
CANADA / JUDGMENT

R. v. Kelly

2006 BCSC 778

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 778 R. v. Kelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kelly,

2006 BCSC 778

Date: 20060516

Docket: CC011648 & 23575

Registry: Vancouver

Between:

Regina

And

Michael Edward Kelly

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Crown:

M. Brundrett

R. Cutler

Counsel for the Accused:

J. Ray

Dates and Place of Trial/Hearing:

February 20, 21 and 22;

March 22, 23 and 31, 2006

Vancouver, B.C.

INTRODUCTION

- [1] The Crown has applied under Part XXIV of the Criminal Code, R.S.C. 1985, c. C-46 [the "Code"] to have Michael Edward Kelly declared a dangerous offender.
- [2] Mr. Kelly was born on November 27, 1962 and is now 43 years old.
- [3] This application is unusual in that Mr. Kelly is before the Court for sentencing in 2006 concerning offences that were committed in 1991 and 1998. Mr. Kelly has now been in custody for almost eight years and I am told that he is now the longest serving inmate on remand in British Columbia.

THE PREDICATE OFFENCES

- [4] The offences out of which this dangerous offender hearing arise are:
 - (1) sexual assault of a prostitute on September 15, 1991 that caused her bodily harm contrary to s. 272(c) of the Code; and
 - (2) breaking and entering into the home of an elderly woman and committing the indictable offence of robbery therein contrary to s. 348(1)(b) of the Code.
- [5] Mr. Kelly pleaded guilty to each offence.
- [6] On this hearing the circumstances of each were the subject of Agreed Statements of Fact for Sentencing.
- [7] Concerning the 1991 sexual assault conviction the parties agreed that:
 - 1. On September 15, 1991 the complainant [W.] was 19 years old and working as a prostitute in the 500 block of Nelson St., Vancouver near Nelson and Richards.
 - 2. Just after midnight, the accused Michael Kelly drove up alone to the complainant who was standing on the street. They struck up a deal to attend his hotel room for sexual relations, in spite of the "weird vibes" that [W.] got from Kelly (over attending his hotel instead of hers). The complainant noted his license plate number saying it aloud to him and several of her friends working nearby.
 - 3. [W.'s] friends repeated the plate number by making a "little song out of it." Kelly gave [W.] his hotel key which she showed to her friends and announced the hotel name and room number so that he knew that they knew where she was going. The truck Kelly was driving was registered to him at the time of the offence.

4. [W.] and Kelly went to the "Delmar Hotel" at 533 Hamilton Street, Vancouver, room #7 for the purpose of sexual relations. They sat on the bed. Kelly told [W.] he just got out of jail "for drugs." Kelly kept sniffing a brown vial from which she could smell fumes. [W.] thought Kelly appeared to be on drugs.
5. When [W.] asked Kelly to "look after the finances," he snapped, grabbed her and pushed her down onto the bed saying he wanted to fuck. [W.] begged Kelly not to do this. [W.] started to cry.
6. [W.] pleaded with Kelly not to do this to her telling him she didn't care about the money. Kelly tore off her clothes. [W.] struggled and pleaded with Kelly not to do this telling Kelly she had a son and would show him a picture. She asked Kelly to at least use a condom." [W.] begged, "please don't do this to me" and told him that she had AIDS.
7. Kelly said he didn't believe her and started forcing intercourse. [W.] then grabbed Kelly's penis and testicles and twisted as hard as she could but Kelly did not react. [W.] then screamed for help as loud as she could.
8. Kelly put his hand over [W.'s] mouth and nose cutting off her breathing, then punched her with one knuckle three times to the left eye. Kelly said, "If you do that again I'm going to get really angry." Kelly asked [W.], ["Are you going to be good?" [W.] nodded. Kelly then let go of [W.'s] mouth and nose.
9. [W.] tried without success to put a condom on Kelly. Kelly pulled the condom off. Kelly attempted to perform oral sex on [W.]. She resisted. Kelly digitally penetrated her. [W.] was crying and pleading.
10. [W.] screamed for help thinking that someone could hear her through the vents in the door. This made Kelly "very angry." Kelly again put his hand over her mouth and nose for a second time. He demanded for her "to behave" and when she agreed he released her.
11. Kelly penetrated [W.] with his penis and ejaculated after a short time. Then he got up and said, "Ok, I don't want to hurt you anymore. Go Leave." Kelly told [W.] to put her clothes on.
12. During the incident, [W.] had been convinced that Kelly was going to kill her when he was finished.
13. [W.] ran from the room. She heard Kelly calling after her, "[S., S.], where are you going?" She continued running and hid in an upstairs bathroom until Kelly was gone.
14. [W.] called police from a pay phone in the lobby and waited for the police and ambulance to attend at that location.

15. Later the same day (Sept. 15, 1991), [W.] was examined by Dr. J. Seely at Shaughnessy Hospital. Dr. Seely reported that [W.'s] shoulder had been dislocated and relocated during the incident (which had apparently occurred previously to the complainant). Dr. Seely noted two scratches and an early bruise developing on [W.'s] left shoulder as well as a two to three centimeter wide bruise beneath her left eye. Dr. Seely noted no other injuries.
 16. During the medical examination of [W.], Dr. Seely took swabs [of the] vaginal area, took clippings of her pubic hair which appeared to have sperm on them, and seized [W.'s] clothing.
 17. Following the incident, Detective Lepine of the Vancouver Police Department Sexual Offence Squad was assigned to the case. He prepared a photo-lineup with a picture of the accused. However, he was unable to locate [W.] after the incident and never showed the lineup to anyone. On April 6, 1992, Det. Lepine concluded the case as inactive.
 18. On January 18, 2000, at the request of the victim [W.], the Vancouver Police reopened the inactive investigation and conducted follow-up interviews with various witnesses including [W.].
 19. On February 14, 2000, the Vancouver Police forwarded to the RCMP Forensic Biology lab several exhibits in relation to this case including vaginal swabs taken by Dr. Seely from [W.] in 1991. The RCMP lab confirmed the presence of spermatozoa and a single male DNA profile on the vaginal swabs.
 20. A DNA warrant was executed by the police on Mr. Kelly on June 15, 2000. As a result, a sample of Mr. Kelly's DNA was obtained by the police and forwarded to the RCMP Forensic Biology Lab. Mr. Kelly's warrant sample of DNA was found by a qualified forensic biologist to match two vaginal swabs taken from the complainant by Dr. Seely. The chance of selecting an unrelated individual at random from the Canadian caucasian population with a matching profile was found to be 1 in 37 billion.
 21. Kelly was formally charged on December 7, 2000 with sexual assault causing bodily harm in relation to this matter. A preliminary hearing was conducted on October 22, 2001 in Vancouver.
- [8] Concerning the 1998 break and enter conviction the parties agreed that
1. On the afternoon of Sunday, June 21st, 1998, Mrs. Margaret Hunt, a 78 year old woman, went for lunch in Sechelt with her son, daughter in law, and granddaughter. After lunch, she returned to her home, located at 5725 Anchor Road, Sechelt, where she lives alone. Mrs. Hunt was going to do some gardening and had changed into her gardening clothes.
 2. As she was about to start gardening, another son from Alberta telephoned her. At about 4:30, while she was still on the telephone, the offender Michael Kelly knocked on her door. She put the telephone down and opened the door. Kelly asked for "Don". Mrs. Hunt told Kelly that nobody named "Don" lived there. Kelly asked if she was sure, and she stated that she

was sure. Kelly became talkative, and he and Mrs. Hunt spoke for a few seconds. He then asked if he could come in and telephone "Don". Mrs. Hunt told him that she did not allow anybody into her house, but that if Kelly gave her the telephone number for "Don", she'd call on his behalf.

3. Kelly initially fumbled through one of his pockets, then quickly stepped through the door. Kelly had a large stone with him when he entered the house, but dropped it once inside.
4. Kelly then grabbed Mrs. Hunt by both shoulders. He closed the door with his foot. He told Mrs. Hunt "I won't hurt you, but I want money. Where's the money? You've got money, haven't you?" Mrs. Hunt replied that she had some money, that it was in her handbag.
5. At this point, Kelly began being rough with Mrs. Hunt, gripping both her shoulders from behind and shaking her. As Mrs. Hunt struggled to get away from Kelly, he got rougher, and the two wrestled.
6. Mrs. Hunt began to scream, and Kelly placed his hand firmly over her mouth to stop her from screaming. He pushed her further into the house, towards the living room then outside her bedroom door. Mrs. Hunt told Kelly that her money was not in the bedroom, but he pushed her into the bedroom and again said "Where's the money?"
7. Kelly still had a hold of Mrs. Hunt by the shoulders at this point. Mrs. Hunt was able to pick up a heavy flashlight and struck Kelly on the head with it.
8. The struggle continued, and Kelly picked up an electric heating pad and waved it at her, stretching the cord as if Kelly would use the cord to strangle her.
9. Kelly backed off for a moment, and Mrs. Hunt ran to the bathroom, climbed onto the toilet and basin, and dove through the bathroom window and fell 8 feet onto her sundeck, where she called for help.
10. Kelly fled the house at this point, but his wallet, containing his identification, had fallen from his pocket on the stair just outside the front door, and it was found by neighbours who had come to help Mrs. Hunt,.
11. Mrs. Hunt sustained extensive abrasions and bruises as well as long lasting emotional trauma.

PRIOR CRIMINAL CONVICTIONS

- [9] Most cases involving applications to have an accused person declared a dangerous offender arise in circumstances where the predicate or index offences were preceded by other criminal convictions involving similar criminal behaviour.
- [10] Mr. Kelly's case is no different. He has committed the following offences for which he was sentenced as indicated:

1981-01-20

VANCOUVER BC

- (1) TRAFFICKING IN A NARCOTIC
- (2) TRAFFICKING IN A NARCOTIC
- (1) 7 DAYS
- (2) SUSP SENT & PROBATION FOR 18 MOS

1983-01-14

VANCOUVER BC

ROBBERY

6 MOS

1983-05-27

VANCOUVER BC

TRAFFICKING IN A NARCOTIC

14 DAYS

1983-10-19

NORTH VANCOUVER

BREACH OF PROBATION

14 DAYS

1983-12-21

VANCOUVER BC

- (1) ASSAULT WITH A WEAPON
- (2) SEXUAL ASSAULT WITH A WEAPON
- (3) ASSAULT
- (1) 1 YR & PROBATION FOR 2 YRS UPON RELEASE
- (2) 18 MOS CONC & PROBATION FOR 2 YRS UPON RELEASE
- (3) 8 MOS CONC & PROBATION FOR 2 YRS UPON RELEASE

1986-05-30

VANCOUVER BC

MISCHIEF TO PRIVATE PROPERTY

30 DAYS

1987-07-10

VANCOUVER BC

SEXUAL ASSAULT

4 YRS

1987-07-24

VANCOUVER BC

FAIL TO COMPLY

30 DAYS CONC WITH SENT SERVING

1991-12-24

SURREY BC

FAIL TO STOP AT SCENE OF ACCIDENT

\$500

& PROBATION 9 MOS

1992-05-01

VANCOUVER BC

ROBBERY

5 YRS

& PROHIBITED FIREARMS, AMMUNITION OR EXPLOSIVE SUBSTANCES FOR 5 YRS

1998-02-03

CALGARY ALTA

(1) ASSAULT A PEACE OFFICER

(2) OBSTRUCT PEACE OFFICER

237275

(1) SUSP SENT & PROBATION 18 MOS

(2) 1 DAY

1998-06-09

MISCHIEF

1 DAY

1998-07-07

VANCOUVER BC

THEFT

6 MO(S)

- [11] In addition to that adult criminal record, Mr. Kelly committed offences as a Young Offender in 1978 and 1979 that included assault, mischief, driving without insurance, indecent assault (of a female), break and enter, theft and possession of marijuana, for all of which offences he was sentenced to probation until his 17th birthday.
- [12] Mr. Kelly's criminal record establishes that he was sentenced to incarceration for a total of almost 14 years in the 17 years between the ages of 19 and 36. His record also indicates that he was subject to probation for most if not all of the balance of those 17 years before he was incarcerated for the 1998 predicate offence of breaking and entering into Ms. Hunt's home in Sechelt.
- [13] It is thus fair to say that rarely, if ever, since he turned 15, has Mr. Kelly not been subject to state control as a consequence of his criminal offending.
- [14] Mr. Kelly's prior offending and the failure of criminal sanctions to curb his criminal behaviour is obviously important to the determination of whether Mr. Kelly should be sentenced as a dangerous offender.
- [15] Of particular importance are those prior offences involving violence and sexual offending.
- [16] For the purpose of sentencing, the parties were able to agree that the following underlying facts gave rise to those most significant offences for which Mr. Kelly was previously convicted and sentenced:

Robbery - April 9, 1982

1. On the 9th day of April, 1982, shortly after 7:00 in the morning, the victim, a 50 year old woman, was proceeding eastbound on Nelson Street in Vancouver, British Columbia, while the offender, Kelly, was walking westbound.
2. The victim walked past Kelly. A few seconds later, Kelly approached the victim from behind, grabbed her around the throat and threw her to the ground saying "Don't scream you slut".
3. In being knocked to the ground, the victim split her lip open resulting in bleeding.
4. Kelly then picked up the victim's purse and ran away.
5. Kelly was arrested approximately 20 minutes later and in possession of monies of the victim.

6. Kelly was sentenced to 6 months in jail on January 4, 1983.

Assault with a weapon - June 6, 1983

1. On June 6, 1983 at approximately nine o'clock in the evening, the offender Kelly approached the victim on the sidewalk of 2000 block of Barkley in Vancouver, British Columbia, put his arm around the victim and stated "I've got a .45 and I'm going to kill you. Follow me into the park."
2. Kelly repeated these threats numerous times.
3. The victim refused to go into the park at which point Kelly became more aggressive and began to pull at the victim's arm stating "Let's go into the park".
4. The victim pulled away, at which point the victim's boyfriend appeared and Kelly fled.
5. Kelly was convicted of assault with a weapon and on December 21, 1983 sentenced to one year in jail.

Sexual assault with a weapon and assault - June 6, 1983

1. On June 6, 1983 at approximately 9:15 in the evening, on a sidewalk adjacent to Stanley Park, in Vancouver, British Columbia, the offender Kelly walked up behind an elderly woman and put his arm around her neck and said "Don't make any noise, I have a .38, I'll blow you away".
2. The victim started yelling at which point Kelly stated "Just shut up, don't scream or I'll kill you".
3. The victim attempted to wrestle away from Kelly but was unable to as Kelly pulled the victim across the sidewalk and up against the wall of an apartment building at which point Kelly pulled the victim down and got on top of her.
4. Kelly attempted to hold his hand over the victim's mouth at which point the victim felt as if she were suffocating. Kelly then said "If you promise not to scream, I'll take my hand away."
5. During this time, Kelly was tugging at the victim's skirt and eventually ripped the skirt off.
6. The victim started to scream again and said "For god's sake, I'm old, what's the matter with you."
7. Kelly responded "See how easy it is to kill somebody".
8. The victim then said "I have a little money, take the money", to which Kelly replied "You know what I want".
9. At that time, a lady passing by observed Kelly and the victim struggling on the ground and proceeded to hit Kelly on the head with her hand.

10. Kelly then got up and kicked the passer-by and struck her in the mouth and pushed her onto the ground. While the passer-by was on the ground, Kelly kicked her in the chest and on the side before fleeing into the park.
11. Kelly was convicted of sexual assault with a weapon and assault for this incident and was sentenced to 18 months and 8 months respectively.

Sexual Assault - July 10, 1986

1. During the afternoon of July 10, 1986, in Vancouver, British Columbia, the offender, Kelly, invited a fourteen year old girl, who he had met the day before, to his apartment to watch TV.
2. The two proceeded to Kelly's apartment where they watched TV for a couple of hours in the presence of Kelly's roommate.
3. When Kelly's roommate left the apartment Kelly asked the victim if she wanted to make love, to which she replied no.
4. Kelly then grabbed the victim's wrist. The victim resisted and a struggle ensued during which Kelly kicked the victim in the stomach.
5. Kelly managed to get the victim on her back while she was yelling "Don't. Don't. Don't." Kelly then pinned the victim on her back while holding her wrists and sitting on her legs.
6. Kelly threatened to hurt the victim if she did not have intercourse with him. Kelly then pulled off the victims clothes and performed oral sex on the victim against her will. He also had vaginal intercourse with her against her will. He then repeated the act.
7. The victim was crying throughout the incident and when Kelly got off the victim she went to the bathroom. When she exited the bathroom, Kelly attempted to prevent her from leaving indicating that he was sorry, but she persisted and Kelly let her go.
8. Kelly pled guilty to the charge of sexual assault and on July 10, 1987 he was sentenced to four years in jail.

Robbery - March 1, 1992

1. At approximately 7:30 on the evening on March 1, 1992, in Vancouver, British Columbia, the offender, Kelly, knocked at the residence of the victim, a 92 year old woman with a pacemaker. The victim was the landlady of a building in which a friend of Kelly's lived.
2. The victim opened the door and Kelly asked for a person called "Jerry". The victim recognized Kelly from a previous occasion when Kelly had attended the house. The victim advised that "Jerry" did not live there.
3. Kelly indicated he wanted to use the phone and pushed the victim inside and he entered.

4. The victim indicated where the phone was and as she passed by Kelly he grabbed the victim by the mouth and by the throat and pushed her backwards towards a chair in the living room, which the victim fell against injuring her back. Kelly placed his hand over the victim's mouth to prevent her from yelling, although she nonetheless was able to cry out for help.
5. Kelly then picked the victim up with one hand on her mouth and the other hand on her throat and dragged her through the living room and the kitchen towards the bedroom. The victim fell down three or four times while she was being dragged and Kelly picked her up each time by the head and the neck.
6. Once in the bedroom, Kelly then threw the victim on the bed and lay on top of her and stated "Give me your money or I'll screw you."
7. The victim indicated that she had money in her purse, but Kelly would not get off the victim and continued to lay on top of the victim between her legs.
8. At this point, the police entered the bedroom as they had responded to a neighbour's call who had heard the victim's screams. The police pulled Kelly off the victim and arrested him.
9. Kelly pleaded guilty to robbery and on May 1, 1992 was sentenced to five years in jail and a firearms prohibition after the judge referred to the offence as a "brutal and senseless assault".

Assault Peace Officer - February 9, 1998

1. On February 2, 1998 in the early evening hours, the police in Calgary, Alberta were investigating a break and enter when a police officer approached the offender Kelly who was walking on the sidewalk in the vicinity of the break and enter.
2. Upon being approached, Kelly ran away from the police officer. The police officer chased and apprehended Kelly in an alley where he had to be subdued.
3. Kelly was transported back to the detachment and upon arrival was being assisted out of the police vehicle when he suddenly kicked at a female police officer's head and made contact with her right jaw, knocking her backwards.
4. Kelly pled guilty to assaulting a peace officer and was sentence[d] to one day in jail and 18 months probation.

Theft and Possession of a Weapon - June 23, 1998

1. On June 23, 1998 at approximately five o'clock in the afternoon, the offender, Kelly, attended at a gift shop at the Sheraton Wall Centre Hotel in Vancouver, British Columbia and selected a disposable lighter.

2. Kelly approached the cashier of the store and provided her monies to purchase the lighter. When the cashier opened the cash register, Kelly reached over and grabbed money from the cash register drawer in the amount of \$185.00. The cashier screamed and Kelly ran from the store with the money.
3. Two hotel employees heard the scream and pursued Kelly. The employees caught Kelly and wrestled him to the floor. Kelly had the stolen money in one hand and a seven inch steak knife in the other hand. During the struggle, one of the hotel employees was stabbed in the shin and the right groin area. Kelly was also stabbed in the stomach.
4. Kelly was sentenced to six months in jail for theft of money and possession of a weapon, a knife, for a purpose dangerous to the public peace.

CHRONOLOGY OF EVENTS SINCE 1998

- [17] As I noted above, Mr. Kelly has been incarcerated since 1998 pending determination of these dangerous offender proceedings.
- [18] That unusual circumstance arose from the following sequence of events:
- (1) In 1998, Mr. Kelly pleaded guilty to the predicate offence of breaking and entering the home of Ms. Hunt in Sechelt and committing robbery.
 - (2) As a consequence of that conviction, the Crown proceeded with a dangerous offender application.
 - (3) On May 3, 2000, following a lengthy hearing, Mr. Kelly was declared a dangerous offender by Rodgers Prov. Ct. J. but filed an appeal of that decision.
 - (4) Following the determination that he was a dangerous offender and pending the outcome of his appeal, Mr. Kelly was transferred from the Provincial to the Federal Corrections system.
 - (5) On December 7, 2000, Mr. Kelly was charged with the sexual assault of W. when she brought that offence to the attention of the police for the first time that year.
 - (6) On October 22, 2001, a preliminary inquiry was held on the 1991 sexual assault causing bodily harm charge. Mr. Kelly was committed to stand trial and has remained in remand on that charge since then.
 - (7) On February 14, 2002, Mr. Kelly was successful in his appeal of his dangerous offender designation by Rodgers Prov. Ct. J. due to his failure to consider the long term offender provisions of Part XXIV of the Code. A new hearing was ordered.
 - (8) The Crown appealed that order as well as the Court of Appeal's companion decision in *R. v. Johnson* (2001), 158 C.C.C. (3d) 155, 2001 BCCA 456, 159 B.C.A.C. 255 and three other cases to the Supreme Court of Canada.

- (9) On September 26, 2003, the Supreme Court of Canada affirmed the Court of Appeal's decision (see: *R. v. Kelly*, [2003] 2 S.C.R. 400). The Court also dismissed the appeal in *R. v. Johnson*, [2003] 2 S.C.R. 357 [Johnson].
- (10) The rehearing of the Crown's dangerous offender application was set for hearing before Rodgers Prov. Ct. J. on January 26, 2004.
- (11) Mr. Kelly applied to have Rogers Prov. Ct. J. recuse himself and his application was dismissed.
- (12) Mr. Kelly then applied to this Court for an order prohibiting Rodgers Prov. Ct. J. from continuing the dangerous offender proceedings and on August 9, 2004, Warren J. granted that order (see: *R. v. Kelly*, 2004 BCSC 1063).
- (13) The Crown subsequently appealed Warren J.'s prohibition order and on January 27, 2005 that appeal was dismissed (see: *R. v. Kelly* (2005), 199 C.C.C. (3d) 336, 2005 BCCA 373, 214 B.C.A.C. 162).
- (14) Mr. Kelly pleaded guilty to both predicate offences before me in 2005 and these dangerous offender proceedings were brought by the Crown.

CODE REQUIREMENTS FOR DESIGNATION AS A DANGEROUS OFFENDER

- [19] There are two legislative prerequisites to a determination that an offender is a dangerous offender.
- [20] Firstly, the predicate offence must be a "serious personal injury offence" within the meaning of s. 752 of the Code.
- [21] Secondly, if I determine that either or both predicate offences are serious personal injury offences, I must then consider whether the evidence establishes that Mr. Kelly's offending fits the criteria for a determination of dangerousness by reason of the applicable provisions of s. 753.1.
- [22] The Crown submits that Mr. Kelly's offending establishes his dangerousness under each of the following specific criteria:
 - (1) s. 753(1)(a)(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;
 - (2) s. 753(1)(a)(ii) - a pattern of persistent aggressive behaviour by the offender, of which the offence for which he 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; and

- (3) s. 753 (1)(b) - [the offender's conduct] in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

LONG TERM OFFENDER CONSIDERATIONS

[23] If the evidence establishes that Mr. Kelly meets the criteria for designation as a dangerous offender, I must, before determining to sentence him as a dangerous offender, first apply the considerations enunciated by the Supreme Court of Canada in Johnson; that is, I must consider whether he would be appropriately declared a long term offender under s. 753.1 of the Code.

[24] Section 753.1 provides:

753.1(1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b) there is a substantial risk that the offender will reoffend; and
- (c) there is a reasonable possibility of eventual control of the risk in the community.

[25] Concerning the potential application of those provisions, the Court in Johnson stated at ¶ 31 to 32:

31 Almost every offender who satisfies the dangerous offender criteria will satisfy the first two criteria in the long-term offender provisions. In virtually every instance in which an offender is declared dangerous, it would have been appropriate to impose a sentence of imprisonment of two or more years in respect of the predicate offence and there will be a substantial risk that the offender will reoffend. In a certain percentage of those cases there will also be a reasonable possibility of eventual control of the risk in the community. In those instances in which the offender currently constitutes a threat to the life, safety or physical or mental well-being of other persons yet there is a reasonable possibility of eventual control of the risk in the community, an offender will satisfy the criteria in both the dangerous offender and long-term offender provisions. [Emphasis in original]

32 In those instances where both the dangerous and long-term offender provisions are satisfied, it may be that the sentencing sanctions available under the long-term offender provisions are capable of reducing the threat to the life, safety or physical or mental well-being of other persons to an acceptable level. Under s. 753.1(3), long-term offenders are sentenced to a definite term of imprisonment followed by a long-term community supervision order of a maximum of ten years in accordance with the Corrections and Conditional Release Act. Supervision conditions under s. 134.1(2) of the Act may include those that are "reasonable and necessary in order to protect

society". The very purpose of a long-term supervision order, then, is to protect society from the threat that the offender currently poses -- and to do so without resort to the blunt instrument of indeterminate detention. If the public threat can be reduced to an acceptable level through either a determinate period of detention or a determinate period of detention followed by a long-term supervision order, a sentencing judge cannot properly declare an offender dangerous and sentence him or her to an indeterminate period of detention.

[26] Also of importance to my consideration of the potential applicability of the long term offender provisions in this case is the question of the burden of proof related to those provisions.

[27] In its recent decision in *R. v. Wormell* (2005), 198 C.C.C. (3d) 252, 213 B.C.A.C. 223 [Wormell], our Court of Appeal determined that in *Johnson* the Supreme Court of Canada had rejected the proposition that in order to establish that an offender was a dangerous offender and not a long term offender the Crown was required to prove beyond a reasonable doubt that there was no reasonable possibility of eventual community control.

[28] In *Wormell* at ¶ 32 to 34 (in reasons concurred in by Ryan and Smith JJ.A.), Southin J.A. determined:

32 The task of the Court from beginning to end is to ask itself, "Am I satisfied that there is a reasonable possibility of eventual control of the risk in the community?" If the judge concludes that he or she is not so satisfied then the judge cannot designate the offender a long-term offender. [Emphasis in original.]

33 In my opinion, it is not right to approach this with burden of proof at the back of one's mind. Burden of proof, whether it is proof beyond a reasonable doubt or on a balance of probabilities, directs itself to determining past events.

34 While on a dangerous offender application the Crown must prove beyond a reasonable doubt past conduct of the accused which it says is relevant, there can be no burden of proof in the classic sense in the assessment of the future.

[29] Therefore to the extent that *Johnson* and *Wormell* are inconsistent with previous decisions of this Court and of the Court of Appeal that applied a standard of proof beyond a reasonable doubt to the question of the reasonable possibility of control of an offender in the community, such decisions must be read with caution.

DOES MR. KELLY MEET THE CRITERIA FOR DESIGNATION AS A DANGEROUS OFFENDER?

[30] I am satisfied that both the 1991 break and enter offence against Ms. Hunt and the 1998 sexual assault offence against W. are serious personal injury offences.

- [31] In the 1991 offence, Mr. Kelly threatened Ms. Hunt with violence, physically attacked her and caused her to suffer severe psychological damage. The 1998 sexual assault causing bodily harm offence involved serious violence and inflicted severe bodily and psychological damage upon W. Further, sexual assault causing bodily harm is defined as a serious personal injury offence under s. 752(b) of the Code.
- [32] The next issue to be determined is whether the Crown has proven that Mr. Kelly's offending meets the criteria under ss. 753(1)(a)(i) or (ii) and/or 753(1)(b) of the Code for sentencing as a dangerous offender.
- [33] Concerning ss. 753(1)(a)(i) and (ii), the Crown submits that Mr. Kelly's pattern of criminal offending over a period of 17 years as an adult prior to his incarceration for breaking and entering into Ms. Hunt's home in 1998, establishes a pattern of behaviour of failing to restrain himself and causing physical and severe psychological injury to such an extent that it is likely that he will similarly reoffend and cause similar injury in the future by reason of a continuation of his failure to restrain himself. The Crown also submits that Mr. Kelly's persistent aggressive behaviour, notwithstanding the many years of his incarceration for that behaviour, and his consistent infliction of harm on vulnerable female victims, establishes not only an inability to control his offending but also indifference to the consequences of that offending.
- [34] Concerning s. 753(1)(b) and Mr. Kelly's sexual offending, the Crown submits that: the number of sexual assaults of which he has been convicted; the fact that those assaults often occurred in public places; the violent nature of the sexual assaults including the use or threatened use of force or weapons; and the sexual overtones of some other offences, including most particularly the robbery of a 92 year old woman in 1992 (for which he was sentenced to five years incarceration), all establish that Mr. Kelly has shown a failure to control his sexual impulses, and the likelihood that he will in future be similarly unable to control his sexual impulses so that other victims will suffer injury and pain from his sexual offending.
- [35] In support of all of those submissions, the Crown relies upon the Agreed Statements of Fact for Sentencing concerning both the predicate offences and the prior criminal convictions that form part of Mr. Kelly's pattern of offending. It also points to his youth record and Mr. Kelly's admissions to corrections officials that he had committed numerous sexual assaults for which he was not convicted.
- [36] In addition, the Crown relies on the psychiatric and psychological assessments of Mr. Kelly that were conducted by Drs. O'Mahony, Ogloff and Lamba, and the testimony of the authors of those assessments concerning the likelihood of Mr. Kelly reoffending violently, sexually or both.

- [37] Dr. R.J. O'Mahony was directly involved in the administration of an "Intensive Treatment Program for Sex Offenders" in which Mr. Kelly participated for 8 months in 1996 at Correction Canada's Pacific Regional Health Centre while serving his five year sentence for the robbery of his 92 year old victim in 1992. As part of that program, Mr. Kelly was the subject of psychological and risk assessments concerning his past offending and the likelihood of his reoffending.
- [38] Dr. O'Mahony assessed Mr. Kelly as being a psychopath based on a score of 32 out of 40 on the Hare Psychopathy Checklist Revised (the PCL-R), and testified that his clinical observations were consistent with that diagnosis. In 1997, when Mr. Kelly was discharged from the intensive sex offender treatment program, Dr. O'Mahony was of the opinion that Mr. Kelly was at a high risk to reoffend violently, in part because of his risk of substance abuse after release from a controlled setting. After his release from jail in 1998, Mr. Kelly did seriously and violently reoffend when he committed the 1998 violent robbery of Ms. Hunt in her home in Sechelt.
- [39] Dr. O'Mahony testified that he remains of the opinion that there is a high risk that Mr. Kelly will reoffend both violently and sexually and that because he is both a violent and a sexual offender, his risk of reoffending is greater and much more difficult to treat. He remains of the opinion that Mr. Kelly's risk of reoffending both violently and sexually is exacerbated by his substance abuse problems which have in the past and will in future, if uncontrolled, serve as a disinhibitor to violent criminal and sexual offending, thus increasing the risk of such offending.
- [40] Dr. John Ogloff assessed Mr. Kelly in December of 1998 for the original dangerous offender proceedings before Rodgers Prov. Ct. J. and also provided an updated report for these proceedings. His updated report of February 13, 2006 was based upon his assessment of updated information now available concerning Mr. Kelly's sexual assault of W. (that was not known to him in 1998) and Mr. Kelly's performance and treatment while in custody since 1999.
- [41] Based upon a series of co-operative interviews with Mr. Kelly in 1998, psychological testing administered by him and his review of previous documentation related to Mr. Kelly's offending and performance while incarcerated as well as rehabilitative programs then completed by him, Dr. Ogloff diagnosed Mr. Kelly as suffering from sexual sadism and, like Dr. O'Mahony, was of the opinion that Mr. Kelly is clinically psychopathic. He concluded in December of 1998 that:

With a concerted treatment effort and careful release planning, accompanied by long-term supervision and aftercare, there is some reason for very guarded optimism in Mr. Kelly['s] case. Although Mr. Kelly is psychopathic, he has demonstrated some limited degree of control over his behaviour. Therefore, should he be able to control his use of alcohol and drugs, he might be able to reduce his level of risk to the community. Again, I state this with appropriate caution.

Mr. Kelly presents a moderate level of reoffending sexually in the future and a high level of risk for reoffending violently in the future. Without intensive treatment for his substance abuse problems and continued treatment for his sexual and violent offending, there appears to be little doubt that Mr. Kelly will reoffend. However, in the future, Mr. Kelly's level of risk may eventually be managed in the community. To maximize the likelihood of him succeeding in the community when released, though, he requires careful risk management planning, community supervision, and aftercare.

[42] In his 2006 report Dr. Ogloff stated:

Based on my review of Mr. Kelly, it is my opinion that his level of risk for both sexual and violent re-offending appears to be in the moderate to high range.

Unfortunately, due in part to the fact that Mr. Kelly has been in provincial custody for almost five years, he has not participated in intensive treatment programs for his sexual offending or violent offending. Given his failure upon release following the treatment he has received in this regard in the past, it is my opinion that until such time as Mr. Kelly can successfully complete such intensive treatment as required, his level of risk cannot be considered to have decreased to the extent that he can be safely returned to the community. Attention must be paid, as well, to his use of substances given his past substance abuse difficulties.

Missing from this case are concrete, realistic plans for the future that would include mechanisms to meet Mr. Kelly's basic needs as well as relapse prevention planning to ensure that he does not return to substance abuse, violence, and sexual offending. Such strategies will need to be in place for him to succeed in the community.

[43] Dr. Rakeesh Lamba assessed Mr. Kelly for the purposes of this hearing upon my order made in early 2005. His assessment was completed without the benefit of an interview with Mr. Kelly who, as he is entitled to do, determined not to be interviewed by Dr. Lamba.

[44] Dr. Lamba opined that the likelihood of Mr. Kelly reoffending both violently and sexually is moderate to high. He was unable to determine if Mr. Kelly is psychopathic because he could not administer a PCL-R, but he noted psychopathic traits such that he could not rule out psychopathy. He also was of the opinion that the nature of the offences committed by Mr. Kelly and the profile of his victims indicate the predatory nature of Mr. Kelly's offending and lack of empathy which together with the lack of success of treatment programs and incarceration make it more likely that he will reoffend if released.

[45] Mr. Kelly's counsel submits that Mr. Kelly should not be sentenced as a dangerous offender.

[46] He relies upon the decisions of the Supreme Court of Canada in *Lyons v. the Queen*, [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1 [Lyons] and Johnson as well as upon the decision of the Alberta Court of Appeal in *R. v. Neve* (1999), 137 C.C.C. (3d) 97, 1999 ABCA 206 [Neve].

[47] Mr. Ray submits that my consideration of Mr. Kelly's offending must bear in mind that in Lyons (at p. 347) the Court decided the dangerous offender provisions of the Code are intended to apply only to a "small group of highly dangerous criminals posing threats to the physical or mental well being of their victims" and (at p. 338) that the pattern of conduct giving rise to a determination of dangerousness is "substantially or pathologically intractable".

[48] In Neve, in considering the Lyons decision, the Alberta Court of Appeal stated at ¶ 57 to 59 that:

57 The majority rejected all Charter challenges. It is evident that one of the most influential factors in their upholding the constitutionality of the legislation was the legislation's highly refined and discriminating aim, both in theory and in execution. Not only does the legislation seek to capture a relatively small group of offenders; but in practice, this is precisely what has happened. The actual number of offenders in the group is relatively small compared to other offenders in Canada. Indeed, the majority concluded that the dangerous offender legislation meets the highest standard of rationality and proportionality which could reasonably be expected of Parliament. As stated in Lyons, *supra*, at 347:

[T]he legislation narrowly defines a class of offenders with respect to whom it may properly be invoked, and prescribes quite specifically the conditions under which an offender may be designated as dangerous the criteria are anything but arbitrary in relation to the objectives sought to be attained; they are clearly designed to segregate a small group of highly dangerous criminals posing threats to the physical or mental well-being of their victims. [Emphasis that of the Court of Appeal.]

58 Viewed through the purpose lens, therefore, the Supreme Court found that the dangerous offender legislation is designed to protect public safety by targeting that relatively small number of recalcitrant offenders who, because of past behaviour, can reasonably be expected in the future to present an unacceptable risk to public safety. In turn, this legitimate societal concern for public safety justifies the special sentencing legislation for dangerous offenders -- and all that this entails.

59 What we take from Lyons and other relevant cases is this. Not everyone who is a criminal or for that matter a danger to the public is a dangerous offender. In the spectrum of offenders, the dangerous offender legislation is designed to target -- and capture -- those clustered at or near the extreme end. Were this otherwise, constitutionality might stumble. In other words, the dangerous offender legislation is not intended to be a process of general application but rather of exacting selection.

[49] The Court went on to say at ¶ 62:

62 We are not saying that the picture cannot be expanded, whether numerically or in terms of the kinds of offences, or offenders, that might typically attract a dangerous offender designation. Of course, the size of the group may increase. So too may the categories of offences which are

considered sufficiently serious to warrant use of this sanction, particularly as society becomes less tolerant of crimes of violence and more aware of the potentially long-lasting and traumatic effects of personal violence on victims. However, what we are saying is that in interpreting the scope of the dangerous offender provisions, one should do so in a manner which preserves their constitutional validity: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513. Ensuring that the group does not include anyone who falls outside of the intended and actual sweep of the legislation will accomplish this.

[50] In *Johnson* at ¶ 19 to 21 the Supreme Court of Canada stated:

19 In *R. v. Lyons*, [1987] 2 S.C.R. 309, this Court affirmed that the primary purpose of the dangerous offender regime is the protection of the public: see also *Re Moore and The Queen* (1984), 10 C.C.C. (3d) 306 (Ont. H.C.), cited with approval in *Lyons*, *supra*, at p. 329. In *Lyons*, La Forest J. explained that preventive detention under the dangerous offender regime goes beyond what is justified in a "just deserts" rationale based on the reasoning that in a given case, the nature of the crime and the circumstances of the offender call for the elevation of the goal of protection of the public over the other purposes of sentencing. La Forest J. confirmed, at p. 339, that the legislation was designed "to carefully define a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive incarceration".

20 Indeterminate detention under the dangerous offender regime is warranted only insofar as it actually serves the purpose of protecting the public. As we discuss more thoroughly below, there may be circumstances in which an offender meets the statutory criteria for a dangerous offender designation but the goal of protecting the public can be achieved without indeterminate detention. An interpretation of the dangerous offender provisions that would require a sentencing judge to declare an offender dangerous and sentence him or her to an indeterminate period of detention in each instance in which the statutory criteria for a dangerous offender designation have been satisfied would introduce an unnecessary rigidity into the process and overshoot the public protection purpose of the dangerous offender regime.

21 Nor is there anything in the purposes of the sentencing regime as a whole, as set out both in the decisions of this Court and in ss. 718 to 718.2 of the Criminal Code, which would indicate a duty to find an offender dangerous in each circumstance in which the statutory criteria are met. On the contrary, the underlying objectives of the sentencing regime, of which the dangerous offender provisions form a part, indicate a discretion to impose a just and fit sentence in the circumstances of the individual case.

[51] I agree with Mr. Ray's analysis concerning the cautious approach that I must take in considering Mr. Kelly's pattern of offending and the nature of his offending in determining whether he is one of those highly dangerous criminals at or near the extreme end of the criminal population who pose a threat to the physical or mental well being of their victims.

- [52] I do not, however, agree that Mr. Kelly's pattern of continual violent and sexual offending, notwithstanding his incarceration for 14 of 17 years as an adult between 1981 and 1998 when he was taken into custody for the robbery of Ms. Hunt in her home in Sechelt, fall short of establishing that Mr. Kelly meets the criteria for sentencing as a dangerous offender. That conclusion is, however, subject as required by Johnson, to my consideration of whether he would appropriately be sentenced as a long term offender.
- [53] In reaching the conclusion that Mr. Kelly meets the criteria for sentencing as a dangerous offender, I specifically rely upon the psychological assessments and testimony of Drs. O'Mahony and Ogloff and their clinical assessments of Mr. Kelly's psychopathy as well as the assessment of Dr. Lamba concerning Mr. Kelly's risk to reoffend both violently and sexually, especially given his problems with substance abuse and his past failure to respond positively either to lengthy terms of incarceration or treatment.
- [54] I also rely upon the predatory and opportunistic nature of Mr. Kelly's offending and his victimization of vulnerable females both violently and sexually without apparent concern for the consequences of his offending upon his victims.
- [55] In reaching those conclusions, I acknowledge Mr. Kelly's expressions of remorse arising from his guilty pleas to the two predicate offences. I also acknowledge the steps he has taken while incarcerated to attempt to overcome his substance abuse, the fact that he has been incarcerated for almost eight years since his last offence, and that he has expressed a willingness to take any programs that are made available to him while incarcerated to reduce his risk of reoffending. I am, however, satisfied that those circumstances do not preclude a determination that the Crown has established beyond a reasonable doubt that Mr. Kelly meets the criteria for designation as a dangerous offender.

SHOULD MR. KELLY BE SENTENCED AS A LONG TERM OFFENDER RATHER THAN AS A DANGEROUS OFFENDER?

- [56] As I have noted, Johnson mandates that before sentencing Mr. Kelly as a dangerous offender, I must first consider whether he would be appropriately declared a long term offender under s. 753.1 of the Code.
- [57] Because I have determined that Mr. Kelly meets the criteria for sentencing as a dangerous offender, the first two preconditions of consideration of the long term offender provisions of the Code have been established. There is no question under s. 753.1(1)(a) that Mr. Kelly should be sentenced to more than two years imprisonment for each predicate offence and the psychological evidence that I have reviewed establishes that there is, as required by s. 753.1(1)(b), a substantial risk that Mr. Kelly will reoffend.
- [58] Accordingly, the focus of the inquiry into the appropriateness of declaring Mr. Kelly a long term offender rather than a dangerous offender is whether I am satisfied under s. 753.1(1)(c) that there is a reasonable possibility of the eventual control of the risk posed by Mr. Kelly if released into the community.

- [59] The psychological assessments of Mr. Kelly that I considered in determining that he meets the criteria necessary to establish dangerousness are also of importance to this enquiry into whether there is a reasonable possibility of controlling Mr. Kelly in this community.
- [60] Also of significant importance is his past record of offending, particularly while on parole or probation which must, however, be weighed against the evidence of the potential for the treatment of the causes of his offending at this stage of his life and also the nature of the controls that may be available under a long term supervision order if Mr. Kelly has served the appropriate sentence for the predicate offences.
- [61] Both Drs. O'Mahony and Lamba are exceedingly pessimistic that the risk of Mr. Kelly reoffending either or both violently or sexually can be eventually controlled in the community.
- [62] Dr. O'Mahony who oversaw the intensive sex offender treatment program in which Mr. Kelly participated in 1996 testified that in his opinion it would be a serious challenge for Mr. Kelly to obtain a significant level of benefit through further treatment. Of particular concern to Dr. O'Mahony was the "tremendous difficulty" that Mr. Kelly had in internalizing the concepts addressed in the sex offender treatment program and in learning to relate to others on an emotional level notwithstanding that he could intellectualize the concepts.
- [63] Other concerns expressed by Dr. O'Mahony which I find particularly troubling in assessing the extent to which treatment may assist in reducing Mr. Kelly's risk to reoffend, and the efficacy of eventual community control, are Dr. O'Mahony's determination that Mr. Kelly has a sense of entitlement that is in keeping with his anti-social personality traits which has in the past resulted in Mr. Kelly having difficulty accepting criticism and becoming angry when professionals do not react to him as he believes they should.
- [64] Also of obvious concern to Dr. O'Mahony is the fact that the intensive sex offender treatment program taken by Mr. Kelly did not translate into significant behavioural change since he committed several violent offences, including the robbery of Ms. Hunt, within months of being released. While I note that none of the offences which Mr. Kelly committed after taking that intensive sexual offender treatment program were sexual offences, the violence involved in the attack on Ms. Hunt was, absent the sexual overtones, strikingly similar to the assault and robbery of Mr. Kelly's 92 year old victim in 1992 that had resulted in him taking the intensive sex offender treatment program in 1996 which Dr. O'Mahony oversaw.
- [65] I note also that after participating in a 22 month sex offender treatment program between 1988 and 1990, Mr. Kelly almost immediately upon release committed the 1991 sexual assault upon W. for which he is now before the court, and in 1992 committed the robbery with sexual overtones of a 92 year old woman in her own home.

- [66] Dr. O'Mahony also expressed the view that, in addition to his concerns about the extent to which Mr. Kelly can be assisted by treatment, he believes that Mr. Kelly would have considerable difficulty in self-management in the community and that the risk of a return to substance abuse in an uncontrolled setting will serve to increase his high risk of reoffending.
- [67] Dr. Lamba's pessimism about Mr. Kelly's prospects for gains as a consequence of treatment were centered primarily upon his concerns that:
- (1) there is no obvious reason or environmental stressor that explains Mr. Kelly's anti-social behaviour indicating that his personality disorder may be innate and internal and thus more difficult to treat effectively;
 - (2) unsuccessful past attempts to treat Mr. Kelly with medication (ciprotene acetate) is a negative prognostic factor for treatment;
 - (3) Mr. Kelly's history of dismissing criticism from treatment providers and professionals and negative reaction to criticism poses a serious concern for effective treatment; and
 - (4) Mr. Kelly's history of adopting an unrealistic positive assessment of himself and his treatment progress is indicative of a lack of acceptance of a need for treatment as well as unrealistic self-assessment, overconfidence and minimal understanding of the impact he has on others that has become entrenched.
- [68] Dr. Lamba is also of the opinion that violent offenders who offend sexually are particularly difficult to treat and that Mr. Kelly must go through a further intensive treatment program for sexual offenders, an intensive program for violent offenders, as well as a maintenance program for both sexual and violent offending in addition to a maintenance program for substance abuse before any release into the community. Even with such programming, Dr. Lamba remains very pessimistic about Mr. Kelly's eventual control.
- [69] On that issue, Dr. Lamba specifically concluded:
- I do not consider his risk to be manageable in the community at this point, and unlikely to be manageable in the foreseeable future.
- [70] Dr. Lamba's lack of confidence in the ability to control Mr. Kelly in the community is founded primarily upon his concerns that:
- (1) community supervision of Mr. Kelly will be particularly difficult due to the versatility of his criminal offending which would require monitoring for both violent and sexual offending. That concern is made more difficult by the wide range of victims which Mr. Kelly may target;
 - (2) Mr. Kelly's underestimation of his own risk (or overestimation of the benefits of treatment) bodes poorly for success in the community;

- (3) Mr. Kelly's history of dismissing criticism from those treating or supervising him results in disengagement with professionals posing serious concerns for his management;
 - (4) the randomness of Mr. Kelly's offending and the lack of a readily identifiable crime cycle that would indicate the precursors to offending, will make supervision more challenging;
 - (5) Mr. Kelly's manageability is severely compromised by his lack of viable community support because his adoptive parents do not fully appreciate his difficulties;
 - (6) the successful ongoing management of sex offenders requires that the offender be self-disciplined and self-monitoring and accepting of the risk and Mr. Kelly's past failures while being supervised on parole or probation does not instil confidence concerning future success;
 - (7) those concerns are exacerbated by Mr. Kelly's life long substance abuse issues which have never been controlled in the community and have acted in the past as a disinhibitor to his offending; and
 - (8) Mr. Kelly's score on the PCL-R (not administered by Dr. Lamba) indicated that Mr. Kelly is a psychopath and thus more likely to reoffend while being supervised and to do so quicker and likely with violence as compared to an offender who is not psychopathic.
- [71] As noted above, Dr. Ogloff is somewhat less pessimistic than either Dr. Lamba or Dr. O'Mahony about the prospects of the reasonable possibility of controlling Mr. Kelly in the community as a long term offender.
- [72] Dr. Ogloff offered the opinion that while treatment of Mr. Kelly will be difficult and gains hard to realize, treatment is not beyond hope. Concerning the difficulty of treatment, Dr. Ogloff points to the entrenchment of Mr. Kelly's behaviour over so many years which would require much effort on Mr. Kelly's part and appropriate treatment programming over time.
- [73] Concerning the challenges to realizing substantial gains from treatment, Dr. Ogloff expressed concerns that:
- (1) it remains difficult to know how Mr. Kelly would benefit from treatment given the lack of success of past programs in which he has participated;
 - (2) those who are diagnosed as psychopathic are particularly difficult to treat with respect to reducing risk for both violent and sexual offending which tends to explain Mr. Kelly's past failures in the community notwithstanding his prior treatment both in 1990 and 1996;
 - (3) of greatest concern regarding Mr. Kelly's risk to reoffend either violently or sexually are: his clinical diagnosis as a psychopath, his sexual deviancy and his substance abuse, all of which will have to be carefully contained before there can be hope of long term rehabilitation;

- (4) there are many contingencies that will effect the gains that might be achieved from further treatment including the extent to which Mr. Kelly may be able to internalize the goals of treatment and whether he will be able to maintain them and carry them into the future if released in the future, thus making any confident prediction of success very tenuous at present;
- (5) although Mr. Kelly has shown some degree of motivation for treatment, his motivation for change has yet to be fully assessed and while he has shown willingness to undergo treatment, especially concerning his substance abuse, there is no assurance that the willingness will extend to other necessary areas of treatment; and
- (6) even if gains can be made from treatment, it would be necessary to see such gains maintained over time to ensure a lowering of Mr. Kelly's risk level.

[74] In his written opinion to which I referred in ¶ 42, Dr. Ogloff concluded that:

It is difficult to provide a firm opinion about the reasonable possibility of the eventual control of Mr. Kelly's risk in the community. Depending on the duration of incarceration in a federal facility, and the extent to which Mr. Kelly responds well to required treatment, it is my opinion that Mr. Kelly's level of risk can be eventually reduced to an acceptable level such that he could be managed in the community under the provisions of [a] long-term supervision order.

In my opinion, at the present time and until such time as he can receive the intensive treatment he requires, Mr. Kelly continues to present a moderate to high risk of sexual and violent offending. He requires intensive treatment to move toward a gradual release strategy with long-term follow-up. On balance, therefore, I could not be confident that at this time Mr. Kelly could be managed safely in the community.

[75] Dr. Ogloff confirmed in cross-examination that the types of treatment he envisaged in his report would be further intensive sex offender treatment, intensive violent offender treatment and substance abuse treatment followed by gradual release, follow-up and maintenance programs in the community.

[76] In his submissions on behalf of Mr. Kelly, Mr. Ray submitted that psychological and opinion evidence of Dr. Lamba and Dr. O'Mahony and even Dr. Ogloff's somewhat more positive opinion as to Mr. Kelly's prospects for rehabilitative treatment and eventual control in the community, should be considered unduly pessimistic.

[77] Mr. Ray particularly points to Mr. Kelly's guilty pleas to both predicate offences as expressions of remorse and empathy for his victims in precluding the necessity of them testifying. He points also to Mr. Kelly's continuing willingness to take treatment programs and to the lack of treatment programs that have been available to him due to his having been on remand in the provincial corrections system for so many years as his successful appeals worked their way through the various levels of courts.

- [78] Mr. Ray also relies upon the fact that the predicate offences, and particularly the sexual assault of W., occurred many years ago when Mr. Kelly was much younger and also to Mr. Kelly's completion of all of the substance abuse programs that have been available to him since his incarceration in 1998 which must be seen as highly successful positive steps indicating not only motivation for treatment but also effective treatment addressing one of the most difficult roots of Mr. Kelly's prior offending.
- [79] In addition, Mr. Ray suggests that Mr. Kelly's acknowledged ability to intellectualize treatment concepts that help him to understand the basis of his offending and control his crime cycle and his genuine expressions of empathy for his victims, indicates a far more optimistic outlook for control than that suggested by the Crown.
- [80] Finally, Mr. Ray points to the efficacy of long term supervision and the means by which a long term supervisory order can be tailored to address Mr. Kelly's specific rehabilitative needs as enhancing the likelihood of Mr. Kelly's eventual control in the community.

CONCLUSION

- [81] After having considered all of the evidence in this proceeding and the submissions of counsel, I have concluded that I am not satisfied that the evidence establishes a reasonable possibility of controlling Mr. Kelly's risk in the community through the imposition of a determinate sentence for the two predicate offences followed by a long term supervision order.
- [82] In reaching that conclusion, I have determined that the totality of the psychological evidence and the expert assessments of Mr. Kelly's risk to reoffend either sexually or violently or both, render the possibility of his eventual control in the community in the foreseeable future at best tenuous and at worst speculative. I am also satisfied that Mr. Kelly's entrenched adult criminal offending over a period of more than 17 years prior to his present incarceration establish such a disregard of community supervision that I cannot reasonably rely upon his self-management or his ability or willingness to work with his supervisors.
- [83] While I acknowledge that Mr. Kelly has worked hard to deal with his substance abuse problems and must be congratulated for that effort, I remain very concerned about Mr. Kelly's previously demonstrated conflict with those who administered treatment programs if they did not concur in his estimate of his progress. I share the concerns of all of the psychological experts that those conflicts severely undermine the potential efficacy for treatment or amelioration of Mr. Kelly's anti-social behaviours which have so often manifested in violent offending.
- [84] I also cannot ignore the failure of two sexual offender treatment programs to effectively curb his violent sexual offending in 1991 and 1992 or his violent offending in 1998 almost immediately after his release from prison in both instances.

[85] Mr. Kelly's pattern of criminal offending, the violent and sexual nature of that offending, the persistence of that offending notwithstanding lengthy terms of incarceration and the taking of programs designed to combat Mr. Kelly's offending, all lead me to conclude that the safety of the public and particularly vulnerable female members of society requires that Mr. Kelly's progress be monitored by the Parole Board with the assistance of treating and assessing professionals over time as he becomes eligible for consideration for release.

[86] I accordingly sentence Mr. Kelly as a dangerous offender under Part XXIV of the Code.

[87] In addition there will be following appropriate supplementary orders sought by the Crown and not opposed by Mr. Kelly:

1. A lifetime firearms prohibition which is mandatory under s. 109(1)(a) and s. 109(3) of the Code because there was a previous firearms order made in 1992;
2. A "DNA Order" to provide samples of DNA pursuant to s. 487.052 of the Code;
3. A Sex Offender Information Registration Act Order (SOIRA) which is mandatory for sexual assault causing bodily harm under s. 490.012(1) of the Code; and
4. An order forwarding a copy of these proceedings to Corrections Canada as required under s. 760 of the Code.

"B.M. Davies, J."

The Honourable Mr. Justice B.M. Davies

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