SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Marriott*, 2024 NSSC 81

Date: 20240322
Docket: CRH 510476
Registry: Halifax

Between:

His Majesty the King

v.

Brian James Marriott

DANGEROUS OFFENDER (STAGE 2) DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: January 16 to 27, May 15 and 16, June 9, November 10 to 16, 2023 and February 23, 2024, in Halifax, Nova Scotia

Counsel: Rick Woodburn, K.C., and Scott Morrison, for the Crown
Nathan Gorham, K.C., for the Defence

By the Court (orally):

[1] Brian James "BJ" Marriott is 41 years old. He has spent all but 9 months of the last 20 years in prison. That is virtually all his adult life so far. He wants to put his past behind him. He is older now of course. And he says that he no longer has the criminal attitudes that he once had.

[2] He is facing designation as a dangerous offender. Such a designation would have lifelong consequences. The designation is permanent. It may result in his receiving an indeterminate sentence and potentially his spending the rest of his life in prison. If he were to be released at some time, as a dangerous offender, he would live under a set of strict conditions and under the supervision of the Parole Board of Canada. Very few people are designated as dangerous offenders. Most of those who are never get released on conditions. It is among the most serious of matters with which a court can deal. It has been described as having devastating consequences for a person, *R. v. Lyons*, [1987] S.C.J. 62. It is a "drastic sentence", *R. v. Roberts*, [2007] O.J. No. 297, para. 44 (C.A.).

[3] A dangerous offender application is unusual in that it is ultimately prospective in its focus. The issue is whether the person constitutes a threat to the life, safety or physical or mental well-being of the public. It requires an assessment of the threat or the risk that the person poses and will continue to pose. It is not about trying to predict human behaviour. It is about weighing evidence and assessing the likelihood that a person will continue with a pattern of violence that poses a serious threat to others. It is an assessment of risk, not a prediction.

[4] Criminal sentences are imposed as a consequence of a person's actions having regard to factors like their degree of moral culpability, the seriousness of the crime, their criminal history and the sentences imposed on others in similar circumstances who have committed similar crimes. While the potential for rehabilitation going forward is a factor, and rehabilitation is a goal, much of the focus is retrospective. People are sentenced for crimes that they have been proven to have committed. A dangerous offender designation is different. It necessarily involves a consideration of a person's past, but for the purpose of making the assessment of the likelihood of dangerous future behaviour consistent with the pattern of past behaviour.

[5] And that is what makes it unusual. Courts deal with the issue of whether something has been proven to have happened. In a dangerous offender application, the issue is whether the likelihood of dangerous behaviour happening in the future

has been proven beyond a reasonable doubt. In a criminal case the issue is about whether guilt has been proven to the criminal standard. It does not require certainty, but it is close to certainty. In a dangerous offender application, no one can know what a person will do in the future. People can change. Proof of the essential elements of a criminal charge is replaced with proof of a high likelihood of a continuing pattern of dangerous behaviour.

Previous Findings

[6] Mr. Marriott pleaded guilty to aggravated assault arising from an incident at the Central Nova Scotia Correctional Facility in Burnside on December 2, 2019. Two trials were held in 2021 for 13 others: *R. v. Ladelpha*, 2021 NSSC 324, and *R. v. Mitton*, 2021 NSSC 325. Mr. Nathan Gorham K.C., on behalf of Mr. Marriott, indicated that Mr. Marriott did not dispute the findings contained in the previous decisions related to the incident. He did not dispute that the inmates involved in the assault on Stephen Anderson were acting as part of a plan. He did dispute the Crown's assertion that Mr. Marriott was a leader in the creation of, and the putting into effect of, the plan. In *R. v. Marriott*, 2022 NSSC 53, I found that there was a plan. There was no reasonable inference other than that the plan involved causing bodily harm to Stephen Anderson. The plan was to hurt him. The result was that he was wounded, and his life was endangered. That was aggravated assault and that is the charge to which Mr. Marriott pleaded guilty. The Crown had not proved beyond a reasonable doubt that Mr. Marriott was a leader in either the forming of the plan or in the execution of it.

[7] In *R. v. Marriott*, 2022 NSSC 121, I ordered that Mr. Marriott be assessed for the purpose of the Crown’s application to have him designated as a dangerous offender. An assessment was prepared by Dr. Grainne Neilson.

[8] In *R. v. Marriott*, 2023 NSSC 90, I provided directions on the admissibility of some evidence in this matter. Mr. Gorham argued that the Crown had provided insufficient notice of the application because it had failed to give notice of the specific incidents of criminal behaviour that it would allege reflect a pattern of behaviour within the meaning of s. 753 of the *Criminal Code*. He applied for an order that the court decline to hear the dangerous offender application or in the alternative for an order that the Crown could not rely on any allegation, as pattern evidence, that was not the subject of sufficient notice. I held that the Crown is required to provide notice of the criminal behaviour that it says forms the basis of a finding that there has been a pattern, but that pattern evidence was not the only

evidence that is used in a dangerous offender application. The determination of whether a person is a dangerous offender is linked to the issue of whether the Crown has proved that the offender's past conduct meets one of the specified thresholds, but they are still separate. The judge does not make the determination that the person constitutes a threat unless the behavioural threshold has been met.

[9] Other evidence, such as conduct within an institution that has not been the subject of a criminal conviction or has not been proven to the criminal standard of proof, upon proper notice in the application, would be admissible. Character evidence would be admissible. But that evidence could not be used as part of the pattern of behaviour that is required. It may be relevant to the threat assessment stage, and it may be used to provide context to support the contention that the proven criminal acts form a pattern of behaviour without itself being part of that pattern. But it could not be used in this matter as part of the pattern.

[10] I held that Mr. Marriott had been provided with a substantial package of organized disclosure. His legal counsel, Mr. Gorham took no issue with that. The notice itself, along with correspondence and materials filed when requesting that an assessment be ordered, made it clear that the Crown would rely in part on evidence set out in Mr. Marriott's criminal record, as evidence of a pattern of behaviour. Only violent crimes can form part of the pattern of violent behaviour. The Crown did not provide notice of any incidents alleged to have taken place in the community that it alleged form part of the pattern of behaviour required to meet the threshold.

> The Crown cannot reach back into Mr. Marriott's past and without notice to him allege behaviours that constitute criminal acts and put them forward as proof of the pattern of violence that it alleges. The Crown would be required to provide specific notice of those incidents. (para. 45)

[11] The Crown provided notice of a series of incidents that took place within institutions while Mr. Marriott was incarcerated. They were identified in the materials by dates and outlines were provided of what they involved. Whether those could be considered in the pattern analysis and whether they qualify for inclusion in the pattern analysis was not the issue at that stage. Notice of them was provided.

[12] Evidence of Mr. Marriott's background and behaviour while incarcerated and in the community could be led for the purpose of providing context and

establishing that the offences set out in the criminal record constitute a pattern of behaviour without being alleged to be part of that pattern themselves.

[13] Mr. Gorham said that much of the Crown's documentary evidence was inadmissible because it was hearsay; related to contested allegations of prior criminal behaviour, which the Crown is seeking to prove as pattern evidence or evidence of Mr. Marriott's intractability; and was not credible or trustworthy. He noted that the Crown had tendered several volumes of material containing, in part, files from the Correctional Services Canada. Some of that material related to unproven allegations of prison misconduct, criminality, decisions of Correctional Services Canada authorities, assessments, and correctional plans. He argued that most of the documents were hearsay because the authors of the documents did not testify in the application. He said that many of the allegations of untried criminal behaviour were based on lay opinion and further hearsay and in some cases the identity of the person making the allegation was not disclosed and details were withheld. In *R. v. Marriott*, 2023 NSSC 157, I held that the documents filed by the Crown, which by the time of the application amounted to about 15,000 pages, were admissible.

> As Judge Derrick noted, and as I have noted several times, but feel compelled to note once again, institutional records must be examined carefully to determine what they establish. The quality and detail of those records must be considered. In some cases, as in *Shea*, records are prepared on the basis of observations made by correctional officers witnessing events or viewing CCTV footage. That can be contrasted with evidence based on reports from named or unnamed third parties that are then recorded by correctional officers. This is an application to determine admissibility of evidence, it is not an application to provide a preliminary or provisional assessment of the weight to be given that evidence if it is admitted. (para. 33)

[14] Mr. Gorham argued that Dr. Neilson’s report should not be admitted. He said that Dr. Neilson should not be qualified as an expert because her report showed bias against Mr. Marriott and lacked objectivity and Dr. Neilson herself was not independent. In *R. v. Marriott*, 2023 NSSC 158, I found that there had been no realistic concerns raised about Dr. Neilson's qualifications as an expert and no realistic concerns raised about her ability to offer an objective and unbiased opinion. She was capable of offering an opinion that was unbiased and impartial.

Expert Reports

[15] Expert evidence plays an important part in the process under the dangerous offender provisions. There is a requirement for an assessment. The offender may also lead expert evidence. Experts provide assistance to the court but do not make the decision. The conclusions reached in the determination of whether a person is designated as a dangerous offender and the appropriate sentence to be imposed are legal ones, not medical or psychiatric ones.

[16] Dr. Grainne Neilson prepared the court ordered assessment of Mr. Marriott. It was dated August 12, 2022.

[17] Dr. Julian A.C. Gojer provided a report at the request of Mr. Marriott. That report is dated June 6, 2023. Dr. Gojer is a psychiatrist in forensic practice in Mississauga Ontario. The Crown did not object to the admission of Dr. Gojer's report. The Crown did not question Dr. Gojer's qualifications or suggest that he had provided a report more favourable to Mr. Marriott because he was retained by Mr. Marriott. Dr. Gojer's professionalism and good faith were at no point brought into question and there was absolutely nothing to suggest that they ought to have been. Dr. Gojer interviewed Mr. Marriott, his mother Dawn Bremner, Dave Russell, his cousin Amy Marriott, Troy Allen, and Michael MacKenzie, who is a correctional case worker.

[18] Dr. Gojer outlined his observations about Mr. Marriott's mental state during their interviews. He noted that Mr. Marriott told him that it was his intention to "put the past behind him and start fresh." Dr. Gojer provides an extensive quote from Dr. Neilson's report about her engagement with Mr. Marriott. That runs from pages 78 through 81.

[19] To that point, and despite several very extensive quotes from Dr. Neilson's report, Dr. Gojer did not identify any aspect of Dr. Neilson's report with which he disagreed or with which he took issue in any way. At the bottom of page 81 he addressed the issue of diagnosis. He noted that Mr. Marriott has a clinical diagnosis of Antisocial Personality Disorder. While the etiology, or the cause or causes of the condition, is unclear and could be attributed, in Dr. Gojer's opinion to "genetic, developmental and sociocultural factors, to name a few", what stood out for him was Mr. Marriott's developmental history. That history, and the extended periods that he spent in segregation while incarcerated could be understood to have had "a negative, harmful and emotionally traumatic effect on him" (Dr. Gojer's report, p. 82). Dr. Gojer says that while Mr. Marriott did not present as suffering from Post Traumatic Stress Disorder, his behaviours over the years can be

explained on the basis of his suffering from Complex Trauma also known as Other Traumatic and Stressor Related Disorder. That is the only reference to Complex Trauma in the 91 page report, although it was addressed extensively in direct examination and in cross-examination.

[20] Dr. Gojer did not at any point indicate a disagreement with Dr. Neilson's diagnosis of Antisocial Personality Disorder.

[21] Pages 83 through 88 contain Dr. Gojer's comments on prognosis, risk, and risk management. He did not dispute Dr. Neilson's scoring on the actuarial risk instruments using static and historical factors, that put Mr. Marriott in the high range of risk and indicated that his score on the psychopathy checklist was somewhat lower. His score for Mr. Marriott was not dissimilar to the scores generally of federal penitentiary inmates. Dr. Gojer said that historical, clinical, social, and legal factors needed to be considered and he preferred to use a risk measure that combined those factors. He said that while Mr. Marriott's prior history and the actuarial risk assessment "done by myself and Dr. Neilson" indicate that he is at a high risk to reoffend, those assessments do not address dynamic factors and the capacity of an individual to change.

[22] Dr. Gojer provided evidence that offered a different perspective from that of his colleague Dr. Neilson. His focus was on Mr. Marriott's capacity to change. He said that Mr. Marriott had already changed and that his risk could be managed in the community with treatment for his complex trauma. Dr. Neilson did not dispute that people are capable of change, but in her view that change for Mr. Marriott would involve wholesale change of entrenched attitudes and belief systems.

[23] Mr. Gorham, on Mr. Marriott's behalf, did not appear to accept the difference in professional opinions as a matter of different perspectives. As noted in *R. v. Marriott*, 2023 NSSC 158, he objected to the admission of Dr. Neilson's report on the basis that among other things she was a "Crown expert" and showed bias against Mr. Marriott. The report was admitted. The arguments presented during that *voir dire* were reprised almost word for word, in the written materials filed on the hearing of the application. This time the arguments would go to the weight to be given to Dr. Neilson's opinion rather than to its admissibility. They crossed from being concerns about Dr. Neilson's methodology and opinions, to concerns about her professional integrity.

[24] Dr. Neilson concluded that Mr. Marriott's risk of violence over the long term was high as compared with other male offenders and that he needed sustained

intensive treatment, monitoring, and supervision upon release. She noted that "it is somewhat encouraging that he seems to be starting to contemplate the need for change in his lifestyle associates." She went on to say that "a critical issue in the coming years will be whether he would be able to shift his allegiance away from these negative influences and get past his mistrust of the justice and correctional system." She said that Mr. Marriott had been inculcated with antisocial values from a young age and he continues to espouse those values to this day.

[25] Mr. Gorham characterized Dr. Neilson's view as "facile". He argued that Dr. Neilson failed to consider whether the offending behaviour was a result of complex trauma. That began when he was young and continued throughout his incarceration. Dr. Gojer however noted during the hearing that complex trauma was not a cause of violence but an associated factor. Violent behaviour is not a result of complex trauma. And Dr. Neilson said that it was not an issue that related to risk assessment. Both psychiatrists acknowledged Mr. Marriott's extremely difficult early years and the impact that they had on his life as he grew toward adulthood.

[26] Mr. Gorham argued that Dr. Neilson's use of the term "living feral" in referring to Mr. Marriott's childhood was "relevant to her lack of objectivity or her unconscious bias" (Defence brief, para. 105). He said that the use of the derogatory, charged, and inappropriate term reflected a lack of empathy and understanding for the trauma that Mr. Marriott had experienced. That issue was addressed in the *voir dire*, at paras. 34 and 35.

> Dr. Neilson acknowledged that she should not have used the word. She said that her training in the United Kingdom where the word is used more frequently may have led her into that error.
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> I note that Dr. Neilson used the phrase "living feral". She did not say that Mr. Marriott was brought up living like a wild animal or that he was a "feral child", because he most certainly was not. She did not say that he was feral. Her reference was to a lack of adult guidance. There would have been better ways to have phrased that, as Dr. Neilson acknowledged. But the use of that phrase is hardly a manifestation of a lack of empathy and understanding of a kind that would render Dr. Neilson incapable of even providing an expert opinion.

[27] I add now that the use of term, "living feral" is not a manifestation of a lack of empathy or understanding that should be used to undermine the reliability of Dr. Neilson's professional opinions.

[28] Mr. Gorham argued that Dr. Neilson was not objective and did not consider alternatives to her "criminal inculcation theory" because her mind was closed to the other possibilities. It is significant however that Dr. Gojer also noted that the circumstances of Mr. Marriott's formative years were important in explaining the diagnosis of Antisocial Personality Disorder.

> Mr. Marriott has a clinical diagnosis of an Antisocial Personality Disorder. This diagnosis is based on a construct rooted in social behaviors that conflict with conventionally accepted social norms. The etiology of this condition is unclear and could be attributed to genetic, developmental and sociocultural factors, to name a few.
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> What stands out in Mr. Marriott's life is his developmental history. He was raised in a family where criminality was the norm. He grew up exposed to both parents being actively engaged in drug related offending behaviour and drug use. He lived in a neighborhood that was deprived and socioeconomically belonging to a lower class in the area. Many young children growing up there, criminal activity was common and the drug culture was prevalent. Mr. Marriott did not receive the supervision he should have gotten. His parents cared for him but there was no stable family life with both parents being involved with crime and being in custody at different times. Mr. Marriott learned to take care of himself at a very young age. (Dr. Gojer's report, p. 83)

[29] Both Dr. Neilson and Dr. Gojer understood the importance of dealing with Mr. Marriott's past, not only as it relates to trauma, but as it relates to the attitudes that he held. Dr. Gojer wrote,

> He has a deeper understanding of his past, the need for life style changes and what the future holds in store for him if this does not happen. He is at this time, ready for change and is not simply contemplating it.
>
> …
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> I see Mr. Marriott as intelligent and aware of the predicament that he placed himself in. He is insightful into how the early childhood experiences led him to becoming independent at a young age, learning to care for himself and how immersion into a subculture lead to him engaging in and becoming part of the criminality that he grew up in. He is not proud of this, would like to see himself move on and not engage in a lifestyle that would drag him back into the past. (Dr. Gojer's report, p. 86)

[30] BJ Marriott's early life, his time incarcerated and the lengthy periods of time he spent in segregation, among other things, underlie his personality disorder. Both Dr. Neilson and Dr. Gojer indicated that they understood that Mr. Marriott's

behaviours are not "caused" by one thing or one factor. Both said that Mr. Marriott needed to change his lifestyle.

[31] Mr. Gorham argued that Dr. Neilson made statements during her testimony that were misleading. Dr. Neilson made many statements with which Mr. Gorham disagreed. There is nothing to support the inference that the statements were made for the purpose of misleading the court. He suggested that Dr. Neilson failed to properly research the impacts of solitary confinement and viewed "in the most charitable light", that would suggest that she was "labouring under the effects of a cognitive distortion—an unconscious bias that kept her mind closed to the potential significance of the solitary confinement" (Defence brief, para. 124). He went on to say that the evidence "raises the spectre of a more troubling problem" (Defence brief, para. 125). He suggested that Dr. Neilson likely knew that she had not researched the literature on solitary confinement and to speak authoritative was "misleading". Dr. Neilson, like Dr. Gojer, provided an opinion and there is nothing whatsoever to suggest that either expert acted in bad faith or with any intent to mislead the court.

[32] Mr. Gorham argued that Dr. Neilson's was "aligned with Crown". He said that could be inferred from parts of the evidence. He said that she "appears to be a "go to" expert for the Crown", because they selected her from amongst a roster of available experts with no reason given for why she was selected. The "apparent ease at which they secured her services suggest a close working, familiar relationship". She wrote to Crown counsel in a friendly, at times, informal tone. He says once again that she also sought legal and strategic advice from the Crown, when asked for a meeting with the Defence. Mr. Gorham says that Dr. Neilson's hourly rate of $425/450 per hour was approved by the government without any apparent scrutiny, at least based on the evidence. He said that this rate is surprisingly high. It is much higher than government doctors are paid in other provinces. The rate, he argues, is relevant to the question of Dr. Neilson's independence. "It offers strong financial incentive to maintain a relationship with the Crown lawyers so that more files will be sent her way." He said that she was in effect a "Crown doctor".

[33] The Defence asked Dr. Neilson for a recorded meeting. She agreed to an unrecorded interview, only if the Defence paid her hourly rate. Dr. Neilson said that she was an expert for the court. Mr. Gorham argued that if she believed that she was serving the court, Dr. Neilson would have believed that she could bill for

the meeting with the Defence. Mr. Gorham proposed another possible inference. That was that Dr. Neilson was trying to deter the Defence from the meeting.

[34] Mr. Gorham went on to make more suggestions about Dr. Neilson's request to be paid for meeting with Defence lawyers, including that the request showed how much Dr. Neilson valued money.

[35] These issues were each addressed in the *voir dire*. That decision dealt with threshold admissibility but my reasons, as expressed in the written decision, are applicable at this stage as well, *R. v. Marriott*, 2023 NSSC 158 (paras. 42-61).

> Mr. Gorham has set out several arguments as to why, in his view, Dr. Neilson is not impartial and should not be qualified as an expert.
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> The Court is required to consider the relationship between the expert and the parties to the litigation. It may be that a proposed expert has a family relationship with a party that would make giving an unbiased opinion and unreasonable expectation. In *White Burgess* the court noted that an expert may be retained who is an employee of one of the parties. The existence of the "mere employment relationship" is not sufficient. Members of police forces with areas of forensic expertise are routinely qualified as experts in areas like blood spatter, ballistics and the packaging, sale, and distribution networks for illegal drugs. Civilian employees of police forces are often qualified as experts in DNA analysis.
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> When a proposed expert is a person with an interest in the outcome of the litigation that had led to exclusion.
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> Mr. Gorham says that Dr. Neilson is aligned with the Crown and that this can be inferred from the appearance of being a "go to" expert for the Crown. They did not provide her with a letter of retainer to set out the scope of her retainer and there is no explanation for why they chose her out of all the available experts. "While there is not (sic) legal requirement of a retainer letter or an explanation of why they chose her, but the apparent ease at which they secured her services suggest (sic) a close working, familiar relationship." (Defence brief, at para. 36)
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> Mr. Gorham notes that the inference is fortified by the nature of the communications. "She wrote to them in a friendly, at times, informal tone. And she addressed her accounts to Mr. Woodburn and Mr. Morrison." (Defence brief, at para. 37)
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> Mr. Gorham says that Dr. Neilson sought legal and strategic advice from the Crown when she was asked to meet with Defence counsel. He requested a recorded meeting with Dr. Neilson, and she wrote to the Crown lawyers. They encouraged her to meet but not to agree to have a recorded conversation. That was what she agreed to do.

Mr. Gorham says that Dr. Neilson's hourly rate was approved by the government "without any apparent scrutiny, at least based on the evidence". He argues that the rate was "surprisingly high" because it is "much higher than government doctors are paid in other provinces." (Defence brief, at para. 39) He argues that the rate and the "government's unflinching willingness to pay the rate, may raise public policy questions, which are not directly at issue on this application. But the rate is relevant to the question of the doctor's independence." (Defence brief, at para. 39) Mr. Gorham argues that the rate offers a strong financial incentive to maintain a relationship with the Crown lawyers so that more files will be "sent her way". He suggests that her rate is prohibitive for the vast majority of defendants. "Practically, this makes her a Crown doctor."

Those are serious allegations to make about a professional whose independent judgement goes to the core of what she does. Once again, these are not issues that go to the capacity of Dr. Neilson to offer an expert opinion. Even if Dr. Neilson were employed by the police and paid by the police as a regular "go to" police expert, that would not make her incapable of offering an expert opinion.

Dr. Neilson was retained to do the assessment. There was, at that time, no complaint from Mr. Gorham. He did not suggest that another doctor should be found because of what he believed then to be a relationship with the Crown. But it is true that much of what he has raised would not have been known when Dr. Neilson was first engaged.

Dr. Neilson has been engaged several times to do these assessments. She is a local expert from the East Coast Forensic Hospital. She can conduct interviews at the Burnside Correctional Facility without the need to travel from out of the province.

The East Coast Forensic Hospital is the only adult forensic psychiatric facility in Nova Scotia and only 4 or 5 forensic psychiatrists work there. Of those few psychiatrists, only some perform dangerous offender assessments. Those who do perform these assessments presumably have other professional commitments.

Experts are retained and given the nature of the expertise required on these files, the pool from which to select is limited. Dr. Neilson will have worked on several of them and may have developed a level of familiarity with legal counsel, both for the Crown and other lawyers with whom she has worked. Imposing on experts a requirement that they not interact with lawyers in a way that is either friendly or informal would require a kind of social distance that is sometimes only expected of judges.

None of that suggests that Dr. Neilson is a "Crown expert" and none of that suggests that she was being disingenuous when she provided the attestation required of every expert giving evidence in court. She said that she could give an independent and unbiased opinion. The fact that she has been retained in the past does not in any way allow for the inference that she was not telling the truth when she gave that attestation or that she was somehow incapable of knowing what was true in that regard.

Dr. Neilson explained the way that she bills for her services. The rate that she charges for private assessments is linked to the rate that she is paid for the private work that she does with Corrections Canada. She noted that it is a similar rate to other psychiatrists who work at the Department of National Defence or Veterans Affairs. She said that it is the same rate that she is paid by other governments. There is no evidence now before me to support the contention that it is an arbitrarily high rate paid "unflinchingly" by government. The rate charged by Dr. Neilson does not provide support for the inference that she was not capable of providing an independent and unbiased opinion.

Mr. Gorham's request for a recorded meeting made Dr. Neilson uncomfortable. She said that it was highly unusual. She had never had it happen before and she was worried that having to put something like that on record would interfere with the criminal process. She consulted with some colleagues at the East Coast Forensic Hospital. They all agreed that it was something that she should not do. She consulted with colleagues elsewhere to see if it was a routine practice in Ottawa or Toronto. It apparently is not, or so she was led to believe.

Dr. Neilson was faced with what she understood to have been an unusual request. Rather than simply say no, she consulted with her colleagues. She decided to follow their advice. There was nothing partisan about that approach.

Mr. Gorham argues that the practice of a recorded interview is not unusual. Dr. Neilson agreed to meet provided that she was paid her hourly rate. He says that she should have believed that the government would have paid her hourly rate for speaking with him. He says that if she were an independent expert a pre-trial meeting with Defence counsel would have been covered by her retainer.

Mr. Gorham suggests that another "possible inference" is that "she was attempting to deter the Defence from the meeting". And he goes on to say,

> Finally, the demand shows how much the doctor values money. ...If the doctor sincerely felt so strongly that she was entitled to 450 dollar/hour for meeting with the Defence, then it tends to demonstrate that she values a small amount of money more than her role in serving the public interest. If she had any thought to the public interest, she would have inquired as to whether government would pay for her time meeting with the lawyers. (Defence brief, at para. 42)

Dr. Neilson was retained to provide a report. She was not obligated to meet with Mr. Gorham in a form of informal pre-trial discovery and did not meet with Crown counsel. She was not under any obligation to make inquiries with government whether she could bill for such a meeting. Experts retained to provide opinions in the course of litigation are not obliged to make themselves available for pre-trial questioning by parties unless they are required to do so in the civil discovery process.

Dr. Neilson's retainer is not exceptional. Her contact with counsel was not unusual. She did not send a draft report to Crown counsel for review or attempt to

> tailor the assessment to the Crown brief. There is no evidence that her findings were dictated by the Crown or that they were not her own conclusions.

[36] The Defence challenged any claim that BJ Marriott was a member of any gang. The allegation of gang involvement on the part of Mr. Marriott has not been proven beyond a reasonable doubt and, as I have already noted, cannot be used as evidence of a pattern of violent behaviour. It would not in any event qualify as violent behaviour and could at most provide context for violent behaviours. Reports and materials from the files of Correctional Services Canada can be used to provide context. Given the nature of the allegations of gang involvement and the fact that those allegations rely almost entirely on reports from security intelligence within Correctional Services Canada using unnamed or confidential sources the safer course of action is to not use them in this case, even as context. Dr. Neilson referred to the allegations of gang involvement and Mr. Gorham notes that "much of the doctor's report relied upon CSC allegations that Mr. Marriott was operating a violent, drug dealing gang from jail" (Defence brief, para. 137). Dr. Neilson noted throughout that Mr. Marriott denied any gang involvement and did not conclude either that he was or was not a part of a gang. She said very clearly that if gang involvement were removed entirely as a consideration it would not change her opinion.

[37] Mr. Gorham said that "the doctor's position is indefensible" (Defence brief, para. 137). He noted that the gang allegations contained in the Correctional Services Canada records are "extremely serious yet sparse and dubious" yet Dr. Neilson relied heavily on them. She did not rely heavily on them. She noted the allegations and at page 39 of her report said that Mr. Marriott's self-report and the reports in the files were "discordant with regard to past or current gang affiliation/relationship to organized crime". She said that from a clinical risk perspective, gang affiliation was relevant in that several studies have shown that gang members are "more likely to cause social harms to a wider range of victims, to seek and perpetrate violence, to be excited by the prospect of violence, and to carry weapons". They are more likely to be violent in retaliation when disrespected, to use violence instrumentally and when angry, and to worry about being violently victimized. She noted that studies had found a "strong relationship between gang membership and prison misconduct". She said that relinquishing gang affiliation can be fraught with difficulty. Importantly, Dr. Neilson says this on p. 39 of her report:

> This may (or may not) be a relevant treatment target going forward, depending on the degree to which CSC officials believe Mr. Marriott's assertions that he is not criminally involved in this fashion. (emphasis added)

[38] Dr. Neilson employed actuarial instruments and clinical assessment. Unstructured clinical assessments have been criticized because they allow the clinician to look at factors that they considered relevant, and those factors may be influenced by the clinician's unguided subjective opinions. Actuarial instruments were intended to remove some of that subjectivity. But the earlier ones were problematic, in that they relied on static factors to evaluate risk. A person could not change the result by changing their behaviour or their circumstances. Those gave way to instruments that take into account dynamic and static factors. In cross-examination Dr. Neilson and Mr. Gorham disagreed on whether she had used an unstructured clinical assessment or a structured clinic assessment which involved the consideration of set factors. Mr. Gorham said that it was "clear" that Dr. Neilson had used an unstructured clinical assessment because she decided which factors to rely upon and how much weight she would give to each factor. Dr. Neilson said that she considered factors set out in the actuarial instruments in the course of her clinical assessment. Mr. Gorham argued that Dr. Neilson's professional judgement set out in her report was "unreliable".

[39] Dr. Gojer, in his report said that actuarial risk assessments are "nomothetic". They comment on group characteristics. "Idiographic" risk assessments focus on the individual. They take into consideration many more factors. Those may be aging, dynamic or clinical factors, sociocultural aspects of the offender, employment, recreation, community supports, and legal mechanisms that can be imposed. Dr. Gojer used the "HCR 20 v3" which is a risk measure that combines historical, clinical and risk management factors. It is also referred to as a Structured Professional Judgement assessment instrument.

[40] Whether what Dr. Neilson used was a structured clinical assessment or an unstructured clinical assessment may be open for debate. But she did consider each of the issues noted by Dr. Gojer.

[41] Mr. Gorham cross-examined Dr. Neilson for three days during the *voir dire* on the admissibility of her report. The evidence from the *voir dire* was admitted as evidence in the dangerous offender application proper. Mr. Gorham noted that at the end of his cross-examination Dr. Neilson was "required to admit that she had done things she should not have done and that she had failed to do things that she ought to have done" (Defence brief, para. 144). Those "admissions", to the extent

they were admissions at all, related primarily to the issue of complex trauma and the literature around complex trauma, which Dr. Neilson continued to maintain throughout was not relevant to the consideration of risk.

[42] Mr. Gorham said that Dr. Neilson acknowledged that her opinion might well have been influenced by her own "cognitive distortions" which she defined as unconscious bias. Dr. Neilson quite properly agreed that she, like everyone else, has unconscious biases. We are not aware of them and yet must guard against them. A denial of the potential of unconscious bias is, with respect, what makes an expert's opinion less reliable. But Mr. Gorham says that this puts Dr. Neilson's objectivity in the most favorable light. It means that she tried her best, but her objectivity was undermined by unconscious tunnel vision. That is not what acknowledgement of unconscious bias means. Dr. Neilson did not say that her objectivity was undermined by tunnel vision. Like any other reasonably self-aware person, Dr. Neilson acknowledged that she may have unconscious biases. And like other professionals, aware of that potential, she would be required to guard against those biases.

[43] The alternative, as set out by Mr. Gorham is quite sinister. He says at para. 148 of his brief that that Dr. Neilson wrote a,

> sweeping aggressive opinion about Mr. Marriott's character designed to promote the prosecution's chance of success in the dangerous offender application. At its core of the opinion, she attempted to write Mr. Marriott it off as a person who was raised by bad antisocial people and then became a bad antisocial person himself. She suggested that he has been inculcated, shaped by antisocial beliefs and that those antisocial beliefs will be very difficult for him to overcome. Her language referring to him as living feral suggested that he was dangerous like an animal. Her reference to his cognitive distortions concerning his employment verged on ridiculing him. Her suggestion that his work plans were fanciful was uninformed and mean spirited. Cumulatively, her language and evidence concerning solitary confinement and Mr. Marriott's family involvement is difficult to understand or rationalize as an innocent mistake.

[44] Mr. Gorham challenged Dr. Grainne Neilson's sincerity and honesty. If unconscious bias is the most charitable explanation for what Mr. Gorham perceived to be the deficiencies in the report, and mistakes that he believed were made were not innocently made, and the report was designed to promote the prosecution's case, that is an assault on the integrity and professionalism of Dr. Neilson. At para. 149 Mr. Gorham writes,

> However, before having to consider the doctor's sincerity or honesty, all of these features of the evidence as well as her admission that she was influenced by cognitive distortion or unconscious bias demonstrates that she lacks the objectivity to be a properly qualified expert in this case. (emphasis added)

[45] It is not clear to me what the phrase "before having to consider the doctor's sincerity or honesty" means. It suggests that at some point, I should consider her sincerity or honesty. It has been put in question in the context of this case at least.

[46] I reject the suggestion that Dr. Neilson's report was a product of dishonesty or insincerity. If there are aspects of it, or conclusions made in it, with which I disagree, or on which I place less weight, I will note them. But the evidence before me does not support the inference that Dr. Neilson prepared her report "to promote" the Crown's case or that it does not reflect her honestly and sincerely reached professional opinion.

BJ Marriott's Background

[47] BJ Marriott's name is well recognized in Halifax. Media reports sometimes refer to him as being a member of the Marriott "crime family". That may cause people to make assumptions about him and jump to conclusions about the risk that he poses. His list of criminal convictions may have the same effect. There are those who will assume that because of his name and his history that Mr. Marriott is "dangerous". Others, who would find that form of reasoning outdated and offensive, may be led in at least a similar direction by inferring that given his family background and his upbringing, he had no chance of doing anything other than spending most of his life in jail. He would be "just a victim of his circumstances".

[48] He is neither the sum of his criminal and institutional records nor a numbered inmate whose life has been predetermined by his family name. Like so many other people, he has been "dealt a bad hand" by life. And like so many people, he has at times, had to make choices and bear the consequences of them.

[49] BJ Marriott's parents are Dawn Ann Bremner and the late Terry Marriott Sr. His mother worked as a cook at a pizza shop. Terry Marriott owned bars but was in and out of jail a lot for drug trafficking. Mr. Marriott assumed that his father made his money from the drug trade. Dawn Bremner confirmed to Dr. Neilson that both she and Terry Marriott Sr. were involved in the drug trade, and that they associated with other families who were also involved in that trade. By the time BJ Marriott

was 6 or 7 years old both his parents were in prison for drug trafficking. He lived with his maternal grandparents between the ages of 7-11. His grandparents used to take him to jail to visit his mother and father.

[50] He was not a good student but was not identified as having any specific learning disabilities. He said that his academic performance was okay but not great. He had some issues with adjusting in school including acting out or misbehaving in class, but he had no school suspensions before he was 12.

[51] Mr. Marriott said that he did not experience physical, sexual, or emotional abuse. He was not subject to corporal punishment and did not witness any domestic violence. He reported to Dr. Neilson that he did not recall being a witness to any parental criminality but did remember "being a kid and the cops kicking our door in". Dawn Bremner said that selling drugs was how they lived. It was normal for them and that her son would have seen it. Mr. Marriott reported to Dr. Neilson that he did not witness any parental substance use or any associated behaviours but was later told that both of his parents had substance use issues, mostly with cocaine. Terry Marriott Sr. was also reported to have had alcohol use problems. Dawn Bremner told Dr. Neilson that parental substance abuse and drug dealing was commonplace and in plain view, especially as BJ Marriott entered adolescence and lived with his father.

[52] At around age 12 BJ Marriott moved from his grandparents' home to live with his mother in Stewiacke. He was unhappy with this move. He missed his Spryfield friends and did not want to attend the local school. He did not get along with his mother's boyfriend. He said that he ran away more than a couple of times. After a few months, he returned to Spryfield to live with his grandparents, and when they moved, he lived briefly with an aunt. He then "bounced around" the homes of friends and cousins and sometimes returned to his mother's home.

[53] He quit school in Grade 7. He started hanging out with other young people who were both using and dealing drugs. He had little adult supervision. He started drinking before age 12. He got involved in antisocial activities, going from breaking windows to stealing cars and joyriding. He reported to Dr. Neilson that he started getting into "fights and stuff" with "groups of kids who were not getting along—you know, two on two or something like that". He explained that during these years "Spryfield was a rough neighbourhood - not like it is today".

[54] BJ Marriott's was first convicted of a criminal offence when he was only 13 years old. After that he spent 5 months at Shelburne Youth Centre, for several

other offences. He said that he did not suffer from any sexual abuse while at Shelburne but that the guards would sometimes rough kids up. He apparently functioned well while at the Shelburne Youth Centre and did not cause problems. As noted by Dr. Neilson, the correctional files indicated incidents including a variety of disciplinary infractions such as non-participation in program/work, physical contact, causing disturbance, disobeying orders, property damage, and a staff assault.

[55] He was able to complete Grade 7 while at Shelburne. He earned some temporary leaves of absence to be re-united with his father who had recently been released from federal custody.

[56] When he was released from Shelburne, he lived with his father in Spryfield from age 14 to 15. He said that this period was more structured than what he had been previously accustomed to. He said that his father was very strict. He did not want his son to get into further trouble with the law. Mr. Marriott said that his motivation to behave was tied to wanting to spend time with his father after a long absence. Dawn Bremner however said that attendance at school was likely the only thing that Terry Marriott Sr. expected of his son. She believed that BJ Marriott otherwise had very little structure and few parental controls. Dr. Neilson noted that probation reports seem to indicate some behavioural stability during this time. She noted though that he was convicted of mischief. That incident involved throwing a rock through a vehicle window after a verbal altercation with another student.

[57] Mr. Marriott told Dr. Neilson that he was using cannabis daily and dealing drugs on the street to people at school to fund his own use by the time he was 14 or 15 years old. He reported that his father did not know about any of this activity. Dawn Bremner doubted that version. She believed that her son "definitely" had the approval of his father, and that he "likely encouraged him to do it". In school BJ Marriott was suspended a few times for "arguments with teachers". He denied physical fights with fellow students or other behaviours prompting disciplinary interventions from the school. A pre-sentence report noted that Mr. Marriott was a "bright kid" who did not apply himself academically and who displayed behavioural problems. He was described as "obnoxious and having an attitude that the world owes him something". It was further noted that "his irresponsible attitude, negative associates and lack of respect for the property of others has resulted in further conflict with the law". Prior to Grade 8, the same source reported that he had "three or four suspensions for fighting, swearing and disrespectful attitude".

[58] Things were getting worse.

[59] When BJ Marriott was 15, Terry Marriott Sr. was remanded into custody. The years after that were very tumultuous. BJ Marriott began living with his brother Terry Marriott Jr., who was 13 years older than him, and he had effectively no supervision. He completed his first month of Grade 9, but then dropped out. During this time, he reported to Dr. Neilson ongoing alcohol and cannabis use and experimenting with other drugs, including using ecstasy "fairly regularly", and mushrooms or acid "a couple of times". He said that he had stolen from stores and stolen cars but was never caught. He acknowledged that he had many criminal peers. He denied ever being a member of any criminal gang. He said that at age 15 he got a tattoo on his back. It had the words "Spryfield MOB". He told Dr. Neilson that it stands for "money over bitches" but said that it was not a sign of gang membership. It was "just a tattoo". His mother, Dawn Bremner had moved to Ontario by this time. She was aware of the tattoo, but she did not think of his friends and associates as a gang. They were just friends who hung out together and got into trouble together.

[60] By the age of 16 BJ Marriott was independently operating a "drug house". He was fully supporting himself through that. While many of his peers carried weapons, Dr. Neilson found that Mr. Marriott had given conflicting reports about his practices with regard to carrying weapons. In one interview he said he "almost never" did, noting that "a few of my family members had already been killed" by then. However, in later interviews, he acknowledged carrying weapons. The files indicated that as early as age 13, he reported carrying mace.

[61] During his adolescent years BJ Marriott's role models appeared to have been peers and family members who had criminal values and attitudes. He adopted those attitudes and values. While Mr. Marriott denied being inculcated or supported by older peers or others involved in the drug trade, Dr. Neilson observed that this was not consonant with the collateral information that she had received. His childhood friend, Troy Allen reported that Mr. Marriott hung out with older peers, including Mr. Allen, and his own brother Terry Marriott Jr. who were criminally involved. They were in the drug trade, and they lived by a "street code". That served the objectives of the group and the people who were important to the group. Dawn Bremner observed to Dr. Neilson that her son, BJ Marriott "…was taught all his life - you don't rat on people, you don't tell on people, you don't do bad things to people - you know, steal and rip people off, you don't tell police things, you respect your elders…" His mother reported that when Mr. Marriott was age 16 or

17, his father violated this code by cooperating with the police following the shooting death of Terry Marriott Jr. This resulted in a permanent rift between the father and son, and they never spoke again. Mr. Marriott reported that his relationship with his father became more distant as time passed. Terry Marriott Sr. died of cancer in 2021.

[62] Between the ages of 16-18, BJ Marriott was sentenced to Waterville Youth Detention Centre twice for a variety of offences including possession and trafficking, once for "a few months" and another for a year. He was released from youth custody a few weeks after he turned 18. Mr. Marriott described his time in Waterville as being "alright", noting that there was structured programming by day and sports and other activities in the evening. He reportedly worked on a maintenance crew and said that he got along reasonably well with his youth worker. He reported that he "might have" been involved in a few fights, "mostly over sports" while at Waterville, but did not become involved in drug use/dealing while there. However, the Waterville Correctional files indicate a variety of disciplinary infractions including causing a disturbance, possession of contraband, abusive language, and staff assault.

[63] In Dr. Neilson's opinion, Mr. Marriott appeared to have had several factors that protected him from early onset delinquent behaviours before he turned 12. Those included a warm and supportive relationship with his maternal grandparents. They provided appropriate monitoring and consistency in parenting, and commitment to conventional activities like school and extracurricular activities. These protective factors appeared to have been sufficient to outweigh the risk factors of early onset delinquency including coming from a broken home, parental criminality, parental substance abuse, and early separation from his parents.

[64] After age 12, he was exposed to several risk factors that are linked to late-onset delinquency. Those included substance use, inconsistent parental involvement, poor or inconsistent monitoring and supervision, academic failure, association with delinquent peers, negative attitudes towards authority, and neighbourhood crime and drugs. Dr. Neilson reported that the impact of living in association with peers and family members who were criminally involved likely had a significant influence on the types and extent of the antisocial behaviours that BJ Marriott exhibited. They ranged from property offences and trafficking to aggressive acts. Dr. Neilson suggested that it is likely that antisocial associates and criminal peers and family members provided the opportunity for role modeling of violent or criminal and anti-authority behaviour to take place. Those associations

reinforced the behaviour and helped to bring about Mr. Marriott's adoption of antisocial values and attitudes.

[65] Dr. Gojer met with Mr. Marriott and spoke with him several times. Dr. Gojer's report traces the narrative of Mr. Marriott's childhood and teenage years, and it does not differ significantly from what Dr. Neilson reported.

BJ Marriott's Youth Criminal Justice Record

[66] Mr. Marriott's criminal convictions as a youth and a young adult were summarized in *R. v. Marriott*, 2022 NSSC 121, paras. 14-22. When he was 13 years old, Mr. Marriott was convicted of attempted theft and failure to comply with a recognizance. He was sentenced to 10 months probation and 45 hours community service. A few months later he was sentenced to a month in the youth facility at Shelburne for failure to comply and another incident of mischief. The next month he was sentenced to 20 days in custody for stealing a car and failing to abide by a court order. Soon after that he was convicted of assault with a weapon and failure to comply with a court order. He was sentenced to 2 months in custody.

[67] In April 1996, when he was about 14 years old, Mr. Marriott was sentenced for an assault that had taken place the year before. There was also a mischief charge and failure to comply with a disposition. He was placed on probation for 8 months. He was sentenced to another 8 months probation on August 31, 1997, for possession of property obtained by crime. Then, in November 1997, he was sentenced to 12 months probation for mischief. The next year, by which time he was 16 years old, Mr. Marriott was sentenced to 15 days in custody for failure to comply with a disposition under what was then the *Young Offenders Act*. Soon after that he was sentenced to 5 days in custody for possession of drugs for the purpose of trafficking, and 5 more days for failure to comply with an undertaking.

[68] In the fall of 1998, he was in court again being sentenced for failure to comply under the *Young Offenders Act*. The result was 15 additional days in custody. A year later, in November 1999, he was involved in possession of drugs for the purpose of trafficking. He was sentenced with respect to that offence on January 14, 2000. He was sentenced to 8 months incarceration and 24 months of probation. This was his second drug trafficking offence while still a youth. He aged out of Youth Court in July 2000, when he turned 18.

[69] In November 2001, he was sentenced once again for failure to comply with an undertaking and a probation order, and with assault. He was sentenced to three

months on the assault, one month on the breach of probation, one month on the failure to comply, and one month for an earlier failure to comply under the *Young Offenders Act*. In February 2002, he was in court again being sentenced on an assault that had taken place the previous June. That also included 2 counts of failure to comply with the undertaking or recognizance. He received a sentence of 45 days to be served intermittently, one year of probation and a $750 fine.

[70] One might well ask what Mr. Marriott's childhood, adolescent and teenage years have to do with assessing the risk that he poses now, as an adult. The sad truth is that the chaotic first 19 years of BJ Marriott's life are the only time that he has lived for any extended time outside a correctional institution. The rest of the story of his life is largely a recitation of prison placements and incidents within jails. He has been outside but never long enough to establish anything like a stable life. Once the narrative of his life begins to centre around the circumstances of his institutionalization, the sense of him as a person seems to fade into the background. It is important to guard against the risk of perceiving him as the sum of his institutional records, although those are for the most part, the only information about him that is available.

[71] After his release from youth custody at 18 BJ Marriott said that he worked as a prep cook for an uncle who was running a pizza shop. But by that time, he realized that he had developed the skills of a drug dealer. He was selling marijuana, cocaine, and crack. He looked for a wider base of customers by operating drug houses where he employed 2 or 3 people to run the operations for him. He commented to Dr. Neilson that it was not hard to find people to do that work in his neighbourhood. He described drug dealing as an exciting and lucrative activity. He also recognized and came to expect violence as part of the lifestyle. He said that he did not carry guns personally, but he reported that he owned guns, and his peers carried them. He said that in Spryfield, it was not uncommon for people to carry guns. Dr. Neilson used the phrase "the fast lane" to describe Mr. Marriott's life at that time. He was going to bars, drinking, and partying and on weekends went to rave parties all over the province. He experimented with ecstasy and occasionally with magic mushrooms and acid.

[72] At around 18 or 19 he learned that he had fathered a daughter with a former girlfriend a few years before. He had some limited involvement with his child. That created some difficulties in the relationship with his long-term girlfriend.

[73] Mr. Marriott's first adult offence happened when he was 18½ years old. It was an assault on a taxi driver when returning with friends from a night of partying. He served a brief provincial sentence.

BJ Marriott's Adult Criminal Record

[74] Then in November of 2002, at the age of 19 he was sentenced to his first federal period of incarceration. It was for the manslaughter death of Parker Sparks outside the Copper Penny Tavern on March 8, 2002. Bruce Jackson went to Mr. Marriott's apartment in Clayton Park. Jason Dorey and others were there as well. BJ Marriott waved a small caliber handgun and commented along the lines of, as set out in an agreed statement of facts, "If anybody messes with us, the others would shoot or kill them". Bruce Jackson dropped off BJ Marriott and Jason Dorey at the Copper Penny Tavern. Parker Sparks arrived at the tavern with his girlfriend shortly after. Mr. Marriott bumped into Mr. Sparks near the main bar. A verbal exchange became a physical confrontation. The men were seen pushing and pulling one another. The bar staff broke up the fight. They took the fight outside. Mr. Sparks was described as agitated. Someone in the Marriott party fumbled with an object and a bullet of the same caliber as the weapon used to shoot Parker Sparks was dropped on the floor and picked up by a witness. As Mr. Marriott and Mr. Dorey entered the lobby on the way to the coat check, Mr. Marriott and Mr. Sparks exchanged angry words. Mr. Sparks had to be restrained and BJ Marriott raised his arms. At the coat check Mr. Sparks' friends told Mr. Marriott that he did not know what he was getting in to, and Mr. Marriott responded that Sparks did not know who he was messing with but would find out when he got outside. Mr. Marriott, knowing that Jason Dorey was armed with a loaded gun, asked Dorey to back him up in the fight that would ensue. Dorey agreed. Outside, as the confrontation began between Marriott and Sparks, Jason Dorey began to fire at Parker Sparks. The first three shots were fired from five to seven feet away. The others were fired as Mr. Sparks ran away. Parker Sparks got into a stranger's vehicle who transported him to hospital where he later died. BJ Marriott fled on foot and was at large for 2 months before being arrested.

[75] BJ Marriott was sentenced to 5 years and 6 months consecutive to the sentence he was then serving.

[76] The sentencing judge noted that while BJ Marriott was not the shooter, and that Jason Dorey was the person who fatally shot Parker Sparks, Mr. Marriott had

the gun earlier on, and made the comment about shooting or killing anyone who messed with them.

[77] The chronology of charges and sentencing at that time can be confusing. The sentencing for the March 8, 2002, manslaughter took place in November 2002. At that time Mr. Marriott was already serving a sentence that had been imposed on June 18, 2002.

[78] That sentencing related to an offence that took place on May 2, 2002. It happened when Mr. Marriott was at large after the Sparks homicide. The police were conducting surveillance in an attempt to locate Mr. Marriott. There was a warrant outstanding in the incident that resulted in the manslaughter plea. The police watched a residence for about an hour. A woman entered. Then BJ Marriott entered. Mr. Marriott came to the front of the residence and was arrested. The police detected the odor of marijuana and then got a second warrant to search the residence. The warrant was executed. There was a stolen motorcycle in the home. Approximately twenty pounds or 8 and a half kilograms cannabis marijuana was seized from a freezer in the bedroom. There was $9,000 located near that and a set of electronic scales as well. A 9-mm semi-automatic pistol was seized. The firearm had never been registered in Canada. There was also a 44 caliber Ruger revolver which also had a scope attached to it. Mr. Marriott admitted to the officers that the drugs, the cash and the guns were his.

[79] BJ Marriott was sentenced to 2 years for the trafficking charge, 5 months for possession of stolen property and one month for each of the two weapons possession charges. The sentences were all consecutive. So, when Mr. Marriott was sentenced for the manslaughter charge, he was already serving a sentence of 2 years and 7 months with respect to the May 2, 2002 incident.

[80] Soon after going into the federal prison system Mr. Marriott was charged again for offences that took place at the end of May 2002 when he was at the Central Nova Scotia Correctional Facility in Burnside. The drug trafficking charge was laid after an investigation conducted by the Drug Section of the Halifax Regional Police. Between May 9, 2002 and July 25, 2002, the Halifax Regional Police conducted an undercover operation known as ‘Operation Midway’. It involved the use of an undercover police agent acting under the direction of Halifax Regional Police. That agent was Bruce Jackson, who was the person who had dropped Mr. Marriott off at the Copper Penny on the evening of Parker Sparks’ death. From 1998 to 2002 Bruce Jackson had a business relationship with

BJ Marriott. That business relationship continued to exist during the course of the undercover operation. Bruce Jackson operated a crack shop. He weighed and packaged the cocaine and oversaw the numerous workers who sold it.

[81] In May 2002, BJ Marriott instructed Bruce Jackson to obtain a "prison package" containing half an ounce of cocaine and fifty grams of hash. The package was to be brought in the girlfriend of an inmate who was also incarcerated at the Springhill Institution. Bruce Jackson told the police about it. He told the person who would be taking the drugs into Springhill to heat up the hash so that she could form it and put it into her body cavity. The package was delivered.

[82] On October 7, 2006, after a trial at the Supreme Court BJ Marriott was found guilty of possessing cocaine for the purpose of trafficking.

[83] The next incident that resulted in a criminal conviction took place less than a month after the "prison package" incident. Mr. Marriott was convicted of conspiracy. He was awaiting sentencing on charges of possession of cocaine for the purposes of trafficking, possession of a weapon, and possession of stolen property. Those were the incidents that had taken place while he was at large on the warrant related to the Sparks homicide. So, he was facing charges for that matter was well.

[84] He asked for a visit from Wayne Marriott and Bruce Jackson. BJ Marriott had asked Wayne Marriott to smuggle a prison package into prison for him, this time to be composed of hashish and pills. BJ Marriott called Bruce Jackson from the jail. Bruce Jackson volunteered to get a prison package organized. Bruce Jackson and others put the package together. The telephone conversations were intercepted. The Crown pursued the case against BJ Marriott on the basis that the trafficking for which he conspired involved trying to get the 50 grams of hashish collected and delivered to him in jail. There was no suggestion that he intended to traffic inside the jail or the prison to which he was subsequently transferred. His sentence was based upon an ultimate intention for personal use, not an ultimate intention for trafficking in prison.

[85] He was sentenced in June 2005 to 2 years, consecutive to the sentences he was already serving.

[86] So, within about a month of being apprehended on the murder warrant, with respect to the charge on which he pleaded guilty to manslaughter, he had been charged with possession for the purpose of trafficking, possession of property

obtained by crime, and possession of a weapon stemming from the surveillance on the home where he was ultimately apprehended; possession of a scheduled substance for the purpose of trafficking, arising from the Operation Midway undercover investigation, and; conspiracy to commit an indictable offence related to the plan to get drugs into a facility.

[87] Dr. Neilson observed that what started out as a two-year, six-month federal sentence in 2002 gradually grew to become 16 years, four months and 22 days, which he served to his warrant expiry. He was incarcerated when picked up on the warrant on May 2, 2002, at the age of 19, and was not released until October 2018, when he was 36 years old. During adulthood, again as observed by Dr. Neilson, Mr. Marriott had nearly two dozen convictions related to 10 sentencing dates, including assault, assault with a weapon, assault causing bodily harm, manslaughter, possession of a weapon, trafficking, conspiracy to commit an indictable offence, and a variety of offences against the administration of justice. Some of these offences, including the predicate offence, took place while he was in custody.

[88] When he was released in October 2018 Mr. Marriott was placed on a s. 810 recognizance, sometimes referred to as a peace bond. That included numerous conditions. He told Dr. Grainne Neilson that he agreed to the conditions in part because he felt that he did not have a choice, and because his (then) lawyer advised him that it would be easy to change the conditions of his release. He found out later that was not the case. Mr. Marriott told Dr. Neilson that he did not believe that the conditions were reasonable or necessary and did not adhere to all of them. For example, he continued to consume alcohol. After his release, BJ Marriott moved to Montreal to live with a longtime girlfriend. She was by then pregnant with his child. She was completing a master's degree in social work and was reportedly a positive and pro-social influence. Mr. Marriott was then working doing waste disposal. He said that his early parenting experiences filled him with pride, happiness and hope that "things were finally going according to plan". Then in July 2019, Mr. Marriott was arrested in relation to an incident outside a Montreal bar. He was one of 5 men accused of an assault on 5 other men. Those charges have since been dismissed. He was granted bail. One of the conditions of the bail was that he could not leave Quebec. He reported that soon thereafter he received a 'duty to warn' call from the Montreal police, causing him to fear for his safety in Quebec. He left his girlfriend and daughter and went to Nova Scotia. Three weeks later, he was arrested in Halifax in violation of conditions of the s. 810 recognizance, as well as the release conditions set by the Montreal judge. He was

detained in custody at the Central Nova Scotia Correctional Facility in Burnside. In November 2019, Mr. Marriott was sentenced to a period of provincial custody for the breach of the s. 810 recognizance.

[89] The offence that gave rise to this dangerous offender application, the predicate offence, took place about two weeks after that sentencing. Mr. Marriott pleaded guilty to aggravated assault. The facts related to that offence are set out in *R. v. Marriott*, 2022 NSSC 53. On December 2, 2019, Stephen Anderson was assaulted by a group of inmates who entered his cell. He was stabbed. His wounds were serious. Several inmates entered the cell and others blocked correctional officers from intervening to protect Mr. Anderson. Mr. Marriott was among those who tried to prevent the officers from stopping the assault. While there was a plan to carry out the assault as a group, the Crown did not prove that Mr. Marriott was a leader in either the preparation of the plan or in the execution of the plan.

[90] So, from the time he was 12 or 13 years old, BJ Marriott has been involved with the criminal justice system. During BJ Marriott's adolescent and teenage years he had little direction or guidance. By the time he was 16 he was supporting himself financially by operating drug houses. He left school in the community in Grade 7 but was eventually able to complete Grade 9. He never acquired job skills or training. By the time he was 19 he was in federal penitentiary where he remained until he was 36. When he was finally released, he lasted less than a year on the outside before he was arrested again and returned to jail. He has experienced less than a full year as an adult living in the community and he is now 41 years old.

Institutional Life

[91] It is not entirely surprising that BJ Marriott's adjustment to institutional life was not smooth. He left the community after living in what was described as the fast lane, with few if any constraints placed on him and was forced into an almost entirely regimented lifestyle in a restrictive environment. He has spent virtually all his adult life in that environment. There are numerous psychological and other institutional reports about him and his behaviour, but the information provided by that material is based on what was required by the institutions for their purposes. The reports do not necessarily address what life was like for BJ Marriott during that time. It is about the person, but it is less personal. He lived with other people in those federal penal institutions but there is, again not surprisingly, no insight from them about the kind of person that he appeared to be. There is no one to say, firsthand, whether he was a good and loyal friend, a bully or a grifter. BJ

Marriott's discussions with officials were necessarily purpose driven. They made observations about him but always as if, often literally, watching him through a glass divide.

[92] The documents from the Correctional Services Canada reviewed by Dr. Gojer, show that Mr. Marriott was transferred from institution to institution. He was picked up on the homicide warrant in May 2002 and was in the Central Nova Scotia Correctional Facility in Burnside. He entered Regional Reception Centre at the Springhill Institution on June 21, 2002. On July 10, 2002 he was transferred to a maximum security facility, the Atlantic Institution in Renous, New Brunswick. That was an involuntarily transfer and the stated reason for the transfer was that Mr. Marriott and his associates were believed to have been bullying and intimidating smaller and quieter inmates. He stayed at Renous until December 2003, when he was transferred to the Special Handling Unit, the SHU, at Saint-Anne-des-Plaines, Quebec. That was as a result of his suspected involvement in the stabbing of another inmate at Renous. He was transferred to the maximum security Donnacona Institution in Quebec on August 4, 2005. He remained there until he was transferred to the maximum security unit in the Saskatchewan Penitentiary on July 23, 2008. He stayed there until March 2009, when he was transferred to the Edmonton Institution. He was sent to Drumheller in June 2010, then transferred back to Edmonton in September 2010 because of suspected involvement in institutional drug trade. On May 20, 2011, he was sent back to the Special Handling Unit in Saint-Anne-des-Plaines. The stated reason was Mr. Marriott's suspected direct involvement in the stabbing of another inmate. On February 20, 2013, he was sent back to Edmonton. He was again transferred to Donnacona and from there to the Regional Reception Centre. On February 18, 2015, he was sent to the Kent Institution in British Columbia. By March 2016 he had been transferred again to Edmonton. He was released at warrant expiry in October 2018.

[93] When he was arrested in the summer of 2019, he was remanded to the Central Nova Scotia Correctional Facility then transferred to the Northeast Nova Scotia Correctional Facility in Pictou. He was later moved to the facility in Cape Breton, where he is now placed.

[94] BJ Marriott spent more than 16 years in federal custody. He was housed mostly in maximum security institutions. His alleged involvement in various security incidents resulted in his transfer to other maximum-security institutions and special handling units across the country during those years. He reported spending the equivalent of 3½ years in segregation.

[95] Mr. Marriott has a long list of infractions within the various institutions in which he was placed. It is important to understand the context within which incidents of violence took place within those institutions. They are in some sense, highly regulated and controlled environments. Inmates are watched and supervised. Their freedom is of course restricted. Perpetrating an act of violence outside that environment would be easier than doing it in jail. Weapons are more readily available and there are more opportunities to do things without being watched. But at the same time there is another aspect of institutional aggression. Maximum security institutions bring together dangerous people and house them in close quarters, while placing stresses on them that would not be experienced living in the community. As Judge Derrick, as she then was, observed in *R. v. Shea*, 2014 NSPC 78, it is a "dog eat dog" world. It has its own culture and its own norms of behaviour.

[96] BJ Marriott was asked about that. He told Dr. Neilson that maximum security institutions are dangerous places where violence occurs frequently. He said that "There's different rules in jail than there is in society" and that issues are resolved among inmates without involving authorities. Mr. Marriott said that the prison culture demands that inmates align themselves in support of one another. He told Dr. Neilson that he was "not a rat" or an informer and said that when faced with a choice of supporting inmates or supporting guards, even when a fellow inmate is at risk of serious harm or death, he would always side with inmates. Mr. Marriott said that notwithstanding his involvement with multiple fights in jail, he does not have any "issues" with anyone, and if he does have "incompatibles", he does not know who they are. Mr. Marriott acknowledged that he has been involved in institutional protests that have become violent. He said that "It's a jail protest. Everybody has to participate" and "Basically, you're a team. You don't line up with guards; you line up with inmates".

[97] Those institutional norms of behaviour, informally referred to as a code, are not dissimilar to the attitudes endorsed by those involved in criminal behaviour. One does not "rat" at any cost or at least is not seen to "rat". One has to remain loyal to the group no matter what. Mr. Marriott explained to Dr. Gojer that he now understands that he has to leave behind some of those attitudes.

[98] If a person is called a name that is understood within the prison environment as being derogatory, the person who is called that name must respond with violence or he is seen as having lost respect or status. That may cause him to be ostracized or bullied by others.

[99] While in prison Mr. Marriott has been involved with incidents that have resulted in criminal convictions. The first two were soon after his arrest and involved getting drugs into correctional facilities or conspiring to do that.

[100] Later, on February 4, 2004, while at the Special Handling Unit in Saint-Anne-des-Plaines, Mr. Marriott was involved in a group assault with 4 other inmates. Mr. Marriott said that he had been transferred to the Special Handling Unit and was tense and "on edge". He told Dr. Neilson that there were two groups on the range, and he associated with one of them. He reported that for self protection he made a knife from a piece of furniture. Mr. Marriott's group was seen attacking the other group and he supported his group when the fight broke out. He said, "You can't stay neutral unless you want to go into protective custody." BJ Marriott was seen assaulting Shane Wilson, with a homemade knife or shank. He was seen stabbing Mr. Wilson on the hand and on the leg. There was no reason given for why the assault took place. The incident stopped when guards intervened and asked them to stop and the whole thing took about a minute. Mr. Wilson was taken to hospital the next day but had no major wounds. Mr. Wilson did not want to proceed with charges and did not want to cooperate with the police. Mr. Marriott pleaded guilty to assault with a weapon and assault causing bodily harm. He was sentenced to 2 years, consecutive to the sentence he was already serving.

[101] On March 20, 2006, while at the Donnacona Institution BJ Marriott struck a correctional officer in the face with a mop during a dispute about cleaning his cell. He was convicted of assault with a weapon and sentenced to 4 months consecutive to the sentence he was then serving.

[102] If only criminal convictions were considered in assessing Mr. Marriott's 16 years in federal prisons, the situation would be if not uneventful, then at least not surprising. Soon after his arrival he was involved in the prison package drug trafficking incident and in the conspiracy, also involved bringing drugs into an institution. He then had the stabbing incident at the SHU and the mop incident at Donnacona. That does not present a fair or accurate picture of BJ Marriott's time in custody. Incidents that were directly observed by correctional officers and recorded for disciplinary purposes should be considered. It is not fair to consider unproven alleged events taken from reports based on rumour, inuendo or unconfirmed confidential reports, within the institutions. In order to maintain control within the environment of a federal penitentiary, the authorities must be able to get information from inmates who are willing to make reports on a confidential basis.

An inmate who comes forward and openly reports an incident to correctional officers, marks themselves as a rat within prison culture. They put their own safety at risk. The authorities must be able to act on that kind of intelligence. The extent to which it can be used to assess the behaviour of the subject of those reports, for purposes of a dangerous offender application is a different matter. The consequences of using those kinds of reports to substantiate a pattern of violent behaviour is too great to permit that use.

[103] On July 9, 2002, an Assessment for Decision form was completed at the Regional Reception Centre at the Springhill Institution. The Regional Reception Centre is where inmates are assessed for security placement within the system. Mr. Marriott arrived having been sentenced to a term of 2 years and 6 months. His placement was assessed as maximum security. The report notes that on arrival at the Regional Reception Centre on June 21, 2002, there were concerns about Mr. Marriott's influence on other offenders. He was first placed in a cell facing the inside recreation yard but because of the significant amount of traffic between his cell window and the yard he had to be moved. On June 30 "reliable information" was received that he had been involved in an altercation with another inmate in the General Population. The information indicated that the fight related to a street debt. Then, on July 5, 2002, when offenders in the Regional Reception Centre were being escorted from the dining hall to the unit, BJ Marriott got into a fight with another offender. The other person appeared to have been the instigator, but both participated in the fight. Following the incident staff members overheard Mr. Marriott's associates verbally intimidating the other offender. That person was then placed in segregation for his own safety.

[104] On July 8, 2002, intelligence received what was believed to have been reliable information that BJ Marriott and his associates were intimidating smaller and quieter offenders. The intelligence indicated that the fight that had occurred earlier was a result of that intimation. The intelligence was that Mr. Marriott and his associates had been intimidating the other offender for the past three weeks and on the date of the confrontation Mr. Marriott and "his followers" threw 3 apples at the other offender. That person then challenged Mr. Marriott.

[105] The report indicates that intelligence revealed that the "laundry man" quit after being assaulted by one of Mr. Marriott's associates and it was also "suspected" that the group was the cause of 2 other inmates seeking protective custody. It was determined that because of Mr. Marriott's ability to influence others presented an undue risk to the good order of the Springhill Institution. He

could not be managed even if placed in a Segregation Unit. He was sent to the Atlantic Institution in Renous.

[106] That information might be properly used internally within the Correctional Services Canada, but it is not sufficiently reliable to be used in making any assessment about a pattern of violent behaviour in the context of a dangerous offender application.

[107] Mr. Marriott arrived at the Atlantic Institution in Renous, New Brunswick, on July 9, 2002. An Institutional Transfer Decision Sheet dated December 3, 2003, notes that he had not completed any programming. He had accumulated 26 disciplinary convictions, roughly one third of which were classified as serious. There were 7 for being intoxicated, or in a condition other than normal or refusing to provide a urine sample. Another 7 were for covering up his window, delaying lock-up or count or refusing to lock-up. A further 11 were for visiting another cell, hiding in another cell, or visiting another range. One was for playing music too loudly during a formal hearing. There is no evidence in the file to substantiate those charges.

[108] That Decision Sheet records that on May 25, 2003, staff witnessed an attack on inmate Joseph Smith by BJ Marriott. Smith was surrounded by Mr. Marriott and two others. Smith was later stabbed 7 times and incurred serious internal injuries. Mr. Marriott was transferred to the Special Handling Unit at Saint-Anne-des-Plaines, Quebec on December 17, 2003. In that case, staff witnessed the event. References to assault being related to gang activity are not substantiated and will not be used. But the assault itself was witnessed.

[109] On February 28, 2004, while at the Special Handling Unit Mr. Marriott was charged with attempted murder of Shane Wilson and was convicted of assault causing bodily harm and assault with a weapon. That incident is referred to above, as one of his criminal convictions.

[110] On September 6, 2005, Mr. Marriott was at the Donnacona Institution. A Structured Casework Record, prepared by Correctional Officer Alain Rainville, and dated October 10, 2005, contains the note that on that date, at around 6:30 pm, Mr. Marriott assaulted another inmate with a hockey stick in the recreation area. Mr. Marriott told Dr. Gojer that he recalled the fight and that he did hit the other inmate with his hockey stick and the other inmate hit him. As Mr. Gorham has suggested, it might have been slashing or cross-checking but was not a crime.

[111] A Security Reclassification Scale was completed on March 29, 2007, when Mr. Marriott was at Donnacona. It notes that on March 15, 2006, Mr. Marriott was "implicated" with other inmates in a fight in the gym. The next day shanks were found in the gym. Correctional officers who observed the situation provided written statements, in French. They observed Mr. Marriott joining one of the groups in the fight and giving high fives afterward.

[112] A few days later, On March 20, 2006, Mr. Marriott shoved a mop at a correctional officer. That resulted in criminal charges and convictions referred to above.

[113] At around that same time, in March 2008, Mr. Marriott was identified as being involved in an assault where he was said to have ordered an assault against another offender resulting in the offender being stabbed approximately 30 times. He was placed in segregation. The Final Decision of the Regional Segregation Oversight Manager, Micheline Beaubien, is dated May 30, 2008. It notes that the information confirmed Mr. Marriott's statement that he was not present when the assault took place. But the finding was that he had "ordered" the assault. Once again, there is no evidence to substantiate the incident and it will not be used.

[114] On April 24, 2008, also at the Donnacona Institution Mr. Marriott was said to have been the instigator of a serious violent aggression against another inmate. The source information was that Mr. Marriott ordered the assault and that the assault took place after the person had had problems with Mr. Marriott. That information is contained in an Assessment for Decision dated May 14, 2008. No underlying evidence was provided, and the claim appears to have been based entirely on confidential source information. It will not be used for the purpose of this application.

[115] Another incident took place on July 23, 2008. Mr. Marriott was alleged to have been involved in a physical altercation with another offender on the range prior to the meal. Mr. Marriott had been in segregation since October 23, 2008. Officers said that they noticed Mr. Marriott involved in a physical altercation with another offender on a range before supper. He complied with orders to stop fighting. There is no indication of who was the aggressor and Mr. Marriott denies that it was him. The evidence supports that he was in a fight. That's all.

[116] An incident allegedly took place Mr. Marriott was involved in a physical altercation with another offender on August 20, 2008, in the common room at the Saskatchewan Penitentiary. He was identified as the aggressor by one officer

though another suggested that it was a consensual fight. One officer reported that Mr. Marriott was holding the other inmate on the ground and beating him. He said that Mr. Marriott appeared to want to continue when the officers gave commands to stop because Mr. Marriott waived his arms dismissively when the commands were given. The threat of OC spray was used to stop the situation though Mr. Marriott and the other inmate continued. He received 30 days segregation.

[117] On October 23, 2008, again at the Saskatchewan Penitentiary, Mr. Marriott was observed to have been in an altercation with another inmate, Ross, in the meal line. He walked down the range and struck the other person in the face. It is difficult to characterize that as a consensual fight.

[118] By July 21, 2009, Mr. Marriott was at the Edmonton Institution. He was involved in a fight with another inmate. The fight lasted several minutes, and both inmates refused orders from staff to stop. The incident was set out in the Involuntary Segregation Placement dated July 22, 2009. There are statements from the correctional officers who were involved, one of whom said that the inmates may have just been "horsing around." Mr. Marriott said that the event was consensual.

[119] In June 2010 Mr. Marriott was transferred to the Drumheller Institution. While there, he was not directly involved in violence. The Correctional Services Canada files indicate that security intelligence information identified Mr. Marriott and another inmate as being involved "behind the scenes" in the recruitment and controlling of two inmate stabbings that occurred at Drumheller in August and September 2010. The latter was "thought to have been" retribution for lost drugs. The files also indicate that he and his accomplices were attempting to control the drug business in the Drumheller Institution. The Assessment for Decision dated April 5, 2011, which makes reference to these matters does not provide any detail as to what the security intelligence information was or what was meant by the reference to involvement behind the scenes. That information will not be used as evidence of a pattern of violent behaviour.

[120] On September 26, 2010, BJ Marriott was transferred on an emergency basis to the Edmonton Institution. That was said to have been because of his suspected involvement in the institutional drug trade at Drumheller and initiating or attempting to initiate gang violence. The Review of Offender's Segregated Status, dated October 4, 2010, states that "due to the nature of the gang population at the Edmonton Institution you may be in danger as a consequence of those actions."

Once again there is no information as to the nature of the security information. But there are repeated references to institutional drug trade and gang violence obtained through security and intelligence. That information does not appear to have been a mere recitation or repetition of observations made earlier during Mr. Marriott's incarceration in Atlantic Canada but is based on new, but undisclosed information. In this application I am not prepared to use it for the purpose of determining a pattern of violent behaviour.

[121] On January 6, 2011, while in Edmonton, Mr. Marriott and another inmate were involved in a fight with two other inmates. An officer who witnessed the fight provided a written statement on the day of the incident.

[122] BJ Marriott was alleged to have been involved in a serious assault on another inmate in the Edmonton Institution on March 20, 2011. He was accused of having stabbed the person over 15 times. Video surveillance showed an inmate falling to the ground from Mr. Marriott's cell. Mr. Marriott was seen to be on top of the victim making stabbing motions. Mr. Marriott was seen wiping his face. Other inmates were seen wiping the floor, but blood was found Mr. Marriott's cell, on the wall and on the bed sheets. Mr. Marriott was referred for transfer to the SHU. That incident was reported to have caused mass instability within the unit and a rift between the existing gangs in the unit. Once again, Mr. Marriott's alleged gang involvement has not been proven. But this incident was witnessed and has been proven.

[123] Mr. Marriott was transferred to the Special Handling Unit on May 20, 2011. On June 13, 2011, he was seen involved in a fight with other inmates. Gas cannisters had to be deployed to stop the fight.

[124] On January 2012 officers in the Special Handling Unit found "foam hands" typically used in combat sports, and a razor hidden in an eraser in Mr. Marriott's cell.

[125] On April 10, 2012, in the Special Handling Unit, Mr. Marriott was again involved in an assault with another inmate. He was identified as the instigator. A third inmate intervened, and the fight stopped. Mr. Marriott was placed in segregation when he refused to go back into general population. In a segregation review, he claimed that he was engaging in "horse play" and the fight was therefore not serious. Correctional staff did not share this view, based on their review of the video and the sense of the "range dynamics".

[126] October 6, 2012, again at the Special Handling Unit, Mr. Marriott assaulted another inmate. He was seen by a correctional officer punching the other person in the head, then later kicking him in the head. He was told to move away from the victim, and he complied with that direction.

[127] He was transferred to the Edmonton Institution and on October 6, 2013, Mr. Marriott was identified as one of the those involved in a unit disturbance that went on for several days. It involved disrespectful behaviour, threats to "shit bomb" the range, throwing food, and yelling obscenities. It was determined through security intelligence that Mr. Marriott was a leader in this disturbance. There is no information as to what that security intelligence information was or what the source of it was. That incident will not be used as proof of any pattern.

[128] On November 30, 2013, at the Edmonton Institution BJ Marriott was involved in an armed assault involving weapons. Mr. Marriott and 12 other inmates from his unit were on their way to the gym. On their way they encountered another group who were members of the security threat group known as the Alberta Warriors. A fight broke out. Correctional officers who witnessed the event described Mr. Marriott as one of the aggressors who was armed with a prison made weapon. Mr. Marriott was placed in segregation.

[129] On November 9, 2014, at the Donnacona Institution BJ Marriott and another inmate attacked a third inmate in a corridor while returning from chapel. The victim was punched and kicked in the head numerous times. Officers yelled at Mr. Marriott to stop the fight.

[130] Mr. Marriott was transferred to the to Kent Institution in February 2015. He was told that he would be placed into Kent's open Protective Custody population. Mr. Marriott refused to integrate into the open population and threatened to harm others. He was placed into segregation.

[131] On May 15, 2015, at the Kent Institution, BJ Marriott was identified as instigator in a fist fight with another inmate. Correctional officers had to use pepper spray and physical handling to separate them. In a segregation review, Mr. Marriott said that the issue with the other inmate was 'over'. He was asking to be returned to the unit. In the Review of Offender's Segregated Status Fifth Working Day Review documents, Robbi Sandu, the warden of the institution notes that Mr. Marriott's attitude and behaviour demonstrated a strong loyalty to the 'con code' and his lack of forthright answers made it difficult to fully assess the situation. The reports of the incidents refer to the other inmate in the fight as a member of

"another gang". Mr. Marriott has adamantly denied any involvement with any gang and again, no use can be made of suggestions that Mr. Marriott has any gang involvement.

[132] While in the Edmonton Institution on March 2, 2016, Mr. Marriott was seen barricading his cell door using his mattress. He physically resisted while attempts were made to observe him for purpose of the inmate count. An emergency response team was sent to the unit. Physical handling and gas were required, and he was moved to another unit.

[133] On June 13, 2016, at the Edmonton Institution Mr. Marriott was observed to have been agitated and aggressive. He refused to lock up as ordered. He threw a container of tuna salad at two correctional officers, striking both.

[134] There are no incidents recorded from June 13, 2016 until August 27, 2019. It must be noted that Mr. Marriott was released at the expiry of his warrant in October 2016 and remained out of custody until he was picked up on the homicide warrant, in the summer of 2019. While at the North Nova Scotia Correctional Facility Mr. Marriott and another inmate had to be moved to Close Confinement Unit (CCU). Mr. Marriott stated that he would not go willingly and would put up a fight. An intervention team had to become involved. Mr. Marriott refused to place his hands through the cell door slot to have handcuffs placed on him. He was directed to do that, three times. Pepper spray was used, and the cell doors opened to allow the intervention teams to enter the cell as a group. Then Mr. Marriott cooperated with being handcuffed, shackled, and escorted to the CCU.

[135] On September 9, 2019, again at the North Nova Scotia Correctional Facility Mr. Marriott expressed his frustrated with being housed in the CCU. He said that he had been patient with the facility to that point but threatened that he would assault correctional officers if that was required. He said that he could make one phone call to cause a major disturbance within the facility if he was not released from the CCU following a habeas corpus hearing. His phone privileges were suspended.

[136] On January 23, 2020, at the North Nova Scotia Correctional Facility BJ Marriott was involved in a physical altercation. In surveillance video, an inmate could be seen hanging a sheet across his cell door. Shortly after that Mr. Marriott and another inmate entered the cell and a fight took place. Mr. Marriott was seen raising his hand to strike the victim. Both inmates then left the cell. The other person had a cut and swelling above his eye.

[137] On November 6, 2021, while at the Cape Breton Correctional Facility, Mr. Marriott as involved in an incident in which he physically blocked officers from stopping a fight that was taking place in a cell. That incident can be seen on video.

[138] Mr. Marriott assaulted another inmate at the Cape Breton Correctional Facility on January 25, 2022. That incident was recorded on video.

[139] On June 26, 2022, Mr. Marriott was involved in another incident at the Central Nova Scotia Correctional Facility. Inmates were fighting inside their cells and Mr. Marriott, among others, confronted staff who arrived to intervene and prevented them from stopping the fighting.

[140] BJ Marriott went into the federal prison system when he was 19. He is now 41. Before he was 19, there are some things known about his life. His turbulent family history and school years, and his early involvement with crime and drugs paint a picture of a troubled child who became a teenager with antisocial and criminal attitudes and values. Once he enters the federal system however, there are reports, assessments and forms detailing his attitudes and the impressions of those involved in his incarceration. They are necessarily bureaucratic. They are prepared for a purpose within the penal system.

[141] There is not much to report on the daily routine life of an inmate.

[142] BJ Marriott must have been doing something else beyond getting into trouble and spending time in segregation. While there are limited opportunities for inmates within institutions to make constructive use of their time, there are some. In that environment it is hard to imagine that friendships grow naturally. Finding a trusted, long-term friend in prison may perhaps be a difficult proposition. There are opportunities for educational upgrading and courses that can be taken. Those may help to alleviate the stultifying boredom of being confined for long periods of time with the same people, in the same place and subject to the same routine.

[143] Over the course of his lengthy federal incarceration Mr. Marriott was not able to complete any programs focused on reducing his propensity for violence. Several programs were recommended for him to attend to address the risk factors that were identified on his correctional plan. Some of those were: Alternatives, Associates and Attitudes; National Substance Abuse Program; High Intensity Violence Prevention Program; Anger Management; Cognitive Life Skills; Counter Point; Multi-target High Intensity. He did not take any of them. Mr. Marriott says

that really is not his fault. He was moved around. He spent a lot of his time in segregation where programming was not available.

[144] Dr. Neilson noted that it appeared that programs were mostly available to Mr. Marriott, including when he was in the Special Handling Units but times he simply refused to attend. At other times he was could not take the programs because they were offered in French. He asked to be transferred with the stated aim of enabling him to attend programs in English. Those requests were denied due to "security concerns". At other times, he was "waitlisted" for programs but then was transferred to other institutions before the programs could be delivered.

[145] The fact is, that regardless of the reasons for it, BJ Marriott did not take programming while in the federal system for more than 16 years. Some of that may have been the availability of programming. Some may have been because of his time in segregation or security issues involving him. Some of it may have been his own low motivation. Dr. Neilson noted that the files suggest that Mr. Marriott's drive to attend programs had a manipulative/self-serving quality at times, with little genuine intent. In 2010 he was voluntarily transferred to the Drumheller (Medium Security) Institution where risk-related programming was available. But even though he claimed that he planned to address his risk factors while in a medium security institution, he became less motived once there. In 2013, he was referred for detention and claimed that he was motivated to complete the high intensity Violence Prevention Program to enhance his chances of being released before his warrant expiry. But he subsequently did not complete this program.

[146] While in Cape Breton Mr. Marriott has focused on getting programming. He completed Respectful Relationships (April 2021), Substance Abuse Management (October 2021), and Options to Anger (November 2020). He completed a course on Mi'kmaw history and culture. Those are all low intensity programs. They do not have formal evaluation criteria.

[147] Inmates have some opportunity to work while incarcerated. BJ Marriott was employed as a range cleaner, range representative, and food server. The Correctional Services Canada files confirmed that he had been employed as Unit General Worker; Social Development Position; Sports and Leisure Activities Attendant; Bio-Hazard Cleaner; Wing Cleaner; Peer Mediator; and Unit Representative. There are no performance evaluations from his time in those positions.

[148] It may safely be said that Mr. Marriott's time while incarcerated federally was not productively spent. There may be a constellation of reasons for that. His behaviour was problematic. That resulted in transfers to high security facilities and spending time in segregation. That limited the scope of what he was able to do in terms of education, training, and counselling.

[149] There are frequent references in the files to Mr. Marriott's alleged gang membership or gang involvement. That did not arise from one assertion early on that was simply repeated over the years. There have been several reports from security and intelligence within the Correctional Services Canada that Mr. Marriott was the instigator of violence and particularly violence between security threat groups, or that he had taken a leadership role in violence or otherwise disruptive events. There is no information about the nature of the information received and how it led to the conclusions that have been reached. For purposes of this application, as I have repeatedly said, it would not be fair to consider the alleged gang membership as a factor in assessing BJ Marriott.

Part XXIV *Criminal Code*

[150] The dangerous offender provisions set out in Part XXIV of the *Criminal Code* allow for the regular sentencing process to be displaced for those who have been convicted of certain offences and who are so dangerous that the ordinary sentencing process should not apply. To protect the public from their risk to reoffend certain offenders can be designated as "dangerous offenders" and potentially incarcerated indefinitely.

[151] The origins of the Canadian legislation are found in the 1908 *Prevention of Crime Act* from the United Kingdom. In 1947 the Canadian government amended the *Criminal Code* to include provisions relating to habitual criminals. The *Code* was amended again in 1960 and 1977, when the dangerous offender provisions were enacted.

[152] When the *Charter* came into force in 1982 the regime was examined for its compliance. In *R. v. Lyons*, [1987] S.C.J. No. 62, the Supreme Court held that the provisions did not violate the principles of fundamental justice. Justice La Forest said that the relative importance of the objectives of rehabilitation, deterrence, and retribution are "greatly attenuated" and that of prevention is correspondingly increased (para. 27). The group to whom the legislation applied was noted as being limited. The Supreme Court again considered the dangerous offender regime in *R. v. Jones*, [1994] 2 S.C.R. 229. That case dealt with the admissibility of psychiatric

observations during the hearing. The Court found that because the evidence was not being used to incriminate the accused it was admissible. The court stressed the importance of allowing the greatest possible range of information to be available to a judge to allow for an accurate assessment about the danger posed by the offender.

[153] The next significant change came in 1997. At that time the dangerous offender provisions were transferred to Part XXIV, where they are to be found today. The amendments created the new designation of long-term offender. That allowed the sentencing judge to impose a sentence that was less restrictive than an indeterminate one. The designation was for those who required a longer period of supervision following a determinate sentence.

[154] Finally, in 2008 Parliament passed the *Tackling Violent Crime Act*. The legislation removed a judge's discretion not to make the dangerous offender designation where the offender fits the definition. Judicial discretion is now limited to determining whether a sentence other than an indeterminate sentence should be imposed if certain criteria are satisfied. Judicial discretion has been shifted to the sentencing stage. There are now three possible sentences to be considered once an offender has been designated a dangerous offender. Those are an indeterminate sentence; a determinate or fixed term sentence followed by a long-term supervision order; and a determinate or fixed term sentence.

[155] The amendments "have made the dangerous offender designation and an indeterminate sentence more easily available." *R. v. Paxton*, 2013 ABQB 750, para. 25. Parliament intended the provisions to have a wider scope. The group is still a small one. Not everyone who is a danger to the public is a dangerous offender. dangerous offender legislation is designed to target “those clustered at or near the extreme end”. It is not intended to be a process of general application. It is one of “rather of exacting selection”, *R. v. Neve*, 1999 ABCA 206, para. 59.

[156] The 2008 legislation provided for an increase in the list of predicate offences. It set an indeterminate sentence as a starting point in the consideration of sentences for dangerous offenders. And it increased the risk standard from “reasonable possibility of eventual control” to the new standard of “reasonable expectation” that a lesser measure than indeterminate custody would adequately protect the public. *R. v. Paxton*, *R. v. Boutilier*, 2017 SCC 64.

[157] In order to proceed with a dangerous offender application, the Crown must meet 5 conditions. There is no dispute that those have been met in this case.

1. The accused must have been convicted of a serious personal injury offence as defined in s. 752(a) or (b), or both;
2. The Crown must have sought and obtained a remand for assessment pursuant to s. 752.1(1);
3. An assessment report must have been filed with the court pursuant to s. 752.1(2) or (3);
4. The Attorney General's consent to the application must have been obtained, pursuant to s. 754(1)(a); and,
5. A written Notice of Application must have been filed with the court and provided to Defence counsel at least 7 days before the hearing, pursuant to s. 754(1)(b) and (c).

[158] The application proceeds by two stages. The first is the determination of whether the person should be designated as a dangerous offender. If that designation is not made the court may consider whether the person should be designated as a long-term offender, or may impose the sentence appropriate for the predicate offence. If the person is designated as a dangerous offender the court must determine the appropriate penalty. Designation and sentencing are separate stages though evidence from the designation phase will be considered in sentencing.

Designation Stage

[159] The statutory criteria for the designation are outlined in s. 753 of the *Criminal Code*. The Crown is relying on s. 753(1)(a)(i) and (ii) of the *Code*.

> 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 described in paragraph (a) of the definition of that expression in section 752 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,

> (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…

[160] The Supreme Court in *Boutilier*, at para. 26, referencing Justice La Forest's comments in *Lyons*, set out the four essential elements that the Crown must prove beyond a reasonable doubt to have a person designated as a dangerous offender:

> 1. The offender must have been convicted of a "serious personal injury offence" as defined in s. 752;
> 2. That offence, referred to as the predicate offence, must be part of a broader pattern of violence;
> 3. There must be a high likelihood of harmful recidivism; and,
> 4. The violent conduct must be proven to be "intractable" which means the behaviour is such that the offender is unable to surmount.

[161] Mr. Marriott was convicted of aggravated assault in the assault on Stephen Anderson at the Central Nova Scotia Correctional Centre. That is a serious personal injury offence as set out in s. 752.

[162] The aggravated assault, the predicate offence, must be proven to be part of a broader pattern of violence, either a pattern of repetitive violence or a pattern of persistent aggressive behaviour. The various convictions and other past conduct must fit together to form that pattern. It is not enough to recite acts of violent behaviour. They must form a pattern. The court must identify the offences, proven beyond a reasonable doubt, that form that pattern.

[163] In *R. v. Neve*, 1999 ABCA 206, the Alberta Court of Appeal discussed the issue of "patterns of behaviour" for dangerous offender proceedings. There are generally three types of evidence that can be considered for the pattern analysis under s. 753. Those are the offender's past criminal acts and criminal record, extrinsic evidence relevant to those past acts and the circumstances surrounding them and psychiatric reports and opinions about that conduct.

[164] At para. 127, the Court stressed that the pattern analysis is about actual conduct.

> In assessing what is relevant and to what issue, one must keep in mind that the standard or measure to be used in determining whether an offender is a threat, and

> thus capable of being designated a dangerous offender, begins with" pattern of behaviour". While psychiatric and character evidence may be admissible, and while such evidence may be used to explain, for example, why the offences make a pattern, they are not the standard or measure. Actual behaviour is. Thus, they cannot be used to create the pattern in the absence of actual conduct. We concede that there may be a fine line between creating a pattern and explaining it. But nevertheless, there is a line. It is there for a reason, one that is integral to the operation of the dangerous offender provisions. That reason is to ensure that any determination of an offender's future danger is firmly anchored in the pattern of past behaviour (and opinions based on that pattern) and not on an assessment of the person or his or her character generally. If the court were able to find a threat without the necessary finding that the required pattern of conduct had been proven, this would effectively mean that evidence which is not allowed in at the pattern stage could find its way in through the back door. In other words, the threat must rest on the concrete foundation of past behaviour. Put simply, no pattern, no threat.

[165] A court must set out clearly the past behaviour that firmly anchors any determination of a pattern of behaviour. The threat cannot be general. It must rest on what the Alberta Court of Appeal called a “concrete foundation of past behaviour”. And, once again, no pattern, no threat.

[166] In that case the Court emphasized that the focus is on “actions, not thoughts”. It is not an inquiry into the thoughts, feelings and actions of the offender throughout their whole life. It is an assessment of the acts that may be an element of the pattern of conduct. The motives behind the actions, and their context may explain the conduct and whether it fits within a pattern, but the thoughts of an offender, absent any causal connection to his or her actions, cannot be loaded onto the pattern scale. “The dangerous offender legislation is designed to capture dangerous offenders, not dangerous thinkers” (para. 131).

[167] Section 753(1) in referring to pattern sets out that there must be repetitive behaviour, of which the predicate offence was a part. There must have been a failure to restrain the behaviour in the past. And there must be a likelihood that the same behaviour in the future will not be restrained and will cause death or injury. A pattern does not mean a series of identical or near identical events. There must be common elements or similarities.

[168] The British Columbia Court of Appeal addressed the issue of patterns in *R. v. Dow*, 1999 BCCA 177, at para. 25:

> I add that the very essence of a pattern that there be a number of significant relevant similarities between each example of the pattern that is being considered, but that, at the same time, there may be differences between each example, some of them quite distinctive, so long as the differences leave the key significant relevant elements of the pattern in place. That is, after all, what is meant by a pattern. We talk of a pattern in dress-making. That means that each example is assembled from pieces that are cut in the same proportions and that fact, in itself, is what constitutes the common element of the pattern. But the size of the pieces and of the assembled item of clothing, the fabric of which they are made, and the colour of the item of clothing may all be different without affecting the identity of the pattern. The same is true of patterns of decorative tiles, and of many other items. The aspects of the object which are relevant to a description of the pattern must all be similar in their essential characteristics. But other aspects of the items, which are not essential to a description of the relevant pattern itself, may be markedly different from one example to another.

[169] In assessing whether there has been a pattern of violence of which the predicate offence is a part it is not necessary that the seriousness of the offences be the same. In *R. v. Shea*, 2017 NSCA 43, Bourgeois J.A. referred to the comments of then Justice Karakatsanis in *R. v. Tremblay*, 2010 ONSC 486. In that case the court said that there is no requirement that past conduct involve objectively serious offences, offences that are more or less serious, or even that the offences be personal injury offences. “Even two incidents with similarities are sufficient to form a pattern”, *Tremblay*, at para. 97. To determine whether there is a pattern a judge can consider what type of conduct was involved, who generally, the victims were and what motivated the offender to commit the offences.

[170] The Crown must establish beyond a reasonable doubt that there is a high likelihood, but not a certainty or a probability, that the offender will inflict injury or severe psychological damage by failing to restrain their behaviour in the future. In coming to that conclusion, the court can consider the past behaviour and expert opinion.

[171] So, as in *Shea*, there is no requirement that the offences forming a pattern in BJ Marriott’s case, be offences of aggravated assault or that they be as serious as an aggravated assault.

[172] In *Shea*, the application judge, Judge Derrick, as she then was, considered the “dog eat dog” world of correctional institutions. Context must be considered when assessing whether there has been a pattern of violence. The context may be the common thread, to use Bourgeois J.A.’s phrase, that weaves a series of behaviours into a pattern. In that case the concern was that the application judge

used the context to assess the moral blameworthiness of Mr. Shea's atrocious conduct within the institutions.

> With respect, the application judge's contextual approach was erroneous. On its face, s. 753(1) does not require the injection of "context" as used by the application judge into the determination of what behaviours may or may not properly fall within "a pattern of repetitive behaviour" or "a pattern of persistent aggressive behaviour."
>
> There are many "contexts" in which problematic (and sometimes criminal) behaviour is common -- with youthful offenders; with those living in poverty; with those suffering from addiction or other mental health difficulties; and with those in historically marginalized groups, to name but a few. The dangerous offender caselaw is replete with pattern analysis which finds as part of a "pattern of behaviour" youthful conduct, behaviour under the influence of drugs or alcohol, behaviour prompted by the effects of poverty and behaviour while incarcerated. Other than *Neve*, I have been unable to find any clear support for the use of the circumstances surrounding behaviour as a means of excluding it from a pattern analysis. These "contexts" may be explanations for criminal choices, but they are not justifications or legal excuses. (paras. 132-133)

[173] That is the law in Nova Scotia. It is the law that I must apply. Mr. Marriott's institutional record is, like Mr. Shea's, atrocious. His behaviour whilst incarcerated was of course, in part, a function of the environment into which he had been placed. But that behaviour can still form part of the pattern. But that does not mean that context does not matter at all. Context must be considered in assessing pattern but conduct in jail cannot be excluded from the pattern because it occurred in jail.

[174] There are two kinds of patterns. The first, under s. 753(1)(a)(i), is a pattern of repetitive behaviour, showing a failure to restrain behaviour. The second, under s. 753(1)(a)(ii) is a pattern of persistent behaviour, showing a substantial degree of indifference respecting the reasonably foreseeable consequences to other people of that behaviour. They are not the same thing. Repetitive behaviour and persistent behaviour are not the same.

[175] In *R. v. Tynes*, 2022 ONCA 866, the Ontario Court of Appeal emphasized that s. 753(1)(a)(i), dealing with repetitive behaviour, is based in part on similarity in the offender's behaviour. It is not based only on the number of offences. The pattern requirement is rooted in elements of similarity in the person's behaviour. *R. v. Langevin* (1984), 11 C.C.C. (3d) 336 (Ont. C.A.), at pp. 348-349. Similarities can be found not only in the types of offences but in the degree of violence or aggression. *R. v. Szostak*, 2014 ONCA 15, at para. 33. The court in *Tynes* noted

that where there are numerous incidents in the pattern, fewer similarities between the incidents are required. *Tynes*, at para. 67, *R. v. Hogg*, 2011 ONCA 840, at para. 39, *R. v. Jones*, [1993] O.J. No. 1321, at p. 3 (Ont. C.A.).

[176] In *Tynes*, at para. 70, the Court said that persistent behaviour does not require similarities between the predicate offence and past offences. The past behavior must be "persistent" and coupled with indifference and intractability. Persistence refers to the subsistence of the behaviour over a long period of time and the main predictive element is the person's indifference to the harm to others caused by their conduct. That indifference is considered by examining the attitude of the person before, during and after the events to identify whether they are conscious and aware of the harm to others.

[177] In *R. v. Kopas*, 2006 CarswellOnt 10063, at para. 29, Justice Sutherland of the Ontario Court of Justice, noted that repeat offending can provide proof of a substantial degree of indifference:

> The question then is, is there evidence showing that there was a substantial degree of indifference on the part of Mr. Kopas respecting the foreseeable consequences to other persons of his behaviour. Now, Mr. Kopas has, it has been noted on a couple of occasions, expressed some remorse, and I certainly give him credit for that. However, when one looks at the pattern of his offences, again, I particularly emphasize the robberies showing on his record, it is my view that although he may occasionally express good intentions, and may occasionally state that he is resolved not to commit further offences, his behaviour shows that he does. That is, regardless of he says from time-to-time, the fact is that upon release, almost invariably he commits more robberies, and in doing this he must be indifferent to the effect on the tellers of his behaviour. Any person of even minimal intelligence would know that the effect on the tellers would be, first of all, cause fear at the time the events happened, and, secondly, to cause continuing psychological damage to them. I cannot see how Mr. Kopas cannot be aware of that since virtually any adult person would know that that is happening. Therefore, I find that there is, in his behaviour, an exhibition of a substantial degree of indifference respecting the foreseeable consequences, that is the severe psychological harm, on the tellers whom he robs.

Pattern

[178] The predicate offence is the group assault on Stephen Anderson in the Central Nova Scotia Correctional Facility on December 2, 2019. Mr. Anderson was seriously injured, and BJ Marriott pleaded guilty to aggravated assault for his part in the incident. That assault was planned and Mr. Marriott with others

facilitated the assault that was physically carried out by others. In considering whether other behaviours form part of a pattern of which the December 2, 2019 aggravated assault forms a part, it is important to set out what might be distinguishing features of that offence.

[179] Mr. Marriott was not a leader. It has already been determined that the Crown has not proved beyond a reasonable doubt that BJ Marriott had a leadership role in planning the assault or in effecting the plan. The assault was planned. It was serious. Stephen Anderson had life threatening injuries. It involved a stabbing. What stands out though, from having watched it unfold on video surveillance, is that it was a group enterprise. BJ Marriott could be seen walking purposefully, shoulder to shoulder with two others to prevent correctional officers from intervening. He played his position, as others played theirs. He made no effort to make his presence less obvious by melding into the crowd. He could be seen gesturing for others to come over to help. He confronted the officers. While he was not a leader, he was a participant who made his involvement a statement to the others about his identity within the group and his support of the norms of the inmate group. His participation in the assault was an unquestionable act of violence. His behaviour during the event was a form of what might be called performative violence. It was done before an audience or to convey a message about status, or group solidarity or adherence to a code of conduct.

[180] His other criminal behaviours should then be considered to determine whether they form part of a pattern of which the December 2, 2019 aggravated assault was also a part. That involves a consideration of the context for those behaviours and the opinions of the two experts who provided reports.

[181] From an early age, BJ Marriott has been involved in performative violence or assaults as part of or within a group. They go back to when he was only about 13 years old. On June 16, 1995, he and other youths surrounded an 18 year old. They punched him and beat him with a stick. They continued to do so when he was brought to the ground. He was convicted of assault.

[182] Less than a year later, on February 6, 1996, BJ Marriott was involved with a group of youths who harassed another young person at the King of Donair. Mr. Marriott approached the victim and sprayed what was believed to have been mace in his face. The victim ran away but was followed by Mr. Marriott and another youth who assaulted him by punching and kicking him. The victim had a broken eye socket. BJ Marriott was convicted of assault with a weapon**.**

[183] At age 18, on December 17, 2000, a taxi driver picked up Mr. Marriott, another male and three females outside of the Cheers bar on Grafton Street. While driving, the occupants of the taxi started smoking crack cocaine. The driver asked them to get out. Mr. Marriott punched the taxi driver in the back of the head. At the time Mr. Marriott was on a probation order to keep the peace and be of good behaviour. He was convicted of assault and the breach.

[184] On June 5, 2001, at around 5:30 pm, BJ Marriott, Gary Boudreau, and a female driver were in a vehicle on Herring Cove Road. They encountered four males walking across the road. The pedestrians were looking at the vehicle to see who it was. Mr. Marriott and Gary Boudreau got out of the vehicle and confronted one of the males. They asked what the pedestrians were staring at and why they were trying to act so "hard". One of them, identified by the initials CW replied that he was not staring at anything. Mr. Marriott punched CW in the face numerous times. Gary Boudreau got a baseball bat from the vehicle and struck CW. That caused him to fall to the ground. BJ Marriott continued to hit and punch the 17-year-old victim in the face. Mr. Marriott was convicted of assault and breaches.

[185] Mr. Marriott was guilty of manslaughter in the death of Parker Sparks that happened on March 8, 2002 outside the Copper Penney Tavern. Once again, BJ Marriott was part of a group. At his apartment, with Bruce Jackson, Jason Dorey he waved a handgun and said that if anyone messed with them, the others would shoot him. And when Mr. Marriott got into an altercation with Parker Sparks that is what happened to Parker Sparks.

[186] On February 20, 2004, at the Special Handling Unit in Saint-Anne-des-Plaines, Quebec, Mr. Marriott was involved in an incident that resulted in a conviction for assault with a weapon and assault causing bodily harm. Mr. Marriott, Mr. Campbell, Mr. Stark, and Mr. Cody were all detained in the special detention unit in the Ste-Anne-des-Plaines. In the morning they were going to go outdoors. Those four individuals were brought to the common room where they were waiting to go outside. In that same room there was also Shane Wilson, Mihail Howes, and Michael Lena, who were also detainees at the special detention unit. Mr. Marriott along with three others, Campbell, Stark and Cody were seen attacking Mr. Wilson, Mr. Howes, and Mr. Lena. BJ Marriott pleaded guilty to assault with a weapon and assault causing bodily harm.

[187] Each of those offences, that resulted in criminal convictions, involved assaults in which BJ Marriott participated with another person or with others

observing, as opposed to acting on his own. Each case could be seen as making a statement. Acts of violence were not carried out surreptitiously.

[188] Incidents that have not be proven in court may still form part of the pattern analysis. Rumour, innuendo, and accusations however do not form part of that analysis.

[189] In the application decision in *R. v. Shea*, 2014 NSPC 78, Judge Derrick, as she then was, dealt with the reliability of institutional records. That issue was not addressed on the appeal.

[190] Judge Derrick noted at para. 426 that the inclusion of specific incidents in the pattern analysis must be founded on proof beyond a reasonable doubt. It was not enough just to prove that an incident took place. The documentation of Mr. Shea's in-custody conduct had to satisfy the judge, beyond a reasonable doubt, that his behaviour justified including the incident in the pattern analysis. In those instances where her review of the documentation from the provincial and federal institutions left her uncertain about Mr. Shea's role, she found that the requirement had not been met. “Where there is ambiguity or only probability, there is no proof beyond a reasonable doubt.” She found that the incidents recorded as having been witnessed by correctional officers or captured on surveillance footage had been proven beyond a reasonable doubt.

[191] In BJ Marriott’s case there are multiple instances of violence within various institutions. Those in which the nature of Mr. Marriott’s involvement was not proven beyond a reasonable doubt, cannot be included in the pattern analysis.

[192] On May 25, 2003, there was an attack on inmate Joseph Smith. He was stabbed 7 times and incurred serious internal injuries. He was transferred to hospital and exploratory surgery revealed a puncture to his heart. He was then air lifted to hospital in St. John from the Miramichi Regional Hospital. The information contained in the files makes reference to Mr. Marriott’s direct involvement. There are several written statements from correctional officers. The Incident Update Report produced on May 27, 2003, notes that inmates from a unit were returning from “change over”. Three inmates from one side went to the other side. Correctional Officer Boutin, who provided a written report, asked the three inmates to leave. Two complied but a third had to be told again to move back to his own side. The barriers were opened to allow that to happen. Correctional Officer Saunders, who also provided a written report, observed BJ Marriott and two others surround another inmate on the landing. Officer Saunders saw BJ Marriott and

another inmate punching the third. Officer Augustine, who also provided a written report, said that he saw BJ Marriott punching a person whose name is redacted from the report, while others were nearby. The inmates were ordered to lock up and refused. The range barriers were barricaded open using brooms and mops. The rest of the Incident Report itself is redacted.

[193] None of the correctional officers saw anyone using a weapon during the incident. Officer Augustine found a small 2-inch blade on the landing after the incident. The evidence is that BJ Marriott, with others, surrounded an inmate on the landing and punched that person. There is not enough evidence to conclude beyond a reasonable doubt that BJ Marriott stabbed anyone. It is however another act of violence perpetrated as part of a group.

[194] A Security Reclassification Scale was completed on March 29, 2007, when Mr. Marriott was at Donnacona. It notes that on March 15, 2006, Mr. Marriott was "implicated" with other inmates in a fight in the gym. The next day shanks were found in the gym. Correctional officers who observed the situation provided written statements, in French. They observed Mr. Marriott joining one of the groups in the fight and giving high fives afterward.

[195] On January 6, 2011, while in Edmonton, Mr. Marriott and another inmate were involved with a fight with two other inmates. An officer who witnessed the fight provided a written statement on the day of the incident.

[196] BJ Marriott was involved in a serious assault on another inmate in the Edmonton Institution on March 20, 2011. The statements from the correctional officers indicate that a group of inmates appeared to be blocking camera views of a particular area. They secured the area and BJ Marriott had what were described as "visible signs" of having been in a fight. He had an abrasion on his head and neck and there was fresh blood on his cell wall and floor. The victim was stabbed over 15 times. Video surveillance showed an inmate falling to the ground from Mr. Marriott's cell. Mr. Marriott was seen to be on top of the victim making stabbing motions. Mr. Marriott was seen wiping his face. Other inmates were involved in wiping the floor. It would not be reasonable to infer that the others were not aware of what had taken place.

[197] On November 30, 2013, at the Edmonton Institution, BJ Marriott was involved in an armed assault involving weapons. Mr. Marriott and 12 other inmates from his unit were on their way to the gym. On their way they encountered another group who were members of the security threat group known as the

Alberta Warriors. A fight broke out. Correctional officers who witnessed the event described Mr. Marriott as one of the aggressors.

[198] On November 9, 2014, at the Donnacona Institution, BJ Marriott and another inmate attacked a third inmate in a corridor while returning from chapel. The victim was punched and kicked in the head numerous times. The incident was observed.

[199] On June 26, 2022, Mr. Marriott was involved in an incident at the Central Nova Scotia Correctional Facility. Inmates were fighting inside their cells and Mr. Marriott, among others, confronted staff who arrived to intervene and prevented them from stopping the fighting.

[200] The predicate offence, which was the aggravated assault on Stephen Anderson, is part of a series of incidents which are connected by a common thread. It is important that the thread relates to the nature of the violence. In Mr. Marriott's case each event involved Mr. Marriott perpetrating an act of violence as part of a group, often but not always on an individual. It was sometimes impulsive and sometimes instrumental. But what is striking is the performative nature of the violent incidents. Mr. Marriott's actions are those of a person who wants it to be known, at least by some people, that he is willing and able to engage in violence and is not willing to comply with rules that restrict violence. The violence is a statement about Mr. Marriott's adherence to his code and his values.

[201] That pattern persists across time. He was doing that as a 13 year old and he was doing that as an adult. It persists across circumstances and environments. He was doing it while in the community and continued to do it while incarcerated. There are situations in which Mr. Marriott acted on his own and not as part of a group. All the acts of violence are not part of the pattern. And Mr. Marriott acted as part of a group when he was involved in getting drugs into an institution or conspiring to do that. Those are not part of the pattern because they are not acts of violence. Some fights were consensual or might be inferred to have been consensual. Within the context of a prison those kinds of fights happen. But a fight is not consensual when it is in response to being called a name that is considered derogatory by inmates. Calling a person a name is not, as counsel suggested, consenting to a fight because everyone knows that the recipient of the remark will have to respond. Context cannot be used to excuse conduct that is otherwise criminal.

[202] The pattern is of performative violence. The violence was perpetrated with others or ostentatiously in the presence of others. The pattern is one of repetitive behaviour. It has happened numerous times. It is also persistent. It is remarkably persistent. It has continued from the time BJ Marriott was 13 years old to the time of the predicate offence in 2019 and beyond.

[203] To be part of the pattern, the incidents must be proven beyond a reasonable doubt. There are acts of violence perpetrated as part of a group, that might otherwise have been part of the pattern, but which are not because they are based on second hand reports or security intelligence. In Mr. Marriott's case the pattern, in chronological order is as follows:

- June 16, 1995: Group of youth surround victim, punch him and hit him with a stick. (Criminal Conviction)
- February 6, 1996: Group of youth surround victim at King of Donair, punched and kicked him. (Criminal Conviction)
- December 17, 2000: Assault on taxi driver, with three females and one male. (Criminal Conviction)
- June 5, 2001: BJ Marriott and Gary Boudreau assault random pedestrian. (Criminal Conviction)
- March 8, 2002: Manslaughter of Parker Sparks with Jason Dorey. (Criminal Conviction)
- May 25, 2003: BJ Marriott and two others surround inmate Joseph Smith on landing and seen punching him. (Observed)
- February 20, 2004: Assault causing bodily harm and assault with a weapon on Shane Wilson at SHU with 3 others. (Criminal Conviction)
- March 15, 2006: Part of a group involved in fight in the gym at Donnacona Institution. (Observed)
- January 6, 2011: With another inmate involved in a fight with 2 others at Edmonton Institution. (Observed)
- March 20, 2011: Stabbing at Edmonton Institution with others involved to block the cameras. (Observed)
- November 30, 2013: Group fight at Edmonton Institution. (Observed)

- November 9, 2014: Along with another inmate punching and kicking a third inmate at Donnacona. (Observed)
- December 2, 2019: Stephen Anderson group aggravated assault at CNSCF. (Criminal Conviction)
- June 26, 2022: Along with others preventing staff from intervening to stop a fight. (Observed)

[204] The expert reports filed by Dr. Gojer and Dr. Neilson provide insight into whether those events are part of a pattern.

[205] When Dr. Gojer asked Mr. Marriott about the assault on Stephen Anderson at the Central Nova Scotia Correctional Facility Mr. Marriott told him that his choices at the time were driven by "his belief in the code of the institution among inmates" (Dr. Gojer's report, p. 32). He told Dr. Gojer that he had been reacting to situations in the system with not much thought about others but about "his position as a person who has been in the system a long time, what other inmates expected of him, and over the years he has had influence over people". Dr. Gojer observed that "At the time he likely did not want to lose respect, his status and possibly being excluded or harmed by other inmates" (Dr. Gojer's report, p. 32). Mr. Marriott's comments to Dr. Gojer indicate not just a concern about being excluded or harmed if he failed to participate. They show his concern for his status as a respected inmate, who has had influence over others.

[206] Mr. Marriott told Dr. Gojer that from a very young age he started to become less respectful of authority and adopted the attitude of the environment in which he grew up. He said that everyone did the same thing, and it was just normal to him. "I recognize I took that attitude with me into the pen and up until the time of this offence" (Dr. Gojer's report, p. 33). He told Dr. Gojer that when he was released and was in Quebec, he made a bad decision to go to a bar then leave to go to Nova Scotia. "That was the defiance in me at the time. I recognize how I put myself in a situation that brought about this dangerous offender application" (Dr. Gojer's report, p. 33).

[207] Dr. Neilson reported that Mr. Marriott adopted and has maintained an antisocial and criminal value system. Dawn Bremner spoke about how, from an early age, her son was taught not to cooperate with the police. He adopted the values and attitudes that were modelled for him by his parents and other adults in their circle of criminal associates. That value system was not dissimilar to the one

endorsed by inmates within the penal system. The criminal subculture and the inmate subculture are both violent and unforgiving. Those operating within them cannot, as Mr. Marriott has observed, stay neutral. One has to endorse those values openly within the group and that is what BJ Marriott did.

[208] His other behaviours that are not part of the pattern, provide further context that informs the pattern analysis. He was involved in offences that were not group assaults but that allowed him to make a statement, through his action, to those within his group that he was an adherent of the value system, or a follower of the code. That began early. He was involved in offences with other youths, in which he tried to steal a vehicle and broke into another vehicle when he was 13. On February 19, 1996, he was in a stolen vehicle with three others involved in a high-speed chase with the police. He was still only 13.

[209] On November 27, 1996, when he was 14 he threw a rock through the windshield of a vehicle of another young person with whom he was having some kind of dispute. Mr. Marriott and two other youths were involved.

[210] On May 2, 1998, he was convicted of failure to comply with a Youth Court disposition and underaged drinking. He was 15 years old at the time. The police were called to a disturbance in front of an apartment. Presumably there were people present to have created that disturbance. BJ Marriott came out of the apartment. He was drunk and aggressive, and had a bottle of beer tucked behind his shorts. He started yelling at officers, challenging them. Once again, this was an open challenge to authority in front of others.

[211] Around the time he turned 16, Mr. Marriott was convicted of possession of drugs for the purpose of trafficking. He was found in the presence of three adults. Involvement in the trade necessarily involves developing some connections with those involved in criminal activities. It is not a solitary undertaking. It was around this time that Mr. Marriott said that he was operating drug houses and employing people to work for him. He needed a network to make that happen. Those involved with him had to know what he was doing. It was a form of status within that group.

[212] Later, when apprehended on the manslaughter of Parker Sparks, Mr. Marriott was charged and convicted of possession of drugs for the purpose of trafficking. That happened on May 2, 2002. There were at least three other people in the house and a significant amount of drugs were seized, along with guns, cash and a stolen motorcycle. Mr. Marriott said that the guns, drugs and cash were his.

Once again, this is a form of criminal activity that affords a kind of status among those who endorse antisocial attitudes.

[213] The Operation Midway conviction for possession for the purpose of trafficking related to the time when Mr. Marriott had been apprehended on the warrant. It was a sophisticated criminal undertaking involving several people aimed at getting drugs into the Springhill Institution. Even if those in the institution would not be aware that Mr. Marriott had been able to get drugs inside for his own use, the ability to do it, would affirm his status among those who worked with him on the attempt. Bruce Jackson, who provided the cocaine, according to the sentencing decision, was at all times acting under the direction of and as the agent of BJ Marriott.

[214] Then in June of 2002, while awaiting sentencing for the manslaughter and the other drug charges, he conspired to smuggle 50 grams of hashish into the institution. Once again, that involved a group of people, acting together and would serve to confirm Mr. Marriott's status within that group.

[215] While in institutions across the country Mr. Marriott is referred to as being an instigator or a leader in various activities. Like the unproven allegations of gang activity and the unproven allegations of internal drug trafficking, those will not be considered, even for the purpose of providing context. There are several events however, in which BJ Marriott was involved, that allowed him to act in front of others to confirm his adherence to antisocial values reflected in either the "inmate code" or the values endorsed by the criminal subculture. Those were not all assaults and if assaults did not involve a group. But where they took place with an audience of other inmates, they support the inference that Mr. Marriott was acting, at least in part, to confirm his status with the others. Within a correctional institution most infractions will happen in the presence of onlookers. But some of Mr. Marriott's behaviours are remarkable for their brazen challenge to authority.

[216] When in the Saskatchewan Penitentiary Mr. Marriott was involved in physical altercations with other inmates, Ross and Fattah. In one case, Mr. Marriott walked down the line and struck the person in the face. Those were done in front of a group and would serve to affirm Mr. Marriott's status and his sense of being a person who has been able to influence others.

[217] October 6, 2013, at the Edmonton Institution Mr. Marriott was identified as one of the offenders involved in a unit disturbance that went on for a period of several days.

[218] On February 18, 2015, Mr. Marriott was transferred to the Kent Institution. When he arrived, he was told that he would be placed into Kent's open Protective Custody population. He refused to integrate into the open population and threatened to harm others. He was placed into segregation.

[219] On March 2, 2016, at the Edmonton Institution Mr. Marriott was seen barricading his cell door using his mattress. He was physically resistant while officers tried to see him for count purposes. An emergency response team was sent to the unit. Physical handling and gas were required and he was moved to another unit.

[220] On June 13, 2016, in the Edmonton Institution Mr. Marriott was reported as being agitated and aggressive. He refused to lock up as ordered. He threw a container of tuna salad at two correctional officers, striking both.

[221] On August 27, 2019, in the North Nova Scotia Correctional Facility Mr. Marriott and another inmate had to be moved to Close Confinement Unit (CCU) for safety and security of the institution. Mr. Marriott stated that he would not go willingly and would put up a fight. An intervention team had to suit up and Mr. Marriott refused to cuff up through the slot, despite three verbal directions to do so. Pepper spray had to be used and the cell doors opened to allow the intervention teams to enter the cell as a group. Mr. Marriott then cooperated with being handcuffed, shackled and escorted to the CCU.

[222] Those incidents are not part of the pattern. They are not necessarily violent. They provide context within which the evidence of a pattern can be analyzed. Mr. Marriott acts in ways that serve to enhance his status within the inmate or criminal population. He shows himself, openly and notoriously, to act in disregard of the rules imposed by the authorities. His acts of violence serve that purpose.

[223] There is a pattern of both repetitive and persistent behaviour of acts of violence proven beyond a reasonable doubt. But a pattern is not enough. For repetitive behaviour the pattern must show a failure on the part of Mr. Marriott to restrain his behaviour and a likelihood of causing death or injury to others through the failure to retrain his behaviour in the future. For persistent behaviour, the pattern must show a substantial degree of indifference on Mr. Marriott's part respecting the reasonably foreseeable consequences to other people of his behaviour. That requires a consideration of context and motive.

[224] None of the acts of violence are identical. The victims are different people and they happened at different times of course. In some cases, the violence may have been instrumental, undertaken to achieve a purpose. In others, the violence may have been more impulsive, in that it was undertaken with no specific purpose in mind. In each case however, Mr. Marriott's status, if not as a leader, then as a member of the group, was involved. The reports from Dr. Neilson and Dr. Gojer each speak to his inculcation in criminal and prison culture and his adoption of those values. Participating in acts of violence to enforce those values or to be perceived as one who maintains those values is important to BJ Marriott.

[225] The pattern of repetitive behaviour must show a failure on Mr. Marriott's part to restrain his behaviour. As noted by the Court of Appeal in *Shea*, that does not mean that his behaviour could have been worse and was, because of that restraint. It refers to the failure to restrain behaviour as demonstrated by repetition (*Shea*, para. 140).

[226] The pattern of repetitive behaviour in this case, consists of 14 instances of violent behaviour. At this stage, the failure to restrain must be limited to a consideration of those instances and not the many others that are not part of the that pattern. It does not involve a consideration of those instances that may have provided context for the consideration of the pattern. The issue is whether these 14 instances, in themselves, show a failure on Mr. Marriott's part, to restrain his behaviour.

[227] They do. BJ Marriott has not been able restrain himself from acting violently, both in the community and while incarcerated. He has done that 14 times. The lack of restraint is evident from the broad range of circumstances within which these incidents have taken place, the at times severe nature of the violence, the period of time over which the violence has persisted and the diversity of victims. Mr. Marriott does not appear to be "set off" by any one thing, so that there are a variety of times when he can restrain himself but a few identified sparks that ignite the violence. His lack of restraint is broad in its range. Those considerations also indicate a pattern of persistent violent behaviour showing a substantial degree of indifference to the reasonably foreseeable consequences of his behaviour. There have been 14 instances of violent behaviour proven beyond a reasonable doubt. They range from when BJ Marriott was 13 to more recent prison assaults. The behaviour has persisted throughout his life. In several incidents the victims were seriously injured. In each case, the circumstances show that the injury

to the victim was reasonably foreseeable and engaging in that form of violence showed indifference to the harm or injury.

[228] The Crown has established that Mr. Marriott has been convicted of a serious personal injury offence, aggravated assault. That aggravated assault was part of a pattern of repetitive violence, showing a failure to restrain his behaviour. The aggravated assault was also part of a pattern of persistent violence, showing indifference to the reasonably foreseeable consequences of that violent behaviour. The Crown must also prove that there is a high likelihood of recidivism and that the violent conduct is intractable.

Recidivism

[229] These last two requirements are future oriented. As Justice La Forest explained in *Lyons*, at p. 338, it must be established that the pattern of behaviour is very likely to continue and that the pattern of conduct is either "substantially or pathologically intractable".

[230] The prospective evidence in the designation stage is concerned with assessing the future threat posed by the offender. At the penalty stage it is aimed at imposing the proper sentence to manage that threat. The past pattern must be proven and if there is no pattern there is no threat. But once the pattern has been proven it must be shown that the pattern will lead to a high likelihood of reoffence.

[231] An offender will not be designated as a dangerous offender if their treatment prospects are so compelling that the judge cannot conclude beyond a reasonable doubt that they present high likelihood to reoffend violently (*Boutilier*, para. 45). There are two prospective aspects. The high likelihood of continuing with the pattern is one. The issue of whether conduct is intractable is another.

[232] It is not enough to prove the high likelihood that the person will continue to commit crimes or even violent crimes. That high likelihood must be with respect to the pattern of violence that has been identified. But the Crown is not required to prove beyond a reasonable doubt that the person will reoffend. That is a level of prediction that could never be met. It is required to prove beyond a reasonable doubt that the pattern of violence is likely to continue. Whether that can be changed with treatment is dealt with under the issue of intractability.

[233] Even before considering the expert reports of Dr. Gojer and Dr. Neilson, it must be observed that the pattern is both repetitive and persistent over decades.

There are 14 incidents that form the pattern but those continue from when BJ Marriott was 13 years old until almost the present. The pattern is not made up of a few incidents for which the similarities are based on things that are tangential to the offences. Mr. Marriott clearly tends to become involved in violence when it serves the purpose of affirming his status within the group. And he has done that for almost his entire life to date.

[234] BJ Marriott started selling drugs as an adolescent. He was immersed in the life of crime from an early age. By 16 he was operating drug houses and by the time he was 19 he was serving a federal penitentiary sentence. Soon after going into prison, he was involved in having drugs smuggled into the institution. Those activities involved maintaining some degree of control or having some degree of status.

[235] Dr. Neilson noted that Mr. Marriott's prison misconduct reflects a persistence of antisociality. It suggests that BJ Marriott does not care about rules. Early in his life BJ Marriott adopted a set of values and attitudes that promoted his involvement in criminal activity. During 16 years of incarceration in the federal penitentiary system Mr. Marriott has not taken any programming aimed at reducing the likelihood of recidivism. He says that they were not available because he was moved frequently or was placed in segregation. But the fact is, he has not received programming to address the criminogenic factors that would lead to violent recidivism.

[236] Dr. Neilson assessed Mr. Marriott using several instruments.

[237] Dr. Neilson used the Violence Risk Assessment Guide-Revised, the "VRAG-R". That is an actuarial violence risk assessment instrument. It was designed to assess the risk of a future violent conviction for offenders who have a history of violent convictions. It is an actuarial instrument and not a predictive one. In other words, a person's score on the VRAG-R does not predict whether they will reoffend any more than the tools used by insurance companies to set rates for people in different age groups, predict whether a person will have an accident.

[238] It provides a numerical value representing the probability of a new criminal charge for a violent offence over periods of 5 years and 12 years. It places individuals in one of nine categories of ascending risk for violent recidivism.

[239] BJ Marriott received a total score of 32 using the VRAG-R. That placed him in the highest risk category for violent recidivism. The proportion of offenders

in that category who are expected to violently reoffend in 5 years is 76%. Over 12 years it is 87%. These offenders demonstrate roughly 2.85 times the recidivism rate of violent offenders in the middle of the risk distribution. The risk level posed by offenders in risk category 9 is just under three times as high as the risk posed by the 'typical' or mid-range violent offender.

[240] That does not mean that BJ Marriott is "76% likely", whatever that may mean, to violently reoffend within 5 years. It is nothing at all like that. It means only that within the group who scored in the high risk category, 76% are likely to reoffend within 5 years.

[241] Dr. Neilson used the Level of Service Inventory-Revised (LSI-R). That is a validated risk/need assessment tool. It identifies problem areas in an offender's life and predicts their risk of recidivism with any criminal offence within a year of release. It is a 54-item instrument which assesses offenders across 10 domains known to be related to an offender's likelihood of returning to prison following release. It deals with any kind of criminal activity and not just acts of violence.

[242] BJ Marriott's score placed him in the category of "high needs/ high risk level of service in secure setting or close supervision, probation maximum". He was in the 84th percentile of offenders, meaning that 16% of offenders would score higher than him.

[243] Dr. Neilson noted that offenders in that category have approximately 76% chance of recidivism/re-incarceration for any criminal offence within one year following release.

[244] Dr. Neilson also used the Violence Risk Scale. It was designed to integrate the assessment of violence risk, criminogenic need, client responsivity, and treatment changes in a single tool. It assesses a client's level of risk of violence, identifies criminogenic needs linked to violence as treatment targets. It evaluates treatment readiness for each of the treatment targets, and measures improvement or lack of improvement in the treatment targets as a result of treatment.

[245] The VRS is a structured clinical tool. It is used to ensure proper consideration of the static and dynamic factors known to be associated with violence. Static factors are those that are not changeable. For example, the age at which a person is first convicted of a criminal offence is static. It is related to violent recidivism but once it happens it does not change. A variable factor may be a person's current relationship status or highest level of education. The static

variables were identified empirically based on their predictive accuracy for violent recidivism and, the dynamic variables were identified after review of the relevant theoretical literature.

[246] BJ Marriott's score on the VRS was 64 out of a possible score of 78. That means that his overall level of risk for violence is the high risk range if no interventions are put into place to address his dynamic risk factors.

[247] Dr. Neilson noted that the risk assessments performed by Correctional Services Canada concur with her assessment. CSC have consistently rated Mr. Marriott as high risk.

[248] Dr. Neilson considered the results of the risk assessment instruments and her clinical observations of Mr. Marriott. In her opinion, BJ Marriott's baseline risk of violence over the long term is in the high range as compared to other male offenders. His risk of engaging in other types of criminal behavior such as drug-related offences or the violation of release conditions is also high.

[249] Mr. Marriott's clinical pattern of violence based on his convictions was considered by Dr. Neilson to be both instrumental violence and reactive or irritable violence. She described instrumental violence as mostly un-emotional, aimed at achieving an external goal and mostly planned to some degree. That included assaults done to intimidate others, to settle a score or retaliate, to exert power and control, or to demonstrate solidarity with criminal peers. The use of weapons she said was usually deliberate and planned. That violence appeared to be related to Mr. Marriott's criminal attitudes, criminal peers, and criminal lifestyle. Reactive or irritable violence was related to anger or frustration, mostly impulsive, and spurred by situational factors. Dr. Neilson suggested that it was difficult to place Mr. Marriott's violent behaviour within a single pattern. There are so many violent incidents that the level of diversity is hardly surprising.

[250] Dr. Gojer did not substantially disagree with Dr. Neilson's actuarial assessment that Mr. Marriott poses a high risk of future violent behaviour. He maintained however that there should be more consideration of context. He said that Mr. Marriott's "present risk status is much lower than what his actuarial risk assessment instruments indicate". He noted that was because he believed that Mr. Marriott's motivation was good, his plans were reasonable and viable, and there were supports for him in the community. He said that BJ Marriott was an intelligent man with insight into his circumstances and a good knowledge of what had to be done to avoid offending again. Dr. Gojer's view was that the offences

that took place within the prison system and "related to prison mentality" were unlikely to occur in the community. BJ Marriott is older and more mature now and recognizes that associating with people who are actively involved in crime, especially in the drug trade, are high risk factors for him. In Dr. Gojer's opinion, any finding of him being a high risk needs to be down graded to moderate risk. Risk is fluid. Moderate risk can increase with drug use and association with individuals who are offending and using drugs and alcohol. Working and support from others could see that risk drop to low. As each year passes without offending or using drugs, Dr. Gojer saw the risk as reducing.

[251] Once again however, Dr. Gojer acknowledged that Mr. Marriott's history and the actuarial risk assessments indicated that BJ Marriott was at a high risk to reoffend. He noted that the evaluation is of risk when looking at historical factors did not address dynamic factors and the capacity of Mr. Marriott to make changes. Dr. Gojer was of the view that Mr. Marriott had developed insight into his own criminal behaviour. He had matured and knew that he had to separate himself from criminal associates and the drug trade in general. He was also of the view that Mr. Marriott's behaviour in jail was in the context of prison or institutional culture. The pressure to conform to the prison code, which involves acting in solidarity with the group and perpetrating acts of violence to enforce compliance with the code, would not be present in the community, where Mr. Marriott would have other supports.

[252] His opinions were based both on what he observed and on what Mr. Marriott told him. Of course, BJ Marriott is getting older, and his risk will reduce as he continues to age. Dr. Gojer suggested that his offending, based on criminal convictions, showed a "downward trajectory" and Mr. Marriott's institutional behaviour "must be understood in the context in which it occurs".

[253] Dr. Gojer acknowledged that while there may have been a downward trajectory in terms of criminal convictions, Mr. Marriott's violent behaviour had persisted. He has continued to act violently within institutions.

[254] If violent behaviour is not mitigated by the fact that it takes place within an institution for purposes of the pattern analysis, it does not show decreasing seriousness for purposes of addressing the likelihood of recidivism. It might also be said that violence within an institution shows a willingness to commit acts of violence when under close supervision and surveillance in a highly restricted environment. It is without question that prisons are dangerous places. That does

not mean that acts of violence within them are indicative only of a response to that environment.

[255] With regard to that institutional violence, Dr. Gojer agreed that he had not seen the video evidence of the assault on Stephen Anderson. He had not seen video of Mr. Marriott's violent behaviour in the Nova Scotia provincial correctional facilities more recently. He watched them in court. He agreed that BJ Marriott had not told him about the details of those events and had minimized the nature of his involvement. To the extent that the context is based on what Mr. Marriott told Dr. Gojer, including Mr. Marriott's assurances that he now understands his situation and no longer wants to be involved in criminal activities, it must be considered in light of the evidence that Mr. Marriott was not entirely forthright with Dr. Gojer. Dr. Gojer acknowledged several times that he had not challenged Mr. Marriott about most of the information provided to him.

[256] Mr. Marriott has not taken any programming to address his risk factors. The actuarial instruments place him in a high risk group. Dr. Neilson's clinical opinion is that he is at a high risk to reoffend. Dr. Gojer's does not disagree with the results obtained from the actuarial instruments but said that context must be considered. The fact that incidents happened within a correctional institution does not mitigate their seriousness and does not reduce the likelihood of violent incidents happening in a less controlled environment. The context provided by Mr. Marriott to Dr. Gojer must be considered in light of Mr. Marriott's minimization of his involvement in offences, both to Dr. Gojer and Dr. Neilson.

[257] The Crown has proven, beyond a reasonable doubt that it is highly likely that Mr. Marriott will continue to commit acts of violence consistent with the pattern behaviour as identified.

Intractability

[258] A person may have committed acts of violence that constitute a pattern of violent behaviour showing an inability to restrain that behaviour, and it may be highly likely that they will commit other acts of violence within that pattern, yet they are not designated as a dangerous offender. The Crown must prove beyond a reasonable doubt that the person's conduct is substantially or pathologically intractable. It is not a frequently used word. A person who is stubborn or inflexible might be considered to be intractable. A person may have an intractable disposition if they are a person who is not easily managed or controlled. The Supreme Court confirmed at para. 27 of *Boutilier*, the intractable behaviour was the "behaviour

that the offender is unable to surmount". Surmount in that context means to overcome.

[259] That could be interpreted as meaning behaviour that, for that person, is impossible to change. It does not mean that. And the Crown has never been required to prove that intractability is absolute. *R. v. Amyotte,* 2005 BCCA 12, at para. 26. A pattern of conduct is intractable if it is deep-seated, but not impossible to treat, *R. v. Nadolnick*, 2013 ABPC 33, at para. 142, citing *R. v. Ackerman*, 2004 BCCA 434, at para. 9, and *R. v. Johnson*, 2001 BCCA 456, at para. 70.

> To say that an offender's conduct is intractable means, in my view, that it is stubborn or difficult to control. It does not mean that the offender is incapable of change with treatment. If it were otherwise, then I could not see any scope for the application of s. 753(4)(b) and (c) once the offender is found to be a dangerous offender. A dangerous offender is not a person for whom the law sees no hope of rehabilitation. Rather, designation as a dangerous offender requires that the protection of the public be given special consideration when imposing a sentence. (*R. v. B.A.R.,* 2011 BCSC 1313, para. 44)

[260] Behaviour can be considered intractable when there are deeply ingrained personality disorders that are resistant to change or a lack of available and appropriate treatment facilities. It may be intractable because of a poor outlook for improvement even where facilities exist or where it is not possible to estimate or predict a timeframe for improvement. Intractability can be proven when there is some, but very little, hope for treatment at some time in the future. If a person can be treated, the condition may be intractable when that treatment that will be long and difficult because the offender has more than one disorder and a limited capacity to learn. *R. v. Ominayak*, 2007 ABQB 442 (aff'd 2012 ABCA 337), at para. 209, citing *R. v. Latham*, (1987), 47 Man. R. (2d) 81 (QB); *R. v. Milne* (1982), 66 CCC (2d) 544 (BCCA); *R. v. Laboucan*, 2002 BCCA 37.

[261] In *R. v. Sohal*, 2023 BCCA 256, para. 19, the British Columbia Court of Appeal referred to *Boutilier* on the issue of assessing an offender's inability to surmount their behaviour. That involves a consideration of treatment prospects.

> Evidence of treatability that "(i) is more than mere speculative hope, and (ii) indicates that the specific offender can be treated within an ascertainable time frame" is required to meet the goal of protecting the public: *R. v. Little,* 2007 ONCA 548 at para. 42.

[262] There must be evidence that the person can be treated. That evidence must be more than hopeful speculation. And there must be evidence that the treatment can be done within an ascertainable timeframe. *R. v. Bird*, 2023 SKCA 40.

[263] The Saskatchewan Court of Appeal in *Bird*, noted at para. 59 that:

> … where the offender's past behaviour suggests that their risk for violent offending will carry into the future, a reasonable doubt about future violence or intractability must be based on evidence that permits the conclusion that the prospects for successful treatment are good enough that they can reduce or contain the offender's risk to such a degree that there is no longer a high likelihood of future violent offending (see, for example: *R. v. W.D.*, 2020 NLSC 96 at paras. 19-20, citing *R. v. Little*, 2007 ONCA 548, 225 CCC (3d) 20). A number of considerations will be relevant in determining whether the evidence permits such a conclusion, including (a) whether the offender has deeply ingrained personality disorders that are resistant to change, (b) the availability or lack of availability of appropriate treatment facilities or programs, (c) the offender's outlook for improvement where programs or facilities exist, (d) whether or not an ascertainable timeframe for improvement can be estimated or predicted, and (e) whether the delivery of the necessary treatment will be impeded because the offender has multiple disorders or a limited capacity to learn (see *R. v. Leach*, 2021 ABQB 61 at para. 91, citing *R. v. Ominayak*, 2007 ABQB 442 at para. 209, 443 AR 1, aff'd 2012 ABCA 337, 539 AR 88). I would also add that a sentencing judge must consider other contextually relevant evidence, including whether there has been a change of significance in the offender's personal circumstances or motivation that speaks directly to their likelihood of complying with treatment or their prospects for benefiting from it. In *R. v. Levac*, 2022 SKKB 215 at paras. 93-95, for example, Mitchell J. observed that evidence regarding the offender's attitude and motivation to change is highly relevant in that regard.

[264] In assessing the issue of treatability the person’s amenability to treatment, treatment avoidance, and failure to follow through with previous treatment can all be considered. *R. v. K.P.*, 2020 ONCA 534, 152 O.R. (3d) 145, at para. 13; *R. v. G.L.*, 2007 ONCA 548, 87 O.R. (3d) 683, at para. 40; *R. v. Simon*, 2008 ONCA 578, 269 O.A.C. 259, at para. 93. The amenability to treatment is particularly important where treatment may be necessary to reduce or control future dangerousness: *R. v. Gibson*, 2021 ONCA 530, 157 O.R. (3d) 597, at paras. 205-206.

[265] So, in BJ Marriott’s case, there is a high likelihood of recidivism, but the question remains as to whether his condition is intractable. And again, it is not necessary for the Crown to prove beyond a reasonable doubt that he can never be

treated. The question is whether his issues are deep-seated, so that he cannot be treated within an ascertainable timeframe to the point at which, with proper ongoing support, he no longer presents a highly likely risk to the safety of the community.

[266] BJ Marriott has been diagnosed as having antisocial personality disorder. That is a diagnosis under the Diagnostic and Statistical Manual of the American Psychiatric Association (fifth edition), the DSM 5. Dr. Gojer does not appear to have disagreed with that diagnosis and said that it arose from aggression during Mr. Marriott's teen and adult years.

[267] BJ Marriott is not a psychopath. He does not meet the designation of psychopathy. Dr. Neilson explained that psychopathy is a "clinical construct that describes certain personality characteristics". Those who score high in psychopathic traits are grandiose, arrogant, callous, dominant, superficial, and manipulative. They are short tempered, unable to form strong emotional bonds with others, and lack guilt or anxiety. These features are associated with an antisocial lifestyle that includes irresponsible and impulsive behaviour, and a tendency to ignore or violate social conventions, frequently resulting in criminal sanctions. But Mr. Marriott does not meet the test that is used to measure traits associated with psychopathy.

[268] Psychopathy is assessed using a semi-structured interview, case history information, and scoring criteria. Those criteria rate each of 20 items on a three-point scale according to the extent to which it applies to a given individual. A 'cut-off' score of 30 typically is used to determine the presence of psychopathy. Dr. Neilson said that Mr. Marriott's raw score was 26 or could be adjusted to 27.4. That would place him in the 71% so that 29% of make offenders would score higher, exhibiting more psychopathic traits. Dr. Gojer scored him lower, at 23.

[269] Dr. Neilson's opinion was that Mr. Marriott needs to work on a plan that will address identified criminogenic needs.

> Most importantly, he will need to become more self-aware and alert to the diverse range of values, beliefs, attitudes, associates, and situations that perpetuate his violence. Such a high and continuous degree of self-awareness and the need to eschew a pathological lifestyle is a challenging task for most people and will be more so for Mr. Marriott who so far does not seem to have a robust understanding of the need for wholesale change (having adopted a 'that was then, this is now' approach to future risk management). (Dr. Neilson's report, p. 41)

[270] What Dr. Neilson described as the "that was then, this is now" approach, is the fundamental difference between her opinion and that of Dr. Gojer. Dr. Neilson considered Mr. Marriott's record of behaviour, along with the testing and her clinical assessment. In order to address the risk that he presents, in her opinion, he needs to come to terms with the extent to which his anti-social, and criminal attitudes have led to violent behaviour. The attitudes he adopted as a 13 year old and maintained through his time as an adult in the community and while incarcerated for 16 years, need to be changed. Those attitudes have in part impeded his ability or willingness to accept counselling and treatment. He does not trust the prison system or the justice system and he perceives himself as a victim. So, he has never accepted counselling or programs within the federal system. Dr. Neilson noted that Mr. Marriott's motivation for counselling has throughout the Correctional Services Canada records been noted as being low.

[271] Mr. Marriott says that he never really had a chance to take programming because he was moved around so much and so frequently placed in segregation. Avoiding any programming at all over a period of 16 years of federal incarceration may in some way relate to those things, but it allows for the strong inference that confirms the assessment that Mr. Marriott's motivation was low.

[272] In Dr. Neilson's opinion Mr. Marriott's criminal values are entrenched. One might infer that from their persistence over decades, but Dr. Neilson notes an example. Mr. Marriott was released upon his warrant expiry in 2018. He had some months living in Montreal with his partner and their newborn daughter. It was a chance to start his life over. He was involved in an incident with several other men at a bar that resulted in charges being laid and his being released on bail. Those charges were dropped so no inference can be drawn from his arrest. But Mr. Marriott left Montreal in breach of his court imposed conditions. He said that he was in fear of his life. So, once again, no inferences should be drawn from that. But what Dr. Neilson notes is that Mr. Marriott got involved in the beating of Stephen Anderson, knowing that his partner and daughter were without him. Those relationships, one might expect, would serve to deter the kind of behaviour in which Mr. Marriott engaged. They did not. His adherence to the code was more robust than his desire to start a new life after 16 years in prison.

[273] Mr. Marriott says that in the prison system a person cannot stay neutral. An inmate must get involved and act in solidarity with the others. But it was clear from the video evidence of the Stephen Anderson assault that everyone on the range was not involved, or at least everyone was not involved to the extent that BJ

Marriott was. And Mr. Marriott's antisocial attitudes and values are not limited to his endorsement of the so called "inmate code". He has criminal and antisocial attitudes that have been a part of his life since adolescence.

[274] Dr. Gojer's opinion was that Mr. Marriott has matured. He no longer endorses the attitudes that resulted in years of criminal convictions and violent behaviour.

> I see Mr. Marriott as intelligent and aware of the predicament that he placed himself in. He is insightful into how the early childhood experiences led him to becoming independent at a young age, learning to care for himself and how immersion into a subculture lead to him engaging in and becoming part of the criminality that he grew up in. He is not proud of this, would like to see himself move on and not engage in a lifestyle that would drag him back into the past. He also sees how his experiences in the penitentiary allowed him to develop mistrust of authority and the institution and in spite of that he allowed himself to open up to Dr. Neilson and myself and in the recent programs that he completed. He is very much aware that he needs to change his lifestyle which he believes he can. He has enlisted with a 7-step program in Halifax and intends to be part of it as soon as possible.
>
> Mr. Marriott no longer holds any violent attitudes and said that he is able to talk himself out of most situations or walk away. He stated that there are extenuating circumstances where one has to defend oneself and given that he has no need to prove himself within or outside the institution, he will be able to walk away from potential confrontations. (Dr. Gojer's report, p. 86)

[275] Dr. Neilson notes that it will take Mr. Marriott some effort to deal with these entrenched attitudes. He has had no programming to address the issues. Dr. Gojer accepts Mr. Marriott's statement that he no longer holds those attitudes. He spoke with Mr. Marriott and appears to have accepted what he said at face value. They have gone away. Mr. Marriott told him that he understood his predicament and Dr. Gojer accepted that. Mr. Marriott said that he was aware of the need to change his lifestyle and "believes that he can". That is a hope. There is no evidence to demonstrate that BJ Marriott can change his lifestyle. Mr. Marriott told Dr. Gojer that he no longer holds violent attitudes and is able to talk himself out of most situations or is able to just walk away. That would be a newly formed attitude if it is one that Mr. Marriott has. Dr. Gojer appears to have accepted Mr. Marriott's claim, now that he is facing a dangerous offender application, that he is willing and able to change.

[276] Mr. Marriott has started taking programs while most recently in provincial custody. He has taken every program available to him. The provincial programs are "low-intensity". They are available to anyone who wants to sign up for them. They tend be shorter than the "high intensity" programming delivered within the federal system and recommended by Dr. Neilson for someone who is high risk. He took courses on Indigenous Culture and African-Nova Scotian history, as well as course on domestic violence or creative imagery. It is a good thing that Mr. Marriott has applied himself in this way. But those courses did not address his clearly identified criminogenic needs.

[277] Alcohol and drug use have been identified as issues that BJ Marriott has to deal with. He took a Substance Abuse Management program in Cape Breton but he told the person in charge of the course that he did not believe he had a substance abuse problem. He did not mention any link between alcohol and violence and did not say anything about having drug issues.

[278] Mr. Marriott did the Options to Anger Program in Cape Breton. It is a low intensity program and involved attending 2 to 3 hour classes twice a week for 2 weeks. He completed the program on November 21, 2020. Since then, he was involved in violent incidents in the Cape Breton Correctional Facility. He blocked correctional officers from intervening during a fight and on another occasion assaulted another inmate. On June 26, 2022, at the Central Nova Scotia Correctional Facility he was involved when inmates took over the wing of the jail and got drunk. They started fighting and refused to lock down. Low intensity programming is not going to deal with the deep-seated and persistent issues that face BJ Marriott.

[279] Dr. Gojer diagnosed Mr. Marriott as suffering from complex trauma. That is based on the ongoing experiences of trauma in Mr. Marriott's life, ranging from his difficult early life, deaths in the family, incarceration and extended periods of time living in segregation. It is a serious and damaging condition. Dr. Gojer contends that BJ Marriott has never received counselling or treatment for that complex trauma. He is the first doctor to offer that diagnosis. Dr. Gojer says that were Mr. Marriott to be properly treated, in the community, he could live in the community without posing a risk. He proposes that the treatment for this serious condition take place through low intensity counselling offered by a social worker.

[280] Dr. Neilson said that complex trauma is not an aspect of risk assessment instruments. Her focus was on risk assessment and risk management. Dr. Gojer's

view was that once the issue of complex trauma has been identified and treated the other issues can be better resolved.

[281] Dr. Gojer again cited Mr. Marriott's "trajectory" of violent behaviour. He said that he saw a reduction in the kind of violent behaviours that Mr. Marriott was engaging in. BJ Marriott went into prison on a manslaughter conviction. Most offences would constitute a reduction in violence after that. Dr. Gojer believed that BJ Marriott was involved early on in violent activities but the level of violence has decreased over time. He believed that his later violent incidents, based on Mr. Marriott's recounting of them, were less serious in nature. That view was considerably modified when Dr. Gojer was shown the videos of Mr. Marriott during the Stephen Anderson assault in December 2019 and video from the more recent incidents in provincial jails. Mr. Marriott's version of events, as given to Dr. Gojer amounted to a minimization. Mr. Marriott was not forthright with Dr. Gojer.

[282] Mr. Gorham offered 9 reasons why BJ Marriott's condition is not intractable.

1. The level of violence has decreased over time and Mr. Marriott has not engaged in violence "with his own hands" for some time. When the starting point is manslaughter, a decreasing violence is to be understood. But Mr. Marriott has continued to be physically violent right up to his time in the Cape Breton Correctional Centre.
2. Mr. Marriott reached out to a family friend Dave Russell at the end of his sentence. Mr. Russell had spent time in jail and turned his life around entirely. Despite that, Mr. Marriott continued to act violently when he was incarcerated again.
3. There was an occasion in which Mr. Marriott was face to face with a correctional officer and they talked through the problem. Mr. Marriott did not become violent. Intractability does not mean that a person will be violent on every occasion when the opportunity presents itself.
4. Dr. Neilson acknowledged the possibility that Mr. Marriott could be capable of change. Once again, intractability does not mean that a person is forever and always incapable of changing. There is a difference between hope and expectation.
5. Dr. Gojer did not believe that Mr. Marriott was intractable. Having been disconnected from family he needs to be around his family in a loving and supportive environment to address his complex trauma. Dr.

Gojer interviewed Mr. Marriott several times. He accepted what Mr. Marriott said at face value. He did not challenge or question Mr. Marriott when he claimed that he had changed and put the past behind him. Essentially, Dr. Gojer said that Mr. Marriott was not intractable because Mr. Marriott told him that he had already changed.

6. Mr. Marriott accepted responsibility for the predicate offence without a trial. Mr. Marriott's case was severed from the others who stood trial in two separate trials. Those trials were held on November 10-15, 2021 and September 22-29, 2021. Both decisions were rendered on November 30, 2021. Mr. Gorham, as counsel for Mr. Marriott, indicated on November 29, 2021 that he needed more time to get final instructions from Mr. Marriott as to whether the matter would be resolved or would require dates for a trial. Mr. Gorham appeared by video on December 7, 2021 and at that time provided an update that Mr. Marriott would be prepared to enter a guilty plea to the aggravated assault charge. The plea was entered on January 12, 2022. He did not enter a plea of guilt before the trials took place and indicated a willingness to enter a plea only after the decision in both cases was rendered.

7. Mr. Marriott has taken every course he could take within the provincial correctional system. That is true and should be some cause for hope. But they do not address in an intensive way the criminogenic needs that have been identified. Taking courses once a dangerous offender process as started does not make up for 16 years of federal incarceration with no programming whatsoever.

8. Mr. Marriott has a plan for his release. The plan that has been provided is for Mr. Marriott to be released immediately, on probation. The plan itself is not evidence that Mr. Marriott's condition is not intractable. And it does not deal with many of the criminogenic needs that have been identified. The plan, which involves counselling through a social worker, does not offer a promise of effective treatment within a realistic or ascertainable timeframe.

9. Mr. Marriott has not offended since the aggravated assault on Stephen Anderson. That is true in the sense that he has not been convicted of any criminal offences since that time. He has demonstrably engaged in criminal acts of violence since then. The video recordings from his time in provincial custody since that time are proof of that.

[283] The final issue in the designation phase, is the determination of whether Mr. Marriott's conduct is intractable. It is not whether treatment is forever impossible. It is not whether Mr. Marriott is without any hope at all. It is whether Mr. Marriott's circumstances are deep-seated and difficult to treat. As Dr. Neilson observed there are several criminogenic factors that require treatment. For purposes of the pattern evidence however, the relevant one is Mr. Marriott's early adoption of a criminal value system that has persisted into his adult life and led to a lifestyle of crime and violence. Maintaining power and status within that value system requires being seen as strong and willing to use violence, sometimes for no apparent reason. Mr. Marriott's statements that he has gone beyond that are not borne out by the evidence. He has continued to act in ways that amount to an outward and public statement of his conformity to those antisocial norms. Changing those attitudes will not just happen because BJ Marriott has decided that he needs to say that he has changed. They are ingrained and firmly set in place. They are part of his identity now. They define who he is to himself and to others. They are an intractable problem.

[284] Mr. Marriott was convicted of a designated offence. That offence forms part of a pattern of behaviour that shows an inability to exercise restraint. There is a high likelihood that the pattern of violence will continue. And finally, with respect to treatment, Mr. Marriott's condition is substantially intractable. Prior to the 2008 amendments the court had discretion at this stage as to whether the person should be designated a dangerous offender. That is no longer so. Once the conditions have been met, as they have here, the person must be designated as a dangerous offender. Section 753(1) no longer uses the word "may" but requires that when the conditions are met, the designation is made.

[285] Mr. Marriott is designated as a dangerous offender.

Sentencing

[286] There are three options for sentencing once a person has been designated as dangerous offender. An indeterminate sentence can be imposed. The person can be sentenced to a fixed term for the offence itself, which must be a minimum of two years, with a long-term supervision order for not more than 10 years. Or the person can be sentenced to a fixed term of imprisonment for the offence, with no long-term supervision order.

[287] The discretion that was once available at the designation stage is now applied at the sentencing stage. Section 753(4.1) of the *Criminal Code* reads:

> 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.

[288] A judge must assess whether the evidence demonstrates a "reasonable expectation" that a sentence for the offence itself, with or without a long-term supervision order, will adequately protect the public. When discretion was exercised at the designation stage the test was whether there was a reasonable possibility of control with the imposition of a sentence less than an indeterminate one. "Reasonable expectation" has been noted as providing a higher standard than reasonable possibility of control. *R. v. Racher*, para. 46.

[289] The factors to be considered are the same even though a reasonable expectation is a different standard from a reasonable possibility. *R. v. Merasty*, 2011 SKPC 109, at para. 114. A higher degree of confidence based on those factors is required.

[290] There is no presumption of an indeterminate sentence that must be rebutted by offender. Section 753(4.1) has been described as a "starting point". *R. v. Downs*, 2012 SKQB 198, at para. 4. The qualification to the starting point is that if there is a reasonable expectation that a lesser measure will protect the public, the court must impose that lesser measure. Neither party bears the onus of proof at that stage. The Crown bears the onus of proving that the person is a dangerous offender but at the sentencing stage the offender does not have an onus of proving that a lesser sentence is inappropriate. The issue before the court is whether "based on the whole of the evidence" there is a reasonable expectation that a fixed penitentiary term followed by a long-term supervision order will adequately protect the public. *R. v. Taylor*, 2012 ONSC 1025, at para. 11.

[291] In considering whether a sentence for the offence itself, in this case aggravated assault, with or without a long-term supervision order, offers a reasonable expectation for the adequate protection of the public it is important to consider what the sentence for this offence might be. The others involved in the assault of Stephen Anderson have received sentences in the range of 4 to 6 years. Those who entered the cell received sentences at the higher end of that range. Those who did not enter the cell but participated in other ways, were sentenced toward the lower end of the range. The incident happened on December 2, 2019. Mr. Marriott has been on remand for almost that entire time, or about 4 years. With

credit of 1.5 days for each day served, he would have close to 6 years of remand credit. His remaining time in penitentiary would be only the sentence beyond 6 years.

[292] A sentencing judge can impose a custodial sentence that is higher than what would be warranted in the ordinary sentencing process. That would be based on expert evidence about the amount of time that would be required for effective treatment. That sentence might depart form the range, but it is less intrusive than the imposition of an indeterminate sentence. *R. v. Spilman*, [2018] O.J. No. 3297, 2018 ONCA 551 (Ont. C.A.).

[293] In *Spilman* the Ontario Court of Appeal noted that s. 753(4.1) provides guidance on how hearing judges can properly exercise their discretion, in accordance with the applicable objectives and principles of sentencing, to impose the appropriate sentence to manage the established threat that the offender poses to society. The judge must examine the evidence to decide whether there is a reasonable expectation that determinate sentence with or without a long-term supervision order will adequately protect the public. The less restrictive sentencing options must be considered before imposing a sentence of indeterminate detention in a penitentiary.

[294] In determining the length of the determinate sentence, the judge is "not restricted to imposing a term of imprisonment that would be appropriate on conviction of the predicate offence but in the absence of a dangerous offender designation" (para. 32). After considering the statutory limits of the offence, the paramount purpose of public protection, and other principles of sentencing, the judge may determine that the sentence to be imposed should be a sentence lengthier than that appropriate outside the dangerous offender context. Protection of the public is an enhanced sentencing objective for those designated as dangerous. Proceedings under the dangerous offender provisions are different from other sentencing proceedings.

[295] Section 753(4)(a) permits sentences of indeterminate detention. Judges have more flexibility to impose a sentence that emphasizes protection of the public. The availability of an indeterminate sentence indicates that the importance of the sentencing objectives of rehabilitation, deterrence and retribution are "greatly attenuated" in cases involving dangerous offenders. If an indeterminate sentence can be justified, the Court said that it would seem logically to follow a less onerous determinate sentences that extends beyond what would be appropriate outside the

dangerous offender setting can also be justified. Section 753(4)(b) does not prevent judges from placing more focus on public safety when imposing a sentence. The requirement that the custodial component of a sentence that includes a long-term supervision order must be a minimum of two years signals a departure from the traditional sentencing principles. Conviction of a predicate "serious personal injury offence" is an essential pre-condition to designation of the offender as a dangerous offender. It is not, as it is in conventional sentencing proceedings, the offence for which the offender is being sentenced.

> The appellant is being sentenced not only as a person who committed the predicate offence, but because he is a dangerous offender, albeit a person who committed the predicate offence among other things. The different focal points of the sentencing proceedings puts paid to the claim that the length of the custodial term in a composite sentence in dangerous offender proceedings should mirror that in stand-alone proceedings for the predicate offence. To do so would be to render the dangerous offender finding redundant. (para. 37)

[296] The available sentencing options under s. 753(4)(b) and (c) should be interpreted broadly and generously. They represent the only available alternatives to ensure the protection of the public from dangerous offenders other than the most extreme form of preventive sentence that the law permits. To interpret the provisions of s. 753(4)(b) to permit the imposition of a custodial term within the sentencing options available for the predicate offence but beyond the range appropriate in the absence of a dangerous offender designation, allows the hearing judge to impose the least intrusive sentence required to achieve the primary purpose of protection for the public but reserves indeterminate sentences for those for whom no other measure will adequately protect the public.

[297] In Mr. Marriott’s case the consideration of whether there is a reasonable expectation that a determinate or fixed term sentence, with or without a long-term supervision order, would adequately protect the public, must be undertaken having regard to the potential that a fixed term sentence is not limited to the sentence that might otherwise have been imposed in the absence of a dangerous offender designation. The options are not limited to what might otherwise be a penitentiary term that has already been served so that Mr. Marriott would be released immediately into the community.

[298] There are several other factors that can be considered.

The Personality Profile of the Offender

[299] Personality disorders, like antisocial personality disorder and psychopathy can be seen as barriers to achieving control in the community. Courts have acknowledged that some personality disorders can cause "inconformity with social norms, increased aggression, impulsivity and a reckless disregard for the safety of others" that can make the person less amenable to treatment. *R. v. Nelson*, 2023 ONCA 143, at para. 31, *R. v. Judge*, 2013 CarswellOnt 15507 (S.C.J.), 2013 ONSC 6803.

[300] BJ Marriott has not been diagnosed as having any mental illness. Dr. Neilson identified him as having both antisocial personality disorder and substance abuse disorder. As Dr. Gojer pointed out one does not treat antisocial personality disorder. "Behaviour is managed" (Dr. Gojer's report, at p. 87).

[301] Mr. Marriott was scored high on the psychopathy checklist by Dr. Neilson, though she said that he does not meet the criteria for having psychopathy. He shows psychopathic traits. Dr. Gojer scored Mr. Marriott somewhat lower regarding psychopathy but did disagree with Dr. Neilson's actuarial assessment.

The Nature and Scale of the Change Needed to Manage Risk

[302] The chances of controlling risk can be related to the kind of changes that the offender must make. When "massive, wholesale changes" need to be made, and there is little of no evidence that it is realistic or likely that the person can make and sustain those changes, that is a factor in determining whether eventual control of the risk in the community can be reasonably expected. *R. v. Casemore,* 2009 SKQB 306, at para. 18.

[303] Dr. Neilson described the kind of change that is required for Mr. Marriott. It appears to be what might be called a "tall order".

[304] She said that because Mr. Marriott is a high risk offender, he requires sustained high intensity programming. Without fully participating in his correctional plan, and without the control of a facility, Dr. Neilson said that BJ Marriott's level of risk upon release would be "reasonably imminent". His anti-authority stance and his belief in being a victim of an unfair justice and correctional system has prevented him from understanding the importance of seeing 'the system' as an important part of his rehabilitation. He needs to shift his allegiance away from negative influences and antisocial associates and get past his mistrust of the justice/correctional system.

[305] Mr. Marriott needs to work with his case management team to devise a correctional plan that will target identified criminogenic needs. As Dr. Neilson said he needs to become more self-aware and alert to the wide range of values, beliefs, attitudes, associates, and situations that perpetuate his violence. That involves a "high and continuous degree of self-awareness" and the requirement to abandon a pathological lifestyle. Those are challenging things for most people. It will take a great deal of effort.

[306] Dr. Gojer's view is substantially different. He believes that for the most part those changes have been made by Mr. Marriott himself. Dr. Gojer accepts Mr. Marriott's statements that he no longer holds those values, beliefs or attitudes and that he will, on his own, and with ongoing voluntary counselling, continue to abjure those values, beliefs and attitudes. Dr. Gojer accepts that Mr. Marriott will avoid contact with his former criminal associates. It would appear that Dr. Gojer believes that Mr. Marriott now has that high and continuous degree of self-awareness of which Dr. Neilson spoke.

Genuine Motivation to Pursue Change

[307] The next issue is whether Mr. Marriott is motivated to make those changes. He says that he is. Dr. Gojer for his part, believes Mr. Marriott when he says he is ready. Dr. Neilson is more skeptical.

[308] Talking the talk is not the same as walking the walk. There must be some evidence to support a claim of high motivation to change. Looking at a person's past statements about their motivation and whether they actually did anything provides some insight into whether that motivation is real. The follow through matters. *R. v. Pilgrim*, 2008 CarswellOnt 3298, para. 214.

[309] In Dr. Neilson's opinion Mr. Marriott so far does not seem to have a "robust understanding of the need for wholesale change having adopted a 'that was then, this is now' approach to future risk management". Neilson said that while Mr. Marriott said that he is committed to change, that he is older and wanting to do something positive with his life, he has previously made similar statements about his commitment to reform only to return to previous patterns of behaviour. His history of antipathy and violence toward correctional officials raised to Dr. Neilson, concerns about the genuineness and sustainability of his motivation.

[310] Dr. Neilson was provided information about violent incidents that Mr. Marriott had been involved in during his time in provincial custody and after she

had finished her report. Some of those happened after the application for designation as a dangerous offender was filed. She reviewed video surveillance and listened to the testimony of witnesses about what had happened. Dr. Neilson said that the incidents suggest that Mr. Marriott's statements about his desire to change made to her during her interviews may not have been genuine.

The Presence or Absence of Pro-Social Supports and Skills

[311] It is important for a person to have support when they are released. That should come from people who have pro-social values. Mr. Marriott has some of that support. There are people who care about him and are ready to help him. But that would not be easy. He was diagnosed with antisocial personality disorder. It is difficult to treat and can at best be managed. There has been no real history of treatment for any of BJ Marriott's issues. His lack of education and job training would make finding employment difficult if the job he has lined up does not work out. He has little experience in working. Mr. Marriott has a job waiting for him but there are no assurances about how long that will last. BJ Marriott has a long and sustained history of relationships with those who have antisocial values. That is not the same as being a member of an organized gang. Having spent most of his adult life in prison Mr. Marriott has had limited opportunity to form relationships with people who do not have the same kinds of attitudes that has had since adolescence.

[312] Mr. Marriott's parents were involved in the drug trade. His mother told Dr. Neilson that "selling drugs was how we lived. It was normal for us." Mr. Marriott started selling as an adolescent and operating his own drug house as a young teenager. The only life he has ever known on the outside, except for 9 months in Montreal, has centred around crime. Separating himself from his former life would be a formidable task.

Court Orders

[313] One of the lesser measures that would be open to consideration as opposed to an indeterminate sentence would be a fixed term sentence with a long-term supervision order. That would require Mr. Marriott to abide by the conditions of that order. His history of compliance generally with court orders is then a factor to consider.

[314] Dr. Neilson's assessment of Mr. Marriott's history of compliance was perhaps somewhat understated. She said that his performance when on community supervision has been "really quite a bit less than stellar".

[315] Before entering the federal corrections system, Mr. Marriott had numerous convictions for failing to abide by various court orders. Once he was incarcerated of course, there was no opportunity to test his compliance with community supervision orders. When he was released at warrant expiry and went to Montreal, he was placed on a s. 810 peace bond. He breached those terms. He was taken into custody and released on bail. He breached the terms of that release.

[316] Mr. Marriott did not believe that the terms of the release on the peace bond were reasonable or fair. His breaches of that order in 2018 were a continuation of his issues with compliance.

History in Rehabilitative Measures and Programming

[317] People can only succeed with rehabilitation and programming if they approach it with some sincere sense of commitment. An offender needs to be able to identify their criminogenic needs and identify the things that have to be changed in order to avoid criminal behaviour in the future.

[318] Natalie Mintsa is an Acting Program Manager for Correctional Services Canada. She said she met with BJ Marriott in 2018 and he at that time refused to participate in programming. He refused programming in the past as well. Mr. Marriott made no progress at all on his correctional plan or programming. He completed not a single program over the course of his 16 year federal incarceration.

[319] Since going into the provincial system Mr. Marriott appears to have become an avid participant. But those programs are low intensity and for the most part are not aimed at the issues that led to his violence. Dr. Gojer notes that Mr. Marriott was involved in the following programs:

- African Heritage Month Jeopardy Program, Cape Breton Correctional Facility, February 16, 2021.
- Certificate of Achievement-Respectful Relationships, April 24, 2021 - Mike McKenzie.
- Certificate of Achievement, Substance Use Management, October 10, 2021 - Mike McKenzie.
- Certificate of Achievement, Options to Anger, Cape Breton Correctional Facility, November 21, 2020.

- DBT programming in September 2022 and addressing addictions and trauma.
- DBT again in May 2033 addressing interpersonal relationships.
- On June 3, 2023 spoke to psychotherapist, Ms. Caroline Kerjikian with respect to engaging in individual counseling by video conferencing.

[320] For some, programming works. For others, it does not. The only way to know for sure whether a person will respond to programming is to have them take the programming and see how it turns out. In Mr. Marriott's case there is no basis upon which to infer that programming will help him or not. If a person has taken courses and engaged in counselling and those things have shown positive effects, it might be inferred that if they are exposed to more, they might benefit from it. Mr. Marriott did not do any programming for 16 years. It is impossible to know how he would respond to intensive programming given that he has only done voluntary low intensity program in the provincial institutions.

Complex Trauma

[321] Dr. Gojer's opinion is that BJ Marriott is suffering from complex trauma.

> Mr. Marriott's developmental history and the extended periods of time in segregation can be understood to have a negative, harmful, and emotionally traumatic effect on him. While not presenting as suffering from a Post Traumatic Stress Disorder, his behaviors over the years can be explained on the basis of him suffering from Complex Trauma which is also known as Other Traumatic and Stressor Related Disorder. (Dr. Gojer's report, p. 83)

[322] That is the only mention of complex trauma in Dr. Gojer's report. In his testimony in court, he explained that Mr. Marriott's life had been one in which there was a series of traumas that compounded each other. In particular, the time that he has spent in segregation or closed confinement while incarcerated would build upon that trauma. If he were to be properly treated for complex trauma with an appropriate therapeutic plan the issues underlying his criminal behaviour could be addressed. No other psychiatrist or psychologist has diagnosed Mr. Marriott with complex trauma. But Dr. Gojer could be right. The problem is that there is no evidence to suggest the extent to which treatment will change BJ Marriott's behaviour. Dr. Gojer said that complex trauma may be one associated factor among Mr. Marriott's criminogenic factors. It is not clear the extent to which the

treatment of complex trauma alone is likely to address Mr. Marriott's violent behaviour.

[323] Dr. Gojer offers hope. It may be that complex trauma is the key that unlocks a series of developments that could lead to Mr. Marriott becoming a non-violent person. But it is not a ready-made solution to the problem. It will require a commitment to treatment and an ongoing willingness to sustained change on the part of Mr. Marriott.

Behaviour Pending Disposition

[324] How an offender behaves when facing a dangerous offender application is an indicator of risk. When someone knows that they are facing the potential of an indeterminate penitentiary sentence, they have a real incentive to control their behaviour.

[325] Mr. Marriott was involved in an incident in the Central Nova Scotia Correctional Facility on June 26, 2022. Multiple inmates were fighting in cells and refused to lock in. Staff entered the unit, and they were confronted by 18-20 inmates who blocked their entry. Staff were not permitted to enter the range to stop the behaviour.

[326] On January 23, 2020, Mr. Marriott assaulted another inmate in his cell. The incident was captured on video.

[327] On November 6, 2021, Mr. Marriott stopped correctional officers from intervening in a fight that was ongoing between two inmates in a cell. Mr. Marriott prevented the officers from entering the cell. That incident was captured on video.

[328] There was another incident on January 25, 2022, in which BJ Marriott assaulted another inmate. That incident was recorded on video as well.

[329] These all happened when BJ Marriott was aware that he was facing a dangerous offender application.

A Timeframe to Manage Risk

[330] The protection of the public is the "overriding purpose" of the dangerous and long-term offender regimes. The court is required to balance the liberty interests of the offender with the risk to the public if the person is released into the community. The Ontario Court of Appeal in *R. v. Little*, 2007 ONCA 548, said that

the balancing exercise is informed by the fundamental principle that in a contest between an individual offender's interest in invoking the long-term offender provisions and the protection of the public, the latter must prevail. That means that if a person requires supervision over a longer term, they must be able to show that the supervision is available in the community and that there is a timeframe within which the person can be "meaningfully treated". In that case the trial judge erred in finding that Mr. Little was a long-term offender and imposing a fixed term sentence in the absence of evidence that he could be "meaningfully treated within a definite period of time, or that the resources needed to implement the supervision conditions" were available in order to bring his risk within reasonable limits. Once it has been established that a person needs long-term supervision, there has to be some estimate as to how long that should last.

[331] In this case Dr. Neilson's opinion is that Mr. Marriott is at a high risk of reoffending. Dr. Gojer says that when context is considered, Mr. Marriott is really a moderate risk. The proposal put forward for Mr. Marriott's release appears to be premised on the understanding that BJ Marriott presents a moderate risk that can be managed immediately in the community.

[332] Mr. Gorham, as counsel for Mr. Marriott, proposes that Mr. Marriott receive a determinate or fixed term sentence followed by a period of probation. Mr. Marriott has been in custody since the assault on December 2, 2019, and has served the equivalent of more than 6 years in custody if given credit for remand time at 1.5 days for each day. A sentence of six years would exceed what is appropriate given his moral culpability and the sentences imposed on others. Mr. Marriott, he says, should be sentenced to one day for the predicate offence. That would be followed by 3 years of probation.

[333] Mr. Marriott would engage in counselling in the community to ensure that he can maintain a prosocial lifestyle. As Dr. Gojer noted, Mr. Marriott has two individuals, Dave Russell and Troy Allen, who would act as mentors and guides. Both of them have had criminal histories but they have been able to put their past behind them and are helping others who have had contact with the criminal justice system to have prosocial lives.

[334] Amy Marriott is aware of her cousin's criminal past and understands what brought him to this point in his life. She lives a prosocial life as a single mother of two young children. She is willing to offer him a place to stay along with emotional support. Mr. Marriott's mother, Dawn Bremner, regrets the life she

gave her son when he was young and is available now to provide him with her emotional support.

[335] Mr. Marriott has a job lined up for him upon his release. That job would provide for a steady and reasonable income.

[336] He has the services of a therapist available to him.

[337] The terms of probation could include the requirement to live with Amy Marriott and remain in the Halifax area. They could include prohibitions against using drugs and alcohol, going to places where alcohol is served, or associating with people who have criminal records. Specific exceptions could be made for those providing support to Mr. Marriott. Dr. Gojer does not support the imposition of counselling and says that while therapy for childhood trauma is important, it should not be imposed. Mr. Marriott "should be allowed to see a therapist and freely discuss his thoughts and feelings without the fear that any and or all information will be breached to a probation or a parole officer".

[338] That is a plan. It would involve Mr. Marriott being released to the community immediately, under some form of supervision. The timeframe for the management of risk in that case, would be a gradual process only in the sense that Mr. Marriott would be supervised over a period of three years. His release into the community, after spending his adult life for the most part in incarcerated, would be immediate.

[339] Dr. Gojer says that BJ Marriott's "history haunts him and hangs over his head like a cloud". He says that offences that took place in prison conditions and involving the prison mentality are "unlikely to occur in the community". Dr. Gojer's opinion is that Mr. Marriott is "older, more mature and has good insight into how his life should evolve if released". He understands that associating with people who are actively involved in crime, particularly the drug trade, is a high risk factor for him. He will try to isolate himself from those circumstances or situations.

[340] But, as Dr. Gojer says, Mr. Marriott's history hangs over his head like a cloud. Under this plan he would be released into the community where, while there are prosocial supports for him, is also the place where that cloud is most thick and dark. It is not at all likely that he will simply return to the community as an anonymous person just looking to integrate into society. That will compound his efforts to stay away from people and situations that are a high risk for him. Dr. Gojer is certainly right that Mr. Marriott is older and it must be acknowledged that

as people get older they become less likely to be involved in crime. But Dr. Gojer's comments about Mr. Marriott's insight are based on what Mr. Marriott told him. BJ Marriott's actions are what matter.

[341] The plan as proposed would set up a situation in which Mr. Marriott, whose history of following court orders is "less than stellar", would be released into the community with the hope that he will be able to avoid being around people who are involved in criminal activity, avoid alcohol and drugs, voluntarily engage in counselling for his complex trauma and manage his antisocial personality disorder. And there is no date, other than the expiry of the probation order, that would be seen as the timeframe within which he would be meaningfully treated.

Any Sentence Less Intrusive Than Indeterminate

[342] The decision about the use of any lesser sentence in controlling Mr. Marriott's pattern of violent behaviour is not a binary choice. It is not a choice of one of two options, which are an indeterminate sentence, and the sentence of one day "time served" and 3 years of probation proposed by Mr. Gorham. A judge is required to consider all reasonable options.

[343] In this case, the proposal put forward which would have BJ Marriott released immediately, with the light supervision that probation involves, does not offer adequate protection to the public. Dr. Gojer's opinion, which suggests that Mr. Marriott has already reached a level of self-awareness based on his maturity and own statements that he understands the factors that led to his violent behaviour in the past, is not supported by evidence. It is a hope. And from an ongoing treatment perspective, that hope is essential. BJ Marriott and those involved in his treatment will have to have hope that he can someday get out from under the cloud of his past. That hope is, in a sense, the evidence of things unseen. But it is not something upon which the safety of the public can reasonably depend.

[344] BJ Marriott has antisocial personality disorder. At best it can be managed.

[345] Mr. Marriott has had significant issues with alcohol and substance abuse and with engrained attitudes and values that supported criminal and sometimes violent behaviour. Those belief systems were entrenched. Dr. Neilson said that dealing with those issues will take a great deal of work. A lifetime spent endorsing criminal values and the inmate code has created an intractable problem for BJ Marriott. Dr. Gojer says that Mr. Marriott has already, on his own, gained the level of self-awareness necessary to allow him to be treated on a voluntary basis, in the

community. That is based on an acceptance of what Mr. Marriott told him and the evidence indicates that Mr. Marriott was not entirely forthright with Dr. Gojer. There is no evidence that Mr. Marriott has seen a light that has changed the values and beliefs that he has endorsed and lived by for his entire adult life thus far.

[346] Dr. Gojer believes that Mr. Marriott is committed to changing and in fact already has changed. Mr. Marriott's commitment to change must be measured against his behaviour. As of December 2019, when the assault on Stephen Anderson took place, Mr. Marriott had not changed. Since then, he has taken courses in provincial jails but has continued to behave violently. Dr. Gojer agreed that what he had thought to be a downward trajectory in violence may have been less dramatic than he had at first thought once seeing the video evidence of Mr. Marriott's violent behaviour in December 2019 and afterward.

[347] Mr. Marriott has taken no programming within the federal system over the 16½ years that he was in that system. He was assessing as having low motivation to participate in programming and as both psychiatrists suggested, he had a high level of distrust of those offering programming. Within the provincial system he has take courses, but they were low intensity programming, and some did not address his criminogenic needs. Who is at fault for Mr. Marriott's failure to take programming over his time in federal custody is not the issue. Public safety is the issue. And public safety cannot be said to be served by releasing a dangerous offender into the community having had no treatment whatsoever for the issues that underlie his violent behaviour.

[348] Mr. Marriott has some people who are available to help him. There is a support system there for him. But releasing him into the larger community where he is known, and where those engaging in ongoing criminal activities, some of whom are his former criminal associates will know where to find him, would demand a very high level of commitment on Mr. Marriott's part. He cannot just avoid being involved. He would have to be able to confront those people, and say no.

[349] He would be going into a community where there is money to be made and status to be gained by involvement in the drug trade. BJ Marriott has limited education, no job training and almost no experience working in a real job. He has limited experience living in the "real world". From the time he was 19 years old, he has spent 9 months living in the community. A person leaving prison after two

decades has many adjustments to make. Some preparation is required. BJ Marrott has had almost none.

[350] Mr. Marriott has shown that he has not been inclined to follow court orders and is prepared to justify his non-compliance by saying that unreasonable conditions were imposed.

[351] Releasing him into the community at this stage is not an alternative that can be considered having regard to the risk that he poses.

[352] There is another potential option. That would involve a sentence beyond that imposed on others involved in the December 2019 assault. Mr. Marriott is being sentenced as a dangerous offender. That could be followed by a long-term supervision order of up to 10 years. If there were evidence that Mr. Marriott could be treated within some kind of timeframe that might be an option. But in this case, the position taken by Mr. Marriott, through his counsel, is that he is ready for the street now. He does not need programming. He does not need any more time within an institution. If he is not ready now, and I find that he is not, there is no evidence about any timeframe that might guide the process of the imposition of a longer fixed term sentence followed by a long-term supervision order.

[353] Mr. Marriott has been designated as a dangerous offender. He cannot be release into the community now without unreasonable risk to the safety of the public and there is no timeframe within which it can be said that he could be released without posing that risk.

Campbell, J.