NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Shea*, 2017 NSCA 43

Date: 20170526
Docket: CAC 432836
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Shawn Michael Shea

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois
The Honourable Justice Peter M.S. Bryson (in dissent)

Appeal Heard: November 17, 2016, in Halifax, Nova Scotia

Subject: Dangerous offender designation; s. 753(1) of the *Criminal Code*

Summary: Following a conviction for aggravated assault, the Crown brought an application to have Mr. Shea declared a dangerous offender, seeking an indeterminate sentence. The Crown relied upon Mr. Shea's extensive history of violent behaviour, including his "atrocious" conduct while incarcerated.

The application judge extensively reviewed the statutory scheme, caselaw, and Mr. Shea's history. She concluded that the Crown had failed to prove beyond a reasonable doubt a "pattern of repetitive behaviour" or a "pattern of persistent aggressive behaviour" by Mr. Shea. As such, the application was dismissed.

In reaching this conclusion, the application judge noted that Mr. Shea's past violent behaviours were not as serious as the predicate offence which triggered the Crown's request—an aggravated assault with a shank. She also considered that his past violent behaviours were mostly in the context of the "dog-eat-dog" world of prison. Finally, she noted that Mr. Shea had been known to possess shanks while incarcerated,

yet he had only violently struck out once, finding this a sign of restraint on his part. These three factors led to the application judge's conclusion that a "pattern" for the purposes of s. 753 was not made out.

Issue: Did the application judge err in law in undertaking the required pattern analysis?

Result: Appeal allowed. The majority found the application judge erred in law, identifying three missteps. Firstly, the application judge erred by requiring the past behaviour, in order to constitute a pattern, to be as objectively serious as the predicate offence (aggravated assault). Although authority for such an approach was cited by the application judge, it has been displaced by the Supreme Court of Canada. Secondly, the application judge's use of "context" was problematic. She improperly utilized the "dog-eat-dog" world of prison as a means of excluding Mr. Shea's "violent" institutional behaviour from a pattern analysis. Finally, the majority was of the view that the application judge's consideration of restraint was incorrect.

Having found the application judge's pattern analysis was flawed, the majority, after reviewing the record, concluded that the requirement of s. 753(1) were made out on two bases. Mr. Shea was found to be a dangerous offender, subject to an indeterminate sentence.

Bryson J.A. in dissent would have dismissed the appeal. The errors of the application judge did not affect her application of s. 753(1) of the *Criminal Code* to the facts. Mr. Shea's history of violence did not accord with the pattern required by that section because it did not habitually result in a "likelihood of causing death or injury", nor was it consonant with the predicate offence, which must be part of the pattern.

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Judges:	Bryson, Bourgeois and Van den Eynden JJ.A.
Appeal Heard:	November 17, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bourgeois J.A.; Van den Eynden J.A. concurring; Bryson J.A. dissenting;
Counsel:	Mark Scott, Q.C., for the appellant Roger Burrill, for the respondent

Dissenting Reasons for Judgment (Bryson J.A.):

Introduction

[1] Shawn Michael Shea has a long history of violent behaviour, in and out of prison. On August 30, 2011, he was found guilty of aggravated assault. He and an accomplice brutally attacked a fellow inmate, stabbing him several times.

[2] The Crown wanted Mr. Shea declared a dangerous offender. They brought a dangerous offender application, seeking an indeterminate sentence. The Honourable Provincial Court Judge Anne S. Derrick identified numerous examples of violent behaviour relevant to the Crown's application. But she disagreed that Mr. Shea's conduct constituted "a pattern of behaviour" rendering him a dangerous offender as contemplated by the *Criminal Code*. She concluded that "… Mr. Shea's atrocious institutional conduct does not satisfy the legislated requirements for his designation as a dangerous offender." She imposed a five-year sentence, (2014 NSPC 78).

[3] The Crown now appeals, arguing that the application judge erred in law by:

1. Requiring a comparative/objective degree of violence in order to establish a pattern of persistent behaviour or aggressive behaviour for which the predicate offence forms a part.
2. By relying on irrelevant dissimilarities between the incidents to conclude that the Crown had failed to prove a pattern of repetitive behaviour or a pattern of aggressive behaviour.
3. By incorporating a restraint component into the pattern of aggressive behaviour inquiry which does not exist in the legislation (s. 753(1)(a)(ii) of the *Criminal Code*).

[4] Mr. Shea resists the Crown's arguments and cautions that this Court should not revisit the application judge's decision as "unreasonable" under the guise of alleged errors of law. An offender may challenge a "dangerous offender" finding as unreasonable. Not so the Crown when appealing an application judge's refusal of that designation. Crown appeals are confined to errors of law.

[5] The Crown's submissions are attractively expressed and forcefully argued. As the following discussion discloses, they have some merit. But in the end, the application judge was not satisfied beyond a reasonable doubt that Mr. Shea is a

dangerous offender. In my view, she did not err in her application of the demanding requirements of s. 753(1) of the *Criminal Code* to the facts of this case. Despite the able argument of Mr. Scott, I would dismiss the appeal.

[6] It will be helpful to preface discussion of the grounds of appeal with an overview of the dangerous offender regime, Mr. Shea's history of violence, the expert evidence and the Crown's limited right of appeal.

The Dangerous Offender Regime

[7] We do not punish people for past behaviour for which they have already been sanctioned, nor for what they might do in the future, or for having a "bad" character. On the other hand, the criminal law recognizes that the persistently violent behaviour of a small group of people constitutes a threat to public safety. The *Criminal Code* provides that such people can be designated "dangerous offenders" and may be given an indeterminate sentence. This legislation is not novel—its antecedents have been part of Canadian and United Kingdom jurisprudence for more than a century, (*R. v. Lyons*, [1987] 2 S.C.R. 309, ¶ 12-15).

[8] In *R. v. Steele*, 2014 SCC 61, the Supreme Court explained the purpose of the legislation addressing the risk to public safety:

> [28] Part XXIV of the *Criminal Code* ***authorizes the indeterminate detention of individuals who are found to be "dangerous offender[s]" on the basis that their past conduct and patterns of behaviour show that they constitute a threat to the life, safety or physical or mental well-being of other persons*** (s. 753(1)(a)), or that their failure to control sexual impulses means that they are likely to cause injury, pain or other evil to other persons (s. 753(1)(b)). It also authorizes the long-term supervision of individuals who are found to be "long-term offender[s]" where a sentence of imprisonment of two years or more would be appropriate, there is a substantial risk that the individuals will reoffend, and there is a reasonable possibility of eventual control of that risk in the community (s. 753.1(1)).
>
> [29] ***The primary rationale for both indeterminate detention and long-term supervision under Part XXIV is public protection.*** Both sentences advance the "dominant purpose" of preventive detention identified by Dickson J. in *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39, at p. 43, namely ***"to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb"***. When the constitutionality of the dangerous offender provisions came before this Court in *R. v. Lyons*, [1987] 2 S.C.R. 309, La Forest J., wrote at p. 329, "[Part XXIV] merely enables the court to accommodate its sentence to the

> common sense reality that the present condition of the offender is such that he or she is not inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be expected of that person" (emphasis in original). Lamer C.J. subsequently explained this rationale as follows in *Currie*, at para. 26: "Parliament has thus created a standard of preventive detention that measures an accused's present condition according to past behaviour and patterns of conduct." See also *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 19.
>
> [Emphasis added]

[9] A dangerous offender designation requires proof beyond a reasonable doubt of a present likelihood of future conduct—not proof beyond a reasonable doubt of something that has not yet happened, (*Lyons*, ¶ 93-94).

[10] The *Criminal Code* provisions relevant in this case are:

> 753(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), ***the court shall find the offender to be a dangerous offender*** if it is satisfied
>
> > (a) that the offence for which ***the offender has been convicted is a serious personal injury offence*** described in paragraph (a) of the definition of that expression in section 752 and ***the offender constitutes a threat to the life, safety or physical or mental well-being*** of other persons on the basis of evidence establishing
> >
> > > (i) ***a pattern of repetitive behaviour*** by the offender, of which the offence for which he or she has been convicted forms a part, ***showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons***, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
> >
> > > (ii) ***a pattern of persistent aggressive behaviour by the offender***, of which the offence for which he or she has been convicted forms a part, ***showing a substantial degree of indifference*** on the part of the offender ***respecting the reasonably foreseeable consequences to other persons*** of his or her behaviour.
>
> [Emphasis added]

The predicate offence must be part of the pattern.

[11] As *Steele* also explains, interpretation of the legislation must not allow protection of the public to overwhelm proportionality:

> [27] … The general purpose of Part XXIV is public protection, and an overly narrow construction of the gateway provision would indeed undermine this purpose. However, the specific purpose of the SPIO requirement is to link the sentence to the predicate offence, and an overly broad construction would undermine this purpose and jeopardize the objective of proportionality. My interpretive approach must be sensitive to both the general and the specific purpose. …

[12] Section 752 tells us what "a serious personal injury offence" means in Mr. Shea's circumstances:

> "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
>
> …
>
> [Emphasis added]

[13] *Steele* describes the difference between "violent" and "dangerous". The first applies to 752(a)(i); the second to (ii). Section (a)(i) refers to attempted violence or violent acts and requires a violent intent. Section (a)(ii) relates to the effects of conduct, not to violence or intent, (*Steele*, ¶ 58-59). A dangerous driver may not intend violence but his conduct may be extremely harmful to his victims. In *Steele*, the Supreme Court embraced a definition of violence which focuses on harm caused, attempted or threatened, rather than on the force applied, (*Steele*, ¶ 46).

[14] Key to a dangerous offender determination is the "pattern analysis". The judge in this case broke down the components of ss. 753(1)(a)(i) and (ii) in this way:

> [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.

[. . .]

[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.

(2014 NSPC 78)

[15] There is a two-stage process for a dangerous offender application. The first stage asks whether the accused is a dangerous offender. If so, the court must so find. There is no discretion. But there is sentencing discretion. That is the second stage. The court may impose an indeterminate sentence. Or it may impose a long-term offender determinate sentence, followed by a supervision order. Or it may impose a determinate sentence.

[16] This sentencing discretion is relatively new, as is the loss of designation discretion if an offender meets the "dangerous offender" definition. These changes arose from legislative amendments in 2008. They are more fully described in the judge's decision, (¶ 11-32). Parliament intended that "… a broader group of offenders" be declared dangerous offenders than was envisaged in *Lyons* where the court spoke of "a very small group of offenders." Nevertheless, the legislation remains "narrowly targeted to a small group of offenders", (per Rosenberg J.A. in *R. v. Szostak*, 2014 ONCA 15, ¶ 54 and *R. v. Boutilier*, 2016 BCCA 235, ¶ 28 quoting *Szostak*).

[17] Once an offender has been found "dangerous", there is a presumption in favour of an indeterminate sentence unless the court "… is satisfied by the evidence adduced during the hearing of the application 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." In cases where the presumption prevails, a dangerous offender's incarceration must be reviewed by the Parole Board seven years from being taken into custody and at least every two years thereafter, (*Criminal Code*, s. 761).

[18] Plainly, an indeterminate sentence is one of the most serious criminal sanctions that the law may impose, (*Decision*, ¶ 19; *R. v. Allen*, 2007 ONCA 421, ¶ 15; *R. v. Hogg*, 2011 ONCA 840, ¶ 38). Unsurprisingly, there are prerequisites to making a dangerous offender application that places the offender at hazard of such a sentence.

[19] The Crown cannot proceed with a dangerous offender application unless the predicate offence is a serious personal injury offence. The Crown must apply to have the offender remanded for assessment (*Criminal Code*, s. 752.1(1)). An assessment report must be filed before the Crown can apply for a finding that the offender is a dangerous offender or a long-term offender (s. 753(1) or 753.1(1)). The offender is given notice of the application including the basis upon which it is made (s. 754(1)(b)). The provincial Attorney General must also consent to the application (s. 754(1)(a)).

[20] Mr. Shea conceded that the foregoing prerequisites to the dangerous offender application had been met, (*Decision*, ¶ 9).

Overview of Mr. Shea's Violent Behaviour

[21] In preparation for her pattern analysis, the judge considered Mr. Shea's extensive history of violent and criminal behaviour and identified 26 discrete incidents, beginning in January of 1994, including the predicate offence in 2011, and concluding with Mr. Shea's assault on another inmate that occurred in the cells during the dangerous offender application on March 31, 2014, (*Decision*, ¶ 431). The judge's summary of those 26 incidents is attached as an appendix to this decision. The vast majority of these incidents describe common assaults on fellow inmates or correctional officers.

[22] Mr. Shea's violent behaviour started early. At 14, he was convicted of possessing a weapon after threatening his mother with a knife. His criminal

behaviour persisted through his teens. Mr. Shea was convicted of assault and assault causing bodily harm for attacking another inmate in November 1998 at the Waterville Correctional Facility.

[23] Mr. Shea was 34 years old when he was tried for the predicate offence of aggravated assault. Mr. Shea had already served four federal penitentiary terms as an adult. First he served two years for break and enter. In November 1999, Mr. Shea was denied accelerated parole because "… there were reasonable grounds to believe that, if he was released, he was likely to commit an offence involving violence before warrant expiry", (*Decision*, ¶ 209). He was later transferred to a maximum security prison because he could not be managed at Springhill.

[24] He also served terms of three, two and a half, and six and a half years respectively for possessing crack cocaine for trafficking purposes and break and enter; conspiracy to traffic and possession for purposes of trafficking; and, finally, extortion and forcible confinement. No doubt related to these activities, prison records describe Mr. Shea as being involved in organized crime as a "prominent member" with "very strong ties" to the Spryfield Mob.

[25] The offence which triggered the Crown's dangerous offender application occurred in June 2010. Mr. Shea, aided by an accomplice, repeatedly stabbed a fellow inmate at the Central Nova Scotia Correctional Facility. The victim suffered five puncture wounds. Fortunately none were life-threatening, but two required stitches. Neither attacker "…could claim that the force they used was not intended to cause grievous bodily harm", (*Decision*, ¶ 63). After declining to find Mr. Shea a dangerous offender, the judge imposed a five-year sentence.

Overview of Expert Evidence

[26] The expert evidence will be summarized here, both for context and because the Crown raises the alleged failure of the judge to consider this evidence as explanatory of motivation in her pattern analysis.

[27] Psychiatric evidence can assist with both pattern and threat analysis, (*R. v. Dow*, 1999 BCCA 177, ¶ 29). It can also assist in exercising sentencing discretion under s. 753(4.1) because the court must consider whether there is a reasonable expectation that a "lesser measure" than an indeterminate sentence will adequately protect the public. In all of these tasks, psychiatric or psychological evidence does not displace the jurisprudential decision to be made, but may assist in making it.

[28] Dr. Scott Theriault is a forensic psychiatrist and Clinical Director for the Capital District Health Authority. He prepared the assessment of Mr. Shea required by s. 752.1(1) of the *Criminal Code*. Mr. Shea declined Dr. Theriault an interview, which Dr. Theriault describes as not unusual in dangerous offender applications.

[29] Mr. Shea filed his own report from forensic psychologist Dr. Andrew Starzomski. He is on staff at the East Coast Forensic Hospital and a practice leader in psychology in the Capital District Health Authority's Mental Health Program.

[30] Both experts used the same three methods when assessing Mr. Shea's risk to reoffend violently: the Psychopathy Checklist Revised (PCLR); the Violence Risk Assessment Guide (VRAG); and the Historical, Clinical, and Risk Management-20 (HCR-20). Both obtained very similar results, (*Decision,* ¶ 350).

[31] Both experts were extensively questioned and cross-examined. The judge observed that they agreed on many significant issues:

> [336] Mr. Shea's criminal and anti-social behaviour has not been driven by either substance abuse problems or a significant or serious mental disorder. Dr. Theriault diagnosed Mr. Shea as having an anti-social personality disorder. Dr. Starzomski came to the same conclusion.
>
> [Exhibit and transcript references omitted]

[32] Mr. Shea scored high on the PCLR. The judge quoted Dr. Theriault's explanation of psychopathy:

> [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…

[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.

[34] While Dr. Starzomski may have been somewhat more optimistic, both experts felt Mr. Shea's rehabilitative prospects were not good. Dr. Starzomski

offered that with appropriate treatment and programming there was a "reasonable possibility" of Mr. Shea controlling his violent behaviour. The judge summarized:

> [395] Dr. Starzomski testified that the dangerous offender application has caught Mr. Shea's attention. "…the reality…if he does not make some notable changes, he stands to not have the chance to be in the community again for a long time, I think that is a factor that can motivate him. It's …a newer aspect of this whole situation. (*Dr. Starzomski's Testimony, page 717*)

[35] For his part, Dr. Theriault opined that Mr. Shea's protestations of any desire to change should be taken "with a large grain of salt".

[36] Ironically, while Dr. Starzomski was testifying, Mr. Shea attacked another inmate in the courthouse holding cells. This attack followed inquiry from the sheriffs about whether Mr. Shea had any "problem" being with the inmate who was then assaulted by Mr. Shea. The attack was clearly calculated and unprovoked, (*Decision*, ¶ 297). Mr. Shea appears to have deceived the sheriffs to further his violent intent. The dangerous offender application may have "caught" Mr. Shea's attention—but not for long. It did not change his behaviour, despite the currency of the dangerous offender application.

[37] Based on their assessments, both Drs. Theriault and Starzomski considered—in the latter's words—"… that Mr. Shea is a high risk to reoffend violently in the future based on his history and the leading risk assessment tools".

Crown Appeal—Standard of Review

[38] The Crown's appeal is authorized by s. 759(2) of the *Criminal Code*. It is confined to questions of law:

> 759(2) The Attorney General may appeal to the court of appeal from a decision made under this Part on any ground of law.

[39] The Crown submits that an incorrect interpretation of what constitutes a "pattern" or "restraint" within the meanings of ss. 753(1)(a)(i) and (ii) of the *Code* is an error of law, (*Dow*, ¶ 28 and *R. v. Knife*, 2015 SKCA 82, ¶ 23-24). The Crown adds that reliance upon incorrect cases or reasons only applicable to the facts of those cases would constitute an error of law, (*R. v. Miller*, 2016 SKCA 32, ¶ 15). The Crown concludes by noting that overlooking or failing to appreciate relevant evidence may constitute an error of law, (*R. v. R.E.M.*, 2008 SCC 51, ¶ 56). In this case, the Crown submits that the judge failed to consider relevant

expert evidence of what motivated Mr. Shea's violent behaviour. The Crown alleges that this fatally compromised the pattern analysis.

[40] The application of a legal standard to the facts of a case is a question of law, (*R. v. Shepherd*, 2009 SCC 35, ¶ 20; *R. v. Araujo*, 2000 SCC 65, ¶ 18; *R. v. Biniaris*, 2000 SCC 15, ¶ 23).

[41] Mr. Shea concedes that the application of the proper test for the dangerous offender designation is a question of law, but findings of fact informing the ultimate legal question cannot be disturbed, absent palpable and overriding error.

[42] There are three grounds of appeal. They all attack the judge's pattern analysis. The first ground is the most substantial, while the second and third issues augment the first.

Issue 1—Did the judge err by requiring a comparative/objective degree of violence to establish a pattern of persistent or aggressive behaviour for which the predicate offence forms a part?

[43] The application judge drew extensively from the Alberta Court of Appeal in *R. v. Neve*, 1999 ABCA 206. In *Neve*, the Court found that a "serious personal injury offence" had to be "objectively serious". In *Steele*, the Supreme Court rejected that interpretation, saying that the "… degree of seriousness intended by Parliament is exhaustively set out in the definition of an SPIO in s. 752." The Supreme Court prefaced its detailed consideration of s. 753 with this observation about the definition of serious personal injury offence in s. 752:

> [27] … I will now discuss each of these purposes in detail and will conclude that the seriousness requirement of subpara. (*a*)(i) of the definition of an SPIO is satisfied by a textual and contextual interpretation of the words "use or attempted use of violence", and that it would be wrong to read in an objective minimum level of violence.

[44] In the result, *Steele* found that a robbery, involving a threat of violence, was a serious personal injury offence. *Neve* had come to the opposite conclusion.

[45] The Crown begins by arguing that the judge's heavy reliance on *Neve* was misplaced because the essential legal finding in *Neve* was rejected by the Supreme Court in *Steele*. The Crown notes that *Steele* was issued after the judge's decision here.

[46] Mr. Shea counters by acknowledging the Crown's point, but maintaining that in other respects *Neve* remains sound law. Certainly, Mr. Shea is correct that *Neve* is frequently referred to as authoritative on other points, including cases on which the Crown relies here, notwithstanding *Steele*, (i.e., *Knife*; *Hogg*; *Szostak*).

[47] At trial, the Crown offered three theories allegedly disclosing relevant patterns of behaviour: patterns of premeditated and instrumental violence against an outnumbered victim; a pattern of diverse, unselective and opportune violence; and a pattern of unremitting institutional violence.

[48] The Crown faults the judge for insisting on "striking similarity" among offences assessed for the pattern analysis. In response to one of the Crown's pattern theories at trial, the judge remarked that where the pattern relied on few examples of impugned behaviour greater similarity between them was required, (*Decision*, ¶ 442). This is not an error of law. Many cases require greater similarity among offences where there are fewer under consideration, (*R. v. Camara*, 2013 ONCJ 534; *R. v. Langevin* (1984), 45 O.R. (2d) 705 (Ont. C.A.). Correlatively, similarity may diminish with a greater number of relevant offences or behaviour, (*Hogg*, ¶ 39).

[49] The real issue is whether the Crown is correct about the judge's alleged error of requiring a comparative/objective level of gravity in Mr. Shea's violent behaviour. The Crown submitted:

> [The judge's] consequent requirement of similarities between the gravity of the predicate offence ***and those incidents said to form part of the pattern*** was critical to her conclusion …
>
> [Emphasis added]

[50] The Crown says that the error of requiring the same level of gravity for both the incidents comprising the pattern behaviour and the predicate offence led the judge to erroneously conclude that there was no pattern of violence as contemplated by s. 753 of the *Code*:

> [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*)
>
> […]

> [458] The Ontario Court of Appeal in *Hogg*, later cited with approval in *Szostak*, held ***it is necessary to ensure, in the pattern analysis, that the level of gravity of the behaviour being assessed is the same as the predicate offence***. The pattern analysis is directed at establishing a basis for predicting that the offender will likely offend in the same dangerous way in the future. (*Hogg*, paragraph 40; *Szostak*, paragraph 56) This is reflected in the language of the reasons in *Camara* at paragraphs 463 and 466 and *Szotstak* at paragraph 63. The dangerous offender provisions were not developed by Parliament to remove all offenders who may be a danger from society and commit them to an indeterminate sentence of imprisonment. There must not be a process of "general application but rather of exacting selection." (*Neve, paragraph 59*)
>
> [*Decision*, Emphasis added]

[51] The Crown connects the judge's reliance on *Neve*, to her alleged error in this way:

> 58. … the trial Judge's heavy reliance on *Neve* ineluctably forced her to require a comparative degree of objective seriousness between the predicate offence and the behaviour which was said to form part of the patterns of repetitive and persistent aggressive behaviour. When she concluded that the requirement was not met because the predicate offence was more serious than the other behaviour, she misinterpreted how a "pattern" could be satisfied under the legislation. This is clear when she stressed that she honoured the rigours set out in paras.121-122 of *Neve*, which reiterated "seriousness" requirements.

[52] Is the Crown correct? Must the pattern only include behaviour with comparative gravity to the predicate offence? Some cases imply as much. Most of them rely on *Neve* for this interpretation, but *Neve* problematically links the "objective seriousness" of a serious personal injury offence (s. 752), with the dangerous offender test in s. 753(1):

> [79] Third, ***the requirements under s.753(a) relating to an offender's past conduct inform – and reign in – the interpretation of what is meant by "violence" under s.752(a)(i) or "endangerment" under s.752(a)(ii)***. This is because s.753(a) requires that the predicate offence be part of a pattern of conduct (or sufficiently brutal in its own right that no pattern need be established). Under ss.753(a)(i) and (ii), there is little guidance as to what level of egregious behaviour must have been reached in terms of that past conduct. In essence, that definition comes in part from the inclusion of the predicate offence in the pattern. In other words, because the predicate offence must be part of the pattern of conduct (under s.753(a)(i) and (ii)), the degree of violence or endangerment in the predicate offence necessarily influences the evaluation of those elements in the past behaviour. ***If the violence or endangerment in a predicate offence did not***

> ***have to be objectively serious, that would raise the possibility of the degree of violence or endangerment in the pattern of conduct not needing to be objectively serious either.*** This interpretation would run counter to the philosophy of the dangerous offender legislation. Instead of capturing a small group of highly dangerous criminals, it would potentially snare a large group of common recidivists.
>
> [Emphasis added]

[53] *Neve* says the pattern offences must be objectively "serious" because the predicate offence is also objectively serious. We know from *Steele* that the second proposition is wrong. It must follow that so is the first. The predicate offence must be a serious personal injury offence, but it need not be "objectively serious" and it must follow that neither need be the pattern behaviour. Otherwise, pattern behaviour would be subject to a higher standard than the predicate offence, which triggers the dangerous offender process. Put otherwise, the pattern offences need not be "objectively serious" because the predicate offence need not be. *Steele* says so. "Seriousness" is captured by the statutory language and does not require embellishment. There is no need to "read in" language that the legislation does not contain.

[54] Nevertheless, *Neve* appropriately recognized that because the predicate offence must be part of the pattern, past behaviour must involve some degree of violence or endangerment related to the predicate offence:

> [110] … Since a predicate offence under s. 753(a) must be a "serious personal injury offence" (meaning that it itself must meet either a violence or endangerment requirement under s. 752(a)), it follows logically that the past behaviour must also have involved some degree of violence or attempted violence or endangerment or likely endangerment (whether more or less serious than the predicate offence). Otherwise, the predicate offence would not be part of that pattern.

[55] In this case, the judge cited *Hogg* on the necessity for comparative gravity between predicate offence and repetitive behaviour:

> [40] To summarize, the pattern of repetitive behaviour that includes the predicate offence has to contain enough of the same elements of unrestrained dangerous conduct to be able to predict that the offender will likely offend in the same way in the future. ***This will ensure that the level of gravity of the behaviour is the same***, so that the concern raised by Marshall J.A. - that the last straw could be a much more minor infraction - could not result in a dangerous offender

> designation. However, the offences need not be the same in every detail; that would unduly restrict the application of the section.
>
> [Emphasis added]

[56] The Crown notes that *Hogg* quotes Marshall J.A. in *R. v. Newman*, [1994] N.J. No. 54 (Nfld. C.A.). In *Newman*, the predicate offence, like Mr. Shea's, was aggravated assault, and some of the "pattern conduct", like Mr. Shea's, consisted of common assaults:

> [85] The criminal record has ***other convictions entailing the necessary attributes of personal violence*** which are appropriate considerations for Mr. Newman's behaviourial pattern, ***such as those for the common assaults*** upon Mr. Mulrooney and Mrs. Hickey immediately preceding the Eveley assault. However, the trial judge was obviously highlighting the above criminal acts because of their heightened gravity.
>
> [Emphasis added]

[57] In *Newman*, the court did not require gravity similar to the predicate offence. It considered the "connecting thread" to be behaviour that disclosed the offender's "propensity for violence":

> [79] It is apparent that these two incidents were considerably less serious and eventful than the Eveley assault. However, ***other acts in the historical outline of an offender's conduct do not require the same degree of gravity as the predicate offence*** to qualify for inclusion in his or her behaviourial pattern. Components of that pattern, apart from the crime whose sentence is under consideration, need not necessarily qualify as a "serious personal injury offence".
>
> [80] Moreover, while these two incidents may be viewed as minor, in comparison with Mr. Newman's attack on Mrs. Eveley, it is not correct to state they are too dissimilar to be included in an overview of Mr. Newman's historical conduct. ***The connecting thread*** of all components in the prescribed patterns, under either of the referenced sub-paragraphs***, is the offender's propensity for violence***. Both of these encounters are tinged with violence, either actual or threatened. They also took place in a public tavern or club which Mr. Newman's history shows to have been an arena utilized by him from time to time for his violent outbursts. The utility lies, however, primarily in the violent features of each encounter. ***As it is the likelihood of his constituting a danger to the public as a result of an established proclivity of violence which is in issue***, these incidents must be held to represent relevant components of his pattern of behaviour notwithstanding their lesser degree of gravity.
>
> [Emphasis added]

[58] Like Mr. Shea, Mr. Newman had convictions for making threats, possession of weapons and an assault causing bodily harm. This case is more like *Newman* than *Hogg* because there are many more incidents of violent behaviour, which *Hogg* acknowledges diminishes the need for similarity.

[59] As *Steele* instructs, the structure of the pattern must serve, and be subordinated to, the legislative goal. The Crown emphasized that s. 753(1)(a) of the *Code* addresses *behaviour*, not *offences*:

> [46] Second, it is important to note that ss. 753(1)(a)(i) and (ii) refer to ***patterns of behaviour*** [emphasis in original] as opposed to offences. Thus in order to establish the patterns referred to, ***it is not necessary that the offences be similar in nature or kind***, nor must the behaviour constituting the pattern arise under the same types of circumstances. What is necessary to establish ***the pattern of repetitive behaviour contemplated*** by s. 753(1)(a)(i) is an ***offender's failure to restrain himself or herself and that the result of that failure is the likelihood of death, injury or severe psychological damage to others***. To establish a pattern of "persistent, aggressive behaviour", as envisioned by s. 753(1)(a)(ii), a substantial degree of indifference must be shown on the part of the offender to the reasonably foreseeable consequences to others of his or her behaviour. ***The predicate offence must be part of the pattern*** referred to in either ss. 753(1)(a)(i) or (ii). Those patterns, however, are not mutually exclusive as suggested by Mr. McCallum. They may well overlap. By necessity, both ss. 753(1)(a)(i) and (ii) will involve repetitive behaviour. After all, that is what a pattern entails -- repetition.
>
> [*R. v. McCallum*, 2016 SKCA 96] [Emphasis added]

[60] The British Columbia Supreme Court has stressed that ***risk*** of future offences, not comparative gravity, ultimately governs:

> [43] In this case, I must determine whether the predicate offences form part of an identifiable pattern with the previous sexual offences for which Mr. J.E.M. has been convicted. While the court should never minimize the severity of any sexual offence, particularly one involving children, the predicate offences clearly involve a degree of violation and violence far beyond what was involved in the previous offences. ***In that sense, the predicate offences were a significant departure from the previous pattern.***
>
> [44] But all the offences share a critical common element--***the inability to control or resist*** sexual attraction to children and adolescents. ***Although the previous offences do not compare to the present ones in terms of severity, that critical common element places both the previous offenses and the current ones within a pattern***, as defined by the authorities.
>
> [*R. v. J.E.M.*, 2011 BCSC 715] [Emphasis added]

[61] *Neve* rightly insists that the pattern and risk assessments, while connected, are logically discrete, (i.e. ¶ 103, 105, 122). But the former analysis serves the latter, where lack of restraint is also indicative of future risk, as *Knife* explains:

> [78] As stated above, the purpose of the "pattern" requirement is to determine whether there is an evidentiary basis capable of supporting a finding the offender is likely to continue to violently offend in the future as per ss. 753(1)(a)(i) or (ii), and is thus a person from whom the public must be protected. Factual similarities in the contexts of the offender's previous offences are relevant, but similarities in the actual violence used cannot be ignored. ***The lack of contextual similarities is not fatal to the existence of a pattern if there are sufficient similarities in the elements of the offender's violent behaviour to show a failure to restrain that behaviour and a likelihood of causing death or injury in the future.***
>
> [Emphasis added]

[62] The Crown need not prove "… there is a 'general similarity' in the aggressive behaviour of the offender, nor does it require proof of 'general similarity' in the nature or degree of violence exhibited in that behaviour…", (*R. v. Wilton*, 2016 SKCA 131, ¶ 28).

[63] As Justice Karakatsanis said, when sitting on the Ontario Superior Court:

> [97] ***There is no requirement that the past conduct that makes up a pattern involve objectively serious offences, offences that are more or less serious***, or even that they be serious personal injury offences: *R. v. Currie*, above, at paras. 24-26; *R. v. Newman*, [1994] N.J. No. 54 (C.A.) at para. 79. Even two incidents with similarities are sufficient to form a pattern: *R. v. Langevin*, at para. 29.
>
> [*R. v. Tremblay*, 2010 ONSC 486] [Emphasis added]

[64] The Crown argues that the evidence clearly showed a repetitive pattern of behaviour predictive of future violence risking death, injury or serious psychological harm. All institutional incidents identified by the judge were violent. Mr. Shea's threats—unlike Ms. Neve's—were delivered directly to the intended victim with the obvious intent of intimidation and enhancing Mr. Shea's status. That Mr. Shea did not "deliver" on each threat, ignores the inherent violence of the threat itself and its menacing purpose, (*Steele*, ¶ 47). And unlike Ms. Neve, whose case the judge analogizes to this one, Mr. Shea routinely attacked inmates and guards. Mr. Shea's threats were aimed at the same population whom he assaulted—his threats were not hollow.

[65] The Crown argues that the judge's dismissal of the application simply because the predicate offence is an "escalation" in Mr. Shea's behaviour and is not "similar" to his previous violence or aggressions, is problematic for two reasons. Neither a "similarity" of violence nor comparative "gravity" of behaviour, is required. In the retrospective analysis, s. 753(1)(a)(i) only requires that the pattern of impugned behaviour be repetitive, unrestrained and inclusive of the predicate offence. The prospective threat analysis requires assessment of whether there is a likelihood of future death, injury or severe psychological damage.

[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*, ¶ 61, citing *Neve* and *R. v. Pike*, 2010 BCCA 401, ¶ 80, 81, 83). The fact of repetition shows a failure to restrain violent behaviour, (*Knife*, ¶ 70).

[67] *Knife* summarizes:

> 72 Thus, the pattern/repetition analysis provides the evidentiary basis for assessing the future threat. It is this future threat the dangerous offender provisions are aimed at curbing. Broadly speaking, if a court is unable to conclude the offender will pose a danger to the public in the future based on the offender's prior violent offences, the requirements of s. 753(1)(a) have not been met and the offender must not be designated as a dangerous offender. However, if it is apparent the predicate offence is not an isolated occurrence but is rather a repetition of violent behaviour which shows a failure to restrain violent behaviour and is likely to continue in the future causing injury or death to others (for s. 753(1)(a)(i)), then the offender does pose a danger to the public in the required sense and should be accordingly designated as a dangerous offender.

[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.

[70] The Crown may respond that Mr. Shea's failure to seriously injure his victims has been purely a matter of good fortune for them. The confined circumstances of prison allowed guards to intervene before more serious results occurred. But just as Mr. Shea's violent behaviour cannot be diminished because it happens in prison, nor can that violence be elevated to capture consequences that did not occur. That is to separate Mr. Shea's behaviour from the environment. We must take Mr. Shea as we find him. We do not know what would have happened in altered circumstances. Mr. Shea's out-of-prison pattern of behaviour does not support the assumption that he would be habitually violent with injurious consequences, if he were unrestrained.

[71] To invoke Mr. Shea's assaultive conduct, absent injury, in the pattern analysis, assumes that absence is purely adventitious. It requires that we incorporate by assumption a missing but essential element in the pattern analysis, as foundation for proving dangerousness "beyond a reasonable doubt". Respectfully, this is a bridge too far.

[72] This does not mean that Mr. Shea's assaults on others are not potentially harmful. One of his victims whom he punched went to hospital with facial injuries. But this was not the usual outcome, as the judge noted. Section 753(1)(a)(i) requires that future injury be likely or that the harm described in s. 753(1)(a)(ii) be a reasonably foreseeable consequence of such behaviour. The potential for such harm alone is not enough when the behaviour relied upon has not produced, or is likely to produce, a harmful result.

[73] If Mr. Shea's "unremitting institutional violence" had produced more injurious results, it would be reasonable to accept the Crown's submission that the pattern could include common assaults, as demonstrative of a propensity for violence, (i.e., *Newman*). But propensity alone, absent behaviour predictive of likely injury, cannot suffice.

[74] In my view, transitory, temporary or trifling "injuries" would not meet the statutory definition or properly balance the statutory purposes of "safety" and "proportionality". On the other hand, injuries comparable to the predicate aggravated assault, would not be required for inclusion of that behaviour in the pattern analysis.

[75] A similar want of endangerment is fatal to a finding under s. 753(1)(a)(ii) which requires:

> (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 […]

[76] Although there may be an overlap of ss. (a)(i) and (ii), they are not the same. Dangerous conduct may not involve violent or forceful behaviour by the perpetrator. It focuses on the consequences or potential consequences of conduct, (*Steele*, ¶ 58, discussing s. 752(a)(i) and (ii); street racing and arson are two other examples of dangerous conduct that are not overtly violent and may fortuitously produce no injuries, but are inherently dangerous).

[77] Again, the judge said Mr. Shea did not meet the criteria in s. 753(1)(a)(ii):

> [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]

[78] The judge was satisfied that Mr. Shea's behaviour was not typically dangerous in a manner in any way consonant with the predicate offence, because of the absence of dangerous consequences—or potentially dangerous consequences—for his victims.

Issue 2—The Provincial Court judge erred in law by relying on irrelevant dissimilarities between the incidents to conclude that the Crown had failed to prove a pattern of repetitive behaviour or a pattern of aggressive behaviour

[79] Under this ground, the Crown primarily criticizes the judge for minimizing Mr. Shea's violent conduct in prison and failing to appropriately consider the expert evidence indicative of motivation, as explanatory of the pattern of Mr. Shea's violence, thereby connecting it to future risk.

[80] Psychiatric evidence can be considered in the pattern analysis, along with extrinsic evidence of surrounding circumstances and criminal behaviour, (*Dow*, ¶ 29 and *Neve*, ¶ 123). But psychiatric evidence alone cannot establish a pattern in the absence of actual behaviour, (*Neve*, ¶ 127). The judge recognized all this. But the Crown says she failed to apply the psychiatric evidence in her pattern analysis.

[81] Although the judge had identified the expert evidence as an element of her pattern analysis, it is not mentioned in her discussion of the Crown's first pattern theory of unremitting institutional violence, except to "contextualize" it in the "dog-eat-dog" world of prison and to imply that Mr. Shea was simply defending himself, or preparing to do so.

[82] The Crown argues that the judge neglected to consider how Mr. Shea's psychopathy influenced his behaviour, revealing a pattern of violence. As Dr. Theriault said, and the judge acknowledged, most people in the "dog-eat-dog" world of prison do not behave like Mr. Shea, (*Decision*, ¶ 418). Mr. Shea's expert, Dr. Starzomski, agreed that Mr. Shea's anti-social personality was of "fundamental importance" and his psychopathy was a "particularly serious variant" of it. Such individuals are "quick to return to crime" and show a "disregard for the consequences of their actions".

[83] The instrumental nature of Mr. Shea's violence is important to understanding its pattern. As Dr. Theriault opined:

> … Mr. Shea does not use violence in an impulsive, emotional fashion but rather … as a tool when it suits his purposes. … Mr. Shea also shows a history of repetitive violence in the institutional setting … here it is likely that Mr. Shea is using violence in an instrumental fashion to advance his purposes within the offender subculture… .
>
> [Theriault Report, Appeal Book Vol VI, p. 145]

[84] Dr. Theriault thought there was evidence that Mr. Shea's trajectory of offending behaviour was towards more violence and more severe offences over time. He concluded on this point:

> … Although there is some evidence that Mr. Shea at times engages in impulsive reactionary violence much of his violence appears to be instrumental in nature and designed to enhance his reputation within the criminal subculture or to gain specific outcomes as was the extortion case in 2009.

[85] Dr. Starzomski agreed in cross-examination that Mr. Shea's violence may be instrumental to "preserve or gain face", (Appeal Book, Vol. IV, p. 628).

[86] The judge recognized that Mr. Shea's conduct was both impulsive and instrumental, (*Decision*, ¶ 411), but appears to have made no use of this evidence in the pattern analysis.

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

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

> [436] Another dimension of the pattern analysis must not be overlooked. Context is a critical aspect of determining if a pattern exists. (*Neve, paragraph 165*) Mr. Shea's context for much of his violent and aggressive behaviour has been in what Dr. Theriault referred to as the "dog-eat-dog" world of the correctional system.
>
> [437] For example, on May 25, 2003, Mr. Shea was the victim of a serious assault by three prisoners in the Renous gym during recreation. He was taken for outside medical treatment and involuntarily transferred to Millhaven Penitentiary in Ontario. (*Reasons, paragraph 241*) Just five days earlier, in a Progress Assessment dated May 20, 2003 Mr. Shea indicated he routinely kept "shanks" to protect himself as he was in a maximum security prison. (*Reasons, paragraph 240*)
>
> [438] Mr. Shea told the National Parole Board in 2007 that in relation to assaults on other prisoners, prison life "is not easy" and to survive he had to defend himself. (*Exhibit 7, page 383 – National Parole Board Decision, May 1, 2007*)

> [439] So, although the evidence reveals that Mr. Shea has possessed shanks in prison, the Crown has proven beyond a reasonable doubt only one instance of him using one – the aggravated assault of Keithen Downey on June 15, 2010. Arguably it is evidence of restraint on Mr. Shea's part that his institutional violence – assaulting other prisoners – has not been shown to involve shanks even though the records establish he had them and presumably could have used them.

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

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

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

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

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

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

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

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

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

> 117. Every incident was assaultive or violent. The vast majority of the incidents were instrumental – the violence was not an end itself. Rather, it was intended to either intimidate or seek retribution and/or foster status. Mr. Shea's early violence provides the beginnings of antisocial conduct and values. Practically every instance was unprovoked (notwithstanding the Respondent's rationalization). All victims were vulnerable – in some instances he used weapons; in other instances they were either lying down or asleep, or otherwise caught unaware; in some instances they were outnumbered. Either way, none involved a "fair fight". They were attacks.

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

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

[99] The Crown cites *R. v. Groot*, 112 O.A.C. 303, ¶ 14-23 and *R. v. Heaton*, 2014 SKCA 140, ¶ 23, as authority for relying on its novel pattern theory on appeal. *Groot* and *Heaton* are cases involving liability of an accused—whether

evidence submitted at trial sustained the changes. The Crown was not required to prove its theory, if the evidence otherwise established guilt.

[100] Mr. Shea objects that *Groot* and *Heaton* are not apposite. He cites *R. v. Hobbs*, 2010 NSCA 53 to preclude the Crown from advancing an alternative pattern theory. But *Hobbs* is not really on point either because it prohibits raising a "new issue"—in that case, a *Charter* argument not made to the trial judge, resulting in a compromised record on the point.

[101] Neither line of authority emulates the situation with which we are confronted here. But there is a fundamental difficulty with acceding to the Crown's argument. The parties and the Court are denied the benefit of the application judge's ruling on the Crown's proposed pattern, effectively delegating that analysis to the Court of Appeal, rather than the application judge, whose primary responsibility it is.

[102] Even if we were to entertain the Crown's alternative theory, it does not reveal a pattern of behaviour predictive of the likelihood of future injury or endangerment, (*Decision*, ¶ 456, quoted above, ¶ 77).

[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*, ¶ 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).

[104] One might argue that Mr. Shea should not benefit from institutional constraints as mitigative of his violent behaviour. But that would be speculative. It assumes his conduct would be no different in altered circumstances. The test requires prediction, not retrospective reconstruction.

Issue 3—Restraint not part of s. 753(1)(a)(ii)

[105] For convenience, subsection (a)(ii) of 753(1) is reproduced here:

> 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 …

[106] The judge found that Mr. Shea's conduct did not meet the requirements of s. 753(1)(a)(ii):

> [403] A pattern of repetitive behaviour in the case of Mr. Shea therefore has to be a pattern of repetitive violent behaviour given that the predicate offence is an aggravated assault. This means that to be considered for a pattern analysis under section 753.1(a)(i) of the *Code*, Mr. Shea's past behaviour must have involved "some degree of violence or attempted violence or endangerment or likely endangerment…" either "more or less violent than the predicate offence." (*Neve*, *paragraph 110*) Such a pattern can include threats although their context would have to be considered. (*Neve*, *paragraphs 172 - 179*)
>
> [404] The same must be true for a pattern of persistent aggressive behaviour given the predicate offence committed by Mr. Shea. The relevant-to-pattern-analysis past behaviour must have elements of "some degree of violence or attempted violence or endangerment or likely endangerment…" 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).

[107] The Crown faults the judge for incorporating a restraint component in this analysis which does not belong:

> [439] So, although the evidence reveals that Mr. Shea has possessed shanks in prison, the Crown has proven beyond a reasonable doubt only one instance of him using one – the aggravated assault of Keithen Downey on June 15, 2010. Arguably it is evidence of restraint on Mr. Shea's part that his institutional violence – assaulting other prisoners – has not been shown to involve shanks even though the records establish he had them and presumably could have used them.

[108] With respect to the last observation—restraint in s. 753 cannot mean being less violent than might otherwise be possible. Inmates do not have a diminished right to safety. Restraint in s. 753 refers to a failure to restrain violent behaviour demonstrated by repetition, (*Knife*, ¶ 70)—not the use of less violence than theoretically possible.

[109] Restraint belongs to s. 753(1)(a)(i). The equivalent consideration in s. 753(1)(a)(ii) is indifference. Not much turns on this. The judge accurately summarized this section. The crucial point for her was the difference between the

aggravated assault and Mr. Shea's history of violent behaviour. The predicate offence was therefore not part of the pattern. If reference to restraint was an error, it was not material, as earlier explained.

[110] Again, the judge was not satisfied that the predicate offence was "of a piece" with Mr. Shea's institutional conduct of fighting without weapons nor inflicting injuries.

Disposition

[111] Although I agree with the Crown that requiring a comparable degree of gravity between the predicate offence and other pattern behaviour may be an error of law, the judge did not make that error because she properly applied the legislative language to the relevant behaviour she identified. If she overlooked psychiatric evidence of motivation in the pattern analysis, it does not matter because she found that Mr. Shea's behaviour did not show a pattern involving injuries or endangerment, or the likelihood of either.

[112] I would dismiss the appeal.

Bryson J.A.

Reasons for Judgment (Bourgeois J.A.):

[113] I have had the benefit of reading my colleague's thorough and thoughtful decision. Although agreeing with much of his analysis, I cannot reach the same conclusion. I would, for the reasons that follow, allow the appeal and find that Mr. Shea be designated a dangerous offender.

[114] I do not intend to repeat to any great extent the analysis undertaken by Bryson J.A. I take no issue with the review undertaken of the dangerous offender regime, the standard of review analysis (¶ 38-42) or the import of the caselaw cited, notably *R. v. Steele*, 2014 SCC 61; *R. v. Szostak*, 2014 ONCA 15; *R. v. Knife*, 2015 SKCA 82; *R. v. Newman*, [1994] N.J. No. 54 (Nfld. C.A.); and *R. v. Tremblay*, 2010 ONSC 486.

[115] I will for ease of reference repeat the relevant portions of s. 753(1) of the *Code*:

> 753(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied
>
> (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
>
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour,

[116] Finding a pattern of behaviour is an essential component of a designation under s. 753(1). No pattern; no dangerous offender designation. In light of the errors raised by the appellant, all of which attack the application judge's pattern

analysis, it is helpful to revisit the patterns initially alleged. The appellant submitted that Mr. Shea's behaviour could be characterized in several ways:

- as a pattern of unremitting institutional violence;
- as a pattern of premeditated and instrumental violence against an outnumbered victim;
- as a pattern of diverse, unselective and opportune violence; and
- as a pattern of persistently aggressive behaviour.

[117] The appellant had argued that any of the above patterns of behaviour were sufficient to support a dangerous offender designation. The application judge considered each proposed pattern in turn, concluding on each, that the appellant had failed to prove the existence of a pattern as defined in the *Code*, beyond a reasonable doubt.

[118] Before this Court, the appellant has raised a number of alleged errors of law, and argues that individually or collectively, they gave rise to the application judge undertaking a flawed pattern analysis. The alleged errors are concentrated in two of the submitted patterns. As such, I will focus on these.

[119] With respect to a "pattern of unremitting institutional violence," the application judge concluded:

> [434] While Mr. Shea's institutional record is deplorable, I do not find it constitutes a pattern of behaviour as contemplated by either section 753.1(a)(i) or (ii). While I agree that Mr. Shea has shown unremittingly bad, disruptive, and defiant institutional behaviour, I do not find in the incidents I can appropriately take into account, a pattern of repetitive behaviour of which the predicate offence - the aggravated assault forms a part, that shows a failure to restrain himself and a likelihood of causing death or injury or inflicting severe psychological damage.

[120] The application judge gives two main rationales for her conclusion:

> [435] There is no evidence of Mr. Shea making good on his threats or trying to do so and most of his assaultive behaviour has involved the use of fists in circumstances where he is quickly subdued. This brings to mind what the Alberta Court of Appeal said in *Neve* about Ms. Neve expressing her threats in the presence of the police: "…the very fact that [the threats] were made directly to the police in their presence speaks volumes about how effective they were and how likely it was that they would result in injury to anyone. Realistically, these threats ended to only way they could – with N.'s arrest and conviction…" (*paragraph*

> *177*) ***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*)
>
> [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.
>
> [Emphasis added]

[121] The application judge also appeared to consider it relevant that although Mr. Shea had possessed shanks in the past, he had only utilized one as a weapon on the single occasion of the predicate offence:

> [439] So, although the evidence reveals that Mr. Shea has possessed shanks in prison, the Crown has proven beyond a reasonable doubt only one instance of him using one – the aggravated assault of Keithen Downey on June 15, 2010. ***Arguably it is evidence of restraint on Mr. Shea's part that his institutional violence – assaulting other prisoners – has not been shown to involve shanks even though the records establish he had them and presumably could have used them.***
>
> [Emphasis added]

[122] The application judge also considered whether, under s. 753(1)(a)(ii), Mr. Shea's behaviour constituted "a pattern of persistent aggressive behaviour." She found no such pattern existed. I take no issue with the application judge's description of what is required under that section:

> [453] To qualify as a pattern of persistent aggressive behaviour under section 753.1(a)(ii), the behaviour must be both persistent and aggressive. 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. (*Camara, paragraph 486*)

[123] Her analysis of why Mr. Shea's "atrocious" institutional behaviour is not sufficient to establish a pattern of persistent aggressive behaviour is brief:

> [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.***
>
> [457] And as I have said at paragraph 404 of these Reasons, it is my view that the requirements for a dangerous offender designation under section 753.1(a)(ii) criteria cannot significantly diverge from the requirements for a dangerous offender designation under section 753.1(a)(i). ***Furthermore, context must be taken into account, including the dog-eat-dog world of prison life***, Mr. Shea having access to but typically not using shanks, and his tendency when assaulting other prisoners or staff to do so in view of cameras and/or witnesses. I find Mr. Shea's atrocious institutional conduct does not satisfy the legislated requirements for his designation as a dangerous offender.
>
> [Emphasis added]

[124] I am *ad idem* with Bryson J.A. that, as the appellant submits, an incorrect interpretation of what constitutes a "pattern" or "restraint" within s. 753(1) is an error of law (¶ 39).

Objective/Comparative Seriousness

[125] The appellant's first ground of appeal is, in my view, persuasive. The appellant submits that the application judge's reasons disclose that in determining whether a pattern existed, she incorrectly required objective and comparative seriousness between the predicate offence and the past conduct. In other words, in order for there to be a pattern in which the predicate offence fell, Mr. Shea's past behaviours needed to be as serious as the aggravated assault. Based on the application judge's analysis, in particular ¶ 435 and 456 quoted above, I am satisfied that she did apply a comparative requirement. She relied on *Neve* in doing so.

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

> 97 ***There is no requirement that the past conduct that makes up a pattern involve objectively serious offences, offences that are more or less serious, or***

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

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

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

Use of “Context”

[129] The appellant argues that the application judge improperly considered the “dog-eat-dog” world of institutional life as minimizing the import of his in-custody behaviour, and this, in turn, influenced her finding that a pattern was not made out.

This argument has been thoroughly canvassed by Bryson J.A. (see ¶ 88-95). I understand him to be agreeing with the appellant that the application judge's use of "context" was problematic. As with the first issue, and for the same reason, he finds that error to be non-material.

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

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

> [436] Another dimension of the pattern analysis must not be overlooked. Context is a critical aspect of determining if a pattern exists. (*Neve, paragraph 165*) Mr. Shea's context for much of his violent and aggressive behaviour has been in what Dr. Theriault referred to as the "dog-eat-dog" world of the correctional system.
>
> [437] For example, on May 25, 2003, Mr. Shea was the victim of a serious assault by three prisoners in the Renous gym during recreation. He was taken for outside medical treatment and involuntarily transferred to Millhaven Penitentiary in Ontario. (*Reasons, paragraph 241*) Just five days earlier, in a Progress Assessment dated May 20, 2003 Mr. Shea indicated he routinely kept "shanks" to protect himself as he was in a maximum security prison. (*Reasons, paragraph 240*)
>
> [438] Mr. Shea told the National Parole Board in 2007 that in relation to assaults on other prisoners, prison life "is not easy" and to survive he had to defend himself. (*Exhibit 7, page 383 – National Parole Board Decision, May 1, 2007*)

> [439] So, although the evidence reveals that Mr. Shea has possessed shanks in prison, the Crown has proven beyond a reasonable doubt only one instance of him using one – the aggravated assault of Keithen Downey on June 15, 2010. Arguably it is evidence of restraint on Mr. Shea's part that his institutional violence – assaulting other prisoners – has not been shown to involve shanks even though the records establish he had them and presumably could have used them.

[132] With respect, the application judge's contextual approach was erroneous. On its face, s. 753(1) does not require the injection of "context" as used by the application judge into the determination of what behaviours may or may not properly fall within "a pattern of repetitive behaviour" or "a pattern of persistent aggressive behaviour."

[133] There are many "contexts" in which problematic (and sometimes criminal) behaviour is common—with youthful offenders; with those living in poverty; with those suffering from addiction or other mental health difficulties; and with those in historically marginalized groups, to name but a few. The dangerous offender caselaw is replete with pattern analysis which finds as part of a "pattern of behaviour" youthful conduct, behaviour under the influence of drugs or alcohol, behaviour prompted by the effects of poverty and behaviour while incarcerated. Other than *Neve*, I have been unable to find any clear support for the use of the circumstances surrounding behaviour as a means of ***excluding*** it from a pattern analysis. These "contexts" may be explanations for criminal choices, but they are not justifications or legal excuses.

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

> 165 We agree that there will be cases where uttering threats will certainly form part of a pattern of behaviour sufficient to satisfy ss. 753(a)(i) or (ii). However, to determine if specific offences fall within the proscribed patterns under s. 753, it is essential to assess the offences in context, having regard to what actually happened and why. For example, there is a world of difference between someone who conveys a threat directly to a police officer about a third party and the stalker who threatens his or her victim directly and then takes steps to carry out that threat.

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

> 166 What were the circumstances surrounding the threat offences which Neve committed? The first incident occurred when Neve was 15. While detained in a

young offender facility with a friend of hers, another juvenile prostitute, Neve wrongly assumed that the person to whom her friend was speaking on the phone was a pimp who had assaulted the friend. Neve took the phone, started swearing at him and threatened to blow his head off. Unbeknown to her, the person on the phone was a detective with the Calgary police. Neve was charged, pled guilty the next day, and received a four month closed custody sentence.

167 The second offence occurred when Neve was 19. The transcripts from the original sentencing hearing reveal that a woman, Tasha Johnson, had implicated Neve in a homicide. While speaking to a police officer investigating this matter, Neve informed him that she would kill Johnson and throw her body in the ocean. She told another officer that she was going to Vancouver and would find Johnson and then send the officer a postcard with Johnson's head smashed in. Neve pled guilty to this offence and was sentenced to 30 days in jail to be served intermittently, a fine, and probation.

[…]

172 Viewed in context, what do these threats reveal? First, it must be remembered that to prove criminal culpability, it is not necessary that the Crown prove that the offender intended that the threats would be conveyed to the victim, nor for that matter that the offender actually intended to carry them out. It is enough that the offender intended that the threats be taken seriously: *R. v. Clemente*, [1994] 2 S.C.R. 758; *R. v. McCraw*, [1991] 3 S.C.R. 72; and *R. v. LeBlanc*, [1989] 1 S.C.R. 1583.

173 We are mindful of the fact that the sentencing judge found that when Neve made the threats, she meant to carry them out if the opportunity to do so arose. However, with respect, on this record, that finding could not reasonably be made. In neither of the two threat offences to which Neve pled guilty was it agreed in the statement of facts put to the court that Neve intended to carry out the threats if the opportunity arose. Nor did Neve testify to this effect at the dangerous offender hearing in reference to any of the threat offences and the other evidence called could not reasonably support this conclusion being drawn even with the benefit of hindsight.

[…]

175 Third, and most importantly, is the context in which the threats were made. The first occasion involved a threat over the phone to someone Neve thought was a pimp. Without trivializing Neve's conduct, her reaction in dealing with a pimp who had assaulted her friend is understandable, given the world of the juvenile prostitute, though not legally justifiable. … This was a young prostitute seeking to defend her friend, another prostitute, from a pimp through the use of verbal utterances over a telephone. More than one study has revealed the high degree of risk of harm to which juvenile prostitutes are subjected by their pimps. Nor can one ignore the limited ability of authorities, despite their best efforts, to adequately protect juvenile prostitutes. Viewed from this perspective, it is difficult

> to characterize what was essentially a pathetically inadequate attempt by a young girl to defend her friend from a pimp as behaviour falling within the proscribed patterns of behaviour.

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

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

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

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

Use of "Restraint"

[139] From the application judge's reasons, it is clear that she considered the concept of "restraint" in undertaking the pattern analysis (¶ 439 and 457 as set out earlier herein). The appellant submits that this use of "restraint" was not as contemplated in s. 753(1)(a)(i):

> 89. The trial Judge suggested that the Respondent's use of a shank in only one occasion, despite his access to them, was "Arguably … evidence of restraint …" [A.B., vol. I, tab 4, at para. 439.] There are two problems with this definition of "restraint". First, it betrays a requirement of an objective degree of seriousness of offending behaviour before it can be considered part of a pattern. If one follows her logic, the Crown could never prove the lack of restraint requirement unless Mr. Shea invariably used shanks. Second, when the dangerous offender provisions speak of "restraint", they mean embarking on the behaviour *at all*, rather than a qualitative assessment of the degree of violence within.
>
> 90. Again, while the questions of the trial Judge during the Crown's oral submissions are not determinative, she did question what "restraint" meant: if restraint is met by the fact of repeated behaviour, is that portion of the provision redundant? [A.B., vol. V, tab 15, at pp.477-479.] The interpretation by the trial Judge seems anchored to the objective and comparative seriousness requirement from her reliance on the previously mentioned cases. As stated in *Knife*, the fact of repetition establishes that the person has failed to restrain his or her behaviour.

[140] I agree with the appellant's argument and, in particular, that the source of the application judge's misuse of restraint is anchored in her faulty objective/comparative seriousness criteria. I agree with the sentiment expressed by my colleague at ¶ 108 herein 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."

[141] The application judge's misapplication of "restraint" is an error of law. Lack of restraint is an essential consideration in finding a pattern of behaviour in s. 753(1)(a)(i). Instead of properly considering whether Mr. Shea's past "atrocious" institutional behaviour displayed a lack of restraint, the application judge focused on what he did not do (use shanks on other occasions) to show he possessed restraint. This invariably impacted upon the pattern analysis.

Materiality of the Errors

[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*, ¶ 61, citing *Neve* and *R. v. Pike*, 2010 BCCA 401, ¶ 80, 81, 83). The fact of repetition shows a failure to restrain violent behaviour, (*Knife*, ¶ 70).
>
> […]
>
> [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 ¶ 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*, ¶ 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 (¶ 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 (¶ 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" (¶ 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 ¶ 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*, ¶ 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* (¶ 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 ¶ 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?

Disposition

[156] On appeal, this Court's authority is set out in s. 759(3) of the *Code*. It contemplates three potential outcomes:

> 759(3) The court of appeal may
>
> (a) allow the appeal and

> (i) find that an offender is or is not a dangerous offender or a long-term offender or impose a sentence that may be imposed or an order that may be made by the trial court under this Part, or
>
> (ii) order a new hearing, with any directions that the court considers appropriate; or
>
> (b) dismiss the appeal.

[157] Where, as here, the record is complete and permits an appellate court to assess the requirements of s. 753(1), a new hearing is not mandated (*Dow*, ¶ 37). I am satisfied that the record amply establishes that Mr. Shea meets the statutory requirements contained in s. 753(1)(a) on two bases.

[158] As noted above, I am satisfied that pursuant to s. 753(1)(a)(i), Mr. Shea's violent institutional conduct, including the aggravated assault, is a pattern of repetitive behaviour showing a failure to restrain his behaviour, demonstrating a likelihood of causing death, injury or severe psychological damage to others due to a future failure to restrain his behaviour.

[159] I am further satisfied that pursuant to s. 753(1)(a)(ii), Mr. Shea has demonstrated a pattern of aggressive behaviour, which includes the aggravated assault, said behaviour showing a substantial degree of indifference regarding the reasonably foreseeable consequences to others.

[160] Having reached the above conclusions, the rebuttable presumption in s. 753(4.1) of the *Code* is engaged. It provides:

> (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.

[161] In *R. v. Bragg*, 2015 BCCA 498, the relevant considerations for sentencing a dangerous offender are set out:

> [55] The judge referred (at para. 154) to the three elements in *R. v. McCallum*, [2005] O.J. No. 1178 at para. 47 (and adopted in *R. v. Taylor*, 2012 ONSC 1025 at para. 356), that must be present to achieve the goal of protecting the public regarding the reduction of risk to an acceptable level:
>
> > (1) there must be evidence of treatability that is more than an expression of hope;

> (2) the evidence must indicate that the offender can be treated within a definite period of time; and
>
> (3) the evidence of treatability must be specific to that offender.

[162] In considering the factors above, the expert evidence is again of assistance. The application judge noted Dr. Theriault's opinion, notably the lack of reasonable expectation that Mr. Shea's behaviour can be managed in the community:

> [359] Dr. Theriault's expectation of the eventual control of Mr. Shea's risk in the community "as it stands today" is low. At the present time, he does not have confidence that there is a "reasonable expectation" that Mr. Shea's behavior could be controlled in the community. (*Dr. Theriault's Testimony*, page 257) Dr. Theriault noted that Mr. Shea has not been able to demonstrate changes in his entrenched, anti-social behaviours. It was his opinion that Mr. Shea would have "to learn to suppress some of the inclinations that arise from having a high psychopathy score…[that is] the basic elements of being psychopathic…[and] he needs to fundamentally change his affiliation with the pro-criminal lifestyle…" (*Dr. Theriault's Testimony, pages 180 – 181*)
>
> [360] Dr. Theriault noted that Mr. Shea's institutional conduct "certainly doesn't demonstrate to this point that he, at least up until now, has demonstrated an interest in utilizing programming to fundamentally change his behaviour and hence his outcome." (*Dr. Theriault's Testimony, page 137*) In Dr. Theriault's view:
>
> > …each time that he goes in he has an opportunity to do something differently and each time when he goes in, despite on at least some occasions his voicing that he is willing and able to do something differently, it quickly degenerates into more of the same and so he gets very quickly back into those kind of behaviours which have always been present when he's in custody and which have generally moved him from whatever security level he's placed at up to maximum security. (*Dr. Theriault's Testimony, page 139*)

[163] Dr. Starzomski, the expert called by Mr. Shea, was not enthusiastic regarding his prospects for control. The application judge noted:

> [366] Dr. Starzomski agreed with Dr. Theriault that it will take "years" for Mr. Shea "to demonstrate a…more stable positive engagement process to manage risk. (*Dr. Starzomski's Testimony, page 522*) He acknowledged that Mr. Shea has "not made a lot of progress in engaging in programs and schooling within the institutions." (*Dr. Starzomski's Testimony, page 541*)

[164] At best, Dr. Starzomski thought there was a "reasonable possibility" that Mr. Shea's violence could be controlled:

> [394] Like Dr. Theriault, Dr. Starzomski sees considerable challenges facing Mr. Shea, but in his opinion there is a reasonable possibility of Mr. Shea controlling his violent behaviour. Especially if a geographical relocation is achieved and attentional issues are confirmed and addressed and Mr. Shea is "able to actually engage in a different sort of relationship and approach to his incarceration, it could actually… So may look much better than it has. Of course, that's not a certainty." (*Dr. Starzomski's Testimony, page 719*)
>
> [395] Dr. Starzomski testified that the dangerous offender application has caught Mr. Shea's attention. "…the reality…if he does not make some notable changes, he stands to not have the chance to be in the community again for a long time, I think that is a factor that can motivate him. It's …a newer aspect of this whole situation. (*Dr. Starzomski's Testimony, page 717*)

[165] It is difficult to ignore that as Dr. Starzomski was assuring the application judge that the potential of an indeterminate sentence had finally caught Mr. Shea's attention, Mr. Shea was taking the opportunity to violently attack another accused at the court holding facilities. Even in the midst of a dangerous offender application, Mr. Shea could not resist the opportunity to violently attack an unsuspecting cellmate. This does not bode well for controlling his behaviour in the community (or while incarcerated).

[166] On the substantial record before this Court, there is nothing which serves to rebut the presumption contained in s. 753(4.1). As such, I find that Mr. Shea should be subject to an indeterminate period of incarceration.

[167] I am mindful of the gravity of imposing an indeterminate sentence. It will ultimately fall to Mr. Shea to address his behaviour and cease the persistent violent behaviour which has resulted in his designation as a dangerous offender. If he is successful in showing the restraint which has been sorely lacking to date, he may be viewed in a different light upon the periodic reviews which are directed under s. 761 of the *Code*.

Bourgeois J.A.

Concurred in:

Van den Eynden J.A.

Appendix

This Appendix reproduces ¶ 431 of the judge's decision. The bolding is the judge indicating incidents for which there were convictions.

- **In January 1994, during a dispute with his mother, Mr. Shea threatened her with a knife; (*Reasons, paragraph 78*) This incident led to a conviction for possession of a weapon.**
- **On August 3, 1995, when spoken to about loitering on the property, Mr. Shea verbally threatened the shift manager at McDonald's on Herring Cove Road; (*Reasons, paragraph 83*) This incident led to a conviction for uttering threats.**
- On February 21, 1996, prior to a Sheriffs' transport to court, Mr. Shea started to punch "at" a sheriffs' officer who entered the cell to speak with him about handing over his sneakers. He ultimately had to be subdued with capsicum spray. (*Reasons, paragraph 87*)
- On October 8, 1998, Mr. Shea, a resident in the Youth Facility at Waterville, punched another youth "several times" over gambling debts. (*Reasons, paragraph 128*)
- **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 February 2, 2001, Mr. Shea was arrested by Halifax Police after making threats against bar security who had refused him entry. (*Reasons, paragraph 221*)
- **On April 8, 2001, Mr. Shea threw a rock at a Shoppers' Drug Mart security officer who followed him from the store believing he had shoplifted. The rock narrowly missed the victim's head. This incident led to a conviction for assault with a weapon.** The National Parole Board (Atlantic) dealing with Mr. Shea's parole suspension determined that the incident was "seen to be on the low side of Assault." (*Reasons, paragraphs 133 and 223*)

- 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*)

- In May 2003, in a Correctional Plan Progress Report, it was noted that of 26 institutional charges between July 22, 2002 and March 27, 2003, one was for a "fight with another inmate" on December 18, 2002. (*Reasons, paragraph 240*)

- On July 3, 2003, Mr. Shea threatened a correctional officer during a strip search by saying: "Wait till I get out in two years, I'll see you on the street and I will beat you." (*Reasons, paragraph 162*)

- 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 April 14, 2007, Mr. Shea was discovered with contraband and threated correctional staff by making a gun noise –"click, click, bang" and saying: "I'll get you. I won't be in here forever. I'll see you on the outside." At his disciplinary board hearing, Mr. Shea admitted making the "gun noise" but said it meant nothing. (*Reasons, paragraph 163*)

- **On January 10, 2009, Mr. Shea committed the forcible confinement and extortion while armed for which he received a six year six month**

sentence for the extortion and a three year concurrent sentence for the forcible confinement. (*Reasons, paragraph 146 and 147*)

- 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 21, 2010, Mr. Shea threated another prisoner with assault if he did not break a sprinkler. (*Reasons, paragraph 181*)
- On April 7, 2010, Mr. Shea bolted from correctional staff serving him a meal to pursue another prisoner, who locked himself in his cell. (*Reasons, paragraph 182*)
- **On June 15, 2010, Mr. Shea committed the predicate offence – the stabbing of Keithen Downey in an altercation that also involved a co-accused, Adam LeBlanc – which led to a conviction for aggravated assault. (*Reasons, paragraphs 58 - 64*)**
- On November 28, 2011 at the CBCF, Mr. Shea was observed on surveillance footage throwing two punches in a fight between two other prisoners. (*Reasons, paragraph 193*)
- On July 19, 2012, Mr. Shea was observed on surveillance footage entering another prisoner's cell where he "struck" him. (*Reasons, paragraph 197*)
- On March 31, 2014, Mr. Shea attacked Christian Clyke in the cells at the Halifax Provincial Court. He and Mr. Clyke had previously been assessed as incompatible although this information had not been accessed by Sheriffs' officers before Mr. Clyke was placed in the same cell as Mr. Shea. (*Reasons, paragraphs 291 - 297*)