Court of Queen's Bench of Alberta

Citation: R v Scrivens, 2019 ABQB 700

Date: 20190913
Docket: 160243630Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Joseph Richard Scrivens

Offender

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.5.
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Reasons for Judgment respecting a Dangerous Offender Application of the Honourable Mr. Justice W.N. Renke

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[*On September 6, 2019, I delivered an abridged version of this decision orally and filed the full decision with the Clerk of the Court. For the purposes of the published version of the full decision, I reserved the right to correct typographical and grammatical errors and to make minor stylistic changes.*]

[1] Joseph Scrivens is 41. He was convicted of sexual assault in 1997 (suspended sentence, 1 year probation), two counts of distribution of child pornography in 1999 (6 months imprisonment

and 3 years probation), mischief under $5,000 in 2001 (suspended sentence and probation for 2 years), failing to comply with a probation order in 2002 (60 days intermittent and 6 months probation), and possession of child pornography in 2007 (2 years imprisonment). As a result of this last conviction, he was found to be a Long-Term Offender under s. 753.1(3) of the *Criminal Code* and following completion of the sentence was bound by a 5-year Long-Term Supervision Order. [Further statutory references will be to the *Criminal Code*.] The LTSO expired in October 2014. After LTSO expiration, an Information for a s. 810.1 recognizance respecting Mr. Scrivens was sworn. Mr. Scrivens was released on recognizance pending the hearing. In November 2015, following a 2-day hearing, Mr. Scrivens was ordered to enter into an 18-month s. 810.1 recognizance.

[2] Mr. Scrivens was arrested on February 26, 2016 in relation to a set of offences alleged to have been committed, for the most part, between October 1 and December 31, 2015. Mr. Scrivens has remained in custody since arrest.

[3] On November 20, 2017, Mr. Scrivens pled guilty to six offences, including sexual interference involving a 6-year old girl (the predicate offence), as set out in an Indictment preferred on August 11, 2016 and amended November 20, 2017 (the Indictment). The offences occurred in Edmonton, Alberta:

> (i) count 2, between October 1 and December 19, 2015 – s. 151, Sexual Interference
>
> (ii) count 3, between April 2 and November 5, 2015 – s. 145(3), Failure to Comply with Recognizance (not to be in the company of children under age 18 unless accompanied by an approved adult, as specified)
>
> (iii) count 4, between November 6 and December 19, 2015 – s. 811, Breach of s. 810.1 Recognizance (not to enter into friendships with any females without disclosure to supervisor and notification of previous offending)
>
> (iv) count 5, between November 6 and December 17, 2015 – s. 811, Breach of s. 810.1 Recognizance (no overnight stays without approval)
>
> (v) count 9, between December 1 and December 19, 2015 – s. 811, Breach of s. 810.1 Recognizance (unapproved cellphone)
>
> (vi) count 10, between December 17 and 18, 2015 – s. 811, Breach of s. 810.1 Recognizance (unauthorized attendance near places where children are likely to congregate)

(cumulatively, the Current Offences). I note that the Indictment refers to recognizances under s. 810 rather than s. 810.1. The charging section was correct, the s. 810 reference occasioned no prejudice to Mr. Scrivens, the Indictment provided sufficient details to give him reasonable information respecting the charges and to prepare a defence, and the evidence, including an Agreed Statement of Facts, consistently and correctly referred to s. 810.1. The s. 811 counts were valid. See ss. 581(3), 601(3) and (4), and ***R v Douglas***, [1991] 1 SCR 301 at 314.

[4] The Crown has applied to have Mr. Scrivens declared to be a dangerous offender and urges a sentence of indeterminate detention in a penitentiary for the predicate offence. Alternatively, the Crown seeks a determinate sentence for the predicate offence followed by a Long-Term Supervision Order. In the further alternative, should Mr. Scrivens not be declared to

be a dangerous offender, the Crown requests that the application be treated as a Long-Term Offender application. The Crown seeks traditional determinate sentences for the remaining Current Offences. The Defence contends that Mr. Scrivens should not be declared to be a dangerous offender, but if he is so declared, that he be sentenced for the predicate offence, or, in the alternative, that he be sentenced for the predicate offence for a term exceeding two years and ordered to be subject to long-term supervision for a period not exceeding 10 years.

[5] The dangerous offender application framework has four main elements. First, an offender must have been convicted of a "serious personal injury offence" as defined in s. 752. Second, the Crown must have satisfied specified formal or procedural requirements. Third, under the provisions of s. 753(1)(a) applicable in this case, the Crown must establish that the behaviour or conduct of the offender meets the criteria set out in ss. 753(1)(a)(i) or (ii) and constitutes a threat to the life, safety or physical or mental well-being of other persons. Fourth, the Court must then sentence the offender, following ss. 753(4) and (4.1).

[6] The first element of the application framework has been satisfied. Mr. Scrivens has conceded that the predicate offence was a serious personal injury offence. Second, the procedural requirements are satisfied. However, the remaining elements of the application framework generate significant issues, respecting whether the Crown has established beyond a reasonable doubt that Mr. Scrivens has met the criteria set out in ss. 753(1)(a)(i) or (ii), whether he is a threat to the life, safety, or physical or mental well-being of others, and, if these elements are satisfied, whether public protection and his treatment prospects dictate that Mr. Scrivens be imprisoned for an indeterminate period or whether there is a reasonable expectation that a lesser measure will adequately protect the public.

[7] Three main questions must be answered:

[8] First, has the Crown established, beyond a reasonable doubt, that Mr. Scrivens engaged in a pattern of conduct under ss. 753(1)(a)(i) or (ii)? If the Crown fails to do so, its dangerous offender application collapses. The failure to establish a 753(1)(a)(i) pattern would also foreclose the s. 753.1(2)(b) route to a long-term offender designation.

[9] Second, if the Crown has established a pattern of conduct, has the Crown established, beyond a reasonable doubt, on the basis of the evidence establishing the pattern of conduct, that Mr. Scrivens constitutes a threat to the life, safety or physical or mental well-being of other persons?

[10] Third, if the Crown has established both pattern of conduct and threat, am I satisfied by the evidence adduced in the hearing that a lesser measure than indeterminate detention in a penitentiary will adequately protect the public against the commission of a serious personal injury offence by Mr. Scrivens?

[11] I will review the elements of the dangerous offender framework and answer these questions in turn.

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I. Serious Personal Injury Offence

[12] The first element of the dangerous offender application is that the offender must have been convicted of a serious personal injury offence: s. 753(1)(a).

[13] "Serious personal injury offence" is defined in paragraph (a) of s. 752:

> "serious personal injury offence" means
>
> > (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
> >
> > > (i) the use or attempted use of violence against another person, or
> > >
> > > (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more.

[14] Section 151 provides as follows:

> 151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> > (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year ….

[15] Mr. Scrivens conceded that the s. 151 offence, count 2 of the Indictment, was a serious personal injury offence: Written Argument of the Accused (SWA) at para 7. In the circumstances, to be reviewed below, this concession was warranted. What occurred was a major sexual interference. A major sexual interference is inherently violent, through the adult's violation of the child's sexual integrity, human dignity, and privacy: ***R v Hajar***, 2016 ABCA 222 at para 115. This offence, moreover, is inherently harmful: *ibid.*

[16] On the basis of his guilty plea and an Agreed Statement of Facts filed in this matter, I find beyond a reasonable doubt that Mr. Scrivens committed the s. 151 offence set out in count 2 in the Indictment and that this offence was a serious personal injury offence as defined in s. 752 and satisfies the requirement for conviction for a serious personal injury offence under s. 753(1)(a).

II. Procedural Requirements

[17] The second element of the dangerous offender framework is that the Crown must have satisfied specified procedural requirements.

[18] I find beyond a reasonable doubt that the following steps have been taken by the Crown in conformity with the statutory requirements for dangerous offender applications.

A. Timing of Application

[19] Under s. 753(2), "[a]n application under subsection (1) must be made before sentence is imposed on the offender" unless certain exceptional conditions have been satisfied. The Crown's application was made before Mr. Scrivens was sentenced.

B. Order for Assessment

[20] Subsection 753(1) refers to an application being made "after an assessment report is filed under subsection 752.1(2)." I made an assessment order under s. 752.1(1). Two reports were filed, one by a forensic psychologist (Dr. Van Domselaar), the other by a forensic psychiatrist (Dr. Zedkova). The reports were filed in conformity with s. 752.1(2). I addressed issues concerning the timing of completion and filing of assessments in separate reasons: 2018 ABQB 1027.

C. Consent of the Attorney General

[21] Under s. 754(1),

> With the exception of an application for remand for assessment, the court may not hear an application made under this Part unless
>
> > (a) the Attorney General of the province in which the offender was tried has, either before or after the making of the application, consented to the application ….

[22] The Deputy Attorney General of Alberta consented to this application on July 6, 2018.

D. Notice Outlining Basis for Application

[23] Under s. 754(1),

> With the exception of an application for remand for assessment, the court may not hear an application made under this Part unless
> …
>
> > (b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and
> >
> > (c) a copy of the notice has been filed with the clerk of the court or the provincial court judge, as the case may be.

[24] The Crown duly gave notice to Mr. Scrivens following the making of the application, outlining the basis of the application. Notice was given to Mr. Scrivens more than seven days before the application. A copy of the Notice has been filed with the clerk of the court.

III. Foundations for the Dangerous Offender Designation

[25] Before turning to the remaining elements of the dangerous offender application framework and responding to main questions posed by this application, I will address some of the legal and evidential background to the application.

A. Statutory Provisions

[26] Under s. 753(1),

> 753(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied
>
> > (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
> >
> > > (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour, [or]
> > >
> > > (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour ….

[27] The Crown did not rely on ss. 753(1)(a)(iii) or 753(1)(b): Written Argument of the Crown (CWA) at paras 19, 12. Further, the conditions for the operation of the presumption set out in s. 753(1.1) were not engaged, since Mr. Scrivens had not been "convicted previously at least twice of a primary designated offence and was sentenced to at least two years of imprisonment for each of those convictions."

[28] Four aspects of s. 753(1) should be immediately noted.

[29] First, the Crown relied on evidence it contended satisfied the criteria of either or both of ss. 753(1)(a)(i) or (ii). Subparagraphs (i) and (ii) are disjunctive not conjunctive.

[30] Second, the Crown must establish the s. 753(1)(a) criteria beyond a reasonable doubt: ***R v Currie***, [1997] 2 SCR 260 at para 42; ***R v Boutilier***, 2017 SCC 64, Côté J at para 41.

[31] Third, since the opening of subsection (1) provides that "the court *shall* find the offender to be a dangerous offender if it is *satisfied* …." and the "shall" language is mandatory, if I am

satisfied that the criteria for a dangerous offender finding have been established, I must find that Mr. Scrivens is a dangerous offender. I have no discretion not to impose the dangerous offender designation.

[32] Finally, I confirm that the dangerous offender provisions serve the ultimate end of preserving public safety or of protecting the public from a particular type of offender who represents a particular type of risk. Justice Macklin wrote as follows in ***R v Blanchard***, 2018 ABQB 43 at para 9:

> [9] Therefore, the primary purpose of the dangerous offender regime is the protection of the public: ***R v Johnson***, 2003 SCC 46 at para 19, [2003] 2 SCR 357. In ***R v Steele***, 2014 SCC 61, [2014] 3 SCR 138, the Court said:
>
> > 29 The primary rationale for both indeterminate detention and long-term supervision under Part XXIV is public protection. Both sentences advance the "dominant purpose" of preventive detention identified by Dickson J. in *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39, at p. 43, namely "to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb."

The dangerous offender regime is to apply to the small subset of offenders whose dangerousness cannot be adequately addressed through the ordinary sentencing system: ***Lyons v The Queen***, [1987] 2 SCR 309 at 339 and 347; ***R v Neve***, 1999 ABCA 206 at paras 55, 57, 60.

B. Evidence

[33] I will comment on evidential issues generally and some witnesses and evidence more specifically.

1. General Evidential Rules

[34] A dangerous offender proceeding is a sentencing proceeding. Hence, there is broader scope for the admissibility of evidence than in trial. See, e.g., s. 723(2) and (5):

> 723(2) The court shall hear any relevant evidence presented by the prosecutor or the offender.
>
> (5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person
>
> (a) has personal knowledge of the matter;
>
> (b) is reasonably available; and
>
> (c) is a compellable witness.

and s. 726.1:

> 726.1 In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.

[35] I have kept in mind s. 724(3)(e):

> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence …
>
> > (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[36] In ***R v Jones***, [1994] 2 SCR 229 at 290, Justice Gonthier confirmed that in dangerous offender proceedings,

> it is all the more important that the court be given access to the widest possible range of information in order to determine whether there is a serious risk to public safety. If there is, the dangerous offender sentencing allows the justice system to more precisely tailor the actual time served by the offender to the threat that he poses to society.

Justice Gonthier wrote at 291 that "[t]he sentencing stage places a stronger emphasis on societal interests and more narrowly defines the procedural protection accorded to the offender. If the sentencing judge is to obtain the accurate assessment of the offender that is necessary to develop an appropriate sentence, he will have to have at his disposal the broadest possible range of information." At 292-293, Justice Gonthier wrote

> …. in determining what facts are admissible at the sentencing stage, *Gardiner* reaffirmed the widely accepted principle that judges should have access to the fullest possible information concerning the background of the accused. As Dickson J. stated, at p. 414:
>
> > It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. <u>The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime</u>. [emphasis in ***Jones***]

[37] Character evidence is statutorily admissible in a dangerous offender application under s. 757:

> 757 Without prejudice to the right of the offender to tender evidence as to their character and repute, if the court thinks fit, evidence of character and repute may be admitted
>
> > (a) on the question of whether the offender is or is not a dangerous offender or a long-term offender; and

> (b) in connection with a sentence to be imposed or an order to be made under this Part.

2. Victim Impact Statements

[38] No victim impact statement was filed.

3. Expert Witnesses

[39] Expert evidence figured prominently in these proceedings. The Court of Appeal provided guidance respecting expert evidence in dangerous proceedings in ***Neve*** at paras 186-199. At para 186 the Court of Appeal wrote that

> Given the acknowledged weaknesses in psychiatric opinion evidence coupled with the fact that a court in dangerous offender proceedings is … considering a more severe sentence, the court has a particularly onerous responsibility to measure the quality and strength of the expert evidence for the purpose of determining which evidence, if any, it will accept ….

And at para 199:

> …. [A]t all times the responsibility remains with the sentencing judge to assess and weigh the opinion evidence, to determine whether the behavioural thresholds have been met, and whether based on that past behaviour someone is a threat and if so, should be designated a dangerous offender …. The experts do not become the judges and the expert opinion is not the judgment ….

[40] The s. 752.1 assessment reports were written by Dr. Theresa Van Domselaar and Dr. Lenka Zedkova, who were called as experts by the Crown. Dr. Van Domselaar is a forensic psychologist and Dr. Zedkova is a forensic psychiatrist. While there is no statutory requirement for both psychological and psychiatric testimony, there is a practice of having a psychologist and psychiatrist testify in tandem. Both interviewed Mr. Scrivens and reviewed documentation concerning Mr. Scrivens, in large part the same documentation available to me as exhibits. Both used various testing tools to assess Mr. Scrivens.

[41] Also called as experts by the Crown were Dr. Alberto Choy and Dr. Liam Ennis. Dr. Choy and Dr. Ennis had provided evidence for Mr. Scrivens' sentencing proceedings respecting his child pornography offence in 2007. Neither Dr. Choy nor Dr. Ennis re-assessed Mr. Scrivens for these proceedings.

[42] I have kept in mind that Dr. Van Domselaar and Dr. Zedkova have completed the most recent interviews and assessments of Mr. Scrivens and have reviewed documentation generated after Dr. Choy and Dr. Ennis made their contributions. Dr. Choy and Dr. Ennis were well-informed about Mr. Scrivens as he was. Dr. Van Domselaar and Dr. Zedkova are better informed about Mr. Scrivens as he is.

[43] Dr. Choy was qualified as an expert in forensic psychiatry, focusing on risk assessment and sexual offending. Dr. Ennis was qualified as an expert in forensic psychology with a specialization in risk assessment and management for sexual offending. Dr. Van Domselaar was qualified as an expert in forensic psychology, including risk assessment, recidivism, and the treatment of violent offenders, including sexual offenders. Dr. Zedkova was qualified in the area of forensic psychiatry. Dr. Zedkova has experience in doing risk assessments for criminal justice

purposes, and in giving opinions on risk and risk management. The reason for the differential treatment of Dr. Zedkova was that she did not have the scope or depth of experience of the other experts. Most of her experience was with mentally disordered offenders rather than with sexual offenders. Her qualification was meant to mark that she certainly had more relevant knowledge and experience than a lay person, an ordinary physician, or a non-forensic psychiatrist, but she did not have degree of expertise of the other experts. For all that, Dr. Zedkova's testimony was thorough, precise, and knowledgeable. In any event, the evidence of all four experts was mutually corroborative and complementary.

[44] The expert evidence will be referred to throughout these reasons. The abbreviations I have used for reference purposes are as follows:

- Dr. Alberto Choy, Transcript of Proceedings, February 20, 2019 (C20); February 21, 2019 (C21); Report, June 7, 2007 (CR)
- Dr. Liam Ennis, Transcript of Proceedings, February 27, 2019 (E27); February 28, 2019 (E28); Report, June 15, 2007 (ER)
- Dr. Lenka Zedkova, Transcript of Proceedings, March 1, 2019 (Z1); March 4, 2019 (Z4); March 5, 2019 (Z5); Report, February 23, 2018 (ZR)
- Dr. Theresa Van Domselaar, Transcript of Proceedings, March 6, 2019 (TVDM6); March 7, 2019 (TVDM7); March 8, 2019 (TVDM8); Report, February 28, 2018 (VDR)

[45] Mr. Scrivens called no witnesses. The Crown called all four experts. The experts' testimony was impartial in the sense of being objective, independent in the sense of being the product of each witness's judgment, and unbiased in the sense of not unfairly favouring one side over the other: see ***White Burgess Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23, Cromwell J at para 32.

[46] To respond to a concern raised by the Defence in submissions, I confirm that I have not relied on the opinions of Dr. Das in forming any of my conclusions in this matter. Dr. Das was not qualified as an expert and the weight of his evidence was substantially undermined in cross-examination.

4. Other Witnesses

[47] Other witnesses called by the Crown included psychologists and psychiatrists who had worked with Mr. Scrivens, facilitators of the Sexual Offender Maintenance Program, and Mr. Scrivens' parole officers. They will be introduced below.

5. Documents

[48] A substantial number of documents were filed, covering, generally, Mr. Scrivens' offence, incarceration, and programming and treatment history. Many of these documents were disclosed by the Crown and identified by a "EDD00…" number. I will refer to that form of number in the text below. The documents can be found in the trial exhibits binder, in some additional hard copy exhibits, and in e-form.

[49] I turn to the assessment of whether the ss. 753(1)(a)(i) or (ii) criteria have been satisfied, beyond a reasonable doubt.

IV. Pattern of Behaviour

[50] The third element of the dangerous offender application framework is that the Crown must, in this case, establish that the conduct of Mr. Scrivens meets the criteria set out in ss. 753(1)(a)(i) or (ii) and that Mr. Scrivens constitutes a threat to the life, safety or physical or mental well-being of other persons. This element has two aspects, pattern and threat. The first and second main questions in this application concern pattern and threat. In this and the next section, I will respond to the first main question: has the Crown established, beyond a reasonable doubt, that Mr. Scrivens engaged in a pattern of conduct under ss. 753(1)(a)(i) or (ii)?

[51] Both ss. 753(1)(a)(i) and (ii) require proof of "a pattern of … behaviour, of which the offence for which [the offender] has been convicted forms a part," showing ultimately that the offender is a threat to the life, safety or physical or mental well-being of other persons. I will begin by discussing some general principles of pattern analysis, review the conduct alleged to be relevant to Mr. Scrivens' pattern(s) of conduct, then determine whether the Crown has established a pattern of conduct under ss. 753(1)(a)(i) or (ii). In the next section, I will consider whether the Crown has established that the pattern of conduct satisfies the remaining criteria of ss. 753(1)(a)(i) or (ii).

A. Criteria to be Satisfied under ss. 753(1)(a)(i) and (ii)

[52] Under s. 753(1)(a)(i), the Crown must establish beyond a reasonable doubt that the offender is a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

- a pattern of repetitive behaviour by the offender
- the offence for which the offender has been convicted (the predicate offence) forms a part of that pattern
- that pattern shows a failure to restrain behaviour by the offender
- that pattern shows a likelihood of both
    - continued (future) failure to restrain behaviour by the offender and,
    - as a result, causing death or injury to other persons or inflicting severe psychological damage on other persons

[53] Under s. 753(1)(a)(ii), the Crown must establish beyond a reasonable doubt that the offender is a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

- a pattern of persistent aggressive behaviour by the offender
- the offence for which the offender has been convicted forms a part of that pattern
- the pattern shows
    - a substantial degree of indifference on the part of the offender respecting
    - the reasonably foreseeable consequences to other persons of his or her behaviour

B. Principles

1. Behaviour

[54] The ss. 753(1)(a)(i) and (ii) patterns are patterns of "behaviour." The pattern, then, is constituted by conduct or acts, not by thoughts, motivations, or dispositions. According to the Court of Appeal in ***Neve*** at para 106, "[t]he starting point for the threat evaluation therefore is past conduct." The term "behaviour" has a broader denotation than "offences" or "convictions" and includes uncharged but proven conduct: ***Neve*** at para 133. Nonetheless, to form part of the pattern, the conduct must be criminal and not merely antisocial or violative of social or moral norms: ***Neve*** at para 109. Further, since the predicate offence must be a serious personal injury offence and the predicate offence forms part of the pattern, the conduct relied on to constitute the pattern must involve some degree orfviolence or attempted violence or endangerment or likely endangerment: ***Neve*** at para 110. I will return to the interpretation of this aspect of ***Neve*** in the circumstances of this case below.

2. The Nature of "Pattern"

[55] The behaviour alleged to meet the ss. 753(1)(a)(i) or (ii) criteria must be a "pattern." The jurisprudence provides some guidance for identifying patterns of behaviour.

[56] A pattern may be discerned from two or more events. A pattern does not need to occur over a protracted or lengthy period of time: ***R v Byers***, 2011 ONSC 4159 at para 6, app dismissed 2017 ONCA 639.

[57] The finding of a pattern for s. 753(1)(a) purposes does not require the level of similarity between events that may be required for the admissibility of similar fact evidence. This caution makes sense. In the type of similar fact case assumed by the caution, what is at issue is identity, whether an accused was the perpetrator of an offence; or whether an offence occurred at all. In such cases, the degree of similarity between otherwise independent acts is itself circumstantial evidence that the accused (out of the universe of potential perpetrators) committed the particular offence, or circumstantial evidence that the independent acts did not share their similarities because of coincidence but because the accused did them. The stronger the similarity, the higher the probative value. Under s. 753(1)(a), there will typically be no issue as to whether the offender was the perpetrator of the acts relied on or whether the past acts actually occurred. (Such issues could conceivably arise, but did not in the present case.) Rather, the issue is whether a "pattern" can be inferred from the evidence, and a pattern may be evident even without exact or striking similarities between events, and even with some distinguishing features between events.

[58] For s. 753(1)(a) purposes, patterns cannot be drawn too broadly or abstractly or too many offenders would be swept into dangerous offender embrace. That would be contrary to the focus of the dangerous offender provisions on that small number of offenders whose dangerousness makes them unsuitable for ordinary sentencing dispositions, and would imperil the constitutionality of the dangerous offender provisions by making them overbroad. In any event, neither subparagraph refers to proof of only a "series" of behaviours.

[59] The *Oxford English Dictionary* entry for "pattern" that comes closest to the sense of that term in s. 753(1)(a) is 11.a:

> 11. a. A regular and intelligible form or sequence discernible in certain actions or situations; esp. one on which the prediction of successive or future events may be based. Frequently with *of*, as ***pattern of behaviour*** ….

Oxford English Dictionary, 3rd ed, 2005, "pattern", *n.* and *adj.* To say that a "pattern" is detected in behaviour is to say that on at least two occasions, behaviour by a person has exhibited some common discernable distinctive features, some common distinctive elements. Those features must be "distinctive," otherwise there would be no reason to identify the pattern, and no basis for distinguishing the behaviour in question from any other behaviour of the individual or for linking several of the individual's behaviours. "Distinctiveness" does not require that the features be unusual or remarkable. By themselves, the features may be unremarkable. The co-presence of otherwise ordinary features may supply the requisite distinctiveness. Neither does a pattern require that exactly the same set of discernable distinctive features recur in each exemplar of the pattern. The Court of Appeal captured this point in ***Neve*** at para 111:

> [111] …. [T]he mere fact that an offender commits a variety of crimes does not mean that no pattern exists. There is no requirement that the past criminal actions all be of the same or similar form, order or arrangement; though if this has occurred, it may well suffice.

[60] The identification of a "pattern" of conduct might be based on factors including the following:

- what was done
- what was done before, during, or after what was done
- the nature of what was done (how it was done)
- the object of what was done (to whom it was done)
- the context in which the acts occurred (e.g. location, time of day, social context)
- the purpose for which the acts were performed.

[61] The predicate offence must share the features of the pattern. It must be part of the pattern.

C. Mr. Scrivens' Behaviour – Elements of the Pattern Analysis

[62] The main question raises two issues. For the purposes of s. 753(1)(a)(i), did the Crown establish a pattern of repetitive behaviour, of which predicate offence forms a part? Alternatively, for the purposes of s. 753(1)(a)(ii), did the Crown establish a pattern of persistent aggressive behaviour, of which the predicate offence forms a part?

1. Pattern Alleged by the Crown

[63] In its Notice of Application, the Crown set out the conduct it would rely on as evidence supporting its application: see ***Neve*** at para 134 (the Crown is required to give notice to the offender "outlining the basis on which it is intended to found the application"). The conduct included the Current Offences, Mr. Scrivens' criminal record, and the facts and circumstances surrounding the commission of his offences. The Crown neither alleged nor sought to prove any uncharged criminal conduct as part of the requisite pattern of behaviour.

[64] I will provide an overview of Mr. Scrivens' past offences then an overview of the predicate offence.

2. Mr. Scrivens' Criminal History

[65] Mr. Scrivens has no youth record.

[66] Mr. Scrivens was convicted of the following offences prior to conviction for the Current Offences. He pled guilty to all of the offences.

(a) December 18, 1997, Kitimat, BC – s. 271, Sexual Assault – Suspended Sentence, 1 year probation; offence date – May 1 - 31, 1997

See EDD000623-002, 122.

[67] Mr. Scrivens was 19, a civilian instructor with the Sea Cadets. During a weekend Sea Cadet function, he touched the genital area of a 14-year old female cadet.

[68] In the sentencing decision, Judge Lawrence of the BC Provincial Court noted the substantial age difference between Mr. Scrivens and the complainant and that Mr. Scrivens was in a "minor position of authority." The offence, though, was "tickling that got out of control." It was an isolated occurrence, falling towards the lower end of the scale of seriousness, and Mr. Scrivens had no record.

[69] Mr. Scrivens was seen in the community by a psychiatrist, Dr. Karl Williams. Mr. Scrivens denied a pre-pubertal sexual attraction. Dr. Williams felt that a "primary pedophilic focus is not apparent," but he regarded Mr. Scrivens as "socially immature:" EDD000661-001. He considered the incident to have the "hallmarks of immature sexual interaction:" EDD000261-001.

(b) December 17, 1998, Kitimat, BC – s. 348(1)(b), Break & Enter – Suspended Sentence, 18 months probation; offence date – February 20 – 28, 1998

[70] Mr. Scrivens and a friend, both intoxicated, broke into a local college and stole some electronic equipment. Mr. Scrivens was on probation for the s. 271 conviction.

(c) November 18, 1999, Kitimat, BC – s. 163.1(3) (2 counts), Distribution of Child Pornography – 6 months gaol and 3 years probation on each charge, concurrent; offence dates - August 11 – 27, 1998

See EDD000624-001.

[71] The offences involved the distribution of downloadable images. Mr. Scrivens was also found in possession of some printed images. In the sentencing decision, Judge E.F. de Walle of the BC Provincial Court took into account Mr. Scrivens' guilty pleas, but regarded the commission of the offences while he was on probation as an aggravating factor. A report from Dr. Karl Williams was filed. Dr. Williams noted Mr. Scrivens' sole regret was that he was detected. Mr. Scrivens displayed a lack of remorse and understanding of his offences.

(d) April 20, 2001/September 22, 2000, Terrace, BC – s. 430(4), Mischief – Suspended Sentence, 2 years probation; offence date – June 11, 2000

[72] An Agreed Statement of Facts respecting this offence was entered as an exhibit. When driving from Terrace to Kitimat, Mr. Scrivens pulled into a provincial campground area with which he was familiar. At about 11 p.m. he was observed by a park ranger and his wife to be in the janitor room, standing on a garbage can, drilling a hole into the women's washroom. When challenged, he stopped what he was doing. Mr. Scrivens was on probation at the time of this offence.

(e) January 23, 2002/December 19, 2001, Fort McMurray, Alberta – s. 145(2), Fail to Attend Court - $100 fine; offence date – October 5/November 14, 2001

[73] Mr. Scrivens was charged with a breach of probation offence. While the breach charge was withdrawn, Mr. Scrivens failed to attend a docket appearance, resulting in this conviction.

(f) January 15, 2003, Fort McMurray, Alberta – s. 733.1, Fail to Comply with Probation Order – 60 days gaol intermittent, 6 months probation; offence date – July 1 – September 5, 2002

See EDD000628-002, -020, -022.

[74] Mr. Scrivens had regular contact, including sexual intercourse, with a 14-year old girl. Sexual interactions occurred over a four to six-month period. She lived in the same apartment building as Mr. Scrivens. At the time, the age of consent was 14. Mr. Scrivens was under probation. One of his conditions was not to have contact with any persons under age 16. He was 23.

[75] The relationship came to police attention after Mr. Scrivens mentioned being in the company of a minor during therapy sessions with psychologist Dr. Sandy Jung.

[76] Mr. Scrivens was sentenced by Judge Peck of the Alberta Provincial Court.

(g) March 26/October 31, 2007, St. Albert, Alberta – s. 163.1(4), Possession of Child Pornography – 2 years gaol, 5 year LTSO; offence date – August 17, 2006

See EDD000620-106; ER at 8; CR at 13.

[77] Mr. Scrivens was residing with his then-common law wife and infant daughter. He and his wife had started their relationship in 2003 and married in 2007. In a conversation with a relative, Mr. Scriven's wife said she had seen child pornography on Mr. Scrivens' computer. In the course of the subsequent police investigation, three of Mr. Scrivens' computers were seized and child exploitation images and videos were found.

[78] Sentencing was before Judge Burch of the Alberta Provincial Court. Mr. Scrivens entered a guilty plea and conceded to the Crown application to designate him a Long-Term Offender. He received a two-year federal sentence (in effect, with no credit for time served), followed by a 5-year Long-Term Supervision Order. The expectation was that the sentence would permit Mr. Scrivens to participate in the Phoenix Program run at that time by Dr. Lea Studer at Alberta Hospital Edmonton. That was Judge Burch's recommendation.

(h) Excluded Non-Criminal Conduct

[79] In 1997, Mr. Scrivens was also charged with another offence relating to another cadet respecting an incident that occurred on a bus. Mr. Scrivens had made some comments about this incident to Dr. Zedkova: ZR at 10; ZM5, 32.22-23. As this charge was stayed, was not referred to in the Notice of Application, and was not relied on by the Crown, it will not be considered as part of any pattern of conduct.

[80] In 1998, Mr. Scrivens absconded from the Terrace Correctional Centre. He had been in general population but his status as a sex offender became known to other inmates: ZR at 26-7; CR 9 at 13. In 2000, at the Prince George Correctional Centre, Mr. Scrivens was in an altercation with another inmate in the tailor shop. Later some contraband (a padlock and paper clips) was found in his cell. The Crown relied on neither of these institutional offences as part of the pattern and they do not form part of any pattern of conduct.

[81] Mr. Scrivens' statutory release relating to his possession offence was suspended and revoked for periods and he was returned on warrant to Bowden Institution for some months while on his LTSO, but he was never charged with or convicted of an offence relating to violations of statutory release or LTSO conditions. None of the conduct relevant to any alleged non-compliance with statutory release or LTSO conditions is relied on as part of any pattern of conduct.

3. Predicate Offence

[82] The following facts are drawn from an Agreed Statement of Facts.

[83] Mr. Scrivens had been serving his two-year sentence for the possession offence at Bowden Institution, but on statutory release was approved to reside at the 101st Street Apartments in Edmonton. (101st Street Apartments is a half-way house, a Community Based Residential Facility.)

[84] Mr. Scrivens met JW at the 101st Street Apartments. He knew JW from Bowden. In the fall of 2011, Mr. Scrivens began staying with JW in a rental house in Edmonton (the Rental House).

[85] In March 2015, BM and her son RM (age 3) and her daughter HM (age 2) moved next door to the Rental House. (This was after the expiration of Mr. Scriven's LTSO and shortly before he entered the April 2015 recognizance pending the s. 810.1 hearing.)

[86] JW and Mr. Scrivens began socializing with the BM family. In April 2015, TH, BM's sister, visited the BM family. TH had a son LH (age 12), a daughter NH (age 9), a daughter SH (age 7), and a daughter AH (age 6). Mr. Scrivens and JW were present at the BM home during this visit.

[87] Mr. Scrivens and JW began a friendship with the TH family.

[88] In about October 2015, JW took TH's children to the Rental Home for some weekends. They stayed with JW and Mr. Scrivens.

[89] JW became close to TH, eventually entering an intimate relationship with her. He moved some of his belongings from the Rental House to TH's residence.

[90] At the end of November 2015 (after the s. 810.1 recognizance issued), JW offered to take TH's children to the Rental House for some days so TH "could have a break." Mr. Scrivens and JW transported the children.

[91] Mr. Scrivens visited JW and the TH family at TH's residence.

[92] On or about December 5, 2015, TH asked Mr. Scrivens to watch the children so she and JW could go out. Mr. Scrivens attended at the TH residence and stayed with the children until TH and JW returned home shortly before midnight.

[93] In mid-December 2015, Mr. Scrivens gave TH's children android tablets and iPads with internet capability, and gave an iPhone with internet capability to TH.

[94] On December 15, 2015, TH asked Mr. Scrivens to drive her and the children to a Christmas concert at the children's school. Mr. Scrivens did so. He dropped them off and picked them up from the street but did not enter the school.

[95] On December 16, 2015, Mr. Scrivens again took the children to the school for a second Christmas concert. Mr. Scrivens offered to take AH for the night, to give TH "a break."

[96] After the Christmas concert, Mr. Scrivens picked up AH from the TH residence. He took AH back to the Rental House. She was in his sole care.

[97] Mr. Scrivens returned AH to the TH residence the next morning. Later that day, AH told her mother that Mr. Scrivens had sexually assaulted her by licking her vagina.

[98] In his post-arrest statement, Mr. Scrivens admitted "to having an attraction to children generally and to [TH's] children specifically."

[99] Mr. Scrivens admitted the sexual assault on AH. He also admitted that he performed similar acts on two other occasions when she was sleeping at his residence (a similar admission was made to Dr. Zedkova. He stated that [JW] was present and was himself engaging in the same activity: ZR at 34.)

[100] Mr. Scrivens acknowledged to police that "he knew that he should not be engaging in sexual touching with [AH] but that it was really hard to restrain himself when the opportunity was there."

[101] Mr. Scrivens had been in the unsupervised presence of minor children, was in a relationship with a female [TH] who had not known of his offence history, had permitted overnight stays of children at the Rental House without supervisor approval, and had possessed Internet-capable devices without supervisor approval.

4. Criminal Conduct Excluded from the Pattern Analysis

[102] In my opinion, two offences in Mr. Scrivens' criminal history have no relationship to any pattern that might be alleged. These are his 1998 break and enter conviction and his 2002 fail to attend court conviction.

D. Mr. Scrivens' Behaviour – Pattern of Conduct?

1. The Offences

[103] Mr. Scrivens' offences fall into four groups – the two contact offences involving 14-year old complainants, the mischief offence, the two child pornography offences, and the predicate offence.

(a) Contact Offences

[104] The 1997 sexual assault offence is manifestly relevant to the pattern analysis. In my opinion, the 2002 breach of probation offence may also legitimately be considered in the pattern of conduct analysis. The age of consent at the time was 14, so Mr. Scrivens could have been guilty of neither sexual assault nor sexual interference. Mr. Scrivens, though, was subject to a special rule under his probation order forbidding him from, in effect, having private contact with a person under age 16: EDD000624-010. He violated that condition by having sexual contact with the minor.

(b) Mischief

[105] The mischief offence was not simply a property offence. Mr. Scrivens was attempting to make a viewing port into the women's washroom. The nature of the offence will be discussed further below, but at this point I will observe that the offence was committed for a sexual purpose, for the purpose of enabling Mr. Scrivens to observe female persons using the washroom.

(c) Child Pornography

[106] The distribution and possession of child pornography convictions are manifestly related to each other. But can these offences form part of a pattern of conduct under s. 753(1)(a)? In ***Neve*** at para 110, the Court of Appeal wrote that

> Since a predicate offence under s.753(a) must be a "serious personal injury offence" (meaning that it itself must meet either a violence or endangerment requirement under s.752(a)), it follows logically that the past behaviour must also have involved some degree of violence or attempted violence or endangerment or likely endangerment (whether more or less serious than the predicate offence). Otherwise, the predicate offence would not be part of that pattern.

At para 112, the Court of Appeal clarified that "it is not necessary that the past conduct have led to actual injury." Judge (now Justice) Henderson clarified this aspect of pattern analysis in ***R v Papin***, 2013 ABPC 46 at para 249:

> The past convictions need not be "serious personal injury offences" to be considered as part of the pattern analysis. Furthermore each of the individual prior convictions need not necessarily involve objectively serious violence or endangerment. However, for the Crown to satisfy the pattern threshold the prior convictions, when taken together, must demonstrate a pattern of violence or endangerment which is objectively serious.

[107] There was no evidence that Mr. Scrivens ever had any direct contact with children in connection with the production of child pornography or that he could have been understood to

have aided or abetted the production of child pornography. His distribution and possession offences were not, in that sense, "contact" offences.

[108] I will set aside the issue of whether the violence occurring in the production of child pornography is attributable to distributors or possessors of such material. I will set aside as well possessors' responsibilities for encouraging and enabling the continued production of child pornography: ***R v Andrukonis***, 2012 ABCA 148 at para 30. In my view, the responsibility of distributors or possessors for others' violence is in addition to violence of their own.

[109] As the Court of Appeal observed in ***Hajar*** at para 116, "[v]iolence comes in many forms." At para 115 of ***Hajar***, the Court of Appeal confirmed that "[v]iolence is inherent in major sexual interference since it involves an adult's serious violation of a child's sexual integrity, human dignity and privacy ...." The viewing of child pornography also involves the continued serious violation of a child's sexual integrity, human dignity and privacy through the sexualized observation of the child. In her minority decision in ***R v Sharpe***, 2001 SCC 2, Justice L'Heureux‑Dubé wrote the following at para 158:

> 158 The very existence of child pornography, as it is defined by s. 163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows directly from the <u>existence</u> of the pornographic representations, which on their own violate the dignity and equality rights of children. The harm of child pornography is inherent because degrading, dehumanizing, and objectifying depictions of children, by their very existence, undermine the *Charter* rights of children and other members of society …. [emphasis in original]

In ***Andrukonis*** at para 29, the Court of Appeal confirmed that the "very existence" of child pornography "is inherently harmful to children" citing ***Sharpe***, including para 158. The Court of Appeal stated that

> the fact that child pornography allows perpetrators to take in the sexual abuse of children virtually through the Internet does not change its essential character. The unvarnished truth is this: possession of child pornography is itself child sexual abuse.

Judge Collinson captured this concept at para 186 of ***R v Downing***, 2018 ABPC 257:

> [186] It must be remembered that while these are images, they are of real persons, children who will be scarred forever by what they were forced to endure to produce this filth. <u>The children depicted in pornographic images are re-victimized each time the images are viewed</u>. [footnote omitted, emphasis added]

[110] In ***Neve***, the Court of Appeal wrote at para 111 that

> [111] … repetitive behaviour under s.753(a)(i) and persistent aggressive behaviour under s.753(a)(ii) can be established on two different bases …. The first is where there are similarities in terms of the kind of offences; the second where the offences themselves are not similar in kind, but in result, in terms of the degree of violence or aggression inflicted on the victims. Either will do. Thus, the mere fact that an offender commits a variety of crimes does not mean that no pattern exists. There is no requirement that the past criminal actions all be of the

> same or similar form, order or arrangement; though if this has occurred, it may well suffice.

[111] Distribution of child pornography and possession of child pornography are similar to contact sexual offences not in all respects, they are not the same offences, but they are similar "in result," in terms of the nature of the sexualized violence inflicted on children, the degradation, violation of privacy and dignity.

[112] This argument is consistent with the "harm-based" basic approach to "violence" for dangerous offender purposes endorsed by the Supreme Court in ***Steele*** at para 51:

> [51] This brief survey of judicial interpretations of the term "violence" suggests that the focus is on the harm caused, attempted or threatened rather than on the force that was applied. I do not suggest that the definition of violence must be a harm-based one in every case. Context will be paramount. As I mention below (see para. 65), there may be situations in which the presumption of consistent expression is clearly rebutted by other principles of interpretation and, as a result, the intended meaning of violence may vary between statutes and even, in some circumstances, within them: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 222. However, unless the context or the purpose of the statute suggests a different approach, the prevailing definition of "violence" is a harm-based one that encompasses acts by which a person causes, attempts to cause or threatens to cause harm.

[113] Hence, in my opinion, child pornography offences may be considered as potential elements in an alleged pattern of conduct under ss. 753(1)(a)(i) or (ii), in determining whether an offender has engaged in pattern of conduct involving sexual offences. I have not yet considered whether the child pornography offences form part of a pattern of conduct on the part of Mr. Scrivens.

(d) The Predicate Offence

[114] As the Crown emphasized, the predicate offence related not to a single incident but, given the Agreed Statement of Facts, to three similar incidents on separate dates involving the same victim and similar conduct by Mr. Scrivens.

[115] Might the predicate offence by itself, given the repetition of events, establish the requisite pattern? I did not understand the Crown to have advanced this argument.

[116] The relevant language of ss. 753(1)(a)(i) and (ii) is similar:

> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
>
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the

> reasonably foreseeable consequences to other persons of his or her behaviour ….
> [emphasis added]

The issue is one of statutory interpretation. I do not resort to any doctrine of strict construction of penal statutes (see 2018 ABQB 1027 at para 55) but rely on the express language of ss. 753(1)(a)(i) and (ii).

[117] Both subparagraphs refer to "a pattern of … behaviour … of which the offence … forms a part."

[118] The subparagraphs refer to "the offence." In this case, the predicate offence was a single count in the Indictment. The count was drafted to capture a single transaction, a series of similar events occurring on dates that had yet to be established. This single count has been established by proof, in this case, of three instances of sexual interference. The drafting technique employed is common and accepted: Justice Kelly in ***R v Hulan***, 1969 CarswellOnt 14, 1969 CanLII 306, [1969] 2 OR 283 (CA), Kelly J at para 27 (CarswellOnt); ***R v Sandhu***, 2009 ONCA 102 at para 19 ("as the Crown points out, commonly a single charge of assault or sexual assault is laid where the offender commits multiple or successive offences against the same person over time"); ***R v Chamot***, 2012 ONCA 903 at para 49; ***R v PEL***, 2017 BCCA 47 at para 45.

[119] The subparagraphs also refer to "behaviour … of which the offence … forms a part." That is, the offender has engaged in a series of pattern behaviours and some of those behaviours supported the offence for which the offender has been convicted, the predicate offence. The pattern behaviours, then, include the behaviours supporting the predicate offence and other behaviours. The predicate offence conduct is only a part of the pattern, not the whole of the pattern.

[120] A single act or single set of behaviours falling under a single count could be the foundation for a dangerous offender finding under s. 753(1)(a)(iii) or s. 753(1)(b). The Crown, however, did not seek to have Mr. Scrivens declared to be a dangerous offender under those provisions.

(e) Patterns

[121] Mr. Scrivens' predicate offence and past offences could form three types of patterns. First, the predicate offence might form a pattern with Mr. Scrivens' 1997 and 2002 contact offences. Second, the predicate offence might form a pattern with Mr. Scrivens' child pornography offences. Third, the predicate offence and all of Mr. Scrivens' past offences could form a single pattern. The mischief offence might be fitted into any of these patterns, since it has features of physical (not re-presented) victims and also of victim observation.

[122] All of the offences relevant to the pattern analysis are serious offences. The dangerous offender finding, however, is not based only on an offender having committed a series of offences, however serious. The ordinary law of sentencing has resources to deal with offenders with past convictions, including multiple past convictions. The dangerous offender finding in this case requires a finding that Mr. Scrivens' behaviour, particularly his offences, form a pattern of behaviour, whether repetitive behaviour or persistent aggressive behaviour.

2. No Pattern?

[123] Mr. Scrivens contended that the criminal history evidence and the predicate offence disclosed no pattern of repetitive conduct. Again, if I were to be left with a reasonable doubt about whether the evidence supported the finding of a requisite pattern, Mr. Scrivens could not be declared a dangerous offender.

(a) Predicate Offence and the Contact Offences

[124] Did the contact offences and the predicate offence demonstrate a pattern of conduct?

[125] The contact offences and the predicate offence were all sexual offences, involving contact by Mr. Scrivens with children 14 or younger. All were serious offences, especially the predicate offence. The seriousness of all the offences is not diminished by the presence of distinctions between the offences or by factors that might aggravate the seriousness of an offence.

[126] There are differences between the 1997 sexual assault and the predicate offence.

[127] At the time of the 1997 offence, Mr. Scrivens was 19. The victim was 14, five years younger. Mr. Scrivens was in a minor sort of "authoritative" position as a civilian Cadet instructor. He did not have exclusive care of the victim. Mr. Scrivens engaged in some planning to create the incident. He had to go to the room where the victim was. He had to start the "tickling" that led to the assault. On the evidence, the time between planning and acting on the plan was short, at least not measured in days, weeks, or months.

[128] At the time of 2002 contact offence, Mr. Scrivens was 23. The victim was 14, about 10 years younger. The sexual contact with the victim took place over some months. Mr. Scrivens was not in a position of trust or authority over the victim but he did take advantage of what he reported was her FAS.

[129] The victim of the predicate offence was 6. Mr. Scrivens was 37. Mr. Scrivens had insinuated himself into her family's life over about 8 months. There was no evidence that either prior contact offence had involved oral contact as did the predicate offence.

[130] While all of the offences were serious, the predicate offence was the most serious. It was extraordinarily serious. The victim was less than half the age of the other victims. By reference to victim age alone, the predicate offence was markedly dissimilar to the contact offences. Fourteen is one thing. Six is another.

[131] The age disparity between Mr. Scrivens and the victim was also markedly dissimilar as between the predicate offence and the prior contact offences. Over 30 years separated Mr. Scrivens and AH. The age difference in the first contact offence was 5 years. In the second contact offence, 10 years.

[132] The nature of physical contact for the predicate offence was markedly different than in the prior contact offences.

[133] The interactions leading to the predicate offence took many months, and involved not just Mr. Scrivens and the victim, but Mr. Scrivens' partner JW and the victim's mother. The development or evolution of the setting of the predicate offence contrasted with the setting of the first contact offence, which might be regarded as more "impulsive" or at least involving shorter

planning (on the moral complexity and varieties of "impulsivity" see ***R v LaBerge***, 1995 ABCA 196, Fraser CJA at para 20).

[134] Mr. Scrivens relied on some minor authority in committing the first contact offence. When committing the predicate offence, he was the temporary caregiver for AH. As the Defence put it, he was "solely responsible for [AH's] wellbeing." SWA at para 266.

[135] The first contact offence was committed in a semi-public place. The predicate offence occurred when Mr. Scrivens was home alone with AH. He fully controlled the environment.

[136] The argument is that Mr. Scrivens had never done anything like the predicate offence before. It was not a repetition of anything in his past. The predicate offence was new, deeply depraved, and far more serious than any of the already serious offences he had committed.

(b) Non-Contact Offences and the Predicate Offence

[137] Did the child pornography offences and the predicate offence demonstrate a pattern of conduct?

[138] It is true that the behaviours underlying both types of offence involve very young children and both sets of offences were sexual offences. Furthermore, both types of offence are inherently harmful and exploitative and are serious violations of children's sexual integrity, human dignity, and privacy: see ***Hajar*** at para 67.

[139] But ss. 753(1)(a)(i) and (ii) do not turn on findings of a pattern of committing similarly culpable acts or persistently committing similarly culpable acts. Both subparagraphs concern behaviour, what the offender has done. Again, ss. 753(1)(a)(i) and (ii) do not apply only because an offender has committed a series of offences, even offences that attract similar determinations of culpability. The subparagraphs turn on repetitive or persistent behaviour, acts, or conduct, on what the offender has done.

[140] Even if Mr. Scrivens had the same or a similar level of culpability for his child pornography offences as for the predicate offence, it may be argued that the predicate offence and the child pornography offences do not form a pattern of repetitive behaviour. Mr. Scrivens did not repeat the same type of conduct in committing the predicate offence and the child pornography offences. The predicate offence was a contact offence and the child pornography offences were not. Acts may have the same depth of culpability without those acts being "repetitions" of each other.

(c) The Behaviour as a Whole

[141] It might be argued on behalf of Mr. Scrivens that the Crown's position is not improved by seeking to form a pattern of all of his past offences. The Crown would be looking to the child pornography offences to provide a mirror of the predicate offence but would be looking to the contact offences to show the repetition of contact with persons.

[142] However, it might be argued that on the evidence, the contact offences and the child pornography offences are not instances of a pattern of conduct. The child pornography offences for which Mr. Scrivens was convicted did not involve contact with children. Lack of contact as opposed to contact is a crucial difference between the child pornography offences and the sexual assault and breach of probation convictions. Further, the sexual assault offence involved a 14-

year old victim, as did the failure to comply with probation offence. The victims were significantly older than the victims depicted in the child pornography.

[143] Again, both the contact offences and the non-contact offences were serious sexual offences. They were not the product of repeated conduct. They were not, as a whole, part of a pattern.

3. Pattern and Context

[144] The difficulty with these "no pattern" arguments is that while the arguments properly focus on behaviour, on what was done, the arguments focus exclusively on the particular circumstances of the conduct not on the context of the conduct, the context that shaped the meaning of the conduct, the meaning of what actually happened.

(a) Importance of Context in Pattern Assessment

[145] In ***Neve***, the Court of Appeal emphasized the importance of context in s. 753(1)(a) assessments, including the assessment of pattern. See, for example, paras 100, 118, and 123:

> [100] … this error cuts across all dimensions of the pattern and threat analysis, the sentencing judge failed to adequately take into account the imperative need to consider an offender's past behaviour in context. Because this error is intertwined with many of the others, we do not deal with it as a separate category but instead refer to it when appropriate in our discussion of the other errors.
>
> [118] Given these various requirements under s.753(a), it is easy to understand why the context in which an offender committed past criminal conduct will be relevant to this part of the analysis. Without understanding that context, it would not be possible for a judge to make an informed, reliable assessment on whether the offender's past behaviour will be likely to lead to harm in the future. After all, whether something is likely to be repeated in the future is linked not only to what happened in the past but why it happened. This being so, it will be evident that if the analysis of past behaviour is undertaken without reference to the surrounding circumstances, this can lead to an undermining of a judge's conclusion on two different levels – first, in terms of assessing which past conduct goes on the pattern scale; and second, in assessing the likelihood of that behaviour continuing in the future as a result of the offender's failure to restrain or substantial indifference.
>
> [123] Generally, there are three areas of evidence which will be considered in determining whether there is a pattern of conduct falling within the threshold requirements under s.753:
>
> 1. the offender's past criminal acts and criminal record;
> 2. extrinsic evidence relevant to those past acts and the circumstances surrounding them; and
> 3. psychiatric reports opining as to that conduct.

See also paras 153 and 172.

[146] What contextual elements are relevant to the pattern analysis?

[147] Before responding to this question, some cautions from ***Neve*** must be flagged: The pattern of behaviour is a pattern of conduct, of action, not of thoughts, not of disposition. For thoughts to be relevant to the pattern assessment, those thoughts must be connected to action. Opinion evidence may illuminate whether a pattern exists, but the interpretation offered in opinion must be grounded in the offender's acts. Thus, paras 127, 131, and 139 of ***Neve***:

> [127] In assessing what is relevant and to what issue, one must keep in mind that the standard or measure to be used in determining whether an offender is a threat, and thus capable of being designated a dangerous offender, begins with "pattern of behaviour". While psychiatric and character evidence may be admissible, and while such evidence may be used to explain, for example, why the offences make a pattern, they are not the standard or measure. Actual behaviour is. Thus, they cannot be used to create the pattern in the absence of actual conduct. We concede that there may be a fine line between creating a pattern and explaining it. But nevertheless, there is a line. It is there for a reason, one that is integral to the operation of the dangerous offender provisions. That reason is to ensure that any determination of an offender's future danger is firmly anchored in the pattern of past behaviour (and opinions based on that pattern) and not on an assessment of the person or his or her character generally. If the court were able to find a threat without the necessary finding that the required pattern of conduct had been proven, this would effectively mean that evidence which is not allowed in at the pattern stage could find its way in through the back door. In other words, the threat must rest on the concrete foundation of past behaviour. Put simply, no pattern, no threat.
>
> [131] The requirement for a pattern of behaviour means that the focus is on actions, not thoughts. An inquiry into whether the requisite pattern of conduct has been established is not an inquiry into the thoughts, feelings and actions of the offender throughout his or her entire life. It is restricted to an assessment of those acts which may or may not be an element of the pattern of conduct. While the motives behind, and the context surrounding an offender's actions, may well be relevant to explain conduct and whether it fits within a proscribed pattern, the thoughts of an offender, absent any causal connection to his or her actions, cannot be loaded onto the pattern scale for the purposes of s.753(a). The dangerous offender legislation is designed to capture dangerous offenders, not dangerous thinkers.
>
> [139] This takes us back to the distinction we have already made about the importance of the judge's being satisfied that there is sufficient evidence of past behaviour – not character, not repute – to meet the proscribed patterns of behaviour. In evaluating whether a pattern of behaviour exists establishing the required lack of restraint or substantial indifference, the court must look to the pattern of behaviour and that pattern alone. Of course, opinions can be given on what the pattern discloses or why the subject offences form a pattern. Or why it is likely that this conduct will continue and pose a threat in the future. This is all permissible. And it may even be permissible for thoughts causally connected with actions to be introduced to explain why the offences do form a pattern. But what is not permissible is for the court to use character evidence alone to find the lack

> of restraint or the substantial indifference portion of the pattern. This is to be found in the pattern of behaviour itself.

Context relevant to assessing whether Mr. Scrivens' offences form a pattern has both general aspects and aspects particular to particular offences.

(b) The General Context of Mr. Scrivens' Offending

[148] The foundational contextual element that must be considered to understand and assess Mr. Scrivens' conduct is that he suffers from pedophilic disorder. He is strongly sexually attracted to prepubescent children, with a clear preference for female children. There is no treatment to "cure" or reverse or change the direction of his sexual interest. The disposition is, if not permanent, at least deep-seated and long-term: CF21, 6.33, .38-41; 7.4-16; 24.17-21; ZM1 72.23-25, .34-39; 72.34-39; 73.1-9; ZM 5, 47.10-38; 48.1; ZR at 36; CR at 17-18. Dr. Van Domselaar confirmed that "[w]hile some aspects of the expression of sexual orientation can be modified to fit the context of societal constraints and expectations, sexual orientation is generally seen as an abiding and fundamentally unchanging aspect of one's human condition:" VDR at 60. The disposition can be treated or managed. That will be discussed below.

[149] Mr. Scrivens' disposition was not chosen, but he bears it. The disposition is part of him. He rejects it but cannot cast it out. It causes him pain and suffering, significant distress. As regards his disposition, he is, in the language of the psychiatrists and psychologists, "egodystonic:" ZM1, 47.12-15; ZM5, 52.27-36, 53.14-40. Mr. Scrivens has known that his interest in children is wrong. He has tried to hide it: CR at 7.

[150] Sexual deviance has multiple facets, including its direction, or preferred target or partner; the type of behaviour expressing the deviance; the level of intensity – e.g., how much mental energy is devoted to thinking about sexual interactions with others: E27, 28.13-41. Mr. Scrivens was highly sexually preoccupied. His behaviour was persistent over time.

[151] A feature of Mr. Scrivens' pedophilic disorder is that he is attracted to prepubescent children across an age range, from about age 3 to about age 13 to 14: ZM1, 72.23-25; CR at 7; VDR at 21; ER at 11; E27, 29.40-41; EDD001638-40 (Dr. Williams); EDD000253-002. Dr. Ennis stated that Mr. Scrivens' target group "is not terribly exclusive;" he has broad parametres around what he finds arousing: E27, 30.1-11.

[152] Mr. Scrivens' response to children as sexual objects varies with age. He has more explicit thoughts around older girls, age 11-12 to 14. He has no desire to interact more physically, in any sort of physically hurtful way, in any explicitly sexual way, with younger children, although he is most attracted to these younger children: ZR at 8; ZM1 45.7-14. His favoured form of child pornography is images of female children between 4 and 7 undressing: ER at 11. His primary sexual fantasies involve non-penetrative fondling of young girls: ER at 11.

[153] Mr. Scrivens has been aware of his attraction to children from a young age. He has reported experiencing sexual attraction to younger females since he was 8 or 9; at other points, he has indicated that he became aware of this attraction in his early teens: VDR at 21; ZM 5.45.19-36; ZR at 8. Dr. Van Domselaar reported that "[h]e clearly recalled having a desire 'to see this kind of stuff then, as early as I can remember, I remember masturbating to these kinds of thoughts, seeking out trying to see younger girls naked ….':" VDR at 21; ZR at 8; CR at 5. He began looking at pornography when he was about 11 or 12, and has used computers to view child

nudity since he was about 14 or 15 and to view child pornography since about 1997: ER at 4; ZM2, 48.23-24.

[154] Dr. Choy confirmed that the cause of Mr. Scrivens' disposition is "unknown:" CR at 18. He was raised by his parents in a stable middle-class family. There were no adverse events in his childhood. His childhood, educational history, and work history are unremarkable: VDR at 16.

(c) Contextualizing Mr. Scrivens' Offences

[155] I will address additional facts and opinions that illuminate the meaning of Mr. Scrivens' conduct and thereby the assessment of whether his conduct formed a pattern under ss. 753(1)(a)(i) or (ii).

(i) 1997 Sexual Assault

[156] The 1997 sexual assault should be understood in light of Mr. Scrivens' deviance, which was well established by the time he was 19. The act undoubtedly has the appearance of tickling that got out of control between individuals of roughly similar age. In light of Mr. Scrivens' "versatile" pedophilia and conduct preferences corresponding to age, I find that this act was Mr. Scrivens' first criminal contact with a child at the older end of the range of children to which he is sexually attracted. This offence was driven by Mr. Scrivens' pedophilia.

[157] I observe that while the age difference between Mr. Scrivens and the complainant was about 5 years, in context that was a significant age disparity. Mr. Scrivens was of the age of someone who had graduated from high school. The complainant was of junior high school age.

(ii) 1998 Distribution of Child Pornography

[158] Dr. Van Domselaar reported that "[u]pon being interviewed by police, Mr. Scrivens admitted to being sexually attracted to girls between the age of six and 12 years:" VDR at 7.

[159] Mr. Scrivens had been accessing child pornography online since about 1997. He became a trader of these images: ER at 5.

[160] Mr. Scrivens had joined a network of online child pornography traders in early 1998.

[161] At the time of the offence, Mr. Scrivens was operating a fileserver (an Internet Relay Chat server) to send and receive images and videos of child pornography. Mr. Scrivens told Dr. Van Domselaar that "he had many thousands of files collected, curated and 'advertised' for re-distribution, and that 'at least 95%' of these were of pre-pubescent girls:" VDR at 7; ZR at 10; ER at 8. He was found in possession of hard copies of 57 child exploitation images: ZR at 11; CR at 12.

[162] He viewed sexual images about two hours per day and masturbated about five times per day: ER at 4.

[163] Mr. Scrivens commented that because of the nature of his transactions and the technology used, his conduct was easily detectable and traceable. It was obvious he was going to be caught: CR at 6; ZM1, 49.31-40.

[164] At the time of this offence, Mr. Scrivens was on probation: EDD000624-001 para 6. He was living with his parents.

(iii) 2000 Mischief

[165] Mr. Scrivens advised Dr. Van Domselaar that "he had been thinking about doing this for a couple years and it seemed like a perfect night to complete the project:" VDR at 8; see ER at 6. He admitted to the police that he planned to return to the hole he planned to drill "on occasion." Dr. Van Domselaar reported that "[w]hen asked, he acknowledged that it was his intention to view 'younger girls' … but he denied any specific, identifiable victim:" VDR at 8; CR at 12.

[166] Mr. Scrivens told Dr. Van Domselaar that he was "the most embarrassed" about this offence because it was "out in public:" VDR at 8. He told Dr. Choy that he had done a shameful and disturbing thing. He was creating actual victims: CR 12.

[167] At the time of this offence, Mr. Scrivens was participating in a weekly sex offender treatment group. He did not consider discussing his plans with his treatment provider or group. He did not trust the group members or group facilitator: VDR at 8.

[168] At the time of the offence, he was prohibited from accessing the Internet as a condition of his probation for his distribution offences. He acknowledged that the attempted voyeuristic activity may have been motivated by his inability to access pornography through the Internet: ER at 6.

(iv) Work with Dr. Sandy Jung

[169] In compliance with the terms of his probation for the distribution offences, Mr. Scrivens attended a sex offender group treatment program in Terrace, BC. He moved to Fort McMurray and was referred to Forensic Assessment and Community Services (FACS) in Edmonton for further assessment and treatment. Mr. Scrivens saw a psychologist, Dr. Sandy Jung at FACS in Edmonton, between December 2001 and April 2003.

[170] Dr. Jung recorded that Mr. Scrivens told her he was interested in prepubescent children, age 1 to 11 or 12: EDD001434-004; Dr. Sandy Jung, Transcript of Proceedings, March 11, 2019 (Jung11), 79.5-18. This was something he had "always known."

[171] In a report to a probation officer, Dr. Jung reported that Mr. Scrivens had downloaded over 10,000 pictures of clothed and unclothed children: EDD000162-001. His preference was young prepubescent females.

[172] Dr. Jung recorded that Mr. Scrivens fantasized about children almost daily, particular concerning females between 5 and 14: EDD001436-004 (February 7, 2002).

[173] Dr. Jung reported that Mr. Scrivens continued to have masturbation fantasies at least daily, involving parenting young children, including the 3 ½ year old female child of an acquaintance: EDD001436-028; EDD001439-010; Jung11, 15.27-41.

[174] As part of a "verbal satiation" exercise (repetition of a fantasy not followed by reinforcement, to reduce the emotional or motivational valence of the thoughts), Mr. Scrivens was asked to verbalize his sexual fantasies. One of two scenarios involved him babysitting a friend's daughter, including undressing her, giving her a bath, and having oral sexual contact: EDD001439-005.

(v) 2002 Probation Breach

[175] Mr. Scrivens told Dr. Van Domselaar the following about the victim: he "got into a relationship with her, which isn't surprising since that's who I'm attracted to:" VDR at 10; ZR at 11-12.

[176] Dr. Van Domselaar reported that "[w]hen asked about the possibility of the victim having been cognitively delayed or otherwise less than optimally able to appreciate the consequences of … sexual relations with a 24-year old man, Mr. Scrivens stated 'She was FAS …, she was problematic, slower learning … did she have the capacity, probably not, to know and understand:'" VDR at 10; ZR at 12. Mr. Scrivens commented, "Was it morally a good decision – no, was it legal – yes:" VDR at 10; ZM1, 50.40-41, 51.1-6.

[177] The probation breach occurred while Mr. Scrivens was seeing Dr. Jung. He had told Dr. Jung about having some social contact with a 13 or 14-year old. The contact as described had no sexual features. Dr. Jung reported the contact to Mr. Scrivens' probation officer as a sign of Mr. Scrivens' progress. Investigation led to the discovery of Mr. Scrivens' sexual relationship with the girl: EDD001436-021, -024.

[178] I have borne in mind that this contact was not illegal by itself, it was not a sexual assault because it was consensual, but it was an offence because it violated Mr. Scrivens' terms of probation.

(vi) 2006 Possession of Child Pornography

[179] Mr. Scrivens admitted to the police that he had "thousands" of child exploitation images on his computer in the months before his arrest but he cleared these images after learning of his wife's disclosure. Because of the time lag between disclosure and arrest, he had concluded that he "wasn't getting caught" and so started to download images again: VDR at 11; ZR at 12; ZM1, 51, 26; ER at 8, CR at 14.

[180] Dr. Ennis commented on Mr. Scrivens' return to downloading images in the context of a discussion of the persistence of his inappropriate sexual conduct over time (E27, 29.6):

> [O]n multiple occasions, when barriers were placed on him or restrictions that was meant to curtail his sexual behaviour, he tried to find ways to circumvent it or to continue in the behaviour. And I think the best example of that, the most telling example of that for me was that I believe prior to the index offence that brought him to my attention in 2007, he was concerned that family members were going to report him for having child pornography on his computer, and in an effort to protect himself against allegations if they were made to the police, he wiped his hard drive or disposed of what he thought was the evidence, but in the interim, in between disposing of the evidence and the police actually coming to investigate, he couldn't resist the urge to go back and continue to look at child pornography. So he essentially accumulated more evidence after he had purged what was on his hard drive, and that to me is the most - the single most poignant example of how his preoccupation was compelling his behaviour.

[181] Mr. Scrivens told the police that the images were for "personal use." He told the police that "he would never hurt a child" but he liked "to watch children and when he sees a child he

gets aroused. He reported that 'his main preference is younger girls' – that his 'only addiction is pre-pubescent' but he 'is turned on a lot by younger girls':" VDR at 11.

[182] Dr. Ennis reported Mr. Scrivens as having stated that he viewed child pornography 1-2 hours per day. He viewed it late at night, after his wife went to sleep: ER at 8.

(vi) Predicate Offence

[183] Mr. Scrivens provided some additional information about the predicate offence, particularly to Dr. Van Domselaar.

[184] He had been in an intimate relationship with JW, but this relationship had ceased in the months leading up to the offence: VDR at 13.

[185] He knew that JW had "similar inclinations, sexually" as Mr. Scrivens and that he should not have formed a relationship with him, but he needed a place to go after the 101st Street Apartments.

[186] Mr. Scrivens said that it was JW who wanted to take the children back to the Rental House. He had initially said No to these ideas, "but at the same time I'm attracted to children … so eventually I said yes, they started to come over:" VDR at 13; ZM4 38.7-10.

[187] With respect to offering to have AH stay overnight, Mr. Scrivens said "I was fully, probably, knowing what was going to happen:" VDR at 13.

[188] Dr. Van Domselaar asked Mr. Scrivens whether he had considered talking to treatment providers during the lead up to the offences. He had two responses. First, "he did not consider the proximity of children living next door as being a risk factor for him. Second, he indicated that it had been his previous experience that talking to his treatment/supervision personnel had typically led to having his freedoms curtailed or revoked" (e.g. as in the case of his 2002 breach of probation offence): VDR at 14.

4. Pattern of Repetitive Behaviour

[189] Understood in context, does Mr. Scrivens' history of offending demonstrate, beyond a reasonable doubt, "a pattern of repetitive behaviour, of which the [predicate offence] forms a part?"

[190] I am satisfied, beyond a reasonable doubt, that the evidence respecting Mr. Scrivens' conduct, including the predicate offence, establishes a "pattern of repetitive behavior" under s. 753(1)(a)(i).

[191] His conduct has had the following features:

- he has been impelled by his pedophilic disorder to seek out sexual contact with prepubescent children
- his victims have all been 14 or younger; all the victims fall within the range of his sexual interest
- he has a particular sexual interest in younger children from about ages 3-6 but his proclivity had been not to engage in invasive sexual contact with them

- his proclivity was to engage in sexual conduct with children at the upper range of his interest
- his offending is covert, hidden from official supervision or his family (the possession offence), yet discoverable, not deeply hidden.

[192] The 1997 and 2002 contact offences were linked as sexual activity with children at the older range of Mr. Scrivens' sexual interest.

[193] The mischief offence was part of Mr. Scrivens' pattern of contact offences, since Mr. Scrivens' offence was designed to permit him to view actual persons, particularly young females.

[194] The mischief offence was part of Mr. Scrivens' pattern of pornography offences, since his offence was designed to permit the sexualized observation of actual persons, again particularly young females, unsuspecting, unaware of his gaze.

[195] The contact offences, the mischief offence, and the child pornography offences exhibit Mr. Scrivens' sexual disorder and his acting to satisfy his sexual desire when opportunity arises.

[196] The contextual evidence illuminates the link between the child pornography offences and Mr. Scrivens' contact offences, particularly the predicate offence. The predicate offence was a step up from the contact offences towards more serious offending. The predicate offence was a step out from the child pornography offences towards transforming observation and fantasy into reality.

[197] As discussed above, the fundamental link between the contact offences and the child pornography offences (and the mischief offence as well) is that the offences involve the degradation, the violation of the sexual integrity, dignity, and privacy of individuals. The contact offences have the added element that the offences involve actual contact with physically present victims. The child pornography offences involve actual victims, but at one remove, at one step away. The victims are re-presented in the images viewed. Their interests and rights are violated but their bodies are not physically touched by the viewer.

[198] Mr. Scrivens' circumstances drew the contact offences and child pornography offences even closer. He not only viewed the images but masturbated to them. From the perspective of Mr. Scrivens as offender, what was occurring had the same significance, had the same sexual meaning, as interaction with a present child (as opposed to a re-presented child). His experience, the meaning and significance of his conduct, was the same whether he interacted with a re-presented child or a present child. The difference between the re-presented and present circumstances was in effect and consequence, not significance. He personally was achieving the same physical result. His use of pornography depended on the intellectual treatment of the images as if they were present children. The distance between Mr. Scrivens' use of child pornography and his contact offences was vanishingly small. The distance was set only by opportunity and circumstance.

[199] The fantasy about babysitting Mr. Scrivens described for Dr. Jung in early 2003 was in structure, in elements and surrounding circumstances, astonishingly similar to the predicate offence. Dr. Zedkova called the resemblance remarkable and I agree with her assessment: ZM4, 15.16-30. The fantasy was conveyed at least 12 years before the predicate offence. That speaks to the persistence, the importance of this fantasy to Mr. Scrivens' sexuality. That fantasy was not actualized in 2003. Mr. Scrivens did not, for example, touch the young child of his acquaintance

that he'd mentioned to Dr. Jung. This fantasy could not therefore form part of any pattern of conduct. It does, however, form part of the background that makes sense of the predicate offence and shows the profound continuity of his various offences.

[200] I am not suggesting that the moral blameworthiness of child pornography offences and contact offences like sexual interference will always and in every case be identical or precisely equivalent. Blameworthiness will vary with the circumstances of the offence and the offender: see ***Laberge*** at para 7; ***Neve*** at para 256; ***Downing*** at para 185.

[201] Consideration of Mr. Scrivens' fantasy life is not a reiteration of the "lust murderer" error identified by the Court of Appeal in ***Neve*** at paras 211 – 215. The Court of Appeal wrote as follows at para 215:

> [215] …. However, we are bound to observe that there is one colossal and compelling difference between lust murderers and Neve which calls into question the appropriateness of this choice of language, no matter its rationale. Lust murderers have translated their actions into murder. Neve has murdered no one. Thus to the extent that this statement effectively implies, as in our view it does, that a woman's thoughts about murder can somehow be equated with a man's commission of a murder, it is suspect, not to mention highly prejudicial.

See W. N. Renke, "Lisa Neve, Dangerous Offender" (1995), 33 *Alta L Rev* 650 at 671-673. Unlike Ms. Neve, Mr. Scrivens did act out his fantasy. There is his masturbation to child pornography. Most importantly, there is his predicate offence. And that offence acted out his fantasy not once, but three times.

[202] The Crown has satisfied the "pattern of repetitive behaviour" criterion under s. 753(1)(a)(i) beyond a reasonable doubt.

5. Pattern of Persistent Aggressive Behaviour

[203] Subparagraph 753(1)(a)(ii) requires proof of "a pattern of persistent aggressive behaviour by the offender, of which [the predicate offence] forms a part."

[204] "Persistent" means "repeated" or "repetitive:" ***Neve*** at para 111; ***Papin*** at paras 244, 304. In my opinion, the evidence that supported my finding that Mr. Scrivens' conduct was a pattern of repetitive behaviour under s. 753(1)(a)(i) also supports the finding, beyond a reasonable doubt, that Mr. Scrivens' conduct has been "persistent." His offending conduct recurred over nearly 20 years, from 1997 to 2015. I accept that his offending was not frequent, and I will return to this below. His offending was regular.

[205] Was Mr. Scrivens' conduct "aggressive"? The first use of "aggressive" recognized by the *Oxford English Dictionary* is "[o]f or relating to aggression; involving attack; offensive." The first use of "aggression" concerns attack or assault. "Attack," in its third use as a noun, is "[a]n act of physical aggression against another; a violent attempt to cause death [or] injury … an assault."

[206] To the extent that "aggression" should be interpreted in a "force-based" manner (not a "harm-based manner), as denoting physical interference or the threat of physical interference with another, the contact offences and the predicate offence were all aggressive. The sexual nature of the conduct is an added moral and legal dimension to the physical conduct. Again

referring to ***Hajar***, "violence" does not require more than non-consensual sex; violence is inherent in the assault: at para 114. The level of violence goes to aggravation, not to whether a measure of violence has occurred.

[207] But if that interpretation is correct and "aggression" denotes physicality, actual contact or its threat, the child pornography offences would not form part of the pattern of aggressive behaviour.

[208] From the perspective of statutory interpretation, it would not be inconsistent to interpret the behaviour stipulated in each of ss. 753(1)(a)(i) and (ii) differently. Were the provisions to have identical interpretations, there would be no need for both provisions. One would do. The presumption must be that each provision is not superfluous, each has its own work to do, each is covering at least distinct types of conduct.

[209] Subparagraph 753(1)(a)(i) does not qualify the term "behaviour" other than with "repetitive." Subparagraph 753(1)(a)(ii) qualifies the term "behaviour" with not only "persistent" but "aggressive." Further, what the behaviour must be established to "show" differs between the two subparagraphs. Subparagraph 753(1)(a)(ii), then, may be read to be picking out a particular type of criminal conduct meeting its particular tests as a foundation for a dangerous offender designation, in distinction from subparagraph 753(1)(a)(i).

[210] I will proceed on the basis that s. 753(1)(a)(ii) does not include the child pornography offences or the mischief offence as conduct relevant to a pattern of persistent aggressive behaviour.

[211] Nonetheless, the child pornography offences and the mischief offence and the facts surrounding those offences still provide context for understanding Mr. Scrivens' contact offences. There are instances – and in the case of the predicate offence alone, three instances – of Mr. Scrivens physically touching a minor. The s. 753(1)(a)(ii) pattern is manifested by Mr. Scrivens' conduct.

[212] I find, beyond a reasonable doubt, that the predicate offence and the contact offences (the 1997 sexual assault and the probation breach), in light of the contextual factors described above, constitute a pattern of persistent aggressive behaviour by Mr. Scrivens, of which the predicate offence forms a part.

[213] The Crown must still establish beyond a reasonable doubt that the remaining criteria of ss. 753(1)(a)(i) or (ii) are satisfied for Mr. Scrivens to be designated a dangerous offender.

V. Remaining Criteria under ss. 753(1)(a)(i) and (ii)

A. Subparagraph 753(1)(a)(i)

1. Failure to Restrain Behaviour

[214] Under s. 753(1)(a)(i), the Crown must establish beyond a reasonable doubt that the pattern of repetitive behaviour, of which the predicate offence forms a part, shows "a failure by [the offender] to restrain his or her behaviour."

[215] Mr. Scrivens' criminal record is relatively short compared with the records of many offenders who come before the Courts. However, his pattern of offending does involve five prior

offences (or six, since there were two distribution counts) and the predicate offence involved three interferences with the victim. In all of these instances, he clearly failed to restrain his behaviour. He chose to commit criminal acts. His failure to restrain his behaviour has been repeated. I find, beyond a reasonable doubt, that Mr. Scrivens' pattern of repetitive behaviour shows a failure to restrain his behaviour.

[216] The frequency of repetition maintains relevance to the dangerous offender analysis and will be considered below.

2. Likelihood of Causing Injury

[217] Subparagraph 753(1)(a)(i) requires that the pattern of repetitive behaviour, including the predicate offence, show a failure to restrain behavior and "a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour." In my opinion, the investigation of this statutory element tracks the investigation of the overall "threat to the life, safety or physical or mental well-being of other persons" in paragraph (a). I will consider these prospective matters together below.

B. Subparagraph 753(1)(a)(ii)

[218] Subparagraph 753(1)(a)(ii) does not have an equivalent express "failure to restrain" element. In my opinion, in any event, "failure to restrain behaviour" is implicit in the "persistent" aspect of s. 753(1)(a)(ii).

[219] The pattern of persistent aggressive behaviour, including the predicate offence, must show "a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour." I will return to the scope of the term "consequences" below. At this juncture, I will assume that the behaviour in question concerns contact offences only.

[220] The substantial degree of indifference could be judged at the time of (e.g.) each offence making up the pattern. The difficulty with this approach, though, is that it would cast the dangerous offender net too broadly. At the time of offending, an offender is likely indifferent to the consequences on others of his or her conduct. Thus, Justice Donald wrote in ***R v George***, [1998] BCJ No 1505, 126 CCC (3d) 384 (CA) at para 23 that

> if indifference is to be determined only at the time of offence, the outcome will almost always be a foregone conclusion. An offender rarely measures the moral quality of his or her act at the time of a personal injury offence.

Justice Donald therefore proposed a larger scope to the "indifference" inquiry:

> In my view the attitude of the offender must be examined more broadly … to identify the truly evil personality type who has no compassion for others at any time ….

[221] In my opinion, a "broad examination of the attitude of the offender" (***Papin*** at para 259) requires the evidential foundation supporting the threat analysis. That is, the "indifference" inquiry, like the s. 753(1)(a)(i) likelihood inquiry, also tracks the assessment under s. 753(1)(a).

[222] In the result, the answer to the first main question in this application is that the Crown has established, beyond a reasonable doubt, that Mr. Scrivens engaged in a pattern of conduct under ss. 753(1)(a)(i) and (ii).

VI. Threat – Principles

[223] The second main question was, If the Crown has established a pattern of conduct, has the Crown established, beyond a reasonable doubt, on the basis of the evidence establishing the pattern of conduct, that Mr. Scrivens constitutes a threat to the life, safety or physical or mental well-being of other persons? In this section I shall consider some general principles bearing on this question. Those principles concern the probabilistic nature of threat, the relevance of the evidence of "intractability" to the threat assessment, and the type of harm that must be threatened for s. 753(1)(a) to apply.

[224] In the next section, I will consider the evidence relevant to the threat assessment and determine whether Mr. Scrivens constitutes the threat contemplated by s. 753(1)(a).

A. Pattern, Probability, and Threat

[225] Subsection 753(1) provides that

> the court shall find the offender to be a dangerous offender if it is satisfied
>
> > (a) … that the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
> >
> > > (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour *and* a *likelihood* of causing death or injury to other persons, or inflicting severe psychological damage on other persons, *through failure in the future to restrain his or her behaviour* [emphasis added]; [or]
> >
> > > (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour …. [emphasis added]

[226] The Court of Appeal explained the retrospective and prospective aspects of the dangerous offender criteria as follows in ***Neve*** at paras 102-103:

> [102] What then does s.753(a) require on the threat issue? The core finding which the judge must make at this stage is whether the offender constitutes a threat to the life, safety or physical or mental well-being of other persons as defined under s.753(a). Finding someone to be a threat is, in essence, a present

> determination that an offender will continue to be dangerous in the future, past the date on which he or she would ordinarily have been released from prison for their most recent crime. How is that threat to be determined? Whatever else may be placed on the threat scale, this much is clear. No threat can be found without proof of past behaviour which meets at least one of the three separate thresholds under ss.753(a)(i), (ii) or (iii). If any one is met, then the judge is able to go on and determine whether the offender is, based on that evidence, a threat to the life, safety or well-being of others as described in s.753(a). If none is met, then the judge cannot find the person to be a "threat" under s.753(a).
>
> [103] While these two steps – whether the Crown has proven that the offender's past conduct meets one of the specified thresholds and whether the offender constitutes a threat of the type contemplated – are linked, they are nevertheless quite separate. They are linked in the sense that the court cannot make a determination that an offender constitutes a threat in the manner specified in s.753(a) except on the basis of evidence that meets at least one of the specified behaviour thresholds. However, they are separate in that even if the Crown proves that one of the thresholds has been met, the court must then go on to consider whether, in light of that evidence, the offender constitutes a threat to the life, safety, or physical or mental well-being of others.

1. Pattern of Repetitive Behaviour

[227] As suggested above, the evidence relevant to s. 753(1)(a)(i) "likelihood" would be relevant to s. 753(1)(a) "threat." What the Crown must prove, beyond a reasonable doubt, is that not only has the offender engaged in a pattern of conduct in the past but that the offender is likely to continue that pattern of conduct into the future, causing injury. Resorting to ***Neve*** once again at para 117 (and see also paras 114, 155):

> [117] This reflects Parliament's intention that not only must the offender have demonstrated a commitment to serious violence or endangerment in the past; the reasons for that behaviour should militate against any reasonable prospect for meaningful change in the future. It is this combination – violence and the likely continuation of that conduct – which, taken together, justify the finding that this offender will likely pose a threat in the future.

[228] The "likelihood" reference does not lower the standard of proof. As Justice LaForest observed in ***Lyons***, the likelihood or probability must be established beyond a reasonable doubt: at 364-365.

[229] The Crown is not required to prove that the offender will reoffend. The Crown is required to prove the likelihood, not the possibility and not the certainty, that the offender will reoffend: ***Neve*** at para 238; ***Lyons*** at 364-365; ***Papin*** at paras 255, 322.

2. Pattern of Persistent Aggressive Behaviour

[230] Subparagraph 753(1)(a)(ii) does not itself expressly refer to future conduct in the manner of s. 753(1)(a)(i). However, it too concerns future conduct. Paragraph (a) demands that the court be satisfied of *threat* to the life, safety or mental well-being of others, on the basis of the s. 753(1)(a)(ii) pattern evidence. Subparagraph 753(1)(a)(ii) then simply lacks the express double reference to the future of ss. 753(1)(a)(i) and s. 753(1)(a). Moreover, s. 753(1)(a)(ii) implicitly

has a future reference. The latter clause of s. 753(1)(a)(ii) concerns indifference to "the reasonably foreseeable consequences to other persons' behaviour. That clause looks to behaviour in the future and its consequences for others.

[231] This interpretation is consistent with ***Neve*** at para 115:

> [115] Under s.753(a)(ii), the persistent aggressive conduct must show a substantial degree of indifference by the offender with respect to the reasonably foreseeable consequences to others of that behaviour. We agree with the sentencing judge that this section should be read as including a requirement that the Crown prove beyond a reasonable doubt that the evidence discloses a likelihood that the type of aggressive behaviour described will continue in the future.

B. Intractability

[232] The "likelihood" determination is not based only on past acts. It is frequently and often appropriately observed that the best way to predict the future is by looking at what an individual did in the past. That heuristic, however, was not adopted in s. 753(1)(a).

[233] Excessive or exclusive focus on the past misses two critical features of an offender's future – the potential for influence or intervention by others, and the offender's agency, his or her capacity for change: see ***R v Handy***, 2002 SCC 56, paras 35 and 38. The Supreme Court has therefore confirmed that part of the risk or threat analysis, part of the prospective assessment of dangerousness, is whether the behaviour is "intractable," in the sense that the offender is "unable to surmount" the behaviour. Justice Côté thus wrote in ***Boutilier*** at paras 25, 35, 42, 43, 45, and 46 as follows:

> [27] …. Before designating a dangerous offender, a sentencing judge must still be satisfied on the evidence that the offender poses a high likelihood of harmful recidivism and that his or her conduct is intractable. I understand "intractable" conduct as meaning behaviour that the offender is unable to surmount. Through these two criteria, Parliament requires sentencing judges to conduct a prospective assessment of dangerousness.
>
> [35] Determining whether or not a high risk of recidivism and intractability are present necessarily involves a prospective inquiry into whether an offender will continue to be, in Justice Dickson's words (as he then was), "a real and present danger to life or limb": *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39, at p. 43 ….
>
> [42] …. An offender's future treatment prospects are, and have always been, a relevant consideration at the designation stage.
>
> [43] As the assessment of prospective risk described above is concerned with whether an offender will continue to be "a real and present danger", being unable to surmount his or her violent conduct, the sentencing judge must consider all retrospective and prospective evidence relating to the continuing nature of this risk, including future treatment prospects ….
>
> [45] The same prospective evidence of treatability plays a different role at the different stages of the judge's decision-making process. At the designation stage, treatability informs the decision on the threat posed by an offender, whereas at the

> penalty stage, it helps determine the appropriate sentence to manage this threat. Thus, offenders will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable: see Neuberger, at p. 7-1, by M. Henschel. However, even where the treatment prospects are not compelling enough to affect the judge's conclusion on dangerousness, they will still be relevant in choosing the sentence required to adequately protect the public.
>
> [46] In sum, a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. This necessarily involves the consideration of future treatment prospects ….

See also ***Neve*** at para 116 and at para 240:

> [240] …. [T]he experts will also be opining on whether the pattern of conduct is substantially or pathologically intractable. To expect the psychiatrists to do this without also considering an offender's treatment prospects would be unrealistic. After all, the focus certainly at the threat stage of the inquiry is directed to the issue of future dangerousness. How could a doctor decide that an offender is likely to be a danger in the future (based on past conduct) or to be someone whose conduct is pathologically or substantially intractable without some understanding of what makes the offender the way he or she is, what motivated the offences and similarly whether this will change in the future? To put it another way, to label someone a risk in the future necessarily entails a present determination of treatment prospects, if only for the purpose of allowing the expert to opine on the degree of intractability of the offender's conduct.

[234] As Justice Côté clarified at para 45 of ***Boutilier***, at the designation stage the intractability issue concerns the future threat posed by the offender, whereas at the sentencing stage the intractability issue concerns the control or management of the risks posed by the offender. Critically, a finding of intractability for designation purposes does not necessitate the imposition of an indeterminate sentence: ***R v SPC***, 2018 SKCA 94 at paras 38-44. In ***R v Racher***, 2011 BCSC 1313, Justice Joyce wrote as follows at para 44:

> [44] To say that an offender's conduct is intractable means, in my view, that it is stubborn or difficult to control. It does not mean that the offender is incapable of change with treatment. If it were otherwise, then I could not see any scope for the application of s. 753(4)(b) and (c) once the offender is found to be a dangerous offender. A dangerous offender is not a person for whom the law sees no hope of rehabilitation. Rather, designation as a dangerous offender requires that the protection of the public be given special consideration when imposing a sentence.

Justice Joyce's point is well-taken. If intractability for designation purposes entailed that change was impossible or risk could not be managed in a determinate term, ss. 753(4) and (4.1) would serve no purpose.

C. The Harm

1. Harm and s. 753(1)(a)(i)

[235] The type of harm referred to by s. 753(1)(a)(i) is other persons' death, injury, or severe psychological damage caused or inflicted by the offender's behaviour (conduct or acts). Paragraph 753(1)(a) refers to the offender constituting "a threat to the life, safety or physical or mental well-being of other persons."

[236] Would a child pornography offence not involving any physical contact with a child by the person viewing the pornography or any secondary liability for others' conduct under ss. 21 or 22 produce a type of harm referred to in s. 753(1)(a)?

[237] This question arises for three reasons.

[238] First, I took into account Mr. Scrivens' child pornography offences as part of his pattern of conduct. In my opinion, a determination that an offence forms part of a pattern of repetitive behaviour (under s. 753(1)(a)(i)) does not mean that the subsequent commission of a particular type of offence falling within that pattern necessarily involves a likelihood of causing death, injury, or severe psychological damage. The "pattern of repetitive behaviour" must show the likelihood of causing death, injury, or psychological damage, but that does not mean that each offence element of the pattern must itself bear the likelihood of causing death, injury, or psychological damage. The "pattern of repetitive behaviour" is not qualified or modified by the inference that the pattern as a whole is to support. Particular elements of a pattern of behaviour may but not must by themselves show a likelihood of causing death, injury, or psychological damage: see ***Papin*** at para 249.

[239] Second, while the possession of child pornography is child abuse, as the Court of Appeal emphasized in ***Andrukonis*** at para 29; while possession of child pornography "necessarily encourages and enables the continued production of child pornography" (at para 30); while the culpability attaching to possession of child pornography is not less than the culpability for "abetting the sexual abuse of the same children in person" (at para 29), s. 753(1)(a) refers to specific types of harm rather than to levels of culpability. I have recognized, in my opinion in line with the reasoning of the Court of Appeal, that viewing child pornography creates harm and violates the rights and interests of children re-presented in images. In my further opinion, however, that inherent harm, as substantial as it may be, is not captured by the language of death, injury, or severe psychological damage; or by the language of threat to life, safety or physical or mental well-being. The harm language of s. 753(1)(a) refers to physical, emotional, or psychological injury to persons: see ***Papin*** at para 257.

[240] Defence counsel commented that s. 753(1)(a) does not use the language of perpetuating or extending harm caused by others. As loathsome as possession of child pornography may be, the possession only of such images does not, in my opinion, fall within the harm contemplated by ss. 753(1)(a). I note para 59 of ***Neve***, where the Court of Appeal wrote that

> [59] …. Not everyone who is a criminal or for that matter a danger to the public is a dangerous offender. In the spectrum of offenders, the dangerous

> offender legislation is designed to target – and capture – those clustered at or near the extreme end. Were this otherwise, constitutionality might stumble. In other words, the dangerous offender legislation is not intended to be a process of general application but rather of exacting selection.

The evidence does not disclose that Mr. Scrivens, in law or in fact, committed or was a party to contact offences in connection with the non-contact offences that he committed.

[241] Third, the risk assessment tools available to the experts in this case permitted the actuarial assessment of the risk of committing sexual offences. I will return to this below. These tools, though, do not permit the actuarial assessment of the risk of committing contact sexual offences as opposed to non-contact sexual offences as opposed to breaches of conditions that may relate to proscribed sexual conduct: E28, 3.16-19; E27, 53-4; ER at 28, 6.

[242] Mr. Scrivens may be at very high risk to commit another child pornography offence. Unless his risk of re-offending would be likely to cause the statutorily-specified harm caused or inflicted by Mr. Scrivens' conduct, it would not fall within the scope of threat contemplated by s. 753(1)(a).

[243] Mr. Scrivens' pattern of offending has not, however, involved only "non-contact" offences. He has physically interfered with three victims, three times with his last victim. In this case, on the evidence, the type of harm implicated by Mr. Scrivens' behaviour is a contact sexual offence with a child. There was no dispute that this type of offence would cause "severe psychological damage" thereby imperilling others' "safety" or "mental well-being." The Court of Appeal wrote in ***Hajar*** at para 63 that "[m]ajor sexual interference, as with major sexual assault, involves a likelihood of serious psychological or emotional harm."

[244] The question, then, is not whether the Crown has established the likelihood that that Mr. Scrivens will commit another possession of child pornography offence. The question is whether the Crown has established the likelihood that Mr. Scrivens will commit another contact sexual offence such as sexual interference.

2. Harm and s. 753(1)(a)(ii)

[245] Paragraph (a) of s. 753(1) applies both to s. 753(1)(a)(i) and (ii), so regardless of which subparagraph is engaged, the Crown must establish that the offender "constitutes a threat to the life, safety or physical or mental well-being of other persons." To that extent, the discussion of harm and s. 753(1)(a)(i) applies to s. 753(1)(a)(ii).

[246] Under s. 753(1)(a)(ii), though, the pattern of behaviour must show "a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour." The threat is mediated through statutorily-specified fault (substantial degree of indifference) relating to consequences of conduct (reasonably foreseeable consequences of behaviour).

[247] An argument may be made that this language is broad enough to encompass possession of child pornography offences. The reasonably foreseeable consequences of consuming child pornography include the encouragement or inducement of others to produce and distribute more child pornography and thereby to damage children physically, emotionally, and psychologically.

[248] I will proceed on the basis that the harm language of s. 753(1)(a) governs, and is not expanded by the particular mode of satisfying the s. 753(1)(a) requirements through subparagraph (a)(ii). Otherwise, different if not inconsistent types of harm would be contemplated within a single statutory paragraph. Subparagraphs (i) and (ii) may, as I have interpreted them, apply to distinguishable conduct. Both subparagraphs, though, are to show threat as identified in their parent paragraph (a). Reading s. 753(1)(a) to have different meanings depending on which subparagraph was engaged would not make sense.

[249] Under s. 753(1)(a)(ii), the interpretation I have advanced entails that the Crown must establish on the basis of the pattern evidence that Mr. Scrivens has shown a substantial degree of indifference respecting the reasonably foreseeable consequences of his conduct that directly affects others. Practically, the issue shall be whether the Crown has established that there is a likelihood that Mr. Scrivens will commit a contact sexual offence such as sexual interference again.

VII. Threat

[250] To determine whether the Crown has established that, on the basis of his pattern of conduct, Mr. Scrivens constitutes a threat to the life, safety or physical or mental well-being of others, I will review the evidence relevant to the threat assessment, then determine whether the Crown has met this part of its burden.

[251] The evidence relevant to the threat assessment concerns Mr. Scrivens' personal history, his treatment and institutional history, his pattern of conduct including the predicate offence, and psychological and psychiatric evidence. The issues of intractability and Mr. Scrivens' treatment prospects are engaged. Much of this evidence is contextual. It aids in understanding the prospective significance of Mr. Scrivens' pattern of conduct. But the threat must remain founded on that evidence of pattern of conduct.

A. Personal History

1. Childhood and Family History

[252] Mr. Scrivens experienced no adverse events or barriers in his childhood. He has described his childhood as happy: VDR at 16.

[253] He suffered no significant medical issues.

[254] He had no history of antisocial behaviour during childhood: VDR at 16.

[255] Mr. Scrivens' parents are still alive and he has had occasional contact with them since leaving BC moving to Alberta, although it appears that he last saw them in 2014. He has a brother, from whom he is estranged.

[256] Mr. Scrivens has a grade XII education. No significant incidents occurred in his educational history.

2. Intimate and Marital Relationships

[257] Mr. Scrivens has had eight or nine adult sexual partners. He has never resorted to sex trade workers.

[258] In about 2003, Mr. Scrivens commenced what would become a common law relationship with an adult woman. They lived together and were married in 2007. They have two children. This relationship ended in 2007 after he was convicted for the possession of child pornography offence. He has not seen the older child in about 10 years. He has never seen the younger child.

[259] Mr. Scrivens had an intimate relationship with JW, a biological male. They met at Bowden Institution.

3. Work History

[260] Mr. Scrivens has an interest in computers and is skilled in fixing computer hardware and in working with software.

[261] Mr. Scrivens was described by Conrad Bueckert, one of his Parole Officers, as having a good work ethic. He's "always had a job:" Conrad Bueckert, Transcript of Proceedings, March 13, 2019 (Bueckert), 44.2. Mr. Scrivens has maintained regular but changing employment.

[262] Mr. Scrivens has never collected EI or accepted governmental financial subsidies.

[263] In BC, he worked in an auto parts store and started a computer business. In Fort McMurray, he worked at a car wash and at two tire retailers. He has distributed industrial equipment and done pizza delivery. After completing his period of incarceration at Bowden, he held a metal roofing and siding job, delivered computer parts and equipment, and worked for a junk removal business. His jobs have tended to be short term.

4. Social Associations/Supports

[264] Mr. Scrivens has participated in video gaming communities and medieval re-enactment groups. He was involved with Edmonton medieval re-enactment groups following his statutory release and prior to his incarceration respecting the Current Offences. See VDR at 21.

5. Drug and Alcohol Use

[265] Mr. Scrivens has no problematic alcohol use issues. His drug use was restricted to using marijuana a few times. He has not used illegal drugs: VDR at 23; ZR at 9.

B. Treatment and Institutional History

[266] Mr. Scrivens' treatment and institutional history has numerous vectors of relevance to his present threat. This history discloses both positive engagement and lack of engagement, incidents illuminating his sexual interests and incidents showing the arbitrariness of institutional life, Mr. Scrivens' "cognitive distortions" and his progress made in overcoming disordered thinking. According to Dr. Ennis, "cognitive distortions" are distorted beliefs, thinking errors about offending, or erroneous ways of thinking about offending: E27, 25.1-8. These appear to be not so much conscious rationalizations as disordered thinking driven by disordered sexuality.

[267] Since some of Mr. Scrivens' offences occurred while he was in treatment and under correctional or non-correctional supervision, this history will provide yet further context for his pattern and predicate offences.

[268] The "RNR" program and treatment model, the principle for effective correctional rehabilitation, is relevant at various points in Mr. Scrivens' program and treatment history. "RNR" stands for "risk, needs, responsivity." The "risk" principle is that treatment or supervision should match an offender's level of risk. High-risk offenders should receive high-

intensity treatment. Low-risk offenders should not receive high-intensity treatment. The "need" principle is that the targets of treatment should be the actual criminogenic needs of an offender. The "responsivity" principle is that interventions should be delivered in a way that accommodates the "learning styles," personality traits, or responsivity factors of the offender. The aim is to optimize the offender's response to the intervention: E27, 35.3-34, 36.1-6; TVDM6, 32.18-33.1-3; ZM1, 73.19-33.

1. Terrace, BC – Sex Offender Group Treatment

[269] In compliance with probation conditions, Mr. Scrivens attended a sex offender group treatment program in Terrace, BC.

[270] In his first set of sessions, Mr. Scrivens' progress was considered minimal. He maintained that his offence was not serious. He did not demonstrate empathy for the victims of child pornography. In a subsequent set of sessions he participated actively in the group and his input was respected: EDD000266-001.

[271] In his report, Dr. Ennis had commented that it was unclear whether this group treatment was "consistent with current best practices for sex offender treatment:" ER at 7. In testimony, Dr. Ennis qualified this assessment as being more in the nature of a suspicion based on the program description: E27, 48.4-16. Dr. Zedkova, though, also commented that she did not believe it adhered to the RNR programming model that is best practice: ZM1, 73.39-41.

[272] Mr. Scrivens committed the mischief offence while attending this program.

[273] Mr. Scrivens' participation in this program was discontinued when he moved to Fort McMurray.

2. Dr. Jung, February 7, 2002 to April 30, 2003

[274] Mr. Scrivens came under the care of Dr. Sandy Jung with FACS, to comply with his terms of probation. Dr. Jung interviewed Mr. Scrivens in December 2001 and their sessions started in February 2002. His last appointment was April 30, 2003. He contacted Dr. Jung on August 29, 2006 after he was arrested for the possession offence: EDD0015440-001.

[275] Dr. Jung reported some errors in Mr. Scrivens' thinking: He did not consider child pornography harmful as he "doesn't offend against a child:" EDD001436-005. Early in July 2002, he claimed that it was ok to have sex with teenagers because this was better than offending against children. However, by mid-July 2002 he said that he had changed his mind about teenagers. They were not capable of having adult sexual relations: EDD001436-013, -014.

[276] Mr. Scrivens told Dr. Jung that he did not see anything wrong with child nudity "except how it was obtained:" Dr. Sandy Jung, Transcript of Proceedings, March 8, 2019 (Jung8), 91.28-92.4.

[277] Dr. Jung encouraged Mr. Scrivens to identify risk factors early and to develop strategies to deal with risks when they first emerged. She worked with Mr. Scrivens to recognize the factors that led him to commit offences. Mr. Scrivens, though, focused on avoidance strategies only: EDD001439-006. His plan, which was not realistic, was simply to avoid risky situations altogether. Mr. Scrivens made only minimal efforts to change his thinking. He did not put in a lot of work, he didn't put in the effort: Jung11, 11.30-31, 27.29-31, 39.23-41; EDD001451-00.

[278] Dr. Jung said "You can give as much treatment to a person as you can, but if they're not going to actually be motivated to actually engage in that treatment, it's like putting them in a room and hoping that they're going to absorb some of it."

[279] Dr. Jung noted that Mr. Scrivens continually engaged in masturbatory reinforcement of his sexual fantasies relating to prepubescent children. He was not changing his beliefs: Jung11, 10.17-23.

[280] Dr. Jung was able to establish rapport, a therapeutic alliance of sorts, with Mr. Scrivens. Even though she had provided the information to probation that led to his breach of probation conviction, he was willing to work with her. Dr. Jung acknowledged that Mr. Scrivens was open about his behaviours: Jung11, 14.31-41.

[281] Mr. Scrivens' breach of probation offence occurred during the period that he was seeing Dr. Jung. The child pornography conviction occurred after their sessions had completed.

3. Bowden Institution, 2007-2009

(a) Phoenix Program Expectation

[282] Mr. Scrivens was sentenced to 2 years federal incarceration followed by a 5-year LTSO for his possession of child pornography offence. He had been recommended for high intensity sexual offender programming by Dr. Choy and Dr. Ennis, who did reports for Mr. Scrivens' sentencing.

[283] Mr. Scrivens' sentencing had proceeded on the understanding that he would enter the Phoenix Program at Alberta Hospital. There had been conversations with Dr. Studer, the head of the program: EDD000620-106, -107, -110. Judge Burch accepted the sentence jointly proposed by Crown and Defence "to allow for [Mr. Scrivens'] possible rehabilitation through treatment in the Phoenix Program:" EDD000620-194, -200. The recommendation was to be noted on the warrant of committal: EDD000620-194. See EDD001484, ZM4, 86.13-41.

[284] The Phoenix Program had three phases. The inpatient phase took, on average, about a year to complete: Dr. Lea Studer, Transcript of Proceedings, February 19, 2019 (Studer), 36.10-11, .15. The intensive outpatient phase took, on average, about 6 months to complete: Studer, 25.4-11. The regular outpatient phase was available for life: Studer, 14.27-38; 24.31-25.11. Dr. Studer stated that a 2 year less-a-day sentence in the Provincial penal system was optimal for program completion: Studer, 38.8-40. Offenders would complete the program by about the time they expected to have reached warrant expiry. There were lags in getting federal offenders into the program: Studer, 32.17-27. They had to come to the program on full parole.

[285] CSC intake and classification processes led to Mr. Scrivens being initially placed at Bowden Institution rather than directly into the Phoenix Program: EDD001015-001; EDD000531-004.

[286] Despite the reports and recommendations, Mr. Scrivens' Correctional Plan at Bowden Institution recommended the Moderate Intensity Sexual Offender Program (MISOP): EDD000533-01, -05. Correctional Officials were aware of the intention to have Mr. Scrivens attend the Phoenix Program as of early November, 2007: EDD001484-002, -003; EDD001015-001.

[287] Later, in February 2008, his parole officer recommended that Mr. Scrivens "be assessed for the Clearwater Program for Sexual Offenders at the Regional Psychiatric Centre (Prairies) or the Phoenix Program…:" EDD001102-002.

[288] On May 6, 2008, Mr. Scrivens inquired with Correctional Program Officer Dolanz as to his place on the waitlist for the MISOP. "He expressed a desire to take the program and stated that he has a fairly short sentence and has a parole date coming up in October 2008." Other inmates, though, were given priority for this program at the time: EDD001484-007.

[289] On July 7, 2008, Mr. Scrivens made another inquiry about when he would be able to start the MISOP. He mentioned that his statutory release date was coming up in March, 2009 and "if I don't get into a program soon I will not have one before my release:" EDD001074-001.

[290] Mr. Scrivens was interviewed by Dr. Studer in May and October 2008: EDD001510. By the time Mr. Scrivens interviewed with Dr. Studer for the program, his odds of getting out by his statutory release date weren't good. It appeared that he would have had to remain in the program past his warrant expiry date: Studer, 30.35-40, 37.15-18, 40.37-39.

[291] Mr. Scrivens therefore decided to take his programming at Bowden instead: Studer, 46.7-10.

[292] However, while Bowden was offering a high intensity sexual offender program (HISOP), it was not offered at a time that would permit Mr. Scrivens to complete the program prior to statutory release or warrant expiry. An August 29, 2008 Program Performance Report, Pre-Program Assessment stated that the next run of the HISOP was not scheduled until June 2009 which would not give Mr. Scrivens time to complete the program with his statutory release date in March 2009 and his warrant expiry date in October 2009: EDD000946-003; Paula Vargas, Transcript of Proceedings, February 26, 2019 (Vargas) at 101.35-36. The HISOP is not offered as often as the MISOP.

(b) MISOP – September 22, 2008-January 9, 2009

[293] Mr. Scrivens completed the MISOP at Bowden instead of the HISOP. According to Kathryn Luft, a CSC Correctional Program Officer, the MISOP and HISOP have the same content, but the HISOP has more material and has deeper coverage: Nora Kathryn Luft, Transcript of Proceedings, February 26, 2019 (Luft), 63.6-38. The HISOP was longer and more time-intensive.

[294] Mr. Scrivens was recognized to have "successfully completed" the program. The Program Performance Report – Final stated that he has "yet to demonstrate commitment to carrying out and strengthening his self-management plan:" EDD001070-001.

[295] The report identified persistent cognitive distortions: the images will be there whether I look at them or not, a picture is not a person, "I don't see how they are my victims," they are enjoying it: EDD001070-003, -004. A Correctional Plan Progress Report of February 6, 2009 stated that Mr. Scrivens did not truly comprehend how he contributed to victimization. While he took "verbal responsibility" for his offences and was very open in discussing his offences, he had "limited insight;" he lacks empathy and remorse. He did not consider himself to be a risk to sexually offend against a child. He did not understand how the use of child pornography can escalate into physical sexual offending against children: EDD000518-001, -003, -004.

4. Statutory Release, February 26, 2009 – October 31, 2009

[296] Mr. Scrivens was released from Bowden on statutory release to the 101st Street Apartments by way of a statutory release certificate dated February 26, 2009.

(a) Incidents

[297] As noted earlier, none of the incidents to be described below resulted in charges or convictions.

(i) March 19, 2009 – Buster's Pizza

[298] Mr. Scrivens was found to be working at Buster's Pizza in Spruce Grove. This put him in contravention of release conditions not to attend a public place where minors may reasonably be present and not to have contact with children under 18 without a specified adult supervisor. Mr. Scrivens had signed out at 101st Street indicating that he would be at Buster's Pizza.

[299] Mr. Scrivens' parole officer reported that in three pre-suspension supervision meetings she had instructed him not to return to work at Buster's on his release. The employer was not fully aware of Mr. Scrivens' offence dynamics, there could be contact with minors at Buster's or on deliveries, Mr. Scrivens might have Internet access. Mr. Scrivens' statutory release was suspended and he was arrested on warrant. The suspension was subsequently cancelled: EDD001167-001; EDD001170-001; EDD000719-001.

(ii) May 11, 2009 – A Child Visits 101st Street

[300] A five-year old daughter of another offender visited 101st Street. She and her father were in the garage. Shortly after they had entered, Mr. Scrivens went into the garage. Staff members responded and had Mr. Scrivens come to the office. He was advised that he was in contravention of the "no contact with children" condition. Mr. Scrivens signed out of 101st Street and was observed to have gone onto the steps, staring at the garage area: EDD001150-001; EDD000523-002.

[301] Mr. Scrivens' statutory release was suspended and he was arrested on warrant: EDD000689-001, EDD000714-002; EDD00 0700-001. Subsequently, the National Parole Board revoked his statutory release. In an August 25, 2009 decision, the Board stated that Mr. Scrivens said that he didn't believe he was putting child at risk. The Board responded that proximity was the issue. The Board stated that (EDD000712-003-005)

> You told the Board that you in fact went to the garage with the intent of seeing the child to provide some sexual gratification in your mind. Your intention was wrong and you admitted this ….
>
> You refused to consider that you might actually sexually assault a child but recognize that others have considered this ….
>
> You yourself have advised that you supplement your inability to use pornographic material by looking at children, which is obviously part of your crime cycle.

[302] Another statutory release certificate was issued on September 2, 2009, with conditions: EDD001126-001.

(b) Sexual Offender Maintenance Program (SOMP)

[303] Mr. Scrivens was accepted into the SOMP based on successful completion of the MISOP at Bowden.

[304] The SOMP was structured in blocks of 12 sessions. According to Eva Marie Suton, a CSC Program Officer and facilitator who facilitated SOMP sessions attended by Mr. Scrivens, the completion statuses were "attended all sessions," indicating attendance but no progress or gains; "successful completion," indicating any sort of gain, even minimal; and "incomplete:" Eva Marie Suton, Transcript of Proceedings, February 21, 2019 (Suton21), 105.3-4, .7, .19-20; 104.33.

5. LTSO – November 1, 2009-October 2014

[305] Following his warrant expiry date (October 31, 2009), Mr. Scrivens was on the conditions of the 5-year LTSO, which expired in October 2014.

(a) Incidents

[306] Again, none of these incidents resulted in charges or convictions.

(i) August 11, 2010 – Zoo Journal Entries

[307] Mr. Scrivens made a "log book" entry indicating that he had accompanied a co-worker to the lunch area at the Edmonton Valley Zoo where children were present. Mr. Scrivens was working at the zoo. He was suspended to "prevent a breach" of a release condition not to be in areas where children under 18 were likely to congregate: EDD001245-001, EDD000689-002. Following a Parole Board decision, he was released from suspension: EDD000688-004, EDD001214-002.

(ii) August 27, 2012 – Internet Usage on Personal Cellphone

[308] On August 27, 2012, Mr. Scrivens was found in possession of four internet capable devices. No child pornography was found. A tracking device had captured an image of a young child, but it was not clear if the image had been viewed or viewed intentionally. Mr. Scrivens was suspended and arrested on warrant: EDD001352-001. He was sent back to Bowden until the expiration of the suspension on November 25, 2012: EDD001302-001.

(iii) September 18, 2013 – SOMP Suspension

[309] In a SOMP group session on September 16, 2013, Mr. Scrivens was disrespectful, disruptive, and inappropriate. He pretended to sleep during the session even after being warned about this conduct. After the session participants were to meet with the facilitator, but he refused to wait for those ahead of him. He left without meeting with the facilitator. The facilitator consulted with Mr. Scrivens' parole officer about his conduct, and Mr. Scrivens' leisure time was suspended for two weeks. Mr. Scrivens responded by sending a sarcastic and challenging (but not otherwise offensive) text to the facilitator. The result was that he was suspended from SOMP. But SOMP attendance was a condition of his LTSO. Mr. Scrivens was therefore suspended under his LTSO again: EDD000502-001-004; EDD001289-001; EDD000655-002; Eva Marie Suton, Transcript of Proceedings, February 22, 2019 (Suton22), 39.33-41.30; EDD001485-018, -021.

(b) SOMP

[310] The Program Performance Report – Final, April 6, 2010, recognized that Mr. Scrivens had "attended all sessions." The Report stated that Mr. Scrivens "drastically underestimates his risk to re-offend." He did make some gains, particularly respecting his cognitive distortion that pornography does not hurt anyone or create victims. That target was "partially reached:" EDD000514-001-002. Mr. Scrivens was recommended for another block of 12 sessions.

[311] Defence counsel pointed out the SOMP notes for May 10, 2010, EDD001484-086:

> Joe was quite honest and up front last night at SOM. We were talking about high risk situations. One of the participants related the details his offence and said the 14 year old female victim had crawled into bed with him. He was not offering this as an excuse but as a matter of fact. Joe remarked that he wasn't at all sure if he could walk away from that even now. I thanked him for his honesty and we explored possible reasons why he couldn't walk away. Joe said that now on the lupron it wouldn't be about sex! We discussed the possibility that it might be for closeness, intimacy, acceptance and comfort: all things that we all desire and can be achieved in a healthy age appropriate relationship. We then discussed his pedophilia, about which he was quite candid. I asked him if he hated himself for that part of himself. He claimed he didn't exactly hate himself but he knew it could cause great harm to a child if he acted upon his urges. The group agreed with him and we each told him that we didn't hate him either. Joe was quite emotional at that point. I consider this to have been a positive session.

[312] This third block of sessions was not completed because of his August 2010 suspension. The Program Performance Report – Final, stated that Mr. Scrivens accepts little responsibility for his actions, underestimates his risk, and his current solution is to "wait it out:" EDD001213-002, -003; Suton22, 5.1-25.

[313] The Program Performance Report – Final, March 11, 2011, recognized that Mr. Scrivens had completed his 4th block of SOMP with no absences. He'd been willing to listen to comments in group. There were "no responsivity issues:" exhibit 27. This report refers to a seizure from Mr. Scrivens' room of DVDs of a television program, Jon & Kate plus 8, that features a couple with eight children, and a Hannah Montana CD. Ms. Suton referred to these items as "erotic indicative material." These are materials that on their face are benign but that Mr. Scrivens would regard and treat as erotic materials: exhibit 27 at 3; Suton22, 13.21-23; 21.30-32. She reported that he often said he was just as aroused or if not more so by pictures of children that were not pornographic in nature: Suton22, 24.6-11.

[314] Ms. Suton reported that Mr. Scrivens believes he finds himself in a dilemma: he can either fulfill his sexual attraction to children by molesting a child or by viewing child pornography, which he views as the lesser of two evils. He does not believe that he has much of a behavioural progression respecting viewing child pornography. He has done it for about 18 years without contact offending: exhibit 27 at 3; Sarah McIsaac, Transcript of Proceedings, March 8, 2019 (McIsaac), 56.6-21 (Ms. McIsaac was a CSC Program Officer who facilitated SOMP sessions after Mr. Scrivens left Ms. Suton's group following his suspension). He believes watching child pornography and molesting children are not correlated: exhibit 27 at 4.

[315] The Program Performance Report – Final, June 22, 2011, recognized that Mr. Scrivens had "attended all sessions." It stated that he'd completed his fifth block of 12 sessions in March 2011. The report stated that Mr. Scrivens had excellent attendance, was an active participant, challenged other participants in respectful and appropriate manner, was open to being challenged himself, and was cooperative and respectful with the facilitator and other group members. There have been improvements in his overall attitude and demeanour: EDD001193-001-004.

[316] The Program Performance Report – Final, September 21, 2011 referred to completion of the 6th block of 12 sessions in June 2011. Besides an incident of "belligerence" when Mr. Scrivens threw his sunglasses at the facilitator, progress and gains were noted respecting insight into his offending and problem solving. A great of deal of work was still required: EDD000507-001-004; Suton22, 21.4-24.

[317] The Program Performance Report – Final, December 15, 2011 referred to completion of the 7th block of 12 sessions, Mr. Scrivens' perfect attendance, and his active contribution to group discussions and favourable attitude. He did not view child pornography as a victimless crime but he struggles to view the children as victims. He is aware that he has work to do in this area: EDD001181-001, -002. He was recommended to attend SOMP biweekly.

[318] The Program Performance Report – Final, July 18, 2012 referred to completion of the 8th block of 12 sessions and Mr. Scrivens' favourable attitude and respectful interactions with peers and the facilitator. Mr. Scrivens indicated that he believes he requires more work in area of victim empathy and understanding the ripple effects of his offences and that his main cognitive distortion was believing he was not hurting anyone by viewing child pornography. He realized he had a lack of empathy. He never wanted to hurt anyone. He is starting to think more about the consequences of his behaviour: EDD001498-001, -002; Suton22, 96.12-33.

[319] The Program Performance Report – Final, April 29, 2013 was written after Mr. Scrivens returned to the community after the expiration of his 2012 suspension. He returned disgruntled. By this time, he had completed some 99 SOMP sessions: EDD000505-001. He stated that he did not plan to continue his medication once his LTSO ended, the main reason being side-effects: EDD000505-004.

[320] The Program Performance Report – Final, August 26, 2013, referred to Mr. Scrivens having completed 105 SOMP sessions, and reiterated that while his attitude had been improving, he had returned to his earlier disgruntled and angry state. He would now put in only the minimum effort required to stay out in the community: EDD000503-001, -003.

[321] The Program Performance Report – Final, October 1, 2013, referred to Mr. Scrivens having completed 106 sessions. It dealt with his suspension because of his conduct in group.

[322] Mr. Scrivens was moved to a group with a different facilitator, Sarah McIsaac. Ms. McIsaac was his facilitator for about 9 months, until his LTSO expired.

[323] Ms. McIsaac's Performance Reports – Final of May 6, 2014 and October 21, 2014 indicated that Mr. Scrivens' attitude was fairly positive, generally cooperative, and improving: EDD000496-001; EDD001500-001; McIsaac 51.31-52.34. Ms. McIsaac reported the following matters (EDD001500-003, -005, -006, McIsaac 52.22-25, 53.8-11, 56.6-21):

- all of his problems are attributable to the CSC

- he will stop taking libido suppressing medication following completion of the LTSO
- he is confident that he can avoid offending, particularly contact offending, but he is not confident that he can avoid using images of children to masturbate
- he continued to engage in risky masturbatory activities
- he lacks insight into his sexual attractions
- he is not committed to changing or managing his risky behaviours
- his self management plan revolves around avoidance strategies (avoiding being in situations in which he has power or control over a child or situations in which a lot of children are present: McIsaac 54.32-41)
- his self management plan does not take into consideration the impact that medications, structure, and CSC support have provided over past 5 years
  (but on the other hand)
- with respect to empathy, he now looks at children as "real people"
- he realizes he is contributing to children being hurt when he views child pornography and he will avoid it.

[324] Mr. Scrivens completed about 124 SOMP sessions.

[325] Mr. Scrivens admitted to Dr. Zedkova that he did not apply himself fully to his programs, especially during core program in Bowden, as he lost respect for the facilitators.

(c) Mr. G. D. Coftas, April 2009 – May 2011

[326] Mr. Scrivens saw Mr. Coftas, a CSC Psychologist, between April 2009 – May 2011, bridging his statutory release and LTSO periods.

[327] In his Psychological Report, Mr. Coftas wrote that Mr. Scrivens had "halting and not very spectacular progress" but "the writer would venture to say that there are positive signs of change, especially attitudinal." This may be "the beginning of maturation and spirit of understanding and cooperation as opposed to emotional and resistant opposition and passive-aggressive reactivity:" EDD000521-002. Mr. Coftas felt that Mr. Scrivens had good potential to grow and perform or enact significant change in criminogenic factors, to grow up and out of a phase of his life that has been dominated by a very strong and resilient sexual addiction: EDD000521- 003.

[328] In his testimony, Mr. Coftas said that Mr. Scrivens was "a very complicated and complex case, and there were many ups and downs, and there were many things to address and to clarify and to solve:" Gregor Dan Coftas, Transcript of Proceedings, March 12, 2019 (Coftas), 60.23-24.

(d) Psychiatric Treatment, March 2009 – October 2014

[329] Mr. Scrivens was under the care of Dr. Rai, a forensic psychiatrist, from March 2009 to April 2012. Dr. Rai prescribed Mr. Scrivens' sex-drive reducing medication. The two did not have a strong therapeutic alliance. This was a difficult period.

[330] In May 2012, Mr. Scrivens came under the care of Dr. Das. Again, the therapeutic alliance was lacking and there was conflict and dissatisfaction with the relationship.

(e) Medication

[331] Mr. Scrivens was prescribed libido-reducing medication from his time at Bowden through to the end of his LTSO (ZR at 20; VDR at 59), and resumed taking this medication during the s. 810.1 recognizance process and during his time in custody for the Current Offences. Medications included SSRIs, cyproterone acetate (Androcur), and leuprolide (Lupron). Androcur and Lupron are anti-androgen medications, reducing testosterone production and effects. Dr. Choy commented on anti-androgens in his testimony (C21, 31.9-14):

> what we're doing is … we're ageing the individual - or helping them - having their body go through the ageing process more quickly. So as we naturally age, we have, for males a decrease in testosterone. There's associated medical effects from that. There can be catastrophic or life-threatening side effects of these medications. They can cause depression. So, you know, there's … lots of side effects to the higher potency medications.

Mr. Scrivens had ongoing concerns with the side-effects of Lupron, in particular. He reacted to Lupron with muscle loss, weight gain, and gynecomastia: ZR at 18-19.

[332] As might be expected given the side-effects of these powerful medications, remaining on these medications was a source of on-going concern for Mr. Scrivens. Mr. Bueckert recalled that Mr. Scrivens hated Lupron. Lupron (along with residency, overnights, and computer usage) was one of his biggest focuses of complaint: Bueckert, 15.6-9; 34.34-38.

[333] Mr. Scrivens discontinued anti-androgen use upon expiration of his LTSO. There have been occasions during his most recent custodial period when he has refused to take his medication. Overall, though, for the most part, when the medication has been prescribed, he has taken it.

[334] There have been instances in which Mr. Scrivens has requested medication. He requested a supply when he left Bowden for the community: EDD001059-001. Mr. Scrivens worked cooperatively with Dr. Rodd respecting the resumption of anti-androgens and the setting of proper medication levels.

6. Section s. 810.1 Order

[335] The EPS Behavioural Assessment Unit (BAU) became involved with Mr. Scrivens as his LTSO drew to a close. The BAU was concerned that he was at risk to re-offend. An information for a s. 810.1 recognizance was sworn in March 2015. Mr. Scrivens was arrested in relation to that information on April 2, 2015 and was released on recognizance pending the s. 810.1 hearing. The hearing occurred November 4-6, 2015. Mr. Scrivens was made subject to a s. 810.1 recognizance that remained in effect until his arrest on February 26, 2016.

(a) Police Supervision

[336] The first officer dealing with Mr. Scrivens was Detective Wayde Peachman. He noted that when EPS became involved, Mr. Scrivens was already living in the JW residence. That arrangement had begun during CSC watch toward the end of Mr. Scrivens' LTSO period: Wayde Peachman, Transcript of Proceedings, March 11, 2019 (Peachman), 70.7-9, 96.3-6.

[337] Mr. Scrivens had become involved with a medieval re-enactment group. This was his primary social outlet and gave him a set of social contacts. Det. Peachman understood that Mr.

Scrivens needed support and that it was good for Mr. Scrivens to engage with the community. He wanted Mr. Scrivens to attend medieval re-enactment events: Peachman 55.27-8, .33-34; 77.5-212; 84.13.

[338] Det. Peachman referred Mr. Scrivens to Dr. Jellicoe with FACS so that Mr. Scrivens could comply with terms of his release recognizance and later the 810.1 recognizance: Peachman 57; 82.24-40.

[339] Det. Peachman's approach to BAU supervision was exemplified in the following comments in his testimony (59.35-39; 60.5-8):

> I'm willing to discuss anything with respect to these type of supervisions. At the end of the day when you're supervising somebody in the community, you're trying to provide support as well as guidance in that structure. So, yes, I would talk with him about the conditions and what his concerns were.
>
> [T]here's a reason to get input from the offender on everything. And the reason is that in order for a person to succeed on a supervision order … he has to engage with his supervisor and treatment team and there has to be … an open dialogue back and forth.

[340] Unfortunately, one of the individuals connected with Mr. Scrivens' medieval re-enactment group became involved in the supervisory dynamic between Mr. Scrivens and the BAU: Peachman, 63; 84.14-27; 99.40-100.1. This individual became an overzealous advocate, whether on his own or because of contributions from Mr. Scrivens I need not decide. Det. Peachman felt that he was becoming the issue rather than the proper supervision of Mr. Scrivens, so he transferred supervision to another officer, Sgt. Eleanor Innes in about July 2015.

[341] Unfortunately again, the relationship between Mr. Scrivens and Sgt. Innes was more fraught than that between Mr. Scrivens and Det. Peachman. In particular, Mr. Scrivens felt that he was now being prevented from doing what he had been permitted earlier in connection with his medieval re-enactment group: Eleanor Innes, Transcript of Proceedings, March 12, 2019 (Innes) at 3.35-38; 6.15-19. The relationship might be summed up in this passage from Sgt. Innes' testimony (22.9-16):

> it all seemed unnecessary to him that he should have to do this, that he should have to have somebody watching over him. He was, in his opinion, in complete control of himself and didn't require that type of supervision. Although he has also mentioned that he should … never be around children and never be in a position where he should be alone with a child at any point in time …. overall, in terms of supervision, he was okay with some, and he wasn't okay with others. But largely he seemed irritated by the process.

[342] The predicate offences occurred during the period of BAU supervision of Mr. Scrivens. Sgt. Innes emphasized that (at 28.6-22):

> There was no indication he was seeing children or seeing a woman that had children or making all of these contacts with her and going to the places where he was going. There was no indication whatsoever that he was doing any of those things during supervision.

> We had no idea to the extent to which things were occurring.

and (at 32.12-21):

> he was doing this whole other thing behind everyone's back. Telling us he wasn't in a relationship, denying that any of this was occurring, and causing issues about other things
>
> I can't see … that anyone could be able to supervise him, a parole officer or probation officer who had even less resources than we did. When you have somebody who is doing all of that in secret, I don't know that it's possible.

[343] Dr. Van Domselaar commented that "Mr. Scrivens repeated his past pattern of non-disclosure and secrecy over the course of many months:" VDR at p. 59.

(b) Dr. Debra Jellicoe

[344] Mr. Scrivens started therapy with Dr. Jellicoe, a forensic psychologist, in August, 2015, on referral from the BAU: EDD001483-001. They had 22 sessions. Mr. Scrivens attended regularly.

[345] Dr. Jellicoe's notes disclosed that Mr. Scrivens acknowledged his sexual attraction to children; that he looks at child nudity but does not believe there is anything wrong with it as children in photographs are not being harmed; he would prefer an adult woman for a romantic partner; children age 10-12 would be more "responsive;" and the medieval re-enactment costume allows him to be "not me" making it easier to socialize: : EDD001483-003 (August 6, 13, 2015); Dr. Debra Jellicoe, Transcript of Proceedings, February 22, 2019 (Jellicoe22), 123.1-32.

[346] A note of September 8, 2015 stated that Mr. Scrivens was masturbating to thoughts of children twice a day: EDD001483-007; Jellicoe22, 127.29-34.

[347] By October, 2015, Mr. Scrivens was seeing Dr. Peter Rodd, a psychiatrist, and was on libido-reducing medication. He was having a difficult time ejaculating and so resorted to fantasizing about naked children and touching but not having sex with children: EDD001483-012; Jellicoe22, 128.19-22; 131.29-30.

[348] A note of February 25, 2016 stated that Mr. Scrivens believed that when a picture of a naked child is taken for non-sexual reasons, he does not see the child as a victim. He acknowledged that the problem becomes when he sexualizes the child in his mind: EDD001483-044.

[349] Dr. Jellicoe's initial impression of Mr. Scrivens was that he was arrogant and oppositional. He was not happy about being placed on the s. 810.1 recognizance. That, in her view, was not an uncommon reaction to this sort of disposition: Dr. Debra Jellicoe, Transcript of Proceedings, February 25, 2019 (Jellicoe25) at 10.21-23. While there were challenges, she was able to forge a therapeutic alliance with Mr. Scrivens. He "needed to settle in a bit:" Jellicoe25, 13.27-30; 121.27-30; 121.1-3. He preferred individual to group treatment. He had difficulty interacting with group members with significant mental health or cognitive difficulties.

[350] Dr. Jellicoe had testified for the Crown in the s. 810.1 hearing. Nonetheless, Mr. Scrivens continued to see her after the recognizance was granted: Jellicoe25, 15.5-40.

[351] Dr. Jellicoe reported that Mr. Scrivens was open to taking libido-reducing medication other than Lupron, which had significant negative side-effects. He cooperated with the medication regime prescribed by Dr. Rodd: Jellicoe25, 24.35-25.2; 28.20-22.

[352] Dr. Jellicoe testified that Mr. Scrivens' crime cycle factors were boredom, loneliness, and isolation. The s. 810.1 recognizance conditions made it hard to find social outlets. She denied, though, that the s. 810.1 recognizance made his crime cycle worse by interfering with his medieval re-enactment group activities. She said that there are still "other avenues for socialization:" Jellicoe25, 18.3-9.

[353] Mr. Scrivens did not disclose to Dr. Jellicoe that he was having contact with children at his house or that he was babysitting children.

(c) Dr. Peter Rodd

[354] Dr. Rodd is a forensic psychiatrist with FACS. Dr. Jellicoe requested a consultation with him respecting Mr. Scrivens.

[355] Dr. Rodd confirmed that Lupron can be significantly problematic for individuals. Its side-effects can include breast development, loss of bone mass, and loss of muscle mass: Dr. Peter Rodd, Transcript of Proceedings, March 14, 2019 (Rodd),12.12-14.

[356] Dr. Rodd used a step-wise, structured "algorithmic" approach to the chemical management of Mr. Scrivens' symptoms, to ensure that side-effects were being identified and managed and to ensure that minimum effective doses were employed.

[357] Dr. Rodd's clinical approach, followed with Mr. Scrivens, was not to force treatment. He presents clients with information. Dr. Rodd attempts to engage them in the discussion about treatment. He recognizes that they are still self-determinant. They have to make the choice, they have the responsibility: Rodd, 23.17-32. Dr. Rodd observed that one catches more flies with honey than vinegar: Rodd, 26.7.

[358] Dr. Van Domselaar commented on Mr. Scrivens' re-engagement in treatment with Dr. Jellicoe and Dr. Rodd at FACS: "his ability to build trust with them was undermined by the residue of difficulties with past treatment providers, and so his treatment progress was slow. Furthermore, his progress in treatment lagged far behind the rate of accumulation of stressors, and therefore also lagged behind the escalation in his risk factors:" VDR at 59.

C. The Pattern and the Predicate Offence

1. The Pattern

[359] The pattern offences have already been described in detail. The description need not be repeated here. At this juncture, I will recount only some comments Mr. Scrivens made to the expert witnesses.

[360] Respecting the 1997 sexual assault, Mr. Scrivens had told Dr. Ennis that what made the interaction with the 14-year old cadet wrong was that he was in a position of authority, but as he "thinks of it now," he understands that the touching was probably unwelcome: ER at 5; see C11; CF20, 48.29-30.

[361] Mr. Scrivens stated to Dr. Van Domselaar that the victim "didn't say no" and he took this as "misconstrued consent." He also reported that the victim had remained in contact with him after the offence: VDR at 6.

[362] Mr. Scrivens told Dr. Zedkova that now he understands that the victim did not consent. This was a situation of misconstrued consent. The incident, though, was not traumatic for her: ZM1, 50.16-20.

2. Predicate Offence

[363] The predicate offence has also been sufficient described above. Two final contextual elements to Mr. Scrivens' history of offending are derived from comments Mr. Scrivens made after the offence.

[364] Dr. Zedkova reported that Mr. Scrivens told an investigator, Detective Lynass, that he hurt the victim and he thinks that he scared her. He also added that he did not understand why she was scared, as she told him during the act that she enjoyed it and wanted more. "He also added that he did not think that he hurt her …. she asked for more:" ZR at 33-4.

[365] Dr. Van Domselaar wrote that "[w]hen asked about the effects of his actions on the victim, Mr. Scrivens acknowledged that at the time of the offense he did not think his actions caused direct harm to the victim, but he verbalized understanding that there was the potential for the victim to be traumatized by his behaviour when she is older and comes to understand what happened:" VDR at 14.

[366] As for the lead-up to the offence, Mr. Scrivens told Dr. Zedkova the following respecting the victim coming to his house: "Then I kind of got stuck in the situation because I am not strong enough to get out of it." He also stated that he was "horrified" of what he knew he should not be doing, but it was really hard for him and the opportunity was there: ZR at 34.

[367] Dr. Van Domeselaar offered a consistent and subtle and insightful assessment of Mr. Scrivens' path to the predicate offence. Mr. Scrivens was said to have "groomed" the victim (or indeed her family). "Grooming" may well be the appropriate term, but "grooming" covers a range of conduct (perhaps not a large range, but yet a range), as "impulsive" acts occur across a range of intentionality (***Laberge*** at paras 18-21). That is to say, "grooming" does not have a univocal moral denotation. Dr. Van Domselaar testified as follows (TVDM8, 11.1-24):

> Q And in your review of Mr. Scrivens' behaviour leading up to the index offence, you said it wasn't grooming in the sense that he was grooming a victim as we normally talk about grooming?
>
> A Right.
>
> Q It was that he was a grooming a situation, a high-risk situation?
>
> A Yeah, it was more of a sort of a general keeping options open or having conditions favourable in case opportunity arose.
>
> Q So is that really grooming then in that case?
>
> A It's, you know, small G grooming as opposed to capital G grooming. It's not as deliberate or sort of intentional or malicious of a focus. It's more of a, you know, something like drilling a hole in the washroom. It's just sort of let's have this here

just in case the opportunity arises, so, you know, it's more of a just planting seeds and seeing if there's a time to harvest.

Q Or it's more - would it be fair to characterize it as more focussed on creating an opportunity or putting yourself in what, if you had the insight, would be a high risk situation rather than selecting a target and sort of going after a specific person?

A It's sort of that passive aggressive mix; right. So it's sort of let's keep my options open for later and just having things - having things be set up to be available if need be.

Q See what happens?

A See what happens.

D. Psychological and Psychiatric Evidence

1. General Observations respecting Recidivism

[368] While determinations of recidivism rates are moderately predictive, research has not supported prediction of the severity of future offences. That is, there can be moderate confidence respecting the likelihood of reoffending, but less confidence in what future offences may be: C21, 14.1-15.20.

[369] Recidivism rates have been trending downwards over the last 20 years, across all offences: C21, 58.35-30; Bruce Anderson, Transcript of Proceedings, February 25, 2019 (Anderson), 94.4-15; E27, 67.11-14.

[370] The overall recidivism rate is lower for sexual offenders in general than for other types of offences: TVDM6, 28.23-24; TVDM7, 44.41, 45.3-6. However, Dr. Van Domselaar qualified this observation by noting that recidivism rates for sexual offences will be underestimates because sex crimes are underreported, undetected, difficult to charge, and difficult to prove.

[371] The research shows that recidivism drops on a curve starting at age 40, dropping steadily to age 60: E27, 66.5-8. Risk declines with age: TVDM6, 77.30-79.2. "With the age of 60 … hardly anything happens for anyone after that age." But while "pretty much everyone's at the same kind of point by age 60," there are people who offend into their 70s.

[372] There was some discussion in testimony of "desistance." If an offender can demonstrate a period of prolonged desistance (non-offending) in the community, for at least 5 years, the offender's risk of offending after that 5-year desistance period decreases by about 50%. For every 5 years offence-free thereafter, there is a risk decrease of about 50%: E27, 57.4-21, .34-40; TVDM7, 86.37, 87.20-22, 87.32-40, 90.38-41, 101.21-24.

[373] The desistance effect applies to sexual offenders and to sexual offenders who have offended more than once: TVDM8, 38.21-31.

[374] After about 16-18 years of non-offending for a moderate risk offender and about 20 years for a high risk offender, the offender's risk for sexual reoffending will have declined to the risk for a non-sexual offender (about a 1-2% probability); that is, "close to rate of spontaneous offence among [those] who have never sexually offended before:" TVDM7, 99.24-26. The risk of recidivism for "anybody" can never be zero: TVDM7, 99.32.-33; E27, 57.4-21.

[375] The desistance period begins on release into the community: TVDM8, 38.21-31.

[376] Two lessons from the desistance research: First, the longer an offender doesn't offend the higher the probability that the offender won't offend. Second, even high-risk sexual offenders may not remain a high risk forever. They do not inevitably reoffend. See TVDM7, 92.23-24; 98.30-37.

[377] The research has not yet determined the cause or the most significant factors correlated with the desistance effect: TVDM7, 104.35-41.

2. Psychological Assessments

(a) Pedophilic Disorder

[378] That Mr. Scrivens suffered from a pedophilic disorder was conceded and manifest on the evidence. Aspects of that disorder were described above.

(b) Intelligence

[379] Dr. Van Domselaar had Mr. Scrivens tested using the Weschsler Adult Intelligence Scale – 4th edition (WAIS-IV). The WAIS-IV measures intellectual functioning and cognitive abilities. Mr. Scrivens' results "depicted an individual with an overall very high level of intellectual abilities:" VDR at 43. In particular, his Full Scale IQ score placed him at the 91st percentile in relation to others in his age group, a Superior category. His General Ability Index score fell at the 98th percentile, a Very Superior ranking: VDR at 42.

[380] Dr. Ennis also had Mr. Scrivens tested, using the Weschsler Abbreviated Scales of Intelligence. Mr. Scrivens' results were equal to or better than 98% of same-aged adults in normative sample. His intellectual functioning falls within superior to very superior range: ER at 11.

[381] High intelligence may assist treatment responsivity, since individuals with average or above average intellectual functioning can benefit from treatment that those with lower cognitive function cannot: TVDM6, 68.37-69.9. High intelligence, though, may also support concealment strategies and may lead to boredom or frustration in the course of treatment, particularly in repetitive group-based treatment like sex offender programming.

(c) Personality Factors

[382] Dr. Van Domselaar had Mr. Scrivens complete the Million Clinical Multiaxial Inventory – 4th ed (MCMI-IV). The MCMI-IV provides information on personality patterns and clinical syndromes and the connections between these areas. Mr. Scrivens' responses suggested that "he expends a considerable amount of energy dampening his own emotions and desires, for the purpose of reducing his own anxieties and mistrust of others:" VDR at 45. The result is social awkwardness. Individuals with similar response patterns tend to be "easily hurt by the comments of others," and so "tend to avoid social encounters" and "to give in quickly to the wishes of those who act more assertively," to avoid conflict. The further result is few relationships and the tendency to pursue activities alone, becoming isolated from everyday relationships. Mr. Scrivens' responses respecting self-image tend to show an individual who sees himself as being weak and ineffective but not disposed to admit these perceptions.

[383] Dr. Van Domselaar commented that (VDR at 45-46)

> Due to the tendencies just described, initial treatment efforts must focus on cultivating his engagement in the therapeutic process. Clinicians will have to devote extra initial effort to establish comfort and rapport with him. This is because requests for information may provoke fear and edginess, and may be seen as a form of painful and embarrassing self-exposure, which he finds highly aversive and deeply threatening. While he has a strong desire to be accepted by others, this is countered by a deep fear of humiliation and rejection. As such, he may guard against anticipated antagonism by presenting either an aggressive or insouciant façade …. Additionally, he is prone to abrupt withdrawal from both social and professional/therapeutic relationships – either by literally refusing to engage with others, or by engaging in "presentee-ism" whereby he is physically present but emotionally and cognitively disengaged. Since his tolerance for social pressure is likely to be very limited, it will be essential for those who work with Mr. Scrivens to balance their own suggestions/directions to him with encouragement to take ownership of his own agenda and circumstances.

In her testimony, Dr. Van Domselaar commented that Mr. Scrivens responds poorly to people who force an agenda on him. It is essential for people who work with him to engage him as a partner, as an active participant in own treatment, to make him feel involved in the process: TVDM6, 70.9-19. Drs. Rodd and Jellicoe provided good examples of the type of treatment providers with the right kind of approach for Mr. Scrivens: TVDM6, 70.29-31.

3. Hare Psychopathy Checklist – Revised (PCL-R)

(a) Nature of the PCL-R

[384] The PCL-R measures the likelihood that a person can be categorized as a psychopath.

[385] Psychopathy is highly correlated with criminality. Dr. Ennis commented that "I don't think it is particularly debatable that high scores are associated with every sort of negative outcome we could be concerned about in the criminal justice system: dropout from treatment, general recidivism, sexual recidivism, violent recidivism, all of those things:" E27, 46.6-9. A high PCL-R score is a good "prognostic indicator" for criminal behaviour of all varieties: E27, 38-40-40.16; CF21, 17.22-25; TVDM8, 17.7-10. The measurement of psychopathy, then, can assist in the prediction of recidivism. Nonetheless, the PCL-R is not technically a risk assessment tool: CF 18.3-9.

[386] The PCL-R has two factors,

> Factor 1, that concerns the interpersonal, emotional, manipulative aspects of being psychopathic, including lack of empathy and lack of remorse or guilt.
>
> Factor 2, that concerns the behavioural aspects of being psychopathic – unstable lifestyle, being impulsive, reckless.

See CF18.17-27; VDR at 57.

[387] The total score is based on a semi-structured interview and a review of collateral information: ER at 10; VDR at 51.

[388] The total score, not factor scores, is the most robust predictor of recidivism. The factor scores are mainly useful for treatment responsivity needs.

[389] In particular, elevations in Factor 1 traits may interfere with or be barriers to treatment: TVDM8, 17.29-36. Dr. Ennis described Factor 1 as referring to a narcissistic personality disposition. Other people are treated as vehicles for self-gratification.

(b) Assessment

[390] In his 2007 assessment of Mr. Scrivens, Dr. Choy scored Mr. Scrivens at 16 on the PCL-R. In his 2007 PCL-R assessment, Dr. Ennis scored Mr. Scrivens at 18. Both measures were far below the traditional psychopathy cut-off score of 30 and lower than the average federal inmate score of 22. The score was higher than the average general population score of 7: CR at 19; E27, 42.18-24.

[391] According to Dr. Choy and Dr. Ennis's ratings, Mr. Scrivens' elevated scores concerned Factor 1. His antisociality related to deceptiveness and manipulation, the exploitative use of others, rather than aggressive behaviour: CR at 19.

[392] Dr. Choy commented that Mr. Scrivens' scores made it likely that he would try to take advantage of others or of situations and to skirt the law in the future. Supervision would be very important: CR at 19. Dr. Ennis stated that Mr. Scrivens' behaviour, specifically his sexual behaviour, would be self-centred and self-serving. He testified that Mr. Scrivens' sexual behaviour "is self-indulgent rather than being something he gives in to … He's not swimming upstream against those deviant sexual inclinations …. Those are his predispositions. He wants to have sexual engagement with a certain demographic …. that's what he wants to do and he's not deterred by how that's impacting anyone else:" E27, 44.26-38.

[393] In assessments reported in 2018, Dr. Van Domselaar and Dr. Zedkova each tallied a total score of 20 for Mr. Scrivens on the PCL-R. This score was slightly higher than his 2007 score. His score, again, was significantly below the cut-off of 30 used to identify psychopathy. His score was at the 39.7th percentile, i.e., higher than 39.7% of the standardization sample (n=5408) of North American male offenders, i.e., 60% scored higher. His total score fell within the Moderate category (below High and Very High): TVDM6, 66.8-16.

[394] His Factor 2 score was 7 (Van Domselaar) or 8 (Zedkova), falling at the 20.5th or 25.2th percentile respectively. His score on the Lifestyle Facet of this Factor was 7, at the 19.5th percentile. On the Antisocial Facet, his score was 4, falling at the 31.7th percentile.

[395] Both Dr. Van Domselaar and Dr. Zedkova, like Dr. Choy and Dr. Ennis, found that Mr. Scrivens' Factor 1 score was elevated. His Factor 1 score was 12 (Van Domselaar) or 11 (Zedkova). This score was relatively high, at the 82.7th or 75th percentile respectively. This Factor has two Facets. Mr. Scriven scored 7 on the Interpersonal Facet, putting him at the 96.4th percentile. On the Affective Facet, Mr. Scrivens scored 5, falling at the 57.9th percentile.

[396] Some particular concerns identified by Dr. Van Domselaar, with Mr. Scrivens scoring a "2" on the item (good match), were

- grandiose sense of self-worth or inflated regard for his own abilities – narcissistic personality features having been repeatedly noted over nearly two decades: this is a large barrier to change: see also ZM4, 8.38-9.6.
- pathological lying – Dr. Van Domselaar stated that "[o]ver the years Mr. Scrivens has become increasingly adept at lies of omission, and their counterparts, obfuscation and

> evasion …. [He] has been able to craft a 'double life' during multiple periods … most recently in the many months leading up to and including the index offence period …. Mr. Scrivens is also very adept at being 'brutally honest' in some areas … which then serves to distract from or conceal his deceit in other areas:" VDR at 53; see also TVDM6, 62.

- conning/manipulative – used to keep others from discovering his sexual proclivities; according to Dr. Van Domselaar, "[h]e also makes use of his ability to present only certain aspects of himself to garner the good will and trust of others, which he can then leverage to his advantage;" this trait would support "grooming" or the cultivation of opportunities: see TVDM6, 63.37; 64.6-7.
- failure to accept responsibility for his own actions - he has lacked genuine effort in making the necessary changes to his attitudes and behaviours to reduce his risk of offending; he minimizes and rationalizes his behaviour, and externalizes blame to others: VDR at 56.

[397] Dr. Van Domselaar testified that in terms of treatability, these traits are the opposite of what's needed to be successful in treatment. These traits set up a "kind of personality barrier" that prevents the formation of the therapeutic bond with treatment personnel: TVDM6, 66.36-67.13; ZM4, 8.27-30. Treatment personnel, then, must be willing to accept that these personality traits exist and work with them rather than against them. Treatment personnel must help him see that treatment is in his best interest, not just for the benefit of others: TVDM6, 67.18-31.

[398] Dr. Van Domselaar wrote that (VDR at 58)

> These traits have solidified over time … as he uses them more frequently and skillfully to keep his sexual proclivities hidden, and to shield himself from his own self-loathing and the judgment of others. However, it is these very traits which Mr. Scrivens must willingly deconstruct and dismantle if he is to be able to truly engage in and benefit from treatment …. What remains unclear is whether … Mr. Scrivens is able or willing to engage in the long-term, arduous therapeutic endeavour required to refashion these long-cultivated aspects of his character."

4. Risk for Sexual Violence Protocol (RSVP)

[399] Dr. Ennis in 2007 and Dr. Zedkova in the present case used the RSVP in their assessments of Mr. Scrivens.

(a) Nature of the RSVP

[400] The RSVP is a risk assessment tool that does not generate a statistical estimate of risk of sexual offending but provides a framework to form a structured professional judgment regarding future risk for sexual violence and risk management: TVDM6,13.25-31. It identifies risk factors linked to recidivism and provides for the rating of 22 risk factors, rated present, possibly present, or absent: ZR at 38; ZM4, 59.27-40; E27, 21.12-21. The RSVP ratings are not summed to provide a total score.

[401] The risk factors set out in the RSVP are derived from meta-analyses of the literature. They are factors that the literature indicates have been correlated with offending, factors that "the literature says are important to consider:" E27, 15-27-16.5; E27, 21.12-21.

(b) Assessment

[402] RSVP risk factors fall within 5 categories, Sexual Violence History, Psychological Adjustment, Mental Disorder, Social Adjustment, and Manageability.

(i) Sexual Violence History

[403] This set of risk factors includes chronicity (persistence, long duration) of sexual violence, diversity of sexual violence, and escalation of sexual violence. The RSVP does not include child pornography offences as sexual violence: ZM5, 36-37; ZM4, 2.41, 3. The violence of Mr. Scrivens' conduct escalated with the predicate offence. Mr. Scrivens has shown some diversity in his victims. History is a strong predictor of future behaviour: ER at 14; E28, 18.31-37.

(ii) Psychological Adjustment

[404] This set of risk factors includes extreme minimization of sexual violence, attitudes that support or condone sexual violence, problems with self-awareness, and problems with stress and coping.

[405] Dr. Zedkova considered this set of risk factors problematic for Mr. Scrivens, because of his lack of empathy, minimization or denial of harm of sexual contact (its impact on 14 year old females), and cognitive distortions.

[406] As regards cognitive distortions, Dr. Ennis referred to Mr. Scrivens' claims (in 2007) that he did not believe that accessing child pornography results in tangible harm to the children depicted: "If I don't hurt anyone, I don't have a problem with it:" ER at 14. Dr. Ennis also referred to Mr. Scrivens having denied or minimized the abusive elements of his sexual offence conviction, as he insisted it was consensual. Mr. Scrivens failed to recognize the cognitive and emotional immaturity of children and young adolescents.

[407] Dr. Ennis distinguished and stated that the RSVP distinguished between minimization or denial that amounted to *post hoc* excuse or justification (accepting behaviour but diluting responsibility) and attitudes or beliefs that support sexual offending: E27, 91.31-41. Dr. Ennis testified that these beliefs are more stable than the *post hoc* rationalizations and "direct behaviour and are associated with behaviour:" E27, 26.2-25, .30-27.5. To provide an example, Dr. Ennis testified that Mr. Scrivens told him ("said at one point to me") that (E27, 26.2-25):

> one day, child pornography could be legalized because he thought it was a positive thing for people like himself who had deviant sexual interests, but it would reduce their likelihood of committing real harm - air quotes around real harm …. So that would have been, in my estimation, sort of a more concrete set of beliefs that he had, that viewing child pornography is not harmful to the child because he's not touching the child, or, at least, if harm is caused to the child, it wasn't caused by him.

Dr. Ennis testified that "[a]ttitudes are harder to change, particularly in the absence of … emotional depth or guilt … [if offenders] are very self-centred, and they aren't, frankly, all that interested in other people or not that capable of empathy, putting themselves in the victim's shoes, it's not going to be very persuasive:" E27, 27.9-31.

[408] Dr. Ennis continued (E27, 27.9-31):

> Now, I will say, in Mr. Scrivens's case, as I recall, he made some statements indicating that he had his own sort of bright lines around behaviour with children that he thought were unacceptable, that children were not naturally inclined to engaging in sexual intercourse, for example; therefore, he didn't find that to be permissible to engage in those behaviours with children; however, he thought it was permissible to engage in oral sex or fondling and those sort of things. So he had his own subjective morality and self-professed objective morality that he lived by, his own view of the world. So it would be difficult for someone who's got a - what seems to be a relatively entrenched belief system about what is and isn't permissible and his belief of what's permissible falling on the wrong side of what is legal to change that, and more concerning when you don't have somebody who is particularly empathetic.

[409] Dr. Ennis also commented that Mr. Scrivens had poor self-awareness respecting his potential for future sexual offending and respecting factors that put him at risk of offending. He had limited insight into the dynamics of sexual behaviour, and he had overly simplistic, ineffective plans for managing his behaviour.

(iii) Mental Disorder

[410] Mr. Scrivens is sexually deviant. However, he is not a psychopath. He has no major mental disorders. He has no substance abuse issues: See ZR at 39; ER at 15.

[411] He did not meet criteria for diagnosis of a mental illness or mood disorder: VDR at 60.

(iv) Social Adjustment

[412] Mr. Scrivens had problems with relationships with adults: ZR at 39; ER at 15. His marriage was an exception. He has had few friends. The problems lead to loneliness, isolation, and boredom. These states lead to increased sexual preoccupation and the development of fantasies as a form of self-soothing: ZR at 39; ER at 15. Dr. Zedkova noted that large-scale studies had found a deficit in intimate relationships with adults as a defined criminogenic factor for sexual re-offending: ZM4.11, 39-40; CF20, 42.17-28.

[413] Dr. Ennis commented in his testimony that Mr. Scrivens has found the real world challenging. It inflicts injuries on his narcissistic, inflated but false sense of self. His remedy lay not in only fantasies but in behaviours: E27, 31.36-41; 32.2-14.

(v) Manageability

[414] The manageability category includes risk factors concerning problems with planning, treatment, and supervision. Dr. Zedkova commented that "[d]espite individual counselling and over five years of sex offender programming, it appears that Mr. Scrivens' idea of self-risk management has not changed significantly:" ZR at 39. Dr. Zedkova confirmed that Mr. Scrivens' self-management focuses on avoidance of children and fear of punishment. He has no internal motivation to take sex drive reducing medications. He has had difficulties building rapport with treatment providers and in committing to making changes.

[415] Dr. Ennis confirmed that Mr. Scrivens' plans to manage his own risk have been poorly conceived and inadequate. He has poor motivation for treatment and has shown unwillingness to address treatment issues. He has failed to benefit from past treatment experiences: ER at 15. He

has never completed community supervision or probation without incurring a new charge: ER at 16. Dr. Ennis observed that Mr. Scrivens' offence history "is characterized by planned, organized, deliberate behaviours aimed at achieving his offence goals and avoiding detection. His criminal behaviours have rarely been impulsive:" ER at 15.

[416] Dr. Ennis testified as follows (E27, 33.13-25):

> So where Mr. Scrivens has adapted his behaviour in the past, there's been little evidence, based on my review at the time, that he has adapted his behaviour in the service of not committing future offences. He has adapted his behaviour in the service of not being detected for new offences or engaging in behaviour that somehow meets his need by proxy, by getting himself into a relationship with somebody who is not technically underage but is as close to it as he could get, or he's not allowed to look at pornography on a computer, so he'll drill a hole in a change room wall in order to continue to indulge his wants without the consequence associated with it. So in my estimation, he's a very deliberate actor. The things that we would typically do in terms of manageability are not likely to be successful for him except to the extent that they are focused on enhancing detection, catching him when he does the thing that he's not supposed to do, rather than creating limitations that will aid him in his efforts not to engage in future offending.

Dr. Ennis's opinion based on the RSVP tool was "consistent with the risk ranking provided by the STATIC-99, that he is a high-risk individual and requires high-level intervention:" E27, 36.39-40.

5. Risk Assessment

[417] Dr. Ennis explained that two methodologies are accepted in risk assessment. "One is known as actuarial assessment, and one is known as structured professional judgment:" E27, 15.27-16.5.

[418] Both historic or "static" (unchangeable) factors and potentially changeable or "dynamic" factors should be considered in the assessment of risk. According to Dr. Van Domselaar, "[s]tatic risk factors provide an anchoring platform from which an individual can be compared with others of a broadly similar group, whereas dynamic risk factors speak to those circumstances and conditions which are more individualized, and which are still potentially subject to change:" VDR at 47. Dr. Choy commented that static variables provide a better foundation for estimating risk over period of years. For estimating risk over periods of weeks to months, dynamic variables are useful: C21.14.1-15.20. Dynamic factors elevate or lower risk. Dynamic factors are often targets of treatment: CF21, 24.1-2.

[419] The historical or static variable risk assessment tool relied on both in the 2007 and the current assessments was the STATIC 99 or STATIC-99R. The dynamic variable risk assessment tools used by the expert witnesses were the STABLE-2007 and the Risk for Sexual Violence Protocol.

[420] These tools, though, do not permit the actuarial assessment of the risk of committing contact sexual offences as opposed to non-contact sexual offences as opposed to breaches of conditions that may relate to proscribed sexual conduct: E28, 3.16-19; E27, 53-4; ER at 28, 6.

6. STATIC-99R

(a) Nature of the STATIC-99R

[421] The STATIC-99 and the STATIC-99R (i.e., "revised") are "actuarial measure[s] of relative risk for sexual offence recidivism:" VDR at 47. The STATIC-99R is a widely used and accepted risk assessment tool: ZR at 37. The STATIC-99R is intended to position offenders in terms of their relative degree of risk for sexual recidivism based on commonly available demographic and criminal history information found to correlate with sexual recidivism in adult male sex offenders.

[422] The STATIC-99R is used for adult males charged with or convicted of at least one sexual offence against a child or non-consenting adult.

[423] The tool is based on ten static or unchangeable (with one exception) items, demographic and criminal history information that has been found to correlate by research with sexual recidivism in adult male sex offenders. The items are added together to create a total score: ER at 13; TVD6, 11.17-18.

[424] The only variable subject to change in a risk-mitigation direction is an offender's increasing age. A score deduction occurs at age 40 and another deduction occurs at age 60.

[425] The STATIC-99R has shown "moderate accuracy in ranking offenders according to their relative risk for sexual recidivism:" VDR at 47.

[426] The STATIC-99R does not predict whether a particular offender will offend. Rather, the offender's score is compared to the scores of a standardized sample of sex offenders. Data on sexual recidivism was gathered from 8106 sex offenders across 23 samples, from Canada, the United States, the United Kingdom, Austria, Denmark, Germany, Sweden, and New Zealand.

[427] The risk measured by the STATIC-99R is the risk of re-offence by members of the "norm" or comparator group of offenders with scores matching the scores of the offender. As Dr. Choy put this point, "[t]he statistics don't tell us about the individual. It tells us about groups of individuals:" CF21, 16.39-17.13. Dr. Van Domselaar explained that "if we take 100 individuals with similar risk levels, the percentage indicates how many of that 100 would be likely to … be charged with a new sexual offence:" TVDM6, 27.13.

[428] The STATIC-99R best serves as a measure of the comparative likelihood of re-offence by offenders sharing one score as compared to offenders sharing another score, that is, the measure of relative risk compared to the total norm group. As Dr. Ennis put this (E27, 15.27-16.5),

> So we can look at a score of 6 on the STATIC-99 and then associate it with what we know about thousands of offenders, other offenders with a score of 6. Over a five- or ten-year period, how many of them went on to get a new charge or a new conviction for a sexual crime?

[429] STATIC-99R scores are described by five risk categories – Very Low risk (scores of -3 to -2), Below Average Risk (scores of -1 to 0), Average risk (scores of 1-3), Above Average risk (scores of 4-5) and Well Above Average risk (scores of 6 and over). Research determines the percentage of offenders within risk categories who re-offend over a specified period ("determines" rather than "determined" since data continues to be generated for analysis). Hence, a score and ranking associate an offender with a group whose members have a percentage chance

of re-offending within a particular period: E27, 15.27-16.5. Dr. Van Domselaar testified that (TVDM6, 5.7-6.17)

> So people with a 6 are more likely to re-offend than people with a 4 who are more likely to re-offend than people with a 2 and so on down the line. And the ranking of where they sit in the overall distribution, whether they're at the 90th percentile versus the 50th percentile, regardless of whether the 30 percent estimate holds true in the different samples, the ranking is robust and seems to travel pretty well from sample to sample and study to study to study.

The STATIC-99R predicts moderately well respecting comparative rankings, but less well respecting the numerical value of the percentage likelihood of reoffending: TVDM6, 26.1-9. The percentage relating to the likelihood of reoffending is less robust, because the sample against which ranking is judged changes over time.

[430] The risk of re-offending includes any sexual offence, whether contact, non-contact (child pornography possession), voyeurism, or breach of condition: E28, 3.1-3.

[431] While the research shows that recidivism drops on a curve, particularly from age 40 to age 60, the STATIC-99R scoring for age moves in steps once age milestones are reached. The age scoring does not, for example, decline to track annual aging between 41 and 59.

[432] Since the factors considered are static, aside from age, the tool does not speak to what will occur, to what may change. The STATIC-99R speaks to likelihood, but not to why offences occur or to the circumstances that support the greatest concern for reoffending: E27.32-33. Put another way, while the STATIC-99R predicts, it does not give treatment targets: TVDM6, 26.19; ZM1, 81.20-25.

(b) Assessment

[433] In their 2007 STATIC-99 assessments of Mr. Scrivens, both Dr. Choy and Dr. Ennis scored Mr. Scrivens at 6. This put him in the highest comparative category for re-offending. His score put him in the "High Risk" category. While higher scores do fall within this category, the distinctions in elevated risk between a score of 6 or 8 or 9 is negligible: CR at 19; CF21, 21.11-13; CF21, 22.10-12, 21.20-21, 19.39-40; ER at 13. Mr. Scrivens had a 39% chance of sexual reconviction over 5 years post-incarceration, 45% over 10 years, and 52% over 15 years: CR at 19; CF21, 22.

[434] In their STATIC-99R assessments of Mr. Scrivens, each of Dr. Van Domselaar and Dr. Zedkova scored Mr. Scrivens at 5. He was at Above Average risk for being charged with or convicted of another sexual offence, the second highest out of five risk categories: ZR at 37; VDR at 48. Dr. Van Domselaar stated that a more typical sexual offender would have a score of 2: TVDM6, 26.33-34. This put him at the 88.7th percentile compared to other Canadian adult male sex offenders in the standardization sample: VDR at 48; ZR at 38. "On average, offenders with this total score of 5 have a sexual recidivism rate almost three (2.7) times the rate of a typical sex offender." Of offenders in the same standardization sample in the same risk category, 15.2% reoffended in a sexual manner within 5 years of opportunity.

[435] The reason for Mr. Scrivens not being in the highest risk category was that he reached age 40: ZR at 38. The next diminution of risk for age will occur at age 60.

7. STABLE-2007

(a) Nature of the STABLE-2007

[436] The STABLE-2007 was developed to assess change in intermediate-term risk status, to assess treatment needs, and to predict recidivism in sexual offenders. When combined with static risk measures, creating a composite assessment of risks and needs, it enhances the prediction of sexual recidivism.

[437] The STABLE-2007 measures empirical risk factors, 13 items, routinely addressed as part of correctional rehabilitation (criminogenic needs), for adult males convicted of sexual offences against a child or non-consenting adult. The results per item are added to create a score.

[438] The offender's score is set against the like score from a sample of sex offenders in Canada and some US States.

[439] The STABLE-2007 is not an actuarial tool; neither is it a structured professional judgment tool. Rather, it is an assessment tool that uses dynamic factors, risk factors that are changeable going forward: ZM4, 61.29-30; .33-34; TVDM6, 11.19-20.

[440] The STABLE-2007 tool is designed to be used with the STATIC-99R. The reason for their complementary use is that combining static, historical risk factors with assessments of dynamic, changeable risk factors produces a more accurate measure of a person's individual risk for recidivism: TVDM6, 11.26-32; 23.15-20 55.14; TVDM8, 13.38-41.

[441] Because dynamic factors are measured, the STABLE-2007 permits reassessment year by year. A trend may be detected in assessments.

[442] Further, because dynamic factors are assessed, the tool is useful in identifying needs and treatment targets. Dr. Van Domselaar emphasised that needs identified through a STABLE-2007 assessment are not necessarily not treatable. The needs point to treatment targets, not to concerns that can't be fixed: TVDM8, 14.18-20.

(b) Assessment

[443] Dr. Van Domselaar scored Mr. Scrivens at 19 out of 26 points on the STABLE-2007. This score was in the High range of dynamic criminogenic needs. Mr. Scrivens had "a lot of dynamic risks," "many treatment needs," that contributed to his overall risk profile: TVD March 6, 33.15-16; 52.35-37.

[444] Under the STABLE-2007, Mr. Scrivens showed seven areas of "significant concern" (score of 2 out of 2) (VDR at 49-50; TVDM6, 33.31-40, 35.6-41, 36.22-37.26, 37.32-40, 38.19-34, 47.8-22):

- General Social Rejection – few emotional connections to others; a persistent and pervasive sense of loneliness.
- Impulsivity – e.g. regarding finances and work; acting without a lot of forethought – relates to treatment, since impulsivity impedes planning, problem solving, and consideration of consequences.
- Negative Emotionality – accumulates resentments and grievances, often disproportionate; externalizes blame; has rebuffed coping or behaviour change strategies; has refused to

deal with some treatment professionals because of feeling wronged, mistreated, misunderstood – "This tendency has been, and continues to be, a significant barrier for Mr. Scrivens in terms of his ability to benefit from various forms of treatment or supervision:" VDR at 49.

- Sex Drive/Sex Preoccupation – high sex drive and persistent sexual preoccupation, past and present.
- Sex as Coping – sexual conduct is the default means of coping with distressing emotions – raises likelihood of engaging in sexual conduct.
- Deviant Sexual Preference – Mr. Scrivens meets diagnostic criteria for Pedophilic Disorder, non-exclusive, with a strong preference for pre-pubescent female children.
- Cooperation with Supervision – there have been periods of genuine cooperation; in other periods Mr. Scrivens' engagement has been superficial only, "including the months leading up to the index offences, where Mr. Scrivens was markedly duplicitous, leading a parallel existence with the victim and her family that was completely unknown to other significant persons in Mr. Scrivens' life;" surface compliance has masked covert non-compliance.

[445] Five areas of criminogenic need were identified as being of "some concern" (scores of 1 out of 2): VDR at 50-51. These were areas for which work needs to be done but these areas were lower priorities (TVDM6, 48.21-36):

- dearth of Significant Social Influences – present social network is essentially non-existent
- Capacity for Relationship Stability
- Emotional Identification with Children
- Hostility toward Women
- Lack of Concern for Others

[446] With respect to Mr. Scrivens' capacity for empathy, Dr. Zedkova testified that he had made progress over time: ZM5, 56.33-35. She did not believe that he is genuinely empathetic but she did believe that he is making an effort to work on being more empathetic. She believes he has made some progress: ZM5, 57.18-19; ZM4, 7.8. She testified that Mr. Scrivens told her that "no one taught him empathy, that he had to learn it himself, that it is difficult for him. He teared up. I saw it at that moment as genuine:" ZM4, 7.9-10.

[447] There were no concerns in the area of Poor Problem Solving Skills. Dr. Van Domselaar observed that "Mr. Scrivens' cognitive capacity is such that, in areas other than his offending behaviour, he is more than capable of being able to identify problems, determine a path to solving them, and in evaluating the outcome of his actions:" VDR at 51.

(c) Composite Assessment

[448] Combined with Mr. Scrivens' Moderate High scoring on the STATIC-99R, his composite assessment placed him in the High priority category for supervision and intervention in comparison to other sexual offenders assessed using these measures. Dr. Van Domselaar wrote that

> Based on empirically derived estimates, men with the same risk profile as Mr. Scrivens have been found to recidivate sexually (including sexually-related non-compliance offences) at a rate of 25.5% within three years of opportunity (95% confidence interval between 15% to 36%), and a rate of 28.9% within five years of opportunity (95% confidence interval [between] 17.9% and 40%): VDR at 49, 61.

[449] The "confidence interval" is the range within which assessors can be confident that the true recidivism rate lies: TVD6, 57.10-28. The recidivism rate could fall at the lower end of the range as easily as at the higher end of the range: TVDM7, 46.39-40.

8. Prospects for Treatment

(a) History of Treatment Generally

[450] Dr. Ennis testified that (E28, 18.31-7):

> history is the best predictor of future behaviour inclusive of intervention. So if somebody has had interventions and they've been ineffective, then the default expectation going forward would be that interventions are ineffective. Now, again, that's a broad statement. Interventions are not all created equal, but that is - that is part of the historical record, and the historical predictive - predictive factors would be how well has an individual responded to interventions in the past, and interventions are both treatment and supervision.

Dr. Choy commented that (CF21, 25.5-17):

> in the worst case scenario, we have individuals who have treatment in the past, and they refuse to accept, you know, what's offered to them in treatment and make changes to their life. Best case scenario, and fairly common, actually, is that individuals sometimes need multiple passes at treatment. You don't pick up everything first time around. And the other issue is that change, as we understand how people change, it's not an immediate thing. People go through different stages of change. They may move forward a couple steps, fall back a couple of steps, so it's a process to change. And so prior treatment is encapsulated in our larger understanding of what the appropriate interventions are going forward, keeping in mind, you know, prior treatment successes and failures and where there might be a long stage of – of change.

[451] Dr. Choy acknowledged that Mr. Scrivens did make some progress in his treatment (C21,74.4-11):

> So if we - if we categorize … an individual as - at the furthest end of the scale, being in complete denial of there being a problem, we can see that there has been some movement from that point?
>
> A Yes.
>
> Q Certainly, there's acceptance of the fact that there is a problem, and there's also some work towards the base layers of starting to change?
>
> A Yes.

(b) Pedophilia

[452] Dr. Ennis testified that (E27, 29.31-39) that

> [W]hen we talk about sexual deviance and prescribing medication to suppress libido, that is dialing back the degree to which the individual is preoccupied with it, but we do not have any evidence as a field that you can alter somebody's sexual interests in terms of who they are attracted to or even the type of behaviour that they're interested in engaging in. So that's something we're not going to cure. That's something that needs to be managed - accepted and managed going forward.

Mr. Scrivens' high sex drive won't be turned down completely by medication. He needs to learn how to manage the residual drive.

(c) Personality Challenges

[453] Some of Mr. Scrivens' personality traits identified in his STABLE-2007 assessment by Dr. Van Domselaar, in his PCL-R assessments, and in his psychological testing by Dr. Van Domselaar would impede treatment. His impulsivity would adversely affect his planning, problem solving, and consideration of consequences. His negative emotionality, particularly his resistance to some treatment professionals, has been, and continues to be, a significant barrier for Mr. Scrivens in terms of his ability to benefit from various forms of treatment or supervision: VDR at 49. As for Mr. Scrivens' overt compliance with supervision masking covert non-compliance, Dr. Van Domselaar's view was that "Mr Scrivens' capacity for long-term duplicity and surreptitiousness is a significant barrier for him, and one which must undergo radical change if he is to make any gains in reducing his risk of reoffending."

[454] Dr. Van Domselaar's opinion was that Mr. Scrivens'

> dynamic criminogenic needs do have the potential for reduction … provided he takes the necessary steps to address these many needs in an effortful and diligent manner – through full and genuine engagement in the required institutional and community treatment programs, and through open, transparent and complete cooperation with his institutional and community supervisors …. [I]t is possible that over time his level of risk could eventually become rated as being in the Moderate -High category [on the STABLE-2007]: VDR at 51, 61-2.

[455] Dr. Van Domselaar wrote that

> In sum, the combination of Mr. Scrivens' considerable intellect and his narcissistic, anti-authoritarian and oppositional personal features have coalesced into an individual disinclined to ask for assistance when he most needs it, and disinclined to take direction from others whom he has dismissed as having anything worthwhile to offer. In so doing he has failed to benefit from opportunities afforded him thus far, and has been able to project blame for this onto certain treatment and supervision providers, and onto society in general: VD at 46, 60.

[456] Dr. Van Domselaar also commented on the dichotomy that has marked Mr. Scrivens' life – his sexual attraction to children and his resultant self-loathing, "rendering him perpetually at odds with himself and society. He is deeply divided, an interpersonal schism which has

manifested … in Mr. Scrivens' practiced ability to live parallel lives, both … within his own mind and … in how he has structured his employment, accommodations, and interpersonal relationships:" VDR at 59. His ability has helped him avoid detection but "simultaneously serves only to deepen his self-loathing, while keeping him from the very supports [he needs]:" VDR at 59.

(d) Conclusions about Mr. Scrivens' Risk

[457] Dr. Ennis testified that (E27, 58.6-10)

> Well, the … big three factors for him - which are sexual deviance, his attitudes about sex offending, and his general self-centredness - those are the primary issues that I would identify as concerns for his risk, and they're all things that I would expect to be - not untreatable, but things that are going to be slow to change.

Dr. Zedkova identified the same "big three factors" as bearing on Mr. Scrivens' risk: ZM4, 16.6-10.

[458] Respecting "self-centredness," Dr. Van Domselaar found that Mr. Scrivens exhibits

- Narcissistic traits – a sense of self-importance, entitlement, specialness/uniqueness, a tendency to haughtiness and arrogance – which should be understood as a means of defending against self-loathing and "overwhelming dismay:" VDR at 60-61. Dr. Van Domselaar said that "[d]ismantling this entrenched and self-reinforcing pattern is possible, but it will be a most prolonged and arduous task," for Mr. Scrivens and his treatment and supervision providers.
- Antisocial traits – including his use of deceit; and also impulsivity and on occasion aggressiveness.
- Borderline traits – an unstable sense of self: VDR at 60-61.

[459] It is not that treatment is impossible for Mr. Scrivens, given his deviance and his personality and including the defects of will that he has exhibited; but treatment is difficult: TVDM7, 126.20-21, .23-40.

[460] Dr. Van Domselaar accepted that "extreme therapy," "something that was not normally offered" would not be required for Mr. Scrivens. Rather, "the diligent application of the proper intensity and forms of treatment that exist now would go a long way:" TVDM8, 23.20-23. Dr. Van Domselaar wrote that "it is possible for Mr. Scrivens to make additional incremental gains with respect to addressing his treatment needs and reducing his offense risk:" VDR at 62.

[461] Like Dr. Ennis, Dr.Van Domselaar did not forecast rapid progression in treatment by Mr. Scrivens. Prediction of the rate of transformation is difficult until actual gains are observed. She was of the view, though, that Mr. Scrivens' gains would be "incremental," slow small steps over time: TVDM7, 12.12-13; TVDM8, 8.37-41; 12.19-36.

[462] Dr. Van Domselaar, joined by Dr. Zedkova, offered recommendations for institutionally-based treatment for Mr. Scrivens and community-based treatment and supervision. Dr. Van Domselaar made recommendations for the approaches to Mr. Scrivens that should be taken by

treatment and supervisory personnel, to ensure that interventions are compatible with Mr. Scrivens' personality traits.

[463] A further factor, perhaps implicit in the three identified, but worth breaking out on its own, concerns Mr. Scrivens' will. By that I mean his willingness to change, his willingness to engage in treatment, his willingness to do the hard work of developing a self-management plan, his willingness to work on changing the errors of his thinking: CR at 20, 22; CF 21, 24.30-33. This factor concerns Mr. Scrivens' "internal motivation:" E27.55.3-16.

[464] Dr. Van Domselaar was very clear that Mr. Scrivens must invest "way more effort" than he has in the past: TVDM8, 22.40-41. What is required of him is genuine, transparent, effortful engagement; a willingness to work with people rather than against them: TVDM7, 11.33-40.

[465] Lack of motivation or will is not a risk factor identified in the literature: E27.58-14.36; ZM5, 82.18-26. Further, motivation or engagement exists on a continuum, as Dr. Ennis explained (a person may have little or a lot of motivation). But without some significant dedication, Mr. Scrivens would not significantly benefit from treatment.

[466] Dr. Van Domselaar emphasized and confirmed that "the ultimate responsibility to participate fully in treatment lies squarely with Mr. Scrivens:" VDR at 65. What is required is his "genuine, transparent, consistent, long-term engagement in his treatment and supervision;" his "full, true and profound effort towards his own personal and characterological transformation:" VDR at 66. This will be "the most arduous undertaking that Mr. Scrivens has faced in his life:" VDR at 66.

E. Threat Assessment

[467] The question that began this section was whether the Crown has established, beyond a reasonable doubt, on the basis of the evidence establishing the pattern of conduct (under either of ss. 753(1)(a)(i) or (ii)), that Mr. Scrivens constitutes a threat to the life, safety or physical or mental well-being of other persons.

1. Threat is Not Established

[468] Mr. Scrivens argues that the evidence fails to establish that he constitutes a threat as required by s. 753(1)(a). He is neither likely to re-offend by committing an offence that will harm the life, safety, or physical or mental well-being of another nor can his condition, given all the evidence, be found to be "intractable." His argument begins, as s. 753(1)(a) dictates, with his pattern of conduct.

(a) Likelihood of Requisite Re-Offending

[469] Mr. Scrivens' offence history is relatively short compared with the offence history of many other individuals who come before criminal courts.

[470] Long intervals occurred between contact offences – 1997, 2002, 2015. These are significant gaps. Mr. Scrivens did fail to curb his behaviour when he offended, but he did control his behaviour over years between offences. He did commit the child pornography offences and the voyeurism offence in the intervals, but none of these offences involved actual contact with any person, let alone with a child.

[471] Mr. Scrivens, it should be acknowledged, had been in a common law relationship that led to marriage and two children. In addition to the social stability and capacity for social stability that this relationship demonstrated, there was absolutely no evidence that Mr. Scrivens did anything at all that was in any way improper with his first-born child. He has had no contact with his second child.

[472] The predicate offence was unique and occurred in unique circumstances. Never before had Mr. Scrivens touched a child of 6 or of any age under 14.

[473] At the time of this offence, he was going through a difficult period of supervision by the BAU. The conditions imposed on him in connection with the s. 810.1 recognizance were more onerous than the conditions imposed on him during his LTSO. He had been trying to establish social supports with his medieval re-enactment group, but with the transition to a new BAU supervisor, he faced barriers to his participation in this group's activities.

[474] The inception of the circumstances leading to the offence was conduct by JW, Mr. Scrivens' main "prosocial support" – with whom he had been permitted to live by CSC.

[475] While his conduct during his statutory release and LTSO was not part of his pattern of conduct, even when he was suspended or ran afoul of CSC supervision, he did not commit anything like the predicate offence. He was insubordinate, he engaged in what CSC considered risky behaviour, he watched a child when he should not have, but there was no allegation whatsoever that whatever he might have been thinking, he tried to translate his thoughts into action involving a child.

[476] It is true that Dr. Van Domselaar and Dr. Zedkova found Mr. Scrivens' combined STATIC-99R and STABLE-2007 scores to put him at a high risk of reoffending.

[477] No issue was taken with the confidence interval for the prediction of risk, large as that confidence interval is.

[478] The determination of higher risk, though, was not a determination that Mr. Scrivens would commit a contact offence like the predicate offence. Rather, it was only a determination that he would commit *a* sexual offence, whether contact offence, non-contact offence such as possession of child pornography, or a breach of a condition for release in the community. The risk assessment could not point to any elevated likelihood that of the possible offences that could be committed, a contact offence would be the type of offence that would most likely be committed.

(b) Intractability

[479] Mr. Scrivens is a pedophile. That is his condition and his affliction. It is fundamental to his being. It is no more changeable than any other sexual orientation. But as the Court of Appeal warned in ***Neve***, the dangerous offender provisions are designed to capture dangerous offenders, not dangerous thinkers. "[T]he focus is on actions, not thoughts:" ***Neve*** at para 131.

[480] Again, he has demonstrated control of his conduct in the past.

[481] The expert witnesses confirmed that he suffers from no mental illness. He is not a psychopath, suffering from anti-social personality disorder. His score on the PCL-R, in fact, was lower than the score for most federal offenders. He has no substance abuse problem.

[482] Mr. Scrivens has offended. He has fallen short. But in each case Mr. Scrivens pled guilty to his offences. He consented to the LTSO that was part of his 2007 possession offence. He consented to the s. 810.1 recognizance. He has taken responsibility for his offences.

[483] Neither Dr. Van Domselaar nor Dr. Zedkova suggested that Mr. Scrivens could not be treated. Indeed, both devoted considerable attention to the types of conditions that would have to be met for his treatment. Dr. Jellicoe, I note, was also willing to continue to see Mr. Scrivens even after learning of the predicate offence. She did not consider him a lost cause.

[484] Mr. Scrivens had lengthy exposure to CSC's sexual offender programming. He completed the MISOP at Bowden and in excess of 100 sessions of the SOMP while in the community.

[485] He did not make consistent linear progress. That could not be expected. With the fundamental deeply entrenched condition that he suffered, it was predictable that his progress would be incremental, involving some positive steps forward, followed by regression, followed by recovery and further steps forward. Dr. Choy confirmed that this sort of progress could be expected.

[486] But Mr. Scrivens did make progress. Dr. Zedkova testified that she considered his work towards developing empathy as genuine. Moreover, there was an evolution in Mr. Scrivens' thinking about harm against children. He came to understand that child pornography is not a "victimless" offence. He went from the point of considering it essentially harmless, at least so far as his involvement was concerned, to recognizing the harm that was caused to its subject victims.

[487] Mr. Scrivens' reports of his understanding of the harm to child pornography victims were sometimes described as mere "intellectualization." His emotions did not go with his words. Intellectual understanding, however, is a necessary step in his management of his condition. Mr. Scrivens may have been only at the stage of "intellectualization," but that was still the achievement of the stage of intellectualization. That step does not itself entail successful management of his condition but it is a step on that path.

[488] Whatever Mr. Scrivens' cognitive distortions may have been, he was consistent in not wishing to harm children. His preferred form of child images has been of naked children, not subject to any sort of force.

[489] Mr. Scrivens has at times been resistant to libido-reducing medication, but because of its side effects. He was specifically concerned about the effects of Lupron. Growing breasts and muscle loss are not insignificant side effects. Mr. Scrivens worked cooperatively with Dr. Rodd, who employed a gradual, minimal-effective-dose approach to chemically controlling Mr. Scrivens' sexual drive. Mr. Scrivens has, for the most part, complied with requirements to take libido-reducing medication.

2. Threat is Established

[490] I find, however, on the basis of the evidence of the patterns of conduct I assessed earlier under ss. 753(1)(a)(i) and (ii) that Mr. Scrivens does, beyond a reasonable doubt, constitute a threat to the life, safety or physical or mental well-being of other persons.

(a) Assessments of Arguments for Lack of Threat

[491] There were gaps between Mr. Scrivens' contact offences. But between the contact offences were the voyeurism and child pornography offences. These offences, as I found above, formed a whole, a pattern of offending expressed through varying conduct. I do not consider the predicate offence to have been simply the last of three widely spaced offences, but the last set of offences in a pattern of regularly-occurring offences.

[492] Further, the predicate offence itself involved three incidents of contact with a child. Between these acts there was no significant gap.

[493] The predicate offence was not unique, in that it expressed manifestly and concretely the pattern shared by Mr. Scrivens' contact offences, the voyeurism offence, and the child pornography offences. It was neither his first time touching a minor, nor the first time that the subject of his sexual desire leading to criminal conduct was a child.

[494] Moreover, the predicate offence followed the outline in fantasy that Mr. Scrivens had been articulating since at least his time with Dr. Jung.

[495] Mr. Scrivens' risk factors were boredom, isolation, and loneliness. These are not unique experiences. Regrettably, many suffer these same experiences. Isolation and loneliness, deficits in intimate relations, are consequences of Mr. Scrivens' personality traits, identified by the RSVP, STABLE-2007, and psychological testing.

[496] Mr. Scrivens' descent to the predicate offence was the product of his failure to self-manage, his failure to move beyond simple avoidance strategies. A consistent theme from Dr. Jung, through the MISOP, through the SOMP, was that Mr. Scrivens failed to identify risk or to develop ways to manage risk as it arose.

[497] Mr. Scrivens did make progress in his views about the harm of child pornography. He did not progress to the point, though, of recognizing the harm inherent in viewing naked children for sexual purposes, as opposed to harms caused in producing child pornography. Neither did he recognize the risk that if he viewed children, his sexual drive would impel him toward acting to touch children.

[498] A feature of Mr. Scrivens' sexuality was that innocent and normal presentations of children had for him a sexual fascination. Hence the reference by, for example, Ms. Suton to the "erotic indicative material" used by Mr. Scrivens. The conduct that led to some (but not all) of Mr. Scrivens' difficulties while on statutory release or the LTSO is evidence of Mr. Scrivens' sexualization of the normal – most prominently, his watching of the child who visited 101st Street, and his possession of a Hannah Montana CD and his use of the Jon & Kate plus 8 DVDs.

[499] Mr. Scrivens was confronted by the conditions of the 810.1 recognizance and the strict and relatively rigid approach sometimes adopted by BAU members. I concede that Mr. Scrivens' liberty was substantially constrained. But that was a consequence of his own earlier behaviour. He did not accept that he brought the s. 810.1 recognizance and the BAU into his life. Mr. Scrivens doubtless perceived the conditions and BAU decisions as arbitrary and unfair. He doubtless was frustrated and disappointed. Again, though, there is nothing unique about experiences of arbitrariness and unfairness. This is what life can hold for all of us. Experiences of frustration and disappointment are common.

[500] When predicting risks of sexual violence, the likelihood of the events or circumstances triggering the violence must be considered: see, e.g, ***R v Luedecke***, 2008 ONCA 716, Doherty JA at paras 88, 91, 111. In this case, boredom, isolation, and loneliness; encountering apparently arbitrary and unfair events in life (and reacting with frustration and disappointment); and encountering children are all virtually certain to recur in Mr. Scrivens' life. This reality strongly reinforces the likelihood that Mr. Scrivens would reoffend in the manner of his pattern of offending, particularly through another contact offence with a child.

[501] Further, Mr. Scrivens did commit the predicate offence. While he is not fated to reoffend inevitably, he is now someone who has improperly touched a very young child. This act opened a path to his possible future. This more general point is true of individuals as well:

> It is in the very nature of things human that every act that has once made its appearance and has been recorded in the history of mankind stays with mankind as a potentiality long after its actuality has become a thing of the past …. [O]nce a specific crime has appeared for the first time, its reappearance is more likely than its initial emergence could ever have been: Hannah Arendt, *Eichmann in Jerusalem – A Report on the Banality of Evil* (Markham, Ontario: Penguin Books, 1977) 273.

This claim is not purely notional. Mr. Scrivens did not touch the child once, but twice, then a third time.

[502] Mr. Scrivens took responsibility after his actions were disclosed, but only after his actions were disclosed. He did not turn himself in. He did not reach out to his treatment providers, like Dr. Jellicoe. He did not, as circumstance moved toward the first touching, ask for help. Responsibility arrived but arrived late.

[503] Mr. Scrivens' conduct flew in the face of his avowed concern not to harm children. He was not driven by an irresistible impulse. Mr. Scrivens did not touch his own child. Instead, as Dr. Ennis had observed, he made the choice to surrender to his desire. His offence was a failure of will. It was an act of self-indulgence: E27, 44.26-38.

[504] As for the failure of risk prediction to discriminate between the varieties of sexual offence, whether contact, non-contact, or breach of condition, it is true that there is no elevated likelihood of commission of a contact offence. But it is also true that there is no decreased likelihood of commission of a contact offence as compared with the other types of offence. No particular type of offence is more likely than the other; each is as likely as the other. What is predicted is a likelihood of offending, and included within that prediction is a likelihood of contact offending.

(b) Intractability

[505] The foundation of Mr. Scrivens' risk is his pedophilia. It is intractable in the sense that it is a deeply-seated, long-term if not life-long element of Mr. Scrivens' being.

[506] Mr. Scrivens' risk was rated as high by Dr. Van Domselaar and Dr. Zedkova. His risk had been rated as high in 2007 by Dr. Ennis and Dr. Choy. Nothing occurred in the interval that significantly reduced that risk, save Mr. Scrivens getting older.

[507] Mr. Scrivens has had years of treatment and programming. Ignoring the Terrace, BC sessions, Mr. Scrivens worked with Dr. Jung in 2002-2003. In connection with his possession of child pornography sentence, he completed the MISOP at Bowden, then over 100 sessions of the SOMP while in the community.

[508] Yet he still re-offended. And the predicate offence involved more severe, more blameworthy conduct than his prior offences.

[509] At the time of the predicate offence, he was working with two very capable and client-centred practitioners, Dr. Jellicoe and Dr. Rodd. They were open, non-judgmental, and consultative, the very type of treatment professionals that work best with Mr. Scrivens' set of personality traits and the very type of treatment professionals that he desired to work with. Yet he still re-offended.

(c) Substantial Indifference

[510] It is clear that when Mr. Scrivens committed the contact offences, including the predicate offence, he was substantially indifferent respecting the reasonably foreseeable consequences to his victims. On the evidence, he utterly disregarded the harm he was causing as he committed the acts, the repeated acts, that support the conviction for the predicate offence. Respecting the breach of probation offence and his sexual relations with a 14 year old girl, Mr. Scrivens said "She was FAS …, she was problematic, slower learning … did she have the capacity, probably not, to know and understand;" and he commented, "Was it morally a good decision – no, was it legal – yes:" VDR at 10; ZM1, 50.40-41, 51.1-6. Although the 14-year old was of the age of consent, if Mr. Scrivens did not otherwise recognize the harm caused by an adult having sex with minor, the terms of his probation should have been a sufficient reminder. I find that this "relationship" served Mr. Scrivens' interests and he was indifferent to the harm he was causing the child. Mr. Scrivens originally viewed his 1997 sexual assault conviction as turning on his position of trust or authority. He has also referred to this incident as involving "misconstrued consent." He has come to understand that the touching was probably unwelcome. Yet he did not consider the incident to have been "traumatic" for the victim: ER at 5; VDR at 6; ZM1, 50.16-20. Again, he did not see the harm he caused by an unwelcome sexual touching.

[511] Mr. Scrivens' indifference runs deeper than these particular events. The indifference is founded ultimately in his disordered desire. The disorder has manifested in Mr. Scrivens' long-standing cognitive distortions respecting lack of harm caused by sexual contact with children, older children or younger children. The indifference is supported by Mr. Scrivens' narcissistic personality traits and his lack of empathy. Indifference facilitates gratification.

[512] Contextually, Mr. Scrivens' cognitive distortions respecting the lack of harm caused by child pornography illuminate the wide scope of Mr. Scrivens' indifference.

[513] Mr. Scrivens has made progress in understanding the harm in deviant sexual conduct. He has taken responsibility for his wrongdoing through guilty pleas. He has expressed remorse (to which I will return below). Yet he committed the predicate offence.

[514] More deeply, the indifference issue and what I consider Mr. Scrivens' sincere response to it confirm Dr. Van Domselaar's insight that Mr. Scrivens is "deeply divided;" he is cut through by a "schism" – on one side his sexual attraction to children, on the other his resultant self-loathing: VDR at 59.

[515] Mr. Scrivens, or part of Mr. Scrivens, can see, if only belatedly, that he has not stopped himself from doing what he knew he should not do. Remorse comes too late. Until Mr. Scrivens can learn to get ahead of his desire, to attend to risk and to manage his risk, he will act with indifference.

[516] Mr. Scrivens is not utterly indifferent to the consequences of his behaviour on children. On the evidence as it is now, I find, beyond a reasonable doubt, that his pattern of persistent aggressive behaviour has however shown a substantial degree of indifference respecting the reasonably foreseeable consequences to children of his sexual conduct.

(d) Conclusion

[517] Based on the evidence of his pattern of conduct under ss. 753(1)(a)(i) and (ii) and the evidence contextualizing that conduct, the expert evidence and the historical evidence, I find, beyond a reasonable doubt, that Mr. Scrivens constitutes a threat to the life, safety or physical or mental well-being of other persons under s. 753(1)(a).

[518] I therefore find Mr. Scrivens to be a dangerous offender.

VIII. Sentence

[519] I arrive at the third main question: If the Crown has established both pattern of conduct and threat, am I satisfied by the evidence adduced in the hearing that a lesser measure than indeterminate detention in a penitentiary will adequately protect the public against the commission of a serious personal injury offence by Mr. Scrivens?

[520] The designation of Mr. Scrivens as a dangerous offender does not determine his sentence. His sentence must be determined under ss. 753(4) and (4.1) and the general sentencing provisions of the *Criminal Code*. I shall consider the principles governing dangerous offender sentencing, the steps of sentencing analysis, and whether a sentence other than indeterminate detention will adequately protect the public.

A. Principles Governing Dangerous Offender Sentencing

[521] Subsections 753(4) and (4.1) provide as follows:

> 753(4) If the court finds an offender to be a dangerous offender, it shall
>
> (a) impose a sentence of detention in a penitentiary for an indeterminate period;
>
> (b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
>
> (c) impose a sentence for the offence for which the offender has been convicted.
>
> (4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c)

will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

1. Dangerous Offender Proceedings are Sentencing Proceedings

[522] Dangerous offender proceedings are sentencing proceedings. In ***Boutilier*** at para 53, Justice Côté confirmed that

> [53] This Court has consistently affirmed that dangerous offender proceedings are sentencing proceedings: ***R. v. Steele*** … at para. 40; ***Jones***, at pp. 279-80 and 294-95; ***Lyons***, at p. 350. Accordingly, a sentencing judge in a dangerous offender proceeding must apply the sentencing principles and mandatory guidelines outlined in ss. 718 to 718.2: ***R. v. Johnson***, 2003 SCC 46, [2003] 2 S.C.R. 357, at para. 23; Neuberger, at p. 3-4. These sections of the *Criminal Code* set out the purpose and objectives of sentencing (s. 718), the fundamental principle of proportionality (s. 718.1) — "the *sine qua non* of a just sanction" (***R. v. Ipeelee***, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37) — and the other sentencing principles that a court "shall" consider before imposing any sentence on an offender (s. 718.2) ….

[523] Factors relevant in conventional sentencing are relevant to determine the appropriate sentence under ss. 753(4) and (4.1). Justice Côté wrote in ***Boutilier*** para 63:

> [63] For all these reasons, an offender's moral culpability, the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders are each part of the sentencing process under the dangerous offender scheme. Each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public ….

2. No Presumption

[524] Justice Côté confirmed in ***Boutilier*** that s. 753(4.1) does not establish a presumption and does not impose a burden on an offender to demonstrate a "reasonable expectation" that a lesser sentence than indeterminate detention will adequately protect the public: at para 64. Justice Côté wrote at para 65 that

> [65] Section 753(4.1) guides the discretion of the judge, who ultimately must determine the fittest sentence in a given case based on the evidence adduced during the sentencing hearing. This Court in ***Johnson*** stated that the "sentencing judge should declare the offender dangerous and impose an indeterminate period of detention if, and only if, an indeterminate sentence is the least restrictive means by which to reduce the public threat posed by the offender to an acceptable level": para. 44. Again, s. 753(4.1) is simply a codification of the exercise of discretion required by ***Johnson*** in light of the regime's general purpose of public protection in dealing with offenders presenting a very high likelihood of harmful recidivism.

And at para 68:

> [68] Under s. 753(4.1), the sentencing judge is under the obligation to conduct a "thorough inquiry" into the possibility of control in the community: ***Johnson***, at para. 50. The judge considers all the evidence presented during the hearing in order to determine the fittest sentence for the offender:

> The judge should . . . take into account all the evidence available before making a determination, which will inevitably require a thorough investigation. Once such an investigation has been conducted, it will be up to the judge to determine the sentence; there is no obligation on any of the parties to prove on any standard the adequate sentence one way or another.

(Neuberger, at p. 4-4.1; see also p. 10-10.)

3. Indeterminate Detention is the Last Option

[525] Indeterminate detention is the last option: ***Boutilier*** at para 69. "The sentencing judge must impose the least intrusive sentence required to achieve the primary purpose of the scheme:" ***Boutilier*** at para 60. At para 57, Justice Côté wrote

> [57] It follows that, if the goal of public protection could be achieved in a given case without imposing indeterminate detention, a dangerous offender provision requiring a sentencing judge to declare an offender dangerous and then sentence him or her to an indeterminate period of detention would "overshoot the public protection purpose of the dangerous offender regime": ***Johnson***, at para. 20. This accords with the principle in s. 718.2(d) that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" ….

See also ***R v Cosman***, 2018 ABCA 388 at para 43.

4. Reasonable Expectation

[526] Subsection 753(4.1) turns on whether where is a "reasonable expectation" that a lesser measure than indeterminate detention will "adequately protect the public against the commission by the offender of … a serious personal injury offence."

[527] A "reasonable expectation" is not merely a "reasonable possibility" or a hope or a chance. In ***R v Lawrence***, 2019 BCCA 291, Justice Saunders wrote as follows at paras 71 and 72:

> [71] On my reading of the reasons for sentence, the judge did not err in his understanding of s. 753(4.1) I do not read Justice Côté 's statement in ***Boutilier*** that the 2008 legislative changes codified ***Johnson***, as meaning that the new words in s. 753 "reasonable expectation" are synonymous with the words "reasonable possibility".
>
> [72] This court considered the words "reasonable expectation" in ***D.J.S.***:
>
> > [30] … the dangerous offender sentencing provisions have been amended at ss. 753(4) and (4.1) to permit an indeterminate sentence only where there is a "reasonable expectation" that a lesser measure would adequately protect the public. <u>There is little doubt that</u>, as stated in *R. v. B.A.R.*, 2011 BCSC 1313, <u>this imposes a higher standard than was previously the case in that an "expectation" speaks to a belief that something will happen, as opposed to the mere possibility</u>. (See also *R. v. Osborne*, 2014

> MBCA 73 at paras. 70-73l, with which I respectfully agree.)
> [Emphasis added [in ***Lawrence***].]

See also *R. v. Sanderson*, 2018 MBCA 63 at para. 20.

And see also ***R v Bragg***, 2015 BCCA 498 at para 29.

[528] The BC Court of Appeal has endorsed the account of "reasonable expectation" as "a confident belief, for good and sufficient reasons" to be derived from the quality and cogency of the evidence heard on the application:" ***Bragg*** at para 34.

[529] In ***Bragg*** at para 55, the BC Court of Appeal referred to but did not expressly endorse the trial judge's view that the following must be present to achieve the goal of protecting the public regarding the reduction of risk to an acceptable level:

> (1) there must be evidence of treatability that is more than an expression of hope;
>
> (2) the evidence must indicate that the offender can be treated within a definite period of time; and
>
> (3) the evidence of treatability must be specific to that offender.

B. Stages of Analysis

[530] In ***Boutilier*** at para 70, Justice Côté wrote that

> [70] The framework a sentencing judge should adopt in exercising his or her discretion under s. 753(4.1) has been aptly explained by Justice Tuck-Jackson of the Ontario Court of Justice: *R. v. Crowe*, No. 10-10013990, March 22, 2017. First, if the court is satisfied that a conventional sentence, which may include a period of probation, if available in law, will adequately protect the public against the commission of murder or a serious personal injury offence, then that sentence must be imposed. If the court is not satisfied that this is the case, then it must proceed to a second assessment and determine whether it is satisfied that a conventional sentence of a minimum of 2 years of imprisonment, followed by a long-term supervision order for a period that does not exceed 10 years, will adequately protect the public against the commission by the offender of murder or a serious personal injury offence. If the answer is "yes", then that sentence must be imposed. If the answer is "no", then the court must proceed to the third step and impose a detention in a penitentiary for an indeterminate period of time. Section 753(4.1) reflects the fact that, just as nothing less than a sentence reducing the risk to an acceptable level is required for a dangerous offender, so too is nothing more required.

This approach is consistent with the approach recommended by Justice O'Ferrall in his minority concurring decision in ***Cosman*** at para 54:

> [54] To address what may be viewed as a tension between protecting the public and the principle of restraint which underlies the sentencing options in section 753, the appellant suggested an analytical framework similar to the following for a judge tasked with sentencing a dangerous offender:

> 1. First, ignoring any evidence regarding the offender's risk to the public, determine a fit sentence for this offence, taking into account all aggravating and mitigating factors.
>
> 2. Then consider the offender's dangerousness. Where the evidence indicates that the offender poses a continuing risk to the public (a future threat to public safety), determine whether this evidence dictates that a lengthier determinate sentence would be fit and proportionate for this offender, recognizing his dangerousness.
>
> 3. If a lengthier, determinate term of incarceration is fit for the offender, determine whether this lengthier sentence, either alone or in combination with a long-term supervision order, would adequately protect the public such that an indeterminate sentence would not be necessary.
>
> 4. If this lengthier determinate sentence will not afford an acceptable level of protection, then an indeterminate sentence is the only option.
>
> As an analytical framework, the foregoing may be of some assistance to judges who are called upon to sentence dangerous offenders.

[531] There are two complexities. First, the Tuck-Jackson/O'Ferrall approach involves two sets of assessments, not one. This is made clear in by Justice O'Ferrall's distinction between the first two steps of the analysis. The sentencing assessment must be compared with the protection of the public assessment based on the evidence in the proceedings including, in particular, the expert evidence. The question is whether the sentence, short of an indeterminate sentence, when set against the threat assessment, would adequately protect the public. Second, Justice O'Ferrall's second step, concerning "lengthier" determinate sentences (proportionate to the offender's risk to the public), aligns with the position of Justice Watt in ***R v Spilman***, 2018 ONCA 551 at para 32:

> [32] As I will explain, I am satisfied that in determining the length of the fixed-term custodial component of a composite sentence under s. 753(4)(b), the hearing judge is not restricted to imposing a term of imprisonment that would be appropriate on conviction of the predicate offence but in the absence of a dangerous offender designation. The hearing judge must take into account the statutory limits of the offence for which sentence is being imposed, the paramount purpose of public protection under Part XXIV, and other applicable sentencing principles under ss. 718-718.2. This analysis may justify fixed term sentences lengthier than those appropriate outside the dangerous offender context ….

C. "Conventional" Sentence for the Predicate Offence and Remaining Current Offences

[532] The first stage of the sentencing analysis concerns whether I am satisfied by the evidence that there is a reasonable expectation that a sentence under s. 753(4)(c), a sentence for the the predicate offence ("the offence for which the offender has been convicted") will adequately protect the public against the commission by Mr. Scrivens of a serious personal injury offence.

[533] In addressing this first stage of the sentencing analysis, I am governed by Justice Côté's direction in ***Boutilier*** at para 63 that "an offender's moral culpability, the seriousness of the offence, [and] mitigating factors … are each part of the sentencing process under the dangerous offender scheme."

[534] I have also taken into account Justice Côté's comments at para 55 of ***Boutilier***, re-affirming a fundamental ***Lyons*** point:

> [55] …. [An indeterminate] sentence is not an exception to the principles of sentencing, but rather a sentence mandated by their proper application. As La Forest J. explained in ***Lyons***, preventive detention "represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased": p. 329. To conclude that the objectives of rehabilitation and retribution are trumped by that of prevention in a given case, the sentencing judge must assess the relative importance of the sentencing objectives in that particular case.

1. General Sentencing Principles

[535] Under s. 718, sentences for offences are "to protect society and to contribute … to respect for the law and the maintenance of a just, peaceful and safe society by imposing <u>just sanctions</u> that have one or more of the … objectives [listed in s. 718]."

[536] A just sanction is a proportionate sanction. Proportionality has two dimensions, captured in s. 718.1:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

The "gravity of the offence" concerns what the offender did wrong: ***R v Arcand***, 2010 ABCA 363 at para 57. The degree of responsibility concerns the moral culpability of the offender in committing the offence.

[537] Proportionality requires the court to ensure that the punishment fits the crime. The punishment must be neither excessive nor inadequate.

[538] A proportionality assessment must take into account subordinate principles of proportionality set out in s. 718.2, which include the following:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, …
>
> > (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> >
> > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
> >
> > (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances …

> shall be deemed to be aggravating circumstances; …
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; [the "totality" principle]
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; [the "restraint" principle] and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders .... [the "last resort" or "parsimony" principle].

[539] Since the circumstances of particular offences and particular offenders will differ, sentencing necessarily involves individualized, case-by-case assessments of proportionality: ***R v Nur***, 2015 SCC 15 at para 43; ***Arcand*** at para 66; ***R v Suter***, 2018 SCC 34 at para 4. The individualization of sentence, a commonplace principle, marks an important moral point. Proportionality demands fit between a sentence and blameworthiness, the gravity of the offence and the degree of responsibility of the offender. Even within our most serious offences, such as manslaughter or sexual assault, there are degrees of blameworthiness. Proportionality requires that degrees of blameworthiness be calibrated with degrees of punishment. Proportionality calls for discrimination, for careful attention, for the lawyerly job of drawing distinctions, and sets its face against moral equivalence, one-size-fits all sentencing.

[540] Mr. Scrivens faces sentencing for the predicate offence and five additional offences. As regards cumulative punishments, there was no suggestion that s. 718.3(7) was engaged. The totality principle, an aspect of proportionality, is engaged. Justice Watson described two forms of totality in ***R v May***, 2012 ABCA 213 at paras 7 and 13:

> [7] There are basically two forms of totality which the law recognizes. The first form of totality is a subsidiary concept related to the fundamental principle of sentencing set out in s. 718.1 of the *Code*. In other words, it is a concept that serves the principle of proportionality that the offender should be subject to a sentence which reflects the gravity of his offence, and the degree of responsibility the offender has for that offence. The totality concept in this respect recognizes the fact that an offender may commit one or more offences in a single transaction, and that to accurately reflect gravity and responsibility may involve concurrence of the sentences ….
>
> [13] The second form of totality is reflected in s. 718.2(c) of the *Code*, which provides that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh". This concept of totality serves both proportionality and the separate sentencing principle of restraint, which is a dominant feature of several parts of s. 718.2 of the *Code*. This concept arises in situations where the court has concluded that in principle the imprisonment sentences on certain counts should run consecutively. In those situations, the proportionality principle has already been taken into account, at least to a *prima facie* extent, in forming a conclusion that consecutive sentences would be fit sentences for the counts.

In ***R v Brodt***, 2016 ABCA 373, Chief Justice Fraser distinguished common law and statutory totality at paras 5 and 6:

> [5] …. Under common law totality, the drug offences should typically run concurrently to one another within each group of offences. As this Court noted in ***R v May*** … a sentencing court should consider "the worst of the offences in the transaction, and then go on to assess what effect the other collateral or associated crimes has on the overall culpability of the offender". It is correct that, as a general rule, multiple offences run consecutively when they are either not part of a single transaction, or deal with different legal interests: *R v Keough*, 2012 ABCA 14 at paras 59-61, 519 AR 236 (Paperny JA in dissent but not on this point); *R v McLean*, 2016 SKCA 93 at paras 49-50 ….
>
> > [I note Justice Watson's comment respecting multiple counts for a single transaction at para 8 of ***May*** that "the court may find it just to consider other counts as essentially modifiers or adjectives to the main crime and as thus deserving of concurrent sentences."]
>
> [6] Statutory totality requires reducing a cumulative sentence that will crush the offender's rehabilitative prospects: see *R v McDonald*, 2015 ABCA 108 at para 54, 599 AR 300. This involves an individualized consideration of restraint which exists over and above whether a cumulative sentence for the offences is broadly proportionate. The focus is instead on the offender's circumstances and whether the sentence is in keeping with the offender's record and future prospects: *R v Wozny*, 2010 MBCA 115 at paras 59-60, 262 Man R (2d) 75 ….

The Chief Justice went on to caution in para 6 that

> [6] …. applying statutory totality under s 718.2(c) of the *Code* in cases of multiple transactions does not obviate the need to first consider common law totality. Relying exclusively on statutory totality, at the expense of common law totality, runs the risk that the final restraint review directed by Parliament, often called the "last look", will start with a disproportionately high notional cumulative sentence. The result – the sentence ultimately imposed will not be sufficiently restrained to fully account for both common law and statutory totality.

[541] A proportionate sentence serves one or more of the objectives set out in s. 718. These objectives include denunciation of unlawful conduct and the harm done to victims or the community, deterrence of the offender and others, rehabilitation of offenders, and promoting a sense of responsibility in offenders and acknowledgement of harm done to victims or the community. Under s. 718.01,

> 718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

Again, in dangerous offender sentencing, the objective of prevention has elevated significance but does not negate the need to consider other penal objectives in relation to a particular offender and his or her particular offences.

2. Sentence Starting Point

[542] For some types of cases, the Court of Appeal has established sentence starting points. Starting point sentencing has three elements. First, the Court of Appeal identifies the type or category of offence. Second, it sets a starting point sentence for that category of offence. The Court of Appeal takes into account the gravity of the offence and the degree of responsibility typically associated with the category of offence and the objectives properly served by sentencing for this type of offence: ***Arcand*** at para 104. "Starting point sentences are thus an assimilation and amalgam of all of the relevant sentencing considerations:" ***R v Godfrey***, 2018 ABCA 369 at para 6. Third, the sentencing judge refines the starting point sentence in light of the specific facts of the individual case and the offender: ***Arcand*** at para 105.

[543] The Court of Appeal has established a starting point sentence of 4 years for a single act of major sexual assault on a child, writing as follows in ***R v SLW***, 2018 ABCA 235 at para 28:

> [28] The sentencing judge properly began by stating that the starting point for a single act of major sexual assault upon a child, by a person in a position of trust, is four years: ***R v S(WB)***, (1992), 127 AR 65, 15 CR (4th) 324 [, 1992 CarswellAlta 274] (CA); *R v L(B)*, 2011 ABCA 375, 519 AR 181; *R v Archibald*, 2012 ABCA 202, 533 AR 188. The sentencing judge then correctly noted that this starting point could be elevated or reduced by mitigating or aggravating factors.

[544] In ***WBS*** at para 40 (cited to CarwellAlta), the Court of Appeal established the "typical category" to which the 4-year starting point would apply: "major sexual assault of a child by a parent or by a person who because of his relationship with the child is in a position of control and trust *vis-a-vis* the child. We would not limit the subcategory to cases in which the victim is a *young* child or there are *repeated* acts of sexual abuse." The starting point applies to a "*single* major sexual assault on a child:" at para 42. Acts constituting "major" sexual assault were identified in ***WBS*** at para 4.

[545] In ***WBS***, the Court of Appeal identified aggravating factors at para 42, such as

- the repetition of sexual assaults,
- protracted confinement or kidnapping,
- gratuitous violence and injuries,
- threats to kill or hurt the child if he or she tells anyone what has happened,
- extreme youthfulness of the child,
- parental use of the child for the carnal pleasure of a friend of the parent,
- physical violence with or without a weapon,
- exposure of the child to printed or visual materials depicting pornography,
- transmission of venereal or other sexually transmitted disease to the child, or
- pregnancy of the child resulting from the sexual assault.

Mitigating factors include a guilty plea.

[546] In ***Hajar***, the Court of Appeal confirmed a starting point sentence of 3 years for "major sexual interference where the offender is an adult, that is, at least 18 years of age:" at para 11. At para 12, the Court of Appeal wrote that "[w]e identify later in these reasons a number of circumstances that would aggravate the three-year starting point for major sexual interference, including breach of trust, and additional violence beyond that intrinsic to the conduct itself." At para 81, the Court of Appeal wrote that

> [81] …. this starting point is premised on there being no gratuitous violence. If the sexual acts involve overcoming resistance, threats, intimidation or other similar acts of gratuitous violence, these will be aggravating factors. The starting point also assumes no prior record. Finally, the three-year starting point is not based on a guilty plea. That would be a mitigating factor reducing sentence.

In ***Hajar*** at paras 117-119, the Court of Appeal set out some aggravating factors, in addition to gratuitous violence:

> [117] …. It is enough to note that they may include the following:
>
> (a) Multiple acts;
>
> (b) Use of drugs, alcohol or other substance on the child to facilitate the offence;
>
> (c) Additional physical harm from the offence;
>
> (d) Psychological or emotional harm from the offence;
>
> (e) Sexual images of the child recorded, retained, solicited or shared;
>
> (f) Targeting of a particularly vulnerable child;
>
> (g) Additional degradation of the child;
>
> (h) Pregnancy or STD as a consequence of the offence; and
>
> (i) Breach of trust or authority.
>
> [118] By its nature, an act of major sexual interference is volitional conduct. It is not accidental. If the offence involves planning and predation, this makes the offender more culpable than engaging in what may be called opportunistic offending.
>
> [119] A significant age gap between the child and adult will tend to increase the overall degree of severity of the offence, and therefore aggravate sentence.

[547] At para 120, the Court of Appeal identified some mitigating factors:

> As with aggravating factors, providing a complete list of mitigating factors is not possible since no list will ever be closed. They may include the following:

(a) Guilty plea;

(b) Mental illness or disability of the offender; and

(c) Remorse.

[548] Mr. Scrivens conceded that his actions constituted a major sexual assault and that the 4-year starting point therefore applies: SWA at para 246. His conduct unquestionable met the "major" aspect of the sexual assault starting point categorization. If the three-year starting point of ***Hajar*** were to govern, the predicate offence being sexual interference, aggravating factors would raise the sentence to four years, and beyond.

[549] A starting point, though, is just that - a starting point. A sentence may be set at the starting point, above it, or below it, based on all the relevant considerations bearing on the offence and the offender.

3. Sentencing for the Predicate Offence and other Current Offences

(a) Aggravating Circumstances

[550] I need not repeat all the circumstances of the predicate offence. The following features of the offence circumstances were aggravating.

[551] The victim was 6. Her age made her particularly vulnerable. I take into account that the fact that the victim was under age 18 is not, by itself, an aggravating factor, since this factor is subsumed in the starting point sentence. However, the victim's very young age of 6 is an aggravating factor.

[552] Mr. Scrivens was 37 years old.

[553] Mr. Scrivens was in a position of trust or authority. He had sole charge of the victim, alone in his home. However, I consider this aspect of the circumstances to be subsumed in the starting point sentence. There was no additional aggravation of this factor (considered by itself) beyond his abuse of his position of trust or authority.

[554] Mr. Scrivens offended against the victim not once but three times. While some other offenders have offended against children many times more, over much longer periods than Mr. Scrivens' offences against the victim, these comparative facts point to lack of aggravation rather than to mitigation. The offence could have been worse, much worse. That does not diminish the blameworthiness inherent in what Mr. Scrivens did.

[555] At all material times, Mr. Scrivens was under the recognizance pending the s. 810.1 recognizance hearing or under the s. 810.1 recognizance.

[556] The offence did not involve gratuitous violence, but that marks only the absence of an aggravating factor, not the presence of a mitigating factor.

[557] Similarly, the offence did not involve any form of penetration. The conduct, nonetheless, still amounted to a major sexual assault. There were no aggravating factors beyond the nature of the conduct itself.

[558] Mr. Scrivens placed himself in a position to accomplish the predicate offence over a period of months. I accept Dr. Van Domselaar's account of Mr. Scrivens' degree of planning and

deliberation leading to the offence. The offence occurred as a result of a series of bad decisions by Mr. Scrivens, as opposed to being the execution of a detailed plan. Regardless, the offence did not occur on the sudden. It certainly was not "opportunistic" in the sense of occurring relatively spontaneously, based on a single error or small number of errors of judgment. There is a modest reduction of Mr. Scrivens' blameworthiness to reflect the reduced element of planning leading to the predicate offence.

[559] Mr. Scrivens was receiving treatment at the time of the offence. He could have reached out to his treatment providers at any point along his fall towards the offence. They were there precisely to help him avoid what occurred. He need not have waited until the contact had occurred, or until he had breached the terms of any recognizance.

[560] Mr. Scrivens did not stop on his own. The victim disclosed his conduct and he was arrested.

[561] I could identify nothing mitigating the seriousness of the offence.

(b) Responsibility of Mr. Scrivens

(i) Criminal Record

[562] Mr. Scrivens was not a first time offender. I reviewed his criminal record in detail above. His record, again, is not long compared with the records of many others. While the predicate offence formed part of his pattern of offending, the predicate offence was Mr. Scrivens' worst offence. None of his past offences matched the blameworthiness of this offence.

(ii) Guilty Pleas

[563] Mr. Scrivens pled guilty to the predicate offence and the remaining Current Offences.

(iii) Cooperation with Administration of Justice

[564] Mr. Scrivens cooperated with the authorities upon his arrest. He provided a frank description of his conduct.

(iv) Remorse

[565] Mr. Scrivens expressed remorse in his s. 726 statement. His counsel emphasized Mr. Scrivens' deep regret for hurting the victim. Mr. Scrivens has been emotional and upset about his conduct.

[566] I accept the sincerity of his remorse.

[567] Dr. Van Domselaar had remarked on Mr. Scrivens' deep self-loathing and overwhelming dismay at his conduct and actions. He knows he has done wrong. He is sorry for doing wrong. What he has not been able to do is stop himself from doing what he knows is wrong.

(v) Rehabilitative Efforts

[568] Mr. Scrivens has been in protective custody for much of his time on remand. I accept that there would not have been many options for rehabilitative work for him in his circumstances.

[569] Mr. Scrivens has, however, completed

- a series of courses offered by New Life Ministries, including Managing Emotional Pain, The Servant of God, Ready to Give an Answer, Guilt and Shame, the Holy Spirit at Work, Lessons on Christian Living, Mending Hearts, Trust, Hope – and I note that his grades ranged from 95-100
- (at least) 75 Bible Courses by correspondence through New Life Ministries
- three correspondence courses through Gospel Echoes Team Bible Studies
- three courses through Crossroads Prison Ministries.

[570] There are no guarantees in this world, but given the disorders to Mr. Scrivens' intellect and will caused by his desire, the sort of engagement that these courses represent has a good chance of helping him move in the right direction.

(c) Personal Factors Following Arrest

[571] On November 16, 2017, while in custody, Mr. Scrivens was hit in the face by another inmate. He suffered lacerations around his left eye and a left orbital wall fracture: EDD001507-002; EDD001508-010, -014, -017; ZR at 27. I can take judicial notice that Mr. Scrivens' status as a sex offender made him a target.

[572] Mr. Scrivens has been incarcerated since his arrest, mostly in protective custody. As of June 12, 2019, he had been incarcerated for 1212 days. As of September 6, 2019, he will have been in custody (by my calculation) about 86 further days, for a total of 1,298 days. Because he has been in remand and in protective custody, this has been difficult time.

(d) Sentence for the Predicate Offence

[573] The Crown and Defence both referred to a sentence of 6 to 8 years imprisonment for the predicate offence alone.

[574] The maximum sentence for this offence is 14 years with a 1 year minimum sentence of imprisonment.

[575] The starting point sentence for the predicate offence is 4 years imprisonment. There were aggravating factors connected to the offence – the young age of the victim; the repetition of the assault; the lengthy process by which Mr. Scrivens came into the life of the victim's family, put himself into a trusted position, and got the victim alone with him in his house, that is, Mr. Scrivens' conscious if not fully planned descent through many steps to his offending against the victim; Mr. Scrivens having been on recognizance at the time of the offence; Mr. Scrivens having had resources available at all material times to help to manage the risks that were ever-increasing and his failure to reach out to those resources. Mr. Scrivens' criminal record was not lengthy but certainly relevant.

[576] Mr. Scrivens did plead guilty, cooperated with the authorities, has expressed remorse, and has on his own taken some steps towards rehabilitation through the courses he has completed while in custody.

[577] Absent his plea, cooperation, remorse, and rehabilitative steps, in my opinion the aggravating factors bearing on the circumstances of this offence would have warranted a sentence of 8 years imprisonment. Taking into account Mr. Scrivens' acceptance of

responsibility, including his guilty plea, in my opinion, the sentence warranted for the predicate offence, without considering Mr. Scrivens' dangerousness, is 7 years imprisonment.

(e) Sentence for the Remaining Current Offences

[578] The remaining Current Offences are as follows:

- count 3, between April 2 and November 5, 2015 – s. 145(3), Failure to Comply with Recognizance (not to be in the company of children under age 18 unless accompanied by an approved adult, as specified)
- count 4, between November 6 and December 19, 2015 – s. 811, Breach of s. 810.1 Recognizance (not to enter into friendships with any females without disclosure to supervisor and notification of previous offending)
- count 5, between November 6 and December 17, 2015 – s. 811, Breach of s. 810.1 Recognizance (no overnight stays without approval)
- count 9, between December 1 and December 19, 2015 – s. 811, Breach of s. 810.1 Recognizance (unapproved cellphone)
- count 10, between December 17 and 18, 2015 – s. 811, Breach of s. 810.1 Recognizance (unauthorized attendance near places where children are likely to congregate)

[579] The sentences for counts 3 and 5 should run concurrently with the sentence for the predicate offence. The conduct violative of the recognizance terms is the same conduct violative of s. 151. A sentence of 6 months imprisonment for each of counts 3 and 5, running concurrently with each other and with the sentence for count 2, is appropriate.

[580] Counts 4, 9, and 10, as the Crown argued, concern conduct distinct from the conduct falling under the s. 151 offence. The conduct relates to breaches of the s. 810.1 recognizance that put Mr. Scrivens in the position to commit the predicate offence. These violations were not trivial or technical. The failure to notify the victim's mother of his background was, by itself, a very serious violation of the trust she extended to him, not to mention a serious violation of the s. 810.1 recognizance. Mr. Scrivens' breach was precisely the type of circumstance that this condition of the s. 810.1 recognizance was to deter.

[581] In my opinion, the sentences for counts 4, 9, and 10 should run consecutively to the sentence for the predicate offence and counts 3 and 5.

[582] In my opinion, with particular regard to the Agreed Statement of Facts, and to the sinister role that the violations of the s. 810.1 recognizance played in facilitating the occurrence of the predicate offence, a further sentence of 1 year imprisonment for each of counts 4, 9, and 10 concurrent as among those offences is warranted. The 1 year period of imprisonment for these three counts is consecutive to the 7 year sentence for the predicate offence (and the concurrent sentences for counts 3 and 5).

(f) Total Sentence

[583] I have taken into account both common law and statutory totality. In all the circumstances, I am satisfied that a fit sentence for Mr. Scrivens for the offences for which he stands convicted, without taking into account his dangerousness, is 8 years imprisonment.

(g) Adequate Protection of the Public

[584] But would a 7 year sentence for the predicate offence adequately protect the public against the commission by Mr. Scrivens of a serious personal injury offence?

[585] In my opinion, I am restricted to consideration of the sentence for the predicate offence, since ss. 753(4)(b) and (c) refer to "*the* offence for which the offender has been convicted" and that phrase refers back to s. 753(1)(a), concerning the prerequisite serious personal injury offence – "the offence for which the offender has been convicted." My conclusions would be the same, though, even if the sentences for the remaining Current Offences could be considered in assessing the protection of the public interest and an 8 year rather than a 7 year sentence were at issue.

[586] In my opinion, there was no serious suggestion that a 7 (or 8) year sentence would adequately protect the public against Mr. Scrivens committing another contact sexual offence.

[587] The Crown and Defence agreed that Mr. Scrivens should receive credit for pre-trial custody. The Crown and Defence agreed that, pursuant to s. 719(3.1), credit for time in custody should be calculated at one and one-half days for each day spent in custody. In light of ***R v Summers***, 2014 SCC 26, this approach was appropriate. Moreover, appropriate credit for pre-trial custody should generally be recognized in sentencing: ***R v Severight***, 2014 ABCA 25 at para 33-35. Mr. Scrivens has done difficult time in remand, much of it in protective custody. By the date of this decision, he will have spent some 1,298 days in custody. At 1.5:1 credit, that yields 1,947 days or about 5.33 years or about 5 years 4 months to be credited against sentence.

[588] If Mr. Scrivens were to receive a 7 year sentence for the predicate offence, Mr. Scrivens would have less than 2 years time to serve, only about 1 year, 8 months. When Mr. Scrivens last served a two-year federal sentence – that is, a period longer than 20 months - he did not have the opportunity to complete a high-intensity sexual offender program before his statutory release date or his warrant expiry date. If he had a 20 month sentence to serve, that would be in a provincial institution. There was no evidence about the current availability of high-intensity sexual offender programs for provincial prisoners.

[589] But even if he could complete the HISOP or an equivalent high-intensity program, he would not have much time to do SOMP in the institution.

[590] If I were entitled to consider the proposed 8 year total sentence, Mr. Scrivens would have less than 3 years time to serve, only about 2 years, 8 months. His statutory review eligibility would be at 21 months, or 1 year and 9 months. If, again, he were able to complete the HISOP before his statutory release date, he could do SOMP in the community for another 11 months after statutory release, but that would be all.

[591] In my opinion, completing the HISOP or an equivalent program (assuming that a program could be completed) plus limited maintenance programming (if any) would not be adequate for Mr. Scrivens to learn to manage his condition. Dr. Van Domselaar had recommended that Mr. Scrivens be able to take the HISOP more than once, not less than once or barely once. Mr. Scrivens has had nearly 30 years of being driven by his desire. His sexual drive is intense. He has never been able to master it. He has never been able to advance in his self-management beyond unrealistic avoidance strategies. He was never able to recognize the risks that he faced and that he posed to others. The HISOP is not a magic bullet. Mr. Scrivens will

need time and effort to overcome his desire. Two years is not enough to reverse 30 years. Two years is not enough time to learn what he needs to learn. Three years would be equally insufficient.

D. Determinate Sentence and LTSO

[592] Since a conventional sentence for Mr. Scrivens' predicate offence will not adequately protect the public from the risk Mr. Scrivens poses to commit a serious personal injury offence, I must consider whether a determinate sentence for the predicate offence and a LTSO under s. 753(4)(b) would adequately protect the public from the commission by Mr. Scrivens of a serious personal injury offence.

1. Considerations Forestalling a Reasonable Expectation Inquiry

[593] The Crown argued that while the treatment of Mr. Scrivens is not impossible, the evidence does not support a finding that Mr. Scrivens' risk could be managed by any determinate sentence, even one followed by a LTSO. Hence, public protection demands indeterminate detention.

[594] The evidence relied on by the Crown concerns Mr. Scrivens' intractability. Mr. Scrivens has a near-to-permanent deviant disposition. Mr. Scrivens has had years of treatment and programs. The result was a predicate offence more serious than any offence Mr. Scrivens had previously committed. The treatment didn't help. He got worse. He has consistently hidden his offending from authorities, including his treatment providers. It would be pointless to consider any sort of treatment or program-based limits on sentence since treatment and programming haven't worked.

[595] Aside from his sexual pathology, Mr. Scrivens' personality traits, his narcissism, distrust for authority, and lack of interest in learning to manage his own condition have impeded his treatment progress. There is no indication that Mr. Scrivens is ready, able, or willing to do the hard work of changing himself or of at least changing what he can. In any event, as Dr. Ennis had indicated, his "big three" factors (deviance, attitude, self-centredness) while not permanent will be slow to change.

[596] Further, keeping in mind ***Bragg*** at para 55, "the evidence of treatability must be specific to that offender" and not be generalized evidence. In this case, the witnesses' comments about declining rates of recidivism and lower recidivism rates for sexual offenders should be ignored. Those are comments about offenders generally not about Mr. Scrivens in particular. The sentencing concerns him, not others: see, e.g., ***Severight*** at para 27.

[597] And in this case, neither Dr. Van Domselaar nor Dr. Zedkova ventured any prediction about a definite period of time in which Mr. Scrivens can be treated. Indeed, Dr. Van Domselaar expressly resisted making such a prediction, pointing out that it could only be made on the basis of actual treatment gains – i.e., based on treatment that hadn't occurred yet.

[598] Finally, while it is true that Dr. Van Domselaar and Dr. Zedkova set out community-based conditions for Mr. Scrivens, those were as strict as or stricter than the conditions found in a s. 810.1 recognizance. Mr. Scrivens had already been bound by such a recognizance and he committed the predicate offence. One might say that "the tools [are] not available to provide the requisite long-term supervision required for the risks presented by [Mr. Scrivens] if allowed into the community:" ***Severight*** at para 43. Sgt. Innes' testimony echoes (Innes at 32.12-21):

> I can't see … that anyone could be able to supervise him, a parole officer or probation officer who had even less resources than we did. When you have somebody who is doing all of that in secret, I don't know that it's possible.

2. Initial Responses

[599] Some concerns can be dealt with directly. Others require a more elaborate response.

[600] The last "Sgt. Innes" point begs the question. The question is whether further treatment and programs contemplated by a sentence that is less than indeterminate could put Mr. Scrivens in a position to be supervised. The fact that Mr. Scrivens had previously behaved in a manner that was practically impossible to supervise is relevant to the "reasonable expectation" argument but not determinative.

[601] As for the "general considerations" point, it is true that Mr. Scrivens and not some "norm group" is being sentenced. His risks, not risks of others, are at issue. To that extent, general considerations, considerations about offenders on the whole or on average or as a group should not be determinative. Nonetheless, general considerations relating to recidivism should be relevant since Mr. Scrivens, as an offender, falls within the general offender group. Moreover, Mr. Scrivens' risk was calibrated based on group comparisons. His risk is the risk determined by the conduct of members of the group with features matching Mr. Scrivens' features. Allowing group conduct to condemn Mr. Scrivens to a risk categorization but not to allow group conduct to ameliorate risk would be unfair.

[602] In my opinion, the experts' lack of commitment to a time-line for management is not fatal to the prospects of a less-than-indeterminate sentence. The sentencing decision is a judicial decision based on all the evidence, informed by but not determined by expert opinion. "The experts do not become the judges and the expert opinion is not the judgment:" ***Neve*** at para 199. In any sentencing decision involving significant violence, a sentencing judge can and should take into account under s. 718 separation or incapacitation to protect the public, that is, to promote the fundamental sentencing purpose of maintaining a safe society. The determination of the proper period of separation in service of public protection falls within judicial competence, again based on an assessment of the evidence in the sentencing proceeding.

[603] Yet there is still the evidence of intractability, the evidence of lengthy treatment and programming followed by the predicate offence, the evidence of entrenched deviance and challenging personality traits. The Crown's real questions remain: Why should *this* time be any different? How can a timeline be rationally determined for the prospect of change by Mr. Scrivens? If the experts could not offer a time-line for Mr. Scrivens' manageability, how can a judge work out a determinate sentence that will protect the public?

3. Factors Bearing on the Reasonable Expectation of Management

[604] The answers to the Crown's questions begin with the expert opinion evidence. Implicit in the expert opinions was a form of time-line. The experts contemplated that Mr. Scrivens would complete the HISOP. He would be prescribed libido-reducing medications and do maintenance in the community. While Mr. Scrivens would not be starting his recovery from the very beginning, his challenges run deep, progress will be slow, and the reduction of his risk will take a substantial period. The principle of proportionality continues to apply in setting the maximum scope of that substantial period.

[605] I have taken the following considerations into account in assessing whether a determinate sentence followed by an LTSO will adequately protect the public from the risk posed by Mr. Scrivens.

(a) Experts and Programs

[606] Both Dr. Van Domselaar and Dr. Zedkova were of the view that Mr. Scrivens should complete the HISOP offered at Bowden Institution: VDR at 62; ZR 41; CR 23-24. He should do high intensity programming: E27, 89.1-4.

[607] Dr. Van Domselaar did state that Mr. Scrivens will likely need to take the HISOP program more than once, to demonstrate sufficient learning and application of skills and thereafter the SOMP: TVDM7, 9.40-41; VDR at 63. From the testimony of CSC officials, the better view is that Mr. Scrivens cannot take the HISOP more than once in a sentence. However, if an offender demonstrates need, the offender may continue in maintenance programming as necessary: Codie Stephan, Transcript of Proceedings, February 26, 2019 (Stephan), 18.7-15, 25-26; Luft at 66.32-39.

[608] Mr. Scrivens will require psychiatric treatment to ensure that he continues on libido-reducing medication.

[609] Mr. Scrivens should upgrade his academic achievements and supplement his vocational training.

(b) Experts and Community Release

[610] Dr. Van Domselaar provided a suite of community-based recommendations for Mr. Scrivens. She acknowledged that the "close supervision" she recommended would be "something akin to the 810 order:" TVDM8, 37.15-17. The presupposition of Dr. Van Domselaar's recommendations was that Mr. Scrivens would have made progress through programs and treatment. Her recommendations included the following (VDR at 64-65; see also ZR at 42; CR at 24):

(1) a "coordinated suite of intensive and frequent supervisory mechanisms, implemented over a long term," including the following:

- frequent, intense, coordinated supervision by highly skilled personnel accustomed to dealing with high risk sexual offenders – the team should have a consistent membership, to the degree possible (to enable mutual trust to develop) – the supervision should be sufficiently flexible to permit Mr. Scrivens to be employed and engage in meaningful pro-social leisure activities
- electronic monitoring of location
- prohibition from unsupervised or unmonitored Internet access
- prohibition from contact with or near proximity to children unless in the presence of an adult approved by supervisors
- requirement to disclose relationships with any persons (so minor children could not come within his sphere of influence: TVDM7, 13.32-33)
- prohibition on development of relationship with any person who cares for children

(2) ongoing community-based sexual offender maintenance programming

(3) treatment by a forensic psychologist; therapy will supplement maintenance programming and ensure sufficient intensity of treatment respecting his sexual attraction; the psychologist should be skilled in dealing with individuals at a high risk for sexually reoffending

(4) treatment by a forensic psychiatrist skilled in dealing with individuals with the personality traits exhibited by Mr. Scrivens (libido-reducing medication would need to be prescribed: ZR at 42)

(4) ensuring that Mr. Scrivens does not face financial barriers to acquiring prescribed psychiatric medication

(5) augmentation of prosocial support networks – including contact with his parents, involvement in approved social activities, and spiritual practice.

(c) Re-Taking Programs

[611] On the evidence, it is not unusual for offenders who have re-offended to re-take programs completed in a previous sentence. The rule is, though, that offenders cannot take the same program twice in the same sentence. A sexual offender could only take one of the MISOP or the HISOP in a single sentence: Stephan, 16.23-6; 14.29-31; 15.36, 16.4-6; Luft, 66.28-30.

[612] When asked whether an offender who had done the MISOP in the past might benefit from the HISOP now, Kathryn Luft responded (76.38-77.3):

> Definitely. And when we get guys in a program who have taken a program previously and they're back, I want to know what didn't work. What did they miss? Because I'm gong to make sure, darn sure, we try and get that covered this time.

[613] And when asked whether an offender who had done the "old" HISOP would benefit from doing the "revised" HISOP (I'll return to the revisions below), Ms. Luft responded (77.17-20):

> Definitely. Because people change … and so because someone took a high intensity program in past, obviously there were still some issues, some things we may not have addressed, and so they can take it again in their next sentence. They cannot take it in the same sentence.

[614] Mr. Scrivens is able to benefit from the HISOP, without modification to match his particular psychological traits. Sex offender treatment programs deal with people who have these sorts of traits: E27, 55.18-35. Ms. Luft observed that offenders needing high intensity sexual offender programs commonly have antisocial traits: Luft, 64.10.

[615] Mr. Scrivens, like other offenders, can benefit from re-taking an institutional sex offender program. Attention can be paid to areas he failed to understand and implement properly.

(d) Poorly-Matching Treatment and Programs

[616] While Mr. Scrivens received treatment and programming during his periods of carceral supervision, this treatment and programming was not always appropriate to Mr. Scrivens' needs and responsivity factors.

[617] I noted above that both Dr. Ennis and Dr. Zedkova did not consider the Terrace group program that Mr. Scrivens participated in as being entirely appropriate or effective: ER at 7; ZM1, 73.39-41.

[618] The express purpose of Mr. Scrivens' possession of child pornography sentence was to ensure, to the extent this was possible, that Mr. Scrivens would be able to participate in the Phoenix Program. Dr. Ennis and Dr. Choy had been clear that Mr. Scrivens was at a high risk to re-offend and therefore he required high intensity sexual offender programming. The Phoenix Program was evidently regarded as the high-intensity programming option best suited for Mr. Scrivens.

[619] What happened is that Mr. Scrivens ended up in the MISOP. Dr. Zedkova confirmed that there was "a bit of disconnect there," "in terms of follow-through of the RNR model:" ZM5, 94.17-28. What should have happened did not happen. Mr. Scrivens' inability to move directly or nearly directly into the Phoenix Program was not his fault. It was the product of CSC processes and sentence length. What should have happened didn't happen.

[620] By the time Mr. Scrivens interviewed for the Phoenix Program, program completion would not have occurred before his statutory release date or indeed before his warrant expiry date. One might respond that if Mr. Scrivens had been serious about change he could have stayed in the Phoenix Program past community release or completion of sentence. It must be acknowledged, though, that this would mean that Mr. Scrivens should have accepted a form a punishment, in effect a form of sentence, beyond that found to have been justified by the sentencing judge. An offer to serve more time, to stay longer under carceral supervision, would not be an attractive choice for anyone. There was other institutional programming available. Unfortunately, the HISOP was not available to him either, within the range of his statutory release and warrant expiry dates: Vargas,101.35-36.

[621] Mr. Scrivens, then, embarked on the MISOP not the HISOP. The program intensity did not match the intensity of his needs.

[622] It is true that the HISOP and the MISOP cover similar topics, similar skills and techniques: Luft, 58.25-34; 62.11-12; 63.6-38. The HISOP, though, covers more material and covers material at a deeper level. It provides more skills to deal with the higher risks of high-risk offenders: Luft, 63.6-38. More time is spent per module: Stephan, 38.21-24. The intensity level is confirmed by the institutional availability of the programs. The HISOP runs about 1.5 times per year (the .5 would be continue in the following year). The program requires about 8 months to complete: Stephan, 12.1-26; 14.7-27. The MISOP runs 3 to 4 times per year: Stephan, 14.7-27.

[623] Mr. Scrivens had personality clashes with two of his psychiatrists during the last phases of community release (prior to the s. 810.1 process), Dr. Rai and Dr. Das. Dr. Das testified. Dr. Das's testimony was harshly criticized by the Defence. I will simply say that Dr. Das's approach did not match Mr. Scrivens' responsivity needs. Neither did Dr. Das take seriously Mr. Scrivens' concerns with the side effects of Lupron. It did not appear that Dr. Das worked with Mr. Scrivens on any reasonable alternatives to Lupron. The treatment regimen was rigid. Mr. Scrivens was the offender and did not have the luxury of dictating to FACS or the institutional system that he entered through his own fault and Mr. Scrivens had the obligation to do his part to make his treatment work. Nonetheless, these phases of his treatment were not conducive to progress.

[624] Because some elements of Mr. Scrivens' past programs and treatment were not responsive to his needs, there is greater scope for Mr. Scrivens to improve through completing the HISOP and subsequent maintenance programs.

(e) Program Revision

[625] The HISOP has been revised. CSC's programs are research-based and are revised in line with current research. While the revised HISOP is not substantially different than the former version, three types of revisions have been made. Group sessions are more structured now, meaning that facilitators' scripts are more extensively constrained: Luft, 49.1-2. Best practices for managing risk factors have been integrated from all of the CSC programs. Most importantly from Mr. Scrivens' perspective, the HISOP has incorporated more offender-centred approaches to programming. There was substantial discussion in testimony of this more offender-centred approach, generally revolving around the "Good Lives" model of programming. Dr. Ennis made the following comments about this model (E27, 82.3-24):

> In essence, but I think that it's more of an overarching philosophy than anything else, that rather than coming from a deficit orientation - that somebody is lacking social skills, for example - the more positive psychology view of that, the Good Lives view of that, is everybody, all of us, aspire towards the same things in life. We all want to feel accepted by others. We all want to have meaningful social relationships. We all want to feel good about ourselves, these sorts of things. And if we start from that place and frame criminal behaviour and sex offending behaviour in terms of maladaptive efforts to achieve that which all of us want to achieve rather than be directed - behaviour that is meant to get something none of us think anybody should want, that that is going to be a more fruitful way of approaching therapy and certainly would probably overcome some barriers that - you know, that sort of browbeating confrontational approach [would not] …

Dr. Van Domselaar described the Good Lives model as being "strength-based psychology," that works with persons based on their strengths: TVDM7, 30.1-8; see also ZM5, 100.1-25.

[626] The approach of the Good Lives model to programming is not, in Dr. Van Domselaar's opinion, contrary to the more traditional RNR approach of CSC programming, but involves an expanded and more sensitive exploration of the responsivity aspect of the RNR model: TVDM7, 32.11-13.

[627] A Good Lives approach would be more aligned with Mr. Scrivens' responsivity factors than the older HISOP or MISOP approach. Dr. Van Domselaar's view was that the new strength-based features of the program would be better aligned with Mr. Scrivens' responsivity factors: TVDM8, 19.17-41.

[628] Not only may Mr. Scrivens benefit from taking the HISOP, and not only may past programming and treatment deficits be corrected, but the mode of delivery of the HISOP will be more conducive to Mr. Scrivens obtaining full benefit of the revised HISOP.

(f) Mr. Scrivens' Attitude

[629] Mr. Scrivens gave a statement under s. 726.

[630] He acknowledged that he has had a hard time with treatment and his motivation for treatment. He wants treatment now. He knows that his active participation in high-intensity treatment is necessary to get his addiction under control. He knows he must take libido-suppressing medication. He recognizes that in the past he did not put real effort into his treatment. He thinks that he will be able to succeed now. He has a team that will work with him. He is not alone. He will not be alone again.

[631] Mr. Scrivens' statement was not on oath. He was not cross-examined. But on the basis of the testimony I heard, the evidence I read, and the days spent in the hearing, I accept that Mr. Scrivens was sincere.

[632] In addition to his time spent in remand, Mr. Scrivens has had the harsh education of dangerous offender proceedings. He has watched as his life has been laid out and autopsied. He has heard the frank descriptions of where he has been, of what he has done, and what his future may be.

[633] Mr. Scrivens has shown progress in his understanding of his affliction and its consequences for others. He is smart. Strong as his desire may be, he is capable of discerning his risk factors. His progress might be viewed as "intellectualization." But intellectualization, understanding, is a necessary first step for change.

[634] Mr. Scrivens has identified that what is crucial is his will to succeed, his will to understand, his will to learn to control his desires. He understands that he must dedicate himself to the hard work, the discipline, of controlling his desires.

[635] This is precisely the attitudinal change that can separate past failure from future success.

(g) Evidence of Restraint

[636] It is important to recognize that until he reached the precipice of the predicate offence, Mr. Scrivens had been largely able to exercise restraint or at least restraint from the worst forms of offending. His contact offences occurred in 1997 and 2002. Until the predicate offence, he had never touched a child. There was no evidence whatsoever that he did anything improper with his own child.

(h) Proportionality

[637] Again, Justice Côté wrote in ***Boutilier*** at para 63 that "an offender's moral culpability, the seriousness of the offence, [and] mitigating factors … are each part of the sentencing process under the dangerous offender scheme. Each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public …."

[638] The proportionality principle is not exhausted by its use in fixing a determinate sentence for first stage of analysis purposes. The proportionality assessment, the assessment of the gravity of the offence and the degree of blameworthiness of the offender, must be set in comparison to the public interest in safety and the dangerousness of the offender at this second stage.

[639] I reviewed the factors that I consider primarily relevant to the proportionality assessment under the headings "Aggravating Circumstances" and "Responsibility of Mr. Scrivens" above. Mr. Scrivens' offence was serious. As indicated, the seriousness is not mitigated by the offence not being worse than it was. That the offence could have been worse goes to the absence of further aggravating circumstances. But when determining a proportional sentence, the absence of

aggravating circumstances may be relevant to determining the fit penalty. Every sexual interference does not deserve the maximum sentence. There are moral distinctions between even serious acts of sexual interference. The number of assaults, the time span over which the assaults occurred, whether the assaults violated a parent-child relationship, the presence of gratuitous violence, and other aggravating factors referred to in ***WBS*** show, by their limitation or absence, where Mrs. Scrivens' offence falls on the scale of culpability as compared with other sexual interference offences and so show (or help to show) what punitive response would be proportionate to Mr. Scrivens' offence. Put another way, a fit or proportional sentence must be fitted or proportional to what an offence was, to its gravity and its degree of blameworthiness. Not to less than what it was, not to more than what it was.

(i) Consequences of an Indeterminate Sentence

[640] An indeterminate sentence is not condemnation to permanent imprisonment. It is not an assurance that treatment will never be received.

[641] Mr. Stephan testified, though, that priority for programs is based primarily on eligibility dates for parole and warrant expiry dates. The objective is to ensure that offenders get their programs and treatment completed by their release dates: Stephan, 11.3-15. Those serving longer sentences, then, must wait for those closer to release dates to complete their programming: Anderson, 86.22-40.

[642] Mr. Stephan confirmed that dangerous offenders would have lower priority. They are put "kind of to the bottom of the list." Stephan at 12.1-26. This testimony was consistent with a report at para 22 of ***R v Walsh***, 2017 BCCA 195:

> [22] The practical effect of the legislation was before the judge. Dr. Smiley, the Chief Psychologist for Community Corrections Pacific Region (Correctional Service of Canada) testified that only 4-5% of those given a dangerous offender designation are released on parole. They are not given priority for programs. Thus, for the majority of offenders, an indeterminate sentence is equivalent to a life sentence with little chance of parole.

I recognize that expert testimony in another case is not evidence in these proceedings.

4. Assessment under ss. 753(4.1) and 753(4)(b)

[643] I am satisfied on the evidence that there is a reasonable expectation that a determinate sentence for the predicate offence in excess of two years followed by a long-term supervision order will adequately protect the public against the commission by Mr. Scrivens of a serious personal injury offence.

[644] I will set out first my reasons for concluding that the evidence supports a reasonable expectation that with further specific programs and treatment it will be reasonably likely that Mr. Scrivens will be safely manageable in the community.

[645] I will then address the time line for Mr. Scrivens' progress and the corresponding sentencing disposition.

(a) Reasonable Expectation of Management of his Condition in the Community

[646] Dr. Van Domselaar and Dr. Zedkova considered completion of an institutionally-based high-intensity sexual offender program to be a prerequisite to Mr. Scrivens being supervisable on conditions in the community.

[647] Mr. Scrivens must take a HISOP offered by CSC. This would occur while he is incarcerated. He would not be the first offender to re-take sexual offender programming on a subsequent sentence. Program facilitators would be able to address program elements missed or improperly understood or appreciated by Mr. Scrivens despite MISOP completion.

[648] The MISOP completed by Mr. Scrivens did not match Mr. Scrivens' risk level. The HISOP will. Mr. Scrivens will gain the benefit of program intensity (at least) that he did not have before. The HISOP will offer Mr. Scrivens a new learning experience.

[649] Further, revisions to the HISOP will make Mr. Scrivens' acceptance and participation in the program easier for him. The newer emphasis on strengths should help accommodate his responsivity factors. He should be able to get more out of the program than he could get out of the MISOP.

[650] Mr. Scrivens has not utterly failed to make progress in his understanding of his condition. Institutional witnesses and the experts have recognized that Mr. Scrivens has made some progress in understanding the harm he has caused. His views on child pornography, in particular, have evolved to the point that he has recognized harm associated with its production. He needs to take the further step of recognizing the harm inherent in the sexualized viewing of images of children and actual children.

[651] Mr. Scrivens has relied, for over a decade, on ineffective and simplistic avoidance strategies. He has recognized that his efforts have been inadequate. That does not mean that Mr. Scrivens is close to governing himself correctly. But at least, with the insight Mr. Scrivens now has, he is in a position to begin to work on his thinking deficits.

[652] A fundamental issue has been Mr. Scrivens' willingness to engage with programs and treatment, to do the hard work required to manage his condition. As Dr. Van Domselaar had said, this will be "the most arduous undertaking that Mr. Scrivens has faced in his life:" VDR at 66. Mr. Scrivens has in the past demonstrated the capacity to exercise his will, to show discipline, to forbear. He has now committed to the hard work that lies ahead. Keeping in mind the constraints under which he lived on remand, he has taken steps to gain a deeper understanding of himself and of the right way forward.

[653] A sentence approximating a life sentence for Mr. Scrivens' conduct would be disproportional to the gravity of his offence and his degree of blameworthiness, even taking into account the need for public safety and the danger posed by Mr. Scrivens.

[654] But I also keep in mind that Mr. Scrivens had years of sexual offender programming and treatment, in Bowden, in the community, and under the s. 810.1 recognizance. That did not avail. All of the expert evidence supported the view that change for Mr. Scrivens will be slow, "incremental." Progress will be slow despite his hard work and good intentions. He has a life to reconfigure.

[655] Given the foregoing, when can Mr. Scrivens be reasonably expected to be in a position to manage his condition in a determinate time? When can it be safe for Mr. Scrivens to be supervised in the community, and for how long should Mr. Scrivens be supervised in the community?

(b) Determinate Sentence

[656] I had found that a 7-year sentence for the predicate offence would not adequately protect the public.

[657] In my opinion, a 9-year global sentence would provide the foundation for Mr. Scrivens' manageability in the community. I was concerned whether a 7 or 8-year sentence would have permitted the requisite program completion once credit for pre-disposition custody were deducted. Mr. Scrivens' two-year sentence for the possession offence proved insufficient to permit completion of the high-intensity program. A 9-year sentence would provide the institutional time required, with the credit for pre-disposition custody.

[658] The Defence invoked ***Spilman***. Justice Watt wrote at paras 51 to 54 as follows:

> [51] …. I am satisfied that when imposing a sentence under ss. 753(4)(b) or (c), a hearing judge may impose a fixed-term sentence that exceeds the appropriate range in the non-dangerous offender context, to ensure the offender has access to treatment programs in a penitentiary. The length of the sentence imposed, however, should be subject to three constraints.
>
> [52] First, the punishment provisions for the predicate offence. Any custodial sentence imposed as a component of a composite sentence under ss. 753(4)(b) or as a standalone disposition under s. 753(4)(c), cannot exceed the maximum term of imprisonment for the predicate offence.
>
> [53] Second, the sentencing objectives, principles and factors in ss. 718-718.2. While factors such as the degree of responsibility of the offender and the gravity of the offence play a lesser role in determining a sentence under Part XXIV, these considerations cannot be entirely ignored. Even where their significance is attenuated, they prevent the imposition of lengthy fixed-term sentences that are entirely disconnected from the circumstances of the offence giving rise to the sentencing proceedings.
>
> [54] Third, the length of sentence imposed must be responsive to evidence adduced at the hearing. The evidence about treatment programs should be specific, preferably indicating an approximate length or range of time within which the offender may be expected to complete the programming said to be necessary to protect the public. There must be a clear nexus between that programming and future public safety, sufficient to support a "reasonable expectation" that the overall sentence will "adequately protect the public against the commission by the offender of murder or a serious personal injury offence": s. 753(4.1). And the evidence must account for the offender's "amenability to treatment and the prospects for the success of treatment in reducing or containing the offender's risk of reoffending": *R. v. Little*, 2007 ONCA 548, 225 C.C.C. (3d) 20, at para. 40.

[659] To ensure that Mr. Scrivens' treatment needs are met, the sentence for the predicate offence should be raised to 9 years. To ensure that the totality principle respecting consecutive sentences is not violated and to ensure that the total sentence does not exceed a fit and proportional sentence, the sentences for the remaining Current Offences shall be concurrent with the sentence for the predicate offence.

[660] A 9-year sentence would not exceed the maximum term for the predicate offence. In light of both the predicate offence and the remaining Current Offences, a 9-year sentence is not "entirely disconnected from the circumstances of the offence." A 9-year sentence is responsive to the expert evidence. It could not be disputed that Mr. Scrivens requires high-intensity sexual offender programming. I acknowledge again that the experts did not expressly delineate the length or range of time within which Mr. Scrivens could be expected to complete the necessary programming. The time of incarceration, though, must include the time necessary to complete the high intensity sexual offender programming.

[661] The 9-year sentence will work in this way: Mr. Scrivens has time in custody of 1298 days. At the 1.5:1 ratio, Mr. Scrivens has a predisposition credit of about 5 years and 4 months. When the credit for pre-disposition custody is deducted from the 9-year sentence, Mr. Scrivens has about 44 months to serve, or 3 years and 8 months. Mr. Scrivens' statutory release date will be at two-thirds of that 44 months or at about 29 months or 2 years and 5 months. Two years and five months will be sufficient time for Mr. Scrivens to complete intake, the primer for sexual offender programming, and the HISOP. There is some buffer for wait-time before Mr. Scrivens completes the HISOP. He will have the opportunity to do the SOMP, and, if his needs require it, further SOMP sessions before his statutory release date. He will have another 15 months on statutory release to do further SOMP in the community.

[662] But once again, as with the 7 year (or 8 years total) sentence, the evidence does not satisfy me that there is a reasonable expectation that Mr. Scrivens will be in a position to manage his conduct properly within a little less than 4 years. He has much to learn and much to practice. Much work needs to be done and progress will be slow.

(c) LTSO

[663] I am therefore satisfied that Mr. Scrivens should be under the terms of a long-term supervision order following completion of the sentence for the predicate offence and Current Offences.

[664] The terms of that order will be set by the correctional authorities. Subsection 753.2(1) provides as follows:

> 753.2 (1) Subject to subsection (2), an offender who is subject to long-term supervision shall be supervised in the community in accordance with the *Corrections and Conditional Release Act* when the offender has finished serving
>
> > (a) the sentence for the offence for which the offender has been convicted ….

In ***R v Wormell***, 2005 BCCA 328, leave app refd 2006 CarswellBC 129 (SCC), Justice Southin wrote the following at paras 27-28:

> [27] From a reading of these sections, it is clear that neither under the *Criminal Code* nor under the *Corrections and Conditional Release Act* does the court hearing a dangerous offender application have any power to determine the terms of a long-term supervision order. That is not unreasonable because if, for instance, a judge sentences an offender to a long term of imprisonment, he or she is not in a position to know what the offender will be like in his attitudes and so on when he is released from custody.
>
> [28] Nonetheless, the court can make recommendations which one would expect will be given by the National Parole Board such weight as seems appropriate when it comes to fixing the terms of long-term supervision if such is ordered.

[665] In my opinion, both to protect the public and to ensure that Mr. Scrivens has the programming and treatment he needs, the term of the long-term supervision order should be 10 years.

[666] A 5-year LTSO term did not put Mr. Scrivens in a position to stop himself from committing the predicate offence. In light of Mr. Scrivens' history, his lack of progress with prior programming and treatment, a five-year LTSO would not be adequate to protect the public from further offending by Mr. Scrivens.

[667] A 10-year LTSO would protect the public interest. Again, Mr. Scrivens has much work to do and progress will be slow.

[668] A longer LTSO will also compensate for Dr. Domselaar's express concern that Mr. Scrivens "receive a sentence that is of sufficient duration to enable him to participate in the HISOP … for more than one iteration, and in a subsequently significant period of maintenance programming:" VDR at 63. As indicated, on the evidence, Mr. Scrivens will be able to take the HISOP only once in this sentence. The 9-year sentence plus a longer LTSO will permit Mr. Scrivens to practice and develop the skills he acquires in the HISOP in the SOMP.

[669] Supervision will be in place while he is in the community, so that the public is protected as Mr. Scrivens learns and changes his life. The LTSO will balance Mr. Scrivens' liberty in the community with the protection of the public. Effective supervision is possible. I do not fault the earlier BAU supervision of Mr. Scrivens. I would not expect the correctional authorities to authorize for a second time Mr. Scrivens' residence with another sex offender such as JW. I would expect the authorities to use, for example, electronic monitoring so that Mr. Scrivens' locations can be tracked, permitting investigation and follow-up. I would expect the authorities to ensure that Mr. Scrivens has the opportunity to engage in prosocial activities, consistently with public protection.

[670] Mr. Scrivens will be about 45 when he reaches his warrant expiration date. A 10-year LTSO will carry him to about age 55. The experts did confirm that recidivism declines with age. Mr. Scrivens will be close to age 60. Some of the work of libido-reducing chemicals will have been done by aging itself.

[671] If Mr. Scrivens succeeds in remaining offence free to the end of his LTSO, his risk will have reduced considerably. For each 5 years of desistance, his risk would reduce by 50%.

[672] Mr. Scrivens knows the consequences if he reoffends when in the community, whether on statutory release or during his LTSO or thereafter. I would expect that he would not breathe free air again. To the extent that Mr. Scrivens remains motivated by self-interest rather than by any broader concerns, the consequences should be a significant and sufficient deterrent.

[673] In my opinion, the basic work done while incarcerated plus 10 years of dedication by Mr. Scrivens to his own reform under the terms and supervision of an LTSO will be sufficient for Mr. Scrivens to learn to manage himself and to be manageable in the community. That is, a 10-year LTSO following his sentence for the predicate offence and remaining Current Offences will adequately protect the public from further offending by Mr. Scrivens.

[674] Further, a combined period of 19 years under carceral control, 19 years of constrained liberty, is proportional to the offences for which Mr. Scrivens is being sentenced and protects the public.

[675] I shall not make an order under s. 161. Conditions will be imposed on Mr. Scrivens for his period of statutory release and will be imposed under the LTSO. Additional terms under a s. 161 order would either be duplicative or would run the risk of creating inconsistencies.

(d) Indeterminate Detention

[676] Given my findings, the "presumption" in s. 753(4.1) is rebutted. An indeterminate sentence is not required to adequately protect the public against the commission of a serious personal injury offence by Mr. Scrivens. I shall not impose a sentence of detention in a penitentiary for an indeterminate period on Mr. Scrivens.

E. Sentence

[*Mr. Scrivens, please stand.*]

[677] I find that Mr. Scrivens is a dangerous offender.

[678] Having considered ss. 753(4) and (4.1), I do not sentence Mr. Scrivens to detention in a penitentiary for an indeterminate period. I sentence Mr. Scrivens as follows:

> for count 2, s. 151, Sexual Interference, I sentence Mr. Scrivens to 9 years imprisonment;
>
> for count 3, s. 145(3), Failure to Comply with Recognizance (not to be in the company of children under age 18 unless accompanied by approved adult, as specified), I sentence Mr. Scrivens to 6 months imprisonment, concurrent with the 9 year sentence under count 2;
>
> for count 5, s. 811, Breach of s. 810.1 Recognizance (overnight stays without approval), I sentence Mr. Scrivens to 6 months imprisonment, concurrent with the 9 year sentence under count 2;
>
> for count 4, s. 811, Breach of s. 810.1 Recognizance (not to enter into friendships with any females without disclosure to supervisor and notification of previous offending), I sentence Mr. Scrivens to 1 year imprisonment concurrent with the sentence under count 2;
>
> for count 9, s. 811, Breach of s. 810.1 Recognizance (unapproved cellphone), I sentence Mr. Scrivens to 1 year imprisonment concurrent with the sentence under count 2;

for count 10, s. 811, Breach of s. 810.1 Recognizance (unauthorized attendance near places where children are likely to congregate), I sentence Mr. Scrivens to 1 year imprisonment concurrent with the sentence under count 2.

[679] Under s. 719(3), Mr. Scrivens has, as of today's date, spent 1,298 days in custody. As discussed above, this time in custody is to be credited at 1.5 days per day of custody. Mr. Scrivens' 9 year sentence under count 2 shall therefore be reduced by 1947 days or about 5.33 years. This will leave about 44 months or 3 years and 8 months to be served. The precise calculation of the reduction and the remaining time to be served shall be determined by the correctional authorities.

[680] I order that Mr. Scrivens be subject to long-term supervision in the community for a period of 10 years when he has finished serving the sentences for the offences for which he has been convicted in accordance with the *Corrections and Conditional Release Act* and s. 753.2 of the *Criminal Code*.

[681] Under s. 760, I order that a copy of all reports and testimony given by psychiatrists and psychologists in this hearing and my reasons, together with a transcript of the dangerous offender proceedings, be forwarded to the Correctional Service of Canada for information.

[682] I recommend that the Correctional Service of Canada and the Parole Board of Canada take into account the recommendations provided by of Dr. Van Domselaar in her report of February 28, 2018 in setting the conditions of Mr. Scrivens' programs and treatment while incarcerated and in setting the terms of Mr. Scrivens' community release and LTSO.

F. Ancillary Orders

[683] Mr. Scrivens is required to give a sample of his DNA in accordance with section 487.051(1) and I hereby make an order in Form 5.03 as contemplated by s. 487.051(1), s. 151 being a primary designated offence under s. 487.04.

[684] Under ss. 490.012 and 490.013(4), Mr. Scrivens having been convicted of an offence under s. 151, a primary designated offence under s. 490.011(1), and having been previously subject to an order under s. 490.012, Mr. Scrivens is required to comply with the *Sex Offender Registration Act* for life and I hereby make an order in Form 52.

[685] [*In relation to the s. 151 conviction and under ss. 109(1)(a) and (3), an order was granted prohibiting Mr. Scrivens from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, and explosive substance for life.*]

[686] Under the authority of Justice Martin's decision in ***R v Boudreault***, 2018 SCC 58 declaring s. 757 invalid, no Victim Fine Surcharge is imposed on Mr. Scrivens.

[687] Exhibits are forfeited to the Crown.

Heard on February 19 to March 22, 2019 and June 21, 2019.
Delivered at the City of Edmonton, Alberta this 6th day of September, 2019.
Signed at the City of Edmonton, Alberta this 13th day of September, 2019.

W.N. Renke
J.C.Q.B.A.

Appearances:

Wendy Miller and Tara Hayes
Alberta Justice, Specialized Prosecutions
for the Crown

Austin Corbett, Bottos Law Group
Kathryn Quinlan, Dawson, Duckett, Garcia & Johnson, Barristers
for Joseph Scrivens