Date: 1998 09 03
Docket: CR 03112

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

IRVIN GEORGE McPHERSON

Crown application pursuant to Part XXIV of the Criminal Code to designate the offender as a dangerous offender and to impose an indeterminate sentence of imprisonment.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Fort Simpson, Northwest Territories
on July 20 - 25, 1998

Reasons filed: September 03, 1998

Counsel for the Crown: Alan R. Regel

Counsel for the Offender: Thomas Boyd

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REASONS FOR JUDGMENT

[1] On February 6, 1997, the offender, Irvin George McPherson, was convicted after trial by judge and jury of the offence of break and enter a dwelling house and committing therein the offence of sexual assault, contrary to section 348(1)(b) of the Criminal Code. After the conviction, but before sentencing, counsel for the Attorney General of Canada gave notice of this application, pursuant to Part XXIV of the Criminal Code, to have the offender declared a dangerous offender and for the imposition of a sentence of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that may be imposed for the offence for which the offender was convicted. For the reasons that follow, the application is granted in both of its aspects.

PRELIMINARY CONSIDERATIONS

[2] I heard the Crown's application since I was the presiding judge at the offender's 1997 trial. The hearing took place over six days in Fort Simpson (the scene of Mr. McPherson's crimes). Counsel did a commendable job in putting forward much of the relevant evidence by way of agreement. I heard from twenty witnesses and received numerous exhibits (including two binders containing records of the offender's past offences, six binders of correctional service records, a binder of juvenile and social service records, and a binder of psychological and psychiatric reports). Counsel agreed that the historical records can be used as evidence of the truth of their contents. The information in these materials may be taken as proof of the circumstances in the absence of other evidence on the matters that these materials relate to. The offender reserved the

right to call evidence relating to any of these matters, including evidence to contradict any of the information. The offender did not testify at the hearing.

[3] Counsel also agreed that Part XXIV of the Criminal Code as it existed prior to the current version should be the operative legislation. Part XXIV was amended on August 1, 1997, subsequent to the Crown's notice in this case, and counsel took the view that the previous provisions were more favourable to the offender. On the face of it this is a valid point. For example, included in the amended version of s.753 is a mandatory requirement to impose an indeterminate sentence following a finding that the offender is dangerous. The pre-amended version made the imposition of such a sentence discretionary. Hence, at the time of this hearing, the penal consequences of being labelled a dangerous offender have been increased. Section 44(e) of the *Interpretation Act*, R.S.C. 1985, c. I-23, provides that when a punishment is reduced or mitigated by a new enactment, any punishment imposed after repeal of the more severe penalty is to be reduced or mitigated accordingly. The present case is the reverse. The former legislation, which was in effect at the time of the offender's conviction and the Crown's first notice of this application, provided for less severe consequences. Therefore, those provisions as they existed prior to the 1997 amendment were applied in this case (and are the versions quoted in this judgment).

[4] All of the procedural requirements of s.754 were met prior to the hearing (filing of the notice of this application and the Attorney General's consent). The offender's counsel raised the point, at the offender's instruction, that the offender was never personally served with notice of this application. The offender was, however, present in court when Crown counsel announced the Crown's intention to bring this application. In addition, the written notice was served on the offender's counsel. No complaint has been made as to the disclosure provided by the Crown for this hearing. In these circumstances the lack of personal service on the offender is immaterial: see, for example, *R v Van Boeyen* (1996), 107 C.C.C. (3d) 135 (B.C.C.A.).

THE CROWN'S APPLICATION

[5] The Crown, in its written notice, relied on the provisions of both subsections (a) and (b) of section 753:

> 753. Where, upon an application made under this Part following the conviction of a person for an offence but before the offender is sentenced therefor, it is established to the satisfaction of the court

> (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
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> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour,
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> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he 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 behaviour, or
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> (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint, or
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> (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 conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses,
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> the court may find the offender to be a dangerous offender and may thereupon impose a sentence of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that might be imposed for the offence for which the offender has been convicted.

[6] The term “serious personal injury offence”, as it is used in s.753, is defined in s.752:

> “serious personal injury offence” means

> (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
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> (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,
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> and for which the offender may be sentenced to imprisonment for ten years or more, or
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> (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

[7] The sub-clauses in subsection (a) and the clause in subsection (b) of s.753 are all alternatives. The offender may be found to be a dangerous offender if any one of these alternatives is established by the evidence. Subsection (a) relates to "patterns" of behaviour. Subsection (b) relates more specifically to a failure to control sexual impulses. But, implicit in both is that the offender's behaviour, both in the past and likely in the future, is intractable. This was explained by LaForest J. in *R v Lyons* (1987), 61 C.R. (3d) 1 (S.C.C.), when he gave a succinct analysis of the scope and purpose of these provisions (at page 31):

> First, the legislation applies only to persons convicted of a "serious personal injury offence" as defined in [s.752]. These offences all relate to conduct tending to cause severe physical danger or severe psychological injury to other persons. Significantly, the maximum penalty for all these offences must be at least ten years' imprisonment. Secondly, it must be established to the satisfaction of the court that the offence for which the person has been convicted is not an isolated occurrence, but part of a pattern of behaviour which has involved violence, aggressive or brutal conduct, or a failure to control sexual impulses. Thirdly, it must be established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others or, in the case of sexual offences, conduct causing injury, pain or other evil to other persons. Also explicit in one form or another in each subsection of [s.753] is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable. Finally, the court has the discretion not to designate the offender as dangerous or to impose an indeterminate sentence, even in circumstances where all these criteria are met.

> It seems to me that, having concluded that the legislative objectives embodied in [Part XXIV] are not only of substantial importance to society's well-being but, at least in theory, sufficiently important to warrant limiting certain rights and freedoms, one must equally conclude that the legislative classification of the target group of offenders meets the highest standard of rationality (and I use the word not as a term of art) and proportionality that society could reasonably expect of Parliament. Not only has a diligent attempt been made to carefully define a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive incarceration, but it would be difficult to imagine a better-tailored set of criteria that could effectively accomplish the purposes sought to be attained.

[8] As noted in this extract, the court has a discretion to not designate the offender as dangerous or to not impose an indeterminate sentence even if the statutory criteria have been met. The exercise of this discretion must, however, be based on rational considerations, not merely out of some sense of sympathy or abhorrence at the severe consequences that may result.

SERIOUS PERSONAL INJURY OFFENCE

[9] The concept of a "serious personal injury offence" has been called the "gatekeeper" to the dangerous offender provisions found in Part XXIV of the Code. It is a conviction for such an offence that makes it possible for the Crown to invoke the dangerous offender application process: see *R v Currie*, [1997] 2 S.C.R. 260 (at page 272). The triggering offence is often referred to as the "predicate" offence.

[10] The predicate offence in this case is the conviction for the offence under s.348(1)(b) of the Code (break and enter into a dwelling house and commit the offence of sexual assault). That offence carries a potential maximum penalty of life imprisonment. There was no argument that this offence did not meet the criteria set out in s.752(a). Clearly, sexual assault is a serious personal injury offence as that term is described in subsection (a) as well as being specifically identified in subsection (b). It is inherently a serious personal injury offence: see *Currie* (at page 274). Therefore the pre-requisite for invoking s.753(a) has been met.

[11] Counsel for the offender submitted, however, that the predicate offence is not one specifically described in s.752(b) and therefore the Crown is foreclosed from relying on s.753(b) as a ground for this application.

[12] The offence, as set forth in the Criminal Code, is break and enter a place and commit an indictable offence. Presumably one could commit this offence without an element of personal violence or the threat to personal safety. For example, a break and enter into an unoccupied office, and the commission of a theft therein, would not be the type of offence to trigger this application since it fails to meet the criteria of s.752(a). Here, of course, the entry was into a dwelling house and the offence committed therein was a violent one. So s.752(a) has been met. But, just because the offence committed as part of the break-in was sexual assault, does that also bring it within s.752(b)?

[13] Subsection (b) refers to "an offence" mentioned in certain specific sections of the Code, including s.271 (sexual assault). Sexual assault, a component of the predicate offence here, is "mentioned" in s.271. But the predicate offence, the "serious personal injury offence" here, is not s.271, it is s.348(1)(b). It is unfortunate perhaps that the Criminal Code does not refer simply to the commission of a sexual assault. It refers, however, to the offence mentioned in s.271. The Code does not refer to specific sections in s.752(a) so I can only presume that Parliament intended to limit s.752(b) to those specific offences that it does refer to (and not any other offences).

[14] Counsel were unable to provide me with any authorities on this point. Crown counsel referred in passing to an Ontario District Court decision, *R v Hrach* (No. 235/88; December 19, 1988). That decision is not helpful since the offence there was sexual assault specifically.

[15] I have concluded that the predicate offence here is not one regarded as a "serious personal injury offence" by s.752(b). Therefore, the Crown is precluded from relying on s.753(b) as a ground for this application. The predicate offence here is, however, a "serious personal injury offence" within the scope of s.752(a). The Crown is therefore limited to the alternatives set out in s.753(a).

[16] Having said this, I should add that, if I am mistaken on the question of the application of s.752(b), then it is an error that can only accrue to the benefit of the offender. The evidence that I heard on this application, some of which I will canvass in these reasons, could easily lead one to the conclusion that the offender meets the criteria of s.753(b). I make no final decision on that point having regard to my conclusion on the initial point respecting s.752(b).

ISSUES

[17] The Crown is limited in this case to relying on s.753(a) to support this application. In argument Crown counsel specified reliance on subclauses (i) and (ii) of that section. While the two subclauses have different wording, they overlap in a requirement for repetitive or persistent behaviour and a likelihood of serious consequences to other persons because of that behaviour. The evidence presented on this application can apply to both sets of criteria. I need, however, consider only subclause (i) of s.753(a). The relevant parts are as follows:

> Where...it is established to the satisfaction of the court
>
> > (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 has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour...

[18] Therefore the following elements must be established by the Crown:

(a) that the predicate offence is a serous personal injury offence;

(b) that there is a pattern of repetitive behaviour by the offender, of which the predicate offence forms a part;

(c) that this pattern of repetitive behaviour shows a failure by the offender to restrain his behaviour;

(d) that there is a likelihood of his causing death or injury, or severe psychological damage, to others through failure in the future to restrain his behaviour; and

(e) that on the basis of the evidence establishing the foregoing, the offender constitutes a threat to the life, safety or physical or mental well-being of others.

If these elements are established then I must decide whether to declare the offender a dangerous offender and, if I do, whether an indeterminate sentence should be imposed.

[19] Section 753 requires that these matters be established "to the satisfaction of the court". This burden, one that rests on the Crown, has been held to be one requiring proof beyond a reasonable doubt: *R v Jackson* (1981), 23 C.R. (3d) 4 (N.S.C.A.); *R v Oliver* (1997), 114 C.C.C. (3d) 50 (Alta. C.A.). I have already concluded that the predicate offence is a serious personal injury offence. The other elements depend on the evidence.

EVIDENCE

[20] As I noted previously, a great deal of evidence was presented on the hearing both through the testimony of witnesses and the filing of documents. All of this evidence falls into four broad categories: (i) the offender's personal history; (ii) his criminal conduct as revealed by his past convictions; (iii) his conduct as revealed by acts for which he was never prosecuted; and (iv) the opinion evidence of the Crown and defence psychiatrists.

Personal History:

[21] The offender was born in Fort Simpson on February 21, 1961. He is 37 years old as of the writing of these reasons. The offender was raised by his grandparents. There was a history of physical violence and alcoholism in the family. All of this had an effect on the offender and he came to the attention of social service workers at an early age.

[22] The offender exhibited aggressive behaviour and inappropriate sexual conduct at a young age. He consumed alcohol and solvents. In 1972, when the offender was only 11 years old, he was sent for a psychiatric assessment. He was identified then as having severe personality problems. He distrusted others and viewed the world as a hostile environment. He was undisciplined. The assessment then was that he required long-term treatment in a therapeutic milieu to try and reverse a process that was "leading to the development of a thoroughly anti-social personality".

[23] There is no record of the offender having received such treatment. What there is is a lengthy record of criminal behaviour. He has limited education. For those periods when the offender was not incarcerated, he held odd jobs. He never had his own home relying instead on family members.

Criminal Record:

[24] The offender's criminal record commenced in 1969, when the offender was only 8 years old, with a disposition under the *Juvenile Delinquents Act*. His juvenile record consists of 25 convictions.

[25] The offender's criminal record as an adult commenced on November 1, 1976. He was 15 years old and raised to adult court. He was convicted of 3 offences on that occasion and received a two-year suspended sentence. He had spent 5 weeks in jail on remand. His first jail term came on April 15, 1977, when he was sentenced to 10 days for breach of probation. Since then he has spent the equivalent of almost 10 years behind bars.

[26] Attached as Appendix "A" to these reasons is a list of the offender's criminal convictions as an adult (up to but not including the predicate offence). There are 62 convictions listed. With the exception of the 62nd conviction, a 1991 conviction also for break and enter and commit sexual assault, most of the offences are what could be termed as relatively minor. There are 8 assault convictions, 4 break and enter offences, 5 theft convictions, 14 for breach of probation or other court orders, and a variety of other offences. Somewhat surprisingly, the longest sentence he received for any specific offence (prior to 1991) was 9 months for a charge of uttering a forged cheque in 1987.

[27] In October of 1991 the offender was convicted, after trial before a Fort Simpson jury, of breaking and entering the home of J.S. and sexually assaulting her. The accused crawled into her home at night and raped her while she was asleep. She woke up, fought him off, and he escaped. The offender denied his guilt at his trial and continued to deny his guilt after his conviction, going so far as writing a threatening letter to J.S. from prison. He was sentenced to four years imprisonment.

[28] The offender was released on parole on August 18, 1994, after serving 34 months of the sentence. On September 16, 1994, the police arrested the offender on a suspected sex assault. That investigation was dropped due to insufficient evidence. His parole, however, was revoked due to parole violations. He was granted parole again on June 2, 1995, but that was revoked on July 5, 1995, due to violations of parole conditions. He was paroled again on September 15, 1995. On October 5th the police received another complaint of an alleged sex assault by the offender. The police decided that there was insufficient evidence to prosecute. Parole was not revoked since the four year sentence expired on October 9, 1995. Then, on November 12, 1995, the offender committed the predicate offence.

[29] The predicate offence consisted of the offender again going into a woman's home at night and sexually assaulting her while she slept. The victim in this case, L.M., also woke up and fought off the accused. He was arrested the day after the offence and has been in custody ever since.

[30] The victims in both of these cases testified at this hearing. Even after 8 years, the victim J.S. was extremely agitated and upset during her testimony. Both J.S. and L.M. testified to the long-lasting psychological harm caused to them by the offender's actions. Both of them suffer from ongoing stress and anxiety. Both of them have received counselling.

[31] The criminal record is remarkable in that up until 1991 it is, while undoubtedly extensive, relatively minor. Most of the offences were alcohol-related crimes. The two most recent offences, however, are in a different order of significance. The defence psychiatrist characterized them as "predatory rapes".

[32] The corrections service records reveal that the offender has been, for the most part, a compliant inmate. He has only four infractions in his lengthy prison history. That cannot be said for his compliance with conditions while on parole or other forms of release. He has a history of non-compliance when he no longer has the control system provided by prison. Progress reports from the federal institutions where the offender served his last sentence identify him as a high risk to reoffend on release.

Non-Prosecuted Conduct:

[33] There were a number of witnesses called to testify as to criminal acts by the offender for which he was never charged or prosecuted. All of these witnesses have known the offender for many years (in some cases since childhood). Some were related in some way to the offender. Three of them were women who lived with the offender for different periods of time. These witnesses related events that were far more similar to the last two offences than the offender's criminal record would reveal.

[34] Section 753(a)(i) requires the establishment of a pattern of behaviour. The predicate offence is merely a part of that pattern. But nothing in the statute requires that the other parts of the pattern be actual criminal convictions. There is no requirement for all parts of a behaviourial pattern to be subjected to prosecution.

[35] Section 755(1) provides for the reception of relevant evidence:

> 755. (1) On the hearing of an application under this Part, the court shall hear the evidence of at least two psychiatrists and all other evidence that, in its opinion, is relevant, including the evidence of any psychologist or criminologist called as a witness by the prosecution or the offender. (emphasis added)

The reference to "all other evidence" was discussed in *R v Lewis* (1984), 12 C.C.C. (3d) 353 (Ont. C.A.), at page 357:

> It has been held that if such evidence is adduced, it must relate to the elements necessary to establish the pattern of behaviour referred to in [s.753], and must be introduced in accordance with the regular rules of evidence: *R v Jackson* (1981), 61 C.C.C. (2d) 540 at p.544, 23 C.R. (3d) 4, 46 N.S.R. (2d) 92. In *R v Kanester*, [1968] 1 C.C.C. 351, and *R v McInnis* (1981), 64 C.C.C. (2d) 533, 49 N.S.R. (2d) 393 *sub nom. (No. 2)*, it was held that evidence of other incidents of a sexual nature involving the accused could be adduced even though the incidents had not resulted in convictions. Such evidence is clearly relevant. "Other evidence" in [s.755(1)] could have been expressly limited to convictions, if that had been the intention of Parliament. It is also noted that provision is made for the admission of evidence as to character and repute under [s.757]. Evidence as to other incidents may be of considerable importance in establishing "a pattern of repetitive behaviour by the offender" under [s.753(a)(i)], "a pattern of persistent aggressive behaviour by the offender" under [s.753(a)(ii)], or "a failure to control his sexual impulses' under [s.753(b)].

[36] In this case the evidence of non-prosecuted acts was presented in accordance with the rules of evidence. The offender had full opportunity to cross-examine the witnesses and to present contradictory evidence if he wished to do so. This evidence, however, went largely unchallenged. The witnesses were by and large credible.

[37] The witness, B.C., has known the offender most of her life. She described his sexually aggressive manner when he was young. She described an incident when she was 17 years old (around 1980). She woke up one time to find the offender having sex with her. She tried to push him off but he restrained her. She said she was afraid to report this incident to the police because she had been drinking underage. She testified that she was always fearful of the offender.

[38] The witness S.M. is an older cousin of the offender. She testified as an unwilling witness in response to a Crown subpoena. She related nevertheless how she saw the offender sexually assault his aunt Rose. The victim appeared to the witness to be very intoxicated and only semi-conscious. The witness gave a statement to police at the time

but apparently the investigating officers did not think there was sufficient evidence to prosecute. This occurred in 1978.

[39] The witness J.M. lived with the offender from 1980 to 1983. She testified how the relationship developed into a pattern of abuse. She was only 14 or 15 years old when they started living together. In 1982 she gave birth to a son. The offender is the father. Their son resides with his mother as part of her family relationship.

[40] This witness described how she and the offender were using alcohol to excess. She described a pattern of abusive conduct: threats, unpredictable acts of violence, and unilateral demands for sex on the part of the offender. She made numerous complaints to the police but seldom followed up with charges. The offender was convicted of assault on her during the relationship as well as two more assaults on her after the relationship ended. She also described witnessing a sex assault by the offender on her cousin, C.D. (C.D. had no recollection of the incident).

[41] The witness C.B. lived with the offender from 1984 to 1986. She was 16 or 17 years old when they started living together. She too described a pattern of assaultive behaviour by the offender. She only reported what she described as the "final incident" to the police. The offender was convicted of assault on C.B. in 1986. She also related how the offender would unilaterally decide to have sex with her whenever he wanted. She recalled one specific incident when she woke up to the accused trying to have sex with her.

[42] The witness, M.A.M., described an incident in 1989 when the offender forced himself on her. She had been drinking (but not with the offender). She had fallen asleep in a friend's van. She awoke to find the offender beating her and trying to rape her. She fought him and eventually her friends arrived. She gave statements to the police but chose not to proceed with any charges because she did not want her family to learn about the incident. Other witnesses confirmed this account in various particulars.

[43] The witness, L.L., lived with the offender in 1989 and 1990. She described a pattern of physical and sexual abuse while living with him. He threatened to kill her if she left him. He hit her regularly. She would have to submit to sexual relations whenever he wanted. She testified as to how the police became involved on a number of occasions but she did not co-operate with them because she was afraid of what the offender would do to her. One of the assaults is corroborated by a hospital report from 1990. She also described how the offender would repeatedly try to have sex with her when she was asleep.

[44] As noted by Crown counsel, all of these witnesses had plausible explanations as to why they did not pursue prosecutions through the police. Also, this evidence is uncontradicted in any material manner. I accept it as relevant and cogent evidence on this application.

Expert Evidence:

[45] On this application I heard evidence from two forensic psychiatrists, Dr. Philip Klassen on behalf of the Crown, and Dr. Robert Dickey on behalf of the defence. Section 755(1) of the pre-amended Part XXIV required the court to hear the evidence of at least two psychiatrists. This requirement was repealed in the 1997 amendment so now the court may receive evidence simply by way of a psychiatric assessment report. It of course does not preclude the reception of in-court testimony.

[46] Whether the pre-amended version of s.755 is more or less beneficial to the offender is immaterial. The relevance of the psychiatric evidence is undoubtable. The Code recognizes the importance of having as much information as possible to assist in the determination of the issues on these applications. But the legislation does not delegate to psychiatrists the responsibility of determining whether the dangerous offender designation should be ascribed to an offender. It is for the court to make that ultimate decision, as well as the decision on sentence, based on a complex mix of factors, the expert evidence being only a part of it.

[47] The evidence of the two psychiatrists in this case did not differ to any significant degree. Where they did it was more to do with the prospects of curative treatment. They pretty well agreed, however, in their assessments of the offender. They also acknowledged the uncertainty surrounding the ability of psychiatry to accurately predict dangerousness. The ability to accurately predict future behaviour is poor. That is a factor that both witnesses brought to bear when formulating their opinions. But they both also acknowledged that consistent past behaviour is the best predictor of likely future behaviour.

[48] The opinion of both psychiatrists, based upon their clinical assessments and a battery of psychological tests administered to the offender, is that Mr. McPherson fits the criteria of a psychopath. He fits the diagnostic profile of antisocial personality disorder with alcohol dependence. The defence psychiatrist was also of the view that the offender may suffer from a core sexual deviance (a “paraphilia”), that being a sexual preference for non-consenting aggressive sexual activities. The Crown psychiatrist was more

hesitant in diagnosing some underlying sexual deviance. Both doctors characterized the offender as being a "high risk" to reoffend.

[49] The labelling of the offender as a psychopath was based on a cumulative analysis of the tests and clinical assessments carried out by each doctor. One of those tests was the "Hare Psychopathy Checklist - Revised". This is a checklist used for psychodiagnostic purposes. It provides a dimensional score that represents the extent to which a given individual is judged to match the prototypical psychopath. Both doctors acknowledged the usefulness of this checklist as an "anchor" for their assessments.

[50] The offender was given the Hare assessment by both doctors and by a psychologist. In all instances his score put him well above the threshold level for psychopathy. The features of a psychopath are an exploitative and domineering personality, a callous and indifferent attitude to the effect of his actions, impulsive and self-serving behaviour that violates the rights of others, and defiance of authority. The offender was said to display all of these features. He was described as showing a seamless history of aggression and community maladjustment. He has never taken responsibility for his actions. He has continually displayed poor internal control over his impulses and a poor response to external controls (outside of jail).

[51] The assessment of psychopathy would apply, according to both doctors, whether one relied merely on the offender's formal criminal record or on the totality of his conduct including the non-prosecuted acts. The only difference would be, in the first case, an emphasis on the potential of violent recidivist behaviour generally or, in the second case, a shifting emphasis on more specifically sexually violent recidivist behaviour. That is because the record reveals only two directly sexual offences (the 1991 conviction and the predicate offence) while the evidence of the non-prosecuted conduct reveals several sexual assault crimes. It is for this reason that Dr. Dickey felt that there was an underlying paraphilia. Dr. Klassen indicated that, because of the generally aggressive nature of the offender's psychopathy, it was difficult to differentiate an underlying core paraphilia to the offender's conduct.

[52] The significance of a diagnosis of psychopathy is that the offender is essentially untreatable. He may be controllable through confinement but there is no known way of ameliorating the condition. Dr. Klassen's opinion was that psychopaths do not change their behaviour and he has no confidence in this offender ever changing his behaviour (except through old age perhaps). Dr. Dickey expressed greater optimism in a long-term control system combined with chemical intervention to inhibit the offender's sex drive. This was because he placed greater emphasis on the likelihood of an underlying paraphilia

as a motivating factor in the offender's behaviour. But even Dr. Dickey acknowledged that, under any scenario, there is a high probability of this offender committing a further serious crime.

[53] There was some exploration of the question of whether the Hare checklist is a reliable test having regard to cultural differences or biases (since the offender is an Aboriginal Canadian). The checklist is used extensively in federal penitentiaries as a risk assessment tool but neither doctor could say whether there are limitations to its use with native offenders. This issue is always an important one when relying on standardized tests of any sort. Cultural biases have a way of subtly distorting the results. There is, however, no evidence of such biases here. To suggest otherwise is mere speculation. Furthermore, it is apparent that both doctors, and the psychologist who administered the test, were cognizant of this concern. The diagnosis of psychopathy is one on which all agreed. It was one that was based on a multitude of factors beside the Hare checklist. For that reason I accept the diagnosis.

ELEMENTS OF SECTION 753(a)(i)

[54] I identified the elements of s.753(a)(i) above. The first element, that the predicate offence is a serious personal injury offence, has been met (as I discussed above). The other elements relate to the identification of a pattern of behaviour on the part of the offender and the likelihood of the offender causing harm in the future.

[55] Is there a pattern of repetitive behaviour on the part of the offender of which the predicate offence forms a part? The evidence reveals a consistent pattern of aggressive acts on the part of the offender over more than 20 years. What his criminal record does not reveal, with the exception of the 1991 conviction, is the expressly sexual nature of his aggressive conduct. That is revealed by the evidence of his acts for which he was never prosecuted. The predicate offence, in addition to being strikingly similar to the 1991 conviction, is clearly a part of a pattern of aggressive and sexually violent behaviour on the part of the offender.

[56] Does this pattern of repetitive behaviour show a failure on the part of the offender to restrain his behaviour? It is true to say that much of the offender's criminal conduct was carried out while he was under the influence of alcohol. But it would be wrong to conclude that alcohol is the cause of that conduct. Alcohol may loosen one's inhibitions but it cannot plant aggressive tendencies where there are none to begin with. In this case, the offender has shown a consistent failure to restrain his behaviour. He has been

incarcerated for his past conduct and nothing to date has worked to restrain him from committing further crimes.

[57] Is there a likelihood of the offender causing death or injury, or severe psychological damage, to others through failure in the future to restrain his behaviour? This is the critical issue since s.753 ultimately requires an assessment of the continuing and future dangerousness of the offender.

[58] In considering this element, the important thing is to focus on the condition of the offender at the present time as revealed by the evidence of past behaviour. It is not, at this stage, a question of determining future probabilities. It is impossible to prove beyond a reasonable doubt that certain events will happen in the future. All that can be done is to assess the evidence of past conduct to determine the present likelihood of future conduct. This was made clear by Lamer C.J.C. in the *Currie* case (at page 285) in commenting about this element in connection with the similar test under s.753(b):

> The Court cannot forget that s.753(b) does not require proof beyond a reasonable doubt that the respondent will re-offend. Such a standard would be impossible to meet. Instead, s.753(b) requires that the court be satisfied beyond a reasonable doubt there there is a "likelihood" that the respondent will inflict harm...

[59] Having regard to the extensive evidence respecting the accused's continuing aggressive behaviour, the failure of past punishment to correct that behaviour, the extremely short lapse of time between his release from the 1991 sentence and the commission of the predicate offence, the similarity of much of his acts over the years, and his apparent lack of appreciation of the consequences of his conduct on others, I am satisfied beyond a reasonable doubt that there is a likelihood that the offender will cause harm in the future through his failure to restrain his behaviour.

[60] Having established the preceding elements, does the offender constitute a threat to the life, safety or physical or mental well-being of others? I am satisfied beyond a reasonable doubt that he does. The evidence convinces me that the offender's pattern of aggressive behaviour and his failure to restrain that behaviour are substantially intractable. The only reasonable conclusion, therefore, is that he constitutes a threat to the public.

DANGEROUS OFFENDER DESIGNATION

[61] Having found the essential elements of s.753(a)(i) proven beyond a reasonable doubt, the next question is whether I should find him to be a dangerous offender. As noted above from the *Lyons* case, the court maintains a discretion to not designate the offender as dangerous even if the statutory criteria are met. In *R v Klengenberg* (N.W.T.S.C. No. 02423; September 28, 1995), Hetherington J. observed that the *Lyons* judgment did not say in what circumstances a judge could properly refuse to find an offender was dangerous when the criteria have been established. But since those criteria are deemed to be the appropriate ones for the designation, it seems to me (as it did to Hetherington J.) that there would have to be good reason for not making the designation in such circumstances.

[62] Counsel for the offender argued that I should not make the designation because of certain reservations expressed by the doctors who did the assessments. The psychologist who administered the Hare Checklist made a comment in his report to the effect that the offender's attitude and demeanour, while in the custodial psychiatric unit, were at odds with the demeanour presented by other psychopaths that he had observed. Dr. Dickey drew a distinction between the offender's two most serious offences (the most recent two) and his relatively less serious earlier criminal record. Dr. Dickey also explored at length various control options. I note in passing, as well, that Dr. Dickey indicated that the offender's demeanour is not a meaningful predictor of likely recidivism.

[63] The evidence, however, clearly showed that even though some of the doctors expressed reservations (and I note that most of these reservations were due to, first, the compliant nature of the accused in a controlled environment and, second, to doubts about whether the offender should receive some different consideration because he is a native offender) all of them agreed on the base diagnosis of psychopathy. All of them agreed on the characteristics of a psychopath and how the offender's profile fit those characteristics. The reservations, if any, have more to do with the questions of treatment and sentence than they do with the designation of dangerousness.

[64] As I noted previously, the evidence has convinced me that the offender's behaviour is intractable. He has shown a pattern of general aggressive behaviour, behaviour that is both impulsive and unrestrained by external or internal control mechanisms. He has also shown a pattern of specifically sexual aggressive behaviour. There is agreement from the expert witnesses that he poses a high risk of reoffending.

[65] I have not ignored the evidence offered by the defence from some relatives and acquaintances of the offender. They acknowledged the fact that the offender has a

pattern of criminal conduct but they did not view his intent to be one of causing harm to others. In their view the offender's alcohol abuse is at the root of his criminal tendencies.

[66] While I appreciate these comments, and understand them coming as they did in this serious context, I think they gloss over the obvious damage, both physical and emotional, that was displayed before me by the various victims of the offender's crimes. Whatever his intention in any specific instance may have been, the result of his actions have been all too apparent. Those actions have been violent, physically and sexually, and extremely harmful.

[67] Having regard to all of the evidence, I can find no rational or reasonable excuse for not making the designation the statutory criteria compel me to make. It would not be appropriate for me to exercise my discretion in a manner inconsistent with those criteria. I therefore find the offender to be a dangerous offender.

INDETERMINATE SENTENCE

[68] The question of sentence inevitably leads to a consideration of treatment or cure and the probability of this offender reoffending in the future. The emphasis at this stage is on protection of the public.

[69] Both expert witnesses described the offender as a high risk to reoffend. That, of course, does not say anything about how serious any future offence may be but it is significant in terms of the probability of reoffending generally. Both expert witnesses classified him as a psychopath. There is general agreement that the underlying anti-social personality disorder is revealed by the offender's personal history going back to childhood. Hence his behaviour patterns are long-standing and entrenched. There is also general agreement that psychopathy is untreatable and that psychopaths (while they may be managed by sufficient controls or they may burn out through old age) are never cured. Both doctors agree that this offender is a poor candidate for psychiatric "treatment" because of his condition and his lack of motivation.

[70] Where the doctors disagreed was on possible control mechanisms. Dr. Dickey, because of his opinion that the offender lakely has a specific core sexual deviance, thought that sex-reduction medication may control the offender's impulsive sexual behaviour. This medication was described as the "chemical analog of castration". The problem with such measures, of course, is that one cannot be forced to comply with them. It is voluntary and requires continual oversight.

[71] In my opinion, the prospects of any medical intervention as providing a cure are totally speculative. I accept Dr. Klassen's opinion that the offender does not have any real rehabilitative prospects at the present. Therefore, the protection of the public demands that the offender be detained until such time as it can be safely concluded that he no longer poses a real and substantial risk to the community.

[72] It is impossible, in light of the evidence in this case, to forecast with any reasonable degree of comfort when and under what conditions this offender will cease to be a continuing danger. It is impossible to predict, and neither of the experts attempted to do so, when the offender will gain sufficient control over his behaviour so as to safely allow him back into the community. Therefore it would be purely arbitrary to set a fixed sentence at the end of which one can say he will no longer be dangerous. If one cannot safely say that in a particular time span the offender will be cured, then one should not gamble with the public's safety.

[73] Offender's counsel submitted that there can be an appropriate determinate sentence in this case. He noted that the possible maximum penalty is life imprisonment so the court has a wide range to work in. Counsel agreed that if this were a traditional sentencing situation an appropriate sentence for the predicate offence would be in the range of 12 to 14 years. That would be significantly reduced by taking into account the time served on remand (some 33 months now). The problem, however, is that any fixed sentence will ultimately expire. At that point there will be no control mechanisms in place. And, there is no assurance that, even at the offender's age, he will no longer pose a threat after all that time.

[74] There is an accepted line of reasoning that where a dangerous offender is a high risk to reoffend, and there is no evidence that he would be "cured" within the period of time fixed by an appropriate determinate sentence, an indeterminate sentence should be imposed: *R v Carleton* (1981), 69 C.C.C. (2d) 1 (Alta. C.A.), appeal dismissed (1983), 6 C.C.C. (3d) 480 (S.C.C.). That is the situation in this case. The evidence does not show that the offender could be treated, so as to not pose a continuing danger, within a fixed period of detention.

[75] I therefore conclude, in the interests of public safety, that I must impose a sentence of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that I might impose for the offence of which he was convicted on February 6, 1997.

CONCLUSION

[76] I have found Mr. McPherson to be a dangerous offender and imposed an indeterminate sentence of detention. This does not necessarily mean that he will spend the rest of his life in prison. There are protections built in to the Criminal Code whereby, pursuant to s.761, his condition will be periodically reviewed by the National Parole Board to determine his suitability for parole.

[77] Whether or not Mr. McPherson will ever be granted parole will depend in large measure on him. I think, however, there may be ways of improving his chances.

[78] During the hearing Dr. Dickey made reference to how the offender may benefit from some of the corrections programmes that are being developed specifically for native offenders. I recognize, as Dr. Dickey did, that there is a danger in treating all native offenders the same just because they are natives. Certainly there is nothing in Mr. McPherson's history that reveals any particular "cultural" aspect to his crimes. His crimes are ones that can be and are committed by men of all races. But it may be worthwhile to ascertain if any of these special programmes could be relevant and helpful to Mr. McPherson at this stage of his life. If so, it could improve his chance of parole at some point in the future. It may also help avoid the prospect of Mr. McPherson simply being "warehoused" as an incurable offender.

[79] I therefore urge the corrections authorities to give careful consideration to this offender's suitability for any programmes within the penitentiary system specifically designed for native offenders.

[80] I thank both counsel for their able and professional work on a most difficult matter.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 3rd day of September, 1998

Counsel for the Crown: Alan R. Regel

Counsel for the Offender: Thomas Boyd

CR 03112

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

IRVIN GEORGE McPHERSON

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE J.Z. VERTES