

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JOHNNY SIMON

Restriction on Publication: There is a ban on the publication, transmission or broadcast of any information that could identify the complainants, pursuant to section 486.4 of the *Criminal Code*

RULING ON LONG TERM OFFENDER APPLICATION

I) INTRODUCTION AND BACKGROUND

[1] On October 23, 2020, I sentenced Johnny Simon for a sexual assault committed against H.K. I designated Mr. Simon a Long Term Offender and sentenced him to a term of imprisonment of 6 years and 8 months, followed by a Long Term Supervision Order of 5 years. I gave reasons for my decision at the time and said that a written Ruling would follow. This is that Ruling.

[2] It has taken considerable time for these sentencing proceedings to be completed. Mr. Simon was convicted following a jury trial held in Inuvik in October 2018. After the conviction, the Crown advised that it would make application for a psychiatric assessment pursuant to section 752.1 of the *Criminal Code*. Although there were indications that the application would be contested, Mr. Simon eventually consented to it and the assessment order was issued.

[3] The assessment was conducted in February 2019 by Dr. Phillip Klassen. His report was completed in March 2019. The Crown, after review of that report, filed a formal Notice indicating that it was seeking to have Mr. Simon designated a Long Term Offender.

[4] The Long Term Offender hearing proceeded in January and February 2020. The scheduling of final submissions was disrupted as a result of the COVID-19 pandemic. The pandemic disrupted programming in federal institutions. This had the potential of having an impact on the Crown's and Defence's ultimate positions as to what Mr. Simon's sentence should be. Because of this, additional evidence was presented in July 2020 to update the Court about the status of program delivery in federal institutions. Final submissions were presented later that month.

[5] A considerable body of evidence was adduced at the sentencing hearing. Several witnesses were called by the Crown and extensive documentary evidence was filed. While I will not refer to all of this evidence, I have considered it all carefully, as well as the thorough written and oral submissions presented by counsel.

II) CIRCUMSTANCES OF THE OFFENCE

[6] At the trial, H.K. described the events that led to her complaint. Although the Crown called other witnesses, H.K. was the only witness who provided direct evidence about the events. Mr. Simon did not present evidence.

[7] Fundamentally, the Crown's case rested on H.K.'s testimony. Her credibility and the reliability of her account were the central issues at trial. In order to find Mr. Simon guilty, the jury had to have accepted her account of what happened. That is the basis upon which he must now be sentenced.

[8] H.K. testified that she and Mr. Simon had known each other for many years. On the day of the incident, they had spent some time together on the streets of Inuvik, drinking.

[9] At one point, they went to the apartment of someone who H.K. knew, looking for more alcohol. There was no one home. Mr. Simon broke into the apartment. He and H.K. went in. They took mickeys of vodka from the fridge and left the apartment. They went to the end of the hallway, to a staircase. They sat on the stairs and started drinking the mickeys.

[10] H.K. testified that at some point Mr. Simon started pushing her on the chest with his hands. She tried pushing him back, unsure of why he was doing this and of what was going to happen. She was very intoxicated by then. He kept pushing her. At one point she fell onto her back. Mr. Simon removed all her clothes, held her down and had sexual intercourse with her. He then left the building.

[11] After Mr. Simon left, H.K. had some difficulties getting up and getting dressed. Eventually, she did. She went directly to the warming shelter and called the R.C.M.P.

[12] H.K. testified that she was sore in her vaginal area after the sexual assault. In a Victim Impact Statement that she completed in January 2019, she described feeling scared and disgusted after the sexual assault, and not wanting to leave her house. As of then, 2 years after the events, she was still experiencing nightmares, anxiety and flashbacks. She also said that some of her friends blamed her for what happened, which made her feel sad, angry and frustrated.

III) MR. SIMON'S CIRCUMSTANCES

[13] As is always the case at a sentencing hearing, Mr. Simon's personal circumstances must be taken into account. He is Gwich'in, which engages the special legal framework that governs the sentencing of indigenous offenders. That framework applies to Dangerous Offender and Long Term Offender proceedings. *R v Ipeelee*, 2012 SCC 13; *R v Boutillier*, 2017 SCC 64, para 55.

A. Overview of Personal Circumstances

[14] There is considerable evidence about Mr. Simon's personal history in the materials filed at the sentencing hearing, in particular in institutional records, Pre-Sentence Reports, and Dr. Klassen's report.

[15] The information contained in those materials is not entirely consistent, in particular with respect to aspects of the timeline of certain events in Mr. Simon's childhood, but nothing turns on those inconsistencies. What is abundantly clear is that Mr. Simon's childhood was deeply traumatic.

[16] Mr. Simon is now 39 years old. He does not know who his father is. He lived with his mother until he was 5 years old. After that, for many years he lived mainly with his grandfather.

[17] Mr. Simon suffered very serious physical and sexual abuse at the hands of his grandfather between the ages of 5 and 18. This abuse happened when his grandfather was intoxicated. In a Pre-Sentence Report prepared for a sentencing hearing in January 2010, Mr. Simon describes his grandfather's home as being "like a drop-in center" where "anyone who had alcohol was allowed in". Mr. Simon witnessed violence and fights in the home on a regular basis.

[18] When Mr. Simon was 14 years old, his mother was stabbed to death. He believes, and has for years, that his grandfather was responsible for her death. He has also suspected for years that his grandfather may in fact be his biological father.

[19] Mr. Simon began consuming alcohol at a very young age (5 or 7 years old). He was using alcohol regularly before he turned 12. When he was 11 years old a relative introduced him to sniffing gasoline. He began sniffing gasoline, propane and other inhalants on a regular basis. He told the author of the January 2010 Pre-Sentence Report that he continued to do so because it "helped him to forget all the bad stuff that happened in his life". He also told the author of the report that all his life, he was never cared for properly; he never had rules or structure; he went hungry; he did not have proper clothing for the seasons.

[20] Reading and hearing about Mr. Simon's personal circumstances brings to mind comments made by Greckol J., as she then was, referring to the very difficult background of an indigenous offender she was sentencing: "few mortals could withstand such a childhood and youth without becoming seriously troubled". *R v Skani*, 2002 ABQB 1097, para 60. Sadly, the same can be said about Mr. Simon.

[21] In his adult life Mr. Simon has had common-law relationships with 3 women: T.K, L.N. and S.A. He has one child with T.K. and two with L.N. Some of the convictions on his criminal record are for domestic violence.

[22] Mr. Simon's step-father, James Martin, is the only family member he feels close to. Mr. Martin has been sober for over a decade. He is supportive of Mr. Simon. He is willing to help him address his trauma and addiction issues. He would be willing to have Mr. Simon live with him if Mr. Simon is able to maintain sobriety.

B. Criminal history

[23] Mr. Simon has an extensive criminal record which includes a wide variety of offenses ranging from relatively minor offenses to very serious ones. His first convictions were in the Youth Court in 1994, when he was just under 13 years old. From that point on he accumulated a steady stream of convictions for a variety of offenses, almost every year.

[24] The particulars of Mr. Simon's criminal convictions are set out in detail in Exhibit S-8. While the record is extensive, some of the convictions do not have much bearing on this Application. Unfortunately, a number of offenders in this jurisdiction have lengthy criminal records. This is typical of individuals who, like Mr. Simon, have had a troubled, difficult and traumatic youth, have developed serious substance abuse issues, and whose life is marked with dysfunction, poverty and homelessness.

[25] The convictions that are most relevant to the current proceedings are the convictions for crimes of violence in both the familial and non-familial contexts, and his two convictions for serious sexual assaults. I will discuss the aspects of his criminal history that are most relevant to this Application as part of my analysis of whether the criteria for a Long Term Offender designation are met.

C. Overview of Correctional History

[26] A number of Exhibits filed at the hearing include records maintained by the correctional authorities, including the Correctional Services of Canada (CSC), over the years when Mr. Simon was serving sentences. These include information about time he spent in institutions as well as when he was on various forms of release.

[27] In January 2010, Mr. Simon received, for the first time, a federal sentence. He was sentenced to a total of 58 months' imprisonment for various offenses. One of these was a serious sexual assault. Another was an aggravated assault against his grandfather. His grandfather sustained serious injuries. He later died in hospital. It was acknowledged at the sentencing hearing that although Mr. Simon's grandfather was in poor health and had pre-existing conditions, the injuries he sustained during this assault were, medically speaking, a contributing factor in his death.

[28] As part of the intake and classification process that follows the imposition of a federal sentence, Mr. Simon's parole officer arranged for Mr. Simon to have a psychological and risk assessment. The psychologist who completed the assessment wrote, among other things:

Mr. Simon presents with symptoms similar to those struggling with complex trauma and disorders of extreme stress. As a child he was repeatedly subject to serious abuse with no respite. His early behavioural patterns appear to have developed as a strategy for escaping the ongoing physical and sexual abuse by his grandfather as well as the violence and alcohol abuse in his family setting. His early exposure to alcohol and long-term abuse of inhalants has likely had an impact on his cognitive development. He struggles with unresolved grief regarding the death of his mother and other family members. He has been intensely angry at what happened to him and at those in the community who he believes let it happen. This leaves him at risk of acting out that anger and harming others when he is intoxicated.

(...)

Although Mr. Simon believes that the death of his grandfather sets the stage for a major change in his life, it is likely that any significant change will require intensive therapeutic intervention and ongoing support. As Mr. Simon rather insightfully put it, he needs to train his brain to recover from all the things that have happened to him.

Psychological Risk Assessment Report dated May 21, 2010, Exhibit S-3, Tab 37.

[29] Mr. Simon was transferred to the Regional Psychiatric Center (RPC) in Saskatoon in July 2010. During his time at RPC, Mr. Simon completed a high-intensity program for sexual offenders. In addition to the correctional records

pertaining to this period of time, I have the benefit of the testimony of Sarah Salzl, a nurse who was employed at the RPC and was Mr. Simon's primary therapist while he was at that facility. She had several in-person meetings with him and developed a good rapport with him.

[30] Although there were ups and downs during this program, Mr. Simon participated in the sessions, and was able to discuss his feelings. When he encountered difficulties he responded well to positive feedback and encouragement.

[31] The reports prepared about Mr. Simon's time at the RPC reflect the gains he made in the program and positive changes that happened while he was at that institution. Staff noticed that at the end of his stay he was generally more stable, and less impulsive and angry than he had been when he first arrived at the facility. He had become more open and honest in the program sessions. He was starting to accept responsibility for his offenses and was more open to feedback and to being challenged. He was showing a progressive change in attitude.

[32] The need for Mr. Simon to take substance abuse programming was identified, as well as the necessity of maintenance programming to prevent relapse after his return to the community.

[33] After being transferred out of RPC, Mr. Simon was transferred back to the Northwest Territories. He was later transferred to the Grand Cache institution in Alberta so that he could participate in substance abuse programming that was being delivered there. Most unfortunately, because of the presence of an inmate in that institution who was "incompatible" with him, Mr. Simon could not remain in that institution. The correctional materials indicate that he was placed in administrative segregation for his own safety. He was later transferred to the Bowden Institution.

[34] Mr. Simon did not benefit from substance abuse programming at Bowden either. He participated in an aboriginal healing program. He also completed several educational courses. He approached a psychologist in the institution and requested individual counselling to address the abuse he had suffered at the hands of his grandfather. The psychologist suggested that he focus on the aboriginal healing program and consider individual counselling after completion of that program. It does not appear Mr. Simon was ever able to access individual counselling at that facility.

[35] Mr. Simon was released on Statutory Release in April 2013. He participated in a sexual offender maintenance program. He was open and respectful in the group work, but facilitators were concerned that he appeared to minimize his risk.

[36] In August 2013 his statutory release was suspended when he failed to return to his halfway house. It was later determined that Mr. Simon had started a relationship with a woman and that he failed to return to his halfway house because he had decided to spend time with her. One of Mr. Simon's release conditions was that he was to report new relationships. He said he had not reported his relationship with his girlfriend because he was worried about being breached. Mr. Simon admitted to using alcohol while spending time with his girlfriend but there were no indications of any incident of violence.

[37] As a result of this incident Mr. Simon's statutory release was revoked. He was also charged and convicted for being unlawfully at large.

[38] Back in custody, Mr. Simon enrolled in the Aboriginal Offender Substance Abuse program and participated in several sessions over a period of three months. His eligibility for Statutory Release came up again before he could complete the program. The final performance report was positive, noting that Mr. Simon had made good progress and had demonstrated an understanding of coping strategies that he could use, as well as motivation to change. Ongoing counselling and substance abuse treatment, again, were recommended as part of risk management strategies for the future.

[39] After his release in July 2014, Mr. Simon returned to living in a community facility. His release was subject to conditions, including one that he not consume alcohol. His statutory release was suspended on two occasions, in October 2014 and December 2014, as a result of breaches of that condition.

[40] The evidence about Mr. Simon's progress in and out of custody while he was serving his first federal sentence is important for a number of reasons. On the positive side, it shows that he is capable of meaningful participation in treatment programs. He is engaged in programming and makes progress. On the other hand, the difficulties he encountered when he was on statutory release underscore that outside a controlled and structured environment, his substance abuse issues and impulsivity continue to be problematic.

[41] This is further evidenced by the difficulties he had after his federal sentence ended. Between the end of that sentence and the sexual assault of H.K., Mr. Simon was convicted of a number of offenses. Most were non-violent offenses, such as breaches of court orders, thefts, and a mischief, and were related to his substance abuse issues. However, one was for an assault on his common law partner, S.A., on January 12, 2016. At the time, Mr. Simon and S.A. had been in a relationship for a year. As they were walking on a street in Fort Smith, she teased him about moving too slowly and told him to hurry up; in response, he kicked her and punched her in the face, causing her mouth to bleed. *Crown Book of Exhibits (Criminal Record, Assessment and Jurisdictional Material)*, Exhibit S-18, Tabs 19 to 21.

[42] The sexual assault of H.K. is also of significant concern, especially considering that Mr. Simon had taken high-intensity programming for sexual offenders, had done relatively well in that program, and had made progress in other programs he took during that sentence. That, in and of itself, makes the need for further intervention obvious. It also shows that for Mr. Simon, as is so often the case, there is a direct link between his substance abuse and the risk that he poses to others.

IV) PSYCHATRIC EVIDENCE

[43] Dr. Phillip Klassen, as I already noted, is the forensic psychiatrist who performed the assessment ordered by the Court pursuant to Section 752.1 of the *Criminal Code*. His report is included in Exhibit S-8. He also testified at length at the hearing.

[44] Dr. Klassen's diagnoses are based on the Diagnostic and Statistical Manual of Mental Disorders (the DSM-5). His report includes helpful excerpts from the DSM-5 that describe some of the characteristics and manifestations of the disorders he diagnosed.

[45] Dr. Klassen diagnosed Mr. Simon as suffering from "one or more" substance abuse disorders. I do not understand this diagnosis to be disputed.

[46] Dr. Klassen also concluded that Mr. Simon meets the criteria for diagnoses of both antisocial personality disorder and borderline personality disorder. He acknowledged in cross-examination that Mr. Simon barely meets the criteria for "conduct disorder", which is a prerequisite for a diagnosis of anti-social personality

disorder. He also testified that Mr. Simon's score on the Psychopathy Checklist – Revised (PCL-R) does not place him in the highest category of severity for that disorder. He testified that Mr. Simon does not present with a “classic anti-social personality situation”, in that his trauma-related traits and addictions are significant contributing factors in the manifestation of his anti-social behavior.

[47] Dr. Klassen did not diagnose Mr. Simon with any sexual deviancy or underlying sexual behavior disorder.

[48] Aside from the PCL-R, Dr. Klassen used other structured and actuarial instruments to inform his risk assessment analysis. He used the Static-99R (an instrument that measures the risk for sexual recidivism), the HCR-20 (an instrument used to predict non-sexual violence), the ODARA and the DVRAG (two instruments used to predict risk of intimate partner violence). He acknowledged on cross-examination that the ODARA forms a large portion of the DVRAG and that because of this, one can expect a very high level of concordance in the results obtained on these two instruments. He acknowledged that they should not be considered as independent predictors of risk.

[49] Dr. Klassen made it clear that an offender's scores on structured and actuarial risk assessment tools do not indicate that offender's specific risk of recidivism. Rather, scores place the offender in a certain cohort of offenders, based on shared characteristics. Within each of these cohorts, research has established the percentages of offenders who re-offended and those who did not re-offend within certain time frames.

[50] Dr. Klassen also noted that these instruments are not helpful in predicting the severity of the violence associated with eventual recidivism. He testified that in that respect, the best predictor of severity of violence in the future is past conduct.

[51] Dr. Klassen was thoroughly cross-examined on his use of these instruments and how he scored Mr. Simon on them. In certain areas, he conceded that his scoring could have been slightly different.

[52] He was also cross-examined about concerns that have been expressed by some of his colleagues about the use of these instruments in assessing risk in indigenous offenders and about the fact that some of them have not been validated for use with

indigenous offenders. Dr. Klassen, evidently aware of this controversy, had addressed it in his report:

Scientific research has consistently shown that structured, or actuarial, methods of risk assessment, are the most accurate. While they are imperfect, no alternative is equal or superior. Studies addressing the accuracy of risk assessment tools in indigenous offenders are ongoing, but available evidence indicates that, taken together, most of these tools are applicable to persons of indigenous background: the Static-99R and the PCL-R have specifically been so evaluated, and perform as well in persons of indigenous background as with others. Indigenous offenders should have access to the best available risk assessment methodology, which at this time remains structures or actuarial instruments.

Assessment Report dated March 31, 2019, Exhibit S-8, Tab 3, p. 28.

[53] While acknowledging the limitations of these instruments and the caution that must be exercised in interpreting their results, Dr. Klassen maintained his opinion that actuarial and structured methods of risk assessment are more accurate than relying solely on clinical judgment, and that they are appropriate for use with indigenous offenders.

[54] He did agree, however, that some variables are not captured by the instruments, and that there is a need to exercise appropriate caution and sensitivity to cultural context when using them. He expressed the view that one critical risk variable that is not measured by any of the instruments is the impact of offenders returning to traumatized communities at the completion of their sentences. In that vein, he expressed the strong view that Mr. Simon's rehabilitation would be better supported if he were not to return to Fort McPherson or Inuvik, because if he were to return to those communities, there would be too many negative influences and strong inducers for him fall back into old patterns and lifestyle choice.

[55] Dr. Klassen also testified about programming and its effectiveness. While answering questions on this topic, he made reference to a study done in 2010 which appeared to show that CSC programming was not having any impact on recidivism for indigenous offenders. My understanding of his evidence, however, is that this study examined the effect of programs prior to some significant changes that were made to the CSC's programming models. There is no evidence, either way, relating to the efficacy of the CSC programming that is used currently, in particular the integrated programming that was specifically designed for use with indigenous offenders.

[56] Despite the various things that Dr. Klassen acknowledged during his cross-examination about the limitations of the instruments and some possible variances in his scoring, he did not resile from the opinion expressed in his report: in his view, from a purely psychiatric perspective, Mr. Simon presents as being a high risk of sexual and violent recidivism and in the absence of significant risk management interventions, is likely to engage in physically or sexually violent behavior, including intimate partner violence.

[57] Dr. Klassen's report and evidence also addressed the intervention measures that he feels are necessary to manage Mr. Simon's risk. He expressed the view that external controls will be necessary to support any internal controls he may develop through programming. Dr. Klassen based this opinion on Mr. Simon's past, his exposure to programming thus far, and his steady pattern of criminality, including violent criminality. In his view, external measures will be required to mitigate Mr. Simon's risk until he reaches the age of 50, as this is the point where his risk will have declined naturally due to ageing. Dr. Klassen expressed some concern about supervisory problems that Mr. Simon could pose, based, among other things, on his history of breaching court orders and the breaches of his release conditions in Alberta in the summer of 2013 and fall of 2014.

[58] Dr. Klassen's recommendations include that Mr. Simon receive further sex offender treatment programming; substance abuse programming (with the strong recommendation that alcohol-deterrent chemotherapy be used); treatment for anger; a residency condition when he is released in the community; engagement in vocational training or employment. It is important to note that Dr. Klassen testified that contrary to statements in some of the records he reviewed, Mr. Simon is not cognitively limited. He has what Dr. Klassen described as a "unique intellectual profile", in that the results of IQ testing suggest he can be expected to have some difficulties with things like verbal expression, written expression, and complex reading but also that he is very gifted in the area of visual spatial skills. Dr. Klassen testified that while slight accommodations in treatment and programming may be required, Mr. Simon's strengths bode well as far as his ability to secure employment in certain areas.

V) PROGRAMMING AND IMPACT OF COVID-19

A. Programming

[59] I have the benefit of documentary and testimonial evidence about the CSC's processes and programming that may be available to Mr. Simon if he receives another federal sentence.

[60] This evidence includes a comprehensive document produced by the CSC which sets out information about its mandate as well as its programs, intervention and case management mechanisms. The document includes information specific to the administration of Long Term Supervision Orders and the supervision of offenders who are bound by such orders.

[61] The intake process for offenders, including the development of their correctional plan, as well as information about the classification mechanisms and supervision of federal offenders was also explained during the testimony of Cindy Sparvier. Ms. Sparvier used to be employed as a parole officer in Yellowknife. She was the one who completed Mr. Simon's intake process after he was sentenced in January 2010. She testified about Mr. Simon's case specifically, and also more generally about the programming available in CSC's institutions and the timelines within which it could reasonably be expected that an offender could receive high-intensity programming.

[62] The Crown also called Rebecca Austin, a Yellowknife-based parole officer. She testified about the mechanisms and processes in place for the supervision of offenders who are on parole in the Northwest Territories, and about the supervision of offenders who are on Long Term Supervision Orders. The evidence about general processes and mechanisms was similar to evidence adduced in a recent case in this Court on a Dangerous Offender application, which was summarized in that decision. *R v Durocher*, 2019 NWTSC 37, paras 291 to 309. I will not refer to it in detail here.

B. The impact of the COVID-19 pandemic

[63] As I noted in my introductory comments, when the Crown closed its case in February 2020 and Mr. Simon indicated that he would not be presenting evidence, it was expected that the next phase of the sentencing hearing would be counsel's final submissions. However, the COVID-19 pandemic disrupted those plans.

[64] Among other things, the pandemic resulted in significant disruption to the delivery of CSC programming in federal penitentiaries. Given the importance of programming in the context of this Application and the impact it could have on its outcome, counsel agreed that additional evidence should be presented to provide the Court with the most up-to-date information possible about the availability of programming in federal institutions.

[65] In July 2020, Jana Glimsdale, the Assistant Warden in charge of interventions at the Bowden Institution, was called to testify on this issue. She was also asked about the prospects of Mr. Simon being able to access sexual assault programming in the context of the ongoing pandemic.

[66] By the time Ms. Glimsdale testified, programming had resumed at Bowden and a high intensity sexual offender program was ongoing. She said that it was possible for an offender sentenced to a federal sentence at the shorter end of the range, (bearing in mind that 2 years imprisonment is the minimum a federal sentence can be), to have the opportunity to complete a high intensity program, but that it would depend on many factors. She confirmed that offenders serving shorter sentences are given a higher priority in accessing programs, as CSC, as part of its mandate, has an obligation to do everything possible to ensure that offenders' programming needs are met during their sentence. However, factors beyond the CSC's control, for example, the timing of the start of the program relative to the offender's statutory release date, necessarily have an impact on whether an offender can access a specific program.

[67] Ms. Glimsdale agreed that based on the number and duration of sessions in a high intensity program, it was theoretically possible that such a program could be completed in 4.5 months. She said, however, that 6 months was a more realistic timeframe for completion given that several things can have an impact on a program's schedule.

[68] As far as the impact of COVID-19 on programming, she explained that the sex offender program that was in progress at Bowden when the pandemic hit was interrupted for a period of time, but that it had since resumed. She said that the targeted completion date was November 2020. She explained that the plan was to have a new cohort of offenders begin with the primer program in January 2021, followed by the core program. I understand from her testimony that while adjustments had to be made to accommodate physical distancing and ensure the

safety of all participants, CSC was striving to continue to offer programming in accordance with its obligations and mandate.

[69] She was careful to note, however, that the situation could change. For example, if there were to be a COVID-19 outbreak in the institution, programming might well have to be shut down again.

VI) ANALYSIS

A. Overview of Legal Framework

[70] Public protection is the general purpose of the special sentencing scheme set out at Part XXIV of the *Criminal Code*. The primary rationale for both the Dangerous Offender and Long-Term Offender schemes is the protection of the public. *R v Steele*, 2014 SCC 61, para 29. *R v Spillman*, 2018 ONCA 551, at para 33.

[71] The Dangerous Offender designation criteria are more onerous than the Long-Term Offender designation criteria. *R v Boutillier*, 2017 SCC 64, para 75. Still, the Long Term Offender regime is part of an exceptional sentencing regime that applies to a limited number of offenders. *R v L.M.*, para 39; *R v C.R.G.*, 2019 BCCA 463, paras 21-22.

[72] While the primary purpose of both regimes is public protection, an important distinction is that the purpose of the Long Term Offender regime, and more specifically the Long Term Supervision Order, also includes the rehabilitation and reintegration of offenders in the community. *R v L.M.*, 2008 SCC 31, para 42 and 46-49; *R v Ipeelee*, paras 47-48 and 50.

[73] Section 753.1 of the *Criminal Code* governs applications to have offenders designated Long Term Offenders. Paragraph 753.1(1) provides that before giving that designation, the sentencing court must be satisfied of 3 things:

1. a sentence of imprisonment of 2 years or more is appropriate for the offence;
2. there is a substantial risk that the offender will reoffend;
3. there is a reasonable possibility of eventual control of the risk in the community.

[74] Even when these 3 conditions are established, the sentencing court retains the discretion not to make the designation. *R v C.G.*, 2019 ONSC 2406, para. 113; *R v C.R.G.*, 2019 BCCA 463, para 19.

[75] In this case, the first and third conditions are not in issue. With respect to the first condition, the sexual assault of H.K. was a major sexual assault, which engages a 3-year starting point on sentencing. *R v Arcand*, 2010 ABCA 363 and *R v A.J.P.J.*, 2011 NWTCA 02. Taking into account Mr. Simon's criminal record and even having regard to his circumstances as an indigenous offender, there is no question that a sentence of imprisonment of well over 2 years is appropriate. As for the third condition, the Crown, by seeking to have Mr. Simon designated a Long Term Offender as opposed to a Dangerous Offender, implicitly concedes that there is a reasonable possibility of eventual control of his risk in the community. Based on the evidence adduced at the hearing, I agree.

[76] The second condition, whether the Crown has established that there is a substantial risk that Mr. Simon will reoffend, is the central issue in this case. It is undisputed that the Crown has the onus of proving this substantial risk beyond a reasonable doubt. *R v D.(F.E.)*, 2007 ONCA 246, para 52.

[77] I agree with Mr. Simon's submission that what must be proven is not merely substantial risk of reoffending generally. The Crown must prove that there is a substantial risk of violent reoffending, in manner that causes serious harm. *R v Piapot*, 2017 SKCA 69, paras 71-78; *R v Turner*, 2019 ONSC 5435, paras 25-26.

[78] The determination of whether the substantial risk has been proven must be made on the basis of the whole of the evidence. The opinion evidence of expert witnesses must be considered, but it is the Court, not the expert, who has to be satisfied beyond a reasonable doubt of the existence of that risk. *R v Morgan-Baylis*, 2018 ONSC 5815, para 138, adopting *R v McLaughlin*, 2014 ONSC 6537.

[79] Substantial risk may be established on the basis of Subsection 753.1(2). Its relevant portion reads as follows:

753.1
(...)

(2) The court shall be satisfied that there is a substantial risk that the offender will

reoffend if

- (a) the offender has been convicted of an offence under (...) section 271 (sexual assault) (...); and
- (b) the offender
 - (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological harm on other persons, or
 - (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown likelihood of causing injury, pain, or other evil to other persons in the future through similar offenses.

[80] This provision creates a conclusive presumption that the necessary level of risk is established if certain conditions are met. It does not preclude the Crown from proving substantial risk through other means. It also does not have the effect of restricting Long Term Offender designations to cases where the predicate offence is a sexual assault or one of the other sexual offenses listed at Paragraph 753.1(2)(a). *R v McLeod*, 1999 BCCA 347; *R v Sakebow*, 2004 SKCA 127; *R v McLean*, 2009 NSCA 1.

[81] The level of risk required to rise to the level of “substantial risk” has been interpreted differently by different courts. So has the meaning and effect of the use of the term “likelihood” in Paragraph 751.2(2)(b)(i) and (ii). Some judges have attributed percentages of risk of re-offense to those terms, no doubt because that is how risk is described in the risk assessment tools that are used by experts who testify on these types of applications.

[82] The term “likelihood” should, in my view, be given its ordinary meaning: “more likely than not”. *R v C.G.*, 2019 ONSC 2406, para 97. It does not import a high degree of probability. *R v Johnson*, [2008] O.J. No.4209, para 60. I also agree with those who view “substantial risk” as representing a lower threshold than “likelihood”. *R v C.G.*, paras 91-94; *R v Smiley*, 2019 ONCJ 75, paras 71-75. These interpretations, in my view, are consistent with the legislative scheme as a whole, more particularly the distinctions between the Dangerous Offender and Long Term Offender designations that the Supreme Court of Canada noted in *Boutillier*.

B. Evidentiary issue regarding disputed utterances attributed to Mr. Simon in CSC materials

[83] Before I turn to the analysis of Mr. Simon's case in light of this legal framework, I must address an evidentiary issue that arose during the hearing.

[84] The Crown seeks to prove, through one of the reports prepared by Ms. Sparvier, that Mr. Simon made certain admissions to her when she interviewed him as part of his intake process after he received his federal sentence in January 2010. The three impugned portions of the report read as follows:

As noted previously SIMON admitted to being violent in his intimate relationship with [name redacted]. He also stated he had forced himself on his partners in a sexual manner, although he states this is only when he was drinking.

(...)

He admits to domestic violence in this relationship while drinking and sober.

(...)

He admits there was violence in their relationship, sober and while drinking. He states that in both relationships, he was the perpetrator of the spousal violence, and never the victim. He views himself as still friends with [L] and doesn't think she would ever describe herself as being scared of him, despite the past violence.

Dynamic Factors Assessment, Exhibit S- 4 (Crown Book of Exhibits – Cindy Sparvier), Tab 1, pp. 1 and 4.

[85] The Crown seeks to have these utterances admitted for their truth. It acknowledges that as the admissions attributed to Mr. Simon are aggravating facts, they must be proven beyond a reasonable doubt if disputed. *R v Gardiner*, [1982] 2 S.C.R. 368.

[86] Mr. Simon disputes these utterances. He argues that the impugned portions of this report are not sufficiently reliable to be admissible for their truth. Alternatively, he argues that even if the evidence is admissible, it is not reliable enough to satisfy an onus of proof beyond a reasonable doubt.

[87] As I already noted Ms. Sparvier testified at the hearing. However, as she does not have an independent recollection of Mr. Simon telling her these things, the Crown is relying on her out-of-court written statement (the report) for its truth. As there was no opportunity for contemporaneous cross-examination at the time Ms.

Sparvier wrote the report, the rules that govern hearsay are engaged. *R v Khelawon* 2006 SCC 57, paras 37-41.

[88] Generally speaking, hearsay is admissible at a sentencing hearing, provided that it is found to be credible and trustworthy. *R v Gardiner*, p.414. It can be used to prove a disputed fact. *R v Nguyen*, 2012 ONCA 534. In addition to this rule specific to the sentencing context, the Crown relies on other mechanisms whereby hearsay can be admissible at other stages of the criminal justice process.

[89] I do not find it necessary to engage in an exhaustive analysis of these various legal frameworks. Suffice it to say that a measure of reliability is usually a factor in the determination of whether hearsay is admissible. For example, under the traditional exception of past recollection recorded - which is one of the avenues the Crown relies on - one of the conditions for admissibility is that the past recollection must have been recorded in a reliable way. *R v Richardson et al*, 2003 CANLII 3896 (ONCA), para 24; *R v Sipes*, 2012 BCSC 834, para 20. Under the principled approach to the admissibility of hearsay, threshold reliability must be established. *Khelawon*. And, even in the context of the relaxed rules that govern a sentencing hearing, as noted above, the admissibility of hearsay is subject to the requirement that it be credible and trustworthy. In my view, this necessarily implies a certain level of reliability. Reliability is embedded in the concept of trustworthiness.

[90] Correctional records such as the one at issue here are created and compiled by CSC employees as part of their regular duties and responsibilities. I agree that generally speaking, they are admissible for their truth at a sentencing hearing, through a variety of different routes. *R v Gregoire* (1998), 130 C.C.C. (3d) 65 (Man CA).

[91] This is implicitly acknowledged by Crown and Defence, as they each rely on the contents of CSC records for their truth on various topics, such as Mr. Simon's performance in programs, his behavior and attitude while incarcerated, and his behavior while on supervised release.

[92] The issue with the disputed excerpts is centered on their reliability, or lack thereof. I have concluded that a detailed analysis of the effect of the reliability concerns on the admissibility of these excerpts is unnecessary. Even assuming that those concerns do not render the excerpts inadmissible, at the very least, they raise

a reasonable doubt about whether Mr. Simon actually made these incriminating admissions to Ms. Sparvier.

[93] Ms. Sparvier explained that the Dynamic Factors Assessment report is one of many documents that is prepared as part of the intake of an offender who has received a federal sentence. She explained that when an offender receives a federal sentence, within 5 days of that sentence, a parole officer meets with the offender to do a preliminary assessment. The parole authorities then have between 50 and 90 days to complete an intake assessment. The parole officer interviews the offender and asks questions in a number of areas. The information thus obtained is used to feed into the development of the offender's correctional plan and other reports. This informs decisions such as an offender's security classification and placement.

[94] Ms. Sparvier does not know who did Mr. Simon's preliminary assessment. She does not think it was her because the CSC records indicate that it was done by telephone, and her own practice was to attend the correctional center and do these preliminary assessments in person.

[95] Ms. Sparvier recalls doing Mr. Simon's intake assessment. She explained that her practice was to make handwritten notes of the information obtained throughout the interview. She would then use those notes to prepare the formal report using the CSC template. Her practice was to prepare the report within a week of the interview. Once the report was done, she discarded her notes. She no longer has any notes of her interview with Mr. Simon.

[96] Ms. Sparvier has a very limited independent recollection of the intake assessment interview with Mr. Simon. This is understandable, as many years have passed and Ms. Sparvier has done numerous interviews with other offenders since. She has a specific independent recollection of Mr. Simon talking about his grandfather and their very difficult history. Not surprisingly, given the extremely troubled nature of that relationship, this stood out for her and she remembers it. However, as noted already, she has no independent recollection of Mr. Simon making the admissions that are reflected in the impugned portions of her report.

[97] Ms. Sparvier acknowledged that the statements attributed to Mr. Simon in her report are not direct quotes but maintained that he was the source of the information that appears in the impugned excerpts. She bases this on the wording that she used.

She explained that if the information had come from another source, she would have made that clear.

[98] As pointed out by the Crown, it is reasonable to expect that the issue of intimate partner violence and sexual offending would come up in the intake interview, given the list of questions and the domains that are covered in the Dynamic Factors Assessment report. That being so, it would be open to me to infer that the information came from Mr. Simon's answers to the interview questions. However, there are a number of things that call this into question.

[99] The first is the lack of evidence about how much time passed between the interview with Mr. Simon and the preparation of the report. Mr. Simon was sentenced on January 27, 2010. Ms. Sparvier sent a referral for psychological assessment on February 5, 2010, which means that she had begun working on his file then. The Dynamic Factors Assessment report was completed on May 5, 2010, some 3 months later.

[100] Ms. Sparvier did say that her practice was to complete the report within a short time after the interview, and that she would not ordinarily schedule an interview with an offender unless she knew she could complete her report within a week of the interview. However, there were various points in Ms. Sparvier's testimony where she answered questions specific to Mr. Simon's case by referring to her normal or typical practice. I accept that her normal practice was as she described, but that does not remove the possibility that something could have happened and a longer period of time could have passed between her interview with Mr. Simon and the completion of the report. It is unfortunate, and somewhat surprising, that the date of the intake interview with an offender is not, as a matter of standard procedure, recorded on the report itself.

[101] The second concern is that the evidence established that Ms. Sparvier made some errors in documents she prepared with respect to Mr. Simon. In the psychological assessment referral, she indicated that Mr. Simon was serving his second federal sentence, when in fact this was his first. She also indicated that this was his second sexual assault on the same victim, which was not the case.

[102] When she was asked about this, Ms. Sparvier explained that the referral document is not a particularly significant document and that she completed it quickly to get the assessment request in. The implication is that she would have been much

more careful in completing a formal report such as the Dynamic Factors Assessment report. Still, the errors in the referral to the psychologist were not innocuous.

[103] There was also an error in the Dynamic Factors Assessment report, on the score noted for Mr. Simon on a substance abuse questionnaire that was administered to him by someone at the correctional center. The email sent to Ms. Sparvier stated that Mr. Simon's score was 29 on the alcohol abuse questionnaire. The score she entered in the report was 20. In her testimony she acknowledged that this was a typographical error.

[104] Finally, a significant concern emerges from some of the language Ms. Sparvier used in the report. The phrase "as noted previously" appears on a few occasions at the very start of the report, including in the first of the three impugned paragraphs attributing incriminating admissions to Mr. Simon.

[105] The use of the phrase in that context does not make any sense because there is no reference to the same information earlier in the report. When this was brought to Ms. Sparvier's attention during her testimony, the only explanation she could offer was that this may have been a reference to the preliminary assessment. But Ms. Sparvier testified that she was not the one who did the preliminary assessment. She also said that any information included in her report that she obtained from another source would be clearly identified as such.

[106] The unexplained use of this language raises an issue about where the information actually came from. It calls into question whether information obtained from sources other than Ms. Sparvier's interview with Mr. Simon was clearly identified as such in the report. In submissions the Crown evoked the possibility that the explanation may be that the order of certain paragraphs were changed by Ms. Sparvier as she was working on her report. That is a possible explanation. However it is not the one that Ms. Sparvier gave in her testimony.

[107] It may well be that none of these concerns, standing alone, would have been sufficient to raise a reasonable doubt in my mind about the source of the information and the accuracy of Ms. Sparvier's recording of it in her report. But cumulatively, they do. That being so, the impugned excerpts cannot be taken into account. I have disregarded them entirely in arriving at my decision on this Application. To the extent the same information appeared in other CSC reports, I have assumed the

source of that information was also Ms. Sparvier's report and have disregarded it as well.

[108] Ms. Sparvier's report was included in the correctional materials that the Crown sent to Dr. Klassen to assist him in conducting the Court-ordered assessment. This is reflected in his report. I understood Dr. Klassen's evidence to be that removing these facts from the analysis would not have any impact on his diagnoses, risk assessment, and opinion about this matter.

C. Designation

[109] In arguing that Mr. Simon should be designated a Long Term Offender, the Crown relies on the presumption set out at Section 753.1(2). It also argues that, quite apart from that presumption, the evidence establishes beyond a reasonable doubt that there is a substantial risk that Mr. Simon will re-offend.

[110] Mr. Simon argues that the conditions to trigger the presumption are not met and that the Crown has not otherwise met its burden in establishing substantial risk of re-offence.

[111] As noted previously, Paragraph 753.1(2) creates a conclusive presumption that a substantial risk of re-offence is established if certain conditions are met.

[112] The first condition is that the offender has been convicted of one of the offenses enumerated in the provision. Sexual assault is one of the enumerated offenses. That condition is met.

[113] Next, to rely on the presumption, the Crown must establish one of two things:

- that the sexual assault of H.K. is part of a pattern of repetitive behavior that shows a likelihood of Mr. Simon causing death, injury, or severe psychological harm to another person; or
- that by his conduct in any sexual matter, including the sexual assault on H.K., Mr. Simon has shown a likelihood of causing injury, pain or other evil to a person in the future through similar offenses.

[114] Under the first option, the existence of a pattern becomes the basis for predicting the likelihood of similar behavior in the future. It follows that it must be

defined with some precision. That does not mean, however, that the offenses need to be the same in every detail. *R v Pike*, 2010 BCCA 401, para 901; *R v Hogg*, 2011 ONCA 840, para 40.

[115] Although sexual assault is inherently a crime of violence, I do not find that the other crimes of violence on Mr. Simon's criminal record are relevant in deciding whether a pattern of conduct is established. None of the sexual assaults he committed involved extraneous violence. For the first two, the force used was limited to that inherent in the sexual act. During the sexual assault on H.K., he used some force to push her down but he did not strike her. The force applied in those three cases was very different from the force used in the events that led to Mr. Simon's convictions for non-sexual violence. That being so, I agree with Mr. Simon that the only conduct that is relevant in deciding whether the sexual assault on H.K. is part of a pattern of repetitive behaviour are his 2 other convictions for sexual assault.

[116] Expert evidence may assist in deciding whether a pattern of conduct exists, but it is ultimately the court's responsibility to make the determination as to whether the evidence establishes one or not. *R v Neve*, 1999 ABCA 206, para 199.

[117] The circumstances in the three sexual assaults are not identical. They do not need to be. They have a number of similarities. They were all committed when Mr. Simon was under the influence of alcohol. They were all opportunistic and impulsive acts, as opposed to premeditated ones. All three were serious sexual assaults. In all three, the victims were adult women who were particularly vulnerable, for different reasons. For the first two victims, their vulnerability stemmed from cognitive issues. For H.K, it stemmed from her high level of intoxication. But all three were, because of their vulnerability, unable to resist Mr. Simon in any meaningful way.

[118] These events were not clustered in a specific time frame. They were spread out over a period of 16 years, ranging from when Mr. Simon was between the ages of 20 and 36 years old. There is nothing to suggest that these events are related to time-specific circumstances in Mr. Simon's life or to anything that would reduce the predictive power that they have about how he might behave in the future.

[119] In my view, these three sexual assaults do form a pattern of Mr. Simon, while under the influence of alcohol, acting in an impulsive and opportunistic way and

taking advantage of vulnerable adult women to satisfy his sexual urges. I would have come to this conclusion even in the absence of any expert evidence.

[120] I find that the repetition of this behaviour over a 16-year time frame shows that it is more likely than not that Mr. Simon will commit another serious sexual assault in the future. And, as Mr. Simon acknowledges, serious sexual assaults can be presumed to inflict the harm contemplated in both Paragraphs 753.1(2)(b)(i) and (ii).

[121] For these reasons I conclude that the presumption is engaged. This conclusively establishes that there is a substantial risk that Mr. Simon will re-offend.

[122] I also find that even without resorting to the presumption, the evidence establishes beyond a reasonable doubt that there is a substantial risk of serious re-offending. A number of factors have contributed to my reaching this conclusion.

[123] The first is Mr. Simon's criminal record. With respect to non-sexual violence, Mr. Simon's criminal record shows that throughout his life, he has had outbursts of violence directed at various people. It is true that his most extreme violence was directed at his grandfather, and that the significance of those offenses must be understood in the context of the deeply traumatic and troubled relationship that Mr. Simon had with him. Still, this context does not render the level of violence Mr. Simon used on those occasions irrelevant to the assessment of the risk he poses because it does show what he is capable of, under certain circumstances, if triggered.

[124] The other occasions when Mr. Simon was violent are not irrelevant to the assessment of the risk he poses simply because the violence he used was less significant. In some of those instances, Mr. Simon appeared to be somewhat out of control. For example, in relation to the assault on L.N. in January 2003, police received several calls from frantic complainants who reported that he was "freaking out". When they arrived at the scene they found a microwave on the floor, broken glass in the residence and damaged light shades. Similarly, his behaviour on September 20 2014, the very day he was released from custody, was very erratic: he entered an elder's home uninvited, punched a 16 year old who refused to help him carry his alcohol, tried to break into another person's house, and was trying to fight a group of youths when police intervened. On both these occasions police intervention put an end to the incident before anyone was seriously hurt but Mr.

Simon was behaving very erratically and the situation could well have escalated further but for that outside intervention.

[125] Another aspect of the criminal record which raises concerns is that it demonstrates Mr. Simon's impulsiveness and how easily his violence can be triggered by minor events. The assault of his spouse S.A. in January 2016 is an excellent example of how something seemingly innocuous can prompt him to lash out violently. So is the fact he punched a teenager in the face in September 2004 simply because he refused to help him carry his alcohol. This type of response to a minor trigger is relevant to the assessment of risk of more serious violence should Mr. Simon be triggered in a more significant way, as he was by his grandfather.

[126] As far as the risk of further sexual re-offending, for reasons I have already explained, I find that Mr. Simon's pattern of taking advantage of vulnerable adult women to satisfy his sexual urges establishes, from a common-sense point of view, that there is a substantial risk that he will do so again in the future. This is especially so considering that Mr. Simon committed the last of these sexual assaults *after* having had the benefit of sex offender treatment.

[127] My concerns about the risk that Mr. Simon presents, based on his criminal history, are supported by Dr. Klassen's opinions. As I already noted, those opinions are neither determinative nor binding. However, they are an important aspect of the evidentiary record, as they often are on these types of applications.

[128] Dr. Klassen's qualifications were not disputed. He has considerable experience in these types of assessments. I am satisfied that he understood that his role in these proceedings was to assist the Court, and not to advocate for any particular outcome. His answers during cross-examination showed that he was neither entrenched in his opinions nor dismissive of other points of view. I found him balanced and fair. I found his evidence, and in particular his diagnoses, very helpful in my analysis.

[129] Mr. Simon's substance abuse disorder, combined with some of his anti-social personality traits, appear to be key elements in explaining both his violent behavior and his sexual offending. On my understanding of the evidence, they are at the root of the risk he presents.

[130] Dr. Klassen was cross-examined at length about the conclusions set out in his report. As I said when I sentenced Mr. Simon on October 23, 2020, this was a very able and thorough cross-examination.

[131] The cross-examination brought out important nuances on some aspects of Dr. Klassen's evidence. For example, he acknowledged that some of the scores he attributed to Mr. Simon on the PCL-R and some of the other instruments he used could be slightly different. He also acknowledged that Mr. Simon's anti-social personality traits were likely largely the product of the trauma and neglect that he suffered, as opposed to more ingrained characteristics.

[132] Dr. Klassen was also cross-examined about the risk assessment structured and actuarial tools that he used. His opinion is that these tools are very important in risk assessment and are better predictors of risk than mere clinical judgment. Again, important nuances were brought out during the cross-examination about how Dr. Klassen scored the instruments, and more generally about the use of these instruments for risk assessment in indigenous offenders.

[133] I accept that these risk assessment instruments have limits. As I already noted, they cannot predict Mr. Simon's risk; they merely indicate the recidivism rates in the cohorts of offenders whose characteristics Mr. Simon shares. Importantly, they are entirely unhelpful in pinpointing whether Mr. Simon will be in the recidivists or non-recidivists' group within any given cohort. And they are of no assistance in predicting the severity of the recidivism.

[134] I recognize as well that the results that these instruments produce must be approached with caution. Some were validated for use with indigenous offenders, but others were not. Dr. Klassen acknowledged that even those that have been validated for use with indigenous offenders have to be used with caution and sensitivity to take into account the specific contexts and realities of indigenous people.

[135] Having said that, Dr. Klassen's professional opinion as a forensic psychiatrist is that these are helpful tools in risk assessment. I see no basis to reject his evidence on this point. I agree that the results from the testing on these instruments must be approached with caution, but there is no evidentiary basis for me to discount them completely, or to reject Dr. Klassen's opinion evidence simply because it is based in part on Mr. Simon's scores on these instruments.

[136] A third factor that has informed my conclusion about the risk of re-offence that Mr. Simon presents is the evidence about how he did while serving his federal sentence, and after.

[137] When Mr. Simon was on early release in Edmonton, despite there being some outside controls, and despite the stakes being very high – Mr. Simon knew he was facing re-incarceration if he did not comply with his release conditions - he relapsed into consuming alcohol. He also breached his release terms by not returning to his halfway house because he wanted to spend time with his girlfriend.

[138] It is not surprising that someone who has a substance abuse disorder would have relapses. Managing this disorder will likely always be a significant challenge for Mr. Simon. But because Mr. Simon's risk of sexual and non-sexual violent offending is linked to his substance abuse issues, the potential for relapse in this area translates into significant concerns from a risk assessment point of view.

[139] The prospects of treatment must be taken into account in the assessment of the risk in a Dangerous Offender Application. *Boutillier*, paras 42-25. Mr. Simon argues, and I agree, that the same is true at the designation stage in the context in a Long Term Offender Application. The treatment prospects play a different role at the designation stage and the penalty stage, but they are relevant to both.

[140] However, taking treatment prospects into account does not assist Mr. Simon in raising a reasonable doubt about whether he presents a substantial risk of re-offence. The evidence shows that he has the ability, cognitive and otherwise, to engage in programming. This is positive. Mr. Simon did take programming while serving the federal sentence he received in 2010. This included sex offender programming. The CSC materials show that he made progress, developed some insight into his behavior, and was not resistant to programming. However, aside from his compliance issues while he was on early release, he also committed further offenses after his sentence was completed. He relapsed into substance abuse. And all things being relative, he sexually assaulted H.K. a relatively short time after he regained his freedom.

[141] I acknowledge that Mr. Simon did not benefit from intensive substance abuse programming and that by all accounts this is a key area that needs to be addressed. Still, the prospect of such programming is not, on its own, enough to raise a

reasonable doubt in my mind about the fact that Mr. Simon presents a substantial risk of re-offence.

[142] I conclude that through the presumption set out at Paragraphs 753.1(2)(a) and (b)(i), and also independently from that presumption, the Crown has established beyond a reasonable doubt that there is a substantial risk that Mr. Simon will reoffend. I am of the view that this substantial risk exists for both sexual reoffending and violent reoffending.

[143] That does not end the analysis. Even when the criteria for a Long Term Offender designation are met, the Court retains the discretion not to make the designation.

[144] I have kept in mind the importance of restraint. I have given careful consideration to Mr. Simon's exceptionally tragic and traumatic background and the effect it has in reducing his moral blameworthiness. Still, protection of the public is paramount in these types of proceeding. In the face of the risk that Mr. Simon presents, I cannot ignore the need to protect members of communities, in the Northwest Territories and elsewhere, from the harm that would result from Mr. Simon committing further sexual offenses or crimes of non-sexual violence.

[145] The consequence of a Long Term Offender Designation is that the offender, after the end of the custodial sentence, is subject to outside controls through a Long Term Supervision Order. That part of the sentence is intended both to help protect the public and support the offender's rehabilitation.

[146] I am not satisfied that sentencing Mr. Simon within the usual sentencing regime, as opposed to the Long Term Offender framework, would address the public safety concerns that exist in this case. It is not only in the interest of the public, but also very much in Mr. Simon's own interests, that every measure available be in place to help him, once released, to build on the gains that he will hopefully have made during the custodial portion of his sentence, and to help prevent relapses. Realistically, outside controls cannot eliminate the risk of relapse entirely. However, they do increase the chances of some form of intervention taking place before a relapse, if it occurs, degenerates and leads to the commission of other serious offenses.

[147] I am not overlooking the impact that Long Term Supervision Orders have on offenders. I agree with Mr. Simon that these orders are intrusive. They give the National Parole Board a lot of control over an offender's life. Their impact on a person's day-to-day life should not be underestimated or taken lightly.

[148] At the same time, not having outside controls that support rehabilitative efforts may lead to far worse consequences for Mr. Simon if this results in the commission of further serious offenses.

[149] I also recognize that Long Term Supervision Orders can have serious consequences, as a breach can lead to a charge, and potentially, further imprisonment. That said, a breach of a Long Term Supervision Order does not necessarily result in a charge. The Parole Board has considerable flexibility in deciding how to handle a breach. Rather than a charge, a breach may result in changes to conditions, adjustments to the supervisory regime or other changes to assist the offender in succeeding on release, which is everyone's ultimate goal.

[150] The reality is that, sadly, Mr. Simon has considerable and very challenging issues to address if he is to overcome his substance abuse disorder and the traumas from his past, and if he is to maintain a pro-social lifestyle despite the anti-social personality traits that he has developed. In my view, his own rehabilitation, as well as the protection of the public, require that he be subject to external controls beyond the reach of the term of imprisonment that must be imposed for his sexual assault of H.K.

D. Sentence

[151] The Crown seeks the imposition of a further jail term of 2.5 years, followed by a Long Term Supervision Order of a duration of 8 years.

[152] Mr. Simon agrees that a further term of imprisonment in the penitentiary range should be imposed so that he can have access to the CSC programming that he needs to support his rehabilitation. He argues that the further jail term should be limited to 2 years. He also argues that the period of Long Term Supervision should be in the range of 5 years.

[153] In *Spillman*, the Ontario Court of Appeal found that in determining the length of the custodial portion of the sentence, the time required to complete available

rehabilitative programming can be taken into account. *Spillman*, paras 38-51. That finding was made in the context of a discussion about the available sentences for an offender designated a Dangerous Offender. In my view, a similar logic applies to sentencing an offender designated a Long Term Offender. Although the two regimes are different, they are both part of the overall special sentencing framework set out at Part XXIV of the *Criminal Code*.

[154] Mr. Simon's credit for the time he has already spent on remand, calculated at the usual ratio, amounts to 4 years and 8 months. Irrespective of what might constitute a fit sentence for the sexual assault on H.K. under the regular sentencing regime, it is open to me, on this Application, to take into account the need for Mr. Simon to have access to rehabilitative programming in deciding what the custodial portion of his sentence should be. However, restraint remains a relevant consideration: as is always the case, the sentence should be no longer than what is needed to achieve its objectives.

[155] Based on the testimony of Ms. Glimsdale, I conclude that a further jail term of 2 years should afford Mr. Simon an opportunity to have access to the programming that he needs. In fact, a shorter sentence may well result in Mr. Simon being given a higher priority in accessing programs.

[156] As for the duration of the Long Term Supervision Order, the Crown's position is based on Dr. Klassen's opinion that taking into account the reduction in risk that occurs naturally through ageing, Mr. Simon should be subject to outside controls until he reaches the age of 50.

[157] As Mr. Simon correctly noted during submissions, the existence of a substantial risk to re-offend is a condition precedent to a Long Term Supervision Order being available as part of sentencing. It follows that such an Order should be in place until the risk is no longer substantial, not until the risk is non-existent. In addition, the treatment prospects are relevant at this stage of the analysis as well.

[158] In my view, considering the fact that Mr. Simon has no impediment, cognitive or otherwise, to taking treatment and programming, that he is motivated and has engaged in programming in the past, I do not think it is necessary to have him subjected to outside controls for a further 8 years after the completion of the custodial portion of his sentence.

VII) CONCLUSION

[159] For those reasons, I concluded that Mr. Simon should be designated a Long Term Offender. I sentenced him to a jail term of 6 years and 8 months, and gave him credit for 4 years and 8 months for the time he had already spent on remand at that point (38 months and 3 weeks). Accordingly, the further jail term imposed was 2 years, to be followed by a Long Term Supervision Order of a duration of 5 years.

[160] I also issued the ancillary orders sought by the Crown. These included a D.N.A Order, a Firearms Prohibition Order, and an Order that Mr. Simon comply with the Sex Offender Information Registration Act for life.

[161] At the conclusion of the proceedings on October 23, 2020 When I imposed sentence, I directed that a transcript of my remarks, and certain other documents, be forwarded to the correctional authorities. I direct the Clerk of the Court to forward a copy of this Ruling to those authorities as well.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
30th day of November 2020

Counsel for Crown: Morgan Fane
Counsel for Accused: Kate Oja

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

and-

JOHNNY SIMON

Restriction on Publication: There is a ban on the publication, transmission or broadcast of any information that could identify the complainants, pursuant to section 486.4 of the *Criminal Code*

RULING ON LONG TERM OFFENDER
APPLICATION OF THE HONOURABLE
JUSTICE L.A. CHARBONNEAU
