Citation: *R.* v. *Smarch*, 2014 YKTC 51

Date: 20141125
Docket: 13-00085
13-00085B
13-00085C
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

JAMES WILLIAM SMARCH

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:
David A. McWhinnie — Counsel for the Crown
Gordon R. Coffin — Counsel for the Defence

REASONS FOR JUDGMENT

[1] On November 12, 2013 Mr. Smarch stood trial on a charge of having sexually assaulted M.B., contrary to s. 271 of the *Criminal Code*. The offence date was May 2, 2013. On December 6, 2013, I provided my judgment convicting Mr. Smarch of sexual assault. My findings in convicting Mr. Smarch are set out in ***R.*** v. ***Smarch***, 2013 YKTC 114.

[2] In brief, the circumstances of the sexual assault were that a passerby on the Whitehorse riverfront noted Mr. Smarch to be lying in a spooning position behind a female, M.B., with his pants down to his knees. M.B. appeared to be clothed. Mr. Smarch was moving but M.B. was not. Concerned about a possible sexual assault

occurring, the passerby called the RCMP. When the RCMP officer arrived on the scene, he noted Mr. Smarch to be lying behind M.B. in a spooning position. M.B.'s pants were below her buttocks, exposing her backside. Mr. Smarch's pants appeared to be somewhat lowered, however not to the extent observed earlier by the passerby, and the officer observed Mr. Smarch to be pulling them up. Mr. Smarch was moving but M.B. was not.

[3] Mr. Smarch was significantly intoxicated and M.B. was passed out and non-responsive. I found that Mr. Smarch was having contact of a sexual nature with M.B. without her consent, but could not conclude that there had been any intercourse or penetration. I further noted the actions of Mr. Smarch to "…have been those of a highly intoxicated individual who likely somewhat spontaneously and opportunistically engaged in sexual contact with the unresponsive M.B."

Application for Dangerous Offender Designation

[4] On December 6, 2013 Crown counsel gave notice of intent to file a dangerous offender or long-term offender application. On December 11 counsel filed a Notice of Application for Remand for Assessment, seeking an order remanding Mr. Smarch into custody for an assessment to be conducted for use as evidence in a s. 753 or s. 753.1 application.

[5] The assessment Order sought by the Crown was granted on December 17, 2013 and Mr. Smarch was assessed by Dr. Shabreham Lohrasbe.

[6] Dr. Lohrasbe provided a Psychiatric Assessment Report dated March 12, 2014 (the "Assessment").

[7] On May 21, 2014 Crown Counsel filed a Notice of Application for a finding that Mr. Smarch is a Dangerous Offender pursuant to s. 753 of the *Code*. The basis for the Crown Application is set out in the application as follows:

> 1. 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 of the Criminal Code, and the Offender, by his conduct in sexual matters, including the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses.

The Application was heard on May 29, 2014.

[8] The following documents were filed as Exhibits in the Application:

> Exhibit 1: Notice of Application and Consent of the Attorney General of Canada filed May 21, 2014;
>
> Exhibit 2: Affidavit of Jean Plenderleith (the "Affidavit")
>
> a) Criminal Record of James Smarch;
>
> b) Psychological Consultation Report of Registered Psychologist Steve Sigmond M.A. dated August 10, 2000;
>
> c) Letter from H. Cam Sinclair, Regional Social Worker , Dawson City and Old Crow, Yukon, dated July 28, 2003;
>
> d) Psychiatric Report prepared by Michael Stefanelli M.D., F.R.C.P. (C), dated August 25, 2003;
>
> e) Psychological Evaluation Report prepared by psychologist Dr. Karl Williams, Ph.D., R. Psych., dated October 3, 2003;
>
> f) Pre-Sentence Report prepared by H. Cam Sinclair, dated October 16, 2003;

g) Pre-Sentence Report prepared by Probation Officer Colleen Geddes, dated August 30, 2010;

h) Information 00-11716; associated Report to Crown Counsel; and Probation Reports prepared by Youth Worker Angie Senft, dated August 1, 2000; October 10, 2000; January 23, 2001; March 26, 2001, and May 28, 2001;

i) Information 00-11703/A; associated Prosecutor's Information Sheet; and Psychological Consultation Report of Registered Psychologist Steve Sigmond M.A. dated August 10, 2000;

j) Information 03-11701; associated Prosecutor's Information Sheet; associated Continuation Report; Bail Supervision Report prepared by H. Cam Sinclair dated September 11, 2003; Progress Report prepared by Youth Worker Jennifer Trudeau, dated November 4, 2004; Progress report prepared by Youth Worker Rob Marshall dated June 2, 2005 and May 24, 2006; Pre-Sentence Report prepared by H. Cam Sinclair (full copy in f) above), Psychiatric Report prepared by Dr. Michael Stefanelli (full copy in d) above), and Psychological Evaluation Report prepared by psychologist Dr. Karl Williams (full copy in e) above).

k) Information 08-11046; associated General Occurrence Report, Supplementary Occurrence Report, General Report, Supplemental Disclosure of General Report and Supplementary Report, further Supplementary Occurrence Report, Report to Crown Counsel; Bail Assessment Reports prepared by Colleen Geddes dated July 22, 2009 and June 9, 2010; Bail Assessment Report prepared by Probation Officer Troy Cairns dated November 5, 2009; Bail Assessment Report prepared by Student Probation Officer Marney Paradis (under supervision of Probation Officer Shayne King) dated July 15, 2010; and Pre-Sentence Report prepared by Collen Geddes (full copy in g) above);

l) Information 10-245; Show Cause report, undated;

m) Bail Assessment Report prepared by Probation Officer Sean Couch-Lacey dated May 7, 2013;

Exhibit 3: Psychiatric Report of Dr. Lohrasbe dated March 12, 2014 and filed May 21, 2014;

Exhibit 4: Criminal record of James Smarch.

> Exhibit 5: Yukon College Food Safe Level 1 Certificate; Relapse Prevention Participant Progress Report; Letter from Midnight Sun Healing & Aftercare services counsellor – (filed July 18, 2014)

[9] Judgment was reserved to July 18, 2014 and further reserved to October 23, 2014. My decision was provided on October 23, 2014 with written reasons to follow.

[10] I found Mr. Smarch to be a dangerous offender and sentenced him to a determinate sentence of 16 months for the predicate offence, to be followed by three years of probation. He also entered guilty pleas to two s. 145(3) offences on October 23 and received consecutive sentences of one month, and one and one-half months for these offences. Several ancillary orders were also made.

[11] These are the written reasons for my decision.

Circumstances of Mr. Smarch

[12] Mr. Smarch is a 28 year old Aboriginal citizen of the Tr'ondek Hwech'in First Nation.

Criminal Record

[13] Mr. Smarch has the following history of criminal convictions as set out in Exhibit 1 a) and Exhibit 4:

2000

[14] In 2000, while a 14 year old youth, he pled guilty and was convicted on Youth Justice Court Information 00-11716 of an amended count of break and enter into dwelling houses and committing an indictable offence contrary to s. 348(1)(b), as well

as a further count of break and enter into a dwelling house with intent to commit an indictable offence contrary to s. 348(1)(a). He was also convicted of a s. 145(3) offence for breaching the curfew term of an undertaking he was bound by at the time.

[15] The circumstances of the s. 348(1)(a) and (b) offences, as set out in the RCMP Report to Crown Counsel, contained in Exhibit 2, are, stated briefly, as follows:

Information 00-11716

[16] Count 1, as amended: On June 26, 2000, at approximately 3:30 a.m. the male resident of a home in Dawson City, Yukon awoke to see Mr. Smarch standing in his room. Mr. Smarch fled the residence with the male occupant in pursuit. Mr. Smarch had gained access to the residence by cutting through a screen on a window. Sixty dollars ($60.00) cash and a small replica Stanley Cup were taken from the residence.

[17] Count 3: At approximately 3:00 a.m. on June 26, 2000, a female heard the sound of a door closing in her residence. She observed Mr. Smarch walking through her kitchen and leaving by the back door. Nothing was stolen but Mr. Smarch left his mother's mountain bike there.

[18] Count 4: Mr. Smarch was bound by an Undertaking at the time that required him to comply with a curfew between the hours of 9:00 p.m. and 7:00 a.m.

[19] Mr. Smarch was also charged on Count 2 of the same Information with break and enter into a dwelling house and committing the indictable offence of sexual assault, contrary to s. 348(1)(b). The allegation was that at approximately 4:12 a.m. Mr. Smarch entered into a residence and touched a sleeping woman's leg while she lay in bed. The

female noted that a backpack containing her Nintendo player and several games had been moved.

[20] I note that the Crown entered a stay of proceedings on this charge. I conclude that the facts of Count 2, insofar as they relate to Mr. Smarch being inside the dwelling house and committing an indictable offence, were included in Count 1 as amended to refer to “houses” rather than “house”.

[21] I cannot, however, conclude that Mr. Smarch admitted to having committed the offence of sexual assault. There is nothing in the court file that indicates that the facts regarding the sexual assault were read in or admitted to by Mr. Smarch. The court registry, despite searching, has not been able to locate any recording of the proceedings. Crown counsel has not been able to provide me any documentation to support a finding that these facts were, or were likely to have been, read in at the sentencing hearing.

[22] Mr. Smarch received concurrent sentences of 18 months probation for the s. 348(1)(a) and (b) offences, and five days time served on the s. 145(3) offence.

2003

Information 03-11701

[23] On October 24, 2003, as an 18 year old, Mr. Smarch pled guilty and was convicted on amended Youth Justice Court Information 03-11701 for offences committed when he was 17 years old. These convictions were for two counts of break and enter and commit the indictable offence of sexual assault, contrary to s. 348(1)(b).

[24] The circumstances of these offences as set out in Prosecutor's Information Sheet and Continuation Report, briefly stated, are as follows:

[25] Count 1: At 2:30 am on July 26, 2003 Mr. Smarch entered the home and bedroom of a sleeping female cousin. He took off his clothes and got into her bed. He was fondling her breasts and bum when she woke up and told him to leave. Mr. Smarch threatened to kill himself if she told anyone.

[26] Count 2: At approximately 11:00 pm on July 25, 2003, Mr. Smarch entered the home and bedroom of a sleeping female complainant, who was known to him. He took off his clothes and climbed into her bed. He began to fondle her breasts and put his fingers into her vagina. He attempted to have intercourse with her but the complainant was able to escape. He threatened to harm her if she told anyone.

[27] Mr. Smarch was sentenced to 6 months probation for the sexual assault set out in Count 1 and 20 months open custody and 10 months community supervision for the sexual assault set out in Count 2. The 20 month sentence was imposed after taking into account six months credit for time on remand.

2010

Informations 08-11046; 10-00245; 08-11046A; 08-11046B

[28] On September 13, 2010, as a 24 year old, Mr. Smarch pled guilty and was convicted on Information 08-11046 of one offence of assault contrary to s. 266, and one offence of touching an individual under the age of 16 for a sexual purpose contrary to s. 151.

[29] On that same date he pled guilty and was convicted on Information 10-00245 of one offence of uttering a threat to cause bodily harm contrary to s. 264.1(1)(a); on Information 08-11046A of one offence contrary to s. 145(5.1) for having breached the no-contact provisions of an Undertaking to a Peace Officer; and on Information 08-11046B of one count of breaching the abstain clause of a Recognizance he was bound by.

[30] The circumstances of the s. 151 and 266 offences as set out in the General Occurrence Report, briefly stated, are as follows:

[31] Count 2: Mr. Smarch had been in a nine-month relationship with the 15-year-old victim. For approximately the last five months of the relationship, and after the victim had turned 15, Mr. Smarch and the victim had sexual intercourse on a number of occasions. This offence occurred within the time period between June 6, 2008 and January 5, 2009.

[32] Count 3: On January 6, 2009, Mr. Smarch punched the same victim in the back of the head, knocking her to the floor. He then shortly thereafter punched her in the face below her eye. It was this event that triggered the RCMP investigation that resulted in the s. 151 charge being laid.

[33] The circumstances of the s. 264.1(1)(a) charge, as set out in the Show Cause Report, are that on July 6, 2010, Mr. Smarch sent a message by Facebook to the victim of the s. 151 and 266 offences. The message threatened the victim by stating that she was "…going to get fuck (sic) up by some bitches so (she) better watch back…".

[34] The facts of the s. 145(5.1) were that at the time Mr. Smarch was in breach of an Undertaking to a Peace Officer that he was bound by that prohibited him from having contact with the victim.

[35] Mr. Smarch was sentenced to 45 days time served and 12 months probation on the s. 266 charge; four months time served and 12 months probation on the s. 151 charge and one day deemed served with credit for 60 days time served and 12 months probation on the s. 264.1(1) charge. He also received a sentence of one day deemed served with credit for 45 days time served on the s. 145(5.1) charge and 30 days time served and 12 months probation for the s. 145(3) charge. The facts of the s. 145(3) on 08-11046B conviction were not before me. This offence date was May 30, 2010.

2011

Information 10-00245A

[36] On October 12, 2011, Mr. Smarch pled guilty and was convicted on Information 10-00245A of one offence contrary to s. 733.1(1) for breaching the abstention clause of a Probation Order he was bound by. The offence date was May 13, 2011. I point out this conviction in order to correct an error in the filed Criminal Record of Mr. Smarch. The Criminal Record incorrectly indicates that Mr. Smarch was convicted of this offence on September 13, 2010. A review of the court files, however, shows that the conviction and sentencing date was October 12, 2011.

[37] Mr. Smarch was sentenced to 27 days time served for this offence.

Additional Offences

[38] Mr. Smarch was also convicted of the following offences which are not referred to in the filed Criminal Record, nor were they brought forward by counsel. These convictions were noted from a review of the court files in the Territorial Court registry.

[39] While it is not my practice to review court files to determine the accuracy of an offender's existing criminal history, I consider such a review to be appropriate in this case, particularly as there was a potential for me to have considered the Criminal Record of Mr. Smarch in a manner that could have been unfairly prejudicial to him.

Information 00-11703A

[40] Count 1: on August 16, 2000 Mr. Smarch pled guilty to a s. 354 offence (possession of property obtained by crime) in lieu of the charged s. 348(1)(b) offence (break and enter and commit). The remaining charges were stayed by the Crown. I note that this Information is included in Exhibit 2, tab i) of the Affidavit. From a review of the Prosecutor's Information Sheet, I surmise that Mr. Smarch admitted to being in the possession of a stolen backpack with three gold nuggets and 15 cans of stolen beer. These had been stolen earlier from a nearby residence.

[41] Mr. Smarch received a sentence of three months probation for this offence.

Information 08-11046C

[42] On April 13, 2011, Mr. Smarch pled guilty to a 733.1(1) offence for failing to abide by the abstention condition of a Probation Order he was bound by. The offence date was December 29, 2010.

[43] Mr. Smarch was sentenced to a 30 day Conditional Sentence Order.

Information 10-245B

[44] On October 12, 2011, Mr. Smarch pled guilty to a s. 145(5) offence for failing to attend court on June 15, 2011. Mr. Smarch received a sentence of 27 days' time served (which I assume was likely concurrent to the 27 day time served sentence he received that same date on Information 10-00245A).

[45] As mentioned, I took the somewhat unusual step of reviewing the court files as I was concerned about the lack of factual information in regard to the allegation of sexual assault in 2000 in Count 2 of Information 00-11716, particularly as I was asked to consider this incident as part of Mr. Smarch's prior sexual offending.

[46] In reviewing these files I noted the error in the filed Criminal Record regarding Information 10-00245A. I also noted three additional convictions for offences which were not in the filed Criminal Record, one of which was in relation to Information 00-11703A and Prosecutor's Information Sheet in Exhibit 2 Tab i) of the Affidavit.

[47] When this matter was before me on July 18, 2014 I advised counsel of what I had learned from my review of the court files. Crown counsel submitted that I could take judicial notice of the court's files and provide counsel with the opportunity to speak to any matters that arise as counsel deems necessary.

[48] Neither Crown counsel nor counsel for Mr. Smarch raised any concerns about my ability to consider and refer to this additional information in my deliberations in this application.

[49] An application to have an individual designated as a dangerous offender is an exceptional circumstance. Information outside of what is normally before the court in a sentencing hearing can be considered in a dangerous offender application.

Forensic Psychiatric Assessment

[50] Dr. Lohrasbe prepared a Forensic Psychiatric Assessment (the "Assessment") in March, 2014. The Assessment focused on issues relevant to Mr. Smarch's risk for future acts of sexual violence and potential risk management strategies.

[51] This Assessment went into considerable detail about Mr. Smarch's personal circumstances and upbringing. As such, I will make significant reference to Mr. Smarch's circumstances and his upbringing in this portion of my judgment. Some of this background was provided to Dr. Lohrasbe by Mr. Smarch and some was included in the earlier records reviewed by him.

[52] Mr. Smarch is the youngest of five children. He has three maternal half-siblings and one paternal half-brother. He was born in Whitehorse but raised mostly in Dawson City. His parents separated when he was two or three years old. He was raised primarily by his mother and step-father. He states that there was a lot of drinking by his mother and step-father. While there was no violence that he recalls, the children were abandoned and neglected at times.

[53] Mr. Smarch appeared uncertain about whether he had been sexually abused as a child, but did recount incidents involving one male cousin, that would appear to be incidents of sexual touching. It is noted later in the Assessment that Mr. Sinclair wrote

that Mr. Smarch had talked to him in 2003 in regard to his childhood sexual abuse. Suggestions of childhood sexual abuse suffered by Mr. Smarch were also noted by Dr. Stefanelli in August, 2003.

[54] Mr. Smarch did not complete high school, quitting in Grade 11. He had difficulties as a student, in particular an inability to sit still.

[55] Mr. Smarch lived in a foster home with a relative, which he describes as having been pretty rough.

[56] He suffered a broken leg in an automobile accident when he was three and he was the victim of a significant dog attack when he was seven or eight.

[57] Mr. Smarch began drinking alcohol at the age of 14 or 15 and shortly thereafter began to consume alcohol regularly. While incarcerated in 2003, he stated that he stopped drinking and was able to abstain from consuming alcohol for six years. He started drinking again in 2009 after he and his girlfriend broke up. He has consumed alcohol regularly since then and has "blacked-out' from alcohol numerous times. Dr. Lohrasbe noted that there is collateral information from Mr. Smarch's probation officer, Colleen Geddes, in 2010, and from Mr. Smarch himself, that are, however, inconsistent with his claim of six years sobriety.

[58] Mr. Smarch first smoked marijuana at the age of 14 and began to use marijuana regularly at the age of 24. While he has on occasion used cocaine, including crack, and non-prescribed pain killers, these do not appear to be a significant problem for him.

[59] Dr. Lohrasbe noted that Mr. Smarch's "engagement in the interview was curtailed by limitations to his cognitive capacities, including poor attention, concentration and vocabulary".

[60] On the Montreal Cognitive Assessment, (designed to be a rapid screening instrument for minor cognitive dysfunction), Mr. Smarch scored as having definite but relatively mild cognitive deficits.

[61] With respect to Mr. Smarch's charges in 2000, when he was 14, he recalled breaking into homes and admitted to touching females while they slept, but denied any sexual arousal or intent.

[62] With respect to the 2003 offences, Mr. Smarch recalled seeing his cousin passed out naked and lying down beside her in bed. He stated that he didn't really do anything. He also recalled seeing the younger female friend passed out. He took off his clothes and lay down beside her. He states that he may have touched her.

[63] Mr. Smarch has little recall of the offence of May 2, 2013, and denies having any sexual thoughts, fantasies or intentions regarding M.B. He has no recollection of doing anything sexual.

[64] Dr. Lohrasbe notes the conclusion reached by Dr. Sigmund in the August 10, 2000 psychological assessment that Mr. Smarch presented as suffering from Conduct Disorder and Substance Abuse. Mr. Sigmond did not find any features of a Major Mental Disorder or Mood Disorder. Mr. Sigmond considered this to be "…less a forensic than it is a social services case". However, Mr. Sigmond concluded that it

would be necessary to monitor Mr. Smarch forensically due to his "…unknown motivation for touching a woman's leg during a break and enter".

[65] A Psychological Evaluation Report prepared by Dr. Williams in October 2003 noted Mr. Smarch's admitted sexual attraction to females in the homes he broke into, in particular when he was on his own. Mr. Smarch conveyed to Dr. Williams that "…it was his intention to have sexual intercourse with them if they were agreed to do so". Dr. Williams' diagnosis was that of Conduct Disorder developing into an Antisocial Personality Disorder.

[66] Dr. Williams went on to conclude:

> Mr. Smarch's past behaviour, current offenses and associated psychological profile do not bode well for his future. Apparently his present offenses reflect pervasive characterological deficits in his willingness to consider the rights and feelings of others and to manage his impulses. Although substance use is likely to have facilitated or enabled his offending by virtue of disinhibiting and emboldening, such usage should not be considered to be a chief causal factor, as he would wish to convey. Rather, it is most probable that the aforementioned personality features and his associated capacity to disregard the welfare of others whilst impulsively seeking sexual excitement and fulfillment, served as principle etiological variables.
>
> … In the absence of such intervention [recommendations] I see Mr. Smarch as being at high risk for sexual re-offense; further, the possibility of such an escalation or intensification of his sexual impropriety certainly cannot be ruled out.

[67] Dr. Brodie conducted a neuropsychological assessment of Mr. Smarch in 2003. A progress report prepared by Mr. Smarch's youth worker at the time noted that Dr. Brodie stated that Mr. Smarch's deficits "…are attributable to the impact of an

underlying Attention Deficit Hyperactivity Disorder ["ADHD"] and a mild intellectual handicap with a selective deficit in verbal aptitude that would be indicative of a severe language based learning disability (dyslexia)". Dr. Brodie noted that these delays could be the result of "…teratogenic effects of alcohol".

[68] Dr. Lohrasbe noted in the Assessment that Mr. Smarch appeared to be willing to participate in both a Sex Offender Treatment Program and an Aboriginal Violent Offender Program.

[69] Dr. Lohrasbe concluded in the Assessment that it is "highly likely" that Mr. Smarch suffers from FASD. He noted that "A significant number of people with FASD commit some kinds of inappropriate behaviour".

[70] Dr. Lohrasbe concluded that while he is inclined to view ADHD as an appropriate diagnosis for Mr. Smarch, he views the features as fairly mild and as not directly relevant to risk. It was not clear to him at this time that Mr. Smarch should take medication for ADHD.

[71] While confirming the diagnosis of Antisocial Personality Disorder, Dr. Lohrasbe did not consider Mr. Smarch to be especially psychopathic.

[72] Dr. Lohrasbe noted that Substance Abuse/Dependence is clearly an ongoing concern, stating: "Acute intoxication has a disinhibitory impact on brain functioning, impairs impulse control, and unleashes aggressive potentials, including those of a sexual nature, in those so inclined".

[73] Dr. Lohrabse noted that:

> …there is no clear information to suggest that a consistent sexual deviancy is present with Mr. Smarch. His offenses as a teenager raise the possibility of a deviant sexual arousal (a preference for touching unsuspecting females) but his subsequent sexual offences have not followed this pattern. Hence, barring further information, I would not diagnose any sexual deviancy with Mr. Smarch. His sexual aggression appears to be opportunistic and an extension of his anti-social personality. Many people with an anti-social personality ignore a wider range of societal limits, taboos and restrictions, including sexual ones.

[74] Dr. Lohrasbe applied the Risk for Sexual Violence Protocol ("RSVP") to Mr. Smarch. This "comprehensive yet practical structured guideline" contains 22 items that are used to assess risk factors. A risk factor is "…a thing (condition, characteristic, event etc.) that is associated with and precedes the occurrence of violence and may play a role in causing it". He listed these risk factors as follows:

1. Chronicity of Sexual Violence: **present**
2. Diversity of Sexual Violence: absent
3. Escalation of Sexual Violence: absent
4. Physical Coercion in Sexual Violence: absent
5. Psychological Coercion in Sexual Violence: **present** (although not-typical of patterns of psychological coercion)
6. Extreme Minimization or Denial of Sexual Violence: absent
7. Attitudes that Support or Condone Sexual Violence: absent (although difficult to assess in this case)
8. Problems with Self-Awareness: **present**
9. Problems with Stress or Coping: **present**
10. Problems Resulting from Child Abuse: **present** (appears to be)
11. Sexual Deviance: absent
12. Psychopathic Personality Disorder: absent

13. Major Mental Illness: **present** (non-typical – marked by impairments in cognition, mood and behaviour)
14. Problems with Substance Abuse: **present** (and central to risk)
15. Violent or Suicidal Ideation: absent
16. Problems with Intimate Relationships: **present**
17. Problems with Non-intimate Relationships: absent
18. Problems with Employment: **present**
19. Non-Sexual Criminality: **present**
20. Problems with Planning: **present**
21. Problems with Treatment: **present**
22. Problems with Supervision: **present**

[75] Dr. Lohrasbe stated that "As with many patients with FASD he lacks the capacity to maintain an awareness that his judgment, cognitive skills, and interpersonal skills are impaired, and that his sexual and social behaviours are inappropriate". Dr. Lohrasbe notes that this lack of awareness is a frequent feature of FASD and he identifies three dimensions to assist in conceptualizing it:

1. Knowledge of the range of deficits or difficulties;
2. Emotional response to difficulties and deficits; and
3. Ability to maintain a comprehension of the consequences of deficits or abnormality in day-to-day life.

[76] Dr. Lohrasbe considered these factors and concluded that:

> To summarize therefore, a clinical formulation of risk places his FASD as the fundamental etiological event that has led to a number of cognitive, affective, social, and behavioural deficits and difficulties that have collectively promoted Mr. Smarch's sexual offending. This is not to say that his FASD 'caused' sexual violence. Rather, FASF [sic] 'set up' the

> conditions promoting the development of his antisocial personality (an indirect, general risk factor) as well as his propensity to abuse alcohol (a direct, proximal risk factor). Given the permanence of these deficits, the ubiquity of substance in our society and in his peer group, and the frequency with which he is going to encounter a potential victim (a sleeping female) he remains at high risk regarding the likelihood of sexual offending in the foreseeable future.
>
> An important facet of risk is its seriousness (the severity of damage to the victim). As described above, it would appear that in [sic] the predicate offense was low on the seriousness dimension of sexual harm. While in no way dismissing the potential for psychological damage with any victim of sexual aggression, his offense in 2003 also did not have the level of intrusiveness typically associated with severe harm to the victims.
>
> However in assessing seriousness I am unable to properly integrate his [2010] offenses with Ms. G. due to the lack of details in the documents made available to me, and his defensiveness. The information that I do have is troubling; Mr. Smarch comes across as far more malevolently aggressive with an intimate partner, and subsequently unmanageable in the community, than the picture that emerges from much of the rest of the history. It may be that intimate partners will be those at greatest risk in the future.

Treatability and Risk Management

[77] Dr. Lohrasbe noted that, while Mr. Smarch would be a challenging candidate for treatment, it is far too premature to be pessimistic about his prospects for change, given that he has not been through intensive risk-related programs.

[78] Dr. Lohrasbe stated that is important for Mr. Smarch to receive a wide range of intensive programs, including:

- A sex offender program;
- A spousal/family violence program;
- An Aboriginal-focused violence program such as In Search of Your Warrior;
- Substance abuse programming;
- Vocational training; and

- Life skills training.

[79] Dr. Lohrasbe stated that a detailed risk management plan could only be formulated close to the time Mr. Smarch would be released from custody as the particulars (such as available resources, residence, family and community support and daily routines) would need to be more certain.

[80] Dr. Lohrasbe noted that Mr. Smarch's sister, who left a lifestyle centered on substance abuse to pursue her education in nursing, is possibly a major factor in Mr. Smarch's rehabilitation.

[81] Dr. Lohrasbe stated that only broad management strategies relevant to managing Mr. Smarch's risk for sexual offending when back in the community could be outlined at this time. These were:

- Monitoring;
- Supervision;
- Treatment; and
- Victim Safety Planning.

[82] A lengthy follow up in the community is essential and the longer the follow up, the greater the possibility of managing risk.

[83] In summary, Dr. Lohrasbe stated:

> On the basis of a review of Mr. Smarch's history and my clinical evaluation, my opinion is that, in the foreseeable future:
>
> 1) He poses a high risk for acts of sexual offending against females.

2) The prospects for reduction of his risk through treatment interventions are unknown.

3) Treatment programs may be helpful in preparing him for risk management in the community.

4) Risk management should involve strategies focused on structuring his life away from high-risk situations.

5) The longest period of parole would assist in managing his risk when he is back in the community.

Risk assessment is not static: it will need revision with new information and the passage of time.

Testimony of Dr. Lohrasbe

[84] Dr. Lohrasbe was qualified as an expert to provide forensic psychiatric evidence regarding accused individuals as it relates to Dangerous Offender Applications. His qualifications were not in issue.

[85] Dr. Lohrasbe stated that he is highly experienced as a forensic psychiatrist, having testified in over 100 Dangerous/Long Term Offender Hearings.

[86] He stated that his intention in testifying was to focus on the treatability and manageability of Mr. Smarch.

[87] He stated that impulsive sexual aggressive behaviour occurs frequently with individuals with anti-social personality traits and other forms of impulse control issues.

[88] He reiterated that there is no apparent sexual deviance associated with Mr. Smarch. He agreed in cross-examination that Mr. Smarch is not a sexual offender, but an impulsive offender who commits sexual offences. He further agreed that Mr. Smarch's offending is connected to substance abuse. If Mr. Smarch is in an

environment where he and others, in particular females, are consuming alcohol and/or using drugs, the setting is more likely to lead to him committing a sexual offence.

[89] Dr. Lohrasbe stated, at the risk of oversimplifying, that the full range of physical brain impacts, when mixed with issues of abuse, neglect, and other associated factors in Mr. Smarch's upbringing, have impacted his capacity; for example his deficiencies are apparent when he has a mental urge and then acts on it.

[90] Whereas unaffected individuals have the inherent capacity and training to interrupt the process of acting on an urge, Mr. Smarch does not, in large part due to his background and related issues.

[91] In Mr. Smarch's case, he has to go through the process of external influences applied over time in order to consistently build up his capacity for impulse control. This needs to be the focus of his treatment. It will be an enormous challenge for Mr. Smarch to learn how to manage his impulses over time. While he is able to do so for short periods of time, in the wide variety of contexts he will face in the future, Mr. Smarch will have to internalize the kind of control he is exhibiting in court today, (Dr. Lohrasbe had noted earlier in his testimony that Mr. Smarch was more settled than at the time of his interview), and that this would require a lot of guidance and structure in the future. While Mr. Smarch's FASD placed limits on aspects of his capacities, within these limits there exists the capacity for change.

[92] Dr. Lohrasbe noted that Mr. Smarch is affable and can form affectionate bonds. It is important to work on Mr. Smarch's strengths and his noted ability to get along with

people. It is important that he have purposes and goals that relate to his strengths in order to see value to his life and improve his sense of self-worth.

[93] Due to his lack of knowledge of the community resources available to Mr. Smarch, Dr. Lohrasbe was unable to state how long it would take for Mr. Smarch to develop the impulse control that he requires. He stated that what Mr. Smarch needs is a lengthy period of services, not a lengthy period of incarceration. The focus should not be on years in prison but on the structure available to Mr. Smarch over a lengthy period in the community.

[94] With respect to the programs available in the Federal Penitentiary system, Dr. Lohrasbe stated that, if so incarcerated, Mr. Smarch should take as many programs as necessary, including for:

- Substance abuse;
- Violent offending; and
- Sexual offending, although Dr. Lohrasbe again noted that Mr. Smarch's issue is more impulse control than sexually rooted. Nonetheless, he said Mr. Smarch needs education on the issue of sexual offending.

[95] From a psychiatric and therapeutic assessment perspective, a period of approximately three years of treatment in the Federal Penitentiary system could make sense.

[96] Dr. Lohrasbe stated that after Mr. Smarch is released from a period of incarceration, the follow-up treatment should be for as long as possible. A balance needs to be struck between community resources that are available and family. Dr.

Lohrasbe was not able to proffer much of an opinion as to the role Mr. Smarch's family may play, as he had no opportunity to interact with them. He noted that Mr. Smarch looked up to his father and expressed admiration for his sister. He was unable to say what the impact on Mr. Smarch would be if he was separated from his family for an extended period of time, as such separation can go either way for offenders. He agreed that for some offenders the impact is negative.

[97] Dr. Lohrasbe noted that Correctional Service Canada ("CSC") has the goal of releasing offenders from smaller communities into the larger community (where more resources are available) with a plan to return the offender to his or her community. The offender needs to buy in and see their parole officer as supporting them, in order for this reintegration to be successful. Dr. Lohrasbe notes that there are strong Aboriginal components within the CSC programming.

[98] With respect to Mr. Smarch's manageability, Dr. Lohrasbe noted his youth and the difficulty of making a long term prognosis as to Mr. Smarch's patterns in future.

[99] Dr. Lohrasbe reiterated that most of Mr. Smarch's sexual offences involved relatively superficial levels of contact. The offence involving his underage girlfriend is somewhat different and presents a confounding circumstance. In regard to this offence, Dr. Lohrasbe considered there to be an element of seeking out an individual of similar intellectual, social and emotional compatibility, This, he states, is a significant issue for persons with FASD or similar afflictions.

[100] However, the violence and the follow-up threats need to be explored in therapy and are issues relevant to the ongoing management of Mr. Smarch in the community, in particular in regard to any relationship he may be involved in.

[101] There is also the unknown factor as to how much further Mr. Smarch would have taken the sexual offending in the other sexual offences if he had not been interrupted.

[102] A common feature of Mr. Smarch's sexual offences, excluding the offence involving his under-age girlfriend, was his extreme intoxication and the victims' partial or complete nudity in some of the offences**.** Intoxication lowers Mr. Smarch's capacity to restrain himself.

[103] Dr, Lohrasbe stated that anything Mr. Smarch learns will dissolve very rapidly if he drinks again.

[104] Dr. Lohrasbe stated that it is good news for Mr. Smarch that he is neither psychopathic, as treatment for this disorder is quite challenging, nor sexually deviant, as such a deviancy would be a driver if Mr. Smarch's impulse control broke down.

[105] In conclusion, Dr. Lohrasbe stated the following:

- Mr. Smarch's ability to learn skills and reduce risk can make him manageable in the community; and
- It is an unknown as to whether Mr. Smarch will take advantage of opportunities to learn these skills. A key component will be whether he sees the system as being on the same side as him. Dr. Lohrasbe stated in cross-examination that Mr. Smarch's expressed interest in participating in programming came across as genuine, although he does not believe that there is much depth to Mr. Smarch's expressed interest. It would be overly naïve to conclude that Mr. Smarch has "got it now", though the lack of depth is not unexpected in his circumstances.

Testimony of James Smarch

[106] Mr. Smarch testified. He stated that he understood some of what Dr. Lohrasbe had said. In regard to Dr. Lohrasbe's Assessment he stated that it had "hard words". He recalls speaking to Dr. Lohrasbe about sex offender treatment and other issues. He can't recall what he told Dr. Lohrasbe, but stated that he knew the suggested treatment programs were good for him, although he didn't know much about them.

[107] Mr. Smarch expressed concern about being a long distance away from his family. This was stated in the context of taking programming at a Federal Penitentiary. He said that it would be hard on him if he had to go south and be a far distance away from his family. He stated that they visit him while he has been in custody at WCC and he knows that they want him to stay here.

[108] He stated that while incarcerated at WCC on remand he had been in the following programs:

- Substance Abuse Management ("SAM");
- Relapse Prevention Program; and
- For the Sake of the Children.

[109] He stated that the SAM program gave him knowledge and strength and taught him how to avoid bad situations. He felt that drinking had put him in his present situation. He has known for a long time that he has a drinking problem.

[110] He stated that he was also involved in individual counselling and was going to be involved in a Healing Group. He stated that he had been attending AA meetings since

being in custody. He stated that he planned on attending a proposed "Changing Behaviour" program that was to be offered in June or July.

[111] Mr. Smarch stated that he took these programs on his own without being told to do so. He said that he felt like he could do more programming and that he needed to. He said that he would attempt to get the help he needed from a sex offender treatment program if such a program was available to him.

[112] He also took the following employment programs:

- Food Safety;
- First Aid; and
- Workplace Hazardous Materials.

[113] He stated that he has been working in the laundry since he came into custody.

[114] In cross-examination Mr. Smarch agreed that he got along well with people and that the various teams, service people and counsellors at WCC were trying to help him get better so he could get out of custody.

[115] He stated that he would see how it went when asked whether he would be willing to stay on a federal institution treatment team. He stated that he was unsure whether he would be able to stick it out if he was incarcerated down south, although he might be prepared to try. He agreed that he would like to spend time with First Nations' Elders who could show him the right way to live. He stated that he wanted to change his ways.

[116] Mr. Smarch stated that he had quit a job at Challenge due to losing interest. He stated that it was too hard and too long.

[117] When asked about his prior sexual offences, Mr. Smarch stated that he could not recall getting into bed and touching the women as these offences occurred “too far back”.

[118] With respect to the index offence, Mr. Smarch stated that he and the victim were both intoxicated and they were just lying there.

Information from Family Members

[119] Mr. Smarch’s father spoke. He said that he had little time for Mr. Smarch when he was growing up beyond the baby/toddler stage. He believes that Mr. Smarch could change. He said that he and Mr. Smarch’s grandmother need him home. He stated that he himself had changed and that he would help Mr. Smarch and take him wherever he needed to go. He asked the court to have mercy on Mr. Smarch.

[120] Mr. Smarch’s aunt spoke. She stated that she believes Mr. Smarch can succeed if he puts his mind to it, and that he has done well, at times, in the past. She said that Mr. Smarch is good with kids and he is soft-spoken and well mannered. She said that he is a help to his grandmother. She supports Mr. Smarch and she also asked the court to have mercy on him.

[121] Mr. Smarch’s uncle spoke. He states that he himself has turned his life around and become a Christian. He said that he now tries to help people out who are involved in the justice system. He stated that Mr. Smarch is a kind-hearted person and not violent. He knows Mr. Smarch has a drinking problem but he supports him. He reiterated that Mr. Smarch is a big help to his grandmother.

[122] Another of Mr. Smarch's aunts spoke. She stated that she has never seen Mr. Smarch angry and that she sees him as always happy and as a good kid. She confirmed that he helps out his grandmother a lot.

Law

[123] The amendments in 2008 to the Dangerous Offender provisions of the *Criminal Code* have significantly altered the landscape with respect to Dangerous Offender applications and designations.

[124] Section 753 reads, in part, as follows:

> 753. (1) On application 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 had 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 or 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 un 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.

(1.1) If the court is satisfied that the offence for which the offender is convicted is a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the conditions in paragraph (1)*(a)* or *(b),* as the case may be, are presumed to have been met unless the contrary is proved on a balance of probabilities.

…

(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 the offence for which the offender has been convicted – which must be a minimum punishment of two years – and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
>
> (c) impose a sentence for the offence for which the offender has been convicted.

(4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation

> that a lesser measure under paragraph 4*(b)* or *(c)* will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.
>
> …
>
> (5) If the court does not find the offender to be a dangerous offender,
>
> > (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or
> >
> > (b) the court may impose sentence for the offence for which the offender has been convicted.

[125] These provisions of the *Code* have removed the discretion from the trial judge to declare an offender to be a dangerous offender if the offender falls within the definition of a dangerous offender as set out in s. 753(1). The discretion for the trial judge has moved, from the initial determination of whether the offender is a dangerous offender or not, to the sentencing options available in that, while an indeterminate sentence is presumptive, a determinate sentence can be imposed when the circumstances warrant it. The issue in regard to the prospects of the offender being controlled in the community has moved from the threshold question of whether the offender is to be designated as a dangerous offender or long-term offender, to the determination of what the appropriate sentence will be.

[126] In ***R.*** v. ***Szostak***, 2014 ONCA 15, the Court noted that the current legislative framework is intended to broaden the group of offenders who may be designated as dangerous offenders. The gateway, so to speak, has been widened through these amendments. At para. 54 the Court stated that:

> … it is apparent that Parliament intended a broader group of offenders be declared dangerous offenders than was envisaged in *Lyons* [***R.*** v. ***Lyons***, [1987] 2 SCR 309] where the court spoke of "a very small group of offenders". While the legislation is still narrowly targeted to a small group of offenders, that Parliament intended to broaden the group of persons to be labelled as dangerous offenders is apparent… (see also ***R.*** v. ***Paxton*** 2013 ABQB 750 at para 25; ***R.*** v. ***Warawa***, 2011 ABCA 294 at para. 6).

[127] The Court in ***Szostak*** notes that one impact of the legislative shift in discretion is that the prospect of the offender being successfully treated impacts on the appropriate sentence to be imposed but has limited application on whether the offender is declared to be a dangerous offender or not. (paras. 36, 52, 53).

[128] As stated in ***R.*** v. ***B.A.R.***, 2011 BCSC 1313 at para 44:

> To say that an offender's conduct is intractable means, in my view, that it is stubborn or difficult to control. It does not mean that the offender is incapable of change with treatment. If it were otherwise, then I could not see any scope for the application of s. 753(4)(b) and (c) once the offender is found to be a dangerous offender. A dangerous offender is not a person for whom the law sees no hope of rehabilitation. Rather, designation as a dangerous offender requires that the protection of the public be given special consideration when imposing sentence.

[129] While the legislative intent includes expanding the group of offenders to be designated as dangerous, such a designation is still categorized as an "exceptional sentence". In ***R.*** v. ***Steele***, 2014 SCC 61 the Court stated at para. 1:

> Indeterminate detention and long-term supervision under Part XXIV of the *Criminal Code*, R.S.C. 1985, c. C-46, are exceptional sentences in our criminal justice system. They are reserved for individuals who pose an ongoing threat to the public and accordingly merit enhanced sentences on preventive grounds.

[130] In ***R.*** v. ***R.E.W.*** (2006), 207 O.A.C. 184, in paras. 22-32, the Court addressed the meaning of “exceptional” within the jurisprudence, stating the following in paras. 30 and 31:

> 30 Parliament rarely uses the term "exceptional" in criminal legislation. I have found the term used only six times in the Criminal Code.[1] [footnote omitted] The term "exceptional" is used only twice in the YCJA: first, it appears in s. 39(1)(d) and second, it appears in s. 39(9) which requires the judge to explain in the reasons why the case is an exceptional case under para. (d).
>
> 31 The theme that runs through use of the term "exceptional" in both criminal case law and legislation, is that it is intended to describe the clearest of cases. Such cases include those where applying the normal rules would undermine the purpose of the legislation, where the exercise of the unusual power is necessary or required, and where the exercise of the unusual jurisdiction is capable of explanation. …

[131] It is not every individual that poses a threat to society who is intended to be captured by the dangerous offender provisions. It is not unusual, and in fact it is commonly the case, that offenders who have committed offences of violence and who are considered as being at “a high risk of re-offending”, have been released into the community on probation orders that are designed to minimize the risk, without the offender being declared to be a long-term or dangerous offender.

[132] However, the primary rationale for the dangerous offender and long-term offender provisions is public protection, and the provisions of Part XXIV cannot be so narrowly construed so as to undermine this objective. (***Steele*** at para. 29; ***Paxton*** at paras 33 – 35); ***Lyons*** at para 14; ***R.*** v. ***Wilband***, [1967] S.C.R. 14 at p.10; ***Warawa*** at para. 40).

[133] A dangerous offender designation is primarily targeted at the offender and the risk presented by the offender at the time of sentencing, and not at the offence that forms the basis of the application.

[134] In ***R.*** v. ***Ominayak***, 2012 ABCA 337 at para. 53 the court stated that "when the amending legislation is read as a whole, it appears that the legislative intent of the 2008 amendments to the dangerous offender regime was to provide harsher, rather [than] more favourable, treatment to an offender".

[135] However, the dangerous offender provisions cannot be so broadly construed as to contravene the fundamental principle of proportionality in that the sentence must still be proportionate to the seriousness of the offence and the degree and responsibility of the offender. The provisions of s. 718 – 718.2 generally continue to apply to dangerous offender applications. This includes s. 718.2(e).

[136] As stated in ***R.*** v. ***Shanoss***, 2013 BCSC 2335:

> [156] The dangerous offender designation constitutes a sentence and must therefore, also be governed by the general principles of sentencing found in ss. 718, 718.1, and 718.2 of the *Code: R. v. Johnson*, 2003 SCC 46. I note, in particular, that the mandate to consider the special status of the accused as an Aboriginal offender in s. 718.2(e) applies equally to a dangerous offender application. (see also ***R.*** v. ***Carter***, 2014 SKPC 150 at paras. 257-259).

[137] In ***Shanoss***, the Court discussed the countervailing views regarding the application of s. 718.2(e) in regard to the particular attention that is to be paid to the circumstances of Aboriginal offenders when sentencing them:

[162] It is apparent from the reasoning in *Ipeelee* [***R.*** v. ***Ipeelee***, 2012 SCC 13] that regardless of how violent and serious the offences committed by the accused, the provisions of s. 718.2(e) apply: per Lebel J. at paras. 84-87. The Crown concedes that this provision applies to dangerous offender applications; however, it argues that the Aboriginal background of the accused is secondary to the need to protect the public, which is the primary factor in dangerous offender applications. This view was adopted in *R. v. Ominayak*, 2012 ABCA 337, at para. 41:

> [41] …We acknowledge that in *Ipeelee*, at para. 84, the Supreme Court commented that there has been undue emphasis placed upon its observation in *Gladue* that sentences for Aboriginals and non-Aboriginals will be close to one another, or the same, in cases of the more violent and serious offences. *Ipeelee*, however, involved the application of principles governing the sentencing of Aboriginal offenders for breaches of long-term supervision orders. As the Court noted at para. 50, "rehabilitation is the key feature of the long-term offender regime that distinguishes it from the dangerous offender regime". Here the appellant was found to be a dangerous offender. The protection of the community is the paramount consideration, whatever the race or ethnicity of the offender. There is no automatic sentencing discount. In such circumstances, merely because the offender is of Aboriginal descent.

[163] A more limited application of the *Gladue* factors in dangerous offender proceedings was recognized by the Saskatchewan Court of Appeal in *R. v. Standingwater*, 2013 SKCA at para. 49, due to the primary focus on protection of the public. However, Coldwell J.A. also articulated a practical application of the *Gladue* factors to dangerous offender proceedings. The sentencing judge should look to whether there are Aboriginal-focused programs and supervision models that will reduce the risk to re-offend posed by the Aboriginal offender. If these programs do exist, then it enhances the possibility of eventual control of the risk in the community in satisfaction of the test in s. 753(4.1).

[164] In my view, it would be an error to limit the application of the *Gladue* factors in a dangerous offender proceeding in order to prioritize protection of the public as a sentencing objective. The unique circumstances of the Aboriginal offender must be given careful consideration in every sentencing. The fundamental principles of sentencing in s. 718.1 and s. 718.2 apply with equal force to a dangerous offender proceeding. The moral blameworthiness of the offender is a fundamental consideration and the Aboriginal heritage of an offender often has a direct and substantial impact on their moral culpability for the offence. A person who grows up

> in a culture of alcohol and drug abuse is less blameworthy than a person who commits a crime despite a positive childhood and upbringing. Further, the systemic underlying criminogenic factors affecting an Aboriginal offender may respond better to Aboriginal-focused rehabilitation and restorative justice models. Re-acquainting the Aboriginal offender with his culture may reduce his risk to re-offend far more successfully than more generalized treatment programs. As Caldwell J.A. says in *Standingwater*, the existence of Aboriginal-focused treatment may give the sentencing judge confidence that a lesser sentence than a dangerous offender designation will adequately protect the public.

[138] In ***Shanoss***, it was conceded by defence counsel that the offender met the definition of a dangerous offender. In rejecting the submission by defence counsel that the offender should receive a determinate sentence of 10 years, less credit for time served, and be placed on a long-term supervision order for 10 years, rather than an indeterminate sentence, the court, after considering all the circumstances of the offence and the offender, including ***Gladue*** factors, stated in paras. 185 and 187:

> [185] The accused's risk for re-offending is so high that it can only be adequately managed in the most rigid, controlled environment. The nature of the supervision required under any form of community release is almost identical to the controls in place within a prison…
>
> …
>
> [187] In my view, the negative factors clearly overwhelm the positive factors in favour of successful, sustained rehabilitation of the accused. For these reasons, I am unable to conclude that the evidence shows there is a reasonable expectation that a lesser measure than an indeterminate sentence will adequately protect the public against the commission of further sexual offences. Even if he could be adequately supervised in the community over the long term, the controls necessary to manage his risk to re-offend are so stringent that the essentially create a prison environment. Not only does this type of supervision not exist in the community, but it belies the reason for the accused's release from prison. There is simply no point in exchanging one prison environment for another.

[139] A significant aspect of the 2008 amendments is that rehabilitation, once primarily associated with the long-term offender designation, is now also a factor in a dangerous offender designation. This is seen in s. 753(4) of the *Code*. Whereas under the regime before the 2008 amendments the sentencing judge was required to impose an indeterminate sentence once the designation had been made, now the ability to sentence the offender to a non-determinate sentence which may include probation or a long-term supervision order allows for the prospects for the offender's rehabilitation to be considered.

[140] If an offender is declared to be a dangerous offender, the presumption is that an indeterminate sentence will be opposed. However, if the court is satisfied that there is a reasonable expectation that an indeterminate sentence is not required to protect the public from the commission by the offender of murder or a serious personal injury offence in the future, two other sentencing options remain. These are a determinate sentence of two years or more with up to a ten year long-term-supervision order, or simply an appropriate determinate sentence.

[141] The notion of "reasonable expectation" speaks to a belief that something will happen, as contrasted with a reasonable possibility that something may happen. In ***R.*** v. ***Osborne***, 2014 MBCA 73, the court stated as follows in paras. 72-74:

> 72 The case law does indicate a different and higher standard in "reasonable expectation" than in "reasonable possibility." See *R. v. J.E.M.,* 2011 BCSC 715 at paras. 53-54 (QL); *R. v. Downs (C.J.),* 2012 SKQB 198 at paras. 7-8, 397 Sask.R. 83; and *R. v. Cote (K.J.),* 2012 SKQB 508 at paras. 20-24, 416 Sask.R. 1.
>
> 73 A most succinct expression of the difference between the phrases is found in *R. v. J.T.M.,* 2011 SKPC 109, 379 Sask.R. 211, a decision of the

Saskatchewan Provincial Court where, after briefly discussing the difference between the two phrases, Labach P.C.J. wrote (at para. 114):

> Both of these phrases really involve an assessment of the offender's risk to the public. They ask a judge to consider if the offender's risk in the community can be lowered to an acceptable level by a lesser punishment. The only difference is under the old regime the question was one of "reasonable possibility" whereas under the new amendments the test is one of "reasonable expectation". The difference in wording, while subtle, is significant. A "reasonable possibility" connotes a belief that something may happen while a "reasonable expectation" speaks to a belief that something will happen. The onus for finding a reasonable expectation then is somewhat higher but the factors to consider under both tests would essentially be the same.

I would substitute the word "standard" for the word "onus" in the above quotation, but otherwise adopt the statement.

74 It would seem to me that the higher standard flows reasonably from the enhanced dangerousness of one designated a dangerous offender, as compared with the lower standard applicable to the lesser dangerousness of one designated a long-term offender.

Positions of Counsel

Crown

[142] Crown counsel submits that there is a compelling case to have Mr. Smarch declared a dangerous offender under s. 753(1)(b). He observes that there are fewer criteria under s. 753(1)(b) than in s. 753(1)(a).

[143] Counsel submits that while Mr. Smarch is not a psychopath or a sexually deviant offender, he is an impulsive person who commits sexual offenses because he fails to control his sexual impulses. When he is in a context where there is a vulnerable woman, there is a strong likelihood that sexually offending will result.

[144] Crown counsel points to, as examples, the two sexual offences from 2003 and the sexual touching in 2000 as evidence of past sexually offending conduct.

[145] Counsel submits that when a dangerous offender designation is made, the legislation clearly creates the presumption that an indeterminate sentence will be imposed.

[146] Counsel submits, however, that in the circumstances of this case, the court could impose a determinate sentence in accordance with s. 753(4)(b). Counsel concedes that there is a sufficient evidentiary foundation to allow the court to find that there is a reasonable expectation that a lesser measure than an indeterminate sentence would protect the public against the commission by Mr. Smarch of a serious personal offence in the future.

[147] Counsel agrees that the purposes, objectives and principles of s. 718 – 718.2 apply. Section 718, however, must be considered in the context of the underlying principle of protection of the public that drives the dangerous offender legislation and designation. Counsel concedes that the application of s. 718.2(e) in regard to Aboriginal offenders being sentenced as dangerous offenders can be somewhat complex.

[148] Counsel submits that, outside of the dangerous offender designation, an appropriate sentence for Mr. Smarch for the index offence would be towards the high end of territorial time. Counsel submits that once an individual is designated a dangerous offender the usual range of sentences does not apply. However, given the evidence that Mr. Smarch's risk factors would best be addressed by a three year period

of treatment, a sentence of four to five years in addition to time served in remand should be imposed. Taking into account the timing of available programming and intervals between programming, a sentence of this length would allow for Mr. Smarch to have an actual three years of programming. The sentence of imprisonment should be followed by a 10 year period of supervision.

[149] Crown counsel also seeks a SOIRA order under s. 490.012, a firearms prohibition under s. 109, a DNA order under s. 487.051 and an order for the provision of documents to the CSC pursuant to s. 760.

Defence

[150] Counsel for Mr. Smarch does not contest that Mr. Smarch meets the statutory criteria for being declared a dangerous offender.

[151] Counsel suggests the possibility, however, of not finding Mr. Smarch to be a dangerous offender but rather a long-term offender under s. 753(5).

[152] He submits that there are a number of factors that point to Mr. Smarch having a diminished level of moral blameworthiness for this offence, such as his limited cognitive capacity and his FASD diagnosis. He also points to Mr. Smarch's chaotic and disruptive background, which are connected to his Aboriginal ancestry.

[153] He concurs with Crown counsel that, in the event that Mr. Smarch is determined to be a dangerous offender, a determinate sentence is appropriate, however, he submits that the sentence does not need to be lengthy.

[154] He notes that Mr. Smarch's behaviours are linked to his alcohol abuse in such a way that, if he is able to deal with his alcohol abuse, the sexually offending behaviour will stop. He points to Mr. Smarch's expressed willingness to deal with his alcohol abuse issues.

[155] Counsel also points to the significant number of risk factors that are not present with Mr. Smarch and, in particular, the absence of sexual deviancy and psychopathy. He further submits that the relatively low level of severity in Mr. Smarch's sexual offences is a factor that should impact not only upon whether there is a reasonable expectation that Mr. Smarch, in future, will not present such a risk to the public that an indeterminate sentence would be necessary, but on the length of the determinate sentence to be imposed.

Analysis

[156] In order for Mr. Smarch to be declared a dangerous offender under s. 753(1)(b) the Crown must establish beyond a reasonable doubt that:

> (a) The offender was convicted of a serious personal injury offence as defined in s. 752(b);
>
> (b) The offender, by his or her conduct in sexual matters, has shown a failure to control his or her sexual impulses;
>
> (c) The offender is likely in the future to show a similar failure; and
>
> (d) The offender is likely, through such failure, to cause injury, pain or other evil to any person.

[157] I must be satisfied beyond a reasonable doubt that his past conduct gives rise to a future likelihood of causing pain, injury or other evil to other persons through a failure

in the future to control his sexual impulses. The Crown must prove both that the past acts of Mr. Smarch meet one of the threshold requirements and that his conduct constitutes a threat to the life, safety or physical or mental well-being of others. (***R.*** v. ***Wormell***, 2005 BCCA 328 leave refused, [2006] 1 SCC xvi.).

[158] Unlike s. 753(1)(a), there is no need to establish a pattern of sexual offending under s. 753(1)(b). (***R.*** v. ***Downs***, 2012 SKQB 101 at para. 55).

[159] With respect to (a), the offence of sexual assault, regardless of whether the Crown has elected to proceed by way of indictment or by summary election, is a serious personal injury offence, so the first criteria is established.

[160] With respect to (b), there is no doubt that Mr. Smarch has shown, both in the predicate offence and in some of his previous offences and actions, a failure to control his sexual impulses.

[161] This said, the circumstances in which he has done so are important.

[162] He has four convictions for sexual offences. The first two convictions were from 2003 for offences that occurred over an approximately four-hour period involving two different women known and/or related to Mr. Smarch. He was 17 years old at the time. These were serious offences and both involved touching and fondling and, in the first instance, digital penetration and an unsuccessful attempt at forcible intercourse.

[163] The 2003 sexual assaults are, in my view, the most serious of Mr. Smarch's criminal convictions. They involve the most intrusive of the sexual contacts, (leaving aside for the moment the 2010 conviction for the s. 151 offence which involved

intercourse), and the fact that the one offence followed almost immediately on the heels of the other demonstrates a persistence in the sexually offending behaviour.

[164] With respect to the 2010 s. 151 offence, while the sexual contact was more intrusive, in my opinion I do not see the circumstances as being in any meaningful way similar to the other sexual offences or indicative of a failure to control his sexual impulses, as least as this term is to be construed within the scope of s. 753(1)(b).

[165] The victim of the offence was in a relationship with Mr. Smarch in which the sexual contact was illegal because of the age of the victim in relation to Mr. Smarch. This was not a circumstance where Mr. Smarch, while intoxicated, took advantage of a vulnerable female. The victim in this case was vulnerable due to her age.

[166] In considering this offence, I must not lose sight of Mr. Smarch's cognitive limitations and the impact these limitations may have on his functional age, which was certainly closer to that of the victim than the chronological age difference suggests. As such I do not find this offence to be similar to the other sexual offences.

[167] With respect to the offence for which Mr. Smarch is being sentenced, I found this offence to be spontaneous and opportunistic in nature. While it involved a sexual assault against a vulnerable female, it is notably different from the sexual assaults that occurred after illegal entries into the homes and bedrooms of the victims of the 2003 offences. The level of sexual contact was not proven to be more than at the lower end of the spectrum.

[168] In Mr. Smarch's case though, there are also additional circumstances possibly indicative of a failure to control his sexual impulses.

[169] The law is clear that it is past conduct that is relevant and not just past convictions. In ***R.*** v. ***Ziegler***, 2012 BCCA 353, the Court upheld the sentencing judge's decision to declare Mr. Ziegler a dangerous offender, notwithstanding the errors the court found the sentencing judge had made when considering Mr. Ziegler's past conduct. The Court stated the basic principles for past conduct to be considered in paras. 7 – 11 as follows:

> 7 A dangerous offender hearing is guided by the same evidentiary principles and objectives as other sentencing proceedings: *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357 at para. 23. The Crown may submit hearsay evidence if it is reliable and credible. If an aggravating fact is challenged by the offender, however, the Crown must prove the disputed facts beyond a reasonable doubt in accord with the general principles that govern criminal proceedings, including resolution of any doubt in favour of the offender: *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 414-415, 140 D.L.R. (3d) 612. The offender must, however, challenge any fact clearly and unequivocally: *R. v. Ford*, 2010 BCCA 105 at para. 59, 254 C.C.C. (3d) 442.
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> 8 Transposing those principles to a dangerous offender proceeding, the Crown may rely on the offender's criminal record, as well as the circumstances surrounding his prior offences, to establish past failure to control his sexual impulses. It need not prove the earlier convictions by calling the witnesses who testified at those trials, and may instead rely on hearsay evidence of the historical facts of previous offences from reliable and trustworthy sources such as court records: *R. v. Jack*, (1998) 104 B.C.A.C. 175 at paras. 40-41 (B.C.C.A.); *R. v. Neve*, 1999 ABCA 206, 137 C.C.C. (3d) 97 at paras. 132-133.
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> 9 Evidence of a conviction alone, however, may be insufficient to establish an offender's earlier conduct shows a failure to control his sexual impulses. It may be necessary for Crown to lead evidence of the circumstances underlying the conviction as well, and it is open to the offender to adduce evidence showing a conviction did not have a sexual component or, if it did, it did not demonstrate a failure to control his sexual impulses: *R. v. Dawson*, [1970] 3 C.C.C. 212 (B.C.C.A.).

> 10 The Crown may also rely on evidence of past conduct of the offender that was not the subject of charges, if it is admitted in accord with the normal rules of evidence. If these past events are denied, they must be proven beyond a reasonable doubt: *R. v. Read* (1994), 47 B.C.A.C. 28 at paras. 74 and 76 (C.A.); *R. v. Pike*, 2010 BCCA 401 at paras. 53-56, 260 C.C.C. (3d) 68.
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> 11 The opinions of psychiatrists and psychologists as to future risk and treatment options often play a significant role in dangerous offender proceedings. While it is permissible for such experts to refer to second-hand information in formulating their views, the weight of their opinions may be diminished if they are based on unproven or unreliable information. A psychiatric opinion is not evidence of the facts upon which it is based. The court must be independently satisfied as to the truth of those facts: *R. v. Wilband*, [1967] S.C.R. 14 at 21, 9 D.L.R. (3d) 1; *R. v. Knight* (1975), 27 C.C.C. (2d) 343 at 354-356 (Ont. S.C. (H. CT. J.)); and *Pike* at paras. 61-63.

[170] In ***Ziegler***, the Crown alleged that seven of Mr. Ziegler's prior offences involved inherently sexual offences and eight of his convictions had a sexual component. These offences are set out in para. 47. Mr. Ziegler disputed that seven of these convictions had a sexual component. For reasons set out in paras. 64-70, the court held that six of the convictions relied upon by the sentencing judge were improperly considered. A seventh, while disputed, was found to have been properly considered because there was evidence that Mr. Ziegler had made an admission of the sexual nature of this offence to a doctor who had interviewed him.

[171] With respect to non-criminal conduct, the sentencing judge relied on 14 incidents recorded in Corrections documents which provided details of Mr. Ziegler's behaviour while being supervised in the community or in custody (set out in para. 48), in addition to obscene phone calls Mr. Ziegler had made to his landlady.

[172] Mr. Ziegler disputed the sentencing judge's consideration of the obscene phone calls and four of the Corrections entries. Due to the lack of an evidentiary foundation for the hearsay evidence from the landlady to a doctor, Crown conceded the obscene phone calls should not have been considered. The court further agreed that two of the incidents in the Corrections reports should have been given little weight because of the unreliability of the third and fourth-hand hearsay evidence. The Court also excluded the other two incidents in the Corrections reports as Mr. Ziegler had been acquitted of these. (paras. 74-75).

[173] The court went on in para. 76 to state:

> I am satisfied the judge did err by relying too heavily on the Crown's summaries of convictions and non-criminal conduct without ensuring each incident had a relevant and reliable evidentiary foundation. While a Crown synopsis provided at the end of a lengthy and difficult case may be a useful aid, it cannot, standing alone, meet the necessary evidentiary threshold: *J.K.L.* at paras. 91-94. I am persuaded this led the judge to consider irrelevant and inappropriate material in concluding the crown had established the second required element, that Mr. Ziegler's past sexual conduct demonstrated a failure to control his sexual impulses.

[174] The errors of the sentencing judge were further compounded by failing to address the impact these improper considerations may have had on the report of the psychologist who was provided this information in the documentation he reviewed in order to conduct the s. 752.1 assessment (para. 80).

[175] However, in upholding the sentencing judge's designation of Mr. Ziegler as a dangerous offender, the court found that even when excluding the unproven allegations, there remained a "substantial body of evidence" that supported the sentencing judge's conclusion (para. 82). The Court noted the seven prior convictions for sexual offences

between 1997 and 2006 in addition to the predicate offence of sexual assault. It was significant that most of these offences were committed when Mr. Ziegler was on probation. Also significant were the numerous incidents indicating a pattern of sexually impulsive behaviour while Mr. Ziegler was incarcerated in 2005, including incidents of exhibitionism, masturbation and inappropriate touching of female staff. He had 35 convictions of breaching probation orders and 16 for breaching undertakings. He was noted by his probation officer to be "…very difficult to manage, extremely transient and non-compliant, continued to abuse alcohol and drugs, was resistant to treatment for substance abuse or his sexual conduct…" (para.84).

[176] The Court also found that there was a substantial body of evidence before the psychologist who assessed Mr. Ziegler, even when considering the potential impact of the information improperly considered and the evidence remaining if it were to be excluded, to support the psychologist's risk assessment regarding the likely future actions of Mr. Ziegler and the sentencing judge's finding that it was likely that Mr. Ziegler would fail to control his sexual impulses in the future and was at a high risk to sexually reoffend (paras. 86, 91).

[177] I have reviewed the decision of ***Ziegler*** at some length as, in my opinion, it assists in putting the circumstances of Mr. Smarch in context.

[178] Firstly, I conclude that I can put little weight on the circumstances in 2000 where Mr. Smarch is alleged to have touched the leg of the woman in her bed when he was in her home.

[179] Psychologist Steve Sigmond questioned Mr. Smarch on August 8, 2000 in regard to the circumstances of his offences and actions and reported as follows:

> … When I tried to explore with him the recent rampage of three break and enters that he committed on one night (two of them being the result of the current charges), the youth denied knowing that there was anyone home in the houses that he entered. He states as well that he was drunk at the time and he added "when you drink you don't remember". I pointed out that he had touched a woman on the leg in her bedroom in one of the homes and when asked why he had [d]one *sic* this, all he offered was "I don't have a clue". I tried to enquire with him whether there was a sexual component to this act, and he stated "no". He in fact smiled when he described that the victim thought it was a spider and that's why she woke up. He simply refused after that to talk about any aspects of this incident.

[180] Mr. Sigmond goes on to state:

> … Of particular concern in one of the reports is the fact that he had gone into a woman's bedroom, and he touched her on the leg. It was impossible to determine Jim's motivation for doing that, as he shut down for any questioning with regard to this action. Obviously there is a concern that there may have been a sexual motivation to this act, although this remains only conjecture at this time, as Jim is unwilling to talk about it beyond saying 'I don't have a clue'. In any event this is going to be an area for continued monitoring for the future.

[181] Mr. Sinclair related to Dr. Stefanelli that Mr. Smarch had stated to him that there had been other behaviours by him that were similar to the circumstances of the 2003 sexual offences that had occurred when he had been drinking.

[182] Dr. Stefanelli also expressed concerns about the 2000 break and enter where Mr. Smarch touched a woman's leg. He does not however, as I read it, relate the source of this information. He does note, however, that Mr. Smarch admitted to him that "…when he is drunk he may touch females' breasts against their wills".

[183] Dr. Stefanelli goes on to state that:

> … This information supplied by James himself and collateral sources suggests that James has significant difficulties exercising appropriate sexual boundaries after he has consumed alcohol. This behaviour will likely continue until James is able to obtain help in dealing with his problem of alcohol abuse and lack of appropriate boundaries.

[184] Dr. Williams wrote as follows:

> Mr. Smarch conveyed to me that for reasons unknown to him he first thought of engaging in sexualized behaviour with female residents of burglarized homes when he was about 16 years old, and that subsequently he has entertained such thoughts "a couple of times". Although he denied planning or fantasizing about committing sexual assaults during a burglary, in reference to his current offences he acknowledged that he "was kind of attracted to (the female victims)" and that it had been his intention to have sexual intercourse with them were they to have agreed to do so. … when he has committed the burglaries alone he has been more likely to think about the sexual possibilities inherent in such behaviour.
>
> …
>
> … With respect to the present offences he indicated that he holds only a vague recollection of his impropriety. However, his memory was apparently reasonably intact inasmuch as when he was asked whether he was feeling sexually aroused prior to the offences he responded "a little bit"…
>
> …
>
> In response to direct questioning on the matter Mr. Smarch expressed his remorse for having offended by asserting that he is "pretty sad – I feel bad for what I did". Moreover, he was able to note that it is likely that his victims have been affected deleteriously by his actions, possibly having been rendered "sad and depressed".

[185] Dr. Lohrasbe noted that Mr. Smarch admitted to having touched females while they slept when he broke into their homes, however he denied having any sexual arousal or intent. Mr. Smarch's recollection for Dr. Lohrasbe of the sentence of three

months he received for having done so does not accord with his criminal record so it is unclear to me exactly what he is referring to.

[186] So with respect to the 2000 incident, while I am prepared to find that Mr. Smarch has made an admission in his psychological and psychiatric assessments of touching at least one female on the leg in 2000 when he was 14, he has also stated that the touching was not sexual in nature. He has further stated that it was not until he was 16 that there was a sexual component to his actions.

[187] As such, had counsel for Mr. Smarch disputed the admissibility of this incident, I would not have been satisfied that the Crown had proven beyond a reasonable doubt that there was any conduct of a sexual nature in relation to this incident such that it could be considered in this application as indicative of Mr. Smarch failing to control his sexual impulses. This said, defense counsel did not make a clear admission with respect to this incident either.

[188] From my review of the court record and the detail, or lack thereof, in regard to the surrounding circumstances, I am concerned about placing any significant weight or reliance on this incident as being indicative of a failure of Mr. Smarch to control his sexual impulses. This said, I am nonetheless aware of its occurrence. Regardless, even had I fully accepted this incident as being of a sexual nature, it would not have altered the sentence I have chosen to impose.

[189] I find that Mr. Smarch's admissions to Mr. Sinclair of having committed similar acts of touching females when they slept and of touching females' breasts when he is intoxicated to be admissible for consideration. These admissions have not been

disputed and are sufficiently reliable to fall within the rules of admissibility. Mr. Smarch has stated to others that there was some sexual component to these actions.

[190] I recognize that there does not need to be a demonstrated pattern of similarity when considering whether there is a failure of Mr. Smarch to control his sexual impulses. Clearly the predicate offence shows a failure to control his sexual impulses. Frankly, to some extent, it would seem to be inherent in almost every sexual offence that there has been a failure by the offender to control his or her sexual impulses, whether the offence is planned and predatory or spontaneous and opportunistic.

[191] Mr. Smarch's current offence has to be considered against his past conduct, including circumstances in which there has been no criminal charge laid.

[192] Therefore, I find that Mr. Smarch has demonstrated, both in the offence for which he is being sentenced and by his past conduct, a failure to control his sexual impulses. I note, however, that this has been established by very few incidents, most of which occurred when he was a youth, with a significant gap of approximately 10 years before the commission of the 2013 offence. Again, I consider the 2010 s. 151 offence to be so markedly different that, while it obviously has a sexual component, it nonetheless falls outside of the previous "pattern" of the earlier incidents and the predicate offence, and is not reflective of a failure by Mr. Smarch to control his sexual impulses in the manner contemplated by s. 753(1)(b).

[193] In ***Downs***, the court was dealing with a dangerous offender application pursuant to s. 753(1)(a)(i) and (ii), and s. 753(1)(b). In considering whether a pattern existed in the context of a sexual assault, Justice Mills stated in para. 47:

> Sexual assault under the *Criminal Code* encompasses an extremely wide variety of conduct. It is not appropriate to simply say that since four sexual assaults have occurred, a pattern has been established. All sexual assaults are serious, and their effects on the individual involved should not be minimized. At the same time, the Courts have recognized that some sexual assaults are more serious than others by the degree of physical violence or sexual interference. A touching of a victim's buttocks can be a sexual assault. It is not in the same category of seriousness as a touching of someone's genital area, and that again is not again on the same level of seriousness as vaginal or anal penetration. Physical violence in order to accomplish that sexual touching will also increase the seriousness of the crime.

[194] In ***Carter***, at para. 268, Whelan J. noted that Justice Mills considered the following criteria in considering whether there was a pattern of sexual offending:

- the characteristics of the victims,
- were the victim and the offender known to each other or was there a relationship,
- was the offender intoxicated on each occasion,
- the presence or absence of a significant degree of psychological and/or physical trauma,
- the proximity of the offences to each other in time,
- the conduct of the accused in perpetrating the assaults,
- was there an escalation or de-escalation in the degree of violence,
- the degree of planning, if any, and
- the presence or absence of anger or animosity toward the victim.

[195] Whelan J., referring to the case of ***R.*** v. ***N.(L.)***, 1999 ABCA 206, stated that two additional criteria should be added:

- the environment in which the offence was committed; and
- the moral blameworthiness of the offender.

[196] I find that these criteria assist in setting the context in which the offences and prior actions of a sexual nature occurred for the determination of whether an offender should be designated as a dangerous offender under s. 753(1)(a). However, I find them to be of less assistance in determining whether an offender should be designated a dangerous offender under. S. 753(1)(b). In the context of a s. 753(1)(b) application, I find that these criteria are of more assistance in determining the appropriate disposition after a finding has been made that the offender is a dangerous offender.

[197] To reiterate, the dangerous offender designation, while legislatively broadened to attract a greater number of offenders, is still, as the Court in ***Steele*** stated, an exceptional sentence. The type of offender meant to be designated is therefore within that group of offenders for whom the application of the purposes, objectives and principles of sentencing are not applied in the usual way due to the ongoing threat that these offenders pose to the public. These offenders require sentences that are exceptions to the norm.

[198] However, the range of sentencing options available in s. 753(4) make it clear that an offender found to be a dangerous offender is not necessarily within that category of offenders whose actions and prospects for rehabilitation are such that they need to be separated from society for significant periods of time. In particular I find this to be the case when considering applications under s. 753(1)(b). A limited repetition of fairly lower-level sexual assaults can result in an offender being declared a dangerous offender. In such cases, particularly where there has been little or no treatment prior to sentencing that targets the underlying issues that have contributed significantly to the lack of impulse control in the sexual offending, the risk of the commission of a further

sexual offense will often be high. It is well-established that the commission of a sexual assault will cause injury, pain or other evil to the victim. It is hard to envisage a sexual offence where it can be said it is not likely that injury, pain or other evil would result. (See ***R.*** v. ***G.W.S.***, 2004 YKTC 5 at paras. 17-21; ***R.*** v. ***McCraw***, [1991] 3 S.C.R. 72 at pp. 81 and 83).

[199] Nothing in s. 753(1)(b) says that the injury, pain or other evil has to be great. Any injury, pain or other evil is sufficient in the plain wording of the legislation.

[200] I bear in mind that the Court in ***Steele*** was not dealing with s. 753(1)(b). Nonetheless, the observation of the court regarding a dangerous offender designation being an exceptional sentence was not expressly limited in any way. Therefore I will assume that a dangerous offender designation under s. 753(1)(b) is also an exceptional sentence. "Exceptional" cannot be construed, however, as meaning "rare", as the criteria of s. 753(1)(b), given its plain meaning, will apply to a significantly broader number of offenders than it would under the prior legislation. "Exceptional" as stated in ***Steele***, therefore, must mean exceptional in that it takes the sentencing hearing somewhat outside of the normal purpose, objectives and principles of sentencing, not that the designation of a dangerous offender under s. 753(1)(b) will be rare or unusual.

[201] I find that s. 753(1)(b) creates a low threshold for declaring an individual to be a dangerous offender. Mr. Smarch has, in the past and in the predicate offence, shown a failure to control his sexual impulses. He is noted to be at a high risk to re-offend. He is not in a position to state that actions he has taken since the commission of the offence, such as involvement in counselling and programming, have reduced his risk of re-

offending from that of high risk to that of a lesser risk. If he re-offends sexually his re-offending will undoubtedly cause “injury, pain or other evil to persons”. This injury, pain or other evil will be through his failure to control his sexual impulses. In light of my finding in regard to these factors, I have no choice, given the wording of s. 753(1)(b) but to declare Mr. Smarch to be a dangerous offender.

[202] I do not have the option of declaring him to be a long-term offender pursuant to s. 753(5) as I “shall” declare him to be a dangerous offender if the criteria for doing so are met. I have found that these have been met.

[203] I have considered the application of the ***Gladue*** factors in s. 718.2(e) and how these apply to my determination that Mr. Smarch is a dangerous offender. Clearly ***Gladue*** considerations apply in this case. This said, I cannot see how these factors could possibly impact upon whether Mr. Smarch has shown a failure to control his sexual impulses. There is no room in the wording of the legislation for me to incorporate any context or explanation into this aspect of s. 753(1)(b).

[204] However, it may be possible for ***Gladue*** considerations to impact upon an assessment of the likelihood of Mr. Smarch re-offending in a determination of whether he is or is not to be designated a dangerous offender. These considerations, however, would need to be based upon a reduction of his risk factors through programming such as Aboriginal-based programming, that he is presently involved in or has recently been involved in, that has, in addressing the negative impacts associated with his Aboriginal heritage, already resulted in his risk factors being lowered or, at a minimum, resulted in a likelihood that his risk of re-offending has been reduced so that it is unlikely that he

will re-offend because he is now in control of, or will be by the time that he is released from custody, his sexual impulses. Nonetheless, I find that ***Gladue*** considerations are much more apt as factors in considering what the appropriate sentence is once an offender has been found to be a dangerous offender.

[205] I find it somewhat counterintuitive that there is a requirement that the sentence for the predicate offense is required to be a minimum of two years for a long-term offender designation or for the imposition of a sentence under s. 753(4)(b), but there is no minimum sentence for the predicate offence required for the dangerous offender designation. It would seem logical that the dangerous offender designation is indicative of an offender who poses a greater danger to the public than the long-term offender designation. However, in appropriate circumstances, an offender can be sentenced as a dangerous offender and yet receive a sentence that is significantly lower than the minimum available to a long-term offender.

[206] It may be that because the presumptive sentence is indeterminate, the dangerous offender designation is reserved, in some cases, for individuals who, although more dangerous, at least with respect to the likelihood of committing a serious personal injury offence, are less likely to commit an offence which in and of itself is serious enough to warrant a lengthy penitentiary sentence.

[207] I note that in ***Ziegler*** the predicate offence was an incident where Mr. Ziegler cupped the breast of a female ambulance attendant. His most recent prior sexual offences involved his touching the buttocks of a female police officer and the buttocks of a female corrections officer. So clearly, the intent of the dangerous offender

designation under s 753(1)(b) is not to capture within the designation those offenders who commit the worst offences, but those offenders who have a "pattern" of committing serious personal injury offences or other offensive acts, whether the offences and acts in and of themselves are particularly serious. I use the word "pattern" as indicative of a demonstrated failure to control one's sexual impulses, as noted by a past act or acts and the predicate offense. I am aware that the word "pattern" does not appear in s. 753(1)(b) as it does in s. 752(1)(a)(i) and (ii) and, as such, I do not ascribe to it the same meaning.

[208] Overall, Mr. Ziegler's pattern of sexual offending fell within what would normally be considered to be towards the lower end of the spectrum. In his case, however, there was a significant and continuous pattern of offending. A pattern of offending behaviour is specifically required in s. 753(a) and is not in s. 753(b). This said, I am satisfied that there needs nonetheless to be some form of sexually offending pattern in the offender's behaviour that points to the offender failing to control his sexual impulses.

[209] When I look at the relatively lower-end sexually offending behaviour of Mr. Smarch, excluding the one 2003 offence where there was a forcible attempt to have intercourse, the circumstances of his subsequent criminal offending in 2010 and 2013 and the time period between the 2003 offences and these acts, his otherwise not particularly significant criminal history, the assessment of him not being sexually deviant or psychopathic, and the absence of a number of risk factors for sexually offending; while I am required to find him to be a dangerous offender, he certainly is not amongst the most dangerous of offenders.

Appropriate Sentence

[210] As stated earlier, both Crown and defence counsel agree that an indeterminate sentence is not required and that Mr. Smarch should be sentenced to a determinate sentence. In doing so, it is implicit that Crown and defense counsel agree that there is a reasonable expectation that a determinate sentence will adequately protect the public against the commission by Mr. Smarch of the offense of murder or a serious personal injury offence.

[211] This reasonable expectation must be read so that it works in conjunction with the earlier determination that it is likely that Mr. Smarch will, through a failure to control his sexual impulses in future, cause injury, pain or other evil to other persons.

[212] So how do I bring harmony to the finding that it is likely he will in future commit a serious personal offence while the submissions of counsel point to a reasonable expectation that he will not?

[213] The difference, in my view, is between the likelihood that exists at the time of the dangerous offender hearing and the anticipated position Mr. Smarch will be in at the time that he is released back into the community. So while it is likely that, if he were to have been released into the community on May 29, 2014, he would commit a serious personal injury offense, the issue is whether it is to be reasonably expected that he will not do so at the time of his release from custody, therefore making it no longer likely that he will commit a serious personal injury offence.

[214] Crown counsel's submission is that a further four to five years in custody is required to ensure that Mr. Smarch receives the full three years of programming that Dr. Lohrasbe stated would be beneficial from a psychiatric and therapeutic perspective.

[215] Defense counsel's submission is that a lesser period of custody would be warranted, pointing to options under both s. 753(4)(b) and (c).

[216] To repeat Dr. Lohrasbe's testimony, he stated that what Mr. Smarch needs is a lengthy period of services, not a lengthy period of incarceration**.** The focus should not be on years in prison but on the structure available to Mr. Smarch over a lengthy period in the community.

[217] Crown counsel's position, to me, is premised on a position that the lengthy period of services that Mr. Smarch requires is available only in the federal correctional system and not in the Yukon community where Mr. Smarch resides. Therefore, in order to manage his risk in the community and have a reasonable expectation that he will not re-offend, he needs to be sentenced to a penitentiary sentence that is long enough to provide him the services he cannot otherwise obtain out of custody.

[218] There is some merit in the Crown's submission. However I cannot accede to it. I find that sentencing Mr. Smarch to a penitentiary sentence would be a disproportionate response in the circumstances of this offence and this offender, and that it is not necessary.

[219] Mr. Smarch has been diagnosed as not sexually deviant and not psychopathic. This is significant as, were he to have been so, the evidence of Dr. Lohrasbe is that

treatment would be much more difficult. It follows from this that if the treatment is much more difficult it is also more intensive and would require a well-structured and lengthy period of programming.

[220] Also significant is that the most notable of Mr. Smarch's risk factors is alcohol abuse. The evidence of Dr. Lohrasbe, not to oversimplify it, points to Mr. Smarch being able to control his sexual impulses if he is not under the influence of alcohol. If he receives treatment that addresses his substance abuse, then his risk is likely manageable in the community. This is not to say that other programming would not be beneficial. It would be, and such other programming would work in conjunction with substance abuse programming towards overall risk reduction.

[221] I am aware that there was not much evidence before me in this application with respect to what is available in the Yukon community with respect to treatment options for Mr. Smarch. Dr. Lohrasbe stated that Mr. Smarch needs intensive programming as follows:

- A sex offender program;
- A spousal/family violence program;
- An Aboriginal-focused violence program such as In Search of Your Warrior;
- Substance abuse programming;
- Vocational training; and
- Life skills training.

[222] From my experience, I am aware that we have programming for these issues available here in the Yukon community, in particular with respect to alcohol abuse,

although I cannot state with any certainty on the evidence before me just how intensive such programming is as compared to that in the federal correctional system and how readily available such programming would be for Mr. Smarch.

[223] Does this uncertainty require me to sentence Mr. Smarch to a penitentiary sentence? I find that it does not.

[224] I turn to the principles of sentencing set out in ss. 718 – 718.2. Notwithstanding the shift in how these principles are to be applied in dangerous offender proceedings, the fundamental principle of proportionality still must be considered. It is here that Mr. Smarch's status as an Aboriginal offender and s. 718.2(e) most applies.

[225] Section 718.2(e) requires that all other sanctions other than imprisonment that are reasonable in the circumstances be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. In the context of a dangerous offender proceeding, "reasonable in the circumstances" means that, in order to choose a sanction other than imprisonment, there must be a reasonable expectation that a sentence other than a sentence of incarceration will adequately protect the public.

[226] When considering a sanction "other than imprisonment", s. 718.2(e) also speaks to the length of a sentence of incarceration, not simply whether a custodial disposition should be imposed at all or not. Therefore the length of any period of incarceration is impacted by s. 718.2(e) as well.

[227] Clearly, ***Gladue*** factors are present in Mr. Smarch's case. He is the product of a dysfunctional background grounded in the harmful, systemic discrimination against

Aboriginal peoples. He suffers from FASD as a result, as well as a number of other issues, including, in particular, his substance abuse issues. As noted by Mr. Sigmond:

> … Unfortunately Jim stems from a family which is heavily loaded for severe substance abuse problems. His mother, sister, biological father, the half brother, are all victims of alcoholism, and this bodes poorly with respect to Jim's ability to get control of his problem which appears to be systemic.
>
> In addition, Jim has his roots in what appears to be a highly chaotic family. Many of the adults in his life have had substance abuse problems as well as violent and criminal offences in their histories, and Jim himself has been privy to very little structure and consistent parenting since residing in Dawson.

[228] The Assessment from Dr. Stefanelli noted Mr. Smarch to have been referred to by Mr. Sinclair as a "child of neglect from birth", who went on to state:

> … [He was] raised in and affected by a family that has struggled with multi-generational incestual relationships (reported residual affect from residential school issues), alcohol and drug abuse, familial suicide ideation and behaviour, physical and sexual abuse …

[229] In order to comply with the requirements of s. 753 and ss. 718 – 718.2, and impose a sentence that is not a sentence of imprisonment, or is a lesser period of imprisonment, I must be satisfied that there is an alternative sanction that is reasonable.

[230] In Mr. Smarch's case, this requires that any period of supervision in the community must provide sufficient access to treatment and programming, as well as sufficient monitoring, to ensure that Mr. Smarch is able to separate himself from the substance abuse issues he has struggled with in the past and maintain a lifestyle free of alcohol abuse. This treatment and programming needs to extend into other areas as well, such as for sexual and violent offending.

[231] Dr. Lohrasbe noted that Mr. Smarch appeared motivated to take programming and that he had the ability to learn skills and reduce risk, noting, however, that the depth of Mr. Smarch's insight is limited.

[232] Mr. Smarch has participated in programming while incarcerated and has been, through incarceration, sober for an extensive period of time, being 425 days since his arrest on August 25, 2013.

[233] In my opinion, based upon what is before me but also based upon what I am aware is available in the community from sitting on the bench, there are sufficient resources in the Yukon community to provide Mr. Smarch with the programming, treatment and monitoring he needs to allow for the required reasonable expectation that Mr. Smarch will not reoffend violently in the community.

[234] It is not insignificant in balancing the relevant considerations that the primary issue that leads to Mr. Smarch's impulsive sexual offending is substance abuse and not sexual deviancy or a psychopathic personality. It is also significant that his sexual offending is towards the lower end of the spectrum. To repeat what Dr. Lohrasbe noted:

> An important facet of risk is its seriousness (the severity of damage to the victim). As described above, it would appear that in the predicate offense was low on the seriousness dimension of sexual harm. While in no way dismissing the potential for psychological damage with any victim of sexual aggression, his offense in 2003 also did not have the level of intrusiveness typically associated with severe harm to the victims.

[235] The issue then becomes whether a disposition under s. 753(4)(b) or (c) is appropriate. Subsection (b) requires that Mr. Smarch receive a minimum sentence of two years for the predicate offence. If such a sentence is appropriate, then there can be

a long-term supervision order of up to ten years. It is relevant that Dr. Lohrasbe stated that Mr. Smarch's treatment in the community after his release from custody should be for as long as possible.

[236] If Mr. Smarch is sentenced under s. 753(c) then the longest period of community supervision and monitoring is three years.

[237] I am satisfied that a period of incarceration is required for the s. 271 offence. Outside of the dangerous offender application, I agree that the appropriate sentence would be territorial time. Certainly the range of sentences that have been established for this type of offence, as set out in ***R.*** v. ***White***, 2008 YKSC 34 would place the sentence for this offence for this offender within territorial time. As I have found Mr. Smarch to be a dangerous offender, with a presumptive indeterminate sentence, the normal range of sentences does not strictly apply such that I must impose a sentence within this range. The sentence that is imposed must be one that is based upon having a reasonable expectation that the public will be protected from the commission by Mr. Smarch of murder or a serious personal injury offence. As such, if a sentence within the range does not allow for the type of programming and rehabilitation that is necessary to achieve this level of reasonable expectation, a sentence outside of the range can be imposed. However, if this reasonable expectation can be achieved by the imposition of a sentence within the normal range, then such a sentence should be imposed.

[238] As such, a sentence of two years, although in my opinion above the usual range for this offence and this offender, outside of a dangerous offender designation, is

nonetheless available, (as is the lengthier period of custody Crown counsel submits should be imposed). The question is what would the impact of such a sentence be?

[239] It is here that I consider the time Mr. Smarch has spent in custody awaiting his sentencing.

[240] Mr. Smarch was arrested on May 2, 2013 and was in custody on consent remand until his release after show cause on May 17, 2013. This is a total of 16 days custody for which, based upon the evidence and ***R.*** v. ***Summers***, 2014 SCC 26, he is entitled to credit at 1.5:1 for a total of 24 days.

[241] Mr. Smarch was arrested on August 25, 2013 on new charges and brought before the court on August 26, 2013. A s. 524 application was made on that day and he has remained in custody since then without proceeding to a show cause hearing. Initially he was on consent remand and then, after his conviction on December 6, 2013 he was detained pending sentencing. On December 6 the Crown gave notice of an intention to bring an application to have Mr. Smarch declared a dangerous or long-term offender. The application was filed on December 11, 2013 and an assessment order was made on December 17, 2013. The Assessment Report was filed on March 14, 2014 and the hearing proceeded on May 29, 2014. Decision was reserved until July 18, 2014 and then further reserved until today's date. This is a total of 425 days in custody in remand for which, based upon the recent decision in ***R.*** v. ***Chambers***, 2014 YKCA 13 Mr. Smarch's credit is limited to 1:1 for 424 of those days and 1.5:1 for the single day prior to the s. 524 application being granted.

[242] As such, it appears that the maximum credit for time served in custody which I am able to consider in sentencing Mr. Smarch is 449.5 days (14.78 months). At the time of Mr. Smarch's sentencing hearing on May 29, 2014 based upon ***R.*** v. ***Chambers***, 2013 YKTC 77 he would have been entitled to 1.5 credit for the entirety of his time in custody which at that time would have resulted in 439.5 days. As of today's date, he would have been entitled to 661.5 days (21.78 months).

[243] If I were to sentence Mr. Smarch for the minimum sentence of two years in order to be able to make a long-term supervision order, this would mean that for the index offence he would be required to remain in custody for an additional 280.5 days or 9.22 months less any remission he would be granted.

[244] In my opinion this is an excessive period of actual custody and is not required in the circumstances. Such a sentence would, in fact, be contrary to the purposes, objectives and principles of sentencing. As Dr. Lohrasbe stated, from a treatment and risk management perspective, it is not a lengthy period of custody that Mr. Smarch needs, it is a lengthy period of treatment. Mr. Smarch has already spent a lengthy period of time in custody during which he has taken programming. While I find that he will require an additional period of time in order to provide opportunity for him to further stabilize and for plans to be made for his treatment, programming and monitoring in the community, it is not that much time. I believe that a shorter period of incarceration, in the range of four months would be appropriate, for adequate preparations to be made for his release into the community.

[245] I will make one comment with respect to s. 719.3(1) as it has been interpreted by the Court of Appeal in ***Chambers***. The result of ***Chambers*** is that Mr. Smarch, having been the subject of a s. 524 application on August 26, 2013, is limited to credit for his time in custody on a 1:1 basis, with no possible exception. The delay between his trial and conviction and sentence being pronounced on October 23, 2014 was not as a result of any action or delay on Mr. Smarch's part. A dangerous offender application is a lengthy process in which almost invariably the offender will be remanded into custody. This already long process was made longer by the time it took me to render this decision. All this time Mr. Smarch was in custody on remand and unable to expedite matters. In the end, through no fault or delay on his part, he is limited to 1:1 credit for his time in custody on remand whereas, had he been sentenced at or near the time of his conviction, he would have been able to earn remission which, as noted in ***Summers***, is almost universally granted at a rate of 1.5:1 to serving prisoners. There is simply no other way to describe this as other than disproportionate and unfair.

[246] At this point in time Parliament has legislated so as to create this unfairness and, based upon the decision of the Court of Appeal in ***Chambers***, the law in the Yukon is that such unfairness does not violate the rights granted under the *Canadian Charter of Rights and Freedoms*. While I have difficulty believing that the ordinary reasonable resident of Canada, properly informed, would find such unfairness acceptable and in accord with the manner in which we want justice to be administered, this is law in the Yukon at this time and I am bound to follow it.

[247] Because of my finding that the requirements of s. 753(4) can be met by a probation order for three years and that the predicate offense is one for which a

sentence of 16 months is appropriate, Mr. Smarch's has experienced no actual disproportionality or unfairness. Had, however, I found that a long-term supervision order was required I would have had no choice but to sentence Mr. Smarch to a sentence of two years notwithstanding that I would have considered this additional time in custody to have been excessive and unnecessary.

[248] I note that, in the event that an indeterminate sentence had been imposed, there would also be no unfairness.

[249] This said, there are many situations where the delay in proceeding to trial and/or a sentencing hearing is not due to any actions of the individual to delay proceedings but due to the operation of the justice system and its participants, including the availability of judges, justices, counsel, including Crown counsel and court facilities. In such cases it would seem that the fundamental principle of proportionality would be offended if an individual, as a result of the sentence imposed, spends more time in custody than necessary due to delays beyond his or her control, than had the individual been able to conclude his or her matter earlier and serve time as a sentenced inmate or be capable of making bail.

[250] This situation also seems to be somewhat inconsistent with the reasoning of the Supreme Court of Canada in other cases. As stated by Strathy J.A. in ***R.*** v. ***Safarzadeh-Markhali***, 2014 ONCA 627 in paras. 58 – 61 and 73:

> 58 Nevertheless, Karakatsanis J. [in ***Summers***] added that it is necessary to interpret s. 719(3.1) in a manner consistent with the principles and fundamental purposes of sentencing set out in s. 718 of the *Code* and as part of a coherent, consistent and harmonious statutory scheme. She noted, in particular, the requirements that a sentence be

proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1) and that it take into account the parity principle - that it should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2).

59 Justice Karakatsanis agreed with this court and with the Nova Scotia Court of Appeal in *Carvery* that an interpretation of ss. 719(3) and (3.1) that does not account for the loss of eligibility for early release and parole while in pre-sentence custody would be incompatible with the parity principle. Offenders who do not receive bail would receive longer sentences than otherwise identical offenders who are granted bail. She stated at para. 63 that, "a rule that creates structural differences in sentences, based on criteria irrelevant to sentencing, is inconsistent with the principle of parity."

60 Justice Karakatsanis also endorsed this court's treatment of the proportionality principle. She said, at paras. 65 and 66,

> [I]t is difficult to see how sentences can reliably be "proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1) when the length of incarceration is also a product of the offender's ability to obtain bail, which is frequently dependent on totally different criteria.
>
> Judicial interim release requires the judge to be confident that, amongst other things, the accused will neither flee nor reoffend while on bail. When an accused is able to deposit money, or be released to family and friends acting as sureties (who often pledge money themselves), this can help provide the court with such assurance. Unfortunately, those without either a support network of family and friends or financial means cannot provide these assurances. Consequently, as the intervener the John Howard Society submitted, this means that vulnerable and impoverished offenders are less able to access bail.

61 She added at para. 67:

> For example, Aboriginal people are more likely to be denied bail, and make up a disproportionate share of the population in remand custody. A system that results in consistently longer, harsher sentences for vulnerable members of society, not based on the wrongfulness of their conduct but because of their isolation and inability to pay, can hardly be said to be assigning sentences in line with the principles of parity and proportionality. Accounting for loss of early release eligibility through enhanced credit responds to this concern. [Footnote omitted.]

….

> 73 In my view, the principle of proportionality in sentencing - a principle expressed in the *Code* itself and rooted in Canada's legal tradition - is a principle of fundamental justice. That principle is understood and endorsed by all Canadians and is applied in our courts on a daily basis. It was described as a principle of fundamental justice by LeBel J. in *R. v. Ipeelee*, 2012 SCC 13, at para. 36. He added, at para. 37:
>
> > The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing -- the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system....
> >
> > Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.
>
> See also *R. v. Anderson*, 2014 SCC 41, at para. 21.

Sentence

[251] I sentence Mr. Smarch to 16 months custody for the s. 271 offence. The 14.5 months he has spent in pre-trial custody will be applied to this sentence, leaving a remanet of 1.5 months in custody.

[252] On October 23, 2014 Mr. Smarch entered guilty pleas to having committed two offences contrary to s. 145(3).

[253] Mr. Smarch pled guilty to being outside of his residence on August 1, 2014, contrary to the curfew terms of his recognizance. He has also entered a guilty plea to

having consumed alcohol on August 25, 2014, contrary to the abstention term of this recognizance.

[254] I sentence him to one and one-half months custody for the August 1, 2014 offense and a further one month custody for the August 25, 2014 offence. These sentences shall run consecutive to each other and consecutive to the sentence for the s. 271 offence. Therefore, in total, Mr. Smarch will serve four further months in custody.

[255] His period of custody will be followed by a period of probation of three years. The probation Order will attach to the s. 271 offence only.

[256] The terms of the probation order are as follows:

1. You will keep the peace and be of good behaviour;

2. You will appear before the court when required to do so by the court;

3. You will notify the probation officer in advance of any change of name or address and promptly of any change of employment or occupation;

4. You are to have no contact directly or indirectly or communication in any way with M.B. except with the prior written permission of your probation officer and with the consent of M.B. in consultation with victim services. You are to have no contact directly or indirectly or communication in any way with M.B. if you or M.B. are under the influence of alcohol;

5. Do not go to any known place of residence of M.B. except with the prior written permission of your probation officer and with the consent of M.B. in consultation with victim services.

6. You are to remain within the Yukon unless you obtain written permission from your probation officer or the court.

7. You are to report to a probation officer immediately upon your release from custody and thereafter when and in the manner directed by your probation officer.

8. You are to reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer.

9. For the first six months of this order you are to abide by a curfew by being inside your residence between ten p.m. and six a.m. daily except with the prior written permission of your probation officer. You must answer the door or the telephone for curfew checks. Failure to so during reasonable hours will be a presumptive breach of this condition.

10. You are not to possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor.

11. You are not to attend any premises whose primary purpose is the sale of alcohol including any liquor store, off-sales, bar, pub, tavern, lounge or nightclub.

12. You are to attend and actively participate in all assessment and counselling programs as directed by your probation officer and complete them to the satisfaction of your probation officer for the following issues: substance abuse, alcohol abuse, spousal violence, psychological issues, sexual offending and any other issues identified by your probation officer, and provide consents to release information to your probation officer regarding your participation in any program that you have been directed to do pursuant to this order.

13. You are to participate in any educational or life skills programming as directed by your probation officer and provide your probation officer with consents to release information in relation to your participation in any programmes that you have been directed to do pursuant to this order.

14. You are to make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts.

15. You are to have no contact or communication with such individuals as are identified to you in writing in advance by your probation officer.

[257] In addition, as the s. 271 is a primary designated offence you will be required to provide a sample of your DNA pursuant to s. 487.05.

[258] You will be subject to the mandatory s. 109 prohibition order. This order will be for 10 years.

[259] Pursuant to s. 490.012 you will be required to comply with the *Sex Offender Information Registry Act*. Pursuant to s. 490.013 you will be required to do so for a period of 20 years.

[260] There will be an order under s. 760 that the materials listed therein are provided to the Correctional Service of Canada. This includes all the Exhibits filed in this application, the transcripts of court proceedings on November 12, 2013, May 27, 2014 and July 18, 2014, my Reasons for Judgment in ***R.*** v. ***Smarch***, 2013 YKTC 114 and these Reasons for Judgment.

[261] With respect to the Victim Surcharges, as Mr. Smarch has no capacity to pay these, and as these offences occurred prior to the recent amendments, I will waive the requirement for Mr. Smarch to pay these.

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COZENS T.C.J.