CANADA

PROVINCE OF NOVA SCOTIA

IN THE PROVINCIAL COURT

Cite as R. v. M.D.W., 2001 NSPC 19

HER MAJESTY THE QUEEN

versus

M. D. W.

Dangerous Offender Application
s. 752, 753 Criminal Code

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Before: **The Honourable David J. Ryan, JPC**

Mr. Andre Arseneau, for the Prosecution
Mr. David Campbell, for the Defence

Decision: July 5, 2001
Sydney, Nova Scotia

[1] This is an application by the Crown that M.D. W. be declared a dangerous offender pursuant to s. 752 and s. 753 of the **Criminal Code.**

[2] M.D.W. pled Guilty that he did on:

August 3, 2001 - in committing an assault on J. W. M. uses a weapon, a ceramic doll contrary to S. 267 of the **Criminal Code**.

August 8, 2001 - commit a sexual assault on T. A. contrary to S. 271 (1)(a) of the **Criminal Code**.

August 8, 2001 - commit an assault on J. A. T. contrary to S.266(b) of the **Criminal Code**.

[3] Prior to the election on the indictable charge (s.271 (1)(a)) and pleas to all counts it was noted by Counsel for the Defence that the issue of an assessment per s. 672.13 of the **Code** had been canvassed with Judge Peter Ross. In as much as such an assessment had previously been performed on Mr. W. in March of the prior year, and in as much as that assessment found Mr. W. fit to stand to trial and that he did not suffer from a mental disorder so as to exempt him from criminal responsibility by virtue of S.16(1) of the **Criminal Code**, Judge Ross was of the opinion that there were not sufficient grounds to order such an examination. Defence Counsel acknowledged there was no further factual basis upon which such a request could be made. A copy of the March 26, 1999 assessment was before this Court and therefore on the 15th of August, 2000 this Court decided to proceed. As indicated, Mr. W. elected Provincial Court on the s. 271 count and then entered guilty pleas on the three charges. The Crown withdrew three other charges. All matters were adjourned to October 11, 2000 for Pre-Sentence Report and sentencing and then again to October 12, 2000. On that latter date the Crown gave notice of its intent to have Mr. W. declared a long term offender and an assessment was then ordered per S. 752.1(1) of the **Criminal Code**. There were subsequent adjournments to December 12, 2000 and January 26, 2001 to schedule dates for a hearing on the Crown application. On January 26, 2001 the Crown changed the application to now have Mr. W. declared a dangerous offender per S. 752.1 and 753 (1) of the **Code**.

[4] Further adjournments then took place to allow the Defence to arrange for experts to assess Mr. W.. A hearing date of March 31, 2001 was scheduled but both Crown and Defence acknowledged that at least five days would be required and as a result the matter adjourned to May 14, 2001. Only preliminary matters (tendering of extensive documentation) were attended to on that date. In addition the signed consent of the Attorney General (dated May 11, 2001) necessitated an adjournment until May 22, 2001 in order to conform with S. 754.(1)(c) of the **Criminal Code**. The Crown had previously made substantial disclosures to the Defence concerning the basis upon which it made its application and such was acknowledged by the Defence.

[5] Included in the exhibits tendered was documentation dealing with his previous medical and mental health records, information and reports covering periods of time when he was incarcerated both in youth facilities and correctional institutions, documentation from when he was supervised by the Probation service both as a young offender and adult, evidence of his past criminal record and the facts surrounding those convictions and of course, the assessments of the two Crown witness specialists.

[6] The Crown also called a number of witnesses who testified as to the results of various investigations or charges flowing from Mr. W.'s conduct (police witness), the various programs that might or might not be available to Mr. W. either in a community or penal setting (Rhonda Walker and John MacDougall), and the psychiatric and psychological experts (Dr. Theriault and Dr. Kelln) who gave expert opinion testimony as to their findings. Drs. Theriault and Kelln had reviewed Mr. W.'s background and conducted interviews and tests with him as per the Court Order for such assessment. Dr. Wayne Macdonald, Ph.D. was called by and on behalf of the Defence.

[7] For the Crown to succeed in its application to have Mr. W. declared a dangerous offender it must prove that Mr. W. committed an offence (a predicate offence) described in S. 752 of the **Code** as a "serious personal injury offence" involving either:

- (i) the use of violence,
- (ii) endangerment or likelihood of endangerment of the life or safety of another person or the inflicting or likely to inflict severe psychological damage upon another person,
- sexual offences as set out in S. 271, 272, or S. 273 of the

Code.

[8] Expert opinion evidence was presented by Dr. P.S. Theriault, a forensic psychiatrist and Dr. Brad R.C. Kelln, a clinical and forensic psychologist who were called by the Crown in support of this application. Dr. Wayne MacDonald, a clinical neuropsychologist was called on behalf of the Defence. All three witnesses personally interviewed Mr. W. and had access to prior hospital and psychiatric records dating back to when he was a child. In addition all three had access to various testing results as had been carried out on Mr. W. in conjunction with the assessment as ordered by this Court. They also acknowledged having access to various police reports concerning Mr. W.'s past conduct resulting in prior Court appearances and convictions.
[9] All three expert witnesses testified as to the nature of their interviews with Mr. W., the nature of the various testing procedures used in assisting them in coming to their respective diagnosis and prognosis. Their findings and reports have been tendered as exhibits in this hearing and were carefully reviewed by the Court.

BACKGROUND INFORMATION

[10] M. W. is now twenty-seven years of age (DOB - *). He is approximately 6'2" tall and would appear to weigh in the 200-225 lb. range. He was disheveled in appearance when in Court and seemed to often pay little or no attention to the Court proceedings. Indeed on a number of occasions he had to be advised by the Court to modify his conduct as he was laughing, making comments and gestures that seemed totally unrelated to the proceedings at hand.

[11] He is the youngest of two children born to a woman of marginal ability who now resides in a group home. His one sibling is now serving a life sentence for the murder of a seven year old niece in the 1980's when he himself was a teenager. All reports indicate that the home environment was at best chaotic, perhaps violent; certainly dysfunctional.

[12] He resided with his maternal grandparents. Excessive alcohol consumption was common in the residence as was verbal and physical abuse within the family as a whole. Discipline was non-existent. Mr. W. appears to have suffered a head trauma when very young (18 months) and was later hit by a van (age 4). There was some confirmation of this fact by

x-ray when he was a child. Whether the original injury was a result of accident or intentional on his part or by someone else is only speculative.

[13] M. W. was developmentally delayed in his early schooling as was evidenced by learning difficulties and behavioral problems. His first contact with mental health providers was as early as December 16, 1981 at age 7. At that time Dr. Kaiser Sarwar, Clinical Psychologist, (whose notes were included in exhibits tendered by the Crown),noted that he had failed Grade 1, was demonstrating marked behavioral problems both at home and at school, problems with socialization, learning and developmental anxiety. He was extremely emotional and tended to be hyperactive, aggressive and asocial at times. Some attempts at remedial programs were put in place - with little success due both to the environment to which he was constantly exposed and his own deficits.

[14] Only two months after his first interview with Dr. Sarwar, M. was seen by the same psychologist who then heard of occasions when M. had struck at least two fellow students. Taunting by other students led to poor responses. Dr. Sarwar made the comment “Frankly, I am very concerned about his behavioral problems.” and suggested that even at that early stage his diagnosis suggested the condition required immediate care most likely “...in a hospital set-up.”

Unfortunately, Mr. W.’s situation never got any better and indeed, if anything, his condition was “deteriorating progressively”. (Dr. Sarwar - October 18, 1982). As one reads through the exhibit (C-2) it is obvious there was no progress made due to his own deficits, the family situation, and failure to consistently attend at various programs that were put in place.

PREVIOUS OFFENCES

1990

[15] In 1990 M. W. came before the Court for the first time. He was charged and convicted in Youth Court of an offence under s. 334 (shoplifting) and placed on probation for five months. The evidence of Sgt. Sheldon MacLeod is of note in that matter. When being questioned by Sgt. MacLeod, in the presence of his mother, Mr. W. picked up a trophy that was in the

office, saying nothing, but wielding it in a matter that Sgt. MacLeod tookl as a threatening gesture. The officer told him to “put it down” and he did, leaving the office and nearly knocking over a commissionaire when exiting the building.

[16] Mr. W. was charged with two more offences that occurred on November 14, 1990. Findings of guilt under s. 175 (creating a disturbance) and s. 266 (assault) were entered on April 23, 1991 and he was sentenced on each charge to one month “continuously and concurrently”. The factual situation is relevant to the present matters as it includes one charge (s. 266) and events which the Court sees as a beginning of an ongoing pattern of behavior of Mr. W..

[17] Mr. W. (then aged 16 ½ years) and his mother were in a MacDonald’s Restaurant. His mother began to have a discussion with a woman who was there with her four year old child. For no apparent reason Mr. W. got quite upset and agitated. He yelled an obscenity at his mother and the woman and told his mother to “shut up”. His mother replied in like manner and continued to speak with the woman. Mr. W. then proceeded to punch the woman (whom he did not know) in the back of the head for no apparent reason. He entered a plea of guilty to both the assault and creating a disturbance charge.

1991

[18] On January 3, 1991, a finding of guilty was entered against Mr. W. for sexual assault contrary to s. 271(1) of the **Code**. The event, a sexual assault on a ten year old boy, took place the previous April. Mr. W. enticed the child from the area of a Zeller’s Store to his home on * where he showed him pornographic magazines. He then took him to a wooded area behind * where he had the child perform fellatio on him and Mr. W. did the same on the child. Mr. W. had hidden the child’s bicycle and would not return it until he had completed the sex act. Sergeant MacLeod (who then headed the Youth Division of the Sydney Police Department) testified that the child stated that Mr. W. wouldn’t take him home unless he performed oral sex. The boy, who was described as being of “below average intelligence” was afraid, it was getting dark and wanted to go home.

[19] The matter only came to the attention of the police as a result of the intervention of the Children's Aid Society which became involved when the boy's mother's complained that the child began to act inappropriately both at home and at school. The child was treated by a psychiatrist who testified that the child exhibited behavior that would be consistent with and appropriate for such a young person, if sexually molested. A disposition was made on the 12th day of February, 1991, committing Mr. W. to secure custody for a period of six months and probation for a further period of sixteen months.

1995

[20] In 1995 Mr. W. was convicted of charges under s. 87 (pointing a firearm), s. 264.1(1)(a) (uttering threats) and s. 740(1) (breach of probation). There was no evidence presented in regard to these charges, although Certificates of Conviction have been tendered by the Crown. There was some reference to an incident regarding a B.B. gun but it was Sergeant MacLeod's recollection that the charge arising from the B.B. gun incident was dropped. In any event, Mr. W. was sentenced to a period of three months incarceration on each of the s.87, s. 264.1, and s. 740 charges, to be followed by two years probation.

1996

[21] In 1996, Mr. W. pled guilty to a charge under s. 430(4) of the **Code** and was sentenced to a period of incarceration of 60 days together with a further probation order for two years. In that matter, an individual was bringing her motor vehicle to a stop at an intersection. Mr. W., who did not know anyone in the car, suddenly jumped on the hood of the car and began banging on the windshield with his fists and generally banging on the hood area. He pulled off a windshield wiper. The female driver of the car, being very afraid and upset, pulled away and Mr. W. rolled off the car. She provided police with a description of the man and Mr. W. was arrested shortly thereafter.

1997

[22] In 1997 Mr. W. pled guilty to a charge of assault under s. 266 of the **Code**. He was a patient at the Cape Breton Hospital and when approached by a staff member for a second time, advising him he was not permitted to smoke in a certain area, he began to swear and punched the female staff member in the chest. He was about to do so again but instead ran from the

hospital. Mr. W. was placed on probation for six months.

[23] Also in 1997 Mr. W. pled guilt to charges under s. 265(1)(b) (threatened assault) and s. 267(1)(a) (assault with a weapon) of the **Code**. Mr. W. was at a Tim Horton's restaurant when he got into a confrontation with two men. He went into the store and returned with a bagel knife with a 12" serrated blade, proceeding to where the two were and threatened to stab at least one of them with the knife. He then ran down the street with the two individuals following him - eventually waving over the police. Mr. W. was later apprehended and denied being there but subsequently pled guilty to the s. 265 charge and was sentenced to two months (consecutive) and two years probation.

[24] In relation to the 267(1)(a) charge Mr. W. pled guilty to the offence that he used a knife when committing an assault. This offence took place in the region of Wentworth Park. Police transported a man to hospital who had received a puncture wound through the cheek and into the tongue. The individual and his sister were walking down the street when passed on bicycles by Mr. W. and a friend. The girl made a comment overheard by Mr. W. which he took as referring to him. He stopped to confront the girl and the victim told him to leave his sister alone. Mr. W. struck the victim in the cheek area with a knife having a 4" long blade. He also advised the victim he was a "marked man" and if he ever saw him again, he would kill him. Mr. W. was charged under s. 267(1)(a) and s. 265(1)(b). On entering the guilty plea to the first charge, the Crown offered no evidence on the second charge. Mr. W. was sentenced to two months consecutive and again placed on probation for two years.

1998

[25] Mr. W.'s next appearance before the Court was in relation to charges under s. 173 (indecent act), s. 173 (indecent act) and s. 271 (sexual assault) of the **Code**. The first offence of an indecent act (s. 173) took place on December 8, 1998 when, in response to taunts by four children (ages 12-14), Mr. W. dropped his trousers on two occasions exposing his buttocks. He entered a plea of guilty and was sentenced on June 11, 1999 to one day in jail and further probation for two years. The second charge under s. 173 occurred on March 4, 1999 at the * in Sydney. Children in the five to seven year range began to taunt Mr. W.. He pulled down his trousers and exposed both his penis and buttocks. When confronted by a teenager (age 16) as to

why he had done so, he replied that he did so because he wanted to and then struck the teenager in the face. Again he was sentenced to the same penalty of one day in jail. The Court took into consideration that he had spent three months on remand while awaiting trial.

[26] The charge under s. 271 arose as a result of a complaint of a fourteen year old female alleging that Mr. W. had touched her breasts and buttocks. She was with Mr. W. and others in an apartment. Apparently the young girl and friends traveled in a circle with people including Mr. W., who they let "hang around". On another occasion he pulled a towel off of her as she got out of the bathtub. Both Mr. W. and the victim had rather crude and unflattering names by which they referred to each other. Mr. W. changed his plea at the trial date of June 11, 1999 and he was sentenced to one day in jail - the Court again being mindful of the months he had spent on remand awaiting trial.

1999

[27] In September of 1999 Mr. W. was before the Court charged under s. 267(1) (assault causing bodily harm) and s. 733.1 (breach of probation) of the **Code**. A young couple were proceeding up Bentinck Street in Sydney when confronted by Mr. W.. The only other contact between them was the previous day when the young lady refused Mr. W.'s request for a cigarette and he replied with an obscenity. On this day Mr. W. made some comment and the young lady's companion took issue. Mr. W. replied with "Come on, I'll slice you.". The young lady stepped between Mr. W. and her companion when Mr. W. was swinging what she described as something looking like "a doorknob with a wire coming from it". She was nicked by the device in the chest area causing a small cut. Mr. W. was subsequently arrested and pled guilty to the charges under s. 267(a) and 733.1. He was sentenced to two months incarceration on the first charge and one month consecutive on the breach of probation charge.

[28] Mr. W.'s last court appearance prior to predicate charge was in relation to a charge under s. 270(1)(a) (assaulting a peace officer). A guard at the Antigonish Correctional Center attempted to break up a fight between Mr. W. and another inmate. As he was escorting Mr. W. back to his cell, Mr. W. assaulted the guard by punching him. He also threatened to kill the guard. The guard received bloody lips as a result of Mr. W.'s blow. Mr. W. was sentenced, after pleading guilty, to forty-five days incarceration and

another probation order for two years was put in place. In addition a Prohibition Order pursuant to s. 110 of the **Code** was put in place.

PREDICATE OFFENCE

[29] The factual situations of the three most recent offences under s. 267, 271 and 266 of the Criminal Code were quite straight forward and admitted by Mr. W..

[30] On August, 2000 police responded to a complaint at * in Sydney. That residence is a boarding house operated by a Mrs. S.. Included among the boarders that day were Mr. W. and one J. W. M. who was described by police as somewhat "slow". Mr. M. had been asleep when Mr. W. came in and began watching television. Mr. M. asked that the television be turned down - Mr. W. disagreed. Mr. W. grabbed a porcelain doll and began to strike Mr. M. with it about the head and arms. Mr. M. suffered abrasions and bumps on the head and injuries to his arms in the form of a laceration. It was thought by police that Mr. M.'s arm may have been broken but subsequent hospital tests indicated otherwise. Mr. M. also complained that after being struck by the doll, Mr. W. hit and kicked him. Mr. W. did not appear to be under the influence of either alcohol or drugs when subsequently arrested. He was charged under s. 267 of the **Code**, the Crown proceeded summarily and Mr. W. entered a guilty plea.

[31] On August 8, 2000 Ms. J. A. was at Wentworth Park in Sydney with her 6 year old grandson T. and the boy's aunt, E. A.. J. A. was feeding the ducks and E. was near T. when a man (Mr. W.) sat on a bench near T.. E. turned to see Mr. W. with his hands rubbing T.'s penis and buttocks area. When E. screamed Mr. W. struck T. with his hand in the area of his eye. J. A. intervened to pull Mr. W. away and he struck her in the face with his fist, causing a small cut. T. had also received a minor cut in the area of his face from Mr. W.'s blow. J. A. also had observed Mr. W. rubbing her grandson with his hands. Mr. W. quickly left the park and Mrs. A. immediately called the police from a pay phone.

[32] Mr. W. was located by police approximately one hour later and resisted arrest. He was pepper sprayed, subdued, arrested and taken to hospital to be decontaminated. He had been advised of the reason for arrest, given his **Charter** rights and police caution. Subsequently, at the

police station he was given the opportunity to speak to counsel and did so. He then provided police with a statement admitting to the sexual assault and the assaults on T. and J. A.. He said he had gotten sexually aroused when he saw the child bend over to feed the ducks and grabbed him. He struck out because Ms. A. had grabbed him. He had been in the area of the park all afternoon. There was no evidence that Mr. W. was under the influence of alcohol or drugs at the time.

[33] Mr. W. elected Provincial Court on the s. 271 charge and entered a guilty plea. On August 15th, 2000, the Crown proceeded summarily on the s. 266(b) charge and Mr. W. entered a guilty plea on the same day. Subsequently, the Crown gave notice of its intention to firstly make application that Mr. W. be designated a long term offender, later changing the application to a dangerous offender application.

EXPERT EVIDENCE

Dr. P. S. Theriault, MD, FRCPC

[34] Dr. Theriault concluded that Mr. W. is suffering from severe antisocial personality disorder as well as pedophilia and paraphilia and NOS (sexually deviant behavior in a number of other spheres). He is not suffering from any psychotic disorder and shows no evidence of any other psychiatric disorder.

[35] Consequent to these findings, Dr. Theriault proceeded to perform a risk assessment. Such assessments have been traditionally the product of clinical examination and subject review. Because of possible inaccuracies in that process risk assessments now focus more on known factors of recidivism together with attempts in a statistical fashion to compile factors in a way that allows estimation of risk. To quote Dr. Theriault's report (page 15): "....risk assessments have become more actuarial in nature ....." Static unchangeable factors (i.e. history of previous offences, personal background) have the best predictability while dynamic factors which are changeable or can be moderated are of importance in identifying areas of risk management and treatment needs.

[36] Because of Mr. W.'s "predicate" conviction as well as previous convictions for assaults, sexual assault, threats, etc. Dr. Theriault performed this risk assessment for both probability of future violence and sexual

recidivism by Mr. W.. In doing so he utilized various accepted assessment instruments set out in the General Guidelines for Clinicians including:

Psychopathy Checklist Revised (PCL-R)
Violent Risk Scale (VSR)
Violent Risk Appraisal Guild (VRAG)
Sex Offender Risk Appraisal Guide (SORAG)
Sexual Violence Risk (SVR-20)

[37] In summary Dr. Theriault found that Mr. W. met the criteria for psychopathy, scoring in the 86 percentile range compared to a male prison sample of 1100. Psychopathy is, according to Dr. Theriault, (page 15) ".....akin to the psychiatric concept of antisocial personality disorder ...." and individuals are at increased risk of violent and sexual recidivism.

[38] Mr. W. also scored in the 8th of 9 ascending categories of risk utilizing the VRAG guide. The SVR-20 testing would place Mr. W. (in Dr. Theriault's opinion) in the range of high risk to re-offend. In attempting to determine Mr. W.'s degree of sexual recidivism Dr. Theriault utilized the SORAG, the RRASOR and the SVR-20. On the SORAG instrument Mr. W. scored in the 9th category of 9 ascending categories. Similar scoring individuals recidivated at rates of 100% over seven (7) years on the construction sample. On the RRASOR Mr. W. scored a total of 5 in the reported sample indicating a recidivism rate of 73.1% over 10 years. Using the SVR-20 instrument he scored in a high range for risk of sexual violence.

[39] Thus Dr. Theriault comes to the following opinions "with reasonable, medical certainty":

- Mr. W. meets the criteria for Antisocial Personality Disorder and, in fact, meets the diagnostic cutoff score for psychopathy as defined in the PCL-R.

- Mr. W. shows clear evidence of severe sexual deviancy. He meets the diagnostic criteria for pedophilia, transvestism and paraphilia, NOS (including elements of bestiality).

- All the instruments utilized to assess Mr. W.'s risk of violent recidivism are congruent and place him consistently at a very high risk of violent recidivism.

- All instruments used to assess Mr. W.'s probability of sexual recidivism are congruent and place him at an extremely high risk of sexual recidivism. In fact, his score on the SORAG places him in a category wherein similarly scoring individuals invariably re-offended

- Mr. W.'s prognosis for treatment is guarded. He has a lifelong history of dysfunctional behavior and has had virtually no exposure to normative, social models or social behavior. He has little to no grasp of normal social behavior and he expresses extreme cognitive distortions with respect to his sexual behavior. His ability to progress in therapy may be limited because of his borderline intelligence.

[40] Any treatment for Mr. W. would need to be highly structured with clear limits and goals set. He would require consistent and aggressive efforts to help develop normative social behaviors, curb impulsivity, and find more adaptive ways of dealing with his anger and frustration. He also is in need of aggressive treatment for his sexual deviancy be it by relapse prevention and/or pharmacological intervention.

Dr. Brad R. C. Kelln, **Ph. D. C.Psych**

[41] Dr. Brad Kelln, Clinical and Forensic Pathologist, was called by the Crown. He interviewed Mr. W., had the benefits of results of testing procedures performed on him and reviewed past police, hospital and psychiatric records of Mr. W.. Dr. Kelln referred to various methods and results of psychological tested performed on Mr. W..

[42] The Psychopathy Checklist-Revised (PCL-R) is a scoring scheme used to identify characteristics of a severe criminal personality known as psychopathy. Mr. W. exhibited psychopathic traits greater than 80% of prison inmates of a known sample thus placing him above the cut off for psychopathy.

[43] The Bender Gestalt-Visual Motor Test (to provide information on neuropsychological functioning) indicated a person who is impulsive, anxious and insecure.

[44] The House Tree Person test which provides some guide as to a person's personality indicated that Mr. W. was immature and prone to impulsivity. He has a very simplistic view of the world and an unrealistic view of relationships and people.

[45] The Sociomoral Reasoning Test is designed to attempt to give some measure of a person's level of moral reasoning. Mr. W. fell within Stage 2 and 3 of 6 stages - the lower end of the scale. Dr. Kelln felt the testing revealed Mr. W. to be an immature psychopathic individual with poor behavior controls, viewing the world in egocentric, instrumental ways and being more concerned with how situations might benefit him rather than what is right or wrong.

[46] Dr. Kelln then proceeded to perform a risk assessment on Mr. W. keeping in mind certain assumptions such as the accuracy of Mr. W.'s reported criminal history and his history of conduct disorder as a youth. Also, significant changes to the context from which this assessment was conducted or changes in dynamic (changeable) risk factors over time would require a re-evaluation of risk. This risk assessment was by testing and scoring according to approved and accepted guidelines for clinicians, most of which were referred to previously in Dr. Theriault's report and assessment.

[47] Dr. Kelln's conclusion as to the risk assessment is that Mr. W. be considered a high risk to re-offend in a violent manner and an even higher risk for sexually re-offending. He shows no evidence of remorse and only a cursory understanding of the wrongfulness of his actions. Dr. Kelln, in his report, refers to the results of the various testing regimens as did Dr. Theriault.

[48] On the HCR-20 test Mr. W.'s score placed him in the high range for violent recidivism. He demonstrated significant numbers of historical factors, clinical, and risk factors that increased Mr. W.'s risk of violent recidivism. Indeed there were **no** factors identified on the HCR-20 that would moderate his risk for violence.

[49] On the VSR testing the result placed Mr. W. in the high range for violent recidivism. Again the historical and dynamic factors that came into consideration were noted. As in the HCR-20 **no** factors were identified that would moderate his risk for violence.

[50] Using the actuarial risk assessment of the VRAG, Mr. W.'s score placed him in the high range of risk for violent recidivism. Again, **no** factors were identified as would moderate his risk for violence.

[51] In assessing Mr. W. to determine risk of sexual offence specific recidivism, the model Clinically Informed Risk Assessment Strategy for Sex Offenders was utilized. This guides the clinical assessment in a number of areas statistically significant for sex offender recidivism, social competence, substance abuse and treatment considerations. Using the SVR-20 assessment method, "...an assessment method rather than a test scale..." Mr. W. had positive scores on 17 items of 20 with 2 questionable and only one score being negative. Such results contributed to Dr. Kelln's belief that Mr. W. has a higher risk of sexually re-offending.

[52] Dr. Kelln also utilized information garnered from the clinical interviews with Mr. W., review of hospital reports and correctional files to complete the Raid Risk of Sexual Offence Recidivism (RRASOR) assessment, the previously mentioned SORAG appraisal and the Minnesota Sex Offender Screening Test (MN-SOST-R). On the RRASOR test Mr. W. placed at the high end of the scale with a 73% chance of recidivism within 10 years. The SORAG scoring placed Mr. W. in the highest of 9 categories indicating he has an approximately 100% chance of violent recidivism in the next 7 to 10 years. The MN-SOST-R scoring placed Mr. W. at high risk to re-offend with a greater than 90% chance of re-offending over the next 6 years.

[53] Thus, the conclusion and opinion of Dr. Kelln that Mr. W. should be considered a high risk to re-offend in a violent manner and secondly, his risk of sexual offence specific recidivism is even higher. Dr. Kelln feels that Mr. W. is at "imminent" risk of re-offending in the next 7 to 10 years because of his strong sexual drive, poor impulse control, cognitive distortions and escalating pattern of sexual offending. These all suggest that Mr. W. is a predator. Dr. Kelln concludes his assessment with this rather bleak portrait:

> "He shows no evidence of remorse and only a cursory understanding of the wrongfulness of his actions. His repeated failures on conditional releases and his unwillingness to follow through on other treatment initiatives result in a poor prognosis for treatment. In addition, there is some evidence of neuropsychological deficits which, if confirmed, make successful treatment even more difficult."

Dr. G. Wayne MacDonald, Ph.D., ABPP(CN)

[54] Dr. Wayne MacDonald, a clinical neuropsychologist called by the defence, presented a very thorough report and evidence. He had known Mr. W. as a patient dating back to at least 1982. Dr. MacDonald also had the opportunity to review the forensic psychological evaluation prepared by Dr. Kelln and the psychiatric evaluation of Dr. Theriault. Dr. MacDonald felt those two evaluations, provided little information on Mr. W.'s current cognitive or neuropsychological functioning. Such an evaluation was performed by Dr. MacDonald and he concluded that his report, presented to the Court, was a reliable and valid estimate of his current neuropsychological abilities in the areas assessed. Dr. MacDonald had the assistance of Dr. Reg Landry, a psychologist, in making assessments and in the preparation of his report.

[55] The various test results carried out by Dr. MacDonald (or Dr. Landry at his request) indicated Mr. W.'s level of functioning fell within the lower limits of "Borderline Intellectual Deficient" range - very similar to Mr. W.'s tested result when Dr. MacDonald dealt with him in 1982 when he had just turned eight years of age.

> "Both profiles are suggestive of global cognitive impairment with non verbal cognitive skills more impaired than verbal skills. Mr. W. has an isolated 'splinter' skill in vocabulary, which will likely create the impression of an individual who is more capable, intellectually, than he really is. Furthermore, Mr. W. has significant deficits in social interaction, difficulties with eye contact, repetitive and stereotypic patterns of behavior, and marked cognitive egocentrism. These features are consistent with what we have come to expect from individuals with 'Asperger's Syndrome', which is an Autism Spectrum Disorder."

[56] Dr. MacDonald notes that people with Asperger's Syndrome are described as naive, inappropriate and one sided when it comes to social interaction. While grammar and vocabulary may appear well developed, body language is poor, and communication is comprised of monologues restricted to few topics of interest. Other aspects are narrow, inflexible routines of daily life and in many cases strong sexual activity with

masturbation in public, exhibitionism and sadistic traits. Dr. MacDonald recognizes in Mr. W.'s continued repeated offences a desire to satisfy a sexual urge characterized by abrupt, impulsive behavior reflecting poor planning and marked inability to take the perspective of the victim. This is a core deficit of people suffering from Asperger's Syndrome and is a fundamental cognitive deficit of Mr. W..

[57] There would appear to be no current medical treatment known to eliminate the basic impairments underlying Asperger's Syndrome. Individual and group therapy is ineffective largely because of the individual's cognitive limitations. While being able to absorb and remember, sometimes, large numbers of facts, they don't seem to be able to generalize from them. They act as if they possess skills equal or superior to anyone else. They typically resist attempts to make them do anything they don't want to and cannot be diverted when they have made up their minds. It is quite common for such adults to require care and supervision throughout their lives.

[58] Dr. MacDonald emphasized the requirements for appropriate care for such people including the need of trained staff, a carefully structured, organized and predictable environment and programs, sufficient personal space combined with "high security when necessary" (p.5).

[59] Not surprisingly since Dr. MacDonald appears to be the first person to identify Asperger's Syndrome as applying to Mr. W., he has never received treatment to help him deal with that deficit. Dr. MacDonald, in response to questions by Mr. Arseneau on cross examination, acknowledged that he had reviewed the risk assessment of both Dr. Theriault and Dr. Kelln as applicable to Mr. W.. He agreed that at this stage Mr. W. is a risk and essentially he agreed with those assessments. He agreed that, at present, Mr. W. is a risk to cause violent harm to some person and even more so sexually. The Asperger's Syndrome will never be cured and that, together with his cognitive impairment, his age, his dysfunctional family background and present lack of support systems, will impair, hinder and slow any kind of treatment.

[60] Finally, Dr. MacDonald suggested that Mr. W.'s cognitive impairment and Asperger's Syndrome provides mitigating circumstances the Court should take into account in making its decision in the Crown's application.

THE LAW

[61] As in any **Criminal Code** matter where an accused faces a criminal charge and potential loss of liberty, the onus of proof is upon the Crown, with the standard being proof beyond a reasonable doubt. Sections 752 and 753 of the **Code** are the pertinent section to which the Court must give consideration in this application.

"752. In this Part,

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

'serious personal injury offence' means

(a) an indictable offence, other than high treason, treason, first degree murder of 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 upon another person,

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

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

752.1(1) Where an offender is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) and before sentence is imposed on the offender, on application by the prosecution, the court is of the opinion

that there are reasonable grounds to believe that the offender might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court may, by order in writing, remand the offender for a period not exceeding sixty days, to the custody of the person that the court directs and who can perform an assessment, or can have an assessment performed by experts. The assessment is to be used as evidence in an application under section 753 or 753.1.

(2) Report - The person to whom the offender is remanded shall file a report of the assessment with the court not later than fifteen days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.

753(1) The court may, on application made, under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender, if it is satisfied

> (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> > (i) a pattern of repetitive behavior 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 behavior 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 behavior,
>
> (ii) a pattern of persistent aggressive behavior 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 behavior, or
>
> (iii) any behavior by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behavior in the future is unlikely to be inhibited by normal standards of behavioral restraint; or
>
> (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses."

[62] The basic principles of law and supporting cases to which the Court

must give its consideration are succinctly set out in R. v. D.L.S. [2000] B.C.J. # 47 by the British Columbia Court of Appeal and referred to in the Crown brief.

> "The onus of proof is upon the Crown and the standard is proof beyond a reasonable doubt, [R. v. Carleton, supra p. 6; R. v. Carleton, p. 480; Lyons v. The Queen (1987), 37 C.C.C. (3d) 1 (S.C.C.) P. 47-48].
>
> The Crown need not prove beyond a reasonable doubt the offender will re-offend, only that there is a likelihood that he will inflict harm. [R. v. Currie (1997), 115 C.C.C. (3d) (S.C.C.) P. 223].
>
> The determination of whether the accused is a dangerous offender is based upon his past conduct and not his future prospect of treatment or rehabilitation. [R. v. Carleton, p. 6; R. v. Noyes (1986), 6 B.C.L.R. (2d) 306 (B.C.S.C.) p. 314-315]
>
> The Court, if it finds the Crown has proven the requisite statutory criteria beyond a reasonable doubt must find the accused to be a dangerous offender. The finding is, upon the attainment of the requisite degree of proof imperative and not discretionary. [R. v. Moore (1985), 16 C.C.C. (3d) 328 (Ont. C.A.) P. 328; R. v. Dow, 134 C.C.C. (3d) 323 p. 334; R. v. Carleton, p. 6-7]
>
> Hearsay evidence is admissible in dangerous offender proceedings. [R. v. Jones (1994), 89 C.C.C. (3d) 353 (S.C.C.) P. 396; R. v. Sharif, [1998] B.C.J. No. 458, June 27, 1997, New Westminster Registry X044551 (B.C.S.C.); Criminal Code Section 723(5)]. Youth Court records are also relevant and admissible in evidence. [R. v. Read (1994), 47 B.C.A.C. 28 (B.C.C.A.) P. 43]

[63] S. 752 refers to predicate offences that must be a "serious personal injury" offence and refers to two categories of offences,

s. 752(a)(i) - those of violence or attempted violence;
(ii) - endangerment or likelihood of endangerment; or
(iii) - sexual offences

[64] It is then incumbent on the Crown to prove that a person is a dangerous offender in one of four ways enumerated in s. 753(1)(a): (i), (ii), (iii) or (b) and all of which have one common requirement that a person be convicted of a serious personal injury offence as defined in s. 752(a). Should the Crown prove beyond a reasonable doubt any one of the four categories, the Court obviously would make a finding of dangerous offender status and shall impose an indeterminate sentence (s. 753(4)).

CONCLUSION

[65] Extensive evidence has been led by the Crown of Mr. W.'s conduct and actions aside from those which resulted in criminal charges or convictions.

[66] Mr. W. did not respond favorably to supervisors in confinement. While incarcerated there were many instances of conflict with other prisoners or staff. There are many, many instances of his lack of control of his sexual urges and especially of his continuing to masturbate in the presence of other prisoners and staff. There is also reference to the performing of sexual acts with other prisoners. Indeed, when one reads through the records provided by the institutions of Waterville and the Cape Breton Correctional Facility there are numerous such occurrences - some of which resulted in conflicts with fellow inmates. Mr. W. had to be placed in custody by himself to alleviate these conflicts. That did not stop his aberrant behavior up to and including the period of his confinement while these proceedings were taking place. He was observed on occasion placing a broom handle into his anus repeatedly.

[67] While in the community, the reports of the various Probation supervisors paint the picture of an individual who was very difficult, if not impossible, to supervise. Many of the criminal convictions against Mr. W. occurred while he was on probation for previous offences.

[68] The Crown adduced evidence through police witnesses which present an individual who associates with people much younger than himself, and persons who were quite often marginal in their abilities both intellectually and socially.

[69] The aberrant behavior of Mr. W. that came to light as a result of his

claim to Dr. Theriault and Dr. Kelln of a pedophile ring, paints a picture of an individual who constantly does not conform to even a modicum of personal control. The alleged pedophile ring, of which he claimed to be a part, was a figment of his imagination, requiring police to interview in excess of seventy-five witnesses before that determination was made. Yet as a result of that investigation evidence came forward of aberrant sexual behavior by Mr. W., such as paying a young woman to insert a broom handle into his rectum, paying various people money to steal soiled women's underwear which he smelled and claimed to have, in some instances, eaten and personally picking up or having people bring him used condoms. There was also evidence of Mr. W. attempting to entice a young adult friend to "leave" his young sister with Mr. W. in his bedroom.

[70] In his interviews with Dr. Theriault, Mr. W. candidly discussed his inappropriate sexual behavior, dating from events as a very young person, undoubtedly with some braggadocio, as to the number of sexual partners, both male and female including males and females sometimes less than twelve years old. His expressed views to Dr. Theriault and his actions as evidenced by convictions under the **Code** would indicate there was some considerable truth to his claims. His admissions to Dr. Theriault are quite succinctly set out in his report at p. 7.

> "In essence, Mr. W. is admitting to extensive, sexual criminal activity for which he has never been charged or convicted. He shows no remorse or concern for these activities."

[71] Having carefully reviewed all of the evidence presented, I am satisfied the Crown has proven beyond a reasonable doubt that Mr. W. is a dangerous offender, in particular, pursuant to the provisions of s. 753(1)(a)(i) and s. 753(1)(b).

[72] Mr. W. has been convicted of the requisite serious personal injury offence as defined in s. 752 of the **Code** as is evidenced by his most recent conviction for the sexual assault on T. A. on August 8, 2001. The Crown has proven the essential elements as required under s. 753(1)(a)(i) and s. 753(1)(b) that Mr. W. has shown and demonstrated a pattern of persistent aggressive behavior of which his sexual assault on T. A. forms a part. He shows and demonstrates a substantial degree of indifference respecting the reasonable foreseeable consequence to other persons of his behavior. I am also satisfied that the Crown has proven that Mr. W., by his sexual conduct

as evidenced by his assault on T. A., by his previous convictions and by his deviant sexual behavior that is well documented, has shown a failure to control his sexual impulses and there is a likelihood of his causing future injury, pain or other evil to persons through his continuing lack of control.

[73] I accept the evidence put forth by the Crown witnesses with special note to that of Dr. Theriault and Dr. Kelln. This determination that Mr. W. is a dangerous offender is based upon his past conduct which is amply set out in the Crown evidence. I am not unmindful in coming to this conclusion of the future prospects of treatment or rehabilitation, but as the law directs that is not the basis upon which I must come to my conclusion.

[74] Mr. Campbell, in his arguments, forcefully argued that Mr. W. should be considered a long term offender, given the nature of his previous convictions (no prior sentence was for longer than six months), and given his deficits both intellectually and socially. None of his prior sexual convictions involved violence to the degree that is often and usually associated with dangerous offenders. However, in that regard I cannot be unmindful of the words of Lamer, C.J. in R. v. Currie [1997] 2 S.C.R. 260 (p. 9; para. 24):

> "I cannot imagine that Parliament wanted the courts to wait for an obviously dangerous individual, regardless of the nature of his criminal record and notwithstanding the force of expert opinion as to his potential dangerousness, to commit a particularly violent and grievous offence before he or she can be declared a dangerous offender."

[75] I am satisfied beyond a reasonable doubt of the likelihood of the future danger that Mr. W. presents to society and find him to be a dangerous offender. According to the provisions of s. 753(4) of the **Code** I hereby impose on Mr. W. a sentence of detention in a penitentiary for an indeterminate period.

Dated at Sydney, Nova Scotia, this 5th day of July, A.D., 2001

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David J. Ryan, JPC