Court of Queen's Bench of Alberta

Citation: R v Strathdee, 2019 ABQB 958

Date: 20191212
Docket: 151547122Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Tyler Gordon Strathdee

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.
NOTE: This judgment is intended to comply with the identification ban.

Reasons for Decision
of the
Honourable Mr. Justice J.S. Little

I Introduction

[1] The Crown seeks a Dangerous Offender designation with an indeterminate sentence for Mr. Strathdee.

[2] His lawyer argues that, while Mr. Strathdee has a high risk of re-offending, that risk can be managed with a determinate sentence and a long-term supervision order (LTSO).

[3] For the reasons that follow, I find Mr. Strathdee to be a dangerous offender and impose a five year custodial sentence followed by a five year LTSO.

II Predicate Offence: Sexual Assault

[4] After a three day, judge-alone trial, which concluded June 20, 2018, I found Mr. Strathdee guilty of the March 11, 2015 sexual assault of Ms. J. The Crown immediately applied to have Mr. Strathdee designated a Dangerous Offender under Part XXIV of the Criminal Code, ss. 752 to 761.

[5] I found the following relevant facts at trial:

1. Mr. Strathdee and Ms. J knew one another as a result of her roommate's friendship with Mr. Strathdee.

2. On the morning of March 11, 2015, he showed up at her apartment building looking for shelter, having just been released from custody.

3. Around noon, he left the apartment for a meeting with his probation officer. When he returned early that evening, he smelled of alcohol and appeared "hyped up" from a fight. He had a phone which he claimed to have stolen, and he had some meth.

4. He asked her to wash his clothes, and he stripped down, wrapped himself in a blanket, and laid down on the bed. He wanted some liquor, gave Ms. J. some money, and she went to buy vodka.

5. When she came back and went into the shower, he grabbed her clothes from the bathroom. She wrapped herself in a towel and went for clean clothes. He grabbed her, threw her on the bed, held her down, and sexually assaulted her.

6. She managed to escape and run, naked, to a neighbouring apartment.

7. Photos taken at her SART exam show cuts and bruises to her face and arms.

III Dangerous Offenders

[6] Part XXIV of the Criminal Code sets out the process for this application, the criteria to be applied, and the sentencing options available.

1. Notice Requirement

[7] Section 752.01 of the Code obligates the Crown to advise the Court of its intention to make an application for a dangerous offender designation in certain circumstances:

> 752.01 If the prosecutor is of the opinion that an offence for which an offender is convicted is a serious personal injury offence that is a designated offence and that the offender was convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under subsection 752.1(1).

[8] On first read, that section suggests that satisfying the criteria in the section is a condition precedent to the application itself. In this case, immediately upon Mr. Strathdee's conviction, the Crown advised in open court that it intended to apply for a dangerous offender designation, consistent with its obligations under s. 752.01.

[9] Mr. Strathdee's record at the time did not satisfy these criteria.

[10] A "serious personal injury offence" includes an indictable offence involving the use or attempted use of violence against a person: s. 252(a)(i). The offence of which Mr. Strathdee was convicted, sexual assault, satisfies the definition of a serious personal injury offence that also is a "designated offence".

[11] But he had not previously been convicted at least twice of a designated offence. The definition of designated offences is found in s. 752. The list is long, but the common themes are that the offences involve violence, or sexual violence, or human trafficking. At the time of his conviction for this sexual assault, his only other previous conviction for a designated offence was a 2017 conviction for robbery, for which he received a sentence of at least two years. He has an additional conviction from 2008 for drug trafficking, for which he received a sentence of at least two years, but drug trafficking is not a designated offence.

[12] I do not, however, read section 752.01 as being a condition precedent to initiation of the dangerous offender application. As can be seen from s. 752.1 below, a formal application is required in all cases in addition to the notice under s. 752.01 that is required in certain cases.

[13] Section 752.01, therefore, might more properly be seen as a means of ensuring that a dangerous offender application is not "sprung" on an offender with a lengthy record for serious offences in the midst of a conventional sentencing hearing.

2. Burden of Proof

[14] I note also that section 753(1.1) creates a presumption, rebuttable on a balance of probabilities, if the circumstances in s. 752.01 exist, ie. two prior convictions for designated offences leading to sentences of at least two years. Because those circumstances do not exist here, the Crown bears the onus of proving, beyond a reasonable doubt that Mr. Strathdee is a dangerous offender (***R v Boutilier***, 2017 SCC 64 at para 46).

3. Remand for Assessment

[15] The actual process begins with the Crown's application under s 752.1.

> 752.1 (1) On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious

> personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.

[16] There is a dearth of jurisprudence on the test the Crown must meet to persuade the Court that an offender might be found to be a dangerous or long-term offender. I expressed concern at the s. 752.1(1) hearing that merely ordering the assessment might conceivably start a self-fulfilling process. As judges, we frequently encounter offenders with records at least as long and serious and Mr. Strathdee's, yet dangerous offender applications are relatively rare. The Crown points out that a dangerous offender application is reserved for those cases where the Crown considers that protection of the public outweighs other sentencing principles.

[17] My interpretation of "reasonable grounds' for the purposes of s. 752.1(1) just means that objectively there is a credibly based possibility that the offender might be found to be a dangerous or long-term offender. That credibly based possibility is a low threshold.

[18] Similarly, the phrase "might be" means just what it says. There is no certainty. There is no inevitability. It just means that the Crown might be able to prove that he is a dangerous or long-term offender. It is not a complete certainty, but neither is it an effort that is destined to be completely unattainable.

[19] In Mr. Strathdee's case, I ordered his remand for the purpose of assessment following the Crown's application, and the experts' reports prepared were used in evidence in this hearing.

4. Attorney-General Consent

[20] The consent of the provincial Attorney-General is required before the Court can hear the Crown's application. Here that consent is evidenced by a July 31, 2019 letter.

5. Test

[21] Section 753 of the Code reads:

> 753 (1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied
>
> (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
>
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
>
> (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
>
> (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

[22] The Crown argues that the test here is met on either or both of s. 753(a)(i) and (ii) or 753(b). It does not rely upon the "brutality" test in s. 753(a)(iii).

[23] Also, the Crown points out that the 2008 amendments to the Criminal Code require that earlier cases be relied upon with caution. Under the previous dangerous offender provisions, the criteria for finding an offender dangerous were the same, but if the court so found, an indeterminate sentence was mandatory. Under the current regime, it is mandatory that the court find an offender dangerous if the criteria are met, but the court then has discretion as to what sentence to impose.

IV Evidence

1. Experts

[24] As part of the assessment ordered, the Crown commissioned two reports, one from Dr. Tara Hook, a forensic psychologist, and one from Dr. Curtis Woods, a forensic psychiatrist. Both were qualified to testify as expert witnesses. Both testified at this hearing.

[25] The Crown also called as witnesses a number of correction and parole officers who had dealings with Mr. Strathdee in some capacity during his periods of incarceration or parole.

Dr. Hook

[26] Dr. Hook interviewed Mr. Strathdee for 7.5 hours over the course of three days and conducted or supervised psychological testing over two days. The aims of her evaluation were threefold:

1. The formulation of a scientifically informed opinion regarding his risk of future violent/sexual offending. Her conclusion here was that he was at high risk for future sexual, violent, and general recidivism.
2. The identification of interventions that may serve to mitigate future risk. Her conclusion here was that due to an absence of motivation, anti-authority attitudes, and the marked presence of psychopathic personality traits, he does not present as a good candidate for correctional programming.
3. Formulation of an opinion regarding the likelihood that his potential for violence may one day be manageable in the community. Here she found that his risk of further violence, including sexual violence, is not manageable in the community and unlikely to decline significantly over time.

[27] Her direct testimony included that:

- Mr. Strathdee consistently provided inconsistent information and when confronted would simply adjust his story.
- His emotional expressions during the interviews were shallow and fleeting.
- His relationships with women were numerous, but superficial, and he used them to satisfy his needs, such as getting drugs into prison for him. He refused to wear a condom, despite having transmitted a sexually transmitted infection to his partners. According to correctional records, he once masturbated in front of a female guard. And while the charge was dropped, he had been charged with sexual assault before this conviction.
- He would not take responsibility for this offence or others he was facing.
- His completion of programming in prison in the past does not seem to have affected his behaviour.
- His psychopathy, as revealed by her testing, gives rise to her opinion that he would have a very low rate of success on conditional release.
- The only programs available for a candidate such as Mr. Strathdee, involving high intensity programming in violence prevention, sexual offending, and substance abuse, are in institutions.
- On the positive side, Mr. Strathdee is relatively young and has not had access to the treatment he needs. If he were to be on strict release conditions for up to five years incident-free, the parole board could consider relaxing those conditions.

[28] On cross-examination, Dr. Hook conceded that certain facts upon which she based her opinion were in turn based upon correctional records assumed to be true such as the report of Mr. Strathdee's masturbation incident and the report of a woman trying to bring drugs to him in prison. She agreed that it was concerning that those reports were treated as factual without being tested. Further, the evidence does show that he avails himself of treatment when available, it just has not been available often. What he has going for him is that he is of average intelligence with no symptoms of mental illness, and no discernible sexual deviancy (such as paedophilia or sadism), though further testing may be required for both.

[29] She also acknowledged that Mr. Strathdee's intention to appeal this conviction, and the fact that he was facing trial on other charges, might explain his failure to confess his guilt or talk much about the offences.

Dr. Woods

[30] Dr. Woods interviewed Mr. Strathdee for four hours. He reviewed a substantial volume of material from Correctional Services Canada (CSC) as well as Dr. Hook's report.

[31] He testified that Mr. Strathdee had a superiority complex, was callous, deceptive, manipulative, impulsive, and irresponsible in his personal relationships, and that his anti-social personality disorder (ASPD) was compounded by a substance abuse disorder. He was devoid of empathic skills and used people for his own personal gratification. On a scale of 40 for psychopathic personality disorder, he rated Mr. Strathdee a 33, which puts him in the 94th percentile in a study of 5400 inmates. The start of psychopathy is 30, and a score of 35 is considered very high. Psychopathy is not treatable with drugs. It is possible that 15% of people in remand at any given time have psychopathy with APSD.

[32] He found him a very high risk for recidivism and a high risk for violent and sexual recidivism.

[33] In cross-examination, Dr. Woods conceded that some of Mr. Strathdee's behaviours and attitudes, such as paranoia, were consistent with someone required to cope in an institutional environment. He was surprised that Mr. Strathdee had been "upgraded" from a maximum to a medium security risk since his interview, and he conceded that since his substance abuse was intertwined with his psychopathy, it was a positive sign that he was off drugs, as was his breaking ties with a gang with which he was formerly involved in prison. He also noted that the offender had not rung up the usual "plethora" of write-ups while in segregation. He found that Mr. Strathdee was not bereft of the ability to change, nor beyond redemption, but that it would require intensive programming while incarcerated and maintenance programming thereafter. He was likely to deteriorate if he had no hope of getting out of prison, which is the norm for most prisoners serving indeterminate sentences. He had greater self-control than other psychopaths Dr. Woods had dealt with.

2. Correctional Services Evidence

[34] The Crown called a number of witnesses to testify about their interactions with Mr. Strathdee in the correctional system. There is no question about the credibility of any of these

witnesses. Most of them relied on entries they or others had made in CSC logs and records, most notably a Criminal Profile Report and a Correctional Plan Progress Report. These are documents created by CSC to keep track of an offender's behaviour while incarcerated or on parole.

[35] **Ms. Lui** is a parole officer who supervised Mr. Strathdee from 2009 to 2011 when he breached his parole and was returned to custody. She explained that based on her review of his former supervisor's report, he had breached three quarters of his conditions of parole: he admitted to drinking twice, he had deposited $130 to two other inmate's accounts, and he had a cell phone with a charger. She explained that parole staff relied heavily on the institutional records without independent verification – the records are based largely on reports of intelligence officers inside the institution who glean their information from a number of sources including inmates and other staff. In the case of information from inmates, the intelligence officers code the information as being reliable or otherwise.

[36] Her impression of him at the beginning was that he was only 20, impulsive, and immature, but that they had a decent working relationship. He was then part of a gang (Security Threat Group or STG) called the Red Alert, primarily comprised of Indigenous prisoners but had expanded to include non-Indigenous prisoners like Mr. Strathdee. The staff worked on getting him out of the STG. Ms. Lui's biggest challenges in supervising Mr. Strathdee were that he did not follow rules of the institution and had no regard for the safety of the institution or others. When he was reclassified to maximum security as a result of staff finding stabbing tools in his cell, she no longer worked with him.

[37] **Mr. Altin** is a Corrections Officer who worked in the Drumheller institution between March and August, 2011 when Mr. Strathdee was incarcerated there on a drug trafficking conviction. He had no specific memory of incidents involving Mr. Strathdee, but relying on notes he made in the Criminal Profile Report, in March and August, 2011 officers searching his cell found a sharpened rod that he denied was his and two home made knives in his cell which he claimed were for protection. His impression of Mr. Strathdee was that he did not respect authority figures.

[38] **Ms. McEwen** supervised Mr. Strathdee in 2013 and 2014 while he was on statutory release from his first federal sentence. She did remember him. He was on a standard weekly reporting requirement. He struggled to find a job, but eventually did so. He did the bare minimum to comply with his conditions and was unenthusiastic about his programming, but mostly he complied until he went unlawfully at large in 2014 and his parole was suspended.

[39] **Ms. Brochu** supervised Mr. Strathdee from July to September, 2009 while he was on accelerated day parole. That program no longer exists, but at the time was available for those serving their first federal offence. It requires residency in a half way house. She had no memory of Mr. Strathdee. Her notes were to the effect that he did not make much of an effort to find employment, but eventually did so. She suspended his day parole because the halfway house staff told her that he had been drinking.

[40] **Ms. Sawatsky** is a parole officer who worked with Mr. Strathdee in the Edmonton Institution during his first federal sentence from 2011 (when he transferred in from Drumheller) to 2013 and again on his 2017 intake for his second federal sentence. In 2011, she noted from his Criminal Profile that he was designated a maximum security prisoner because of the two weapons found in his cell in Drumheller. He called her a "bitch" on his original intake when she reprimanded him about an infraction of movements to and from his cell and the courtyard.

[41] Her notes show that he attended AA meetings, an AAA (attitudes, associates, and alternatives) program which is referred to as education upgrading, and a Basic Healing Program.

[42] As a result of what she considered his unacceptable institutional behaviour and incidents in remand (visitor with drugs in her clothing, assault against inmates), she recommended on his second intake in 2017 that his security level be maintained at maximum and the warden, who has the final say, agreed.

[43] I note a reference in the September, 2017 security review that Mr. Strathdee arrived at the Edmonton Institution in June, 2017 and that there was no indication he had been involved in criminal activities since then, nor had he received any institutional charges.

[44] **Krystal Jereda**, a Parole Officer at the Saskatchewan Penitentiary who supervised the offender from July to October, 2019, wrote his most recent security report. She testified that he told her he wanted to regain a medium classification so that he could obtain programming and avoid being housed in the Edmonton Institution during this hearing. She recommended a maximum classification, but the warden reduced it to medium.

[45] **Mr. Anderson** is a parole officer whose testimony was primarily intended to explain the availability of parole for dangerous offenders with indeterminate sentences and long term offenders with determinate sentences. I found telling that by his count, there were only 792 dangerous offenders in Canada, 80 of whom were on release, and five of whom were on release in Alberta.

3. Criminal Record

[46] Mr. Strathdee's criminal record, without further detail, is what counsel often refer to as "unenviable" but is not what might be considered extraordinary.

[47] His only convictions as a young offender are from 2007: two counts of assault with a weapon for which he received 12 months probation on each charge.

[48] His next conviction, from 2008, is for one count of possession for the purpose of trafficking and two counts of possession for the purpose of trafficking, for which he received 24 months and 42 months, consecutive. That was his first "federal" sentence.

[49] He was paroled in 2009 and recommitted for parole violation in 2009.

[50] In 2010, he was convicted of mischief under $5000 and sentenced to 15 days.

[51] In 2011, he was convicted of mischief under $5000 and sentenced to 15 days.

[52] In 2013 he was convicted of engaging in prostitution and received 10 days.

[53] He then had three years of multiple convictions.

[54] In July, 2014 he was convicted of and sentenced to:

fraudulently obtaining food	90 days presentence custody
possession of a weapon,	90 days presentence custody
possession of stolen property under $5000 (times two)	90 days presentence custody
uttering threats.	90 days presentence custody

[55] In August, 2014, he was convicted of and sentenced to:

theft under $5000	6 days
possession of a scheduled substance.	6 days

[56] In October, 2015, he was convicted of and sentenced to:

theft under $5000,	15 days
unauthorized possession of a weapon,	10 days
possession of break-in instruments,	10 days
and possession of stolen property under $5000,	5 months consecutive
mischief under $5000,	1 month
theft under $5000,	1 month consecutive
escaping lawful custody.	15 days
failure to comply (times two)	10 days
fraudulently obtaining food	1 month consecutive
theft under $5000	1 month
mischief under $5000	1 month
failure to comply	1 month

[57] In 2016 he was convicted of and sentenced to:

conspiracy to obstruct justice	24 months
obstruction of justice	24 months concurrent
failure to comply	30 days concurrent
robbery	6 years consecutive
failure to comply	30 days concurrent
failure to comply	30 days concurrent

[58] With the exception of his 2008 trafficking conviction and 2016 robbery conviction, his criminal record to 2016 is mostly the result of relatively minor, property related offences for which he received short sentences.

[59] Crown counsel points out, however, that the bare record does not tell the whole story and that transcripts from the sentencings flesh it out.

[60] In the first assault conviction as a young offender, he had called out a young man about his age to come and fight. The young man came out of his house to talk, and Mr. Strathdee threw a two by four at his head, causing a deep gash.

[61] In the second assault conviction as a young offender, a group of individuals including Mr. Strathdee approached the complainant and asked him where another individual was. The complainant told them he did not know, and Mr. Strathdee hit him in the head with a rock, resulting in five stitches.

[62] The July, 2014 incident which gave rise to four convictions involved Mr. Strathdee running up a bill at a Boston Pizza and then telling staff he had to go to his car to get cash. The staff followed him out. He cocked at Airsoft BB pistol, pointed it at them, and said that if they came any closer he would use it. He then ran away.

[63] The 2016 convictions resulted from two incidents in 2015. In the first, he confronted a woman leaving her apartment. He forced her back in, assaulted her, and robbed her of cash and medications, threatening to "fucking do you". He later attempted to pay the complainant to drop the charges and when she refused, he arranged with another person who claimed to have a gun to "deal with her".

[64] In the second 2016 conviction, about a week after the above robbery, Mr. Strathdee followed a woman to her car and ordered her to sit in the driver's seat. She tried to run. He grabbed her by the hair and attempted to knee her in the head. She got away.

[65] As a result of a fight in February, 2015, Mr. Strathdee has been convicted, as a party, of three counts of aggravated assault: ***R v Strathdee***, 2019 ABQB 479. The incident giving rise to those convictions involved Mr. Strathdee and a group of his associates visiting an apartment where they got into a fight with four occupants leading to the death of one individual and the stabbing of three others. At the time of argument in this hearing, he had not been sentenced for those convictions but was expected to received between two and three years.

[66] I described at the beginning of this judgment the facts which grounded the 2018 sexual assault conviction which began these proceedings. It is relevant that that assault took place in March, 2015, just after Mr. Strathdee was released on bail for the aggravated assaults described immediately above.

4. Analysis of Institutional Records

[67] Crown counsel correctly points out that the lengthy institutional records kept on Mr. Strathdee, despite being hearsay in the instances where the authors of the material were not called as witnesses, are admissible in this sentencing hearing on the basis that the Court ought to have liberal access to "the greatest possible range of information on which to make an accurate evaluation of the danger posed by the offender" (***R v Jones***, [1994] 2 SCR 229 at para 127). In ***Jones***, the Supreme Court of Canada reaffirmed the statement of Dickson J in ***R v Gardine***r, [1982] 2 SCR 368 at 414, that "the strict rules which govern at trial do not apply at a sentencing... Hearsay evidence may be accepted where found to be credible and trustworthy."

[68] The points that defence counsel made, however, are that the records, including of institutional charges and convictions, are kept by those in charge of the institutions for the purpose of maintaining order in the institutions and that the conclusions the users draw from them about the guilt or innocence of an offender are not necessarily those that would be permitted to be drawn in a court of law. As an example, Mr. Strathdee's continued involvement in the drug trade appears to be based on the fact that a visitor, not necessarily confined to visiting him, was found with drugs and that a cell he once occupied smelled like cannabis.

[69] And I note comments in the records from October, 2010 (pages 3731 and 3732) from one correctional officer, who did not testify, that:

> Offender Strathdee has been put unto my caseload with an overdue stapled to it. Offender Strathdee is not new to unit 9 or this writer. I have read his current OMS reports and was suppose to get married, but its funny how he got denied a PFV because of his gang involvement and drug affiliation with the RA. So really was it

> for Love, No it was to get an innocent female victim to try and probably bring drugs in form the PFV.
>
> Offender Strathdee was a bonehead during the section 53 lockdown. It was not just Strathdee however this shows that he would be an instigator if something was happening, he supports whatever is going on that pertains to offenders… (description of him kicking and banging his door)…Offender Strathdee continues to work at Corcan and hasn't been fired yet, he is coming up for pay review and I will give him a raise if he continues with his good behaviour…"

[70] It is difficult to make sense of the contradictory sentiments and conclusory statements expressed in those statements. These sorts of subjective comments detract from the objectivity which witnesses, such as Dr. Hook and Dr. Woods, likely assume when they base their recommendations or opinions, in part, on the institutional notes.

[71] For that reason, while I accept that his institutional records were prepared by those charged with the responsibility of maintaining order in a difficult environment with challenging residents, I approach his institutional behavioural record with a healthy skepticism that it objectively assists in predicting his future behaviour. A great number of incidents upon which the Crown relies may more accurately reflect the behaviour of an eighteen year old placed into a federal prison for the first time. As Dr. Woods pointed out, Mr. Strathdee did not run up the usual plethora of institutional charges more often seen in the case of other offenders in similar conditions.

[72] I do take from these records that Mr. Strathdee has made efforts to change his behaviour through progams when available to him. Whether those efforts are a genuine attempt to better himself or to "game" the system is debatable, but the efforts are indisputable.

V Analysis of Expert Evidence

[73] Dr. Hook in her report concludes that:

> The current assessment found him to be at high risk of future sexual, violent and general recidivism. His history shows an uninterrupted pattern of engaging in criminal behaviour including violent assaults against others from a young age. His behavior during his most recent release to the community was indicative of an escalation in both frequency and intensity of violence and other criminal behaviors. Due to the absence of motivation, anti-authority attitudes, and the market presence of psychopathic personality traits, he does not present as a good candidate for correctional programming. His risk of future violence, including sexual violence, is not manageable in the community currently, and is unlikely to decline significantly over time.

[74] Dr. Woods in his report concludes that:

> It is my opinion, put forward with a reasonable degree of medical certainty, that Mr. Strathdee is a HIGH RISK-HIGH NEED-LOW RESPONSIVITY client. Moreover, it is a highly dubious assertion to infer that Mr. Strathdee is either treatable or manageable in the community, since the preponderance of evidence does not appear to support said reasoning and supposition.

[75] ***R v Neve***, 1999 ABCA 206 (at para 189) provides a framework for the assessment of psychiatric and psychological expert opinion evidence in dangerous offender applications pursuant to which I need to weigh the following factors:

1. The qualifications and practice of the expert.

   In the case of both Dr. Hook and Dr. Woods, I accept their qualifications and expertise and recognize that their respective practices include extensive experience in assessing offenders for the purpose of this type of application.

2. The opportunity that they had to assess the offender, including the length of personal contact, the place of contact, role with ongoing treatment, and involvement with the institution.

   While it may be implicit in the fact that they both confidently gave their expert opinions, neither was asked what length of interview time was ideal or preferable in drawing conclusions about whether a person might be found to be a dangerous offender. Here, I am not persuaded that 7.5 and 4 hours of interviews provide a particularly compelling foundation on which to base an assessment of a person's personality and character for use in a decision as important as this one. The interviews were conducted in a maximum-security prison and not a medical office. Neither had any other contact with Mr. Strathdee or was involved in his ongoing treatment. I do not question the doctors' professionalism or independence, but I note that both experts are associated with Forensic Assessment and Community Services and therefore come to their opinions from the same perspective.

3. The unique features of the doctor-patient relationship.

   Those features are not particularly relevant in this situation. Both clearly informed Mr. Strathdee of the reason for their evaluations. But it cannot be considered a situation where a patient would be expected to be fully open and honest with a medical professional. To the extent that these features are at play here, it would be expected that Mr. Strathdee would understate or minimize anything he knew would be used against him, and that is acknowledged by the experts.

4. The documents available to the experts.

   Both did an intensive review (Dr Woods refers to twenty hours) of extensive material contained in the several thousand pages comprising Mr. Strathdee's institutional and court reports. I am satisfied that both had all

such information that could reasonably be expected to be valuable in forming their opinions. Dr. Woods had Dr. Hook's report as well and refers to it as background, but I am satisfied that in arriving at his conclusions respecting Mr. Strathdee's psychopathy, he relied on his own independent testing.

5. The nature and scope of consultations.

   Their consultations were limited to a review of records and interviews with Mr. Strathdee. No third parties were consulted, including the CSC staff who have had experience with Mr. Strathdee and who testified in this hearing.

6. Specifically, what the experts relied on in forming their opinions.

   In this case, they relied on their interviews, their review of the ancillary material referred to above, and the results of clinical tests. Dr. Hook refers to:

   A. Clinical Procedures, being interviews and psychometric testing: Weschler Adult Intelligence Scale, Wide Range Achievement Test, Personality Assessment Inventory, Minnesota Multiphasic Personality Inventory, Paulhus Deception Scale, and Hare Psychopathy Checklist.

   B. Risk Appraisal Procedures, being Level of Service, HSR-20, and Static 99R.

   C. Other documentation (presumably the institutional records).

7. The strength and weaknesses of the material relied upon.

   I have commented on this above in relation to the institutional records. I do not question their fundamental accuracy (ie. dates and times), but I recognize that where the authors of the reports have drawn certain conclusions, those conclusions are not always going to be those which might have been drawn had additional information or independent verification been sought. In cross-examination, Dr. Hook acknowledged that it was concerning that in such records, suspicions (for example a woman bringing drugs in to Mr. Strathdee or that he did not maintain contact with his family) were stated as truths.

[76] Bearing in mind those factors and the testimony of the experts, I am confident in accepting their conclusions that, without intervention, Mr. Strathdee remains a high or very high risk to re-offend. Those conclusions can be based largely on Mr. Strathdee's criminal record and the objective testing they did, as opposed to the interviews and review of institutional material.

[77] I am satisfied, based on the testimony of both experts, that the tests upon which they relied are valid for the purposes they are given.

[78] And while Dr. Woods relied on Dr. Hook's report, he conducted the Hare Psychopathy Checklist independently.

[79] Because of the concerns I have expressed regarding the institutional records upon which the experts relied, I am not as confident as the experts that:

1. Mr. Strathdee is not a good candidate for correctional programming.

   He has shown that he can complete programming. As his counsel points out, he has shown that he can walk the walk, but he will stumble. And Dr. Hook agreed that if he were institutionalized for a sufficient time to enable him to take programming, he could be a good candidate for correctional programming.

2. His risk of future violence is unlikely to decline over time.

   Dr. Hook agreed during her testimony that the more recent criminal convictions were drug-related and that if he could continue to stay off drugs, that risk would decline. She also testified that if he were released on a ten year LTSO, it could be relaxed after five years if he complied.

3. He could not be treated or managed in the community.

   Bruce Anderson, a parole officer, has experience managing dangerous offenders, both with indeterminate sentences paroled into the community and those with long term supervision orders released into the community. He refers to risk management of such offenders as his department's "bread and butter."

VI Stage 1 of the Test: Is Mr. Strathdee a Dangerous Offender?

[80] For convenience I will restate section 753 (1) in part that … the court shall find the offender to be a dangerous offender if it is satisfied

> (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his

> or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour (or)
>
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour (parentheses added).

[81] As referenced earlier, the Crown's onus overall is to the standard of beyond a reasonable doubt. That is straightforward for the first part of the test. The predicate offence here is sexual assault, which is a serious personal injury offence for the purpose of the first part of s. 753(1)(a), and it forms part of the patterns for the purposes of subsections (i) and (ii).

[82] In applying the evidence to the balance of the test, the Crown's onus is to the standard of beyond a reasonable doubt in the case of past behaviour (***R v Wormell***, 2005 BCCA 328 at para 34). With respect to future behaviour, ie. the likelihood of causing death or injury to other persons, or inflicting severe psychological damage, I must be satisfied beyond a reasonable doubt of the likelihood of that occurrence, not its certainty and that it is substantially or pathologically intractable: ***Lyons v The Queen***, [1987] 2 SCR 309 at para 93-95; ***Boutilier,*** at paras 26-27.

1. Pattern of Repetitive Behaviour or Aggressive Behaviour

[83] Meriam-Webster defines a pattern as "a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group, or institution." A pattern need not have any fixed number of incidents, though the fewer incidents, the more similar they should be: Neve at para 113. Nor is there a requirement that the incidents be regular; in this case there are gaps in the incidents giving rise to Mr. Strathdee's convictions, though perhaps largely because of the times he has been incarcerated.

[84] Mr. Strathdee's criminal record shows a pattern of repetitive behaviour exhibiting a failure to restrain his behaviour. He has assaulted people he knew and those he did not know. He has threatened someone he knew only because he had earlier robbed her. His predicate offence was committed against someone he knew, as were his aggravated assaults. In all of those situations, he failed to restrain his behaviour. In all cases, he initiated the situations.

[85] Those offences also show a pattern of persistent aggressive behaviour showing a substantial degree of indifference respecting the reasonably foreseeable consequences to others. He apparently was not concerned that throwing a piece of lumber at someone's head or hitting another in the head with a rock would have consequences to those people. After running up a restaurant bill, he appeared to have no qualms in pulling a pistol as opposed to paying. In the predicate sexual assault, he appeared to have no concern that his victim would be forced to run naked out of her own apartment, and from her victim impact statement read at this hearing it was clear that she is facing long-term consequences. In grabbing a woman by the hair when she tried to run, he showed indifference to the consequences she would bear. And in his aggravated

assault convictions, the judge found that "bodily harm was objectively foreseeable as a probable consequence of the attack."

[86] With respect to his future risk of serious harm, a statutory requirement of subsection (i) and an implicit requirement in subsection (ii) (***Neve*** at para 115), it is not sufficient to look only at past behaviour. There must also be a future threat, a likelihood of causing death or injury to other people or inflicting psychological damage on other people through failure to restrain that behaviour in the future. Past behaviour is one predictor of future behaviour. But assessing future risk requires other indicia of risk to re-offend because of deep-seated, or intractable, (personal characteristics ***(Boutilier*** at paras 42-45).

[87] The evidence of both experts here, which I accept, is that Mr. Strathdee has a high or very high risk of re-offending, violently and otherwise. In part, that is due to his psychopathy, including his inability to feel empathy. In part, it is due to his poor, but not non-existent, prospects for treatment.

[88] For the reasons given above, I find that the Crown has proven Mr. Strathdee to be a dangerous offender as defined in s. 753(1(a)(i) and/or (ii).

[89] Having concluded that Mr. Strathdee is a dangerous offender under s. 753(1)(a), I need not consider the Crown's arguments respecting section 753(1)(b). What I will say is that a court should be cautious to rely on that subsection when the offender has only one sexual offence conviction, combined with allegations of promiscuity.

VII Stage 2 of the Test:

> 753(4) If the court finds an offender to be a dangerous offender, it shall
>
> (a) impose a sentence of detention in a penitentiary for an indeterminate period;
>
> (b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
>
> (c) impose a sentence for the offence for which the offender has been convicted.
>
> (4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

1. Sentencing Principles

[90] Crown counsel argues that the primary sentencing principle here is protection of the public. She submits that there is no evidence to support the position that any lesser measure than

an indeterminate sentence will adequately protect the public, but that if a determinate sentence is part of the sentence imposed, it should be six years based on the three-year starting point for the predicate offence and a number of aggravating factors

[91] Defence counsel argues that there can be hope for Mr. Strathdee's rehabilitation and that, assuming a dangerous offender designation, a determinate sentence of four to five years plus a long term supervision order of ten years achieves the sentencing objective of protecting the public, while leaving the offender with some hope.

[92] Despite this being a dangerous offender application, the fundamental purposes and principles of sentencing continue to apply (***R v Cosman***, 2018 ABCA 388 at para 42):

> The dangerous offender provisions form part of the sentencing process, and their interpretation must be guided by the fundamental purposes and principles of sentencing, including proportionality: ***R v Sawyer***, 2015 ONCA 602 (CanLII) at para 60, 127 OR (3d) 686, citing ***R v Johnson***, 2003 SCC 46 (CanLII) at paras 22-23, [2003] 2 SCR 357. The sentencing principles and mandatory guidelines outlined in ss 718 to 718.2 apply to every sentencing decision, whether made under the regular sentencing regime, the dangerous offender regime, or the long-term offender regime: ***Boutilier*** at paras 53-54. A fit sentence for a dangerous offender is attributable solely to the sentencing principles and objectives that apply to a sentence for an offender who is not adjudged to be a dangerous offender. One of the applicable principles, indeed the "fundamental purpose of sentencing", is to protect society and to contribute to the maintenance of a safe society by imposing just sanctions that have the objective of, among other things, separating the offender from society. In the context of dangerous offender proceedings, the sentencing objective of protecting the public is enhanced: ***Boutilier***, para 56.

[93] Thus, while the objective of protection of the public is enhanced, it is not overarching.

[94] The written opinions of the experts suggest that there is little expectation that Mr. Strathdee could be released to the community. Those opinions, as I have pointed out above, were softened somewhat during questioning when they agreed that their conclusions were based on institutional records that may not support those conclusions.

[95] My review of the evidence of Mr. Strathdee's institutional behaviour and his interactions with his various supervisors leads me to a reasonable expectation that a lesser measure than an indeterminate sentence will adequately protect the public.

[96] He has shown that he is willing to take programming when it is available. As a result of his bouncing from institution to institution during the various trials arising from his 2015 crime spree, those programs generally were not available to him.

[97] Similarly, they were not available when he was in maximum security. He expressed a desire to get himself upgraded to medium so that he could get those programs; in fact he bet Dr. Woods that he would do it and he did.

[98] As defence counsel pointed out, his 2015 incidents appeared largely to be based on his meth addiction. Since his incarceration, he appears to have kicked that habit, even though a number of witnesses conceded that meth was available in the prisons which housed Mr. Strathdee.

[99] His years from aged 18 to 32 are characterized by criminal activity, including violent criminal activity. He has hurt people physically and psychologically. But as his lawyer points out, there is evidence before me that at least based on his institutional behaviour he can "walk the walk" even if while doing that he has stumbled. With an indeterminate sentence, the offender is permitted to apply for parole every seven years, but according to Dr. Woods and Mr. Anderson, it is rarely granted. The evidence further supports a conclusion that with the consequent unlikelihood of ever being released, Mr. Strathdee is likely to deteriorate even further.

[100] The evidence of the experts is that with years, not months, of programming available in institutions, Mr. Strathdee's risk in the community diminishes. Mr. Anderson testified that there is programming available in the community, largely run in the evenings. Further his evidence was that of those on long term sentence orders in the community, most breaches are technical as opposed to criminal activity.

2. Sentence

[101] Because it is clear that Mr. Strathdee requires programming and supervision when released into the community, I also reject the option of a determinate sentence alone.

[102] That leaves the option of a determinate sentence with an LTSO.

[103] Pursuant to the chart helpfully prepared by Mr. Anderson at the Crown's request, if Mr. Strathdee were to receive a three year sentence for his aggravated assaults (he actually received 33 months), six years for the predicate offence, and a 10 year LTSO, his warrant expiry date, meaning the date that he would no longer be subject to any control by the state, would be August 30, 2042. That means that the state would have a degree of control over his actions for over two decades: greater during incarceration and lesser during supervision. In my view, that length of state supervision is not required here.

1. Custodial Sentence: Mr. Strathdee has been convicted of sexual assault. It was a major sexual assault as I have described above. There are no mitigating factors. In aggravation, the complainant was a friend trying to help him, and she opened her house to him. She is a member of a vulnerable population. He took advantage of her hospitality and left her to run naked to a neighbour for help. He committed the crime on his return from checking in with his probation officer. Starting at three years and working up for those aggravating factors, I find a fit sentence to be five years.

2. Long Term Supervision Order: If Mr. Strathdee, as I have been persuaded during this hearing, is genuinely interested in turning his life around, he will do what is necessary to remain in medium security for the sentence that I impose and his sentence for the aggravated assaults. In medium security he can get the programming he needs. If after spending that time in prison, subject to the parole dates in the Crown's chart, he either does

> not take that programming or does not take it to heart, he will be back in the system very quickly. If he takes the programming seriously, and if he complies with his conditions for five years, I have a reasonable expectation that he will not revert to his violent past. With a five-year condition period, his warrant expiry date would be about 2035. I am satisfied that a period of over 15 years of state control over his behaviour will adequately protect the public.

[104] He must know that under s. 753.01, if he breaches or re-offends by committing a serious personal injury offence between now and the expiry of his LTSO, he could find himself back in this process, but without the need for the Crown to prove that he is a dangerous offender.

VIII Summary

[105] I impose a custodial sentence of five years.

[106] That shall be followed by a long-term supervision order for a period of five years. I order that a copy of the material required by s. 760 of the Criminal Code be delivered to CSC.

[107] There will be a s. 109 weapons prohibition for life.

[108] There will be a DNA order under s. 487.051.

[109] There will be a SOIRA Order for a period of 20 years under s. 490.012.

Heard between November 12th and 22nd 2019.
Dated at the City of Edmonton, Alberta this 12th day of December, 2019.

J.S. Little
J.C.Q.B.A.

Appearances:

Chantell Washenfelder
Thomas J. O'Leary
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for the Crown

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for the Offender