SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Marriott*, 2023 NSSC 158

Date: 20230524
Docket: CRH 510476
Registry: Halifax

Between:

His Majesty the King

v.

Brian James Marriott

EXPERT EVIDENCE (*VOIR DIRE* 1) DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: May 16, 2023, in Halifax, Nova Scotia

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

By the Court:

[1] The Crown has applied to have Brian James Marriott designated as a Dangerous Offender. The report of Dr. Grainne Neilson was filed with the court. That report was ordered by the court as part of the process involved in the Dangerous Offender Application.

[2] Nathan Gorham K.C., on behalf of Mr. Marriott, says that that Dr. Neilson is not a properly qualified expert. At para. 16 of the Defence brief Mr. Gorham writes,

> Her opinion lacks objectivity. She is not independent. And her evidence exhibits bias, whether conscious or unconscious. Based on these three interrelated and overlapping problems, the prosecution has failed to prove on the balance of probabilities that Dr. Neilson is able to meet her duty to the Court.

[3] There is no debate about Dr. Neilson's qualifications in terms of her education and experience. Her CV sets out her education as a psychiatrist, specializing in forensic issues. She has been a Member of the Royal College of Psychiatrists and a Fellow of the Royal College of Physicians and Surgeons of Canada since 1993. She completed Forensic and Correctional Psychiatry Fellowship Training at Dalhousie University in 2004 and obtained a sub-specialist qualification in Forensic Psychiatry from the Royal College of Physicians and Surgeons of Canada in 2014. Dr. Neilson has a full specialist licence from the College of Physicians and Surgeons of Nova Scotia.

[4] Dr. Neilson is an Assistant Professor in the Department of Psychiatry at the Faculty of Medicine at Dalhousie University. She is also employed by the Nova Scotia Health Authority, Central Zone, at the East Coast Forensic Psychiatry Hospital as a full-time Consultant Forensic Psychiatrist. Dr. Neilson is a part-time contract psychiatrist with Correctional Services of Canada - Community Mental Health Initiative.

[5] Dr. Neilson is the author of several publications in the Canadian Journal of Psychiatry.

[6] Dr. Neilson's career has involved dealing with assessments of offenders and their risks to reoffend. She has given expert evidence in court many times and more specifically has given expert evidence in Dangerous Offender Applications, like this one. Dr. Neilson is certainly qualified in that sense to give an opinion on these matters.

[7] The position taken by Mr. Gorham is not that Dr. Neilson lacks the education, knowledge or expertise to offer an opinion but that she lacks independence and objectivity and is biased against Mr. Marriott.

Procedure

[8] Mr. Gorham argued that it was important for the court to hear Dr. Neilson's evidence in full, along with his cross-examination, in order to decide whether she should be qualified. I allowed that process, notwithstanding the reservation that if it were applied in jury trials, it would require expert evidence to be heard once in a *voir dire*, then again, in its entirety before the jury if the expert is qualified. It was agreed in this case that the evidence from the *voir dire* could be applied in the application itself, if Dr. Neilson was qualified as an expert.

[9] While the approach may have appeared novel to the Crown and to me, Mr. Gorham described how it was used in other jurisdictions in which he practices. In Ontario, for example, a *voir dire* was held in *R. v. France*, 2017 ONSC 2040, in which Mr. Gorham himself conducted a cross-examination of the proposed expert, Dr. Pollanen, a forensic pathologist. In that case the defence objected to some aspects of Dr. Pollanen's evidence, for example his conclusion that the death of the child was more likely to have been caused by an assault than an accidental fall. Justice Molloy ruled that Dr. Pollanen would not be permitted to testify that the assault was more likely to have caused the injury than an accidental fall, or that the child's other injuries made it more likely that the abdominal injury that he suffered was caused by an assault. He could not testify that the abdominal injury was caused by a significant blow because this would likely be seen by the jury as an opinion on the degree of force used. Justice Molloy also ruled that any hypothetical question put to Dr. Pollanen should not be so detailed that it mirrored the facts of the case exactly and essentially asked him to answer the very question that was before the jury.

[10] This approach to the review of expert evidence is not entirely novel. Justice Molloy noted that Dr. Pollanen was one of Canada's leading experts in the field of forensic pathology. But no pathologist can be an expert in every variable of every single cause of death. Justice Molloy concluded that Dr. Pollanen considered himself to have been completely neutral but started his task with the mindset that this child had been a victim of an assault.

[11] Justice Molloy noted that Dr. Pollanen could say that the mechanism of death was either something hitting the abdomen or the abdomen hitting something.

He would not be able to determine, based solely on autopsy findings whether the blow was violent or trivial force and was not able to determine if it was inflicted deliberately or intentionally. This was a case of an expert "overreaching" to use Justice Molloy's term. The evidence of the likelihood of it being an assault was based on statistics gleaned from a limited review of research done by others and it was not within his area of expertise.

> In short, Dr. Pollanen's opinion as to whether there was an assault is irrelevant, adds nothing, is unnecessary, usurps the role of the jury, and is highly prejudicial. It is inadmissible. (*France*, at para. 58)

[12] The concern was that if this evidence were permitted to go before a jury, it would be given weight because it came from an expert, despite the fact that the expert had gone beyond his remit.

[13] This case is not before a jury. But Mr. Gorham has explained why a fulsome consideration of the admissibility of Dr. Neilson's report is required. The admissibility of the report will inform Mr. Marriott's decision about whether he is required to mount a defence. That may involve retaining his own expert and potentially giving evidence himself. Admitting the report in evidence and assigning weight to it based on the frailties that may have been identified during the course of the hearing, would not allow Mr. Marriot to make a fully informed decision.

[14] I am satisfied that the procedure used in this case was appropriate. Concerns about judicial economy were addressed by counsels' willingness to have the evidence from the *voir dire* adopted as evidence in the application. Whether the procedure should be adopted routinely in jury trials is not a matter before me. Nor the issue of the scope of the *voir dire*.

Threshold Admissibility and the Gatekeeper Function

[15] There was no disagreement about the law to be applied. The Crown bears the burden of proving that Dr. Neilson is able to meet her duties to the court as an expert.

[16] The admissibility and use of expert testimony has become a complicated and fraught issue. There are concerns about "junk science" entering the courtroom. In the context of criminal law, the use of what was considered scientific evidence has led in some cases to notorious miscarriages of justice. It should also be noted that some miscarriages of justice have occurred when experts using established

scientific techniques in well researched scientific disciplines have offered opinions that go beyond their expertise.

[17] The subject matter of the opinion in this case is not novel. Reports by psychiatrists have been routinely admitted in dangerous offender applications. The concern here is not with the subject matter but with the proposed expert.

[18] Expert evidence must be relevant to the issues in the trial. It must be necessary in assisting the trier of fact. It must not offend any exclusionary rule. And it must come from a properly qualified expert. Those are the threshold requirements for admissibility.

[19] If those four preconditions are met the trial judge must still exercise the gatekeeper function. That involves deciding whether the value to the trial process of the testimony outweighs the costs and dangers associated with opinion evidence. And there are costs and dangers. Expert evidence may distort the fact-finding process and be misused. Scientific language that the trier of fact does not understand submitted through a witness with an impressive CV, may be accepted by a jury or a judge as having more weight than it deserves.

[20] The judge in exercising the gatekeeper function must consider the value of the evidence in supporting the inference for which it is offered.

[21] That two-stage analysis of assessing whether the four preconditions have been met and exercising the gatekeeper function can each address the issue of the impartiality of the expert witness. Again, there is no issue here that the evidence provided by a forensic psychiatrist in a Dangerous Offender Application is relevant, necessary and generally does not offend any rule for the exclusion of evidence. And there is no issue that Dr. Neilson has the education and expertise necessary to offer an opinion. Her "qualifications" in that sense are not contested. What is contested is her independence, objectivity and lack of bias.

[22] The issue of independence of the expert witness may be considered under the issue of threshold qualifications. It may also be considered as part of the gatekeeper function.

[23] Lack of impartiality on the part of an expert is an admissibility issue not a weight issue. Expert evidence is not permitted easy entry into the trial on the basis that issues with it will be dealt with later. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at para. 45.

[24] When an expert attests to recognizing and accepting the duties imposed on expert witnesses, to provide independent and impartial evidence, that is usually enough to establish that the threshold has been met. The onus is then on the party opposed to the admissibility of the evidence or the qualification of the expert, to show a realistic concern that the expert is unable or unwilling to comply with those duties of impartiality, fairness and objectivity. The party proposing the evidence is then required to establish on the balance of probabilities that the proposed expert should be qualified.

[25] It was not intended that challenges to an expert's impartiality would become routine in Canadian courtrooms. The expert usually attests to their willingness and ability to comply with the legal requirements and that is sufficient. There may be times when that is questioned. As noted by the Court in *White Burgess*, paras. 49 and 50, that will be rare.

> This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
>
> As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's

> interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

[26] The issue of whether a proposed expert is impartial is properly the subject of a *voir dire*. The scope of the *voir dire* and how impartiality and objectivity are defined are important questions. The Ontario Court of Appeal in *Alfano v. Piersanti*, 2012 ONCA 297, dealt with a trial judge's refusal to admit an expert opinion. The trial judge said that the role adopted by the proposed expert in that case appeared to be as a person trying his best for his client to counter the other side. The lack of impartiality was clear from the content of the emails between the party and the person retained as an expert.

> When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client. Courts require more. The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and conclusion. While the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client. An expert's report or evidence should not be a platform from which to argue the client's case. As the trial judge in this case pointed out, "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court." (*Alfano,* at para. 108)

[27] The Court of Appeal also addressed the information that would be relevant to the determination of objectivity.

> In considering the issue of whether to admit expert evidence in the face of concerns about independence, a trial judge may conduct a *voir dire* and have regard to any relevant matters that bear on the expert's independence. These may include the expert's report, the nature of the expert's retainer, as well as materials and communications that form part of the process by which the expert formed the opinions that will be the basis of the proposed testimony. (*Alfano,* at para.112)

[28] The Court of Appeal noted that the proposed expert's reports were argumentative and repetitious. They read like a legal argument and offered opinions about the law. They also went beyond the areas on which the proposed expert was qualified to offer an opinion. The emails between the proposed expert and the client showed a pattern of the expert trying to craft an opinion to fit the

client's litigation objectives. Reports were sent to the client for review, revision and approval. The Court of Appeal upheld the trial judge's decision to not admit the evidence of the proposed expert.

[29] *Alfano v. Piersanti is* an example of a very clear case.

[30] Exclusion at the threshold stage happens in the very clear case in which the expert is unwilling or unable to provide fair, objective and non-partisan evidence. That is relevant to both the threshold analysis and the discretionary gatekeeper phase. An expert's bias may not result in exclusion at the threshold stage but can still be used in the weighing of costs and benefits as part of the gatekeeper function. That function is ongoing throughout the course of a trial.

[31] The assessment of whether an expert is biased or partial or incapable or unwilling to give evidence that is fair and objective is an assessment of the circumstances of the proposed expert, the substance of the evidence that is proposed, the relationship of the proposed expert to the litigants or any interest that the expert may have in the outcome of the litigation, and whether based on the opinion that has been filed, the person has adopted the position of an advocate for one of the parties.

Is Dr. Grainne Neilson incapable of giving an opinion that is unbiased and impartial?

Use of the word "feral"

[32] Dr. Neilson referred to Mr. Marriott as "living feral" as a child. She was describing his circumstances as having received little by way of guidance from his parents who had both served time in jail.

[33] Mr. Gorham has noted that the word in its ordinary usage refers to a wild or undomesticated animal and Dr. Neilson agreed that she should not have used the term because among other things it might send the wrong message. He says in his brief at paras. 20 and 21:

> More importantly, her use of the phrase is relevant to her lack of objectivity or her unconscious bias. Using such a derogatory term reflects a lack of empathy and understanding for the trauma that Mr. Marriott had suffered as a young man.
>
> To objectively evaluate why Mr. Marriott began his offending behaviour, the doctor needed to understand his emotional struggles as a young man. She was not

> able to do so, and her inability manifested itself in her use of the derogatory, charged, and inappropriate term "feral."

[34] Dr. Neilson acknowledged that she should not have used the word. She said that her training in the United Kingdom where the word is used more frequently may have led her into that error.

[35] I note that Dr. Neilson used the phrase "living feral". She did not say that Mr. Marriott was brought up living like a wild animal or that he was a "feral child", because he most certainly was not. She did not say that he was feral. Her reference was to a lack of adult guidance. There would have been better ways to have phrased that, as Dr. Neilson acknowledged. But the use of that phrase is hardly a manifestation of a lack of empathy and understanding of a kind that would render Dr. Neilson incapable of even providing an expert opinion.

Use of the word "fanciful"

[36] Dr. Neilson referred to Mr. Marriott's plans for employment upon his release as being "fanciful". Mr. Gorham argued that the word showed that the language was misleading, showed a lack of empathy and "bordered on a degree of callousness".

[37] Dr. Neilson said that Mr. Marriott told her that he wanted to start a drywall company or something in the area of construction or demolition. He had a friend who had left prison and gone on to start his own company which still operates successfully.

[38] Mr. Gorham argued that it was improper for Dr. Neilson to have used the term "fanciful". Mr. Marriott had someone to help him and could with "blood, sweat and tears" start his own company.

[39] Dr. Neilson's point was that Mr. Marriott lacked experience, and the basic amount of literacy skills required to start a company. He would need to start at a more modest level.

[40] There is a clear disagreement. Mr. Gorham says that Mr. Marriott could achieve what he said he planned to achieve. His goals are not unrealistic much less fanciful. Dr. Neilson believed that they were unrealistic.

[41] Experts are allowed to have opinions. They are in fact supposed to have opinions and express those opinions. They need to assess the evidence that they

have. Their assessment and opinions will almost certainly be disputed by the other party. The expert's refusal to agree with the position taken by the other party on disputable issues is not necessarily evidence of a lack of objectivity.

Alleged "Alignment with the Crown"

[42] Mr. Gorham has set out several arguments as to why, in his view, Dr. Neilson is not impartial and should not be qualified as an expert.

[43] The Court is required to consider the relationship between the expert and the parties to the litigation. It may be that a proposed expert has a family relationship with a party that would make giving an unbiased opinion and unreasonable expectation. In *White Burgess* the court noted that an expert may be retained who is an employee of one of the parties. The existence of the "mere employment relationship" is not sufficient. Members of police forces with areas of forensic expertise are routinely qualified as experts in areas like blood spatter, ballistics and the packaging, sale, and distribution networks for illegal drugs. Civilian employees of police forces are often qualified as experts in DNA analysis.

[44] When a proposed expert is a person with an interest in the outcome of the litigation that had led to exclusion.

[45] Mr. Gorham says that Dr. Neilson is aligned with the Crown and that this can be inferred from the appearance of being a "go to" expert for the Crown. They did not provide her with a letter of retainer to set out the scope of her retainer and there is no explanation for why they chose her out of all the available experts. "While there is not (sic) legal requirement of a retainer letter or an explanation of why they chose her, but the apparent ease at which they secured her services suggest (sic) a close working, familiar relationship." (Defence brief, at para. 36)

[46] Mr. Gorham notes that the inference is fortified by the nature of the communications. "She wrote to them in a friendly, at times, informal tone. And she addressed her accounts to Mr. Woodburn and Mr. Morrison." (Defence brief, at para 37)

[47] Mr. Gorham says that Dr. Neilson sought legal and strategic advice from the Crown when she was asked to meet with Defence counsel. He requested a recorded meeting with Dr. Neilson, and she wrote to the Crown lawyers. They encouraged her to meet but not to agree to have a recorded conversation. That was what she agreed to do.

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

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

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

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

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

[53] Experts are retained and given the nature of the expertise required on these files, the pool from which to select is limited. Dr. Neilson will have worked on several of them and may have developed a level of familiarity with legal counsel, both for the Crown and other lawyers with whom she has worked. Imposing on experts a requirement that they not interact with lawyers in a way that is either

friendly or informal would require a kind of social distance that is sometimes only expected of judges.

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

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

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

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

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

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

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

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

[61] Dr. Neilson's retainer is not exceptional. Her contact with counsel was not unusual. She did not send a draft report to Crown counsel for review or attempt to tailor the assessment to the Crown brief. There is no evidence that her findings were dictated by the Crown or that they were not her own conclusions.

Alleged Lack of Objectivity

[62] Mr. Gorham contends that Dr Neilson lacked objectivity. He said she failed to consider the "alternative explanation". She claimed that Mr. Marriott had been inculcated with anti-social values from a young age and continues to espouse those views as an adult. Mr. Gorham refers to Dr. Neilson's view as "facile" and says that it failed to consider another reasonable alternative. That alternative as put forward by the Defence is the possibility that Mr. Marriott's behaviour was due to "complex trauma" which began when he was young and continued throughout his incarceration.

[63] Mr. Marriott's parents were both sent to jail when he was young. His father was transferred out of the area and Mr. Marriott could not visit him. Mr. Marriott's aunt and uncle were murdered. He was told that his own life was in danger. Those events would have been traumatic for a young man, as Dr. Neilson acknowledged.

[64] Mr. Gorham said that complex trauma can lead to emotional struggles including hyper-impulsivity, hyper-responsivity, paranoia, aggression and

substance abuse. Mr. Gorham suggests that one reasonable explanation for the period of offending when Mr. Marriott was younger was that he had lost connection with loving family members, and was living in fear and anxiety, which led to impulsive behaviour, substance abuse, and the association with anti-social people.

[65] While in penitentiary Mr. Marriott continued to experience traumatic events. He was sent to the Atlantic Institution in Renous New Brunswick. He was then transferred to the Special Handling Unit in Quebec. There inmates spend 23 hours a day in cells and have only a brief time for interaction with others in a common room.

[66] Mr. Gorham asserts that Dr. Neilson did not turn her mind to what it was like to live in the Special Handling Unit. She did not come to grips with the conditions of solitary confinement that he experienced. He has spent nearly 1,300 days in solitary confinement.

[67] The failure to consider that explanation for Mr. Marriott's behaviour, Mr. Gorham argues, is evidence of Dr. Neilson's lack of objectivity. Objectivity requires the willingness to consider other reasonable explanations. Complex trauma is another potential explanation.

[68] The Crown has responded by saying that Dr. Neilson was aware of and considered those things.

[69] Dr. Neilson addressed at length Mr. Marriott's family background and the challenges he faced as a child and young adult. She addressed the impact of separation from his family and associates while incarcerated. She concluded that there was no evidence that Mr. Marriott was suffering from the effects of complex trauma. There were no psychological reports indicating that while Mr. Marriott was incarcerated, he was showing symptoms and Marriott himself did not report that he suffered any symptoms resulting from dislocation from family or from extended periods in close confinement.

[70] Mr. Gorham noted that it should not be surprising that a person who is incarcerated might not identify such symptoms because they would be a sign of weakness. Dr. Neilson did not use trauma informed interviewing techniques to get that kind of information from Mr. Marriott.

[71] It is important at this stage to note yet again that this *voir dire* is not about deficits in Dr. Neilson's report or about the weight that would ultimately be given to it if it is admitted. It is about whether the report and the evidence in the *voir dire* is such that it is reasonable to infer that Dr. Neilson was not capable of giving an unbiased and independent opinion despite her attestation that she was. The "alternative explanation" put forward by Mr. Gorham may be argued on the issue of the weight to be given to her opinion, but it does not mean that Dr. Neilson was so biased or unobjective or closed minded that she should not be qualified as an expert. Experts are supposed to have opinions and they are entitled to vigorously defend them.

Alleged Misleading Statements

[72] Mr. Gorham argues that Dr. Neilson in her examination in chief said that there was no link between solitary confinement and the commission of violence. He says that she purported to make that claim based on her knowledge of the literature and Mr. Marriott's failure to report any of the dramatic symptoms associated with solitary confinement. He says that the claims were wrong, her language was misleading, and she was forced to admit that on cross-examination.

[73] Mr. Gorham says that the medical and psychiatric literature has recognized the emotional harm, complex trauma, that can be caused by solitary confinement and the literature cautions against relying on self reporting by inmates because they have been shown to minimize or fail to recognize their own symptoms.

[74] Mr. Gorham goes on to say that Dr. Neilson failed to research a relevant topic. She obtained a single article and "she did not read the article closely enough to properly understand the effects of solitary confinement or the proper way to interview a person in order to ascertain the impact of their time in solitary confinement." (Defence brief, at para. 32)

[75] Mr. Gorham says that in its most charitable light this is a sign of a cognitive distortion on the part of Dr. Neilson but that it raises the "spectre of a more troubling problem". He says that Dr. Neilson "likely knew" that she had not researched the literature on solitary confinement. "To speak authoritatively was misleading, and she must have known as much. To suggest otherwise is to ask the court to suspend disbelief." (Defence brief, at para. 34)

[76] Mr. Gorham says that Dr. Neilson wrote a misleading explanation about Mr. Marriott's visitation with family members while incarcerated in central and western Canada.

> Notwithstanding the transfer/moves to higher security institutions across Canada and his prolonged time in segregation, Mr. Marriott managed to maintain regular contact (through visits, calls, and letters) with several important people in his life, including his mother and grandparents, a cousin, some romantic partners, and the mother of his first daughter, with whom he briefly re-united. He also had contact with his longtime girlfriend (and now mother of his second daughter), with whom he later lived common-law. (Assessment Report by Dr. Neilson, page 6)

[77] Mr. Gorham says that Dr. Neilson admitted that the language in the paragraph was misleading. "In truth, she did not know how long the stretches were in which Mr. Marriott was not able to maintain meaningful contact with his family members." Dr. Neilson said that she saw Mr. Marriott's efforts to maintain contact with his family as a positive thing.

[78] Dr. Neilson and Mr. Gorham clearly have some fundamental disagreements about the psychiatric literature. Mr. Gorham disagrees with much of what Dr. Neilson said. He characterizes that disagreement as an attempt by Dr. Neilson to deceive or mislead the court. Mr. Gorham on behalf of Mr. Marriott may call another expert who may say that based on his or her opinion Mr. Gorham is correct, and Dr. Neilson was absolutely and unequivocally wrong.

[79] Disagreement is not necessarily evidence of deceit or bias.

[80] Dr. Neilson answered questions from the Crown about segregation within the prison system and violence. She said that that the literature does not support the notion that segregation causes someone to be violent.

[81] Dr. Neilson described solitary confinement syndrome. Those who are held for periods of time in solitary confinement do not have the regular stimulation that others have on a day-to-day basis. They can have various psychological and psychiatric problems associated with that. Those range from anxiety all the way through to psychosis and suicidality.

[82] Dr. Neilson agreed with Mr. Gorham that, despite some criticism of the concept, researchers generally accept there can be deleterious effects due to solitary confinement. She did not pursue the topic of trauma with Mr. Marriott

because the evidence did not suggest that he had suffered from trauma. The testing did not flag anything that would rise to being of clinical importance.

[83] On the issue of complex trauma Dr. Neilson agreed that the topic requires further study. She said that the whole notion of complex trauma is that people can be exposed to different traumas throughout their life that may impact their functioning later. It may not rise to the level of a form of post-traumatic stress disorder diagnosis. These things are "responsivity issues". If there are emotional or traumatic problems that create anxiety someone may not respond as well to certain types of treatments. Dr. Neilson said that they are not so much related to risk or need but they are related more to responsivity.

[84] Dr. Neilson agreed that Mr. Marriott may or may not have experienced trauma from various events in his life. She was asked whether trauma might lead to substance use, antisocial behaviours and eventually criminality. She cautioned that correlation is not the same as causation. There are many correlates of violence, including trauma. And trauma can span static factors as well as dynamic factors. But the causative factors are those that are dynamic.

[85] Mr. Gorham apparently did not accept Dr. Neilson's answer about the distinction between causation and correlation when dealing with trauma and criminality.

[86] Mr. Gorham asked whether an article by Dr. Grassian says that segregation can cause things like aggression, impulsivity, hypervigilance, all the same things that are thought to be causal factors for violence. Dr. Neilson replied again that causation and correlation are different things. She said that she did not think that it was accepted that segregation causes violence. Not everybody who is in segregation becomes violent. It is not necessarily a causal factor. It is an associated factor, but not a causal factor.

[87] Once again, there is a disagreement.

[88] Mr. Gorham said that Dr. Neilson did not alert the court to this body of literature. Dr. Neilson said that she read the article and her recollection was that there was nothing about solitary confinement precipitating violence. She said that she continued to feel that segregation in and of itself does not result in people perpetrating violence.

[89] Dr. Neilson did agree that she could have used different language on this point.

Alleged Partisan Answers About Gang Involvement

[90] Mr. Gorham says that the Defence will vigorously challenge any claim that Mr. Marriott was a member, much less a leader, of any organized gang. He says that by the time Dr. Neilson gave her evidence it was "clear that the prosecution's gang allegation was failing". He says that this seems significant because much of Dr. Neilson's report relied upon Corrections Services Canada allegations that Mr. Marriott was operating a violent, drug dealing gang from jail.

[91] Mr. Gorham argues that on any rational evaluation of the evidence Dr. Neilson's position is "indefensible". He says that the gang allegations contained in the records are serious yet "sparse and dubious" and the entire body of information might well be the product of Mr. Marriott's family name. Yet, regardless of the evidence Mr. Gorham says, Dr. Neilson relied heavily on the report. "Her claim appeared designed to ensure that her opinion would survive any judicial decision that the Crown had failed to prove the gang allegation". (Defence brief, at para. 46)

[92] Dr. Neilson, in direct examination, said that Mr. Marriott does not accept CSC's characterization that he is involved in a gang. She was asked in direct examination about the role that "gang affiliation" played in her report. She said that Mr. Marriott indicated that he felt that these were incorrect characterizations. She did not want to put too much weight on them.

[93] Dr. Neilson explained the role that "gang affiliation" played in her analysis. She said that based on her review of the literature in the area, being part of a gang is a concern for correctional institutions and concern for violence risk. That is because being a member of a gang is associated with a wider range of harm to the victims. Members of gangs tend to be more likely to carry weapons and are more likely to perpetrate violence in gang form because it serves the objectives of the gang. Studies have found that there is a strong relationship between gang membership and prison misconduct. That is in part because gangs appear to be more involved in the importation of contraband. Gang members appear to have much lower motivation levels and lower reintegration potential. Dr. Neilson specifically cautioned that although the files seemed to suggest very strongly that Mr. Marriott was part of an organized crime family and was part of the organized institutional drug trade, those were aspects that Mr. Marriott denied.

[94] When asked about the weight that would be placed on alleged membership in a gang Dr. Neilson said that typically, we would not comment on gang membership. Whether violence occurs as part of a gang or not is less material than the interventions that may have to take place going forward. She said that it was not as relevant in terms of the risk assessment.

[95] "Antisocial peers are antisocial peers whether they are gang members or not". That, said Dr. Neilson, was the relevant factor.

[96] Dr. Neilson was asked about whether the allegations of gang involvement may have contributed to an unconscious bias on her part. Dr. Neilson acknowledged that she could have unconscious bias. It would be fair to assume though that a person who denies the possibility of unconscious bias on their own part might be characterized as lacking self awareness.

[97] Once again, at this stage the issue is not whether Dr. Neilson's assessment is correct or accurate or is consistent with the most up-to-date research in the area. The issue is not the weight to be given to Dr. Neilson's evidence and assessment and nothing in this decision should be seen as a preliminary judgement on those issues.

[98] The way in which Dr. Neilson dealt with the issue of Mr. Marriott's alleged involvement in a gang or organized criminal group was not such that it would serve as evidence to support the inference that she was incapable of giving evidence that was unbiased, independent or objective. That is different from saying that it is accepted by the court. But at this stage it does not mean that Dr. Neilson is not capable of providing an expert opinion that conforms to the attestation that she gave.

Use of "Unstructured Clinical Judgement"

[99] Mr. Gorham says that Dr. Neilson employed actuarial tests but much of her opinion took the form of "unstructured professional judgement". He says that she acknowledged during cross-examination that unstructured clinical assessment was seen as unreliable in a variety of medical and psychiatric studies.

[100] Mr. Gorham says that Dr. Neilson's use of unstructured clinical assessment, "the force at which she expressed her opinion, and her attempts to defend it in court demonstrate a lack of objectivity." (Defence brief, at para. 49) He says that Dr. Neilson knew that first generational tools were less reliable than actuarial tests,

which were only moderately predictive, and she did not acknowledge that in her report. He argued that she expressed her opinions at the end of her report with "greater certainty in force then (sic) what was seen with the actuarial tests." (Defence brief, at para. 49) He says that all this suggested that Dr. Neilson was not bringing a valid and objective methodology to bear in her final evaluation while "she knew that that type of subjective clinical evaluation was shown to be unreliable." (Defence brief, at para. 49)

[101] Clearly Dr. Neilson and Mr. Gorham disagree.

[102] In the Assessment Report Dr. Neilson noted that there are two components to her risk analysis. The first involves evaluating the magnitude of future risk. And the second is the nature of that risk.

[103] With regard to the first component, the magnitude of the risk, there are two ways to predict the magnitude of risk of future violence. The first way is by an actuarial analysis. Those are heavily based on historical/static factors that are known to be associated with violence. The factors are analyzed and generate a statistical probability of re-offending that can be expressed in broad categories or by numeric probabilities. But actuarial scales do not predict individual behaviour. Dr. Neilson said that they provide a framework within which an individual is placed within a group having greater or lesser total risk than individuals in that group.

[104] The second way of predicting the risk of future violence is by considering variables that are specific to the individual case. Those assessment instruments consider both static and dynamic variables that are known through the literature to be associated with violent recidivism. That allows the clinician to identify variables that are specific to the individual offender that might impact their individual risk.

[105] In the assessment of Mr. Marriott, Dr. Neilson reported that she used three risk assessment instruments to examine future risk. Two were actuarial risk assessment instruments that consider static risk indicators, the Violence Risk Appraisal Guide-Revised (VRAG-R) and the Level of Service Inventory-Revised (LSI-R). She also used a structured professional judgement violence risk assessment guide that incorporates dynamic risk factors, the Violence Risk Scale (VRS).

[106] Dr. Neilson said that these risk assessment instruments are well-researched and widely accepted in the field of forensic psychology. They have demonstrated at least "moderate predictive accuracy".

[107] Mr. Marriott was considered an appropriate candidate for the use of those instruments. Dr. Neilson noted that Mr. Marriott's individual risk may be higher or lower than the probabilities estimated in the instruments depending on other individual risk factors and/or protective factors not measured by the instruments.

[108] The second part of Dr. Neilson's analysis involved considering the nature of the risk that Mr. Marriott poses. She explained that this is an individualized process. The consideration of the nature of risk requires the use of clinical judgement to consider the circumstances in which risk can arise and considers the magnitude of harm. Dr. Neilson said that there are no actuarial tools for that assessment.

[109] During the hearing, Mr. Gorham and Dr. Neilson had a lengthy exchange about structured and unstructured assessments.

[110] In cross-examination Dr. Neilson noted that the Violence Risk Appraisal Guide is subject to criticism. She said that all risk assessment instruments are the subject of criticism in the literature, not just the V-RAG. Dr. Neilson noted that it is still the best researched risk prediction tool supported by a robust body of research. Dr. Neilson said that there are risks associated with using newer-generation tools because they do not have a large body of research behind them. They are still in the development stage and are not suitable for use where the consequences of error are significant.

[111] Dr. Neilson agreed that she used her professional judgement when generally formulating her opinion of Mr. Marriott's risk. Dr. Neilson explained that part of her analysis involved determining the magnitude or likelihood of risk and that portion of her analysis involved the use of actuarial instruments and structured professional judgement.

[112] While she agreed that she relied on clinical judgement she did not agree that she relied on "unstructured" clinical judgement. Dr. Neilson said that she believed that the reason an expert is hired is that otherwise, anyone could plug information into an instrument and come up with a level of risk. The expert develops an overall global statement that encompasses both the likelihood and the circumstances in

which risk may materialize. Dr. Neilson said that is necessarily based on clinical judgement.

[113] Dr. Neilson said that she did not use unstructured professional judgement to come to an assessment of the likelihood of risk that Mr. Marriott posed for violent recidivism. She said that she used standard tools that are available in the risk literature. There are no other tools available for the other parameters of risk that needed to be analyzed and considered.

[114] Once again, the focus at this stage is not on the weight to be given to Dr. Neilson's opinion or on whether shortcomings in the methodology employed have been identified. It is whether, as Mr. Gorham suggests, Dr. Neilson was influenced by her own cognitive distortions to the point that she cannot give an unbiased, independent and objective opinion.

[115] Dr. Neilson could give a report that meets the threshold criteria for admissibility.

Conclusion

[116] The legal standard to be applied is not in dispute. The Crown must establish that Dr. Neilson should be qualified as an expert. Dr. Neilson gave testimony that she was able to provide an impartial opinion that reflects an objective assessment of the questions at hand. She said that she could give an independent opinion that is the product of her own judgement, uninfluenced by who had retained her. She said that she believed that she could provide an unbiased opinion. And she recognized that her duty to the court prevailed over her duty to any of the parties to the proceeding. She said that her opinion would not change depending on who had retained her and noted that in this case she was retained by the court.

[117] Dr. Neilson's education and training has not been called into question. She has given expert evidence in similar matters before.

[118] Mr. Gorham on behalf of Mr. Marriott argued that there is a realistic concern that Dr. Neilson does not meet the criteria for qualification.

[119] Mr. Gorham says that Dr. Neilson wrote a,

> sweeping aggressive opinion about Mr. Marriott's character designed to promote the prosecution's chance of success in the dangerous offender application. At its core of the opinion, she attempted to write Mr. Marriott it (sic) off as a person

> who was raised by bad antisocial people and then became a bad antisocial person himself. She suggested that he has been inculcated, shaped by antisocial beliefs and that those antisocial beliefs will be very difficult for him to overcome. Her language referring to him as living feral suggested that he was dangerous like an animal. Her reference to his cognitive distortions concerning his employment verged on ridiculing him. Her suggestion that his work plans were fanciful was uninformed and mean spirited. Cumulatively, her language and evidence concerning solitary confinement and Mr. Marriott's family involvement is difficult to understand or rationalize as an innocent mistake.
>
> However, before having to consider the doctor's sincerity or honesty, all of these features of the evidence as well as her admission that she was influenced by cognitive distortion or unconscious bias demonstrates that she lacks the objectivity to be a properly qualified expert in this case. (Defence brief, at paras. 53-54)

[120] It is critical to note, yet again, that this part of the analysis is not about the weight to be given to Dr. Neilson's report. This is about whether she is capable of offering an opinion that should even make its way into the application to be considered. Comments on that issue, in this *voir dire*, should not in any way be taken as accepting, adopting or giving a particular weight to the opinions offered by Dr. Neilson.

[121] There have been no realistic concerns raised about Dr. Neilson's qualifications as an expert and in particular no realistic concerns raised about her ability to offer an objective and unbiased opinion. There may be areas of genuine dispute with the opinions offered by Dr. Neilson. There may be aspects of her opinions that should be rejected in favour of other opinions. There may be parts of her opinions that are expressed in language that is either too strong or too definitive. There may be scientific literature that can be introduced that will suggest that Dr. Neilson failed to address alternative approaches. There may be things that she did not know.

[122] But it is not realistic to say that Dr. Neilson was not capable in this matter of offering an opinion that was unbiased and impartial. The disputes may lie with her conclusions and her methodologies but there have been no realistic concerns raised as to her impartiality or objectivity.

[123] Dr. Neilson's Assessment Report is admissible as expert evidence. The weight given to Dr. Neilson's evidence and Assessment Report will be determined at the conclusion of this Dangerous Offender Application.

[124] Dr. Neilson is qualified as an expert in this Dangerous Offender Application as follows:

> A psychiatrist, able to provide opinion evidence in the area of psychiatry, including but not limited to:
>
> - Forensic psychiatry
> - The diagnosis, assessment and treatment of mental disorders,
> - The diagnosis and classification of violent offenders,
> - Identifying patterns of repetitive violent behaviour,
> - The assessment of risk for future violence or recidivism for violent offenders,
> - Risk management strategies for violent offenders,
> - The ability to control the risk of violent offenders in the community, and
> - The nature and degree of psychological harm caused by offenders to their victims. (Exhibit VD1-1)

Campbell, J.