15 days. (*Exhibit 14, page 1786*) Although initially threatening towards staff and non-compliant, Mr. Shea was escorted to segregation without incident. (*Exhibit 14, page 1790*) The CBCF records indicate that once Mr. Shea had served his segregation he would be locked indefinitely "in max". (*Exhibit 14, page 1791*)

[175] Mr. Shea was returned from the CBCF to the CNSCF on November 18, 2009 and placed in segregation. (*Exhibit 14, page 1645*) On December 7, 2009, he was being returned from court via the Sheriffs' van. A standard request was made for him to sit in the BOSS chair. Mr. Shea responded by yelling profanities and kicking the chair, destroying it. The intervention of three correctional officers led to Mr. Shea becoming compliant. (*Exhibit 14, page 1649*) As mentioned earlier, the destruction of the chair led to a damage-to-property charge being laid against Mr. Shea.

[176] A recommendation for a shorter period of segregation was over-ridden by the Deputy Superintendent for the CNSCF and Mr. Shea was given a 25-day segregation. He was also given 25 days, to be served concurrently, for fighting with another prisoner in the Sheriffs' van. (*Exhibit 14, pages 1653 and 1654*)

[177] Mr. Shea had numerous disciplinary reports in 2010 and 2011 while in custody in the provincial correctional system.

[178] On January 25, 2010, Mr. Shea was observed on camera assaulting another prisoner. Mr. Shea claimed they had been "practice WWE wrestling." (*Exhibit 15, pages 2042 and 2045*) He received 10 days in segregation. (*Exhibit 15, pages 2046*)

[179] By February 7, Mr. Shea was out of segregation. After he refused to lock up, correctional officers escorted him to his cell. Mr. Shea reacted by punching one of the officers in the face. During the use of force that followed, he punched another officer but was eventually controlled and locked in his cell. (*Exhibit 15, page 2047*) He received 15 days confined to his cell. (*Exhibit 15, pages 2048 and 2051*)

[180] On various dates - February 6, March 5, Mr. Shea was verbally abusive to correctional officers and was confined to his cell for it. (*Exhibit 15, pages 2052, 2059, 2056, 2062*) In one instance he admitted to being upset because his cell was dirty and said he had apologized to the officer involved. (*Exhibit 15, page 2055*)

[181] Late in the evening on March 21, 2010, Mr. Shea was overheard by correctional staff threatening to assault another prisoner if he did not break the sprinkler. (*Exhibit 15, page 2070*) Mr. Shea admitted only to "hollering" and was confined to his cell for 5 days. (*Exhibit 15, pages 2071 and 2072*)

[182] On April 7, 2010, Mr. Shea bolted past a correctional officer who was serving him his meal, and ran toward another prisoner who locked himself in his cell. (*Exhibit 15, page 2073*) Mr. Shea claimed to be just getting some hot water, an implausible explanation in the circumstances. He was confined to his cell for 7 days. (*Exhibit 15, page 2077*)

[183] Other disciplinary incidents involved insubordination, contraband and verbally abusive behaviour.

[184] On May 1, 2010 Mr. Shea was seen fighting with another prisoner. He responded to verbal commands to stop and locked himself in his cell without incident. (*Exhibit 15, page 2088*) This netted Mr. Shea 10 days confined to his cell.

[185] By July 2010, Mr. Shea had established a reputation at the CNSCF of having no respect for staff and being "problematic…for some time." (*Exhibit 15, page 2100*) "Offender Incident Report" documents the incidents I have just discussed as well as reports for "detrimental behaviour", insubordination, causing a disturbance, verbal abuse of staff, damage to property, and possession of contraband. (*Exhibit 15, pages 2118, 2121 – 2124*) Mr. Shea's customary response was one of denial.

[186] On September 29, 2010, Mr. Shea was accused of burning another prisoner's arms. He denied the allegation, describing them as "crazy". The complainant prisoner told the discipline hearing board he had permitted Mr. Shea to burn him and did not want to give a statement to the police. (*Exhibit 15, page 2151*) Mr. Shea received 10 days in segregation. (*Exhibit 15, page 2152*)

[187] Mr. Shea's rude, disrespectful, and defiant behaviour resulting in disciplinary sanctions continued throughout the fall of 2010 and the spring of 2011. He was frequently written up for misconduct and subject to being segregated.

[188] On March 8, 2011, Mr. Shea filled a carton with his faeces and urine and threw it on correctional officers who had entered his cell to restore order. Mr. Shea had been refusing to cooperate with his "mattress protocol" (which required him to hand over his bedding to correctional officers in the morning) and was assaultive.

(*Exhibit 15, pages 2193, 2208*) Already in segregation, he was given concurrent segregation time for the incident.

[189] In segregation Mr. Shea complained about a lack of privacy and being cold. He told correctional staff his rights were being violated and he refused to hand over his blanket. (*Exhibit 15, page 2225*) This defiance extended his time in segregation. (*Exhibit 15, page 2237*) As of March 16, 2011 Mr. Shea was completing 45 days in segregation with a release date of April 20. (*Exhibit 15, page 2247*) Ongoing insubordination and non-compliance led to further segregation. The sanctions did not appear to have any effect on Mr. Shea's behaviours or attitude. (*Exhibit 15, page 2266*)

[190] Mr. Shea's Nova Scotia Corrections file contains copies of official complaints forms that he submitted between May 12, 2010 and March 15, 2011 (*Exhibit 15, pages 2298 to 2350*) In his complaints, Mr. Shea raised concerns about the lack of healthy snacks in the canteen, a lack of law books and case-law materials, problems with accessing his disclosure, the poor quality of the meals, the cost and quality of personal hygiene products, issues with visits, removal of newspapers (which the CNSCF said was due to the messy condition of the dayroom), perceived unfairness in the institutional discipline process, provision of "bag lunches" to segregated prisoners instead of hot meals, use in segregation of what the CNSCF called "eco-utensils (which Mr. Shea described as "paper spoons"), handcuffing of segregated prisoners in segregation during recreation, use of cameras in segregation, lack of any opportunity for prisoners to raise some money for local charities, (according to Mr. Shea's complaint, "There's nothing positive in here"), and the "no blanket" policy in the segregation cells which Mr. Shea said were "freezing cold."

[191] Mr. Shea's behaviour continued to cause him problems in the CNSCF during 2011. On September 1, 2011, Mr. Shea became very agitated while speaking on the intercom to correctional staff. He began screaming and yelling, banged the dayroom windows and kicked a mop bucket. He hit the mop bucket around the room and continued screaming and hitting the "duress" button and the intercom. (*Exhibit 16, page 2657*) Mr. Shea subsequently admitted he was upset about the dayroom rotations.

[192] On October 20, 2011, it was alleged that "facility surveillance" had found that Mr. Shea was involved in planning an assault against a staff member. (*Exhibit 16, page 2662*) Mr. Shea denied the accusation. He was already in segregation. His punishment was the suspension of his current privileges and 30 days more of segregation.

[193] In November 2011, Mr. Shea was transferred to the CBCF. (*Exhibit 16, page 2675*) While there he became involved in a fight between two other prisoners and was captured on video throwing two punches. (*Exhibit 16, page 2687*) This resulted in him being locked in his cell for 5 days.

[194] Mr. Shea was back at the CNSCF in December 2011 and being written up for being verbally abusive and disrespectful to staff.

[195] In January 2012, Mr. Shea was in the Cape Breton Correctional Facility. He was in trouble throughout his stay there. On January 3 his maximum range refused to lock up and Mr. Shea was identified as a spokesperson for the range. (*Exhibit 16, page 2697*) He was also described as the "ringleader." (*Exhibit 16, page 2699*) At his discipline hearing, Mr. Shea said he had been attempting to get programming and jobs for his fellow prisoners. (*Exhibit 16, page 2700*) For the

lock-up defiance, Mr. Shea received 10 days in segregation. His clothing, bedding, and mattress were removed. Later, his mattress and blanket were returned. (*Exhibit 16, page 2698*)

[196] On February 27, 2012 Mr. Shea was seen in a brief physical altercation with another prisoner. This lasted approximately 50 seconds. Mr. Shea and the other prisoner were separated without incident and taken to segregation. (*Exhibit 16, page 2721*) The video footage of the incident was reviewed and Mr. Shea was observed "lunging @ & striking" the other prisoner. The other prisoner "retaliated by fighting back." (*Exhibit 16, page 2723*) Mr. Shea was segregated and lost privileges. (*Exhibit 16, page 2725*)

[197] A disciplinary report for July 19, 2012 indicates that Mr. Shea was seen on video footage entering another prisoner's cell and striking him. The other prisoner confirmed the assault. (*Exhibit 16, page 2736*) Once again Mr. Shea is sent to segregation. (*Exhibit 16, page 2738*)

[198] On June 3, 2012, Mr. Shea was transferred from the CBCF back to the CNSCF. (*Exhibit 16, page 2756*) At some point he is returned to the CBCF and then back to the CNSCF on January 2, 2014. (*Exhibit 16, page 2769*)

[199] Mr. Shea's records also show consistent institutional misconduct: verbal abuse of staff, allegations of possession of contraband, disobeying institutional orders and defiance.

Shawn Shea's Federal Incarcerations – the Records of the Correctional Service of Canada

[200] Mr. Shea's provincial correctional records contain 17 pages of records from his federal incarcerations, described as "Offender Profile, Custom Report". These

records document Mr. Shea's institutional offences in Springhill and Atlantic Institution and their dispositions. (*Exhibit 11, pages 431 - 446*) Mr. Shea was a discipline problem throughout his time in federal custody and consistently rude and disrespectful to correctional staff. He showed little inclination to abide by institutional rules and was frequently defiant and uncooperative.

First Penitentiary Sentence – Two Years

[201] As I noted earlier, Mr. Shea's first federal sentence of incarceration was imposed on June 1, 1999 when he was 19 years old. He received two years for break and enter and concurrent custodial terms for other offences.

[202] For this first federal sentence, Mr. Shea was given a Medium classification and a pen-placement of Dorchester Institution. Having said that, it appears he remained at Springhill Institution until an involuntary transfer to Atlantic Institution (Renous), a maximum security institution. I will review those developments in due course.

[203] On June 2, 1999 the Halifax Area Parole Office completed a Preliminary Assessment Report. It described Mr. Shea as "young, angry and has been rebelling against authority for some time." (*Exhibit 6, Correctional Services of Canada File, page 54*) In this report, Debbie Melvin was described as Mr. Shea's stepmother. Mr. Shea told the author of the report that when it came to his release on parole, he did not believe Ms. Melvin would take him in again. (*Exhibit 6, page 55*) The report concluded by noting that Mr. Shea presented as "angry and defiant and not pleased that he will have to report to a parole officer" on release. His needs were identified as "cog skills, upgrading and work on his attitude." He was seen as

having potential but lacking motivation. The comment was made that Mr. Shea did "not have a lot of support." (*Exhibit 6, pages 55 and 56*)

[204] Contrary to Mr. Shea's view, in the Community Assessment completed on June 14, 1999, Debbie Melvin indicated she and her family were willing to offer Mr. Shea continued support, including a place to live when he was released. Ms. Melvin spoke positively about Mr. Shea's conduct in her home and his girlfriend of three months described him as a source of support and never abusive to her "in any fashion." She described Mr. Shea as having "a lot of potential…intent on acquiring his GED during his incarceration and avoiding future conflicts with the law after he gets out." (*Exhibit 6, page 59*)

[205] In the Community Assessment, Ms. Melvin described Mr. Shea as feeling abandoned by his family and having a wide circle of friends all "involved in criminal activity in the local area." (*Exhibit 6, page 60*) Ms. Melvin said Mr. Shea was "basically a passive, easy-going individual with a good sense of humor." He had not been a discipline problem when in her home and according to her, "appeared to cope with day-to-day life relatively well." She did not view him as either "impulsive or manipulative." (*Exhibit 6, page 61*)

[206] The author of the Community Assessment identified "personal/emotional orientation, employment, substance abuse and attitude as contributing factors" to Mr. Shea's criminality. As neither Ms. Melvin nor Mr. Shea's girlfriend at the time identified any substance abuse problems, the reference to substance abuse must have been related to Mr. Shea indicating that his index offences had been committed under the influence of Valium. The Community Assessment concluded with the author's opinion that Mr. Shea's chances of a successful reintegration

were "significantly reduced if he returns to his former neighbourhood." (*Exhibit 6, page 62*)

[207] In a CSC document entitled "Correctional Plan" and dated October 4, 1999 it was noted that Mr. Shea did not "meet the criteria for mandatory referral for psychological assessment. He does not have a history of mental illness and has never been involved in any interventions in this area." (*Exhibit 6, page 71*)

[208] Although according to the Correctional Plan, Mr. Shea indicated he was motivated to take programming, this was regarded with skepticism on the basis that he lacked insight and had "strong criminal values." (*Exhibit 6, page 73*) Goals were set for Mr. Shea to: "demonstrate positive change by not becoming involved in illegal activities and through positive interactions with staff and other inmates"; obtaining his GED; disassociating himself from "individuals known or suspected of being involved in illegal or subversive activities in the institution and the community"; and actively participating in the Cognitive Living Skills Program and "applying the principles he learns in a positive and pro-social manner".

[209] On November 9, 1999 the National Parole Board turned Mr. Shea down for accelerated parole on the grounds that there were reasonable grounds to believe that, if he was released, he was likely to commit an offence involving violence before warrant expiry.

[210] By February 2000, Mr. Shea's institutional behaviour had deteriorated. On February 18, 2000 Mr. Shea was in segregation and subject to a "Fifth Working Day Review." The Review noted that he had been "repeatedly breaking institutional rules." He had been sent to segregation for "being out of bounds, disrespectful to staff and possession of drug paraphernalia which tested positive for

THC." (*Exhibit 6, page 99*) The Review recommended that Mr. Shea be returned to general population given his commitment "to avoid confrontation with staff." (*Exhibit 6, page 101*)

[211] After Mr. Shea's release from segregation, a referral was made to the Anger and Emotions Management Program. In his assessment for admission to the program, Mr. Shea consistently scored at the high end of the needs scale. However he reacted badly to being told he would be taking the program. In his view he did not need it and became agitated and angry. The Assessment for admission to the program noted that Mr. Shea believed being verbally abusive allowed him "to express himself." (*Exhibit 6, page 104*) He was described at this time as impulsive with poor stress management and low frustration tolerance, hostile, showing poor conflict resolution, aggressive, and non-reflective. (*Exhibit 6, page 105*)

[212] On February 24, 2000, Springhill Institution was contacting Atlantic Institution (Renous) about involuntarily transferring Mr. Shea to the maximum security institution. The reasons were noted to be a response to "reassessed security requirements." (*Exhibit 6, page 107*) Mr. Shea's Unit Manager and the Institutional Protective Security Officer (IPSO) agreed that Mr. Shea could not be managed at a medium security institution and should be subject to an involuntary transfer. Mr. Shea's medium security classification was upgraded to maximum. It was indicated that there were "three or more" serious disciplinary offences and "three or more" minor disciplinary offences and that he had not been "addressing contributing and other factors" identified in his Correctional Plan and showed "no motivation, [and] limited participation in programs…" (*Exhibit 6, page 108*)

[213] The decision to involuntarily transfer Mr. Shea reflected many themes that would recur in the future. These were described as:

> His deliberate disregard of the rules…is of great concern. Another great concern in his repeated lack of respect for the authority of security staff which is unacceptable in an open medium security environment…some of the incidents…could have easily escalated to unmanageable levels; he has been non-compliant and disrespectful at rather untimely moments such as when other inmates have been around. Also, he has caused some problems within the segregation unit via interfering with other offenders' efforts to do their time by repetitive name calling and labelling. In addition to this, it must be noted that his associates at the institution are a concern because some of them are perceived to be in the heavy category, and it is suspected that he is involved in the institutional drug trade. Associates is a contributing factor and so is Attitude. Shea has not made any progress in these areas since his arrival at our medium security institution (both areas seem to have gotten worse) and this has been interfering with our ability to manage his risk." (*Exhibit 6, page 109*)

[214] It appears that Mr. Shea's release from segregation was short-lived and he was re-segregated quickly. The involuntary transfer document detailed numerous incidents of non-compliance with institutional rules, suspicion of or actual use of cannabis, and verbal abuse of correctional officers. It was noted that Mr. Shea had been counselled "on numerous occasions" by staff and even advised by fellow prisoners "on how he should behave" all to no avail. (*Exhibit 6, page 110*) Springhill saw no alternatives to transferring Mr. Shea. He had been given "ample opportunities to change his ways and adapt to living in a medium security

institution…His behaviour indicates that he needs to reside in a more restrictive environment." (*Exhibit 6, page 110*)

[215] Springhill contemplated that Mr. Shea could be returned from Renous if he managed to achieve approximately two months of positive institutional behaviour. This timing was seen as dove-tailing with a Cognitive Living Skills Program due to start at Springhill in July, 2000. Springhill also wanted to see Mr. Shea take the Anger and Emotions Management Program and earn his GED before his statutory release in September 2000. (*Exhibit 6, page 130*)

[216] Although Mr. Shea received primarily negative reviews at Springhill, it was noted that he had maintained employment during his incarceration by going to school and working on his living unit. The author of his Correctional Plan Progress Report dated March 27, 2000 observed that Mr. Shea had interacted "in a polite and respectful manner" with him, although this was not how he had treated other correctional staff. The Progress Report concluded that Mr. Shea's "respect for rules and authority must improve." (*Exhibit 6, page 129*)

[217] The Correctional Plan Progress Report viewed programs relating to personal/emotional orientation and employment as beneficial for Mr. Shea. The Report's author indicated his opinion that Mr. Shea "would benefit from individual counselling versus group activities. This may enable him to open up and productively discuss the issues that have been causing him problems in his life."

[218] A Progress Assessment from Renous dated July 12, 2000 noted a "great" improvement in Mr. Shea's behaviour since his transfer from Springhill. He was not causing problems for correctional staff or other prisoners. He was "progressing quickly and efficiently" in school, had written his GED and was awaiting the

results. He was employed in the kitchen. His Case Management Team's action plan was to assist Mr. Shea transfer to a medium security institution – he had been re-assessed as medium – and ultimately to the street. (*Exhibit 6, pages 149 and 150*)

[219] Mr. Shea's behavioural upswing was short-lived. Not long after the positive Progress Assessment, Mr. Shea was suspended from the Cognitive Living Skills program for inappropriate conduct toward the facilitator and, on July 13, he was involved in a fist fight with another prisoner. Both he and the other prisoner had to be taken to an outside hospital for medical attention and stitches. Renous withdrew its support for his transfer back to Springhill. (*Exhibit 6, page 152*) The physical altercation led to Mr. Shea's segregation and a recommendation was made to again override his medium security classification to maximum. His Case Management Team recommended he remain at Renous until his statutory release in September. (*Exhibit 6, page 153*)

[220] Mr. Shea remained at Renous until his statutory release on September 29, 2000. The day before he defied a direct order to lock up and was disrespectful to correctional officers. As a consequence he spent his last night in Renous in segregation. (*Exhibit 6, page 168*)

[221] An incident on February 2, 2001 at a downtown Halifax bar led to police being called because Mr. Shea was intoxicated and making threats of violence against bar security who had refused Mr. Shea entry. Mr. Shea continued to be aggressive and obnoxious even once police arrived on the scene. At a post-parole suspension interview, Mr. Shea provided some context for his behaviour and took responsibility. In light of Mr. Shea's positive attitude toward his obligations to maintain weekly supervision contacts with his parole officer, and the fact that he

had been on statutory release for four months without incident, it was decided not to suspend his parole. Mr. Shea indicated he was willing to participate in the community-based Cognitive Skills Program however it had not yet been made available to him. (*Exhibit 6, page 174*)

[222] Individual counselling, referred to in Mr. Shea's correctional plan, was not made available to him. An "Assessment for Decision" assessing the continuation of Mr. Shea's statutory release stated that, "To date, it has not been assessed that [Mr. Shea] requires individual counselling. At this time, it is seen appropriate to meet [Mr. Shea's] needs through regular supervision and the referred to program involvement." (*Exhibit 6, page 175*)

[223] Mr. Shea's warrant expiry date was May 31, 2001. On April 8, 2001, Mr. Shea threw the rock at the security officer who followed him from the Herring Cove Shopper's Drug Mart believing Mr. Shea had taken items without paying for them. (*Exhibit 6, page 181*) In an Assessment for Decision dated April 25, 2001, prepared for the National Parole Board (Atlantic) to deal with Mr. Shea's parole suspension, it was determined that the incident was "seen to be on the low side of Assault." Mr. Shea admitted to throwing the rock at the officer, not hitting him. (*Exhibit 6, page 185*) CSC recommended that Mr. Shea's statutory release be revoked.

[224] The Assessment of Decision for the National Parole Board (NPB) noted that Mr. Shea had been involved with a Relapse Prevention program, a program that had been recommended if he was unable to access the community-based Cognitive Living Skills Program. (*Exhibit 6, page 175*) Mr. Shea reported that he had acquired a better understanding of his "offence cycle" and "better understood the importance of being aware of his thoughts, feelings, and behaviours. This

awareness was to assist him to contemplate his situation rather than just acting out and not thinking about the impact that his thoughts, feelings and behaviours might have on his relationship with the rest of his world." (*Exhibit 6, page 186*)

[225] Coincidentally, Mr. Shea's program facilitator was June Dicks, a parole officer, who offered evidence at this proceeding in her current role as Community Program Manager with CSC. (*Exhibit 6, page 186*)

[226] The National Parole Board (Atlantic) revoked Mr. Shea's release saying he had "exercised extremely poor judgment and…once again demonstrated aggressive behaviour." In its decision, the NPB also observed that "in recent times, there has been a marked leaning toward aggressive and/or violent behaviour." (*Exhibit 6, page 193*)

Second Penitentiary Sentence – Three Years

[227] On November 23, 2001, Mr. Shea was sentenced to three years in prison – two years for possession of crack cocaine for the purpose of trafficking and one year, consecutive, for break and enter. His statutory release date was November 23, 2003 and his warrant expiry date was November 22, 2004. (*Exhibit 8, page 435*)

[228] Mr. Shea re-entered Springhill Institution with "a change of heart." It was once again noted that he needed "Cognitive Living Skills and could benefit by getting his GED." A "Preliminary Assessment Report" concluded with these comments: "The real issue for Shawn is one of lifestyle. He has many criminal associates and said he worked in Jimmy Melvin's pawn shop. Counterpoint would be a test of Shawn's desire to stay clean. He has been told day parole in a year or so is possible but only if there is the turnaround of his institutional behavior." (*Exhibit 8, page 423*)

[229] Mr. Shea still had the support of Debbie Melvin who had had no problems with him while he lived with her. According to Ms. Melvin he was kind to her children, did chores around the house, and helped with the family "buy and sell" business. (*Exhibit 8, page 427*) In a "Community Assessment" dated December 18, 2001, Mr. Shea was described as being "without basic life skills to function independently in a pro-social manner in the community." (*Exhibit 8, page 429*)

[230] Mr. Shea was initially given a Medium security classification. (*Exhibit 8, page 435*) His case was not referred for a Psychological Intake Assessment as he was not identified as meeting the criteria for such an assessment. (*Exhibit 8, page 440*)

[231] Mr. Shea's difficulties adjusting to institutional rules and routines continued during his second Federal sentence. He fell into similar patterns of behaviour that had been problematic during his first Federal sentence. His Correctional Plan dated February 4, 2002 had this to say:

> Mr. Shea is criminally ingrained and becoming more so. He lacks the maturity, insight, desire, and/or ability to maintain a pro-social lifestyle. He has definite cognitive distortions regarding his offending and lacks the ability to understand the severity of his actions and had no victim empathy. He has difficulty adapting to his surroundings with a tendency to deflect responsibility and minimizes the seriousness of his offences both on the street and within an Institutional setting. Mr. Shea also has a reduced ability to control his behaviour in situations he perceives as a threat and lashes out either physically or more often verbally. Although Mr. Shea indicates

> a desire to change he presents a self-defeating attitude that prevents him from accomplishing such. (*Exhibit 8, page 442*)

[232] Mr. Shea's needs were seen as related to his personal/emotional "domain". His correctional plan contemplated him successfully completing the Cognitive Living Skills and Community Integration programs. He was also expected to "demonstrate his ability to change by being appropriate in his interactions with staff and other inmates…" to remain charge free and not to associate with individuals known or thought to be involved in criminal activity in the institution. (*Exhibit 8, page 443*)

[233] An actuarial assessment of Mr. Shea's institutional adjustment and security risk was made on December 18, 2001. This produced a Maximum security classification. It was recommended that Mr. Shea be pen-placed at Renous "to address [his] programming requirements and security needs." (*Exhibit 8, page 446*) Mr. Shea challenged the recommendation and was successful in achieving a pen-placement at Springhill so that he could "prove himself." (*Exhibit 8, page 447*) The maximum security classification was overridden and Mr. Shea was given a medium classification.

[234] But by July 2002 Mr. Shea was being recommended for an involuntary transfer to Renous as a result of "institutional adjustment problems." His behaviour was described as having deteriorated such that he no longer qualified for a medium security classification. He was re-classified as maximum. (*Exhibit 8, page 452*) It was noted that since Mr. Shea's arrival at Springhill at the end of November 2001, he had accumulated institutional charges for disobeying written rules, possession/dealing in contraband, disrespectful/abusive treatment of staff, being in a prohibited area, and possession of drug paraphernalia. He had also been involved

in assaults on other prisoners. (*Exhibit 8, page 454*) He was placed in segregation on July 6, 2002 where he also exhibited inappropriate behaviours. (*Exhibit 8, page 455*)

[235] Mr. Shea's accomplishments while at Springhill were disappointing. He completed the Cognitive Skills Program but his participation had fluctuated and it was thought that he had not made a sincere effort. (I note that subsequent CSC records indicate that Mr. Shea did not successfully complete the 2002 Cognitive Skills program and was only given an "attended all sessions.") (*Exhibit 7, page 356*)

[236] Mr. Shea worked as a recreational general worker from April 3, 2002 until his transfer to Renous on July 10, 2002. His punctuality was erratic and his supervisor rated him as not a good worker. (*Exhibit 8, page 464*)

[237] On July 10, 2002 Mr. Shea was transferred from segregation to Renous. (*Exhibit 8, page 459*)

[238] Mr. Shea was segregated at Renous on several occasions. On December 13, 2002 he was involved in an altercation with three other prisoners. A warning shot was fired and then gas was used. (*Exhibit 8, page 496*) The CSC records do not disclose whether Mr. Shea was an aggressor in this incident or a victim. On February 21, 2003 Mr. Shea was placed in administrative segregation after two home-made knives where found in his cell. (*Exhibit 8, page 514*) He was described as quiet and cooperative during this segregation placement. (*Exhibit 8, page 515*) A further segregation occurred on March 25, 2003 when a shank was found in Mr. Shea's cell at a time when another prisoner was in it with him. Mr. Shea was given a direct order to lock up which he defied. (*Exhibit 8, page 518*)

[239] In a Progress Assessment dated May 20, 2003, it was noted that Mr. Shea was considered to be associated with the North End Dartmouth (NED) gang. (*Exhibit 8, page 524*)

[240] In a Correctional Plan Progress Report dated May 20, 2003, it was noted that Mr. Shea's progress "would have to be considered marginal." (*Exhibit 8, page 525*) 26 institutional charges were noted for the period July 22, 2002 to March 27, 2003. These were for: inter-range visiting, refusing to lock up, disobeying a written rule, covering his cell window, attempting to bribe a staff member, contraband, improper dress, inter-cell visiting, and fighting with another prisoner. The fighting with another prisoner was a one-time occurrence in this period, on December 18, 2002. Mr. Shea indicated that he routinely had "shanks" to protect himself as he was in a maximum security prison. He continued not to meet "the Psychological Assessment Criteria" and was therefore not referred for assessment. (*Exhibit 8, page 525*)

[241] On May 25, 2003, Mr. Shea was the victim of a serious assault by three other prisoners in the gym during recreation. (*Exhibit 8, page 529*) He was segregated while the incident was investigated. He was taken for outside medical treatment and was described as very cooperative with staff, following direction without difficulty and conducting himself appropriately at the hospital. (*Exhibit 8, page 534*)

[242] An institutional investigation concluded that Mr. Shea had been assaulted because of his status as a member of the Spryfield MOB. Members of the MOB had assaulted another prisoner shortly before Mr. Shea was assaulted in retaliation. Mr. Shea was assaulted as he was the only Spryfield MOB member in the gym at the time. As a result of the assault and his Spryfield MOB affiliations, Mr. Shea

was recommended for involuntary transfer to Millhaven Penitentiary in Ontario. (*Exhibit 8, page 551*) CSC concluded that Mr. Shea's "continued presence in Atlantic Institution increases the likelihood of further violence." (*Exhibit 8, page 552*)

[243] A Correctional Plan Progress Report dated June 17, 2003 reiterated significant portions of his May 20 Progress Assessment. It included a Community Strategy document prepared in contemplation of Mr. Shea's upcoming Statutory Release. It noted that Mr. Shea had refused to identify accommodations for Statutory Release, indicating that he would advise CSC just before release about his intended residency. The Progress Report observed that "This makes release planning difficult." (*Exhibit 8, page 544*)

[244] Under its "Supervision Plan", the Progress Report commented that Mr. Shea appeared to have anger management issues although he had not completed the Anger Management program. His "dynamic factor of personal/emotional orientation indicates a referral to a psychologist for assessment and one on one counselling appear appropriate." (*Exhibit 8, page 544 – 545*) Mr. Shea was rated as having "low reintegration potential" as well as "high static and dynamic factors." An intensive level of community supervision would be required on his release, twice weekly reporting to a parole officer. (*Exhibit 8, page 545*)

[245] CSC documents later in the sequence of documents show a Statutory Release date for Mr. Shea of December 13, 2003 and Warrant Expiry of December 22, 2004. (*Exhibit 8, page 575*) Mr. Shea was released on Statutory Release with special conditions imposed by the National Parole Board to participate in psychological counselling if recommended to address personal/emotional issues related to risk including anger management; abstain from drugs; and non-

association with persons involved or believed to be involved in criminal activity. (*Exhibit 8, page 573*)

[246] It appears there was CSC follow-up on the Supervision Plan recommendation for psychological counselling for Mr. Shea once he was on Statutory Release. On two occasions – January 20 and February 26, 2004 - Mr. Shea was seen by a psychologist after being referred for the purpose of counselling to address his attitude. He missed a number of appointments despite the efforts of his Case Management Team to facilitate and encourage his attendance. The short psychological report had this to say: “Mr. Shea has a number of barriers to intervention. Perhaps his biggest barrier is his limited insight into his abilities and how to set realistic goals for his future. He needs significant assistance.” (*Exhibit 8, page 538*)

Third Penitentiary Sentence – Two Years and Six Months

[247] Mr. Shea had returned to the community on December 12, 2003 on Statutory Release from his second Federal sentence of incarceration. He was facing charges of conspiracy to traffic and possession for the purposes of trafficking in cocaine arising from events that occurred during the period of June 16 and July 11, 2002. His sentencing was to have occurred on March 4, 2004 but Mr. Shea did not appear. He was apprehended in the community on May 21, 2005. It was during this period of being unlawfully at large that Mr. Shea was living in Matthew Lohnes’ apartment and dating Stacey McKenna.

[248] Mr. Shea was ultimately sentenced on July 14, 2005 for conspiracy to traffic cocaine. He received a 30 month sentence (two years and six months.) His Warrant Expiry was January 13, 2008. (*Exhibit 7, page 318*) The offence appears to have

involved Mr. Shea and his co-accused making arrangements by telephone from Springhill to have the co-accused's visitor pick up a quantity of crack cocaine from a police agent for smuggling into the institution during a visit. (*Exhibit 7, page 331*)

[249] In a report dated August 5, 2005, Springhill recommended Mr. Shea's involuntary transfer to Renous. Springhill noted that Mr. Shea had been admitted to Springhill on July 27, 2005. He had been implicated by "security intelligence" in the assault of another prisoner on August 3, 2005 and for that reason and "operational requirements for bed space in segregation", an emergency involuntary transfer was "deemed appropriate and necessary." (*Exhibit 7, page 202*) Mr. Shea's security classification was upgraded to Maximum. (*Exhibit 7, page 204*)

[250] The assault was described in Springhill's report as an "attempted murder" with Mr. Shea believed to have been "an active participant." (*Exhibit 7, page 202*) The victim received several lacerations that were non-life threatening. Three other prisoners were also involved. (*Exhibit 7, page 212*) Springhill's report recommending Mr. Shea's involuntary transfer to Renous noted that he was "a prominent member of the Spryfield Mob organized crime group, which is well known for their propensity for violence, as evidenced by their actions inside and outside the institution." (*Exhibit 7, page 203*)

[251] On arrival at Renous on August 5, 2005, Mr. Shea was placed in administrative segregation "because it was felt that his presence in the general population could jeopardize the security of the Institution, other offenders and staff." (*Exhibit 7, page 208*) By the fifth day in segregation Mr. Shea had still not been provided with "any institutional clothing or his own clothing." Appearing before the Administrative Segregation Review Board, Mr. Shea said he would have

no difficulties integrating with the prisoner population in Unit 1. (*Exhibit 7, page 216*)

[252] By August 31, 2005 Mr. Shea was still in segregation. He declined to be interviewed for the purpose of his monthly psychological segregation review. The CSC psychologist reported that: “Based on information available on the unit there are no reasons indicating that his long-term placement in segregation has any detrimental psychological impact on him thus far.” (*Exhibit 7, page 225*)

[253] Mr. Shea had a hearing before the Administrative Segregation Review Board on September 1, 2005. He was upset about his involuntary transfer from Springhill and his segregation at Renous. He wanted to be released from involuntary segregation to Unit 1. He told the Board he had nothing to do with any assaults at Springhill. The Board indicated they were still waiting for the investigation report from Springhill about the assault that had led to Mr. Shea being transferred. (*Exhibit 7, page 228*)

[254] On September 19, 2005, Mr. Shea’s Statutory Release for his November 23, 2001 sentence (second Federal sentence of incarceration) was revoked as a result of him having been unlawfully at large from March 2004 to May 2005. (*Exhibit 7, page 233*) The National Parole Board took into account that Mr. Shea said he had been distraught at the time over the murder of a friend in Spryfield.

[255] It is apparent from the documents that Mr. Shea’s girlfriend, Ms. McKenna, presented herself to CSC as having lived common-law with Mr. Shea during the time he was unlawfully at large. Her evidence at this proceeding establishes that was not the case. I find it reasonable to infer that Ms. McKenna told CSC she had

been living with Mr. Shea because it conferred benefits for them, including the approval of Private Family Visits. (*Exhibit 7, page 236*)

[256] Mr. Shea was still in segregation at the end of September 2005. He declined to be interviewed for the monthly psychological assessment and his long-term placement in segregation was again said to be having no detrimental effect on him psychologically. (*Exhibit 7, page 239*) By this time it appears that Renous was holding Mr. Shea in segregation because he was believed to be a member of a criminal organization and consequently, seen as "a risk to the security of others because of ongoing gang related activities and violence in the general population." (*Exhibit 7, page 241*) I note that Mr. Shea had not yet been in the general population of Renous during this sentence as he was immediately placed in administrative segregation on his arrival at Renous on August 5, 2005.

[257] In a Regional Review of Mr. Shea's segregated status it was said that Mr. Shea had "very strong ties" to the Spryfield MOB and that "the ongoing unrest at Atlantic Institution and other institutions in this region can be linked to several members of this group." (*Exhibit 7, page 243*) The Warden's review of Mr. Shea's segregation cited Spryfield MOB involvement in "assaults on inmates, the intimidation and muscling of inmates and the introduction and distribution of contraband." (*Exhibit 7, pages 244 – 245*)

[258] By the end of October, 2005 Mr. Shea was being maintained in administrative segregation "pending the opening of the intensive intervention unit (IIU)" being developed specifically for prisoners with gang affiliations. (*Exhibit 7, page 256*)

[259] In a meeting with the CSC psychologist on October 26, 2005, Mr. Shea complained about the deplorable conditions in the segregation unit where he was being housed: his cell was cold, his meals were cold and there were delays in receiving them, soiled meal trays were not collected for days and no CSC officials were addressing these problems and rectifying them. (*Exhibit 7, page 260*)

[260] In a mid-November assessment for approval of a Private Family Visit (PFV), it was noted that Mr. Shea was in segregation and had "a negative attitude." He was said to have been on "posing a threat status." He was seen as a good candidate for a PFV if approved. The report states: "He is usually good to deal with and respectful with staff." (*Exhibit 7, page 262*)

[261] A psychology resident saw Mr. Shea on December 12, 2005 for the purpose of his monthly psychological segregation review. He was said to have "voiced no complaints." (*Exhibit 7, page 278*) Mr. Shea was still in segregation on January 9, 2006. The psychology resident noted "no evidence of psychological issues." (*Exhibit 7, page 287*) The "gang management strategy" for Renous which was to "manage the risk presented by so identified inmates in a less restrictive environment" had still not been developed as of February 7, 2006 when Mr. Shea entered his seventh month in segregation. It was anticipated it would go into effect the following week. (*Exhibit 7, page 291*)

[262] Mr. Shea was finally released from segregation on February 20, 2006 on the basis of a determination by his Case Management Team and Intensive Intervention staff that his "risk for limited reintegration with compatible inmates is assumable." He was admitted to the Intensive Intervention Unit. (*Exhibit 7, page 316*)

[263] As for the "attempted murder" that led originally led to Mr. Shea's involuntary transfer to Renous, it appears to have been investigated with "Three reports of inmate source information" identifying Mr. Shea as one of the attackers. Staff information put him in the area of the assault and the victim was said to in conflict with members of the Spryfield MOB. The victim would not cooperate with police and did not identify his assailants. Consequently, no charges were laid. CSC concluded that it was "probable but not certain" that he was one of the primary attackers. (*Exhibit 7, page 321*)

[264] In May 2006, Mr. Shea was anticipating a Private Family Visit. His visiting privileges were suspended on May 16 as a result of institutional concerns that he was involved in "the consumption and potential distribution" of narcotics at Renous. He had recently refused to undergo urinalysis and narcotics had been discovered in his cell. (*Exhibit 7, page 333*)

[265] A report was prepared in August 2006 for the purpose of Mr. Shea's annual security classification review. It was noted that Mr. Shea had been convicted of ten serious and sixteen minor institutional offences. The serious offences were for refusing a direct order, refusing twice to provide a urine sample, smoking, blocking his cell door, delaying count, being disrespectful to staff, threatening staff, and possessing contraband. The report took the view that Mr. Shea was "an individual who displays frequent or major difficulties causing serious institutional adjustment problems and requiring significant management intervention…" (*Exhibit 7, page 338*) Mr. Shea's Maximum security classification was confirmed.

[266] CSC's view of Mr. Shea's ability to deal with his issues remained pessimistic. In a Correctional Plan Progress Report dated September 7, 2006, his lack of insight was identified. The comment was made: "He had no more

considered the causes of his criminal behaviour, than a fish would consider why it swims." Mr. Shea was not seen as having any relapse planning or commitment to it. (*Exhibit 7, page 343*) The author of the Progress Report said he found it "difficult to believe that [Mr. Shea] has not, since the start of his sentence, recognized that his criminal behaviour and lifestyle are a problem, that he does not discuss his criminal behaviour in a meaningful way, that he expresses no acceptance of responsibility or willingness to change, that he lacks the skills to do the same should he choose to and that he has a limited support network." (*Exhibit 7, page 344*)

[267] Mr. Shea's Statutory Release plan included some massaging of the truth. He indicated an intention to live with Ms. McKenna with whom CSC believed he had been living from 2004 to 2005. He told CSC he would return to snow plowing with Matthew Lohnes, saying he had been doing that while unlawfully at large. The testimony of Ms. McKenna and Mr. Lohnes establishes that it was not true that he had previously lived with Ms. McKenna and been employed as a snow plow operator by Mr. Lohnes.

[268] Mr. Shea was subsequently described as "rejecting the need for change" and having a "low level of motivation." It was noted that he needed "to disassociate himself from the criminal subculture, participate in interventions and put the acquired skills from the interventions to use in both the institution and the community." (*Exhibit 7, page 351*)

[269] Stacey McKenna was interviewed for a Community Strategy assessment in relation to preparations by CSC for Mr. Shea's Statutory Release. She was optimistic Mr. Shea's reintegration into the community would be successful. She felt that Mr. Shea had matured and would not associate with "a negative group" on

his release. She said they had long term plans together that included getting married, having a baby, buying a house, and opening a business. She described Mr. Shea as wanting as family and to stay out of jail. It was her view that Mr. Shea felt he had missed a lot of things in life due to jail and wanted to make positive changes. (*Exhibit 7, pages 355 – 356*)

[270] On January 2, 2007, Mr. Shea's conduct resulted in him being sent to administrative segregation for "undermining the security of the institution." CSC noted that he had been disrespectful toward the control and unit officers. He threw items at the control post, attempted to incite other prisoners to block their cell doors, and refused to lock up for the 22:30 hour count. (*Exhibit 7, page 365*) He was maintained in segregation because his behaviour did not improve and he received "a number of offence reports." (*Exhibit 7, page 367*) On January 29, 2007 Mr. Shea was released from segregation and returned to the Intensive Intervention Unit. (*Exhibit 7, page 372*)

[271] On February 23, Mr. Shea was released from Renous on Statutory Release. Almost immediately he was in trouble. A resisting arrest charge arose on February 26. Mr. Shea was taken into custody. In a post-suspension interview on March 12, 2007, Mr. Shea blamed police for his troubles and suggested they had a vendetta against him. (*Exhibit 7, page 376*)

[272] On February 26 in the Halifax Provincial Court cells, Mr. Shea got into an altercation with another prisoner. According to Sheriffs' officers who witnessed the incident, Mr. Shea was placed in a cell with the other prisoner who greeted him. Mr. Shea advanced on the prisoner and began hitting him with a closed fist, connecting twice before being restrained. He actively resisted being restrained and

was taken to the ground outside the cell where he was handcuffed. (*Exhibit 7, page 377*)

[273] As a consequence of the events following Mr. Shea's release from Renous, the National Parole Board decided to revoke his Statutory Release and return him to prison until Warrant Expiry. The Board viewed Mr. Shea as unwilling to abide by his conditions of release and lacking the desire to change his criminal behaviour and adopt a pro-social lifestyle. (*Exhibit 7, page 382*)

[274] The Board commented on Mr. Shea's tendency to use violence freely to solve problems or differences. Mr. Shea told the Board that in relation to assaults on other prisoners, prison life "is not easy" and to survive he had to defend himself. (*Exhibit 7, page 383*)

[275] Mr. Shea was once again assessed with a Maximum security classification. (*Exhibit 7, page 389*) He was released again on September 27, 2007 and had his Statutory Release suspended again on November 2, 2007. (*Exhibit 7, page 396*) He was readmitted to Renous on November 8, 2007. The Intensive Intervention Unit, in CSC nomenclature also referred to as the "gang range", was "no longer operational." (*Exhibit 7, page 394*) On November 16, 2007 Mr. Shea was involuntarily placed in administrative segregation. (*Exhibit 7, page 390*) Allegations relating to a violent assault of another prisoner at the CNSCF, receipt of contraband and drug related activity, and serious gang involvement led to Mr. Shea's placement in segregation. Renous told Mr. Shea in a review of his segregation placement: "It is known that you have a great deal of influence over this [Spryfield MOB] group and can direct actions to be taken." (*Exhibit 7, page 390*) It was concluded that Mr. Shea could not be safely released into the general population, that the risk he presented "is not manageable and would continue to

present a situation that would serve to jeopardize the safety of others." (*Exhibit 7, page 392*)

[276] The revocation in November of Mr. Shea's Statutory Release in September arose from concerns expressed by Halifax Regional Police about his activities and associations in the community. A CSC report from the end of November 2007 noted that Mr. Shea appeared to be "quite comfortable with his association [with members of the Spryfield MOB] and does not accept that such an association is problematic." (*Exhibit 7, page 397*)

[277] Mr. Shea was very upset about his November suspension and accused CSC of suspending him for no reason. He denied breaching his non-association condition or assaulting anyone. He said the police were harassing him and fabricating allegations to get him off the streets. During the post-suspension interview, Mr. Shea was quite worked up, calling the interviewing parole officer "ignorant and a racist" and suggesting he was involved in a relationship with a member of the Halifax Regional Police Service and "therefore in collusion with them." (*Exhibit 7, page 398*)

[278] It was noted that during Mr. Shea's short release into the community he had been compliant with respect to attending for supervision meetings and was not difficult to deal with. However he was described as showing a low level of motivation to find employment "or become involved in anything productive." His attitude toward his friends and associates was obdurate: "He was quite adamant that he has no intention of disassociating himself from former associates once his period of supervision ends even with the knowledge that that choice will keep him on the police radar. This type of attitude almost certainly guarantees [his]

continued involvement in the criminal justice system in the future." (*Exhibit 7, page 399*)

[279] Ms. McKenna presented a different picture of Mr. Shea's time in the community. She said he had not been involved in any negative activity and had been spending all his time with her and her children. (*Exhibit 7, page 400*)

[280] On January 3, 2008, Mr. Shea's involuntary administrative segregation came to an end with his release that day on Statutory Release. (*Exhibit 7, page 414*) His Warrant Expiry was ten days later.

Fourth Penitentiary Sentence – Six Years and Six Months

[281] On February 2, 2010, Mr. Shea was sentenced to a fourth penitentiary term: six years and six months concurrent on two counts of extortion and three years concurrent for forcible confinement (involving Luke Hersey and the missing Lincoln.)

[282] Mr. Shea's Warrant Expiry on this sentence is December 15, 2014. (*Exhibit 5, page 17*) He unsuccessfully appealed his conviction and sentence and had a provincial remand until November 2010. (*Exhibit 5, page 3*)

[283] In his Preliminary Assessment Report dated February 11, 2010, Mr. Shea was reported to be interested in pursuing his GED "once again" having failed previously. He claimed to have a job off-shore that he couldn't take up because of release conditions. (*Exhibit 5, page 4*) However Mr. Lohnes' evidence at this proceeding establishes that he would like to have assisted Mr. Shea in qualifying for off-shore work but that never happened. Mr. Lohnes would have helped him get an off-shore job once he took the necessary courses.

[284] In the February 2011 Preliminary Assessment Report Mr. Shea indicated that he planned to stay in the provincial system as long as possible. *(Exhibit 5, page 4)* His interest in continuing on a provincial remand has to be situated in the context of Mr. Shea's circumstances at the time: he had appealed his convictions and was in a relationship with Stacey McKenna. *(Exhibit 5, page 4)* Of course any appeal was not going to be heard for some time and he had been subject to a no-contact order in relation to Ms. McKenna as she was a co-accused. Mr. Shea may have been hoping that condition would be removed and at some point, it was.

[285] In her interview for Mr. Shea's Community Assessment, Ms. McKenna was once again factually imprecise about her relationship with Mr. Shea. She claimed that they had been common-law for most of their six years together. More truthfully it would appear, she indicated that she loved Mr. Shea very much and would continue to support him. It was her view that Mr. Shea did not have any issues "pertaining to memory, concentration, reading, writing, or understanding and following instructions." (*Exhibit 5, page 7*)

[286] CSC assessed Mr. Shea as having a maximum security classification. (*Exhibit 5, page 16*) A Dynamic Factors Assessment prepared on August 3, 2010 rated personal/emotional, associates, and attitude as the factors that demanded the highest priority. Mr. Shea was said to be "aware of the risks and consequences of his decisions for most of his offences but made the inappropriate choices that he did due in large part to his criminal attitudes and negative associates." He was described as: "somewhat impulsive" with unrealistic goal-setting "based on his history". His current convictions were seen as "an escalation in offending" and his "reported ties to the Spryfield group increase the risk of violence." (*Exhibit 7, page 21*) The Assessment noted that Mr. Shea had "demonstrated negative behaviour

while incarcerated over the years" and referred to Mr. Shea's high profile affiliation with the Spryfield MOB as "a major factor in [his] lifestyle." (*Exhibit 7, page 22*) It concluded with these comments:

> The critical external factors would appear to be [Mr. Shea's] lifelong involvement in criminal activity…Essentially he does not really know any other life and will have to learn new skills to remain crime free…[he] will require significant community support in order to remain crime free and he does not appear to have significant pro-social support." (*Exhibit 5, pages 35 - 36*)

[287] In an Assessment for Mr. Shea's pen-placement, the unsurprising recommendation was made that he be pen-placed in Renous. (*Exhibit 5, page 40*) Mr. Shea's initial Correctional Plan assessed him as needing the VPP – HI program at Renous to address his "violent offending and…cognitive deficits…this will also address deficits in the associates and attitude domains to some extent." Expectations were that Mr. Shea would participate fully in the program and apply an understanding of its concepts to his everyday activities while incarcerated. He was told: "You will be able to demonstrate positive change by developing and understanding program target areas related to awareness, motivation, violent behaviour, skill enhancement and relapse prevention." (*Exhibit 5, page 44*) Other goals for Mr. Shea were identified: completion of his GED, developing some vocational skills while incarcerated (what these might be is not addressed), alignment with offenders interested in turning their lives around and re-integrating into society as law-abiding citizens, adherence to institutional rules, and making reasonable efforts to remain in the general population so as to be able to complete required work and program interventions. (*Exhibit 5, pages 46 and 47*)

[288] Mr. Shea's Correctional Plan stated under Motivation: "It has not been determined if you will follow your Correctional Plan but you do appear to have the necessary skills needed to remain crime free should you choose to lead a pro-social lifestyle." *(Exhibit 5, page 46)*

[289] In November 2011, CSC recommended that Mr. Shea be involuntarily transferred to Edmonton Institution. He was still in the provincial correctional system awaiting the hearing of his appeal of the forcible confinement/extortion convictions. CSC noted that the purpose of the transfer was "in large part to provide for institutional security…" due to Mr. Shea's affiliation with the Spryfield MOB. Mr. Shea was described as "one of the identified leaders" and there were concerns that the continued presence of members of the MOB in Renous elevated the risk to the safety of staff and offenders. (*Exhibit 9, page 579*) CSC viewed Mr. Shea's transfer to Edmonton as the option for providing him with "an institutional environment where he could safely integrate and participate in the objectives identified in his Correctional Plan…" (*Exhibit 9, page 589*)

[290] Throughout Mr. Shea's federal incarcerations he was never deemed to be a candidate for detention. In November 2011, it was once again noted that: "There is no specific information that [Mr. Shea] is likely to commit a serious offence prior to warrant expiry." (*Exhibit 9, page 584*) A report prepared in January 2013 indicated that Mr. Shea was not being referred for detention "as there are no reasonable grounds to believe he is likely to cause serious harm to another person" before warrant expiry. (*Exhibit 9, page 596*) The report concluded that:"…with appropriate conditions, including residency, along with a strict supervision plan, Shea's risk at this time can be managed upon Statutory Release." (*Exhibit 9, page 596*)

In-Custody Conduct during the Dangerous Offender Proceedings

The March 31, 2014 Holding Cells Incident

[291] On Monday March 31, 2014, Shawn Shea was transported to the Spring Garden Road courthouse for the continuation of his Dangerous Offender hearing. Over the lunch break Mr. Shea was housed in the “bullpen” cell, the largest cell in the cells area, capable of holding as many as 20 prisoners. While he was there he assaulted a prisoner who was placed into the cell with him.

[292] Deputy Sheriffs were called to testify about what happened in cells during the luncheon period. Their evidence was augmented by the high resolution video footage from the cells area. (*Exhibit 38*)

[293] Three new prisoners arrived at the courthouse over lunch. One of them was an “incompatible” with Mr. Shea due to their affiliations with antagonistic crime groups. This detail was overlooked by the Deputy Sheriff tasked with deciding what cells the new prisoners should occupy. The concern with putting incompatibles together is that they may fight.

[294] Christian Clyke was the first prisoner off the van. He indicated to the Deputy Sheriff that he had no issues with anyone, including Mr. Shea. Mr. Shea and his bullpen cell-mate, Mr. Chan, were also canvassed: they advised there was no problem with Mr. Clyke being put in with them.

[295] Exhibit 38, the video footage shows Mr. Shea and Mr. Chan looking quite relaxed after the Deputy Sheriff speaks to them about Mr. Clyke. When Mr. Clyke is brought into the bullpen, he looks over to Mr. Shea on his left but does not approach him. Mr. Shea ambles over to Mr. Clyke and then lunges at him. Mr. Chan joins in and the two of them punch away at Mr. Clyke who fights back.

[296] The Deputy Sheriffs wasted no time getting to the cell and deploying OC spray to break up the fight. Both Mr. Shea and Mr. Clyke showed signs of being affected by the spray. Mr. Clyke can be seen over in the corner of the bullpen sitting down. When he starts to get to his feet, Mr. Shea, with the Deputy Sheriffs gathered around him, suddenly lunges at him again and has to be dragged back.

[297] The video footage of the fight in the bullpen leaves no doubt that Mr. Shea instigated the incident. He appears to have anticipated a fight: he can be seen on camera exchanging his shirt for Mr. Chan's jacket just before Mr. Clyke is placed in the cell. This suggests he took a calculated step to avoid soiling his court shirt in the fight.

The April 3, 2014 Hallway Escort Incident

[298] The Crown led evidence of another incident involving Mr. Shea during the time the Dangerous Offender hearing was proceeding. On April 3, Mr. Shea was being escorted to court from the cells. His escort team included D/S Josh Norwood. In a cell area hallway another escort was underway. The prisoner in that escort was Mr. Hudder. D/S Norwood testified that as the two escorts passed each other, Mr. Shea swung his leg out and tried to kick at Mr. Hudder.

[299] There is video footage of the April 3 escort incident - Exhibit 39. In it Mr. Hudder's escort team can be seen waiting in front of the door that Mr. Shea's escort is about to come through. As Mr. Shea walks by with his escort, his hands cuffed behind his back, he kicks his leg back toward Mr. Hudder. He appears to be smiling and Mr. Hudder also seems to be grinning. The kick did not connect and there is no indication that Mr. Hudder was at all rattled or agitated by the encounter

with Mr. Shea. D/S Norwood can be seen moving from his rear escort position into the space between the two prisoners and the Shea escort keeps going.

[300] D/S Norwood testified that Mr. Hudder is an associate of the Melvin "crime family" and therefore an incompatible with Mr. Shea. He did not take Mr. Shea's attempt at a kick to be a joke. He said the atmosphere was more "I don't like you." It was his evidence that it was not just "buddies horsing around."

[301] Having in mind the March 31 bullpen altercation with Mr. Clyke and the fact that Mr. Shea was in the midst of a Dangerous Offender hearing, D/S Norwood told Mr. Shea he would have to learn to control himself. Mr. Shea retorted that "they", meaning the Sheriffs, would have to "stop setting him up."

PART VII –*The Evidence of Witnesses and Mr. Shea's Statement to the Court*

The Evidence of Matthew Lohnes

[302] Not surprisingly, Mr. Shea is not merely the sum of his atrocious institutional behaviour and criminal offending. He has been capable of creating a favourable impression and meaningful interpersonal connections and at one point, stood on the threshold of a life that involved a legitimate job and a stable, loving relationship.

[303] Matthew Lohnes was called as a Defence witness. He is the President of a company that works in the off-shore industry. In 2004 and 2005 Mr. Shea rented the apartment in Mr. Lohnes' home and Mr. Lohnes had a very positive experience with him. He described Mr. Shea as "an excellent tenant" who always paid his rent on time, never caused any disturbance, and was extremely clean. Mr. Lohnes refunded Mr. Shea his damage deposit at the end of the tenancy because the

apartment was in such meticulous condition. Mr. Lohnes testified that his views of Mr. Shea were shared by his wife.

[304] Mr. Lohnes had high praise for Mr. Shea because of his willingness to be helpful. He pitched in to assist Mr. Lohnes on a consistent basis, loading and unloading his truck, and also gave a helping hand to Mr. Lohnes' wife when Mr. Lohnes was away. Mr. Lohnes valued Mr. Shea's presence while he was gone as it made him feel better about leaving his wife alone. Mr. Lohnes testified that Mr. Shea was always around and available to help out. He explained that this is what he was referring to when interviewed for Mr. Shea's pre-sentence report of July 21, 2005.

[305] Mr. Shea was never employed by Mr. Lohnes although he worked for Mr. Lohnes on three occasions as a labourer. Mr. Lohnes testified that Mr. Shea worked with his landscaping crew for about a week and then with his paving crew, also for about a week. On a third occasion he helped with a "tie-up" at the Autoport, a task that took about four hours. Mr. Lohnes did not pay Mr. Shea on these occasions as Mr. Shea offered his services as a friend in circumstances where Mr. Lohnes was in a bind when, at very short notice, crew members couldn't come to work.

[306] Mr. Lohnes noted that all his crews would have had Mr. Shea back "in a second." If a full-time position had become available, Mr. Lohnes would have hired Mr. Shea.

[307] Mr. Lohnes could not say how Mr. Shea supported himself to be able to pay $600 a month rent which was paid in cash. Mr. Lohnes was unaware that Mr. Shea had a criminal record or that he was on parole. He learned this about two weeks

prior to his testimony when he was speaking with Mr. Craggs. He acknowledged being a bit surprised by the information.

The Evidence of Stacey McKenna

[308] Stacey McKenna testified on Mr. Shea's behalf. She has known Mr. Shea for approximately 11 years. For about seven or eight years, from 2003 to 2010, she and Mr. Shea were in an intimate relationship. Ms. McKenna says they are now just friends although they no longer have much contact. Mr. Shea's incarceration put a strain on the relationship and Ms. McKenna reached the point where she did not want to be subject to police surveillance any longer. She testified that Mr. Shea was "harassed" quite a bit by the police who pulled her over "all the time" as well.

[309] Ms. McKenna worked full-time during her relationship with Mr. Shea. She was also responsible for raising two children, a son and a daughter. Her son is now 16 and her daughter is 22.

[310] Ms. McKenna recalled that she and Mr. Shea lived together for about a year to a year and a half at her home on Wheatstone Heights in Dartmouth. She was unsure of the precise dates. Records filed by the Crown detailing Mr. Shea's criminal convictions indicate that in February 2007 Mr. Shea was residing at Wheatstone Heights as he was on January 22, 2008. Mr. Shea, Ms. McKenna and Ms. McKenna's children took a trip to Toronto in March 2008 as evidenced by a photograph taken at the time. (*Exhibit 32*) In the period of November 18 and December 21, 2008 when Mr. Shea was conspiring to traffic in cocaine and MDMA (which led to his third penitentiary sentence in December 2010), the intercept evidence established that he was living at Wheatstone Heights. (*Exhibit 22, page 1813, paragraph 36*) Mr. Shea was also living there at the time of the

forcible confinement and extortion of Luke Hersey in January 2009. This evidence taken together indicates that Mr. Shea and Ms. McKenna cohabited for about two years in total.

[311] It was Ms. McKenna's evidence that Mr. Shea as "good to live with." He wasn't lazy and took care to keep the house clean. He was good with Ms. McKenna's children, particularly her son, and played basketball with him and his friends. He attended her son's hockey games and went out with Ms. McKenna to eat with the children. Mr. Shea left the parenting of the children to Ms. McKenna which is what she wanted as he wasn't their father.

[312] The household routine was uneventful. Ms. McKenna worked full-time. Mr. Shea never gave Ms. McKenna any money but would buy groceries "when he could." He would give "a couple of bucks" to Ms. McKenna's children and bought them food. It was Ms. McKenna's evidence that she "pretty much paid for everything."

[313] In 2008, Ms. McKenna and Mr. Shea took the two children to Toronto to visit a friend of Ms. McKenna's. Ms. McKenna testified that during the 7 to 10 day trip they had a good time, visiting Toronto, Niagara Falls, and Montreal.

[314] In 2009, Ms. McKenna and Mr. Shea registered their common-law partnership. They planned to get married. However, their life together was derailed by Mr. Shea's arrest in January 2009 for forcible confinement and extortion. As I noted earlier, Ms. McKenna did not escape the consequences of Mr. Shea's crime: when she responded to his call to go and pick him up, they were surrounded by police and she too was arrested. Convicted of being an accessory after the fact, she

received a twelve month conditional sentence with house arrest. Ms. McKenna has been in no trouble with the law since.

[315] Ms. McKenna testified that for sixteen months after they were arrested she and Mr. Shea were on conditions to have no contact. Things were not good between them during this time: they couldn't talk and Ms. McKenna says, "…it hurt, changed my life." After they were successful in having the no-contact condition removed, Ms. McKenna says, "It was good" but "really emotional; he'd cry, I'd cry." It was the beginning of the end for their relationship. As Ms. McKenna put it: "It got to be too much…"

[316] Toward the end of their time living together at Wheatstone Heights, Ms. McKenna assisted Mr. Shea get a social insurance number. She testified that she tried to motivate Mr. Shea to get a job or take a course. She had suspicions that he was involved in illegal activities: when he would buy groceries or sneakers for her children her suspicions were raised but she didn't inquire where the money was coming from. She suspected Mr. Shea was selling drugs.

[317] Ms. McKenna knew Mr. Shea had been convicted of drug offences in the past, before they had known each other. A couple of months into their relationship, when Mr. Shea was living at Matthew Lohnes', he told Ms. McKenna that he should be reporting to his parole officer.

[318] Ms. McKenna testified that Mr. Shea was mindful of not exposing her and her children to the risk of harm. He would stay in a hotel if he thought that he might draw violence in her direction. He told Ms. McKenna he would never forgive himself if anything bad happened to her or the children.

[319] Over the course of their relationship, Ms. McKenna heard Mr. Shea talk about various plans that never came to anything. He told Ms. McKenna he wanted to get a job off-shore but Ms. McKenna said he knew he had to first deal with his outstanding warrant. He talked to her about turning himself in and straightening his life out. He mentioned taking some courses. He also talked about moving away.

[320] Ms. McKenna was asked about an interview she had with CSC after Mr. Shea was picked up on the outstanding warrant. The report of the Dartmouth Parole Office (*Exhibit 7, page 197*) indicates that Mr. Shea was living with Ms. McKenna in 2004 – 2005 while he was at large. The report cites Ms. McKenna as having provided this information, stating: "Ms. McKenna indicated that she resided with [Mr. Shea] over the past year…" Ms. McKenna explained in her testimony that this was not correct.

[321] Although Ms. McKenna's testimony indicated that she has moved on from her life with Mr. Shea, it was apparent that she harbours deep feelings of loss and sorrow. She was mostly composed in giving her evidence, but shed some tears when talking about the hopes they once had of getting married. Ms. McKenna's evidence left no doubt that Mr. Shea's choices eventually made their relationship untenable for her.

[322] For all Mr. Shea's considerable faults, the evidence of Mr. Lohnes and Ms. McKenna illuminated another dimension of him as a person, someone with the ability to connect on a genuine and meaningful basis with others.

The Evidence of Deputy Sheriff Salvator Auvolese

[323] The evidence indicates that Mr. Shea has not had unremittingly negative relationships with all persons in authority although his institutional records

disclose him as having a history of hostility and aggression toward police and correctional officers.

[324] Salvator Avolese who has worked both as a Deputy Sheriff and a correctional officer has not experienced the angry, impulsive and violent Mr. Shea. Mr. Avolese has worked as a Deputy Sheriff with the provincial Sheriffs' Services for two years. Previously, from June 2008, he was a correctional officer at the Central Nova Scotia Correctional Facility.

[325] D/S Avolese started working in provincial corrections in 1993. His correctional service has included: 1993 to 2002 as a correctional officer at Toronto's Metro West 700 bed institution for adult males; 2002 to 2004 as the operational manager, equivalent to a Captain, at Toronto's Youth Assessment Centre; and 2004 to 2007 as an operational manager in Admitting and Discharge at Toronto's Metro West correctional institution. In 2007, D/S Avolese attended university and started his application to work as a correctional officer at the CNSCF. He worked at the CNSCF until 2012, first in a part-time role working full-time hours and then as a full-time employee starting in 2010.

[326] D/S Avolese testified that during the four years he worked at the CNSCF Shawn Shea was there. During this time, the prisoner population increased putting pressure on the institution's capacity which led to double-bunking. This increased tensions in the living quarters, known as day rooms. D/S Avolese noted that there is a day room hierarchy with one or two offenders, regarded as the "heavies", determining what happens in that day room.

[327] D/S Avolese acknowledged that Mr. Shea was considered at the top of the prisoner "pecking order" in his Unit. He agreed on cross-examination that Mr.

Shea would qualify as the "heavy", could be trouble if he was not happy, and would influence others in the day room. D/S Avolese tried to resolve Mr. Shea's issues by exploring the reasons for his disobedient behaviour. He would work to try and address the problem although he acknowledged he first of all needed Mr. Shea to be compliant. He testified that many of Mr. Shea's frustrations arose from systemic issues. He knew Mr. Shea could be a difficult prisoner and was not surprised when the Crown told him that Mr. Shea had had 46 to 47 incidents at the CNSCF over the period of D/S Auvolese's employment there.

[328] D/S Auvolese's contact with Mr. Shea varied depending on his duty assignments. Although not regularly assigned there, D/S Avolese worked on the North Unit where Mr. Shea was housed. He did a lot of overtime on the North and West Units. He had no complaints about Mr. Shea and found Mr. Shea to be reasonable to deal with. Frustrations sometimes led to the North Unit refusing to lock up and in discussions that D/S Avolese had with Mr. Shea about the matter, he undertook to look into the Unit's complaints. On that basis, Mr. Shea had the Unit lock up. D/S Avolese testified that Mr. Shea would give him his word and never went back on it.

[329] D/S Avolese gave an example of Mr. Shea honouring his word in the context of being permitted to watch a movie through his food slot when it would have otherwise been secured at 23:00 hours. D/S Avolese acquiesced to Mr. Shea's request in exchange for Mr. Shea promising he would not tamper with the locks on the food slot. The same agreement was reached with Mr. Shea's next door neighbour. True to his word, Mr. Shea did nothing to the food slot lock although his neighbour did.

[330] It was D/S Auvolese's evidence that Mr. Shea never gave him any grief and always followed his direction. He described their relationship as amiable and professional and said in their dealings, Mr. Shea was always respectful. He did observe Mr. Shea being disrespectful and verbally abusive to other correctional officers. D/S Auvolese knew Mr. Shea could be difficult to deal with at times and quite obstinate, particularly if he is focused on something. On two occasions, D/S Avolese had to use force on Mr. Shea in the context of cell extractions ordered by the Captain.

[331] D/S Avolese was not working when the 2009 riot occurred nor was he present on any occasions when Mr. Shea threw excrement and urine at correctional officers. He witnessed no assaults on other prisoners by Mr. Shea. He was aware that Mr. Shea had many incompatibles and understood he was Marriott-affiliated and incompatible with Melvin associates. D/S Avolese knew that Marriot associates and Melvin associates had to be kept apart or there would be fighting.

The Expert Evidence of Dr. Scott Theriault and Dr. Andrew Starzomski

Introduction

[332] Dr. Theriault, until recently the Clinical Director of the East Coast Forensic Hospital, is now on staff there as a forensic psychiatrist. He is also holds an administrative position as the Clinical Director for the Capital District Health Authority (CDHA) Mental Health Programme. Dr. Theriault prepared the assessment of Mr. Shea as required under section 752.1(1) of the Criminal Code and his report, Exhibit 2, is dated May 6, 2012. In preparing his report, Dr. Theriault reviewed the documentation that contains Mr. Shea's Correctional Service of Canada records, his Nova Scotia Corrections records, and the records of his prior criminal convictions.

[333] Dr. Starzomski is a forensic psychologist working on staff at the East Coast Forensic Hospital. He is a professional practice leader for psychology in the CDHA Mental Health Programme and has a private practice as well. He was retained by Mr. Shea to prepare a report, Exhibit 24, dated March 5, 2014.

[334] Dr. Theriault and Dr. Starzomski were questioned exhaustively by Crown and Defence. The transcript of their evidence has been entered as Exhibit 42.

[335] On many significant issues, Dr. Theriault and Dr. Starzomski were in agreement. Their risk assessment scores for Mr. Shea's future risk for violence were quite close. They both see a long and challenging road ahead for Mr. Shea if he decides to seriously address the issues that their assessments and his history have identified. Dr. Theriault agreed with many of the recommendations in Dr. Starzomski's report that contemplate "strategies [that] could make solid contributions to a plan for a successful future for Mr. Shea both while incarcerated and upon transition to the community." (*Exhibit 24, Dr. Starzomski's Report, pages 40 and 41*)

[336] Mr. Shea's criminal and anti-social behaviour has not been driven by either substance abuse problems (*Exhibit 2, Dr. Theriault's Report, page 15; Dr. Theriault's Testimony, page 117*) or a significant or serious mental disorder. (*Exhibit 2, Dr. Theriault's Report, page 15; Dr. Theriault's Testimony, page 157*) Dr. Theriault diagnosed Mr. Shea as having an anti-social personality disorder. (*Dr. Theriault's Testimony, page 159*) Dr. Starzomski came to the same conclusion. (*Exhibit 24, Dr. Starzomski's Report, page 23; Dr. Starzomski's Testimony, page 448*)

Interviewing Mr. Shea and the Assessment Process

[337] Mr. Shea chose not to meet with Dr. Theriault. Dr. Theriault testified that it was "hardly unusual that individuals for a dangerous offender application decline to attend for the interview." (*Dr. Theriault's Testimony, page 105*) Mr. Shea did meet with Dr. Starzomski. None of what Dr. Starzomski related in his report from his discussions with Mr. Shea had any effect on Dr. Theriault's opinion with respect to his risk assessment of Mr. Shea or the likelihood for his eventual control in the community. (*Dr. Theriault's Testimony*, *pages 204 – 205*)

[338] Dr. Starzomski took a "multi-method approach" to preparing his report on Mr. Shea, an approach that seeks to rely on more than just one source of information. Dr. Starzomski testified that:

> To reach a conclusion one needs to find and weigh out multiple sources of information...in order to…arrive at some conclusion about that issue. So self-report alone is very problematic… Self-report testing can be problematic… And so there's a way and a significance to putting all that information together.…(*Dr. Starzomski's Testimony, page 388*)

[339] Dr. Starzomski referred to a 2009 study published by Dr. Marianne Campbell of the University of New Brunswick which examined a very large number of studies dealing with the PCL-R and the VRAG and other instruments. The study found that risk assessments based on file review plus interview were incrementally and modestly better in terms of predictive accuracy over the long term than assessments based on file review alone. (*Dr. Starzomski's Testimony, pages 482 – 483*)

[340] It was Dr. Starzomski's opinion that he acquired a fuller sense of Mr. Shea through his interviews of him. (*Dr. Starzomski's Testimony, page 401*) He found that Mr. Shea showed some capacity for "self-reflection and for considering personal responsibility in relation to managing anger, managing relationships and a need to try to do things differently" as a result of Mr. Shea spontaneously offering his understanding that many of his personal problems relate to acting without thinking things through leading to impulsive remarks and escalating conflict. (*Dr. Starzomski's Testimony, pages 403 – 404*) Dr. Starzomski testified he was encouraged that Mr. Shea showed awareness and commented that he works with many people who show no capacity for introspection and direct the blame elsewhere. (*Dr. Starzomski's Testimony, page 404*) He viewed Mr. Shea as having "the ability to recognize that he has a part to play in his own situation and…the conflicts and problems that generate from him." (*Dr. Starzomski's Testimony, page 405*)

[341] In cross-examination, Dr. Starzomski agreed that self-awareness with no follow through is concerning from a clinical perspective. He described it as showing there are "complications with either the person's consistency and motivation and approach, or there's other problems involved in the situation overall that could be related to why there have not been the desired or expected result. So something chronic is not working." He acknowledged this could indicate the person was not genuine about changing or be due to a personality pathology the person is unable to change. (*Dr. Starzomski's Testimony, page 692*)

[342] Dr. Starzomski experienced Mr. Shea as having an interest that went beyond institutional walls. In Dr. Starzomski's words: "… He's not solely resigned to life

in an institution… He doesn't…see that experience as his sole focus and priority in his day-to-day life." Dr. Starzomski described Mr. Shea has having a connection with the world outside of prison and noted that he "spoke about it quite readily a number of different times." (*Dr. Starzomski's Testimony, page 399*)

Dr. Theriault's Violence Risk Assessment and the Risk Assessment Tools

[343] Dr. Theriault and Dr. Starzomski used the same three assessment tools to assess Mr. Shea's risk for violent reoffending. The instruments used, the PCL-R (Psychopathy Checklist Revised), the VRAG (Violence Risk Assessment Guide), and the HCR-20 (Historical, Clinical, Risk Management) are "the professional standard for dangerous offender applications or for risk assessments generally." (*Dr. Theriault's Testimony, page 160*) In calculating his scoring, Dr. Theriault had to use pro-rating, a legitimate technique commonly employed where certain information is missing. (*Dr. Theriault's Testimony, page 163*) Some information was not available to Dr. Theriault because Mr. Shea declined to be interviewed by him. (*Dr. Theriault's Testimony, page 162*)

[344] Dr. Theriault did not view the absence of an interview with Mr. Shea as an impediment to his diagnostic findings. (*Dr. Theriault's Testimony, page 158*)

The Psychopathy Checklist-Revised

[345] Using pro-rating, Dr. Theriault assessed Mr. Shea as a 35 out of 40 on the Psychopathy Checklist Revised (PCL-R) (*Dr. Theriault's Testimony, page 164*) He testified that the PCL-R score is used in the VRAG to calculate the risk to reoffend, noting that although a risk assessment would not normally be based on the PCL-R score alone, "…in general…high scores…on the PCL-R are indicative of increased risk for violent recidivism..." (*Dr. Theriault's Testimony, page 165*)

[346] In his report, Dr. Theriault explained psychopathy:

> Psychopathy is a clinical construct traditionally defined by a constellation of interpersonal, emotional and lifestyle characteristics on the interpersonal level, psychopaths are grandiose, arrogant, callous, dominant, superficial and manipulative. Mostly they are short tempered, unable to form strong emotional bonds with others and lacking in guilt or anxiety. These interpersonal and emotional features are associated with a socially deviant lifestyle which includes irresponsibility and impulsive behavior and a tendency to ignore or violate social conventions or mores…(*Exhibit 2, page 16*)

The Violence Risk Assessment Guide

[347] The VRAG "is an actuarial instrument that gauges the individual's risk comparative to other groups with known rates of violent recidivism based on static factors."(*Exhibit 2, Dr. Theriault's Report, page 17*) An individual's VRAG score will place him in one of nine ascending bins/categories of risk. Each "bin" has been assigned a range of probabilities for violent recidivism. Dr. Theriault placed Mr. Shea in the 8th "bin" based on his VRAG score, indicating in his report that individuals with similar scores in the 8th "bin" reoffended violently "at rates of 76% over 7 years at risk and 82% over 10 years at risk" (*Exhibit 2, Dr. Theriault's Report, page 17*) Dr. Theriault explained that "at risk" usually means in the community although in Mr. Shea's case it could also mean in a correctional institution. He testified that Mr. Shea's risk of offending violently in an institution is assessed as 7 years out from the time of the assessment, a risk period that

obviously includes Mr. Shea's current incarceration. (*Dr. Theriault's Testimony, page 170*)

[348] The VRAG "strips" down "…those variables that objectively can be assessed that meaningfully inform risk for violence recidivism." (*Dr. Theriault's Testimony,page 167*) Dr. Theriault's report indicates as follows:

> The VRAG cannot determine when in the period of risk violent behavior will occur, although in general the higher the VRAG score, the more likely violence will occur early in the period of risk. Similarly the VRAG cannot predict the magnitude of violence, although generally, it is in keeping with the previous pattern observed violence. (*Exhibit 2, page 17*)

The Historical, Clinical, Risk Management Instrument

[349] Dr. Theriault also did an HCR-20 assessment of Mr. Shea. In his report he stated:

> In the area of risk management Mr. Shea has a number of ongoing concerns. Previous periods of federal incarceration did not suggest that he has done much in the way of planning for his releases. He tends to simply, as he did very early on in his life, spend the time doing time rather than learning any set of skills or making plans for a productive future. Mr. Shea's hostility towards justice officials is now so ingrained that it is difficult to see how he would ever bring himself to avail himself of the supports delivered by them whether in an institutional or community setting. As a result of these

> historical, clinical and risk management issues, Mr. Shea's risk on the HCR-20 in, in my opinion, in the high category." (*Exhibit 2, page 18*)

Dr. Starzomski's Violence Risk Assessment

[350] Dr. Starzomski also administered the PCL-R, VRAG and HCR-20, with very similar results. He scored Mr. Shea in the psychopathic range with a 31.6. Dr. Starzomski placed Mr. Shea in the seventh bin on the VRAG which means he falls into the category of individuals found to recidivate violently at the rate of 55% within seven years and at a rate of 64% within 10 years of release from custody. (*Dr. Starzomski's Testimony, page 470*)

[351] Dr. Starzomski described how the VRAG and HCR-20 get used in risk management:

> …if they are falling in that high risk bracket [of the VRAG], they're the kind of person that's going to need particularly intensive and extensive risk management planning and rehabilitation and look different from the kind of person who is going to score low on the VRAG. So it sets in motion a sense of intensity of expectation about managing and working with an offender over time and then the HCR 20 has pieces in it that lets you look at…are things changing or things were still really problematic over time? (*Dr. Starzomski's Testimony, page 472*)

[352] It was Dr. Starzomski's conclusion that Mr. Shea is a high risk to reoffend violently in the future based on his history and the leading risk assessment tools. (*Dr. Starzomski's Testimony, pages 479, 544*) He noted that where there is

disagreement in the PCL-R, as here, it is an accepted practice to average the scores. Doing that in Mr. Shea's case – averaging the scores of Dr. Theriault and Dr. Starzomski – has the effect of placing Mr. Shea in the 7th bin on the VRAG, with a slightly lower probability of violent reoffending than Dr. Theriault assessed. (*Dr. Starzomski's Testimony, pages 480 – 481*)

[353] Dr. Theriault reviewed and commented on the concordance between his and Dr. Starzomski's violence risk assessment: "I would say we're quite close actually." (*Dr. Theriault's Testimony, page 243*) He noted that risk assessments for dangerous offender applications used to involve scoring of PCL-R tests by a psychiatrist and a psychologist separately but now only the psychiatrist does the assessment scoring, largely due to time and resource constraints. (*Dr. Theriault's Testimony, page 310*)

[354] Dr. Starzomski also conducted a number of psychological tests with Mr. Shea which, Dr.Theriault testified, would have no effect on the scoring of a person's violent risk profile. (*Dr. Theriault's Testimony, page 210*) Dr. Starzomski did not suggest otherwise.

Assessing Mr. Shea's In-Custody Behaviour

[355] It is Dr. Starzomski's opinion that Mr. Shea's behavior toward correctional staff reflects in part an effort to preserve and maintain his social status. Dr. Starzomski viewed it as also relating to a "very poor capacity to consider alternatives or the merits of alternatives to engaging in this kind of behavior…." (*Dr. Starzomski's Testimony, page 627*) Describing it as "a sort of battle approach" to living in the correctional system, Dr. Starzomski thought it could be due to a host of issues…"not just to…feeling unfairly treated, but seeking to gain... a power

advantage." (*Dr. Starzomski's Testimony, page 628*) He agreed with Mr. Heerema that Mr. Shea may be using violence in an instrumental fashion. (*Dr. Starzomski's Testimony, page 628*)

[356] Dr. Theriault testified that the materials he reviewed suggested Mr. Shea is "at times preoccupied with his relationship with authority figures and custodial officials…" (*Dr. Theriault's Testimony, page 200*) He was responding to a question about Dr. Starzomski's observation that Mr. Shea's focus in the interviews would at times shift toward talking about "his experiences of difficulties during his years of incarceration and his involvement with authorities." (*Exhibit 24, Dr. Starzomski's Report, page 3*)

[357] Dr. Starzomski asked Mr. Shea why he had not utilized pro-social procedures within the institutions to address his concerns. As the records indicate, and as Mr. Shea confirmed to Dr. Starzomski, he has launched formal complaints. Dr. Starzomski observed that Mr. Shea also engages in immediate and inappropriate behaviors in the meantime. He described Mr. Shea as having a lot of trouble "sitting back" and waiting to see what might come of the grievance process which would be a much better approach. (*Dr. Starzomski's Testimony, page 629*)

Managing Mr. Shea's Risk

[358] Dr. Theriault has a very pessimistic view of Mr. Shea's rehabilitative prospects. He comments in his report that:

> … Mr. Shea's institutional record does not give one much hope for his rehabilitative prospects. He has never seriously engaged in any rehabilitative programming; this includes not just psychological or other programming related to violence or

> offending behaviour but even practical programming such as educational upgrading or training. His institutional record shows persistent offending during each and every period of incarceration whether in federal or provincial custody including numerous incidents of violence. He has been shown on repeated admissions to have a deeply ingrained criminal attitude and belief system and his behaviour both within the institution and in those brief periods of time when he is not in the institution, indicate that his primary association is with criminal peers. He has been reported to be associated with the criminal gang…(*Exhibit 2, page 15*)

[359] Dr. Theriault's expectation of the eventual control of Mr. Shea's risk in the community "as it stands today" is low. At the present time, he does not have confidence that there is a "reasonable expectation" that Mr. Shea's behavior could be controlled in the community. (*Dr. Theriault's Testimony*, *page 257*) Dr. Theriault noted that Mr. Shea has not been able to demonstrate changes in his entrenched, anti-social behaviours. It was his opinion that Mr. Shea would have "to learn to suppress some of the inclinations that arise from having a high psychopathy score…[that is] the basic elements of being psychopathic…[and] he needs to fundamentally change his affiliation with the pro-criminal lifestyle…" (*Dr. Theriault's Testimony, pages 180 – 181*)

[360] Dr. Theriault noted that Mr. Shea's institutional conduct "certainly doesn't demonstrate to this point that he, at least up until now, has demonstrated an interest

in utilizing programming to fundamentally change his behaviour and hence his outcome." (*Dr. Theriault's Testimony, page 137)* In Dr. Theriault's view:

> …each time that he goes in he has an opportunity to do something differently and each time when he goes in, despite on at least some occasions his voicing that he is willing and able to do something differently, it quickly degenerates into more of the same and so he gets very quickly back into those kind of behaviours which have always been present when he's in custody and which have generally moved him from whatever security level he's placed at up to maximum security. (*Dr. Theriault's Testimony, page 139)*

[361] Dr. Theriault would approach expressions by Mr. Shea of a desire to change, "with a large grain of salt." (*Dr. Theriault's Testimony, page 141*) He noted that actions speak louder than words and that a person with psychopathic tendencies may be saying what they think others want to hear, that being the nature of psychopathy. Dr. Theriault testified that Mr. Shea's case suggests that he is "very reluctant to give up… a lifetime of attitudes and behaviours that he has embraced over a long period of time." (*Dr. Theriault's Testimony, pages 139 – 140*)

[362] In Dr. Theriault's opinion, it will be hard for Mr. Shea to adapt to being in a subordinated position in the community, for example, working a menial job. His response will be influenced by his psychopathy: "… He would not take to it kindly, he'd be more impulsive about it, he'd be more irritable and angry about it… He might not believe that it's fair for him to be in that position. He might feel that he should have better and bigger things so his reaction might be very different from somebody that doesn't have those traits." (*Dr. Theriault's Testimony, page 149*)

[363] In responding to the question about how it could be possible for Mr. Shea to achieve the status in a pro-social way in the community that he is perceiving he gets from his behaviour in the criminal subculture, Dr. Theriault stated:

> … I don't know that there's any easy way to do that other than through demonstrating, over a period of time through hard work, increasing your education, demonstrating reliable work skills, perhaps learning a trade, and those sorts of things and that will take a period of time and it may not translate into for an individual like Mr. Shea, the level of respect that he feels or felt that he was accorded within a more criminally oriented subculture. (*Dr. Theriault's Testimony, page 148*)

[364] Dr. Theriault testified that if Mr. Shea can demonstrate "over a prolonged period of time in the custodial environment that he can manage his behavior in a pro-social fashion, that might give one more confidence that eventually he could do it in a community setting." (*Dr. Theriault's Testimony*, *page 182; see also pages 152-153*)

[365] Although Dr. Starzomski identified strategies he believed could support Mr. Shea progressing toward a more pro-social orientation and away from his entrenched attitudes and behaviours, he too saw very significant challenges facing Mr. Shea:

> … His adversarial approach to authority and… The general expectations about institutions and society will really have to undergo a major overhaul…They could be easier to meet out

> West if he's able to…maintain a distance from the sort of anti-social element that he's been very wrapped up with here for a very long time. If he can just…find a way, if that move separates him enough socially that he can stay focused on what his goals ought to be and what he says they are, then…he's going to have a little better shot, I suppose, but I think that his capacity to…bear down on changing things…with his attitudes and his behavior… is going to be a work over time and learning to relate differently with some of the people who can help with that, who are the staff of the correctional facility…(*Dr. Starzomski's Testimony, page 506-507*)

[366] Dr. Starzomski agreed with Dr. Theriault that it will take "years" for Mr. Shea "to demonstrate a…more stable positive engagement process to manage risk. (*Dr. Starzomski's Testimony, page 522*) He acknowledged that Mr. Shea has "not made a lot of progress in engaging in programs and schooling within the institutions." (*Dr. Starzomski's Testimony, page 541*)

[367] Mr. Heerema put to Dr. Starzomski many examples of Mr. Shea stating that he is going to take steps to change but not doing so. Dr. Starzomski responded by saying: "… I do emphasize that it would be extremely challenging for Mr. Shea to make changes in the areas that need to be undertaken…I'm not necessarily thinking that his expressions of plan are sufficient by any means to get him there in and of itself." (*Dr. Starzomski's Testimony, page 697*) Dr. Starzomski observed that just because Mr. Shea has not achieved or wanted to achieve a change in his behaviours, "doesn't mean that it could not happen in the future with a different

approach, mindful of the reality that there's been decades of lack of success here." (*Dr. Starzomski's Testimony, page 705*)

[368] On cross-examination, Dr. Starzomski was asked to describe what constitutes the possibility of change for Mr. Shea. He said:

> You gauge it to demonstrated behavior and obviously Mr. Shea's case, that's going to be within an institution that's going to be demonstrated by diminished or eliminated acts of violence and disrespect towards fellow inmates and correctional workers…It's going to be compliance and meaningfully working through practical problems that relate to discharge – readiness eventually. It's the ability to cascade down in security. It's being willing to work in a different way with people who can help him, and demonstrating that over a period of time. (*Dr. Starzomski's Testimony, page 706*)

Dr. Starzomski's Provisional ADHD Diagnosis

[369] Dr. Starzomski provisionally diagnosed Mr. Shea with ADHD and formed the opinion that there are problems with Mr. Shea's cognitive capability that are contributing and very likely have contributed for some time to his problems with social adjustment and other issues like school and work. (*Dr. Starzomski's Testimony, page 498*) He noted that the documentation of Mr. Shea's history contains observations of Mr. Shea that could be consistent with him having attentional problems. (*Dr. Starzomski's Testimony, page 492*) Dr. Starzomski saw signs of attentional issues when interviewing Mr. Shea. (*Dr. Starzomski's Testimony, page 494*) He felt that Mr. Shea "… had a challenging time just staying

with… What we were trying to do… he was struggling to… stay on track…" (*Dr. Starzomski's Testimony, page 494*)

[370] Dr. Starzomski defined "provisional" as meaning that an individual appears to meet "…the required diagnostic elements of the disorder, at least many of them, and that there is a need for further investigation to determine with greater certainty if this is a condition that applies in a given case." (*Dr. Starzomski's Testimony, page 636*)

[371] The diagnosis of ADHD in adults is challenging and controversial. A lack of historical information makes the diagnosis difficult to make. Dr. Starzomski noted about Mr. Shea: "We don't have someone who's been really close with Mr. Shea consistently for many years. That would be ideal. We don't have that." (*Dr. Starzomski's Testimony, page 499*) He testified that "There is no gold-standard structured interview around adult ADHD yet in the field. It's still a field that's developing and under development." (*Dr. Starzomski's Testimony, page 648*) He agreed with Dr. Theriault's comment that adult ADHD is somewhat controversial in psychiatry "at the moment." (*Dr. Theriault's Testimony, page 212*) This acknowledgement did not change Dr. Starzomski's opinion that ADHD is "a very reasonable thing to wonder about" in Mr. Shea's case. (*Dr. Starzomski's Testimony, page 651*)

[372] Dr. Theriault noted that attention "like many other attributes…a person has, is distributed…" (*Dr. Theriault's Testimony*, *page 213*) which makes it difficult to know where the dividing line is between people who have attention deficit and people who do not. Although Dr. Theriault indicated that adult ADHD is a diagnosis usually made "in concert with significant history from… childhood…to suggest that the person had ADHD as a youth", (*Dr. Theriault's Testimony, page*

214) it was Dr. Starzomski's evidence that this is not essential. (*Dr. Starzomski's Testimony, page 650*)

[373] The review of Mr. Shea's files disclosed to Dr. Theriault no strong evidence to suggest ADHD in childhood. "He wasn't diagnosed with ADHD. He wasn't treated for ADHD. He had lots of evidence of conduct disorder, but there was no specific evidence of ADHD." (*Dr. Theriault's Testimony, page 214*) Dr. Theriault conceded that Mr. Shea's failure to complete his schooling could be consistent with ADHD although other explanations, such as disinterest, were also possible. (*Dr. Theriault's Testimony*, *page 315*) He testified that observations reported by Dr. Starzomski in his report (*Exhibit 24, page 18*) were "certainly consistent with some sort of cognitive difficulties that Mr. Shea was having around that time." Those difficulties could have been related to learning new information or that Mr. Shea simply wasn't paying attention. (*Dr. Theriault's Testimony*, *page 317*) Dr. Theriault was of the opinion that the observations referred to in Dr. Starzomski's Report were more suggestive of conduct disorder rather than ADHD. (*Dr. Theriault's Testimony*, *page 319*)

[374] If Mr. Shea has ADHD, Dr. Theriault acknowledged that treatment of it with prescribed psycho-stimulant medication could enable him to better pay attention to, and perform better in programming. (*Dr. Theriault's Testimony*, *page 218*) Notwithstanding, Dr. Theriault does not support Dr. Starzomski's recommendation that Mr. Shea be prescribed psycho-stimulant medication. (*Dr. Theriault's Testimony, page 248*) In his view, even if Mr. Shea has ADHD, he would not expect its treatment to fundamentally shift Mr. Shea's views of authority or his pro-criminal attitudes and behaviour. (*Dr. Theriault's Testimony*, *page 219*) It is

Dr. Theriault's opinion that ADHD medication would have effect no real change to Mr. Shea's psychopathic personality profile. (*Dr. Theriault's Testimony*, *page 220*)

[375] Dr. Starzomski was asked in cross-examination whether Dr. Theriault's review of his psychometric results and his conclusion that he would not feel comfortable making an ADHD diagnosis or prescribing medication for Mr. Shea caused him to question his provisional diagnosis. Dr. Starzomski responded by saying: "No, because it's provisional, and I stand by my organization of that information as encapsulating the existence of a number of issues that are clinically important to explore and understand further." (*Dr. Starzomski's Testimony, page 653*) He agreed it would be necessary to consider whether Mr. Shea's impulsive behaviour over the years and at present was driven by his psychopathic traits or ADHD. (*Dr. Starzomski's Testimony, page 654*) And he acknowledged that even if the diagnosis of ADHD was correct, there was no certainty that medication would have an impact on Mr. Shea's behaviours. (*Dr. Starzomski's Testimony, page 654*)

The Relevance of Dr. Starzomski's Provisional ADHD Diagnosis

[376] Dr. Starzomski testified that there is a reasonable basis to consider the possibility of attentional deficits being a factor in Mr. Shea's unsuccessful programming performance. Dr. Starzomski is aware that Mr. Shea has been removed from programs for disruptive and inappropriate behaviour, and views this as not simply an indication of poor motivation and indifference. While acknowledging that Mr. Shea may act out to maintain face in a group setting, Dr. Starzomski thought there could be another explanation: "And those kinds of behaviours to a clinician, they represent the possibility that there something else going on." (*Dr. Starzomski's Testimony, page 634*)

[377] In Dr. Starzomski's opinion, Mr. Shea may have attention deficit issues that will challenge him to manage some of the programming demands in the correctional system. That being said, it was Dr. Starzomski's opinion that Mr. Shea's academic profile is not "glaringly different" from what the Correctional Service of Canada typically encounters. He noted there are "strategies and ways that the correctional system can and does accommodate" offenders in their programmes with these deficits. (*Dr. Starzomski's Testimony, page 426*) He found nothing to indicate that Mr. Shea is not capable of performing well in CSC programmes, other than his possible attention deficit issues which are relevant, in Dr. Starzomski's opinion, not merely to succeeding in programmes but relate to his general behaviour in the institution. (*Dr. Starzomski's Testimony, pages 631, 632-633*)

[378] Dr. Starzomski explained the synergy between attention deficits and motivation: encountering a lack of success can have the effect of diminishing motivation: "…one of the diagnostic criteria of ADHD is individuals with ADHD do have a tendency to disengage from activities that require sustained mental effort…(*Dr. Starzomski's Testimony, page 728*) Dr. Starzomski described what he saw in Mr. Shea:

> …he doesn't have what I would call strategies in place to kind of navigate his way through some of these more demanding process (sic) of solving problems and keeping track of what's happening and what he's expected to do and that fundamentally goes to this concern that emerged out of this, as well as my interviews with him, that his way of working with information is really anomalous. (*Dr. Starzomski's Testimony, page 439*)

[379] This can indicate ADHD. (*Dr. Starzomski's Testimony, page 439*) In a self-report checklist to determine if Mr. Shea identified symptoms of ADHD applying to him, the result obtained by Dr. Starzomski was that "he did not fall into a category where he would… describe himself as a person exhibiting a lot of the different kinds of symptoms with a high degree of frequency that are part of the ADHD diagnosis." (*Dr. Starzomski's Testimony, page 441*) Dr. Starzomski noted that approximately one-third of the people diagnosed with ADHD do not score in the diagnosed range on the test he gave Mr. Shea. "It does not pick up everybody. In fact, it misses a lot of people who actually have the diagnosis." Dr. Starzomski testified that: "… That's not an uncommon thing in fields of mental health and cognition. It's hard always for people to give an entirely objective assessment of themselves because they are not fully tuned into their issues the way that objective observers might be." (*Dr. Starzomski's Testimony, page 442*) This, said Dr. Starzomski, can explain how a diagnosis of ADHD can be valid in cases where the individual has not identified themselves as having attentional deficits. "It's not a given that a person's own rating is how other people or clinicians will rate that person…" (*Dr. Starzomski's Testimony, page 496*)

[380] With respect to the significance of Mr. Shea possibly having attention deficit issues, Dr. Starzomski spoke of "a really negative cycle" which has involved Mr. Shea's "engagement in the immediate feedback of the criminal subculture…" (*Dr. Starzomski's Testimony, page 485*) He expressed the opinion that:

> … These kinds of issues are going to be one of the major challenges when it comes to… looking to manage his behavior differently in the future and to me that is a fundamental component about his capacity to stay on track and stay attentive

> to what's important and be less distracted from and distracted by these other influences that he's always found interesting…(*Dr. Starzomski's Testimony, page 485*)

[381] While viewing the attentional issues as "a really important piece of Mr. Shea's overall history and ongoing challenge", Dr. Starzomski acknowledged that Mr. Shea's anti-social personality is of fundamental primary importance. (*Dr. Starzomski's Testimony, page 488*) He agreed in cross-examination that Mr. Shea has an anti-social personality disorder and that personality disorders are difficult to treat and typically referred to as "fixed and enduring." (*Dr. Starzomski's Testimony, pages 534-535*) He also agreed that psychopathy is considered a particularly serious variant of anti-social personality disorder and, amongst criminal offenders, is associated with the perpetration of "especially high and serious forms of violence." (*Dr. Starzomski's Testimony, page 535*) He acknowledged that individuals in the higher range of the PCL-R tend to be "quick to return to crime" and show "a disregard for the consequences of their actions." (*Dr. Starzomski's Testimony, page 536*)

[382] Dr. Starzomski testified that further investigative steps would need to be taken to confirm or deny his provisional ADHD diagnosis. (*Dr. Starzomski's Testimony, page 499*) He agreed with Mr. Heerema in cross-examination that Mr. Shea has shown an ability to plan and stay on track, for example, in executing the strategies behind the forcible confinement and extortion of Luke Hersey in January 2009. (*Dr. Starzomski's Testimony, page 601-602*) However Dr. Starzomski testified that he would expect to see some variability in how Mr. Shea's attentional issues manifest themselves in different situations and over time. Dr. Starzomski would not expect Mr. Shea to be "easily derailed all the time…" (*Dr. Starzomski's*

Testimony, page 602) He also wondered about the degree to which Mr. Shea's attentional problems could affect his ability to find better alternatives to a situation, "that he can get… locked into a track and not have a chance to… reflect and consider other options… he settles on one track and goes with that." (*Dr. Starzomski's Testimony, page 602*)

Strategies for Change

[383] Dr. Theriault agreed with Dr. Starzomski's inventory of issues that Mr. Shea needs to deal with: minimizing problematic relationships with anti-social peers; developing pro-social life skills; regulating negative emotion – although Dr. Theriault noted that Mr. Shea's instrumental violence is not emotion-based. He supported recommendations by Dr. Starzomski for: school[4] and employment programs, recreational programming, residency in a halfway house on release. In Dr. Theriault's opinion, Mr. Shea's anti-social, pro-criminal, anti-authoritarian view of the world is what really needs to be "centrally addressed for him to be successful." (*Dr. Theriault's Testimony*, *page 251*) The recommendations made by Dr. Starzomski would be beneficial but only if Mr. Shea addresses his entrenched attitudes and behaviours first. (*Dr. Theriault's Testimony*, *pages 251-252*) Dr. Theriault testified that:

> You'd want to see a period of time of stability within the institution where he's really just not getting into difficulties. Then you would have more confidence that if he were to engage in these kinds of programs, they might be meaningfully changing for him.

[384] Dr. Theriault is unaware of any literature to suggest that treating ADHD in someone with psychopathy would lead to a moderation of the risk that arises from the psychopathy. (*Dr. Theriault's Testimony*, *page 214*) Furthermore, treating inattention will not necessarily reduce impulsive behavior. Dr. Theriault noted that "impulsive-related violence" is a concern in Mr. Shea's case. (*Dr. Theriault's Testimony*, *page 215*)

[385] In Dr. Theriault's opinion the cognitive and attentional issues present in the psychological testing by Dr. Starzomski would be useful if Mr. Shea enters into programming, to help programmers adapt if necessary any programming that he needs. Dr. Theriault views Mr. Shea's psychopathy and his affiliation with an anti-social lifestyle and values as the biggest factors to be confronted. (*Dr. Theriault's Testimony*, *pages 243–247*) He testified that Mr. Shea would benefit from psycho-educational programs and the Correctional Service of Canada violence prevention program. As Dr. Theriault put it: "…it's not simply removing Mr. Shea from an anti-social peer group. It's helping Mr. Shea understand that he himself espouses a number of anti-social views that he needs to directly address." (*Dr. Theriault's Testimony*, *page 248*)

[386] Dr. Theriault explained why a history of entrenched or ingrained criminality and involvement in the criminal subculture is a concern:

> The concern really is from a treatment perspective we know that for individuals that have those sorts of deeply ingrained values and attitudes that it's very difficult to shift them. So you know, a comparative would be if you take somebody who's leading an ordinary life and they have to suddenly change who they are, how they think about themselves, who they associate

> with, how to make decisions about what a correct course of action is, an individual who's deeply involved in criminal subculture needs to make shifts in all of those different areas. That's difficult to do and it's difficult to do when you're in a correctional facility because of course, you have to start to become a person that everyone will see you as quite different than the person that you were before. (*Dr. Theriault's Testimony, pages 129 – 130*)

[387] Dr. Theriault testified that cognitive behavioural therapies work best with individuals who have psychopathic tendencies. (*Dr. Theriault's Testimony*, *page 94*) And while Dr. Theriault agreed with Dr. Starzomski that individual counseling would be useful for Mr. Shea (*Dr. Theriault's Testimony*, *page 249*), the evidence established that the Correctional Service of Canada does not provide individual counseling other than some limited one-on-one interaction with program facilitators.[5] (*Evidence of June Dicks, Nova Scotia Community Programme Manager with the Correctional Service of Canada*)

[388] On cross-examination, Dr. Theriault observed that the provincial correctional system does not have much programming of the kind that Mr. Shea needs. He agreed with the proposition put to him that in the last approximately 5 years that Mr. Shea has been in the provincial institution he has had limited opportunities to engage in treatment and demonstrate whether or not he is responsive to it. (*Dr. Theriault's Testimony*, *page 307 – 308*)

[389] As I noted earlier in these reasons, the records indicate that Mr. Shea has often spent extended periods of time in segregation. Prolonged segregation is not healthy. (*Dr. Theriault's Testimony*, *page 323*) Dr. Theriault observed that

segregation "isn't a particularly mentally healthy place to be. It's isolating, and it removes one from regular stimulation…"(*Dr. Theriault's Testimony*, *page 322*) He agreed a cycle can occur: "so being in segregation doesn't help your mood and you may be irritable. You continue to act out so you get more time in seg and so on and so forth…" (*Dr. Theriault's Testimony*, *page 324*)

[390] Dr. Starzomski expressed the view that a transfer of Mr. Shea to a prison in western Canada could be an important step in distancing him from an environment where he keeps cycling through anti-social behaviours. Dr. Theriault agreed (*Dr. Theriault's testimony, pages 236 –237*) that a relocation of Mr. Shea to a prison in western Canada would help "dislodge" him from "especially negative peer relations, and the burden of his personal history within institutions." (*Exhibit 24, Dr. Starzomski's Report, page 28*) But he pointed out that unless Mr. Shea "manifestly disavows" his anti-social world viewpoint, he could be quickly drawn back into the institutional conduct and peer associations that have characterized his incarceration to date. (*Dr. Theriault's testimony, pages 236 – 237*)

[391] In preparing his report, Dr. Starzomski spoke to an uncle and half- brother who live in Calgary and have been having contact with Mr. Shea during his incarceration. Although it is many years since Mr. Shea has seen these relatives, they expressed an interest in reconnecting with Mr. Shea in person should he be transferred to Alberta and in Dr. Starzomski's opinion, were realistically informed about the challenges. They are also willing to help Mr. Shea with employment on release: Mr. Shea's half -brother has a small trucking business that could supply Mr. Shea with a basic labouring job.

[392] Mr. Shea spoke with Dr. Starzomski about the significance to him of having reconnected with family out West. Dr. Starzomski saw in Mr. Shea "… A capacity for… warmth and meaningful connection" with other people and a desire to be part of positive relationships outside of prison. (*Dr. Starzomski's Testimony, page 407*) Through psychological testing, Dr. Starzomski assessed Mr. Shea's outlook on close personal relationships as "a sort of positive and functional one."

> …He has a relatively favourable outlook on other people and he has a sense that he has some ability to bring some good personal contributions to relationship….He's a person who's interested and oriented to relationships and wants to have relationships and values them. (*Dr. Starzomski's Testimony, page 453*)

[393] The Crown asked Dr. Theriault about Mr. Shea's relatives in western Canada and whether it was reasonable to consider that they could provide adequate support for him. He responded by noting there is not a lot of information about how these relationships would be transacted and "too many unknowns" to say that Mr. Shea's relatives could be reliably depended upon as social supports for him. (*Dr. Theriault's Testimony, page 208*)

Is There Anything New in the Mix?

[394] Like Dr. Theriault, Dr. Starzomski sees considerable challenges facing Mr. Shea, but in his opinion there is a reasonable possibility of Mr. Shea controlling his violent behaviour. Especially if a geographical relocation is achieved and attentional issues are confirmed and addressed and Mr. Shea is "able to actually engage in a different sort of relationship and approach to his incarceration, it could

actually… So may look much better than it has. Of course, that's not a certainty." (*Dr. Starzomski's Testimony, page 719*)

[395] Dr. Starzomski testified that the dangerous offender application has caught Mr. Shea's attention. "…the reality…if he does not make some notable changes, he stands to not have the chance to be in the community again for a long time, I think that is a factor that can motivate him. It's …a newer aspect of this whole situation. (*Dr. Starzomski's Testimony, page 717*)

Mr. Shea's Statement to the Court

[396] Once all the evidence was heard Mr. Shea was asked if he had anything he wanted to say. He did. He told me he is sorry "for hurting Keithen Downey" and said they are now friends. He offered some context for his behaviour: "Sometimes I have to do things in jail to survive. Prison has its own set of rules and I don't want to be part of it anymore." He went on to say: "I made bad choices and some of my bad choices were selfish and some of them were about survival."

[397] Although Mr. Shea's institutional records indicate that a proposed transfer to prison in Edmonton was to have been an involuntary transfer, Mr. Shea now wants to "get away from here." He had the following to say about the dangerous offender application:

> This DO application which came out of nowhere and I can't believe I am put in a category like this, has forced me to think about how sad and lonely it would be to die in jail. This is not who I am and it is not what I want out of my life. I remember the time I lived with Stacey and her children as being the happiest days of my life. I don't have children so Stacey's kids

> are my kids. I was part of a family. Even though I sold drugs I always tried to keep it away from them.

[398] Mr. Shea spoke about family in Alberta and said, “I want to be close to family and friends who do good things. There are people out there who want to help me and I want to prove that I can be helped… I want to get a fresh start, far away from my bad habits in Nova Scotia. I know it won’t be easy, but my family’s willingness to help shows me they love me.”

[399] Mr. Shea’s statements to the Court have to be viewed with considerable skepticism. As Dr. Theriault noted, Mr. Shea has expressed good intentions previously and has consistently fallen back in to anti-social and counterproductive behaviours. That being said, Mr. Shea did not try to displace responsibility: “I’ve put myself in these situations. I don’t blame anyone.” Despite, or perhaps because of the time he has spent locked up, Mr. Shea said: “jail isn’t for me. It’s not my life. It’s depressing. I want to have kids and a job to take care of them.” He acknowledged: “I still have a lot to learn and more to do. There is hope for me.” He said he found meeting with Dr. Starzomski to be beneficial: “He listened to me and made me think about who I am and ways I could better myself…”

[400] Mr. Shea wants to be seen as more than what is portrayed in his institutional records. “I’m more than a piece of paper… I can change and will change.” He went on to say:

> I’ve done a lot of bad things in my life but my crimes don’t define who I am. I am more than a box of paper or criminal record. I have flesh and blood and I don’t want to die in prison.

I need a chance. I'm sorry about what I've done and I want to
put it behind me.

PART VIII – *The Pattern Analysis*

Introduction

[401] To reiterate, for the purposes of a dangerous offender determination under section 753.1(a)(i) of the *Code*, a pattern of **repetitive behaviour** has to:

- Include the predicate offence
- Show a failure of restraint, and
- Show a likelihood of causing death or injury or inflicting severe psychological damage.

[402] For the purposes of a dangerous offender determination under section 753.1(a)(ii) of the *Code*, a pattern of **persistent aggressive behaviour** has to:

- Include the predicate offence
- Show a substantial degree of indifference for the reasonably foreseeable consequences to other persons.

[403] A pattern of repetitive behaviour in the case of Mr. Shea therefore has to be a pattern of repetitive violent behaviour given that the predicate offence is an aggravated assault. This means that to be considered for a pattern analysis under section 753.1(a)(i) of the *Code*, Mr. Shea's past behaviour must have involved "some degree of violence or attempted violence or endangerment or likely endangerment…" either "more or less violent than the predicate offence." (*Neve,*

paragraph 110) Such a pattern can include threats although their context would have to be considered. (*Neve, paragraphs 172 - 179*)

[404] The same must be true for a pattern of persistent aggressive behaviour given the predicate offence committed by Mr. Shea. The relevant-to-pattern-analysis past behaviour must have elements of "some degree of violence or attempted violence or endangerment or likely endangerment…" I find that the standard of conduct for persistent aggressive behaviour under section 753.1(a)(ii) cannot be significantly divergent from what is contemplated for a pattern of behaviour under section 753.1(a)(i).

[405] In determining whether there is a pattern of conduct falling within the threshold requirements of sections 753.1(a)(i) or (ii), there are three areas of evidence to be considered: (1) the offender's past criminal acts and criminal record; (2) extrinsic evidence relevant to those past acts and the circumstances surrounding them; and (3) psychiatric opinion about that conduct. (*Neve, paragraph 123*)

[406] That being said, it is the sentencing judge – "not the psychiatrists, or the Crown, or the defence" – who determines the key elements of the pattern of behaviour. (*Dow, paragraph 29 (C.A.), cited in Neve, paragraph 199*)

[407] I find that determining this dangerous offender application takes me beyond the evidence provided by Dr. Theriault and Dr. Starzomski. I must ground my analysis in the provisions of the *Criminal Code*, sections 753.1(a)(i) and (ii). That analysis does not include resolving the issue of whether Mr. Shea does or does not have ADHD, a possibility that Dr. Starzomski has said requires further investigation.

[408] In conducting my pattern analysis, I will be doing the following: (1) considering evidence given by Drs. Theriault and Starzomski on the issue of Mr. Shea's violence in the community and in custody; (2) identifying the convictions and institutional misconduct and offences that could be considered in the pattern analysis; (3) identifying the convictions and institutional misconduct and offences that qualify for inclusion in the pattern analysis and those that don't; and finally, (4) determining whether the qualifying convictions and incidents of institutional misconduct and offences constitute either a section 753.1(a)(i) or a section 753.1(a)(ii) pattern of behaviour.

How the Expert Evidence Factors into the Pattern Analysis

[409] There is a distinction to be made between what constitutes a threat according to risk assessments conducted by forensic risk assessors such as Dr. Theriault and Dr. Starzomski and what constitutes a threat under the dangerous offender legislation. For dangerous offender designation purposes, there is no threat if there is no pattern. (*Neve, paragraph 127*) Dr. Theriault and Dr. Starzomski have identified Mr. Shea as a threat, that is, a high risk to re-offend violently, based on the results produced by the risk assessment tools they used. That being said, Mr. Shea is not unique: other offenders have high PCL-R and VRAG scores. And not all offenders with high PCL-R and VRAG scores are the subject of dangerous offender applications. Simply put: Mr. Shea's PCL-R and VRAG scores do not make him a dangerous offender under Part XXIV of the *Criminal Code*.

[410] My point is this: Mr. Shea cannot be designated a dangerous offender unless the Crown discharges its onus of establishing beyond a reasonable doubt that he meets the legislated criteria. A dangerous offender designation flows from a determination that Mr. Shea is a "threat to the life, safety or physical or mental

well-being of other persons" on the basis of evidence that establishes a pattern of behaviour as defined in sections 753.1(a)(i) or (ii). Mr. Shea cannot be designated a dangerous offender based on the risk assessments and opinion evidence of Dr. Theriault or Dr. Starzomski. That is not the criteria established by Parliament. Their evidence is certainly germane to whether something less than an indeterminate sentence of imprisonment can manage Mr. Shea's risk but before that inquiry is relevant, the issue of whether Mr. Shea is a dangerous offender must be resolved. This takes me to an examination of the pattern of behaviour issue to be considered in relation to the provisions of sections 753.1(a)(i) and (ii).

[411] Mr. Shea's criminal behaviour in the community has involved both impulsive and instrumental violence: the Shoppers' Drug Mart rock-throwing incident showing impulsivity and the forcible confinement and extortion of Luke Hersey being an example of instrumental violence. Dr. Theriault described the difference between instrumental and impulsive violence: instrumental violence is "goal directed and has a purpose whereas emotional violence…is utilized primarily for the expression of the emotion." (*Dr. Theriault's Testimony, page 132)*

[412] Dr. Theriault saw the Shoppers' Drug Mart incident in these terms:

> … Now, you know, one could argue how violent that was but what it suggests is that at least at some level he's prone to impulsivity in terms of his violence. So he has this interaction with the security guard and, you know, perhaps impulsively picks up this rock and whatever happened happened, right. So that ... that's an impulsive sort of response to a situation…(*Dr. Theriault's Testimony, pages 124-125)*

[413] In Dr. Theriault's view, the forcible confinement and extortion of Luke Hersey is "the purest example" in Mr. Shea's history "of this tendency towards instrumental violence. He saw it as "…a very coordinated activity on the part of Mr. Shea for a specific purpose for which he wasn't hesitant to use violence or the threat of violence to achieve the end that he wished." (*Dr. Theriault's Testimony, page 127)*

[414] Dr. Starzomski also commented on Mr. Shea's use of violence, as follows, in his report:

> Mr. Shea has incurred convictions for violence on an intermittent basis since his later teenage years. I have a difficult time concluding that Mr. Shea's violence has become more severe in the recent past on the basis of his criminal record. His violence is consistently rated on the less severe end of the seriousness scale within his CSC documentation (i.e., that is how his violence has been evaluated by their criteria). A few of his convictions have occurred in the community (where they have often been of a relatively minor scope for the most part) but many of the more serious concerns have primarily arisen in relation to violence in correctional institutions. There is often evidence of larger scale social forces at play in those situations, such as references to gangs of involvement with others in acts of aggression, which is a factor that could be regulated by careful placement and relocation of Mr. Shea. (*Exhibit 24, page 37*)

[415] It was Dr. Theriault's evidence that Mr. Shea shows the general pattern of criminality seen in an individual who starts at a young age. (*Dr. Theriault's Testimony,page 119)* The assault in Waterville[6] was important to Dr. Theriault because it was "the first example of what seems to have been an habitual problem for Mr. Shea in custodial settings where he becomes involved in violent altercations with other individuals in correctional facilities." (*Dr. Theriault's Testimony, page 122, referring to his report, Exhibit 2, page 7*)

[416] When asked on direct examination to offer an insight into why Mr. Shea would behave violently while incarcerated, Dr. Theriault had a contextualized response:

> In general and I hadn't, of course, discussed this with Mr. Shea, I mean, there's a very prominent subculture in correctional facilities when you've been in them for a period of time so where, honestly, it's a bit of a dog-eat-dog world from my understanding of it, where you have to be able to demonstrate or some people believe you have to be able to demonstrate to be tough and sort of stand up for yourself and there's the so-called con code and all those sorts of things. So inmates that get caught up in that kind of thinking often wind up engaging in those sorts of behaviours that are really under discussion and which find its genesis really very early on in Mr. Shea's history at ... at Waterville when he was there as a youth. (*Dr. Theriault's Testimony, page 122*)

[417] On cross-examination, Dr. Theriault explained his comment about prison being a dog-eat-dog world by saying he meant it "in the sense that it can be an

unforgiving place for inmates….” He agreed it was part of the mentality of prison life that "If you appear weak, you will be a victim." (*Dr. Theriault's Testimony, page 259*) And he agreed that it was the ethos of the prison subculture that "if you don't stand up for your friends [in prison] when they need you, your friends won't stand up for you when you need them." (*Dr. Theriault's Testimony, page 260*) Dr. Theriault also agreed that defying prison authority was a choice some prisoners made so as not to be victimized. He noted that not all offenders buy into this prison sub-culture mentality (*Dr. Theriault's Testimony, page 260*) In his opinion, Mr. Shea fell at "the far end or the extreme end" of the prison sub-culture. (*Dr. Theriault's Testimony, page 328*) For much of his life, Mr. Shea has been immersed in a harsh and unforgiving environment; to this point at least, he has chosen to navigate it by being a "heavy."

[418] Not all prisoners are aggressive or violent or even anti-social during their time in custody. But as Dr. Theriault's testimony indicates, violence and the threat of violence can be features of the correctional environment. Any assessment of Mr. Shea's behaviour in custody has to take that into account even while appreciating that he has acquired a deeply ingrained set of anti-social values and attitudes and acts in accordance with them.

Looking for the Patterns of Behaviour contemplated by sections 753.1(a)(i) and 753.1(a)(ii)

[419] Using the framework for patterns of behaviour captured by sections 753.1(a)(i) and (ii), I have to extract from Mr. Shea's history of convictions and institutional misconduct and offences the incidents that I can appropriately consider in my analysis. Anti-social behaviour may fall within the framework for the pattern analysis but it is not necessarily relevant given the governing

parameters. For example, Mr. Shea has a long history of being defiant and disrespectful toward authority figures. Some of this can be properly characterized as anti-social behaviour. Evidence of such behaviour being manifested by a refusal to comply with an order given in a correctional institution or being verbally abusive or damaging property is not relevant to the pattern analysis. Neither in my view are convictions for resisting arrest. These behaviours do not fit into the predicate offence-informing pattern I have to look for.

[420] Aggressive anti-social behaviour that is not criminal does not satisfy the requirements of section 753.1(a)(ii):

> …the type of past behaviour encompassed by these sections is criminal behavior since the predicate offense, a criminal one by definition, must form part of the pattern of conduct. The dangerous offender legislation is directed at those who hurt people through criminal, as opposed to simply anti-social, conduct. The latter cannot be the foundation for a dangerous offender application. (*Neve, paragraph 109*)

[421] The evidence discloses that Mr. Shea has used violence or the threat of violence both in the community and in correctional institutions. While the following convictions and incidents illustrate this, I must conduct my pattern analysis in two stages: first I have to determine which offences and incidents qualify for inclusion in the analysis and then I have to determine if the offences and incidents that do qualify constitute a section 753.1(a)(i) or section 753.1(a)(ii) pattern of behaviour.[7]

[422] The starting point for my "pattern analysis" then is to identify the possible incidents to be included. I have bolded the incidents that led to convictions.

- **In January 1994, during a dispute with his mother, Mr. Shea threatened her with a knife; (*Reasons, paragraph 78*) This incident led to a conviction for possession of a weapon.**

- **On August 3, 1995, when spoken to about loitering on the property, Mr. Shea verbally threatened the shift manager at McDonald's on Herring Cove Road; (*Reasons, paragraph 83*) This incident led to a conviction for uttering threats.**

- On February 21, 1996, prior to a Sheriffs' transport to court, Mr. Shea started to punch "at" a sheriffs' officer who entered the cell to speak with him about handing over his sneakers. He ultimately had to be subdued with capsicum spray. (*Reasons, paragraph 87*)

- On October 8, 1998, Mr. Shea, a resident in the Youth Facility at Waterville, punched another youth "several times" over gambling debts. (*Reasons, paragraph 128*)

- **On November 23, 1998, Mr. Shea, with others, assaulted another prisoner at the Waterville Correctional Facility. This incident led to convictions for assault and assault causing bodily harm. It seems there was more than one victim: correctional records indicate he was charged for punching "one of the victims" numerous times in the head. (*Reasons, paragraph 130*)**

- On July 13, 2000 Mr. Shea was involved in a fist fight with another prisoner at Renous. I could not tell from the institutional records if Mr. Shea had been the instigator or how the fight came about. (*Reasons, paragraph 219*)

- On February 2, 2001, Mr. Shea was arrested by Halifax Police after making threats against bar security who had refused him entry. (*Reasons, paragraph 221*)

- **On April 8, 2001, Mr. Shea threw a rock at a Shoppers' Drug Mart security officer who followed him from the store believing he had shoplifted. The rock narrowly missed the victim's head. This incident led to a conviction for assault with a weapon.** The National Parole Board (Atlantic) dealing with Mr. Shea's parole suspension determined that the incident was "seen to be on the low side of Assault." (*Reasons, paragraphs 133 and 223*)

- On June 22, 2001 at the Central Nova Scotia Correctional Facility (CNSCF), Mr. Shea was observed by surveillance camera punching another prisoner who was lying down. (*Reasons, paragraph 159*)

- Between the time of his return to Springhill at the end of November 2001 (to serve a three year sentence for possession for the purpose of trafficking crack cocaine and break and enter) and his involuntary transfer to Renous in July 2002, institutional records indicate that Mr. Shea had been involved in assaults on other prisoners at Springhill. No details are provided in the records.

- On October 19, 2001, Mr. Shea bit a correctional officer on the wrist, drawing blood. Mr. Shea was also written up for "swinging objects at

correctional officers trying to harm them and throwing scalding hot water at them." (*Reasons, paragraph 159*)

- On August 14, 2002, Mr. Shea punched a correctional officer at the CNSCF while the officer was trying to control him. (*Reasons, paragraph 160*)
- On October 17, 2002 Mr. Shea punched another prisoner in front of a correctional officer because he believed him to be a Protective Custody prisoner. He made "a sudden dash around the correctional officer and punched [KG] in the face." (*Reasons, paragraph 160*)
- On December 13, 2002, Mr. Shea was involved in an altercation with three other prisoners in Renous. The CSC records do not disclose whether Mr. Shea was an aggressor in this incident or a victim. (*Reasons, paragraph 238*)
- In May 2003, in a Correctional Plan Progress Report, it was noted that of 26 institutional charges between July 22, 2002 and March 27, 2003, one was for a "fight with another inmate" on December 18, 2002. (*Reasons, paragraph 240*)
- On June 12, 2003, a correctional officer observed a prisoner (WB) "running out of" Mr. Shea's cell. As WB "was making his way to the front of the day room Shea was punching and kicking at [him]" (*Reasons, paragraph 161*)
- On July 3, 2003, Mr. Shea threatened a correctional officer during a strip search by saying: "Wait till I get out in two years, I'll see you on the street and I will beat you." (*Reasons, paragraph 162*)
- At Springhill Penitentiary on August 3, 2005, soon after his return on a 30 month conspiracy to traffic cocaine sentence, Mr. Shea was believed to have

been involved as "an active participant" in an assault on another prisoner who received several non-life threatening lacerations. He was involuntarily transferred to Renous. At an Administrative Segregation Review Board hearing he told the Board he had nothing to do with any assault at Springhill. The Springhill CSC investigation concluded that it was "probable but not certain" that he was one of the primary attackers. (*Reasons, paragraphs 249, 250, 253, and 263*)

- On February 26, 2007, Mr. Shea got into an altercation with another prisoner in the cells at the Halifax Provincial Court. According to Sheriffs' officers who witnessed the incident, Mr. Shea was placed in a cell with the other prisoner who greeted him. Mr. Shea advanced on the prisoner and began hitting him with a closed fist, connecting twice before being restrained. He actively resisted being restrained and was taken to the ground outside the cell where he was handcuffed. (*Reasons, paragraph 272*)

- On April 14, 2007, Mr. Shea was discovered with contraband and threated correctional staff by making a gun noise –"click, click, bang" and saying: "I'll get you. I won't be in here forever. I'll see you on the outside." At his disciplinary board hearing, Mr. Shea admitted making the "gun noise" but said it meant nothing. (*Reasons, paragraph 163*)

- On November 3, 2007, Mr. Shea was observed on camera squaring off with another prisoner "in a fighting position". It appeared to correctional staff that some punches had just been thrown but whatever was happening stopped when it became apparent to Mr. Shea and his adversary that correctional staff were watching. (*Reasons, paragraph 164*)

- **On January 10, 2009, Mr. Shea committed the forcible confinement and extortion while armed for which he received a six year six month sentence for the extortion and a three year concurrent sentence for the forcible confinement. (*Reasons, paragraph 146 and 147*)**

- On March 14, 2009, Mr. Shea was observed on surveillance footage punching another CNSCF prisoner in the eye. (*Reasons, paragraph 165*)

- **On April 8, 2009, Mr. Shea participated in a riot. He pleaded guilty on April 30, 2010 and was sentenced to six months. (*Reasons, paragraph 153*)**

- On November 13, 2009, Mr. Shea was seen on camera assaulting another prisoner, [AS]. The assaults on AS were on two separate occasions, within five minutes of each other. AS was sent to hospital with facial injuries. (*Reasons, paragraph 173*)

- On January 25, 2010, Mr. Shea was observed on camera assaulting another CNSCF prisoner. (*Reasons, paragraph 178*)

- On February 7, 2010, Mr. Shea punched a correctional officer in the face when being escorted to his cell after refusing to lock up. During the use of force that followed, Mr. Shea punched another officer. (*Reasons, paragraph 179*)

- On March 21, 2010, Mr. Shea threated another prisoner with assault if he did not break a sprinkler. (*Reasons, paragraph 181*)

- On April 7, 2010, Mr. Shea bolted from correctional staff serving him a meal to pursue another prisoner, who locked himself in his cell. (*Reasons, paragraph 182*)

- On May 1, 2010, Mr. Shea was seen fighting with another prisoner in the day room. He was compliant with verbal commands to stop and locked himself in his cell without incident. (*Reasons, paragraph 184*)

- **On June 15, 2010, Mr. Shea committed the predicate offence – the stabbing of Keithen Downey in an altercation that also involved a co-accused, Adam LeBlanc – which led to a conviction for aggravated assault. (*Reasons, paragraphs 58 - 64*)**

- On September 29, 2010, Mr. Shea was accused of burning another prisoner's arms, which he denied. The complainant told the discipline hearing board that he had permitted Mr. Shea to burn him and did not want to give a statement to police. (*Reasons, paragraph 186*)

- On November 28, 2011 at the CBCF, Mr. Shea was observed on surveillance footage throwing two punches in a fight between two other prisoners. (*Reasons, paragraph 193*)

- On February 27, 2012, Mr. Shea was in a 50 second physical altercation with another prisoner. In the discipline report it is noted as Mr. Shea and JM "got into a physical confrontation." No force was needed to separate them and they were compliant with staff. (*Reasons, paragraph 196*)

- On July 19, 2012, Mr. Shea was observed on surveillance footage entering another prisoner's cell where he "struck" him. (*Reasons, paragraph 197*)

- On March 31, 2014, Mr. Shea assaulted Christian Clyke in the cells at the Halifax Provincial Court. (*Reasons, paragraphs 291 - 297*)
- The April 3, 2014 hallway escort incident. (*Reasons, paragraphs 298 – 301*)

[423] I have extracted the above incidents from the documentation detailing Mr. Shea's criminal record and his conduct in the community and in custody. They are all incidents involving violence or aggression. I find they cannot all be considered in the pattern analysis. I will explain the basis for my concluding this.

[424] The essential criteria for inclusion in the pattern analysis has to be: incidents that have been proven beyond a reasonable doubt and incidents that involved "some degree of violence or attempted violence or endangerment or likely endangerment…"[8]. With this in mind I have determined that a number of incidents must be excluded from the pattern analysis.

Not Proven Beyond a Reasonable Doubt

[425] Obviously, all of the incidents that led to convictions have been proven beyond a reasonable doubt. Of the in-custody incidents –those that did not lead to criminal convictions - that could possibly come within the pattern analysis, I find some of them <u>not</u> to have been proven beyond a reasonable doubt. Before I identify what I am excluding from consideration, I will explain my reasoning.

[426] The evidence about institutional incidents is admissible as I discussed in Part III, paragraphs 51 - 56 of these Reasons. But the inclusion of specific incidents in the pattern analysis has to be founded on proof beyond a reasonable doubt. It is not enough to simply prove that an incident occurred. The documentation of Mr. Shea's in-custody conduct must satisfy me on a proof-beyond-a-reasonable-doubt

standard that his role justifies including the incident in the pattern analysis. In those instances where my review of the documentation from the provincial and federal institutions left me uncertain about Mr. Shea's role, I found that the proof-beyond-a-reasonable-doubt requirement had not been met. Where there is ambiguity or only probability, there is no proof beyond a reasonable doubt.

[427] I find that incidents recorded as having been witnessed by correctional officers or captured on surveillance footage have been proven beyond a reasonable doubt. However some incidents do not satisfy the exacting standard of proof beyond a reasonable doubt. I find the Crown has not proven beyond a reasonable doubt that Mr. Shea committed unlawful assaults on July 13, 2000[9]; between November 2001 and July 2002 when he was alleged to have been involved in assaults on other prisoners at Springhill[10]; December 13, 2002[11], the June 12, 2003 "punching and kicking at" WB[12]; and on August 3, 2005. Even the CSC investigation of an assault of a prisoner at Springhill on August 3, 2005 concluded that Mr. Shea's involvement as a "primary attacker" was probable but not certain. "Probable" is not proof beyond a reasonable doubt.

[428] I am also not satisfied that proof beyond a reasonable doubt has been made out in relation to the following incidents: November 3, 2007 when Mr. Shea was observed on camera squaring off with another prisoner "in a fighting position" - I have no evidence that Mr. Shea was the aggressor or how the fight got started; May 1, 2010 when Mr. Shea was seen fighting with another prisoner in the day room – again I have no evidence that Mr. Shea was the aggressor or how the fight started; the September 29, 2010 accusation that Mr. Shea burned another prisoner's arms, which he denied;[13] and February 27, 2012, when Mr. Shea was seen by correctional staff in a 50 second physical altercation with another prisoner. Again,

there is nothing to indicate how the fight got started and who may have been the aggressor.

The Riot and the Hallway Escort Incident

[429] I also find that Mr. Shea's conviction for participating in the April 8, 2010 riot cannot be considered in the pattern analysis. At Mr. Shea's sentencing the Crown described his role as "somewhat more limited" than that of other rioters. At paragraph 153 of these Reasons, I set out the Crown's description of Mr. Shea's involvement, a description I have accepted.[14] This does not falls within the framework of the pattern analysis. Even the description by the British Columbia Court of Appeal in *R. v. Berntt*, 97 B.C.A.C. 296 at paragraph 34 of how an unlawful assembly becomes a riot "by reason of an air or atmosphere of force or violence as exhibited by menaces or threats" leads me to conclude that Mr. Shea's behaviour in the CNSCF riot, as accepted by the Crown at his sentencing, falls outside of a repetitive pattern of violence or attempted violence and instead closely resembles his anti-social, defiant, and obstructionist institutional misconduct. On April 8, 2010, as in other instances, Mr. Shea resorted to property damage when acting out.

[430] Another incident that I have excluded from the pattern analysis is the April 3, 2014 hallway escort incident. Mr. Shea's actions during the hallway escort – kicking out at Mr. Hudder as they were escorted past each other – do not rise to the level of constituting violence or attempted violence. Notwithstanding D/S Norwood's evidence about how he perceived the atmosphere in the hallway (which I reference at paragraph 300 of these Reasons), I do not attach any weight to the incident. It may be that Mr. Shea and Mr. Hudder do not like each other but I find

Mr. Shea's attempt to kick at Mr. Hudder was a casual, essentially indifferent gesture with none of the aggression seen in other in-custody incidents.

The Convictions and Incidents for Inclusion in the Pattern Analysis

[431] Once the not-proven-beyond-a-reasonable-doubt and disqualified incidents have been eliminated, the following aggressive or violent convictions and incidents are left to be considered:

- **In January 1994, during a dispute with his mother, Mr. Shea threatened her with a knife; (*Reasons, paragraph 78*) This incident led to a conviction for possession of a weapon.**
- **On August 3, 1995, when spoken to about loitering on the property, Mr. Shea verbally threatened the shift manager at McDonald's on Herring Cove Road; (*Reasons, paragraph 83*) This incident led to a conviction for uttering threats.**
- On February 21, 1996, prior to a Sheriffs' transport to court, Mr. Shea started to punch "at" a sheriffs' officer who entered the cell to speak with him about handing over his sneakers. He ultimately had to be subdued with capsicum spray. (*Reasons, paragraph 87*)
- On October 8, 1998, Mr. Shea, a resident in the Youth Facility at Waterville, punched another youth "several times" over gambling debts. (*Reasons, paragraph 128*)
- **On November 23, 1998, Mr. Shea, with others, assaulted another prisoner at the Waterville Correctional Facility. This incident led to convictions for assault and assault causing bodily harm. It seems there**

was more than one victim: correctional records indicate he was charged for punching "one of the victims" numerous times in the head. (*Reasons, paragraph 130*)

- On February 2, 2001, Mr. Shea was arrested by Halifax Police after making threats against bar security who had refused him entry. (*Reasons, paragraph 221*)

- **On April 8, 2001, Mr. Shea threw a rock at a Shoppers' Drug Mart security officer who followed him from the store believing he had shoplifted. The rock narrowly missed the victim's head. This incident led to a conviction for assault with a weapon.** The National Parole Board (Atlantic) dealing with Mr. Shea's parole suspension determined that the incident was "seen to be on the low side of Assault." (*Reasons, paragraphs 133 and 223*)

- On June 22, 2001 at the Central Nova Scotia Correctional Facility (CNSCF), Mr. Shea was observed by surveillance camera punching another prisoner who was lying down. (*Reasons, paragraph 159*)

- On October 19, 2001, Mr. Shea bit a correctional officer on the wrist, drawing blood. Mr. Shea was also written up for "swinging objects at correctional officers trying to harm them and throwing scalding hot water at them." (*Reasons, paragraph 159*)

- On August 14, 2002, Mr. Shea punched a correctional officer at the CNSCF while the officer was trying to control him. (*Reasons, paragraph 160*)

- On October 17, 2002 he punched another prisoner in front of a correctional officer because he believed him to be a Protective Custody prisoner. He made "a sudden dash around the correctional officer and punched [KG] in the face." (*Reasons, paragraph 160*)

- In May 2003, in a Correctional Plan Progress Report, it was noted that of 26 institutional charges between July 22, 2002 and March 27, 2003, one was for a "fight with another inmate" on December 18, 2002. (*Reasons, paragraph 240*)

- On July 3, 2003, Mr. Shea threatened a correctional officer during a strip search by saying: "Wait till I get out in two years, I'll see you on the street and I will beat you." (*Reasons, paragraph 162*)

- On February 26, 2007, Mr. Shea got into an altercation with another prisoner in the cells at the Halifax Provincial Court. According to Sheriffs' officers who witnessed the incident, Mr. Shea was placed in a cell with the other prisoner who greeted him. Mr. Shea advanced on the prisoner and began hitting him with a closed fist, connecting twice before being restrained. He actively resisted being restrained and was taken to the ground outside the cell where he was handcuffed. (*Reasons, paragraph 272*)

- On April 14, 2007, Mr. Shea was discovered with contraband and threated correctional staff by making a gun noise –"click, click, bang" and saying: "I'll get you. I won't be in here forever. I'll see you on the outside." At his disciplinary board hearing, Mr. Shea admitted making the "gun noise" but said it meant nothing. (*Reasons, paragraph 163*)

- **On January 10, 2009, Mr. Shea committed the forcible confinement and extortion while armed for which he received a six year six month sentence for the extortion and a three year concurrent sentence for the forcible confinement. (*Reasons, paragraph 146 and 147*)**
- On March 14, 2009, Mr. Shea was observed on surveillance footage punching another CNSCF prisoner in the eye. (*Reasons, paragraph 165*)
- On November 13, 2009, Mr. Shea was seen on camera assaulting another prisoner, [AS]. The assaults on AS were on two separate occasions, within five minutes of each other. AS was sent to hospital with facial injuries. (*Reasons, paragraph 173*)
- On January 25, 2010, Mr. Shea was observed on camera assaulting another CNSCF prisoner. (*Reasons, paragraph 178*)
- On February 7, 2010, Mr. Shea punched a correctional officer in the face when being escorted to his cell after refusing to lock up. During the use of force that followed, Mr. Shea punched another officer. (*Reasons, paragraph 179*)
- On March 21, 2010, Mr. Shea threated another prisoner with assault if he did not break a sprinkler. (*Reasons, paragraph 181*)
- On April 7, 2010, Mr. Shea bolted from correctional staff serving him a meal to pursue another prisoner, who locked himself in his cell. (*Reasons, paragraph 182*)
- **On June 15, 2010, Mr. Shea committed the predicate offence – the stabbing of Keithen Downey in an altercation that also involved a co-**

accused, Adam LeBlanc – which led to a conviction for aggravated assault. (*Reasons, paragraphs 58 - 64*)

- On November 28, 2011 at the CBCF, Mr. Shea was observed on surveillance footage throwing two punches in a fight between two other prisoners. (*Reasons, paragraph 193*)
- On July 19, 2012, Mr. Shea was observed on surveillance footage entering another prisoner's cell where he "struck" him. (*Reasons, paragraph 197*)
- On March 31, 2014, Mr. Shea attacked Christian Clyke in the cells at the Halifax Provincial Court. He and Mr. Clyke had previously been assessed as incompatible although this information had not been accessed by Sheriffs' officers before Mr. Clyke was placed in the same cell as Mr. Shea. (*Reasons, paragraphs 291 - 297*)

The Crown's Pattern Analysis Categorizations

[432] The Crown has submitted that Mr. Shea's pattern of behaviour can be categorized in several ways – (1) a pattern of unremitting institutional violence; (2) patterns of premeditated and instrumental violence against an outnumbered victim; and (3) a pattern of diverse, unselective and opportune violence. (*Crown Written Submissions, pages 46 – 53*) I will now discuss these categorizations.

Is There A Pattern of Unremitting Institutional Violence?

[433] Mr. Shea has spent a considerable amount of his life locked up, in provincial jails, on remand, and in federal prisons. He has a history of getting into fights or punching prisoners and sometimes, correctional staff. He has made threats to correctional staff. It is an understatement to say that he has often been a very

difficult prisoner to manage who has shown deeply entrenched, virulently anti-social tendencies.

[434] While Mr. Shea's institutional record is deplorable, I do not find it constitutes a pattern of behaviour as contemplated by either section 753.1(a)(i) or (ii). While I agree that Mr. Shea has shown unremittingly bad, disruptive, and defiant institutional behaviour, I do not find in the incidents I can appropriately take into account, a pattern of repetitive behaviour of which the predicate offence - the aggravated assault forms a part, that shows a failure to restrain himself and a likelihood of causing death or injury or inflicting severe psychological damage.

[435] There is no evidence of Mr. Shea making good on his threats or trying to do so and most of his assaultive behaviour has involved the use of fists in circumstances where he is quickly subdued. This brings to mind what the Alberta Court of Appeal said in *Neve* about Ms. Neve expressing her threats in the presence of the police: "…the very fact that [the threats] were made directly to the police in their presence speaks volumes about how effective they were and how likely it was that they would result in injury to anyone. Realistically, these threats ended to only way they could – with N.'s arrest and conviction…" (*paragraph 177*) The aggravated assault stands out as an escalation in Mr. Shea's violence and does not fit with the pattern of his institutional behaviour. There is no similarity in the "degree of violence or aggression threatened or inflicted on the victims." (*Neve, paragraph 113*)

[436] Another dimension of the pattern analysis must not be overlooked. Context is a critical aspect of determining if a pattern exists. (*Neve, paragraph 165*) Mr. Shea's context for much of his violent and aggressive behaviour has been in what Dr. Theriault referred to as the "dog-eat-dog" world of the correctional system.

[437] For example, on May 25, 2003, Mr. Shea was the victim of a serious assault by three prisoners in the Renous gym during recreation. He was taken for outside medical treatment and involuntarily transferred to Millhaven Penitentiary in Ontario. (*Reasons, paragraph 241*) Just five days earlier, in a Progress Assessment dated May 20, 2003 Mr. Shea indicated he routinely kept "shanks" to protect himself as he was in a maximum security prison. (*Reasons, paragraph 240*)

[438] Mr. Shea told the National Parole Board in 2007 that in relation to assaults on other prisoners, prison life "is not easy" and to survive he had to defend himself. (*Exhibit 7, page 383 – National Parole Board Decision, May 1, 2007*)

[439] So, although the evidence reveals that Mr. Shea has possessed shanks in prison, the Crown has proven beyond a reasonable doubt only one instance of him using one – the aggravated assault of Keithen Downey on June 15, 2010. Arguably it is evidence of restraint on Mr. Shea's part that his institutional violence – assaulting other prisoners – has not been shown to involve shanks even though the records establish he had them and presumably could have used them.

Is There a Pattern of Premeditated and Instrumental Violence against an Outnumbered Victim?

[440] The Crown has submitted that the aggravated assault of Keithen Downey and the forcible confinement and extortion of Luke Hersey satisfy the pattern criteria for a dangerous offender designation because, although only two offences, they "bear remarkable similarities." In the Crown's written brief, the submission is made that "Two highly similar instances such as these are sufficient to constitute a pattern." (*Crown's Written Submissions, Pages 49 and 50*)

[441] It is the Crown's submission that the predicate offence and the forcible confinement/extortion offence share sufficient similarities to constitute a

dangerous offender-worthy pattern of behaviour: both offences involved Mr. Shea being violent against a lone victim with the assistance of an accomplice; in both instances Mr. Shea was armed with a weapon or weapons; and the violence in both instances was premeditated.

[442] I find that these two incidents of violence are not "remarkably similar" such that it would be justifiable to describe them as pattern behaviour. I do not accept that the generic similarities in the violence perpetrated by Mr. Shea on these two occasions can satisfy what is required for a pattern of behaviour that would establish an offender as a dangerous offender. The similarity that is necessary to establish a pattern of behaviour where the focus is on only two offences has to be more remarkable than seen in these offences. Where only two instances of past behaviour are being relied upon to establish the pattern of behaviour for a dangerous offender designation, the similarities have to be striking. I find the predicate offence and the forcible confinement/extortion offences do not constitute the requisite pattern of behaviour.

[443] The Crown argues that the requisite pattern of behaviour is found in the incidents where Mr. Shea was violent in concert with others against a single victim. The incidents I regard as relevant in relation to this pattern analysis are the November 23, 1998 assault of another prisoner at the Waterville Correctional Facility; the January 10, 2009 forcible confinement and extortion of Luke Hersey; the aggravated assault of Keithen Downey on June 15, 2010; and the March 31, 2014 assault of Christian Clyke in the Spring Garden Road courthouse cells.

[444] These four incidents, occurring from 1998 to 2014, a span of 16 years, do not represent a repetitive pattern of behaviour as required by section 753.1(a)(i) or a persistent aggressive pattern of behaviour as required by section 753.1(a)(ii) of

which the predicate offence must be a part. Their occurrence cannot be described as "repetitive" or "persistent" and, furthermore, there is nothing in these incidents that resembles the predicate offence: they are dissimilar incidents of violence sharing only the feature that Mr. Shea was involved, with others, usually one person, in victimizing someone. Such features do not characterize the nature of Mr. Shea's violent and aggressive behaviour which has primarily been him acting alone and unarmed.

[445] There is an additional observation to be made about the March 31 assault of Christian Clyke. I find the evidence of that assault does not establish that Mr. Shea attacked Mr. Clyke in collaboration with Mr. Chan. Mr. Chan joined in but it was Mr. Shea who instigated the assault and I find he would have started a fight with Mr. Clyke whether Mr. Chan was there or not. The Clyke assault, as with other assaults by Mr. Shea, was violence perpetrated in the view of cameras and quickly suppressed. The actual violence itself was quite different from the aggravated assault of Keithen Downey which involved the use of a weapon.

Is There a Pattern of Diverse, Unselective and Opportune Violence?

[446] The Alberta Court of Appeal held that "the mere fact that an offender commits a variety of crimes does not mean that no pattern exists. There is no requirement that the past criminal actions all be of the same or similar form, order or arrangement; though if this has occurred, it may well suffice." (*Neve, paragraph 111*)

[447] *Neve* also sets out the two different bases on which a pattern under either section 753.1(a)(i) or (ii) can be established: (1) where there are similarities in terms of the kind of offences; and (2) where dissimilar offences produce similar

results, "in terms of the degree of violence or aggression inflicted on the victims." (*Neve, paragraph 111*) Similarity can be found "not only in the types of offences but also in the degree of violence or aggression threatened or inflicted on the victims." (*Neve, paragraph 113*)

[448] Mr. Shea has engaged in a variety of violent and aggressive behaviours – threats, assaults, and fights being most common in his criminal and institutional history. As Dr. Theriault noted, Mr. Shea has been instrumental in his violence as well as impulsive. He has committed relatively minor acts of violence, for example, in November 2011, throwing two punches in a fight between two other prisoners, and very serious violence – the forcible confinement and armed extortion of Luke Hersey and the aggravated assault of Keithen Downey. But where is the pattern of repetitive behaviour of which the aggravated assault is a part or the persistent aggressive behaviour of which the aggravated assault is a part? I find that no such pattern has been established.

[449] I disagree with the Crown's submission that Mr. Shea's "various forms of violence, for a variety of purposes, in a variety of conditions" (*Crown's Written Submissions, page 51*) constitutes a pattern of behaviour for the purposes of a dangerous offender designation. Mr. Shea's violence has been diversified but it does not constitute "a repeated and connected design or order of things…" It amounts to what is not a pattern but "a differentiated or random arrangement." (*Naess, paragraph 61*)

[450] Mr. Shea has been given a psychopath rating on the PCL-R and has been assessed as high risk to re-offend violently. He has been oppositional, disruptive, defiant, and violent while incarcerated. He has committed violent offences in the community. He has adhered to an anti-social, criminally-entrenched lifestyle. But

none of this leads to a dangerous offender designation in the absence of the requisite pattern of behaviour being established.

Is There a Pattern of Persistent Aggressive Behaviour…?

[451] It is indisputable that much of Mr. Shea's institutional behaviour has been aggressive and confrontational. Aggressive behaviour can earn an offender a dangerous offender designation. But alone it is not enough. And as I indicated earlier, aggressive behaviour that is not criminal does not satisfy the requirements of section 753.1(a)(ii). (*Neve, paragraph 109*)

[452] A dangerous offender declaration under section 753.1(a)(ii) has to be grounded on evidence that establishes "a pattern of persistent aggressive behaviour" that shows "a substantial degree of indifference" respecting reasonably foreseeable consequences to others. A judge must not only identify a pattern, she must consider whether the pattern is persistent. Finding a pattern of behaviour is not enough. (*Fulton, paragraphs 11 and 13*)

[453] To qualify as a pattern of persistent aggressive behaviour under section 753.1(a)(ii), the behaviour must be both persistent and aggressive. For a section 753.1(a)(ii) dangerous offender designation, the Crown must prove beyond a reasonable doubt that the evidence discloses a likelihood that "this type of aggressive behaviour will continue in the future" (*Neve, paragraph 115*) and that it will be accompanied by "a substantial degree of indifference" to the reasonably foreseeable consequences for others. (*Camara, paragraph 486*)

[454] Dr. Theriault viewed Mr. Shea from "a clinical perspective" as having shown "a continuing phenomenon" of "persistent aggression". (*Dr. Theriault's Testimony, page 256*) When asked about the aggravated assault of Keithen

Downey and how Dr. Theriault saw that fitting in with the history of Mr. Shea's behavior, Dr. Theriault responded:

> …it's part of that continuing clinical picture where he has been shown historically over time to continue to act aggressively towards other individuals… The purpose isn't always entirely clear, of course, from an outsider's perspective. But it's a continuing phenomenon for him. (*Dr. Theriault's Testimony, page 256*)

[455] Dr. Starzomski saw the same picture, testifying that he was "certainly very aware that [Mr. Shea] has been aggressive on a great many occasions persistently within the prison environment." (*Dr. Starzomski's Testimony, page 626*) "Mr. Shea has been aggressive…on quite a number of occasions in institutions especially." (*Dr. Starzomski's Testimony, page 450*)

[456] Mr. Shea's aggressiveness has been particularly pronounced in custody. It has primarily consisted of threats and fighting without weapons, behaviour which has been captured on camera and witnessed by correctional staff. The predicate offence – the aggravated assault of Keithen Downey – is similar in that respect, it was an assault on another prisoner, captured on surveillance footage and witnessed by correctional staff, but Mr. Shea has not shown a pattern of behaviour in custody that is comparable. The predicate offence stands out from so much of Mr. Shea's in-custody violence that has taken the form of threats or fighting without serious or any injuries.

[457] And as I have said at paragraph 404 of these Reasons, it is my view that the requirements for a dangerous offender designation under section 753.1(a)(ii)

criteria cannot significantly diverge from the requirements for a dangerous offender designation under section 753.1(a)(i). Furthermore, context must be taken into account, including the dog-eat-dog world of prison life, Mr. Shea having access to but typically not using shanks, and his tendency when assaulting other prisoners or staff to do so in view of cameras and/or witnesses. I find Mr. Shea's atrocious institutional conduct does not satisfy the legislated requirements for his designation as a dangerous offender.

Not a Dangerous Offender Within Part XXIV of the Criminal Code

[458] The Ontario Court of Appeal in *Hogg*, later cited with approval in *Szostak*, held it is necessary to ensure, in the pattern analysis, that the level of gravity of the behaviour being assessed is the same as the predicate offence. The pattern analysis is directed at establishing a basis for predicting that the offender will likely offend in the same dangerous way in the future. (*Hogg, paragraph 40; Szostak, paragraph 56*) This is reflected in the language of the reasons in *Camara* at paragraphs 463 and 466 and *Szotstak* at paragraph 63. The dangerous offender provisions were not developed by Parliament to remove all offenders who may be a danger from society and commit them to an indeterminate sentence of imprisonment. There must not be a process of "general application but rather of exacting selection." (*Neve, paragraph 59*)

[459] I have been required in this case to engage in an exacting process of closely examining the evidence tendered and the applicable legal principles. I have endeavoured to honour the approach to the pattern analysis articulated by the Alberta Court of Appeal in *Neve* at paragraphs 121 and 122 of their reasons. This has led me to conclude that Mr. Shea does not meet the criteria for designation as a dangerous offender. The Crown has not established on a proof-beyond-a-

reasonable-doubt standard that Mr. Shea has shown the patterns of behaviour that qualify for a dangerous offender designation.

PART IX – Disposition of the Crown's Application and Sentencing Options

[460] In an email shortly before final submissions on June 23, 2014 Mr. Craggs requested that the issues of the duration of a Long Term Offender Order and/or a determinate sentence be addressed as alternative submissions for my consideration should I decide to dismiss the Crown's Dangerous Offender application or, in designating Mr. Shea a dangerous offender, sentence him to a lesser measure than an indeterminate sentence. Mr. Craggs was seeking to avoid any further delay in Mr. Shea's sentencing so that he could get his programming started in whatever Federal prison he would be serving his time.

[461] In response, the Crown reiterated its position that the conditions for lesser measures, that is a Long Term Offender Order with a determinate sentence or a determinate sentence with no LTO, have not been met. The Crown opposed the defense proposal and, requested time, in the event of a complete denial of the Crown application under Part XXIV of the Code, to formulate submissions on the quantum of sentence.

[462] I took the view, and advised counsel accordingly, that the Crown's Part XXIV dangerous offender application should be decided with counsel then having the opportunity to address Mr. Shea's sentencing should that be where we found ourselves.

[463] My dismissal of the Crown's dangerous offender application means that a date will be required for Crown and Defence submissions on the appropriate sentence for Mr. Shea for the aggravated assault of Keithen Downey.

Endnotes:

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[1] *R. v. Lyons, [1987] S.C.J. 62*. In *Lyons*, the majority of the Supreme Court of Canada held that: "In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime in the circumstances of the offender. No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing.(*paragraph 26*) The Court noted that the genesis of Canadian legislation to deal with "habitual criminals" was the 1938 Archambault Commission which observed in its report at page 218: "Notwithstanding the best methods of punishment and reformation that may be adopted, there will always remain a residue of the criminal class which is of incurable criminal tendencies and which will be unaffected by reforming took efforts. These become hardened criminals for whom "iron bars" and "prison walls" have no terrors, and in whom no hope or desire for reformation, if it ever existed, remains." (*Lyons, paragraph 13*)

[2] At a pretrial on July 3, 2013, Mr. Heerema indicated the Crown had had the opportunity to discuss with defense counsel the fact that when Dr. Theriault prepared his report "he was sent numerous binders of materials by the crown which we would anticipate would form the evidentiary basis at the subsequent hearing. In other dangerous offender hearings often the court is given those documents in advance to assist the court in knowing, I guess, what the evidence is and to help streamline the procedure. We spoke with Mr. Craggs about whether he would be okay with that in this case, and I believe he is." Defence counsel confirmed that he was, stating: "in other DO applications in which I've been involved, it's standard and I think it's important for the court to be able to read this stuff before the hearing starts so that things don't get chopped into little pieces. And, of course, it is the information which is the substance of Dr. Theriault's report."

[3] Stacey McKenna was tried before LeBlanc, J. with Mr. Shea and Mr. Stevenson and convicted of being an accessory after the fact to extortion. LeBlanc, J. determined that, "…the purpose of Ms. McKenna's action was to provide the means by which Mr. Shea and Mr. Stevenson could escape the area…undetected." (*Exhibit 20, page 1289*)

[4] Mr. Shea received his High School Equivalency Certificate (certifying completion of his GED) on July 19, 2014. (*Exhibit 43*)

[5] For a review of June Dicks' evidence concerning Correctional Service of Canada programming for violent offenders, see Appendix "A" of these Reasons.

[6] November 23, 1998, described in paragraph 130 of these Reasons

[7] see, Part II of these Reasons, and particularly, paragraph 37 discussing *Neve*, *paragraphs 121 and 122*

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[8] *Neve, paragraph 110*

[9] I could not tell from the institutional records if Mr. Shea had been the instigator or how the fight came about.

[10] No details are provided by the records in relation to the allegations that Mr. Shea had been involved in assaults on other prisoners at Springhill.

[11] The CSC records do not disclose whether Mr. Shea was an aggressor in this incident or a victim.

[12] I have no information from the institutional records concerning this incident and whether WB had done anything to cause Mr. Shea to chase him out of his cell.

[13] This is another instance where Mr. Shea probably committed the assault – the complainant told the discipline board he did, although I have no way of assessing the credibility of that claim as this is not a case where the incident was witnessed by correctional staff or captured on surveillance camera – and "probably" is not proof beyond a reasonable doubt.

[14] In paragraph 154

Appendix "A" – Correctional Service of Canada (CSC) Programming for Violent Offenders

[1] Testimony was given by June Dicks, the Nova Scotia Community Program Manager with CSC, on CSC's programming for violent offenders in the Atlantic Region. In addition to the evidence she provided in court, Ms. Dicks responded to an email inquiry made of her about programming in the Prairie Region. The following represents a summary of Ms. Dicks' evidence.

[2] Programming is now focused on risk, not needs as it used to be. Since June 2011 in the Atlantic and Pacific Regions, a pilot project of multi-streaming programming has been rolled out for violent offenders who are assessed as either high-risk or moderate-risk. Assessments as to risk are made at the time of reception

into the federal penitentiary system. A high-risk offender goes into a high-intensity program; a moderate-risk offender goes into a moderate-intensity program.

[3] A high-risk to offend violent offender would go through the multi-target, high risk offender program. The high-intensity modular program is a one-size fits all integrated correctional program. It is based on 100 sessions over the course of six months, meeting on a daily basis for approximately two hours a session. Computerized selection would identify 10 offenders for a group. The program is designed to have only high-risk offenders in the high-intensity program. Moderate-risk offenders are streamed into their own program.

[4] The computer selection uses actuarial tools to determine priority for the programming based on risk. For example, an offender with a minus six would be considered a higher risk than an offender with a minus two or a plus one. Another factor determining priority for programming is an offender's unescorted/escorted temporary release and statutory release dates.

[5] Priority for programming does not guarantee placement. A prioritized offender could be bumped if another offender comes along with a higher priority. This can happen more than once.

[6] The content of the violent offender programming is not directed at a specific offence. The components are problem solving and conflict resolution and challenging beliefs and healthy relationships. The programming is directed at skill development and based on cognitive behavioural therapy.

[7] Each offender develops a self-management plan focused on his risk issues. A self-management plan is like relapse prevention. An offender is working on his triggers and specific high-risks. His self-management plan is intended to identify what he needs to be successful in the community.

[8] The program design provides a "motivational module component" throughout the 100 sessions for offenders who are having particular difficulty or needing extra help. Offenders are required to do work sheets which will assist the Correctional Program Officer identify if an offender is having problems. The extra support is provided on a one-on-one basis outside the classroom setting, in an

office of the Correctional Program Officer. This out-of-classroom time is spent enhancing and augmenting the skills the offender is learning in the classroom.

[9] Cognitive and educational deficits can make the learning process more challenging for some offenders. Ideally the offender is supposed to be in a concurrent educational program at the same time he is in programming, if the need is there.

[10] The end-of-program goals are being called “personal targets.” Offenders are expected to write a report and talk about personal targets.

[11] After completion of the high-risk multi-stream program, an offender is eligible to do the maintenance program. Areas that need ongoing attention are addressed in the maintenance program. An offender may take the maintenance program once a week for a 12 week cycle, dealing each week with a different topic. The 12-week cycle can be repeated. Alternatively, an offender can enter the maintenance program if he needs to refurbish his skills or his risk is increasing again.

[12] A violent offender is expected to attend a maintenance program in the community once he is released from prison.

[13] The first 90 days following an offender’s release from prison are critical. The community maintenance program focuses on the challenges the offender is having in the community and how he is applying the skills that he learned while incarcerated.

[14] Offenders who do not complete the violent offender high-intensity program may be able to start the program again if there is sufficient time in their sentence. An offender could be given an “incomplete” for refusing to work with the Correctional Program Officer or refusing to work through the motivational module support. Another outcome could be “attended all sessions”, which indicates that the offender went to the program but got nothing out of it.

[15] Poor behaviour can result in an offender being removed from the program although it is likely that an offender demonstrating unacceptable behaviour in the

program has poor institutional behaviour. Ms. Dicks testified that through the efforts of the Correctional Program Officer, the institutional parole officer and other members of the case management team, "There would be lots of attempts to try and correct the behaviour" before an offender was removed. Such an offender could be re-admitted if his attitude and behaviour changed and there was still time left in his sentence to do the program.

[16] Ms. Dicks was asked by way of an email inquiry following her testimony in court to explain the nature of the programming that is available for a Prairie Region violent offender, how priority for participation in the program is determined, and any other relevant differences. Ms. Dicks' email response is contained in Exhibit 34.

[17] The Integrated Correction Program is presently only being piloted in the Atlantic and Pacific Region, and therefore is not offered at Edmonton Institution which, based on recent CSC records, is where Mr. Shea might be pen-placed.

[18] The programming available in the Prairie Region consists of a) Violence Prevention Program (high and moderate intensity), b) National Substance Abuse Program (high and moderate intensity), c) Family Violence Prevention Program (high and moderate intensity) and d) Attitudes, Associates and Alternatives. The Attitudes, Associates and Alternatives program is the same program for high and moderate risk offenders.

[19] Admission to these programs is based on needs not risk. An offender's needs are determined during the Offender Intake Assessment Process conducted in the first 50 days at Reception. This needs assessment will determine which program or programs the offender will be admitted to as part of his Correctional Plan. His risk will determine the level of intensity. An offender deemed to be high risk will only do one high intensity program, the one that is identified as addressing his greatest need area, and the rest of his programming would be done at the moderate level.

[20] Priority is determined on the basis of the demand for the particular program and the offender's release dates. An offender scheduled for programming can still be "bumped" by an offender with an earlier release date requiring a higher

intensity program. An offender can also lose his spot in the program if he ends up in segregation.

[21] The Prairie Region programs have 100 sessions in the high intensity version and 50 in the moderate version but cover the same material as the Integrated Correction Program in the Atlantic and Pacific Regions.