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CANADA / JUDGMENT

## R. v. Clayton

2018 BCSC 1671

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 1671 R. v. Clayton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Clayton,

2018 BCSC 1671

Date: 20180927

Docket: X078546

Registry: New Westminster

Between:

Regina

And

Larry Daniel Clayton

Before: The Honourable Mr. Justice Jenkins

Oral Reasons for Judgment on Dangerous Offender Application under s. 753(1)(a) of the Criminal Code

Counsel for the Crown:

M.A. Fortino

Counsel for Mr. Clayton:

A.C. Nelson

Place and Date of Trial:

New Westminster, B.C.

October 23, 2017

April 16-20, 2018

May 18 and 22, 2018

August 7 and 8, 2018

Place and Date of Judgment:

New Westminster, B.C.

September 27, 2018

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- [1] The Crown seeks an order designating Mr. Clayton a dangerous offender under s. 753(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46 [the Code] and to sentence him to an indeterminate sentence pursuant to Part XXIV of the Code. This sentencing procedure follows a finding of Mr. Clayton's guilt of assault and unlawful confinement of his former intimate partner, Cecilia Odong, and notice having been delivered by the Crown of its intention to apply for a dangerous offender declaration under s. 752.1(1) of the Code.
- [2] Both offences for which Mr. Clayton has recently been convicted are designated offences under s. 752 of the Code and the conviction for unlawful confinement constitutes a serious personal injury offence pursuant to s. 752 of the Code. Conviction for a serious personal injury offence is a pre-requisite for a dangerous offender finding under s. 753(1) of the Code.
- [3] On March 6, 2017, this Court granted an order that Mr. Clayton be assessed in accordance with s. 752.1 of the Code which resulted in an assessment by Dr. Lohrasbe dated May 4, 2017.

- [4] Subsequently on June 16, 2017, the Attorney General consented to the application that Mr. Clayton be designated a dangerous offender.
- [5] The intent of the dangerous offender regime has been discussed in several decisions, more recently by Pearlman J. in *R. v. Dadmand*, 2018 BCSC 729 at paras. 47 and 48 [Dadmand]:
- [47] However, unlike the conventional sentencing process under Part XXIII of the Code, the primary objective of the dangerous offender regime is the protection of the public. While other purposes of sentencing are relevant, the principle objective of the dangerous offender regime is the protection of the public from the risk of violent or sexual re-offending that an offender represents: *R. v. Johnson*, 2003 SCC 46 at para. 19; *R. v. Lyons*, [1987] 2 S.C.R. 309.
- [48] The dangerous offender regime is aimed at "a very small group of offenders whose personal characteristics in particular circumstances militates strenuously in favour of preventive incarceration": *R. v. Neve*, 1999 ABCA 206 at para. 55.

## The Statutory Regime

### Stage 1: Designating the Offender as a Dangerous Offender

- [6] In seeking a designation of Mr. Clayton as a dangerous offender, the Crown relies upon s. 753(1)(a) of the Code which requires a finding of dangerousness resulting from violent behaviour. That section states:

753(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to life, safety or physical or mental well-being of other persons on the basis of evidence establishing
- i. a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
- ii. a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
- iii. any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or

- [7] Sub-subparagraphs (i), (ii) and (iii) are disjunctive, and "they provide three standalone grounds for a finding that the offender is a "threat" under s. 753(1)" (R. v. Boutilier, 2017 SCC 64 at para. 18 [Boutilier]).
- [8] In the case of Mr. Clayton, the burden is on the Crown to prove beyond a reasonable doubt that he presents a future threat to safety after a consideration of all of the evidence including a prospective assessment of risk. Referring once again to Boutilier at para. 46:
- [46] In sum, a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. This necessarily involves the consideration of future treatment prospects. Had the prospective aspects of the dangerousness criteria been removed by the 2008 amendments, the constitutionality of the provision might have required a deeper analysis. But that is not the case. The sentencing judge erred in concluding otherwise. Accordingly, this Court need not revisit its decision in Lyons as to the constitutionality of s. 753(1).

#### A. The Requirement to Prove a "Serious Personal Injury Offence"

- [9] Section 752 of the Code defines a "serious personal injury offence" under (a) of the definition as an indictable offence involving either:
- (i) the use or attempted use of violence against another person, or
  - (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
- and for which the offender may be sentenced to imprisonment for ten years or more, or
- [10] "Violence" is not qualified and was referred to in R. v. Steele, 2014 SCC 61 at para. 39 [Steele]:
- [39] In subpara. (a)(i), the word "violence" is not qualified, which means that the criteria may be satisfied even if the violence in question is not in itself "serious" (see Goforth, at para. 21; Lebar, at para. 67; R. v. Smith, 2012 ONCA 645 (CanLII), at para. 2). The degree of seriousness intended by Parliament exists if all three requirements of the definition are met. Thus, an offence that involves the use or attempted use of violence against another person is not an SPIO under para. (a) of the definition if it is not an indictable offence or if it is not punishable by a sentence of imprisonment for 10 years or more. Just as para. (b) of the definition does not invite the court to assess the manner of commission of the enumerated offences, subpara. (a)(i) does not invite it to assess the seriousness of the violence the offender used or attempted to use; any level of violence is sufficient.

- [11] The predicate offence of unlawful confinement calls for a maximum sentence of ten years. It is clear that in committing the offence, "violence" was inflicted upon the victim. The degree of seriousness of the violence is not a factor. Returning to Steele at para. 42:
- [42] The question of what constitutes violence is as old as the criminal law itself. It is a moral question as much as a legal one, and no doubt society's answer to it has changed in tandem with evolving social mores. I will not attempt -- nor am I required -- to answer it definitively. However, in interpreting the words "use or attempted use of violence" in subpara. (a)(i) of the definition of an SPIO, I must endeavour to ascertain their "plain meaning". In this regard, I am aided by dictionary definitions as well as by judicial interpretations from a variety of contexts involving both the Criminal Code and other legislation. I will explain a conflict that exists between harm-based definitions of violence that focus on acts by which a person causes, attempts to cause or threatens to cause harm, and force-based definitions that focus on the physical nature of the act. Building upon this Court's reasoning in C.D. and subsequent cases, I conclude that the prevailing definition of violence is a harm-based one.
- [12] Based upon the authorities, the plain wording of s. 752 "serious personal injury offence" under (a) of the Code, and the conviction of Mr. Clayton for unlawful confinement under s. 279(2) of the Code, the Crown has proven a conviction of Mr. Clayton for a serious personal injury offence.
- [13] Mr. Clayton has conceded that the conviction for unlawful confinement satisfies the first requirement under s. 753(1)(a) but adds that offence is among the least serious offences for which a dangerous offender designation is available.

## B. Evidence Establishing a Pattern of Repetitive Behaviour

- [14] The next step in a finding of dangerousness is for the Crown to establish a pattern of violent conduct on the part of Mr. Clayton and that his current offence forms a part of that pattern under s. 753(1)(a)(i).
- [15] This inquiry involves an assessment of all of the evidence which can include expert evidence relating to a pattern of violent conduct on the part of the offender. In *R. v. Pike*, 2010 BCCA 401 at para. 26 [Pike], the Court of Appeal quoted from the decision of the Alberta Court of Appeal in *R. v. Neve*, 1999 ABCA 206 (CanLII) [Neve], respecting the elements of what may constitute a "pattern of violent conduct":
- [26] In *Neve* at (paras. 107-108), the Court set out the elements that must be proven to establish the prescribed patterns of behaviour in ss. 753(1)(a)(i) and (ii):

What does it take for the Crown to prove the required patterns of behaviour under ss. 753(a)(i) and (ii)? While "pattern" is not defined in the Code, what is defined in each of ss. 753(a)(i) and (ii) are the various components instrumental in creating the pattern. If the Crown fails to prove one or more of the required elements, then the proscribed pattern has not been made out. Under s. 753(a)(i), the elements are the following:

1. A pattern of repetitive behaviour,
2. The predicate offence must form part of that pattern;
3. That pattern must show a failure by the offender to restrain his or her behaviour in the past; and
4. That pattern must show a likelihood of death, injury or severe psychological damage to other persons through a failure to restrain his or her behaviour in the future.

Under s. 753(a)(ii), the required elements are these:

1. A pattern of persistent aggressive behaviour;
2. The predicate offence must form part of that pattern;
3. That pattern must show a substantial degree of indifference by the offender respecting the reasonably foreseeable consequences of his or her behaviour.

[16] Regarding what could constitute a pattern, Karakatsanis J. (as she then was), stated, in *R. v. Tremblay*, 2010 ONSC 486 [Tremblay]:

[96] To constitute a pattern, there must be a common element in the behaviour, something that connects prior incidents together in a manner that justified considering them as a whole. A pattern of behaviour is something more than a mere history of criminal activity. Similarity can supply the requisite degree of connection. However, "similarity can be found not only in the types of offences but also in the degree of violence or aggression threatened or inflicted on the victims ... [and] similarity in terms of kinds of offences is not crucial when the incidents of serious violence and aggression are more numerous": *R. v. Neve*, above, at para. 113. Generally, in order to meet the requirements of a pattern, the fewer the incidents, the more similar they must be: *R. v. Langevin* (1984), 45 O.R. (2d) 705 at para. 29 (C.A.).

[97] There is no requirement that the past conduct that makes up a pattern involve objectively serious offences, offences that are more or less serious, or even that they be serious personal injury offences: *R. v. Currie*, above, at paras. 24-26; *R. v. Newman*, [1994] N.J. No. 54 (C.A.) at para. 79. Even two incidents with similarities are sufficient to form a pattern: *R. v. Langevin*, at para. 29.

[98] To determine whether there is a pattern sufficient to predict future conduct, a trial judge may consider evidence of:

- i. what type of conduct was involved,
- ii. who, generally, the victims were, and
- iii. what motivated the offender to commit the offences.

The Crown only need establish beyond a reasonable doubt that there is likelihood - not a certainty or a probability, but "a reasonable possibility" - that the offender will cause death or injury or inflict severe psychological damage by failing to restrain his behaviour in the future. To determine whether there is a present likelihood that the offender will fail to restrain his behaviour in the future, the court may refer to the offender's past failure to restrain his behaviour, together with any expert opinions: *R. v. Currie* at para. 22; *R. v. Young* (1998), 159 Nfld. & P.E.I.R. 136 at paras. 59-63 (C.A.); leave to appeal to the S.C.C. refused [1998] S.C.C.A. No. 122; *R. v. Lyons*, above, at para. 94.

[17] The Crown submits the pattern of behaviour attributed to Mr. Clayton is violent behaviour towards intimate partners. It is further submitted that any finding of a pattern of violent behaviour requires only a general similarity of behaviour so long as the "essential characteristics" of the conduct are in place as per *R. v. Walsh*, 2017 BCCA 195 at paras. 34 and 46. The Crown further submits that differences in the pattern are permissible so long as the differences leave the key "significant relevant elements of the pattern in place", relying upon *R. v. Dow*, 1999 BCCA 0177 at para. 25 [Dow].

[18] The defence concedes that most of Mr. Clayton's criminal record occurred in the context of intimate partner relationships and that all of the offences since 1991 occurred within intimate partner relationships. Mr. Clayton further submits that the requirements for a pattern of behaviour relevant to a dangerous offender hearing are as set out in *Dow* at para. 24:

- a) Repetitive behaviour;
- b) There has been a failure in each case to restrain the behaviour; and
- c) There has been an injury to other persons arising from that failure.

Specifically, Mr. Clayton submits that the test set out in *Dow* has not been met in that the record does not reflect injury to other persons arising from recent offences.

### C. Failure to Restrain and the Likelihood of Future Harm

[19] In *Neve*, the Alberta Court of Appeal discussed the lack of restraint element in the context of a dangerous offender application at paras. 114 through 117:

[114] Moving from the behavioural component of the pattern contemplated under s. 753(a)(i), we turn to the lack of restraint element. To qualify as a part of the pattern, the impugned conduct must show that the offender has failed to restrain his or her behaviour in the past (and that this has led to death, injury or severe psychological damage or at least a likelihood of this harm) and that there exists a likelihood of causing death, injury or severe psychological damage through a failure to restrain that behaviour in the future. Likelihood, in this context, means more than simply a possibility. At the very least, it means more probable than not.

[115] Under s. 753(a)(ii), the persistent aggressive conduct must show a substantial degree of indifference by the offender with respect to the reasonably foreseeable consequences to others of that behaviour. We agree with the sentencing judge that this section should be read as including a requirement that the Crown prove beyond a reasonable doubt that the evidence discloses a likelihood that the type of aggressive behaviour described will continue in the future.

[116] There is another dimension to the offender's conduct which merits special emphasis. The net effect of the threshold requirements under ss. 753(a)(i) and (ii) is that not only is the sentencing judge to consider whether the past conduct is likely to continue. To satisfy the pattern requirements, the conduct must also demonstrate a relatively high level of intractability. As La Forest J. confirmed in Lyons, *supra* at 338:

Also explicit in one form or another in each subparagraph of [s. 753] is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable. [Emphasis added]

[117] This reflects Parliament's intention that not only must the offender have demonstrated a commitment to serious violence or endangerment in the past; the reasons for that behaviour should militate against any reasonable prospect for meaningful change in the future. It is this combination - violence and the likely continuation of that conduct - which, taken together, justify the finding that this offender will likely pose a threat in the future.

[Emphasis in original]

[20] Also at the designation stage, the court must conduct a prospective assessment of risk and the court can only designate the offender a dangerous offender if it concludes the offender poses a threat of future harm (Boutilier at para. 23).

[21] In order to find a present likelihood that the offender will fail to restrain his behaviour in the future, a court must consider all of the evidence including any expert opinions, however, the Crown need not prove beyond a reasonable doubt that the offender is bound to re-offend (R. v. Lyons, [1987] 2 S.C.R. 309 at paras. 91-94 [Lyons])

[22] The prospect of treatment in the future for the offender is relevant to the assessment of risk. At the hearing, there was substantial evidence as to possible treatment, education and counselling which may be available to Mr. Clayton should he be incarcerated which is a valuable factor in assessing the possible nature of Mr. Clayton's risk in the future and whether it can be lessened.

[23] Effective treatment requires a commitment on the part of the offender to undergo treatment. In para. 45 of Boutilier, the court stated:

[45] The same prospective evidence of treatability plays a different role at the different stages of the judge's decision-making process. At the designation stage, treatability informs the decision on the threat posed by an offender, whereas at the penalty stage, it helps determine

the appropriate sentence to manage this threat. Thus, offender will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable: see Neuberger, at p. 7-1, by M. Henschel.

- [24] As will be stated later in these reasons, treatability is a major concern in the case of Mr. Clayton.

### Options for the Sentencing Judge at the Designation Stage

- [25] If this Court decides the statutory requirements of s. 753(1) have been proven by the Crown, the Court has no choice but to designate the offender a dangerous offender. At the following penalty stage, this Court has discretion as to the appropriate disposition, which may be an indeterminate sentence.
- [26] If the Court finds the statutory requirements for designation as a dangerous offender have not been proven, under s. 753(5), the Court may either treat the application as an application to find the offender to be a long-term offender under s. 753.1, or may impose a conventional sentence for the offences for which he or she has been convicted.

#### Stage 2: The Penalty Stage if the Offender is Designated a Dangerous Offender

- [27] The applicable sections of the Code following a finding that the offender is a dangerous offender are ss. 753(4) and 753(4.1):

- (4) If the court finds an offender to be a dangerous offender, it shall
- a) impose a sentence of detention in a penitentiary for an indeterminate period;
  - b) impose a sentence for the offence for which the offender has been convicted - which must be a minimum punishment of imprisonment for a term of two years - and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
  - c) impose a sentence for the offence for which the offender has been convicted.

(4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

- [28] The effect of ss. 753(4) and 753(4.1) is that if there is a finding the offender is a dangerous offender, unless the court is satisfied there is a reasonable expectation that a lesser sentence than an indeterminate sentence will adequately protect the public, the court must impose an indeterminate sentence.

[29] In *Dadmand*, Pearlman J. found, at paras. 34 and 35:

[34] A "reasonable expectation" is "a confident belief, for good and sufficient reasons to be derived from the quality and cogency of the evidence heard on the application": *R. v. Walsh*, 2011 BCSC 1911 at para. 291.

[35] In *R. v. Taylor*, 2012 ONSC 1025 at para. 348, the court applied the following test:

I must be satisfied that there is a reasonable expectation defined as a confident belief for good and sufficient reason based upon the evidence that a penitentiary sentence followed by a 10 year supervision order will "reduce the threat to life, safety or physical or mental well-being of other persons to an acceptable level".

[30] The Supreme Court of Canada, at para. 68 of *Boutilier*, stated, respecting s. 753(4.1):

[68] Under s. 753(4.1) the sentencing judge is under the obligation to conduct a "thorough inquiry" into the possibility of control in the community: *Johnson*, at para. 50. The judge considers the evidence presented during the hearing in order to determine the fittest sentence for the offender:

[31] At para. 70 of *Boutilier*, the court discussed the framework for a judge to exercise discretion under s. 753(4.1) as follows:

[70] The framework a sentencing judge should adopt in exercising his or her discretion under s. 753(4.1) has been aptly explained by Justice Tuck-Jackson of the Ontario Court of Justice: *R. v. Crowe*, No. 10-10013990, March 22, 2017. First, if the court is satisfied that a conventional sentence, which may include a period of probation, if available in law, will adequately protect the public against the commission of murder or a serious personal injury offence, then that sentence must be imposed. If the court is not satisfied that this is the case, then it must proceed to a second assessment and determine whether it is satisfied that a conventional sentence of a minimum of 2 years of imprisonment, followed by a long-term supervision order for a period that does not exceed 10 years, will adequately protect the public against the commission by the offender of murder or a serious personal injury offence. If the answer is "yes", then that sentence must be imposed. If the answer is "no", then the court must proceed to the third step and impose a detention in a penitentiary for an indeterminate period of time. Section 753(4.1) reflects the fact that, just as nothing less than a sentence reducing the risk to an acceptable level is required for a dangerous offender, so too is nothing more required.

### **A. The Relevance of Treatability, Treatment Prospects and Motivation**

[32] It cannot be overstated that the treatability, treatment prospects and motivation of the offender are very significant if the offender is to satisfy the court that the risk posed by the offender can be adequately managed or reduced.

[33] In *R. v. Bragg*, 2015 BCCA 498 at para. 55, the Court of Appeal referred to three elements of treatability that must be present to achieve the goal of protecting the public and reduce the risk to the public to an acceptable level:

1. there must be evidence of treatability that is more than a expression of hope;
2. the evidence must indicate that the offender can be treated within a definite period of time; and
3. the evidence of treatability must be specific to that offender.

[34] In the case of Mr. Clayton, his motivation towards treatment is a central factor for consideration. There must be a reasonable possibility that Mr. Clayton will make sufficient progress with a determinate sentence and the treatment that may be available to him.

## **B. Applicability of the Principles of Sentencing and Proportionality**

[35] In a dangerous offender application, as in any other procedure for sentencing, the court must apply the principles of sentencing in ss. 718 through 718.2 of the Code, however, the most significant principle in dangerous offender applications is the protection of society and to separate offenders from society, where necessary (*R. v. Armstrong*, 2014 BCCA 174 at para. 72). Referring once again to the recent decision in *Boutilier* at para. 65:

[65] Section 753(4.1) guides the discretion of the judge, who ultimately must determine the fittest sentence in a given case based on the evidence adduced during the sentencing hearing. This Court in *Johnson* stated that the "sentencing judge should declare the offender dangerous and impose an indeterminate period of detention if, and only if, an indeterminate sentence is the least restrictive means by which to reduce the public threat posed by the offender to an acceptable level": para. 44. Again, s. 753(4.1) is simply a codification of the exercise of discretion required by *Johnson* in light of the regime's general purpose of public protection in dealing with offenders presenting a very high likelihood of harmful recidivism.

### **Position of the Parties**

[36] The Crown seeks an order designating Mr. Clayton a dangerous offender and sentencing him to an indeterminate sentence.

[37] Mr. Clayton submits that a fit sentence on count one, i.e. the conviction for simple assault, would be a conditional sentence order followed by three years of probation. Regarding the conviction for confinement, he submits that he should be sentenced to time served, which by the date of this decision, will have been approximately three years and three months.

[38] The evidence during this hearing consisted of the following:

- a) Mr. Clayton's criminal record including his CPIC record, local records from Nova Scotia and British Columbia;

- b) Records pertaining to Mr. Clayton's previous convictions, including court documents and transcripts;
  - c) Institutional Records from the Correctional Service of Canada relating to Mr. Clayton's time in the federal penitentiary system;
  - d) Institutional Records from the Nova Scotia Correctional System relating to Mr. Clayton's time in the provincial reformatory system;
  - e) Institutional Records from the British Columbia Correctional System relation to Mr. Clayton's time on remand in British Columbia;
  - f) Previous Pre-sentence Reports, Psychological assessments and psychology documents from the Correctional Service of Canada;
  - g) Expert Opinion Evidence (viva voce and reports) from Drs. Lohrasbe, Cooper and Riar with respect to assessing Mr. Clayton's risk and management in the community;
  - h) Evidence from Laurretta MacCarron relating to the programming currently available in the Correctional Service of Canada; and,
  - i) Evidence from Patricia Shae relating to parole and supervision in the community.
- [39] Other than the report and testimony of Dr. Riar, Mr. Clayton provided no evidence other than a brief statement made through his counsel. Also of significance in the evidence is the refusal of Mr. Clayton to be interviewed by the two expert witnesses qualified by the Crown, i.e. Dr. Lohrasbe and Dr. Cooper.

#### Summary of Evidence on the Dangerous Offender Hearing

#### Circumstances of the Offender

- [40] Mr. Clayton is currently 54 years of age. He has spent all but the last approximately four years of his life in Nova Scotia. At the time of the predicate offence, Mr. Clayton was on a probation order.
- [41] While a child in Nova Scotia, Mr. Clayton observed intimate partner violence on the part of his father and also experienced physical violence at the hands of his father, eventually moving out on his own in his late teens and began to enter into multiple intimate partner relationships. Mr. Clayton has three children, one of whom is in Nova Scotia and maintains a relationship with Mr. Clayton.
- [42] Historically he has worked at labouring jobs including jobs in the construction industry and as a truck driver. Throughout the reports relating to Mr. Clayton, he is consistently referred to as a good worker. He did not complete secondary school but has completed a GED as of 1997 while he was incarcerated in Nova Scotia.

[43] At a young age, Mr. Clayton was drinking heavily but neither alcohol nor drug abuse appear to have been a problem for Mr. Clayton as an adult.

### **Offender's Previous Offences and Criminal History**

[44] Mr. Clayton has a lengthy criminal record. His convictions are not disputed and the circumstances of the offences were supported in most cases with transcripts of the offences which provided some detail on the events which led to his convictions or guilty pleas.

[45] A summary of his crimes with the last names of the respective victims follow. The dates refer to the date of the conviction or guilty plea, as the case may be.

a) 1986: Waterfield (Sexual Assault) and Moore (Sexual Assault)

These convictions are for two separate sexual assaults that occurred in September 1985 and January 1986, Mr. Clayton being on bail for the first assault of Waterfield when he committed the second sexual assault. He was sentenced to two years in jail for the Waterfield offence and three years consecutive for the Moore offence for a total of five years. Versions of the events leading to these convictions given by Mr. Clayton for a penitentiary placement report and to Dr. Riar for the purposes of a report by Dr. Riar for this application differ in the extreme. Both of these offences, by any version of Mr. Clayton, occurred in his vehicle, which is a factor the Crown submits is part of a pattern of the offences of which Mr. Clayton has been convicted. Considering the penitentiary terms given to an offender who had no previous record, the offences most likely were very serious and sexual assault by its nature is a very controlling occurrence. Mr. Clayton told Dr. Riar that he had pulled Ms. Waterfield into the vehicle and took her clothes off and in the case of Ms. Moore, Mr. Clayton described to Dr. Riar how he had picked her up hitch-hiking and took her to an isolated location where the sexual assault took place. Mr. Clayton pleaded guilty to both accounts.

b) 1993: Dalton and Wilson (Child Prostitution)

These offences occurred in the fall of 1991 and resulted in guilty pleas by Mr. Clayton relating to extortion, assault and procurement of two children into the sex trade in Halifax. The offences occurred within three months of the warrant expiry date for the sentences for assaulting Ms. Waterfield and Ms. Moore and resulted in a global sentence of four years and six months imposed on May 27, 1993. There could be no doubt from the evidence that Mr. Clayton used violence against young victims. It was stated by the sentencing judge that the crimes to which Mr. Clayton pleaded guilty were "the nearest form of slavery in the 1990s that can go on in society and it is not to be condoned in any manner, shape or form". In his statement to the case management officer in prison was to the effect that he was taking the blame for his sister's actions. His report when interviewed by Dr. Riar was very different, stating the young girls mistook him for his brother and after giving the girls a ride he gave them his number, they called and he booked a hotel room where he engaged in consensual sex with both girls.

c) 1993: Cutting (Unlawful Confinement)

Exhibit 3 at the hearing is a transcript of the sentencing hearing which was held after Mr. Clayton pleaded guilty to unlawful confinement at the opening of his preliminary inquiry. Briefly, after having consensual sex with Ms. Cutting's friend in the presence of all three, Mr. Clayton was driving Ms. Cutting home to Halifax, he stopped his car in the far corner of a mall parking lot, locked his car, Ms. Cutting attempted to leave on "several occasions" and was stopped from leaving by Mr. Clayton who eventually had sexual intercourse with Ms. Cutting. Crown and defence agreed on a joint submission to a four year jail sentence to be served concurrently with the Dalton and Wilson sentence, but the court imposed a two year sentence, noting it was not going to consider the sexual assault in the course of sentencing, even though it had been admitted by the defence.

- d) 1999: LaPierre (Uttering Threats; Mischief) and Clyke (Assault; Uttering Threats; Resisting Arrest; Public Mischief; Assault with a Weapon; Breach of Undertaking)

Mr. Clayton had been involved in intimate relationships with both women and in December 1999 pleaded guilty to several offences. Offences in which Ms. LaPierre was the victim were uttering threats and mischief. Mr. Clayton and Ms. LaPierre had a child from their earlier relationship. One month after his release on the Wilson, Dalton and Cutting cases, Mr. Clayton made several calls to Ms. LaPierre in which he threatened her and her then boyfriend. The offences occurred in August 1997 after the phone calls and included slashing the tires of the victim's car as a penalty for being with her new boyfriend. The offences relating to Ms. Clyke were assault, uttering threats, resisting arrest, public mischief (for providing a false name), assault with a weapon and breach of undertaking and occurred in May and October 1999. The May 1999 incident involved Mr. Clayton threatening the victim's life for speaking to another man which resulted in his attempt to choke her while on the ground, a further threat and resulted in injuries to her throat and neck. Mr. Clayton secured bail and in October 1999 he was driving Ms. Clyke to a party when he drove her to a secluded area where he again asked her about other men and eventually assaulted her with an aluminum baseball bat to her arms and legs resulting in injuries to those areas as well as bruising to her neck. His aggregate sentence for all of these offences was two years of imprisonment. Based upon all of the evidence, these offences were against women with whom Mr. Clayton had been in an intimate relationship, and his offences were motivated by jealousy and a desire for control over the women.

- e) 2001: Clyke (Aggravated Assault; Uttering Threats; Failure to Comply; Possession of a Weapon)

These offences occurred on November 14 and 24, 1999. Following the October 1999 offences above regarding Ms. Clyke, Mr. Clayton was placed on a recognizance to have no contact with Ms. Clyke and not attend her home where she lived with her parents. Mr. Clayton and Ms. Clyke had previously been in a dating relationship for nearly eighteen months. The convictions followed a trial held in October 2000. Mr. Clayton made a threatening call to Ms. Clyke on November 14, 1999, threatened her at her work place and then late in the evening of November 24, 1999 the doorbell at her home rang twice which Ms. Clyke feared was Mr. Clayton at the door. She and her mother refused to answer the door. Later, Mr. Clyke returned home, was advised of the earlier

door bell rings and after failing to find anyone outside, entered the house again when the door bell rang again, Mr. Clyke opened the door and Mr. Clayton threw acid in his face resulting in serious injury to his eye. The trial judge found that Mr. Clayton had refused to accept the breakup as the motive for the attack. As had been the case in other cases, the offences occurred after the breakup of an intimate relationship, breaches of no contact orders and threats. Mr. Clayton was sentenced to six years imprisonment with his parole delayed to one-half of his sentence.

f) 2007: Section 810.2 Breach of Recognizance

On his release from custody for the previous offences on January 4, 2007 he entered into a preventative recognizance due to concern he may commit a serious personal injury offence which he breached within two days, the circumstances of which are unknown. He then entered into a s. 810.2 recognizance for nine months, commencing May 28, 2007.

g) 2009: Goodman (Assault)

On October 11, 2008 Mr. Clayton was involved in an argument with Ms. Goodman, who was his girlfriend at the time, which resulted in Mr. Clayton grabbing her by the mouth causing bruises with the young children of Ms. Goodman nearby. The effective sentence, taking into consideration time served, was twenty months plus six months probation which expired February 6, 2010.

h) 2012: MacVicar (Assault Causing Bodily Harm; Uttering Threats; Unlawful Confinement)

Five months after expiry of the probation order which expired in February 2010, i.e. during the summer of 2010, Mr. Clayton was charged with the above offences in connection with his then intimate partner, Ms. MacVicar. The evidence disclosed controlling behaviour on the part of Mr. Clayton including his statement to her that he then "owned" her and would control her friendships, where she was allowed to go and more. Ms. MacVicar was then eighteen years old. In July 2010 while the pair were in his car which he had driven to an underground parking lot, he went through her cell phone, deleting some contacts, slapped her face and after he was asked to take her home, refused and drove to a rural wooded area. Again he slapped or punched her, drawing blood and continued to confine her to the car against her wishes. At the wooded area, Mr. Clayton had a "crowbar-shaped steel bar" in the back of his car and threatened her for failing to answer his calls and orders. In August 2010, there was another encounter between them followed by him leaving threatening messages, all of which resulted in an effective sentence of four years imprisonment plus thirty months probation.

i) 2013: Grant (Trespass; Peace Bond)

While on probation for the MacVicar offence, Mr. Clayton entered a guilty plea to trespassing near the property of Ms. Grant which resulted in a negotiated resolution resulting in a s. 810 peace bond for a period of twelve months.

j) 2016: Odong (Attempt to Obstruct Justice; Breach of Court Order)

Mr. Clayton was arrested in April 2015 for the index offences, i.e. unlawful confinement and assault of Ms. Odong, and placed in custody by a Provincial Court Judge. While in custody he breached several non-communication orders protecting Ms. Odong by calling from prison. There were several calls to Ms. Odong while Mr. Clayton was using a calling card belonging to another inmate, the calls being attempts to convince Ms. Odong to not testify against him on the confinement and assault charges. He had been in an intimate relationship with Ms. Odong for several months before his arrest. In the several calls he would continue to seek information on whom she was with and her daily activities. The calls were recorded and transcribed and the trial judge on the obstruction and breach trial in Provincial Court stated:

what the entire context of the calls presents is a very narcissistic, nasty man calling a vulnerable woman. He is charged with criminal offences and he uses every possible psychological pressure that he can come up with to persuade her to proceed in a manner which will, in effect, have the charges against him go away. He is suggesting to her that she present a position to the Crown that, due to some imaginary emergency that she will have to return to South Sudan and will be gone for several years. The result is that at an application for judicial interim release that has not yet occurred, the Crown will not have a viable argument on either the tertiary or secondary ground to seek his detention because there will be no hope of an immediate prosecution and a judge could not hold him in custody that long. The result is that a judge would be compelled to release him and that eventually, because the Crown would believe she is on a different Continent, there would be no one to subpoena, there would be no evidence against him at his trial and that he would be acquitted. The entire plan was designed to defeat and pervert the course of justice [Emphasis added].

[Emphasis in original]

Mr. Clayton was convicted and sentenced to an effective sentence of two years.

k) 2016: Index Offence (Assault; Unlawful Confinement)

My detailed reasons for judgment on this matter were issued November 18, 2016 and I will not repeat the detail save that during an intimate relationship of approximately six months, Mr. Clayton became controlling and concerned that Ms. Odong may be seeing another man and on one occasion destroyed her cell phone. In late April, Mr. Clayton chased Ms. Odong and grabbed her while she was on the ground and choked her causing bruises. He then forced her up and towards his car and pushed her into the front passenger seat. She attempted to get out by opening the door which resulted in him speeding away with the door open, before she closed the door to avoid falling out. He then took her to a dark parking lot where he continued to threaten her. At one point she "zoned out". He took her phone and eventually took her home. He subsequently threatened her again, was arrested in April 2015 and has been in custody ever since. Although the defence minimizes the injuries to Ms. Odong, it is clear that she did suffer bruising, "zoned out" and was in considerable fear of Mr. Clayton over his threats and his actions.

- [46] A review of Mr. Clayton's experiences with the justice system since 1986 reveal that he has been in federal custody for approximately sixteen of twenty years to 2007 which was the completion of his last federal offence before the index offence.

### Correctional System Documents

- [47] In evidence are the records of the Correctional Service of Canada ("CSC"), Nova Scotia Provincial Corrections and British Columbia Corrections are included in Exhibit 1 on this hearing and detail Mr. Clayton's behaviour, applications for parole, case management and more during his lengthy periods in prison over many years.
- [48] From the perspective of Mr. Clayton, the correctional records during the period 1986 to 1991 reflect very positively on his efforts at rehabilitation, progress in education and positive behaviour. The records at one point refer to Mr. Clayton as a "model inmate", however, it was also noted that he denied the serious nature of the crimes he had committed.
- [49] In October of 1987, Dr. Gerry undertook a psychological assessment of Mr. Clayton which indicated a departure from the positive reports to that time. Dr. Gerry's report included the following statements:

He is currently not receptive to counselling about his offence, is defensive and unrealistic in his self-concept, lacks appropriate insight into these serious offences and has convinced himself he will not re-offend.

Perhaps he should consider marital counselling in the community, however he is not receptive to such suggestions now and basically denies he had a problem. Under these conditions he is a significant risk of similar violent recidivism.

- [50] The Parole Board of Canada ("PBC") denied Mr. Clayton's application for parole in July 1989 due to his failure to be involved in "any psychological or psychiatric counselling for sexual anxiety". From the records it appeared as though Mr. Clayton had developed a very negative attitude towards the justice system.
- [51] After being sentenced for his second federal offence in 1993, any counselling was brief, approached with no commitment, and ended with Mr. Clayton rejecting advice and recommendations from the system.
- [52] Due to his lack of cooperation, refusals to take recommended programming, obstructiveness and his lack of respect to staff among other reasons, he was consistently not released from his federal sentences before his warrant expiry date.

- [53] At one point in the early 2000s he was referred to the Family Violence Program which he had previously sought, however, he was withdrawn from the program for refusing to participate. Another time, Mr. Clayton was referred to the Anger and Emotions Management Program which he had sought, but would not meet the criteria for the program. On one occasion, the PBC described Mr. Clayton as having a persistent attitude of blaming others for not taking programming that would be available to him.
- [54] Reports from the Nova Scotia Correctional Authorities and British Columbia Corrections showed that he consistently denied case management, engaged in fighting, breaking institutional rules and was defiant to officials. In B.C, in 2016 he was placed on a waiting list for Respectful Relationships and Violence Prevention programming but did not apply for the same nor did he participate in any way.
- [55] The records also indicate occasions when he could be cooperative and respectful to staff, however, his lack of cooperation, his failure to engage with case management and his defiance of authority would soon return.

### **Prior Pre-Sentence Reports and Psychological Assessments**

- [56] The two pre-sentence reports prepared in connection with Mr. Clayton's offending were written in 1986 and 2000 and so are considerably dated. What is emphasized is his failure to accept full responsibility for his offending, failing to show "a great deal of emotion or anxiety regarding his behaviour", and in the 2000 report, the report writer "failed to detect any expression of remorse or regret in regard to [his] behaviour" and noted he tended to blame his victims.
- [57] The psychological assessment reports are also somewhat dated, having been written in 1987, 1994 and 2003. In written submissions, Crown counsel has adequately summarized the findings regarding Mr. Clayton:
171. A consistent theme amongst each of the assessments was that Mr. Clayton minimized his culpability or denied responsibility, had no insight into his offending, and presented as a high risk to re-offend violently. Another theme was that Mr. Clayton possess significant antisocial personality characteristics that drove his offending behaviour.

### **Expert Reports and Evidence**

- [58] In evidence at this hearing were expert reports filed by the Crown and written by Dr. Lohrasbe and Dr. Cooper. Dr. Lohrasbe and Dr. Cooper also testified and were cross-examined by counsel for Mr. Clayton. Mr. Clayton declined to be interviewed by both Dr. Lohrasbe and Dr. Cooper which reflects the long-standing mistrust exhibited by Mr. Clayton towards authority and those who have attempted to work with him in attempting to understand his motivations, attitudes and most significantly, his likelihood of re-offending in a violent manner. As a result, the reports of these two psychiatrists were limited to extensive reviews of Mr. Clayton's criminal records, the Correctional Records, prior

psychological records, reasons for judgment, transcripts from trials and sentencing hearings and other documents previously listed in these reasons and included in Exhibit 1.

- [59] Dr. Riar was able to conduct an interview of Mr. Clayton. Dr. Rair was also able to review the contents of Exhibit 1 and the opinion of Dr. Lohrasbe.
- [60] I state at this point in these reasons that the Court found all three experts to be very helpful, non-adversarial, frank and straightforward in their opinions and under cross-examination. All three are very well qualified to opine and assess risk in the dangerous offender context as well as in diagnosing and treating psychiatric conditions including personality disorders. Their evidence has been very helpful to the Court in understanding the potential risk of re-offending and in understanding the root causes of the behaviour and personality of Mr. Clayton.

### **Dr. Shabehram Lohrasbe**

- [61] Dr. Lohrasbe has conducted over 6,000 forensic assessments and has testified as a forensic psychiatrist on over 600 occasions in Canada, including over 200 assessments on dangerous or long-term offender matters and has testified on over 150 occasions on dangerous or long-term offender applications.
- [62] Dr. Lohrasbe's opinions are best summarized with reference to quotes from his report and testimony, firstly under the heading of "Current Risk Assessment" commencing at p. 42:

As a general statement, it can be said that Mr. Clayton's violent offences subsequent to those comments about his high risk, summarized above, have an overall effect that "elevates" a current risk assessment to levels higher than previously rated. In particular, the comprehensive risk assessment by Dr. Durepos (with the caution that it too was also completed without the benefit of a direct examination of Mr. Clayton) clearly rated him as high risk for general, spousal and sexual violence.

The pattern described above (repetitive, non-trivial, diverse acts of violence, over an extended period of time, in varied situations, with multiple victims) is clearly applicable to Mr. Clayton. Hence we can conclude that whatever factors drive his risk for violence reside firmly within Mr. Clayton (as against changing situations or circumstances).

On the basis of that history alone, given the absence of any countervailing data, it can be assumed that there is a high likelihood of a future act of violence. However, given his unwillingness to be interviewed, precisely how established patterns of thinking, feeling, and behaviour have come together in diverse contexts to perpetuate violence (including that within the predicate offences) remains unexplored.

[Emphasis added]

Dr. Lohrasbe states, at p. 43:

However, it is noteworthy that at times his violence has been impulsive (affective, emotional), at other times an instrumental (deliberate, calculating) tool for interpersonal exploitation and dominance, at times both. Such men, with mixed patterns of serious violence driven by both lack of self-control as well as malevolent self-direction, tend to be at highest risk for persistently criminal and violent behaviours (as compared to those with a more stereotyped pattern), Their violence is both "hot" and "cold", implying a diverse range of motivational factors.

It is also noteworthy that, with the single and dramatic exception of the acid-throwing incident, Mr. Clayton's victims have been females, often extremely vulnerable females. His behaviour with females has been predatory and remarkably varied in its manifestations. To put it extremely mildly (and in the vernacular) it is readily apparent that Mr. Clayton has a "problem with females". His first acts of sexual violence toward females was some three decades ago and his most recent actions during the predicate offences, although not consisting of sexual violence, continued to manifest themes of control, power, entitlement and manipulation. Insofar that any scenario of heightened risk can be forecast, it can be assumed that a future victim will most likely be a female, but beyond that generalization, little can be said about identifying a future victim. She could be a stranger or non-sexual partner, a child or an adult. The violence could be of a sexual or non-sexual nature. This has been a remarkable range in the nature, severity, frequency and context of his violence.

A persistent theme in the file is Mr. Clayton's very limited acceptance of responsibility for his actions, although he has taken legal responsibility on several occasions, and through taking legal responsibility has taken physical responsibility for his actions (he occasionally "backtracked" even on those relatively concrete aspects of responsibility). What is lacking however is any information to suggest that Mr. Clayton has accepted moral and psychological responsibility for his actions. Despite his occasional claims in court that he is experiencing remorse, there are far more frequent notations of his utter lack of remorse on his file. His lack of remorse is not limited to the remote past; his phone calls to the victim of the predicate offence are graphic illustrations of his self-centredness, manipulativeness, and sense of entitlement.

[Emphasis added]

[63] In his direct evidence, Dr. Lohrasbe, after referring to the acid incident, discussed he cannot assume the risk to re-offend has declined in that there is a "need to thoroughly understand what drove his past violences" and there is no evidence as to what has driven his past offences.

[64] Also, Dr. Lohrasbe testified that even high risk offender can be managed if one understands that if he cooperates with the system, he can improve: "high risk can be managed if [the offender] thinks his or her supervisors are on their side, ie. it is in his interest to cooperate" and "motivation is the key component of change in anyone including offenders" (emphasis added).

[65] Under the heading "Treatability and Risk Management", Dr. Lohrasbe stated, at p. 46:

Mr. Clayton has consistently been observed to be unable to experience guilt, remorse or shame for his violent actions and, as noted above, he does not accept moral and psychological responsibility. Hence it is no surprise that his motivation for change is poor. Based on experience with offenders as a whole, my view is that it is likely that underlying his impaired capacities (for guilt, remorse, shame and acceptance of moral and psychological responsibility) is a more fundamental deficit: impaired capacity for empathy.

[Emphasis added]

Dr. Lohrasbe stated, at pp. 47 and 48:

With Mr. Clayton, problems with personality and character are likely to be a formidable obstacle to treatment, and may remain so indefinitely. It is unrealistic to expect him to change his personality and character at this stage in his life and it is the realm of therapy that requires very high levels of motivation.

.

In my opinion, it is not feasible to address risk management in the community at this time, Mr. Clayton will have to have demonstrated profound changes before such management could be considered. Even after an offender has gone through relevant programs and has been seen to make good progress in risk-relevant areas, there would have to be a sustained record of full cooperation, total honesty and disclosiveness to ensure that the 'system' works with him to manage his risk once back in the community. Conversely, when an offender is hostile toward assessors and those who will supervise him, and when there is little by way of cooperation, honesty and disclosiveness, risk management in the community is impossible. To date, there is little to indicate such a shift in Mr. Clayton's stance toward the justice system is forthcoming. If and when that happens, an updated assessment of risk would be indicated and a risk management plan can then be put in place.

[Emphasis added]

[66] On cross-examination, Dr. Lohrasbe agreed, regarding honesty, that honesty with a prisoner can put an inmate in jeopardy in the prison hierarchy and hence, is an explanation why Mr. Clayton may have been less than honest with authority.

[67] Other evidence arising on cross-examination included:

- a) Mr. Clayton could possibly be managed in a medium security environment where there is more access to programming.

- b) It was only after Mr. Clayton refused phalometric testing and any kind of sexual offender programs that he was declined other programs such as violent offender programs which indicated a willingness on his part to engage in programming, however, Mr. Clayton was agreeing only under his terms. It was also pointed out that it has been over 30 years since Mr. Clayton has been convicted of sexual assault, suggesting that such treatment was unnecessary.
- c) With age, it is common that aggressiveness and violent offending will recede and with Mr. Clayton now being in his mid-fifties, that trait may apply to him. Secondly, it was agreed that the impact of the current proceedings could have an impact on Mr. Clayton, however, without Dr. Lohrasbe being able to explore that possibility with him, it was not possible to opine on whether these mitigating factors could apply to Mr. Clayton.

### Dr. Barry Cooper

- [68] The opinions of Dr. Cooper regarding the risk of Mr. Clayton re-offending in a violent manner, especially with women, and treatability are very similar to Dr. Lohrasbe's opinions. Dr. Cooper testified at length, and also referenced in his report of November 30, 2017, the several assessment tools available to assist and support psychologists in evaluations of risks and treatability, all qualified to some degree by the refusal of Mr. Clayton to be interviewed for the assessment. Dr. Cooper has had extensive experience in the field of clinical and forensic psychology as a clinical instructor, a private clinical-forensic practitioner and contract psychologist with the CSC.
- [69] Once again, I refer to passages in the report best summarizing the opinions of Dr. Cooper provided in his report based upon the many documents reviewed by him including the report of Dr. Lohrasbe and assessment tools which were applied in the case of Mr. Clayton:

At pp. 41-42:

Mr. Clayton has proven to be a diverse recidivist offender who has offended sexually and violently, the latter mostly in the context of inter-personal violence ("IPV"). If Mr. Clayton does commit another offence, it would likely be precipitated by relationship challenges, rejection from intimate partners, sexual jealousy, an attitude of entitlement, impulsivity, poor coping and negative emotions (eg., anger). If he does re-offend, he may be violent towards a woman he has charmed into engaging in an intimate relationship. He will likely view his partner as his property, control her contacts and monitor her movements. If his intimate partner ends the relationship or if Mr. Clayton suspects an infidelity, he will likely respond with intimidation / stalking, threats and violence. It is possible the violence could escalate to lethal violence (indeed, he has choked victims in the past). Potential victims could include past or present intimate partners or even a friend who has ended their friendship. In addition to violence and IPV, he may also sexually assault adult females.

At p. 42:

Risk for violence is a fluid concept that can be impacted by a number of variables. With respect to Mr. Clayton, his risk for future violent (IPV) and sexual recidivism is currently viewed as high, in part as he has demonstrated a repetitive pattern of violent (including violence in the intimate partner context) and sexually violent behaviour and has proven to be resistant to even participating in intervention. Certain factors could impact his risk level. Indeed, his risk level has the capacity to decrease through introspection and intervention (i.e., if the appropriate risk-needs-responsivity services are made available).

Regarding current impressions being consistent with previous statements, Dr. Cooper remarks at pp 42-43:

Indeed, Mr. Clayton has proved to be resistant to participating in risk relevant and he appears to possess a number of problematic personality traits that do not bode well for a positive treatment outcome, particularly in the near future. In order for Mr. Clayton to be responsive to intervention, he requires high intensity treatment - including a heavy dose of motivational interviewing - tailored to individuals with personality challenges. There will likely be resource and related challenges in attempting to address his high risk and high needs. Thus, his treatment prognosis is heavily guarded at the present time.

At p. 43:

Mr. Clayton is clearly a high-risk, high-needs offender and requires treatment in accordance with his risk and needs level. Based upon the results of the present assessment the following recommendations are offered for consideration regardless of whether Mr. Clayton is incarcerated or in the community.

[Emphasis added]

Dr. Cooper went on to detail possible programs, both federal and provincial including anger management and IPV among other programs which he noted are more easily found in institutions.

[70] Dr. Cooper also testified as to the need for extensive release restrictions to minimize risk and his concern that Mr. Clayton has blatantly violated court orders in the past, referencing his recent breach regarding the no contact order regarding Ms. Odong among other instances.

[71] Dr. Cooper testified there was no evidence that Mr. Clayton was motivated to pursue treatment, effectively agreeing with the opinion of Dr. Lohrasbe.

### **Dr. Kulwant Riar**

[72] Dr. Riar was called as a witness for Mr. Clayton and submitted a report dated April 13, 2018. Dr. Riar was the only expert witness to have the benefit of a personal interview of Mr. Clayton.

[73] Dr. Riar was accepted as an expert qualified to opine as a forensic psychiatrist who had previously been qualified as an expert witness in dangerous offender applications since 1995 on over twenty occasions. Mr. Clayton provided a history of his youth and his family and then gave his version of the events which led to his criminal history. As has been noted earlier in these reasons, the facts as related to Dr. Riar from Mr. Clayton differ significantly from records which have been exhibited in this proceeding which supports concern with the credibility of the offender.

[74] Included in his report are the following statements or opinions:

At p. 11:

There was little in the way of remorse about what he has done; on the contrary, he feels unjustly treated by others and in the system. He took responsibility for only a few of the criminal acts that he had committed in the past, but for the rest of them, he deflected the responsibility somewhere else rather than himself. Although I felt that he had the ability to empathize, there were no attempts to express empathy towards the victims.

At p. 12:

I noted that he had displayed anti-authority attitudes almost regularly whenever he was incarcerated. His own understanding is that he did not get along with the staff during his recent incarceration as his background information was disclosed to other inmates and he became the target of abuse from other inmates and staff. On the contrary, his attitudes and behaviour remained the same throughout the years, starting from his first and second incarcerations. He frequently disobeyed the staff, broke the rules of the custody facility and frequently had been disrespectful and verbally abusive towards staff.

At p. 14:

His aggression towards women most likely stemmed from his personality traits; being impulsive, possessive, grandiose, lack of empathy, having poor self-image, somewhat self-righteous, etc.

As far as treatment for his antisocial and psychopathic traits, and his aggression towards women, ideally it can be addressed by individual and group treatment. In addressing these issues, it is paramount that a person having these difficulties has to accept that there are issues in their life and there is willingness and motivation to make a change.

...

As far as risk of engaging in similar behaviours in the future, it is at least moderately high. All of the risk assessment rating scales I employed placed him again at least in moderate category as offending in the future, especially aggressively and violently. The sexual risk assessment rating also placed him at moderately high risk too, but on the other hand, he has not had any sexual conviction for at least two decades. My own clinical impression or judgment also places him, at least, at moderately high risk for committing violent acts in the future. category as offending in the future.

[Emphasis added]

- [75] A review of the whole of the expert evidence, both in the three reports and the viva voce evidence of each of the three experts, leaves very little difference in their conclusions. Although Dr. Riar's report assesses Mr. Clayton in the moderately high risk to re-offend violently, Dr. Lohrasbe assesses men of the nature of Mr. Clayton to be at the highest risk for persistently criminal and violent behaviours. At the conclusion of his cross-examination, Dr. Riar agreed that Mr. Clayton represented a high risk to re-offend violently against women and there was no evidence at this time to suggest that risk will be reduced in the future.

### **Evidence Relating to Correctional Programming and Community Supervision**

- [76] Previously in these reasons I have referenced the significance of treatability, treatment prospects and the significance of motivation on the part of the offender to proceed with treatment.
- [77] During the trial, the Court heard the evidence of Patricia Shae, a Community Parole Officer and Lauretta McCarron, Regional Programs Manager for the Correctional Service of Canada which is of significance in assessing the programming that may be available to an offender, limitations on the availability of programming and the need for an offender to willingly participate in appropriate programming. Ms. Shae's evidence primarily dealt with community supervision issues and its availability depending on the nature of the sentence of incarceration.

### **Patricia Shae**

- [78] Ms. Shae testified as to the differences between parole availability and supervision in the case of an indeterminate sentence and a long term supervision order ("LTSO").
- [79] The Court was advised that one who has been found to be a dangerous offender sentenced to an indeterminate sentence can apply for parole after serving seven years of his or her sentence. The PBC assesses the appropriateness of parole based upon the inmate's risk to those in the community and, if released, whether that risk can be managed so as to minimize risks. If released on parole, a dangerous offender would be subject to indefinite parole supervision.
- [80] Ms. Shea testified that if an offender sentenced to a LTSO is found to be in breach of parole conditions, he or she may be detained, the LTSO may be suspended and charged with a breach or may be released back into the community. The maximum period of time for an LTSO is ten years.
- [81] In the case of a dangerous offender sentenced to an indeterminate sentence, the PBC continues to have jurisdiction over the offender so as to always be able to assess the risks of the offender being in the public arena.

- [82] If sentenced to a determinate sentence, the offender will automatically be released into the community upon expiry of his or her warrant expiry date.

### **Lauretta McCarron**

- [83] Ms. McCarron testified regarding the Integrated Correctional Program Model implemented by the CSC which was described in detail in Exhibit 9 on the hearing. The intent of that program is to focus on understanding the factors which can and have lead to criminal activity and, if possible, to provide the offender with educational programs to be able to move forward with a reduced likelihood of remaining part of the criminal justice system. Ms. McCarron testified that the program is educational, not treatment and emphasis is placed upon attempting to motivate offenders to participate in programming.
- [84] Ms. McCarron also emphasized that programming may have limited availability depending upon the institution and that participation is based upon an assessment of an inmate's risk and needs.

### **Provincial Programming**

- [85] By consent, Exhibit 12 was filed which included programming available in B.C. provincial institutions and in the community.

### **Statement of Mr. Clayton**

- [86] Mr. Clayton was asked by the Court whether he wished to address the Court. He did not speak on his own behalf but through his counsel expressed that he wishes to take family violence counselling and relationship counselling if available. Through Mr. Nelson he also stated he wants to stay out of jail and "does not want to hurt anyone any more".

### **Analysis and Conclusion**

- [87] The Criminal Code calls for a two stage proceeding in the sentencing relating to dangerous offender hearings. Firstly, the Crown must establish beyond a reasonable doubt that the offender be designated as a dangerous offender, i.e. the designation stage. Secondly, if Mr. Clayton is designated as a dangerous offender, the Court assesses the penalty phase to determine whether Mr. Clayton should be sentenced to an indeterminate sentence or to a determinate sentence with a LTSO, the primary issue being whether the latter order will adequately protect the public against further offending by Mr. Clayton of a serious personal injury offence.

#### **Stage 1: The Designation Stage - Should Mr. Clayton be Designated a Dangerous Offender?**

- [88] Stage one involves an analysis of evidence capable of supporting a designation of dangerous offender under s. 753(1)(a) which includes the following elements:
- a. The Commission of a "Serious Personal Injury Offence"

- [89] Following the trial of Mr. Clayton for charges of confinement under s. 279(2) of the Code, Mr. Clayton was found guilty of that offence as well as for common assault.
- [90] The evidence submitted at trial, which included a video recording from a security system of a portion of the offence, proved the use of violence as well as threats of violence showing how Mr. Clayton raced after Ms. Odong as she attempted to get to her residence, evidence of Ms. Odong describing how Mr. Clayton held her to the ground attempting to strangle her and leaving bruises on her neck, and ultimately forced her into his vehicle. The evidence at trial satisfies the requirements of the first aspect of a s. 752 "serious personal injury offence" under (a) of the definition.
- [91] A conviction under s. 279(2) carries a maximum term of imprisonment of ten years which satisfies the second aspect of a s. 752 "serious personal injury offence" under (a) of the definition.
- [92] The Crown has shown beyond a reasonable doubt the commission of a serious personal injury offence required under s. 753(1)(a).
- b. Does Mr. Clayton's Offending Constitute a Pattern of Repetitive Behaviour Showing a Failure to Restrain his Actions?
- [93] Previously in these reasons, I have referred to the decision of Karakatsanis J. (as she then was) in Tremblay in which the learned judge stated in part, at para. 96:
- [96] To constitute a pattern, there must be a common element in the behaviour, something that connects prior incidents together in a manner that justifies considering them as a whole. A pattern of behaviour is something more than a mere history of criminal activity. Similarity can supply the requisite degree of connection. ...
- [94] In the evidence before me there are threads which support a finding of patterns in the offences committed by Mr. Clayton including:
- a) Mr. Clayton's offences have, with one exception, involved women victims. The lone exception was the acid-throwing incident in which Mr. Clyke was the victim, however, Mr. Clayton's actions were precipitated by the rejection of him by Ms. Clyke. Ms. Clyke may well have been the intended victim of Mr. Clayton who had been stalking her house, only to have Mr. Clyke open the door.
- b) The need for power and control over women, often arising from jealousy and rejection is a common thread in all of the offences. Often, Mr. Clayton was aware or perceived that his victim was seeing other men, usually after they had attempted to withdraw from his controlling behaviour. Power and control which Mr. Clayton sought over his victims was a factor in all offences.
- c) Uttering threats was an element present in the Clyke, LaPierre, McVicar and Odong cases.

- d) Assault including aggravated assault was present in the sexual assault convictions, the child prostitution offences, the Cutting, LaPierre, Goodman, MacVicar and Odong cases and included assaults with a weapon in the case of Clyke and MacVicar.
  - e) Confinement, often in his vehicle, in the Cutting, Clyke, Odong cases.
  - f) Breach of protection or no contact orders, probation terms, undertakings and a recognizance in the cases of Ms. Clyke and her father and most recently in the case of Ms. Odong when, while in custody, he attempted to coerce his victim to not testify against him.
- [95] Each of the factors listed by Karakatsanis J. in para. 98 of Tremblay have been present, i.e. the type of conduct; who, in a general sense the victims were; and the motivation of Mr. Clayton to commit the offences, i.e. power, control and jealousy.
- [96] The offending by Mr. Clayton has continued since 1986 through to and including the offences committed against Ms. Odong in 2015, often shortly after having been released following a warrant expiry date.
- [97] The defence has submitted that the predicate offence should not be considered part of the pattern of violence against intimate partners and women generally and in doing so quotes from the decision of Pike at para. 82:
- [82] The predicate offence is not a meaningless, statutory trigger. It is a "last straw", described by Marshall J.A. in *R. v. Newman* (1994), 115 Nfld. & P.E.I.R. 197 at para. 69 (Nfld. C.A.) as a "one last act of serious personal violence to anchor the offender's pattern of pre-existing unrestrained or uninhibited behaviour". It takes its significance, in part, from the fact that it demonstrates that the relevant pattern of behaviour continues. As Marshall J.A. explains, it serves an important purpose: "[i]t guards against visiting one of the most serious criminal sanctions upon someone who has essentially abandoned a past pattern of intensely serious violence on the basis of a relapse of relatively less grave proportions" (at para. 72). This explains why the pattern and predicate offence must be related. It would be inconsistent and unfair if the ultimate threat determination were to be made on the basis of a perceived threat unrelated to either the predicate offence or the pattern of behaviour it reveals as still persisting.
- [98] The defence continues and states, at para. 20 of his written submissions:
- a) The assault was minor;
  - b) The unlawful confinement was relatively brief, and ended with Mr. Clayton dropping Ms. Odong off at her home;
  - c) There is no evidence of any injury that rises to bodily harm suffered by Ms. Odong;
  - d) The tumultuous context of the relationship, with the pregnancy and Ms. Odong's avoidance of discussing it with Mr. Clayton and going out to a club with an ex-boyfriend; and

e) Ms. Odong's refusal to provide a victim impact statement or participate in any way in this sentencing.

[99] The assault did result in relatively minor physical injury to Ms. Odong who testified to having been held on the ground and choked, leaving bruises on her neck and causing her to briefly blackout. She was also pushed into a vehicle, attempted to escape as the vehicle pulled out and fortunately was able to close the car door as it rounded a corner. The assault has resulted in Ms. Odong being traumatized and physically injured and considering the facts, Mr. Clayton was fortunate that more serious physical injury was not inflicted on Ms. Odong. Still, the assault was not minor, was frightening and was committed while she was trying to get to the safety of her home. It was very significant to the victim.

[100] Also, this is not a case, as discussed in Pike at para. 82, where there was "a relapse of relatively less grave proportions". The assault and confinement was part of a continuing pattern of violence against women, especially those with whom Mr. Clayton has been involved intimately. He pursued Ms. Odong that evening from a nightclub in New Westminster, was rejected and then drove to and waited in his car in the driveway of her residence. He was attempting to exert control over Ms. Odong and used violence in trying to get his way. His actions were precipitated by his urge to control the victim and jealousy, as was often the case in his prior offending.

[101] The unlawful confinement was not relatively brief, Mr. Clayton having driven off, going to a darkened portion of a shopping center parking lot where he continued to berate and confine Ms. Odong at length.

[102] Finally, the failure of Ms. Odong to provide a victim impact statement in this case is irrelevant. She testified at length at trial and was cross-examined by then-counsel during which she described what had occurred and her fear of Mr. Clayton. It cannot be said that there has been a de-escalation in violence on the part of Mr. Clayton, the predicate offence was serious and fit the pattern of many of his prior offences.

[103] In spite of many years of imprisonment, Mr. Clayton has not appreciated the need for him to change his ways. Evidence, including the evidence of the experts, leads to the conclusion that Mr. Clayton is unable to control his actions and show any extent of restraint.

[104] The Crown has proven beyond any reasonable doubt that there has been a pattern of repetitive behaviour and a failure to constrain his actions against women.

c. Is There a Likelihood of Future Harm?

[105] The experts who have examined Mr. Clayton's history of offending, the nature of the offences, corrections records and in the case of Dr. Riar, having the benefit of a personal interview, have opined or testified that Mr. Clayton is a high risk to re-offend. Those assessments by all three experts have not been challenged by the defence.

- [106] The experts have also noted the lack of empathy on the part of Mr. Clayton and the lack of empathy, or acceptance of responsibility for his actions identify a significant risk to re-offend. Mr. Clayton has not shown remorse or empathy for his victims which is a condition for him to be able to accept responsibility and take advantage of treatment. Until he acknowledges clear empathy and responsibility for the harm caused to the many women, there is no motivation for him to step forward and participate in effective treatment.
- [107] That Mr. Clayton's offences have occurred over many years indicate that he, now at age 54, is unlikely to change his anti-social behaviour. Based again upon the expert evidence and other factors referred to previously in these reasons, the inevitable conclusion is that the risky behavior will continue to persist and that Mr. Clayton is not treatable within any identifiable period of time.
- [108] Mr. Clayton submits that he has been denied access to programming that is relevant to his risk. There were occurrences when courses or programs he requested were not made available, however, Mr. Clayton has consistently insisted that he determine what courses he needed as opposed to those which may have been available. Mr. Clayton says at para. 37 of his written submissions that "[he] concedes that his efforts to obtain programing relevant to intimate partner violence and anger management were intermittent". That is correct, and on occasion, even though he sought out programming, he refused to participate or cooperate with those in charge of the program. The greatest problem for Mr. Clayton regarding his treatability is his lack of empathy for his victims and his lack of motivation to reform and accept advice and counselling from the authorities.
- [109] Also significant in the case of Mr. Clayton is that his behaviour has continued over many years and has involved many different women. There is reason to believe that if he were to be in the community, based upon his current assessment, he would soon re-offend against a woman in a violent manner.

### Decision on Stage 1: The Designation Stage

- [110] I conclude for the above reasons that Mr. Clayton be designated as a dangerous offender under s. 753(1)(a)(i) of the Code. The evidence establishes that the offence for which Mr. Clayton has been convicted is a serious personal injury offence, and that he constitutes a threat to life, safety or the physical or mental well-being of other persons.

### Stage 2: Penalty Stage - How Should the Court Sentence the Dangerous Offender?

- [111] The Crown submits that an indeterminate sentence is the only proportionate sentence for Mr. Clayton considering the principles of sentencing as set out in ss. 718 and following of the Code.
- [112] Sections 753(4) and 753(4.1) of the Code set out the options for the Court upon finding an offender to be a dangerous offender.

[113] As stated previously in these reasons, the offender submits that he be sentenced to a conditional sentence order of two years followed by probation for three years.

Is There a Sanction Lesser than an Indeterminate Sentence which will Adequately Protect the Public against Mr. Clayton Committing Another Serious Personal Injury Offence or Murder?

[114] There are several factors arising from the evidence which lead the Court to the conclusion that the only sentence which can adequately protect the public from Mr. Clayton committing another serious offence or murder would be an indeterminate sentence of imprisonment.

[115] The reasons for this finding can be summarized as follows:

- a) The most significant factor supporting an indefinite sentence is the lengthy and frequent list of violent offences committed by Mr. Clayton over almost thirty years. Frequently, he has committed offences shortly after having been released from custody and the nature of those offences indicate that women who come into contact with him, especially intimate partners, are at a very significant risk of being a victim of his next offence. Even if terms were imposed upon him, such as a term of release that he not enter into any intimate relationship or if he does, that he notify that person of his criminal past, there is little if anything that can be done to enforce such conditions or terms. Also, Mr. Clayton has a history of not honouring orders, recognizances, bail terms, etc. on multiple occasions involving several women and circumstances. The experts have also testified as to the high likelihood of Mr. Clayton re-offending in a violent manner and that such offending will most likely involve a woman who is an intimate partner or some other woman. There is no reason to believe that Mr. Clayton's history of offending will not be repeated.
- b) The second reason supporting this finding is that Mr. Clayton has consistently been adverse to treatment and lacks the motivation to change and end his criminal ways. Both Drs. Lohrasbe and Riar believe there is little evidence Mr. Clayton is treatable and have found little if any motivation on his part to enter serious treatment. As stated previously, he has consistently blamed his victims for his offending, has declined treatment and when he has agree to entering programs, has failed to follow through with treatment.
- c) Mr. Clayton is 54 years of age and evidence suggests that even though offenders may tend to be less likely to re-offend as they age, there is no evidence before the Court to the effect that Mr. Clayton's behaviour once released will change.
- d) Historically, Mr. Clayton has not cooperated with correctional authorities. It is unlikely that he will cooperate with one who would be in the position of a probation officer should he be released into the public arena.

[116] For the above reasons and with reference to his lack of motivation to improve his behaviour discussed previously in these reasons, the public cannot be adequately protected from Mr. Clayton for the foreseeable future if he is released into the public arena.

Is an Indeterminate Sentence Proportionate and does it satisfy the Objectives and Principles of Sentencing?

- [117] The imposition of an indeterminate sentence for a dangerous offender is an exceptional and significant sentence which should be reserved for that narrow group of offenders in respect of whom their release into society would place the persons near the offender at substantial risk.
- [118] The principles of sentencing are listed in ss. 718 and 718.2 of the Code and include denunciation and deterrence, separating offenders from society "where necessary" (emphasis added), to assist in rehabilitating offenders among others. However, the framework of dangerous offender legislation emphasizes the need for the protection of the public "where necessary" from those persons in respect of whom the dangerous offender provisions were implemented, i.e. that narrow group of offenders whose release into society would place persons at risk of the commission of a personal injury offence or murder.
- [119] The imposition of an indefinite sentence of imprisonment in this case is proportionate to the circumstances of Mr. Clayton considering his offending history, the strong likelihood that he cannot or will not change his conduct in the future and the protection of society.
- [120] In the case before the Court, Mr. Clayton clearly has a deep mistrust of those in authority as is evidenced by his conduct with correctional personnel and his refusal to even consent to being interviewed by psychiatrists and other professionals.
- [121] The distrust exhibited by Mr. Clayton runs very deep and there is no indication that lack of trust will change, just as there is little likelihood he will be able to exhibit motivation which could lead him on the road to positive treatment.

## Decision on Stage 2: The Penalty Stage

- [122] It is not with a sense of satisfaction that this judge is sentencing Mr. Clayton to an indeterminate sentence. Unless he can change his ways while in prison, there is a likelihood he may spend the rest of his days in prison. He will have seven years minimum in jail with time to prove to those in authority that he is deserving of release back into society. However, at this time, the paramount principle of sentencing to apply in this case is the protection of the public and as, currently, should Mr. Clayton be released into society, he is highly likely to re-offend in a violent manner, the protection of the public must govern.
- [123] Crown counsel has referred, in his written submissions, to a quote from Nova Scotia Crown counsel made in 2012 regarding Mr. Clayton which bears repeating:

Mr. Clayton has done every miserable thing that he could do to somebody I imagine in the facts that we have here; he's been convicted or pled guilty to. His speciality is hurting people, women specifically, and then loved ones if they are, I guess, aiding the victims of his crimes in any way.

We are not sentencing him purely based on all that, but we can't leave that aside when we look at Mr. Clayton again at his age picking up an 18-year old woman and manipulating her and controlling her in the way he's done since 1985 to women and then hurting her the way that he's done since 1985. The olden not the olden olden days, but I guess they used to call people like Mr. Clayton incorrigible. I would say the same. Mr. Clayton is not going to get it, he won't get it. He talks my friend talks about it in his brief about him not having an opportunity at anger management counseling and if he had of got anger management counseling that he wouldn't perhaps be where he is right now. I don't take any stock in that. If Mr. Clayton wants anger management counseling he can go out and get it. He's been out lots of times, why does it have to be ordered?

In 1985, when he first sexually assaulted a woman he could have went out in 1986 and got anger management counseling, the second time, the third time when he threw acid in somebody's face. It's no good for Mr. Clayton to come in and sit there now and go, Well, nobody ever gave it to me.

Mr. Clayton doesn't want to change, he wants to be the person he is. We've seen that very clearly when he testified. He has no problem with the person he is right now. He showed absolutely no remorse and he didn't really seem to care. He doesn't care about women, he cares about himself.

### **Sentence on Assault Conviction**

[124] Having considered the principles and objectives of sentencing under the Code, I conclude the appropriate sentence for Mr. Clayton's assault conviction is nine months in prison with credit for time served.

### **Ancillary Orders**

[125] I will finally make the following ancillary orders:

1. Pursuant to s. 760 of the Criminal Code, an order that a copy of all reports of Drs. Lohrasbe, Cooper and Riar, along with transcripts of their testimony and transcripts of the observations of the Court at the application together with the Court's reasons for judgement on the application, the trial and the trial transcripts be forwarded to the Correctional Service of Canada for information.
2. Pursuant to s. 743.21 of the Criminal Code, an order that prohibits Mr. Clayton from having any contact or communication directly, or indirectly with Cecilia Odong or any of his previous victims unless such contact is through legal counsel and reasonably necessary for any application for parole.
3. Pursuant to ss. 109(1) and 109(3) of the Criminal Code, an order prohibiting the possession of any of the enumerated items for life. Pursuant to s. 109(a.1), this is a mandatory order.

4. Pursuant to s. 487.051(3) of the Criminal Code, an order requiring Mr. Clayton to provide a sample of his DNA to the databank. Unlawful confinement and assault are both secondary designated offences and the order is discretionary. Given Mr. Clayton's criminal history, the nature of the offences for which he was convicted and their surrounding circumstances, the Crown submits that the minimal intrusion on Mr. Clayton's privacy and security interests is outweighed by the substantial law enforcement objectives the DNA databank provides.

"Jenkins J."

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