

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

EDWIN JOSEPH ANDREW AVIK

**REASONS FOR SENTENCE
of the
HONOURABLE JUDGE GARTH MALAKOE**

Heard at: Yellowknife, Northwest Territories

Date of Decision: January 15, 2021

Date of Hearing: September 16, 2020 and December 11, 2020

Counsel for the Crown: Billi Wun

Counsel for the Accused: Peter Harte

[Sections 266, 733.1(1), 264.1(1)(a), 430(4) and 264.1(1)(a) of the *Criminal Code*]

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A. INTRODUCTION

A.1 Background

[1] Mr. Avik entered guilty pleas to five offences which he committed in Inuvik from October 16 to 19, 2019. He admitted to an assault, a breach of a probation condition that he abstain from alcohol, two uttered threats of death, one to a police officer, the other to a jail guard and mischief to a jail cell. Counsel filed an agreed statement of facts and based on his admissions, I found Mr. Avik guilty of these offences. This is my decision with respect to the sentence that Mr. Avik will receive with respect to these offences.

[2] The factors that determine Mr. Avik's sentence are complex. The five offences are summary offences, which although serious, would not, in the normal course, attract the four year penitentiary term that the Crown is requesting. On one hand, Mr. Avik's background and past criminal behaviour justify the consideration of a penitentiary term. He has spent most of his adult life in and out of prison. He has amassed a lengthy and varied criminal record which include two federal penitentiary terms of imprisonment. His offences are usually unprovoked and violent. The offences that are before the Court are typical of this behaviour.

[3] On the other hand, there is a recognition that Mr. Avik, as an adult, carries trauma which results from the prolonged and horrific abuse that he was subjected to as a child. According to expert evidence before the Court, the trauma has affected his ability to self-regulate. He is reactive, impulsive, angry and lacking in insight and good judgment. The trauma and this resultant behaviour explains, in large part, his criminal activity. If his trauma is successfully treated and he does not drink, his behaviour will likely change.

[4] The time that Mr. Avik has already spent in jail on these charges further complicates the sentencing. As of January 15, 2021, the date of sentencing, Mr. Avik has been in remand for 458 days. If credit is given at 1.5 days, then Mr. Avik has accumulated 687 days or close to 23 months of credit for the time he has already spent in remand in Territorial facilities. For this Court to accept the Crown's submission that Mr. Avik should be placed in a federal penitentiary means that the Court would have to impose a term of imprisonment of at least an additional two years, i.e., a sentence which is a month short of four years.

[5] The Crown is seeking a sentence of 4 years less 2 days so that Mr. Avik would have a further 2 years and 1 month to serve. Mr. Avik's lawyer submits that an appropriate sentence would be time served and a lengthy period of probation.

[6] The Crown's position appears to be based on the submission that the federal incarceration system is the most appropriate system to handle Mr. Avik's special needs and to provide the necessary treatment and supervision to reintegrate him back into the community. Mr. Avik's lawyer submits that a 4 year sentence is excessive; that the federal system does not provide proper treatment for Mr. Avik's trauma and that this treatment can be obtained on an outpatient basis in Yellowknife or alternatively, while Mr. Avik is in a Territorial institution.

[7] Mr. Avik will only go to a federal penitentiary if he receives a sentence of two or more years of incarceration. The Court must impose a sentence after careful consideration of the principles and objectives contained in the *Criminal Code*. If, after this consideration, the sentence is one which results in a penitentiary term (i.e., two years or more), then Mr. Avik will go to a federal penitentiary. The Court cannot impose a sentence of incarceration of two years or more simply to get Mr. Avik into the federal incarceration system if such a sentence is disproportionate.

[8] In this decision, a reference to a section number in the absence of the name of a statute is a reference to the *Criminal Code*, R.S., c.C-34, s1 as amended.

A.2 Conduct of the Sentencing Hearing

[9] At the sentencing hearing, the Crown called Jennifer Gould, a parole officer with the Northwest Territories Parole Office. Ms. Gould described the intake and assessment process for federal inmates. She also described the programming available in the federal institutions based on the inmate's programming and security needs. This included an explanation of the Integrated Correctional Program Model (ICPM). Finally, Ms. Gould explained the process for reintegrating the offender back into the community.

[10] The defence called Jodi Kapicki, a psychologist, who has treated Mr. Avik. Ms. Kapicki was qualified as an expert to give evidence with respect to the following:

- (a) What has been the impact of trauma on Edwin Avik?
- (b) How does trauma explain his criminal record?

[11] Ms. Kapicki also described her history with Mr. Avik and her preferred method of treatment for trauma, EMDR therapy (Eye Movement Desensitisation Reprocessing).

A.3 Issues

[12] In this decision, I will deal with the following issues:

- (a) What are the relevant sentencing principles and objectives?
- (b) Should the sentencing objective of “protection of the public” be paramount?
- (c) The rehabilitation of Edwin Avik within the federal prison system.
- (d) The rehabilitation of Edwin Avik outside of the federal prison system.
- (e) Does the Crown have to prove the appropriateness of a federal penitentiary beyond a reasonable doubt?
- (f) What is the appropriate sentence for Mr. Avik?

[13] Before dealing with these issues, it is important to understand the circumstances of the offences, Mr. Avik’s background and his prior interactions with the criminal justice system.

B. AGREED STATEMENT OF FACTS

[14] The facts which form the basis for the Court’s findings of guilt with respect to the five offences are taken from the filed agreed statement of facts which sets out the following.

[15] At all material times, the accused, Edwin Avik, was bound by a probation order with conditions including to abstain absolutely from the consumption and possession of alcohol and to keep the peace and be of good behaviour.

[16] On October 16, 2019, the accused, Edwin Avik was at the warming shelter in Inuvik, Northwest Territories. He was intoxicated by alcohol.

[17] William Conley, a staff member at the shelter, was trying to remove Mr. Avik because he was causing a disturbance. This led to a physical altercation in which Mr. Avik struck Mr. Conley in the face and broke Mr. Conley's eyeglasses. Mr. Avik then grabbed Mr. Conley's arm and dragged him down 6 – 7 stairs toward the shelter's exit.

[18] As a result of the assault, Mr. Conley suffered an abrasion to his right cheek.

[19] Mr. Conley called the police. RCMP located Mr. Avik walking on the street away from the shelter. Upon arrest, Cst. Mysko noted an odour of liquor on Mr. Avik's breath. He admitted to drinking alcohol earlier. During the transport back to RCMP detachment and throughout the booking process, Mr. Avik was rude to police officers and generally non-compliant with police commands. He was successfully lodged in cells at 11:35pm.

[20] At approximately midnight, while Cst. Mysko was in the prisoner cell area, Mr. Avik said that after he is released he would take one of the police officers' guns and shoot the police in the head.

[21] Throughout the evening, while in cells, Mr. Avik was belligerent and generally non-compliant. He urinated on the cell door and threatened to defecate all over the cell. He attempted to peel off the flooring and damage the cell. By 11am, Mr. Avik had defecated on the cell floor and smeared faeces all over the cell.

[22] The police were unable to conduct a remand hearing with Mr. Avik because he was yelling into the speakerphone. He then threatened to smear faeces on the police officers and give them HIV.

[23] On October 18, 2019, while still in cells at the Inuvik RCMP detachment, Mr. Avik said to a cell guard, Kathryn Prichett, "I will take out as many people as I fucking can. You'll be the first one." Throughout the day, Mr. Avik was agitated and continued to intermittently defecate in his cell on the floor. His behaviour returned to normal and he became more compliant on October 19, 2019 when police took him out of his cell to transport him to Yellowknife.

C. EDWIN AVIK'S BACKGROUND

[24] Edwin Avik was born in May of 1983. At the time of sentencing, he is 37. He is Inuvialuit and was born in Inuvik, NT to Margaret Avingayoak (Avik) and

Stanley Keevik Jr. He and his two siblings, Nathan and Jolene were raised in an environment where their parents abused alcohol and drugs and where their father was often incarcerated.

[25] At a relatively young age, Mr. Avik was custom adopted by his birth mother's parents, Mary and Joseph Avik. Between the ages of three to eleven, he spent time between the houses of this parents and his grandparents (his adoptive parents). He lived with his adoptive parents in Tuktoyaktuk. He was removed from the home at twelve years and placed in foster care. Mr. Avik was subject to physical, mental and sexual abuse at the hands of many of his relatives. He states that he was fondled by his adoptive father on two occasions when he was eight and nine. He also alleges that he was physically abused by both parents.

[26] Mr. Avik resided in various foster homes as well as the Territorial Treatment Centre. The following paragraph summarize this background:

As stated earlier, he did not feel comfort and safety in his own home due to the emotional, physical and mental abuse that he was exposed to on a daily basis. He went to prison on a sexual assault when he was sixteen years old. He used to smoke weed and drink on a daily basis which he felt was a release from what and who he was becoming. He says if [he] had the chance he would like to be reborn and rid himself of the shame, guilt and regrets that he lives with on a daily basis.¹

[27] Mr. Avik has been involved in several intimate relationships. He has a 15 year old child with an ex-common-law partner. Mr. Avik was convicted of several assaults of this partner including the aggravated assault that led to his first federal term of incarceration.

D. EDWIN AVIK'S CRIMINAL RECORD

[28] The Crown's position is largely informed by the length and the nature of the entries on the criminal record of Edwin Avik. The first entry on the criminal record, a sexual assault, is from 1997 when Mr. Avik would have been 13. Beginning in 1999, there are entries in each year for which Mr. Avik did not spend the entire year in custody. This criminal history can be described as follows:

Mr. Avik is noted to have an extensive and unabated criminal history which contains convictions of a violent (both general violence and family violence), sexual (both child and adult victims) and property nature. Any gaps in offending can be explained by periods of time spent in incarceration.²

Mr. Avik has committed all varieties of violent offences. He has engaged in family violence offences, sexual offences (against child victims and adult victims), sexually

¹ Information taken from *Criminal Profile Report – Bowden Institution – Edwin Joseph Avik*, 2010/12/16 07:29, page 4

² *Criminal Profile Report – Bowden Institution – Edwin Joseph Avik*, 2010/12/16 07:29, page 6

motivated assaults, unprovoked assaults against stranger victims and threats to kill officers of the law. He has met the criteria for the High Intensity Sex Offender Program, High Intensity Family Violence Program, and High Intensity General Violence Programming, and High Intensity Substance Abuse Programming.³

[29] To assist in explaining Mr. Avik’s interaction with the criminal justice system over the past 10 years and to provide a context for the descriptions of Mr. Avik’s time in the federal institution, the following table sets out his criminal record and certain relevant events since July of 2010.

2010-07-29 Yellowknife, NT	(1) Assault s.266 CC	(1) 2 yrs & Discretionary Weapons Prohibition s. 110 CC for 10 years
	(2) Fail to comply with conditions of undertaking given by officer in charge s.145(5.1) CC	(2) 2 mos Conc
	(3) Uttering Threats S. 264.1 CC (3 chgs)	(3) 1 yr Consec &
	(4) Assault S.266 CC	(4) 6 mos Conc & Discretionary Weapons Prohibition s. 110 CC for 10 years
2013-03-05	Released on a One-Chance Statutory Release	
2013-03-28	Breach of residency condition. Warrant executed on 2013-04-12	
2013-08-11	Warrant expiry after 3 year sentence imposed on 2010-07-29	
2013-09-24 Edmonton, AB	S.810.2 Recognizance (2 years)	
2014-05-13 Edmonton, AB	Breach of Recognizance s.811 CC (5 chgs)	12 mos on each chg
2014-07-23 Edmonton, AB	Breach of Recognizance S.811 CC	9 mos
2015-01-24	Arrested for breaches	
2015-05-01	(1) Breach of Recognizance	(1) 12 mos.

³ Assessment for Decision – Bowden Institution – Edwin Joseph Avik, 2011/12/12 13:33, page 4

Edmonton, AB	s.811 CC (2) Breach of Recognizance s.811 CC	(2) 6 mos.
2015-07-24	Psychological Report by George Pugh, Psychologist	
2015-09-30	Release date from Fort Saskatchewan Correctional Centre	
2015-09-30 Yellowknife, TT	S.810.2 Recognizance (1 year)	
2016-01-21 Yellowknife, NT	Breach of Recognizance S.811 CC	12 mos & probation 3 years
2017-01-13 Yellowknife, NT	(1) Arson causing damage to property s.434 CC	(1) 2 yrs less 1 day & probation 2 yrs & Discretionary Weapons Prohibition s. 110 CC for 10 years
	(2) Breach of Recognizance s. 811 CC	(2) 15 mos Conc
	(3) Uttering Threats S. 264.1 CC (3 chgs)	(3) 12 mos Conc
	(4) Assault S.266 CC	(4) 6 mos Conc
2018-07-11 Inuvik, NT	Fail to Comply with Probation Order s. 733.1(1) CC	90 days
2018-08-19	Arrested for s.270(1)(b), 264.1(1)(a) and 733.1(1) CC	
2018-10-31	s.270(1)(b), 264.1(1)(a) and 733.1(1) CC	16 mos & 3 yrs probation
2019-10-16	Arrested on current offences	

E. ANALYSIS

E.1 What are the relevant sentencing principles and objectives?

[30] As I stated earlier, Mr. Avik's situation is complex. In this context, it is useful to review the fundamental purpose and objectives of sentencing as stated in the *Criminal Code*:

718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate the offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community;
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community.

[31] Other relevant sentencing principles include the following:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender . . .
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (c) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[32] Mr. Avik's interaction with the criminal justice system is well documented. There are sentencing decisions, pre-sentence reports, psychological reports and institutional reports. This documentation describes the previous offences and the methodology that has been used in sentencing, programming and supervising Mr. Avik. It also provides insight into the circumstances of the offences.

[33] Looking at the current offences in the context of Mr. Avik's record, they are a continuation of a pattern of offending. The pattern is simple and repeated. Mr. Avik drinks. He perceives an individual as a threat or having done something that angers Mr. Avik. He assaults the individual. Mr. Avik is arrested. He is belligerent and threatens whoever is around, including the police and guards.

[34] As I indicated earlier, the circumstances of each current offence are not so aggravating as to cause this Court to consider the offence to be the most serious instance of the offence for the purpose of sentencing. The assault was shoving. The injuries were minor. The threats were serious but while Mr. Avik was in no position to carry them out. The mischief was not permanent. There were none of the “deemed” aggravating factors such as vulnerable or intimate partner victims or motivations of race.

[35] With respect to the two components of the principle of proportionality, these observations deal with the “gravity of the offence.” The more difficult analysis concerns the “degree of responsibility of the offender.”

[36] It is noteworthy that Mr. Avik has entered guilty pleas to these offences. These pleas are mitigating since they indicate an acceptance of responsibility. The pleas along with my own observations of Mr. Avik also demonstrate a remorse, both for his victims and for the situation he finds himself in. I do not question that the sober Mr. Avik that appears in Court is genuinely sorry for what he did and is convinced that, upon release, he will not reoffend.

[37] On the other hand, it is aggravating and informative that Mr. Avik has a lengthy and continuous criminal record.

[38] Ms. Kapicki attributes, in part, Mr. Avik’s criminal record to the trauma that he has suffered:

Due to the chronic, frequent, and pervasive abuse and neglect, Mr. Avik’s ability to develop healthy/adaptive internal coping strategies was impaired. He grew up not being able to trust his own perception of the world. Furthermore, he could not trust that anyone had his best interest in mind when they interacted with him. He was unable to form secure bonds/connections with people and did not learn how to develop the ability to self-regulate. This means he was reactive, impulsive, angry, misguided, and lacked insight, good judgment, and higher order brain functioning (complex decision making skills) because his brain did not develop the way a person’s would who grew up in a loving and supportive environment.

It is important to note that none of the above excuses the crimes that Mr. Avik has committed but it does offer an explanation as to how he came to function the way he does.

[39] The abuse and neglect that Mr. Avik experienced arise in the context of his aboriginal background. His grandparents (adoptive parents) were residential school survivors. His childhood was shaped directly by the systemic and background factors affecting aboriginal people generally, but more specifically by the abuse he received at the hands of his relatives. *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, [2012] 1 S.C.R. 433 require this Court to recognize the

diminished blameworthiness of Mr. Avik and to consider alternatives to incarceration.

[40] The documentation before the Court indicates that if Mr. Avik does not change his behaviour, he will likely re-offend within a short time after his release from imprisonment.

[41] The connection between Mr. Avik's trauma and his criminal behaviour raises the potential futility of unduly emphasizing the objective of specific deterrence. Mr. Avik does not appear to be deterred from future crime by lengthy periods of incarceration. Similarly, the objectives of general deterrence, denunciation and reparation are of secondary importance since the length of the previous periods of incarceration have reached a point where the ordinary member of the public would consider their length to sufficiently denounce the offence and to provide deterrence.

[42] The Court is left with balancing two objectives: first, separating Mr. Avik from society and second, the possibility of rehabilitation.

E.2 Should the sentencing objective of “protection of the public” be paramount?

[43] If Mr. Avik is unable to break his cycle of re-offending, he needs to be separated from society. In the context of this sentencing, this separation and the need to protect the public is important; however, it cannot be unduly long or indeterminate. At best, Mr. Avik's separation from society is a “pause” in his offending which gives him time to rehabilitate, to benefit from his time in prison and then to reintegrate into society.

[44] The *Criminal Code* does provide for the situation where an accused needs to be separated from society on an indeterminate basis through the provisions dealing with dangerous offenders and long term offenders. This is a last resort and only applicable when the sole objective is to protective the public from harm. The possibility of such a fate for Mr. Avik was recognized over ten years ago:

So it cannot be said that rehabilitation has not been considered and played a part in his sentences in the past. All I can say today is that Edwin Avik is incorrigible and the public has to be protected from him. Until Mr. Avik takes steps to deal with his issues, to stop drinking, and only he can decide to take those steps, he will continue to be dangerous. Sentences will become longer and longer. Mr. Avik, if you do not do something, then I would say that you are well on your way to becoming a dangerous offender.⁴

⁴ R. v. Edwin Avik, NWTTC, T-1-CR-2010-000989, unreported decision, page 25

[45] Let me be clear about the priority of the sentencing objectives. The sentence imposed by this Court will address all of them. The sentence is, however, a recognition that rehabilitation is still a valid objective which has a potential of succeeding and because of Mr. Avik's background and the *Gladue* factors needs to be tried. The Court can only accept this prioritization while rehabilitation is a possibility.

[46] Rehabilitation, in Mr. Avik's case, seems to require a commitment on his part and the opportunity to access treatment for the trauma that he has suffered. The Crown and defence differ on how the trauma treatment should be made available. The Crown submits that Mr. Avik can receive treatment in a federal institution where certain programming is available which can be supplemented by access to outside therapy.

[47] The defence submits that Mr. Avik's period of incarceration has been sufficient and that he should be released to take treatment on an out-patient or on a residential basis.

[48] The following two sections examines the potential of rehabilitation for Mr. Avik in the federal prison system and outside of the federal prison system.

E.3 Rehabilitation within the federal prison system.

[49] The Crown submits that Mr. Avik's best chance for success to be rehabilitated and reintegrated into society requires him to be placed in the federal prison system. The basis for this argument is the documentation provided as a result of Mr. Avik's two previous incarcerations in the federal system. The Crown submits that the documentation demonstrates a certain progression in Mr. Avik's motivation and involvement with programming. As a result, the federal system provides the best carceral environment for Mr. Avik to access treatment while protecting the public.

[50] The Crown makes this argument by showing how Mr. Avik started off in the federal system reluctant to access programming and then during his last federal incarceration, appears to have been motivated to participate. I have reproduced this argument in some detail since the documentation gives insight into Mr. Avik's behaviour in and out of jail.

[51] In June of 2006, Mr. Avik was 23 years old and before the Territorial Court for sentencing for an aggravated assault. His lawyer stated that Mr. Avik had been reluctant to take programming the past, but wished to go into the federal system for treatment:

In the past he was reluctant to take programming to deal with his anger management and with the underlying emotional problems which he is plagued with, but since this offence he has been more than willing to take the programming.⁵

His concern is that the programs at the correctional centre may not be able to provide him with the in-depth programming that he needs. He has advised me that this morning he did speak with his case officer to request the possibility that he be sent to a federal penitentiary for that programming . . . but I have been instructed to inform the court that Mr. Avik would prefer to have the opportunity to take part in the more intensive programming, which he believes he will be able to receive at a federal penitentiary.⁶

[52] Mr. Avik was sentenced to two years plus a probation order of one year. During this first period of federal incarceration, his behaviour was compliant (in contrast to his behaviour during previous incarcerations in Territorial facilities); however, he refused to complete programming:

AVIK's behaviour during this prior federal term was also non-problematic, although he refused to complete programming. This is a sharp contrast to information that has been received in regards to AVIK'S behaviour during the times that he spent incarcerated in the Northwest Territories. . . . An approximate total of 104 incidents were noted to have been on file ranging from disobeying orders to attempted assaults on staff to assaults on other offenders and it was noted that AVIK spent a considerable amount of time in Administrative Segregation as a result of his negative behaviour. The offender also refused to attend any programs or seek any kind of assistance to address his criminal behaviour.⁷

AVIK was detained during his first federal term of incarceration and did not complete any of the programming that was recommended on his Correction Plan (the Aboriginal Substance Abuse Program, Aboriginal Sex Offender Program and In Search of your Warrior).⁸

[53] On July 29th of 2010, Mr. Avik was sentenced to a three year federal term of incarceration for assault, failure to comply with an undertaking and uttering threats. Mr. Avik's second penitentiary term would have started with this sentencing. During this second term, he did complete some programming. The initial report in this regard is from 2011 and is based on a review of reports after Mr. Avik stated that he did not wish to meet with the author:

As mentioned previously, during this term of incarceration, the CMT recommended that Mr. Avik may benefit from the National Moderate Intensity Substance Abuse Program (NMISAP), as well as the appropriate maintenance programs.

The offender was suspended from the NMISAP program for poor attendance, and a poor attitude. Mr. Avid also voluntarily quit attending the Adult Basic Education (ABE) School Level 2 program, despite having relatively high marks when he participated.⁹

⁵ R. v. Edwin Avik, unreported, June 13 and 14, 2006, NWTTC, T-1-CR-2006000522, page 13

⁶ R. v. Edwin Avik, *supra*, page 15

⁷ Criminal Profile Report – Bowden Institution – Edwin Joseph Avik, 2010/12/16 07:29, page 18

⁸ Criminal Profile Report – Bowden Institution – Edwin Joseph Avik, *supra*, page 1

⁹ Psychological/Psychiatric Assessment Report - Bowden Institution – Edwin Joseph Avik, 2011/10/04 11:18, page 3

[54] In December of 2011, Mr. Avik was being considered for Statutory Release; however, he was detained. In that report, the author states the following:

Mr. AVIK remains an untreated offender with a very horrendous supervision history. Probation or conditional sentences have not deterred him from committing violent acts and seriously harming others. He is impulsive in his violence as indicated in the index offence.

He does not have a specific target group, he has offended against a variety of victims which further presents a risk to the public.

Unless Mr. AVIK makes some much needed changes which he appears to be making through the substance abuse program, his risk will remain as high. His PO is exploring some avenues via the section 84 release to the community; this type of release will give him some extra resources such as an Aboriginal psychologist who will be able to assist him with his upbringing and his abandonment issues. CMT is exploring the possibility of this counselling starting as soon as possible prior to release to the community.¹⁰

Mr. AVIK is commended for participating in the Aboriginal Substance Abuse Program to address his substance abuse issues after having being terminated from the first attempt for being unmotivated.¹¹

[55] In March of 2012, Mr. Avik was detained on a detention review. The author made the following comments regarding his programming:

While you successfully completed the Aboriginal Offender Substance Abuse Program in January 2012 and you received a successful complete, you are considered an untreated violent offender who is seen as “completely unmotivated” to address issues.

While the Correctional Services of Canada is recommending Detention Ordered, it has acknowledged some recent progress. You completed the substance abuse program and responded well; you have also inquired about the Violence Prevention Program which is seen as out of character for you. Your case management team is exploring a Section 84 release plan and has put together a plan for a one chance statutory release.¹²

[56] Mr. Avik completed the Violence Prevention Program during June 4, 2012 to August 16, 2012:

AVIK, Edwin attended all 34 out of 36 sessions of the program. His missed sessions were unauthorized sick leaves. Make up sessions were done for both missed sessions. Within the group sessions, Edwin initially presented as guarded and hesitant to share relevant information. At the beginning of the program, he rarely willingly contributed to group discussions, but as time went on he regularly provided meaningful responses, which showed comprehension of program concepts. Edwin appeared more comfortable to express himself in his written work than in discussions. His written assignments were

¹⁰ *Assessment for Decision – Bowden Institution – Edwin Joseph Avik*, 2011/12/12 13:33, page 11

¹¹ *Assessment for Decision – Bowden Institution – Edwin Joseph Avik*, *supra*, page 15

¹² *NPB Detention Review Decision Sheet – Bowden Institution – Edwin Joseph Avik*, 2012/03/22 16:53, page 5

completed with good thought and detail and he did not hesitate to ask for clarification if necessary.¹³

[57] Although Mr. Avik was not given statutory release, he was recommended for a one chance statutory release. It was recognized that the successful completion of the Violence Prevention Program had resulted in positive gains:

In regards to Anger and Emotions Management, Mr. AVIK is now “able to recognize his anger triggers, the old thoughts that would drive his anger and he identified the necessity of expressing his emotions so he does not explode in rage”. Mr. AVIK is aware that in his case he needs to “talk things out and not let emotions get out of control.”

In regards to self-management, Mr. AVIK reports that since the program he reports that he is much more aware of where his old lifestyle will lead him and is using the skills to always think of the consequences. Mr. AVIK presented a detailed and achievable self-management plan.

Mr. AVIK started to make changes in his life even prior to being recommended for detention. His progress came about as a result of his opening up and communicating with his Parole Officer and taking the Aboriginal Substances Abuse Program with the attitude of wanting to make changes. He responded well to the Aboriginal program. He also responded very well to the Pathways program, where he started to work with the Elder closely, wanting to learn more every day. He displayed insight into his substance use, but more importantly he demonstrated his insight into the harm he caused to his victims, sometimes unprovoked. He realized using alcohol was destroying him. Prior to this change in attitude, all Mr. AVIK thought about when [he] gets out of prison was going for a drink, whereas currently his thoughts are towards how he would like to join a soccer team to play soccer, get a job and continue with his journey in a positive manner and hope to one day get married and have a family.¹⁴

[58] Mr. Avik was released on a One Chance Statutory Release on March 5, 2013 to Stan Daniels Healing Centre CRF in Edmonton. This release was suspended on March 28, 2013 when Mr. Avik failed to return. He remained at large until April 12, 2013 when he was apprehended by police. It was then decided that Mr. Avik would remain in the Bowden Institution until his new warrant expiry date of August 11, 2013.

File information indicates that positive changes in attitude and behaviour were initially noted by the case management team when first released in the community. You were considered to be engaged in your Correctional Plan. You had continued with Elder counselling and participated in some cultural/spiritual ceremonies that appeared to have a therapeutic impact on you. You were reported as saying and doing the “right things”.

You have an extensive and unabated criminal history that includes over 50 convictions including approximately 18 convictions for extreme violence that includes assaults, sexual assaults, anal intercourse, threats, aggravated assaults and assaults causing bodily harm. You have approximately 15 convictions for non-compliance, including unlawfully at large and conditional breaches.

¹³ *Program Performance Report Final – Bowden Institution – Edwin Joseph Avik, 2012/10/22 16:22, page 1*

¹⁴ *Assessment for Decision – Bowden Institution – Edwin Joseph Avik, 2012/10/18 12:55, page 2*

You have frequently shown that you do not abide by conditions of release while under community supervision and when you are in the community, you are at an elevated risk of re-offending. In your case the risk of reoffending includes instrumental violence and sexual violence which could result in serious harm to another person. Based on your history and your recent behaviours in the community, it is clear that conditions of release do not play an important role in your reintegration plan.

The Board is of the opinion that the actions leading to you becoming unmanageable in the community, going unlawfully at large, and return to substance use were directly within your control. Your recent behaviour is indicative of a lack of commitment on your part to change your lifestyle and an unwillingness to be supervised in community. Despite having numerous community supports and the assistance of a community Elder, you chose not to utilize these supports while in the community.¹⁵

[59] In summary, the Crown argues that Mr. Avik has shown progress while in the federal system. However, he cannot succeed in rehabilitation if he is not in an environment where he is supervised strictly and where he is unable to access alcohol and drugs.

E.4 Rehabilitation outside of the federal prison system

[60] The submission of the defence is that first, Mr. Avik has already spent enough time in jail and that second, the federal prison system does not have the ability to provide treatment for trauma, but can only provide skills for dealing with the effects of trauma.

This therapy needs to address all aspects of the trauma – not just help him learn skills to manage emotions when they arise. Only offering to teach skills in therapy is like putting a bandaid over a surgical wound without any stitches. It can only do so much in the realm of healing.¹⁶

[61] Although I accept that Ms. Kapicki was not qualified to provide an opinion on the efficacy of the Integrate Correctional Program Model (ICPM) offered by the Correctional Service Canada, I accept that the treatment offered in the federal institutions is to teach skills that help reduce risk and/or harmful behaviour. This treatment does not treat the underlying trauma. This was confirmed in the cross-examination of Ms. Gould.

[62] I accept the evidence of Ms. Kapicki that Mr. Avik would benefit from therapy to treat his trauma and that he is unlikely to change his criminal behaviour unless that trauma is treated. Ms. Kapicki met Mr. Avik 25 years ago when he was a young person in the Territorial Treatment Centre and she was a child care worker. She began a therapeutic relationship with him at the beginning of 2019. During the interval, she had become a psychologist and Mr. Avik was incarcerated

¹⁵ PBC Post Release Decision Sheet – Bowden Institution – Edwin Joseph Avik, 2013/05/24 14:44, page 3

¹⁶ Report of Jodi Kapicki, M.Ed., Registered Psychologist, page 4

at the North Slave Correctional Centre. This therapy lasted until his release in July of 2019. It began again in December of 2019 after he had been re-arrested in October of 2019. Since March of 2020, the sessions have been twice a month over the phone as a result of the COVID-19 pandemic. The funding for these sessions comes from the Health Canada's Indian Residential School Program. Mr. Avik is currently in the second phase of the eight phase EMDR (Eye Movement Desensitization Reprocessing) therapy.

[63] Ms. Kapicki acknowledges that Mr. Avik's complex trauma will take years to heal. She also acknowledges that Mr. Avik's commitment to receiving therapy has been largely while he has been incarcerated. Mr. Avik has not proven that he is committed to receiving therapy while he is in the community.

E.5 Does the Crown have to prove the appropriateness of a federal institution beyond a reasonable doubt?

[64] The defence takes the position that a finding that the sentencing objective of Mr. Avik's rehabilitation and reintegration into society is best obtained in a federal institution must be determined on proof beyond a reasonable doubt. As I understand the argument, the defence is saying that to send Mr. Avik to the federal system means that the Court would have to give him a sentence of two years or more. In this situation, such a sentence is not appropriate based on any other sentencing objective or combination of sentencing objectives. Sentencing him to a federal sentence means he is receiving a longer sentence in order that he can benefit from being in a federal institution. Therefore, this makes the fact that a federal institution is appropriate an "aggravating fact" and "aggravating facts" must be proven on proof beyond a reasonable doubt.

[65] The starting point of the defence argument is section 724, which states, in part:

- 724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentence proceedings and any facts agreed on by the prosecutor and the offender.
- (3) Where is a dispute with respect to any fact that is relevant to the determination of a sentence,
- (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
 - (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
 - (c) either party may cross-examine any witness called by the other party;

- (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
- (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[66] The defence relies on s. 724(3)(e). Whether or not a federal sentence is more suitable for Mr. Avik is an “aggravating fact” and must be proven with proof beyond a reasonable doubt. In response, the Crown argues that, at best, it is a “disputed fact” which must be proven with proof on a balance of probabilities.

[67] In particular, the Crown argues that “aggravating facts” are those facts which relate to show that an offence was committed in a more aggravating way, or that the accused had committed other crimes. Whether or not Mr. Avik should be sent to a federal penitentiary system to achieve appropriate sentencing objectives is not a fact at all. In this regard, reference is made to *R. v. Angelillo*, 2006 SCC 55.

[68] It is not appropriate that I decide whether or not there is any merit to this submission in this case. The reason is simple. I find that a penitentiary term in this case would be a disproportionate sentence. Therefore, it is not necessary to decide whether or not the appropriateness of a federal institution has to be proven with proof beyond a reasonable doubt.

F. SUMMARY AND CONCLUSION

[69] Edwin Avik has spent most of his adult life locked up in a Territorial or federal prison. When he is released, he drinks and he re-offends and is locked up again. Without a change in Mr. Avik’s behaviour, this cycle will continue.

[70] When Mr. Avik is out of jail, he does not appear to be deterred by the length of the sentence associated with a potential offence. Increasing the length of these sentences will not deter future criminal behaviour. Even long sentences will eventually be served and Mr. Avik will be released. The exception to this, of course, is an indeterminate period of incarceration which recognizes that Mr. Avik will not change and the sole objective is to protect the public from his harm.

[71] The Crown has not asked the Court to declare Mr. Avik a dangerous offender nor a long term offender. Both of these designations are a recognition that other sentences will not adequately protect the public.

[72] In the absence of a dangerous offender or long term offender application, the Court cannot impose a period of incarceration which is determined solely on the need to separate Mr. Avik from the public.

[73] The starting point has to be the fundamental principle of sentencing, that is, the proportionality principle, as stated in section 718.1: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[74] In my view, a period of incarceration of four years is disproportionate for the five offences. The Court cannot impose a disproportionate period of imprisonment only for the purpose of ensuring that Mr. Avik has at least an additional two years or more to serve and therefore will be placed in a federal institution. This principle was stated by the Ontario Court of Appeal in *R. v. Spilman*, 2018 ONCA 551 at paragraph 40:

[40] . . . It is also well settled that outside the dangerous offender environment, sentencing judges are disentitled to determine the length of a sentence of imprisonment solely by reference to the period of time necessary to complete essential or recommended rehabilitative programs: see for example, *R. v. M.B.* (1987), 36 C.C.C. (3d) 573 (Ont. C.A.), at pp. 574-575; *R. v. Legere* (1995), 22 O.R. (3d) 89 (C.A.), at p. 101.

[41] Implicit if not explicit in the appellant's complaint is that to take cognizance of the time needed for rehabilitative treatment or programs in a penitentiary in fixing the length of the custodial component of composite sentence results in the unwarranted extension of the appropriate range of sentence, and does not accord the fundamental principle of the proportionality its proper due.

[75] The criminal cycle which Mr. Avik repeats (jail, release, reoffend) will continue until Mr. Avik changes his behaviour. Ms. Kapicki wrote, "It is this psychologist's opinion that in order for Mr. Avik to effect positive changes in his life, he needs to continue to engage in therapy to work on his complex trauma." Ms. Kapicki further testified, "Edwin and I have talked about this a lot. He just needs to not drink. But that is not the only thing he needs not to do. He absolutely needs to not drink and if that was removed from the equation, I think that life would be a lot better."

[76] Is Mr. Avik capable of changing his behaviour? There is evidence that such a change is possible but certainly, would be difficult. Ms. Kapicki states, "Edwin needs to heal from the trauma he experienced. That trauma, which started almost from the moment he was alive, has resulted in him having a deep-rooted negative belief system. This is going to take years to treat. Edwin is aware of this and seems motivated to engage in the healing process and effect positive change in his life."

[77] The correctional reports filed with the Court indicate that Mr. Avik was able to successfully complete the Aboriginal Offender Substance Abuse Program and the Violence Prevention Program during his period of federal incarceration ending on August 11, 2013. Ms. Kapicki treated him with EMDR therapy for about six months before his release from NSCC in July of 2019 and further therapy starting a month after his arrest in October 2019 including therapy that was effected over the telephone as a result of the Covid-19 pandemic in March of 2020.

[78] Ms. Kapicki acknowledged that the skills that Mr. Avik would receive in the federal system would complement other in-depth treatment for trauma. She also acknowledged that Mr. Avik would benefit from the kind of support and supervision that is offered to federal prisoners who are released and that this type of support and supervision is not available for prisoners who are released from the Territorial prison system.

[79] Had Mr. Avik been sentenced in a timely manner, he would have been sentenced to a period of incarceration in excess of two years which would have been served in a federal penitentiary. Give the amount of time that Mr. Avik has already spent in remand custody, a proportionate sentence for Mr. Avik is not a federal penitentiary term despite the benefits to him that this might provide. In order for Mr. Avik to break the cycle of his reoffending, he needs to change his behaviour. There may be various ways of making this change, but the evidence presented to me indicates that in order to stop offending:

- (a) Mr. Avik cannot drink;
- (b) Mr. Avik needs to be treated for his trauma; and
- (c) Mr. Avik needs to be strictly supervised and supported when in the community.

[80] In my view, an appropriate sentence will consist of further time in the Territorial facility followed by a conditional sentence order followed by a period of probation. While in the Territorial facility, Mr. Avik will have some time to consider his future behaviour, to plan for his release into the community and to continue his therapy for trauma. It will also provide time to the appropriate authorities to arrange for residential treatment for Mr. Avik, such as the Homewood program (which was indicated as a priority on his October 31, 2018 probation order) and to arrange for supports in the community. When he is released after approximately 3 ½ months, he will be subject to a conditional sentence order followed by a period of probation. The conditional sentence order is intended to allow Mr. Avik to be in the community under strict supervision, to access trauma counselling and to access residential trauma treatment. His

continued presence in the community will depend on whether he is able to follow the conditions including a condition to abstain from alcohol and drugs.

Therefore, Mr. Avik's sentence is as follows:

October 16, 2019	266 – assault - William Conley	26 months
October 16, 2019	733.1(1) – breach of probation	12 months CSO
October 16, 2019	264.1(1)(a) – uttering threats – Cst. Nick Mysko	26 months concurrent
October 17 to 19, 2019	430(4) – mischief	12 months CSO concurrent
October 18, 2019	264.1(1)(a) – uttering threats - Kathryn Pritchett	26 months concurrent

[81] Mr. Avik will have a further 26 months minus 687 days to serve in jail. This is approximately 3 ½ months of further institutional incarceration. Following the expiry of his period of incarceration in the institution, he will be subject to a conditional sentence order of twelve (12) months, with the optional conditions, specified in Appendix “A”. Following the expiry of his conditional sentence order, he will be subject to a probation order of two (2) years with the optional conditions specified in Appendix “B”.

[82] I am obliged to remind Mr. Avik that a conditional sentence order is a period of incarceration in the community. The conditions that I have imposed on him must be strictly obeyed. If he fails to follow one or more of these conditions and he is caught, then he will be brought before the Court. In all likelihood, the Court will collapse the conditional sentence order and Mr. Avik will be obliged to spend the time remaining under the one year conditional sentence order in a Territorial correctional facility.

[83] In summary, I also remind Mr. Avik of the words of his psychologist, “Edwin needs to not drink.” It is clear to the Court that if Mr. Avik drinks when he is in the community, he will re-offend. Under the conditional sentence order, if he makes the choice to drink, he will lose his freedom to be in the community. At this point in Mr. Avik's life, the choice is that simple.

[84] Mr. Avik already has his DNA in the DNA data bank. I decline to make a further DNA order. I also decline to make an order for Mr. Avik to pay a victim of crime surcharge.

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 15th day of
January, 2021.

APPENDIX "A"

Conditional Sentence Order

T-1-CR-2019-002242

EDWIN JOSEPH ANDREW AVIK

Edwin Joseph Andrew Avik, conditions continued

- | | | |
|-------------------------------------|-----|--|
| <i>Report</i> | (f) | Report to your Supervisor in person or by telephone, as directed by your Supervisor, at least once per week; |
| <i>Counselling</i> | (g) | Take and complete any counselling or programs recommended by your Supervisor, including but not limited to, counselling or programs dealing with, or related to, trauma, substance abuse and anger management; |
| <i>Treatment</i> | (h) | Take and complete any residential treatment program recommended by your Supervisor. Such a residential treatment program should emphasize treatment for trauma; |
| <i>Programs</i> | (i) | Take and complete any educational or training programs dealing with employment and/or career counselling recommended by your Supervisor; |
| <i>Employment</i> | (j) | Make sincere efforts to find and maintain employment or enrol in a full-time educational or training program that will benefit or assist you in finding employment; |
| <i>Reside</i> | (k) | Reside at a location approved by your Supervisor and do not change your place of residence without first obtaining the approval of your Supervisor; |
| <i>Curfew</i> | (l) | For the entire twelve (12) months of this sentence, you are to be in your residence every day from 9:00 p.m. to 6:00 a.m. unless prior written permission is given by your Supervisor to be out of your residence during those hours; |
| <i>"inside your residence"</i> | (m) | For the purposes of this Conditional Sentence Order, the phrase "inside your residence" shall include being in the yard of your residence if the residence is a single family dwelling; |
| <i>Cooperate with Random Checks</i> | (n) | Cooperate fully with random checks by telephone and in person by your Supervisor or by a peace officer to verify your compliance with this conditional sentence. This includes the requirements that:

(1) if a peace officer or your Supervisor come to your residence, then you will come to the door of your residence personally if you are in the residence; and

(2) if a peace officer or your Supervisor phone your residence, then you will speak to them on the telephone if you are in the residence; |
| <i>No Weapons</i> | (o) | Do not own, possess or carry a knife or other weapon except you may use a knife as an eating utensil; |
| <i>Abstain from Drugs</i> | (p) | Abstain absolutely from the possession or consumption of marijuana and any non-prescribed illegal drugs; |
| <i>Abstain from Alcohol</i> | (q) | Abstain absolutely from the consumption of any alcoholic beverage; |
| <i>Breath Sample</i> | (r) | provide, for the purpose of analysis, a sample of your breath, on the demand of a peace officer or your Supervisor, at the place and time and on the day specified by the person |

making the demand, if that person has reasonable grounds to believe that you have breached the condition to abstain absolutely from the consumption of any alcoholic beverage;

Do not be in places where alcohol is sold
Sign Releases

(s) Not to enter any liquor store, or lounge, or bar, or any place where the primary business is the sale of alcoholic beverages;

(t) Sign releases in favour of your Supervisor to enable the Supervisor to confirm your attendance at employment, school, treatment, counselling or programs;

Carry copy of CSO

(u) Carry a copy of this Conditional Sentence Order, as well as any written authorizations provided by your Supervisor, on your person at all times you are not in your residence, and provide them on demand to a peace officer.

Judge G. E. Malakoe

Witness

Edwin Avik

January 15, 2021

Date

Appendix "B"

Probation Order

T-1-CR-2019-002242

EDWIN JOSEPH ANDREW AVIK

- Report* (d) Report to a probation officer within two (2) working days of the expiry of your Conditional Sentence order and thereafter as directed by the probation officer;
- Counselling* (e) Actively participate in counselling or programs as directed by the probation officer and to the satisfaction of the probation officer, including but not limited to counselling or programs for trauma, substance abuse and anger management;
- Treatment* (v) Take and complete any residential treatment program recommended by your probation officer. Such a residential treatment program should emphasize treatment for trauma;
- Residence* (f) Reside at a location approved by your probation officer and do not change that residence without prior written permission of the probation officer or the Court;
- Abstain from Alcohol and Drugs* (g) Abstain completely from the consumption and possession of alcohol and non-prescribed illegal drugs;
- Curfew* (h) Be inside your residence between the hours of 10:00 p.m. and 6:00 a.m. unless for a medical emergency or with the written permission of your probation officer which you shall carry with you;
- Cooperate with Random Checks* (i) Cooperate fully with random checks by telephone and in person by your probation officer or a peace officer to verify your compliance with the terms of this probation order. This includes the requirements that
- (1) if a peace officer or your probation officer come to your residence, then you will come to the door of your residence personally if you are in the residence; and
 - (2) if a peace officer or your probation officer phone your residence, then you will speak to them on the telephone if you are in the residence;
- No Weapons* (j) Do not own, possess or carry a knife or other weapon except you may use a knife as an eating utensil;
- Sign Releases* (k) Sign releases in favour of your probation officer to enable the probation officer to confirm attendance at treatment, counselling or programs.

January 15, 2021

DATE

Judge G. Malakoe,
Territorial Court Judge

Edwin Avik

Witness

**IN THE TERRITORIAL COURT
OF THE NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

- and -

EDWIN JOSEPH ANDREW AVIK

**REASONS FOR SENTENCE
of the
HONOURABLE JUDGE GARTH MALAKOE**

[Sections 266, 733.1(1), 264.1(1)(a), 430(4) and
264.1(1)(a) of the *Criminal Code*]