SUPREME COURT OF YUKON

Citation: *R. v. J.M.*, 2021 YKSC 17

Date: 20210311
S.C. No. 18-01506
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

J.M.

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.5 of the *Criminal Code*.

Before Chief Justice S.M. Duncan

Appearances:
Noel Sinclair — Counsel for the Public Prosecution Service of Canada
Vincent Larochelle — Counsel for the Accused

REASONS FOR SENTENCE

Introduction

[1] DUNCAN C.J. (Oral): J.M. was found guilty by a jury of aggravated assault on July 9, 2019. The Crown has brought an application with the consent of the Attorney General to have him declared a long-term offender under Part XXIV of the *Criminal Code*. The following is my determination of that application and the imposition of sentence.

[2] There are two conditions for a long-term offender application: first, the offender must have committed a serious personal injury offence as defined in s. 752 of the *Criminal Code*; and second, an assessment report must be prepared.

[3] The assessment report was applied for by the Crown under s. 752.1 and consented to by defence. The order granted on August 29, 2019 was for an assessment and report to be completed by Dr. Shabehram Lohrasbe, a psychiatrist with acknowledged expertise in medicolegal psychiatry. The order provided that the report could be used as evidence in either a dangerous or long-term offender application. The Crown chose to pursue only the long-term offender designation.

[4] An offender is found to be a long-term offender if the court is satisfied that:

i. a sentence of two years or more (before any pre-sentence custody credit) is appropriate;

ii. there is a substantial risk of re-offending; and

iii. there is a reasonable possibility of eventual control of the risk in the community (s. 753.1(1)).

[5] If I find J.M. to be a long-term offender, I must impose a period of imprisonment of at least two years and order that he be subject to a long-term supervision order for a maximum period of ten years (s. 753.1(3)). If I do not find him to be a long-term offender, I must impose a sentence in the normal course (s. 753.1(6)).

[6] I will first summarize the facts of the predicate offence, and review J.M.'s criminal record and relevant history. I will then summarize the evidence of the witnesses from Corrections and the Parole Board and of Dr. Lohrasbe. I will then set out the legal principles applicable to the long-term offender provisions, and will apply them to the facts and evidence in this matter. Finally, I will set out the sentence.

[7] Like the Court in *R. v. Johnson*, [2008] O.J. No. 4209, I have chosen to decide the long-term offender application before determining the appropriate sentence for J.M.

I recognize that the Supreme Court of Canada in *R. v. L.M.*, 2008 SCC 31, stated that "[p]arliament intended that the judge determine the appropriate sentence first", no doubt because one of the prerequisites to a finding that a person is a long-term offender is the imposition of a period of two years or more of imprisonment. Here, the seriousness of the offence for which J.M. has been convicted means that an appropriate sentence will be more than two years. In his submissions, defence counsel suggested that a fair outcome would be a sentence of 2 years and 10 months (taking into account his pre-sentence custodial time). As a result, I will proceed to address the long-term offender application first.

Facts

[8] I made findings of fact for the purpose of sentencing on October 24, 2019, as required under s. 724(2) of the *Criminal Code*. These were provided to Dr. Lohrasbe before he finalized his assessment report. The following summarizes those findings.

[9] J.M. and the victim, D.J., were in an intimate relationship. They regularly spent time together on weekends or during weekday evenings fishing, camping, biking and visiting at each other's homes. Many of these occasions involved drinking alcohol. For D.J. the relationship was monogamous, while for J.M. it was not. D.J. did not object to J.M. seeing other people, as long as he told D.J. when and who, so that D.J. could make his own health and safety decisions.

[10] On April 27, 2017, D.J. and J.M. spent the evening together. They met at the Airport Chalet for a drink of tequila, then stopped at the liquor store where D.J. bought a 15-pack of beer. J.M. had a two-litre bottle of cider with him.

[11] They went to J.M.'s apartment where D.J. prepared for a work presentation the following day and J.M. watched television. Over the course of the evening, J.M. drank at least one two-litre bottle of cider and approximately six beers. He may also have drunk part of a second two-litre cider. Earlier that evening, he had two tequilas at the Airport Chalet. D.J. drank one tequila and two beers.

[12] Around 10 or 11 p.m. that evening, the two went out for something to eat as they had not yet had dinner. After trying a few places that were already closed, they settled on Big Macs at McDonald's and returned to J.M.'s apartment. D.J. refused J.M.'s request for another beer because D.J. thought he had had enough to drink that evening, and he wanted his 15-pack to last the week.

[13] D.J. began to get ready for bed by retrieving his bedding which he normally kept rolled up and packed neatly in the closet. When D.J. saw the dishevelled state of the bedding in the closet, he asked J.M. jokingly who had been sleeping in his bed. J.M. told D.J. that a man named B.G. had stayed overnight. An argument between the two men then ensued because D.J. did not like B.G. He was also angry that J.M. had not told him about B.G.'s visit because of their understanding that they would be honest about other people they spent time with.

[14] D.J. was so angry that he decided to leave the apartment and the relationship and began gathering his belongings to do so. He was at the closet getting his clothes when J.M. approached him. D.J. put his arm straight out with his palm facing flat out toward J.M., who walked into his hand. D.J. then knelt down on his bedding to retrieve more of his belongings. As he was turning around to get up, J.M. hit him on the head with an aluminum baseball bat. He struck D.J. at least four times, causing heavy

bleeding from his head and bruising on his shoulder and arms. D.J. required stitches to his forehead and back of his head.

[15] J.M. testified he acted in self-defence. He had experienced D.J.'s anger on several occasions in the past, and knew the body language signs he exhibited when he was angry. They included heavy breathing, bulging eyes, tense body and red face. J.M. testified D.J. was showing all of these signs at that time.

[16] J.M. had an honest but unreasonable belief that D.J. was threatening to use force against him. Although D.J. was angry, he did not threaten J.M., in words or gestures, nor did he have a weapon. Further, J.M. used excessive force, disproportionate to any justification of self-defence.

[17] The police officer who arrived on the scene confirmed that J.M. showed physical signs of intoxication including smelling of alcohol and repetitive, slow speech. D.J. on the other hand, showed no signs of intoxication when the police arrived. He was lying on the ground in the hallway outside the apartment, visibly upset, bleeding from his forehead, and holding his head. There was blood on the floor and walls in the living room area, around the front door, foyer area and in the hallway.

Evidence on Application

Records related to J.M.

[18] The Crown submitted a significant number of records in support of its application, all of which were also provided to Dr. Lohrasbe. Some of these were marked for identification only. They included psychiatric evaluation assessments done in 1974 and 1992, a pre-sentence report done for the British Columbia Provincial Court Judge

Brecknell for the charges from 1992, and Judge Brecknell's reasons for sentence, and a letter of October 2019 from Michael Dockum, a probation officer.

[19] The Crown also introduced as exhibits J.M.'s criminal record, police documents from the 1975 manslaughter conviction in Ontario, court documents from the 1992 sexual assault convictions in Kelowna, British Columbia, and court documents from the 2005 assault conviction in Watson Lake, Yukon.

[20] Also introduced at the hearing as exhibits by defence were the transcription of the preliminary hearing of the charge of assault in Watson Lake from 2005, Correctional Service of Canada records, Integrated Case Management Termination summary from Yukon Justice, and two documents from Correctional Services Canada about long-term supervision orders.

[21] Defence also included an article from *The Globe and Mail* in his book of authorities about bias against Black and Indigenous people in the prison system, but I have not considered it, as I do not find it relevant to the considerations in this application.

Criminal Record of J.M.

[22] J.M. has been convicted of four offences of personal violence. They are as follows. First, he was convicted of manslaughter after a jury trial in 1975 - when he was 19 years old, for shooting his adoptive father. He was sentenced to 12 months in jail. I will not dwell long on this as the information we have is restricted to case summaries from police files and we have no information about the evidence at trial. It happened so long ago that its usefulness is limited. The surrounding circumstances are useful to know in that J.M. lost his adoptive mother around the time of his father's death and his

adoptive parents had previously separated. He was left penniless after their deaths and left Ontario.

[23] The second violent offence was the sexual assault on his two children and a niece in 1992 in Kelowna, British Columbia. He was sentenced on two counts to six years in jail concurrent, and the third count was stayed. These offences occurred when J.M. was 35 years old, during his 10-year marriage, described by the probation officer who wrote the pre-sentence report as a "highly dysfunctional … arrangement plagued by chronic substance abuse, near-incessant quarrelling and domestic violence". The children at the time of the arrest were ages 6 and 9. The younger one in particular exhibited significant signs of trauma from the assaults. J.M. attributed his behaviour to chronic drunkenness and his wife's belittling of and indifference to him, both sexually and socially.

[24] The third offence was aggravated assault and uttering threats to his intimate partner in 2005 in Watson Lake, Yukon. He pled guilty to assault and served 1 day plus 5 months' time served. The uttering threats charge was stayed. The victim described the incident at the preliminary inquiry as occurring when she and J.M. were drinking and arguing. He put a small cushion from the couch over her mouth to "shut her up". She could still breathe and talk, so she yelled for help and a neighbour came in which caused J.M. to stop with the pillow.

[25] The last offence is the predicate offence of aggravated assault after the jury trial in 2019.

[26] As was said by the Court in *R. v. Turner*, 2019 ONSC 5435, quoting from Justice Alder: [J.M.'s] "criminal record for violence is not the most minor of criminal records but certainly not the most severe" (para. 73).

Evidence of Kandace Goldstone

[27] Ms. Goldstone is a regional program manager at Correctional Services Canada ("CSC"), Pacific Region. She testified primarily about the interventions and programs of CSC described in the affidavit of Sukhwinder Toor, parole officer. She first described the offender intake assessment by CSC to determine risks and needs and to establish an initial placement at an institution at the appropriate security level. From this process, a Correctional Plan is developed for each offender, used to measure the offender's progress throughout the sentence.

[28] Kandace Goldstone also described the five primary areas addressed by CSC programs: general criminality, violence, family violence, substance abuse and sexual violence. There are three types of violence prevention correctional programs: general, family and sexual violence prevention. The substance abuse programs target offenders assessed as moderate to high-risk offenders whose substance abuse is directly linked to their criminal behaviour.

[29] Ms. Goldstone also described the Integrated Correctional Program Model ("ICPM") which is designed to help offenders understand the risk factors linked to their criminal behaviour and teach them how to use the skills learned in the program in challenging situations. The ICPM consists of three program streams: multi-target programs, Aboriginal programs, and sex offender programs. They are offered at moderate and high-intensity levels to address the criminal risks of the offender. They

can continue throughout the sentence, to warrant expiry. Ms. Goldstone confirmed that CSC can deliver high intensity multi-target therapeutic programs to those offenders with a two-year sentence. The offenders are prioritized for programming based on their date of day parole eligibility.

Evidence of Sukhwinder Toor

[30] Mr. Toor described the process and conditions of release of long-term offenders into the community and the role of the community parole officer. They provide direct monitoring and communication with the released offenders, consisting of office and community visits, collateral contacts and case conferences. Supervision can include monitoring the offender's behaviour, release conditions and compliance with court-ordered obligations; developing and implementing interventions to address and respond to the offender's risk and needs; and documenting relevant information about the offender's circumstances. There may be conditions about where the offender shall live and who the offender will socialize with. Urinalysis is also used if there is a condition relating to abstention from drugs or alcohol.

[31] Mr. Toor also described what happens when there is a breach of conditions or an increase in risk. The parole officer can issue a warrant of suspension and apprehension, to hold the long-term offender in custody for a maximum of 90 days. During that time period the Parole Board can recommend the laying of an information for breach of a long-term supervisory order condition. A breach is a serious criminal charge.

Evidence of Jennifer Murray

[32] Jennifer Murray is a case manager at Whitehorse Correctional Centre ("WCC"). She reviewed and adopted the affidavit of Valerie Goodkey, deputy superintendent of

programs at the Government of Yukon Department of Justice, Corrections Branch. She described generally the programs provided at WCC. She indicated that the federal ICPM programs are significantly longer and more intense than those offered by WCC. She described generally the *Courage to Change* series, the substance abuse programming, and the violent offender program offered at WCC.

[33] Jennifer Murray knew J.M. because of his time spent in WCC in 2017-18 in remand and after his failure to appear in court. She described him as having good institutional behaviour, with no violations. She indicated that he requested counselling with Mr. Craig Dempsey, a forensic psychologist who is still his counsellor, and also requested spiritual guidance from Bishop Hector. He attended church services. He worked in the library and attended school. He worked as a unit cleaner for a period and then wanted to work in the kitchen but was unable to because inmates who had been sentenced had priority for work. Ms. Murray's observations about J.M. were confirmed by the Integrated Case Management Termination Summary provided by WCC, indicating he was not a behaviour problem and co-existed with fellow inmates as expected.

Opinion of Dr. Lohrasbe

a. Qualifications and Introduction

[34] Dr. Lohrasbe was qualified as an expert forensic psychiatrist to give opinion evidence concerning the risk assessment, treatability, and risk management of serious violent offenders in the context of dangerous and long-term offender applications. He is a recognized expert in this area as he has practiced principally medicolegal psychiatry for more than 30 years, has assessed several thousand individuals and has testified

more than 600 times at all levels of trial courts, mostly in Western Canada and the North. He has testified in more than 160 dangerous and long-term offender hearings.

[35] He conducted the psychiatric assessment and report dated October 27, 2019, that was court-ordered on August 29, 2019. The basis of his assessment included an interview with J.M. at the WCC on September 12, 2019; a telephone conversation with Mr. Craig Dempsey, J.M.'s therapist, on September 26, 2019; a review of documentation sent by Court Services before the interview; and my finding of facts dated October 24, 2019.

[36] The documentation from Court Services included the material described above related to J.M.'s previous convictions; documents generated by Correctional Services of Canada during his incarceration about his behaviour and his participation in treatment programs; the psychiatric evaluations from 1974, 1976, and 1992; information about his education and employment history from a probation officer in 1991; and information about his recent behaviour while released on bail from the probation officer's letter dated October 3, 2019.

b. Impression of J.M.

[37] Dr. Lohrasbe testified that J.M. was cooperative and engaged throughout most of the interview. He noted J.M. is slightly built, at 136 pounds and approximately 5'7". He presented with reasonably good intelligence and not as angry, paranoid or threatening. He did appear to lose focus and become distracted on occasion, possibly attributable to his medication (Hydrochlorothiazide for hypertension; Naproxen for pain from injuries and arthritis; Escitalopram and Amitriptyline for depression). Dr. Lohrasbe described his demeanour as "carefree, relaxed and almost flippant". He came across as somewhat

eccentric as a result of a combination of his style of speech, odd affect due in part to an offbeat sense of humour and occasional guffaws, and a certain detachment and lack of emotional investment, making it seem as though he were an observer in his own life, not a participant.

[38] Dr. Lohrasbe characterized J.M. as not forthcoming and an unreliable historian on issues that put him in a negative light. He described him as having limited insight with a strong tendency toward minimization. Dr. Lohrasbe attributed this to his need to protect his self-image, which is of a kind, curious and generous man.

[39] Most significantly Dr. Lohrasbe noted J.M. was defensive about his use of alcohol and resistant to the notion that his alcohol consumption was problematic. He minimized his use of alcohol. His treatment over the years was limited to institutional Alcoholics Anonymous ("AA") meetings at Kamloops Correctional Centre in 1991, and a voluntary admission into the Detox Program and In-patient Treatment Program in Whitehorse in 2006-07. He claimed he had been a moderate drinker all his life and since the in-patient program has been a social drinker.

[40] Dr. Lohrasbe concluded after hearing J.M.'s description of the predicate offence and reviewing my finding of facts that J.M.'s "violent actions were emotional, reactive, and impulsive rather than instrumental or premeditated."

[41] Dr. Lohrasbe noted that J.M.'s employment has been sporadic and minimal. He has worked at a wide variety of jobs, all of which were short-lived, rarely lasting more than one year. He did not complete high school but upgraded to Grade 11 equivalency and attended college preparation courses in English, computer science and math for two and a half years.

c. Information from Other Professionals about J.M.

[42] In 1974, Dr. Scott's psychiatric evaluation revealed no evidence of psychiatric disorder but recommended a further assessment on receiving a report from Kingston Psychiatric Hospital in 1973 where J.M. had been a patient for 17 days. It concluded that he ""[s]howed total lack of remorse at having absconded" … had no obvious remorse over the shooting incident in relationship with his father."

[43] In 1976, a pretrial report by Dr. Hill, psychiatrist at the Clarke Institute of Psychiatry in Toronto, confirmed J.M.'s fitness for trial, noting that his testing revealed "average intelligence with adequate judgment and reality contact. He projects the personality profile of a rather ingenuous socially immature youth striving to impress. … this was countered with a high degree of defensiveness when people tried to get to know him. Intellectualization and a general separation of his emotional state from his thoughts and actions are ways he avoids both arguments and self-inspection." Dr. Hill noted that J.M. was at no time aggressive, "nor does he represent an immediate danger to any particular person".

[44] In 1992, Dr. Semrau wrote an extensive psychiatric assessment, excerpts from which are:

> … J.M. has very serious difficulties in three major areas: substance abuse, personality disorder and sexual deviance.
> …
>
> … [H]e resorts to alcohol and marijuana in order to cope with distressing emotional states, which are likely to arise quite frequently with him given his generally maladaptive life-style and serious personality difficulties. J.M. does appear to sincerely acknowledge that he has at least a significant alcohol problem and has indicated that he has been involved with Alcoholics Anonymous for sometime now and wishes to maintain his sobriety. …

> It is difficult to say exactly what role substance abuse has played in J.M.'s offenses. … Given his strong tendency to use substance abuse as an explanation, I do not feel that I can reliably indicate whether this has had a serious role in the commission of the offenses or not. …

In his recommendations, Dr. Semrau wrote "it would be certainly helpful in terms of avoiding future reoffending if he were to abstain from non-prescription drug or alcohol use".

[45] Dr. Semrau wrote the following about J.M.'s personality:

> … [T]here is no question that J.M. exhibits a number of very pathological personality traits, including dependence, denial, rationalization, narcissism, and anti-social tendencies.
>
> …
>
> He has a subtle but strong tendency to expect others to take responsibility for problems and decisions and has a correspondingly strong tendency to place the blame upon others for his own misdeeds and misfortunes. …

[46] In a letter dated October 3, 2019, Mr. Michael Dockum, probation officer, noted that J.M. is "normally on time for his [weekly or bi-weekly] appointments and has always presented as calm and in a seemingly sober state." There was no evidence of any breaches of his conditions.

[47] Mr. Craig Dempsey, as of September 26, 2019, the date of Dr. Lohrasbe's telephone conversation with him, had been seeing J.M. in therapy for approximately four years, averaging twice a month. He began seeing him for depression following the death of his friend/partner B. (not B.G.). He described J.M. as passive and mild, and somewhat physically fragile. Mr. Dempsey questions why J.M. chooses to continue to live where he does, an environment conducive to substance abuse and crime, despite many offers to assist in finding a better living arrangement. Mr. Dempsey wonders that it

may be to boost his self-esteem because he is functioning at a higher level than his peers.

[48] One other obvious hypothesis is that his chosen living environment allows J.M. to continue to use alcohol. Although Mr. Dempsey has never seen evidence of J.M.'s use of alcohol during their treatment sessions, or received direct information about J.M. drinking, he questions whether J.M. has been fully honest about alcohol consumption, given his peer group, many of whom struggle with substance abuse, and his missed or cancelled appointments with Mr. Dempsey.

d. Dr. Lohrasbe's short conclusion

[49] Dr. Lohrasbe concluded that J.M. poses a high risk for further acts of violence and the consequences for any future victim could be severe. In the short term, the sentencing proceedings may have a salutary effect on risk. In the longer term, his age will likely cause his risk to decline. His participation in a high-intensity treatment program was recommended by Dr. Lohrasbe as mandatory before considering his risk management in the community. He noted there were no major obstacles to his participation in such programs. Risk management in the community will depend heavily on his willingness to cooperate with monitoring and supervision and a lengthy period of follow up is crucial for ongoing risk reduction and management.

e. Dr. Lohrasbe's assessment process

[50] Dr. Lohrasbe's assessment process was described as a structured professional judgment. He used the HCR-20 methodology. This stands for historical, clinical, risk management, taking into account 20 different risk factors organized into past, present and future. The past (historical) are factors that are static and unchanging and include

past acts of violence; relationships; employment; substance use; personality disorder and traumatic experiences. The present (clinical) are within the past 6 months and reflect dynamic or changeable correlates of violence such as insight; symptoms of major mental disorder; instability. The future (risk management) focus on post-assessment issues that may aggravate or mitigate risk such as living situation, personal support, stress or coping.

[51] This HCR-20 methodology is a third generation of risk assessment. It applies, in Dr. Lohrasbe's view, the best parts of the first-generation clinical judgment by removing some of the subjectivity and lack of structure. It also sets out 20 risk factors, without the shortfalls of the limits and unreliability of the straight actuarial tools approach, the second generation. The shortfalls of the actuarial approach include the limitation that the tools could only address what can be counted or measured, and the limitation that the group data that informs the actuarial tools assessment does not allow for variations in an individual's situation. The actuarial tools were predictive and could only address the factor of likelihood and not the other aspects of risk. It was therefore only a predictive tool, not an assessment tool.

[52] The structured professional judgment assessment, the third generation, ensures that the assessor considers each risk factor identified in the literature as relevant to risk for violence. The assessor states whether each risk factor is present or absent and, if present, relevant or not. The assessor formulates risk within each factor and then exercises further clinical judgment to come up with an overall formulation of risk.

[53] Dr. Lohrasbe explained that his use of HCR-20 is not a rigid, mechanical approach; instead, the whole process is clinical and how it is used varies from case to

case. For Dr. Lohrasbe, the presence or absence and relevance of risk factors emerges from the entire process of the assessment – reviewing the file, interviewing the offender and others, and reflecting on all of the information received.

[54] Before Dr. Lohrasbe applied the HCR-20 in this case, he also drew conclusions from his clinical judgment, which he organized into four areas: historical; dispositional; contextual; and immediate clinical. This approach led to the same conclusion: specifically, "there is an elevated *likelihood* of further violence without significant changes and/or intervention" (p. 16 of the assessment report).

f. Elaboration on Dr. Lohrasbe's conclusion

[55] Dr. Lohrasbe diagnosed J.M. with substance use disorder and personality disorder. He focussed on the three previous assaults in assessing risk: first, the sexual assaults of his children in 1992; second, the assault on his partner at the time in 2005; and third, the assault on D.J. in 2017, the predicate offence. He did not consider the manslaughter conviction extensively in his assessment because it occurred so long ago. He described J.M. as a broad-spectrum violent offender, (spousal, sexual, general) because of the nature of the assaults, but he noted they had common elements. These were: known victims, in close relationships with J.M.; conflict in the relationships; and his use of alcohol. Although the incidents were approximately 15 years apart, so the risk of frequency is immaterial; the severity of the assaults contributed to create a high risk overall.

[56] J.M.'s use of alcohol has been a problem in his life and correlates with his violent activities. His use of alcohol on its own is not seen by Dr. Lohrasbe as a cause of the violent offending, but it is a critical ingredient to his offending. Dr. Lohrasbe expressed

surprise that at J.M.'s age, with his level of intelligence and despite his admission in the past of his problems with alcohol, at the interview with Dr. Lohrasbe resisted the characterization of him as having a drinking problem, and was hesitant to commit to absolute abstinence in future.

[57] Dr. Lohrasbe described J.M.'s personality disorder as a chronic but not acute risk factor, meaning that when he is sober it is not a prominent concern. Dr. Lohrasbe did not see the narcissism described by Dr. Semrau in 1992. Instead, he described J.M. as exhibiting a lack of caring. He said the sharp edges of a destructive personality disorder can decline with age, but can still be brought forth in certain circumstances. More often, though, the personality disorder manifests as depression, as sufferers recognize the emptiness of their lives. Dr. Lohrasbe noted that J.M. takes medication for depression.

[58] Other historical risk factors Dr. Lohrasbe described as present and relevant were traumatic experiences, the severity of the violence, other anti-social behaviour, problems establishing stable personal relationships, and violent attitudes.

[59] On the clinical scale, Dr. Lohrasbe referenced J.M.'s lack of insight into the effect of alcohol on his behaviour as a present and relevant risk factor.

[60] Finally, on the risk management scale, described by Dr. Lohrasbe as "crystal ball gazing," Dr. Lohrasbe identified J.M.'s reliance on alcohol as a coping mechanism for emotional distress as a present and relevant risk factor. He identified his future living situation as another risk factor, based mainly on Mr. Craig Dempsey's observations that J.M. continued to choose living arrangements and companions conducive to continued substance abuse and potential criminal behaviour.

[61] Dr. Lohrasbe observed that J.M. was not internally motivated, but that he responded more to external forces. This increased the possibility that he could be managed well in the community.

[62] Dr. Lohrasbe agreed that the best predictor of future behaviour is past behaviour. He acknowledged that during J.M.'s last lengthy incarceration he demonstrated good effort and had a significant positive outcome after undergoing intensive sexual offender programming twice. Since his release from prison for the sexual assaults in 1998 he has had no further sexual offending.

[63] Finally, Dr. Lohrasbe noted that one of the most reliable actuarial indicators is age. An individual's risk of violence declines exponentially as a person reaches ages 65-70 and even more dramatically over age 70. Dr. Lohrasbe noted that J.M. was already an outlier in this area, because the predicate violent offence occurred when he was 61. In other words, it is unusual to see this severity level of violence committed by a 61-year-old. However, he did not go so far as to say this reliable actuarial indicator would not apply to J.M.

Statutory Provisions

[64] The relevant statutory long-term offender provisions are:

> **753.1 (1)** The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> > **(a)** it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
> >
> > **(b)** there is a substantial risk that the offender will reoffend; and

(c) there is a reasonable possibility of eventual control of the risk in the community.

Substantial risk

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

(a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), 163.1(3) (distribution, etc., of child pornography), 163.1(4) (possession of child pornography) or 163.1(4.1) (accessing child pornography), section 170 (parent or guardian procuring sexual activity), 171 (householder permitting sexual activity), 171.1 (making sexually explicit material available to child), 172.1 (luring a child) or 172.2 (agreement or arrangement — sexual offence against child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) 273 (aggravated sexual assault) or 279.011 (trafficking — person under 18 years) or subsection 279.02(2) (material benefit — trafficking of person under 18 years), 279.03(2) (withholding or destroying documents — trafficking of person under 18 years), 286.1(2) (obtaining sexual services for consideration from person under 18 years), 286.2(2) (material benefit from sexual services provided by person under 18 years) or 286.3(2) (procuring — person under 18 years), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

> > **(ii)** by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.
>
> **Sentence for long-term offender**
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> **(3)** If the court finds an offender to be a long-term offender, it shall
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> > **(a)** 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
> >
> > **(b)** order that the offender be subject to long-term supervision for a period that does not exceed 10 years.
>
> …
>
> **753.2(3)** An offender who is required to be supervised, a member of the Parole Board of Canada or, on approval of that Board, the offender's parole supervisor, as defined in subsection 99(1) of the *Corrections and Conditional Release Act*, may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant.

Legal Principles of a Long-Term Offender Designation

[65] The following general principles are applicable to the determination to be made in this case. Counsel referred to other propositions that remain unsettled areas of law but are not necessary to be determined for this application and they will not be addressed here.

a. Read harmoniously with the dangerous offender provisions

[66] The long-term offender provisions of the *Criminal Code* were introduced into Part XXIV in 1997. They are to be read harmoniously with the dangerous offender provisions. The primary rationale for both is public protection.

b. Purpose suggests a small, well-defined group of offenders

[67] The purpose of a long-term offender designation has been described as:

> … Long-term supervision has as its objective the enhanced safety of the public through targeting those offenders who could be effectively controlled in the community … Long-term supervision is based on the assumption that there are identifiable classes of offenders for whom the risk of re-offending may be managed in the community with appropriate, focused supervision and intervention, including treatment. As a result, the long-term supervision net should not be cast too widely. It is intended to be targeted at offenders who pose a substantial risk of committing further violent or sexual crimes, but who offer a reasonable possibility of eventual control of that risk in the community. (para. 54, *R. v. Johnson*, [2008] O.J. No. 4209).

[68] The Supreme Court of Canada in *R v. L.M.*, 2008 SCC 31, noted at para. 39 "the exceptional nature of the finding that an offender is a *long-term* offender. … the strictness and precision of the rules applicable to this supervisory mechanism necessarily limit the number of people to whom it will apply." [emphasis already added] And, at para. 42 of *R. v. L.M.*, "[t]his measure, which is less restrictive than the indeterminate period of incarceration that applies to dangerous offenders, protects society and is at the same time consistent with "the principles of proportionality and moderation in the recourse to sentences involving a deprivation of liberty" (*Dadour*, at p. 228)."

[69] The Supreme Court of Canada stated in 2014 in *R. v. Steele*, 2014 SCC 61, that "[t]he purpose of long-term supervision provisions is twofold: to protect the public and to rehabilitate offenders and facilitate their reintegration into the community: *R. v. Ipeelee*, 2012 SCC 13, at para. 50."

[70] Before the long-term offender amendments were introduced in 1997, the Department of Justice prepared a report entitled: *Report of the Federal/Provincial/Territorial Task Force on High Risk Violent Offenders: Strategies for Managing High-Risk Offenders* (Department of Justice, January 1995), in which the authors wrote:

> … The success of an LTS [long term supervision] scheme based on the relapse prevention model rests on several key factors:
>
> a. the measure should be focused on particular classes of offender. The inclination to make long-term supervision widely available should be resisted as costly, unwarranted in most cases, and as contributing to "net widening." The target group, and thus the expectations of the scheme, should be well defined;
>
> b. the criteria should selectively target those offenders who have a high likelihood of committing further violent or sexual crimes but who would not likely be found to be a Dangerous Offender [emphasis already added] [*R. v. Guindon*, 2008 QCCA 1445].

[71] The Crown argues that the long-term supervision scheme has built-in procedural protections and flexibility, including the discretion of the Parole Board to impose conditions suited to the individual and to vary those conditions after regular reassessments, as well as the ability of the offender to apply to reduce the length of supervision under s. 753.2(3). The Crown says these provisions are a way to manage risk without the heavy hand of further prosecution, and discretion exists as a safety

valve to ensure the long-term offender provisions operate fairly and consistently. The Crown says this supports the application of the provision to a wider group of offenders. While all of these characteristics of the provisions may be accurate, they describe how the scheme works. The implementation of the scheme should not be determinative of its initial scope. The weight of the jurisprudence favours its application to a small, well-defined group of offenders.

c. Long-term offender designation is discretionary

[72] Through legislative amendments in 2008, Parliament eliminated the judge's discretion in the designation of dangerous offenders, once the criteria in s. 753(1) have been met. However, there were no amendments to the long-term offender provisions. The designation of a long-term offender remains discretionary. Even if all of the criteria in s. 753.1 are met, the Court has the discretion not to designate the offender as a long-term offender (*R. v. J.J.P.*, 2020 YKCA 13, para. 89).

d. Section 753.1(2) is not exhaustive

[73] Section 753.1(2) is not to be interpreted as restricting s. 753.1 to apply only to offenders convicted of one of those listed offences. This would mean that the long-term offender provisions are limited to sexual offenders. As stated by the British Columbia Court of Appeal in *R v. McLeod*, 1999 BCCA 347, at para. 27, "[i]f Parliament had intended to limit the designation of long-term offender to those convicted of sexual offences, it could have done so by simply adding that as a fourth condition to be satisfied under s. 753.1(1)." Further, as the Saskatchewan Court of Appeal in *R. v. Weasel*, 2003 SKCA 131, at para. 56, said on considering this same issue:

> ... subsection (2) is not to be seen as defining the term "substantial risk" appearing in subsection 753.1. Rather, it is

> to be seen as creating a conclusive presumption of "substantial risk" in those circumstances to which paragraphs (a) and (b) of the subsection are addressed, leaving the issue of such risk in other circumstances to be determined without the aid of the presumption.

[74] The Court of Appeal in *R v. McLean*, 2009 NSCA 1, agreed with these authorities and referred to various decisions of the Quebec and Ontario Courts of Appeal in which long-term offender designations were upheld for offenders convicted of assaults and unlawful confinement, attempted murder, and bank robbery. The Court of Appeal in *R. v. McLean* also referred in para. 18 to the Supreme Court of Canada decision in *R v. L.M.* in which the Court noted (at para. 39) that most, but not all of those persons currently designated long-term offenders had committed sexual offences, implicitly recognizing that long-term offender provisions are not restricted to those who have committed an offence listed in s. 753.1(2)(a).

[75] The decision of *R. v. C.R.G.*, 2019 BCCA 463, relied on by defence in this case is not authority for the proposition that s. 753.1(2) is exhaustive as that case dealt with a sexual offender and the issue did not arise, nor was it discussed.

Have the long-term offender criteria been met for J.M.?

[76] As I have already noted, the two pre-conditions have been met. J.M. was convicted of aggravated assault. This qualifies as a serious personal injury offence under s. 752 the definition of which includes "an indictable offence … involving the use … of violence against another person." An assessment report has been provided.

[77] The criterion in s. 753.1(1)(a) - imprisonment of two years or more for the predicate offence - is not in issue. The Crown has proved beyond a reasonable doubt

that the sentence imposed for this offence should be more than two years, and defence does not disagree.

[78] The criterion in s. 753.1(1)(c) - reasonable possibility of eventual control of the risk in the community – is not required to be proven beyond a reasonable doubt by the Crown (*R. v. Johnson*, [2008] O.J. No. 4209; *R. v. F.E.D.* (2007), 222 C.C.C. (3d) 373). This criterion is there to address "whether the offender qualifies for a long-term offender designation as opposed to the more onerous dangerous offender designation" (para. 53, *R. v. F.E.D.*). It allows the court to exercise discretion to impose a less restrictive sanction where the objective of protecting the public can be met.

[79] Dr. Lohrasbe observed that J.M. is externally motivated. His probation officer, Mr. Michael Dockum, positively reported by letter dated October 3, 2019, that since he began supervising him on July 3, 2018, J.M. has complied with conditions, rarely missed an appointment and always presented in a calm and seemingly sober state. Mr. Craig Dempsey, his therapist, provided similar positive reports about his compliance, although he expressed some uncertainty about J.M.'s abstinence from alcohol consumption, based on some missed or cancelled appointments and the peer group he associates with. Mr. Dempsey had no evidence of J.M.'s breaching of his abstinence conditions, however.

[80] On the evidence, this criterion has been met.

Is There a Substantial Risk that J.M. will Re-offend

[81] The main issue to be decided in this case is whether the criterion in s. 753.1(1)(b) is satisfied.

Determination of Substantial Risk

[82] It requires the Crown to prove beyond a reasonable doubt that there exists a substantial risk that J.M. will re-offend. It does not require proof beyond a reasonable doubt that the offender will re-offend as that standard would be impossible to meet (*R v. Currie*, [1997] 2 S.C.R. 260).

[83] Substantial risk has been defined as “a risk the reality of which is well-grounded in the evidence” (*R v. Mentuck*, 2001 SCC 76, at para. 34). Black’s Law Dictionary defines substantial as and including “of real worth and importance, of considerable value, belonging to substance, actually existing, real, not seeming or imaginary.” (*Catholic Children’s Aid Society of Metropolitan Toronto v. A.D. and W.G.*, [1993] O.J. No. 3129, at para. 32).

[84] Determining substantial risk to reoffend requires a consideration of the whole of the evidence pertaining to this issue. This includes the assessment report as well as the offender’s history of offending (*R v. McLean*, 2009 NSCA 1, at para. 28). As stated by the Court in *R. v. Moore*, 2016 MBQB 116, at para. 17 “[t]he past is often a reliable predictor of the future”. Past conduct provides the evidentiary basis for assessing the future threat, but it is the future threat that Part XXIV is aimed at curbing (*R. v. Knife*, 2015 SKCA 82, at para. 55).

[85] The risk assessment is ultimately a judicial one. The question of whether an offender has a substantial risk to re-offend is one of fact. It is necessarily, and by statute, informed by expert evidence, which forms an integral part of any long-term offender application. The court in *R. v. J.W.R.*, 2010 BCCA 66, described the interaction between the two at para. 40 of that decision, quoting from the respondent’s factum:

> The assessment of a likelihood that an offender will reoffend is a complex task that may not lend itself to precise articulation. The nature and limits of psychiatric evidence will not always provide a dispositive answer, and must be approached realistically and in conjunction with all the evidence when assessing whether the legal burden of proof has been met.
>
> …
>
> Thus, while medical evidence will be significant in a dangerous offender proceeding, finding a likelihood of reoffence is a legal finding, not a medical diagnosis. Ultimately, it is the trial judge who makes the finding, based not just on the medical evidence, but on the evidence in relation to all the elements required pursuant to s. 753. … [I]t is not psychiatric or psychological conditions alone, or treatment of those conditions, that define dangerousness, or likelihood of reoffending. It is a combination of factors, including the predicate offence(s); criminal offending history; other background and behavioural characteristics; the offender's attitudes; resources available in custody and the community; reasonably foreseeable risks should there be future offending, and the assessment(s) that are considered.

[86] I recognize this quote refers to an assessment in the dangerous offender context and the wording of likelihood of re-offending is not present in the long-term offender designation context. However, the approach to consideration of evidence is the same for both.

[87] It is not necessary to decide for the purpose of this application whether a pattern of behaviour is required before a long-term offender designation can be made. The statutory provision (s. 753.1(2)(b)(i)) referring to pattern of repetitive behaviour does not apply here. It is sufficient to assess the past conduct of the offender in this case, to determine the risk of future threat. What is significant is to look at the past conduct of the three assaults, the relevance of which are agreed upon by Crown and defence and

determine whether this identified, agreed upon, relevant conduct in this case leads to a finding of substantial risk to re-offend.

[88] The risk of re-offending must be a risk of violent re-offending (*R. v. Turner*, 2019 ONSC 5435, para. 25, referring to *R. v. Smiley*, [2019] O.J. No. 757 at para. 48, and para. 26, referring to *R. v. Ryan*, [2017] O.J. No. 2091 at para. 10). One of the purposes of the long-term offender provisions is to use long-term supervision to protect the public from harm. Thus the question is whether the Crown has established beyond a reasonable doubt that J.M. presents a substantial risk to re-offend violently upon his release (*R. v. Turner*, para. 27).

[89] In this case, Dr. Lohrasbe's detailed assessment report and extensive *viva voce* evidence were of assistance to me in understanding the process of assessing risk from a therapeutic perspective, as well as in understanding J.M.'s character and why Dr. Lohrasbe concluded he is at high risk to reoffend. I accept his explanation of his approach to his use of the analytical tools, primarily the HCR-20, in completing his assessment. He is a credible, reliable and pre-eminent expert witness in this area.

[90] I note that Dr. Lohrasbe's conclusion became more nuanced after cross-examination. Those nuances are:

i. Dr. Lohrasbe agreed that J.M.'s criminal record was "on the lighter side" than one usually sees in dangerous or long-term offender applications.

ii. Dr. Lohrasbe agreed that several factors he assessed in his report as present and relevant for risk of violent re-offending were not prominent risk factors. Those factors were: first, J.M.'s unemployment, which for many people can lead to a loss of self-esteem and the entrenchment of habits

that indirectly can lead to violence, including substance abuse and conflicted relationships. He ultimately stated he did not explore it in great detail with J.M. and it was not a prominent risk factor. Second, the presence of traumatic experiences in J.M.'s past (i.e. he was a victim of a sexual assault at age 15) was not considered at great length as he did not consider it to be a critical risk factor. Third, Dr. Lohrasbe said he did not have a lot of information about J.M.'s unstable living arrangements, to the extent this was related to the offences in 1992 and 2005. He also said his assessment of the relevance of this factor was based primarily on Mr. Craig Dempsey's observation that J.M.'s current chosen living arrangements at the Barracks, despite the availability of better options, were not optimal because he is surrounded by others with substance use issues or criminal behaviour tendencies.

iii. Dr. Lohrasbe stated that J.M.'s motivation to complete successfully (twice) sexual violence programming in prison in the mid 90s may have resulted from feelings of remorse and shame about the sexual assaults. Dr. Lohrasbe said that although it is reasonable to say that if he realizes what the stakes are now he may make the same kind of effort, it is a "bit of a different thing". Dr. Lohrasbe however then acknowledged that J.M. had initially minimized and showed no remorse for his sexual offending and this changed once he began attending programming in prison. Dr. Lohrasbe agreed that there was no reason to believe that this will not be the case here.

iv. Dr. Lohrasbe confirmed that the most reliable actuarial tool in assessing risk of violence is age. While he stated that J.M. is presently a bit of an outlier because of his commission of the predicate violent offence at age 61, he was unable to conclude that J.M. would not follow the general pattern of exponentially declining risk the closer he gets to age 70 and over. He testified that the risk of violent re-offending by the time someone is in their 70s is “vanishingly small”.

v. Dr. Lohrasbe elaborated in cross-examination on the salutary effects of the sentencing proceeding itself in bringing home to an offender the realization of their “predicament” and the seriousness of any re-offending. This is particularly the case with someone who responds well to external motivators. Dr. Lohrasbe said he had no reason to believe that this would not be the case for J.M.

vi. In sum, Dr. Lohrasbe on cross-examination said the three factors of aging, the salutary effects of the proceedings, and the possibility of treatment benefit in an institutional setting could mean J.M.’s risk could very well be low.

[91] I have carefully considered all of the evidence in this case. I have considered the past conduct of J.M. in assessing whether there is a substantial risk of reoffending violently. I have also considered the factors that both minimize and enhance this risk.

[92] J.M.’s criminal record is not lengthy. Although it contains three offences of severe violent assaults, they are infrequent, spaced apart by approximately 15 year increments. Dr. Lohrasbe observed that “things build up in him.” This suggests it could be some

years before there is a risk of further violence and by that time J.M. could be in his 70s, thereby lowering the risk. Even if this pattern of infrequency is not followed, J.M. will be in his late 60s by the time of his release. Dr. Lohrasbe clearly stated that the risk of violent offending starts declining around age 60, and then accelerates so that by the 70s the risk of serious violent offending is vanishingly small. Age may also have an effect on the severity of the violence as with age people grow physically weaker and have less energy. There is no reason to conclude that this declining risk will not apply to J.M.

[93] J.M. completed programming twice in the penitentiary for sexual offenders very successfully, in that he accepted responsibility for his offences, showed remorse, did not minimize their seriousness, gained insight, and did not re-offend. This successful treatment completion suggests a positive response to high intensity programming. In fact, J.M. told Dr. Lohrasbe and the Court through counsel that he wanted to go to the penitentiary in order to have access to good programming that he thinks will help him. This stated motivation is supported by evidence from WCC from 2019, in which he requested work, asked for counsellors – Bishop Hector and Craig Dempsey - and demonstrated good behaviour.

[94] He has breached once since his release into the community after the predicate offence in 2017; his failure to appear for his preliminary inquiry.

[95] This long-term offender application occurred over a period of 4 days, including psychiatric evidence about J.M. and victim impact statements from D.J. I agree with Dr. Lohrasbe that it is likely that this process will have a salutary or deterrent effect on J.M. in the short term.

[96] I appreciate that J.M.'s lack of insight into the effects of alcohol abuse on his behaviour as well as his lack of commitment to abstinence in future is a concerning factor. However, the question is whether this is enough, along with the other risk factors identified, especially the severity of the predicate offence and the 1992 sexual offences, to support a conclusion beyond a reasonable doubt that he is at a substantial risk to re-offend.

[97] J.M. has attended AA meetings at various times, and completed one residential treatment program in 2006-07. These were entered into voluntarily by him, showing some insight into alcohol issues in the past, as noted by Dr. Lohrasbe. There is no evidence, however, that use of alcohol has been a focus of his previous institutional treatment programs or his therapy sessions. This absence of specific treatment may account for some of his lack of insight. I also note that J.M. has complied with his conditions over the last approximately three years, including abiding by the condition to abstain from alcohol. Although I recognize that his success may be because of regular supervision, and that there is some speculation about whether he has fully complied, there is no evidence to suggest he has not.

[98] Dr. Lohrasbe was clear that alcohol was not the cause of his violent offending. The violent offending comes from within J.M.; but his alcohol use correlates with his offending because it is consistent with conflict situations and is a disinhibitor. J.M.'s past success with high-intensity institutional treatment programming, the availability of high-intensity institutional treatment programming in the penitentiary that addresses substance abuse and violent offending, and J.M.'s stated desire to serve his sentence in a penitentiary so he can access good programming, are all factors that in my view

reduce the risk. I note that in saying this I am not attempting to predict the future, but I am focussing on the evidence of J.M.'s past conduct.

[99] So while this factor is a concern, on all of the evidence, I do not find it enough to outweigh the other factors that in my view reduce the substantial risk of reoffending.

[100] For these reasons, I do not find that J.M. is at a substantial risk to re-offend under s. 753.1(1)(b). The long-term offender application is dismissed.

Appropriate Sentence

[101] I now turn to what the appropriate sentence in this case should be. It is generally accepted that the range of sentence in the Yukon for aggravated assault is between 16 months and six years (*R. v. Quash*, 2019 YKCA 8). In that case, the Court of Appeal substituted a sentence of two years' imprisonment less 3.5 months credit for time served for the 10-month sentence originally imposed. The 29-year-old offender cut the victim's face with a pocket knife, creating a 15 cm gaping, gruesome wound from the earlobe to the base of the chin. The defence of self-defence was rejected. The offender's criminal record dated to 2009 and consisted of nine convictions, including spousal assault, impaired driving and breaches. Gladue factors were relevant and considered as were the cognitive limitations of the offender and the fact that he apologized to the victim. The impact of the offence on the victim was also considered.

[102] In the case of *R. v. Robinson*, 2004 BCCA 480, the offender was sentenced to two years less a day reduced to 10 months for time already spent in custody after assaulting the victim with a baseball bat. The blow was directed towards the victim's head. The Court of Appeal found that it was a vicious assault that was without warning. The sentence was found to be appropriate because of the offender's age of 20 years,

the facts that he had the support of his parents and employer, that he planned to upgrade his education and he had prepared a written apology to the victim.

[103] In *R. v. Johnny*, 2011 BCCA 25, the Court sentenced the offender to 6½ years for an aggravated assault that resulted in the victim being in a coma and on life support, and left with a permanent pervasive cognitive deficit, making him dependent on others for the rest of his life. The offender was a 28-year-old indigenous man with a very unhappy background. His criminal record included a manslaughter conviction when he was 15 years old and then a number of probation breaches and drug related charges.

[104] A final comparator is *R. v. Wiebe*, 2006 YKTC 80, where the offender was 39 years old, with a significant criminal record, mostly property offences, and evidence of a significant substance abuse problem. The aggravated assault consisted of repeated punches and kicks to the face resulting in significant injuries to the victim including neurological damage affecting balance and memory. The victim was off work for four months and although suffered negative effects for some time, did not suffer long-lasting effect. The offender was sentenced to three years, after the court took into account the fact that the assault was not premeditated and he contacted the police to provide the victim with assistance, after realizing the extent of the beating.

[105] Here, two victim impact statements were read into court. They consisted of diary-like entries describing D.J.'s feelings and the impacts of the assault on him starting four days after the event and ending on the date close to the first date of sentencing. The entries were intermittent and consisted of approximately five pages in total. It is clear that D.J. suffered physically from the injuries, most significantly the blows to the head, including sustaining a concussion and experiencing post-concussion syndrome. It is

also clear he suffered emotionally - fear, depression, hurt, and anger. He attributes the loss of his job, which involved relating to the public, to the change in his attitude caused by the assault.

[106] The law requires I consider the principles of general deterrence, specific deterrence, denunciation and rehabilitation in determining an appropriate sentence. The sentence should also promote a sense of responsibility in the accused for his actions and acknowledgement of the harm done. The sentence must be proportionate to the gravity of the offence and the responsibility of the offender. Restraint in sentencing must be taken into account. Section 718 requires that I also take into account the impact of the injury on the victim.

[107] Aggravating factors in this situation include:

i. J.M. and D.J. were intimate partners and in a relationship of trust.

ii. The attack with the baseball bat was unprovoked. An unprovoked attack tends to result in the imposition of a sentence at the higher end of the range (*R. v. Craig*, 2005 BCCA 484, at para. 10).

iii. D.J. sustained serious injuries to his head, requiring stitches, and bruising to his shoulders, upper back and arms. He had a concussion and suffered post-concussion syndrome. He experienced emotional and psychological harm.

[108] A mitigating factor is the fact that the assault was not premeditated but appeared to occur relatively spontaneously (*R. v. Wiebe*, para. 13).

[109] J.M. relied on the defence of self-defence at trial. I found that he had an honest but unreasonable belief that D.J. might have been aggressive towards him, and that in any event the force J.M. used was excessive in the circumstances.

[110] Considering the circumstances of the assault, its impact on the victim, the criminal record of J.M., his personal circumstances, and being mindful of the sentencing principles, this is a case deserving of penalty on the higher end of the range. I impose a sentence of four years, less the credit of time already served in the amount of 10 months.

[111] I will also order a firearms prohibition for 20 years; an order authorizing the taking of samples for forensic DNA analysis; the transmission of the exhibits at trial to the CSC. Finally, I grant an order forfeiting the offence-related property, namely the baseball bat, to the Crown.

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DUNCAN C.J.