SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Melvin*, 2019 NSSC 334

Date: 20191203
Docket: 447189
Registry: Halifax

Between:

Her Majesty the Queen

v.

James Bernard Melvin

LIBRARY HEADING

Judge: The Honourable Justice Peter P. Rosinski

By Written Submissions Filed: August 23 and September 6, 2019, in Halifax, Nova Scotia

Written Decision: November 28, 2019

Subject: Admissibility of an offender's historical records (convictions; PSRs; psychiatric, psychological and substance abuse records, etc.) at a Dangerous Offender hearing – s. 754(1) *Criminal Code*.

Summary: Mr. Melvin was convicted by a jury of conspiracy to commit murder and attempted murder. The Crown gave notice that it sought to have him declared a dangerous offender. At such hearing the Crown would be relying on 12 binders of materials, which the court appointed assessor (expert forensic psychiatrist witness) will rely upon incoming to his opinions. The defendant argued that the court should not review the contents of the binders before the commencement of the hearing; and challenged the admissibility of all of the contents of the 12 binders, if the purpose to which they would be put is for the truth of their contents.

Issues:

(1) Should the court examine the contents of the 12 binders before the commencement of the hearing where they could be individually addressed?

(2) Are the contents of the binders admissible for the truth of their contents?

Result:

(1) It is in the interests of justice, and common practice that sentencing judges have copies of proposed materials such as these available for their inspection before the commencement of a hearing – therefore I have superficially reviewed the materials;

(2) The court discussed the various bases for the admissibility of the nature of documents contained in the 12 binders (criminal convictions; untried criminal offences; the contents of Correctional Services Canada and the Nova Scotia Correctional Services files regarding Mr. Melvin-including his pre-and post-sentencing circumstances which entail records of his (mis) conduct within correctional facilities, and with staff generally, Pre-Sentence Reports, psychiatric, addictions, and health records).

Generally speaking it is anticipated that all such records, subject to individual exceptions which will be more fully examined at the hearing, are admissible for the truth of their contents on various bases: that they are "credible and reliable" per s. 723(5) CC, and *R v Gardiner*, [1982] 2 SCR 368; the common law and statutory (s. 30 *Canada Evidence Act*) "business records" exception to the hearsay rule; and the principled exception to the hearsay rule, per *R v Khelawon*, [2006] 2 SCR 787.

<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *R. v. Melvin*, 2019 NSSC 334

Date: 20191203
Docket: 447189
Registry: Halifax

Between:

Her Majesty the Queen

v.

James Bernard Melvin

Admissibility of the Records for use at a Dangerous Offender Hearing

Judge: The Honourable Justice Peter P. Rosinski

By Written Submissions Filed: August 23 and September 6, 2019, in Halifax, Nova Scotia

Counsel: Eric Woodburn, Christine Driscoll, Q.C. and Sean McCarroll for the Crown
Patrick Atherton and Michelle James for the Defendant

Introduction

[1] After his conviction for conspiracy to commit murder and attempted murder of Terry Marriott Junior, the Crown gave notice that it was seeking to have Mr. Melvin designated a dangerous or long-term offender (s. 753(5) *CC*) pursuant to section 754 (1)(b) of the *Criminal Code* ("*CC*"). This decision addresses the admissibility of evidence that the Crown wishes to rely upon at that hearing.

Prologue

[2] Not long after the jury found Mr. Melvin guilty on October 5, 2017, and well before February 2018, the Crown provided Mr. Melvin 12 binders of documentation upon which it wishes to rely in this Application. The binders have been relied on by Dr. Shabreham Lohrasbe, the Crown's Forensic Psychiatrist in forming his opinions herein. In my October 11, 2018 letter, I had asked Mr. Melvin's counsel to examine the 12 binders, and by February 2019 identify what items if any they were objecting to as inadmissible. No response was forthcoming other than a late generalized objection in open court largely based on hearsay concerns. Defence counsel argued that I should not review the contents of the binders without first making a determination of the admissibility of each of those documents and associated factual assertions. On August 13, 2019, (much closer to the beginning of the hearing which was set for September 23 – October 18, and

December 16, 17 and 18, 2019 which had to be adjourned because Mr. Melvin's counsels withdrew two days before the hearing's commencement-see 2019 NSSC 306.), I set dates for counsel to brief me on this issue. I have received written briefs from the Crown (an earlier brief filed was updated to August 23, 2019) and Defence (September 6, 2019). As an aside, I note that the Crown would appear to have been correct when its counsel stated that often in their experience, counsel have agreed to permit the court to review the materials in advance of the hearing in order to assist the presiding judge. As Judge Derrick (as she then was) noted in footnote number 2, to her reasons in *R v Shea*, 2014 NSPC 78:

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

Background

[3] Mr. Melvin was charged that he, on December 2, 2008 at Harrietsfield, Nova Scotia, did attempt to murder Terry Marriott Junior contrary to section 239 *CC*; and did conspire with Jason Hallett, an unindicted co-conspirator to commit the

murder of Terry Marriott Junior, contrary to section 465(1)(a) *CC*. He was convicted by a jury on both counts. I was the presiding Judge.

[4] Shortly after his conviction on October 5, 2017, it seemed that the matter would proceed to a sentencing sometime in early 2018. However, after the Crown confirmed to Mr. Melvin's then counsel, Phil Star, Q.C., that the Crown would seek a dangerous or long-term offender designation against Mr. Melvin, Mr. Star withdrew, and the matter languished until present counsel were retained on or about March 22, 2018.

[5] On January 31, 2019 the Crown filed its Notice pursuant to section 754(1)(b) *CC*. I am satisfied that the preconditions for the Application to proceed have been met. Therein, the Crown must "[outline] the basis on which it is intended to found the application".[1]

[6] The Crown has set out the basis for its Application in writing as follows:

1. that Mr. Melvin was convicted of "serious personal injury offences" and that he constitutes a threat to the life, safety or physical or mental well-being of other persons on the bases of evidence establishing:

---

[1] Notably if the defence is calling an expert who will rely on "foundational information" in his or her report, and such information has not by evidence been presented during the Crown's case, the defendant must disclose it to the Crown in a timely way – *R v C.G.*, 2018 ONSC 6204 per Bell J. at para. 14.

a. a pattern of repetitive behaviour by you, of which the offences for which you have been convicted form a part, showing a failure to restrain your 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 your behaviour;

b. a pattern of persistent aggressive behaviour by you, of which the offences for which you have been convicted form a part, showing a substantial degree of indifference on the part of you respecting the reasonably foreseeable consequences to other persons of your behaviour,

as set out in section 753 (1)(a)(i) and (ii) *CC*;

2. that the Crown will be tendering relevant evidence, including all information contained within or in relation to, Mr. Melvin's:

a. files relating to both predicate offences (two binders)[2];

b. Correctional Services Canada file (five binders);

c. Correctional Services, Nova Scotia, file – offender incidents (two volumes/binders);

d. Community Corrections (Probation) file (one binder);

e. previous convictions (documentation – five binders/volumes);

f. Nova Scotia Health Authority file (psychiatry and addiction matters) (one binder/volume);

g. a recent charge contrary to s. 270.01(1)(b) *CC* arising in New Glasgow, Nova Scotia and pending trial March 7, 2019 in Provincial Court[3];

h. July 18, 2018 appearance before Justice Peter Rosinski to appoint a forensic psychiatrist to perform an assessment of Mr.

[2] Regarding the circumstances of the offences for which Mr. Melvin was found guilty by the jury, I am required to follow the fact-finding process described in section 724 *CC*.

[3] Regarding the admissibility of such matters, see section 725(1) (b.1) *CC*.

Melvin pursuant to section 752.1 *CC* (recording of court proceeding).[4]

3. And further take notice that we are giving Canada Evidence Act notice with regards to any and all Correctional Services Canada Reports contained in the aforementioned binders;

4. And further take notice that without limiting the generality of the foregoing, the evidence in support of this application will include the following:

    a. Predicate Offences (the facts are to be determined by Justice Rosinski pursuant to s. 724 *CC*, and additionally the impact of your conduct upon the family of Terry Marriott Junior may be outlined in victim impact statements)[5];

    b. Other criminal convictions (your history of criminal convictions and the underlying facts);

    c. Other relevant information-including, but not limited to:

        i. pre-sentence reports prepared for your sentence hearings;

        ii. your entire file from Correctional Services Canada, including your psychological file (see five binders/volumes);

        iii. all reports, medical records, notes and files, relating to your treatment (including diagnoses, assessments and treatments for medical, social and mental health issues) that you have received;

        iv. testimony of witnesses from Correctional Services Canada, Nova Scotia Department of Justice Correctional Services, Nova Scotia Department of Justice Probation

---

[4] The Crown provided the 12 binders in question to the defendant or his counsel some significant time before May 24, 2018 when the Crown section 752.1 *CC* Application was filed, and these were all reviewed by Dr. Shabehram Lohrasbe, who was appointed on July 18, 2018 as the s. 752.1 *CC* assessor. His report was filed with the Court on September 19, 2018.

[5] These are admissible in dangerous offender hearings- s. 753.02 *CC*.

Services, and the Nova Scotia Health Authority – East Coast Forensic Hospital.

5. the evidence of Dr. Shabehram Lohrasbe, MD, MBBS, FRCPC, forensic psychiatrist, including his Assessment Report dated September 15, 2018, and his opinion with respect to a variety of issues including, but not limited to:

    a. psychiatric disorders and related dysfunctions;

    b. substance abuse;

    c. your patterns of behaviour;

    d. your risk to the community.

[7] Although not stated expressly, the Crown appears to rely on s. 757 *CC* to introduce character and reputation evidence in relation to both the designation and sentence stages, which can include witnesses articulating the background information for why they hold the opinion that they do- see *R v Gregoire*, (1998) CCC (3d) 65 (Man. CA) at paras 43-49; *R v Neve*, 1999 ABCA 206 at paras. 124-128:

> "While psychiatric and character evidence must be relevant and may be admissible [at both the "threat" and "designation" stages] and while such evidence may be used to explain, for example, why the offences make a pattern, …they cannot be used to create the pattern in the absence of actual [pattern] conduct."

[8] It is important to recall that otherwise admissible extrinsic evidence (ie. using Neuberger's characterization "non-criminal past conduct") may be contextually relevant to examining whether the suggested "offences" do represent "pattern" conduct, *as well as* relevant when assessing the weight to be accorded to

any expert opinion, which entails an assessment of the factual foundation in the evidence relied upon in support of the opinion, which may include relevant *general* background and contextual evidence, which I refer to as "ancillary" in nature.

[9] Section 757 *CC* is found in Part 24- Dangerous Offenders – and reads:

> Without prejudice to the right of the offender to tender evidence as to their character and repute, if the court thinks fit, evidence of character and repute may be admitted
>
> a) on the question of whether the offender is or is not a dangerous offender or a long-term offender; and
> b) in connection with the sentence to be imposed or in order to be made under this Part.

[10] Neuberger states at page 6 -15[6]:

---

[6] It is an open question whether, such evidence which is admissible by virtue of a statutory provision, should still be assessed for its probative value and prejudicial effect. Arguably it should not be, given that its use is in the context of a sentencing, and specifically a "dangerous offender" sentencing wherein an offender is entitled to "a fair hearing; [but] it does not entitle him to the most favourable procedures that could possibly be imagined." per LaForest J in *R v Lyons*, [1987] 2 SCR 309 at para. 88; and because "it is commonplace that the strict rules which govern a trial do not apply to sentencing hearing and it would be undesirable to have formalities and technicalities characteristic of the normal adversary proceedings prevail… The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime." per Dickson J in *R v Gardiner*, [1982] 2 SCR 368 at para. 26. The appropriate preliminary weighing of the "probative value" of evidence is described in *R v Farouk*, 2019 ONCA 662 at paras. 32-39. The prejudicial effect upon Mr. Melvin's right to a fair sentencing process is necessarily more limited than the prejudicial effect of the evidence would be upon his right to a fair "trial" process regarding his guilt. As an example, non-pattern "character" evidence in a dangerous offender proceeding can include proof of sexual disposition – *R v Hexamer*, 2019 BCCA 285 at paras. 53, 82 – 90 and 167. In that case (para. 89) the judge concluded in relation to evidence presented about sexual misconduct by the defendant with another young child where no charges were laid, that although there was not proof beyond a reasonable doubt of a crime (sexual assault) "the [sexual] transactions between the accused and child have been proven beyond a reasonable doubt". In my opinion, the application of the probative value/prejudicial effect test is better suited to the trial rather than sentencing context – however, see in the *trial* context, for example, *R v Boyce*, 2019 ONCA 828. The court concluded that, a reading of section 36 [Foreign Records] of the *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, C. 30 (4th Suppl.) which allows a Canadian court receiving foreign records in support of criminal charges in Canada to accept those records as admissible "and draw any reasonable inference from the form or content of the record or copy" suggests that it is not also necessary to consider the two prongs of necessity and threshold reliability, and went on to state: "section 36(1) does not, on this reading, determine the question of

> "… the offender will always have the right to introduce character evidence in defence. The provision allows the judge to allow character evidence both at the threshold stage for a dangerous offender determination… and at the sentencing stage… Background evidence explaining the evidence of reputation is relevant and therefore admissible if not unduly prejudicial."

Considerations regarding the Notice of Application for a declaration of dangerous/long-term offender status

[11] The Crown has given notice that it intends to prove the existence of the constituent elements of subsections 753(1)(a) (i) and (ii) *CC* beyond a reasonable doubt.

[12] Both these subsections involve proof of a "pattern" of criminal behaviour – repetitive behaviour showing a failure to restrain oneself and a likelihood of causing death or injury, or inflicting severe psychological damage on other persons, *and* persistent aggressive behaviour showing a substantial degree of indifference respecting the reasonably foreseeable consequences to other persons of the behaviour, respectively.

[13] Before designating an offender as "dangerous", a court must also be satisfied beyond a reasonable doubt on the evidence that the offender's conduct is

---

ultimate admissibility. Evidence derived from foreign law enforcement is still subject to the general exclusionary rule – weighing probative value as against prejudicial effect… Furthermore, trial judges retain the power to exclude otherwise admissible hearsay evidence where its admission would infringe on the fair trial rights of an accused: *R v Harrer*, [1995] 3 SCR 562 at paras. 21 – 24."

intractable (meaning defined criminal behaviour that the offender is unable to surmount – *R v Boutilier*, 2017 SCC 64 at para. 27). Notably, at both the designation and penalty stages,[7] an offender's "treatability", or conversely the intractability of the offender's conduct, must be considered.

[14] As Neuberger puts it at page 4-2:

> "In *Boutilier* the court, referencing *Lyons* held that four criteria were explicitly required in the language of s.753(1):
>
> 1- The offender must be convicted of and is to be sentenced for a 'serious personal injury offence'. (The objective element of dangerousness);
> 2- the predicate offence must be part of a broader pattern of violence;
> 3- there is a high likelihood of harmful recidivism;
> 4- the violent conduct is intractable.
>
> The last three criteria constitute the subjective part of the assessment of the threat posed by the offender, and the third and fourth are future oriented."

[15] The purpose of the Notice is to clearly stipulate which subsections the Crown relies upon, thus identifying the constituent elements the Crown must prove beyond a reasonable doubt, and to correspondingly identify the nature of the evidence in support of the Crown's case.[8] It is especially important for the Crown

---

[7] At the designation stage intractability "informs the decision on the threat posed by an offender, whereas at the penalty stage it helps determine the appropriate sentence to manage this threat"- per *R v Boutilier*, 2017 SCC 64.

[8] Often the "pattern" evidence referred to in a Notice is a simple recitation of a small number of criminal offences (eg. *R v. Inacio*, 2015 ONSC 6617 at para. 138). Mr. Melvin's circumstances bear some degree of similarity to those of Mr. Inacio. It has been suggested that any material incident upon which the Crown wishes to rely during the hearing must be listed in the Notice, so that the offender has fair notice of the alleged bases for the Crown's position that he or she should be declared a Dangerous or Long Term Offender- Eg. See *R v Neve*, 1999 ABCA 206, at paras. 132-145; regarding "untried criminal acts", if suggested to be directly relevant to the establishing of a

to state with precision those incidents it claims establish the touchstone "pattern" evidence in a case such as this, which presents a greater number of potential touchstone incidents of "pattern" evidence.

[16] One must keep in mind that **only** incidents directly relevant to the constituent elements in s. 753(1)(a) (i) and (ii) *CC* may be relied upon to establish a "pattern". This inherently limits the number of touchstone incidents to be relied upon by a court in making the determination whether there is proof beyond a reasonable doubt allowing an individual to be designated a dangerous offender:

> "It is the sentencing judge – not the psychiatrists, or the Crown or the defence – who decides what the key elements of the pattern of conduct are." (para. 199 *Neve*)

[17] Until recently, courts did not question the characterization of "pattern" conduct as described in *R. v. Neve* at paras. 109-111: criminal conduct akin to (similar in kind or in result) the predicate offence(s) which itself must be a "serious personal injury offence".

[18] However, the reasoning in *Neve* on that point was displaced by the court's reasons in *R v Steele*, 2014 SCC 61; see also Justice Bourgeois's reasons in *R. v.*

"pattern of behaviour for the purposes of dangerous offender procedures, that portion of the application is more akin to a trial"; and *R v Campbell*, [2003] OJ No. 4015 (SC). Specificity is also desirable since s. 754(3) *CC* permits admissions by an offender: "For the purposes of an application under this Part, where an offender admits any allegations contained in the notice referred to in paragraph (1)(b), no proof of those allegations is required."

Shea, 2017 NSCA 43*,* at paras. 125-128, that it is an error for a judge to require "objective and comparative seriousness between the predicate offence and the past conduct". As the Justices agreed in *Shea*:

> "The predicate offence must be a serious personal injury offence, but it need not be 'objectively serious' and it must follow that neither need be the pattern behaviour…put otherwise, the pattern offences need not be 'objectively serious' because the predicate offence need not be." [per Bryson JA in dissent at para. 53; Justices Bourgeois and Van den Eynden stated]
>
> …
>
> [116] Finding a pattern of behaviour is an essential component of a designation under s. 753(1). No pattern; no dangerous offender designation. In light of the errors raised by the appellant, all of which attack the application judge's pattern analysis, it is helpful to revisit the patterns initially alleged. The appellant submitted that Mr. Shea's behaviour could be characterized in several ways:
>
> - as a pattern of unremitting institutional violence;
> - as a pattern of premeditated and instrumental violence against an outnumbered victim;
> - as a pattern of diverse, unselective and opportune violence; and
> - as a pattern of persistently aggressive behaviour.
>
> [117] The appellant had argued that any of the above patterns of behaviour were sufficient to support a dangerous offender designation. The application judge considered each proposed pattern in turn, concluding on each, that the appellant had failed to prove the existence of a pattern as defined in the *Code*, beyond a reasonable doubt.
>
> …
>
> [125] *The appellant's first ground of appeal is, in my view, persuasive*. The appellant submits that *the application judge's reasons disclose that in determining whether a pattern existed, she incorrectly required objective and comparative seriousness between the predicate offence and the past conduct. In other words, in order for there to be a pattern in which the predicate offence fell, Mr. Shea's past behaviours needed to be as serious as the aggravated assault*. Based on the application judge's analysis, in particular ¶ 435 and 456 quoted above, I am satisfied that she did apply a comparative requirement. She relied on *Neve* in doing so.

[126] At ¶ 53, my colleague explains why the reasoning in *Neve* respecting the need for comparative seriousness has been displaced by the Supreme Court of Canada's recent decision in *Steele*. I do not disagree. I also found helpful the comments of Karakatsanis J. (as she then was) in *R. v. Tremblay*, 2010 ONSC 486:

> 97 ***There is no requirement that the past conduct that makes up a pattern involve objectively serious offences, offences that are more or less serious, or even that they be serious personal injury offences:*** *R. v. Currie*, above, at paras. 24-26; *R. v. Newman*, [1994] N.J. No. 54 (C.A.) at para. 79. Even two incidents with similarities are sufficient to form a pattern: *R. v. Langevin*, at para. 29.
>
> 98 To determine whether there is a pattern sufficient to predict future conduct, a trial judge may consider evidence of:
>
> (i) what type of conduct was involved,
>
> (ii) who, generally, the victims were, and
>
> (iii) what motivated the offender to commit the offences.
>
> The Crown only need establish beyond a reasonable doubt that there is likelihood - not a certainty or a probability, but "a reasonable possibility" - that the offender will cause death or injury or inflict severe psychological damage by failing to restrain his behaviour in the future. To determine whether there is a present likelihood that the offender will fail to restrain his behaviour in the future, the court may refer to the offender's past failure to restrain his behaviour, together with any expert opinions: *R. v. Currie* at para. 22; *R. v. Young* (1998), 1998 CanLII 18090 (NL CA), 159 Nfld. & P.E.I.R. 136 at paras. 59-63 (C.A.); leave to appeal to the S.C.C. refused [1998] S.C.C.A. No. 122; *R v. Lyon*s, above, at para. 94.
>
> 99 Similarly, when considering the likelihood of causing death, injury or severe psychological harm, a Court may consider the impact of the offender's conduct on past victims to inform the likely impact on future victims. ***However, it is not necessary that the past conduct led to actual injury. Attempted serious violence and likely serious endangerment of life, safety or physical well-being, or severe psychological harm may well be adequate.***
>
> [Emphasis added]

[127] See also *R. v. Bebonang*, 2015 ONSC 195 (CanLII), where Cornell J., after setting out the requirements of a pattern analysis, notes that "it is not necessary that the past conduct have led to actual injury" (¶ 33).

[128] I am satisfied that the application judge erred in her pattern analysis when she required Mr. Shea's past conduct to be as serious as the aggravated assault. Where I part ways with my colleague is with respect to the materiality of that error. Prior to embarking on where our views diverge, I will address two other concerns with the application judge's analysis—the use of "context" and "restraint".

[My italicization added]

[19] To the extent that the Crown introduces evidence that it argues is material and directly relevant to establishing a "pattern" it must prove the facts of such earlier relevant instances of "pattern" behaviour beyond a reasonable doubt- namely, any prior criminal offences (convictions) or behaviour independently proved to be such at the hearing- see eg: *R v Sullivan* (1987) (Ont. CA); *R v Lewis* (1984), 12 C.C.C. (3d) 353 (Ont. C. A.) at paras. 12-14 (this may include charges not laid or withdrawn) -Leave granted [1985] 2 SCR viii but the case was abandoned due to the death of the offender; *R v MacInnis* No.2, [1981] NSJ No. 531 (NSSC); *R v Crowe*, 2014 NSSC 210 at para. 29[9]:

> "The evidence may include previous criminal convictions, evidence from preliminary inquiries on charges never brought to trial, evidence related to charges laid and otherwise disposed of or evidence relating to outstanding charges. However disputed allegations of criminal conduct or other aggravating facts must be proved beyond a reasonable doubt. (*R v Jack* [1998] B.C.J. No. 458; *R v D.E.D. (Dicks)*, [1996] N.S.J. No. 392; *R v MacInnis* (1981), 64 C.C.C. (2d) 553 (N.S.C.A.); *R v D.L.S.*, supra; and R. v. L.M.T., supra.)".

[20] As Neuberger states at p. 6-1 in "Assessing Dangerousness":[10]

---

[9] As the court in *Neve* emphasized at paras. 218-219: "The sentencing judge on a dangerous offender application has a responsibility to be concerned about the use of transcripts by experts…there is a responsibility on counsel and the sentencing judge to see that their use is fair; that the transcripts are complete; and that the decisions of the relevant courts are included."

[10] Regarding the statutory and common law bases for the admissibility of evidence of untried criminal offences at a simple sentencing, see Justice Lynch's decision in *R v Heath*, 2019 NSSC 309.

"The Crown, though must still prove the elements for a dangerous offender designation contained in s. 753(1) beyond a reasonable doubt: *R v Jackson* (1981) 23 CR (3d) 4 (NSCA) at para. 18. This parallels the sentencing principle that any aggravating facts- or facts that could increase the length of the sentence- must be proved beyond a reasonable doubt… The elements forming part of the pattern can either include past convictions, necessarily already proved beyond a reasonable doubt, or other incidents, so long as they too are proved beyond a reasonable doubt….if the Crown is to rely on the evidence for proof of [the elements of] dangerousness, it must be proved beyond a reasonable doubt... any evidence constitutive of a pattern upon which a psychiatrist must form a professional opinion must first be proved beyond a reasonable doubt… [*R v Shrubsall*, [2001] NSJ No. 539 (NSSC), evidence from withdrawn or stayed charges alleged are] also admissible…if these are to form the basis of a pattern they must be proved beyond a reasonable doubt":

Joseph A. Neuberger, *Assessing Dangerousness: Guide to Dangerous Offender Application Process*, loose-leaf (Toronto: Thomson Reuters Canada, 2019) at pp.6-6 to 6-7.

[21] Neuberger goes on to say at p.5-9:[11]

"**As to the evidence adduced to pass this threshold, it can either be evidence of past criminal acts, relevant extrinsic evidence or psychiatric opinions. In terms of extrinsic evidence (i.e. non-criminal past conduct) and psychiatric opinion, the evidence cannot be used as a basis of the actual pattern envisaged under sections 753(1)(a)(i) and (ii); it can only be used to explain the pattern (i.e. as contextual, rather than foundational evidence).**"[12]

[My bolding added]

[11] It can be useful to recall Justice David Watt's commentary in his textbook, Watt's Manual of Criminal Evidence, (Toronto: Thomson Reuters Canada, 2019) at p. 28 in relation to "relevance": "Relevance is not a legal concept, rather, a matter of everyday experience and common sense…context is critical… An item of relevant evidence is relevant where it is probative of the fact a party seeks to establish by its introduction through the same process of reasoning [ie. "By reason of its natural, common sense connection with that fact."]. Any two facts to which the term "relevant" is applied, are so related to each other that, according to the common course of events, one, either taken by itself or together with or in the context of other facts, proves or renders probable the past, present, or future existence or non-existence of the other."

[12] In *Neve* at para. 189 the court listed considerations that a court should address in weighing expert opinion evidence. Relevant extrinsic evidence may include evidence that is relevant as foundational to psychiatric opinion evidence regarding why the expert opines there is a "pattern" (*Neve*, paras. 124-128) and the "treatability" issue relevant at both the designation and penalty stages.

[22] Correspondingly, extrinsic evidence which by definition is not adduced to prove the constituent elements of a "pattern", but rather as contextual evidence, need only be proved as more likely than not (i.e. on a balance of probabilities standard)- s. 724(3)(d) *CC*. The Court in *Shea* discussed "context" or extrinsic evidence, and stated:

> [82] The Crown argues that the judge neglected to consider how Mr. Shea's psychopathy influenced his behaviour, revealing a pattern of violence. As Dr. Theriault said, and the judge acknowledged, most people in the "dog-eat-dog" world of prison do not behave like Mr. Shea, (*Decision*, ¶ 418). Mr. Shea's expert, Dr. Starzomski, agreed that Mr. Shea's anti-social personality was of "fundamental importance" and his psychopathy was a "particularly serious variant" of it. Such individuals are "quick to return to crime" and show a "disregard for the consequences of their actions".
>
> [83] The instrumental nature of Mr. Shea's violence is important to understanding its pattern. As Dr. Theriault opined:
>
>> … Mr. Shea does not use violence in an impulsive, emotional fashion but rather … as a tool when it suits his purposes. … Mr. Shea also shows a history of repetitive violence in the institutional setting … here it is likely that Mr. Shea is using violence in an instrumental fashion to advance his purposes within the offender subculture… .
>
> [Theriault Report, Appeal Book Vol VI, p. 145]
>
> [84] Dr. Theriault thought there was evidence that Mr. Shea's trajectory of offending behaviour was towards more violence and more severe offences over time. He concluded on this point:
>
>> … Although there is some evidence that Mr. Shea at times engages in impulsive reactionary violence much of his violence appears to be instrumental in nature and designed to enhance his reputation within the criminal subculture or to gain specific outcomes as was the extortion case in 2009.
>
> [85] Dr. Starzomski agreed in cross-examination that Mr. Shea's violence may be instrumental to "preserve or gain face", (Appeal Book, Vol. IV, p. 628).
>
> [86] *The judge recognized that Mr. Shea's conduct was both impulsive and instrumental, (Decision, ¶ 411), but appears to have made no use of this evidence in the pattern analysis.*

[87] *The Crown urges that failure to incorporate the psychological evidence into the pattern analysis at this point to explain Mr. Shea's motives represents an error of law because that evidence gives context and explanation to Mr. Shea's violent behaviour. It shows how much of that violent behaviour is instrumental, enhancing Mr. Shea's status, (for example, Dr. Starzomski, Decision, ¶ 355). The expert evidence links Mr. Shea's attacks on guards and inmates, and explains his threats to both, as enhancing his status in the criminal subculture*.

[88] When applying contextual considerations in the institutional environment, the judge emphasized the oppressive circumstances of prison:

> [436] Another dimension of the pattern analysis must not be overlooked. Context is a critical aspect of determining if a pattern exists. (*Neve, paragraph 165*) Mr. Shea's context for much of his violent and aggressive behaviour has been in what Dr. Theriault referred to as the "dog-eat-dog" world of the correctional system.
>
> [437] For example, on May 25, 2003, Mr. Shea was the victim of a serious assault by three prisoners in the Renous gym during recreation. He was taken for outside medical treatment and involuntarily transferred to Millhaven Penitentiary in Ontario. (*Reasons, paragraph 241*) Just five days earlier, in a Progress Assessment dated May 20, 2003 Mr. Shea indicated he routinely kept "shanks" to protect himself as he was in a maximum security prison. (*Reasons, paragraph 240*)
>
> [438] Mr. Shea told the National Parole Board in 2007 that in relation to assaults on other prisoners, prison life "is not easy" and to survive he had to defend himself. (*Exhibit 7, page 383 – National Parole Board Decision, May 1, 2007*)
>
> [439] So, although the evidence reveals that Mr. Shea has possessed shanks in prison, the Crown has proven beyond a reasonable doubt only one instance of him using one – the aggravated assault of Keithen Downey on June 15, 2010. Arguably it is evidence of restraint on Mr. Shea's part that his institutional violence – assaulting other prisoners – has not been shown to involve shanks even though the records establish he had them and presumably could have used them.

[89] *The Crown complains that the judge used the prison environment to minimize Mr. Shea's violent behaviour. As Dr. Theriault explained, and the judge seemed to acknowledge, not all offenders behave in the aggressive, violent manner of Mr. Shea. But that behaviour is consistent with him being a dominant figure in the criminal subculture of the prison, which he accomplishes with threats and violence. Contrary to the mitigating implication of being in a "dog-eat-dog" environment, the record overwhelmingly showed Mr. Shea to be a victimizer, rather than a victim*. To cite a quote attributed to Mr. Shea, he "owns this jail".

[90] Even one of Mr. Shea's witnesses corroborates the psychological picture:

> [327] D/S Avolese acknowledged that Mr. Shea was considered at the top of the prisoner "pecking order" in his Unit. He agreed on cross-examination that Mr. Shea would qualify as the "heavy", could be trouble if he was not happy, and would influence others in the day room. D/S Avolese tried to resolve Mr. Shea's issues by exploring the reasons for his disobedient behaviour. …

[91] As the Crown argues, the judge's diminution of Mr. Shea's violent behaviour in the "dog-eat-dog" world of the prison, implicitly acknowledges that Mr. Shea will act violently in the future. In fact, his conduct was designed to ensure that he was "top dog". Why should this be excluded from the pattern analysis? *The Crown argues that the judge's view of context undermined the pattern analysis*.

[92] *The Crown correctly observes that Mr. Shea's conduct is rooted in an anti-social personality disorder by which he has embraced criminal values that inform his conduct. Viewed in this context, the predicate offence was entirely consistent with Mr. Shea's past violent behaviour and could help predict its recurrence*.

[93] *In the Crown's words, in each case the victim "... was either outnumbered, out-weaponed, or unsuspecting. Even the correctional officers who were punched or bitten were not suspecting it. Each case was unprovoked. Each case was driven by a desire to achieve an enhanced status and to effect retribution or intimidation.*"

[94] The Crown concludes that the application judge erred in her application of the pattern analysis, which properly applied, supported *the Crown's theory at trial of unremitting institutional violence*.

[95] The Crown is correct that the psychiatric evidence is helpful in showing the pattern of *Mr. Shea's behaviour*. But that behaviour *must demonstrate injury or endangerment, or risk of either*. For reasons already described under the first issue, the judge concluded that it did not consistently do so. While the judge did not advert to all the psychiatric evidence when conducting the pattern analysis, it does not matter because the pattern of violence or endangerment did not meet the statutory criteria.

[96] *Alternatively, the Crown submits that the Court has an obligation to find a pattern, if there is one, irrespective of the Crown's theory*. Developing its earlier submission regarding Mr. Shea's prison violence, the Crown argues that all his behaviour, both in and out of prison, is violent:

> 117. Every incident was assaultive or violent. The vast majority of the incidents were instrumental – the violence was not an end itself. Rather, it was intended to either intimidate or seek retribution and/or foster status. Mr. Shea's early violence provides the beginnings of antisocial conduct and values. Practically every instance was unprovoked (notwithstanding the Respondent's rationalization). All victims were vulnerable – in some instances he used weapons; in other instances they were

either lying down or asleep, or otherwise caught unaware; in some instances they were outnumbered. Either way, none involved a "fair fight". They were attacks.

[97] The Crown adds, "The March 31, 2014 attack on Christian Clyke is important. This attack occurred during a recess in the very dangerous offender application under appeal, during a break from Dr. Starzomski's testimony." As usual, Mr. Shea was the aggressor. The victim was outnumbered. As the Crown submits, it is one more example of Mr. Shea's refusal to restrain himself, even when very much in his immediate interest to do so.

[98] *These are fair submissions, embracing virtually all of Mr. Shea's prior conduct. But they were not made to the application judge, and we do not have the benefit of her consideration of this alternative theory.*

[per Bryson JA]

…

[129] *The appellant argues that the application judge improperly considered the "dog-eat-dog" world of institutional life as minimizing the import of his in-custody behaviour, and this, in turn, influenced her finding that a pattern was not made out. This argument has been thoroughly canvassed by Bryson J.A. (see ¶ 88-95). I understand him to be agreeing with the appellant that the application judge's use of "context" was problematic*. As with the first issue, and for the same reason, he finds that error to be non-material.

[130] At this point, *it is useful to examine the application judge's use of context in further detail*. The consideration of context in a pattern analysis is a given. *Whether or not a pattern exists depends very much on the circumstances in which past behaviours have occurred. The "context" in which behaviours have occurred may constitute the "common thread" weaving a series of behaviours into a pattern as contemplated by s. 753(1) (for example, here the appellant alleges a pattern of violence against unsuspecting victims, clearly requiring a consideration of the context in which behaviour arises). A consideration of the context in which behaviours have occurred is also relevant to the analysis of future risk.*

[131] There is no doubt that the application judge, relying on *Neve*, found a consideration of "context" to be a "critical aspect" of the pattern analysis. That, on its face, is not problematic. However, it is also clear that *the application judge did not use context as a means of determining whether similarity existed among various behaviours, or whether it reflected on risk. Rather, she used it as a means of explaining and, in my view, mitigating Mr. Shea's "atrocious" institutional behaviour*, injecting into the analysis a consideration of his moral blameworthiness. The following passage from her reasons is instructive:

> [436] Another dimension of the pattern analysis must not be overlooked. Context is a critical aspect of determining if a pattern exists. (*Neve, paragraph 165*) Mr. Shea's context for much of his violent and aggressive behaviour has been in what Dr. Theriault referred to as the "dog-eat-dog" world of the correctional system.
>
> [437] For example, on May 25, 2003, Mr. Shea was the victim of a serious assault by three prisoners in the Renous gym during recreation. He was taken for outside medical treatment and involuntarily transferred to Millhaven Penitentiary in Ontario. (*Reasons, paragraph 241*) Just five days earlier, in a Progress Assessment dated May 20, 2003 Mr. Shea indicated he routinely kept "shanks" to protect himself as he was in a maximum security prison. (*Reasons, paragraph 240*)
>
> [438] Mr. Shea told the National Parole Board in 2007 that in relation to assaults on other prisoners, prison life "is not easy" and to survive he had to defend himself. (*Exhibit 7, page 383 – National Parole Board Decision, May 1, 2007*)
>
> [439] So, although the evidence reveals that Mr. Shea has possessed shanks in prison, the Crown has proven beyond a reasonable doubt only one instance of him using one – the aggravated assault of Keithen Downey on June 15, 2010. Arguably it is evidence of restraint on Mr. Shea's part that his institutional violence – assaulting other prisoners – has not been shown to involve shanks even though the records establish he had them and presumably could have used them.

[132] 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."

[133] 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*.

[134] The application judge relied on the following passage from *Neve*:

> 165 We agree that there will be cases where uttering threats will certainly form part of a pattern of behaviour sufficient to satisfy ss. 753(a)(i) or (ii). However, to determine if specific offences fall within the proscribed patterns under s. 753, it is essential to assess the offences in context, having regard to what actually happened and why. For example, there is a world of difference between someone who conveys

> a threat directly to a police officer about a third party and the stalker who threatens his or her victim directly and then takes steps to carry out that threat.

[135] As the above indicates, at issue was whether certain threats, made by a youthful Ms. Neve, should be considered in the pattern analysis. The Court of Appeal concluded they should not be, explaining:

> 166 What were the circumstances surrounding the threat offences which Neve committed? The first incident occurred when Neve was 15. While detained in a young offender facility with a friend of hers, another juvenile prostitute, Neve wrongly assumed that the person to whom her friend was speaking on the phone was a pimp who had assaulted the friend. Neve took the phone, started swearing at him and threatened to blow his head off. Unbeknown to her, the person on the phone was a detective with the Calgary police. Neve was charged, pled guilty the next day, and received a four month closed custody sentence.
>
> 167 The second offence occurred when Neve was 19. The transcripts from the original sentencing hearing reveal that a woman, Tasha Johnson, had implicated Neve in a homicide. While speaking to a police officer investigating this matter, Neve informed him that she would kill Johnson and throw her body in the ocean. She told another officer that she was going to Vancouver and would find Johnson and then send the officer a postcard with Johnson's head smashed in. Neve pled guilty to this offence and was sentenced to 30 days in jail to be served intermittently, a fine, and probation.
>
> […]
>
> 172 Viewed in context, what do these threats reveal? First, it must be remembered that to prove criminal culpability, it is not necessary that the Crown prove that the offender intended that the threats would be conveyed to the victim, nor for that matter that the offender actually intended to carry them out. It is enough that the offender intended that the threats be taken seriously: *R. v. Clemente*, 1994 CanLII 49 (SCC), [1994] 2 S.C.R. 758; *R. v. McCraw*, 1991 CanLII 29 (SCC), [1991] 3 S.C.R. 72; and *R. v. LeBlanc*, 1989 CanLII 56 (SCC), [1989] 1 S.C.R. 1583.
>
> 173 We are mindful of the fact that the sentencing judge found that when Neve made the threats, she meant to carry them out if the opportunity to do so arose. However, with respect, on this record, that finding could not reasonably be made. In neither of the two threat offences to which Neve pled guilty was it agreed in the statement of facts put to the court that Neve intended to carry out the threats if the opportunity arose. Nor did Neve testify to this effect at the dangerous offender hearing in reference to any of the threat offences and the other evidence called could not reasonably support this conclusion being drawn even with the benefit of hindsight.
>
> […]
>
> 175 Third, and most importantly, is the context in which the threats were made. The first occasion involved a threat over the phone to someone Neve thought was a

> pimp. Without trivializing Neve's conduct, her reaction in dealing with a pimp who had assaulted her friend is understandable, given the world of the juvenile prostitute, though not legally justifiable. … This was a young prostitute seeking to defend her friend, another prostitute, from a pimp through the use of verbal utterances over a telephone. More than one study has revealed the high degree of risk of harm to which juvenile prostitutes are subjected by their pimps. Nor can one ignore the limited ability of authorities, despite their best efforts, to adequately protect juvenile prostitutes. Viewed from this perspective, it is difficult to characterize what was essentially a pathetically inadequate attempt by a young girl to defend her friend from a pimp as behaviour falling within the proscribed patterns of behaviour.

[136] *I question the reasonableness of the application judge's reliance on Neve in these circumstances. From a factual perspective, there is an important distinction between the pattern of behaviour presented in relation to Ms. Neve, and that of Mr. Shea*. In the former, the pattern of behaviours consisted primarily of threats, which the Court of Appeal found were lacking in intent, and an objective ability to implement. They were excluded from the pattern analysis based on those contextual considerations. Mr. Shea's institutional behaviour, although certainly containing threats, is peppered with numerous incidents of actual physical violence. *Unlike Ms. Neve, his record of lashing out unexpectedly demonstrates his threats of violence towards correctional officers and other inmates are not hollow*.

[137] *Further, the unique legislative circumstances which existed in Neve give rise to some caution in the adoption of its contextual approach*. In *Szostak*, the Ontario Court of Appeal explained:

> 50 As noted above, the trial judge also referred to the decision of the Alberta Court of Appeal in *Neve*, an important case interpreting the 1997 legislation. There is a complication in applying *Neve* because the accused in that case was sentenced under the 1977 legislation but her appeal was heard after the 1997 amendments came into force. Although Neve's predicate offences were committed before 1997, the court held that the appeal was governed in part by the new, more favourable, legislation by virtue of s. 44(e) of the *Interpretation Act*, R.S.C. 1985, c. I-21. But, Neve was also entitled to the benefit of those parts of the 1977 regime that were more favourable to her. The result, according to the *Neve* court, was that the court had discretion not to find the person to be a dangerous offender even if she met the s. 753 definition and further discretion not to impose an indeterminate sentence even if the person was declared to be a dangerous offender and to impose instead a conventional sentence.

[138] I am satisfied that the application judge's use of "context" was material in her conclusion that Mr. Shea's institutional behaviour did not constitute a "pattern of behaviour" as contemplated by both ss. 753(1)(a)(i) and (ii).

[per Bourgeois JA]

[My italicization added]

[23] Let me next examine the admissibility requirements of the evidence the Crown may seek to introduce in this case.

The Crown and Defence positions regarding potential hearsay objections to materials filed by the Crown/testimony by Crown expert and other witnesses

[24] In its Notice, the Crown has set out specifically that it will tender relevant evidence based on Mr. Melvin's:

1. criminal record (two binders in relation to the predicate offences of December 2, 2008; five binders regarding documentation of previous convictions);
2. outstanding, section 270.01(1)(b) *CC* charge, which was pending trial, and is admissible if the requirements of section 725 (1)(b).1) *CC* are met;
3. misbehaviour while in provincial and federal jails (which could include breaches of administrative rules/directions by staff, and behaviour that amounts to criminal conduct – under the *Criminal Code* or the *Controlled Drugs and Substances Act*) – five binders regarding Correctional Services Canada (which includes his psychological file), and two binders regarding Nova Scotia Correctional Services, which could include his time in custody as and adult and a youth;
4. one binder of Nova Scotia Community Corrections materials (presumably including Pre-disposition Reports and Pre-sentence Reports, possibly his status/ behaviour while on probation);
5. Nova Scotia Health Authority file generally, (psychiatry and addiction matters – one binder); and which would include specifically the East Coast Forensic Hospital materials as well.

[25] The Crown has also indicated that it will be presenting witnesses from: Correctional Services Canada, the Nova Scotia Department of Justice Correctional

Services, Nova Scotia Department of Justice Probation Services, and the Nova Scotia Health Authority – East Coast Forensic Hospital.

[26] Given that I am providing this preliminary decision as a guide for counsel generally, I will restrict my comments to those areas that counsel have identified as specifically being in dispute, and will focus my comments on legal principles rather than factual matters, which remain to be established before me at the hearing.

[27] The Crown and Defence each characterize the hearsay admissibility dispute similarly:

> (Crown) The offender objects to the admission of the institutional records contained in *all* the proposed volumes. He objects to the reports that detail misconduct, discipline and safety and security management within the institution where James Melvin has been incarcerated either during pretrial/presentence custody or while serving sentence (provincially and federally). He further objects to any and all materials disclosed to the defence and used by Dr. Lohrasbe in his assessment filed with the court.

[28] The Crown submits that there are four ways in which these records may be admitted for the truth of their contents:

1. as hearsay on the basis that they are “credible and trustworthy”;

2. pursuant to section 30 of the *Canada Evidence Act* (*CEA*);

3. pursuant to the common-law business records exception; and

4. as a principled exception to the hearsay rule.

[29] The Defence's position is that:

> Crown seeks to rely upon several volumes of materials and records pertaining to Mr. Melvin. They can be generally categorized as follows:
>
> - Health Authority records
> - materials related to previous convictions [including the relevant surrounding circumstances found or accepted by a court]
> - Corrections Canada records
> - Probation records
>
> The records of materials tendered by the Crown are, in the defence submission, hearsay and therefore *prima facie* inadmissible in a criminal proceeding. The defence does acknowledge that the dangerous offender hearing is a sentencing procedure, rather than a trial, and that the rules of evidence are more relaxed in sentencings. "However, that does not translate into a situation where all hearsay is admissible… Although the Crown submissions attempt to deal with the admissibility of the records as a whole, defence submits that to do so is in error. The court must assess the records individually, as different concerns arise, depending on the nature of the documents…
>
> [In *R v Williams*, 2018 ONCA 437, leave to appeal refused [2019] SCCA No.164] the Ontario Court of Appeal discussed the difficulties with using police synopses, which included 'evidentiary frailties inherent in the nature of the police synopsis' (para 55) and urged using caution… The defence further submits the same reliability concerns expressed by the court in Williams attach to the correctional records related to incidents within the institution (see *R v JKL*, 2012 ONCA 245 at para 82) … The same can be said in our submission of many of the records here. For example, records that contain "risk assessments", apparently completed by correctional staff and that contain comments regarding mental health diagnoses – often in inflammatory language. We know nothing of the source of that information, or anything about the purported qualifications of the authors. In those circumstances it is impossible to meet the credible and trustworthy standard – see for example *R v AB*, 2017 ONCJ 419.
>
> … It is the defence position that should the court conclude that the documents qualify as business records generally, the exceptions set out in section 30 (10) operates to exclude a significant portion of the materials upon which the Crown purports to rely. With respect to Mr. Melvin's previous convictions, the Crown seeks to tender police generated documentation such as Crown brief reports and police notes. These documents were clearly

created for the purpose of what was then an investigation. As such they are exempt from the application of section 30. Similarly, the corrections records contain reference to/reports of other alleged incidents within the institution. These documents, we submit were created for the purpose of investigating alleged institutional disciplinary infractions. These investigations can result in discipline hearings and penalties. The Crown suggestion that they are not "investigations" in the usual and ordinary meaning of that word, is simply incorrect (see eg. *R v Farhan*, 2013 ONSC 7094 at paras. 12-19) …

It is not simply a matter of the documents being prepared by professionals or a matter of their 'official" nature. A report that relies upon information from a federally sentenced inmate, with an unknown criminal record, an unknown track record for dishonesty, does not gain the veil of reliability because it is signed by a correctional officer, in the defence's respectful submission."

What is "hearsay"?

[30] I can do no better than to adopt Justice Watt's commentary from his text at pp. 385 – 6[13] :

"The essential defining features of hearsay are twofold:

i. the out-of-court statement is introduced to prove the truth of its contents; and
ii. the absence of a contemporaneous opportunity to cross-examine the declarant.

There are at least four potential sources of error when a witness describes an event that s/he claims to have observed:

i. perception;
ii. memory;
iii. communication; and

[13] His commentary is premised on the trial context and oral testimony. I bear in mind that the admissibility of hearsay in the sentencing context is subject to more relaxed rules of admissibility.

iv. sincerity.

In the usual course, the trier of fact will consider these testimonial factors in deciding what weight, if any, to assign to a witness's evidence. To diminish the potential for error because of the dangers inherent in a witness's description of a previous event, a witness is generally required to testify under three conditions:

i. personal presence before the trier of fact;
ii. under oath or its equivalent; and
iii. subject to cross-examination.

The principal reason for the exclusion of hearsay is the absence of a contemporaneous opportunity for cross-examination. It is cross-examination that may best expose defects in perception and memory, as well as ambiguity in communication and want of sincerity.

The classic hearsay paradigm consists of four elements:

i. declarant;
ii. recipient;
iii. statement; and
iv. purpose.

The declarant is the person, usually not called as a witness in the proceedings, who makes a statement that a party seeks to adduce in evidence.
The recipient is the person who has received the statement from or heard the statement by the declarant and who is summoned as a witness by a party to give evidence of the statement before the trier of fact.

There is greater difficulty in fashioning an acceptable and exhaustive definition of "statement", at all events one that reaches beyond the obvious. A statement should include, at least, an oral or written assertion of the declarant, and non-verbal conduct of the declarant intended by the declarant to be an assertion. Implied assertions are also covered by the rule.

> The element of purpose is critical to the application of the hearsay rule. The exclusionary rule does not bar reception of every statement made by a declarant that a party seeks to introduce in evidence through the testimony of the recipient. *The statement is only excluded by the rule when offered for the purpose of proving the truth of its contents. The hearsay rule does not exclude a statement offered as original evidence, viz., for a relevant purpose other than to prove the truth of its contents.*[14]

A review of the jurisprudential treatment of hearsay in sentencings

[31] Often experts are presented with hearsay statements (verbal or documentary) purportedly as a foundational basis for their opinions. Whether they are admissible is context specific and largely depends on the evidentiary purpose for which they are put forward.[15] Firstly, let me say that in my opinion, for any criminal offence conviction the Crown wishes to rely upon as proved beyond a reasonable doubt, **only** court-certified copies of the Informations and transcripts, or some equally authoritative evidence will be sufficient[16].

---

[14] One further point should be made – again in the trial context, as Justice Watt, relying on the reasons in *R v Baldree*, [2013] 2 SCR 520, summarizes it at p. 386: "An implied assertion tendered for the proof of its contents is hearsay and *prima facie* inadmissible. To determine admissibility, no principled reason exists to distinguish between express and implied assertions tendered for the truth of their contents."

[15] I have recently discussed this area in the context of a criminal trial in which a properly qualified "specialized knowledge" expert in the area of so-called "outlaw motorcycle gangs" was permitted to give opinion evidence relevant to whether the Bacchus Motorcycle Club was a "criminal organization"- *R v Howe*, 2018 NSSC 156 at paras. 253 – 259 and footnotes 106 and 107 (presently under appeal).

[16] The statutory and common law "public documents" or records of court proceedings rule can be relied on for such documents admissibility: s. 23 *CEA* (and the common law doctrine of exemplification) and see the reasons in *R v Caesar*, 2016 ONCA 599 at para. 38. See also s. 12 *Canada Evidence Act* and s. 667 of the *Criminal Code*; and as to youth records see ss. 82 and 119 *Youth Criminal Justice Act*; *R. v. AWH*, 2019 NSCA 40 at para. 39 in the trial context, relying on Justice Beveridge's (as he then was) reasons in *R. v. Upton*, 2008 NSSC 338 – see also *R. v. Hammerstrom*, 2019 BCCA 269 – although both these cases involved the protections to be afforded to witnesses with youth records.

[32] In the context of a simple sentencing, I have previously considered hearsay (s.723 *CC*) and other potential limitations on evidence that arise in pre-sentence reports (s. 721 *CC*), "any relevant information", including representations or submissions made by the parties (s. 726.1 *CC*), and statements made personally by offenders to the court (s. 726 *CC*).[17]

[33] Section 723(5) *CC* reads:

> Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person
>
> (a) has personal knowledge of the matter;
> (b) it is reasonably available; and
>
> (c) is a compellable witness.

[34] The prevailing common-law position regarding sentencings, established in *R v Gardiner*, [1982] 2 SCR 368 at paras 107 – 114 per Dickson J, as he then was, is that hearsay may be accepted "where found to be credible and trustworthy" provided "the obtaining and weighing of such evidence should be fair". In my opinion, the sentencing provisions ss. 723 and 724 *CC* were intended to codify and

---

[17] See *R v Howe*, 2018 NSSC 274 (presently under appeal) at paras. 53-73 (including my statement at para. 69, that "I also proceed on the presumption that if an offender does not object to any aspect of the PSR, then I should be entitled to consider all the contents of that report."). I appreciate that when reviewing Mr. Melvin's earlier court-ordered Pre-Disposition and Pre-Sentence reports, since I was not the sentencing judge therefore I do not have direct knowledge whether the contents of those reports were redacted or modified by the judge at the time of sentencing. Nevertheless, given the purposes of such reports, and particularly because they usually chronicle ancillary evidence, it is acceptable here for me to consider true copies of the originals of those PSRs/PDRs to be presumptively reliable. The defence can still challenge or contextualize those, *inter alia* by providing their own evidence.

reflect those considerations – correspondingly the arguably stricter requirements of the principled exception to the hearsay rule required in a trial (guilty or not guilty) context, as referenced in *R v Khelawon*, 2006 SCC 57 and its progeny, are generally *not* applicable to sentencings, unless the hearsay is offered for the purpose of establishing aggravating facts regarding the circumstances of the commission of the predicate offence(s). The *Khelawon* admissibility standards are also not applicable to any earlier conduct that the Crown relies on as specific touchtone instances of "pattern" conduct (since he is not being sentenced for that conduct *per se*) which still must be proved beyond a reasonable doubt however.[18]

[35] This makes sense particularly since sentencing judges should be entitled to have the fullest information reasonably available to render a just sanction flowing from the "complicated calculus" involved- see also *R v Jones* [1994] 2 SCR 229:

> "In the case of dangerous offender proceedings, it is all the more important that the court be given *access to the widest possible range of information* in order to determine whether there is a serious risk to public safety. If there is, the dangerous offender sentencing *allows the justice system to more precisely tailor the actual time served by the offender to the threat that he poses to society*… If the sentencing judge is to obtain the accurate assessment of the offender that is necessary to develop an appropriate sentence, he will have to have at his disposal the broadest possible range of information."
>
> [My italicization added]

---

[18] One must recall that in simple sentencings a court is tasked with imposing a "fit" sentence based on a consideration of the circumstances of the offender, and the circumstances of the commission of the predicate offence(s). Neuberger comments at p. 6.8: "Are there other 'aggravating factors that, in keeping with s. 724(3)(e) *CC*, have to be proved beyond a reasonable doubt? The jurisprudence has not shown anything beyond elements that could constitute a pattern."

[36] Another example thereof found in the jurisprudence is that, generally speaking, in dangerous offender proceedings, the confession rule (*R v Oickle*, 2000 SCC 38) does not apply to statements made by an offender to probation officers, classification officers, parole officers, prison guards, psychiatrists etc. -*R v Wilband*, 2 C.C.C. 6 (SCC); see also *R v Campbell*, [2003] O.J. No. 4085 (SC) (affirmed [2010] O.J. No. 2448 (CA)) per Casey Hill J. wherein he concludes at paras. 29-31:

> "In practice, in sentencing hearings, the exclusionary rules of evidence, such as the rules respecting hearsay, prior consistent statements, collateral facts, etc. are not applied with the same rigour as during a criminal trial… The touchstone for sentencing procedure is flexibility with diminished procedural impediments to the acquisition of the fullest possible information regarding the offender. The spectre of mandatory confessional voir dires in sentencing hearings respecting an offender statements to a probation officer authoring a presentence report or to a police investigator would not advance sentencing objectives. In most dangerous offender sentencing hearings… there are prior statements made to classification officers, parole officers and prison guards. The prosecution would rarely be in a position to produce the chain of persons in authority to in contact with the inmate prior to his statement and frequently the recipient of the statement must rely on his or her historical recording of the utterance without present recovery of the specific circumstances of the statement… This said, concerns about evidentiary reliability are not merely abandoned in a sentencing hearing. The court remains vigilant to act upon reliable evidence… A sentencing court is empowered, at common law, to exclude unreliable evidence, evidence not properly considered creditworthy, and to exclude 'evidence obtained in circumstances such that it would resulting in fairness if the evidence was admitted at trial': R v Buhay, (2003) 174 CCC (3d) (SCC) at 115-6."

[37] In summary, sentencings must proceed fairly but should not bear the full-fledged characteristics of trials, as a matter of judicial economy and given their more focussed purpose.

[38] Hearsay evidence can be relevant to various matters, and consequently whether such hearsay is admissible or not, largely depends on the purpose for which the hearsay is being proposed as evidence, and the source of that hearsay.

[39] For example:

1. is the potential hearsay evidence presented as an "admission" by an offender (such informal admissions made to psychiatrists or psychologists who have conducted clinical interviews with an offender are also to be reviewed on the "credible and trustworthy" standard-see eg. *R v Bisson*, 2017 ONCJ 419 at para. 20. Formal admissions of any of the "allegations contained in the notice" filed by the Crown are also admissible pursuant to s. 754 (3) *CC*);[19]

2. merely for the fact that a statement was made;

[19] As Justice Watt puts it in his textbook at page 664 speaking in the context of the pre-sentencing/trial process: As a general rule, an informal admission is a statement made by or on behalf of the defendant which is adduced by the prosecution as part of the prosecution's case. It may be oral or written. Conduct may also constitute an informal admission. Admissions are often characterized as an exception to the hearsay rule, yet we do not require a showing of necessity and reliability or other conditions precedent as it is the case with the traditional hearsay exceptions. The admissions exception is a function of the adversary system. An admission need not be against the declarant's interest, rather we leave it to the opponent to decide whether to adduce the alleged admission in evidence. Its weight is for the trier of fact to decide (admissions may be directly made by an offender -*R v Evans*, [1993] 3 SCR 653, *R v Streu*, [1989] 1 SCR 1521, and *R v SGT*, [2010] 1 SCR 688-or indirectly by assent (Watt's at pp. 668-674)-"An adoptive admission is a statement made by a third party in the presence of and adopted by the defendant. There is only adoption to the extent that the defendant assents to the truth of the statement expressly or impliedly. Assent may be inferred from the defendant's words, actions, conduct or demeanour, and sometimes from the defendant's silence where the circumstances give rise to a reasonable expectation of reply."- *R v Steu*, *R v Robinson*, 2014 ONCA 63 and *R v Thompson*, (1974) 26 CRNS 144 (NSCA).

3. in support of a suggested "extrinsic evidence" finding; or

4. as relevant to establish the constituent elements of a "pattern" of dangerousness?

[40] The Ontario Court of Appeal has stated in *R v Williams*, 2018 ONCA 437 (leave to appeal denied [2019] SCCA No. 164), regarding the admissibility for the truth of their contents of police synopses:

> 42 In instances such as the present case, the Crown will seek to admit and rely upon police synopses to establish the factual basis of prior convictions in support of a dangerous offender application. This is often because transcripts of those prior trials, pleas and sentencing hearings may no longer be available or do not contain sufficient detail to permit a proper analysis of the offender's conduct. However, police synopses are often prepared at the time of arrest, or in the early stages of a criminal prosecution. A fuller appreciation of the facts often emerges later, such that the facts set out in the synopses will often diverge from the facts proven at trial or admitted on a guilty plea: R. v. Gibson, 2012 ONSC 5527, [2012] O.J. No. 4612 (admissibility ruling), at para. 8; R. v. Gibson, 2013 ONSC 589, [2013] O.J. No. 490 (dangerous offender designation), at para. 32; R. v. Keizs, 2013 ONSC 4322, [2013] O.J. No. 3572, at para. 41, aff'd 2015 ONCA 905, 342 O.A.C. 79.
>
> 43 Mr. Williams argues that it was an error for the sentencing judge to have admitted the various police synopses, and that the sentencing judge further erred in finding their contents to be proven beyond a reasonable doubt. Without the synopses, which were relied upon by the sentencing judge in identifying the requisite pattern of behaviour under s. 753(1)(a) and by Dr. Klassen in writing his report, the sentencing judge could not have concluded that the statutory elements of dangerousness had been satisfied.
>
> 44 Mr. Williams relies on R. v. J.K.L., 2012 ONCA 245, 290 O.A.C. 207, at paras. 88-94, leave to appeal refused, [2013] S.C.C.A. No. 116, which was not placed before the sentencing judge by trial counsel. In J.K.L., this court expressed the view that it is difficult to conclude that a Crown synopsis, standing alone, is an accurate reflection of events. The court noted that the sources of information contained in the synopsis may not be specified and an assessment of the reliability and trustworthiness of the information contained within may be difficult or impossible.
>
> 45 *I agree that there are issues respecting the reliability of information contained in synopses, be they labelled as police or Crown synopses. However, I do not agree with Mr.*

Williams' submission that synopses are wholly inadmissible at a sentencing hearing. As further explained below, the court must take a generous approach to admissibility in a dangerous offender proceeding. However, once the evidence has been admitted, the court must then grapple with the appropriate weight to be accorded to the information contained within the synopses. In the present case, the sentencing judge properly admitted the police synopses, but erred in finding that their contents had been proven beyond a reasonable doubt. However, I conclude that there is no reasonable possibility that this error had any impact on the outcome. I would therefore dismiss the appeal.

1. <u>Did the sentencing judge err in admitting the police synopses?</u>

46 *In my view, the sentencing judge correctly admitted the police synopses tendered in the dangerous offender proceeding*.

47 It is well established that the strict rules of evidence applicable at trial do not govern sentencing proceedings. Once guilt has been established beyond a reasonable doubt, the task of the sentencing judge is to tailor a sentence that is appropriate to the particular circumstances of each offender. For that reason, the sentencing judge "must have the fullest possible information concerning the background of the [offender]": *R. v. Gardiner*, [1982] 2 S.C.R. 368, [1982] S.C.J. No. 71, at p. 414.

48 A dangerous offender proceeding is part of the sentencing process and is governed by the same sentencing principles, objectives and evidentiary rules: R. v. Boutilier, 2017 SCC 64, [2017] 2 S.C.R. 936, at para. 53; R. v. Johnson, 2003 SCC 46, [2003] 2 S.C.R. 357, at para. 23; R. v. Jones, [1994] 2 S.C.R. 229, [1994] S.C.J. No. 42, at pp. 279, 294; R. v. Ziegler, 2012 BCCA 353, [2012] B.C.J. No. 1755, at para. 7, leave to appeal refused, [2014] S.C.C.A. No. 491. *As explained by Gonthier J. in Jones, at p. 290, the importance of the sentencing judge having access to the fullest possible information about the offender is heightened in the context of a dangerous offender application*:

> In the case of dangerous offender proceedings, it is all the more important that the court be given access to the widest possible range of information in order to determine whether there is a serious risk to public safety. If there is, the dangerous offender sentencing allows the justice system to more precisely tailor the actual time served by the offender to the threat that he poses to society. The overriding aim is not the punishment of the offender but the prevention of future violence through the imposition of an indeterminate sentence.

49 *As with any sentencing hearing, hearsay evidence is admissible so long as it is found to be "credible and trustworthy": Gardiner, at p. 414. This common law principle is codified in s. 723(5) of the Criminal Code*. Character evidence is also specifically admissible in a dangerous offender proceeding pursuant to s. 757 of the Criminal Code.

50 I do not, as suggested by Mr. Williams, read J.K.L. as suggesting that police synopses are wholly inadmissible. Rather, in the passage quoted by Mr. Williams, the court in J.K.L.

highlights the reliability threshold that evidence must meet in order to be relied upon, and the concerns that arise in this regard due to the nature of police synopses. I agree with those concerns and address them further below.

51 *In Gibson (admissibility ruling), the sentencing judge admitted CAS and correctional records in an advance admissibility ruling prior to a dangerous offender hearing. He was satisfied that the records, which included police synopses, met the "credible and trustworthy" threshold*. For the same reasons, I am satisfied that it was appropriate for the sentencing judge to admit the police synopses.

2. <u>Did the sentencing judge err in finding that the facts contained in the police synopses were proven beyond a reasonable doubt?</u>

52 *In Gibson (admissibility ruling), the sentencing judge cautioned, however, that portions of certain records, such as the police synopses contained in the correctional records, may be less reliable*. For that reason, when the admissible evidence is subsequently considered on the merits, the court must carefully consider the weight to be accorded to those portions of the records.

53 Despite the broad approach to admissibility at the sentencing stage, it is not the case that the offender is deprived of all protections: Jones, at p. 292. The Crown must prove disputed aggravating facts beyond a reasonable doubt: Jones, at p. 292, quoting Gardiner, at p. 414; see also s. 724(3)(e) of the Criminal Code. The corollary to this principle in a dangerous offender proceeding is that the Crown must prove the statutory elements of dangerousness beyond a reasonable doubt: Joseph A. Neuberger, Assessing Dangerousness: Guide to the Dangerous Offender Application Process, loose-leaf (Toronto: Thomson Reuters Canada, 2017), at pp. 6-5 to 6-6; Boutilier, at para. 36, n. 1; R. v. Jackson (1981), 61 C.C.C. (2d) 540 (N.S.C.A.), at p. 544, leave to appeal refused, [1982] S.C.C.A. No. 423; Ziegler, at para. 6.

54 As described above, the sentencing judge accepted the entire contents of the police synopses as proven beyond a reasonable doubt. In my view, this was an error. The sentencing judge ought not to have treated this as an all or nothing decision. *The synopses were properly admitted but the contents had to be considered carefully before being relied upon. Some basic facts set out in the synopses can be used for the purposes of establishing details such as dates and ages*: Gibson (admissibility ruling), at para. 8; Gibson (dangerous offender designation), at para. 34. *Other facts, where support can be found in other parts of the record, can likewise be relied upon: Gibson (dangerous offender designation), at para. 34. This does not, however, lead to the conclusion that the entire contents of the document can be taken as proven beyond a reasonable doubt*.

55 Due to the evidentiary frailties inherent in the nature of a police synopsis, caution is required when the sentencing judge is considering whether the contents of those records can, along with the rest of the record, provide the basis for a finding that the statutory elements of dangerousness have been proven beyond a reasonable doubt. *The incidents set*

out in the synopses must be considered in light of all of the evidence led at the hearing. Certain parts of a synopsis may find support and confirmation, either directly or by reasonable inference, in other parts of the record. If so, it is open to the sentencing judge to rely on those incidents as evidence in support of a finding that the statutory elements of dangerousness, such as the requisite pattern of behaviour, are made out.

[My italicization added]

[41] In *Williams*, (at paras. 42 and 51) the court approvingly referred to Justice Code's decision in *R v Gibson*, 2012 ONSC 5527, wherein he stated:

4 I am satisfied that the documents are all admissible. They were obtained by the Crown from six agencies and can be summarized as follows:

i) Between July 1990 and February 1992, the Children's Aid Society of Toronto (the CAS) kept a file on P.G.'s family. P.G. was fourteen years old when the file was opened. He had been the subject of certain complaints, and one criminal charge, alleging sexual misconduct with other children. The one criminal charge was apparently dismissed at a court proceeding and the CAS never sought or obtained any supervisory orders relating to the family. The parties agree that these records are not admissible to prove the fact of any sexual misconduct by P.G. as none of these early complaints ever resulted in a conviction and the alleged sexual misconduct cannot otherwise be proved to the requisite criminal standard. See: R. v. Lewis (1984), 12 C.C.C. (3d) 353 (Ont. C.A.); R. v. Pike (2010), 260 C.C.C. (3d) 68 (B.C.C.A.); R. v. S. (C.L.) (1999), 133 C.C.C. (3d) 467 at paras. 26-31 (Ont. C.A.). *The Crown seeks to rely on the CAS records only to show the dynamics of the P.G. family at the time and to show that counseling was made available to P.G. and his response to it*;

ii) The program that P.G. was referred to by the CAS was known as "SAFE-T" (Sexual Abuse: Family Education and Treatment Program) and it was run by the Thistletown Regional Centre of the Ministry of Community and Social Services. They kept a file on P.G., from January 1991 until April 1991, concerning his response to the program that they offered. P.G. would have been fourteen years old at the time;

iii) *P.G.'s first Youth Court conviction was on October 31, 1991, for carrying a concealed weapon*. He was fifteen years old and was placed on probation for nine months. As a result, the Ministry of Community and Social Services kept a file on P.G., concerning his probation, until the order expired on July 31, 1992. By the end of this period, P.G. would have just turned sixteen years old;

iv) P.G.'s more significant Youth Court convictions were entered on November 25, 1993. He was now seventeen years old and was sentenced to nine months open custody and was placed on probation for fifteen months in relation to three counts of invitation to sexual touching and one count of abduction of a child under age fourteen. The charges appear to have been laid in March 1993, when P.G. was sixteen years old, and an older adult co-accused was also charged. *The probation order required P.G. to "continue treatment and counselling*" and it referred to an existing program and report from the J.D. Griffin Adolescent Centre that appears to have been filed with the Court at the time of sentencing. *The Ministry of Correctional Services kept a file on P.G. relating to this second period of probation*;

v) During the nine-month period of open custody, from November 25, 1993 until August 24, 1994, P.G. was referred to the Hincks-Dellcrest Centre of the Ministry of Correctional Services. *They kept a file which includes a large number of "psychiatric notes"* from the senior psychiatrist at the Centre, Dr. Sowa. P.G. was eighteen years old at the end of this open custody period of his sentence;

vi) As noted previously, P.G. had attended a program at the J.D. Griffin Adolescent Centre in late 1993, while awaiting trial and sentencing on the various charges that he was facing. *They kept a file on him which includes two "assessment reports" from social workers named Arlene Sager and Chris Brown. It appears that they continued to see P.G. during 1994*, while he was serving his nine-month open custody sentence, as their reports are both dated in 1994.

5 *The above records represent P.G.'s only prior contacts with the criminal justice system or with any agencies that have provided him with counselling or with psychiatric treatment. The present offences, on which he awaits sentencing, were committed in the summer and fall of 2009*. At that time, P.G. was thirty-three years old. He is now thirty-six years old. It can be seen that there is *a fifteen- year gap* between 1994, when P.G. completed his only previous custodial sentence, and 2009 when the present offences were committed.

6 *I am satisfied that all of the above documentary records tendered by the Crown are admissible*. They are clearly relevant to the dangerous offender Application as *they provide evidence of P.G.'s only prior correctional history, his only prior treatment history, and his only prior record of criminal conduct*. *Although the records are hearsay, they are admissible at a sentencing hearing*. The dangerous offender Application is a sentencing hearing and it is the rules of evidence relating to sentencing that govern. See: *R. v. Wilband*, [1967] 2 C.C.C. 6 at 9-10 (S.C.C.); *R. v. Jones* (1994), 89 C.C.C. (3d) 353 at 394, 396 and 398 (S.C.C.); *R. v. Johnson* (2003), 177 C.C.C. (3d) 97 at para. 23 (S.C.C.).

7 The common law allows hearsay to be admitted at a sentencing hearing, provided it is "credible and trustworthy" and provided the Crown takes on the burden of proving any aggravating factors that are disputed to the normal criminal standard of proof beyond reasonable doubt. See: R. v. Gardiner (1982), 68 C.C.C. (2d) 477 at 514 (S.C.C.); R. v. Albright (1987), 37 C.C.C. (3d) 105 at 111 (S.C.C.).

8 *I am satisfied that the records tendered by the Crown are "credible and trustworthy" in the sense that they were prepared contemporaneously by professionals who were carrying out important and responsible public duties*. See: R. v. Gregoire (1998), 130 C.C.C. (3d) 65 at paras. 53 and 62-3 (Man. C.A.); R. v. Piché (2006), 210 C.C.C. (3d) 459 at paras. 9-20 (Alta. C.A.). *There may be certain parts of certain records that are less reliable and that are not entitled to any weight*. For example, police synopses of the offences that P.G. was convicted of in 1993 form part of the correctional records. The facts set out in a police synopsis at the time of arrest are often not reliable and do not always reflect the facts that are later proved at trial or admitted on a guilty plea. See: R. v. L. (J.K.) (2012), 290 O.A.C. 207 at paras. 88-94 (Ont. C.A.); R. v. Ziegler, 2012 BCCA 353 at paras. 61-2 and 76. The Crown accepts this proposition and only relies on the police synopses to establish the dates of the offences and the dates of P.G.'s arrest and not to prove the facts of the offences. I am satisfied that the police synopses are reliable for these limited purposes.

9 Ms. Choi does not dispute the admissibility of many of the records. She mainly attacks their weight. She agrees that the two experts, who will both testify at the sentencing hearing, can refer to the records and can indicate what weight they have attached to the records. Her only real concerns, that relate to admissibility in her submission, are that the CAS records not be used to prove earlier sexual misconduct by P.G. in 1990 and that the authors of some of the assessments made of P.G. in 1993 and 1994 be made available for cross-examination. The former point, concerning the limited use of the CAS records, is conceded by the Crown, as I have already noted earlier in these reasons. The latter point, concerning the alleged need to produce some of the authors of the 1993 and 1994 assessments, is provided for in certain circumstances both at common law and pursuant to s. 723(5). It is not a point that relates to the admissibility of the documents. *In R. v. Albright, supra at 114-115, Lamer J. (as he then was) gave the unanimous judgment of the Court and held that in cases where an* ***admissible*** *hearsay document's "accuracy is seriously put in issue, it would be incumbent upon the Crown to call whomever signed the [document] and make him or her available for cross-examination by the accused"*. Section 723(5) of the Criminal Code similarly provides that "hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify".

10 I will determine, at the sentencing hearing, whether the accuracy of the 1993 and 1994 assessments has been "seriously put in issue" and whether it is "in the interests of justice" to have the Crown produce their authors for cross-examination, once I have heard all of the evidence that will be called and once I have read the written arguments (or facta) to be filed by the parties prior to the hearing.

> 11 For all these reasons, the documentary records tendered by the Crown in Exhibits 3 and 4 are admissible at the sentencing hearing. I have made no findings, at this stage, as to the weight of the documents which all relate to a time period when P.G. was age fourteen to eighteen.
>
> [My italicization and bolding added]

[42] I am not aware of a decision from the Nova Scotia Court of Appeal or Supreme Court of Canada that directly canvasses the admissibility issues raised by Mr. Melvin. I am persuaded that the Ontario jurisprudence in relation to these issues is correct, and I will follow it.[20]

The application of the law to hearsay arising from the documents in issue

[43] Let me then turn next to the Crown position in relation to the following types of potential evidence, which I will presume will be tendered for the truth of their contents:

1. police synopses as evidence of the surrounding factual circumstances involving criminal (*CC* and *Controlled Drugs and Substances Act* (*CDSA*)) convictions registered against Mr. Melvin;

[20] I appreciate that the reasons in *R v Shea*, 2017 NSCA 43 (leave denied) are very much relevant to these proceedings, though they do not directly address the hearsay issues I am presently considering. Having come to the conclusion that a review of the voluminous documents is required to position me to provide a meaningful provisional ruling regarding these issues, and that no material risk of prejudice to Mr. Melvin's right to a fair hearing will result, on September 18, 2019 I directed the Crown to provide the "12 binders" of materials to me for my personal review and use.

2. the facts of untried criminal offences occurring within a correctional facility, where no "convictions" have been registered against Mr. Melvin;

3. the facts of untried criminal offences occurring outside a correctional facility;

4. previous psychological and psychiatric assessments, and chart notes, including diagnoses (including in relation to substance abuse issues) etc. made in relation to Mr. Melvin:

    a. formal court ordered assessments;

    b. for administrative or institutional purposes;

5. the facts of administrative misconduct within a correctional facility, not rising to the level of criminal offences.

[44] As contemplated by s. 723(5) *CC*, the Crown suggests four bases for allowing hearsay on such sentencings:

1. a common law rule, that where the evidence is "credible and trustworthy", hearsay is admissible: *R v Gardiner*, [1982] 2 SCR 368 at paras. 107 – 114, now largely codified in ss. 723 and 724 CC;

2. a common law rule, "principled exceptions" to the hearsay rule – *R v Khelawon*, 2006 SCC 57;[21]

3. a common law rule, the "business records" exception to the hearsay rule – *R v Ares and Venner*, [1970] SCR 608; The Crown also relies upon: *R v Monkhouse*, [1987] AJ No. 1031 at para. 25 (CA);[22]

4. a statutory exception – s. 30 *Canada Evidence Act* ("business records").

A. A consideration of the 3 common law bases.[23]

[45] In *R v Nield*, 2019 BCCA 27, Justice Willcock helpfully clarified this last basis in a nuanced manner, albeit regarding a conviction appeal:

> 77 *The Crown says the trial judge properly refused to admit the entire hospital record into evidence*. This record consisted of 148 pages and the Crown says providing it to the jury would have been "highly unhelpful and confusing". In my view, the judge did not adequately examine whether portions of the hospital record could properly be admitted as business records. *There is no doubt that, but for concerns with respect to the relevance of*

---

[21] As I noted earlier, generally speaking, the strict application of the principles in such cases, having their roots in the trial context, are not applicable to the sentencing context. The Crown also relies upon: *R v Jerome*, [2011] OJ No. 405 at para 41 (dealing with probation materials from British Columbia and Ontario as well as records of Correctional Services Canada); *R v James*, [1999] OJ No. 5969 at para. 6 (dealing with Children's Aid Society, probation materials, school records, and medical records). The law referenced by both these cases has to be seen in the light of the decisions of Justice Code and the Ontario Court of Appeal in *Gibson* and *Williams* respectively.

[22] In his textbook Justice Watt states: "Business records may also be admissible under an existing [traditional] exception to the hearsay rule. The proponent of the evidence must satisfy the trial judge, *inter alia*: that the declarant is dead; record was made by declarant contemporaneously with the events recorded; record was made by the declarant pursuant to a duty noted; record was made in the usual and ordinary course of business; and the declarant had no motive to misrepresent."

[23] I have referenced the general principles for these bases in my discussion of *Williams* and *Gibson* and elsewhere herein. Therefore, I will focus here on the remaining "business records" exception.

certain entries, the hospital record was an admissible document. Rita Johnson, a nurse who was a witness at the voir dire, identified the complete hospital record and this record was admitted into evidence on the voir dire, as Exhibit 3, without objection.

78 *The Crown's objection* to admitting the hospital record into evidence was that it was voluminous and contained material that might be difficult for the jury to understand and appropriately weigh. That objection *was to the "wholesale" admission of the hospital record. The trial judge, however, rejected defence counsel's request to have even part of the hospital record, the nursing notes, admitted into evidence*. That ruling appeared to be founded upon the view that the hospital record spoke only to the complaint that the appellant had not received appropriate medical care, *whereas the appellant's counsel sought to introduce it as a record of the appellant's deteriorating mental health in the hospital*.

79 *In my view, once a witness had attested to the authenticity of the hospital record and it was admitted into evidence on the voir dire without objection, the judge should have admitted relevant portions of the record as prima facie proof of the facts recorded therein. Those facts included observations made by medical staff regarding the patient's behaviour and the type and quantity of drugs administered to him*.

80 Although she left it open to reconsideration, the constraint the judge placed upon the appellant's counsel in his questioning of Ms. Reichenbach was inappropriate. In my view, there is no principled basis to preclude the appellant's counsel from asking Ms. Reichenbach about any factual observation noted in the hospital record with respect to a relevant issue. The judge expressed some concern with respect to hearsay in the record, but Crown counsel did not object to the admission of the hospital record on that basis. Rightly so, because *Ares v. Venner* settled the question, described by Hall J. (at p. 622) in that case as: whether hospital records and nurses' notes are "either admissible and prima facie evidence of the truth of the statements made therein or not admissible as being excluded by the hearsay rule". They are admissible as evidence of the truth of facts recorded.

[My italicization added]

[46] In *R v Shea*, 2014 NSPC 78 Judge Derrick (as she then was) stated[24]:

48 The Supreme Court of Canada has held that "the greatest possible range of information" should be placed before the Court hearing a dangerous offender application. This serves "...

---

[24] Although her conclusion was overturned on appeal, 2017 NSCA 43, leave denied [2017] SCCA No. 351, her comments regarding the admissibility of evidence were not questioned. Therein, Mr. Melvin and his family are referenced as having significant contact with Mr. Shea – at paras. 99-100 and 106.

the public interest in safety and the general sentencing interest of developing the most appropriate penalty for the particular offender..." and ensures the Court is in the best position possible "to make an accurate evaluation of the danger posed by the offender." (Jones, paragraphs 123 and 124)

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

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

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

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

> ...All of the authors of the documentary evidence had extensive personal knowledge of the accused because it was part of their job to acquire such information. It was also part of their job to make reports about the accused's activities and progress within the prison system that became part of the official record for the purposes of parole and prison discipline...(paragraph 63)

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

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

> *the job of correctional staff to document Mr. Shea's behaviour and make reports about him "for the purposes...of prison discipline." (Gregoire, paragraph 71)*
>
> 55 However, records of institutional behaviour that have been admitted into evidence must still be examined carefully to determine what they establish. *Evidence of untried criminal offences which the Crown seeks to rely on to establish a pattern of behaviour is subject to the proof beyond a reasonable doubt standard. (Neve, paragraph 133)* The quality and detail of the records will determine whether this standard has been met. In some instances, institutional records relating to Mr. Shea were prepared on the basis of observations made by correctional officers witnessing events or viewing CCTV footage. This constitutes reliable evidence that establishes basic facts relevant to these proceedings, that is, specific instances of Mr. Shea engaging in assaultive behaviour while incarcerated.
>
> 56 *Mr. Shea has objected to his institutional records being used in the pattern analysis*. He consented to their admission although my review of the record for the July 3, 2013 "pre-trial" where the issue was addressed suggests that neither Mr. Shea nor his counsel may have fully appreciated the role they would play in these proceedings. (see Endnote 2) And *while I am satisfied these records are admissible and can be mined for evidence for the pattern analysis, I must still assess what they establish about specific incidents - to be taken into account or not - in determining whether the Crown has proven the requisite pattern of behaviour beyond a reasonable doubt*. (R. v. Ziegler, [2012] B.C.J. No. 1755, paragraph 76 (C.A.); R. v. Pike, [2010] B.C.J. No. 1803, paragraphs 48 - 51 (C.A.))
>
> 57 With these legal principles in mind, I will now describe Mr. Shea's predicate offence, the aggravated assault, which underpins this sentencing, and then review his criminal and institutional record. In Part VIII of these reasons I will discuss what I have found to be the convictions and incidents that belong in the pattern analysis under sections 753.1(a)(i) and (ii).
>
> [My italicization added]

[47] In *R v Wilcox*, 2001 NSCA 45, an appeal arising from the trial context, Justice Cromwell (as he then was) adopted the formulation of the *Ares v Venner* test as put by the court in *R v Monkhouse* [1987] AJ No. 1031 (CA)[25]:

> 44 The Crown's principal submission on appeal is that Exhibit 24 is admissible under the principled approach to the hearsay rule developed by the Supreme Court of Canada in cases beginning with Ares v. Venner , [1970] S.C.R. 608. …

[25] More recently, see Justice Beveridge's reason in *R. v. Keats*, 2016 NSCA 94.

47… *the law relating to documentary evidence has been significantly reformed, both by statute and judicial decision with the result that one would expect a more limited scope for the application of the principled approach here as compared to many other areas of hearsay evidence*.

…

49 Is Exhibit 24 admissible under the common law business records exception to the hearsay rule? All respondents *accept R. v. Monkhouse*, [1988] 1 W.W.R. 725 (Alta. C.A.) *as an accurate statement of the requirements for such admissibility. The following passage from the judgment of Laycraft, C.J.A., for the Court at p.732 sets out the applicable principles*:

> In his useful book, Documentary Evidence in Canada (Carswell Co., 1984), Mr. J.D. Ewart summarizes the common law rule after the decision in Ares v. Venner as follows at p. 54:
>
> > ... the modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after Ares does reflect a more modern, realistic approach for the common law to take towards business duty records.
>
> *To this summary, I would respectfully make one modification. The "original entry" need not have been made personally by a recorder with knowledge of the thing recorded*. On the authority of Omand, Ashdown, and Moxley, *it is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records*. ...
>
> [My italicization added]

B. Section 30 of the Canada Evidence Act

[48] This section reads:

Business records to be admitted in evidence

30 (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains

information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

Inference where information not in business record

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

Copy of records

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Where record kept in form requiring explanation

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

(a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Court may order other part of record to be produced

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

Court may examine record and hear evidence

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Notice of intention to produce record or affidavit

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

Not necessary to prove signature and official character

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Examination on record with leave of court

(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

Evidence inadmissible under this section

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or

(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record the production of which would be contrary to public policy; or

(c) any transcript or recording of evidence taken in the course of another legal proceeding.

Construction of this section

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

(a) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or

(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

Definitions

(12) In this section,

business means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government; (affaires)

copy and **photographic film**, in relation to any record, includes a print, whether enlarged or not, from a photographic film of the record, and **photographic film** includes a photographic plate, microphotographic film or photostatic negative; (copie et pellicule photographique)

court means the court, judge, arbitrator or person before whom a legal proceeding is held or taken; (tribunal)

legal proceeding means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration; (procédure judiciaire)

record includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4). (pièce)

[49] While s. 30(10) (a)(i) *CEA* arguably may preclude the admissibility thereunder of police synopses, they are generally admissible pursuant to the "credible and trustworthy" standard (*Williams*), and in my opinion, s. 30(10)(a)(i) does not render inadmissible, records from CSC, and provincial government bodies having records related to Mr. Melvin's pre-sentence or post sentence custody – including PSRs/PDRs, psychological and psychiatric assessments and observations of Mr. Melvin's progress, and institutional records generally.[26]

[50] Regarding Correctional Service of Canada ("CSC") records, the Supreme Court of Canada, in *R v Ewert*, 2018 SCC 30 commented on CSC's obligation under s. 24(1) of the *Corrections and Conditional Release Act* (*CCRA*). As stated by Chief Justice Wagner for the majority (para.3):

> "If the CSC is to effectively assist in the rehabilitation of inmates while ensuring the safety of other inmates and staff members and the protection of society as a whole, it must base its decisions about inmates in its custody on sound information. This is explicitly recognized in s. 24(1) of the *CCRA*, which requires the CSC to "take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up-to-date and complete as possible."

---

[26] See in this respect *Correctional Services Act*, c. 37 SNS 2005, (s. 22 in particular, and generally, ss. 20-23 "Inspections, investigations and enquiries"; as well as ss. 27-30,35-40,67-73, 77-87, and 89) and the jurisprudence: *inter alia*, Justice Code's *Gibson* decision, Justice Derrick's *Shea* decision, and that of the Ontario Court of Appeal in *Williams*. More specifically, in *R v Crate*, 2012 ABCA 144, the Court distinguished the common law business records exception as *not* including the effect of the statutory s. 30 *CEA* inadmissibility of records created in the course of an investigation or inquiry.

[51] The majority elaborates at para.35 that the obligation arising from s. 24 "which applies to 'any information about an offender that [the CSC] uses' -was intended to have broad application". At paragraphs 37 – 38 the court pointed out that this includes information in relation to "any physical or mental illness or disorder suffered by the inmate" and "the inmate's potential for violent behaviour" in determining the security classification to be assigned to an inmate, as well as "the accuracy of psychological or actuarial test results that it uses."

[52] In summary, the majority finds that the section "requires more than simply good record keeping" - and "information" "includes the results generated by psychological or actuarial assessment tools" within the meaning of that section (para. 45). In particular, the CSC records (and in my opinion, provincial Correctional Services records) are generally admissible pursuant to section 30 *CEA*. More generally, I am satisfied that CSC records, (similarly so for the provincial Correctional Services records including PSRS/PDRs -*inter alia*, see ss. 721 *CC* and ss. 34 and 40 *Youth Criminal Justice Act*; and ss. 15 and 23 *Evidence Act*, c. 154 RSNS 1989, and the *Correctional Services Act*) also fall within the common law "business records" exception: see *R v Farhan*, [2013] OJ No. 5519 (SC) at para.12, and *Gregoire* at paras. 61 – 64.

Conclusion

[53] Firstly, as to timing.

[54] It is impossible in advance of the hearing, for me to divine:

1. for which purpose(s) (*inter alia*: as an admission; for the truth of its contents; or whether merely for the fact that his statement was made) each particular item of evidence in the Crown's 12 binders will be put forward,

2. the nature of supporting evidence that will be provided at the hearing in support of the admissibility of true "hearsay" statements tendered for the proof of their contents, and

3. the timing of when that evidence will be presented during the hearing.

[55] Consequently, at this time, I am precluded from providing herein anything more than the general legal principles which could be said to be applicable to such matters.

[56] Nevertheless, it made sense to me, to have the opportunity in advance of the hearing to review the proposed documentary materials the Crown wishes to rely upon – i.e. the so-called 12 binders. That opportunity gave me an appreciation of the entire context, and a better understanding of the arguments likely to be made during the hearing, and potential responses to those arguments. I presume that only

at the end of the hearing will I know with sufficient precision which evidence is admissible, for which purpose, and how much weight to attribute to such evidence.

[57] Therefore, in spite of Mr. Melvin's contrary position, I was satisfied that it is in the interests of justice for me to have had advance access to these 12 binders of Crown materials.

[58] Secondly as to the applicable principles.

[59] Only evidence that is directly relevant to proof of the constituent elements of a "pattern", as contemplated by ss. 753(1)(a)(i) or (ii) *CC*, is admissible to prove such a "pattern". Such evidence must be proved beyond a reasonable doubt.[27]

[60] On the other hand, if evidence is indirectly relevant to proof of a "pattern" (i.e. contextual extrinsic evidence, which may include character and reputation evidence- s. 757 *CC*), that evidence must only be proved on a balance of probabilities.

[61] In this case, I expect that the Crown will seek to introduce hearsay evidence (documentary, and possibly by *viva voce* testimony) as "pattern evidence" and as

[27] Only "formal admissions deliberately acknowledged by an offender can be considered to be admissible as relevant to the constituent elements of a "pattern" - s. 754(3) *CC*. Regarding s. 757 *CC* character and reputation evidence, the *Gregoire* case suggests that witnesses need not confine their evidence to their personal knowledge of the offender's character/reputation and are entitled to provide background information for holding their opinions, which would then become a matter of weight, not admissibility – yet see also the restrictions thereon stated in *Neve*, at paras. 124-127.

"extrinsic" or contextual and ancillary evidence. The more disputable hearsay concerns arise in relation to the "pattern evidence".[28]

[62] Whether pursuant to the "credible and trustworthy" standard, or meeting the requirements of the common law or statutory "business records" exceptions, and including consideration of the possible application of the traditional categories of exceptions to hearsay now to be seen in the light of the principled exception to the hearsay rule analysis, at their core each of these bases will tend to admit evidence that is sufficiently "credible and reliable".

[63] Provisionally, I generally anticipate that the proffered Crown evidence (i.e. 12 binders) will be admissible at the hearing for the truth of their contents, subject to limited specific instances where defence arguments seriously put that hearsay's materiality and accuracy (credibility and reliability) into question. In that case, as Justice Code has suggested in *Gibson*, at paras 9-. 10:

> "… it would be incumbent upon the Crown to call whomever signed the [document] and make him or her available for cross-examination by the accused". Section 723(5) of the Criminal Code similarly provides that "hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify".

---

[28] It would be very helpful for the Crown to identify which specific instances of "criminal" behaviour by Mr. Melvin it asserts are to be relied upon as "pattern evidence".

[64] Upon it being specifically raised, I will determine at the sentencing hearing whether the materiality and accuracy of disputed evidence has been "seriously put in issue" and whether it is "in the interests of justice" to have the Crown produce their witness(es) (authors) for cross-examination.

[65] I appreciate that, if I find hearsay evidence is admissible, the court will have to carefully assess the weight to be accorded to such evidence, and ultimately assess whether the "pattern evidence" has been proved beyond a reasonable doubt, and the extrinsic/contextual and ancillary evidence has been proved on a balance of probabilities.

[66] Let me then in summary fashion, specifically turn to the most controversial potential sources of hearsay[29] identified by counsel:

1. police synopses as evidence of the surrounding factual circumstances involving criminal (*CC* and *CDSA*) **convictions** registered against Mr. Melvin constituting **"pattern" evidence**.[30]

---

[29] See s. 723(5) *CC*.

[30] It is incumbent on the Crown, at a minimum, to present certified copies of all Informations (or provide equally authoritative evidence to that effect) if it seeks to have the court consider same as evidence of the truth of their contents – including endorsements therein. The most prudent approach would see certified copies of Informations *and* sentencing transcripts provided as evidence. As to their general admissibility, see *Williams* (paras. 42-55) summarized in *R v Inacio*, 2018 ONSC 6617 per Corrick J. at paras. 143-145.

a. If the offence is directly relevant to proof of a pattern, the offence and any aggravating features of the offence must be proved beyond a reasonable doubt- s. 724(3) CC.

b. The most reliable source of the circumstances of the offence(s) is the court's conclusions on the facts at trial and sentencing (with supporting certified copies of court transcripts and documents).

c. Exceptionally, to the extent that those are unavailable, where the aggravating (proof beyond reasonable doubt) or non-aggravating (proof on balance of probabilities) facts of and surrounding an offence are contained in a (hearsay) police/investigator's synopsis and related materials, and meet the "credible and trustworthy" standard, they will generally be admissible- see *R v Williams*, 2018 ONCA 437 at paras 1, 42-45, 51 and 54-55; *R v Gibson*, 2012 ONSC 5527 and 2013 ONSC 589- which may also be considered in deciding what ancillary facts are proved. Otherwise only the dates and fact of the offence conviction may be admissible.

2. the facts of **untried criminal "offences"** occurring within a correctional facility, yet **no criminal convictions** are registered against Mr. Melvin.[31] If the "offence" is directly relevant to **proof of a pattern**, the offence and the aggravating features of the offence must be proved beyond a reasonable doubt- s 724(3) *CC*. Where the aggravating (proof beyond reasonable doubt) or non-aggravating (proof on balance of probabilities) facts surrounding an offence are contained in a (hearsay) police/investigator's synopsis or Correctional Services equivalent records and related materials, if they meet the "credible and trustworthy" standard, they may be admissible and considered in deciding what aggravating, extrinsic, and ancillary facts are proved.[32]

3. the facts of **untried criminal offences** occurring outside a correctional facility, the "offence" and any aggravating features of the offence must be proved beyond a reasonable doubt - s 724(3) *CC*, if the offence is directly relevant to **proof of a pattern**. Where the

---

[31] Institutional records have repeatedly been found to be admissible when "credible and reliable": *inter alia*, *Gregoire* at paras. 62-63; *Shea* at paras. 49-56.

[32] See *Neve* (paras. 132-135); *Shea*: Institutional records "can be mined for evidence for the pattern analysis." (paras. 49-56); *Inacio* (paras. 67-69) albeit the Court in *R v Miller*, 2016 ABPC 59 at paras. 182-185, reminds us that institutional disciplinary process results should be the product of fundamentally fair process if we are to treat their findings as reliable.

aggravating (proof beyond reasonable doubt) or non-aggravating (proof on balance of probabilities) facts surrounding an offence are contained in a (hearsay) police/investigator's synopsis and related materials, if they meet the "credible and trustworthy" standard, they generally will be admissible, and considered in deciding what aggravating, extrinsic, and ancillary facts are proved.[33]

4. relevant previous psychological and psychiatric assessments, and chart notes, including diagnoses (including in relation to substance abuse issues) etc. made in relation to Mr. Melvin, whether in the form of formal court-ordered assessments or for administrative or institutional purposes (including PDRs/PSRs and Probation or Correctional Services institutional records) to be relied upon as **extrinsic evidence**, or as proof of ancillary facts, only require proof on a balance of probabilities, and generally will be admissible as hearsay, after an assessment of some or all of the statutory, common-law "business records", and the "credible and trustworthy" bases.

[33] I note that it may well be that Courts generally will be reluctant to find proof beyond a reasonable doubt regarding such untried offences, without hearing *viva voce* evidence or having the benefit of proportionately reliable evidence – *R v Hexamer*, 2019 BCCA 285; *R v. Neve* (para. 133).

5. relevant facts of administrative misconduct within a correctional facility, not rising to the level of "pattern" criminal offences are also in the nature of **extrinsic and ancillary evidence**, only require proof on a balance of probabilities, and will generally be admissible as hearsay based on some or all of the statutory, common law" business records" bases, and the "credible and trustworthy" standard.

Rosinski, J.