Date: 20011221
Docket: CR 162262 and 162264

IN THE SUPREME COURT OF NOVA SCOTIA

[Cite as: R. v. Shrubsall, 2001 NSSC 197]

BETWEEN:

HER MAJESTY THE QUEEN

- AND -

WILLIAM CHANDLER SHRUBSALL

DECISION

DANGEROUS OFFENDER APPLICATION

HEARD: At Halifax, Nova Scotia before the Honourable Justice Felix A. Cacchione. on February 26th to 28th, March 1st, 5th to 9th, 14th, 19th to 23rd, 26th to 29th, April 2nd, 5th, 9th, 10th, 12th, 17th to 19th, 23rd to 25th, 27th, 30th, May 1st to 4th, 7th, 8th, 11th, 30th and 31st, June 1st, 4th to 7th, 11th to 15th, 19th, 20th, August 2nd, 3rd, 7th, 8th, September 14th, 18th, 19th and 24th, October 1st to 3rd, 9th, 15th, 16th, 18th, 31st, November 1st, 2nd, 5th, 6th, 2001.

DECISION: December 21st, 2001

WRITTEN RELEASE
OF DECISION: December 21st, 2001

COUNSEL: Paul Carver and Robert Fetterly, for the Crown
Lonny Queripel, Cecil Woon
and Suzanne Kennedy, for the Accused

A Ban on publication of the names of victims and witnesses in these proceedings is in effect.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

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INTRODUCTION

[1] There are two separate applications before this Court to have William Chandler Shrubsall (the offender) declared a dangerous offender and sentenced to an indeterminate term of imprisonment. Both applications will be dealt with and referred to as one.

[2] The offender was originally charged on one indictment with eight offences against three separate complainants. Saunders, J. (as he was then) granted a motion for severance of those counts as they related to each complainant. This resulted in three separate trials held before two different juries and a judge sitting alone. The trials were not held in chronological order of the occurrences. The offender was convicted on all counts at each of the three trials.

[3] The Crown, at the conclusion of the trial presided over by Saunders, J. (as he was then), gave the first notice of its intention to have the offender declared a dangerous offender. The Crown gave a similar notice to this Court at the conclusion of the offender's second trial. Separate dates were set for the hearing of these applications.

[4] Prior to the commencement of the dangerous offender application before Saunders, J. (as he was then) Justice Saunders was elevated to the Court of Appeal. In a written judgment issued September 5th, 2000 Saunders, J. divested himself of jurisdiction to hear the first application. All counsel agreed that this Court, having presided over the offender's second trial, should hear both applications.

[5] The conditions precedent to a dangerous offender application, as set out in ss. 752(a) and (b), 753(2), 752.1(1) and (2), s. 754(1)(a) and (b), and s.754(1)(c) have been met. The particulars are as follows: On May 3rd, 2000 the offender was found guilty by a jury of a robbery and aggravated sexual assault committed upon Tracey Jesso. On June 30th, 2000 the offender was convicted by a separate jury of the aggravated assault endangering life, robbery and possession of a weapon for the purpose of committing a robbery in relation to T. D..

[6] It was acknowledged by counsel for the offender, at the beginning of this application, that the aggravated sexual assault of Ms. Jesso and the aggravated assault endangering the life of Ms. D. (the predicate offences) are both serious personal injury offences as defined in s.752(a) and (b) of the **Criminal Code**.

[7] Notice of the Crown's intention to seek a dangerous offender designation was given at the conclusion of both trials before sentence was imposed as required by s.753(2).

[8] Pursuant to s.752.1(1) remands for assessment were made on May 3rd and August 30th, 2000. The reports were filed within the prescribed time as set out in s.752.1(2).

[9] The consent of the Attorney General to the application, as required by s.754(1)(a), was dated January 10th, 2001 and filed with this Court on January 15th, 2001. Service of the Notices of Application was acknowledged by counsel for the offender on January 16th, 2001.

[10] The 23 page Notice of Application is very detailed in outlining the basis on which it is intended to found the application. The Notice was filed with this Court pursuant to s.753(1)(c), on January 15th, 2001.

[11] The application seeks to have the offender declared a dangerous offender under s.753(1)(a)(i), (ii), (iii), and 753(1)(b).

[12] The hearing of this application lasted 73 days and approximately 85 witnesses were called to testify. Twenty-one volumes of materials were filed as well as transcripts of the offender's previous trials in Nova Scotia. Transcripts of criminal proceedings held in the United States of America were also filed with the Court.

[13] All of the evidence given by witnesses, together with the documentary evidence before this Court, has been considered. Because of the volume only portions of the evidence will be referred to and highlighted.

THE LAW

[14] The aim of the provisions contained in Part 24 of the **Criminal Code** is not punishment but rather the prevention of future violence and the protection of the public from potentially dangerous offenders: **R. v. Jones** (1994), 89 C.C.C. (3d) 353 at 396-397 (S.C.C.); **R. v. Jack**, [1998] B.C.J. No. 458.

[15] The dangerous offender provisions are "clearly designed to segregate a small group of highly dangerous criminals posing threats to the physical or mental well being of their victims": **R. v. Lyons**, [1987] 2 S.C.R. 309 at 347 (S.C.C.). The offender is not being sentenced for past or future criminality. He is being sentenced for a particular violent crime pursuant to a procedure aimed at determining the appropriate penalty in the circumstances: **R. v. Lyons** (supra) at pp. 327-28; **R. v. Currie**, [1997] 2 S.C.R. 260 at paragraphs 25-31.

[16] A dangerous offender application is a sentencing matter and not a trial: **Wilband**, [1967] S.C.R. 14 (S.C.C.) reaffirmed in **Lyons v. The Queen** (supra); and **R. v. Jones** (1994), 89 C.C.C. (3d) 353. In **R. v. Jones** (supra) the Supreme Court of Canada confirmed the necessity of using the greatest possible range of information during a dangerous offender application in order to determine the appropriate sentence for the person.

[17] The Ontario Court of Appeal in **R. v. Lewis** (1984), 12 C.C.C. (3d) 353 referred to evidence concerning other incidents as being of considerable importance in establishing a pattern of repetitive or persistent aggressive behaviour or a failure to control sexual impulses. In **R. v.**

Dicks, [1995] N.S.J. No. 159 Chief Justice Glube held that the Court is entitled to hear evidence beyond or in addition to the actual offence before the Court. In addressing s.753(1)(b) she stated at paragraph 19:

> A concern of the court in a dangerous offender application is to hear evidence relating to the persons "conduct in any sexual matter". The evidence can include, previous convictions or other examples of incidents where there has been no conviction (see **R. v. Kanester**, [1968] 1 C.C.C. 351 (B.C.C.A.); **R. v. Dawson**, [1970] 3 C.C.C. 212 (B.C.C.A.); **R. v. Jackson** (1981), 61 C.C.C. (2d) 540 (N.S.S.C.A.D.); **R. v. MacInnis** (1981), 64 C.C.C. (2d) 553 (N.S.S.C.A.D.); evidence from preliminary inquiries on charges never brought to trial; evidence relating to incidents where no charges were laid as well as one where the charges had not been disposed of prior to the dangerous offender hearing and such evidence was found to be admissible.

[18] The Alberta Court of Appeal in **Regina v. Neve** (1999), 137 C.C.C. (3d) 97 held that evidence of criminal behaviour which was not the subject of criminal charges may be introduced in dangerous offender proceedings. The Ontario Court of Appeal in **R. v. Sharrow** (1999), 133 C.C.C. (3d) 467 also held that the dangerous offender provisions of the **Criminal Code** contemplate the admissibility of evidence of prior misconduct, including matters which were not the subject of criminal charges if the evidence is relevant. The same direction is also found in **R. v. Lewis** (1984), 12 C.C.C. 353 (Ont. C.A.) and **R. v. Corbiére** (1995), 80 O.A.C. 222.

[19] Where the Crown seeks to introduce proof of untried criminal offences in order to establish a pattern of behaviour for the purposes of dangerous offender proceedings, that portion of the application is more akin to a trial. Thus, it has been held that this conduct must be proven beyond a reasonable doubt: **R. v. Newman** (1994), 115 Nfld. & P.E.I. R 197 (Nfld C.A.**; R. v. Jackson** (1981), 61 C.C.C. (2d) 540 (NSSCAD) leave to appeal to SCC refused (1982), 30 C.R. (3d) xxix.

[20] Hearsay evidence is admissible in dangerous offender applications. The Supreme Court of Canada in **Regina v. Gardiner** (1982), 68 C.C.C. (2d) 477 at 513-514 held that the judge at a sentencing hearing should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Hearsay evidence may be accepted where found to be credible and trustworthy.

[21] Hearsay evidence is admissible to show the information on which the expert opinion is based and not as evidence going to the existence of the facts on which the opinion is based. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist: **Lavallee v. The Queen** (1990), 55 C.C.C. (3d) 97; **Wilband v. The Queen** (supra) at page 11.

[22] The onus of proof in a dangerous offender application is on the Crown. The standard of proof is beyond a reasonable doubt (**R. v. Carleton** (1981), 69 C.C.C. (2d) p. 1 at 5-6 (Alta. C.A.) affirmed (1983), 6 C.C.C. (3d) 480; **R. v. Lyons** (supra). The Crown need not prove beyond a reasonable doubt that the offender will re-offend, only that there is a likelihood that he will inflict harm; **R. v. Currie** (supra).

[23] The Crown is required to prove that the predicate offence is a "serious personal injury offence" as defined in s.752.

[24] The Crown must prove that the offender is a dangerous offender in one of four ways enumerated in s.753(1)(a)(i), (ii), (iii) or (b).

[25] Under s.753(1)(a)(i) the Crown must prove: (a) the offender has been convicted of a serious personal injury offence as defined in s.752(a); (b) the offender constitutes a threat to life, safety, or physical or mental well being of other persons; (c) a pattern of repetitive behaviour of the offender, of which the present offence forms part, showing a failure to restrain behaviour; (d) a likelihood of the offender causing death, injury or inflicting severe psychological damage to other persons in the future, through failure to restrain his behaviour.

[26] The requisite proof under s.753(1)(a)(ii) consists of: (a) a conviction for a serious personal injury offence as defined in s.752(a); (b) the offender constituting a threat to life, safety or physical or mental well being of other persons; (c) a pattern of persistent aggressive behaviour, of which the present offence forms part, showing a substantial degree of indifference respecting the reasonably foreseeable consequences of his behaviour to others.

[27] The Crown must prove under s.753(1)(a)(iii) that: (a) the offender has been convicted of a serious personal injury offence as defined in s.752(a); (b) the offender constitutes a threat to the life, safety or physical or mental well being of others; (c) the behaviour associated with the predicate offence is of a brutal nature; (d) the offender's future behaviour is unlikely to be inhibited by normal standards of behavioural restraint.

[28] When proceeding under s.753(1)(b) the Crown must prove: (a) the offender has been convicted of a serious personal injury offence as defined in s.752(b); (b) the offender's past conduct in any sexual matter, including the predicate offence, has shown a failure to control his sexual impulses; (c) a likelihood the offender would cause injury, pain or other evil to others through failure in the future to control his sexual impulses.

[29] Before a Court determines whether an offender is a threat, there must be proof of past behaviour which meets at least one of the three separate thresholds under s.753(1)(a). Should proof of past behaviour meeting one or more of the thresholds be met the Court will then consider if based on that behaviour the offender constitutes a threat of the type contemplated in s.753(1)(a). Offences that do not form part of the proscribed conduct under s.753(1)(a)(i) or (ii) will not be considered when assessing whether there is a pattern.

[30] A pattern of repetitive behaviour under s. 753(1)(a)(i) is not determined only by the number of offences committed. The elements of similarity in the offender's behaviour are also relevant; **R. v. Langevin** (1984), 11 C.C.C. (3d) 336 at 348 (Ont.C.A.).

[31] The following three elements must be present in order to form a pattern: repetitive behaviour, failure to restrain behaviour and injury to others as a result. While the significance and relevance of common elements must be considered, the level of detail should not be allowed to obscure common characteristics which reveal and embody the pattern; **R. v. Dow** (1999), 134 C.C.C. (3d) 323 at paragraph 23 (B.C.C.A.). The offences may be similar in kind or in result (in terms of the degree of violence or aggression inflicted on the victims). The fewer incidents present the more similar they must be.

[32] Three areas of evidence will be considered in determining whether there is a pattern of conduct falling within the threshold requirements under s.753. These are: (a) the offender's past criminal acts and criminal record; (b) extrinsic evidence relevant to those past acts and the circumstances surrounding them; (c) psychiatric reports opining as to that conduct.

[33] The Court must be satisfied that the pattern of conduct is substantially or pathologically intractable; **R. v. Lyons** (supra) at p. 338. It is the combination of violence and the likely continuation of that conduct which justifies the conclusion that the offender will likely pose a threat in the future; **R. v. Neve** (supra) at paragraph 117.

[34] The provisions of s.753(1)(a)(iii) do not require the presence of a pattern of behaviour. Under this section, it is the brutality of the conduct which is relevant. A situation of stark horror is not required in order to find brutality. Conduct which is coarse, savage and cruel and which is capable of inflicting severe psychological harm on the victim is sufficiently brutal to meet the test in this section; **R. v. Langevin** (supra) at p. 349.

[35] The wording of s.753(1)(b) also does not contain a reference to a "pattern of behaviour". Under this section the Crown must establish that the offender has been convicted of a "serious personal injury offence" and that there is a likelihood of harm to others through future failure to control sexual impulses. The Crown is not required to prove beyond a reasonable doubt that certain events will happen in the future. It is the quality and strength of the evidence of past and present facts together with the expert opinion thereon, which forms an existing basis for a finding of present likelihood of future conduct; **R. v. Knight** (1975), 27 C.C.C. (2d) 343 at 356.

[36] Character evidence is admissible in a dangerous offender application pursuant to provisions of s.757 of the **Criminal Code**. Its use however is limited. Character evidence cannot be used to create a pattern, although it may explain why something is reflective of a pattern; **R. v. Neve** (supra) at paragraph 127.

[37] Expert evidence is admissible in these proceedings, but it is for the Court to determine the relevant aspects of the pattern. It is the Court and not the experts which must decide if a pattern has been established. The experts can interpret the past conduct and give opinions on the likely future conduct of the offender based on his past behaviour. The expert opinions are also of assistance as they relate to whether the offender suffers from a psychological disorder and the prospects for treatment.

[38] The offender's refusal to be interviewed by the Crown experts is not a bar to the experts formulating their opinions. The psychiatrists and psychologists can give an opinion based on past behaviour, medical records and prior convictions; **R. v. Kanester** (supra).

[39] No adverse inference can be drawn from an offender's refusal to be interviewed; **R. v. Brown**, [1999] B.C.J. No. 3040 at paragraph 34. No adverse inference has been drawn in these proceedings as a result of the offender declining to be interviewed by the experts.

[40] It is in light of the preceding directions that the following evidence of criminal conduct, criminal conduct not prosecuted and other relevant conduct will be considered.

R. v. WILLIAM CHANDLER SHRUBSALL
RECORD OF CONVICTIONS

Date of Offence	**Date of Conviction**	**Charge**	**Description of Offence**	**Sentence**
June 25, 1988	Sept. 27, 1989	s. 125.20 New York Penal Law	Manslaughter (1st Degree)	Custody - 1 1/3 to 4 years
April 11, 1995	Sept. 5, 1995	s. 130.55 New York Penal Law	Sexual Abuse (3rd Degree	Custody - 60 days
August 6, 1995	Nov. 20, 1996 Nov. 20, 1996	s.130.65 New York Penal Law s. 130.55 New York Penal Law	Sexual Abuse (1st Degree) Sexual Abuse (3rd Degree)	Custody - 2 1/3 to 7 years Custody - 90 days
June 12, 1997	Aug. 6, 1997	s. 213(1)(c) - C.C.C.	Communication for the Purpose of Prostitution	Fine $100.00
March 31, 1998	May 26, 1998	s. 145(5.1) - C.C.C.	Breach of Undertaking	Probation - 6 months
Feb. 4 - 22, 1998	Feb. 12, 1999	s. 264(3) - C.C.C.	Criminal Harassment	Probation - 3 years
May 3, 1998	May 3, 2000	s. 273 - C.C.C. s. 344 - C.C.C.	Aggravated sexual assault Robbery	
Feb. 12, 1998	June 30, 2000	s.344 - C.C.C. s.268 - C.C.C. s.87 - C.C.C.	Robbery Aggravated Assault Possession of a Weapon	
June 22, 1998	Nov. 16, 2000	s.273(2) - C.C.C. s.279(2) - C.C.C. S.246(a) - C.C.C.	Aggravated Sexual Assault Forcible Confinement Overcoming Resistance to the Commission of an offence	

PREDICATE OFFENCES:

[41] The offender was convicted, after a trial by judge and jury, of aggravated assault, robbery, and possession of a weapon for the purpose of committing the indictable offence of robbery in relation to T. D..

[42] On February 12th, 1998 Ms. D. was a clerk working alone in a small retail shop on the Halifax waterfront. The offender entered her shop wearing dark clothing, a dark toque, mirrored sunglasses and carrying a duffel bag containing an aluminum baseball bat. Ms. D. was struck on the head with the bat. The force of the blow was so powerful that her skull was fractured and depressed into her brain. Ms. D. was discovered on the floor of her shop by two customers who entered the shop. She was unconscious and foaming at the mouth. She was rushed to the hospital and intubated. Ms. D. underwent neurosurgery to reconstruct her fractured skull. Some 12 metal plates and 50 metal screws were required to repair the damage caused to her skull.

[43] Ms. D.'s arm was also fractured in the attack. The medical evidence confirmed that this was a defensive wound commonly described as a classic "billy stick" fracture.

[44] The purpose of the attack was financial gain. The shop's cash register was emptied by the offender. In all, $120.00 was taken from the cash register. Ms. D.'s wallet was also taken by her attacker and subsequently recovered during a search of the offender's room some three months later. The contents of the wallet, save for a small amount of cash, were still in tact.

[45] Ms. D. suffered life-threatening injuries during this attack. She would have died had she not been so close to the only medical facility in the province equipped to perform the neurological surgery required to save her life.

[46] Ms. D. required weeks of hospitalization to recover from her head and arm injuries. After her release from the hospital she was transferred to a rehabilitation centre where she spent another three or four weeks receiving speech therapy, physiotherapy, occupational therapy and psychiatric help.

[47] Ms. D. continues to have lasting difficulties with slurred speech and word retrieval. In the victim impact statement filed with this Court Ms. D. indicated that she no longer has the patience and tolerance that she once had. She continues to have difficulty showing emotion. Her trust in people has diminished and she has difficulty establishing lasting friendships and relationships. Ms. D. revealed that her personality and her life have been altered as a result of the attack upon her by the offender. Ms. D.'s psychological injuries continue to this day.

[48] The second predicate offence involves the aggravated sexual assault and robbery of Tracy Jesso. The offender was convicted of these offences by a different jury.

[49] Ms. Jesso's identity was originally banned from publication, as were the identities of all the offender's other victims. Ms. Jesso requested, during the course of this application, that the ban on the publication of her identity be lifted. Her request was granted.

[50] The facts surrounding the offences against Ms. Jesso are as follows. On May 3rd, 1998 Ms. Jesso went to a bar with some friends. She left the bar in the early hours of May 4th and proceeded to walk home. She had almost reached her destination when she sensed that someone was following her. She quickened her pace, but to no avail. She was grabbed around the neck from behind, rendered unconscious and dragged into a driveway. Ms. Jesso was savagely beaten. Her face was repeatedly pounded into the pavement. Her pants and underwear were removed. A passerby observed the offender doing up the zipper on his pants while Ms. Jesso lay helplessly on the pavement. The offender's semen was found on Ms. Jesso's clothing but not on or near her vaginal area. Ms. Jesso's blood was found on the pants worn by the offender at the time of his arrest on another aggravated sexual assault charge some six weeks later.

[51] When Ms. Jesso was first seen by the police she was naked from the waist down. Her face was significantly swollen and she had blood coming from her mouth and nose. Ms. Jesso's facial injuries were so severe that her contact lenses had to be surgically removed. Her sinuses were punctured, her eye socket was fractured and 13 sutures were required to close the laceration below her lip.

[52] The abrasions to her face, the fractured eye socket, the eyes swollen shut, the cut below her lip together with the medical evidence and that of nearby witnesses all give credence to the submission that Ms. Jesso's face was repeatedly pounded into the driveway pavement.

[53] Ms. Jesso required approximately one month to recover from her physical injuries, however her psychological injuries continue to haunt her to this day.

[54] During the robbery Ms. Jesso's purse was taken. The purse was found approximately six weeks later during a search of the offender's room. The contents of this purse, as with the contents of Ms. D.'s purse, were still in tact.

[55] As a result of the attack upon her, Ms. Jesso continues to suffer from panic attacks, post traumatic stress disorder, difficulty in sleeping and over or under eating. She continues to have trouble concentrating. Ms. Jesso does not trust people, particularly men. She is constantly fearful and when out after dark she usually runs instead of walks. Ms. Jesso continues to have a fear of being grabbed from behind when she is outdoors. She has also suffered from depression which has caused her to cry a lot, avoid people and have suicidal ideation.

[56] Ms. Jesso also suffered financially as a result of either quitting or taking time off her employment due to her emotional instability. The large sum of money she spent on her

university tuition was also wasted because she was unable to complete her courses due to her depression and post traumatic stress disorder.

OTHER CRIMINAL CONVICTIONS

[57] The offender has a record for other criminal convictions. These will be addressed in their chronological order of occurrence.

[58]

[59] On June 25th, 1988 Maryann Shrubsall, the offender's mother, was beaten to death with a baseball bat in her home in Niagara Falls, New York. The offender was initially charged with murder in the second degree, but was permitted to enter a plea to the lesser included offence of manslaughter in the first degree based largely on his claim that he was the victim of abuse by his mother and was reacting to such abuse when he killed her.

[60] The offender was sentenced to a term of five to 15 years by the Trial Court in New York State. His application before that Court for Youthful Offender status was denied. On appeal, however, the New York State Appeals Court granted him Youthful Offender status and reduced his sentence to one and a third to four years incarceration.

[61] This Court must accept the ruling by the New York State Appeals Court that the offender was reacting to being abused when he killed his mother. That ruling however, does nothing to change the gruesome facts of what occurred on June 25th, 1988.

[62] Mrs. Shrubsall was brutally beaten about the head with a baseball bat. Her skull was fractured in numerous places. Her face was so badly beaten that some police officers at the scene had difficulty making out her facial features. There was a great deal of blood splattered on the walls of the hallway and in the two bedrooms of the residence where she was killed.

[63] Initially the offender maintained that his mother had been attacked by a stranger or strangers who entered the residence. He told this story to his neighbours and to the police officers at the scene. He continued to recount this fabrication at the police station when he was being interviewed by the investigators. At one point when asked how he got the blood on his legs he stated that he got it when he was hitting his mother. The offender denied saying these words when confronted. He subsequently gave a statement acknowledging that he struck his mother with a baseball bat but said that this was only after she had started hitting him and threatening him with death. The giving of the statement was preceded by the investigator telling him that the motive for committing an offence often affects the degree of liability attached.

[64] The next offence for which the offender was convicted occurred on April 11th, 1995, again in his hometown of Niagara Falls, New York. On that date the complainant, K. R., was out for her nightly walk. She was approached from behind by the offender who said something

to her which she could not hear. The offender continued to follow her and at one point he put one hand on her buttocks and the other around her waist. Ms. R. believed that he was trying to pull her off the sidewalk. Ms. R. screamed and tried to strike her attacker. He fled and she gave chase. She eventually confronted the offender in a parking lot, but he ran off again.

[65] The manager of a nearby motel, who had gone to school with the offender, recognized him and chased after him in his vehicle. The offender was brought back to the motel. The police were across the street from the motel speaking with the complainant when she noticed the offender and identified him to the police as her assailant. He was arrested and charged with sexual abuse in the third degree. He pled guilty to this charge and was sentenced to a period of 60 days incarceration.

[66] K. R. testified that she was shaken up as a result of the offence. She was aware from previous media reports that the offender had killed his mother and feared that he would have access to her name and address through the police reports. She has slept with a baseball bat by her side since this incident some six years ago. For a time she did not go out for her nightly walks and when she did resume them she carried with her a can of mace for protection. Ms. R. was afraid to walk in her own neigbourhood after this incident.

[67] The offender's next convictions relate to an incident which occurred on August 6th, 1995. The offender was then 24 years old. He attended a party where the complainant H. M., then 17 years old, was also in attendance. Ms. M. became intoxicated at the party and ill as a result. One of her friends took her to a bedroom so that she could recuperate. Ms. M. was still feeling the effects of alcohol and in her words "passing in and out of consciousness". The offender entered the room under the pretense of wanting to care for her. While there he put his hand down Ms. M.'s pants and onto her vagina. She pulled his hand out and told him to stop. Ms. M.'s next recollection was of the offender straddling her body and seeing his penis close to her face. She then felt something wet on her face, down the side of her neck and on her shirt. The offender's semen was subsequently found to be present on the shirt worn by Ms. M. at the party.

[68] This matter proceeded to trial. At the conclusion of the trial but before the jury rendered its verdict the offender absconded and fled to Nova Scotia. He was convicted in absentia of sexual abuse in the first degree and sexual abuse in the third degree. He was subsequently sentenced in absentia to a period of two and half to seven years incarceration.

[69] The next criminal conviction on the offender's record is dated June 12th, 1997 and relates to a conviction in Halifax for the offence of communicating for the purpose of prostitution. In brief, the facts surrounding this offence are that the offender requested oral sex in return for $15.00 from an undercover police officer who was posing as a prostitute.

[70] On August 6th, 1997 the offender pled guilty to the offence and was fined $100.00. He wrote a letter to the judge essentially saying he was not guilty but was pleading guilty for reasons of cost and expedience.

[71] On February 12th, 1999 the offender was convicted of criminal harassment under s.264(3)(a) of the **Criminal Code of Canada**. This offence involved his words and actions during the period between February 4th and 22nd, 1998 following the breakup of the relationship with his girlfriend T.C.

[72] The offender's repeated direct and indirect communication caused her to fear for her safety. At one point the offender let himself into Ms. C.'s apartment, without her permission, using a key which she did not know he had. He was advised by the city police not to have any further contact with her, but he persisted in doing so. He was also told by the University Campus Security not to be on campus, yet he continued to be present there. He was then advised in person by the city police to have no further contact with his girlfriend. He did not heed this advice either. Finally, after he was seen walking back and forth in front of T. C.'s apartment and looking in her windows, he was charged.

[73] During the period from February 5th to 22nd, 1998 there was a virtually continuous and endless amount of undesired contact from the offender toward his former girlfriend.

[74] He was given a suspended sentence and placed on probation for a period of three years.

[75] On April 1st, 1998 the offender was charged with failing to comply with a condition of an undertaking given to an officer in charge. This undertaking related to his arrest for the criminal harassment of his former girlfriend T. C.. As a term of his release, the offender was ordered to have no contact with the complainant and to stay away from the property of Dalhousie University where T. C. was a student. On March 31st, 1998 he was observed in one of the buildings on the University campus. He was arrested and charged with being in violation of a term of his release. He appeared in court and was released on a recognizance with conditions similar to his previous undertaking.

[76] On May 26th, 1998 the offender pled guilty to this offence and the passing of sentence was suspended. He was placed on probation for a period of six months with conditions that he report to a probation officer and perform a number of hours of community service work.

[77] While on probation, the offender, on June 22nd, 1998 committed the offences of aggravated sexual assault, forcible confinement and choking to overcome resistance to the commission of the sexual assault. He was tried in November 2000 and convicted of these three offences by a judge sitting alone.

[78] The complainant in this matter, K. C. testified that she met the offender at a bar and danced with him. She went to his room afterwards with the intention of calling a taxi so that she

could return to her home. The offender did not want her to leave. He pushed her down onto the bed and starting choking her. Ms. C. lost consciousness. When she regained consciousness the offender was all over her. He choked her again into unconsciousness.

[79] Ms. C. was punched in the facial area. Her left eye was swollen shut. She had extensive bruising to the right upper and lower eyelid, a laceration to her right cheek, a bloody nose and bruising at the base of her neck on both sides. The laceration to her cheek required suturing. Ms. C.'s blood was splattered throughout the offender's room. The medical evidence confirmed, through the presence of petechiae on Ms. C.'s face, that she had been choked.

[80] Ms. C.'s top and bra were removed. The zipper on her pants was broken and the crotch area of her pants was torn. Her screaming and kicking the wall in the offender's room lead other house residents to come to the room. The offender told them that it was nothing. Ms. C. exited the room semi-naked and bloodied. The offender ran away but was arrested later that same day.

[81] Ms. C. testified, during this application, about her injuries. She indicated that five stitches were required to close the laceration to her face. She also stated that she suffered from some nerve damage to the right side of her face and strained muscles in her neck. She related how she suffers from depression which requires counselling. Ms. C. is still receiving counselling some three years after the attack.

[82] Ms. C. testified that she lost one year of schooling in the * course she was enrolled in because she could not bring herself to touch anyone or to have anyone touch her. She continues to be afraid of being alone and still sleeps with a light on in her room. She continues to have flashbacks of the incident to this day.

OTHER CRIMINAL CONDUCT NOT PROSECUTED

[83] For reasons contained in a separate decision dated May 23rd, 2001 this Court ruled that acts which did not result in charges or convictions were admissible in a dangerous offender proceeding provided they were proven beyond a reasonable doubt. This Court noted that it was the offender's past conduct which was under scrutiny in these proceedings and not just his past criminal conduct.

[84] I will refer to these untried allegations of criminal conduct in their chronological order of occurrence.

[85] The Crown alleges that on January 27th, 1986 the offender approached C. B., who was then 14 years old, from behind, grabbed her and pushed her onto the ground. He allegedly told her that he had a knife, tried to kiss her and demanded oral sex. Ms. B. fought off her attacker and screamed. Her attacker fled the scene.

[86] Ms. B. reported the incident to the police and gave them a description of what happened and where. Her description of the attacker was minimal. It consisted of his apparent age, type of jacket worn and that he had a funny sounding voice.

[87] Ms. B. testified on this application. Her evidence differed from what she told the police at the time of the incident. In her testimony she indicated that some two or three months after the incident she recognized the person who attacked her. She testified that she recognized the offender as her attacker because of his voice and because he wore the same jacket as her assailant. She told her boyfriend of her identification and he, together with some others, chased and beat the offender. She testified that whenever she saw the offender at school or other locations she would call him a rapist. This was said to him even when he was with his friends.

[88] Ms. B. did not report her identification to the police. She testified that this was because she had taken care of the situation in her own way, that is, having the offender beaten by her boyfriend.

[89] While I am satisfied that Ms. B. was assaulted, I am not, however, satisfied beyond a reasonable doubt that her attacker was the offender. Ms. B.'s identification of the offender as her attacker was substantially undermined by the following: (1) her recognition of the offender as her attacker was based solely on the similarity of clothing and voice; (2) the location of the alleged offence noted in the police report is different from that testified to in court; (3) Ms. B. never reported her purported identification to the police; (4) no details were given to the police of the attackers facial features, hair colour and length; (5) the description of the attacker's clothing given at the time of the occurrence did not mention a gray hood or sweatshirt, whereas the identification given in court referred to gray hooded sweatshirt; (6) witnesses who were close friends of the offender at the time and who testified in these proceedings could not recall him ever being called a rapist or being beaten outside his residence. As well, none of the offender's neighbours at the time recalled this beating or hearing of it.

[90] Ms. B.'s identification evidence is not trustworthy and it does not establish beyond a reasonable doubt that the offender was her attacker. The incident involving Ms. B. will not be considered in this application.

[91] The next untried allegation of criminal conduct relates to two incidents at Niagara University in July 1986. It was alleged that the offender approached two female university employees at separate times on the same day. He allegedly followed them and said the words "I want you". Both women were frightened and ran away. The offender was alleged to have chased them and said to one "Turn around and you'll change your mind".

[92] The offender acknowledged to his psychiatrist, Dr. Akhtar, that he made the comments to A.S., but denied making the comments to S.K.. He referred to these comments as "just making a joke".

[93] Ms. K.'s identification of the offender as the person who followed her is problematic. She observed the person, whom she said she had never seen before, for only a few seconds. She was called to the University gymnasium by the basketball coach to see if she could identify the person who followed her. She testified that she saw one person who looked familiar but she was not positive. The next day she was called to another gymnasium where there were fewer persons present. She identified someone but again she was not absolutely sure. A few days after this she was asked again to attempt to identify the person and was told that one of the coaches would walk close to the person whom the coach believed was the one responsible. On this last occasion she identified the offender. Ms. K. testified that she was pretty sure she had not pointed out this person before.

[94] Ms. K.'s identification was tainted by the method used to have her identify the perpetrator. I am not satisfied that her identification of the offender was an independent identification based on what she recalled, but rather it was one which was influenced by the actions and words of others. I am not satisfied this allegation has been proven beyond a reasonable doubt.

[95] While I accept that Ms. S. correctly identified the offender as the person who approached and spoke to her I am not, however, satisfied that what he did amounted to criminal conduct which can be factored into the pattern analysis portion of this application. Accordingly the allegations of Ms. S. and Ms. K. will not be considered.

[96] Another untried allegation of criminal conduct concerns the beating of Mr. R. V. at a bowling alley on April 15th, 1988. Charges were laid in this incident but the matter did not proceed to a formal adjudication in criminal court. Instead the matter was referred to the Dispute Resolution Centre for mediation. It was resolved on June 7th, 1988 by the parties apologizing to each other.

[97] The offender who was some three years older and physically much larger became upset at Mr. V. for some reason. The offender approached Mr. V., who was bent down in a locker room, and kneed him in the face. He then proceeded to slam Mr. V.'s head into the lockers and punch him in the face. Mr. V. suffered from abrasions to the face, a broken nose, two black eyes and a swollen lip.

[98] While there was disagreement at the mediation session about how the incident started, there was no disagreement about the injuries suffered by Mr. V., how they were sustained or who gave them to him.

[99] I am satisfied beyond a reasonable doubt that the offender assaulted Mr. V. on April 15th, 1988 and caused him bodily harm.

[100] This incident is admissible and will be considered by the Court in its analysis.

[101] The next allegation of untried criminal behaviour occurred in the fall and winter of 1992 when the offender was attending the University of Pennsylvania. He was on parole at the time for the killing of his mother. While at the University he made numerous anonymous telephone calls to A.E.. Some of these calls were simply annoying hangup calls while others were obscene. During some of the obscene calls the offender told Ms. E. that he wanted to "fuck her in the ass" or "cream in her ass". These calls made Ms. E. extremely upset and concerned about her safety.

[102] The calls were traced to the offender's telephone number and the campus police were notified.

[103] The offender was asked by the campus police to come to their office where he was made aware of Ms. E.'s complaint and told to stop this harassment. He did not deny making the calls. He indicated to the campus police that he wished to apologize to Ms. E. but was told by them not to have any further contact with her. Despite this warning not to contact Ms. E. again, the offender did so. He called Ms. E. to apologize but this only served to make her more upset. She again contacted the campus police. They in turn contacted the offender and told him that if he continued his contact with Ms. E. the matter would be referred to the City Police. After this there was no further contact with Ms. E. by the offender.

[104] I am satisfied beyond a reasonable doubt that the offender made these obscene telephone calls. This incident will also be considered by the Court in its analysis.

[105] B.M. was an employee of the University of Pennsylvania from 1994 - 1997. The offender was a student there. He graduated in May 1994 but returned afterwards to apply for a position as an Alumni representative.

[106] Ms. M. testified that while working in the * Office on campus a man would come to her office and tell her she was pretty or had nice legs. On one occasion the same person entered her office with a camera and asked if he could take her picture. Ms. M. refused but the man took the photo in any event and then left.

[107] Ms. M. testified that this same person followed her, asked her to go out with him and asked for her telephone number. Ms. M. recounted being in line at a banking machine where this person came up behind her and asked if she recognized him. Ms. M. said "no" even though she did recognize him. The man then got very close to her face and asked her to meet him later and suck his dick. She was frightened. She screamed for this person to stay away from

her and ran back to her office. The University Police were called and the incident was reported to them.

[108] Entered into evidence were police reports from the University of Pennsylvania Police Department confirming Ms. M.'s evidence. The reports show that Ms. M. complained of being harassed between May 11th and 17th, 1994. She also complained about the lewd suggestion on September 8th, 1994.

[109] Ms. M. met with a Halifax Regional police officer in the year 2000 and identified the offender from photographs shown to her. Ms. M. had never been shown photos before this occasion. She also identified the offender from a photographic lineup shown to her in Court. These were different photographs than the ones she had been shown previously. The Court had the benefit of seeing Ms. M. and hearing her testimony by way of video conference hook-up. Ms. M. was a credible witness. She was clearly disturbed to this day by what occurred to her in May and September 1994.

[110] I am satisfied beyond a reasonable doubt that the offender was the person who harassed, followed and made lewd suggestions to Ms. M.. This incident will form part of what is considered by the Court in its analysis.

[111] The Crown submits that the next allegation of untried criminal conduct involving G. R. should also form part of the material considered by the Court on this application.

[112] It is alleged that on January 6th, 1995 the offender, posing as a police officer in civilian clothing, had Ms. R. stop her vehicle and provide him with her driver's licence and vehicle registration. When Ms. R. asked for his identification he told her that she could see it if she returned to his vehicle. She did not accept this invitation. The offender pretended that he would be issuing a ticket and told Ms. R. that she could take care of it by giving him a "blow job". Ms. R. was afraid and fled the scene in her vehicle.

[113] The offender was charged with impersonating a police officer under the New York State Penal Code. He appeared in court on January 11th and the matter was adjourned to February 15th, 1995. On the latter date, the matter was dismissed for lack of prosecution.

[114] Although suspicious that this incident did occur, I am not satisfied that it has been proven to the requisite standard for the following reasons: Ms. R. told the police that the offender handled her driver's licence and registration. These documents were given to the police for fingerprint analysis. The result of this analysis was negative and Ms. R. was so advised. There is nothing in Ms. R.'s supporting deposition of January 6th, 1995 or anywhere else in the police file alleging that the offender wore gloves. It was only in her interview with the Nova Scotia authorities given on June 14th, 2000 that Ms. R. first mentioned the offender wearing gloves when he handled the documents.

[115] The offender gave a statement to the police acknowledging that he did have contact with Ms. R. but denying that he impersonated a police officer. He described stopping her vehicle because he believed something was hanging from the rear or the underside of the vehicle.

[116] Ms. R. testified that she did not want to proceed with the charges once she was told by the police that the offender had previously killed his mother, however, there is nothing in the police file corroborating this. There is evidence, however, that Ms. R. was told by the police that the matter would proceed despite her wishes. The investigation ended the same day it began and was seen by the police authorities at the time as a "he said, she said" case.

[117] For the above noted reasons this matter will not form part of what is considered in this application.

[118] The following incidents are alleged to have occurred in the Halifax area after the offender fled from the United States to this jurisdiction. These relate to incidents involving J. J. and C. R., K. A., M. M., and T. C..

[119] I am satisfied that the incidents involving threatening telephone calls to Ms. J. have been proven beyond a reasonable doubt and should be considered in this application.

[120] Ms. J. and Ms. R.s worked together in the same office. Their office was located in the same building as that of the offender. Ms. J. began receiving anonymous telephone calls in April 1997. These calls lasted for several months. At first the calls were just annoying hangup calls, but as time went on the calls became more personal in nature. The anonymous caller would become breathless during some of these calls and Ms. J. concluded that the caller was masturbating. Ms. J. received further calls which were frightening to her. During one of these calls the caller said "I'm the guy who's going to find you, tie you up and ass rape you.".

[121] Ms. J. was fearful and contacted the police. The call was traced to Ian O'Leary. This name was one of the aliases used by the offender at the time. The police spoke to Mr. O'Leary (the offender) and warned him that further calls to Ms. J. would result in criminal charges. Ms. J. received no further calls after the police spoke to the offender.

[122] In June 1998 the police conducted a search of the offender's room. They found, amongst other things, an address book containing the names, addresses and telephone numbers of both Ms. J. and Ms. R.s. The words "do not call" were written next to both of these entries.

[123] Ms. R.s also received numerous anonymous hangup calls. On some occasions the caller would say "I'll treat you like the tart you are.". The calls to Ms. R.s also stopped after the police spoke to the offender.

[124] Although I have strong suspicions that the offender also made the anonymous telephone calls to Ms. R.s I find, for the following reasons, that this has not been proven beyond a reasonable doubt.

[125] Ms. R.s in her statement to the police given contemporaneously with the events stated that she recognized the caller as Mark Styles. Her identification of Mark Styles as the anonymous caller was based on previous dealings which she had had with this person.

[126] Ms. R.s in a subsequent statement, given 13 months after her first statement and after the offender had been charged with numerous violent offences, attributed the same calls to the offender. The calls she received did not contain explicit threats as in the case of Ms. J.. The person who called Ms. R.s did not become breathless as did the person who called Ms. J..

[127] Ms. R.'s evidence concerning the telephone calls will not be considered in this application.

[128] The next evidence of untried criminal conduct involves the offender's actions toward K. A. in October 1997.

[129] After his arrest in June 1998 the offender was charged with numerous offences including both predicate offences presently under consideration, the offences involving Ms. C. and two offences involving Ms. A.. The charges of sexual assault and unlawful confinement relating to Ms. A. were withdrawn by the Crown prior to the commencement of the preliminary inquiry.

[130] Shortly after the offender's arrest Ms. A.. was interviewed as part of a large scale police investigation launched to determine the true identity of the person in custody who was then known to the police as Ian Greene. Ms. A. gave a statement to the police about her contact with Ian Greene. Her purpose for giving her statement was to inform the authorities of the harassment she felt because of Mr. Greene's (the offender) numerous telephone calls to her. In the course of her statement she described a sexual assault. Ms. A. advised the police of her wish not to proceed with any action against Ian Greene (the offender).

[131] Ms. A. testified in these proceedings. She described meeting the offender and going out with him to a movie on two separate occasions. On the first occasion they returned to the offender's room were she intended to call for a student security patrol to walk her home. The offender expressed his wish for her to stay, but did not interfere with her leaving.

[132] Ms. A. testified about the second time she went to a movie with the offender. On this occasion she returned to his room after the movie to retrieve a book bag which she had left there. Once in the room Ms. A. sat on the offender's bed. He attempted to persuade her to stay but she kept insisting that she had to go home. He tried to kiss her but she said "no". Ms. A. testified how she was caught by surprise when the offender pushed her down on the bed while trying to kiss her. She stated that he held her arms down on the bed. At one point

he let go of one of her arms and tried to put his hand up her shirt, but she pushed it away. Ms. A. testified that the offender touched her chest area on the outside of her clothing. This was something which she had not mentioned in her statement to the police.

[133] Ms. A. described how she repeatedly told the offender that she had to go. She said that her voice kept getting louder as she was telling him this. The offender then got up, said "fine", and called her a taxi. She noted that he seemed upset at this point.

[134] Ms. A. was not injured and her clothing was not damaged. She did not strike the offender nor was she struck by him.

[135] Although there were some inconsistencies between Ms. A.'s evidence under oath in these proceedings and her statement to the police, I find that Ms. A. was a credible witness and I accept her evidence as truthful. The Crown has proven this incident beyond a reasonable doubt and it may be considered by the Court in its analysis.

[136] The next incident of untried criminal conduct is in relation to M. M..

[137] On October 21st, 1998 the offender was charged with aggravated sexual assault and administering a stupefying drug with intent to commit a sexual assault. These charges were in reference to an incident on October 24th, 1997 involving Ms. M.. The charge of administering a stupefying drug with intent to commit a sexual assault was withdrawn by the Crown prior to the offender's arraignment.

[138] The aggravated sexual assault charge proceeded to a preliminary inquiry. The offender was committed to stand trial on the lesser charge of sexual assault. This charge was stayed by the Crown prior to trial.

[139] Ms. M. did not testify in these proceedings. Her evidence given at the preliminary inquiry was admitted into evidence. The bulk of the Crown's case against the offender was based on the evidence of Ms. M..

[140] Ms. M.'s testimony at the preliminary inquiry was that she met the offender at a bar. She consumed four to six drinks there and then returned to his residence where sexual activity took place. Ms. M. testified that she disrobed herself and told the offender "not without a condom". They had sexual intercourse in different positions after which Ms. M. drove home. Some days later Ms. M. began to have memories of what she believed had occurred.

[141] The very experienced judge presiding at the preliminary inquiry committed the offender to stand trial on the lesser charge of sexual assault. In doing so the judge noted that if there was only the evidence of Ms. M. it would be quite difficult to conclude that there was any evidence upon which a reasonable jury, properly instructed and acting judicially, could find that there was a lack of consent. The committal to stand trial was based in large part on the

evidence of Mr. M. M. who described Ms. M. as not being aware of where she was when he saw her that evening at the offender's residence.

[142] Mr. M. testified in this application. He was not a very credible witness particularly when testifying about a photograph showing Ms. M. naked in the offender's bed. The camera used to take the photograph belonged to Mr. M.. The photograph taken with that camera was in his possession. This photograph was turned over to the police only after Mr. M. had been placed under arrest. Mr. M. testified that it was the offender who took the photograph, however, he could not explain how the offender came to have his camera or why Mr. M. never gave this photograph to the offender. Mr. M. also acknowledged that the offender never asked for the photograph which he had supposedly taken himself.

[143] Mr. M.'s evidence is unreliable.

[144] Ms. M.'s evidence stems mostly from memories which came to her in the days following her encounter with the offender. Ms. M. acknowledged under oath that her memory was playing games on her. A review of her evidence given at the preliminary inquiry shows that she, on numerous occasions, attempted to fill in the gaps in her memory by testifying about what she thought or believed had happened. It would be unsafe to base a conviction on Ms. M.'s testimony.

[145] Even if coupled with Mr. M.'s evidence I am not satisfied that the Crown has proven this allegation beyond a reasonable doubt. It will not form part of what is considered by the Court in this application.

[146] The next incident of untried criminal conduct relates to the alleged assault and drugging of the offender's former girlfriend T. C.. The offender was charged with assault and administering a stupefying substance with intent to enable him to commit an assault. These charges were withdrawn by the Crown prior to arraignment.

[147] The Crown in its closing argument in these proceedings disclosed that it was not relying on the alleged assault and drugging of Ms. C.. These allegations will not form part of what is considered in this application.

[148] The final allegation of untried criminal conduct relates to the harassment of V. M..

[149] Ms. M. worked as a waitress in a lounge on the University campus. She served a person whom she came to know as Ian Greene (the offender). He obtained her telephone number and began calling her at home. He kept asking her to go out with him but she continually refused. Ms. M. also received numerous anonymous hangup telephone calls.

[150] On one occasion she received an anonymous call at 5:00 a.m. during which the caller spoke to her. Ms. M. believed at the time that it was the person she had dated that evening. During

this conversation Ms. M. heard heavy breathing and a slapping noise. She believed the caller was masturbating and she terminated the telephone conversation.

[151] A few weeks later Ms. M. received another call. She spoke to this caller believing him to be a friend who had recently left her residence. When she determined that it was not her friend she asked who was calling. The caller became angry and said "Who do you think it is, who the fuck do you think it is - it's Ian Greene. I don't believe you don't know who it is.". Ms. M. described the caller as being extremely angry. She felt threatened on this occasion and reported the matter to the police.

[152] On this last occasion Ms. M. made the association between the voice who had screamed at her and the voice of the caller on a previous occasion whom she believed had been masturbating. She concluded that it was one in the same person.The offender's room was searched by the police. Found in his room was a matchbook cover with Ms. M.'s telephone number written on it.

[153] Ms. M. was a very credible witness. She was forthright and did not exaggerate her evidence. I accept her evidence and I am satisfied that the Crown has proven this offence beyond a reasonable doubt. This incident may be considered as part of this application.

OTHER RELEVANT CONDUCT

[154] A considerable amount of the evidence presented at this application concerned the offender's non-criminal conduct in both New York State and Nova Scotia. Much of this information was background information about the offender. It was used by the Crown experts in formulating their opinions. Although this evidence does not concern criminal activity, it does reveal a great deal about the offender's character including that he is not constrained by the normal rules of society. This evidence shows that the offender has been prepared to lie or cheat whenever it has suited him. The evidence also documents his persistence at meeting and going out with women; his sense of self importance and his manipulative nature.

[155] In late 1994 the offender acted as an alumni representative for the University of Pennsylvania. In that capacity he conducted interviews with students who were seeking to gain admission to that institution. He interviewed students at his residence. The interviews were described as lasting much longer than other similar interviews. In one case the interview lasted over three hours. For a large part of the time the offender spoke about himself and his accomplishments.

[156] When interviewing K. F. he kissed her on three occasions unexpectedly. He told her that she had a good figure and invited her out to dinner.

[157] Upon first meeting N. G. the offender attempted to kiss her. He explained to her that kissing someone upon first meeting them was a European custom. This was done while Ms. G.'s father had gone out momentarily to his vehicle to retrieve a magazine.

[158] Both witnesses testified that the interviews were more personal in nature than they had expected and lasted much longer than expected.

[159] While on the High School cross-country team the offender cheated during a race. He was thrown off the team for this.

[160] On the night of his mother's death the offender initially lied to his neighbours and to the police about a stranger entering the house and killing his mother.

[161] Upon his arrival in Halifax the offender lied to whomever he met about his background. He told people his parents had died tragically, that he had a promising hockey career, that he was a pre-med student and that he had graduated from some distinguished American universities. On some occasions when recounting the story about his parents' death he feigned emotion by crying and trembling. He used a similar approach with Gerald White, a guidance counsellor at the local High School when he tried to gain admission to that school.

[162] Using the name Corey Callaghan the offender defrauded the Archdiocese of Halifax of a sum of money. Again he used a false story about his parents dying tragically.

[163] The offender used a number of different aliases when in Nova Scotia. While residing at a local fraternity house he had his telephone service hooked up under a false name. He also received mail at that residence under a number of different aliases.

[164] In correspondence seized from his residence or turned over to the police by the recipient the offender lied about such things as losing his employment because he would not sleep with his supervisor or being a lawyer with a large New York City law firm. In a letter written in July 2000 while in custody awaiting trial on the C. charges and after he had been convicted of both the D. and Jesso matters, the offender wrote to a former classmate from the University of Pennsylvania. He advised this woman that he was in Nova Scotia on business and would be travelling to Hawaii to conduct further business. He wished to meet with her when in Hawaii. In this letter he noted his achievements since graduating. All of this was false.

[165] Numerous statements were given to the police by persons who had contact with the offender in Halifax. These statements were filed in this application and used by the psychiatrists in reaching their opinions. The statements describe a person who lied about his background, was persistent in attempting to meet and go out with women and had a sense of self-importance far beyond what one would normally encounter.

[166] The offender not only lied to strangers, but also to family members and friends. He told his aunt, June Epp, who continues to be supportive of him, that he was incarcerated in Nova Scotia because of a false accusation of rape made against him by his former girlfriend. He also denied to her the M. accusation in New York State which led to his conviction and

subsequent flight to Canada. This latter incident caused his aunt to forfeit the $20,000.00 U.S. which she had posted for his bail.

[167] In cross-examination the offender's aunt was visibly shaken when shown the photos of what he did to Ms. Jesso, Ms. D. and Ms. C.. It was clear from her reaction on the stand that she knew and was told nothing by the offender about the facts surrounding these three incidents. When the facts surrounding these incidents were relayed to her she was clearly shocked. She said her belief in her nephew was shaken by these revelations, although not completely.

[168] Ms. Epp's evidence also confirms some parasitic traits noted by the experts and used in their scoring of the PCL-R. In particular Ms. Epp's evidence that after the death of the offender's mother he lived in Ms. Epp's house rent free and was given an allowance. Once his mother's estate was settled and the court ruled that he could not benefit from the estate, his aunts, who had become the beneficiaries, paid for his education as well as providing him with a monthly allowance. Ms. Epp spent her $50,000.00 share of her sister's estate on the offender and his education. The offender was also paid a pension from his late father's insurers until he reached the age of 21.

EXPERT EVIDENCE

[169] Expert opinion evidence was given by four witnesses. The Crown called Dr. Stanley Semrau and Dr. Peter Collins, both forensic psychiatrists, and Dr. Angela Connors a forensic psychologist. Dr. Syed Akhtar, a forensic psychiatrist, testified for the defence

[170] Dr. Semrau's professional experience dates back to 1984. He has testified in 80 dangerous offender applications as a witness for the Crown, the defence and as a court appointed expert. He has been qualified as an expert witness in forensic psychiatry in five provinces and one territory. His qualifications have allowed him to testify about, among other things, dangerousness, sexual offenders, risk of recidivism and violence causation.

[171] He has been a member of the psychiatric staff at the Forensic Psychiatric Services Commission of British Columbia since 1985. He has obtained extensive experience and has done considerable work with federal inmates. Dr. Semrau is highly trained and clearly possesses the expertise to express opinions about the present condition of the offender and his future prospects.

[172] It is of significance that his opinion as to the offender's character makeup, risk of re-offending and treatment prospects was corroborated not only by the other Crown experts, but in large part, also by the defence expert.

[173] Dr. Connors is a clinical and forensic psychologist in private practice. She is also Program Manager of the Community Sexual Offender Assessment and Treatment Services at the Provincial Forensic Psychiatric Services. She has, in the past, been the Program Director for

low functioning sexual offenders at the Regional Health Centre (Pacific). Dr. Connors has worked with federally incarcerated sexual offenders.

[174] Dr. Connors has been and was qualified as an expert witness in the field of forensic psychology as it relates to both violent and sexual offenders, in terms of the risk that they pose to the community and their treatability.

[175] Dr. Collins is a staff forensic psychiatrist at the Centre for the Addiction and Mental Health in Toronto. He is also a consulting psychiatrist at the Sexual Behaviour Clinic. He has written and presented extensively in the field of psychopathy, personality disorders, sexual deviance and the human sex drive. Dr. Collins was qualified to express opinions about personality disorders, paraphilia, risk of recidivism and treatment.

[176] Dr. Akhtar is an experienced and well respected forensic psychiatrist in this province. He has been assessing patients for court purposes since 1969 and has practiced forensic psychiatry almost exclusively since 1979. He was also qualified to express opinions about personality disorders, paraphilia, risk of re-offending and treatment.

[177] All the experts who testified had previous, and in some cases, extensive experience in dealing with violent and sexual offenders.

[178] The Crown experts were asked to review 21 volumes of police reports, parole records, trial transcripts, witness statements and interviews, hours of the offender's videotaped interviews with the police, media reports and documents produced by the offender before preparing their opinions.

[179] Dr. Semrau, however, was asked to consider only the convicted offences and the alleged criminal behaviour of the offender in preparing his assessment. He considered other material in preparing his supplemental report but stated that 80 to 90% of his opinion was based on the offender's previous convictions.

[180] Drs. Collins and Connors also had the benefit of observing the offender's testimony given in the Jesso and C. trials before preparing their assessments. Dr. Collins observed the offender's testimony in the Jesso trial while Dr. Connors observed it in the C. trial.

[181] All of the assessments, save for that of Dr. Akhtar, were done without the benefit of an interview with the offender. Although the reports of Drs. Semrau, Collins and Connors must be weighed with some caution given the lack of direct contact with the offender, there is ample evidence that risk assessment may be undertaken with assurance given adequate access to collateral information. In the present case Dr. Semrau referred to the volume of information he reviewed as being greater than in any other dangerous offender application he has done before. Dr. Collins made a similar observation about the volume of information he considered in preparing his opinion.

[182] The Crown experts were all trained and experienced in the use of actuarial risk assessment instruments. In order to provide a reasonably balanced and comprehensive estimate of the offender's risk of re-offending the Crown experts used a variety of different actuarial risk assessment instruments. They all used the Psychopathy Check List Revised (PCL-R) and the Sex Offender Risk Appraisal Guide (SORAG). Other actuarial instruments, such as the Static-99, the Violence Risk Appraisal Guide (VRAG), the Sexual Violence Risk (SVR-20), the Violence Prediction Scheme (VPS) and the HCR-20 were used by Drs. Semrau and Connors. Dr. Semrau testified that he routinely uses a number of these tests because individually they have weaknesses. He also uses a variety of instruments to obtain as broad and balanced a view of the offender as possible.

[183] I am satisfied after reviewing the evidence used by the experts to score the various actuarial instruments that these instruments were properly scored based on proven facts and admissible evidence.

[184] The PCL-R is used to estimate the extent of psychopathic traits and the related risk of future violence. It is an instrument which has been validated as a predictor of future sexual violence. It is a valid instrument for use without a clinical interview and research has indicated that a PCL-R based risk assessment undertaking without clinical interview results in an estimate of risk that is not significantly different from that obtained with the benefit of a clinical interview. There is even some research which indicates that the estimate of risk may be underestimated on the basis of a file review alone.

[185] The PCL-R has a maximum score of 40 points. For research purposes a score of 30 or more is the cutoff for the designation of psychopathy. Drs. Semrau and Collins testified however that the author of the PCL-R, Dr. Hare, has indicated that a score of 25 or more is sufficient to diagnose someone as a psychopath.

[186] Psychopathy was described as a pervasive pattern of behaviour in which the rights and interests of others are violated to serve the selfish interests of the offender in a manner that is callous.

[187] Dr. Semrau arrived at a score of 32 for the offender on this instrument. Dr. Collins scored the offender at 28, but pro-rated it to 31.1 because of some omitted questions. Dr. Connors scored the offender at 28.4 on this instrument. The range of error is plus or minus three points, two out of three times. The combined average of the three scores is 30.5. Factoring into this average the possible range of error provides a score of 27.5 to 33.5.

[188] The Crown experts commented on studies which have shown that an interview with an offender will in most cases raise the PCL-R score by two or three points.

[189] Drs. Semrau and Collins both labeled the offender a psychopath. Dr. Connors was not prepared to use this designation because the offender's score on the PCL-R was slightly

below the diagnostic cutoff suggested for a diagnosis of psychopathy. She did note, however, that the offender's score placed him "firmly within the range of scores typically considered to be in the high range of psychopathy" for the purposes of predictive studies.

[190] Dr. Akhtar did not employ actuarial risk assessment instruments to assist him in formulating his opinion. He did however have the benefit of interviewing the offender for approximately eight hours. The combination of the interviews and Dr. Akhtar's experienced clinical judgment more than compensates for his not employing actuarial risk assessment instruments.

[191] Dr. Akhtar, while reluctant to use the label "psychopath", did testify that a psychopath is someone with a severe form of antisocial personality disorder. He described the offender as having a high end personality disorder.

[192] Whether or not the offender is labeled a psychopath may be open for academic debate in the forensic psychiatric community. What is clear from the evidence, however, is that the offender manifests strong psychopathic traits.

[193] The experts all arrived at their respective opinions independently. They all made similar diagnoses about the offender's personality without having reviewed each other's reports beforehand.

[194] Dr. Collins testified that it would be unethical for him to provide a diagnosis because he did not interview the offender. He did however, testify that based on his review of the documentation provided to him and his observance of the offender's testimony in the Jesso trial it would be reasonable to conclude that the offender meets the American Psychiatric Association criteria for both a narcissistic personality disorder and an antisocial personality disorder. He also concluded, based on the offender's past conduct, that he has multiple paraphilias or sexual deviancies. These include a preference for violent hyper-dominant non-consenting sex with women, paraphilic stalking and telephone scatologia (obscene telephone calls).

[195] Dr. Semrau did not feel the same ethical constraints about providing a diagnosis as did Dr. Collins. Dr. Semrau diagnosed the offender as having a narcissistic personality disorder with antisocial features. He also inferred from the offender's behaviour patterns the presence of a sexual deviancy, but he could not characterize it in detail because he did not have the benefit of interviewing the offender.

[196] Dr. Semrau testified that simply by looking at the offender's criminal convictions he was able to form the opinion that the offender had a narcissistic and antisocial personality with a proclivity to violent and sexual offending. He also commented that he would have to ignore everything the offender did while in Canada before he could question his diagnosis.

[197] Dr. Connors provided a provisional diagnosis of a narcissistic personality disorder with antisocial and histrionic features. She also queried the presence of sexual sadism.

[198] Both Drs. Semrau and Connors concluded that the offender met the adult criteria for an antisocial personality disorder but they did not have sufficient information to find that a conduct disorder existed prior to age 15. Given this lack of information about the offender prior to age 15 these experts felt unable to diagnose a full antisocial personality disorder. Dr. Semrau found that the offender met four or five of the seven criteria for an antisocial personality disorder.

[199] Dr. Akhtar had the benefit of interviewing the offender. He diagnosed the offender as having a mixed personality disorder with antisocial and narcissistic traits. He testified that it did not matter to him whether he diagnosed a narcissistic personality disorder and an antisocial personality disorder or a mixed personality disorder with narcissistic and antisocial features because the end result would be the same. He also concluded that the offender has a sexual deviancy involving a predilection for coercive sex with non-consenting females.

[200] There is an abundance of evidence to support the conclusions of Drs. Semrau, Collins, Connors and Akhtar. Each of their conclusions was based upon evidence before the Court. The fact that extraneous evidence was considered by the Crown experts goes to the weight given to their evidence. So does the fact that the offender was not interviewed by them. The lack of an interview does not render their opinions meaningless.

[201] I have not drawn any adverse inference from the offender's refusal to be interviewed by the Crown experts.

[202] Where the Crown experts relied upon evidence that I have not relied upon, such as the B., K., S., R. and M. incidents, there was other evidence also in support of their positions such that the overall effect of their opinions was not compromised. I found the assessments completed by the Crown experts to be reasonable and accurate despite any limitations in their reports because of the lack of an interview with the offender.

[203] The evidence satisfies me that the opinions expressed by all the experts were formed according to recognized normal psychiatric procedures. The experts considered all possible sources of information including secondhand source information. They considered the reliability of that information, its accuracy and its significance.

[204] Dr. Semrau factored into his assessment what he termed "islands of good behaviour" by the offender while in the community. He also made allowances for police bias in interviewing witnesses, such as the search for only negative things done by the offender, as well as any potential bias on the part of witnesses stemming from the fact that the offender killed his mother.

[205] Dr. Collins, although not prepared to acknowledge that the police can ever be biased, testified that he was conservative in scoring the PCL-R because of the lack of an interview with the offender.

[206] Dr. Connors testified that although she reviewed the evidence of alleged crimes, she put no reliance at all on that information nor did she put reliance on any media reports that she reviewed. Her approach, since she was preparing an assessment based solely on file information, was to look for a convergence of opinion in that information before relying upon it.

[207] Dr. Akhtar did not review the 21 volumes of material filed in this application. He did review a detailed statement of facts prepared by counsel for the offender, the reports of the three Crown experts and reports prepared in 1989 by a psychiatrist and a psychologist. He did however have the benefit of interviewing the offender. It is noteworthy that he came to the same conclusion as the Crown experts. His diagnosis of the offender's personality disorder is almost identical to that given by the Crown experts. Dr. Akhtar's opinion as to the offender's risk of re-offending is exactly the same as that of the Crown experts.

[208] All experts agreed that the offender is at a high risk of re-offending both violently and sexually.

[209] Dr. Semrau found the risk of violent re-offending to be 55% in seven years and 64% in 10 years. The risk of re-offending sexually was estimated at 75% in seven years and 84% in 10 years. Dr. Connors' scoring of the VRAG and SORAG provided exactly the same estimation of risk.

[210] The experts also provided opinions regarding the offender's treatment prospects. Dr. Semrau stated that the prognosis for the treatment of someone, such as the offender, with a severe narcissistic personality disorder with antisocial features is dismal. He referred to the scientific evidence regarding the treatment for narcissistic and antisocial disorders as showing that these disorders are extremely difficult to treat.

[211] He testified that treating someone with the offender's disorders involves changing the behaviour and not the personality because the record on changing personality is extremely poor. Dr. Semrau identified the key to treatment as being motivation. He testified however that his experience has been that persons who have severe narcissistic and antisocial disorders are only motivated when they are in trouble. He described this as a self-serving motivation as opposed to a motivation based on empathy for others.

[212] Dr. Semrau also testified that no cure exists for the offender's disorders. He opined that given the severity of the offender's criminal conduct the soonest one would see some semblance of progress in the offender's treatment is in three to four years and the longest is never. He cautioned about the great danger that exists of someone with the offender's

intelligence and personality makeup deceiving the therapists. He stated that past behaviour is the best predictor of future behaviour.

[213] Dr. Connors noted that the offender does not have a mental disorder or addiction that disinhibits him. She said that treating him will be more difficult than treating someone who does have such disinhibitors. Her prognosis for the offender's ability to change or to manage his risk is poor.

[214] Drs. Collins, Connors and Semrau all referred to studies which have shown that treating someone who is a psychopath only makes them a better psychopath. The doctors referred to the caution which must be exercised when treating a psychopath because of this. Dr. Connors observed that treatment programs presently used in federal institutions focus on what is effective in risk management not in treating the psychopathy.

[215] Dr. Connors testified that even if the offender accepted guilt, acknowledged that he had a problem and was willing to take treatment, her prognosis would not change.

[216] Dr. Collins referred to the best predictor of future behaviour as being past behaviour. He indicated that psychopaths do not learn from their past mistakes and are difficult to treat because they have high self-esteem and because they do not think that there is anything wrong with them. He noted that there is no way to teach empathy. He also pointed out that at present there are no drugs that can be used to address the problems of a psychopath.

[217] Dr. Collins was of the opinion that the combination of the offender's paraphilic disorder and his psychopathy makes the diagnosis for treatment very poor. He stated that there is no cure for paraphilia.

[218] Dr. Akhtar testified that he did not consider the offender as having complete insight into his problems. He viewed the offender as minimizing his behaviour and having a benign explanation for even the offences for which he has been convicted. The doctor noted that the offender, although acknowledging legal guilt, did not show psychological guilt, that is remorse.

[219] Dr. Akhtar was of the opinion that at this stage, it was impossible to say if any treatment would be effective. He noted that treatment of the offender would be difficult and time-consuming because his personality disorder and paraphilia have existed for years. He was unable to say how many years of treatment would be needed to assess its effectiveness. He was, however, able to say that the effectiveness of treatment cannot be judged in a prison setting and whether the offender has modified his behaviour will not be known until he is back in the community and exposed to women.

[220] Dr. Akhtar could not say that he saw genuine or enduring motivation. He was skeptical about a number of things the offender told him but especially about his motivation. He noted

that the offender could be telling the truth about being motivated yet not have any real motivation. He termed the offender's insight into his problems as dim.

[221] Dr. Akhtar testified that the offender's sense of entitlement (his narcissism) and his antisocial traits make it more difficult for him to control his paraphilia. He could not recall anyone with an antisocial and narcissistic personality and paraphilia ever changing. He acknowledged that the success rate in treating persons with the offender's constellation of disorders was not high. He described the offender as being one of the most serious cases he has ever dealt with.

[222] Dr. Akhtar found that, at present, the offender's potential for violent sexual recidivism is high. He pointed out that the offender has never had treatment. He stated that if the offender responds to treatment it is possible that his potential for recidivism will decrease. He noted however that the potential will remain high so long as the offender's attitudes remain the same.

[223] Dr. Akhtar was of the opinion that the offender must be given treatment in order to determine if it is possible for him to change. In other words, to see whether he responds to it. The analogy Dr. Akhtar used was that "you can't win the lottery if you don't buy the ticket".

[224] Dr. Akhtar observed that it would be dangerous to release the offender now.

PATTERN ANALYSIS

[225] The offender's criminal behaviour, as outlined previously, must be measured against the exacting requirements of s.753 of the **Code.** The core finding which the Court must make at this stage is whether the offender constitutes a threat to the life, safety, physical or mental well being of other persons. In essence this Court must make a present finding that the offender will continue to be dangerous in the future.

[226] Should any one or more threshold set out in s.753 be met, the Court must go on and determine whether the offender is, based on that evidence, a threat to the life, safety or well being of others.

[227] In conducting this analysis the Court is bound to only look at the offender's criminal behaviour which has involved some degree of violence or attempted violence or endangerment or likely endangerment. The conduct referred to may be more or less serious than the predicate offence.

[228] Section 753(1)(a)(i) refers to repetitive behaviour while s.s. (a)(ii) refers to persistent aggressive behaviour. In **R. v. Yanoshewski** (1996), 104 C.C.C. (3d) 512 the Saskatchewan Court of Appeal equated persistent with repetitive. More than one incident of violence or aggression is required to make a pattern.

[229] In 1988 the offender, for some trivial reason, savagely beat a young boy who was physically much smaller than he was. The blows were delivered to the head causing a broken nose and blackened eyes.

[230] Some two months later the offender killed his mother by hitting her repeatedly with a baseball bat. The blows were delivered almost exclusively to her head. These blows fractured her skull and caused her death. The assault left her face unrecognizable.

[231] Some 10 years later following a breakup with his girlfriend and in a state of financial need the offender robbed Ms. D. (the first predicate offence). He struck her on the head with a baseball bat. The force of the blow crushed her skull and drove the bone into her brain matter. Ms. D.'s life was endangered.

[232] Less than three months after almost killing Ms. D. the offender committed an aggravated sexual assault upon the person of Tracy Jesso (the second predicate offence). He pounded her face into the pavement numerous times fracturing her facial bones and causing multiple contusions.

[233] A mere six weeks after Ms. Jesso was brutally assaulted the offender also sexually assaulted Ms. C.. He repeatedly choked her into unconsciousness. He punched her in the face many times causing facial contusions and bleeding.

[234] Although not all of these five offences are similar in kind they are similar in terms of the degree of violence or aggression inflicted upon the victims.

[235] Four of the five victims were women. Three of these four victims were young women. The violence used against all of the victims was excessive and beyond what was required to gain compliance. All of these victims suffered serious injuries to their head. Each offence contained fear inducing elements. All of the offences against women feature elements of control and domination.

[236] The offender's behaviour in the two predicate offences and the other offences referred to shows a failure on his part to restrain his behaviour.

[237] The offender's past criminal conduct together with the psychiatric evidence of his personality disorders and psychopathic features convinces me that there is a likelihood he will cause death, or injury or inflict severe psychological damage on other persons, particularly women, in the future because of his inability to restrain his behaviour.

[238] The offender, because of his narcissistic personality disorder has shown that he has not learned as a result of his past conflicts with the law nor has he re-assessed his own behaviour. His antisocial personality has caused him to violate, with indifference, the rights of others in a way that is harmful to them.

[239] He has also shown through his conduct a substantial degree of indifference regarding the reasonably foreseeable consequences to others of his behaviour. Striking Ms. D. in the head with a baseball bat after having killed his mother using the same weapon in the same manner shows a substantial degree of indifference regarding the reasonably foreseeable consequences of his behaviour. The continuation of the Jesso and C. assaults after it was evident that the victims were bloodied and not resisting is as well a strong indicator of his indifference.

[240] I am satisfied the Crown has proven a pattern of repetitive behaviour under s.753(1)(a)(i) and a pattern of persistent aggressive behaviour under s.s. (a)(ii).

[241] The offender's violent conduct in relation to his mother, Ms. D., and Ms. Jesso was brutal. Striking someone repeatedly with a baseball bat until their face is unrecognizable or until their skull is fractured or pounding someone's face into the pavement until it is broken and unrecognizable can only be described as coarse, savage and cruel. This conduct has caused severe psychological harm to two of these three victims. The third died.

[242] These offences were of such a brutal nature so as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.

[243] Should I be in error in finding that the requirements of s.753(1)(a)(i),(ii), and (iii) have been met, I am convinced beyond any doubt that the requirements of s.753(1)(b) have been proven to the requisite standard.

[244] The offender's conduct in any sexual matter has shown his failure to control his sexual impulses. His history reveals numerous incidents where he has failed to control his sexual impulses. Such failure has led on many occasions to serious physical injury and on all occasions to psychological damage being inflicted on his victims.

[245] In 1995 his failure to control his sexual impulses led him to grab a women's buttocks as she was walking down the street. Some four months later the offender's failure to control his sexual impulses led him to sexually assault and ejaculate on the face of a young women who was intoxicated and at times unconscious. He again failed to control his sexual impulses when he attacked a perfect stranger, Ms. Jesso and committed an aggravated sexual assault on her person. He failed to control his sexual impulses when he committed an aggravated sexual assault on K. C., a woman he had just met a few hours before.

[246] The obscene phone calls made by the offender to Ms. E., Ms. J. and Ms. M. are as well reflective of a failure to control his sexual impulses.

[247] He has inflicted on some victims gratuitous violence resulting in serious physical injury and hospitalization. This violence was not necessary to complete the sexual assaults. In all cases the result has been severe psychological damage to those victims. Reference has been made

previously to victims who are unable to sleep at night, who fear going out, who suffer depression, and who are still in counseling because of his actions.

[248] The fact that the offender continued his attack on Ms. Jesso despite lights coming on and that he continued his attack on Ms. C. until someone opened the door to his room speaks volumes about his self control.

[249] The offender has shown a progression in his sexual offending by using greater violence with his victims. The level of intrusion, in his sexual assaults has also increased over time. He has also committed some sexual offences while being under external supervision.

[250] His sexual offending is fueled by his deviancy and his personality disorders. It shows a deepening of his sexual deviancy and a continuing failure to control his sexual impulses. The fact that the offences have increased in frequency, severity, intrusiveness, boldness, brutality and callousness is of great concern.

[251] These offences make it abundantly clear that his conscience and empathy for others are not working to control his impulses. The offender has a preference for coercive sex with women. This deviancy coupled with his narcissistic personality disorder and his antisocial personality traits make it very clear that there is a strong likelihood of his causing injury, pain or other evil to others in the future through a failure to control his sexual impulses.

ANALYSIS AND CONCLUSION

[252] I have outlined, in the preceding pages, the basis for my finding that the offender is a threat. The requirements of s. 753(1)(a)(i), (ii), (iii) and s. 753(1)(b), having been proven beyond a reasonable doubt, I will now address the question of whether it is appropriate, in all the circumstances, to designate the offender a dangerous offender and impose an indeterminate sentence, or designate the offender a long term offender and impose a determinate sentence, coupled with a long term supervision order.

[253] The following analysis involves an element of judicial discretion. In the recent past, courts have disagreed over whether there exists a residual discretion to not designate an offender a dangerous offender once the Crown has proven all the requisite statutory requirements beyond a reasonable doubt. Cases such as **R. v. Moore** (1985), 16 C.C.C. (3d) 28; **R. v. Dow (supra)**; **R. v. D.M.** (1995), 136 Sask. R. 135 and others have held that there is no residual discretion once the statutory requirements have been proven beyond a reasonable doubt.

[254] The Supreme Court of Canada in **R. v. Lyons (supra**) at p. 338 held that the court has a discretion not to designate the offender as dangerous or to impose an indeterminate sentence even in circumstances where all of these criteria are met. The decision in **R. v. Lyons** was rendered prior to the 1997 amendments to part 24 of the **Code** which make mandatory the

imposition of an indeterminate sentence once the offender is found to be dangerous. The 1997 amendments did not change the wording of "may" in s. 753(1). This wording suggests that even if the statutory requirements are met the court has a discretion to find that the offender is not a dangerous offender.

[255] In **R. v. Neve (supra)** and **R. v. Deckert** [2001], S.J. No. 15, the Alberta Court of Appeal and the Saskatchewan Court of Queen's Bench both held that there still exists a residual discretion to not declare the offender dangerous even if all the statutory criteria have been proven. The court in **R. v. Neve (supra)** at p. 176 noted that it is the existence of the various layers of judicial discretion, including this layer at the very end which in part, shield the dangerous offender proceedings from successful **Charter** challenges.

[256] Crown counsel in the present case correctly conceded that this Court does have such a residual discretion.

[257] The considerations which must be addressed by this Court in exercising its residual discretion are the offender's treatment prospects, the relative degree of seriousness of the criminal conduct and the extent of the offender's moral blameworthiness and the offender himself.

[258] The two predicate offences presently before the Court and the other violent offences are all extremely serious.

[259] In the preceding pages, I noted the factual underpinnings and the results of those offences. They are at the high end in terms of seriousness. The offender is the only one who bears moral blameworthiness for these offences. All the offences were unprovoked and resulted from the offender's failure to control his impulses.

[260] Counsel for the offender argues that the designation of dangerous offender should not be made solely on the basis of the PCL-R scores. The offender's scores do not, it is submitted, show intractability or that the offender is among the worst of the offenders. It is offered that what the PCL-R scores do show is this offender needing control, treatment and supervision, all of which can be achieved through a long term offender designation.

[261] The defence points to the offender's acknowledgment to Dr. Akhtar and to this Court of his need for treatment. It identifies his acceptance of responsibility, as evidenced by the abandonment of his appeals and written allocution to the Court, as indicators of insight and not intractability. It is argued that even if the offender has not accepted full responsibility, he has at least begun to accept it. This, it is argued, shows an appreciation that the problem is his and that he must change. It is submitted that the beginning of insight shows that treatment can be effective.

[262] The cases of **R.. v. W.A.H.**, [2001] N.S.J. No. 346 (N.S.S.C.); **R. v. Payne**, [2001] O.J. No. 146 (Ont. S.C.J.); **R. v. J.G.T.**, [2000] A.J. No. 938 (Alta. Q.B.); **R. v. G.C.**, [2001] S.J. No. 177 (Sask. Q.B.) and **R. v. J.S.M.** [2001] B.C.J. No. 1328 (B.C.S.C.) are all offered as examples of courts not requiring full and complete insight before designating someone a long term offender. Since the offender has never received treatment before but is willing to take it now and since treatment can be effective, it is argued that a reasonable possibility that treatment can be successful exists. Accordingly, the offender should be declared a long term offender.

[263] The defence submits that because the offender has not has the opportunity of receiving treatment, this Court cannot find that his condition is intractable. Cases such as **R. v. Kim** [2000] B.C.J. No. 1716 (B.C.S.C.); **R. v. Weatherbee**, [2001] N.S.J. No. 259 [N.S. Provincial Ct.]; **R. v. Nepoose** (1997), 118 C.C.C. (3d) 570 (Alta. C.A.) and others were cited as examples of offenders who showed intractability by having received treatment and failed. **R. v. G.C. (supra)**; **R. v. W.A.H. (supra)**; **R. v. J.S.M.**, [2001] B.C. J. No. 1328 (B.C.S.C.) and others were offered as examples of courts giving offenders a chance to demonstrate that change was possible. The defence submitted that there are no cases where an offender has not been given treatment and yet found to be a dangerous offender.

[264] The defence remarks that the long term offender provisions do not require that a cure be a certainty, only that there be a reasonable possibility of controlling the risks. It is argued that a lengthy determinate sentence would allow treatment to take place and this, coupled with a long term supervision order, would ensure the protection of society.

[265] Briefly stated, the Crown position is that the offender's behaviour is pathologically intractable. His verbalization of a need for treatment and a willingness to take it does not mean that intractability ends. The hope that treatment will be successful is not sufficient to conclude that there is a reasonable possibility of controlling the risk in the future. The Crown submits that the offender should be declared a dangerous offender and sentenced to an indeterminate term of imprisonment.

[266] As already stated, the dangerous offender designation is one which is reserved for that small number of offenders who, by their behaviour, have shown that they are dangerous and that they pose a threat to the physical or mental well-being of their victims.

[267] The offender, in the present case, is at a high risk of re-offending, both violently and sexually. He has been diagnosed with a severe narcissistic and antisocial personality disorder. He also has sexual deviancy which is fuelled by his personality disorder. He has offended both violently and sexually in the past. His violence and lack of control have led to the death of his mother, the near death of Ms. D. and serious physical injuries to his other victims. His behaviour has caused severe psychological trauma to all of his victims.

[268] The offender has shown a capacity for extreme violence based on a number of different motivational mechanisms. He has acted violently in domestic situations, as well as to achieve material gain or to pursue his sexual pleasure. This alone shows the severity, depth and breath of his personal psycho pathology. The escalation in the frequency and severity of his offending is frightening.

[269] The offender is a very intelligent man. He has an I.Q. of 124 to 132, placing him in the superior range on intelligence. He has a faculty of reasoning, logic and intellect well above that of the average person. He was the class valedictorian and stood first in his highschool graduating year. He is a graduate of a prestigious American Ivy League university. He is someone who could have achieved a great deal in any chosen profession. Unfortunately, he is also manipulative, extremely violent, sexually deviant and lacking a conscience.

[270] The offender has led a life of deception, marked by acts of theft, fraud, serious physical and emotional violence, sexual perversion and death. In most instances, he has denied culpability resulting in contested proceedings and a further traumatization of his victims. He has fled one jurisdiction in order to avoid accepting responsibility for his actions. He has disrespected court orders and committed offences while under supervision. He has shown through his pattern of offending both impulsivity and premeditation, together with a callous disregard for the life and safety of others. He has repeatedly demonstrated a complete lack of empathy for his victims and remorse for his actions. He has not altered his behaviour as a result of the consequences of his actions. In fact, his behaviour has worsened.

[271] The offender is incapable of empathy or remorse because of his narcissistic and antisocial personality disorder. His antisocial characteristics cause him to believe that the rules of society do not apply to him. His narcissistic personality disorder causes him to lie, cheat and manipulate people and situations. He has done everything in his power, including committing perjury on at least two occasions, to avoid accepting responsibility. The offender's history of manipulating people and situations in order to achieve his own objectives, his past lack of remorse for his actions and his perjury casts a large shadow over his written expression of remorse and stated motivation to get treatment. His continued attempts at manipulating people, even while in custody, as evidenced by his letter to Ms. C. in July, 2000, or his interviews with Dr. Akhtar in October, 2000 and September, 2001, gives me strong reason to doubt the sincerity of his expressed motivation for change.

[272] The offender's conduct and the expert evidence satisfies me beyond a reasonable doubt that his behaviour is pathologically intractable.

[273] The evidence which I have considered, including that of the experts as to the offender's present condition and its treatability, gives me no confidence whatsoever that there will be any particular time span within which he may be able to function in the community given the seriousness of his personality disorders. Whenever the offender is at large in the community, there will be ample victims (women) and suitable offending circumstances available to him.

[274] Both the Crown and the defence experts agreed that it is the behaviour and not the words, of someone like the offender, which should be relied on. In September, 2001, the offender when being interviewed by Dr. Akhtar stated that he realized in 1998 that he had a "sexual problem". I have made the assumption that this reference to 1998 was to the period after his arrest and detention. His actions after that realization, such as going to trial in each case and perjuring himself at two of his trials, gives me no confidence in accepting what the offender is now saying, particularly when it is viewed in the context of him facing a dangerous offender designation.

[275] His intelligence and history of deceit and manipulation would, in my opinion, make community supervision very difficult, if not impossible.

[276] I am unable to conclude, on the evidence before me, that there is a reasonable possibility of eventually controlling the risk he poses in the community. The evidence, relating to the issue of a reasonable possibility of eventual control of the risk in the community, is speculative. At best, it is a hope that perhaps treatment and control may be successful in time. This is simply not good enough. In **R. v. Poutsoungas** (1989), 49 C.C.C. (3d) 388, the Ontario Court of Appeal held that if the possibility of rehabilitation is dependent on so many contingencies that it amounts to little more than a hope, it would be an error of law to fail to impose an indeterminate sentence.

[277] Dr. Akhtar, while acknowledging that the offender has a severe personality disorder and is a high risk of re-offending, both violently and sexually, was of the opinion that the offender should be given treatment to see if it is possible for him to change. The analogy which Dr. Akhtar used was "if you don't buy a lottery ticket, you can't win".

[278] In the present case, I cannot, objectively speaking, conclude that following the serving of a custodial sentence there is a realistic prospect of controlling the threat of dangerousness and managing the risk that the offender poses in the community. If the offender were to re-offend, there is no question in my mind that his behaviour would likely result in death, severe physical injury or psychological damage to a future victim. The damage he has inflicted on his past victims makes this conclusion abundantly clear.

[279] The evidence gives me no confidence whatsoever that there is any particular time period when this offender will no longer pose a risk. The court is not entitled to gamble on the safety of the public when that risk has so clearly been identified for it.

[280] Accordingly, I find the offender to be a dangerous offender and sentence him to an indeterminate term of imprisonment.

Felix A. Cacchione

Halifax, Nova Scotia