SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Melvin*, 2021 NSSC 4

Date: 20210118
Docket: 447189
Registry: Halifax

Between:

Her Majesty the Queen

v.

James Bernard Melvin

Decision – Dangerous Offender Hearing

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	July 6, 7, 8, 9, 10, September 11, November 2, 3, 9, December 4 and 9, 2020, in Halifax, Nova Scotia
Counsel:	Christine Driscoll, Q.C., Senior Crown Counsel; Rick Woodburn, Senior Crown Counsel; and Sean McCarroll, Senior Crown Attorney for the Crown Raymond Kuszelewski and Laura McCarthy for the Defendant

Introduction

[1] On October 5, 2017, a jury found Mr. Melvin guilty on two counts, namely that he did, on or about the 2nd day of December, 2008, at or near Harrietsfield, Nova Scotia:

1. attempt to murder Terry Marriott Junior, contrary to section 239 of the *Criminal Code*; and

2. conspire with, Jason Hallett, an unindicted co-conspirator, to commit the murder of Terry Marriott Junior, contrary to section 465(1)(a) of the *Criminal Code* ["*CC*"].

[2] The Crown has applied to this Court to have Mr. Melvin declared a dangerous offender and sentenced to an indeterminate sentence.[1]

[3] As Justice Côté stated for the majority in *R v Boutilier*, 2017 SCC 64 at para. 33:

> This Court has characterized the sentence of indeterminate detention as being a preventive sentence "in its clearest and most extreme form": *R. v. Sipos*, 2014 SCC 47, [2014] 2

[1] The lengthy period between the commission of the offence in 2008, conviction in 2017 and sentencing in 2020 does not preclude this court from considering subsequently committed offences/pattern incident evidence (Lord Coke's principle) in the context of a dangerous offender application – *R v Wilson*, 2020 ONCA 3. This sentencing has been delayed on multiple occasions, for various reasons not unlike an earlier case where the process consumed four years after conviction: *R v Bailey*, 2017 NSCA 48 at para. 103. As will become evident below, because it has been 12 years since these offences were committed, this court has to consider the amendments to the dangerous offender provisions over that time interval, and whether those in force at the time of the offence, or at the time of sentencing should be relied upon. I conclude that there are no relevant material differences, and therefore it is appropriate to rely upon the present provisions. Both the Crown and Defence agree with my conclusion.

> S.C.R. 423 (S.C.C.), at para. 19. The purpose of this type of sentence has always been "neither punitive nor reformative but primarily [the offender's] segregation from society": *Report of the Royal Commission to Investigate the Penal System of Canada* (1938), at p. 223. This preventive sanction can be imposed only upon offenders for whom segregation from society is a rational means to achieve the overriding purpose of public safety.

[4] I am satisfied that he should be declared a dangerous offender and sentenced to an indeterminate period of imprisonment. I will also authorize ancillary orders that flow from his conviction and sentence.

Mr. Melvin's background

[5] He was born on March 11, 1982 and became an adult when he turned 18 years of age on March 11, 2000. A chronology of significant events in his life can be found in the many assessment reports from periods when Mr. Melvin was in custody or on probation, presentence reports prepared for sentencings,[2] and the court has the report of Dr. Shabehram Lohrasbe, MD, who has been found to be qualified to give expert opinion evidence as follows:

> "A psychiatrist able to provide opinion evidence in the area of psychiatry including, but not limited to, the practice of forensic psychiatry, the diagnosis, assessment and treatment of mental disorders; the diagnosis and classification of violent offenders; the assessment of risk for future violence or recidivism for violent offenders; the treatment and risk management for violent offenders; and the nature and degree of psychological harm caused by violent offenders to their victims."

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[2] *Inter alia*, see Exhibits 12 – Community Corrections binder; 13 and 35 – Nova Scotia Health Authority (psychiatry and addiction) binder and affidavit.

[6] Next, I will briefly set out his criminal record history.

1 - Youth and Adult criminal history[3]

A - Youth Record

[7] At his first sentencing on **December 15, 1994**, (for a charge of summary conviction theft from Sears – the matter had been referred through Alternative Measures, but because of Mr. Melvin's attitude it was unable to proceed and therefore was dealt with through the courts) his counsel set out his background:[4]

> "James Melvin is a 12-year-old young person who is before the court for the very first time today. He's a young person who has experienced a series of traumatic events during the past year. **He has seen his father tried and convicted of trafficking in narcotics and just over a year ago his father left the family home to do an eight-year prison sentence.** Since then his family has had to rely upon family benefits for financial survival.… **However, Jimmy has dealt well with these changes**. He's kept up in school. He is presently a Grade seven student at BC Silver Junior High School. He is also kept up with his involvement in organized sports. He plays hockey in school, and also plays hockey for his school and basketball and baseball.… Jimmy has daily interactions with an attentive and loving mother… and has the support of the grandmother and aunt are also here. The crisis that has followed… that has happened in this family regarding his father and the financial difficulties will be around for some time. The need for some help and guidance to get through this time has not gone unnoticed. Jimmy and his mother have attended at the Atlantic Child Guidance Centre and it's hoped that could at some point in the future provide further stability of the sort that Jimmy needs at this point. I would submit that Jimmy, by being apprehended by the police and coming before this court has learned his lesson at this point. I am also informed by his mother that he and his mother had a long talk about theft and the consequences of breaking the law. Given his father's recent incarceration this was a lesson that was not lost on Jimmy."

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[3] A history of his criminal convictions is contained at Tab 1 Exhibit 14 - provincial and federal offences, and in Exhibits 23 and 24.

[4] *R v James Edward Melvin*, 2005 NSSC 368 confirms that Mr. Melvin's father was sentenced for two counts of trafficking, s. 5(2) *CDSA* on September 12, 2003 to six years and three months in a federal institution, consecutive to the eight year sentence earlier imposed for trafficking in narcotics and referenced within the following quotation.

[My bolding added]

[8] In an **October 10, 1995** report by Probation Officer LWE Saunders wrote:

"**With regard to mental health, offender Melvin advised he was scheduled to attend an anger management program set up by his and other schools. However, after one or two sessions same left the group…** states that he was not under the influence during the commission of any of the above offences and does not have any addictive problem with any form of substance… was interviewed at the Shelburne Youth Centre. He was at that time in the Special Attentions Unit, and this was further complicated by the fact that he was also on a "24" which indicated that he was of such attitude and demeanour that he was required to remain in his single room for at least 24 hours… James Melvin expects that some period of custody is expected to form part of the disposition and indicated that he **wished to go to Waterville because all his friends were there**. It is noted that the offender should be housed in the Orientation Unit of the Youth Centre. Standard procedure involves a one-week period in Orientation then the subject is transferred to another unit. However, SAU [Special Attentions Unit] personnel believe that **James Melvin has never completed orientation because of his attitude and demeanour and thus numerous transfers to SAU**."

[My bolding added]

[9] In a **February 19, 1997** Progress Report by John Sarsfield, Youth Worker at the Nova Scotia Youth Centre, he stated:

"**[Mr. Melvin] has expressed no desire whatsoever to take part in any of the Nova Scotia Youth Centre's programming**. Having spent most of his time in-room confinement, the youth has not permitted staff an opportunity to help him help himself".

[My bolding added]

[10] In the first court ordered assessment, dated **February 28, 1997**, Dr. John S. Bishop, Psychologist, stated in relation to Mr. Melvin:

"This is the second assessment of this almost 15-year-old young offender, although it is the first one to be completed in response to a court order. The court order makes note of the

young offender's history of violence and focuses on the question of the treatment/therapy options. The initial assessment was completed on May 27, 1996 [9 months ago] secondary to a referral from Deputy Superintendent… The referral was made because of the young offender's history of 'going off'… His psychological test results pointed to a **conduct disorder of moderate to severe intensity** with the likelihood of disruptive acting out behaviour. The results further indicated that he was **an individual with poor impulse control, and a low frustration tolerance who sought constant stimulation and who was a risk taker in terms of his behaviour… Results further indicated the likelihood that he would display serious antisocial behaviour and that because of his difficulty in controlling his anger, the behaviour could well be aggressive in nature**… He was likely to try to shift the blame for any of his own unacceptable behaviour on to others… Basically a manipulative individual who did not trust others… Prone to outbursts of temper if things did not go his way… had many of the personality characteristics of adolescents who have marked problems in terms of substance abuse… **When these results were presented to him the following day, he admitted that the findings were a very accurate description of him, but he simultaneously denied that he had any kind of problems or difficulties**… The initial assessment concluded by noting **the treatment with him was likely to be very difficult because of his insistence that he had no problems and because of his mistrust of others, which would make it difficult for him to relate to any therapist.** Consequently, it was recommended a behavioural managerial approach to him should be taken, rather than trying to implement a talking, insight type of therapy… **Current MMPI-A results are almost identical to those that were obtained nine months ago… Diagnosis continues to be that of a conduct disorder of moderate to severe proportions, highlighted by impulsive and aggressive acting out behaviour of a very antisocial nature… the probability of a significant substance abuse problem, and the rather discouraging findings regarding treatment are virtually identical to the earlier findings**."

[11] On **March 3, 1997**, Mark Smith, Unit Supervisor at the Nova Scotia Youth Centre wrote:

"On February 21, 1997 a Progress Report was completed on young offender James Bernard Melvin… was **transferred to the Nova Scotia Youth Centre on October 8, 1996 for his part in disturbances at the Shelburne Youth Centre**. Since the completion of the February 21 report, Mr. Melvin has continued to be a source of major concern for staff. On February 25 young offender Melvin completed sanctions from a previous Level 3 incident report. After four days back on the unit, he was involved in two physical altercations on the unit where he assaulted two separate staff within a four-hour period.… **It is uncertain whether or not the Nova Scotia Youth Centre offers any program which this young man will allow himself to benefit from**."

[My bolding added]

[12] On **April 10, 1999**, Mark Smith, Unit Supervisor at the Nova Scotia Youth Centre authored a report addressed to the Deputy Superintendent regarding Mr. Melvin:

> "Minutes after young offender Melvin was issued a blanket, he complained that he wanted a different blanket. When advised that he would not receive another blanket he began to escalate his behaviour and was verbally abusive towards this writer and Youth Worker Stacey… **During this incident young offender Melvin repeatedly threatened this writer… threatened to kill [me] the first time he saw me in Halifax.** This type of abusive language continued, and **Melvin continued to make racial comments. As well**, young offender Melvin was extremely abusive towards Youth Worker Garnet Stacey and **made threats toward Youth Worker Stacey safety and family.… Note that Youth Worker Stacey has been a constant target of young offender Melvin and he has made several threats against the safety of Mr. Stacey and his family**..."[5]
>
> [My bolding added]

[13] In summary, in the period between April 21, 1994 and April 7, 1999, he has:

1. 8 separate convictions for assaults, threats and engaging in threatening conduct, and possession of firearms or weapons, and

2. 15 separate convictions for breaches of release conditions or probation.

[14] His first sentence of incarceration was imposed on October 16, 1995. In 12 of his 15 appearances for sentencings he received some period of custody.

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[5] Such reports cannot qualify as "pattern" behaviour because they have not been established beyond a reasonable doubt, and not been put forward as such – however their contents can be used as extrinsic evidence to explain the pattern behaviour of Mr. Melvin as part of the constellation of facts that support the expert opinion evidence herein.

[15] As I stated in *R v Morine*, 2011 NSSC 46, regarding the *Youth Criminal Justice Act*, and with its predecessor the *Young Offenders Act*, the focus is on the rehabilitation of young persons who commit criminal offences, recognizing that their immaturity necessarily reduces their "moral blameworthiness" or culpability in relation to crimes they commit: *R v DB* [2008] 2 S.C.R – the spectrum of moral blameworthiness is expansive:[6]

> 10 Now, one can imagine a spectrum of moral blameworthiness insofar as the responsibility for criminal actions are concerned, spanning - on the one end, those persons unfit to be tried; then leading into children less than 12 years of age who are unable to be tried under the Criminal Code; next, adult persons, yet not criminally responsible, who are dealt with separately under the Criminal Code. Then we have children between the ages of 12 and 18 years, who are considered to have a diminished moral culpability or blameworthiness, based on their immaturity-heightened vulnerability. And lastly, we have persons 18 years or older, who are presumed to be in a fit state of mind and able to distinguish right from wrong and, thus, are responsible as adults for the consequences of the offences they commit.
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> 11 This summary is taken in part from the Supreme Court of Canada case, R. v. B. (D.), 2008 SCC 25 (S.C.C.), at paras. 41 and 106.
>
> 12 What is moral blameworthiness? In R. v. Ruzic, [2001] 1 S.C.R. 687 (S.C.C.), Justice LeBel for the Supreme Court of Canada, in discussing the defence of duress (not relevant in this case), framed the discussion as follows: As we will see below, this Court has recognized on a number of occasions that moral blameworthiness is an essential component of criminal liability which is protected under s.7 [of the Charter of Rights and Freedoms] as a "principle of fundamental justice". [at para. 32] He continued: What underpins both these conceptions of voluntariness is the critical importance of autonomy in the attribution of criminal liability, [and I'm omitting the citations]. The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law. Its importance is reflected not only in the requirement that an act must be voluntary, but also in the condition that a wrongful act must be intentional to ground a conviction. Like voluntariness, the requirement of a guilty mind is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society: [Martineau, at pp. 645 to 46].

[6] My discussion of the *mens rea* should be supplemental by Justice Moldaver's reasons in *R. v. Tatton*, 2015 SCC 33, regarding "specific intent".

Criminal liability also depends on the capacity to choose - the ability to reason right from wrong. As McLachlin J. observed in Chaulk ... at p. 1396, in the context of the insanity provisions of the Criminal Code, this assumption of the rationality and autonomy of human beings forms part of the essential premises of Canadian criminal law: At the heart of our criminal law system is the cardinal assumption that human beings are rational and autonomous: ... This is the fundamental condition upon which criminal responsibility reposes. Individuals have the capacity to reason right from wrong, and thus choose between right and wrong. Ferguson continues (at p. 140): It is these dual capacities - reason and choice - which give moral justification to imposing criminal responsibility and punishment on offenders. If a person can reason right from wrong and has the ability to choose right or wrong, then attribution or responsibility and punishment is morally justified or deserved when that person consciously chooses wrong.

13 And then there's a relevant citation here from Justice Sopinka, in dissent, in the R. c. Daviault, [1994] 3 S.C.R. 63 (S.C.C.), commenting on the Court's consensus that: The first requirement of the principles of fundamental justice is that a blameworthy or culpable state of mind be an essential element of every criminal offence that is punishable by imprisonment. This principle reflects the fact that our criminal justice system refuses to condone the punishment of the morally innocent. ... The second requirement of the principles of fundamental justice is that punishment must be proportionate to the moral blameworthiness of the offender. ... That's at paras. 104 and 106.

14 In summary, our criminal justice system assigns responsibility for criminal actions on a proportionate basis. The greater the capacity of the person for reason and choice, the greater the responsibility. Moreover, since the punishments must also be proportionate to the gravity of the offence and the degree of responsibility of the offender, according to s. 718.1 of the Criminal Code, the penalty for criminal actions is also determined upon a proportionate basis.

15 It has also been said that "mens rea", that is, guilty mind: ... connotes volition on the part of the accused, that is to say, given an awareness that certain consequences will follow (or will probably follow) if he acts, an accused who chooses to act when he has the alternative of not acting "intends" those consequences in the sense of choosing to bring them about .... Mewett and Manning, Criminal Law, (Second Edition, 1985 at p. 113)

16 This idea of a spectrum also relates to the state of mind of an offender or in the nature of the offence. For example, one can see the spectrum of deliberation, if you will, or thought, and the mens rea underlying it, as including ranges running from criminal negligence under ss. 219 and 221 of the Criminal Code, which requires that one, in doing anything or omitting to do anything one has a legal duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

17 Next, we might have what's called penal negligence, such as unlawful act manslaughter, where there is a deliberate intention to do the underlying act and, on top of that, there is

objective foreseeability of the consequences thereof to others that are neither transient nor trivial and which do, in fact, cause death.

18 And we also have offences where actual intention or deemed actual intention to do a criminal act are involved, such as those involving wilful blindness or recklessness which equate, if you will, or are deemed to be the actual intention to do prohibited acts.

19 We can also consider a spectrum of deliberation as to consequences. Most criminal offences are what are traditionally called general intention offences, where it is sufficient to be found guilty if you intend to do the prohibited act and then you are responsible for whatever consequences are caused thereby. An example of this would be dangerous driving causing death - R. v. Beatty, [2008] 1 S.C.R. 49 (S.C.C.).

20 There are a limited number, but still some criminal offences which are traditionally called specific intent offences, and those are ones like murder, where not only do you intend to do the underlying act, but you intend the consequences as well, which is the intention to kill, in that case.

21 This context, although it seems abstract, does allow the Court to see where an offender such as Mr. Morine sits on the spectrum of moral blameworthiness generally and how his responsibility individually should be adjusted for the circumstances of the offence and his own circumstances, to result in a specific moral blameworthiness, if you will, for him, in these circumstances.

22 To me, the degree of offender responsibility and the gravity of the offence are at the core of what is moral blameworthiness. To this I add the specific circumstances of the offence and the offender before applying the relevant law to determine an appropriate sentence.

B - Adult Record [Mr. Melvin turned 18 years old on March 11, 2000; the predicate offences herein were committed on December 2, 2008][7]

[16] His first adult offence occurred in December 2000 – uttering threats – section 264.1 *CC*.

[7] He has continuously been remanded in custody on the predicate offence charges since July 17, 2015.

[17] His last adult criminal offence for which he has been convicted occurred on March 24, 2018 – assault causing bodily harm to a peace officer – section 270.01(1) *CC* - the victim being Greg Aitken, Correctional Officer.[8]

[18] In summary, in that time interval, he has 34 separate convictions for assaults, threats and engaging in threatening conduct, and possession of firearms or weapons.

[19] His first adult sentence (30 days incarceration) was imposed on April 4, 2001, for offences stemming from **December 2000 and January 2001**.

[20] His second sentence (incarceration of two years in custody in a federal penitentiary) was imposed on May 18, 2001, for trafficking contrary to s. 5(2) *CDSA* on **December 22, 2000**, assault causing bodily harm s. 267 *CC* on

[8] Criminal charges have been laid in New Brunswick, but not tested by trial in a court of competent jurisdiction regarding the September 26, 2020 incident, which I chronicle in a separate decision (2020 NSSC 346). I have concluded beyond a reasonable doubt that Mr. Melvin committed the attempted murder and aggravated assault of the victim, who was also an inmate at the Atlantic Institution, Renous, New Brunswick. Moreover, interspersed with criminal convictions, given that he has spent an inordinate amount of his life in custody, also relevant is a continuous record of institutional disciplinary mis- behaviour by Mr. Melvin - see the Correctional Services Canada binders, Exhibits 3-9 and 21; and 25, 28, 32 and 33 - I accept those records as established for the truth of their contents on a balance of probabilities; and the associated testimony, which I accept, *inter alia* of CSC staff Robyn Gay, Parole Officer since 2005, and Julie Dicks, Parole Officer since 2007. Within seconds of a break during her testimony, and while I was still present seated on the bench, Mr. Melvin took off the T-shirt he was wearing in court, exposing his back to the court which revealed a large lettered tattoo of the words "Spryfield Mob" across his back. Insofar as Mr. Melvin's incarceration in Nova Scotia Provincial Correctional facilities, those records can be found as Exhibits 10 – 11, and (which include references to New Brunswick Provincial Correctional Centres at Exhibit 17 as testified to by Deputy Superintendent Luc Cormier and which I accept have been proved as admissible for the truth of their contents on a balance of probabilities, *inter alia*, by his testimony) which I accept have been proved as admissible for the truth of their contents on a balance of probabilities, *inter alia*, based on Superintendent Richard Troy Foote's testimony.

December 31, 2000, possession of ammunition contrary to prohibition order s. 117.01 *CC* on **January 2, 2001**, and four counts of uttering threats s. 264.1(1)(a) *CC* on **February 16, 2001**.

[21] On December 6, 2002 he was sentenced to a consecutive three years in custody in a federal penitentiary for conspiracy to traffic cocaine on **June 8, 2002**, which he served to warrant expiry date in May 2006.[9]

[22] Once released in **2006**, he committed offences on: **June 14, June 15, June 23, September 4, September 25, 2006**.

[23] He committed offences **in 2007**: **March 12 and March 13**, for which he was sentenced to time served March 12-September 12, 2007.

[24] He committed offences **in 2008**:

1. **April 4, April 5, October 13** [Exhibit 15, Tab 46, p. 5(15) – s. 264.1(1) *CC*, and pp. 13 and 40], and **November 27** [Exhibit 23; Exhibit 15, Tab 40]

2. **December 2 -** attempted murder and conspiracy to commit the murder of Terry Marriott Jr. [the predicate offences herein for which he was

[9] His sentence appeal was dismissed – *R v Melvin*, 2003 NSCA 142.

arrested in 2015, and convicted on October 5, 2017 - notably Mr. Melvin himself was shot in that same time interval - see *R v LeBlanc*, 2011 NSCA 60 – Mr. LeBlanc shot at Mr. Melvin on December 4, 2008, striking him twice in the torso.]

[25] He committed offences **in 2009**: **March 23** [Exhibit 15; Exhibit 23], and **September 11**.

[26] He committed offences in **2010**: **January 24, February 10, February 11, April 25, June 2, June 5, September 20, October 6, October 26**.

[27] He committed no offences in **2011**, however he was sentenced in 2011 on **March 16, 2011**, for offences as follows:

1. 1 month concurrent - s. 430(4) *CC* - April 4, 2008

2. 2 months consecutive - s. 430(4) *CC* - April 5, 2008

3. 1 month consecutive – s. 264.1 *CC* – October 13, 2008 (New Brunswick)

4. 1 month consecutive - s. 264.1(1)(a) *CC* - March 23, 2009

5. 3 months consecutive - s. 270(1)(a) *CC* - June 5, 2010 - (3 x 3 months each concurrent

6. 1 month consecutive- s.270(1)(a) *CC* - October 6, 2010

for a total of 12 months in custody (statutory release would be expected after eight months, in November 2011 –or he could've remained in custody if he was on remand regarding outstanding charges); and on

December 6, 2011 – for offences of February 10, October 6 and October 26, 2010 - 21 months concurrent to any sentence being served +3 years probation (statutory release, would be expected after 14 months, in February 2013 –or he could've remained in custody if he was on remand regarding outstanding charges)

[28] He committed no offences **in 2012**, except on:

November 29, 2012 – assault with a weapon s 267(a) *CC* - two counts, for which on May 14, 2013, he received four months consecutive to any sentence being served. [Exhibit 17, Tab 50 – New Brunswick Provincial Court – PCJ Camille Vautour]

[29] He was not convicted of having committed any offences between November 29, 2012 and July 18, 2015.

[30] Dr. Lohrasbe records in his Report at page 37:

> "Mr. Melvin stated that the longest continuous stretch of time in the community during his entire adulthood was for approximately 23 months between the summer of 2013 and his arrest in July 2015… He acknowledges that during those two years 'I was smoking crazy drugs' and that he had been 'really high' when he jumped off a roof and attempted to evade the police. He stated that even after his arrest on the predicate or related charges [July 2015] there has not been any significant period of abstinence from illegal substances. He acknowledges a variety are available in each of the four institutions where he has been incarcerated and 'I'll do anything to get it'."

[31] He committed offences **in 2015**:[10] **July 18** (trafficking and possession *CDSA*) and **November 28** (s. 264.1 *CC*).

[32] He committed offences in **2016**: **March 16, April 1, April 5, April 6, August 8, October 21, December 5**.

[33] He committed offences in **2017**: **March 29, May 19, November 28** [see Exhibit 23].

[34] He committed the following offence in **2018**:

March 24 (Assault on Correctional Officer Greg Aitken- s. 270.01(1) *CC*) - sentenced July 30, 2019, to 10 months custody consecutive to any sentence presently being served (Mr. Melvin's federal sentences Warrant Expiry Date

[10] Mr. Melvin was arrested for the predicate offences on July 17, 2015 and has been in custody since then. At the time of his interview in August 2018 with Dr. Lohrasbe, Mr. Melvin stated that "he has been in some form of segregation for the bulk of the three years he has been in custody. He estimated that he was out of segregation for perhaps 12 days during the entire period" – page 37 Report Exhibit 2. While all prisoners may make applications for *habeas corpus* to challenge stints in segregation, there is no evidence that Mr. Melvin availed himself of that process.

> is now: January 13, 2021 - see email received by Nova Scotia Supreme Court Criminal Scheduling Office Manager Tanya Allan, on November 19, 2020, from Lyse-Anne Doiron, Regional Manager, Sentence Management, CSC which has been forthwith circulated to counsel herein.)[11]

[35] In my separate reasons, *R v Melvin*, 2020 NSSC 346, I have concluded beyond a reasonable doubt for present purposes, that Mr. Melvin committed an attempted murder/aggravated assault against the victim of the **September 26, 2020** incident at Atlantic Institution, Renous, New Brunswick.

2 - Previous Psychiatric assessments[12]

[36] In one of the first psychiatric assessments prepared after Mr. Melvin became an adult, Dr. Risk Krofli noted on **November 5, 2002**, after his admission on November 1, 2002:[13]

> … On November 3, Mr. Melvin settled somewhat, and he was released into the day room… **Mr. Melvin attempted to get staff's vehicle makes, addresses and family history, and asked staff to 'hook him up'.** This was denied, and he was informed that this was inappropriate. He showed some stable mood throughout his stay and no evidence of

[11] See photographs and videotape of assault – Exhibits 29 and 30.

[12] I am satisfied that the facts, and opinions of apparently qualified persons, in these assessments, whether contained in federal Correctional Services documentation, provincial Correctional Services documentation, Nova Scotia Health Authority or the like, are admissible, though the weight I give them must be determined individually in each circumstance by me.

[13] Although Dr. Kronfli did not testify, I have qualified him previously, and accepted reports from him (eg see *R v Christian Clyke*, 2019 NSSC 137) – I am satisfied that he is a properly qualified expert to give the opinions he has, and I accept the facts he recounts.

> psychosis. **During his stay, Mr. Melvin received cigarettes from the outside. Upon inspection prior to delivery to the patient, correctional staff discovered that the packs were tampered with and cigarettes were cut and replaced with marijuana**. The cigarettes were confiscated and Mr. Melvin was notified. He denied any knowledge of who might send these to him… 'I asked my mother for cigarettes, but I don't know who dropped these, I can't be held responsible'."
>
> [My bolding added]

[37] In her **February 23, 2004** report, Dr. Melanie Cadieux describes Mr. Melvin's clinical presentation and developmental history [he is just 21 years of age at this time] as follows:

> "… **he stepped out of line when he tried to obtain personal information about the assessor's life.… He is not motivated to take programs or accept help. As for his plans, Mr. Melvin has not turned his back on his former lifestyle given that he has no intention of improving a situation through school or work and plans to return to same surroundings as before.** In terms of an occupation, however, he can apparently work for his parents' businesses which will provide him with an income… He appears to have an antisocial personality disorder with narcissistic traits and a possible substance abuse disorder… The PCL – our results show that he presents a moderate to high risk of violent recidivism… The HCR – 20 violence risk assessment guide results point to a high risk of violent recidivism. The risk is slightly higher under release into the community than the institution. **The principal factors contributing to his dangerousness are static factors: past violence, substance abuse, adjustment problems and early violence, personality disorder and failures during supervision. His characteristic static dynamic factors are probably more critical in his case: lack of insight, impulsiveness, negative attitude, and past resistance to treatment. Unaddressed and unresolved, these risk factors seem decisive in Mr. Melvin's case inside or outside the institution.** As for future risk factors [acute dynamic factors], five points need to be considered: the relevance of his plans, exposure to destabilizing factors, support, compliance with his relapse prevention plan and stress. **The subject plans for a possible conditional release are to continue living as he did in the past, without making personal changes or altering his habits in the community.** It seems unrealistic to expect that he will avoid bars of the downtown area as he claims. Exposure to destabilizing factors is likely (drugs, criminal peers, street gang, close relatives involved in crime and so on) and constitutes a major risk factor for these factors will directly encourage him to reoffend**. He is unlikely to follow his relapse prevention plan considering that he defies constraints even in the institution and refuses treatment except for purely self-serving reasons.** Lastly, he will likely experience stress in the community, more responsibility (such as parental responsibility), social adjustment. He seems to have personal support available to him, but his loved ones

> appear to have no firm influence over his actions… His motivation and reintegration potential are rated low, his risk is rated high (inside and outside the institution) and his institutional adjustment rating is also high… [In conclusion she states, Mr. Melvin has] an antisocial personality disorder with narcissistic traits and a possible substance abuse disorder… a moderate to high risk of violent recidivism… a high risk of recidivism in or outside the institution. **He has not completed any institutional programs… we recommend that he be detained in custody**."
>
> [My bolding added]

[38] Notably, he was detained by decision of the Parole Board of Canada to Warrant Expiry Date: September 17, 2006.

[39] Dr. Christopher Murphy's s. 672.11 *CC* court ordered assessment of Mr. Melvin dated **December 17, 2015** (Exhibit 31) was elaborated upon in testimony before me. I accept his qualifications to give such opinion evidence, and his testimony. In his report under "opinion and conclusions" he stated:

> "During his period of incarceration, Mr. Melvin spent a significant amount of time in segregation, which he describes as 'psychological torture'. **A review of materials provided by the North Nova Scotia Correctional Facility [in Priestville, Nova Scotia] and the Central Nova Scotia Correctional Facility [in Dartmouth, Nova Scotia] indicates that efforts were made to develop a behavioural management plan to minimize the use of segregation. These plans, however, were met with limited success, in part due to Mr. Melvin's behavioural issues, including refusing to comply with correctional officer directives, possession of contraband and assaultive behaviours towards fellow offenders and correctional staff. Mr. Melvin's time in segregation has been extended due to endorsing suicidal ideation in response to seclusion**, which I note is a frequent response when Mr. Melvin feels he is overwhelmed or under significant stressors rather than a symptom of major mental illness.… He responded to fitness related questions in a manner that, in my opinion, was representative of a deep-rooted mistrust of and cynicism toward authority figures and the legal system in general rather than being suggestive of delusional thinking or other symptoms of major mental illness… Throughout our time together, however, Mr. Melvin presented as eager to engage in conversation and matters that were unrelated to the current assessment. **He presented a superficially charming, engaging in conversation with his correctional workers in a playful, joking manner that was at times over familiar, relating anecdotes about correctional officers**

> **and shared acquaintances in other facilities…** Mr. Melvin's lack of cooperation with the assessment process was felt to be a voluntary choice rather than an inability to communicate or other symptom of mental illness."
>
> [My bolding added]

[40] Dr. Murphy testified that when he made his tentative opinion clear to Mr. Melvin, Mr. Melvin jumped up and grabbed Dr. Murphy's notes and ripped them into shreds – and then nonchalantly reached his hand out to shake Dr. Murphy's hand. Dr. Murphy characterized this action by Mr. Melvin as completely "unpredictable" based on his previous manner with Dr. Murphy in the room.

[41] By report dated **April 18, 2016** [Exhibit 18, Tab 54 page 48 and following] Dr. Murphy once again prepared a fitness to stand trial report on Mr. Melvin. Dr. Murphy testified that during that assessment Mr. Melvin was not interested in discussing his psychosocial background nor getting any help for his mental health needs. Mr. Melvin confirmed to him that in effect "that this had all been a waste of time because he thought he was getting out of segregation" and chastised Dr. Murphy for writing what he did in the earlier December 17, 2015 report.

[42] While sitting in court listening to Dr. Murphy recount details of the allegation about what Mr. Melvin had said in relation to Captain SB (regarding an outstanding charge of uttering a threat to cause death to her on November 28, 2015), he confirmed that Mr. Melvin said to him during the assessment process "I

know the whore - she only wishes she could get raped", to which Mr. Melvin could clearly be heard (by me) saying in court: "that's true!".[14]

[43] Dr. Murphy went on to state in his opinion, to a high degree of medical certainty, that all of Mr. Melvin's interactions with him and correctional officers and staff had the underlying purpose of getting Mr. Melvin's needs met. There was a well documented history of him voicing complaints and suicide threats 'in order to get his needs met' which was consistent with his history of antisocial personality disorder in the community and jail, and it was the same pattern of behaviour as has been historically present. Notably, two days after his threats to Captain SB, Mr. Melvin was moved to the so-called "Burnside" (CNSCF) correctional facility where he wanted to be. Dr. Murphy confirmed in re-direct examination that during his testimony he saw Mr. Melvin gave him "the middle finger" from where Mr. Melvin was seated in custody.

[44] Dr. Murphy agreed that Mr. Melvin's primary desire was to get out of segregation as well as also to get creature comforts, and that he was 'self sabotaging' in that he couldn't consistently regulate his behaviour enough to get what he wanted in the normal fashion, so he resorted to claims of suicidal ideation

[14] To be clear, I am satisfied in relation to all of the instances of "pattern" offending behaviour, that Mr. Melvin "[lacks] insight into the harm caused to the victims, [lacks] empathy for them, and demonstrated a substantial indifference to the reasonably foreseeable consequences of his behaviour on other persons". – *R v Cook,* 2020 ONCA 809 at para. 25.

and other approaches to get what he wanted. This, then would lead to further segregation once his claims of suicide risk were shown to be unfounded, or if he acted out.[15] The records available to Dr. Murphy confirmed that Mr. Melvin had a positive history for surgical interventions for two gunshot wounds in 2008 including a splenectomy and colostomy that was subsequently reversed.

The predicate offences and alleged s. 753(1)(a)(i) and (ii) *CC* "pattern" offences and incidents

The predicate offences[16]

[15] In *R v Melvin*, 2016 NSSC 130, Justice Duncan was considering whether Mr. Melvin should serve his remand time in a federal penitentiary rather than a provincial correctional facility, although he was an un-convicted person at that time and not serving a sentence. Justice Duncan stated: "What in my view makes Mr. Melvin's situation unusual is that either he is unable to, or unwilling to, conduct himself in a manner that encourages more privileges than segregation provides in a provincial institution… It is difficult though to say that these issues are solely the responsibility of Mr. Melvin… The bottom line for me today is this: the evidence emanating from the provincial correctional facilities is clear. There are a high number of incompatibles between Mr. Melvin and other inmates and with staff… In this case what is overshadowing the provincial attempts is Mr. Melvin's accentuated issues with incompatibles and the attempts to deal with him in different institutions of differing characteristics- still unsuccessfully." (paras. 30 and 41)

[16] As this was a jury trial, it is incumbent upon me as the presiding judge to make findings of fact per s. 724(2) *CC*. Though I will say more later, as set out in s. 753(1), I conclude that the predicate offences form a part of both (a) a pattern of repetitive behaviour by Mr. Melvin showing a failure to restrain his 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 behaviour, and (b) a pattern of persistent aggressive behaviour by Mr. Melvin showing a substantial degree of indifference on the part of Mr. Melvin respecting the reasonably foreseeable consequences to other persons of his behaviour. (The Crown does not rely upon s. 753(1.1) *CC*, and I have given it no consideration herein). In so concluding, I keep in mind our Court of Appeal's reasons in *R v (Shawn) Shea*, 2017 NSCA 43 (May 26, 2017) which confirm that ***it is an error of law*** **in determining whether a "pattern" exists as between the predicate offence and other alleged past pattern evidence** ***to require an "objective and comparative seriousness between the predicate offence and the past conduct."*** In other words, [it was an error for the application judge to require that] in order for there to be a "pattern" into which the predicate offence fell, [the offender's] past behaviours needed to be as serious as the [predicate offence] (**para. 125**); moreover Justice Bourgeois identified the other error made by the application judge when she stated (**para. 120** ***Shea***) citing the application judge: '[436] Another dimension of the pattern analysis must not be overlooked. *Context is a critical aspect of determining if a pattern exists.* (*Neve, paragraph 165*) Mr. Shea's context for much of his violent and aggressive behaviour has been in what Dr. Theriault referred to as the "dog-eat-dog" world of the correctional system… So, although the evidence reveals that Mr. Shea has possessed shanks in prison, the Crown has proven beyond a reasonable doubt only one instance of him using one - the aggravated assault of Keithen Downey on June 15, 2010. *Arguably it is evidence of restraint on Mr. Shea's part that his institutional violence - assaulting other prisoners - has not been shown to involve shanks*

[45] The evidence presented at this trial included that there was a history of animosity between Mr. Melvin and Terry Marriott Junior. Mr. Melvin sought to end that conflict on **December 2, 2008**.

[46] He enlisted the assistance of Reagan Henneberry and Jason Hallett.[17]

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even though the records establish he had them and presumably could have used them.'; and (**para. 123**): '[456] Mr. Shea's aggressiveness has been particularly pronounced in custody. It has primarily consisted of threats and fighting without weapons, behaviour which has been captured on camera and witnessed by correctional staff. The predicate offence - the aggravated assault of Keithen Downey - is similar in that respect, it was an assault on another prisoner, captured on surveillance footage and witnessed by correctional staff, but Mr. Shea has not shown a pattern of behaviour in custody that is comparable. *The predicate offence stands out from so much of Mr. Shea's in-custody violence that has taken the form of threats or fighting without serious or any injuries.* [Emphasis added] … (**paras. 130-33**) "*At this point, it is useful to examine the application judge's use of context in further detail.* The consideration of context in a pattern analysis is a given. **Whether or not a pattern exists depends very much on the circumstances in which past behaviours have occurred. The "context" in which behaviours have occurred may constitute the "common thread" weaving a series of behaviours into a pattern as contemplated by s. 753(1) (for example, here the appellant alleges a pattern of violence against unsuspecting victims, clearly requiring a consideration of the context in which behaviour arises). A consideration of the context in which behaviours have occurred is also relevant to the analysis of future risk.** There is no doubt that the application judge, relying on *Neve*, found a consideration of "context" to be a "critical aspect" of the pattern analysis. That, on its face, is not problematic. However**, it is also clear that the application judge did not use context as a means of determining whether similarity existed among various behaviours, or whether it reflected on risk. Rather, she used it as a means of explaining and, in my view, mitigating Mr. Shea's "atrocious" institutional behaviour, injecting into the analysis a consideration of his moral blameworthiness. With respect, the application judge's contextual approach was erroneous**. On its face, s. 753(1) does not require the injection of "context" as used by the application judge into the determination of what behaviours may or may not properly fall within "a pattern of repetitive behaviour" or "a pattern of persistent aggressive behaviour." There are many "contexts" in which problematic (and sometimes criminal) behaviour is common - with youthful offenders; with those living in poverty; with those suffering from addiction or other mental health difficulties; and with those in historically marginalized groups, to name but a few. The dangerous offender caselaw is replete with pattern analysis which finds as part of a "pattern of behaviour" youthful conduct, behaviour under the influence of drugs or alcohol, behaviour prompted by the effects of poverty and behaviour while incarcerated. *Other than Neve, I have been unable to find any clear support for the use of the circumstances surrounding behaviour as a means of excluding it from a pattern analysis. These "contexts" may be explanations for criminal choices, but they are not justifications or legal excuses*." [My italicization and bolding (of the Court of Appeal decision reasons only) added]; leave refused [2017] SCCA No. 351 (September 20, 2017) which preceded the release of *R v Boutilier*, 2017 SCC 64 on December 21, 2017. Therein, Justice Karakatsanis in dissent cited *Shea* at para. 104 and stated: "… with the 2008 [July] changes, Parliament intended to capture a broader group of offenders…".

[17] Mr. Hallett testified that he was shot by Aaron Marriott on **November 18, 2008** at the IWK Hospital in Halifax - see also *R v Marriott*, 2014 NSCA 28 at paras. 8 and 12. Mr. Hallett testified that on two other occasions Aaron Marriott shot at him from close range: once on Lavender Walk pathway, and another time while he was at his

[47] On December 2, 2008, Mr. Melvin called Mr. Hallett and told him to come to the Spryfield Jessy's Pizza location at 374 Herring Cove Road - he added that the police were following and otherwise surveilling him at that location (the trial evidence confirmed that this was in fact the case). Once there, he told Mr. Hallett of his intention to kill Terry Marriott Junior, and his plan to do so. After 2 separate short trips in the cars of reluctant drivers Michael Coombs and Trevor Hanna to the Greystone Avenue area, they took great pains, travelling a significant distance through a heavily wooded rough watershed terrain to avoid being followed by the police. They walked to the Crystal Pizza location in Harrietsfield, where Vanessa Slaunwhite picked them up in a vehicle and drove them to Warren (Wacko) Clarke's residence. While there, Brandon Momberquette arrived with firearms (a large handgun and a semi-automatic rifle). Mr. Henneberry arrived. He drove Messrs. Melvin and Hallett, who were both armed with firearms (a handgun and at least one long gun - which had a 16 round ammunition clip, and was described as a semi-automatic rifle), towards the home of Derek MacPhee, where Terry Marriott Junior was a guest. They intended to shoot and kill Terry Marriott Junior.[18]

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mother's home. Derek MacPhee testified that he shot Reagan Henneberry four times in the leg, contrary to s. 244 *CC,* for which he was sentenced to five years in custody on January 29, 2010. He further admitted that in 2003 he had shot at BJ Marriott's residence twice, the targets being the car in the driveway and the house. He confirmed that on December 2, 2008 he was warned that Mr. Melvin was coming over to Mr. MacPhee's house to kill Terry Marriott, and as a result he called police to avoid this encounter.

[18] I also rely on herein, as extrinsic or contextual evidence, witness testimony and exhibits which were produced at the trial - eg. regarding the circumstances of Mr. Melvin's life. Moreover, in spite of the high level of caution with

[48] Mr. MacPhee had been warned that they were on their way, so he contacted police to ask them to attend at his home, as he was also afraid for his own safety. Patrol cars were sent, which had arrived just prior to the Henneberry vehicle coming around the corner of Mercury Avenue, several hundred feet from the MacPhee home. Henneberry immediately drove the car away so as to avoid the attention of the police. He drove them to a home on nearby Brunt Road where Natalie Digioacchino lived, and Mr. Henneberry hid the guns in the woods - a mini 14 Ruger semi-automatic rifle .223 calibre matching the description of one of the rifles was found after a later search of Reagan Henneberry's house. A female arrived and picked up Mr. Hallett. Police continuously observed, by direct surveillance, as Mr. Melvin was picked up by his brother Cory (Patrick Melvin, DOB August 26, 1985), who drove with him in his truck until he reached the family home in Fall River.[19]

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which a trier of fact should approach the evidence of Messrs. Hallett and MacPhee, and the serious scrutiny that should be given to the evidence of Reagan Henneberry, and Vanessa Slaunwhite, I found the evidence of each of them reliable in relation to the core allegations, and that the evidence of Messrs. Hallett and MacPhee were compelling given the corroborative evidence surrounding the core allegations. For sentencing purposes, I conclude that the testimony they provided regarding the life circumstances of Mr. Melvin and themselves to also be reliable - which, in addition to other evidence I have available to me presently, confirms that Mr. Melvin was from an early age, at that time, and thereafter, continuously seriously involved in a criminal lifestyle and regularly abused substances.

[19] As contextual background only, which is elsewhere in the evidence before me confirmed, I reference that it was on December 4, 2008, that Jeremy LeBlanc fired shots at Mr. Melvin, striking him with two, which required Mr. Melvin to wear a colostomy bag for approximately one year. While I do not rely thereon as facts in this proceeding, the agreed statement of facts included that: LeBlanc was known to police to be a member of a group working in the illicit drug trade and referring to themselves as the "Spryfield M.O.B." He pled guilty and was sentenced to 16 years

The Crown's position

[49] It is not disputed that Mr. Melvin has been convicted of a "serious personal injury offence" as defined in s. 752 *CC*. The Crown says the December 2, 2008 offences are part of a "pattern" as described in s. 753(1)(a)(i) *and* (ii) *CC*.[20]

[50] In its written brief the Crown states:

> For the past twenty-five years, Mr. James Bernard Melvin Jr. (Mr. Melvin) has engaged in a pattern of unrestrained, repetitive, violent behaviour. For the past twenty-five years, Mr. Melvin has engaged in a pattern of persistent, aggressive behaviour. His actions have come at a great cost to society. Mr. Melvin is a dangerous offender that requires an indeterminate sentence.
>
> **1.1 Pattern of Repetitive Behaviour**
>
> Mr. Melvin has engaged in
>
> - Violent behaviour in the community
> - Violent behaviour inside Provincial institutions
> - Violent behaviour inside Federal institutions
> - Violent behaviour against strangers
> - Violent behaviour against people known to him
> - Violent behaviour that was pre-meditated

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incarceration for attempted murder, which was upheld on appeal: *R v LeBlanc*, 2011 NSCA 60. Derek MacPhee testified that on **December 16, 2008** he and Terry Marriott Jr. visited Mr. Melvin while he was in hospital as a result of Mr. LeBlanc's shooting of him on December 4, 2008. I accept his evidence thereon, including that the purpose was to "patch things up" between the rival criminals, Messrs. Melvin and Marriott.

[20] The Crown points out that s. 753 refers to a pattern "of repetitive *behaviour*" and "of persistent aggressive *behaviour*" not to a "pattern of offences". Moreover, it argues that although there are some distinctions between the two subsections - both subsections are applicable to Mr. Melvin's circumstances ("repetitive behaviour… showing a failure to restrain his behaviour…" and "persistent aggressive behaviour… showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his behaviour") which have been explored in cases such as: *R v Camara*, 2013 ONCJ 534 at paras 484-6, affirmed, 2017 ONCA 817; *R v Kopas*, 2012 ONCA 16; *R v TG*, [1998] BCJ No. 1505 (CA) - cited in *R v Bunn*, 2013 SKQB 397 at para. 19; *R v Fulton*, 2012 ONCA 781 - I note the court there concluded the circumstances required that the judge address separately whether the pattern was "persistent" as well, and I will separately do so in this case, although I will not expressly set out the details given the numerous potential incidents of pattern evidence herein under s. 753(1)(a)(ii) *CC*.

- Violent behaviour that was impulsive
- Violence on his own
- Violence in concert with others

1.2 Pattern of Persistent, Aggressive behaviour

Mr. Melvin has engaged in persistent, aggressive behaviour

- In the community
- In Provincial Institutions
- In Federal institutions
- On his own
- In concert with others

1.3 Indeterminate sentence

The need for an indeterminate sentence is supported by

- The report and evidence of Dr. Lohrasbe
- Mr. Melvin's criminal record
- The aggravated assault committed by Mr. Melvin against Josh Preeper (evidence to be called November 2, 2020)
- Mr. Melvin's behaviour in Provincial institutions and
- Mr. Melvin's behaviour in Federal institutions, which all show that there is no reasonable expectation that some lesser penalty will protect society.

[51] In oral argument, Senior Crown Counsel Ms. Driscoll stated:

"Mr. Melvin was first sentenced in Youth Court in December 1994. The following 26 years have brought him to this point. The Crown certainly acknowledges that there are different things that happened to Mr. Melvin that were not in his control that contributed to who he is today and why he's here… [which included] the dynamic of the family into which he was born [and the fact that his father James Melvin Senior was sentenced to eight years in prison for drug trafficking when he was 11 years old and was therefore absent from the home, and the fact that his family were unable to ensure he got treatment for his attention deficit hyperactivity disorder when he was younger]. He entered a criminal justice system that was different 26 years ago than it is today, and he spent a lot of time at a young age in segregation. I think as a society, and a justice system that we can have sympathy and empathy for those things. At the same time Mr. Melvin is responsible for the choices he has made over the past 26 years – his substance abuse, his criminal associations, the violence, [and] what seems to

> be a lack of effort on his part to do anything to improve his fate. Because of all this, the cost that Mr. Melvin has exacted on society is just too high, and it's time for the justice system to say: 'no more'."

Mr. Melvin's position

[52] His counsels put his position relatively simply, *inter alia* that:

1. the records the Crown relies upon, which it has the burden to prove as admissible, are not properly admissible;

2. even if they are admissible, their prejudicial effect on Mr. Melvin's fair trial/sentencing rights outweigh their probative value (including in the case of the videotape of the September 26, 2020 incident);

3. the weight that can properly be given to those records is insufficient to support the conclusions that the Crown say can be drawn from Dr. Lohrasbe's testimony relying upon those records, *inter alia*, that suggest Mr. Melvin's future treatment prospects are not realistic;

4. the Crown has not met the burden of proof beyond a reasonable doubt in relation to its allegation that Mr. Melvin committed a criminal offence in relation to the September 26, 2020 incident, nor has the Crown met that burden in relation to establishing that Mr. Melvin should be designated a "dangerous offender";

5. even if the court concludes that Mr. Melvin is properly designated as a "dangerous offender", the Crown has not established that an indeterminate sentence is necessary, and that it is appropriate for the court to impose either a determinate sentence with a long-term offender supervision order, or preferably merely a determinate sentence in relation to the predicate offences.

Are the dangerous offender provisions from the date of the offences or the date of Mr. Melvin's sentencing applicable?

[53] As a preliminary matter, it is appropriate to identify which dangerous offender provisions prevail.

[54] Generally, in the criminal law context, "purely procedural" legislative amendments operate retrospectively upon offences committed in the past but presently in the criminal justice system - *R v Chouhan*, [2020] SCJ No. 101.

[55] However, to the extent that legislative amendments between the time of the commission of an offence and charges being laid could affect present substantive provisions, such as the "punishment" available, they do not operate retrospectively, because "as a general matter, persons accused of criminal conduct are to be charged and sentenced under the criminal law provisions in place at the time that the offence allegedly was committed." (*R v Johnson*, 2003 SCC 46). However,

they can operate prospectively because of the effect of s. 11(i) of the *Charter of Rights* which entitles any person "found guilty of [an] offence… if the punishment for the offence has been varied between the time of commission and the time of sentencing, *to the benefit of the lesser punishment*."[21]

[56] The question arises: if the preconditions to a declaration that an offender be declared and sentenced as a dangerous offender/long-term offender have materially changed between the date of the offence and the date of the sentencing on the predicate offence (or the available sentencing provisions have), is this a change in the "punishment" available, and if so, which provision prevails as the "lesser punishment"?

[57] As stated in *Poulin*:

> 33 In *R. v. J. (K.R.)*, 2016 SCC 31, [2016] 1 S.C.R. 906 (S.C.C.), this Court stated that the underlying purposes of s. 11(*i*) are the rule of law and fairness. …
>
> …
>
> 37 Once the relevant sentencing provisions have been identified, the question becomes which of the measures or sanctions contained within these provisions constitute "punishments" in the sense contemplated by s. 11(*i*). In *K.R.J.*, at para. 41, this Court held that a measure will constitute punishment under s. 11(*i*) when:
>
> > (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a

[21] As the court concluded in *R v Poulin*, 2019 SCC 47, s. 11(i) of the Charter provides only two choices: the date of the commission of the offence or the date of the sentencing.

> significant impact on an offender's liberty or security interests. [Footnote omitted, para. 41.]

Notably, *K.R.J.* expanded the s. 11(*i*) concept of "punishment" beyond what it had been before. Specifically, *K.R.J.* added factor (3) to the test for punishment "to carve out a clearer and more meaningful role for the consideration of the impact of a sanction" (para. 41; see also paras. 28 and 36).

38 Numerous measures and sanctions have been assessed against the s. 11(*i*) concept of "punishment". *The following measures have been found to qualify as punishment: the timing of eligibility for parole* (*Liang v. Canada (Attorney General)*, 2014 BCCA 190, 355 B.C.A.C. 238 (B.C. C.A.), at paras. 27 and 43); pre-sentence custody (*R. v. S. (R.)*, 2015 ONCA 291, 333 C.R.R. (2d) 160 (Ont. C.A.), at para. 32); *the conditions governing the "faint hope" regime* (*R. v. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215 (B.C. C.A.), at paras. 88-89); *Criminal Code* driving prohibition orders (*R. v. Wilson*, 2011 ONSC 89, 225 C.R.R. (2d) 234 (Ont. S.C.J.), at para. 37); and weapons prohibition orders (*Bent*, at para. 71; see also *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895 (S.C.C.), at para. 3 (although not a s. 11(*i*) case)). By contrast, the following sanctions have been found *not* to constitute s. 11(*i*) "punishment": post-conviction DNA databank orders (*R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554 (S.C.C.), at paras. 64-65); sex offender registration (or "SOIRA") orders (see, for instance, *R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349 (N.S. C.A.), at para. 84); and provincial driving suspensions imposed in response to criminal convictions (*Wilson*, at para. 34). However, without commenting on their merits, I observe that these latter decisions were rendered prior to *K.R.J.*

…

42 *Once the various "punishments" for the offence have been identified, they must be compared and contrasted to determine which one — or ones — reflect the "lesser" punishment.* Often, this determination is obvious; it selects the shorter period of incarceration over the longer one, and the absence of a weapons prohibition over the imposition of one. *However, sometimes the determination of the lesser punishment is more nuanced. For instance, the sentencing court comparing two competing sentencing regimes must be alive to the possibility that each of the regimes contains some 'lesser' aspect of punishment. To this end, in R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357 *(S.C.C.), this Court observed that while the new sentencing regime was more favourable to Mr. Johnson if he qualified as a long-term offender, the former regime would be more favourable to him if he did not, as it provided him with the benefit of an earlier parole hearing* (para. 46).

[My italicization added]

[58] In *R v KRJ*, 2016 SCC 31, the court concluded that the parameters of "punishment" must be understood more broadly than had been the case in the existing jurisprudence:

> 41 *Thus, I would restate the test for punishment as follows in order to carve out a clearer and more meaningful role for the consideration of the impact of a sanction: a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests.*[1]
>
> 42 As this Court wrote in *Cunningham v. Canada*, [1993] 2 S.C.R. 143 (S.C.C.) : "The *Charter* does not protect against insignificant or 'trivial' limitations of rights .... The [state action] must be significant enough to warrant constitutional protection" (p. 151). That is why, if a consequence of conviction is not imposed in furtherance of the purpose and principles of sentencing, it must have a *significant* impact on an offender's constitutionally protected *liberty* or *security* interests before it will qualify as punishment for the purposes of s. 11(*i*). To satisfy this requirement, a consequence of conviction must significantly constrain a person's ability to engage in otherwise lawful conduct or impose significant burdens not imposed on other members of the public. Again, Doherty J.A.'s comments in *Hooyer* are helpful: "... a prohibition that significantly limits the lawful activities in which an accused can engage, where an accused can go, or with whom an accused can communicate or associate, would sufficiently impair the liberty and security of the accused to warrant characterizing the prohibition as punishment" (para. 45).
>
> [The court's footnote number one reads: "In articulating this test, I do not decide whether s. 11(*i*) would be infringed in circumstances akin to those in Whaling , in which accelerated parole review was retrospectively eliminated, thereby impacting the length of incarceration that was imposed as a sanction consequent to conviction."]
>
> [My italicization added]

[59] In *R v Johnson*, 2003 SCC 46, the unanimous court concluded that even though the accused's offence was committed prior to the 1997 amendments to the dangerous offender provisions, the sentencing judge was required to consider the

applicability of the long-term offender provisions, since the accused, who may have been declared a dangerous offender under the former provisions, *could* benefit from the long-term offender designation available under the current provisions. If the long-term offender criteria were satisfied and there was a reasonable possibility that harm could be reduced to an acceptable level under the long-term offender provisions, s. 11(i) dictated that the proper sentence, under the then extant regime, was a determinate period of detention followed by a long-term supervision order.

[60] Mr. Melvin committed these offences on December 2, 2008.

[61] Have the dangerous offender/long-term offender regime provisions changed significantly enough to trigger an obligation on the court to conduct an analysis pursuant to s. 11(i) of the *Charter*?[22]

[62] In *Johnson*, the offender's relevant criminal conduct took place while only the "dangerous offender" designation was available. At the time of their sentencings, the long-term offender designation and regime were also in place. The dangerous offender designation and regime had not changed.

[22] This issue was not specifically raised by counsel, as they agree that the present provisions should prevail. Although the Crown is relying upon numerous incidents that they say qualify as "pattern" evidence between June 16, 1995 and September 26, 2020, only the date of the commission of the predicate offences and the date of sentencing are relevant in this respect.

[63] As the court stated:

> "The question in this appeal is whether the new provisions offer any benefit to the respondent such that his sentencing must be governed retrospectively by the provisions as amended in 1997. *In order to answer this question, it is necessary to interpret both the old and new provisions, to determine which offers the prospect of a lesser punishment to an accused in the position of the respondent who was sentenced under them*." (p.369)
>
> …
>
> 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." (p. 376)
>
> …
>
> For the above reasons, the British Columbia Court of Appeal was correct to conclude that a sentencing judge must take into account the long-term offender provisions prior to declaring an offender dangerous and imposing an indeterminate sentence if a sentencing judge is satisfied that the sentencing options available under the long-term offender provisions are sufficient to reduce the threat to the life, safety or physical or mental well-being of other persons to an acceptable level, the sentencing judge cannot properly declare an offender dangerous and thereupon imposing an determinate sentence, even if all of the statutory criteria have been satisfied.
>
> …
>
> As a general matter, persons accused of criminal conduct are to be charged and sentenced under the criminal law provisions in place at the time that the offence allegedly was committed. The Charter aside, the four respondents convicted of offence is committed prior to the 1997 amendments are properly sentenced under the former regime. However, s. 11(i) of the Charter provides that any person charged with an offence has the right 'if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.' (p. 382)

[64] The reasoning in *Johnson*, clearly suggests that this court must consider whether the December 2, 2008 dangerous offender/long-term offender provisions are materially different from those at present insofar as the could potentially effect

different punishments. If so, Mr. Melvin is entitled to the more favourable provisions.

[65] Let me next then canvas the relevant provisions on or about December 2, 2008 and at present.

[66] The significant sections of the *Criminal Code* for present purposes are 752, 753.1, and 753.2 *CC*. The provisions presently in force follow. I will not reproduce the provisions in force as at December 2, 2008.

Present Provisions of the *Criminal Code*

752. Definitions

In this Part,

"court" means the court by which an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction;

"designated offence" means

(a) a primary designated offence,

(b) an offence under any of the following provisions:

(i) paragraph 81(1)(a) (using explosives),

(ii) paragraph 81(1)(b) (using explosives),

(iii) section 85 (using firearm or imitation firearm in commission of offence),

(iv) section 87 (pointing firearm),

(iv.1) section 98 (breaking and entering to steal firearm),

(iv.2) section 98.1 (robbery to steal firearm),

(v) section 153.1 (sexual exploitation of person with disability),

(vi) section 163.1 (child pornography),

(vii) section 170 (parent or guardian procuring sexual activity),

(viii) section 171 (householder permitting sexual activity by or in presence of child),

(ix) section 172.1 (luring child),

(ix.1) section 172.2 (agreement or arrangement — sexual offence against child),

(x) [Repealed 2014, c. 25, s. 29(1).]

(x.1) [Repealed 2014, c. 25, s. 29(1).]

(xi) [Repealed 2014, c. 25, s. 29(1).]

(xii) [Repealed 2014, c. 25, s. 29(1).]

(xiii) section 245 (administering noxious thing),

(xiv) section 266 (assault),

(xv) section 269 (unlawfully causing bodily harm),

(xvi) section 269.1 (torture),

(xvii) paragraph 270(1)(a) (assaulting peace officer),

(xviii) section 273.3 (removal of child from Canada),

(xix) subsection 279(2) (forcible confinement),

(xx) section 279.01 (trafficking in persons),

(xx.1) section 279.011 (trafficking of a person under the age of eighteen years),

(xx.2) section 279.02 (material benefit — trafficking),

(xx.3) section 279.03 (withholding or destroying documents — trafficking),

(xxi) section 279.1 (hostage taking),

(xxii) section 280 (abduction of person under age of 16),

(xxiii) section 281 (abduction of person under age of 14),

(xxiii.1) subsection 286.1(2) (obtaining sexual services for consideration from person under 18 years),

(xxiii.2) section 286.2 (material benefit from sexual services),

(xxiii.3) section 286.3 (procuring),

(xxiii.4) section 320.13 (dangerous operation),

(xxiii.5) subsections 320.14(1), (2) and (3) (operation while impaired),

(xxiii.6) section 320.15 (failure or refusal to comply with demand),

(xxiii.7) section 320.16 (failure to stop after accident),

(xxiii.8) section 320.17 (flight from peace officer),

(xxiv) section 344 (robbery), and

(xxv) section 348 (breaking and entering with intent, committing offence or breaking out),

(c) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:

(i) subsection 146(2) (sexual intercourse with female between ages of 14 and 16),

(ii) section 148 (sexual intercourse with feeble-minded),

(iii) section 166 (parent or guardian procuring defilement), and

(iv) section 167 (householder permitting defilement),

(c.1) an offence under any of the following provisions of this Act, as they read from time to time before the day on which this paragraph comes into force:

(i) subsection 212(1) (procuring),

(ii) subsection 212(2) (living on the avails of prostitution of person under 18 years),

(iii) subsection 212(2.1) (aggravated offence in relation to living on the avails of prostitution of person under 18 years), and

(iv) subsection 212(4) (prostitution of person under 18 years); or

(d) an attempt or conspiracy to commit an offence referred to in paragraph (b), (c) or (c.1); *("infraction désignée")*

"long-term supervision" means long-term supervision ordered under subsection 753(4), 753.01(5) or (6) or 753.1(3) or subparagraph 759(3)(a)(i); *("surveillance de longue durée")*
"primary designated offence" means

(a) an offence under any of the following provisions:

(i) section 151 (sexual interference),

(ii) section 152 (invitation to sexual touching),

(iii) section 153 (sexual exploitation),

(iv) section 155 (incest),

(v) section 239 (attempt to commit murder),

(vi) section 244 (discharging firearm with intent),

(vii) section 267 (assault with weapon or causing bodily harm),

(viii) section 268 (aggravated assault),

(ix) section 271 (sexual assault),

(x) section 272 (sexual assault with weapon, threats to third party or causing bodily harm),

(xi) section 273 (aggravated sexual assault), and

(xii) subsection 279(1) (kidnapping),

(b) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983:

(i) section 144 (rape),

(ii) section 145 (attempt to commit rape),

(iii) section 149 (indecent assault on female),

(iv) section 156 (indecent assault on male),

(v) subsection 245(2) (assault causing bodily harm), and

(vi) subsection 246(1) (assault with intent) if the intent is to commit an offence referred to in any of subparagraphs (i) to (v) of this paragraph,

(c) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as enacted by section 19 of *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, chapter 125 of the Statutes of Canada, 1980-81-82-83:

(i) section 246.1 (sexual assault),

(ii) section 246.2 (sexual assault with weapon, threats to third party or causing bodily harm), and

(iii) section 246.3 (aggravated sexual assault),

(d) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:

(i) subsection 146(1) (sexual intercourse with female under age of 14), and

(ii) paragraph 153(1)(a) (sexual intercourse with step-daughter), or

(e) an attempt or conspiracy to commit an offence referred to in any of paragraphs (a) to (d);

("infraction primaire")

"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

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

Amendment History

2008, c. 6, ss. 40, 61; 2010, c. 3, s. 8; 2012, c. 1, s. 35; 2014, c. 25, s. 29; 2018, c. 21, s. 25

Currency

Federal English Statutes reflect amendments current to October 28, 2020

Federal English Regulations are current to Gazette Vol. 154:20 (September 30, 2020)

[67] Section 752 has not significantly changed between December 2, 2008 and the present, as it pertains to the case at Bar.

753.

753(1) Application for finding that an offender is a dangerous offender
On application made under this Part after an assessment report is filed under subsection

752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

(a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her

behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

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

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (*b*) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

753(1.1) Presumption

If the court is satisfied that the offence for which the offender is convicted is a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the conditions in paragraph (1)(a) or (b), as the case may be, are presumed to have been met unless the contrary is proved on a balance of probabilities.

753(2) Time for making application

An application under subsection (1) must be made before sentence is imposed on the offender unless

(a) before the imposition of sentence, the prosecutor gives notice to the offender of a possible intention to make an application under section 752.1 and an application under subsection (1) not later than six months after that imposition; and

(b) at the time of the application under subsection (1) that is not later than six months after the imposition of sentence, it is shown that relevant evidence that was not reasonably

available to the prosecutor at the time of the imposition of sentence became available in the interim.

753(3) Application for remand for assessment after imposition of sentence

Notwithstanding subsection 752.1(1), an application under that subsection may be made after the imposition of sentence or after an offender begins to serve the sentence in a case to which paragraphs (2)(*a*) and (*b*) apply.

753(4) Sentence for dangerous offender

If the court finds an offender to be a dangerous offender, it shall

(a) impose a sentence of detention in a penitentiary for an indeterminate period;

(b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or

(c) impose a sentence for the offence for which the offender has been convicted.

753(4.1) Sentence of indeterminate detention

The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

753(4.2) If application made after sentencing

If the application is made after the offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply, a sentence imposed under paragraph (4)(a), or a sentence imposed and an order made under paragraph 4(b), replaces the sentence that was imposed for the offence for which the offender was convicted.

753(5) If offender not found to be dangerous offender

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; or

(b) the court may impose sentence for the offence for which the offender has been convicted.

753(6) [Repealed 2008, c. 6, s. 42(5).]

Amendment History

1997, c. 17, s. 4; 2008, c. 6, s. 42

Currency

Federal English Statutes reflect amendments current to October 28, 2020

Federal English Regulations are current to Gazette Vol. 154:20 (September 30, 2020)

[68] Section 753(1) has changed, *inter alia*, as follows:

From - on December 2, 2008, when the wording commenced with:

"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… [the remainder of the subsection is the same as it is presently]".

To - presently, which reads:

"On application made under this Part after an assessment report is filed under subsection 752.1(2), the court *shall find* the offender to be a dangerous offender if it is satisfied… [the remainder of the subsection is the same as it was in 2008]."

[69] I find that this is not a substantial change, based on the reasons in *R v Boutilier*, 2017 SCC 64.

[70] In *R v Boutilier*, 2017 SCC 64, the offender applied for a declaration of constitutional invalidity regarding sections 753(1) and (4.1) claiming they were overbroad and in contravention of sections 7 and 12 of the *Charter of Rights*. The Supreme Court held that the legislation was not overbroad and did not violate either section. The court noted that the sentencing judge committed an error of law because he failed to consider the accused's treatment prospects *before* designating him as a dangerous offender. Nevertheless, the error did not change the proper conclusion of dangerousness regarding the offender.

[71] In relation to the changes to s. 753(1) - namely "shall find"; and (4.1) - namely "shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence"; the court concluded as follows:

> 46 In sum, *a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct*. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. This necessarily involves the consideration of future treatment prospects. Had the prospective aspects of the dangerousness criteria been removed by the 2008 amendments, the constitutionality of the provision might have required a deeper analysis. But that is not the case. The sentencing

judge erred in concluding otherwise. *Accordingly, this Court need not revisit its decision in Lyons as to the constitutionality of s. 753(1).*

47 A final point must be addressed. The 2008 amendments also introduced s. 753.01. The sentencing judge found that this provision made the s. 753(1) designation permanent and imposed new consequences on the offender. The dangerous offender regime, however, has had permanent effect since *Lyons*: p. 342. The change has to do with the potential consequences of that designation as a result of s. 753.01. That being said, the constitutionality of those consequences is not at stake in this case. Mr. Boutilier was not sentenced to an indeterminate detention on the basis of s. 753.01, but rather after a regular application for a dangerous offender designation pursuant to s. 753. It would be imprudent for this Court to rule on the constitutionality of s. 753.01 without a concrete example of its real effects. It is therefore unnecessary to consider the constitutional validity of the interaction between s. 753(1) and s. 753.01, a provision applying to later convictions of dangerous offenders.

B. Does Section 753(4.1) Lead to a Grossly Disproportionate Sentence, Contrary to Section 12 of the Charter, by Presumptively Imposing Indeterminate Detention and Preventing the Sentencing Judge From Imposing a Fit Sentence Consistent With the Principles and Objectives of Sentencing?

48 The current s. 753(4.1) was introduced in 2008. This Court has not yet considered its constitutionality. It reads as follows:

> (4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

49 Mr. Boutilier contends that s. 753(4.1) infringes s. 12 of the *Charter*.

50 McLachlin C.J. recently summarized the framework applicable to a claim of cruel and unusual punishment under s. 12 of the *Charter*:

> A sentence will infringe s. 12 if it is "grossly disproportionate" to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: [*R. v.*] *Nur*, [2015 SCC 15, [2015] 1 S.C.R. 773], at para. 39; *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. A law will violate s. 12 if it imposes a grossly disproportionate sentence on the individual before the court, or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others: *Nur*, at para. 77.

(*R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130 (S.C.C.), at para. 22)

51 Mr. Boutilier argues that the reasonably foreseeable applications of s. 753(4.1) lead to grossly disproportionate sentences because the provision presumptively imposes indeterminate detention on designated offenders each time there are public safety concerns, even when such a sentence would be unfit in a specific case. This argument rests on two premises. First, Mr. Boutilier argues that s. 753(4.1) is properly read as impeding the discretion of a sentencing judge to impose a fit sentence in light of all relevant factors and circumstances and the principles and objectives of sentencing. Second, he says that s. 753(4.1) imposes a *presumption* of indeterminate detention for designated offenders.

52 Having carefully read my colleague's reasons, I cannot, for the reasons outlined below, agree that s. 753(4.1) imposes indeterminate detention in cases where it is grossly disproportionate to the sentence mandated by sentencing principles. *The sentencing principles and objectives set out in the Criminal Code, including the fundamental principle of proportionality in s. 718.1, do not have constitutional status and may be limited by Parliament where necessary to achieve a valid penal purpose, so long as a sentencing judge is not required to impose a sentence that is "grossly disproportionate" to the sentence normally mandated by ss. 718 to 718.2 of the Criminal Code*: *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180 (S.C.C.), at para. 71; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 (S.C.C.), at paras. 40-42. In *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.), this Court referred to three factors that are useful in determining whether punishment is "grossly disproportionate" to what would have been appropriate: "whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed" (p. 1074). Considering the provision's heightened preventive purpose, recognized by s. 718(c), as well as the sentencing judge's duty to carefully inquire into the appropriateness of alternatives to indeterminate detention in light of the full range of sentencing principles, I cannot conclude that s. 753(4.1) imposes punishment that is "grossly disproportionate" to the extent that Canadians would find it abhorrent or intolerable.

(1) The Sentencing Judge's Discretion to Impose a Fit Sentence Under Section 753(4.1)

53 This Court has consistently affirmed that dangerous offender proceedings are sentencing proceedings: *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138 (S.C.C.), at para. 40; *Jones* , at pp. 279-80 and 294-95; *Lyons*, at p. 350. *Accordingly, a sentencing judge in a dangerous offender proceeding must apply the sentencing principles and mandatory guidelines outlined in ss. 718 to 718.2: R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357 (S.C.C.) , at para. 23; Neuberger, at p. 3-4. These sections of the *Criminal Code* set out the purpose and objectives of sentencing (s. 718), the fundamental principle of proportionality (s. 718.1) — "the *sine qua non* of a just sanction" (*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 (S.C.C.), at para. 37) — and the other sentencing principles that a court "shall" consider before imposing any sentence on an offender (s. 718.2). An error in the application of these principles is reviewable by an appellate court: *R. c. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 (S.C.C.).

54 Mr. Boutilier's position that, under the dangerous offender scheme, a sentencing judge lacks discretion to impose an appropriate sentence in light of the principles and objectives of sentencing has no support in the jurisprudence. Appellate courts have continued to apply these principles under s. 753 since the 2008 amendments: *R. v. Warawa*, 2011 ABCA 294, 278 C.C.C. (3d) 409 (Alta. C.A.), at para. 40; *R. v. Osborne*, 2014 MBCA 73, 314 C.C.C. (3d) 57 (Man. C.A.), at paras. 90-91; *R. v. Bragg*, 2015 BCCA 498, 332 C.C.C. (3d) 145 (B.C. C.A.), at para. 26; *R. v. Smarch*, 2015 YKCA 13, 374 B.C.A.C. 291 (Y.T. C.A.), at paras. 46-47. *These sentencing principles apply to every sentencing decision, whether made under the regular sentencing regime, the dangerous offender regime or the long-term offender regime.* One example is provided by *Ipeelee*, in which Manasie Ipeelee and Frank Ralph Ladue, were sentenced under the long-term offender regime. Nevertheless, this Court reviewed the fitness of their sentence according to sentencing principles, and more specifically the principle in s. 718.2(e) requiring judges to pay attention to the circumstances of Aboriginal offenders in sentencing proceedings: see *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.).

55 Mr. Boutilier's contention is also not supported by the principles underlying indeterminate detention. *This exceptional sentence is not an exception to the principles of sentencing, but rather a sentence mandated by their proper application*. As La Forest J. explained in *Lyons* , preventive detention "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": p. 329. *To conclude that the objectives of rehabilitation and retribution are trumped by that of prevention in a given case, the sentencing judge must assess the relative importance of the sentencing objectives in that particular case.*

56 Mr. Boutilier contends that, by referring solely to the objective of public protection, the wording of s. 753(4.1) excludes other sentencing objectives and principles from the sentencing judge's discretion. In my view, a fair reading of s. 753(4.1) does not result in the exclusion of these principles. *Parliament is entitled to decide that protection of the public is an enhanced sentencing objective for individuals who have been designated as dangerous. This does not mean that this objective operates to the exclusion of all others. It is permissible for Parliament to guide the courts to emphasize certain sentencing principles in certain circumstances without curtailing their ability to look at the whole picture*. Emphasis on the public safety component is consistent with the fact that public protection is the general purpose of Part XXIV of the *Code*: *Steele*, at para. 27. Further, because *the enhanced objective of public safety parallels the justification for imposing an indeterminate detention,* such emphasis is also consistent with the principles of sentencing generally.

57 It follows that, if the goal of public protection could be achieved in a given case without imposing indeterminate detention, a dangerous offender provision requiring a sentencing judge to declare an offender dangerous and then sentence him or her to an indeterminate period of detention would "overshoot the public protection purpose of the dangerous offender regime": *Johnson*, at para. 20. This accords with the principle in s. 718.2(d) that "an offender should not be deprived of liberty, if less restrictive sanctions

may be appropriate in the circumstances". *Even though the current sentencing mechanism for dangerous offenders differs from the one in place when Johnson was decided, the Court's reasoning in Johnson is still applicable*. Let me explain.

58 Since the 2008 amendments, indeterminate detention is no longer automatic for a dangerous offender. Rather, this sentence is only one option among others available under s. 753(4). In lieu of an indeterminate detention, a judge may impose a sentence that is more proportionate to the predicate offence for which the offender is being sentenced, whether it is imprisonment for a minimum of two years followed by long-term supervision — which amounts to a long-term offender sentence — or a sentence under the regular sentencing regime. The sentencing alternatives listed in s. 753(4) therefore encompass the entire spectrum of sentences contemplated by the *Criminal Code*.

59 When *Johnson* was decided, indeterminate detention was the only sentence available for dangerous offenders under s. 753. Nonetheless, this Court did not interpret this provision as requiring indeterminate detention for every designated offender. It refused to do so because this would have been "in direct conflict with the underlying principle that the sentence must be appropriate in the circumstances of the individual case": *Johnson*, at para. 24.

60 *Section 753(4) and (4.1) should therefore be read as a codification of Johnson*: the first subsection lists the alternatives available to a sentencing judge, while the second codifies the exercise of the sentencing judge's discretion required by *Johnson*. *In order to properly exercise his or her discretion under s. 753(4), the sentencing judge must impose the least intrusive sentence required to achieve the primary purpose of the scheme*.

61 Against this backdrop, it would strain credulity to suggest that the principles enumerated in ss. 718 to 718.2 are irrelevant to the exercise of the sentencing judge's newly codified discretion in s. 753(4) and (4.1) when they were relevant even under the former scheme, which imposed automatic indeterminate detention for every dangerous offender. *The 2008 amendments replaced mandatory indeterminate detention with a codification of the principle that a sentencing judge must impose a sentence that is tailored to the specific offender and consistent with the principles of sentencing.* When considered in its historical context, *the current s. 753(4.1) confers a discretion to apply general sentencing principles more explicitly than the former scheme did. It does so for the benefit of the offender, who cannot complain of a discretion that can only operate to his or her benefit*: see *Lyons*, at pp. 348-49.

62 Further, nothing in the wording of s. 753(4.1) removes the obligation incumbent on a sentencing judge to consider all sentencing principles in order to choose a sentence that is fit for a specific offender.

63 For all these reasons, *an offender's moral culpability, the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders are each part of the sentencing process under the dangerous offender scheme. Each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public.*

> Mr. Boutilier's suggestion to the contrary has been repeatedly rejected by this Court in relation to any of the *Criminal Code*'s sentencing regimes and, in effect, seeks to read a prohibition into s. 753(4.1) where none exists.
>
> *(2) The Question of the Presumption of an Indeterminate Period of Detention Under Section 753(4.1)*
>
> 64 Section 753(4.1) states that a judge "shall" impose an indeterminate sentence unless he or she is satisfied on the evidence "that there is a reasonable expectation that a lesser measure ... will adequately protect the public against the commission by the offender of murder or a serious personal injury offence". Mr. Boutilier contends that this provision enacts a presumption that an indeterminate sentence is a fit sentence for a dangerous offender and imposes a burden on the offender to adduce evidence to demonstrate "a reasonable expectation" that a lesser measure will adequately protect the public. He also argues that this burden extends beyond the one envisioned by this Court in *Johnson*. Again, I disagree.
>
> 65 Section 753(4.1) guides the discretion of the judge, who ultimately must determine the fittest sentence in a given case based on the evidence adduced during the sentencing hearing. *This Court in Johnson stated that the "sentencing judge should declare the offender dangerous and impose an indeterminate period of detention if, and only if, an indeterminate sentence is the least restrictive means by which to reduce the public threat posed by the offender to an acceptable level"*: para. 44. Again, *s. 753(4.1) is simply a codification of the exercise of discretion required by Johnson* in light of the regime's general purpose of public protection in dealing with offenders presenting a very high likelihood of harmful recidivism.
>
> 66 This interpretation of s. 753(4.1) is consistent with s. 718.3:
>
> > 718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.
> >
> > (2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

[72] With the reasons in *Boutilier* and other binding and persuasive jurisprudence in mind, I conclude that there is no material difference between the dangerous

offender/long-term offender provisions in place on December 2, 2008, and those presently in force.

753.1

753.1(1) Application for finding that an offender is a long-term offender
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.
753.1(2) Substantial risk

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), 163.1(3) (distribution, etc., of child pornography), 163.1(4) (possession of child pornography) or 163.1(4.1) (accessing child pornography), section 170 (parent or guardian procuring sexual activity), 171 (householder permitting sexual activity), 171.1 (making sexually explicit material available to child), 172.1 (luring a child) or 172.2 (agreement or arrangement — sexual offence against child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) 273 (aggravated sexual assault) or 279.011 (trafficking — person under 18 years) or subsection 279.02(2) (material benefit — trafficking of person under 18 years), 279.03(2) (withholding or destroying documents — trafficking of person under 18 years), 286.1(2) (obtaining sexual services for consideration from person under 18 years), 286.2(2) (material benefit from sexual services provided by person under 18 years) or 286.3(2) (procuring — person under 18 years), 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.

753.1(3) Sentence for long-term offender

If the court finds an offender to be a long-term offender, it shall

(a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and

(b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

753.1(3.1) Exception — if application made after sentencing

The court may not impose a sentence under paragraph (3)(*a*) and the sentence that was imposed for the offence for which the offender was convicted stands despite the offender's being found to be a long-term offender, if the application was one that

(a) was made after the offender begins to serve the sentence in a case to which paragraphs 753(2)(*a*) and (*b*) apply; and

(b) was treated as an application under this section further to the court deciding to do so under paragraph 753(5)(*a*).

753.1(4) [Repealed 2008, c. 6, s. 44(2).]

753.1(5) [Repealed 2008, c. 6, s. 44(2).]

753.1(6) If offender not found to be long-term offender

If the court does not find an offender to be a long-term offender, the court shall impose sentence for the offence for which the offender has been convicted.

Amendment History
1997, c. 17, s. 4; 2002, c. 13, s. 76; 2008, c. 6, s. 44; 2012, c. 1, s. 36; 2014, c. 25, s. 30
Currency
Federal English Statutes reflect amendments current to October 28, 2020
Federal English Regulations are current to Gazette Vol. 154:20 (September 30, 2020)

[73] A comparison of the December 2, 2008 s. 753.1 provision with the present one, shows no material differences.

753.2

753.2(1) Long-term supervision

Subject to subsection (2), an offender who is subject to long-term supervision shall be supervised in the community in accordance with the *Corrections and Conditional Release Act* when the offender has finished serving

(a) the sentence for the offence for which the offender has been convicted; and

(b) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (*a*).

753.2(2) Sentence served concurrently with supervision

A sentence imposed on an offender referred to in subsection (1), other than a sentence that requires imprisonment, is to be served concurrently with the long-term supervision.

753.2(3) Application for reduction in period of long-term supervision

An offender who is required to be supervised, a member of the Parole Board of Canada or, on approval of that Board, the offender's parole supervisor, as defined in subsection 99(1) of the *Corrections and Conditional Release Act*, may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant.

753.2(4) Notice to Attorney General

The applicant must give notice of an application under subsection (3) to the Attorney General at the time the application is made.

Amendment History
1997, c. 17, s. 4; 2008, c. 6, s. 45(1), (2); 2012, c. 1, ss. 147, 160(c)(iv)
Currency
Federal English Statutes reflect amendments current to October 28, 2020
Federal English Regulations are current to Gazette Vol. 154:20 (September 30, 2020)

[74] A comparison of the December 2, 2008 s. 753.2 provision with the present one shows no material differences.[23]

Conclusion regarding whether the dangerous offender provisions in existence at the time of the commission of the offence (December 2, 2008) or at the time of sentencing should apply

[75] I am satisfied that there are no material differences between the relevant provisions I would be required to consider as of the date of the offences, and the date of this sentencing. Therefore, I will rely upon the dangerous offender/long-term offender provisions at the date of sentencing.

[76] To be clear, regardless which sentencing regime I apply to the facts of this case, I would come to the same conclusion – I am satisfied beyond a reasonable doubt that Mr. Melvin is a dangerous offender, and the only appropriate consequence is indeterminate incarceration.

Are the alleged "pattern" offences admissible, have they been proved beyond a reasonable doubt, and are they properly described as "pattern" incident evidence?

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[23] In its November 18, 2020 written submission, the Crown has fairly pointed out that: "[Regarding s. 753.3(1) *CC*] subsection (b) was added to this section to allow a breach of long-term supervision to be elected by the Crown counsel as indictable *or* summary. If Mr. Melvin were at any point subject to long-term supervision, he should have the benefit of the Crown's consideration with respect to election. Section 11(i) of the *Charter* provides that a person should have the benefit of a lesser punishment."

[77] The following are a list of the incidents the Crown relies upon as "pattern" incident evidence:[24]

> The Court ultimately determines whether the requisite pattern or patterns have been established. The Crown respectfully submits that the court can rely on the following offences committed by Mr. Melvin to find that the patterns required by ss. 753(1)(a)(i) and 753(1)(a)(ii) have been established. It is open to the court to exclude some of the suggested offences or consider others not listed:
>
> **1.** Offence date: **June 16, 1995** - (Exhibit 14, Tab 3)
>
> Offence: **Robbery s. 344**

[24] Inserted in brackets after every such alleged "pattern" incident evidence are my comments. I have also relied upon Exhibits 14-18 "Previous Convictions" documentation, Exhibit 23, Bail Report JEIN Person ID: 311715 James Bernard Melvin, DOB March 11, 1982 and Exhibit 24 - "CPIC" print-out in coming to my conclusions. For pattern incident evidence that proceeded to trial and concluded with finding of guilty, or a plea of guilty, the more contentious issue is to what extent can the court conclude that aggravating facts have been proved beyond a reasonable doubt. In *R v Phinn*, 2015 NSCA 27, Justices Saunders and Bourgeois stated: "Sections 723 and 724 together create a framework for what information can be considered by a sentencing court … The task of interpreting the above provisions and applying them to the matter at hand is aided by the case authorities… *R v Gardiner*, [1982] 2 SCR 368 has stood for the proposition that the Crown has the burden of proving aggravating facts beyond a reasonable doubt for the purpose of sentencing. Although not an incorrect statement of principle, the Court's reasons display a much more nuanced approach than that single proposition would at first blush suggest. Dickson J (as he then was) for the majority writes at pages 414-5: 'It should also be recalled that a plea of guilty, in itself, carries with it an admission of the essential legal ingredients of the offence admitted by the plea, and no more. *Beyond that any facts relied upon by the Crown in aggravation must be established by the Crown. If undisputed, the procedure can be very informal.* If the facts are contested the issue should be resolved by ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender.'. As the last paragraph suggests, the court certainly contemplated that in many instances, aggravating facts may not be disputed, and as such, the procedure to introduce same to the sentencing court may be 'very informal'. It is when alleged aggravating facts are contested where the burden of proof rests with the Crown.… Respectfully, we think that this is a proper statement of the law [*R v Ladue*, 2011 BCCA 101 at paras. 30-1], which is particularly relevant in the circumstances of this case. *Ladue* confirms what appears to us to be the clear meaning of s. 724(3) - *the Crown's obligation to prove aggravating factors beyond a reasonable doubt is only triggered by a clear and unequivocal factual dispute*… The nature and type of 'information' which a sentencing court may consider, especially where introduced with the consent of both parties, is broad." [My italicization added]

Summary: Mr. Melvin and a group of youth confronted the victim at Levis Street and Spencer Avenue. **The victim was struck numerous times with a stick and struck on the back with a rock.** Mr. Melvin took the victim's pouch containing money. The victim was knocked to the ground and kicked and stomped by the group.

Sentence/Date: 2 months open custody - October 16, 1995

[the documentation establishes the conviction (not for robbery, but for the included indictable offence of assault - s. 266(a) *CC* - see the Order of Disposition; although I acknowledge that Exhibit 24 shows a conviction for "robbery with violence - s. 343(a) *Criminal Code*" sentenced on October 16, 1995), circumstances and sentence as follows:

> Mr. Melvin was found guilty of the included offence of assault by indictment and sentenced on October 16, 1995 to two months custody. Mr. Melvin and a cohort of his friends with youth criminal records, confronted the victim. Although there is no transcription of the circumstances recounted at the court sentencing, I am satisfied by virtue of the numerous signed written statements, the requirement for a section 26 *YOA* confirmation of the guilty plea by reference to agreed facts, and the two month custodial sentence that the court accepted, that this was not a simple assault, but rather that the victim was surrounded by a group including Mr. Melvin, and that Mr. Melvin assaulted him in that context. I accept that the circumstances included, as the victim stated in his written police statement June 16, 1995: "the guy with the blond hair [Mr. Melvin] said 'what are you looking at? Do you want to fight me? Did you hear that you guys? He said he wants to

> fight me' I never said nothing… They pushed me towards him. He pushed me… I was pushed from behind. Then the blond guy [Mr. Melvin] pushed me again. Then he swung the stick and kept hitting me with it." [p.109 Tab 3 Exhibit 14][25]

2. Offence date: **April 3, 1995** (Exhibit 14, Tab 3)

Offence: Assault with a weapon s. 267(a)

Summary: The victim was riding his bike in the community when he was confronted by Mr. Melvin. As the victim drove away **Mr. Melvin threw a hockey stick at the victim, striking him in the back of the head. The victim needed three stitches.**

Sentence/Date: 1 month open custody and 18 months probation - October 16, 1995

[the documentation establishes the conviction, circumstances and sentence.]

3. Offence date: **September 27, 1996** (Exhibit 14, Tab 6 – not reflected on Bail report – Exhibit 23, or CPIC – Exhibit 24)

Offence: Assault with a weapon s. 267(a)

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[25] The police statements of Mr. Melvin's cohort indicate that the group he was with included: BJ Marriott (aka Bremner), Shawn Shea, and Stephen Skinner. None of them were charged for that assault. I note, but do not rely thereon herein, that Mr. Shea's community interactions with Mr. Melvin are outlined in *R v Shea*, 2014 NSPC 78 at paras. 98-100; 106-109; 229; 241-242; and 250.

Summary: **Mr. Melvin confronted a high school student and sprayed him with pepper spray.** The student was treated by a school nurse, then transported to hospital. A police officer transported the student to the hospital, and as a result was also affected by the pepper spray.

Sentence/Date: 3 months open custody - October 9, 1996

[the documentation establishes the conviction, circumstances and sentence – see transcription of the court appearance created on April 7, 2018 - the transcript of the October 9 1996 Appearance in Youth Court, transcribed April 7, 2018 confirms that Mr. Melvin pled guilty to the assault with a weapon. The circumstances included that on Friday, September 27, 1996, "the victim in this matter discovered that someone had attempted to enter his motor vehicle, which was parked at the JL Ilsley school ground sometime around 12 PM. Rumours and innuendo around school suggested that Mr. Melvin may be involved. The victim… went to Mr. Melvin's house to confront him, he was not home, and he spoke with Mr. Melvin's mother. When he returned to school he spoke to Constable Saunders the investigating officer in this matter, who was also a football coach at the school…. the victim was told to stay away from Mr. Melvin as whatever any kind of altercation would certainly come to no good. On Monday, September 30, 1996, Constable Saunders… located Mr. Melvin… and a conversation ensued during which Mr. Melvin denied going near the car, but indicated to Constable Saunders 'I am going to get [the victim] or one

of your fucking football players'. Mr. Melvin indicated that he wasn't scared, despite his size, that he could certainly equalize the fight no problem, and continued to say that he was going to get [the victim] for scaring his mother. Constable Saunders warned him that any encounter could result in a charge as well as a breach of probation. On Tuesday, October 1, 1996 at 11 am the victim was in the school at the third-floor window looking out over the main entrance with a teammate who pointed out Jimmy Melvin just off the school property. Mr. Melvin somehow was alerted and yelled for the victim to come down. The victim did go down. The victim asked Mr. Melvin if he was the one who damaged his car and the accused was very upset telling the victim that he better apologize to his mother. *During this time, the accused threatened the victim and tried to provoke a fight… 'Hit me so I can fight you, hit me so I can fight you'. The victim then indicated to Mr. Melvin that 'you're not shit to me' and left to return to the school …when the victim left to return to school, Mr. Melvin pulled something out of his pocket, something which contained a chemical spray, similar to pepper spray, and sprayed him in the face. The victim went down on the ground."…* At the time of this particular offence [Mr. Melvin] was on probation ordered… on April 24, 1996 [for a period of one year].… throughout the time frame between September 30 and October 4, 1996, Constable Saunders observed [Mr. Melvin] in the company of [AM] and [BJM].… [each] known to have a Youth Court record [and who were both previously co-accused with Mr. Melvin so he was thereby in breach of his probation terms not to be in the association or company of persons with known criminal

records].

4. Offence date: **December 31, 2000** (Exhibit 14, Tab 27)

Offence: Assault causing bodily harm s. 267(b)

Summary: **Mr. Melvin attacked the victim in a pool hall in Spryfield. He kicked the victim and struck the victim with a pool cue. The victim needed four stitches to his right eye, four stitches to his ear lobe, and had other cuts and bruises.**

Sentence/Date: 6 months custody concurrent - May 18, 2001

[the documentation establishes the conviction, circumstances and sentence. Notably, DD - whose statement is corroborated by the other EHS witness, MC, who also gave a statement - one of the EHS staff who attended at the Q Billiards club in South Center Mall Spryfield, gave a brief description of finding the victim with blood all over his head. His statement included the following: "he was also very upset and crying… The victim stated he had been beaten with a pool cue. We asked if he wanted the police called. He became even more upset stating 'no', he did not, because Jimmy Melvin would beat him even worse the next time… He said 'no' again, again stating Jimmy Melvin would get him if the police were involved. He was even afraid to go to the hospital, fearing the hospital would call the police. He continued to make it clear to us that he did not want the police involved, even without us asking. He stated he was going to leave the city [redacted] because he was so afraid for his safety. I drove the ambulance to the

> hospital, and we left our patient in the care of the triage personnel at the QE2 Emergency. These are the details of the incident as I recall them." There is also a photograph of the victim showing noticeable head/facial injuries. The background to this is that the victim had only recently moved to the Spryfield area, and about a week before December 31, 2000, when he was playing pool at the same Q Billiards he noted Mr. Melvin smoking drugs near the VLT machines - the victim was prone to epileptic seizures and the smell of illegal drugs smoke can cause him to have seizures. As a result, he approached Mr. Melvin and asked him not to smoke drugs inside the hall. A minor verbal confrontation occurred at that time. On December 31, 2000, the victim advised that Mr. Melvin had approached him while he was playing pool and without warning threw two kicks at the victim striking him in the right side of the face and head. Melvin also threw a third kick that he blocked with his left arm. Shortly thereafter, the victim became unconscious and did not remember anything further. Videotape from the pool hall showed Mr. Melvin walking over to where the victim is and then away from the area but didn't show the actual assault. A pool cue used in the assault was found broken into several pieces.]

[78] On May 18, 2001 Mr. Melvin was sentenced to two years in custody for a series of offences, including drug trafficking contrary to s. 5(2) of the *CDSA*. On December 6, 2002 Mr. Melvin, convicted of conspiracy to commit an indictable

offence, received three years consecutive in custody.[26] These convictions are not being suggested as part of the pattern, but are noted to account for the gap in his record.

5. Offence date: **September 20, 2010** (Exhibit 15, Tab 44)

Offence: Assault s. 266

Summary: Mr. Melvin was attending a hearing in CNSCF. Mr. Melvin's request for a transfer was denied. He threw his shirt at victim and knocked off the victim's glasses.

Sentence/Date: 1 day deemed served

[the documentation establishes the conviction (Crown elected as a summary conviction offence), circumstances and sentence - – see transcription of court appearance created February 9, 2018 – the victim was Sean Kelly, the Director of the Central Nova Scotia Correctional Facility, who was observing a hearing involving Mr. Melvin when Mr. Melvin "became verbally abusive to Mr. Kelly, indicated that he 'had no balls', and threw his shirt at [him]". No further custody was ordered, given his effective sentence of 21 days – which was unnecessary after Mr. Melvin received credit for his 14 days of remand time per Provincial Court Judge Flora Buchan on December 15, 2010.]

[26] See the dismissal of his appeal – 2003 NSCA 142. His warrant expiry date was in May 2006.

6. Offence date: **February 11, 2010** (Exhibit 15, Tab 46 and 47)

Offence: Assaulting a police officer s. 270(1)(a)

Summary: Spitting on officers

Sentence/Date: 3 months custody - March 16, 2011

[the documentation establishes the conviction (indictably elected), circumstances and sentence - see the transcription of court appearance created February 26, 2018 (pp. 14-5). **Mr. Melvin spit on Halifax Regional Police Constable Marinelli and Constable Smith who were both outside the cell area where he was. The spit hit both officers in the head area**.]

7. Offence date: **April 25, 2010** (Exhibit 15 Tab 46 and 47)

Offence: Uttering threats s. 264.1(1)(a)

Summary: Threatening to shoot correctional guard

Sentence/Date: 1 month custody - March 16, 2011

[The documentation establishes the conviction (indictably - elected by the Crown), circumstances and sentence - see the transcription of court appearance March 16, 2011 at p.15, certified February 6, 2018. Mr. Melvin was in custody at the Cape Breton County Correctional Centre “while an inmate there, he placed toilet paper over the security

camera in his cell. Officers went in to get the toilet paper off the camera. The last officer that was in the cell was leaving, was one [BS] and Mr. Melvin stated to this officer as he was walking out of his cell: **"in five months when I get out I'm going to put a bullet in your head."** The officer took that seriously, his threat, and hence the charge." On Mr. Melvin's behalf, his counsel, Joshua Arnold stated: (pp. 25-27) "… I believe that the court has attached to one of the documents that I filed early on in relation to that application [a psychiatric assessment of all Mr. Melvin's institutional files], a letter from Dr. Stuart Grassian dated November 19, 2009, whereby he outlines his background with regard to psychiatry and neurology and research into solitary confinement syndrome and his having met with Mr. Melvin and other individuals related to Mr. Melvin and having reviewed the documents that we have achieved to the date of his report and determining that it had become clear to him that Mr. Melvin had suffered serious significant psychiatric difficulty during his incarceration in solitary confinement and concluded that Mr. Melvin, from the review of the records to date at that time, had spent a considerable period of time in restricted and isolated conditions of confinement… In the meantime, Mr. Melvin continued to remain in custody for most of that time and as I am advised by Mr. Melvin, a significant portion of his time in custody has been spent yet again in segregation in solitary confinement and as Dr. Grassian indicates in his report, that type of isolation, for Mr. Melvin in particular, causes him significant psychiatric difficulty… He's accumulating a lot of time in segregation in solitary confinement and at least not offered as

an excuse for this behaviour at this stage, but certainly as an explanation that there's a snowball effect, I would suggest, occurring with regard to Mr. Melvin's custody and where he's housed in custody and what happens when he is housed in those locations in custody." Thereafter, Mr. Melvin made lengthy personal comments to Justice Kevin Coady, the sentencing judge, who accepted the joint recommendation proposed of 12 months custody on a number of charges.

8. Offence date: **June 5, 2010** (Exhibit 15, Tab 46 and 47)

Offence: Assaulting police officer x3 s. 270(1)(a)

Summary: Mr. Melvin threw an item at correctional guard and spit at two others. Spit landed in the eye of one officer.

Sentence/Date: 3 months on each count (concurrent to each other) - March 16, 2011

[The documentation establishes the conviction, circumstances and sentence - see the transcription of court appearance March 16, 2011 before Justice Coady. These arose while Mr. Melvin was in the Cape Breton Regional Correctional Centre.) p. 16-17: - Correctional Officer, Sgt S. "stated he was outside of his cell occupied by inmate Melvin. Melvin had covered the camera lens with something, and Sgt. S was addressing inmate at Melvin through the meal slot in the cell door, instructing him to remove the item covering the camera. While this was taking place, Mister Melvin threw a banana through the

slot.… struck Sgt. S in the face.… At the same time are very close to that time… Inmate Melvin was removed from the cell and taken to an area known as Isolation. **Cape Breton Regional Police Constables K and V came down to do some assisting Sgt. S [in the transfer from the cell to Isolation]… They were spit at in the face area. The most notable was that K got it in the eye area and he had to get his eye flushed out** ..." The contemporaneous statement of K [accident/injury report - Department of Justice Correctional Services] explains the circumstances in his own handwriting: "**while placing inmate James Melvin into isolation cell number four I was holding the shield and inmate Melvin grabbed the top of the shield pushing it down and spit into my face. The fluid got into my left eye**.".]

9. Offence date: **October 6, 2010** (Exhibit 16, Tab 48)

Offence: Assault s. 266

Summary: Mr. Melvin threw fecal matter at two correctional guards.

Sentence/Date: 3 months custody concurrent - December 6, 2011

[The documentation establishes the conviction, circumstances and sentence [Exhibit 23] - Mr. Melvin was charged with numerous offences for which he was sentenced to a total of 21 months [having been credited with 9 ½ months remand time on a 1:1 day basis - p. 28 - 9] custody and three years' probation on a joint recommendation - the circumstances are captured in the transcription dated February 9, 2018 regarding an appearance by four accuseds (Mr. Melvin, his

brother Cory Melvin, Robert Cox, and Natalie Digioacchino) before his Honour, Provincial Court Judge Frank Hoskins - Exhibit 16 tab 48 (p. 6 line 11 and p. 18 onward). The circumstances at the sentencing were described as: "This is an incident occurring at the provincial **correctional facility in Cape Breton**. The two individuals named [as victims] are corrections officers… as they passed isolation cell number three, which housed Mr. Jimmy Melvin, **Mr. Melvin threw fecal matter through the window of the cell. It struck Corrections Officer DL and also struck Corrections Officer AH, struck AH on the shoes, pants, shirt, neck, and arms. The fecal matter was also on the cell door and the window.**… It's my understanding from speaking with [Elizabeth Buckle, defence counsel/though I note later in the transcript that p. 27 it also records Joshua Arnold speaking on behalf of Mr. Melvin] that it's Mr. Melvin's position that he essentially was not intending to strike the officers, but strike the prisoner they were escorting. The Crown is not disputing his intent." The Court: "So you're saying that this is an intentional application of force to the officers, and you're saying that it's a transfer of intent because his intent was to what, throw it on the prisoner, and is that what you're arguing?" Paul Carver: "That's correct." Ms. Buckle: "Yes. There is no dispute on the facts read by my friend." The Court: … So, it's the transferred intent? "Mr. Carver: Yes."] Judge Hoskins accepted the joint recommendation. Notably, **Ms. Buckle** represented to the court: "We've not requested a pre-sentence report, so **I'd like to provide your Honour with some background information about Mr. Melvin** to support the joint recommendation. He is 29 years old.

He's never been married. He has one child who is primarily in the care of his parents. He was born and raised in the Halifax area. For most of his late youth and adult life he's been in custody. The circumstances of his care and custody have been the subject of previous reports provided to courts that has had significant impact on him, on his psychiatric health and drug use. He has a lengthy related criminal record, and that's been admitted. His parents are alive. They live in the Halifax area. They've always been very supportive of him. His siblings are also very supportive. He has minimal education. **He struggled with drug use**. At the time of this offence he had recently been released from custody and was struggling with, obviously, reintegration after spending so much time in custody…" **The Court**: "My only question to both of you is that probation for three years with no reporting? **This is somebody who was struggling with addiction issues and psychological issues, underlying mental health issues. Is there some reason why those conditions that routinely would you be imposed are not being imposed here for someone for his rehabilitation?** …" Mr. Carver: "I can tell you from the Crown point of view the intent of the probation order was to… provide the maximum amount of protection by way of court order to the victim in this particular matter…" The Court: "But a probation also, usually, is applied to assist people in their rehabilitation, and that's the main emphasis usually of probationary terms…" Mr. Carver: "… This is what we wanted to accomplish through probation, which is why we didn't seek a reporting condition, having felt that a probation order that kind of length would have I suppose prevented agreement in this

particular matter. Mr. Melvin obviously has the opportunity, once he's back in the community, to pursue these rehabilitative efforts on his own. I expect that if you look through his record you'll see he's been on probation before and is familiar with the resources that would be available to him…" Ms. Buckle: **"Mr. Melvin is going to be in custody for a lengthy period of time and will have the benefit of any resources available within the provincial correctional facilities geared toward any psychological or drug use issues that he has. Once he's released again, in my submission, a reporting condition would not assist with his rehabilitation at all and would in fact set them up for further breaches. His family has resources. If there are issues when he comes out of custody that need to be addressed my submission would be that those can be addressed through his family's resources and not necessarily by order of the court…" Mr. Melvin: "Plus now while I'm in custody…" Ms. Buckle: "He's simply advising that his intention is to deal with his issues during this period of incarceration…** My friend Mr. Arnold has previously represented Mr. Melvin… He is reminding me that his primary issue is solitary confinement syndrome and that Mr. Arnold has, in the past, explored options available through probation services to deal with that, and there are none." (p. 41)

10. Offence date: **October 6, 2010** (Exhibit 15, Tab 46)

Offence: Assaulting a police officer s. 270(1)(a)

Summary: Spitting on correctional guard

Sentence/Date: 1 month custody - March 16, 2011

[the documentation establishes the conviction [Exhibit 23], and the sentence [one month consecutive custody]. The circumstances were recounted to Justice Coady on March 16, 2011 – see p.18 Transcript. The incident was captured on videotape, wherein **Mr. Melvin spit through the opening around his viewing window in his cell door after staff had left the cell. Correctional officer SB was struck by the spit on the left side of his forehead.** His own contemporaneously hand-written statement contained in a "disciplinary report - level 2 and 3" confirms this.]

11. Offence date: **February 10, 2010** (Exhibit 16, Tab 48)

Offence: Kidnapping s. 279(1)(a)

Summary: Victim attended an apartment in Highfield Park. He was grabbed by Mr. Melvin. **Mr. Melvin punched and kicked the victim and then struck the victim in the eye with a baseball bat. Mr. Melvin then took the victim from the apartment against his will, and to a parking lot where there was a further confrontation. The victim was so scared he urinated himself.**

Sentence/Date: 21 months custody plus 3 years' probation - December 6, 2011

[the documentation establishes the conviction, sentence and circumstances - Exhibit 16 - tab 48 - transcription dated February 9,

2018 at pp. 18-9.)

[79] The circumstances represented to Judge Hoskins included:

> "During the afternoon of February 10, 2010, an issue or dispute had arisen between RM and Mr. Melvin. [The documentation including the victim's sworn testimony of the preliminary inquiry (Exhibit 17 Tab 49 pp. 15-26) confirms that Mr. Melvin was travelling in a vehicle with RM, when they collided with another vehicle – Mr. Melvin immediately gave RM a handgun and told him to flee, which he did. RM had not made any efforts to return the handgun to Mr. Melvin. Consequently] in the early evening RM attended at an apartment in Highfield Park Dr. in Dartmouth because he was hoping to clear up the misunderstanding. When he opened the door to one of the apartments he was grabbed by Mr. Melvin. Mr. Melvin began to punch and kick RM and then struck him in the eye with a baseball bat. RM was taken from the apartment against his will by Mr. Melvin. He was taken down to the parking lot where the confrontation continued - a witness had called police who attended quickly. Mr. Melvin and RM both fled the area once the police had arrived, but they were both detained after short pursuits. RM was very afraid during the course of all these events, and as he testified before you at the preliminary inquiry, at one point he urinated in his pants as a result of his fear."

Offence date: **February 10, 2010** (Exhibit 16, Tab 48)

Offence: Assault with a weapon s. 267(a)

Photograph of injury - Exhibit 16, Tab 49 pages 980-982

Summary: Victim attended an apartment in Highfield Park. He was grabbed by Mr. Melvin. **Mr. Melvin punched and kicked the victim and then struck the victim in the eye with a baseball bat**. Mr. Melvin then took the victim from the apartment against his will, and to a parking lot where there was a further confrontation. The victim was so scared he urinated himself.

Sentence/Date: 21 months concurrent plus three years' probation - December 6, 2011

[the documentation establishes the conviction, total sentence on this offence and others, and circumstances – Exhibit 16 – Tab 48 at pp. 18-9].

12. Offence date: **November 29, 2012** (not reflected on Bail report or CPIC) (Exhibit 17, Tab 50 and 51)

Offence: Assault with a weapon s. 267(a) x2

Summary: Accused threw feces at two corrections guards in an Institution in New Brunswick

Sentence/Date: 4 months custody on each concurrent - February 8, 2012 [in addition to 4 months pre-trial custody – p. 7, Tab 51, Exhibit 17]

[the documentation establishes the conviction, the sentence and the circumstances - Exhibit 17 Tabs 50 and 51 - being a sentencing in New Brunswick Provincial Court on May 14, 2013 for 2 counts contrary to s. 267(a) *CC* - **Mr. Melvin admitted to assaults, by throwing liquid materials onto corrections guards at the Southeast Correctional Centre where he was being held in the Special Handling Unit** for 23 hours per day. Two aggravating factors remained - he denied throwing bodily fluids/feces at the officers, and if he did so, whether that could constitute assault with a "weapon". Judge Vautour concluded that [Tab 50, pp. 39-44]:

> "on the totality of the evidence the proof that the accused threw-of what the accused threw at the guards, is overwhelming and could lead to no other rational conclusion than that **it was human feces**. Now in the circumstances of this case that's the next issue: has the Crown proven the feces thrown at the two guards constitute a weapon and intended to be used as such… It is common knowledge that… feces from humans or otherwise are carriers of disease. When thrown towards the face and eyes of another human being the potential for contracting disease or other or being contaminated is even greater. **Feces thrown at one's face risk contracting diseases aside considering the overwhelming stench and [repulsiveness] of the act can only lead one to conclude that the intent of the perpetrator was to threaten and intimidate and intend to weaken the ability of the intended victim to defend himself…** In the totality of the evidence I am satisfied beyond a reasonable doubt that the feces were human feces intended to be used and used as a weapon. I find the accused guilty as charged on both counts." (pp. 39-44).

[80] In the sentencing transcript, Judge Vautour notes:

> "in this particular case, **the mountain of evidence submitted by the Crown leads to the inescapable conclusion that for a substantial period of time the accused is inclined to overreact if he does not get his ways. He is manipulative, scheming, devious about getting his ways with the guards, making it known in no uncertain terms that he will not conform to the rules. His intention to take over the structure of the prison system ruling over him, to him ruling over the guards in the prison system is blatant and barefaced. If he does not get his ways, the guards will bear the consequences of his wrath.** The nature of the offences was most insulting, repulsive, vile and disgusting. The offences in the circumstances of the offences in this case is a serious matter. The accused has a significant criminal record. His prospects of rehabilitation are far from encouraging.… In my opinion it is absolutely imperative for the courts to express society's repulsion and intolerance towards the type of conduct such as that committed by the accused… I am however mindful of the potential effects of solitary confinement which although not an excuse for it, might have been a contributing factor to the accused's behaviour. As I stated earlier, **pretrial custody of about four months would also have to be factored in…the proper and fit sentence is a term of imprisonment of four months concurrent to each other and consecutive to any term of imprisonment that the accused could have been currently serving**." (Tab 51 pp.4-8).

[81] *Viva voce* testimony was also presented by Deputy Superintendent Luc Cormier, whose evidence I accepted and was to the effect that Mr. Melvin

relentlessly made efforts to intimidate staff, by attempting to obtain personal information about staff family connections, vehicles driven, places of residence etc., as well as making verbal threats to seriously injure or kill staff, and assaultive behaviours, such as the throwing of feces in this case. His criminal conduct has had significant impacts on a number of correctional officers and other staff at this and other institutions (eg. being screened for any contagious diseases that may be contained in feces or spit propelled in their direction by Mr. Melvin, particularly the facial area). I am satisfied that the records the witness relied upon were reliable and admissible - and that Correctional Officers LeBlanc and Berubé ultimately discontinued their careers as a result; physical/mental injuries that required them to be off from work such as also in the case of Correctional Officer Greg Aitken (whose evidence I accept that, as a result of Mr. Melvin's March 24, 2018, unexpected and vicious physical attack upon him caused him to see multiple dental surgeons occasioning two root canals and other surgeries, laser surgery to his gums, and treatment for significant bone fracture to his teeth and gum area – he was unable to eat whole food for almost a year and he has been off with PTSD since that time going through many sessions of counselling and therapy);

13. Offence date: **November 28, 2015** (Exhibit 18, Tab 53)

Offence: Uttering threats s. 264.1(1)(a)

Summary: **Mr. Melvin told victim (corrections guard) that she was "fucking dead, that she would get her face broke" and that if he saw her in North End Halifax she would get her "fucking legs broke."**

Sentence/Date: 6 months custody (concurrent) - November 29, 2016

[the documentation establishes the conviction, circumstances, and sentence. His Honour, Provincial Court Judge Del Atwood stated:

> "Mr. Melvin elected to have his charge dealt with in this court and entered a guilty plea to a single count of uttering threats to cause death to [SB, Capt. of Correctional Officers].… *This was a threat to cause death. The words that were uttered by Mr. Melvin were certainly chilling, but it's important for the court to take into account the situation under which the words were uttered. Mr. Melvin had been in segregation for an extended period of time. He had just been pepper-sprayed. The court is certainly aware from long-standing experience that segregation typically wears away on the mental fortitude of offenders.… It was spontaneous. It was situational. It arose, in my view, almost entirely from the fact that Mr. Melvin and spent some considerable period of time in segregation, had been pepper sprayed, and was being video recorded, undoubtedly for a valid corrections purpose* but certainly not capturing Mr. Melvin at his best… I would situate the seriousness of the offences being at the lower to mid-range of seriousness… I do not find that [SB] had ramped this up in any way shape or form, but again, this was a situational offence.… I was informed that as the prosecution read in the statement of facts pursuant to section 723 and 724 of the Criminal Code, that a fellow inmate, Mr. Nickerson, informed Mr. Melvin that [SB] drove a particular make and model of car. Mr. Melvin is not responsible for the conduct of Mr. Nickerson. Mr. Melvin is responsible for his conduct only… There is no argument that's being made that Mr. Melvin should receive pretrial credit… because Mr. Melvin has not been in custody in relation to this charge… The court sentences Mr. Melvin to a period of imprisonment of six months… The court is going to order and direct that the warrant of committal be endorsed with the non-communication order that while in custody Mr. Melvin is to have no contact or communication either directly or indirectly with [SB]."

[My italicization added]

14. Offence date: **April 1, 2016** (Exhibit 18, Tab 57)

Offence: Uttering threats s. 264.1(1)(a)

Summary: Mr. Melvin struck a correctional guard in the face with closed hands. Mr. Melvin was wearing handcuffs. The guard suffered cuts to the face. (Correctional Officer Miller). Mr. Melvin told Miller that he would kill him.

Sentence/Date: 5 months concurrent - March 14, 2018

[Crown elected as indictable: the documentation confirms the conviction, circumstances and sentence: p. 11(15) Tab 57 Exhibit 18 - guilty plea entered March 14, 2018 – "it was about *10:30 am. April 1, 2016, and Correctional Officer Miller was with Mr. Melvin. At that point,* **Mr. Melvin was agitated and struck Capt. Miller with closed hands.** *He had handcuffs on. The blows caused some cuts and slashes to the face of Capt. Miller, and he was threatened at the time as well by* **Mr. Melvin stating "he would kill me***".* - p. 24 at Tab 57 Exhibit 18.]

Offence date: **April 1, 2016** (Exhibit 18, Tab 57)

Offence: Assault peace officer with weapon s. 267(a)

Summary: Mr. Melvin struck a correctional guard in the face with closed hands. Mr. Melvin was wearing handcuffs. The guard suffered

cuts to the face. (Correctional Officer Miller). Mr. Melvin told Miller that he would kill him.

Sentence/Date: 5 months concurrent - March 14, 2018

15. Offence date**: April 5, 2016** (Exhibit 18, Tab 57)

Offence: Assault peace officer s. 270(1)(a)

Summary: Mr. Melvin punched Correctional Officer Mackenzie in the groin area, and spit in his eye.

Sentence/Date: 5 months consecutive - March 14, 2018

[the documentation confirms the conviction, circumstances and sentence: "April 5, 2016 at about *1:35 pm. a Captain reported an incident with Justin MacKenzie. Mr. MacKenzie had been dealing with Mr. Melvin. They were headed towards the shower. They went to the area and were asking Mr. Melvin to put his hands through the meal slot to be handcuffed.* **However, at that point, Mr. Melvin reach through and punched the officer in the groin area. When they escorted him back to cell later, he spit into the officer's right eye**. *At that point he had been physically resisting officers with his body. The officer ended up going to the hospital to get his eye checked out.*"- p. 25-6 Tab 57]

16. Offence date: **April 6, 2016** (Exhibit 18, Tab 57)

Offence: Assault peace officer with a weapon s. 270.01(1)(a)

Summary: Mr. Melvin threw feces at four corrections guards, striking three in the face and one on the clothing.

Sentence/Date: 10 months concurrent - March 14, 2018

[The documentation confirms the conviction, circumstances and sentence: “April 6, 2016 7:25 am., four officers were attempting to perform segregation procedures with Mr. Melvin while he was in segregation cell number nine. Capt. Hawkins was speaking, attempting to get him to be cooperative. They were attempting to get the mattress out. **Originally, Mr. Melvin was cooperative with the officers, was placed in wrist restraints by officer Henry through the meal slot. The officers ended up opening the door when they did, Mr. Melvin picked up what was a milk carton full of fecal matter and threw it at the officers. It ended up striking three of them in the face and one of them on the vest and the pants.** At that point they exited the cell….”- p. 26 Tab 57.]

17. Offence date: **December 5, 2016** (Exhibit 18, Tab 57)

Offence: Uttering threats s. 264.1(1)

Summary: Mr. Melvin threatened to kill Correctional Officer Morris.

Sentence/Date: 4 months concurrent

[The documentation confirms the convictions, circumstances and

sentences: “December 5, 2016 RCMP got a call from Ms. Teasdale of Northeast Nova [in Priestville, Nova Scotia] with the complaint… Officers were preparing to move Mr. Melvin from Northeast Nova to Renous, in New Brunswick. As he’s being escorted into the Sheriff’s vehicle, was upset that he’s told he couldn’t take a book that was the property of Antigonish Library. **He got into the vehicle, threatened Officer Morris saying: ‘when I see you, I’m going to fucking kill you.’ Was told to get back in the vehicle, became aggressive and spit in officer Morris’s face**, was restrained by other sheriffs, placed on the ground. Some other people arrive to assist. He was brought to his feet, **attempting to spit on another officer’s face, and she ended up covering his mouth. He turned his head and spit in officer Krista Gould’s face**.” – While only a guilty plea was entered to the assault of Correctional Officer Morris…the facts really relate to both”. - Exhibit 18, p. 30 Tab 57.

18. Offence date: **December 5, 2016** (Exhibit 18, Tab 57)

Offence: Assaulting peace officer s. 270(2)

Summary: Mr. Melvin spit in the face of officer Morris and officer Gould.

Sentence/Date: 4 months consecutive

(See above circumstances)

19. Offence date: **May 19, 2017** (Exhibit 18, Tab 57)

Offence: Assaulting a peace officer s. 270(1)(a)

Summary: Mr. Melvin shoved Officer Mosher as he was being removed from court in an agitated state.

Sentence/Date: 12 months concurrent - March 14, 2018 [Exhibit 18, Tab 57]

[the documentation confirms the conviction, circumstances and sentence - on March 14, 2018, Mr. Melvin was sentenced after guilty pleas and a joint recommendation on numerous charges by his Honour Provincial Court Judge Theodore K. Tax to 30 months in custody less six months for pretrial custody or 24 months remaining (p. 22, Tab 57 Exhibit 18): "it was in court room number five in Halifax. **Mr. Melvin was there for a sentencing, was upset with the outcome and kicked the barrier in the form of the prisoner's bench and yelled at two officers in the courtroom. Judge requested he be removed. On the way out, continued to yell, kicked the door outside of the courtroom causing damage. Mr. Melvin then shoved Deputy Sheriff Earl Mosher, stating 'get your hands off me Earl or I will bang you out.'"**. Counsel agreed that the facts recited here would also apply to the threat charge sentencing noted below – (pp. 33-5).

20. Offence date: **May 19, 2017** [Exhibit 18, Tab 57]

Offence: Uttering threat s. 264.1(1)(a)

Summary: Mr. Melvin told officer Mosher to get his hands off of him or he would “bang him out”.

Sentence/Date: 2 months concurrent - March 14, 2018

[the documentation confirms the conviction, circumstances and sentence]

21. Offence date: **March 24, 2018**

Offence: Assault causing bodily harm to peace officer s. 270.01(1)(b)

Summary: Mr. Melvin committed an unprovoked attack on Correctional Officer Aitken resulting in serious cuts and fractures requiring surgery. Evidence of Aitken found at pages 7-32 of transcript of hearing from July 9, 2020. Exhibit 29 (photos) Exhibit 30 (video)

Sentence/Date: 10 months consecutive/July 30, 2019

[The documentation confirms the conviction, circumstances and sentence. Notably, this **vengeful and premeditated attack on Correctional Officer Aitken took place a mere 10 days after Mr. Melvin’s sentencing on March 14, 2018**. The intended specific deterrence of that sentencing had no effect. Mr. Aitken testified on July 9, 2020. I accept his evidence as truthful and reliable. He described that day how the institution was understaffed, meaning he was working by himself, and he was responsible for the segregation

cells.

“[March 24, 2018] That was a Saturday, we showed up for the day shift, there were six staff on duty, two managers, the facility was very short that day, I’m pretty sure the count for the inmate count was 197.”

Those segregation cells for which he alone was responsible that day, containing 18 inmates including Mr. Melvin, were a comprised of: “the initial unit, there is eight individual cells with inmates that were either had caused problems in the facility, that were taken away to be isolated from other inmates; it also had two health units for weekenders [intermittent sentence inmates]; it had another segregated cell for suicide watch or drug intervention coming into the facility; and then we also took care of a couple of other cells that we had on the healthcare side.” (p. 9 Transcript certified July 10, 2020)

…

Question – do you know Mr. Jimmy Melvin?

Answer – I know him as an inmate and I only know him through one encounter that we had with him in Cape Breton.

[At North Nova, Mr. Melvin was on “administrative hold”, basically “because he couldn’t be placed anywhere else in the facility]

…

Question – and how was your morning with Mr. Melvin, how did the morning go?

Answer – it was good. It was good, the rapport was there.

Question – you indicated that they had a late sleep-in, correct?

Answer – yes.

Question – and then brunch?

Answer – yeah.

Question - and what else did Mr. Melvin do if anything?

Answer – well, he was the very first one that said: “thanks for letting the boys be, we appreciate that’, right…

Question – did he do anything else after brunch, did he stay inside or go outside?

Answer – No, with his administrative hold he had certain privileges so he had TV time, rec area time, and so it was around maybe 330… I

had to call for another officer to escort him outside to the recreation area, we escorted him outside to the recreation area, and then he said, 'after this can I get some TV time?' and I said 'you know 'we'll see, we'll see what to do', I said 'it might not be right on time but we'll do what we can for you, all right'. So we went out to the recreation area and then maybe after 30 to 45 minutes or so I called for another officer, which took maybe another 10 minutes for the officer to come in, which was Jennifer Marshall, a female officer. **We went out to the recreation area to get him, he was talking like, you know, as nothing was going to happen, and then right around 4 o'clock or so when we finally got inside the facility there was another inmate asking me for the phone and then when I turned to go get the phone… [And the door to his cell, number seven] "was opened by her**. It would be opened initially by a controller officer that's not located in that unit.

Question – when you entered to head to Mr. Melvin's cell, what did you do?

Answer – I'm keeping my eyes on him, I'm making sure that I'm safe and my partner's safe, and all of a sudden, **I was asked to get a phone**.

Question – who asked you to get the phone?

Answer – **it was an inmate that was across the hall, Brandon**

Lawrence.… The phone is on a pedestal that has four wheels and it was only just in the corner, **I turned to go get the phone and as I turned to go back with the phone I was struck in the face [by Mr. Melvin]…**

Question – had he said anything to you just before striking you?

Answer – no.

Question – and what did he strike you with?

Answer – [at approximately 4:05 PM] **he struck me with his fist, a closed fist… My face, right in my, initially, face, lips, front mouth… Then I received probably maybe seven or eight more shots towards my head, my glasses went flying, I started to get pushed back towards the corner of that unit and then all of a sudden it was over and he retreated back to his cell**… There was only one patrol officer, and as for the staff they had a hard time trying to find out where the initial call was coming from… [The assault ended and at that point Mr. Melvin was going back to his cell] I think at this point once I did know the door was closed… It took me a couple of minutes to find [my glasses] and a couple of minutes to catch my breath… Injuries? … I received a couple of nasty, which are **still scarred, nasty lower lip cuts that bled profusely**, a severe bump on the upper lip and a **fractured aveolar bone**… (p.15) [he has not worked for two years and three months as a result of this attack- p.

17/see also Exhibit 29 photos and Exhibit 30 the videotape]…

Question – in relation to this matter that we're discussing, the November 24, 2018 matter, **after you were assaulted what if anything did Mr. Melvin say?**

Answer – after he got back into his cell and the other officers showed up to escort me to the other side of the facility and the holding cell side, he said a lot of un-choice words I would not like to repeat because of everything that's going on in the world today, like he used the N-word a lot…[CO Aitken himself is Caucasian]

Question – you have referenced, Mr. Aitken, an incident in Cape Breton?…

Answer – **that was probably about five months before we left and went to [North Nova]. It also happened in our segregation cell in Cape Breton… He assaulted one of our senior staff CO [DL], and as we entered the segregation unit he was wrestling with two officers there, we finally got him on the floor and asked him to put his hands behind his back, we had to forcefully put his hands behind his back";[and after the assault at North Nova Institution, that's when Mr. Melvin made the remark towards CO Aitken: "'that's for Cape Breton – that's for the day you hurt my arm'."]**

When Mr. Aitken was asked, 'how does it feel to be testifying today?';

he answered: “It’s very scary. Very scary, lots of anxiety.”

In cross-examination he was asked:

“Question – and can you tell us a little bit about what you mean by they [the inmates] had their own way of doing things?

Answer – as in their culture ‘they do what they do’, we’re there to make sure that the rest of them are safe, they don’t get into fights, but when they want to do it, it doesn’t matter what we do.

Question – and what I don’t understand is, what does ‘they do what they do’ actually means, what is it that they do?

Answer – well, inmates, they smuggle their own drugs in, they have their own way of, of setting things up to beat another inmate, they go on their daily business as if they were still on the outside.

Question – and what role do you play in that?

Answer – to make sure that they don’t kill each other. To make sure that they are safe, to make sure they are fed.” (p.29 Transcript)

22. Offence date: **December 2, 2008** (Exhibit 19 and 20)

Offence: Predicate offences - Attempt murder s. 239, and conspiracy to commit murder s. 465(1)(a)

[I have discussed my findings regarding the predicate offences elsewhere herein.]

23. Offence date: September 26, 2020

Offence: Attempted murder and aggravated assault on Joshua Preeper

[See my separate decision, *R v Melvin*, 2020 NSSC 346 - **I am satisfied that the Crown has proved beyond a reasonable doubt that Mr. Melvin committed the offences of attempted murder and aggravated assault upon the victim**.]

Mr. Melvin's substance abuse[27]

[82] I will add here that it is apparent throughout the materials filed that Mr. Melvin has an entrenched substance abuse problem that he does not wish to address. There are repeated references throughout the materials that Mr. Melvin has access to illegal drugs within the institutions in which he is incarcerated. One would think correctional facilities' security would be impervious to such penetration and the provision of illegal drugs to inmates. However, it does appear to be so, and the reality of this continuing penetration and provision of illegal drugs to inmates creates enormous problems for correctional facilities staff.

[27] I am satisfied that Mr. Melvin has had a long-standing association with the abuse of substances. Although I am satisfied that illegal substances find their way into our Federal and Provincial correctional facilities, and there is a reasonable likelihood that Mr. Melvin would have access to such substances from time to time, in none of the instances of proposed "pattern" evidence do I have reliable evidence that Mr. Melvin was under the influence of such substances at the time of those instances. Nevertheless, I accept Dr. Lohrasbe's opinion that substance abuse by Mr. Melvin exacerbates his risk otherwise for violent recidivism. Thus, Mr. Melvin is dangerous without substance abuse, and more dangerous with it.

[83] On May 19, 2017, Mr. Melvin appeared at his sentencing in Provincial Court in Halifax, NS - he had been in custody since July 17, 2015 - p. 32 Transcript Exhibit 18 Tab 55/ see also *R v Melvin* 2016 NSPC 71. In her sentencing submissions of Senior Crown Counsel Christine Driscoll stated:

> "Going through the record, it appears that Mr. Melvin has five convictions related to drugs, CDSA… most significant and relevant to this matter is that on May 18 of 2001, Mr. Melvin received two years in custody for possession of a scheduled substance for the purpose of trafficking contrary to s 5(2) CDSA along with numerous other offences, threats and weapons, violence and breaching court orders. He received two years in relation to the drugs [matter], and what's noteworthy about that is that not long after, December 6, 2002, he is convicted for conspiracy to commit an indictable offence. It doesn't specify on this record, but I can tell you that *there was a three-year sentence for conspiracy to commit an indictable offence bringing drugs… having drugs brought into the institution for him to receive, and he did receive three years consecutive to the sentence he was already serving… it was a small amount of cocaine, I believe 3 ½ g, that were brought into the institution*." Patrick MacEwan, his counsel, stated that "he's here for 23, 24 g of marijuana… The court would be well aware of the fact and I think can take some judicial notice of the fact that's well within the amount that a person would have for personal use" (p.36)… There was no real evidence of an ongoing plan. The plan was that Mr. MacPhee was going to receive this package. The drugs never made their way into the facility. It doesn't appear that they were en route there.… The packages had been prepared and that's the evidence that we have before the court." (p.37) … Mr. Melvin, once again, was essentially responding to a friend who, the friend's admission, had been bugging him for a while for a package." (p. 42) In his sentencing decision Judge Chisholm stated: "Mr. Melvin was requested by an individual known to him, who was in custody at the Central Nova Scotia Correctional Facility, an individual with a long criminal record who requested Mr. Melvin arrange to have illegal drugs transported into the institution to that individual. Mr. Melvin agreed to do so. That was prior to July 18, 2015.… The individual who was to transport the drugs was an individual who was to be released from custody. The plan was for him to pick up the drugs, secrete them on his person, then get arrested for shoplifting or some other similar offence and be taken back to the Correctional Centre. This phone call occurred on July 18, 2015. That same night police located and arrested *Mr. Melvin*. He, at the time of his arrest *was driving a motor vehicle. He was the only individual in the motor vehicle. Under the driver's seat were found two prison packs as described, one containing tobacco, the other containing cannabis marijuana, approximate 23 g*…".

[84] Judge Chisholm was sceptical that this was just a favour for a friend. He went on to conclude: “there is nothing before the court to suggest that Mr. Melvin has any intention to change his lifestyle of the past 20 years. He appears to be an individual committed to a life of crime and it is the view of the court that there is nothing before the court to suggest there is any likelihood of rehabilitation at this time… The appropriate sanction… **is a sentence of 36 months imprisonment… Credit will be given** on the basis as previously indicated in the amount of 27 months **such that the sentence going forward from today will be a sentence of nine months’ imprisonment**.” (p.56)

[85] At that same hearing, RA Simpson, a CSC Intelligence Officer, who had been stationed at the Dorchester penitentiary in New Brunswick, (since July 2013) testified as an expert, before His Honour Provincial Court Judge Marc C. Chisholm, based on information available to him to that date: “to discuss the ills of bringing drugs and contraband into a jail and the effects of it… [and] to give opinion evidence in regards to inmate behaviour and criminal subculture activities.” (Exhibit 18 Tab 55 pp. 4-19).

[86] He testified that he started with the Correctional Service of Canada in 1990 as an Entry Level Guard, Correctional Officer I, progressing through competition to the Living Unit Officer, Correctional Officer II, then progressing to what used to

be called the ISPO, and now is called the Security Intelligence Officer position. He described that position: "you deal with all the criminal on-goings inside the jail. You conduct investigations, liaise with the police, deal with things like telephone intercepts, things of that nature… I've been an Intelligence Officer for 23 years.

[87] He was asked: (p. 8 Tab 55 Exhibit 18) "… Tell us about the types of activities with regards to drugs and contraband, we are going to keep it to the drug trade and tobacco trade, if you would, and the ills and effects of that. "

[88] He answered:

> "…unfortunately just about any drug that's on the street, illegal drug or mishandled drug, prescription drugs like fentanyl or oxycodone or hydromorphone, all those drugs, anything that's for sale criminally on the street, unfortunately, is also imported and for sale inside the institutions. It's brought in in all kinds of different ways.… unfortunately, compromised staff, wives, moms, grandmothers, aunts, uncles, cousins, visitors, compromised contractors that come in the facilities, throw-overs the wall. Currently there is a big problem. The biggest issue on the block now is dropped in by drone… it's a basic economic supply and demand. If there is a big demand, somebody will meet the supply and then the price, according to the supply that's coming in … [and] our abilities to keep it out. As there is more in the jail, the prices fluctuate with supply and demand just like any economic situation.
>
> Question – so if the price on the street is a $10 for a gram of weed…
> Answer – standard procedure usually is about three times. Whatever the street value is, it usually three times the value inside the jail but that can fluctuate, again, by supply and demand….
>
> Question – you mentioned other people bringing it in. The one about inmates themselves who are either on leave or get caught doing something, how do they get it in?
>
> Answer – inmates can get it in – offenders, inmates can get it in in several different ways. TD [temporary Detention] unit… and guys that are out on statutory release, some kind of release, they get picked up where they're going to get suspended, they'll package it, anal cavity, on their person, hidden in clothes.… I know provincial jails, they'll have guys

coming in doing weekend – serving their sentences on weekends intermittently. Those guys, a lot of times, had been a problem. They have to do great things to try to keep those guys separate from the rest of the population because they are coming in and out of the jail. Any time you come in and out of a jail, there is the ability to compromise the facility."

…

Question – Now what about the ills? What's the big problem? (p. 13)

Answer – well we could spend weeks on that, but the biggest problem is contraband comes in. So there's rules and then the rules are broken and the whole idea of prison or jail is to help the offender live to learn as a law-abiding citizen. Then there's the problem of addiction… Then they have to pay for it. So it leads to bartering of their possessions. It leads to bank transfers, sexual favours, power and intimidation. If a guy has the ability to get tobacco and contraband in a jail that that gives him power and then he wields that power by having control over of his range, his cell, the institution. He puts their family members in harms way because family… A lot of times these guys family are suffering.… These monies are being sent all over the place via E transfers and bank deposits to pay for tobacco that the inmate is smoking.

Question – is that the same with drugs?

Answer – the same, the very same procedure.

Question- what about security, safety and security inside the institution?

Answer – well anytime there's contraband there's a black-market activity. There is tension. There is tension because debts… Guys can't help themselves. They have to smoke it if it's in front of you. If you've got an addiction to something and somebody's got it in there for sale and you're paying… An exorbitant amount for it, you are still, 'well I'll get some. I'll get some, and I'll get some, and then pretty soon you can't pay. Well then there's the violence that follows that… acts of violence and intimidation.

Question- can this also create a hierarchy in a jail…?

Answer – yes, very much so. As I said before, if you have the ability to get contraband in a jail, if you have the ability, the network, the organization whether it be an organized crime group, a security threat group, gangs as it were, or an organized crime group. It's a very elaborate system. You have whatever your introduction, whether it be a compromised staff or a throw-over the wall, it takes a lot of planning and energy to run a sophisticated system like that… You have to have a network communication so you are compromising the telephone system. Inmates are allowed to phone their family members and stuff once they are on the FIN list but they are not supposed to do three way calls. Certainly not supposed to do illegal activity over the phone. So then they have to do illegal activities over the phone. Then they have to have their loved ones sending actually the proceeds of crime through E transfers and bank deposits paying for criminal activity… It's been my

> experience over 24 years in this field… wives and moms and sisters… law-abiding citizens who family member have gone astray and now they're doing bank deposits out of love and loyalty, they can't say 'no' to their loved one and suddenly they are drawn into this illegal activity and suddenly they are accepting E transfers from people they don't know…[28]
>
> Question- how does drug trafficking and contraband trafficking affect the security?
>
> Answer – talking drugs, you're talking possibilities of drug overdose… If you're talking injectable drugs then you are talking syringes, home-made syringes. Then you're talking staff searching cells and getting pricked with needles that have been used by people that have hepatitis C or hepatitis B or any of those kinds of diseases. Then there's the violence that erupts from debt collection and inmates that are under the influence of drugs.…" (p. 37).[29]

[89] Dr. Lohrasbe testified that, before Mr. Melvin should be considered for release into the community, he must reduce his risk for recidivism, and in order to reduce his risk in the community, Mr. Melvin would have to, for a lengthy period of time, demonstrate that he entirely curtailed his substance abuse (as well as any involvement in the institutional drug trade, and keep his anger in check and not engage in verbal threats and physical assaults).

[90] In that vein, it is helpful to consider the materials and testimony regarding Mr. Melvin which do touch on these problems as continuing.

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[28] There are even reported cases of lawyers who are complicit in providing drugs to inmates: *R v Calder*, 2012 NSCA 3; and inmates trafficking – e.g. *R v BJ Bremner*, 2005 NSSC 163.

[29] I appreciate that this generic evidence was given three years ago at Mr. Melvin's sentencing, and that counsel in the case at Bar has had no opportunity to cross-examine the witness. Thus, the weight that I can give to that evidence is limited.

[91] These include, that as recently as July 2020, while Mr. Melvin was being transferred from the federal Atlantic Institution, at Renous, NB, to the provincial CNSCF in Burnside, Halifax, NS, guards discovered, when he was put through a scanner at his destination, that he had wrapped in cellophane in his hand, (which had traces of fecal matter on it) which contained a razor blade, a lighter, and a needle.

[92] Dr. Lohrasbe testified that there have been no apparent attempts by Mr. Melvin to address his substance abuse disorder which seems "unabated over 20 years". He also stated – "we don't have the tools to deal with him – first the behaviour must be stopped before we start therapy to achieve insights… As long as he is using drugs or acting out, we're really at a standstill."

[93] Since 2005, Robyn Gay has been a parole officer with CSC, and as of 2015 she has been in a managerial position with community corrections/CSC. She is now again active as a parole officer in Halifax.

[94] She testified on July 8, 2020:

> "Question – With regard to Federal institutions, are there wings or areas in the correctional facility that are dry or drug-free, that offenders can say 'I want to go to this dry unit'?
>
> Answer – Yeah. So, essentially, I think, everyone likes to think that there's no drugs in the institution, but we know that there are drugs that can get in. But there are sections in the institution, the federal institution that are drug-free units. So, they are urinalysis tested more frequently. We do have a urinalysis testing also in the community, and there is

> random testing throughout the institution. But on the drug-free unit, you do have to be motivated to maintain a drug free lifestyle. You have to make that commitment and you are tested for that." (p. 82, transcript certified on July 9, 2020)

A discussion of the proposed "pattern" evidence[30]

[95] At the end of the day, the court will be faced with the question of whether, regarding proof of a "dangerous offender" designation and disposition, the Crown has proved beyond a reasonable doubt the statutory requirements in s. 753(1)(a)(i) or (ii) *CC*, as interpreted by the jurisprudence.

[96] In examining the proposed "pattern" incidents, the court must remain mindful that the purpose of the dangerous offender provisions is:

> "neither punitive nor reformative but primarily [the offender's] segregation from society": *Report of the Royal Commission to Investigate the Penal System of Canada* (1938), at p. 223. This preventive sanction can be imposed only upon offenders for whom segregation from society is a rational means to achieve the overriding purpose of public safety."
>
> (*Boutilier*, at para. 33)

[97] In attempting to identify true "pattern" incidents, it is helpful to examine the proposed "pattern" incidents according to whether, they "fit with" other incidents

[30] I am satisfied that each of the proposed "pattern" incidents listed above is admissible evidence and that each and their circumstances have been proved beyond a reasonable doubt. I will next examine each to determine if they are part of a "pattern". I bear in mind that there are differing requirements to find a "pattern" as between sub-sections 753(1)(a)(i) and (ii) *CC*. In both cases, the predicate offences must be able to be characterized as part of the "pattern". I find that the predicate offences are part of a pattern under both subsections.

of past "pattern" criminal violence or endangerment, and provide a rational basis to predict future conduct.

[98] Justice Bourgeois for the majority in *R v Shea*, 2017 NSCA 43 stated:

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

[99] At para. 126, Justice Bourgeois approvingly cited Justice Karakatsanis (as she then was) in *R v Tremblay*, 2010 ONSC 486:

> "97 There is no requirement that the past conduct that makes up a pattern involve objectively serious offences, offences that are more or less serious, or even that they be serious personal injury offences [citations omitted]. Even two incidents with similarities are sufficient to form a pattern: *R v Langevin*, at para. 29.
>
> 98 To determine whether there is a pattern sufficient to predict future conduct, the trial judge may consider evidence of:
>
> i) what type of conduct was involved,
>
> ii) who, generally, the victims were, and
>
> iii) what motivated the offender to commit the offences."
>
> …

> 99 Similarly, when considering the likelihood of causing death, injury or severe psychological harm, a Court may consider the impact of the offender's conduct on past victims to inform the likely impact on future victims. ***However, it is not necessary that the past conduct led to actual injury. Attempted serious violence and likely serious endangerment of life, safety or physical well-being, or severe psychological harm may well be adequate.***
>
> [Emphasis added]

[100] The majority made clear in *R v Shea*, 2017 NSCA 43, it is an error of law to require that in order for there to be a pattern into which the predicate offence fell, [an offender's] past behaviours needed to be as [objectively] serious as the [predicate offence].

[101] Justice Bourgeois went on to say, which is particularly *à`propos* in the case at Bar:[31]

> 142 Having found several errors in the application judge's approach to the pattern analysis, I turn to where I part ways with my colleague. Although I understand him to have similar cause for concern, he ultimately concludes that any error in the application judge's pattern analysis was non-material. I repeat his reasoning for ease of reference:
>
> > [66] But even if the Crown is right that a comparative seriousness between predicate and pattern behaviour is not necessary, Mr. Shea's conduct must still satisfy the legislative conditions for designation as a dangerous offender. A link must exist between the pattern of repetitive behaviour and the potential for future offending. The threat must be established on the basis of a pattern of behaviour inclusive of the predicate offence, (*Knife*, para 61, citing *Neve* and *R. v. Pike*, 2010 BCCA 401, para 80, 81, 83). The fact of repetition shows a failure to restrain violent behaviour, (*Knife*, para 70).

[31] Since there are instances of criminal convictions in relation to 17 correctional or police officers who Mr. Melvin: spat upon; threw mixtures of liquid and substance of feces at; physically assaulted; 2 correctional officers on separate occasions unto whom he threw items like a banana or shirt; and 5 instances of threats to kill made to correctional staff - which bear similarities to the Appendix of the proposed pattern evidence in *Shea* ,as attached at the end of the Court of Appeals decision in *Shea.*

> [...]
>
> [68] Here, the Crown confronts two difficulties. First, Mr. Shea's pattern of repetitive, unrestrained behaviour must embrace the predicate offence, *and* involve injury or likely injury to his victims. ***The absence of injury or its likelihood fatally compromises the pattern analysis both because it would not approximate the behaviour of the predicate offence and would not support "... a likelihood of causing injury..."***, (s. 753(1)(a)(i)). The judge found:
>
> > [435] ... The aggravated assault stands out as an escalation in Mr. Shea's violence and does not fit with the pattern of his institutional behaviour. There is no similarity in the "degree of violence or aggression threatened or inflicted on the victims." (*Neve, paragraph 113*)
>
> [69] ***This finding is clearly grounded in the evidence and focuses on the statutory imperative that the impugned conduct be injurious or likely so.*** While comparable gravity of behaviour may not be required to meet the pattern analysis mandated by s. 753(1)(a), the judge properly applied the statutory language in her analysis of Mr. Shea's behaviour. She found Mr. Shea's behaviour fell short of the requisite pattern. That was her decision to make.
>
> [Emphasis added]

And further at para. 103:

> [103] If we consider Mr. Shea's whole history in light of the theory now advanced by the Crown, and leaving aside the predicate offence, ***Mr. Shea's violent behaviour does not reveal a pattern of injuring his victims, with two notable exceptions.*** The first is the 1998 assault causing bodily harm in Waterville. The second is the 2009 extortion and forcible confinement. A 2001 conviction for assault with a weapon (throwing a rock at a security guard which did not hit the guard), while violent, is not part of any pattern of instrumental violence, (*Decision*, para 411, citing Dr. Theriault). ***Other than the transient or temporary ill effects of fisticuffs, Mr. Shea's other 23 instances of violent or dangerous behaviour did not produce any injuries, nor were likely to do so.*** Accordingly, his history does not disclose a pattern of injurious or dangerous conduct within the meaning of ss. 753(1)(a)(i) or (ii).
>
> [Emphasis added]

143 From the above, I understand Bryson J.A. to be asserting that:

- factually, apart from a few exceptions, Mr. Shea's past violent conduct was not injurious or likely to be injurious (para 69 and 103) but merely minor "fisticuffs";

- the absence of past injury or its likelihood in the prior incidents compromises a finding of a pattern because they do not "approximate the behaviour" of the aggravated assault (para 68); and

- the lack of injuries or likelihood of injuries arising from Mr. Shea's past violent conduct also precludes a finding of a future "likelihood of causing injury" (para 68).

144 I fundamentally disagree with the above propositions.

145 At its core, my divergence with Bryson J.A. relates to his view of the nature of Mr. Shea's past behaviour. With respect, he has minimized its seriousness and potential for risk of harm, both physical and psychological.

146 I mention but a few of the institutional incidents which I am satisfied carried a real risk of actual harm when acted upon by Mr. Shea:

- On November 23, 1998, Mr. Shea, with others, assaulted another prisoner at the Waterville Correctional Facility. This incident led to convictions for assault and ***assault causing bodily harm.*** It seems there was more than one victim: correctional records indicate ***he was charged for punching "one of the victims" numerous times in the head.*** (*Reasons, paragraph 130*)
- On June 22, 2001 at the Central Nova Scotia Correctional Facility (CNSCF), Mr. Shea was observed by surveillance camera ***punching another prisoner who was lying down.*** *(Reasons, paragraph 159*)
- On October 19, 2001, Mr. Shea bit a correctional officer on the wrist, drawing blood. Mr. Shea was also written up for "swinging objects at correctional officers ***trying to harm them*** *and* ***throwing scalding hot water at them.***" (*Reasons, paragraph 159*)
- On August 14, 2002, Mr. Shea punched a correctional officer at the CNSCF while the officer was trying to control him. (*Reasons, paragraph 160*)
- On October 17, 2002 he punched another prisoner in front of a correctional officer because he believed him to be a Protective Custody prisoner. He made "a sudden dash around the correctional officer and punched [KG] in the face." (*Reasons, paragraph 160*)
- On February 26, 2007, Mr. Shea got into an altercation with another prisoner in the cells at the Halifax Provincial Court. According to Sheriffs' officers who witnessed the incident, Mr. Shea was placed in a cell with the other prisoner who greeted him. ***Mr. Shea advanced on the prisoner and began hitting him with a closed fist, connecting twice before being restrained.*** He actively resisted being restrained and was taken to the ground outside the cell where he was handcuffed. (*Reasons, paragraph 272*)

- On March 14, 2009, Mr. Shea was observed on surveillance footage ***punching another CNSCF prisoner in the eye.*** (*Reasons, paragraph 165*)
- On November 13, 2009, Mr. Shea was seen on camera assaulting another prisoner, [AS]. The assaults on AS were **on two separate occasions, within five minutes of each other. AS was sent to hospital with facial injuries.** (Reasons, paragraph 173)
- On January 25, 2010, Mr. Shea was observed on camera assaulting another CNSCF prisoner. (*Reasons, paragraph 178*)
- On February 7, 2010, Mr. Shea ***punched a correctional officer in the face*** when being escorted to his cell after refusing to lock up. During the use of force that followed, Mr. Shea punched another officer. (*Reasons, paragraph 179*)
- On March 8, 2011, Mr. Shea filled a carton with his faeces and urine and threw it on correctional officers who had entered his cell to restore order. (*Reasons, paragraph 188*)
- On July 19, 2012, Mr. Shea was observed on surveillance footage entering another prisoner's cell where he "struck" him. (*Reasons, paragraph 197*)

[Emphasis added]

147 *The above instances, along with the others identified by the application judge, are, in my view, more than harmless or irrelevant fisticuffs. They speak clearly to the real risk of harm embedded in Mr. Shea's ongoing behaviour. They are instances where Mr. Shea employed unexpected violence against unsuspecting victims.*

148 The expert evidence provided an explanation for Mr. Shea's behaviour. This was summarized by Bryson J.A. at para 30-37. Some aspects bear repeating. The application judge appeared to accept the diagnosis of both experts of anti-social personality disorder, and that Mr. Shea's violent behaviour was instrumental--it was directed at elevating his status in the prison criminal subculture. The application judge also appeared to accept Dr. Theriault's finding that placed Mr. Shea high on a diagnostic tool used to identify psychopaths. She accepted Dr. Theriault's explanation as follows:

> [346] ... Psychopathy is a clinical construct traditionally defined by a constellation of interpersonal, emotional and lifestyle characteristics on the interpersonal level, psychopaths are grandiose, arrogant, callous, dominant, superficial and manipulative. Mostly they are short tempered, unable to form strong emotional bonds with others and lacking in guilt or anxiety. These interpersonal and emotional features are associated with a socially deviant lifestyle which includes irresponsibility and impulsive behavior and a tendency to ignore or violate social conventions or mores...

149 *Although serious injury did not result from Mr. Shea's past incidents of violence, the potential was real. A well-placed punch, notably to the head, can cause serious injury, or*

worse. Scalding water can maim. Threats of violence from a source prone to unpredictable violence produces a real risk of psychological harm.

150 *Focusing on the lack of serious outcomes of Mr. Shea's past violent incidents to inform the assessment of future risk of death or injury is problematic. Firstly, such an approach transfers the analysis away from the best indicator of future risk--the motivation and psychopathy behind Mr. Shea's violent behaviour--and places it upon something entirely unrelated to his behaviour--the ability of correctional workers to control and intervene in relation to Mr. Shea's attacks to avoid serious harm.*

151 The application judge acknowledged that in many instances of past institutional violence, Mr. Shea's attacks were stopped by the efforts of correctional officers (*Decision,* para 435). *To discount the multiple instances of violence because no serious injury occurred ignores that it was outside forces which restrained Mr. Shea. The lack of serious injury in those instances are irrelevant to the real risk Mr. Shea's violent behaviour poses in future. Numerous violent assaults do not become meaningless as an indicator of risk of future harm simply because Mr. Shea was unsuccessful in seriously injuring his victims. I reject the proposition that Mr. Shea's past violent behaviours were not injurious or likely to be injurious. I find them, coupled with the expert evidence, to establish a likelihood of Mr. Shea causing injury in the future.*

152 *I also find it problematic that the approach of my colleague appears to apply an objective seriousness comparison to the risk assessment. Of course, we know that such an approach in identifying a pattern of behaviour is problematic. Why, then, does it find its way into a determination of future likelihood of harm? I am satisfied it should not.*

153 I return to *R. v. Tremblay* (para 124) where, in speaking on "the likelihood of causing death, injury or severe psychological harm", Karakatsanis J. confirmed that there was no requirement that past conduct led to actual harm. This is inconsistent with the view expressed by my colleague that "the absence of injury or its likelihood" would not support a "likelihood of causing injury."

154 *The aggravated assault is not meaningfully different from Mr. Shea's history of violent institutional behaviour. They are part of a common pattern of using instrumental violence to maintain and enhance his status in prison. The lack of past injuries is not determinative of the risk analysis. I am of the view that Mr. Shea's numerous instances of institutional violence and the motivation behind it amply demonstrate a likelihood of future harm.*

155 For the reasons set out above, I am satisfied that the application judge's errors led her to improperly discount the significance of the incidents of institutional violence, resulting in a flawed pattern analysis. At para 69, my colleague says the application judge "found Mr. Shea's behaviour fell short of the requisite pattern. That was her decision to make." It was her decision to make, but it is not insulated from appellate review. Her errors were material and justify appellate intervention. What, then, are the consequences of that determination?

[My italicization added]

[102] As a start, let me briefly examine the following questions regarding the proposed "pattern" incidents:

1. what type of conduct was involved,

2. who, generally, the victims were, and

3. what motivated the offender to commit the offences.

[103] **1** - The type of conduct is targeted to specific individuals.[32] This suggests a deliberateness and purpose. His conduct is limited by the lack of opportunity to

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[32] Though I refer to his attacks as "targeted to specific individuals", they are still properly seen as "random" attacks, which is an aggravating factor because it "adds to his moral blameworthiness through the harm that it [causes]", as I infer that "it breeds fear that anyone is a potential target", per Trotter, JA in *R v Brown*, 2020 ONCA 657 at para. 62 – although there the offence occurred in the community. I observe that there are significant similarities between the relevant evidence regarding the dangerous offender paradigm between Mr. Shea and Mr. Melvin - for example, both have: comparable criminal records and criminal and institutional misconduct; anti-social personality disorder diagnoses with psychopathic features; 'instrumental' violent behaviour, "directed at elevating his [Mr. Shea's] status in the prison [and community] criminal subculture."; they are similar in age, and have had connections to the so-called "Spryfield MOB". While the facts in *Shea* are not in evidence before me, I find support for similar observations to be made about Mr. Melvin based on credible and trustworthy evidence I have before me. Judge Derrick concluded: **"**257 In a Regional Review of Mr. Shea's segregated status it was said that Mr. Shea had 'very strong ties' to the Spryfield MOB and that 'the ongoing unrest at Atlantic Institution and other institutions in this region can be linked to several members of this group.' (Exhibit 7, page 243) The Warden's review of Mr. Shea's segregation cited Spryfield MOB involvement in 'assaults on inmates, the intimidation and muscling of inmates and the introduction and distribution of contraband.' (Exhibit 7, pages 244 - 245)"; and further: "355 It is Dr. Starzomski's opinion that Mr. Shea's behavior toward correctional staff reflects in part an effort to preserve and maintain his social status. Dr. Starzomski viewed it as also relating to a "very poor capacity to consider alternatives or the merits of alternatives to engaging in this kind of behavior..." (Dr. Starzomski's Testimony, page 627) Describing it as "a sort of battle approach" to living in the correctional system, Dr. Starzomski thought it could be due to a host of issues..."not just to...feeling unfairly treated, but seeking to gain... a power advantage." (Dr. Starzomski's Testimony, page 628) He agreed with Mr. Heerema that Mr. Shea may be using violence in an instrumental fashion. (Dr. Starzomski's Testimony, page 628)." On appeal, Justice Bryson (and the majority at para.

commit the offences, especially recently due to the restrictive nature of his incarceration, and the lack of access to makeshift weapons.[33]

[104] The evidence bears out the following contextual observations:

1. If the victim is not within his physical reach, he will threaten them with death or grievous bodily harm; if the victim is not within his physical reach, he will assault them by throwing at them what he has available: clothing, food articles, spit and feces;[34]

2. if the victim is within his physical reach, his assaults are either unexpected or supplemented weapons and others with him, to ensure

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148) accepted this view – "33 The experts appear to have agreed that much of Mr. Shea's violent behaviour is 'instrumental'--in his case, committed to furthering the goal of enhancing his status in the criminal subculture."

[33] I conclude there is a real possibility, and probability if he were highly motivated in the circumstances, that whether Mr. Melvin is in jail *or* in the community, he will instruct others to carry out violence against targeted individuals if he was sufficiently motivated, yet personally unable to achieve the result. I accept that there is trafficking of illegal drugs inside Federal and Provincial correctional institutions, and I conclude that such organized, repetitive trafficking is reflective of an effort by those committed to the criminal subculture within and outside the correctional facilities. If one gives any credence to Mr. Melvin's claim that he is a regularly "high" on non-prescribed drugs while incarcerated (since 2015 in particular), and I do so find, that suggests he is well connected in the criminal subculture, both within and outside the correctional facilities.

[34] His threats/intimidation are enhanced in cases where the victim believes or knows that Mr. Melvin is aware of their personal circumstances (e.g. where they live, who their family and friends are; what vehicles they drive; etc.) – as are the victim impacts thereof. I agree with the comments of Judge Vautour regarding Mr. Melvin's convictions and sentencing in relation to the throwing liquid feces materials onto two corrections officers at the Southwest Correctional Centre while being held in the Special Handling Unit near Moncton New Brunswick on November 29, 2012. The throwing of human feces at other persons is a serious and dangerous form of assault. These assaults demonstrated that Mr. Melvin could reach any correctional officers who had dealings with him near his cell, and since correctional officers had to deal with him near his cell, they were practically defenceless from such assaults. These assaults could happen at any time as the "weapon" is always available. Therefore, Mr. Melvin was able to intimidate staff, to get things done as he wanted, or to punish them for perceived disrespect or their handling of him or his complaints/requests. This behaviour in particular, and the consistency with which he has held gravely antagonistic attitudes towards State authorities, reflects the ingrained nature of his adherence to the tenets of the criminal subculture. In each of the "pattern" behaviour instances, I conclude that Mr. Melvin's conduct was reasonably capable of inflicting, and did inflict psychological harm on each of his victims.

> success - the extent of the assault will depend on the nature of the opportunity and availability of weapons (e.g. on December 2, 2008, Mr. Melvin saw an opportunity to personally plan and nearly complete a surprise attack on Terry Marriott Junior and kill him) and length of time available to commit it - when he has more opportunity the violence will be extended – e.g. In the cases of the December 31, 2000 assault causing bodily harm upon the victim in the pool hall- injuries to the face and head area; and the February 10, 2010 assault with a baseball bat (injuries to the face and head area) and abduction of the victim from the Highfield Park apartment building; the April 1, 2016 assault with a weapon (handcuffs) on a correctional officer (injuries to the head and face area); the March 24, 2018 assault causing bodily harm on a correctional officer (very serious injuries to the head and face area); and, most brutally, as seen on the videotape of the September 26, 2020 aggravated assault/attempted murder of an inmate (very serious injuries to the head and face area).

[105] **2** - Because Mr. Melvin has been in custody for so much of his life, and particularly recently, his victims are correctional services staff, or inmates, and police officers. These persons all became victims because they *had to be* in close

proximity to Mr. Melvin by virtue of their work/status. His opportunities were necessarily limited.

[106] Generally, his victims are at a disadvantage – *inter alia*, Mr. Melvin attacks by surprise to gain the advantage, or they are unable to flee - for example:[35]

1. June 16, 1995 - [found guilty of the included offence of assault by indictment and sentenced on October 16, 1995 to two months custody] Mr. Melvin and a cohort of his friends, some with youth criminal records, confronted the victim. Mr. Melvin assaulted the victim, who was heavily outnumbered. Although there is no transcription of the circumstances recounted at the court sentencing, I am satisfied by virtue of the numerous signed written statements, the requirement for a section 26 *YOA* confirmation of the guilty plea by reference to agreed facts, and the two month custodial sentence that the court accepted that this was not a simple assault, but rather that the victim was surrounded by a group including Mr. Melvin, and that Mr. Melvin assaulted him in that context. I accept that the circumstances included, as the victim stated in his written police statement June 16,

[35] I similarly conclude that when Mr. Melvin has been in the community and lashed out at others, typically he has the advantage of surprise, a number of friends/followers with him, or weaponry. Moreover, his long-standing reputation for violence, and perception that he is a member in a criminal gang, is an advantage not to be underestimated – see s. 757 *CC* and *R v Gregoire*, (1998) 13 CCC (3d) 65.

1995: “the guy with the blond hair [Mr. Melvin] said ‘what are you looking at? Do you want to fight me? Did you hear that you guys? He said he wants to fight me’ I never said nothing… They pushed me towards him. He pushed me… I was pushed from behind. Then the blond guy pushed me again. Then he swung the stick and kept hitting me with it.” [p. 109 Tab 3 Exhibit 14]

2. October 1, 1996 – the victim had confronted Mr. Melvin about damaging his motor vehicle, and Mr. Melvin taunted him to fight: “hit me so I can fight you, hit me so I can fight you”– and when the victim turned to leave “Mr. Melvin pulled out [pepper spray] of his pocket… sprayed him in the face. The victim went down on the ground.”

3. December 31, 2000 – the attack on the victim in the pool hall – he kicked the victim twice in the head area without warning; typically, the incidents of spitting and the throwing of feces were like this;

4. the attempted surprise attack and murder of Terry Marriott Junior on December 2, 2008;

5. the February 10, 2010 attack on the victim unsuspectingly entering the apartment, where Mr. Melvin who was not alone, struck him in the eye with a baseball bat, and began to punch and kick him;

6. April 1, 2016, the sudden striking of a correctional officer in the face with the handcuffs Mr. Melvin was wearing;

7. March 24, 2018, as the correctional officer was distracted and turned away to provide a phone to another inmate, Mr. Melvin attacked him viciously punching him repeatedly in the head area causing significant physical damage and psychological harm;

8. the September 26, 2020, physical attack on Joshua Preeper is consistent with this pattern – for more details the reader may consult my decision *R v Melvin*, 2020 NSSC 346.

[107] **3** - I am satisfied that, writ large, his motivation is instrumental – that is, a means to achieve an end.

[108] Although Dr. Lohrasbe stated that Mr. Melvin resorts to violence in both a reactive, impulsive way, and in an instrumental (or more thought-through) manner in order to gain something he wants, I conclude that the instrumental motivation is ingrained and continues to dominate his behaviour; that it significantly more so has fuelled his harmful behaviour in the past; and subject to a complete turn-around of his criminal sub-culture based beliefs, and <u>sustained</u> changes by Mr. Melvin, his instrumental motivation will continue to fuel his "pattern" of criminal behaviour.

[109] It is clear that Mr. Melvin adopted the tenets of an anti-prosocial criminal sub-culture very early in his life, and he continues to cling to these norms. According to Dr. Lohrasbe, he has significantly impaired self-regulation. Consequently, his externalized behaviour manifests the indicia of his beliefs: he presents as, acts as, and wishes to be seen as, a dangerous criminal. He has deliberately cultivated a public *persona* for himself - that public notoriety and status within the criminal subculture, including a reputation for violence, is what he seeks to have, and seeks to perpetuate. It has come to define him - all too well.

[110] His repeated use of spit and feces, threats to cause death, actual and attempted physical violence, are motivated by his ingrained anti-authority and criminal sub-culture personality features. He resents, and at all times will resist, any State exercised authority over him. To this end, he is highly motivated to intimidate and retaliate against agents of the State, and anyone else who interferes with his liberty to do as he pleases.

[111] The following exchange with Dr. Lohrasbe adds weight to my conclusion that there is usually a real risk of significant psychological harm to victims, of

having feces thrown at them, striking the face area in particular, or threats to do physical harm, including to wound or kill them or their family members:[36]

> "Question – … Do you, in your opinion equate a threat of violence as a violent act?
>
> Answer – oh yes, it's well accepted in the literature that- when I say the literature, I'm talking about the mental health literature on risk- that significant threats to, meaning you know, that any reasonable person would view as having an impact on the person at the receiving end, should be viewed as an act of violence. Because *the effect, the psychological effect can be sometimes far greater than physically inflicted violence*.… Independent of what the offender may at intend or want from what he does, the reality is that some people are deeply affected by credible threats. Particularly we know when they go beyond, you know, I could smash your face and go on to, you know, I've got my buddies looking out for you or something like that. That goes a step further, it frightens people and can affect them and causes great harm.
>
> Question- and *when you threaten to rape, kill or behead a member of the victim's family, does that have the equal effect on that, on that person*? And *in particular, correctional guards* in this particular case.
>
> Answer – yeah, I mean those are especially vicious if I can put it that way, and *their effect can be far more*. I mean, I've been at the receiving end of threats like that, so I know personally how upsetting it can be and destabilizing it can be. So, like I said, independent of whatever an offender may hope to achieve, the reality is that *the impact, the psychological impact on the person at the receiving end can be tremendous*."[37]
>
> [My italicization added]

[36] See also the Court's comments in *R v McRae*, 2013 SCC 68 at para. 24: "Threats are tools of intimidation and violence."

[37] Correctional staff, including Sheriffs' staff at courthouses and elsewhere are vulnerable, merely by virtue of their occupation, to violence (verbal and physical) inflicted by inmates. They are easy and available targets; in spite of violence against them, they may be required to continue working in that same environment. It is wrong to accept the notion that violence against them is "just part of the job" and therefore sentences for such crimes against them should be less than had the violence involved other victims in the public. As do other law enforcement professionals, correctional staff are expected to maintain order. Their work can be very challenging, and when they are threatened, or physically assaulted in carrying out their duties, courts should recall that they are "peace officers" and "justice system participants" - therefore courts *must* give *primary* consideration to their protection by a proportionate assessment of the objectives of denunciation and deterrence of such conduct - s. 718.02 *CC* and *R v Lis*, 2020 ONCA 551 at paras. 47-8.

[112] Dr. Lohrasbe has testified in more than 150 dangerous and long-term offender hearings. In his report, he references Mr. Melvin's relevant misconduct as consistent with an anti-social personality disorder, and found noteworthy how unusually ingrained it is with Mr. Melvin (Exhibit 2) at pp. 42-4:

> "*The diagnosis of antisocial personality disorder (ASPD) is clearly applicable to Mr. Melvin*… At first glance Mr. Melvin's notoriety and relentless violence suggest strong psychopathic features and he undoubtedly has some. However, as above, an earlier assessor… concluded that Mr. Melvin would not meet the criteria. Based on my interview impressions, I agree… There is one prominent feature in his history that is very different from what is typically seen among offenders who are strongly psychopathic; Mr. Melvin relentlessly antagonizes people within the system. By and large, strongly psychopathic men learn to 'play' the system to their advantage. *Mr. Melvin's explosiveness suggests deficient self-regulation that is of a different kind – relentlessly self-destructive as well as violent towards others – than typical in psychopathy and more of kind associated with childhood/adolescent ADHD.*… Personality disorders are only diagnosed when personality dysfunction is long-standing, more or less continuous, and pervasive in its impact on various realms of the person's life [work, friendships, intimate relationships]. Typically, personality disorders become manifest in adolescence or at latest in early adulthood. *People with personality disorders do not function well in the community at multiple levels, as they tend to alienate many if not most people they encounter. They lack insight or inward knowledge and also misapprehend how his actions affect others, and persistently show persistently poor judgement*… At age 36 years, it is unlikely that sorting out 'what diagnosis is relevant to what' is possible, or necessary. *For risk and its management, the central issue is Mr. Melvin's impaired self-regulation.*"
>
> [My italicization added]

[113] What then can be said is the "pattern"?; or as Justice Bourgeois put it: "the 'common thread' weaving a series of behaviours into a pattern as contemplated by s. 753(1) (for example, here the appellant alleges a pattern of violence against unsuspecting victims, clearly requiring a consideration of the context in which behaviour arises)".

[114] As Judge Derrick pointed out in *Shea* at para. 406, it is for the presiding Judge, not psychiatrists, the Crown or the Defence, to determine the key elements of the pattern of behaviour. My determination may be based upon a blend of relevant evidence sourced in Mr. Melvin's past criminal acts (proved beyond a reasonable doubt before me) and record of convictions; extrinsic evidence relevant to those past acts and the circumstances surrounding them; and psychiatric opinion about that conduct (para. 405).

[115] Bearing in mind the Supreme Court of Canada's reasons in *Boutilier*,[38] and the Court of Appeal's comments in *Shea*,[39] I find Judge Derrick's following statements to be a helpful starting point in assessing the "pattern" issue in the case at Bar:

> *The Legislated Criteria for a Dangerous Offender Designation*
>
> 21 *The Crown submits that Mr. Shea qualifies for a dangerous offender designation under either of sections 753.1(a)(i) or (ii)* of the *Criminal Code*. Those sections are as follows:
>
> > 753.(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

[38] Particularly at para. 29, that the reasons in *R v Szostak*, 2014 ONCA 15 that "intractability is no longer a requirement under the current dangerous offender regime", is wrong.

[39] Particularly at paras. 125, 131-138 to the effect that comparative and objective seriousness between the predicate offence and past conduct are not required; and that under the heading "context", Judge Derrick (as she then was) incorrectly used the circumstances of surrounding behaviour as a means of excluding incidents from the pattern analysis. I also note that at para. 24 in *Shea* – Judge Derrick cites paras. 93 and 94 in *Lyons* [1987] 2 S.C.R. 309 – the better paragraph references are in fact: paras. 117-121; and 126-127.

> (a) that the offence for which the offender has been convicted is a serious personal injury offence...and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour, [or]
>
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour...

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

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

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

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

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

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

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

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

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

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

The "Lesser Measures" Options

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

> The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

…

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

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

> that the judge has the discretion to impose either of the other two available forms of sentence.

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

The Rationale for the Pattern Requirement

33 The Supreme Court of Canada in *Lyons* explained the rationale for the pattern requirement: "...it must be established to the satisfaction of the court that the offence for which the person has been convicted is not an isolated occurrence, but part of a pattern of behavior which has involved violence, aggressive or brutal conduct..." If a pattern of conduct is found, then "it must be established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others..." (*Lyons, paragraph 43*)

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

No Pattern, No Threat

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

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

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

> What happened here? As already observed, in finding N. to be a threat, the sentencing judge did not address how the various convictions and other past conduct fit together to form a pattern of behavior sufficient to satisfy the requirements of either s. 753(a)(i) or 753(a)(ii). Nor did the sentencing judge articulate which conduct

> he found fell within s. 753(a)(i) or s. 753(a)(ii) or why. It is true that he summarized N.'s criminal behavior and other evidence at length. But no analysis of how the stated offenses constituted a pattern under ss. 753(a)(i) or (ii) was undertaken other than a general finding of violence and aggression. And while violence and aggression, depending on degree, may very well be sufficient, here that finding was not tethered to any assessment of the degree of harm, whether physical or psychological, caused or threatened by the criminal conduct found to constitute the pattern of behavior.
>
> While the absence of this analysis need not be fatal, the problem is that a careful review of the reasons for judgment reveals two difficulties. First, offences which do not belong on the pattern scale were placed on it. Second, the pattern assessment and the threat assessment were effectively treated as one. And while the reasoning process employed may result in a telescopic finding that an offender is a threat, the judge must be alive to the fact that the Crown must prove that one of the threshold patterns of behavior under s. 753 has been met. Then and only then can the sentencing judge go on to decide whether, on the basis of that evidence, the person is a threat.

What is a Pattern?

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

39 The British Columbia Court of Appeal has noted in *Dow*, [1999] B.C.J. No. 569, that *a pattern consists of three components - repetitive behavior; dangerous behavior that was not restrained in the past; and a likelihood that the same behavior in the future will not be restrained and will cause death or injury*. (*Dow, paragraph 22, referring to section 753(a)(i)*) The Court went on to say that,

> ...in any particular case, for the purposes of describing the pattern, each of the three elements may be particularized in a way that gives individuality to the pattern by indicating specific similarities between one incident at another. But it is important that the process of particularization not result in a level of detail which obscures the common characteristics which embody and reveal the three essential elements of the pattern." (*Dow, paragraph 23*)

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

Features of a Pattern of Behaviour

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

- The focus at the pattern stage of the analysis is on past conduct, not character. (*Neve, paragraph 203*)

- For the predicate offence to be part of the requisite pattern of behaviour, the past behavior must also have involved some degree of violence or attempted violence or endangerment or likely endangerment (whether more or less serious than the predicate offence). (*Neve, paragraph 110*)

- Not every element of the pattern needs to be expressed in the predicate offence; (*Solano, paragraph 4, citing R. v. Lewis, [1984] O.J. No. 3203, (C.A.)*)

- The pattern does not need to be based on prior offences or conduct that would necessarily meet the standard of admissibility as similar fact evidence; (*Solano, paragraph 44, citing R. v. Hartling, [2005] O.J. No. 545 (S.C.J.)*)

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

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

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

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

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

[116] I agree with Judge Derrick (as she then was) that:

"the essential criteria for inclusion in the pattern analysis has to be: incidents that have been proven beyond a reasonable doubt and incidents that involved 'some degree of violence or attempted violence or endangerment or likely endangerment …". (her footnote references *R v Neve*, 1999 ABCA 206, at para. 110 - which must now be read in conjunction with the Court's reasons in *R v Shea*, 2014 NSCA 43);[40] and

that a pattern may be apparent from a series of diverse unselective and opportune incidents of violence, *or* from (as little as two) separate but sufficiently similar incidents of violence (see *Neve*, at paras.111-113).

[117] In summary, Judge Derrick characterized them as follows:

41 Repetitive behaviour under s. 753(a)(i) and persistent aggressive behaviour under s. 753(a)(ii) can be established on two different bases:

[40] Under s. 753(1)(a)(i) "failure to restrain his behaviour" is also a criterion - I keep in mind that Justice Bryson and the majority agreed that, 'restraint' for the purpose of the legislation 'cannot mean being less violent than might otherwise be possible'; rather, it 'refers to a failure to restrain violent behaviour demonstrated by repetition' at paras. 108 and 140 respectively.

> the first is where there are similarities in terms of the kind of offences;
>
> the second where the offences themselves are not similar in kind, but in results, in terms of the degree of violence or aggression inflicted on the victims. Either will do. Thus, the mere fact that an offender commits a variety of crimes does not mean that no pattern exists. (*Neve, paragraph 111*) There is no requirement that the past criminal actions all be of the same or similar form, order or arrangement, though if this has occurred it may well suffice. (*Dow, paragraph 27*)
>
> - As few as two occurrences can constitute a pattern provided there is sufficient similarity; (*Solano, citing R. v. Langevin, [1984] O.J. No. 3159, paragraph 30 (C.A.)*) In *R. v. Jones, [1993] O.J. No. 1321*, the Ontario Court of Appeal explained *Langevin*: "The emphasis [in *Langevin*] on the offences being remarkably similar was not intended as an expansion of the requirement of s. 753(a)(i) of the Code. He was simply commenting that, in *Langevin*, the fact that the similarity was remarkable, compensated for there being but two offences relied on by the Crown."
>
> …
>
> 446 The Alberta Court of Appeal held that "the mere fact that an offender commits a variety of crimes does not mean that no pattern exists. There is no requirement that the past criminal actions all be of the same or similar form, order or arrangement; though if this has occurred, it may well suffice." (*Neve, paragraph 111*)
>
> 447 *Neve* also sets out the two different bases on which a pattern under either section 753.1(a)(i) or (ii) can be established: (1) where there are similarities in terms of the kind of offences; and (2) where dissimilar offences produce similar results, "in terms of the degree of violence or aggression inflicted on the victims." (*Neve, paragraph 111*) Similarity can be found "not only in the types of offences but also in the degree of violence or aggression threatened or inflicted on the victims." (*Neve, paragraph 113*)

[118] Mr. Melvin's pattern of violence is primarily fuelled by an instrumental motivation, his "impaired self regulation (self-awareness, self control and mis-regulation)",[41] and overall, it is connected by a common thread: Mr. Melvin's

[41] As described and discussed by Dr. Lohrasbe in his Report at p. 44 and elsewhere, as well as in his *viva voce* testimony.

desire to maintain and perpetuate a continuing reputation for violence, which sits comfortably with his long-standing choices to behave in a anti-prosocial manner, and to endorse the tenets of a criminal subculture. This reputation gives him what he has wanted: broadly speaking - status in the criminal subculture; and specifically in each circumstance, whether it be in relation to items he wants – in jail or in the community; treatment he wishes - to be "respected" and feared by others, including the victims of his offences; to get his needs met – e.g. regarding his substance abuse, or better treatment by staff in jails, including transfers out of an institution (or segregation), and the like.

[119] I conclude that his pattern of behaviour is reflected in each of the proposed pattern incidents[42] and the September 26, 2020, offences in relation to Joshua Preeper, and that they all satisfy the criteria in both s. 753(1)(a) (i) and (ii) *CC*.[43]

[42] Including number 5, the throwing of a shirt at the Director of the CNSCF knocking off his glasses in response to denial of a transfer – while no physical injury is reported, the audacity to attack the senior supervisor of the CNSCF in that manner is to show that no one is safe, and to intimidate, and encourage more favourable responses. Combined with the supervisor's inside knowledge and beliefs regarding Mr. Melvin's reputation and position in a Recognized Security Threat group, a low level assault like this would be taken much more seriously than it would otherwise, and be expected to cause significant psychological harm.

[43] I agree with Judge Derrick's statement in *Shea* at para. 404: "I find that the standard of conduct for persistent aggressive behaviour under section 753.1(a)(ii) cannot be significantly divergent from what is contemplated for a pattern of behaviour under section 753.1(a)(i) *CC*." I also recognize that, among the proposed "pattern" incidents, and specifically those that I find represent a "pattern", there are some which could be characterized as diverse, unselective and opportune violence, and others that could be characterized as sufficiently similar.

[120] Next, as part of the "designation" phase of this dangerous offender hearing, I must consider whether Mr. Melvin's patterns of behaviour are "intractable".[44]

It is Mr. Melvin's pattern of criminality intractable?[45]

[121] This consideration is centred on a finding that Mr. Melvin's past "pattern" behaviour is highly likely to continue in future, and considering whether: he would sincerely avail himself of the recommended treatment options that could realistically be made available to him; and if so, would his risk for violent recidivism reliably be reduced to a point at which he no longer should be *designated* a dangerous offender?

[122] The Supreme Court of Canada reiterated that the prospective assessment of risk is both a factor at the designation and penalty stages in dangerous offender hearings - see *Boutilier*, 2017 SCC 64:

> 34 A provision imposing an indeterminate detention is therefore not overbroad if it is carefully "confined in its application to those habitual criminals who are dangerous to others": *Lyons*, at p. 323. **For an offender to be so "dangerous"** as to render the "clearest

[44] Whether Mr. Melvin's behaviour is intractable is *also* an important consideration at the "penalty" phase, where a court considers whether an indeterminate sentence, a determinate sentence with a long-term offender order or merely a determinate sentence is the appropriate disposition.

[45] In *Boutilier*, at paras. 25-7, Justice Côté characterized the remaining core requirements for the dangerous offender designation, after it is been established that the predicate offence is a 'serious personal injury offence' and is part of the required broader pattern of violence, as "a high risk of recidivism and intractability [of the violent conduct]" (para. 35). She cites Justice LaForest, in *Lyons*, who stated that 'the court must be satisfied that the pattern of conduct is substantially or pathologically intractable.' She goes on to state: "I understand 'intractable' conduct as meaning behaviour that the offender is unable to surmount."

and most extreme form" of preventive sentence a rational means to achieve the purpose of public safety, **the offender must pose a future "threat" to public safety**. This threat, characterized by the elements set out in *Lyons*, must consequently elevate the sentencing objective of segregation from [page958] society, at least in part, over the other objectives: *Lyons*, at pp. 328-29.

35 **Determining whether or not a high risk of recidivism and intractability are present necessarily involves a prospective inquiry into whether an offender will continue to be**, *in Justice Dickson's words (as he then was),* **"a real and present danger to life or limb"***: Hatchwell v. The Queen*, [1976] 1 S.C.R. 39, at p. 43. …

36 The jurisprudence of this Court subsequent to *Lyons* has consistently considered a prospective assessment of risk to be a component of dangerous offender applications. In *R. v. Currie*, [1997] 2 S.C.R. 260, Lamer C.J. said that *a judge has to "be satisfied beyond a reasonable doubt of the likelihood of future danger that an offender presents to society before he or she can impose the dangerous offender designation and an indeterminate sentence*": para. 25.1 In *Sipos*, at para. 20, which concerned s. 753(1)(b), this Court explained that designation requires evidence on both the retrospective and the prospective elements.

37 *Indeed, three features of the designation scheme demonstrate the importance of prospective evidence to a finding of dangerousness. First*, the pattern of violence that is proven through evidence of past conduct is future-oriented - it must show a "likelihood" of harmful recidivism "in the future": see the language in s. 753(1)(a). As Neuberger put it, "[t]hough a past pattern may be proved by the Crown, if there is no evidence that such a pattern will necessarily lead to a likelihood of re-offence, the dangerous offender application will fail": J. A. Neuberger, *Assessing Dangerousness: Guide to the Dangerous Offender Application Process* (loose-leaf), at p. 4-27. *A past pattern of violence is considered in the global assessment of an offender's future behaviour, which, in turn, is considered by the court in determining whether the offender constitutes a "threat".*

…

39 *Second*, the *Criminal Code* requires that an assessment report be filed before a dangerous offender application can proceed: ss. 752.1 and 753(1). Usually, the assessment is conducted by a psychiatrist or psychologist: Neuberger, at p. 2-1. *This report includes expert evidence on prospective aspects of dangerousness, such as risk factors, probabilities [page960] of recidivism, and treatment prospects*: *R. v. Jones*, [1994] 2 S.C.R. 229; see also *Lyons*, at pp. 364-65.

40 *Third*, s. 757(a) provides that "*evidence of character and repute may be admitted on the question of whether the offender is or is not a dangerous offender*". Such evidence, while grounded in past conduct, is future-oriented - it speaks to the likelihood of harmful recidivism and the intractability of the violent pattern of conduct. If a dangerousness finding could be made without any prospective assessment of risk, this type of reputational

evidence would be irrelevant to the designation, since it tends to show the offender's propensity for future bad acts. *Indeed, it is not highly probative of past conduct, which is better proven by evidence of the prior bad acts themselves.* Thus, by making evidence of character and repute relevant to the designation, this provision strongly suggests that a prospective assessment of future risk is part of the inquiry.

41 *Section 753(1) states that, once the judge is satisfied that the designation criteria are met, the judge "shall" designate the offender as dangerous.* Recall that before the 2008 amendments, the legislation provided that, once these criteria were met, the judge "may" make the designation. Some interveners suggested that this amendment requires the judge to declare an offender dangerous as soon as the statutory criteria are met, even if the judge is not satisfied of his or her future dangerousness. This argument is based on the premise that the statutory criteria for designation are overbroad and might apply to non-dangerous offenders. *However, as explained above, a prospective assessment of the future risk posed by an offender is embedded within the dangerous offender criteria. Thus, a judge "shall" designate an offender as dangerous only if he or she is satisfied beyond a reasonable doubt that the offender actually constitutes a future [page961] threat to safety in light of all the relevant evidence*. Once a judge finds an offender to be a "threat" after a prospective assessment of harmful recidivism and intractability, requiring a further exercise of discretion to determine whether the offender poses a future risk would be unnecessary and would contradict the very conclusion the judge has just reached.

[2] Evidence of Future Treatment Prospects Remains Relevant at Both Stages of the Statutory Scheme

42 *This brings us to the central issue in the instant case, namely whether a sentencing judge is entitled to consider evidence of future treatment prospects when deciding whether to designate an offender as opposed to when imposing a sentence.* Though I recognize that the jurisprudence on this question has been divided, with some courts finding future treatment prospects to be irrelevant at the designation stage (*R. v. Carleton* (1981), 32 A.R. 181 (C.A.), at para. 13, aff'd [1983] 2 S.C.R. 58; *R. v. Sullivan* (1987), 20 O.A.C. 323, at para. 23; *R. v. Newman* (1994), 115 Nfld. & P.E.I.R. 197 (C.A.), at para. 127; *R. v. Oliver* (1997), 114 C.C.C. (3d) 50 (Alta. C.A.), at p. 57), and some finding them to be a relevant consideration (*R. v. Neve*, 1999 ABCA 206, 137 C.C.C. (3d) 97, at para. 241), I cannot agree with the Court of Appeal that the criteria for designation "have never included the future treatability of the offender": para. 53. *An offender's future treatment prospects are, and have always been, a relevant consideration at the designation stage.*

43 As the assessment of prospective risk described above is concerned with whether an offender will continue to be "a real and present danger", being unable to surmount his or her violent [page962] conduct, the sentencing judge must consider all retrospective and prospective evidence relating to the continuing nature of this risk, including future treatment prospects**.** Furthermore, I am of the view that confining the consideration of treatability to the choice of penalty under s. 753(4.1) rests on a theoretical distinction between the designation stage and the penalty stage that is neither practical nor useful.

44 Given that a dangerous offender application is typically conducted in one hearing, it would be artificial to distinguish evidence that should be considered to designate an offender as dangerous from evidence that should be considered to determine the appropriate sentence. *All of the evidence adduced during a dangerous offender hearing must be considered at both stages of the sentencing judge's analysis, though for the purpose of making different findings related to different legal criteria. During the application hearing, the Crown or the accused must present any prospective evidence concerning risk, intractability, or treatment programs, including the required assessment report addressing prospective treatment options. Many aspects of clinical evaluations provide evidence going to both the assessment of the offender's future risk and the sentence necessary to manage this risk:*

> Clinical evaluations identifying the presence of enduring mental illnesses and their treatability, presence of deeply ingrained personality traits or personality disorders that are likely to persist with time, sexual deviations, and substance-use disorders all become relevant in understanding the meaning of repetitive behaviours, persistent aggressive behaviours, and their relationship to the predicate offence/offences. The presence of impulsivity, lack of empathy, and need for immediate gratification at the expense of others will assist the court in examining whether the risk assessment and management of risk factors are related to the statutory tests concerned. [Emphasis added; footnotes omitted.]

(Neuberger, at p. 2-37)

45 *The same prospective evidence of treatability plays a different role at the different stages of the judge's decision-making process.* **At the designation stage, treatability informs the decision on the threat posed by an offender, whereas at the penalty stage, it helps determine the appropriate sentence to manage this threat. Thus, offenders will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable**: see Neuberger, at p. 7-1, by M. Henschel. **However, even where the treatment prospects are not compelling enough to affect the judge's conclusion on dangerousness, they will still be relevant in choosing the sentence required to adequately protect the public.**

(3) Conclusion

46 *In sum, a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention*. This necessarily involves the consideration of future treatment prospects. Had the prospective aspects of the dangerousness criteria been removed by the 2008 amendments, the constitutionality of the

> provision might have required a deeper analysis. But that is not the case. The sentencing judge erred in concluding otherwise. Accordingly, this Court need not revisit its decision in *Lyons* as to the constitutionality of s. 753(1).
>
> [My italicization and bolding added]

[123] My task is aptly characterized in Boutilier:

> 43 As the assessment of prospective risk described above is concerned with **whether an offender will continue to be "a real and present danger", being unable to surmount his or her violent [page962] conduct**, the sentencing judge **must consider all retrospective and prospective evidence relating to the continuing nature of this risk, including future treatment prospects.** Furthermore, I am of the view that confining the consideration of treatability to the choice of penalty under s. 753(4.1) rests on a theoretical distinction between the designation stage and the penalty stage that is neither practical nor useful.

[124] I conclude beyond a reasonable doubt that Mr. Melvin will continue to be, a 'real and present danger', and unable to surmount his violent conduct in future, given the realistically available treatment/intervention options in the community and in correctional facilities. I will next examine Dr. Lohrasbe's opinion evidence regarding those two aspects. I accept his opinions thereon, and find support therefor in the evidence available to me.

What does Dr. Lohrasbe conclude about Mr. Melvin's treatability, and how much weight can I give his opinion?[46]

[46] Dr. Lohrasbe is highly qualified to give this form of opinion evidence. I accept his evidence – he presented his report and testimony in an impartial, independent and compelling manner that gives the court a very high level of confidence in his opinion. I am satisfied that I should give the corresponding weight to his opinion, *inter alia*, because of his vast experience and expertise, the fact that in the case of Mr. Melvin Dr. Lohrasbe has had the benefit of "multiple eyes across long stretches of time" regarding psychiatric assessments; he testified that the data available in this case for his consideration "is far greater… than in many others… It is very consistent in depicting Mr. Melvin… The overall picture is quite clear." Moreover, the bases for his opinions are manifold, well documented

[125] In his report dated September 15, 2018, he stated based on the information available to him *at that time*:[47]

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and admissible. Dr. Lohrasbe's opinions are based on second-hand reports as well as information provided directly by Mr. Melvin. Dr. Lohrasbe has been appointed by the court pursuant to the procedure contemplated by s. 752.1 *CC*. The purpose is to assess Mr. Melvin after my conclusion that "there are reasonable grounds to believe that [Mr. Melvin]… might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1". Regarding the information provided directly by Mr. Melvin, a question arises whether his statements may be accepted by the court or must be proved independently if the court would wish to rely upon them. I incline to the former view. I am also fortified in my position by the reasons in *R v Paul*, (2010) 262 CCC (3d) 490 (ONCA) at paras. 31-42 Leave to appeal refused March 10, 2011 - [2010] SCCA No. 452 - which was cited with approval in *R v Boutilier*, 2015 BCSC 901 at para. 95 - which itself was a dangerous offender hearing, with similarities to Mr. Melvin's circumstances, and was upheld ultimately: 2017 SCC 64. Mr. Melvin was under no legal obligation to speak to Dr. Lohrasbe. The evidence suggests that he voluntarily provided this information while represented by counsel and was well aware of its intended purpose. His counsel has not objected to any of the contents of Dr. Lohrasbe's report. In *R v Phinn*, 2015 NSCA 27 the majority discussed sections 723 and 724 *CC* between paras. 46-50, and referenced with approval *R v Ladue*, 2011 BCCA 101 where the offender had provided the sentencing court with excerpts from correctional services reports and complied further when the judge asked to view the entire reports. The sentencing judge referenced information beyond what the offender had initially submitted in the excerpts, and the Court of Appeal found they had properly done so, because the offender did not clearly and unequivocally dispute those facts beyond the excerpts relied upon by the judge. Moreover in *Phinn*, the majority stated in relation to the use of the term 'information' contained in section 724(1) *CC*: "the nature and type of 'information' which a sentencing court may consider, especially where introduced with the consent of both parties, is broad." Notably in Mr. Melvin's case, he did not discuss any of the circumstances of the predicate offences – such information should not be included in presentence reports, forensic assessments, and Gladue reports - see for example the reasons in *R v Alcorn*, 2015 ABCA 182 and *R v Corbiere*, 2017 ABCA 164.

[47] Although Dr. Lohrasbe testified in July 2020, and his report is dated September 2018, I am satisfied that the significant factual references and his conclusions in his Report were still relevant, reliable and reflected his opinion when he testified. Where he supplemented or modified his opinion, I accept his testimony as his last word thereon, and find his evidence, was given in an independent and impartial manner, and is both reliable and compelling. I believe it helpful in this extraordinary case, to set out significant portions of his risk assessment from his Report, however I have certainly considered other relevant materials properly admissible for this purpose, and have factored in his commentary on the relevant issues from his testimony. He testified that it was "discouraging", in relation to Mr. Melvin's potential for rehabilitation and his continued risk for violent recidivism, that just a week earlier Mr. Melvin had been found in possession of a needle, lighter and razor blade on being searched at the CNSCF in Burnside Nova Scotia, where he was staying throughout the anticipated testimony for this hearing in July. In addition, I also have available to me the facts of the September 26, 2020 incident involving Joshua Peeper. Given Dr. Lohrasbe's report and testimony, I am satisfied that he would find this incident relevant to Mr. Melvin's risk and treatability - and I suggest he would find it "very discouraging" in relation to Mr. Melvin's potential for rehabilitation/treatability and his continued risk for violent recidivism. He testified: "…any act of violence simply keeps elevating the risk assessment, elevating, in the sense of confirming, consolidating the idea that he is at high risk for acts of violence." (p. 123 Transcript July 6, 2020)

"Mr. Melvin then extended his criticism to the correctional system and the lack of treatment and rehabilitative services. He insisted that he had cooperated with treatment when it was offered to him and encouraged me to contact Dr. Kronfli to confirm his compliance.

Mr. Melvin then expressed an interest in participating in any programs deemed appropriate for him. He listened attentively as I explained the basics of the high intensity multitarget violent offender program. He was made aware that participation would entail him engaging in a detailed exploration of his criminal history and violence in particular in order to identify the full range of risk factors that have driven his criminality and violence. He appeared to be listening carefully, voiced some ambivalence and fear… Then added 'but I know this is it for me… He knew 'for sure' that if he gets an opportunity to reintegrate into the community, it will be the last one." (p. 38)[48]

…

2. Substance use disorders (SUD)

There is little doubt that SUD [substance use disorders] has had a powerful and negative impact on Mr. Melvin from an early age, and has **long been closely linked to his criminal and violent behaviours and further undermining any hope of effective management of ADHD**.

As mentioned earlier, incarceration and even relative isolation within jails/prisons has not curbed his appetite, nor, if he is reporting accurately, his access to a range of drugs, including crystal amphetamine.

As with ADHD, substances of abuse do not by themselves 'cause' violence in some disembodied way - most people do not commit criminal or violent acts when intoxicated. Nonetheless, substance abuse has a prominent correlation with interpersonal violence in our society. With Mr. Melvin, the dominance of substance abuse as a risk factor can

[48] Mr. Melvin presented himself to Dr. Lohrasbe in the summer of 2018 as being interested in participating in any programs deemed appropriate for him. However, there is no evidence that in the two years since then, particularly after Mr. Melvin would've been aware (by October 2018 at the latest) of Dr. Lohrasbe's unfavourable conclusions (regarding his high risk to violently reoffend and no evidence that he is prepared to engage the rehabilitative processes that would reduce his risk) that he has made any effort to investigate and undertake any opportunities to address his risk factors, most notably the dynamic factors [antisocial personality pattern; pro-criminal attitudes; social supports for crime; substance abuse; family and marital relationships; school and work; prosocial recreational activities]. I heard evidence from Dr. Lohrasbe regarding the high intensity multitarget violent offender program, (he has greater familiarity with the operation of the program at British Columbia federal correctional institutions - pp. 40-1, Transcript July 7, 2020)); he also referenced this generally as the Risk Need Responsivity model at p. 49 of his Report. In this respect I also heard about programming in federal institutions/and in the community from Robyn Gay CSC Parole Officer since 2005 and Julie Dickie CSC Parole Officer since 2007. I further notice that in Judge Derrick's decision in *Shea*, 2014 NSPC 78, she attached Appendix "A" entitled: Correctional Service of Canada Programming for Violent Offenders, which is consistent with the programming available in 2020.

plainly be seen by considering the four broad ways in which alcohol and drugs enhance risk for violence.

The first is *physiological*, via direct chemical influence on neuronal and hence mental functioning during intoxication and withdrawal. Both when 'high' and when 'getting dry', substance abuse impairs impulse control, heightens emotional reactivity and volatility, promote paranoid tendencies, and even precipitate psychotic symptoms in those who are predisposed, all of which can enhance the likelihood of violence.

The second is *situational*; for many chronic abusers the setting within which consumption occurs (parties, bars, street corners, crack shacks, etc.) tend to be those that promote rowdiness, fearfulness, machismo, and violence.

The third is thorough *economic* pressure; cravings for more alcohol or drugs and the need to maintain a supply can lead to property crimes, with its associated potential for instrumental violence.

The fourth is through the drug *subculture*, an extension and intensification of the situational link, due to the more pervasive presence of threat and violence that goes all the way to gangs and 'turf wars' directly linked with many acts of serious violence.

All four links between substance abuse and violence have been relevant to Mr. Melvin's risk for violence.

3. Personality disorders

The diagnosis of Antisocial Personality Disorder (ASPD) is clearly applicable to Mr. Melvin. This diagnosis is based on a history of repeated lawbreaking typically associated with a broad range of troubling behaviours such as irresponsibility, irritability, aggression, recklessness, and impulsivity. Frequently applied to people who have repeatedly been incarcerated, the diagnosis of ASPD has been criticized because it overlaps heavily with the concept of 'chronic criminality'. Being omnipresent among repeat offenders, this diagnosis is of limited value as a guide to risk and treatability.

Somewhat more useful for those purposes is the 'diagnosis' (not a formal diagnosis in the current diagnostic nomenclature, DSM5) of Psychopathic Personality Disorder (also termed Psychopathy), applied to a subset of people with ASPD and sometimes regarded as a severe form of ASPD. The diagnosis is relevant since such individuals are often resistant to treatment and change, and frequently drop out of treatment. Prominent with Psychopathic Personality are features such as lack of guilt, empathy, and remorse. Interpersonally, people with Psychopathic Personality are glib, shallow, demanding, manipulative, antagonistic, domineering, controlling, evasive, and relentlessly self-centered.

At first glance, Mr. Melvin's notoriety and relentless violence suggest strong psychopathic features and he undoubtedly has some. However, as above, an earlier

assessor had applied the PCL-R, a common instrument for making this 'diagnosis', and concluded that **Mr. Melvin would not meet the criteria. Based on my interview impressions, I agree**. His interpersonal presentation is not of the glib, smooth, type seen in classical psychopaths, not does he have the superficial charm that is characteristic of this dysfunction. In fact, there is one prominent feature in his history that is very different from what is typically seen among offenders who are strongly psychopathic; Mr. Melvin relentlessly antagonizes people within the system. By and large, strongly psychopathic men learn to 'play' the system to their advantage. **Mr. Melvin's explosiveness suggests deficient self-regulation that is of a different kind - relentlessly self-destructive as well as violent toward others - than typical in psychopathy and more of the kind associated with childhood/adolescent ADHD.**

Earlier assessors have mentioned narcissistic and paranoid features to his personality (they often go together). While narcissism was present to some degree during the interview with me, paranoia was much more prominent. However, it is extremely difficult to disentangle environmental factors from established personality with Mr. Melvin. He has lived his life between two paranoia-promoting environments, alternating between the criminal subculture on the street and the interpersonally-hostile world of incarceration. He most certainly has paranoid personality traits, and has had periods of paranoid dysfunction, but **whether he has a full-fledged paranoid personality disorder will only become clear if and when he is free of substance abuse and living a crime-free life in the community.**

(**Personality *traits* refer to each individual's characteristic ways of feeling, thinking, and interacting with others**; the particular and often subtle ways in which all people differ from one another. Most people have multiple distinctive personality traits, and many tend to 'cluster' together, such that every person has a specific constellation of personality traits. Even when prominent and noticeable, personality traits are not in themselves problematic. Some, such as obsessive-compulsive traits, are especially valued among high functioning professionals, and narcissistic traits can provide dynamism and motivation to creative artists and those who seek political power. Personality *dysfunction* typically occurs at times of acute stress. What were previously unique but non-interfering traits become problematic as those traits become magnified and unbalanced when the person is under stress or in unusual circumstances. However, the dysfunction is transient and situationally-driven [a boss with obsessive-compulsive traits becomes unusually rigid and unyielding, one with narcissistic traits becomes unusually rude and obnoxious with underlings, etc.]. Most people can, in retrospect, acknowledge their dysfunction and learn to anticipate and head off the more destructive manifestations of personality dysfunction. That is, they develop insight and maturity and learn to minimize the damaging interpersonal aspects of their personality traits during later times of stress. Few people entirely escape such episodes of personality dysfunction over the course of a lifetime.

Personality *disorders* are only diagnosed when personality dysfunction is longstanding, more or less continuous, **and pervasive in its impact on various realms of the person's life** [work, friendships, intimate relationships]. Typically, personality disorders become manifest in adolescence or at latest in early adulthood. People with personality disorders do not function well in the community at multiple levels, as they tend

to alienate many if not most people they encounter. They lack insight or inward knowledge and also misapprehends how his actions affect others, and persistently show persistently poor judgement.)

It is possible that Mr. Melvin paranoid traits and dysfunctional attitudes have become entrenched into an overt disorder and will manifest even if he manages to live a life that is free of drug and crime; but at this point we simply do not know.

…

At age 36 years, it is unlikely that sorting out 'what diagnosis is relevant to what' is possible, or necessary. **For risk and its management, the central issue is Mr. Melvin's impaired self-regulation.**

5. Self-regulation (**self-awareness, self-control, and mis-regulation**)

Psychiatric disorders do not in themselves explain violence but particular disorders can include persistently impaired self-regulation, and recent research has emphasized the relationship between self-regulation and violence. **Self-awareness** (consciously thinking about one's own thoughts, feelings, speech, behaviours) is developed slowly and cumulatively early in life and **is a pre-condition for self-regulation**. When a person is not self-aware, he can react automatically, mindlessly, and impulsively in reaction to situational pressures. **Hence self- awareness has been identified as the critical variable that determines whether behavior is reactive and influenced primarily by situations, versus being driven primarily by consciously chosen goals.**

Self-control refers to behaviour, including speech, that involves the overriding of an immediate urge (wish, desire, action-tendency) in order to attain another, more distant goal. Self-regulation is a broader term which includes self-control but also the habitual management of thoughts and emotions, beyond immediate behavioural control, to attain long-term goals.

A widely accepted theory of the development of self-awareness, regulation and control (together, SARC) posits that in any individual that most important (not 'only') influence in SARC development is the influence of socialization by his parents early in life especially those that monitor the child's behaviour, recognize deviant behaviour, and appropriately/effectively punish deviant behaviour while rewarding positive behaviours. The critical phrase is 'early in life', as many developmental theorists believe that by around age 8 or 9 years a person's relative level of self-regulation has largely been established and is then less amenable to shaping by parents, other adults, and societal forces.

Mis-regulation occurs when a person exerts control in a way that does not bring about the desired result. A classic example is smoking: smokers 'feel better' in some way when they indulge in their habit, hence exerting control over mood/anxiety. The short-term alleviation

of negative affect (improvement of mood/reduction of stress) overrides the long-term goals (financial, social, health) resulting from quitting. Immediate affect is regulated but at the cost of far more important and desired outcomes. The principle of mis-regulation applies to many dysfunctional behaviours that are controlled where temporal salience trumps long-term benefit.

Poor self-awareness, self-regulation, and self-control, as well as mis-regulation are prominent features in Mr. Melvin's history. They overlap with psychiatric dysfunctions, including all three discussed above and are prominent aspects of ADHD; hence the value of early intervention for that disorder. **They remain closely linked to each other and to his risk for violence and will need to be targeted for effective treatment and risk management.**

6. Institutionalization and Isolation

The words 'institutionalization' and 'institutionalized' can be used to denote a variety of psychosocial adaptations to the prison environment. **With Mr. Melvin, a prominent feature is rebellion against authority, common in younger men but has been unusually persistent with him.**

Driven by perceptions of victimization, chronic and intense anger can be a feature of institutionalization and can promote a widening circle of beliefs that get increasingly disconnected from objective reality. As mentioned above, at times Mr. Melvin made allegations and assertions that evoked collusions among individuals and systems all with him as their target. While at times he came across as a paranoid 'conspiracy theorist', I agree with Dr. Siddhartha, as quoted in the file review, that **his beliefs are better characterized as overvalued ideas rather than outright delusions. (It should be noted that over time, the former can consolidate into the latter**; what was a distortion of reality advances to an outright break with reality. The boundaries are not rigid).

Anger is the dominant and recurrent theme in Mr. Melvin's history and his rebelliousness goes back to his childhood as does his contempt and hostility toward authority figures, sometimes resulting in overt violence toward correctional officers. **He was an angry child even before he was incarcerated and hence institutionalization cannot be said to have 'caused' his anger and associated attitudes and behaviours. Institutionalization has however deepened his mistrust and loathing for those that symbolize the 'system'.** He feels dehumanized by them which in turn justifies his own dehumanization of those who hold power over him. **It is a vicious cycle, long established.**

Nevertheless, the process is not absolute and he has retained the capacity to remain friendly with those officers who he believes do not 'have it in' for him. This was apparent in his lighthearted demeanour with the officers who escorted him to and from the interview room and in his comments that he has recently been treated more fairly and has often been assigned officers who do not treat him with disrespect.

Institutionalization refers to more than hostility and dehumanization. Within jails and prisons, rigid rules enforce routine and structure, with little room for choice or decision making. **Over time the effect is often to infantilize the offender. Although unavoidable, this has been particularly undesirable for Mr. Melvin, given that he has rejected taking responsibility for his actions for much of his life.** He is street smart but unaccustomed to applying healthy strategies for coping with frustration, disappointment, and conflict. The system provides him an ongoing foil and justifies, for him, his reactive and immature behaviours.

Moreover, **it is now well established that prolonged periods of isolation can lead to a host of negative consequences for any person's mental health.** To list each potential psychiatric disorder would be to list most psychiatric disorders, since a full range of symptoms have been described in the literature. Psychosis and suicide are perhaps the most severe acute sequelae.

Two broad groups of variables influence the kind and degree of mental health consequences. The first are *external*, things like physical layout of cell, lighting, cleanliness, facilities, time outside of cell per day, frequency and duration of contact with other people including other offenders, visiting family, correctional officers, or health professionals. **It is also universally acknowledged that the duration of isolation is a major factor in the precipitation or exacerbation of mental health problems.** Hence there has been a steady shift towards shorter periods of isolation in Canada and elsewhere.

The second is *internal*, that which the offender 'brings to' the situation, his preexisting vulnerabilities that may render the person especially susceptible to the negative mental health effects of isolation. It is this issue of pre-existing vulnerability that likely accounts for the discrepancies in some of the research about the acute and chronic effects of isolation.

The above is a very brief summary of the research of the effects of isolation, a growing body of knowledge that provides the impetus for three widely recognized principles:

i. Necessity: Given the well-known negative consequences, use isolation as a last resort.

ii. Selectivity: Especially avoid prolonged isolation of those who have pre-existing mental vulnerabilities.

iii. Duration: Keep isolation as short as possible.

I hasten to add that the above is descriptive and is not intended as a criticism. I am acutely aware that options are very limited when attempting to assert control over a chronically acting-out inmate, as exemplified in the exchange between Judge Levy and Mr. Melvin's mother when he was yet a teen, as extracted in the file review. **Mr. Melvin has made it**

> **extraordinarily difficult for correctional authorities to offer him less restrictive options.**[49]
>
> [My bolding added]

[126] Next, Dr. Lohrasbe goes on in his Report to his Risk Assessment vis-à-vis Mr. Melvin's likelihood of committing further acts of violence, and concludes that as of September 2018, that risk is **high**.

[127] While Dr. Lohrasbe does not discount entirely Mr. Melvin taking some steps to address his risk factors (which would be a rational response if one were facing being incarcerated indeterminately, with the option of satisfying the Parole Board that some limited form of release is appropriate), he points out that "treatability" is not an "either/or" proposition. However, he did note that generally, treatability outcomes are "extremely unpredictable". Moreover, Mr. Melvin has problems in each of the eight categories or factors associated with 'high risk'. Mr. Melvin has a 'high need' for **all** of those factors to be addressed.[50]

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[49] I agree with Dr. Lohrasbe's conclusion – this is an example of the ingrained and profound impaired self-regulation Mr. Melvin exhibits. Like any other offender, Mr. Melvin is entitled to seek relief from segregation or other residual deprivations of liberty he experiences while in correctional facilities by virtue of making an application to this Court for *habeas corpus*- see *Pratt v Nova Scotia (Attorney General),* 2020 NSCA 39. Mr. Melvin has had many counsel throughout the years. I'm confident that he is aware of the *habeas corpus* remedy. There is no evidence that he has ever availed himself of that remedy – this seems rather odd considering how much time he has spent in segregation as an adult in particular – however, it is consistent with his belief in never cooperating with State authorities in any context – even if to his obvious own detriment – e.g. refusing to take part in available programs while incarcerated and hope for earlier release.

[50] The Crown presented a number of useful factors as commonly considered in the jurisprudence regarding s. 753(4.1) *CC* and whether a "reasonable expectation" exists that a lesser measure than indeterminate detention will adequately protect the public: **1**-the personality profile of the accused – is relevant to offending behaviour and

[128] In his testimony, after taking into account additional information since his Report (September 2018) to the date of his testimony, Dr. Lohrasbe was of the opinion that presently Mr. Melvin is not motivated to change and be dedicated to making true changes by fully engaging the necessary treatment options (including with therapists and counselling regarding his risk factors) which could lead to a change in his ingrained attitudes and behaviours, thereby reducing his present risk of violent recidivism.

[129] I include large parts of his risk assessment to contextualize my commentary and conclusions:

RISK ASSESSMENT

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whether it can be treated or managed (*R v Judge*, 2013 ONSC 6803 (paras. 261-7)); **2**-the nature and scale of the change needed to manage the risk – if large-scale difficult changes are required and there is little evidence the offender is likely to make the changes, there is less chance of control of the risk (*R v Casemore*, 2009 SKQB 306 paras. 261-269 - affirmed, 2009 SKCA 14); **3**-genuine motivation to pursue change – the sincerity of recent willingness to participate in programs should be assessed in light of past failures and non-compliance (*R v Bruneau*, 2009 BCSC 1089 paras. 232-38); **4**-the presence or absence of pro-social supports and skills - those who will have great difficulty finding employment, no support network in the community or street gang affiliations are unlikely to gain control of their violent tendencies (*R v Innocent*, [2009] OJ No. 3663 (SC), at para. 56, affirmed 2012 ONCA 659); **5**-past history of compliance with court orders – signals prospects for success on conditions of LTO (*R v Kudlak*, 2011 NWTSC 29 at para. 103); **6**-past history in rehabilitative measures and programming – present success requires sincere commitment of the offender (*R v Bruneau*, 2009 BCSC 1089); **7**-the impact of untried treatment programs - "the proposed untested CCS programming was no more than an expression of hope… [and] the trial treatment of a relatively new anti-psychotic medication… was too speculative a measure of future risk reduction… past responses to treatment in the community strongly undercut any suggestion of future compliance" (*R v Solano*, 2014 ONCA 185 at para. 16); **8**-speculative verses confirmed diagnosis - when there is no confirmed diagnosis, it undercuts the claim that if the offender receives treatment for a suspected diagnosis such as ADHD, he will be treatable (e.g. *R v Whitedeer*, 2004 SKQB 268 para. 79); **9**-behaviour of offender while pending disposition – misbehaviour while under threat of dangerous offender designation is a strong indicator of lack of self-control, and enhanced recidivism risk (*R v Gonzalez*, 2013 SKCA 10 at para. 38); **10**-a definite timeframe to successfully manage risk and the [consideration of the "real world" limitations of] resources necessary to manage risk are presently in existence - a) the ability to identify a definite period of time in which risk can be successfully managed, and b) the existence of resources necessary to manage the risk/a failure for either subfactor is sufficient to undermine a suggested reasonable expectation for control in the community (*R v Little*, 2007 ONCA 548 at paras. 8 and 70). I find myself in general agreement with their submissions at paragraphs 61 - 76 in their written brief, filed October 16, 2020.

In the file review I have provided extracts from prior assessments that have addressed risk for violence both explicitly through the use of risk assessment instruments and implicitly through narrative accounts and inferential reasoning. **Repeatedly, prior risk assessments have concluded that Mr. Melvin is at high risk for violence.**

For instance, Dr. Cadieux in 2004 utilized standard instruments and concluded that "*.... his risk is rated high (inside and outside the institution) and his institutional adjustment rating is also high",* conclusions that remain valid to the present.

Such unanimity renders an additional formal and elaborate risk assessment redundant, especially since those assessments occurred before the predicate offenses, which can only serve to 'elevate' prior ratings of risk, no matter what approach or instrument is used.

Nevertheless, given the sentencing context, I will expand on the 'high risk' opinions previously documented by breaking down the concept into some of its constituents relevant to Mr. Melvin.

a. Denial of responsibility

An absolute denial of responsibility by an assessee of offenses for which he has been convicted can place severe limits on a risk assessment, especially if there is little by way of relevant history or prior documentation. Such is not the situation here. Although I am unable to offer the Court a dynamic formulation ('crime cycle', 'crime chain') of what specifically contributed to the predicate offenses, **Mr. Melvin's well-documented history provides abundant information about the kinds of risk factors generally relevant to his risk for violence.**

b. Risk factors

All approaches to risk assessment, whether clinical formulations, actuarial instruments, or structured professional guidelines, are based on identifying risk factors and exploring their relevance to the assessee. **A risk factor is anything** (condition, habit or mind or behaviour, relationship, event, etc.) **that is associated with the occurrence of violence in the offender's history, although causality can be established only occasionally**. More commonly, risk factors seen to be at least of indirect etiological importance for the occurrence of violence in the individual.

Risk for violence is a complex and multifaceted concept. When an opinion is expressed (high, moderate, low) the assumption is that the likelihood of future violence is being addressed, and it is, but other facets of risk include the nature, severity, context, frequency, and imminence of the hazard being predicted. Most risk factors have multifaceted influences, but some may be differentially related to individual facets of risk.

Risk factors fall into four broad categories:

Historical risk factors, including adverse or traumatic childhood experiences, prior criminal and violent behaviours, and prior poor responses to treatment and supervision. These are static factors that are unchangeable. Research has consistently pointed to the enduring power of static risk factors and hence they are the baseline for any risk assessment.

With Mr. Melvin: Historical risk factors are emphatically present and relevant to risk. His childhood was marked by one parent being incarcerated and lack of discipline at home, resulting in poor self-regulation, the 'common denominator' seen in men who commit repeated acts of violence. The onset of his criminality and violence was early and has been persistent, and he has resisted most attempts at external control, direction, and supervision.

Dispositional risk factors, refer primarily to personality traits, dysfunctions, and disorders, especially those reflecting antisocial attitudes, relationships, and habits, all of which make violence more likely. These are dynamic but stable personal factors that tend to evolve slowly with maturity, but more rapidly if the offender is motivated to change and has the support and guidance to sustain that motivation over extended periods of time.

With Mr. Melvin: Dispositional factors are clearly present and relevant to risk. He has a longstanding Anti-social Personality Disorder, with additional Paranoid features (at least traits and dysfunction, and possibly disorder).

Contextual risk factors, such as chaotic intimate relationships, lack of stable employment, and criminal peer/subcultural social networks. These are dynamic situational influences that are amenable to change from personal efforts and choices, as well as through guidance, direction, and supervision.

With Mr. Melvin: Contextual factors are also present and relevant to his risk. He has an established history of rejecting the values of mainstream society and endorsing a 'gangster' lifestyle. His hostility toward the Justice and Correctional systems is severe. Looking ahead, these will be central issues for effective risk management, explored further below.

Clinical risk factors are those that are acute and immediately enhance the possibility of violence, including acute mental dysfunction, acute substance abuse, and intense interpersonal conflicts in the community; these are risk factors most clearly related to the imminence facet of risk. These are dynamic, acute factors that are amenable to monitoring and treatment by correctional and mental health personnel if the individual is carefully supervised.

With Mr. Melvin: **Clinical factors are also present and relevant to risk. A pervasive one is substance abuse**, as intoxication can disinhibit pre-existing or reactive anger. Conflicted interpersonal functioning also appears to be an important risk factor, both for

his in-custody and in-community violence. Paranoia may play a role in particular foci for his anger.

Taken collectively, Mr. Melvin's history indicates that his violence has been driven by a diverse range of risk factors and there is no single or simple path toward desistance from violence. However, as mentioned above, impaired self-regulation (of emotions, thoughts, values, relationships, consumption of substances, etc.) **is the final common denominator**, and to reduce his risk Mr. Melvin will have to learn to be self-aware, continually alert to the diverse range of mental habits that perpetuate his violence. Such a high and continuous degree of self-awareness is a challenging task for most people, and will be more so for Mr. Melvin who has had little training or practise in self-awareness. **Until he demonstrates that he has achieved at least enough self-awareness to exercise behavioural self-control, it will have to be assumed that he remains at high risk for violence both in and out of institutions.**

c. Durability of risk factors and persistence of criminal identity

A striking feature in this case is the early onset and near-continuous presence of the wide range of risk factors discussed above. Mr. Melvin's embrace of a 'gangster' identity has been enduring, as has his intensely hostile rejection of most attempts to help him reconsider the direction of his life. **Most young men tend to outgrow their fascination with criminality as they age and mature; such maturation has been delayed with Mr. Melvin.** Recurrently incarcerated from an early age, he has the kind of immaturity associated with never having taken on an adult role with its accompanying responsibilities in society.

d. Diversity of criminality and violence

Mr. Melvin's convictions are for violent (assault and related, threatening and related, kidnapping, weapons) and for non-violent (property crimes, 'compliance' offenses, drugs and related, vehicular, mischief) offenses. He has been violent within institutions and in the community. His documented history (he was unwilling to discuss the specifics) indicate that his violence has spanned a wide range of severity; at times it has been reactive/emotional/ 'hot', at other times instrumental/predatory/ 'cold'. He is not a 'specialist' offender who is violent only under particular circumstances (which allows for a narrower range of monitoring conditions).

e. Treatability

The word 'treatability' is a neologism but is in widespread use. While its basic meaning (prospects for treatment) is apparent, there is a lack of a universally accepted conceptualization and no particular method or format for its assessment. Clinicians can mean different things when they say that an offender is treatable or untreatable. At one extreme, treatability can be equated with the expectation of 'cure', which in the case of a violent offender would be a guarantee that he will never reoffend. At the other extreme are those who regard a violent offender as being treatable if there is likelihood or even a

possibility that some aspects of his maladaptive and destructive behaviors can be addressed and altered. **In practice there can never be a guarantee of no further violence and it is a rare offender who does not change at all during the course of treatment interventions.**

The Risk-Need-Responsivity (RNR) model, developed in Canada, has been widely accepted as a guide to planning treatment interventions for most violent offenders. Briefly, The RNR model indicates that treatment will be more effective if it matches the level of service and resources to the level of risk posed by the offender (risk principle), if it seeks to address criminogenic needs in the offender that are linked to recidivism and targets them in treatment (need principle) and if cognitive-behavioural therapeutic methods are tailored to the learning style, motivation, abilities, and strengths of the particular individual being treated (responsivity principle).

The RNR posits that of the 'central eight' major predictors of future violence only one, criminal history, is entirely static and there can be targeted changes in the other seven. Examples of matching treatment goals to the other seven include:

Antisocial personality pattern	Build self-management and anger-management skills
Pro-criminal attitudes	Counter rationalizations for crime; build prosocial identity
Social supports for crime	Replace pro-criminal friends and associates with prosocial ones
Substance abuse	Learn alternatives to substance abuse for mood regulation, stress relief, socializing
Family and marital relationships	Enhance attachment and caring, teach parenting skills
School and work	Enhance study and work skills, nurture relationships that support skills
Prosocial recreational activities	Teach prosocial hobbies and sports, encourage participation in prosocial recreational pursuits

Mr. Melvin has all eight of the major/risk need factors associated with high risk. He has never completed a violence offender program (VOP). **Given his history a high-intensity VOP (HI-VOP) is mandatory for any meaningful effort at rehabilitation.** (The name of the program is evolving; **'Multi-target' is included in the title in many provinces)**.

During our interview Mr. Melvin mentioned two matters related to the HI-VOP. Firstly, he stated that if he does not succeed in his appeal then, independent of the particular outcome of sentencing, he is not likely to get parole if he does not successfully complete such a program. Secondly, he has heard that the HI-VOP offers him the best opportunity to truly

work at making sure he does not reoffend, and he knows that if and when he is back in the community, it will be his "*last chance*". Although he expressed some anger at "*being DO'd for something I did not do*" he also stated that his notoriety made it inevitable that he would be "*DO'd*" if he did reoffend.

Whether this awareness of legal jeopardy translates into a genuine and sustained motivation to participate in treatment is of course yet to be seen. On the one hand the cumulative weight of his criminal/violent history and antagonism towards correctional personnel can readily arouse cynicism about his newfound willingness to participate in programs. On the other hand, he now clearly understands what he is up against if he reoffends, and **the fact that he has never participated in a VOP would make it unreasonable to dismiss the possibility of benefiting from a high-intensity treatment program**.

Ideally, the motivation for change in an offender embarking on rehabilitative programs should be heartfelt and internally-driven. This clearly not the case with Mr. Melvin, but in itself the lack of deep, internal motivation to change is not unusual; the proportion of chronic offenders who begin with such internal motivation is relatively low. Most start with superficial and instrumental motivations, driven by the grudging acknowledgement that they must change if they are to avoid further incarcerations. For some, motivation stays superficial and fear-driven. For others (to the delight of their therapists) there is a gradual transformation as the offender experiences the benefits of changes in his attitudes, relationships, and behaviours. It is likely that individual therapy to prepare him for more challenging group-work will help reduce his mistrust and build on his motivation for group programs. 'Primer' group programs are also available in many federal institutions. Following completion of a high-intensity program, many offenders take a less-intense follow up programs while in the institution and then again in the community.

While motivation is key to sustaining effort through treatment programs and the ongoing rehabilitative process, other important predictors of treatment success include the ability to engage with therapists, adequate cognitive capacities, and emotional stability. Despite the disdain he has expressed for psychiatrists and other mental health professionals in his younger days, Mr. Melvin appears to have a different view at this time. As mentioned above he portrayed his relationships with Dr. Kronfli, among others, in a positive light. He had no difficulty establishing rapport with me. Hence he may be at a point where he is more open to exploration and guidance.

His emotional stability and cognitive capacities are likely to weaken or strengthen in tandem. Effective treatment of his ADHD will improve his capacity to focus and sustain his attention, resist distractions, and keep long-term goals in mind, which will improve his mood and his emotional stability. He does not think clearly when angry or despairing, and tends to express his anger and frustration with dire threats that alienate him from those who may otherwise be able to assist.

f. Ageing

Young men are responsible for a large proportion of violence in our society as **aging typically involves multiple physiological, psychological and social changes that slowly encourage desistance from violence**. Although this decline in violence has repeatedly been confirmed by research, it is a group finding and there are exceptions. Nevertheless, **barring strong reasons to reject this expectation of decline of risk with age, it is the default prediction: Mr. Melvin's risk for violence will decline as he ages**.

g. Substance abuse as a concrete marker of commitment to change

Mr. Melvin was candid in his acknowledgement of ongoing, near-daily substance abuse even while in custody. He was a little taken aback when it was put to him that abstinence was going to be necessary for him to participate meaningfully in any intensive programming and that it is hard to envision him successfully turning his life around without abstaining from use of all intoxicants. **The prospect of sobriety clearly daunts him**, but he did grasp the principle.

Given the early onset and severity of his substance use disorder, it is going to be a major challenge for him to live a life of sobriety. His willingness to try – and be honest when he 'slips' - will be a concrete marker of both his motivation and his capacity to change. Without abstinence, there is little prospect for effective treatment. Hence there is a very specific measure for progress both while he is in custody and when back in the community.

h. Risk management

At this point it is far too early to propose specific risk management strategies. **Prior to Mr. Melvin being a reasonable candidate for risk management in the community he will have to demonstrate his commitment to abstinence from substances, participate in and successfully complete a high-intensity violent offender program, demonstrate a far greater degree of behavioural self-control, and consistently be honest, disclosive and cooperative with 'the system'.** Risk management strategies for all violent offenders can be divided into four general categories.

i. *Monitoring* involve frequent appointments to remind him of expectations and consequences, and home visits with a parole officer.
ii. *Supervision* could involve impositions and restrictions, including specific strategies such as restrictions on residence, travel, and being at locations and events where there is a high potential for criminal activity.
iii. *Treatment* on an ongoing basis is likely to include assistance in engaging in (ongoing and as-needed) programs (general support, violent offender maintenance, substance abuse, educational, vocational, etc.).
iv. *Victim safety planning* varies from case to case, depending on identifying the most likely victims or groups.

> The specific content of detailed risk management plan can only be put together when Mr. Melvin is close to being released into the community, since much depends on the particulars, such as progress during the intervening time, professional resources available to him and to his parole supervisors in the community at that time, housing, family supports available for support and circle of supervision.
>
> As things stand, **Mr. Melvin's stance of being a victim of an unfair Justice System detracts him from appreciating the importance of seeing the system as part of his rehabilitation and a critical issue will be his attitudes toward people within 'the system' in the years ahead.** If and when Mr. Melvin gets past his hostility toward the Justice system, he may be able to grasp the principle that full cooperation will assist not just to prevent further victims but also his ability to reside in the community.
>
> *I had noted above that as things stand it would be* ***unreasonable to dismiss the possibility of Mr. Melvin making treatment gains. To actualize that possibility is going to take a tremendous and sustained effort by Mr. Melvin****, especially when it comes to trusting those who work within the justice and correctional system. Any scenario of his rehabilitation into the community works on the principle that 'high risk is not unmanageable risk' and even high risk offenders can be managed in the community if they* ***totally commit to the risk management process and are consistently open, honest, and cooperative. Mr. Melvin has a long way to go from his current mistrust and hostility to what will be required of him for effective risk management in the community.***
>
> Decades of research and clinical experience inform us that benefits from treatment can rapidly dissipate without ongoing maintenance and reinforcement via the strategies outlined above - even where there has been 'treatment success'. **Hence, a very lengthy follow-up with any risk-management plan is critical to its success.**

[130] In his testimony, Dr. Lohrasbe, reiterated that it would be unreasonable to dismiss the possibility of Mr. Melvin benefiting from the high intensity treatment program, however he would have to fully engage therapists and counselling, **before** he would be eligible for entrance into the program.[51]

[51] In his opinion, only *once* Mr. Melvin has demonstrated a far greater degree of control or self-regulation, which would involve being sober, emotionally stable, otherwise motivated and not acting out, would he be eligible for this program, which is the most intensive program available - and goes on for approximately six consecutive months, five days a week at 2.4 hours sessions per day, and can involve additional counselling for specific issues.

[131] Dr. Lohrasbe added that, while "intellectually Mr. Melvin understands", his impression is that Mr. Melvin can't imagine going day-to-day without seeking drugs, and there is really nothing in the materials that would demonstrate that Mr. Melvin can keep his drug use and anger in check for any substantial period of time.[52] Moreover, Mr. Melvin has not yet shown signs of genuine change of heart and motivation to rehabilitate himself to the extent required to significantly reduce his high risk for violent recidivism. To reduce his risk, *inter alia,* Mr. Melvin first must demonstrate for a lengthy period of time, no:

1. verbal and physical assaults;

2. substance abuse; and

3. involvement in the institutional drug trade;

before he then must be honest, disclosive and cooperative with any treatment providers within the context of those treatment programs which could address Mr. Melvin's risk numerous factors.

[132] Dr. Lohrasbe testified that due to Mr. Melvin's established history of rejecting the values of mainstream society and endorsing a gangster lifestyle, these

[52] "He stated that even after his arrest on the predicate charges, there has not been any significant period of abstinence from illegal substances … Mr. Melvin was candid in his acknowledgement of ongoing nearly daily substance abuse even while in custody … without abstinence there is little prospect for effective treatment." (pp. 37 and 51 Report - Exhibit 2)

will be central issues for effective risk management. Until he demonstrates that he has achieved at least enough self-awareness to exercise behavioural self-control, it will have to be presumed that he remains at high risk for violence while *both inside and outside of correctional institutions*. Presently, Mr. Melvin is unmotivated to change.[53]

[133] While the specific content of a detailed risk management plan can only be put together when Mr. Melvin is close to being released into the community, he will have to totally commit to the risk management process, and know that a very lengthy follow-up in the community will be critical to its success.

[134] Dr. Lohrasbe was not encouraged upon reviewing the updated information since his August 2018 interview with Mr. Melvin – it shows continued drug abuse, violence towards corrections staff etc.[54]

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[53] I appreciate that while in the community, Mr. Melvin had a lengthy gap in his record of convictions between the summer of 2013 and his arrest in July 2015. Notably, he was sentenced on December 6, 2011 to 21 months custody and 3 years probation - hence his probation would have ended on September 6, 2016 (September 6, 2013, the Warrant Expiry Date + 3 years per *R v Kelly Dawn Smith*, (1999) 175 NSR (2d) 171 at para. 8 per Chipman JA). Dr. Lohrasbe states that: "Mr. Melvin stated that the longest continuous stretch of time in the community during his entire adulthood was for approximately 23 months between the summer of 2013 and his arrest in July 2015. He stated that he accrued new charges [See Exhibit 31 Dr. Murphy's assessment December 17, 2015 at p. 3 where he describes the July 7, 2015 offences - s. 355 *CC* - these are not recorded as convictions] about a week prior to his arrest on the predicate offences and acknowledges that those charges reflected his criminal activities, including possession of stolen property. He acknowledges that during those two years 'I was smoking crazy drugs'…". (p. 37 Report - Exhibit 2)

[54] Furthermore, Dr. Lohrasbe stated Mr. Melvin's diagnoses of ASPD, SUD, and ADHD are "well established", and "it is possible" that Mr. Melvin has stand-alone delusional disorder/paranoia as a result of his long-standing substance abuse, which adds "one more layer of complexity of treatment he needs".

[135] Dr. Lohrasbe went on to say that each successive piece of evidence of lack of self-control is worrisome because cumulatively this increases the need for caution regarding Mr. Melvin's risk for violent recidivism.

[136] Generally speaking, Dr. Lohrasbe was of the view that because Mr. Melvin has violently offended inside and outside of correctional facilities, he therefore remains at risk of violence in multiple settings- see his testimony, which I accept, at p. 128 - Transcript July 6, 2020:

> Question – and… In Mr. Melvin's case, the fact that he is, had resort, resorted to violence in the community and in some cases if you read the materials, impulsive violence and directed violence, and you see the same sort of attitudes carrying to the correctional centre, what you say about that?
>
> Answer – so, that's a good point, that, okay, it's fine to be cautious in general, but **here we do see sort of patterns, there's a continuity of patterns**. **So even accounting for the unique provocations that may occur within institutions, there are no, there are no good reasons to believe that for Mr. Melvin they are vastly different from the provocations that he may perceive in the community. Because he does resort to violence in multiple settings."**

[137] He noted that Mr. Melvin was assessed as early as February 23, 2004 for having "a moderate to high risk of violent recidivism" (p. 22 of his Report), and that when a pattern of violence becomes particularly well-established the risk of relapse is more likely, because any continuation of violence since 2004 "elevates the risk level over and above previous assessments". The most reliable predictor of violent recidivism is based on the maxim: 'past predicts future' – that is, the past

violence predicts the likelihood of and the kind of violence expected in the future. In relation to Mr. Melvin, he is satisfied that the maxim is a "very reliable one", and that Mr. Melvin's risk level for violent recidivism remains **high**.

[138] Regarding treatability generally Dr. Lohrasbe notes while it's not an "either/or" proposition, treatability outcomes are also generally "extremely unpredictable". In Mr. Melvin's case this is particularly troubling because he has a high need in *all* eight categories of risk factors, and most of those have been in place for over 20 years. During that time interval, Mr. Melvin has not apparently made any serious rehabilitative attempts at addressing any one of those factors.[55]

[139] It was suggested to him in cross-examination that Mr. Melvin should at least be given "an opportunity" to engage the rehabilitation program and process that he requires – Dr. Lohrasbe responded: "**he's a standout – we don't have the tools to deal with him – first the behaviour must be stopped, before we start therapy to achieve insights**… As long as he is using drugs or acting-out, we are really at a standstill."

[55] Dr. Lohrasbe testified that his opinion relies on the "overall accuracy" of the vast documentation provided. This means that inevitably some documents will be inaccurate - however because of "the consistency of the information here, it makes any individual event or document" less likely to effect an overall material inaccuracy which could significantly undermine his opinion evidence. Dr. Lohrasbe indicated that he has "never done an assessment with such a relentless history of antagonism" to correctional and justice system participants, and he characterized Mr. Melvin's circumstances as very "unusual" in this respect.

[140] Dr. Lohrasbe testified that Mr. Melvin sees himself as part of the criminal subculture, which celebrates the expression of anger, and there is no sign that he wishes the change that, which is unusual at his age and stage of life. Because his criminal subculture thinking is "very well ingrained into his psyche, it is very hard to treat." He testified that "more so than any individual I have ever assessed" has Mr. Melvin resisted efforts at rehabilitation.[56]

[141] I conclude in relation to Mr. Melvin, as stated by Justice Côté for the Court in *Boutilier*, at para. 10: "his prospect of successful treatment [is presently] nothing more than an 'expression of hope' …".

[142] I am satisfied beyond a reasonable doubt that Mr. Melvin meets all the statutory criteria, as interpreted by the jurisprudence, that he presents a high risk

[56] Dr. Lohrasbe relies on his examination of the evidence provided to him by the Crown (which is all before me as admissible evidence) in concluding that Mr. Melvin has ingrained anti-prosocial/criminal subculture beliefs and tendencies in his behaviour. When he is in custody, both federal and provincial correctional authorities manage Mr. Melvin as if he is part of a "Recognized Security Threat" group – some of these references are found in Exhibit 2 at pp. 19 (March 1, 2003), 20 (April 9, 2003 and February 23, 2004), and 24 (January 4, 2006). Mr. Melvin's criminal record and life circumstances evidence is consistent with these conclusions – see also Mr. Melvin's statements to Dr. Lohrasbe in Exhibit 2 pp. 34 and 39 where he does not disavow the substance of this evidence; the fact of his tattoo: "Spryfield MOB". There is not a shred of evidence that Mr. Melvin has ever expressed any remorse in relation to the many violent offences he has committed, including the predicate offences. Most recently regarding the September 26, 2020 incident, immediately after their cessation of the assault, he and Morgan McNeil gave each other a "high five". Upon being confronted by correctional officers, Mr. Melvin responded: "wasn't my fault". I observe that the Crown made Mr. Melvin aware that they were seeking to have him designated as a dangerous offender shortly after his conviction in October 2017. Since then, he has committed the serious assault on CO Ailken (March 24, 2018) and upon Mr. Preeper (September 26, 2020). Moreover, given a chance to express remorse and openness to rehabilitation regarding the predicate offences, pursuant to s. 726 *CC*, Mr. Melvin did not do so on December 9, 2020. – see also *R v JJP*, 2020 YKCA 13 at paras. 52-60. Though I do **not** rely on them as evidence in this case, the jurisprudence contains multiple references to a hostility between some members and associates of the Melvin and Marriott families: *R v (Cody) Muise*, 2013 NSSC 407; *R v (Jeremy) LeBlanc*, 2011 NSCA 11; *R v Shea*, 2014 NSPC 78; *R v Hudder*, 2014 NSPC 105; *R v (Aaron) Marriott*, 2014 NSCA 28.

for violent recidivism consistent with the pattern to date, and that his risk is intractable.

[143] I declare and designate him a “dangerous offender” pursuant to sections 753(1)(a)(a)(i) and (ii) CC.

The Penalty Phase

[144] The Crown seeks to have Mr. Melvin declared a dangerous offender, and an indeterminate sentence of imprisonment imposed.[57] This phase has succinctly been described by the Court in *R v KP*, 2020 ONCA 534:

> (2) Penalty Stage — Imposing an Appropriate Sentence
>
> 9 Once a person is designated a dangerous offender, the sentencing judge moves on to consider the appropriate sentence — the "penalty stage". Section 753(4) of the *Criminal Code* provides three options for sentencing:
>
> (a) impose a sentence of detention in a penitentiary for an indeterminate period;
>
> (b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
>
> (c) impose a sentence for the offence for which the offender has been convicted.
>
> 10 Section 753(4.1) provides guidance on how the sentencing judge should exercise discretion when choosing among the three options:

[57] Pursuant to s. 753(4.1) *CC* the court must impose an indeterminate term of incarceration “unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence” as defined in s. 752 *CC*.

> The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph 4(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

11 To determine whether a lesser measure will adequately protect the public, there must be evidence before the sentencing judge that the dangerous offender can be safely released into the community. However, as the majority of the Supreme Court of Canada held in *Boutilier*, at para. 76, s. 753(4.1) "does not create a presumption that indeterminate detention is the appropriate sentence".

12 Section 753(4.1) requires the sentencing judge to engage in a thorough examination of all the evidence presented during the hearing to determine the fittest sentence: *Boutilier*, at para. 76. The sentencing judge must consider whether there is a "reasonable expectation" that a lesser measure — a conventional fixed-term sentence or a fixed-term sentence of at least two years followed by a long-term supervision order — will adequately protect the public against the risk that the offender will commit murder or further serious personal injury offences: *Boutilier*, at para. 77. The sentencing judge must exhaust those lesser measures before imposing an indeterminate sentence. The majority further explained that indeterminate sentences should be limited to "habitual criminals who pose a tremendous risk to public safety": *Boutilier*, at para. 77.

13 When determining the appropriate sentence to manage the risk to public safety, the sentencing judge may consider treatability: *Boutilier*, at para. 45. In assessing the manageability and treatability of the offender's behaviour, the sentencing judge may consider evidence, such as: treatment avoidance, failure to respond to treatment, breaches of court orders, lack of motivation, continued involvement in high-risk conduct, serious personality disorder, and elevated likelihood of violent recidivism: *R. v. Radcliffe*, 2017 ONCA 176, 347 C.C.C. (3d) 3 (Ont. C.A.), at paras. 64-65, leave to appeal refused, [2017] S.C.C.A. No. 274 (S.C.C.).

14 Where the management of risk requires more tools than are available under the parole authorities, an indeterminate sentence is reasonable. Risk management evidence must demonstrate a prospect of effective supervision, within the means and capacity of the parole authorities: *R. v. Severight*, 2014 ABCA 25, 566 A.R. 344 (Alta. C.A.), at paras. 40-43, leave to appeal refused, [2014] S.C.C.A. No. 184 (S.C.C.). As this court has explained, "'real world' resourcing limitations cannot be ignored or minimized where to do so would endanger public safety": *R. v. Little*, 2007 ONCA 548, 87 O.R. (3d) 683 (Ont. C.A.), at para. 70, leave to appeal refused, [2008] S.C.C.A. No. 39 (S.C.C.).

[145] I bear in mind Justice Côté’s statements in *Boutilier*:

65 Section 753(4.1) guides the discretion of the judge, who ultimately must determine the fittest sentence in a given case based on the evidence adduced during the sentencing hearing. *This Court in Johnson stated that the "sentencing judge should declare the offender dangerous and impose an indeterminate period of detention if, and only if, an indeterminate sentence is the least restrictive means by which to reduce the public threat posed by the offender to an acceptable level": para. 44. Again, s. 753(4.1) is simply a codification of the exercise of discretion required by Johnson in light of the regime's general purpose of public protection in dealing with offenders presenting a very high likelihood of harmful recidivism.*

66 This interpretation of s. 753(4.1) is consistent with s. 718.3:

> 718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.
>
> (2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

67 It is also consistent with this Court's interpretation of s. 742.1 -- a provision requiring judges to be "satisfied that the service of the sentence in the community would not endanger the safety of the community" before imposing a conditional sentence. As Lamer C.J. explained:

> The wording used in s. 742.1 does not attribute to either party the onus of establishing that the offender should or should not receive a conditional sentence. To inform his or her decision about the appropriate sentence, the judge can take into consideration all the evidence, no matter who adduces it ([*R. v.*] *Ursel*, [(1997), 96 B.C.A.C. 241], at pp. 264-65 and 287).
>
> In matters of sentencing, while each party is expected to establish elements in support of its position as to the appropriate sentence that should be imposed, the ultimate decision as to what constitutes the best disposition is left to the discretion of the sentencing judge. [Emphasis added.]
>
> (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 120-21)

68 Under s. 753(4.1), the sentencing judge is under the obligation to conduct a "thorough inquiry" into the possibility of control in the community: *Johnson*, at para. 50. The judge considers all the evidence presented during the hearing in order to determine the fittest sentence for the offender:

> The judge should ... take into account all the evidence available before making a determination, which will inevitably require a thorough investigation. Once such an investigation has been conducted, it will be up to the judge to determine the sentence; there is no obligation on any of the parties to prove on any standard the adequate sentence one way or another.
>
> (Neuberger, at p. 4-4.1; see also p. 10-10.)

69 In other words, s. 753(4.1) provides guidance on how a sentencing judge can properly exercise his or her discretion in accordance with the applicable objectives and principles of sentencing. As explained above, it is permissible for Parliament to guide the courts to emphasize certain sentencing principles in certain circumstances without curtailing their discretion. Once the sentencing judge has exhausted the least coercive sentencing options to address the question of risk based on the evidence, indeterminate detention in a penitentiary is the last option.

70 **The framework a sentencing judge should adopt in exercising his or her discretion under s. 753(4.1) has been aptly explained** by Justice Tuck-Jackson of the Ontario Court of Justice: ***R. v. Crowe***, No. 10-10013990, March 22, 2017. **First, if the court is satisfied that a conventional sentence**, which may include a period of probation, if available in law, **will adequately protect the public** against the commission of murder or a serious personal injury offence, then that sentence must be imposed. **If the court is not satisfied that this is the case, then it must proceed to a second assessment and determine whether it is satisfied that a conventional sentence of a minimum of 2 years of imprisonment, followed by a long-term supervision order for a period that does not exceed 10 years, will adequately protect the public** against the commission by the offender of murder or a serious personal injury offence. If the answer is "yes", then that sentence must be imposed. **If the answer is "no", then the court must proceed to the third step and impose a detention in a penitentiary for an indeterminate period of time**. Section 753(4.1) reflects the fact that, just as nothing less than a sentence reducing the risk to an acceptable level is required for a dangerous offender, so too is nothing more required.

[My italicization and bolding added]

[146] Should I conclude that there is a “reasonable expectation” that a lesser measure than an indeterminate sentence, in relation to the predicate offences, will adequately protect the public against Mr. Melvin committing murder or a “serious personal injury offence” in future, then I must impose that lesser sentence.

[147] This is an opportune moment to briefly consider what is the range of determinate sentence for Mr. Melvin for the predicate offences, in order to give context to the analysis I must follow regarding whether the preconditions for the imposition of an indeterminate sentence have been met.

[148] Although I have not heard specific submissions from counsel in relation to the range of sentence that would be appropriate in this case, should I impose a determinate sentence for the attempted murder and conspiracy to commit murder charges, the jurisprudence does permit me to conclude "that the low end of the range for attempted murder is around ten years' imprisonment; the middle around 12; and the high between 15 years and life" per Justice Oland in *R v Aaron Marriott*, 2014 NSCA 28 at para. 114.

[149] I excerpt the following therefrom:[58]

> "112 While parity is one of the several sentencing principles, proportionality is the fundamental principle. Section 718.1 establishes that proportionality is most directly concerned with the gravity of the offence and the degree of responsibility of the offence.
>
> Fundamental Principle
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> It is the individualisation of sentencing that calls on a court to determine a fit sentence with regard to all relevant factors concerning the offence and the offender.

[58] Insofar as conspiracy to commit murder is concerned, while legally distinguishable, the court did make statements in relation to such sentences in *R v Souvannarath*, 2019 NSCA 44, per Bourgeois, JA.

113 In determining whether a sentence was fit and appropriate in all the circumstances, the case law on sentencing is helpful. The following case summaries, supplied by the Crown, provide guidance:

- (i)*R. v. LeBlanc*, 2011 NSCA 60 ... -- This Court confirmed sixteen years' incarceration for a botched hit on James Melvin, Jr. The offender and others planned to kill Mr. Melvin and communicated with him in order to ascertain his whereabouts. The offender chased the victim, and fired a handgun a number of times. The victim was struck twice suffering internal injuries for which he received surgery. The Appellant had a lengthy criminal record. There was no joint recommendation;

- (ii)*R. v. Smith*, 2012 NSCA 37 ... -- Seventeen and a half year old offender, nineteen at the time of sentencing, convicted of shooting Michael Patriquen, Jr. at close range in the chest. The victim suffered many health problems, including paraplegia. His life expectancy to be shortened by twenty to twenty-nine years. The victim was shot at the request of an associate of the Appellant. A lengthy violent criminal record and disturbing psychiatric profile. Fourteen years' incarceration confirmed on appeal;

- (iii)*R. v. Clarke*, 2010 ONSC 656 ... -- Offender shot victim in front of convenience store just after noon. The victim suffered two chest wounds from a sawed-off shotgun at close range. Injuries were life-threatening. Offender had young family. Four prior convictions. Use of handgun in a public place during daylight hours, and reckless disregard for human life factors in informing twelve and a half years' imprisonment minus remand time;

- (iv)*R. v. Guedez-Infante*, 2009 ONCA 739 ... -- Appellant was a young man with no prior criminal record. The shooting, however, took place in public leaving serious injury to the victim. Alcohol involved. Ten years' imprisonment confirmed on appeal;

- (v)*R. v. Thompson*, 2009 ONCA 243 ... -- Few facts in appeal case. Twelve years affirmed on appeal for serious shooting with a handgun planned in advance and committed in a public place by individual with lengthy record, including convictions for violence;

- (vi)*R. v. Boissonneault*, 2012 MBCA 40 ... -- In the days leading up to a shooting in public, the Appellant was drinking, smoking crack cocaine and marijuana, and not sleeping much. He used a 357 Smith and Wesson to shoot the victim while he was sitting in a cab with another person. The Appellant harboured a strong dislike for the victim. The Court of Appeal intervened where trial Judge failed to explain consecutive sentences for firearm convictions which arose as a result of the attempt murder. Seventeen years in total reduced to fourteen years based on totality. Appellant had significant criminal record; however, majority of convictions were drug related. [Appears to be second degree attempted murder.];

- (vii)*R. v. Situ*, 2010 ONCA 683 ... -- Two Appellants involved in horrific shooting in a public place which rendered victim quadriplegic. Situ had a criminal record. Fifteen years' incarceration confirmed on appeal;

- (viii)*R. v. Truelove*, 2010 ONCA 608 ... -- Few facts from Court of Appeal decision. Conviction for attempted murder and several other charges which arose out of a shooting in a nightclub. Thirteen years' incarceration upheld on appeal;

- (ix)*R. v. Chevers*, 2011 ONCA 569 ... -- Appellant twenty-four years old when he twice shot the victim in a public place. He missed both times. Fifteen year sentence upheld on appeal where the Court noted the double-digit prison sentences for attempted murder had been imposed in cases of planned executions involving the use of loaded firearms. Other factors included premeditation, use of prohibited handgun, firing two shots, impact on the victim and community, and offender's prior record;

- (x)*R. v. Brown*, 2009 ONCA 563 ... -- At 7 p.m., June 14, 2005 victim shot six times at point-blank range in parking lot. Victim survived, however paralyzed from the waist down. Numerous injuries to critical areas. Appellant was a first offender with a young child. No evidence of rehabilitative potential apart from implication arising from youth. The Court characterized the offence as a cold-blooded senseless act which was unprovoked. Life imprisonment confirmed due to use of gun without warning in a public place where other citizens, including children, were present and at potential risk. Growing gun violence a proper and necessary factor as well.

114 It appears that the low end of the range for attempted murder is around ten years' imprisonment; the middle around 12; and the high between 15 years and life. See also *R. v. Tan*, 2008 ONCA 574, at para. 35 to 39.

115 In this case, the aggravating factors include:

(a)The brazen shooting in a hospital parking lot, a public place, in the early evening;

(b)The use of a relatively high-powered handgun;

(c)The firing of multiple shots; and

(d)A lengthy criminal record, albeit mostly a youth record, including crimes of violence and the use of weapons.

The appellant on appeal denies any planning or joint enterprise with the co-accused because the telephone intercepts did not include him taking part in the exchanges as the two vehicles sped to the hospital and Mr. Hallett. However, it is difficult to accept that Mr.

> Marriott could not have known from hearing the urgency and content of the discussions, that Mr. Hallett was the target.
>
> 116 The firing of multiple shots in a public place shows a callous and high disregard for the safety of others going about their business. The attempted murder calls for denunciation of that unlawful conduct and for deterrence, specific to this offender and general to other members of the public, that such actions will attract heavy penal consequences.
>
> 117 The mitigating factors are the appellant's youth -- he was 18 at the time of the shooting -- and his guilty plea to attempted murder. Since sentencing, he is doing well in the correctional institution and has shone in his academic studies. However, the appellant did not plead guilty until the first day of trial. He did not do so until after the preliminary inquiries were held, negotiations between the Crown and trial counsel towards resolution of all charges including others of attempted murders were completed, and he had re-elected from trial by judge and jury to judge alone.
>
> 118 Having considered the offence and this offender, and the principles of sentencing and particularly those of proportionality and sentence, it is my view that 15 years imprisonment on a go forward basis may be at the higher end, but is still within the range of sentence. Consequently, it is not a demonstrably unfit sentence."

[150] Without having the full benefit of submissions of counsel, but having heard the evidence during the trial, and sentencing process, and being aware of Mr. Melvin's criminal record and personal circumstances, in my opinion a fit and proper determinate sentence for Mr. Melvin would otherwise be 12-14 years' incarceration. He has been in custody since July 2015 on the predicate offence charges, and although serving other sentences at times would receive a significant remand credit per s. 719 *CC*; although he has also been sentenced since December 2, 2008, I keep in mind, according to Lord Coke's principle, those offences cannot be seen as aggravating facts, but only as detracting from Mr. Melvin's

rehabilitation prospects were this a mere sentencing. Specifically since July 17, 2015 (offence/sentencing dates):

1. November 28, 2015/November 29, 2016 – s. 264.1 *CC* - 6 months concurrent incarceration;

2. April 1, 2016/March 14, 2018 - ss. 267(a) and 264.1 *CC* - 5 months concurrent on each;

3. April 5, 2016/March 14, 2018 - s. 270(1)(a) *CC* - 5 months consecutive;

4. April 6, 2016/March 14, 2018 - s. 270.01(1)(a) *CC* - 10 months concurrent;

5. December 5, 2016/March 14, 2018 - s. 264.1(1) *CC* - 4 months concurrent -s. 270(2) CC - 4 months consecutive

6. May 19, 2017/March 14, 2018 - s. 270(1)(a) *CC* - 2 months concurrent; s. 264.1 *CC* - 2 months concurrent

7. March 24, 2018/July 30, 2019 - s. 270.01(1)(b) *CC* - 10 months consecutive

[151] Turning back to a consideration of s. 753(4.1) *CC*, Exhibit 34 is a December 31, 2018 Parole Board of Canada – Status Change form and enclosures. Mr.

Melvin was being reviewed for "full parole – pre-release", and the Board postponed the review to February 2019: "The Parole Board of Canada has received your request to postpone this review as you would like to have an assistant with you at your hearing. The Board has accepted your request."

[152] Underlying that process were the following: Mr. Melvin's CMT (case management team) recommended a Commissioner's referral in relation to Mr. Melvin's detention pre-screening. The Assistant Manager of Assessment and Intervention, and Acting Warden at Atlantic Institution both supported this view.

[153] The Regional Deputy Commissioner recommended this:

> "Having been briefed regarding the Commissioner's referral for Mr. Melvin I believe that there are reasonable grounds that he will commit an offence causing serious harm prior to his warrant expiry date. As such I am referring my recommendation to the Senior Deputy Commissioner for consideration."

[154] On December 28, 2018, Fraser Macauley, Assistant Senior Deputy Commissioner of the CSC wrote to the Parole Board of Canada recommending a detention review. In his letter entitled "Subject – Commissioner's Referral for Detention: James Melvin, FPS – 666465D; SRD: 2019 – 07 – 14; WED: 2020 – 03 – 13 he elaborated:

> "I am referring this case for a detention review in accordance with paragraph 129(3) CCRA. The current sentence includes a sentence imposed for an offence set out in Schedule 1 of the CCRA, however serious harm was deemed not to have been met.

…

Since his incarceration on the current sentence, Mr. Melvin has continued to display high risk behaviours and he has been implicated in multiple incidents involving violence and threatening behaviour, which is in line with his offence cycle. During his previous sentence, Mr. Melvin did not complete any correctional programs and his institutional behaviour was marked with several incidents, including violence, which resulted in placement to maximum security institutions as well as a transfer to the Special Handling Unit (SHU). Mr. Melvin is currently assessed as requiring the Multi Target High Intensity Program and the Non—Intake Primer; however, he is not engaged in his Correctional Plan, has not participated in programs, and has not made the necessary progress to mitigate the risk for future violence. Furthermore, Mr. Melvin has been described as having no insight into his behaviours and no remorse or empathy for his victims.

Mr. Melvin's behaviours are the result of criminally embedded values and antisocial attitudes towards societal convention including a deep-rooted in disdain for police and correctional authority. He surrounds himself with criminally oriented individuals to the extent he is recognized as a key player in the Spryfield MOB, a recognized Security Threat Group.

In a psychological assessment report completed in November 2018, Mr. Melvin was assessed posing a very high risk of general recidivism and a high risk for violent recidivism if released to the community. The assessment indicated that these conclusions include regarding risk would remain as long as he continues to remain involved in gang activity, continues his criminal lifestyle and holds his antisocial perspectives, attitudes and values. His criminal pattern of behaviours are described as entrenched and have become an automatic response in many situations.

The duration of Mr. Melvin's upcoming statutory release is approximately eight months. Mr. Melvin's response to CSC supervision and PBC imposed conditions cannot be determined given his detention on his previous federal sentence. Consultation with the community parole office has occurred and it was assessed that there are no community supervision programs available to adequately mitigate Mr. Melvin's high risk for violent reoffending during statutory release.

Mr. Melvin presents with a consistent and significant history of violent offending. Taking into consideration is deeply entrenched criminal lifestyle demonstrated by his leadership in a Security Threat Group, his continuing use of violence, his current psychological risk determination for violence, his history of reoffending and most significant the Crown's pursuance of a dangerous offender designation, there are reasonable grounds to believe Mr. Melvin is likely, before the expiration of the sentence according to law, to commit an offence causing serious harm to another person."

[155] As I have indicated regarding the documentation from the CSC generally, all persons creating such documentation are duty bound by section 24 of the *CCRA* (*Corrections and Conditional Release Act*, S.C. 1992, c. 20) :

> 24(1) Accuracy, etc. of information
> The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.
>
> 24(2) Correction of information
> Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein,
>
> (a) the offender may request the Service to correct that information; and
>
> (b) where the request is refused, the Service shall attach to the information a notation indicating that the offender has requested a correction and setting out the correction requested.

[156] Julie Dickie testified that during his two previous federal sentences, and to date while on a federal remand (see *R v Melvin*, 2016 NSSC 130 which has largely continued to this day), Mr. Melvin has not completed a single CSC - recommended program – p. 114 Transcript of July 10, 2020. Sometimes, these programs were terminated because he was placed in segregation for institutional misconduct, transferred to other institutions and the like. Parole Officer Dickie testified on July 10, 2020, that she was intending to recommend that Mr. Melvin be detained until his Warrant Expiry Date on his existing sentences – p. 56 July 10, 2020 Transcript. According to a November 19, 2020 CSC email to the court, Mr. Melvin's present sentences' Warrant Expiry Date is January13, 2021. Thereafter, he will be

detained merely on remand on the predicate offence charges/convictions, and therefore "will be moved back to a provincial correctional facility in Nova Scotia prior to the Warrant Expiry Date."

[157] I have considered Mr. Melvin's treatability, and the prospects are not at all encouraging – he has no apparent history of meaningfully accessing any rehabilitative programs during his manifold probationary terms and cumulatively very lengthy periods of incarceration.

[158] Nevertheless, Mr. Melvin still has the opportunity to make rehabilitative changes in his life. Given his steadfast refusal to do so to date, and the ingrained nature of his risk factors, even if he at some point becomes fully engaged in the rehabilitative process, effecting those changes in a manner that significantly reduces his risk of recidivism will be a very lengthy process. He has not been motivated toward rehabilitation to date by determinate sentences – he merely waits for the sentence to run out.

[159] The following exchange between Mr. Woodburn and Dr. Lohrasbe is significant, and I accept Dr. Lohrasbe's testimony regarding Mr. Melvin's motivation to change:

> Question – when we talk about Mr. Melvin we see, at this time, at the end of your report he is unmotivated to change is –

Answer – correct. That's right. (p. 113 Transcript July 6, 2020)

…

Question – I see on page 50 it talks about your interview with Mr. Melvin. And in your conversations and interview with Mr. Melvin he understood what the dangerous offender application was about and the possible results?

Answer – yes.

Question – that he could be given an indeterminate sentence. That he could be given an indeterminate sentence at the end of this if he doesn't change his ways?

Answer – yes. (p. 115)

…

The impression I got from Mr. Melvin is some – and these are not his words. This was the impression I got, was that 'well, if my appeal fails I'll think about these things'. (p. 116)

Question – does that tell you, in your expert opinion, that **he's motivated to change**?

Answer – **oh, certainly not now**.

Question – and with regards to opinion, **would that say to you, that his motivation to change only comes into effect when he's forced into no other choice but to change** – participate, yes?

Answer – **yeah**…

So, there's no indications from him of anything coming from within, and **it's more like if it's forced on me then I'll think about it**. So any motivation, so to speak, will be external. And if it's there, that will allow him entry into the process provided he meets the preconditions.

Question – and in your expert opinion with regards to that motivation and timeframe with Mr. Melvin, **would you say that there is a difference between him having a static base, i.e. 'I'm going to get out next week regardless if I do the programs', or 'I don't get out until I do the programs?' Would that have a difference in Mr. Melvin's psyche**, in your expert opinion?

Answer – **very likely**.

Question – and would it be fair to say, in your expert opinion, that if he is forced to do this program, being forced to show his motivation or to show his change and lack of drug use

> before he is allowed to be released in the community, **do you think that would motivate him more, or – yes?**
>
> Answer – **it would seem to be the only shock at motivating him** because it's certainly not going to come from within… I mean, he's got long experience in waiting things out so with – he's going to need some kind of an external reason to even start the process of change." (p. 118)

[160] Robyn Gay, a parole officer with CSC since 2005 testified regarding long-term supervision orders (Exhibit 22) and the administrative aspects of being designated a "dangerous offender".

[161] Offenders serving determinate sentences are statutorily entitled to release at two thirds of their sentence, unless they are detained thereafter following a detention hearing where there are demonstrated recidivism concerns as determined by the Parole Board of Canada.

[162] Offenders serving determinate sentences and associated Long-Term Offender (LTO) orders are similarly treated in relation to the determinate sentence. They serve the determinate sentence and then they are subject to the LTO order.[59]

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[59] Pursuant to s. 753.1 *CC* an LTO can be imposed to follow upon a sentence of imprisonment, where the offender is ordered to serve a determinate term of imprisonment of two years or more, and there is a substantial risk that the offender will reoffend, as well as a reasonable possibility of eventual control of the risk in the community. Such offenders are *eligible for release* at two-thirds of their determinate sentence regardless of their risk level. However, if CSC can establish that their detention is necessary until their risk of recidivism is reduced, they may be detained beyond the two-thirds point of their determinate sentence. If their risk in the community thereafter is considered unmanageable, the only option during the currency of the LTO, is to wait until the offender breaches the terms of his LTO order (s. 753.3 *CC*) or commits one or more new offences (s. 753.4 CC). If a sentence of imprisonment is imposed for the new offences, the long-term supervision is interrupted until the offender is finished serving all the sentences, unless earlier the court orders its termination-see also the testimony of Robyn Gay at pp. 60-74 Transcript of July 8, 2020.

[163] Offenders serving an indeterminate sentence as dangerous offenders are permitted to apply to the Parole Board for "day parole" after four years, but legislatively CSC must review the case after seven years, and then again every two years following that, to see if the risk has decreased to a point where an offender can be safely released into the community.

[164] I am satisfied that there is no "reasonable expectation" that a determinate sentence will adequately protect the public against the commission by Mr. Melvin of murder or a serious personal injury offence.[60]

[165] Is there a "reasonable expectation" that a determinate sentence plus up to a ten-year long-term offender order will adequately protect the public against the commission by Mr. Melvin of murder or a serious personal injury offence?

[166] The LTO is served in the community. Mr. Melvin will not be safe to release for a long time.[61] I conclude that the answer is – no.

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[60] It must be kept in mind that persons inside correctional facilities are also members of "the public" – thus any correctional services staff and inmates, or others who are present there and in the presence of Mr. Melvin, may be at risk of being victims of Mr. Melvin's violence. Moreover, I also keep in mind my conclusions regarding Mr. Melvin's reach beyond the perimeter of correctional facilities.

[61] To date, even recent deterrent sentences have not caused Mr. Melvin to cease and desist from further violence. It is noteworthy that, but for some short stints, Mr. Melvin has spent a significant part of his life, as a youth since he was 12 years old in 1994, and since 2000 as an adult thereafter, in custody. In the circumstances, concluding he is properly detained by an indeterminate sentence is a rational next step. The Crown made Mr. Melvin aware shortly after his conviction on October 5, 2017 that they would seek a "dangerous offender" designation and sentence. Since then, he has not accessed any rehabilitative programs or brought his substance abuse and "acting out" and criminal behaviour under control. Since then, he has committed two very serious violent assaults on March 24, 2018

[167] An indeterminate sentence provides Mr. Melvin with only one way out of continued incarceration – that is, by establishing a record of positive change before the Parole Board that would justify a conclusion that his ongoing risk level, should he be released into the community, has been reliably reduced to a point that his detention could no longer be justified. It provides Mr. Melvin the opportunity for release into the community and protects the public by limiting his release into the community unless and until public safety no longer trumps Mr. Melvin's right to reasonable liberty.

Conclusion

[168] I am satisfied beyond a reasonable doubt that Mr. Melvin is properly designated as a "dangerous offender", and that an indeterminate sentence of incarceration is the only appropriate sentence.

Ancillary orders

[169] I will sign the following orders:

1. s. 487.051 *CC* DNA (primary)

2. s. 109(3) *CC* - during his lifetime

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and September 26, 2020. The latter assault after he was aware that Dr. Lohrasbe's September 2018 Report likely supported his being found to be a "dangerous offender".

3. s. 760 *CC* – that all the required documentation "be forwarded to the Correctional Service of Canada for information" as soon as possible and by no later than March 11, 2021

4. I waive any victim surcharge for reasons of undue hardship (s. 737 *CC*)

5. Pursuant to s. 743.21 *CC*, I also order that Mr. Melvin is prohibited from communicating, directly or indirectly with anyone who was a witness at his trial and sentencing in Supreme Court, as well as Joshua Preeper (Appendix "A" hereto contains the list of those persons).

Rosinski, J.

Appendix “A”

Trial Witnesses

1. Jason Hallett
2. Reagan Henneberry
3. Vanessa Slaunwhite
4. Derek Thomas MacPhee
5. Martin Champion
6. Sgt. Jeff Clarke
7. Det/Cst. Joseph Farrow
8. Cst. Trent Milton
9. Cst. Justin Sheppard
10. Sgt. Nick Pepler
11. Det/Cst. Jeff Seebold
12. Det/Cst. Steven Wagg
13. Sgt. Michael Checchetto
14. Cst. Andrew Conrad
15. Det/Cst. John Mansvelt
16. Cst. Wayne Hunter
17. Cst. Darryl Morgan
18. Cpl. Mark Kellock
19. Cst. Colin Brien

"Video" *voir dire* – October 5-6, 2017

1. Deputy Sheriff Craig Pothier
2. Deputy Sheriff Blaine Tolland
3. Deputy Sheriff Jason Godreau
4. Deputy Sheriff Hyson Decoste

Mistrial Motion – September 26, 2017

1. Cst. Josh Underwood

Sentencing Witnesses

1. Dr. Shabehram Lohrasbe, MBBS, FRCPC
2. Deputy Superintendent Luc Cormier (New Brunswick)
3. CSC Parole Officer Robyn Gay
4. Greg Aitken
5. Dr. Christopher Murphy
6. CSC Parole Officer Julie Dickie
7. Superintendent Richard Troy Foote (Nova Scotia)
8. Dr. Camille Haddad
9. Correctional Officer Brent Carter
10. Correctional Officer Daniel Paul Durelle
11. Carolyn Morrison, RN
12. CSC Acting SIO Roland Mazerolle
13. Joshua Preeper