
CANADA / JUDGMENT

R. v. Jackson-Bullshields

2019 BCSC 1960

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1960 R. v. Jackson-Bullshields

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Jackson-Bullshields,

2019 BCSC 1960

Date: 20190912

Docket: 27144

Registry: Vancouver

Regina

v.

Wilbert Luke Jackson-Bullshields

Before: The Honourable Madam Justice Russell

Oral Reasons for Judgment on Sentence

and Long-Term Offender Status

Counsel for the Crown:

L. Krivel

Counsel for the Offender:

J. Turner

Place and Dates of Hearing:

Vancouver, B.C.

June 6-7, 12-13 and 17-19, 2019

Place and Date of Judgment:

Vancouver, B.C.

September 12, 2019

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Overview

- [1] On July 7, 2017, I convicted Mr. Jackson-Bullshields (the "Offender") of eight counts on a multiple count indictment. Count 3 on that indictment was stayed by the Crown and I ordered a judicial stay on counts 6 and 8, under the Kienapple principle.

- [2] Subsequently, I heard an application under s. 752.1 of the Criminal Code, R.S.C. 1985, c. C-46 [Code] by the Crown for an order that the Offender be remanded for assessment by an expert to prepare a report for the Court and the parties. This report would present information to consider whether the Offender would be subject to a dangerous offender or long-term offender designation under ss. 753 and 753.1 of the Code.
- [3] In reasons dated June 4, 2018, I granted the Crown's application for an assessment.
- [4] After I granted this order, the Offender fired his counsel and rejected several more. This caused a substantial delay during which the Offender remained in custody. After some urging in this respect, the Offender settled on new counsel and the sentencing submissions and submissions on the designation proposed by the Crown, that of a long-term offender, proceeded in June 2019.
- [5] As required by the legislation, I will proceed with the sentence and then deal with the Crown's application to have the Offender designated as a long-term offender and thus subject to supervision in the community after his release.

Facts

- [6] The Offender stole a car and drove it through a stop sign at the intersection of 49th Avenue and Nanaimo in Vancouver, BC.
- [7] 49th Avenue is a busy street and when he drove through the intersection without stopping, the Offender caused a number of chain reaction accidents. Fortunately, no serious injuries resulted but that was due only to good luck rather than any care on the Offender's part.
- [8] The Offender crashed the stolen vehicle into another car across the intersection. He ran from the car, fleeing southbound on Nanaimo.
- [9] He ducked behind a house on Berkeley Street and approached a woman sitting in her car. He asked for a ride; she refused and he pulled on her door a number of times and then pounded on the hood of the car. When she began honking her horn, he ran away.
- [10] The victim of this attempted theft was very frightened.
- [11] The Offender ran to a gas station located at East 54th and Kerr Street. In the vicinity of the gas station, he picked up a 2x4 piece of wood and a piece of metal or ceramic material from a construction site.
- [12] He returned to the gas station, demanded the attendant provide him with a free soft drink, and when refused, he took a Coke and then threw around several items outside the station's office such as water bottles, and other bottles. He swung the 2x4 and dented one of the refrigerators belonging to the station.

- [13] The Offender approached a young man filling his car. He demanded a cigarette and the young man's car. When the driver refused his demand, and attempted to leave the gas station, the Offender chased the car, swung the 2x4 at the driver side window, and smashed the window causing a small cut on the driver's face.
- [14] The final episode in this spree occurred further east on 54th.
- [15] As he ran from the gas station, the Offender came upon a young couple sitting in their car. He opened the car door and asked for a ride. The driver refused him. The Offender demanded a ride again and once more was refused. He shouted at the driver to get out of the car and when that driver tried to close his door, the Offender pulled it open and tried to yank the driver from his seat.
- [16] When this tactic was unsuccessful, the Offender tried to get into the car alongside the driver and reached over to start the car. The driver's companion tried to grab the keys, failed and began honking the horn.
- [17] Two passersby noticed the struggle and assisted in pulling the Offender from the car and holding him down until the Vancouver police arrived.
- [18] At that point, the Offender continued to resist until he was subdued with two blows and finally handcuffed.
- [19] The observation of the police officer who arrested the Offender was that it appeared the Offender was high on drugs.

Circumstances of the Offences

- [20] The Offender stole a car, caused several accidents and then failed to stop and ran from the scene, attempted to steal another car, committed mischief and stole a Coke, tried to take a car at the gas station and when refused, went after the car and driver with a 2x4 and smashed his window, damaged merchandise in the gas station, and tried to steal the car belonging to another young man further east on 54th after the Offender left the gas station.
- [21] While he was intoxicated, he was not intoxicated to the degree that it negated his mens rea to commit these offences. He was able to converse and he was physically competent to run.

Circumstances of the Offender

- [22] The Offender is an Indigenous man, born September 11, 1984. He is now 35 years old.
- [23] He has a prodigious criminal record and a history of drug and alcohol addiction. I have no doubt that the vast majority of his offences have been committed while he was intoxicated on drugs and/or alcohol.

- [24] I have had the benefit of reading a Gladue report (prepared pursuant to s. 718.2(e) of the Code) prepared in December 2017. It is replete with details of a chaotic childhood, a mother who admits that she was incapable of good parenting due to her own past alcohol and substance abuse issues, damage following time spent in a Tuberculosis sanatorium and residential school, and poor parenting by her parents who were part of the same traumatic residential school experience.
- [25] It is clear the mother was not present for the Offender during his youth and adolescence.
- [26] The Offender is the product of a relationship between his mother and Wilbert Jackson whom she described as "a severely damaged, used up, has-been, violent drunk of a man." The Offender's mother, Ms. Bullshields, was verbally, emotionally, physically and sexually abused by the Offender's father and she says he also sexually abused her daughters.
- [27] The Offender's father was murdered in 1991 but the Offender's mother had long since left him and had met a man who seemed to be a cut above many of her earlier partners. But that relationship ended and the Offender's mother moved her family to Lethbridge, Alberta.
- [28] There the Offender attended a public school but had serious relationship issues and was in many fights. He felt victimized by the other students at his school and when it became clear he could not get along in that setting, it was agreed he would be kept separate from his schoolmates, from grade one to his eventual expulsion in grade six.
- [29] He was poor, hungry, did not fit in, and his escalating violence and disciplinary problems finally resulted in a decision to home-school him with support provided by the local school district.
- [30] Ultimately, he completed a grade eight equivalency in a middle school and then abandoned his education.
- [31] The Offender's mother moved her family to Vancouver when the Offender was 13. She had reported the Offender's paternal grandfather to the police for his sexual abuse of his grandchildren. The grandfather was ultimately charged with 54 counts of sexual assault. The grandfather was convicted and served custodial time.
- [32] However, the extended family had wished to avoid a police investigation and ostracized the Offender's mother and her children for reporting to the police. Hence, her decision to move her family to Vancouver.
- [33] The Offender's misuse of substances began early. He was eight when he began using cannabis and he began drinking about the same time. He drank and used cannabis to forget the problems in his life and became a life long user of cannabis. He began using and selling crack cocaine at 13, with his need dictating the use of up to eight grams a day by the time he was 15. When crack cocaine no longer satisfied his needs, he switched to crystal meth that he used with OxyContin, ecstasy, heroin, psilocybin mushrooms and a variety of other illicit substances.

- [34] Both as a youth and an adult, the Offender has never established relationships with stable, sober people. Because he has been in and out of prison for most of his life, he has never had a home. His relationships with his mother and siblings have been detrimentally affected by his criminal lifestyle and repeated incarceration.
- [35] While in prison or remand, he has been kept in administrative segregation for the most part.
- [36] The Offender has not been able to maintain any job for more than a short period of time. He is aware that his lack of education is a major obstacle in finding employment. His primary source of income when in the community has been the drug trade.
- [37] The Offender believes his dysfunctional formative years, including witnessing and being a victim of abuse, coupled with viewing violence and substance abuse in the community and in jail have resulted in his self-destructive lifestyle and conflict with the criminal justice system. However, to date he has not disclosed much interest in managing his compulsion to use drugs despite acknowledging that his use of intoxicants has figured substantially in his commission of crimes and his incarceration.
- [38] On the advice of counsel, the Offender refused to discuss in any depth the offences for which he was convicted in July 2017. Therefore, there is no way of knowing if he accepts responsibility for his actions.
- [39] The Offender advised Mr. Cadwallader, who prepared the Gladue report, that he was willing to try to address the underlying factors that have contributed to his conviction by seeking therapeutic supports as part of his institutional and post-release planning.
- [40] In summary, it is obvious that many adverse factors are present in the Offender's life that have made him who he is today. As stated in the Gladue report, they include "multigenerational familial instability, violence, breakdown and fragmentation" with his childhood defined by "poverty, neglect, chronic alcoholism and drug abuse, sexual predation, violence and fear". He lacked any positive adult role models. He was involved in the foster care system and suffered a loss of self-worth and feelings of social alienation.
- [41] His lack of educational achievement has contributed to his marginalization, poverty and has helped lead him to criminality.
- [42] The intergenerational effects of the residential school experience suffered by his mother and his grandparents have exacerbated his social isolation and his dislocation from his Aboriginal community with a corresponding loss of language, culture and traditions.

Pre-Sentence Report

- [43] The Offender has a long criminal history but has not previously received lengthy sentences. Most of his sentences have required lengthy periods of probation with conditions attached for counselling and treatment since on a number of occasions, his lack of mental stability

has been pointed out. Unfortunately, he has not complied with his obligation to report to community corrections and has mostly been absent without leave or in custody. Notably, since August 2014 and up to the date of his convictions in the matter currently before the Court, he has been charged and convicted of nine breaches of probation, and possession for purposes of trafficking under ss. 5(1) and 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.

- [44] The pre-sentence report sets out reports from the corrections file logs (Client logs, or "C-Logs") that note consistent patterns of peer violence, unpredictability and being aggressive and non-compliant with staff. To handle this behaviour, he was held in long-term separate confinement for the last few months previous to the preparation of the pre-sentence report on January 18, 2018. As well, special handling protocols were put in place so that two officers are required to escort the Offender.
- [45] The writer of the pre-sentence report notes at page 5 that the Offender is "criminally entrenched with a long history of serious violence, substance abuse, trauma and mental health issues and continued volatile and non-compliant behaviour".
- [46] The writer also points out that for the Offender to have a possibility of success in reintegrating with the community, he will need assistance with housing and obtaining incoming assistance and teaching of basic life skills. The scarcity of such resources is obvious.
- [47] With respect to the Offender's volatility and non-compliance, I note as well that in court, three sheriffs were present at all times and on occasion, when the Offender became angry and acted out, additional personnel were required to remove him from the courtroom.

Impact on the Community

- [48] The Court does not have victim impact statements from those who were involved in the motor vehicle accidents caused by the Offender driving through the stop sign at 49th and Nanaimo and his failure to stop and assist.
- [49] I have four victim impact statements from victims of the attempted car theft on Berkeley Street, the robbery in the gas station and the robbery of the car occupied by two people on 54th Avenue.
- [50] All the victims reported feeling fearful and wondering if the kinds of experiences they had suffered at the Offender's hands would be repeated. They all experienced feelings of paranoia and the sense that they should always keep their doors locked.
- [51] The victim of the attempted car theft on Berkeley Street could not bring herself to use her carport for a number of nights after the incident with the Offender. She also reported feeling fear for her partner during the incident because she would be coming home shortly after the victim.

[52] The victim of the robbery in the gas station reported that he experienced more suspicion of people around him and that he felt upset about the randomness of the crime committed against him. It increased his feeling of vulnerability.

[53] It is not difficult to understand that the victims' sense of personal security has been undermined by the Offender's actions.

Position of the Crown

[54] I quote from the Crown's submission at para. 31:

The principles of sentencing engaged in the circumstances of all of these offences are denunciation (718(a)), deterrence (718(b)), the need to separate the defendant from society in order to ensure the safety of the community (718(c)), to assist in the rehabilitation of the offender (718(d)), and promote a sense of responsibility in the offender and acknowledgment of the harm done to the victims and to the community (718(f)) while also taking into account his aboriginal history (718(e)).

[55] The Crown argues that the conduct of the Offender is serious and his behaviour so uncontrolled that the high end of the various ranges for each of the offences of which he is convicted are justified and necessary to take into account the principles of sentencing.

[56] With respect to the sentence for robbery, Crown notes that the maximum sentence for robbery is life, indicating the range of circumstances in which this offence can be committed.

[57] In the circumstances of this case, on counts 5 and 11, where the robbery of Mr. McCord involved a degree of violence, as did the robbery of Mr. Gee and the attempted robbery of Ms. Rogers, the Crown suggests the sentences should run consecutively as the offences were not connected.

[58] Crown submits that the sentences for counts 5 and 11 (the robberies) should be four to five years consecutive.

[59] On count 4, for the attempted theft of Ms. Rogers' car, Crown submits 12 to 18 months is appropriate and should be served consecutively to the other robbery charges as the attempted car theft was separate in time and nature from the other offences.

[60] The case law submitted by the Crown on the robbery counts is as follows:

· R. v. Bell, 2006 ONCJ 452: The offender here approached a woman sitting in her vehicle at a drive through. He demanded she get out of her car and attempted to take it. This was the offender's third robbery. He pleaded guilty and was given a three-year sentence.

- R. v. Noor, [2007] O.J. No. 4092 (Ont. S.C.J.): A first-time offender, acting with another, carjacked a car at a red light. His companion told the driver that he had a gun and would shoot the driver if he did not give up the car. Although this was a first offence for the offender, he had acquired a number of convictions since this offence was charged. He was sentenced to three and one-half years.
- R. v. Anderson, 2007 BCCA 462: The offender robbed a convenience store and brandished a steak knife to threaten the clerk. The offender was on a conditional sentence at the time of the offence for a similar conviction. He had also held up a taxi driver using scissors as a weapon. The trial judge held that he had a pattern of being unable to control his need for drugs. His substance abuse issues led to the violent robberies and his prospects for rehabilitation were held to be poor. He had a history of non-compliance with the conditions of sentence. The four-year sentence was upheld on appeal.
- R. v. McCrea, 2008 BCCA 227: Armed with bear spray and masked, the offender robbed a store clerk. He fled in a vehicle, was pursued in a high speed chase, and after crashing his vehicle, stopped a truck, ejected the driver and sped off. He was sentenced to three years for the store robbery and three and one-half years consecutive for the truck robbery. He had a 20-year criminal record with the longest sentences he had served previous to these offences being two years less a day conditional, and an 18-month jail sentence. He had three previous robbery convictions and had continued to commit crimes while under supervision. He had been out of jail for eight and one-half months and was still serving the probationary term of his sentence when he committed these offences. He had substance abuse issues.
- R. v. Chad, 2009 ABCA 48: While trying to evade police, the offender jumped into the victim's car, ordered him to drive and when he refused, pushed him out of the car and drove off. The offender pleaded guilty. At trial, the judge imposed a sentence of 18 months that was raised to three years on the Crown's appeal.
- R. v. Gill, 2006 BCCA 127: The offender robbed a store clerk using an imitation gun and wearing a mask. At the time of the offence, the offender was serving a conditional sentence for theft of a truck, and had breached his conditions two weeks earlier by failing to comply with his curfew. He pleaded guilty and his sentence was reduced from five years to three due to his age (23 years old) and the fact he did not present as a hardened criminal.
- R. v. Stein, 2017 YKCA 14: The offender used bear spray to subdue his victim, grabbed him by the neck and broke his glasses. He was high on drugs at the time. He was sentenced to five years but on the totality principle, the sentence was reduced to four years. He was characterized as a "career criminal" and the sentence was upheld on appeal.

[61] On counts 1 and 2, the possession of a car stolen from John Vint and the failure to stop at the scene of an accident, the Crown submits those counts should run concurrently to each other, provided the Court finds the robbery charges should be punished consecutively and should run consecutively to the robbery charges with 18 to 24 months for the possession of stolen property and 12 to 18 months concurrent for failure to stop at the scene of an accident.

[62] The case law offered by the Crown on these counts is as follows:

- R. v. Yakobchuk, 2016 BCCA 458: The offender with a serious drug addiction and lengthy criminal record, pleaded guilty to possession of a stolen vehicle and a bike. As a result of a joint submission, a sentence of 21 months, characterized as "lenient" was imposed.
- R. v. McCaskie, 2006 BCCA 382: Possession of a stolen vehicle and operating a motor vehicle in a manner dangerous to the public, resulted in a three-year global sentence. The offender fled from the police at high speed and "drove like a maniac" causing minor injuries to two pedestrians and aiming his car at police vehicles swerving away at the last minute.

[63] On the count of failure to stop, the Crown submits the following authorities:

- R. v. Hughes, 2012 BCCA 87: The offender failed to stop and offer assistance after he drove at a high rate of speed and hit another car, killing four of five occupants inside. He was a first offender, but had a lengthy record of driving offences. He demonstrated a lack of remorse by his lies in court. The trial judgment of a sentence of 18 months was upheld on appeal.
- R. v. Gill, 2010 BCCA 388: The offender crossed four lanes of traffic and collided with another car, seriously injuring the driver. He left the driver unconscious and bleeding, failed to call for help although equipped with a telephone and arranged to leave the scene. Despite the fact he was a first offender and otherwise a contributing member of society, the court found his actions selfish and irresponsible, and imposed a sentence of 18 months. The sentence was upheld on appeal.

[64] On count 7, possession of a weapon for a purpose dangerous to the public peace, the Crown submits as appropriate, a sentence of 18 to 24 months to run concurrently to the sentence for robbery of Mr. McCord.

[65] The Crown has submitted three authorities in support of the sentence suggested as appropriate. However, while I recognize the difficulty of finding a comparable case that is apt on the facts, and I note that, accordingly, Crown has not submitted the sentence on this count should be at the higher end, nonetheless, I find two of the cases submitted by the Crown describe more serious circumstances.

- [66] I do find R. v. Petrach, [1984] B.C.J. No. 1509 (C.A.) somewhat useful. In this case, the offender was waving a knife about in a public place in a dangerous fashion when police arrested him. The Court of Appeal found the offender to be a "man of violence", noting his dreadful record went back 17 years and included convictions for assault and uttering threats. He received an 18-month sentence upheld on appeal.
- [67] On count 9, theft of merchandise from Petro-Canada, the Crown submits a sentence of six to nine months to be served concurrently to the McCord robbery is appropriate.
- [68] The Crown has submitted the following authorities on this count:
- R. v. Marrott, 1999 BCCA 99: The offender was convicted of one count of theft under \$5,000 for the theft of meat valued at \$29. He committed the offence two days after being released following another sentence he was serving. He had 128 prior convictions, mostly for theft. The trial judge emphasized the offender's "horrendous" record. He referred to the need to protect the public in imposing a sentence of nine months, a sentence not interfered with on appeal.
 - R. v. Drake, 2007 BCCA 204: The offender here had a history of substance abuse and a 25-year criminal record with at least 20 prior convictions for related offences. He was assessed a sentence of one-year global for two counts of theft under \$5,000 described as "shoplifting incidents". His most recent conviction was on two counts of theft under \$5,000 for which he had received a sentence of four months concurrent, leading the trial judge on the offence before him to state that he had no confidence a rehabilitative approach to sentencing would have any positive effect on the offender. The sentence was upheld on appeal.
 - R. v. Mack, 2008 BCCA 520: The offender was an alcoholic who stole four bottles of mouthwash valued at \$16 while intoxicated. He had a prolific criminal record including 73 convictions in the past 25 years. The trial judge found his behaviour to be incorrigible and gave primary weight to the sentencing principle of separating the offender from society in order to protect the public. He received a one-year sentence for theft that was upheld on appeal.
- [69] For the mischief charge noted at count 10, and arising from damage to Petro-Canada property, the Crown submits a sentence of six to nine months concurrent to the time allotted for count 9.
- [70] The Crown did not submit authorities on this charge.
- [71] The Crown closes her sentencing submissions on the determinate sentence she seeks by pointing out that there were a number of distinct offences that occurred in this case and they were not all part of a single endeavour. Therefore, there are some offences that should be assessed as attracting consecutive sentences.
- [72] Crown submits that a global sentence of seven to eight years should be imposed to address the concerns of multiple offences involving multiple victims.

- [73] Crown also submits that the principle of totality should apply in the event I determine that consecutive sentences are appropriate.
- [74] With respect to the credit for time served, the Crown suggests that a credit of 1:1 should be considered if the substantial time in custody passed by the accused should reduce his sentence below the minimum of two years required for federal time. Crown makes this argument because the Offender has never had the benefit of the intensive programming available for him only in a federal institution.

Position of the Defence

- [75] The submission of the defence turned on the relative lack of injury resulting to the victims of the numerous offences committed by the Offender.
- [76] Counsel pointed out that the offences were at the low end of violence for the most part.
- [77] Defence submitted a grid of cases relating to sentences for robbery from 1971 to 2013 indicating a range of sentences from 90 days to 15 years for store robberies, suspended sentence to 10 years for street robberies, and 18 months to 17.5 years for bank robberies. I did not consider the home invasion category to be relevant and did not consider the sentences involved. As well, there were several cases noted as "uncategorized" that did not appear to be relevant.
- [78] What I take from the provision of these bare summaries of cases, is that sentences for robbery where there is little violence are at the lower end of the range.
- [79] Looking at the category "Street Robberies", probably most similar to the offences committed by this Offender, the only sentences over 90 days involved injury to the victim. Since I was not provided with the cases, I reviewed the summaries only.
- [80] Defence also pointed out that the sentences imposed on the Offender in the past were not nearly as severe as what has been requested by the Crown in the facts before me. If I were to impose the sentence suggested by Crown, it would be a major increase in severity and thus not reasonable, in his submission.
- [81] I will note that the most severe sentence imposed on the Offender to date is an effective sentence of 34 months and two weeks for an aggravated assault, use of a face mask and possession of a number of prohibited weapons. This sentence was characterized as "significantly longer" than any other sentence he had previously received.
- [82] Defence raised the terrible childhood of the offender set out in the Gladue report and that, as directed by the Supreme Court of Canada, the culpability of the Offender should be viewed in the light of his background.
- [83] There were no ranges of sentence suggested by defence counsel.

- [84] Defence counsel argued that I should consider the substantial number of days spent by the Offender in segregation and isolation during his time in custody to increase the credit for time served to 3:1. However, notwithstanding that I understand that because of his history of addiction he suffers from a predisposition to mental illness, it remains the fact that he was unable to get along in the general prison population and was often involved in fighting or resisting the compliance efforts of correctional officers. He refused to accept a place in the mental health unit as he would be labelled a "bug" if he did so. That left few options for him and segregation and isolation became the only way he and the other inmates could be protected in the remand centre.
- [85] Defence offered the case of *R. v. Prystay*, 2019 ABQB 8, as support for the proposition that substantial credit should be given to the Offender as a result of the lengthy time he spent in isolation/segregation while he was in remand, under conditions that were less than acceptable. Mr. Prystay did not have much in the way of activities to occupy his time and did not even have a television in his cell, contrary to recommendations suggesting this amenity be made available.
- [86] However, the case is distinguishable because Mr. Prystay's behaviour did improve as requested yet he received no advice about when or how he could get out of segregation. He was left with no hope.
- [87] The Offender here was visited regularly by the mental health team and by corrections officers. He was made the unit cleaner and that gave him some meaningful activity during his day. He was also offered time out of his cell on a daily basis although he often refused it. He was given journals on request and had books and a television as diversion.
- [88] As well, Prystay was a constitutional case in which he succeeded with an allegation that his Charter rights were breached by reason of the fact that this treatment amounted to cruel and unusual punishment.
- [89] I do not have numbers current to today's date but Ms. Krivel states that from July 16, 2016, the date of arrest, to June 18, 2019, the Offender was in the general population for 150 days, in segregation for 414 days (where he was allowed one hour a day out of his cell) and in isolation for 489 days (where he was allowed four to six hours a day out of his cell with access to a number of different facilities). Within that total there are ten days not accounted for.
- [90] No constitutional case is before me but I will credit the Offender on a 1.5:1 basis for days spent in custody after arrest and before sentence.

Sentence

Mitigating and Aggravating Factors

- [91] The mitigating factors in this case stem from the Gladue report prepared about the Offender.

- [92] In *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada explained that systemic and background factors are mitigating in nature:
- [73] First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in *Wells* where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (*Wells*, at para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely -- if ever -- attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing -- that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment per se.

[Emphasis in original.]

- [93] I must consider the Offender's overall moral culpability for the offences in light of his deprived childhood and lack of parental guidance.

- [94] There are a number of aggravating factors present. These are:

- The Offender has a lengthy criminal history commencing in 1999 when he was a youth. He had approximately 30 youth offences and 31 adult offences including robbery and assault, possession of weapons, aggravated assault and numerous convictions for breaches of probation and condition and past non-compliance.
- At the time of the offences for which he is currently before the Court, he was on probation for his conviction for aggravated assault.
- He caused psychological harm to a number of victims in the instant case and physical harm to one.
- He put public safety at risk by driving through a stop sign, resulting in a number of accidents.
- He shows no insight into the relationship of his drug use and the crimes he has committed.

[95] In coming to the appropriate sentence for the offences of which the Offender has been convicted, I must look to the principles of sentencing in the Code.

[96] These principles are found at ss. 718, 718.1 and 718.2 of the Code.

[97] I have quoted the principles at para. 54 above but in summary form, the purposes of sentencing set out in s. 718 are as follows:

Denunciation; deterrence; protection of the public; rehabilitation of the offender; reparation and promotion of responsibility in offenders and acknowledgment of harm done.

[98] In the circumstances before me, I find that all of the purposes of sentencing are engaged. Clearly, there needs to be denunciation of acts that caused extreme fear and some injury. There is a need to deter others who would indulge in drug use and commit acts of violence. The community needs to know that its safety is important and those who commit crimes of the nature of those committed by the Offender will be kept separate from society for an appropriate period of time. In recognition of the need of this Offender to be reintegrated into society after serving his sentence, there must be a focus on his rehabilitation. Finally, the Offender must be helped to accept responsibility for his choices and acknowledge the harm he has done to the victims.

[99] The fundamental principle of sentencing is that of proportionality. A trial judge must make the sentence proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1.

[100] Section 718.2 (b) requires the Court to consider that the sentence be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; and (c) that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[101] Many courts have considered the principles and purposes of sentencing and the principle of totality has been restated on many occasions. In *R. v. G.F.*, 2018 BCCA 339, the Court expressed the principle articulated in *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 40, as follows:

[36] The totality principle recognizes that the quantum of sentence imposed should be broadly commensurate with the gravity of the offences committed and the moral blameworthiness of the offender: *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 40.

[37] In *R. v. K.R.J.*, 2014 BCCA 382 (*K.R.J. BCCA*), reversed in part on other grounds, 2016 SCC 31 (*K.R.J. SCC*), Groberman J.A., speaking for the Court on this issue, described the operation of the totality principle:

[27] Where an offender is convicted of more than one offence, the sentencing judge is required to consider the offender's overall culpability in fixing the global sentence. In *R. v. Li*, 2009 BCCA 85, this Court recommended a two-stage approach:

[26] Whether sentences for multiple offences are made consecutive or concurrent, it is the task of the sentencing judge to fix an appropriate global sentence that reflects the specific circumstances of the offences and the unique circumstances of the offender. The importance of this balancing is reflected in the principle of proportionality, which has been codified in s. 718.1 of the Criminal Code under the heading "fundamental principle":

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

[27] The principle of totality also factors into the imposition of an appropriate aggregate sentence for multiple offences. In *M.(C.A.)*, Lamer C.J.C. described the principle:

[42] In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979) at p. 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

[28] Thus, there is a two-stage approach to sentencing an offender convicted of multiple offences. The first stage is to determine the appropriate sentence for each offence, and decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, then the second stage is to determine whether the sentences, in the aggregate, offend the totality principle. If the sentence, as a whole, is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence. See *R. v. P.P.H.*, 2003 BCCA 591.

[28] In *R. v. Joseph*, 2010 BCCA 525 at para. 17, the Court made it clear that the recommended two-stage approach is not an absolute requirement, but rather a means of ensuring that the sentencing judge has properly considered the totality principle:

[17] While I do not suggest that sentencing judges are required to follow a rigid two-step approach in sentencing for multiple offences, there should be something in the reasons for sentence which reflects that the totality principle was taken into account, and the two-step approach makes that clear.

[18] The question remains whether, even if the sentencing judge erred in failing to take into account the totality principle, the sentence was, nonetheless fit.

- [102] Therefore, I will use the two-step approach by first determining the appropriate sentence for each offence and whether they should be made consecutive or concurrent and then I will consider the totality principle to decide whether the sentence as a whole is unduly harsh or disproportionate.
- [103] I will determine whether a sentence is to be served consecutively or concurrently, by looking at "whether the acts constituting the offence were a part of a linked series of acts within a single endeavour": *R. v. Li*, 2009 BCCA 85 at para. 42.
- [104] In my view, within the eight counts of which the Offender is convicted, there are several acts which fall within this definition. However, the major offences, those of attempted robbery of Ms. Rogers, and the robbery of Mr. McCord and the robbery of Mr. Gee, are not part of a single endeavour. They are separate in time and place.
- [105] Following are the sentences to be imposed in the first step of the process. I will then consider whether I should adjust them to arrive at an appropriate global sentence.
- [106] Please stand, Mr. Jackson-Bullshields.
- [107] Before I sentence you, do you have anything to say to the Court?
- [108] On count 1: Possession of Stolen Property, I sentence you to 14 months.
- [109] On count 2: Failure to stop at the scene of an accident, I sentence you to ten months, to be served concurrently with the sentence for count 1.
- [110] On count 4: Attempted theft of a motor vehicle, I sentence you to 16 months consecutive to the sentence set out on count 1 above.
- [111] On count 5: Robbery of Finn McCord, I sentence you to three years and six months consecutive to the sentences set out on counts 1 and 4.
- [112] On count 7: Possession of a weapon, I sentence you to 18 months to be served concurrently with the sentence on count 5.
- [113] On count 9: The theft of merchandise, I sentence you to four months to be served concurrently to the sentence on count 10 but consecutively to all other offences;
- [114] On count 10: Mischief, I sentence you to four months to be served concurrently with the sentence imposed on count 9 but consecutively to all other offences;
- [115] On count 11: Robbery, I sentence you to three years to be served consecutively to the sentence imposed on count 5.
- [116] Before I credit you for time served, the global sentence is nine years and four months.
- [117] But taking into account the Gladue factors that slightly mitigate your culpability and also, looking at the totality principle and adjusting for the consecutive sentences, I have decided that I must adjust the global sentence downwards to seven years.

- [118] Your credit for time served is 1,154 days to and including today's date. At a credit of 1.5:1, your revised credit is 1,731 days.
- [119] Your sentence is therefore 824 days.
- [120] I am hopeful that this sentence will allow the Offender to complete the Aboriginal Integrated Correctional Program Model and the high intensity Multi-Target Program before he is released. While I do not have power to make an order in this regard, I do point out that the Offender has stated on many occasions that he requests treatment in a one-on-one format.
- [121] I will reserve the ancillary conditions to the end of my reasons.
- [122] I will now move to consider the Crown's application for a ten-year long-term offender designation.

Long-Term Offender

- [123] The long-term offender application from the Crown forms part of the sentencing process.
- [124] As required, I have set out the determinate sentence above.
- [125] The legislative provisions dealing with the long-term offender designation are set out in s. 753.1 of the Code. It is a discretionary decision to be made by the Court on application following the filing of an assessment report under subsection 752.1(2).
- [126] The statutory criteria are as follows:
- (a) The Court may make this designation, where it is appropriate to impose a sentence of imprisonment of two years or more for the offences for which the Offender has been convicted. This is the case as I have sentenced the Offender to a seven-year sentence less time served for a net sentence of two years and 94 days. This is a federal term and will allow the Offender access to "a thorough intake assessment process and correctional plan. It also allows for participation in programs and interventions and maintains continuity throughout the rehabilitation and reintegration process" (Canada, Correctional Service of Canada, CSC and Long Term Supervision Orders (LTSO), (Ottawa: Library and Archives Canada, 2013) at 4).
 - (b) The second requirement to be satisfied is that there is a substantial risk the Offender will re-offend. I have concluded that this is indeed the case and I will develop this conclusion in my reasons to follow.
 - (c) The third requirement of which I must be satisfied is that there is a reasonable possibility of eventual control in the community of the risk presented by the Offender. I have concluded that this is also the case based on the s. 752.1(2) assessment of Dr. Shahram Lohrasbe, a psychiatrist with extensive experience assessing and treating both dangerous offenders and long-term offenders.

[127] Under s. 752.1(1), the predicate offence must be a personal injury offence to be considered under s. 753.1.

[128] A "serious personal injury offence", defined in s. 752 of the Code, is an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving:

- the use or attempted use of violence against another person, or
- conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person,
- and for which the offender may be sentenced to imprisonment for 10 years or more.

R. v. Weasel, 2003 SKCA 131, at paras. 36-39.

[129] Among the offences of which the Offender has been convicted and sentenced, are the counts of robbery of Mr. McCord and of Mr. Gee. In the robbery of Mr. McCord, the Offender swung a 2x4 at the driver's window, smashing it and causing a small cut to Mr. McCord. In the robbery of Mr. Gee, the Offender tried to haul him out of the car and when that failed, pushed him over forcibly and tried to start the car to take it.

[130] Both incidents were violent and caused danger to the personal safety of Mr. McCord and inflicted severe psychological distress on both Mr. McCord and Mr. Gee. Therefore, the offences were serious personal injury offences.

[131] Robbery falls within the definition of a serious personal injury offence: R. v. Steele, 2014 SCC 61.

Substantial Risk

[132] There is always difficulty in predicting what is likely to occur in the future. Then again, one of the best predictors of future behaviour is past behaviour.

[133] A CPIC print out of the Offender's criminal history is found at tab 1 of Exhibit 1 but is too lengthy to attach to my reasons.

[134] The Offender has the following list of convictions for violent and weapons-related offences:

- Robbery (using a firearm) - 1999 - Youth conviction. Sentenced to probation
- Possession of a weapon - 2002 - Youth conviction. Fine and prohibition
- Possession of a weapon - 2002 - Youth conviction. Sentenced to 21 days
- Carry concealed weapon - 2005 - Sentenced to a two month conditional sentence
- Robbery - 2005 - Sentenced to 18 months conditional sentence and eight months' probation (Part of the offence noted immediately above)
- Assault - 2007 - Sentenced to 30 days' and 18 months probation

- Assault - 2008 - time served credit of 98 days in custody and one day probation and prohibition
- Threats - 2008 - Sentenced to one day
- Assault - 2008 - Sentenced to time served of 60 days and one day jail
- Possessing a weapon dangerous to the public - 2008 - Sentenced to a six month conditional sentence
- Uttering threats - 2009 - Sentenced to 16 days time served and one day and 33 days' time credited
- Carrying a weapon or prohibited device - 2009 - sentenced to 30 days
- Possession of a weapon for a dangerous purpose - 2009 - Sentenced to time served of two months
- Assault causing bodily harm - 2010 - sentenced to 30 days and 18 months' probation
- Possession of a weapon - 2013 - Sentenced to one day
- Aggravated assault and disguising face - offence took place September 2012 - sentenced August 22, 2014 - one day jail and time served. Jail term that would have been imposed was 698 days because actual pre-sentence time was 698 days. Probation order two years
- Assault - 2015 - four months' custody and two years' probation.

[135] The above does not deal with the predicate offence which is summarized above in my reasons on the determinate sentence.

[136] However, I will say in summary that the Offender stole a car, ran a stop sign and caused a series of accidents, attempted to force a woman sitting in her car to open her door to give him a ride. When she refused, he yanked on her locked door handle multiple times and then slammed his hand on the hood of her car and only ran away when she honked her horn. He ran to the nearby Petro-Canada, stole a bottle of Coke, threw items in the gas station around, swung a 2x4 around in the presence of people in the gas station, dented a refrigerator, demanded a cigarette and a ride from a customer in his car and when the customer refused and started to leave, the Offender swung his 2x4 at the driver's side window, smashed it, cutting the driver's face, and then chased the moving car as it left the station. All the victims report being badly frightened by the incidents.

[137] After the incident at the gas station, the Offender saw another car occupied by two people. He demanded a ride, was refused and then tried to pull the driver from the car. The driver resisted and the Offender ripped his shirt. When the driver would not leave the car, the Offender pushed into the car and tried to start it. The other passenger honked the horn repeatedly until the Offender was pulled from the vehicle and held down by two men until the police arrived.

- [138] The driver and passenger were also frightened by the incident and had their personal sense of safety seriously undermined.
- [139] The Offender attempted to resist the police efforts to search him and struggled until he was subdued by physical force. He was shouting, agitated, and angry.
- [140] The Crown has outlined a number of dangerous assaults that occurred before the predicate offence. What is clear from the account of these offences is that they are violent and frightening and apparently unprovoked. In 2012, the Offender caused serious injury to an unarmed man when he cut him with a sickle. The injury resulted in permanent injury to the radial nerve that required surgery. The Offender was found in possession of several dangerous weapons, including an improvised bullet launcher containing a bullet. He also had ammunition.
- [141] He was at the time subject to two weapons prohibitions orders that forbade him from possessing ammunition and explosive substances.
- [142] The victim of that assault expressed the impact of the attack as major and said that it had ended his life as he knew it.
- [143] His 2013 assault of another inmate at North Fraser Pre-trial Centre ("NFPC") was savage and unprovoked. It may have stemmed from the victim being destined for protective custody.
- [144] A screwdriver was observed in the hands of the Offender as he lunged at a victim when he was observed by police in 2009. He was found to be in possession of bear spray when searched on arrest.
- [145] When he breached his conditional sentence order ("CSO") in March 2009, he was arrested in possession of a knife and was inside his no-go area. He was yelling and screaming on arrest.
- [146] This incident above was preceded by another breach when he was arrested for being in his restricted area and intoxicated. He threatened the arresting officers with death after he had completed his four-month CSO.
- [147] The Offender persuaded the Court to give him another chance and he was given another lenient sentence.
- [148] Looking back through the criminal history of the Offender, there are many occasions where the Offender has been given the benefit of the doubt based partly on his Aboriginal heritage and on at least one occasion, given the opportunity to go to detox and rehab after a very short sentence for an assault that occurred while he was on probation.

- [149] I will note a robbery in May 2005 in which the Offender threatened to kill a small female store clerk if she did not give him her money. He threatened a person who entered the store and chased him out while he was committing the robbery. The observer called 9-1-1. The Offender was caught by a police dog who tracked him and the money was recovered. He was given a CSO and allowed to attend a Christian facility.
- [150] I have reviewed two pre-sentence reports. They are dated 2014 and 2018 (an addendum to the 2014 report). They are replete with details of the truly terrible childhood of the Offender. They also detail the Offender's continuing and historical dependence on alcohol, cocaine, heroin and crystal meth. He has not achieved any success in recovery programs despite having some support from his mother, brother and Mr. Friesen, a family friend.
- [151] In fact, his probation officer stated in 2014 that he "Never did treatment, nor expressed any interest in it."
- [152] While in custody, his corrections file shows that the Offender was involved several times in peer violence, was unpredictable and aggressive and non-compliant with staff. His placement in segregation was inevitable with these behaviours since the staff had to take into consideration not only his safety but that of the other inmates as well.
- [153] There were attempts to reintegrate him but they were not successful. He resisted placement in the mental health unit and even rejected the efforts of the mental health team to reach him while he was in segregation.
- [154] The Offender takes some responsibility for the incident at the gas station, blaming it on a "harsh nervous breakdown" but refuses to acknowledge his culpability for the theft of the car, the attempted theft of Ms. Rogers' car and the robbery of Mr. Gee.
- [155] Another example of his determined non-compliance is his assertion that a probation order dated December 10, 2014 was illegal and therefore he would not sign one of the two orders.
- [156] He has a pattern of non-compliance, neglecting orders for drug treatment and the conditions of his probation orders. He has been convicted of at least nine breaches since a conviction for aggravated assault in 2012.
- [157] Ben Atkinson, the Assistant Deputy Warden of Classification and Case Management at NFPC is in charge of the segregation unit where the Offender has spent much of his time while at NFPC, first awaiting trial and then awaiting sentencing.
- [158] He would see the Offender when he is on his rounds. Often he has a brief interaction with the Offender. He tries to determine whether his segregation classification still applies or if an alternative disposition is possible. He holds discussions with the Correctional officers on the unit to learn how the Offender is coping.

- [159] His job on initial intake following an interview with the classification officer where the Offender's history was considered, is to attempt to integrate the Offender with his peers. However, because of the Offender's issues with peer violence that put him or his peers at risk, there was little possibility of placing him in the general population.
- [160] The Offender spent most of his time at NFPC in the isolation unit. Here, he was kept apart from his peers but not segregated in the sense of being held in solitary confinement. Enhanced supervision was another option for the Offender but there were threats from his peers so that segregation became the only way to ensure his and others' safety.
- [161] In the unit where the Offender was held, he had some facilities available such as an exercise bike, chin-up bar, television in his cell, and a kitchen. He would have escorted access to the law library, some peer interaction and access to a Mental Health Liaison Officer. He would have educational programming available to him as well.
- [162] Some limited programming is available to inmates in longer-term segregation.
- [163] The Offender has taken advantage of some programs such as smudging. He refuses to do more than visit the mental health unit to use the gym and the yard because he is fearful of being labelled a "bug".
- [164] The Mental Health Liaison Officer sees that the Offender is provided with journals to write in but despite the Offender displaying symptoms consistent with mental illness, he will not accept treatment.
- [165] Once an inmate has been in the mental health unit or segregation, it is difficult to reintegrate into the general population.
- [166] Mr. Atkinson explained that an inmate coming from segregation may suffer as a result of guilt by association: having mixed with gang members or "bugs" (the mentally ill) would put that inmate at risk in the general population.
- [167] The C-logs reveal a history of disciplinary incidents involving the Offender and complaints made by the Offender and dealt with under the Correction Act Regulation, B.C. Reg. 58/05, and protocols.
- [168] His disciplinary issues arise mostly due to refusals to cooperate with staff requests or unreasonable demands that when denied, result in the equivalent of a temper tantrum for which he will be written up.
- [169] The C-logs disclose a pattern of violence in custody.
- [170] The Offender has also become obsessed with the sense that his food is contaminated with feces and will often reject the food delivered to him. His complaints in this regard show up in the C-logs.
- [171] However, the C-logs also indicate periods of time when he is getting along with staff.

- [172] Mr. Atkinson's comment about the Offender is that he functions well in separate confinement but could not do well in the general population. He is often polite but has not infrequent negative interactions with staff. The Offender watches television until late at night or raps and sings and then sleeps until late in the day. He receives three to six hours out of his cell daily but often refuses the opportunity to leave his cell. In that case, his cell door is left open for the period of his break.
- [173] The Offender has no communication with other inmates but does speak to officers and the Mental Health Liaison Coordinator.
- [174] Nicole Easton testified to the provincial programs that would be available to the Offender. The particular difficulty with provincial programs is that a provincial sentence does not afford sufficient time for the kind of intensive programs that would likely benefit the Offender with his long-term addiction issues. There are also often waitlists for the programs available and the participants must sign up themselves.
- [175] However, as defence counsel pointed out, there is no prohibition against attaching a long-term supervision order to a provincial sentence.
- [176] A short sentence does present difficulties with insufficient time to complete intensive programing at the level required for this offender.
- [177] Candace Goldstone, the Regional Program Manager for Correctional Service Canada - Pacific Region, testified to the process and the programs available in the federal system.
- [178] The high intensity programs in the federal system attempt to target the factors that led an inmate to commit the crimes of which that inmate was convicted.
- [179] The programs begin on intake with an extensive assessment of the security and medical needs of the offender with that assessment's goal to lead to a correctional plan for the inmate to follow through their time in prison and on release.
- [180] The assessment can take up to 90 days to complete while parole officers gather as much information as possible to develop the criminal profile and the correctional plan.
- [181] The Aboriginal Integrated Correctional Program Model and the high intensity Multi-Target Program are the programs that the Offender would be eligible for and encouraged to participate in. These programs operate on a voluntary basis but there is a motivational module to assist offenders who refuse to participate or drop out or require assistance with.
- [182] These programs take place over six months at 112 sessions of two to two and one-half hours and the motivational component is 66 sessions. Ultimately, the programs aim to help the inmates' successful reintegration into society.
- [183] To conduct the Aboriginal Integrated Correctional Program, CSC uses two facilitators who are either Indigenous or culturally competent. There is 50% elder involvement to assist with 12 group members.

- [184] Continuity is attempted within the programs with the same facilitators used wherever possible.
- [185] The programs attempt to deal with anti-social attitudes and to develop social skills and behaviour.
- [186] Every session has accountability built in including an exploration of risk factors that were part of the reasons the offender committed the crimes she/he is incarcerated for. The offenders are encouraged to take responsibility for their behaviour and they are informed that a report about their participation will be sent to the parole board.
- [187] There are two one-on-one sessions scheduled in the programs and more could be allowed. But the process relies on peer-to-peer learning and more one-on-one sessions may be antithetical to this.
- [188] There is an adapted version of the programs available for those with cognitive or mental health issues. This is separate from the Aboriginal Integrated Correctional Program but if an Indigenous offender participates in the adapted program, CSC employs elders to meet one-on-one with the offender. These elders are encouraged to help the offender participate in cultural activities.
- [189] There is a maintenance program available in the community with one to two- hour sessions per week. The community program attempts to achieve further integration of skills learned in the programs and provide an opportunity to talk about successes, issues, relationships, triggers and interactions with others.
- [190] Offenders with mental health issues can be handled through the regional treatment centre ("RTC") and if those issues become significant, the offender could go back to the RTC until stabilized.
- [191] If an offender is compliant and also has a "shortish" sentence, he/she may be eligible for day parole after six months and therefore would be immediately placed in programs to allow for completion as soon as possible.
- [192] It is always the offender's choice whether he/she opts to participate in the Aboriginal programing available. For some offenders it is the first time they have identified as Indigenous and the first time they have ever met with an elder.
- [193] Shannon Plumpton is a parole officer supervisor for the Correctional Service of Canada. She supervises parole officers in Vancouver who themselves supervise those on conditional release, parole or long-term supervision orders.
- [194] The parole board itself is an independent tribunal with statutory authority under the Corrections and Conditional Release Act, S.C. 1992, c. 20 to consider parole, release and, as well, the imposition of release conditions on long-term offenders. It may grant, deny revoke or hold offenders until the warrant expiry date.

- [195] Long-term supervision orders only take effect once a sentence is completed or the warrant expires. After the last day of the actual sentence, the long-term supervision order activates.
- [196] Ms. Plumpton explained that between the completion of the sentence and the commencement of the long-term supervision order, comes the statutory release date.
- [197] Statutory release is a mandatory, non-discretionary form of release that takes place after the completion of two-thirds of a sentence. The release may be referred to where there is a formal designation dealing with the likelihood the offender will commit an offence causing serious harm or death, a sexual offence against a child, or a serious drug crime.
- [198] The statutory release means that there is a gap between the completion of sentence, expiry of the warrant and the implementation of the long-term supervision order. However, the offender on statutory release is supervised in the community by parole officers.
- [199] If a long-term offender does well on statutory release, when the sentence is completed, the degree of supervision in the community will likely be reduced.
- [200] The incarcerated offender may apply for temporary absence via day parole six months before the completion of one-third of the sentence. The parole board makes the decision based on the offender's progress, compliance and program completion.
- [201] If day parole is granted, the parole officer would write a report with a recommendation. It must be reviewed every six months and can be revoked if there are problems.
- [202] After completing one-third of the sentence, the offender may apply for full parole.
- [203] The CSC assesses the offender before release into the community some six to nine months before the date of parole eligibility. Secure housing, and treatment options for any substance abuse problem are canvassed in the CSC assessment.
- [204] The focus of the conditions for a parole order or a long-term supervision order is primarily the protection of the public but with rehabilitation as an important and parallel condition. When the parole board is considering release, it is attempting to determine the risk presented by the offender in the community based on the offender's history in custody. This determination of risk is made by the parole board at the parole hearing.
- [205] The parole board puts significant time, with careful consideration of the offender's history, into the development of appropriate conditions for a parole order and for the long-term supervision order.
- [206] Often there is consultation with the police in the area into which the offender is to be released. Where the offender has issues with mental illness, there will be consultation with the mental health team. Where there is a residence condition, there will be a visit to the home where the offender will stay.

- [207] If the parole officer decides that the risk of reoffending presented by the offender has increased, the frequency of reporting will also be increased.
- [208] If that risk is elevated to an unacceptable level, the parole officer can request the Parole board to re-assess conditions of the parole order at any time.
- [209] While the offender is in custody and taking part in the high intensity Aboriginal program, elders can assist with motivation for offenders. They also assist with culturally relevant teaching within the program.
- [210] Educational programs are made available along with social and vocational programming.
- [211] Typically, high risk offenders with a residence condition will live at an enhanced house on release. This type of halfway house has parole officers on site, security measures in place and is staffed 24 hours a day by at least two officers.
- [212] Where an offender on release demonstrates serious mental health issues, the parole board would issue a warrant and take the offender to the regional treatment centre. Initially, the offender could be held for 90 days but that is subject to a longer hold if necessary.
- [213] If the offender is high risk but has no residence condition as part of his parole or long-term supervision order, he would meet with his parole officer eight times a month. If he has a housing condition in place, that would be reduced to four times a month. Meetings can be as brief as 15 to 20 minutes or could take up to one hour, if necessary.
- [214] Probation officers check the activities of offenders and look to collateral sources to monitor adherence to conditions.
- [215] On conditional or statutory release, the offender can be returned to custody and the release suspended if the parole officer so decides. A rehearing can be held by the parole board where the release is revoked or its suspension cancelled and the offender returned to the community. Most often, the problem arises with the violation of a condition such as abstinence from drugs and alcohol or a no-contact order.
- [216] From the point of statutory release until the end of the sentence, parole officers and the parole board deal with breaches of conditions. After the commencement of the long-term supervision order, the Crown prosecutes breaches.
- [217] The Crown states the following in its submissions on Ms. Plumpton's evidence at paras. 141-42:
- [141] Offenders can earn their release based on the fact they have completed treatment and show manageable risk skills, have had good behaviour and can show parole and case management they have the skills to manage their risk on release. . . . offenders may be released on day parole (earlier eligibility date than full parole) to a half-way house before they get full parole where they can live on their own. . . . conditions would attach to their parole that would be supervised. She explained that the Correctional and Conditional

Release Act and Regulations and the special conditions of the parole board impose conditions upon release. She explained that curfews at halfway houses are usually about 11 or 11:30 pm to 6 am After that offenders are not generally supervised. There may be more supervised curfews and other conditions imposed.

[142] [S]elf admission is a "very important concept" throughout the entire supervision because offenders have a lot of liberty and spend their time unsupervised. Parole officers may meet with offenders once or at the most twice a week . . . but the rest of the time they are unsupervised other than limited observations and reporting that can occur at the halfway house. In the meetings the parole officers may discuss if there are any triggers, if anything has arisen in relation to risk and if there have been any violations in conditions and their activities. The idea is that the offender has a strategy to monitor themselves which has . . . been taught in custody via programming. Parole acts as a secondary body that supervises [the offender's own strategy.]

[218] It seems somewhat obvious that the system relies on the offender's ability to self-report honestly.

Expert Evidence of Dr. Shahram Lohrasbe

Dr. Lohrasbe's viva voce evidence

[219] Dr. Lohrasbe is a highly experienced forensic psychiatrist. He has done many assessments and opinions concerning long-term and dangerous offenders. He has previously testified before administrative bodies and many levels of court in British Columbia and other provinces. Additionally, he was a member of the B.C. Review Board between 1998 and 2004.

[220] His qualifications are extensive and defence counsel accepted his expertise.

[221] I accepted him as an expert in the field of forensic psychiatry. He has done more than 200 assessments since 1997 although he no longer performs in a therapeutic role.

[222] The Offender was not particularly cooperative with Dr. Lohrasbe.

[223] However, in a question and answer format, Dr. Lohrasbe was able to elicit not only some useful information but also received answers that manifestly demonstrated that the Offender shows symptoms of mental illness.

[224] Those symptoms included disordered thoughts, auditory hallucinations, clanging (changing word patterns into nonsensical strings) and use of neologisms (made up words).

[225] It is Dr. Lohrasbe's sense that the very long-term abuse of substances by the Offender has pre-disposed him to a form of psychosis that while not necessarily irrevocable, causes serious disruption to his coping ability.

- [226] Dr. Lohrasbe was asked to opine on the level of risk presented by the Offender. He concludes that the Offender currently presents a high level of risk, that he lacks insight into his mental problems, his violence and his need for treatment. He also concludes that the Offender lacks motivation to participate in the kinds of programs necessary for his rehabilitation.
- [227] He relies on the Offender's pattern of non-compliance with probation orders, and treatment orders and his refusal to cooperate with staff in custody, his refusal to take responsibility for his offences and his continued substance abuse that all point to a continuation of his offending, particularly when alcohol and drugs continue to be triggers for his violent criminal behaviours.
- [228] Dr. Lohrasbe believes that the Offender can be managed in the community and that he would do much better there than in continued custody. He is not in favour of a long sentence as he believes such a sentence would exacerbate mental illness in the Offender.
- [229] At the same time, Dr. Lohrasbe is very much in favour of the kinds of programming available in federal institutions as they are of higher intensity, are longer and have more continuity than those offered in provincial facilities.
- [230] He is very concerned that the Offender be properly assessed if he moves to the federal system. Following that, Dr. Lohrasbe thinks the Offender would be treated by the RTC. If diagnosed there with a mental illness, he would likely be given medications. The key to his successful treatment is stabilization of his mental illness. Once his mental illness is under control, he would then be able to concentrate on programming that could assist him with an understanding of how his substance abuse has triggered his violence and assist him with his reintegration into the community.
- [231] The Offender has never had this kind of intensive programming before.
- [232] Dr. Lohrasbe views the long-term offender designation as a very useful way of dealing with offenders who meet the criteria in the statute. If such an offender improves over the course of his order, then supervision will decrease but there is always a link with an entity that will keep track of the Offender for the length of the supervision order.
- [233] This continuity of care offers the kind of guidance that may help to keep the Offender connected with a path to better mental health and an improved attitude to society since he currently suffers from strong anti-social reactions. It does so without the baggage that accompanies a long period of incarceration.
- [234] Coupled with abstinence conditions and the sense that the Offender will be breached if he violates them, there is a reasonable possibility he can be managed in the community.
- [235] According to Dr. Lohrasbe, in the past the Offender has not complied with conditions of release but if he knows of the possibility of being returned to prison for longer periods of time each time he is breached, he may be able to remain compliant.

- [236] Dr. Lohrasbe agrees that the predicate offences are not the most violent he has seen but holds the view that the Offender has never learned to self-regulate and in the right circumstances, he could cause serious injury unless his risk factors can be reduced.
- [237] Certainly, the behaviour of the Offender before the Court was illustrative of his inability to self-regulate and necessitated the use of belly chains to control him.

Summary of Dr. Lohrasbe's Written Report

- [238] Dr. Lohrasbe based his assessment on an interview with the Offender, pre-sentence reports and trial proceedings from the Offender's past convictions, and reports generated by the NFPC containing notes from psychiatrists, psychologists, and other mental health professionals.
- [239] Dr. Lohrasbe opines that the interview with the Offender ruled out the possibility of malingering, the exaggeration of symptoms by a patient, usually with the intention of achieving an immediate goal such as the desire to stop medications. The Offender evidently responded to stimuli (in this instance, he seemed to answer to a voice speaking to him) that were absent but did not draw attention to the stimuli, showing hostility when questioned about whom he was speaking to. Additionally, he did not draw attention to his symptoms. Therefore, it is unlikely that the Offender attempted to exaggerate his symptoms.
- [240] Dr. Lohrasbe is certain that the Offender was psychotic during their interview. The report notes that the Offender also suffered from a psychosis in May 2017 and was later certified under the Mental Health Act, R.S.B.C. 1996, c. 288. However, since he has been incarcerated with close supervision for a majority of the past two years, the psychosis cannot be attributed to ongoing drug use. Instead, it is likely the psychosis is attributable to the Offender's long-term pattern of substance abuse and prolonged periods of isolation during the course of his incarceration.
- [241] His chronic drug use may have contributed to the Offender's psychosis in three ways: through inducing psychosis during intense periods of drug use and withdrawal, through creating a "standalone" psychiatric disorder independent of the substance abuse, and lastly through the surfacing of an underlying mental health issue by the substance abuse. In addition, periods of isolation during incarceration may have had the effect of worsening the Offender's mental health. A definitive diagnosis of the disorder causing the symptoms of psychosis is difficult without multiple interviews with the Offender, but Dr. Lohrasbe concludes that the diagnosis 'Psychosis of Unknown Origin' would be sufficient for the purposes of the assessment.
- [242] In addition to psychosis, Dr. Lohrasbe concludes that the Offender exhibits Antisocial Personality Disorder ("ASPD"). The report notes that the utility of an ASPD diagnosis has been questioned and that the Offender does not have an extreme form of ASPD known as Psychopathic Personality which is characteristic of individuals who elude treatment.

- [243] The report considers four categories of risk factors in assessing the Offender's risk of violence: historical, dispositional, contextual, and acute precipitating factors, concluding that all factors are present. Central to the risk is the presence of substance abuse. The Offender's difficult childhood with recurring violence and criminality indicates the presence of historical factors. A diagnosis of ASPD suggests that dispositional factors were present. The Offender's relations with criminals and other substance abusers are contextual factors. Lastly, his substance abuse and its related risks are an acute precipitating factor.
- [244] This last factor is particularly important in the Offender's risk assessment because drug and alcohol abuse are intimately connected to his violent behaviour in four broad ways. This is through the direct physiological effects of intoxication and withdrawal of substances, the Offender finding himself in situations such as bars, parties and street corners which tend to promote violence, instrumental violence promoted by the economic pressures of the need for drugs, and through participating in the drug subculture which is closely related to serious violence.
- [245] In addition to the broad risk assessment considered by the report, Dr. Lohrasbe adopts the widely-used HCR-20 methodology to qualitatively assess the Offender's risk of engaging in violent behaviour. Using the methodology, he concludes the presence and relevance of the vast majority of risk factors, which means that violence is likely to recur in the future.
- [246] HCR-20 organizes 20 factors into three scales covering past, present and future risks and asks the assessor to consider the factual presence and relevance of each factor to the case at hand. The report finds the presence and the direct or indirect relevance of a history of problems with violence, antisocial behaviour, relationships, employment, substance abuse, major mental disorder, personality disorder, traumatic experiences, violent attitudes, and treatment or supervision response.
- [247] This covers all risk factors in the historical scale used to measure past factors, and Dr. Lohrasbe notes substance abuse and problems with a major mental disorder as prominent considerations in determining the Offender's risk of violence. Factors relevant to present or recent circumstances are measured using the clinical scale. Under this scale, too, the report finds that all factors are relevant and present. These factors are recent problems with insight, violent ideation or intent, symptoms of major mental disorder, instability, and treatment or supervision response.
- [248] The risk management scale pertains to future problems and Dr. Lohrasbe notes the inherent difficulty in making assessments about future behaviour. He concludes that future problems with living situation, treatment or supervision response, and stressing or coping are present and relevant to the Offender's case. While the future problems with professional services and plans, and personal support are not currently present or relevant, the report asks that they be reconsidered before the Offender is released into the community.

- [249] In assessing the severity of risk, Dr. Lohrasbe finds there exists the potential of severe harm to a future victim. He notes that most of the Offender's acts are impulsive, tied to substance abuse, and do not indicate patterns of predatory, measured, or excessive violence. However, the Offender's frequent use of weapons and repeated threats are problematic and increase the potential severity of risk.
- [250] Dr. Lohrasbe then reviews the mitigating factors for risk of violence, noting that the mitigating factors are more likely to be effective in the federal rather than the provincial prison system. The strong link between the Offender's substance abuse and violence suggests that a reduction in substance abuse will drastically reduce the potential for violence.
- [251] The treatment of the Offender's psychosis would also be an important mitigating factor, including changing the Offender's view of high intensity treatment programing. Age is generally associated with a reduction in violence, which means that the Offender is likely to be less violent as he ages. The report notes that these long-term offender proceedings themselves may leave an impression on the Offender with respect to the gravity with which the Court treats his recurring violence.
- [252] High-intensity treatment programing is likely necessary in rehabilitating the Offender, but he remains determined not to take advantage of such a program, thus eliminating its effect as a mitigating factor. Dr. Lohrasbe notes that the Offender's stance on such programing may change if he receives treatment for his psychosis.
- [253] To manage the Offender's risk of violence, Dr. Lohrasbe recommends an initial focus on stabilizing the Offender's mental health at the regional treatment centre. Following that, high-intensity treatment programing and comprehensive risk assessment is recommended while the Offender is incarcerated. Once released into the community, the report emphasizes the importance of lengthy follow-up involving monitoring through frequent appointments, supervision through geographical and social restrictions, and ongoing mental health and substance abuse programing.

Conclusion

- [254] I agree with the Crown's submission that the Offender meets the criteria to be found a long-term offender.
- [255] He has committed an indictable offence, robbery, that is within the definition of a serious personal injury offence that involves the use or attempted use of violence against another person or conduct which endangered or was likely to endanger the life or safety of another person or likely to inflict severe psychological damage for which the offender may be sentenced to imprisonment for ten years or more: s. 752(a) (i) and (ii).
- [256] The Offender has been the subject of an assessment performed by an expert (Dr. Lohrasbe) for use of evidence in the application under s. 753.1.

- [257] There is little doubt that a sentence of two years or more is appropriate for this indictable offence since the range of sentence for robbery is very broad. This criterion set out in s. 753.1(1)(a) is also met.
- [258] Both the expert evidence of Dr. Lohrasbe that the Offender is a high risk and my consideration of all the evidence before me have persuaded me that there is a substantial risk the Offender will reoffend and may reoffend with violence. His past behaviour is an indicator of this substantial risk.
- [259] The fact that the Offender did not seriously injure any of the victims involved in the predicate offences is a matter of good luck rather than the Offender's restraint. His intoxication at the time of the offences does not excuse his behaviour, rather it triggered it. The victim impact statements make clear the fear and subsequent paranoia caused to the victims.

Is there a reasonable possibility of control of the Offender in the community?

- [260] To satisfy this requirement, I must be satisfied on the evidence that the Offender can be treated and treated within the time allowed by the term of the long-term supervision order.
- [261] There must be more than a mere hope that the Offender will benefit from treatment: *R. v. Natomagan*, 2012 SKCA 46 at para 32.
- [262] Here, there is always a degree of conjecture that an event will occur in the future but based on the evidence before me, and the fact that the Offender is an intelligent man, leads me to believe that once his mental illness is properly diagnosed and stabilized, he will be able to benefit from the high intensity Multi-Target Aboriginal Program available in federal institutions. He has never had the benefit of such attention in the past.
- [263] The Offender's need for a connection with his culture and contact with elders has not been satisfied in the past. He will have many more such opportunities in a federal institution and on release and supervision.
- [264] Many more resources can be provided to assist the Offender even after release than would otherwise be available after his warrant has expired.
- [265] His mother has commented on his need for post-release support.
- [266] The Offender has in the past been able to be abstinent for short periods of time. While abstinent, he has demonstrated progress. If he is once again able to remain sober, he will be able to better manage his treatment.
- [267] All of these factors will contribute to the management of his risk in the community, and protection of the public is the purpose of the long-term supervision order.

- [268] It is in the best interests of the public to protect it from the threat currently posed by the Offender and it is in the best interests of the Offender that he be given mental health treatment, intensive programming and the support represented by a long-term supervision order.
- [269] Therefore, I declare the Offender to be a long-term offender.
- [270] As for the term of the long-term supervision order, I accept Dr. Lohrasbe's position that there is little downside to a lengthy order. If the Offender demonstrates compliance with his conditions, his reporting will be reduced. If he is non-compliant, the risk he represents will be removed from the public because he will be breached. He can be returned to prison for up to the term of his supervision order.
- [271] I must consider his substance abuse issues and their trigger effects, the need to track his likely abstinence conditions, and the opportunity for quick action if he begins to use again. A long order will allow careful observation of the Offender on this issue.
- [272] The multiple "passes" the Offender has been given in the past with lenient sentences and alternative placements have not worked. Only lengthy supervision and support is going to effect the necessary changes for him to turn his life around.
- [273] Until the Offender is able to stop seeing himself as a victim of the system and takes responsibility for his actions, he will not take control of his life and accept treatment for his mental health problems. To take these steps, he will need continuing supervision and support.
- [274] The term of his long-term supervision order will be ten years and will be monitored by the parole board.
- [275] I grant the ancillary orders sought by the Crown as follows:
- There will be a lifetime mandatory firearms prohibition pursuant to section 109(1).
 - There will be a mandatory primary designated DNA order pursuant to section 487.051(1) to attach to count 5, the robbery of Finn McCord.
 - There will be a mandatory order pursuant to s. 760 that a copy of all reports and testimony given by psychiatrists, psychologists, criminologists and any other experts and the reasons for judgment of the Court on the trial and on the sentencing and the declaration of the long-term offender designation and long-term supervision order together with a trial transcript of the Offender's trial be forwarded to Correctional Service Canada.
 - I order that a transcript of Dr. Lohrasbe's evidence from these proceedings also be forwarded to Correctional Service Canada.
- [276] I do not have the power to make the following orders but at the request of Crown, I will make the following recommendations:

- The Offender should attend at the Regional Assessment Centre for a 30-day assessment and then be transferred to the RTC where he can receive treatment to be stabilized and enter psychiatric treatment for what Dr. Lohrasbe believes is thought disorder and psychosis of unknown origin;
- Once the Offender is stabilized, he should immediately enter the high-intensity programing offered in the federal system;
- Upon his release from custody, the Offender should report as directed to the Forensic Outpatient clinic in Vancouver or to a similar clinic as specified if he does not remain in Vancouver;
- Upon his release from custody, he should attend, participate in and complete any counselling as directed and abstain from using alcohol or any drugs not prescribed to him by a qualified medical practitioner.

"Russell J."

The Honourable Madam Justice Russell

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