

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

-and-

NOEL AVADLUK

Respondent

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Ruling on Dangerous Offender Application

Heard at Yellowknife: February 28-March 1, April 20-21, and July 18, 2017.

Oral Reasons delivered: August 2, 2017

Written Reasons filed: August 4, 2017

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REASONS FOR JUDGMENT OF THE  
HONOURABLE JUSTICE K.M. SHANER

Counsel for the Applicant: Wendy Miller

Counsel for the Respondent: Tracy Bock

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**INTRODUCTION**

[1] This is a Crown application for a finding that Noel Avadluk is a dangerous offender pursuant to Part XXIV of the *Criminal Code*, RSC 1985, Chap C-46 and to have an indeterminate sentence imposed on him.

**PROCEDURAL HISTORY**

[2] Noel Avadluk was convicted of sexual assault on August 29, 2014 following a jury trial.

[3] Crown counsel advised the Court of her intention to bring this application immediately after the conviction was entered and she filed a Notice of Application in Court on September 8, 2014 seeking a remand order to have Mr. Avadluk assessed. The assessment order was granted December 3, 2014.

[4] The assessment was conducted by Dr. Scott Woodside, a forensic psychiatrist. It was completed April 2, 2015. Mr. Avadluk had his own assessment carried out by forensic psychologist Dr. Marc Nesca. His report was completed August 18, 2016 and subsequently filed with the Court by Mr. Avadluk's lawyer.

[5] The Crown subsequently filed a Notice of Application seeking to have Mr. Avadluk designated a dangerous offender. The hearing was held February 28 to March 2 and April 20 and 21, 2017. Crown and defence counsel provided written submissions to the Court and made oral argument on July 18, 2017. My decision and oral reasons were provided on August 2, 2017, with written reasons to follow.

### **THE PREDICATE OFFENCE**

[6] On the evening of April 14, 2012, Mr. Avadluk and another man went to the victim's home. When it was time for them to leave, the victim escorted them to her door. The other man left. Mr. Avadluk remained and propositioned the victim to have sex. She said no. Mr. Avadluk then proceeded to drag her into the bathroom where he threw her to the floor and forced her to have sexual intercourse. She resisted and he put his hand over her nose and mouth. He then took her into her bedroom, put her on the bed and sexually assaulted her a second time. He once again covered her nose and mouth with his hand. She passed out. Mr. Avadluk then fell asleep in another room. When the victim awoke, she chased him out of her apartment and sought assistance from the police.

[7] The attack was sudden, brutal and sustained. It has had a profound effect on the victim, who said in her Victim Impact Statement:

Today I'm too depressed to do anything. This has caused me to drink more – fight more with [my] boyfriend – very close friends. I have lost 26 pounds. Loss of appetite. I anger very easily. Sleep [hasn't] been too easy either. I wake up from nightmares 2 or 3 times a night and in cold sweats. This man is so very dangerous, that I don't ever want to see him near me again.

*Exhibit S-12*

### **EVIDENCE AT THE SENTENCING HEARING**

[8] Crown counsel called evidence from Dr. Woodside, Cynthia Sparvier and James Gonzo, both of the Correctional Service of Canada ("CSC"), and David Pin of Northwest Territories Corrections, a case manager who has worked with Mr. Avadluk while he has been on remand. Dr. Nesca gave testimony for the defence regarding his assessment of Mr. Avadluk.

- [9] Several exhibits were tendered. These include:
- a. the assessment reports from Dr. Woodside and Dr. Nesca as well as certain scoring sheets and working notes;
  - b. a Pre-sentence Report (“PSR”) prepared by Probation Services;
  - c. a copy of Mr. Avadluk’s criminal record;
  - d. a summary prepared by the Crown of the circumstances of Mr. Avadluk’s past violent crimes, conduct and treatment taken during past periods of incarceration and probation, and the documents supporting the summaries;
  - e. an affidavit from James Gonzo respecting, *inter alia*, the CSC’s intake and assessment protocols, responsibilities of institutional and community parole officers, the parole decision-making process and referral guidelines for treatment programs; and
  - f. information respecting the CSC’s Integrated Correctional Program Model (ICPM) treatment program.

[10] In support of its earlier application for an assessment order, the Crown filed three volumes of documents, including transcripts from past convictions and sentencing hearings and information about Mr. Avadluk’s participation in treatment offered during past periods of incarceration.

[11] Defence counsel took no issue with any of the exhibits submitted by the Crown.

### ***Mr. Avadluk’s Background and Circumstances***

[12] Evidence about Mr. Avadluk’s background is found primarily in the PSR. I have also relied on the assessment reports and defence counsel’s submissions.

[13] Mr. Avadluk is currently forty-four years old. He is Inuit. He grew up in a large family, being the youngest of ten siblings. He spent his early childhood in Umingmaktok, a very small community in what is now Nunavut. The family lived a traditional lifestyle, spending significant time on the land. Mr. Avadluk’s father taught him how to hunt, trap and carve. He can speak Inuktitut fluently and he can write in it syllabics.

[14] Unfortunately, Mr. Avadluk’s childhood was marked by poverty, neglect and physical and sexual abuse. He comes from a family of residential school

survivors and he, too, attended residential school in Yellowknife for a year. He was expelled. His mother left the family when he was five years old. He lived with both his father and mother at different times growing up. He described his mother as a violent alcoholic who beat him and his siblings with brooms and hockey sticks, woke them in the night in fits of anger and locked him outside in the cold for hours at a time.

[15] Mr. Avadluk began consuming alcohol and sniffing gasoline when he was around ten years old. He was apprehended from his father's care when he was twelve by child protection authorities and placed in a group home for six months. There, he was sexually assaulted by a care-giver.

[16] Mr. Avadluk was involved in the justice system from a young age and he spent time in custody as a youth. He reports he was sexually assaulted by a guard at a youth facility.

[17] Mr. Avadluk attended grades seven, eight and nine in Fort Smith, Northwest Territories. He lived with a family friend. He then returned to Umingmaktok at fifteen, but he found it difficult to re-integrate back into the community. He did not complete high school. He has attained journeyman certification in small engine repair. Throughout his adult life, he has supported himself in this line of work, as well as construction, commercial fishing and carving.

[18] Mr. Avadluk acknowledges that he has struggled with alcohol addiction throughout his life. This was noted by Dr. Woodside, Dr. Nesca and the author of the PSR. Alcohol figures prominently in his criminal history.

[19] Mr. Avadluk says he has a Fetal Alcohol Spectrum Disorder ("FASD"). Dr. Woodside indicates in his report that while it cannot be diagnosed definitively, there are a number of features present, including Mr. Avadluk's mother's known alcohol abuse, which suggest this is so.

[20] Mr. Avadluk has two adult children who live in Nunavut. He told the author of the PSR that he has a good relationship with both of them. He also had a very close relationship with his father. His father died in 2005. This was very traumatic for Mr. Avadluk.

[21] Mr. Avadluk did not testify during the sentencing hearing, but when asked if he would like to make any submissions on his own behalf, he made a statement in which he expressed a desire to change his life and his path. He acknowledged the need to address his alcohol addiction and to deal with the effects of his own victimization by sexual abuse and the trauma created by his upbringing. He also

said he was sorry, which I interpreted as a general apology for his past conduct but not specifically as any sort of admission respecting the predicate offence.

### ***Mr. Avadluk's Criminal History***

[22] Mr. Avadluk has a lengthy criminal record containing forty-three convictions dating back to 1985 when he was a youth. Eighteen of them are property crimes, including break and enter, being unlawfully in a dwelling house, mischief and taking a motor vehicle without consent. Fourteen are for non-compliance with court ordered probation and recognizance conditions and failing to attend court. He also failed to comply with an order to register as a sex offender. The remaining convictions are for violent crimes, including assault, assault with a weapon, assault causing bodily harm, uttering threats and two counts of sexual assault, including the predicate offence. The details of these are set out below.

- a. ***November 21, 1994 – Assault causing bodily harm and assault with a weapon:*** The victim, J.A. was in a relationship with Mr. Avadluk. They were drinking alcohol and they got into an argument. Mr. Avadluk threw a beer bottle at the victim's face and ran away. The victim chased him and punched him in the face. He punched her in the face and when she fell to the ground, he kicked her in her face. She tried to protect herself with her arm and he kicked her there several times. He was sentenced to five months in custody, during which he reportedly displayed insight into his substance abuse problems and participated in anger management programming. His sentence expired March 1, 1995.
- b. ***January 19, 1996 – Assault:*** Mr. Avadluk was in a romantic relationship with the victim, D.K. He entered her home as she slept. She awoke to Mr. Avadluk choking her. She escaped but only got to the bedroom door when Mr. Avadluk grabbed her by the wrist and twisted it and then grabbed her hair and threw her to the floor. He was sentenced to thirty days and he was released in early February of 1996.
- c. ***July 22, 1996 – Assault:*** Mr. Avadluk and the victim, L.B., were in a common law relationship. The victim requested he move out. He slapped the victim across the face. He then pushed her to the floor, got on top of her and slapped her three more times. Mr. Avadluk was sentenced to four months in custody and twelve months of probation. He was released on October 11, 1996.

- d. ***December 30, 1996 – Assault:*** This was another assault on L.B. By this time, they had a seven week old baby. They were arguing. He then slapped her in the face, pulled her hair and knocked her to the floor. He continued to assault her intermittently for a number of hours and he threatened to kill her if she called the police or took away the baby. Mr. Avadluk left after the victim gave him \$300.00 for rent.

This assault occurred while Mr. Avadluk was on probation for the assault conviction the previous July. He received a custodial sentence of six months, followed by probation for six months. While in custody he participated in the Drug Awareness Program and other programming.

- e. ***January 28, 1999 – Assault:*** The victim was another common law partner, L.D. Mr. Avadluk accused her of cheating. He grabbed her by her shoulders and pushed her to the bed, telling her he would rather kill her and himself than let her go. He ripped the telephone cord out of the wall when she tried to call the police. He continued to pin her down for long periods of time before finally leaving the residence.

Mr. Avadluk was sentenced to eight months in custody, during which he was seen by a psychiatrist. He participated in the Life Skills and Anger Management Program and he expressed a desire to make changes in his life. Mr. Avadluk was released on July 8, 1999.

- f. ***June 19, 2000 – Assault Causing Bodily Harm:*** The victim was again L.D. who was by this time married to Mr. Avadluk. The assault occurred on October 12, 1999, after the couple had gone to bed. They were discussing their marriage when Mr. Avadluk became angry and agitated. He choked the victim with his forearm until she was having problems breathing. He then held her down and beat her on her head and face with his fist. He kicked her. She attempted to call the police but he prevented her from doing so. When L.D.'s then nine-year old daughter tried to call the police, Mr. Avadluk pulled the phone from the wall.

He was sentenced to one year in custody and released February 20, 2001. While serving his sentence he participated in the Anger Management, Health Relationships/Grief and Cognitive Skills programs.

- g. **May 5, 2009<sup>1</sup> – Sexual Assault:** This crime occurred in June, 2007. The victim and Mr. Avadluk were strangers. The victim was making her way through a stairwell to a radio studio on the third floor of an apartment high rise in Hay River. Mr. Avadluk followed her. He asked her what floor she was going to and she told him. He said he was going to another floor in the building. He passed her. As she was unlocking the door of the radio studio Mr. Avadluk approached her from behind and he eventually forced his way into the studio.

The victim screamed for help, but Mr. Avadluk put his hand over her mouth and pushed her to the floor. She had been struggling. She stopped because she was having problems breathing. Mr. Avadluk asked for money and she gave him what she had. He then sexually assaulted her by digitally penetrating her vagina several times. The attack lasted almost three hours. Mr. Avadluk finally stopped and he asked the victim for forgiveness. He then left.

Mr. Avadluk was sentenced to a year in custody, in addition to the eighteen months he had spent awaiting trial. The custodial portion of the sentence was followed by two years probation. He was also ordered to comply with the *Sex Offender Information Registration Act*, SC 2004, c 10 and provide a DNA sample under s. 487.051 of the *Criminal Code*. The sentencing Judge also imposed a firearms prohibition for 10 years.

While in custody Mr. Avadluk participated in the National Substance Abuse Program, but nothing else. He was released from custody December 31, 2009 and began serving the probation order, which was to expire January 2, 2012.<sup>2</sup>

- h. **August 29, 2014 – Conviction for the Predicate Offence of Sexual Assault:** This crime occurred on April 14, 2012 and the circumstances have been described. Mr. Avadluk has been held in custody since his arrest and he has participated in the Reintegration Program (2014) and Alcoholics Anonymous meetings. He attends meetings with a psychologist three times a month, he meets with a padre and he meets with a traditional counsellor once a week.

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<sup>1</sup> Between February 26, 2002 and November 2, 2007, Mr. Avadluk sustained sixteen additional convictions, including break and enter and uttering threats, and he received custodial sentences totaling thirty-five months.

<sup>2</sup> Mr. Avadluk did not comply with this order and on August 8, 2012 he was sentenced to forty-five days in custody, in addition to five months for pre-trial custody.

## *Evidence from CSC Personnel*

### a. Cynthia Sparvier

[23] Ms. Sparvier is a parole officer in Yellowknife. She provided evidence about the intake and assessment process for those designated dangerous or long-term offenders, as well as information about supports available for offenders who are released to Yellowknife and Edmonton under supervision orders. She also testified that to ensure access to a high intensity treatment program, an offender would need to be serving a sentence of at least two and half to three years. This is required to accommodate assessments, program schedules, waiting lists and the program itself. She also indicated that where an offender has appealed it can delay entry into treatment programs. She has some knowledge of Mr. Avadluk's case and she indicated that upon release, he would require a great deal of structure, which would not likely be available in Yellowknife.

### b. James Gonzo

[24] Mr. Gonzo has been with the CSC in various capacities since 1998 and has significant experience with long-term and dangerous offenders. He testified about the intake and assessment process, including risk assessment and offender placement. He also described the ongoing risk assessment process for long-term and dangerous offenders and the role the Parole Board plays.

[25] Mr. Gonzo explained, *inter alia*, that dangerous offenders are assessed by the Parole Board for parole eligibility seven years from the date of arrest and every two years thereafter. In determining whether an offender should be released on conditions prior to warrant expiry, the Parole Board examines a number of factors, including program participation and the offender's institutional adjustment. It considers evidence from psychologists and psychiatrists about the ability to manage the offender in the community. Mr. Gonzo said one of the CSC's objectives is to see high risk offenders transition to medium, and then minimum, risk, with the ultimate goal of community management.

[26] The Crown also filed an affidavit from Mr. Gonzo (Exhibit S-7) in which he set out in detail information about the intake process, security classifications, custody levels and the process for dangerous offenders from intake to eventual release. The affidavit also contains detailed information about current programs, including a summary of the CSC's referral guidelines.

[27] Key in Mr. Gonzo's oral evidence was information he provided about the CSC's Integrated Correctional Program Model ("ICPM"). It is a new program that

has been successfully piloted in British Columbia and is being implemented nationally. It is comprehensive, intended to target all of an offender's criminogenic factors in one program, instead of in a piecemeal fashion. It is offered at various intensity levels, to suit the needs of an individual offender.

[28] A booklet describing the ICPM in detail was tendered into evidence and contains the following general description:

Moving away from the traditional "multi-program" model and into the next generation of correctional programming, the Integrated Correctional Program Model (ICPM) includes three distinct correctional program streams for men offenders: a multi-target program, an Aboriginal-specific multi-target program, and a sex offender program, all of which include a maintenance component.

While these three distinct program streams allow the Correctional Service of Canada (CSC) to continue to target the needs and risks presented by specific offender populations, the multi-target nature of the program streams also allows the Service to more holistically address the individual needs and risks of offenders. As most offenders enter CSC custody with needs in more than one domain, the integrated, multi-target nature of the ICPM programs enhance offenders' understanding of the interplay among other multiple personal risk factors, as well as their understanding of how the same skill sets can be used to effectively manage them.

*Exhibit S-8, p 5*

[29] The ICPM also contains a maintenance component, which can begin while the offender is still in the institution and continue or start, as the case may be, once the offender has been released into the community. The maintenance components are offered at both the moderate and high intensity levels.

### ***Evidence from Case Manager***

[30] David Pin gave evidence about Mr. Avadluk's time on remand since April of 2012. He has been Mr. Avadluk's case manager since 2014. He indicated Mr. Avadluk has been the subject of numerous negative behaviour complaints, internal charges and consequently disciplinary action while on remand, but there has been nothing since December of 2016. Mr. Pin felt this was a significant development.

[31] Mr. Pin testified that Mr. Avadluk has participated in a reintegration program and that he has spent time with a traditional counsellor, a psychologist and the padre. Program participation was verified by letters from NWT correctional officials which were tendered into evidence by defence counsel.

## ***Expert Psychological and Psychiatric Evidence***

### a. Dr. Woodside

[32] Dr. Woodside is a forensic psychiatrist with the Centre for Addiction and Mental Health (CAMH) in Toronto, Ontario. He is also the lead clinician for Acute Assessment Services and head of the Sexual Behaviours Clinic there. It is apparent from both his *curriculum vitae* and his testimony that he has extensive training and experience treating and assessing sexual offenders and conducting court ordered assessments for dangerous offender applications. Following a *voir dire*, he was qualified as an expert and allowed to give opinion evidence in the areas of diagnosis, treatment and risk assessment of sexual offenders.

[33] Dr. Woodside examined Mr. Avadluk in-person over a four-day period totalling approximately nine hours at CAMH. This consisted of personal interviews and testing using a variety of instruments, described below. The Crown provided Dr. Woodside with copies of the documents used in support of the assessment application which include detailed information about Mr. Avadluk's criminal and institutional history. Dr. Woodside also had information obtained from an interview conducted with Mr. Avadluk's mother by a CAMH staff member. There were attempts made to reach other family members, but these were unsuccessful.

[34] Dr. Woodside diagnosed Mr. Avadluk with antisocial personality disorder, severe alcohol use disorder and post-traumatic stress disorder. As noted earlier, he indicated it was possible Mr. Avadluk has FASD, based on Mr. Avadluk's own reports, his mother's alcohol abuse and the presence of other features. Dr. Woodside considered the possibility of paraphilic disorder, that is, a preference for non-consensual, coercive sex, but he opined it is more likely Mr. Avadluk's sexual offending is attributable to alcohol use and antisocial personality disorder.

[35] Mr. Avadluk's antisocial personality disorder was diagnosed using criteria from the *Diagnostic and Statistical Manual – 5<sup>th</sup> Edition* (the "DSM5"). Dr. Woodside explained that an individual must meet three or more of the following criteria:

- a. failure to conform to social norms with respect to lawful behaviours;
- b. deceitfulness as indicated by repeated lying, use of aliases or conning others for personal profit or pleasure;
- c. impulsivity or a failure to plan ahead;

- d. irritability and aggressiveness;
- e. reckless disregard for the safety of self or others;
- f. consistent irresponsibility as indicated by repeated failure to sustain consistent work behaviour or honour financial obligations;
- g. lack of remorse, as indicated by being indifferent to, or rationalizing, having hurt, mistreated, or stolen from another.

[36] Dr. Woodside's opinion is that Mr. Avadluk meets all of these criteria.

[37] In carrying out the risk assessment, Dr. Woodside employed the Sex Offender Risk Appraisal Guide ("SORAG"), its component, the Psychopathy Checklist – Revised ("PCL-R"), and the Static-99R, in addition to his clinical judgment.

[38] Dr. Woodside said the SORAG is a tool which measures the risk of violent reoffending, including both sexual and non-sexual violence. He stated Mr. Avadluk's score resulted in a probability of violent reoffence in the range of between 76 to 89% within ten years of opportunity, which places him in the high risk category.

[39] Mr. Avadluk's score on the PCL-R was twenty-nine out of a possible forty. Dr. Woodside indicated that a score of thirty or more is required for a diagnosis of psychopathy, but that there is research demonstrating significant risk of criminal behaviour begins with scores of twenty or above. He opined Mr. Avadluk's score indicates elevated risk to reoffend.

[40] Dr. Woodside described the Static-99R as a screening tool that identifies individuals at risk for future sexual offending. It does not measure risk for non-sexual violent offending. Mr. Avadluk's score indicated his risk of committing further sexual offences is 1.71 times greater than the average sex offender, placing him in the moderate to high risk category.

[41] Dr. Woodside concluded Mr. Avadluk is at high risk to continue to commit violent crimes and that he poses a moderate to high risk to commit further sexual crimes. He also indicated he felt it would be difficult to manage Mr. Avadluk outside of an institutional setting. This was based on numerous factors including his opinion that Mr. Avadluk has antisocial personality disorder with significant psychopathic personality traits and severe alcohol abuse disorder. He also considered the effect of aging on Mr. Avadluk's overall risk, his history of non-compliance with court orders, his personal circumstances, his upbringing, his

criminal and correctional histories and experiences with past treatment, including several alcohol treatment programs. His opinion is summarized in his report:

Overall, I would view Mr. Avadluk as being at very high risk for violent recidivism and moderate to high risk for purely sexually violent recidivism from a clinical perspective, as well as from an actuarial perspective. The nature of his previous offending also speaks to some degree to the anticipated severity of future potential re-offenses. His non-sexual violent offending has most frequently been directed toward his intimate partners although he has also acted out aggressively (both sexually and non-sexually) in other contexts (e.g. in jail and towards strangers).

*Exhibit S-2, p 52*

[42] Dr. Woodside was pessimistic about whether the risk that Mr. Avadluk would reoffend would decrease with age, something often referred to as “burnout”. In his report he stated:

In this case, as already noted, Mr. Avadluk’s criminal involvement began at a relatively young age, continuing into adulthood. As well, I noted that rather than demonstrating a gradual reduction or de-escalation with advancing age, it is arguable his violent offending behaviour has actually increased in terms of severity. In this regard, he would appear to [be] demonstrating the reverse of the expected trend. In my view, he has many years of increased risk ahead of him before one could anticipate any appreciable decrease in risk of offending on the basis of age alone.

*Exhibit S-2, p 51*

[43] Dr. Woodside was asked to opine further on the effect of age, generally and with respect to Mr. Avadluk. Under cross-examination he said the following:

I’ve indicated to the Court that I think Mr. Avadluk is kind of at that threshold of where we start to expect to see more significant drops in violent behaviour and in sexually violent behaviour as well. Of course, you really have to have an opportunity to exhibit that behaviour, and that usually means release into the community to really know what’s happening. Although if someone continues to accumulate offences in jail, you certainly take that into consideration.

The actual reasons for people slowing down are thought to be –well, they’re thought to include things like diminished physical prowess. So as men age, they’re no longer as strong, as able as they might have been in the past to subdue or to engage physically in violence with others.

In my experience, men often shift from more overtly violent behaviour to more subtle forms of aggression. So they may – they’re not beating people up as much, but now they’re threatening people, or they’re not sexually assaulting strangers,

but they're sexually assaulting acquaintances in what might be colloquially know as kind of like a date rape situation. So not using as much overt force.

*Transcript of Dr. Woodside's Evidence, p 173, ll 3-27*

[44] With respect to how Mr. Avadluk would respond to treatment, Dr. Woodside said there is little evidence that individuals with antisocial personality disorder benefit from treatment in terms of reduced recidivism. He also pointed to research which suggests individuals high in psychopathic traits (a category in which he places Mr. Avadluk) show a poorer response to treatment and supervision.

[45] Dr. Woodside was asked about drug therapy to control Mr. Avadluk's alcohol abuse and reduce his sex drive.

[46] With respect to using drug therapy to reduce sex drive, Dr. Woodside said it would be "grossly unsuitable" in this case. He stated that close supervision is required to ensure offenders comply with the medication regime. He said there many ways to foil the intended effects of these drugs, including the use of topical testosterone cream and obtaining testosterone injections from other medical professionals who may not be aware the offender is taking anti-androgen medication. Nevertheless, treatment with this type of medication is among the recommendations in Dr. Woodside's report for supports that should be in place if Mr. Avadluk is to be released into the community.

[47] With respect to medication for alcohol abuse, Dr. Woodside indicated it would be helpful for Mr. Avadluk, provided he was willing to take it. He recommended it, along with other programming to help Mr. Avadluk control his alcohol abuse.

[48] Dr. Woodside noted Mr. Avadluk has not received sex offender treatment, but that he had received extensive treatment for alcohol use and for aggression and anger management. He concluded the treatment Mr. Avadluk has received was not effective. He opined that augmenting sex offender and alcohol treatment with medication could reduce the likelihood of some types of violent recidivism by Mr. Avadluk.

[49] In addition to concluding Mr. Avadluk is at high risk to reoffend violently, Dr. Woodside indicated he did not think Mr. Avadluk could be managed successfully in the community. Among other things, he considered Mr. Avadluk's significant history of non-compliance and he considered this "quite negative". He went on to write:

In summary, I believe there is reason for pessimism, from a psychiatric perspective, regarding this individual's future manageability within the community, even if strict conditions were put in place and Mr. Avadluk were to agree to follow through with conditions and treatment recommendations.

*Exhibit S-2, p 55*

[50] Finally, Dr. Woodside offered his opinion, both in his report and in testimony, on what structures and conditions would need to be in place to manage Mr. Avadluk in the community if he was given a determinate sentence and then released on a long-term supervision order. They can be summarized as follows:

- a. intense, daily supervision upon release;
- b. participation in and completion of programming while incarcerated in anger management, domestic violence, substance abuse and programs to deal with antisocial attitudes;
- c. participation in intensive sex offender programming in perpetuity;
- d. treatment with anti-androgen medication, starting prior to release into the community;
- e. treatment with anti-alcohol medication, to be supervised daily, and participation in alcohol and substance abuse programming following release; and
- f. a requirement that he abstain permanently from alcohol and street drug use and that he be required to submit to testing to confirm abstinence.

b. Dr. Nesca

[51] Dr. Nesca is a psychologist in private practice in the area of forensic assessment. He holds a Ph.D. in clinical psychology from the University of Manitoba. Like Dr. Woodside, Dr. Nesca has extensive experience conducting forensic psychological assessments and risk assessments. He was qualified as an expert and allowed to give opinion evidence in the areas of diagnosis, treatment and risk assessment of sexual offenders.

[52] Dr. Nesca met with Mr. Avadluk at Bowden Institution in Alberta. He was provided with the same documents as Dr. Woodside. Dr. Nesca used different tools to assess Mr. Avadluk and he did not make the same diagnoses as Dr. Woodside did, although there were some common elements. Most notably, both

experts determined Mr. Avadluk is at high risk to reoffend<sup>3</sup>, that he suffers from trauma and that he has a severe alcohol problem which contributes to his criminal behaviour.

[53] The tools Dr. Nesca used in his assessment were the Psychopathic Personality Inventory – Revised (“PPI-R”), the Barratt Impulsivity Scale-11 (“BIS-11”) and the Personality Assessment Inventory (“PAI”). He also conducted neuropsychological testing on Mr. Avadluk.

[54] The PPI-R measures psychopathy. Using this, Dr. Nesca determined Mr. Avadluk had a global psychopathic rating that is average among a normative sample of offenders. He concluded Mr. Avadluk does not have antisocial personality disorder but he found Mr. Avadluk’s results revealed a number of personality traits which he deemed “problematic”, including attitudes conducive to reckless disregard of societal values; fearlessness that is likely to manifest as a willingness to engage in risky activities; and a tendency to reject personal responsibility. Later in his report Dr. Nesca identified antisocial tendencies as one of Mr. Avadluk’s criminogenic factors, stating:

Although not a specific risk factor for sexual offending, Mr. Avadluk’s antisocial tendencies promote rule violations, including criminal behaviour. I also cannot rule out the possibility that his paranoid tendencies contribute to the cognitive distortion mentioned earlier (eg. that the victim wanted sex) since projection (the tendencies to attribute one’s own impulses and wants to others) is a cardinal feature of paranoia.

*Exhibit 14, pp 15-16*

[55] The BIS-11 measures impulse control. Dr. Nesca interpreted Mr. Avadluk’s score as indicative of significant impulse control problems.

[56] The PAI, which is a diagnostic tool that measures mental health and general personality functioning, showed Mr. Avadluk suffers from, *inter alia*, paranoia and trauma-related anxiety and alcohol dependency. The PAI also revealed a heightened risk for violent behaviour, exacerbated by alcohol abuse problems, a sense of persecution and a limited capacity for empathy.

[57] From the neuropsychological testing he conducted, Dr. Nesca concluded Mr. Avadluk has an IQ of 81. He also determined Mr. Avadluk has difficulty sustaining attention and that his memory is “not great”.

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<sup>3</sup> Dr. Nesca did not assess risk for non-sexual violent behaviour.

[58] Dr. Nesca disagreed with some of the scores Dr. Woodside assigned to Mr. Avadluk on the PCL-R as well as its overall usefulness. He also felt that aging would figure more prominently in reducing Mr. Avadluk's overall risk of violently reoffending.

[59] In reviewing Mr. Avadluk's conduct difficulties while in custody, Dr. Nesca noted Mr. Avadluk had a relatively positive history prior to the 2000s. At that point, however, his conduct deteriorated. Dr. Nesca noted a correlation between reports of what he termed "paranoid" behaviour and Mr. Avadluk's misconduct. He concluded Mr. Avadluk was suffering from some form of mental illness during this period, possibly brought on by his father's death.

[60] Unlike Dr. Woodside, Dr. Nesca concluded Mr. Avadluk would be responsive to treatment and could eventually be managed in the community within the parameters of a determinate sentence and a supervision order. This is premised on a number of conditions and structures being in place, including a custodial sentence long enough to coincide with Mr. Avadluk reaching fifty years of age, at which point, in Dr. Nesca's opinion, his risk of sexual recidivism would start to diminish. Dr. Nesca also emphasized that Mr. Avadluk has not participated in high intensity treatment programs and has never attended sex offender treatment targeting his criminogenic factors. He stated in his report:

Given that all available intervention options have not been exhausted and that sound treatment options are readily available, I see no reasonable foundation for a conclusion that Mr. Avadluk's criminal behavior is unlikely to ever to be brought under control. On the contrary, it seems more reasonable to conclude that effective risk management is likely feasible with appropriate treatment and with full consideration of age related declines in risk.

*Exhibit S-14, p 16*

[61] Defence counsel asked Dr. Nesca to expand on the comments in his report about Mr. Avadluk's treatment history. He stated:

His treatment history is quite unusual, and particularly within the context of a dangerous offender period. Usually by the time we get to this point, all or most treatment options have been exhausted and the individual continues to offend.

In this case, what we see is a man who has received relatively mild treatment and no treatment for sexual deviance. So after his first offence, he was released into the community as an untreated sexual offender. So his treatment history, just to summarize it, is noteworthy for the absence - - or for inappropriate treatment intensity and an absence of intervention that specifically target his criminogenic factors.

*Transcript of Dr. Nesca's Evidence, Volume 2, p 50, ll 5-20*

[62] Dr. Nesca was also asked to elaborate on why he felt effective community-based management is possible. His response, in part, was this:

. . . the new Sex Offender Treatment Program targets deviant sexual interest, sexual preoccupations, antisocial personality disorder, psychopathy, self-regulations, employment, hostility, intimacy deficits, sexual self-regulation, and an attitude supportive of sex crimes. That program covers all of Mr. Avadluk's needs.

He has a substance abuse problem. Substance abuse problems are exceedingly common in correctional settings. A recent 2004 scan of Saskatchewan provincial inmates, for example, identified 93 percent of inmates had a substance abuse problem. So this is not something that Correctional Services of Canada is not used to dealing with.

So what we have is we have a risk-needs profile that is matched by available and demonstrably effective programming. When you have that and when you add into the additional observation that Mr. Avadluk is getting older and that as he gets older his risk should diminish simply as a function of ageing, if you put all that together, then it leads to the conclusion that if he participates in programs and if he's successful in completing those programs and if he then does what he's told in terms of being released into a maintenance program in the community, then it should be manageable. Or more succinctly perhaps, there is no reason in this case to believe that management is categorically impossible.

*Transcript of Dr. Nesca's Evidence, Volume 2, pp 223-224*

[63] The conditions and structures which Dr. Nesca recommended be in place to effectively manage Mr. Avadluk's recidivism risk are:

- a. the imposition of a custodial sentence long enough to access the high intensity sexual offender treatment programs offered by the CSC;
- b. successful completion of the sex offender treatment followed by a community-based relapse prevention program and, if deemed advisable, periodic follow-up sessions;
- c. successful completion of intensive substance abuse programming, followed by community-based follow-up; and
- d. a lengthy supervision order to follow custody, which would include requirements for regular contact with officials from community corrections and a prohibition against the use of all intoxicants, to be confirmed through random breath and urine sampling.

## LEGAL FRAMEWORK

[64] The dangerous and long-term offender provisions in the *Criminal Code* apply to those convicted of a “serious personal injury offence”. The predicate offence must form part of a pattern of conduct which involves violence or a failure to control sexual impulses which is likely to continue. The primary purpose of the legislation is to protect the public, not to punish an offender. *Lyons v R*, [1987] 2 SCR 309 at para 69, 1987 CarswellNS 342; *R v Steele*, [2014] 3 SCR 138 at para 29, 2014 CarswellMan 589; *R v Jones*, [1994] 2 SCR 229 at para 128, 1994 CarswellBC 1240.

[65] Section 753 of the *Criminal Code* contains the elements of which the Court must be satisfied to designate an offender a “dangerous offender”. The portions relevant to this application are as follows:

753 (1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

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

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

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

[...]

(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.

[...]

(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.

[...]

(5) If the court does not find an offender to be a dangerous offender,

(a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or

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

[66] The term “serious personal injury offence” is defined in s. 752:

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,

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

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

[67] The Crown argues Mr. Avadluk can be deemed a dangerous offender under ss. 753(1)(a)(i) and (ii), as well as s. 753(1)(b).

***Requirements to be Satisfied under ss. 753(1)(a)(i) and (ii)***

[68] In *R v Neve*, 1999 ABCA 206, 71 Alta LR (3d) 92, the Alberta Court of Appeal set out the analysis to be undertaken in determining if the required elements of ss. 753(1)(a)(i) and (ii) have been satisfied.

[69] Ultimately, the Court must determine if the offender is a threat. Whether the offender is a threat requires a present determination that he or she will continue to be dangerous in the future after the point he or she would be released if sentenced in the ordinary course for the predicate offence. A finding of threat, in turn, must be based on evidence supporting the conclusion that the offender's past conduct falls within the thresholds set out in ss. 753(1)(a)(i) and (ii). *Neve, supra*, paras 102-105.

[70] *Neve* sets out what is required to prove the pattern or conduct threshold in each of subsections (i) and (ii):

[107] What does it take for the Crown to prove the required patterns of behaviour under ss.753 (a)(i) and (ii)? While "pattern" is not defined in the *Code*, what is defined in each of ss.753 (a)(i) and (ii) are the various components instrumental in creating the pattern. If the Crown fails to prove one or more of the required elements, then the proscribed pattern has not been made out. Under s.753 (a)(i), the elements are the following:

1. A pattern of repetitive behaviour;
2. The predicate offence must form part of that pattern;
3. That pattern must show a failure by the offender to restrain his or her behaviour in the past; and
4. That pattern must show a likelihood of death, injury or severe psychological damage to other persons through failure to restrain his or her behaviour in the future.

[108] Under s. 753(a)(ii), the required elements are these:

1. A pattern of persistent aggressive behaviour;
2. The predicate offence must form part of that pattern; and
3. That pattern must show a substantial degree of indifference by the offender respecting the reasonably foreseeable consequences of his or her behaviour.

[71] Not all of an offender's past criminal conduct will form part of a repetitive or persistent aggressive pattern. The legislative context requires the past conduct have some degree of violence, attempted violence or endangerment or likely endangerment. At the same time, it is not necessary that the past crimes be the same or similar or that they take place in any particular order. More than one episode of violence or aggression is required to demonstrate the conduct has been "repetitive" or "persistent" as the case may be. *Neve, supra*, paras 110-113.

[72] If the pattern thresholds in either case have been met, the Court must go on to consider whether, based on that past conduct, the offender presents "a threat to the life, safety or physical or mental well-being of other persons".

[73] The Crown does not need to prove the offender *will* reoffend. Rather, it must prove there is a *likelihood* (ie. it is more probable than not) that the offender will commit further harm. It must do so beyond a reasonable doubt. *R v Currie*, [1997] 2 SCR 260 at para 42, 1997 CarswellOnt 1487; *Lyons v R, supra*, at paras 118-119.

[74] The requirement in s.753(1)(a)(ii) that the persistent pattern shows a substantial degree of indifference by the offender respecting reasonably foreseeable consequences of his or her actions includes a requirement that the Crown prove beyond a reasonable doubt there is a likelihood that the behaviour will continue in the future. *Neve, supra*, para 116.

[75] Repeatedly committing crimes involving threatened or actual violence or actual or threatened endangerment can itself provide proof beyond a reasonable doubt that the offender displays a substantial degree of indifference. *R v Kopas*, 2006 CarswellOnt 10063 at para 29; *R v Bunn*, [2012] SJ No 637 (QB) at para 19, 2012 CarswellSask 674.

### ***Requirements to be Satisfied under s. 753(1)(b)***

[76] In determining whether an offender is a dangerous offender under s. 753(1)(b), the question on the pattern analysis is whether the offender's conduct in any sexual matter has shown a *failure* to control his or her sexual impulses. It

matters not whether the offender *can* or *could* control them. *R v Oliver*, 1997 ABCA 49, paras 8-12, 114 CCC (3d) 50.

[77] If the pattern threshold is met, then the threat is assessed using the offender's *present* condition to determine whether there is a likelihood that the offender will cause injury, pain or other evil to others. The probability of successful treatment in the future is not relevant to the threat assessment, although it is a factor which is considered in sentencing. *Oliver, supra*, para 13.

[78] If the Court is satisfied an offender meets the criteria in ss. 753(1)(a) or (b), it *shall* find the offender to be a dangerous offender.

### ***Sentencing Requirements Upon Finding an Offender is Dangerous***

[79] Upon finding an offender is a dangerous offender, the Court is bound by s. 753(4.1) to impose an indeterminate sentence unless it is satisfied there is a "reasonable expectation" that the public will be adequately protected from future violence by the offender through the imposition of the lesser measures. The lesser measures are a determinate sentence or a determinate sentence followed by a long-term supervision order of up to ten years.

[80] The requirement of a "reasonable expectation" that the public will be adequately protected through less restrictive measures requires there be more than mere potential or possibility. In *R v Bitternose*, 2013 ABCA 220 (CanLII) at paras 36-37, 2013 CarswellAlta 1006, 97 Alta LR (5<sup>th</sup>) 207, Côte, J., stated:

[36] Indeed, the statutory test here (quoted above) expressly calls for evidence founding a reasonable expectation of adequate public protection. The offender does not succeed merely because of some chance of protection, nor some evidence, nor a reasonable doubt. The Crown need not disprove such protection beyond a reasonable doubt: *R v FED*, 2007 ONCA 246 (CanLII), 222 OAC 253, 84 OR (3d) 721 (paras 44ff), lv den (SCC Apr 24 '08); *R v Haug, supra* (paras 78-85); *R v JKL*, 2012 ONCA 245 (CanLII), 290 OAC 207 (para 75). (Later statutory amendments either do not apply, or are not favorable to the offender on this topic.)

[37] Nor is it enough to postulate that the necessary facilities might be created by the time of the respondent's release years in the future. The subsection says "is satisfied", and "is a reasonable expectation", using the present tense. Besides, a mere hope for the future would not be reasonable. Nor do the sentencing Reasons here express any belief in future programs not yet existing.

## ***Expert Evidence***

[81] Expert opinion evidence plays an important role in assisting the Court with the threat assessment and, where it is satisfied the offender is a dangerous offender, determining whether or not there is a reasonable expectation that lesser measures will adequately protect the public; however, it remains the responsibility of the sentencing judge to make factual findings and draw conclusions. As stated in *Neve, supra*:

[199] What this reduces to is the following. First, at all times the responsibility remains with the sentencing judge to assess and weigh the opinion evidence, to determine whether the behavioural thresholds have been met, and whether based on that past behaviour someone is a threat and if so, should be designated a dangerous offender: *Jones (S.C.C.), supra*; *Young, supra*. The experts do not become the judges and the expert opinion is not the judgment. Second, it is the sentencing judge – not the psychiatrists, or the Crown, or the defence – who decides what the key elements of the pattern of conduct are: *Dow, supra*. Third, in assessing the existence of a pattern, psychiatric opinion evidence, admissible under s.755, must be used cautiously. Clearly, psychiatrists can opine on the interpretation of what is alleged to constitute a pattern of conduct, on whether that pattern of conduct is pathologically or substantially intractable and of course, on the issue of future dangerousness. But, quite apart from any other use of psychiatric evidence in dangerous offender hearings, while the psychiatrists may review past criminal conduct and then give an opinion on whether it forms a pattern, it is in the final analysis the court's responsibility and not the psychiatrists' to make the determination whether the evidence establishes the proscribed patterns.

## ***Gladue Factors***

[82] Notwithstanding the emphasis on public protection in dangerous offender proceedings, systemic or *Gladue* factors in an indigenous offender's background remain relevant. *R v Ipeelee*, 2012 SCC 13. That said, the role they play is necessarily limited by the nature of the proceedings and the circumstances through which the offender has become the subject of those proceedings. *R v Kudlak*, 2011 NWTSC 29 at para 108, [2011] 10 WWR 96; *R v Bonnetrouge*, 2017 NWTCA 1.

[83] The Court of Appeal commented on this recently, in *Bonnetrouge*:

[22] The *Gladue* factors can have but a limited role in a dangerous offender situation. The sentencing judge quoted from *R. v Kudlak*, 2011 NWTSC 29(CanLII) at para. 108, [2011] 10 WWR 96, in determining whether an offender's aboriginal status could justify a different outcome in circumstances similar to those present in this appeal:

. . . 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.

As the trial judge observed:

103. . . . The sad reality is that Mr. Bonnetrouge has proven to be very dangerous for members of his community, who are in majority aboriginal. He has caused great harm to young children and others who, by virtue of various circumstances, were in vulnerable positions. He has done this consistently over the years and he did so again in 2009 when he committed the two offences that he must be sentenced for today.

104. One can have empathy for the situations that he himself has faced when he was growing up and for the fact that throughout all these years, in and out of the correctional system, he has not had access to programing that was suited to his specific needs or to the type of treatment and programming he would have needed at a much younger age when he first came into contact with the criminal justice system. But as the Court said in *R. v. Evans*, 2008 Carswell Ont 994, at paragraph 127: “Sympathy cannot ground the conclusion that there is a reasonable expectation of controlling his risk in the community.”

If a person is dangerous, the *Gladue* factors may explain how he came to be dangerous, but that does not make him any less dangerous.

[23] The *Gladue* factors seek to address certain entrenched socio-economic issues faced by aboriginal offenders, but they are not a cure-all; they are helpful only “to the extent that a remedy is possible through the sentencing process”: *Gladue* at para. 64. They might sometimes be relevant to whether the person can be “controlled in the community”, or to the prospects of rehabilitation and reintegration (see *R. v Ipeelee*, 2012 SCC 13 (CanLII) at para. 89, [2012] 1 SCR 433), but that is not the situation here.

## ISSUES

[84] The issues are whether the Crown has established beyond a reasonable doubt that the criteria in ss. 753(1)(a)(i) or (ii) or s.753(1)(b) have been met and if so, whether there is a reasonable expectation that imposing a determinate sentence, followed by a supervision order, will adequately protect the public from further violence by Mr. Avadluk.

## ANALYSIS

### *Serious Personal Injury Offence*

[85] The predicate offence is clearly a serious personal injury offence as that term is defined in both ss. 752(a) and (b). First, the victim was subdued with violence and forced into sexual intercourse. This meets the definition set out s. 752(a). Second, Mr. Avadluk was convicted of sexual assault pursuant to s. 271 of the *Criminal Code*, which is specifically identified as a serious personal injury offence in s.752(b).

***Whether Mr. Avadluk is a Dangerous Offender under ss. 753(1)(a)(i) and (ii)***

[86] The evidence demonstrates unquestionably both a pattern of repetitive behaviour and a pattern of persistently aggressive behaviour, culminating in the predicate offence.

[87] Mr. Avadluk perpetrated repeated violence, resulting in serious harm, on four intimate partners on six separate occasions. He subsequently sexually assaulted two other women under what can only be described as terrifying circumstances. All occurred when Mr. Avadluk had consumed alcohol. All feature significant impulsivity and demonstrate a failure by Mr. Avadluk to exercise any restraint.

[88] I also find Mr. Avadluk has displayed, and continues to display, substantial indifference to the consequences of his actions for his victims. This is borne out in his offending pattern and supported by the evidence of both experts. Mr. Avadluk has offended violently and been punished repeatedly. I recognize that he asked the victim of the 2009 sexual assault to forgive him, but this is not sufficient to overcome the overwhelming evidence pointing to a substantial indifference to the serious physical and psychological harm done to the victims.

[89] Dr. Woodside noted in his report that Mr. Avadluk minimizes his responsibility for his criminal actions and stated:

From a psychiatric perspective, this is consistent with his showing a significant degree of indifference to the potential effects of his behaviour on his victims. I believe his capacity to empathize with others, in particular his victims, and to experience genuine remorse for his transgressions, is very limited.

*Exhibit S-2, p 49*

[90] Similarly, Dr. Nesca determined Mr. Avadluk has a tendency to reject personal responsibility for his actions and that he has a limited capacity for empathy.

[91] The likelihood that Mr. Avadluk will reoffend violently is also beyond doubt. This is clear from the evidence of the two experts, who both concluded Mr. Avadluk is at high risk to reoffend. It is also a conclusion that flows logically from Mr. Avadluk's extensive and largely uninterrupted history of violence. His pattern of violent offending is, on its face, intractable and there is no evidence that it is going to change in the foreseeable future.

[92] Accordingly, I find Mr. Avadluk is a dangerous offender based on ss. 753(1)(a)(i) and (ii) of the *Criminal Code*.

***Whether Mr. Avadluk is a Dangerous Offender under s. 753(1)(b)***

[93] The Crown has proved beyond a reasonable doubt the criteria in s. 753(1)(b).

[94] Mr. Avadluk clearly failed to control his sexual impulses in both the first sexual assault and the predicate offence. In the first case, he came upon the victim by chance in the stairwell of a high rise apartment building in the middle of the day. They did not know each other. Mr. Avadluk surreptitiously followed her to where she was going and violently forced her into the radio studio, where he almost immediately began to sexually assault her and continued to do so for almost three hours.

[95] The speed with which this situation escalated from a chance encounter in a stairwell to a violent sexual assault - its suddenness, impulsiveness and Mr. Avadluk's complete lack of restraint - is clearly demonstrative of a failure by Mr. Avadluk to control his sexual impulses.

[96] Failure to control his sexual impulses is also apparent in the circumstances of the predicate offence. Mr. Avadluk and his friend were leaving the victim's apartment. The friend left, at which point Mr. Avadluk asked the victim to have sex. She refused and he immediately attacked her, subdued her and repeatedly raped her over the next few hours. Again, there was a complete lack of restraint and the attack was markedly sudden and impulsive. The only conclusion to be drawn is that Mr. Avadluk failed to control his sexual impulses.

[97] I am satisfied beyond a reasonable doubt that Mr. Avadluk will cause injury, pain or other evil to others through a failure to control his sexual impulses in the future. Mr. Avadluk had sexual impulses in each of these assaults, which he acted upon. Further, that future harm is likely is well-supported by the evidence from both Dr. Woodside and Dr. Nesca. Each determined that Mr. Avadluk is at high risk to re-offend. Dr. Nesca concluded specifically that Mr. Avadluk is a sexually

deviant offender at high risk to commit further sexual offences and identified his sexual deviance as a criminogenic factor. He also found that Mr. Avadluk has significant impulse control problems.

### *Sentence*

[98] Having found Mr. Avadluk is a dangerous offender, I am bound to impose an indeterminate sentence unless I am satisfied that there is a reasonable expectation that the public can be adequately protected by the combination of a term of custody followed by a long-term supervision order. Defence counsel submits that the lesser measure is feasible and appropriate. The Crown submits that the public will not be adequately protected with anything short of an indeterminate sentence.

[99] Defence counsel's argument is premised on Mr. Avadluk not having had the benefit of intensive sex offender and other treatment specifically targeting his criminogenic factors. Moreover, he is just now coming to terms with the impact his experience as a victim of sexual assaults and he has not had treatment for this, nor treatment to deal with the effects of his chaotic childhood and his experience in residential school. The Court is asked to draw the conclusion that if given the chance to access appropriate treatment, Mr. Avadluk will, within a set period of time, be manageable in the community and will eventually require no supervision at all.

[100] The evidence is clear that there is treatment available through the CSC, both institutionally and in the community, which would target Mr. Avadluk's criminogenic factors. Mr. Avadluk has indicated a willingness to take it and wants the opportunity to do so. I am not, however, satisfied that there is a reasonable expectation that imposing a determinate sentence and a long-term supervision order will adequately protect the public. There are a number of reasons for this.

[101] First, it is clear from the evidence of both Dr. Woodside and Dr. Nesca that Mr. Avadluk has a vast array of psychological problems, problematic personality traits, impulse and anger control problems, a limited capacity for empathy, and a serious addiction to alcohol. These drive his violent conduct. Dr. Woodside's view is that they militate against the prospect of successful treatment. While I do not conclude CSC programming will be ineffective or insufficient in meeting Mr. Avadluk's needs *eventually*, I am not convinced he will get to the point where can control his anger, his aggression and his sexual impulses any time soon. There is simply no way of predicting how long it will take to see improvement, if there is to be any.

[102] Second, whether Mr. Avadluk will have an opportunity to complete intensive programming within the confines of the period of custody his counsel suggests is wholly uncertain and, in my view, unlikely. The time frame of two and a half to three years to get treatment, which both Ms. Sparvier and Mr. Gonzo estimated, is a “best case scenario”. It is a tight timeline based on a number of contingencies lining up, including space in the appropriate institution and space in the program. The plan also assumes Mr. Avadluk will complete the treatment and that he will respond positively to it in a relatively short time frame. Again, this cannot be predicted with any reasonable degree of certainty.

[103] Increasing the length of the sentence to accommodate the contingencies is not an option. If the court imposes a determinate sentence, whether or not it is followed by a supervision order, it must fall within the range the predicate offence would attract in an ordinary sentencing. *R v Severeright*, 2014 ABCA 25 (appeal to SCC dismissed).

[104] Related to this is Dr. Nesca’s recommendation that Mr. Avadluk’s sentence be of sufficient length to coincide with him reaching age fifty to account for anticipated decrease in risk due to age. That would require an additional six years of custody be imposed. Again, this is not an option. Further, given the escalation in Mr. Avadluk’s offending pattern and the personality traits identified by both experts, I am not convinced age would have the significant effect Dr. Nesca anticipates it would. I prefer Dr. Woodside’s opinion on this point.

[105] Third, Mr. Avadluk has expressed a willingness to participate in treatment, but there is no way of ensuring he will do so. He has expressed a willingness and a desire to change his life and his conduct and I believe he is sincere in his desire to change. He has, however, expressed similar desires in the past without actually following through. His criminal conduct has continued and it has escalated. In my view, this demonstrates his criminal conduct is intractable and unlikely to change within the next three years. If Mr. Avadluk is released with insufficient, ineffective or no treatment, he will be back in front of the Court, likely having harmed someone else. That is an unacceptable risk.

[106] Fourth, there is significant risk Mr. Avadluk will not comply with the terms of a long-term supervision order once released, even if there is optimal supervision. It may be that his ability and willingness to do so will change in the future but, as noted above, it is impossible to predict when that might be. What I have to consider is the evidence in front of me and that evidence is that Mr. Avadluk has consistently been unable or unwilling to comply with court orders over the past three decades. At least one of the violent offences occurred while he was on probation.

[107] Finally, that Mr. Avadluk has not had the opportunity to engage in the kind of high intensity treatment he needs does not create a reasonable expectation that his risk can be managed. All it demonstrates is a *potential* for treatment, which *may* eventually lead to a manageable risk. I say this with full appreciation that the principle of restraint and the objective of rehabilitation are fundamentally important in our justice system and that an indeterminate sentence is among the severest of consequences. I also recognize that the fact that efforts to rehabilitate Mr. Avadluk through treatment have failed to this point is not entirely his fault. He was only able to access the programming that was available to him in the institutions to which he was sent and that programming was inadequate. Unfortunately, there is now an obvious need to protect the public and it cannot be compromised.

[108] In summary, there are simply too many unknowns and contingencies to conclude there is a reasonable expectation that the public will be adequately protected from Mr. Avadluk if something less than an indeterminate sentence is imposed. The prospect of Mr. Avadluk experiencing long-lasting and positive outcome treatments in the short-term is at best, speculative. There is possibility and there is hope, but possibility and hope do not equate to a reasonable expectation. Therefore, an indeterminate sentence must be imposed.

[109] In coming to this conclusion I am mindful of Mr. Avadluk's personal circumstances and, in particular, the trauma he has experienced in his life, which is largely attributable to the impact of colonialist policies and systemic factors over which he had no control.

[110] Residential school devastated his parents, particularly his mother. That filtered down and devastated Mr. Avadluk, wreaking havoc and chaos in his home, the place where he should have been safe and felt loved. When there was finally intervention, it did nothing to address his needs. Instead, it resulted in further trauma for him, in the form of sexual assault. He turned to substances for comfort and he started to engage in criminal conduct at a young age. He was in and out of prisons, his underlying needs, his addiction, his mental health problems, his anger issues and his own trauma, remaining unresolved. It is little wonder Mr. Avadluk turned to solvent and alcohol abuse at a young age. It is little wonder he has spent much of his life incarcerated. And it is little wonder that he has now been designated a dangerous offender. The system has failed Noel Avadluk and in doing so, it has failed his victims. He now needs significant treatment and the public needs protection. I truly hope he will get the help he so desperately needs.

## **CONCLUSION**

[111] Considering Mr. Avadluk's criminal history, his personal circumstances, the expert opinion evidence and that of the correctional officials, I am satisfied Noel Avadluk is a dangerous offender, pursuant to ss. 753(1)(a)(i) and (ii) and 753(1)(b). I also conclude there is no reasonable expectation that the risk he poses to the public can be adequately managed by imposing anything but an indeterminate sentence.

[112] Accordingly, I declare he is a dangerous offender and I sentence him to an indeterminate term of custody.

### **ANCILLARY AND OTHER ORDERS**

[113] The Crown also sought a number of ancillary orders, namely, a firearms prohibition pursuant to s. 109 of the *Criminal Code* to be in effect for ten years, an order pursuant to s. 490.012 requiring Mr. Avadluk to comply with the terms of the *Sex Offender Information Registration Act*, which will be in effect for life and an order pursuant s. 477.051 authorizing that taking of bodily fluids from Mr. Avadluk for DNA analysis. These orders were granted.

[114] Mr. Avadluk is also prohibited from having contact, direct or indirect, with the victim in this case.

[115] Finally, I order that the following be provided to the CSC, pursuant to s. 760 of the *Criminal Code*:

- a. copies of the reports provided by Dr. Woodside and Dr. Nesca;
- b. transcripts of the testimony given at the sentencing hearing by Dr. Woodside, Dr. Nesca, Cynthia Sparvier, James Gonzo and David Pin;
- c. a transcript of my oral reasons for sentence;
- d. a transcript of the trial; and
- e. a copy of these reasons.

K. M. Shaner  
J.S.C.

Dated in Yellowknife, NT this  
4<sup>th</sup> day of August, 2017

Counsel for the Applicant: Wendy Miller  
Public Prosecution Service of Canada

Counsel for the Respondent: Tracy Bock  
Yellowknife Legal Aid Clinic

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**IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES**

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BETWEEN:

HER MAJESTY THE QUEEN

Applicant

-and-

NOEL AVADLUK

Respondent

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REASONS FOR JUDGMENT OF  
THE HONOURABLE JUSTICE K.M. SHANER

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