
CANADA / JUDGMENT

R. v. Wright

2018 BCSC 237

COURT

Supreme Court of British Columbia

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2018 BCSC 237 R. v. Wright

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wright,

2018 BCSC 237

Date: 20180216

Docket: X078524

Registry: New Westminster

Between:

Regina

v.

Blake Randall Wright

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Before: The Honourable Mr. Justice Ball

Restriction on Publication: Pursuant to Sections 486.4 and 539 of the Criminal Code of Canada

Oral Reasons for Judgment

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Place and Date of Hearing:

New Westminster, B.C.

April 11 - 13, 24 - 26, 2017

June 7 - 9, 12 - 14, 2017

September 6, 2017

Place and Date of Judgment:

New Westminster, B.C.

February 16, 2018

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I. Introduction

[1] Blake Randall Wright was convicted on the 15th day of July, 2016 by this Court, sitting without a jury, of the following offences:

Count 1

Blake Randall Wright, from the 21st day of May, 2013 to the 11th day of June, 2013, inclusive, at or near Surrey, in the Province of British Columbia, did sexually assault [T.D.], contrary to Section 271 of the Criminal Code.

Count 2

Blake Randall Wright, from the 21st day of May, 2013 to the 11th day of June, 2013, inclusive, at or near Surrey, in the Province of British Columbia, with intent to enable himself to commit the indictable offence of sexual assault, did attempt to render [T.D.] insensible, unconscious or incapable of resistance by choking, suffocating or strangling [T.D.], contrary to Section 246(a) of the Criminal Code.

And against the peace of Our Lady the Queen, her Crown and dignity.

[2] In proceedings on December 11, 1984, Mr. Wright was designated a "dangerous offender". In this case and following the conviction of the accused, the Attorney General of British Columbia consented in writing on March 31, 2017 to an application being made under Section 753.01(4) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] for the Court to sentence Blake Randall Wright as a dangerous offender -- such designation having been made by this Court on December 11, 1984 -- and to impose on Blake Randall Wright the appropriate sentence as prescribed by law which the Crown submits is a second indeterminate sentence. Mr. Wright was given proper notice of that consent, a copy of which was filed with the clerk of the Court as an exhibit in these sentencing proceedings.

II. Circumstances of the Offence(s)

[3] This accused was on full parole on the date of the offences for which he is now convicted.

- [4] The circumstances of the offences are detailed in Reasons for Judgment pronounced on July 15, 2016, as yet unpublished. In very brief summary, on the night the offences occurred, the accused met the complainant as a result of her employment as a sex trade worker in Surrey, BC. She was then working at or near the corner of 81st Avenue and King George Boulevard; a customary site for prostitution in that community. The accused and the complainant agreed that she would perform oral sex on him for \$40. She then entered his vehicle and he drove her to his apartment. After a short period of consensual sexual activity, the accused was found to have sexually assaulted the complainant and then choked her into an unconscious state. At that time, he sexually then assaulted her again by, among other acts, forcing his fist and forearm into her vagina causing considerable pain to the complainant. She made considerable noise by striking the floor of the apartment and screaming. The accused temporarily moved off of her person on the floor of the apartment. In that moment, she grabbed her clothing and escaped the apartment.

III. Agreed/Proven Facts

- [5] It was conceded at trial that the accused was the party named in the indictment and he was at some time in the presence of the complainant in his apartment. Likewise, the situs of the events was acknowledged to be in his apartment located on the second floor of an apartment building in the 14900 block of 100th Avenue in Surrey, BC. The issue at trial was credibility. The testimony of the complainant was accepted as credible for reasons given in the judgment referred to above. The accused did not testify and exercised his right to remain silent.

IV. Victim Impact

- [6] The complainant in this case read a victim impact statement in which she related that her sleep has been interrupted and reduced on an ongoing basis by flashbacks and nightmares of the events in Mr. Wright's apartment. Those occurrences make her feel empty, scared, and not in control of her life. Choking has become a feared event in her life, a fear so profound that a strong hug from her infant child causes a fear reaction. She is receiving therapy to deal with these concerns.

V. Circumstances of the Offender

A. Relevant Personal Background

- [7] The accused was born on July 4, 1961 in Calgary, Alberta. He had three brothers -- two older and one younger. His parents had substance abuse problems and were in frequent conflict. His father left the family home when the accused was six years old. His mother then left Calgary to move to the Lower Mainland in British Columbia.
- [8] His mother continued to have substance abuse issues and Mr. Wright became her caregiver. He had anger issues and conflicts with his brothers. He attempted to keep his home clean.

- [9] His school experience is discussed below in the references to the report of Dr. Riar. He was arrested for his first sexual offence while in grade eleven. While Mr. Wright had several periods of work experience, he has spent the majority of his adult years in prison. He has also had several experiences on parole, but without much success.

B. Criminal Record

The relevant record of convictions for Mr. Wright that led to the designation of Mr. Wright as a dangerous offender followed by the imposition of an indeterminate sentence is as follows:

- a) October 9, 1978 -- Offence of Rape and failure to comply with the conditions of recognizance with a sentence imposed on December 21, 1978 of 18 months in prison followed by two years of probation for the rape and 30 days concurrent for the breach charge. This offence occurred when the accused, while in high school, raped another female high school student with a significant degree of violence;
- b) February 2, 1980 -- Offence of Rape for which the accused was sentenced to three years in prison on April 28, 1980. This offence occurred three weeks after the release of the accused from imprisonment on the first rape charge. The victim was a 48 year old woman, who was a friend of his mother. Following this conviction, according to the reasons of the Honourable Judge Rowles (as she then was) dated June 29, 1984, Mr. Wright spent 22 months in sex offender programing;
- c) Offence of Buggery for which the accused was sentenced to eight years in custody on June 29, 1984. This charge occurred during the same time as the offences referred to in the paragraph immediately below, but Mr. Wright was sentenced at a different time. The victim, in that case, spent time in hospital because of injuries caused by violent anal intercourse forced on her by the accused.
- d) July 12, 1983 -- Offence of Sexual Assault (two counts) where Mr. Wright attended the home of a woman friend, who attended Alcoholics Anonymous with him. After asking to talk to the woman, he attacked her "with some violence," tied her up with electrical cords, and sexually assaulted her. A second sexual assault occurred in 1983 when Mr. Wright followed a woman out of a bar to her vehicle where he asked the woman for a ride. The woman refused. He tried to enter the vehicle with some violence. On December 11, 1984, he was found to be a dangerous offender and sentenced to an indeterminate sentence.
- e) Mr. Wright was also convicted of property offences including four counts of breaking and entering for which he was sentenced to concurrent sentences with the earliest offences noted above.

C. Relevant Comments in Pre-Sentence/Psych Report

- [10] In response to the application by the Crown for an assessment, this Court ordered that an assessment be conducted pursuant to Section 753.01 of the Code. Dr. K. Riar performed the assessment; he filed with the Court a nine-page report dated January 5, 2017, and a two-page addendum dated February 16, 2017. Dr. Riar is a psychiatrist, who began his speciality in psychiatry in 1992 and obtained a Fellowship in Forensic Psychiatry in 2013. He currently is the Provincial Clinical Director for Youth Forensic Psychiatric Services and a Clinical Professor in the Faculty of Medicine at the University of British Columbia. From 2000 to the current date, he has been a member of the staff in Sexual Medicine at Vancouver General Hospital.
- [11] The expert forensic report by Dr. Riar was substantially prepared before he had an opportunity to read the Reasons for Judgment of this Court in this case. For the preparation of the forensic report, he was provided extensive documentation of institutional records, community supervision records by parole officers, as well as numerous psychiatric reports and evaluations and treatments. These were in addition to the following documents: Assessments for Decision for July 16, 2015, June 28, 2016, and July 26, 2016; Community Assessments for June 10, 2016; Correctional Plan updates for June 16, 2016 and June 30, 2016; a CSC Board Review dated July 12, 2016; the ICPM Program Performance Report Final dated June 23, 2014; the PBC Decision Sheet, FPS #172316B; the Program Performance Report, FPS #172316B; a Psychological Assessment dated June 26, 2016; and a Psychology Update.
- [12] In addition to the foregoing documentation, which Dr. Riar reviewed to reach his conclusion and opinion, he also used three actuarial assessment tools -- PCL-R, V-RAG and Static-2002R -- the results of which were incorporated into his opinion.
- [13] On page two of Dr. Riar's report at para. 4, the following appears:
- I must state that, although there was limitation to my assessment due to the unavailability of Mr. Wright for direct interview, there was no lack of collateral information. For the last thirty-six years, he has seen many psychologists and psychiatrists, and there were countless evaluations over the period of the last three-and-a-half decades. I found it impossible to summarize each and every assessment and opinion provided by various mental health and forensic experts. Instead, I will take inference from them, in general.
- [14] Dr. Riar's report included a detailed history of Mr. Wright taken from records noting the difficulties he experienced with behaviour in grade school. He first attended the office of a psychiatrist when he was 14-years-old, but there are no reports of any follow-up. He was expelled from school in grade seven, eight and nine due to outbursts of temper and fighting. He was arrested in high school for his first sexual charge. He completed grade 12 while incarcerated and earned a Bachelor of Arts degree in psychology in June 1989.

- [15] Dr. Riar notes that in the 36 years Mr. Wright has been in custodial facilities he has been transferred to various institutes in Saskatchewan, Alberta, and British Columbia. In each, various forensic professionals attached to those institutes have assessed him. He was also assessed at Forensic Psychiatric Services in British Columbia and Alberta. "The main theme from those assessments was that he does not suffer from any major psychiatric disorders, like major depression, anxiety or psychosis. He was described as having alcohol use disorder " He has also been diagnosed with a personality disorder, mainly of an antisocial type. When he was assessed for psychopathy, various professionals found that he does not possess any significant or strong traits that indicate that he has a high level of psychopathy.
- [16] It was noted that from December 1984 until April 1986, Mr. Wright attended a sex offender treatment program in Saskatchewan. In 1989 he attended a sex offender program in Bowden, Alberta. From September 1989 to April 1990 Mr. Wright attended a sex offender program in Clearwater. Again, in 1990 to 1991 he attended a sex offender program in Bowden, Alberta. From July 1994 to 1995 he attended a sex offender program at RPC Abbotsford in BC. In addition, he has attended a sex offender maintenance program in the community as well as while incarcerated, the last being in June 2014 when he was in jail. He has also attended Breaking Barriers, as well as anger management, drug and alcohol abuse, cognitive skills, substance abuse, and relapse prevention programs while incarcerated. He attended a personality disorder program for sex offenders in 1994.
- [17] Dr. Riar noted that in every sex offence for which Mr. Wright stands convicted, he was aggressive and violent towards his victims. He threatened, and there were attempts to humiliate the victims. He also planned to be with the victims and then assaulted them sexually and physically. According to the expert report, at para. 19, "he was indiscriminate and determined in his sexual acting out towards the victims. Also, subsequent to those assaults, he either denied or undermined what he had done. Also, on the contrary, he blamed the victims to some extent. He did not take much responsibility after the fact, and showed disregard and callousness towards them."
- [18] I would note that when Dr. Riar wrote the above he had not received the transcript of the testimony of the complainant or the Reasons for Judgment of this Court dated July 15, 2016.
- [19] Dr. Riar also noted that there have been a number of occasions when Mr. Wright violated his parole conditions, most recently in the middle of 2013 and on the occasion of the index offences.

[20] At para. 30 of his report, Dr. Riar states:

He does not carry any diagnosis of major psychiatric disorder -- that is, depression, anxiety, or psychosis. He had alcohol and marijuana use disorder in the remote past, but has not used any illicit substances since his first incarceration. He has significant traits of personality disorder, if not full fledged personality disorder, of antisocial type. He does not have very many or strong psychopathic traits. In the past there has been mention of attention-deficit and hyperactivity disorder, but it is hard for me to conclude if he had attention-deficit and hyperactivity disorder.

He certainly had conduct disturbances during his childhood, adolescence and teen years.

- [21] Dr. Riar, when commenting on the sexual acting out of Mr. Wright, asserted his profile fit with having a sexually deviant tendency or disorder with a sadistic element in his sexual acting out. "My rationale of putting forward this opinion is that it is not possible for him to contain or control his sexually driven fantasies or impulses, even after attending extensive treatment spending this much time incarcerated, and with advancing of his age. The other element is that he tends to assert dominance on his victims by threatening them, humiliating them, and causing them physical pain" (at para. 32). Later in the same paragraph, Dr. Riar states: "On the other hand in spite of targeted treatment for years for his sexual offending behaviours, he is not able to control or modulate his sexual impulses. This confirms that his sexual arousal patterns are such where they are firmly grained and are very hard to change just by volition."
- [22] Dr. Riar expressed the opinion that he does not believe that any form of treatment will benefit Mr. Wright in the future, although he recommends that if Mr. Wright is ever released into the community he should be followed closely by mental health professionals "who are savvy" at treating sex offenders. In his written report, Dr. Riar expressed the opinion that Mr. Wright is still at risk -- at least moderate in nature -- for committing another sexual offence.
- [23] In his testimony before the court, having considered the Reasons for Judgment together with the transcript of the evidence of T.D., Dr. Riar opined that on a clinical basis Mr. Wright's risk to re-offend with sexual violence was actually high. From 2005 to date the dynamic and static risk factors have not fallen below a moderate-high risk to re-offend, and the current offence has demonstrated an increase in his risk to re-offend.
- [24] In the addendum dated February 16, 2017, after reviewing the transcript of the testimony of T.D. and the Reasons for Judgement of this Court dated July 15, 2016, Dr. Riar came to a firm view that Mr. Wright suffers from sexual sadism disorder; in other words, causing physical and psychological suffering to the victims has given him sexual arousal and pleasure. Dr. Riar opines that "sexual sadism disorder is very difficult to treat and manage." The only treatment to show some success in many jurisdictions, according to the Doctor, involves a combination of anti-androgen agents (medication used in order to lower sexual drive and libido), psychological treatment, and strict supervision. As a result of the conclusion that Mr. Wright suffers from sexual sadism, Dr. Riar expressed that Mr. Wright's risk of re-offending is higher than that previously stated, and consideration of a release into the community must include an assessment for the medical management of his deviant sexual arousal in addition to psychological intervention and strict supervision.

VI. Crown and Defence Positions

[25] Crown counsel applied after the conviction of the accused for an indeterminate sentence based on the history of the accused, his prior convictions, and a prior finding that he is a dangerous offender. Crown counsel relies upon the provisions of Section 753.01 of the Code, and in particular ss. 753.01(4) and (5). The provision states as follows:

753.01 (1) If an offender who is found to be a dangerous offender is later convicted of a serious personal injury offence or an offence under subsection 753.3(1), on application by the prosecutor, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under subsection (4).

- (2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than 30 days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.
- (3) On application by the prosecutor, the court may extend the period within which the report must be filed by a maximum of 30 days if the court is satisfied that there are reasonable grounds to do so.
- (4) After the report is filed, the prosecutor may apply for a sentence of detention in a penitentiary for an indeterminate period, or for an order that the offender be subject to a new period of long-term supervision in addition to any other sentence that may be imposed for the offence.
- (5) If the application is for a sentence of detention in a penitentiary for an indeterminate period, the court shall impose that sentence unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a sentence for the offence for which the offender has been convicted -- with or without a new period of long-term supervision -- will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.
- (6) If the application is for a new period of long-term supervision, the court shall order that the offender be subject to a new period of long-term supervision in addition to a sentence for the offence for which they have been convicted unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that the sentence alone will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

- [26] After the assessment report was filed pursuant to s. 753.01(1), the Crown again exercised its discretion -- this time under s. 753.01(4) -- to apply for a sentence of detention for an indeterminate period. Submissions were made over a number of days regarding whether, pursuant to s. 753.01(5), there was a reasonable expectation that a determinate sentence would adequately protect the public from the danger posed by Mr. Wright.
- [27] It was only following these submissions that defence counsel for Mr. Wright presented a changed position. He then submitted that s. 753.01 does not apply at all to Mr. Wright. The Crown opposed this position, and another day-and-a-half of submissions on the applicability of the provision to Mr. Wright ensued. Both parties properly engaged in the modern approach to statutory interpretation as guided by Driedger's oft-cited principles: see, for example *R. v. Steele*, 2014 SCC 61 at para. 23, which states the following in determining the breadth of a statutorily defined term:
- [23] I reach this conclusion in light of the modern principle of statutory interpretation that the words of legislation must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

A. The Defence Position: Applicability of s. 753.01

- [28] Counsel for the defence submitted that on a plain reading of s. 753.01, the section does not apply to this accused; he argued that the provision was not intended to capture dangerous offenders who are already subject to an indeterminate sentence. With reference to the modern approach to statutory interpretation, he submits that the purpose of the provision -- being protection of the public -- is maintained without the consideration of a second indeterminate sentence given that the first indeterminate sentence does not expire.
- [29] With the coming into force of the current version of the dangerous offender regime in 2008, Parliament reduced judicial discretion at the designation stage, but increased sentencing options available and hence discretion regarding sentence; a determinate sentence with or without a long term supervision order was made possible. This created, he suggests, a new category of persons: dangerous offenders not sentenced to indeterminate sentences. To counter concerns of re-offending by people in this category, defence counsel submits that Parliament enacted s. 753.01 specifically to streamline the process for recidivist dangerous offenders not previously imprisoned indeterminately. The dangerous offender designation itself simply did not have to be revisited.
- [30] Hansard excerpts are referenced in support of this, as is *R. v. Lewis*, 2012 ONCA 78 at para. 3 in which the Ontario Court of Appeal discusses the 2008 amendments. The defence argues that ss. 753 and 753.01 of the Code complement each other, with it not being intended -- and at any rate being unnecessary -- for s. 753.01 to apply to dangerous offenders already given indeterminate sentences under s. 753.

- [31] Relatedly, counsel for Mr. Wright points to the "new" language in s. 753.01(4) and (6) with regard to the application for a long term supervision order. He posits that since there is no language guiding the process for a "new" indeterminate sentence, the provision must have been intended only to apply to previously designated dangerous offenders who were not initially sentenced to an indeterminate period of incarceration.
- [32] In support of his arguments, defence counsel cites *R. v. Obey*, 2015 SKPC 99, a case involving a constitutional challenge of the dangerous offender regime. This was in the context of an application under s. 753 of the Code, but in which the accused raised the prospect of future jeopardy under s. 753.01 as part of the argument. In finding that s. 753.01 did not directly apply at that time, and may never do so, the Judge wrote the following at para. 49:
- [49] It is clear that Mr. Obey is correct that my designating him a dangerous offender under section 753(1) would potentially expose him to the risk of facing the consequences of section 753.01 in the future and that this potential would hang over him for life. It is also clear that his actual exposure to those consequences is dependent on a number of considerations, none of which have yet occurred. These are:
1. That I designate Mr. Obey to be a dangerous offender;
 2. That I impose a determinate sentence, with or without a long-term offender order;
 3. That Mr. Obey in future commits a serious personal injury offence or a breach of his long-term offender order; and
 4. That the Crown makes application for him to be sentenced pursuant to section 753.01, rather than in the usual manner of sentencing.

[Emphasis added.]

- [33] Defence counsel submits that this list is comprehensive, and shows that s. 753.01 only applies if a determinate sentence had previously been rendered. He further refers to *R. v. Wong*, 2016 ONSC 2984, which cites *Obey* but uses slightly different language -- also in the context of a Charter challenge to ss. 753(1) and 753.01 of the Code. This was once again the first dangerous offender proceedings brought against the offender. The Wong decision states at para. 95:
- [95] In *R. v. Obey*, [2015] S.J. No. 345 (Sask. Prov. Ct.) at paras. 49 to 50, the court responded to the argument that a designation under s.753(1) would potentially expose an offender to the risk of the consequences in s.753.01, and that risk would last in perpetuity. The court concluded that before there is any impact on the liberty interest of an offender, the following must take place:
1. A judge must designate an offender a dangerous offender;
 2. A judge does not designate him an indeterminate dangerous offender;

3. The offender commits another serious personal injury offence or a breach of his long-term offender order; and
4. The Crown brings an Application under s.753.01 rather than asking for an ordinary sentence.

[Emphasis added.]

- [34] The exact language is different in Wong, and includes the imperative must take place where Obey, despite being cited for the principle, does not. Mr. Fox argues that the language may be different, but the meaning is the same. Namely, it is submitted that s. 753.01 operates in combination with s. 753, and is only triggered if a dangerous offender was given a determinate sentence on a first dangerous offender application.

B. The Crown Position: Applicability of s. 753.01

- [35] In the Crown's position, the nature and scope of a dangerous offender hearing under s. 753.01(5) of the Code is qualitatively different than a standard sentencing hearing where the objective is to determine a fixed sentence. In particular, the provision states that the court "shall impose that sentence unless " Given this unique characteristic, the Crown submits that the provision applies to Mr. Wright, and was not enacted solely for cases where a previously-designated dangerous offender was given a determinate sentence and re-offends.
- [36] It is argued that, read in its grammatical and ordinary sense, the facts in Mr. Wright's case clearly trigger the Crown's discretion: he was previously found to be a dangerous offender, and he was thereafter, before this Court, convicted of a serious personal injury offence. The Crown may then apply for an indeterminate sentence in consideration of what is adequate for protection of public safety.
- [37] It is the Crown's submission that Parliament clearly intended this second inquiry for this most dangerous category of offenders, who are already subject to indeterminate sentences. To not impose a second indeterminate sentence would leave the situation entirely to the Parole Board. This new scrutiny of the offender's circumstances, therefore, allows for a consideration of what went wrong the first time, as well as for the courts to send a more significant message that greater security is needed to protect the public. This is the case in particular where, as here, there has been a long gap between the first indeterminate sentence and the subsequent serious personal injury offence.
- [38] Further, this is not a re-sentence, but, following a dangerous offender designation, a new hearing altogether for a new offence at the second stage of sentencing pursuant to the dangerous offender provisions. According to the Crown, there is nothing prohibiting a second indeterminate sentence from being rendered concurrent to the first. As a result, it is up to the Crown to pursue a second such sentence if of the opinion that no other sentence sufficiently protects the public.

- [39] Turning back to the elements of the modern approach to statutory interpretation, the Crown argues that the language of the provision clearly captures offenders in Mr. Wright's situation. The plain meaning is clear, and there are no doubtful words or expressions to cloud the understanding. For example, it would be redundant to say a "new" indeterminate sentence when there could be no other such kind.
- [40] Finally, the Crown notes that Hansard statements should be given very little weight as they are made by politicians trying to pass a bill, and, being made by an individual, are not likely representative of the House as a whole. At any rate, the Crown argues, Parliament would not purport to protect the public from violent crime, yet not subject the most dangerous of offenders to the full scope of the related provisions. The sentencing regime envisages a balancing between the protection of the public and the rights of the offender. It only makes sense that s. 753.01 applies to Mr. Wright.

C. Conclusion re: Applicability of s. 753.01

- [41] Upon a review of the positions of Crown counsel and defence counsel and the arguments which have been advanced, it is my decision that the submission of Crown counsel correctly reflects a principled reading of the provisions of s. 753.01 of the Code. Mr. Wright is a designated dangerous offender who now has been convicted of another serious person injury offence. Subject to a prospective assessment of dangerousness, the sentence specified by Parliament is an indeterminate sentence unless the accused can demonstrate certain criteria. Namely, Mr. Wright must be able to satisfy the Court by the evidence adduced during the hearing of the application that there is a reasonable expectation that a sentence for the offence for which the offender has been convicted will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

VII. Applicable Sentencing Authorities

- [42] Section 753.01(5) of the Code provides the basis for sentencing in this matter. It states:
- (5) If the application is for a sentence of detention in a penitentiary for an indeterminate period, the court shall impose that sentence unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a sentence for the offence for which the offender has been convicted -- with or without a new period of long-term supervision -- will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.
- [43] Thus, the court shall impose an indeterminate sentence unless satisfied by the evidence that there is a reasonable expectation that a lesser sentence will adequately protect the public. However, as noted in *R. v. Hunter*, 2015 ABCA 276 at para. 25, "[p]roportionality and the implications as to principles and objectives of the other sentencing provisions of the Criminal Code, even if they are clearly subject to the express stipulations of Parliament in this Part XXIV (viz, the specific over the general in statutory interpretation terms) are not entirely irrelevant."

[44] In *Hunter*, the Court heard an appeal of a newly designated dangerous offender's indeterminate sentence under ss. 753(4) and (4.1) of the Code. Those provisions state:

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

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

[45] The trial judge in *Hunter* was found to have erred with regard to the scope and extent of her discretion under s. 753(4) of the Code in stating that the provisions do not permit the sentencing judge to consider the degree of responsibility of the offender in making a determination regarding the finding or the imposition of an indeterminate sentence. The Court held that, even with the clear indication of Parliament about the presumptive applicability of an indeterminate sentence under s. 753(4) of the Code, Parliament clearly chose not to forego three possibilities of a different practical outcome. The Court's rationale is expanded at paras. 19-20:

[19] While Parliament has shifted the emphasis as to whether the offender's position is "intractable" to the sentencing phase, Parliament's will as expressed in s 753(4) of the Code and its surrounding provisions still leaves a discretion to be exercised judicially in light of all relevant considerations.

[20] Clearly all relevant statutory and common law objectives, principles and factors would be relevant to the content of a sentence under s 753(4)(b) and (c). It would not be logical to assume that Parliament intended that the choice between s 753(4)(a) to (c) would disregard the same considerations. Parliament's policy as to the choice is reflected in s 753(4.1) of the Code

[Emphasis in original]

[46] This is consistent with the Supreme Court of Canada's recent decision in *R. v. Boutilier*, 2017 SCC 64, where at paras. 53-63, Côté J. for the majority confirms the application of the principles of sentencing to the dangerous offender regime.

[47] The same sentencing options are available under s. 753.01(4) of the Code, and s. 753.01(5) provides the same presumption of an indeterminate sentence subject to the evidence demonstrating a reasonable expectation that one of the lesser options would adequately protect the public against a future murder or serious personal injury offence. As such, and keeping in mind that Parliament has escalated the priority of public protection when it comes to dangerous offenders, the same logic indicates that the Code's other applicable principles of sentencing apply in this case.

[48] The purpose of sentencing is set out in s. 718 of the Code, which provides:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[49] Section 718.1 of the Code provides that a fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Further, s. 718.2 of the Code sets out other sentencing principles. Those of particular relevance to the sentencing of Mr. Wright include:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
- (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
- (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
- (vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and Conditional Release Act

shall be deemed to be aggravating circumstances;

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

VIII. Protection of the Public

- [50] The Crown called a significant body of evidence for the intended purpose of demonstrating that there is not a reasonable expectation that any sentence other than an indeterminate sentence will adequately protect the public against the commission by this accused of, at least, a further serious personal injury offence.
- [51] This evidence included a number of witnesses familiar with treatment and counselling programs available from Correctional Service of Canada for federal inmates with histories of sexual and violent offences.
- [52] Another witness called was, C.T., a former sex trade worker from Surrey, who also at the time of events in the Indictment in this case was in the throes of an active addiction with heroin and methamphetamine. She related in evidence two incidents with the accused which occurred while he was using alcohol and involved in retaining her services as a sex trade worker. Involvement with alcohol and sex trade workers were breaches of the parole of this accused, and both were triggers for criminogenic violent behaviour by this accused. Her evidence was relevant to the expectation of the control of the behaviour of this accused in the future.
- [53] The accused did not call any evidence in support of the opposite conclusion.
- [54] The issue of whether the public can be protected has been considered by the Ontario Court of Appeal in *R. v. Radcliffe*, 2017 ONCA 176, leave to appeal refused, 37671 (December 12, 2017) as follows:
- [57] As a matter of general principle, characteristics that make an offender "less blameworthy" have little impact on a dangerous offender application: *R. v. B. (D.V.)*, 2010 ONCA 291, 254 C.C.C. (3d) 221, leave to appeal refused, [2011] S.C.C.A. No. 207, at para. 80. Where Gladue factors serve to establish the existence and availability of alternative Aboriginal-focused means aimed at addressing the environmental, psychological or other circumstances which aggravate the risk of re-offence posed by the Aboriginal offender, a sentencing judge must

make reference to them: *R. v. Jennings*, 2016 BCCA 127, 384 B.C.A.C. 152, at paras. 35, 38; *R. v. Standingwater*, 2013 SKCA 78, 417 Sask. R. 158, at para. 51.

[58] To determine whether a lesser measure will adequately protect the public, there must be evidence before the sentencing judge that the dangerous offender can be safely released into the community. Mere hope, even a judicial assumption about the existence of community programs or other necessary resources, is inadequate to the task of addressing the reasonable expectation of protection of the public. Evidence of the existence and availability of community resources that will provide the essential level of extra-custodial supervision to adequately protect the public is necessary: *R. v. Smarch*, 2015 YKCA 13, 374 B.C.A.C. 291, at para. 48.

[55] The Court continues at para. 63:

63 It is well settled that Gladue factors and s. 718.2(e) of the Criminal Code have limited relevance in dangerous offender proceedings. They have no say in whether an offender meets the statutory requirements for designation as a dangerous offender. Their influence has to do with the subsidiary question of whether there is a reasonable possibility of eventually controlling the offender's re-offence risk in the community, thus on the divide between dangerous and long-term offenders. With the paramount sentencing objective of protection of the public, the judicial discretion to determine an appropriate sentence is significantly circumscribed.

[Emphasis added.]

[56] In the case at bar, Mr. Wright called no evidence. He was not required to do so. Based on the evidence presented by the Crown, it is clear that while Mr. Wright has been involved on many occasions in sexual offender treatment and counselling, notwithstanding those attempts at rehabilitation, within a very short period after he was released on full parole he has been found to have committed a serious personal injury offence of a sexual nature causing great pain to his victim. Dr. Riar, an expert psychiatrist, has opined that Mr. Wright has a sexual sadism disorder which is very difficult to treat or manage. Dr. Riar also noted in his testimony before the Court that the treatment records of Mr. Wright in 1982 and 1990 pointed to sexual sadism where Mr. Wright reported fantasies about causing non-consensual pain to others. This Court has not been satisfied by evidence called in this sentencing hearing that there is a reasonable expectation a sentence for the offences for which Mr. Wright has been convicted, short of an indeterminate sentence, will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

IX. Range of Sentence

- [57] The position of crown counsel was that an indeterminate sentence was the fit and proper sentence, considering the nature of the offences and history of the accused in this case. However, the crown also submitted as an alternative, in the event the court determined that a finite sentence was appropriate, a significant sentence should be imposed.
- [58] The defence submitted that a fixed term sentence was all that was necessary in this case because the accused was already subject to a dangerous offender designation and would likely not gain his freedom in the future based on the potential future decisions of the National Parole Board.

X. Aggravating and Mitigating Factors

A. Aggravating Factors

- [59] The aggravating circumstances of this case are legion. Mr. Wright has a serious criminal record for violent sexual offences and other crimes. He has taken a wide variety of sexual offender treatment programs and notwithstanding those programs, he has continued to offend in a violent and sexual manner against a sex trade worker. He was on parole at the time of the offences with which he is charged and was not permitted by the terms of his parole to be in the company of a sex trade worker. T.D. was, by her own evidence, a sex trade worker who had agreed to perform oral sex on Mr. Wright for the sum of \$40. This was a clear violation of his parole. He also failed to report his dealings with sex trade workers to his parole supervisors. His index crime was further violation of that parole.

B. Mitigating Factors

- [60] There are no circumstances which appear to mitigate the crime which occurred in this case. The accused attended extensive sexual abuse education and prevention courses, but without apparent positive effect.

C. Principles of Sentencing Deserving Greatest Emphasis

- [61] In this case, the sentencing principals which deserve the greatest emphasis are protection of the public and deterrence.

D. Moral Blameworthiness pursuant to s.718.1 (gravity of the offence and degree of responsibility of the offender)

- [62] This was a violent pair of crimes which have a high degree of blameworthiness and for which this accused has a high degree of responsibility. Mr. Wright committed violent offences against the complainant for sexual arousal purposes. He has spent a long time in jail as a result of prior crimes against women. He attempted rehabilitation on repeated occasions, but he has now demonstrated that those attempts were not successful and a further violent personal injury offence followed against a vulnerable sex trade worker. Mr.

Wright has demonstrated he has no control over his sexual impulses.

- [63] Further, it was acknowledged that because of the existing dangerous offender designation and previously imposed indeterminate sentence, a sentence under s. 753.01(6) (long-term supervision) could not be imposed because the period of long-term supervision would never begin.

E. Other Relevant Statutory Sentencing Provisions

- [64] Section 718.2(e) has no application in the case at bar.

XI. Summary of Conclusions re: Kind of Sentence that Needs to be Imposed

- [65] The evidence brought before this Court demonstrates that: Mr. Wright has previously been found a dangerous offender after a number of serious sexual offences against women; he has spent decades in treatment programs while incarcerated for those offences; and within a short time of release on full parole, he has been found guilty of further offences of a violent sexual nature against a vulnerable sex trade worker. Based on this evidence, this accused must be separated from civil society for the protection of its female members until it is established that he does not present an ongoing danger -- such danger which is evidenced in the conduct that has returned him to this Court for sentencing. In *R. v. Boutilier*, 2017 SCC 64, the Court described this as "an enhanced sentencing objective" and I note that Mr. Wright's behaviour would bring him within either of the categories of dangerousness contemplated by s. 753(1) of the Code. Further, while the Supreme Court of Canada in *Boutilier* did not consider the constitutional validity of the interaction between s. 753 and s. 753.01, the Court specifically referred to s. 753.01 as "a provision applying to later convictions of dangerous offenders". That reference is wholly at odds with the second argument of counsel for Mr. Wright to the effect that s. 753.01 does not apply to his client at all. With the enhanced sentencing objective in mind, I therefore impose the fit and proper sentence in this case which is an indeterminate sentence of imprisonment for the offences set out in the Indictment.

XII. Ancillary Orders

- [66] There will be an order in Form 5.03 pursuant to s. 487.04 and 487.051 of the Code that within 14 days of entry into custody, Mr. Wright shall provide a sample of his DNA suitable for analysis and placement in the National Data Bank.
- [67] There will be an order in Form 52 pursuant to s.490.012 of the Code that Mr. Wright comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10 for life.
- [68] There will be an order pursuant to s. 109 of the Code prohibiting Mr. Wright from possessing weapons or firearms for life.

- [69] There will be an order pursuant to s. 743.21 of the Code that for the length of his sentence Mr. Wright shall have no contact with T.D. or any member of her immediate family, directly or indirectly, including by any digital or electronic means or by any means through internet.
- [70] There will be a victim fine surcharge pursuant to s. 737 of the Code, which I calculate at \$200 per count, times two counts, or \$400. In accordance with the recent decision of R. v. Bateman, 2015 BCSC 2071, because of the nature of the indeterminate sentences which Mr. Wright is serving, he will be unlikely to have the wherewithal to pay the surcharge due to continuing time in custody without the expiry of the warrant of committal. Therefore, the court will not allow Mr. Wright any time to pay the surcharge, Mr. Wright will be found in default immediately and he will serve two days for each victim fine surcharge concurrent to all other offences. That translates into two days per offence, times two offences, or a total of four days which he will serve concurrent with the sentence that I have imposed. Bateman was cited with approval and applied in R. v. Learning, 2017 BCSC 1594 at para. 95. It was also referenced by Associate Chief Justice Cullen (as he then was) in R. v. Andrews, 2017 BCSC 216 at para. 34.
- [71] Finally, there will be an order pursuant to s. 743.2 of the Code that the reasons for judgment on conviction and the reasons for sentence in this case shall be delivered to the Correctional Service of Canada. The forensic report of Dr. Riar dated January 5, 2017 together with the addendum to that report dated February 16, 2017, bot exhibits in this hearing shall also be delivered to the Correction Service of Canada.

"Ball J."

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