IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. A.D.M.,2008 NSSC 54

Date: 20080116
Docket: CRH 257643
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

and

A. D. M.

D E C I S I O N

Restriction on Publication:	Restriction on release of name of victim or anything which would identify him under s. 486.5 of the *Criminal Code*
Judge:	Justice Suzanne M. Hood
Heard:	In Halifax, Nova Scotia: October 15, 16, 17 & 19, 2007 November 7, 19 & 20, 2007 January 2, 4 and 16, 2008
Written Decision:	February 22, 2008 *(Oral decision rendered on January 16, 2008)*
Counsel:	Eric G. Taylor, for the Crown Luke A. Craggs, for the Accused

By the Court:

[1] A. D. M. pled guilty to aggravated assault. The Crown has applied for a dangerous offender designation for Mr. M. or, alternatively, for a long-term offender designation.

Issues

1) Should A. D. M. be designated a dangerous offender?

2) Alternatively, long term offender

3) Alternatively, sentenced for the aggravated assault.

Facts of the Predicate offence

[2] On January 29, 2005, Mr. M., after an argument with another inmate on the range at the Central Nova Scotia Correctional Facility, assaulted the other inmate with a heavy shower broom used to scrub the showers. The victim suffered severe injuries to his jaw, face and teeth and was knocked to the concrete floor unconscious. Mr. M. pled guilty to the offence on May 24, 2006. A videotape of the incident was captured on the correctional facility's security cameras. It was played at the hearing and entered as an exhibit. As well, the victim testified and witness statements, both videotaped and written, were entered as exhibits including a videotaped statement from Mr. M.. The videotape shows the victim and Mr. M. arguing and then Mr. M. going off-camera. He returned approximately nine minutes later, walking along the wall, depositing a coffee cup in the trash, going to where a long-handled scrub brush stood along another wall, then swiftly approaching the victim from behind and striking him with the brush end of the shower brush, knocking him off his chair onto the concrete floor of the range. Mr. M. then replaced the shower brush and again went off-screen.

[3] The victim testified that A. D. M. was in what he called "an A. mood" but that he did not expect violence from him. He said he saw him come out of his cell, walking along the wall beyond the table where he sat and put something in the garbage. He said he then went out of his line of sight and the next thing he knew he woke up in the hospital. He said he was in the hospital for several days and had two operations. He said he had a huge gash in his cheek, stitches inside and outside his

mouth, a fractured eye socket, had his palate broken and lost 16 teeth. He said he is still in pain all the time.

[4] P. R.'s written statement was that he was playing cards with the victim when A. D. M. picked up the shower brush and swung it striking the victim.

[5] A. D.'s statement said he was sitting at the table near the victim and Mr. R.. He said he saw Mr. M. hit the victim with the shower brush. His statement says he asked Mr. M. "what the hell" he was doing and that Mr. M. told him to mind his own business or he would get him next. In his videotaped statement, Mr. D. referred to A. etting into "moods" and he would not know what would set him off. He said A. has a temper but nothing like this.

[6] I should also note that at the end of this hearing, Mr. M. read into the record a letter he has written to the victim apologizing for the incident and the injuries he caused him.

[7] Constable David Li testified with respect to the police investigation, taking of statements and seizing of exhibits. Dr. Bezulhy testified about injuries to the victim and also in evidence was an estimate of the cost of the dental and other work required by the victim.

A. D. M.'s Criminal Record

[8] Mr. M. has a lengthy criminal record for a variety of offences dating back to when he was seventeen years of age. He is now forty-seven years of age. These offences are as follows:

Offence	Sentence Date
118(a) Obstructing Police Officer 246(2)(a) Assaulting a Police Officer	August 24, 1978
87 Carrying a concealed weapon	January 27, 1981
294(b) Theft Under	August 13, 1981
294(a) (Theft Over)	December 4, 1981
294(a) (Theft Over)	March 1, 1982
306(1)(b) (Break Enter and Commit an Indictable Offence)	May 14, 1982
306(1)(b) (two counts) (Break Enter and Commit an Indictable Offence)	May 17, 1982
294(b)(ii) (Theft Under)	September 20, 1983
246.1(1)(a) (Sexual Assault)	February 25, 1985
390(a) (Arson)	October 23, 1985
246.1(1)(a) (Sexual Assault), 222 (Attempted Murder)	January 23, 1986
264(2)(d) (Criminal Harassment), 173(1)(a) (3 counts) (Indecent Act)	February 1, 1996
173(1)(a) (Indecent Act)	July 23, 1996
173(1)(a) (Indecent Act)	October 9, 2002
173(1)(a) (Indecent Act)	October 9, 2002
271(1)(a) (Sexual Assault)	October 4, 2004
173(1)(a) (Indecent Act)	October 4, 2004
268(1) (Aggravated Assault)	Predicate Offence

[9] These offences in my view fall into four categories:

1) Personal property offences - thefts, break & enters and arson;

2) Sexual offences - a number of indecent exposures; one conviction for sexual harassment; and three sexual assaults, one is the one charged with the attempted murder, one grabbing the crotch of a young girl in 1985 and another grabbing the breast of a woman on the Salt Marsh Trail in September of 2003;

3) Other offences against persons: assault against a police officer in 1978; attempted murder and the aggravated assault (predicate offence); and

4) Other: obstructing a police officer and carrying a concealed weapon.

[10] Mr. M. has had a number of periods of incarceration, many of which were at the Central Nova Scotia Corrections Facility, part on remand and part which were sentences as follows:

Provincial: Part remand/part on sentence

Central Nova Scotia Correctional Facility

November 24, 1981 - March 1, 1982

May 14, 1982 - May 21, 1982

September 20, 1983 - October 20, 1983

February 25, 1985 - March 22, 1985

April 26, 1985 - April 29, 1985

May 27, 1985 - January 24, 1986

January 29, 1996 - February 2, 1996

Cape Breton Correctional Facility

August 14, 2002 - May 2, 2003 *(part remand)*

Central Nova Scotia Correctional Facility

October 16, 2003 - to present (ERD August 25, 2005, later October 28, 2005)

3 Penitentiary Sentences

1 commencing:

May 17, 1982

January 1986 - January 19, 1996 (served full sentence to warrant expiry and concurrently 2 years for arson)

1 commencing:

February 1, 1996, and in July 1996 - 3 mos. consecutive; release date of April 29, 1998

Evidence at The Dangerous Offender Application

[11] It was acknowledged by defence counsel for Mr. M. that all the procedural requirements for a dangerous offender application had been met and I am satisfied that is the case. They are set out in s. 752.1 and s. 754(1) of the *Criminal Code*. Section 752.1(1) provides:

> Application for remand for assessment
>
> **752.1**(1) Where an offender is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) and, before sentence is imposed on the offender, on application by the prosecution, the court is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court may, by order in writing, remand the offender, for a period not exceeding sixty days, to the custody of the person that the court directs and who can perform an

> assessment, or can have an assessment performed by experts. The assessment is to be used as evidence in an application under section 753 or 753.1.

[12] The report of Dr. Grainne Neilson and Dr. Roger Brown (Ex. 14) is the report prepared pursuant to this section. I will refer to it as the Neilson Report since it was Dr. Neilson who testified. She was qualified as an expert to provide opinion evidence in the fields of clinical psychiatry and forensic psychiatry, including the diagnosis of psychiatric conditions and disorders and the treatability of these and their overall prognosis; also, as an expert qualified to provide opinion evidence in the area of the assessment of offenders' risk for re-offence, including the interpretation of tests related to the risk for re-offence, the identification of risk cycle elements, the theory and application of sexual offending types and the responsiveness of offenders to treatment.

[13] The Neilson Report covers Mr. M.'s background, family history, education, job history, past psychiatric and other medical history, substance abuse history, relationship history and his criminal history. In addition, Dr. Brad Kelln carried out cognitive testing and concluded that Mr. M. was functioning with borderline intellectual capacity. He was qualified as an expert to provide opinion evidence in the field of forensic psychology and clinical psychology including diagnosis of psychological conditions and disorders and the treatability of these and overall prognosis; and in the area of assessment of risk for re-offence including the application and interpretation of psychological tests and the statistical quantification of risk for re-offence, identifications of risk cycle elements, theory and application of sexual offending types and the responsiveness of offenders to treatment.

[14] Dr. Neilson referred to other tests previously performed including: the Millon Clinical Multiaxial Inventory II; the Minnesota Multiphasic Personality Inventory 2 and the Penile Plethysmography. She gave a diagnosis based on DSM–IV of exhibitionism, possible pedophilia, possible sexual sadism and victim of childhood sexual assault on Axis I; Anti-social personality disorder and borderline intellectual functioning on Axis II, history of epilepsy with no recent seizures on Axis III. Psycho-social stressers including interaction with the legal system, problems with social environment, problems with primary support group and economic problems on Axis IV; and moderately severe symptoms of personality dysfunction and moderately serious impairment in social functioning on Axis V.

[15] The testing done by Dr. Neilson and Dr. Brown were risk assessments of Mr. M.'s likelihood of re-offending. Actuarial risk assessment instruments used were the Sex Offender Risk Assessment Guide (SORAG), Violence Risk Assessment Guide (VRAG) and Static 99. These three consider static or unchanging risk indicators. In addition, two tests were used that also include dynamic risk factors, that is, risk factors that can change. These are the sexual violence risk (SVR-20) and historical clinical risk (HCR-20). Dr. Neilson also performed a Psychopathy Checklist Revised (PCL-R). These instruments all deal with the risk of re-offence. Likelihood of re-offence is one factor in dangerous offender/long-term offender determinations.

[16] In their conclusions, Dr. Neilson and Dr. Brown say that Mr. M. is in a moderately high risk to re-offend violently and a high risk to re-offend sexually "compared to the general violent offender population and a general sexual offender population respectively." Dr. Neilson also commented on Mr. M.'s community rehabilitation potential. She said:

> - Mr. M.'s treatment and rehabilitation needs are extensive and would require considerable coordination of multiple treatment providers and service agencies.
>
> - Eventual control of Mr. M. in the community is predicated on his willingness to be *fully* involved in, consistently cooperative with, and honestly engaged in, treatment and rehabilitation programming. Based on his past performance, it is unlikely that this is an attainable goal. In our view, community management should only be attempted after Mr. M. has successfully demonstrated (over a sustained period of time) that he is willing to fully participate in, and benefit from, relevant institutional treatment programs. However, it should be noted that, although behavioral and/or pharmacological treatments may reduce his risk for reactive (impulsive) violence, his risk for instrumental (calculated) violence is linked more closely to his psychopathic traits, and therefore is not amenable to treatment.
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> - Community management is also predicated on the availability of the appropriate treatments/supervision for his level of risk in the community. To our knowledge there are currently no community-based high intensity relapse prevention treatment programs modified for the intellectually challenged available in Nova Scotia, although such programs may be available in other provinces. The degree to which Corrections Canada could provide appropriate supervision/monitoring and housing is unknown to us.
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> - Overall, taking into account the actuarial risk assessments and the case-specific variables as noted above, it is our opinion that Mr. M.'s community rehabilitation

> potential is poor and the prospect of controlling his risk of violent and sexually violent re-offence in the community is low.

[17] To the contrary is the report of Dr. Risk Kronfli for Mr. M.. Dr. Kronfli was qualified as an expert in the fields of clinical psychiatry, offender mental health, forensic psychiatry including the diagnosis of psychiatric conditions and disorders and the treatability of these and their overall prognosis; and able to give opinion evidence in the area of assessment of offenders' risk for re-offence including the interpretation of tests in relation to re-offence, the identification of risk cycle elements and the responsiveness of offenders to treatment.

[18] Dr. Kronfli has been treating Mr. M. since February 2, 2005. His report sets out his series of contacts with Mr. M. since that time. It also sets out his adjustment to and additions to Mr. M.'s medications. His opinion is that Mr. M. is responding to treatment both because of the medications he is on and the therapeutic alliance he has with Dr. Kronfli and his team. He concludes in his report:

> For all of the above, it is my opinion that Mr. M. has an acceptable chance of benefiting from programming while incarcerated for the latest conviction. If the programs are tailored for his level of cognitive functioning and establishing a good therapeutic alliance, in addition to the use of psychopharmacology, his chance increases to benefit with the end result being a reduction in his future risk for violence.

[19] The evidence at the hearing fell into three other categories, the fourth being the one to which I have already referred: the psychological and psychiatric evidence. As well, there was:

1) Evidence about the aggravated assault and its aftermath from the victim, from Constable David Li, from Dr. Bezulhy and from the videotapes of the statements and of the incident and the written statement of P. R..

2) Also there was evidence from records: Louise Campbell provided Central District Health Authority medical records of Mr. M.; there were Correctional Service of Canada's corrections records and records from the Central Nova Scotia Correctional Facility and the Cape Breton Correctional Facility ; Crown sheets; and the probation records of Mr. M..

3) There was also evidence provided about programs and treatment available for offenders inside and outside institutions. Corrections Service Canada programming material was an exhibit. William Duncan, a probation officer, testified as did Wanda Atwell, a parole officer at Dorchester and June Dicks, who was the program manager for the community for Corrections Service Canada.

Statutory Provisions – Dangerous Offenders

[20] The *Criminal Code* provisions with respect to dangerous offenders applicable in this application are ss. 753(1)(a)(i),(ii) and (iii) as follows:

> 753 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied
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> (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
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> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, that showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
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> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
>
> (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; ...
>
> 752

...

'serious personal injury offence' means

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,

and for which the offender may be sentenced to imprisonment for ten years or more, or ...

[21] The defence concedes that the aggravated assault in this case fits within that definition and it is clear that that is the case.

Purpose of Dangerous Offender Legislation

[22] The purpose of the dangerous offender provisions is the protection of the safety of the public. In *R. v. Lyons*, [1987] 2 S.C.R., Justice LaForest gave a history of dangerous offender legislation beginning at para. 12. He said in para. 13:

> 13 The 1938 Royal Commission established to investigate the penal system of Canada, the Archambault commission, in its report at p. 220 identified the initial purpose of the British legislation as the reformation of professional or persistently dangerous criminals, but observed that this did not occur in the British practice. It observed, at p. 218, that:
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> > Notwithstanding the best methods of punishment and reformation that may be adopted, there will always remain a residue of the criminal class which is of incurable criminal tendencies and which will be unaffected by reformative efforts. These become hardened criminals for whom 'iron bars' and 'prison walls' have no terrors, and in whom no hope or desire for reformation, if it ever existed, remains.
>
> It thus recommended that legislation be enacted to identify this residual class of criminals ands provide for their indeterminate detention in a special prison. The

> purpose of such detention was conceived of as 'neither punitive nor reformative but primarily segregation from society'.

[23] Justice LaForest in para. 15 quoted from Chief Justice Dickson's decision in *R. v. Hatchwell*, [1976] 1 S.C.R. 39 where he quoted from the Committee's report:

> It appears to the Committee that the protection of the public from unlawful violence, or from unlawful conduct which represents a serious threat to the physical safety of citizens, is one of the most urgent problems of the criminal law.

and where Chief Justice Dickson said at p. 43:

> Habitual criminal legislation and preventive detention are primarily designed for the persistent dangerous criminal and not for those with a prolonged record of minor offences against property. The dominant purpose is to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb.

[24] Justice LaForest said in para. 16:

> 16 The present legislation, enacted in 1977, clearly pursues the historical purpose of protecting the public, but is now carefully tailored so as to be confined in its application to those habitual criminals who are dangerous to others.

[25] In 2003, the Supreme Court of Canada decided *R. v. Johnson*, [2003] S.C.J. No. 45, after the long term offender provisions were added to the *Criminal Code* in 1997. In para. 19 of that decision, Justices Iacobucci and Arbour referred to *R. v. Lyons* saying:

> 19 In *R. v. Lyons*, [1987] 2 S.C.R. 309, this Court affirmed that the primary purpose of the dangerous offender regime is the protection of the public: see also *Re Moore and The Queen* (1984), 10 C.C.C. (3d) 306 (Ont. H.C.), cited with approval in *Lyons*, *supra*, at p. 329. In *Lyons*, La Forest J. explained that preventive detention under the dangerous offender regime goes beyond what is justified on a 'just deserts' rationale based on the reasoning that in a given case, the nature of the crime and the circumstances of the offender call for the elevation of the goal of protection of the public over the other purposes of sentencing. LaForest J. confirmed, at p. 339, that the legislation was designed 'to carefully define a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive incarceration'.

[26] Justices Iacobucci and Arbour continued in para. 29:

> 29 In this case, the sentencing objective in question is public protection; see for example *Lyons*, *supra*, at p. 329, and *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39, in which Dickson J. (as he then was) wrote, at p. 43, that the dominant purpose of preventive detention is 'to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb'. Absent such a danger, there is no basis on which to sentence an offender otherwise than in accordance with the ordinary principles of sentencing. The principles of sentencing thus dictate that a judge ought to impose an indeterminate sentence only in those instances in which there does not exist less restrictive means by which to protect the public adequately form the threat of harm, i.e., where a definite sentence or long-term offender designation are insufficient. The essential question to be determined, then, is whether the sentencing sanctions available pursuant to the long-term offender provisions are sufficient to reduce this threat to an acceptable level, despite the fact that the statutory criteria in s. 753(1) have been met.

Dangerous Offender Hearings

[27] It is in this context that I must consider the dangerous offender application in this case. It is the public interest and not punish of the offender which is the primary focus of the dangerous offender hearing. As Justice LaForest said in *Lyons*, *supra*, at para. 27:

> 27 ... Preventive detention in the context of Part XXI, however, simply represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased. Part XXI merely enables the court to accommodate its sentence to the common sense reality that the present condition of the offender is such that he or she is not inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be expected of that person. In such circumstances it would be folly not to tailor the sentence accordingly.

[28] The onus of proof is on the Crown and the standard of proof is proof beyond a reasonable doubt. The Supreme Court of Canada in *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.), concluded that disputed facts in a sentencing hearing should be resolved by the criminal standard, that is, proof beyond a reasonable doubt.

[29] However, since the dangerous offender application is a sentencing hearing the strict rules of evidence required at trial area not applicable. In particular, hearsay

evidence can be admissible and the sentencing judge must decide what weight is to be given to the hearsay evidence in determining whether the Crown has met its burden. Justice Gonthier in *R. v. Jones* (1994), 89 C.C.C. (3d) 353 said at p. 398:

> The sentencing stage places a stronger emphasis on societal interests and more narrowly defines the procedural protection accorded to the offender. 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.

[30] He continued on that page:

> That is not to say that no protection is afforded to the offender at the sentencing stage. As Lamer C.J.C. points out, this court held in *R. v. Gardiner*... that the Crown must prove disputed facts beyond a reasonable doubt during the sentencing hearing. However, in determining what facts are admissible at the sentencing stage, *Gardiner* reaffirmed the widely accepted principle that judges should have access to the fullest possible information concerning the background of the accused. As Dickson J. stated, at p. 514 C.C.C., p. 648 D.L.R.:
>
> > It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. 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.

[31] Before concluding that an offender is a dangerous offender, the court must determine that the offender constitutes a threat. The words in s. 753(1)(a) are:

> ... the offender constitutes a threat to the life, safety or physical or mental well-being of other persons ...

[32] In *R. v. Neve* (1999), 137 C.C.C. (3d) 97, the Alberta Court of Appeal considered what this required. It said in para. 102:

> 102 ...The core finding which the judge must make at this stage is whether the offender constitutes a threat to the life, safety or physical or mental well-being of

> other persons as defined under s. 753(a). Finding someone to be a threat is, in essence, a present determination that an offender will continue to be dangerous in the future, past the date on which he or she would ordinarily have been released form prison for their most recent crime. How is that threat to be determined? Whatever else may be placed on the threat scale, this much is clear. No threat can be found without proof of past behaviour which meets at least one of the three separate thresholds under s. 753 (a) (i)(ii) or (iii). If any one is met, then the judge is able to go on and determine whether the offender is, based on that evidence, a threat to the life, safety or well-being of others as described in s. 753(a). If none is met, then the judge cannot find the person to be a 'threat' under s. 753(a).

[33] As the Alberta Court of Appeal said, there were three thresholds which relate to the past behaviour of the offender. If one of these thresholds is not met, then the offender cannot be determined to be a threat. The court continued in para. 103:

> While these two steps – whether the Crown has proven that the offender's past conduct meets one of the specified thresholds and whether the offender constitutes a threat of the type contemplated – are linked, they are nevertheless quite separate. They are linked in the sense that the court cannot make a determination that an offender constitutes a threat in the manner specified in s. 753(a) except on the basis of evidence that meets at least one of the specified behaviour thresholds. However, they are separate in that even if the Crown proves that one of the thresholds has been met, the court must then go on to consider whether, in light of that evidence, the offender constitutes a threat to the life, safety, or physical or mental well-being of others.

[34] Two of the three thresholds are linked to a pattern of behaviour by the offender. The court in *Neve* considered what has to be proven to establish a pattern of behaviour under these sections. It said in paras. 107-08:

> 107 ... While 'pattern' is not defined in the Code, what is defined in each of ss. 753(a)(i) and (ii) are the various components instrumental in creating the pattern. If the Crown fails to prove one or more of the required elements, then the proscribed pattern has not been made out. Under s. 753(a)(i), the elements are the following:
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> 1. A pattern of repetitive behaviour;
>
> 2. The predicate offence must form part of that pattern;
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> 3. That pattern must show a failure by the offender to restrain his or her behaviour in the past; and

> 4. That pattern must show a likelihood of death, injury or severe psychological damage to other persons through failure to restrain his or her behaviour in the future.
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> 108 Under s. 753(a)(ii), the required elements are these:
>
> 1. A pattern of persistent aggressive behaviour;
>
> 2. The predicate offence must form part of that pattern; and
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> 3. That pattern must show substantial degree of indifference by the offender respecting the reasonably foreseeable consequences of his or her behaviour.

[35] The court continued in para. 109:

> 109 What do these sections require in assessing an offender's past conduct? First, the type of past behaviour encompassed by these sections is criminal behaviour since the predicate offence, a criminal one by definition, must form part of the pattern of conduct. The dangerous offender legislation is directed at those who hurt people through criminal, as opposed to simply anti-social, conduct. The latter cannot be the foundation of a dangerous offender application.

[36] The court then considered the "quality of the past behaviour." It said in para. 110:

> 110 This takes us to the second point: the quality of the past behaviour. Does all criminal behaviour form part of the pattern? In our view, it does not. We read s. 753(a) as requiring that the court be satisfied on two points: (a) that the predicate offence is part of a pattern of behaviour which has involved violent, aggressive or brutal conduct; and (b) that it is likely that this pattern of conduct will continue and will lead to conduct endangering the life, safety or physical well-being of others: ... Since a predicate offence under s. 753(a) must be a 'serious personal injury offence' (meaning that it itself must meet either a violence or endangerment requirement under s. 752(a)), it follows logically that the past behaviour must also have involved some degree of violence or attempted violence or endangerment or likely endangerment (whether more or less serious than the predicate offence). Otherwise, the predicate offence would not be part of that pattern.

[37] But the court said there were two ways in which the requisite behaviour can be established. It said in para. 111:

> 111 ... The first is where there are similarities in terms of the kind of offences; the second where the offences themselves are not similar in kind, but in result, in terms of the degree of violence or aggression inflicted on the victims. Either will do. Thus, the mere fact that an offender commits a variety of crimes does not mean that no pattern exists. There is no requirement that the past criminal actions all be of the same or similar form, order or arrangement; though if this has occurred, it may well suffice.

[38] The court referred to *R. v. Dow*, [1999] B.C.J. No. 569 (QL)(C.A.) in para. 112 with respect to s. 753(a)(i). The court said:

> 112 ... In short, the significance and the relevance of common elements of the pattern must be determined by whether they tend to show first, repetitive behaviour, second, that there has been a failure in each case to restrain the behaviour, and third, that there has been injury to other persons arising from that failure. If any of those three elements is missing , then there may be a pattern but it will not be a relevant pattern. But if all three are present then the essential elements of a relevant pattern area revealed.
>
> The one qualification we would add to these comments is that it is not necessary that the past conduct have 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.

[39] In *Dow*, *supra*, at para. 25., Lambert, J.A. said:

> 25 I add that it is the very essence of a pattern that there be a number of significant relevant similarities between each example of the pattern that is being considered, but that, at the same time, there may be differences between each example, some of them quite distinctive, so long as the differences leave the key significant relevant elements of the pattern in place. ...

[40] In the context of (i) and (ii) which require a pattern, the court in *Neve* said in para. 113 referring to *Lyon*s, *supra*:

> 113 ... evidence of one episode of violence or aggression will not suffice.

[41] The court continued:

> 113 ... This does not mean that it will always be necessary that the offender have a lengthy history of violence or aggression. To the contrary. Depending on the facts,

> a pattern sufficient to form the basis for predicting future behaviour which threatens others may be found on very few such incidents.... Generally, however, in order to meet the requirements of a pattern, the fewer the incidents, the more similar they must be.... We do not suggest that the offences must be of the same kind, that is, for example a number of robberies. Similarity, as noted, can be found not only in the types of offences but in the degree of violence or aggression threatened or inflicted on the victims. This explains why the requirement for similarity in terms of kinds of offences is not crucial when the incidents of serious violence and aggression are more numerous....

[42] The court then considered the specific requirements of ss. (i). It said in para. 114:

> 114 ... To qualify as party of the pattern, the impugned conduct must show that the offender has failed restrain his or her behaviour in the past (and that this has led to death, injury or severe psychological damage or at least a likelihood of this harm) and that there exists a likelihood of causing death, injury or severe psychological damage through a failure to restrain that behaviour in the future. ...

[43] In para. 115, the court considered the requirements of ss. (ii) and it said under that subsection:

> 115 ... the persistent aggressive conduct must show a substantial degree of indifference by the offender with respect to the reasonably foreseeable consequences to others of that behaviour.

[44] The court continued in para. 116:

> 116 There is another dimension to the offender's conduct which merits special emphasis. The net effect of the threshold requirements under ss. 753(a)(i) and (ii) is that not only is the sentencing judge to consider whether the past conduct is likely to continue. To satisfy the pattern requirements, the conduct must also demonstrate a relatively high level of intractability. As La Forest J. confirmed in Lyons, supra, at 338: Also explicit in one form or another in each subparagraph of [s. 753] is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable.

[45] From these requirements, the court then said in para. 118:

> 118 ... it is easy to understand why the context in which an offender committed past criminal conduct will be relevant to this part of the analysis. Without understanding that context, it would not be possible for a judge to make an informed, reliable

> assessment on whether the offender's past behaviour will be likely to lead to harm in the future. After all, whether something is likely to be repeated in the future is linked not only to what happened in the past but why it happened. This being so, it will be evident that if the analysis of past behaviour is undertaken without reference to the surrounding circumstances, this can lead to an undermining of a judge's conclusion on two different levels –first, in terms of assessing which past conduct goes on the pattern scale; and second, in assessing the likelihood of that behaviour continuing in the future as a result of the offender's failure to restrain or substantial indifference.

[46] The court in *Neve*, *supra*, gave a reminder of the purpose of the dangerous offender legislation. It said in para. 119:

> 119 ... As noted, the dangerous offender provisions are not designed to remove all recidivists from society. ...

[47] Before considering whether Mr. M.'s conduct has a pattern of repetitive behaviour or aggressive behaviour, it is useful to look at previous decisions where a pattern of behaviour has been found.

[48] In *R. v. D.L.S.*, [2000] B.C.J. No. 47 (B.C.S.C.) the offender had been convicted of an aggravated sexual assault on a seven year old girl eight years previously and was then convicted of another sexual assault. During the dangerous offender hearing, his former girlfriend gave evidence of his abusive sexual conduct and general violence towards her during their relationship over a period of three years. Her evidence was corroborated in part by a friend of hers. On the basis of the two convictions and the evidence of the former girlfriend of behaviour over a period of three years, Holmes, J. said at para. 79:

> A pattern of repetitive and/or aggressive behaviour is established by the number of sexual assaults and the similarity of the offender's behaviour.

[49] Holmes, J. in paras. 80-88, set out the evidence he accepted in coming to that conclusion. It is noteworthy in my view that that it was based upon the record of convictions and *viva voce* testimony of the former girlfriend and her friend.

[50] In *R. v. Langevin* (1984), 11 C.C.C. (3d) 336 (Ont. C.A.), Lacourciere, J. said:

> The offences committed were remarkably similar.

In each case, the offender came up behind the victims as they were walking, took them to a secluded place, forced the victims to undress and sexually assaulted them with both vaginal and anal penetration. He confined them with him for a substantial period of time then released them after getting assurances from them that they would not tell anyone.

[51] In *P.M.C.*, [1998] B.C. J. No. 3225 (B.C.S.C.), A.F. Wilson, J. considered submissions about the similarities and differences in the offences. He concluded there was a pattern including deviant sexual behaviour and an element of aggression in all but one of the offences.

[52] In *Dow*, *supra*, the British Columbia Court of Appeal overturned the sentencing judge's decision not to declare Dow a dangerous offender. He had been convicted of three sexual assaults before the predicate offence which did not involve a sexual assault. The offender pled guilty to break and enter with intent to commit an indictable offence, assault with a weapon and attempted kidnapping. In that case, Lambert, J.A. said in paras. 26 and 27:

> 26 It follows from what I have said that I think that the sentencing judge erred in law when he said that it was a necessary part of the pattern in this case that the victim in every incident must have been 'identified by Mr. Dow for the purposes of venting his range against a person of the female gender'. It is sufficient that all the victims were female and were violently assaulted in generally similar circumstances. The fact that in the most recent incident the victim was not sexually penetrated is not a distinction which destroys the pattern, just as the fact that Dow knew Ms. M.V. before he raped her does not destroy the pattern which covers all the other incidents in which the person assaulted was unknown beforehand to Dow.
>
> 27 It also follows from what I have said that I think the sentencing judge erred in law when he said that 'all of the parts of the [most recent] offence must be of like form, order or arrangement.' That constitutes a degree of similarity that is more than is required to represent a relevant pattern. As I have said, the three elements of subpara. (i) of s.753 (a) must be present in the pattern, and should be described at a level of generality which gives individuality to the pattern, but beyond that it is not necessary that all of the parts of the most recent offence must be like all parts of the earlier offences, though further similarities may add vividness to the pattern.

[53] Although many of the cases where the dangerous offender designation has been considered were cases where there were sexual offences only, there are a number where that was not the case.

[54] In *R. v. Jackson* (1981), 61 C.C.C. (2d) 540 (N.S.S.C. App. Div.) the predicate offence was an assault causing bodily harm by the offender on his common law wife. She also testified about the many times he had beaten her when they lived together. That evidence was supported by evidence of doctors who had treated her. Members of the police force testified about similar beatings on other women and about his general reputation in the community for violence. The offender was found to be a dangerous offender at trial and this was upheld on appeal.

[55] In *R. v. F.E.D.*, 2007 CarswellOnt 1971, the Ontario Court of Appeal heard an appeal from a long term offender designation. In that case, the accused had been found guilty of procuring a young woman to become a prostitute and living off the avails of prostitution of a person under eighteen. These were the accused's tenth and eleventh prostitution related offences. The sentencing judge concluded that the offender met the criteria for being designated a dangerous offender but, because the Crown had not proven beyond a reasonable doubt that there was no reasonable possibility of managing the risk in the community, he should be designated a long term offender. The appeal court ordered a new hearing on the dangerous offender application for two reasons: 1) because the trial judge had not made findings of fact; and 2) the court of appeal concluded that the sentencing judge erred in concluding that the Crown had to prove beyond a reasonable doubt that there was no reasonable possibility of eventual control of the risk in the community.

[56] In *R. v. Shrubsall*, [2001] N.S.J. No. 539 (N.S.S.C.), one of the predicate offences was a violent aggravated assault committed during a robbery. The offender's criminal record between 1988 and 1998 included manslaughter, sexual abuse, aggravated sexual abuse, forcible confinement and criminal harassment. In addition, there was evidence the sentencing judge accepted of other criminal conduct, one of which was a beating of a boy at a bowling alley in 1998. Others were incidents of criminal harassment of women.

[57] The pattern of behaviour that Justice Cacchione found was: delivering blows to the head of a boy he beat up; killing his mother by hitting her repeatedly with a baseball bat, mostly to her head; robbing his former girlfriend and striking her head with a baseball bat; and, shortly after that offence, sexually assaulting another victim and pounding her head into the pavement numerous times; aggravated sexual assaults (one of the predicate offences); aggravated assault endangering life (the other predicate offence); and sexually assaulting another victim, choking her into

unconsciousness and punching her in the face many times. William Shrubsall was designated a dangerous offender.

[58] In *Neve*, the offender was convicted of robbery. She and another woman took the victim to a field where they cut her clothing off and left her naked in the early hours of the morning. They believed the victim had beaten one of their friends inducing a miscarriage. The offender had been a prostitute since age twelve and had a substance abuse problem. She had a youth and adult criminal record: at age fifteen for carrying a concealed weapon, her first offence; break and enter offences (six of them over a five day period at age seventeen); and four convictions for uttering threats. The court concluded that those three did not fall within the pattern. The offences the court said could be considered in determining if there was a pattern were the two confinement offences, two assaults with a weapon and an aggravated assault. The court took a global perspective and concluded the young woman was not a dangerous offender. The court said in para. 289:

> 289 In all these circumstances, we have concluded that the decision to designate Neve a dangerous offender was not reasonable. It is only by taking the global perspective we have described that it is possible to assess whether Neve, in view of her record, and the circumstances and context of the offences she has committed, belongs in that relatively small group such that the most severe sentence that can be imposed under the Code, short of life imprisonment, is strenuously required....

[59] In assessing the conduct in that case, the Alberta Court of Appeal said in *Neve* in para. 123:

> 123 Generally, there are three areas of evidence which will be considered in determining whether there is a pattern of conduct falling within the threshold requirements under s. 753:
>
> 1. the offender's past criminal acts and criminal record;
>
> 2. extrinsic evidence relevant to those past acts and the circumstances surrounding them; and
>
> 3. psychiatric reports opining as to that conduct.

That is the process upon which I must embark in order to determine if the Crown has satisfied me beyond a reasonable doubt that there is a pattern of conduct falling within s. 753(1)(a)(i) or (ii).

The Evidence Alleged to be a Pattern under Section 753(1)(a)(i) or (ii)

[60] The Crown listed in his closing submissions the acts and criminal record which he submits form the pattern of behaviour under (i) and (ii). I will deal with each in turn.

[61] Hearsay evidence is admissible in a sentencing hearing as I have said and, since the dangerous offender application is a sentencing, it is of course admissible on this application. However, as Justice Cacchione said in *Shrubsall* in para. 20:

> Hearsay evidence may be accepted where found to be credible and trustworthy.

[62] The only witness who testified to first-hand knowledge of Mr. M.'s past behaviour was the victim in the predicate offence. Also in evidence is Mr. M.'s criminal record along with Crown sheets and witness statements for some of those offences. The rest of the evidence of Mr. M.'s past behaviour comes from hearsay, which, as I have said, is admissible in this application.

[63] William Duncan, a probation officer, provided records with respect to Mr. M.'s probation; Wanda Atwell, a parole officer at Dorchester provided records of Mr. M.'s time in federal institutions; Louise Campbell provided the Capital District Health Authority medical records for Mr. M. and they included records from the Nova Scotia Hospital.

[64] Information contained in these records was relied upon by Dr. Neilson and in turn by the Crown in their assertions that Mr. M.'s past conduct should lead me to conclude that he is a dangerous offender. I must therefore carefully assess the information relied upon to determine if a pattern of behaviour similar to that of the predicate office exists.

[65] This in turn causes me to consider the role of psychiatrists in a dangerous offender hearing.

The Role of the Psychiatrist

[66] Experts routinely rely on hearsay in formulating expert opinions. However, the weight to be given to that opinion depends upon the Court's assessment of the fact upon which the opinion is based. As Justice Cacchione said in *Shrubsall* at page 22:

> ....the facts upon which the opinion is based must be found to exist.

[67] The psychiatrist has in my view at least two roles in a dangerous offender application. One is to opine on the offender's past conduct and the existence of a pattern of behaviour. Another is to assess the risk of future offences. (The role is somewhat different with respect to an application pursuant to section 753(1)(a)(iii) and I will deal with that hereinafter.)

[68] In *Neve, supra,* the Alberta Court of Appeal considered the role of psychiatric evidence and character evidence. The court said in para 124:

> In deciding whether someone is a threat, what role, if any, does character evidence and psychiatric evidence play? This is a complex question. There is no doubt that psychiatrists perform an indispensable function in dangerous offender proceedings.

[69] The Court continued in para 125, referring to the decision in *Jones*:

> 125 This then leads us further into the analysis of what evidence may properly be placed on the pattern scale -- and what cannot. The Supreme Court has stated that as much evidence as possible should be before the court in a dangerous offender proceeding. As explained by Gonthier J. in *Jones*, supra, at 289-90:As with all sentencing, both the public interest in safety and the general sentencing interest of developing the most appropriate penalty for the particular offender dictate the greatest possible range of information on which to make an accurate evaluation of the danger posed by the offender.

[70] The Court gave a caution in para 126:

> However, while the range of information is broad, it is not unlimited. As in all legal proceedings, the primary restriction is relevancy. Relevant evidence is evidence which tends to prove that a fact in issue is more likely than not....

[71] In looking at whether the offender is a threat the Court said in para 127:

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

[72] In *Neve*, the Court said that the offender's diaries, where they referred to thoughts unconnected to criminal offences or criminal acts, were not relevant to the pattern assessment. The court said in para 131:

> The requirement for a pattern of behaviour means that the focus is on actions, not thoughts. An inquiry into whether the requisite pattern of conduct has been established is not an inquiry into the thoughts, feelings and actions of the offender throughout his or her entire life. It is restricted to an assessment of those acts which may or may not be an element of the pattern of conduct.

[73] After saying that the criminal record of the offender is properly before the Court, the Court said in para 133:

> However, where the Crown seeks to introduce proof of untried criminal offences in order to establish the pattern of behaviour for the purposes of dangerous offender proceedings, that portion of the application is more akin to a trial. Thus, it has been held that this conduct must be proven beyond a reasonable doubt....

[74] The Court also referred to character evidence in para 139:

> But what is not permissible is for the court to use character evidence alone to find the lack of restraint or the substantial indifference portion of the pattern. This is to be found in the pattern of behaviour itself.

[75] Dealing specifically with psychiatric evidence, the Court in *Neve* said in para 186:

> Given the acknowledged weaknesses in psychiatric opinion evidence coupled with the fact that a court in dangerous offender proceedings is, as acknowledged by Lamer C.J.C. in *Lyons*, supra considering a more severe sentence, the court has a particularly onerous responsibility to measure the quality and strength of the expert evidence for the purpose of determining which evidence, if any, it will accept. The quality of that evidence varies greatly, in part, because of the quality of the information the expert relies on in arriving at an opinion.

[76] The Court continued in para 187:

> As explained by the Supreme Court of Canada in Wilband...: The value of a psychiatrist's opinion may be affected to [sic] the extent to which it may rest on second-hand source material; but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the truth of the information but evidence of the opinion formed on the basis of that information.

[77] In para 189, the Court set out its considerations in weighing psychiatric evidence:

1. the qualifications and practice of the psychiatrist;

2. the opportunity the psychiatrist had to assess the person, including: length of personal contact, place of contact, role with ongoing treatment, and involvement with the institution in which the person is a patient or prisoner;

3. the unique features of the doctor-patient relationship, such as hostility or fear by the patient (or the psychiatrist) arising from the personalities, the circumstances of the contact, and the role of the psychiatrist;

4. specifically and precisely what documents the psychiatrist had available and reviewed, for example, from earlier court proceedings, institutional records, other medical consultations, or treatment;

5. the nature and scope of consultations (this could include: personal contact with third parties, information from other health care professionals, prison authorities, police, lawyers, family);

6. specifically and precisely what the psychiatrist relies on in coming to an opinion; and

7. the strengths and weaknesses of the information and material that is relied on.

[78] The Court in para 191 commented on the "expert's reliance on secondary sources of information". It said there may be weaknesses in that information and gave as examples:

> ...incomplete records; lack of reliability such as might occur where a document is created for one purpose but used for another (e.g., a prison incident report being used to predict future behaviour); lack of trustworthiness such as where the subject of an interview is lying or describing fantasies as if they were realities (including in diaries); and lack of objectivity or first-hand knowledge by the author of a report...

[79] The Court also cautioned that the psychiatrist may be using words without understanding their legal meaning. It said in para 194:

> ...a court cannot simply assume that the words or terms used by a psychiatrist mirror their legal meaning.

[80] The Court summarized all this in para 199:

> What this reduces to is the following. First, at all times the responsibility remains with the sentencing judge to assess and weigh the opinion evidence, to determine whether the behavioural thresholds have been met, and whether based on that past behaviour someone is a threat and if so, should be designated a dangerous offender... The experts do not become the judges and the expert opinion is not the judgment. Second, 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... Third, in assessing the existence of a pattern, psychiatric opinion evidence, admissible under s. 755, must be used cautiously. Clearly, psychiatrists can opine on the interpretation of what is alleged to constitute a pattern of conduct, on whether that pattern of conduct is pathologically or substantially intractable and of course, on the issue of future dangerousness. But, quite apart from any other use of psychiatric evidence in dangerous offender hearings, while the psychiatrists may review past criminal conduct and then give an opinion on whether it forms a pattern, it is in the final analysis the court's responsibility and not the psychiatrists' to make the determination whether the evidence establishes the proscribed patterns.

Dr. Grainne Neilson

[81] Dr. Brown and Dr. Neilson interviewed Mr. M. on ten occasions between June 30, 2006 and August 3, 2006 for a total of approximately 12 hours. They also

reviewed the East Coast Forensic Hospital's reports on Mr. M. during his stay in the hospital during that period. Dr. Brad Kelln, a psychologist, also met with Mr. M. for psychological testing. Dr. Brown and Dr. Neilson also reviewed substantial materials provided by the Crown and some from Mr. M.'s counsel. I will refer to the materials reviewed hereinafter.

[82] The first issue for me to address is the existence of a pattern of behaviour. Dr. Neilson concludes in her report that there is such a pattern. In her summary under the heading "Developmental and Family History" she says at p. 4:

> There appears to have been early behavioural / anger management and resultant discipline problems from an early age...

[83] She does note, however, that there is "no record that he was ever formally disciplined or charged for this".

[84] Under the heading "Educational History" Dr. Neilson says in summary on p. 5:

> He reports having engaged in aggression with both peers and staff. There were significant behavioural and discipline problems from early in his school career with suspensions and expulsions. His extra-curricular activities appear to have been deviant / prankster behaviours or substance abuse.

[85] In the summary at p. 9 under the heading "Past Psychiatric History" Dr. Neilson mentions involvement with psychiatric services for behavioural problems, antisocial personality disorder and anger / impulse control problems, among others.

[86] Under "Substance Use History", she says at p. 11:

> He reports increased aggression / anger when under the influence of substances, admits to having offended when under the influence of alcohol.

[87] Under the heading "Sexual and Relationship History", she says at p. 14:

> Mr. M. seems to harbour a high level of anger towards women, evidenced by way of domestic violence in his relationships.

[88] Under the heading “Institutional Behaviour” she says in her summary at pp 24 -25:

> ...Mr. M.’s conduct within the institutional setting has been quite variable, but in general it has reflected his overall low level of social and intellectual function, and poor impulse control and conflict management. He has sometimes had difficulty conforming and adapting to the structure, expectations, and pressures of the setting, yet at other times appears to adapt reasonably well. He has been victimized and has victimized others. He has at times had difficulty interacting appropriately with both the inmate population and with authority figures, resulting in interpersonal conflict with which he is ill-equipped to manage. He has demonstrated aggressive conduct as well as sexual misconduct while incarcerated. He has on occasion been segregated, placed in protective custody, or transferred to other institutions to address these problems, as well as for his own safety due to the nature of his offences.

[89] In summarizing Mr. M.’s criminal history Dr. Neilson says at p. 22:

> ...Mr. M.’s criminal history spans his entire adulthood, essentially without disruption, and demonstrates considerable criminal versatility including non-violent, violent, and sexually violent crimes, including offences while incarcerated. He denies a considerable number of the document offences despite having entered guilty pleas. For many offences, (including the current offence for which he is awaiting sentencing), he fails to accept personal responsibility, either by justification of his actions, minimization of their seriousness, or displacing blame onto the victim(s). Two of the offences involved a high level of aggression and use of weapons.... The sexual offences are a mixture of “hands on” (e.g. sexual assault) and “hands off” (e.g. indecent exposure) offences. There appears to be a pattern of escalation developing inasmuch as incarceration / external controls seem no longer sufficient to deter him from offending in a violent or a sexually violent manner. Mr. M.’s description of the events seemed to reveal a certain cavalier attitude toward the consequences of his criminal behaviour both to himself and to his victims. None of the sexual offences were against children under the age of 14, and none of the victims were related to Mr. M.. Advancing age does not appear to be moderating his offending behaviour.

[90] In her conclusions she says on p. 43:

> 1) From a clinical standpoint, Mr. M. has shown a repetitive pattern of violent and sexual offending behaviour. It is clear that Mr. M. has not controlled his violent and sexual impulses and has caused significant physical and likely psychological harm to his victim.

[91] Dr. Neilson gives some examples of reported violent or aggressive behaviour in her report. I must assess these in two ways. First by determining if I am satisfied beyond a reasonable doubt that these events occurred and, if they did, that they were violent or aggressive acts. Secondly, I must assess those I accept in relation to their similarity to the predicate offence – the aggravated assault.

[92] From her report and from the Crown's closing submissions the following is a list of the evidence the Crown says shows a pattern of behaviour falling within section 753(1)(a)(i) or (ii):

1. Almost strangling his sister;

2. Hitting her or his mother with a chair;

3. Smashing furniture in his bedroom and breaking windows;

4. Frightening family members with his violent temper and aggressive behaviour;

5. Breaking a teacher's arm at age six;

6. Being expelled from school for aggressive behaviour;

7. Being physically aggressive towards small children;

8. Attempted rape of a six-year-old;

9. As a youth at the Nova Scotia Hospital "handling reluctant females" on the ward;

10. In the adult ward of the Nova Scotia Hospital, being physically aggressive towards mentally challenged adults;

11. Punching out his boss at age 21 on his dishwashing job;

12. Domestic violence in at least one relationship – slapping the woman in the mouth and throwing her against the wall;

13. Attempted murder and a very serious sexual assault;

14. Fighting back physically in institutions;

15. Threatening to kill someone;

16. Exposing himself to a female guard;

17. The sexual violence implicit in exhibitionism and low-end sexual assault such as grabbing a breast or grabbing the crotch of clothed females as he passes them; and

18. Assaulting a police officer.

[93] As Justice Cacchione said in *Shrubsall*, at para 82:

> ....acts which do not result in charges or convictions were admissible in a dangerous offender proceeding provided they were proven beyond a reasonable doubt.

He said:

> ...it was the offender's past conduct which was under scrutiny and not just his past criminal conduct.

[94] This is where I must use the utmost care. It is perfectly acceptable for a psychiatrist to use hearsay in forming an opinion. However, the weight I give to that opinion will be greatly affected by the reliability of the information used.

[95] As I said, only one person testified about Mr. M.'s character – the victim. He said he did not have a reputation for violence. He had been on the range with him at the Central Nova Scotia Correctional Facility and previously had known him when both were incarcerated at Dorchester in around 1988.

[96] The only other character evidence about Mr. M. comes from the reports upon which Dr. Neilson relied in coming to her conclusions. None of the authors of those reports testified. The reports are admissible on a sentencing hearing but as I have said they must be used with caution.

[97] I am not satisfied beyond a reasonable doubt that the following allegedly violent events occurred. The reports of these events is double hearsay. Mr. M.'s mother reported events to social workers and psychologists who put them in their reports. So the psychiatrist is then commenting on events related to another professional by Mr. M.'s mother. Furthermore, Mr. M. did not admit these events occurred and no one corroborated them. They are: 1) Almost strangling his sister; 2) Going after her or his mother with a chair. (From the original report it is not clear whether this alleged incident was against his sister or his mother in my view); 3) Grabbing a teacher at age six or seven and breaking her arm. I should add I find it difficult to understand how a six or seven year old could break the arm of an adult woman unless a weapon of some sort were used of which there is no indication. The report says "grabbed teacher and broke her arm".

[98] Furthermore I do not have the context in which these alleged incidents occurred even if they did occur. As the Alberta Court of Appeal said in *Neve*, in para 100, it is important to know the context. The Court said:

> ....the sentencing judge failed to adequately take into account the imperative need to consider an offender's past behaviour in context.

[99] There are other alleged incidents where I am not satisfied, even if they occurred, that there was any behaviour similar in kind to this offence or similar in degree of violence or aggression inflicted on the victim this case (paraphrasing *Neve*) and these are:

- Expulsion from school for aggressive behaviour – there was no evidence of the kind of violence or its degree;

- Smashing furniture in his bedroom and breaking windows – this was not violence towards a person;
- Frightening family members with his violent temper and aggressive behaviour – there is no evidence of the kind of aggressive behaviour exhibited nor of the results of his violent temper so as to enable me to make any determination of any similarity to the predicate offence;

- Being physically aggressive towards small children – there is no evidence of the specifics of this behaviour;

- Being physically aggressive towards mentally challenged adults at the Nova Scotia Hospital – again, there are no specifics of these incidents;

- Fighting back physically when incarcerated – there are no details of this either so as to permit me to assess similarity to the predicate offence. It is noteworthy in this regard that no criminal charges were laid for this or these incidents, unlike what was done when Mr. M. exposed himself to a female guard: summary offence charges were laid on that occasion. I therefore find it difficult to accept that any such incidents of fighting back physically when incarcerated were in kind or degree similar to the predicate offence.

- Threatening to kill someone – if this occurred it is not an act like an assault; furthermore the report from 1977 when Mr. M. was federally incarcerated is as follows (quoting from p. 23 of Dr. Neilson's report:

> ...According to an activity record by * (1997-06-16), Mr. M. left school after becoming agitated because another student was talking out loud. Mr. M. "used some very strong words. He said, "What do I have to do to get people to listen to me? Do I have to hit somebody upside the head before they will believe me? He also threatened to kill somebody, but didn't specify who".

[100] These events, if they occurred, might best be described in the words used in *Neve*, as anti-social behaviour not criminal behaviour.

[101] Other alleged offences are of a sexual nature. Although Dr. Neilson said that all sexual offences are offences of violence, none of the sexual offences alleged have any similarity to the predicate offence. They involved young children when Mr. M. was himself a pre-teen or in his early teens or other teens when he was a teenager in the Nova Scotia Hospital.

[102] Two alleged incidents merit separate consideration. These are Mr. M. saying that he punched out his boss when he quit his dishwashing job and his admission of domestic violence.

[103] Although not to be condoned, neither is in any way similar to the predicate offence in kind or in degree of violence, at least on the information before the Court.

No evidence was put forward of any injuries sustained by either the employer or the domestic partner.

[104] Furthermore, there are numerous instances in Dr. Neilson's report and in the testimony of Dr. Kronfli of Mr. M. exaggerating events, even negative ones. Even if I were to conclude these events, or either or them, were similar in kind or degree of violence to the predicate offence, I would exercise some caution in accepting that they occurred as related only by Mr. M.. As Dr. Neilson said, he has "considerable facility with the truth".

[105] This then leaves Mr. M.'s criminal record. It is lengthy and as Dr. Neilson put it, Mr. M. displays "criminal versatility", in other words the offences are varied. Earlier I put these offences into four categories. In my view the property offences have no similarity to the predicate offence. Offences against property are different in kind and result from offences against the person.

[106] I will deal hereinafter with the sexual assault committed with the attempted murder. The other sexual offences for which Mr. M. has been convicted are seven charges of indecent acts, one of which also involved a charge of criminal harassment arising out of one of the indecent acts. The other sexual assaults are: 1) grabbing the crotch of a student on her way to school in December of 1984; and 2) grabbing a woman's breast on September 7, 2003, one of the so-called Salt Marsh Trail incidents.

[107] As I have said, Dr. Neilson considered all offences of a sexual nature to be violent offences. In most cases that is true but the **Criminal Code** distinguishes an indecent act, exhibitionism from other sexual offences. The **Criminal Code** makes it a summary conviction offence. Although the headings in the statute are not part of the statute but are only there for convenience, it is interesting to note that the exhibitionism offence falls under the heading of "Disorderly Conduct" and is followed by offences dealing with public nudity, causing a disturbance and obstructing a clergyman performing a religious service, etc.

[108] The two sexual assaults, although offensive and disturbing, are in no way similar to the aggravated assault on the male victim in this case, which was not of a sexual nature and which caused him serious injury. Neither victim of the two sexual assaults was physically injured although physically touched.

[109] Next I will consider the offences of assaulting a police officer and obstructing a police officer. The sentence date was August 1978, the offence date is unknown, and the offence of carrying a concealed weapon in October 1980.

[110] There is no factual context in evidence for the offences against the police officer. Furthermore, Mr. M. was seventeen at the time of the offences and received only a suspended sentence and one year probation. This was his first conviction. His next conviction was the offence of carrying a concealed weapon. Mr. M. is reported by Dr. Neilson to have told them that he had a billy stick with him when he confronted a teacher who had reportedly struck his brother. He told them he had it in his hand near the Dartmouth Shopping Centre when the police found him. However, the Crown sheet for this offence (Tab E, Criminal History volume) states that he and another man were found at 4:30 in the morning on Almon Street at Isleville Street in Halifax. He was found with a two-foot long wooden club hidden inside his pants and covered by his jacket. Since the offence charged, and to which Mr. M. pled guilty, was carrying a concealed weapon, I conclude it is unlikely Mr. M.'s version of this offence is accurate. He received a fine of $50.00 and two months probation (not two years as the Crown Notice states). Under these circumstances I cannot conclude that that offence has any similarity to the predicate offence.

[111] That leaves the attempted murder and the serious sexual assault committed on April 24, 1985. The details of the injuries sustained by the victim of that offence are largely uncontradicted. The female victim was choked to unconsciousness, struck in the head by a rock and stabbed several times in the neck, narrowly missing her carotid artery. The sexual assault included intercourse and although he was not sentenced for it because of the Kienapple principle, Mr. M. was also found guilty of forced oral sex: a gross indecency charge.

[112] In comparing the degree of harm to that victim to the harm to the victim in the predicate offence I note that both were seriously injured, the female victim much more seriously so. Several assaults, any one of which could have killed her, were made on the female victim. She was left unconscious and bleeding. In his sentencing, Palmeter, C.J.C.C. (as he then was) cited a case which he said was similar, where the Court of Appeal commented on the callous attitude of that offender as to whether his victim lived or died. He then said "Almost on all fours with this particular case."

[113] Mr. M. was not charged with attempted murder in this case. This offence is therefore inherently less serious, although still a very serious offence.

[114] Mr. M.'s 1985 victim was a female, not a male. She was the friend of his current girlfriend and the former girlfriend of his best friend. There was no argument between the two before the violence occurred. Mr. M. reportedly has given varying accounts of the event – in Dr. Neilson's report she mentions three. First, a report in 1991 (while in custody) saying it was consensual sex and denying any knowledge of how the victim was injured. Another version from earlier that same year was that they were at a party and the victim invited him to go for a walk in the woods and initiated the sex. He is reported to have said that he was on heroin and the next thing he knew he was stabbing her with a penknife. When interviewed by Dr. Neilson and Dr. Brown, he denied being under the influence of drugs and said they had gone into the woods to get drugs. He said he decided they would have sex and when she started crying and said she was going to call the police, he freaked out and started to beat her up, acknowledging he may have stabbed her in the neck with a penknife. He denied having oral sex or anything other than intercourse. He said he didn't know if he intended to kill her or not and denied using other objects to strike the victim.

[115] In a portion of one of the Correctional Services of Canada files in the exhibits there is a reference to the offence and it was read out by the Crown in his closing submissions. In the report from the sex offender program at Dorchester there are notes of what Mr. M. reportedly said he was thinking and feeling on the day of the sexual assault and attempted murder. Throughout I will be referring to what he was reported to have said. He reportedly said he thought he would find a victim and hurt her. Then he found her and convinced her to go for a walk with him. He is reported to have said that he might talk to her and he might rape her. He then said he convinced her to undress for sex but then she started to cry. He thought he might smash her head with a rock but would rape her first. Then he became scared because she had a knife and had to get it from her. He is reported to have said he grabbed the knife, threw her to the ground, hit her head with a rock, raped her, hit her in the head and elsewhere, stabbed her, choked her and then left. He said he later went back with a friend but could not find her to help her. He is reported to have said that he then felt scared, hurt, remorseful and ashamed, sick that he had done it and concerned how this would affect his best friend and his family.

[116] All the witnesses to the predicate offence refer to an argument between Mr. M. and his victim, as previously referred to. The attempted murder and sexual assault took place in a wooded and secluded area whereas the predicate offence in January of 2005 occurred in a secure facility in full view of other inmates and captured on the

institution's security cameras. The 1985 crime had a substantial sexual violence component and the 2005 predicate offence had none.

[117] I therefore have evidence of two violent offences and, although I do not have the context for it, an assault on a police officer around 1978, when Mr. M. was 17 years old.

[118] I conclude that I must find a pattern, if there is one, from two of those offences; the aggravated assault and the attempted murder and sexual assault. As the Court of Appeal said in Alberta in *Neve*, the fewer the offences the greater must be the similarity. As I have outlined above, I find little or no similarity between the two offences. It is also noteworthy that they occurred 20 years apart with other criminal offences in the intervening years, but none of a nature similar to the predicate offence in kind or degree of violence.

[119] I therefore cannot conclude that Mr. M. is a threat pursuant to section 753(1)(a)(i) or (ii).

[120] I must move on to consider section 753(1)(a)(iii).

S. 753(1)(a)(iii)

[121] Section 753(1)(a)(iii) provides:

> 753 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender if it is satisfied
>
> (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> ...
>
> (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that

> the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; ...

[122] I must determine if Mr. M. constitutes a threat to the life safety or physical or mental well-being of others based upon evidence of behaviour that is of a "brutal nature" associated with the predicate offence.

[123] In *Neve*, although this section was not in issue, the Alberta Court of Appeal appointed out in para 113 that with respect to this subsection a pattern is not needed and one brutal attack may be sufficient. In *Shrubsall*, although the principal focus was on a pattern of behaviour, Cacchione, J. said in para 242:

> These offences were of such a brutal nature so as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.

[124] In *R. v. Antonius*, [2000] B.C.J. No. 577 (B.C.S.C.), the offender pled guilty to sexual assault causing bodily harm. He knew he was HIV positive and knew the virus could be passed on by sexual contact. He accosted the victim and dragged her into an alley. He put his hand over her mouth and began to undress her. As he began forced intercourse she blacked out. When she regained consciousness, he helped her dress but when she tried to escape he put his hand over her mouth and said he would silence her. He forced her to perform oral sex, pushing her down and starting to choke her. She blacked out again. She said he had his hands around her neck and his knees on her chest. She said she thought he was going to kill her. Her face was swollen and her neck ligaments were injured requiring physiotherapy. She also had to be monitored for a year before it was determined that she had not in fact contracted HIV.

[125] McEwan, J. said in that decision in paras 24 and 25:

> 24 There are now two violent sexual offences in Mr. Antonius' record. Each, on the evidence, caused injury and psychological damage to his victims. Each is similar in terms of some of the coercive elements it manifested....
>
> 25 ... The offence was of a brutal nature, not in the sense that remarkable physical violence was associated with it - although Mr. Antonius' assault was serious - but in that it clearly demonstrates such a low threshold of inhibition that I must conclude that Mr. Antonius poses a grave risk that his future behavior will not likely be inhibited by normal standards of behavioral restraint.

[126] On appeal, the Court of Appeal referred to the similarity in violence of the two attacks but did not comment on the issue of brutality. The issue on appeal was whether an adjournment should have been granted and that was the issue on the leave application to the Supreme Court of Canada which was dismissed.

[127] In *Langevin*, *supra*, Lacourciere, J.A. at page 349 considered what is required to establish behaviour of a brutal nature. The trial judge had concluded that the offender's conduct was "coarse, savage and cruel" and, accordingly so "brutal" as to fit within the requirement of what is now section 753(1)(a)(iii). The submission by the appellant offender was that "any rape by definition contains severe physical and psychological abuse, but that the 'brutal nature' requirement of subparagraph (ii) required a greater element of savagery, evidenced by sadism, torture or mutilation (p. 349). The Court of Appeal rejected this argument and agreed that the trial judge's definition of behaviour of a brutal nature. Lacourciere, J.A., at page 349 said that it was not necessary that there be a situation of "stark horror" as he said was the case in *R. v. Hill* (1974), 15 C.C.C. (2d) 145 and *R. v. Pontello* (1977), 38 C.C.C. (2d) 262.

[128] The offences in *Hill* and *Pontello* are to be compared with that in *Langevin*. In *Hill*, the offender assaulted a 14-year old who was babysitting, raped her, forced her outside with nothing on but a jacket and, when she tried to run away, forced her back into the house, knocked her to the floor and stabbed her repeated in the face, eyes and throat with a paring knife and then abandoned her.

[129] In *Pontello*, three separate offences were considered:

1) The offender forced a 14-year old girl into a car at knife point, drove her to an isolated area, raped her and forced her, with threat of a knife, to participate in oral sex.

2) 18 days later he forced an adult woman into his car at knife point, throwing her into the car, took her to the same isolated area, raped her and subjected her to oral sex and buggery.

3) About one and one half months later, he parked his car and walked toward a woman, pressing a knife into her back, trying to force her into a car. When she resisted he stabbed her under the breast between two ribs. Fortunately, a police cruiser pulled up and the woman got away and

> jumped into the cruiser so traumatized she could not speak of the offender the judge said: "With great coolness the appellant walked over to the cruiser and said: 'It's all right officer, it was just an argument' " . He then got into his car and drove away. A few moments later the victim composed herself enough to be able to tell the police that he had stabbed her.

[130] The trial judge referred to "the enormity of the crimes" committed and said that "the crimes of rape with the violence associated with them.... are only slightly less serious than murder". He also referred to them being planned and deliberate.

[131] In *Langevin* the conduct of a brutal nature was as follows. The offender was out on a weekend pass from a local correctional centre. He rented a car and on the evening he was to return, he parked his car, ran up behind a 12-year old victim and forced her into his car, punching her in the forehead when she resisted. He made her lie down on the front seat with her sweater over her head while he drove to a secluded area. He then pushed her out of the car, forced her to remove her clothing, made her perform oral sex on him and forced himself partway into her vagina and rectum. As they returned, the car went into a ditch and he forced her to accompany him and say nothing or run away or he would kill the farmer he sought help from. He and the victim returned to the vehicle while the farmer got his tractor and he forced her to lie down on the back seat and say nothing, again with the threat that he would kill the farmer. When the car was extricated he drove to another secluded place and made the victim promise she would tell no one. He then left the victim on the side of the road two miles outside the city.

[132] On examination at the hospital, she had red marks on her neck, nose and cheek and swelling on her forehead which developed into black eyes the following day. There was a small tear in her hymen and some bleeding. Her psychiatrist later diagnosed "a traumatic and depressive neurosis resulting from a sexual assault".

[133] Langevin had committed a prior sexual offence one year previously on a 17-year old in similar circumstances, causing the court also to conclude he had a pattern of repetitive behaviour. According to *Langevin*, it did not have to be a situation of stark horror, as he characterized the events in *Hill* and *Pontello*. However, one could easily characterize the events in *Langevin* as events of stark horror: the distinguishing feature being there was no use of a weapon, although the events took several hours during which the offender threatened to kill the farmer who was helping get the car

out of the ditch if the victim cried out or tried to escape. Langevin also left the victim two miles outside of the city late at night or in the early hours of the morning. The events in *Hill*, *Pontello* and *Langevin* were clearly coarse, savage and cruel.

[134] I must consider the predicate offence in the context of section 753(1)(a)(iii). Although the cases to which I have referred relate to sexual offences, they do provide some assistance in determining if the behaviour of Mr. M. during the aggravated assault was behaviour of a brutal nature.

[135] I must consider whether the aggravated assault was coarse, savage and cruel and in doing so I must distinguish it from other aggravated assaults.

[136] Dr. Neilson referred to the aggravated assault as extremely violent. She did not use the phrase "brutal nature" or refer to coarseness, savagery or cruelty. Assaults are by their nature violent and aggravated assaults are extreme in their violence. Aggravated assaults by definition involve wounding, maiming, disfiguring or endangering the life of the victim. In my view, to make this offence fall within the words "coarse, savage and cruel" it has to be an aggravated assault worse in its circumstances than many aggravated assaults.

[137] To conclude otherwise would in my view be inconsistent with the purpose of the dangerous offender provisions of the Criminal Code. If all aggravated assaults were considered to be behaviour of a brutal nature, all those convicted of such an offence could be considered dangerous offenders if the rest of the requirements of the dangerous offender provisions were met. In my view that casts too wide a net – the dangerous offender provisions would not exist solely for "a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive incarceration (quoting from *Lyons*, para 44).

[138] Accordingly, I conclude that to be considered brutal, the behaviour of an offender in an aggravated assault must have some characteristics similar to those found in cases like *Langevin*. In *Langevin*, the offender carried it out over a substantial period of time and threatened to kill another if his victim cried out or tried to escape. He cooly went to a farm and enlisted help to get his car out of a ditch after sexually assaulting the 12-year old he still had control over. These are cruel actions, they are savage and coarse. The offender kept his young victim captive and coerced her into silence with threats to kill the farmer. This is cruelty even beyond the cruel acts of sexual assault perpetrated upon her.

[139] The aggravated assault in the predicate offence was one swift blow followed by Mr. M. quickly returning to his cell. There was no prolonged cruelty in his actions. He did not threaten his victim before the assault nor did he confine his victim to perpetrate the assault. Nor was there more than one kind of assault or a period of terrorizing his victim before the assault occurred or afterwards. Although the victim in his testimony talked about a period when he planned revenge on Mr. M., there is no indication he has had to see a psychiatrist as did the young victim in *Langevin*. In fact, he said he is doing his best to put the incident behind him.

[140] In the circumstances of this case, I cannot conclude the predicate offence is of a brutal nature. I therefore do not need to compare it to the sexual assault and attempted murder in 1985 which, in my view, was similar to the events in *Langevin*.

[141] Without a pattern of behaviour required by section 753(1)(a)(i) or (ii) or behaviour of a brutal nature required by (iii) I cannot conclude that Mr. M. is a "threat" as required by introductory words of section 753(1)(a).

Long Term Offender

[142] However, I must consider whether Mr. M. should be declared a long-term offender. There are two means by which a Court may find an offender a long-term offender. If I had found Mr. M. met the criteria for a dangerous offender I have discretion to designate him a long-term offender if I were satisfied that "there was a reasonable possibility of eventual control of his risk in the community". Having found he did not meet the dangerous offender criteria, this alternative is not applicable in this case.

[143] The second means of finding a person a long-term offender is pursuant to section 753(5)(a) of the Criminal Code which provides:

> (5) If the court does not find an offender to be a dangerous offender,
>
> (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; ...

[144] The long-term offender provisions are set out in section 753.1(1) of the Criminal Code:

> 753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (b) there is a substantial risk that the offender will reoffend; and
>
> (c) there is a reasonable possibility of eventual control of the risk in the community.

[145] With respect to (b), substantial risk of re-offending, subsection (2) provides:

> (2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if
>
> (a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and
>
> (b) the offender
>
> (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
>
> (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.

[146] With respect to (2)(a), Mr. M. has been convicted of two sexual assaults so that requirement is met.

[147] With respect to (b) I have concluded above that no pattern has been established, so (i) under (b) is not applicable. The alternative is (ii). It refers to conduct in any sexual matter, including that involved in the commission of the offence for which the offender has been convicted. In my view, that wording contemplates that the predicate offence is a sexual offence. The words are "sexual matter, including" the predicate offence.

[148] Since the predicate offence is not a sexual offence and did not involve conduct in a sexual matter, I conclude the requirements for Mr. M. to be found to be a long-term offender are not established.

[149] This is consistent in my view with the focus of section 752(2)(a) on sexual offences. Subsection (b) gives two alternatives for a long-term offender designation. One because of sexual behaviour and the other where there is a pattern of behaviour of which the predicate offence is a part showing a likelihood of causing death or injury or severe psychological damage. Subsection (b)(i) is tied to the predicate offence. In my view (b)(ii) must be read so as to connect the conduct in the sexual matter to the predicate offence as well.

[150] Accordingly, I do not need to address the final requirement under this section, which is a reasonable possibility of eventual control of risk in the community. However, if I were to do so, I would prefer the evidence of Dr. Kronfli over that of Dr. Neilson. He has been treating Mr. M. for almost three years and in my view the clinical override would prevail over the actuarial evidence of risk of re-offence. Accordingly I would have concluded that there is a reasonable possibility of eventual control of risk in the community.

[151] Since I am unable to designate Mr. M. a dangerous offender or a long-term offender I must sentence him for the offence of aggravated assault.

Sentence for Aggravated Assault

[152] The Crown seeks a sentence of eight to ten years but has not provided any authority for a sentence in this range. The defence says the range is three to six years for an aggravated assault of this nature. Mr. Craggs for the defence submits that for

Mr. M. the appropriate range is five to six years, taking into consideration his age, previous criminal record and the mitigating factor of a guilty plea. He also submits that Mr. M. should receive double credit for his remand time, a proposition with which the Crown does not disagree.

[153] The case authorities to which Mr. Craggs referred are the following:

[154] In *R. v. Roberts*, [2007] O.J. No. 297 (Ont. C.A.), the offender was found on appeal to be a long-term offender, but his sentence at the trial level of five years, four months was determined to be the appropriate determinate sentence for the offender as a long-term offender. The offender had attacked a man in a bar with a pool cue, striking him on the head three times, knocking him unconscious and causing bleeding and some after-effects. The offender had a lengthy criminal record which included eight previous crimes of violence against strangers and two former spouses as well as two sexual assaults against strangers which included rape at knife-point. He also had a history of failing to comply with court orders and parole and probation violations.

[155] In *R. v. Vickerson*, [2005] O.J. No. 2798 (Ont. C.A.), the accused was sentenced for aggravated assault and assault with a weapon. The Ontario Court of Appeal upheld a sentence of six years where the assault was unprovoked and showed evidence of some planning because the accused brought an iron bar with him. The two victims were struck, one in the head, and both wound up in hospital. The victims were no threat to the accused and his actions were to avenge an earlier altercation between the offender's girlfriend and other women with the two victims, who were intoxicated. The Appeal Court also referred to the offender's prior criminal record.

[156] In *R. v. N.H.N.*, [2005] M.J. No. 200 (Man. Q.B.), the accused was sentenced to five years for an aggravated assault where the offender and an accomplice attacked two others to steal a case of beer. One victim was slashed with a broken beer bottle and suffered serious lacerations. The Court concluded the offence was violent and unprovoked, with a very dangerous weapon and that the offence would likely had continued with more serious injuries if the police had not arrived. The victim required 45 stitches to close one laceration to his cheek and other stitches to his face as well as staples to close lacerations to his right shoulder and to his back, the latter requiring 30 staples. He also had other cuts and bruises to his face as well as losing two front teeth. The accused had a lengthy criminal record for violent offences including a number of assaults, two assaults with a weapon, assaulting a police officer, assault on a spouse, assault causing bodily harm and a previous aggravated assault. The most recent three

offences, including the current one, were assault causing harm and two aggravated assaults. The Court concluded that the assaults were becoming more violent. The offender was on parole at the time of the last offence.

[157] In *R. v. Sparks*, [2007] N.S.J. No. 50 (N.S. Prov. Ct.), three accused were sentenced to 72 months (for two of them) and 60 months (for the third). Williams, P.C.J. referred to the crime as "horrible and violent conduct" showing "a callous disregard for the safety and welfare of another human being". They attacked the victim (who died later from a gunshot), without any provocation. He referred to it as "a shameful, unprovoked, savage, baseless assault." The victim suffered serious bodily injuries. The victim was ganged up on and stomped and kicked. He was dazed or only semi-conscious and motionless during the attack. The judge noted the attack was not planned. Two of the offenders had prior records and received the lengthier sentences. The prior offences of one included a lengthy youth record for violence.

[158] In *R. v. Fajcsik*, [2005] B.C.J. No. 201 (B.C. Prov. Ct., Crim. Div.), the British Columbia Provincial Court sentenced a 36-year-old offender to five years for an unprovoked attack, while on heroin, on an 86-year-old. He hit the victim's head on the sidewalk several times and kicked him. He left the scene and then returned and resumed the assault even with others present. The victim suffered serious injuries and he was left with memory and visual problems and his hearing loss was worsened. He suffered a fractured skull which required a four week stay in hospital. He subsequently developed blood clots in his head and had to have brain surgery, remaining in hospital for five weeks. The offender had a serious drug problem and a lengthy criminal history including some ten year old violent offences. Although there were expressions of remorse and of a change in criminal lifestyle, the Court was not optimistic about his rehabilitation.

[159] Lesser sentences were imposed in *R. v. Nelson*, [2006] B.C.J. No. 662 (B.C. Prov. Ct., Crim. Div.) and *R. v. Deperry*, [2004] O.J. No. 5483 (Ont. C.J.). In *Nelson*, the accused pled guilty to an aggravated assault on a semi-conscious drunk in a holding cell at a Vancouver jail. The victim was hand-cuffed behind his back and for the most part lay on the floor of the cell while the offender kicked him in the head and head-butted him during the video-taped incident that lasted several minutes.

[160] The victim was not permanently injured but his nose was so badly damaged he required plastic surgery to reconstruct it. The offender had a previous history of violence and was on bail when the offence occurred. The Judge found among the

aggravating factors that the assault was unprovoked and was not just one or two blows in a fit of rage but was a continuous assault over several minutes. The offender, an aboriginal, had a severe alcohol addition. The Court concluded the range of sentence was three to six years and said in para 14:

> Weighing all of the circumstances, I find that a jail term of three years is the minimum term that can be imposed. In my view the aggravating circumstances take this offence out of the range of provincial time, even when I factor in the accused's relative youth, his Aboriginal background, and the disadvantages he suffered as a child.

[161] In *R. v. Deperry* the Ontario Provincial Court sentenced DePerry to three years and his co-accused, Godfrey, to 18 months for an aggravated assault. They assaulted another inmate at a correctional facility. The assault was unprovoked and seriously injured the victim whose jaw was broken requiring surgery and insertion of plates and screws to stabilize it. The victim also had to have his lower teeth removed because of an infection. Deperry, although only 23, had a lengthy youth and adult criminal record including numerous crimes of violence.

[162] In sentencing Mr. M., I have a great deal of information about his background and future prospects for rehabilitation, from the reports of Dr. Neilson and Dr. Kronfli as well as from the Pre-Sentence Reports filed in relation to other offences. I also have Mr. M.'s Correctional Services Canada records as well as medical information.

[163] The offence itself has been described previously in this decision and I will not repeat the details here.

[164] Mr. M. is 46 years of age. He had an extremely difficult childhood, beginning with his premature birth, serious problems in the family with his father which resulted in his mother leaving the father and placing the children, including Mr. M., in Foster Care at a young age. Because of his low level of intellectual functioning, he did not do well in the educational system, being a behaviour problem at home and in school. Ultimately, his family placed him in the adolescent unit at the Nova Scotia Hospital and ultimately agreed that he should be placed in a Regional Rehabilitation Centre.

[165] Mr. M.'s criminal history has already been referred to. His first conviction was at age 17 and he has had a serious of provincial and federal incarcerations since 1981 when he was aged 20, the lengthiest being the full ten years to warrant expiry for

attempted murder and sexual assault. He was in prison for that offence from the time he was 25 until he was 35.

[166] Mr. M. has largely been unemployed and has little in the way of job skills. He has worked in prison but outside has relied for income principally on a disability pension and social assistance.

[167] In terms of family and other support, there is little. He has lived for a period with a half-brother but that ended with his sentencing for indecent acts. He has had a few relationships but none recently.

[168] He has a history of substance abuse, both with alcohol and illegal drugs. I have already referred to the psychiatrists' reports.

[169] The principles of sentencing are set out in sections 718 to 718.2 of the Criminal Code. Denunciation and deterrence are important factors in this case. I must also be mindful of the principle of rehabilitation. A good deal of evidence has been led about Mr. M.'s prospects for having his risk to re-offend managed in the community. These factors which I consider to be important in this case must be balanced along with the need to separate offenders from society when necessary, which I conclude is necessary in this case. The sentence I impose must also be proportionate to the gravity of the offence and the offender's degree of responsibility. This was a serious offence causing serious injury to the victim who has ongoing medical and dental problems arising from the attack on him. Mr. M. pled guilty but it is noteworthy in this regard that the entire incident was recorded on the correctional facility's video recording system, albeit without sound. Although a guilty plea is a mitigating factor it is therefore somewhat less so in this case because of that. Aggravating factors are the unprovoked nature of the assault, Mr. M.'s previous record and his age.

[170] The calculation of remand time has been agreed upon by counsel to run from October 28, 2005, Mr. M.'s earliest release date for the offences for which he was serving time at the time of this offence. Accordingly Mr. M. has served, up to today's date, two years, two months and 18 days. Counsel also agree that credit should be given on a two for one basis and they agree therefore that the remand time is equivalent to four years, five months.

COURT: Mr. M., would you please stand.

[171] Mr. M., it is the decision of this Court that a fit sentence would be a period of incarceration of six years, which taking your remand time into consideration results in a sentence of one year, seven months, which you are to serve in a provincial institution. This is to be followed by a period of probation of three years.

COURT: You may sit down while we talk about the probation conditions.

[172] Obviously, there are the mandatory probation conditions but I would ask for counsels' submissions about what those probation conditions, what the optional ones should be, and if you want to take a few minutes we can take a brief break.

Conditions of Probation

COURT: My understanding is that counsel have agreed on the terms of probation.

[173] Custody will be one year, seven months at the Central Nova Scotia Correctional Facility. Recommendations are that Mr. MacLean will continue with his treatment with Dr. Risk Kronfli or another psychiatrist. Upon expiration of that sentence there will be probation for three years and the conditions are:

1.) To keep the peace and be of good behaviour;

2.) Appear before the Court when required to do so by the Court;

3.) Notify the Court, Probation Officer or Supervisor in advance of any change of name, address, employment or occupation;

4.) Report to a Probation Officer, Suite 100, 277 Pleasant Street, Dartmouth, Nova Scotia within seven days from the date of the expiration of the sentence of imprisonment and thereafter as directed by the Probation Officer or Supervisor;

5.) Remain within the Province of Nova Scotia unless you receive written permission from your Probation Officer;

6.) Not to take or consume alcohol or other intoxicating substances;

7.) Not to take or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* except in accordance with a physician's prescription for you or a legal authorization;

8.) Not own, possess or carry a weapon, ammunition or explosive substance;

9.) Have no direct or indirect contact or communication with J.L.;

10.) Not be within 50 metres of any premises known as a place of residence or employment of J.L.;

11.) Attend for a mental health assessment and counselling as directed by your Probation Officer;

12.) Attend for substance abuse assessment and counselling as directed by your Probation Officer;

13.) Attend for assessment and counselling in anger management as directed by your Probation Officer;

14.) Attend for assessment counselling or program directed by your Probation Officer;

15.) Participate in and cooperate with any assessment, counselling or program directed by your Probation Officer and pay the cost or a portion of the cost as directed by your Probation Officer.

COURT: I reiterate that, although I have read out Mr. L.'s name, I was careful not to say it in my decision, obviously it has to be in the Probation Order, this is just another reminder about the Ban on Publication.

Court signs the Order of Prohibition and DNA Order.
Crown not seeking victim fine surcharge.
Crown offers no evidence on Section 88 and withdraws charge.