R. v. *Kudlak*, 2011 NWTSC 29

Date: 2011 05 27
Docket: S-1-CR-2010000058

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

BOBBY KUDLAK

Application pursuant to s. 753 of the *Criminal Code*, to declare the offender a dangerous offender and to sentence him to an indeterminate period of detention in a penitentiary.

Heard at Yellowknife, NT, on May 9,10, 13, 16 & 19, 2011.

Reasons filed: May 27, 2011.

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

Counsel for the Crown: Janice K. Walsh

Counsel for the Defence: Thomas H. Boyd

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REASONS FOR JUDGMENT

[1] This is an application, pursuant to s. 753 of the *Criminal Code*, to declare the offender, Bobby Kudlak, a dangerous offender and to sentence him to an indeterminate period of detention in a penitentiary.

[2] The offender pled guilty to three offences: (1) sexual assault on A.H., contrary to s. 271 of the *Criminal Code*, committed on June 16, 2009, in Yellowknife; (2) breach of a probation order, contrary to s. 733.1(1) of the *Criminal Code*, also committed on June 16, 2009; and (3) sexual assault on K.F., committed on or between August 15 and September 30, 2005. These were the initial predicate offences for this application.

[3] The Crown subsequently complied with the procedural requirements of s. 754 of the Code. The offender was remanded for assessment pursuant to s. 752.1. A report of that assessment was prepared by a forensic psychiatrist and filed with the court.

[4] These reasons address my conclusion that the offender must be declared a dangerous offender and sentenced to an indeterminate period of imprisonment. I can find no reasonable prospect that any lesser measure would adequately protect the public.

Preliminary Application:

[5] At the commencement of the hearing, Crown Counsel applied to amend the Notice of Application filed in this matter to delete reference to the sexual assault offence committed in 2005. Instead, Crown counsel indicated that she will seek the imposition of a determinate sentence for that offence. The reason for this request has to do with the amendments made on July 2, 2008, to certain provisions of the Criminal Code dealing with dangerous and long-term offenders. In Crown counsel's opinion, keeping the reference to the 2005 offence would mean that the hearing would be governed by two legislative schemes: the pre-amendment provisions for the 2005 predicate offence and the current provisions for the 2009 offences.

[6] Defence counsel objected to this request. In his view, the entire proceeding must come under the pre-amendment legislative scheme because of the inclusion of the 2005 predicate offence. The pre-amendment provisions were more favourable to the offender and thus, in counsel's submission, to allow the amendment would cause prejudice to the offender.

[7] During the hearing, and before final argument, I informed counsel of my decision allowing the amendment. I said then that more fulsome reasons would be forthcoming and these are those reasons.

[8] I want to start with the proposition that the pre-2008 provisions were more favourable to an offender. Counsel are in agreement that they were more favourable and, indeed, that was the conclusion in several cases from British Columbia: *R.* v. *Dorfer*, [2009] B.C.J. No. 291 (S.C.); *R.* v. *Bruneau*, [2009] B.C.J. No. 1607 (S.C.); and, *R.* v. *D.M.H.*, [2009] B.C.J. No. 2192 (S.C.). This conclusion is premised primarily on two factors.

[9] First, the pre-amendment s. 753(1) provided the judge with a discretion not to declare the offender dangerous: "The court may ... find the offender to be a dangerous offender...". The amended s. 753(1) removes that discretion: "... the

court shall find the offender to be a dangerous offender ...". The result is that the sentencing judge no longer has the discretion to decline to find the offender to be a dangerous offender if the statutory criteria in s. 753(1) are satisfied.

[10] Second, under the current s. 753(4.1), the court must impose a sentence of detention for an indeterminate period unless it is satisfied that there is a reasonable expectation that a lesser measure — such as a determinate sentence or a determinate sentence with a long-term supervision order — will adequately protect the public from the commission of a serious personal injury offence. In the view of defence counsel, this places an onus on the offender to show that a less severe sanction is warranted. It should be noted that, if this is a reverse onus provision, no constitutional challenge has been taken to it.

[11] I agree that, taken as a whole, the pre-amendment provisions were more favourable to an offender. And, as noted by defence counsel, s. 11(i) of the *Charter of Rights and Freedoms* would give the offender the benefit of the more favourable provisions in terms of punishment at least with respect to the 2005 offence since that offence pre-dates the amendment. A dangerous offender proceeding is regarded as a "sentencing" proceeding, notwithstanding the fact that its purpose is not punishment *per se* but the protection of the public: *R.* v. *Jones*, [1994] 2 S.C.R. 229 (at para. 106); *R.* v. *Johnson*, [2003] 2 S.C.R. 357 (at para. 29).

[12] In my view, however, this is not the crux of the application. After all, it is a well-accepted general proposition that persons accused of criminal conduct are to be charged and sentenced under the criminal law provisions in place at the time that the offence allegedly was committed: see *Johnson* (at para. 41). The real questions are whether (a) the mere inclusion of the 2005 predicate offence determines the applicable legislative scheme; and (b) whether the Crown can amend its Notice. Both questions require an examination of the purpose for the Notice.

[13] Section 754(1) sets out three pre-conditions to the hearing of an application under s. 753: (i) consent to the application by the Attorney General; (ii) seven days notice to the offender by the prosecutor outlining the basis on which the application is founded; and, (iii) filing a copy of that notice with the court. The defence in this case acknowledges that those pre-conditions have been met.

[14] The notice requirement in s. 754(1) is meant to ensure that the offender knows the case which he or she must meet on a dangerous offender application: *R.* v. *Neve* (1999), 137 C.C.C. (3d) 97 (Alta. C.A.), at 148. The Notice filed in this case makes reference to the three predicate offences to which the offender pled guilty. It also refers to his criminal record and alleges a pattern of repetitive behaviour and a failure to control his sexual impulses. No objection has been taken to the sufficiency of the Notice.

[15] A notice under s. 754(1) is not the equivalent of an indictment. It is not a charging document. The offender has already been convicted. The notice is meant to outline the basis of the application so that the defence can make a full answer. So, while failing to disclose something in advance may be prejudicial to the defence, the same concern should not arise if something was withdrawn from the notice.

[16] While a notice is not equivalent to an indictment, I think one can still use the example of an indictment for analytical assistance.

[17] Section 591 of the *Criminal Code* permits any number of counts to be included in an indictment. However, s. 591(2) provides that, where multiple counts are joined in one indictment, each count may be treated as a separate indictment. And this only makes sense. For example, take the evidentiary situation in a multi-count indictment. Joinder of counts does not make evidence on one count admissible on another count simply because of the joinder; the evidence must meet the standard of similar fact evidence.

[18] In this case, the offender was originally facing charges in two separate indictments: one charging just the 2005 offence and the other charging the two 2009 offences. These were replaced on August 3, 2010, by one indictment charging all three offences. But, no one would suggest that, if the matters went to trial, the Crown would be precluded from proceeding on only one or two counts, or stay one or two counts, or even file new indictments separating the counts. And, if the law were somehow different as between the 2005 and 2009 offences, then each case would have to be tried according to its law. Section 11(i) of the Charter would have no application because that only applies if the law changes between the time of the offence and the time of sentencing.

[19] I look at the Notice in this case in a similar fashion. If we were to proceed on all three predicate offences, the dangerous offender determination for the 2005 offence would be taken under the pre-amended legislative scheme while the determination for the 2009 offences would be taken under the current scheme. I see no logic in the argument that just because the 2005 offence is included in the Notice then the entire proceeding must be taken under the pre-amended scheme.

[20] I also fail to see any reason why the Crown should be precluded from amending the Notice so as to withdraw reliance on the 2005 offence. The offender is placed in no different position than before. He must answer the application founded on the basis of the 2009 offences, as he would have had to do all along. The only difference is that he no longer has to address this application on the basis of the 2005 offence. That will be the subject of a regular sentencing hearing. Instead of being taken into account as one of the predicate offences on this application, it will be part of the background as an aspect of the offender's criminal history.

[21] Would allowing this amendment cause prejudice to the offender? Defence counsel referred me to the decision in *R.* v. *M.B.P.*, [1994] 1 S.C.R. 555, as an example of prejudice being caused by a shift in the case to be met resulting from an amendment to the indictment during the course of the trial. There the accused was charged with a sexual assault allegedly committed in 1982. The defence was an alibi. After the Crown closed its case, it asked to amend the indictment to allege 1983 and then was permitted to reopen its case to call a witness to testify as to the corrected date. The accused was convicted. On appeal the conviction was quashed on the ground that the amendment and the reopening caused prejudice to the accused since it enabled the Crown to recast its case in the face of the alibi defence. The Supreme Court upheld the Court of Appeal decision.

[22] The majority in the Supreme Court held that allowing the Crown to reopen its case caused an injustice since the defence had begun to answer the case. But, it also noted that it was not the mere amendment of the indictment that caused the prejudice. The inability to rely on a particular defence is not co-extensive with irreparable prejudice or injustice. Those matters are highly contextual and fall to be determined in the particular circumstances of each case.

[23] Here, there has been no change in the evidence. There has been no change in the case the defence has to meet. There has been no change in the law that must be applied to the 2009 predicate offences. The only change is that we no longer have to consider the pre-amended legislative scheme since the 2005 offence does not form part of the basis for the application.

[24] It may be that the current provisions, particularly s. 753(4.1), place an added burden on the offender that was not there before the 2008 amendments. But he would have had to confront that burden with respect to this application in any event since the application's basis included from the beginning the two 2009 offences. In the circumstances I fail to find prejudice to the offender in allowing the requested amendment.

[25] For these reasons I granted the Crown's application to amend its Notice so that the hearing proceeded on the basis of only the 2009 offences serving as the predicate offences. For the 2005 offence, a determinate sentence of 18 months was imposed. The facts of that offence will be discussed further in these reasons.

The Predicate Offences:

[26] Section 753(1) stipulates as a prerequisite that the offender be convicted of a "serious personal injury offence" as described in either paragraph (a) or (b) of s. 752:

> "serious personal injury offence" means
>
> (a) an indictable offence, other than high reason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage 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 party or causing bodily harm) or 273 (aggravated sexual assault).

[27] Here the predicate offences are sexual assault (s.271 of the Code) and breach of a probation order (s.733.1(1) of the Code). Sexual assault is designated as a "serious personal injury offence" under paragraph (b) of the definition. But is this sexual assault also a "serious personal injury offence" under paragraph (a)? The distinction is important because of differences in s.753(1) as to the process for finding an offender to be a dangerous offender:

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

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

[28] The predicate offences arise from the same set of circumstances. On June 16, 2009, the victim, A.H., an eleven year old girl, was in the Yellowknife library during a children's reading session. At one point she was playing hide and seek with some friends. She was lying on the floor on her stomach with a large bean bag covering her upper body. A.H. felt something brush against the back of her knee on top of her pants. She could not see who it was. She then felt something brush against her upper thigh and something then touched her vagina through her pants. She tried to kick away what was touching her and she kicked a man's arm. A.H. got out from underneath the bean bag chair and saw a short male walking away very quickly.

[29] A.H. went immediately to the front desk and told the librarian what had happened. From the description given by A.H., the librarian concluded that the perpetrator was Bobby Kudlak, a short Inuit male who had been in the library earlier that day. Kudlak was known to the library staff because he had been banned previously from the premises.

[30] Another young girl told the police that she had seen a short male person standing over A.H. while they were playing. She saw this male reach down toward A.H. under the bean bag chair as he stood over her. This young witness eventually picked out Kudlak from a photo line-up as the man she saw standing over A.H. Kudlak was arrested a few hours later.

[31] At the time of this offence, Kudlak was on probation pursuant to an order made on November 5, 2008. At that time he had been convicted of sexual assault and sentenced to 8 months imprisonment and probation for 3 years. He was

released in mid-April, 2009. A condition of the probation order was that he keep the peace and be of good behaviour.

[32] I do not regard the breach of probation order as constituting a "serious personal injury offence". The essence of that offence is non-compliance with a valid court order. It is the primary offence of sexual assault that must be considered.

[33] In my opinion, the conduct of the offender comes within the meaning of "serious personal injury offence" found in paragraph (a) of s. 752. A sexual assault is conduct that is inherently violent. It is conduct that is "likely to endanger the ... safety of another person" and "likely to inflict severe psychological damage upon another person". The fact that the victim was a young girl, and the manner in which the offender touched her, satisfies me that these criteria are met. Also, it is a sentence for which the offender may be sentenced to imprisonment for 10 years. Defence counsel conceded that this offence constituted a "serious personal injury offence". Therefore, the offence comes within both paragraphs (a) and (b) of s. 752.

The Hearing:

[34] The hearing before me was relatively brief. The Crown called two witnesses: Dr. Scott Woodside, a forensic psychiatrist who conducted the court-ordered assessment of the offender; and, Mr. David Chapman, the associate district director for Correctional Service of Canada for the Alberta/Northwest Territories parole district. The defence called no evidence.

[35] In addition to the oral evidence, as well as Dr. Woodside's written report and an additional report by a psychologist, the Crown filed six binders of materials relating to the offender's criminal history, inmate corrections history and social services records. Counsel were aware of the onus on the Crown to prove beyond a reasonable doubt all of the elements necessary to find an offender a dangerous offender, particularly with respect to alleged acts of past conduct that is said to establish the requisite pattern: *R.* v. *Pike*, [2010] B.C.J. No. 1803 (C.A.), at para. 29. Therefore, in order to avoid confusion as to how this documentary evidence was to be assessed, counsel agreed on the evidentiary basis upon which I can treat this evidence. This agreement was reduced to writing:

1. All convictions and all material related to the convictions should be accepted by the Court as proven beyond a reasonable doubt.

2. All other material produced to the Court including but not limited to correctional and probation records, social services records and past psychological/psychiatric records should be accepted for the truth of their contents as if the author testified in court for background purposes.

3. All matters where there was not enough evidence to support a charge, where an acquittal was registered or where the Crown has not proven a charge beyond a reasonable doubt may be taken into account by the Court for the limited purpose of establishing Mr. Kudlak came into contact with the Royal Canadian Mounted Police (RCMP) for an investigation.

4. All matters where the Crown has not proceeded with charges regarding Mr. Kudlak's interactions with the RCMP as a result of alcohol intoxication may be considered by the court for the limited purpose of establishing that Mr. Kudlak cane into contact with the RCMP for an investigation and shows the degree and severity of Mr. Kudlak's dependency on alcohol.

[36] This was extremely helpful because it dispensed with the need to authenticate the records and avoided questions as to what can be considered for the truth of their contents (something that is often a problem when large volumes of documents are placed into evidence without a clear statement as to their purpose). So I thank counsel for their agreement.

Personal & Criminal History:

[37] Bobby Kudlak was born on April 9, 1974, in Cambridge Bay. He is of Inuit heritage. He is now 37 years of age. He has been quoted as saying that he is one of eight children. Social services records, however, show that he is the second youngest of six children. All of them were apprehended as children and made wards of the state; his three older brothers have records for crimes of violence; and, one of his sisters died from methyl hydrate poisoning when Mr. Kudlak was 11 years old.

[38] Life in the Kudlak home was consistently described in social service reports as chaotic and plagued by chronic alcohol abuse which in turn bred violence and abusive behaviour, within the family and toward other community members. This is how it was described in a child welfare report from 1986:

> The Kudlak family, including his parents Luke and Mary Kudlak and his older siblings in Cambridge Bay continue to have a long-standing history of alcohol abuse, violence, gambling, dependence on social welfare, and a repetitive pattern of conflict with the law.

[39] In October 1982, the offender, who was then 8 years of age, was apprehended as a child in need of protection. He was eventually made a permanent ward by court order issued in June, 1986. During the 4 years from 1982 to 1986, he was living with a foster family in Yellowknife. This placement had to be ended, however, due to repeated complaints from the foster parents that the offender had engaged in inappropriate sexual behaviour toward two young girls living in the home. An assessment report from April, 1986, reported that there was a history of inappropriate sexual activity with younger girls, including his younger sister. A report in June, 1986, described the offender as extremely immature. Although he was age 12 his mannerism and verbal interaction seemed to be that of a child of 5 or 6 years of age.

[40] In several reports there is speculation as to the possibility that the offender suffers from fetal alcohol spectrum disorder. But, there was never any formal testing or diagnosis when he was young. And, as Dr. Woodside noted, it becomes much more difficult to diagnose FASD as the subject gets older. But it is a likelihood considering his mother's history of alcohol abuse.

[41] In 1986, after leaving his foster home in Yellowknife, the offender was placed in a residential treatment centre for youths in Calgary. In 1987 he was returned to Cambridge Bay where he spent the next few years in different group homes and foster homes, as well as periods of time with his parents. A clinician who saw him in 1989 described the offender as a "lost soul".

[42] Reports submitted as part of the evidence reveal a developing alcohol abuse problem from a young age, delayed development, sexual acting out without any age appropriate sexual knowledge, and increasingly aggressive behaviour as he got

older. The offender went only to grade 7 in his formal education and was described as being uninterested in things and unmotivated to do anything, an isolated individual with a passive demeanour. He was diagnosed with hypothyroidism in childhood which was thought to be the reason for his small stature. He underwent a thyroidectomy in 2007 and has been receiving medication to normalize his thyroid function.

[43] The offender's formal criminal history begins in 1990. The following is the offender's criminal record listed by conviction date:

1. January 11, 1990:

Four convictions, two for sexual assault and two for sexual interference, for offences committed between November, 1988, and November, 1989, in Cambridge Bay. The victim was a 12 year old female living in the same group home as the offender. The circumstances involved instances of sexual intercourse and sexual touching. The offender was 16 and 17 years old at the time. The sentence was probation for 2 years.

2. October 22, 1991:

Convictions for mischief and breach of probation. Sentenced to 1 day secure custody and 2 months probation.

3. December 31, 1991:

Conviction for break and enter with intent and breach of probation. Sentence was one year probation on each charge.

4. May 12, 1992:

Convictions for (i) possession of a dangerous weapon, and (ii) breach of probation, committed in January 1992; and (iii) break, enter and commit sexual assault, and (iv) breach of probation, committed in April, 1992. On the dangerous weapon charge, the offender swung an axe at another person during an argument. On the sex assault charge, the offender broke into a

home and touched the buttocks of a sleeping 11 year old girl. He was sentenced to a total of eight months secure custody and 6 months probation.

5. January 20, 1993:

Convicted for careless use of a firearm and two counts of breach of probation, committed in November, 1992. The offender was intoxicated, got into an argument, left, and then returned with a rifle pointing it at others. He was fined $600.00, committed to 2 days custody, and placed on further probation for 1 year.

6. November 17, 1993:

Convicted of possession of a dangerous weapon and assault. The offender assaulted his mother and, when his father intervened, he got a rifle and threatened his parents. These offences were committed in September, 1993. He was sentenced to 1 year in custody on the weapon charge and 3 months concurrent on the assault charge.

7. December 7, 1995:

Convicted of two counts of break, enter and commit sexual assault, committed on September 8 and 15, 1995. In both cases, he broke into private dwellings at night. In one, he sexually touched a 13 year old girl (the same victim as in the May, 1992, conviction for the same offence). In the other, he rubbed himself against the 21 year old sleeping victim. The sentence was a total of 25 months imprisonment. He was released on January 5, 1998 (2 days short of the full sentence).

8. March 11, 1998:

Convicted for assault with a weapon committed on February 8, 1998 (one month after his release). The offender participated in an assault on his brother in which he held him down and a co-accused slashed the brother's face with a knife. He was sentenced to 13 months custody.

9. April 30, 1999:

Convicted on two counts of taking an auto without consent (stole snowmobiles in March and April, 1999). Sentenced to 4 months probation on each charge.

10. September 20, 1999:

Convicted of two counts of being unlawfully in a dwelling house and a charge of failing to appear. On May 30, 1999, the offender entered a residence and confronted a 25 year old female resident. He had a knife which fell on the ground at which point he left. Later that same day, he entered another residence where he lay down beside a sleeping 14 year old girl. Victim woke up and offender left. He was sentenced to 5 months concurrent on each of the 2 charges of unlawfully in a dwelling house and 30 days consecutive on the fail to appear charge.

11. June 14, 2001:

Convicted of being unlawfully in a dwelling house and breach of probation for offences committed in August, 2000. The offender entered a residence through a window and climbed into bed with the 24 year old female resident. The victim awoke and the offender left. He was sentenced to a total of 6 months custody and one year probation.

12. October 9, 2002:

Convicted of two counts of sexual assault committed on the same night in August, 2002. The offender broke into a residence. The 24 year old female victim awoke to find the offender lying beside her with his hand on her hip. She forced him out and later found knives on the floor beside the bed. Later that night, the offender broke into another residence where the 17 year old female victim awoke when she felt the offender's finger in her vagina. She kicked him out and later found a table knife at the foot of her bed. He was sentenced to 2 years less a day on the first charge and 1 year concurrent on the second charge. He was released from that sentence on February 19, 2004.

13. March 15, 2005:

Convicted of possession of a dangerous weapon and disturbing the peace, in Yellowknife, for actions in January, 2005. He was highly intoxicated in a public place and, when confronted, reached behind him and a knife fell to the ground. Sentenced to 4 months custody and 1 year probation.

14. March 31, 2005:

Convicted of mischief in January, 2005, in Yellowknife and sentenced to time served plus 6 months probation.

15. March 7, 2006:

Convicted of breach of probation and fail to appear. Sentenced to time served and 18 months probation.

16. June 7, 2007:

Convicted of a sexual assault and breach of probation committed in May, 2006, in Cambridge Bay. The 41 year old female victim awoke to find the offender having intercourse with her. He was sentenced to 10 months custody (after being credited with 26 months for pre-trial custody) and 1 year probation. He was released on December 26, 2007.

17. April 8, 2008:

Convicted of uttering threats, breach of probation, and two counts of breaching an undertaking, all committed in January, 2008, less than one month after his release from his previous sentence. The offender threatened to shoot his sister. He was sentenced to time served (77 days on remand) and 18 months probation.

18. November 4, 2008:

Convicted of sexual assault and breach of probation for offence committed in June 2008. The offender approached the 10 year old female victim in the

toy aisle of the Walmart store in Yellowknife and touched her buttocks. Sentenced to 8 months in custody on the sexual assault charge (after remand credit of 10 months) plus 3 years probation and 2 months custody on the breach of probation charge. He was released in April, 2009 (the predicate offence was committed 2 months later).

19. May 19, 2011:

This was the charge of sexual assault, which occurred in Yellowknife in 2005 (but not reported until 2009), and was originally a predicate offence listed in the Crown's Notice of Application on this hearing but is no longer because of my decision, discussed earlier, allowing the Crown to amend the Notice. The offender touched the sleeping 10 year old victim on her vagina and buttocks over her clothing. The offender was a guest in the home at the time. As noted previously, I sentenced the offender to a determinate sentence of 18 months imprisonment.

[44] The record reveals a total of 45 convictions (including the predicate offence). Of those, 14 are for crimes of sexual violence; 7 are for other crimes of violence or where violence was threatened; 12 are for breaches of court orders; and 12 are for other offences (but even among those there are at least 3, the convictions for being unlawfully in a dwelling house, that have sexual overtones).

[45] In addition to the convictions, the police reports also recount numerous uncharged or untried allegations of similar conduct as well as many instances where the offender came into contact with the public because of his extreme intoxication and where he was either a nuisance to others or a danger to himself. With respect to most of the convictions it is noted that the offender was intoxicated.

[46] Generally speaking, the dangerous offender provisions of the *Criminal Code* require initially that the Crown establish a pattern of repetitive or persistent behaviour by the offender, of which the predicate offence — that being sexual assault — forms a part. Having regard to this criminal history, and here I refer solely to the convictions, I am satisfied beyond a reasonable doubt that the Crown has done so in this case.

Psychiatric Evidence:

[47] At the hearing, evidence was led as to the assessment of the offender conducted at the Centre for Addiction and Mental Health in Toronto pursuant to s. 752.1 of the Code. The results of this assessment were detailed by Dr. Scott Woodside, a staff psychiatrist and senior clinician in the assessment and triage unit, in a written report dated April 19, 2011, and in oral testimony at the hearing. In addition, I was provided with an assessment report prepared by a psychologist, Dr. Stephanie Penney.

[48] I recognize that psychiatric evidence plays a vital role in dangerous offender proceedings, furnishing the court with "an expert opinion on the interpretation of past conduct and the likely future conduct of the offender based on his or her past behaviour": *Neve*, at para. 182. But it remains my responsibility, as the sentencing judge, to make all requisite findings of fact and come to my own conclusions as to the risk posed by the offender and the prospects, if any, for treatment. In this case, however, I had no hesitation in accepting Dr. Woodside's expertise on the subject.

[49] In Dr. Woodside's opinion, the offender suffers from:

(a) an anti-social personality disorder;

(b) multiple forms of sexual deviance, including pedohebephilia (an erotic preference for pubescent and pre-pubescent aged children) and a coercive sexual preference;

(c) impaired cognitive and intellectual functioning at borderline mental retardation level;

(d) a severe alcohol dependence disorder as well as a history of abusing other drugs; and,

(e) difficulties with anger management, aggressive behaviour and impulse control.

[50] "Anti-social personality disorder" is a formal non-specific diagnosis whose essential feature is a pervasive pattern of disregard for, and violation of the rights

of, others over a long period of time. It is highlighted by repetitive failure to conform to lawful behaviour, impulsivity, aggressiveness, a reckless disregard for the safety of self or others, consistent irresponsibility as evidenced by a failure to sustain work, and a lack of remorse and indifference to the feelings of others, all of which, in Dr. Woodside's opinion, are evident in the offender. These represent a fixed pattern of personality traits over time and, in all likelihood, date back to his chaotic family situation when he was young.

[51] "Psycopathy" is a sub-set of anti-social personality disorder used to designate severe anti-sociality. It has more meaning in a criminal context since it usually refers to those who are more violent and recidivist and less controllable. The offender's results, after being administered the commonly accepted tests, put him below the cut-off for a diagnosis of psychopathy. His score, however, placed him in the 71st percentile compared to the male prison population. In other words, his score is higher than 70% of the prison population. As Dr. Woodside wrote in his report: "In and of itself, it would be significantly predictive of future general, violent and sexual recidivism."

[52] The offender was also tested using the "Violence Risk Appraisal Guide" (VRAG) and the "Sexual Offence Risk Appraisal Guide" (SORAG), both of which are actuarial instruments for risk assessment, generally and specifically with respect to sex offenders. He was also tested using the "Static - 99R" and "Static - 2002" instruments, both developed to identify individuals at risk for future sexual offending. On all of these instruments, the offender scored very high. He poses an extremely high risk to reoffend. Specifically for sexual offending, Dr. Woodside's opinion was that this offender's risk of recidivating sexually was almost 5 times that of the average sex offender.

[53] Dr. Woodside acknowledged that there were no specific studies as to the application of these testing instruments to aboriginal offenders. But, he did not think there was any reason why they would not apply. They have been the subject of repeated validation studies and used throughout the world. He wrote in his report as follows:

> I would note that the majority of these instruments have not been extensively researched with respect to aboriginal offenders and thus may not as accurately reflect the risk in that population. Therefore, I would recommend caution in

> making use of these risk estimates, although I am not aware of instruments that have been identified as providing more accurate information in this regard.
>
> However, there is nothing in this individual's clinical presentation or history to suggest that these risk estimates are over-estimates. Mr. Kudlak clearly embodies a number of clinical variables known to be related to sexually violent and non sexually violent recidivism, including more significantly, the presence of significant antisocial personality traits, the presence of sexual paraphilias (pedohebephilia and a coercive preference), along with severe substance dependence. These variables should likely be considered static variables, which will not be specifically responsive to intervention.
>
> ...
>
> Overall, I would view Mr. Kudlak as being at very high risk for sexually violent recidivism and high risk for non-sexually violent recidivism from a purely clinical perspective, as well as from an actuarial perspective.

[54] Dr. Woodside's diagnosis that the offender suffers from pedohebephelia (a deviant sexual preference for pubescent and pre-pubescent girls) is based on both the offender's criminal history and phallometric testing. His criminal record reveals multiple offences involving young or younger females (at least 8 offences involving females under 18 years of age). The phallometric testing was indicative of an arousal preference for young females.

[55] In Dr. Woodside's opinion, this sexual deviance is not treatable. It is an immutable and unchanging sexual preference in most cases. It may, however, be controlled through psychological and pharmacological treatment. Dr. Woodside testified that at best psychological therapy had a modest effect on recidivism while pharmacological treatment, i.e. the use of drugs that impede sex drive and sexual function, are potentially helpful but not foolproof. There are ways of getting around their effects and treatment requires the willing participation of the subject. In this offender's case, the records show that he received some treatment, such as sex offender counselling, in the past. But he has also consistently demonstrated a lack of motivation to take programs offered to him.

[56] The cognitive deficits under which Mr. Kudlak functions also impede the prospects of successful treatment programs. In Dr. Woodside's opinion, he lacks awareness of the need for treatment as well as a lack of motivation.

[57] The psychological testing conducted by Ms. Penney placed this offender in the mildly mentally retarded range. Dr. Woodside preferred to place him in a borderline category particularly because earlier assessments, when Mr. Kudlak was young, had him functioning at higher ranges. Dr. Woodside had no specific answer as to why the offender has regressed intellectually but he thought it could be due to alcohol and substance abuse or it may be due to deficiencies in the earlier testing. But both Dr. Woodside and Ms. Penney agree that the offender's cognitive deficits and low intellectual function mean that he has and will continue to have difficulty navigating day-to-day life. He would require considerable on-going assistance. And, if he was undergoing treatment, he would have to be constantly supervised to make sure that he was following treatment procedures.

[58] With respect to the offender's substance abuse disorder, Dr. Woodside testified that the offender has been suffering from a severe alcohol dependence since his teenage years. The offender attributed virtually all of his offences to his substance abuse. He was offered treatment in the past but rarely continued with it for any length of time. As a result, he has been unable to maintain employment, depends on family and friends for support, and often times has lived on the street.

[59] Dr. Woodside emphasized, however, that the offender's alcohol dependence was not the cause of his behaviour. It does not explain the persistence of his behaviour.

[60] Dr. Woodside did not find any evidence of the offender suffering from a psychotic illness (such as mood disorders, schizophrenia or a delusional disorder) although there were observations by correctional staff in the recent past of Mr. Kudlak complaining of transient psychotic episodes (such as hearing voices) which may relate to a degree of paranoia. Such episodes may be due to substance abuse induced psychosis.

[61] Dr. Woodside concluded that, from a psychiatric perspective, the offender poses a significant risk to reoffend sexually through a failure to control his sexual impulses.

[62] His opinion was that the offender's history and behaviour in the commission of his offences demonstrate that he has significant difficulties in comprehending the

consequences of his behaviour both to himself and others. He has continued in high risk behaviour. According to Dr. Woodside, from a psychiatric perspective, this is consistent with a significant degree of indifference on the part of the offender, a lack of the capacity of empathy for others.

[63] Dr. Woodside went on, in both his report and his oral testimony, to consider whether there is a reasonable possibility of eventual control of the risk posed by Mr. Kudlak.

[64] Dr. Woodside acknowledged that studies have shown that there is a general decrease in violent offending among males after the age of 40. This may be due to any number of reasons, including decreased testosterone. However, he also noted that people with anti-social personality disorder and those scoring high on the psychopathy scale (such as this offender) are typically less amenable to treatment and less likely to comply with the demands of supervision. This last point is illustrated by Mr. Kudlak's repeated breaches of court orders. With respect to this offender's sexual deviance, Dr. Woodside pointed out that even the most optimistic research into treatment options have indicated only a modest reduction in risk.

[65] Dr. Woodside also noted that the cognitive and intellectual deficits under which this offender functions pose additional risks of, not merely not following treatment and supervision requirements, but also of reoffending due to his impulsivity and poor judgment. Overall, this offender's constellation of problems are difficult to treat with the prognosis being significantly poorer when compared with other offenders.

[66] Dr. Woodside also pointed out, quite fairly, that various measures have not been tried previously, measures such as pharmacological treatment for the offender's alcohol dependence and to reduce his sex drive. The offender apparently expressed a willingness to the doctor to take whatever treatment was recommended but this has to be considered in light of his history. He was not motivated to pursue what treatment was offered in the past and his response to supervision, as noted previously, was repeated non-compliance. Dr. Woodside summarized his opinion on this point as follows:

> Overall, there are very significant issues present relating to managing this individual's risk in the community. Efforts to date have clearly not been

> effective and would suggest that his risk is not manageable in the community in the foreseeable future.
>
> However, there are numerous approaches to managing this individual's risk that have the potential to be of significant assistance that have not been tried to date. In particular, were this individual to be living in a group home targeted to developmentally delayed sex offenders, with 24 hour supervision and with both sex-drive reducing medication and anti-alcohol medication, then I think his risk could likely be managed in the community. Such treatment would need to continue in essence in perpetuity. As previously noted, however, such resources are in scarce supply and it is not clear whether Mr. Kudlak would even be considered an appropriate candidate, given his current criminal record. Absent such structure being available to him, I do not believe that his risk is manageable in the community, from a psychiatric perspective.

[67] Dr. Woodside was quite emphatic in his testimony that many of the measures he suggested were ones that had to be maintained on a permanent basis for the rest of this offender's life, measures such as medication to suppress sex drive, supervision on a 24-hour basis in a group home specifically targeted to developmentally delayed sex offenders with no unaccompanied access to the community, abstention from alcohol or non-prescribed drugs and administration of anti-alcohol medication. Dr. Woodside did not think that the risk posed by this offender could be managed if he were allowed in the community without these permanent, round-the-clock controls.

Evidence of CSC Witness:

[68] Mr. David Chapman testified generally about protective security and treatment programs within the Correctional Service of Canada. He said that there were some group homes and community residential centres in the Alberta/NWT region. A few of these were specifically for sexual offenders and fewer still for cognitively - impaired offenders. But, there are no halfway houses or community residence centres with 24-hour on-site supervision or the resources to enforce the taking of medication by residents.

[69] When asked specifically about Dr. Woodside's conditions for treatment and supervision in a community residential setting, Mr. Chapman said that CSC does not have the capability to do it. The following is the pertinent portion of his

testimony on this point (upon being questioned by me after his examination and cross-examination):

> THE COURT: I just want to get your comments from the perspective of management and control and resources available to the Correction Services of Canada on some comments made by Dr. Woodside in his report that has been provided to us, and he is referring to the prospect of some type of long term supervision regime for this offender. As you have heard, there are problems identified by Dr. Woodside of alcohol dependence, sexual preference for pubescent, prepubescent girls, antisocial personality disorder, and some borderline mental retardation and cognitive issues.
>
> Now Dr. Woodside makes the comment, and here I am referring to page 57 of his report, counsel. Dr. Woodside says, "were this individual", referring to Mr. Kudlak,
>
> > "Were this individual to be living in a group home targeted to developmentally delayed sex offenders, with 24-hour supervision and with his receiving treatment with both sex driving reducing medication and anti-alcohol medication, then I think his risk could likely be managed in the community. Such treatment would need to continue, in essence, in perpetuity. As previously noted howeve, such resources are in scarce supply and it is not clear whether Mr. Kudlak would even be considered an appropriate candidate given his current criminal record".
>
> And granted you don't know anything specifically about Mr. Kudlak, but having regard to those comments, particularly the living in a group home targeted to developmentally delayed sex offenders with 24-hour supervision, receiving treatment, receiving medication, in perpetuity, what is your opinion of even the possibility of such a structure being put into place?
>
> A THE WITNESS: I think it's a pretty significant challenge for us to provide it, certainly we don't have it right now, that type of capability. We do - - our experience also has shown if you put someone in an halfway house for too long, that eventually there is going to be a failure. They kind of, after some point, get tired of the facility. We have had people, certainly it is not uncommon with people serving life sentences to spend two years in a halfway house but that seems to be the high end of how long someone can take that kind of structure before there is some kind of violation or some kind of difficulty with them abiding by the conditions. The type of facility that I'm thinking that the doctor is referring to would

> be a more specialized mental health type group home, very highly structured, and it is probably very limited access to the community which is not what we have in our halfway houses. The offenders are, do have access to the community. It would be a pretty significant challenge for us to meet those criteria.
>
> THE COURT: Any questions arising, counsel?
>
> MS. WALSH: No, thank you, sir.
>
> THE COURT: Mr. Boyd?
>
> Q MR. BOYD: Are you aware, if apart from the prairie region, for example Ontario, might have a facility tailored to those types of individuals?
>
> A I am aware that Ontario does have the Keele Community Correctional Centre in downtown Toronto which offers something to similar to 101st Street Apartments. They still have access to community but I certainly do not think they have the capability to supervise someone on a one-to-one basis 24/7.

Submissions:

[70] In this case, Crown counsel argued that the offender meets the criteria for a dangerous offender designation and an indeterminate sentence should be imposed. In counsel's submission, the evidence established that Mr. Kudlak poses a continuing risk to reoffend and there is no realistic or reasonable possibility that the risk can be managed in the community.

[71] The Crown relies specifically on sections 753(1)(a)(i) and (ii) as well as s. 753(1)(b). Crown counsel argued that the offender's history demonstrates a pattern of repetitive behaviour showing a failure to restrain his behaviour as well as a failure to control his sexual impulses. In counsel's submission, although the offender has shown signs of remorse, these, according to the psychiatric evidence, were not meaningful and had no real emotional sincerity. The offender lacks empathy and insight into the impact of his actions on others or himself.

[72] Crown counsel also submitted that there was no evidence of a reasonable possibility of control in the community. If supervision requirements replicate jail,

as they do in Dr. Woodside's set of conditions, then the appropriate thing to do is to commit the offender to jail.

[73] The defence position is that Mr. Kudlak should be found to be a long-term offender under s. 753.1 of the Code. Defence counsel argued that Dr. Woodside's opinion as to various conditions of supervision and treatment provide a reasonable possibility of eventual control of risk. The lack of readily available resources to meet those conditions should not govern the determination in this case. On this point, defence counsel relied on the judgments in *R.* v. *Makar*, [2000] M.J. No. 458 (C.A.), *R.* v. *Roberts*, [2000] O.J. No.3750 (C.A.), and *R.* v. *McGarroch*, [2003] CanLII 1974 (Ont.S.C.J.). The first two cases dealt with the lack of resources available to supervise conditional sentences due to inaction on the part of provincial governments. The Courts in those cases held that it would be an error in principle to deny an offender the benefit of this option due to the failure of a provincial government to have available the necessary supervisory resources. In the *McGarroch* case, which was also one dealing with the long-term offender provisions of the Code, Wilson J. made the point that "the Court must assume that reasonable resources will be in place when making the determination of whether the offender can be controlled in the community" (at para. 166).

[74] Defence counsel also submitted that the prospect of control in the community is realistic and, in support, he pointed to what he regards as evidence of decreasing severity in the offender's conduct. In particular he notes that the predicate offence was not particularly serious.

Effect of 2008 Amendments:

[75] One of the issues argued by counsel was the effect of the 2008 amendments to Part XXIV of the *Criminal Code* and, in particular, whether the Supreme Court's 2003 ruling in *R.* v. *Johnson (supra)*, survives those amendments.

[76] In *Johnson*, the Supreme Court of Canada held that a sentencing judge retains the discretion not to declare an offender dangerous even though the offender meets the statutory criteria. The Court relied on two factors: (1) the fact that at that time s.753(1) contained permissive language; and (2) the argument that the underlying objectives of the sentencing regime in the Criminal Code mandate the existence of a discretion to impose a just and fit sentence in the circumstances of

each case, including dangerous offender proceedings. Having regard to the principles of proportionality and restraint, the Court held that an indeterminate sentence should only be imposed where lesser sanctions would be insufficient to adequately protect the public from the risk of harm posed by the offender. The Court wrote (at para. 29):

> The principles of sentencing thus dictate that a judge ought to impose an indeterminate sentence only in those instances in which there does not exist less restrictive means by which to protect the public adequately from the threat of harm, i.e., where a definite sentence or a long-term offender designation are insufficient. The essential question to be determined, then, is whether the sentencing sanctions available pursuant to the long-term offender provisions are sufficient to reduce this threat to an acceptable level, despite the fact that the statutory criteria in s. 753(1) have been met.

[77] The Supreme Court mandated, as a result, that a sentencing judge must take into account the long-term offender provisions prior to declaring an offender dangerous and imposing an indeterminate sentence.

[78] The "permissive language" contained in the pre-amendment s.753(1) was as follows: "The court may ... find the offender to be dangerous ...". The 2008 amendment to s. 753(1) changed the wording: "... the court shall find the offender to be a dangerous offender ...". The pre-amendment s. 753 also contained a ss. (4) which provided : "If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in a penitentiary for an indeterminate period." Now, s. 753 has been amended to include a new ss. (4) and a new ss. (4.1):

> (4) If the court finds an offender to be a dangerous offender, it shall
>
> (a) impose a sentence of detention in a penitentiary for an indeterminate period;
> (b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
> (c) impose a sentence for the offence for which the offender has been convicted.

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

[79] The Crown submitted in this case that these amendments have changed the process so that it is no longer necessary to consider the long-term offender provisions before declaring an offender dangerous. Defence counsel, however, argued that the *Johnson* two-step process, consideration of long-term offender prospects before considering a dangerous offender designation, still applied.

[80] In my view, what the 2008 amendments have done is to shift the discretion. Prior to 2008, as noted in *Johnson*, s. 753(1) provided only one option on a designation of dangerous offender status, that being the imposition of an indeterminate sentence. The discretion that the Supreme Court upheld was that of not declaring an offender dangerous even if the statutory criteria were met. Now, there is no discretion not to declare an offender dangerous if the criteria are met but there is a discretion as to the sentence to be imposed. The limitation on that discretion is found in the new ss. (4.1) which mandates an indeterminate sentence unless the court is satisfied that there is a "reasonable expectation" that a lesser measure will adequately protect the public. Parliament has recognized a discretion, but just not in the same way that the Supreme Court did in *Johnson*. It is a discretion as to sentence, but with the limitation set out in ss.(4.1).

[81] With these amendments, there is no longer a requirement to consider the long-term offender provisions as an initial step. But, in effect, the same practical approach, as in *Johnson*, still has to be followed because of the sentencing options set out in the new ss. (4). Sub-clause (4)(b), for example, replicates the sentencing provision for a long-term offender found in s. 753.1(3).

[82] Defence counsel described the new ss. (4.1) as imposing a burden of proof on the defence. I would not describe it as such although I recognize that in practice it may indeed impose an evidentiary burden on the defence. The reason I do not think there is a reversal of the burden of proof is because of the case law that interpreted the long-term offender provisions.

[83] Subsection 753.1(1)(c) states that the court may find an offender to be a long-term offender if it is "satisfied" that "there is a reasonable possibility of eventual control of the risk in the community". Subsection 753(4.1) states that the court shall impose an indeterminate sentence upon declaring an offender dangerous unless it is "satisfied" that "there is a reasonable expectation that a lesser measure ... will adequately protect the public ...". Leaving aside the distinction between "possibility" and "expectation", the "proof" requirement is the same in both: the court must be "satisfied".

[84] Earlier I made reference to the burden on the Crown, that being to prove the elements necessary for designation of dangerous offender status beyond a reasonable doubt. But many cases have rejected that burden when it comes to assessment of future risk and the possibility of control in the community. In *R.* v. *Wormell* (2005), 198 C.C.C. (3d) 252 (B.C.C.A.), leave to appeal refused [2005] S.C.C.A. No. 371, the British Columbia Court of Appeal held, in the context of ss. 753.1(1)(c), that there was no onus on the Crown to prove beyond a reasonable doubt that there is no reasonable possibility of eventual control of risk in the community. Southin J.A. wrote (at paras. 32-34):

> The task of the Court from beginning to end is to ask itself, "Am I satisfied that there is a reasonable possibility of eventual control of the risk in the community?" If the judge concludes that he or she is not so satisfied then the judge cannot designate the offender a long-term offender.
>
> In my opinion, it is not right to approach this with burden of proof at the back of one's mind. Burden of proof, whether it is proof beyond a reasonable doubt or on a balance of probabilities, directs itself to determining past events.
>
> While on a dangerous offender application the Crown must prove beyond a reasonable doubt past conduct of the accused which it says is relevant, there can be no burden of proof in the classic sense in the assessment of the future.

See also *R.* v. *F.E.D.*, [2007] O.J. No. 1278 (C.A.), at paras. 45-50; and *R.* v. *Moosomin*, (2008), 239 C.C.C. (3d) 362 (Sask.C.A.), at paras. 34-41.

[85] I think the same considerations come into play when applying ss. 753(4.1). The sentencing judge must be satisfied that either a determinate sentence or a

sentence with a long-term supervision order will adequately protect the public. To be so satisfied, the judge must take into consideration all of the evidence no matter who adduces it. If the judge is not satisfied, then he or she must impose an indeterminate sentence.

Analysis:

[86] The Crown relies on sub-sections 753(1)(a)(i) and (ii) as well as s. 753(1)(b) to establish that Mr. Kudlak is a dangerous offender. Both subsections (a)(i) and (ii) require the Crown to establish that the offender "constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing" a pattern of behaviour of which the predicate offence forms a part. Section 753(1)(b) similarly requires proof of a likelihood of causing injury or pain to others because of a failure to control his sexual impulses as shown by his conduct in any sexual matter including the predicate offence.

[87] With respect to the predicate offence, there is no doubt that it is part of a pattern of repetitive behaviour that has involved violent and persistently aggressive conduct. The offender's criminal record reveals numerous instances of similar conduct. It is also demonstrative of this offender's inability to control his sexual impulses.

[88] I want to address defence counsel's argument regarding the relatively less serious nature of the sexual assault constituting the predicate offence. This was part of counsel's broader submission that the pattern of Mr. Kudlak's offending is decreasing in severity. These points are similar to ones discussed in the Supreme Court of Canada judgment in *R.* v. *Currie*, [1997] 2 S.C.R. 260.

[89] In *Currie*, the predicate offences were three counts of sexual assault, each consisting of the offender sexually touching young girls in a department store. He had a lengthy history of violent sexual offences. He was found to be a dangerous offender and sentenced to an indeterminate sentence.

[90] One of the issues on appeal in *Currie* was whether the sentencing judge must focus on the seriousness of the predicate offences. The Supreme Court acknowledged that the predicate offences were of a less serious nature than the offender's earlier offences, however, this did not affect the finding that the offender

was a dangerous offender. Parliament, in s. 752, has specifically designated sexual assault as a "serious personal injury offence" and therefore the relative seriousness of the offence does not affect its role as the triggering mechanism for the dangerous offender application. On the specific point raised by defence counsel in this case, the following words from the judgment in *Currie* are particularly apt (at para. 23):

> ... I would find it contradictory, as well as callous, to categorize the impugned predicate assaults as "nuisance-type offences". These sexual assaults, while not as violent or grave as some of the respondent's earlier offences, were nevertheless within the category of violent and grave. The predicate offences involved repeated sexual touching of young girls in public and at least two of the victims of the assaults have experienced serious psychological trauma and other side effects. If these sexual assaults were not serious, sexual assault would not be enumerated as a s. 752 offence. Nor would Parliament have ever seen fit to eliminate the distinction between rape and indecent assault - - indeed it would have ensured that such a distinction endured.

[91] The judgment in *Currie* also speaks to defence counsel's broader point that the predicate offence is a part of a pattern of decreasing severity in the nature of the offender's conduct. The Court in *Currie* noted (at para. 39) that the predicate offences could be interpreted in any number of ways. They might suggest that the offender's condition was improving. Or, because the offences occurred in broad daylight in a public place, they might indicate that the respondent's condition had become more blatant and reflected a lessening of self-control.

[92] Similarly, in Mr. Kudlak's case, while the predicate offence is relatively less serious, it was committed in a crowded public place (as was his sexual assault offence in 2008). Dr. Woodside, when asked on cross-examination whether there seems be a drop-off in the severity of Kudlak's behaviour, noted that one could not draw the conclusion that his activity reflects the extent to which he would have gone if he had not been caught, or driven off by his victims who, in many cases, were asleep when he assaulted them. It also ignores the fact that his 2007 conviction involved an act of intercourse on an unconscious woman. In my opinion, if anything, the most recent offences show that this offender is becoming more blatant and reckless in his conduct, exhibiting a greater lack of self-control.

[93] Based on all of the evidence, I am satisfied beyond a reasonable doubt that the Crown has established the statutory criteria for finding Mr. Kudlak to be a dangerous offender.

[94] I find that the offender's criminal history, in particular his record of sexual offending, establishes a pattern of repetitive behaviour showing a failure on his part to restrain his behaviour. It also establishes a pattern of persistent aggressive behaviour showing a substantial degree of indifference on the part of the offender respecting the consequences of his behaviour on others. His lack of empathy and awareness of the impact of his actions, as described by Dr. Woodside, support my conclusion as to the substantial degree of the offender's indifference. I also find that the evidence has clearly shown a failure on the part of the offender to control his sexual impulses.

[95] The undisputed evidence as to the offender's anti-social personality, his sexual deviance and his alcohol dependence problem, convinces me that there is a high risk of reoffending and a likelihood of causing injury to others or of inflicting psychological damage through his inability to control his behaviour and his sexual impulses.

[96] Therefore, the statutory criteria under sub- sections 753(1)(a)(i) and (ii), as well as s.753(1)(b), have been met.

[97] The real issue in this case is whether some measure other than an indeterminate sentence will adequately protect the public.

[98] In this case, defence counsel relied on the suggestions made by Dr. Woodside to argue that there are measures that can adequately protect the public. But, it is important to recall that all of Dr. Woodside's recommendations — placement in a home targeted specifically to developmentally delayed sex offenders, treatment with sex-drive reducing and anti-alcohol medication — are premised on 24 hour supervision and no unaccompanied access to the community. And, all of his recommended measures would have to be in place in perpetuity. Dr. Woodside also pointed out in his report that, if this type of structure was not in place, he did not believe that the risk posed by Mr. Kudlak is manageable in the community.

[99] Two points arise from the evidence. First, the protective measures recommended by Dr. Woodside resemble for all intents and purposes a sentence in jail, albeit with treatment. Many cases have noted that where the form of supervision proposed comes close to replicating the form of monitoring and supervision that are provided in custodial settings, then the objective of protecting the public tilts the balance in favour of incarceration: see *R.* v. *G.L.*, [2007] O.J. No. 2935 (C.A.), at paras. 61-62, leave to appeal denied [2008] S.C.C.A. No. 39.

[100] Secondly, the resources required for round-the-clock supervision in the type of setting recommended by Dr. Woodside are not available, according to Mr. Chapman. In this regard, again considering the overriding purpose of the dangerous offender provisions as the protection of the public, these types of resource limitations must be taken into account. To do otherwise could endanger public safety: see *G.L. (supra)*, at para. 70; also *R.* v. *D.V.B.*, [2010] O.J. No 1577 (C.A.), at paras. 59-60; *R.* v. *Trevor*, [2010] B.C.J. No. 1293 (C.A.), at para. 35.

[101] I do not consider this case to be in the same category as those relied on by the defence to argue that resource limitations should not hinder a long-term supervision order if otherwise appropriate. In *McGarroch*, Wilson J. ordered the offender's release into an already existing facility for a period of limited duration and subject to a treatment program that the expert witnesses agreed would, in all probability, reduce the risk posed by the offender. The other cases, *Makar* and *Roberts*, dealt with supervisory resources for conditional sentences. In such cases I agree that resource limitations should not preclude the imposition of a sentence. But the difference is that the Criminal Code contains a specific legislative regime for conditional sentences. Any offender in any part of Canada who meets the criteria should be entitled to it. But, here, we are not addressing a general scheme but a highly specific individualized set of recommendations. The state cannot be expected to allocate scarce resources to any and all treatment programs, particularly ones that are highly specific to single individuals.

[102] The other principle that emerges from this discussion is, as articulated in much of the case law, that "there must be evidence of treatability that is more than an expression of hope and that indicates that the specific offender can be treated within a definite period of time": *R.* v. *McCallum*, [2005] O.J. No. 1178 (C.A.), at para. 47, leave to appeal denied [2006] S.C.C.A. No. 145. Arguably this principle has been reinforced by the use of the expression "reasonable expectation" in s.

753(4.1), as opposed to the term "reasonable possibility" used in s. 753.1(1)(c). A "reasonable expectation" may require a higher level of certainty. And, in this regard, as noted in *Johnson* and *G.L.*, the offender's amenability to treatment and the prospects for success are critical factors to address.

[103] With respect to treatability, Dr. Woodside noted that Mr. Kudlak's past record is not a cause for optimism. He has committed offences on release. He violated the conditions in probation orders repeatedly. He did not participate in treatment programs well and he did not pursue treatment on his own. Hence, Dr. Woodside recommended the strict external controls he did. The offender lacks, in his opinion, any internal motivation for treatment. This, coupled with his cognitive difficulties, means that the offender lacks even the awareness of the need for treatment.

[104] It is apparent to me that Dr. Woodside's recommendations were not aimed at "treatment", but at "management". Some of this offender's problems, such as his sexual deviance and anti-social personality disorder, are not treatable. They are fixed psychological and personality traits. And, even if some of these traits could be controlled by pharmacological intervention, the results are not universally successful and there are ways of defeating the effects (not to mention the problem of the offender having to consent to such treatment and his ability to withdraw consent at any time).

[105] In this case, even if I think that Dr. Woodside's recommended treatment plan might be able to control the risk posed by this offender, the very fact that the suggested security and treatment measures must be in place in perpetuity takes this situation out of consideration for anything less than an indeterminate sentence. A long-term supervision order cannot last indefinitely. And nothing can provide the 24-hour supervision that a penitentiary provides.

[106] I have not ignored Mr. Kudlak's status as an aboriginal offender. As stated in *Johnson*, since a dangerous offender proceeding is still a sentencing proceeding, the fundamental principles of sentencing contained in ss. 718 to 718.2 of the Code are still applicable. One of those is s. 718.2(e) which requires the court to consider "all available sanctions other than imprisonment that are reasonable in the circumstances ... with particular attention to the circumstances of aboriginal offenders". Sentencing judges must take into account the unique circumstances of

the aboriginal offender and, further, the systemic and background factors affecting aboriginal people: *R.* v. *Gladue*, [1999] 1 S.C.R. 688.

[107] I have taken into consideration Mr. Kudlak's difficult childhood. He had a chaotic family life marked by alcohol abuse and violence. Sadly many of our northern aboriginal communities are afflicted by similar problems. I have no doubt that part of the reason for the difficulties that confronted the Kudlak family thirty some years ago was the dislocation of the family from a more traditional, land-based way of life to the settled community of Cambridge Bay where they became dependent on welfare. I am also sure that some of Mr. Kudlak's early problems were due to a lack of resources available in Cambridge Bay for diagnosing and effectively treating childhood problems. These types of disrupted childhoods are all too common as well in many of our communities.

[108] Mr. Kudlak's psychological problems and sexual deviance cannot, however, be traced to his aboriginal heritage. These are traits that developed at an early age. His victims have, for the most part, been aboriginal as well, including members of his family, and they have been affected by his uncontrolled behaviour. The need for protecting the public is just as acute in a northern aboriginal community as anywhere else. In a case such as this, where public protection is paramount, incarceration is the only alternative, whether one is considering an aboriginal or non-aboriginal offender.

Conclusion:

[109] Based on all of the evidence, in particular this offender's criminal history and the expert psychiatric evidence, I am satisfied that there is no reasonable expectation that a lesser measure will adequately protect the public. Therefore, having found Mr. Kudlak a dangerous offender, I sentence him to an indeterminate sentence of imprisonment.

[110] Under the circumstances, a judicial stay will be entered on the breach of probation charge dating from June 16, 2009. There will be no victim of crime fine surcharge.

J.Z. Vertes

J.S.C.

Dated this 27th day of May, 2011.

Counsel for the Crown: Janice K. Walsh
Counsel for the Defence: Thomas H. Boyd

Docket: S-1-CR-2010000058

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

BOBBY KUDLAK

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