
CANADA / JUDGMENT

R. v. Trainor

2010 BCSC 829

COURT

Supreme Court of British Columbia

DECIDED

29 April 2010

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2010 BCSC 829 R. v. Trainor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Trainor,

2010 BCSC 829

Date: 20100429

Docket: 66311

Registry: Kelowna

Regina

v.

Gary Frederick Trainor

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Sentence

Counsel for the Crown:

D. Campbell

Counsel for the Defence:

J. Phillips

Place and Date of Trial:

Kelowna, B.C.

December 8-12 and 15, 16, 2009

Place and Date of Long-Term Offender Hearing:

Kelowna, B.C.

April 12-16, 2010

Place and Date of Judgment:

Kelowna, B.C.

April 29, 2010

- [1] THE COURT: Mr. Trainor was convicted by a jury of aggravated assault. The Crown has applied under s. 753.1 of the Criminal Code to have him declared a long-term offender. The issues raised in these circumstances are three in number: first, what is a fit determinate or conventional sentence?; second, has the Crown proven to the requisite degree the prerequisites set out in s. 753.1, namely, that the offence warrants a sentence of imprisonment of two years or more, that Mr. Trainor poses a substantial risk to reoffend, and that there is a reasonable possibility of eventual control of that risk in the community?; and finally, even if the foregoing are established, should the court should exercise its residual discretion in making the declaration the Crown seeks?
- [2] In what follows I will address these issues in the order noted, but before doing that it is appropriate to set out the statutory framework.

Statutory Framework

- [3] Section 268(2) of the Criminal Code sets the maximum penalty for aggravated assault at 14 years. There is no minimum.
- [4] The fundamental purposes of sentence are set out in s. 718, and they include denunciation of the conduct, specific and general deterrence, and rehabilitation of the offender.
- [5] The Code also identifies certain guiding principles that are to inform the sentencing process. The first and overarching principle is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. There are a number of circumstances that are deemed to be aggravating by s. 718.2(a). None of them apply in this case.
- [6] Of significance, however, are the provisions of s. 718.2(b) and (d), which provide that:
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

And:

- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.

- [7] A determination of whether an offender should be found to be a long-term offender is part of the sentencing process, and as such is to be applied with the principles just noted in mind. All of that follows from the Supreme Court of Canada's decision in *R. v. Johnson*, [2003] 2 S.C.R. 357 at para. 23.
- [8] The relationship between s. 753.1(b) and 753.1(2) was considered in *R. v. McLeod*, 1999 BCCA 347, and again in *R. v. McLean*, 2009 NCSA 1.
- [9] The two sections in question relate to the issue of whether there is a substantial risk that an offender will reoffend. That is a prerequisite to a finding that an offender is a long-term offender. Section 753.1(2) sets out circumstances in which the court shall find that the offender represents a substantial risk to reoffend. It provides that if an offender has been convicted of certain sexual offences and if the offender has shown a pattern of repetitive behaviour that gives rise to certain inferences, then the court shall be satisfied that there is a substantial risk that the offender will reoffend.
- [10] In *McLeod*, Prowse J.A. addressed the relationship between these two sections. She rejected the argument that long-term offender designations are only available in cases in which an offender stands convicted of one of the sexual offences listed in s. 753.1(2)(a). That argument was based on the proposition that s. 753.1(2)(a) exhaustively determines the circumstances in which an offender will be found to pose a substantial risk to reoffend. At para. 26, she concluded that all s. 753.1(2)(a) does is establish a presumption. If the conditions there set out are met, the court must find that the offender poses substantial risk to reoffend.
- [11] In *McLean*, Bateman, J.A., on behalf of the Nova Scotia Court of Appeal, cited both *McLeod* and *R. v. Weasel*, [2003] S.J. No. 854 (C.A.), as well as Québec and Ontario authority to the same effect. Of note are the remarks of Cameron J.A. at p. 57 of *Weasel*, where he wrote:

56 Based on the foregoing, we are of the opinion section 753.1 extends to an offender convicted of either a serious personal injury offence, as defined in section 752, or an offence referred to in paragraph 753.1(2)(a). That being so, subsection (2) is to not to be seen as defining the term "substantial risk" appearing in 753.1. Rather, it is to be seen as creating a conclusive presumption of "substantial risk" in those circumstances to which paragraphs (a) and (b) of the subsection are addressed, leaving the issue of such risk in other circumstances to be determined without the [benefit] of the presumption.

In this case, the Crown relies on both the presumption and, in the alternative, seeks a finding of substantial risk without the aid of the presumption.

- [12] Even if the prerequisites in s. 753.1 are proven, the court retains a residual discretion. That is so because of the opening words of the section, which provide "the court may" and the analysis in *Johnson* (at para. 27). Although *Johnson* dealt with the dangerous offender aspects of s. 753, and although those provisions were later amended, prior to the amendments the structure and language of the dangerous offender provisions and the long-term offender portions here under consideration were the same. Thus, the analysis

that led the court in Johnson to conclude that there was a residual discretion applies to the long-term offender provisions. The amendments that were made for Johnson did not affect the long-term offender provisions.

Analysis

A. Circumstances of the Offence

- [13] In reasons indexed at 2009 BCSC 1871, I found the facts of the offence. For convenience, I will repeat some of the more significant aspects of those findings.
- [14] The assault occurred on a hot Sunday afternoon in early July 2007. Mr. Trainor was working as a fruit picker on an orchard. He lived on the orchard in a trailer which also housed, in separate rooms, two other workers. One of those other workers was Mr. Dufresne, the victim of this assault. He lived next door to Mr. Trainor. Mr. Schulte occupied the third room in the trailer. These rooms all had separate doors to the outside.
- [15] All three men had been drinking during the day. Mr. Trainor had consumed about 12 beer by mid-afternoon, when the assault occurred. He was reasonably intoxicated.
- [16] Earlier in the day, he came to believe that Mr. Dufresne had stolen his harmonica. The two men exchanged unpleasanties, which included Mr. Trainor accusing Mr. Dufresne of theft and Mr. Dufresne denying that.
- [17] Throughout the afternoon, Mr. Trainor continued to harbour a suspicion of Mr. Dufresne, which he periodically expressed to him. Ultimately, Mr. Dufresne started a physical altercation with Mr. Trainor on the grass just in front of Mr. Dufresne's door. Mr. Dufresne was unarmed. Mr. Trainor had a knife. He almost immediately lost all measure of self-control and began to repeatedly stab Mr. Dufresne. As he was doing so, Mr. Dufresne was on the ground on his back essentially defenceless. Mr. Trainor was on top of him, repeatedly saying, "I'll fucking kill ya."
- [18] At that point, Mr. Schulte happened to come around the corner of the trailer. He saw the two men and quickly intervened. He grabbed Mr. Trainor around the neck from behind and tried to pull him off. Although Mr. Schulte is a big man, at least as big as Mr. Trainor, it took virtually all of his strength to pull Mr. Trainor off. He had to choke Mr. Trainor almost to the point of unconsciousness to get him to drop the knife. When Mr. Trainor eventually did drop the knife, Mr. Schulte released his hold and Mr. Trainor left the area.
- [19] Mr. Dufresne was bleeding profusely. Paramedics were called and they took him to the hospital, where he was examined and treated by Dr. Conchie. The doctor found six stab wounds and a number of abrasions and bruises. The two most serious wounds were to the abdomen and the shoulder. The latter struck bone, which prevented serious damage to underlying organs. The former punctured the abdomen, but fortunately did not damage any of the underlying organs.

- [20] Mr. Dufresne had also been stabbed in the head. He bled profusely from that wound, but it was not otherwise serious. He received stitches and checked himself out of the hospital the next day. Dr. Conchie was of the view that none of the injuries would cause lasting or permanent damage.
- [21] Mr. Trainor was arrested later that night in a house in Kelowna. He had not been injured in the assault. He was taken to the detachment, where he gave a statement in which he repeated various themes, including in particular his belief that Mr. Dufresne was a "crackhead". Mr. Trainor said that he did not like or trust crackheads.
- [22] When first at the police station, and notwithstanding that some five hours had elapsed since the assault, Mr. Trainor was still visibly very agitated. He was allowed to calm down for several hours before the police took a statement. In his statement, he claimed to have acted in self-defence. He was then, and remains now, of the view that his actions were justified.
- [23] Mr. Trainor pled not guilty to these charges and testified in his own defence, repeating his claim that he acted in self-defence. He was convicted by a jury in December 2008.

B. Mr. Trainor's Circumstances

- [24] Mr. Trainor is 51 years old. He was 48 years old at the time of the offence. He was born and raised on a farm in Prince Edward Island. He had trouble with school and quit in the middle of grade 10. He has not furthered his education since. He is one of seven children. He left home at age 17. His father drank excessively and had a violent temper. The relationship between Mr. Trainor and his parents was dysfunctional, if not frankly abusive.
- [25] Mr. Trainor now has a different view of his upbringing, but, for reasons I will address later, I am satisfied that his memory in that regard is faulty. In any event, he has had little contact with his family, save for one younger brother, since he left home. His family is not a source of support for him. Whether that is by Mr. Trainor's choice or the result of other issues is not clear and is of little consequence. The fact remains they are not a source of support to him now.
- [26] Throughout his adult life, Mr. Trainor has been a loner. He has never married. He has one child, a daughter, with whom he has, I infer, relatively little contact.
- [27] In the past decade or two, his seasonal migration has included orchard work in the Okanagan in the summer, daffodil and other flower picking in Victoria in the fall and winter, and odd jobs or unemployment in Prince Edward Island for the balance of the year. He has no close friends. To his credit, he works regularly, although never for very long and often for different employers.
- [28] His material needs are minimal, and he has, for the most part, been able to support himself without the need of social assistance. He does not have (nor has he ever had) any significant assets, with the exception of motor vehicles he has owned from time to time.

- [29] His criminal record begins in 1977, with a conviction for mischief. He received three months' probation. In April 1980, he received seven days for break and enter and theft in Alberta. In August 1980, he received 30 days for theft under. In September 1981, he was placed on probation for possession of a narcotic. That occurred in Ontario. Also in 1981, but this time in Prince Edward Island, he was convicted of the first of several offences involving violence or threats of violence. That was in November and was a conviction for break and enter and common assault. He received two months in jail. In September 1982, in Ontario, he was convicted of assault causing bodily harm and fined \$200.
- [30] In the late 1980s, he was charged and convicted of a series of sexual offences and sentenced to three years in a federal penitentiary. After his release he returned to his migrant lifestyle, and in November 1996, in Kelowna, he was convicted of assault and assault with a weapon and received six months in jail followed by three years' probation.
- [31] In February of 2003, he was convicted, again in Prince Edward Island, of assault causing bodily harm and received two years' probation.
- [32] In January 2006, he was convicted of assault with a weapon and sentenced to six months in jail followed by 18 months' probation. He was also convicted on that occasion of uttering threats and received 14 days in jail for that.
- [33] Mr. Trainor was on probation for the January 2006 assault in Prince Edward Island when he assaulted Mr. Dufresne.
- [34] In addition to the overtly violent offences, Mr. Trainor has a number of other convictions, including causing a disturbance and failing to appear in 1990, mischief and obstructing a police officer in 1996, and failing to comply with a probation order in January 2006.
- [35] Of note is the conviction in 1996 in Kelowna, and the two in Prince Edward Island during the last decade. The 1996 conviction arose out of events that occurred in June 1994. Mr. Trainor had picked up the victim, a prostitute, and hired her. They drove in his van to an isolated location in order for the prostitute to perform the services that she had been engaged to provide. A dispute arose as to the extent of the permitted activities. Mr. Trainor lost his temper, grabbed the victim by her hair, and smashed her head into the dashboard two times. She produced a knife and was able to get out of the van and run. Mr. Trainor chased her with a bat. She took refuge at a house and called a taxi. The taxi returned her to downtown, where she began again to ply her trade. Mr. Trainor then went back downtown, found her and chased her, threatening her again.
- [36] The 2003 assault causing bodily harm conviction arose out of events that occurred in September 2002. Mr. Trainor was on a sidewalk outside a Tim Hortons restaurant in Charlottetown. The victim, a stranger to Mr. Trainor, went into the restaurant. Mr. Trainor called him a pedophile. The victim either did not hear the remark or ignored it. When the victim left the restaurant, Mr. Trainor repeated the remark. The victim asked Mr. Trainor if he had a problem, in response to which Mr. Trainor punched him in the face. The victim

tried to defend himself, but Mr. Trainor bit him on the ear and produced a dog bone, which he used to strike the man. Eventually, passersby intervened and pulled Mr. Trainor off. The victim received five stitches to his ear and a stitch to the top of his head. He was otherwise bruised and lacerated.

- [37] The 2006 Prince Edward Island assault with a weapon offence occurred in late 2005. Mr. Trainor was in a bar and got into a fight with the first of the two victims in that matter. During the fight, Mr. Trainor pulled a knife and cut the man for 20 stitches on his right cheek. A second victim intervened to pull Mr. Trainor off, and he too was stabbed, this time in the shoulder. He received five stitches.
- [38] The police arrived and eventually arrested Mr. Trainor. When he was put in the back of the police car he was still so agitated that he repeated, in the presence of the officer, "I'll fucking kill 'em", referring to the individuals with whom he had just been in conflict.
- [39] In all of these events, Mr. Trainor exhibited a serious loss of self-control to the point where, but for the intervention of bystanders, the consequences may have been much more serious than they were. That is true of the present offence as well.
- [40] Further, his previous convictions and this case demonstrate that once aroused, Mr. Trainor's anger is not quick to subside.
- [41] Finally, in both the present case and the earlier offences, Mr. Trainor believes that his conduct was justified.

C. Position of the Parties on a Fit Conventional Sentence

- [42] It is first of note that Mr. Trainor has been in custody since July 8, 2007, a period of two years and 10 months. The Crown argues that a fit sentence is one of eight years, which, if allowance is made for pre-trial custody, would result in a sentence of about two years' duration. Counsel for Mr. Trainor argues that a sentence of less than two years is appropriate, and if that is so, it would eliminate from consideration a long-term offender designation and result in Mr. Trainor's immediate release.
- [43] The Crown relies on several cases, but primarily *R. v. Biln*, 1999 BCCA 369; *R. v. Caulfield*, 1999 BCCA 190; *R. v. Hiscock*, 2002 BCSC 1772; and a number of other Court of Appeal decisions of lesser relevance.
- [44] Ms. Phillips points to *R. v. Berry*, [1998] A.J. No. 436; *R. v. Porter*, [1995] Y.J. No. 189; and *R. v. Desjarlais*, [2006] B.C.J. No. 2760; as well as a number of other cases of lesser relevance.
- [45] In *Biln*, McEachern C.J.B.C. upheld a three-year sentence for a first offender. The accused was a 50 year old married father of three, employed, with strong family and community support. He was drunk at a wedding, and when asked to leave took offence. He did leave and returned hours later with a crowbar and struck the victim, leaving the victim with "serious permanent injuries". At para. 24, McEachern C.J.B.C. said that apart from the personal

circumstances a range of two to six years, depending on the degree of violence, is appropriate, although in some cases higher sentences may be warranted.

- [46] The Crown argues that Biln sets the range, but allows for exceptional circumstances in which a longer sentence may be appropriate, and argues that this case is one of those exceptional circumstances.
- [47] In Caulfield, a 53-year-old grandmother, with a minor unrelated criminal record, was convicted by a jury of aggravated assault. The victim was a mature man with multiple sclerosis. Both had been drinking, although neither were drunk. The victim had climbed over a balcony railing in a third-floor apartment. The accused pushed him off. He caught himself and she pushed him again. He fell to the ground. He was rendered a paraplegic as a result of the injuries. A sentence of three years was upheld on appeal.
- [48] In Hiscock, a 20-year-old with a significant criminal record, including a two-year sentence for mischief, who was on bail for assault with a weapon, when, in a single punch, he injured the victim. The victim hit his head and was left in a vegetative state as a result. He was sentenced to eight years.
- [49] Mr. Dufresne's injuries were generally much less severe than those in the authorities to which the Crown has referred me. Secondly, Mr. Trainor did not start this encounter. That diminishes his moral culpability, but not to a significant degree. That is so because Mr. Trainor quickly gained the upper hand in the dispute; he was armed and Mr. Dufresne was not; and, after gaining the upper hand, Mr. Trainor continued to vigorously assault Mr. Dufresne.
- [50] Turning to the authorities that Ms. Phillips cites, in *Berry* the Crown sought a sentence of two years less a day, and the judge granted that sentence, but ordered that it be served subject to a conditional sentence order. He did that without hearing from counsel. The Court of Appeal, on a Crown appeal, upheld the two-year sentence but ordered that it be served conventionally. Although interesting from a procedural point of view, it is of little assistance in the circumstances at hand.
- [51] So, too, with respect to *R. v. Porter* in which two offenders committed aggravated assault. Both were given two years less a day, not because that was necessarily the right custodial sentence, but because the judge wanted to impose a period of probation, and that is the longest sentence that can be imposed and yet be followed by a probationary period.
- [52] In *Desjarlais*, the facts of the case are not particularly helpful. What is helpful are Madam Justice Smith's comments on the range of sentence for aggravated assault. At para. 69, she wrote:
- [69] The broad range of sentence for aggravated assaults has variously been set at between 16 months and six years in *Johnson*, *supra*, two years less a day to six years in *R. v. Biln* (1999), 125 B.C.A.C. 254, 1999 BCCA 369, and between 18 months and six years in *R. v. Willier*, [2005] B.C.J. No. 1746, 2005 BCCA 404. In *R. v. Craig* [2005] B.C.J. No. 2180, 2005 BCCA 484 at

[paragraph] 10, Kirkpatrick J.A. summarized the approach to determining an appropriate sentence within this broad range by stating that "... an unprovoked attack with a weapon tends to result in the imposition of a sentence at the higher end while a consensual fight that has escalated with resulting injury tends to result in a sentence at the lower end. See in particular: R. v. Willier, at [paragraph] 22, and R. v. Johnson, at [paragraph] 10." The range of sentence for assault causing bodily harm falls between a suspended sentence and a sentence of two-to-three years...

[53] That brings me to R. v. Craig, the authority to which Madam Justice Smith made reference. There, at para. 2, Kirkpatrick J.A. wrote:

[2] The circumstances of the crime, described by the trial judge as particularly vicious, can be summarized as follows. Approximately two weeks after separating from a woman with whom he had lived for 23 years, the respondent approached her on the veranda of an inn where she was sitting with her daughter...[He was] armed with a knife [and he attacked her]...Her injuries were severe. She required emergency surgery and blood transfusions...

As against that background, Kirkpatrick J. set out the ranges of sentences decided by the authorities to which I have already referred. The offender in that case had been sentenced to a year in jail. The Crown appealed. The Court of Appeal imposed a sentence of two years less a day, which was an effective sentence of three years. The accused in that case had a .21 blood-alcohol reading and was in his early 50s, with five drug and alcohol-related offences some 25 years ago.

[54] Based strictly on the injuries that resulted and the manner in which the altercation began, Mr. Trainor would fall at the lower end of the range set out in these cases. There is, however, another aspect to the sentencing equation, and that is the offender's background, and in particular his record. This is the sixth offence for violence on Mr. Trainor's record. Three of the four most serious of them occurred within the past four years. In addition, in 2008 Mr. Trainor was convicted of threatening. I will say more about that in a moment.

[55] From the background, it appears that Mr. Trainor's offences have increased in severity, as measured by the injuries inflicted on his victim. In addition, he was on probation for assault when this offence occurred. Notwithstanding that it began with Mr. Dufresne, like the other offences, there was a serious and dangerous loss of control, both in terms of degree and duration.

[56] Finally, as I have already noted, Mr. Trainor feels justified. Although the injuries were less serious than might otherwise have been the case, that was so not because of Mr. Trainor's response, but rather in spite of it. All of this serves to elevate the need for public protection in these circumstances.

[57] Recognizing that this sentence is at the high end of the range set in the authorities, I consider that a fit sentence is one of six years. The term of imprisonment, therefore, absent any consideration of credit for pre-trial custody, would be six years. Mr. Trainor has been in custody since July 8, 2007, a period of 33 1/2 months. Credit is to be given for pre-trial

custody at the rate of two-for-one, absent special circumstances, and none apply in this case. In the result, the pre-trial custody that Mr. Trainor has served is the equivalent of 67 months, or five years seven months. The net result is that the sentence will be one of five months.

The Long-Term Offender Application

- [58] Given my conclusion as to a fit conventional sentence, and bearing in mind that pre-trial custody is to be taken into account in determining the length of the conventional sentence, Mr. Trainor meets the requirement as it relates to the length of conventional sentence. There are only three further issues to be addressed, namely:
1. Does he pose a substantial risk to reoffend?
 2. If so, is there a reasonable possibility of eventual control of that risk in the community?
 3. If so, should the court exercise its discretion in favour of the application?
- [59] Both the Crown and the offender take the position that whatever the level of risk that Mr. Trainor poses to reoffend, it is a risk for which there is a reasonable possibility of eventual control in the community. They disagree as to whether Mr. Trainor poses a substantial risk now.
- [60] As earlier noted, the Crown relies both on the presumption in s. 753.1(2) and on the proposition that the evidence supports, without the aid of the presumption, the conclusion that Mr. Trainor poses a substantial risk to reoffend.
- [61] I am not convinced that the presumption in s. 753.1(2) applies in these circumstances. Read literally, it does. Mr. Trainor has been convicted of an offence listed in that section, but that was some 20 years ago, and all of his difficulties since then, including the offence that he is now convicted of, have nothing to do with sexual offending. It seems illogical to create a presumption based on a particular kind of offending, which, on its face, may be predictive of future offending of that kind, and apply that presumption and the predictive quality it contains, to offences of an entirely different kind.
- [62] I will, in the result, simply address whether there is a substantial risk to reoffend without recourse to the presumption.
- [63] All of that said, the existence of an offending pattern is relevant to whether it can be said there is a substantial likelihood of future offending. It is also relevant to the issue of whether there is the possibility of eventual control in the community.
- [64] Dr. Riarr prepared an assessment as a result of an order made under s. 752.1 of the Code. He interviewed Mr. Trainor. He reviewed the Correctional records both from the provincial and the federal Correctional institutions and administered three risk assessment instruments. Based on all of this, he reached several conclusions. Before addressing those conclusions, some comment on the risk assessment instruments is necessary.

- [65] The first one is the PCL-R, which is designed to "construct the psychopathy" of the person to whom it is administered. The degree of psychopathy has a linear relationship to risk, and especially to risk of violence. On that instrument, Mr. Trainor scored between the 25th and 30th percentile of the prison population. That puts him at a moderate risk to reoffend over the remainder of his life.
- [66] The second instrument used is called the VRAG. It is an actuarial checklist which attempts to measure risk directly, and by that instrument Mr. Trainor is said to have a 30 percent chance of reoffending in the next seven years and a 48 percent chance of reoffending in the next 10 years.
- [67] The final instrument is the Static-99. It is an instrument that is predictive of sexual reoffending. Mr. Trainor is, according to that instrument, at high risk to reoffend sexually. Mr. Trainor's risk to reoffend sexually, while of concern, is not the focus of this proceeding. I mention it, though, for two reasons. First, it illustrates the limitations of these instruments. Dr. Riar's opinion is that, notwithstanding the score that Mr. Trainor got on the Static-99, he is actually at a much lower risk of future sexual offending. To the best of everyone's knowledge, he has not reoffended in the 20 years since he was sentenced for the offences that I earlier mentioned. That is so despite an unstable lifestyle and one which may otherwise be predictive of a high risk to reoffend. In the result, Dr. Riar's opinion is that the Static-99 is not a particularly useful measure in the particular circumstances of Mr. Trainor. I accept that that is so. The second point is the relationship between alcohol and Mr. Trainor's own perception of his risk of reoffending sexually. Contrary to the run of offenders, Mr. Trainor says, and I accept, that he uses alcohol on occasion to mute latent sexual desires. Most offenders use alcohol for its disinhibiting quality. Mr. Trainor is in precisely the opposite situation. It is difficult to know whether in fact that is the case. I accept, however, that Mr. Trainor believes it, and while it may serve to mute his risk of sexual reoffending, it does not augur well for the potential of treating his alcoholism, which, for reasons that I will come to in a moment, are most significant in this case.
- [68] Returning to Dr. Riar, he concluded that the various instruments he administered placed Mr. Trainor at moderate risk for reoffending violently in the future. More significantly, his opinion is that based on the violence predictive instruments and his clinical judgment, together with his review of the Correctional documentation, Mr. Trainor is at moderate risk to reoffend violently. His risk will, however, change. If he remains sober and makes the changes necessary to ensure a stable lifestyle, his risk of reoffending will be much lower. If he returns to drinking, however, the risk he poses will be much higher. Dr. Riar's opinion is, based on all of the materials he reviewed, that Mr. Trainor does not have the ability to make the long-term changes that are necessary to avoid reverting to alcohol abuse without some externally imposed structure, such as might be provided through court-ordered supervision.

- [69] Dr. Riar diagnosed Mr. Trainor as having an antisocial personality disorder, that is, a personality pattern characterized by a pervasive pattern of violating social rules and the liberty of others. Personality disorders can be of different degrees, and they can, with varying degrees of success, be managed. They cannot be cured. Mr. Trainor is not suffering from any mental illnesses, although Dr. Riar noted his recurrent paranoid thoughts.
- [70] All of this leads me to the following conclusions.
- [71] Mr. Trainor experienced a difficult childhood. He reported to one probation officer that if he had gone missing from his home as a boy, he doubted if anybody would have noticed. His father drank and was harsh and intimidating. His mother was described by Mr. Trainor as "not being there", by which I take him to mean she was not present emotionally.
- [72] At the conclusion of his counsel's submissions, Mr. Trainor took the opportunity to make some remarks, and from those, and from his counsel's submissions, I understand that he is very fond of and close to his family. He does not blame them for any of his difficulties. That sentiment, though honestly held, is at odds with Mr. Trainor's own consistent statements over the years. He has had very little contact with his family, save for the younger brother I mentioned earlier.
- [73] I accept that he does not blame his family. I am satisfied, however, that his upbringing explains, to some degree, his adult life. It is appropriate to note at this juncture one further conviction on Mr. Trainor's record. That resulted from a 2004 event involving threats issued to his sister. He telephoned her in May of 2004. She had not heard from him for two years. He spoke of his daughter and his daughter's mother and became moody. His sister, Ms. McDonald, tried to change the subject, but Mr. Trainor became upset. Several times he told her, "I'm going to blow your fucking head off". This scared her. She phoned the police and an investigation ensued and eventually Mr. Trainor was charged and convicted. I note that simply because it illustrates something of the relationship he had, at least with one of his siblings, and it belies the notion that he remains close to his family or has been close with them over the years.
- [74] Mr. Trainor has had three brief relationships in his adult life. The first lasted for a year and involved dating, as opposed to communal living. The second was described as an on-and-off-again relationship for two years. It did involve some periods of common-law domestic relationship, and it is from that union that Mr. Trainor has a daughter. The third lasted for about a year, and it was, I infer from the materials, many years ago. He has no close friends and no social support in the community.
- [75] In 1990, when Mr. Trainor was assessed in relation to the sex offences he committed, Dr. Kerr described him as a loner and a drifter. Dr. Lohrasbe described him as shy and withdrawn. Both noted his tendency to alcohol abuse. These descriptions remain apt today.
- [76] Mr. Trainor followed the itinerant pattern of work that I noted earlier throughout the years since his 1990 incarceration.

- [77] The absence of any social support and the lack of any close relationships, combined with a transient lifestyle, are all circumstances that elevate Mr. Trainor's risk of reverting to alcohol abuse. I am satisfied that if Mr. Trainor does revert to drinking, there is a substantial risk of him reoffending violently.
- [78] The reports relating to the 1994 assault on the prostitute do not indicate whether Mr. Trainor was drinking. I suspect he was not, or was not drinking to any particular degree. The 2003 assault in Prince Edward Island outside the Tim Hortons restaurant occurred when Mr. Trainor was, on his own admission, either on drugs or alcohol, at least that is what he told his probation officer. Further, it happened when he was not working and was, again by his own admission, living on the streets. The 2005 assault occurred when he was under the influence of alcohol in a bar in Prince Edward Island. Finally, he was drunk when the index offences occurred.
- [79] Mr. Trainor appreciates that if he drinks alcohol there is a significant chance he will get involved in a physical fight. Every time that has happened and has resulted in charges, he has acknowledged as much and resolved to abstain from drinking. I accept that his resolutions on those occasions, as today, are genuine. That is to say, he really does appreciate the risk that alcohol abuse poses. Nevertheless, he has not been successful in overcoming it.
- [80] Dr. Riar and some of the Correctional staff with whom Mr. Trainor has been involved have detected in him genuine remorse for his offending, albeit remorse that is coupled with a limited ability to accept responsibility. I accept that Mr. Trainor is remorseful and has been in the past.
- [81] His limited capacity to accept responsibility is related to his extreme temper and his inability to control it. One recurrent theme in the Correctional records is the belief that his behaviour has been justified. The prostitute in 1996 deserved to have her head smashed into the dashboard, because she had reneged on an arrangement of sex. As to the 2005 fight in the bar, in which he stabbed two men, he told his probation officer that he would do the same thing again if placed in the same situation. Finally, in the present situation Mr. Trainor believes that he was entirely justified in repeatedly stabbing Mr. Dufresne. He is sorry for all the trouble he has caused and is glad that he did not hurt Mr. Dufresne more seriously, but otherwise he feels justified. In some respects, this attitude does not augur well for future abstinence. If the events are all someone else's fault, then, in Mr. Trainor's view of things, alcohol may have had little to do with them. Thus, the connection between his drinking and his harming of others may be tenuous in his mind. A robust connection would assist in resisting future temptation.

- [82] From all of the foregoing, I am satisfied that if Mr. Trainor drinks alcohol he poses a substantial risk to reoffend, and reoffend violently. He has a longstanding history with alcohol. I am, however, satisfied that if he abandons his transient lifestyle, the prospects of him drinking will go down. That is so, in part, because he may develop better social support in the community if he remains in one place. I am satisfied that he will not remain in one place unless compelled to do so by court order.
- [83] Although Mr. Trainor has been defiant towards Correctional employees (on occasion) in the past, for the most part he has been cooperative. I am reasonably confident he will be cooperative in the future. Given the high likelihood that he will, if left unsupervised, soon return to drinking, and given the high likelihood that if he does he will reoffend, I am satisfied there is a substantial likelihood he will reoffend. I am, for the reasons noted, satisfied that there is the possibility of eventually managing his risk in the community.
- [84] The final issue is whether I should exercise my residual discretion not to declare Mr. Trainor a long-term offender. I am not persuaded that I should. Indeed, I think it appropriate that he be declared a long-term offender.
- [85] The next issue is the duration of the long-term offender supervision.
- [86] Mr. Trainor is 51 years old. He has been in custody for just over two and a half years. He has not been idle during that time; rather, he has taken advantage of the limited programming available to inmates on remand, and especially those who are in protective custody as Mr. Trainor has been. He completed a substance abuse program in May of 2008. He completed the program known as Breaking Barriers in August of that year. He has attended some AA meetings and participated in other programs, such as an aboriginal culture based program, although Mr. Trainor is not of aboriginal descent. In sum, Mr. Trainor has generally been a good inmate, although he was initially noted to be confused, irritable, agitated, and prone to abrupt mood swings.
- [87] The probation records reveal a similar pattern. He was initially confrontational with one of his probation officers, but over time became much more compliant. I note this because in my view it is further evidence of the effect that alcohol abuse has on Mr. Trainor. When abusing alcohol, or in the throes of withdrawing from it, his personality is mercurial and he tends to become paranoid. That, in turn, elevates the likelihood of violence. When he is sober, and not experiencing withdrawal, he is much more pleasant and generally a much more pro-social individual. He is motivated to get help and he follows through on that motivation. His experience in pre-trial is evidence of that, as is his experience as a federal inmate. That experience also shows he can benefit from treatment. To his very significant credit, subsequent to his 1989 offences he has not reoffended sexually.
- [88] Returning to the issue, I consider that seven years is an appropriate period of long-term offender supervision. That will, if completed successfully, mean that Mr. Trainor will have had 10 years of alcohol-free life. He will be 58 years old. It will allow him time to establish a social network, which in turn will support his sobriety. Whether he reverts to a migratory

lifestyle is up to him. The point is, a supervision period of that duration, on the one hand recognizes the positive efforts he has made to this point, and on the other puts him in a position where his risk of future offending will remain as low as Correctional authorities are able to make it.

[89] Are there any questions from your perspective, Ms. Phillips?

[90] MS. PHILLIPS: No, My Lord.

[91] THE COURT: Mr. Campbell?

[92] MR. CAMPBELL: My Lord, the Crown also requests ancillary orders: provision of a sample of DNA and prohibition under s. 109 from possession --

[93] THE COURT: As I recall, Ms. Phillips, you had no objection to those orders. Right?

[94] There will be an order, under the appropriate section, that Mr. Trainor provide a sample of his DNA for inclusion in the federal DNA databank, and an order under s. 109 of the Criminal Code prohibiting him from possessing any weapons for life.

Barrow J.

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