*R v Durocher* 2019 NWTSC 37

Date:  2019 10 01

Docket:  S-1-CR-2014-000 062

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

CODY DUROCHER

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| **Restriction on Publication:** By Court Order, there is a ban on publishing information that may identify any victims referred to in this Ruling. |

RULING ON DANGEROUS OFFENDER APPLICATION

1. INTRODUCTION
2. On March 9, 2016 Cody Durocher was found guilty by a jury of sexual assault and sexual interference of J.S. The Crown applies to have him designated a dangerous offender and sentenced to an indeterminate sentence pursuant to the regime set out at Part XXIV of the *Criminal Code*, R.S.C.1985, c. C-46.
3. The witnesses called by the Crown included the two experts who performed the assessment ordered by the Court, a correctional officer who was employed at the Peace River Correctional Centre when Mr. Durocher was incarcerated there, facilitators who were involved in delivering the programs Mr. Durocher took at Bowden Institution, his institutional parole officer, and Correctional Services Canada (CSC) personnel who testified about policies and processes in place for the management of offenders serving federal sentences, and those in place for offenders who have a Long Term Offender or Dangerous Offender designation.
4. The Crown also filed extensive documentary evidence which includes, among other things, the particulars of Mr. Durocher's criminal history, extensive information about his correctional history, reports summarizing his participation in various correctional programs, reports prepared by the two experts and related materials, and a Pre-Sentence Report that addresses Mr. Durocher's indigenous background and circumstances (the *Gladue* report).
5. Mr. Durocher chose not to call evidence at the hearing.
6. THE LEGAL FRAMEWORK
7. The legal framework that governs this Application is not contentious. It is set out at Part XXIV of the *Criminal Code*. The constitutional validity of the statutory scheme was challenged in *R v Boutillier,* 2017 SCC 64. Karakastanis J. concluded that as a result of the most recent amendments to Part XXIV, the statutory regime was no longer consistent with section 12 of the *Charter*. A majority of the Court reached the opposite conclusion.
8. The majority concluded that, properly interpreted, the amendments to the provisions did not alter the regime in a way that compromises its *Charter* compliance. Before turning to the evidence presented in this case, I will outline some of the fundamental principles enunciated by the majority in *Boutillier* which have guided my analysis.
9. There are two stages in a dangerous offender application, the designation stage and the penalty stage. At both stages, the Crown bears the onus. That onus is proof beyond a reasonable doubt. *Boutillier*, paras 13-15.
10. Section 753 of the *Criminal Code* governs the designation stage. There are a number of different routes that the Crown may rely on in seeking a dangerous offender designation. In this case, the Crown relies on the routes set out at Paragraphs 753(1)(a)(i) and 753(1)(b).
11. The elements that the Crown must prove under these routes are slightly different, but they both require that four things be established:

(a) the index offence is a "serious personal injury offence";

(b) the index offence is part of a broader pattern of violence;

(c) there is a high likelihood of harmful recidivism;

(d) the offender's violent conduct is intractable.

*Boutillier,* para 26; *R v Lyons* [1987] 2 S.C.R. 309, p.338.

1. The Defence concedes in this case that the Crown has established the first three criteria. The fourth, intractability, is the only one in issue.
2. The assessment of both intractability and the likelihood of recidivism require the Court to engage in a prospective analysis:

Before designating a dangerous offender, a sentencing judge must still be satisfied on the evidence that the offender poses a high likelihood of harmful recidivism and that his or her conduct is intractable. I understand "intractable" conduct as meaning behaviour that the offender is unable to surmount. Through these two criteria, Parliament requires sentencing judges to conduct a prospective assessment of dangerousness.

*Boutillier*, para 27.

1. Evidence about treatment prospects is relevant at the designation stage because treatability informs both the assessment of the likelihood of recidivism and the intractability of the conduct:

(...) offenders will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable.

*Boutillier*, para 45.

1. The penalty stage is governed by Subsections 753(4) and (4.1). Once an offender is designated a dangerous offender, there are three sentencing options: the imposition of an indeterminate sentence of imprisonment; the imposition of a determinate sentence of more than two years followed by a Long Term Supervision Order (L.T.S.O.) of a maximum duration of ten years; or the imposition of a sentence under the regular sentencing regime.
2. Subsection (4.1) states that an indeterminate sentence must be imposed unless the Court is satisfied that there is a reasonable expectation that one of the other two options will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.
3. In this jurisdiction, the phrase "reasonable expectation" has been interpreted to mean more than the expression of hope that the risk can be managed other than through an indeterminate sentence:

What is required is more than the expression of hope. What is required is that there be specific evidence that the specific offender, within a definite period of time, can be treated in such a way as to reduce his risk. The implication is that by virtue of the combined effect of the determinate sentence and the period of long term supervision, the risk will have been reduced to an acceptable level and that it will remain at that level even in the absence of exterior controls.

*R v Bonnetrouge*, 2013 NWTSC 93, pp.30-31 (aff'd, 2017 NWTCA 1).See also *R v Kudlak*, 2011 NWTSC 29.

1. Other courts have used different language to describe what "reasonable expectation" means in this context:

‘Reasonable expectation’ does indicate a different and higher standard than the former provision in the legislation of "reasonable possibility" (...). While the factors to be considered are essentially the same, a "reasonable expectation" requires a higher level of confidence that the risk to the public can be managed in the community, than that required under the previous language of "reasonable possibility". In *R v Walsh*, 2011 BCSC 1911 the Court described the phrase "reasonable expectation" as (...)

'What I draw from the above authorities as the meaning of the phrase 'reasonable expectation that a lesser measure (...) will adequately protect the public' in s. 753(4.1) is that it amounts to 'a confident belief, for good and sufficient reasons' to be derived from the quality and cogency of the evidence heard on the application'

(references omitted)

*R v Sanderson*, 2018 MBCA 63, para 20.

1. At the penalty stage, the evidence of treatability is key in determining the appropriate sentence to manage the threat posed by the offender, and in particular, in deciding whether there is a reasonable expectation that a sentence other than an indeterminate sentence will adequately protect the public.
2. Again, this requires a prospective assessment. The Supreme Court explained the different uses of the prospective evidence at the two stages of the analysis:

(...) the purposes of prospective evidence at the designation and sentencing stages are different. The designation stage is concerned with assessing the future threat posed by an offender. The penalty stage is concerned with imposing the appropriate sentence to manage the established threat. Though evidence may establish that an offender is unable to surmount his or her violent conduct, the sentencing judge must, at the penalty stage, turn his or her mind to whether the risk arising from the offender's behaviour can be adequately managed outside of an indeterminate sentence.

*Boutillier*, para 31.

1. Dangerous offender proceedings are sentencing proceedings. The fundamental sentencing principles and mandatory guidelines that govern sentencing generally, set out at sections 718 to 718.2 of the *Criminal Code*, apply to such proceedings. *Boutillier*, paras 53-63.
2. Mr. Durocher is Metis. Therefore, the principles that apply to the sentencing of indigenous offenders, as set out at section 718.2(e) of the *Criminal Code*, are engaged. Those principles were articulated by the Supreme Court of Canada in the often quoted cases of *R v Gladue* [1999] 1 S.C.R. 688 and *R v Ipeelee*, 2012 SCC 13. They are well established and frequently engaged in this jurisdiction. They are very important principles that bear repeating.
3. In *Gladue* and *Ipeelee*, the Supreme Court of Canada held, among other things, that section 718.2(e) is a remedial provision designed to ameliorate the serious problem of overrepresentation of indigenous offenders in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing in cases involving indigenous offenders. *Gladue*, para 93, referred to in *Ipeelee*, para 59.
4. The Supreme Court has directed that in sentencing indigenous offenders, courts must consider the unique systemic or background factors that may have played a part in bringing the offender before the courts and the types of sanctions that might be appropriate in the circumstances of the offender because of his or her indigenous heritage or connection. *Gladue*, para 66; *Ipeelee*, para 59.
5. More specifically, courts must take judicial notice of the history of colonialism, displacement, residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for indigenous people. This provides necessary context for understanding and evaluating the case-specific information about the offender before the court. *Ipeelee*, para 60.
6. These circumstances are relevant because they have a bearing on the offender's level of blameworthiness which, in turn, is an important component of the fundamental principle of proportionality. *Ipeelee*, para 73.
7. Although this approach may not necessarily result in a reduction of sentence in every case, it must be applied in every sentencing of an indigenous offender, including sentencings for serious offenses. *Ipeelee*, paras 84-87. They apply to dangerous offender proceedings. *R v Johnson*, 2003 SCC 46, para 29. *Boutillier*, para 54.
8. Restraint is not only relevant when deciding whether incarceration is required. In cases where incarceration is warranted, restraint requires that the least restrictive sanction that can achieve the objectives of sentencing be imposed. In the context of dangerous offender proceedings, it means that if the Crown has established that the offender poses a threat to public safety, the sentence imposed must be the least restrictive means capable of managing that threat.
9. THE CIRCUMSTANCES OF THE OFFENCE
10. In January 2014, J.S. was 13 years old. On the night of the events, she was at a friend’s house in Hay River. She had been consuming alcohol and marijuana. She phoned a man she knew who lived in an apartment building in Hay River.
11. Mr. Durocher answered the phone. He invited J.S. to come over and said he would pay for her cab. She agreed to come over.
12. When she arrived at the apartment building, Mr. Durocher was waiting for her in the lobby of the building. He paid for the cab and they went inside the apartment.
13. Mr. Durocher offered her some vodka. She took a few sips herself and he squeezed the bottle to make her drink more.
14. J.S. was starting to feel drunk. As they were sitting on the couch, Mr. Durocher kissed her on the lips and called her "baby". She told him not to touch her. He persisted and kissed her on the lips.
15. Mr. Durocher started pulling down his pants. He pulled down J.S.'s pants and underwear. She told him to stop and punched him. She stood up and tripped. He placed her back on the couch. He then had anal intercourse with her.
16. After the assault she left the apartment and the building. She was highly intoxicated and could not walk straight. She made it back to the house where she had been earlier in the evening. There, she laid on a bed and passed out.
17. J.S. was on a court-ordered curfew at the time. Police officers did a curfew check on her that night and she was not home. They began looking for her. They went to the house of J.S.'s friend, as they knew she often spent time there. They found her passed out on the bed and arrested her for breach of her curfew. The arresting officer testified that in previous dealings he had with her when she was intoxicated, she was usually belligerent and abusive. This time her demeanour was different. She was extremely upset, sobbing. Once at the police detachment she disclosed that Mr. Durocher had sexually assaulted her.
18. At the time of this offence, Mr. Durocher was on process for two other sexual offenses.
19. SUMMARY OF EVIDENCE ADDUCED ON APPLICATION

A. Mr. Durocher's Personal History

1. The primary source of information about Mr. Durocher’s background and personal circumstances is the *Gladue* report.
2. Mr. Durocher is now 34 years old. His mother is Dene Tha’ from Meander River in Alberta. His father was from Québec. He has three younger siblings.
3. Many of Mr. Durocher’s family members on his mother’s side attended residential school. His mother is unclear as to which ones, and did not have any specific information about their experience there.
4. The fact that his father was a white man caused some difficulties for the family. Other band members harassed them. Eventually, the family moved off the reserve. Mr. Durocher's parents never married because his mother would have lost her treaty rights if she had married a non-indigenous man.
5. The family moved to Yellowknife when Mr. Durocher was 6 years old, and back to Meander River a few years later. That is where Mr. Durocher lived most of his adult life.
6. Mr. Durocher reports that he was sexually abused, when he was between 3 and 5 years old, by a female babysitter who was an extended family member. He did not disclose this to his parents, and only spoke about it to a relative years later. His mother first heard about this through one of Mr. Durocher’s ex-girlfriends. She later asked him about it he but he did not say anything in response.
7. Mr. Durocher’s father was skilled on the land. They spent time together hunting and fishing. They would frequently spend time at Mr. Durocher’s maternal grandmother’s trapline. He enjoyed the time he spent there with his father and relatives.
8. Mr. Durocher’s father always maintained employment and was a hard worker. Mr. Durocher began spending time with him at the work sites, cleaning up and sweeping, when he was 10 years old. Over the years he learned how to weld and some other related skills. He continued working with his father on various construction contracts in the community and in the area.
9. Mr. Durocher’s father had an alcohol problem. His parents argued frequently, but there was no domestic violence in the home. Mr. Durocher’s father passed away in 2013. In the year before his death his drinking had increased, which led to his parents’ separation. Unbeknownst to the family, his father had cancer and was very ill. He died six months after the separation.
10. Mr. Durocher told the author of the report that he grew up with Aboriginal culture and ceremonies. As already mentioned, he learned traditional trapping, hunting and fishing skills with his maternal grandparents and his father.
11. Mr. Durocher was quite young when he first experimented with alcohol. He started using marijuana in grade 6 and has continued using it regularly throughout his life. He told the author of the report that it helps him sleep and with back and neck pain. He reports he was introduced to crack cocaine by one of his girlfriends. It is apparent from the report that his drug use caused some problems in his subsequent relationships.
12. Mr. Durocher has been in a number of relationships and has three children from different mothers. His first daughter was born in 2008. His relationship with the mother of that child, C., ended because she gave him an ultimatum and asked him to make a choice between continuing to use drugs or having a family life. He committed to remaining drug free, but C. later caught him using drugs again and ended the relationship. Mr. Durocher told the author of the report that he had maintained contact with his daughter before his incarceration.
13. In 2009 Mr. Durocher was in a relationship with another woman, K. She became pregnant and gave birth to a boy in February 2010. During her pregnancy Mr. Durocher had an affair with another woman, C. C. also became pregnant and gave birth to a girl in early 2010.
14. Mr. Durocher told the author of the report that his son is living with his maternal grandmother and is being told he has no father. As for his younger daughter, C. has custody of her. It is not clear whether Mr. Durocher had maintained contact with her before his incarceration.
15. Mr. Durocher has suffered many losses and trauma throughout his life.
16. His maternal grandfather, who he was close to, passed away when he was 6 years old. When he was 11 one of his uncles hung himself. Mr. Durocher was present in the house when another uncle removed the body. He has vivid memories of that. Another uncle shot himself in the head in a closet and Mr. Durocher saw his body there. Another uncle froze to death. In addition Mr. Durocher and his brother saw a neighbour get killed on their street.
17. Mr. Durocher had traumatic experiences with death as an adult as well. A friend got critically injured after accidentally falling in a window well. Mr. Durocher was there when this happened. He tried, unsuccessfully, to revive his friend.
18. Mr. Durocher's mother reports as well that there were many deaths in their community due to alcohol, vehicle accidents, and suicide.
19. Mr. Durocher’s mother is supportive of him. She describes him as a good father and someone who gets along with everyone. She says he always took care of his siblings and has a close relationship with his family.
20. His aunt describes him as energetic, hardworking and outgoing, non-violent and friendly. Other relatives also describe him as hard working, someone who jumps in to help without being asked, respectful, polite, and caring. Mr. Durocher's family appears to be very supportive of him.

B. Mr. Durocher’s Criminal Record

1. Mr. Durocher has an extensive criminal record. It includes three convictions for sexual assault aside from the one he now faces sentencing for, other crimes of violence and seven convictions for breaches of court orders and other offenses against the administration of justice.
2. Exhibit S-4 includes certified copies of court documents and transcripts, when available, relating to Mr. Durocher’s convictions. Mr. Durocher’s behaviour in the commission of some of these offenses is in sharp contrast with the behaviour and personality traits described by his mother and other family members.
3. Although the whole criminal record is relevant on this Application, the convictions for sexual assault are the most serious and the most significant.
4. The first sexual assault that Mr. Durocher was convicted of occurred in January 2010. H.A., an adult woman, was drinking with friends outside a restaurant in Wabasca, Alberta. Mr. Durocher approached her, claiming he knew her from Facebook. She did not think she knew him.
5. At one point she got into an argument with her friends and walked away. They asked Mr. Durocher to go after her and bring her back. He caught up with her. He took her by the arm and took her into some bushes near the road. She fell on the ground. Her pants and underwear were removed. Mr. Durocher had vaginal intercourse with her against her consent. She told him to stop, pushed him away and ran towards the road yelling she had been raped.
6. A sexual assault examination was done the next day. Forensic analysis eventually resulted in D.N.A. evidence incriminating Mr. Durocher.
7. This charge was pending for some time. Mr. Durocher was still on process for it when he sexually assaulted J.S. in 2014. Ultimately Mr. Durocher pleaded guilty to the charge in April 2014 and was sentenced to imprisonment for two and a half years.
8. The second sexual assault happened in April 2010. Mr. Durocher and the victim, M.A., had known each other a long time, as they are related, but they had never socialized together.
9. On April 16, 2010 they communicated through Facebook. He asked her if she wanted to go for a ride with him on a quad. He told her he had a joint. She agreed to go with him.
10. They went for a ride on some trails. They stopped and smoked the joint. Mr. Durocher pulled out a bottle of whiskey. She took a few sips from it. He tried to give her more but she refused. She felt a bit intoxicated by this point. He tried to kiss her and she said "no". He kept trying to kiss her.
11. Mr. Durocher took M.A. further into the trails. He stopped and pushed her off the quad and removed her pants. She started crying. He spread her legs and put his mouth on her genitals and in her vagina. She said "no" many times as he was doing this and she covered her face. Mr. Durocher then had forced vaginal intercourse with her.
12. He told her to get dressed. They got back on the quad and drove to some bushes. Mr. Durocher stopped the quad again and told her to get off. He turned her around, pulled down his pants and hers, and had forced anal intercourse with her. He also had vaginal intercourse with her again. Afterwards, he told her to put her pants back on. He then drove her back to her mother's house.
13. Mr. Durocher had a trial on this charge and was convicted in July 2012. He was sentenced on November 30, 2012. The full transcript of the sentencing proceedings is not available because there was a power outage that day, but the Warrant of Committal indicates that the sentence imposed, before any credits were applied, was 3 years. He received a credit of 17 months for pre-trial custody and he received a further credit of 13 month sentence reduction “per *R v Askov*”. As a result, a further jail term of 6 months was imposed. Without a full transcript, it is not entirely clear what this “Askov credit” relates to but it is clear this credit was applied.
14. The third sexual assault occurred in May 2013. T.T. was 14 years old at the time. At the time this offence was committed, Mr. Durocher was on process in relation to the January 10, 2010 sexual assault on H.A.
15. T.T. and Mr. Durocher knew each other because he had been in a relationship with her older sister. On May 13, T.T. went to Mr. Durocher's house after a party. They had sexual intercourse while she was at his house.
16. When police interviewed Mr. Durocher, he admitted that he had sexual intercourse with T.T. and had not taken any steps to determine her age. He told them she had seduced him.
17. Mr. Durocher pleaded guilty to this offence on May 17, 2016. The sentencing judge found that a sentence of 4.5 years was appropriate. After giving Mr. Durocher credit for the time spent in remand, he imposed a further jail term of 3 years.

C. Mr. Durocher's Institutional Behaviour

1. Peace River Correctional Centre

1. Mr. Durocher spent time in custody at the Peace River Correctional Centre (PRCC) between 2010 and 2013. During that time frame, he was at times on remand and at times serving the 6 month sentence for the sexual assault on M.A. There were also points in time when he was not in custody. The specific dates when he was released and re-incarcerated are set out in Exhibit V-11 filed on the Similar Fact Application brought at trial.
2. Christine O'Toole was Mr. Durocher’s case worker while he was incarcerated at PRCC. She described the different living units and detention conditions at the facility, some of the institutional procedures, and her dealings with Mr. Durocher while he was there.
3. She explained that the general population unit housed both remand inmates and serving prisoners. On that unit, inmates had free access to the whole of the range and were only in lock-down at night. They had access to the library, the gym, and to phones all day.
4. The conditions in the segregation units were markedly different. Whether in administrative segregation or disciplinary segregation, inmates were in lock-up 23 hours a day. They had a one hour "exercise period". This was the time available to them to make phone calls, shower, and exercise. Those in disciplinary segregation had even more restrictions. Their phone privileges were restricted. Their personal items were taken away.
5. One of the segregation units was referred to as "the dark side". That unit was in the basement, had no windows and the lighting was very poor.
6. The facility also had a unit that was labelled "the incompatible unit". Inmates in that unit were in a dorm setting, as opposed to a cell, and had slightly more freedom of movement than those in segregation, but not as much as those in general population.
7. Mr. Durocher spent the majority of his time at PRCC in administrative segregation. Ms. O'Toole explained that inmates who were thought to be potentially at risk in the general population were required, if they wanted to be in the general population, to sign a "general population waiver". This waiver purported to release Alberta Corrections of any liability should something happen to the inmate while in general population. Mr. Durocher, because he was facing charges for sexual offenses, fell in this category of inmates. He refused to sign the waiver form. As a result, he was placed in administrative segregation.
8. At PRCC, inmates who had requests made them by filling out a form called “Request for Interview”. Ms. O’Toole testified that Mr. Durocher submitted requests like that every week and that this frequency of request was uncommon in comparison to what she received from other inmates.
9. Exhibit S-3 includes copies of several such forms submitted by Mr. Durocher. They vary in scope and include requests for access to programs, using the telephone, being moved between units or placement with certain inmates or away from certain inmates. At times he made requests and later withdrew them.
10. When Ms. O’Toole was asked to describe Mr. Durocher’s behaviour as an inmate, she answered that he was needy and attention-seeking.
11. Mr. Durocher's detention conditions while at PRCC were the subject of extensive submissions by Defence, in particular concerning the effect they had on his ability to be responsive to programs later on. I will return to that specific issue later in this Ruling, but I will say now that, given his detention conditions, Mr. Durocher's institutional conduct during that period of time is of no assistance to the Crown on this Application.

2. Bowden

1. As noted above, Mr. Durocher was sentenced to 2.5 years’ imprisonment for the sexual assault on H.A. in April 2014. As part of the usual intake process for offenders sentenced to a penitentiary sentence, his security classification was assessed. This resulted in his placement in Bowden Institution, a medium security institution.
2. Inmates serving federal sentences are assigned an institutional parole officer. Matthew Kennedy is an institutional parole officer employed with CSC. He was not the officer assigned to Mr. Durocher initially but he took on that role in January 2015 and remained Mr. Durocher's institutional parole officer until his transfer out of Bowden in October 2018.
3. During his time at Bowden, Mr. Durocher accumulated a number of institutional charges. Mr. Kennedy testified that Mr. Durocher generated institutional charges at a frequency far greater than the average offender.
4. The institutional charges that Mr. Durocher was found guilty of were for a variety of breaches of institutional rules, and included: willfully delaying the sheriffs by not reporting to where he was supposed to when he returned from court; attempting to steal a small portable stereo from one of the program rooms; throwing a bucket of water on an inmate; being found in possession of pornographic materials; being found in possession of home brew; forging the signature of an Elder; attempting to steal an atlas from the library; being belligerent and using abusive language with staff on a few occasions.
5. Mr. Durocher also received several institutional charges for being involved with tattooing. Mr. Kennedy explained that tattooing is not permitted at Bowden because of the risk of spreading infectious diseases within the institution. Mr. Durocher was charged, found guilty and sanctioned as a result of being caught tattooing himself or other inmates, or for being found in possession of objects used in tattooing. The sanctions imposed for these charges were modest, such as fines and extra hours of duty.
6. Mr. Kennedy spoke to Mr. Durocher on several occasions about the consequences he could face if he continued accumulating institutional charges. In one of those discussions Mr. Durocher became upset and told Mr. Kennedy he would never stop tattooing but would just get better at hiding it.
7. Mr. Kennedy explained how inmates’ security classifications are assessed and how they evolve over time. The three levels of security classification are high, medium and low. The classification determines in which institution the inmate will be placed. As already noted, determining an offender’s security classification is part of the intake process. The hope and goal is that over time, inmates can work at reducing their security classification level.
8. The three main components that determine the security classification level are institutional adjustment, escape risk, and risk to public safety. For each of these components the assessment can be low, medium, or high. In this context a rating of "low" is positive and signals low risk. The institutional adjustment factor relates to the inmate's behaviour, attitude, and willingness to address his correctional plan. The accumulation of institutional charges has an impact on how this factor is rated.
9. Inmates' security classifications are reviewed a minimum of once every two years. They can also be reviewed as a result of a specific event.
10. In July 2018 Mr. Kennedy proceeded to the bi-annual review of Mr. Durocher's security classification. At that point, because of the number of institutional charges he had accumulated, Mr. Durocher met all the requirements to receive a rating of "high" on the institutional adjustment factor. Such a rating would have resulted in his security classification being upgraded to "high", in which case Mr. Durocher would be transferred to a maximum security institution.
11. Mr. Kennedy decided to recommend maintaining the "medium" rating on the institutional adjustment factor so Mr. Durocher could retain his medium security classification rating, remain at Bowden and continue with the Aboriginal High Intensity Sexual Offender Program (AHISOP) he was engaged in.
12. This was an unusual recommendation for Mr. Kennedy to make but the warden supported it. It was felt that since Mr. Durocher was facing sentencing on this matter, it would be in his best interest to have the opportunity to complete the program he was in, as that would give him the best chance of seeking an eventual return to the community.
13. Mr. Kennedy told Mr. Durocher about this and warned him that any further poor behaviour or breach of institutional rules would result in an increase in his security classification.
14. Also in July 2018, Mr. Durocher had a hearing with respect to an institutional charge dating back to April 2018. The allegations were that he was observed tattooing another offender. He was in possession of a tattoo gun, a power source, stencils, and several rubber gloves.
15. The independent chairperson who presided over the disciplinary hearing, instead of completing the matter that day, adjourned disposition to December 2018. This was a very unusual thing for an independent chairperson to do. Mr. Kennedy explained that his understanding was that had the matter been dealt with that day, disciplinary segregation would have been imposed because Mr. Durocher had received several other penalties for institutional charges related to tattooing and was continuing to engage in it. Segregation would result in Mr. Durocher missing some of his program sessions and possibly lead to his suspension from the program. To avoid this, the chairperson delayed disposition to a date when the program was expected to be completed.
16. Mr. Kennedy reviewed Mr. Durocher's security classification again in October 2018. At that point Mr. Durocher had been suspended from the AHISOP. As had been the case at the July review, Mr. Durocher met the criteria for a change of classification to maximum security. The rationale for maintaining him at a medium level - allowing him to complete the AHISOP - no longer existed. Mr. Kennedy recommended an increase in Mr. Durocher's security classification. The warden agreed.
17. Mr. Durocher was very upset when Mr. Kennedy told him that his security classification had been elevated to maximum. He appeared surprised to learn that he was going to be transferred. Mr. Kennedy told him that the accumulation of incidents within the institution required an increase in his security classification. As part of that discussion, on the subject of Mr. Durocher's continued involvement in tattooing, Mr. Durocher told Mr. Kennedy that he had made arrangements to tattoo three offenders, that he felt obligated to follow through on those commitments, and that he would do so.

D. Programming

1. Mr. Durocher did not have access to programming while at the PRCC. He did access programs at Bowden.

1. Adult Basic Education

1. This program is for high school upgrading. It is not a risk management program. Mr. Durocher did well in it at first, but his attitude then deteriorated. Because he had a negative influence on other students in the class, he was removed from that program.

2. Aboriginal Basic Healing Program

1. Mr. Durocher took the Aboriginal Basic Healing Program (ABHP) in 2015. It was an introductory program designed to provide indigenous offenders with a frame of reference for other programs they might take. It included teachings about colonialism and basic aboriginal teachings. The goal of the program was to help participants to begin to use these teachings to develop pro-social problem solving skills and address other lifestyle choices that contribute to offending behaviour. It was a moderate intensity program that ran for approximately six weeks.
2. Dale Johnson was the main facilitator. He worked with an Elder who performed the ceremonies and attended some of the sessions to provide a spiritual perspective and guidance to the participants.
3. Mr. Johnson testified that Mr. Durocher's performance and attitude during the program was "subpar" and "unacceptable". There were times when he was engaged but many times when he was not. While he satisfactorily completed some of the assignments and had positive interactions with the Elder, there were many instances where his attitude and behaviour were problematic. He was disruptive and disrespectful to other participants. He challenged Mr. Johnson and actively attempted to undermine him during the group sessions.
4. In February 2015, on a day the program was not running, Mr. Durocher was caught attempting to remove a portable stereo from the program room. Another facilitator, Nora Luft, saw this and confronted him. This resulted in an institutional charge. After that incident Mr. Johnson told Mr. Durocher that he would be given one last chance but that if there was further incident he would be suspended from the program.
5. Within weeks, Mr. Durocher got into a heated confrontation with another program participant. Mr. Johnson testified that it appeared to him that Mr. Durocher was the instigator. Mr. Johnson was concerned that the incident would escalate to a physical fight, to the point he asked the other participant to return to the living unit. Mr. Durocher wanted to follow him. Mr. Johnson had to insist that Mr. Durocher remain in the program room.
6. As a result of this incident Mr. Durocher was suspended from the program. Mr. Johnson testified that in his thirteen years working as a facilitator for CSC programs, he has only suspended five or six offenders.
7. Mr. Johnson's overall assessment of Mr. Durocher's performance was that although Mr. Durocher expressed a willingness to change at certain points, and made modest progress toward understanding the consequences of his criminal behaviour, he did not make any meaningful progress. He was not able to say how his offenses affected his victims and the effects of his behaviour on them. His lack of empathy resulted in a lack of motivation to address his behaviour.

3. High Intensity Sexual Offender Program (HISOP)

1. The High Intensity Sexual Offender Program (HISOP) is designed to identify and address risk factors that contribute to sexual offending. Its objective is to get offenders to develop a self-management plan to address their risk to reoffend. It is a high intensity program that runs for a period of approximately five to six months and is run by two facilitators. Mr. Durocher started this program in December 2016. The program was expected to run until May 2017.
2. Ms. Luft was one of the co-facilitators in the program. She testified that Mr. Durocher seemed really interested at the beginning but his behaviour soon became problematic. He was disrespectful to the other facilitator. He had difficulties moving toward success in his treatment targets, such as the management of his emotions.
3. Ms. Luft never saw any indication of empathy for his victims. She testified that when they tried to talk about it, Mr. Durocher would "quickly enter victim stance himself" and talk about his own victimization. He did not seem able to relate to what the consequences of his actions may have been for his victims.
4. Ms. Luft testified that as time progressed, his behaviour continued to be problematic and became increasingly difficult to manage in the classroom. If Mr. Durocher was upset about something he would go off on tangents and was difficult to get back on track. This had a negative impact on the group.
5. Mr. Durocher completed many of his assignments while he was in the program, and in particular, did a lot of journaling. Ms. Luft testified that in her view Mr. Durocher made some headway in gaining theoretical understanding about certain issues, but was not able to apply them in practice. He had a basic understanding of cognitive distortions (sometimes referred to as "thinking errors") and could recognize them in other participants in the group, but had great difficulty recognizing them in himself and challenging himself to come up with a different way of thinking about the issue.
6. Over time, Mr. Durocher’s behaviour in the program continued to be disruptive. He was suspended from the program in April 2017. My understanding of the evidence was that in addition to the fact that he was causing disruption in the group, the concern was also that if he completed all the sessions he may not be able to take the program again, even if he made no actual gains towards reducing his risk. Being suspended from the program before completion would make it possible for him to take it again.
7. Ms. Luft's case notes reflect the difficulties Mr. Durocher had during the program. She noted, among other things, that his classroom behaviour was disruptive, that his hostility towards women was apparent, that he "spent his program time being less than honest", that he was "cunning, sly, and heavily engaged in impression management", and that he was not making any effort to address his treatment targets.
8. Ms. Luft noted the program may be of more benefit to Mr. Durocher at a later time. She felt that the proceedings he was facing in this Court were distracting him and causing him stress. She thought he might benefit from taking a "primer program" before taking HISOP again. She was aware that a new Aboriginal High Intensity Sexual Offender Program might be offered and felt this may be a good program for Mr. Durocher, as she knew that he was especially interested in aboriginal programming.

4. Aboriginal High Intensity Sexual Offender Program (AHISOP)

1. AHISOP is part of a new stream of programs developed by CSC. Its goal is similar to that of the HISOP, but it is built around traditional indigenous teachings. The program content includes aboriginal history and addresses issues of trauma specific to indigenous people. The program includes traditional ceremonies and work with Elders.
2. The AHISOP was offered for the first time in Bowden commencing in May 2018. Mr. Durocher was one of the first participants. Before the program started, he also completed a "primer program". Mr. Kennedy explained that the primer program is not a risk-mitigating program. Rather, it is intended to identify key targets to be worked on during the program itself.
3. The decision to have Mr. Durocher take the program was based on the fact that his warrant expiry date on the sentence he was serving at the time was approaching and it was felt he would benefit from this program. Everyone involved in the decision to allow Mr. Durocher to take this program was aware that dates were scheduled for his dangerous offender hearing in Yellowknife and that he would have to attend those proceedings.
4. Kristin Levesque was the facilitator who delivered this program. She testified that Mr. Durocher was very interested in the ceremonies that were part of the program and was very engaged in this regard. He completed his written assignments and was able to understand concepts intellectually.
5. She testified that Mr. Durocher's behaviour, however, was problematic. He lacked discipline and was unable to manage his impulsivity. He was disruptive in the group and did not change this behaviour despite receiving several warnings. He did not take responsibility for his offenses and often portrayed himself as a victim. Although he understood the concepts that were being taught, his behaviour did not demonstrate that he was able to internalize the program's teachings.
6. Before having to go to Yellowknife for these proceedings, Mr. Durocher had missed one program session and a one-on-one session with the Elder.
7. Mr. Durocher came to Yellowknife in June 2018 for the first part of the hearing. He did not miss any sessions as a result of the proceedings that week because the program was not running. The continuation of the hearing was adjourned, as had been planned, to dates in September.
8. In August, Defence made an application to adjourn the continuation of the hearing to a date after the completion of the AHISOP. That Application was heard in August 2018. Evidence was called about the potential consequences of the hearing proceeding in September as scheduled. Ms. Levesque testified, as did Cody Stefan, the Manager of Programs at Bowden. Mr. Stefan explained that if Mr. Durocher missed program sessions because of court, make-up sessions could be offered to him to help him catch up some of what he would have missed.
9. The adjournment application was dismissed. The hearing continued in September as scheduled. The program ran during this time and Mr. Durocher missed 11 sessions.
10. When he returned to Bowden, Mr. Durocher was not offered any make-up sessions. One of the people who potentially could have done these make-up sessions was away at training. The other was Mr. Johnson, who had facilitated the Aboriginal Basic Healing Program and had suspended Mr. Durocher from that program. Mr. Durocher had said he would not work with Mr. Johnson. Because of this, Mr. Durocher was not offered the option of having make-up sessions with Mr. Johnson.
11. Ms. Levesque asked Mr. Stefan for permission to shut the program down and do the make-up sessions with Mr. Durocher herself. Mr. Stefan did not give her permission to do that. In his testimony, Mr. Stefan said that he felt that the program should continue because they needed to get on with it and get it completed.
12. Ms. Levesque explained that the sessions Mr. Durocher missed related to the emotional component of the program. When he returned from court, she observed that he was having difficulty keeping up with the group and at times appeared distressed. She was of the view that the sessions that Mr. Durocher missed had a negative impact on his ability to meet his targets. The fact that Mr. Durocher missed these sessions and was not offered any make-up sessions is one of the reasons Defence argues the evidence does not establish intractability. I will return to this later in this Ruling.
13. As noted above, Mr. Durocher faced institutional charges on a number of occasions for being involved with tattooing while he was at Bowden. This continued while he was in the AHISOP program. Although program suspension is not used as a punishment in the institutions, Mr. Durocher's continued breaches of institutional rules was putting his ability to continue with the program in jeopardy in two ways: first, if he received segregation as a punishment, he would miss more program sessions which could eventually result in his suspension; second, if his security classification was upgraded to high, he would be transferred out of Bowden.
14. Just as Mr. Kennedy had, Ms. Levesque talked to Mr. Durocher about the potential consequences of his continued involvement with tattooing. She confronted him about choosing to continue to engage in this activity knowing it was jeopardizing his ability to stay in the program. Mr. Durocher's response was that he would never stop tattooing.
15. On October 9, 2018, Mr. Durocher missed a program session because he was confined to his cell as a result of his behaviour in the living unit. This led to his suspension from the program.
16. In her final report, Ms. Levesque noted that Mr. Durocher's attitude and behaviour regarding tattooing, and his determination not to stop engaging in this activity at a time when he knew it would jeopardize his ability to remain in the program, is consistent with his sexual offending, in that it shows he will satisfy his needs and choose to ignore the consequences. In her opinion, his risk remained unchanged.
17. Ms. Levesque’s report includes notes from Elder Lashmore. She was the main Elder involved in the program. Mr. Durocher had engaged with her. Elder Lashmore indicated that Mr. Durocher, during the group sessions, chose to use manipulation and interruptions, which was not helpful to him or to the other participants. Elder Lashmore did not think Mr. Durocher was ready to move forward with the program, although she was of the view that there is potential for success in the future, given Mr. Durocher's intelligence and skills.

E. Opinion Evidence

1. Dr. Alberto Choy is a forensic psychiatrist. Dr. Theresa Van Domselaar is a forensic psychologist. Together, they performed the court-ordered assessment of Mr. Durocher. They prepared reports and testified about their methodology and the conclusions they arrived at.

1. Dr. Choy

1. Dr. Choy's first report was prepared in December 2016. He produced other reports to update his opinion based on new information provided to him. All the reports were filed as exhibits at the hearing. He testified in June 2018 and again in December 2018. He explained that in carrying out his assessment, he reviewed background materials, interviewed Mr. Durocher and used a number of risk assessment instruments.
2. In speaking with Mr. Durocher, Dr. Choy observed that he had a general pattern of minimizing his responsibility and would frequently attempt to shift responsibility away from himself when disclosing something that may put him in a negative light. He consistently denied or minimized his responsibility with respect to his criminal history.
3. Dr. Choy found that Mr. Durocher does not suffer from any major mental illness or disorder. He noted the presence of anti-social personality traits such as being irresponsible, un-empathetic, reckless, a tendency to view his needs above others, and a pattern of violating social rules and the rights of others for his own purpose. Dr. Choy was not able to diagnose an anti-social personality disorder because that diagnosis requires evidence of anti-social conduct before adulthood.
4. Dr. Choy also diagnosed Mr. Durocher as having mild cannabis use disorder. Dr. Choy did not consider this disorder severe as cannabis use did not appear to be linked to the commission of offenses or dysfunctional behaviour.
5. Dr. Choy noted that although Mr. Durocher described his sex drive as medium, this was not in line with his account of the frequency of his sexual relationships. He concluded that Mr. Durocher’s preoccupation for sex may be much greater than he is willing to admit.
6. Dr. Choy scored Mr. Durocher on the Psychopathy Checklist-Revised (PCL-R). The general population scores 7 or 8 on this instrument. The average score for the correctional population is in the low 20's. A score of 30 or more allows a diagnosis of psychopathy.
7. Mr. Durocher's score was 26. Dr. Choy explained that this high score does not mean that Mr. Durocher cannot succeed in treatment. However, people who score high on this instrument are more likely to have an offending history that lasts longer through life, to be more violent in their offending and to be more resistant to treatment. They also have a tendency to fail more often and more quickly when they are under supervision in the community.
8. Dr. Choy also used the Static-99 and the Violent Risk Appraisal Guide - Revised (VRAG-R), two actuarial-based instruments, to assist him in assessing Mr. Durocher's risk. For each of these instruments, the person conducting the assessment assigns scores in various areas. The final score places the person being assessed in one of several categories of risk of recidivism in comparison with cohorts of offenders. On both the Static-99R and the VRAG-R, Mr. Durocher's scores placed him in the highest category of risk of recidivism.
9. Dr. Choy also scored Mr. Durocher on the Violence Risk Scale Sexual Offender Version (VRS-SO). Dr. Choy explained that this instrument includes statistical measurements, but also measures short-term clinical variables that have an impact on risk as well as an offender’s readiness for treatment. Dr. Choy’s conclusion, based on this instrument, was that there were a number of changes that Mr. Durocher would need to make to manage his risk. He rated Mr. Durocher's treatment needs as high to moderate. Dr. Choy’s greatest concern was that Mr. Durocher was very far from understanding his treatment needs and the treatment targets he would need to have in order to address his behaviour.
10. Dr. Choy was asked if he was aware that many of the instruments he used have been criticized for their cultural bias. He explained that he was aware of these criticisms and was mindful of them as he scored the instruments.
11. Dr. Choy gave specific examples of how he adjusted his scoring to take into account Mr. Durocher's background. On one of the instruments, truancy in school, is one of the factors that must be scored. Dr. Choy explained that he assigned a lower score than he might otherwise have on this factor because he knew Mr. Durocher grew up on a reserve and was aware that truancy can be more common on reserves that in other environments. Similarly, in scoring Mr. Durocher for "shallow affect" on the PCL-R instrument, Dr. Choy was cautious because he was aware that Mr. Durocher’s history of trauma could have an impact on how he presents.
12. Dr. Choy also testified that there has been, over the past few years, considerable research about whether certain instruments are valid for use in risk assessment of indigenous offenders. He explained that this research has validated some of the instruments for this use. Others have not been validated and he did not use them.
13. When Dr. Choy performed the court-ordered assessment of Mr. Durocher in 2016, Mr. Durocher had not yet had access to any programming. Dr. Choy's opinion was that it was reasonably possible that Mr. Durocher, despite his lack of insight and poor motivation to change at the time, could, with the benefit of treatment programs, learn to manage his risk in the community. This was in part because Mr. Durocher has no mental illnesses or other obvious barriers to treatment.
14. By the time he testified in June 2018, Dr. Choy had information about Mr. Durocher's poor performance in CSC programs he had taken up to that point. He felt that Mr. Durocher's lack of engagement in the programs was a reason to be pessimistic about his ability to address his risk factors in the future. Dr. Choy found Mr. Durocher's attitude and performance in his programs particularly disturbing given that this occurred while he was in the midst of his sentencing hearing, and knew the stakes were very high. This opinion was reinforced when he testified the second time in December 2018.
15. On the whole, Dr. Choy's opinion was that Mr. Durocher's impulsivity, lack of empathy, and tendency to place his needs above those of others, combined with a possible significant preoccupation with sex and external factors such as substance abuse, are the probable explanations for his offending behaviour. Mr. Durocher denied any interest in coercive sexual contact but Dr. Choy noted that if such a paraphilia is present, it would further explain Mr. Durocher's sexual offending.
16. Dr. Choy concluded that there is a substantial risk that Mr. Durocher will reoffend violently and sexually. In the absence of any positive evidence that Mr. Durocher will be able to benefit from treatment in the future, Dr. Choy concluded that ageing is the only factor that will mitigate his risk, as the manifestation of anti-social personality traits tends to attenuate over time. He concluded that the management of Mr. Durocher's risk would require very close supervision until at least his late 50's or 60's.

2. Dr. Theresa Van Domselaar

1. Dr. Van Domselaar provided opinion evidence based on information she had access to from various sources, including tests she administered to Mr. Durocher and interviews she had with him. She had access to collateral information provided by Mr. Kennedy, Dr. Choy, documentary materials, and a variety of personality and cognitive psychological tests that were administered to Mr. Durocher by a psychometrist. Generally speaking, her conclusions were in line with Dr. Choy’s. She concluded that Mr. Durocher does not suffer from any mental illness or mood disorders.
2. Some of the tests performed with Mr. Durocher are designed to identify whether or not a person is being genuine in their answers. Dr. Van Domselaar determined that Mr. Durocher deliberately performed poorly on some of the tests that were administered, and that the results suggest that he may have been attempting to undercut his cognitive abilities. He made a concrete effort to feign poor cognitive functioning. This is corroborated by the evidence of Mr. Kennedy, who testified that Mr. Durocher admitted that he deliberately did poorly on some of the tests because he felt it would be to his advantage to present as having a mental illness or cognitive challenges.
3. Given the indications that Mr. Durocher deliberately under-performed on some of the tests, Dr. Van Domselaar was of the view that all results of the psychological tests should be approached with caution.
4. She acknowledged in cross-examination that she did not have a lot of information about Mr. Durocher's teenage years, although Dr. Choy relayed some of the information he had obtained from Mr. Durocher's mother.
5. Dr. Van Domselaar testified that in his interviews with her, Mr. Durocher frequently engaged in impression management. When she discussed his past offenses with Mr. Durocher, he minimized his responsibility. He insisted that his sexual offenses were not violent and tended to blame his victims for misrepresenting or misunderstanding what happened.
6. He also told her he has a low sex drive and expressed disdain for anal sex. Dr. Van Domselaar was of the view this may have been an attempt to make others believe that there were no issues with his sexual behaviour. In fact, he appeared to attempt to portray himself as nearly asexual. According to her, this type of impression management is common in untreated sexual offenders.
7. Dr. Van Domselaar scored Mr. Durocher on the STATIC-99R, the VRAG-R, and another instrument called the Historical Clinical Risk 20. The results in all three suggested that Mr. Durocher presents a high risk to re-offend.
8. She also scored him on the PCL-R and arrived at a score of 27, one more point than what Dr. Choy had arrived at.
9. She scored him as well on the STABLE-2007. As this instrument has not been validated for indigenous offenders, she did not use it for the purposes of her risk assessment. She used it instead to identify treatment targets.
10. Based on all of the information she had access to, Dr. Van Domselaar concluded that Mr. Durocher has a high risk of sexual and violent recidivism. In her view, his risk would be very difficult to manage in the community given his personality traits and his behaviour patterns. She concluded that he does not have any major mental illness, learning disability, cognitive disability or substance abuse issues that would be an obstacle to his treatability. The main obstacles to his treatability are his personality characteristics and his lack of motivation.
11. At the time Dr. Van Domselaar did her assessment, Mr. Durocher had been accepted in the High Intensity Sexual Offender Program, but the program had not yet started. She testified that his performance in that program would be very telling about his commitment to make genuine changes in his attitudes and behaviours. She expected he would encounter difficulties in that program. She also thought that access to culturally relevant programs would maximize his chances of success.
12. Dr. Van Domselaar was of the view that even if Mr. Durocher successfully completed treatment programs, he would still need intense levels of supervision in the community in order to manage his risk. She felt this would be a lifetime requirement for him, and that he may not do well under supervision because following directions is a challenge for him.
13. POSITIONS OF THE PARTIES

A. The Crown

1. The Crown argues that Mr. Durocher should be designated a dangerous offender. It relies on the number of sexual offenses he has committed and his inability to make any meaningful gains in the correctional programs he took over several years at Bowden. The Crown also relies on Mr. Durocher's persistent breaches of institutional rules as further evidence that he is unable to control his impulsivity and to comply with rules. The Crown relies as well on the opinion of the two expert witnesses who performed the court-ordered assessment and were pessimistic about his ability to address his risk factors in the future.
2. The Crown argues that this evidence demonstrates that Mr. Durocher's conduct is intractable. The Crown notes that there is no tangible evidence suggesting that Mr. Durocher will be able to address his risk factors to an acceptable level in the foreseeable future, leaving ageing as the only known risk reducing factor. That being so, the Crown argues that the only sentence that can ensure external controls will be in place for Mr. Durocher for a sufficient period of time is an indeterminate sentence.

B. The Defence

1. As noted above at Paragraph 10, Defence concedes that the sexual assault committed against J.S. is a serious personal injury offence. Defence also concedes that the Crown has established that it is part of a broader pattern of violence, and that Mr. Durocher presents a high likelihood of harmful recidivism. Defence argues that Mr. Durocher should not be designated a dangerous offender because the Crown has not established beyond a reasonable doubt that his conduct is intractable.
2. Defence's position is that Mr. Durocher should be designated a Long Term Offender and be sentenced to a determinate sentence followed by a Long Term Supervision Order. Defence argues that such a sentence would enable Mr. Durocher to take relevant programming to address his risk factors and be under supervision for an extended period of time once released. Defence argues that the imposition of an indeterminate sentence would not be consistent with approaching the matter from a perspective of restraint, as is required in sentencing an indigenous offender.
3. ANALYSIS

A. The Designation Stage

1. As I already noted, given the concessions made by Defence, the only issue to be decided at the designation stage is whether the Crown has proven beyond a reasonable doubt that Mr. Durocher’s conduct is intractable.
2. There are several aspects of the evidence adduced by the Crown that support the conclusion that Mr. Durocher is not able to surmount his conduct.
3. First, he has committed several serious sexual assaults in the span of a few years. Some of these were committed while he was on process for other sexual assault charges. Facing serious charges and being on court-ordered conditions does not seem to have had any effect on his ability to restrain himself.
4. Second, he has not shown any ability to restrain his behaviour and impulses and comply with rules, even in the highly structured and controlled setting of a federal penitentiary. He has breached institutional rules at a frequency higher than the average offender. Perhaps more significantly, he has continued to breach these rules knowing that doing so would jeopardize his ability to continue with programming.
5. Third, he has had access to highly intense and culturally relevant programs while at Bowden and has made no meaningful gains towards managing his risk. In addition, his behaviour during those programs was consistently disruptive and problematic.
6. Mr. Durocher persisted in this conduct even at a time when it would have been clear to him that the stakes were very high. In particular, just as he was beginning the AHISOP program, he heard the testimony of several witnesses during the first week of the hearing on this Application in June 2018. He heard these witnesses describe his behavioural problems in programs, the concerns that this raised about his treatability, and how telling his performance at AHISOP would be.
7. Later on, he was given clear warnings by Mr. Kennedy and by Ms. Levesque about the consequences of continuing to breach institutional rules, yet he persisted and told both of them he would never stop tattooing.
8. Finally, the two experts who performed the court-ordered assessment came to the conclusion that Mr. Durocher’s risk of recidivism is very high at this time and will remain very high in the foreseeable future. They both concluded that Mr. Durocher’s anti-social personality traits were at the root of his criminality and that those traits would present considerable hurdles for him in developing self-control and being able to manage his risk. Mr. Durocher’s behaviour in the institution and his problematic behaviour in programming confirms that the experts' concerns in this regard are well founded.
9. Despite this evidence, Defence argues that there are significant shortcomings in the Crown’s case on intractability when one takes into consideration Mr. Durocher’s circumstances, the trauma he has suffered, and aspects of his correctional history. Defence also calls into question the reliability of the opinions expressed by the two experts.

1. Impact of Time Mr. Durocher Spent in Segregation

1. Defence argues that Mr. Durocher's first significant contact with the correctional system, his time at the PRCC, was very harmful to his mental health generally speaking, and more specifically set him back considerably in his ability to be responsive to programming.
2. The evidence of Ms. O'Toole about the detention conditions in the segregation units at PRCC, in particular the unit referred to as “the dark side”, raises serious concerns, especially considering that Mr. Durocher was detained in those units for extended periods of time.
3. As noted above, Ms. O'Toole explained that the standard practice at PRCC was to give prisoners who were considered to be at risk a "choice" between signing a waiver absolving Alberta Corrections of any responsibility if they were harmed, or being confined to their cell 23 hours a day. For anyone who, like Mr. Durocher, refused to sign the waiver form, this meant being permanently housed in the segregation units. This had nothing to do with an inmate’s poor institutional behaviour. It was simply that institution’s version of “protective custody”.
4. Being detained in these types of conditions for extended periods of time is not conducive in any way to rehabilitation. The contrary is true. It could be argued that this type of situation calls into question the legitimacy of the correctional system as a whole. In a very different context, the point about the importance of detention conditions and treatment of prisoners being humane and adhering to certain minimum standards was made in this jurisdiction in *R v Palmentier*, 2014 NWTTC 10.
5. The Crown has pointed out that Alberta Corrections is not on trial in these proceedings. That is true. The issue on this Application is not whether the detention conditions and the policies in place at PRCC at the time were appropriate. Rather, the issue for this Court is whether Mr. Durocher's detention conditions mitigates or explains his poor performance in the programs he took at Bowden.
6. Defence did not call any evidence on the deleterious effects of segregation in general, nor about its specific impact on responsiveness to programming. Defence's position is that I can and should take judicial notice of those things.
7. The doctrine of judicial notice dispenses a party from calling evidence to prove a fact. A court may properly take judicial notice of facts that are either so notorious or generally accepted as to not be the subject of debate amongst reasonable persons or facts that are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. *R v Find*, 2001 SCC 32.
8. This can, in some cases, extend to facts previously found by other courts. For example, in *R v Paszczenko*, 2010 ONCA 615, the Ontario Court of Appeal held that judicial notice could be taken of certain assumptions underlying toxicology reports in impaired driving cases, based on the practice and precedent of hundreds of cases. The same court noted in another case, however, that caution is warranted in this area and that a party cannot be permitted to substitute precedent for proof. *R v Levkovic*, 2010 ONCA 830.
9. The harmful effects of administrative segregation have been recognized in Canadian jurisprudence.
10. In *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 (*BCCLA*), the Court made several findings, based on expert evidence presented in that case, about the risk of psychological harm to inmates who are subjected to segregation, including: mental pain and suffering, increased incidence of self-harm and suicide, anxiety, withdrawal, hypersensitivity, loss of control, irritability, aggression, hopelessness, and a sense of impending emotional breakdown. The Court also found that while the most acute symptoms are likely to subside when the segregation ends, many may suffer permanent harm, including a continued intolerance for social interaction which has repercussions for offenders’ ability to successfully re-adjust to the prison's general population. *BCCLA*, paras 247-250.
11. Similar conclusions were recently reached at the appellate level in Ontario, in the context of a challenge to the provisions of the *Corrections and Conditional Release Act*, S.C. 1992, c.20 (*CCRA*) that authorize administrative segregation. Again, expert evidence had been adduced on the application and was accepted by the application judge. On appeal, the Court of Appeal concluded that prolonged administrative segregation exposes inmates to a risk of serious and potentially permanent psychological harm. It declared the impugned provisions of no force and effect because they can result in cruel and unusual punishment, contrary to the *Charter*. *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243. That decision is now under appeal to the Supreme Court of Canada and an interim order staying the execution of that judgment has been granted. *Canada (Attorney General) v Canadian Civil Liberties Association*, [2019] S.C.C.A. No. 96.).
12. I note in passing that the Legislative Assembly of the Northwest Territories has very recently enacted legislation setting strict parameters around the use of segregation in territorial jails, both from the point of view of detention conditions and the amount of time an inmate can be held in segregation. *Corrections Act*, S.N.W.T. 2019, c.18. That statute has not yet been proclaimed in force but its adoption signals a recognition by the Legislative Assembly of the importance of setting clear parameters around this form of detention.
13. At the hearing, Dr. Choy and Dr. Van Domselaar were asked some questions about the impact of segregation on inmates.
14. Dr. Choy agreed with the suggestion that being in solitary confinement has negative effects on a person's mental health and that the deleterious effects of that type of detention would vary depending on the degree and duration of the time spent in isolation. Dr. Van Domselaar testified that the effects of solitary confinement vary from person to person but that it is a difficult situation to cope with for anyone, especially if it lasts for a long time. She said she was "broadly familiar" with the literature about the mental health effects of solitary confinement. She was not asked to elaborate on what those effects are.
15. She was asked what impact segregation would have had on Mr. Durocher’s treatability. She agreed that not having access to any programs at PRCC would mean he would have not been able to build any foundation for future treatment. She also agreed that difficult detention conditions would set a person back compared to where they would have been if they had not been in that kind of setting. She said that there could be some ground to make up in terms of institutional adjustment, building trust, and being inclined to access services.
16. She was not able to specify the number of days or weeks that it would take someone to gain that ground back. She said the longer a person would have been in segregation, the longer it would take to get back to a baseline. She did not think, however, that the negative effects of having been in segregation would be impossible to overcome. She said that it could take weeks or months, but not years.
17. I have no difficulty taking judicial notice of the general proposition that prolonged solitary confinement or segregation has negative consequences for a person's mental health, and that those effects can be long lasting. Strictly speaking, I do not think I need to resort to the doctrine of judicial notice to make that finding because, as I have noted, evidence to this effect was adduced at the hearing through Dr. Choy and Dr. Van Domselaar.
18. Relying on judicial notice to find that there is a connection between the time Mr. Durocher spent in segregation in PRCC and his poor performance in programs in Bowden is more problematic. It is one thing to recognize, as courts have done and as certain international instruments recognize, that solitary confinement is harmful to a prisoner's mental health and well-being. It is another to make specific findings on how time spent in segregation had a specific impact on a specific offender as far as treatability and responsiveness to specific programming 2, 4 and 5 years later.
19. This is especially so because the only evidence before me on the potential effect of segregation on treatability is the testimony of Dr. Van Domselaar. She testified that it would take months, not years, for someone who has spent time in segregation to be ready to engage in programming. It may well be that other experts in the field would hold a different view. However, this demonstrates that this is not a matter that is beyond dispute and so readily ascertainable that I can take judicial notice of it.
20. I conclude that there is not a sufficient evidentiary basis for me to conclude that there is any connection between the time Mr. Durocher spent in administrative segregation in PRCC and his performance on the programs he took after his transfer to Bowden.

2. Unreliability of Expert Evidence

1. Defence has argued that the evidence of Dr. Choy and Dr. Van Domselaar cannot be relied on to conclude that Mr. Durocher's conduct is intractable, for a number of reasons.

i) Use of risk assessment instruments

1. Defence has raised concerns about the use of risk assessment instruments by both experts. The first concern relates to the validity of the instruments for use with an indigenous offender. The second relates to the unreliability of some of the information used in the scoring.
2. The validity of risk assessment instruments for indigenous offenders was challenged in recent years in the context of risk assessment done in the federal correctional system. An inmate, Mr. Ewert, challenged the use by CSC of five risk assessment instruments on the basis that those instruments had been developed and tested predominantly on non-indigenous populations and there was no research confirming that they were valid for the risk assessment of indigenous persons.
3. The trial was held in May and June 2015. Mr. Ewert adduced evidence from an expert that the instruments in question had never been validated for use with indigenous offenders. He argued that by continuing to use these instruments in making various decisions about his situation, CSC breached its obligations under the *CCRA* as well as his *Charter* rights. The trial judge accepted the evidence of the expert and found that Mr. Ewert’s *Charter* rights had been breached. The trial judge found it unnecessary to address the argument based on CSC’s statutory obligations. *Ewert v Canada (Correctional Services)*, [2015] F.C.J. No.1123.
4. The matter was appealed to the Federal Court of Appeal, and ultimately, to the Supreme Court of Canada. The Supreme Court did not find that Mr. Ewert had established a *Charter* breach, but concluded that reliance on the impugned instruments constituted a breach of section 24(1) of the *CCRA* which provides that CSC must take all reasonable steps to ensure that any information that it uses about an offender is accurate, up to date and as complete as possible. *R v Ewert*, 2018 SCC 30.
5. Some of the impugned risk assessment instruments in *Ewert* were used by Dr. Choy and Dr. Van Domselaar in their assessment of Mr. Durocher. They both scored him on the PCL-R, the Static-99, and the VRAG-R. Dr. Choy also used the VRS-SO.
6. The Supreme Court decision in *Ewert* was released the week after Dr. Choy and Dr. Van Domselaar testified in this Court. As I noted in my overview of the evidence, they were both asked about the controversy around the use of risk assessment instruments for indigenous populations. They both testified that, as a result of this controversy, there has been in the last two years considerable research into this issue. They testified that studies have actually validated several of the instruments that they used. Where research did not validate the instruments for use with indigenous populations, they did not use them for risk assessment purposes.
7. Dr. Choy also explained that he was conscious of the inherent bias in these instruments and that it was important to be mindful of that when going through the scoring process. He gave concrete examples of areas where he adjusted his scoring in an effort to counteract any inherent cultural bias that may be built into the instrument.
8. Similarly, Dr. Van Domselaar demonstrated her awareness of the potential issues and concerns with the instruments and how she addressed them. For example, she was aware that the STABLE 2007 instrument has not been validated for use with indigenous offenders. Because of this, she did not use it for the risk assessment itself. She used it as an aid in identifying treatment targets.
9. I conclude that Dr. Choy and Dr. Van Domselaar were both aware of the potential shortcomings of the instruments they used. They were aware of recent studies on this topic. They used the instruments having the benefit of this information and exercised the necessary caution both in the scoring process and in their use of the instruments.
10. Defence has also argued that the results generated by the instruments are not reliable because the scoring depends in part on information obtained from Mr. Durocher. Dr. Van Domselaar concluded that Mr. Durocher attempted to falsify the results of the tests. This, Defence argues, renders the overall results unreliable.
11. Dr. Choy acknowledged that to the extent the information provided by Mr. Durocher could be considered unreliable, this would affect the reliability of the ultimate results. So did Dr. Van Domselaar.
12. However, neither the scoring on the instrument nor these witnesses' overall assessment were based only on information provided by Mr. Durocher. Dr. Choy and Dr. Van Domselaar had access to extensive materials about Mr. Durocher's past offenses, his institutional behaviour, and other information.
13. It is also important to bear in mind that on this Application, Mr. Durocher did not take issue with the fact that he presents a high risk of harmful recidivism. This is one of the things that these instruments measure. In that sense, with respect to present risk, the results of testing with these instruments are entirely in line with a fact that Mr. Durocher has conceded is true.

ii) The inclusion of unproven allegations in the materials reviewed by the experts

1. Defence argues that the experts' conclusions were tainted because they relied on correctional materials that included details of unproven allegations.
2. The materials reviewed by the experts did include unproven allegations. They made reference to certain criminal charges for which Mr. Durocher was not found guilty. They also include references to institutional charges for which he was not found guilty.
3. In addition, with respect to the criminal charges, the CSC materials often refer to allegations in the police reports as opposed to the facts that were admitted or found to have been proven by the courts at trial.
4. Both experts were asked about this. They explained that some of the instruments require taking into account unproven allegations in the scoring. As far as that information tainting their view in a more general way, they acknowledged that they could not "un-know" something once they have read it, but that they understood the difference between proven and unproven allegations and took that into account in formulating their opinions. Finally, they testified that none of their conclusions would be any different if the unproven allegations were entirely removed from the analysis.
5. There may be cases where the Defence's concern about unproven allegations tainting the analysis would have merit, depending on the nature of the unproven allegations and how they compare to the proven ones. For example, if the materials reviewed by the experts contained multiple examples of unproven allegations far more serious than the proven ones, there may come a point where it would be difficult to accept that this information has not compromised their analysis to some extent. That is not the situation here.
6. In this case, there was a large body of material available to the experts that related to proven misconduct. This included information about several serious sexual assaults, and a variety of other crimes that Mr. Durocher was convicted for. As far as his conduct while incarcerated, there was also a clear pattern of breaching institutional rules while he was at Bowden.
7. I do not find that there is any risk, in the circumstances of this case, that the experts could have been influenced by references to unproven allegations in the materials that they reviewed.

iii) Insufficient consideration for Mr. Durocher's indigenous heritage

1. Defence also argues that the experts were not sufficiently sensitive and concerned about Mr. Durocher's indigenous background. They did not obtain sufficient information about his cultural background and his circumstances as an indigenous man to enable those factors to inform their analysis.
2. Again, both Dr. Choy and Dr. Van Domselaar were asked about this. They explained that they were mindful of Mr. Durocher’s indigenous background. This sometimes had an impact on how they scored him on the instruments they used. Perhaps more importantly, Dr. Choy did review the very detailed *Gladue* report and when he testified in December 2018 he said that the information contained in that report did not change any of his conclusions, diagnosis or risk assessment.
3. Mr. Durocher's background and some of the struggles he has faced, as well as other systemic factors that must be taken into account, most likely go a long way to explaining how he got to where he is today. This must be taken into account, but it does not mean that those circumstances reduce the risk he poses. It also does not mean that these circumstances should necessarily lead to a different conclusion about intractability.

iv) Conclusion regarding expert evidence

1. In conclusion, I do not agree with the Defence position that the conclusions reached by the experts in this case are flawed and should not be given any weight.
2. Of course, expert evidence, just like any other type of evidence, must be assessed by the Court. The fact that an expert formed an opinion does not mean that the Court has to accept it in whole or in part. Far from it. However, I reject the submission that this evidence is flawed in the manner suggested by Defence, and that it should carry no weight.

3. Mr. Durocher's performance in the AHISOP

1. Mr. Durocher's poor performance in programs was an important factor in Dr. Choy's increased pessimism about his treatment prospects when he testified in December. Not surprisingly, the Crown also relies heavily on Mr. Durocher's poor performance in programs to support the proposition that his conduct is intractable.
2. While the outcome of Mr. Durocher's participation in all the programs he took is relevant, what transpired during the AHISOP is of particular significance, for a few reasons.
3. First, it was the program he took most recently, and after having had the benefit of other programming. In other words, AHISOP was not his first engagement with programming.
4. Second, AHISOP is a program designed for indigenous sex offenders. Of the programs available in the federal correctional system, it is, by all accounts, the one that is best suited for Mr. Durocher. In addition, it was delivered by Ms. Levesque, an experienced facilitator who I find, based on my assessment of her evidence, was genuinely committed to helping offenders succeed in the program.
5. Third, Mr. Durocher took this program after having heard the testimony of the facilitators who worked with him in the other two programs. He heard them testify about aspects of his behaviour, in particular in the group work, that were disruptive, unhelpful, and obstacles to his making gains towards his treatment targets. He had also heard the testimony of both experts about what they viewed as his challenges, and how his performance in programming would be very telling of his prospects for making gains on his risk factors. In short, he knew what was at stake.
6. Defence argues that Mr. Durocher's inability to complete this program successfully is not an indication of his intractability. Rather, Defence argues, it should be no surprise that he struggled, particularly because just as he was starting to make gains, he missed, for reasons beyond his control, 11 sessions at a crucial point in the program and was not offered make-up sessions. Defence argues that, considering that it is not unusual for offenders to have to take a program more than once before succeeding, at this point there is nothing to suggest that Mr. Durocher will not eventually succeed if given the opportunity to take the AHISOP again.

i) Mr. Durocher's performance before September 2018

1. Given the importance that Defence argues I should give to the fact that Mr. Durocher missed the September sessions, it is necessary to examine his performance in the program before that happened.
2. Exhibit S-20 includes Ms. Levesque's case notes about Mr. Durocher's participation in the AHISOP. These document various issues that arose before the September court dates and include:

* in May, Mr.Durocher was late for the program and lied about why;
* in June, Mr Durocher told Ms. Levesque that he had obtained a copy of the facilitator's manual from his lawyer; this was, obviously, a concern for Ms. Levesque. She eventually was able to determine that this was untrue;
* in July, Mr. Durocher neglected to pick up his medication, which affected his focus and attention in the program. Ms. Levesque told Mr. Durocher that it was important he take his medication to be able to be engaged in the sessions;
* in August, Mr. Durocher missed a morning session. He attended the afternoon one and said he thought it was Sunday so missing the morning session “was both his fault and not his fault”;
* also in August, Mr. Durocher missed a 10:00am appointment with one of the Elders. His explanation was that his alarm went off at 10:30.

1. There is also an entry that refers to a discussion Ms. Levesque had with Mr. Durocher about what would happen if he missed sessions to attend Court in September. The possibility of make-up sessions was discussed. Mr. Durocher immediately responded that he would not work with Mr. Johnson, who was one of the facilitators who did make-up sessions with offenders.
2. It is apparent from these records, as well as from the report prepared by Ms. Levesque after Mr. Durocher was suspended, that he was having behavioural and motivational issues in the program before he missed the September sessions.

ii) The missed sessions

1. As I have already noted, in the context of the August adjournment application, I heard testimony from Ms. Levesque and Mr. Stefan, who both explained that while it was not ideal for Mr. Durocher to miss program sessions, make-up sessions could be made available to him to help him catch up. When proceedings resumed in September, I heard that, in the end, make-up sessions were not offered to him.
2. This gave rise to some controversy and was the subject of conflicting evidence when the hearing resumed in December 2018. Strictly speaking, I do not need to resolve the inconsistencies in this evidence to decide what sentence should be imposed to Mr. Durocher because it is clear he missed those sessions and was not offered make-up sessions. The issue that I have to decide is what impact, if any, this has on my assessment of whether his conduct is intractable.
3. Nevertheless, I found some of the inconsistencies between the testimony of Ms. Levesque and Mr. Stefan very disturbing, particularly considering that they are both CSC employees who have significant responsibilities in delivering programs to offenders within the federal correctional system. Given this, I am compelled to address this aspect of the evidence even if it does not have a bearing on my ultimate conclusions.
4. After Mr. Durocher was suspended from the program in October, and as part of the usual CSC procedures, Ms. Levesque prepared a Program Performance Report about his participation. She uploaded her draft report in the Offender Management System. My understanding of the evidence is that the usual procedure is that Mr. Stefan would then review the report and "lock" it into the system. Ms. Levesque advised Mr. Stefan that her report was in the system. Mr. Stefan later advised her that he had “locked” the report.
5. In the process of preparing for the testimony she was scheduled to give in December, Ms. Levesque reviewed her report in the system. She discovered that it had been substantially edited by Mr. Stefan. In particular, she noted that a lengthy paragraph about the impact on Mr. Durocher of having missed the September sessions had been removed.
6. This upset Ms. Levesque enormously. She testified that her reports had never been edited to that extent before. It was obvious that she was still very upset about this when she testified in December.
7. Ms. Levesque advised Crown counsel of this. Crown counsel, properly so, entered the unedited version of the report as an exhibit at this hearing and adduced evidence from both Ms. Levesque and Mr. Stefan about what happened.
8. Ms. Levesque testified that some time after she discovered the changes that had been made to her report, she confronted Mr. Stefan about it. He confirmed that he had made changes to the draft report. Ms. Levesque's evidence about how the conversation went from there was as follows:

(...) I said you revised it, you made changes, and he said no, just a couple, and I said no, you made multiple changes, you deleted things, you made multiple changes, and I said I, I can't say that I wrote it. I, I have to tell them, and he said you could say I just reviewed it, and I said no, I can't.

Q. Did you ask him why he made the changes?

A. Yes. I said why did you make the changes? I said the report has got important things in it that I felt are important. So he said he changed it to take the light off of the no-make-up sessions.

Q. And what's the, let's say the main thing that is missing from the final report?

A. The make-up sessions when I talk about he - - how he felt, how Cody, how he felt about not having make-up sessions.

1. In his testimony, Mr. Stefan said that these types of reports come to him for quality review and that editing them is part of his job. He said that with some of the newer facilitators he occasionally has to re-write them. His role in editing the reports is to ensure that the reports follow the proper structure and that the content is appropriate. He also said that he does not, as a matter of course, discuss changes with the author of the reports.
2. With respect to Ms. Levesque's report, he explained that he removed portions he felt were redundant, or comments he felt were subjective and not supported by any collateral information.
3. He recalls Ms. Levesque coming to talk to him about the changes to her draft, and that she was concerned about it. His recollection of the discussion they had is different from hers:

(...) she approached me and she asked me about the report and, whether or not - - she said well that's not, you know, there's things in there that - - it's not the same report she said, and she was concerned that I had changed it, and I - - and I - - and I gave her the same explanation, and she was a little concerned about that, I think mostly because she was going to be talking to the courts about it and whether or not that she could speak to whether or not this was her report or not.

Q. And did you discuss with her what she should say if she was questioned about who drafted the report and if any changes were made?

A. Yeah. I told her to be honest. I said yeah, I changed, I changed some things here and there, Kristin. That's part of my job is to, review the report, to make sure that it's, you know, it's saying what it's - - addressing what it's supposed to say. I didn't tell her at all not to, you know, to say, oh no, no, that's she written it, no, no, I didn't. I said just be - - because she was quite concerned at that point and I was unsure what - - I was kind of actually - - I didn't quite understand where she was coming from, and the fact that I had reviewed the report, made some changes here and there, she seemed to be a little caught back by that, I said, you know, that's what we -- that's what happens at every report that gets reviewed, and, you know, make sure you let them know that. That's - - it's still, I mean, it's still her report. I changed a paragraph, a couple of sentences here and there to make it, in my mind, more comprehensible.

1. He acknowledged that they discussed the issue of removal of the paragraph that referred to Mr. Durocher not having received make-up sessions and the effect it had on Mr. Durocher. He testified that he told Ms. Levesque that one of the reasons he took that part out was that this was not why Mr. Durocher was suspended from the program.
2. In Cross-Examination, Mr. Stefan was asked directly whether he was trying to minimize the fact that make-up sessions were not offered to Mr. Durocher. He answered:

You know, that's - - no, because that information is already in the report. It's in the beginning of the report, in the attendance and participation area. We've already identified that those weren't - - that the sessions weren't made up, and in the, in the revision that I made I did state, you know, is unable to make up the materials from these missed sessions.

1. I have difficulties with Mr. Stefan's testimony and his explanations. I have compared Ms. Levesque’s draft report against the edited version. In my view, it is quite a minimization to characterize the edits as "changes here and there" or changes to "a paragraph and a couple of sentences".
2. Mr. Stefan's claim that the paragraph that he deleted was unnecessary, because the information about the sessions not being made up was included elsewhere in the report, is dubious. The deleted paragraph did not just refer to the fact of the missed sessions and the lack of make-up sessions. It mostly addressed the impact that this had on Mr. Durocher. Ms. Levesque included this because she felt it was an important element in the assessment of Mr. Durocher's performance in that program.
3. Another aspect of Mr. Stefan's evidence that I found curious was his answer when Crown counsel asked him what was done to help Mr. Durocher make up the sessions he had missed. He said:

Well, we weren't, we weren't aware that he - - it happened kind of last minute so we weren't able to work ahead with him at all. When we, when the facilitator found out that the sessions were gone she - - perhaps some material - - we were unaware of when he would be coming back, we didn't have the exact information. (...)

1. Aside from being a very confusing answer, it is a rather surprising one. The September court dates had been set for several months. More importantly, the possibility of Mr. Durocher missing sessions because of his September hearing was at the heart of the adjournment application in August. Mr. Stefan had testified at that application. Nothing about Mr. Durocher's having to attend the hearing in Yellowknife in September was "last minute".
2. I found Ms. Levesque's testimony far more convincing and straightforward, both in its content and in its delivery, than Mr. Stefan’s.
3. I conclude that at least one of Mr. Stefan’s objectives in deleting the parts of Ms. Levesque’s report that dealt with missed sessions was to shift the focus away from that fact. I accept Ms. Levesque’s evidence that Mr. Stefan told her as much.
4. In effect, what the Court was told would happen at the time of the August adjournment application - that Mr. Durocher would have the benefit of make-up sessions if he missed parts of the program because of court - did not happen. This may have been an uncomfortable reality for Mr. Stefan, as the Manager of Programs at Bowden and one of the witnesses who had testified make-up sessions would be available; but attempting to obfuscate that fact, obviously, was an entirely inappropriate way to deal with the situation.
5. All that being said, none of the issues to be decided on this Application turn on Mr. Stefan’s credibility. He was involved in the decision to suspend Mr. Durocher from AHISOP, but all the information he had about Mr. Durocher’s performance and behaviour in that program was second-hand information he received from Ms. Levesque. For that reason, the concerns I have about Mr. Stefan’s motivations, credibility or reliability have no bearing on my assessment of this case.

iii) Mr. Durocher's suspension from AHISOP

1. As already noted it is clear from Ms. Levesque's notes and testimony that Mr. Durocher struggled with program content when he returned from Yellowknife after his September court hearing, but there also continued to be behavioural issues.
2. In September, a week after his return to the program, he missed one session because he had to attend "inside court" in relation to an institutional charge. A few days later he did not complete an assignment. He told Ms. Levesque he fell asleep after consuming a mixture he made with Medicine ingredients he had brought back from Yellowknife. That same day he had not taken his medication and was disruptive in the group by interrupting other participants and talking over them, speaking randomly and off topic, and displaying an overall inability to focus. He also expressed concern about not having been provided make-up sessions.
3. The entries from the two last days Mr. Durocher attended the sessions read as follows:

September 27:

DUROCHER was challenged on the subject denial and not taking responsibility for his offending as well as his erratic attention span and how it affects the group as a whole and manipulation within verbal discussions. It was evident he was triggered as he refused to answer direct questions from this facilitator. He indicated his emotions were high with hand gesture and said 'I'm not going to say anything'. DUROCHER reported he gets mixed up when he does not get his meds. He said he can't go to health care because of the crowds and how his anxiety is. DUROCHER stated to this facilitator and to the group - 'I am having trouble opening up because I don't trust the group'

September 28:

DUROCHER arrived at group in what he stated as a 'bad mood' as he reported he had been disrespected. DUROCHER had difficulty with the program session as he had to have instructions for group assignment repeated several times and at times still remained confused. Additionally he would hang his head down and look like he was about to cry, eyes watery looking. At one point a sharing circle was held with Elder Pam Lashmore present and DUROCHER did not speak for himself only against another group participant.

1. The next entry is dated October 9, and refers to Mr. Durocher not being at the morning session as a result of being confined to his cell for disruptive behaviour in his living unit. Mr. Durocher was suspended from the program at that point.
2. Exhibit S-20 includes a document entitled "Offender Suspension From A Program Assignment". It is dated October 10, 2018, which is the day after Mr. Durocher missed a session because he was confined to his cell.
3. The following appears under the heading “Reason(s) for the suspension”:

Ongoing behavioural issues within the program sessions and missing too many group (and ceremony) sessions essential to effectively address his risk & personal targets.

DUROCHER was often disruptive during group sessions, interrupting other members of the group and manipulating discussions, making it difficult for others to focus on the session objectives and address their own personal program targets. DUROCHER missed 14 group sessions. Although many of these sessions were missed due to outside court, he also missed several sessions due to his problematic behaviour and involvement in sub-culture activities (attending Inst. Court, meeting with Unit CM and officers to address ongoing behavioural concerns). DUROCHER missed a morning group session as well as a 1-1 session with the Program Elder because he slept in. On another occasion DUROCHER arrived late to group and lied to the facilitator stating he was getting his meds, however Healthcare confirmed that he had not been there that morning.

1. Mr. Stefan signed this document, but the information provided is consistent with Ms. Levesque's file notes. She confirmed in her testimony that she agreed with the contents.
2. I accept that the sessions that Mr. Durocher missed in September set him back even further and made it more difficult for him to follow along with the program; but he had displayed behavioural and attitude problems in this program well before then. This is also conduct he had displayed when involved in the other two correctional programs he took at Bowden.
3. Ms. Levesque's final report - and here I refer to her unedited draft, Exhibit S-21 - addressed those issues. She noted that although Mr. Durocher frequently said how important the program was for him, he demonstrated an inconsistent attitude and questionable motivation. She noted that one of the biggest concerns she had was his inability or unwillingness to give a straight answer. He had an ongoing pattern of interrupting her and other participants, or answering for other participants. He had issues with focus and did not follow his medication schedule.
4. She noted that, in contrast, Mr. Durocher demonstrated that he could maintain focus on topics that were meaningful to him.
5. Ms. Levesque further noted that Mr. Durocher continued to minimize his sexual offending. Defence counsel noted that some of the offence summaries in the CSC materials are not the facts as found in the court proceedings and that since this is the information Ms. Levesque used when attempting to discuss Mr. Durocher's offenses with him, this may explain the way he reacted. That is a fair point; but it would be much more compelling if Mr. Durocher, while disagreeing with the information put forward by Ms. Levesque, acknowledged some wrongdoing. He did not.
6. For example, with respect to the 2010 offence committed against H.A., Mr. Durocher wrote in one of his assignments "she started kissing me and rubbing me I thought she wanted to have sex". This bears no resemblance to the facts of that offence. Those facts were that Mr. Durocher took H.A. by the arm, took her into the bushes, and had forced vaginal intercourse with her.
7. Ms. Levesque also noted the gap between Mr. Durocher’s words and his actions. In her report, she writes:

Mr. DUROCHER is quite adept at verbalizing his motivation and commitment to stop his impulsivity and resist temptations however there is very little evidence he is capable of enforcing this. As an example Mr. DUROCHER continues to accrue institutional charges even while he is fully aware of the possible consequences of being suspended from the program should this behaviour continue. Prior to his suspension a discussion was had with Mr. DUROCHER as to his most recent charge for housing contraband within his cell. Tatoo paraphernalia items were found to which Mr. DUROCHER stated "I didn't even know it was there". When pressed for honesty Mr. DUROCHER stated "I won't quit tatooing. It will be employment when I get out". He then proceeded to pull up the left pant leg of his jeans to show the progress of his tatoo work on his lower leg. He stated "I work on this one when we are locked down". He was asked the question "Why would you continue to risk institutional charges which then put you at risk to be suspended from the program?". Mr. DUROCHER stated "I will never stop tatooing". In a nutshell Mr. DUROCHER still exhibits behaviour that is consistent with his sexual offending - MR. DUROCHER will continue to satisfy his needs of getting what he wants when he wants it and in doing so choose to ignore the consequences of his actions.

1. This is entirely consistent with the observations of the other facilitators who worked with Mr. Durocher in programs. It is also consistent with Elder Lashmore's comments, referred to above at Paragraph 134. Elder Lashmore indicated that she did not think Mr. Durocher has the tools or understanding to move forward in the program and that he is "far from ready".
2. While Mr. Durocher's suspension from the AHISOP was the result of an accumulation of factors, I conclude that it was primarily due to his behaviour and lack of true engagement.

4. Conclusion on Designation

1. The onus is not on Mr. Durocher to prove that his conduct is not intractable. It is for the Crown to prove beyond a reasonable doubt that it is.
2. I conclude that there is a compelling body of evidence that establishes the intractability of Mr. Durocher's conduct.
3. First, he committed several sexual offenses in a relatively short time span. This behaviour continued after he was first charged and was on process. Some of his other criminal convictions also demonstrate an inability to control his impulses.
4. Accepting, as I do, that his behaviour at the PRCC is not probative of anything given the detention conditions he was in, his institutional behaviour at the Bowden Institution demonstrates a consistent pattern of an inability to comply with institutional rules.
5. In particular, Mr. Durocher was persistent in engaging in tattooing. Tattooing is not illegal. In fact it is a pro-social activity and a legitimate source of income; but it is not permitted in federal institutions. Mr. Durocher has known this for a long time and has continued to do it. He has continued to place his desire to do so above everything else, at the expense of his chances of being released in the future. Mr. Durocher made it clear to Ms. Levesque and to Mr. Kennedy that no matter what the consequences, he would never stop. This speaks volumes about his ability to surmount his impulsivity and some of the manifestations of his anti-social traits.
6. Mr. Durocher has, since his transfer to Bowden, been given opportunities to begin addressing his risk factors. Many people attempted to assist him and help him succeed. On the evidence before me, he has not made any real gains towards addressing his risk factors, despite having access to culturally relevant programs.
7. The evidence from the experts, which is uncontradicted, is that for Mr. Durocher, the main barrier to treatment is the motivation to truly engage. It is difficult to imagine a higher source of motivation than facing the potential consequences of this hearing. If that was not sufficient to motivate him to make some concrete changes, it is difficult to imagine what will.
8. In short, the evidence of what happened when Mr. Durocher was given an opportunity to engage meaningfully in a process of change is in line with what Dr. Van Domselaar had predicted when she assessed him, and also in line with Dr. Choy’s opinion that his anti-social personality traits and his lack of motivation will make it exceedingly difficult to succeed in programs and treatment.
9. I conclude that the Crown has established beyond a reasonable doubt that Mr. Durocher's conduct is intractable and that he should be designated a dangerous offender.

B. The penalty stage

1. The available sentences

1. A dangerous offender designation does not create a presumption that an indeterminate sentence should be imposed. The three options available to the Court are the imposition of a sentence under the usual sentencing regime, the imposition of a determinate sentence followed by a Long Term Supervision Order for a maximum period of 10 years, or an indeterminate sentence.
2. The Defence acknowledges that a determinate sentence under the usual regime would not be an appropriate penalty in this case. This is a realistic concession. The evidence clearly establishes that, one way or another, Mr. Durocher’s eventual reintegration in the community will need to be progressive and will require that he be subject to external controls for a significant period of time. A determinate sentence, standing alone, would be woefully inadequate to protect the public.
3. Before I turn to the appropriate penalty in this case, I want to address a few preliminary issues about the parameters that govern the determinate sentence that is available in the context of this case.
4. The first issue is the maximum sentence that applies to the two charges that Mr. Durocher is to be sentenced for.
5. At the time the offenses were committed, the maximum penalty for sexual assault and sexual interference was 10 years imprisonment. Since then, these have been increased to 14 years imprisonment where the victim is under the age of 16 years old. J.S. was under 16 at the time of the offenses.
6. Paragraph 11(i) of the *Charter* provides that if a penalty for an offence changes between the time the offence is committed and sentencing, the offender is entitled to the benefit of the lesser of the two penalties. Under the usual sentencing regime, this would mean that the maximum sentence for each of these offenses would be 10 years.
7. Here, the imposition of a determinate sentence followed by a L.T.S.O. would be more advantageous to Mr. Durocher than the imposition of an indeterminate sentence. In that sense, the higher maximum penalty gives the sentencing court more options and may result in avoiding the imposition of an indeterminate sentence. In these circumstances, I conclude that Paragraph 11(i) of the *Charter* requires that the maximum determinate sentence available to the Court be 14 years. Defence concedes that this is so.
8. The second issue is whether, in considering the imposition of a determinate sentence, the Court is limited to the range of sentence that would be proportionate to the offences committed under the usual sentencing regime.
9. In my view, the answer is no. Although dangerous offender proceedings are sentencing proceedings, they operate differently from the usual sentencing regime because the protection of the public is an enhanced sentencing objective. Since *Boutillier* makes clear that the sentencing court is required to exhaust all possible options before imposing an indeterminate sentence, it seems to me it must be open to the sentencing court to impose a determinate sentence that is longer than what might otherwise be imposed under the ordinary sentencing regime, if this can avoid the imposition of an indeterminate sentence. In this respect I agree entirely with the approach in *R v Spilman*, 2018 ONCA 552 and *R v Cosman*, 2018 ABCA 388.
10. The third issue is whether it is open to me to impose consecutive sentences in this matter.
11. In *Spilman*, while the Ontario Court of Appeal found that a sentence that would otherwise be disproportionate to the offence could be imposed in these types of proceedings, it also found that there are certain limits to what the sentencing court can do: the sentence imposed must not exceed the maximum sentence available for the offence; the sentence must not be entirely disconnected from the circumstances of the offence that gives rise to the proceedings; and the sentence must be responsive to the evidence adduced at the hearing. *Spilman*, paras 52-54.
12. In this case, the factual basis for the conviction for sexual interference (kissing J.S. on the lips) is part of the same ongoing chain of events as the factual basis for his conviction for sexual assault (forced anal intercourse on J.S.). Under those circumstances, in my view, the imposition of consecutive sentences would be, in the words of *Spilman*, "entirely disconnected from the circumstances of the offence". For that reason consecutive sentences cannot be imposed.
13. In summary, the two sentencing options available to the Court are an indeterminate sentence or a jail term of a maximum of 14 years followed by a L.T.S.O. of a maximum duration of 10 years.

2. Mechanisms that govern the release of offenders

1. In considering what sentence is adequate to protect the public, regard must be had for the mechanisms that govern the release of offenders serving a federal sentence and the means available to CSC and the National Parole Board to supervise those offenders in the community.
2. James Gonzo testified at length about this topic. In addition, the Crown filed Exhibit S-17, a document entitled *Correctional Services of Canada Court Information* *Report*, which includes detailed information about this. Cindy Sparvier also testified about the management of offenders on release, with a focus on the management of such offenders in the Northwest Territories.
3. For present purposes, the most relevant forms of release for offenders serving a federal sentence are statutory release, day parole and full parole. The eligibility for these forms of release depends on the type of sentence the offender is serving.
4. The large majority of offenders serving a determinate sentence become eligible for statutory release after serving two thirds of a determinate sentence. In rare circumstances, CSC may recommend to the National Parole Board that an offender remain in custody until the sentence has been fully served (warrant expiry date). Statutory release is not available to offenders serving an indeterminate sentence.
5. To be detained until warrant expiry date, an offender has to meet one of three criteria: likelihood of committing a sexual offence involving a child; likelihood of committing a serious drug offence; or likelihood of committing an offence causing death or serious harm to another person. The decision about whether an offender will remain in custody until warrant expiry date is made by the National Parole Board.
6. As for parole, a person serving a determinate sentence is eligible for parole after serving one third of the sentence or seven years, whichever is less. That person is eligible for day parole six months before that date. A person serving an indeterminate sentence is eligible for full parole 7 years after his or her arrest, and for day parole 4 years after arrest.
7. The CSC makes recommendations about the conditions that should govern day parole and full parole. The National Parole Board is responsible for making the ultimate decision as to what conditions will be put in place. The same is true for conditions that are included in an L.T.S.O.
8. Mr. Gonzo explained that all offenders released on day parole are subject to a residency requirement. Offenders on day parole have to live in halfway houses. Those can be facilities operated by the CSC or private facilities that CSC contracts with. Residency requirements can also be imposed as part of full parole, or as part of an L.T.S.O. Again, the National Parole Board decides whether a residency requirement should be imposed.
9. Mr. Gonzo testified that programming is never forced on an offender, but in practice the failure to take programs or to succeed at programs may have an impact on that offender's release.
10. He explained that for an offender serving an indeterminate sentence, taking programming is the only practical way to get the point of being supported by CSC on an application for release on parole.
11. He also explained that although only a small proportion of offenders serving determinate sentences are held until warrant expiry date, an offender serving a determinate sentence to be followed by a L.T.S.O. who does not successfully take programs is more likely to be part of that small group.
12. Both Mr. Gonzo and Ms. Sparvier testified about the different levels of supervision an offender may be under while on release in the community.
13. The most intensive form of supervision requires the offender to meet with the parole officer eight times a month. Parole officers may direct an offender to report more frequently than that from time to time if they feel that doing so is necessary to manage an increase in risk. However, that level of supervision is not sustainable in the long term. If the risk becomes so high that an offender requires constant monitoring, that offender, arguably, should not be at large and might be subject to a parole revocation.
14. Mr. Durocher's arrest on the charges he is now being sentenced on dates back to January 2014. Given this, somewhat ironically, he will be eligible for day parole immediately if he receives an indeterminate sentence, whereas if he receives a determinate sentence, he will not be eligible until after having served a part of that sentence. He could also well be eligible for full parole sooner if he receives an indeterminate sentence.
15. Practically speaking, of course, one would hope that CSC would not recommend, and the National Parole Board would not grant, any form of parole to an untreated sexual offender such as Mr. Durocher, who presents a high risk to reoffend. The fact is, however, that no matter what sentence is imposed, the National Parole Board is the agency that will have the power to decide, for a significant period of time, when Mr. Durocher will be released in the community, and on what terms.
16. Mr. Gonzo testified about what happens when an offender who is on parole, or bound by an L.T.S.O., breaches one of the conditions set by the National Parole Board.
17. For an offender on parole, this can lead to parole revocation and ultimately, the offender's re-incarceration. Parole eligibility is then recalculated based on the portion of the sentence that remains to be served.
18. For an offender on an L.T.S.O., in the event of a breach, the offender can be taken back into custody. A decision is then made about whether a breach charge will be pursued. The offender can be detained for a maximum period of 90 days while this decision is made. If no charge is laid, the offender is released. If a breach charge is laid, the usual bail process is triggered and that is what determines whether the offender will be detained or at large until the charge is dealt with.
19. Importantly if an offender who has been designated a dangerous offender is convicted of a breach of an L.T.S.O., the Crown can apply for an assessment and ultimately seek to have an indeterminate sentence, or a further period of Long Term Supervision, imposed on the breach charge. *Criminal Code*, s.753.01.

3. Appropriate Penalty

1. If I impose an indeterminate sentence on Mr. Durocher, the National Parole Board will have the ability to deny him release until he has successfully engaged in programs and reduced his risk. If Mr. Durocher achieves release on parole, the Board will have the ability to have external controls placed on him for the rest of his life.
2. By contrast, if I impose a determinate sentence on Mr. Durocher, he will necessarily be released, whether he has successfully engaged in programming or not. The CSC may apply to have him remain in custody until his warrant expiry date, but, at the latest, he will be released at that point. In the next stage of the sentence, the National Parole Board will have the power to impose conditions while the L.T.S.O. is in effect. At the expiration of the L.T.S.O., Mr. Durocher will no longer be subject to any form of external controls.
3. In Dr. Choy's opinion, Mr. Durocher will likely continue to struggle to find the motivation to truly engage in interventions that will assist him in making the changes he needs to make in his life. Dr. Choy expressed the view that it may not be until Mr. Durocher reaches his late 50's or 60's that his risk might be manageable in the community. This opinion is based in part on Mr. Durocher’s institutional behaviour, his poor performance in programs, the result of the scoring on the risk assessment instruments and Dr. Choy's and Dr. Van Domselaar's clinical assessments.
4. The risk assessment instruments show that, statistically speaking, there is a reduction of risk as offenders age. In addition, anti-social personality traits generally tend to attenuate with age. As Mr. Durocher's anti-social personality's traits are believed to be the main reason for his offending, the passage of time can be expected to result in a reduction of his risk factors.
5. In addition, one theme that emerges from the correctional record, the program reports, and the experts' testimony, is that Mr. Durocher is intellectually capable of understanding the concepts that are taught in correctional programs. He is capable of focus when he wants to be focused. In short, he has the capacity to take programming. He has not refused to participate in programming. He has shown interest, particularly in the culturally relevant components of the programs. His main barrier to making gains has been his inability to remain motivated, his inability to control his impulsivity, and his unwillingness to set aside his own grievances or desires to meaningfully engage in a true process of change.
6. The evidence also establishes that Mr. Durocher has been exposed to a significant amount of trauma. The information about this does not come only from his own narrative in the *Gladue* report. It comes from other persons the author of the report spoke to. Ms. Levesque explained that the first step in treatment is acknowledging and addressing this type of trauma. The experts testified to the same effect. Everyone seems to agree that this is an essential step for Mr. Durocher.
7. Ms. Levesque also said that she thought Mr. Durocher was beginning to acknowledge some of his trauma. He also told her at one point that he did not trust the group. While this may not seem, at first blush, to be a particularly positive thing, in Ms. Levesque's eyes it was "huge", because it meant he was starting to look at his feelings and to be honest about them.
8. As I already noted, Mr. Durocher has no mental illness or cognitive barrier to treatment. On the evidence before me, there is also no diagnosis of a sexual disorder. In addition, Mr. Durocher can count on strong family support as part of an eventual risk management plan. His positive work history could also be very helpful in that regard; and it can be expected, statistically speaking and given that his anti-social traits are the main reason for his offending, that his risk will diminish as he ages.
9. Several aspects of the evidence that led me to the conclusion that Mr. Durocher should be designated a dangerous offender also suggest that public protection requires that there be controls and monitoring of his behaviour for a very significant period of time. I am referring here specifically to the evidence about his performance and attitudes while taking programs; his institutional behaviour; his anti-social personality traits; the opinions of the experts; and Mr. Durocher's inability to comply with court orders in the past.
10. It is also of great concern that Mr. Durocher expressed to Mr. Kennedy that his plan and hope was to finish serving his sentence and be released into the community without any forms of outside controls. This speaks volumes about Mr. Durocher complete lack of insight into his behaviour and the risk he presents. That type of attitude is also very common in untreated sexual offenders.
11. The fact is that the worst thing that could happen would be for Mr. Durocher to find himself back in the community, untreated, and without any form of supervision. If that were to happen, based on the whole of the evidence before me, it is almost a certainty that he would commit another serious offence. This would, of course, be a terrible outcome from a public safety point of view. It would also make it very difficult for Mr. Durocher to hope to ever be released again. For those reasons, it is very much in his own interest not to be released until he has successfully engaged in treatment.
12. Everyone agrees that the AHISOP is the best program for Mr. Durocher and that he should be enrolled in it again. Everyone also agrees that sometimes offenders have to take a program more than once before they succeed.
13. The Crown argues that an indeterminate sentence must be imposed because it is very likely that the outcome of Mr. Durocher taking further programming will be the same as it has been to date. While I agree his past performance in programming raises concerns, I am not convinced, for a number of reasons, that it is a foregone conclusion that the outcome of future programming will necessarily be the same as it has been to date.
14. First, if Mr. Durocher takes AHISOP again, or any other risk management program for that matter, he will have the benefit of having taken portions of AHISOP before, so he will have a better foundation than the first time around.
15. Next, he will hopefully not be facing sentencing proceedings the next time he takes the program. Although, as I have noted, the pending proceedings should have been a powerful incentive for him to engage in programming, Ms. Luft noted in her final report that the ongoing dangerous offender proceedings were also a source of stress and distraction for Mr. Durocher.
16. Finally, while I have concluded that Mr. Durocher's behaviour was the primary reason he was suspended from the AHISOP, Ms. Levesque did find that he seemed to struggle more after he returned after having missed the 11 sessions in September 2018.
17. Clearly there are things Mr. Durocher will have to do differently, behaviour-wise, if he has any hope of making progress in programs; but he has never refused to take programs before. Hopefully he will see the benefit of taking programming again. If he does, some of the factors that created additional challenges for him in earlier programming will not be present.
18. On the issue of projecting into the future how long outside controls will be necessary to protect the public against the risk that Mr. Durocher poses, Dr. Choy himself acknowledged that there is no "crystal ball". He said that the actuarial instruments are better at assessing long-term risk than purely clinically-based opinions. He said the instruments are moderately predictive. They simply determine the percentage of risk of recidivism associated with the cohort of offenders whose characteristics Mr. Durocher shares, nothing more; and they do not take programming or treatment into account.
19. The law is clear that not all offenders whose conduct is found to be intractable and are designated dangerous offenders must be sentenced to an indeterminate sentence to achieve public protection. On the contrary, the imposition of an indeterminate sentence is a last resort. Moreover, restraint takes on particular importance when sentencing an indigenous offender.
20. I conclude that the protection of the public requires that Mr. Durocher be subject to external controls for a very extensive period of time, but I am not persuaded that the Crown has established that this is required for the rest of his life. In my view, the maximum determinate sentence, followed by the maximum period of Long Term Supervision, will empower CSC and the National Parole Board, over a sufficiently long period of time, to plan for, and eventually manage, Mr. Durocher's reintegration in the community such that public protection can be achieved.
21. I acknowledge that this means that there will come a point when Mr. Durocher will be released, irrespective of whether he has taken AHISOP or some other programming and made progress toward managing his risk. If that scenario plays itself out, however, CSC and the National Parole Board will still have some tools to manage his risk for the next decade. The Board will be able to impose conditions on him, including residency conditions. If Mr. Durocher has in fact made no progress at all, it can be expected that he will not be able to comply with the conditions of his L.T.S.O. and will quickly find himself back in custody.
22. The sentence that I will impose will result in Mr. Durocher being under external controls for a total of 24 years. That should provide a powerful incentive for him to commit to change. It will allow sufficient time for him to access programming again, multiple times if that is needed. It will enable CSC and the National Parole Board to subject him to external controls until he is almost 60 years old. That is a very significant period of time and in my view, that will adequately protect the public.
23. CONCLUSION
24. These were the reasons why, on September 3, 2019, I imposed the sentences I did on Mr. Durocher. The sentences were, on the charge of sexual assault, 14 years’ imprisonment, followed by a Long Term Supervision Order for a period of 10 years, and, on the charge of sexual interference, 4 years’ imprisonment, to be served concurrently. The ancillary orders that the Crown sought were also issued.
25. Although the sentence that Mr. Durocher was previously serving expired in May 2019, I declined to grant him any credit for his remand time. I concluded that the need to protect the public militated against any reduction of the period of time for which he will be subject to outside controls.

L.A. Charbonneau

J.S.C.

Dated in Yellowknife, NT this

1st day of October, 2019

Counsel for the Crown: Annie Piché

Counsel for the Accused: Jennifer Cunningham

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| S-1-CR-2014-000 062 |
| **IN THE SUPREME COURT OF THE**  **NORTHWEST TERRITORIES** |
| BETWEEN:  HER MAJESTY THE QUEEN  -and-    CODY DUROCHER   |  | | --- | | **Restriction on Publication:** By Court Order, there is a ban on publishing information that may identify any victims referred to in this Ruling. | |
| RULING ON DANGEROUS OFFENDER APPLICATION OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU |