IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Aylward, 2008 NSPC 55

Date: September 26, 2008
Docket:1682628
1682631
Registry: Halifax

Between:

Her Majesty the Queen

v.

Mark Garnet Aylward

Judge:	The Honourable Judge Castor H.F. Williams
Sentence:	September 26, 2008
Charge:	272(2)(a); 264.1(1)(a) Criminal Code
Counsel:	C. Cogswell, counsel for the Crown P. MacEwen, counsel for the Defendant

Introduction

[1] The Crown has made application for the Court to declare the accused, Mark Garnet Aylward, now age forty-three years, a long term offender. His counsel does not contest the application and, together with Crown counsel, has presented a joint recommendation urging the Court to designate the accused a long term offender and to sentence him as jointly recommended.

Criminal Record of the Accused

[2] Mr. Aylward has pleaded guilty to the predicate offences of sexual assault with a weapon [s.272(2)(a)] where the victim was a fourteen-year-old boy and uttering a threat to cause death or bodily harm [s.264.1 (1)(a)] to the same victim, all of which happened on May 13, 2006 in the Halifax Regional Municipality. In addition, on July 27, 1987, he was convicted of break and enter with intent [s.306(1)(a)] and break enter and theft [s.306 (1)(b)] for which he was sentenced to two years probation on both offences.

[3] On October 27, 1998, in Springhill, he was convicted of sexual assault [s.246.1(1)(a)] where the victim was a thirteen-year-old boy. For this offence he was sentenced to eight months imprisonment. This latter victim was the cousin of another fourteen-year-old male victim for whom, in Springhill, on March 10, 1989, he was convicted of second degree murder [s.218]. For this latter offence he received a life sentence with no eligibility for parole for eleven years. Other criminal conduct for which he has not been tried are allegations of sexual assault [s. 271(1)(a)], possession of a weapon for the purpose of committing an offence [s.88(1)] and unlawful confinement [s.279(2)].

Summary Of The Evidence Of The Predicate Offences

[4] Counsel have submitted and filed an ***Agreed Statement of Facts***, Exhibit C1. Succinctly, in the early evening of May 13, 2006, the accused, armed with an air pistol that he had purchased on May 12, 2006, accosted a fourteen-year-old male youth who, to him, was a total stranger. Pointing the weapon at the youth and threatening to kill him should he resist or call for help, the accused, with the weapon now continuously pressed against the youth's back, directed him to enter into a nearby wooded area.

[5] When inside the wooded area and, at a secluded location, the accused demanded that the victim completely disrobe and, at a point in time, used the victim's T-shirt to gag him. Now controlling the situation with the weapon that he held to the victim's head, he removed the gag, put a condom on his penis and forced the victim to perform an act of fellatio. The terrified victim complied. After a few minutes of this activity, the accused turned the victim around, lubricated his anus and proceeded to sodomize him. Commanding that the victim sit in his lap he continued the act of sodomy and even asked the victim whether he, the victim, was enjoying the act.

[6] Before allowing the victim to put on his clothes, the accused, with a flashlight, examined the victim's body to ensure that he had no tell tale signs of either the sexual encounter or any injuries. He then hugged and thanked the victim for sharing the experience with him and then released him. Subsequent forensic examination and analyses of the victim's person and clothing did not reveal any DNA that belonged to the accused.

[7] At the time of these predicate offences the accused was serving a life sentence for second degree murder but was on parole. His parole, however,

has been revoked.

Position of the Parties

[8] Both the Crown and Defence counsel have joined in recommending that the accused be designated a long term offender and that he serve a determinate period of imprisonment of twelve years with a lifetime weapons prohibition. Counsel also agree that the accused has met all the statutory requirements of a long term offender. Further, they have submitted that, as he is serving a life sentence, and, considering the operation of the ***Corrections and Conditional Release Act***, Stats. Canada 1992, c. 20, s. 102, in the current set of circumstances, the long term offender designation was the fit and proper sentence.

The Evidence On The Application

[9] The Court, pursuant to the ***Criminal Code***, s.752.1, received an assessment report prepared by Dr. Grannie Neilson, a forensic psychiatrist. In addition to the assessment report and psychiatric testimony, the Court also

heard the testimony of Linda Brown, the Halifax Region Supervisor of the Correctional Services Canada. Likewise, it received, as exhibits, six volumes of copious records of the accused prison management prepared by personnel of Correctional Services Canada.

[10] The accused did not testify on the application.

[11] The assessment report revealed that the accused was born in 1965. He was the fourth of five children and between the ages of nine to thirteen years he was sexually victimized by a male cousin who was ten years his senior. Also, due to his small physical size, he was bullied throughout his school career and was sexually harassed by other boys. Leaving school at age sixteen years to attend trade school, he, between the ages of seventeen and twenty years gradually became involved in antisocial behaviour.

[12] Correctional Services Canada records disclosed that he was the leader of a clique of “streetwise” youths who stole goods for him and with whom he shared the proceeds. On July 27, 1987, at age 20, he was convicted of break, enter and theft and break enter with intent. However, within hours of

his sentencing for these offences, at age 21, he committed second degree murder for which he was convicted on March 10, 1988. Even so, he was granted judicial interim release and while residing with his parents, at age 22 years, he committed a sexual assault for which he was convicted on October 27, 1988. He has been incarcerated for most of his adult life.

[13] In any event, Dr. Neilson's testimony amplified her assessment report. She testified that she interviewed the accused, reviewed his Capital District Health Authority health records and every single Correctional Services Canada record and information concerning him and also all pertinent Crown material. She considered these contacts and records in reaching her conclusions and her opinion. Likewise, the psychological tests that were conducted by a staff psychologist and his conclusions were considered in the formulation of her opinion.

[14] Based on her clinical assessment and actuarial and non-actuarial risk assessment tools, Dr. Neilson opined that the accused had difficulty taking responsibility for any of the offences and, if at all he took any responsibility, he minimized it. She also commented that as he did not follow-up on his

serious medical conditions she wondered whether he would follow advise on any sexual medications, should that situation arise.

[15] Also, in her opinion, the accused presented with sexual deviant behaviour in that he admitted that he had a sexual attraction predominantly to teenage boys. She opined further that he was quite resistant to treatment although it was possible with individual counselling. However, considering the escalation of his sexual conduct as manifested in the deliberate planning and preparation of the predicate offences, her opinion was that he was a high risk to recidivate.

[16] Additionally, she opined that he presented with avoidance personality traits in that he appears to be compliant when in reality he is not. In this regard, she concluded that he was duplicitous and any treatment gains that might have occurred, quickly would be lost, as, in her opinion, no gains, in fact, would be made as his duplicity was a core feature of his psychopathy. Also, it was her belief that as he lacked insight, internal control and suffered from a state of self-denial, it would be difficult for him to start any programs, without external controls, unless he seriously addressed those pertinent traits

that, historically, it would appear he has failed to do.

[17] In her opinion, the accused also presented with cognitive distortions in that he justified his anti-social behaviour; was in denial; displaced blame; had selective memory recall; minimized the harm done to his victims and minimized his role in the events. Her clinical assessment was that he committed the personal injury offences to gain dominance and, as well, they acted as a medium for his sexual outlet.

[18] Historically, all his offences involved planning and his method of approach depended on the social circumstances and, in her opinion, his *modus operandi* was to form a friendship. In further support of this hypothesis, she concluded that prior to the predicate offences when he was on parole and before his prohibition on communicating with young persons at the Mall, his intent was to form a relationship with someone at the Mall and groom that person. However, the prohibition caused him to change his usual method and he became desperate, brazen and much more aggressive. As a result, his crime was well planned as evidenced by his purchase of the air pistol and his possession of the condoms and lubricant.

[19] Concerning his treatment prospects, it was her opinion that his risk to re-offending sexually was in the highest category. In support, she commented on what she characterized as his brazen, callous and remorseless use of other persons that would have a significant impact on his treatment prospects. Also, she believed that the offences demonstrated that any treatment gains, that he may or may not have achieved or maintained, were not apparent and his behaviour clearly evidenced and represented a complete treatment loss. Furthermore, he displayed a gross lack of empathy and his age had not reduced his risk. What is more, he had recidivated in a relatively short period of time after he had been released into the community.

[20] She further opined that from a clinical assessment perspective, given his static factors, the accused appears to follow rules while within the institutional environment and was compliant although he resented control. Notably, he has demonstrated that he was unable to self-regulate and break his crime cycle. This was the case, despite supervision when in the community, where he quickly reverted to his deviant and devious paedophilic traits. He did well in situations of external controls but poorly

when he had to rely on internal controls.

[21] Given all these factors, Dr. Neilson further opined that should the accused be released into the community, in the distant future, there would be a need to address anti-arousal medication but his current medical problems, if still existing, may present contraindications. However, she presented that this approach may not be sufficient to correct the problem if other motivators such as the desire for power and control still existed. Similarly, within the institution he would need to re-attend the high intensity deviant sexual interest program, assuming that it existed, and any release had to be highly structured. However, she was uncertain whether Correctional Services Canada could provide these needed and necessary services for the accused should he be released into the community.

[22] Linda Brown was the Halifax Region supervisor for Correctional Services Canada. Although officially she was not the accused parole officer, she was, however, familiar with his file. She did supervise him on at least three occasions. Further, she had reviewed his file and had been briefed by his regular parole officer.

[23] She testified that the accused was subject to a term of imprisonment for his natural life as a result of his sentence for second degree murder. Additionally, she explained the legislated roles of the National Parole Board and Correctional Services Canada in the supervision and the granting of parole to an offender who was undergoing a sentence imposed by the court. Further, she explained the authority of Correctional Services Canada to suspend or to revoke parole based on the criterion that an offender's risk was not dependent upon the crime and that any risk assessment determination was independent of any court's findings.

[24] In addition, she remarked that supervision in the community was not applicable to a long term offender who was also serving a life sentence. Likewise, to her knowledge, Correctional Services Canada did not have any community facilities that was appropriate for the clinical assesses needs and requirements of Mr. Aylward. Furthermore, as he was on parole at the time, he committed the predicate offences, his parole has been revoked.

Issue

[25] In the Court's opinion, the predominant issue is: Given that Mr. Aylward is serving a life sentence for second degree murder, is it appropriate for the Court to accept a joint recommendation for a statutory designation on an application, under the ***Criminal Code*** Part XXIV, without satisfying itself on an analysis of the statutory criteria, of their applicability? As a secondary issue: Can the Court make the long term offender designation without considering whether there is a reasonable possibility of controlling the offender's risk in the community given that, in serving a life sentence, there is a statutory prohibition of any imposition of a long-term supervision order?

Preliminary Issues

[26] During their presentations counsel raised several points that the Court will first address.

*(a) The retroactive date of the Application under the **Criminal Code** Part XXIV.*

[27] Counsel asserted that the accused should have the benefit of the law that was applicable at the time of his commission of the predicate offences. This law ought to be that which is applied concerning the statutory interpretation of the ***Criminal Code,*** s.753.1(4).

[28] In the Court's opinion, on the principle that the law is always speaking, the date of the application is the date of the applicable law. That is so, as in the Court's view, the accused is subject to an application under Part XXIV, that is current.

[29] Although the process embarked upon under Part XXIV is within the scope of the sentencing procedures and must be guided by the fundamental purposes and principles of sentencing, those objectives are attenuated in favour of indefinite preventive detention. ***R. v. Lyons***, [1987] 2 S.C.R. 309, ***R.v. Jones***, [1994] 2 S.C.R. 229. However, the normal sentence for the predicate offences that he committed, the law that was applicable, at the time of the commission of those offences, would apply. See: ***Canadian Charter of Rights and Freedoms***, s.11(I).

[30] Even so, despite the fact that these offences have triggered and formed the basis of the application under Part XXIV, the application itself requires and follows specific statutory procedural steps that are distinct and independent of the imposition of the usual sentence for those offences. See: ss. 752, 753, and 754. This view is strengthened by the fact that an application under Part XXIV can be made even after the accused has commenced serving a regular sentence for the predicate offences. See: s.753(2). Thus, in the Court's view, the law on the application under Part XXIV runs current with its commencement date and not retroactively to the date of the predicate offences that form the basis of the application subject, of course, to the Court's earlier observation concerning the operation of ***Charter*** principles.

(b) Joint recommendation concerning a designation under Part XXIV

[31] Counsel submitted, as a joint recommendation, that the Court designate the accused a long term offender. They submitted that they are in agreement that he meets all the statutory criteria for such a designation.

[32] All the same, in the Court's opinion, the paramount issue is neither the long term offender designation nor the period of time that the accused should serve, as jointly recommended. Rather, it is whether the Court, on an assessment of all the evidence and on the statutory criteria, is indeed satisfied that the accused be designated under Part XXIV. Given that the standard or test for any of the two designations that can be imposed on an offender pursuant to Part XXIV is statutorily defined and must be present, with certain narrow exceptions, also statutorily, it is the duty of the Court, if it is satisfied on an assessment of these statutory criteria, to decide what ought to be the designation. Thus, it is only the Court that can make and declare the statutory designation.

[33] Moreover, in the Court's view, a designation under Part XXIV is not the usual sentence where an appropriate quantum or range can be agreed upon by counsel, as pronounced in ***R.v. G.P.***, [2004] N.S.J. No.496. (C.A.). Hence, in the Court's view, a joint recommendation as to sentence, is confined to counsel recommending the quantum of the sentence within an appropriate range that is not contrary to the public interest and which would not bring the administration of justice into disrepute. Therefore, here, in the

Court's opinion, any purported recommendation on the statutory designation of the offender, under Part XXIV, by counsel, is outside the scope of what they can assert and, statutorily, it appears to be impermissible.

[34] As well, in the Court's opinion, the resolution of any disputes concerning how and in what manner the accused should serve his sentence or the quantum of the sentence, would have no efficacy, as a joint recommendation, until the issue of his statutory designation is determined by the Court. That is so, as in the Court's view, s.753.1(3) is not a prerequisite to the determination of his status as a long term offender. Rather, it only establishes a minimum sentence once he has been found to be a long term offender. ***R.v. H.P.W,*** [2001] A.J. No. 1167 (C.A.), at para. 16. Consequently, it is the Court's view that any joint recommendation that is meant, however altruistically, to fetter its statutory prerogative prior to its determination of the statutory designation of the accused, has no efficacy as it is not allowed under the statute.

[35] In any event, the Court did adjourn the hearing to allow counsel to present further arguments concerning the applicability of the joint

recommendation. Essentially, both counsel were of the view that ***G.P.,*** *supra.,* was still applicable as the ***Criminal Code*** Part XXIV was a sentencing process where all the principles and purposes of sentencing apply. Consequently, the accused is entitled to the least restrictive sanctions that would be appropriate in his case. Likewise, counsel submitted a background of the negotiating process and the reasons for arriving at their joint conclusion and recommendation. This process, according to both counsel, involved lengthy and difficult discussions over a period of a year with consultations that included Correctional Services Canada personnel as to the proper sentencing sanctions that ought to be imposed.

[36] Also, the discussions considered the triable issues and the difficulties in areas of the Crown's evidential burden. But, in the end, the accused, when before the Court and upon entering his pleas, was clear that he made the pleas voluntarily; that he understood that the pleas were an admittance that he committed the offences as charged; that he understood the nature and consequences of his pleas; and, that any agreements or arrangements that he might have made with the Crown the Court was not bound by that agreement. The Court was satisfied on all these factors and accepted his

guilty pleas.

[37] After hearing further arguments, the Court, for the above stated reasons is still of the view that here, ***G.P***., *supra.*, is not applicable. Put another way. In the Court's opinion, a system of law under which it is the expressed duty and obligation of the Court to make a determination based upon a formulated legislative process, with standard tests and rules, that affect the life and liberty of an individual and with no provisions for an exemption to the initial process, a joint recommendation, by counsel, that effectively makes that determination, which statutorily is reserved to the Court, and, without adhering to the statutory process, is difficult to justify. Consequently, the Court doubts and is inclined to the view that the joint recommendation of counsel, as to the statutory designation of the accused, has neither the jurisdictional nor the constitutional gravitas contemplated by the statute.

Discussion and Analysis

[38] Thus, the combined and joint thrust by counsel, in the Court's view, was based upon the premise that the accused assessed conduct and the

attendant risks can be treated, over time, within the prison environment, assuming his cooperation in such treatment. However, this steadfast approach by counsel appears to ignore the fundamental principle that the determination of whether or not the accused is declared a long term offender or a dangerous offender is established by statutory criteria and not by the facts surrounding the commission of the predicate offences.

[39] Moreover, in the Court's opinion, there is no requirement that those facts, horrendous as they are, clear any threshold of seriousness to engage the dangerous offender or the long term offender designation. Rather, in the Court's opinion, the issue, here, is whether on the evidence, the sum total of the accused conduct in sexual matters shows that he has failed to control his sexual impulses and there is "a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his . . . sexual impulses." See: s.753(1)(b); ***R.v. H. (M.B.)*** (2004), 186 C.C.C. (3d) 62.

[40] Although counsel presented and tendered, in six large binders, what they described as all the Correctional Services Canada records pertaining to the incarceration and prison management of the accused, neither of them

directed the Court's attention to any single pertinent document nor any relevant documentary evidence that supported the proposition or the notion, as advanced, that there is currently a reasonable possibility that the risks that the accused poses to the public can be controlled in the community. Rather, in the Court's opinion, they both optimistically emphasized the continued and future treatment of the accused within the Correctional Services Canada environment, assuming his genuine compliance with such treatment regimen.

[41] Significantly, in the Court's view, they presented this affected view despite the guarded actuarial and non-actuarial risk assessment of Dr. Grannie Neilson, the forensic psychiatrist. For example, she opined that, based on historical factors, the accused was in self-denial; was quite resistant to treatment; was duplicitous with cognitive distortions; was paedophilic and was unable to self-regulate in the community. Additionally, according to Linda Brown, the Halifax area Correctional Services Canada supervisor, an offender's risk assessment determination is independent of any findings of the court.

[42] Nevertheless, it is the Court's view that, in its proper context, there is some merit to the argument, assuming that it is satisfied that the accused meets the statutory criteria for long term offender, that no period of long-term supervision can be imposed as he is serving a life sentence. The logic appears to be that under s. 753.2, the long-term supervision period can only take effect after he has finished serving the sentence for the predicate offences and any other period of imprisonment that he is serving. So, as he is currently serving a life sentence where his warrant expiry date is also the end of his natural life, it will be impossible for him to commence his long-term supervision within the community. But, theoretically, it is conceivable, as a matter of legislative fiat, that he could be designated a long term offender and, as he is serving a life sentence, supervision in the community is not feasible and therefore that portion of the designation is not imposed, as is authorized by s.753. 1(4) [now s.755].

[43] However, it seems to the Court that the fundamental difference between being designated a dangerous offender or be declared a long term offender, is that as a long term offender "there is a reasonable possibility of eventual control of the risk in the community." s.753.1(1)(c). If the Court is

not satisfied that there is such a reasonable possibility of eventual risk control, and the offender also meets all the statutory criteria of a dangerous offender, the Court, in considering public safety, conceivably could not justify a long term offender designation.

[44] If, on the other hand, the Court does not find him to be a long term offender, here, it does not think that it can sentence him for the offences for which he has been convicted, as contemplated by s. 753.1(6). This is so as, based on Dr. Neilson's clinical assessment of his risks, it is the Court's opinion that his dangerousness still presents a clear and continuing threat to the community. Equally significant, as pronounced by Iacobucci and Arbour JJ. , in ***R. v. Johnson***, [2003] 2 S.C.R. 357 at para. 39:

> ...Parliament did not intend that the dangerous offender provisions and the long term offender provisions to be considered in isolation of one another. On a dangerous offender application, a sentencing judge may consider the possibility that a long term offender designation is appropriate.

[45] As a result, in considering the scope of what can be ordered and the operation of the same principles, as pronounced in ***Johnson***, *supra*. , in this Court's opinion, the converse would also be applicable. Thus, on a long term

offender application, the Court may consider the possibility that a dangerous offender designation is appropriate if it is satisfied that there is no reasonable possibility of control of the risk in the community, notwithstanding that the application was advanced for a long term offender designation. Furthermore, to release an offender into the community while, in sexual matters, he remains unable to control his sexual impulses and with the likelihood that he would cause injury, pain and other evil to other persons, serves neither the interest of the offender nor those of the community.

[46] Additionally, since the designation of a long term offender ordinarily entails a determined sentence and a community supervision combination, the fact that the community supervision cannot be imposed under s.753.1(4), does not, in the Court's opinion, vitiate the criteria as set out in s.753.1(1)(c). The exemption only applies to that portion of the sentence that must be served in the community under supervision and nothing more.

[47] In the Court's view, he still must satisfy all the statutory criteria before he can be designated a long term offender. Therefore, the community supervision criterion can neither be discounted nor be ignored simply

because he is serving a life sentence. It matters not that it cannot be imposed as, in the Court's opinion, it is still a critical aspect of the analysis that it must make. Only when it is satisfied that he has met all the statutory criteria can the Court consider the appropriate designation subject to the statutory exemption.

[48] In considering all the facts before it, this Court attaches particular significance to the opinion of Dr. Neilson concerning the disposition of the accused. She concluded in her report at pp 33-34:

> 1. It is clear that Mr. Aylward has caused significant physical and likely psychological, harm to his victims. There is no psychiatric or medical evidence to suggest that he would have been unable to control his impulses, or to conform his behaviour to societal norms.
>
> 2. There are no psychological operational criteria with regard to 'brutality', or 'indifference' (i.e., the intent of the offender to inflict harm, the amount of suffering endured by the victim and/or the extent of the injuries inflicted) therefore no comment is made in this regard.
>
> 3. In arriving at a professional judgment concerning Mr. Aylward's risk of violent recidivism, I have considered risk assessment instruments that weigh both static and dynamic factors for the risk of future violence, and relevant case-specific factors. Based on this comprehensive risk assessment, it is my opinion that Mr. Aylward poses a **moderately high** risk of future violence, including sexual violence, compared to the general offender population.
>
> 4. From a clinical standpoint, Mr. Aylward has shown a persistence of violence, including sexually violent behaviour during his adult life when he has been at liberty to offend. There are no relevant psychological

operational criteria for “pattern” as it relates to violent or sexually violent offending. While it is never possible to predict exactly the form that future violence may take, when it will occur, or indeed, if it will occur, it is noted that Mr. Aylward has now a third violent conviction at age 40, clinically similar to those perpetrated at ages 21 and 22 (i.e., perpetrated against a teenage boy; to assert dominance sexually or otherwise). However, it is noteworthy that he most recent offence appears to represent an escalation inasmuch as on this occasion he targeted a stranger, used a weapon, and used credible threats of death.

5. Acknowledging that the Court may also be examining this case in the context of long-term offender legislation, and examining the question of whether there is a reasonable possibility of eventual control of this risk in the community, the following comments are offered in this regard:

> Mr. Aylward’s treatment and rehabilitative needs are extensive and would require considerable coordination of multiple treatment providers and service agencies, both within the Institutional Correctional environment and upon any future release.
>
> Eventual control of any offender in the in community is predicated on their willingness to be fully involved in, consistently co-operative with, and honestly engaged in, their Correctional Plan, both within the institution and post-release. This includes participating in any recommended treatment and rehabilitative efforts and engaging in an honest reporting relationship with their correctional supervisors. The aim of a Correctional Plan is to facilitate the development of an offender’s internal controls, such that external controls eventually become redundant. Community management should only be attempted after Mr. Aylward has successfully demonstrated (over a sustained period of time) that he is willing to fully participate in, and demonstrated benefit from, relevant institutional treatment programs.
>
> Mr. Aylward appears to have had the benefit of

> programs and services offered by Correctional Services of Canada, with the exception of the National Offender Substance Abuse Program. Participation in this program would likely be of value. Further, an assessment of the utility of arousal control medications upon any future release would be advisable.
>
> In addition to program response, eventual community management is also predicated on the availability of the appropriate rehabilitation programs/treatments/supervision for his level of risk in the community. The degree to which the Correctional Service of Canada could provide appropriate community programs, supervision, monitoring, and housing is unknown to me.

[49] The Court, in exercising its discretion, must give weight to this opinion for the following reasons:

(a) The accused "has numerous medical conditions, but none that affect his current sexual functioning." Further, "he has a history of failure to follow medical advise, even for potentially life-threatening condition." This may speak to his ability to cooperate and to comply with any anti-arousal medication supervision within the community.

(b) The accused "has failed to seek timely psychological assistance when his mental situation was deteriorating prior to the offence." He has

been noncompliant with medications and has met the criteria for a "diagnosis mixed personality disorder throughout adulthood."

(c) The accused has a poor insight into his behaviour with "a tendency toward interpersonal exploitation or manipulation to meet his own needs."

(d) The accused has a poor performance record of community supervision. All his offending behaviour occurred when he was on judicial release and under some form of judicial supervision. While his institutional correctional behaviour was relatively good, his behaviour was characterized as one of a "passive-aggressive stance" that was "clearly one of defiance of authority and [the] need to perceive himself as the one in control."

(e) The accused has failed to follow his release plans and continuously "relapsed into high risk sexual offending behaviour which he failed to report."

(f) The accused “continues to use a wide array of cognitive distortions, demonstrating only superficial awareness of the consequences of his anti-social behaviour to his victims in particular, and to society in general.”

[50] Equally significant, in this regard, is that to exclude clear psychiatric evidence of the dangerousness of the accused would be to ask other young boys in society to bear the risk that this offender may or may not control his sexual impulses. The release of the accused while he continues to pose a clear threat to their security is not a risk that they should be forced to bear.

[51] The evidence is that he would require a structured environment. Further, he may not be a candidate for anti-arousal therapy as his sex drive may not be the primal operating factor for his sexual recidivism given the existence of his cognitive distortions and the traits of dominance and control over others. Moreover, there was no evidence that Correctional Services Canada has a group home or a community correctional centre structured with the resources capable of dealing safely with the multidimensional needs of the accused. See; ***R. v. Bird***, [2007] N.S.J. No.510, 2007 NSPC 73.

[52] Consequently, the Court finds Dr. Nielsen's testimony concerning the current disposition of the accused to be credible, reliable and trustworthy. On the other hand it finds that the submissions of counsels, on the critical points, to be one of hope and speculation that is not supported either by the empirical or the substantive evidence that they presented to the Court.

[53] As a result, it is common ground that the proper course for this Court to take is to consider whether the long term offender designation, as urged upon it, would virtually replicate jail-like conditions in the community should the accused be released into the community. Furthermore, it is important to bear in mind that resource limitations cannot be used to render meaningless the statutory criteria designations under Part XXIV. See: ***R.v. G.L.***, [2007] O.J. No. 2935, 2007 ONCA 548.

Conclusions

[54] From the Court's perspective, this case was presented in the context of a determinate sentencing scheme where the availability of parole was an additional superadded protection for the public safety. Also, it would appear

that, from the point of view of the offender, as urged by counsel, his detention is never completed as he is serving a life sentence and each opportunity for parole would be the sole mechanism for the termination of his close detention and making his release into the community more certain.

[55] Seen in this light, the parole process assumes the utmost significance as it is only that process that would be capable of accommodating and tailoring his sentence to fit his evolving needs and criminogenic tendencies. However, in the Court's opinion, the criteria under the ***Criminal Code***, Part XXIV is no less a reflection of society's concern in releasing dangerous offenders into the community than the release of other offenders under the provisions of the ***Corrections and Conditional Release Act***.

[56] Furthermore, in the Court's view, the state of the law regarding the sentencing process, as set out in ss.718-718.2, requires the Court to limit itself to the rules set out in the ***Criminal Code***. Thus, unless entrenched by Parliament in the ***Criminal Code***, the Court does not examine how a sentence, in reality, is managed by the State and its representatives. Therefore, on that principle, the internal practices of the Parole Board and

Correctional Services Canada are not relevant for sentencing, and, the incorporation in sentencing of considerations of how the sentence would be served would be an inadmissible exercise. See for example: ***R. c. Villar*** (2005), [2005] R.J.Q. 3102, 35 C.R. (6th) 191.

[57] In the result, the Court concludes and finds, as submitted and agreed by counsel, that the Crown has met all the procedural requirements for the making of the application. Likewise, by virtue of his guilty pleas the accused has admitted that he has committed a "serious personal injury offence" under s.752(a), (sexual assault with a weapon), and, as a result, there is no doubt that the Crown has met the burden of proof concerning these preliminary matters.

[58] In addition, the Crown has met its burden of proof on the following factors and accordingly, on the evidence, the Court is satisfied and finds that the accused:

(a) has been convicted of sexual assault with a weapon (a serious personal injury offence) and by his conduct in committing the predicate offence

of sexual assault with a weapon he has shown that he has failed to control his sexual impulses and there is a likelihood that, in the future, in sexual matters, he will fail to control his sexual impulses and will, as a result, cause injury, pain or other evil to other persons. [s.753(1)(b), 753.1(2)(b)(ii)].

(b) has shown a pattern of persistent aggressive behaviour of which his conviction of the sexual assault with a weapon forms a part. Further, in its commission, he showed a substantial degree of indifference regarding the reasonably foreseeable consequences to his victim as a result of his behaviour and the likelihood of him causing death or injury or inflicting severe psychological damage on other persons. [s.753(1)(a)(i),(ii), 753.1(2)(b)(I)].

(c) his behaviour in the commission of the sexual assault with a weapon was of such an unfeeling nature that it compelled the conclusion that his future behaviour would not be inhibited by normal standards of behavioural constraints. [s.753(1)(a)(iii)].

[59] Additionally, in instructing itself on the principles and directions pronounced in ***Johnson***, *supra*. , at paras. 21-40, the Court is satisfied, on the record before it, and finds that there is unquestioned evidence that establishes that the accused:

(a) constitutes a threat to the life, safety or physical or mental well-being of other persons in that he has been convicted of sexual assault with a weapon and poses a substantial risk to reoffend;

(b) has demonstrated a pattern of repetitive behaviour, of which the predicate offence of sexual assault with a weapon forms a part, that shows a likelihood of him causing death or injury to other persons or inflicting severe psychological damage on other persons.

(c) has shown by his conduct in sexual matters, including the predicate offence of sexual assault with a weapon, a failure to control his sexual impulses and a likelihood of causing injury, pain or other evil to another person through failure in the future to control his sexual impulses.

[60] This Court has considered, as urged upon it by both counsel, and, as it is obligated to do, a long term offender designation. In addition, it has considered the principles of sentencing as set out in the ***Criminal Code***, ss. 718-718.2. In the result, on the analysis that it has made and on the totality of the evidence, it concludes and finds that, in this case, a long term offender designation may not be sufficient to protect the public from Mr. Aylward's criminal and dangerous behaviour.

[61] That is so as, in the Court's opinion, Mr. Aylward has not succeeded in controlling his sexual impulses and his prognosis to do so is poor. He has had limited access to the community with no marketable skills or history of employment stability that would allow him to find and hold a job should he be released into the community. Further, he has a history of failing to follow medical advice and it is unsure whether he is a candidate for anti-arousal medication or therapy. Likewise, he has poor insight into his sexual behaviour and manifests significant cognitive distortions and progressive predatory conduct in the index offences.

[62] Additionally, he has a disastrous history of community supervision. In

this regard, the Correctional Services Canada file indicates that he has significant difficulty managing supervision stipulations and that he has never had a successful period of release into the community. Significantly, all of his offending behaviour happened when he was under some form of judicial supervision. What is more, there is no evidence that the required resources are available to supervise his safe reintegration into the community. Moreover, it is apparent, at this point, that should he be released from a highly structured and highly supervised environment, he will hurt some innocent boy as, in the Court's opinion, this case is not so much an issue of external controls as it is one of lack of personal internal controls that would require stringent community monitoring measures that presently are not available. See for example: ***Bird,*** *supra*.

Disposition

[63] This Court has considered, long and hard, the possibility of designating Mr. Aylward a long term offender, as urged by counsel. However, for the reasons stated, this Court has rejected this option as too theoretical and speculative for it to be satisfied and to find that there is a reasonable

possibility of eventual control of his risk in the community. There may be a possibility, but on the total evidence, this Court is not satisfied and therefore cannot conclude and find, on the above analysis, that such a possibility can be characterized as reasonable. Thus, in all the circumstances and to protect the public, it is appropriate, in this case, not to impose a determinate sentence.

[64] Consequently, this Court is satisfied and finds that the accused meets the statutory criteria for both a dangerous offender and a long term offender. But, on its assessment of the total evidence and on its analysis, it is satisfied that there is no reasonable possibility of eventual control of Mr. Aylward's risk in the community. Therefore, on the above analysis and on the authority of the ***Criminal Code***, s.753(4) this Court finds and declares Mr. Mark Garnet Aylward, a dangerous offender.

[65] As a result, the Court imposes a sentence of an indeterminate period in a penitentiary. Further, the Court understands that the accused has been the subject of a prior mandatory DNA order and thus a further order is not required. However, as requested, the Court orders that under the ***Criminal***

Code, s.109(3), he is prohibited, for life, from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance.

[66] Sentenced accordingly.

J.